25-2756 (L),

25-2792 (Con), 25-2824 (Con), 25-3055 (Con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL NATIONAL MORTGAGE ASSOCIATION, PRINCIPAL FINANCIAL GROUP, INC., PRINCIPAL FINANCIAL SERVICES, INC., PRINCIPAL LIFE INSURANCE COMPANY, PFI BOND & MORTGAGE SECURITIES FUND, PFI BOND MARKET INDEX FUND, PFI CORE PLUS BOND I FUND, PFI DIVERSIFIED REAL ASSET FUND, PFI EQUITY INCOME FUND, PFI GLOBAL DIVERSIFIED INCOME FUND, PFI GOVERNMENT & HIGH QUALITY BOND FUND, PFI HIGH YIELD FUND, PFI HIGH YIELD FUND I, PFI INFLATION PROTECTION FUND, PFI MONEY MARKET FUND, PFI PREFERRED SECURITIES FUND, PFI SHORT-TERM INCOME FUND, PRINCIPAL VARIABLE CONTRACTS FUND, INC., PVC ASSET ALLOCATION ACCOUNT, PVC BALANCED ACCOUNT, PVC BOND & MORTGAGE SECURITIES ACCOUNT, PVC EQUITY INCOME ACCOUNT, PVC GOVERNMENT & HIGH QUALITY BOND ACCOUNT, PVC INCOME ACCOUNT, PVC MONEY MARKET ACCOUNT, PVC SHORT-TERM INCOME ACCOUNT, PRINCIPAL FUNDS, INC., MAYOR AND CITY COUNCIL OF BALTIMORE, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, CITY OF NEW BRITAIN, JENNIE STUART MEDICAL CENTER, INC., VISTRA ENERGY CORP., YALE UNIVERSITY, PFI INCOME FUND, THE FEDERAL HOME LOAN MORTGAGE

(*Caption continued on next page*)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICUS CURIAE THE AMERICAN ANTITRUST INSTITUTE (AAI)

CORPORATION, THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR AMCORE BANK, N.A., AMTRUST BANK, COLONIAL BANK, CALIFORNIA NATIONAL BANK, CORUS BANK, N.A., GUARANTY BANK, IMPERIAL CAPITAL BANK, INDYMAC BANK, F.S.B., INTEGRA BANK, N.A., LYDIAN PRIVATE BANK, PACIFIC NATIONAL BANK, PARK NATIONAL BANK, R-G PREMIER BANK OF PUERTO RICO, SAN DIEGO NATIONAL BANK, SILVERTON BANK, N.A., SUPERIOR BANK, UNITED COMMERCIAL BANK, UNITED WESTERN BANK, WASHINGTON MUTUAL BANK, WESTERNBANK PUERTO RICO,

Plaintiffs - Appellants,

v.

THE ROYAL BANK OF SCOTLAND PLC, UBS AG, CREDIT SUISSE AG, CREDIT SUISSE INTERNATIONAL, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., MERRILL LYNCH CAPITAL SERVICES, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF SCOTLAND PLC, THE ROYAL BANK OF SCOTLAND GROUP PLC, NATWEST MARKETS PLC, FKA THE ROYAL BANK OF SCOTLAND PLC, BRITISH BANKERS' ASSOCIATION, BBA ENTERPRISES, LTD., BBA LIBOR, LTD., CHASE BANK USA, N.A., COOPERATIEVE CENTRALE RAIFFEISEN - BOERENLEENBANK B.A., NKA COOPERATIEVE RABOBANK U.A., DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES INC., HBOS PLC, J.P. MORGAN BANK DUBLIN PLC, FKA BEAR STEARNS BANK PLC, JPMORGAN CHASE BANK, N.A., JPMORGAN CHASE & CO., J.P. MORGAN SECURITIES LLC, LLOYDS BANKING GROUP PLC, LLOYDS BANK PLC, ROYAL BANK OF CANADA, RBS SECURITIES INC., UBS SECURITIES LLC, BARCLAYS BANK PLC, BBA TRENT LTD., FKA BBA LIBOR, LTD., COOPERATIEVE RABOBANK UA, FKA COOPERATIVE CENTRALE RAIFFEISEN-BOERENLEENBANK, B.A., HSBC BANK PLC, HSBC BANK USA, N.A., WESTLB AG, PORTIGON AG, FKA WESTLB AG, MERRILL LYNCH INTERNATIONAL BANK, LTD., THE HONGKONG AND SHANGHAI BANKING CORPORATION, LTD., BEAR STEARNS CAPITAL MARKETS, INC., J.P. MORGAN MARKETS LTD.,

FKA BEAR STEARNS INTERNATIONAL, LTD., MERRILL LYNCH & CO.,

Defendants - Appellees,

(Caption continued on next page)

MERRILL LYNCH INTERNATIONAL,

Defendant-Interested-Party-Appellee,

JPMORGAN CHASE BANK, N.A.,

Defendant-ADR Provider-Appellee,

CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC,

Defendants.

