Nos. 25-7103, 25-7104, 25-7105, 25-7107 & 25-7108

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION (NO. I) –
MDL NO. 1869

DONNELLY COMMODITIES INCORPORATED, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED; STRATES SHOWS, INC.; OLIN CORPORATION,

Plaintiffs-Appellants,

v.

BNSF RAILWAY COMPANY; CSX TRANSPORTATION, INC.; NORFOLK SOUTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Defendants-Appellees,

SOUTHERN COMPANY; DOW CHEMICAL COMPANY; RAYONIER INC.,

Intervenors-Appellees.

(*Case captions continued on inside cover*)

On Appeal from the United States District Court for the District of Columbia,
No. 1:07-mc-00489

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE (AAI) IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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December 19, 2025

25-7104

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION (NO. II) – MDL NO. 2925

AMERICAN HONDA MOTOR CO., INC., et al.,

Plaintiffs-Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, et al.,

Defendants-Appellees.

25-7105

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION (NO. II) – MDL NO. 2925

LANSING ETHANOL, et al.,

Plaintiffs-Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, et al.,

Defendants-Appellees.

25-7107

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION (NO. II) – MDL NO. 2925

SUZUKI MOTOR OF AMERICA, INC., et al.,

Plaintiffs-Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, et al.,

Defendants-Appellees.

25-7108

OXBOW CARBON & MINERALS, LLC, et al.,

Plaintiffs-Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, et al.,

Defendants-Appellees.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae certifies as follows:

A. Parties and Amici Curiae

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are identified in the Brief for Plaintiffs-Appellants:

The American Antitrust Institute (AAI)

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases

The cases now pending before this Court were not previously before this Court or any other court. Counsel is not aware of any related case pending before this Court or any court besides those identified in the Brief for Plaintiffs-Appellants.

\/s/ Randy Stutz
Randy Stutz

CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

/s/ Randy Stutz
Randy Stutz

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INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Antitrust cases are notoriously complex, and parsing the facts at summary judgment can be a Herculean task. In Section 1 cases where consumers are injured but lack direct evidence of a cartel agreement, courts sometimes struggle to balance the risk of under-deterring collusion, "the supreme evil of antitrust," *Verizon Commc'ns v. Law Offs. of Curtis V. Trinko*, 540 U.S. 398, 408 (2004), with the risk that oligopolists might be haled into court for unilateral conduct

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[1] All parties have consented to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.
[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Members of AAI's Advisory Board or their law firms represent Plaintiffs, but those members played no role in AAI's deliberations with respect to the filing of the brief.

that is unavoidable in a concentrated market. For both reasons, it is especially important that courts screen circumstantial-evidence claims correctly.

The Supreme Court has delineated a two-part framework. The plaintiffs must plead and prove (1) "parallel conduct" and (2) "something more," *i.e.*, some "further circumstance pointing toward a meeting of the minds." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 560 (2007); *see also id*. at 560 (discussing "*Monsanto* and *Matsushita*" and observing that the framework for determining whether an inference of agreement is permissible is the same on a motion for summary judgment and a motion to dismiss). Evidence pointing toward a meeting of the minds is called a "plus factor." *Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig. v. Samsung Elecs.*, 28 F.4th 42, 47 (9th Cir. 2022) ("[P]lus factors serve as the 'something more.'") (quoting *Twombly*, 550 U.S. at 557).

The district court here failed to faithfully apply the Supreme Court's two-part framework. It erred in both parts of the analysis by conflating the second part of the framework with the first part. Instead of asking whether Plaintiffs can prove parallel conduct and plus factors, it asked whether Plaintiffs can show "unusual parallel conduct." Op. at 148. Specifically, it required Plaintiffs to show conduct that is "so unusual" in its *parallelism* that it is even more parallel than oligopolistic interdependence. *Id*. at 43 (quoting the plus-factor discussion in *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999)); *id.* at 48 (same) (internal quotation marks omitted); *see also id.* at 148 (describing requirement as "unusual parallel conduct"). But the point of plus-factor analysis is to distinguish oligopolistic interdependence from agreement.

