

No. 14-1746

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SD3, LLC, *et al.*,
Plaintiffs-Appellants,

v.

BLACK & DECKER (U.S.), INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia
Case No. 14-cv-00191-CMH-IDD
The Honorable Claude M. Hilton, United States District Judge

DEFENDANTS-APPELLEES' JOINT RESPONSE BRIEF

John D. Harkrider
Richard B. Dagen
AXINN, VELTROP & HARKRIDER LLP
950 F Street, NW
Washington, DC 20004
Phone: (202) 912-4700
Fax: (202) 912-4701

Bernard J. DiMuro
DIMURO GINSBERG PC
1101 King Street, Suite 610
Alexandria, VA 22314-2956
Phone: (703) 684-4333
Fax: (703) 548-3181

*Counsel for Appellees Stanley Black &
Decker, Inc., Black & Decker (U.S.) Inc.,
and The Black & Decker Corporation*

J. Scott Ballenger
LATHAM & WATKINS LLP
555 11th Street, NW, Suite 1000
Washington, DC 20004
Phone: (202) 637-2200
Fax: (202) 637-2201

Christopher S. Yates
Christopher B. Campbell
Aaron T. Chiu
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Phone: (415) 391-0600
Fax: (415) 395-8095

*Counsel for Appellee Emerson
Electric Co.*

Additional Counsel Listed on Inside Cover

Paul Devinsky
Stefan M. Meisner
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001
Phone: (202) 756-8000
Fax: (202) 756-8087

*Counsel for Appellees Hitachi Koki
USA, Ltd. and Hitachi Koki Co., Ltd.*

David M. Foster
FULBRIGHT & JAWORSKI LLP
801 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: (202) 6662-4517
Fax: (202) 662-4643

Layne E. Kruse
Eliot Fielding Turner
FULBRIGHT & JAWORSKI LLP
1301 McKinney Street, Suite 5100
Houston, TX 77010
Phone: (713) 651-5151
Fax: (713) 651-5246

*Counsel for Appellees Robert Bosch
Tool Corporation and Robert Bosch
GmbH*

Lee H. Simowitz
Elizabeth A. Scully
Katherine L. McKnight
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036-5304
Phone: (202) 861-1500
Fax: (202) 861-1783

*Counsel for Appellees Makita U.S.A., Inc.
and Makita Corporation*

James G. Kress, Esq.
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400
Phone: (202) 639-7700
Fax: (202) 639-7890

Scott W. Hansen
Steven P. Bogart
James N. Law
REINHART BOERNER VAN DEUREN s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202-6650
Phone: (414) 298-1000
Fax: (414) 298-8097

*Counsel for Appellees Milwaukee Electric
Tool Corporation, One World
Technologies Inc., OWT Industries, Inc.,
Ryobi Technologies, Inc., Techtronic
Industries Co., Ltd., and Techtronic
Industries North America, Inc.*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

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,

Emerson Electric Co.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Christopher S. Yates

Date: August 6, 2014

Counsel for: Appellee Emerson Electric Co.

CERTIFICATE OF SERVICE

I certify that on August 6, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Please see the attached Service List

s/ Christopher S. Yates
(signature)

August 6, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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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,

Stanley Black & Decker, Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Bernard J. DiMuro

Date: 8/5/2014

Counsel for: Stanley Black & Decker, Inc.

CERTIFICATE OF SERVICE

I certify that on 8/5/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Bernard J. DiMuro
(signature)

8/5/2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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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,

Black & Decker (U.S.) Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

Black & Decker Inc.; Stanley Atlantic LLC; B&D Holdings, LLC; The Black & Decker Corporation; Stanley Black & Decker, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO

If yes, identify all such owners:

Stanley Black & Decker, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Bernard J. DiMuro

Date: 8/5/2014

Counsel for: Black & Decker (U.S.) Inc.

CERTIFICATE OF SERVICE

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s/ Bernard J. DiMuro
(signature)

8/5/2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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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,

The Black & Decker Corporation
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

Stanley Black & Decker, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO

If yes, identify all such owners:

Stanley Black & Decker, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Bernard J. DiMuro

Date: 8/5/2014

Counsel for: The Black & Decker Corporation

CERTIFICATE OF SERVICE

I certify that on 8/5/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Bernard J. DiMuro
(signature)

8/5/2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Hitachi Koki U.S.A., Ltd.

(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
Hitachi Koki Co. Ltd.; Hitachi Ltd.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
Hitachi Koki Co. Ltd.; Hitachi Ltd.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Paul Devinsky

Date: August 8, 2014

Counsel for: Hltachi Koki USA Ltd.

CERTIFICATE OF SERVICE

I certify that on August 8, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

See attached list

/s/ Paul Devinsky
(signature)

August 8, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Hitachi Koki Co., Ltd.

(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
Hitachi Ltd.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
Hitachi Ltd.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Paul Devinsky

Date: August 8, 2014

Counsel for: Hltachi Koki Co.Ltd.

CERTIFICATE OF SERVICE

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See attached list

/s/ Paul Devinsky
(signature)

August 8, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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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,

Makita U.S.A., Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
 If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
 Makita Corporation

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
 If yes, identify all such owners:
 Makita Corporation

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
 If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
 If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
 If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Elizabeth A. Scully

Date: August 8, 2014

Counsel for: Makita U.S.A., Incorporated

CERTIFICATE OF SERVICE

I certify that on August 8, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

(See attached service list.)

/s/ Elizabeth A. Scully
 (signature)

August 8, 2014
 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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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,

Makita Corporation
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Elizabeth A. Scully

Date: August 8, 2014

Counsel for: Makita Corporation

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(See attached service list.)

/s/ Elizabeth A. Scully
(signature)

August 8, 2014
(date)

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

See attached list.

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Eliot Fielding Turner

Date: August 8, 2014

Counsel for: Robert Bosch Tool Corporation

CERTIFICATE OF SERVICE

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See attached list.

/s/ Eliot Fielding Turner
(signature)

August 8, 2014
(date)

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

See attached list.

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Eliot Fielding Turner

Date: August 8, 2014

Counsel for: Robert Bosch Tool GmbH

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/s/ Eliot Fielding Turner
(signature)

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Milwaukee Electric Tool Corporation
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
 If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
 Esstar, Inc., which is owned by Defendant Techtronic Industries North America Inc., which in turn is a subsidiary of Techtronic Industries Co., Ltd.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
 If yes, identify all such owners:

- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

Techtronic Industries Co., Ltd.

- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ James Kress

Date: August 8, 2014

Counsel for: Milwaukee Electric Tool Corporation

CERTIFICATE OF SERVICE

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See attached

s/ James Kress
(signature)

August 8, 2014
(date)

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

One World Technologies, Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
 If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
 Defendant Techtronic Industries North America, Inc., which is a subsidiary of Techtronic Industries Co., Ltd.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
 If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

Techtronic Industries Co., Ltd.

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ James Kress

Date: August 8, 2014

Counsel for: One World Technologies, Inc.

CERTIFICATE OF SERVICE

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August 8, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

OWT Industries Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Date: August 8, 2014

Counsel for: OWT Industries Inc.

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Counsel for: Ryobi Technologies, Inc.

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

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

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Techtronic Industries North America, Inc.
(name of party/amicus)

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Counsel for: Techtronic Industries North America, Inc.

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8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (3d ed. 2012) 44, 45

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JURISDICTIONAL STATEMENT

Five of nineteen Defendants sought dismissal for lack of personal jurisdiction or insufficient service of process. *See* A-19–22. The district court had both subject-matter and personal jurisdiction over the other Defendants. The Rule 12(b)(6) arguments applied to all Defendants; thus, the district court correctly dismissed Plaintiffs’ complaint without addressing the jurisdictional issues. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012). This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Plaintiffs failed to allege a plausible conspiracy to boycott their SawStop technology, especially given Plaintiffs’ allegations that several Defendants offered to license the technology *after* the alleged conspiratorial agreement?
2. Whether Plaintiffs failed to allege a plausible conspiracy to prevent Underwriters Laboratories from requiring the use of SawStop, where Plaintiffs merely alleged facts consistent with routine standard-setting activity?
3. Whether Plaintiffs failed to allege harm to competition, given their allegations that they rejected offers to license SawStop and where they allege that they themselves brought SawStop to market?

INTRODUCTION

In 2000, Plaintiffs SD3, LLC and SawStop, LLC demonstrated a prototype table saw safety technology they called “SawStop,” which was, they concede, still years away from being ready for market. Several Defendants actively discussed licensing the technology from Plaintiffs. Ryobi sent Plaintiffs a signed license providing generous terms. Plaintiffs never countersigned it. In mid-2002, Black & Decker offered to take a license, on terms that would have been worth millions of dollars annually to Plaintiffs. Plaintiffs rejected this proposal. Instead Plaintiffs made clear that they wanted royalty payments as high as *8% of Defendants’ wholesale sales price*, in a fiercely competitive industry with thin margins. Finding no takers for a license to untested technology on those terms, Plaintiffs entered the market themselves after working to develop the technology and have been selling “SawStop”-enabled table saws in competition with several Defendants for the past decade.

Rather than simply competing on the merits, Plaintiffs tried to convince Underwriters Laboratories, Inc. (“UL”) to effectively mandate that all manufacturers license Plaintiffs’ technology at whatever price they demanded, and to incorporate it into all table saws. And when that effort failed, Plaintiffs filed this lawsuit—seeking, with remarkable chutzpah, to use the antitrust laws to reduce consumer choice and force all manufacturers to license their technology.

In their first amended complaint (“FAC”), Plaintiffs allege three separate conspiracies: (1) a supposed conspiracy in October 2001 to boycott SawStop technology; (2) a supposed conspiracy in 2003 to block UL from mandating the use of that technology in all table saws; and (3) a supposed conspiracy to have UL “implement a design requirement for [Defendants’] own uniform guard design.” A-71, A-97 (FAC ¶¶2, 105).

The district court correctly recognized that the allegations in the FAC fail to state a claim. The allegations do not support an inference that any of the supposed conspiracies occurred, and Plaintiffs conceded below that the allegations are fully consistent with each Defendant pursuing its independent self-interest. Indeed, Plaintiffs’ allegations that certain Defendants continued to negotiate individually for SawStop licenses *after* the alleged October 2001 boycott agreement actually *refute* Plaintiffs’ claim. So does the testimony of David Peot, the supposed “direct” evidence of conspiracy that Plaintiffs mischaracterize by selective quotation in the FAC.

Plaintiffs’ allegations about Defendants’ role in the UL standard-setting process also do not suggest any anticompetitive agreement. As the district court found, the allegations show merely that each Defendant was (independently and unsurprisingly) opposed to any industry-wide mandate that would have permitted Plaintiffs to demand whatever royalty they desired for an unproven technology,

and that would have significantly restricted consumer choice and the ability of each Defendant to compete. Plaintiffs' allegations also make clear that nothing has, in fact, excluded their technology from the market, as they continue to sell table saws incorporating SawStop technology today, in active competition with Defendants.

