United States Court of Appeals
For the First Circuit

No. 12-1730

EVERGREEN PARTNERING GROUP, INC.
Plaintiff - Appellant

MICHAEL FORREST
Plaintiff

v.

PACTIV CORPORATION; GENPAK, LLC, a/k/a Genpack, LLC; SOLO CUP COMPANY, a corporation; DOLCO PACKAGING, a Tekni-Plex Company, a corporation; DART CONTAINER CORPORATION; AMERICAN CHEMISTRY COUNCIL, INCORPORATED, an association
Defendants - Appellees

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INTRODUCTION

This is—or should be—a fairly simple case. Plaintiff-Appellant Evergreen Partnering Group, Inc. ("Evergreen") developed an innovative business method to help schools and large institutions save money and preserve the environment. Although some of the smaller Defendants[1] initially committed to adopt and implement Evergreen's business method—recognizing the "magnitude of the opportunity" as "enormous"—the larger Defendants did not share Evergreen's vision and used their market power and influence to bully the interested parties into submission. These facts describe a paradigmatic group boycott between competitors that violates the Sherman Act and the Massachusetts General Laws.

Faced with overwhelming legal authority dictating that Evergreen has sufficiently pled valid claims, Defendants predicate their 75-page Answering Brief on a series of factual arguments requiring an inversion of the applicable legal standard. The lens urged by Defendants and the district court used for viewing Evergreen's Second Amended Complaint ("SAC") is improper. Defendants' position is irreconcilable with long-settled principles that survive *Bell Atlantic Corp. v. Twombly* and its progeny.

[1] As used herein, "Defendants" refers to Defendants-Appellees Pactiv Corporation ("Pactiv"), Genpak, LLC ("Genpak"), Dolco Packaging, a Tekni-Plex Company ("Dolco"), Solo Cup Company ("Solo"), and Dart Container Corporation ("Dart").

The district court adopted Defendants' overly stringent legal standard and overstepped its bounds by engaging in improper fact-finding on a pure question of law—whether a complaint can survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court relied on *Twombly* in rendering its improper factual findings, but nothing in *Twombly* or the Federal Rules of Civil Procedure allows district courts to go as far as it did here. This Court must determine whether a "plausibility" analysis permits a district court to: (a) make factual determinations that directly contradict the allegations of a complaint; and (b) draw inferences in favor of the moving party rather than those most favorable to the nonmoving party. Additionally, this Court should correct the district court's clear errors of law, including its understanding that Evergreen's vertical relationship as a potential supplier to Defendants effectively negates its claims.

LEGAL ARGUMENT

I. EVERGREEN HAS STATED A CLAIM FOR RELIEF UNDER THE SHERMAN ACT, AND DEFENDANTS' MANY FACTUAL COUNTERARGUMENTS ARE UNRIPE FOR CONSIDERATION ON A MOTION TO DISMISS

A. Defendants' Group Boycott Falls Within The Proscriptions Of The Antitrust Laws

Evergreen's Sherman Act claim stems directly from a group boycott targeting Evergreen's innovative closed-loop business methodology, which had a

pending patent. Notwithstanding Defendants' supposed surprise that "Evergreen now makes it clear that what it complains of is *not* that Defendants collusively refused to do business with Evergreen" (Appellees' Consolidated Brief ("ACB") 21), Evergreen has always alleged that this case concerns a concerted refusal to deal with Evergreen in a sole source closed-loop recycling program. (JA 0007; 0501.) There is nothing "strange" about this boycott (ACB 21 n.5); Defendants were threatened by a specific service and product that Evergreen offered and they acted to keep them out of the market. Defendants do not—and cannot—provide any rule of antitrust jurisprudence dictating that the goal of a boycott must be the complete exclusion of a competitor or its product. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 n.14 (1977) (noting that plaintiff may prove antitrust injury or violation before it is actually "driven from the market"); *Nurse Midwifery Associates v. Hibbett*, 549 F. Supp. 1185, 1191 (M.D. Tenn. 1982) ("An unreasonable restraint on the freedom to buy and sell in an open market—not necessarily total exclusion—is essential to the Sherman Act concept of boycott."); 13 Herbert Hovenkamp, *Antitrust Law*, ¶ 2202b, at 258 (2d ed. 2005) ("[F]irms that are threatened by an aggressive innovating rival may take steps to keep the rival *or its newly innovated product* out of the market." (emphasis added)).

However Defendants attempt to frame their conduct, the boycott "deprive[d] the marketplace of independent centers of decisionmaking that competition assumes and demands." *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2209 (2010). Here, interested consumers were unable to partake in Evergreen's closed-loop recycling program for their polystyrene waste because of Defendants' unlawful concerted action. This is exactly what the antitrust laws were enacted to protect against—depriving consumers of innovative and efficient products or services because it would disturb the status quo for entrenched and powerful market players. *See Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21–22 (1st Cir. 1990) (Breyer, J.).

B. The Second Amended Complaint Directly Alleges Conspiracy

The SAC specifically alleges industry strategy discussions at a specific trade association meeting initiated by a specific individual (John McGrath) from a specific Defendant (Pactiv). (JA 0494.) The primary purpose of this meeting was to discuss the industry's group response to recycling in the face of mounting opposition. (*Id.*) These allegations, linked with ongoing concerted conduct, constitute direct evidence of conspiracy that should end the inquiry as to whether Evergreen has alleged a combination or conspiracy for purposes of Section 1 liability.

Evergreen's direct allegations are adequate to withstand a motion to dismiss. In *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765–66 (1984), the Court held that there was "substantial *direct* evidence of agreement[]" including an "arguably more ambiguous" newsletter discussing "Monsanto's efforts to get the market place in order . . . and then states that in addition every effort will be made to maintain a minimum market price level." *Id.* (internal quotations omitted). That newsletter is no more explicit than the statements made at the PFPG meeting.

Similarly, Evergreen's direct allegations do not materially differ from those found to be sufficient in *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010). Defendants distinguish *West Penn* on the basis that one defendant had told the plaintiff that it could not violate an agreement it made with another defendant. (ACB 25 n.9.) That is no different than this case. Although Evergreen was not at the PFPG meeting where Defendants agreed that recycling polystyrene was not an option, a participant at this meeting informed Evergreen of what was discussed there. (*See* AOB 14.)

Consistent with recent case holdings, Evergreen does not rely on any omission of discussion of the business method or disagreement among Defendants as direct evidence. *See, e.g.*, TruePosition, *Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571, 594 (E.D. Pa. 2012) (holding that direct allegation of agreement through a "December 2008 Work Item . . . that was co-sponsored by the Corporate

Defendants" from which the plaintiff was omitted was insufficient because "the mere fact that UTDOA was not carried forward in the 2008 Work Item alone is insufficient to constitute direct evidence of an unlawful agreement to exclude it"); *Golden Bridge Tech. Inc. v. Motorola, Inc.*, 547 F.3d 266, 272 (5th Cir. 2008) (finding that on summary judgment, emails "actually reveal[ing] disagreement among the Appellees" do not constitute direct evidence of agreement). But of course, emails evidencing an agreement constitutes direct evidence. *Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 410 (5th Cir. 2007).

