No. 14-1746

In the

United States Court of Appeals

For the Fourth Circuit

SD3, LLC AND SAWSTOP LLC,
***Plaiantiffs-Appellants*,**

v.

BLACK & DECKER (U.S.) INC., ET AL.,
***Defendants-Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA
Case No. 14-cv-00191-CMH-IDD

BRIEF OF *AMICUS CURIAE*
AMERICAN ANTITRUST INSTITUTE AND
NATIONAL CONSUMERS LEAGUE
IN SUPPORT OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 14-1746 Caption: SD3, LLC et al. v. Black & Decker (U.S.), Inc., et al.

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Signature: /s/ David D. Golden Date: 11/17/2014

Counsel for: American Antitrust Institute

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No. 14-1746 Caption: SD3, LLC et al. v. Black & Decker (U.S.), Inc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

NATIONAL CONSUMERS LEAGUE
(name of party/amicus)

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Counsel for: NATIONAL CONSUMERS LEAGUE

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STATEMENT OF INTEREST OF AMICI[1]

The American Antitrust Institute ("AAI") is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org. The AAI's Board of Directors approved of this filing.[2] AAI has long been involved in advocacy on standard-setting matters to ensure that voluntary consensus standard setting serves its intended role in promoting competition, and is not subverted to undermine the competitive process.

The National Consumers League is the nation's oldest consumer and worker advocacy group, formed in 1899, with a mission to protect and promote the interests of workers and consumers. The League has long supported safer products and technologies for consumers and workers, including technology that addresses the very grave hazards of table saws. The League is keenly interested in promoting

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] A member of AAI's Board of Directors is a partner at the law firm that represents Appellants. She was recused from this matter.

efforts by industry to incorporate safer technologies into products, and discouraging anticompetitive conduct that prevents safer technologies from being adopted.

This case involves Active Injury Mitigation Technology ("AIMT"), also referred to as "Sawstop" technology, which provides significant safety benefits for table saw users. Appellants' AIMT technology would greatly lessen the consequences of blade contact injuries – including amputations – and save thousands of Americans from serious physical injury and considerable medical expenses.

In Counts I, II, and III of their Amended Complaint, Plaintiffs-Appellants alleged that Appellees jointly, illegally, and in violation of Section 1 of the Sherman Act conspired to (1) engage in a group boycott of AIMT technology, (2) corrupt table-saw safety standards to prevent AIMT technology from becoming an industry standard, and (3) corrupt safety standards for table saw blade guards so as to implement a design standard rather than a performance standard. *Amici* file this brief in support of Appellants to urge the Court to properly consider the allegations of the Amended Complaint in the standard-setting context, and vacate the lower court's decision and remand the case for further proceedings.

SUMMARY OF THE ARGUMENT

When competitors conspire to corrupt or subvert the standard-setting process to prevent the introduction of other companies' beneficial technologies, they violate Section 1 of the Sherman Act, 15 U.S.C. § 1. The Amended Complaint includes sufficient allegations of a group boycott of the AIMT technology, including subversion of the industry standard-setting process with the intention to perpetuate outdated safety standards, for the purpose of avoiding both royalty payments on the superior technology being excluded by their actions, and potential product liability claims on the existing inferior technology.

Safety codes and standards produced by standard-setting organizations like Underwriters Laboratories have great power and influence in the U.S. economy. They "may result in economic prosperity or economic failure, for a number of businesses of all sizes through the country, as well as entire segments of an industry." *Am. Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982) (internal quotations and citations omitted). And standard-setting organizations "can be rife with opportunities for anticompetitive activity." *Id.* at 571. Accordingly, allegations concerning corruption of the standard-setting process for anticompetitive purposes require close and contextual judicial analysis.

In dismissing the Amended Complaint with prejudice, the district court failed to properly analyze the allegations within the unique standard-setting context[3] and as a whole. Instead, the court summarily addressed specific allegations in only two sentences of its 21-page Memorandum Opinion and was silent as to most of the other allegations. *SD3, LLC v. Black & Decker (U.S.), Inc.*, CA No. 1:14-cv-191, 2014 U.S. Dist. Lexis 96256, at *19-20 (E.D. Va. July 15, 2014). This was clear error. *See Ocasio-Hernández v. Fortuño-Burset,* 640 F.3d 1, 14 (1st Cir. 2011) (vacating dismissal because "the district court erred when it failed to evaluate the cumulative effect of the factual allegations.").

