

26-457

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

LUCINA UDDIN, SHELLEY FACENTE, ROBERT MAHON, ELVISHA DHAMALA,
Plaintiffs-Appellants,

v.

ELSEVIER, B.V., WOLTERS KLUWER N.V., JOHN WILEY & SONS, INC., SAGE
PUBLICATIONS, INC., TAYLOR & FRANCIS GROUP, LTD., SPRINGER NATURE
AG & Co. KGAA, INTERNATIONAL ASSOCIATION OF SCIENTIFIC, TECHNICAL,
AND MEDICAL PUBLISHERS, JOHN DOES 1 THROUGH 50, INFORMA PLC,
TAYLOR & FRANCIS GROUP, LLC, WOLTERS KLUWER HEALTH, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York,
No. 1:24-cv-06509 (Hon. Hector Gonzalez)

**BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute (“AAI”) 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.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	7
I. The District Court Ignored Numerous Well-Pleaded Factual Allegations of Agreement.....	7
A. The District Court Misconstrued the Scholar-Scientists’ Complaint and Binding Precedent.	8
B. The Illusory Line Between Direct and Circumstantial Evidence Should Not be Dispositive.	14
II. The Complaint Plausibly Alleged an Agreement in Restraint of Trade.....	17
A. The Complaint Alleged that Publisher-Defendants Agreed to Comply with the Principles.	18
B. The Complaint Alleged that the Agreement Restrains Publisher-Defendants’ Conduct.	19
C. The Seemingly Normative Phrasing of the Principles Does Not Foreclose the Conclusion that the Principles Constitute an Agreement in Restraint of Trade.	23
CONCLUSION	26
CERTIFICATE OF SERVICE.....	C-1
CERTIFICATE OF COMPLIANCE.....	C-2

TABLE OF AUTHORITIES

Cases

<i>Am. Needle, Inc. v. NFL</i> , 560 U.S. 183 (2010)	7, 20
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	12
<i>Champagne Metals v. Ken-Mac Metals, Inc.</i> , 458 F.3d 1073 (10th Cir. 2006)	16
<i>Cont'l Ore Co. v. Union Carbide & Carbon Corp.</i> , 370 U.S. 690 (1962)	11
<i>Fleischman v. Albany Med. Ctr.</i> , 728 F. Supp. 2d 130 (N.D.N.Y. 2010)	12
<i>Goldfarb v. Va. State Bar</i> , 421 U.S. 773 (1975)	24, 25
<i>Heartland Surg. Specialty Hosp., LLC v. Midwest Div., Inc.</i> , 527 F. Supp. 2d 1257 (D. Kan. 2007)	17
<i>In re Ethylene Propylene Diene Monomer (EDPM) Antitrust Litig.</i> , 681 F. Supp. 2d 141 (D. Conn. 2009)	14
<i>In re High Fructose Corn Syrup Antitrust Litig.</i> , 295 F.3d 651 (7th Cir. 2002)	13, 16
<i>Interstate Cir., Inc. v. United States</i> , 306 U.S. 208 (1939)	13
<i>InterVest, Inc. v. Bloomberg, L.P.</i> , 340 F.3d 144 (3d Cir 2003)	13
<i>Matsushita Elec. Ind. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	11
<i>Monsanto Co. v. Spray-Rite Serv. Corp.</i> , 465 U.S. 752 (1984)	12, 13, 22, 23
<i>Nat'l Soc'y of Prof'l Eng'rs v. United States</i> , 435 U.S. 679 (1978)	24

