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

APPELLANT'S OPENING BRIEF

Maxwell M. Blecher
Donald R. Pepperman
Jordan L. Ludwig
Blecher & Collins, P.C.
515 South Figueroa Street, Suite 1750
Los Angeles, California 90071
213-622-4222 | 213-622-1656 fax
mblecher@blechercollins.com
dpepperman@blechercollins.com
jludwig@blechercollins.com

Christopher A. Kenney
Eric B. Goldberg
Kenney & Sams, P.C.
Southborough Place
134 Turnpike Road, Suite 300
Southborough , MA 01772
508-490-8500 | 508-490-8501 fax
cakenney@KandSlegal.com
ebgoldberg@KandSlegal.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff/Appellant does not have a parent corporation, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Treatises

INTRODUCTION

This civil appeal concerns the foreclosure of a new business from a market as a result of an unreasonable restraint of trade among that market's entrenched competitors calculated to impede competition and protect the status quo. Plaintiff-Appellant Evergreen Partnering Group, Inc. ("Evergreen") presented the Defendants in this case with an economically proven business methodology that would solve a serious environmental problem, which had plagued and vexed the polystyrene food service industry for decades and has recently led to the enactment of legislative bans. Implementing Evergreen's business model would have substantially benefitted consumers, including the tight budgets of large school districts, the environment, and any Defendant(s) that elected to partner with Evergreen through increased sales.

But Evergreen's model would have upset the tightly structured, oligopolisitc nature of the polystyrene food service market, where each of the Defendants held a dominant share of a particular market sector within the overall market. Consequently, certain Defendants that were interested in the program were pressured to back out of earlier commitments to the Evergreen model and pressured to join a conspiracy to boycott Evergreen's cost-effective and "patent published" business model. Concluding that the down-sides outweighed the

pluses, Defendants agreed among themselves that none would partner with Evergreen. That agreement is the predicate for this antitrust action.

This case affords this Court the opportunity to closely consider the Federal Rule of Civil Procedure 8 pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in the context of an antitrust dispute. What constitutes "plausibility" under *Twombly* escapes strict definition, and a true test for when a complaint sufficiently alleges facts under Rule 8(a)(2) such that it may withstand a Rule 12(b)(6) motion has been elusive. Over the past few years, several circuit courts have written detailed opinions explicating the *Twombly* pleading standard in the antitrust context.

Here, the district court failed to accept Evergreen's allegations as true, failed to draw inferences in Evergreen's favor, and failed to consider the allegations collectively. Evergreen's detailed, 29-page Second Amended Complaint ("SAC") alleges, directly and circumstantially, that Defendants entered into an unlawful concerted refusal to deal. Without affording the SAC the "context" emphasized by the Supreme Court, and in some instances simply ignoring Evergreen's allegations, the district court instead focused on a few facts—with its own (impermissible) negative spin—and concluded that the claims of conspiracy were implausible. Nothing in the Federal Rules of Civil Procedure or *Twombly* and *Iqbal* permits the

granting of a Rule 12(b)(6) motion on this basis.

The district court's antitrust analysis is also seriously flawed. Rather than assessing the potential anticompetitive harms of the alleged boycott, the district court's analysis improperly relies on arbitrary line drawing, which the Supreme Court has repeatedly and expressly condemned as being inimical to the enforcement of the antitrust laws. The district court improperly skewed the allegations and then interpreted them according to an erroneous reading of the law.

Even assuming that this Court finds that Evergreen's SAC did not state any claims for relief, the district court also erred in denying Evergreen's request for leave to amend. Most importantly, the district court provides no reason for its denial, which under established law is a categorical abuse of discretion. Additionally, the SAC was the first time the district court considered the merits of Evergreen's claims. To the extent the court's expressed reasons for granting Defendants' motions involved alleged factual deficiencies, these can be cured by amendment. If this Court finds that the district court was correct that the SAC fails to state a claim, the erroneous denial of leave to amend constitutes an alternative and independent basis for reversal.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction of this case pursuant to 15

U.S.C. § 15; 15 U.S.C. § 1121; 28 U.S.C. § 1331; and 28 U.S.C. § 1337. This Court has jurisdiction to review the district court's judgment on appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court erred in granting Defendants' Motions to Dismiss on the ground that Evergreen failed to allege a conspiracy under Section 1 of the Sherman Act or an unfair business practice under Chapter 93A of the Massachusetts General Laws where Evergreen alleged direct evidence such as specific statements, at specific meetings, by specific individuals, in addition to other circumstantial evidence supporting conspiracy including a concentrated market structure, motive to enter into a conspiracy, common trade association membership, conduct against self-interest in the absence of agreement by rivals, and other facts implying a traditional conspiracy.

Whether the district court abused its discretion in denying Evergreen leave to amend where it only considered the merits of the case on a single occasion, its dismissal with prejudice was based primarily on purported factual deficiencies that were capable of being cured, and it did not state any reason for denying leave to amend.

STATEMENT OF THE CASE

A. Statement of Facts

1. The Parties

The parties in this dispute are the major players in the disposable expanded foam polystyrene food service packaging and products ("polystyrene") industry. Evergreen, the Plaintiff, is a Massachusetts corporation and an innovator that developed and commercialized a business methodology for a cost-effective means for closed-loop recycling polystyrene. This methodology would provide an environmental solution for the industry.

The Defendants are the primary manufacturers of polystyrene products and the key contributing members of their trade association. Pactiv Corporation ("Pactiv") is a Delaware corporation that manufactures disposable polystyrene products. Genpak, LLC ("Genpak") is a New York limited liability company that manufactures polystyrene products. Dolco Packaging, a Tekni-Plex Company ("Dolco") is a Delaware corporation that manufactures polystyrene products. Solo Cup Company ("Solo") is a Delaware Corporation that manufactures polystyrene products. Dart Container Corporation ("Dart") is a Michigan corporation that manufactures polystyrene products. In March 2012, Dart announced that it acquired Solo for $1 billion. The American Chemistry Council ("ACC") is a New

York trade association. The Plastics Food Service Packaging Group ("PFPG"), which is not named as a Defendant but as an "unnamed co-conspirator," is an unincorporated division of the ACC and is not a named Defendant.

2. The Market For Disposable Polystyrene Food Service Products

The manufacture and sale of disposable plastic is a multi-billion dollar industry in the United States. (JA 0480.) Polystyrene composes an enormous segment within this greater industry. (JA 0484.) Polystyrene is commonly referred to as "Styrofoam," which is trademarked by Dow Chemical Company, a polystyrene resin manufacturer. (*Id.*) The relevant polystyrene products here include plates, bowls, hinged containers, school lunch trays, cups, egg cartons, meat and product packing trays, and others. (*Id.*)

Polystyrene products are particularly popular in large institutional cafeterias such as those in schools, hospitals, prisons, or governmental buildings. (JA 0485.) The reason for this popularity is that polystyrene possesses several unique characteristics: it is inexpensive to the consumer, extremely lightweight, and possesses both hot and cold insulating properties. (JA 0481.) Polystyrene products generate an estimated $4.5 billion in annual sales in the United States. (JA 0484.) The largest 30 public school systems in the United States alone purchase over 3 million cases of polystyrene lunch trays annually. (JA 0485.)

Within the market for polystyrene products, there is a distinct product division among manufacturers that allows Defendants to leverage additional business with year-end rebates linked to the purchases of products from their respective market segments: Pactiv controls over 70 percent of the market for foam trays in the large school systems, supermarkets, and food management companies; Genpak controls over 70 percent of the lunch tray market in small and medium schools; Dart controls over 70 percent of the market for injected foam hot and cold cups; Dolco controls over 70 percent of the market for egg foam cartons; and Solo controls over 70 percent of the market for thermoformed foam cups. (JA 0484.) Cumulatively, these five Defendants control approximately 90 percent of the polystyrene market, with Pactiv and Dart having the vast majority. (*Id.*) These figures demonstrate that the relevant product market for polystyrene is highly concentrated and oligopolistic.

3. The Environmental Consequences And Attendant Costs Of Disposable Polystyrene Food Service Product Consumption

Polystyrene products are extremely high-cubed and light because they are composed of 90 percent air. (JA 0485.) Despite being extremely light, they do not compact well and therefore create an enormous volume of trash relative to its light weight, which creates costly haulage and disposal fees. (*Id.*) This holds

particularly true for school districts and large institutional cafeterias. (*Id.*) Every year, millions of cases of polystyrene are disposed in landfills after a single use. (*Id.*) Unfortunately, polystyrene is commonly perceived to be economically non-recyclable and is excluded from most recycling bins. (JA 0481, 0486.)

There have been few meaningful efforts to solve this problem. The last industry effort came in the 1980s when the industry committed approximately $88 million to developing means to recycle polystyrene. (JA 0485.) The National Polystyrene Recycling Company developed a potential method for recycling polystyrene, but the result was a non-food grade resin that had no demand or value. (*Id.*) Following this failed venture, the industry concluded that polystyrene was not capable of being cost-effectively recycled. (*Id.*) Despite over two decades of advances in the industry and technology, Defendants continue to adhere to this position. (JA 0486.)

4. Evergreen's Proven Closed-Loop Polystyrene Recycling Solution

Evergreen was founded in 2000 by Michael Forrest ("Forrest"), a commission broker for polystyrene and other packaging products for over 40 years. (JA 0486.) Evergreen was founded primarily to rectify the industry's environmental problems and benefit its consumers. Forrest's extensive experience in the industry provided a unique perspective and array of contacts to launch

Evergreen. In 2002, Evergreen became the first and only company in the United States to commercialize recycled post-consumer content polystyrene products that were suitable for use and contact with food. (JA 0486–87.) After years of testing and piloting with the Boston public schools, Evergreen obtained a "non-objection" letter from the U.S. Food and Drug Administration ("FDA"), which effectively deemed Evergreen's post-consumer resin safe for contact with food. (*Id.*)

After polystyrene producers and others had insisted for decades that it was impossible to cost-effectively recycle polystyrene, Evergreen found a viable avenue. The first step in the model was for Evergreen to organize and assist with the certifying, sorting, and collecting of used polystyrene products from designated large school districts and other institutions. (JA 0487.) Then, second, Evergreen would process the used polystyrene by washing, grinding, and extruding it into an FDA approved food grade resin. (*Id.*) Third, using this post-consumer resin, Evergreen and its designated partnering manufacturer(s) would manufacture new polystyrene products. (*Id.*) These products were known as Poly-Sty-Recycle products—Evergreen's trademarked name. (JA 0486.) Finally, Evergreen, working as a sales/marketing broker for these Poly-Sty-Recycle products, would work with distributors and food management groups to broker and deliver these products to schools, large institutions, and national chains. During the delivery,

school districts and other large institutions in the Evergreen closed-loop program would give the truck drivers soiled stacks of used trays to be delivered back to Evergreen processing sites, thereby "closing" the recycling loop. (JA 0487.)

The success of this closed-loop method was predicated on three separate revenue sources, and each was specifically designed to ensure *no additional cost* to partnering manufacturers and to also to save schools and other large consumers up to 35 percent of their former waste disposal fees. (JA 0487–88.) The first revenue source was obtained through the sale of Evergreen's post-consumer polystyrene resin benchmarked at prime pricing of food-grade resin. (JA 0488.) Because polystyrene manufacturers must buy resin anyway, and because Evergreen's post-consumer resin was specifically priced to be competitive with other available resins, the purchase of Evergreen's resin imposed no additional cost. (*Id.*) The second revenue source was a broker commission or royalty rate of 4 percent paid to Evergreen for brokering sales of all Poly-Sty-Recycle products sold to schools, distributors, consumers, and the like. (*Id.*) In other words, Evergreen would receive a nominal percentage on all incremental business it brought a Defendant through its business model. These brokerage commissions or royalties were standard in the industry and posed no unique or additional cost to the manufacturer. (*Id.*) The third revenue source was an environmental fee that

schools and other institutions in the closed-loop would pay Evergreen. (*Id.*) These environmental fees, determined by Evergreen's extensive waste fee audits, were specifically structured to constitute a marginal percentage of the cost-savings that a participating school or institution saved through the closed-loop model. (*Id.*) As such, under Evergreen's model, there was no additional cost to participating consumers. (JA 0487–88.) After developing its model, Evergreen applied for a business methodology patent in 2003 that was pending until 2011. (JA 0487.)

