No. 12-1730

United States Court of Appeals for the First Circuit

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPELLEES' CONSOLIDATED BRIEF

December 5, 2012

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CORPORATE DISCLOSURE STATEMENTS

The appellees, by and through their undersigned counsel, hereby make the following corporate disclosures pursuant to Fed. R. App. P. 26.1, 28(a)(1), and 28(b):

I. PACTIV LLC

Pactiv LLC hereby states: (i) the correct name of Pactiv now is Pactiv LLC; (ii) Pactiv LLC is wholly owned by Reynolds Group Holdings, Inc., which is privately held; and (iii) no publicly held corporation owns 10% or more of the stock of Pactiv LLC.

II. DOLCO PACKAGING

Dolco Packaging hereby states: (i) Dolco Packaging is not an independent legal entity, it is an operating division of Tekni-Plex, Inc. ("Tekni-Plex"), a privately-held corporation; (ii) Tekni-Plex does not have a parent corporation; (iii) Morgan Stanley & Co. Incorporated, a publicly-held corporation, owns 10% of Tekni-Plex's stock; and (iv) Oaktree Capital Group, LLC, a publicly-held corporation, indirectly is beneficial owner of greater than 10% of Tekni-Plex's stock.

III. SOLO CUP COMPANY

Solo Cup Company hereby states: (i) Solo Cup Company is wholly owned by Solo Cup Investment Corporation, a Delaware Corporation; (ii) Solo Cup Investment Corporation is wholly owned by DS Holdings LLC, a Michigan

Corporation; and (iii) no publicly held corporation owns 10% or more of Solo Cup Company's stock.

IV. GENPAK LLC

Genpak LLC hereby states: (i) its parent corporation is The Jim Pattison Group, which is privately held; and (ii) no publicly-held corporation owns 10% or more of its stock.

V. DART CONTAINER CORPORATION

Dart Container Corporation hereby states that it has no parent corporation and that no publicly held corporations own 10% or more of its stock.

VI. AMERICAN CHEMISTRY COUNCIL, INC.

American Chemistry Council, Inc. hereby states that: (i) it has no parent corporation; and (ii) no publicly-held corporation owns 10% or more of its stock.

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I. JURISDICTIONAL STATEMENT

The basis for the subject matter jurisdiction of the District Court, as claimed by Appellant, is 15 U.S.C. §§ 15 and 1121, 28 U.S.C. §§ 1331 and 1337 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

The basis for the jurisdiction of this Court is 28 U.S.C. § 1291, as it is an appeal from a final judgment of a District Court.

The District Court judgment was entered on June 7, 2012. The notice of appeal of Appellant was filed the same day. JA0866.

The appeal is from a final judgment that disposed of all parties' claims.

II. STATEMENT OF ISSUES

1. Whether the District Court correctly dismissed Evergreen's Sherman Act Section 1 claim, where Evergreen's Second Amended Complaint failed to allege facts plausibly suggesting direct or circumstantial evidence of a combination or conspiracy among the Defendants to boycott Evergreen.

2. Whether the District Court's dismissal of Evergreen's claim under Mass. Gen. L. Chapter 93A, Section 11 was correct where Evergreen: (a) abandoned this claim when it failed to submit a developed argument in its Opening Brief; (b) failed to argue any basis for its Chapter 93A claim beyond its insufficient antitrust claim; and (c) in the alternative, failed to allege any "actions and

transactions" by defendants that were "primarily and substantially" in Massachusetts.

3. Whether the dismissal of Genpak, LLC should be affirmed for the additional reasons that Evergreen released Genpak of liability and failed to plausibly state claims against Genpak.

4. Whether the dismissal of all claims against the American Chemistry Council ("ACC") should be affirmed for the additional reason that Evergreen fails to allege plausibly that the ACC itself participated in the purported group boycott or that it would have had the means or motive to do so as a trade association that does not manufacture polystyrene.

5. Whether the District Court correctly dismissed Evergreen's Second Amended Complaint with prejudice, and without extending leave to further amend, where the District Court already allowed Evergreen to amend its Complaint twice, and removing a default to do so, and where Evergreen failed to present any request for leave to amend to the District Court that identified additional facts it would allege that would cure the grounds for dismissal.

III. STATEMENT OF THE CASE

On May 9, 2011, plaintiffs Evergreen Partnering Group ("Evergreen") and Michael Forrest ("Forrest") filed their original Complaint, *pro se*, alleging that the Defendants violated the Sherman Act, Lanham Act, and Mass. Gen. Laws ch. 93A

("Chapter 93A"). JA0001-36. Plaintiffs also alleged common law claims of trade libel and tortious interference with prospective economic advantage and contractual relations. *Id.* Counsel thereafter appeared for Plaintiffs, but then promptly withdrew from the case, on June 22, 2012. JA0877; Docket Nos. 2-5. Over Mr. Forrest's objection (JA0037-114) withdrawal was permitted and Evergreen was given thirty days to have successor counsel appear. JA0877; Docket No. 5.

On July 20, 2011, new counsel appeared for Plaintiffs. JA0877; Docket No. 7. On August 19, 2012, that counsel filed an Amended Complaint (the First Amended Complaint, "FAC"). JA0115-423. The FAC retained the claims of violations of the Lanham Act, Chapter 93A and common law tortious interference, but *dropped* the Sherman Act and trade libel claims. *Id*. In addition to the 39 pages of text (JA0115-54), the FAC included nearly 270 pages of attachments. JA0155-423.

On October 6, 2011, Plaintiffs' second counsel filed his own motion to withdraw from the case, which the District Court allowed, again over Mr. Forrest's objection. JA0430-53, JA0873-74; Docket No. 47. The District Court again gave Evergreen thirty days, *i.e.*, to November 6, 2011, to have new counsel file an appearance. *Id*.

Mr. Forrest then sought leave to file a second amended complaint solely in his individual capacity and without naming Evergreen as a Plaintiff. JA0462-68, JA0873; Docket Nos. 53-54. Defendants moved to dismiss the FAC and opposed Mr. Forrest's motion for leave to file a second amended complaint individually. JA0871-72; Docket Nos. 61-63. In a December 1, 2011 Memorandum and Order, the District Court found: 1) that any alleged injuries were to Evergreen and not to Mr. Forrest; 2) that Mr. Forrest lacked standing to bring individual claims for those corporate injuries; 3) that Evergreen could not proceed *pro se*; and 4) that Evergreen had exceeded the deadline set by the District Court for retaining counsel. JA0454-0460. Accordingly, the District Court dismissed the FAC and denied Mr. Forrest's request to file his proposed second amended complaint. *Id*. The District Court entered a Judgment of Dismissal on December 1, 2011. JA0461.

On December 29, 2011, Plaintiffs moved to reopen the case and again sought leave to file a second amended complaint, advising that a third counsel would file an appearance. JA0462-68, JA0871; Docket Nos. 71-72. On January 12, 2012, the District Court allowed Plaintiffs' motion, vacating the default against Evergreen and affording yet another opportunity to amend the complaint, this time by January 30, 2012. JA0479. New counsel then filed an appearance for the Plaintiffs. JA0870; Docket Nos. 74-78.

On January 30, 2012, Evergreen filed its Second Amended Complaint ("SAC") – the fourth iteration of complaints filed or proposed – renewing the Sherman Act claim alleged in its original Complaint, and repeating its Lanham Act and Chapter 93A claims against Pactiv LLC ("Pactiv"), Dolco Packaging ("Dolco"), Solo Cup Company ("Solo"), Genpak, LLC ("Genpak"), Dart Container Corporation ("Dart"), and the ACC. JA0480-0513. The SAC omitted any individual claims by Mr. Forrest and abandoned the state common law tortious interference claims. *Id*. The SAC is the operative pleading in this appeal.

On February 27, 2012, all Defendants filed motions to dismiss the SAC, pursuant to Fed. R. Civ. P. 12(b)(6) (JA0514-16, 0531-33, JA0572-573, JA0585-587, JA0600-602 and JA0603-605), along with supporting memoranda of law.[1] JA0761-814. Although it opposed Defendants' motions, Evergreen expressly abandoned its Lanham Act Claim (JA0655 n.2), pursuing only the Sherman Act and Chapter 93A claims set forth in the SAC. Oral argument was held on May 15, 2012. JA0818-58.

On June 7, 2012, the District Court granted the Defendants' Motions and dismissed the SAC with prejudice. JA0866; Docket Nos. 114-115. Later that same day, Evergreen filed its notice of appeal. JA0815.

[1] Defendants filed a joint memorandum (JA0534-0552) and individual memoranda. JA0517-0530, JA0553-0571, JA0574-0584, JA0588-99, 0607-20 and JA0621-48. Evergreen filed corresponding opposition memoranda. JA0649-0760. Defendants filed reply memoranda. JA0761-814.

IV. STATEMENT OF FACTS

A. Allegations in the Second Amended Complaint

Evergreen's Second Amended Complaint sets forth the following allegations material to this appeal.[2] Evergreen is a supplier of post-consumer polystyrene resin used to manufacture polystyrene products. JA0486-90. Evergreen does not itself manufacture polystyrene products. *Id.* Defendants Pactiv, Genpak, Solo, Dolco, and Dart (together referred to as "the Manufacturer Defendants") are involved in the manufacture and sale of products made from expanded polystyrene (also known as styrofoam). JA0484. Defendant ACC is a trade association that represents companies in the chemical and plastic industries. JA0490. Each of the Manufacturer Defendants is a member of the Plastics Food Service Packaging Group ("PFPG"), an affinity group within the ACC. *Id.*

Evergreen claims to have developed a concept for recycling polystyrene products purchased and used by large public school systems and other substantial institutional consumers of such products. JA0486-90. Specifically, Evergreen's recycling concept called for it to collect of used polystyrene food service trays from large school districts and other institutional users, which it would process back into a food grade resin (known as post-consumer polystyrene resin, or "PC-

[2] Defendants dispute the truth of many of the allegations in Evergreen's SAC, but the material factual allegations are discussed here without addressing those disputes, given the standard applicable on an appeal from the dismissal of a complaint.

PSR"). JA0487. Evergreen then planned to sell its PC-PSR resin to one or more manufacturers for them to make into new polystyrene food service products to be sold back to the end users, and so on in a continuing cycle. JA0487-88. Plaintiff referred to this recycling concept as a "closed-loop system." JA0486-90.

Evergreen planned for its closed-loop system to generate revenue for Evergreen at each stage of the transaction: (1) Evergreen's sale of PC-PSR to manufacturers benchmarked at prime pricing of new (non-recycled) food-grade resin; (2) a four percent royalty to be paid to Evergreen by the manufacturers, based on sales of all Poly-Sty-Recycle products sold to Evergreen's school district and other institutional customers; (3) an environmental fee paid to Evergreen by those participating end users; and (4) a supplemental fee "to offset financial damages that had been caused by ACC/PFPG and its members." JA0487-88, JA0499-500. Evergreen claimed that it had no competition, making its closed-loop recycling services a "sole source" that school districts could lawfully select without competitive bidding. JA0491.

Evergreen contends that, between 2002 and 2007, it reached agreements with several school systems to utilize its closed-loop recycling process and either generated commitments for business from other sources, or received preliminary requests to expand its services into other areas of the country. JA0488-89, JA0492. Evergreen's business plan contemplated development of nine facilities

capable of producing enough resin to supply the nation's ten largest school systems (with significant excess for additional sales), all of which was "predicated on the participation of any one of the producer Defendants: Pactiv, Genpak, Solo, Dolco and/or Dart." JA0489. Although various Manufacturer Defendants expressed an interest in working with Evergreen by purchasing recycled resin or funding Evergreen's recycling plant (JA0490, JA0494, JA0497, JA0500), Evergreen was unsuccessful in reaching an agreement with any of the Manufacturer Defendants to participate fully in the closed-loop recycling proposal. JA0491, JA0494-0495.

However, many of the Manufacturer Defendants did do business with Evergreen in various capacities. Solo and Pactiv tested Evergreen's recycled resin. JA0497; JA0499. In June 2007, Genpak and Dolco entered into a Funding Agreement (the "2007 Funding Agreement") with Evergreen pursuant to which Genpak and Dolco agreed to provide Evergreen with up to $150,000 in funding and agreed to purchase resin from Evergreen. JA0350-51.[3]

On April 15, 2008, Genpak entered into a further agreement (the "2008 Agreement") to continue to purchase Evergreen's resin and provided Evergreen with an additional $21,000 in financing. In that agreement, Evergreen agreed "to

[3] In that agreement, Evergreen also agreed to indemnify and hold Genpak harmless from all claims incurred for any act or omission by Evergreen. *Id*.

release Genpak of any future liability."[4] JA0497, JA0567-68. Evergreen also acknowledged production problems at its facility and stated that it "greatly appreciated the support that Genpak has provided over the past year . . ." JA0568. In October 2008, the ACC issued a letter encouraging outside investment in Evergreen. JA0179.

