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PLAUSIBLE PLEADING: *BELL ATLANTIC CORP. V. TWOMBLY*

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INTRODUCTION

Motions to dismiss antitrust cases have gone in and out of favor over the years. There was a time when plaintiffs—especially government plaintiffs—needed to plead little more than that defendants had conspired to fix prices and restrain trade. More recently, many courts began demanding appreciably more than conclusory allegations of conspiracy and unreasonable restraint of competition, including both some factual allegations and a theory of liability that makes sense.[1] Meanwhile, some other courts

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[1] *See* Associated Gen. Contractors of Cal. v. Cal. State Counsel of Carpenters, 459 U.S. 519, 528 n.17 (1983) (noting that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual [antitrust] controversy to proceed" and thus reversing a court of appeals that had reversed a district court for granting a motion to dismiss); Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1261 (11th Cir. 1998) ("[S]uch vague, conclusory allegations are insufficient to state a claim upon which relief can be granted."); Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 221 (4th Cir. 1994) (holding that an antitrust claim was properly dismissed where plaintiffs "fail[ed] to provide any factual support for their allegations that a conspiracy existed"); Penn. *ex rel.* Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988) (stating that "only allegations of conspiracy which are particularized . . . will be deemed sufficient" on a motion to dismiss (quoting Garshman v. Universal Res. Holding, Inc., 641 F. Supp. 1359, 1370 (D.N.J. 1986), *aff'd*, 824 F.2d 223 (3d Cir. 1987))); Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985) ("[C]onclusory allegations 'will not survive a motion to dismiss if not supported by the facts constituting a legitimate claim for relief.' " (quoting Quality Foods v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983))); Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 611 (4th Cir. 1985) (" '[P]laintiff's conclusion or speculation as to existence of a conspiracy, without more, is not sufficient . . . .' " (quoting Terry's Floor Fashions v. Burlington Indus., 568 F. Supp. 205, 210 (E.D.N.C. 1983))); Gilbuilt Homes, Inc. v. Cont'l Homes of New Eng., 667 F.2d 209, 210 (1st Cir. 1981) (affirming dismissal of Sherman Act cause of action because plaintiff "failed to allege facts suggesting that the decision to terminate plaintiff as a dealer was other than . . . a unilateral decision"); Havoco of

continued to insist that pleading requirements are intended to be minimal, and that only plaintiffs pleading nothing but conclusions should be denied the opportunity for discovery.[2]

Through the decades, discovery itself changed dramatically. When the Federal Rules of Civil Procedure were adopted in 1938, photostats were only thirty years old and xerography had not quite been invented.[3] The creators of the concept of liberal discovery could not possibly contemplate the nature or volume of the electronic data and documents that would proliferate seventy years later.

These two trends converged in *Bell Atlantic Corp. v. Twombly*,[4] an antitrust case with broad implications for pleading all federal claims.

There can be little doubt that the Supreme Court purposefully recalibrated the pleading requirements under Rule 12(b)(6) in *Twombly*. In a 7-2 decision, the Court reversed the Second Circuit Court of Appeals and upheld the district court's dismissal of an antitrust conspiracy complaint on the ground that the allegations of the complaint failed to provide "plausible grounds to infer an agreement."[5] The High Court's opinion, authored by Justice

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Am., Ltd., v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980) ("Not only is the allegation conclusionary, but further, the complaint is utterly devoid of any supporting factual allegations. . . . We are simply unwilling to construe pleadings so liberally . . . ."); Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 273–74 (5th Cir. 1979) (affirming dismissal of Sherman Act § 1 claim because when alleging conspiracy, "[t]he pleader must allege the facts constituting the conspiracy, its object and accomplishment"); Cal. Dump Truck Owners Ass'n v. Associated Gen. Contractors of Am., 562 F.2d 607, 615 (9th Cir. 1977) (holding that the "amended complaint fail[ed] to adequately inform the appellees of the appellants' claim of a . . . conspiracy"); Floors-N-More, Inc. v. Freight Liquidators, 142 F. Supp. 2d 496, 501 (S.D.N.Y. 2001) ("[P]laintiff must do more than allege the existence of a conspiracy—it must allege some facts in support of the claim."); Cont'l Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater N.Y., 956 F. Supp. 367, 373 (E.D.N.Y. 1997) ("[C]onclusory allegations which merely recite the litany of antitrust will not suffice.").