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May 26, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 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.

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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]

SUMMARY OF ARGUMENT

The standard for summary judgment in a Section 1 case under the Sherman Act is the same as in any other: a defendant is entitled to summary judgment only when, drawing all reasonable inferences in favor of the plaintiff, no rational jury could find in its favor. *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 61 (2d Cir. 2012); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 468 (1992). Because collusion is almost always hidden, Section 1 plaintiffs are often forced to

[1] All parties consent 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. Certain members of AAI's Board of Directors or Advisory Board, or their law firms, represent Plaintiffs-Appellants, but they played no role in AAI's deliberations with respect to the filing of the brief.

rely on circumstantial evidence—including evidence of defendants' conduct—to prove a violation.

At the same time, courts have recognized that, in oligopoly settings, firms may operate in parallel even in the absence of an agreement. They have thus adopted the so-called "parallel-plus framework," under which Section 1 plaintiffs who rely on ambiguous evidence of oligopolists' parallel conduct must also provide "plus factors" that make the inference of an agreement reasonable. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *Publ'n Paper*, 690 F.3d at 62. Courts "have not coalesced on a uniform definition of plus factors," but many conceive of them as "economic actions and outcomes" that are inconsistent with unilateral behavior and consistent with concerted action. Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 Am. U. L. Rev. 1713, 1727 (2020) [hereinafter "*Circumstantial Evidence*"] (quoting *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015)). Here, however, in addition to economic evidence, Plaintiffs-Appellants have offered extensive documentary evidence of express communications—a type of non-economic evidence that, while rarely available, can prove an actual agreement independently of the parallel-plus framework. *See infra* Part I.

The district court strayed far from the well-trodden summary judgment standard in evaluating Plaintiffs-Appellants' documentary evidence. It speciously

characterized evidence of express communications as circumstantial that other courts have characterized as direct, then equated circumstantiality with ambiguity to permit itself to draw inferences in Defendants-Appellees' favor, and then misapplied the parallel-plus framework by imposing an erroneous parallel-conduct standard and failing to consider the evidence as a whole.

If followed by other courts, the district court's approach will undermine Section 1 by artificially suppressing the probative value of express communications, holding plaintiffs to inappropriate standards when they prove violations using circumstantial evidence, and distorting the parallel-plus framework. To avoid this outcome, this Court should clarify that plaintiffs can prove a Section 1 claim using circumstantial evidence of an actual agreement, independent of the parallel-plus framework. It should also clarify the parallel-plus framework itself to avoid further misapplication.

ARGUMENT

I. CIRCUMSTANTIAL EVIDENCE OF AGREEMENT CAN INDEPENDENTLY RAISE GENUINE TRIAL ISSUES

The district court's analysis of Plaintiffs-Appellants' circumstantial evidence of conspiracy is premised on a false choice. After characterizing Plaintiffs-Appellants' proffer of direct evidence as circumstantial evidence, the court held that "circumstantial evidence of a conspiracy *must* consist of: (1) evidence of defendants' parallel conduct; and (2) the presence of certain 'plus factors.'" Dist. Ct. Op. at 49

(emphasis added). This either/or framing of the available methods of proof—either direct evidence of an actual agreement or economic evidence of parallel conduct with plus factors—is erroneous and caused the district to overlook genuine trial issues. Reversal is warranted because antitrust plaintiffs may prove agreement using independent evidence of an actual agreement, regardless of whether the evidence is direct or circumstantial.

A. The Jury May Draw Reasonable Inferences of Agreement from Ambiguous Statements

The Supreme Court held in *Twombly* that plaintiffs can prove agreement by offering (1) evidence of parallel conduct with plus factors or (2) "independent [evidence] of actual agreement." 550 U.S. at 564 (noting that the latter was not at issue in the case). The former is "the most common way that plaintiffs present a circumstantial case for price-fixing," Leslie, *Circumstantial Evidence* at 1724, n.53, but it "is merely one such form of circumstantial evidence." *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010) (internal quotation marks omitted).