Evergreen alleges that it was forced out of business as a result of an agreement between the Defendants to refuse to deal with Evergreen and adopt its "closed-loop system." JA0481-2, JA0491, JA0496. At the same time, Evergreen admits in its SAC that various Manufacturer Defendants *did* independently test and/or offer to purchase Evergreen's resin for purposes other than participation in the closed-loop recycling program. JA0490, JA0494, JA0497, JA0499, JA0500.

B. The District Court's Dismissal of the Second Amended Complaint

On June 7, 2012, the District Court granted the Defendants' Motions to Dismiss with prejudice and entered Judgment for Defendants. The District Court reasoned that the Defendants' behavior, as alleged by the Plaintiff, showed that the "defendants did not act consistently with any alleged agreement to boycott

[4] Evergreen submitted the 2007 Funding Agreement to the Court as an attachment to the Amended Complaint it filed on August 18, 2011. JA0350-51. It referenced the 2008 Agreement in SAC ¶ 46 (JA0497) and Genpak attached it to its motion to dismiss. JA0568. There is no dispute among the parties as to the authenticity of either agreement and Judge Stearns, accordingly, properly considered them in his decision. *See, e.g., Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). Evergreen does not challenge Judge Stearns' consideration of either agreement on this appeal.

Evergreen." Order at 16. Explaining that, "to survive a motion to dismiss, Evergreen must plead 'enough factual matter (taken as true) to suggest an agreement was made'" (Order at 10), the District Court held that Evergreen failed to carry that burden, in part because the SAC "describes behavior at cross-purposes with the supposed conspiratorial goal." Order at 16. The District Court specifically identified allegations in the SAC acknowledging that several Defendants had entered into agreements to do business with Evergreen, while others had tested Evergreen's resin. Order at 16. The District Court also held that Evergreen's allegations failed to account for numerous alternative explanations, other than conspiracy, which could explain why the Defendants chose not to engage fully with Evergreen and all elements of its closed-loop business plan. Order at 12-13.

The District Court thus determined that, when stripped of conclusory labels and unsupported characterizations of the Defendants' alleged actions, the SAC failed to allege the threshold elements of a plausible conspiracy among Defendants. Order at 17-18.

V. SUMMARY OF ARGUMENT

According to its SAC, Evergreen devised a business plan that depended in substantial part on the Manufacturer Defendants committing their production capacity (JA0489) to making school lunch trays and other products with

Evergreen's recycled polystyrene resin, in some cases expanding their existing product offerings to do so, and in all cases necessarily agreeing to disrupt their own established, profitable business practices and distribution arrangements – all to establish Evergreen as the industry's chosen "sole-source" vendor of recycled products to large schools and other institutions. For those substantial accommodations, the Manufacturer Defendants would earn the dubious "opportunity" to make yet another one, namely, a significant "royalty" payment to Evergreen on the products sold to the schools and institutions, over and above the price each Manufacturer Defendant would have to pay to get Evergreen's recycled resin. This, even though some of the Manufacturer Defendants already served those very customers, and even though Evergreen was already planning to compensate itself with an additional, separate "environmental fee" to be collected directly from those customers. JA0487-88.

Evergreen acknowledges that several of the Defendants showed interest in Evergreen and in recycled products generally, but complains that none subscribed fully to all of the elements of Evergreen's closed-loop business method. Given all the things Evergreen's plan demanded of the manufacturers for the privilege of devoting their resources to Evergreen's advancement, it hardly takes a Sherman Act conspiracy to explain why no manufacturer fully embraced the precise "deal" that this company offered. Nonetheless, Evergreen has claimed Defendants agreed

upon an extraordinarily odd "boycott", in which certain Manufacturer Defendants concededly *did* do business with Evergreen and some even funded its operations, but allegedly agreed not to undertake the substantial additional accommodations – in some cases, changes to their product lines – which would have been necessary to maximize Evergreen's profitability, and thus drove the company out of business.

The District Court saw through Evergreen's rhetoric, however, to the fundamental factual deficiencies in its claims. Correctly applying the "plausibility" standards articulated in *Twombly*, the Court dismissed the SAC with prejudice, and that decision should be affirmed for the following reasons:

1. Evergreen did not plead any direct evidence of a conspiratorial agreement. It relies instead on comments by two Defendants at a trade association meeting some seven years ago, to the effect that recycling was not an effective option for responding to environmentally based public criticism of polystyrene. JA0494. No one at that meeting is alleged to have said anything about the prospect of doing business with Evergreen or any other recycling vendor, about school lunch trays, about closed-loop recycling, or even about whether it made good business sense to engage in recycling.

2. Evergreen likewise pleaded no circumstantial evidence supporting a plausible conspiracy. No parallel conduct was alleged. Rather, Evergreen conceded that several Manufacturer Defendants dealt favorably with Evergreen,

each in its own way, and well after the alleged "conspiracy" was supposedly hatched. JA0490, JA0494, JA0497, JA0499, JA0500. These undisputed circumstances defeat not only any plausible inference that there was an antecedent agreement to put Evergreen out of business, but also the inference that anyone was acting in concert to prevent the closed-loop recycling method from taking root. Indeed, had there really been a conspiracy to eliminate Evergreen's business method, common sense says these Defendants would have avoided Evergreen entirely.

3. Evergreen's own allegations provide obvious, lawful explanations for Manufacturer Defendants' decisions not to do business with Evergreen in the way Evergreen preferred. As is evident from Evergreen's allegations, for example, Evergreen's business plan stood to raise costs for Manufacturer Defendants and their customers; required Manufacturer Defendants to expand beyond their established market niches and disrupt a profitable status quo (exactly the circumstances that made conspiracy implausible at the pleading stage in *Bell Atl. Corp. v. Twombly* ("*Twombly*"), 550 U.S. 544 (2007)); and would have undermined Manufacturer Defendants' existing and even more profitable environmentally conscious products. JA0484, JA0487-88, 0491. Evergreen's only answer to this basic implausibility in its claim is a self-serving contention to the effect that the "upsides" of doing business with Evergreen on its stated terms were

so obvious and dramatic that no rational economic actor would have declined unless he was obeying the dictates of an illegal conspiracy. Appellant's Brief at 45. *Twombly* requires courts to ignore exactly this sort of fact-deficient, conclusory rhetoric. Evergreen's failure to adequately plead direct or circumstantial evidence of conspiracy dooms its Sherman Act claim.

4. As the District Court held, because Evergreen based its Massachusetts Chapter 93A claim entirely on an underlying Sherman Act conspiracy, that claim must fall along with the antitrust count, for failure to allege a plausible conspiracy. The Chapter 93A dismissal can also be affirmed on grounds that the scant two sentences devoted to the claim on appeal amount to a waiver, and because the record reveals no allegations supplying the Massachusetts nexus necessary to sustain such a claim. The law is clear that a plaintiff's Massachusetts residence – the only nexus alleged here – is not adequate.

5. Evergreen's claims against Genpak are additionally barred by the clear terms of a release, which Evergreen agreed to as consideration for Genpak's agreements in 2007 and 2008 to provide substantial funding to Evergreen and purchase the company's recycled resin.

6. Evergreen's claims against ACC are additionally barred for failure to allege that this trade association, which does not manufacture or sell anything,

either was involved in or had any motive or means to participate in the alleged conspiracy of its members.

7. Evergreen's claims against Dolco additionally fail based on the acknowledgement in Evergreen's pleadings that Dolco supported Evergreen's business as fully as it could within Dolco's existing business model, including entering a supply contract and agreeing to help fund the growth in its operations, and because Evergreen itself explains the independent business reasons Dolco had for not agreeing to change its business model in order to pursue any other venture with Evergreen.

8. The District Court's dismissal "with prejudice" should be affirmed. Evergreen did not make a proper Rule 15 request for leave to amend below, thereby failing to preserve any issue for appeal. Moreover, neither in the District Court nor in this Court has Evergreen proffered any facts that could be pled in good faith, in what would be a fifth iteration of a complaint, to change the result. That is the very definition of futility.

VI. ARGUMENT

A. <u>This Court Should Affirm the District Court's Dismissal of the Second Amended Complaint.</u>

1. Standard of Review

An appellate court reviews *de novo* a district court's decision granting a motion to dismiss. *Rectrix Aerodrome Ctrs., Inc. v. Barnstable Mun. Airport*

Comm'n, 610 F.3d 8, 11 (1st Cir. 2010). Although on review an appellate court must assume the truth of all well-pled facts and draw all reasonable inferences in the plaintiff's favor, the Court should not accept allegations that amount to mere labels or conclusions. *Ashcroft v. Iqbal* ("*Iqbal*"), 556 U.S. 662, 678 (2009). Rather, rejecting all conclusory allegations, the Court must consider whether the complaint has alleged sufficient *facts* to state a plausible entitlement to relief, not just the mere possibility of unlawful conduct. *See SEC v. Tambone* ("*Tambone*"), 597 F.3d 436, 442 (1st Cir. 2010)(citing *Twombly*, 550 U.S. at 555).

Evergreen has also challenged the "with prejudice" form of the dismissal below. As discussed in Section VI(B), *infra*, no proper motion for leave to amend was made in the District Court. To the extent the Court concludes otherwise, however, the result would be no different. Although this Court reviews denials of leave to amend under Fed. R. Civ. P. 15 for abuse of discretion, *see Maine State Bldg. & Constr. Trades Council v. United States Dep't of Labor*, 359 F.3d 14, 18 (1st Cir. 2004), it will uphold the denial of a motion to amend and "defer[] to the district court for any adequate reason apparent from the record." *Id.* (quoting *Resolution Trust Corp. v. Gold*, 30 F.3d 251, 253 (1st Cir. 1994)). Thus, review of a Rule 12(b)(6) dismissal is "not wedded to the lower court's rationale and [this Court] may affirm the district court's order of dismissal on any ground made manifest by the record." *Edlow v. RBW, LLC*, 688 F.3d 26, 31 (1st Cir.

2012)(quoting *Decotiis v. Whittemore*, 635 F.3d 22, 28 (1st Cir. 2011)). Here, there was no error in the District Court's dismissal of Evergreen's entire case with prejudice and without leave to amend.

2. Evergreen Failed To Plead A Plausible Conspiracy Claim.

a) *Twombly* and *Iqbal* Establish The Standard To Be Applied In This Case.

This Court and the Supreme Court have made it clear that, to survive a motion to dismiss, a plaintiff must provide a "short and plain statement of the claim," which "must nonetheless contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face . . . ." *Tambone*, 597 F.3d at 442 (quoting *Iqbal*, 556 U.S. at 677-78) (internal quotation marks omitted). "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." *Id*. A plaintiff must allege facts establishing "more than a sheer possibility that the defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. *See also Schatz v. Republican State Leadership Comm'n*, 669 F.3d 50, 55 (1st Cir. 2012) ("Plausible, of course, means something more than merely possible . . . ."). Similarly, allegations which are "merely consistent with" entitlement to relief "stop[] short of the line between possibility and plausibility . . . ." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

This Court applies a two-step analysis to determine whether a complaint has satisfied the "plausibility" standard. First, it requires the reviewing court to "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Schatz*, 669 F.3d at 55. Second, the reviewing court must take only the complaint's "well-pled (i.e., non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Id.* at 55. In doing so, the reviewing court should recognize that the evaluation of whether a claim is plausible is context specific and requires the court "to draw on [its] judicial experience and common sense.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679) (internal quotation marks omitted). The analysis also requires the plaintiff to account for "obvious alternative explanation[s]" for the conduct alleged. *See Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567).

In light of this settled case law, Evergreen is mistaken when it suggests that the "the level of detail needed . . . to withstand a motion to dismiss following *Twombly* and *Iqbal* is unclear." Appellant's Brief at 28. This Court did observe in *Pruell v. Caritas Christi* that "[t]he need for pleading specificity in federal complaints has been somewhat unsettled" since *Twombly* and *Iqbal*. *See* 678 F.3d 10, 12 (1st Cir. 2012). However, the Court went on to reiterate the standards described above, affirm the District Court's dismissal of the complaint, and

emphasize the sound reasons for "stiffen[ing]" the pleading standards, including addressing an "earlier swing of the pendulum" toward weaker pleading standards. *See id.* at 13. This Court noted the "growing dockets, the enormous cost of modern discovery, and the benefits to court and parties of sorting out hopeless claims early on." *See id. See also Twombly*, 550 U.S. at 559 (emphasizing the value of avoiding the "potentially enormous" expense of antitrust litigation for courts and litigants). This Circuit has not hesitated to affirm Rule 12(b)(6) dismissals under *Twombly* and *Iqbal*. *See, e.g., Pruell*, 678 F.3d at 12-13 (affirming dismissal of complaint that lacked the factual specificity necessary to state a plausible claim for relief); *Schatz*, 669 F.3d at 58 (affirming dismissal and rejecting appellant's argument that the court was improperly applying a heightened standard); *González-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 247-50 (1st Cir. 2012) (affirming dismissal of constitutional and antitrust claims under the analysis articulated in *Twombly*). Other Circuit Courts have shown similar rigor in applying these standards. *See, e.g., Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 345-48 (7th Cir. 2012) (affirming dismissal of complaint and denial of leave to replead, holding that the complaint did not sufficiently identify a commercial market, and plaintiffs had sufficient opportunities to state a viable claim); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198-204 (9th Cir. 2012) (affirming dismissal, holding that plaintiffs failed to adequately allege a plausible

injury to competition); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225-30 (3d Cir. 2011) (affirming dismissal of a Section 1 claim without leave to amend, holding plaintiff failed to adequately plead either direct or circumstantial evidence of agreement).

b) Evergreen Did Not Allege A Plausible Conspiracy Claim.