Standard-setting is not inherently suspect as Plaintiffs and their *amici* suggest.¹ Standard-setting is procompetitive, and absent well-pled factual allegations detailing subversion of the process or conspiratorial agreements outside of standard-setting to corrupt the process, courts routinely dismiss antitrust claims by competitors whose technology was omitted from a standard.

If Plaintiffs were truly supporters of the public interest, as they claim, they would have made their technology available on fair, reasonable and non-discriminatory ("FRAND") terms to all manufacturers. But Plaintiffs' allegations demonstrate that their own unwillingness to compromise derailed the initial licensing of their technology. Plaintiffs were offered licenses that would have generated millions of dollars of licensing revenue, but rejected them as "anemic." This lawsuit is nothing more than an attempt to obtain the monopoly they failed to

¹ A partner in the law firm representing Plaintiffs sits on the seven-person Board of Directors of *amicus* American Antitrust Institute, an organization largely comprised of lawyers from plaintiffs' firms and which typically supports plaintiffs. See American Antitrust Institute, <http://antitrustinstitute.org/people/board-of-directors> (last visited Dec. 12, 2014).

impose upon the industry a decade ago. As the district court properly concluded, Plaintiffs failed to allege any plausible conspiracy. The district court's order dismissing Plaintiffs' claims should be affirmed.

STATEMENT OF THE CASE

SawStop Technology

Table saws are power tools used to cut wood and can range in size from bench-top saws that weigh less than eighty pounds to cabinet saws that weigh several hundred. A-81 (FAC ¶45). Defendants Black & Decker, Bosch, TIC, Emerson, Hitachi Koki USA, Makita, Pentair, and Chang are current or former suppliers of table saws in the United States. A-73–78 (FAC ¶¶11–30). In 2000, Plaintiffs' founder, Stephen Gass, developed an "active injury mitigation technology" ("AIMT") he called "SawStop" that is allegedly able to detect contact between a person and a table saw blade and then stop the blade. A-83 (FAC ¶¶59–60). In August 2000, Plaintiffs showed an early prototype cabinet saw incorporating AIMT at a trade show in Atlanta. A-86 (FAC ¶66). In November 2000, Plaintiffs made a presentation at a meeting of the Power Tool Institute ("PTI"), a non-profit organization that promotes the interests of the power tool industry, and encourages high standards of safety in the manufacture of power tools, and whose membership includes several of the Defendants. A-78, A-87

(FAC ¶¶31, 71). Employees of various Defendants attended that demonstration. A-87 (FAC ¶71).

The prototype made for a dramatic presentation. Plaintiffs used a hot dog in place of a human finger to demonstrate that “[t]he blade would cut through the wood as expected, but stopped when it contacted the hot dog, resulting in only a small nick.” A-86 (FAC ¶66). As it turned out, however, the prototype shown onstage by Gass did not translate into a commercially feasible or reliable product when used in a real woodworking environment.

Plaintiffs acknowledge that, even if Defendants had adopted the technology immediately, it would not have been ready for commercialization until at least 2004, and that full implementation on all table saws could have taken until 2008, if at all. A-92 (FAC ¶90).

The Alleged Conspiracy Not to License or Implement

Plaintiffs contend that, in October 2001, while the SawStop prototype was still in its developmental stage, Defendants formed a conspiracy to refuse to license and/or implement AIMT technology. A-71 (FAC ¶2). According to Plaintiffs, the PTI held a meeting on October 5–6, 2001 at which various Defendants were present, including Black & Decker, Emerson and Ryobi. A-89 (FAC ¶78). A separate meeting of table saw suppliers allegedly took place at the same time and included representatives from Bosch, Ryobi, Makita U.S.A., Emerson, Pentair,

Hitachi Koki USA, Black & Decker and Milwaukee Electric. *Id.* (FAC ¶79).

Plaintiffs allege that at this October 2001 meeting “[a] consensus was reached that (1) all should take a SawStop license and/or implement AIMT, or (2) none take it or otherwise implement AIMT.” A-89 (FAC ¶80). And “within a period of months following the October 2001 meeting, each of Defendants ... had agreed to enter into a boycott ... of SawStop’s intellectual property, by collectively (1) refusing to license SawStop technology, and (2) agreeing not to otherwise implement AIMT.” A-90–91 (FAC ¶83). Pursuant to that supposed agreement “Defendants not yet in license negotiations with SawStop refrained from requesting a license, and the Defendants who were already in negotiations found ways to abort them as opportunities arose.” A-91 (FAC ¶85).

Plaintiffs’ Licensing Negotiations With Defendants

The FAC is astonishingly short on details with respect to the actual agreement that Defendants allegedly reached or any discussions that allegedly led to it. Plaintiffs now embellish their allegations *in their brief* with new details not found in the FAC. For example, Plaintiffs’ assertion that Bosch’s Peter Domeny “explained why uniform rejection of the licenses and the SawStop Technology safety feature was in the large table saw manufacturers’ best interests” (Opening Br. 37), is nowhere to be found in the FAC. Plaintiffs’ FAC also contains no

allegations about supposed direct evidence in “the form of the email in which Mr. Peot memorialized the meeting,” as they now claim. Opening Br. 21–22.

What the FAC *does* contain are allegations that directly contradict the existence of any agreement not to license or implement AIMT. For example, Plaintiffs allege that several Defendants continued to negotiate with Plaintiffs about licensing the SawStop technology—and one alleged conspirator *sent a signed* license agreement to Plaintiffs—well after the alleged agreement not to license was supposedly reached:

- Ryobi began negotiating a license with Plaintiffs around the time of the PTI demonstration. According to the FAC, in *January 2002—three months after an unlawful agreement was allegedly reached—* Ryobi sent a *signed* agreement to license the SawStop technology to Plaintiffs in exchange for a royalty payment of between 3% and 8%. A-91–92 (FAC ¶87). Plaintiffs refused to countersign this agreement, claiming that there was a “minor ambiguity” in the wording of the agreement. A-92 (FAC ¶87).
- The FAC concedes that Black & Decker negotiated with Plaintiffs for more than two years. In or around April 2002, Black & Decker offered Plaintiffs a license agreement with a 1% royalty payment. A-

92 (FAC ¶89). Plaintiffs elected not to move forward with the license because they did not like the financial terms. *Id.*²

- Emerson and Plaintiffs began negotiating a license agreement in 2000. Those negotiations included several in-person meetings at Emerson's St. Louis headquarters and at Plaintiffs' offices in Oregon. A-88–89 (FAC ¶77). The negotiations continued into 2002, again well after the alleged early October agreement. A-92 (FAC ¶¶88–89). Emerson exited the table saw business entirely in 2003. A-97 (FAC ¶108).
- The Complaint alleges that Bosch ended negotiations with Plaintiffs the month *before* the alleged conspiratorial agreement. A-88 (FAC ¶75). Plaintiffs then allege that Bosch resumed negotiations “years later.” *Id.*

Similarly, although Plaintiffs allege that in October 2001 “Defendants not yet in license negotiations with SawStop refrained from requesting a license,” A-91 (FAC ¶85), the FAC contains no allegations with respect to the negotiation history of these remaining Defendants: Hitachi Koki USA, Pentair, Makita U.S.A. and Milwaukee Electric. Specifically, there is no allegation that Plaintiffs ever

² SawStop tries to slight Black & Decker's offer of a 1% royalty, claiming that it was an “anemic” royalty for SawStop's invention. Opening Br. 36. But, using the sales figures in SawStop's FAC (*see* A-81 (FAC ¶¶46–48)), a 1% royalty would result in annual licensing revenue of millions of dollars.

approached these Defendants about a license, or that these Defendants refused to enter into a license with Plaintiffs.

Other allegations in the FAC also contradict Plaintiffs' claim. Plaintiffs allege that Defendants engaged in an all or none conspiracy because "if one manufacturer adopted SawStop Technology, then all manufacturers would be subject to greater liability in future product liability cases" if they did not also adopt the technology. A-89 (FAC ¶80). But Plaintiffs allege that offers were made by Defendants and that one manufacturer—Plaintiffs themselves—has marketed table saws incorporating the SawStop technology for years now.

In 2004, Plaintiffs introduced their own line of cabinet saws incorporating the SawStop technology, and by Plaintiffs' own account they are doing quite well. A-84–86, A-95–96 (FAC ¶¶63, 101-02). Plaintiffs now manufacture three different lines of table saws. A-95–96 (FAC ¶¶101-02). Yet despite SawStop's presence in the marketplace for over ten years, Plaintiffs concede that neither Defendants nor other manufacturers have adopted the technology to avoid any feared onslaught of products liability suits. A-103 (FAC ¶127).

The Peot Testimony

In an attempt to paper over the defects of the FAC, Plaintiffs re-characterize and paraphrase the testimony of David Peot, former Engineering Director at Ryobi,

during a products liability trial. A-71, A-89 (FAC ¶¶3, 80).³ According to Plaintiffs' FAC, Peot testified in 2010 that "PTI's table saw manufacturers determined [at the October 2001 meeting] that they would decide how to respond, as an industry, to the SawStop Technology." A-89 (FAC ¶80).⁴ Plaintiffs allege that Peot's testimony indicated that "participants expressed concerns that if one manufacturer adopted SawStop Technology, then all manufacturers would be subject to greater liability in future product liability cases." *Id.* And Plaintiffs allege that "[m]embers also discussed developing something like SawStop Technology, without having to pay a royalty to Dr. Gass." *Id.* Nowhere do Plaintiffs allege that Peot identified an actual *agreement* not to license SawStop technology.

Plaintiffs did not attach Peot's trial testimony to the FAC or provide any direct quotations from it. Instead, they opened their complaint with the bold claim that Peot "exposed the conspiracy during his testimony in a product liability trial," A-71 (FAC ¶3), selectively paraphrased his testimony with scattered citations to the transcript, A-87, A-89–90 (FAC ¶¶69, 80), and then urged the district court to

³ The full transcript of Peot's testimony is available on ECF. *See Osorio v. One World Techs. Inc.*, No. 06-CV-10725 (D. Mass. 2010), ECF No.137.

⁴ Gass has, for nearly a decade, served as an expert witness in product liability suits brought against Defendants, including in the case in which Peot testified. *See, e.g.*, A-142–143, A145 (Opinion & Order of Civil Contempt 1–2, 4, *Thull v. Techtronic Indus. Co.*, No. 3:13-mc-00102 (D. Or. filed Feb. 3, 2014)).

ignore the words of the actual transcript. The district court, however, recognized that Plaintiffs' reliance on selective quotations and paraphrased statements made it appropriate to consider Peot's entire testimony when evaluating the sufficiency of Plaintiffs' allegations. A-172–73. That testimony is in the public domain and relevant excerpts appear in the record in Defendants' motions to dismiss. *See* A-133–40, A-123–30. And as the district court ultimately found, even a cursory review of the testimony reveals that Peot *did not* “expose” any “conspiracy” to boycott licensing SawStop technology.

