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## The Decline and Fall of Circumstantial Evidence in Antitrust Law

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## The Decline and Fall of Circumstantial Evidence in Antitrust Law

LEAD ARTICLE

THE DECLINE AND FALL OF  
CIRCUMSTANTIAL EVIDENCE IN  
ANTITRUST LAW

CHRISTOPHER R. LESLIE\*

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*“[C]ircumstantial evidence is the lifeblood of antitrust law.”*  
—United States v. Falstaff Brewing Corp.<sup>1</sup>

#### INTRODUCTION

Judges presiding over price-fixing claims recognize that “‘circumstantial evidence is the lifeblood of antitrust law’ because direct evidence will rarely be available to prove the existence of a price-fixing conspiracy.”<sup>2</sup> Courts of late, however, have drained this lifeblood by discounting and diminishing the legal significance of circumstantial evidence in price-fixing litigation. This is surprising because price-fixing conspiracies illegally overcharge consumers by billions of dollars every year and are the archetypal problem that antitrust law seeks to deter and to punish.<sup>3</sup> Federal courts have described collusion among competitors as “a root evil forbidden by the Sherman Act”<sup>4</sup> and have opined that “[n]o antitrust violation is more abominated than the agreement to fix prices.”<sup>5</sup> As such, price fixing is one of the only antitrust violations that creates both civil and criminal liability.<sup>6</sup> Given the unanimity of opinion that price-fixing

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1. 410 U.S. 526, 534 n.13 (1973).

2. *City of Rockford v. Mallinckrodt ARD, Inc.*, 360 F. Supp. 3d 730, 749 (N.D. Ill. 2019) (quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973)).

3. *United States v. Gen. Dyestuff Corp.*, 57 F. Supp. 642, 647 (S.D.N.Y. 1944) (“The primary evil is the suppression of competition. Price fixing is condemned because it invariably leads to that evil.”); John M. Connor & Robert H. Lande, *Does Crime Pay? Cartel Penalties and Profits*, ANTITRUST, Spring 2019, at 29.

4. *United States v. Gravely*, 840 F.2d 1156, 1161 (4th Cir. 1988).

5. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003).

6. Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 695 (2001) (“Thus, price-fixing, bid-rigging, and customer and market allocations came to be regarded as criminal, while most other conduct (for example, joint venture rules, standard setting practices, and vertical restraints) came to be regarded as only suitable for civil prosecution.”); Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L.

conspiracies represent the ultimate anticompetitive transgression, one should expect that federal judges would construct and interpret the common law of antitrust in a manner that would facilitate holding price-fixing conspirators accountable. Yet by misconstruing the role of circumstantial evidence in antitrust litigation, federal courts are making it exceedingly difficult for private plaintiffs to bring price-fixing claims. This Article explains how.

Antitrust law distinguishes between direct evidence and circumstantial evidence. Although the actual distinction is often unclear,<sup>7</sup> whether a plaintiff's evidence is labeled "direct" or "circumstantial" can be dispositive of price-fixing claims. In most circuits, if the court regards the plaintiff's evidence as "direct," then the case is more likely to make it to a jury trial.<sup>8</sup> If, however, a judge categorizes the plaintiff's proffer of proof as "circumstantial" when considering pre-trial motions, the court will often weigh, dissect, and reject the plaintiff's evidence and grant summary judgment to price-fixing defendants.<sup>9</sup>

This Article reveals an unappreciated way that courts are devaluing circumstantial evidence in antitrust litigation: in price-fixing cases, judges routinely reject the plaintiff's circumstantial evidence as not having any probative value unless the plaintiff presents separate *direct* evidence of a conspiracy. Documenting this phenomenon across federal circuits and over various forms of circumstantial evidence, this Article shows how courts have made it unreasonably difficult for plaintiffs to reach a jury in price-fixing lawsuits based on circumstantial evidence. Price-fixing

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REV. 1323, 1357 (2016) (The DOJ "files criminal actions only for clearly intentional violations of antitrust law, usually for explicit price fixing or bid rigging").

7. See *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661–62 (7th Cir. 2002) (describing the "distinction between direct and circumstantial evidence" as "confusing [] and . . . largely if not entirely superfluous").

8. *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63–64 (2d Cir. 2012) ("[A]t least three of our sister circuits have held that summary judgment is generally not appropriate where a plaintiff has produced direct, as opposed to circumstantial, evidence of an agreement to fix prices.") (citing *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003); *Petruzzi's IGA Supermarkets, Inc. v. Darling—Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 441 (9th Cir. 1990)); see also *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226–27 (4th Cir. 2004).

9. See, e.g., *Superior Offshore Int'l, Inc. v. Bristow Grp.*, 490 F. App'x 492, 497 (3d Cir. 2012) ("Given the relatively lighter burden afforded to a plaintiff putting forth direct evidence of concerted action, the difference between direct and circumstantial evidence in an antitrust case assumes heightened significance."); see *infra* Part II.

claims based on circumstantial evidence are increasingly unlikely to survive defendants' motions to dismiss or motions for summary judgment, no matter how persuasive the plaintiff's case and how plentiful the plaintiff's body of circumstantial evidence.

The current state of affairs is troubling because direct evidence of price fixing is usually unobtainable, as courts uniformly acknowledge.<sup>10</sup> Price-fixing cartels take significant measures to conceal their crimes.<sup>11</sup> Telephone discussions are conducted over pay phones and untraceable burner phones.<sup>12</sup> While price-fixing conspirators often conduct face-to-face meetings, cartel members make "active effort[s] to conceal those meetings,"<sup>13</sup> including using offsite locations.<sup>14</sup> For example, the members of a multi-million dollar synthetic rubber price-fixing conspiracy held their cartel meetings at random restaurants, coffee shops, and airport hotels, as well as the Russian Tea Room in New York City and the Grand Ole Opry in Nashville, Tennessee.<sup>15</sup> The multi-billion dollar international vitamins cartel held covert meetings in Germany's Black Forest.<sup>16</sup> When not colluding in the wilderness, price fixers register for

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10. *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553–54 (8th Cir. 1991) (citation and internal quotation marks omitted) ("Indeed, it is axiomatic that the typical conspiracy is rarely evidenced by explicit agreements, but must almost always be proved by inferences that may be drawn from the behavior of the alleged conspirators."); *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 714 (E.D. Tenn. 2011) ("In conspiracy cases, '[t]he element of agreement, . . . is nearly always established by circumstantial evidence, as conspirators seldom make records of their illegal agreements.' *United States v. Short*, 671 F.2d 178, 182 (6th Cir. 1982).").

11. Christopher R. Leslie, *How to Hide a Price-Fixing Conspiracy*, 2021 U. ILL. L. REV. (forthcoming 2021) [hereinafter Leslie, *Price-Fixing Conspiracy*]; see, e.g., *Ohio Valley Elec. Corp. v. Gen. Elec. Co.*, 244 F. Supp. 914, 932 (S.D.N.Y. 1965) ("The members of this conspiracy went to great lengths to conceal their activities from those charged with assuring compliance with the Company's Directive Policy. The concealment was highly effective . . .").

12. *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1156 (D. Kan. 2012) (explaining how a conspirator used a "pay phone at a gas station using a prepaid credit card").

13. E.g., *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 173 (D. Conn. 2009).

14. *GEICO Corp. v. Autoliv, Inc.*, 345 F. Supp. 3d 799, 836 (E.D. Mich. 2018) (stating that alleged price fixers met at "private residences or remote locations"); *In re Urethane*, 913 F. Supp. 2d at 1156 ("Messrs. Fischer and Bernstein conducted numerous meetings outside of their offices around the time of price increase announcements.").

15. *EPDM*, 681 F. Supp. 2d at 174.

16. Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 714 (2001).

conference rooms and hotel rooms under false names.<sup>17</sup> When conspirators are nervous that a room has been bugged,<sup>18</sup> they will sometimes discuss pricing outside to avoid listening devices that may be inside.<sup>19</sup> Some price-fixing conspiracies assign code names to firms and individuals within the cartel,<sup>20</sup> while others instead have issued individuals at cartel meetings “color-coded badges”—instead of traditional nametags—designed to ensure their anonymity.<sup>21</sup>

Perhaps the most common way that illegal cartels conceal their price-fixing meetings is to hold them in conjunction with trade association meetings. Indeed, some cartels, such as the citric acid cartel, create fake trade associations as a cover for their illegal meetings, including creating and distributing fake meeting agendas to show government officials or judges considering summary judgment motions in antitrust litigation.<sup>22</sup> This is a more extreme version of the general principle that price fixers agree to lie when asked about their inter-competitor discussions.<sup>23</sup> For example, conspirators tell falsehoods to make their parallel price increases look like independent cost-based decisions.<sup>24</sup>

Price fixers also attempt to obliterate and distort any document trail that could lead back to them. Price-fixing cartels often adopt strict rules that forbid notetaking at their meetings and require members to destroy any incriminating documents that may exist.<sup>25</sup> When price

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17. See *In re Refrigerant Compressors Antitrust Litig.*, 795 F. Supp. 2d 647, 663 (E.D. Mich. 2011) (“Defendants traveled to the clandestine meetings separately, so as to not be seen together, and reserved hotel rooms under false names.”); see also *GEICO*, 345 F. Supp. 3d at 836; *EPDM*, 681 F. Supp. 2d at 174.

18. This is not an unreasonable fear. See JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND, THE SUPERMARKET TO THE WORLD 224 (2000) (discussing how the FBI installed a camera in a lamp in the hotel suite where members of the lysine price-fixing cartel were meeting).

19. *In re Urethane*, 913 F. Supp. 2d at 1156.

20. MICHAEL A. UTTON, CARTELS AND ECONOMIC COLLUSION: THE PERSISTENCE OF CORPORATE CONSPIRACIES 56 (2011) (discussing graphite electrodes cartel).

21. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 857 (N.D. Cal. 1975).

22. James M. Griffin, *An Inside Look at a Cartel at Work: Common Characteristics of International Cartels*, in CARTELS VOLUME I 115, 122 (Margaret C. Levenstein & Stephen W. Salant eds., 2007).

23. See *In re Urethane*, 913 F. Supp. 2d at 1156.

24. ROBERT C. MARSHALL & LESLIE M. MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS 38, n.36 (2012) (discussing the cartonboard cartel).

25. Leslie, *Price-Fixing Conspiracy*, *supra* note 11; see, e.g., THURMAN W. ARNOLD, THE BOTTLENECKS OF BUSINESS 210 (1940) (“An astonishingly large number of respectable businessmen will strip their files of incriminating documents.”); JOHN M. CONNOR,

fixers do share sensitive documents with their co-conspirators, it is with the understanding that the document will be destroyed as soon as practicable.<sup>26</sup> When they exchange emails, the messages come with instructions to “destroy e-mail after reading.”<sup>27</sup> Should these efforts fail, cartel members alter written documents to exclude the details of incriminating discussions.<sup>28</sup> They doctor travel documents and expense reports, falsifying their travel destinations and dining companions in order to conceal their meetings with rivals.<sup>29</sup>

Because price fixers generally eliminate direct evidence of their crime, most plaintiffs making price-fixing claims must rely on circumstantial evidence. If, however, courts evaluating such claims are unreceptive to circumstantial evidence, victims of price fixing will go uncompensated and price-fixing conspirators will be emboldened to continue and perhaps expand their illegal activities. Unfortunately, judicial hostility to circumstantial evidence is causing a state of decline in the effectiveness of antitrust law’s ability to combat collusion. Unless federal judges recognize and arrest this problematic trend, courts will invite a new wave of price fixing.

Part I introduces the basics of a price-fixing claim. The plaintiffs’ first hurdle is to show that competitors agreed to collude. Because direct evidence of price-fixing conspiracies rarely exists, federal courts have constructed a legal test for proving a conspiracy through circumstantial evidence. Plaintiffs generally need to show that the defendants engaged in parallel conduct and that “plus factors” are present. Plus factors are evidence suggesting that the defendants’ parallel conduct was the product of collusion, not of independent decision making. Part I reviews the role of plus factors in proving price fixing through circumstantial evidence.

Part II explains how courts have misapplied the plus-factor analysis by disregarding specific plus factors unless plaintiffs have direct

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GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY 313 (2001) (“At these meetings, participants were reminded that paper records were to be destroyed.”).

26. *In re Urethane*, 913 F. Supp. 2d at 1156 (“Mr. Stern gave Mr. Hankins a document containing pricing information after Mr. Hankins gave assurances that the document would be destroyed . . .”).

27. *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 174 (D. Conn. 2009).

28. *In re Urethane*, 913 F. Supp. 2d at 1156.

29. *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d 750, 759 (E.D. Pa. 2017) (falsifying a lunch companion on an expense report to conceal meeting with a competitor); *In re Urethane*, 913 F. Supp. 2d at 1156 (“Mr. Dhanis failed to list Messrs. Wood and Dineen on the expense report for a meal at which he made comments indicating that he may have been attempting to coordinate pricing . . .”).



evidence of a conspiracy. Judges have done this over a range of plus factors, including the defendants' opportunity to conspire; their inter-competitor communications, including invitations to collude; their exchanges of price and sales data; their possession of rivals' confidential documents; their price-fixing activities in foreign countries; their artificial standardization of their products; and their maintenance of stable market shares. For these plus factors, some courts have essentially required plaintiffs to present direct evidence of an agreement in order for a particular plus factor to count as circumstantial evidence from which an agreement can be inferred. This effectively eliminates the value of circumstantial evidence—"the lifeblood of antitrust law"—in price-fixing litigation by crediting it only when direct evidence makes the plaintiff's circumstantial evidence unnecessary.<sup>30</sup>

Other antitrust opinions inappropriately weaken circumstantial evidence by denying certain plus factors their probative value unless the plaintiff can prove a causal link between that individual plus factor and the defendants' parallel price increases. This type of causation requirement is deeply flawed because proof of agreement and proof of causation are entirely separate elements of a price-fixing claim. By misconceiving the relationship between plus factors and causation, these decisions essentially impose a direct evidence requirement. Finally, some courts have chastised antitrust plaintiffs for "assuming" that a price-fixing conspiracy exists and then proffering plus factors to support their case. This judicial critique is misguided because it fundamentally misconstrues how evidence works: the plaintiff presents her theory of the case and then proffers evidence to support her theory. If antitrust plaintiffs cannot use this centuries-old process, then they cannot bring antitrust claims based on circumstantial evidence.

Part III describes the proper role of circumstantial evidence in price-fixing litigation. At root, the dozens of antitrust opinions discussed in Part II all suffer from the same problem: courts invert the proper relationship between plus factors and agreement by suggesting that plaintiffs need to prove the presence of an agreement in order to establish that a plus factor exists and should be given weight. This is incorrect because plus factors are used to show that an agreement exists, not vice versa.

Part IV concludes. It explains the consequences of the misguided antitrust opinions analyzed in Parts II and III. Through a multitude of missteps, federal courts have improperly required plaintiffs to present

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30. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973).

direct evidence of collusion even though the plaintiffs are bringing a circumstantial case. By effectively requiring direct evidence—often while acknowledging that direct evidence is generally unavailable to antitrust plaintiffs—courts are inappropriately shielding price-fixing conspirators from liability. This undermines deterrence of cartel activity and denies compensation to victims of cartel overcharges.

### I. PROVING AGREEMENTS TO FIX PRICES

Section 1 of the Sherman Act condemns “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . .”<sup>31</sup> Federal courts generally use the word “agreement” as a short hand for the first element of a Section 1 claim and have read the word “unreasonable” into the statute, so that Section 1 condemns only those agreements that unreasonably restrain trade.<sup>32</sup> Some agreements, such as horizontal price fixing, are considered unreasonable as a matter of law and are declared per se illegal.<sup>33</sup> Thus, the focus of price-fixing litigation is generally whether or not the plaintiff can prove the first element—agreement.

#### A. *Direct Proof*

Plaintiffs can prove an agreement among competitors to fix prices with either direct evidence or circumstantial evidence or a combination of both. As in other areas of law, direct evidence of conspiracy is stronger than circumstantial evidence. Courts have defined direct evidence in the context of antitrust conspiracies as “evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.”<sup>34</sup> Because direct evidence entails no inferences to establish the fact of an agreement, “a court need not be concerned about the reasonableness

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31. 15 U.S.C. § 1 (2018).

32. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“[T]his Court has long recognized that Congress intended to outlaw only unreasonable restraints.”).