The Amended Complaint sufficiently alleges a conspiracy to corrupt the UL standard-setting process and is replete with well-plead factual allegations of

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[3] Underwriters Laboratories ("UL") is a standard-setting organization accredited by the American National Standards Institute ("ANSI"), which coordinates the U. S. standards and conformity assessment system. Pursuant to the National Technology Transfer and Advancement Act of 1995, 15 U.S.C. § 272, the Office of Management and Budget promulgated OMB Circular Number A-119 (1998) that defined "voluntary consensus standards bodies" that all federal agencies should support in their procurement and other functions as bodies with the following characteristics: openness, balance of interests, due process, an appeals process, and consensus. *See* Office of Mgmt. & Budget, Circular No. A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, Revised* (Feb. 10, 1998), http://www.whitehouse.gov/omb/circulars_a119. Those characteristics are embodied in the ANSI Essential Requirements, which apply to the Underwriters Laboratories standard-setting activities. *See* American National Standards Institute, *ANSI Essential Requirements: Due process requirements for American National Standards* (Jan. 2014), http://www.ansi.org/essentialrequirements/.

anticompetitive conduct. These allegations, when viewed in their totality and in the context of a standard-setting organization, describe a plausible conspiracy, which satisfies the pleading requirements of Fed. R. Civ. P. 8(a) and Rule 12(b)(6).

Moreover, the court mischaracterized the law governing standard-setting activities. First, anticompetitive conduct can be done openly and with the imprimatur of the standard-setting organization and still violate the antitrust laws. Second, a plausible conspiracy to corrupt a standard-setting organization need not include allegations of organization rule violations. Defendants' conduct must meet higher legal standards of due process and objective technical merit. Third, the Amended Complaint sufficiently alleged competitive harm by reducing the quality and safety of table saws available to consumers, and adversely affecting the ability of a technology to compete in the marketplace. Nothing more is required in the context of a conspiracy to subvert the integrity of the processes and standards of a consensus-driven standard-setting organization.

ARGUMENT

I. STANDARD-SETTING ABUSE REQUIRES CLOSE JUDICIAL SCRUTINY.

A. Without Proper Safeguards, The Standard-Setting Process Is Inherently Anticompetitive.

For more than 50 years, the Supreme Court has consistently and repeatedly cautioned lower courts about the competitive dangers of standard setting. Absent

the standard-setting organization context, agreements among competitors to exclude certain technologies from the market would be considered *per se* violations of Section 1 of the Sherman Act. The sole reason that private standard-setting among competitors is permitted *at all* under the antitrust laws is "on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits" with "meaningful safeguards" that "prevent the standard-setting process from being biased by members with economic interests in stifling product competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 506-07 (1988).[4]

According to well-established precedent, participants in standard-setting organizations are liable under U.S. antitrust laws when they corrupt the standard-setting process to block technologies and products developed by smaller and more

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[4] *See, e.g.*, *In re Motorola Mobility, LLC*, No. 121-0120, Statement of Fed. Trade Comm'n at 1-2, 2013 WL 124100, at *37 (Jan. 3, 2013) ("standard setting often supplants the competitive process with the collective decision-making of competitors, requiring that we be vigilant in protecting the integrity of the standard-setting process"); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 34-35 (Apr. 2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf ("Recognizing that collaboratively set standards can reduce competition and consumer choice and have the potential to prescribe the direction in which a market will develop, courts have been sensitive to antitrust issues that may arise in the context of collaboratively set standards. They have found antitrust liability in circumstances involving the manipulation of the standard-setting process or the improper use of the resulting standard to gain competitive advantage over rivals.") (footnote omitted).

innovative companies. *Id.*; *Hydrolevel*, 456 U.S. 556; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

Participants in private standard-setting organizations like UL are subject to "antitrust scrutiny" because an "[a]greement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products." *Allied Tube*, 486 U.S. at 500. The Supreme Court has "no doubt" that organization members "have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Id.* & n.5.[5] Accordingly, industry-wide product and safety standards – in their "natural anti-competitive state" – inevitably produce anticompetitive effects. *See Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 796 (N.D. Tex. 2008).[6] "It almost goes without saying, therefore, that the collusive atmosphere of an SSO presents a very real opportunity for anticompetitive behavior . . . [and] the subversion of an SSO by a single industry

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[5] The Court explained, "Product standardization might impair competition in several ways . . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." (quoting 7 P. Areeda, Antitrust Law ¶ 1503, p. 373 (1986)).