Nowhere has this Court or the Supreme Court suggested that independent evidence of an actual agreement "must" be direct evidence, as the district court held. Dist. Ct. Op. at 49. Indeed, this Court has been careful to say only that a plaintiff without direct evidence of a conspiracy "may" rely on the parallel-plus framework, preserving flexibility to permit proof using independent circumstantial

evidence. *See, e.g.*, *Mayor & Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (an agreement "*may* be inferred on the basis of conscious parallelism . . . accompanied by circumstantial evidence and plus factors.") (emphasis added) (internal quotation marks omitted); *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) ("[P]laintiffs *may*" present evidence of parallel behavior and circumstantial facts to prove conspiracy) (emphasis added).

The Supreme Court has found circumstantial evidence sufficient to create genuine trial questions on the issue of agreement without relying on the parallel-plus framework. *See, e.g.*, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 767–68 (1984) (affirming inference of a link between termination of price-cutting distributor and illegal agreement based on prior communications about distributor's prices); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 (1966) (evidence of coordinated manufacturer–dealer pressure and communications aimed at stopping discounting "compel[led] the conclusion that a conspiracy to restrain trade was proved."); *Interstate Cir., Inc. v. United States*, 306 U.S. 208, 221 (1939) (affirming inference of agreement between defendant and distributors based on evidence of proposals made by defendant to distributors and distributors' conduct after the proposals were made).

Other courts have expressly held that "a plaintiff can prove an agreement through circumstantial evidence without proof of parallelism." Leslie,

Circumstantial Evidence at 1724, n.53; *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 626 (E.D. Mich. 2012) ("[T]his Court is aware of no case law—nor have Defendants identified any—that mandates that a plaintiff's portfolio of circumstantial evidence in a § 1 case must include proof of parallel conduct."); *see also InterVest, Inc. v. Bloomberg*, L.P., 340 F.3d 144, 165 (3d Cir 2003) (Parallel-plus framework necessary only "[w]ithout any evidence of communication … or other reasonable inferences of concerted action"). That is only possible because plaintiffs can offer independent circumstantial evidence of an actual agreement.

Here, a huge swath of the evidence is documentary evidence of statements by banks and brokers, not conduct evidence. Plaintiffs-Appellants uncovered communications from panel banks' employees and agents directly stating that the banks' submissions were artificially suppressed. *See* Opening Br. at 52–57. They also uncovered "367 documented 'instances in which Panel Banks purportedly spoke to brokers about what LIBOR rates the Banks planned to submit.'" *Id.* at 4 (quoting Dist. Ct. Op. at 118). Viewed "as a whole" in conjunction with the economic evidence, and giving the plaintiffs "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each," *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), these communications should have easily established

genuine trial issues regardless of whether they are characterized as direct or circumstantial evidence.

But the district court evaluated the communications only as a potential plus factor and denied them any significant probative value because it labeled them ambiguous. Dist. Ct. Op. at 119–20 ("The picture that emerges is too murky for us to conclude that the evidence is anything other than ambiguous.") (quotation and citation omitted). Even if it were correct, communications "are not to be disregarded because of their ambiguity." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (noting that direct evidence is "tantamount to an acknowledgement of guilt" and usually "obviate[s] the need for a trial," while circumstantial evidence is "everything else *including* ambiguous evidence"). But it is incorrect. What the district court equated with ambiguity is the need to draw inferences to establish a fact. *See* Dist. Ct. Op. at 119 (The evidence did not "exclude the possibility of independent action."). That is true of *all* evidence, including direct evidence. *See infra* Part I.C.

Under the district court's circular chain of reasoning, all circumstantial evidence requires inferences and all evidence that requires inferences is ambiguous, and therefore plaintiffs' documentary evidence is circumstantial and ambiguous because it requires inferences. Confronted, for example, with the Bank of America LIBOR submitter's statement that she was aware of "a market consensus around

the setting of LIBOR" and a "general understanding as to where LIBOR submissions would be made," the district court concluded that the evidence was ambiguous because it was susceptible to a competing inference: she could have been innocently "maintaining a view … as to where the market was trending." Dist. Ct. Op. 44–46 (cleaned up). Similarly, confronted with the Credit Suisse LIBOR submitter, who stated that "there was a consensus as to where LIBOR was going to fix" on a given day, the district court concluded that that evidence was ambiguous because, from his cumulative testimony, it seemed more likely that he meant "where the fix looks likely" rather than "where it should [be]." Dist. Ct. Op. 44, 46.

On summary judgment, it does not matter that noneconomic evidence is subject to competing interpretations—*i.e.*, that the evidence may be circumstantial rather than direct. Summary judgment is improper if a juror could reasonably infer agreement from just one of the interpretations. *Apex Oil Co. v. Di Mauro*, 822 F.2d 246, 253 (2d Cir. 1987) ("[T]he question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial."); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (The moving party's submission must "foreclose[] the possibility of the existence of certain facts from which it would be open to a jury to infer … a meeting of the minds.") (cleaned up). "The correct standard" is only that "there must be direct or circumstantial evidence that reasonably tends to prove that the [defendants] had a

conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768.