[2] *See, e.g.*, Invamed, Inc. v. Barr Labs., Inc., 22 F. Supp. 2d 210, 216 (S.D.N.Y, 1998) ("In antitrust cases, 'where the proof is largely in the hands of the alleged conspirators," dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.' " (quoting Hosp. Bldg. Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 746 (1976) (internal quotation marks omitted))).

[3] *See* David Walton, *Machine Dreams*, N.Y. TIMES, Oct. 3, 2004, § 7, at 35.

[4] 127 S. Ct. 1955 (2007).

[5] *Id.* at 1965. The Court held that the claims pleaded must cross "the line from conceivable to plausible." *Id.* at 1974. This may be compared with the line between *plausible* and the apparently stricter standard established by Congress for securities fraud. *See* 15 U.S.C. § 78u-4(b)(2) (2000) (requiring a complaint to "state with

Souter, recognized that instances of competitors responding in the same way to the same set of circumstances do not constitute evidence of conspiracy and, for this reason, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."[6] The Court pointedly observed that "antitrust discovery can be expensive," generating "reams and gigabytes of business records," and unless implausible claims are weeded out at the pleading stage, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial]."[7]

The complaint in *Twombly* was filed on behalf of consumers of telephone service, seeking class treatment.[8] The plaintiffs alleged anticompetitive conduct by local telephone companies, including refusal to deal with competitors, providing inferior connections to their networks, overcharging, and engaging in improper billing practices, coupled with a published statement by one of the company's CEOs that competition "might be a good way to turn a quick dollar but that doesn't make it right."[9]

This was not enough to state a claim, but it does provide plenty of insight into what will and will not suffice under the pleading standard that the Court announced.

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particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind" (emphasis added)). In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2404–05 (2007), a suit brought by shareholders alleging securities fraud under 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, the Supreme Court rejected a plausibility standard in construing the "strong inference" language of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). That Act requires dismissal of a complaint unless it lists "with particularity facts giving rise to a strong inference" of scienter or fraudulent intent. *Tellabs*, 127 S. Ct. at 2501 (quoting PSLRA § 21D(b)(2), 15 U.S.C. § 78u–4(b)(2)). The Court resolved a split among the circuits by declaring that "[t]o qualify as 'strong' . . . an inference of scienter must be *more than merely plausible or reasonable*—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Id.* at 2502 (emphasis added); *see also* Steven Wolowitz & Joseph de Simone, *Did* 'Tellabs' *Raise PSLRA Scienter Bar?*, N.Y. L.J., Dec. 3, 2007, at S3.

[6] *Twombly*, 127 S. Ct. at 1966.

[7] *Id.* at 1967. Some earlier cases had expressed similar concerns. *E.g.*, Valley Liquors, Inc. v. Renfield Imps., Ltd., 678 F.2d 742, 745 (7th Cir. 1982) (holding that courts should hesitate before "trundling out the great machinery of antitrust enforcement").

[8] *Twombly*, 127 S. Ct. at 1962.

[9] *Id.*

I. NO MORE INFERRING CONSPIRACY FROM PARALLEL BEHAVIOR

Twombly effectively heralded that the days of alleging a "conceivable" antitrust conspiracy in order to survive a motion to dismiss are over. After *Twombly*, a complaint must allege sufficient "factual matter (taken as true)" to "plausibly suggest[]" that parallel conduct among competitors was the product of a "preceding agreement," and was "not merely parallel conduct that could just as well be independent action."[10] To illustrate the kind of allegations that would suffice to meet this test, the Court pointed to allegations of the "specific time, place, [and] person involved in the alleged conspiracies"—i.e., "*which* [defendants] supposedly agreed" and "*when* and *where* the illicit agreement took place."[11]

The Court's analysis is premised on the principle that parallel decisions among competing companies to make more money or, presumably, to pursue any goal that would be in each defendant's self-interest in the absence of conspiracy,[12] is not evidence of a conspiracy. Because such decisions would be in the individual interest of each of the companies, the same decisions just as likely would be reached in the absence of an agreement. Consequently, it has long been settled that such parallel self-interested conduct does not constitute evidence of conspiracy.[13]

To punctuate this point, the Supreme Court pointed out that, even absent conspiracy, it is not ordinarily in the individual interest of any company to ignite competition every chance it gets.[14] Accordingly, it is never enough for a plaintiff simply to allege that companies *must* have been colluding or else they would have been competing against one another harder and sooner. To the contrary, the Court acknowledged that "resisting

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[10] *Id.* at 1965–66.

