
**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, d/b/a Vienna Echo Farms; Melinda Budde; Randi Handwerk; John Vehrenkamp; Justin Pic; Dan Flaten; Ryan Bros., Inc.; Michael J. Ryan; Leon Pfaff; Jason Canjar, d/b/a 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; Syngenta Corporation; Winfield Solutions, LLC; Univar Solutions USA LLC, f/k/a Univar Solutions, Inc.; Federated Co-Operatives, Ltd.; CHS Inc.; Nutrien Ag Solutions, Inc.; Growmark, Inc., d/b/a as Farm Supply agent of FS; Simplot AB Retail Sub, Inc., f/k/a 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

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs allege that Defendants violated Section 1 of the Sherman Act by engaging in a group boycott against emerging ecommerce platforms selling crop inputs. Because they have no direct evidence of this boycott, Plaintiffs must adequately allege parallel conduct. They do not. Instead, they allege only a handful of dissimilar actions, by only a few Defendants, at different or unstated times over a five-year period. And courts reject the notion that conclusory allegations against “Defendants” generally and allegations about the actions of non-Defendants could cure this fatal defect.

Even if Plaintiffs had sufficiently alleged parallel conduct, they fail to adequately plead “plus factors” necessary to make their claim plausible. The complaint itself explains why each Defendant individually might not have been eager to welcome a new market participant: ecommerce platforms stood to reduce profits for manufacturers, wholesalers, and retailers alike. Nor can allegations of membership in trade associations, whose meetings Plaintiffs do not even allege Defendants attended, transform Plaintiffs’ allegations into a plausible conspiracy.

Accordingly, and because Plaintiffs never sought leave to amend to cure these deficiencies, the district court’s dismissal with prejudice was proper.

Defendants-Appellees do not oppose Plaintiffs-Appellants’ request for oral argument but believe 15 minutes per side would be sufficient.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees disclose the following information.

BASF Corporation is a Delaware Corporation whose shares are not publicly traded. BASF Corporation is a wholly-owned subsidiary of BASF USA Holding LLC, a Delaware limited liability company. BASF USA Holding LLC is a wholly-owned subsidiary of BASF Nederland BV, a Dutch limited liability company. BASF Nederland BV is a wholly-owned subsidiary of BASF SE (Societas Europaea – “SE”), a publicly traded European company. Further, no publicly held corporation owns 10% or more of BASF Corporation’s stock.

Bayer CropScience Inc., a non-governmental entity, is an indirect subsidiary of Bayer AG. Bayer AG, a publicly held German stock company, has no parent company and no publicly held company owns 10% or more of its stock.

Bayer CropScience LP, a non-governmental entity, is an indirect subsidiary of Bayer AG. Bayer AG, a publicly held German stock company, has no parent company and no publicly held company owns 10% or more of its stock.

Cargill, Incorporated, a non-governmental entity, has no parent corporation and no publicly held company owns 10% or more of its stock.

CHS Inc., a non-governmental entity, is a publicly held Minnesota cooperative corporation which has no parent company, and no publicly held company owns 10% or more of its stock.

Corteva, Inc., a non-governmental entity, has no parent corporations, and no publicly held company owns 10% or more of its stock.

Federated Co-Operatives Limited has no parent company and no publicly held company owns 10% or more of its stock.

GROWMARK, Inc., a non-governmental entity, is a cooperative organized under Delaware law. It has no parent corporation, and no publicly held company owns 10% or more of its stock. GROWMARK FS, LLC is a wholly owned subsidiary of GROWMARK, Inc.

Nutrien Ag Solutions, Inc., a non-governmental entity, is a wholly-owned subsidiary of United Agri Products, Inc., which is also a corporation. United Agri Products, Inc. is a wholly-owned subsidiary of AGU US Holdings Inc., which is also a corporation. AGU US Holdings Inc. is a wholly-owned subsidiary of Nutrien US, LLC, which is also a limited liability company. Nutrien US, LLC is a wholly-owned subsidiary of Nutrien US Corp B Inc., which is also a corporation. Nutrien US Corp B Inc. is a wholly-owned subsidiary of Nutrien (Canada) Holdings ULC, which is also a corporation. Nutrien (Canada) Holdings ULC is a wholly-owned subsidiary of 10706957 Canada Inc. (Canada), which is also a corporation. 10706957 Canada

Inc. (Canada) is a wholly-owned subsidiary of Nutrien Ltd., a publicly traded company. Nutrien Ltd. owns 10% or more of Nutrien Ag Solutions Inc.