33. *FTC v. Actavis, Inc.*, 570 U.S. 136, 161 (2013) (Roberts, C.J., dissenting).

34. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) (citations omitted); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (“Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.”); cf. *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012) (“All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though ‘[p]erhaps on average circumstantial evidence requires a longer chain of inferences.’” (quoting *Sylvester v. SOS Children’s Vill. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006))).

of the inferences to be drawn from such evidence.”<sup>35</sup> Some federal courts have defined direct evidence in the context of antitrust conspiracies as evidence that is “tantamount to an acknowledgment of guilt.”<sup>36</sup>

Beyond such descriptions of direct evidence, many courts define the concept of direct evidence by listing examples of it. Direct evidence is not a monolithic category; direct evidence exists along a continuum of strong to weak. Admission by a defendant that it conspired to fix prices with its competitors is, by itself, sufficient proof of an agreement.<sup>37</sup> Such

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35. *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993).

36. *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014) (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002)).

37. *In re High Fructose Corn Syrup*, 295 F.3d at 654 (“Because price fixing is a per se violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs.”).

Confessions are most likely to occur in criminal cases against price fixers. The government can use the threat of imprisonment to encourage price fixers to admit guilt in exchange for leniency. ABA ANTITRUST SECTION, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 62–63 (2d ed. 2018) (“Direct evidence of a conspiracy is often present in criminal cases in which there has been a successful amnesty applicant or plea bargain that supplies testimony from a coconspirator.”). Under the government’s antitrust amnesty program, the first cartel member to expose the cartel gets automatic leniency, which means amnesty/freedom from criminal fines and no imprisonment for any of that firm’s employees. These confessions generally entail an obligation of the confessing firm and its employees to cooperate with the government’s prosecution of the non-confessing firms in the cartel. Perhaps because of this leverage, the government does not generally prosecute price fixing unless it has direct evidence of collusion. Louis Kaplow, *Direct Versus Communications-Based Prohibitions on Price Fixing*, 3 J. LEGAL ANALYSIS 449, 517 (2011) (“[C]riminal price-fixing prosecutions (that occur mainly in the United States), which target individuals for incarceration, seem to require direct, explicit, even smoking-gun evidence of prohibited communications, presumably due in significant part to high proof burdens and perhaps also the exercise of prosecutorial discretion.”).

If the government secures a victory against a price-fixing firm—whether through confession, consent decree, or a verdict at trial—private plaintiffs can use the government’s case as *prima facie* evidence of a violation. 15 U.S.C. § 16(a) (2018). Most private antitrust lawsuits do not follow on the heels of government litigation. Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1299 (2013) (noting estimates of between twenty and twenty-five percent of private antitrust cases following DOJ cases). But, even in follow-on cases, plaintiffs often need to proffer additional evidence of liability because government prosecutors will allow defendants to plead guilty to conspiracies that are narrower in time and scope than the conspiracies alleged in private follow-on lawsuits. *See, e.g., In re Parcel Tanker Shipping Servs. Antitrust Litig.*,

admissions, however, are rare. Many courts describe “[a] document or conversation explicitly manifesting the existence of the agreement in question” as “an example of direct evidence.”<sup>38</sup> If the plaintiffs possessed, for instance, a recorded phone call between competitors in which the defendants agreed to fix prices, that would be direct evidence of an agreement.<sup>39</sup> In the absence of a recording, eyewitness testimony detailing inter-competitor conversations to collude also constitutes direct evidence of an agreement.<sup>40</sup> Direct evidence of an agreement becomes significantly stronger when multiple participants testify about price-fixing meetings or when contemporaneous written notes support an individual’s testimony.<sup>41</sup>

If the plaintiff presents direct evidence of an agreement, then the plaintiff does not need circumstantial evidence to survive summary judgment. The presence of direct evidence of price fixing should fast track an antitrust case to be heard by a jury because a proffer of direct evidence generally prevents the dismissal of a Section 1 case and precludes summary judgment for defendants.<sup>42</sup> Because direct evidence requires no inferences,<sup>43</sup> once an antitrust plaintiff proffers direct

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541 F. Supp. 2d 487, 492 (D. Conn. 2008); JOHN M. CONNOR, GLOBAL PRICE FIXING 400–01 (2d ed. 2008).

38. *Burch*, 662 F.3d at 226 (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010)); see also *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987) (holding that “a memorandum written by [a] GMC representative . . . describing [his] meeting with dealers of the Better Buy Buick Association” was direct evidence of “concert of action among the defendants relevant to the alleged conspiracy”); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 634 (5th Cir. 1981).

39. See *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (“Such evidence would consist, for example, of a recorded phone call in which two competitors agreed to fix prices at a certain level.”); *Iowa Pub. Emps.’ Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F. Supp. 3d 285, 317–18 (S.D.N.Y. 2018) (treating as direct evidence “a recorded Morgan Stanley conference call” in which defendants “agreed that Morgan Stanley and Goldman Sachs needed to ‘get a hold of this thing,’ [meaning] that they needed to act together to” exclude a competitive threat).

40. See *United States v. Therm-All, Inc.*, 373 F.3d 625, 636 (5th Cir. 2004).

41. See *United States v. Taubman*, 297 F.3d 161, 165 (2d Cir. 2002) (per curiam).

42. See *In re Ins. Brokerage*, 618 F.3d at 323–24 (positing that “[a]llegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate” under *Twombly*).

43. *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993).

evidence of an agreement, the case should proceed to a jury, which can evaluate the credibility of this evidence.<sup>44</sup>

Direct evidence is powerful but often not available, particularly for per se antitrust violations such as price fixing.<sup>45</sup> Horizontal price fixing, after all, violates both civil and criminal law, the latter of which prescribes imprisonment for up to ten years.<sup>46</sup> Criminals are generally reticent to memorialize their criminal activity in writing.<sup>47</sup> Direct evidence generally is unobtainable because price fixers take great efforts to conceal their actions,<sup>48</sup> including using false names, creating fake trade associations

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44. William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 443 (2007) (“The only question about this sort of evidence is its credibility, which the jury is best situated to evaluate . . .”).

45. *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998) (“While direct evidence, the proverbial ‘smoking-gun,’ is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by.”); *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015) (“Because unlawful conspiracies tend to form in secret, however, proof of a conspiracy will rarely consist of explicit agreements.”). In many Section 1 cases not involving claims of naked price-fixing, direct evidence often exists in the form of written contracts and organization by-laws. *See, e.g.*, *NCAA v. Bd. of Regents*, 468 U.S. 85, 89–91 (1984) (analyzing NCAA’s written by-laws limiting the number of televised college football games); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4 (1979) (analyzing the legality of written blanket licenses for copyrighted works); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 684 (1978) (analyzing the legality of a trade association’s “Code of Ethics” precluding engineers from competing on price when bidding for contracts).

46. 15 U.S.C. § 1 (2018).

47. Direct evidence of price-fixing can nonetheless exist in the form of audio and video recordings of cartel meetings or eyewitness accounts of cartel participants who have turned states’ evidence in exchange for leniency. *See, e.g.*, *United States v. Andreas*, 216 F.3d 645, 659 (7th Cir. 2000) (“The government established the accuracy of the recordings through witnesses who attended the meetings . . .”). Such evidence is the exception.

48. John E. Lopatka, *Economic Expert Evidence: The Understandable and the “Huh?”*, 61 ANTITRUST BULL. 434, 439 (2016) (“Indeed, sometimes the only available evidence will be circumstantial, colluders being clever enough to avoid fixing prices in front of eyewitnesses and loyal (or frightened) enough to remain mum.”); *see, e.g.*, *In re Vitamins Antitrust Litig.*, No. MISC 99-197 (TFH), 2000 WL 1475705, at \*3 (D.D.C. May 9, 2000) (alleged price fixers’ acts of concealment included holding “secret meetings, confining the conspiracy plan to a small group of key officials at each company, avoiding references in documents or the creation of documents which would reveal these antitrust violations, destroying documents, using codes to conceal the identity of co-conspirators, and providing false information to law enforcement authorities”); JOHN G. FULLER, *THE GENTLEMAN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY* 12–13 (1962) (discussing concealment methods of electrical equipment cartels).

as a cover for their cartel meetings, using pay phones, falsifying travel and business records, and destroying incriminating documents.<sup>49</sup> For these reasons, several courts have acknowledged that “it is axiomatic that the typical conspiracy is ‘rarely evidenced by explicit agreements,’ but must almost always be proved by ‘inferences that may be drawn from the behavior of the alleged conspirators.’”<sup>50</sup> Thus, as a rule, direct evidence would be potent but is mostly inaccessible.

### B. Circumstantial Evidence

Direct evidence is not required to prove price fixing.<sup>51</sup> In the absence of direct evidence of a horizontal agreement, antitrust plaintiffs can prove the existence of illegal collusion through circumstantial evidence.<sup>52</sup> The traditional process for proving an anticompetitive agreement through circumstantial evidence involves two steps: parallel behavior and plus factors.<sup>53</sup> Initially, the plaintiff should show that the defendants engaged in similar conduct. Courts refer to this as “conscious parallelism,” which the Supreme Court has defined as “the process, *not in itself unlawful*, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing,

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49. See Leslie, *Price-Fixing Conspiracy*, *supra* note 11.

50. *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553–54 (8th Cir. 1991) (citations omitted); see *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991) (“[I]t is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators.”).

51. *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007) (“[D]irect allegations of conspiracy are not always possible given the secret nature of conspiracies. Nor are direct allegations necessary.”).

52. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (“Direct evidence of conspiracy is not a *sine qua non*, however. Circumstantial evidence can establish an antitrust conspiracy.”).

53. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 n.11 (3d Cir. 2004). I say this is the “traditional process” because, while the two-step approach is the most common way that plaintiffs present a circumstantial case for price-fixing, a plaintiff can prove an agreement through circumstantial evidence without proof of parallelism. See *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 626 (E.D. Mich. 2012) (“Nonetheless, this 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.”); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 158 (N.D.N.Y. 2010) (“Parallel pricing is merely ‘one such form of circumstantial evidence.’ *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 166 (D. Conn. 2009). Accordingly, Plaintiffs need not prove parallel pricing in order to prevail on per-se claim based on circumstantial evidence.”).

supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”<sup>54</sup> This parallel conduct generally involves synchronous price movements, but can include concurrent changes to other contract terms or business practices.<sup>55</sup>

Conscious parallelism is probative of price fixing<sup>56</sup> but is insufficient on its own for a plaintiff to prove that the defendants have colluded.<sup>57</sup> This makes sense because even in a perfectly competitive market, prices can move in unison.<sup>58</sup> Parallel pricing, or other conduct, can occur even when firms are engaging in unilateral decision making.<sup>59</sup>

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54. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

55. *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009) (“Allegations of concerted action by competitors are frequently based on a pattern of uniform business conduct, which courts often refer to as ‘conscious parallelism.’”); *see also* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381 (2018) [hereinafter Leslie, *Conspiracy to Arbitrate*] (discussing parallel imposition of anti-consumer mandatory arbitration clauses).

56. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (“Thus, when two or more competitors in such a market act separately but in parallel fashion in their pricing decisions, this may provide probative evidence of the existence of an understanding by the competitors to fix prices.”).

57. *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 398 (3d Cir. 2015) (citations omitted) (“Accordingly, evidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy. To move the ball across the goal line, a plaintiff must also show that certain plus factors are present.”); *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 859 (10th Cir. 1999) (“While consciously parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, standing alone, to prove conspiracy.”); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 51 (7th Cir. 1992) (“[T]he fact that [the defendants] engaged in parallel pricing of insulation cannot, by itself, support an inference that the two companies conspired to fix prices.”); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987) (citation omitted) (“Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy. However, parallel conduct alone will not suffice as evidence of such a conspiracy even if the defendants ‘knew the other defendant companies were doing likewise.’ More must be shown.”).

58. *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1022 (N.D. Cal. 2007) (“We must remember that competitive market forces will tend to drive the prices of like goods to the same level, so like prices on like products are not, standing alone, sufficient to implicate price-fixing.”).

59. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011) (“Parallel conduct in itself is insufficient to state a plausible claim because it is ‘consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.’” (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007))); *see also In re Chocolate*, 801 F.3d at 397 (“The upshot is oligopolists may maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful

The First Circuit has explained that “[e]ach producer may independently decide that it can maximize its profits by matching one or more other producers’ price, on the hope that the market will be able to maintain high prices if the producers do not undercut one another.”<sup>60</sup> Further, courts cannot require sellers to ignore their rivals’ pricing altogether.<sup>61</sup> Ultimately, allowing juries to infer a price-fixing agreement solely from parallel price movements could essentially force sellers to make inefficient pricing decisions simply to avoid the appearance of parallelism.<sup>62</sup>

In order to reduce the risk that courts will condemn conduct that is merely parallel but not collusive, plaintiffs must also present plus factors.<sup>63</sup> Evidence of plus factors augments the evidence of parallelism, making the latter more probative of price fixing.<sup>64</sup> Some antitrust

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concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices.”); *White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011) (“Because supracompetitive prices—prices above what they would be in a perfectly competitive market—can result from both lawful conscious parallelism and an unlawful agreement to fix prices, antitrust doctrine has developed evidentiary standards to minimize the risk that legal conduct will be chilled or punished.”).

60. *White*, 635 F.3d at 576.

61. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1042 (8th Cir. 2000) (Gibson, J., dissenting) (en banc) (“[W]e cannot order sellers to make their decisions without taking into account the reactions of their competitors.”).

62. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445 (9th Cir. 1990) (“[P]ermitt[ing] an inference of conspiracy from the parallel pricing evidence alone would result in an anticompetitive dislocation by distorting independent pricing decisions.”).

63. *In re Chocolate*, 801 F.3d at 398 (citations omitted) (“Accordingly, evidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy. To move the ball across the goal line, a plaintiff must also show that certain plus factors are present.”); *Blomkest Fertilizer, Inc.*, 203 F.3d at 1033 (“A plaintiff has the burden to present evidence of consciously paralleled pricing *supplemented with* one or more plus factors.”); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (citations omitted) (“Because the evidence of conscious parallelism is circumstantial in nature, courts are concerned that they do not punish unilateral, independent conduct of competitors. They therefore require that evidence of a defendant’s parallel pricing be supplemented with ‘plus factors.’”); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1201 (7th Cir. 1981) (“Parallel behavior without more (a ‘plus factor’) is not enough to establish a Sherman Act violation.”).

64. *Michael v. Intracorp, Inc.*, 179 F.3d 847, 858–59 (10th Cir. 1999) (“Such parallel behavior may, however, support the existence of an illegal agreement when augmented by ‘additional evidence from which an understanding among the parties may be inferred.’”); *see also White*, 635 F.3d at 577 (“Plaintiffs must establish that it is plausible that defendants are engaged in more than mere conscious parallelism, by



opinions have defined plus factors as “economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.”<sup>65</sup> Courts, however, have not coalesced on a uniform definition of plus factors.<sup>66</sup> Some courts have treated plus factors as “proxies for direct evidence of an agreement.”<sup>67</sup> Other courts have noted, that “[t]he simple term ‘plus factors’ refers to ‘the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy.’”<sup>68</sup> Plus factors can help “establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade.”<sup>69</sup> The presence of plus factors, “when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.”<sup>70</sup> This combination of conscious parallelism and plus factors forms the foundation of most price-fixing cases based on circumstantial evidence.<sup>71</sup>

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pleading and later producing evidence pointing toward conspiracy, sometimes referred to as ‘plus factors.’”); *In re Med. X-Ray Film Antitrust Litig.*, 946 F. Supp. 209, 218 (E.D.N.Y. 1996) (“Thus, although evidence of parallel conduct between competitors alone is insufficient to prove an agreement or conspiracy, an agreement may properly be inferred from conscious parallelism when these ‘plus factors’ are present.”).

65. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015).

66. Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CALIF. L. REV. 683, 749–50 (2011) (“[T]here is no readily accepted principle that determines what counts as a sufficient plus factor and what does not (or what combinations might be jointly sufficient).”).

67. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004).

68. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (quoting AREEDA, ANTITRUST LAW § 1433(e)).