Peot's testimony focused largely on the creation of a joint research venture that certain members of PTI formed to explore safety devices for table saws long *after* October 2001. The joint venture participants provided notice of its formation, objectives and intended activities to the Department of Justice's Antitrust Division and the Federal Trade Commission in December 2003. A-132. As Peot testified, the participants in this joint venture were “chartered to use whatever technology we felt would be best to prevent table saw accidents” and “[t]here were no limitations” on what technology they could consider. A-140. The purpose of the committee was to develop *new* technology that “would be the best way of improving table saws for table saw safety and blade contact avoidance,” A-127, and to investigate alternatives that would avoid paying the high license fees demanded by Gass, A-136. Critically, and directly contrary to the misleading

descriptions in the FAC, Peot testified that there was *no* agreement among the committee, joint venture or Defendants that Defendants were not to license or use Plaintiffs' technology. A-128.

The Alleged Standard-Setting Conspiracies

Plaintiffs also allege two conspiracies focused on standard-setting. After Plaintiffs failed to persuade Defendants to pay royalties for the unproven SawStop technology, Plaintiffs tried to use UL to force Defendants to do so. Gass proposed a revision to certain safety standards created and maintained by UL Standards Technical Panel 745 (“STP 745”).⁵ UL and STP 745 promulgate *minimum*⁶ standards for the safe operation of table saws and other power tools, and include as members Gass and representatives from certain (but not all) of the Defendants. A-96–97 (FAC ¶¶104, 106). According to Plaintiffs, Gass proposed modifying UL Safety Standard 987 for stationary power tools in a way that would have “required the implementation of AIMT.” A-96 (FAC ¶104). In other words, Gass proposed that UL *mandate* the adoption of his patented technology in every table saw sold in the United States.

⁵ UL is a nonprofit safety consulting and certification organization that provides safety-related certification, validation, and testing services to a wide range of entities. A-79 (FAC ¶33).

⁶ *ECOS Elecs. Corp. v. Underwriters Labs., Inc.*, 743 F.2d 498, 500 (7th Cir. 1984). Nothing prevents a manufacturer from exceeding the UL standard.

On February 11, 2003, STP 745 voted to reject Gass' proposal. A-97 (FAC ¶¶106–07). Plaintiffs allege that Defendants unlawfully agreed to “vote as a bloc ... to thwart any proposal by any person to mandate the implementation of AIMT.” A-97 (FAC ¶105). But Plaintiffs do not allege any details about when, where or how this supposed agreement was formed—just the empty conclusion that Defendants agreed to “vote as a bloc.” Several of the Defendants are not even alleged to have had representatives on STP 745. *Id.* (FAC ¶106).⁷ Even as to those Defendants who allegedly participated in STP 745, there are no allegations regarding their role in UL or STP 745, or how they supposedly acted to “corrupt” the standards that those bodies put out. *See id.* (FAC ¶¶106–07). The FAC only alleges that certain Defendants participated in the STP 745 committee and that STP 745 rejected Gass's proposal. *Id.*

Nor does the FAC explain why it would not have been in every Defendant's independent business interest, absent any agreement, to vote against Gass's proposal. The FAC makes clear that the adoption of that proposal would have required each of them to implement the still-unproven SawStop technology, the only “AIMT” then on the market, and pay royalties to Plaintiffs. A-96 (FAC ¶104). In Plaintiffs' words, “Gass' patents could not be avoided.” A-103 (FAC ¶127). And the proposal was made after Plaintiffs

⁷ These Defendants are Hitachi Koki, USA; Hitachi Koki Co., Ltd.; Pentair Water Group, Inc.; and Chang Type Industrial Co., Ltd.

had insisted on 8% of wholesale table saw prices as a licensing fee. A-86 (FAC ¶65).

Finally, Plaintiffs allege a variation of their standard-setting conspiracy claim that focuses on the research joint venture formed by certain Defendants in 2003 and described in Peot's testimony. Again, Plaintiffs lump numerous Defendants into their claim despite their failure to allege that those Defendants participated in the joint venture.⁸ Plaintiffs claim that even though the publicly-announced purpose of the 2003 joint venture was "to work collectively to develop technology for blade contact injury avoidance," it was really a "smokescreen designed to fend off potential implementation by the CPSC of AIMT requirements." A-97 (FAC ¶109). But as Plaintiffs acknowledge, new blade guard standards *were* "substantially changed" by UL's STP 745 in 2005 when it added a requirement for an anti-kickback device called a riving knife. A-98 (FAC ¶113). Further safety revisions were adopted in 2007. A-99 (FAC ¶115). Plaintiffs contend, with no factual support, that these revisions must have been conspiratorial simply because

⁸ These Defendants are Stanley Black & Decker, Inc.; Black & Decker (U.S.) Inc.; Chang Type Industrial Co., Ltd.; Delta Power Equipment Corp.; Hitachi Koki Co., Ltd.; Makita Corp.; Makita U.S.A., Inc.; Milwaukee Electric Tool Corp.; OWT Industries, Inc.; Pentair Water Group, Inc.; and Techtronic Industries North America, Inc. A-97 (FAC ¶109). Plaintiffs expressly exclude Emerson from their standard-setting claim, presumably because Emerson exited the table saw business entirely in early May 2003 and moved to dismiss the original complaint on that basis. *Id.* (FAC ¶108).

none of them required the adoption of Plaintiffs' SawStop technology. *See* A-101–102 (FAC ¶124); *see also* A-102 (FAC ¶126).

Proceedings Below

Plaintiffs filed the original complaint on February 20, 2014. Defendants moved to dismiss pointing out, among other things, that the negotiation history detailed in the complaint refuted Plaintiffs' claims of conspiracy. Plaintiffs did not oppose, but filed their FAC on April 24, 2014; the FAC deleted many specific factual allegations about the negotiations and replaced them with conclusory assertions of conspiracy. A-88–92 (FAC ¶¶75–89). The FAC also added claims under Ohio and Illinois state antitrust laws, which Plaintiffs do not address in their appellate brief. A-107, A-108 (FAC ¶¶164, 174). Defendants again moved to dismiss on May 13, 2014, and the district court held oral argument on June 13, 2014. A-19–20, A-26.

Judge Hilton dismissed the FAC, ruling that “Plaintiffs’ conspiracy allegations are belied by their negotiating history with varying Defendants,” and specifically by allegations that Plaintiffs “negotiated with Defendants Emerson, Ryobi, and Black & Decker, respectively, well after the alleged group boycott began in October 2001.” A-170. As one example, Judge Hilton noted that Ryobi signed an agreement with Plaintiffs in January 2002, “within the time that the Amended Complaint alleges that Ryobi was a part of a conspiracy to refuse to deal

with the Plaintiffs regarding the very same technology.” A-170–71. Judge Hilton also noted that Plaintiffs alleged that their negotiations with “Bosch ... ceased in September 2001—the month before the alleged conspiracy began,” and that, in any event, the negotiations with Bosch resumed several years later. A-171–72. The district court found that “[t]hese events cannot plausibly be characterized as a refusal to deal,” and that “[t]he sequence of all of these events undermines the Plaintiffs’ group boycott allegations.” A-171, A-172.

The district court also ruled that the excerpts of Peot’s testimony cited in the complaint “do not bring [Plaintiffs’] allegations from the possible to the plausible because they conflict with the full quotations from Mr. Peot’s testimony, which the Court may take notice of.” A-173 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 n.13 (2007)). Judge Hilton recognized that Peot’s testimony largely concerned Defendants’ creation of the 2003 joint venture to investigate safety technology for the industry. A-172–73. And in that context, Peot testified “that the joint venture’s purpose was ‘to use whatever technology we felt would best prevent table saw accidents. There were no limitations that [Peot] can remember one way or the other.’” A-173. The district court explained that “[e]ven the concern over product liability exposure is revealed in context to be a desire of some individual suppliers to explore alternatives before adopting untested technology with an unknown demand.” A-173–74.

The district court similarly ruled that the alleged motive for the conspiracy, a desire to avoid increased liability exposure if SawStop became commercially available, was not plausible in light of Plaintiffs' own allegations. "Plaintiffs state that they entered the table-saw marketplace approximately ten years ago, sold their technology, and have proven its commercial viability." A-175. And Plaintiffs concede that, in the ensuing years, "Defendants did not subsequently hasten to adopt the technology to avoid the anticipated catastrophic liability exposure." *Id.* Therefore, "Defendants' purported motivation for the alleged conspiracy is non-existent." *Id.*

The court also found that Plaintiffs' allegations regarding the alleged "standards" conspiracy were insufficient. Plaintiffs alleged that only certain Defendants had representatives on the UL panel, but nevertheless lumped all Defendants into the alleged conspiracy. A-176. Moreover, the district court held that the FAC did not adequately allege that the Defendants that *did* participate in the UL process did anything other than act in their own unilateral self-interest by seeking "a more economically-appealing alternative technology." A-179; *see also* A-178 ("[A]n antitrust violation is not composed of merely advocating for an industry standard that accords with one's own economic interest.").

The court additionally held that Plaintiffs' allegations did not establish competitive harm. At most, "Plaintiffs' allegations of competitive harm ultimately

amount to lost sales and profits from UL failing to mandate its safety technology upon the market.” A-177. But customers were not “constrained from buying [Plaintiffs’] products,” and failing to mandate the adoption of SawStop did not inhibit Plaintiffs’ ability to access the market. *Id.* (alteration in original) (citation omitted). “The fact that UL safety standards permitted other safety technologies to compete with Plaintiffs’ does not give rise to an antitrust violation.” A-178. “Plaintiffs’ allegations are colored by the reality that they sought to mandate their technology throughout the table-saw industry and reap the royalties of such widely-imposed technology.” A-178–79. The court ruled that such allegations failed to state a conspiracy to corrupt the standard-setting process. A-176, A-179.

SUMMARY OF THE ARGUMENT

The district court, accepting well-pled factual allegations as true and expressly drawing inferences in Plaintiffs’ favor, held that Plaintiffs failed to plead a plausible conspiracy to boycott AIMT. The district court properly examined all of Plaintiffs’ allegations in reaching that conclusion, including their allegations that Defendants offered to license AIMT (and one sent a signed license agreement) *after* the formation of the claimed boycott. Given Plaintiffs’ use of selective snippets and out-of-context paraphrases of Peot’s testimony, the district court also properly considered the entirety of his testimony in reaching this holding.

The district court also correctly held that Plaintiffs failed to allege plausible conspiracies by Defendants to prevent UL from adopting AIMT as a minimum safety standard and to corrupt the standard-setting process. Plaintiffs' conclusory allegations that defendants "agreed to vote as a bloc" or that the standard-setting process was "corrupt" do not suffice to state a claim. If they did, standard-setting would grind to a halt as disgruntled proponents of technologies not selected for inclusion could all bring antitrust claims.

Finally, the district court properly held that Plaintiffs failed to allege the requisite harm to competition given their failure to allege a *per se* violation of the antitrust laws. Plaintiffs' alleged injury—that UL did not require participants in the table saw industry to license AIMT—is merely an assertion that a defendant refused "to promote, approve, or buy the plaintiff's product," and not a cognizable competitive harm. *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 297 (5th Cir. 1988).

