

## *Bell Atlantic Corp. v. Twombly*: Requiring a Plausible Analysis at the Pleadings Stage

### Gerald A. Stein

The U.S. Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*<sup>1</sup> requires courts and litigants to grapple with a threshold issue at the outset of Sherman Act Section 1 actions: whether the complaint alleges the existence of a plausible and unlawful conspiracy. Prior to *Twombly*, complaints asserting conclusory allegations of an unlawful conspiracy commonly survived the pleadings stage.<sup>2</sup> Many defendants therefore refrained from expending resources on pre-answer motions to dismiss because courts routinely held that evidentiary facts, if any, proving the conspiracy could be established during discovery and adjudicated during summary judgment or trial. Any resources spared by abstaining from pre-answer motion practice, however, were quickly spent many times over during the subsequent discovery phase.

*Twombly* changes all that. District courts are now required to dismiss at the pleadings stage conspiracy allegations that are not plausible. Drawing on the concept of "plus factors" firmly established in the context of summary judgment motions,<sup>3</sup> the Supreme Court held in *Twombly* that a claim under Section 1 must be dismissed when the complaint fails to allege evidentiary facts sufficient to make an inference of a conspiracy plausible. A complaint that merely alleges an opportunity to conspire, or that alleges facts that could support a plausible, non-conspiratorial explanation for the alleged agreement, is not sufficient to permit an inference of conspiracy. Recognizing today's spiraling litigation costs, the Court liberated defendants from the "no set of facts" standard<sup>4</sup> that permitted complaints to proceed to expensive discovery even when they presented only conclusory allegations of conspiracy.

*Twombly*'s plausibility standard was not met with universal fanfare. Dissenting from the majority's opinion in *Twombly*, Justice Stevens argued that the new pleading standard will "invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence."<sup>5</sup> Justice Stevens reasoned that *Twombly* "permits immediate dismissal based on the

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<sup>1</sup> 127 S. Ct. 1955 (2007).

<sup>2</sup> See, e.g., *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) ("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").

<sup>3</sup> See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); see also *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) ("[T]his court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense . . . '[C]onscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.").

<sup>4</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

<sup>5</sup> *Twombly*, 127 S. Ct. at 1988 (Stevens, J., dissenting).

assurances of company lawyers that nothing untoward was afoot[.]”<sup>6</sup> which he argued ran counter to the purpose of the relaxed pleading standards of the Federal Rules.<sup>7</sup>

Over eighteen months and thousands of citations later, this article now examines how rigorously district courts are analyzing the plausibility of conspiracy claims at the pleadings stage and whether any trends have developed to predict the types of allegations that sufficiently allege a plausible conspiracy.<sup>8</sup>

### ***Twombly* Requires a Plausible Conspiracy**

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”<sup>9</sup> Thus, the fundamental issue that a court must decide in many motions to dismiss is whether the Section 1 complaint contains factual allegations sufficient to support a finding of an unlawful and plausible conspiracy. It is well established that conscious parallelism cannot form the basis of a Section 1 conspiracy.<sup>10</sup>

***[T]he fundamental issue that a court must decide in many motions to dismiss is whether the Section 1 complaint contains factual allegations sufficient to support a finding of an unlawful and plausible conspiracy.***

The plaintiffs in *Twombly* alleged a conspiracy between Bell Atlantic and its competitors, asserting that there was an illegal agreement among them, but they did not allege facts concerning the nature of the agreement, the parties involved, or when the agreement was purportedly formed. The plaintiffs merely alleged “on information and belief” that an agreement could be inferred from the companies’ parallel marketplace conduct. The district court dismissed the complaint finding that plaintiffs’ allegations “provide[d] no reason to believe that defendants’ parallel conduct was reflective of any agreement.”<sup>11</sup> On appeal, the Second Circuit found the pleading sufficient under the controlling precedent of *Conley v. Gibson*, in which the Supreme Court had held that a motion to dismiss could be granted only when there is “no set of facts” that a plaintiff could prove under the allegations of the complaint that would entitle it to relief.<sup>12</sup>

The Supreme Court in *Twombly* overturned its prior precedent to set a more demanding standard for pleading a Section 1 conspiracy: the complaint must allege evidentiary facts that show that the purported conspiracy is not just conceivable, but that it is plausible. Acknowledging the high stakes and expense of complex antitrust litigation, the Court held that a complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made[.]” so as to “raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>13</sup> As one leading commentator noted, “Although the Court insisted that it was not applying a heightened pleading standard comparable to Federal Rule 9(b), which requires parties to plead fraud or mistake ‘with particularity,’ it did require the plaintiff alleging an agreement to plead enough ‘grounds,’ ‘context,’ ‘circumstance,’ or ‘fact’ to make the claim ‘plausible.’”<sup>14</sup>

<sup>6</sup> *Id.* at 1975 (Stevens, J., dissenting).

<sup>7</sup> *Id.* at 1976 (Stevens, J., dissenting). Justice Stevens more forcefully argued that the majority’s “‘plausibility’ standard is irreconcilable with Rule 8 and with our governing precedents.” *Id.* at 1983.

<sup>8</sup> Although *Twombly* has been cited in numerous other contexts in antitrust cases and in other areas of law, this article focuses only on Section 1 conspiracy claims.

<sup>9</sup> 15 U.S.C. § 1.

<sup>10</sup> *See, e.g.,* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993).

<sup>11</sup> *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003).

<sup>12</sup> 355 U.S. 41, 45–46 (1957).

<sup>13</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>14</sup> William H. Page, *Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards* (University of Florida Levin College of Law Research Paper No. 2008-01, Oct. 19, 2008), available at <http://ssrn.com/abstract=1286872> at 10.