[11] *Id.* at 1971 n.10 (emphasis added). The dissent criticized this reference by pointing out petitioners' concession at oral argument that they were not asserting a lack of specificity in the complaint, *id.* at 1985 n.9, and that Form 9 in the appendix to the Federal Rules of Civil Procedure, on which the majority relied, "states only" that the defendant "negligently drove a motor vehicle against plaintiff who was then crossing said highway," *id.* at 1977.

[12] In *Twombly*, the goal of the incumbent telephone companies was "to keep [new competitors] out and manifest disinterest in becoming [new competitors] themselves." *Id.* at 1971.

[13] *Id.* at 1968 & n.7 ("[N]either parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy . . . .").

[14] *Id.* at 1971.

competition is routine market conduct" and "only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing."[15]

In the district court opinion below, Judge Lynch had noted that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions."[16] Then, in language quoted by the Supreme Court and derived from earlier cases concerning summary judgment, the district court held that at the pleading stage, although plaintiffs obviously need not present *evidence* that will "tend[] to exclude independent self-interested conduct," they must make *allegations* tending to exclude such conduct "as an explanation for the defendants' parallel behavior."[17]

The Supreme Court elaborated on this requirement, explaining that there must be allegations of "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."[18] The concept of "advance understanding"—or as the Court also termed it, "a preceding agreement"[19]—has emerged as crucial to meeting the Court's new formulation of the applicable test. To plead such an advance understanding adequately, there must be "factual enhancement"[20] with "allegations plausibly suggesting (not merely consistent with) agreement"[21] and amounting to "enough facts to state a claim to relief that is plausible on its face."[22] In other words, parallel behavior without

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[15] *Id.*

[16] Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *rev'd*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

[17] *Id.*; *Cf.* Spray-Rite Serv. Corp. v. Monsanto Co., 465 U.S. 752, 764 (1984) ("[S]omething more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.").

[18] *Twombly*, 127 S. Ct. at 1966 n.4 (quoting 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1425a, at 167 (2d ed. 2003)).

[19] *Id.* at 1966.

[20] *Id.* at 1959.

[21] *Id.* at 1966.

[22] *Id.* at 1960.

a factual allegation of a prior agreement will not suffice to state a valid claim.

II. THE PRIOR "PLUS FACTOR" APPROACH

Prior to *Twombly*, most courts applied a so-called "plus factor" analysis, under which parallel behavior—or "conscious parallelism"—could provide sufficient basis for pleading a Sherman Act violation even if supported only by such "plus factors" as "motive," opportunity to conspire, or "pervasiveness."[23]

The Supreme Court had repeatedly rejected the notion that conscious parallelism alone could state a claim under § 1 of the Sherman Act.[24] The "plus factor" approach, however—which the Supreme Court itself never addressed—won considerable acceptance among the lower courts.[25]

All that changed with *Twombly*. The Supreme Court did not include "plus factors" in its new test; instead, as noted above, the Court required "factual enhancement"[26] adding up to "enough facts to state a claim to relief that is plausible,"[27] such as the "specific time, place, or person involved in the alleged conspiracies."[28] Lower courts already have begun to recognize and embrace this shift, and they began to abandon the plus factor test immediately.[29]

Nevertheless, this leaves open the question whether any of the old "plus factors" will survive as providing a sufficient degree of "factual enhancement" to qualify as demonstrating "plausibility" under *Twombly*. The more amorphous of these

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[23] *See* Michael D. Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 883–87 & nn.11–19 (1979). The court in *Iqbal v. Hasty*, a qualified immunity case, acknowledged that the "full force" of *Twombly* applies, and "is limited to," the "antitrust context." 490 F.3d 143, 157 (2d Cir. 2007).