Defendants also contend that, "the comments simply reflect a general statement of opinion by one Defendant about the viability of polystyrene recycling." (ACB 23.) That may be one way of reading it. This is a motion to dismiss, however, and it is beyond peradventure that allegations and inferences must be viewed in the light most favorable to Evergreen. *Edlow v. RBW, LLC*, 688 F.3d 26, 31 (1st Cir. 2012) (noting that facts must be construed "in the light most favorable to the plaintiff"). The majority of the Consolidated Brief's discussion relating to whether the allegations provide sufficient direct evidence is predicated on Defendants' averred negative reading.

No inferences are required to connect Defendants' statements with Evergreen unless the allegations of the SAC are not accepted as true. The SAC notes that Evergreen was a "sole source" cost-effective closed-loop recycler (*E.g.*,

JA 0491, 0500), and therefore any statements referencing recycling polystyrene were patently directed at Evergreen. This is fact, not inference. Defendants' promotion of Packaging Development Resources ("PDR") changes nothing. Evergreen alleges that PDR was a sham, that Defendants knew it was a sham, and that its promotion was intended to corrupt the science of Evergreen's method.[2] (JA 0499.) Such an allegation is entirely consistent with Defendants' agreement that recycling polystyrene was not an option.

Lastly, as an aside, Defendants contend that Evergreen's direct allegation falls outside of the Sherman Act's statute of limitations. (ACB 22 n.6.) Settled Supreme Court precedent summarily refutes this point. *F.T.C. v. Cement Inst.*, 333 U.S. 683, 704 (1948) (holding that pre-limitations conduct was "admissible for the purpose of showing the existence of a continuing combination among respondents"); *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1347 (9th Cir. 1984).

The applicable standard for direct evidence on a motion to dismiss is whether there is "a reasonable expectation that discovery will reveal this direct evidence." *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 324 (3d Cir.

[2] Evergreen emailed ACC leadership, copying Defendants, stating that PDR was a sham and that several site investigations demonstrated that no operational equipment existed. Evergreen similarly notified the FDA that PDR was not authorized, and the FDA responded with a recommendation to initiate legal action against PDR.

2010). Defendants do not even contest that discovery is unlikely to (or will not) yield this evidence but instead ask this Court to read the facts in a way that is favorable to them—defying the applicable legal standard. Consequently, their arguments should be rejected.

C. The Second Amended Complaint Circumstantially Alleges A Plausible Conspiracy Among Defendants

Even though Evergreen's SAC directly alleges conspiracy, thereby obviating the need for a "plausibility" analysis using circumstantial evidence, the SAC also circumstantially alleges conspiracy. Under this Court's interpretation of *Twombly*, "'[a]n allegation of parallel conduct . . . gets the complaint close to stating a claim' for purposes of surviving an initial motion to dismiss." *White v. R.M. Packer Co., Inc.*, 635 F.3d 571, 580 (1st Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Defendants contend that Evergreen has neither alleged parallel conduct nor the "more" that *Twombly* requires. *Twombly*, 550 U.S. at 556–57. They are wrong on both fronts.

1. Defendants' conduct relating to closed-loop recycling is identical

Defendants' argument that Evergreen has not alleged parallel conduct falters in the first sentence and underscores exactly what the district court got wrong. Defendants write: "As the District Court pointed out, the SAC is replete with allegations of individual defendants continuing to *favorably* deal with Evergreen in

varied ways. . . ." (ACB 27 (emphasis added); ACB 44–49.) But the entire point of Evergreen's claim is that Defendants' limited dealings with Evergreen were extremely *unfavorable*—and would eventually lead to Evergreen's failure—and Defendants knew it was unfavorable because Evergreen supplied each Defendant with a confidential business proposal detailing the closed-loop model.[3] (JA 0495, 0501, 0700.) It was not the district court's prerogative at this stage to determine whether such dealings were favorable, and as Defendants note, that is exactly the type of finding that the district court engaged in.

Moreover, acting in lock-step unison, Defendants *all* refused to recycle polystyrene using Evergreen's closed-loop method. First, while Defendants are entitled to argue to a jury that they "supported" Evergreen with some type of dealing, this is not a basis for dismissing the complaint because the Supreme Court has already classified blanket refusals to deal and dealings on unfavorable terms as falling under the same umbrella of parallel conduct. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959). Second, some Defendants' belated attempts to reach out to Evergreen do not demonstrate a lack of parallel activity. These purported endorsements or offers came when Evergreen had already been

[3] The SAC also alleges that in the 1980s, Defendants funded an $88 million effort to recycle polystyrene, but all that resulted was a low-value resin that could not sustain any recycling initiative. (JA 0485.) This allegation belies Defendants' assertion that they had committed to Evergreen's business model through resin purchases. As discussed, these resin purchases are pretextual defenses for the refusal to deal with Evergreen's business model.

crippled and was on the verge of shutting down or shortly after Evergreen shut down. (JA 0500.) If anything, such an abrupt change in position from multiple Defendants suggests conspiracy, particularly after years of steadfast refusal. Finally, *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, (3d Cir. 2011), does not help Defendants because some of the defendants in that case actually dealt with the plaintiff on the terms he wanted despite an alleged boycott. (AOB 56–57.) While Defendants may classify their dealings with Evergreen as "favorable," Evergreen submits that in addition to being untrue and contradicted by the facts alleged, this is a paradigm question of fact, not law.

2. The Second Amended Complaint alleges numerous factual indicia of conspiracy

a. The factual specificity urged by Defendants and accepted by the district court exceeds the legal standard

If for some reason this Court finds that Evergreen's direct allegations do not plead a viable Section 1 claim, Evergreen's circumstantial allegations strongly suggest conspiracy. At the outset, it should be noted that in assessing plausibility, "courts have held that antitrust conspiracy allegations need not be detailed on a defendant-by-defendant basis." *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 719 (E.D. Pa. 2011); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008). Therefore, individual Defendants' arguments that certain facts were not specifically alleged against them do not affect

the overall plausibility. Moreover, "some latitude may be appropriate where a plausible claim may be indicated based on what is known, at least where, as here, some of the information needed may be in the control of the defendants." *Menard v. CSX Transp., Inc.*, 698 F.3d 40, 45 (1st Cir. 2012) (citation and internal quotations omitted). Such is the case here where Defendants possess the bulk of the information in question.