The Court reasoned that parallel conduct that is “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market” is not sufficient to sustain a complaint.<sup>15</sup> Applying that rationale, allegations based only on conduct that may be consistent with conspiracy but also in line with accepted competitive business strategy, such as publicly publishing prices or other information, also would be subject to dismissal.<sup>16</sup>

Antitrust claims arise in a limitless variety of circumstances and industries, so there can be no particular set of allegations that courts will uniformly find sufficient.<sup>17</sup> But recent decisions reveal certain trends in how courts analyze conspiracy claims in light of *Twombly*. Many courts have denied motions to dismiss where plaintiffs plead specific facts to support their conspiracy claims, such as direct communications among competitors and attendance at specific meetings at or around the time of the alleged anticompetitive behavior. Fewer courts have sustained complaints based on parallel conduct supported by generalized, conclusory allegations of “meetings,” “conversations,” and “agreements.” The closer calls are when the alleged conspiracy is challenged on the ground that it is not economically plausible. In those cases, the outcome largely depends on how rigorously the court tests the allegations and understands the economics of the relevant product and geographic markets.

### What Is a Plausible Conspiracy After *Twombly*?

The most obvious and natural course of action for plaintiffs attempting to satisfy *Twombly*'s plausibility threshold is to plead specific facts that demonstrate the existence of an unlawful conspiracy. Plaintiffs' ability to pursue this strategy obviously is constrained by the pre-discovery facts in their possession or facts for which they will likely have evidentiary support after a reasonable opportunity for discovery.<sup>18</sup> The Court acknowledged this reality in *Twombly*: “Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>19</sup> The Court further explained that, “before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct.”<sup>20</sup>

Not all allegations of conspiratorial conduct are weighed equally in determining whether a conspiracy has been sufficiently alleged. Certain alleged communications among competitors have a higher correlation with success for plaintiffs. For example, a leading commentator explains:

Communication of intent and reliance is a tangible, culpable action that differs from the actions of firms in ordinary competition or in simple conscious parallelism. The character of the communications and their proximity to parallel action in conformity with the communications, distinguishes them from other,

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<sup>15</sup> *Twombly*, 127 S. Ct. at 1964.

<sup>16</sup> See Page, *supra* note 14, at 18–32 (discussing the legal continuum of the forms of competitor communications).

<sup>17</sup> As one commentator noted: “Taking merely the antitrust context, numerous elements of various claims present potential avenues for ‘plausibility’ arguments at the motion to dismiss stage: market definition, injury and recoupment, to name just a few.” Scott Martin, *One Year Post-‘Twombly,’ Trends Emerge*, N.Y.L.J., Aug. 25, 2008, at S4 (Litigation Special Section).

<sup>18</sup> See also Fed. R. Civ. P. 11.

<sup>19</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>20</sup> *Id.* at 1969 n.8.

benign exchanges. It thus provides a focus for judges and juries at the key decisional stages of the legal process, including pleading.<sup>21</sup>

Our review of post-*Twombly* cases reveals that plaintiffs who pursue three types of pleading strategies generally have been able to demonstrate a plausible conspiracy under *Twombly*.

- First, allegations of private communications between alleged conspirators, such as specific cites to emails, telephone calls, or in-person conversations with competitors, particularly when coupled with direct quotes that make explicit reference to an agreement or to anticompetitive actions taken in furtherance of an agreement.
- Second, allegations that the conspirators are parties to a separate agreement or relationship (often a contract, joint venture, or membership in a trade association) if they assert the opportunity and perhaps the motive to conspire. From this, plaintiffs can allege regular communications between conspirators consistent with an agreement or conspiracy.
- Third, allegations of specific actions taken by defendants pursuant to the alleged agreement or conspiracy, particularly where those actions are inconsistent with past practices or depart from rational business practices.

**Allegations of Communications Among Co-Conspirators.** Not surprisingly, the most persuasive allegations of conspiratorial conduct are specific communications among defendants, particularly where the conspirators allegedly shared non-public or proprietary pricing, strategic, or technical information.<sup>22</sup>

Citing specific communications and alleging details, such as date, message content, or parties involved, is akin to presenting the court with a smoking gun; such an allegation will be a significant factor in the court's decision on a *Twombly* challenge, if not the decisive one. After all, details of specific incriminating communications establishing the existence of an actual agreement is the best evidence that plaintiffs can reasonably be expected to produce, short of an admission from a defendant or an actual signed agreement to violate antitrust laws. Two such cases are discussed below.

In *In re OSB Antitrust Litigation*<sup>23</sup> allegations of a horizontal price-fixing conspiracy among manufacturers of oriented strand board (OSB) were supported by two specific communications by defendant Louisiana-Pacific in which Louisiana-Pacific informed its competitors of planned mill downtime. In addition to the specific private communications among the competitors, the plaintiffs also alleged that the defendants fixed prices by publishing their prices twice a week in an industry periodical and using these published prices to monitor whether any member of the conspiracy cheated by offering significantly different prices. The court found determinative that the plaintiffs specifically alleged that the defendants kept OSB from the market through shutting down mills, delaying or canceling the construction of new OSB mills, purchasing OSB from competitors instead of manufacturing it themselves (which would have been cheaper) and maintain-

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<sup>21</sup> Page, *supra* note 14, at 17–18. Moreover, “private communications are far more probative of agreement than public ones. . . . Because [public] announcements provide benefits to consumers, and serve a variety of other functions, they do not convey any clear reliance on rivals to follow suit.” *Id.* at 31.

<sup>22</sup> See, e.g., *In re Static Random Access Memory Antitrust Litig. (In re SRAM)*, No. 07- 01819, 2008 U.S. Dist. LEXIS 15826 (N.D. Cal. Feb. 14, 2008) (exchange of technical “product roadmaps” and pricing information); *Hyland v. Homeservices of Am., Inc.*, No. 05-612, 2007 U.S. Dist. LEXIS 65731 (W.D. Ky. Aug. 17, 2007) (exchange of price information and catalogues); *In re OSB Antitrust Litig.*, No. 06-826, 2007 U.S. Dist. LEXIS 56573 (E.D. Pa. Aug. 3, 2007) (announcement of planned “mill downtime,” and exchange of price information via industry periodical).

