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ANTITRUST DIGEST

Emerging Trends and Patterns in Federal Antitrust
Cases After *Bell Atlantic Corp. v. Twombly*

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Bell Atlantic Corp. v. Twombly

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I. DIGEST OVERVIEW

This digest examines how federal courts are interpreting pleading requirements for antitrust claims alleging violations of the Sherman Act after the Supreme Court's pronouncement in *Bell Atlantic Corp. v. Twombly*.¹

Like all federal civil actions, Rule 8(a) of the Federal Rules of Civil Procedure governs the pleading requirements for antitrust claims. Rule 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."² Rule 8(a) or "notice pleading," has had harsh ramifications for antitrust defendants. Under a strict reading of the rule, claims alleging nothing more than general unlawful restraint of trade move past the pleadings stage and into discovery. The desire to avoid burdensome discovery and litigation costs results in many antitrust defendants settling feeble or spurious claims.³

Underlying the decision in *Twombly* was an acknowledgement of the ubiquitous tension in antitrust law between plaintiffs' need to gain access to and obtain discovery in federal court and defendants' need to avoid unnecessarily lengthy and expensive litigation.⁴ In *Twombly*, the Supreme Court explicitly rejected its prior interpretation of Rule 8 under *Conley v. Gibson*.⁵ The Court stated in *Conley* 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."⁶ This language remained the test for pleading standards for over 50 years.

In *Twombly*, the Court replaced the 'no set of facts' or 'notice pleading' standard with the 'plausibility standard.' The Supreme Court clarified that a plaintiff alleging a Sherman Act conspiracy violation will not satisfy Rule 8 pleading requirements with a bald assertion that defendants participated in a conspiracy. Rather, a plaintiff must allege *specific facts* that suggest the defendants reached an agreement.

Since the *Twombly* ruling nearly two years ago, federal courts have grappled with what a plaintiff must plead to satisfy this new *Twombly* standard. The purpose of this digest is to examine approximately 90 post-*Twombly* cases that substantively discuss pleading standards and not to just catalogue every case that cited *Twombly*. This digest analyzes and summarizes cases⁷ that have expressly dealt with defendants' motion to dismiss an antitrust claim, alleging that the plaintiff has not met the *Twombly* pleading requirements in to diagram emerging trends and patterns.

¹ *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

² FED. R. CIV. P. 8(a)(2) (2008).

³ *Twombly*, 127 S. Ct. at 1967.

⁴ Federal Rule of Civil Procedure 26 grants a party discovery on "any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26.

⁵ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

⁶ *Conley*, 355 U.S. at 41.

⁷ The case summaries that follow are organized by circuit of decision and in chronological order. Not all circuits are represented in the digest.

A. Summary of *Twombly*

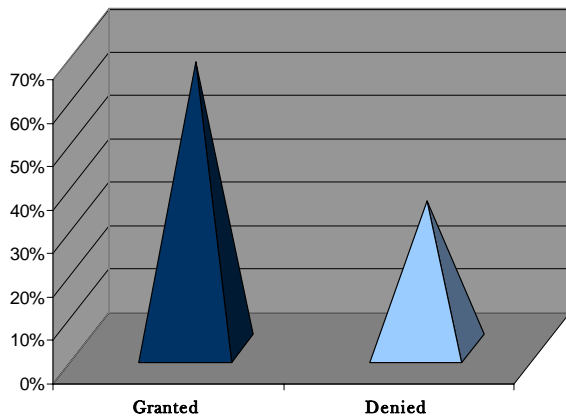
In *Twombly*, the Court held that an allegation of parallel conduct with a “bald assertion that the defendants were participants in a ‘conspiracy,’ without any allegations that, if later proved true, would establish the existence of a conspiracy” was insufficient to state a claim under the Sherman Act.⁸

The 1984 divestiture of the American Telephone & Telegraph Company’s local telephone business created a system of regional service monopolies, also known as “Baby Bells” or Incumbent Local Exchange Carriers. The Baby Bells were excluded from the separate market for long-distance service providers.⁹ A decade later Congress withdrew approval of the Baby Bell monopolies and subjected them to a host of regulations intended to facilitate market entry for competitors.¹⁰

Subscribers of local telephone and high speed internet services brought a federal antitrust class action alleging that the Baby Bells were conspiring to restrain competition in the local telephone and high-speed internet market. Plaintiffs supported their claim with allegations of parallel conduct: that the Baby Bells remained in *their own geographic areas* despite being able to conveniently and cost-effectively enter each other’s. The Second Circuit found the complaint sufficient under the *Conley* interpretation of Rule 8.¹¹ The Supreme Court reversed and held that a plaintiff must allege enough factual matter, taken as true, to suggest that an agreement was made.¹² Even evidence of deliberate parallel conduct was insufficient without some circumstantial evidence of an agreement.¹³ The Court did not explicitly state what additional facts plaintiffs needed to plead to avoid early dismissal,

nor did the Court explain which facts were dispositive of whether plaintiffs had sufficiently pled a cognizable action pursuant to the Sherman Act. The Court also noted that the defendants’ actions could be justified based on their prior existence as regulated monopolies after AT&T’s divestiture.

**Disposition of Defendants’ Motion to Dismiss
Federal Antitrust Claims**



B. *Twombly*’s Application by Circuit

An analysis of how *Twombly* is being applied in federal antitrust claims depicts the substantial impact *Twombly*’s plausibility standard has had on the viability of plaintiffs’ antitrust claims. For example, of the 86 substantive cases investigated

⁸ *Twombly*, 127 S. Ct. at 1965.

⁹ *Id.* at 1961.

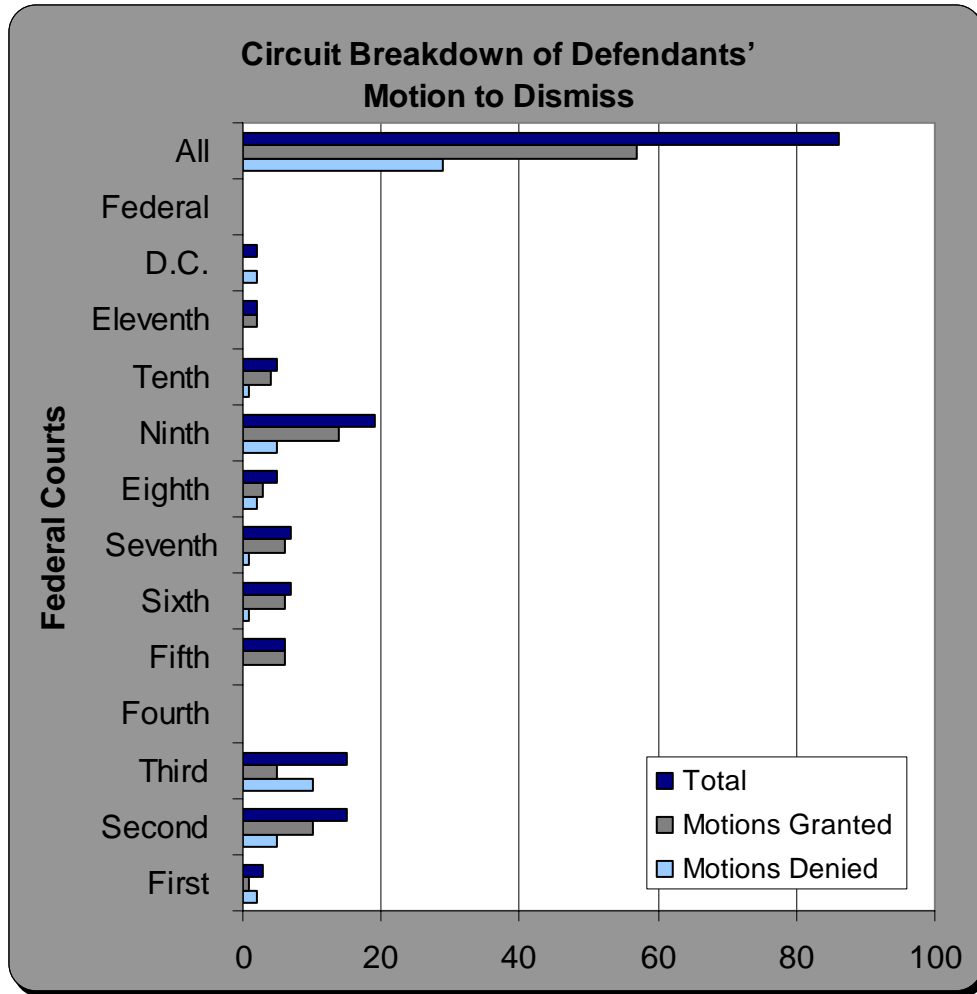
¹⁰ *Id.*

¹¹ *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005).

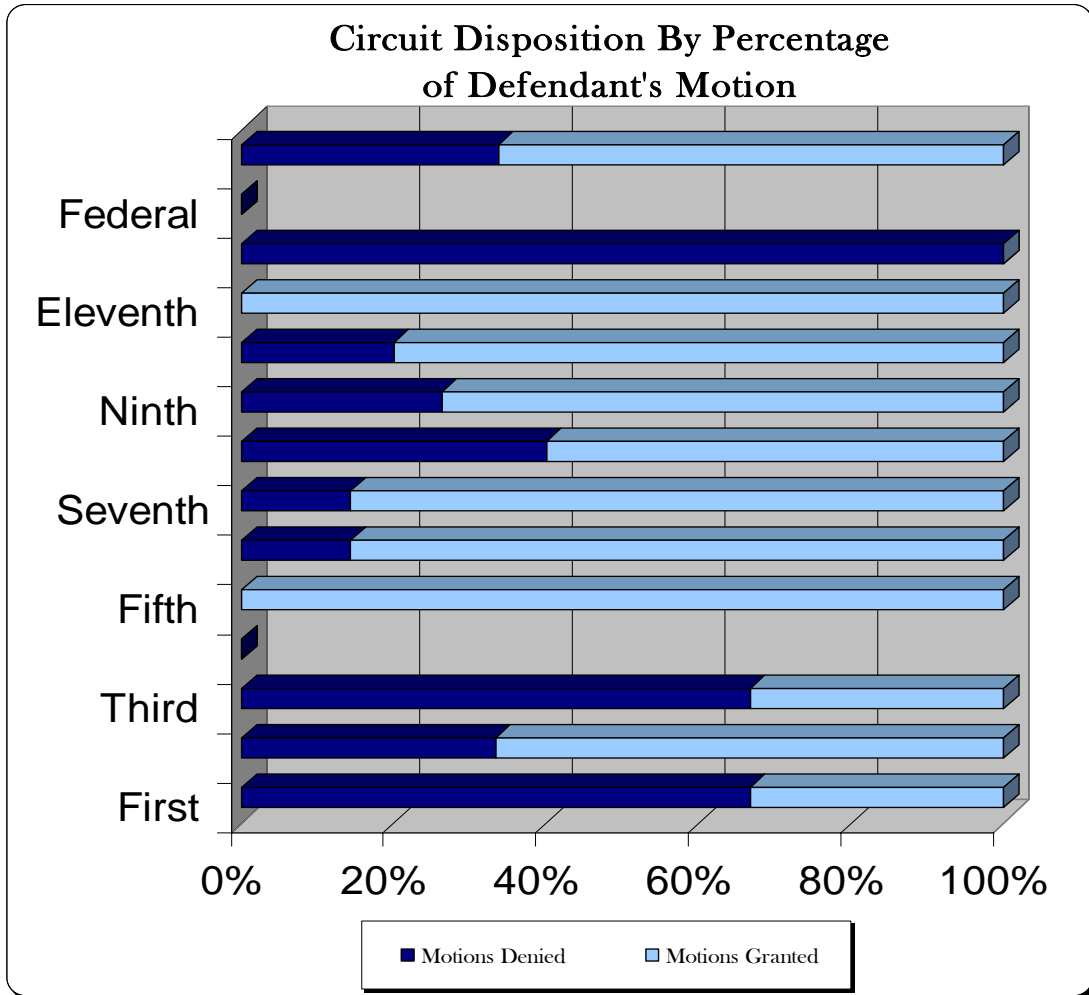
¹² *Twombly*, 127 S. Ct. at 1965.

¹³ *Id.*

in this digest, 57 of defendants’ motions to dismiss were granted. This dismissal rate equates to almost a 2:1 ratio for granting defendants’ motion to dismiss or as the graph above reveals defendants’ motions to dismiss were granted 66.3% of the time at the pleadings stage of litigation . A circuit by circuit examination reveals additionally instructive patterns as to how defendants might better implement and execution their litigation strategy. The graph below depicts the disposition of defendants’ motions to dismiss for failure to state a claim by circuit.



Notably, filings appear to be concentrated in three circuits, the Ninth (19 cases), the Second (15 cases), and the Third (15 cases.) Together these circuits have heard over 57% of the federal antitrust cases, included in this digest, that were brought pursuant to a violation of the Sherman Act post-*Twombly*. Not only did the Ninth Circuit have the highest volume of antitrust cases amongst these three circuits, but also it had the highest likelihood of granting defendants’ motion to dismiss. The Ninth Circuit granted defendants’ motion to dismiss 74% of the time. Whereas the Second Circuit and the Third Circuit only granted 66% and 33% of defendants’ motions to dismiss, respectively. At 33% each, the First Circuit (3 cases) and the Third Circuit denied defendants’ motion to dismiss more than any other jurisdiction.

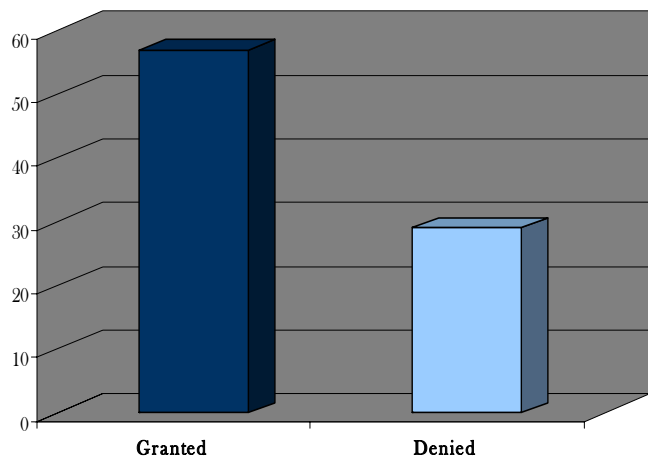


As shown above, the Fifth (6 cases) and Eleventh (2 cases) Circuits granted 100% of defendants' motion to dismiss. Followed closely by the Sixth Circuit (7 cases) and the Seventh Circuit (7 cases) which both granted 86% of defendants' motions to dismiss, then the Tenth Circuit (5 cases) at 80% and the Fifth Circuit (5 cases) at 60%. The District of Columbia Circuit ("D.C. Circuit") was the only circuit that has refused to grant any defendants' motions to dismiss. Neither the Federal Circuit, nor the Fourth Circuit have heard a substantive antitrust case.

II. RECENT TRENDS AND PATTERNS

The cases in this digest illustrate four emerging trends. The sum effect of these trends is that federal courts are granting, at almost a 2:1 ratio, defendants' motions to dismiss.

Disposition of Defendants' Motion to Dismiss of Federal Antitrust Cases



The first trend is that federal courts appear to be applying *Twombly* to all elements of an antitrust complaint. For instance, courts are evaluating plaintiff's alleged antitrust injury and relevant market under *Twombly*'s plausibility standard.

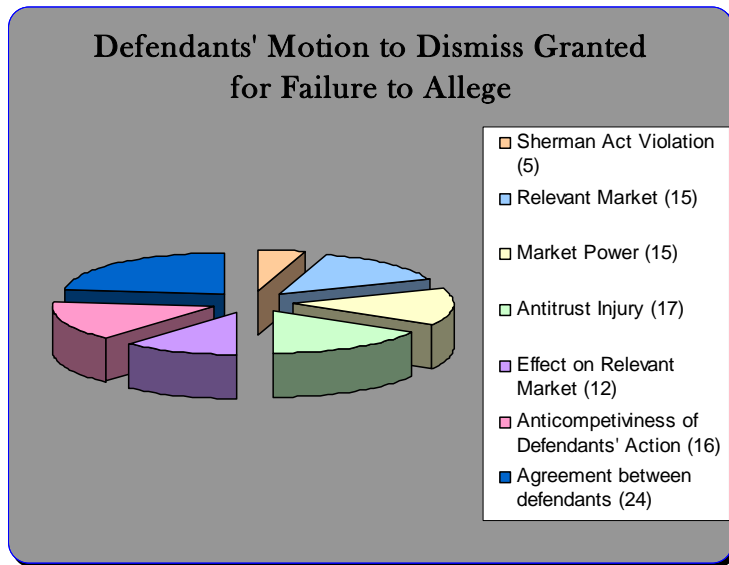
The second trend exposes the proliferation of certain widely-accepted "plus factors" that federal courts appear to examine before determining the adequacy of a plaintiff's complaint. Generally, these plus factors ask whether a plaintiff's complaint has "nudged" the allegation of conspiracy from the realm of possibility to plausibility by alleging enough factual enhancements from which the courts could infer an unlawful agreement between the defendants.

The third trend highlights the courts' willingness to grant defendants' motion to dismiss even when the complaint includes specific factual allegations that would support an agreement, if the court can attribute the defendants' parallel conduct to a legitimate business action or if it takes judicial notice of industry customs that offer a justifiable explanation.

Lastly, although *Twombly* has clearly raised the bar for plaintiffs attempting to plead an antitrust action in federal court, it has not restricted the leniency with which the courts' continue to allow plaintiffs to amend their complaints.

A. *Twombly*'s Plausibility Standard Applies to All Elements of a Complaint

The clearest effect of *Twombly* appears to be a stricter adherence to threshold issues confronting any federal antitrust action such as failing to plead any cognizable violation pursuant to the Sherman



Act, an antitrust injury, a relevant market, the market power of the defendants, and an unlawful agreement between defendants. Additionally, federal courts are granting defendants' motions to dismiss even when the plaintiff fails to allege how defendants' actions were anticompetitive. Although the exact elements of each of the above threshold issues vary across jurisdictions, the courts are readily applying *Twombly*'s plausibility standard to these issues. The sampling of post-*Twombly* cases and the graph to the left illustrate that in at least twenty-four federal antitrust cases courts cited

plaintiff's failure to allege an agreement between defendants to be fatal to the complaint. Almost as detrimental was the failure to allege an antitrust injury (in seventeen cases) and failure to allege a relevant market (in fifteen cases.) In short, *Twombly*'s plausibility standard provides defendants with many grounds on which they can challenge a plaintiff's complaint.

B. Proliferation of Widely-Accepted Plus Factors

Plus factors are allegations that when pled, nudge an antitrust claim across the line from conceivable to plausible. A plus factor tends “to exclude the possibility” that defendants’ actions were undertaken independently. They usually involve the defendants’ economic interests or motives. Even though there is no universal set of plus factors, the cases demonstrate a pattern of commonly referenced allegations that courts appear to be looking for.

Plus factors allow the court to infer an agreement, only when the defendants have engaged in conscious parallelism. Thus, before plus factors are assessed, the complaint must first put forth factual allegations of defendants’ parallel conduct. Although *Twombly* did not expressly set forth specific plus factors, the Supreme Court highlighted certain factual enhancements that if adequately alleged, could allow a court to plausibly infer an agreement between defendants. The plus factors specifically mentioned in *Twombly* include:

- Parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties;
- Conduct that indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement;
- Complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason;
- Mentioning specific time, place, or person involved in the alleged conspiracies;
- In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could signify an agreement; and
- The absence of any natural noncompetitive explanations such as industry or market custom to account for the parallel conduct.

Prior to *Twombly*, circuit courts had identified certain plus factors that they looked to in assessing whether a complaint based on circumstantial evidence could survive a motion to dismiss. The accompanying box lists frequently referenced plus factors, common to the majority of circuit courts.

WIDELY-ACCEPTED POST-TWOMBLY PLUS FACTORS FROM THE CIRCUIT COURTS:

- Motive or problem that conspiracy fixes for defendants.
- Opportunity or specific occasions on which the defendants met and where.
- Specific time period over which alleged unlawful agreement took place.
- A specific market for the product or service.
- Specific harm to consumers:
 - Increase in cost of product or service.
 - Decrease in quality of product or service.
 - Decrease in availability of product or service.
- Simultaneous price changes.
- Simultaneous uniform changes in production.
- Acting against self-interest.

As illustrated by both lists, the Supreme Court and the circuits courts are requiring more detailed allegations and specific facts on the who, what, where, why, when, and how of the conduct at issue prior to allowing claimants to move forward. Because a lot of this information rests in the hands of the defendants, plaintiffs have traditionally relied on the discovery process to gather these facts. After *Twombly*, however, courts are requiring the complaint to lay out such information prior to discovery.

C. Alternative and Legitimate Explanations for Defendants' Parallel Conduct

Even when a complaint alleges plus factors such as those in the box above, a court may dismiss the complaint if it identifies a reasonably legitimate noncompetitive explanation for defendants' conduct mirroring that of their competitors. A court may raise an alternative business justification *sua sponte* from publicly known information, the defendant may ask the court to take judicial notice of general information about a market, or the defendants' argument in its motion to dismiss may reference prior cases dealing with their industry's particular trade customs. Such a consideration often appears to tip the plausibility of illegal parallel conduct back in the direction of lawful independent action that *Twombly* permits.