Despite Plaintiffs' contentions to the contrary, the district court faithfully applied *Twombly* in analyzing the FAC, and correctly concluded that Plaintiffs failed to state any plausible conspiracy. The district court's order should be affirmed.

STANDARD OF REVIEW

This Court reviews the dismissal of a complaint under Rule 12(b)(6) *de novo*. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFFS FAILED TO ALLEGE A PLAUSIBLE CONSPIRACY TO BOYCOTT AIMT

A. The district court correctly applied the *Twombly* standards in finding that Plaintiffs' alleged conspiracy was not plausible.

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face,’” which means “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Facts that are “‘merely consistent with’ a defendant’s liability,” or a “sheer possibility that a defendant has acted unlawfully,” are not enough. *Id.* (citation omitted).

In a Sherman Act Section 1 case, that means the plaintiff must plead facts, not merely conclusions, “plausibly suggesting (not merely consistent with) agreement.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Allegations of supposedly “parallel” conduct “must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Id.* Similarly, “a mere opportunity to conspire does not,

standing alone, plausibly suggest an illegal agreement.” *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009). For that reason, participation at trade association meetings in which issues of interest to the industry are discussed does not, standing alone, support any inference of conspiracy. *See Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) (“[I]t was well-settled before *Twombly* that participation in trade organizations provides no indication of conspiracy.”).

Likewise, conduct that is merely consistent with a defendant’s independent business interests cannot support a reasonable inference of a conspiracy. *See Twombly*, 550 U.S. at 557; *see also Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 137 (2d Cir. 2013). In *Twombly*, for example, the Court rejected allegations that the defendants resisted competition because the claims amounted to “routine market conduct” that was consistent with the “natural, unilateral reaction” of the defendants. 550 U.S. at 566. These standards are also supported by important policy considerations, not least of which is the fact that “proceeding to antitrust discovery can be expensive.” *Id.* at 558.

The district court articulated these standards correctly, explaining that “[t]o survive Defendants’ Motions to Dismiss, Plaintiffs’ ‘allegations must produce an inference of liability strong enough to nudge the [Plaintiffs’] claims across the line from conceivable to plausible.’” A-168 (quoting *Nemet Chevrolet, Ltd. v.*

Consumeraffairs.com, Inc., 591 F.3d 250, 256 (4th Cir. 2009)). The court also explained that Plaintiffs should “receive all inferences drawn in their favor.” A-169. In assessing whether the FAC’s allegations brought Plaintiffs’ claims “from the possible to the plausible” the district court examined them in light of the full scope of their allegations. A-173. These principles are straight from *Twombly*.

The district court’s application of these principles to Plaintiffs’ FAC was also sound. The court considered, for example, whether an inference of an agreement not to license AIMT was plausible in light of Plaintiffs’ allegation that several Defendants attempted to negotiate just such a license *after* the formation of the supposed conspiracy. A-170. As Plaintiffs admitted, this negotiating history “could just as easily support an inference of legal unilateral conduct as it could support an inference of concerted anticompetitive behavior.” Pls.’ Opp. to Joint Mot. to Dismiss Am. Compl. 27, ECF No. 190.

The district court also considered whether the alleged agreement was plausible in light of the fact that, accepting Plaintiffs’ allegations as true, Defendants did not even act in a parallel manner. Some Defendants did not attempt to license AIMT, others entered negotiations but ultimately decided against a license, and still others actively sought a license and offered contractual terms that Plaintiffs refused. A-170–72. The district court properly took these allegations into account in determining whether an inference of conspiracy was

plausible in light of the full context and the many alternative, unilateral explanations for the Defendants' conduct. A-170; *see Twombly*, 550 U.S. at 556–57; *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275, 281 (4th Cir. 2012) (where there are unilateral business reasons explaining an alleged refusal to deal, the claim fails absent plausible allegations of an anticompetitive agreement).

Based on the district court's passing reference to *Matsushita*, Plaintiffs wrongly argue that the district court applied a summary judgment standard. In fact, Plaintiffs' real contention is that ordinary motion to dismiss standards are either automatically satisfied or do not apply whenever there are "allegations of direct evidence," which they define as "alleged facts about the substance of their agreement." Opening Br. 20. Apparently, so long as "direct evidence" is pled, it is improper for a court to assess whether the allegations are plausible in light of the context of the claims and the remaining allegations in the complaint, because doing so would "resembl[e] a summary judgment standard." Opening Br. 26. That contention misconstrues both the motion-to-dismiss standard and what it means to allege "direct evidence" of a conspiracy.

Whether a plaintiff attempts to plead "direct" or "circumstantial" evidence of agreement, the allegations must describe a plausible conspiracy, and not simply unilateral conduct. *See Twombly*, 550 U.S. at 554, 561-62 (citation omitted). As the Court in *In re Insurance Brokerage Antitrust Litigation*

explained, “if a plaintiff expects to rely exclusively on direct evidence of conspiracy, its complaint must plead ‘enough fact to raise a reasonable expectation that discovery will reveal’ this direct evidence,” *i.e.*, “‘enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.’” 618 F.3d 300, 323-24 (3d Cir. 2010) (citations omitted); *see also LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136, 147 (E.D.N.Y. 2010) (*Twombly* applies to allegations of direct evidence of conspiracy)

The “direct evidence” that would (if true) permit a reasonable inference of conspiracy is the proverbial “smoking gun” that is “‘explicit and requires no inferences to establish the proposition or conclusion being asserted.’” *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir. 2004) (citation omitted); *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 290-91 (4th Cir. 2012) (allegations of by-laws “plainly” documenting an agreement constituted direct evidence of a conspiracy). “Such evidence would consist, for example, of a recorded phone call in which two competitors agreed to fix prices at a certain level.” *Mayor*, 709 F.3d at 136. Where such evidence is both sufficiently pled and plausible in light of the remaining allegations of the complaint, courts generally rule that dismissal is inappropriate.

Plaintiffs’ allegations do not remotely resemble “direct evidence” of an agreement not to license AIMT. Peot’s testimony certainly doesn’t qualify. As the

district court explained, Peot did not testify to any unlawful agreement. A-173. He described a proposed joint venture, years *after* the time period of the alleged boycott, to investigate alternative safety technologies for table saws. *Id.* And Peot was clear that the venture would consider *all* possibilities, including AIMT. *Id.* Plaintiffs argue that various *inferences* of conspiratorial conduct can be drawn from aspects of Peot's testimony, such as his statement that industry participants were concerned about the potential implications of AIMT in products liability suits. But the district court properly applied *Twombly* by testing whether those proposed inferences gave rise to a plausible conspiracy case, in light of the full context and other alleged facts.

Plaintiffs also did not allege direct evidence in “the form of the email in which Mr. Peot memorialized the meeting,” as they now claim. Opening Br. 21–22. The amended complaint does not mention such an email, and there are therefore no allegations that might sustain Plaintiffs' burden. Nor did Plaintiffs allege the existence of any “minutes” of the October 2001 meeting that they now assert might sustain their burden. *See id.* at 8 n.7, 22. And Plaintiffs' assertion that it is “probable that the minutes of PTI meetings' would ‘provide additional direct evidence of the conspiracy,’” *id.* at 8 n.7, is pure speculation of the type that *Twombly* explicitly rejected. *See Twombly*, 550 U.S. at 556, 561–62.

B. The district court correctly held that the facts alleged by Plaintiffs do not create any reasonable inference of a conspiracy.

The district court correctly determined that the plausibility of the alleged conspiracy is fatally undermined by Plaintiffs' own allegations.

Though devoid of many details regarding the claimed conspiracy, the FAC is at least specific about the critical time frame of the supposed agreement (October 5–6, 2001, or shortly thereafter) and the general terms (no Defendant was to license AIMT from Plaintiffs). A-89–91 (FAC ¶¶78–83). Plaintiffs also allege that the motive of the conspiracy was to avoid “catastrophic product liability consequences” that would come from the introduction of AIMT to the market. A-90 (FAC ¶81).

As the district court recognized, the FAC completely fails to allege any facts regarding participation by many of the defendants, including Hitachi Koki USA, Makita U.S.A., Milwaukee Electric Tool, One World Technologies, and Techtronic Industries North America in the alleged agreement, because Plaintiffs never sought a license with any of them. A-172. Nonetheless, the FAC lumps those Defendants in with the rest and claims that they too entered the unlawful conspiracy. *Id.* Similarly, Plaintiffs sued several foreign parent companies that they do not claim were directly involved in the conspiratorial agreement, including Techtronic Industries Co. Ltd., Makita Corporation, Hitachi Koki Co. Ltd. and Robert Bosch GmbH. As to each of these Defendants, the allegations clearly fail

the *Twombly* standard. There certainly is no inference to be drawn from their mere ownership of a U.S. subsidiary. “[P]laintiffs can not rely merely on the parents’ ownership interest in their respective subsidiaries to sustain a [Sherman Act] § 1 claim against parent defendants.” *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 687 (E.D. Pa. 2009); see *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Moreover, Plaintiffs’ failure to allege any specific facts as to these Defendants undermines Plaintiffs’ proposed inference of a “collective[.]” agreement across the industry to refuse to license AIMT. A-71 (FAC ¶2).

The allegations are no more plausible as to the other Defendants. Critically, Plaintiffs allege that at least four defendants—Ryobi, Black & Decker, Emerson and Bosch—continued to do the very thing that they had supposedly agreed not to do: negotiate an AIMT license with Plaintiffs. A-88–89, A-91–92, A-97 (FAC ¶¶75–77, 86–89, 108). In January 2002, Ryobi actually signed an AIMT license agreement for a royalty between 3% and 8%, but Plaintiffs refused to sign it because of a “minor ambiguity.” A-91–92 (FAC ¶87). Similarly, Black & Decker offered a license agreement to Plaintiffs at a 1% royalty in or around April 2002, which Plaintiffs also rejected. A-92 (FAC ¶89). Although Plaintiffs now argue that such a license—worth millions in annual royalty payments—was “anemic,” Opening Br. 36, any affirmative offer of a license agreement is fundamentally inconsistent with the alleged “all” or “none” boycott. See *Cascades Computer*

Innovation LLC v. RPX Corp., No. 12-CV-01143, 2013 U.S. Dist. LEXIS 10526, at *4, 24–25 (N.D. Cal. Jan. 24, 2013) (granting motion to dismiss where Plaintiff characterized Dell’s offer as “spurious” and “made in bad faith” because “[a]ny offer to license Cascades’ patents” after the onset of the alleged conspiracy that *none* of the defendants would enter into a license “is not conduct consistent with participation in the conspiracy as pled”).

Still other Defendants negotiated for AIMT license agreements months and years after the supposed agreement went into effect. Emerson allegedly negotiated with Plaintiffs for many months after the supposed agreement, and ultimately decided to exit the table saw business entirely. A-92, A-97 (FAC ¶¶88–89, 108). And Plaintiffs allege that, while Bosch ended its negotiation *before* the alleged conspiracy was formed, it resumed those negotiations “years later.” A-88 (FAC ¶75).