In its Opening Brief, Evergreen set forth many reasons, backed by sound legal precedent, why Defendants' conduct here plausibly suggests conspiracy. In contrast, Defendants' Consolidated Brief sets forth little legal support for the several *factual*—albeit misleading—reasons they provide for why they believe a conspiracy is not *legally* plausible. This lack of citation is not surprising given that their argument is premised on an inverted legal standard that allows the trial court to read allegations in a light favorable to Defendants and to draw inferences against Evergreen. The "plausibility" inquiry cannot become a means for courts to engage in fact-finding on a motion to dismiss, which is effectively what the district court did.

Defendants' lead argument as to why Evergreen has not alleged a plausible conspiracy is that "Defendants promoted PDR, another company that held itself out as a closed-loop recycler." (ACB 29.) This again ignores the plain allegation in the SAC that PDR was "illegitimate or a fraud, and was not running, or capable

of running, a closed-loop recycling program similar to Evergreen's." (JA 0498.) Instead, PDR was a vehicle for Defendants to corrupt the science of closed-loop recycling by reinforcing to consumers and regulators that polystyrene could not be cost-effectively recycled and that Evergreen was not a sole source.[4] (JA 0498–99.)

The district court's improper factual finding that the closed-loop business method would raise costs for Defendants is perhaps the most significant error in the entire Order. Most simply put, Defendants would face virtually no new costs. (JA 0486.) The allegation of cost-neutrality is neither a legal conclusion nor a formulaic recitation of an element; it is a factual allegation that must be accepted as true. Requiring Evergreen to plead the specific details of its business model demonstrating cost-neutrality would fly in the face of the Supreme Court's holding that detailed factual allegations are not required. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Even so, all of the items Defendants challenge are explained in the SAC.

- Royalties/Commissions: Evergreen earned a four percent commission for all products it sold. (JA 0488.) As alleged, this four percent commission was what Defendants paid all of their brokers because it

[4] Being a sole source exempted Evergreen from the bidding process once proven competitive by audits. (JA 0499.) The ACC/PFPG, Pactiv, and Dart communicated this message, and other similar messages denigrating the economic viability of closed-loop recycling, to schools, state and municipal officials, and consumers. (JA 0497–500.)

was "standard in the industry." (*Id.*) The only difference is that Evergreen's commission would come from selling Poly-Sty-Recycle products rather than non-recyclable polystyrene products. (AOB 10.) In fact, in its belated attempt to work with Evergreen, Genpak stated, "At Genpak we understand your need to make this a revenue stream and are willing to pay this additional fee." (JA 0180.)

- Post-Consumer Resin: Evergreen did not charge more for its resin than Defendants already had to pay. (JA 0488.) Defendants do not appear to argue this would raise their costs.
- Environmental Fee: Defendants insinuate that the "environmental fee" Evergreen charged to schools would somehow negatively affect their business through increased costs to customers. (ACB 30.) This characterization misrepresents the allegations. Evergreen specifically keyed this fee to be a fraction of the savings each school would obtain in Evergreen's system. (*Id.*) In addition, Evergreen provides numerous examples of schools that wanted to join the closed-loop system, even if it meant paying Evergreen a part of their savings. (JA 0489.) It was not Evergreen's environmental fee—but Defendants' refusal—that was a hindrance.

- Supplemental Damages: The "supplemental fee" to offset financial damages was not part of the closed-loop model. These fees only came in later negotiations when Evergreen had already been crippled and was on the verge of collapsing. (JA 0500.) In any event, these fees presumably could not have deterred Defendants too much because it was only when Evergreen was about to collapse or had already collapsed—i.e., when Evergreen was asking for these supplemental fees—that Defendants reached out and offered to work with Evergreen.

There is nothing remarkable about any of these standard industry costs. The district court's factual determination that Evergreen's method would raise Defendants' costs is, in addition to being legally erroneous as violating the applicable standard, also factually erroneous.

As a proffered alternative for why Defendants would have chosen not to partner with Evergreen, Defendants argue the district court was correct in its factual finding that "each Defendant was comfortable with the status quo and saw no need to replace it with Evergreen's alternative model." (ACB 31.) Although such a contention may have held true in *Twombly* (AOB 49–53), Evergreen has alleged instances where some Defendants *wanted to change* the status quo by partnering with Evergreen but ultimately reversed course because of pressure from

the group boycott (JA 0494–95) led by fear of retaliation from industry leaders Pactiv and Dart (JA 0491, 0496). This distinction makes all the difference in the world. Maybe the facts will ultimately show that Dolco rejected Evergreen because it wanted to focus primarily on egg cartons; however, where Dolco, Genpak, and others expressed interest in the closed-loop method—noting that it had enormous economic potential—and then suddenly changed their mind after inter-competitor meetings where industry strategy about recycling was discussed, Dolco, Genpak, and the remaining Defendants are not permitted to hide behind their purported satisfaction with the status quo as a defense. This chain of events alone provides "some factual context suggesting agreement" and the relevant "setting" that was absent in *Twombly*. *Twombly*, 550 U.S. at 549, 557. It is indefensible to conclude *as a matter of law* that one cannot plausibly infer from Dolco's conduct that it acquiesced to an agreement with its competitors. Even if there are multiple inferences, "[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

As a third "explanation," Defendants submit that they would have to forego the sale of other "green" products more profitable than recycled polystyrene. (ACB 33.) The SAC contains another explanation. Evergreen alleges that it was

in Defendants' best interests to offer these higher priced "green" products *only if* no competitor was offering recycled polystyrene at a fraction of the cost. (JA 0491–92.) Evergreen's allegation aligns with the rule that a boycott will be plausible if the plaintiff has "alleged behavior that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals." *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 327 (2d Cir. 2010) (citation and internal quotations omitted). Applied here, Evergreen has alleged that it was in each Defendant's self-interest to partner with Evergreen unless *all* agreed not to in order to force higher priced "green" products that were insulated from price competition. This allegation comports with economic sense.

The only case other than *Twombly* that Defendants provide is *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (11th Cir. 2010). *Jacobs* involved vertical resale price maintenance and was dismissed primarily for failure to plead a proper relevant market and harm to competition—matters not at issue here. *Id.* at 1339–40. As a secondary claim, the plaintiff also stated that because the manufacturer imposing the vertical policy also sold at the retail level, the vertical price policy could constitute horizontal price-fixing. *Id.* at 1340. The Eleventh Circuit declined to find a plausible conspiracy because, in addition to the absence of any substantive allegations of horizontal agreement, it was in the "distributors' independent economic interest to maintain prices at TPX-set minimums" and if

TPX undercut its own price policy, it would drive its distributors out of business, which "would be undesirable for TPX for economic reasons." *Id.* at 1341–42. Unlike in *Jacobs*, Evergreen has provided specific statements constituting "plus factor" evidence demonstrating that adopting the closed-loop system *was in the economic best interests* of each Defendant. (AOB 45.)