B. *Matsushita* Does Not Prevent Inferences from Noneconomic Evidence of an Actual Agreement

In holding that the availability of competing inferences forecloses the possibility that a juror could reasonably infer an agreement, Dist. Ct. Op. 101–02, 107–09, 118–31, 134–38, the district court badly misread *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Court in *Matsushita* held that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," *id*. at 588, but the operative word is "limits." The Court did not bar all inferences from ambiguous evidence, which would have contravened *Monsanto* by creating a de facto direct-evidence requirement in Section 1 cases. *See Petruzzi's IGA Supermarkets v. Darling-Del. Co.*, 998 F.2d 1224, 1233 (3d. Cir. 1993) ("The Supreme Court [in *Matsushita*] did not draw a distinction between direct evidence on the one hand and circumstantial evidence on the other."). The cases finding genuine trial issues without direct evidence of agreement, cited *supra* in Part I.A., confirm that is not the law.

Properly construed, *Matsushita* applies to conduct evidence, not statements. It provides a frequently applicable but narrow rule limiting the range of permissible inferences from ambiguous evidence of "conduct that is as consistent with permissible competition as with illegal conspiracy." 475 at 588. While *Matsushita*

prevents juries from inferring conspiracy from parallel conduct alone, jurors remain free and capable of weighing competing inferences and making credibility determinations from circumstantial evidence of statements evincing an actual agreement. By characterizing these statements as inherently ambiguous on grounds that they are circumstantial, the district court ignored its obligation to draw these inferences in Plaintiffs-Appellants'' favor at summary judgment.

Matsushita's prohibition on inferring conspiracy from parallel conduct alone is premised on an economic concern involving "conscious parallelism." *Theatre Ents., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (prohibiting inference from "parallel behavior" and quipping that "'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."). But conscious parallelism is unique to concentrated oligopoly markets. It is a form of conduct that arises from oligopolistic interdependence, whereby firms in a highly concentrated market cannot help but "recognize their shared economic interests … with respect to price and output decisions." *Twombly*, 550 U.S. at 553 (quoting *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)); *see* Richard Posner, Economic Analysis of Law 310–11 (7th ed. 2007). Because of interdependence, firms in an oligopoly may make coordinated but entirely unilateral pricing decisions that raise market prices above competitive levels without an agreement. *Id*. Parallel conduct in oligopoly markets without accompanying plus-factor

evidence thus is economically ambiguous, and without more, inferences drawn from it may be mistaken. *Matsushita*;, 475 U.S. at 588; Posner, *supra* at 310–11.

This case involves a qualitatively stronger kind of conspiracy allegation than *Matsushita* and the vast majority of the cases applying the parallel-plus framework. First, the LIBOR panel banks likely do not constitute an oligopoly: there are sixteen of them. Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 Minn. L. Rev. 9, 9, n.2 (2004) ("Most economists also agree on the outer limits of oligopoly power; that is, that oligopoly power likely exists in markets with three or four major firms, but not in markets with fifteen to twenty firms."); *see also Ambook Enters. v. Time, Inc.*, 612 F.2d 604, 615 (2d Cir. 1979) (explaining that the "number of competitors . . . argues against the claim" of oligopolistic interdependence) .

While the banks are interdependent in the important sense that the LIBOR benchmark is set according to their cumulative offering rate submissions, meaning each bank maximizes returns on financial instruments only if all make artificially low submissions—a fact that uniquely incentivizes collusion, see Opening Br. at 18–19, 120–23, 127–29, 134–37, 140–41—it is impossible for the admittedly low submissions to have come about through the lawful, unavoidable conscious parallelism found in oligopoly markets. *See* Opening Br. at 123, 133–36. Apart from the likely absence of oligopoly, the LIBOR rate-setting process itself permits no

corollary to the "price leader" scenario that is inseparable from conscious parallelism: LIBOR rules require private rather than public communication of offering rate submissions and prohibit panel banks from otherwise coordinating. Opening Br. at 23, 41–42, 113–14. Here, there is thus no competing theory of lawful tacit coordination for jurors to weigh against Plaintiffs-Appellants' theory of unlawful collusion.