Pioneer Hi-Bred International, Inc., a non-governmental entity, is a wholly owned subsidiary of EIDP, which is a wholly-owned subsidiary of Corteva, Inc. No publicly held company owns 10% or more of Pioneer Hi-Bred International, Inc.'s stock.

Simplot AB Retail, Inc., as successor in interest by merger of Simplot AB Retail Sub, Inc., formerly known as Pinnacle Agriculture Distribution, Inc., is a wholly-owned subsidiary of J.R. Simplot Company. No publicly held company owns 10% or more of Simplot AB Retail, Inc.'s stock.

Syngenta Corporation is a wholly-owned U.S. subsidiary of Syngenta Crop Protection AG, a non-U.S. entity. Syngenta Crop Protection AG is a wholly-owned non-U.S. subsidiary of Syngenta AG, a non-U.S. entity. Syngenta AG is a wholly-owned non-U.S. subsidiary of Syngenta Group (NL) B.V., a non-U.S. entity. No publicly held company owns 10% or more of Syngenta Corporation's stock.

Tenkoz, Incorporated, a non-governmental entity, has no parent corporation and no publicly held company owns 10% or more of its stock

Univar Solutions USA LLC (f/k/a Univar Solutions USA Inc.), a non-governmental entity, is an indirect subsidiary of Univar Solutions LLC. No publicly

held company owns 10% or more of Univar Solutions USA LLC membership interest.

Winfield Solutions, LLC, a non-governmental entity, is a limited liability company. Its only member is Land O'Lakes, Inc. Land O'Lakes, Inc. has no parent company and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE ISSUES

1. Did Plaintiffs adequately allege sixteen Defendants at three different distribution levels engaged in the parallel conduct required to state a Sherman Act Section 1 claim?

Most Apposite Cases:

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

Park Irmat Drug Corp. v. Express Scripts Holding Co., 911 F.3d 505 (8th Cir. 2018)

2. Did Plaintiffs adequately allege plus factors to “nudge[] their claims across the line from conceivable to plausible,” *Twombly*, 550 U.S. at 570, as required to state a claim under Section 1 of the Sherman Act?

Most Apposite Case:

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

3. Did the district court act within its discretion to dismiss with prejudice where Plaintiffs never moved to amend, never provided a proposed amended complaint or clarified what any amendment would have contained, and were on notice of their pleading deficiencies before they filed their amended complaint?

Most Apposite Cases:

Hennessey v. Gap, Inc., 86 F.4th 823 (8th Cir. 2023)

Murphy v. Aurora Loan Servs., LLC, 699 F.3d 1027 (8th Cir. 2012)

STATEMENT OF THE CASE

This case began with a complaint filed in the Southern District of Illinois on January 8, 2021.¹ Twenty-eight cases were soon filed across the country. Plaintiffs filed Consolidated Amended Complaints in the District of Minnesota and the Southern District of Illinois, and Defendants moved to dismiss in the Southern District of Illinois on May 5, 2021.² App. 220; R. Doc. 280, at 29.³ The Judicial Panel on Multidistrict Litigation thereafter consolidated all cases for pretrial proceedings in the Eastern District of Missouri. App. 192; R. Doc. 280, at 1 n.4.

After four months to review the infirmities detailed in Defendants' motion to dismiss, on September 17, 2021, Plaintiffs filed the Consolidated Amended Class Action Complaint that is the subject of this appeal (the "CAC"). Plaintiffs allege a conspiracy among sixteen manufacturers, wholesalers, and retailers of "Crop Inputs" to boycott ecommerce sales platforms "[b]eginning in at least 2014." App. 3, 6-16, 42-43; R. Doc. 104, at 3, 6-16, 42-43, ¶¶ 8, 22-65, 144.⁴

¹ *Piper et al. v. Bayer CropScience LP et al.*, No. 3:21-cv-00021 (S.D. Ill. Jan. 8, 2021).