In sum, Defendants have importuned this Court to weigh competing inferences and rule in their favor. Below, Defendants convinced the district court that under *Twombly* the court was permitted to consider and weigh alternative explanations for the conduct alleged. This is not how other circuits have interpreted *Twombly*, however, and the district court expressly disavowed and disagreed with these circuit court decisions. *Compare Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion")[5], *and Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings

[5] Defendants try to distinguish *Anderson News* factually (ACB 34 n.13, 47–48), but Evergreen cites this case primarily for its legal principles, which directly apply here and often contradict the district court. In any event, after the trade association meeting, Dolco *did* cut off Evergreen and there *was* a "lock-step" refusal to adopt the closed-loop model notwithstanding Defendants' characterization of their future dealings with Evergreen outside the closed-loop model as "favorable."

stage")[6], *with* Order 14–15 n.17 (citing *Watson Carpet* and stating that "[t]he Supreme Court's decision in *Twombly* holds the opposite"). The district court's opinion also conflicts with this Court's recent holding that, "[t]he place to test factual assertions for deficiencies against conflicting evidence is at summary judgment or trial." *Liu v. Amerco*, 677 F.3d 489, 497 (1st Cir. 2012). According to the district court, *Twombly* "holds the opposite." Evergreen respectfully submits that *Anderson News*, *Watson Carpet*, and *Liu* were all correctly decided and should be applied here, and this Court should reverse the district court's error in rejecting these holdings.

b. Defendants' response to Evergreen's legal arguments relating to conspiracy is also predicated on the same faulty legal standard and improper fact-finding

The several counterarguments Defendants present in response to Evergreen's many circumstantial factual allegations of conspiracy should also be rejected.

Defendants first contend: "Evergreen does not, in fact, allege that it was in Defendants' interests to do business with it." (ACB 35.) Such an allegation was unnecessary given that at least one of the Defendants admitted the opportunity

[6] The Sixth Circuit just reaffirmed that plaintiffs need not allege: (1) facts showing that an unlawful agreement is more likely than lawful parallel conduct; and (2) facts tending to exclude the possibility of lawful independent conduct. *Erie County, Ohio v. Morton Salt, Inc.*, No. 11-4153, 2012 WL 6581676, at *7–*8 (6th Cir. Dec. 18, 2012). The court noted that if this were the standard "almost no private plaintiff's complaint could state a Section One claim. *Id.* at *8.

Evergreen presented was "enormous." (JA 0490.) It is also readily inferable from the remaining allegations that several Defendants, for a period of time, perceived it to be in their best interests to commit to the closed-loop model—they clearly saw the model as having threshold merit. Indeed, Evergreen alleged that it had funding from a reputable investment firm (contingent on one Defendant's participation) (JA 0495); it had commitments from many large customers that would result in new business for a participating Defendant (JA 0489); and its closed-loop model would solve the industry's environmental waste problems, which have resulted in bans of polystyrene products (JA 0480–82; AOB 16–17 n.2). Defendants again cite *Twombly* to state that firms do not expand into every market that an "outside observer might regard as profitable." (ACB 35.) Here, it is not just an "outside observer" that regarded the closed-loop system as profitable but also "insiders"—two of the Defendants. (JA 0490.)

Because Defendants can provide no real answer for Dolco's and Genpak's abrupt change in course and refusal to provide any explanation, Defendants must resort again to impermissibly placing a negative spin on Evergreen's allegations and rewriting them. Only by drawing negative inferences from Evergreen's allegations can this Court conclude that Dolco might not have "necessarily . . . bought into Evergreen's closed-loop method lock, stock, and barrel." (ACB 36.) Of course it is *possible* that Dolco might have withdrawn its agreement for

independent reasons (and it is merely a coincidence that this happened shortly after an inter-competitor meeting about industry strategy), but that inference cannot be drawn at this stage because this Court must "indulge every reasonable inference in [Evergreen's] favor." *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). Again, Dolco's and Genpak's subsequent resin purchase agreement did not constitute acceptance of Evergreen's closed-loop business method and does not undercut Evergreen's claim of a group boycott.

Accepting Defendants' characterization of their joint rejection of Evergreen's proposal is also inappropriate at this early stage. First, on a motion to dismiss, "[t]he presentation of a common economic offer . . . does not provide antitrust immunity." *Anderson News*, 680 F.3d at 192. (*See also* AOB 39–41.) Second, Defendants myopically focus on the ultimate rejection letter from the ACC/PFPG without putting that letter into a proper context with the first. In the initial email, the Director of the PFPG flatly states that it would be the "decision of the companies to move ahead." (JA 0511.) Presumably, the "detailed review and discussion" referenced in the PFPG's June 20, 2007 rejection letter was a discussion between "the companies" as was originally stated. (JA 0513.) Defendants again ask this Court to render factual findings and impermissibly draw inferences in their own favor.

Defendants misconstrue Plaintiff's trade association argument. (ACB 38 & n.4.) Plaintiff does not argue that Defendants' common trade association membership and industry-strategy discussions *necessarily* evidence a conspiracy, but rather that the circumstances as they unfolded provided a setting and opportunity for collusion between Defendants that *suggests* conspiracy. The SAC alleges specific meetings and specific discussions relating to industry strategy, Evergreen, and its closed-loop recycling method—not mere membership or mere attendance.[7] This opportunity to conspire is one factor suggestive of conspiracy—exactly as Justice Sotomayor held during her tenure on the Second Circuit. *Todd v. Exxon Corp.*, 275 F.3d 191, 213 (2d Cir. 2001) (noting that trade association meetings, while not inherently unlawful, "have the potential to enhance the anticompetitive effects and 'likelihood of . . . uniformity' caused by the information exchange"). *See also Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278, 288 (4th Cir. 2012) ("When a group of competitors . . . join together to cooperate in the conduct of their business, there naturally arise antitrust suspicions.").

Defendants also argue that *Twombly* "directly refutes" Evergreen's circumstantial allegation regarding the tight-knit structure of the polystyrene

[7] E.g., the late 2005/early 2006 meeting after which Dolco rescinded its interest (AOB 15); the March 2007 meeting after which Genpak withdrew its interest (*id.*); and the May 2007 discussion of Evergreen's proposal, after which the PFPG and its members collectively rejected the closed-loop method (*id.* at 17).

industry being conducive to collusion (ACB 39); yet, the language actually cited from *Twombly* does not even deal with industry structure—directly or indirectly—as circumstantial evidence. Even after *Twombly*, courts continue to hold that a compact industry structure is valid circumstantial evidence supporting conspiracy. *See, e.g.*, *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627-28 (7th Cir. 2010)[8]; *Haley Paint Co. v. E.I. Dupont De Nemours & Co.*, 804 F. Supp. 2d 419, 426 (D. Md. 2011). This makes sense because in concentrated industries it is easier for competitors "to monitor each other and structure agreements in violation of § 1." *Haley Paint*, 804 F. Supp. 2d at 426. And that is exactly what happened here: when Dolco and Genpak expressed interest in the closed-loop method, larger rivals Pactiv and Dart initiated a concerted refusal to deal. Again, while industry structure *standing alone* may not suffice to render a claim of conspiracy plausible,

