NO. 24-3104

United States Court of Appeals for the Eighth Circuit

In re: Crop Inputs Antitrust Litigation

Darren Duncan; Jones Planting Co. III; Charles Lex; John C. Swanson; James Koch, doing business as Vienna Echo Farms; Melinda Budde; Randi Handwerk; John Vehrenkamp; Justin Pic; Dan Flaten; Ryan Bros., Inc.; Michael J. Ryan; Leon Pfaff; Jason Canjar, doing business as Yedinak Registered Holsteins; Eagle Lake Farms Partnership; Brad DeKrey; Tyler Schultz; Hapka Farms, Inc.; Amy Hapka; Beeman Berry Farm, LLC; Wunsch Farms; Kenneth Beck; Duane Peiffer; Tom Burke, f/k/a Tom Burke Farms; George Potzner; JSB Farms LLC; Mark Krieger; Krieger Family Farms, LLC; Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

Bayer CropScience LP; Bayer CropScience Inc.; Corteva, Inc.; Cargill, Incorporated; BASF Corporation, a Delaware limited company for corporate parent BASF USA Holding LLC; Syngenta Corporation; Winfield Solutions, LLC; Univar Solutions USA, LLC., formerly known as Univar Solutions, Inc.; Federated Co-Operatives, Ltd.; CHS, Inc.; Nutrien AG Solutions, Inc.; Growmark, Inc., doing business as Farm Supply agent of FS; Simplot AB Retail Sub, Inc., formerly known as Pinnacle Agriculture Distribution, Inc.; Tenkoz, Inc.; Pioneer Hi-Bred International, Inc.; Growmark FS, LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
(CIV. NO. 4:21-md-02993-SEP)
HONORABLE SARAH E. PITLYK

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Defendants are manufacturers, wholesalers, and retailers of agricultural products including seeds and pesticides ("Crop Inputs"). Over the last decade, Defendants faced an increasingly competitive threat from emerging ecommerce sales platforms selling Crop Inputs directly to farmers. These platforms provided greater price transparency than the traditional distribution system. Defendants' pricing practices depend on the opacity of a tightly structured distribution chain. With inflated profit margins in jeopardy, Defendants at each level of the chain agreed to boycott the ecommerce platforms. The group boycott enabled Defendants to maintain supracompetitive prices for Crop Inputs by denying farmers access to accurate pricing information and forcing them to accept opaque price increases without a lower cost option. Defendants' anticompetitive boycott caused Plaintiffs to pay more for Crop Inputs than they would have in a free market.

The district court erred in granting Defendants' motion to dismiss by applying the more stringent summary judgment standard to Plaintiffs' allegations at the pleading stage. The court held that to plausibly allege parallel conduct, Plaintiffs were required to (i) offer evidence tending to rule out the possibility Defendants acted independently, and (ii) plead specific facts as to each Defendant's role in the conspiracy. Neither requirement exists at the pleading stage.

Appellants request 20 minutes for oral argument.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants disclose the following information:

James Koch d/b/a Vienna Eqho Farms has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Jones Planting Co. III has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

JSB Farms, LLC has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Ryan Bros., Inc., has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Tom Burke has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Wunsch Farms has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Beeman Berry Farm, LLC has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Eagle Lake Farms Partnership has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Hapka Farms, Inc., has no parent companies or corporations, and no subsidiaries, and no publicly held company or corporation owns ten percent (10%) or more of its stock.

Plaintiffs-Appellants will update this disclosure statement to the extent it becomes necessary.

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JURISDICTIONAL STATEMENT

Federal question jurisdiction exists over this case pursuant to 15 U.S.C. §§ 15 (a) & 26 and 28 U.S.C. §§ 1331 & 1337. Federal class action jurisdiction exists pursuant to 28 U.S.C. § 1332(d) & 1367. On September 13, 2024, the district court dismissed claims in Appellants' Consolidated Amended Complaint (the "CAC"). App. 01; R. Doc. 104, at 1. The Order of Dismissal was entered on September 13, 2024. App. 221; R. Doc. 281, at 1; P.Add.31.[1]

Appellants (hereinafter "Plaintiffs") timely filed their notice of appeal on October 11, 2024. App. 222; R. Doc. 282, at 1. Jurisdiction exists over this appeal pursuant to 28 U.S.C. § 1291 because this appeal is taken from the Order of the district court dismissing Plaintiffs' federal claims with prejudice.

[1] Throughout this brief, "App." refers to Joint Appendix, "P.Add." refers to Plaintiffs' Addendum, and "R. Doc." refers to docket entries in the district court.

STATEMENT OF THE ISSUES

1. Whether the district court erred by applying the summary judgment standard to Plaintiffs' Sherman Act claims at the motion to dismiss stage and finding that, to plausibly allege parallel conduct as an element of conspiracy in the context of an unlawful group boycott, Plaintiffs are required to offer evidence tending to rule out the possibility of independent action.

Apposite Authority: *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1069 (8th Cir. 2017).

2. Whether a de novo review of Plaintiffs' complaint reveals that Plaintiffs have adequately alleged parallel conduct under *Twombly*.

Apposite Authority: *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059,1069 (8th Cir. 2017).

3. Whether the district court erred by applying an erroneous legal standard to Plaintiffs' Sherman Act claims at the motion to dismiss stage where it found that, under *Twombly*, Plaintiffs are required to plead specific facts as to each Defendant that are sufficient, in isolation, to establish each Defendant's participation in the unlawful group boycott.

Apposite Authority: *See Twombly*, 550 U.S., at 556-58; *Warmington v. Bd. of Regents of Univ. of Minnesota*, 998 F.3d 789, 795 (8th Cir. 2021).

4. Whether a de novo review of Plaintiffs' complaint reveals that Plaintiffs have alleged plus factors which, considered together with the alleged parallel conduct, support a plausible inference that Defendants conspired to restrain competition.

Apposite Authority: *See Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 79 (2009); *Johnson v. Perdue*, 862 F.3d 712, 716 (8th Cir. 2017); *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc).

5. Whether the district court erred in dismissing Plaintiffs' claims with prejudice where it assumed without justification that the Plaintiff's factual allegations "contain[] as much specificity as Plaintiffs can muster," and that amendment would be futile.

Apposite Authority:

Cornelia I. Crowell GST Tr. v. Possis Med., Inc., 519 F.3d 778, 782 (8th Cir. 2008).

STATEMENT OF THE CASE

I. Background

This case arises out of an agreement among Defendants[2]—the largest manufacturers, wholesalers, and retailers in the $65 billion United States Crop Inputs industry—to stamp out competition from emerging ecommerce platforms that offered greater price transparency to purchasers, and thereby posed a significant threat to Defendants' tight control of the market. App.02, 06, 28, 32, 43-45, 103; R. Doc. 104, at 2, 6, 28, 32, 43-45, 103.[3] Defendants, many of whom are well-known antitrust recidivists, jointly strategized against this competitive threat and coordinated their collective response through industry trade groups and publications. And then, just as they had strategized, Defendants acted in parallel to prevent the ecommerce platforms from driving down prices of Crop Inputs.

Over the last several years, farmers in the United States have taken on a staggering amount of debt due to the skyrocketing prices of Crop Inputs.[4] App.03,

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[2] Defendants Bayer CropScience, Inc., Bayer CropScience, LP (collectively, "Bayer"), Corteva, Inc. ("Corteva"), Pioneer Hi-Bred International, Inc. ("Pioneer"), Syngenta Corporation ("Syngenta"), and BASF Corporation ("BASF") are referred to as the "Manufacturer Defendants." CAC ¶ 5. Defendants Cargill Inc. ("Cargill"), Tenkoz Inc. ("Tenkoz"), Winfield Solutions, LLC ("Winfield"), and Univar Solutions, Inc. ("Univar") are referred to as the "Wholesaler Defendants." *Id.* Defendants CHS Inc. ("CHS"), Nutrien Ag Solutions Inc. ("Nutrien"), Growmark Inc. ("Growmark"), Simplot AB Retail Sub, Inc. ("Simplot"), and Federated Co-Operatives Ltd. ("Federated") are referred to as the "Retailer Defendants."

[3] *See* ¶¶ 4, 20, 101, 114, 146, 151, 238.

[4] "Crop Inputs" are seeds and crop protection chemicals such as fungicides, herbicides, and insecticides. CAC ¶ 3.

16-17; R. Doc. 104, at 3, 16-17.[5] Defendants have been able to maintain the prices of Crop Inputs at supracompetitive levels because of an opaque system designed to prevent farmers from getting usable information on pricing and labeling of Crop Inputs that would otherwise allow farmers to comparison shop. App.02-03, 17, 25-26, 43-44; R. Doc. 104, at 2-3, 17, 25-26, 43-44.[6] This secrecy around pricing is maintained through an overlapping system of contractual agreements between the Manufacturer, Wholesaler, and Retailer Defendants, which bar disclosure of prices paid by Retailer Defendants to the Manufacturer and/or Wholesaler Defendants. Similarly, Retailers are required to maintain secrecy about how they price Crop Inputs to their customers. App.17-18; R. Doc. 104, at 17-18.[7] Through these confidentiality agreements and other means of obscuring prices (e.g., bundling the cost of Crop Inputs with other products or services), Defendants were able to avoid the pricing pressures of an informed customer base and reap supracompetitive profits.

In 2014, new ecommerce platforms selling Crop Inputs entered the market and disrupted the status quo. The online sales platforms of Farmers Business Network ("FBN") and Agroy, Inc. increased transparency in the Crop Inputs market by providing farmers with pricing comparison tools. App.03, 18-19; R. Doc. 104, at

[5] *See* ¶¶ 6, 67.
[6] *See* ¶¶ 5, 69, 93, 94, 148
[7] *See* ¶¶ 70, 71, 73.