69. *Capitol Body Shop, Inc. v. State Farm Mut. Auto. Ins.*, 163 F. Supp. 3d 1229, 1234 (M.D. Fla. 2016) (citing *City of Tuscaloosa v. Harcros Chems, Inc.*, 158 F.3d 548, 570–71 (11th Cir. 1998)); see also *In re Baby Food*, 166 F.3d at 122 (stating that plus factors “show that the allegedly wrongful conduct of the defense was conscious and not the result of independent business decisions of the competitors”).

70. *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253–54 (2d Cir. 1987).

71. *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232–33 (3d Cir. 1993) (“[I]n a conscious parallelism case, a plaintiff also must demonstrate the existence of certain ‘plus’ factors, for only when these additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently.”); *Avenarius v. Eaton Corp.*, 898 F. Supp. 2d 729, 738 (D. Del. 2012) (“Ultimately, however, plus factors are simply circumstances in which the inference of independent action is less likely than that of concerted action.”).

Courts have not created a completely comprehensive list of plus factors.<sup>72</sup> Instead, courts generally discuss the plus factors proffered by the plaintiffs in the litigation at hand. But because plaintiffs only present those plus factors that they think are present and relevant to their lawsuit, the plus factor list in any given antitrust opinion is “neither exhaustive nor exclusive.”<sup>73</sup>

The plus-factor approach provides a loosely structured framework for making a circumstantial case for finding an agreement among competitors to fix prices. Each plus factor is a piece of circumstantial evidence. No minimum number of plus factors is required as “the plus-factor inquiry is not intended to be rigid or formulaic.”<sup>74</sup> Moreover, because these are plus *factors*, not elements, no single plus factor is dispositive or necessary to a plaintiff’s case.<sup>75</sup>

Finally, judges and juries must analyze all of the proffered plus factors collectively and not in isolation from each other.<sup>76</sup> Over half a century ago, the Supreme Court established the rule that plaintiffs in antitrust cases

should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The 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.<sup>77</sup>

At the pre-trial stage, if the totality of plus factors, read together, provides a plausible basis for inferring a price-fixing conspiracy, a

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72. *In re Flat Glass*, 385 F.3d at 360.

73. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir. 2016) (noting that the list of plus factors it presented was “neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior, might permit a jury to infer the existence of an agreement”); *see also In re Flat Glass*, 385 F.3d at 360 (“The question then becomes, what are ‘plus factors’ that suffice to defeat summary judgment? There is no finite set of such criteria; no exhaustive list exists.”).

74. *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 207 (3d Cir. 2017) (Stengel, J., dissenting) (citing *In re Flat Glass*, 385 F.3d at 361 n.12; *Petruzzi’s*, 998 F.2d at 1242).

75. *Id.* at 206–07; *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002).

76. *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 58 (D.D.C. 2016) (“‘Plus factors’ must be evaluated holistically.”); *In re Currency Conversion Fee Antitrust Litig.*, 773 F. Supp. 2d 351, 370–71 (S.D.N.Y. 2011) (“Plaintiffs’ conspiracy allegations must be examined holistically.”); *see* Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. (forthcoming 2021) (manuscript at 1–2) (on file with author) [hereinafter Leslie, *Probative Synergy*].

77. *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

judge should allow the case to proceed to trial, and at trial a reasonable jury may find the defendants liable based on this circumstantial evidence.<sup>78</sup>

Circumstantial evidence sufficient to infer an agreement displaces any need for direct evidence of an agreement.<sup>79</sup> Consequently, to survive a defendant's motion for summary judgment, "a nonmovant plaintiff in a section I case does not have to submit direct evidence, i.e., the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence."<sup>80</sup> Despite the fact that all courts have recognized the principle that circumstantial evidence alone can be sufficient, many judges have misapplied antitrust law in a manner that effectively requires private plaintiffs to present direct evidence of price fixing, as Part II shows.

## II. THE DE FACTO DIRECT EVIDENCE REQUIREMENT IN PRICE-FIXING LITIGATION

Judges have misunderstood how to interpret plus factors when assessing a circumstantial case for inferring an agreement among competitors, as dozens of recent antitrust opinions show. This Part exposes how judges routinely miscomprehend the role of plus factors as circumstantial evidence and effectively require direct evidence of an agreement. Judges do so in several ways, including depriving plus factors of their probative value unless the plaintiff has direct evidence of collusion;

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78. *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 47 (1st Cir. 2013) ("While each of [plaintiff's] allegations of circumstantial [evidence of] agreement standing alone may not be sufficient to imply agreement, taken together, they provide a sufficient basis to plausibly contextualize the agreement necessary for pleading a § 1 claim."); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) ("[W]hen examining the sufficiency of what the plaintiff has adduced, [courts] are not to 'tightly compartmentalize the evidence,' but rather [courts] must evaluate it as a whole to see if it supports an inference of concerted action."); *Alpha Lyracom Space Commc'ns, Inc. v. Comsat Corp.*, 968 F. Supp. 876 (S.D.N.Y. 1996), *aff'd*, 113 F.3d 372 (2d Cir. 1997) ("The Court . . . does not examine each piece of evidence in a vacuum, but considers the evidence as a whole to determine the reasonableness of inferences to be drawn by a jury.").

79. *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) ("[E]ven in the absence of direct 'smoking gun' evidence," a horizontal agreement, such as the one alleged in the case before us, "may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors").

80. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) ("Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy.").

imposing a causation requirement on individual plus factors; and condemning the entire plus-factor framework as “backward reasoning.” These judicial opinions display a fundamental misconception about the purpose and process of proving collusion through circumstantial evidence.

*A. Direct Evidence as a Prerequisite to Crediting Circumstantial Evidence*

Across a range of different plus factors, several judicial opinions share common errors in their approach to evaluating the connection between plus factors and proof of agreement. Federal courts have diminished or eliminated the significance of circumstantial evidence in price-fixing cases by condemning plus-factor evidence that falls short of direct proof or is not supported by direct evidence of collusion. In some ways, courts confuse the relationship between circumstantial evidence and direct evidence. A court traditionally performs plus-factor analysis after determining that insufficient direct evidence exists to prove an agreement. If the plaintiffs have direct evidence of an agreement, then there is no need to rely on circumstantial evidence. Many antitrust opinions, however, have discounted individual plus factors unless the plaintiffs also have direct evidence of collusion. This Section demonstrates how several courts have essentially stripped several well-established plus factors of their probative value.

*1. Opportunity to conspire*

Like most illegal conspiracies, price-fixing cartels are generally preceded by motive and opportunity. The motive for price fixing is straightforward: rival firms can maximize their collective profits by colluding instead of competing.<sup>81</sup> Opportunity can be trickier. A gathering of rival firms can appear suspicious to antitrust authorities and customers. Adam Smith famously asserted that “[p]eople in the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public and in some contrivance to raise prices.”<sup>82</sup> Although Smith overstated the case,<sup>83</sup>

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81. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194–95 (9th Cir. 2015) (“Any firm that believes that it could increase profits by raising prices has a motive to reach an advance agreement with its competitors.”).

82. *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002) (per curiam) (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 55 (Great Books ed. 1952) (1776)).

83. *See id.* at 166 (describing the Adam Smith quotation as “problematic” because it “suggests that knowledge of and participation in an antitrust conspiracy can be

competing firms do often find opportunities for collusion in trade association conferences and other seemingly legitimate get-togethers, as well as in secret meetings.<sup>84</sup> Proving that such opportunities existed among defendants can be an important part of a plaintiff's circumstantial case.<sup>85</sup>

Although courts recognize that the opportunity to conspire is a plus factor,<sup>86</sup> in discussing the role of opportunity to conspire as circumstantial evidence, some courts seem to require direct evidence of collusion before treating opportunity as having probative value. For example, in *Williamson Oil Co. v. Phillip Morris USA*,<sup>87</sup> a case in which tobacco retailers accused tobacco manufacturers of fixing the price of cigarettes, the Eleventh Circuit held that “the opportunity to fix prices without any showing that appellees *actually* conspired does not tend to exclude the possibility that they did not avail themselves of such opportunity or, conversely, that they actually did conspire.”<sup>88</sup> The court's language suggests that the opportunity to fix prices does not support any inference of actual conspiracy unless the plaintiffs can separately prove that the defendants “actually conspired.” This formulation essentially eliminates opportunity as a plus factor because if the plaintiff could already show that the defendants “actually conspired,” the plaintiff would not need to raise the opportunity to conspire as a plus factor.

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inferred merely from the fact of meetings between persons engaged in competing businesses, which is not the law”).

84. CONNOR, *supra* note 25, at 32 (“In some cases, cartels create sham associations with fake agendas as a cover for illegal price discussions.”); Griffin, *supra* note 22, at 121–22 (“Another characteristic of international cartels is that they frequently use trade associations as a means of providing ‘cover’ for their cartel activities.”).

85. *Petruzzi's*, 998 F.2d at 1244 n.17 (“[T]he testimony relating to the defendants' opportunity to conspire and the solicitation of others to partake in common action is also relevant.”).

86. *See, e.g., Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999) (listing as plus factor “whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy”); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 711 (E.D. La. 2013) (“Plus factors identified by courts and commentators include . . . an opportunity to conspire . . . .”); *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007).

87. 346 F.3d 1287 (11th Cir. 2003).

88. *Id.* at 1319.

The Eleventh Circuit's conversion of opportunity from relevant plus factor into irrelevant fact has proven influential,<sup>89</sup> and what the Eleventh Circuit implied, other courts have made explicit. For example, in *In re Brand Name Prescription Drugs Antitrust Litigation*,<sup>90</sup> a case involving a buyers-side price-fixing cartel, the court disparaged the plaintiffs' evidence that the defendants had "held several meetings" in which buyer efforts to reduce prices were discussed.<sup>91</sup> The court granted the defendants' motions for judgment as a matter of law because the "[p]laintiffs failed to present *direct evidence* that illegal discussions or conspiratorial conduct occurred at these meetings."<sup>92</sup> The judge seemed to think that opportunity to conspire was not a plus factor because there was no "direct evidence" that the opportunity led to illegal discussions or agreements. If, however, the plaintiffs had such direct evidence of an agreement, they would not need to proffer the opportunity to conspire as a plus factor that could support an inference of an agreement.

Some courts have also asserted that the opportunity to conspire is not a plus factor at all unless the plaintiffs have separate proof of collusion. For example, one district judge asserted that the showings that "[d]efendants' key decision-makers met at trade shows and summits . . . don't really amount to 'plus factors' either, because all they show is that Defendants' decision-makers had the opportunity to communicate or meet to reach agreements, or to enter into a conspiracy—not that they did."<sup>93</sup> Under this formulation, the opportunity to conspire ceases to be a plus factor. Similarly, another district court explicitly stated that an "'opportunity to conspire' without a showing of actual conspiracy is *insufficient to create a plus factor* which would survive

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89. For example, a Kansas state court "rejected" opportunity as a plus factor by quoting the Eleventh Circuit's *Williamson* opinion discounting the opportunity to fix prices absent proof of actual collusion. *Smith v. Philip Morris Cos.*, 335 P.3d 644, 669 (Kan. Ct. App. 2015) (quoting *Williamson Oil Co.*, 346 F.3d at 1319 in granting summary judgment to defendant); *see also In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 60 F. Supp. 3d 914, 959 (N.D. Ill. 2014), *aff'd*, 801 F.3d 758 (7th Cir. 2015) (quoting *Williamson*).

90. No. 94 C 897, 1999 WL 33889 (N.D. Ill. Jan. 19), *aff'd in part, vacated in part*, 186 F.3d 781 (7th Cir. 1999).

91. *Id.* at \*16.

92. *Id.* (emphasis added).

93. *In re Nat'l Ass'n of Music Merchs., Musical Instruments & Equip. Antitrust Litig.*, No. 09CV2002, 2012 WL 3637291, at \*5 (S.D. Cal. Aug. 20, 2012), *aff'd sub nom. In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186 (9th Cir. 2015).

summary judgment.<sup>94</sup> In particular, the defendants' common membership in "alliances, trade associations, and other cooperative ventures" that give the defendants opportunity to conspire "do not create a plus factor or even an inference of conspiracy."<sup>95</sup> Both of these decisions confused the existence of evidence with the sufficiency of evidence. The opportunity to conspire is always a plus factor, but one whose strength must be judged as part of the plaintiff's bundle of proffered plus factors.<sup>96</sup>

All of the above antitrust decisions distort the relationship between plus factors and proof. Plus factors are a type of proof. Courts are correct to hold that the opportunity to conspire alone is insufficient to prove a price-fixing conspiracy occurred.<sup>97</sup> But many courts have held that because the evidence of opportunity to conspire fell short of proving that the defendants "actually conspired," that meant that the opportunity to conspire was not a plus factor at all.<sup>98</sup> These opinions are Kafkaesque: if the opportunity to conspire is not a plus factor unless the plaintiff can separately prove the defendants "*actually*

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94. *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 664 n.12 (E.D.N.C. 2003) (emphasis added), *aff'd sub nom. Hall v. Am. Airlines, Inc.*, 118 F. App'x 680 (4th Cir. 2004) (per curiam).

95. *Id.* at 672, 678. The court asserted that because the plaintiff did not present "evidence of actual knowledge of, and participation in, an illegal scheme," the defendant was entitled to summary judgment. *Id.* at 678.

96. Leslie, *Probative Synergy*, *supra* note 76.

97. The mere fact of meetings among competitors does not prove an agreement. For example, to survive a motion for summary judgment, plaintiffs should present "additional evidence that would permit an inference that the meetings led to an illegal agreement." *Sancap Abrasives Corp. v. Swiss Indus. Abrasives*, 19 F. App'x 181, 189–90 (6th Cir. 2001).

98. Other courts have also implicitly required direct evidence by condemning plaintiffs for not providing "evidence . . . that any actual collusion occurred at these meetings, or that the conspiracy was formed or advanced at any particular meeting or meetings." *In re Text Messaging Antitrust Litig.*, 46 F. Supp. 3d 788, 806 (N.D. Ill. 2014), *aff'd*, 782 F.3d 867 (7th Cir. 2015). The court here failed to appreciate that the timing of price changes is the circumstantial evidence that price was discussed at meetings. *Id.* ("Although plaintiffs reference the existence of communications involving defendants that are temporally near some of the pricing changes at issue here, they offer nothing other than speculation about the substance of these talks."); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 412 (3rd Cir. 2015) ("Evidence of a disconnected foreign conspiracy, limited possession of advance pricing information, mere opportunities to conspire without suspect meetings or conversations about pricing, conduct that is consistent with pre-conspiracy conduct, and a weak showing of pretext do not support a reasonable inference of a conspiracy."); *Smith v. Philip Morris Cos.*, 335 P.3d 644, 669 (Kan. Ct. App. 2014) (finding that the opportunity to fix prices is not a plus factor absent proof that the defendants "*actually* conspired").

conspired,” then the plus factor only exists when it is superfluous. After all, if the plaintiff could show that the defendants actually conspired, then the plaintiff would not need to use the plus-factor approach in the first place.

## 2. *Inter-competitor communications*

Price-fixing conspiracies generally rely on some form of communications between rival firms in order to form and manage their illegal cartel operations. All federal circuits recognize that communication among competitors is a plus factor for proving a price-fixing conspiracy through circumstantial evidence.<sup>99</sup> This makes sense because inter-competitor communications help the conspirators to reach an initial collusive agreement and to negotiate the cartel details—including prices, production levels, exchange rates, and market allocation. Ongoing communications may be necessary for cartel enforcement as the conspirators monitor each other for cheating and implement remedies to redress any violations of the cartel allotments.<sup>100</sup> Finally, greater communications among conspirators helps build trust, which is often necessary for market rivals to come together and agree to commit a felony.<sup>101</sup>

Despite its status as a well-recognized and universally accepted plus factor, several courts have interpreted or applied the inter-competitor communications plus factor in a manner that deprives it of its probative value. For example, the district court in *In re Chocolate Confectionary Antitrust Litigation*<sup>102</sup> quoted Third Circuit precedent for the proposition

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99. See, e.g., *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432 (4th Cir. 2015) (“Allegations of communications and meetings among conspirators can support an inference of agreement because they provide the means and opportunity to conspire.”) (citing *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 49 (1st Cir. 2013)); *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 320 (6th Cir. 2014); *Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013); *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc) (“Courts have held that a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy.”) (citing *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633–34 (5th Cir. 1981)); *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 983 (N.D. Ohio 2015) (“Evidence of communications between competitors can serve as circumstantial evidence of price-fixing.”).

100. See Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 842–43 (2011).

101. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 538–39 (2004) [hereinafter Leslie, *Trust, Distrust, and Antitrust*].