[8] Defendants attempt to distinguish many cases Evergreen cites on the ground that those cases involved price fixing, not a group boycott. (ACB 40 n.16, 45, 46 n.17.) For purposes of this appeal, the distinction is irrelevant. All Section 1 claims share two elements: (1) a combination or some form of concerted action; and (2) that agreement was either a per se unreasonable restraint of trade or was unreasonable under the "rule of reason." *Capital Imagine Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993). Only the "concerted action" element is at issue here. While the second element may vary based on the type of restraint—that is, a group boycott or price fixing—the concerted action element follows the same analysis, and Defendants can provide no authority stating that the "agreement" analysis varies based on the type of restraint at issue. That is because courts treat them exactly the same—a group either came to an agreement or did not. If Defendants' distinction is credited, then this Court should distinguish *Twombly* itself on this ground because the restraint alleged there was not a group boycott but an agreement not to compete with one another.

it is yet another factor Evergreen has alleged that "nudges" the claim from implausible to plausible and another factor the district court refused to credit. *Erie County*, 2012 WL 6581676 at *9 (noting that allegation of market structure "when combined with other factors, strengthen[s] the plausibility of [an inference of unlawful agreement]" but alone cannot give rise to this inference).

Finally, while Evergreen's status as an innovator may not be "recognized" circumstantial evidence, it incontrovertibly provides an incentive for Defendants to conspire to exclude the closed-loop model, which they assert is lacking. (ACB 51 n.21.) *See, e.g.*, 13 Hovenkamp, *supra*, ¶ 2202b, at 258 ("[F]irms that are threatened by an aggressive innovating rival may take steps to keep the rival *or its newly innovated product* out of the market."); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 Antitrust L.J. 313, 316 (2012) ("[F]rom the perspective of innovation promotion, exclusion is the real supreme evil. It is exclusion, whether practiced by a monopolist or oligopoly, that restricts or raises the price by which new ideals (embodied in products) get to enter the market."); Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 Antitrust L.J. 749, 752 (2011) ("[A]ntitrust case law contains ample evidence of both concerted and unilateral exclusionary practices whose only reasonable purpose was to keep competitors' innovations from being developed or marketed.").

Perhaps most telling is what the Defendants do not address. In its 75 pages, the Consolidated Brief does not even address the district court's unsupported and indefensible factual finding that Defendants "found the results [of Evergreen's resin] disappointing for various and often different reasons." (Order 12.) No allegations in SAC remotely support this statement. (AOB 42.) This factual finding is demonstrative of the negative lens the court used to view Evergreen's SAC. Defendants have absolutely no response to this plain error.

3. Critical factors distinguish *Twombly* from this case

In their ongoing effort to align Evergreen's case with *Twombly*, Defendants continue to distort the allegations of the SAC. Most egregious is the analogy Defendants draw between the regulatory disadvantages faced by the CLECs in *Twombly* and Evergreen's allegations of entry barriers in the polystyrene market. (ACB 41–42.) Defendants mischaracterize Evergreen's allegation—Defendants do not face the enumerated barriers to entry because they are already entrenched competitors in the market. Aspiring competitors, however, "are unlikely to enter the market at price and volume levels sufficient to challenge [Defendants]" because of Defendants' monopoly-level power. *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1448 (9th Cir. 1995). In other words, a smaller or aspiring manufacturer of polystyrene products could not enter or expand in the relevant market to work with Evergreen in adopting the closed-loop method;

certain market "barriers" prevent this, and that is precisely what Evergreen alleged. Defendants, as entrenched competitors, no longer face these barriers, and only the most cynical reading of the SAC can lead to such a conclusion.

Defendants also continue to liken the SAC's allegations regarding the preservation of the status quo to *Twombly*. The district court erroneously did the same. While the Court declined to use the preservation of the status quo as a factor suggesting conspiracy in *Twombly*, it did not hold that this could *never* be a factor in analyzing a Section 1 claim; rather, because of other factors (AOB 49–53), the Court would not allow that conclusory allegation to be the basis for inferring a conspiracy. Unable to provide a valid answer to Evergreen's significant factual distinction of *Twombly*—that is, maintenance of the status quo through threats of retaliation—Defendants revert to the "conclusory" mantra. (ACB 43.) Such allegations are not the type considered "conclusory" for purposes of *Twombly* because they are neither a "legal conclusion" nor a "formulaic recitation of the elements." *Compare Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 47 (1st Cir. 2012) (noting that allegation that "each of the defendants 'belong[s] to a different [political] party than [the plaintiff]" is a "specific factual allegation which, in itself, is adequate for pleading purposes"), *with Shay v. Walters*, No. 12-1494, 2012 WL 6577207, at *5 (1st Cir. 2012) (noting that allegation of "actual malice"—an element of defamation—was conclusory).

4. The district court committed plain error in allowing Evergreen's vertical relationship to Defendants to color its understanding of the plausibility of the alleged conspiracy

Defendants defend the district court's finding that Defendants' vertical relationship with Evergreen somehow renders Evergreen's boycott claim "inherently implausible" or even less plausible than it would be otherwise. (Order 18–19 (quoting *Mendez Internet Mgmt. Servs., Inc. v. Banco Santander de Puerto Rico*, No. 08-2140, 2009 WL 1392189 (D. Puerto Rico May 15, 2009).[9] That is simply incorrect. Just a few months ago this Court correctly stated that "[a] violation of section 1 may well occur when a group of independent competing firms engage in a concerted refusal to deal with a *particular supplier*, customer or competitor." *Gonzalez-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 249 (1st Cir. 2012) (emphasis added). An unpublished outlier case from the district court cannot overwrite this accepted rule—the district court just got the law wrong.

Defendants also try to mask the district court's error by ignoring comments at oral argument. (ACB 49 n.18.) The district court stated: "My understanding, and it may be unsophisticated, of the Sherman Act was that it did not reach, at least under Section 1, that kind of relationship." (JA 0838–39.) Indeed, it was the first

[9] As they do throughout their Consolidated Brief when lacking a substantive response, Defendants try to refute Evergreen's distinction of *Mendez* by stating that "this assertion is based on conclusory allegations." (ACB 51 n.21.) Because they do not even try to state what allegations are "conclusory" beyond merely pointing to a two-page citation, it is unclear what Defendants are arguing.

question the court asked. (JA 0821.) Even after Evergreen's counsel informed the court that this interpretation of Section 1 was demonstrably incorrect (JA 0841, 0853–55), the court still heavily relied on this fact in dismissing Evergreen's claims. (Order 18–19.) Further, the district court gave more legal weight to the vertical relationship than simply as "one factor in assessing the plausibility of Evergreen's conspiracy claim." (ACB 52.) The district court held that because of Evergreen's vertical relationship, "it is unclear how defendants' sometime refusal to deal could have had an anti-competitive effect on the market." (Order 18.) This is tantamount to the court holding that the vertical relationship effectively negated Plaintiff's claims because without some showing of anticompetitive effect, Evergreen could never state a claim. *See Nat'l Soc. Of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978). Finally, it is unclear why the district court would write that "Evergreen's counsel was unable to articulate how Evergreen competed with any of the named defendants" (Order 18 n.21), if it was applying the correct law. The district court committed plain error of law, and this incorrect legal "lens" colored its perception of the plausibility of Evergreen's allegations—*as the court itself acknowledged*.