<i>Ortiz v. Stambach</i> , 137 F.4th 48 (2d Cir. 2025).....	14
<i>Pennsylvania Dental Ass’n v. Med. Serv. Ass’n</i> , 815 F.2d 270 (3d Cir. 1987).....	25
<i>Petruzzi’s IGA Supermarkets v. Darling-Del. Co.</i> , 998 F.2d 1224 (3d Cir. 1993).....	17
<i>Relevant Sports, LLC v. U.S. Soccer Fed’n, Inc.</i> , 61 F.4th 299 (2d Cir. 2023)	7, 9, 10, 11, 19, 25
<i>Sylvester v. SOS Children’s Vill. Ill., Inc.</i> , 453 F.3d 900 (7th Cir. 2006)	15
<i>Tyler v. Bethlehem Steel Corp.</i> , 958 F.2d 1176 (2d Cir. 1989).....	14
<i>United States v. Apple, Inc.</i> , 791 F.3d 290 (2d Cir. 2015).....	11
<i>United States v. Casamento</i> , 887 F.2d 1141 (2d Cir. 1989).....	15
<i>United States v. Gen. Motors Corp.</i> , 384 U.S. 12 (1966).....	13
Statutes	
15 U.S.C. § 1	1, 7
Rules	
Fed. R. Civ. P. 12(b)(2)	5
Fed. R. Civ. P. 12(b)(6)	5
Other Authorities	
Christopher R. Leslie, <i>The Decline and Fall of Circumstantial Evidence in Antitrust Law</i> , 69 AM. U. L. REV. 1713 (2020)	14
DEBORAH JONES MERRITT & RIC SIMMONS, <i>LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM</i> (4th ed. 2018)	16

Richard K. Greenstein, <i>Determining Facts: The Myth of Direct Evidence</i> , 45 HOUSTON L. REV. 1801 (2009).....	16
William H. Page, <i>Direct Evidence of a Sherman Act Agreement</i> , 83 ANTITRUST L.J. 347 (2020).....	15, 16, 17
WILLIAM PROSSER, THE LAW OF TORTS (4th ed. 1971).....	15

INTEREST OF AMICUS CURIAE¹

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

In this price-fixing and market allocation case brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, scholar-scientists allege

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 this brief.

that publishers of for-profit, peer-reviewed scholarly journals have conspired to avoid paying for labor. Fixing the price of labor or allocating a labor market “is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.” *NCAA v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring). However, the district court dismissed the case on the pleadings because it believed that the plaintiffs’ complaint failed to plausibly allege that the publishers acted in concert.

Plaintiffs-appellants are four scholar-scientists—Dr. Lucina Uddin, Dr. Shelley Facente, Dr. Robert Mahon, and Dr. Elvisha Dhamala—who seek to represent a class of similarly situated scholar-scientists (collectively “Scholar-Scientists”). Defendants-appellees are the world’s six-largest for-profit publishers of peer-reviewed scholarly journals—(1) Elsevier B.V., (2) John Wiley & Sons, Inc., (3) Sage Publications, Inc., (4) Springer Nature AG & Co. KGaA, (5) Taylor & Francis Group, LLC, Taylor and Francis Group, Ltd., and Informa plc, and (6) Wolters Kluwer Health, Inc. and Wolters Kluwer N.V. (collectively “Publisher-Defendants”). The Publisher-Defendants earn

billions of dollars annually from the Scholar-Scientists' labor and intellectual property.

The Scholar-Scientists allege that the Publisher-Defendants unreasonably restrain trade by collectively imposing three principal restraints. JA-74. First, by collectively requiring that scholars provide peer review services voluntarily, the Publisher-Defendants allegedly fix the price of scholars' compensation for such services at \$0. JA-47. Second, by collectively requiring scholars to submit such manuscripts to only one journal at a time, the Publisher-Defendants allegedly allocate the market for manuscript submissions. JA-57–58. Third, by preventing scholars from sharing the intellectual content of submitted manuscripts even prior to acceptance, the Publisher-Defendants allegedly reinforce both restraints, further insulate themselves from market forces, and suppress the emergence of rivalry among Publisher-Defendants to compete for peer reviewers and manuscript submissions. JA-61–62. Together, the challenged restraints allegedly reduce demand for peer review and manuscript submissions, delay the dissemination of scientific advancements, and harm scholars and society.