[24] *See Twombly*, 127 S. Ct. at 1968 n.7.

[25] *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 768 (2007).

[26] *Twombly*, 127 S. Ct. at 1966.

[27] *Id.* at 1974.

[28] *Id.* at 1970 n.10.

[29] *See, e.g.*, Wellnx Life Scis. Inc. v. Iovate Health Scis. Res. Inc., 516 F. Supp. 2d 270, 291 (S.D.N.Y. 2007) (" 'Plus' factors . . . do not constitute plausible grounds to infer an agreement . . . ."); Schafer v. State Farm Fire & Cas. Co., 507 F. Supp. 2d 587, 596 (E.D. La. 2007) ("[T]he *Twombly* ruling supersedes any articulation of the 'plus factor' test . . . ."); *see also In re* Late Fee & Over-Limit Fee Litig., 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007) (holding alleged plus factors insufficient to plead a case).

"plus factors"—including motive or opportunity to conspire and the pervasiveness of a practice—have long been criticized because they never were reliable indicators of collusion and always were largely consistent with "parallel conduct that could just as well be independent action."[30]

A law review article cited in *Twombly* criticized those "plus factors" that possessed little probative value on the ground that they did not adequately "distinguish between conscious parallelism and conspiracy."[31] *Twombly* cited this article,[32] not to suggest that the old "plus factors" would suffice under its new test, but to demonstrate that under the new test there still exist "examples" of certain alleged conduct that legitimately *could* provide "plausible grounds to infer an agreement."[33] The examples cited there, however—such as companies that imposed penalties upon themselves for price cutting and companies that felt the need to explain their pricing errors to competitors—are far more probative of conspiracy than simple notions of motive, opportunity, or pervasiveness.

What all of the examples that the Court cited approvingly have in common is that each demonstrates a consciousness of commitment to an agreement by featuring both "restricted freedom of action" and a "sense of obligation."[34] In other words, factors that reflect a conscious commitment to an illegal agreement will suffice, but factors that could just as well reflect independent action will not. Some of the most questionable "plus factors" under the old test were opportunity to conspire, "motive" to conspire, market concentration, parallel pricing, and "pervasiveness."[35] None of these appears likely to survive *Twombly*.

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[30] *Twombly*, 127 S. Ct. at 1966; *see, e.g.*, Blechman, *supra* note 23, at 898.

[31] Blechman, *supra* note 23, at 898.

[32] *Twombly*, 127 S. Ct. at 1966 n.4 (citing Blechman, *supra* note 23, at 899).

[33] *Id.* at 1965, 1966 n.4.

[34] *Id.* at 1966 n.4. More specifically, the examples cited were of companies that: (1) decline to pursue profitable business in arbitrary categories; (2) rigidly refuse to make sales by lowering prices by even de minimis amounts; (3) furnish competitors detailed information about their own operations; (4) impose penalties upon themselves for price cutting; or (5) feel the need to report and explain pricing errors to competitors. *Id.*

[35] *See* Blechman, *supra* note 23, at 885–87.

A. *Opportunity to Conspire*

Opportunities to conspire are not, in themselves, either meetings of the mind or conspiracies.[36] Indeed, in *Twombly*, the plaintiffs alleged that the defendants would " 'communicate amongst themselves' through numerous industry associations," and had "numerous opportunities to meet with each other,"[37] but the Supreme Court held that this was not sufficient to raise an inference of conspiracy.[38] Significantly, the dissent in *Twombly* recognized the view that "an allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with . . . an unlawful agreement."[39] But seven Justices rejected this position and ordered the complaint dismissed.[40]

B. *Motive to Conspire*

Under the prior test, plaintiffs regularly claimed that defendants had a motive to fix prices, relying on cases purportedly holding that parallel pricing plus a motive to conspire to charge higher prices can, without more, overcome a motion to dismiss.[41] This appears to be precisely what *Twombly* rejects by recognizing that the "natural" instinct to avoid competition and make more money rather than less money is not probative of conspiracy.[42]

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[36] *See* Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 545 (2d Cir. 1993) ("The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred."); *In re* Late Fee & Over-Limit Fee Litig., 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007) ("[O]ther courts have consistently refused to infer the existence of a conspiracy from these kinds of averments.").