D. Defendants' Remaining Individual Arguments Do Not Erase The District Court's Errors

A few Defendants propound arguments individual to them as an alternative ground to affirm the dismissal holding as to each such Defendant. None of these

arguments succeeds. First, enforcing the Genpak "release" would violate decades of precedent. In addition to not applying to Evergreen, the clause in question, which does not resemble a release, is hopelessly vague and also unconscionable. Second, the law confers no antitrust immunity on the ACC because it is a trade association. Its factual argument must fail at this stage. Finally, for the reasons discussed throughout Evergreen's briefing, Evergreen has alleged facts sufficient to state a claim against Dolco.

1. The Genpak "release" fails as a defense on multiple fronts

Genpak contends that a clause in a vaguely drafted contract releases it of all future liability. (ACB 57–59.) Apart from this clause not remotely resembling a traditional (or untraditional) release, such an argument violates established public policy. Evergreen did not raise this issue in its Opening Brief because it was not a basis for the district court's ruling—if the court can even be considered to have ruled on it at all. Nevertheless, Evergreen responds to Genpak here.

Genpak first argues that Evergreen has waived any challenge to Judge Stearns's ruling regarding Genpak. The only arguable independent holding Judge Stearns reached involved a single act by Genpak in Florida. (Order 19 n.23.) This footnote, however, can hardly be deemed a "ruling" because the district court expressly stated: "In their separate memoranda of law, defendants make numerous arguments as to why the SAC is insufficient as to each of them. . . . [I]t is not

necessary to address each of its constituent parts." (Order 19 n.22.) If this footnote can be considered a "ruling," as opposed to passing dicta, Judge Stearns decided only that Evergreen could not sue Genpak for switching from white to black trays and disrupting Evergreen's business in Florida. As even Genpak admits, this ruling applied only to the Chapter 93A claim. (ACB 58.) Regardless, the purported "release" Genpak relies on cannot help it for several reasons.

First, it is very telling that Genpak does not quote from the agreement supposedly releasing its unlawful participation in a group boycott. In the document titled "Michael Forrest Agreement," the sixth paragraph states: "*Forrest* agrees not to make either directly or indirectly any comments or actions about or against Genpak that might have a negative effect on Genpak's results or reputation, even in the event Genpak decides to reduce or eliminate funding after May 15, 2008, to Forrest's polystyrene recycling business." (JA 0568 (emphasis added).) This paragraph facially applies to only Forrest, an individual, not Evergreen, the corporation. And because Forrest was dropped as a Plaintiff in the SAC after the district court held he lacked standing to pursue the claims at issue (JA 0459), the release does not bar this action.

Second, even if this Court finds a reason that this clause should apply to Evergreen (Genpak does not offer one), this provision is too vague and ambiguous to enforce; it fails at the first level of contract validity and enforcement. "A court

cannot enforce a contract unless it can determine what it is." 1 Arthur Linton Corbin, *Corbin on Contracts* § 4.1, at 525 (rev. ed. 1993). *See also Armstrong v. Rohm & Haas Co.*, 349 F. Supp. 2d 71, 78 (D. Mass. 2004). This principle holds particularly true for releases where "any doubts about the interpretation of the release must be resolved in the plaintiff's favor." *Cormier v. Central Mass. Chapter of Nat'l Safety Council*, 416 Mass. 286, 288, 620 N.E. 2d 784, 786 (1993); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982) ("A clause exonerating a party from liability will be strictly construed against the benefited party. If the clause is . . . ambiguous in scope . . . it will not be enforced.").

The scope of the nebulous clause at issue is hardly definitive. The paragraph neither delineates any specific conduct that is released nor contains any words such as "release," "exonerate," or other language indicating a release. The phrasing similarly does not suggest that Evergreen cannot sue Genpak for prior wrongs, prospective wrongs, or both. Under the "release's" language, Forrest would be prohibited in perpetuity from ever criticizing Genpak, endorsing a Genpak competitor, or even purchasing a product of a Genpak competitor because these could all be considered "comments" or "actions" that might "directly or indirectly affect Genpak's business results." The deficiencies of this paragraph are clear and vast, and the many doubts must be resolved in Evergreen's favor. This hopelessly vague paragraph cannot bar this suit.

Third, even if this Court holds the clause applies to Evergreen and can find meaning in its words, the contract is unconscionable. Evergreen signed this contract out of desperation to survive with no timely alternative. (JA 0497.) It had no meaningful choice but to agree to the contract. A release of one party from potentially enormous liability for a marginal sum strongly suggests a one-sided, unconscionable contract. *E.H. Ashley & Co., Inc. v. Wells Fargo Alarm Servs.*, 907 F.2d 1274, 1278 (1st Cir. 1990). As alleged in the SAC, both factors are present here. (JA 0497.)

Finally, if despite all of the above this Court still finds a valid release, it is long settled that a release of future antitrust violations is void as a matter of public policy. The Second Circuit recently affirmed that "an agreement which confers even 'a partial immunity from civil liability for future violations' of the antitrust laws is inconsistent with the public interest." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 214–15 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (Nov. 9, 2012) (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)). So, at the absolute most, paragraph 6 could only release conduct up to the date of the agreement, which was before Evergreen was driven out of business. Genpak is still liable for its participation in the group boycott from the signing of the agreement until Evergreen shut down.

2. The ACC's role as a trade association does not provide it with antitrust immunity

ACC argues that it cannot be held liable as a participant in the group boycott because it did not have the "motive or means" to do so and was not acting as an "independent entity." (ACB 61.) This label aside, it is a maxim of antitrust jurisprudence that "'[t]hose who, with knowledge of the conspiracy, aid or assist in carrying out the purposes of the conspiracy make themselves parties thereto and are equally liable to or guilty with the original conspirators.'" *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 119 (3d Cir. 1988). Likewise, acquiescence to a trade-restraining agreement is actionable under Section 1. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948).[10] Apart from all of Evergreen's other allegations, ACC admits that it acted on at least one occasion to "facilitate" Defendants' decision not to deal with Evergreen. (ACB 63.) This facilitation alone qualifies as aiding, assisting, or acquiescing to a Section 1 conspiracy.