An additional benefit of Evergreen's business model was that it was a "sole-source." (JA 0491.) Because it was the only company that offered a polystyrene closed-loop recycling service, school districts or large institutional cafeterias would not have to expend valuable time and resources to seek bids as long as Evergreen could validate the savings to the schools for the cost of polystyrene trays and recycling, compared to the cost of polystyrene trays and disposal, and, of course, provided no other companies had similar capabilities. (*Id.*)

Given the negative enduring image of polystyrene, it was not surprising that Evergreen's business model generated tremendous hype and buzz in the industry. Beginning in the 2002/2003 school year, Evergreen partnered with the Boston Public School System, the Providence Rhode Island Public School System, and food services management giant Sodexo. (JA 0488.) These early pilot programs

were resoundingly successful, and Evergreen quickly built a plant and began implementing closed-loop programs in the Gwinnett and DeKalb County Public School (Atlanta) systems in Georgia. (*Id.*) Evergreen's program was so successful that the Gwinnett program was awarded the National Recycling Award for K–12 schools in 2007. (JA 0489.) Because of these successes, Evergreen secured contracts, commitments, and deep expressions of interest from large schools, institutional cafeterias, and large chains around the nation. (*Id.*)

The problem remained, however, of meeting the needs of the largest school districts. Evergreen's business model called for nine fully commercialized facilities that would produce an estimated 9 to 10 million pounds of resin annually, which would enable Evergreen to supply the demand from the largest school systems and an estimated $100 million in Poly-Sty-Recycle products to supply national distributors, food management groups, and chains. (*Id.*) Only Pactiv, Genpak, Solo, Dolco, or Dart had the production capacity to meet these supply requirements. (*Id.*) By reason of the monopolistic positions each of these Defendants obtained in their market niche, no smaller producer has the means to meet the national demand to implement Evergreen's closed-loop model. (*Id.*)

To fulfill these needs, Evergreen reached out to all of the Defendants. In 2005, in response to Evergreen's proposal, Dolco Executive Vice President Norm

Patterson ("Patterson") stated in writing that Dolco was "anxious to be involved in wherever this product takes us" and that the "magnitude of the opportunity is enormous." (JA 0490.) Dolco acknowledged that partnering with Evergreen could provide it with an "enormous" financial benefit and planned to implement the closed-loop model and produce a full line of Poly-Sty-Recycle products for Sodexo, Sysco, and other large distributors. (JA 0490.) Many distributors and food management groups such as Eastern Bag & Paper Group, Sodexo, Compass, Southeastern Paper Group, and others hoped to work with Evergreen and help schools implement and benefit from the closed-loop model. (JA 0492–94.) Likewise, Perot Investments (Ross Perot) was willing to fund Evergreen $10 million if one or more of the major producers committed to the business method. (JA 0495.) Despite the nearly universal excitement Evergreen's model generated, an artificial restraint of trade prevented the closed-loop model from surviving.

5. Defendants Refuse In Concert To Partner With Evergreen And Implement Its Closed-Loop Business Model

The manufacturer Defendants—Pactiv, Dart, Genpak, Solo, and Dolco—all belong to the same trade association, Defendant ACC, and the ACC subgroup, the PFPG. (JA 0490.) The PFPG comprises polystyrene resin suppliers and polystyrene product manufacturers. (*Id.*) From 2005 through 2008, the PFPG

sought to develop and agree on the industry's strategy for dealing with continuously escalating environmental criticisms. (*Id.*) It was amid this climate that the Defendants orchestrated their group boycott against Evergreen's model.

Evergreen has alleged, through direct and circumstantial evidence, that this unreasonable restraint of trade was jointly formulated and that each Defendant agreed or acquiesced to it. After forming Evergreen, Forrest remained in contact with many high level executives from the industry, including executives from Defendants in this case. It is information obtained from these executives that ultimately tipped Forrest and Evergreen off that antitrust violations were occurring.

In response to growing demand for Evergreen's closed-loop recycling services and food-grade recycled polystyrene resin, and similar environmental concerns, the Defendants convened an inter-competitor meeting in late 2005 or early 2006. (JA 0494.) According to information that Patterson provided to Forrest, Pactiv Vice President of Sales John McGrath announced to the members of the PFPG at that meeting that recycling polystyrene was not an option in the industry's battle with its environmental critics. (*Id.*) A representative from Dart agreed. (*Id.*) Pactiv and Dart, which both adamantly opposed school recycling, are the industry's two largest manufacturers and pay a significant portion of the PFPG's annual dues; accordingly, they hold significant sway over the industry's

smaller competitors that feared retaliation. (JA 0491, 0494, 0496.)

Very shortly after this inter-competitor meeting, Dolco abruptly broke off its agreement with Evergreen to implement the closed-loop recycling model. (JA 0494.) After being informed of this reversal of interest, Forrest asked Patterson why Dolco was no longer interested in Evergreen's program; Patterson replied that Dolco was not going to oppose Pactiv's and Dart's "call to action" against recycling announced at the above-mentioned meeting. (*Id.*) Later, when Evergreen's counsel asked Patterson for more specifics, Patterson refused to provide a reason for Dolco's abrupt about-face and indicated he would only respond to questions if served with a subpoena. (JA 0495.) Similarly, Patterson stated that Dolco had no interest in competing with Pactiv, presumably, for fear of Pactiv retaliating by invading Dolco's market. (*Id.*) Genpak had similarly expressed strong interest in the closed-loop model and negotiated a partnering deal with an option to lower commissions if sales of Poly-Sty-Recycle exceeded $100 million, as well as an option to purchase Evergreen. But Genpak later withdrew its interest, without explanation, after several inter-competitor PFPG meetings, including one in March 2007 where the PFPG members decided not to endorse

recycling.[1] The PFPG instead continued to declare publicly that recycling polystyrene was not economically feasible. (JA 0498.)

Defendants reinforced this public relations message and took further measures not to adopt the closed-loop in response to a proposal Evergreen submitted to the PFPG in May 2007. (JA 0495.) The PFPG and its members were under pressure to find environmental solutions in California, and based on suggestions from Jim Reilly, the President of Genpak, Evergreen began a dialogue with the PFPG. (*Id.*) On May 14, 2007, Mike Levy, the director of the PFPG, stated in an email that whether the PFPG would adopt the closed-loop program would be "the decision of the companies." (*Id.*) On May 21, 2007, Evergreen submitted its proposal, which contained its confidential financial and operation information relevant to the closed-loop business model, with additional options for commitments by Perot Investments for national funding, or ACC/PFPG funding on a Los Angeles Unified School District Evergreen recycling site. (*Id.*) On June 20, 2007, the PFPG rejected Evergreen's model, stating that "*we* have decided to pursue other options at this time." (JA 0495–96 (emphasis added).)[2]

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[1] This fact was not alleged in the SAC; however, were Evergreen afforded leave to amend the SAC, as it should have been, this fact would have been alleged.

[2] The "other options" pursued by the PFPG were ineffective. On August 22, 2012, CBS reported that the Los Angeles Unified School District banned

The anticompetitive motive and goal of this boycott was two-fold. First, if a competitor was able to offer Poly-Sty-Recycle products, Defendants would have had to significantly lower costs for other "green" products such as paper, pulp, bamboo, and bio-polymer because these products were priced three to four times higher than Poly-Sty-Recycle products. (JA 0491–92.) Each Defendant recognized that demand for these products would be far lower, especially in bulk, if consumers were able to purchase Poly-Sty-Recycle products at the same price as virgin polystyrene products. (JA 0492.) As both Dolco and Genpak stated, the market for Poly-Sty-Recycle would be enormous. (JA 0490, 0496.) If, however, Poly-Sty-Recycle was "not an option," Defendants could foist these higher priced alternatives on environmentally conscious consumers. (JA 0491–92.)

Second, Defendants knew that Evergreen's innovative and market-altering closed-loop model could dramatically disrupt the dynamics of the oligopolistic market. (JA 0491.) Defendants feared a loss of control in the overall market, and each feared loss of control or retaliation in their respective market segments, particularly the smaller producer Defendants (e.g., Dolco and Genpak), from larger competitors and potential new entrants if they did not join the conspiracy to

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polystyrene trays due to environmental concerns from a lack of recycling. The ACC spoke out against this measure. There is also a pending bill in California that would proscribe dispensing cooked food in polystyrene containers (SB 568).

boycott Evergreen's business model. (*Id.*)

The conduct of each Defendant, taken as a whole, supports the reasonable inference that an agreement to boycott Evergreen's closed-loop model was reached. Each Defendant acted in a manner that was contrary to its business and economic best interests in the absence of similar conduct from its competitors or acted in another manner indicating conspiracy.

Pactiv. Pactiv refused to work with Evergreen's model and was opposed to the closed-loop model from the beginning. Beginning in 2002, Eastern Bag & Paper, a northeastern regional distributor of food service products, requested that Pactiv work with Evergreen to promote a closed-loop system in the Boston Public Schools. Pactiv refused. (JA 0492.) Then, in 2004, Sodexo, a multi-billion dollar food services management corporation, wanted to implement the closed-loop model for its school system customers. (*Id.*) Hoping to thwart Evergreen's expansion through its partnership with Sodexo, Pactiv: threatened to revoke Sodexo's Vendor Distribution Allowances—a significant portion of Sodexo's revenue; refused to provide Poly-Sty-Recycle products to Sysco—a large distributor for Sodexo; and misrepresented the economic viability of recycling polystyrene. (JA 0493.) Pactiv's intimidation ultimately caused Sodexo to cancel its partnership contract with Evergreen. (*Id.*) Pactiv's refusal continued into the

latter part of the decade, when it turned away new Poly-Sty-Recycle business from Compass, U.S. Foods, The Performance Group, Eastern Bag & Paper, and Southeastern Paper Group, among others. (JA 0493–94.) Shortly after Evergreen shut down its business operations, Pactiv, with knowledge that Evergreen was no longer a threat or doing business, belatedly offered to partner with Evergreen and implement the closed-loop model. (JA 0500.)

Genpak. Genpak's conduct is also consistent with a group boycott. Evergreen's SAC alleges that Genpak's President, Jim Reilly, knew that partnering with Evergreen could have profitably boosted its business, improved polystyrene's image, and saved schools substantial disposal fees. (JA 0496.) That is why Genpak initially agreed to partner with Evergreen and was willing to participate in the full closed-loop model; subsequently, however, Genpak abruptly changed course and consistently refused to partner with Evergreen on multiple occasions, including with Eastern Bag and Paper and Southeastern Paper Group. (JA 0492, 0494.) Reilly stated that Genpak had no interest in competing with Pactiv for fear of retaliation. (JA 0496.) Similarly, Reilly stated he would only work with Evergreen's model if another one of the producers would as well. (*Id.*) Genpak, however, was aware that no other Defendant would work with Evergreen's model because of the united front of the boycott. (*Id.*) Like Pactiv, Genpak reached out

to Evergreen only after Evergreen had already ceased operations, which Genpak knew. (JA 0500.)

Dolco. Dolco also initially expressed strong interest in implementing Evergreen's closed-loop model to produce a full line of Poly-Sty-Recycle products. (JA 0490.) Norm Patterson of Dolco recognized that the "magnitude of the opportunity is enormous" and was "anxious" to work with Evergreen. (*Id.*) Shortly after an inter-competitor PFPG meeting, however, Dolco indicated that it was breaking off its agreement. (JA 0494.) After this abrupt change in stance, Dolco continued to refuse new business and to partner with Evergreen on the business model. (*Id.*)

Solo. Solo's actions belie its economic interests in a manner supporting conspiracy. Solo successfully tested 15,000 pounds of Evergreen's post-consumer resin and used this resin to test the production of cups, plates, containers, and cutlery. (JA 0497.) At the time, Solo was looking for new business in Massachusetts. (*Id.*) Despite enthusiasm from the general manager of Solo's North Andover, Massachusetts plant about the positive test results of Evergreen's resin, and despite looking for new business, Solo refused to work with Eastern Bag & Paper to provide a line of Poly-Sty-Recycle products to implement the Evergreen closed-loop model. (*Id.*) Solo's President and CEO, Bob Korenski, told

Eastern Bag & Paper that he was told "by his people" not to work with Evergreen. (*Id.*)

Dart. Dart, like its co-Defendants, refused to work with potential new customers that were willing to purchase a full line of Poly-Sty-Recycle products in implementing the closed-loop model. (JA 0493, 0496.) A Dart representative was outspoken at the meeting in late 2005 or early 2006 where Defendants agreed that recycling polystyrene was not an option. (JA 0494.) Dart was active in attempting to convince the industry and the public that recycling polystyrene was not economically viable. For example, Dart's Ray Ehrlich, working closely with the director of the PFPG, wrote and published an article, promoted on the PFPG website, claiming that recycling polystyrene was not economically feasible. (JA 0498.) Dart, working closely with Pactiv and the PFPG, promoted a sham competitor of Evergreen's, Packaging Development Resource ("PDR"), to create the false impression that Evergreen was not a sole source, knowing full well that PDR was incapable of cost-effectively recycling polystyrene. (*Id.*) Indeed, a reporter from *Plastic News* (Michael Verespej) told Forrest that Dart's promotion of PDR was likely an attempt to corrupt the science of Evergreen's closed-loop model. (JA 0498–99.)