A violation of Section 1 of the Sherman Act requires a "contract, combination . . . , or conspiracy." 15 U.S.C. § 1. A "crucial question" thus is whether the alleged conduct "stems from independent decision or from an agreement, tacit or express . . . ." *Twombly*, 550 U.S. at 553 (internal citations and quotations omitted). "To adequately plead an agreement, a plaintiff must plead either direct evidence of an agreement or circumstantial evidence." *Burtch*, 662 F.3d at 225. The SAC fails to allege facts suggesting a plausible conspiracy claim, either by direct or circumstantial evidence. Moreover, among many other basic implausibilities evident from the SAC, Evergreen's own allegations of Defendants' favorable dealings with Evergreen after the conspiracy was allegedly formed substantially undercut the plausibility of Evergreen's conspiracy claim. In a thoughtful, well-reasoned decision, the District Court held that, "[w]hen shorn of its conclusory labels, Evergreen's SAC fails to limn even the essentials of a conspiratorial agreement among the Defendants." Order at 17. Judge Stearns' decision should be affirmed.

(1) Evergreen Does Not Adequately Plead Direct Evidence of A Conspiracy.

Evergreen now makes it clear that what it complains of is *not* that Defendants collusively refused to do business with Evergreen. Evergreen concedes that various Manufacturer Defendants purchased its recycled resin and tested its product. Appellant's Brief at 54-55. Its allegations also concede that other Defendants provided funding for its facilities and encouraged others to invest in Evergreen. JA0497; *see also* JA0179, JA0350-51. Instead, Evergreen claims that Defendants agreed not to adopt Evergreen's "sole-source closed-loop recycling business method for polystyrene food service products." Appellant's Brief at 55.[5]

Evergreen's closed-loop system purportedly had four components: (i) Evergreen would collect used polystyrene products from school systems; (ii) it would process those products into raw polystyrene resin; (iii) one of the

[5] If this counts as a "boycott" at all, it is surely a strange one, in that Defendants are not accused of refusing to deal with a person or entity, but of refusing to fully embrace a *business concept.* On its face, the SAC seemed to allege a more traditional boycott, in which Defendants allegedly so feared competition with recycled products, and profited so much from the so-called "status quo of not recycling," (JA0481), that they conspired to destroy Evergreen by withholding their business. *See* JA0490-91 (alleging that "the producer Defendants orchestrated the boycott against recycling and the use of post-consumer recycled material for their polystyrene food service products, and specifically, Evergreen".) Confronted with its own allegations, however, which concede that Defendants did do business with Evergreen and did show interest in recycling, Evergreen has had to press this novel "business method boycott" theory.

Defendants would process that recycled resin into new product; and (iv) Evergreen would cause the Defendants to resell the product made with the recycled resin to customers participating in Evergreen's system. JA0481, 0487, 0489.

Evergreen contends on appeal that it has adequately alleged direct evidence of an agreement to boycott Evergreen's business method pointing to the following three allegations (1) all of the Manufacturer Defendants are current members of the industry group PFPG; (2) six or seven years ago, in "2005 or 2006," a Pactiv representative stated at a PFPG meeting "that recycling polystyrene products was not an option in the industry's battle with polystyrene critics;"[6] and (3) "[a] representative from Dart agreed." Appellant's Brief at 33-35; JA0490, JA0494.

These allegations fall well short of establishing direct evidence of a conspiracy to refuse to adopt Evergreen's sole-source closed-loop recycling business method for polystyrene food service products. "Direct evidence of a conspiracy is evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *Burtch*, 662 F.3d at 225 (internal citations and quotations omitted). Evergreen's allegations simply do not amount to explicit evidence of an alleged conspiracy between the Defendants.

On its face, there is nothing in the alleged colloquy between two Defendants at the "2005 or 2006" PFPG meeting suggesting any agreement to boycott

[6] This alleged meeting is outside the four-year statute of limitation for Sherman Act claims. 15 U.S.C. § 15b.

Evergreen, let alone an agreement not to adopt Evergreen's sole source, closed-loop business model. JA0494. As alleged, the comments simply reflect a general statement of opinion by one Defendant about the viability of polystyrene recycling as a means of defusing public hostility toward the material on environmental grounds, with a second Defendant allegedly agreeing. That is, according to what little the SAC actually says (versus the characterizations in Evergreen's brief), no one was talking about whether recycling was an appropriate or economically viable thing to do, much less whether and how to do business with recycling vendors like Evergreen, or whether closed-loop school tray recycling or any other business approach was a good one. This was, rather, an opinion about the efficacy of recycling to solve a problem of public relations. There is no allegation that any Manufacturer Defendant advocated that the group pursue a particular course of conduct at all, let alone with respect to Evergreen, and no allegation that any Manufacturer Defendant agreed to any such recommended course of conduct. [7]

[7] Evergreen also asserts that its allegations of trade association meetings provide circumstantial evidence sufficient to establish a plausible conspiracy claim. Appellant's Brief at 38-39. But the SAC alleges only one trade association meeting and an exchange of emails between Evergreen and ACC a year and a half later. JA0494-95. As noted above, at the meeting in late 2005 or early 2006, all that allegedly occurred was a colloquy by two Defendants regarding the viability of recycling polystyrene products as a means of blunting polystyrene criticism. JA0494. The exchange of emails in May and June 2007 involved only ACC considering and responding to Evergreen's request that ACC consider funding Evergreen's California project. JA0495-96. These allegations do not provide circumstantial evidence of the agreement Evergreen asserts, *i.e.*, an agreement

Indeed, the supposed comments do not even mention Evergreen (*or* closed-loop recycling *or* any kind of recycling of school lunch trays). Evergreen admits that it must rely on inference even to connect the alleged statements to Evergreen. Appellant's Brief at 34 ("Because at that time Evergreen's model was a sole-source for recycling polystyrene (JA0491), the Defendants were referring to Evergreen."). However, Evergreen's own allegations acknowledge the existence of a competitor, Packaging Development Resources ("PDR"). JA0498, *see also* JA0387 (PDR's "non-objection" letter from the Department of Health and Human Resources, dated April 26, 2006).[8]

Even if one could make the inferential leap that the statement "that recycling polystyrene products was not an option" referred to Evergreen, it does not describe

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among Defendants not to adopt Evergreen's sole source, closed-loop business method.

Furthermore, Defendant Solo is not even alleged to have been at the subject meeting. JA0494. In the few references to Solo in the SAC, the SAC fails to allege any communication between Solo and any other Defendant regarding Evergreen. There is simply no allegation of direct evidence that Solo joined the alleged conspiracy.

[8] Evergreen does not allege that it, in fact, held any intellectual property which would have made Evergreen synonymous with closed-loop polystyrene recycling. To the contrary, the public record demonstrates that the patent Evergreen sought for its closed-loop system was rejected by the patent office and subsequently abandoned by Evergreen during the pendency of the District Court action. United States Patent and Trademark Office, http://portal.uspto.gov/external/portal/pair (search for Application Number 10/899,536) and November 8, 2011 Notice of Abandonment; *see also* Order at 3 n.7.

the boycott Evergreen claims occurred. As the District Court correctly points out (Order at 6), the statement Evergreen relies on was simply a criticism of "recycling polystyrene products." And the SAC makes it clear that the criticism was of the effectiveness of such products as a means of addressing "polystyrene's critics" – not of Evergreen's supposed four-step closed-loop system. JA0494. Evergreen is desperate to leave the impression that this meeting was a "vocal" expression of "adamant[]" opposition to closed-loop school tray recycling and a "call to action" against Evergreen in particular (Appellant's Brief at 14-15), but those are characterizations, not facts, and they show up only in Evergreen's brief, not the SAC itself. In short, Evergreen's allegations which it claims show a direct agreement fall far short of the required explicit factual allegations that Defendants concertedly refused to adopt Evergreen's sole-source, closed-loop business method. *See Burtch*, 662 F.3d at 226 (alleged conversations among defendants exchanging credit information is not direct evidence of an agreement to fix credit terms or not extend credit to plaintiff).[9]

[9] The Third Circuit's decision in *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010) does not help Evergreen. There, the plaintiff hospital alleged that the dominant hospital and dominant health insurer had conspired to protect each other from competition. The court found sufficient allegations of a direct agreement based on the allegations that the defendant insurer had made direct statements to the plaintiff, that the insurer and the defendant hospital had an agreement, that the agreement was "probably illegal," that any assistance the insurer provided plaintiff would violate that agreement, and that the

(2) Evergreen Fails to Adequately Plead Circumstantial Evidence of A Plausible Conspiracy.

Failing to adequately plead any direct evidence of conspiracy, Evergreen must rely on allegations of circumstantial evidence to suggest that an improper agreement was made. However, Evergreen's factual allegations are manifestly insufficient to plausibly suggest conspiracy based on circumstantial evidence.

Evergreen claims that Defendants engaged in parallel conduct, while conceding that *Twombly* requires more. Appellant's Brief at 36. As the Supreme Court has stated: "Without more, parallel conduct does not suggest conspiracy . . . when allegations of parallel conduct are set out in order to make a § 1 claim, they 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." *Twombly*, 550 U.S. at 556-57. *See also In re Travel Agent Comm'n Antitrust Litig. v. Delta Airlines, Inc.*, 583 F.3d 896, 902-03 (6th Cir. 2009) ("In the wake of *Twombly*, allegations of parallel conduct and bare assertions of conspiracy no longer supply an adequate foundation to support a plausible § 1 claim."); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1343 (11th Cir. 2010) (affirming dismissal because the complaint did not contain facts sufficient to render a Section 1 conspiracy plausible "when the inference of conspiracy is juxtaposed with the inference of independent

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defendant hospital would retaliate against the insurer. *See id.* at 100. Evergreen's SAC contains no such allegations of direct agreement.

economic self-interest"). Here, Evergreen's factual allegations fail even to show parallel conduct, let alone any factual enhancement that suggests the preceding agreement required by *Twombly*.

(a) Evergreen fails to allege parallel conduct.

As the District Court pointed out, the SAC is replete with allegations of individual defendants continuing to favorably deal with Evergreen in varied ways after "the conspiracy was supposedly hatched at the 2005 or 2006 PFPG meeting." Order at 16. For example, Evergreen alleges that Dolco and Genpak continued to purchase Evergreen's recycled resin. JA0494. Dolco then entered into an agreement with Evergreen, along with Genpak, to purchase Evergreen's resin and to provide funding for Evergreen's Georgia recycling facility. JA0497; *see also* JA0350-51. Genpak continued to do business with Evergreen, to buy its resin and fund its facility under the 2008 Agreement. Solo and Pactiv tested Evergreen's recycled resin. JA0497; JA0499. The ACC issued a letter encouraging outside investment in Evergreen. JA0179.[10]

All of these undisputed dealings were supportive of Evergreen's business. If there really was an agreement not to contribute to the success of the closed-loop

[10] In fact, Dart is the only Manufacturer Defendant not alleged to have done business with Evergreen. As Judge Stearns correctly noted (Order at 16 n.19), however, Evergreen does not allege that it ever even *asked* for Dart's business, as it did either directly or indirectly with other defendants. Dart (like Solo) makes cups, not the school lunch trays that are the centerpiece of Evergreen's closed-loop business plan. JA0484.

business method, it is difficult to see why these defendants would have done anything at all to advance Evergreen's fortunes, as they clearly did, instead of just ignoring Evergreen altogether and starving the company of any funding for its closed-loop efforts. Certainly, providing funding to Evergreen and encouraging others to do so, as several Defendants did, can hardly be characterized as an attack on Evergreen's "sole-source closed-loop recycling business method for polystyrene food service products." Appellant's Brief at 55. *See Burtch*, 662 F.3d at 228 (allegations showing varied conduct by defendants, some favorable to plaintiff, "fall far short of demonstrating parallel behavior. . . .").