² *Piper*, No. 3:21-cv-00021 (S.D. Ill.), ECF No. 127.

³ Throughout this brief, "App." refers to the Joint Appendix and "R. Doc." refers to docket entries in the district court.

⁴ The CAC does not precisely define "Crop Inputs," but they include at least seeds and pesticides. App. 2; R. Doc. 104, at 2, ¶ 3. The "Manufacturer Defendants" are Bayer CropScience Inc., Bayer CropScience LP, Corteva, Inc., Pioneer Hi-Bred International, Inc., BASF Corporation, and Syngenta Corporation. The "Wholesaler

The CAC alleges violations of the Sherman Act, state antitrust and consumer protection statutes, and the Racketeer Influenced and Corrupt Organizations Act (“RICO”), as well as unjust enrichment. App. 42, 46, 69, 100-01; R. Doc. 104, at 42, 46, 69, 100-01.

Defendants moved to dismiss the CAC for failure to state a claim. R. Doc. 141. The district court granted Defendants’ motion, dismissing the Sherman Act and RICO counts with prejudice for failing to state a claim, and declining to exercise supplemental jurisdiction over the state-law counts. App. 221; R. Doc. 281, at 1. The court concluded that Plaintiffs had not adequately pled parallel conduct, and—because this was fatal to Plaintiffs’ Sherman Act claim—did not address other arguments for dismissal. App. 214; R. Doc. 280, at 23.

Plaintiffs appealed. App. 222; R. Doc. 282, at 1. As their brief does not contest dismissal of the RICO count or the supplemental jurisdiction ruling, any challenge to these rulings is “deemed waived.” *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008).

Defendants” are Cargill, Inc., Tenkoz, Inc., Winfield Solutions, LLC, and Univar Solutions USA LLC. The “Retailer Defendants” are CHS Inc., Nutrien Ag Solutions, Inc., GROWMARK, Inc., Simplot AB Retail Sub, Inc., and Federated Co-operatives Ltd. App. 2; R. Doc. 104, at 2, ¶ 5. The sixteenth Defendant, Growmark FS, LLC is listed in paragraph 1, but is not referenced elsewhere in the CAC. App. 1; R. Doc. 104, at 1, ¶ 1.

SUMMARY OF THE ARGUMENT

Given the enormous costs of antitrust discovery, courts adjudicating antitrust claims properly “insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Twombly*, 550 U.S. at 558 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)). A complaint must set forth “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. A pleading that offers only “labels and conclusions” is insufficient, and claims that are merely “conceivable” require dismissal. *Id.* at 555, 570.

Plaintiffs allege a sprawling conspiracy hinging on a web of horizontal and vertical agreements among sixteen market participants at three levels of the distribution chain. But they admit they have no direct evidence of an alleged conspiracy, and their claim instead relies on only circumstantial evidence of a conspiracy. As such, they are required to adequately plead the existence of both parallel conduct and “plus factors” to survive dismissal. *See Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc). Because their alleged conspiracy is so far-flung, Plaintiffs must show that more than a dozen manufacturers, wholesalers, and retailer defendants acted in parallel, as well

as plus factors that suggest they all did so as a result of an agreement, rather than independently in response to common stimuli. They plead neither.⁵

Instead of the required parallel conduct, Plaintiffs allege a hodgepodge of disparate, unilateral acts by only some of the sixteen Defendants, at different points in time. None are both (1) “similar” and (2) temporally proximate, and thus none indicates parallel conduct. *Park Irmat*, 911 F.3d at 516-17. Although Plaintiffs generically allege that Defendants *as a group* refused to supply Crop Inputs to ecommerce platforms, Plaintiffs fail to identify any specific request by any platform to purchase Crop Inputs from any Defendant in the United States, let alone the refusal of any such request. Instead, Plaintiffs cobble together an audit by this manufacturer, a letter by that retailer, a task force study by another manufacturer, and a statement by a non-Defendant at a trade-association meeting that no Defendant is even alleged to have attended—all across a span of years. App. 19, 23, 26-27; R. Doc. 104, at 19, 23, 26-27, ¶¶ 77, 86, 95, 98. These and other conclusory allegations fail to state a claim because they do not show that each Defendant engaged in similar conduct at the same time.