B. The District Court's Dismissal Opinion

On June 7, 2012, the district court issued its Order granting Defendants' Motions to Dismiss, denying leave to amend, and dismissing the action with prejudice. The district court's Order is bottomed on three separate grounds.

First, the district court distinguishes the bulk of Evergreen's authority on the ground that "defendants did not act consistently with any alleged agreement to boycott Evergreen." (Order 15–17.) According to the court, because some Defendants dealt with Evergreen on *any* terms—even unfavorable ones—there was no boycott. (Order 16.) The court also notes that "the Sherman Act did not obligate defendants to guarantee Evergreen's profits by paying a royalty over and above the market price for otherwise suitable prime resin" and that "a company's unilateral refusal to deal is not actionable under the Sherman Act." (Order 16, ns.18, 19.) The court wrote: "Evergreen has not alleged any express agreement that plausibly shaped the defendants' subsequent conduct." (Order 16–17.)

Second, the district court ruled that the SAC did not contain enough factual detail to support a conspiracy among the Defendants. (Order 17–18.) According to the court, Evergreen alleged "only (1) the attendance by unidentified persons at a PFPG meeting at which Pactiv and Dart are said to have disparaged polystyrene recycling, and (2) a rejection by the PFPG of Evergreen's request that the trade

group fund Evergreen's California proposal." (Order 17.)

Third, the district court ruled that the alleged group boycott was implausible because Evergreen, "as a putative supplier of recycled resin, did not compete against the producer defendants, but instead sought to partner with them" and that "it is unclear how defendants' sometime refusal to deal with Evergreen could have had an anti-competitive effect on the market." (Order 18.) In a nutshell, the district court held that it is implausible that competitors would boycott a supplier.

Finally, the district court held that Evergreen's Chapter 93A claim failed for the "same reasons that the Sherman Act claim fails." (Order 19.) Additionally, the court held that Evergreen's Chapter 93A claims about fraudulent statements fell outside of the four year statute of limitations. (Order 19, n.23.)

For these reasons, the district court allowed Defendants' motions with prejudice. (Order 20.) On June 7, 2012, the court entered judgment in favor of Defendants. Evergreen filed a timely Notice of Appeal. (JA 0815.)

STANDARD OF REVIEW

Appellate courts review a district court's grant of a motion to dismiss *de novo*, with all factual allegations accepted as true and all reasonable inferences drawn in the plaintiff's favor. *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488, 490 (1st Cir. 2009).

The standard of appellate review for a district court's denial of leave to amend is abuse of discretion. *Morales-Alejandro v. Med. Card Sys., Inc.*, 486 F.3d 693, 698 (1st Cir. 2007).

SUMMARY OF ARGUMENT

This case alleges a concerted refusal to deal, also known as a group boycott, among the five leading manufacturers of polystyrene food service products and their trade association. The unlawful purpose of this boycott was to prevent a new business from implementing its innovative business model. In its SAC, Evergreen alleged direct evidence of a trade restraining agreement, circumstantial evidence of an agreement, and conduct in accordance with the alleged agreement. Evergreen's detailed factual allegations sufficiently state claims for relief under the Sherman Act and Chapter 93A.

When fully distilled, this Court must consider what allegations are sufficient under the pleading standard of Federal Rule of Civil Procedure 8(a)(2). This Court has yet to consider or analyze this standard in detail in the context of an antitrust dispute, but several recent decisions from other circuit courts have trended away from overly restrictive interpretations of *Twombly*.

Long-settled antitrust jurisprudence permits Evergreen to allege a conspiracy in one of two ways (or both): by direct allegations of conspiracy *or* by

circumstantial allegations of conspiracy. The SAC contains both. Evergreen alleges that at a trade association meeting, the Defendants agreed not to pursue recycling polystyrene as the industry's environmental strategy. These agreements targeted Evergreen's business model, the only genuine business model for closed-loop polystyrene recycling. Additionally, Evergreen circumstantially alleges an agreement through a variety of allegations including several different motives, a concentrated industry structure prone to collusion, common trade association membership, actions not in the economic interests of Defendants (in the absence of similar behavior by rivals), and other conduct commonly suggestive of conspiracy or collusion.

The district court failed to credit any of the above allegations, failed to accept Evergreen's allegations as true, and failed to draw inferences in Evergreen's favor. Instead, it cherry-picked a few allegations, put a negative spin on them, and improperly substituted its own version of the events for those that were alleged. Nothing under the Federal Rules or even the strictest approach taken after *Twombly* allows a dismissal with prejudice of this variety.

In addition to basing its ruling on an improper legal standard, the district court erred in its antitrust analysis. The court's two primary antitrust conclusions were: (1) that *any* dealings the Defendants had with Evergreen negated a finding of

conspiracy; and (2) that a competitor boycott of a supplier cannot have any anticompetitive effects. Both of these conclusions are at odds with the antitrust laws and are also premised in part on arbitrary "formalistic line drawing" that the Supreme Court has strictly condemned.

Finally, even assuming the district court did not err in its Order, Evergreen at least should have been afforded leave to amend its SAC. The district court reached the merits of Evergreen's case for the first time in the SAC. Without providing Evergreen a single opportunity to cure its SAC, the court simply dismissed the case with prejudice; yet, neither the district court's order nor the record itself contains any accepted reason for denying leave to amend. Under settled Supreme Court law, this alone is an abuse of discretion meriting reversal.

LEGAL ARGUMENT

I. EVERGREEN'S SECOND AMENDED COMPLAINT ALLEGES FACTS SUFFICIENT TO STATE CLAIMS UNDER SECTION ONE OF THE SHERMAN ACT AND CHAPTER 93A OF THE MASSACHUSETTS GENERAL LAWS

Rule 8(a)(2) of the Federal Rules directs that a pleading must simply contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Twombly* and *Iqbal*, the Supreme Court attempted to clarify this standard.

In this case, the issue is whether the SAC contains a short and plain statement showing that Evergreen is entitled to relief under Section 1 of the Sherman Act and Chapter 93A of the Massachusetts General Laws. Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . ." 15 U.S.C. § 1. The sole issue here is whether Evergreen has alleged facts to support a plausible conspiracy. Section 11 of Chapter 93A provides a "cause of action to 'any person who . . . suffers any loss of money or property . . . as a result of the use or employment by another person who engages in any trade . . . of an unfair method of competition or an unfair or deceptive act or practice.'" Whether Evergreen has alleged a claim for relief under this statute presents essentially the same issues as those framed by the federal antitrust laws.

A. The *Twombly* Standard On A Motion To Dismiss Requires A Plausible, But Not A Probable, Claim

Under Rule 8(a)(2), "[d]etailed factual allegations are not required" but the factual allegations must state a claim that is facially "plausible." *Iqbal*, 556 U.S. at 678. A plausible claim need not be probable, but the facts must suggest that discovery will reveal some evidence supporting the claim. *Twombly*, 550 U.S. at 556. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that

actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* (citation omitted).

The level of detail needed in a complaint to withstand a motion to dismiss following *Twombly* and *Iqbal* is unclear. *Pruell v. Caritas Christi*, 678 F.3d 10, 12 (1st Cir. 2012). This Court has not considered *Twombly* in an antitrust case on a motion to dismiss[3]; however, the Court's opinion in *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1 (1st Cir. 2011), provides detailed guidance. Reflecting on *Twombly* and *Iqbal*, this Court recognized that "a 'short and plain' statement needs only enough detail to provide a defendant with 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 11–12 (citation omitted). "In short, an adequate complaint must provide fair notice to the defendants and state a facially plausible legal claim." *Id.* at 12.

Ocasio-Hernandez delineates a two-pronged approach to evaluating complaints on motions to dismiss. The court "should begin by identifying and disregarding statements in the complaint that merely offer legal conclusions couched as fact or threadbare recitals of the elements of a cause of action." *Id.* (quoting *Twombly*, 550 U.S. at 555). Then, the "[n]on-conclusory factual

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[3] This Court has, however, applied *Twombly* to a case sounding in antitrust principles, although the case was brought under Chapter 93A. *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

allegations in the complaint must then be treated as true, even if seemingly incredible," and "[i]f that factual content, so taken 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' the claim has facial plausibility." *Id.* (quoting *Iqbal*, 556 U.S. at 678). *Ocasio-Hernandez* notes that trial courts may not disregard properly pled allegations even if the plaintiff's chance of prevailing is remote. *Id.* at 12–13. Recently, this Court emphasized that "[t]he place to test factual assertions for deficiencies and against conflicting evidence is at summary judgment or trial." *Liu*, 677 F.3d at 497; *In re Gilead Sciences Secs. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008) ("[A] district court ruling on a motion to dismiss is not sitting as a trier of fact.").

Judge Posner of the Seventh Circuit offered the following interpretation of the plausibility standard in a Section 1 case:

> The Court said in *Iqbal* that the "plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a defendant has acted unlawfully." . . . The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligble probability that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' connote.

In re Text Messaging Antitrust Litigation, 630 F.3d 622, 629 (7th Cir. 2010).

Recently, the Second Circuit issued a detailed and well-reasoned

interpretation of *Twombly* in the context of an alleged group boycott:

> [T]o present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment. . . . Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible. . . . The choice between or among plausible inferences or scenarios is one for the factfinder.

Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012). *See also West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010) (noting that plausibility does *not* function like a probability requirement).

Although the Sixth Circuit appears to impose a standard that requires the specific pleading of the "who, what, where, when, how or why" of the conspiracy, *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 445 (6th Cir. 2012), other courts have explicitly rejected any such requirement. *See, e.g., Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2011) ("Defendants next argue that *Twombly* requires that a plaintiff identify the specific time, place, or person related to each conspiracy allegation. This is also incorrect."). *Twombly* itself expressly notes that "we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9." *Twombly*, 550 U.S. at

569 n.14.

In short, "plausible" does not mean "probable." All of Evergreen's factual allegations must be accepted as true, and all inferences must be drawn in Evergreen's favor. If there are multiple interpretations of the facts, the trial court must accept the interpretation most favorable to Evergreen. Evergreen's version of the events does not need to be more persuasive than Defendants'—it need only be plausible in itself. Thus, as the Second Circuit explained:

> 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. . . . A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.

Anderson News, 680 F.3d at 185. Indeed, this Court has stated that *Twombly* "required that facts and not mere generalities be set forth in a complaint, but only enough facts to make the claim plausible, and [on a motion to dismiss] reasonable inferences are taken in favor of the pleader." *Liu*, 677 F.3d at 497 (citations omitted). As long as there is a "non-negligible" probability that the discovery process will yield evidence to prove Evergreen's allegations, the district court's dismissal Order should be reversed.

B. Evergreen's Second Amended Complaint Satisfies The *Twombly* Standard Under Section 1 Of The Sherman Act, But The District Court Misapplied It

To state a claim under Section 1 a plaintiff must plead: (1) a combination or some form of concerted action between distinct economic entities; and (2) that the agreement was either a per se unreasonable restraint of trade or was unreasonable under the Rule of Reason. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993). At issue in this appeal is the first element. In a Section 1 case, "[t]he crucial question is whether [defendants'] conduct toward [plaintiff] stemmed from independent decision or from an agreement, tacit or express." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). "[A]lmost any agreement between independent actors that restrains competition is potentially subject to examination for 'reasonableness' under section 1." *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999). "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." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

A conspiracy may be proved by either direct or circumstantial evidence. *See Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.). Given the

sophistication of modern businesses, it is accepted that "[d]irect evidence will rarely be available." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990). For this reason, the Supreme Court has recognized that "circumstantial evidence is the lifeblood of antitrust law." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973). "No formal agreement is necessary to constitute an unlawful conspiracy." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Evergreen has alleged direct evidence of conspiracy and circumstantial evidence that permits the plausible inference of conspiracy or agreement among Defendants.