Evergreen's suggestion that Defendants' willingness to work with Evergreen should be disregarded because it came "too late" after Evergreen had "effectively" ceased operations in December 2008 (Appellant's Brief at 19-20; JA0500), is contradicted by Evergreen's own allegations. Evergreen filed suit in May 2011, meaning that the relevant time period under the Sherman Act statute of limitations is May 2007 forward. *See* 15 U.S.C. §15b. Genpak and Dolco funded Evergreen's facility under the 2007 Funding Agreement beginning in July 2007 (well before Evergreen ceased operations and at the beginning of the statute of limitations period). Genpak continued to fund Evergreen's operations pursuant to the 2008 Agreement – also well before Evergreen allegedly ceased operations. JA0497. Even the supportive ACC letter was issued in October 2008, prior to Evergreen's

allegedly shutting down. JA0179. The failure of Evergreen to allege facts showing that Defendants engaged in parallel conduct dooms Evergreen's conspiracy claim based on allegations of circumstantial evidence.

(b) Even if Evergreen had alleged parallel conduct, it failed to allege a plausible conspiracy claim.

Even if Evergreen had successfully alleged parallel conduct, however, *Twombly* and its progeny teach that Evergreen must allege additional facts making it "plausible" that that parallel conduct was the product of a conspiracy. *See Twombly*, 550 U.S. at 557. To support a Section 1 claim, the plaintiff must plead facts "plausibly suggesting (not merely [being] consistent with) [a preceding] agreement . . . ." *Id.* at 557. In doing so, the plaintiff must account for "obvious alternative explanation[s]" for the conduct alleged. *Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567).

Evergreen cannot meet its plausibility burden here. One especially powerful reason is Evergreen's allegation that Defendants promoted PDR, another company that held itself out as a closed-loop recycler. JA0498; *see also* JA0630-31. If the aim of this alleged conspiracy was to "boycott" this business method, touting PDR is a strange way to advance that aim. As the District Court correctly found, there are many other obvious reasons – likewise evident from Evergreen's own allegations – for each Defendant to have unilaterally decided not to adopt

Evergreen's unique single-source, closed-loop method of business. *See* Order at 13. These obvious explanations for Defendants' actions render any inference of "agreement" implausible. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1343 (11th Cir. 2010) (finding that "inference of conspiracy [ ] juxtaposed with the inference of independent self-interest" renders alleged conspiracy implausible).

As the District Court observed, a particularly obvious explanation for any unwillingness by Defendants to adopt Evergreen's single source, closed-loop business model is concern that Evergreen's system threatened to raise Defendants' costs and those of their customers. Order at 12-13. Evergreen alleges that, under its system, it would charge Defendants royalties of four percent, it would charge Defendants "prime resin" prices for its recycled resin, it would charge an "environmental fee" to Defendants' customers, and it would charge yet another supplemental fee "to offset damages that had been caused by ACC/PFPG and its members." JA 0487-88, 0499-500. Small wonder then, that however much the Manufacturer Defendants may have been interested in exploring the business possibilities of recycled resin, none of them ultimately decided to subscribe to an "opportunity" that seemed to revolve around enriching a single supplier in multiple ways – particularly where that supplier could fairly have been perceived to be profiting much more from *Defendants'* manufacturing capacity and established

industry brands than from anything the supplier itself planned to contribute to the enterprise.

Evergreen asserts that the District Court erred in interpreting these allegations because the SAC also contains the allegations that Evergreen's closed-loop system was "cost-neutral" to Defendants and the royalty was supposedly "standard in the industry." Appellant's Brief at 42. The allegation of cost neutrality is conclusory and there is no allegation that any Defendant paid a 4% royalty to anyone. *Twombly* and *Iqbal* state that such conclusory allegations must be disregarded, and this is particularly so there are factual allegations to the contrary. In any event, it is obvious from Evergreen's description of its model that Defendants could have concluded that it threatened to raise their costs (or simply couldn't see how Evergreen's additional charges could be cost-neutral) and have declined to adopt it for that reason.

Evergreen also alleges that its proposed business method was "innovative and market-altering;" a dramatic change from the status quo. JA0491. Based on these allegations, the District Court recognized that another obvious explanation for each Defendant's unilateral decision not to participate in the closed-loop system was that each Defendant was comfortable with the status quo and saw no need to replace it with Evergreen's alternative model. Appellant's Brief at 13. *Twombly* expressly holds that an alleged desire to preserve the status quo is as

consistent with unilateral conduct as with agreement and, accordingly, does not support a Sherman Act claim. *See* 550 U.S. at 568 ("natural explanation" for defendants' behavior was that they were comfortable with and saw no reason to change status quo).

In fact, the express allegations of the SAC suggest several reasons (in addition to simple inertia) why a Defendant may have preferred the status quo. For example, some Defendants are alleged to have built well-established niches in products (like cups and egg cartons) other than the school lunch trays that were the centerpiece of Evergreen's business plan, and thus would have had to take on the risks and expense of manufacturing a different product if they were to fully embrace Evergreen's business method. JA0484; *see also* JA0502-03 (allegations of the barriers to entry). In addition, the SAC alleges that the Manufacturer Defendants used a system of year-end rebates and volume discounts to encourage customer loyalty. JA0491. Evergreen then alleges that because it would have been the exclusive "sole source" under its proposed "closed-loop" model, the Manufacturer Defendants would not have been able to maintain those programs. *Id.* A natural explanation for a Manufacturing Defendant's decision not to participate in the closed-loop system was the desire to retain its existing ability to use rebate and discount programs to drive sales. Moreover, Evergreen's boast that it would become the "sole source" supplier to the Manufacturer Defendants'

customers (JA0491), highlights another obvious reason each Defendant could have elected to stick with the status quo: it did not make business sense to abdicate a Defendant's customer relationships and contribute them to Evergreen's "sole source" system.[11]

As the District Court correctly noted, Evergreen's own allegations lead to yet another reason for a Manufacturer Defendant to have unilaterally decided not to fully participate in Evergreen's closed-loop system – the system would have precluded Defendants from developing and selling other profitable product lines. Order at 13; JA0491-92. The SAC concedes that the Manufacturer Defendants achieve substantial profits selling other "environmentally conscious" products made from paper, pulp, bamboo and biopolymer. JA0491-92. By Evergreen's own admission, each Manufacturer Defendant may have simply declined to participate in Evergreen's program because they wished independently to continue to pursue profitable sales of those other products. *Id*. Declining less profitable

[11] Evergreen asserts that its claimed role as an "innovator" provides circumstantial evidence supporting its conspiracy theory. Appellant's Brief at 38. However, it cites no court, nor can any precedent be found, that holds that allegations that the plaintiff is an innovator provides circumstantial evidence of a plausible conspiracy claim. Indeed, *Twombly* holds to the contrary. *See* 550 U.S. at 566-68.

business opportunities does not support an inference of conspiracy. *Twombly*, 550 U.S. at 568-69.[12, 13]

In short, Evergreen's allegations here closely resemble those found insufficient in *Twombly*. As in *Twombly*, the alleged conduct "viewed in light of common economic experience" does not "invest[] either the action or inaction alleged with a plausible suggestion of conspiracy." 550 U.S. at 565-66. The District Court properly applied common sense and judicial experience to Evergreen's allegations and correctly concluded that Evergreen failed to allege a plausible conspiracy claim.

[12] The fact that Evergreen's closed-loop system was not proprietary, *see* footnote 8, suggests yet another innocent reason the Manufacturer Defendants unilaterally may have declined to pay Evergreen to license it.

[13] The facts on which the Second Circuit relied in its decision to remand *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 162 (2nd Cir. 2012) are starkly different from the facts alleged by Evergreen. There, the court found that unlike the *Twombly* complaint, Anderson's proposed amended complaint did not rely solely on allegations of parallel conduct that were explicable as natural, unilateral reactions, but did, in fact, allege actual agreement -- identifying specific dates, executives, and statements that could plausibly be interpreted as such, and also alleged that all defendants "ceased, in virtual lock-step, to deal with Anderson." *Id*. at 187. Here, Evergreen has not alleged that Defendants acted in lock-step, nor has it alleged any specific facts to support the existence of an agreement.

(3) Evergreen's Other Purported Circumstantial Evidence Does Not "Plausibly" Suggest Conspiracy.

On appeal, Evergreen points to other allegations of circumstantial evidence as supportive of its conspiracy claim, but none plausibly suggests the existence of an agreement.

First, Evergreen claims that it has plausibly alleged a conspiracy because it has alleged that it was against Defendants' self-interest *not to adopt* Evergreen's business model. *See* Appellant's Brief at 44-46. Evergreen does not, in fact, allege that it was in Defendants' interest to do business with it – it merely alleges that its system would be "cost-neutral" to Defendants, scarcely a clarion call for participation. Appellant's Brief at 42. In any event, the mere assertion allegation that Defendants would have profited from doing business with Plaintiff does not plausibly suggest conspiracy. In *Twombly* itself, for example, the Supreme Court rejected the argument that the allegation that Defendants refrained from pursuing "attractive business opportunit[ies]" offered by the plaintiffs was sufficient to satisfy the "plausibility" standard. *Twombly*, 550 U.S. at 568-69 ("[F]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets.") (quoting P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 307d, at 155 (Supp. 2006)).

Second, Evergreen claims that it has plausibly alleged a conspiracy because it has alleged that Dolco was initially interested in working with Evergreen, but allegedly changed its mind after an alleged trade association meeting in 2005 or 2006 at which Pactiv allegedly criticized the efficacy of polystyrene recycling. Appellant's Brief at 43. Evergreen, however, does not allege that Dolco was present at the alleged "2005 or 2006" meeting, and it does not allege that Dolco necessarily would have bought into Evergreen's closed-loop method lock, stock, and barrel anyway, absent the alleged conspiracy. *See* JA0494 (alleging that Dolco's interest had been in either implementing closed-loop recycling or manufacturing products with recycled resin, or possibly both). In any event, the documents Evergreen filed with its Amended Complaint show that Dolco went on to fund Evergreen's operations under the 2007 Funding Agreement. JA0350-51. Similarly, its assertion that, if permitted to replead, it would allege that Genpak altered the terms on which it was prepared to deal with Evergreen "after March 2007" would not change the analysis. *See* Appellant's Brief at 4. Evergreen admits that Genpak was funding Evergreen's operations and buying its resin from July 2007 through 2008 – conduct that is directly contrary to the alleged conspiracy. *See* JA0350-51; JA0567-68.

Third, Evergreen's assertion that the alleged facts surrounding the ACC's denial of its business proposal for expansion of activities in California evidences a

concerted refusal to deal, (Appellant's Brief at 16; JA0495-96), is contradicted by the SAC and the documents attached as exhibits. In the first place, this was not a proposal for ACC or anyone else to do business with Evergreen in a closed-loop business model – ACC does not buy resin and it does not make any product. Rather, the "pitch" was to have the industry *invest* in Evergreen through its trade group, *i.e.*, bankroll its planned California operations. And the communication at issue concerned a request by Evergreen for a grant *from the ACC* and a denial of that request *by the ACC*. JA0511, JA0513. Indeed, Evergreen alleges that, having failed to generate any interest from the other Defendants, it "reached out *to the ACC* to validate its closed-loop program." JA0495 (emphasis added). The June 20, 2007 ACC response to Evergreen's invitation (JA0511) was a clear and unambiguous unilateral rejection of the Evergreen proposal by ACC. The letter was from the ACC alone. The text of the letter makes it plain that ACC is referring only to itself. It states that "upon detailed review and discussion, including an assessment of *our program budgets* and current investments in ongoing California pilot programs, we have decided to pursue other options at this time." JA0511 (emphasis added). *See, also, Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) ("Section 1 of the Sherman Act . . . reaches unreasonable restraints of trade effected by a 'contract, combination . . . or

conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.'").

Moreover, as the District Court observed, when a plaintiff invites industry action through a trade association, as Evergreen did here, it cannot claim that a response by the association constitutes a conspiracy of its members. Order at 18 n.20, citing *Tunica Web Adver. 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].").[14]

In any event, any claim that the ACC communications suggest a conspiracy not to adopt Evergreen's business method is belied by the fact that, one month later, Genpak and Dolco entered into the July 2007 Funding Agreement ("the 2007

[14] It is also well-settled that attendance at trade association meetings or membership in a trade association does not constitute evidence of conspiracy. *See Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 584 (1925); *In re Travel Agent Com'n Antitrust Litig.*, 583 F.3d 896, 910-11 (6th Cir. 2009) (attendance at trade association meetings not sufficient to allege a plausible conspiracy); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir. 2004) (membership in a trade association "will not automatically involve all members in [an antitrust] violation.").