102. 999 F. Supp. 2d 777 (M.D. Pa. 2014), *aff'd*, 801 F.3d 383 (3d Cir. 2015).



that “[c]ommunications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.”<sup>103</sup> As written, this standard makes inter-competitor communications essentially irrelevant unless the plaintiff can prove that these communications were themselves the illegal agreement. But this formulation fails to recognize that communications could be circumstantial evidence of illegal collusion because they were prefatory to the conspiracy or related to issues of cartel enforcement (such as reporting cheating or discussing penalties for suspected cheaters).<sup>104</sup> In other words, the inter-competitor communications do not themselves have to “rise to the level of an agreement” in order for them to be probative of collusion. Members of illegal cartels communicate for many reasons besides forming the initial agreement. Nevertheless, the district court invoked this phrase to discount the evidence provided by the plaintiffs’ expert, Dr. Robert Tollison, an expert economist who studies markets and cartel behavior. When Dr. Tollison explained why the defendants’ inter-competitor communications were a plus factor, the court disparaged the expert’s informed opinion because he was “unable to point to anything beyond his own speculation to establish that defendants’ executives discussed collusive price increases” during their conversations.<sup>105</sup> The court’s approach fundamentally fails to understand the difference between circumstantial and direct evidence. If Dr. Tollison could prove that the competitors actually colluded on price in their discussions at trade shows, that would be direct evidence of an agreement.<sup>106</sup> The plaintiffs wouldn’t need to use the plus-factor framework at all. Indeed, they wouldn’t need an expert on cartel behavior; they could just point to the direct evidence of a conspiracy.

Courts routinely fail to appreciate how inter-competitor communications serve several functions for a cartel. For example, in *In re Citric Acid Litigation*,<sup>107</sup> the Ninth Circuit considered a district court’s grant of summary judgment in a civil case in which four out of the five leading manufacturers of citric acid had already pleaded guilty to criminal

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103. *Id.* at 800 (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3rd Cir. 1999)); see *infra* notes 142–53 (critiquing this aspect of the *In re Baby Food* opinion).

104. Leslie, *Trust, Distrust, and Antitrust*, *supra* note 101, at 610–20.

105. *In re Chocolate*, 999 F. Supp. 2d at 804.

106. See Page, *supra* note 44, at 443 (“Evidence is only direct if it spells out the terms of the communications, which in turn meet the definition of agreement.”).

107. 191 F.3d 1090 (9th Cir. 1999).

price fixing but the fifth firm, Cargill, maintained its innocence.<sup>108</sup> To make their case, the plaintiffs showed that Cargill had followed similar pricing to the known price fixers and “that representatives of Cargill attended meetings and had telephone conversations with individuals who have been identified as” the ringleaders and foot soldiers of the cartel.<sup>109</sup> The Ninth Circuit deprived these communications of probative value—even though they were conversations with admitted price fixers—because the plaintiffs did “not offer any specific details with regard to illegal discussions.”<sup>110</sup> The appellate panel conceded that Cargill met with the convicted price fixers, but then the court demanded too much from the plaintiffs given that they were using circumstantial evidence to survive a summary judgment motion. If the plaintiff’s evidence of inter-competitor communications needs to spell out the specific illegal content of those communications, then this requires the plaintiff to present direct evidence of a price-fixing agreement.<sup>111</sup> The *In re Citric Acid* plaintiffs had already detailed the time and participants of the communications.<sup>112</sup> For the court to require even more “specific details with regard to illegal discussions” is essentially a demand for direct evidence of an illegal agreement.<sup>113</sup>

Some courts use language that comes close to eliminating inter-firm communications as a plus factor altogether when the plaintiff does not know the contents of the discussions. For example, in *In re Travel Agent Commission Antitrust Litigation*,<sup>114</sup> the Sixth Circuit affirmed the dismissal of the plaintiff’s price-fixing claim because—despite the complaint’s allegations of inter-rival communications—the plaintiff’s “allegations, however, aver[red] only an opportunity to conspire, which does not necessarily support an inference of illegal agreement.”<sup>115</sup> The Sixth

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108. *Id.* at 1092–93.

109. *Id.* at 1103. The cartel had used the language of “masters and sherpas” to describe the cartel’s participants. *Id.*

110. *Id.*

111. Page, *supra* note 44, at 443.

112. *In re Citric Acid*, 191 F.3d at 1103.

113. Similarly, some courts have suggested coordination with competitors through trade associations and joint ventures is not a plus factor when the plaintiff lacks evidence that the defendant “has participated in any collusive activity through its memberships in these business ventures.” *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 666–67 (E.D.N.C. 2003) (granting summary judgment to defendant), *aff’d sub nom. Hall v. Am. Airlines, Inc.*, 118 F. App’x 680 (4th Cir. 2004) (per curiam). This seems like a requirement of direct evidence of agreement.

114. 583 F.3d 896 (6th Cir. 2009).

115. *Id.* at 905.

Circuit's reasoning is wrong; inter-competitor communications are a plus factor and can indeed "support an inference of illegal agreement." They may not be enough on their own to prove an agreement, but they are still circumstantial evidence. The Sixth Circuit opinion seems to undermine both opportunity and communications as plus factors when the details of the communications are unknown at the time that the complaint is filed and before discovery has taken place.<sup>116</sup> Requiring such a level of detail about conspiratorial meetings is particularly unreasonable when plaintiffs have not had the benefit of full discovery.<sup>117</sup>

The judicial urge to deny the probative value of inter-firm communications absent separate proof of an underlying antitrust conspiracy is not limited to purely price-fixing claims. In *Rosefelde v. Falcon Jet Corp.*,<sup>118</sup> a New Jersey district court considered an alleged conspiracy to prevent the resale of business jets and to fix prices.<sup>119</sup> After noting that "[a] high level of interfirm communications is one of the 'plus factors' which may indicate the defendants were engaged in collusive anticompetitive behavior,"<sup>120</sup> the court diminished the significance of the defendant's inter-competitor meetings because the defendants' notes did not memorialize their illegal agreement.<sup>121</sup> Instead, the court reasoned that the plaintiffs could not prove that during the communications the defendants agreed to take collective action to restrain trade even though after their meetings "each of the four alleged conspirators took significant steps to deter the resale of new business jets, an anticompetitive objective under the Sherman Act."<sup>122</sup> The rival firms' simultaneous action on the heels of their inter-competitor communications is circumstantial evidence that—combined with other plus factors—could allow a reasonable jury to infer a conspiracy.<sup>123</sup> Yet, the court rejected this circumstantial

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116. See generally Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744 (2016).

117. Leslie, *Price-Fixing Conspiracy*, *supra* note 11.

118. 701 F. Supp. 1053 (D.N.J. 1988).

119. *Id.* at 1055.

120. *Id.* at 1074.

121. *Id.*

122. *Id.* at 1073.

123. See *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 197 (E.D. Pa. 2016) ("[O]pportunities to conspire may be probative of a conspiracy when meetings of Defendants are closely followed in time by suspicious actions or records."); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 239 F. Supp. 2d 180, 187 (D.R.I. 2003) (noting that inter-competitor meetings are more probative of collusion

evidence, because it fell short of being direct evidence. Similarly, in a footnote considering the plaintiffs' price-fixing claims, the district court's language improperly implied a requirement of direct evidence, noting that "[p]laintiffs admit there is *no direct evidence* of an express agreement to fix prices in the industry; *therefore*, defendants are granted summary judgment with respect to the existence of an express agreement to fix prices."<sup>124</sup> One hopes that this language is unintentionally careless because it incorrectly suggests that plaintiffs bringing price-fixing claims must present direct evidence in order to survive summary judgment, which is unquestionably incorrect.<sup>125</sup> Whatever the intent behind this particular phrasing, the court's approach minimized the significance of inter-firm communications as a plus factor.

In sum, several courts have interpreted the inter-competitor communications plus factor in a manner that essentially necessitates direct evidence of an agreement in order for this plus factor to count as circumstantial evidence.<sup>126</sup> While frequent meetings among rival firms alone do not prove conspiracy, evidence of such meetings is an important plus factor that helps create a circumstantial case when combined with other evidence.<sup>127</sup> To require specific details about contents of inter-competitor meetings is to require direct evidence of collusion.<sup>128</sup> Courts should not require direct evidence of the content of inter-competitor communications in order for those communications

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when "followed shortly thereafter by parallel behavior that goes beyond what would be expected absent an agreement"), *aff'd*, 373 F.3d 57 (1st Cir. 2004).

124. *Rosefield*, 701 F. Supp. at 1061 n.13 (emphasis added) (citations omitted).

125. See *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007).

126. See, e.g., *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 152 F. Supp. 3d 234, 250–51 (D. Del. 2016), *aff'd*, 873 F.3d 185 (3d Cir. 2017) (granting summary judgment to defendants because plaintiffs' evidence of inter-competitor communications did not include "explicit agreement between competitors"); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1259 (W.D. Wash. 2009) ("[P]laintiffs here do not identify any specific communications or contracts.").

127. *Venture Tech., Inc. v. Nat'l Fuel Gas Co.*, 685 F.2d 41, 45 (2d Cir. 1982) (quoting *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980)) ("[F]requent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement.").

128. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 34 (D.D.C. 2008) ("Short of being in the boardroom at the meeting, it is hard for the Court to imagine how plaintiffs could more fulsomely allege that defendants entered into an agreement at the AAR meetings."); see Page, *supra* note 44, at 443.

to represent a plus factor in a plaintiff's circumstantial case.<sup>129</sup> If evidence of inter-competitor communications is only given weight when it rises to the level of direct evidence that the content of those communications included an agreement to collude on price, then the court has essentially eliminated plaintiffs' ability to prove agreements through circumstantial evidence.

### 3. *Invitation to collude*

Certain types of inter-competitor communications are particularly symptomatic of price collusion. Notably, when one competitor in a market solicits one or more of its rivals to fix prices, this one-way message is highly probative of conspiracy. By itself, an invitation to collude is already halfway to an antitrust violation. The solicitation proves that at least one firm is ready and willing to agree to fix prices in violation of antitrust law.<sup>130</sup> Unsurprisingly, courts usually consider invitations to collude an important plus factor.<sup>131</sup>

Despite this recognition, some courts have nevertheless interpreted this plus factor in a way that undermines its usefulness. In *Alakayak v.*

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129. Some courts have admirably resisted defendants' efforts to convert the communications plus factor into a direct evidence requirement. For example, in *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, 681 F. Supp. 2d 141 (D. Conn. 2009), the defendants argued that evidence of communication must be formal communications that "unambiguously support an inference of conspiracy." *Id.* at 168–69. The defendants argued that communication must "demonstrate conclusively" that the defendants agreed. *Id.* at 175–76. That is wrong; that is demanding direct evidence. The court rejected the defendants' argument and held that the plaintiffs had presented sufficient circumstantial evidence to survive the defendants' motion for summary judgment. *Id.* at 176.

130. *In re Fortiline, LLC*, No. 151-0000, 2016 WL 4379041, at \*11 (F.T.C. Aug. 9, 2016) (defining an "invitation to collude" as "an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition").

131. See *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1372 (N.D. Ga. 2017), *aff'd sub nom. Siegel v. Delta Air Lines, Inc.*, 714 F. App'x 986 (11th Cir. 2018) (per curiam) ("Numerous cases have recognized that an invitation to collude can serve as evidence of a conspiracy." (citing *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939))); *Fishman v. Wirtz*, No. 78 C 3621, 1981 WL 2153, at \*59 (N.D. Ill. Oct. 28, 1981) ("One of the strongest circumstantial indicators of a conspiracy is the existence of a common invitation or request to join into a concerted plan of action."); *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 300–01 (5th Cir. 1978); see also *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1045 (8th Cir. 2000) (en banc) (Gibson, J., dissenting) (noting that an invitation to collude "shows conspiratorial state of mind on the part of the solicitor and may also indicate that the solicitor was acting upon an earlier agreement").

*British Columbia Packers, Ltd.*,<sup>132</sup> the Alaska Supreme Court noted that “evidence of a traditional conspiracy agreement is a ‘plus factor,’” but then asserted that a plaintiff’s evidence “does not qualify as such unless there is evidence of *both* an invitation to collude, as well as acceptance of that invitation.”<sup>133</sup> Other courts have similarly implied that solicitations to fix price are meaningless unless the plaintiff proffers direct evidence that the invitees accepted the offer and, thus, formed a conspiracy.<sup>134</sup> Finally, some courts have held that “a conspiracy to fix prices can be inferred from an invitation, followed by responsive assurances and conduct.”<sup>135</sup> What this passage describes, however, is not an inference of agreement from circumstantial evidence but an actual agreement proven through direct evidence.

Such treatment of invitations to collude confuses plus factors with proof of agreement. If the plaintiff must show *both* solicitation and acceptance for the invitation to collude to be a plus factor, then the plaintiff is not really using plus factors so much as it is proving an actual agreement by showing the classic common law definition of mutual assent: offer and acceptance. For example, the Supreme Court in *Interstate Circuit, Inc. v. United States*<sup>136</sup> held that “[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”<sup>137</sup> In other words, requiring both proof of invitation and of acceptance eschews the plus-factor approach altogether. The offer-and-acceptance approach to proving an agreement uses the mutual assent test of contract law, not the plus-factor framework of antitrust law. Yet, were the plaintiffs to possess proof of offer and acceptance, they would not need circumstantial evidence at all. If courts require proof of acceptance as a prerequisite to giving an

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132. 48 P.3d 432 (Alaska 2002).

133. *Id.* at 458 (emphasis added). The Alaska Supreme Court ultimately found evidence of both invitation and acceptance on the facts before it. *Id.*

134. See *Blomkest Fertilizer, Inc.*, 203 F.3d at 1045 (Gibson, J., dissenting) (criticizing majority’s failure to appreciate significance of “evidence that various defendants invited others to join in stabilizing prices [because] the class was not able to adduce direct evidence that the people on the receiving end of these solicitations accepted them and formed a deal”). The *Blomkest* majority ultimately discounted the “significant evidence of solicitations to enter a price-fixing agreement.” *Id.* at 1038, 1044.

135. *In re TFT—LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1116 (N.D. Cal. 2008).

136. 306 U.S. 208 (1939).

137. *Id.* at 227.

invitation to collude any probative value, they have effectively eliminated the invitation to collude as an independent plus factor, albeit without acknowledging that they are doing so.

#### 4. *Exchange of price information*

Courts also recognize another subspecies of inter-competitor communication, the inter-firm exchange of price information, as a separate plus factor. Price-fixing conspirators commonly share their confidential pricing information with each other.<sup>138</sup> Disclosing price data can inform cartel negotiations as to what the fixed price should be and how it should be modified over time and across various geographic markets.<sup>139</sup> Price exchanges also provide a monitoring mechanism so that cartel members can more easily determine whether any of their partners are cheating on the cartel agreement by charging a price below the one fixed by the cartel.<sup>140</sup> For these reasons, courts treat inter-competitor price exchanges as a plus factor.<sup>141</sup>

Despite its inherent probative value as circumstantial evidence of collusion, some courts have suggested that the exchange of price information among competitors does not support an inference of conspiracy unless the plaintiff presents separate proof of an agreement. In *In re Baby Food Antitrust Litigation*,<sup>142</sup> the Third Circuit

138. See, e.g., *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633–34 (5th Cir. 1981).

139. *Blomkest Fertilizer, Inc.*, 203 F.3d at 1047 (Gibson, J., dissenting) (“The price communications in this case are more like those in *In re Coordinated Pretrial Proceedings*, 906 F.2d at 448, which served little purpose other than facilitating price coordination.”).

140. *Id.* (“[I]f there were a cartel, it would be crucial for the cartel members to cooperate in telling each other about actual prices charged in order to prevent the sort of widespread discounting that would eventually sink the cartel.”); ABA SECTION OF ANTITRUST LAW, ANTITRUST HEALTH CARE HANDBOOK ch. IV.B (4th ed. 2010), LexisNexis (“Exchanges of price information . . . facilitate[] the competitors’ detecting others ‘cheating’ on their tacit agreement.”).