<sup>23</sup> No. 06-826, 2007 U.S. Dist. LEXIS 56573 (E.D. Pa. Aug. 3, 2007).

ing low operating rates at the mills. The court distinguished the mere parallel conduct alleged in *Twombly* by considering “in combination” plaintiffs’ “explicit allegations of defendants’ agreement to fix prices through [the industry publication], and their price-fixing discussions during industry events.”<sup>24</sup>

Likewise, the plaintiffs in *In re Static Random Access Memory (SRAM) Antitrust Litigation* successfully opposed a motion to dismiss under *Twombly* when they quoted numerous internal and inter-defendant emails sharing technical “product roadmaps” and confidential pricing information.<sup>25</sup> Although the court acknowledged that most of these emails did not independently establish a conspiracy, the court concluded that taken together, the communications were sufficient to satisfy *Twombly*.

In both cases, detailed allegations of defendants’ private communications with each other were decisive for each court in finding that *Twombly*’s plausibility threshold was reached. Another advantage of specific allegations of inter-defendant communications is the dual effect of making the requisite conspiracy more plausible, and of “rais[ing] a reasonable expectation that discovery will reveal [additional] evidence of illegal agreement.”<sup>26</sup> Communication between defendants strongly supports the inference of an agreement either by alluding to the agreement itself or by discussing activity that appears to be pursuant to the agreement.<sup>27</sup> Allegations of such communications may be tantamount to an admission by the speaker that the conspiracy actually exists. Where allegations of the content of communications cannot be made with specificity, references to messages or conversations between defendants may strongly support the inference that discovery will be fruitful—one of the formulations for *Twombly*’s threshold of plausibility—because a court may decide that discovery will reveal the nature of the information exchanged.

In contrast, complaints that allege only unilateral communications will likely not support the inference of a “meeting of the minds” or “conscious commitment to a common scheme” that forms the basis of an adequately pled Section 1 conspiracy. Thus, allegations of internal communications that did not involve other co-conspirators also may not be enough to “nudge” an alleged conspiracy across the line from conceivable to plausible.

It is useful to compare cases like *Twombly*, which contained a unilateral statement,<sup>28</sup> with *In re OSB* and *In re SRAM*, both of which involved allegations of responses by co-conspirators. The *In re SRAM* court cited an “email chain” between codefendants Hitachi and Samsung, as well as an email solicitation to “exchange product roadmaps again” that alludes both to an expected response as well as to past reciprocal exchanges.<sup>29</sup> Similarly, the announcement of its mill downtime by defendant Louisiana-Pacific in *In re OSB* takes on a bilateral character when paired with the allegation that its recipients took specific actions in response—namely that they “began to take production downtime” themselves.<sup>30</sup>

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<sup>24</sup> *Id.* at \*5.

<sup>25</sup> *In re SRAM*, 2008 U.S. Dist. LEXIS 15826, at \*42–\*44.

<sup>26</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>27</sup> See, e.g., *In re SRAM*, 2008 U.S. Dist. LEXIS 15826, at \*42 (discussing defendant’s email solicitation to “exchange product roadmaps again”).

<sup>28</sup> The CEO of an alleged co-conspirator stated that “competing in the territory of [another competitor] ‘might be a good way to turn a quick dollar, but that doesn’t make it right.’” *Twombly*, 127 S. Ct. at 1962.

<sup>29</sup> *In re SRAM*, 2008 U.S. Dist. LEXIS 15826 at \*42, \*44 (emphasis added).

<sup>30</sup> *In re OSB*, 2007 U.S. Dist. LEXIS 56573, at \*7.

**Allegations of Pre-Existing Relationships Among Co-Conspirators.** Alleging a specific pre-existing relationship between defendants can greatly improve the chances that a court will find a plausible conspiracy in three ways. First, a prior arrangement between defendants can color a court's analysis of parallel conduct alleged in the complaint because a prior relationship between defendants suggests that the parallel conduct may in fact be conspiratorial. Second, it is incrementally easier to demonstrate the existence of an agreement extending into unlawful conduct if plaintiff can demonstrate that defendants already had some form of agreement in place. Third, allegations of pre-existing relationships also assist in convincing the court that discovery will produce additional evidence.

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Pre-existing relationships between defendants are often alleged in the form of contracts to buy and sell goods or services, as in *Babyage.com, Inc. v. Toys "R" Us, Inc.*,<sup>31</sup> or other business affiliations, such as the joint venture in *Fair Isaac Corp. v. Equifax, Inc.*<sup>32</sup> In both of those cases, the allegations of prior relationships between defendants cast the alleged parallel conduct in a more suspicious light.

In *Babyage.com*, the plaintiff-retailers alleged that a retail price maintenance program imposed by certain manufacturers of baby products was the result of an illegal conspiracy between Babies "R" Us (BRU) and the manufacturers. BRU is one of the largest purchasers of products from those manufacturers. The plaintiff-retailers had attempted to undercut BRU's prices for certain products also sold by BRU. Plaintiffs alleged that BRU used its purchasing power and relationships with manufacturers to insist that the manufacturers impose an RPM policy to prevent the smaller retailers from undercutting BRU's prices.

In *Fair Isaac*, the credit bureau defendants' seemingly coincidental decisions to deny Fair Issac access to credit data were no longer presumed innocent in light of their joint venture to operate VantageScore as Fair Isaac's competitor. Allegations of an existing relationship between defendants can thus make allegations of otherwise isolated activities seem connected, particularly when the relationship gives defendants an economic incentive to coordinate the conduct in question.

In cases where allegations of certain pre-existing relationships between defendants lean toward finding a strong plausibility of a conspiracy, the crucial question becomes whether the conduct was undertaken pursuant to the agreement and whether it was an illegal restraint of trade. For example, plaintiff cable subscribers in *Behrend v. Comcast Corp.* distinguished *Twombly* on the basis that defendant cable companies had actual agreements to swap shares in certain geographic markets.<sup>33</sup> The pivotal question then became whether the swap transactions were illegal under the Sherman Act. Plaintiffs' detailed descriptions of defendants' contracts moved the court substantially closer to sustaining the complaint by clearly demonstrating that the defendants had

<sup>31</sup> 558 F. Supp. 2d 575, 582 (E.D. Pa. 2008) (noting that defendant Babies "R" Us had "significant power" over each manufacturer as a principal retailer).

<sup>32</sup> No. 06-4112, 2008 U.S. Dist. LEXIS 16664, at \*17-\*18 (D. Minn. Mar. 4, 2008) (finding plausible pleading of agreement when codefendant credit bureaus' parallel conduct was taken in light of their "recent agreement to jointly own and control VantageScore").