[6] The *Research in Motion* court cited *Allied Tube* and *Broadcom v. Qualcomm,* 501 F.3d 297, 309-310 (3d Cir. 2007). In *Broadcom*, the Third Circuit reversed the dismissal of an antitrust complaint by finding a sufficient claim of attempted monopolization where patent holder Qualcomm allegedly induced inclusion of its technology in an industry standard through false promises of fair, reasonable and nondiscriminatory licensing.

player or by a limited subset of SSO members can result in anticompetitive outcomes." *Rambus, Inc. v. Infineon Technologies AG*, 330 F. Supp. 2d 679, 696 (E.D. Va. 2004).

B. Allegations of Defendants' Corruption or Subversion of an Industry Standard Setting Require Careful Judicial Analysis.

At the pleading stage, a plaintiff need only include in its complaint enough factual allegations to create a "reasonable expectation that discovery will reveal evidence of illegal agreement."[7] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Moreover, the court must view the allegations as a whole, in context, and not atomistically as discrete or disconnected events. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (citation omitted). Accordingly, the Supreme Court instructs courts evaluating the sufficiency of a complaint to assess the allegations as a whole within its specific factual context. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

[7] *Accord In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008) ("Whether the acts committed by the defendants are simple, benign business decisions made by these individual defendants or whether they represent concerted effort in violation of the Sherman Act are issues of fact which this Court cannot decide on the pleadings and which require discovery prior to resolution.").

Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). Only then can the plausibility of the plaintiffs' claims be properly assessed to determine whether the alleged conduct was the result of a preceding anticompetitive agreement, tacit or otherwise, among members of the organization. *See Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007-8 (3d Cir. 1994).

The district court committed reversible error when it failed to analyze the events described in the Amended Complaint in the context of standard setting. Careful consideration of such allegations is essential to evaluate the sufficiency of a complaint, especially where due process protection provides the only justification by which agreements on standards that admit some technologies into the standards and exclude others are saved from a Sherman Act Section 1 violation.

The Supreme Court decisions in *Radiant Burners* and *Allied Tube* are instructive. In *Radiant Burners*, the Court reversed *per curiam* the dismissal of a Sherman Act Section 1 claim where the plaintiff had alleged the competing gas burner manufacturers manipulated the American Gas Association's "seal of approval" standards to exclude competition from the plaintiff's products. 364 U.S. at 658. The plaintiff alleged the Association's rejection of the plaintiff's burner design, which was "safer and more efficient" than other designs, was not based on "objective standards," but rather the decision was made "arbitrarily and capriciously" due to the "influence" of the defendant/competitors. *Id.* The

Supreme Court found those allegations to be sufficient. In *Allied Tube*, the Court further explained that private associations must "promulgate safety standards based on the merits of *objective* expert judgments and through procedures that *prevent* the standard-setting process from being biased by members with economic interests in stifling product competition." 486 U.S. at 501 (emphasis added); *see also Hydrolevel*, 456 U.S. at 570-73. Accordingly, well-plead factual allegations of corruption or subversion of the standard-setting process, whether by undue influence or lack of objective technical merit, provides the necessary context for a complaint to raise the suggestion of a preceding agreement.