In *Twombly* the Supreme Court noted that the Baby Bells emerged at a time of traditional public monopolies, which made them keenly aware of the benefits of a "sit tight" and expect your "neighbors to do the same"¹⁴ policy. The Supreme Court relied upon the history of the telecommunications industry and the impact of the Telecommunications Act of 1996 to conclude that defendants' actions could easily have been non-conspiratorial reactions to dominant market influences. The Court further noted that the *Twombly* plaintiffs failed to suggest that by sitting tight, defendants' actions were against their economic interests.¹⁵

To this end, in several of this digest's cases, courts have been willing to rely on information available through public access or the defendants' reply to refute the inference of unlawful agreement if the customs or trade practices of the particular industry at issue can legitimately explain the questionable conduct. For example, in *In re Digital Music Antitrust Litigation*, even though plaintiffs alleged many of the plus factors highlighted above, the court granted the defendants' motion to dismiss. The court explained that given the social backdrop of wide spread piracy and unauthorized music downloading, the plaintiffs' allegations of price increases did not necessarily support an inference of unlawful agreement. Such behavior was viewed by the court as a rational business strategy and reasonable reaction to normal market forces.

D. Allowing Amendment

In light of the liberal provisions of Rule 15(a) for amending pleadings,¹⁶ even after *Twombly*, most circuits continue to allow plaintiffs to remedy identified deficiencies by filing an amended complaint. Most of the included cases that granted defendants' motion to dismiss either dismissed the complaint at issue *without prejudice*, were adjudicating a *previously amended complaint*, or dismissed the complaint but *granted leave to amend*. Defendants should not expect to encounter any heightened requirements with respect to allowing amendment.

¹⁴ *Twombly*, 127 S. Ct. at 1972.

¹⁵ *Id.*

¹⁶ Under Federal Rule of Civil Procedure 15(a), a party can amend their pleading with the court's leave and "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

III. CONCLUSION

Although most of the circuits have been arguably only nominally following *Conley* in recent years,¹⁷ *Twombly* is still likely to result in increased hurdles for plaintiffs bringing antitrust claims without much specific factual information. Defendants' ability to secure a dismissal will turn on distinguishing conclusory allegations from factual ones and addressing courts' commonly referenced plus factors.

Twombly's plausibility standard may also slow the race to the courthouse for plaintiffs' lawyers seeking to be the first to file a class action. The need for specific details on and instances of unlawful action may force plaintiffs to wait for a government investigation to begin in order to have sufficient information to survive a courts' scrutiny under *Twombly*.

Twombly's plausibility standard for pleading serves to balance the concern that plaintiffs have ready access to courts against the concern for burdening potentially innocent defendants. The case summaries below illustrate that courts have renewed their commitment to their role as gatekeepers. Complex litigation like antitrust suits can potentially lead to massive expenditure of resources by defendants and pleadings are the only way for courts to determine whether the burden of investigation into the conduct at issue is justified.

¹⁷ See, e.g., *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (reaffirming principle that dismissal should be carefully granted when information is only available to defendant).

In re New Motor Vehicles Antitrust Litigation (2008)¹⁸

INDUSTRY: Automotive leases

ANTITRUST VIOLATION(S) ALLEGED: Unlawful agreement pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Lessees of new automobiles brought putative class action alleging that automobile manufacturers and their captive leasing companies conspired to prevent lower priced Canadian cars from entering American market during certain periods thereby illegally driving up or artificially maintaining American prices and rental payments, in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendants appealed the dismissal of their putative antitrust class action lawsuit in which they seek antitrust damages under § 1 of the Sherman Act.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that lessees were not direct purchasers and thus lacked standing to sue defendants under federal antitrust laws. Plaintiffs failed to adequately allege antitrust standing because:

- Plaintiffs did not join dealers as defendants, nor did they plead sufficiently or argue consistently that dealers were part of the conspiracy;
- Plaintiff's complaint describes a horizontal conspiracy among the manufacturers that adversely affected dealers as well as the ultimate consumers, thus not alleviating the court's concern about the risk of double recovery because they failed to join dealers as defendants; and
- Complaint failed on its face to allege a scenario in which plaintiffs could be direct purchasers.

¹⁸ *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 533 F.3d 1 (1st Cir. 2008).

American Steel Erectors, Inc. v. Local Union No. 7 (2008)¹⁹

INDUSTRY: Steel erection contract bids

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): American Steel Erectors Inc. (“ASE”) and Local Union No. 7, International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers (“Local Union”) both are engaged in bidding on steel erection contracts in the Boston area. To make their union more competitive with non-unionized outfits, Local Union subsidized many of the bids for their members’ steel erection contracts. Plaintiff alleged that defendant employed several unlawful practices to facilitate their market recovery program. These practices excluded plaintiffs from a large part of the structural steel market in the greater Boston area.

DEFENDANTS’ MOTION: Plaintiffs appealed the district court’s granting of summary judgment.

DISPOSITION: United States Court of Appeals, First Circuit **REVERSED** and **DENIED** the motion for summary judgment.

COURT’S RATIONALE: Court held that there were sufficient genuinely disputed issues of material fact that rendered summary judgment inappropriate because:

- Plaintiff alleged concerted union-employer action that extended beyond the wage deduction provided for in the contractor’s bargaining agreement and the job-by-job subsidy agreements, to collaboration in the identification and acquisition of target projects;
- Plaintiff alleged that signatory contractors and the fabricators or general contractors that employ them were complicit in the union’s efforts to shut out open-shop outfits; and
- The district court did not squarely address this issue.

¹⁹ *Am. Steel Erectors, Inc. v. Local Union No. 7, Int’l Ass’n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68 (1st Cir. 2008).

Dahl v. Bain Capital Partners (2008)²⁰

INDUSTRY: Securities

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs²¹ brought this action on behalf of all persons who had an ownership interest in securities in any publicly listed company traded on any U.S. securities market. The class claimed that the defendants illegally conspired to purchase companies through leveraged buyouts. Specifically, plaintiffs claimed that defendants conspired to pay less than the fair value for the target companies, thereby depriving the target companies' shareholders of the true value of their shares.

DEFENDANTS' MOTION: Defendants filed a joint motion to dismiss the Third Amended Complaint for failure to state a claim upon which relief could be granted. The defendants argued:

- That plaintiffs claims were pre-empted from consideration under antitrust laws because the conduct at issue was regulated by the Securities and Exchange Commission and
- That plaintiffs failed to properly plead a § 1 Sherman Act claim.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: In contrast with *Twombly*, the Court held the circumstances plausibly suggested that an illegal agreement existed in violation of § 1. The court came to this conclusion because:

- The complaint provided detailed descriptions of nine transactions which illustrated what plaintiffs called the overarching conspiracy;
- The presence of the same private equity firms in multiple transaction tied the defendants together in a way that *Twombly* defendants were not; and
- The overlap in the firms, coupled with the shareholders allegations that the PE Firms conspired to prevent open, competitive bidding for the target companies plausibly suggested an illegal agreement.

²⁰ *Dahl v. Bain Capital Partners, LLC*, No. 07-12388, 2008 WL 5206990 (D. Mass. Dec. 15, 2008).

²¹ Plaintiffs included a trust, a public retirement trust fund, and a group of five individuals that owned shares in companies that the defendants purchased.

In re Elevator Antitrust Litigation (2007)²²

INDUSTRY: Elevator manufacturers & elevator maintenance and repairs services

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Purchasers of elevators and elevator maintenance services brought a putative class action against defendants,²³ alleging a horizontal price fixing conspiracy for the sale and the continuing maintenance of elevators. Specifically, plaintiffs alleged that beginning in 2000, defendants agreed to suppress and eliminate competition in the market for sale and service of elevators. Defendants allegedly fixed prices of elevators and replacement parts and services and rigged the bidding for contracts for and service of elevators. Plaintiffs asserted that part of the conspiracy occurred in Europe as well.

DEFENDANTS' MOTION: Defendants' motion to dismiss was granted. Plaintiffs appealed.

DISPOSITION: Court of Appeals for the Second Circuit **AFFIRMED** and **GRANTED** defendants' motion to dismiss.

COURT'S RATIONALE: Court held that the conspiracy claims provided no plausible ground to support the inference of an unlawful agreement. Specifically, the Court found that the complaint failed to satisfy *Twombly* because:

- Purchasers failed to allege plausible inferences of agreement;
- Purchasers failed to allege that sellers terminated any prior course of dealings;
- Allegations of anticompetitive wrongdoing in Europe—absent any evidence of linkage between such foreign conduct was inappropriate because conduct merely suggested that if it happened here, it could have happened in U.S.;
- Without adequate allegations of facts linking transactions in Europe to transactions and effects in US, conclusory allegations did not nudge the plaintiffs' claims across the line from conceivable to plausible; and
- Complaint merely listed bald assertions of every type of possible conspiratorial behavior by defendants such as:
 - (1) Participating in meetings to discuss pricing and market divisions;
 - (2) Agreeing to fix prices for elevators and services;
 - (3) Rigging bids for sales and maintenance;
 - (4) Exchanging price quotes;
 - (5) Allocating markets for sales and maintenance;
 - (6) Collusively requiring customers to enter long-term maintenance contracts;
 - (7) Collectively trying to drive independent repair companies out of business; and
 - (8) Engaging in illegal parallel conduct via similarities in contractual language, pricing, and equipment design.

²² *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007) (*per curiam*).

²³ The named defendants included United Technologies Corp.; Otis Elevator Co.; Kone Corp.; Kone Inc.; Schindler Holding Ltd.; Schindler Elevator Corp.; ThyssenKrupp AG; ThyssenKrupp Elevator Corp.; and Thyssen Krupp Elevator Capital Corp.

Port Dock & Stone Corp. v. Oldcastle Northeast, Inc. (2007)²⁴

INDUSTRY: Aggregate stone distribution

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Aggregate distributor and its subsidiaries brought suit against aggregate manufacturers,²⁵ alleging they attempted to and did monopolize the relevant market for manufacturing crushed stone or aggregate by buying out its only significant competitor, then refusing to sell aggregate to plaintiffs. Thus, allegedly depriving plaintiffs of any supply and forcing them to sell its assets to defendants at below market value.

DEFENDANTS' MOTION: Defendant's motion to dismiss for failure to state a claim upon which could be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Second Circuit **AFFIRMED** and **GRANTED** defendant's motion to dismiss.

COURT'S RATIONALE: Court held that distributor did not allege antitrust injury from manufacturer's alleged monopolization of production levels, and allegations did not support claim alleging monopolization at the distribution level. In fact, the court recognized that defendant had an apparent legitimate business reason for defendant's refusal to deal: efficiency. The complaint failed because:

- Plaintiff failed to allege how the defendant's practices were anticompetitive;
- Plaintiff failed to allege how it suffered injury;
- Plaintiff failed to allege that defendant had an economic incentive to exclude it;
- Plaintiff failed to allege any such circumstances that would make defendant's vertical integration and refusal to deal with it anticompetitive; and
- Plaintiff failed to allege how defendant's refusal to deal was done for the purposes of monopolizing the aggregate market.

²⁴ *Port Dock & Stone Corp. v. Oldcastle N.E., Inc.*, 507 F.3d 117 (2d Cir. 2007).

²⁵ The named defendants included CRH, PLC, Oldcastle Northeast, Inc., and Tilcon, Inc.

**Wellnx Life Sciences, Inc v. Iovate Health Sciences Research, Inc.
(2007)²⁶**

INDUSTRY: Dietary supplement manufacturing

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott that unreasonably restrained trade pursuant to §§ 1 and 2 of the Shearman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that defendants,²⁷ with Iovate acting as the architect of a conspiracy, agreed with publishers of bodybuilding periodicals to boycott Wellnx in the market for advertising space in bodybuilding publications. Wellnx and Iovate were direct competitors in the dietary supplements market that primarily advertised in fitness magazines.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the amended complaint failed to allege facts sufficient to infer a horizontal agreement between any two publishers. The principle basis advanced for inferring a horizontal agreement was parallel conduct. Plaintiffs failed to allege sufficient factual enhancements to infer an agreement between defendants. The allegations the court held failed to meet *Twombly's* plausibility standard included:

- Allegation that refusal of Wellnx advertisements was a departure from prior practice;
- Allegation that each publisher was aware the defendant Iovate solicited similar agreements from others;
- Allegation that each publisher had a substantial profit motive for refusing Wellnx;
- Allegation that the refusal to deal was uniformly the same by each publisher; and
- Allegation that refusing Wellnx's business was against publishers' self-interest because it caused them to reject valid offers for advertising space.

Court found that the inference that emerged was that each defendant publisher was presented with a choice between Wellnx or Iovate. The facts alleged did not imply an agreement, but rather a substantial profit motive incentive that each could have independently reached.

As to plaintiff's allegation that the refusal to deal described in the amended complaint had the effect of unreasonably restraining trade in the sale of advertising space, the court held that plaintiffs failed to allege that agreements between Iovate and the publishers adversely affected price, output, or quality of services in the overall market. As to the § 2 claim—plaintiff failed to allege that any defendant was a monopolist.

²⁶ *Wellnx Life Scis., Inc. v. Iovate Health Scis. Research, Inc.*, 516 F. Supp. 2d 270 (S.D.N.Y. 2007).

²⁷ The named defendants included: Iovate Health Sciences Group Inc., Iovate Health Sciences, Inc., Iovate Health Sciences U.S.A. Inc., Canusa Products Inc., and Musclemag International Corporation U.S.A. Inc.

In re Short Sale Antitrust Litigation (2007)²⁸

INDUSTRY: Securities

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Electronic Trading Group alleged, *inter alia*, in its second amended complaint that defendants²⁹ violated federal antitrust laws. Plaintiffs, who acted as short sellers in short sale security transactions, brought action against defendants-brokers alleging that brokers violated antitrust laws by charging artificially inflated and unjustified fees to brokers in connection with the borrowing of certain classes of securities.

DEFENDANTS' MOTION: Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Relying on the Supreme Court's recent decision in *Credit Suisse Secs. (USA) LLC v. Billing*³⁰, defendants argued that the securities laws implicitly precluded application of the antitrust laws to the conduct alleged in the amended complaint.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that federal securities laws implicitly precluded application of the antitrust laws to alleged conduct of brokers in conspiring to classify particular securities involved in short sale transactions as hard-to-borrow and in fixing minimum borrowing rates. Court found that the liquidity and pricing benefits created by the short sales placed those transactions "within the heartland" of federal securities regulation and were "central to the proper functioning of well-regulated capital markets."

²⁸ *In re Short Sale Antitrust Litig.*, 527 F. Supp. 2d 253 (S.D.N.Y. 2007).

²⁹ The named defendants included: Morgan Stanley & Co., Inc.; Morgan Stanley DW Inc.; Bear Stearns Companies, Inc.; The Goldman Sachs Group, Inc.; Goldman Sachs & Co.; Goldman Sachs Execution & Clearing, L.P.; UBS Financial Services, Inc.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Citigroup Inc.; Citigroup Global Markets, Inc.; Credit Suisse Inc.; Credit Suisse Securities L.L.C.; Deutsche Bank Securities, Inc.; Lehman Brothers, Inc.; Banc of America Securities L.L.C.; Van der Moolen Specialists USA, L.L.C.; and CIBC World Markets Corp.

³⁰ *Credit Suisse Secs. (USA) LLC v. Billing*, 127 S.Ct. 2383 (2007)

Arista Records v. Lime Group (2007)³¹

INDUSTRY: Music digital recordings

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and monopolization or attempt to monopolize pursuant to § 2 of the Sherman Act.

NATURE OF ALLEGED VIOLATION(S): Thirteen major record companies that collectively owned rights to a majority of copyrighted sound recordings sold in the U.S. alleged that Lime Group infringed on their copyrights through use of a music file-sharing application that utilized peer-to-peer technology. Defendant filed an antitrust counterclaim alleging restraint of trade in violation of the Sherman Act.

DEFENDANTS' MOTION: Arista Records moved to dismiss for failure to state a claim upon which relief could be granted arguing that Lime Group lacked standing to prosecute such antitrust claims and had not suffered an antitrust injury.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Lime Group failed to demonstrate the requisite antitrust injury necessary to establish standing to challenge Arista Records' pricing schemes at either the wholesale or retail levels. Lime Group failed to allege an actual injury that it had suffered as a result of these restraints. The complaint was also found to be insufficient because:

- Distributor's allegations failed to plausibly suggest existence of a conspiracy;
- The counterclaim failed to allege who participated in illicit agreements and when and where they took place;
- The complaint contained no facts that plausibly suggested that Arista Records' refusal to provide Lime Group with "reasonable access to the hashes of their copyrighted works" was the result of anything other than independent decision-making by each company to refrain from doing business with Lime Group;
- The complaint failed to allege either that counter-defendants sought to unite in a single monopolistic entity or that they sought to allocate shares of the relevant market; and
- The complaint failed to allege market power.

³¹ *Arista Records v. Lime Group*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007).

McCagg v. Marquis Jet Partners, Inc. (2007)³²

INDUSTRY: Charter jet cards

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In McCagg's amended complaint, it alleged that defendant,³³ a private company that provided various packages of access to charter jets and accompanying services to customers, had a monopoly on charter jet frequent user cards, and held its exorbitant prices for over five years in violation of antitrust laws.

DEFENDANTS' MOTION: Defendants moved for a motion to dismiss for failure to state a claim upon which could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that McCagg's amended complaint still did not plead a plausible market. It was highly unlikely that McCagg would be able to demonstrate market power in a properly pled market that included these charter services. Court found the complaint deficient under the plausibility-pleading standard because:

- Plaintiff failed to adequately identify the relevant market as to the rules of “interchangeability” or “cross-elasticity”;
- Plaintiff failed to adequately allege the reduction in output or change in price; and
- Plaintiff failed to allege that prices in any market had increased to above competitive levels or that competition was excluded because of illegal agreements.

³² *McCagg v. Marquis Jet Partners, Inc.*, No. 05 CV 10607, 2007 WL 2161786 (S.D.N.Y. July 27, 2007).

³³ The named defendants included Marquis Jet Partners, Inc. and Netjets, Inc.

Temple v. Circuit City Stores, Inc. (2007)³⁴

INDUSTRY: Credit cards services

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Action arose out of earlier settlement of a class action suit alleging Visa and MasterCard had violated the § 1 of the Sherman Act, where present defendants and many other named plaintiffs³⁵ filed suit on behalf of millions of merchants. In that suit, it was alleged that Visa and MasterCard had violated § 1 of the Sherman Act, by using their considerable market power in the credit card market to force merchant plaintiffs through “Honor All Cards” policies to accept Visa and MasterCard debit cards as well. Plaintiffs in their Second Amended Class Action Complaint claimed merchants, Circuit City and Wal-mart passed on to them additional costs incurred due to the unlawful tying practices of Visa by inflating their retail prices.

DEFENDANTS’ MOTION: Circuit City and Wal-Mart both moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that dismissal was warranted because the plaintiffs failed to establish that they suffered an antitrust injury. In light of *Twombly*, the plaintiffs’ allegations of a vertical conspiracy were insufficient to state a claim for relief. The complaint alleged conduct that was equally explained by independent decision as by a vertical conspiracy. The allegations that the Court held failed to satisfy the *Twombly* pleadings standard included:

- Allegation that defendants elected to pay interchange fees imposed by Visa and MasterCard to protect their own profits; and
- Allegation that defendants then overcharged customers to make up for paying the excessive transaction fees of Visa and MasterCard.

Furthermore, the complaint mentioned no facts to support the claim that such an agreement or conspiracy existed, and the repeated assertions of conspiracy were insufficient.

³⁴ *Temple v. Circuit City Stores, Inc.*, No. 06 CV 5303, 2007 WL 2790154 (E.D.N.Y. Sept. 25, 2007).

³⁵ The alleged conspiracy participants included: Visa, MasterCard, numerous financial institutions, and Visa Card Class Action—Merchant-Plaintiffs, specifically: Circuit City Stores, Inc. and Wal-Mart Stores, Inc.

Ross v. Bank of America (2008)³⁶

INDUSTRY: Credit card issuing banks

ANTITRUST VIOLATION(S) ALLEGED: Unlawful agreement and conspiracy to boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Credit card holders brought putative antitrust class action against credit card issuing banks alleging that banks illegally colluded to force cardholders to accept mandatory arbitration clauses. Plaintiffs also alleged that the banks participated in a group boycott by refusing to issue cards to individuals who did agree to arbitration.

DEFENDANTS' MOTION: Defendants moved to dismiss for plaintiff's failure to state a claim upon which relief could be granted; arguing that plaintiffs did not have standing under Article III of the United States Constitution to assert their antitrust claim. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Second Circuit **REVERSED** and **DENIED** defendants' motion to dismiss because the court found that the plaintiffs had Article III standing, but notably, it did not address whether they also had antitrust standing.

COURT'S RATIONALE: Court held that cardholders had adequately alleged antitrust injuries in fact because the reduction in choice and diminished quality of credit services to which the cardholders claimed they had been subjected were anti-competitive effects constituting Article III injury in fact. The Court declined to assess the plausibility of the alleged injuries in fact, stating that presently only Article III standing was in issue.

³⁶ *Ross v. Bank of Am.*, 524 F.3d 217 (2d Cir. 2008).

In re Parcel Tanker Shipping Services Antitrust Litigation (2008)³⁷

INDUSTRY: Parcel tankers manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff and defendants³⁸ are in the business of shipping and transporting bulk liquid chemicals via specialized shipping vessels called parcel tankers. Plaintiffs alleged that defendants engaged in a conspiracy to fix the price of international shipments of liquid chemicals, thereby driving the plaintiff corporation out of business.