The continued negotiations by these defendants *after* the formation of the alleged conspiracy directly conflicts with the supposed continuing agreement not to license, and undermines any plausible inference of a group boycott. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 396 (7th Cir. 1993) (plaintiffs’ conspiracy claim was belied by the fact that several of the defendants

sold alcohol-blended gasoline during the period of the alleged conspiracy to restrain trade in gasohol).⁹

Plaintiffs attempt to frame the license negotiations as somehow consistent with an agreement not to license. They assert that Ryobi's offer of a license does not matter because "Ryobi disappeared completely when it was on the verge of consummating an agreement." Opening Br. 36. They similarly claim that Black & Decker's offer of a 1% royalty was too low and that Black & Decker demanded a "high risk" indemnification. *Id.* at 36–37. And they claim that Emerson's continued negotiations in 2002 should not matter because Emerson's ultimate lack of interest was for "pretextual reasons." *Id.* at 37.

This sort of speculation does not even suggest a *conceivable* conspiracy, and the reasonable inferences from these allegations are that the Defendants did not conspire. There is no plausible way to reconcile, for example, the allegation that Ryobi was an active participant in a conspiracy not to license AIMT, with the fact that it then provided a signed agreement to license AIMT, on economic terms that Plaintiffs themselves proposed. Conclusory assertions that Ryobi "disappeared completely" after *Plaintiffs* decided not to sign that agreement, citing some sort of

⁹ The fact that multiple defendants made varying offers means this case is nothing like *Sony Electronics, Inc. v. Soundview Technologies, Inc.*, 157 F. Supp. 2d 180, 183 (D. Conn. 2001) (plaintiff cited declaration reporting an offer on behalf of all defendants to pay the same 5-cents-per-unit royalty, which naturally plausibly suggested a pre-existing agreement among defendants on the royalty rate).

unexplained ambiguity, do not remotely support an inference of conspiracy. And in the district court, Plaintiffs conceded that the negotiating history “could just as easily support an inference of legal unilateral conduct as it could support an inference of concerted anticompetitive behavior.” Pls.’ Opp. to Joint Mot. to Dismiss Am. Compl. 27, ECF No. 190.

Plaintiffs’ allegations of non-parallel conduct by Defendants also strongly suggest the absence of any agreement. It is familiar law that allegations of parallel behavior among competitors are not sufficient to infer a conspiracy, in the absence of some contextual “plus factors” that make conspiracy a more reasonable explanation than independent decisions. But an antitrust plaintiff hoping to infer conspiracy from circumstantial evidence *must at least allege parallel behavior*. See, e.g., *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) (“When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants’ actions were parallel.”); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54 (3d Cir. 2007) (same). Plaintiffs allege non-parallel behavior. The Defendants *never* approached the issue of licensing AIMT in the same way. Certain Defendants offered license agreements with varying royalty rates; others attempted to negotiate a license agreement but never offered terms; and for others there are no allegations of license negotiations at all. Plaintiffs’ allegation of an

“agreement” among such divergent players is far weaker than the “descriptions of parallel conduct” rejected in *Twombly* itself. 550 U.S. at 554, 564; *see also Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) (rejecting bare statements that defendants acted in concert to boycott plaintiff).

This lack of parallel conduct and Defendants’ continued negotiations with Plaintiffs distinguishes this case from *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162 (2d Cir. 2012), and other cases involving industry-wide abrupt changes in pricing or practice. There, the plaintiff (Anderson) alleged that the defendants agreed to boycott Anderson after it imposed a surcharge on certain goods. *Id.* at 170–72. Finding the allegations sufficient, the Second Circuit made clear that the plaintiff alleged that “defendants ceased, in virtual lock-step, to deal with Anderson.” *Id.* at 187. The plaintiff alleged that “within days of Anderson’s announcement of its proposed Surcharge, each of the four distributor defendants met or communicated with at least two other distributor defendants” and “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.” *Id.* at 188–89, 191. By contrast, while Plaintiffs claim that Defendants met and agreed not to license AIMT in October 2001, they affirmatively alleged that multiple Defendants continued to negotiate—and even offered to license AIMT—well into 2002.

Plaintiffs' alleged conspiracy is also implausible for other reasons. For example, the district court properly recognized that Defendants' alleged conduct is not consistent with the alleged motive for the conspiracy. Plaintiffs claim that Defendants entered into the agreement out of fear that if table saws using AIMT were made available to the public, courts and juries would then find all other saws "inherently unsafe." A-90 (FAC ¶81). But at the same time, Plaintiffs allege that after they themselves began selling AIMT-equipped saws in 2004 not a single Defendant licensed AIMT. A-92, A-95 (FAC ¶¶89, 101). In the words of the district court, Plaintiffs "concede that Defendants did not subsequently hasten to adopt the technology to avoid the anticipated catastrophic liability exposure" and "Defendants' purported motivation for the alleged conspiracy is non-existent." A-175. Like the unsuccessful *Twombly* plaintiff, Plaintiffs here assert that a conspiracy is plausible because "success by even one" would have made adoption of the technology by all necessary, but as in *Twombly*, "this general premise fails to answer the point that there was just no need for joint encouragement" not to license this unproven technology. *See* 550 U.S. at 566.

Taking the FAC as a whole, the allegations establish nothing more than that Plaintiffs sought to license a technology, certain Defendants entered into license negotiations while others did not, some (but not all) of those Defendants proposed license terms to Plaintiffs and were refused, and one Defendant provided a signed

license agreement. These are not even allegations of parallel conduct. They are allegations of independent and unique business decisions by different Defendants at differing times. And the motive that Plaintiffs allege for the supposed conspiracy is inconsistent with what the Defendants are alleged to have done. As the district court properly recognized, such allegations are not even close to what *Twombly* requires to state a plausible conspiracy to collectively boycott AIMT technology or refuse to deal with Plaintiffs. *See* 550 U.S. at 556-57; *see also Beef Industry*, 907 F.2d at 514; *Cosmetic Gallery*, 495 F.3d at 54.

C. The district court properly ruled that Plaintiffs' characterizations of Peot's testimony were insufficient to support their conspiracy claim.

Plaintiffs suggest that the alleged conspiracy is made plausible by snippets of Peot's testimony in a products liability trial in 2010, which they characterize as "direct evidence" that "first exposed the conspiracy." Opening Br. 21; A-69 (FAC ¶3); *see also* Opening Br. 27. The district court properly concluded that the allegations of the FAC and Peot's actual testimony do not support Plaintiffs' contentions. Indeed, the FAC mischaracterizes Peot's testimony through misleading and out-of-context paraphrasing, and the testimony is neither direct evidence of an agreement nor circumstantial evidence supporting an inference of conspiracy.

Although Plaintiffs claim that Peot's testimony supplies "direct evidence" of conspiracy—i.e., the "smoking gun" that requires no inferential leaps—they insist that neither the district court nor this Court should read what Peot actually said. *See, e.g.*, Opening Br. 31–34. If Peot's testimony were truly "direct evidence" of a conspiracy, Plaintiffs would have plastered the FAC, their motion to dismiss briefing, and their briefing on this appeal with Peot's supposed "revelation" of an agreement among competitors not to license AIMT. Plaintiffs do the exact opposite, relying only on their own characterizations and paraphrases of what he said, and arguing that the district court and this Court should consider nothing else. Indeed, the handful of actual quotations that Plaintiffs now rely upon are as often the words of the (hostile) examining lawyer as Peot's. *See* Opening Br. 8–9.

Peot did not actually testify about any supposed conspiratorial agreement not to license AIMT in or around October 2001. With respect to the portions of Peot's testimony that Plaintiffs rely on, the full testimony makes clear that Peot was talking about the creation of a PTI committee to investigate, and subsequent formation of, a joint venture chartered to develop additional safety devices for table saws. A-127–28 (Emerson Mot., Ex. B at 4-145:13–146:12); A-136–37 (Joint Mot., Ex. 2 at 4-111:7–112:7). That joint venture was not established until December 2003, long after the supposed conspiracy was allegedly formed. Opening Br. 29 (recognizing that the blade contact joint venture "was not formed

until 2003”). Peot offered no testimony regarding any supposed conspiracy in October 2001 to boycott AIMT. In fact, Peot was asked point blank whether the PTI committee that was formed to evaluate the joint venture agreed to exclude Gass’s AIMT from consideration:

Q. And one of the ground rules was that we would not use technology developed by Dr. Gass, we’d try to find a way to do it without using his technology, correct?

A. No, it was not.

Q. So were you considering his technology—

A. We were chartered to use whatever technology we felt would be best to prevent table saw accidents. There were no limitations that I can remember one way or the other.

A-140 (Joint Mot. to Dismiss, Ex. 2 at 4-146:5–12).

The joint venture’s members disclosed its formation and purpose to the Department of Justice’s Antitrust Division and the Federal Trade Commission, as well as to the public through publication in the Federal Register, pursuant to the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* See A-132 (Joint Mot. to Dismiss, Ex. 1). This publicly disclosed joint venture does not plausibly support the existence of the conspiracy alleged by

Plaintiffs, particularly given Peot's unequivocal testimony that the joint venture was not precluded from considering Plaintiffs' technology. *See id.*¹⁰

Peot's testimony suggests only that the members of the PTI committee (some but not all of the Defendants) collaborated to determine what safety technologies would best assist the industry and whether there were any alternatives to AIMT, a then-untested technology. This is nothing like the "smoking gun" evidence courts explain would be sufficient "direct evidence." *See Trigon Healthcare*, 367 F.3d at 226; *Hyland v. Homeservices of Am., Inc.*, 771 F.3d 310, 319 (6th Cir. 2014) ("[T]he 'direct' evidence relied upon by plaintiffs falls far short of the standard that it be 'explicit and require[] no inferences.'" (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999))).

Peot's testimony is also not circumstantial evidence that permits any plausible inference of an agreement to boycott AIMT. It merely shows that certain Defendants acted in line with rational independent business interests—the desire to seek out alternative safety technologies before adopting one that was still

¹⁰ The public disclosure of the joint venture distinguishes this case from *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010). There, the Second Circuit specifically relied on allegations that the defendants "attempted to hide their MFNs because they knew they would attract antitrust scrutiny." *Id.* at 324. Here, Defendants disclosed the joint venture to the antitrust authorities and the public, stating that the purpose was "the research and development of technology for power saw blade contact injury avoidance, including skin sensing systems, blade braking systems, and/or blade guarding systems." A-132 (Joint Mot. to Dismiss, Ex. 1.)

developmental, not ready for production, and expensive. In *Mayor*, 709 F.3d at 137, allegations that the defendants agreed to boycott auction rate securities (“ARS”) and simultaneously stopped buying ARS failed to satisfy *Twombly* because there were independent business interests that explained the parallel conduct. “Defendants’ alleged actions—their *en masse* flight from a collapsing market in which they had significant downside exposure—made perfect business sense.” *Id.* at 138.