By converting the Supreme Court's threshold requirement of "merely parallel" conduct, *Twombly*, 550 U.S. at 557, into a requirement of "unusual parallel conduct," Op. at 148, the district court smuggled plus factors into the threshold inquiry—specifically "simultaneity" plus factors, which involve evidence that defendants acted unusually close together in time or in close sequences. In doing so, it fundamentally altered both parts of the two-part framework. It altered the threshold inquiry by throwing up an unprecedented new hurdle for plaintiffs alleging parallel conduct in oligopoly markets: "unusual" interdependence, Op. at 48 (quoting the plus-factor analysis in *Baby Food*, 166 F.3d at 135), instead of the "mere interdependence" that precedent requires. *Twombly*, 550, U.S. at 556, n.4 (quoting 6 Phillip E. Areeda & Herbert Hovenkamp*, Antitrust Law: An Analysis of Antitrust Principles and their Application* § 1425, at pp. 167–85 (2d ed. 2003)). And it altered the plus-factor inquiry by treating certain plus factors as elements, such that their absence is grounds for summary judgement rather than a factor to consider among other factors.

Antitrust law recognizes a "basic distinction" between concerted and independent conduct. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). But the district court overlooked the obvious fact that both concerted and independent conduct are parallel conduct in an interdependent oligopoly. Price fixing is parallel conduct and "conscious parallelism," as the name implies, is parallel conduct too. *Twombly*, 550 U.S. at 553 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 227 (1993)).

By refusing to treat Defendants' conscious parallelism as parallel conduct, the district court badly distorted the law and made cartel enforcement significantly more difficult in the very industries where cartels are most likely to form. Raising the bar for parallel conduct to require unusual simultaneity in oligopoly markets double-counts the benefit of the doubt given to oligopolists, who already enjoy discounts on plus factors that "largely restate the phenomenon of interdependence." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004). And treating simultaneity as an element rather than a plus factor ensures that other plus factors will be ignored whenever simultaneity evidence is not present. The result is a how-to guide for oligopolists seeking to shield secret cartel agreements from scrutiny: they need only use artifice to make collusive conduct appear spaced apart in time or sequencing, as numerous cartels have already shown they are quite adept at doing.

The district court's approach not only fails as a matter of law but as a matter of competition policy. It wrongly assumes that, because the rail freight market is an oligopoly, Defendants' conduct is easily explained by conscious parallelism. That assumption is unsound and fails the error-cost test.

For the reasons explained more fully below, the district court's approach should be rejected.

ARGUMENT

The district court erred by allowing plus factors to "bleed into" the parallel-conduct requirement. Op. at 43 n.10. This analytical error led the court to mistakenly hold that conscious parallelism is not parallel conduct and to treat simultaneity as an element rather than a plus factor, preventing the plus-factor analysis from serving as the flexible, holistic, and context-dependent indicator of collusion that the Supreme Court intended it to be. If the district court's approach is not rejected, these errors will make it more difficult for plaintiffs to plead and prove a Section 1 violation in the very markets where collusion is most likely to occur, rendering the Sherman Act toothless against the most common and harmful forms of collusion.

I. "Mere Interdependence" is the Threshold Requirement; "Unusual" Interdependence is the "Something More" that Plus-Factor Analysis Determines

The district court's first error was to raise the bar for pleading and proving the threshold parallel-conduct requirement in oligopoly markets. Instead of "mere interdependence," *Twombly*, 550 U.S. at 556, n.4, the district court required "unusual" interdependence. Op. at 48, (quoting the plus-factor analysis of *Baby Food*, 166 F.3d at 135); *see also id.* at 148 (requiring "unusual parallel conduct"). This was erroneous because "[p]arallel conduct alone" satisfies the threshold showing. *Mosaic Health, Inc. v. Sanofi-Aventis U.S., LLC*, 156 F.4th 68, 77 (2d Cir. 2025). And while parallel conduct alone is not sufficiently suggestive of conspiracy unless it is accompanied by "something 'more.'" *id.* (citing *Twombly*, 550 U.S. at 556 n.4), the "more" is not limited to unusual parallelism, as the district court held. Any "further circumstance pointing toward a meeting of the minds" can be a plus factor. *Twombly*, 550 U.S. at 557, 560; *see also id*. at 557, 570 (Any "further factual enhancement"—"some setting suggesting the agreement"—can be a plus factor that moves parallel conduct "across the line" for purposes of establishing entitlement to relief.); *see also SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 424 (4th Cir. 2015) ("That 'more' must consist of 'further circumstance[s] pointing toward a meeting of the minds[,] … [o]ften 'characterized as "parallel plus" or "plus factors."'") (quoting *Twombly*, 550 U.S. at 557, and *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 45 (1st Cir. 2013)).