As controlling law establishes, trade associations are "routinely treated as continuing conspiracies of their members." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988). There is nothing "misleading and incorrect"

[10] ACC argues that Evergreen waived the argument that "acquiescence" to a boycott is actionable. (ACB 62 n.27.) ACC is incorrect. The district court never ruled on the issues unique to the individual Defendants. (Order 19 n.22.) Evergreen, therefore, had nothing to appeal. It is only ACC that brings up the issue, which Evergreen now directly responds to.

(ACB 61) about this verbatim quote from the Supreme Court. All of ACC's citations—none from the Supreme Court—merely demonstrate that concerted action does not exist "*every time* a trade association member speaks or acts." (ACB 61 (quoting *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) (emphasis added))).

The citations ACC provides certainly do not mean that trade associations are not routinely treated as conspiracies between their members; rather, as Evergreen as ACC's own authority dictates, the applicable test states that "a court must examine *all the facts and circumstances* to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association." *Alvord-Polk*, 37 F.3d at 1007–08. ACC argues that "the record is devoid of any evidence that the ACC participated in the group boycott." (ACB 62.) This demand for "record evidence" is at best premature because this is a motion to dismiss, and Evergreen has not had the benefit of any discovery. For this reason, the district court could not have considered any—let alone *all*—the facts and circumstances as in *Alvord-Polk*, which was decided on summary judgment. Like many of Defendants' other arguments, this issue is one that must be left for summary judgment or trial once a factual record is developed.

Even under ACC/PFPG's "independent entity" standard, however, there are allegations in the SAC stating that ACC acted as an "independent entity" in

refusing to deal with Evergreen in a closed-loop model. ACC is speaking out of both sides of its mouth here. Earlier in the Consolidated Brief, Defendants argue that the ACC/PFPG was not acting as a combination of its members but was working as an independent and unilateral entity. (ACB 36–38.) Later, ACC alone argues that it was not in fact acting as an independent entity in the boycott. (ACB 62–64.) Left to deal with this contradiction, the distinction ACC draws is vague and tautological: it appears to concede that it was acting as an independent entity in denying Evergreen funding but contends that its rejection was unilateral.

ACC cannot have it both ways; it is not clear how ACC can argue it was not acting as an independent entity while at the same time claiming it acted unilaterally. Regardless, Evergreen has presented allegations, along with a supporting document, that the decision to deal with Evergreen would be "the decision of the companies." (JA 0511.) Evergreen submits that the allegations demonstrate that the decision to reject Evergreen was collaborative. If ACC contends that it was acting unilaterally, however, it was certainly acting as an "independent entity." When this "unilateral" rejection is viewed in tandem with the remaining allegations of the SAC, it is more than plausible to infer that ACC was an active and "independent" participant in the boycott given its consistent and undeniable relations with Defendants.

Finally, ACC asserts that it had no motive to boycott Evergreen. That argument cannot be credited given the allegations of the SAC. (ACB 64–65.) Evergreen alleges that Pactiv and Dart, the leaders of the group boycott, pay the majority of the PFPG's annual dues. (JA 0494, 0496.) Were the ACC/PFPG to back Evergreen's closed-loop model and endorse Genpak, Dolco, or another smaller manufacturer in implementing it, Pactiv and Dart could bring the PFPG to its knees. No more expansive pleading of motive is needed.

3. For the reasons discussed above and in the Opening Brief, Evergreen has more than adequately stated a claim against Dolco

Dolco, the only manufacturer Defendant to individually challenge the sufficiency of Evergreen's allegations against it, rehashes many of the same arguments made in the joint portion of the Consolidated Brief. The few additional arguments it presents are similarly unpersuasive.

Dolco argues that it "made the decision not to sell the very products necessary to participate in the closed-loop recycle business systems envisioned by Evergreen." (ACB 65–66.) This is misleading for several reasons. First, in addition to providing trays for schools, the closed-loop system provided for approximately $100 million of other Poly-Sty-Recycle products, which included

egg-cartons, cups, and any other item made from polystyrene.[11] (JA 0489.) Second, just because Dolco monopolizes one segment of the polystyrene market does not mean that it does not produce other products. Indeed, according to Dolco's website, it produces several varieties of trays, bowls, lids, and other products. Dolco Packaging Extensive Product Line, http://dolco.tekni-plex.com/products-5 (last visited Jan. 4, 2013). Finally, Dolco had previously committed to the closed-loop model before abruptly backing out and working with Evergreen on only a limited, pretextual basis. (JA 0494–95.) If being required to produce trays were truly an impediment to Dolco's participation, it is unlikely it would have ever been "excited" about the Evergreen closed-loop system. For these reasons, Dolco's excuse that it specialized in egg cartons and not trays is unpersuasive.

Dolco's remaining arguments are mostly repetitive of the earlier portions of Defendants' brief. For instance, Dolco again argues that it continued to deal with Evergreen. (ACB 66.) These limited and unfavorable dealings, however, are not the basis for Evergreen's claim. Dolco also contends that Evergreen does not allege that Dolco made any negative remarks about or "communicated an agreement" with other Defendants regarding the closed-loop system. (ACB 66–

[11] Of the $4.5 billion polystyrene food service market, the Evergreen business method would have represented less than five percent; of this five percent, trays comprised only ten percent, and the rest, general food service products.

67.) As mentioned above, "courts have held that antitrust conspiracy allegations need not be detailed on a defendant-by-defendant basis," *Processed Egg Products Antitrust Litigation*, 821 F. Supp. 2d at 719, so such allegations are unnecessary. Regardless, the pattern of conduct alleged against Dolco—changed conduct on the heels of an inter-competitor meeting—strongly suggests that Dolco was involved in an unlawful agreement. Evergreen refutes Dolco's argument dealing with the supposed increased costs of the closed-loop system above. (*Supra*, 12–14.) Dolco provides no new arguments that would render dismissal as to it alone proper.

II. EVERGREEN HAS ALSO STATED A CLAIM UNDER CHAPTER 93A OF THE MASSACHUSETTS GENERAL LAWS

A. Evergreen Waived No Arguments On Appeal Because The District Court Did Not Independently Rule On The Chapter 93A Claim

Defendants first argue that Evergreen has waived any challenge to the district court's Chapter 93A "ruling." Beyond holding that "Evergreen's boycott conspiracy allegations under Mass. Gen. Laws ch. 93A, § 11, fail for the same reasons that the Sherman Act claim fails" (Order 19), the remainder of the "ruling" that Defendants reference is a mere footnote. (Order 19 n.23.) Further, the purported limitations defects mentioned by the district court that were relegated to this footnote were not raised in the briefs of any party below.

Either way, the district court was incorrect. The SAC alleges that Defendants made many fraudulent statements from 2007 through 2009—a time

frame within the limitations period. (JA 0497–98.) The court appears to have ignored this allegation. So, in addition to the boycott continuing through at least the end of 2008, Evergreen also alleged that Defendants made fraudulent statements within the limitations period.