141. *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995) (describing “exchange of price information and opportunity to meet” as plus factor); *Wilcox v. First Interstate Bank of Or., N.A.*, 815 F.2d 522, 526 (9th Cir. 1987) (discussing “exchange of price information” as plus factor); *In re Tyson Foods, Inc. Sec. Litig.*, 275 F. Supp. 3d 970, 995 (W.D. Ark. 2017) (“The broadcasting of sensitive business information . . . is . . . circumstantial evidence of a conspiracy among competitors.”) (alteration in original) (quotation omitted); *Ash v. Hack Branch Distrib. Co.*, 54 S.W.3d 401, 419 (Tex. App. 2001) (“[Plus] factors traditionally include price parallelism, product uniformity, exchange of price information, and the opportunity for the alleged conspirators to meet to formulate illegal policies.”).

142. 166 F.3d 112 (3d Cir. 1999).

considered plaintiffs' claims that three major baby manufacturers—Gerber, Beech-Nut, and Heinz, which collectively controlled over 98% of the American market—conspired to raise and stabilize the price of baby food.<sup>143</sup> Although the plaintiffs provided evidence of parallel pricing and significant inter-rival communications regarding future price increases, the Third Circuit affirmed summary judgment for the defendants, reasoning in part that “communications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.”<sup>144</sup> The court's formulation here is troubling because it suggests that price exchanges are not circumstantial evidence of collusion unless the plaintiff can prove that those suspicious communications are themselves an illegal agreement. The Third Circuit's approach is flawed because these inter-competitor price exchanges are not necessarily the illegal agreement. Rather, they are circumstantial evidence of cartel management and cartel enforcement, which helps the factfinder determine whether there is an underlying agreement to fix prices.

The Third Circuit opinion seems to conflate the two separate roles that inter-competitor price exchanges can play in establishing antitrust liability. Price exchanges can themselves, under certain circumstances, violate Section 1 when the exchange has the purpose or effect of stabilizing prices.<sup>145</sup> But this has little to do with how the sharing of price data constitutes a plus factor. These are two separate inquiries. The Ninth Circuit has correctly explained that inter-competitor

information exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, *or* (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of § 1 under a rule of reason analysis.<sup>146</sup>

The inter-firm sharing of price information has different legal significance depending on which path the antitrust plaintiff is taking. The first path treats price exchanges as a plus factor that plaintiffs can

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143. *Id.* at 118.

144. *Id.* at 126 (quotations omitted).

145. *See* *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969) (“The exchange of price data tends toward price uniformity.”).

146. *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 447 n.13 (9th Cir. 1990) (emphasis added); Page, *supra* note 44, at 431 (“An information exchange may be unlawful if it is found to have an unreasonable effect on prices, or if it is found to be a plus factor permitting an inference of a per se illegal agreement to fix prices.”).



use as circumstantial evidence to prove an agreement to fix prices, which is *per se* illegal.<sup>147</sup> The second path treats agreements to exchange price information as a separate antitrust claim, which courts evaluate under the Rule of Reason.<sup>148</sup> In other words, a horizontal agreement to exchange price information *might* violate the Sherman Act. In contrast, a horizontal agreement to fix prices *does* violate the Sherman Act because it is *per se* illegal. And evidence that competitors are exchanging price information can help prove that there is an underlying agreement to fix prices.

The *In re Baby Food* opinion confused these two distinct inquiries. In *In re Baby Food*, the Third Circuit evaluated the plaintiffs' plus factor under the second path, as if the plus factor has to be an antitrust violation unto itself. That is wrong because the plaintiff was proffering the defendants' exchange of price information as a plus factor—i.e., as evidence to prove an agreement under path one—not as an independent violation under path two. In other words, the plaintiff was arguing that the price “exchange indicates the existence of an express or tacit agreement to fix or stabilize prices,” not that the price exchange was itself illegal.<sup>149</sup> The court was wrong to suggest that the price exchanges did not constitute circumstantial evidence because the communications themselves were not illegal. There is no requirement that plus factors be independently illegal. Thus, the Third Circuit erred when it asserted that inter-competitor price exchanges do not support an inference of collusion.

Moreover, the *In re Baby Food* approach is based on a misreading of precedent. In diminishing inter-competitor price exchanges as a plus factor, the Third Circuit cited as its sole support the case of *Alword-Polk, Inc. v. F. Schumacher & Co.*<sup>150</sup> But *Alword-Polk* did not hold that inter-competitor communications were not evidence of conspiracy unless

147. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1046 (8th Cir. 2000) (en banc) (Gibson, J., dissenting) (“In price fixing cases, the exchange of sensitive price information can sometimes be circumstantial evidence of the existence of a *per se* violation.”); *Morton Salt Co. v. United States*, 235 F.2d 573, 577 (10th Cir. 1956) (inter-competitor exchange of price information “is a factor appropriately considered in determining the existence of a conspiracy”).

148. See, e.g., *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (“Exchanges of information are not considered a *per se* violation because ‘such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.’” (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978))).

149. *In re Coordinated Pretrial Proceedings in Petroleum Prods.*, 906 F.2d at 447 n.13.

150. 37 F.3d 996 (3d Cir. 1994).

the communications themselves constituted an agreement. The court in *Alvord-Polk* merely stated the uncontroversial proposition that “[c]ommunications alone, although more suspicious among competitors than between a manufacturer and its distributors, do not necessarily result in liability.”<sup>151</sup> In other words, the *Alvord-Polk* court said that communications themselves are *not illegal* unless they “rise to the level of an agreement.”<sup>152</sup> The *In re Baby Food* court misconstrued *Alvord-Polk* to hold that communications are *not evidence* unless the plaintiff can separately prove an agreement. But something can be evidence of an illegal agreement without being illegal in and of itself.<sup>153</sup>

Despite its fundamental mistake, the *In re Baby Food* court’s approach has influenced many courts. Several judges have invoked *In re Baby Food*’s operative language—that “[c]ommunications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise”—in order to deprive evidence of inter-competitor communication of probative value and to grant summary judgment to defendants.<sup>154</sup> For example, the Ninth Circuit in *In re Citric Acid*, discussed previously,<sup>155</sup> quoted *In re Baby Food* to affirm summary judgment for Cargill, which had been accused of conspiring to fix prices for citric acid with four of its competitors.<sup>156</sup> Cargill executives had had several meetings and telephone conversations with their counterparts at the four putative rivals, who had already been

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151. *Id.* at 1013.

152. *Id.* (“[I]t is only when those communications rise to the level of an agreement, tacit or otherwise, that they become an antitrust violation.”).

153. Christopher R. Leslie, *Foreign Price-Fixing Conspiracies*, 67 DUKE L.J. 557, 597 (2017) [hereinafter Leslie, *Foreign Price-Fixing Conspiracies*].

154. See, e.g., *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1375 (N.D. Ga. 2017) (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir. 1999)), *aff’d sub nom.* *Siegel v. Delta Air Lines, Inc.*, 714 F. App’x 986 (11th Cir. 2018) (per curiam); *Superior Offshore Int’l, Inc. v. Bristow Grp. Inc.*, 738 F. Supp. 2d 505, 516 (D. Del. 2010) (quoting *In re Baby Food*, 166 F.3d at 126); *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1308 (N.D. Ga. 2002) (quoting *In re Baby Food*, 166 F.3d at 126), *aff’d*, 346 F.3d 1287 (11 Cir. 2003); see also *Bailey Lumber & Supply Co. v. Georgia-Pac. Corp.*, No. 1:08CV1394 LG-JMR, 2010 WL 1141133, at \*4 (S.D. Miss. Mar. 19, 2010) (invoking *In re Baby Food*’s operative language to assert “there is nothing inherently improper with competitors communicating with one another”); cf. *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 983 (N.D. Ohio 2015) (quoting *In re Baby Food*’s operative language but denying summary judgment).

155. See *supra* notes 107–13.

156. 191 F.3d 1090, 1103, 1107 (9th Cir. 1999).

convicted of criminal price fixing and had settled the private litigation that Cargill was challenging. The Ninth Circuit invoked *In re Baby Food's* operative language to condemn the plaintiff who did “not offer any specific details with regard to illegal discussions, but instead merely asks us to infer participation in the conspiracy from the opportunity to do so. Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity.”<sup>157</sup> While *In re Baby Food's* reasoning is inherently suspect, this is a particularly dubious use of persuasive authority given that *In re Citric Acid* involved a defendant repeatedly communicating with competitors who were actively conspiring to fix prices. Moreover, it was later revealed that one conspirator informed the FBI that Cargill had in fact participated in the illegal cartel.<sup>158</sup> In short, the inter-competitor exchange of price plans is always circumstantial evidence when such pricing discussions are correlated with parallel pricing. Plaintiffs do not need direct evidence of an illegal agreement in order for this form of circumstantial evidence to constitute a plus factor.

#### 5. Possession of competitors' price-related documents

In a competitive market, firms generally keep their future pricing plans to themselves. Pricing information has strategic value. In contrast, firms in an illegal cartel relationship often share their confidential documents.<sup>159</sup> The act of revealing private information builds trust among rivals and, thus, can help stabilize price-fixing conspiracies.<sup>160</sup> Because the possession of rivals' proprietary records is more consistent with collusion than with competition,<sup>161</sup> courts treat an antitrust defendant's possession of a competitor's price-related documents as a plus factor.<sup>162</sup>

Of course, possession of competitors' documents does not itself prove price fixing because there may be an innocent, non-collusive explanation. A competitive firm may obtain its rival's pricing information in ways unrelated to an antitrust conspiracy, such as

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157. *Id.* at 1103.

158. David Barboza, *Archer Daniels Executive Said to Tell of Price-Fixing Talks with Cargill Counterpart*, N.Y. TIMES, June 17, 1999, at C6.

159. *See, e.g.*, *United States v. Therm-All, Inc.*, 373 F.3d 625, 629 (5th Cir. 2004).

160. Leslie, *Trust, Distrust, and Antitrust*, *supra* note 101, at 572.

161. *See In re High Pressure Laminates Antitrust Litig.*, No. 00 MDL 1368(CLB), 2006 WL 1317023, at \*2 (S.D.N.Y. May 15, 2006).

162. *See, e.g.*, *In re Bulk Popcorn Antitrust Litig.*, 783 F. Supp. 1194, 1196 (D. Minn. 1991).

through industrial espionage or transmission by a mutual customer.<sup>163</sup> This latter explanation, however, is likely inapplicable when a firm has its rival's non-public—or pre-announced—pricing documents, as has happened in many antitrust cases.<sup>164</sup>

Nevertheless, some courts have chastised antitrust plaintiffs for not providing evidence of *how* competitors' confidential memos came into the possession of their rival.<sup>165</sup> For example, the Third Circuit has diminished the probative value of this plus factor by observing that the “[p]laintiffs pointed to a few competitors’ memos in sales files, but there was no evidence of how the documents got there.”<sup>166</sup> Yet the Third Circuit has also granted summary judgment for price-fixing defendants even when the defendants had “no explanation as to how they obtained [pricing] information” of their alleged co-conspirators.<sup>167</sup> This asymmetry of burdens is both troubling and illogical: the plaintiff must show how these sensitive documents got into the defendant's files, but the defendant (who actually acquired and retained the documents) does not have to do so. That is one step closer to requiring that antitrust plaintiffs present direct evidence of collusion. For example, if the plaintiff must *prove* that the competitors' confidential pricing memoranda were exchanged as part of a price-fixing conspiracy, then that essentially requires proving a conspiracy as a prerequisite to crediting this circumstantial evidence.

#### 6. Exchange of sales data

Like the sharing of sensitive pricing information, the inter-competitor exchange of sales data is often part and parcel of a price-fixing arrangement. Cartel members circulate their production and sales data for many reasons, including assisting in allocating market

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163. See, e.g., *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 996 n.9 (4th Cir. 1990) (“When asked in his deposition how Olan Mills obtained the Kinder-Care price list, the Olan Mills local representative stated that he got the list from his son who attends a local high school.”).

164. See, e.g., *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 392 (3d Cir. 2015); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 119 (3d Cir. 1999).

165. *In re Citric Acid Litig.*, 191 F.3d 1090, 1099 (9th Cir. 1999) (crediting defendant's explanation at summary judgment that it had *firm-specific* data on its rivals because of “its own internal market research . . . [because the plaintiff] offered no evidence to the contrary”).

166. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 368 (3d Cir. 2004) (discussing *In re Baby Food*).

167. *In re Chocolate*, 801 F.3d at 408 (discussing *In re Baby Food*).

share.<sup>168</sup> More importantly, price fixers share sales data in order to monitor each other's sales activities to ensure that no firm is cheating on the cartel agreement by selling more than their cartel allotment.<sup>169</sup> Because sharing sales data stabilizes cartels—and is often employed by cartels—courts treat this as a plus factor.<sup>170</sup>

Despite the fact that exchanging sales data is a classic tactic used by price-fixing cartels to monitor their members, some courts require direct evidence of a conspiracy before crediting inter-competitor data sharing as a plus factor. In *Williamson*, the Eleventh Circuit asserted that the plaintiff needed to prove an agreement among the defendants to *misuse* their shared sales data in order for collective monitoring of sales to be a plus factor.<sup>171</sup> The court reasoned that “although the sharing of information can be seen as suggesting conspiracy, . . . it also can be seen equally as a necessary means to the receipt of its competitors' information.”<sup>172</sup> The court's analysis devalues inter-competitor sales-data sharing as a plus factor and is remarkable for several reasons. First, the sharing sales data among competitors is a plus factor in and of itself.<sup>173</sup> There is no additional requirement of data misuse.

Second, to require proof of misuse is tantamount to requiring independent proof of conspiracy. Under the Eleventh Circuit's approach, sharing sales data is not a plus factor unless the data was

168. See, e.g., MARCO BERTILORENZI, *THE INTERNATIONAL ALUMINIUM CARTEL, 1886–1978: THE BUSINESS AND POLITICS OF A COOPERATIVE INDUSTRIAL INSTITUTION* 136 (Taylor & Francis eds., 2016) (“Since the [aluminum] cartel provided a reliable statistical survey that allowed forecasting of market trends, it was considered useful to set optimal output rates in this context of growth.”).

169. William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 424 (2011) (“The conveyance of firm-specific production and sales information is important for monitoring compliance with many cartel agreements.”); CONNOR, *supra* note 37, at 294–95 (discussing the vitamin B2 cartel).

170. *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (noting that plus factors include facilitating practices, such as inter-competitor information exchanges); *In re Ductile Iron Pipe Fittings (DIPF) Direct Purchaser Antitrust Litig.*, No. 12-711, 2013 WL 812143, at \*13 (D.N.J. Mar. 5, 2013) (discussing defendants “shar[ing] current market information concerning the volume of Defendants' sales” and noting that “participation in information exchanges in highly concentrated markets involving a fungible product with inelastic demand can be indicative of anticompetitive behavior”); *In re Currency Conversion Fee Antitrust Litig.*, 773 F. Supp. 2d 351, 369 (S.D.N.Y. 2011).

171. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1315 (11th Cir. 2003).

172. *Id.* at 1313.

173. See cases cited *supra* note 170 and accompanying text.

misused pursuant to a price-fixing conspiracy, which means that the plaintiffs must prove a conspiracy in order to show that the shared data was misused by the conspirators. But if the plaintiffs could make this showing of conspiracy, they would not need to use the inter-competitor data exchange as a plus factor in the first place.

Third, in exonerating the price-fixing defendants, the Eleventh Circuit does not seem to realize that it is justifying cartel conduct writ large. The court thought it perfectly rational that each firm shared its confidential data as the price of getting its rivals to correspondingly share their confidential data.<sup>174</sup> While the *Williamson* court saw this as an innocent explanation, what the court described is the essence of collusion: cartel members share their sensitive data as part of the conspiracy.<sup>175</sup> The court's analysis did not explain why the defendants' activity was not collusive; instead, it justified cartel behavior as permissible because each of the co-conspirators profits from its participation in the inter-competitor exchange of sensitive sales data.<sup>176</sup> The opinion, thus, turns antitrust doctrine on its head. Unfortunately, the Eleventh Circuit's *Williamson* mistreatment of sales data as a plus factor is not a complete aberration.<sup>177</sup>

#### 7. Evidence of foreign price fixing

In some price-fixing cases, plaintiffs who claim that the defendants are fixing prices in the American market present evidence that the defendants have fixed—or are currently fixing—prices in foreign markets. This evidence can include actual guilty pleas or findings of guilt in foreign jurisdictions but may instead involve strong circumstantial evidence of foreign collusion. Such evidence is probative of price fixing in the American market for several reasons. First, it shows that the defendants have solved the coordination and trust problems that can make cartel formation and maintenance unfeasibly difficult.<sup>178</sup> Foreign

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174. *Williamson Oil Co.*, 346 F.3d at 1313 (“If a particular manufacturer ceased providing its own information, its entitlement to that of its competitors would similarly end.”).