3, 18-19.[8] Both of these platforms enjoyed early success, with thousands of farmers signing up for FBN. App.19; R. Doc. 104, at 19.[9]

Defendants quickly recognized the need to neutralize these ecommerce platforms in order to protect their margins. App.03-04, 33, 44, 103-04; R. Doc. 104, at 3-4, 33, 44, 103-04.[10] Two particular trade associations, CropLife America ("CropLife") and the Agricultural Retailers Association ("ARA"), actively communicated the urgency of the threat and served as hubs to coordinate Defendants' conspiracy to protect their market power. App.20-23, 44; R. Doc. 104, at 20-23, 44.[11] CropLife in 2016 expounded on "the devil known as 'price transparency'" and characterized the emergence of an earlier ecommerce platform as a "draconian" mechanism of cutting out retailers. App.30; R. Doc. 104, at 30.[12] By 2017, FBN was the main topic at CropLife's PACE Advisory Council meeting, with members lamenting that FBN had impacted their "already slim margins." In 2018, CropLife reported a "huge price war in chemicals" in Iowa as a result of FBN disrupting the market. App.21-22; R. Doc. 104, at 21-22.[13]

At the "main event" at the ARA's 2017 annual conference, Steve Watts of Farrell Growth Group ("FGG") explicitly urged retailers to combat the intrusion of

[8] *See* ¶¶ 7, 74, 76.
[9] *See* ¶ 75.
[10] *See* ¶¶ 8, 9, 116, 150, 239-40, 242.
[11] *See* ¶¶ 80-86, 149.
[12] *See* ¶ 110.
[13] *See* ¶¶ ¶¶ 82-83.

e-commerce entities. App.23; R. Doc. 104, at 23.[14] FGG, in partnership with Defendant Winfield's Canadian subsidiary, also provided Defendants with a benchmarking service, not unlike those at the heart of other antitrust conspiracies, that provided another means for Defendants to collude. App.23-25; R. Doc. 104, at 23-25.[15]

Defendants play a prominent role in the leadership of both CropLife and ARA. ARA's board of directors is chaired by an employee of Defendant Growmark and includes board members from Defendants Nutrien, CHS, Winfield Solutions, Corteva, Bayer, BASF, and Syngenta, among others. App.22-23; R. Doc. 104, at 22-23, 107.[16] The board of directors for CropLife includes employees from Winfield's parent company Land O'Lakes, BASF, Corteva, Bayer, Growmark, Tenkoz, and Simplot. App.23, 30, 106; R. Doc. 104, at 23, 30, 106.[17]

Defendants' efforts to communicate and enforce the boycott succeeded. Manufacturer and Wholesaler Defendants refused to sell Crop Inputs to the ecommerce platforms despite the potential to sell to a new customer base. Forbes reported that the CEO of a generic chemical products company was aware of the boycott's existence and afraid of violating it, saying he was wary of supplying ecommerce Crop Inputs sales platforms, but "[i]n an ideal world, if I could flip the

[14] *See* ¶ 86.
[15] *See* ¶¶ 87-91.
[16] *See* ¶¶ 85, 86, 258.
[17] *See* ¶¶ 80, 110, 256.

switch and sell to these guys, I would do it in a heartbeat." App.27; R. Doc. 104, at 27.[18] In 2018, when FBN purchased Yorkton Distributors ("Yorkton"), a Canada-based retailer with longstanding supply agreements with Bayer, Syngenta, BASF, Corteva, and Winfield, these companies abruptly cancelled their agreements with Yorkton. App.26, 28-29; R. Doc. 104, at 26, 28-29.[19] FBN's co-founder stated the response to Yorkton "was similar to the United States' industry response when FBN first launched in 2014," which seriously harmed FBN. App.29-30; R. Doc. 104, at 29-30.[20]

Several manufacturer Defendants also began using new contractual audit provisions to ensure discipline within the conspiracy. Syngenta audited its retailers after learning some had sold to ecommerce platforms, and Bayer, BASF and Corteva implemented contractual audit provisions to ensure that ecommerce platforms could not purchase name brand Crop Inputs from an authorized retailer. App.27; R. Doc. 104, at 27.[21]

Defendants engaged in fearmongering and the spread of misinformation regarding FBN. Defendants made baseless claims suggesting FBN was selling counterfeit products and "was lining the pockets of investors and big data companies

[18] *See* ¶ 100.
[19] *See* ¶¶ 96, 102-107.
[20] *See* ¶ 108.
[21] *See* ¶ 99.

like Google." App.19, 27, 107; R. Doc. 104, at 19, 27, 107.[22]

Defendants' anticompetitive conduct has been investigated by antitrust authorities in the US and Cananda. Cargill, Corteva, Federated, Univar, BASF, and Bayer, have been investigated by the Canadian Competition Bureau ("CCB"), and Corteva and Syngenta are defendants in a lawsuit by the FTC. App.4, 13-14, 33-35; R. Doc. 104, at 4, 13-14, 33-35.[23]

II. Procedural History

On June 8, 2021, the Judicial Panel on Multidistrict Litigation consolidated 28 related cases into an MDL in the Eastern District of Missouri. On September 17, 2021, Plaintiffs filed their Consolidated Amended Class Action Complaint (the "CAC"), alleging violations of federal and state antitrust laws, violation of the Racketeer Influenced and Corrupt Organizations Act, state unfair competition laws, state consumer protection laws, and state unjust enrichment laws. App.01; R. Doc. 104, at 1. On November 10, 2021, Defendants jointly moved to dismiss the CAC, arguing, among other things, that Plaintiffs had failed to plausibly allege circumstantial evidence of a conspiracy through parallel conduct or plus factors and had engaged in group pleading. Defendants Cargill, Univar, Syngenta, and Federated also each separately moved to dismiss on various grounds. Plaintiffs opposed the

[22] *See* ¶¶ 77, 97, 257.
[23] *See* ¶¶ 11, 56, 116-120.

motions to dismiss on December 20, 2021, and Defendants replied on January 29, 2022.

Over two and a half years later, on September 13, 2024, the district court granted Defendants' joint motion to dismiss (the "Order", referring to the Memorandum and Order) which is the subject of this appeal. App.192; R. Doc. 280, at 29; P.Add.01.[24] The district court dismissed the entirety of the CAC and dismissed Plaintiffs' Sherman Act claims and RICO claims with prejudice. *Id.* In dismissing the CAC, the district court held that Plaintiffs failed to allege parallel conduct, that the allegations were largely conclusory, and Defendants' conduct was based on independent business decisions rather than a conspiracy. App.213-14; R. Doc. 280, at 22-23; P.Add.22-23.

Plaintiffs were not allowed to conduct any discovery. On September 3, 2021, before filing the CAC, Defendants filed a Motion to Stay Discovery, which Plaintiffs opposed. A hearing was held on October 15, 2021, and the district court granted Defendants' motion from the bench. App.154, R. Doc. 139, at 33:17-25; P.Add.32. Therefore, contrary to the general rule, discovery was stayed pending resolution of the motions to dismiss. App.120, R. Doc. 133, at 1. The district court reasoned a stay was warranted in part because it did not anticipate "letting [the motions to dismiss] sit around and gather dust," (App.155, R. Doc. 139, at 34:9-11; P.Add.33), and did

[24] The district court denied the individual Defendants' motions to dismiss as moot in the Order. App.220; R. Doc. 280, at 29; P.Add.29.

not "expect this stay to go on for a year or two." *Id.* at 36:22-23. A year passed, and Plaintiffs moved to lift the stay on December 19, 2022, arguing that discovery should be conducted as to the FTC's investigation and subsequent complaint against Defendants Syngenta and Corteva. Defendants opposed, Plaintiffs replied, and the motion was denied as moot in the Order. App.220; R. Doc. 280, at 29; P.Add.29.

SUMMARY OF ARGUMENT

The district court erred by applying the wrong standard of review to Plaintiffs' pleadings and concluding that Plaintiffs had not adequately pleaded the parallel conduct necessary to state a group boycott conspiracy claim under the Sherman Act.

The district court imposed the more stringent summary judgment standard of probability to Plaintiffs' allegations in the CAC, rather than the appropriate plausibility standard applicable at the motion to dismiss stage. The correct *Twombly* standard on a motion to dismiss requires the court to accept all of Plaintiffs' factual allegations as true and draw all reasonable inferences in their favor. Had the district court properly drawn all reasonable inferences in Plaintiffs' favor as required, it would have found that Plaintiffs' allegations suffice to prevail on a motion to dismiss.

Plaintiffs also alleged sufficiently specific allegations as to each Defendant's participation in, and the perpetuation of, the group boycott conspiracy. The District Court erred by holding otherwise and compounded this error by viewing Plaintiffs' allegations against the context of distinguishable, non-binding authority.

Plaintiffs alleged specific parallel conduct that had anticompetitive effect in the United States market for Crop Inputs, citing to many examples of specific anticompetitive actions taken by Defendants in furtherance of their unlawful group boycott.

Likewise, the CAC alleged that Defendants had ongoing communications regarding the boycott through trade associations, and the District Court therefore erred when it held that the CAC did not allege communications between any Defendants regarding a boycott.

In addition, the district court erred in holding that Plaintiffs' CAC failed to sufficiently allege that Defendants' parallel conduct was a group boycott. The District Court: 1) improperly compartmentalized facts; 2) overlooked context (such as the group boycott itself, the timeline of pertinent alleged events, and Defendants' discussions of margins and maverick competitors); and 3) evaluated facts in isolation.

Finally, Plaintiffs' plus factor allegations further support that Plaintiffs plausibly alleged Defendants conspired and engaged in a group boycott of the ecommerce platforms. The district court erred by failing to evaluate these plus factors, having decided it was unnecessary given the court's holding that Plaintiffs had not sufficiently alleged parallel conduct.

STANDARD OF REVIEW

This Court reviews "de novo the grant of a motion to dismiss." *Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 911 F.3d 505, 512 (8th Cir. 2018) (citation omitted). The Court must "accept as true the complaint's factual allegations and grant all reasonable inferences to the non-moving party." *Id.* (internal citation omitted). Plaintiffs must simply plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. v. Twombly*, 550 U.S. 544, 545 (2007); Fed. R. Civ. P. 8(a)(2). A claim is plausible when a plaintiff pleads facts that "allow[] 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).

ARGUMENT

I. The District Court Erred by Imposing a Summary Judgment Standard on Plaintiffs' Claims at the Motion to Dismiss Stage.

Under the correctly-applied *Twombly* standard, where all reasonable inferences are properly drawn in Plaintiffs' favor, Plaintiffs plausibly state a group boycott claim under the Sherman Act. The district court erred by instead applying a *summary judgment* standard to Plaintiffs' pleadings rather than the plausibility standard applicable on a motion to dismiss.