Plaintiffs’ plus factor allegations come up equally short. The Supreme Court in *Twombly* rejected alleged market concentration and common motive to conspire

⁵ Defendants also contend that Plaintiffs’ Sherman Act claim is untimely. *See* R. Doc. 142, at 61-68. If this Courts remands, Defendants intend to raise this argument for decision by the district court.

as plus factors. *See* 550 U.S. at 551, 553-54. The CAC’s barebones allegation that each Defendant acted against its own self-interest similarly fails, as it is contradicted by express allegations that selling to ecommerce platforms would lower each Defendant’s profits. App. 18, 35; R. Doc. 104, at 18, 35, ¶¶ 71, 121. This provides the “obvious alternative explanation” for such conduct: Defendants “liked the world the way it was.” *Twombly*, 550 U.S. at 567-68. Nor do allegations that Defendants participated in trade associations qualify as a plus factor, as these allegations are unaccompanied by any alleged communication among any Defendants related to the alleged boycott (or anything else). Plaintiffs’ bare suggestion that trade associations gave Defendants an “opportunity to conspire” does not “plausibly suggest an illegal agreement.” *Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 310 F. Supp. 3d 1002, 1015 (E.D. Mo. 2018), *aff’d*, 911 F.3d 505 (8th Cir. 2018). Finally, Plaintiffs’ allegations regarding government investigations also miss the mark. The Canadian investigation (the apparent impetus of Plaintiffs’ lawsuit) involved only one of sixteen Defendants and was closed because it found no boycott, or any other violation of competition law. And a foreign investigation of different parties is irrelevant regardless. *See In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 403 (3d Cir. 2015) (“A conspiracy elsewhere, without more, generally does not tend to prove a domestic conspiracy[.]”). The Federal Trade Commission investigation is likewise irrelevant, as it involved unrelated conduct by only two

Manufacturer Defendants involving just six pesticides, rather than a boycott by sixteen Defendants at various levels involving all “Crop Inputs.” *See id.* at 402.

Plaintiffs gloss over these pleading deficiencies to premise their appeal on a mischaracterization of the district court’s decision, which found—after painstaking review—that the CAC “include[d] only a handful of actions allegedly taken by specific Defendants in the relevant geographic market during the relevant period,” which were “dissimilar events.” App. 202, 211; R. Doc. 280, at 11, 20. But Plaintiffs’ criticisms are beside the point. Because this Court reviews dismissal *de novo*, the question on review is whether Plaintiffs stated a claim under *Twombly*; they did not.

Finally, Plaintiffs’ argument that they should be allowed to amend fails. Plaintiffs were on notice of the infirmities in their complaint for years but failed to seek leave to amend, let alone submit the requisite proposed amendment. *See Par v. Wolfe Clinic, P.C.*, 70 F.4th 441, 449 (8th Cir. 2023). Accordingly, this Court should affirm the district court’s dismissal with prejudice.

ARGUMENT

I. This Court Reviews De Novo Whether Plaintiffs Stated a Claim, Which Requires Plausible Allegations of Parallel Conduct and Plus Factors.

This Court reviews *de novo* the district court’s grant of a motion to dismiss. *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 543 (8th Cir. 2015).

In pleading a claim, “a plaintiff’s obligation to provide the grounds of his entitlement

to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (cleaned up). Instead, the dispositive question is whether Plaintiffs adequately plead facts that plausibly support a conspiracy.

To sufficiently plead a claim under Section 1 of the Sherman Act when, as here, Plaintiffs do not allege direct evidence of agreement (App. 201; R. Doc. 280, at 10), Plaintiffs must allege (1) parallel conduct and (2) “plus factors” that “raise[] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Twombly*, 550 U.S. at 553, 556-57. Failure to adequately plead either is fatal. *See id.* at 570 (affirming dismissal when plaintiffs failed to plead plus factors to “nudge[] their claims across the line from conceivable to plausible”); *Park Irmat*, 911 F.3d at 517 (affirming dismissal when plaintiffs failed “to plausibly plead parallel conduct”).