[37] 127 S. Ct. at 1974, 1986.

[38] *See id.* at 1971.

[39] *Id.* at 1986 n.10.

[40] The leading case suggesting that mere opportunity to communicate was ever a "plus factor," *C-O Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952), *abrogated by* Theatre Enters., Inc. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954), was a case brought *before* the Supreme Court had clarified that conscious parallelism alone does not violate the Sherman Act, and a case that involved additional evidence—submitting identical bids, raising prices during a time of surplus, artificial standardization of products and policing of pricing compliance. *See Twombly*, 127 S. Ct. at 1968 n.7.

[41] *See, e.g.*, Bogosian v. Gulf Oil Corp. 561 F.2d 434, 446 (3d Cir. 1977); Venzie Corp. v. U.S. Mineral Prods. Co., 521 F.2d 1309, 1314 (3d Cir 1975).

[42] 127 S. Ct. at 1971; *see also In re* Bath & Kitchen Fixtures Antitrust Litig., No.

C. *Market Concentration*

High market concentration likewise should not suffice as an alleged fact that "raises a suggestion of a preceding agreement" to fix prices under the *Twombly* requirement of "allegations plausibly suggesting (not merely consistent with) agreement."[43] Whether or not the level of market concentration is consistent with particular conduct, the market shares of firms competing in an industry are not "conduct" and do not imply that an anticompetitive agreement has been made. Alleging parallel conduct within a concentrated market may have been enough to plead a section 1 violation at one time, but that day has passed.[44]

D. *Parallel Prices*

Evidence that prices are all at or about the same level will almost always exist in competitive markets—indeed, perfectly competitive markets are characterized by all competitors charging identical prices.[45] If such evidence constituted evidence of conspiracy, nearly every market would be subject to antitrust allegations every day.

Furthermore, care must be taken not to confuse unexplained price *increases*, in which a group of competing sellers—usually of undifferentiated commodities—all raise their prices at the same time even though costs remain the same,[46] with the situation in

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05-cv-00510 MAM, 2006 WL 2038605, at *5–6 (E.D. Pa. July 19, 2006); AREEDA & HOVENKAMP, *supra* note 18, ¶¶ 1434c, 1434c1, 1434c2, at 243–46 (stating that "motivation" is synonymous with "interdependent parallelism," which is not a § 1 violation, and that "conspicuous by its rarity is the occasional court suggesting that conspiratorial motivation" suffices); Blechman, *supra* note 23, at 898 ("The problem . . . with a 'plus factor' test which depends upon whether particular conduct is or is not contrary to companies' 'independent self-interest' is that it does not, by itself, distinguish between conscious parallelism and conspiracy.").

[43] 127 S. Ct. at 1966.

[44] *See Twombly*, 127 S. Ct. at 1968 n.7 (rejecting Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957)); *In re* Late Fee & Over-Limit Fee Litig., 528 F. Supp. 2d 953, 961–62 (N.D. Cal. 2007).

[45] *See* Alan J. Daskin & Lawrence Wu, *Observations on the Multiple Dimensions of Market Power*, ANTITRUST, Summer 2005, at 53, 54; *see also* Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986).

[46] This is what Phillip E. Areeda and Herbert Hovenkamp discuss in the passage cited in *Twombly*. AREEDA & HOVENKAMP, *supra* note 18, ¶ 1425c, at 170 ("When two competitors announce a price increase or an identical change in business at the very same moment a conspiracy may be the explanation, although not necessarily . . . ."); *Twombly*, 127 S. Ct. at 1965 n.4; *see also* RICHARD POSNER, ANTITRUST LAW 88 (2d ed. 2001) ("Simultaneous price increases and output

which sellers continue to charge the same prices over a period of time even though their costs decline over that period. It is hardly probative of conspiracy for competitors to continue to charge the same prices when customers keep buying their products at those prices, and *not* to begin charging less just because they can, as the Supreme Court implicitly recognized in *Twombly*.[47]

E. Pervasiveness

The "pervasiveness" of parallel conduct sometimes has been identified as a plus factor,[48] but the more efficient a practice is within an industry, the more pervasive it is likely to be. While the pervasiveness of a practice within a market may magnify its impact,[49] it does not tend to prove that the practice was adopted as the result of a preceding agreement rather than through independent business judgments reaching the same conclusion. "Pervasiveness" is as likely to show the efficacy of a practice as it is to show conspiracy.