DEFENDANTS' MOTION: In light of *Twombly*, defendants moved for reconsideration of the court's prior ruling on their motion to dismiss. Specifically, defendants argued that plaintiff's complaint:

- Failed to allege any facts in support of the claim for predatory pricing; and
- Failed to allege any facts to support the claim that certain defendants participated in a conspiracy.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court found that the complaint contained only conclusions and labels and lacked the factual enhancements required after *Twombly*. The Court found the complaint deficient under the plausibility-pleading standard because:³⁹

- The complaint alleged general conspiratorial activity without reference to specific actions by a particular defendant at a particular time;
- The complaint never alleged specific facts tending to support the alleged theories of conspiracy;
- The complaint set a time frame only with respect to alleged "clandestine meetings" among some of the defendants, but stated no specific examples of the defendants' conduct in the meetings, other than general allegations of conspiracy; and
- The complaint never cited to specific wrongful acts of specific defendants to support the allegations of customer allocation, division of markets, bid rigging, predatory pricing, elimination of competitors, nor monopolization.

³⁷ *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487 (D. Conn. 2008).

³⁸ The named defendants included Odfjell Terminals Houston LP, Stolt-Nielson, Stolthaven Terminals, Inc, Jo Tankers, Tokyo Marine, TMM, and Copenhagen Tankers.

³⁹ Court rejected, plaintiff's reliance on the fact that defendants had admitted to participation in a conspiracy and pled guilty to criminal conspiracy charges, finding that the admitted conspiracy involved different conduct than the conduct alleged by the plaintiff. Specifically the criminal charges involved an unlawful conspiracy to raise prices while the predatory pricing claims involved an unlawful conspiracy to lower prices.

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation (2008)⁴⁰

INDUSTRY: Credit card issuers

ANTITRUST VIOLATION(S) ALLEGED: Monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Individual plaintiffs alleged the existence of at least two relevant product markets where defendant, MasterCard, had a monopoly of network services, namely the authorization, clearance, and settlement of retail transactions.

DEFENDANTS' MOTION: MasterCard moved to dismiss arguing:

- Its roughly 30 percent share of the General Purpose Market foreclosed the plaintiffs claims as a matter of law; and
- That the law strongly disfavored recognition of a single-brand product market.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that plaintiffs' two liability theories were viable provided they could demonstrate the existence of the facts alleged in their pleadings⁴¹. The allegations that the court held as sufficient to support MasterCard having a monopoly in the General Purpose Market included:

- Allegations that MasterCard controlled prices by setting pricing tiers, increased interchange fees, and established different rates for general and premium cards, without losing business;
- Allegation that MasterCard forced merchants to accept a series of rules that insulated its interchange fees from competition, such as a prohibitions against passing cost of interchange fees to customers or refusing to accept a higher fee carrying MasterCard;
- Allegation that the cost to merchants of accepting the card had increased, but in a properly functioning market, one would see higher prices correlating with lower demand; and
- Allegation that the level of MasterCard's interchange fees had no relationship to the processing burdens that MasterCard or its member banks incurred thus allowing MasterCard to set the price of its cards without regard to its costs.

Plaintiffs' allegations sufficient to support MasterCard having a Single-Brand Market included:

- Allegation that MasterCard required merchants to use its network to process all cards with its brand logo; and
- Allegation that MasterCard prohibits issuing banks from issuing payment cards that processed transactions through any other network.

⁴⁰ *In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig.*, 562 F. Supp. 2d 392 (E.D.N.Y. 2008).

⁴¹ Court noted that the instant motion was briefed and argued before *Twombly* was decided. No party had suggested in its brief that *Twombly* altered the analysis or the outcome this case.

Louisiana Wholesale Drug Co. v. Sanofi-Aventis (2008)⁴²

INDUSTRY: Pharmaceuticals—leflunomide manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that defendant violated § 2 of the Sherman Act when it filed a sham citizen-petition to the Federal Drug Administration to block the approval of five generic manufacturers. Plaintiff contended that defendant filed the petition willfully to maintain and extend its monopoly power over the drug leflunomide, thereby continuing their ability to charge supra-competitive prices for the drug.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which could be granted, alleging that plaintiffs lacked antitrust standing to sue Sanofi-Aventis because plaintiffs were not the most efficient enforcers of antitrust claims, and that plaintiffs failed to allege a relevant market as required by § 2 of the Sherman Act.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that plaintiffs had sufficiently defined the relevant market of the alleged monopoly. Court found that the complaint satisfied *Twombly* because:

- Plaintiff alleged actual injury by directly purchasing drugs from defendants;
- Plaintiff alleged identifiable damages and injuries;
- Plaintiff had an identifiable self-interest in pursuing the claim; and
- Plaintiff correctly alleged the relevant market to be the brand drug and its generic AB-rated equivalents.

⁴² *Louisiana Wholesale Drug Co. v. Sanofi-Aventis U.S., LLC*, No. 07 Civ. 7343 (HB), 2008 U.S. Dist. LEXIS 3611 (S.D.N.Y. Jan. 18, 2008).

Maverick Recording Co. v. Chowdhury (2008)⁴³

INDUSTRY: Recordings/music downloads

ANTITRUST VIOLATION(S) ALLEGED: None

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, a group of record companies, sued individual defendants for copyright infringement via the internet. Defendants counterclaimed alleging *inter alia* “antitrust violations.” In its entirety, defendants counterclaimed: “Plaintiffs have violated the antitrust laws of the United States by collusively refusing to enter into separate settlements, instead of trying settlement with anyone plaintiff to settlement with every other plaintiff, and conferring all settlement authority upon their cartel, the Recording Industry Association of America.”

DEFENDANTS’ MOTION: Maverick Recording, plaintiffs-defendants, moved to dismiss the counter claim for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that defendants-plaintiffs failed to adequately plead any cognizable claim. Court found the complaint to be insufficient because:

- Defendants-plaintiffs did not specify which provision of antitrust law they believed the plaintiffs were violating, nor did they attempt to establish any specific elements of an antitrust claim;
- Defendants-plaintiffs failed to allege enough facts to support even a possible, let alone a plausible antitrust violation; and
- Even if defendant had adequately alleged a plausible antitrust violation, Maverick Recording’s initiation of a lawsuit to enforce its legitimate copyrights would be immune from antitrust liability.

⁴³ *Maverick Recording Co. v. Chowdhury*, No. 07 Civ. 200, 2008 WL 3884350 (E.D.N.Y. Aug. 19, 2008).

American Medical Association v. United Healthcare Corp. (2008)⁴⁴

INDUSTRY: Health insurers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade and conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs challenged defendants' practices in relation to decisions involving the "usual, customary, and reasonable" ("UCR") rates paid by defendants for out-of-network medical services in connection with certain health care plans. Plaintiffs claimed that defendants' conspired to under-reimburse beneficiaries and medical care providers by manipulating UCR data.

DEFENDANTS' MOTION: Defendants' moved to dismiss alleging that plaintiffs failed to state a claim upon which relief can be granted. In particular, defendants highlighted plaintiffs' claims regarding the relevant market and degree of market power as insufficient.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that plaintiffs "easily satisfy" the *Twombly* standard with respect to the conspiracy allegation because the complaint included the following allegations:

- Specific persons at meetings;
- Specific times of meetings;
- Specific locations of meetings;
- That an association of health insurance companies created a database in 1973 that it used for making UCR determinations "in direct violation of their contractual requirements" to their respective subscribers so as to under compensate their subscribers; and
- That the UCR rates were lower than the rates should have been due to the use of purposely flawed data.

The court also noted that plaintiffs did not need to provide evidence that defendants were acting contrary to their "independent business interests."

⁴⁴ *Am. Med. Assoc. v. United Healthcare Corp.*, No. 00 Civ. 2800, 2008 WL 3914868 (S.D.N.Y. Aug. 22, 2008).

U.S. Information Systems v. International Brotherhood of Electrical Workers Local Union Number 3 (2008)⁴⁵

INDUSTRY: Subcontractors

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade and conspiracy pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): U.S. Information Systems employees, belonging to the Communications Workers of America (CWA union), alleged that Local 3, in conspiracy with the defendant subcontractors, coerced general contractors to only use Local 3 subcontractors. CWA alleged that a general contractor who used CWA subcontractors for telecommunications work ran the risk of incurring vandalism or sabotage of the CWA subcontractor's work.

DEFENDANTS' MOTION: Defendants moved to dismiss alleging that plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court held that plaintiffs' complaint satisfied *Twombly* because:

- The complaint alleged that a specific meeting took place where Local 3's losing of bids to CWA subcontractors was discussed;
- The complaint alleged that after the meeting, Local 3 enforced a "total job policy" of attempting to exclude CWA workers from obtaining or keep local telecommunication jobs;
- The complaint alleged several instances where a contract went to a Local 3 subcontractor after Local 3 had forced a general contractor to abandon CWA labor;
- The complaint included examples of Local 3 sabotaging a building sites where CWA labor had been hired or was about to be hired;
- The complaint alleged that defendant subcontractors were the longtime beneficiaries of Local 3's illegal activities; and
- The complaint alleged meetings where Local 3 representatives threatened contractors with slowdowns if they used CWA subcontractors.

⁴⁵ *U.S. Info. Sys. Inc. v. Int'l Bhd of Elec. Workers Local Union No. 3*, No. 07 Civ. 127, 2008 WL 4090143 (S.D.N.Y. Sept. 2, 2008).

In re Digital Music Antitrust Litigation (2008)⁴⁶

INDUSTRY: Digital music recordings

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs sought to represent a putative nation-wide class of purchasers of Digital Music. Digital music is manufactured as a digital file and delivered in two interchangeable formats, compact discs and through internet downloads. Defendants,⁴⁷ described as the four largest record companies in the U.S., allegedly control 80% of that market. Plaintiffs alleged that defendants conspired to fix or artificially maintain the price of digital music by inflating and maintaining at supra-competitive levels the price of digital music. Defendants allegedly achieved this by fixing a high price for restraining the availability of Internet music, which in turn buoyed the price of CDs despite declining costs of production associated with the introduction of new technologies.

DEFENDANTS' MOTION: Defendants moved to dismiss the Second Consolidated Amended Complaint ("SCAC") for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that plaintiffs failed to state a claim for relief because the instances of parallel conduct plaintiff relied on did not place defendants' conduct in the "context that raises a suggestion of preceding agreement." Importantly, the court noted that defendants' "antitrust record" did not support an inference of illegal agreement. Rather, the court found mere investigation by governmental agencies not to be tantamount to an antitrust record. The allegations that the court found insufficient to infer an agreement included:

- Allegation that defendants' subsequent adoption of parallel price and use restrictions resulted from an agreement based on their creation of or membership in a joint venture;
- Allegation that trade associations created an opportunity to communicate;
- Allegation that defendants' imposition of price and use restrictions were against defendants' economic self-interest was implausible against the backdrop of widespread unauthorized music downloading; and
- Plaintiffs' ambiguous allegation of price increases did not support an inference of agreement because, as alleged, that conduct was merely consistent sequential parallelism.

⁴⁶ *In re Digital Music Antitrust Litig.*, No. 06 MDL 1780, 2008 WL 4531821 (S.D.N.Y. Oct. 9, 2008).

⁴⁷ The named defendants included: Bertelsmann, Inc.; SONY BMG Music Entertainment; Sony Corp. of America; Capitol Records, Inc. d/b/a EMI Music North America; EMI Group North America, Inc.; Capitol-EMI Music, Inc.; Virgin Records America, Inc.; Time Warner Inc.; UMG Recordings, Inc.; Warner Music Corp.

Howard Hess Dental Laboratories, Inc. v. Dentsply International (2007)⁴⁸

INDUSTRY: Artificial teeth manufacturers and dealers

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Dental Laboratories brought an antitrust class action against manufacturers of artificial teeth and designated dealers.⁴⁹ Plaintiffs alleged exclusive dealing and price-fixing conspiracies to maintain a purported monopoly on the manufacturing of artificial teeth for sale in the U.S., restraint of trade by the implementation of exclusive dealing arrangements, and sale of teeth at anticompetitive prices.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the amended complaint contained no facts to support an inference that defendants acted in unison or shared a unity of purpose or a meeting of the minds as opposed to parallel conduct. The complaint failed to satisfy the *Twombly* standard because:

- Plaintiffs failed to plead facts from which the court could reasonably infer the intent of the dealers to create and maintain a monopoly; and
- Plaintiffs failed to offer facts that demonstrated a concerted action between the defendants as required for plaintiffs' § 1 claims.

⁴⁸ *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 516 F. Supp. 2d 324 (D. Del. 2007).

⁴⁹ The moving defendants included Arnold Dental Supply Co.; Atlanta Dental Supply Co.; Dental Supplies & Equipment, Inc.; Iowa Dental Supply Co., LLC; Johnson & Lund Co., Inc.; Kentucky Dental Supply Co.; n/k/a/ KDSA Liquidation Corp.; Marcus Dental Supply Co. Inc.; Mohawk Dental Co.; Ryker Dental of Kentucky, Inc.; Accubite Dental Lab, Inc.; Benco Dental Co.; Burkhart Dental Supply Co.; Darby Dental Laboratory Supply Co., Inc.; Hendon Dental Supply, Inc.; Henry Schein, Inc.; Jahn Dental Supply Co.; Nowak Dental Supplies, Inc.; Patterson Dental Co.; and Pearson Dental Supplies, Inc.

Behrend v. Comcast Corporation (2007)⁵⁰

INDUSTRY: Cable services provider

ANTITRUST VIOLATION(S) ALLEGED: Per se violation based on horizontal allocation of markets pursuant to § 1 and monopolization or attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Consolidated class actions arising from cable televisions corporation's activities in Philadelphia, Chicago, and Boston geographic markets. Plaintiff's alleged in their consolidate amended class action complaint that because of prior swap agreements between AT & T and Charter Communications, Cablevision Systems Corp., and MediaOne in the Boston Cluster prior to AT & T Broadbands' merger with Comcast, Comcast is liable for antitrust liability arising from the creation of the Boston cluster. Plaintiff asserted that the swap transactions in Boston eliminated actual and potential competitors, constituting an unreasonable restraint on competition for cable television services in the Boston cluster.

DEFENDANTS' MOTION: Defendants moved for a judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court first distinguished from *Twombly* in that here, the complaints allege sufficient facts to show an "agreement." Court held that the complaints satisfied the antitrust pleading standard announced in *Twombly* based upon a per se violation of § 1 of the Sherman Act because the following factual averments were found:

- Before the transactions, the Philadelphia market contained numerous competitors;
- Parties to the swap transactions were in actual or potential competition with each other;
- The swap transactions physically removed actual and potential competitors from the Philadelphia and Chicago clusters, making the competitors' return to those areas financially unattractive and further raising barriers to entry for other competitors;
- The swap transactions removed a check on Comcast's ability to raise prices;
- Potential competitors have not entered or re-entered the Philadelphia and Chicago Markets;
- The swap transactions further suppressed competition by increasing already high barriers to entry by actual or potential competitors, including over-builders;
- Comcast received competitors' cable systems and cable subscribers in the Philadelphia and Chicago cable markets in exchange for Comcast's cable systems and cable subscribers in other parts of the country;
- Comcast currently controls ninety-four percent and ninety-two percent of the cable market in Philadelphia and Chicago clusters; and
- Comcast has used its monopoly to power to raise cable priced in the Philadelphia and Chicago clusters to artificially high, supra-competitive levels.

⁵⁰ *Behrend v. Comcast Corp.*, 532 F. Supp. 2d 735 (E.D. Pa. 2007).

In re Linerboard Antitrust Litigation (2007)⁵¹

INDUSTRY: Manufacturers of corrugated sheets

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that several United States linerboard manufacturers conspired to restrict linerboard (which included any grade of paperboard suitable for use in the production of corrugated sheets used in manufacture of corrugated boxes) output in order to increase the price of corrugated sheets and corrugated boxes.

DEFENDANTS' MOTION: Defendants *inter alia* moved for summary judgment arguing that plaintiffs' conspiracy evidence did not rule out the possibility that defendants acted independently.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that there was sufficient evidence of a conspiracy to deny the motion because:

- The facts strongly suggested, and were not merely consistent with, a price-fixing conspiracy;
- Defendants took “market downtime” at linerboard mills, or the idling of machines that are capable of full production;
- Plaintiffs alleged that market downtime was incredibly expensive to defendants because it entailed shutdown costs, startup costs, and opportunity costs of foregone sales;
- Plaintiffs alleged that prior to this market downtime, one of the defendants had never taken any market downtime in its forty-plus year history of operating linerboard mills and another defendant had only taken one in ten years before the downtime in issue;
- Plaintiffs alleged that the linerboard industry was susceptible to collusion because linerboard was a homogeneous commodity sold in a concentrated market with high barriers to entry and “huge” fixed costs of production; and
- Plaintiffs produced “immense” support and documentation of a possible agreement between the defendants to fix prices.

⁵¹ *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38 (E.D. Pa. 2007).

In re Hypodermic Products Antitrust Litigation (2007)⁵²

INDUSTRY: Medical/pharmaceutical suppliers

ANTITRUST VIOLATION(S) ALLEGED: Unreasonable restraint of trade and unlawful tying pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs are pharmacies in Tennessee and New York and healthcare providers and distributors in the pharmaceutical and medical device industry that purchased various disposable hypodermic products manufactured by defendant through a distributor or wholesaler. Plaintiffs alleged that defendant, a medical device manufacturer that supposedly controlled a dominant share of the relevant market for hypodermic products in the early 1980s, engaged in anticompetitive and illegal practices to foreclose competition in the relevant market by suppressing competition from current competitors and/or product innovators in violation of the Sherman Act. Specifically, the plaintiffs alleged that defendant committed anti-competitive practices with the imposition of market share purchase requirements on persons purchasing disposable hypodermic products; defendant's bundling of its goods for exclusionary and predatory purposes; defendant's exclusionary contracts with certain GPOs; and defendant's bundling of its goods with the goods of other manufacturers for exclusionary purposes.

DEFENDANTS' MOTION: Defendant moved to dismiss plaintiffs' consolidated class action complaint for failure to state a claim upon which relief could be granted. Defendant argued that plaintiffs did not adequately allege the essential elements or necessary facts of any of its federal antitrust claims, such as a relevant market, anti-competitive effects, antitrust injury, standing, and unlawful exclusive dealing or exclusionary conduct.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the complaint satisfied *Twombly* because:

- Complaint alleged that defendant entered into anti-competitive arrangements with Group Purchasing Organizations ("GPOs"), such as Premier, whereby it would pay the GPOs millions of dollars in cash payments as well as equity positions;
- Complaint cites to an article from February 1997 which state that as a result of a recent deal between defendant and Premier, Premier would receive a portion of administrative fees in the form of warrants to buy defendant's stock;
- Complaint alleged that defendant entered into agreements with certain customers which included bundled financial incentives and exclusive dealing commitments;
- Complaint alleged that the object of such arrangements was to prevent plaintiffs from purchasing disposable hypodermic products made by other manufacturers;
- Complaint alleged that plaintiffs were injured by defendant's exclusionary practices;
- Complaint alleged that defendant attempted to maintain monopoly power by bundling prices with intent to foreclose competition; and
- The complaint adequately alleged four different relevant markets.

⁵² *In re Hypodermic Prod. Antitrust Litig.*, No. 05-CV-1602, 2007 WL 1959224 (D.N.J. June 29, 2007).

In re OSB Antitrust Litigation (2007)⁵³

INDUSTRY: Oriented strand board manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, direct and indirect purchasers of Oriented Strand Board, filed class action alleging a horizontal price fixing conspiracy among the nine major OSB manufacturers.⁵⁴

DEFENDANTS' MOTION: Defendants moved for judgment on the pleadings alleging plaintiffs' complaint did not meet the *Twombly* pleading standard because plaintiff failed to allege sufficient facts of an agreement.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that plaintiffs satisfied the *Twombly* standard by stating a claim of relief that was plausible on its face, by making independent allegations that supported an inference of an actual agreement among defendants that would go beyond parallel conduct. The allegations that the court held satisfied *Twombly* included:

- Allegation that defendants together control 95% of the OSB market;
- Allegation that on or about June 1, 2002, defendants together tacitly agreed to raise OSB prices to revitalize the stagnate OSB market;
- Allegation that defendants fixed prices using the twice-weekly published price list in *Random Lengths*, which included lists of OSB prices by region;
- Allegation that by agreement defendants continued to curtail production over the next two years despite increasing industry demand and skyrocketing OSB prices;
- Allegation that defendants confirmed their agreements at industry trade shows meeting; and
- Allegation that acting in concert defendants took the following actions to reduce the supply of OSB (and so drive up the price) in accordance with such agreement:
 - (1) Kept OSB from the market through mill shutdowns;
 - (2) Delayed or canceled the construction of new OSB mills;
 - (3) Bought OSB from competitors instead of manufacturing it themselves (which they could have done at lower cost); and
 - (4) Maintained low operating rates at mills.

⁵³ *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 (E.D. Pa. Aug. 3, 2007).

⁵⁴ Named defendants included Louisiana-Pacific; Norbord; Weyerhaeuser; Potlatch; Ainsworth; and Grant Forest Products, Inc. Defendant Grant Forest sought dismissal on pleadings because it was only explicitly mentioned as defendant in one lone paragraph. Court denied dismissal noting that plaintiffs need only allege a defendant joined and participated in the alleged price-fixing conspiracy. Court cited *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 822 (3d Cir. 1982) (district court should not “compartmentalize” a conspiracy claim by conducting “a seriatim examination of the claims against each of five conspiracy defendants as if they were separate lawsuits”).