The plus-factor analysis emerged from a concern that firms sometimes engage in parallel conduct that is consistent with an anticompetitive agreement, and that even has obvious anticompetitive effects, but that "could be because of 'chance, coincidence, independent responses to common stimuli, or mere interdependence.'" *Mosaic Health*, 147 F.4th at 7 (quoting *Twombly*, 550 U.S. at 556 n.4). "Interdependence" is a phenomenon, unique to oligopoly markets, which gives rise to "conscious parallelism," whereby all of the firms in the market "recognize their shared economic interests … with respect to price and output decisions." *Twombly*, 550 U.S. at 553 (quoting *Brooke Grp.*, 509 U.S. at

227); *see also Williamson Oil Co. v. Philip Morris USA,* 346 F.3d 1287, 1299 (11th Cir. 2003) (describing oligopolists' "rational recognition that the market structure in which they operate will most easily yield profits by means other than price competition."). This conscious parallelism can sometimes—but does not always, *see infra* Part III.A.—give rise to harmful "oligopolistic price coordination," whereby firms "in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level." *Brooke Grp.*, 509 U.S. at 227.

When a court holds that oligopolistic price coordination is parallel conduct, it is holding something exceedingly uncontroversial: that "conscious parallelism" is parallel; nothing more. Having acknowledged that Plaintiffs established Defendants "operated as an oligopoly," Op. at 72; *see id*. at 6, and that they achieved supracompetitive pricing outcomes through either lawful oligopolistic price coordination or unlawful agreement, Op. at 37–38, 46–47, 67, the district court should have ended its inquiry into parallel conduct and shifted the focus of its analysis to Plaintiffs' plus-factor evidence. Indeed, litigants and courts often ignore the parallel conduct question altogether because parallelism is so obvious in oligopoly markets. *See id*. at 42 (citing examples).[3]

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[3] The district court conceded that parallel conduct often goes uncontested but speculated that this is because the question is "fact intensive." Op. at 42. Neither of the two cases the district court cites—the Second Circuit's unpublished summary order in *Tera Grp., Inc. v. Citigroup, Inc.*, 2024 U.S. App. LEXIS 26029 (2d Cir. 2024) and the Third Circuit's opinion in *Williamson Oil*, 346 F.3d at 1310—support that conclusion. Indeed, *Williamson Oil* held precisely

The irony of finding that conscious parallelism is not parallel conduct was lost on the district court, which led it to draw a string of contradictory conclusions. The court held, on the one hand, that Defendants are in "an interdependent oligopoly," and on the other, that Plaintiffs "cannot demonstrate that defendants even acted in a parallel fashion." Op. at 37. And it reached this holding notwithstanding its repeated concession that, as a result of oligopolistic interdependence, the only lawful explanation for defendants' conduct was "independent *parallel* behavior." Op at 35–36 (quoting *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 879 (7th Cir. 2015) (Posner, J.)) (emphasis added).

The district court had no other way to characterize the defendants' conduct as lawful. The only lawful alternative to independent parallel behavior would have been independent unilateral behavior, but that is not possible because of interdependence. Richard Posner, *Economic Analysis of Law* 311 (7th ed. 2007) (explaining why firms in an interdependent oligopoly cannot help but adapt their behavior to the anticipated reactions of their rivals). At one point the district court suggested firms in an interdependent oligopoly could engage in "conscious parallelism borne of unilateral action," Op. at 135, but that formulation, which has never appeared previously in case law, is a contradiction

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the opposite—that "the existence of parallel pricing behavior" was "plain[]" and "uncontroversial." 346 F.3d at 1304. The more reasonable explanation is that, as in *Williamson Oil*, defendants often do not bother disputing that oligopolistic coordination is parallel. *See id.*

in terms. Independent, unilateral behavior *despite* conscious parallelism would be a paradox. How does a firm in an interdependent oligopoly set its prices *without regard* to the likely reactions of its competitors? *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.).

Both of the district court's either/or findings—either agreement or conscious parallelism—require the holding that Defendants engaged in parallel conduct because both unlawful agreement and lawful oligopolistic price coordination are invariably parallel. The district court thus failed to credit its own repeated findings that the threshold parallel-conduct requirement was satisfied. *See, e.g.*, Op. at 37 (finding that elevated FSCs were motived by either an "an illicit agreement" or "self-interested decision-making in an interdependent oligopoly"); Op. at 38 (finding that some of Plaintiffs' plus factors "may be equally consistent with lawful interdependence" as with an agreement); Op. at 69–70 (finding Defendants' conduct "more consistent with conscious parallelism than the existence of an unlawful agreement.").