Here, of course, Defendants are not alleged to have acted in a parallel manner at all. And the only arguable similarity—that no Defendant ultimately took a license from Plaintiffs—is explained by obvious independent business justifications, as in *Mayor*. Defendants had every reason not to pay for a new, untested technology that had not been proven in any commercial setting. Plaintiffs’ demand for license fees of up to 8% of the price of each table saw made such an investment even less attractive. These legitimate and independent justifications are consistent with the actual substance of Peot’s testimony and render the alleged conspiracy implausible. *Cf. Ins. Brokerage*, 618 F.3d at 335, 337, 349 (even defendants’ adoption of their trade association’s suggested “deceptive reporting model” did not state plausible allegation of conspiracy where each defendant “would be independently motivated to evade the [reporting] requirement”).

Plaintiffs argue that the district court's consideration of Peot's testimony involved a variety of related legal errors. Plaintiffs are wrong.

First, Plaintiffs claim that the district court improperly took "judicial notice" of Peot's testimony and accepted the "truth of the matters asserted" in that testimony. Opening Br. 32–34. That is not correct. A court is indisputably entitled to—and indeed must—"consider the complaint in its entirety, as well as other sources . . . , in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (4th Cir. 2011) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). This is not a question of taking "judicial notice" of the entirety of Peot's testimony or accepting it as true. It is about fairly evaluating whether Peot's testimony, in its full and proper context, creates a reasonable inference of conspiracy. *See In re Travel Agent*, 583 F.3d at 909–10 (dismissing complaint notwithstanding out of context deposition testimony that there was an "industry consensus" on lowering commission rates because full deposition transcript included express denial of prior agreement).

This wider context is particularly necessary here, given that Plaintiffs simply paraphrased Peot's testimony rather than quoting or attaching it in full. Any analysis of whether the FAC's descriptions are true to Peot's testimony—and whether that testimony pushes Plaintiffs' claims across the line from the

conceivable to the plausible—depends on what Peot *actually* said. It was therefore entirely correct for the district court to review all of Peot’s testimony. The Supreme Court endorsed exactly such an approach in *Twombly*, where the plaintiffs’ complaint quoted “only part of” a statement by the defendant’s CEO “to suggest that the [defendants] declined to compete.” 550 U.S. at 569 n.13 (“[T]he District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn.”); *see also New Beckley Min. Corp. v. Int’l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir. 1994) (court did not err in relying on document referred to in complaint; plaintiffs’ “disagreement over the court’s analysis of the document affords little basis for the claim that consideration of the document was in error”); *Trigon Healthcare*, 367 F.3d at 234.

Second, Plaintiffs argue that the court could not properly consider any testimony other than what they themselves “adopt[ed].” Opening Br. 33–34. However, the cases Plaintiffs cite for this proposition concern situations where the plaintiff incorporates a document into a complaint without intending to assert or rely upon the truth of its contents at all. *See Guzell v. Hiller*, 223 F.3d 518, 519 (7th Cir. 2000) (“plaintiff in a libel suit who attached the allegedly libelous article to his complaint would obviously not be vouching for the truth of the libelous assertions”); *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 675 (2d Cir. 1995)

(plaintiffs “have invited us to read Exhibit B as a self-serving document rather than a particularization of their claim”).

That is not the case here. Plaintiffs relied on portions of Peot’s testimony as supposed direct evidence of an unlawful agreement. A-89 (FAC ¶80). Given that reliance, the district court was not required to limit its assessment of Peot’s testimony to portions “adopted” by Plaintiffs through selective and misleading paraphrases of his testimony. Rather, the district court properly reviewed Peot’s full testimony regarding the joint venture’s purpose. *See Sec’y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (“We may consider documents attached to the complaint, as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic.” (citing *Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006))). Peot was not a witness who clearly testified one way and then recanted and testified to the opposite. *See* Opening Br. 31–32. A full and fair reading of Peot’s testimony reveals that he simply never testified to any conspiracy to boycott AIMT.

Plaintiffs’ continued mischaracterization of Peot’s testimony—along with their attempts to prevent the district court and this Court from simply evaluating the testimony on its own terms—is both wrong and telling. The district court applied the proper standards and came to the correct result with respect to the alleged licensing and implementation conspiracy.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFFS FAILED TO ALLEGE PLAUSIBLE CONSPIRACIES TO PREVENT UL FROM ADOPTING PLAINTIFFS' TECHNOLOGY BY CORRUPTING THE STANDARD-SETTING PROCESS

The district court also properly held that Plaintiffs insufficiently pled a second set of conspiracies to “corrupt[] industry standard-setting processes.” A-96 (FAC ¶103). According to Plaintiffs, Defendants engaged in a “Standards Conspiracy” supposedly embodied in two different agreements: (1) an agreement to “vote as a bloc” to “thwart any proposal by any person to mandate the implementation of AIMT,” and (2) an agreement “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.” A-97 (FAC ¶105). These two separate alleged agreements serve as the basis for Counts II and III of the FAC.

The factual allegations that underlie these “standards conspiracies” are wholly conclusory and would not have been sufficient even before *Twombly*. Plaintiffs cannot create a plausible inference of conspiracy through conclusory allegations regarding “voting as a bloc” and labels such as “corruption.” Plaintiffs allege no more than routine standard-setting behavior by certain (but not all) Defendants, combined with a routine standard-setting outcome—a decision regarding what technologies to include in a *minimum* safety standard. In effect, all

they complain about is that a standard other than the one they favored was adopted by UL. Nothing about such a result is inherently suspect under the antitrust laws or permits every disgruntled participant in standard-setting to bring a claim. To the contrary, standard-setting is almost always procompetitive.

Indeed, it is *Plaintiffs'* own proposal to the UL panel that would have raised prices to consumers and excluded competition. Plaintiffs hoped to commandeer the UL process to effectively force the entire industry to license and implement their own untested and proprietary technology. That mandate would have significantly diminished competition in the table saw market, permitted Plaintiffs to hold-up manufacturers for unreasonable royalty demands, and foisted untested technology upon consumers.

A. Absent separate unlawful conduct, standard-setting activities are procompetitive and not “suspect” under the antitrust laws.

At the outset, Plaintiffs and their *amici* incorrectly assert that the actions of standards-setting organizations are inherently suspect under the antitrust laws. *See* Opening Br. 46–47; Amicus Br. 3–4. The Supreme Court has consistently rejected any interpretation of the Sherman Act that would treat the activities of joint ventures among competitors as presumptively suspect, let alone as *per se* unlawful. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500–01 (1988); *see also Texaco v. Dagher*, 547 U.S. 1, 7 (2006).

This is particularly true of standard-setting, which exhibits significant procompetitive benefits. “[I]t has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function.” *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 294 (5th Cir. 1988). It is ““axiomatic”” that, while the consequence of any standard-setting process is that certain standards or products will be selected to the exclusion of others, “such exclusions are not themselves antitrust violations.” *Golden Bridge Tech. Inc. v. Motorola Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) (citation omitted). The adoption of certain technologies into a standard is what yields a procompetitive benefit—it clears the path for “promoting technological compatibility,” “facilitating economies of scale in the market for complementary goods, reducing consumer search costs, and increasing economic efficiency.”¹¹ *Id.* at 273 & n.2.

Accordingly, routine conduct by a standard-setting organization that results in the selection of one technology to the exclusion of others does not give rise to *per se* scrutiny under the Sherman Act. *See Consol. Metal Prods.*, 846 F.2d at 292 (“[A] trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate section 1 when, for

¹¹ Standards “make products less costly for firms to produce and more valuable to consumers” and “increase innovation, efficiency, and consumer choice.” U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33 (2007), available at <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>.

whatever reason, it fails to evaluate a product favorably to the manufacturer.”); 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (3d ed. 2012) (“Exclusion by the joint setting and enforcing of standards is ordinarily evaluated under the rule of reason.”).

Plaintiffs argue that standard-setting conduct is somehow inherently suspicious. This is ironic, because Plaintiffs themselves were participants in the same process and their claim is that the standards body should have forced everyone else to adopt (and pay for) *their* technology. Not one of the cases cited by Plaintiffs support their radical proposition that standard-setting is somehow inherently suspicious. In *Radiant Burners, Inc. v. People Gas Light & Coke Co.*, the plaintiffs alleged a *per se* Section 1 violation because the defendants denied the plaintiff an industry certification in a process that was “arbitrar[y] and capricious[]” and which completely precluded the plaintiff from selling its gas burners. 364 U.S. 656, 658–60 (1961). The Court did not analyze the actual allegations of agreement, and instead focused on the Circuit court’s ruling that no “public injury” had been alleged, ultimately finding that blocking the plaintiff’s ability to sell its product pursuant to a conspiratorial agreement (independent of the standard-setting) could cause competitive harm. *Id.* at 658–59. Here, Plaintiffs do not allege that UL or Defendants prevented them from selling AIMT-enabled saws; to the contrary, Plaintiffs concede that they were able to enter the market

successfully. A-95–96 (FAC ¶¶101-02) Nothing in *Radiant Burners* stands for the proposition that the standard-setting process is presumptively anticompetitive.

Areeda, supra ¶2232b.

Plaintiffs’ other cases fare no better. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 572–73 (1982), the Supreme Court said nothing about whether standard-setting conduct is presumptively suspicious, but rather held that a trade association that engages in standard-setting may be held liable for antitrust violations committed by an agent with apparent authority, where that agent engages in conduct that otherwise violates the Sherman Act. *See Areeda, supra* ¶1477 (“The only issue before the Supreme Court was the organization’s liability for such unauthorized conduct”). And in *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990), the Court did not address standard-setting activity at all. It merely held that an agreement by criminal defense lawyers to cease representing indigent defendants absent a government fee increase was subject to *per se* treatment. *Id.* at 426–27, 436.

Contrary to Plaintiffs’ assertion, none of these cases imposes a presumption that routine standard-setting activity is suspicious or unlawful. And the few cases cited by Plaintiffs that have recognized antitrust liability in standard-setting have found separate conspiratorial agreements outside the standard-setting process itself, or that the standard-setting process was misused in a way to exclude the plaintiff’s

products. *See, e.g., Am. Inst. of Intradermal Cosmetics, Inc. v. Soc’y of Permanent Cosmetic Prof’ls*, No. CV 12-06887, 2013 WL 1685558, at *6 (C.D. Cal. Apr. 16, 2013) (standard “enforced arbitrarily, capriciously, and in such a way that forecloses Plaintiff ... from selling their products and services” is not typically viewed as standard-setting (citation omitted)). In this case, there are no such allegations. Indeed, it is beyond dispute—and acknowledged by Plaintiffs—that the alleged “standards conspiracy” did not prevent AIMT from successfully entering the market. A-80–81, A-84–86, A-95–96 (FAC ¶¶41–42, 63).