Funding Agreement") pursuant to which they agreed to fund Evergreen's operations and buy its resin. JA 0350-51.[15]

Fourth, Evergreen relies on its allegation regarding the polystyrene industry's structure to support its conspiracy claim. Appellant's Brief at 38; JA0484. However, *Twombly* directly refutes this argument. In *Twombly*, consumers brought a Section 1 conspiracy suit against the regional exchange carriers – the so-called "Baby Bells" – who were the local monopolies which had been created in the 1984 break-up of AT&T. 550 U.S. at 549. Plaintiffs charged that the defendants had all conspired to "inhibit the growth of upstart" competitive local exchange carriers or CLECs. *Id.* at 550. Like Evergreen here, the *Twombly* plaintiffs alleged that the defendants shared the "common motivation" to thwart the CLECs because, if successful, the innovative CLECs would have disrupted the favorable status quo in which the defendants operated. *Id.* at 551. The Supreme Court found that the conduct alleged was equally compatible with independent,

[15] There is no allegation that Defendant Solo had any involvement in the alleged activities of ACC in May and June 2007. Paragraph 42 of the SAC, which discusses these activities, makes no mention of Solo and no representative of Solo is shown as a recipient of the documents attached as exhibits to the SAC. (And even as to those who were apparently copied on some of the correspondence, there is nothing to indicate that they did or said anything at all about it, let alone acted in combination or in any way unlawfully.)

Indeed, there are no allegations of circumstantial evidence connecting Solo to the alleged conspiracy. The only allegation relating to Solo asserts that its president told a customer that Solo employees advised him not to work with Evergreen. JA0497. This is wholly intra-firm, unilateral conduct.

rational business decisions: "nothing in the complaint intimates that the resistance to upstarts was anything more than the natural, unilateral reaction of each [defendant] intent on keeping its regional dominance. . . . [T]here is no reason to infer that the companies had agreed among themselves to do what was only natural any way. . . ." *Id.* at 566.[16]

Finally, Evergreen argues that the District Court failed to apply *Twombly* properly and did not appreciate distinctions between that case and this one. For example, Evergreen criticizes the District Court for supposedly considering "Defendants' own alternative explanations for their conduct in order to refute the inference of conspiracy." Appellant's Brief at 47. But it did nothing of the sort.

[16] Evergreen's reliance on *In re Text Messaging Antitrust Litigation* ("*Text Messaging*"), 630 F.3d 622 (7th Cir. 2010), and *In re Flat Glass Antitrust Litigation* ("*Flat Glass*"), 385 F.3d 850 (3d Cir. 2004) is misplaced. The complaint in *Text Messaging* alleged price fixing, not a refusal to adopt plaintiff's business model, and, importantly, the complaint alleged trade association meetings at which pricing information was exchanged directly among the defendants. Moreover, the *Text Messaging* defendants were alleged to have held other meetings the purpose of which was "to substitute 'co-opetition' for competition." *See id*. at 628. Further, the *Text Messaging* complaint alleged price increases in the face of steeply falling costs and that "all at once the defendants changed their pricing structure . . . and then simultaneously jacked up their prices by a third." *Id*. According to the court, the change in industry pricing was so rapid, "it could not have been accomplished without agreement. . . ." *Id*.

Flat Glass clearly states that industry structure does not supply a "plus factor" sufficient to establish conspiracy. There, the plaintiffs had evidence of reduced demand and excess capacity, price increases not correlated with costs or supply and demand conditions, numerous lock step price increases, and a competitor of the defendant admitting to the Department of Justice that the industry had agreed to fix prices. *See Flat Glass*, 385 F.3d at 360-69. Evergreen's SAC contains no allegations comparable to those in *Text Messaging* or *Flat Glass*.

The Court simply relied on Evergreen's own factual allegations – allegations which revealed obvious reasons why Evergreen's proposed business method would be unattractive to Defendants – to assess the plausibility of Evergreen's conspiracy claim. Order at 15 n.17. The District Court's approach was exactly the approach followed by the Supreme Court in *Twombly* and *Iqbal*, in which the Court reviewed the "obvious alternative explanation" arising from the plaintiffs' allegations in those two cases to assess the plausibility of the plaintiffs' claims. *Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567). *See also Jacobs*, 626 F.3d at 1340-43 (alternative explanations flowing from plaintiff's allegations render conspiracy implausible).

Evergreen's efforts to distinguish its SAC from the complaint found insufficient in *Twombly* are similarly unavailing. Appellant's Brief at 49-53. Evergreen incorrectly asserts that the *Twombly* complaint alleged that the defendants' entry into new markets in that case would not be "a sustainable economic model." Appellant's Brief at 50. To the contrary, the quoted language was from a statement by an executive of one defendant that was not alleged in the complaint *Twombly*, 550 U.S. at 569 n.13. But even if it had been alleged, this statement is akin to Pactiv's supposed statement that recycling polystyrene products is not a viable option (JA0494) – as in *Twombly*, hardly an admission that the plaintiff's proposal had obvious appeal and thus would have been adopted

absent a conspiracy. Evergeen also argues that the *Twombly* defendants faced "long odds" and "high costs" costs if they entered each other's markets, which they were alleged to have conspired not to do. Appellant's Brief at 50. But Evergreen alleges the same thing in its SAC with respect to entering the markets in issue here. The SAC alleges that each Manufacturer Defendant was dominant in its particular market and that the market is characterized by high entry barriers, including high capital costs, entrenched market participants and regulatory barriers. JA0484, JA0502-03.

Evergreen asserts that its complaint differs from the complaint in *Twombly* because Evergreen alleges that if one Manufacturer Defendant entered the market of another it would "instantly disrupt the status quo because the demand for cost-effective recycled product . . . was so great." Appellant's Brief at 51. But the Supreme Court considered and rejected as insufficient a comparable allegation in the *Twombly* complaint. There, the complaint alleged that if one of the defendants had entered another defendant's territory, it would have revealed "the degree to which competitive entry . . . would have been successful." *See Twombly*, 550 U.S. at 566. The Supreme Court noted that this allegation "fail[ed] to answer the point that there was just no need for joint encouragement" to resist competition, because each defendant would have the natural desire to resist competition. *See id.*

Evergreen also argues that the "key distinction" between its complaint and *Twombly*'s is that Evergreen alleged "that status quo was preserved based on retaliation," citing Appellant's Brief at 51-52 (citing JA0491, JA0496). But these allegations are purely conclusory. SAC Paragraph 30 alleges only "[a]ccordingly, fearing retaliation (*i.e.*, increased competition) from its competitors, or worse yet, potential new entrants, Defendants agreed in concert to refuse to deal with Evergreen . . . ." JA0491. There is no factual content to this "retaliation" allegation. The same is true for SAC Paragraph 44, which alleges only that "Genpak feared that Pactiv would target Genpak's customers. . . ." JA0496.

In short, the parallels between Evergreen's complaint and the complaint in *Twombly* far exceed any superficial differences and the holding in *Twombly* dictates the outcome here. The District Court correctly concluded that Evergreen's allegations fail to allege a plausible conspiracy based on circumstantial evidence.

3. The District Court Appropriately Considered Evergreen's Admissions Regarding its Relationships With the Various Defendants in Assessing the Plausibility of Evergreen's Conspiracy Allegations.

Evergreen argues that the District Court erred because it "held" that: (1) "because the Defendants dealt with Evergreen – even if these dealings were on unfavorable terms – the SAC did not, and could not, allege a boycott"; and (2) "a boycott of a supplier by a group of competitors can have no anticompetitive effect." Appellant's Brief at 53. This misrepresents the District Court's

Memorandum and Order, which contains no such holdings. Rather, the District Court simply reviewed Evergreen's own allegations regarding its dealings with each Defendant and the parties' "differing roles in the polystyrene business" and noted that these allegations "weigh against the plausibility" of Evergreen's conspiracy claim. Order at 18. Thus, the District Court faithfully followed the dictates of *Twombly* and *Iqbal*, by making a "context specific" assessment of Evergreen's allegations, "draw[ing] on its judicial experience and common sense." *See Iqbal*, 556 U.S. at 679.

a) Individual Defendants Continued To Deal with Evergreen On A Favorable Basis After The Alleged Conspiracy was Supposedly Formed, Weighing Against The Plausibility Of Evergreen's Conspiracy Claim.

As the District Court pointed out, the SAC is replete with allegations of individual defendants continuing to favorably deal with Evergreen after "the conspiracy was supposedly hatched at the 2005 or 2006 PFPG meeting." Order at 16. These allegations are detailed above at pages 27-29. The District Court simply noted that these allegations of favorable dealings are inconsistent with Evergreen's claim of conspiracy and are therefore one factor to be considered in assessing the plausibility of Evergreen's claim.

Evergreen misleadingly asserts that the District Court found the above allegations of Defendants' dealings with Evergreen "of greatest significance" in

dismissing the SAC. Appellant's Brief at 54. However, Evergreen lifts this three-word phrase from that portion of the District Court's Memorandum and Order which distinguishes several cases relied upon by Evergreen. The District Court merely observed that "of greatest significance" in distinguishing the SAC "from the complaints in each of the cited cases" is that "defendants [here] did not act consistently with any alleged agreement to boycott Evergreen." Order at 15-16.

The District Court's observation is correct. Evergreen's conspiracy allegations are a far cry from the conspiracy allegations in the cases upon which it relies. For example, the complaint in *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 884 (N.D. Ill. 2009), alleges price fixing, not a group boycott. There, the plaintiffs alleged that the defendant steel producers had conspired to reduce production in order to raise prices. *Id*. at 884. According to the allegations, certain defendants significantly curtailed their steel output "*[i]mmediately* following [a] series of executive-level communications concerning the need to restrict industry output. . . ." *Id.* at 885 (emphasis supplied). Within two months "all Defendants are alleged to have implemented massive and unprecedented production cuts." *Id.* at 886. Because of the sharp change in the defendants' behavior after the conspiracy was allegedly formed, consistent with the alleged

object of the conspiracy, the court determined that the plausibility requirement had been met. *Id.* at 900.[17]

The District Court also appropriately distinguished the one group boycott case principally relied on by Evergreen, *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 454-56 (6th Cir. 2011) ("*Watson*"). There, the plaintiff alleged an express agreement followed by a refusal to sell to the plaintiff, consistent with the alleged agreement. *See id*. at 454-56. As the District Court stated, the allegations in Evergreen's SAC tell a different story. Here, the SAC alleges that after the conspiracy was supposedly formed in 2005 or 2006, a number of Defendants engaged in a variety of conduct that is inconsistent with the object of the alleged conspiracy, i.e., driving Evergreen out of the market. It was therefore appropriate for the District Court to consider these inconsistent allegations as a factor in assessing the plausibility of Evergreen's claim.

[17] The other price fixing cases cited by Evergreen below, and distinguished by the District Court, are similarly inapposite. In each instance, the alleged conduct after the conspiracy was allegedly formed was consistent with the claimed object of the conspiracy. For example, *In re Delta/Airtran Baggage Fee Antitrust Litig.* involved allegations suggesting that shortly after the purported price fixing agreement was entered into by the defendants, "AirTran virtually overnight . . . cut capacity by eight percent." *See* 733 F. Supp. 2d 1348, 1355, 1361-62 (N.D. Ga. 2010). Similarly, complaint in *In re Flash Memory Antitrust Litig.* ("*In re Flash Memory*") alleged specific instances of reduced production following the alleged conspiratorial meetings. *See* 643 F. Supp. 2d 1133, 1144 (N.D. Cal. 2009). Many of the defendants in *In re Flash Memory* had also previously pled guilty to price fixing after a Department of Justice investigation, making this case all the more inapposite. *See id.* at 1139, 1142.

Evergreen now relies on the Supreme Court's 1959 decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), for the proposition that a Sherman Act violation is adequately pled where the defendants' only dealings with the plaintiff were "on highly unfavorable terms." Appellant's Brief at 55. However, Evergreen's allegations regarding Defendants' dealings with it show favorable, not unfavorable dealings. Moreover, the holding in *Klor's* has no application to the issues on this appeal. There, the defendants *conceded* the existence of a conspiracy to refuse to sell to the plaintiff. *See Klor's Inc.*, 359 U.S. at 209. The only issue presented to the Supreme Court was whether a group boycott of one customer can have an anticompetitive effect. *Id*. at 213. Thus, *Klor's*, decided 48 years before *Twombly*, never considered the plausibility of the conspiracy allegations in that case, the issue raised in Evergreen's appeal.

Evergreen's reliance on *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 162 (2d Cir. 2012), is equally misplaced. There, the plaintiff's proposed amended complaint contained detailed allegations of a direct agreement among the defendants, followed by "lock-step" conduct by all defendants consistent with the alleged agreement. *See id.* at 187-89. It is against the backdrop of these allegations that the court held that the defendants' differing *initial* reactions to Anderson's attempted surcharge did not render implausible the conspiracy alleged

there. Evergreen misleadingly ends its quote from *Anderson News, LLC* (Appellant's Brief at 56) before the court's key sentence:

> The [district] court's reliance on the variety of defendants' original reactions failed to take into account that, notwithstanding their responses initially, *some two weeks later every defendant publisher and distributor acted, within a span of three business days, to cut Anderson off*.