The district court could hold that conscious parallelism is not parallel conduct only by combining and conflating Section 1's threshold parallel-conduct requirement with its plus-factor requirement. *See* Op. at 4 (characterizing conduct as not "sufficiently parallel"). It ported over a cluster of plus factors, involving the timing and nature of the conduct, from the second part of the two-part framework to the first part. The analytical error is evident from the court's many non-sequiturs in which it concluded that conduct was not parallel because certain plus factors indicative of simultaneous price movements were lacking, such as its statements that "pricing, strategy, or practice changes over time lead[] inexorably to the conclusion that defendants did not take parallel action," and "[t]hat defendants all increased prices in some fashion over the course of a year and took efforts to enforce those higher prices is not enough" to show parallel conduct. Op. at 44, 67.

Those statements are plainly wrong. First, parallel price increases are widely recognized as a paradigmatic example of parallel conduct. *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 131 (D.D.C. 2006) (discussing "parallel behavior, such as parallel price increases"); *see also In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1197 (9th Cir. 2015) ("[P]arallel price increases … are no different from other forms of parallel conduct."); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 398 (3d Cir. 2015) (discussing "parallel price increases, as opposed to some other form of concerted action").[4]

Second, "pricing, strategy, and practice changes over time," Op. at 44, are all widely recognized as plus factors, as the cases the district court cited all

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[4] The district court implied in passing that interdependent oligopoly pricing fails the parallel conduct test not because it it is not parallel but rather because it is not "conduct." *See* Op. at 47 ("A conspiracy requires not just similar price outcomes among defendants, as plaintiffs insist defendants reached, but parallel price *changes*—or parallel *behavior* of some other kind—during the conspiracy period."). Although we do not read the court to necessarily hold that pricing is not "conduct" or "action," we submit that such a proposition is false for a variety of reasons, one of which is that the cases cited above hold otherwise.

hold. *See, e.g., In re RealPage, Inc., Rental Software Antitrust Litig*. (No. II), 709 F. Supp. 3d 478, 505 (M.D. Tenn. 2023) ("[T]emporal proximity of the parallel conduct is only one factor"; "there is no infirmity with the *type* of parallel conduct the Multifamily Plaintiffs allege."); *In re Baby Food*, 166 F.3d at 35 (discussing, in the plus-factor section of the opinion, the requirement that "[p]arallel price-fixing" be "unusual" such that it "go[es] beyond mere interdependence" for purposes of establishing plus-factor evidence); *In re Pork Antitrust Litig.*, 781 F. Supp. 3d 758, 821 (D. Minn. 2025) (relating "the relevant time period" to the question of whether "communications among competitors can constitute a plus factor").

The circuit court cases the district court relied on to justify conflating plus-factor analysis with the threshold parallel conduct analysis do not support its holding either. All did something very different than what the district court does here. In *Baby Food,* the Third Circuit looked at the plaintiffs' evidence of parallelism and found not that it was "not parallel enough," Op. at 95, but rather that the plaintiffs' allegations that the market operated as an oligopoly were unsubstantiated by the evidentiary record. *Baby Food* at 132. The plaintiffs lost because the record "negate[d] the plaintiffs' inference of conscious parallelism" on which its allegations of interdependence were premised. *Id*. Unlike in *Baby Food*, oligopoly and interdependence are not in doubt here. Op. at 6, 37, 38, 69–70, 72.

Anderson News, L.L.C. v. Am. Media, Inc. offers no support at all for the district court's approach because it is not even a case about oligopoly pricing. 899 F.3d 87, 95 (2d Cir. 2018). The line between tacit collusion and illegal agreement was not at issue. It was a group boycott case, meaning the plaintiffs' allegations were grounded in a theory that the defendants all reached an agreement to cease doing business with the plaintiff. *Id.* After questioning whether the defendants stood to benefit by putting the plaintiff out of business via boycott, the court determined that the plaintiffs' conspiracy theory "makes no economic sense." *Id.* at 99 (internal quotation marks omitted); *see id.* at 102 (noting that plaintiff's evidence did not "show that reducing competition would in any way benefit" the defendants). As in *Baby Food*, the question was not whether the defendants were acting the way we expect oligopolists to act—i.e., colluding or coordinating—but whether they were acting like oligopolists at all: the court did not agree that a group decision to stop dealing with the plaintiff was in the defendants' shared self-interest, individually or collectively.