1. The SAC Adequately Alleges Direct Evidence Of A Conspiracy

Unlike in *Twombly*, Evergreen alleges direct evidence of an agreement among the Defendants not to deal with Evergreen in implementing its business model. "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." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). "If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled." *West Penn*, 627 F.3d at 99. "After *Twombly*, if a plaintiff

expects to rely exclusively on direct evidence of conspiracy, its complaint must plead 'enough fact[s] to raise a reasonable expectation that discovery will reveal' this direct evidence." *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 324 (3d Cir. 2010). *Twombly* itself distinguishes between an "independent allegation of actual agreement" and mere "descriptions of parallel conduct." 550 U.S. at 564. In other words, if direct evidence is alleged, there is no need for a "plausibility" analysis.

Examples of direct evidence include "documents, meetings, and participant testimony." 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410a, at 69 (3d ed. 2010). A solicitation to join a conspiracy can also serve as direct evidence of agreement. *See Morton Salt Co. v. United States*, 235 F.2d 573, 575 (10th Cir. 1956); 6 Areeda & Hovenkamp, ¶ 1419c, at 140. Evergreen directly alleges that at a meeting in late 2005 or early 2006, a named representative from Pactiv stated that recycling polystyrene was not an option in the industry's battle with its environmental critics and that a representative from Dart agreed. (JA 0494.) Because at that time Evergreen's model was a sole-source for recycling polystyrene (JA 0491), the Defendants were referring to Evergreen. The SAC also alleges that this was a meeting of the PFPG, of which all Defendants are members. (JA 0494.) The district court fails to credit these direct allegations, however, and

instead merely notes "the attendance by unidentified persons at a PFPG meeting at which Pactiv and Dart are said to have disparaged polystyrene recycling." (Order 17.) In no sense does the district court's omission and mischaracterization of these allegations satisfy the requirement on the present motion to construe all allegations in the light most favorable to Evergreen.

The court does not, and could not, claim that the discovery process would be unlikely to yield evidence of this agreement or solicitation of an agreement—the applicable test for direct allegations of conspiracy. Likewise, in that respect, the SAC is completely unlike *Twombly*, where the allegations were purely circumstantial and contained no allegations of meetings between competitors, let alone what was said, who said it, and who agreed. The direct evidence of conspiracy here alone satisfies the *Twombly* standard. *See West Penn*, 627 F.3d at 99. At a minimum, Evergreen should have been given limited discovery to confirm whether its direct allegations of agreement were verifiable. *See, e.g.*, *Movie 1 & 2 v. United Artists Commc'ns, Inc.*, 909 F.2d 1245, 1248 (9th Cir. 1990) (noting that "summary procedures should be used sparingly in complex antitrust litigation" because "the proof is largely in the hands of the alleged conspirators").

2. Evergreen's SAC Also Circumstantially Alleges A Plausible Conspiracy

Even assuming this Court finds Evergreen's direct allegations of conspiracy inadequate, the SAC contains ample circumstantial allegations sufficient to withstand a Rule 12(b)(6) motion. The requisite circumstantial pleading includes "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly*, 550 U.S. at 556 n.4. "'An 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 *Twombly*, 550 U.S. at 557); however, "a statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim." *Twombly*, 550 U.S. at 557. Thus, what is needed after *Twombly* is an allegation of parallel conduct with "some further factual enhancement," which "suggest[s] that an agreement was made." *Twombly*, 550 U.S. at 556, 557. And indeed, Evergreen alleges a litany of circumstantial evidence—including the aforementioned meeting(s) that provide the "setting" for an agreement—which the court unjustifiably refused to credit.

Key circumstantial allegations include the following:

First, Evergreen was an innovator; its program would have revolutionized the industry. It is no secret that entrenched competitors often resist innovation for anticompetitive reasons and utilize anticompetitive tactics to stifle or suppress innovation. *See Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (noting that the antitrust laws "are aimed at encouraging innovation"). Justice Breyer, during his tenure on this Court, noted that an action "harms [the competitive] process when it obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods." *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 21–22 (1st Cir. 1990) (Breyer, J.); *Sullivan v. NFL*, 34 F.3d 1101 & n.3 (1st Cir. 1994) (noting that conduct restricting consumer choice or rendering the market "unresponsive to consumer preference" harms consumers). Evergreen's closed-loop method provided lower total costs to schools, consumer choice for inexpensive Poly-Sty-Recycle products, and the *only* production method where polystyrene products could be cost-effectively recycled.

As Professor Hovenkamp, one of the nation's leading antitrust scholars, notes, "the non-innovating firm or unsuccessful innovator can experience enormous losses, in some cases great enough to force its bankruptcy and exit from

the market." 13 Hovenkamp, ¶ 2202b, at 258 (2d ed. 2005). Accordingly, this motive "may explain concerted refusals to deal undertaken in the context of joint ventures: firms that are threatened by an aggressive innovating rival may take steps to keep the rival or its newly innovated product out of the market." *Id.* Evergreen was not a rival so much as a corollary plug-in supplier with an innovative recycling method that posed a threat to their way of doing business. Furthermore, their meetings, among other alleged evidence, plausibly gave them the opportunity to confer and agree on how to face that threat.

Second, the polystyrene food services industry is highly concentrated, with five producers controlling 90 percent of the market and each dominant in their respective market segment. (JA 0484.) Such an industry structure supports the inference of conspiracy. *E.g.*, *Text Messaging*, 630 F.3d at 627–28; *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004). Despite prominent mention of that market structure in the SAC and recognition by the courts of the inference of conspiracy such structure may raise, the court gave it no credit.

Third, the district court greatly discounted the significance of Defendants' trade association conduct. The Supreme Court and many circuits have held that "trade and standard-setting associations [are] routinely treated as continuing conspiracies of their members." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,

486, U.S. 492, 500 (1988). *See also Todd*, 275 F.3d at 213; *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994); *North Texas Speciality Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008); *Text Messaging*, 630 F.3d at 628. Although *Twombly* stated that trade association membership alone cannot be a predicate for inferring conspiracy, the SAC pleads far more than mere membership. Unlike in *Twombly*, Evergreen alleges discussions at specific times and changed conduct on the heels of those discussions. (JA 0494–96.) This does not require the same inferential leap that membership alone does.

Fourth, the district court's (and Defendants') reliance on *Tunica Web Advertising v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410 (5th Cir. 2007), is misplaced, and its application here contravenes the legal standard. In *Tunica*, on a motion for *summary judgment*, the Fifth Circuit held: "Given the joint nature of [plaintiff's] initial proposal, which invited the [defendants] to respond together as a single entity, the [defendants'] decision to reject that proposal is not concerted action subject to section 1." *Id.* at 410. Such a decision on summary judgment may be appropriate because "in assessing whether a trade association . . . has taken action, a court must examine *all of 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 (emphasis

added). *See also North Texas Speciality Physicians*, 528 F.3d at 357. "[T]he relevant inquiry is whether actions by a member or officer of a trade association are the individual's alone or can be deemed the actions of the group." 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 41 (7th ed. 2012). Here, however, on a motion to dismiss, the district court discredited and mischaracterized Evergreen's allegations and, of course, could not examine "all of the facts and circumstances" because there is no factual record.[4] The court's reasoning here is therefore doubly flawed—factually and as a matter of law.

The Second Circuit's decision in *Anderson News* further supports Evergreen on this point. Similar to the district court's analysis here, the district court there ruled that "Anderson alleges facts suggesting that the Defendants merely responded to a common market stimulus created by Anderson itself and that 'having proposed its pay-it-or else Surcharge, Anderson can not claim collusion in the Defendants' refusal to acquiesce to its self-destructive demand.'" *Anderson*

[4] The basis for this entire argument is that the SAC states that "Evergreen began a dialogue with the PFPG." (JA 0495.) In fact, Evergreen began a dialogue with the PFPG at Jim Reilly's (Genpak) insistence. Reilly, who wanted to work with Evergreen but would not break ranks with the boycott, hoped that the Defendants would change their mind with a proposal. The SAC does not contain these allegations because "detailed factual allegations are not required." *Iqbal*, 556 U.S. at 678. In light of Defendants' Motions and the district court's Order, an amended complaint would have alleged this.

News, 680 F.3d at 192. The Second Circuit rejected this analysis and singled it out as one of the bases for reversing the district court's finding of implausibility. Indeed, the Second Circuit relied on *Twombly* itself to parse the distinction, which the lower court had incorrectly collapsed between concerted and independent action:

> [T]he *Twombly* Court referred not simply to "responses" to given stimuli, but rather to "*independent* response to common stimuli, or . . . interdependence *unaided by an advance understanding among the parties*." The presentation of a common economic offer may well lend itself to innocuous, independent, parallel responses; but it does not provide antitrust immunity to respondents who get together and agree that they will boycott the offeror. The latter is what the [Proposed Amended Complaint] alleged.

Id. (citing *Twombly*, 550 U.S. at 556 n.4).

Fifth, although the foregoing allegations are strongly suggestive of conspiracy, the district court substituted its own version of the supposed facts. The court wrote: "Of concern to all defendants was the fact that Evergreen's business model would have significantly increased their costs – Evergreen charged prime resin prices while demanding an additional four percent royalty on all sales, making its PC-PSR more expensive than virgin resin." (Order 12–13 (citing SAC ¶ 24).) This passage is one of several instances where the court improperly drew

inferences in Defendants' favor; furthermore, the negative inference drawn by the district court directly contradicts what is actually alleged. The SAC explicitly alleges that the closed-loop program was "cost-neutral" to Defendants. (JA 0486.) Moreover, the SAC alleges that the 4 percent royalty rates were "standard in the industry." (JA 0488.) The district court did not believe, or simply ignored, this allegation, which is not its prerogative at this stage.[5] This again demonstrates the district court premising its ruling on supposed facts found nowhere in the SAC.

In addition to failing to accept as true the allegation that the closed-loop business model was cost-neutral, the district court also decided that Defendants "found the results [of Evergreen's resin] disappointing for various and often different reasons." (Order 12.) But even the most cynical reading of the SAC cannot lead to this unfounded conclusion. The paragraphs of the SAC that the trial court cites to support this supposed proposition do not allege that Defendants were disappointed—they state exactly the opposite. For example, paragraph 28 alleges that Dolco was excited about dealing with Evergreen, not that it found the results

[5] In fact, there are other ways Evergreen's business model helped save the producer Defendants money. These are not contained in the SAC because the Federal Rules do not mandate that Evergreen provide "detailed factual allegations" of its business model. *Iqbal*, 556 U.S. at 678. Had the district court accepted the allegation of cost-neutrality as true, as required, this would have obviated the need for such detail.

disappointing; similarly, paragraph 47 alleges that "Solo successfully tested 15,000 pounds" of Evergreen's resin; paragraph 53 alleges that Pactiv's Technical Director stated that "Evergreen's resin ran and was capable of producing products with no major problems;" and paragraph 55 alleges that Defendants belatedly acknowledged Evergreen's successes and reached out to implement the closed-loop model. The district court's inexplicable and unwarranted conclusion from these allegations that the "Defendants found the results disappointing" hardly satisfies its obligation to construe all non-conclusory allegations in Evergreen's favor and should in itself constitute grounds for reversal, especially given the importance the court attaches to this conclusion.

Sixth, the SAC alleges changed conduct following an inter-competitor meeting—perhaps the quintessential circumstantial allegation of conspiracy. *See*, *e.g.*, *Tunica*, 496 F.3d at 410; *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 3d 1348, 1360 (N.D. Ga. 2010); *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 897 (N.D. Ill. 2009). The district court notes that "Dolco rescinded its agreement with Evergreen" (Order 14) but then fails to draw the required inference in Evergreen's favor that this conduct implies—that is, that subsequent to a meeting of competitors, Dolco "got the message" from Pactiv and Dart that recycling was not an option for the industry and shaped its conduct

accordingly.

Seventh, Defendants' behavior is consistent with traditional conspiratorial conduct. After Evergreen shut down operations and closed its recycling plants, several Defendants that had steadfastly refused to deal with Evergreen suddenly changed their minds and reached out in an attempt to finally partner with Evergreen and adopt the closed-loop model. (JA 0500.) Although this conduct provides multiple inferences (as most conduct does), the district court violated the motion to dismiss standard by failing to draw the one most favorable to Evergreen: that Defendants attempted to disguise or cover up their conduct by disingenuously and belatedly soliciting Evergreen.

Eighth, even if, despite all of the foregoing circumstantial evidence, this Court were to conclude that the allegations still do not take the SAC over the line of independent, parallel conduct, it has long been established that certain "plus factor" evidence plausibly takes that evidence across the line sufficient to allege conspiracy. *E.g.*, *White*, 635 F.3d at 577. And here, Evergreen has alleged at least one particular kind of "plus factor" conduct—conduct that would be against the economic self-interest of Defendants in the absence of similar behavior by rivals. *See, e.g.*, *Starr*, 592 F.3d at 327 (quoting 7 Areeda & Hovenkamp ¶ 1415a (2d ed. 2003)); *Re/Max Int'l., Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999).