<sup>33</sup> 532 F. Supp. 2d 735, 738-39 (E.D. Pa. 2007).

an agreement, and by showing that the conduct at issue was unambiguously contemplated by the language of their contract.<sup>34</sup>

Finally, allegations of a contractual relationship between co-defendants can prompt the court to find that *Twombly's* expectation of fruitful discovery threshold has been satisfied.<sup>35</sup> Substantial business relationships are bound to generate discoverable material from the contract itself to the supporting materials and communications that go into its creation and enforcement. For example, in *Transworld Techs., Inc. v. Raytheon Co.*, the plaintiff, a U.S. Navy defense contractor, brought an action against two defendants for allegedly entering into a conspiracy to prevent the plaintiff from bidding on a certain naval contract. The court found sufficient allegations that the defendants had worked together on other aspects of the contract and that enough circumstantial facts had been pled “to raise a reasonable expectation that discovery will reveal an illegal agreement.”<sup>36</sup>

Such allegations, however, were not sufficient in *In re Digital Music Antitrust Litigation*,<sup>37</sup> where the plaintiffs alleged that the defendants conspired to fix prices of digital music through the use of two distribution joint ventures and through defendants’ business dealings with third-party licensees. The joint ventures allegedly operated as a means by which the defendants could impose price and use restrictions and impose restrictive licensing arrangements. The plaintiffs alleged that these arrangements were contrary to the economic self-interest of the individual defendants and were therefore shams. The court disagreed, finding that “the bald allegation that the joint ventures were shams is conclusory and implausible [and] . . . ignores the context in which those entities were created.” The *Digital Music* court reasoned: “In the absence of any formal veil-piercing allegations and without challenging the legality of those joint ventures under the antitrust laws, Plaintiffs cannot now call into question their legitimacy simply by describing conduct consistent with rational business decisions.”<sup>38</sup> The court further reasoned that it “is common sense that some level of information sharing must inevitably occur in the operation of a joint venture.”<sup>39</sup> The court thus rejected as unreasonable the plaintiffs’ argument that the defendants’ subsequent adoption of parallel price and use restrictions resulted solely from an agreement based on their creation of or membership in the joint ventures, in the absence of any other allegations tending to show an illegal agreement.

***Allegations of Actions Taken Pursuant to the Conspiracy.*** Allegations of specific conduct taken pursuant to an alleged conspiracy are a third way in which plaintiffs can demonstrate a plausible con-

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<sup>34</sup> *Id.* at 741 (discussing plaintiffs’ allegations as “sufficient to show [that] an ‘agreement’ was made . . . and how the terms thereof allegedly eliminated competitors.”); see also *Jabo’s Pharmacy v. Becton Dickenson & Co.* (*In re Hypodermic Prods. Antitrust Litig.*), No. 05-1602, 2007 U.S. Dist. LEXIS 47438, at \*25–\*26 n.12 (D.N.J. June 29, 2007) (finding a plausible complaint based on allegations of contracts between defendant medical device manufacturer and defendant distributors, pursuant to which distributors imposed anticompetitive contract terms on retail purchasers); *Omnicare Inc. v. UnitedHealth Group, Inc.*, 524 F. Supp. 2d. 1031, 1037 (N.D. Ill. 2007) (holding that the “[*Twombly*] test is easily met here[, where plaintiff] has alleged that [defendants] UnitedHealth and PacifiCare entered into an explicit merger agreement which restricted PacifiCare’s ability to enter into contracts.”) *Transworld Techs., Inc. v. Raytheon Co.*, No. 06-5012, 2007 U.S. Dist. LEXIS 82118, at\*11–\*12 (D.N.J. Nov. 1, 2007) (finding assertions that defendant Lockheed Martin was working as defendant Raytheon’s procurement agent to be sufficient circumstantial evidence of an agreement to misuse proprietary information supplied by the plaintiff).

<sup>35</sup> See *Twombly*, 127 S. Ct. at 1965.

<sup>36</sup> *Transworld Techs.*, 2007 U.S. Dist. LEXIS 82118, at \*12. See also *Dahl v. Bain Capital Partners*, No. 07-12388, 2008 WL 5206990, at \*5 (D. Mass. Dec. 15, 2008) (finding allegations of conspiracy plausible where complaint specifically pled nine transactions and the presence of the same defendants in multiple transactions, which “ties the [defendants] together in a way that the *Twombly* defendants were not”).

<sup>37</sup> MDL No. 1780, 2008 U.S. Dist. LEXIS 79764 (S.D.N.Y. Oct 9, 2008).

<sup>38</sup> *Id.* at \*31–\*32.

<sup>39</sup> *Id.* at \*32.

spiracy at the pleadings stage. This is especially true where the conduct is inconsistent with past practices or is economically irrational as an independent business judgment.

*City of Moundridge v. Exxon Mobil Corp.*<sup>40</sup> illustrates how a court can infer an antitrust conspiracy based on the actions of multiple defendants. In *City of Moundridge*, the plaintiffs alleged that defendant gas companies conspired to artificially raise natural gas prices by manipulating market data to create the false impression of a shortage. Although the court found nothing unusual about the parallel nature of the defendants' actual price increases, it determined that the broader allegations that the defendants had agreed to contribute false information regarding gas supply levels to industry reports, withheld supply, and engaged in price fixing were sufficient to show a plausible conspiracy. These broad allegations were made in the context of circumstantial factual allegations, such as historical supply and consumption levels, market prices, profit levels, and the use of industry reports. The court found that in combination, these allegations distinguished the bare parallel conduct in *Twombly* and held that the alleged conspiracy was plausible in the context of the market.