Three recent district court cases have held that allegations of defendant misconduct in the standard-setting process met the pleading requirements of Rule 8(a) and Rule 12(b)(6). First, in *Golden Bridge Tech., Inc. v. Nokia, Inc.*, the plaintiff alleged that its technology was removed from the technical standards of 3GPP, a standard-setting organization for the wireless telecommunications industry, by 3GPP members with competing technologies and products in "offline" meetings. 416 F. Supp. 2d 525, 528-29 (E.D. Tex. 2006). Plaintiff's allegations also included defendants acting in concert to vote and agree to remove the plaintiff's technology "without notice" and "without technical justification." *Id.* The court found these allegations sufficient to overcome a Rule 12(b)(6) motion to

dismiss, "especially" when the plaintiff "has not been able to conduct extensive discovery at this point in the proceedings to determine exactly what occurred." *Id.*

Second, in *Cryptography Research Inc. v. Visa Int'l Serv. Ass'n.*, the court held that "a plaintiff must allege that members of a standards-setting organization have conspired to exclude a technology from the standard for reasons unrelated to the objective qualities of the technology." No. C 04-04143(JW), 2008 WL 5560873, at *3 (N.D. Cal. Aug. 13, 2008). There, the plaintiff had alleged that Visa and MasterCard, who were members of a standard-setting organization formed to adopt Smart Card technology standards, conspired to remove the plaintiff's security technology from the standard, solely to foreclose the implementation of that technology. *Id.* The court credited the plaintiff's circumstantial evidence concerning the standard-setting process at issue in the case, which the defendants allegedly used as "tool to conspire." The plaintiff alleged that Visa and MasterCard eliminated the plaintiff's technology from the standard completely without any technical justification, only to replace it with a less-secure protocol. *Id.* at *4. Visa and MasterCard even refused to allow the plaintiff's technology to remain in the standard as an option. *Id.* Based on these allegations and others, the district court denied defendants' motion to dismiss and held that the plaintiff had sufficiently pled a *per se* antitrust violation. *Id.* at *5.

Third, in *TruePosition, Inc. v. LM Ericsson Tel. Co.*, the district court denied the defendants' motions to dismiss because the plaintiff plead sufficient factual allegations – in the context of a standard-setting organization – to suggest a plausible conspiracy. No. 11-4574, 2012 WL 3584626 (E.D. Pa. Aug. 21, 2012). The plaintiff alleged the defendants had conspired to delay or prevent the standardization of the plaintiff's technology in 3GPP, the same standard-setting organization involved in the *Golden Bridge* case. *Id.* at *22. The complaint contained numerous allegations of defendant misconduct in the standard-setting process: questionable timing of submissions and objections, imposing unreasonable and questionable preconditions on testing and simulations of plaintiff's technology, submitting allegedly false and pretextual simulation results to discredit the plaintiff's technology, and defendant representatives using leadership positions in 3GPP committees to suppress competition from the plaintiff's technology and favor the defendants' technologies. *Id.* The *TruePosition* court emphasized that the standard-setting context is not a "typical example of parallel conduct found in price fixing, but, instead involves the behavior of the Corporate Defendants in an organization that sets the standards of an industry that are pivotal to the success of themselves, as well as their

competitors." *Id.* at *21-22 ("It is clear that in the standard setting organization setting, opportunities for agreement are prolific.").[8]

As these cases illustrate, in the standard-setting context in which the Amended Complaint is framed and must be analyzed, actions by members of a standard-setting organization that undermine the standard-setting organization's legitimate goals and exclude technologies for reasons unrelated to their objective qualities and merits, are tell-tale indicators of anticompetitive conduct that can have no procompetitive justification. Courts are obligated to view such allegations as a whole within the standard-setting context, which the district court below clearly failed to do.

The Amended Complaint in the case currently before the Court pleads factual allegations similar to those in the cases cited above in which the motions to

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[8] The TruePosition court considered the plaintiff's allegations of defendant conduct in the 3GPP standard-setting organization as a "plus factor" of "evidence implying a traditional conspiracy." *Id.* at *7. Some courts emphasize the presence of plus factors as bolstering factual allegations for parallel conduct and providing additional context upon which to evaluate allegations of parallel conduct. *See Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227 (3d Cir. 2011). However, other courts have criticized over-reliance on plus factors because of the "increasing complexity and expert nature of 'plus factor' evidence which would not likely be available at the beginning stages of litigation." *Evergreen Partnering Grp.v. Pactiv Corp.*, 720 F.3d 33 at 46-47 (1st Cir. 2013) ("We are thus wary of placing too much significance on the presence or absence of 'plus factors' at the pleadings stage. While they are certainly helpful in guiding a court in its assessment of the plausibility of agreement in a § 1 case, other, more general allegations informing the context of an agreement may be sufficient.").