Such "plus factor" evidence should suffice to satisfy *Twombly*, even though, again, the district court did not properly credit it. This evidence of conduct against self-interest is of two orders.

As a first order of conduct against self-interest in the absence of an agreement by competitors, the SAC contains express, non-conclusory allegations that Defendants knew that the "magnitude of the opportunity" of partnering with Evergreen was "enormous" and that there was high demand for Evergreen's services. (JA 0490.) The SAC also alleges that Genpak knew it "could have profitably grown its business." (JA 0496.) Early on, Genpak also expressed interest in working with Evergreen. Evergreen alleged that the demand for recycled polystyrene products was stratospheric (JA 0491) and enumerated numerous customers, suppliers, and even investment funds that wanted to work with Evergreen's model. Yet, Defendants shunned requests to implement the closed-loop from actual or potential customers, even when looking for new business. (*E.g.*, JA 0493–98.)

As a second order of conduct against self-interest, and more pointed, Dolco and Genpak's initiatives with Evergreen, coupled with their statements, as alleged in the SAC, reflected a serious interest on the part of each in partnering with Evergreen on its closed-loop recycling program. The SAC has alleged, and it is

reasonable to infer, that Genpak, Dolco, or both would have pursued their interest in partnering with Evergreen but for an agreement by all of the Defendants to refuse to deal with Evergreen. It is similarly reasonable to infer that Genpak and Dolco faced a threat from their larger rivals that each smaller firm's exclusive control in their respective market segments would no longer be respected if they did not acquiesce to the boycott. (JA 0491, 0495, 0496.) After the PFPG inter-competitor meeting in late 2005 or early 2006 to discuss industry strategy regarding recycling, Dolco did an about-face and abruptly ceased negotiations with Evergreen (JA 0494), and Genpak subsequently followed suit. At one point, Genpak's Jim Reilly, fearing that Pactiv would target Genpak's customers, said that "Genpak had no interest in competing against Pactiv." (JA 0496.) Genpak and Dolco each faced a potential threat from larger rivals given the tight oligopolistic nature of the polystyrene market. Each, however, also saw the possibility of implementing Evergreen's model as initially in its own self-interest—until, that is, they each faced threats from their larger rivals.

This turn-about conduct on the part of Dolco and Genpak not only satisfied the criteria for changed conduct after an inter-competitor meeting, as described in the sixth factor above, but also fits squarely within the established category of "plus-factor" conduct against self-interest, thereby plausibly establishing an

agreement in the absence of which these firms might have pursued their initiatives with Evergreen.

C. The District Court Prematurely Considered Alternative Explanations For Defendants' Conduct

Evergreen argued below that it was improper for the district court to consider Defendants' own alternative explanations for their conduct in order to refute the inference of conspiracy. The district court rejected Evergreen's position, and stated that *Twombly* allows trial courts to consider these explanations on a motion to dismiss. (Order 14–15 n.17.) The district court cites no authority supporting this position, and for good reason. Indeed, even if a court may consider alternative explanations proffered by the defendant, "[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" and the court may not "dismiss a complaint that states a plausible version of the events merely because [it] finds a different version more plausible." *Anderson News*, 680 F.3d at 185.

The Second Circuit has explicitly rejected the argument that a complaint must allege facts excluding the likelihood of independent conduct to survive a motion to dismiss:

> Defendants first argue that a plaintiff seeking damages under Section 1 of the Sherman Act must allege facts that

> "tend to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." This is incorrect. Although the *Twombly* court acknowledged that for purposes of summary judgment a plaintiff must present evidence that tends to exclude the possibility of independent action . . . it specifically held that, to survive a motion to dismiss, plaintiffs need only "enough factual matter (taken as true) to suggest that an agreement was made."

Starr, 592 F.3d at 325 (citations omitted). Even the Sixth Circuit, which applies one of the most restrictive *Twombly* approaches, agrees: "Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452, 458 (6th Cir. 2011). *See also Standard Iron Works*, 639 F. Supp. 2d at 902; *Delta/AirTran*, 733 F. Supp.2d at 1363; 2 Areeda & Hovenkamp ¶ 307d1, at 118 ("The 'plausibly suggesting' threshold for a conspiracy complaint remains considerably less than the 'tends to rule out the possibility' standard for summary judgment.").

The district court also points out that Defendants themselves assert "various reasons disclosed in the SAC for resisting Evergreen's closed-loop system." (Order 15 n. 17.) Defendants are entitled to their argument but nothing in the law permits the court to credit it by characterizing them as "disappointed" with the performance of the closed-loop system when the SAC alleged to the contrary (as

explained above), by ignoring many of Evergreen's contemporaneous factual allegations and by systematically drawing inferences in Defendants' favor. For instance, Defendants contended that partnering with Evergreen would raise their costs, and the district court agreed with Defendants; however, as discussed above, this allegation is not found in the SAC and is merely a negative inference drawn from Evergreen's brokerage commission or royalty allegation (which is alleged to be standard in the industry). Similarly, Defendants argued that Evergreen's model would force Defendants to forego other apparently profitable business ventures and would upset the status quo. (JA 0540–42.) Evergreen's allegations are alleged as motives for the boycott. Rather than accept these allegations as true and draw any attendant inferences in Evergreen's favor, however, the district court accepted Defendants' version and made factual findings unsupported by the SAC. This inference shifting and improper fact finding does not comport with the legal standard applicable to motions to dismiss and is exactly what persuaded the Second Circuit in *Anderson News* to reverse the district court's dismissal of the complaint in that case.

D. Evergreen's SAC Does Not Resemble *Twombly*

On a very superficial level, a comparison may be drawn between Evergreen's SAC and *Twombly*. This is because both cases rest on the ostensible

"inaction" of a group of competitors (i.e., none of the Defendants here partnered with Evergreen and none of the ILECs in *Twombly* pursued business in each other's territory as CLECs). The similarities, however, end there for at least the following reasons.

Most importantly, the complaint in *Twombly* did not allege that competing as CLECs was potentially any more lucrative than other opportunities the ILECs were pursuing. *Twombly*, 550 U.S. at 568. There, the complaint itself noted that "entering new markets as a CLEC would not be 'a sustainable economic model' because the CLEC pricing is 'just . . . nuts'" and that it was "'unwise' to base a business plan on the privileges accorded to CLECs under the 1996 Act because the regulatory environment was too unstable." *Id.* at 568 n.13. In short, the defendants in *Twombly* faced long odds, high costs, and nearly insurmountable regulatory disadvantages that would have effectively guaranteed failure had they actually engaged in the conduct they supposedly conspired not to do (i.e., not compete for business in each other's territories). Consequently, as the complaint in *Twombly* was based merely on the defendants' parallel conduct, with a long history of maintaining the status quo, no additional circumstantial evidence, and no economic motive to conspire, the court found the allegations of conspiracy to be implausible.

In stark contrast, as explained in more detail above, Evergreen's SAC, in addition to containing direct allegations of conspiracy (whereas *Twombly* had none), contains specific statements from specific Defendants acknowledging that partnering with Evergreen would be economically advantageous to them. At the same time, however, the district court here also highlighted various potential disadvantages that the Defendants may have foreseen from partnering with Evergreen (*e.g.*, Order 13), and concludes as follows: "Finally, as in *Twombly*, defendants may have unilaterally chosen to refuse to deal with Evergreen because they were each comfortable with the status quo, which Evergreen's entry into the market threatened to disrupt." (*Id.*) But this ostensible similarity with *Twombly*, on which the district court substantially rests its decision, does not withstand closer analysis. Evergreen alleged that "each company had dominance in their niche" but, with the suggestion of interest by several Defendants in Evergreen's business method, "[t]he threat of one company with cost-effective close-loop recycling capabilities could instantly disrupt this status quo because the demand for cost-effective recycled products with post consumer content was so great. Accordingly, fearing retaliation from [their] competitors . . . Defendants agreed in concert to refuse to deal with Evergreen and each maintained market power in their market segments." (JA 0491.) The key distinction between this case and *Twombly* is,

thus, that Evergreen's SAC alleges that the status quo was preserved based on threats of retaliation by the industry's largest competitors—Pactiv and Dart (JA 0491, 0496)—whereas the alleged agreement in *Twombly* was based on the failure of each ILEC to pursue an unattractive opportunity on its own initiative, with no coercion alleged. Thus, despite the district court's statement that "legitimate business reasons can as easily explain defendants' refusal to deal," (Order 13), as the evidence clearly suggested in *Twombly*, changed conduct for fear of retaliation is not a "legitimate business reason" and is not typically equated with independent motive and conduct.

Similarly, whereas the SAC provided relevant context for a concerted refusal to deal, as explained above, the complaint in *Twombly* provided none. *Anderson News*, 680 F.3d at 186. This was especially true because the ILECs in *Twombly* did not even reject an opportunity presented to them but merely failed to compete with other ILECs on their own initiative. *See Twombly*, 550 U.S. at 551. As the Supreme Court noted, "monopoly was the norm in telecommunications" and the defendants "were born in that world [and] doubtless like the word [that] way." *Id.* at 568. Given these facts, as the Second Circuit noted in *Anderson News*, there was no context indicating the defendants needed to conspire.

Also, as discussed above, unlike Evergreen's SAC, while mere trade

association membership was found inconsequential in *Twombly*, that complaint did not contain detailed factual allegations of trade association conduct, unlike Evergreen's SAC.

In a nutshell, the SAC does not suffer the paucity and implausibility of facts that rendered the complaint in *Twombly* insufficient to withstand a motion to dismiss. Unlike *Twombly*, Evergreen has placed its factual allegations—both direct and circumstantial—in a context that practically requires a finding of conspiracy as an explanation. Any comparisons to *Twombly* are inapposite.

II. THE DISTRICT COURT'S ANALYSIS IS FLAWED BECAUSE IT DID NOT CORRECTLY APPLY THE ANTITRUST LAW RELATING TO CONCERTED REFUSALS TO DEAL

In addition to its misapplication of *Twombly*, the district court made two fundamental statements of law that further undergird its dismissal; both are incorrect as a matter of law. Both of these errors are far too important to the court's decision to be discounted as harmless error. First, the court held that because the Defendants dealt with Evergreen—even if these dealings were on unfavorable terms—the SAC did not, and could not, allege a boycott. Second, the court appears to have held that a boycott of a supplier by a group of competitors can have no anticompetitive effect. These findings have no basis in antitrust jurisprudence.

A. No Rule Of Antitrust Jurisprudence Limits Concerted Refusals To Deal To Only Those Cases Where The Defendants Have Absolutely No Dealings With The Target Of The Boycott

Of "greatest significance" to the district court in holding that Evergreen's SAC did not state a Sherman Act claim was that Defendants' "pattern of conduct not only belies the existence of a boycotting conspiracy, but also describes behavior at cross-purposes with the supposed conspiratorial goal." (Order 16.) Later, the district court refers to the allegations as "defendants' sometime refusal to deal." (Order 18.) Effectively, the court held that variance in the actions of the Defendants in dealing with Evergreen refutes a group boycott claim. This is wrong and is simple arbitrary "line drawing." *E.g.*, *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466–67 (1992).

While at a cursory level the Defendants' conduct may appear to be at odds with the purposes of a boycott, a fair and complete reading of the SAC demonstrates the patent falsity of this conclusion. The SAC alleges that the purchase of resin was only one of the three components necessary to make the closed loop model work. (JA 0488.) Because Evergreen had submitted confidential business proposals to each of the Defendants, they all knew that the closed-loop system would not work (and Evergreen would not survive) if they

merely purchased or tested resin. (JA 0495.) Moreover, the SAC does not allege a concerted refusal to deal with Evergreen on *any* terms; rather, it alleges a concerted refusal to deal with Evergreen in "a sole-source closed-loop recycling business method for polystyrene food service products." (JA 0501.)