Building Materials Corporation of America v. Rotter (2008)⁵⁵

INDUSTRY: Manufacturing of roofing products

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff-defendant⁵⁶ is the dominant manufacturer and marketer of commercial and residential roofing products and accessories in the United States. Defendant-plaintiff alleged that plaintiff-defendant entered into an exclusive contract with a supplier of non-woven meshed used in defendant-plaintiff's competing roof vents with the intent to harm the competitiveness of his product by forcing him to buy non-woven mesh from overseas.

DEFENDANTS' MOTION: Plaintiff-defendant brought motion to dismiss defendant-plaintiff's counterclaims.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that defendant-plaintiff did not adequately allege relevant product market on a claim of illegal restraint of trade nor did defendant-plaintiff adequately allege relevant product market on monopoly leveraging claim. Court found that in neither his counterclaim nor in his brief did defendant-plaintiff provide any factual basis to support his bare assertion that the relevant market was asphalt shingle roof-ridge vents. The court held the complaint failed to satisfy the *Twombly* pleading standard because:

- Defendant-plaintiff made no reference to the price of and/or demand for asphalt shingle roof ridge vents relative to the roofing products industry as a whole;
- Defendant-plaintiff defined the relevant product market without reference to the rule of reasonable interchangeability and cross-elasticity of demand; and
- Defendant-plaintiff's monopoly leveraging claim failed to provide proof of a threatened or actual monopoly in the leverage market and failed to allege a relevant product.

⁵⁵ *Bldg Materials Corp. of Am. v. Rotter*, 535 F. Supp. 2d 518 (E.D. Pa. 2008).

⁵⁶ The named plaintiff-defendants were Building Materials Corp. of America, d/b/a GAF Materials Investment Corp.

In re Pressure Sensitive Labelstock Antitrust Litigation (2008)⁵⁷

INDUSTRY: Manufacturers/producers of pressure sensitive labelstock (“PSL”)

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Self-adhesive labelstock purchasers brought a class action asserting a conspiracy among self-adhesive labelstock producers⁵⁸ to fix prices.

DEFENDANTS’ MOTION: Defendants moved for a motion on the pleadings arguing that *Twombly* required that each allegation be assessed separately as to its consistency with competitive behavior.

DISPOSITION: Motion **DENIED** as to defendant MAC, but **GRANTED** as to defendant, Bemis.⁵⁹

COURT’S RATIONALE: Court held that *Twombly* was distinguishable because it involved state-created monopolies that created a unique market, from which to assess the conscious parallelism.

Allegations against MAC that the court held satisfied *Twombly* included:

- Allegation that prior to UPM’s expansion into the North American market, defendants MAC and Avery elected not to compete for customers;
- Allegation that UPM entered the U.S. market despite the excess production capacity and cut prices by 10% because prices were maintained at supra-competitive levels;
- Allegation that such agreement was contrary to MAC’s economic self interest in light of the newly developed and considerable excess production capacity;
- Allegation that there was excess-capacity industry wide;
- Allegation that as a consequence of such forbearance, the conspirers respective market shares and prices remained relatively stable;
- Allegation that prices for PSL were set a supra-competitive levels, as evidenced by UPM’s entry into the U.S. market despite the existence of considerable excess capacity in the industry and its ability (through defendant Raflatac) to undercut prices by ten percent or more;
- Allegation that UPM’s goals was to acquire 20% of the U.S. market and that two of named defendants held meetings to discuss easing price competition between them;
- Allegation that Bemis agreed and sold MAC to UPM as part of the conspiracy to restrain trade, as evidenced by selling said division for half the price it had rejected two years earlier;
- Allegation that MAC CEO appointed by UPM predicted “discipline” in the market.; and
- Allegation that MAC announced a price increase that Avery later followed occurred after employees from both attended an October 2000 conference together.

⁵⁷ *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008).

⁵⁸ The named defendants included: Morgan Adhesives Company (MAC); Bemis Company, Inc. (the parent of Morgan Adhesives); Avery Dennison Corporation (largest producer of PSL in the US); Raflatac, Inc. (the second largest PSL producer); and UPM-Kymmene (Finnish corporation, major producer of various types of paper used to produce PSL).

⁵⁹ Bemis, the parent company of MAC, was not held liable merely because its subsidiary was liable because plaintiff failed to attribute to Bemis the conduct of MAC.

BabyAge.com v. Toys “R” Us (2008)⁶⁰

INDUSTRY: Retailers of baby and juvenile products

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade and conspiracy to monopolize under § 1 and monopolization and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, retailers and consumers of baby and juvenile products, alleged that Babies “R” Us (“BRU”) conspired with manufacturers of products sold in their stores to sell goods at or above a certain price, causing consumers to pay above and beyond what they would have paid under competitive conditions.

DEFENDANTS’ MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **DENIED**.

COURT’S RATIONALE: Court held that plaintiffs’ allegations, if proven, would demonstrate a §§ 1 or 2 claim. The following specific allegations regarding restraint of trade were sufficient:

- There are “high-end” markets for various baby products such as strollers or car seats; and
- A hypothetical monopolist could profitably raise prices in each of the respective markets for a short time, supported by data on interchangeability and cross-elasticity of demand.

The court held that the plaintiffs pleaded widely-acceptable “plus factors” in support of their claim of concerted action. Those allegations included:

- That the parallel conduct at issue was against each manufacturers’ independent self-interest because minimum resale price maintenance agreements (“RPMs”) ultimately diminish sales;
- That BRU wielded sufficient influence over each manufacturer to inflict duress;
- That BRU threatened to retaliate against manufacturer that did not implement RPMs.

The court found the following allegations in support of anticompetitive action sufficient:

- Each manufacturer depended upon BRU for a large portion of its retail sales because of its monopolistic-share of the relevant markets; and
- That BRU’s RPMs blocked certain sales.

The court found the following allegations sufficient to support plaintiffs’ monopolization claims:

- The relevant markets have significant barriers to entry because of high start-up costs and industry regulation and BRU contributed to the barriers by procuring anticompetitive RPMs;
- BRU’s monopolization caused injury to the consumer plaintiffs who paid higher prices and for the retailer plaintiffs who lost sales volume; and
- Numerous meetings took place regarding the RPMs and BRU enforced them via threats.

⁶⁰ *BabyAge.com v. Toys “R” Us*, 558 F. Supp. 2d 575 (E.D. Pa. 2008).

Univac Dental Company v. Dentsply International (2008)⁶¹

INDUSTRY: Manufactures of prefabricated artificial teeth

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In January, 1999, the U.S. Department of Justice instituted an antitrust action against Dentsply. Reversing the district court, the Third Circuit found that Dentsply's aggressive market-control strategies violated § 2 and final judgment against Dentsply was entered on April 26, 2006. On April 25, 2007, Lactona, and its predecessor entity, Univac Dental Company, alleged that Dentsply monopolized the market for artificial teeth.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted on two grounds. First, it argued that the claim was time-barred because when Lactona filed, the statute of limitations forbade all claims except those accruing on or after January 5, 1995 and no specific allegations were made about conduct occurring after that time. Second, Dentsply alleged that Lactona's complaint failed to allege a substantive antitrust injury.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that Lactona's complaint, predicated upon Dentsply's 1994 actions and two undated incidents, was sufficient under the four year statute of limitations because Lactona did not need to allege the precise timing of every instance of conduct. There is no heightened pleading standard with respect to a statute of limitations argument. The court also held that Lactona pled allegations that, if proven, would demonstrate a § 2 claim:

- Dentsply controlled approximately seventy-five percent of the U.S. market for prefabricated artificial teeth, a share about fifteen times as large as that of the second-largest producer;
- Because laboratories expect dealers to stock Dentsply products, due in part to its market dominance, Dentsply wielded considerable influence over the terms and conditions on which dealers purchased and sold its products and those of its competitors;
- Dentsply threatened to cease supplying teeth to one dealer that had ordered \$25,000 Lactona teeth;
- Dentsply purchased and destroyed another dealer's inventory of Lactona teeth;
- Dentsply threatened other dealers with termination if they continued to sell competitor's teeth;
- In 1993, Dentsply promulgated Dealer Criterion No. 6, which prohibited its dealers from carrying competitors' new products; and
- No Dentsply dealer added competing tooth lines to its inventory between 1993 and 1999.

⁶¹ *Univac Dental Co. v. Dentsply Int'l, Inc.*, No. 1:07-CV-0493, 2008 WL 2486134 (M.D. Pa. June 17, 2008).

**Alarmax Distributors, Inc. v. Tyco Safety Products Canada Ltd.
(2008)⁶²**

INDUSTRY: Tyco distributors

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In 2002, plaintiff and defendant reached a settlement agreement regarding breach of an oral distribution agreement. Plaintiff contended that the agreement was renewed on June 28, 2007 and set to expire on June 27, 2009. This distribution agreement required plaintiff and other independent distributors to become exclusive dealers and carry only defendant's products. Plaintiff refused to sign the agreement and brought suit alleging *inter alia* violation of §§ 1 & 2 of the Sherman Act.

DEFENDANTS' MOTION: Defendant moved to dismiss arguing that:

- Plaintiff's claimed product market definition was legally invalid;
- Plaintiff failed to plead a cognizable antitrust injury; and
- Plaintiff failed to plead an actual agreement.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the facts as pled would raise a reasonable expectation that discovery would reveal evidence of an agreement. Thus, the court held that dismissal was not merited under *Twombly* because:

- The complaint contained allegations indicating that the independent distributors were the customers;
- The complaint included allegations as to why the manufacturers were unable to employ their own distribution channels;
- The complaint alleged that barriers to entry in the industry were high;
- The complaint alleged an adequate injury in that the sale of burglar alarm products has been unreasonably restrained; installers and contractors had to pay artificially high prices; and Tyco competitors had been foreclosed from competing; and
- The complaint sufficiently alleged an unlawful agreement in that plaintiff referenced a distribution agreement with which defendants were attempting to force it to sign that defendant told plaintiff all of Tyco products' distributors had to sign.

⁶² *Alarmax Distribs., Inc. v. Tyco Safety Prods. Canada Ltd.*, No. 7 CV 1744, 2008 WL 2622899 (W.D. Pa. June 27, 2008).

Teva Pharmaceutical Industries v. Apotex (2008)⁶³

INDUSTRY: Pharmaceutical manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Monopolization and attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Teva sued Apotex alleging that Apotex infringed three of its patents. Apotex counterclaimed alleging that Teva violated § 2 of the Sherman Act based on its sham litigation of a patent infringement suit.

DEFENDANTS' MOTION: Plaintiff, responding to defendant's counterclaim, moved to dismiss, arguing that Apotex's § 2 claim must fail because it had not alleged sufficient facts to show that Teva's lawsuit was objectively baseless.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the amended answer was deficient. Court agreed with Teva that Apotex's antitrust counterclaims constituted sham litigations, thus Noerr-Pennington exception did not apply. The court dismissed the claim pursuant to *Twombly* because:

- Apotex failed to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand; and
- Apotex failed to allege Teva's market power.

⁶³ *Teva Pharm. Indus., Ltd. v. Apotex, Inc.*, No. 07-5514, 2008 WL 3413862 (D.N.J. Aug. 8, 2008).

In re Compensation of Managerial Antitrust Litigation (2008)⁶⁴

INDUSTRY: Oil industry staffing

ANTITRUST VIOLATION(S) ALLEGED: Unlawful restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs (several managerial, professional and technical (“MPT”) employees of certain major U.S. oil companies) alleged that defendant oil companies, in violation of § 1 of the Sherman Act, exchanged detailed salary information so as to suppress the growth in oil industry salary levels and eliminate the so-called oil industry premium paid on the salaries of MPT employees.

DEFENDANTS’ MOTION: Defendants moved for summary judgment under Rule 56(c) arguing that plaintiffs failed to present evidence sufficient to create a triable issue of fact with respect to the claim of information sharing causing anticompetitive effects in the relevant market. Defendants argued that:

- The relevant product market was limited to oil and petrochemical industry employers or that plaintiffs lacked substitutable job opportunities outside of those employers; and
- The court, in denying class certification, had already rejected any attempt by plaintiffs to proceed without having to prove a relevant product market.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that direct evidence must be “moored” to an appropriate relevant market. Although plaintiffs may not need to define the relevant market with the same level of precision that is required under the traditional method of demonstrating market power, plaintiffs are required to prove, at least roughly the parameters of the relevant labor markets.⁶⁵

⁶⁴ *In re Compensation of Managerial, Prof'l & Technical Employees Antitrust Litig.*, Nos. MDL 1471, 02-CV-2924, 2008 WL 3887619 (D.N.J. Aug. 20, 2008).

⁶⁵ *Id.* at *8.

Black Box Corporation v. Avaya, Inc. (2008)⁶⁶

INDUSTRY: Telecommunications software and maintenance

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying and illegal conspiracy pursuant § 1 and monopolization, attempt to monopolize, and conspiracy to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed an amended complaint asserting *inter alia* five causes of action for violations of the Sherman Act. Plaintiff alleged that Avaya has monopolized, conspired to monopolize and attempted to monopolize the market of post-warranty service and maintenance for Definity and other ECG Platform equipment including the submarkets for the provision of service and maintenance and the sale of maintenance contracts in the United States.

DEFENDANTS' MOTION: Defendants moved to dismiss the claim arguing that the complaint did not allege facts sufficient to establish a conspiracy because plaintiff failed to (1) identify any of the other alleged co-conspirators by name; (2) identify any particular communication supporting the conspiracy; and (3) identify any of the steps that were used by the co-conspirers to eliminate competition.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: The court rejected defendants' arguments, stating that "in *Twombly*, the concern was not that the allegations in the complaint were insufficiently particularized, but warranted dismissal because it failed *in toto* to render plaintiff's entitlement to relief plausible." The complaint satisfied *Twombly* because on the facts before the court, the conspiracy allegations were plausible based on specific and actual agreements that were alleged, and not mere parallel conduct.

⁶⁶ *Black Box Corp. v. Avaya, Inc.*, No. 07-6161, 2008 WL 4117844 (D.N.J. Aug. 29, 2008).

Heartland Payment Systems, Inc. v. MICROS Systems, Inc. (2008)⁶⁷

INDUSTRY: Credit card processing services

ANTITRUST VIOLATION(S) ALLEGED: Tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Heartland is a credit and debit card processing corporation that provides credit and debit card processing and additional services for more than 160,000 restaurants, hotels, and retail merchants throughout the United States. Defendant MICROS is the leading developer of restaurant point of sale information systems, including hardware and software for such systems and operational applications. Defendant Merchant Link is a network based company that provides merchants with a single interface to connect with all major payment processors. Plaintiff alleged that MICROS and Merchant Link entered into an agreement for MICROS devices to exclusively use Merchant Link Services for the transmission of electronic transactions from MICROS terminals and network and help desk services for such terminals.

DEFENDANTS' MOTION: Defendants moved to dismiss *inter alia* the federal antitrust claims for failure to state a claim upon which relief could be granted. Specifically defendants' asserted:

- That Heartland failed to adequately plead its tying and conspiracy claims because the merchants the purchasers of the tying product were not required by defendants to purchase the services of Merchant Link; and
- That Heartland lacked standing to bring its tying claim.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that assuming plaintiff's allegations as true; defendants' scheme clearly implicated the antitrust concern against tying arrangements. The court held that the complaint regarding the allegation of tying met the *Twombly* standard because:

- Plaintiff alleged that due to defendant MICROS' market power, defendant Merchant Link could charge supra-competitive transaction fees;
- Plaintiff alleged that as a result of the tie, competition in the interface market was stifled; and
- Plaintiff participated in the pertinent market as a customer of the tied product, thereby having standing to sue.

⁶⁷ *Heartland Payment Sys., Inc. v. MICROS Sys., Inc.*, No. 3:07 CV 5629, 2008 WL 4510260 (D.N.J. Sept. 29, 2008).

St. Clair v. Citizens Financial Group (2008)⁶⁸

INDUSTRY: Banking services

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy pursuant to § 1 and monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): St. Clair alleged that the overdraft fees which he was forced to pay were not a product of market forces, but instead were falsely inflated as a result of a conspiracy between defendants and various “unknown person conspirators of competitor banks and/or bank enterprises” or because of defendants’ monopolization of the market.

DEFENDANTS’ MOTION: Defendant moved to dismiss alleging that plaintiff lacked antitrust standing and that even if he had such standing, he failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED** as to the failure to state a claim.

COURT’S RATIONALE: Court held that although plaintiff had antitrust standing, he did not submit factual allegations to raise his claim of conspiracy beyond a speculative level. Plaintiff offered only the following conspiracy allegations:

- That the banks were engaged in parallel conduct because their overdraft fees were similar; and
- That defendant’s individual officers had experience working for other banks.

Plaintiffs’ monopoly claim similarly failed because plaintiff pointed only to the relative success of Citizens Financial Group as evidenced by its \$159 billion in assets and the fact that it is one of the largest ten commercial bank holding companies in the United States. The court found that the plaintiff failed to set forth any facts showing:

- The strength of competition;
- The development of the industry;
- The barriers to entry;
- The nature of the anti-competitive conduct;
- The elasticity of consumer demand; or
- The particular percentage of any relevant market controlled by defendants.

⁶⁸ *St. Clair v. Citizens Fin. Group*, No. 08-1257, 2008 WL 4911870 (D.N.J. Nov. 12, 2008).

Norris v. Hearst Trust (2007)⁶⁹

INDUSTRY: Newspaper distributors in Houston, Texas

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Six former distributors of the *Houston Chronicle* sued the newspaper owners⁷⁰ alleging *inter alia* violation of antitrust laws. In their second amended complaint, plaintiffs alleged that defendants terminated plaintiffs' contracts because they refused to falsely testify to the Audit Bureau of Circulations so as to mislead potential advertisers.

DEFENDANTS' MOTION: Defendants' motion to dismiss was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Fifth Circuit **AFFIRMED** and **GRANTED** defendants' motion to dismiss.

COURT'S RATIONALE: Court held that plaintiffs failed to allege antitrust injury and lacked antitrust standing under *Twombly* because plaintiffs were not consumers of the *Chronicle* or its advertising services, and they were not producers or sellers of competing publications or media. Specifically, the complaint failed the *Twombly* because:

- Plaintiffs failed to allege any harm or increased price or cost to subscribers or readers;
- Plaintiffs failed to allege sufficient facts suggesting that alleged antitrust violations came before the distributors were terminated; and
- Plaintiffs failed to allege that the termination of the plaintiffs had any adverse effect on anyone else, either by increasing the price or decreasing the availability of the *Chronicle* to subscribers.

⁶⁹ *Norris v. Hearst Trust*, 500 F.3d 454 (5th Cir. 2007). Decided on September 18, 2007.

⁷⁰ The named defendants included: The Hearst Trust, The Hearst Corporation, and Hearst Newspapers Partnership, LP.

Hydril Company v. Grant Prideco (2007)⁷¹

INDUSTRY: Manufacturers of drill pipe used in drilling of oil and gas wells

ANTITRUST VIOLATION(S) ALLEGED: Obtaining a patent through fraud and misuse of that patent in violation of § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed this amended complaint, alleging Grant Prideco obtained the patent at issue through fraud and therefore the company's assertion of rights under that patent constituted a violation of antitrust laws.

DEFENDANTS' MOTION: Defendant moved to dismiss, alleging that plaintiff did not have standing to assert an antitrust claim and that plaintiffs did not allege proper antitrust injury.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint failed to allege facts that supported plaintiff's standing to pursue an antitrust claim. The patent at issue did not extend to areas outside the U.S. and it was only outside the U.S. that plaintiff competed in the relevant market. The complaint failed *Twombly* because:

- Complaint failed to allege facts to support plaintiff's conclusory assertion that it suffered an "antitrust injury" because it did not demonstrate an injury in the market in which it competed; and
- Complaint failed to demonstrate, with adequate factual support, that plaintiff was a potential competitor in the market at issue, and merely formulaically recited the plaintiff's intention and preparedness to enter the field.

⁷¹ *Hydril Co., L.P. v. Grant Prideco, L.P.*, No. H-05-0337, 2007 WL 1791663 (S.D. Tex. June 19, 2007).

Schafer v. State Farm Fire and Casualty Co. (2007)⁷²

INDUSTRY: Home insurance

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Insured plaintiffs filed putative class action against insurer and computer software developer alleging that software used by insurance claims adjusters utilized below market pricing database to give plaintiffs less than the value of their property. Plaintiffs alleged that State Farm conspired with other insurers to payout less than the market price for repair services through use of the Xactimate program although the insurers were required to pay for the market price for the loss under the terms of their respective contracts.

DEFENDANTS' MOTION: Defendants moved to dismiss.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court found that the plaintiffs did not present the necessary factual predicates that plausibly suggested the existence of a conspiracy. The defendants' behavior was natural considering the strong economic incentive to keep payouts low and nothing in the complaint suggested the conduct was anything other than unilateral.

⁷² *Schafer v. State Farm Fire & Cas. Co.*, 507 F. Supp. 2d 587 (E.D. La. 2007). Decided on August 22, 2007.

Love Terminal Partners v. City of Dallas (2007)⁷³

INDUSTRY: Airport leases

ANTITRUST VIOLATION(S) ALLEGED: Illegal agreement in violation of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Leaseholders of airport land brought antitrust action against cities, two commercial airlines, and an airport board, alleging that defendants engaged in an illegal conspiracy to allocate markets between horizontal competitors ultimately resulting in a contractual commitment by the city to demolish the airport terminal.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that leaseholders failed to state an antitrust claim against defendants for conduct leading up to the passage of the Wright Reform Act, and defendants did not violate antitrust laws by implementing provisions of the Act.