The complaint alleges that the Publisher-Defendants impose their restraints through their trade association, the International Association of Scientific, Technical, and Medical Publishers (“STM”). JA-44. STM originally adopted the alleged restraints, which it styled as “Ethical Principles for Scholarly Publishing,” and it requires its members to agree and adhere to the Principles as a condition of membership. JA-44, ¶ 41. Scholar-Scientists further allege that the Publisher-Defendants, in fact, adhere to the Principles in their policies and practices, and they enforce the Principles against authors, including through technological tools such as duplicate submission detection software. JA-47–48; JA-59–60; JA-62–65.

According to the complaint, the Publisher-Defendants’ allegedly collusive agreement in restraint of trade harms competition in two markets: (1) the market for publication by peer-reviewed journals and (2) the market for peer-review services. JA-68–72. Regarding the former, the Scholar-Scientists maintain that in a competitive market, authors would submit their manuscripts to multiple publishers simultaneously, spurring competition among publishers to obtain manuscripts and increasing the probability that an article would be

published soon after its completion. JA-58–59. Further, they maintain that the delay caused by the concurrent-submission ban reduces the number of articles that can be published at any given time, thereby suppressing output at a substantial cost to society. *Id.* In the peer review market, the Scholar-Scientists allege that the prohibition on paying reviewers eliminates price competition for review services and causes a shortage of peer reviewers, which further delays publication. JA-50–51.

Publisher-Defendants moved to dismiss the Scholar-Scientists’ complaint under Rule 12(b)(6), and the district court granted the motion with prejudice. SPA-43.³ In so doing, the court considered only a small subset of the complaint’s factual allegations, namely those reciting the Principles themselves, while ignoring many other fact allegations offered to prove the Publisher-Defendants’ express commitment to adhere to the Principles and their policies and practices enforcing them. The district court pronounced that the Principles are non-binding and constitute merely “a collection of policies and guidance concerning best

³ The court also granted the motion of foreign Publisher-Defendants to dismiss the complaint under Rule 12(b)(2) for lack of personal jurisdiction. SPA-26.

practices.” SPA-32. Further, the court denied Scholar-Scientists leave to amend their complaint to address its purported defects, concluding that any such amendment would be futile. SPA-41–43. Scholar-Scientists appealed.

For the following reasons, AAI urges this Court to reverse. First, the district court failed to consider the entirety of the complaint’s allegations. Fully considered, those allegations, including ones concerning the Publisher-Defendants’ own statements about their adherence to and enforcement of the Principles, should have been credited as direct evidence of agreement on a motion to dismiss. And even if the allegations are viewed as circumstantial evidence, the illusory distinction between direct evidence and strong circumstantial evidence should not have been dispositive here. Consideration of the allegations was not foreclosed by Scholar-Scientists’ statement that they are not seeking to prove an agreement by relying on inferences from parallel conduct and plus factors.

Second, all of the complaint’s allegations, considered holistically, plausibly allege an agreement in restraint of trade. The allegations detail an express agreement and express commitment by each of the

Publisher-Defendants to abide by the Principles. The allegations describe the Publisher-Defendants' own policies and actions enforcing the Principles and the restraints they impose. The district court thus erred in concluding that the normative phrasing of the Principles prevent a reasonable inference of concerted action. The Supreme Court and this Court hold unequivocally that such phrasing is not determinative of whether an agreement in restraint of trade exists.

ARGUMENT

I. The District Court Ignored Numerous Well-Pleaded Factual Allegations of Agreement.

Section 1 of the Sherman Act states: “Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade ... is ... illegal.” 15 U.S.C. § 1. “The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.” *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 186 (2010); *see also Relevent Sports, LLC v. U.S. Soccer Fed’n, Inc.*, 61 F.4th 299, 306 (2d Cir. 2023). While Scholar-Scientists’ complaint alleges both that the Publisher-Defendants entered an agreement in restraint of trade and that the agreement was

unreasonable, the district court ended its analysis at step one, concluding that the complaint did not allege concerted action. SPA-40.

The district court's approach to analyzing the complaint's allegations was fatally flawed. It improperly considered only a small subset of allegations and gave dispositive weight to the Defendants' own characterization of the Principles as ethical guidance, while ignoring the remaining allegations that described the Publisher-Defendants' binding commitment to adhere to the Principles and their policies and practices enforcing them. The district court's reasons for doing so are invalid.