Finally, *Kleen Products, Chocolate Confectionary,* and *Text Messaging* are not to the contrary. Each reinforces the idea that the analysis of the timing and the nature of price increases in oligopoly price fixing cases belongs squarely in a holistic plus-factor analysis, not in a threshold parallel conduct inquiry. *See Kleen Prods. LLC v. Georgia-Pacific LLC,* 910 F.3d 927, 936–41 (7th Cir. 2018) (assessing whether timing and nature of price increases broke with historic practice as a plus factor alongside interfirm communications, evidence of prior knowledge, and other plus factors); *Chocolate Confectionary*, 801 F.3d at 398–99 (noting no dispute that alleged conspiratorial price increases were sufficient to show parallel conduct and discussing "timing of" price increases in plus-factor analysis); *Text Messaging*, 782 F.3d at 877 (analyzing non-"lockstep" timing of allegedly collusive price increases as part of six-part plus-factor analysis).

All of the relevant precedent recognizes that plus factors are not used to determine whether conduct is sufficiently *parallel*; they are for determining whether parallel conduct is suggestive of lawful interdependence or unlawful agreement. *Twombly*, 550 U.S. at 554. Plaintiffs do not have to show a "degree of parallelism" in the qualitative sense, Op. at 42, or that conduct is "particularly parallel," Op. at 43 n.10, at the threshold. *Mosaic Health*, 156 F.4th at 81 ("[T]he Supreme Court and our binding authority that followed rejects setting a high bar for what constitutes parallel conduct."). Rather, the Supreme Court's precedent holds that "[p]arallel conduct alone," *Mosaic Health* at 192 (citing *Twombly*, 550 U.S. at 556 n.4), including "mere interdependence," *Twombly*, 550 U.S. at 556 n.4, satisfies the threshold showing and shifts the focus of the analysis to plus factors.

II. Plus "Factors" Are Not Elements

The district court's second error was to allow the plus factor requirement to "bleed into" the threshold parallel-conduct requirement. Op. at 43 n.10. No other court has ever held that this approach is legally permissible or analytically sound. It is not.[5]

The district court's approach fundamentally changes the nature of both the parallel-conduct and plus-factor requirements, contravening the Supreme Court's two-part framework. It converts plus factors from "something more" into "something more parallel"—indeed, something "so unusual" in its parallelism, Op. at 48 (internal quotation marks omitted), that it is more parallel even than oligopolistic coordination, which the Supreme Court has identified as the form of parallel conduct that comes closest to concerted action on its own. *See Twombly* 550 U.S. at 553–54 ("Even 'conscious parallelism' … is 'not itself unlawful'") (quoting *Brooke Grp.*, 509 U.S. at 227); *id*. at 557 ("[P]arallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim.").

This has the effect of improperly converting certain plus factors into elements. The flaw in the district court's analysis is illustrated by an article the

[5] The district court cited *Baby Food* in support of this claim, pointing to the fact that *Baby Food* discussed the "unusualness" of the parallel conduct under a section-heading of the opinion labeled "plus factors." Op. at 43 n.10 (citing *Baby Food*, 166 F.3d at 135). But the district court never explains its circular reasoning. The *Baby Food* court located its unusualness discussion under the plus-factor heading, confirming it treated unusualness as a plus factor, as every other court has treated it. Moreover, the *Baby Food* court had already analyzed the threshold parallel-conduct requirement by that point in the opinion and never hinted at any "bleeding" between the two requirements. To the contrary, it held that Plaintiffs need only "present[] evidence of Defendants' consciously parallel pricing and supplement[] this evidence with plus factors." 166 F.3d at 122.

district court itself cites. *See* Op. at 44. Professor Christopher Leslie, who has published many of the leading articles on the role of circumstantial evidence in Section 1 cases, explains why it is essential for courts to respect the legal difference between a factor test and an element test in antitrust cases. *See generally* Christopher R. Leslie, *The Factor/Element Distinction in Antitrust Litigation*, 64 Wm. & Mary L. Rev. 585 (2023). In short, element tests require that a litigant prove a series of independent components to succeed. A single element, if not proven, will lead the claim or defense to fail. A factor test, by contrast, does not hinge on any single component of the analysis for success. The distinction is vital: "Confusing a factor for an element, or vice versa, will necessarily distort the analysis—and sometimes the results—in many legal disputes." *Id*. at 593.