III. BEYOND PLUS FACTORS: THE NEW PLAUSIBILITY STANDARD

The bedrock underlying the plus factor approach was the Supreme Court's 1957 decision in *Conley v. Gibson*,[50] which held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove

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reductions unexplained by any increases in cost may therefore be good evidence of the initiation of a price-fixing scheme, while changes in the opposite direction would be evidence that a cartel had just collapsed."). There is a difference between a group of competitors all raising their prices at the same time notwithstanding the absence of any concurrent change in cost—or demand—and a group of competitors keeping their prices the same during a period when costs begin to fall—or demand begins to rise. *See Twombly*, 127 S. Ct. at 1971 (stating that "resisting competition is routine"); *accord* Petruzzi's IGA Supermkts., Inc. v. Darling-Del. Co., 998 F.2d 1224, 1244 (3d Cir. 1993) ("[Sellers] might [all charge] the same above-marginal cost price . . . because [they assume that] "competitors would match any price cut. . . . Accordingly, Areeda warns courts not to consider a failure to cut prices . . . as an action against self-interest . . . .").

[47] 127 S. Ct. at 1971 (stating that "there is no reason to infer" that companies which could have competed harder than they "had agreed among themselves . . . to resist competition"); *see also In re* Elevator Antitrust Litig., 502 F.3d 47, 51 (2d Cir. 2007) ("[S]imilar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy . . . .").

[48] *See* Blechman, *supra* note 23, at 886, 898.

[49] *See, e.g.*, Standard Oil Co. v. United States, 337 U.S. 293, 309 (1949); *In re* Beltone Elec. Corp., 100 F.T.C. 68 (1982).

[50] 355 U.S. 41 (1957), *overruled in part by* Twombly v. Bell Atl. Corp., 127 S. Ct. 1955 (2007)

no set of facts in support of his claim which would entitle him to relief."[51] *Twombly* unceremoniously relegated *Conley* to "retirement," criticizing it on the ground that it could be, and had been, interpreted to mean that "any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings . . . ."[52] With the demise of *Conley*, the Supreme Court also effectively marked the retirement of the plus factor approach and its replacement with a new approach that "require[s] enough facts" to make the claims in a complaint plausible.[53]

The new test immediately began to take shape in the lower courts. One of the first leading illustrations was *In re Elevator Antitrust Litigation*,[54] where the plaintiffs pleaded that the defendants:

> (a) Participated in meetings in the United States and Europe to discuss pricing and market divisions; (b) Agreed to fix prices for elevators and services; (c) Rigged bids for sales and maintenance; (d) Exchanged price quotes; (e) Allocated markets for sales and maintenance; (f) "Collusively" required customers to enter long-term maintenance contracts; and (g) Collectively took actions to drive independent repair companies out of business.[55]

This was not enough to state a claim.[56]

The Second Circuit, quoting the district court, held that the complaint "enumerat[ed] 'basically every type of conspiratorial activity that one could imagine. . . . The list is in entirely general terms without any specification of any particular activities by any particular defendant[; it] is nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatever.' "[57] The Second Circuit added:

> Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract

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[51] *Id.* at 45–46.

[52] 127 S. Ct. at 1968–69.

[53] *Id.* at 1974.

[54] 502 F.3d 47 (2d Cir. 2007).

[55] *Id.* at 51 n.5.

[56] *See id.* at 50.

[57] *Id.* at 50–51 (quoting *In re* Elevator Antitrust Litig., No. 04 CV 1178 (TPG), 2006 WL 1470994, at *2–3 (S.D.N.Y. May 30, 2006)). *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), confirms that "[s]pecific facts are not necessary" to provide defendants fair notice of the claims, *id.* at 2200, but *Erickson*, an Eighth Amendment action, cites and reconfirms *Twombly*, *id.*

> language can reflect the copying of documents that may not be secret; similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy; and similar equipment design can reflect the state of the art.[58]

The court further added that allegations of collusion in Europe would not suffice "[w]ithout an adequate allegation of facts linking transactions in Europe to transactions and effects" in the United States.[59] Under *Twombly*, it will not do to allege that because defendants were colluding abroad, it can be inferred that they must have been colluding in the United States as well.