175. Leslie, *Trust, Distrust, and Antitrust*, *supra* note 101, at 539.

176. *Williamson Oil Co.*, 346 F.3d at 1313.

177. See, e.g., *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 198 (3d Cir. 2017).

178. Hovenkamp & Leslie, *supra* note 100, at 825; Leslie, *Foreign Price-Fixing Conspiracies*, *supra* note 153, at 584 (“Launching an international cartel requires significant coordination among rival firms that come from different corporate cultures, often speak different languages, and may be generally reluctant to cooperate with their competitors.”).

cartels often provide a dry run for competitors who are intent on fixing the prices charged to American consumers.<sup>179</sup> Moreover, if a group of multinational corporations is fixing prices in foreign markets, they have a strong motive to fix American prices as well because the asymmetry of prices across international markets creates opportunities for arbitrage and may provide competition authorities with evidence of collusion in the higher-priced foreign market.<sup>180</sup> For all of these reasons, the defendants' participation in foreign price-fixing activity should be considered an important plus factor.<sup>181</sup>

Although it makes perfect sense why foreign price fixing is—and should be—a plus factor for proving a domestic price-fixing conspiracy,

179. Leslie, *Foreign Price-Fixing Conspiracies*, *supra* note 153, at 579–87; Leslie, *Trust, Distrust, and Antitrust*, *supra* note 101, at 610–22.

180. Grant Butler, *The Supreme Court's Destruction of Incentive to Participate in the Justice Department's Cartel Leniency Program*, 15 B.U. PUB. INT. L.J. 169, 180 (2005) (“If a cartel chose to fix prices only in foreign countries, arbitrageurs can purchase the goods in the United States at the competitive market price and take them to a foreign country where the goods could be sold at a price higher than the competitive price but lower than the fixed price of the cartel.”); *see also* John M. Connor & Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PA. ST. L. REV. 813, 835 (2008) (“Arbitrage undermines the ability of international cartels to set prices at the most profitable level in each currency zone and could even destroy collusive arrangements.”); Leslie, *Foreign Price-Fixing Conspiracies*, *supra* note 153 (explaining why foreign cartels expand into the American market in order to deter foreign consumers from purchasing lower-priced American goods and to prevent price disparities from alerting competition authorities to price fixing in the markets with elevated prices); Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels*, 72 U. CHI. L. REV. 265, 275 (2005).

181. Leslie, *Foreign Price-Fixing Conspiracies*, *supra* note 153, at 591–96; *see also* United States v. Andreas, 216 F.3d 645, 666 (7th Cir. 2000) (stating defendants' participation in a citric acid price-fixing conspiracy was relevant in a criminal case against participants in lysine price-fixing conspiracy); *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1011 (E.D. Mich. 2010) (“[G]uilty pleas in one market are suggestive of the plausibility of a conspiracy to commit the same illegal acts in another market.”); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (stating guilty pleas of price fixing in the Dynamic Random Access Memory (DRAM) market “support an inference of a conspiracy in the SRAM industry”); *In re Auto. Refinishing Paint Antitrust Litig.*, No. 1426, 2004 WL 7200711, at \*3 (E.D. Pa. Oct. 29, 2004) (“Evidence of cooperation between Defendants in foreign price-fixing, through a trade association or otherwise, would certainly be relevant to establish the existence of an illegal combination or conspiracy in restraint of trade” in the American market); *Eddins v. Redstone*, 35 Cal. Rptr. 3d 863, 877 n.11 (Cal. Ct. App. 2005) (recognizing “proved conspiracy or competition in other markets or times” as a plus factor).

some courts have approached the issue in a manner that seems to require direct evidence of an illegal conspiracy before crediting foreign price fixing as circumstantial evidence of collusion. For example, in *In re Chocolate*, in trying to prove that Hershey, Nestle, and Mars conspired to fix chocolate prices in the American market, the plaintiffs pointed to the companies' proven illegal price-fixing activities in Canada.<sup>182</sup> The district court reasoned that communications related to the proven Canadian cartel and the alleged American cartel were not a plus factor in the case by quoting *In re Baby Food* for the—now infamous and still incorrect—proposition that “[c]ommunications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.”<sup>183</sup> As noted previously, this reasoning is inherently troubling,<sup>184</sup> but it is particularly inappropriate when applied in the shadow of *actual* price fixing occurring in foreign markets because we know that these corporations' prior communications included price fixing discussions and agreements. Nonetheless, the Third Circuit affirmed, holding that the plaintiffs could not survive summary judgment absent evidence of “the U.S. Chocolate Manufacturers' *direct* participation in or knowledge of the Canadian conspiracy.”<sup>185</sup> This smacks of requiring direct evidence of collusion in the American market.

The Eleventh Circuit was more explicit in requiring direct evidence of collusion as a prerequisite for treating foreign price fixing as a plus factor. In *Williamson*, the Eleventh Circuit simultaneously increased the price-fixing plaintiff's evidentiary burden and minimized the evidentiary significance of foreign price-fixing conspiracies.<sup>186</sup> The appellate court affirmed the district court's denial of discovery related to the defendants' foreign price fixing, which the district judge denied because the plaintiffs had no “*direct evidence* [of] one or more price fixing episodes” in the foreign markets during the time that the defendants

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182. *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, 780 (M.D. Pa. 2014), *aff'd*, 801 F.3d 383 (3d Cir. 2015).

183. *Id.* at 800 (citing *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir. 1999)).

184. See *supra* notes 142–53.

185. *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d at 405–06 (emphasis added).

186. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1317 (11th Cir. 2003).



were allegedly fixing prices in the American market.<sup>187</sup> Consequently, the court required the plaintiffs to have direct evidence of foreign price fixing in order to conduct discovery for circumstantial evidence to prove a plus factor for a domestic price-fixing conspiracy.

The reasoning in these opinions undermines the use of foreign price fixing as a plus factor altogether. For example, in affirming the district court's grant of summary judgment to the defendants, the Eleventh Circuit in *Williamson* did not merely hold that the plaintiff's evidence of the defendants' price-fixing activities in foreign markets was insufficient to prove a corresponding agreement to target American consumers with fixed prices. Instead, the court asserted that the plaintiffs' "alleged evidence of foreign agreements to collude does not rise to the level of a plus factor."<sup>188</sup> In other words, the court's language suggests that absent direct evidence of foreign price fixing—which the plaintiffs must secure without full discovery—strong circumstantial evidence that the defendants fixed prices abroad is not circumstantial evidence of domestic price fixing, despite all of the logical and empirical evidence linking foreign and domestic price-fixing activities.<sup>189</sup>

These opinions are incorrect; even without direct evidence, circumstantial evidence that price-fixing defendants have engaged (or are engaging) in price fixing in foreign markets is a plus factor that bolsters a plaintiff's circumstantial case for proving that the defendants also fixed prices in the American market. To rule otherwise invites firms to engage in price fixing in foreign markets—where they can perfect their mechanisms for managing, enforcing, and concealing their cartel operations—before expanding their collusion to the U.S. market.<sup>190</sup> And then after the conspiracy reaches American consumers, opinions like *Williamson* will make it difficult for plaintiffs to hold the cartel accountable because U.S. courts will discount the significance of the foreign price fixing.<sup>191</sup> To hold that proof of a non-U.S. price fixing

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187. *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1312 (N.D. Ga. 2002) (emphasis added).

188. *Williamson*, 346 F.3d at 1317.

189. Moreover, the *In re Chocolate* price-fixing case involved proven illegal price fixing in the Canadian market. Between *In re Chocolate* and *Williamson*, courts seem to imply that it is not enough to present direct evidence that the defendants—*admittedly*—fixed prices in another country, continent, or worldwide. Rather, the plaintiff must prove that the foreign conspiracy penetrated the American border. But that is direct evidence.

190. Leslie, *Foreign Price-Fixing Conspiracies*, *supra* note 153, at 579–87.

191. *Id.* at 596–613.

conspiracy is not a plus factor unless the plaintiffs can prove with direct evidence that the foreign price fixing occurred and that the foreign activity had a direct effect on American prices imposes an unreasonable burden on plaintiffs trying to make a circumstantial case that the defendants fixed prices in the American market.

#### 8. *Artificial standardization*

Markets in homogeneous products are more susceptible to cartelization because rivals can more easily agree upon a fixed price, divide markets, and monitor for cheating on a cartel agreement when all of the firms in the market are selling identical products.<sup>192</sup> To facilitate their cartel activities, conspirators sometimes artificially standardize their products.<sup>193</sup> While some products require standardization to make differently branded products interoperable, courts treat artificial standardization as a plus factor because it benefits cartels, not consumers.<sup>194</sup>

Even though artificial standardization has been well recognized as a plus factor for over half a century, some courts have approached the issue in a way that confuses the relationship between plus factors and proof. For example, in *Ross v. American Express Co.*,<sup>195</sup> the plaintiffs alleged that a group of banks had illegally conspired to impose mandatory arbitration clauses on their customers.<sup>196</sup> As one of their plus factors, the plaintiffs argued that the banks' arbitration clauses "were all artificially standardized to incorporate class action waivers and otherwise bar collective legal redress."<sup>197</sup> These changes hurt

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192. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002); *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 822 (D. Md. 2013).

193. *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952).

194. *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139–40 n.10 (2d Cir. 1984); *C-O-Two Fire Equip. Co.*, 197 F.2d at 493; *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 482 (7th Cir. 1946) ("The meticulous effort disclosed by the record by which petitioners standardized their products is also a strong circumstance in support of the Commission's finding that their activities were the result of an agreement."); see also Joseph J. Simons, *Fixing Price with Your Victim: Efficiency and Collusion with Competitor-Based Formula Pricing Clauses*, 17 HOFSTRA L. REV. 599, 628 n.167 (1989) ("[A]rtificial standardization may indicate an attempt to form cartels.").

195. 35 F. Supp. 3d 407 (S.D.N.Y. 2014), *aff'd sub nom. Ross v. Citigroup, Inc.*, 630 F. App'x 79 (2d Cir. 2015).

196. *Id.* at 433. Such conspiracies violate antitrust law because they injure consumers directly and help conceal price fixing. See Leslie, *Conspiracy to Arbitrate*, *supra* note 55, at 410–13.

197. Plaintiffs' Proposed Findings of Fact, *In re Currency Conversion Fee Antitrust Litig.*, No. 04 CV 5723, 2013 WL 1174714, at \*168–69 (S.D.N.Y. Mar. 19, 2013) ("Before the current and settled Defendants coordinated their efforts, the marketplace featured

consumers.<sup>198</sup> Although the banks had met repeatedly to exchange and discuss their respective arbitration clauses and their clauses became uniform after this series of meetings, the district court rejected artificial standardization as a plus factor by stating that “[t]o infer an illegal agreement from artificial standardization, the uniformity in products cannot be the result of legitimate processes.”<sup>199</sup> This standard is troubling because it suggests that the plaintiffs must show that the artificial standardization is the product of an illegitimate conspiracy,<sup>200</sup> which implies that the plaintiffs must first prove an illegal conspiracy before the artificial standardization is treated as a plus factor.

The Second Circuit affirmed the district court’s verdict for the defendants and, in doing so, further compounded the problem of when artificial standardization constitutes a plus factor. The appellate opinion phrased the plus-factor inquiry as “whether the arbitration clauses were ‘artificially standardized’ *as a result of an illegal agreement*.”<sup>201</sup> Under this articulation, the court seemed to require *proof* of an illegal agreement as a prerequisite to artificial standardization being a plus factor. The Second Circuit framed the inquiry incorrectly: the issue is not whether the plaintiffs can prove that the artificial standardization is the product of an illegal conspiracy. Rather, the issue is whether the artificial standardization supports an inference of an underlying illegal conspiracy among the banks to impose mandatory arbitration (with class action waivers) on the defendant banks’ customers.

In essence, the *Ross* opinions improperly reordered the inferential relationship between artificial standardization and proof of an illegal agreement. Artificial standardization is circumstantial evidence that supports an inference of illegal collusion. The *Ross* opinions, however, suggest that artificial standardization is not a plus factor unless the plaintiffs can prove that the artificial standardization was done

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major participants with neither arbitration clauses nor class action waivers, and another with an arbitration clause without a class action waiver.”).

198. Leslie, *Conspiracy to Arbitrate*, *supra* note 55, at 410–12; Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 37–39 (2015).

199. *Ross*, 35 F. Supp. 3d at 448.

200. The district court improperly phrased the issue as whether the “Banks’ arbitration clauses were artificially standardized *as a result* of their illegal agreement to include class action waivers and to otherwise bar collective redress.” *Id.* (emphasis added). The standardization is artificial because banks do not need to coordinate their arbitration clauses the way that cellphone makers need to comply with agreed-upon technical standards.

201. *Ross v. Citigroup, Inc.*, 630 F. App’x 79, 82 (2d Cir. 2015) (emphasis added).

pursuant to an illegal antitrust conspiracy. This is incorrect because plaintiffs do not have to *first* prove an illegal agreement in order for artificial standardization to be a plus factor. After all, if the plaintiffs could independently prove an underlying illegal agreement, they wouldn't need to raise the issue of artificial standardization as a plus factor.

### 9. *Stable market shares*

Some plus factors can be described as cartel markers, a term that refers to economic or market phenomena that are often seen in cartelized markets but are less consistent with competitive markets. For example, if the firms in a market maintain the same relative market shares over time, this is a cartel marker, and thus a plus factor.<sup>202</sup> Stable market shares are suspicious because competitive firms jockey for market share, trying to take sales away from their competitors.<sup>203</sup> Cartel managers, on the other hand, dislike fluctuating market shares, which make it more difficult to equally distribute the cartel's profits and to monitor members for cheating on their cartel agreement.<sup>204</sup> Price-fixing conspirators try to prevent market share fluctuations by setting production limits and fixing each cartel member's market share.<sup>205</sup> This makes cartel cheating less tempting and less likely.<sup>206</sup> Given the relationship between market share stability and cartel stability, federal courts treat inflexible market shares as an important plus factor.<sup>207</sup>

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202. See cases cited *infra* note 207.

203. See, e.g., *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1479 (9th Cir. 1986) (treating sellers' refusal to sell products to willing customer as circumstantial evidence of collusion).

204. See ERVIN HEXNER, *INTERNATIONAL CARTELS* 76 (1945).

205. See *id.* ("Cartel agreements frequently contain certain provisions regulating the quantity and quality of production (supply), the direction of trade (markets), and the determination of trade terms (prices in the broadest sense)."); *id.* at 77 ("Many cartel agreements are based on determined marketing shares of participants."); see, e.g., Joel M. Podolny & Fiona M. Scott Morton, *Social Status, Entry and Predation: The Case of British Shipping Cartels 1879–1929*, 47 J. INDUS. ECON. 41, 51 (1999).

206. MARSHALL & MARX, *supra* note 24, at 121–22 (discussing "the role of a market share allocation in deterring secret deviations"); Christopher R. Leslie, *Balancing the Conspiracy's Books: Inter-Competitor Sales and Price-Fixing Cartels*, 96 WASH. U. L. REV. 1, 2, 11–12 (2018).