dismiss were properly denied: defendants dominated the relevant committee of the standard-setting organization; the plaintiffs' technology provided tangible benefits to consumers but competed with defendants' technologies and products; defendants were opposed to paying any licensing fees for AIMT technology and concerned about potential product liability lawsuits for those manufacturers who did not implement AIMT technology, and existing products without AIMT; the defendants struck a secret, illegal agreement to block the plaintiffs' technology through the standard-setting process; and, the standard-setting organization rejected the technology for no objective technical reason. *See, e.g.*, Amended Comp. ¶¶ 33, 35-36, 80-83, 104-107, 113, 115, 124-25. The district court, however, gave short shrift to these well-plead allegations regarding the corruption of the UL standard-setting process, by cherry-picking two allegations out of the more than 24 paragraphs of allegations in the Amended Complaint and ignoring the rest. Opinion at *19-20. In such circumstances, Courts of Appeal vacate the lower courts' decisions. *See, e.g., Ocasio-Hernández,* 640 F.3d at 14; *cf. Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) ("Rule 8 does not, however, require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful.").

The district court's cursory analysis also frustrates the public policy behind the Supreme Court's tolerance of private standard-setting. Procompetitive benefits

of standard setting outweigh the potential preclusive effects on competition *only* where the standard setting is based on objective technical merit and conducted in a fair and *nonpartisan* manner. *See Allied Tube*, 486 U.S. at 506-07, 509 (holding that "the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition"). Accordingly, Appellants' factual allegations that suggest standard setting has been corrupted or subverted by dominant firms to their economic advantage warrant careful examination by the court, and vacatur and remand.

II. THE AMENDED COMPLAINT SUFFICIENTLY ALLEGES AN ANTICOMPETITIVE CONSPIRACY TO SUBVERT THE STANDARD-SETTING PROCESS.

A conspiracy can be proved by either direct or circumstantial evidence, or a combination of both. The allegations must plausibly suggest the existence of a conspiracy "in a context that raises a suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557; *Ashcroft*, 556 U.S. at 678. "Allegations contextualizing agreement need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action at the motion to dismiss stage." *Evergreen Partnering Grp.*, 720 F.3d at 47. Rather, a complaint must allege "the general contours of when an agreement was made" and support those

allegations "with a context that tends to make said agreement plausible." *Id.* at 46; s*ee Owens v. Balt. City State's Attorneys Office*, No. 12-2173, at 46 (4th Cir. Sept. 14, 2014) (holding that, to survive a motion to dismiss, "The recitation of facts need not be particularly detailed, and the chance of success need not be particularly high."); *EI Du Pont de Nemours v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) ("[A] complaint need only give the defendant fair notice of what the claim is and the grounds upon which it rests.") (internal quotations and citation omitted).

Antitrust plaintiffs are not required at the pleading stage to rule out alternative plausible explanations that would exculpate defendant conduct. That decision is left to the factfinder, not the court on a motion to dismiss. *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 190 (2d Cir. 2012) (holding "although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible"). At the pleading stage, a district court may not choose "between two plausible inferences that may be drawn from factual allegations"— even where a court believes that the defendants' version is "more plausible" or "the most plausible scenario." *Id.* at 185, 190.

The Amended Complaint alleges direct and circumstantial evidence of a plausible conspiracy to corrupt table-saw safety standards to prevent AIMT technology from becoming an industry standard. Those allegations include:

- The Consumer Product Safety Commission ("CPSC") estimates table saws are responsible for 67,300 medically-treated injuries every year in a two-year period with 12% of those injuries resulting in amputations. The CPSC also estimates that table saw injuries cost consumers $2.36 billion annually. It is alleged that a person using a table saw equipped with AIMT technology typically would receive only a "small nick" as the result of blade contact. Amended Compl. ¶¶ 52-54, 60;
- UL is a private standard-setting organization whose work largely is done by members who represent vested commercial interests. The UL Standards Technical Panel 745 ("STP 745") that establishes and maintains safety standards for table saws, and is the primary venue for the anticompetitive effort alleged in this case, consists "primarily of manufacturers and individuals with connections to manufacturers." Amended Compl. ¶¶ 33, 35;
- Members of STP 745 consider their companies' financial, business, and competitive interests over public safety concerns, and STP 745 was and remains under the "firm control" of the Appellees, including control over the approval or rejection of changes to the UL table saw standards. Amended Compl. ¶ 36, 106;