A. The District Court Misconstrued the Scholar-Scientists' Complaint and Binding Precedent.

The district court limited its analysis to allegations involving the “four corners of the Principles” themselves, while ignoring all other allegations. SPA-30–32. It did so based on Scholar-Scientists' statement in a pre-motion letter that they “do not rely upon an inference of collusion from parallel conduct.” SPA-30 n.17 (quoting ECF No. 107 at 3). From that statement, the court apparently concluded, mistakenly, that Scholar-Scientists were not relying on any “circumstantial evidence,” *id.*, and thus it would be improper for the court to consider

allegations about the Publisher-Defendants' explicit agreement to adhere to the Principles or their policies and practices enforcing them.

SPA-41. The district court plainly erred.

In explaining why it limited its analysis to just the Principles themselves, the court relied on *Relevant Sports*, 61 F.4th at 308, stating that “reading beyond the plain text of the Principles is incompatible with the analysis the Court must perform when confronted with an allegation that ‘the policy or rule *is* the agreement itself.’” SPA-41 (quoting *Relevant Sports*, 61 F.4th at 308). But *Relevant Sports* holds that an association policy is direct evidence of agreement if the association members are bound to follow it by the terms of their membership. 61 F.4th at 309–10. That is the exact opposite of what the district court held.

The policy at issue in *Relevant Sports* was adopted by the Fédération Internationale de Football Association, better known as “FIFA,” in 2018. The policy’s plain text stated: “Consistent with the opinion expressed by the Football Stakeholders Committee, the Council emphasized the sporting principle that official league matches must be played within the territory of the respective member association.”

Relevant Sports, 61 F.4th at 304. In concluding that the 2018 FIFA Policy “is direct evidence of an agreement for purposes of Section 1 of the Sherman Act,” *id.* at 310, this Court did not accept the policy’s facial characterization of the alleged restraint as a “sporting principle” and rest. Rather, it considered and credited the plaintiffs’ additional allegations that “national associations, leagues, and teams have surrendered their freedom of action ... and agreed to abide by the will of the association,” and to “comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time.” *Id.* at 303, 309 (cleaned up).

This Court rejected FIFA’s preferred characterization of its restraint precisely because the complaint alleged that national associations, leagues and teams “were required to agree to adhere to this policy.” *Id.* at 310. The policy’s restraint, viewed holistically with “the member leagues’ prior agreement, by joining FIFA, to adhere to its polices, constitutes an agreement on the part of all—whether they voted in favor of the policy or not—to adhere to the announced restriction on competition.” *Id.* at 307. Thus, the Court held that “[n]o further proof is

necessary” where “a binding association rule [is] designed to prevent competition.” *Id.*⁴

Moreover, the Scholar-Scientists’ pre-motion letter cannot credibly be read as a disavowal of the voluminous evidence beyond the four corners of the Principles, which the district court characterized as circumstantial rather than direct. Their statement in the letter only clarified that they are not relying on the “parallel-plus” analytical framework articulated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, which permits an inference of agreement from evidence of parallel conduct and plus factors. 475 U.S. 574, 588 (1986). That evidence “is merely ‘one such form of circumstantial evidence.’”

Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 158 (N.D.N.Y.

⁴ The district court’s approach is also inconsistent with this Court’s decision in *United States v. Apple, Inc.*, 791 F.3d 290, 319 (2d Cir. 2015). There, the Court rejected Apple’s attempt to isolate any individual piece of evidence to determine whether it alone supported an inference of a conspiracy. *Id.* It explained that “[i]n antitrust cases, ‘[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.’” *Id.* (quoting *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Scholar-Scientists thus should have been given “the full benefit of their [allegations] without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.” *Cont’l Ore*, 370 U.S. at 699.

2010) (citation omitted). Even if the district court were right that the evidentiary allegations were circumstantial rather than direct, it should not have refused to credit other forms of circumstantial evidence on a motion to dismiss.