Professor Leslie explains that, while there are many element tests in antitrust law, including the element of concerted action in Section 1 cases, factor tests are often embedded in elements. The "plus factor" test, as the name suggests, is a factor test embedded in Section 1's concerted action element. Specifically, it is an "over-the-line" factor test as distinct from a "balancing" factor test. *See Twombly*, 550 U.S. at 570 (Plaintiffs must "nudge" their claims "across the line."). In the article cited by the district court, Professor Leslie explains the difference as follows:

> In a balancing-factor test, the absence of a factor has legal significance because the presence or absence of each factor determines the overall balance of factors. There are two sides of the ledger, one for factors that

> support the plaintiff 's position and one for factors that support the defendant's position….
>
> In contrast to balancing tests, over-the-line tests do not entail weighing. These tests require the party with the burden of proof to present enough factors to meet their burden. The two-sided ledger is replaced with a line—an evidentiary threshold that the party with the burden of proof must cross.

Id. at 592 (internal citations omitted).

Other circuits have warned against the error that Professor Leslie identifies: treating plus factors as elements in circumstantial-evidence cases under Section 1. As the Fourth Circuit put it, courts should not "parse each 'plus factor' individually and ask whether that factor, standing alone, would be sufficient to provide the [something] 'more'" required by the Supreme Court's framework. *Black & Decker*, 801 F.3d at 425; *see also id.* (explaining that "plus factors must be analyzed in groups or 'constellations'" because "[a]ctions that might seem otherwise neutral in isolation can take on a different shape when considered in conjunction with other surrounding circumstances") (citation omitted); *see also* Leslie, *supra*, at 592–93 ("[N]o single factor is ever required. If a factor were required, it wouldn't be a factor; it would be an element.").

The district court here failed to heed that advice. By smuggling plus factors into its very definition of parallel conduct, Op. at 43, 48, 148, the court effectively converted those plus factors into elements. Instead of requiring Plaintiffs to point to "something" more under *Twombly*, 550 U.S. at 560, it required Plaintiffs to point to one thing: parallelism "so unusual" that it is somehow even more parallel that oligopolistic coordination. Op. at 48 (internal quotation marks omitted).

Under the district court's approach, the absence of evidence becomes evidence of absence. *See Leslie*, *supra*, at 591, 630. The court treats its finding that Plaintiffs lack plus-factor evidence sufficient to show "pricing, strategy, or practice changes over time," Op. at 44, as disproving concerted action. Because Plaintiffs fail at the threshold under the district court's approach, the entire framework collapses into the single question of whether conduct is "parallel enough." Op. at 70, n.15. Under this approach, courts are encouraged to ignore the Supreme Court's over-the-line test, where inferences must be drawn in the non-movant's favor, in favor of weighing the qualitative "degree of parallelism," Op. at 42, and deciding whether, on balance, it is wanting.

Courts have long held that such weighing is not permissible at summary judgment under *Matsushita*, which "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 468 (1992); *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (Posner, J.) (cautioning courts against falling into this "trap"); *see also* Edward D. Cavanagh, Matsushita *at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?*, 82 Antitrust L.J. 81, 98–99 (2018) (warning that the Supreme Court's "tends to exclude" formulation can wrongly encourage lower courts to weigh evidence). "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury." *Kodak*, 504 U.S. at 468.

The district court's approach poses significant dangers to cartel enforcement and deterrence. As Professor Leslie notes, the type of error the district court committed distorts a test meant to ask whether there is sufficient evidence to support a reasonable inference of conspiracy into one in which a particular type of evidence becomes necessary for the case to go to a jury. Leslie, *supra*, at 591, 630. Here the district court required close timing of parallel price increases to establish threshold parallel conduct notwithstanding that simultaneity is a well-recognized plus factor. *See, e.g.*, *Mayor & City Council of Balt. v. Citigroup., Inc.,* 709 F.3d 129, 136–38 (2d Cir. 2013); Leslie, *supra*, at 625–29. There is a perilous difference between, on the one hand, acknowledging that particularly close timing increases the suspiciousness of parallel conduct and, on the other, treating a lack of particularly close timing as evidence of innocence. The latter is inconsistent with the factor/element distinction and conflicts with binding Supreme Court precedent holding that "an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Cir., Inc. v. United States*, 306 U.S. 208, 227 (1939).

