

Nos. 25-7103

(Consolidated with 25-7104, 25-7105, 25-7107 & 25-7108)

**United States Court of Appeals
for the District of Columbia Circuit**

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION (No. I)
MDL No. 1869

DONNELLY COMMODITIES INC.,
on behalf of itself and all others similarly situated, et al.,
Plaintiffs-Appellants

v.

BNSF RAILWAY CO.; CSX TRANSPORTATION, INC.;
NORFOLK SOUTHERN RAILWAY CO.; UNION PACIFIC RAILROAD CO.,
Defendants-Appellees

On Appeals from United States District Court for the District of Columbia
Cases Nos. 07-mc-489, 20-mc-8, 11-cv-1049 — Hon. Beryl A. Howell

**BRIEF OF *AMICUS CURIAE* ACADEMICS
AND FORMER ENFORCERS IN SUPPORT OF AFFIRMANCE**

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March 5, 2026

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GLOSSARY

BNSF	Defendant BNSF Railway Co.
CSX	Defendant CSX Transportation, Inc.
Defendants	BNSF Railway Co., CSX Transportation, Inc., Norfolk Southern Railway Co., Union Pacific Railroad Co.
FSC	Fuel Surcharge
ICC	Interstate Commerce Commission
NS	Defendant Norfolk Southern Railway Co.
OPEC	Organization of Petroleum Exporting Countries
Plaintiffs	Plaintiffs in cases nos. 07-mc-489, 20-mc-8, 11-cv-1049
WTI	West Texas Intermediate (crude oil spot price)
UP	Defendant Union Pacific Railroad Co.

INTEREST AND INDEPENDENCE OF *AMICUS CURIAE*

The amici are present or former academics and former government enforcers. The Appendix lists their names and affiliations. The amici share an interest in the development of antitrust law and the proper application of summary judgment principles in Sherman Act conspiracy cases.

All parties consented to the filing of this brief. No party's counsel authored any part of the brief, and only the amici and their counsel contributed funds for the preparation or submission of the brief.

INTRODUCTION

“The dizzying increase in fuel prices associated with the OPEC oil embargo of 1973 had a severe impact on the trucking industry.” *Cent. Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1268 (5th Cir. 1983). The Interstate Commerce Commission (ICC), which regulated the industry, responded with rate increases, and when oil prices spiked much higher in 1979, the ICC responded with fuel surcharges. *See id.* at 1268–69.

Defendants adopted fuel surcharges (hereinafter, FSCs) in 2000. Trucks and trains use the same fuel, but trains are more efficient. Appellants observe that “everything changed in 2003.” Brief for Plaintiffs-Appellants (Pl. Br.) 1. Indeed, the “most remarkable surge in the price of oil since 1979 occurred between mid-2003 and mid-2008 with the WTI [West Texas Intermediate

crude] price climbing from \$28 to \$134 per barrel.” Christiane Baumeister & Lutz Kilian, *Forty Years of Oil Price Fluctuations: Why the Price of Oil May Still Surprise Us*, J. Econ. Persps., Winter 2016, at 139, 147. The underlying data was before the district court. Dep’t of Energy, Energy Info. Admin., Cushing, OK WTI Spot Price, www.eia.gov/dnav/pet/hist/RWTCD.htm.

Plaintiffs alleged a conspiracy among Defendants relating to their use of FSCs, and they argue that the conspiracy can be inferred from circumstantial evidence. But Defendants had to act as fuel prices rose, and the obvious action was aggressive use of escalators tied to the price of oil—their FSCs. As the district court concluded, Defendants did not act simultaneously or in remarkably similar ways, and their actions were consistent with the pursuit of independent self-interest.

Appellants argue that Defendants’ use of FSCs in 2003 was “nothing like” what came before, and that this alone raises “a triable question about concerted action.” Pl. Br. 50–51. But fuel price increases beginning in 2003 were “nothing like” what came before. The necessity of decisive action and the rationality of the action taken amply support the district court’s conclusion that the evidence did not tend to exclude the possibility that Defendants acted independently.

SUMMARY OF ARGUMENT

I. The district court faithfully applied precedent demanding evidence from which a reasonable jury could find the inference of a conspiracy more attractive than the alternative inference of independent action. The court determined that a reasonable jury could not infer that Defendants conspired.