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that a plaintiff can plausibly allege an agreement through either (1) allegations of parallel conduct with plus factors that nudge the allegation of concerted action over the line from conceivable to plausible agreement, *or* (2) “independent allegation[s] of [an] actual agreement.” 550 U.S. 544, 564, 570 (2007). Neither the Supreme Court nor this Court has suggested that independent evidence of an actual agreement—that is, evidence that does not rely on an inference of agreement from parallel conduct and plus factors—must be direct evidence. Rather, allegations of an actual agreement may be supported by any “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 Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

Numerous courts have held, not only on the pleadings but at summary judgment and trial, that a plaintiff may rely on circumstantial evidence to prove an “explicit, manifested agreement” without relying on inferences from parallel conduct and plus factors. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654–55 (7th Cir. 2002) (Posner, J.). *See, e.g., Monsanto Co.*, 465 U.S. at 767–68 (link between termination of price-cutting distributor and illegal agreement could be reasonably inferred from prior communications); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 141 (1966) (“[A] conspiracy to restrain trade was proved” using evidence of coordinated manufacturer-dealer pressure and communications aimed at stopping discounting); *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); *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”); *In re Ethylene Propylene Diene Monomer (EDPM) Antitrust Litig.*, 681 F. Supp. 2d 141,

166 (D. Conn. 2009) (“[T]he plaintiffs may present circumstantial evidence from which the existence of an explicit, manifested agreement to fix EPDM prices may be inferred.”) (cleaned up); *see also* Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 AM. U. L. REV. 1713, 1723–24 & n.53 (2020). The Scholars’ disavowal of reliance on the parallel-plus framework thus was not a disavowal of reliance on any and all circumstantial evidence.

B. The Illusory Line Between Direct and Circumstantial Evidence Should Not be Dispositive.

The district court’s insistence that it could consider only the text of the Principles themselves, while ignoring their binding nature, turned heavily on its supposition that everything outside the four corners of the Principles was circumstantial rather than direct evidence of agreement. Even putting aside that much of this evidence can be properly characterized as direct evidence, this approach “runs afoul of more general evidentiary principles.” *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1989). 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 a court needs to “draw any inferences,” SPA-40—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,” *In re High Fructose Corn Syrup Antitrust Litig.*, 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 “[a]ll 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 Hospital, LLC v. Midwest Division, Inc.*, 527 F. Supp. 2d 1257, 1301, 1315 (D. Kan. 2007), and “strong circumstantial evidence.” *Petruzzi’s IGA Supermarkets v. Darling-Del. Co.*, 998 F.2d 1224, 1231, 1233 (3d Cir. 1993); *see also* Page, 83 ANTITRUST L.J. at 383. 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 any appropriate standard, written statements or policies evincing agreement should survive a motion to dismiss regardless of whether they are labeled as direct or circumstantial evidence.

II. The Complaint Plausibly Alleged an Agreement in Restraint of Trade.

The Scholar-Scientists’ complaint identifies three alleged “rules” that restrain trade. The first is the “Unpaid Peer Review Rule,” which reflects two Principles: STM Principle 1, which provides that peer review is “uncompensated” or “volunteer work,” JA-47, ¶ 52, and STM Principle 3.3.1, which states that “[i]t is generally agreed that scholars who wish to have their own work published in journals have an obligation to do a fair share of reviewing for these journals.” *Id.* The

second is the “Single Submission Rule,” which reflects STM Principle 3.1.4 and provides that “[s]ubmitting the same manuscript to more than one journal concurrently [] constitutes unethical behaviour and is unacceptable.” JA-57–58, ¶ 91. The third is the “Gag Rule,” which reflects STM Principle 2.2 and provides that submitted manuscripts “must not be shown to or discussed with others except as authorized by the editor.” JA-61, ¶ 100. Considering the Scholar-Scientists’ complaint in its entirety, this Court should hold that it plausibly alleges an agreement under Section 1 of the Sherman Act.