In the Supreme Court's seminal boycott case, the alleged group boycott involved a group of suppliers who conspired with one another "either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959). This is virtually no different than what occurred here. The only Defendants that dealt with Evergreen knowingly dealt with it on highly unfavorable terms. Under the district court's analysis, the "sometimes refusal to deal" in *Klor's* would not be actionable because some defendants there actually dealt with the plaintiff and this behavior was "at cross-purposes with the supposed conspiratorial goal" of putting Klor's out of business. Yet, the "sometimes refusal to deal" in *Klor's* was deemed by the Supreme Court to be subject to the per se illegality rule. At a very minimum, on a motion to dismiss where all inferences must be drawn in Evergreen's favor, the court should not have inferred that any dealings—even unfavorable dealings—were at odds with an agreement to drive Evergreen out of business by means of a group boycott. This is especially true because "a conspirator may join a

conspiracy at any time that it is ongoing; there is no requirement that a conspirator join in a conspiracy from its inception." *In re Electronic Books Antitrust Litigation*, No. 11 MD 2293 (DLC), 2012 WL 1946759 (S.D.N.Y May 15, 2012).

Anderson News also involved diverse responses in the context of an alleged boycott. There, the district court found the plaintiff's conspiracy allegations implausible because "defendants had 'a variety of reactions'" to a proposed surcharge. *Anderson News*, 680 F.3d at 191. Some publishers entered into new negotiations with the plaintiff and some chose not to negotiate at all. *Id.* The Second Circuit took issue with this argument because "'the *key* parallel conduct allegation' was that all of the publisher and distributor defendants ceased doing business with Anderson." *Id.* Here, the key parallel conduct allegation is that Defendants did not adopt the closed-loop business model. As in *Anderson News*, varied responses from Defendants should not defeat a conspiracy claim when all engaged in the same key conduct.

The sole authority relied on by the Defendants below is inapposite. In *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228–29 (3d Cir. 2011), the Third Circuit held that the plaintiff had not alleged circumstantial evidence of an agreement because it had not even alleged parallel conduct. The crux of the complaint in *Burtch* was an alleged boycott where the defendants refused to extend

the plaintiff credit. The Third Circuit held that the wildly diverse behavior of the defendants fell "far short of demonstrating parallel behavior by Appellees because the Factors were choosing to decline, decrease, and even increase credit to Factory 2–U at different time periods." *Id.* at 228. In contrast, Evergreen's SAC alleges parallel behavior agreeing not to adopt the closed-loop business model. Defendants' counsel at oral argument even admitted the conduct was parallel. (RT 14:22–23 ("All you have is parallel conduct, and there was a reason for parallel conduct.)." The unfavorable dealings Defendants engaged in with Evergreen are a far cry from the defendants in *Burtch* who actually dealt with the plaintiff on the terms he dictated. In short, there is nothing inconsistent about Defendants dealing with Evergreen on unfavorable terms and Defendants refusing to adopt Evergreen's closed-loop business model.

Finally, the district court's footnotes (footnotes 18 and 19) relating to an obligation to pay Evergreen's industry standard brokerage commission or royalty on Poly-Sty-Recycle products and unilateral refusals to deal are not germane to this case. While a "manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes," this rule applies only "as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). This is because "[c]oncerted activity is inherently fraught with

anticompetitive risk" and decisions between competitors often "deprive[] the marketplace of the independent centers of decision making that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–89 (1984). So, although the antitrust laws may not require Defendants to individually deal, or deal in a certain manner, with Evergreen, if they collectively agreed not to, then this agreement falls squarely within the proscription of Section 1 of the Sherman Act.

B. Suppliers Are Proper Plaintiffs In Antitrust Cases, Including Group Boycott Cases

The district court's second error in its antitrust analysis concerns its finding that "it is unclear how defendants' sometime refusal to deal with Evergreen could have had an anti-competitive effect on the market." (Order 18.) In a nutshell, the district court held that the antitrust laws do not reach boycotts where the target of the boycott is vertically situated to the Defendants. This view finds support in neither the facts of this case nor the antitrust laws.

First, the district court found that Evergreen did not compete with the Defendants and that Evergreen's counsel was unable to state at oral argument how Evergreen competed with Defendants. (Order 18 & n.21.) Aside from deviating from the proper legal standard, the district court is incorrect. The SAC alleges that

Evergreen was a "potential new entrant[]" into Defendants' market for polystyrene products. (JA 0491.) Similarly, Evergreen's counsel stated at oral argument how Evergreen was a potential rival to the Defendants. (RT 24:8–22.) In each instance, the district court plainly erred, substituting its "facts" for Evergreen's allegations.

Second, the trial court erred in effectively ruling that a supplier cannot state a concerted refusal to deal claim against competing firms that are vertically situated to it, such as Defendants are to Evergreen here. As the Fifth Circuit recently stated in *Tunica*, concluding that the boycott of a supplier by buyers could be per se unlawful: "Nothing in *Northwest Wholesale Stationers* or the Supreme Court's later cases . . . establishes a bright-line rule limiting the application of the *per se* rule to cases in which the victim is a competitor of at least one of the conspirators, and no such rule is justified under the Court's precedents." *Tunica*, 496 F.3d at 413. This passage differs dramatically from the district court's ruling that the alleged agreement was *not even covered by the antitrust laws*. (*See* Order 18; RT 21:25–22:1.)

Other courts have similarly held that where a supplier is the target of an antitrust violation, the supplier has standing to sue. *E.g.*, *Amarel v. Connell*, 102 F.3d 1494, 1507–13 (9th Cir. 1996); *Asahi Glass Co., Ltd. v. Pentech Pharmaceuticals., Inc.*, 289 F. Supp. 2d 986, 991 (N.D. Ill. 2003) (Posner, J.).

Under the allegations of the SAC, Evergreen was the direct target of an agreement to refuse to deal with it, and its injury flowed directly from that agreement. To categorically hold that a supplier cannot be the target of a boycott is arbitrary and impermissible "formalistic line drawing," incorrect as a matter of law, and grounds for reversal.

The cases cited by the district court do not support the court's position or are distinguishable. First, the district court cites this Court's decision in *Eastern Food Serv., Inc. v. Pontifical Catholic Univ. Serv. Ass'n, Inc.*, 357 F.3d 1, 5 (1st Cir. 2004), for the proposition that "only horizontal refusal-to-deal arrangements between *competitors* amount to per se violations." (Order 18.) The district court appears to have misconstrued *Eastern Food* because this is exactly what Evergreen alleged—a "horizontal agreement between competitors." (JA 0501.) While noting, correctly, that *Eastern Food* states that agreements among competitors to boycott are per se unlawful, the court erroneously cites it to show that the boycott of Evergreen could not have had an anticompetitive effect, which is plainly incorrect.

The district court next cites *Mendez Internet Mgmt. Servs. Inc. v. Banco Santander de Puerto Rico*, 2009 WL 1392189 (D.P.R. 2009). The district court there found the plaintiff's boycott claim inherently implausible *on the facts of the case* because the plaintiff did not compete with defendants. *Id.* at *5. But, the case

hardly stands for the proposition that a supplier cannot state a concerted refusal to deal claim against potential buyers. The plaintiff in *Mendez*, who traded in traded in Iraqi dinars, alleged that the defendants sought to "reserve or monopolize the dinar market in Puerto Rico," but the defendants did not trade in dinars and instead offered traditional banking services. *Id.* Common sense dictates that a group of banks would have no motive to boycott a single trader of a single foreign currency because such a boycott would not enable the banks to charge higher prices, reduce output, or engage in any other traditional anticompetitive conduct, and under these circumstances, an illegal group boycott made no economic sense. Evergreen, on the other hand, sought to partner with the Defendants to develop a competitive product in Defendants' market that would drive prices down and prevent Defendants from forcing higher-priced products on the public. These allegations, and additional motivations for boycotting Evergreen, are explicitly delineated in the SAC. (JA 0491–92.)

The district court also cites *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 295 (5th Cir. 1988), decided on summary judgment. The plaintiff, a supplier, presented no evidence of defendants' motive to boycott it, *id.*, and, under those circumstances, the court understandably declined to infer a conspiracy. *Id.* & n.38. *Consolidated Metal* is therefore also inapposite here.

III. EVEN IF THE SECOND AMENDED COMPLAINT WAS DEFICIENT, THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO GRANT LEAVE TO AMEND

The Federal Rules of Civil Procedure direct that courts "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The Supreme Court has held: "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). This Court has described Rule 15's policy as "liberal." *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 154 (1st Cir. 2004).

A. The District Court's Failure To State A Reason For Its Denial Of Leave To Amend Is A Categorical Abuse Of Discretion

It is a manifest abuse of discretion for a district court to fail to justify the denial of leave to amend. The Supreme Court has expressly stated that "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182. *See also Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 792 (1st Cir. 1995); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). The district court failed to heed the mandate of the Federal Rules and the Supreme Court.

The trial court provided several (incorrect) reasons why the SAC does not

state a claim, but its Order is bereft of any reason why leave to amend was denied. This is an abuse of discretion, and this Court can reverse solely on this basis.

B. No Accepted Reason Applies To Explain The District Court's Denial Of Leave To Amend

Even if this Court were willing to read a reason for the denial of leave to amend into the district court's Order, where the district court itself stated none, no accepted reason exists. The Supreme Court has articulated several narrow exceptions for when a district court may deny leave to amend including: (1) "undue delay"; (2) "bad faith or dilatory motive"; (3) "repeated failure to cure deficiencies by amendment previously allowed"; (4) "undue prejudice to the opposing party by virtue of allowance of the amendment"; and (5) "futility of the amendment." *Foman*, 371 U.S. at 182. The most important of these factors is prejudice. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1487, at 701 (2010).

Defendants' Motions to Dismiss the SAC were the *first* time the district court assessed the merits of this case. Allowing amendment, therefore, would not result in undue delay. There is no evidence of bad faith or dilatory motive in the record. While two prior Complaints were filed, this was due to Evergreen's

difficulty in locating counsel—not a repeated failure to cure. There is similarly no prejudice to Defendants. This Court has found prejudice where a motion to amend was filed seven years after the complaint and twenty-four days prior to trial for one defendant and nine years after the complaint was filed and two days into trial for another. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 139 (1st Cir. 1985). The circumstances in this case are far from those in *Andrews*.

Finally, the standard for futility as a reason for denying leave to amend is exacting. *Gallegos v. Brandeis School*, 189 F.R.D. 256, 258–59 (E.D.N.Y. 1999) (noting that amendment is futile only where the claim is clearly "frivolous . . . on its face"). Even assuming the district court's Order was correct, Evergreen could have amended to add additional factual support. The court cites no defect that would render amendment futile. This was an abuse of discretion.

CONCLUSION

For all of the foregoing reasons, this Court should: (1) reverse the district court's judgment of dismissal; or (2) reverse the judgment of the district court and remand this case to the district court with instruction to allow Evergreen to file a

Third Amended Complaint.

DATE: October 15, 2012

Respectfully submitted,

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

By: s/ Maxwell M. Blecher
Maxwell M. Blecher
Attorneys for Plaintiff/Appellant

REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant Evergreen Partnering Group, Inc. respectfully requests that this Court hear oral argument in this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and Ninth Circuit Rule 32-1, Plaintiff/Appellant hereby certifies that this Opening Brief is proportionately spaced, has a typeface of 14-point, and contains 13,971 words.

DATE: October 15, 2012

Respectfully submitted,

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

By: s/ Maxwell M. Blecher
Maxwell M. Blecher
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

1st Circuit Case Number 12-1730

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on October 15, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Maxwell M. Blecher

ADDENDUM

TABLE OF CONTENTS

Addendum A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 11-10807-RGS

EVERGREEN PARTNERING GROUP, INC.

v.

PACTIV CORP.; GENPAK, LLC;
DOLCO PACKAGING CORP.; SOLO CUP CO.,
DART CONTAINER CORP.;
and AMERICAN CHEMISTRY COUNCIL

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS
TO DISMISS THE SECOND AMENDED COMPLAINT

June 7, 2012

STEARNS, D.J.

Plaintiff Evergreen Partnering Group (Evergreen) alleges that it was the victim of a conspiracy by defendants Pactiv Corp., Genpak, LLC, Dolco Packaging Corp., Solo Cup Company, Dart Container Corp. (collectively the producer defendants), and the American Chemistry Council (ACC) to freeze its closed-loop recycling business out of the polystyrene products market.[1] The Second Amended Complaint (SAC) alleges violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and the Massachusetts Fair

[1] Evergreen is domiciled in Massachusetts and filed the case in the District of Massachusetts, asserting federal question jurisdiction.

Business Practices Act, Mass. Gen. Laws ch. 93A.[2] Defendants collectively and individually[3] move to dismiss Evergreen's SAC for failure to state a viable legal or equitable claim.