Plaintiffs also offer no authority for their notion that it somehow violates the antitrust laws for a participant in a standard-setting organization to vote its own self-interest and that “[a]ctions taken with pecuniary motives by members of standard-setting organizations are subject to *higher* antitrust scrutiny than those undertaken in furtherance of the public interest.” Opening Br. 51. Competitors frequently advocate for their own technologies in standard-setting bodies (as Plaintiffs themselves did), and courts routinely reject any notion that standard-setting participants must pursue some vague concept of consumer welfare, rather than their own economic interests, in choosing to accept or reject particular technologies for a standard. *See Golden Bridge*, 547 F.3d at 273; *Advanced Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170, 178 (D. Mass. 2013) (allegations that “competitors in a market decline to support a standard that would promote another

competitor's technology" showed merely parallel conduct); *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571, 596 (E.D. Pa. 2012) (“[T]he possibility of independent conduct cannot be excluded when a company with an economic motive to disfavor a competing technology in fact disfavors that very technology.”).

Routine standard-setting activity will always result in choices among technologies. If such choices were sufficient to give rise to presumptive antitrust liability, “every successfully standardized technology would ... breed ruinous and unmerited litigation.” *Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905 et al., 2008 WL 73689, at *9 (N.D. Cal. Jan. 5, 2008). The selection of a standard will frequently be to the economic self-interest of certain participants. But that selection process is central to the procompetitive role of standard-setting. It does not, standing alone, give rise to any presumptive liability under the Sherman Act. *See Advanced Tech. Corp.*, 925 F. Supp. 2d at 179 (no inference of agreement to vote against inclusion of plaintiff's technology where each defendant “had its own economic incentive to independently oppose [plaintiff's technology] and promote its own products”); *TruePosition*, 844 F. Supp. 2d at 594–95 (dismissing a conspiracy allegation based on claims that a standard-setting organization did not include a technology in its standard).

B. The district court correctly held that Plaintiffs failed to allege a plausible conspiracy to prevent UL from adopting AIMT as a standard

As the district court properly concluded, Plaintiffs' allegations of a "standards conspiracy" are conclusory and fall far short of what is required to give rise to a plausible conspiracy, much less one that presumptively violates of the Sherman Act. Indeed, the supposed conspiracy to "thwart" the mandate of AIMT by UL rests entirely on the allegation that those defendants with representatives on STP 745 (Black & Decker, Emerson, Makita U.S.A., Bosch, and Ryobi) agreed to "vote as a bloc." A-97 (FAC ¶¶105–06). Such conclusory allegations do not suffice to state a conspiracy claim.

1. Plaintiffs failed to allege any facts regarding the participation in the "Standards Conspiracy" by Defendants that were not members of STP 745

As the district court recognized, there are no allegations as to how several Defendants—Hitachi Koki USA, Milwaukee Electric Tool, One World Technologies, Techtronic Industries North America, or any of the foreign corporate parents of any Defendant—participated in any alleged agreement to "vote as a bloc" or to "thwart any proposal ... to mandate the implementation of AIMT." A-97–98 (FAC¶¶ 105, 111); A-176. This alone defeats Plaintiffs' claim of a conspiracy by all Defendants to ensure that AIMT is not adopted as a UL standard. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue*

Shield, 552 F.3d 430, 436 (6th Cir. 2008) (“[A]lleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy” is insufficient to state a claim). Plaintiffs attempt to gloss over the lack of allegations as to these Defendants by relying on the principle that co-conspirators are jointly and severally liable. *See* Opening Br. 52. That is a *non-sequitur*; the issue is a complete lack of allegations as to which of these specific Defendants even participated *at all*. Absent any allegations about whether these Defendants agreed to “vote as a bloc,” or whether they were even members of STP 745 and in fact voted against the adoption of AIMT, Plaintiffs cannot possibly allege a conspiracy including these Defendants. *See Kendall v. VISA, U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (“[T]he complaint must allege facts such as a ‘specific time, place, or person involved in the alleged conspiracies.’” (quoting *Twombly*, 550 U.S. at 565 n.10)). Plaintiffs cannot simply point to STP 745, list manufacturers of table saws and claim an industry-wide conspiracy. As the district court properly recognized, specific allegations about each of the Defendants are required, and dismissal on this ground was appropriate. *See* A-175.

2. Allegations regarding STP 745’s decision not to adopt AIMT or Plaintiffs’ preferred blade guard as the UL minimum standard amount to nothing more than routine standard-setting activity insufficient to give rise to a plausible conspiracy

Plaintiffs also fail to allege a plausible conspiracy as to those Defendants who *did* have representatives on STP 745. Despite conclusory statements that “Defendants agreed to vote as a bloc” and that they “corrupt[ed]” the standard-setting process, A-97, A-102–03 (FAC ¶¶105, 126), the FAC actually alleges nothing more than routine standard-setting activity—namely, a vote within STP 745 on SawStop’s proposal to require AIMT and Plaintiffs’ blade guard on all table saws sold under the UL standard. This is activity courts have repeatedly recognized does not violate the antitrust laws. *See TruePosition*, 844 F. Supp. 2d at 596; *Advanced Tech. Corp.*, 925 F. Supp. 2d at 179; *Golden Bridge*, 547 F.3d at 273. And any allegation of a separate conspiracy, outside the UL process, is just a conclusion with no supporting facts.

Plaintiffs’ complaint is no different from that in *Plant Oil Powered Diesel Fuel Systems, Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163 (D.N.M. 2011). There, a manufacturer of triglyceride fuel alleged that the participation of competing oil companies in a standard-setting body that proposed a new standard and guidelines for biofuels that limited the use of triglyceride diesel fuel violated Section 1 of the Sherman Act. *Id.* at 1172–73. Like the FAC in this case, the

plaintiffs alleged that the defendant oil companies “used their influence in [the standard-setting organization] with the purpose and effect of excluding triglyceride diesel fuel from the Relevant Markets.” *Id.* at 1192 (citation and internal quotation marks omitted). The court concluded that such an allegation was insufficient to give rise to a plausible conspiracy. *Id.* at 1193. The defendants’ opposition to the plaintiff’s proposed standard was also inconsequential, for “it would defeat the purpose of standard-setting organizations to hold that it is unlawful for members of standard-setting organizations to state opposition to ... a proposed standard.” *Id.* at 1195.

Plaintiffs’ allegations here are nearly identical in substance. As in *Plant Oil*, they “rel[y] principally upon the ... Defendants’ participation in [STP 745] as the foundation for [their] antitrust claims.” *Id.* at 1195. Beyond alleging that members of STP 745 engaged in an ordinary vote on a standards proposal that did not favor Plaintiffs, the FAC contains “bare assertion[s] of [a] conspiracy” that do not suffice to state a claim.¹² *See Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 679

¹² To the extent Plaintiffs contend that the STP 745 vote was a manifestation of an earlier agreement not to license or implement AIMT, that claim also fails. As discussed in Section I.A–C, *supra*, that supposed agreement is itself implausible. Nor do Plaintiffs explain how Defendants’ supposed agreement to not license AIMT translated into a separate agreement to exclude AIMT from the UL table saw standard. *Mayor*, 709 F.3d at 139 (“numerous” allegations of motives to conspire to support the ARS market “ha[ve] no bearing on their motivation to exit the market, which is the alleged antitrust violation”).

("[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Further, and critically, what separates the FAC here from complaints that actually allege plausible antitrust conspiracies is the complete lack of allegations that Defendants, in electing not to adopt AIMT, strayed from the normal procedures of the UL process. *See Greater Rockford*, 998 F.2d at 397 (no evidence of concerted action where a standard-setting organization "did not stray from its normal procedures"); *Golden Bridge*, 547 F.3d at 273. Merely asserting that the decision to not adopt AIMT rendered the UL's standard-setting process "corrupt" is insufficient to state a plausible antitrust conspiracy.

The lack of allegations that UL strayed from its ordinary procedures render this case distinguishable from the order denying motions to dismiss an amended complaint in *TruePosition, Inc. v. LM Ericsson Tel. Co.*, No. 11 4574, 2012 WL 3584626 (E.D. Pa. Aug. 21, 2012), a case relied upon by Plaintiffs' *amici*. There, the plaintiffs alleged, with comprehensive detail, that the defendants intentionally deviated from the standard-setting organization's routine procedures to deliberately exclude the plaintiffs' proposed technology from adoption. According to the complaint, the individual defendants: (a) exploited their positions of power within working groups to circumvent the organization's due process rules; (b) accepted late submissions of proposals by those other than the plaintiff; (c) imposed

unreasonable preconditions and testing parameters on plaintiff's proposed standard; and (d) submitted false results in an attempt to discredit plaintiff's proposed standard. *Id.* at *22.

By contrast, the FAC alleges no facts suggesting that any of the Defendants or STP 745 actually "corrupted" its ordinary process or otherwise failed to adhere to UL procedures. Plaintiffs' allegations here are therefore analogous to the original complaint in *TruePosition*, in which the plaintiff's mere allegation that defendants excluded its technology from a mobile phone technology standard was "insufficient to constitute direct evidence of an unlawful agreement." 844 F. Supp. 2d at 595, 598 (citing *Golden Bridge*, 547 F.3d at 273 and dismissing the complaint for failure to state a claim).¹³

Despite their attempts to cast routine UL standard-setting activity as "corrupt," Plaintiffs' contention is really that the UL and STP 745 chose not to mandate Plaintiffs' technology for all UL-certified saws. There are no additional allegations that plausibly allege that this decision was anything other than the unilateral and ordinary actions of standard-setting participants. And while that

¹³ Confirming their bias, Plaintiffs' *amici* fail to discuss the order dismissing the original complaint in *TruePosition* (a case in which counsel for *amici* represented the plaintiff). Amicus Br. 12–13. Plaintiffs and their *amici* also fail to discuss the Fifth Circuit's opinion in *Golden Bridge*, in which the court expressly noted that it did not endorse the district court's analysis relied on by both Plaintiffs and their *amici*. 547 F.3d at 273 n.2. Moreover, Plaintiffs and their *amici* fail to acknowledge that the district court's decision in *Golden Bridge* was issued before the Supreme Court's *Twombly* and *Iqbal* opinions.

decision may not have matched Plaintiffs' hopes, it did not prevent them from selling their technology in the market, as they now do. As a result, the FAC simply does not contain the types of allegations sufficient to state a plausible conspiracy. *See id.*; *Plant Oil*, 801 F. Supp. 2d at 1190-93; *see also Golden Bridge*, 547 F.3d at 273.

3. The decision not to adopt AIMT was in Defendants' independent self-interest and thus insufficient to give rise to a plausible inference of a conspiracy

The fact that the decision not to include AIMT in the UL standard was in the independent economic self-interest of the Defendants further eliminates any plausible inference of a conspiracy. It is simply not the law, as Plaintiffs suggest, that actions taken by Defendants “solely to benefit themselves” or “with pecuniary motives” are somehow subject to greater antitrust scrutiny. *See* Opening Br. 51 (citation omitted). Rather, courts have recognized the exact *opposite*—that actions undertaken by defendants in their independent economic self-interest are of no antitrust concern, while actions *against* one's independent self-interest can serve as “plus” factors that might support an inference of a conspiracy. *See Mayor*, 709 F.3d at 136 (mere parallel conduct must be accompanied by allegations that the acts “were against the apparent individual economic self-interest of the alleged conspirators” to give rise to an inference of a conspiracy (citation omitted)).