In the absence of oligopoly and any viable theory of conscious parallelism, the district court posited a theory of *un*conscious parallelism, whereby the coalescence of artificially low offering rates in a pack was pure happenstance driven by a combination of market dynamics and banks' unilateral incentives to suppress LIBOR. Dist. Ct. Op. at 38, 57, n.41, 98, 105–07, 159–60, 168, 173, n.123.[3] That

[3] In doing so, the district court doubled down on its misguided intuition, articulated in *LIBOR I*, that if a defendant has an incentive to achieve unilaterally what is alleged to have achieved through concerted action, then this incentive undermines an inference of concerted action. Dist. Ct. Op. at 98; *see In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 689, 691 (S.D.N.Y. 2013) (hereinafter "*LIBOR I*") ("[T]he plaintiffs here could have suffered the same injury had each bank decided independently to submit an artificially low LIBOR quote."). That intuition is wrong, and the district court's reasoning is tautological. "Every economic injury caused by collusion could be caused by the colluding firms instead acting independently." Brief of the American Antitrust Institute as Amicus Curiae in Support of Plaintiffs-Appellants at 13, *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016), *available at* https://www.antitrustinstitute.org/wp-content/uploads/2015/05/LIBOR-FINAL.pdf. This Court has already corrected the district court's error but must do so again here. *See Gelboim*, 823 F.3d at 777, n.15 ("The district court's musing" is "inapt" and "amounts to forcing antitrust plaintiffs to rule out the possibility of unilateral action," which is "unsupported by precedent."); *see also Apple*, 791 F.3d at 317–18 ("[T]he fact that Apple's conduct was

theory seems strained and implausible given the evidence of artificially low submissions, the 367 acknowledged instances of the Defendant-Appellants discussing their submissions in violation of LIBOR rules, and the remarkable charts in Plaintiffs-Appellants' Opening Brief showing that the banks' submissions stayed within a pack even during the 2008 financial crisis, when financial conditions should have caused their rates to disperse. *See* Opening Br. at 47–48, 52–63, 109–10, 131–32. As this Court stated when it reviewed this case on a motion to dismiss, "[c]lose cases abound on [the issue of inferring agreement], but this is not one of them." *Gelboim*, 823 F.3d at 781. More importantly, the jury is free to weigh the credibility of the district court's theory of the evidence against Plaintiffs-Appellants' theory of the evidence at trial.

Second, the voluminous documentary evidence of statements by banks and brokers in this case is not economic conduct evidence from which jurors are prohibited from inferring conspiracy under *Matsushita*. To be sure, evidence of parallel conduct and plus factors is ample here, *see* Opening Br. at 46–52, 118–32, but that fact does not suggest *Matsushita*'s bar on inferences from ambiguous conduct evidence controls this case. Parallel conduct is present in every meritorious price-fixing case by definition, because parallel pricing—which is both the necessary

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in its own economic interest in no way undermines the inference that it entered an agreement.").

consequence of price-fixing and the mechanism that ensures cartel members earn supracompetitive profits—is a well-established form of parallel conduct. *See infra* Part II.

In this case, some of the most highly probative evidence of conspiracy is independent of (but corroborated by) the parallel-conduct and plus factor evidence. In particular, the most significant probative value of the statements by banks and brokers lies not in the fact that they permit an inference of conspiracy from parallel conduct (although they do), but in the content of the statements themselves. A reasonable juror could infer agreement from the statements if the juror weighs competing inferences and, considering the evidence as a whole, finds the inference suggested by Plaintiffs-Appellants more credible than the alternative inferences identified by the district court. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1989) ("If a jury can give equal or greater weight to circumstantial evidence, then requiring only 'direct' evidence to sustain a plaintiff's burden of proof is not only unhelpful, it is baffling.").

C. The Illusory Line Between Direct and Circumstantial Evidence Does Not Bear the Weight the District Court Assigns It

The district court's insistence that only direct evidence can independently prove allegations of an actual agreement "runs afoul of more general evidentiary principles." *Bethlehem Steel*, 958 F.2d at 1184. Juries in this Circuit "are frequently (and correctly) instructed … that 'the law makes no distinction between

the weight to be given to either direct or circumstantial evidence.'" *Ortiz v. Stambach*, 137 F.4th 48, 62 (2d Cir. 2025) (describing this as a "fundamental legal rule") (quotation omitted); *see also United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989) ("Circumstantial evidence, it should be noted, if relied upon by the jury, is of no lesser probative value than direct evidence.").