On motions to dismiss, *Twombly* requires the court to accept Plaintiffs' factual allegations as true and draw all reasonable inferences in their favor. *Topchian v. JPMorgan Chase Bank*, N.A., 760 F.3d 843, 848 (8th Cir. 2014). Importantly, at the

pleading stage, courts cannot weigh "competing inferences" or "credit a defendant's counterallegations." *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 45 (1st Cir. 2013) (citing *Twombly*, 550 U.S. at 555-56). Moreover, the complaint "should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Warmington v. Bd. of Regents of Univ. of Minnesota*, 998 F.3d 789, 795 (8th Cir. 2021) (internal citations omitted).

The district court stated, "[A] § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently," citing *Twombly*. App.214; R. Doc. 280, at 23; P.Add.23. But this is a plaintiff's burden on summary judgment, not on a motion to dismiss, and the citation to "*Twombly*"—a defining moment for Rule 8, not Rule 56—is specious for that reason. The district court omitted the vital qualifying language that appears immediately before the quoted excerpt. The complete passage reads:

> . . . and *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, *see Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Twombly, 550 U.S. at 554 (emphasis added). The standard the district court applied is not the *Twombly* pleading standard, but rather dicta discussing the *Matsushita* summary judgment standard. The distinction is critical.

On a motion to dismiss, the plausibility "threshold for a conspiracy complaint remains considerably less than the 'tends to rule out the possibility' standard for

summary judgment." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015) (cleaned up); *see also Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 35 (1st Cir. 2013) (stating that post-*Twombly*, "[p]leading requirements are thus starkly distinguished from what would be required at later litigation stages under *Matsushita*"); *Erie Cnty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 869 (6th Cir. 2012) ("there is no authority cited . . . for extending the [*Matsushita*] standard to the pleading stage"); *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 159 (D.D.C. 2004) (making clear that the "application of the *Matsushita* rule simply is not appropriate in the context of a motion to dismiss."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010) (observing that "[a]lthough Twombly's articulation of the pleading standard for § 1 cases draws from summary judgment jurisprudence, the standards applicable to Rule 12(b)(6) and Rule 56 motions remain distinct.").

The district court applied the *Matsushita* summary judgment standard and held that Plaintiffs' allegations did not "plausibly rebut the inference that Defendants' conduct served their respective individual legitimate business interests to maintain a profitable market structure." App.213; R. Doc. 280, at 22; P.Add.22. The district court supplied its own "obvious alternative explanations" for Defendants' conduct that could plausibly be understood as perpetuating the conspiracy. App.203; R. Doc. 280, at 12; P.Add.12 (finding that CHS could have been encouraging customers to refrain from doing business with a competitor and

disregarding allegations that Bayer formed a task force in response to FBN's entry into the market); App.205-06; R. Doc. 280, at 14-15; P.Add.14-15 (discounting Plaintiffs' detailed allegations as to specific conspiratorial conduct taken by specific defendants in favor of a non-conspiratorial explanation for the same).

It is "wholly unrealistic" to extend the summary judgment burden to a motion to dismiss because "a plaintiff may only have so much information at his disposal at the outset." *SD3, LLC*, 801 F.3d at 425 (cleaned up). Here, over their objections, Plaintiffs were denied discovery. *See* App.154, R. Doc. 139, at 33:17-25, P.Add.32. As a result, "we can hardly expect [Plaintiffs] to have built [their] entire case so early on." *SD3, LLC*, 801 F.3d at 426.

The district court further improperly extrapolated from *Twombly*, holding that at the pleading stage "each defendant is entitled to know how it is alleged to have conspired, with whom, and for what purpose." App.204; R. Doc., at 13; P.Add.13. (citing *Twombly*, 550 U.S. at 557-58). While *Twombly* prohibits conclusory assertions of a conspiracy, it does not discuss "group" or "generalized" pleading, nor does it state that a plaintiff must include allegations specific to each individual defendant. *Id.* at 557. Rather, *Twombly* explains that requiring "plausible grounds to infer an agreement … simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556; *see also In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 630 F. Supp. 3d 968, 984 (N.D. Ill. 2022) ("While the complaint need not contain detailed 'defendant by defendant'

allegations, it must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision to join it."). The CAC puts each Defendant on notice of its alleged involvement in the conspiracy, including that each Defendant joined the conspiracy and its role in the same.

II. Plaintiffs Plausibly Plead a Conspiracy Under § 1.

A. Plaintiffs Sufficiently Allege Plausible Parallel Conduct and Anticompetitive Effect in the US Market for Crop Inputs.

Plaintiffs plausibly allege Defendants conspired to boycott ecommerce Crop Inputs platforms and sufficiently allege each Defendant's participation in the conspiracy. Moreover, "[g]iven plaintiffs' thesis that the [Defendants] participated in a collective boycott, it is natural that the [complaint] express some factual allegations collectively." *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 478 (S.D.N.Y. 2017) (denying motion to dismiss where generalized claims were backed up by specific acts of common conduct).

A group boycott is the defendants' concerted refusal or failure to deal with the boycott's target, or third parties that might deal with the target. *E.g., SD3 LLC*, 801 F.3d at 427 (none of defendants took a license or implemented plaintiff's technology); *SourceOne Dental, Inc. v. Patterson Cos., Inc.*, 310 F. Supp. 3d 346, 358 (E.D.N.Y. 2018) (defendants declined to attend trade shows if associations dealt with plaintiff). A boycott's parallel conduct need not be simultaneous. *SD3, LLC*,

801 F.3d at 429 (parallel conduct "need not be exactly simultaneous and identical in order to give rise to an inference of agreement") (quotation omitted); *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp.3d 772, 791 (N.D. Ill. 2017) (quoting *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939)). It need not be identical. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 144 (1966) ("fabric interwoven by many strands of joint action to eliminate discounters" constituted violation); *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) ("each conspirator may be performing different tasks to bring about the desired result"); *Precision Rx Compounding, LLC*, 2016 WL 4446801, at *3 ("combination of techniques defendants and their co-conspirators" used pled parallel conduct).

Here, Plaintiffs' allegations plausibly establish the existence of a conspiracy to boycott ecommerce Crop Inputs platforms. *See* App.19; R. Doc. 104, at 19.[25] (CHS sent letter to farmers discouraging them from using FBN); App.26; R. Doc. 104, at 26.[26] (Bayer formed an internal task force to study the long term competitive impact of FBN's ecommerce Crop Inputs sales platform); App.19; R. Doc. 104, at 19.[27] (Syngenta's head of crop protection sales falsely claimed Crop Inputs ecommerce platforms would deliver counterfeit products); *Id.*[28] (Syngenta initiated audit of its authorized retailers to punish retailers that sold Crop Inputs to ecommerce

[25] *See* ¶ 77.
[26] *See* ¶ 95.
[27] *See* ¶ 97.
[28] *See* ¶ 98.

platforms); *Id.*[29] (Bayer and Corteva used contractual provisions to audit retailers' records to ensure that ecommerce platforms could not purchase Crop Inputs); App.25-26, 28; R. Doc. 104, at 25-26, 28.[30] (When FBN purchased Yorkton, a retailer with longstanding supply agreements with Defendants Bayer, Syngenta, BASF, Corteva, and Winfield, the Wholesaler and Retailer Defendants threatened to retaliate against the Manufacturer Defendants if they honored FBN's supply agreements from Yorkton.); App.28; R. Doc. 104, at 28.[31] (Manufacturer and Wholesaler Defendants collectively agreed to boycott Yorkton and canceled those supply agreements only a few months after FBN's acquisition of Yorkton); *Id.*[32] (On March 31, 2018, four days after FBN announced its purchase of Yorkton, Federated warned that FBN would upend their business models, writing, "[h]ow our key manufacturing partners decide to engage with this business will be closely observed by us and likely all of our traditional retailing peers across Western Canada."); App.29; R. Doc. 104, at 29.[33] (On April 6, 2018, Univar emailed retailers after FBN's purchase of Yorkton, declaring it would cease conducting business with FBN after July 31, 2018, due to FBN's model of pricing transparency, stating "If anyone thinks socialism is going to feed the world just call Russia first and see how that worked

[29] *See* ¶ 99.
[30] *See* ¶¶ 93, 102-03.
[31] *See* ¶ 103.
[32] *See* ¶ 104.
[33] *See* ¶ 105.

out."); *Id.*[34] (April 6, 2018, Univar sent an email notifying its suppliers of its decision not to do business with FBN and provided false and misleading talking points to justify its decision.).

The CAC further demonstrates how Defendants perpetuated the boycott through trade associations. App.20-21; R. Doc. 104, at 20-21[35] (detailing specific executives from Defendants serving on the board of CropLife, a key trade association used to effectuate Defendants' group boycott); *Id.*[36] (In February 2016, CropLife stated it was "concerned that the retailer could be disintermediated—i.e., that ecommerce platforms would 'cut out the middle man'—allowing growers to find product conveniently and at a lower market price," and decried the "devil known as 'price transparency,'" stating that "[g]rowers were not really as interested in buying and selling and storing product as they were in printing price lists off the Internet and waving them in their retailer's faces. Already low margins were about to race to the bottom."); App.30; R. Doc. 104, at 30[37] (February 2016, CropLife described ecommerce platforms, such as FarmTrade, as "draconian" for allowing growers to find product conveniently and at a lower market price.); App.21-22; R. Doc. 104, at 21-22[38] (Central topic of CropLife's PACE Advisory Council's 2017

[34] *See* ¶ 106.
[35] *See* ¶ 80.
[36] *See* ¶ 81.
[37] *See* ¶ 110.
[38] *See* ¶ 82.

annual meeting was FBN, including discussions about how FBN had negatively affected Defendants' business by cutting into their "already slim margins."); *Id.*[39] (February 2018, CropLife reported on a local "huge price war in chemicals" in Iowa as a result of FBN competing in the Market); App.22-23, 25; R. Doc. 104, at 22-23, 25[40] (CropLife reported it had improved cooperation with ARA, another trade association Plaintiffs' include detailed allegations regarding, including that Defendants Nutrien, CHS, Winfield Solutions, Corteva, Growmark, Bayer, BASF, and Syngenta all have employees on its board of directors, who likewise identified FBN and ecommerce entities as the enemy and called its members to action.).

The district court disregarded many of these key allegations, improperly concluding that "plaintiffs point to no specific action by any identified Defendant(s)" (App.206; R. Doc. 280, at 15; P.Add.15), despite the fact the CAC contains specific allegations as to each Defendant's participation in and the perpetuation of their conspiracy to boycott ecommerce platforms. App.19-30, 32-34, 43-45; R. Doc. 104, at 19-30, 32-34, 43-45.[41] The district court dismissed these allegations as "slight" (App.211; R. Doc. 280, at 20; P.Add.20), but this was error because, even at the trial stage, "[o]nce a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient to prove the defendant's involvement."