II. Plaintiffs Fail to Adequately Plead Parallel Conduct.

The CAC begins with a barebones allegation that Defendants agreed to boycott ecommerce platforms, without explaining “who, did what, to whom (or with whom), where, and when.” *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 n.6 (9th Cir. 2015) (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)) (requiring these “evidentiary facts”). Plaintiffs attempt to cure this deficiency by claiming that Defendants engaged in parallel conduct. But

they allege just four specific, dissimilar actions in the United States by three (of sixteen) Defendants over a five-year period.⁶ A fifth allegation concerns the presence of routine “audit” provisions in contracts of three Manufacturer Defendants without any factual content from which to infer that any Defendants adopted or invoked the provisions near in time, much less in response to the emergence of ecommerce platforms. Plaintiffs’ only other specific allegations relate to conduct in Canada involving a single Defendant. None of this comes close to meeting Plaintiffs’ burden to plead “parallel conduct.”

A. Plaintiffs’ Conclusory Allegation of a Group Boycott Does Not Establish Parallel Conduct.

Plaintiffs argue the alleged “boycott itself is parallel conduct.” Appellants’ Brief (“Br.”) at 41. Not so. *Twombly* makes clear that a bare allegation of the existence of a conspiracy is a “legal conclusion,” 550 U.S. at 564, that a court does not accept as true for purposes of a motion to dismiss, *id.* at 555; *see also Reyn’s Pasta Bella, LLC v. Visa U.S.A.*, 259 F. Supp. 2d 992, 1003 (N.D. Cal. 2003) (“The bare assertion that Defendants engaged in a boycott presents nothing more than a legal conclusion that this Court is not bound to accept.”).

⁶ Plaintiffs now suggest that the “threat and motive to conspire began as early as 2014” and “the boycott was firmly in place at least by sometime between” 2017-18. Br. at 44. But the CAC alleges a conspiracy “[b]eginning in at least 2014.” App. 42-43; R. Doc. 104, at 42-43, ¶ 144; *accord* App. 2, 42; R. Doc. 104, at 2, 42, ¶¶ 2, 141. Thus, Plaintiffs’ handful of supposedly parallel acts take place over five years.

Here, Plaintiffs do not allege any actual (much less parallel) refusals by Defendants in response to supply requests from ecommerce platforms, but only the generic assertion that “Defendants conspired to boycott these ecommerce Crop Inputs sales platforms[.]” App. 3; R. Doc. 104, at 3, ¶ 8. Plaintiffs’ conclusory allegation represents precisely the sort of deficiency that *Twombly*’s pleading requirements were designed to protect against. *See* 550 U.S. at 565 & nn.9-10 (allegation “ILECs engaged ‘in a contract, combination or conspiracy’ and agreed not to compete with one another” was a “legal conclusion” that need not be credited). Plaintiffs’ “boycott” allegation is no more than a “naked assertion[.] devoid of further factual enhancement” and is plainly insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs cannot “unlock the doors of discovery . . . armed with nothing more than conclusions.” *Id.* at 678-79 (citing *Twombly*, 550 U.S. at 556).

B. Plaintiffs Allege Only a Few Instances of Unilateral, Dissimilar Conduct by Named Defendants in the United States.

Parallel conduct means “adopting similar policies around the same time in response to similar market conditions.” *Musical Instruments*, 798 F.3d at 1193; *accord Mosaic Health Inc. v. Sanofi-Aventis U.S., LLC*, 714 F. Supp. 3d 209, 219 (W.D.N.Y. 2024) (“[W]here the alleged conspirators engaged in divergent conduct at significantly different times, a plaintiff’s allegations fall far short of demonstrating parallel behavior.” (cleaned up)). Parallel conduct requires both (1) similarity and (2) temporal proximity. *See Park Irmat*, 911 F.3d at 516-17.