The district court's approach is also especially dangerous for consumers. As Professor Leslie explains, "when antitrust opinions treat certain plus factors as elements, judges provide a roadmap for price-fixing conspirators for how to structure their cartel operations and how to implement their price increases." Leslie, *supra*, at 630. Real world examples where cartelists manipulated the timing and nature of parallel conduct to avoid detection and liability abound. The infamous 1990s vitamin cartel, for example, agreed that a designated member would announce a price increase while others waited for a "prechoreographed" moment to follow, rotating the leader to avoid a suspicious appearance. *Id*. at 633. Similar "staggering" schemes have been carried out by cartels in various industries, including carbonless paper, electrical and mechanical carbon and graphite products, copper plumbing tubes, fine arts auction houses, and sorbates. *Id*. at 629 (citing cases).

The solution to the problem is not to discount the timing and nature of the parallel conduct altogether, but to treat it properly as a factor rather than an element embedded in the threshold parallel-conduct requirement. It should be considered alongside other plus factors in determining whether summary judgement is appropriate. That is the only approach that allows the Supreme Court's two-part framework to be flexible enough to respond to a variety of factual contexts, as it must in order to properly deter cartel behavior.

The district court's approach is dangerous because "cartel managers conceal their collusion through myriad deceptions." *Id*. at 638. Requiring "unusual parallel conduct," Op. at 148, creates loopholes that creative cartelists will exploit. It also improperly gives oligopolists the benefit of the doubt twice over: once by discounting "motive to conspire" and "actions against self-interest" as plus factors, because they "'largely restate the phenomenon of interdependence,'" Op. at 38 (quoting *Flat Glass,* 385 F.3d at 360–61), and then again by ignoring all other plus-factor evidence that may be suggestive of conspiracy when the timing-and-nature plus factors do not make parallel conduct "unusual." Op. at 43, 48, 148.

III. The District Court's Approach Ignores the Economics of Oligopoly Pricing

The district court's analysis also rests on an economically incorrect assumption that interdependence necessarily explains supracompetitive pricing in an oligopoly. That is not at all clear, either in general or on the facts of this case. Assuming as much puts a thumb on the scale against Section 1 plaintiffs in oligopoly settings, making Section 1 enforcement more difficult in precisely those markets in which the risks of collusion are highest and the risks of overdeterrence are lowest. This Court should reject the district court's unwarranted assumption.

A. Interdependence Does Not Explain Supracompetitive Prices

The district court's assumption that Defendants' supracompetitive prices can be explained by conscious parallelism alone rests on an incomplete analysis. In a competitive market with many sellers, an individual seller is too small for his decisions on pricing and output to affect the market price. By lowering his prices, he can increase sales and make a higher profit. Because there are so many other sellers, each will only lose a fraction of sales to him, and so they are unlikely to feel pressure to quickly lower their prices to match his, allowing him to continue to reap profits. The seller in a competitive market thus can make pricing decisions without regard to how his competitors will respond. Posner, *Economic Analysis of Law* 310–11.

In a highly concentrated oligopoly market, however, one seller's price decrease and corresponding increase in sales will infringe greatly on his rivals' sales. This means that the seller's rivals will promptly react by meeting his prices, quickly nullifying any gains he could make by lowering his price. The rational oligopolist thus will be reluctant to lower his prices. According to the "price leader" theory advanced by Donald Turner and others, the corollary to this proposition is that he may also raise his prices to supracompetitive levels, relying on his competitors to recognize that they would all be better off at the higher price and to raise their own prices to match. *See id*.

While that much is well accepted, it is "incomplete." *Id*. at 311. Judge Posner and others have hotly contested the idea that supracompetitive pricing can be easily explained by interdependence alone. "If oligopolists are so wary of each other's reactions to any price change," Posner reasons, "an oligopolist contemplating a price increase would worry that its competitors would delay in matching the increase, since by lagging they would gain sales at his expense." *Id.* "How then would a supracompetitive oligopoly price emerge?" *Id*. The same coordination problem that cartelists must overcome to form cartels should, in theory, cause similar problems for oligopolists who wish to coordinate their prices at supracompetitive levels.

Put another way, the logic of the price-leader theory is in tension with the logic of interdependence: just as a rational oligopolist will be reluctant to reduce prices because it expects its rivals to follow, it will also be "reluctant to exercise price leadership knowing that the others will be tempted by the prospect of short-term gains at his expense to lag in following." Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stanford L. Rev. 1562, 1568–69 (1968). Thus, argues Posner, supracompetitive oligopoly prices are best explained not by interdependence but by collusion. *Id.* at 1569; *see also* Posner, *Economic Analysis of Law* 311 ("A simple alternative to the 'interdependence' theory is to view anticompetitive pricing in oligopolistic markets as … a special case of the theory of cartels.").