680 F.3d at 191 (emphasis supplied). Here, unlike in *Anderson News, LLC*, there are no factual allegations of numerous meetings and other communications among the defendants followed by a "lock-step" refusal to deal. Instead, Evergreen alleges one trade association meeting in 2005 or 2006 followed by differing and favorable dealings between various defendants and Evergreen, which conduct is inconsistent with the claimed object of the alleged conspiracy.

Unlike the complaints in the cases relied on by Evergreen, the complaint found insufficient in *Burtch*, is directly comparable to the SAC. In that case, like here, the defendants differed in their dealings with the plaintiff, some treating the plaintiff favorably. *See Burtch*, 662 F.3d at 228. Given this varying conduct, the Third Circuit held that "[t]hese allegations fall far short of demonstrating parallel behavior by Appellees because [they] were choosing to decline, decrease, and even increase credit to [plaintiff] at different time periods." *Id.* The very same fact pattern is alleged here. Some of the Defendants bought Evergreen's resin, others tested the resin, and others funded Evergreen's facilities or encouraged investment

in Evergreen. Such variation of conduct – including *positive* interactions – is properly considered in assessing the plausibility of Evergreen's conspiracy claim.

b) Evergreen's Role As A Potential Supplier to Defendants, Not a Competitor, Is An Appropriate Plausibility Factor.

Evergreen's allegations make it clear that it was a producer of recycled polystyrene resin. The Manufacturer Defendants did not produce resin; they purchased resin to produce polystyrene products. JA0488. Evergreen did not produce polystyrene products. Evergreen admits that it needed one of the Manufacturer Defendants to commit its production capacity to produce product from Evergreen's resin. JA0489. Based on Evergreen's allegations, the District Court stated only that "the parties differing roles in the polystyrene business weigh against the plausibility" of Evergreen's boycott claim. Order at 18. The District Court did not, as Evergreen claims, hold that "a supplier cannot state a concerted refusal to deal against competing firms that are vertically situated to it." Appellant's Brief at 59.[18]

On appeal, Evergreen attempts to argue that it was a horizontal competitor of the Defendants, asserting that the "SAC alleges that Evergreen was a 'potential

[18] Evergreen also miscites page 18 of the District Court's Memorandum and Order for the proposition that the District Court "rul[ed] that the alleged agreement was *not even covered by the antitrust laws*." (Emphasis in original.) However, the District Court made no such "ruling," either on page 18 or anywhere else in its Memorandum and Order.

new entrant[]' into Defendants' market for polystyrene products." Appellant's Brief at 59 (citing JA0491).[19] Evergreen misrepresents its own allegations. The "potential new entrants" language quoted by Evergreen appears in Paragraph 30 of the SAC. JA0491. That paragraph clearly alleges that one or more of the *Defendants* could use Evergreen's resin to commence the production of the type of polystyrene products produced by another Defendant (*e.g.*, Dolco, which makes polystyrene egg cartons, potentially commencing the production of polystyrene trays). JA0491. Nowhere in the SAC is there an allegation that Evergreen was, or planned to be, a manufacturer of polystyrene products, as opposed to a producer and seller of recycled resin.[20]

The District Court's consideration of the vertical nature of the relationship between Evergreen and the Defendants, as one factor in assessing plausibility, is supported by decisions in this and other Circuits. For example, in *Mendez Internet Management Services, Inc. v. Banco Santander de Puerto Rico*, Civil No. 08-2140 (JAF), 2009 WL 1392189, at *1-2 (D. Puerto Rico May 15, 2009) *aff'd* 621 F.3d 10 (1st Cir. 2010), the plaintiffs, who were engaged in trading Iraqi dinars, alleged

[19] At another point in Evergreen's brief it admits that it was a potential supplier, not a competitor of Defendants: "Evergreen was not a rival so much as a corollary plug-in supplier . . . ." Appellant's Brief at 38.

[20] In addition, even if this single conclusory reference to "potential new entrants" did refer to Evergreen, which it does not, it is precisely the type of conclusory allegation that *Twombly* and *Iqbal* instruct should be disregarded. *Iqbal*, 556 U.S. at 678.

that the defendant financial institutions conspired to refuse to deal with them in violation of the Sherman Act. In dismissing the complaint, the court found that because the defendants did not trade in dinars and the plaintiffs did not offer traditional banking services, "Plaintiffs' allegations [were] inherently implausible, since Defendants do not compete with Plaintiffs." *See id.* at *5.[21] *See also Consol. Metal Prods, Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 295 (5th Cir. 1988) (buyers have no motive to drive a potential supplier from the market).[22]

The District Court properly considered Evergreen's allegations of the variety of dealings between the Defendants and Evergreen after the conspiracy was allegedly formed, and the allegations showing that Evergreen did not compete with

[21] Evergreen attempts to distinguish *Mendez Internet Management Services, Inc.* by claiming that the Defendants here have an incentive to conspire. Appellant's Brief at 61 (citing JA0491-92). However, this assertion is based on conclusory allegations. No factual allegations support such an assertion and Evergreen makes no claim that any such facts could be alleged.

[22] Evergreen points out that *Consolidated Metal Products, Inc.* was decided on summary judgment. Appellant's Brief at 61. However, the procedural posture of the case does not undercut its common sense observation. Evergreen also criticizes the District Court's citation to *Eastern Food Services, Inc. v. Pontifical Catholic Services Association, Inc.*, 357 F.3d 1 (1st Cir. 2004). But the District Court cited that case simply as one example of an antitrust complaint found to be implausible where the alleged conspiracy included at least some defendants operating at a different level of the market from the plaintiff.

the defendants, as one factor in assessing the plausibility of Evergreen's conspiracy claim.[23]

4. The Chapter 93A Claim Correctly Was Dismissed.

Count III of the Amended Complaint asserted a claim under Mass. Gen. Laws ch. 93A, § 11 ("Section 11") against all Defendants. JA506-07. The District Court dismissed this claim. Order at 19-20. The dismissal was correct, first and foremost because this claim relies on the deficient Sherman Act count as its predicate conduct but also because Evergreen has waived its arguments on appeal and failed to plead the required Massachusetts nexus.

a) Evergreen Has Waived Its Argument On This Issue.

Evergreen's Chapter 93A "argument" consumes all of two sentences at page 27 of its brief. The first sentence simply quotes from portions of Section 11. The second sentence then makes the conclusory and unsupported statement that the Chapter 93A claim "presents essentially the same issues as those framed by the federal antitrust laws." Appellant's Brief at 27. Evergreen does not claim, and thus has abandoned, any independent basis for a violation of Chapter 93A. Specifically, although Evergreen notes that the District Court found its "Chapter

[23] Evergreen curiously cites two cases in support of its argument that suppliers have standing to sue for antitrust violations. Appellant's Brief at 59 (citing *Amarel v. Connell*, 102 F.3d 1494 (9th Cir. 1996); *Asahi Glass Co., Ltd. v. Pentech Pharma., Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003)). Defendants did not, however, challenge Evergreen's standing and no questions of standing are in issue in this appeal.

93A claims about fraudulent statements fell outside of the four year statute of limitations." Appellant's Brief at 23, Order at 19 n.23. Evergreen does not challenge that holding. The issue is waived.

Both for its abandoned claims and even as to any claim based upon its antitrust claim, Evergreen's passing reference is not argument. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Zannino* ("*Zannino*"), 895 F.2d 1, 17 (1st Cir. 1990) (overruled on other grounds by *Idaho v. Wright*, 497 U.S. 805 (1990)). Thus:

> It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. . . . [A] litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace."

Id. (internal citations omitted). This is settled law. *Gilca v. Holder*, 680 F.3d 109, 118 (1st Cir. 2012); *Harriman v. Hancock County*, 627 F.3d 22, 28 (1st Cir. 2010).

PowerComm, LLC v. Holyoke Gas & Electric Department, 657 F.3d 31 (1st Cir. 2011) applied this rule to a Chapter 93A claim. Citing *Zannino*, this Court stated: "PowerComm's remaining claims do not require separate discussion. PowerComm advanced . . . a claim that HG&E engaged in unfair or deceptive acts or practices under [Chapter 93A], but both are presented in wholly conclusory

terms on appeal and are therefore forfeited." *PowerComm, LLC*, 657 F.3d at 38. Evergreen's Chapter 93A claim similarly is forfeited.

b) The Alleged Conduct Did Not Occur Primarily and Substantially in Massachusetts.

Although the District Court plainly was correct to dismiss Evergreen's 93A claim on grounds that Evergreen had failed to plead its predicate Sherman Act conspiracy (Order at 19), this Court "may affirm the district court's order of dismissal on any ground made manifest by the record." *Edlow v. RBW, LLC*, 688 F.3d 26, 31 (1st Cir. 2012) (internal citations and quotations omitted). This applies to Chapter 93A claims. *See Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 13 (1st Cir. 1994).

The "actions and transactions" on which Evergreen's Chapter 93A claim allegedly are based did not occur "primarily and substantially" within Massachusetts and thus are not within the scope of Section 11. This issue was developed in the District Court[24] and may be resolved on a motion to dismiss.[25]

[24] Defendants argued this issue below (JA0528-29, JA0546-50, JA0564-65, JA0582-83, JA0765-67, JA0784-87, JA0804), as did Evergreen (JA0671-74, 0689-90, 0719) and it was addressed at oral argument. JA0834-38 and JA0856-57.

[25] *See Market Masters-Legal v. Parker Waichman Alonso LLP*, C.A. No. 10-cv-40115-MAP, 2011 WL 196929, at *3 (D. Mass. Jan. 20, 2011) (motion granted); *Weber v. Sanborn*, 502 F. Supp. 2d 197, 199 (D. Mass. 2007) (motion granted); *NEGB, LLC v. Weinstein Co. Holdings*, LLC, 490 F. Supp. 2d 89, 97 n.4 (D. Mass. 2007) (other issues prevented court from reaching a "forceful argument that no claim under Chapter 93A will lie").

Evergreen's bare assertion that actions occurred primarily and substantially in Massachusetts, (JA0482, JA0507) does not satisfy Section 11. Such assertions are the mere "formulaic recitation of the elements of a cause of action" that are insufficient under *Twombly*. *See* 550 U.S. at 555.

Fishman Transducers, Inc. v. Paul ("*Fishman*"), 684 F.3d 187 (1st Cir. 2012), affirmed dismissal of a Chapter 93A claim for failure to meet this requirement. In *Fishman*, as here, plaintiff argued that it met the requirement because it was based in Massachusetts. The *Fishman* court rejected that argument. "That a Massachusetts company was arguably deprived of sales may be relevant... but here the direct impact of the deception—to the extent it occurred—was on customers all over the country, few of whom were in Massachusetts." *Fishman*, 684 F.3d at 197 (internal citations omitted). *Fishman* explained further: "Where wrongdoing is not focused on Massachusetts but has relevant and substantial impact across the country, the "primarily" requirement of section 11 cannot be satisfied." *Id*. (emphasis supplied).

Evergreen has not alleged facts that plausibly support any finding that the "center of gravity" of events that purportedly violate Chapter 93A were "primarily and substantially" in Massachusetts. The 75-paragraph, 29-page SAC (JA0480-0513), particularly in light of the 221-paragraph, 39-page FAC, with over 250 pages of attachments (JA0115-423), state Evergreen's claims in detail; absent is

any substantive allegation of timely "actions and transactions . . . occurr[ing] primarily and substantially" in Massachusetts. Rather, the focus of its allegations are national, are in the Southeast, where it had a plant, or in California, where it sought to expand. JA0488-89, JA0494-0500. There is no dominant event in Massachusetts. "[W]hen 'virtually all the conduct that can be said to be unfair or deceptive' occurs outside the Commonwealth, there can be no Chapter 93A liability." *Kenda Corp., Inc. v. Pot O'Gold Money Leagues, Inc.*, 329 F.3d 216, 236 (1st Cir. 2003) (quoting *Kuwaiti Danish Computer Co. v. Digital Equip. Corp.*, 438 Mass. 459, 475 (2003)).

Pressed in the District Court to show some Massachusetts-related allegation, Evergreen (JA0673) pointed to its being Massachusetts-based (inadequate for the reasons stated above), and to paragraphs 33 and 47 of the SAC. JA0673, JA0492, JA0497. Paragraph 33 (JA0492) concerns events in 2002, nearly five years outside the applicable statute of limitations. *See* Mass. Gen. Laws ch. 260, § 5A.

The other reference is to an alleged act by Solo. JA0497 (SAC ¶ 47). However, the allegation is no more than an internal Solo decision not to do business with Evergreen, which does not violate Chapter 93A. Also, the alleged statement by Solo was made to a customer, not Evergreen, by the president of Solo, a company that Evergreen alleges is based in Illinois. JA0483 (SAC ¶ 13). There is no allegation whatsoever that the purported "actions and transactions" of

Solo ever took place in Massachusetts, nor any allegation that any other defendant knew of this decision.