PROCEDURAL BACKGROUND

Evergreen filed its original Complaint on May 9, 2011. After two sets of attorneys withdrew their appearances, Evergreen's First Amended Complaint (FAC) was dismissed because Evergreen failed to comply with the court's order to obtain substitute counsel. *See Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 2011 WL 6012403 (D. Mass. Dec. 1, 2011). After Evergreen belatedly engaged current counsel, the court removed the default and reinstated the case, leading to the filing (on January 30, 2012) of the SAC. Defendants then renewed their motions to dismiss.

FACTUAL BACKGROUND[4]

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[2] Evergreen has withdrawn a third claim of violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

[3] Defendants filed a joint memorandum of law (J. Mem., Dkt # 86), as well as individual memoranda in support of their motions.

[4] In the context of a motion to dismiss, plaintiff's plausible allegations of facts are assumed to be true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007). However, "documents the authenticity of which are not disputed by the parties; [] official public records; [] documents central to plaintiffs' claim; or [] documents sufficiently referred to in the complaint" may also be considered on a motion to dismiss. *Alt. Energy Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001) (citation omitted).

Polystyrene disposable food service products, which are lightweight and cheap, are also savaged by environmentalists because they are biodegradation-resistant.[5] Evergreen, founded in 2000 by Michael Forrest, developed a "closed-loop" business model for the recycling of polystyrene products, which involved:

> (1) physically collecting certified food-grade polystyrene products from large school systems; (2) processing these used products into an FDA approved, food-grade post-consumer polystyrene resin ("PC-PSR");[6] and (3) using this PC-PSR to manufacture new products for use again in the same school systems and in other polystyrene products.

SAC ¶ 2. Evergreen's model offered to save participating school systems up to 35 percent of their waste disposal fees by reducing the cumulative volume of waste, while also benefitting the environment.

Evergreen's business model anticipated three sources of revenue:

> [f]irst, royalties are paid to Evergreen by producers of the Poly-Sty-Recycle products based on the total number of these Evergreen foam products of similar quality sold to consumers each year. . . . Evergreen's business model assumed a royalty rate of 4 percent,[7] which is standard in the industry. . . . Second, Evergreen would obtain revenue from selling its PC-PSR to manufacturers benchmarked at prime pricing of food-grade

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[5] Polystyrene products, being mostly air, create high volumes of non-biodegradable landfill waste.

[6] Evergreen marketed recycled food-grade food service products under the trademark Poly-Sty-Recycle.

[7] Evergreen applied for a patent on its business method in 2004, but has since abandoned the application.

> resin. Again, because polystyrene product producers must buy resin anyway, and because PC-PSR is priced no differently than the offset prime resin, this poses no additional cost to the producers. Finally, the schools or other institutions implementing a closed-loop program would pay an "environmental fee" to Evergreen, which was specifically structured to be merely a percentage of the cost-savings each school achieved by virtue of its participation in the closed-loop program.

Id. ¶ 24. As explained in its business model, Evergreen collected and recycled used polystyrene products into PC-PSR, but did not manufacture polystyrene products. As Evergreen expanded and planned a nine-facility expansion,[8] it sought to partner with a company with a large enough production capacity to convert its PC-PSR into Poly-Sty-Recycle products.

Only the producer defendants had the ability to meet Evergreen's production needs. Each of the producer defendants controls a distinct segment of the polystyrene products market.[9] As summarized in the SAC,

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[8] In 2002-2003, Evergreen partnered with the Boston and Providence Public School Systems and Sodexo, Inc. (Sodexo is a large food service management company.) Evergreen then expanded to the Gwinnett and DeKalb County Public School Systems in Georgia. In 2008, Evergreen secured contracts with the Newton County School System in Georgia, the Pasco County School System in Florida, a 25-school pilot program in Miami-Dade County in Florida, and obtained commitments from the Atlanta Public School h System, Georgia Tech University, and IRS and Centers for Disease Control government cafeterias in Atlanta.

[9] Pactiv is incorporated in Delaware with a principal place of business in Illinois. Genpak is incorporated in New York with a principal place of business in New York. Dart is incorporated in Michigan with a principal place of business in Michigan. Dolco is incorporated in Delaware with a principal place of business is New Jersey. Solo is

> Pactiv controls over 70 percent of the foam lunch tray market for large school systems and food management companies; Genpak controls over 70 percent of the foam lunch tray market for small to medium schools; Dart controls over 70 percent of the market for injected foam hot and cold cups; Dolco controls over 70 percent of the market for egg foam cartons; and finally, Solo controls over 70 percent of the market for thermoformed foam cups. Together, these five Defendants possess or control an estimated 90 percent of the market for single service polystyrene food service packaging and tableware.

Id. ¶ 17. The producer defendants are also members of the Plastics Food Service Packaging Group (PFPG), an affinity group within the ACC.[10]

In 2002, as Evergreen launched its business, Eastern Bag & Paper Group, a Northeastern U.S. distributor of food service products, requested that Pactiv and Genpak work with Evergreen and the Boston Public Schools in establishing a recycling program, but both companies declined. In 2004, Sodexo contracted with Evergreen to test the market for Evergreen's model in the Providence, Rhode Island school system.[11] Pactiv caused Sodexo to cancel its contract with Evergreen by

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incorporated in Delaware with a principal place of business in Illinois.

[10] ACC is an association organized under the laws of New York with a principal place of business in Washington, D.C. The PFPG was formerly known as the Polystyrene Food Service Packaging Group. From 2005 through 2008, the PFPG was tasked with finding solutions to counter the environmental criticism of polystyrene products.

[11] A small producer – Commodore Manufacturing – was able to meet the production needs of the Providence pilot program. However, Commodore did not have the capacity to meet the needs of Sodexo's other clients.

> (1) [] refus[ing] to provide Poly-Sty-Recycle products to Sysco Corporation (an extremely large distributor that Sodexo employs) and Eastern Bag & Paper; (2) threatening to revoke Sodexo's Vendor Distribution Allowances ("VDAs"), which constitute a significant portion of Sodexo's revenues; and (3) misrepresenting that polystyrene recycling was not economically feasible.

Id. ¶ 35.

In 2005, after reviewing a proposal, Dolco expressed strong interest in Evergreen's model, but backed away after representatives from Pactiv and Dart opined at a 2005 or 2006 PFPG meeting that recycling polystyrene was not economically viable. While Dolco continued to purchase PC-PSR as scrap resin for use in fabricating its egg cartons, it refused to promote Evergreen's close-loop system or to pay Evergreen royalties. Sometime thereafter, Solo expressed an initial interest in Evergreen's model and tested 15,000 pounds of PC-PSR. However, Solo broke off dealings with Evergreen after Solo's president was "told by his people not to work with Evergreen or Michael Forrest." *Id.* ¶ 47.

Between 2007 and 2008, Pactiv refused to provide the distributors of Compass (a Sodexo competitor) with Poly-Sty-Recycle products. At some point Pactiv also tested Evergreen's PC-PSR, but told a representative of the Gwinnett County Schools that PC-PSR was more expensive than virgin resin and created problems during the manufacturing process. Pactiv and Genpak also refused to work with Southeastern

Paper Group, which had expressed interest in implementing the Evergreen closed-loop system. Despite the opportunity to do so, Dolco, Dart, and Solo would not compete with Pactiv and Genpak for a share of the polystyrene tray market. Genpak's president stated that "Genpak had no interest in competing against Pactiv" and would only support Evergreen's closed-loop program if it was endorsed by another PFPG member. *Id.* ¶ 44.

In May of 2007, Evergreen made overtures to the ACC and the PFPG. Evergreen sought funding from the PFPG to institute a polystyrene recycling program in California, where sentiment for a complete ban on polystyrene products was gathering momentum. The director of the PFPG informed Forrest that its members would collectively decide whether to approve Evergreen's proposal. By letter of June 20, 2007, the PFPG turned down Evergreen's funding request.[12]

Despite the PFPG's decision, in August of 2007, Genpak and Dolco agreed to provide Evergreen with $150,000 to fund its recycling plant in Norcross, Georgia, and to purchase PC-PSR from Evergreen.[13] However, in late 2007, Genpak switched the Pasco County, Florida school system from white trays to black trays, making Evergreen's recycled resin unsalable. Genpak nonetheless agreed to purchase a quantity of

[12] The letter is attached as Exhibit 2 to the SAC.

[13] This agreement is attached to Evergreen's FAC as a part of Exhibit M, as well as to Genpak's Memorandum (where it appears as Exhibit B).

Evergreen's unsalable black resin and to provide an additional $21,000 in funding for the Norcross facility. In return, Evergreen agreed "to release Genpak of any future liability." *Id.* ¶ 46.[14]

Because of defendants' refusal to subscribe to its business model, Evergreen claims to have lost out on a $10 million investment from Perot Investment. In October of 2008, ACC provided a letter[15] to Evergreen lauding its recycling program, and "encourag[ing] [profit organizations] to contact [Evergreen] as potential investors."[16]

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[14] This agreement is referenced in paragraph 46 of the SAC, and is attached to Genpak's Memorandum as Exhibit A. Part 1 of the agreement stated that Genpak had previously experienced a major production problem as a result of the quality of Evergreen's black resin, and would not accept any additional black resin from Evergreen until the problem had been resolved. Part 5 of the agreement stated that "Forrest greatly appreciates the support and help that Genpak has provided over the past year but realizes that Forrest needs to achieve the goals/objectives detailed in Parts 2 and 3 [whereby Forrest agreed to do his best to obtain contracts from schools] to have Genpak consider any additional support to Forrest and/or [Evergreen]."

[15] This letter is attached as Exhibit C to Evergreen's FAC and as Exhibit B to Dart's Memorandum.

[16] Previously, in late 2007 or early 2008, the ACC had posted on its website an article by Dart's Ray Ehrlich describing polystyrene recycling as an economically failed strategy. Dart, Pactiv, and PFPG are also alleged to have held out Packaging Development Resource (PDR) as a competitor of Evergreen able to supply closed-loop recycled polystyrene trays. As a result, Evergreen was required to participate in various school systems' competitive bidding processes rather than be exempted as a single-source supplier. Dart points out that, like Evergreen, PDR had received a letter of non-objection from the FDA for its recycled resin. A portion of this letter is included as part of Exhibit P to Evergreen's FAC, and is attached as Exhibit D to Dart's Memorandum. The letter was still available on the FDA's website as of May 9, 2012.

However, with its capital and investor pool exhausted, Evergreen shut down its operations in December of 2008. In early 2009, Pactiv and Genpak expressed an interest in resuming work with Evergreen. But Evergreen was no longer able to perform.

DISCUSSION

To survive a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations of the complaint must "possess enough heft" to set forth "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 559 (2007); *Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008). As the Supreme Court has emphasized, this standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted). The determination of the plausibility of a claim is "context specific," and requires the court "to draw on its judicial experience and common sense." *Id.* at 679.

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http://www.fda.gov/Food/FoodIngredientsPackaging/FoodContactSubstancesFCS/ucm155214. These facts, however, relate only to Evergreen's now-withdrawn Lanham Act claim, *see* Pl. Dart Opp'n at 12 & n.4, and thus have no present bearing.

Liability under section 1 of the Sherman Act requires a "contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. As the Supreme Court has explained, section 1

> "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984), "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enterprises* [*Inc. v. Paramount Film Distributing Corp.*], 346 U.S. [537], [] 540 [(1954)]. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.*, at 540-41. Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

Twombly, 550 U.S. at 553-554. To survive a motion to dismiss, Evergreen must plead "enough factual matter (taken as true) to suggest that an agreement was made." *Id*. at 556. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* More is required – allegations of parallel conduct "must be placed in a context that raises a suggestion of a *preceding agreement*, not merely parallel conduct that could just as well be independent action." *Id.* at 557 (emphasis added).

Defendants contend that Evergreen's SAC suffers from the same defects as the

complaint in *Twombly*. In *Twombly*, consumers brought a section 1 class action lawsuit against incumbent local exchange carriers (ILECs) for allegedly conspiring to keep competitive local exchange carriers (CLECs) from entering the divested local telephone business. Twombly alleged that the ILECs conspired to restrain trade in two ways. First, the ILECs engaged in "parallel conduct" in their respective geographic service areas to choke off the growth of startup CLECs by restricting the CLECs' access to the ILEC networks, providing inferior connections, and overcharging and billing in ways intended to sabotage the CLECs' relationships with their customers. *Id.* at 550-551. Second, the ILECS refrained from competing with one another despite attractive opportunities to do so. *Id*. at 551.

The Supreme Court found that Twombly's allegations lacked persuasive heft. Other than conclusory labels, Twombly made no plausible factual allegations that the ILECs had entered into an actual agreement to stifle competition. *Id.* at 564-566. Their parallel conduct "could equally have been prompted by lawful independent goals which do not constitute a conspiracy." *Id*. at 567.