⁷³ *Love Terminal Partners v. City of Dallas*, 527 F. Supp. 2d 538 (N.D. Tex. 2007).

Golden Bridge Technology, Inc. v. Motorola, Inc. (2008)⁷⁴

INDUSTRY: Wireless service providers/networks

ANTITRUST VIOLATION(S) ALLEGED: Refusal to deal pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, Golden Bridge Technology (“GBT”) develops wireless communication technology for cellular networks. It is a member of a non-profit standard setting organization called Third Generation Partnership Project (“3GPP”). The 3GPP members are responsible for creating and developing the 3GPP standard that determines what technologies will be included in the standard as either mandatory or optional. Golden Bridge brought suit against 3GPP and other members alleging defendants unlawfully conspired not to deal with the developer in violation of § 1 of the Sherman Act. Specifically plaintiff alleged defendants conspired with each other to remove Common Packets Channel technology (“CPCH”), patented GBT software from the 3GPP standard, which resulted in the unlawful exclusion of GBT from the market.

DEFENDANTS’ MOTION: Defendants’ motion for summary judgment on developer’s claim was granted. Plaintiff appealed.

DISPOSITION: United States Court of Appeals for the Fifth Circuit **AFFIRMED** and **GRANTED** defendants’ motion for summary judgment.

COURT’S RATIONALE: Court held that plaintiff at best had only alleged parallel conduct. Thus under *Twombly*’s pleading standard plaintiff failed to allege enough plausible facts to allow the court to draw an inference of a conspiracy. The court held the complaint failed *Twombly* because:

- None of the emails or any other evidence GBT presented showed an explicit understanding between the defendants to unlawfully collude to eliminate the CPCH from the standard;
- The email offered in support actually revealed disagreement among the defendants; and
- Developer failed to meet the threshold requirement of demonstrating the existence of agreement in restraint of trade.

⁷⁴ *Golden Bridge Tech., Inc. v. Motorola Inc.*, 547 F.3d 266 (5th Cir. 2008). Decided on October 23, 2008.

Mornay v. Travelers Insurance (2008)⁷⁵

INDUSTRY: Home insurance

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendant⁷⁶ along with other insurance companies used a program called Xactimate that is produced by Xactware for the purpose of making insurance adjustments to customer homes. Plaintiffs alleged that there was a conspiracy among insurers and Xactware to fix the prices of repair services utilized in calculating the amounts to be paid under the terms of insurance contracts. The alleged purpose of the conspiracy was to depress the amount paid out under the terms of the insurance contracts to below market prices and deprive customers with claims of the actual cash or replacement value of their damaged property.

DEFENDANTS' MOTION: Defendant moved to dismiss *inter alia* because plaintiffs' allegations failed to allege that the anticompetitive actions were motivated by anything other than rational and competitive business strategy.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that defendant did not sufficiently allege an antitrust conspiracy. Court noted that defendant had an independent basis that would support a notion of conscious parallelism. The fact that several insurers' price lists were identical suggested that they commonly used Xactware, which the Louisiana Insurance Department specifically suggested they do. Plaintiffs' complaint as alleged was insufficient to support a price fixing conspiracy.

⁷⁵ *Mornay v. Travelers Ins.*, No. 07-5274, 2008 WL 2439941 (E.D. La. June 13, 2008).

⁷⁶ The named defendants included Standard Fire Insurance Co. and Xactware, Inc.

NicSand, Inc. v. 3M Co. (2007)⁷⁷

INDUSTRY: Manufacturers of sandpaper

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a competitor in the sandpaper market brought suit against defendant, 3M, a fellow competitor, claiming that competitor's multi-year exclusive-dealing agreements with retailers that plaintiff formerly had exclusive dealings with constituted an unlawful monopolization in violation of the Sherman Act.

DEFENDANTS' MOTION: Defendants' motion to dismiss because plaintiff lacked antitrust standing was granted. Plaintiff appealed.

DISPOSITION: United States Court of Appeals for the Sixth Circuit **AFFIRMED** and **GRANTED** defendants' motion to dismiss.

COURT'S RATIONALE: Court of Appeals held that plaintiff satisfied Article III standing, but did not suffer a cognizable antitrust injury caused by any of competitors' actions or conduct.

⁷⁷ *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007).

Calabrese v. St. Mary's of Michigan (2007)⁷⁸

INDUSTRY: Health care providers

ANTITRUST VIOLATION(S) ALLEGED: Violations of §§ 1 & 2 of the Sherman Act.

NATURE OF ALLEGED VIOLATION(S): Plaintiffs filed an amended complaint after the court previously granted defendants' motion to dismiss, alleging that defendant Health Plus carbon copied defendant Hospital as to the personal and private communications between defendant Health Plus and plaintiffs.”

DEFENDANTS' MOTION: Defendants⁷⁹ moved to dismiss for failure to state a claim.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint failed to plead a viable antitrust cause of action. The complaint failed *Twombly* because:

- Failed to provide any evidence of an agreement;
- Failed to plead facts directly or inferentially that would identify the relevant geographic market;
- Failed to show the defendants' capacity to affect the overall market; and
- Failed to identify the relevant product.

⁷⁸ *Calabrese v. St. Mary's of Mich.*, No. 06-13908-BC, 2007 WL 2128338 (E.D. Mich. July 25, 2007).

⁷⁹ Defendants included St. Mary's of Michigan, Health Plus of Michigan, Inc., George Roller, M.D., Faith Abbot, D.O., Medly Larkin, D.O., and Charles Jessup, D.O.

Total Benefits Planning Agency Inc. v. Anthem BCBS (2007)⁸⁰

INDUSTRY: Healthcare insurance providers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade in violation of § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): In their amended complaint, plaintiffs alleged that they were in the business of selling health and life insurance to individuals and businesses and had developed a strategy for controlling healthcare costs, which it called the Total Benefits Strategy (“the Strategy”). The Strategy used “a 51-year old federal tax law to ‘refinance’ healthcare costs by raising deductibles on existing group insurance policies and administering benefits through a medical expense reimbursement plan.” The Anthem defendants were insurance companies, who later called the plan unethical. Until June 3, 2005, plaintiffs maintained appointments with the Anthem defendants to sell life and health insurance. Plaintiffs alleged that during a meeting in September of 2004, a representative of the Anthem defendants informed plaintiffs that the Anthem defendants had concerns that the Total Benefits Strategy was not in the best interests of the Anthem defendants. Plaintiffs alleged that defendants conspired and engaged in practices to force them to stop using the Strategy and coerced and threatened certain insurance agents by threatening to ‘blacklist’ them and cancel their contracts to ensure that these agents did not do business with plaintiffs. Plaintiff alleged that defendants actions constituted a § 1 Sherman Act violation.

DEFENDANTS’ MOTION: Defendants moved to dismiss arguing that plaintiffs failed to plead a sufficient conspiracy or combination under the Sherman Act.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that plaintiffs merely alleged parallel, non-competitive behavior without any facts that would compel an inference as to the motive for that conduct. Complaint failed *Twombly* because:

- Plaintiffs did not allege that there was a set price or price level, nor did they identify a written agreement or the basis for inferring a tacit agreement;
- Complaint failed to include any specific time, place, or person involved in the alleged acts or omissions that pertain to the antitrust violation;
- Complaint failed to provide plausible grounds to infer an agreement;
- Complaint failed to adequately plead other elements under the rule of analysis;
- Complaint failed to identify the relevant market; and
- Complaint failed to adequately plead a scheme that produced anticompetitive effects.

⁸⁰ *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, No. 1:05 CV 519, 2007 WL 2156657 (S.D. Ohio July 25, 2007).

In re Travel Agent Commission Antitrust Litigation (2007)⁸¹

INDUSTRY: Airlines

ANTITRUST VIOLATION(S) ALLEGED: Commission fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that defendants⁸² conspired to cap or cut the travel agent commissions on six separate occasions.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which could be granted asserting that plaintiffs could not meet the new pleading standard enunciated in *Twombly*. Specifically defendants argued:

- Plaintiffs failed to demonstrate parallel conduct as to some of the defendants;
- Plaintiffs failed to allege any facts regarding KLM's participation in the alleged conspiracy;
- Defendants Delta, United and Northwest's asserted that their bankruptcies dismissed all claims against them; and
- Plaintiffs failed to plead sufficient facts that plausibly suggested an agreement or conspiracy.

DISPOSITION: Motions **GRANTED**.

COURT'S RATIONALE: Court held that plaintiffs had failed to meet the pleading standards enunciated in *Twombly*. Plaintiffs support was not grounded in fact but in mere conclusory statements. The allegations that the court held failed to satisfy *Twombly* included:

- Allegation that each defendant knew that the other airlines were reducing and capping travel agent commissions because the information was common knowledge;
- Allegation that a series of price fixing cases and investigations supported their allegations that the airlines conspired to reduce the commissions of the travel agents—specifically plaintiffs referred to the governmental investigation of a conspiracy involving computer reservation systems from the late 1980s and early 1990s⁸³;
- Allegation that any airline unilaterally reducing or capping travel agent commissions would suffer a substantial loss of business when travel agents directed their customers to others;
- Plaintiffs alleged that defendants met frequently during the period when the cuts and caps were negotiated and that defendants had opportunity to conspire through trade associations and jointly formed business ventures; and
- Allegation that defendants took parallel actions to reduce or limit commissions paid to travel agents on six occasions, pointed to similar pricing and proximity in time as indications that defendants conspired.

⁸¹ *In re Travel Agent Comm'n Antitrust Litig.*, Nos. MDL 1561, 1:03 CV 30000, 2007 WL 3171675 (N.D. Ohio Oct. 29, 2007).

⁸² The named defendants included: Alaska Airlines, Inc.; Alaska Air Group, Inc.; Air Tran Airline, Inc.; American Airlines, Inc.; American West Airlines, Inc.; Continental Airlines, Inc.; Delta Airlines, Inc.; Horizon Air Industries, Frontier Airlines, Inc.; KLM Royal Dutch Airlines, Northwest Airlines, Inc., and United Airlines, Inc.

In re Southeastern Milk Antitrust Litigation (2008)⁸⁴

INDUSTRY: Dairy farmers

ANTITRUST VIOLATION(S) ALLEGED: Plaintiffs alleged five Sherman Act violations: (1) conspiracy to monopolize and monopsonize in violation of § 2; (2) attempt to monopolize and monopsonize in violation of § 2; (3) unlawful monopolization in violation of § 2; (4) unlawful monopsony in violation of § 2; and (5) unlawful conspiracy to foreclose competition and price fixing in violation of § 1.

NATURE OF ALLEGED VIOLATION(S): Plaintiffs are present or former dairy farmers in the Southeastern United States who raise cows and produce milk. Defendants are entities and/or individuals involved in either the marketing and sale of milk on behalf of dairy farmers or the purchase and processing of that milk. Plaintiffs alleged that defendants conspired to operate an unlawful cartel that refused to compete for the purchase of Grade A milk, foreclosed access to fluid Grade A milk bottling plants and processors, and fixed prices for Grade A milk paid to farmers.

DEFENDANTS' MOTION: Defendants moved to dismiss the claim arguing the plaintiffs failed to state a claim upon which relief could be granted, lacked antitrust standing, failed to define the relevant market, and that the statute of limitations barred this claim.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that in accordance with *Twombly*, plaintiffs had alleged enough facts to put the defendants on notice concerning the basic nature of their complaints against the defendants and the grounds upon which their claims exist. The court rejected defendants' independent business action justifications. The complaint satisfied *Twombly* because:

- Plaintiffs alleged that using various controlled entities, the defendants monitored prices, threatened to cut off and did cut off access to bottling plants, boycotted independent farmers, fixed prices, and flooded the Southeast milk market with milk from other regions;
- Plaintiffs alleged defendants purchased bottling plants with the purpose and intent to further suppress competition;
- Plaintiffs alleged and defendants conceded an actual agreement existed in the form of the vertical full supply and outsourcing agreements;
- Plaintiffs alleged that through the full supply and outsourcing agreements defendants agreed to and did commit numerous illegal acts;
- Plaintiffs alleged that they were sellers, not competitors and antitrust injury occurred when defendants paid less than they otherwise would have paid in a competitive market;
- Plaintiffs alleged that the relevant market was defined as USDA Federal Milk Marketing Orders 5 and 7 or the Southeast; and
- Plaintiffs alleged that defendants controlled significant portions of both the buy-side and the sale-side of the relevant product markets, which significantly established a prima facie case of monopoly power.

⁸⁴ *In re S.E. Milk Antitrust Litig.*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008).

CBCInnovis, Inc. v. Equifax Information Services (2008)⁸⁵

INDUSTRY: Credit bureaus

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs were in the business of gathering information from the three nationwide consumer-reporting agencies to form a tri-merged credit report. Plaintiffs bought defendants' credit data to compose its reports for a period of two years without a reseller agreement. Defendants tried to get plaintiff to enter such agreement but plaintiff refused. Thereafter defendants reduced the reissue fee for their proprietary information from previous cost to a new fee of only \$1.05. Plaintiffs asserted that defendants conduct caused and would cause harm to competition in the market for authentication of existing tri-merged reports and antitrust injury to CBC.

DEFENDANTS' MOTION: Defendants moved for a dismissal for failure to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that plaintiffs failed to assert market-wide injury or specify any competition reducing effect of defendants' behavior. The complaint failed *Twombly* because:

- The amended complaint contained only speculation and no concrete facts as to the injury to competition caused by Equifax's Reissue policy; and
- Court found noticeably missing from the complaint any substantive facts relating to the harm suffered, such as the specific increase in cost of reissues, the identities of any specific reseller or lender that suffered any harm or whether any reseller including CBC had in fact lost a share of reissues because of the Reissue Policy.

⁸⁵ *CBCInnovis v. Equifax Info. Servs. LLC*, No. 2:06-CV-654, 2008 WL 320147 (S.D. Ohio Feb. 4, 2008).

Spahr v. Leegin Creative Leather Products (2008)⁸⁶

INDUSTRY: Manufacturers of women's fashion accessories

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy and restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Purchasers of retail products manufactured and distributed by the defendant filed their amended class complaint alleging both horizontal and vertical restraints of trade. Plaintiffs alleged an unlawful agreement between defendant, a manufacturer which also distributes some of its own products, and other distributor retailers who distribute plaintiffs' products. Leegin's participation in the retail market, argued plaintiffs, transformed its retail price maintenance policy into a horizontal restraint. The class plaintiffs also argued that Leegin, acting as a manufacturer, imposed an agreement on its distributors, imposing a vertical restriction.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted. Specifically defendant contended that plaintiffs defined a facially implausible product market by defining it as the market for the manufacture, distribution and/or sale of products manufactured and distributed by defendant.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that plaintiffs allegation that a horizontal price-fixing conspiracy between the defendant and one of its branded lines was insufficient because it was premised only upon the following allegations:

- That defendant was a distributor of its own brand;
- That defendant entered into minimum resale pricing agreements with independent dealers of this brand line; and
- That defendant coerced those dealers into selling at specified minimum resale prices through threats of economic sanctions.

The court rejected plaintiffs' argument that Leegin's brand line products constituted a market by themselves. Plaintiffs failed to allege even in a conclusory fashion that there were no reasonably interchangeable substitutes, only that many brand line customers would not consider a substitute by asserting that in regard to Leegin's brand line, there was:

- Customer loyalty;
- Reluctance on the part of consumers to consider substitute products; and
- Advertising slogans stating brand line was "one of a kind" or the "only major accessories line" featuring certain products.

Citing the defendants, the court stated, "Plaintiffs insist that popular products are antitrust markets to themselves." The court also held that the plaintiffs alleged only that the agreements resulted in higher prices for brand line products and that was not an anticompetitive effect.

⁸⁶ *Spahr v. Leegin Creative Leather Prods. Inc.*, No. 2:07-CV-187, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008).

Hackman v. Dickerson Realtors, Inc. (2007)⁸⁷

INDUSTRY: Realtors in Rockford, Illinois

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Realtor brought action against defendants,⁸⁸ who were competitors, state realtors' association, and local realtor association. Realtor alleged defendants excluded him from the local real estate market because he charged a lower commission rate than the 6-7% the defendants-realtors were accustomed to receiving and sharing equally under local multiple listing rules. As a result, plaintiff alleged that defendants unlawfully conspired to boycott and exclude him from the Rockford, Illinois realtors market.

DEFENDANTS' MOTION: Defendants moved *inter alia* for dismissal, arguing that the Sherman Act did not apply to non-profits and that plaintiff failed to plead that the realtor associations engaged in competitive conduct or possessed monopoly power.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the Sherman Act does apply to non-profits, but held that plaintiff failed to allege that defendants did more than encourage anticompetitive activity. The court found the allegations conclusory because plaintiff presented no evidence other than parallel conduct. The court held that the complaint failed *Twombly* because:

- Plaintiff failed to allege that associations reached an actual agreement with other defendants and failed to plead facts from which an agreement could be inferred;
- Plaintiff failed to sufficiently allege associations agreed or conspired with other defendants to monopolize the market;
- Plaintiff failed to plead facts from which an agreement to monopolize the market could be inferred from other defendants actions; and
- Plaintiff failed to plead facts to show how or when the defendants' conduct affected interstate commerce.

⁸⁷ *Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954 (N.D. Ill. 2007). Decided on August 31, 2007.

⁸⁸ The named defendants included: Diane Parvin; Dickerson Realtors, Inc.; Whitehead, Inc.; Century 21, Premier Real Estate Brokerage Services d/b/a Coldwell Banker Premier; R. Crosby, Inc. d/b/a/ Prudential Crosby Realtors; McKiski-Lewis, Inc.; Illinois Association of Realtors ("IAR"); and Rockford Association of Realtors ("RAR").

Omnicare, Inc. v. Unitedhealth Group, Inc. (2007)⁸⁹

INDUSTRY: Pharmaceuticals

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Pharmacy brought claim against managed care companies and prescription drug provider alleging merger agreement violated the Sherman Act.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted because as a matter of law once the defendants entered into a merger agreement they became a single entity for antitrust purposes.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that plaintiff pleaded an outright agreement, with enough specific facts, including exact wording of the agreement, to render the allegation of agreement plausible. The court, nevertheless, given the novelty of the issue, made its decision without prejudice to a limited additional briefing on the question of whether *Twombly* should be interpreted differently in its application to the facts of this case. Complaint satisfied *Twombly* because:

- Complaint's allegation that merger agreement restricted one defendant's ability to enter into contracts was straightforward allegation of explicit agreement between defendants;
- Complaint's allegations were sufficient to suggest that intent of merger agreement was to suppress price competition between the two firms; and
- Complaint's allegations were sufficient to state claim that it suffered antitrust injury.

⁸⁹ *Omnicare, Inc. v. Unitedhealth Group, Inc.*, 524 F. Supp. 2d 1031 (N.D. Ill. 2007).

Justice v. Town of Cicero (2007)⁹⁰

INDUSTRY: Municipal water services

ANTITRUST VIOLATION(S) ALLEGED: General federal antitrust violations

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that the Town of Cicero's water department's rates and billing amounted to an antitrust violation.

DEFENDANTS' MOTION: Defendant moved to dismiss all accounts of the complaint for failure to state a claim upon which can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the facts stated in plaintiff's complaint, even if, true did not give rise to a claim entitling him to relief. In light of *Twombly* making a bare assertion would not suffice. Plaintiff failed to provide the factual grounds of his entitlement to relief. The complaint failed to satisfy *Twombly* because:

- Plaintiff failed to identify which provisions of the antitrust laws the town allegedly violated; and
- Plaintiff failed to allege anticompetitive action by the town to support his allegation of the town having a monopoly of the water supply.

⁹⁰ *Justice v. Town of Cicero*, No. 06 C 1108, 2007 WL 2973851 (N.D. Ill. Oct. 10, 2007).

Sheridan v. Marathon Petroleum Company, LLC (2008)⁹¹

INDUSTRY: Gasoline station franchises

ANTITRUST VIOLATION(S) ALLEGED: Tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs, franchisee petroleum dealers, filed a class action against franchisor oil company, Marathon, claiming per se violation of Sherman Act by franchisor's alleged tying of processing of all credit card sales to franchise, under tying agreement that required franchises to use franchisor's designated processing service for credit card sales. Plaintiffs claimed that franchisor conspired with banks to fix price of processing service.

DEFENDANTS' MOTION: Defendant's motion for failure to state a claim upon which relief can be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for Seventh Circuit **AFFIRMED** and **GRANTED** defendant's motion to dismiss.

COURT'S RATIONALE: Court held that, under *Twombly's* pleading standard, the plaintiffs' bare assertion of Marathon's appreciable economic power was an empty phrase that did not save the complaint. The franchisor lacked the market power necessary to sustain a tying violation. The court also found that the franchisor did not conspire with credit card issuers. The court found that the complaint did not satisfy *Twombly* because:

- No monopolistic competition was alleged;
- The complaint failed to allege that Marathon was colluding with the other oil companies to raise the price of credit card processing;
- The complaint failed to allege that Marathon had significant unilateral power over the market price of gasoline and so could charge a supra-competitive price; and
- The complaint gave no hint of the role Marathon played in a conspiracy of card companies.

⁹¹ *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590 (7th Cir. 2008).

Siemer v. Quiznos's Franchise Company (2008)⁹²

INDUSTRY: Franchise of fast food chain

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs claimed that Quiznos exercised its substantial economic power to coerce franchisees to purchase essential goods from its affiliates and approved vendors.