At oral argument, after being prompted to address Chapter 93A, counsel for Evergreen effectively conceded the inadequacy of the claim on the present record. JA0857. Evergreen relies on: (1) a time-barred event, (2) an event that did not take place in Massachusetts and did not violate Chapter 93A and (3) its mere presence in Massachusetts to confect a Chapter 93A claim. This does not suffice. As its concession at oral argument makes clear, Evergreen simply is hoping that "something" turns up during extended and open-ended discovery.

Evergreen made no attempt in the District Court to supplement its Chapter 93A allegations. Its arguments concerning amendment do not reference the Chapter 93A claim. The District Court correctly dismissed the Chapter 93A claim and that dismissal should be affirmed.

5. The Claims Against Genpak and the ACC Also Fail For Reasons Specific to Those Appellees.

a) Evergreen's Claims Against Genpak Are Barred by its Release of Genpak.

Evergreen expressly pleads in the SAC that the 2008 Agreement (JA0567-68) "release[d] Genpak of any future liability." JA0497 (SAC at ¶ 46). Judge Stearns appropriately dismissed Evergreen's c. 93A claims against Genpak, *inter alia*, based on that release, holding that the 2008 Agreement "between Genpak and

Evergreen released Genpak from any liability." Order at 19 n.7. Although this passage in Judge Stearns' ruling only referred to Evergreen's c. 93A claims, Genpak respectfully submits that Judge Stearns' ruling should be affirmed with respect to Evergreen's c. 93A claims and that the same reasoning also requires dismissal of Evergreen's Sherman Act claims.

First, on appeal, Evergreen does not challenge Judge Stearns' ruling with respect to Genpak. Evergreen has, accordingly, waived any challenge to the ruling. *See, e.g., Morales-Tanon v. Puerto Rico Elec. Power Auth.*, 524 F.3d 15, 19 (1st Cir. 2008) (holding that the issue was waived where appellant did "not provide any legal argument or case citations on appeal as to why the district court was wrong."); *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997) (superseded by statute on other grounds) ("We have steadfastly deemed waived issues raised on appeal in a perfunctory manner, not accompanied by developed argumentation."); *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988) ("[A] litigant has an obligation 'to spell out its arguments squarely and distinctly' . . . or else forever hold its peace." (quoting *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988))).

Second, Judge Stearns' ruling on the release was manifestly correct. Massachusetts state and federal courts regularly dismiss actions at the pleading stage when it is evident (as here) that the plaintiff has released its claims or

otherwise agreed that it cannot bring suit. *Citibank Global Markets, Inc. v. Santana*, 573 F.3d 17, 23, 30 (1st Cir. 2009) (affirming dismissal of counterclaims pursuant to Rule 12(b)(6) on basis of release); *Rivera-Olmo v. State Ins. Fund Corp.*, 250 Fed. Appx. 365, 365-66 (1st Cir. 2007) (affirming dismissal of claims on 12(b)(6) motion and holding that claims were barred by settlement agreement's general release of all claims); *Hogan v. E. Enters./Boston Gas*, 165 F. Supp. 2d 55, 57-58 (D. Mass. 2001) (granting motion to dismiss employment action on basis of release); *Dorn v. Astra USA*, 975 F. Supp. 388, 390-93 (D. Mass. 1997) (granting motion to dismiss on basis of release); *Karcher v. Burbank*, 303 Mass. 303, 307 (1939) (dismissing action on pleadings based on covenant not to sue). Evergreen admits that its claims against Genpak are directly barred by the 2008 Agreement and they should, accordingly, be dismissed.[26]

[26] Language in the SAC suggested that Evergreen may have intended to argue might have argued that the 2008 Agreement was obtained "by economic duress" or fraud. In the briefing below, however, Genpak demonstrated that, as a matter of law, the SAC demonstrated that Evergreen had ratified the 2008 Agreement and, in any event, the SAC did not adequately plead duress or fraud. JA0553-71, JA0770-78. Evergreen did not take issue with Genpak on either point in the briefing below. Evergreen's primary argument below was that the actual wording of the 2008 Agreement was ambiguous, to which Genpak responded by demonstrating that no ambiguity existed and that the express admissions of the SAC resolved any possible ambiguity. JA0770-73. Evergreen does not raise any of these issues on this appeal.

b) Evergreen's c. 93A Claim Against Genpak Was Properly Dismissed.

In addition to finding that Evergreen had released Genpak, Judge Stearns dismissed Evergreen's c. 93A claims against Genpak on the following alternative grounds: (i) the sole allegation against Genpak relating to Massachusetts (the assertion that "in 2002" Genpak declined to work with Evergreen on a Boston Public Schools pilot program which Evergreen alleges nonetheless proved to be highly successful, (Appellant's Brief at 11-12; JA0492) occurred well beyond c. 93A's four-year statute of limitations, Mass. Gen. Laws ch. 260, § 5A; (ii) any claim arising from Genpak's alleged sale of black trays to the Pasco County Florida School System fails to satisfy c. 93A's jurisdictional requirement that the alleged conduct occurred "primarily and substantially" in the Commonwealth; and (iii) Genpak's alleged sale of black trays in Florida did not violate any duty Genpak could have owed Evergreen or otherwise come "within at least the penumbra of some common-law, statutory or other established concept of unfairness" as required by c. 93A. *See Lambert v. Fleet Nat'l Bank*, 449 Mass. 119, 126-27 (2007) (quoting *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. 672, 679 (1986)). Order at 19 n.23. Evergreen does not challenge any of these rulings on appeal and, in any event, each was manifestly correct and provides additional bases for affirming dismissal of the claims against Genpak.

c) Evergreen Cannot Allege Plausibly That the ACC Acted As An Independent Entity to Participate in the Purported Group Boycott.

Evergreen argues on appeal that this case involves a group boycott "among the five leading manufacturers of polystyrene food service products and their trade association." *See* Appellant's Brief at 24. This bald assertion notwithstanding, Evergreen has failed at every step of these proceedings to allege plausibly that the ACC – the "trade association" in question – participated independently in the purported boycott or that it would have had the motive or means to do so.

In the first instance, it is misleading and incorrect for Evergreen to assert that trade associations are "routinely treated as continuing conspiracies of their members." *See id.*, at p. 38. To the contrary, the law is clear that a trade association is not rendered a "walking conspiracy" for purposes of the Sherman Act simply by virtue of the fact that its membership is comprised of competitors within an industry. *See, e.g., Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) ("[C]oncerted action does not exist every time a trade association member speaks or acts."); *Moore v. Boating Indus. Ass'ns*, 819 F.2d 693, 712 (7th Cir. 1987) ("[A] trade association is not always and at all times 'involved in concerted action,' either 'by its nature' or otherwise."). Rather, trade associations are subject to antitrust liability only where a plaintiff can allege plausibly that the trade association acted as an independent entity to participate in

the purported conspiracy. *See, e.g., Alvord-Polk, Inc.*, 37 F.3d at 1007 (holding that a trade association "can only be held liable for concerted action if it acted as an entity."); *Jung v. Ass'n of Am. Medical Colleges*, 300 F. Supp. 2d 119, 165 (D.D.C. 2004) ("[T]he Court will not impute the activities of either organization's members to the organization itself absent allegations that the entity participated in the conspiracy.") Active participation by the ACC is precisely what Evergreen has not and cannot allege plausibly in this lawsuit.[27]

(1) The Record is Devoid of Any Evidence That The ACC Participated in the Group Boycott.

Tellingly, the ACC is not mentioned by name in the legal argument sections of Evergreen's opening brief. Rather, Evergreen seems to imply on appeal that the ACC is somehow culpable under antitrust law because other defendants used ACC meetings as a forum to communicate with each other in furtherance of the alleged group boycott. Whatever the merits of this argument with regard to the Manufacturer Defendants, it is plainly insufficient to establish antitrust liability against the ACC where, as here, there is no evidence or allegation in the record that the ACC or its representatives themselves participated in these purported discussions with the other defendants.

[27] In the District Court, Evergreen maintained that the ACC's "mere acquiescence" to the alleged group boycott could be actionable. *See* JA0751-52. Evergreen does not press this argument on appeal, and has therefore waived any suggestion that acquiescence, as opposed to active participation, can render a trade association liable for antitrust violations.

Nor does Evergreen's passing reference to the ACC's role in rejecting an Evergreen business proposal save its antitrust claim from dismissal. In the fact section of its opening brief, Evergreen implies that evidence of a group boycott can be inferred from the rejection of what was, in essence, a request for the ACC to fund Evergreen's proposed California recycling site. *See* Appellant's Brief at 16. These allegations mischaracterize the actual content of this rejection, and are insufficient to establish antitrust liability in any event.

In the first instance, it is plain from the face of the correspondence referenced by Evergreen that the ACC was rejecting the California proposal unilaterally. The May 14, 2007 email correspondence between Mike Levy and Evergreen stated that the PFPG would distribute Evergreen's California proposal to its members, facilitate consideration of that proposal, and then determine what resources PFPG had available in its budget to help support Evergreen's proposal. JA0495. Consistent with this promise, Levy then responded to the Evergreen proposal in a June 20, 2007 letter – written on ACC/PFPG letterhead – in which he informed Evergreen that after an "assessment of our program budget and current investments in ongoing California pilot programs, we have decided to pursue other options at this time." JA 0495-96 (emphasis supplied). The June 20, 2007 letter to Evergreen was authored by Levy alone on behalf of the ACC/PFPG, and was not signed by any of the other defendants. *See id.* As such, this correspondence

conveyed the ACC's unilateral decision to reject Evergreen's California proposal in a manner that did not preclude any of the ACC's individual members from pursuing that proposal on their own.[28] This unilateral action on the part of the ACC is not actionable under antitrust law. *See, e.g.*, *Copperweld Corp.*, 467 U.S. at 768 (holding that antitrust law "does not reach conduct that is 'wholly unilateral.'")[29]

(2) The ACC Lacked the Motive and Means to Participate Actively in the Alleged Group Boycott.

Not only has Evergreen failed on appeal to identify any direct or circumstantial evidence of the ACC's participation in the alleged group boycott, but it has also failed to offer any plausible explanation as to why the ACC would have been motivated to participate in such a boycott or how it could have participated as a practical matter if it were so inclined. Indeed, Evergreen's own allegations make clear that it was the refusal of the Manufacturer Defendants to partner with Evergreen that purportedly doomed Evergreen's business model, because "only these Defendants have the production capacity to meet the demands of the bulk consumers of polystyrene products required by the [Evergreen business

[28] In fact, as noted by the District Court, at least some of the Manufacturer Defendants subsequently agreed to purchase resin from Evergreen and fund another Evergreen venture in Georgia. *See* Order at 7.

[29] Even if the ACC's rejection could be construed as a collective decision, it still would not be legitimate evidence of anticompetitive behavior for the reasons stated, *supra*, at pp. 37-38.

model]." *See* JA0489 (emphasis supplied). *See also* Appellant's Brief at 56 ("Here, the key parallel conduct allegation is that Defendants did not adopt the closed-loop model."). In stark contrast, the ACC had no production capacity to offer Evergreen, had no products to sell, could not have partnered with Evergreen even if it wanted to, was not in competition with Evergreen, and was not in a position to be harmed by Evergreen's entry into the market.[30] In these circumstances, Evergreen's assertion that the ACC harbored an anticompetitive animus that led it to boycott Evergreen is pure conjecture and is unsupported by record before the Court.

d) Evergreen Does Not Plausibly Allege That Dolco Conspired To Boycott Evergreen, Or Its Recycling Concept.

Evergreen's closed-loop recycling business model was premised on the sale of polystyrene foam trays and related products to large public school systems and institutional buyers. JA0481, JA0487-89 (SAC ¶¶ 2, 23-27). Evergreen acknowledges that Dolco manufactures and sells polystyrene egg cartons, not trays or other products to schools and institutional buyers. JA0484 **(**SAC ¶ 17). In other words, independent of and prior to any contact with Evergreen, Dolco (like Dart and Solo, which make cups, not trays) made the decision not to sell the very

[30] *See* Order at 18 ("The ACC and the PFPG, as industry groups, did not engage in competitive market activities at all.")

products necessary to participate in the closed-loop recycle business systems envisioned by Evergreen.

Evergreen attempts to make much of its allegation that a Dolco employee, upon initially learning of Evergreen's recycling concept, expressed interest. JA0490 (SAC ¶ 28). Evergreen argues to this Court that Dolco then changed its position after a meeting of the Defendants. Appellant's Brief at 15. But Evergreen's argument is not supported by its actual pleadings.