207. See, e.g., *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 210 (3d Cir. 2017) (Stengel, J., dissenting) ("Market share stability is a well-recognized symptom of collusive and concerted action in antitrust cases."); *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 876 (7th Cir. 2015) ("[I]nflexibility of the market leaders' market shares over time [] suggest[s] a possible agreement among them not

Despite the fact that stable market shares are a cartel marker that serve as a plus factor, some courts have discounted the significance of this circumstantial evidence unless the plaintiff presents direct evidence of an agreement to fix prices. For example, a North Carolina district court in *Hall v. United Air Lines, Inc.*<sup>208</sup> discounted this plus factor because “the stability of their market shares does not tend to exclude the possibility that defendants acted independently, particularly in light of a lack of any *direct evidence* to the contrary.”<sup>209</sup> As support, the court cited the Ninth Circuit’s opinion in *In re Citric Acid*, which the *Hall* court described as

affirming [a] district court’s grant of summary judgment for one defendant because although “the evidence in the record . . . clearly shows that several [defendants] conspired to . . . allocate market shares,” the plaintiffs had *no direct evidence* against that defendant and therefore the evidence did “not support a reasonable inference” against that defendant.<sup>210</sup>

This is astonishing because even when a market is corrupted by an actual conspiracy to allocate market shares, the court reasoned that stable market shares do not indicate collusion absent direct evidence of a conspiracy. Other antitrust opinions, too, have diminished the probative value of stable market shares by suggesting that, in the absence of direct evidence of collusion, the defendants’ market share stability may be the product of unilateral action, and therefore awarding defendants’ summary judgment.<sup>211</sup>

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to alter prices, since such an alteration would tend to cause market shares to change.”); *White v. R.M. Packer Co.*, 635 F.3d 571, 582 (1st Cir. 2011) (treating “stable market shares” as plus factor); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 659 (7th Cir. 2002) (“In part because of those transactions the market shares of the defendants changed very little during the period of the alleged conspiracy, which is just what one would expect of a group of sellers who are all charging the same prices for a uniform product and trying to keep everyone happy by maintaining the relative sales positions of the group’s members.”); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 9 CR 3690, 2013 WL 212908, at \*5 (N.D. Ill. Jan. 18, 2013) (“Unusual and sustained pricing stability is not expected in a competitive market and, as a ‘plus factor,’ can indicate collusion.”).

208. 296 F. Supp. 2d 652 (E.D.N.C. 2003), *aff’d sub nom. Hall v. Am. Airlines, Inc.*, 118 F. App’x 680 (4th Cir. 2004) (per curiam).

209. *Id.* at 676 (emphasis added).

210. *Id.* at 676 (quoting *In re Citric Acid Litig.*, 191 F.3d 1090, 1106 (9th Cir. 1999)) (emphasis added).

211. *Valspar*, 873 F.3d at 210 (Stengel, J., dissenting) (“Just like the District Court, the majority weighed the expert evidence on this issue and made a finding: that the evidence of (likely unilateral) market share stability was insufficient in this case to show

Such analysis misconstrues the plus-factor framework for proving an illegal price-fixing agreement through circumstantial evidence. If a plaintiff had the type of direct evidence that these courts demanded, then the plaintiff would not need to invoke plus factors at all, stable market shares or otherwise. By demanding direct evidence of collusion before crediting stable market shares as a plus factor, these opinions fundamentally undermine the ability of plaintiffs to plead and prove a circumstantial case for price fixing.

#### 10. Summary

For each of these plus factors, courts have committed the same error. Federal judges across several circuits have taken well-established plus factors and deprived them of their probative value because the plaintiffs did not proffer direct evidence of illegal collusion. Part III explains how these antitrust opinions have fundamentally misconstrued the process of proving an agreement through circumstantial evidence. Unfortunately, many courts have employed additional tactics to undermine the significance of circumstantial evidence in price-fixing litigation, as the following two Sections explain.

#### B. Causation

Beyond explicitly requiring direct evidence of an agreement before crediting plus factors, courts have also diminished the probative value of circumstantial evidence by improperly introducing a causation component into plus-factor analysis. For example, the inter-competitor sharing of price information is a plus factor because conspirators use this information to set the cartel price and to monitor for cheating.<sup>212</sup> Despite its importance as circumstantial evidence in price-fixing litigation, some antitrust opinions have seemingly woven a direct-evidence requirement into this plus factor by bringing causation into the inquiry. In *In re Baby Food*, for example, the Third Circuit held that in order for the plaintiff to survive summary judgment, “there must be evidence that the exchanges of information had an impact on pricing decisions.”<sup>213</sup> In its subsequent opinions, the Third Circuit interpreted *In re Baby Food* as holding it is not enough to show “that the exchanges

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concerted action or agreement. It seems to me that if the court is ‘weighing evidence’ or ‘making findings’ it should be at trial, on a full record and done by a fact finder, i.e., a jury or judge sitting without a jury.”).

212. See *supra* notes 138–41 and accompanying text.

213. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999).

of information ‘impacted the market as a whole.’”<sup>214</sup> Instead, the Third Circuit required antitrust plaintiffs to link “information exchanges with specific collusive behavior.”<sup>215</sup> Under this approach, the price exchange alone is no longer circumstantial evidence; rather, the plaintiffs must prove that the price exchange *caused* the defendants to raise their prices. In essence, the court is manifesting a version of the mistake documented in Part II.A: the court is demanding plaintiffs establish that the defendants colluded in order for the plaintiffs to get credit for a plus factor that is designed to help prove collusion. This confuses the relationship between plus factors and proof of conspiracy. If the plaintiff had proof of the “specific collusive behavior” demanded by the court, that alone would be sufficient to prove a Section 1 violation.<sup>216</sup> Plus factors would be unnecessary at that point.

Similarly, in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*,<sup>217</sup> the Eighth Circuit imposed a quasi-causation requirement on another version of the price-exchange plus factor. The court asserted that price verifications on past sales are not probative of collusion when “[t]here is no evidence to support the inference that the verifications had an impact on price increases.”<sup>218</sup> Price verifications—in which competitors confirm actual prices charged to actual consumers in prior transactions—are a plus factor because they are a monitoring device used by cartel members to ensure that their co-conspirators are not cheating by charging a price below the cartel-fixed price.<sup>219</sup> In the Eighth Circuit’s formulation, however, the plus factor of price verification is not a plus factor at all unless the plaintiffs can separately prove that the plus factor itself *causes* the price to increase. This approach might make sense if the plaintiffs were challenging the defendants’ price verifications as an

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214. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004) (discussing and quoting *In re Baby Food*); see also *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 238 (E.D. Pa. 2016) (“A jury could consider the manufacturers’ communications to be probative of an agreement only if there is some evidence that exchanges of information had an impact on pricing decisions.”) (citing *In re Flat Glass* and *In re Baby Food*).

215. *In re Flat Glass*, 385 F.3d at 369.

216. *Id.*

217. 203 F.3d 1028 (8th Cir. 2000) (en banc).

218. *Id.* at 1034.

219. *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1147–48 (8th Cir. 1979).

independent antitrust violation, but they were not.<sup>220</sup> The defendants' price-verification system was merely a plus factor, one among many that the plaintiffs proffered;<sup>221</sup> plus factors do not have to have a causal nexus to antitrust injury. The defendants' practice of verifying prices with each other served as circumstantial evidence of an underlying agreement among the defendants to fix prices.

Courts have also invoked these causation concepts to reject foreign price-fixing activities as a plus factor. Notably, in *In re Chocolate*, the Third Circuit asserted that proof of the defendants' participation in the Canadian chocolate cartel was not evidence of price fixing in the American market unless the plaintiffs could "show that the unlawful Canadian conduct actuated, facilitated, or informed the U.S. conduct."<sup>222</sup> The court's language comes close to requiring direct evidence. After all, if antitrust plaintiffs must prove that foreign price-fixing activity essentially actuated illegal parallel pricing in the United States, then the plaintiffs must essentially present direct evidence of collusion as to the U.S. market in order for the defendants' foreign price fixing to count as a plus factor.

These examples of judicial coupling of plus factors and causation are problematic. As a matter of law, causation is a separate element from agreement. In order to prove illegal price fixing, a private antitrust plaintiff must prove the following elements: (1) agreement or concerted action; (2) an unreasonable restraint of trade (which horizontal price fixing is, by definition); (3) an effect on interstate commerce; and (4) causal antitrust injury.<sup>223</sup> Causation is its own discrete element. Yet, in

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220. *Blomkest Fertilizer, Inc.*, 203 F.3d at 1047–48 (Gibson, J., dissenting) (noting that plaintiffs were using "price verifications as circumstantial evidence of a broader conspiracy").

221. In addition to the defendants' price verifications, the plaintiffs also proffered evidence the potash market was susceptible to cartelization because of its high barriers to entry, inelastic demand, and a standardized product, each of which is a separate plus factor; that one defendant had solicited a price-fixing agreement; that the defendants had issued advance price announcements and exchanged price lists; that the defendants had "an explicitly discussed cheater punishment program;" and that the defendants charged similar prices despite different production costs. *Id.* at 1044, 1051 (Gibson, J., dissenting).

222. *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 405 (3d Cir. 2015) (emphasis omitted).

223. See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988) ("To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm



the above opinions, courts suggested that a single piece of circumstantial evidence intended to help prove the first element of a price-fixing claim must independently prove the fourth element. This is misguided.

Plus factors are not part of the causation inquiry. They are circumstantial evidence that help prove the first element of a price-fixing claim: agreement. Thus, in *In re Baby Food*, the issue was not whether the individual plus factor of inter-competitor price exchanges caused antitrust injury; it was whether all of the plus factors proffered by the plaintiff—when viewed holistically—showed an agreement to fix price. The causation inquiry comes *after* the plaintiff demonstrates that an agreement has occurred. Similarly, in *Blomkest*, the plaintiffs were not arguing that the inter-competitor price verifications were themselves *causing* parallel prices. Rather, they were explaining how these price verifications were part of a cartel enforcement mechanism, which—when combined with the other plus factors<sup>224</sup>—indicated that the defendants’ parallel price increases were the product of collusion. Finally, the plaintiffs in *In re Chocolate* who proffered evidence of the defendants’ foreign price-fixing activities were not arguing that this foreign collusion was actuating or causing domestic collusion. Instead, they were proffering evidence of an important plus factor, which demonstrated a strong motive to fix prices in the American market, as well as illustrating these defendants’ experience in solving the coordination and trust problems that can doom price-fixing conspiracies. None of the plus factors in these cases—inter-competitor price exchanges, price verifications, or foreign price fixing—play a role in proving the causation element of a price-fixing claim.

In sum, the Third and Eighth Circuits have conflated plus factors and causation, which is improper because antitrust law does not require plaintiffs to prove that the particular behavior that constitutes any individual plus factor causes anticompetitive harms. As the Tenth Circuit has explained, plaintiffs do not have to demonstrate that “an instrument used to effectuate” a price-fixing conspiracy actually “*caused* supra-competitive prices.”<sup>225</sup> Instead, the tools of cartel management and enforcement—whether they be price verifications or price

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or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., ‘antitrust injury’).”

224. *Blomkest Fertilizer, Inc.*, 203 F.3d at 1047–48 (Gibson, J., dissenting) (noting that plaintiffs were using price verifications to evidence a broader conspiracy).

225. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1265–66 (10th Cir. 2014).

announcements or other cartel devices—are circumstantial evidence of the underlying conspiracy.<sup>226</sup> If courts require that a plus factor have a demonstrable effect on price, they are essentially requiring the plaintiff to present direct evidence of a price-fixing agreement. At a minimum, the opinions of the Third and Eighth Circuits are undermining the significance of important circumstantial evidence.

### C. *The Backwards-Reasoning Fallacy*

Courts have also distorted the relationship between circumstantial and direct evidence in price-fixing cases by reprimanding plaintiffs for even proffering plus factors to make a circumstantial case. Most notably, in *Blomkest*, the Eighth Circuit's en banc majority condemned the plaintiffs' use of price verifications as a plus factor because "the class's argument regarding price verifications . . . assumes a conspiracy first, and then sets out to 'prove' it."<sup>227</sup> The court held that "a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly."<sup>228</sup> Applying this logic to the price verifications themselves, the majority opined that if the plaintiffs "were to present independent evidence tending to exclude an inference that the producers acted independently, then, *and only then*, could it use these communications for whatever additional evidence of conspiracy they may provide."<sup>229</sup> The Eighth Circuit's opinion mischaracterizes the proffering of plus factors as inviting backwards reasoning and incorrectly requires plaintiffs to prove collusion before its plus factors would be credited.

Under the *Blomkest* logic, in order to survive summary judgment, antitrust plaintiffs must first prove the existence of an illegal conspiracy and *then* present plus factors. This makes no sense; it's backwards and imposes an impossible burden on plaintiffs trying to prove a conspiracy through circumstantial evidence. By misapprehending the function of circumstantial evidence, the opinion effectively requires plaintiffs to present direct evidence of collusion before making a circumstantial case that the defendants conspired to restrain trade.<sup>230</sup>

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226. *Id.*

227. *Blomkest Fertilizer, Inc.*, 203 F.3d at 1033.

228. *Id.*

229. *Id.* at 1037 (emphasis added).

230. *Id.* at 1039 (Gibson, J., dissenting) ("The Court today rejects circumstantial evidence of conspiracy and requires direct evidence to withstand summary judgment in an antitrust case.").

Moreover, the Eighth Circuit's reasoning is completely at odds with the Supreme Court's antitrust jurisprudence that describes the hoops that plaintiffs must jump through in order to get their price-fixing claims before a jury. The Supreme Court in *Bell Atlantic Corp. v. Twombly*<sup>231</sup> established a new heightened pleading requirement, which encourages plaintiffs to plead as many plus factors as possible to survive a motion to dismiss. Courts have interpreted *Twombly* as holding that "[t]o plead a conspiracy through circumstantial evidentiary facts, a plaintiff must allege both (i) actual parallel conduct and (ii) additional 'plus factors' to 'nudge[ ] the[ ] claims across the line from conceivable to plausible[.]'"<sup>232</sup> Prior to *Twombly*, federal courts held that "a plaintiff need not allege the existence of these plus factors in order to plead an antitrust cause of action."<sup>233</sup> Post-*Twombly*, however, absent direct evidence, a plaintiff's failure to plead plus factors could result in the dismissal of its price-fixing claims.<sup>234</sup>

The Eighth Circuit's approach is also inconsistent with the Supreme Court's summary judgment jurisprudence. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>235</sup> the Supreme Court held that "[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."<sup>236</sup> Many courts interpret *Matsushita* to require

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231. 550 U.S. 544 (2007).

232. *Kelsey K. v. NFL Enters., LLC*, 757 F. App'x 524, 526 (9th Cir. 2018) (quoting *Twombly*, 550 U.S. at 570).

233. *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir. 2004).

234. *White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011) ("Plaintiffs must establish that it is plausible that defendants are engaged in more than mere conscious parallelism, by pleading . . . evidence pointing toward conspiracy, sometimes referred to as 'plus factors.'"); *Abbott Labs. v. Adelpia Supply USA*, No. 15-CV-5826 (CBA) (LB), 2017 WL 5992355, at \*10 (E.D.N.Y. Aug. 10, 2017) ("To plead a horizontal price-fixing conspiracy through circumstantial evidence, a plaintiff must allege parallel conduct and plus factors."); *Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*, 926 F. Supp. 2d 36, 46–47 (D.D.C. 2013) (same); *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 711 (E.D. La. 2013) (same); *Avenarius v. Eaton Corp.*, 898 F. Supp. 2d 729, 737 (D. Del. 2012) (same); *Superior Offshore Int'l, Inc. v. Bristow Grp. Inc.*, 738 F. Supp. 2d 505, 511–12 (D. Del. 2010) (same). *But see In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 549 (1st Cir. 2016) ("[T]his court has cautioned against converting *Twombly's* mandates into a requirement that antitrust plaintiffs provide evidentiary support or set forth other 'plus factors' to demonstrate the plausibility of their Sherman Act claims.").

235. 475 U.S. 574 (1986).

236. *Id.* at 588.

plaintiffs to proffer evidence to support as many plus factors as possible in order to survive the price-fixing defendants' inevitable motion for summary judgment.<sup>237</sup> Indeed, *Blomkest* itself held that "[a] plaintiff has the burden to present evidence of consciously paralleled pricing *supplemented with* one or more plus factors."<sup>238</sup> This is what the plaintiff did and the court accused it of backwards reasoning for proffering plus factors that somehow assumed collusion. The *Blomkest* majority admonished the plaintiffs for doing exactly what the court instructed them to do: show parallel pricing supplemented with plus factors. Ultimately, the court simultaneously requires plus factors and disregards them unless the plaintiff has already proven a conspiracy.

By accusing antitrust plaintiffs of engaging in backwards reasoning, *Blomkest* turns the plus-factor framework on its head. If antitrust plaintiffs do not plead plus factors, their price-fixing complaint is dismissed under *Twombly* as not plausible. If they do not proffer evidence of plus factors, courts may cite *Matsushita* to grant summary judgment to the defendants. Yet under the *Blomkest* formulation, plaintiffs are to be chastised for presenting plus factors to support their price-fixing claims because, according to the *Blomkest* majority, these plus factors "assume[] a conspiracy first, and then set[] out to prove it."<sup>239</sup> In so holding, the Eighth Circuit effectively forecloses the use of circumstantial evidence to prove anticompetitive collusion.