Park Irmat's analysis is instructive. There, this Court rejected allegations that Express Scripts and CVS conspired to boycott the plaintiff-pharmacy. Although both defendants had terminated the plaintiff from their respective networks, the terminations were “executed under dissimilar circumstances”: CVS had *required* the plaintiff to participate in CVS’s mail-order network, while Express Scripts had demanded the plaintiff *cease* mail-order activities months earlier. *Id.* Meanwhile, the plaintiff alleged CVS conducted “abusive audits throughout the years,” but did not allege Express Scripts ever audited the plaintiff. *Id.* at 516. Further, the dissimilar terminations were “separated by six months,” which “was too long of a time frame to suggest parallel activity.” *Id.* at 516-17; *accord Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011) (allegations of refusals to deal at different times “fall far short of demonstrating parallel behavior”). Given these differences in the timing and circumstances of termination, the defendants’ conduct fell “short of unusual, lockstep . . . behavior” and was thus non-parallel, requiring dismissal. *Park Irmat*, 911 F.3d at 517 (quoting *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1022 (N.D. Cal. 2007)).⁷

⁷ In separately analyzing each defendant’s unique circumstances, the Eighth Circuit in *Park Irmat* implicitly adopted a means-based method for analyzing parallel conduct, rather than the ends-based method that has been subject to widespread criticism. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 449 (4th Cir. 2015) (Wilkinson, J., dissenting in part) (criticizing ends-based method adopted by the Fourth Circuit majority: “[T]he ends-based approach carries an unacceptably high risk of finding parallel conduct in wildly disparate behaviors motivated by

Plaintiffs’ allegations here suffer the same fate. Plaintiffs admit the CAC contains only four specific allegations about any Defendant’s conduct in the United States, plus general allegations that three Manufacturer Defendants included routine audit provisions in contracts with retailers. Br. at 18-19. These alleged acts were temporally distant and factually dissimilar. Plaintiffs’ claim of mere trade-association membership similarly is insufficient to establish parallel conduct.

1. The customer letter, task force, quality concerns, and audit are factually dissimilar and temporally distant.

Plaintiffs first allege that Retailer Defendant CHS sent a letter to farmers “[i]n 2016”—at least two years after Plaintiffs allege the boycott began—discouraging farmers from using one specific ecommerce platform, Farmers Business Network (“FBN”). App. 19; R. Doc. 104, at 19, ¶ 77. The district court correctly concluded there was nothing conspiratorial about such conduct, finding it “unsurprising that CHS, a retailer, would independently encourage its customers to refrain from doing business with an emerging retail competitor.” App. 203; R. Doc. 280, at 12 (citing *Twombly*, 550 U.S. at 566).⁸ More fundamentally, Plaintiffs do not allege CHS

independent economic concerns For good reason then, courts have shied away from the . . . ends-driven conception of parallel conduct and instead required more specific similarities.”) (collecting cases).

⁸ This makes sense considering CHS is “a farmer-owned coop” (App. 202; R. Doc. 280, at 11), and therefore CHS and its farmer-owners have an interest in not diverting sales to a competitor.

coordinated with other Defendants or that any other Defendant sent a similar letter discouraging farmers from using FBN or any ecommerce platform.

Second, Plaintiffs allege that one of the “Bayer” Defendants—the CAC fails to specify which—formed an internal task force sometime “[i]n 2016” to study the competitive impact of FBN. App. 26; R. Doc. 104, at 26, ¶ 95.⁹ Again, there is nothing inherently conspiratorial about this: “forming a task force to study a novel entrant to one’s business market is facially innocuous behavior and is not alleged to have been done in coordination with other Defendants.” App. 203; R. Doc. 280, at 12. There is no allegation that any other Defendant was even aware of the task force, much less formed a similar task force, or that “Bayer” took any action as a result.

Third, Plaintiffs allege that when a Syngenta executive learned that an ecommerce platform had sold some branded crop inputs, he suggested that some could be counterfeits. App. 27; R. Doc. 104, at 27, ¶ 97.¹⁰ The CAC does not mention to whom this statement was made or in what context (internal or public), nor does it allege that any other Defendant was aware of Syngenta’s concern, much

⁹ Plaintiffs erroneously refer to an allegation that Winfield formed a task force. Br. at 30 & n.59. The CAC includes no such allegation.