Another notable illustration was *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*,[60] where the Second Circuit characterized *Twombly* as holding "that a complaint must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which *actively* and plausibly suggest that conclusion."[61] It cited a prior Second Circuit decision as "interpreting *Twombly* as instituting a 'plausibility standard,' requiring *amplification* of facts in certain contexts."[62]

Port Dock involved a supplier that had acquired its only competitor and subsequently refused to continue selling to its only distributor, preferring to distribute directly.[63] The court affirmed dismissal of the complaint, inferring from some prior cases that the supplier did not have an anticompetitive purpose: "Our cases establish that when a monopolist has acquired its monopoly at one level of a product market, its vertical expansion into another level of the same product market will ordinarily be for the purpose of increasing its efficiency, which is a prototypical valid business purpose."[64]

The court specifically pointed to precedent recognizing that "a monopolist can only extract one monopoly profit on a product"[65] and concluded on that basis that

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[58] *In re Elevator Antitrust Litig.*, 502 F.3d at 51.

[59] *Id.* at 52.

[60] 507 F.3d 117 (2d Cir. 2007).

[61] *Id.* at 121 (emphasis added).

[62] *Id.* (emphasis added) (citing Iqbal v. Hasty, 490 F.3d 143, 155–58 (2d Cir. 2007)). *Iqbal*, however, has been interpreted in some quarters to read *Twombly* narrowly. *See* No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 WL 4139399, at *3–4 (N.D. Ga. Nov. 13, 2007); Polzin v. Barna & Co., No. 3:07-CV-127, 2007 WL 2710705, at *6 n.6 (E.D. Tenn. Sept. 14, 2007).

[63] *See Port Dock*, 507 F.3d at 119–20.

[64] *Id.* at 124.

[65] *Id.*

> a complaint pleading that a defendant expanded vertically and as a result, decided to discontinue doing business with its erstwhile trading partners at the next level down, does not plead an actionable refusal to deal. Such allegations are equally consistent with the idea that the monopolist expected to perform the second level service more efficiently than the old trading partners and thus undertook the vertical integration for a valid business reason, rather than for an anticompetitive one.[66]

The court went on to note that there may be circumstances in which a monopolist's vertical expansion could be anticompetitive, but the plaintiff had not alleged any of those.[67] The court also distinguished situations in which a monopolist has no legitimate business reason for refusing to deal.[68]

> Here, in contrast, our vertical integration cases show that Tilcon's[, the supplier's,] expansion into distribution was most likely in pursuit of increased efficiency, and Port Dock has not alleged any facts that would plausibly suggest that Tilcon's purpose was anticompetitive. There was thus an apparent legitimate business reason for Tilcon's refusal to deal.[69]

Thus, the plausibility standard not only requires plaintiffs to plead facts, but can enable courts to assume pro-competitive, or at least competitively neutral, explanations for defendants' conduct in the absence of contrary allegations.

These are not isolated cases. Numerous other antitrust decisions across the country have continued to apply and interpret *Twombly*'s requirement of a factual showing of a plausible claim, granting motions to dismiss where courts have determined that a complaint lacked sufficient factual allegations to warrant allowing a lawsuit to proceed.[70] Even those courts

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[66] *Id.* at 125.

[67] *Id.*

[68] *See id.* at 124, 126.

[69] *Id.* at 126.