In *Hackman v. Dickerson Realtors, Inc.*,<sup>41</sup> the plaintiff-realtor alleged that other realtors, realty companies, and realty associations conspired to drive him out of business. The plaintiff's amended complaint against one realtor, Licary, was found adequate based on a single act that included Licary into the conspiracy as established by allegations against her co-defendants. The alleged act by Licary taken pursuant to this conspiracy was that she made "a knowingly false statement about [plaintiff] Hackman in order to undermine his deal. . . ." <sup>42</sup> By asserting just this single act in furtherance of the conspiracy, the plaintiffs alleged that Licary had knowledge of and agreement with the conspiracy, and the court held the amended complaint now plausibly pled that the conspiracy encompassed her as well.<sup>43</sup>

In *re Rail Freight Fuel Surcharge Antitrust Litigation*<sup>44</sup> illustrates how an alleged shift in past practices can support an inference of conspiracy. The complaint alleged that defendants controlled approximately 90 percent of all rail freight traffic in the United States and sought to increase their revenues through the use of fuel surcharges. To avoid existing rate escalation provisions contained in standard rail freight transportation contracts, which included a variety of cost factors including fuel, the defendants allegedly conspired to remove fuel as an existing component of the standard index so they could apply a separate "fuel surcharge" as a percentage of the total cost of freight transportation. The plaintiffs alleged that this scheme, which was contrary to prior industry practice, was accomplished in several steps after the defendants met at specifically identified industry meetings. Although the court acknowledged that the plaintiffs had not alleged the precise context of the agreement among the defendants, it reasoned: "Short of being in the boardroom at the meeting, it is hard for the Court to imagine how plaintiffs could more fulsomely allege that defendants entered into an agreement at the [industry] meetings."<sup>45</sup>

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<sup>40</sup> 250 F.R.D. 1 (D.D.C. 2008).

<sup>41</sup> 557 F. Supp. 2d 938 (N.D. Ill. 2008) (*Hackman II*).

<sup>42</sup> *Id.* at 944.

<sup>43</sup> *Id.* at 944–45.

<sup>44</sup> MDL No. 1869, 2008 U.S. Dist. LEXIS 95456 (D.D.C. Nov. 7, 2008).

<sup>45</sup> *Id.* at \*22–\*23.

*The challenge for defendants, however, is to convince the court to delve into and test the plausibility of the alleged conspiracy theory at the pleadings stage.*

In holding that the plaintiffs had alleged enough to “infer that it is plausible that an actual agreement existed,”<sup>46</sup> the court emphasized that the plaintiffs had alleged the defendants’ attendance at specific meetings, coupled with coordination of fuel surcharges coincident with those meetings. The plaintiffs asserted that it is unlikely that geographically diverse railroads “would independently impose identical fuel surcharges, because fuel cost as a percentage of operating cost and fuel efficiency differed widely among the defendant railroads.”<sup>47</sup> The court also found determinative that the method of surcharge was allegedly “complex and completely new.”<sup>48</sup>

Allegations about other culpable conduct in *In re OSB* and *In re SRAM* bolstered the persuasive value of the inter-defendant communications alleged in those cases.<sup>49</sup> The same argument applies to *Hyland*, in which the plaintiffs survived a *Twombly* motion on the combined allegations of exchange of price information, along with “references to enforcement actions brought by the Department of Justice[,] admissions of price-fixing by [some defendants, and] price increases while Defendants’ costs and non-real estate broker fees declined. . . .”<sup>50</sup> The plaintiffs in *Babyage.com* enhanced their allegations of resale price maintenance agreements with explanations (and supporting data) regarding the market power that Babies “R” Us deployed to compel manufacturers to adopt the desired pricing policy.<sup>51</sup> Alleging that defendants took steps pursuant to an alleged agreement can persuade the court that the alleged conspiracy is plausible and can aid plaintiffs to withstand a *Twombly* challenge.

### Successful Arguments Showing the Absence of a Plausible Conspiracy

*Twombly* removed all doubt that allegations of mere parallel conduct coupled with assertions of vague and generalized communications among the alleged conspirators will not suffice to plead a viable antitrust conspiracy claim. The challenge for defendants, however, is to convince the court to delve into and test the plausibility of the alleged conspiracy theory at the pleadings stage. Two leading circuit court cases demonstrate the extensive analysis that courts should undertake in the context of actual market conditions.

In *Kendall v. Visa U.S.A., Inc.*,<sup>52</sup> the plaintiffs alleged two conspiracies: first, that the Visa and MasterCard consortia had conspired to set the interchange fee charged to member banks, and, second, that the credit-card issuing member banks of those consortia conspired to pass on the interchange fee to merchants in the form of the “merchant discount” charged for credit card transactions.<sup>53</sup> In *Kendall*, the Ninth Circuit began with the assumption that, “[a]t least for the purposes of adequate pleading in antitrust cases, the [Supreme] Court specifically abrogated the usual ‘notice pleading’ rule, found in Federal Rule of Civil Procedure 8(a)(2) and *Conley v. Gibson*.”<sup>54</sup> The Ninth Circuit’s rationale for this heightened pleading standard is rooted in

<sup>46</sup> *Id.* at \*23.

<sup>47</sup> *Id.* at \*25.

<sup>48</sup> *Id.*

<sup>49</sup> See *In re OSB*, 2007 U.S. Dist. LEXIS 56573, at \*7–\*8; *In re SRAM*, 2008 U.S. Dist. LEXIS 15826, at \*47.

<sup>50</sup> *Hyland*, No 3:05-CV-612, 2007 U.S. Dist. LEXIS 65731, at \*10.

<sup>51</sup> See *Babyage.com*, 558 F. Supp. 2d at 582–83.

<sup>52</sup> 518 F.3d 1042, 1048 (9th Cir. 2008) (affirming the dismissal, with prejudice, of antitrust claims that “failed to plead the necessary evidentiary facts” beyond parallel conduct).

<sup>53</sup> *Id.* at 1048.

<sup>54</sup> *Id.* at 1047 n.5.

inescapable realities: “discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case.”<sup>55</sup> Then, after thoroughly reviewing the allegations, the Ninth Circuit held that “merely charging, adopting or following the fees set by a Consortium is insufficient as a matter of law to constitute a violation of Section 1 of the Sherman Act.”<sup>56</sup> What seems to set *Kendall* apart from *In re Rail Freight* (which involved the coordinated imposition of novel fuel surcharges) is that in *Kendall* there is no allegation of a sudden shift in practice.