The district court did not adopt either Turner's or Posner's reasoning in reaching its conclusions. Instead, it merely assumed that conscious parallelism could explain Defendants' supracompetitive prices, without holistically assessing all of Plaintiffs' plus-factor evidence and without placing the burden on Defendants to establish as much. Because it is far from obvious that supracompetitive prices can be explained by interdependent pricing alone, without an agreement, the district court's opinion reflects an unwarranted analytical bias against a finding of collusion—one that is unjustified by economic theory.

B. When Oligopolies Achieve Supracompetitive Prices, the Risks of False Positives Are Low and the Costs of False Negatives Are High

The district court's approach also fails when viewed through the lens of error-cost analysis. Error-cost analysis involves weighing the costs of "false positives"—finding a violation when the conduct does not harm competition—against "false negatives"—not finding a violation when the conduct harms competition—alongside the "transaction costs" associated with the legal process. C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 Antitrust L.J. 41, 43–52 (1999). Because "antitrust rules benefit society primarily by deterring harmful conduct," an error-cost analysis must account for "the consequences of the decision or legal rule for conduct by other firms, not simply to . . . the parties to the case." Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L. J. 1, 5 n.18 (2015). False positives risk chilling conduct that is potentially beneficial, while false negatives fail to deter harmful conduct. An ideal legal rule is one that minimizes both types of error with the lowest possible transaction cost.

From an error-cost perspective, the district court's approach accepts the risk of false negatives in order to avoid false positives. The problem is that it does so in a context in which the social cost of false positives is comparatively low, and the social cost of false negatives is high. Perversely, it tolerates supracompetitive prices and consumer harm out of fear of punishing conduct—oligopoly price leadership—which has little to no social benefit.

Legally and economically, it is well settled that the risk of coordination is higher in oligopoly markets than in competitive ones. This is due to the simple fact that, "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (Bork, J.)); *see also Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) ("[T]he fewer competitors there are in a market, the easier it is for them to coordinate their pricing. . . .").[6] The risk is even higher in the presence of high entry barriers. *Heinz*, 246 F.3d at 724 ("The combination of a concentrated market and barriers to entry is a recipe for price coordination.").

At the same time, oligopolists who do not charge supracompetitive prices are unlikely to be hauled into court. Private plaintiffs are likely to bring Section 1 claims only when they can prove they paid overcharges, which is necessary to establish injury-in-fact and antitrust standing. *See, e.g.*, *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 981–82 (D.C. Cir. 2017). Thus, lawsuits are

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[6] This "concentration-coordination inference" undergirds much of contemporary merger enforcement, which treats the avoidance of oligopoly as a necessary stopgap against tacit collusion. D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 Fla. L. Rev. 265, 282 (2024).

likely to follow only when oligopolies solve their coordination problems and successfully achieve the harmful price leadership that generates supracompetitive prices, not when they have engaged in more innocent and unavoidable "mere interdependence." *Twombly*, 550, U.S. at 556, n.4. The costs of false positives therefore are likely to be limited to instances where consumers are being injured, and they are offset to a large extent by deterrence gains, insofar as oligopolists forced into interdependence are discouraged from attempting to tacitly collude to raise prices.

Meanwhile, the social costs of false negatives are high, and they are borne both by consumers and by society as a whole. When oligopolists charge consumers more for services than they would be able to charge in a competitive market, they extract excess profits at consumers' expense. *Kleen Prods.*, 910 F.3d at 942 ("[O]ligopolistic behavior . . . leads to higher prices and reduced consumer choice . . . ."). In this way, oligopoly pricing is bad for consumer welfare because it reduces the share of the pie that goes to consumers. *See* Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 337–38 (2010). But it also bad for society because it reduces the size of the pie: higher prices mean fewer sales, which, in economic terms, means a suboptimal allocation of resources that reduces total surplus, creating deadweight loss. *See, e.g.*, Bruno Pellegrino, *Product Differentiation and Oligopoly: a Network Approach* (2019) 4, https://ssrn.com/abstract=3329688.

Contemporary scholarship suggests that these combined costs are high: in 2021, oligopoly profits amount to an estimated 22.7% of total surplus, producing an estimated deadweight loss of 12.6%, or around $1.81 trillion. *Id.*

As a matter of economic policy, the district court's approach tolerates the very real—and very high—costs of supracompetitive prices out of fear of punishing conduct which has little, if any, social value. And it does so in precisely the context in which illegal conduct is most likely to occur.

CONCLUSION

For the foregoing reasons, the district court's opinion should be reversed.

Respectfully submitted,

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