DEFENDANTS' MOTION: Quiznos moved to dismiss alleging that plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: The court held that the complaint was insufficient under *Twombly* because:

- The definition of the relevant market, "Quick Service Toasted Sandwich Restaurant Franchises" was too narrow because the relevant product market must include all "products that have reasonable interchangeability for the purposes for which they are produced";
- The plaintiffs failed to show that market power existed because they did not plead any facts to demonstrate that pre-contract, Quiznos had the power to force a potential franchisee to purchase something that it would not have had there been a competitive market; and
- The plaintiffs made no suggestion that Quiznos was in a position to coerce investors, not otherwise determined to do so, to purchase its franchise.

⁹² *Siemer v. Quizno's Franchise Co.*, No. 07 C 2170, 2008 WL 904874 (N.D. Ill. Mar. 31, 2008).

Medical Consultants v. Iroquois Memorial Hospital (2008)⁹³

INDUSTRY: Radiology services in Iroquois Memorial Hospital

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 and attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, a board-certified radiologist, provides radiology services at Iroquois Memorial Hospital. Plaintiff in his amended complaint alleged defendant conspired to boycott in violation of § 1 of the Sherman Act

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted. Defendants argued that plaintiff failed to allege an antitrust injury; instead they only alleged an injury to themselves as competitors.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that complaint failed *Twombly* because:

- Plaintiff failed to allege that prices had increased or availability of services had declined;
- Plaintiff failed to allege that defendant's conduct resulted in a decline in the availability of radiology services in general, only that plaintiffs' ability to provide those services has declined;
- Plaintiff failed to allege an antitrust injury related to availability; and
- Plaintiff failed to allege that the quality of the radiology services had declined

⁹³ *Med. Consultants, Ltd. v. Iroquois Mem'l Hosp.*, No. 07-VC-2083, 2008 WL 2477464 (C.D. Ill. June 16, 2008).

DSM Desotech Inc. v. 3D Systems Corporation (2008)⁹⁴

INDUSTRY: Manufacturers of stereo-lithography machines

ANTITRUST VIOLATION(S) ALLEGED: Unlawful tying and restraint of trade pursuant to § 1 and attempt to monopolize under § 2 of the Sherman Act.

NATURE OF ALLEGED VIOLATION(S): 3D Systems (“3DS”) is a manufacturer of large frame stereo-lithography (“SL”) machines. Stereo-lithography is a process by which a physical object is created layer by layer from liquid resin that is solidified into shape with a laser. Plaintiff, Desotech is the leader in the SL resin market and has two equipment patents allegedly covering the resin recoating technology used in eight of the SL machines produced by 3DS. Plaintiff alleged patent infringement and various antitrust claims against defendants. Defendant raised an affirmative defense to the patent infringement claim and moved to dismiss antitrust claims under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. While that motion was pending plaintiff requested defendants produce over eight years worth of business records.

DEFENDANTS’ MOTION: Defendants moved to stay discovery requests until after motion to dismiss was decided.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that *Twombly* counseled in favor of granting defendants’ motion to stay because as the *Twombly* court recognized, discovery in any antitrust case can quickly become enormously expensive and burdensome to defendants.

⁹⁴ *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2008 WL 4812440 (N.D. Ill. Oct. 28, 2008).

Fair Isaac Corporation v. Equifax Inc. (2008)⁹⁵

INDUSTRY: Credit bureaus

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 and monopolization under § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): The Fair Isaac Corporation (“FICO”) creates and markets the FICO Classic and other credit scores by modifying information collected by the defendants.⁹⁶ Fair Isaac alleged that the defendants, credit bureaus that collect and market credit scores that quantify an individual’s credit worthiness, agreed jointly to create, own, and control VantageScore, which was designed to directly compete with FICO scores. Plaintiff further alleged VantageScore had the purpose and effect of extending the credit bureaus’ collective market power in the aggregated credit data market, which was 100%, into the credit score market. Fair Isaac alleged that in selling credit scores to lenders, the credit bureaus manipulated the prices of their bundle of products and services so that the bundles that included Fair Isaac’s credit scores were more expensive than bundles that included VantageScore.

DEFENDANTS’ MOTION: Defendants moved for a partial judgment on the pleadings or alternatively for partial summary judgment in respect to antitrust claims of plaintiff’s Second Amended Complaint (“SAC”).

DISPOSITION: Motions **DENIED**.

COURT’S RATIONALE: Court held that the SAC alleged a close temporal proximity between the credit bureaus agreement to jointly create, own, and control VantageScore and the beginning of the alleged parallel price manipulation and denial of access to the credit bureaus’ data. The allegations that the court held satisfied *Twombly* included:

- Allegation that VantageScore was a joint venture created, controlled and owned by the three credit bureaus and was developed specifically to compete with Fair Isaac’s products;
- Allegation that these three combine to have a 100% share of the market of credit data;
- Allegation that simultaneously they increased the prices for accessing their credit data;
- Allegation that defendants manipulated the prices of their product bundles to make bundles including Fair Isaac’s credit scores more expensive than VantageScore bundles;
- Allegation that the aggregated credit data necessary to develop and apply credit scores was controlled exclusively by the credit bureaus;
- Allegation that defendants charged Fair Isaac significantly higher prices for a credit-score-and-credit-report bundles than the bureaus charged other resellers of credit reports; and
- Allegation that Experian refused to participate in a joint release of a prior collaboration with Fair Isaac to develop a bankruptcy score was against economic interests.

⁹⁵ *Fair Isaac Corp. v. Equifax Inc.*, No. 06-4112, 2008 WL 623120 (D. Minn. Mar. 4, 1980).

⁹⁶ The named defendants collectively represent the only three credit bureaus in the United States. They included Equifax Inc.; Equifax Information Services LLC; Experian Information Solutions Inc.; Trans Union LLC; and VantageScore Solutions, LLC.

America Channel v. Time Warner Cable (2007)⁹⁷

INDUSTRY: Cable providers

ANTITRUST VIOLATION(S) ALLEGED: Conspiratorial refusal to deal, to monopolize, to horizontally divide markets, and anticompetitive acquisition of another cable provider pursuant to §§ 1 & 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, The America Channel (“TAC”), filed an amended complaint, alleging that defendants have “market power, if not monopoly power” in the multi-channel video programming distributors market and that they conspired to engage in persistent and extensive discrimination against independent programming networks.

DEFENDANTS’ MOTION: Defendants moved to dismiss for failure to state a claim. Defendants asserted that TAC’s allegations were conclusory and failed to identify the roles each defendant played in the conspiracy, the means by which the conspiracy was affected, or any specific communications.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that the amended complaint failed to allege facts regarding defendants’ communication, sufficient to state a claim for conspiratorial refusal to deal. The court found that the allegations did not exclude the possibility of independent action because it was in both defendants’ economic interest to promote their own affiliated networks. The anticompetitive acquisition claim was also found to be conclusory. The allegations that the court held failed *Twombly* included:

- Allegation that during the four years prior to the filing of the original complaint that defendants “agreed, combined, and conspired to engage in a concerted refusal to deal with independent programming networks” including TAC, supported by statistics of defendants’ similar decisions not to carry other independent networks and detailing how difficult survival for any independent network is without carriage by the defendants;
- Allegation that defendants conspired because both allegedly declined to carry 112 of 114 networks that sought carriage; and
- Allegation that defendants conspired to thwart TAC’s effort to obtain carriage on Adelphia (another cable provider) based on “information and belief” that abrupt change in negotiations with Adelphia resulted from instructions from defendants who were at the time, potential bidders for Adelphia.

⁹⁷ *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175, 2007 WL 1892227 (D. Minn. June 28, 2007).

Southeast Missouri Hospital v. C.R. Bard, Inc. (2008)⁹⁸

INDUSTRY: Urological catheters manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Unlawful restraint of trade pursuant to § 1 and monopoly and attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, Southeast Missouri Hospital, alleged that defendants acted in concert, combination, and conspiracy to maintain its monopoly power in the urological catheter markets by engaging in a campaign of disparagement and misinformation about the urological products manufactured by competitors. Plaintiff alleged that defendants, Bard and Tyco, had exclusive dealings contracts with group purchasing organizations that conditioned discounts, rebates, and lower prices on a member hospital's agreement to purchase a specific percentage of urological catheters from them and penalizing the hospitals who purchase other, unrelated products from another vendor.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Tyco's motions were **GRANTED** as to both counts, Bard's motion regarding plaintiff's § 1 claim was **GRANTED**, but Bard's motion regarding the § 2 claim was **DENIED**.

COURT'S RATIONALE: Court held that plaintiff failed to allege, with any specificity, that Bard and Tyco had an agreement to act as one. The court adopted the view that a shared monopoly does not itself violate § 2 of the Sherman, rather in order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a particular defendant. Thus, the court found that as to Tyco, plaintiff failed to satisfy *Twombly* because:

- Tyco's market share was 20% at best, which was too little to establish any market power; and
- Without any specific allegations of an agreement between defendants, plaintiff cannot bootstrap its claims against Tyco by accumulating its market share with that of Bard.

⁹⁸ *S.E. Mo. Hosp. v. C.R. Bard, Inc.*, No. 1:07cv0031, 2008 WL 199567 (E.D. Mo. Jan. 22, 2008).

Windage v. United States Golf Association (2008)⁹⁹

INDUSTRY: Golf retailers

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that the United States Golf Association (“USGA”) and individuals that applied the Rules of Golf in the thirteen national championships it conducts every year, arbitrarily applied the Rules of Golf to the Windage device (that allowed golfers to assess wind conditions without having to bend over to pluck grass), harmed competition, and stifled innovation in the market for golf products. The stated purposes of the Rules of Golf are to preserve the traditions of golf and to ensure that a player’s score is the product of skill, and not equipment. Because more than twenty thousand golf courses and twenty-five million golfers voluntarily follow the Rules of Golf, defendants ruling negatively affected the sale of the Windage device. Windage alleged that the USGA, its members, affiliates, and those acting in concert engaged in a group boycott to restrain trade and inhibit research and development in the golf products market.

DEFENDANTS’ MOTION: Defendants moved to dismiss arguing that Windage failed to adequately allege the existence of an illegal agreement.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that Windage did not allege any facts that suggested an unlawful agreement between defendants. The court concluded that golf retailers’ parallel refusals to sell the Windage device did not create a plausible inference that the USGA and the golf retailers reached a preceding agreement. The complaint failed *Twombly* because:

- Plaintiff failed to provide a plausible factual context in which the USGA, golf pro shops, and golf retailers would conspire to interpret the Rules of Golf to exclude Windage’s device;
- Plaintiff failed to allege that the USGA or the golf retailers were direct competitors of Windage; and
- Plaintiff failed to allege that USGA, a non-profit entity, had any economic motivation to exclude the Windage device.

⁹⁹ *Windage, LLC v. United States Golf Ass’n*, No. 07-4697, 2008 WL 2622965 (D. Minn. July 2, 2008).

Best Pallets v. Brambles Industries (2008)¹⁰⁰

INDUSTRY: Recyclers of wood pallets

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs claim that Brambles, d/b/a/ CHEP USA, attempted to monopolize the national wood pallet market by instituting an Accelerated Volume Program (“AVP”) which led to the addition of thousands of CHEP customers. First, the AVP leased pallets to CHEP customers with no requirement to return them, knowing that many of its pallets would be lost. Then, instead of collecting the pallets from its customers, CHEP purposefully waited for recyclers, who are bound by contract to collect the pallets, to accumulate them. CHEP then allegedly demanded the return of its leased pallets from the recyclers but did not compensate them or under compensated them for the return. Plaintiffs also alleged that CHEP threatened and took legal action against recyclers who would not return the pallets.

DEFENDANTS’ MOTION: CHEP moved to dismiss alleging that plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **DENIED**.

COURT’S RATIONALE: The court held that the following allegations were sufficient to establish CHEP’s tendency to discipline or eliminate competition to enhance their long term monopoly power:

- That CHEP embarked on the AVP knowing it would result in widespread loss of its pallets;
- CHEP purposefully permitted its pallets to come into the possession of pallet recyclers to use their established pallet-collection network for its own benefit without providing adequate compensation; and
- By not bearing the collection costs associated with its leasing program, gained long term pricing advantage at the expense of recyclers.

The court held that the following allegations were sufficient to establish a realistic probability that CHEP could achieve a monopoly in the wood pallet market:

- CHEP is the largest producer of pallets in the pallet market;
- CHEP’s AVP rapidly increased its customer base; and
- CHEP had the ability to shift its own costs to the pallet recyclers.

¹⁰⁰ *Best Pallets Inc. v. Brambles Indus., Inc.*, No. 08-2012, 2008 WL 3539627 (W.D. Ark. Aug. 11, 2008).

In re Live Concert Antitrust Litigation (2007)¹⁰¹

INDUSTRY: Promotion of live concerts

ANTITRUST VIOLATION(S) ALLEGED: Monopolization and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): This Multi-district litigation consisted of twenty-two class actions from across the country against defendant Clear Channel Communications, Inc. and its subsidiaries (collectively, “CCC”). The plaintiffs, individuals who purchased tickets to live rock concerts, alleged that CCC engaged in unlawful and anticompetitive activities to acquire, maintain, and extend its monopoly power in various regional ticket markets for live rock concerts. Plaintiffs alleged that defendants actions, *inter alia*, violated § 2 of the Sherman Act.

DEFENDANTS’ MOTION: Defendants moved for a judgment on the pleadings arguing that plaintiffs did not have antitrust standing.

DISPOSITION: Motion **DENIED**.

COURT’S RATIONALE: Court held, *inter alia*, that plaintiffs had alleged sufficient facts to have antitrust standing to bring attempted monopolization claim. The complaint satisfied *Twombly* because:

- Plaintiffs alleged that CCC “has engaged in a vast array of anticompetitive, predatory and exclusionary practices in the course of acquiring, maintaining and extending its monopoly power in the relevant market”;
- Plaintiffs alleged that CCC substantially eliminated competition in the radio and concert promotion markets by increasing its market power through the acquisition or merger of primary competitors;
- Plaintiffs alleged that CCC leveraged its market power in the radio market to increase its market power in the concert promotion market;
- Plaintiffs alleged that CCC “repeatedly has used its size and clout to coerce artists-including artists who had pre-existing business relationships with competitors-to use Clear Channel to promote their concerts or else risk losing airplay and other on-air promotional support on radio stations owned or otherwise controlled by Clear Channel”;
- Plaintiffs alleged that airplay of music and concert promotion on radio stations could determine the financial success of a concert;
- Plaintiffs alleged that CCC bids up the fees for artists to levels at which competing promoters cannot compete; and
- Plaintiffs alleged that CCC would guarantee artists more than 100 percent of gross sales in exchange for the right to promote the artist’s concert, resulting in competing producers having to either pass on such artists or promote the artists at a guaranteed loss.

¹⁰¹ *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98 (C.D. Cal. 2007).

In re Netflix Antitrust Litigation (2007)¹⁰²

INDUSTRY: Home delivery DVD rentals

ANTITRUST VIOLATION(S) ALLEGED: Monopolization or attempt to monopolize pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Customer brought putative antitrust class action against operator of online DVD-rental service, alleging *inter alia* violations of the Sherman Act. Netflix operates an online DVD-rental service that claims 5.2 million subscribers and obtained two patents on its DVD-rental service that described methods of ordering, but not transmission of DVDs via the internet.

DEFENDANTS' MOTION: Defendants moved to dismiss plaintiff's antitrust claims for lack of stand and for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that plaintiff failed to meet the *Walker Process Claim* test pursuant to the *Twombly* standard which required a claimant to show: (1) that the asserted patent was obtained by knowingly and willfully misrepresenting the facts to the PTO; (2) that that party enforcing the patent was aware of the fraud when bringing suit; (3) independent and clear evidence of deceptive intent; (4) a clear showing of reliance, i.e. that the patent would not have issued but for the misrepresentation or omission; and (5) the necessary additional elements of an underlying violation of the antitrust laws. Thus, the court granted the motion because the defendant showed that plaintiff did not plead a sufficient level of patent enforcement against Netflix's potential competitors, so plaintiff's federal antitrust claims failed.

¹⁰² *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308 (N.D. Cal. 2007). Case was decided on June 14, 2007.

Perry v. Rado (2007)¹⁰³

INDUSTRY: Medical providers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that Kadlec Medical Center (“Kadlec”), his former employer, revoked his credentials as a result of a conspiracy to restrain trade. Plaintiff alleged that Associated Physicians for Women (“APW”) and its individual members drove Dr. Perry out of business in the entire Tri-City area of Washington.

DEFENDANTS’ MOTION: Defendants moved to dismiss for failure to state a claim, contending that plaintiff’s complaint failed to allege an “antitrust injury” (harm to competition) and claimed “no more than Dr. Perry’s personal grievance with the defendants.”

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court found that the complaint contained nothing but conclusions and that the factual allegations that plaintiff said he could plead in an amended complaint were mere speculations. The allegations concerned the impact on Dr. Perry of the alleged agreement or conspiracy, rather than with injury to competition in general. The allegations that the court held failed to satisfy *Twombly* included:

- Allegation that APW and/or its individual members, in order to accomplish an “anticompetitive purpose,” solicited and obtained agreements from doctors at Kadlec to exclude Dr. Perry from practice in the Tri-City Area of Washington;
- Allegation that defendants conspired to use the credentialing and quality assurance processes to boycott Dr. Perry to reduce and/or eliminate effective competition in the Tri-City Area;
- Allegation of exclusion from only some of the municipalities of the alleged geographic market and retaining privileges at hospitals in the actual Tri-Cities region; and
- Allegation that conspiracy had caused and will continue to cause a price increase for medical services, a reduction in quality of services, and/or will restrict or reduce the availability of medical services in the Tri-Cities area without specifying *which* medical services.

Because proposed amendment would not cure the defect of not alleging a cognizable antitrust injury, the court denied the motion to amend. Specifically, the plaintiff failed to:

- Allege a rise in the price of OB/GYN services above a competitive level;
- Allege a decrease in the supply of OB/GYNs in the relevant market;
- Allege a decrease in the quality of OB/GYN service provided; and
- Allege domination of the Tri-Cities market for OB/GYN services by defendants.

¹⁰³ *Perry v. Rado*, 504 F. Supp. 2d 1043 (E.D. Wash. 2007).

In re Late Fee and Over-limit Fee Litigation (2007)¹⁰⁴

INDUSTRY: Credit card services

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGE VIOLATIONS(S): The plaintiffs represented a putative class of credit cardholders who paid excessive late fees and/or over-limit fees to the defendants,¹⁰⁵ most of the large credit card issuers in the United States. Plaintiffs alleged *inter alia* that defendants conspired to fix prices and maintain a price floor for late fees in violation of § 1 of the Sherman Act. Complaint contended that the defendants together controlled over 70% of the United States credit card market.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint's substantive allegations referred to the defendants in collective terms and did not advance any individualized allegations about particular defendants. Court found specific allegations suggested a rational and competitive business strategy because defendants all faced: declining interest rate revenue, increased competition from new market entrants, elimination of annual fees as a revenue source, and higher costs due to expanded reward and affinity programs. Specifically, the court found that the complaint failed to satisfy *Twombly* because:

- Plaintiffs failed to identify any actual agreement;
- Plaintiffs failed to provide details as to when, where, or by whom the alleged agreement was reached that would support an inference that defendants agreed to increase late fees;
- Plaintiffs failed to identify which of the defendants (if any) issued a credit card to him or her, no plaintiff specified which type of fee (e.g., late fee or over-limit fee) he or she paid;
- No plaintiffs alleged which of the defendants (if any) he or she paid the unspecified fee;
- Plaintiffs did not allege that the defendants' holding companies issued their credit cards, imposed late or over-limit fees on them, or otherwise took any action in connection with the conduct that the complaint raised; and
- Allegations were too vague—e.g. “some of the defendant banks, at some times during the last decade had late fee terms on some credit card accounts that were in part parallel behavior, or ‘lockstep pricing’ of late fees.”

¹⁰⁴ *In re Late Fee & Over-limit Fee Litig.*, 528 F. Supp. 2d 953 (N.D. Cal. 2007).

¹⁰⁵ The named defendants were bank of America, N.A.; Bank of America Corporation; N.B. Holdings; MBNA American Bank, N.A.; Capital One Bank; Capital One FSB; Capital One Financial Corporation; Chase Bank USA, N.A.; JPMorgan Chase & Co.; Bank One Corporation; Bank One; Citibank South Dakota, N.A.; Citigroup, Inc.; Washington Mutual Bank; Washington Mutual, Inc; Providian; Wells Fargo & Company; Wells Fargo Bank, N.A.; Wells Fargo Financial Bank; and Well Fargo Financial National Bank.

Person v. Google (2007)¹⁰⁶

INDUSTRY: Internet advertising

ANTITRUST VIOLATION(S) ALLEGED: Monopolization and attempted monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff filed a second amended complaint alleging that Google had attained or will attain a monopoly in the market for search advertising and as a competitor with Google, he had been injured by Google's discrimination among users and failure to give reasonable access to a search advertising program that had "not been able to be duplicated by Yahoo or MSN."

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint failed to distinguish between the "search advertising market" and the larger market for Internet advertising. The complaint failed *Twombly* because:

- Complaint failed to properly plead a relevant market;
- Complaint failed to demonstrate how Google's action threaten plaintiff; and
- Complaint failed to plead facts that could show Google has monopolized the Internet advertising market.

¹⁰⁶ *Person v. Google, Inc.*, No. C 06-7297, 2007 WL 1831111 (N.D. Cal. June 25, 2007).