> The 1996 [Telecommunications] Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, . . . there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that

> if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

Id. at 566. The Court also found that the ILECs' reluctance to compete with one another did not amount to a convincing claim of a conspiracy.

> The ILECs were born in that world [where monopolies in telecommunications was the norm], doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

Id. at 568.

Defendants argue that Evergreen has alleged nothing more substantial than the unsuccessful plaintiffs in *Twombly*. They note that the thrust of Evergreen's SAC involves instances in which various producer defendants unilaterally refused to deal with Evergreen, or evinced disinterest in competing with one another in each other's respective niche markets. Defendants contend that like the ILECs, they had rational business reasons for ultimately deciding to reject Evergreen's partnering overtures. *See* J. Mem. at 7-9. Several of the producer defendants independently tested and/or purchased Evergreen's recycled resin, but found the results disappointing for various and often different reasons. *See* SAC ¶¶ 28, 46, 47, 53, and 55. Of concern to all defendants was the fact that Evergreen's business model would have significantly

increased their costs – Evergreen charged prime resin prices while demanding an additional four percent royalty on all sales, making its PC-PSR more expensive than virgin resin. *See* id. ¶ 24. Moreover, because under the proposed business model, Evergreen would serve as the "sole source" of resin for the "closed loop" products, defendants would forfeit the opportunity to sell competing wares to closed-loop customers, *see id.* ¶ 31, including more environmentally friendly and profitable trays made from paper and/or bamboo. *Id.* ¶ 32. Finally, as in *Twombly*, defendants may have unilaterally chosen to refuse to deal with Evergreen because they were each comfortable with the status quo, which Evergreen's entry into the market threatened to disrupt. *See id.* ¶ 30. Because, as in *Twombly*, there are legitimate business reasons that can as easily explain defendants' refusal to deal with Evergreen or to compete with one another for market share as can any insinuation of a conspiratorial agreement, Evergreen has failed to plead a viable claim under section 1.

As its final line of defense, Evergreen points to the additional allegation that defendants' membership in the ACC enabled them to covertly deploy the PFPG as the coordinating vehicle of the conspiracy. *See In re Test Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) (noting that membership in a trade association could facilitate alleged price fixing by companies with a dominant share of a contested market). Specifically, Evergreen points to the previously cited meeting of the PFPG

in 2005 or 2006 at which recycled resin was discussed in negative terms. Shortly after that meeting, Dolco rescinded its agreement with Evergreen to implement the closed-loop program, while the following year, Evergreen's California recycling proposal was scuttled by a collective decision of the PFPG membership.

Evergreen contends that these allegations are consistent with those found plausible in *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452 (6th Cir. 2011). Watson, a carpet vendor, accused two other vendors and a carpet supplier of an express agreement to concertedly destroy Watson's business. *Id.* at 454-455. As alleged, the supplier would refuse to sell to Watson, while the vendors would disparage Watson among potential customers. *Id.* The Sixth Circuit found that, unlike in *Twombly*, Watson had alleged not only an express conspiratorial agreement, but also a plausible "connection between the original agreement and the later refusal to sell." *Id.* at 457.

Evergreen further relies on *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877 (N.D. Ill. 2009), *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348 (N.D. Ga. 2010), and *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133 (N.D. Cal. 2009).[17] In *Standard Iron*, the district court held that a steel

[17] Evergreen additionally argues that at the pleading stage, it is premature for the court to evaluate defendants' proffered business judgement reasons for boycotting Evergreen. *See Watson*, 648 F.3d at 458 ("Often, defendants' conduct has several

purchaser had sufficiently alleged a section 1 claim against steel producers for conspiring to suppress production of raw steel where, immediately after the steelmakers' trade association endorsed an industry-wide strategy of cutting back production, the producers fell in line contrary to their competitive interest. *Standard Iron*, 639 F. Supp. 2d at 893-901. In *Delta/AirTran*, the court found that plaintiffs plausibly alleged that defendants

> (1) engaged in collusive communications through earnings calls and industry conferences; (2) aligned their business practices following the collusive communications; (3) implemented business practices contrary to their self-interest following the communications; (4) offered a pretextual explanation for the implementation of the first-bag fee; and (5) undertook this concerted action to achieve higher revenues at the expense of higher prices for consumers.

Delta/AirTran, 733 F. Supp. 2d at 1361. Finally, in *Flash Memory*, the court found that plaintiffs plausibly alleged that defendants routinely exchanged highly sensitive pricing and production data to curtail the production of flash memory devices in order to drive up consumer prices. *Flash Memory*, 643 F. Supp. 2d at 1142.

Evergreen's SAC, however, is distinguishable from the complaints in each of the

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plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage."). The Supreme Court's decision in *Twombly* holds the opposite. Moreover, defendants do not independently assert reasons for their business decisions, but assert that the various reasons disclosed in the SAC for resisting Evergreen's closed-loop system render the conspiracy claim implausible.

cited cases. Of greatest significance, defendants did not act consistently with any alleged agreement to boycott Evergreen. After the conspiracy was supposedly hatched at the 2005 or 2006 PFPG meeting, Dolco – whatever it thought of Evergreen's closed-loop system – continued to purchase Evergreen's resin. Dolco later entered into another agreement, along with Genpak, not only to purchase recycled resin from Evergreen, but also to provide funding for Evergreen's Norcross, Georgia facility.[18] This pattern of conduct not only belies the existence of a boycotting conspiracy, but also describes behavior at cross-purposes with the supposed conspiratorial goal. Other defendants also, in varying degrees, continued to deal with Evergreen – Pactiv and Solo separately tested Evergreen's resin, while the ACC issued a laudatory letter in October of 2008 encouraging venture capital to invest in Evergreen.[19] Unlike the plaintiffs in *Watson* and the other cases, Evergreen has not alleged any express agreement that

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[18] Evergreen discounts the significance of defendants' purchase of its resin and insists that the defendants' target was the closed-loop system because of the royalties and environmental fees that Evergreen would have reaped. The short answer is that the Sherman Act did not obligate defendants to guarantee Evergreen's profits by paying a royalty over and above the market price for otherwise suitable prime resin.

[19] The only defendant not alleged to have dealt with Evergreen during the relevant time frame is Dart. But there is no allegation that Evergreen ever approached Dart with an offer to do business. That said, a company's unilateral refusal to deal is not actionable under the Sherman Act, *see Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 136-137 (1998) (buyer's unilateral decision to switch suppliers does not harm the competitive process), for the common-sense reason that a company cannot conspire with itself.

plausibly shaped the defendants' subsequent conduct.

When shorn of its conclusory labels, Evergreen's SAC fails to limn even the essentials of a conspiratorial agreement among the defendants. The complaints in *Delta/AirTran* and *Flash Memory* included highly specific details as to how the alleged conspirators communicated with each other, the individuals who were involved, when the communications took place, the substance of their contents, and the dramatic switch in business practices that followed.[20] *See Delta/AirTran*, 733 F. Supp. 2d at 1362; *Flash Memory*, 643 F. Supp. 2d at 1143-1144. In contrast, Evergreen's SAC alleges only (1) the attendance by unidentified persons at a PFPG meeting at which Pactiv and Dart are said to have disparaged polystyrene recycling, and (2) a rejection by the PFPG of Evergreen's request that the trade group fund Evergreen's California proposal.[21]

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[20] *Flash Memory* and *Delta/AirTran* both dealt with "per se" price-fixing antitrust violations, which are not at issue here. *See Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001). The complaints in *Watson* and *Flash Memory* were also supported by extrinsic corroboration. In *Watson*, a Tennessee state court jury had found the defendants liable for tortious interference with Watson's contractual relations with one of its customer (although the verdict as to the supplier was later reversed because of the supplier's privilege not to deal under Tennessee state law.) *Watson*, 648 F.3d at 455. In *Flash Memory*, the U.S. Department of Justice had initiated an active investigation of the flash memory market and had issued grand jury subpoenas to several of the named defendants. *Flash Memory*, 643 F. Supp. 2d at 1140.

[21] As defendants note, mere membership in a trade association does not trigger antitrust liability. *See Twombly*, 550 U.S. at 567 n.12 (rejecting the argument that a conspiracy could be inferred from defendants' membership in various trade

This is not the stuff of a plausible conspiracy.

Furthermore, the parties' differing roles in the polystyrene business weigh against the plausibility of any antitrust claim. Evergreen, as a putative supplier of recycled resin, did not compete against the producer defendants, but instead sought to partner with them in establishing a business model highly beneficial to Evergreen as the designated exclusive supplier. The ACC and the PFPG, as industry groups, did not engage in competitive market activities at all. Thus, it is unclear how defendants' sometime refusal to deal with Evergreen could have had an anti-competitive effect on the market.[21] *Cf. Eastern Food Serv., Inc. v. Pontifical Catholic Univ. Serv. Ass'n, Inc.*, 357 F.3d 1, 5 (1st Cir. 2004) (only horizontal refusal-to-deal agreements between *competitors* amount to per se violations). *See also Mendez Internet Mgmt. Servs. Inc. v. Banco Santander de Puerto Rico*, 2009 WL 1392189, at *5 (D.P.R. 2009) (an

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associations); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925) ("We do not conceive the members of trade associations become conspirators merely because they gather and disseminate information."). Moreover, where Evergreen invited the action of the PFPG as a group, it is hard pressed to claim that the group action was illegal simply because its decision was not the one that Evergreen requested. *See Tunica Web Advertising v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410 (5th Cir. 2007) ("Given the joint nature of [plaintiff's] initial proposal, which invited the [defendants] to respond together as a single entity, the [defendants'] decision to reject that proposal is not concerted action subject to section 1 [of the Sherman Act].")

[21] At oral argument, Evergreen's counsel was unable to articulate how Evergreen competed with any of the named defendants.

alleged concerted refusal to deal was inherently implausible where defendants did not compete with plaintiff); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 295 (5th Cir. 1988) (buyers have no conceivable motive to drive a potential supplier from the market).[22]

Finally, Evergreen's boycott conspiracy allegations under Mass. Gen. Laws ch. 93A, § 11, fail for the same reasons that the Sherman Act claim fails. Massachusetts courts have long held that refusal to deal, without more, is insufficient to state a claim under Chapter 93A.[23] *See PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 595-96 (1975) (upholding dismissal of complaint, stating that refusing to do business

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[22] In their separate memoranda of law, defendants make numerous arguments as to why the SAC is insufficient as to each of them. Because I find that the SAC does not plausibly allege a conspiracy of the whole, it is not necessary to address each of its constituent parts.

[23] Evergreen's Chapter 93A claims also suffer from statute of limitations defects. Evergreen's only alleged harm falling within the applicable four-year limitations period, *see* M.G.L.A. 260 § 5A, was Genpak's decision to switch from white to black trays in servicing the Pasco County School System in late 2007. However, Evergreen has not alleged that Genpak was under any duty to it to continue selling white trays in Pasco County. Without identifying any such duty "within at least the penumbra of some common-law, statutory or other established concept of unfairness" as required to allege a Chapter 93A claim, this allegation is not actionable. *See Lambert v. Fleet Nat. Bank*, 449 Mass. 119, 126-27 (2007) (citation omitted). It is also seems unlikely that the decision, which involved a Florida school system, would meet section 11's jurisdictional requirement that any alleged unfair competition "occur primarily and substantially within the commonwealth." In any case, the subsequent agreement between Genpak and Evergreen released Genpak from any liability.

"is not within any recognized conception of unfairness, is neither immoral, unethical, oppressive nor unscrupulous, and would not cause substantial injury to consumers, competitors or other businessmen."); *Chiodini v. Target Marketing Grp., Inc.*, 58 Mass. App. Ct. 376, 379 (2003) (affirming summary judgment on a claim that refusal by newspaper to do business with competitor did not constitute unfair trade practices under Chapter 93A).

ORDER

For the foregoing reasons, defendants' motions to dismiss are ALLOWED with prejudice. The Clerk will enter judgment for defendants and close the case.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE

Addendum B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EVERGREEN PARTNERING GROUP, INC.
Plaintiff

V.

CIVIL ACTION

NO. 11-10807 RGS

PACTIV CORP ET AL
Defendant

JUDGMENT

STEARNS, D. J.

In accordance with the Court's Memorandum and Order dated 6/7/12 granting defendant's motion to dismiss, it is hereby ORDERED that judgment be entered for the defendants.

By the Court,

6/7/12
Date

/s/ Elaine Flaherty
Deputy Clerk

(Dismissal Memo.wpd - 12/98)