- Appellants submitted a written proposal to UL to require the implementation of AIMT technology. Appellees "agreed to vote as a bloc . . . both (1) to thwart any proposal by any person to mandate the implementation of AIMT, and (2) to implement a design requirement for their own uniform guard design, as opposed to a performance-specific design, to prevent competition with respect to that feature." STP 745 rejected the AIMT proposal "in accordance with the Defendants' agreement." Amended Compl. ¶¶ 104, 105, 107;
- Members of STP 745 voted to amend the UL table saw standards in 2005 and 2007 by approving changes that are alleged to be "inferior" to AIMT technology. Both times they refused to mandate AIMT technology. Amended Compl. ¶¶113, 115, 124-25;
- Appellees had motive to conspire to block AIMT technology, including opposition to AIMT technology license fees and concerns about potential product liability litigation for manufacturers who did not implement AIMT technology. Amended Compl. ¶¶ 80-83.

These allegations alone are sufficient to state a claim in the pleading stage, but they are especially compelling when placed within the specific context of the UL standard-setting organization. A standard-setting organization whose officials are drawn from industries affected by the standards under development, "can be

rife with opportunities for anticompetitive activity." *Hydrolevel*, 456 U.S. at 570-71 (1982). The paragraphs of the Amended Complaint cited above allege that the Appellees colluded to abuse their power within the UL standard-setting organization to exercise control over whether technologies would not be included in UL safety standards. Those factual allegations are sufficient to establish a plausible claim under Sherman Act Section 1 in the standard-setting context. "*Twombly* emphasized context. Accordingly, the Court begins by exploring the unique context of the alleged conspiracy . . . ." *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 631 (E.D. Pa. 2010).

III. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT.

The district court dismissed the group boycott count (Count I) because it believed that Appellants had essentially pleaded themselves out of a conspiracy by the allegations of negotiations that occurred after the alleged conspiracy began. *Amici* believe the Court erred for the reasons stated above and by Appellants. But as to the "Standards Conspiracy," (Counts II and III), the district court did not and could not rely on the absence of a conspiracy, because the allegations of an agreement are more than plausible; they are inherent in the standard-setting process. Rather, the district court suggested three other reasons why the alleged standard-setting abuse did not state a claim, none of which is persuasive.

A. Anticompetitive Conduct In The Standard-Setting Context Is Often Open and Notorious; The Underlying Agreement May Be Secret.

In its Opinion, the district court erroneously imposed a secrecy requirement on defendants' participation and domination of a standard-setting proceeding. Opinion at *19-20 ("Plaintiffs put forth no facts, however, alleging that Defendants' participation was . . . undisclosed . . . ."). However, there is no requirement that anticompetitive conduct in the standard-setting context be concealed to be actionable under the Sherman Act. In fact, standard-setting is frequently conducted in public, with misconduct by dominant firms notorious and unfortunately commonplace. *See, e.g., Broadcom*, 501 F.3d at 312 (recognizing "a growing awareness [by the judiciary and antitrust enforcement agencies] of the risks associated with deceptive conduct in the private standard-setting process"). The court cited no authority for its "undisclosed" conduct requirement, and *amici* are unaware of any such requirement in the case law on abuse of the standard-setting process.[9]

Nevertheless, the illegal agreement itself is frequently kept secret by the conspirators, as alleged in this case. *See* Amended Compl. ¶¶ 105, 122-23; *see also*

[9] Secrecy is an element of anticompetitive conduct in one scenario related to standard-setting, in which a participant knowingly fails to disclose ownership of one or more patents essential to the practice of the standard being set. That patent hold-up scenario is not alleged in the Amended Complaint.

Blumenfield v. U.S., 284 F.2d 46, 54 (8th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961) ("[C]onspirators ordinarily do not announce that they have joined their efforts for the purpose of engaging in or furthering some unlawful scheme or plan – rather they are inclined to cover their machinations.").