Kumho Petrochemical v. Flexsys America LP (2007)¹⁰⁷

INDUSTRY: Manufacturers of 6PPD, a rubber chemical

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to reduce production pursuant to § 1 and monopolization of the 6PPD market pursuant § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff alleged that defendants¹⁰⁸ conspired together to restrain trade, foreclose markets, allocate customers, reduce supply, and monopolize trade in the United States for 6PPD, a rubber chemical that plaintiff manufactures.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted arguing that plaintiff's claims were legally insufficient after *Twombly*.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that plaintiff did not adequately allege that it suffered antitrust injury. None of their allegations spoke to the existence or nature of any antitrust injury actually suffered by them. The allegations identified the purpose and goals of the alleged conspiracy, and indicated that plaintiff was a target of the conspiracy. Absent however was any adequate allegation of facts that would establish that plaintiff suffered some sort of cognizable injury. The allegations that the court found to be conclusory and insufficient to support an antitrust injury included:

- Allegations that defendants conspired to foreclose KKPC from the 6PPD market;
- Allegations that defendants sought to impede KKPC's ability to compete in the market for 6PPD;
- Allegations that defendants targeted KKPC for adverse and predatory treatment;
- Allegations that defendants agreed to refuse to deal with KKPC;
- Allegations that defendants sought to impede KKPC's entry into the U.S. 6PPD market; and
- Allegations that defendants sought to constrain plaintiff's growth by a variety of methods.

The court also found lacking sufficient factual allegations as to decreased sales, profits or market share resulting from conduct violating the Sherman Act; and how KKPC itself suffered any antitrust injury.

¹⁰⁷ *Korea Kumho Petrochem. v. Flexsys Am. LP*, No. C 07-01057, 2007 WL 2318906 (N.D. Cal. Aug. 13, 2007).

¹⁰⁸ The named defendants included Flexsys America LP; Flexsys N.V.; Akzo Nobel Chemical Int'l B.V.; Akzo Chemicals, Inc.

Cargill Inc. v. Budine (2007)¹⁰⁹

INDUSTRY: Dairy manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff-defendant is a manufacturer of formulated feed for dairy herds. Defendant-plaintiff counterclaimed alleging conspiracy, attempt to, and monopolization of the beef blood meal in the Western Region of the United States by plaintiff-defendant.¹¹⁰ Blood meal was a cost-efficient nutritional formula given to cows. Defendant-plaintiff claimed that plaintiff-defendant, in a direct attempt to harm them, purchased essentially the entire beef blood meal supply in the Western United States. Thereafter plaintiff-defendant charged dairy farmers not using its formulae a higher price for feed incorporating beef blood meal than it offered to customers who did use their beef blood meal formulae. Defendant-plaintiff alleged this effectively raised the prices of blood meal above the product costs for anticompetitive purposes in violation of the Sherman Act.

DEFENDANTS' MOTION: Plaintiff-defendant moved to dismiss defendant-plaintiff's antitrust counter claims for lack of antitrust standing and/or failure to state a claim upon which could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that defendant-plaintiff lacked antitrust standing because they were not participants in the relevant market. Defendant-plaintiff failed to assert sufficient facts as to the market share to satisfy the plausibility requirement set forth in *Twombly* and that other alleged actions of plaintiff-defendant were not inconsistent with competitive behavior. The allegations that the court held failed to satisfy *Twombly* included:

- Allegations that Cargill purchased “all” or “essentially all” or “much if not all” of the beef blood meal in the West Coast Region;
- Allegations that for anticompetitive purposes, to interfere with their ability to obtain blood meal and to drive up their product costs and make them a less desirable option for customers and other dairy farmers, Cargill purchased essentially all of the beef blood meal;
- Allegations that defendant-plaintiff and their customers were forced to choose between purchasing beef blood meal from Cargill or from even more costly distant sources; and
- Allegations that Cargill eliminated alternate sources in the product and geography markets and intentionally and artificially inflated beef blood meal costs in so doing.

¹⁰⁹ *Cargill Inc. v. Budine*, No. CV-F-07-349, 2007 WL 2506451 (E.D. Cal. Aug. 30, 2007).

¹¹⁰ The named plaintiff-defendants included Cargill Inc. and CAN Technologies, Inc.

In re Ditropan XL Antitrust Litigation (2007)¹¹¹

INDUSTRY: Pharmaceuticals

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 and monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, American Sales Company (“ASC”), alleged that defendant¹¹² Alza filed a baseless complaint to preclude competitors from producing a generic version of the drug Ditropan XL and engaged in other anticompetitive conduct to maintain a monopoly and charge supra-competitive prices for Ditropan XL. Specifically plaintiff alleged that defendants as “business partners” conspired together to exclude competitors from the Ditropan market.

DEFENDANTS’ MOTION: Defendants moved to dismiss the second amended class action complaint arguing that plaintiff lacked antitrust standing. Defendants argued that ASC did not have antitrust standing to sue defendants because it was not a direct purchaser.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held although the action arises under § 2 of the Sherman Act, there was no reasoned basis to avoid the application of the standard set forth in *Twombly*, especially because ASC’s sole basis for having a direct purchaser action rests on a purported conspiracy between the defendants. The court held that the complaint failed *Twombly* because plaintiff failed to allege any facts that would demonstrate the existence of a conspiracy between defendants.

¹¹¹ *In re Ditropan XL Antitrust Litig.*, No. M:06-CV-1761, 2007 WL 2978329 (N.D. Cal. Oct. 11, 2007).

¹¹² The named defendants included Alza Corp.; Ortho-McNeil Pharmaceutical, Inc.; and Johnson & Johnson, Inc., the parent company of other two defendants.

International Norcent Tech. v. K. Philips Electronics (2007)¹¹³

INDUSTRY: DVD player manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, International Norcent, Technology in their second amended complaint against its competitors, defendants allege that Philips joined with nine other producers of DVD players (“the Group”) to develop a technical standard for DVDs which violated § 1 of the Sherman Act. The standard was written to ensure that each member of the Group owned a patent or patents that met this standard. Plaintiff alleged that various members of the Group pooled their patents and formed patent licensing entities to exact royalties and licenses from competitors outside the Group. Norcent contended that the Group also implemented a DVD specification/logo licensing program that charged fees for specifications and logos that were essential for competitors to compete effectively in the market for DVD players.

DEFENDANTS’ MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that given the lack of specific factual context supporting Norcent’s conclusory allegations that the Group agreed to produce only compact video disc players that complied with the standard, failed to “nudge” the claim from conceivable to plausible. Specifically, Norcent’s second amended complaint failed to satisfy *Twombly* because:

- The complaint failed to allege an agreement between defendants supported by sufficient facts;
- The complaint failed to allege which executives met to set the DVD standard;
- The complaint failed to allege that these executives agreed not to sell non-DVD video disc players;
- The complaint failed to allege any parallel conduct by the Group that would give rise to an inference that an agreement was made; and
- The complaint failed to allege that any of the members of the Group ever manufactured a competing video disc player.

¹¹³ *Int’l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. 07-00043, 2007 WL 4976364 (C.D. Cal. Oct. 29, 2007).

Kendall v. Visa U.S.A., Inc. (2008)¹¹⁴

INDUSTRY: Credit card issuers

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs-appellants are a group of businesses who offer their customers the convenience of paying with a credit card, at a cost to the business. This cost, known as the “merchant discount fee” is usually around 3% but is negotiable. The acquiring bank may elect not to charge this fee if the merchant leaves a large amount of money in its account which the bank can lend out. The acquiring bank then delivers the credit card receipt to the issuing bank, via Visa. The issuing bank pays the acquiring bank the original amount minus a fee of around two percent, known as an interchange fee. The difference between the two fees represents the greater risk the issuing bank and Visa have that the consumer will not pay compared to the lesser risk the acquiring bank has that the issuing bank will not pay. Plaintiffs-appellants alleged that defendants-appellees¹¹⁵ conspired to set the amount of the merchant discount fee and interchange fee in violations of § 1 of the Sherman Act.

DEFENDANTS’ MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Ninth Circuit **AFFIRMED** and **GRANTED** defendants’ motion to dismiss.

COURT’S RATIONALE: Court held that plaintiffs-appellants complaint failed to plead evidentiary facts sufficient to establish a conspiracy. The complaint failed to answer the basic questions: who did what, to whom (or with whom), where, and when? The court found that the complaint did not satisfy *Twombly* because:

- Banks did not engage in conspiracy to fix interchange fees merely by charging, adopting or following fees set by association;
- Allegation that participation on an association’s board of directors was not enough by itself; and
- As to the Consortiums, appellants did not allege any facts showing the Consortiums had any direct control over the merchant discount fee the acquiring bank chose to charge or not charge the merchant.

¹¹⁴ *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008).

¹¹⁵ The named defendants included Visa U.S.A. Inc.; MasterCard International, Inc.; Bank of America, N.A.; Wells Fargo Bank, N.A.; U.S. Bank, N.A.; and Citigroup.

Rick-Mik Enterprises Inc. v. Equilon Enterprises, LLC (2008)¹¹⁶

INDUSTRY: Gasoline station franchises

ANTITRUST VIOLATION(S) ALLEGED: Tying pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Gasoline station franchises of Equilon brought antitrust action against franchisor¹¹⁷ alleging violation of §1 of the Sherman Act. Defendant Equilon refines and markets substantial volumes of gasoline and other petroleum products in all or parts of 31 states, selling petroleum products to approximately 9,000 Shell and Texaco-branded retail outlets. Equilon's standard franchise agreement required its franchisees, Shell and Texaco gasoline stations, to use Equilon to process credit-card transactions. Plaintiffs alleged this constituted a tying arrangement involving purchase of franchise and credit-card processing services.

DEFENDANTS' MOTION: Defendant's motion to dismiss for failure to state a claim upon which relief can be granted was granted. Plaintiffs appealed.

DISPOSITION: United States Court of Appeals for the Ninth Circuit **AFFIRMED** and **GRANTED** defendants' motion to dismiss.

COURT'S RATIONALE: Court held that in light of *Twombly*, the price fixing claim was impermissibly vague and that franchise and processing services were not separate products for tying purposes. All that was alleged was that Equilon received kickbacks (or perhaps commissions) from banks for processing the transactions of Equilon's franchises. Court concluded such an agreement did not violate antitrust laws. The complaint failed to satisfy *Twombly* because:

- The complaint merely alleged that Equilon conspired with numerous banks, banking associations and financial institutions throughout the United States to fix, peg and stabilize the price of credit and debit card processing fees, or an agreement on price;
- Allegations were too vague as to conspiracy players (the co-conspirator banks or financial institutions were not mentioned);
- Allegations failed to allege the nature of the conspiracy or agreement;
- Allegations failed to identify the types of agreements entered into; and
- The plaintiffs' discernible theories did not implicate antitrust laws.

¹¹⁶ *Rick-Mik Enters. Inc. v. Equilon Enters., LLC*, 532 F.3d 963 (9th Cir. 2008). Decided on July 11, 2008.

¹¹⁷ The named defendants included Equilon Enterprises LLC d/b/a Shell Oil Products; Motiva Enterprises LLC (together with Equilon are known as Retail USA); and Shell Oil Company, the parent company to Equilon and Motiva.

Pennsylvania Ave. Funds v. Borey (2008)¹¹⁸

INDUSTRY: Securities

ANTITRUST VIOLATIONS ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATIONS: Shareholder of acquired corporation brought action alleging that defendants, an acquiring corporation and competitor agreed to artificially fix prices, refrain from bidding, and rig tender offer bids for acquired corporation's shares, in violation of federal antitrust laws. This action arose in the wake of a merger that extinguished WatchGuard Technologies Incorporated as a publicly traded corporation. Plaintiff, Pennsylvania Avenue Funds, owned shares of WatchGuard and sought to represent a class of all persons who held WatchGuard stock at the time of the merger.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim for which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint failed to meet *Twombly* because:

- Price fixing among rival bidders in a contest for corporate control is not, in general, anticompetitive;
- Plaintiff's description of the alleged relevant market as "the market for corporate control of WatchGuard and other technology companies," was fatal to its Sherman Act claim;
- Plaintiff failed to allege defendants had market power in a \$160 billion dollar market, consisting of private equity funds;
- The illusion of market power arose not from defendant's anticompetitive conduct, but from the lack of market interest in WatchGuard.

¹¹⁸ *Penn. Ave. Funds v. Borey*, 569 F. Supp. 2d 1126 (W.D. Wash. 2008).

In re SRAM Antitrust Litigation (2008)¹¹⁹

INDUSTRY: Manufacturers of static random access memory (“SRAM”)

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs alleged that defendants¹²⁰ conspired to fix and maintain artificially high prices for SRAM. SRAM is a type of memory device, used in various types of computers, designed to interface with computers at high speeds using low battery consumption.

DEFENDANTS’ MOTION: Defendants moved to dismiss arguing that the complaint failed to include any factual allegations supporting agreement between defendants as *Twombly* required.

DISPOSITION: Motion **DENIED**.

COURT’S RATIONALE: Court held that plaintiffs had sufficiently pled facts that plausibly suggested a § 1 price fixing conspiracy. Plaintiffs’ limited discovery gave them access to documents defendant had provided to the Department of Justice, such as emails to support their allegations. The allegations that the court held satisfied *Twombly* included:

- Allegations that defendants had an ongoing agreement to exchange price information and intended that these exchanges lead to price stabilization or increases, supported by:
 - (1) A 1998 email chain between Hitachi and Samsung for discussing monthly updates of revenue and ASP for specific products; and
 - (2) An email from a Hitachi employee to a Samsung employee asking, “Are you willing to exchange product roadmaps again?”
- Allegation that the same actors associated with certain defendants that were responsible for marketing both DRAM and SRAM had already pled guilty to DRAM price-fixing conspiracies sufficiently supported an inference of a conspiracy in the SRAM industry;
- Allegation that defendants’ participation in various trade organizations gave them opportunities to exchange information or make agreements;
- Allegation that defendants carried out this conspiracy through in-person, telephone and email communications regarding pricing to customers and market conditions;
- Allegation that defendants exchanged product roadmaps to limit the supply of SRAM; and
- Allegations that SRAM was particularly susceptible to price-fixing because it was a homogenous product sold primarily on the basis of price market was highly concentrated; and there were high manufacturing and technological barriers to entry into the market.

¹¹⁹ *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896 (N.D. Cal. 2008).

¹²⁰ The Court classified two classes of defendants that sold Static Random Access Memory: (1) direct purchasers and (2) indirect purchasers. The named defendants included: Cypress Semiconductor; Etron Technology America, Inc.; Etron Technology, Inc.; Hitachi Ltd; Hitachi America; Hynix Semiconductor, Inc.; Hynix Semiconductor America, Inc.; Integrated Silicon Solution, Inc.; Micron Semiconductor Products, Inc.; Micron Technology Inc.; Mosel Vitelic, Inc.; Mosel Vitelic Corp.; Mitsubishi Electric & Electronics USA, Inc.; NEC Electronics America, Inc.; NEC Electronics Corp.; Renesas Technology America, Inc.; Renesas Technology Corp.; Samsung Electronics Company Ltd.; Samsung Electronics America; Samsung Semi-conductor, Inc.; Toshiba Corp.; Toshiba America, Inc.; and Toshiba America Electronic Components, Inc.

Apple v. Psystar Corporation (2008)¹²¹

INDUSTRY: Manufactures of computer operating systems

ANTITRUST VIOLATION(S) ALLEGED: Monopoly pursuant to § 2 and unlawful tying in violation of § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Apple brought suit against Psystar for copyright and trademark violations and Psystar filed counterclaims against Apple alleging antitrust violations. Psystar alleged that Apple engaged in anticompetitive conduct to “protect its valuable monopoly in the Mac OS (operating system) market and, by extension, Apple-Labeled Computer Hardware Systems from potential threats.”

DEFENDANTS’ MOTION: Defendant moved to dismiss for failure to state a claim upon which relief can be granted. Apple argued that the alleged markets were neither legally nor factually plausible and that Apple was not required by law to help its competitors compete by forcing it to enter into unwanted licensing agreements with them.

DISPOSITION: Motion **GRANTED**.

COURT’S RATIONALE: Court held that Psystar failed to plead facts demonstrating a relevant market. Antitrust markets consisting of just a single branch were not *per se* prohibited and Psystar offered no facts to support the claim that Apple’s OS was so unique that it suffers *no* actual or potential competitors. A price differential alone between OS producers did not signal a distinct market. Specifically, the following allegations did not sustain a “Mac OS-capable computers” market argument:

- That Apple’s End User License Agreement for the Mac OS specifically prohibited customers from installing the OS on non-Apple computers;
- That Apple had erected technical barriers that prevent Mac OS from operating on non-Apple computers;
- That Apple intentionally embedded code in Mac OS that allowed the OS to recognize any non-Apple hardware system and that the Mac OS will then cease to function properly;
- That this conduct caused harmful and anticompetitive effects in the marketplace.

The court also noted that Psystar’s claim that Apple’s extensive advertising campaigns constituted anticompetitive conduct was incorrect. Apple’s vigorous advertising would be wasted money if there was actually no reasonable substitute for Mac OS and advertising was a sign of competition, not lack thereof.

¹²¹ *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190 (N.D. Cal. 2008).

Daw Indus., Inc. v. Proteor Holdings (2008)¹²²

INDUSTRY: Distribution of materials containing polyolefin foam

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendant claimed ownership of a U.S. patent for a process of manufacturing a flexible sleeve for prosthesis or an orthopedic appliance made with, polyolefin foam. Plaintiff served as the exclusive distributor of defendant's patented product for many years, then sometime in 2007 defendant became aware that plaintiff was also distributing similar flexible sleeves made with polyolefin foam. Plaintiff brought suit seeking a declaration that it was not infringing defendant's patent and alleged that defendant had engaged in a scheme to fix prices in interstate commerce in the United States for its "Keasy" product, in violation of the United States antitrust laws.

DEFENDANTS' MOTION: Defendant moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that plaintiff failed to state a violation of antitrust laws because resale price maintenance was not a per se violation of the antitrust laws. Plaintiff's bald allegations were not supported by factual assertions that would allow an inference of an antitrust violation. The complaint failed to satisfy *Twombly* because:

- Plaintiff failed to make any allegations concerning standing;
- Plaintiff failed to allege how the restraint was unlawful;
- Plaintiff failed to allege the relevant market power; and
- Plaintiff failed to make any allegations that defendant willfully failed to cite prior art to the patent office or any other fact tending to suggest defendant knew its patent was invalid or otherwise.

¹²² *Daw Indus., Inc. v. Proteor Holdings, S.A.*, No. 07 CV 1381, 2008 WL 251977 (S.D. Cal. Jan. 29, 2008).

Shames v. Hertz Corporation (2008)¹²³

INDUSTRY: Airport car rentals in California

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs brought a putative class action against several passenger rental car companies and the California Travel and Tourism Commission (“the CTTC”) alleging, in their second amended complaint that the rental car defendants facilitated by the CTTC, entered a horizontal price-fixing agreement concerning automobile rentals at certain Californian airports. Specifically, plaintiffs alleged that defendants agreed to raise prices thereby avoiding competition by passing on to consumers a 2.5% assessment fee the rental car companies had to pay to fund the CTTC.

DEFENDANTS’ MOTION: Defendants moved to dismiss.

DISPOSITION: Motion **GRANTED** as it related to CTTC,¹²⁴ but rental car defendants’ motion to dismiss was **DENIED**.

COURT’S RATIONALE: Court held that the SAC cured the court’s concerns about the first complaint at least as it related to the CTTC. The court held the complaint satisfied the *Twombly* standard because:

- Plaintiffs attached a written agreement between the CTTC and the rental car defendants to set the assessment rates;
- The complaint alleged multiple documented references to an agreement to pass on the CTTC assessments;
- The complaint alleged the CTTC meeting minutes from October 2006, which state that the rental car industry would like to start passing on the fees beginning in January 2007;
- The complaint alleged documents relating to the January 25, 2007 meeting indicated that one car rental company challenged another for not charging the pass on fees;
- The complaint alleged that average national rates fell while those at California airports rose; and
- Plaintiffs identified specific meeting dates and individuals involved in the agreement.

¹²³ *Shames v. Hertz Corp.*, No. 07-CV-2174 H, 2008 WL 4103985 (S.D. Cal. July 24, 2008).

¹²⁴ The CTTC was able to invoke the state action immunity doctrine, as the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 350-351 (1943), noted that the Sherman Act did not intend to restrain state action.

In re TFT-LCD (Flat Panel) Antitrust Litigation (2008)¹²⁵

INDUSTRY: TFT-LCD manufacturers

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Defendants manufacture, sell, or distribute thin film transistor liquid crystal display (“TFT-LCD”) to customers in the United States. TFT-LCDs are used in various products, such as computer monitors, laptops computers, televisions, and cellular phones. Plaintiffs brought a class action against manufacturers, sellers, and distributors of TFT-LCD panels and products alleging defendants engaged in a horizontal price fixing of TFT-LCDs.

DEFENDANTS’ MOTION: Defendants moved to dismiss for failure to allege enough facts to demonstrate a plausible basis for a claim to relief under Rule 8 and *Twombly*. Defendants argued:

- Consolidated complaint failed to allege evidentiary facts showing an actual agreement between defendants to engage in a price fixing conspiracy; and
- Plaintiffs’ allegations were equally consistent with independent action and competition as they were with conspiracy in the TFT-LCD markets.

DISPOSITION: Motion **DENIED**.