Among other things, circumstantial evidence can be at least as compelling as direct evidence, if not more so. *See, e.g., Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006) (Posner, J.) ("Perhaps on average circumstantial evidence requires a longer chain of inferences, but if each link is solid, the evidence may be compelling—may be more compelling than eyewitness testimony"); William H. Page, *Direct Evidence of a Sherman Act Agreement*, 83 Antitrust L.J. 347, 359, n.58 (2020) (noting that "'dog tracks in the mud' are more probative than 'the sworn testimony of 100 witnesses that no dog passed by.'") (quoting William Prosser, The Law of Torts 212 (4th ed. 1971))

The distinction between direct and circumstantial evidence—to the extent it is defined by whether or not evidence can be said to require "no inferences," Dist. Ct. Op. at 46–47—is also illusive. *See* Page, 83 Antitrust L.J. at 356 ("[T]here is no clear line between direct and circumstantial evidence."); Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 Houston L. Rev. 1801, 1807,

1815 (2009) (describing distinction as "wholly illusory" and a "linguistic trick" that has no "epistemological significance").

The distinction has been described as "confusing" and "largely if not entirely superfluous," *High Fructose Corn Syrup*, 295 F.3d at 661–62, because "[a]ll evidence depends upon some inferences." Page, 83 Antitrust L.J. at 355 (quoting Deborah Jones Merritt & Ric Simmons, Learning Evidence: From the Federal Rules to the Courtroom 15 (4th ed. 2018)); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1083 n.9 (10th Cir. 2006) ("[I]t is possible to construct ambiguity in almost any statement."). "[T]he promise of direct evidence is precisely that it brings the factfinder in direct contact with a crucial fact about the instant dispute," but "all facts are a function of interpretation, and this unavoidability of interpretation makes all facts a matter of inference and all evidence, whether called 'direct' or 'circumstantial,' nothing more or less than a contribution to that inferential process." Greenstein, 45 Houston L. Rev. at 1802, 1804.

As if to illustrate the absence of a clear line, courts that have struggled to parse the distinction have invented subcategories that draw even finer distinctions, such as "weak direct evidence," *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 527 F. Supp. 2d 1257, 1301, 1315 (D. Kan. 2007), and "strong circumstantial evidence." *Petruzzi's,*, 998 F.2d at 1231, 1233. *See also* Page, 83 Antitrust L.J. at 383 (Communications that do not reflect the full temporal and

spatial scope or all the participants in the alleged agreement may be "direct evidence of parts of the alleged agreement" and "circumstantial evidence of others"). This Court should hold that those distinctions are too ephemeral to serve as the basis for a legal rule that can make or break a Rule 12 or Rule 56 motion. Under these courts' standards, communications evincing agreement should survive summary judgement regardless of how they are labeled.

Notably, numerous courts have categorized evidence like the Plaintiffs-Appellants' evidence here as direct evidence, or at least weak direct evidence that satisfies the summary judgment standard. For example, the district court here faulted Plaintiffs-Appellants because some of the proffered statements could have suggested agreement between some of the banks but not all of them. Dist. Ct. Op. at 45 ("[P]laintiffs' proffered testimony, from only two individuals, does not unambiguously establish the existence of a sixteen-bank, multi-year conspiracy."). But in *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, the Third Circuit treated similar statements as sufficient to raise genuine trial issues on their own. 530 F.3d 204, 220 (3d Cir. 2008). There, the court held that a statement from one Mack dealer who said that "other Mack dealers" told him they "did not compete on price" was held to be "direct evidence" even though the plaintiff's "inability to present the details of any agreement among dealers [might] leave a jury unpersuaded that such agreements did in fact exist." *Id*. Notwithstanding that the statement

"does not reveal the exact extent of any such agreements . . . .[,] a jury considering it could believe it and reasonably conclude that agreements not to compete did exist among Mack dealers." *Id*.; *Tunica Web Advert. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410–11 (5th Cir. 2007) (holding similar statements to be, "if credited, direct evidence"). *See also Rossi v. Standard Roofing, Inc*., 156 F.3d 452, 468 (3d Cir. 1998) (direct evidence); *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1074–75 (D. Colo. 2016) (weak direct evidence); *Heartland Surgical*, 527 F. Supp. 2d at 1301 (weak direct evidence); *Champagne Metals*, 458 F.3d at 1085 (weak direct evidence; remanding on whether it "suffices by itself to remove this case from the *Matsushita* framework"); *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1154 (D. Kan. 2012) ("[E]ven if none of this evidence constituted strong direct evidence that could defeat summary judgment by itself, each piece of evidence supports the other, such that a reasonable jury could find that an agreement existed from this testimony taken together."); *Petruzzi's,*, 998 F.2d at 1233 ("[I]t is unnecessary for a court to engage in the exercise of distinguishing strong circumstantial evidence of concerted action from direct evidence of concerted action for both are sufficiently unambiguous," and it is "doubly unnecessary" when the plaintiff's theory is "not implausible.") (internal quotation marks omitted). No court has characterized such statements as ambiguous and assigned them no

probative value on grounds that they are circumstantial rather than direct evidence, as the district court did here.