[39] *See* ¶83.
[40] *See* ¶¶ 85, 92.
[41] *See* ¶¶ 77, 80-83, 85-89, 91-93, 95, 97-99, 102-107, 110, 114, 117-119, 146, 151 (discussed *infra*).

In re Bulk Popcorn Antitrust Litig., 783 F. Supp. 1194, 1197 (D. Minn. 1991) (emphasis added); *see also In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1070 (8th Cir. 2017) ("Plaintiffs need not provide specific facts in support of their allegations . . . Rather, they need only provide sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level.") (internal citation omitted).

i. The CAC Pleads Individual Defendants' Participation in the Conspiracy.

The district court ignored allegations specific to each Defendant's participation in the conspiracy and failed to view the allegations in the CAC as a whole, as it must at the motion to dismiss stage. *Ringhofer v. Mayo Clinic, Ambulance*, 102 F.4th 894, 901 (8th Cir. 2024) ("At the motion to dismiss stage, '[t]he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible.'") (internal citation omitted); *see also Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."). Instead, the district court found Plaintiffs had not identified any "specific action by any identified Defendant(s)" [Bayer, BASF, Corteva Pioneer, Federated, Growmark, Nutrien, Simplot, Cargill, Tenkoz, Winfield, and Univar] and instead Plaintiffs had engaged in improper group pleading. App.205-06; R. Doc. 280, at 14-15; P.Add.14-15.

The "group pleading" language relied on by the district court in dismissing the CAC does not come from *Twombly* or Eighth Circuit law. Instead, the district court relied on cases from the Southern District of New York. *See* App.204-05, 211; R. Doc. 280, at 13-14, 20; P.Add.13-14.

The group pleading doctrine allows a plaintiff to allege wrongdoing against a group of individuals or entities jointly engaging in fraudulent or conspiratorial conduct. *Wool v. Tandem Computers*, 818 F.2d 1433, 1440 (9th Cir. 1987) (allowing group pleading where a group of corporate officers jointly published fraudulent financial statements), *overruled on other grounds by Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1575 (9th Cir. 1990) (en banc). In an antitrust case, a plaintiff "'must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective.'" *Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F. Supp. 3d 285, 316 (S.D.N.Y. 2018) (internal citation omitted)). A complaint should only be dismissed where there are no allegations in the complaint to connect each, or any, of the group defendants to the conspiracy. *Id.* at 317.

The district court disregarded Plaintiffs' collective allegations regarding the actions of the various groups of Defendants (Manufacturer, Wholesaler, and Retailer) as lacking the required specificity to survive a motion to dismiss. App.206; R. Doc. 280, at 15; P.Add.15. However, because the CAC "alleges each Defendant's

participation separately, it is not impermissible group pleading to refer to their collective actions in furtherance of the conspiracy using a more general phrase such as "the [Manufacturing] Defendants." *Id.*

Further, the fact that the CAC contains more specific allegations related to some Defendants compared to others does not summarily support dismissal as to the other Defendants. *See Duffy v. Yardi Sys. Inc.*, No. 2:23-cv-01391-RSL, 2024 WL 4980771, at *8 (W.D. Wash. Dec. 4, 2024) ("The fact that some of the [] defendants made public statements regarding aspects of the coordinated plan that were included in the [complaint] does not detract from the sufficiency of the allegations related to other [] defendants.") An examination of the CAC's allegations demonstrates that contrary to the district court's holding, there are more than sufficient allegations as to Bayer, BASF, Corteva Pioneer, Federated, Growmark, Nutrien, Simplot, Cargill, Tenkoz, Winfield, and Univar. Therefore, the district court's finding that the allegations as to these defendants were deficient should be reversed.

a. Plaintiffs Sufficiently Allege that Bayer, BASF, and Corteva Implemented Audits to Eliminate Sales to Ecommerce Platforms.

The district court inexplicably found that Plaintiffs failed to allege facts that the contractual audit provisions implemented by Bayer, BASF, and Corteva were punitive to retailers and that the audit's purpose was to curtail sales to ecommerce platforms. App.205; R. Doc. 280, at 14; P.Add.14. However, the CAC explicitly alleges both: "Defendants Syngenta, Bayer, BASF, and Corteva used audits and

inspections of their authorized retailers to ensure that ecommerce Crop Inputs sales platforms were unable to obtain Crop Inputs from their authorized retailers." App.03; R. Doc. 104, at 3.[42] The purpose of these contractual provisions was "to ensure that ecommerce Crop Inputs sales platforms could not purchase name brand Crop Inputs from an authorized retailer." App.27; R. Doc. 104, at 27.[43]. *See In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d at 1070 (finding that plaintiffs had pled with sufficient detail and citing allegations including, "through at least the end of 2010, Defendants regularly communicated to assure compliance with the conspiracy, monitoring the market to ensure that neither cheated on their anticompetitive agreement by offering a price reduction").

b. Plaintiffs Sufficiently and Specifically Allege the Conduct of All Defendants.

The district court found that Plaintiffs failed to allege concerted parallel conduct in the alleged geographic market for Manufacturer Defendant Pioneer, Retailer Defendants Federated, Growmark, Nutrien, and Simplot, and Wholesaler Defendants Cargill, Tenkoz, Winfield, and Univar. App.205-06; R. Doc. 280, at 14-15; P.Add.14-15.

The court concluded that certain allegations against these Defendants did not bolster Plaintiffs' claims and ignored other allegations, which, when taken together,

[42] *See* ¶ 8.
[43] *See* ¶ 99.

plausibly suggest a conspiracy to boycott ecommerce Crop Inputs platforms. *See* App.22-23; R. Doc. 104, at 22-23.[44] (Growmark's Rod Wells is chairman of the board for ARA; Nutrien, and Winfield employees serve on ARA board of directors); App.28; R. Doc. 104, at 28.[45] (Federated warned that FBN would upend their business models); App.29; R. Doc. 104, at 29.[46] (Univar emailed retailers in 2018 declaring it would cease business with FBN); *Id.*[47] (Cargill informed FBN they would no longer sell Crop Inputs to Yorkton); App.34; R. Doc. 104, at 34[48] (Pioneer's subsidiary ordered to produce records to the CCB); App.20-21; R. Doc. 104, at 20-21.[49] (From 2016-19, employees from Growmark, Tenkoz, and Simplot served on CropLife's Board of Directors).

Because the CAC makes particularized, specific allegations as to these Defendants, it should survive a motion to dismiss even under the non-binding authority the district court relied on. *See In re Mexican Gov't Bonds Antitrust Litig.*, 412 F. Supp. 3d at 389 (noting that claims against defendants for whom plaintiff made specific allegations should be allowed to survive a motion to dismiss despite the dismissal of defendants for whom there were only generalized allegations).

[44] *See* ¶ 85.
[45] *See* ¶ 104.
[46] *See* ¶¶ 105-06.
[47] *See* ¶ 107.
[48] *See* ¶ 118.
[49] *See* ¶ 80-81.

c. Plaintiffs Allege That Defendants Used Trade Associations to Communicate Regarding the Boycott.

Plaintiffs allege that Defendants communicated about the boycott through trade associations, including CropLife and ARA. App.44; R. Doc. 104, at 44.[50] ("Defendants formed and maintained their conspiracy using a high degree of inter-firm communication both directly and through wholesalers and retailers, such as through CropLife America's annual board of directors meeting which specifically discussed the threat posed by the entry of ecommerce Crop Inputs sales platforms. Because no farmer representatives can participate, these meetings provided a forum for collusion."); App.20-21; R. Doc. 104, at 20-21.[51] (CropLife America's board of directors has included executives from BASF, Corteva, Winfield, Bayer, Growmark, Tenkoz, and Simplot); App.22-23; R. Doc. 104, at 22-23.[52] (ARA's board of directors included employees of Nutrien, Winfield, and Growmark.); *Id.*[53] (At the 2017 ARA conference, Steve Watts of FGG announced that it was time for the Crop Inputs retailers to take steps to combat the intrusion of ecommerce entities. Once FBN left the conference, the ARA members had ample opportunity to build on Mr. Watts' calls to action).

The CAC also alleges that communications among Defendants were ongoing,

[50] *See* ¶ 149.
[51] *See* ¶ 80.
[52] *See* ¶ 85.
[53] *See* ¶ 86.

such that Plaintiffs could not fully allege them because that information lies in Defendants' exclusive control. *See, e.g.*, App.105; R. Doc. 104, at 105.[54] "Where a plaintiff is not a party to a communication, particularity in pleading may become impracticable." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 921 (8th Cir. 2001). It is "only fair to give" plaintiffs "the benefit of discovery" before requiring they "plead facts that remain within the defendants' private knowledge." *Id.* Thus, this Circuit has "declined to require, before discovery, the pleading of dates and times of communications in furtherance of a scheme to defraud, where the complaint alleges facts supporting the inference that the mails or wires were used." *Id.*

The district court's holding that the CAC did not allege communications between any Defendants regarding a boycott of ecommerce platforms is incorrect. App.214; R. Doc. 280, at 23; P.Add.23.

i. The Authorities the District Court Relied On Are Distinguishable and Not Binding.

The case law relied upon by the district court discussing "group pleading" or "generalized allegations" does not support dismissing the case, and certainly not all Defendants, with prejudice. The non-binding authority from outside the Eighth Circuit relied on by the district court is distinguishable.

The district court, relying on *Bank of America, N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013), held that "[w]hen alleging a conspiracy, the law is clear that

[54] *See* ¶ 250.

'[e]ach defendant is entitled to know what he or she did that is asserted to be wrongful,' and a 'complaint based on a theory of collective responsibility must be dismissed.'" App.204; R. Doc. 280, at 13; P.Add.13. *Knight* is an outlier. *Knight* notably involved a plaintiff who was the defendant's principal lender and had access to the defendant's book and records. The *Knight* court noted the complaint was "maddeningly vague," and its pleading deficiencies warranted dismissal because the plaintiff had access to evidence to bolster its allegations and chose not to do so. 725 F.3d at 819. Unlike *Knight*, Plaintiffs' allegations in this CAC provide far more detail than simply "the defendants looted the corporation." 725 F.3d at 818. The CAC puts each of the defendants on notice of their unlawful actions by alleging each one's role in the conspiracy, including, among other things, discouraging farmers from using ecommerce platforms: App.19; R. Doc. 104, at 19[55] (CHS: warning that ecommerce platforms would upend the traditional Crop Inputs business model); App.28; R. Doc. 104, at 28.[56] (Federated: participating in trade association meetings where ecommerce platforms were "the main event" and perceived as the "devil known as price transparency"); App.20-23; R. Doc. 104, at 20-23[57] (Nutrien, CHS, Winfield, Corteva, Growmark, Bayer, BASF, Syngenta, Tenkoz, and Simplot: providing benchmarking services to analyze industry trends); App.23-25; R. Doc. 104, at 23-

[55] *See* ¶ 77.
[56] *See* ¶ 104.
[57] *See* ¶¶ 80-83, 85-86.