Erratic and rapidly rising fuel prices provided “a strong basis for the inference of independent action.” Op. 77. Consequently, a reasonable jury could not infer conspiracy from some similarities in Defendants’ FSCs and some conversations between pairs of Defendants touching on FSCs.

Conspiracy can be inferred from marketplace conduct only with actions contrary to independent self-interest. Plaintiffs did not show that anything about Defendants’ FSCs was contrary to their independent self-interest.

II. The district court did not grant summary judgment because of an absence of unusual parallelism. The court concluded that the nature and extent of parallelism did not itself support the inference of conspiracy, and then went on to meticulously examine Plaintiffs’ other evidence and argument, and the record as a whole.

The district court did not explain Defendants’ FSCs as “mere interdependent” conduct, but rather as rational *independent* action.

The district court did not ignore “plus factors,” but rather required evidence that tends to exclude the possibility of independent action. Ticking a few “plus factor” boxes does not assure that a reasonable jury could find the inference of a conspiracy more attractive than the alternative inference of independent action.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THE PROPER SUMMARY JUDGMENT STANDARD

Plaintiffs alleged that Defendants engaged into a conspiracy relating to their FSCs, in violation of Section 1 of the Sherman Act. After many years of litigation, the district court granted Defendants’ motion for summary judgment. Appellants submit that the court departed from “bedrock summary-judgment principles,” Pl. Br. 30, but Appellants misstate those principles and mischaracterize the district court’s ruling.

A. The District Court Applied the Proper Standard

Appellants fault the district court for demanding that Plaintiffs’ evidence “make the inference of a conspiracy more ‘attractive’ than the alternative inference of independent action.” Pl. Br. 30–31, quoting Op. 35. But this articulation of the summary judgment standard is fully consonant with bedrock principles articulated by the Supreme Court.

In *Matsushita*, the Supreme Court held that “conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.” *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (citations and internal quotation marks omitted).

In *Twombly* the Supreme Court reiterated that, at “the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

The district court accurately articulated the standard of *Matsushita* and *Twombly*. Op. 34–37. Among other things, the court observed that “*Matsushita* simply demands that the nonmoving party’s inferences be *reasonable* in order to reach a jury, in light of the alternative inferences and economic realities.” Op. 36, *see Matsushita*, 475 U.S. at 588.

For guidance on which inferences are reasonable, the district court referred to a pre-*Matsushita* decision by this Court requiring that “plaintiffs’ evidence must make the inference of a conspiracy more ‘attractive’ than the

alternative inference of independent action.” Op. 35, citing *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass’n*, 663 F.2d 253, 267 (D.C. Cir. 1981) (“inference of conspiracy . . . is warranted only when a theory of rational, independent action is less attractive than that of concerted action”).

In that case, this Court rejected the trial court’s conspiracy finding. The Court held that the trial court clearly erred in finding a conspiracy on the basis of parallel conduct that was not a kind that “could only make sense in the context of” a conspiracy, but rather could “be persuasively explained by the exercise of rational, independent judgment.” *Fed. Prescription*, 663 F.2d at 267.

Appellants wrongly assert that *Federal Prescription’s* “less attractive” formulation demands proof of the underlying claim just to get the opportunity to prove it at trial. Pl. Br. 30. It does nothing of the kind. What it demands is evidence that would permit a reasonable trier of fact to find a conspiracy, which is exactly what *Matsushita* demands.

The district court did what it was required to do. “If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the

plaintiff on the evidence presented.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court asked that question, and the answer was no.

B. The District Court Applied the Standard Correctly

“[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.” *Matsushita*, 475 U.S. at 588. But “*Matsushita* demands only that the nonmoving party’s inferences be reasonable in order to reach the jury.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468 (1992). And Appellants argue that “inferences of collusion . . . are entirely permissible here.” Pl. Br. 37.

In carefully reviewing the evidence, the district court was not, as Appellants argue, “usurping the jury’s role.” Pl. Br. 31. The district court applied the *Matsushita* standard and granted summary judgment because “a reasonable jury could not conclude” that Defendants’ actions relating to their FSCs were “the result of a conspiracy.” Op. 37.