This Court should reject the district court's misapplication of *Matsushita* to noneconomic evidence of an actual agreement and assign the evidence due probative value regardless of whether it is susceptible to reasonable competing interpretations that jurors are free to weigh at trial.

II. THE DISTRICT COURT MISAPPLIED THIS COURT'S PARALLEL CONDUCT STANDARD

In addition to misapplying *Matsushita* and the summary judgment standard to Plaintiffs-Appellants' documentary evidence under the parallel-plus framework, the district court also applied the wrong standard to each part of the framework. In the first part, it relied on an unpublished, out-of-circuit district court opinion to increase Plaintiffs-Appellants' burden of proving parallel conduct. Dist. Ct. Op. at 86–93 (relying on *In re Rail Freight Fuel Surcharge Antitrust Litig. (No. I)*, No. Civ. 11-1049, 2025 U.S. Dist. LEXIS 123024, at *114 (D.D.C. June 27, 2025)). In the second part, it failed to review the plus-factor evidence as a whole, required Plaintiffs-Appellants to disprove the possibility of independent conduct, and improperly weighed the evidence. Dist. Ct. Op. at 93–176. If followed by other courts, the district court's approach will raise the bar for plaintiffs to plead and prove a Section 1 violation using ambiguous evidence of parallel conduct. Accordingly, although this Court can reverse based on the district court's misapplication

of the parallel-plus framework alone, *see supra* Part I, it should take this opportunity to clarify the proper standard.

Under the Supreme Court's two-part framework for evaluating claims that rely on ambiguous conduct evidence, plaintiffs must plead and prove (1) "parallel conduct" and (2) "something more," *i.e.*, some "further circumstance pointing toward a meeting of the minds." *Twombly*, 550 U.S. at 557, 560. Evidence pointing toward a meeting of the minds is called a "plus factor." *Publ'n Paper*, 690 F.3d at 62 (quoting *Apex Oil*, 822 F.2d at 254).

The first part of the framework is not rigorous. As this Court has repeatedly clarified, "the Supreme Court and our binding authority that followed rejects setting a high bar for what constitutes parallel conduct." *Mosaic Health, Inc. v. Sanofi-Aventis U.S., LLC*, 156 F.4th 68, 81 (2d Cir. 2025), *cert. filed*, Dkt No. 24-598 (U.S. Mar. 6, 2026) (arguing other grounds); *see id.* (requiring "high-level similarities" between defendants' conduct as opposed to "precise similarities"). *Id.* The standard is met whenever plaintiffs show that "defendants acted with a similar anticompetitive effect but through varied means." *Id*.

The second part of the framework is a factor test under which plaintiffs' evidence is considered holistically to determine whether, "when viewed in conjunction with the parallel conduct," it "would permit a fact-finder to infer a conspiracy." *Publ'n Paper*, 690 F.3d at 62. Unlike an element test, which requires

that a litigant prove a series of independent components to succeed, a litigant does not fail a factor test for missing any one factor. Christopher R. Leslie, *The Factor/Element Distinction in Antitrust Litigation*, 64 Wm. & Mary L. Rev. 585, 593 (2023) [hereinafter "*Factor/Element Distinction*"]; *id.* 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 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.

Specifically, the plus-factor test is an "over-the-line" factor test, as distinct from a "balancing" factor test. *Id.* at 592; *see also Twombly*, 550 U.S. at 570 (Plaintiffs must "nudge[]" their claims "across the line."). As explained by Professor Christopher Leslie, who has published many of the leading articles on the role of circumstantial evidence in Section 1 cases:

> 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.

Leslie, *Factor/Element Distinction*, at 592 (internal citations omitted); *see also Rail Freight*, 2025 U.S. Dist. LEXIS 123024, at *116 (citing Leslie, *Factor/Element Distinction* at 625–26).

For this reason, courts do 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," as "[a]ctions that might seem otherwise neutral in isolation can take on a different shape when considered in conjunction with other surrounding circumstances." *D3, LLC v. Black & Decker (U.S.) Inc.,* 801 F.3d 412, 425 (4th Cir. 2015). Nor are courts permitted to weigh plaintiffs' plus factor evidence against defendants' contrary evidence, or to require plaintiffs to "exclude or dispel the possibility of independent action." *Publ'n Paper*, 690 F.3d at 63 (internal quotation marks omitted). As this court has made clear, "if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference." *Id.*

The court misapplied the standard at both steps. In the first step, it ignored this Court's precedent holding that the parallel-conduct standard is met whenever plaintiffs show that "defendants acted with a similar anticompetitive effect but through varied means," *Mosaic Health*, 156 F.4th at 81, instead relying on *Rail Freight* to require plaintiffs' to show "the same or very similar behavior." Dist. Ct.