The public setting of the STP 745 standard-setting proceedings is especially crucial in the context of the boycott alleged in the Amended Complaint. The district court considered only the effect of the alleged conspiracy on the ability of the Appellants to make table saws in competition with the Appellees. But it ignored the allegation of anticompetitive effects on Appellants' ability to compete in a technology market. UL's failure to require AIMT, following the boycott, directly affected the ability of the Appellants to license the AIMT technology to other participants in the table-saw technology market, as well as the availability of products for end users. This separate technology market is cognizable as a discrete market under antitrust law, and should have been considered separately by the district court. "Defining a technology market, as opposed to a product market, makes sense where 'rights to intellectual property are marketed separately from the products in which they are used.'" *Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905 RMW, 2008 WL 73689, at *2 (N.D. Cal. Jan. 5, 2008) (quoting U.S. Dept. of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.2 (1995)); *see also Broadcom*, 501 F.3d at 315

(recognizing mobile telephone technology market and finding deceptive practices in a standard-setting organization to be actionable anticompetitive conduct); *Rambus, Inc. v. Infineon Technologies, AG*, 304 F. Supp. 2d 812, 820-21 (E.D. Va. 2004) (recognizing DRAM technology market in evaluating unfair competition claim under Cal. Bus. & Prof. Code § 17200 on a Rule 15(a) motion). Additional significance attaches to the anticompetitive effects in the technology market in this case, because it is alleged that the AIMT technology annually could save thousands of people from serious debilitating injury.

B. A Plausible Conspiracy Involving A Standard-Setting Organization Need Not Include Allegations of Rule Violations.

The district court discounted allegations of defendant dominance in the UL standard-setting process because Appellants had not alleged that defendant participation was "otherwise impermissible." Opinion at *19-20. While standard-setting rule and procedure violations are frequently cited as evidence of conspiracy, the Supreme Court made clear in *Allied Tube* that rules violations are not necessary to an allegation of unlawful conspiracy. There, the jury in the underlying case found that the petitioner did *not* violate the National Fire Protection Association's rules, but "nonetheless did 'subvert' the consensus standardmaking process." 486 U.S. at 498. The Court held that anticompetitive activities by members of a standard-setting association are not "validated" simply because they conformed to the organization's rules; such a ruling would preclude

liability where the association's rules inadequately protected due process. *Id.* at 509. Rather, it is substance of the defendant's conduct, when placed in the context of the standard-setting organization and viewed as a whole with a plaintiff's other allegations that is the proper focus of judicial inquiry. *Id.*[10]

C. Appellants Sufficiently Alleged Competitive Harm.

Finally, the district court found that Appellants had not alleged competitive harm as a result of the standards conspiracy because UL did not "mandate" AIMT technology. Opinion at *19. The court's finding was clear error and mischaracterizes the relevant law. First, Appellants alleged harm to competition as a result of the conspiracy to corrupt the UL standard-setting process, which reduced the quality and safety of the table saws available to consumers. Amended Compl. ¶¶ 90-91, 126. The court completely ignored those allegations in its analysis.

Second, courts find harm to competition when the subversion of the standard-setting process affects the ability of a product or technology to compete in a particular market. For example, in *Hydrolevel*, the Supreme Court affirmed a

[10] "Petitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body. . . . What the petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition." *Allied Tube*, 486 U.S. at 510.

jury verdict finding the issuance of a safety code interpretation as a violation of Section 1 of the Sherman Act. 456 U.S. at 571-72, 577. In certain industries, inclusion of a technology is more than a mere stamp of approval; it is virtually a prerequisite to competition. *See Radiant Burners*, 364 U.S. at 659-660; *Allied Tube*, 486 U.S. at 500-01; *Golden Bridge Tech.*, 416 F. Supp. 2d at 532. In any event, complete exclusion from a market is not a necessary prerequisite for antitrust harm. *See U.S. v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001); 13 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 2234b, p. 432 (2d ed. 2005) ("It should be clear . . . that antitrust injury can refer to loss of technical progressiveness, or innovation, just as much as loss of competitive pricing.").

CONCLUSION

For the foregoing reasons, *amici* respectfully ask the Court to vacate the lower court's decision.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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