Far from alleging a plausible basis to find that Dolco changed its position, Evergreen's pleadings acknowledge that Dolco, in fact, continued to support Evergreen's business throughout, ultimately signing an agreement to both buy Evergreen's resin and to help finance its business growth. JA0139, JA0350-0351 (FAC ¶ 134 and Exhibit L). The District Court properly held Evergreen to this factual admission rejecting its effort to recharacterize Dolco's actions in its legal arguments in opposition to the Motion to Dismiss. Order at 12, 16. As Evergreen explains in its SAC, the sale of excess resin to other polystyrene product manufacturers was an element of its original business plan. JA0488, JA0489 (SAC ¶¶ 24, 27). Moreover, Evergreen does not allege that Dolco participated in the discussion during a trade association meeting in which one or more of the Defendants allegedly made negative comments concerning polystyrene recycling. JA0494 (SAC ¶ 39). Nor does Evergreen allege that Dolco was made aware of

those remarks or ever communicated an agreement, or even acceptance, of that alleged position.

Presumably because it was unable to convince any manufacturer of the products on which its closed-loop recycling system was premised to pay its required royalty and other fee on top of the cost of its resin, Evergreen was not satisfied with Dolco providing all the support for Evergreen that was consistent with its business model. Evergreen hoped Dolco would expand its product offerings and distribution systems to take on the manufacture and sale of polystyrene trays and public schools and institutional cafeterias.

The business proposition Dolco faced was to change its operations to take on entrenched competitors with over 70% market share (JA0484 (SAC, ¶ 17)) and, when doing so, pay a royalty to Evergreen on top of the costs of its resin, thereby saddling it with higher costs and putting it at an even greater competitive disadvantage compared to the well-established competition it would have to challenge. Then, even assuming Evergreen could successfully sell its recycled product concept to enough customers such that the entrenched competitors' market share might be challenged, there would be nothing to prevent those competitors from simply buying into the Evergreen system in order to retain their position.

In short, Evergreen's SAC acknowledges Dolco did support and do business with Evergreen. The one business venture it did not agree to undertake would have

imposed unreasonable expense and risk of failure for Dolco, while benefiting Evergreen and potentially competing manufacturers. Having contracted with Evergreen for the supply of its resin and having invested in Evergreen's business growth, it is not plausible, or even remotely conceivable, that Dolco would enter a conspiracy to drive Evergreen out of business in order to limit competition for the sale of products that Dolco does not manufacture to customers Dolco does not serve. Accordingly, the District Court's dismissal of Evergreen's claims against Dolco should be affirmed.

B. This Court Should Affirm the District Court's Denial of Leave to Amend.

Evergreen is improperly appealing from a "with prejudice" dismissal as if the District Court had denied a motion for leave to amend under Fed. R. Civ. P. 15(a). Appellant's Brief at 62. Evergreen made no such motion. Instead, it included the following boilerplate at the end of each of its briefs opposing Defendants' motions to dismiss: "In the event that any of Evergreen's claims are deficient in some manner, Evergreen requests leave of the Court to amend any such allegations or claims." JA0674, JA0690, JA0706, JA0720, JA0733, JA0747, JA0759. This Court has made very clear that a contingent request like that – contained in an opposition to a motion to dismiss with no indication of the grounds for permitting amendment – does not constitute a motion for leave to amend, does not require the District Court to perform a Rule 15(a) analysis, and does not

produce any ruling that can be appealed. *Gray v. Evercore Restructuring, L.L.C.*, 544 F.3d 320, 327 (1st Cir. 2008) (rejecting appeal from denial of leave to amend where plaintiff's brief opposing motions to dismiss stated that, "in the event that the Court finds that the Amended Complaint fails to state a claim, Plaintiff requests leave to replead.")[31] The District Court's dismissal with prejudice should be affirmed on these grounds.

Even if Evergreen *had* properly sought leave to amend, its challenge to the form of the judgment still would have to be rejected, based as it is on the incorrect assertion that the District Court must be reversed for not discussing its reasons. In fact, this Court "will generally defer to a district court's decision to deny leave to amend where the reason is 'apparent *or* declared,'" *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 792 (1st Cir. 1995) (internal quotes and citations omitted; emphasis supplied), and "will affirm if *any adequate reason* for the denial is apparent from the record." *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 154 (1st Cir. 2004) (emphasis supplied). The reasons for not allowing Evergreen to amend yet again are abundantly clear, and indeed, were not contested below.

[31] *Accord Fisher v. Kadant, Inc.*, 589 F.3d 505, 513-14 (1st Cir. 2009); *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 56-57 (1st Cir. 2008); *Wayne Inv., Inc. v. Gulf Oil Corp.*, 739 F.2d 11, 15 (1st Cir. 1984).

In their District Court briefs, the Defendants expressly sought dismissal with prejudice and explained why. They cited Evergreen's three prior pleading attempts over the previous year (both *pro se* and through different counsel), the ever-changing menu of legal theories that Evergreen applied to alleged facts that changed very little from one pleading to the next, and the fact that a prior version of the complaint included more than 250 pages of exhibits purporting to demonstrate the Defendants' bad acts (JA0155-0423), all of which strongly suggests the futility of further amendment. *See* JA0767, 0788, 0804. As Defendants further explained at oral argument: "The facts haven't expanded. It's not that there's going to be repleading with some new facts. They had an ample opportunity to plead and replead the facts, and it's the same facts, the same events, in all of the iterations. Actually, if anything, I think if you look at the complaints, they've shrunk a little." JA0837.

In other words, we have already seen it all – there are no other, *new* material facts that could be pled in what would be a *fifth* Evergreen/Forrest complaint. If a complaint states no claim as pled, and there are no other facts that can be pled in good faith to cure that problem, then, as Defendants argued, it would be futile to permit further amendment, an empty exercise in which lawyers try to wordsmith (again) the same deficient facts. *See* JA0804; *HPY, Inc. v. Elec. Power Auth.*, No. 92-2370, 1993 WL 118055, at *1 (1st Cir. 1993) (per curiam) (unpublished table

decision) (affirming dismissal with prejudice where district court concluded that "we are as likely to squeeze blood from a stone as we are to squeeze any more facts from this complaint") (internal quotation marks omitted).[32]

To the extent that Evergreen acknowledged these arguments at all, it was, again, with a boilerplate contingent request for the chance to cure whatever deficiencies the District Court might identify. *See, e.g*, JA0674. Evergreen made no written or oral proffer about what additional facts it might plead if given the chance. In fact, Evergreen did not address the question of further amendment *at all* during oral argument, electing instead to argue the sufficiency of its current complaint and requesting discovery to supply the missing factual predicate for its claims. JA0848, JA0851-52.[33]

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[32] Amendment is futile, not just in cases where the allegations are frivolous (as Evergreen argues, Appellant's Brief at 64), but whenever "the complaint, as amended, would fail to state a claim upon which relief could be granted." *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996). In this connection, it is also worth noting that, in a series of email exchanges that Evergreen elected to share with the District Court, a representative of the Federal Trade Commission reviewed Evergreen's allegations and evidence and concluded that, "[w]hile we certainly see the difficulties that Mr. Forrest has encountered as a business matter, we do not believe that they involve the kind of conduct that the antitrust laws prohibit." JA0038, JA0060-63. The same package of materials shows that several other law firms reviewed the allegations but ultimately did not move forward with litigation on Evergreen's behalf. JA0038, JA0455-57.

[33] *See Goldstein v. MCI Worldcom*, 340 F.3d 238, 254-55 (5th Cir. 2003) (affirming dismissal with prejudice where plaintiff made a "general curative amendment request" in opposition brief, but did not show "any additional facts not initially pled that could, if necessary, cure the pleading defects raised by the defendants").

That is a waiver. "Judges are not expected to be mindreaders," so if a litigant fails to "spell out its arguments squarely and distinctly" before the district court, it must "forever hold its peace." *Rivera-Gomez*, 843 F.2d at 635 (internal quotations omitted). This Court seldom considers points that could have been raised in the district court, but were not. *Id*. at 633; *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2003) ("[I]t is a virtually ironclad rule that a party may not advance for the first time on appeal either a new argument or an old argument that depends on a new factual predicate.").

And even if Evergreen had not waived its arguments in the District Court, it certainly has waived them on appeal, offering this Court nothing but the unsupported assertion that it "could have amended to add additional factual support." Appellant's Brief at 64. That is hopelessly short of the "exceptional circumstances" it would take for an appeals court to permit amendment "in its discretion and in the interests of justice" without a proper motion having been made below. *See Fisher*, 589 F.3d at 510 (citing, *inter alia*, *Gray*, 544 F.3d at 327).[34] Indeed, Evergreen does not marshal any facts at all when it makes its argument for leave to amend. Appellant's Brief at 62-64. Instead, it scatters a few

[34] A party that fails to seek proper leave to amend in the district court generally cannot obtain that relief on appeal, and this Court has held that its "power, in the interests of justice, to make exceptions to this prudential rule" must be "exercised sparingly." *Viquiera v. First Bank*, 140 F.3d 12, 20 (1st Cir. 1998) (holding that the "instant plaintiffs have alluded to no circumstances that would warrant a departure from the general rule").

"new" assertions elsewhere in its brief as footnotes and asides, none of them making a good case for yet another complaint.[35]

For instance, citing its current complaint (JA0494), Evergreen claims that a Dolco representative said he would not oppose two other defendants' "call to action" against recycling. Appellant's Brief at 15. Of course, "call to action" is a conclusory characterization, not a factual allegation, but whatever it is, it is not in the current complaint. It is an allegation from a previous version (*see* JA0013, JA0016), left on the cutting room floor when Evergreen's current lawyers "reviewed the pleadings and evidence in this case," and persuaded the District Court to allow them to submit their retooled complaint, the one now at issue. JA0463. Similarly, Evergreen asserts that, if allowed to amend, it could allege that there was a March 2007 trade association meeting where the Defendants "decided not to endorse recycling." Appellant's Brief at 15-16 n.1. But Evergreen already alleged this in a prior complaint (*see* JA0132), and quite correctly chose not to do it again, because the exhibits cited to support the assertion do not say any such thing, let alone that the industry conspired to boycott Evergreen. *See* JA0268,

[35] *See Gray*, 544 F.3d at 327 (affirming dismissal with prejudice where, even on appeal, plaintiff "failed to allege any facts that would suffice to avoid dismissal").

JA0278.[36] Evergreen cannot support a request for leave to amend with offers to resurrect allegations like these, which were jettisoned after careful consideration by experienced antitrust counsel JA0462-68.[37]

Finally, in a footnote, Evergreen for the very first time asserts that an executive of one defendant supposedly insisted that Evergreen approach the PFPG because (as Evergreen characterizes it) he "wanted to work with Evergreen" but did not want to "break ranks with the boycott" and "hoped" a proposal to PFPG would change other defendants' minds. Appellant's Brief at 14, 40 n.4. Nonsense. Evergreen's conclusory speculation about someone else's state of mind is just that, and carries no weight under the *Twombly/Iqbal* standard. In addition, Evergreen's complaint already describes its alleged conversations with the same executive, and does not include this additional vignette. Rather, Paragraph 44 of the SAC (JA0496) alleges only that this executive indicated he would "embrace Evergreen's

[36] In addition, this allegation would conflict with Evergreen's allegations that, even after March 2007, various defendants continued to do business with and otherwise support Evergreen. *See supra*, Section 3(a) of Section VI.

[37] There is a pattern to this. As explained above, Evergreen's Sherman Act and tortious interference claims have been in and out of the case along the way, and now, Evergreen appears to be relying once again on allegations that it previously conceded were irrelevant in light of its decision to abandon its Lanham Act claim. *See* Appellant's Brief at 21; JA799-800 (Order at 9 n.16) (referring to abandoned allegations relating to an article questioning the economic viability of recycling and alleged efforts to promote PDR as a competitor to Evergreen). *Cf. Cochran*, 328 F.3d at 11 (reviewing denial of motion for reconsideration, observing that "[l]itigation is not a game of hopscotch" and that, once the trial court rules, "a litigant should not be allowed to switch from theory to theory like a bee in search of honey").

closed-loop program only if another PFPG member agreed to be involved as well." That is not evidence of a conspiracy, let alone an admission of any "boycott." If Evergreen had a good faith factual basis for alleging any such admission, that allegation would have been featured prominently in at least one of Evergreen's several complaints, or it would have been the very first thing counsel offered to plead when faced with defendants' request for dismissal with prejudice. Instead, it first comes up as an afterthought on appeal, in a footnote, and is neither repeated nor even referenced when Evergreen gets around to its arguments for granting leave to amend. This Court, accordingly, should ignore it.

Evergreen did not properly seek leave to amend and has not proffered any new facts that could change the outcome of this case, either in the District Court or on appeal. The dismissal should be affirmed as entered, with prejudice.

VII. CONCLUSION

For the foregoing reasons, the District Court's Judgment should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as enlarged by this Court's order dated October 26, 2012, because it contains 18,387 words, excluding the parts of this brief that are exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2007 in Times New Roman.

/s/ *Kristy S. Morgan*
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I, Kristy S. Morgan, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 5th day of December, 2012.

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