B. The "Primarily And Substantially" Challenge Defendants Raise Is A Factual Issue Not Amenable To Resolution On A Motion To Dismiss

Defendants also contend that Evergreen's Chapter 93A claim should fail because the conduct at issue did not occur "primarily and substantially" in Massachusetts. Unless the allegations of the SAC are entirely bereft of a nexus to Massachusetts, this issue should not be resolved on a motion to dismiss.

As the Massachusetts Supreme Court stated: "Whether the 'actions and transactions occurred primarily and substantially within the commonwealth' is not a determination that can be reduced to any precise formula. Significant factors that can be identified for one case may be nonexistent in another. Any determination necessarily will be fact intensive and unique to each case." *Kuwaiti Danish Computer Co. v. Digital Equipment Corp.*, 438 Mass. 459, 472–73, 781 N.E. 2d 787, 798 (2003). This Court has also held that this inquiry is fact intensive. *Kenda Corp., Inc. v. Pot O'Gold Money Leagues, Inc.* 329 F.3d 216, 235 (1st Cir. 2003). *See also Guest-Tek Interactive Entm't Inc. v. Pullen*, 731 F. Supp. 2d 80, 92 (D. Mass. 2010); *Omni-Wave Elecs. Corp. v. Marshall Indus.*, 127 F.R.D. 644, 649 (D.

Mass. 1989) ("Rather, [the inquiry] is a question of fact upon which the defendant bears the burden of proof and, as such, is not susceptible to dismissal under Rule 12(b)(6).")

"For purposes of a motion to dismiss, a 'section eleven cause of action . . . should survive a 'primarily and substantially' challenge so long as the complaint alleges that the plaintiff is located, and claims an injury in Massachusetts.'" *Guest-Tek*, 731 F. Supp. 2d at 92 (citation omitted). Evergreen was located in Massachusetts; was injured in Massachusetts; developed its business plan in Massachusetts; was incorporated in Massachusetts; contacted and negotiated with Defendants in Massachusetts; lost specific business opportunities in Massachusetts because of Defendants' conduct; paid taxes in Massachusetts; and was put out of business in Massachusetts. (*E.g.*, JA 0492, 0497, 0507.) Under the law as it currently stands, Evergreen's SAC must survive a "primarily and substantially" challenge.

The only cases Defendants cite where this issue was resolved on a motion to dismiss involve claims where not a single act alleged occurred in Massachusetts. For example, in *Market Masters-Legal v. Parker Waichman Alonso LLP*, C.A. No. 10-cv-40115-MAP, 2011 WL 196929, at *3 (D. Mass. Jan. 20, 2011), the district court dismissed the Chapter 93A claim because the plaintiff did not allege *a single action* that occurred in Massachusetts, and the plaintiff's counsel could not identify

a single act. Likewise, in *Weber v. Sanborn*, 502 F. Supp. 2d 197, 199 (D. Mass. 2007), the district court dismissed the claim because not one act occurred, and the plaintiff was not even based, in Massachusetts. Finally, in *NEGB, LLC v. Weinstein Co. Holdings*, 490 F. Supp. 2d 89, 97 n.4 (D. Mass 2007), the court did not rule on the "primarily and substantially" issue—the case was dismissed for lack of ripeness. These cases are all distinguishable based on the Massachusetts nexus allegations put forth by Evergreen. Defendants' inability to provide legal authority dismissing a Chapter 93A claim where the plaintiff pled *some* activity in Massachusetts is dispositive. The "primarily and substantially" issue should not be fatal to a pleading.

This Court's decision in *Fishman Transducers, Inc. v. Paul*, 684 F.3d 187 (1st Cir. 2012), on which Defendants primarily rely, did not involve a motion to dismiss. Instead, "[a]fter extensive discovery and shortly before trial, the district court dismissed Fishman's chapter 93A claim." *Id.* at 190. There has been no such discovery here, and accordingly, the factual findings the district court made in *Fishman* could not have been made here.

III. THE COURT ABUSED ITS DISCRETION IN DENYING EVERGREEN LEAVE TO AMEND

Defendants rely primarily on a procedural mechanism in an effort to deflect the district court's error in denying Evergreen leave to amend. Defendants argue that Evergreen's request in the district court was a "contingent request" that "does

not require the District Court to perform a Rule 15(a) analysis, and does not produce any ruling that can be appealed." (ACB 69.)

Defendants' proffered procedural defect argument is inapplicable here. Unlike the instant case, the cases Defendants cite did not involve an appeal directly from an order granting a motion to dismiss. This distinction is important. This Court has written: "[Appellee] says [Appellant] has waived his opportunity to amend by making only a 'passing reference' to a request for leave to amend in his briefs to the district court. That is not our law. This court has treated many similar requests to be sufficient invocations for leave to amend under Rule 15(a)." *U.S. ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 734 (1st Cir. 2007), *abrogated on other grounds by Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008). Indeed, Defendants own authority draws the same exact distinction. *Fisher v. Kadant, Inc.*, 589 F.3d 505, 510 (1st Cir. 2009) ("That case, unlike this one, involved an appeal from the granting of a motion to dismiss."). Defendants' reliance on procedural law is misplaced here.

Moreover, when leave to amend is denied on grounds of futility—which is unknown here due to the district court's silence—the review of the denial is "for practical purposes, identical to review of a Rule 12(b)(6) dismissal." *Platten v. HG Bermuda Exempted Ltd.*, 437 F.3d 118, 132 (1st Cir. 2006). Evergreen was never provided with the opportunity to demonstrate that it could allege additional or

different facts that would survive an additional motion to dismiss and the district court does not cite a single reason why the SAC could not be cured. This was plain error constituting an abuse of discretion.[12]

CONCLUSION

For all of the above reasons, and for those in Evergreen's Opening Brief, the judgment of the district court should be reversed and the action remanded.

DATE: January 9, 2013

Respectfully submitted,

BLECHER & COLLINS, P.C.
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By: s/ Maxwell M. Blecher
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[12] Defendants also complain that Plaintiff has had numerous prior pleading attempts with an "ever-changing menu of legal theories." (ACB 70.) Contrary to Defendants' pejorative language, there were sensitive and complicated reasons for Evergreen's difficulty in commencing this case and finalizing a complaint. This information is contained in sealed records in the district court. Evergreen has reason to believe that Defendants' counsel have some knowledge of such difficulty, and if the records were opened, the facts would plainly show the difficulties had nothing at all to do with the merits of this case, but rather with unusual impediments, through no fault of Evergreen's own, to a proper filing of the substantive claims herein. Given these unusual impediments, the procedural history of this case should not be viewed in any way prejudicial to Evergreen.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and this Court's enlargement order dated December 19, 2012, Plaintiff-Appellant hereby certifies that this Reply Brief is proportionately spaced, has a typeface of 14-point, and contains 9,994 words.

DATE: January 9, 2013

BLECHER & COLLINS, P.C.
KENNEY & SAMS, P.C.

By: s/ Maxwell M. Blecher
Maxwell M. Blecher
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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2013, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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