Contrary to Appellants’ claim, the district court did not draw “improper inferences” in concluding that “Defendants’ focus on FSCs was driven by erratic and rapidly rising fuel prices.” Pl. Br. 43–44. Uncontroverted government data demonstrated “erratic and rapidly rising fuel prices.” With occasional ebbs, oil prices doubled between the Spring of 2003 and the Summer of 2005, and then doubled again by the Summer of 2008. Dep’t of

Energy, Energy Info. Admin., Cushing, OK WTI Spot Price, www.eia.gov/dnav/pet/hist/RWTCD.htm.

The district court was amply justified in concluding that erratic and rapidly rising fuel prices gave Defendants “a rational business motivation for aggressively pursuing higher FSCs.” Op. 70 (capitalization altered). And the court rightly observed that “an independent business justification for the defendants’ behavior makes inferring the requisite illegal conspiratorial agreement for a Sherman Act section 1 violation more difficult.” Op. 70.

Appellants argue that the evidence of Defendants’ meetings nevertheless could support a reasonable inference of conspiracy. Pl. Br. 46–50. But the district court carefully reviewed the evidence and concluded that “none of the meetings relied on by plaintiffs aid them in making plausible an inference of conspiracy.” Op. 120. Defendants “had a few meetings and a handful of sporadic communications where FSCs may have merely come up, though not contemporaneously to any change in defendants’ conduct or the context of creating an agreement.” Op. 152.

The district court correctly concluded that the mere fact of the meetings was not a permissible basis for inferring conspiracy. Op. 105–07, 152. Pairs of Defendants communicated because they partnered in numerous “interline” movements. Op. 7–8. Interline movements were quite important

because Defendants CSX and NS operated in the East, while Defendants BNSF and UP operated in the West. Op. 6.

Appellants point to a May 2003 meeting at which NS and UP allegedly agreed that “it would be a positive outcome if all roads had the same process in the eyes of our customers.” Pl. Br. 49–50. The district court observed that the meeting occurred shortly *after* NS and UP announced FSC formulas and there was no evidence of parallel action following the meeting, which “undercuts any inference” of conspiracy. Op. 115–16.

Appellants point to a July 2003 meeting between BNSF and NS, several months after the conspiracy’s alleged onset, discussing a “potential industry position” on FSCs. Pl. Br. 48–49. Appellants ignore the district court’s observation that discussing a “potential” position “suggests that none was extant already” and thus “undermines plaintiffs’ alleged conspiracy.” Op. 119.

Appellants argue that the “district court read *Matsushita* to require that Plaintiffs show inter-Defendant pricing dialogues tethered to ‘simultaneous’ (or ‘near-simultaneous’) and ‘unusual’ lockstep pricing actions across all Defendants.” Pl. Br. 35. The district court did no such thing. Instead, it carefully examined the evolution of Defendants’ FSCs for any parallelism from which a reasonable jury could have inferred a conspiracy. Op. 42–69.

Nor did the district court fall into the “trap” of “considering Plaintiffs’ conspiracy evidence piecemeal,” as Appellants argue. Pl. Br. 45. Judge Posner identified this “trap” but observed that “zero plus zero equals zero.” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002). The district court rightly concluded that most of Plaintiffs’ evidence was a “zero,” and it concluded that “all of plaintiffs’ evidence together” did “not tend to exclude the inference of independent action.” Op. 150.

The district court recognized that the “ultimate inquiry . . . is a holistic one,” Op. 150, because the whole of Plaintiffs’ circumstantial evidence could be greater than the sum of its parts, Op. 40–41, 149–50. And the court concluded that the evidence, “evaluated cumulatively,” did not tend to exclude the possibility of independent action. Op. 151. Appellants disparage the district court’s holistic assessment of the evidence but identify no synergy in the evidence that the district court overlooked. Pl. Br. 46–47.

Viewing the evidence as a whole, the court concluded that it did not tend to exclude the possibility of independent action, “especially given the strong showing made by defendants that they acted in their unilateral self-interest.” Op. 151. “[T]here is no reason to infer that [Defendants] had agreed among themselves to do what was only natural anyway.” *Twombly*, 550 U.S. at 566.

C. The Missing Plus Factor Is Action Against Self-Interest

“A plaintiff may establish a conspiracy under Section 1 of the Sherman Act by circumstantial evidence such as inferences drawn from the behavior of the alleged co-conspirators.” *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1487–88 (D.C. Cir. 1984). “Such an inference may only be drawn, however, when an alleged conspirator has acted contrary to his own independent interest.” *Id.* at 1488.