Similarly, in *Transhorn, Ltd. v. United Technologies Corporation (In re Elevator Antitrust Litigation)*,<sup>57</sup> a putative class of purchasers of elevators and/or elevator maintenance and repair services alleged that defendants conspired to fix prices for the sale and maintenance of elevators. Plaintiffs alleged that defendants met in the United States and in Europe to fix prices and allocate markets, rig bids, and exchange price quotes to drive independent repair companies out of business. In affirming the dismissal of the Section 1 claim, the Second Circuit found that the plaintiffs pled only inferences of illegal activity and failed to allege specific conduct sufficient to nudge the allegations from conceivable to plausible. The Second Circuit agreed with the district court that the complaint alleged “‘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.’”<sup>58</sup>

**Establishing That the Allegations Amount Only to Parallel Conduct.** Throughout the cases applying *Twombly*, an allegation’s persuasive effect is directly proportional to the specificity with which it is made. Blanket assertions of parallel conduct coupled with a failure to assert specifics such as “who, what, where, and when” are often dismissed as a mere conclusory statements. Defendants generally win *Twombly* motions when plaintiffs allege only parallel conduct and that defendants met at certain unspecified meetings to further the alleged conspiracy.<sup>59</sup> Courts have also discounted the related charge of membership in trade or industry groups, often passing off these accusations as “opportunities to conspire” rather than evidentiary allegations of an actual conspiracy.<sup>60</sup>

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<sup>55</sup> *Id.* at 1047.

<sup>56</sup> *Id.* at 1048.

<sup>57</sup> 502 F.3d 47 (2d Cir. 2007).

<sup>58</sup> *Id.* at 50–51 (alteration in original) (quoting *In re Elevator Antitrust Litig.*, 2006 U.S. Dist. LEXIS 34517, at \*2–\*3).

<sup>59</sup> See, e.g., *In re Elevator Antitrust Litig.*, 502 F.3d at 50–51 n.5 (disregarding assertions that defendants “[p]articipated in meetings in the United States and Europe” as “theoretical possibilities, which one could postulate without knowing any facts whatever”); *Arista Records, LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 577 (S.D.N.Y. 2007) (noting that plaintiff’s complaint does not specify which defendant participated, or where or when meetings allegedly took place); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1021, 1023 (N.D. Cal. 2007) (finding that plaintiffs failed to allege which persons from which company attended the putative meetings, and failed to allege that price fixing was actually discussed).

<sup>60</sup> See *Twombly*, 127 S. Ct. at 1971 n.12 (rejecting alleged membership in trade association as supporting an inference of antitrust conspiracy); *Kendall*, 518 F.3d at 1048 (“[M]embership in an association does not render an association’s members automatically liable for antitrust violations . . . .”); *Schafer v. State Farm Fire & Cas. Co.*, 507 F. Supp. 2d 587, 597 n.33 (E.D. La. 2007) (allegation that defendants “actively coordinated their actions through various organizations and associations” held insufficient under *Twombly*); see also *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175, 2007 U.S. Dist. LEXIS 47966, at \*13 (D. Minn. June 28, 2007) (“opportunities to conspire” insufficient to plausibly plead conspiracy).

To a more limited extent, defendants have in some cases persuaded courts to disregard allegations of information sharing as mere conclusory statements.<sup>61</sup> It is worth noting that the success of this argument depends in large part on the specifics of the given complaint. Thus, the general allegations found inconsequential in *In re Elevator*, *In re Insurance Brokerage*, and *In re Travel Agent* were easily distinguishable from the specific communications, including *actual quoted excerpts*, offered by the plaintiffs in *In re SRAM* and *In re OSB*.

**Demonstrating that the Alleged Conspiracy Is Not Plausible.** Even when a plaintiff makes specific allegations of fact, a defendant may still argue that the alleged conduct does not constitute a plausible conspiracy based on the economic realities of the industry.<sup>62</sup> The defendant's success with this argument at the pleadings stage wholly depends on how closely the court will examine the allegations of the complaint in the context of the relevant market. For example, such argument was not successful in *Heartland Payment Systems Inc. v. Micros Systems, Inc.*,<sup>63</sup> where the court rejected the defendants' argument that the conspiracy was not economically plausible. Rather than applying a rigorous analysis, the court merely recited allegations in the complaint and concluded that, "at least at this stage of the proceedings, the Court cannot confidently say that it is implausible" that defendants would have participated in the alleged scheme.<sup>64</sup>

In contrast to *Heartland Payment Systems*, the court in *In re Late Fee and Over-Limit Fee Litigation*,<sup>65</sup> applied a rigorous analysis of the market to dismiss a conspiracy claim because it was not economically plausible. The plaintiffs, a putative class of credit card holders who paid late fees and/or over-limit fees, alleged that the defendants conspired to fix the prices of such fees. Failing to allege any actual agreement among the defendants, the plaintiffs instead alleged that the defendants had engaged in parallel lock-step pricing. The plaintiffs' claim was based on the defendants' alleged "opportunities and incentives" to engage in a conspiracy.

In dismissing the complaint, the court rejected all the conclusory allegations of conspiratorial conduct and found that the complaint itself provided an alternative explanation for the price increases. The court reasoned that the fees were the result of a rational and competitive business strategy unilaterally prompted by common perceptions of the market. Importantly, the court noted that the defendants' similar cost structures would explain why the defendants' prices would naturally be similar without the need for any agreement. Thus, given the "natural explanations"<sup>66</sup> for the increases in late fees, coupled with the absence of any factual allegations of conspiratorial conduct, the complaint was dismissed.

**Plaintiffs' Failure to Allege Facts as to Each Defendant.** A final factor, and one that may have significant impact on a *Twombly* motion's success, is how the court analyzes a complaint where there are strong Section 1 conspiracy allegations against some defendants, but weak and/or generalized allegations as to others. Decisions applying *Twombly* in this situation have been inconsistent.

*Even when a plaintiff makes specific allegations of fact, a defendant may still argue that the alleged conduct does not constitute a plausible conspiracy based on the economic realities of the industry.*

<sup>61</sup> See *In re Elevator Antitrust Litigation*, 502 F.3d at 51 n.5 ; *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 U.S. Dist. LEXIS 64767, at \*67, \*93 (D.N.J. Aug. 31, 2007); *In re Travel Agent Comm'n Antitrust Litig.*, MDL No. 1561, 2007 U.S. Dist. LEXIS 79918, at \*36 (N.D. Ohio Oct. 29, 2007).