Here, the alleged standard-setting conduct is indisputably consistent with each Defendant's economic self-interest. Had STP 745 incorporated AIMT into the UL standard, *all* manufacturers of table saws would have been forced to adopt AIMT in order to comply with the UL safety standard. A-96 (FAC ¶ 104). This, in turn, would have forced those Defendants to negotiate license agreements with Plaintiffs at steep prices.¹⁴ The decision to avoid handing Plaintiffs the keys to what would have amounted to an industry-wide monopoly over AIMT is indisputably consistent with each Defendant's individual economic self-interest. *See Golden Bridge*, 547 F.3d at 273; *Advanced Tech*, 925 F. Supp. 2d at 179 (allegations that "competitors in a market declined to support a standard that would promote another competitor's technology" showed merely parallel conduct); *TruePosition*, 844 F. Supp. 2d at 596 ("[T]he possibility of independent conduct cannot be excluded when a company with an economic motive to disfavor a competing technology in fact disfavors that very technology.").

¹⁴ Plaintiffs made no commitment to license AIMT on FRAND terms if it were included in the UL standard. Indeed, Plaintiffs allege that any use of AIMT requires a license to Dr. Gass' patents and that they wanted far more than the "anemic" 1% royalty offered by Black & Decker, even though this would have meant millions of dollars in royalty payments. *See* Opening Br. 36. Put simply, Plaintiffs attempted to mandate AIMT precisely to achieve the kind of patent hold-up that the antitrust laws condemn. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 309 (3d Cir. 2007). Each STP 745 member obviously had an independent economic interest in avoiding such a hold-up.

4. Plaintiffs' allegation that Defendants' joint ventures were "smokescreens" to prevent the adoption of AIMT as a UL standard fail for all the same reasons

Plaintiffs fare no better with their allegations that Defendants' two joint ventures to develop technology for blade contact injury avoidance (the "Blade Contact JV") and to develop a uniform blade guard standard were mere "smokescreen[s]" to conceal supposed corruption of the UL standard-setting process. *See* A-97–98 (FAC ¶109). First, as with the allegations regarding STP 745's decision not to incorporate AIMT into the UL standard, the allegations regarding the joint ventures are silent as to a broad set of individual Defendants. As to the Blade Contact JV, the FAC alleges participation only by Black & Decker Corp., Hitachi Koki USA, Pentair, Robert Bosch Tool Corporation, Robert Bosch GmbH, Ryobi, One World Technologies Inc., Techtronic Industries Co., Ltd., Pentair Tools Group Inc., and Scintilla AG. *Id.* And as for the blade guard standard joint venture, the only alleged participants were Black & Decker Corp., Makita U.S.A., Robert Bosch Tool Corporation, and Techtronic Industries North America, Inc. A-98 (FAC ¶111). Noticeably absent from these allegations are Defendants Emerson, Techtronic Industries, Makita Corporation, Hitachi Koki USA, Hitachi Koki Co., Ltd., and Robert Bosch GmbH. Absent specific factual allegations regarding the participation of these Defendants in the joint ventures, or as to their participation in any agreement to use these joint ventures as

“smokescreens” to conceal an agreement to corrupt the UL standard-setting process, Plaintiffs fail, yet again, to allege a plausible standards conspiracy amongst all the Defendants. *See Total Benefits*, 552 F.3d at 436.

Further, as the district court properly recognized, the formation of these two joint ventures by certain Defendants was in their individual economic self-interest. A-178. Faced with the prospect of having to accept Plaintiffs’ proposal to mandate AIMT technology for all UL-certified saws, it was certainly prudent for the Defendant participants to explore alternatives. This was particularly true given that AIMT had yet to be proven in the marketplace, was not yet commercially viable, continued to demonstrate key performance issues, and remained prohibitively expensive. A-86, A-92 (FAC ¶¶65, 90). If anything, Plaintiffs allege that the JVs *did* achieve improvements to table-saw safety standards in 2005 and 2007. A-101–02 (FAC ¶¶125–26). These allegations undermine Plaintiffs’ cursory attempt to cast the JVs as mere “smokescreens.”

Plaintiffs’ conclusory allegations that these JVs were “smokescreens” is not enough to state a plausible conspiracy, and the district court was correct to reject them. At most, the allegations regarding the joint ventures support nothing more than that Defendants “declined to support a standard that would promote another competitor’s technology,” and sought out other alternatives. *Advanced Tech.*, 925 F. Supp. 2d at 179. Such conduct is “likely explained by lawful, unchoreographed

free-market behavior,” and is insufficient to state a claim. *Id.* at 178 (quoting *Iqbal*, 556 U.S. at 680)); *see also Golden Bridge*, 547 F.3d at 273. Furthermore, the fact that “[m]embers also discussed developing something like SawStop Technology, without having to pay a royalty to Dr. Gass,” A-89 (FAC ¶80), is typical conduct in standard-setting; permitting any negative inference from such conduct will chill most procompetitive standard-setting activity. *See Broadcom*, 501 F.3d at 312.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFFS FAILED TO ALLEGE HARM TO COMPETITION

Because Plaintiffs failed to allege any *per se* violation of the Sherman Act, the district court properly concluded that Plaintiffs were required to allege a cognizable harm to competition in a relevant market and failed to do so.

The gravamen of Plaintiffs’ alleged injury from the supposed “standards” conspiracies is that UL did not force all participants in the marketplace to license Plaintiffs’ technology, and substantially reduce the variety of table saw alternatives in the market. This is not a cognizable competitive harm. Plaintiffs must allege that the competitive process was harmed, and it is not enough that a defendant refused “to promote, approve or buy the plaintiff’s product.” *Consol. Metal Prods.*, 846 F.2d at 297; *see also* 2 Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* ¶35.4a2 (2d ed. 2014 Supp.) (“[A]n antitrust plaintiff complaining of a denial of a proposed

standard must show that the denial of that standard had a significant adverse effect on competition.”). Nor can Plaintiffs allege their own exclusion, given that they declined to enter into a signed license agreement and successfully brought a line of table saws incorporating AIMT to market in 2004, *only a year* after the initial vote by STP 745. A-95–96 (FAC ¶¶101–02). As Plaintiffs themselves allege, they have enjoyed considerable success in the years since they began manufacturing and selling table saws.

Plaintiffs’ proposal would have required all manufacturers that sold UL-certified table saws to license AIMT at the rates Plaintiffs demanded. In turn, that would have driven less expensive table saw products from the market, thereby reducing consumer choice and increasing prices. Accordingly, UL’s decision not to mandate AIMT enhanced competition.

It is no secret that Plaintiffs dislike the UL’s refusal to mandate their AIMT technology for UL-certified table saws, and Plaintiffs now attempt to cast their own inability to earn license fees as harm to the competitive process. But “[t]he antitrust laws...were enacted for ‘the protection of *competition*, not *competitors*.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (citation omitted). The mere fact that the UL did not help Plaintiffs sell more AIMT-equipped products does not amount to a harm to competition. *See Consol. Prods.*,

846 F.2d at 297. Nor is it a harm to *competition* that Plaintiffs think table saws should be safer (and more expensive) than they currently are.

Finally, with respect to the alleged license conspiracy, Plaintiffs similarly fail to plead competitive harm. They attempt to cast any alleged harm to *themselves* as harm to competition in the market for table saws. A-92–93 (FAC ¶¶90-91). But as the district court recognized, the fact that SawStop was able to enter the table saw market in 2004 is indicative of a lack of injury to competition. A-174–75. Moreover, Plaintiffs themselves allege that they rejected signed license agreements and offers that would have generated millions of dollars in licensing revenues. They cannot, therefore, allege exclusion from any market, which is fatal—as competitors who bring antitrust claims “must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative.” *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000); *see also Dickson v. Microsoft Corp.*, 309 F.3d 193, 206 (4th Cir. 2002).

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's order dismissing Plaintiffs' claims with prejudice.

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Respectfully submitted,

J. Scott Ballenger
LATHAM & WATKINS LLP
555 11th Street, NW, Suite 1000
Washington, DC 20004
Phone: (202) 637-2200
Facsimile: (202) 637-2201

s/ Christopher S. Yates
Christopher S. Yates
Christopher B. Campbell
Aaron T. Chiu
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Phone: (415) 391-0600
Facsimile: (415) 395-8095

Counsel for Appellee Emerson Electric Co.

Bernard J. DiMuro
DIMURO GINSBERG PC
1101 King Street, Suite 610
Alexandria, VA 22314-2956
Phone: (703) 684-4333
Fax: (703) 548-3181

John D. Harkrider
Richard B. Dagen
AXINN, VELTROP & HARKRIDER LLP
950 F Street, NW
Washington, DC 20004
Phone: (202) 912-4700
Fax: (202) 912-4701

*Counsel for Appellees Stanley Black & Decker, Inc., Black & Decker (U.S.) Inc.,
and The Black & Decker Corporation*

Paul Devinsky
Stefan M. Meisner
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001
Phone: (202) 756-8000
Fax: (202) 756-8087

Counsel for Appellees Hitachi Koki USA, Ltd. and Hitachi Koki Co., Ltd.

Lee H. Simowitz
Elizabeth A. Scully
Katherine L. McKnight
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036-5304
Phone: (202) 861-1500
Fax: (202) 861-1783

Counsel for Appellees Makita U.S.A., Inc. and Makita Corporation

David M. Foster
FULBRIGHT & JAWORSKI LLP
801 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: (202) 6662-4517
Fax: (202) 662-4643

Layne E. Kruse
Eliot Fielding Turner
FULBRIGHT & JAWORSKI LLP
1301 McKinney Street, Suite 5100
Houston, TX 77010
Phone: (713) 651-5151
Fax: (713) 651-5246

Counsel for Appellees Robert Bosch Tool Corporation and Robert Bosch GmbH

James G. Kress, Esq.
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400
Phone: (202) 639-7700
Fax: (202) 639-7890

Scott W. Hansen
Steven P. Bogart
James N. Law
REINHART BOERNER VAN DEUREN S.C.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202-6650
Phone: (414) 298-1000
Fax: (414) 298-8097

Counsel for Appellees Milwaukee Electric Tool Corporation, One World Technologies Inc., OWT Industries, Inc., Ryobi Technologies, Inc., Techtronic Industries Co., Ltd., and Techtronic Industries North America, Inc.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-1746

Caption: SD3, LLC, et al. v. Black & Decker (US) Inc., et al.

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

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(s) Christopher S. Yates

Attorney for Defendants and Appellees

Dated: December 15, 2014

CERTIFICATE OF SERVICE

I certify that on December 15, 2014, the foregoing document was served on all parties and *amici*, or their counsel of record, through the CM/ECF system.

s/ Christopher S. Yates _____

Christopher S. Yates