¹⁰ Plaintiffs erroneously refer to an allegation that Bayer claimed ecommerce products were counterfeit. Br. at 30 & n.60. The CAC includes no such allegation.

less “cooperated in the communication or engaged in similar conduct.” App. 203-04; R. Doc. 280, at 12-13.¹¹

Fourth, Plaintiffs allege Syngenta audited unidentified retailers “in 2018” after learning some had sold Crop Inputs to ecommerce platforms. App. 27; R. Doc. 104, at 27, ¶ 98. There is no hint that other Defendants were aware of Syngenta’s alleged audit or initiated similar audits, or that Syngenta coordinated its audit with other Defendants. Plaintiffs also do not claim that Syngenta took any punitive action as a result, or that it audited “any Retailer Defendants who are purportedly participants in the boycott.” App. 204-05; R. Doc. 280, at 13-14.

Four dissimilar acts over a span of three years, by three Defendants, at different levels in the distribution chain, are insufficient to find “parallel” conduct among those three Defendants—let alone all sixteen—over a period of more than seven years. *See Park Irmat*, 911 F.3d at 516-17; *see also City of Pontiac Police & Fire Ret. Syst. v. BNP Paribas Sec. Corp.*, 92 F.4th 381, 390 (2d Cir. 2024) (rejecting “attempt to weave scattered, unrelated episodes” into parallel conduct).

¹¹ Plaintiffs do not allege in Count One when this statement occurred. An allegation in their RICO count suggests it was in 2018 (App. 110; R. Doc. 104, at 110, ¶ 264(b))—years after the CHS letter, which did not raise similar counterfeiting concerns.

2. Vague allegations of “audit” provisions do not permit an inference of similarity or temporal proximity.

In their final Defendant-specific allegation in the United States, Plaintiffs allege that BASF’s, Bayer’s, and Corteva’s retailer agreements include provisions granting them audit rights, which they “used . . . 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, ¶ 99. This allegation is yet another “naked assertion[] devoid of further factual enhancement,” *Iqbal*, 556 U.S. at 678 (internal quotations omitted), as Plaintiffs do not say when the three Defendants adopted or used the provision, making it impossible to deduce if this conduct was close in time and thus “parallel.” Moreover, there is no allegation that the contract provisions are unusual for the industry.

Plaintiffs cite *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059 (8th Cir. 2017) (“*Propane 2017*”), to suggest that their allegation regarding “audit” provisions sufficiently pleads parallel conduct. Br. at 25. It does not. In *Propane 2017*, the Eighth Circuit concluded that allegations of *identical* conduct by both defendants within days of each other in 2008—along with allegations that specifically named executives “exchanged seven phone calls on June 18 and 19, 2008” wherein they “*agreed*” to reduce fill levels in their propane tanks while maintaining the same price—adequately alleged a price-fixing conspiracy. 860 F.3d at 1069 (emphasis added). As to these 2008 violations, the parties and the court

agreed that the conspiracy—which had been the subject of prior lawsuits resolved by settlements—was adequately alleged. *See, e.g., id.* at 1062-63, 1069 (noting the district court “assumed the existence of an agreement”).

The crux of the dispute in *Propane 2017* was instead whether plaintiffs adequately “allege[d] a continuing violation” with allegations of overt acts in 2010 so as to bring the 2008 agreement within the statute of limitations. *Id.* at 1064. As to those continuing violations, Plaintiffs correctly note that the *Propane 2017* plaintiffs alleged generally that “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.” Br. at 25 (quoting *Propane 2017*, 860 F.3d at 1070). But they ignore the Court’s reference in the very next sentence to “more *specific*[.]” allegations of conversations, including participants by name, occurring “until at least late 2010.” 860 F.3d at 1070 (emphasis added). Thus, while some of the plaintiffs’ 2010 allegations failed as “naked assertion[s],” “[o]thers . . . list[ed] relevant individuals, acts, and conversations” and thus sufficed. *Id.* Nothing about *Propane 2017* relieves Plaintiffs of the burden to allege “‘factual content’ to support ‘the reasonable inference that [each] defendant is liable.’” *Id.* (quoting *Iqbal*, 556 U.S. at 678); accord *In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d 1047, 1057 (8th Cir. 2018) (“*Propane 2018*”) (holding that allegations of continuing violations after 2015

lacked the necessary “factual content” where the allegations did not “list relevant individuals, acts, and conversations” (quoting *Propane 2017*, 860 F.3d at 1069-70)).