A. The Complaint Alleged that Publisher-Defendants Agreed to Comply with the Principles.

Scholar-Scientists allege that the Publisher-Defendants are explicitly bound to adhere to the Principles. Specifically, the complaint reproduces the attestation to which Publisher-Defendants had to agree when joining STM:

Please confirm that you have read the STM Ethical Principles for Scholarly Publishing (note that all STM members must adhere to these guidelines) and are agreeing that your organization abides by these principles or equivalent principles, such as those of the Commission on Publication Ethics.

JA-44, ¶ 41. The district court’s opinion makes no mention of this allegation. Instead, and contrary to it, the court drew an adverse inference that the Principles did not “bind the Defendants to anticompetitive practices.” SPA-32. Yet the attestation bound the Publisher-Defendants to the Principles in the same way that national associations, leagues and teams became bound to comply with the 2018 Policy at issue in *Relevant Sports*. The same reasoning applies here. When the Scholar-Scientists’ complaint allegations are considered as a whole, there is no doubt that the Principles are binding. Like the 2018 Policy in *Relevant Sports*, they can be characterized as direct evidence of concerted action when properly credited on a motion to dismiss.

B. The Complaint Alleged that the Agreement Restrains Publisher-Defendants’ Conduct.

The district court also reasoned that the Principles did not “require any publisher to adopt any specific practice.” SPA-40. Regarding the “Unpaid Peer Review Rule,” the court said that the language of the Principle simply served as “‘guidelines’ concerning ‘best practice[s]’” that did not govern the Publisher Defendants’ conduct. SPA-34. Regarding the Single Submission Rule, the court said that the Principle neither prohibited nor banned Publisher Defendants’ conduct

but rather served merely as “guidance” and “not a mandate.” SPA-35. As for the Gag Rule, the court said that, despite using terms such as “shall” and “must,” the Principle operated as a “guideline” for “maintenance of ethical standards in publication.” SPA-39. The district court’s adverse inferences are unsupported.

In order for an agreement to constitute a “contract, combination ..., or conspiracy” in restraint of trade, it must restrain the conduct of the parties to the agreement such that it “deprives the marketplace of independent centers of decisionmaking.” *Am. Needle, Inc.*, 560 U.S. at 195. The Supreme Court has instructed that the existence of such an agreement must be based on a “functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.” *Id.* at 191. The complaint’s allegations show that the Publisher-Defendants’ own conduct, namely their policies enforcing the Principles, deprives the market of independent decisionmaking. These allegations, which described how the Publisher-Defendants’ “actually operate,” are evidence that the Principles in fact serve as restraints.

Regarding the Peer Review Rule, the complaint alleges that each of the Publisher-Defendants have adopted policies stating that

reviewers are unpaid volunteers. JA-47–48, ¶ 54. For example, both Elsevier and Wiley state that reviewers perform their services on a “volunteer” basis. *Id.* Wolters Kluwer and Springer stress that, rather than monetary compensation, reviewers receive “recognition” as an expert in their field and “prestige and honor.” *Id.*

The Publisher-Defendants’ statements regarding the Single Submission Rule show that, in practice, it is enforced. JA-59–60, ¶ 96. For example, Elsevier’s website states that “[a]rticles submitted for publication ... must not have been submitted to any other publication.” *Id.* Wiley states that it will reject a paper if it is “currently under review at another journal (submitting the same paper to multiple journals at the same time is not allowed).” *Id.* Taylor & Francis requires that authors “declare upon submission that the manuscript is not under consideration elsewhere.” *Id.* Springer states that it “can’t consider” a paper that is “already under review elsewhere.” *Id.*

Beyond these statements showing that the Publisher-Defendants adhere to the Single Submission Rule, the complaint alleges that they enforce the rule through STM’s “Integrity Hub,” a cloud-based application that includes a “Duplicate Submission Checker” “that

detects whether an article has been submitted to another journal.” JA-60, ¶ 97–98. According to the complaint, the Publisher-Defendants collaborated to develop the Duplicate Submission Checker Tool in order to detect “simultaneous duplicate submissions.” JA-60–61, ¶ 99.