Kreuzer is consistent with *Matsushita* and *Twombly*. Recapitulating the holding of *Matsushita*, *Twombly* observed that conduct “consistent with conspiracy” is of no avail to plaintiffs opposing summary judgment if it is “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Twombly*, 550 U.S. at 554. Thus, marketplace conduct supports an inference of conspiracy only when it is contrary to unilateral self-interest.

“Where the conduct of an alleged co-conspirator is in its own economic self-interest *only if* the other alleged co-conspirators follow suit, there is strong circumstantial evidence of a conspiracy.” *Honey Bum, LLC v. Fashion Nova, Inc.*, 63 F.4th 813, 823 (9th Cir. 2023). Put another way, conspiracy can be inferred from “perilous” conduct, which cedes business unless rivals

respond in a parallel fashion and thus bypass opportunities to gain business. *Kleen Prods. LLC v. Ga.-Pac. LLC*, 910 F.3d 927, 937–38 (7th Cir. 2018).

Parallel conduct supported an inference of conspiracy in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221–22 (1939). “Key to *Interstate Circuit’s* conspiracy finding was its determination that each distributor’s decision to accede to Interstate’s demands would have been economically self-defeating unless the other distributors did the same.” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 331 (3d Cir. 2010).

Appellants argue that Defendant’s FSCs during the period of alleged conspiracy “were a significant break from the surcharges of the past.” Pl. Br. 25. But fuel prices indisputably soared; Defendants had powerful self-interested reasons to act in response; and aggressive use of FSCs was an obvious and sensible action. Appellants do not argue that breaking from the past was “perilous” or unwarranted by circumstances.

“Here, detailed evidence of each defendant’s internal debates and analyses . . . demonstrates independent decision-making and logical, self-interested business justifications for the choices each defendant made.” Op. 77, *see* Op. 139–43. Appellants identify no factual dispute as to whether either the construction of Defendant’s FSCs or the expansion of their coverage was consistent with independent self-interest.

II. THE AMICI PROVIDE NO SOUND BASIS FOR REVERSING THE GRANT OF SUMMARY JUDGMENT

A. The District Court Did Not Demand Unusual Parallelism

Amicus curiae States and the American Antitrust Institute mistakenly assert that the district court granted summary judgment on the basis that Plaintiffs could not show unusual parallelism. Brief for the District of Columbia and 22 States as Amicus Curiae in Support of Appellants (St. Br.) 15–19; Brief of the American Antitrust Institute (AAI) in Support of Plaintiffs-Appellants and Reversal (AAI Br.) 5–13, 16–17.

Circumstantial proof of a price-fixing conspiracy entails inference from conduct, especially parallel prices and parallel price movements. *See, e.g., Am. Tobacco Co. v. United States*, 328 U.S. 781, 804–05 (1946); *High Fructose*, 295 F.3d at 654. In ruling on summary judgment, a court determines what inferences a reasonable jury could draw from the conduct documented in the record within the context of the other evidence.

“Parallel behavior of a sort anomalous in a competitive market” supports an inference of conspiracy. *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 870 (7th Cir. 2015). And parallel conduct can support an inference of conspiracy if “inconsistent with that to be expected from each party individually pursuing his own interest.” *Kreuzer*, 735 F.2d at 1487.

The State and AAI amici argue that the district court erred by asserting: “Parallel conduct . . . requires pricing decisions so ‘unusual,’ they could not be expected from an ordinary competitive market.” Op. 48, quoted by St. Br. 15–16; AAI Br. 5, 14. The court’s phrasing was not ideal, but it correctly described parallelism that would support an inference of conspiracy. *See Twombly*, 550 U.S. at 556 n.4 (“[C]omplex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, would support a plausible inference of conspiracy.” (internal quotation marks omitted)).

The amici do not question the district court’s conclusion that a reasonable jury could not infer conspiracy from the details and evolution of Defendants’ FSCs. Op. 42–69. The amici argue instead that the court erred by treating the absence of unusual parallelism as a sufficient basis for granting summary judgment. St. Br. 15–19, 24; AAI Br. 5–6, 11, 14, 16, 19–20. But the court did not do that. After concluding that no parallels in Defendants’ FCSs could support an inference of conspiracy, the court devoted nearly 100 pages to exhaustively reviewing all the other evidence.