25[58] (Winfield: forming a task force to study the competitive impact of FBN's ecommerce platform); App.26; R. Doc. 104, at 26[59] (Bayer: claiming ecommerce platform's Crop Inputs products were counterfeit); App.27; R. Doc. 104, at 27[60] (Syngenta: performing audits and utilizing mandatory audit provisions in contracts with retailers to ensure that ecommerce Crop Inputs platforms were not being sold to); App.29; R. Doc. 104, at 29[61] (Univar, Bay, Corteva, Cargill, and Winfield: ultimately cutting off supply to FBN).

Furthermore, unlike the plaintiff in *Knight* who had access to the defendant's records, Plaintiffs had no such access and were denied discovery. Moreover, a price fixing conspiracy is "often inferred from context," because of the limited amount of "publicly available evidence of its existence." *In re Broiler Chicken Antitrust Litig.* ("*Broilers*"), 290 F. Supp. 3d 772, 804 (N.D. Ill. 2017). "[A]ny direct evidence of the agreement will only be uncovered through discovery." *Id.* at 804.

The district court also relied on *In re Mexican Gov't Bonds Antitrust Litigation*, 412 F. Supp. 3d 380 (S.D.N.Y. 2019). App.204; R. Doc. 280, at 13; P.Add.13. In *Mexican Government Bonds*, the complaint was dismissed because it contained "almost no individualized allegations at all." 412 F. Supp. 3d at 389. The allegations there were aggregated statistics, included conduct of defendants and non-

[58] *See* ¶¶ 87-91.
[59] *See* ¶ 95.
[60] *See* ¶ 97.
[61] *See* ¶ 105.

defendants alike, and did not distinguish or describe the conduct of any defendant in particular. The court recognized that "a plaintiff need not adduce direct evidence for each and every defendant named, but there must be something in the complaint that ties each defendant to the conspiracy." *Id.* at 388 (cleaned up). Here, the CAC ties each Defendant to the conspiracy by identifying specific acts of conspiratorial conduct by each Defendant. *See* App.20-23, 26-27, 29, 32-34, 43-35; R. Doc. 104, at 20-23, 26-27, 29, 32-34, 43-45, 106[62] (Bayer was on CropLife's and ARA's board of directors, formed a task force to study long-term competitive impact of FBN's ecommerce Crop Inputs sales platform, utilized mandatory audit provisions in retailer contracts, ceased selling Crop Inputs to FBN in 2018, is a leading antitrust recidivist, ordered to produce records to the CCB, its merger review documents indicated substantive consideration of FBN in the US and its competitive significance, and dominates production in a highly concentrated marketplace); App.20-23, 27, 29, 32-35, 41, 43-45; R. Doc. 104, at 20-23, 27, 29, 32-35, 41, 43-45, 106[63] (Corteva was on CropLife's and ARA's board of directors, utilized mandatory audit provisions in retailer contracts, ceased selling Crop Inputs to FBN in 2018, is a leading antitrust recidivist, ordered to produce records to the CCB, was investigated by the FTC, and dominates production in a highly concentrated

[62] *See* ¶¶ 80, 85, 95, 99, 107, 114, 117-119, 146, 151, 256.
[63] *See* ¶¶ ¶¶ 80, 85, 99, 107, 114, 117, 120, 140, 146, 151, 256.

marketplace); App.34; R. Doc. 104, at 34[64] (Pioneer Hi-Bred, a Corteva subsidiary ordered to produce records to the CCB); App.20-23, 37, 32-34, 43-45, 106; R. Doc. 104, at 20-23, 27, 32-34, 43-45, 106[65] (BASF was on CropLife's and ARA's board of directors, utilized mandatory audit provisions in retailer contracts, ordered to produce records to the CCB DOJ investigation uncovered records of its views of the potential competitive significance of FBN, dominates production in a highly concentrated marketplace, and is an antitrust recidivist); App.20-23, 27, 43; R. Doc. 104, at 20-23, 27, 43[66] (Syngenta is member of CropLife's and on ARA's board of directors, claimed ecommerce Crop Inputs sales platforms would sell counterfeit products, audited its authorized retailers after learning that some retailers had sold Crop Inputs to ecommerce Crop Inputs sales platforms, dominates production in a highly concentrated marketplace, falsely justified its audit by expressing concern about product quality); App.29, 33-34; R. Doc. 104, at 29, 33-34[67] (Cargill ceased selling Crop Inputs to FBN in 2018, and was investigated and ordered to produce records to the CCB); App.20-21; R. Doc. 104, at 20-21, 106[68] (Tenkoz was on CropLife's board of directors); App.20-21, 22-25, 29; R. Doc. 104, at 20-21, 22-25, 29[69] (Winfield's parent company serves on CropLife's board of directors and

[64] *See* ¶ 118.
[65] *See* ¶¶ ¶¶ 80, 85, 99, 114, 117, 118, 119, 146, 151, 256.
[66] *See* ¶¶ ¶¶ 80, 85, 97, 98, 146.
[67] *See* ¶¶ ¶¶ 107, 117, 118.
[68] *See* ¶¶ ¶¶ 80, 256.
[69] *See* ¶¶ ¶¶ 80, 85, 87, 89, 107.

Winfield is on ARA's board of directors, partnered with FGG to provide benchmarking services, and ceased selling products to FBN in 2018); App.29; R. Doc. 104, at 29[70] (Univar sent an email to retailers in 2018 declaring it had ceased business with FBN criticizing FBN's pricing transparency); App.19, 22-23; R. Doc. 104, at 19, 22-23[71] (CHS sent letters to farmers discouraging them from using FBN and falsely claiming it would be lining the pockets of investors and big data companies like Google, served on ARA's board of directors); App.22-23; R. Doc. 104, at 22-23[72] (Nutrien served on ARA's board of directors); App.20-23, 106; R. Doc. 104, at 20-23, 106[73] (Growmark served on CropLife's and ARA's board of directors); App.20-21, 106; R. Doc. 104, at 20-21, 106[74] (Simplot served on CropLife's board of directors); App.28, 33-34; R. Doc. 104, at 28, 33-34[75] (Federated warned that FBN would upend the traditional Crop Inputs business model and was investigated by the CCB).

Finally, the court below relied on *Litovich v. Bank of America. Corp.*, 568 F. Supp. 3d 398, 434 (S.D.N.Y. 2021) (which relies on *In Re Mexican Government Bonds*) to support its holding of group pleading. App.204; R. Doc. 280, at 13; P.Add.13. In *Litovich*, the court found that the complaint did not contain allegations

[70] *See* ¶¶ ¶¶ 105, 106.
[71] *See* ¶¶ ¶¶ 77, 85.
[72] *See* ¶ 85.
[73] *See* ¶¶ 80, 85, 256.
[74] *See* ¶¶ 80, 256.
[75] *See* ¶¶ ¶¶ 107, 117, 118.

as to any individual defendant that would establish a group boycott, which required dismissal. 568 F. Supp. 3d at 435. The *Litovich* court further found that the plaintiffs had failed to plead that the defendants consciously committed themselves to a common scheme to achieve an unlawful objective. *Id.* at 437. Here, however, Plaintiffs have pled that Defendants committed themselves to the conspiracy by coordinating and colluding through specific trade associations which they led (App.20-23; R. Doc. 104, at 20-23[76]), sent pretextual letters and emails about ecommerce platforms (App.19, 28; R. Doc. 104, at 19, 28[77]), implemented punitive audit provisions in retail contracts to ensure retailers were not selling to ecommerce Crop Inputs platforms (App.27; R. Doc. 104, at 27[78]), and ceased business with ecommerce platform FBN (App.29; R. Doc. 104, at 29[79]). Additionally, as noted above, this case is not binding authority in this Circuit and, more importantly, Plaintiffs plead specific allegations as to each Defendant's misconduct.

B. Plaintiffs' Allegations Plausibly Suggest Defendants' Parallel Conduct Was a Group Boycott.

Plaintiffs' allegations, when viewed as a whole, plausibly suggest Defendants' parallel conduct constituted a group boycott. The district court's fragmented reading of Plaintiffs' allegations was reversible error. On a motion to dismiss, the complaint

[76] *See* ¶¶ 80-86.
[77] *See* ¶¶ 77, 104.
[78] *See* ¶¶ 98-99.
[79] *See* ¶¶ 105-07.

"should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Warmington v. Bd. of Regents of Univ. of Minnesota*, 998 F.3d 789, 795 (8th Cir. 2021) (internal citations omitted). Plausibly pleading a conspiracy requires less than defeating summary judgment. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015), as amended on rehearing in part Oct. 29, 2015; *Evergreen Partnering Grp. Inc. v. Pactive Corp.*, 720 F.3d 33, 45-46 (1st Cir. 2013). Courts should not "choose" defendants' inferences to dismiss a complaint. *Id.* Rather, courts evaluating antitrust conspiracies evaluate the evidence as a whole and avoid "piece-meal analysis." *In re Workers' Compensation Ins. Antitrust Litig.*, 867 F.2d 1552, 1563 (8th Cir. 1989); *accord, Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 355 (4th Cir. 2024) ("tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" misapplies antitrust doctrine).