[70] *See, e.g.*, NicSand, Inc. v. 3M Co., 507 F.3d 442, 455 (6th Cir. 2007) (granting motion to dismiss when "NicSand simply ha[d] not alleged facts establishing that the agreements in and of themselves created market-entry barriers that caused it a cognizable antitrust injury" (citing Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (holding that plaintiffs must allege "enough facts" to "nudge[] their claims across the line from conceivable to plausible"))); S.W.B. New Eng., Inc. v. R.A.B. Food Group, LLC, No. 06 Civ. 15357, 2008 WL 540091, at *6 (S.D.N.Y. Feb. 27, 2008) ("Plaintiff has not alleged that it has, in fact, been forced to reduce prices in order to compete, nor that such price reductions have caused it to incur a loss, and thus it does not have standing to make a predatory pricing claim."); Arista Records

that have not outright rejected the notion of "plus factors" have held that the particular plus factors they were called upon to examine failed to satisfy the *Twombly* test.[71] At the same time, the *Twombly* requirements have been satisfied in numerous other antitrust cases, including both cases in which the alleged agreement was in a writing as well as cases in which agreement had to be inferred.[72]

Perhaps the surest way to gauge the impact of the *Twombly* standard is to examine the antitrust allegations that are being dismissed as insufficient.[73] In cases like *In re Elevator Litigation, Port Dock*, and others described above, courts once might have stretched to find an adequate claim among the allegations that were pleaded. Today, courts expect plaintiffs to sniff out enough factual content in advance to state a plausible claim, and will not "fill in the blanks" if there are gaps in the plaintiff's factual allegations or logic. Indeed, if the courts are filling in any blanks today, it is to explain why the claim is implausible and unlikely to be sound.

LLC v. Lime Group LLC, No. 06 Civ. 5936, 2007 WL 4267190, at *15 (S.D.N.Y. Dec. 3, 2007) ("Lime Wire has failed to plead facts plausibly suggesting a 'meeting of the minds' among any of the counter-defendants to refuse 'reasonable access' to their hashes . . . ."); Sheridan v. Marathon Petroleum Co., No. 1:06-cv-01233-SEB-JMS, 2007 WL 2900556, at *8 (S.D. Ind. Sept. 28, 2007) (dismissing claim because "Plaintiffs have not alleged *any additional facts* to support this bare allegation that would plausibly suggest an illegal agreement" (emphasis added)); *In re* Netflix Antitrust Litig., 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) ("[D]iscovery could indeed prove expansive if allowed to proceed. Plaintiffs' claims have been dismissed because they have failed to plead the requisite level of enforcement to sustain a Walker Process claim.").

[71] *See* Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 53–55 (3d Cir. 2007); *In re* Late Fee & Over-Limit Fee Litig., 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007).

[72] *See, e.g.*, *In re* Static Random Access Memory (SRAM) Antitrust Litigation, No. M: 07-CV-01819 CW, 2008 WL 426522, at *6 (N.D. Cal. Feb. 14, 2008); Cargill Inc. v. Budine, No. CV-F-07-349-LJO-SMS, 2007 WL 4207908, at *5 (E.D. Cal. Nov. 27, 2007); Stand Energy Corp. v. Columbia Gas Transmission Corp., 521 F. Supp. 2d 537, 540–41 (S.D.W. Va. 2007); Omnicare, Inc. v. UnitedHealth Group, Inc., 524 F. Supp. 2d 1031, 1037–38 (N.D. Ill. 2007); Behrend v. Comcast Corp., No. 03-6604, 2007 WL 2221415, at *5 (E.D. Pa. July 31, 2007).

[73] In *Twombly* itself, the dissent pointed out that "the plaintiffs allege[d] in three places . . . that the [defendants] did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other." 127 S. Ct. at 1984.

CONCLUSION

The lesson to be learned from *Twombly* is to investigate more thoroughly than ever before filing a complaint. A strong hunch plus the prospect of substantiating that hunch in discovery is no longer enough.

Ultimately, the key issue always will be whether the plaintiff has pleaded "enough facts" to state a plausible claim,[74] without resorting to " 'a legal conclusion couched as a factual allegation.' "[75] The principal challenge will be to distinguish facts from conclusions masquerading as facts,[76] and decide how many genuine facts are "enough." Although this always was pivotal on motions to dismiss, *Twombly* increases the burden by replacing the "no set of facts test" with a "show me the facts" test.

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[74] *Id.* at 1974.

[75] *Id.* at 1965 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

[76] The dissent in *Twombly* charged that the majority's "dichotomy between factual allegations and 'legal conclusions' is the stuff of a bygone era . . . . That distinction was a defining feature of code pleading, . . . but was conspicuously abolished when the Federal Rules were enacted in 1938." *Id.* at 1985 (Stevens, J., dissenting).