Amicus AAI alone argues that parallel conduct is a “threshold” trivially crossed because Defendants’ small numbers made their actions “invariably parallel.” AAI Br. 5, 7–9, 13. And once the threshold was crossed, AAI argues

that “the district court should have ended its inquiry into parallel conduct.” AAI Br. 7. AAI’s authority for the threshold notion is a pleading decision. *Mosaic Health, Inc. v. Sanofi-Aventis U.S., LLC*, 156 F.4th 68 (2d Cir. 2025), cited at AAI Br. 5–6, 13. And AAI asserts that the district court “raise[d] the bar for pleading.” AAI Br. 5.

In ruling on summary judgment, the court was tasked with determining whether the evidence “tends to exclude the possibility that the alleged conspirators acted independently.” *Matsushita*, 475 U.S. at 588 (internal quotation marks omitted). The nature and extent of parallelism unquestionably was relevant. *See, e.g., Twombly*, 550 U.S. at 553, 556 n.4.

B. The District Court Did Not Rely on “Mere Interdependence”

On the authority of a single article, the academic amici argue that courts systematically err in evaluating circumstantial evidence of collusion by assuming that all parallel conduct could be due to “mere interdependence.” Brief of *Amicus Curiae* Antitrust Law and Economics Professors in Support of Plaintiffs-Appellants and Reversal (Acad. Br.) 2–4, 7–8.

But the district court did not explain Defendants’ aggressive use of FSCs as “mere interdependence,” and the academic amici offer scant support for the charge that the “‘mere interdependence’ assumption runs throughout” the court’s opinion. Acad. Br. 8; *see* AAI Br. 20 (“The district court’s analysis

also rests on an economically incorrect assumption that interdependence necessarily explains supracompetitive pricing in an oligopoly.”).

The district court observed that Defendants’ actions were “not completely independent but rather *interdependent*.” Op. 72. Defendants’ FSC formulas were public, and the court noted the attention that Defendants paid to each others’ formulas. Op. 78–94. As the court acknowledged, interdependent competitors always take account of each others’ actions. Op. 36, 38–39.

Interdependent competitors sometimes act in parallel. Op. 39–44. And the district court noted that Defendants sometimes emulated one another’s FSC formulas. Op. 78–79 (CSX emulated BNSF), 82–83 (UP emulated BNSF), 89, 91 (NS emulated CSX). But the district court did not rely on “mere interdependence” to explain why all four Defendants’ began aggressively pursuing FSCs in 2003.

The district court carefully examined the record and concluded that the “detailed evidence of each defendant’s internal debates and analyses as each one considered when and how to change its FSCs demonstrates *independent* decision-making.” Op. 77 (emphasis added), *see id.* 139–40. In other words, the court concluded that Defendants’ pursuit of FSCs was a “rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Twombly*, 550 U.S. at 554.

C. Plus Factors Do Not Tend to Exclude the Possibility of Independent Action

While appellants mention “plus factors” in passing, Pl. Br. 26, 34, 35, the academic amici focus on them, Acad. Br. 6–8, 14–23. Citing only “plus factors,” the academic amici claim that “more than enough evidence exists for a reasonable juror to infer an agreement.” Acad. Br. 27. As a practical matter, the amici argue that summary judgment in antitrust conspiracy cases is a box-ticking exercise and that Plaintiffs ticked the necessary boxes.

Unlike recent appellate decisions, the academic amici do not analyze “plus factors” in the context of *Matsushita* and *Twombly*. The amici do not explain why particular “plus factors” necessarily “show that the inference of conspiracy is reasonable in light of the competing inference[] of independent action.” *Matsushita*, 475 U.S. at 588.

The academic amici baselessly argue that the district court held that “multiple long-established plus factors are no longer valid.” Acad. Br. 7–8. The notion of “long-established plus-factors” is problematic at the start because “plus factors” are not fixed and invariant. Actions and background facts become “plus factors” when, *in a particular context*, they “make the inference of rational independent choice less attractive than that of concerted action.” *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir. 2004).

Citing *Twombly*, the Ninth Circuit explained that “plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.” *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015); see also *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 62 (2d Cir. 2012) (“Plus factors” are “circumstances” that, “when viewed in conjunction with the parallel conduct, would permit a fact-finder to infer a conspiracy”).

The district court conducted a holistic analysis of the evidence, as the academic amici and AAI advocate. Acad. Br. 25–27, AAI Br. 12. But the court’s holistic analysis, unlike that advocated by the amici, faithfully applied the *Matsushita* standard. Applying that standard, the court correctly concluded that Plaintiffs’ purported “plus factors” were insufficient.