Here, Defendants, in a "joint, collaborative action," as in *General Motors*, 384 U.S. at 140, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959), and *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985), refused to sell maverick ecommerce platforms the Crop Inputs they needed to compete App.04, 26; R. Doc. 104, at 4, 26.[80] Defendants did so to further their anticompetitive agreement to keep farmers in the dark about pricing and maintain

[80] *See* ¶¶ 9, 96.

their unlawful supracompetitive prices. App.17, 26, 31, 35; R. Doc. 104, at 17, 26, 31, 35.[81]

Defendants dominated the Crop Inputs market and conspired to increase and fix prices. App.02, 06, 28, 43; R. Doc. 104, at 2, 6, 28, 43.[82] New ecommerce platforms increased Crop Inputs' price transparency, (App.03, 18, 30; R. Doc. 104, at 3, 18, 30[83]), which threatened Defendants' "market position, power and profit margins." App.19, 104; R. Doc. 104, at 19, 104.[84] Defendants studied and discussed these new online platforms. For example, in 2016, CropLife America expressed concern in its magazine about price transparency and disintermediation (App.21; R. Doc. 104, at 21[85]) and Defendant Bayer formed an internal task force to analyze the competitive impact of FBN's sales platform.[86] App.26; R. Doc. 104, at 26[87]; *see also* App.20-23, 44; R. Doc. 104, at 20-23, 44[88] (industry boards and discussing margins and FBN). Through their trade groups, Defendants discussed the competitive threat

[81] *See* ¶¶ 96, 69, 111, 121(d).
[82] *See* ¶¶ 3, 5, 20, 101, 146.
[83] *See* ¶¶ 7, 74, 110.
[84] *See* ¶¶ 76, 242.
[85] *See* ¶ 81.
[86] The district court's handling of Plaintiffs' allegations related to Bayer's task force is one example of its improper dismembering of Plaintiffs' allegations. Rather than analyzing Plaintiffs' allegations as a whole, the district court dismissed Plaintiffs' allegations as to Bayer's task force, viewing it in isolation, and concluding it was irrelevant because Plaintiffs had not alleged any other defendant created such a task force. App.203; R. Doc. 280, at 12; P.Add.12.
[87] *See* ¶ 95.
[88] *See* ¶¶ 80, 82, 84, 85, 149.

posed by these ecommerce platforms and their price transparency, and organized a boycott to stomp them out. App.21-22, 30; R. Doc. 104, at 21-22, 30.[89]

Based on these discussions, Defendants agreed to stop supplying the competing platforms due to their threat to Defendants. App.03, 25-26; R. Doc. 104, at 3, 25-26.[90] As agreed, Manufacturer and Wholesaler Defendants refused to sell Crop Inputs to the online platforms. App.26; R. Doc. 104, at 26.[91] The CAC describes two significant examples of such collective refusals and two additional types of anticompetitive parallel conduct.

First, the CAC summarizes 2016 and 2017 articles that originated from CropLife—an organization Plaintiffs allege is controlled by Defendants—and that focus on and complain about the risk posed by the online platform FarmTrade to disintermediate retailers. Plaintiffs allege that manufacturers (which by reasonable inference include the Manufacturer Defendants and others in the distribution channel) "corrected" the situation, thereby "ending the 'unnerving and unhappy time'" for Defendants. App.30; R. Doc. 104, at 30.[92] Plaintiffs also make numerous allegations that suggest Defendants control CropLife. App.20-21; R. Doc. 104, at 20-21.[93]

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[89] *See* ¶¶ 81, 83, 110.
[90] *See* ¶¶ 8, 93.
[91] *See* ¶ 96.
[92] *See* ¶ 110, nn.19, 20.
[93] *See* ¶¶ 80-81.

Additionally, the CAC alleges that in 2018 FBN, a would-be competitor, purchased Yorkton Distributors, a Canadian retailer with longstanding supply contracts with Manufacturer Defendants Bayer, Syngenta, BASF, Corteva, and Winfield, and that those manufacturers abruptly cancelled their contracts with would-be ecommerce competitor FBN after threats from Wholesaler and Retailer Defendants. App.28; R. Doc. 104, at 28.[94] Federated circulated an email stating they and their "retailing peers across Western Canada" would "closely" observe manufacturer's responses to FBN's acquisition of Yorkton. *Id.*[95] Univar told other retailers it cut off FBN, criticizing FBN's price transparency and "[m]argin compression." App.29; R. Doc. 104, at 29.[96] Univar also emailed its manufacturer suppliers about cutting off FBN. *Id.*[97] Bayer, Corteva, Cargill, and Winfield sent cut-off notices to FBN in spring and summer 2018. *Id.*[98] FBN's co-founder stated the response to Yorkton "was similar to the United States' industry response when FBN first launched in 2014," which seriously harmed FBN. App.29-30; R. Doc. 104, at 29-30.[99] The district court notably failed to acknowledge FBN's statement about Defendants' analogous response in the United States when it concluded that the

[94] *See* ¶¶ 102-03.
[95] *See* ¶ 104.
[96] *See* ¶ 105.
[97] *See* ¶ 106.
[98] *See* ¶ 107.
[99] *See* ¶ 108.

Yorkton allegations were not sufficiently connected to Defendants' conduct in the United States. App.206-07; R. Doc. 280, at 15-16; P.Add.15-16.

The district court also improperly disregarded Plaintiffs' allegations of parallel conduct by the Manufacturer Defendants, including implementing provisions in their contracts with retailers requiring them to "toe the line" about price secrecy and blocking them from supplying Crop Inputs to ecommerce platforms. The CAC contains clear allegations that these contractual provisions were intended to and did perpetuate Defendants' group boycott. Plaintiffs allege that Defendants Bayer, BASF, and Corteva each imposed contractual provisions on authorized retailers that allowed them to perform audits and on-site inspections at any time, audits they implemented to prevent retailers from selling to online platforms. App.27; R. Doc. 104, at 27.[100] The district court also ignored allegations connecting the audits with Defendants' goal of preventing sales to FBN. For example, Plaintiffs alleged that in 2018, Syngenta initiated audits of its authorized retailers after it learned that some retailers sold Crop Inputs to online sales platforms. App.03, 27; R. Doc. 104, at 3, 27.[101]

In yet another example of parallel conduct, Plaintiffs allege Defendants conducted a "campaign of misleading statements" in furtherance of their boycott. *Precision Rx Compounding*, 2016 WL 4446801, at *1, 3; *see Evergreen Partnering*

[100] *See* ¶ 99.
[101] *See* ¶¶ 8, 98.

Grp., 720 F.3d at 39 (misrepresentations). For example, CHS sent a letter to farmers falsely claiming FBN would be "lining the pockets of investors and big data companies like Google." App.19; R. Doc. 104, at 19[102]; *but see* App.20; R. Doc. 104, at 20.[103] (FBN did not sell data). And a Syngenta executive falsely claimed in an interview that online ecommerce platforms would deliver counterfeit products and "you'd better question and be concerned about the quality." App.27; R. Doc. 104, at 27.[104] Likewise, in an email to retailers, Univar called FBN "a data company" that would sell its data to "make farmers grow us food for nothing," calling it socialism and referring to Russia. App.29; R. Doc. 104, at 29.[105]

In incorrectly concluding the CAC did not allege conduct similar to CHS's letter to farmers, the district court completely ignored the Syngenta and Univar allegations detailed above. App.202-03; R. Doc. 280, at 11-12; P.Add.11-12. Moreover, the court improperly viewed Plaintiffs' allegations in isolation, ignoring important context and additional allegations supporting the boycott and Defendants' parallel conduct related to the same, such as allegations of Defendants' executives discussing the threat to their profit margins posed by FBN at industry meetings, and improperly weighed inferences in Defendants' favor by deeming it natural for Defendants to discourage dealing with competitors while rejecting Plaintiffs'

[102] *See* ¶ 77.
[103] *See* ¶ 79.
[104] *See* ¶ 97.
[105] *See* ¶ 105.

allegations. Order at 12. *See also* App.206; R. Doc. 280, at 15; P.Add.15 (suggesting considering plausibility "in the face of an 'obvious alternative explanation"); *but see Evergreen Partnering Grp.*, 720 F.3d at 50 (weighing inferences as error).

In conclusion, the district court erred by evaluating numerous facts in isolation from one another, thus improperly compartmentalizing and overlooking the broad picture painted by Plaintiffs' allegations in holding Plaintiffs' allegations did not plausibly plead parallel conduct in support of their group boycott claim. The district court further erred by weighing inferences in Defendants' favor on a motion to dismiss and improperly applying a heightened summary judgment pleading standard to Plaintiffs' claims.

i. The Timeline of Events Contextualizes the Agreement to Boycott Ecommerce Platforms, Creating a Plausible Inference of Conspiracy.

Moreover, the timeline of events alleged in this case further provides context for Defendants' parallel conduct—the "more" (along with plus factors) suggesting the existence of an agreement as required by *Twombly.* The district court never addressed whether Defendants' boycott of ecommerce Crop Inputs platforms was *itself* parallel conduct. Instead, the district court parsed allegations presented in a timeline of boycott allegations and concluded none of them, individually, amounted to parallel conduct. App.202-04; R. Doc. 280, at 11-13; P.Add.11-13. The boycott itself is parallel conduct, and the CAC alleges a combination of techniques Defendants used to effectuate the boycott for the unified purpose of eliminating

ecommerce platforms from the market. *See Precision Rx Compounding,* 2016 WL 4446801, *3 (noting that the complaint described a "combination of techniques defendants and their co-conspirators allegedly all used for the unified purpose of eliminating plaintiffs and other independent pharmacies from the market.").

Around 2014, new web-based ecommerce sales platforms for Crop Inputs, such as FBN and Agroy, began selling Crop Inputs and related performance data directly to farmers nationwide in competition with Defendants. App.03, 18; R. Doc. 104, at 3, 18.[106]

These ecommerce platforms were initially successful, as thousands of farmers signed up to receive Crop Inputs data and access FBN's sales platform. App.19; R. Doc. 104, at 19.[107] Through the new platforms, farmers could view what other farmers were paying for the same Crop Inputs. App.03; R. Doc. 104, at 3.[108] Farmers not only could compare products, they could also buy Crop Inputs *a la carte*—as single products unbundled from other warranties or services—an option not available under the opaque sales regime Defendants imposed prior to the introduction of the electronic platforms. App.19; R. Doc. 104, at 19.[109]

The introduction and success of these platforms in 2014 marked the beginning

[106] *See* ¶¶ 7, 74.
[107] *See* ¶ 75
[108] *See* ¶ 7.
[109] *See* ¶¶ 76.

of a competitive threat to Defendants. App.03; R. Doc. 104, at 3.[110] Indeed, industry insiders CoBank and CropLife America publicly acknowledged the threat beginning in 2016. App.19-21; R. Doc. 104, at 19-21.[111] That same year, Bayer formed an internal task force to study the long-term competitive impact of FBN's ecommerce Crop Inputs sales platform (App.26; R. Doc. 104, at 26[112]) and CHS criticized FBN to discourage farmers from using FBN. App.19; R. Doc. 104, at 19.[113]

The district court concluded that these allegations were not examples of parallel conduct, and that CHS had obvious independent reasons for discouraging farmers from using ecommerce platforms. App.202-03; R. Doc. 280, at 11-12; P.Add.11-12. But these allegations not only exemplify efforts to effectuate the boycott for the unified purpose of eliminating ecommerce Crop Inputs platforms (as discussed above in Section II. A.), they also show that CHS and Bayer, like other Defendants at this time, viewed the ecommerce platforms as a threat and had a motive to conspire to eliminate that threat. Motive is a plus factor.