<sup>62</sup> See, e.g., *City of Moundridge*, 250 F.R.D. at 5 ("Economic interests and motivations can be relevant to evaluate plausibility, and price increases can be the result of an independent business decision.").

<sup>63</sup> No. 3:07-CV-5629, 2008 U.S. Dist. LEXIS 74972 (D.N.J. Sept. 29, 2008).

<sup>64</sup> *Id.* at \*50.

<sup>65</sup> 528 F. Supp. 2d 953 (N.D. Cal. 2007).

<sup>66</sup> *Id.* at 965.

In *Hackman v. Dickerson Realtors Inc. (Hackman I)*,<sup>67</sup> for example, the trial court carefully evaluated each defendant's alleged connection to the asserted conspiracy and did not allow claims against one defendant to color its analysis of the claims against another. Likewise, in *In re Travel Agent Commission Antitrust Litigation*, the court separated its analysis of the claims raised against each defendant, dismissing some out of hand and subjecting others to a more careful review.<sup>68</sup>

In *In re Parcel Tanker Shipping Services Antitrust Litigation*,<sup>69</sup> the district court dismissed an antitrust conspiracy complaint that "allege[d] general conspiratorial activity without reference to specific actions by a particular defendant at a particular time," gave "no specific examples of the defendants' conduct" in alleged secret meetings, and cited no "specific wrongful acts of specific defendants" to support the conspiracy allegations. As the court found, "[t]his lack of specifics with respect to the acts of a particular defendant or defendants renders the complaint inadequate after" *Twombly*.<sup>70</sup>

In another case, the Second Circuit affirmed the dismissal of a complaint that "enumerate[ed] basically every type of conspiratorial activity that one could imagine . . . without any specification of any particular activities by any particular defendant."<sup>71</sup> The court concluded that plaintiffs' allegations that the defendants participated in meetings to discuss pricing and market divisions, agreed to fix prices, rigged bids, exchanged price quotes, and allocated markets, among other things, were nothing more than "a list of theoretical possibilities, which one could postulate without knowing any facts adequate to show illegality," and that they did not provide plausible ground to support the inference of an unlawful agreement.<sup>72</sup>

In contrast to those cases, some courts have found blanket allegations against large groups of defendants sufficient under *Twombly*, even when the strength of the allegations as to each defendant varies significantly. For example, the court in *In re SRAM* extended its findings against the defendants for whom the allegations were strong to those against whom the allegations were comparably weak.<sup>73</sup> As discussed previously, the court found a conspiracy was sufficiently pled between defendants Hitachi and Samsung, based on their email chain sharing confidential business information.<sup>74</sup> However, the court also found the conspiracy adequately pled as to the

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<sup>67</sup> 520 F. Supp. 2d 954 (N.D. Ill. 2007). *But see* discussion of *Hackman II*, *supra* text accompanying note 41.

<sup>68</sup> *In re Travel Agent*, 2007 U.S. Dist. LEXIS 79918, at \*17 ("Plaintiffs have not put forth any 'factual matter' suggesting that [certain defendant airlines] engaged in parallel conduct. . . ."); *see also id.* at \*18 (dismissing claim against defendant KLM, finding it based solely on allegations of trade association membership); *see also id.* at \*29-\*38 (dismissing plaintiffs' claims against defendants Northwest, United, and Delta subsequent to a full *Twombly* analysis of parallel conduct, opportunities to conspire, "plus factors," and industry practices).

<sup>69</sup> 541 F. Supp. 2d 487 (D. Conn. 2008).

<sup>70</sup> *Id.* at 491-92. Several pre-*Twombly* cases also support this proposition. *See* *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1386-87 (10th Cir. 1980) ("To provide adequate notice, a complaint in a complex, multi-party suit may require more information than a simple, single party case."); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 16663, 2007 U.S. Dist. LEXIS 25632 at \*117-\*118 (D.N.J. Apr. 5, 2007); *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 163 (D.D.C. 2004) ("Plaintiffs cannot escape their burden of alleging that each defendant participated in or agreed to join the conspiracy by using the term 'defendants' to apply to numerous parties. . . .").

<sup>71</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 50 (internal quotation omitted).

<sup>72</sup> *See also* *Rick-Mik Enters. Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 975-76 (9th Cir. 2008) (dismissing price-fixing allegations that did not allege specific details of an alleged illegal price-fixing scheme); *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, No. 1:05-CV-519, 2007 U.S. Dist. LEXIS 53862, at \*17-\*18 (S.D. Ohio 2007) (dismissing complaint that alleged only a general time span during which the defendants' alleged antitrust violations were supposed to have occurred, but failed to allege specific times, places or the parties involved).

<sup>73</sup> *In re SRAM*, 2008 U.S. Dist. LEXIS 15826, at \*49-\*50.

<sup>74</sup> *Id.* at \*42-\*44.

*Demonstrating that an alleged conspiracy is not economically plausible may require the introduction of industry or market facts that were not alleged in the complaint.*

remaining defendants, against whom no comparable transgressions were alleged. In doing so, the court noted that against these additional defendants, plaintiffs “only need to make allegations that plausibly suggest that each [defendant] . . . participated in the alleged conspiracy” already identified by the court as to Hitachi and Samsung.<sup>75</sup>

The court in *In re OSB Antitrust Litigation* relied on pre-*Twombly* jurisprudence to explicitly hold that “[a]ntitrust conspiracies need not be detailed defendant by defendant.”<sup>76</sup> The court applied this rationale in sustaining the complaint against defendant Grant Forest Products, Inc., which was mentioned by name only in “one lone paragraph” and even then only for the blanket “allegation that Grant joined and participated in the alleged price-fixing conspiracy.”<sup>77</sup> Like the court in *In re SRAM*, the court in *In re OSB* essentially subdivided its plausibility analysis into two discrete questions: whether an antitrust conspiracy was adequately pled as to any two defendants, and then whether that conspiracy can be imputed against any other defendants.<sup>78</sup> Having found a conspiracy adequately pled between Grant’s co-defendants (the OSB producers who had planned and executed a coordinated mill shutdown), the court was satisfied by only the incremental allegation that Grant was a party as well.<sup>79</sup>