Although the *Blomkest* court's analysis is unsound, it has proven influential. The Third Circuit in *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*,<sup>240</sup> for instance, applied the Eighth Circuit's backwards-reasoning argument to reject competitors' sharing of sales data as a

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237. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991) ("To ensure that we do not punish unilateral conduct, however, we require more than mere evidence of parallel conduct by competitors to support an inference of a conspiracy; an agreement is properly inferred from conscious parallelism only when 'plus factors' exist."); see also *In re Managed Care Litig.*, 430 F. Supp. 2d 1336, 1345 (S.D. Fla. 2006) ("Thus, a plaintiff relying on evidence of parallel conduct to show a conspiracy where the competing inference of independent action is just as likely must present additional evidence of conspiratorial behavior to survive summary judgment."), *aff'd sub nom. Shane v. Humana, Inc.*, 228 F. App'x 927 (11th Cir. 2007) (per curiam).

238. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc).

239. *Id.* at 1033.

240. 873 F.3d 185 (3d Cir. 2017).

plus factor.<sup>241</sup> To support their claim that the defendants' thirty-one parallel price increases for titanium dioxide were the product of manufacturers conspiring to raise prices, the antitrust plaintiffs proffered several plus factors, including the fact that the defendants had shared production, inventory, and sales data with each other through the Global Statistics Program (GSP).<sup>242</sup> Despite the fact that sharing such data is an important plus factor related to cartel monitoring, the Third Circuit quoted *Blomkest* to argue that the plaintiff's "argument suffers from the loaded question fallacy. Instead of setting out to prove: 'Does the GSP show that a conspiracy existed?,' [plaintiff] attempts to answer: 'How did the GSP further the conspiracy?'" This approach cannot satisfy [plaintiff's] burden."<sup>243</sup> These questions, however, are not as distinct as the Third Circuit seems to think. Many plus factors answer both of the Third Circuit's questions simultaneously, demonstrating *that* a conspiracy existed by showing *how* the conspiracy operated. The *Valspar* court's confusion upends the plus-factor framework. If the plaintiff bringing a price-fixing claim cannot "satisfy [its] burden" by presenting recognized plus factors, then antitrust plaintiffs cannot rely on circumstantial evidence; the only avenue left is direct evidence.<sup>244</sup>

Other antitrust opinions have quoted *Blomkest* and chastised plaintiffs for "first assuming a conspiracy" and have rejected numerous plus factors, including inter-firm communications and opportunities to conspire,<sup>245</sup> parallel pricing and price signaling,<sup>246</sup> and awareness of

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241. See *supra* notes 168–70 and accompanying text (explaining that the inter-competitor exchanges of sales data is a plus factor).

242. *Valspar*, 873 F.3d at 198.

243. *Id.* In rejecting price signaling as probative of price fixing, the district court in *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 152 F. Supp. 3d 234 (D. Del. 2016), *aff'd*, 873 F.3d 185 (3d Cir. 2017) embraced the *Blomkest* opinion's condemnation of price-fixing plaintiffs who "proceed by first assuming a conspiracy and then setting out to prove it." *Id.* at 249. The *Valspar* district court reasoned that price signals "would perhaps describe how a conspiracy practically functioned, but only if there were there some indication of an agreement to begin with." *Id.*

244. *Valspar*, 873 F.3d at 212 (Stengel, J., dissenting) ("Today's decision could easily be read to require direct evidence of an agreement in an oligopoly/antitrust case despite the fact that neither our prior jurisprudence (nor the Supreme Court's) has ever required such evidence.").

245. *In re High Fructose Corn Syrup Antitrust Litig.*, 156 F. Supp. 2d 1017, 1043 (C.D. Ill. 2001), *rev'd*, 295 F.3d 651 (7th Cir. 2002).

246. *Valspar*, 152 F. Supp. 3d at 249; *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1277 (N.D. Ga. 2002), *aff'd sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003).

rivals' price increases.<sup>247</sup> At least one court has invoked *Blomkest's* language to reject expert testimony.<sup>248</sup> Finally, some judges considering price-fixing claims have used the *Blomkest* anti-assumption admonition to reject the plaintiffs' circumstantial evidence writ large.<sup>249</sup>

All of these judicial decisions betray a misunderstanding of how circumstantial evidence works. In all areas of law, plaintiffs relying on circumstantial evidence have a theory of the case and a clean slate upon which to place their circumstantial evidence, which in price-fixing litigation is denominated as "plus factors." Antitrust plaintiffs proffer as many plus factors as they can in order to demonstrate that their theory of the case is plausible and should be decided by a jury. If courts reject plaintiffs' circumstantial evidence because the plaintiffs started with a theory of their case and then laid out circumstantial evidence consistent with that theory, then courts have essentially eliminated circumstantial evidence as a means of proving illegal collusion.

### III. THE RELATIONSHIP BETWEEN PLUS FACTORS AND AGREEMENT

The cases analyzed in Part II show courts depleting the probative value of plus factors unless the plaintiffs can separately prove the presence of the underlying illegal agreement. This is a Catch-22: a plus factor is not evidence of an as-yet unproven agreement unless the plaintiff can independently prove that agreement. Yet if the plaintiff can independently show the agreement, then she doesn't need the plus factor in the first place. When courts require plaintiffs to prove an agreement before circumstantial evidence can be a plus factor, they impose a logically impossible burden on plaintiffs in making a circumstantial case, which is the vast majority of plaintiffs bringing price-fixing claims.

The traditional two-step framework for using circumstantial evidence to prove an agreement among competitors is essentially a syllogism. First, the plaintiff must show conscious parallelism, which alone

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247. *In re Flat Glass Antitrust Litig.* (II), No. 11-658, 2012 WL 5383346, at \*4 (W.D. Pa. Nov. 1, 2012) ("Plaintiff points to Defendants' communications with customers, and isolated instances of purported predictions of co-Defendants' price increases.").

248. *Allen v. Dairy Mktg. Servs., LLC*, No. 5:09-CV-230, 2013 WL 6909953, at \*12 (D. Vt. Dec. 31, 2013).

249. *Nitro Distrib., Inc. v. Alticor, Inc.*, No. 03-3290-CV-S-RED, 2008 WL 11384211, at \*10 (W.D. Mo. Feb. 8, 2008), *aff'd*, 565 F.3d 417 (8th Cir. 2009); *In re Nw. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 196 (E.D. Mich. 2002).

provides an insufficient basis for inferring an agreement.<sup>250</sup> Second, the plaintiff must present plus factors that indicate that the parallel conduct (that has already been established) is the product of an agreement and not independent decision making by the competing firms.<sup>251</sup> This syllogism can be expressed as a simple formula:

CONSCIOUS PARALLELISM + PLUS FACTORS = AGREEMENT

Despite the fact that courts uniformly describe this as an appropriate framework for proving a price-fixing agreement through circumstantial evidence, the decisions discussed in this Article have changed the order of proof, such that:

CONSCIOUS PARALLELISM + AGREEMENT = PLUS FACTORS

This reconverted syllogism makes no sense because proof of agreement is not a way of proving plus factors; rather, plus factors are a way of proving an agreement through circumstantial evidence. Yet, this convoluted reordering of the syllogism is apparent across several different plus factors, in which dozens of courts have made the same mistake of misconstruing the relationship between plus factors and agreements. By way of review:

- Courts have suggested that competitors having the opportunity to conspire is not a plus factor unless the plaintiff first presents direct evidence that an illegal conspiracy occurred during that opportunity;<sup>252</sup>
- Several courts have interpreted the inter-competitor communications plus factor in a manner that essentially necessitates direct evidence of an agreement in order for this plus factor to count as circumstantial evidence;<sup>253</sup>
- Courts have held that even inter-competitor price exchanges are not probative of collusion unless the plaintiff can first prove that the communications themselves constitute an illegal agreement;<sup>254</sup>
- Courts have suggested that possessing competitors' pricing materials and other confidential documents is not necessarily evidence of a conspiracy unless the plaintiff can show how the documents were

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250. See *supra* notes 54–62 and accompanying text.

251. See *supra* notes 63–71 and accompanying text.

252. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1999 WL 33889, at \*16 (N.D. Ill. Jan. 19), *aff'd in part, vacated in part*, 186 F.3d 781 (7th Cir. 1999).

253. See *supra* notes 99–129 and accompanying text.

254. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir. 1999).

transferred pursuant to a conspiracy, which requires plaintiffs to first prove a conspiracy before courts will credit the plus factor;<sup>255</sup>

- Courts have diminished the significance of foreign price fixing as a plus factor by requiring plaintiffs to present direct evidence of the foreign price fixing and its direct connection to the alleged domestic price fixing;<sup>256</sup>

- Courts have implied that artificial standardization is not a plus factor unless the plaintiff can prove that the artificial standardization was the “*result of an illegal agreement*,”<sup>257</sup> which would require the plaintiff to prove an illegal agreement first and then show that the plus factor followed;

- Courts have asserted that stable market shares were not a plus factor unless the plaintiff had “direct evidence” of an agreement;<sup>258</sup>

- Finally, in *Alakayak*, the Alaska Supreme Court essentially declared that an invitation to collude was not a plus factor unless the plaintiff could show an agreement.<sup>259</sup>

Indeed, the *Alakayak* court not only treated agreements as a prerequisite for crediting plus factors, it demoted proof of an agreement to a mere plus factor. The Alaska Supreme Court asserted that “evidence of a traditional conspiracy agreement” is not a plus factor “unless there is evidence of both an invitation to collude, as well as acceptance of that invitation.”<sup>260</sup> In applying its rule, the court noted that the plaintiff proffered “documents . . . tending to establish the invitation” and that “[a]cceptance can reasonably be inferred from the evidence that [one alleged co-conspirator] set a low initial price in 1991 before other defendant processors, from the evidence that [one defendant’s] representatives ‘agreed’ with [another defendant’s] suggestion of a \$0.50 initial price in a February 1991 meeting,” and from other evidence.<sup>261</sup> The court concluded that this evidence of an offer to collude coupled with evidence of acceptance “constitutes a

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255. See *supra* notes 159–67 and accompanying text.

256. *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 405 (3d Cir. 2015); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1317 (11th Cir. 2003); see *supra* notes 178–91 and 221–22 and accompanying text.

257. *Ross v. Citigroup, Inc.*, 630 F. App’x 79, 82 (2d Cir. 2015) (emphasis added).

258. *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 676 (E.D.N.C. 2003), *aff’d sub nom. Hall v. Am. Airlines, Inc.*, 118 F. App’x 680 (4th Cir. 2004) (per curiam).

259. *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 458 (Alaska 2002).

260. *Id.*

261. *Id.* (citations omitted).



‘plus factor.’”<sup>262</sup> The *Alakayak* court’s approach confuses the relationship between proof and plus factors. The plaintiff’s evidence of offer and acceptance is not simply a plus factor; it is the entire anticompetitive agreement. To demote proof of an agreement to mere plus-factor status exposes a fundamental misunderstanding of how plus-factor analysis works.

All the antitrust opinions discussed in this Section have, in different ways, improperly required the plaintiff to prove an agreement (sometimes explicitly requiring direct evidence) in order to have a plus factor given credit as circumstantial evidence. This approach effectively dismantles the entire plus-factor framework and, in some cases, effectively requires antitrust plaintiffs to present direct evidence. Because direct evidence of price fixing is rarely available, this fundamental mistake in the application of plus-factor analysis risks undermining price-fixing law entirely.

#### CONCLUSION

Direct evidence of cartel agreements is rarely available because cartel managers and participants go to great lengths to conceal their price-fixing activities. Indeed, concealment efforts are themselves a plus factor for determining whether an illegal agreement exists.<sup>263</sup> The absence of direct evidence—despite the presence of illegal price fixing—is precisely why the Supreme Court and federal courts developed the plus-factor framework and have employed it for over seventy years, allowing plaintiffs to prove antitrust conspiracies through circumstantial evidence.<sup>264</sup> Yet recent opinions have undermined this body of law.

The travesty here is not merely that courts are requiring antitrust plaintiffs to present direct evidence of an agreement. Though that alone is a serious mistake, the problem is far worse. Courts are requiring antitrust plaintiffs to have direct evidence of an agreement in order to survive summary judgment. Under this approach, courts

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262. *Id.*

263. *See, e.g., In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1156 (D. Kan. 2012) (recognizing the defendants’ efforts to conceal their communications as a plus factor).

264. *Gen. Chems., Inc. v. Exxon Chem. Co.*, 625 F.2d 1231, 1233 (5th Cir. 1980) (“Even a successful antitrust plaintiff will seldom be able to offer a direct evidence of a conspiracy and such evidence is not a requirement.”); *Alakayak*, 48 P.3d at 450 (“A plaintiff is not required to present any direct evidence, but may support his case solely with circumstantial evidence.”).

essentially preclude plaintiffs from presenting to a jury antitrust conspiracy claims that are based on circumstantial evidence. Courts that require direct evidence for an antitrust plaintiff to survive summary judgment are essentially ignoring the standard for summary judgment—or turning it on its head. The standard is not whether the plaintiff *must* win given the evidence that it has presented. The standard is whether a reasonable jury *could* find for the plaintiff.

One plus factor at a time, federal courts are making it unreasonably difficult for antitrust plaintiffs to bring price-fixing cases based on circumstantial evidence. Judicial opinions, such as those examined in Part II, that deprive circumstantial evidence of its probative value serve to embolden conspirators and strengthen price-fixing cartels. Courts must do a better job of recognizing that when they are employing the plus-factor framework, they should not ask the plaintiff to present direct evidence of an agreement.

Courts sometimes appear overly eager to dismiss price-fixing complaints or grant summary judgment to defendants on antitrust collusion claims even when plaintiffs have pleaded numerous plus factors from which an agreement to restrain trade could reasonably be inferred. By misinterpreting the process of identifying and applying plus factors, courts create a significant risk of false negatives: firms that have actually engaged in illegal price fixing may escape liability because courts have made it inappropriately difficult for plaintiffs to prove agreements through circumstantial evidence.

Although courts repeatedly tout the well-established rule that anticompetitive agreements can be established through either direct or circumstantial evidence,<sup>265</sup> by misapplying the dismissal and summary judgment standards in price-fixing cases relying on circumstantial evidence, some courts have made it practically impossible to prove price fixing through circumstantial evidence.<sup>266</sup> This undermines the entire

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265. Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 219 (3d Cir. 2008) (citing Rossi v. Standard Roofing, Inc., 156 F.3d 452, 465 (3d Cir. 1998)) (“[W]hile direct evidence, the proverbial ‘smoking-gun,’ is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by. Thus, plaintiffs have been permitted to rely solely on circumstantial evidence (and the reasonable inferences that may be drawn therefrom) to prove a conspiracy.”).

266. Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 206 (3d Cir. 2017) (Stengel, J., dissenting) (“The majority’s formulation of the summary judgment standard in this case, coupled with its dismissive treatment of unprecedented parallel-

antitrust regime. As Judge Gilbert Merritt has explained, as it becomes “possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence . . . the antitrust laws fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices.”<sup>267</sup> Diminishing the role and the probative value of circumstantial evidence undermines deterrence of price fixing, which harms consumers by raising prices of—and reducing access to—food, healthcare, and the necessities, as well as the luxuries, of life.<sup>268</sup> Ultimately, converting plus-factor analysis into a direct-proof requirement protects price-fixing conspirators from antitrust liability.<sup>269</sup>

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conduct evidence, creates too high a hurdle for plaintiffs attempting to prove a price-fixing conspiracy using circumstantial evidence.”).

267. *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 915–16 (6th Cir. 2009) (Merritt, J., dissenting).

268. See Kaplow, *supra* note 66, at 518 (“[D]isallowance of circumstantial evidence would presumably reduce deterrence because liability could no longer be successfully established in certain settings.”); Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 885, 885 (2012).

269. See *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1039 (8th Cir. 2000) (en banc) (Gibson, J., dissenting) (“Because conspirators cannot be relied upon either to confess or to preserve signed agreements memorializing their conspiracies, the court’s requirement for direct evidence will substantially eliminate antitrust conspiracy as a ground for recovery in our circuit.”); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶1410b, at 71–72 (3rd ed. 2010) (“Because insistence upon direct proof would remove too many conspiracies from the embrace of the antitrust laws, the courts necessarily consider circumstantial proof of agreement.”).