Recognizing the threat, CropLife, a trade association of major Crop Inputs manufacturers, wholesalers, and retailers (App.20-21; R. Doc. 104, at 20-21[114]), focused on the FBN platform at its 2017 annual meeting, and in 2018 reported on a

[110] *See* ¶¶ 7.
[111] *See* ¶¶ 76, 80-81.
[112] *See* ¶ 95.
[113] *See* ¶ 77.
[114] *See* ¶ 80.

2017 price war in Iowa resulting from FBN's competition. (App.21-22; R. Doc. 104, at 21-22[115]). In 2017, the Annual Conference & Expo of ARA, a trade association representing the interests of U.S. agricultural retailers and distributors (App.22-23; R. Doc. 104, at 22-23[116]), featured a "main event" clash between FBN and ag retailer consultant Steve Watts of FGG. Watts communicated his belief that it was time to "affirmatively combat" the ecommerce platforms. *Id.*

Plaintiffs allege that Defendants took Steve Watts up on his invitation to engage in combat with the threat of ecommerce Crop Input platforms and agreed among themselves to boycott the platforms. Plaintiffs acknowledge they do not know exactly when Defendants reached this agreement. Group boycotts are inherently self-concealing (App.40; R. Doc. 104, at 40[117]), and discovery is necessary to unveil the details of the conspiracy. But Plaintiffs allege the threat and motive to conspire[118] began as early as 2014, when the ecommerce platforms began to operate. Plaintiffs have alleged facts reflecting that the boycott was firmly in place at least by sometime between the ARA 2017 Annual Conference and 2018. App.25-26; R. Doc. 104, at 25-26.[119]

By at least that time frame, Defendants mutually agreed not to sell to

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[115] *See* ¶¶ 82, 83
[116] *See* ¶ 85.
[117] *See* ¶¶ 137.
[118] Motive to conspire is discussed *infra* at Section II. B. ii. addressing plus factor allegations.
[119] *See* ¶ 93.

ecommerce platforms, with Retailer Defendants encouraging the Manufacturing Defendants' participation. *Id.* Syngenta, Bayer, BASF, and Corteva used the threat of contractually allowed audits and inspections to ensure Retailers adhered to the agreement and did not supply to the ecommerce platforms. App.03, 27; R. Doc. 104, at 3, 27.[120] When platforms sought to purchase from Manufacturer and Wholesaler Defendants, they all refused and offered only pretextual excuses. App.26; R. Doc. 104, at 26.[121] These allegations reflect parallel efforts by specific Defendants to effectuate and enforce the boycott.

Plaintiffs also allege that Retailers who failed to comply with the group boycott were penalized by other Defendants. App.27; R. Doc. 104, at 27.[122] The district court acknowledged that Plaintiffs allege a specific instance of such retaliation: Defendant Syngenta initiated an audit of its authorized retailers in 2018 after learning that some of them sold Crop Inputs to ecommerce platforms. App.204; R. Doc. 280, at 13; P.Add.01. However, the district court concluded that this was only one example and therefore was "not a plausible allegation of parallel conduct." *Id.* The 2018 Syngenta audit reflects the existence of the boycott and shows that Syngenta, a participant, took steps to ensure retailers were complying with it.

The CAC alleges that when Syngenta's Head of Crop Protection Sales in the

[120] *See* ¶¶ 8, 99.
[121] *See* ¶ 96.
[122] *See* ¶ 98.

United States, Michael Boden, learned that some branded Crop Inputs were sold by a platform "in violation of the Defendants' boycott," he falsely claimed that the platforms would use counterfeit products and warned about the quality of products available from the platforms. App.27; R. Doc. 104, at 27.[123] The district court took issue with the fact that Plaintiffs do not allege that any other Defendant cooperated in Mr. Boden's communication or engaged in similar conduct, and that it is unknown to whom Mr. Boden's statement was made. App.204; R. Doc. 280, at 13; P.Add.01. However, again, these allegations show Defendants' boycott of ecommerce platforms was underway and that Defendant Syngenta acknowledged and sought to protect the boycott's existence by dissuading boycott-violating sales.

A 2018 Forbes article similarly reflects that the CEO of a generic chemical products company was also aware of the boycott's existence and was afraid of violating it. The article reflects the CEO having said he was wary of supplying ecommerce Crop Inputs sales platforms because it could anger existing sales channels, but he said that "[i]n an ideal world, if I could flip the switch and sell to these guys, I would do it in a heartbeat." App.27; R. Doc. 104, at 27.[124]

Additional allegations regarding the Defendants' 2018 boycott of FBN in Canada (discussed further in section II. B. ii.) show FBN's co-founder likening the response by Defendants in Canada to Defendants' response in the United States

[123] *See* ¶ 97.
[124] *See* ¶ 100.

when FBN first launched in 2014, again indicating the existence of the boycott and similar tactics by Defendants in the United States to effectuate a boycott of Crop Inputs ecommerce platforms for the unified purpose of eliminating them as competition. App.28-30; R. Doc. 104, at 28-30.[125]

ii. The Alleged Plus Factors Plausibly Suggest the Existence of Defendants' Group Boycott.

An antitrust claim based on circumstantial allegations, such as this one, satisfies the requirements of *Twombly* when it places "allegations of parallel conduct" into "a context that raises a suggestion of a preceding agreement." In other words, "a plaintiff must plead parallel conduct *and* something 'more'" *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412 (2015) (citing *Twombly,* 550 U.S. at 557). The Court may "infer the existence of an agreement from consciously parallel conduct if the parallelism is accompanied by substantial additional evidence—often referred to as the 'plus factors.'" *See Precision Rx Compounding, LLC v. Express Scripts Holding Co.*, 2016 WL 4446801, at *2-3 (E.D. Mo. Aug. 24, 2016).

Plus factors are "circumstances demonstrating that the wrongful conduct was conscious and not the result of independent business decisions of the competitors." *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp.3d 46, 58 (D.C. Cir. 2016). To satisfy *Twombly* in this Circuit, antitrust plaintiffs seeking to establish a conspiracy with circumstantial evidence must plead plus factors in addition to

[125] *See* ¶ 102-08.

parallel conduct to survive a motion to dismiss. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc) ("An agreement is properly inferred from conscious parallelism only when certain 'plus factors' exist."). As the district court here observed, "[t]there is no finite list of plus factors, but examples include: (1) a shared motive to conspire; (2) action against self-interest; (3) market concentration; and (4) a substantial amount of interfirm communication in conjunction with the parallel conduct." App.201; R. Doc. 280, at 10; P.Add.10 (citing *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194–95 (9th Cir. 2015)). *See also Precision Rx,* 2016 WL 4446801, at *2 (identifying a common motive to conspire as a plus factor).

The Supreme Court instructs courts to evaluate plus factors holistically. *See SD3,* 801 F.3d at 424 (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699 (1962) (cautioning courts not to "compartmentaliz[e] the various factual components of an antitrust case")). Courts should also not "parse each 'plus factor' individually and ask whether that factor, standing alone, would be sufficient to provide the 'more'" required by *Twombly*. Courts "must consider the complaint in its entirety" to determine whether "all of the facts alleged, taken collectively," give rise to relevant inferences, rather than asking "whether any individual allegation scrutinized in isolation, meets that standard." *SD3,* 801 F.3d at 424 (*citing Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310 (2007)).

Importantly, *Twombly*'s requirement to plead something "more" than parallel

conduct does not impose a probability standard at the motion to dismiss stage. Courts must not confuse plausibility with probability and prematurely "weigh" the allegations in antitrust cases, as the district court did. The district court, having erroneously concluded that Plaintiffs failed to allege parallel conduct, failed to address Plaintiffs' plus factor allegations. However, these allegations satisfy *Twombly* by illustrating and contextualizing Defendants' related, parallel efforts and motivations to perpetuate the boycott.

High Market Concentration. A highly concentrated market is circumstantial evidence from which to infer a plausible agreement. *Evergreen Partnering Grp.*, 720 F.3d at 48. The CAC alleges that the Crop Inputs market is highly concentrated, with Manufacturer Defendants dominating nearly every segment, including 85% of the corn seed market, 75% of the soybean seed market, and 90% of the cotton seed market. App.43; R. Doc. 104, at 43.[126] The CAC alleges that the wholesale market is also highly concentrated, with seven wholesalers accounting for 70% of all sales volume. *Id.* This high concentration provides plausible context for the conspiracy. *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 323 (2d Cir. 2010) (defendants' combined 80% market share was a persuasive plus factor); *Haley Paint Co. v. E.I. Dupont De Nemours & Co.*, 804 F. Supp. 2d 419, 421, 426 (D. Md. 2011) (high market concentration where defendants controlled 70% of the market).

[126] *See* ¶ 146.

Common Motive to Conspire. The CAC alleges that Defendants had a common motive to conspire because they were all similarly incentivized to preserve the existing system by keeping pricing of Crop Inputs opaque and fencing out new ecommerce platforms that would increase price transparency. *See* App.17-18, 25-26, 43, 103; R. Doc. 104, at 17-18, 25-26, 43, 103.[127] Without price transparency, farmers cannot "shop around," enabling Defendants to charge supracompetitive prices for Crop Inputs. *See* App.33, 103; R. Doc. 104, at 33, 103[128]; *In re Disposable Contact Lens Antitrust*, 215 F. Supp. 3d 1272, 1306 (M.D. Fla. 2016).