A court’s willingness to extend the scope of a conspiracy, substantiated only between certain parties, to other defendants against whom there is only the bare assertion of involvement, significantly impairs those additional defendants’ ability to mount a successful challenge under *Twombly*, which held that “bare assertion[s] of conspiracy” and “conclusory allegation[s] of agreement” simply “will not suffice” to sustain a plaintiff’s complaint.<sup>80</sup>

**Judicial Notice and the Inclusion of Publicly Available Facts in Defendants’ Motions.** Two commentators recently noted: “If the Supreme Court’s own analysis in *Twombly* is any indication, an antitrust class action complaint must provide an economic theory which truly hangs together based on plaintiff’s factual allegations in order to survive a motion to dismiss.”<sup>81</sup> Thus, “defendants may want to consider engaging an expert economist at the outset of an antitrust class action to assist in framing for a motion to dismiss any deficiencies with the economic theories advanced in the plaintiff’s complaint.”<sup>82</sup> This is so because the plausibility standard requires the court to determine whether “the economic theory advanced in plaintiff’s complaint is logical and, if so, whether the alleged facts truly support that economic theory.”<sup>83</sup>

Demonstrating that an alleged conspiracy is not economically plausible may require the introduction of industry or market facts that were not alleged in the complaint. Although a motion to dismiss generally is limited to the allegations set forth in the complaint, the court “may consider evidence on which the complaint ‘necessarily relies’ if: “(1) the complaint refers to the document;

<sup>75</sup> *Id.* at \*49.

<sup>76</sup> *In re OSB*, 2007 U.S. Dist. LEXIS 56573, at \*13 (citing *Alaska v. Boise Cascade Corp.* (*In re Fine Paper Antitrust Litig.*), 685 F.2d 810, 822 (3d Cir. 1982)).

<sup>77</sup> See *In re OSB*, 2007 U.S. Dist. LEXIS 56573, at \*12–\*13.

<sup>78</sup> *Id.* at \*13 (“[A]n antitrust complaint should be viewed as a whole, and the plaintiff must allege that each individual defendant joined the conspiracy and played some role in it.”) (citing *Jung*, 300 F. Supp. 2d at 164, n.27).

<sup>79</sup> *In re OSB*, 2007 U.S. Dist. LEXIS 56573, at \*13.

<sup>80</sup> *Twombly*, 127 S. Ct. at 1966.

<sup>81</sup> Wendy L. Bloom & James Langenfeld, *The Potential Impact of Twombly on Antitrust Class Actions*, GLOBAL COMPETITION POL’Y, June 2008, Release Two, at 4.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 8.

(2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion."<sup>84</sup> The court may also rely on facts subject to judicial notice.<sup>85</sup>

Under Rule 201 of the Federal Rules of Evidence, a "judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Judicial notice "may be taken at any stage of the proceeding,"<sup>86</sup> including the pre-answer motion.

Thus, in *Singh v. Memorial Medical Center*,<sup>87</sup> the court took judicial notice of the existence of many other hospitals in the relevant geographical market in determining whether the plaintiffs' claim for exclusion from the dominant hospital stated a cause of action under the Sherman Act. In dismissing their complaint, the court found that "[p]laintiffs have alleged harm to a single competitor at a single hospital rather than an injury to competition. Such harm does not come within the purview of the antitrust laws, and is not the type of harm the antitrust laws intended to prevent."<sup>88</sup> Similarly, in *Arista Records LLC v. Lime Group, LLC*,<sup>89</sup> the court took judicial notice of information publicly announced on a party's Web site when the Web site's authenticity was not in dispute and was capable of accurate and ready determination in granting motion to dismiss antitrust counterclaims. And in *Shames v. Hertz Corporation*,<sup>90</sup> the court took judicial notice of documents related to the legislative history of a statute, concluding that "these are matters of public record suitable for judicial notice."

## Conclusion

*Twombly* requires district court judges to engage in a thorough fact-intensive analysis at the pleadings stage. Decisions entered in *Twombly*'s aftermath show that many courts have adapted to this new standard and have conducted a rigorous analysis of the factual allegations of a complaint. Not surprisingly, these decisions reveal that factual allegations that point to specific communications among alleged conspirators sharing non-public or proprietary pricing, strategic, or technical information, coupled with conduct consistent with those communications, will be highly successful for plaintiffs bringing Section 1 actions. For defendants, a successful *Twombly* motion to dismiss a complaint requires convincing the court to carefully review the allegations of conspiracy in the context of the relevant market, and to demonstrate that the allegations amount to nothing more than mere parallel conduct or that the conspiracy theory makes no economic sense. For the courts and litigators alike, *Twombly* therefore puts at the forefront of Section 1 litigation many complex issues that must be determined at the pleadings stage. Although *Twombly*'s new standard initially was criticized for requiring too much too soon, the post-*Twombly* cases show that the bench and bar have adapted to this rigorous analysis by requiring more detailed and fact-based complaints and dismissing those complaints that fail to meet this standard. ●

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<sup>84</sup> *Marder v. Lopez*, 450 F.3d, 445, 448 (9th Cir. 2006).

<sup>85</sup> See, e.g., *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

<sup>86</sup> Fed. R. Evid. 201(f).

<sup>87</sup> 536 F. Supp. 2d 1244 (D.N.M. 2008).

<sup>88</sup> *Id.* at 1253. But see *Hear-wear Techs., LLC v. Oticon, Inc.*, 551 F. Supp. 2d 1272, 1279 (N.D. Okla. 2008) (denying motion to dismiss antitrust counterclaims and denying motion to take judicial notice of disputed facts to resolve the relevant geographic market inquiry).

<sup>89</sup> *Arista Records*, 532 F. Supp. 2d at 571 n.20.

<sup>90</sup> No. 07-CV-2174, 2008 U.S. Dist. LEXIS 56952, \*32 (S.D. Cal. July 24, 2008).