Op. at 86, 89, 90, 93 (quoting *Rail Freight*, No. Civ. 11-1049, 2025 U.S. Dist. LEXIS 123024, at *19). In the second step, rather than viewing Plaintiffs-Appellants' plus-factor evidence as a whole, the court "parse[d] each plus factor individually," rejecting each piece of evidence because it failed on its own to "exclude or dispel the possibility of independent action," and impermissibly weighed Plaintiffs-Appellants' evidence against Defendants-Appellees'. *Black & Decker,* 801 F.3d at 425 (internal quotation marks omitted); *Publ'n Paper*, 690 F.3d at 63 (internal quotation marks omitted).

With respect to parallel conduct, Plaintiff-Appellants' evidence establishes the Defendants-Appellees' LIBOR submissions moved in tandem over the relevant period, even during and around the 2008 financial crisis, when economic conditions should have caused those submissions to differ greatly. Opening Br. at 46–52. Although this is alone enough to amount to the "high-level similarities" required to show parallel conduct, *Mosaic Health*, 156 F.4th at 81, these allegations are strengthened by additional evidence showing that the banks' LIBOR submissions were also suppressed during that time period. Opening Br. at 52–92. Even assuming that the banks' submissions were not sufficiently parallel, this evidence of joint suppression should have supported a finding that they acted "with a similar anti-competitive effect" in satisfaction of the standard. *Mosaic Health*, 156 F.4th at 81.

Instead of following this Court's precedent, the district court followed *Rail Freight* in imposing a stricter "same or very similar" standard. Dist. Ct. Op. 86, 89, 93. The court in *Rail Freight* adopted this standard because it mistakenly believed that plaintiffs must disprove the possibility of accident or interdependence at the first part of the framework, and thus must show "unusual parallel conduct" in order to move on to the plus-factor part. *Rail Freight*, No. Civ. 11-1049, 2025 U.S. Dist. LEXIS 123024, at *148; *see also* 48 (requiring "unusual" interdependence to satisfy first step). In doing so, the court acknowledged that it was allowing the plus-factor test to "bleed into" the threshold parallel-conduct analysis. *Id.* at 43, n.10. As AAI explained in its amicus brief before the D.C. Circuit in that case, that was a clear error of law. *See* Brief of the American Antitrust Institute (AAI) in Support of Plaintiffs-Appellants and Reversal, at 5–20, *In re: Rail Freight Surcharge Antitrust Litig.*, MDL No. 1869, (D.C. Cir. filed Dec. 19, 2025) [hereinafter "*Rail Freight* Appeal"], *available at* https://www.antitrustinstitute.org/wp-content/uploads/2025/12/TSAC-AAI-Br-25-7103.pdf. Requiring parallel-conduct evidence to disprove the possibility of accident or interdependence contravenes the Supreme Court's two-part framework by collapsing the two parts into one, converting plus factors into elements and distorting the outcome. *See id.* at 3, 4–17. Notably, the *Rail Freight* defendants unequivocally conceded this point in their recently-filed

response brief. Brief of Appellees, *Rail Freight* Appeal at 50, n.6 (citing AAI Brief and agreeing that parallel conduct is a "threshold" inquiry).

With respect to plus factors, the district court paid lip service to the requirement that Plaintiffs-Appellants' evidence be reviewed "as a whole," but in practice it only reviewed each plus factor individually, dismissing each one in turn after it found that it was insufficient on its own to disprove the possibility of independent action. Dist. Ct. Op. at 31, 110, n.77; *see also id.* at 105–06, 110–11, 162, 166, 173–74; Opening Br. at 132. It also erred by weighing Plaintiffs-Appellants' evidence against Defendants-Appellees' contrary evidence, which a court is not permitted to do, either under the parallel-plus framework or under the general summary judgment standard. Dist. Ct. Op. at 95, 174–76 (weighing defendants' evidence and referring to it as a "minus factor"); *see also* Opening Br. at 141.

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 using ambiguous evidence of parallel conduct, weakening Section 1's ability to protect competition and consumers. Accordingly, this Court should vacate the district court's reasoning and clarify the proper standard which applies under the parallel-plus framework.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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May 26, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Randy M. Stutz

Dated: May 26, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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