Rather than treat Plaintiffs’ purported “plus factors” as boxes to be ticked, the district court viewed them in light of *Matsushita*’s requirement that Plaintiffs “show that the inference of conspiracy is reasonable in light of the competing inference[] of independent action.” *Matsushita*, 475 U.S. at 588. The academic amici wrongly characterize the district court’s analysis as holding Plaintiffs’ “plus factors” to be “irrelevant.” Acad. Br. 13–14, 17, 19.

The district court correctly concluded that high concentration, high entry barriers, and inelastic demand suggested weak competition but did “not

push plaintiffs over the line toward an inference of conspiracy.” Op. 145. The amici wrongly assert that the court held these market characteristics “irrelevant to Sherman Act agreement analysis.” Acad. Br. at 13–16.

The district court correctly concluded that a “conspiratorial motive does not move the needle in plaintiffs’ favor” given that Defendants had a “clear rational business motive” to use FSCs aggressively in coping with rising fuel prices. Op. 105. The amici wrongly assert that the district court held a motive to conspire “irrelevant to the agreement inquiry.” Acad. Br. 13, 17–19.

The district court correctly concluded that communications among Defendants “should be accorded little, if any weight” in view of their content and the context in which they occurred. Op. 105. The amici wrongly assert that the district court held the communications “irrelevant to the agreement inquiry.” Acad. Br. 19–24 (capitalization altered).

Another error attributed by the amici to the district court is analyzing “the common-motive evidence in isolation from market-structure evidence.” Acad. Br. 19. But doing so would have been to Plaintiffs’ benefit. High concentration, high entry barriers, and inelastic demand tend to yield weak competition and high profits without collusion (and without “conscious parallelism”), which results in a weak motive to conspire and run the risk of prosecution and payment of treble damages.

The academic amici submit that price-fixing allegations based on parallel conduct should always survive summary judgment if plaintiffs show that market structure is conducive to collusion and that the defendants had motive and opportunity to conspire. Acad. Br. 3, 27–28. This submission is irreconcilable with *Matsushita* because these boxes can be ticked even if the evidence does not tend to exclude the possibility of independent action.

In a market structure conducive to collusion, competitors “recognize a mutual interdependence of their price-output decisions, and therefore act interdependently.” Joe S. Bain, *Industrial Organization* 114 (2d ed. 1968); see *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 359 (3d Cir. 2004). The results can be parallel conduct and diminished competitive vigor, which may be undesirable, but they are not a sufficient basis for inferring conspiracy. See, e.g., *Twombly*, 550 U.S. at 553–54, Op. 145.

Motive is ubiquitous. The Ninth Circuit observed that: “Any firm that believes that it could increase profits by raising prices has a motive to reach an advance agreement with its competitors.” See *Musical Instruments*, 798 F.3d at 1194. A motive to conspire exists whenever there is competition, but criminal enforcement and treble damages actions are potent deterrents. The district court was right to conclude that “a mere motive to conspire does not alone tend to exclude the possibility of independent action.” Op. 104.

Competitors legitimately communicate on matters of industry concern. “Atypical communications between alleged coconspirators can constitute a plus factor because such communications provide the opportunity for parties to come to (and enforce) an illicit agreement. But to qualify as a plus factor, such communications must go beyond the ‘standard fare’ of business and trade-association practice.” *Honey Bum*, 63 F.4th at 823.

After a holistic review of a voluminous record, the district court wrote a thorough 166-page decision. The court properly concluded that Plaintiffs’ “evidence lacks the crucial thrust of a conspiracy claim: facts that tend to exclude the possibility that defendants acted unilaterally and made their decisions independently.” Op. 165–66.

CONCLUSION

This Court should affirm the district court’s June 24, 2025 grant of summary judgment.

Respectfully submitted,

March 5, 2026

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the brief contains 4404 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Microsoft Word version 2602, using 14 pt. Georgia, a proportionally spaced typeface.

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Dated: March 5, 2026

CERTIFICATE OF SERVICE

I certify that on March 5, 2026, I caused the foregoing brief to be filed and served on all parties and their counsel of record through this Court's CM/ECF system.

March 5, 2026

/s/ Kevin Calia

KEVIN CALIA