Actions Against Self-Interest. As the CAC alleges, Defendants' parallel actions were against their economic self-interest absent a conspiracy because ecommerce platforms provided them with a significant new business opportunity. App.44; R. Doc. 104, at 44.[129] Ecommerce platforms represented well-financed customers ready to purchase high volumes of Crop Inputs and provided an opportunity for an individual Manufacturer Defendant to grow its market share through sales to farmers nationwide, not merely where its authorized retailers were located. *Id.* None of the Manufacturer Defendants seized this opportunity; instead, Defendants publicly signaled their refusal to deal with the ecommerce platforms. *See* App.19, 27-29; R. Doc. 104, at 19, 27-29[130]; *Precision Rx*, 2016 WL 4446801, at *4

[127] *See* ¶¶ 70, 71, 73, 93, 94, 148, 239.
[128] *See* ¶¶ 116, 238.
[129] *See* ¶ 150.
[130] *See* ¶ 77, 97, 104-106.

("The broadcasting of … plans or strategies is further circumstantial evidence of a conspiracy among competitors.").[131] No reasonable Crop Inputs manufacturer, acting alone, would have chosen to forego this opportunity to increase sales and market share. Instead, concerted action maintained the secrecy of their pricing information. *See Pork Antitrust Litig.*, 495 F. Supp. 3d 753, 768 (D. Minn. 2020) (concerted action may be shown through circumstantial evidence that "similar behavior would probably not" occur absent "an advance understanding among the parties"); *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 935 (7th Cir. 2000).

High Level of Interfirm Communications and Opportunities to Conspire. "'Membership and participation in a trade group facilitates collusion' and provides opportunities to conspire." *Precision Rx Compounding, LLC*, 2016 WL 4446801, at *3. The CAC details Defendants' active participation in trade associations, including CropLife and ARA. App.106-07; R. Doc. 104, at 106-07.[132] The CAC further alleges Defendants' communications during CropLife's annual board meetings, with no farmer representatives allowed to participate (App.44, 106-07; R. Doc. 104, at 44, 106-07[133]), and at the ARA annual conference, at which each Defendant was

[131] Defendants proffered several excuses for why their actions were not against economic their self-interest, but "based on the factual allegations in the complaint and reasonable inferences drawn therefrom . . . the alternative explanation [] is not 'obvious' or 'more likely' than [P]laintiffs' plausible claims." *Precision Rx*, 2016 WL 4446801, at *4.
[132] *See* ¶¶ 255-58.
[133] *See* ¶¶149, 255-58.

represented. App.22-23, 107; R. Doc. 104, at 22-23, 107.[134] Defendants' membership in these trade groups—which actively and vocally opposed price transparency and ecommerce Crop Inputs platforms (App.20-23, 106-07; R. Doc. 104, at 20-23, 106-07[135])—"supports an inference of a conspiracy." *Precision Rx*, 2016 WL 4446801, at *3.

Government Investigations. Finally, the CAC alleges that the Canadian Competition Bureau and the United States FTC are investigating Defendants for anticompetitive conduct. App.04, 13-14, 33-34; R. Doc. 104, at 4, 13-14, 33-34.[136] The existence of foreign and domestic government investigations enhances the plausibility of an alleged conspiracy. *See, e.g.*, *Starr v. Sony BMG Music Entertainment*, 592 F.3d 324-25 (2d Cir. 2010) (investigations coupled with other allegations may be suggestive of a conspiracy); *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 576 & n. 44–45 (M.D. Penn. 2009) ("Defendants' alleged conduct in Canada enhances the plausibility of the alleged U.S. price-fixing conspiracy.").[137] While Defendants' motions to dismiss were

[134] *See* ¶¶ 85, 86, 258.
[135] *See* ¶¶ 80-83, 86, 149, 257-258.
[136] *See* ¶¶ 11, 56, 117-19.
[137] The district court took "judicial notice that on March 15, 2022, the CCB announced in a Press Release and Position Statement that it had closed the investigation after determining the evidence did not demonstrate an agreement existed between competitors with respect to FBN." App.196; R. Doc. 280, at 5 fn.12; P.Add.05. This, however, should be construed as dicta given the district court's subsequent explanation that the CCB investigation could only be relevant to its

pending, the United States District Court for the Middle District of North Carolina sustained the complaint that resulted from the FTC investigation, further enhancing the plausibility of Plaintiffs' alleged conspiracy.

Accordingly, Plaintiffs have sufficiently alleged plus factors, in addition to parallel conduct, such that the CAC states a plausible group boycotting conspiracy claim.

iii. This Court Has Authority to Conclude that the Complaint Adequately Alleges Plus Factors as Part of Its De Novo Review.

Although the district court "d[id] not reach the adequacy of Plaintiffs' alleged plus factors" because it incorrectly concluded that Plaintiffs had not sufficiently alleged parallel conduct,[138] this Court has authority to decide the issue in the first instance because it "was fully briefed [and] addresses a pure question of law…." *Johnson v. Perdue*, 862 F.3d 712, 716 (8th Cir. 2017); *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 79 (2009)

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analysis as a plus factor, and that it was not reaching the plus factors. *See* App.207; R. Doc. 280, at 16; P.Add.16. To the extent that the CCB's determination factored into the district court's decision, it would be an improper use of judicial notice. *See, e.g.*, *N. Oil & Gas, Inc. v. EOG Res., Inc.*, 970 F.3d 889, 895 (8th Cir. 2020) ("[J]udicial notice is inappropriate" when documents are offered "for the truth of the matters within them and inferences to be drawn from them" and the opposing party disputes those matters."). At the same time, the lower court did not take notice of the U.S. Federal Trade Commission's investigation and lawsuit against Defendants. Nor did it take notice of its sister federal court's decision to sustain the FTC's pleadings in that case.

[138] *See* App.207; R. Doc. 280, at 16; P.Add.16.

(court may address an "alternative ground" when it "presents a pure question of law that th[e] Court can and should resolve without need for remand" (alternation in original) (internal quotation omitted)).

This Court should exercise that authority in the interest of judicial economy. The district court took over two-and-a-half years to decide Defendants' motions to dismiss. Under these circumstances, "[i]t would serve no useful purpose to pass the issue to the district court, thereby probably generating another appeal, when the issue is clear and can be easily laid to rest now." *See Slaughter on Behalf of Slaughter v. Levine*, 855 F.2d 553, 554 (8th Cir. 1988).

III. The Court Erred By Dismissing Plaintiffs' Claims with Prejudice.

Even if this Court declines to reverse the district court's dismissal, the Court should reverse the decision to dismiss with prejudice. This Court favors dismissals under Rule 12(b)(6) without prejudice. *Finnegan v. Suntrust Mortgage*, 140 F. Supp. 3d. 819, 832 (D. Minn. 2015). There are limited circumstances under which dismissal with prejudice may be warranted, such as where amending the pleadings would be futile, or where there are persistent pleading failures despite multiple opportunities to amend. *See Bhd. Mut. Ins. Co. v. ADT LLC*, 978 F. Supp. 2d 1001, 1003 (D. Minn. 2013) (finding that amending the pleading would be futile because there was "no set of facts that would entitle [the plaintiff] to relief" making it impossible to adequately plead the claim) (quoting *Hollowell v. Hosto*, 389 F. App'x 583, 584 (8th Cir. 2010) (per curiam)). No such circumstances are present here.

While the decision to dismiss with or without prejudice is generally reviewed for an abuse of discretion, "when the court denies leave on the basis of futility, it means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss … and appellate review of this legal conclusion is also de novo." *Cornelia I. Crowell GST Tr. v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir. 2008). Here, the district court did not allow discovery and erroneously applied a summary judgment standard at the pleading stage.[139] The district court compounded that error by simply inferring futility from a perceived lack of specificity in Plaintiffs' factual allegations. *See* App.220; R. Doc. 280, at 29; P.Add.29 (inferring that the CAC "contains as much specificity as Plaintiffs can muster[.]"). The district court failed to engage in any analysis as to whether Plaintiffs' claims suffered from some legal bar to relief. *See Mell v. Minnesota State Agric. Soc'y*, 557 F. Supp. 3d 902, 924 (D. Minn. 2021) (dismissing claims without prejudice because "[t]he primary flaw in these claims is a lack of factual allegations, not any insuperable legal bar to relief."); *see also Washington v. Cranne*, No. 18-CV-1464 (DWF/TNL), 2019 WL 2147062, at *5 (D. Minn. Apr. 18, 2019) (a claim should be dismissed without prejudice "where the claims might conceivably be repleaded with success."). Even if the district court had analyzed futility, it was doing so through the lens of the incorrect summary judgment standard, requiring an

[139] *See supra* at section I.

improperly heightened level of specificity in which the allegations would have to rule out the possibility that Defendants acted independently. The district court should have analyzed futility under *Twombly's* plausibility standard.[140]

The district court also incorrectly attributed persistent pleading failures to Plaintiffs despite its Order being the first judicial determination on any of Plaintiffs' claims. *See* App.220; R. Doc. 280, at 29; P.Add.29 (characterizing the CAC as "Plaintiffs' third attempt to state viable claims."). The court ignored that no decisions had been rendered on Defendants' motions to dismiss in other districts before transfer to the MDL court, and that the Order was the first judicial determination on the adequacy of Plaintiffs' claims. Under these circumstances, Plaintiffs cannot be adjudged to have committed "persistent pleading failure." *See, e.g.*, *Paisley Park Enterprises, Inc. v. Boxill*, 361 F. Supp. 3d 869, 880 n.7 (D. Minn. 2019) ("although [d]efendants have asserted this counterclaim on two prior occasions, this is the first instance that Defendants' counterclaim is the subject of a judicial ruling"); *see also Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 439 (8th Cir. 1983) (plaintiff had "adequate warning from the district court and sufficient opportunity" to amend where previous complaint was dismissed without prejudice).

For these reasons, the district court abused its discretion when it dismissed Plaintiffs' claims with prejudice.

[140] *See supra* at section I.

CONCLUSION

Under *Twombly,* Plaintiffs have plausibly alleged parallel conduct and plus factors to support the existence of a conspiracy to boycott ecommerce platforms. Therefore, Appellants respectfully request that this Court reverse the district court's decision, including the decision to grant the motion to dismiss with prejudice, and deny Defendants' Joint Motion to Dismiss.

Dated: January 7, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,957 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f). 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 this brief has been prepared in a proportionally spaced typeface using Microsoft 365, in 14-point Times New Roman. Pursuant to 8th Cir. R. 25, I certify that this brief has been scanned for viruses and is virus-free.

Dated: January 7, 2025

/s/ Michelle J. Looby
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I hereby certify that on January 7, 2025, I electronically filed the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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