As for the Gag Rule, the complaint’s allegations describe how the Publisher-Defendants enforce the rule prior to and after publication. JA-62–63, ¶ 102. All of them enforce “embargos” before publication and control who has access to the manuscript. *Id.* Once a manuscript is accepted for publication, they typically require authors to assign their copyright to the publishers or at least license the copyright to the publisher on an exclusive basis. *Id.*

These allegations demonstrate the binding nature of the Principles, and it is the kind of evidence that the Supreme Court has held is “persuasive” proof of agreement. *Monsanto Co.*, 465 U.S. at 765. In *Monsanto*, the Court cited testimony from a Monsanto employee, who had communicated to distributors who sought to cut prices for herbicides, that there would be adverse consequences if they did not maintain minimum resale prices. *Id.* The testimony further showed that Monsanto complained to one price-cutting distributor’s parent company,

which then instructed the distributor to comply. *Id.* The distributor informed Monsanto that it would comply. *Id.* The Supreme Court said: “Evidence of this kind plainly is relevant and persuasive as to a meeting of the minds.” *Id.*

The complaint’s allegations describing the Publisher-Defendants’ policies enforcing the Principles are similarly persuasive that the Scholar-Scientists plausibly allege the Principles operate as restraints. The district court plainly erred in concluding otherwise.

C. The Seemingly Normative Phrasing of the Principles Does Not Foreclose the Conclusion that the Principles Constitute an Agreement in Restraint of Trade.

Repeatedly, the district court justified its dismissal of the Scholar-Scientists’ complaint by referring to the Principles as “guidelines concerning best practices,” SPA-32, “guidance on generally accepted, industry-wide practices,” SPA-35, “a type of you-should-know-better maxim,” SPA-36, and “guidelines [that] concentrate on the maintenance of ethical standards in publication,” SPA-39. The Supreme Court and courts of appeals, however, have repeatedly held that such characterizations are not controlling. Were it otherwise, naked cartel agreements could escape scrutiny by adopting formalistic labels.

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), is the leading case holding that a “code of ethics” can constitute an agreement in restraint of trade. There, an engineering society sought to justify its ethical code proscribing competitive bidding as “a reasonable method of forestalling the public harm that might be produced by unrestrained competitive bidding,” *id.* at 687, and as “inur[ing] to the public benefit by preventing the production of inferior work and ... insuring ethical behavior.” *Id.* at 693–94. The Supreme Court rejected the engineers’ ethics-based justification as “nothing less than a frontal assault on the basic policy of the Sherman Act.” *Id.* at 695. “The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.” *Id.*

A few years earlier, the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), addressed whether a fee schedule, characterized by its proponents as “purely advisory,” restrained trade. *Id.* at 781. The Court rejected that characterization in light of evidence that the lawyers subject to the fee schedule adhered to it. *Id.* The Court noted that consumers seeking legal services “could not turn to

alternative sources for the necessary service.” *Id.* at 782. The Court held that the fee schedule was “a classic illustration of price fixing.” *Id.* at 783; *see also Relevent Sports*, 61 F.4th at 309–10; *Pennsylvania Dental Ass’n v. Med. Serv. Ass’n*, 815 F.2d 270, 272–73 (3d Cir. 1987) (having no difficulty finding that “recommendations” of multiple county dental associations that their members avoid Blue Shield insurance company were “direct evidence” of a conspiracy to restrain trade). So too here—the Publisher-Defendants’ adherence to the Principles, as illustrated by their own policies described in their own words, shows that the Principles operate to restrain, not merely to guide. The Principles’ seemingly normative language thus is not dispositive. This Court should emphatically reject the district court’s formalistic holding to the contrary.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Scholar-Scientists' complaint and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2026, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Second Circuit using the Appellate Case Management System. Counsel for all parties to the case are registered users and will be served by that system.

/s/ Mark S. Hegedus

Mark S. Hegedus

June 18, 2026

CERTIFICATE OF COMPLIANCE

I am counsel of record and certify as follows:

1. This document is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5) and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the items exempted by Fed. R. App. P. 32(f), this brief contains 4,699 words.
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/s/ Mark S. Hegedus
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