COURT’S RATIONALE: Court held that the consolidated complaints met the standard enunciated in *Twombly* because the complaint alleged parallel conduct and a number of other facts that plausibly suggested an agreement.¹²⁶ The court held that the complaint satisfied *Twombly* because:

- The complaint alleged complex and unusual pricing practices by defendants, which could not be explained by the force of supply and demand;
- The complaint alleged that in the pre-conspiracy market, the industry faced declining TFT-LCD panel prices, which industry analyst attributed to advances in technology;
- The complaint alleged that new companies entered the market which resulted in increased competition and significant price declines;
- The complaint alleged however that beginning in 1996, the TFT-LCD product market has been characterized by unnatural and sustained price stability as well as certain periods of substantial increases in prices as well as a compression of price ranges for TFT-LCD products, which is inconsistent with natural market forces;
- The complaint alleged that defendants controlled prices by manipulating the capacity of various fabrication plants as well as the timing of bringing new capacity on line;
- The complaint also alleged specific instances of invitations to agree and subsequent agreements by high ranking executives;
- The complaint alleged they offered pretextual reasons for increases/output restrictions; and
- The complaint alleged defendants exchanged sensitive competitive information, including pricing through trade association meetings, private communications, and published data.

¹²⁵ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2008 WL 3916309 (N.D. Cal. Aug. 25, 2008).

¹²⁶ The court noted that as drafted the consolidated complaint lacked sufficient allegations specific to certain defendants and accordingly granted certain defendants motions to dismiss with leave for plaintiff to amend.

Alaska Airlines, Inc. v. Carey (2008)¹²⁷

INDUSTRY: Airlines industry

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff is a major U.S. air carrier that operates a frequent flyer program to encourage travel and promote customer loyalty. Plaintiff alleged that defendants, who operate a travel agency, with express knowledge of the rules of the plaintiff's frequent flyer program, operated a scheme to purchase mileage rewards from plaintiff's program members, redeem the awards, and then sell the wrongfully purchased mileage awards to plaintiff's customers for a profit without compensating the plaintiff. Alaska Airlines contracted exclusively with Points.com to broker its miles on the Internet, in the secondary market for reward miles. Defendants counterclaimed that upon finding out about Carey Travel Agency, plaintiff refused to sell miles to Carey Travel on any terms, thereby foreclosing defendants from the secondary market in violation of § 1 of the Sherman Act.

DEFENDANTS' MOTION: Plaintiff motioned to dismiss all of defendants' counterclaims for failure to state a claim upon which relief could be granted.

DISPOSITION: The motions relating to the conspiracy claims were **GRANTED**, but the court **DENIED** all of the other motions.

COURT'S RATIONALE: Court held that defendants did not plead any facts to suggest the existence of a conspiracy, so their claims relating to conspiracy to boycott were dismissed. The plaintiff's motion to dismiss the defendants' § 2 claims, however, were denied because the court held that it need not address the merits of whether a legitimate secondary market has been created or whether Alaska has taken steps to control this market. Court found these to be factual disputes which could not be resolved in a 12(b)(6) motion.

¹²⁷ *Alaska Airlines, Inc. v. Carey*, No. C 07-5711, 2008 WL 2725796 (W.D. Wash. July 11, 2008).

Fox v. Piche (2008)¹²⁸

INDUSTRY: Pediatric Intensive Care Unit (“PICU”) of Good Samaritan Hospital in California

ANTITRUST VIOLATION(S) ALLEGED: Conspiratorial restraint of trade pursuant to § 1 and monopolization and attempt to pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff was a pediatrician who specialized in the care of critically ill children who required mechanical ventilation. Plaintiff practiced at Good Samaritan Hospital (“GSH”). In 1999, GSH instituted a rule requiring any physician seeking practice privileges at the hospital to appoint two physicians with identical privileges to serve as backups. Plaintiff declined to designate backups. He claimed as a result defendants denied him the pediatric intensive care (“PIC”) privileges needed for him to provide PIC services. This denial ultimately required him to relocate his practice to a nearby hospital. Plaintiff alleged that the rule change was part of an anticompetitive scheme designed to gain the benefit of plaintiff’s practice and to favor a competing group of physicians with whom defendants had a relationship. Defendants were all GSH board of trustees or members or members of relevant hospital committees.

DEFENDANTS’ MOTION: Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted and moved to strike portions of the First Amended Complaint (“FAC”). Specifically, defendants asserted that plaintiff cannot maintain his claim because:

- Plaintiff did not adequately allege a contract, combination, or conspiracy; and
- Plaintiff did not allege the restraint affected interstate commerce.

DISPOSITION: Motion **DENIED**.

COURT’S RATIONALE: Court held that plaintiff did meet the new pleading standard announced in *Twombly* because:

- Plaintiff alleged in almost ten pages of his FAC facts relating to a conspiracy;
- Plaintiff alleged facts suggesting a conspiracy when his suspension occurred shortly after he spoke out against transferring PIC patients to another hospital outside the zone of the alleged conspiracy;
- Plaintiff alleged that GSH was in negotiation with physician who could not provide adequate call coverage to give said physician plaintiff’s group;
- Plaintiff also alleged facts reflecting that his claims implicated interstate commerce in that he received patients and payments for his services from sources outside California;
- Plaintiff alleged a relevant market in that GSH, with its unique PICU program was a separate geographic market because children born at GSH used the services of PICU exclusively;
- Plaintiff alleged McConnell, as NorCal PICU’s owner, was the only defendant who provided PICU services at GSH; and
- Plaintiff adequately pled the requisite market power based on defendants’ roles on their respective committees or as chief of a medical service provider.

¹²⁸ *Fox v. Piche*, No. C 08-1098, 2008 WL 4334696 (N.D. Cal. Sept. 22, 2008).

Singh v. Memorial Medical Center, Inc. (2008)¹²⁹

INDUSTRY: Radiologist in New Mexico

ANTITRUST VIOLATIONS ALLEGED: Conspiracy to boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATIONS: Radiologist and his New Mexico professional corporation and Texas physician association filed an amended complaint against a New Mexico hospital and various individuals under the Sherman Act alleging that the defendants¹³⁰ conspired to restrain competition and inhibit trade in the radiology market of southern New Mexico and western Texas.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that the complaint did not allege a violation of § 1 of the Sherman Act under the standard enunciated by the Supreme Court in *Twombly*. Specifically the complaint failed *Twombly* because:

- Plaintiffs failed to meet the requirements of a *per se* violation of the Sherman Act;
- Plaintiffs failed to allege a horizontal conspiracy;
- Plaintiffs failed to allege any direct and specific effect on the wider relevant market;
- Plaintiffs failed to allege any anticompetitive effect defendants' behavior had on the market;
- Plaintiffs failed to allege an antitrust injury; and
- Plaintiffs' alleged market encompassed at least eight other such hospitals, thus plaintiff too narrowly defined the relevant market.

¹²⁹ *Singh v. Mem'l Med. Ctr., Inc.*, 536 F. Supp. 2d 1244 (D.N.M. 2008).

¹³⁰ The named defendants included Lifepoint Hospitals, Memorial Medical Center, Nathan Williams, Bruce San Filippo, Dennis Myers, Ravi Gorav, Thomas Jackson, Paul Herzog and Geoffrey Jones.

Native American Distributing v. Senca-Cayuga Tobacco Co. (2008)¹³¹

INDUSTRY: Tobacco distributors/manufacturers

ANTITRUST VIOLATION(S) ALLEGED: None. Plaintiff argued to the district court that their civil conspiracy claim arose under the Sherman Act and acknowledged that their complaint did not recite the Sherman Act by statute number.

NATURE OF ALLEGED VIOLATION(S): The Seneca-Cayuga Tribe of Oklahoma (“SCTO”) is a federally-recognized Indian tribe that has been given the right to organize and act through both a governmental entity organized under a constitution and a corporate entity organized under a corporate charter. In accordance with their corporate charter and their bylaws SCTO incorporated an enterprise known as Seneca-Cayuga Tobacco Company (“SCTC”). The Business Committee of the SCTC manufactured, sold, and distributed tobacco products; and in 2001 SCTC engaged plaintiff to distribute its products. In 2005, plaintiff filed suit alleging defendants engaged in market manipulation and other illegal competitive practices while acting as officers of SCTC.

DEFENDANTS’ MOTION: Plaintiff appealed the lower court’s granting of defendants’ motion to dismiss pursuant to Rule 12(b)(1) and that the doctrine of tribal sovereign immunity shielded defendants’ from this suit. Plaintiff alleged that individual defendants were not protected under sovereign immunity.

DISPOSITION: United States Court of Appeals, Tenth Circuit **AFFIRMED** and **GRANTED** defendants’ motion to dismiss pursuant to Rule 12(b)(6).

COURT’S RATIONALE: Court held that there were simply nothing more than conclusory allegations that a civil conspiracy existed, and this is not enough to satisfy the requirement of “concerted action” stated in *Twombly*. After dismissing the claims against SCTC pursuant to the doctrine of sovereign immunity, the court found that only the civil conspiracy claims against the individuals remained. Although plaintiff was unclear about which statutory authority governed their action, the plaintiff’s suit would not survive a motion to dismiss because:

- Plaintiff failed to allege any facts suggesting an agreement existed; and
- Plaintiff failed to allege that defendants acted in concert or conspired with the SCTC.

¹³¹ *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008).

FLSmidth v. Jeffco (2008)¹³²

INDUSTRY: Manufacturer of compressors

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy or agreement to restrain trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): FLSmidth filed a lawsuit against Jeffco for trademark infringement. Jeffco answered and filed numerous counterclaims. Jeffco claimed that FLSmidth's lawsuit against them constituted a restraint of trade and that plaintiffs' true motivation for filing was to prohibit Jeffco from competing in the marketplace.

DEFENDANTS' MOTION: In defense to the counterclaim, FLSmidth moved to dismiss alleging that plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that Jeffco's claim was deficient because:

- Claim did not allege facts to identify which entities engaged in a conspiracy or even that a restraint of trade occurred because the alleged conspirators were only identified as "the plaintiffs";
- The companies that Jeffco claimed engaged in a conspiracy were a parent company and its wholly owned subsidiary, which were not legally capable of entering into a § 1 conspiracy; and
- Claim did not allege FLSmidth's activities had an anticompetitive effect on the marketplace, only that FLSmidth's actions harmed Jeffco.

¹³² *FLSmidth A/S v. Jeffco LLC*, No. 08-CV-0215, 2008 WL 4426992 (N.D. Okla. Sept. 25, 2008).

Thermal Technologies v. UPS (2008)¹³³

INDUSTRY: Parcel delivery service

ANTITRUST VIOLATION(S) ALLEGED: Tying and monopoly pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs claimed that UPS was unlawfully tying two markets: the product market for ground shipment of packages within the U.S. and the product market for insurance for ground shipments within the United States. As a result of the unlawful tying, members of the putative class claimed they were forced to obtain an insurance product that they did not want or would have preferred to obtain from a source other than UPS. Plaintiffs posited that in a competitive market devoid of defendant's forced tie, UPS would not be able to unlawfully force consumers to overpay for these services, leading to lower prices for consumers.

DEFENDANTS' MOTION: UPS moved to dismiss alleging that plaintiffs failed to state a claim upon which relief can be granted.

DISPOSITION: Motion **GRANTED**.

COURT'S RATIONALE: Court held that UPS' Terms and Conditions lawfully imposed a limitation on the carrier's liability for goods damaged in shipment. The tariff merely constituted an agreement that allocated risk of loss between the shipper and carrier. Based upon its review of the plain language of the UPS tariff and the history of carriers' liability case law (presented in defendant's motion), the court did not find that the agreement created a separate contract of insurance.

The following allegations by the plaintiffs did not adequately support their § 2 claim:

- That the putative class had used UPS for ground shipment within the U.S. for parcels valued up to \$100;
- That it had been forced to pay a bundled price for shipment including a sale of insurance coverage by UPS for the shipment; and
- That UPS exploited its 70% market share to force customers to obtain insurance coverage regardless of whether the customer desires insurance coverage at all.

¹³³ *Thermal Techs., Inc. v. UPS, Inc.*, No. 08-CV-102, 2008 WL 4426992 (N.D. Okla. Nov. 5, 2008).

Champagne Metals v. Ken-Mac Metals (2008)¹³⁴

INDUSTRY: Aluminum distributors

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to boycott pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, an aluminum distributor, filed suit against defendants¹³⁵ alleging they violated § 1 of the Sherman Act by engaging in a horizontal group boycott. Plaintiff claimed that defendants, established distributors, conspired to attempt to keep him out of their established market, by threatening to move their collective business from mills that sold aluminum to defendants, if those mills did business with plaintiff.

DEFENDANTS' MOTION: Defendants renewed their motion for summary judgment.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that plaintiff had met its burden by establishing by a preponderance of the evidence that an antitrust conspiracy was formed and that all defendants and mills. The court found that in combination different pieces of evidence sufficed to establish the predicate conspiracy. The allegations the court held sufficient included:

- Allegation that certain mills had agreed to recognize plaintiff and that actual orders had been placed, and credit approval was assured, then mills pulled out unexpectedly;
- Allegation that refusal to fill plaintiff's metal orders was against one of the mill defendant's economic interests because plaintiff was the largest supplier to the \$1 billion horse trailer market and exposed the company to potential litigation;
- Allegation that other mills soon began refusing to sell plaintiff the same pounds they had previously supplied; and
- The court found that the record contained persuasive evidence of continued pressure imposed by the service centers on the various mills to compel them not to recognize plaintiff.

¹³⁴ *Champagne Metals v. Ken-Mac Metals, Inc.*, No. 02-0528, 2008 WL 5205204 (W.D. Okla. Dec. 11, 2008).

¹³⁵ The named defendants included Ken-Mack Metals, Inc.; Samuel, Son & Co.; Samuel Specialty Metals, Inc.; Earle M. Jorgensen Co., and Ryerson Tull, Inc.

Lady Deborah’s, Inc. v. VT Griffin Services, Inc. (2007)¹³⁶

INDUSTRY: Governmental cleaning contracts

ANTITRUST VIOLATION(S) ALLEGED: Restraint of trade pursuant to § 1 and monopolization pursuant to § 2 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiff, Lady Deborah’s, Inc. (“LDI”), a subcontractor, brought suit against VT Griffin Services, Inc., and VT Group, PLC (collectively, “VT Griffin”), who held the prime contract at Kings Bay for construction of a US Naval base. According to LDI, because VT Griffin held the prime contract at Kings Bay for construction services, it had a monopoly over which vendors would get cleaning services subcontracts. Plaintiff alleged that VT Griffin advised it to enter into an agreement with a third entity whereby that entity would perform about half of the cleaning services work under LDI’s Kings Bay subcontract. LDI insisted that this vertical arrangement precluded LDI’s ability to seek out a cheaper vendor, or to perform the work itself. LDI alleged that this vertically imposed restriction violated § 1 of the Sherman Act. Plaintiff also alleged that defendants violated the Sherman Act by using its monopoly power over the King Bay contract in question to control prices and exclude competition to their detriment.

DEFENDANTS’ MOTION: Defendants moved to dismiss all counts.

DISPOSITION: Motion **GRANTED** as to the antitrust violations.

COURT’S RATIONALE: Court held that LDI’s antitrust claims were not legally viable. The complaint failed *Twombly* because:

- The complaint failed to allege any facts supporting its conclusory antitrust claims;
- The complaint failed to allege an injury to competition as a whole, rather than an injury to plaintiff alone;
- The complaint failed to allege facts that showed a conspiracy to restrain trade in violation of § 1 of the Sherman Act;
- The complaint failed to define the relevant product market and geographical market adequately; and
- The complaint failed to offer any factual allegations to support a theory that VT Griffin had a monopoly over all prime contracts for the Navy.

¹³⁶ *Lady Deborah’s, Inc. v. VT Griffin Sems., Inc.*, No. CV 207-079, 2007 WL 4468672 (S.D. Ga. Oct. 26, 2007).

Appleton v. Intergraph Corp. (2008)¹³⁷

INDUSTRY: Governmental contracts

ANTITRUST VIOLATION(S) ALLEGED: Conspiracy to restrain trade pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Appleton, as a pro se plaintiff, brought suit against Intergraph and others alleging nine violations of §§ 1 & 2 of the Sherman Act. Plaintiff allegedly developed a software program to alleviate the inefficiencies that existed in the Department of Defense's management of the contractors that worked for its many military program offices.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim upon which relief could be granted.

DISPOSITION: Motions **GRANTED**.

COURT'S RATIONALE: The amended complaint was riddled with examples of vague and conclusory statements, and assertions that amounted to only legal conclusions. The complaint failed *Twombly* because:

- The section of the Complaint titled "Conspiracy" cited no facts constituting an agreement between one or more defendants;
- The allegation that "two or more persons conspired against plaintiff to shut her out of competition" was more vague than that in *Twombly*;
- The complaint provided no facts to create a reasonable expectation that an agreement would be revealed during discovery; and
- After citing key language in *Twombly*, that "allegations of parallel conduct and an agreement made at an unspecified time are not sufficient to plead a conspiracy under § 1," the court found the allegations insufficient as a matter of law.

¹³⁷ *Appleton v. Intergraph Corp.*, No. 5:07-CV-179, 2008 WL 2967112 (M.D. Ga. July 30, 2008).

City of Moundridge v. Exxon Mobil Corp. (2008)¹³⁸

INDUSTRY: Natural gas suppliers

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to §1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Eighteen municipalities brought action against defendants energy companies¹³⁹ alleging defendants illegally agreed to artificially inflate the price of natural gas. Despite defendants' claims of a dwindling natural gas supply, plaintiff maintained that no natural gas shortage existed and that the defendants reaped substantial profits from their unlawful agreement.

DEFENDANTS' MOTION: In light of *Twombly*, defendants moved for reconsideration of the January 9, 2007 order that denied their motion to dismiss the price fixing claim in light of *Twombly*. Defendants argued:

- *Twombly* changed the Rule 8 pleading standard for claims under § 1 of the Sherman Act;
- The complaint failed to provide factual allegations to suggest an actual agreement among defendants; and
- Plaintiff failed to allege facts suggesting that higher natural gas prices resulted from an agreement as opposed to independent business decision to increase profits.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that municipalities properly stated a claim for price fixing conspiracy under the Sherman Act. Unlike in *Twombly*, the court found that plaintiff did not rely on only bare allegations of parallel conduct. The allegations that the court held satisfied *Twombly* included:

- Allegation that the natural gas total resource base had not decreased;
- Allegation that the natural gas prices had risen and never fallen below an agreed-upon price;
- Allegation that defendants had reported high profits;
- Allegation that Hurricanes Katrina and Rita should not have affected the market as the defendants claimed;
- Allegations that these Hurricanes were only pretenses to justify withholding market supply to create an artificial shortage;
- Allegation that defendants falsified their natural gas shortage statements to increase their profits; and
- Allegation of specific years, dates, and locations where the agreement was reached and the defendants who participated in the agreement.

¹³⁸ *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1 (D.D.C. 2008).

¹³⁹ The named defendants included Exxon Mobil Corp.; BP America, Inc.; ConocoPhillips Corp.; and Coral Energy Resources, LP (their motion to dismiss was granted on January 9, 2007). Plaintiffs moved to amend to add Shell Oil Company, but the Court denied without prejudice because proposed amended complaint included previously dismissed claims.

In re Rail Freight Fuel Surcharge Antitrust Litigation (2008)¹⁴⁰

INDUSTRY: Transportation services

ANTITRUST VIOLATION(S) ALLEGED: Price fixing pursuant to § 1 of the Sherman Act

NATURE OF ALLEGED VIOLATION(S): Plaintiffs¹⁴¹ consolidated from eighteen separate class actions alleged that the four major United States railroads¹⁴² conspired to fix prices through their use of fuel surcharges. Direct purchasers alleged that in 2003, defendants, who controlled about ninety percent of all domestic rail freight traffic, conspired to increase their profits through the imposition of a new uniform, artificially high, fuel surcharge.

DEFENDANTS' MOTION: Defendants moved to dismiss for failure to state a claim. Defendants asserted that the facts plead showed only price matching and follow-the-leader pricing, not a restraint of trade. Defendants argued that at a time of dramatically fluctuating fuel costs, the new system allowed them to adapt their rates to better reflect the changing cost of fuel.

DISPOSITION: Motion **DENIED**.

COURT'S RATIONALE: Court held that the plaintiffs alleged substantially more circumstantial evidence than those in *Twombly* and they demonstrated a plausible theory that defendants' behavior was collusive and anticompetitive. The allegations that the court found sufficient included:

- Allegation that surcharges varied in the past and fuel cost differed widely among the railroads yet they imposed identical fuel surcharges for 3 years adjusting on agreed triggers;
- Allegation that top executives from each defendant met regularly at restaurants and recreational and conference facilities beginning in the spring of 2003 to discuss fuel surcharges in July 2003, BNSF and UP began charging identical fuel surcharges;
- Allegation that during the October and December 2003 meeting of the Association of American Railroads, dominated by defendants, they agreed to create a new cost escalation index to raise rates without undergoing the difficulty of extensive contract renegotiation;
- Allegation that then CSX and NS began charging the same fuel surcharges as BNSF and UP;
- Allegation that the new method achieved was "complex and completely new," which *Twombly* suggested made inferences of conspiratorial agreement more plausible; and
- Allegation that the defendants' actions resulted in billions of dollars of additional profits because they raised rates far beyond the real increased cost of fuel.

¹⁴⁰*In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27 (D.D.C. 2008).

¹⁴¹ Plaintiffs were divided into two putative classes: direct and indirect purchasers.

¹⁴² Defendants included BNSF Railway Company; CSX Transportation, Inc.; Norfolk Southern Railway Company; and Union Pacific Railway Company.

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