Here, Plaintiffs offer no “factual content” to make sense of their vague allegations that three (of sixteen) Defendants “used” their contract rights for nefarious purposes. If the mere fact that three manufacturers in one industry all had commonplace contract terms with retailers and “used” them—without any allegation that the terms were adopted or exercised close in time, much less in response to a competitive threat—were sufficient, any plaintiff could establish “parallel conduct” in virtually any industry, in every case. This is not the standard. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) (allegation of “similarities in contractual language,” “without some further factual enhancement,” does not state a plausible conspiracy claim (second quotation, quoting *Twombly*, 550 U.S. at 557)).

Perhaps recognizing that the absence of any temporal allegation is fatal, Plaintiffs now mischaracterize the CAC as alleging that “[s]everal manufacturer Defendants also began using *new* contractual audit provisions to ensure discipline within the conspiracy.” Br. at 8 (emphasis added). But no paragraph in the CAC, including the one Plaintiffs cite, alleges that these audit provisions were new or that they were adopted after any perceived ecommerce threat. *See* App. 27; R. Doc. 104,

at 27, ¶ 99 (“Bayer, BASF and Corteva utilize mandatory language in their form contracts with authorized retailers that permit audits[.]”).¹²

The Second Circuit’s recent rejection of a group boycott claim in *City of Pontiac* is instructive. That court held the plaintiffs “largely fail[ed] to plausibly allege parallel conduct,” 92 F.4th at 403, despite alleging identical conduct, i.e., that defendants “regularly threatened” a start-up, *id.* at 407-08. The Second Circuit explained that “without specifying the nature of the threats” or that they were made close in time, the vague allegations “swe[pt] in years” and did “not provide ‘enough factual matter (taken as true) to suggest that an agreement was made.’” *Id.* at 398, 408 (quoting *Twombly*, 550 U.S. at 556); *see also id.* at 390 (“Plaintiffs fail in their attempt to weave scattered, unrelated episodes involving different dealers [at different times] into an actionable conspiratorial narrative.”).

¹² In addition to these and other previously noted misstatements, *see nn.9 & 10, supra*, Plaintiffs misrepresent other allegations. For example, Plaintiffs claim Federated “participat[ed] in trade association meetings where ecommerce platforms were ‘the main event’” Br. at 29 & n.56. But Plaintiffs do not allege Federated is even a member of trade associations, much less that it participated in their meetings. *See* App. 21-23; R. Doc. 104, at 21-23, ¶¶ 81-86. Similarly, while the Brief states (at 36-37 & n.89) “Defendants discussed the competitive threat posed by . . . ecommerce platforms” “[t]hrough their trade groups,” not a single CAC paragraph alleges *any* discussion between any Defendants regarding ecommerce platforms, anywhere.

3. Defendants’ alleged participation in trade associations is not parallel conduct.

For Simplot, Growmark, Nutrien, Tenkoz, and Winfield, the *only* thing Plaintiffs allege to connect these Defendants to a purported conspiracy is that their executives have served on the boards of CropLife or ARA, two agricultural-industry trade associations. App. 20-23; R. Doc. 104, at 20-23, ¶¶ 80, 85. Plaintiffs insinuate that a defendant’s participation in a trade association to which other defendants also belong can be parallel conduct sufficient to state a Section 1 claim. *See* Br. at 27 (within parallel-conduct section). It cannot.¹³

The Supreme Court has cautioned against inferring a conspiracy to restrain trade from defendants’ common membership in a trade association. *See Twombly*, 550 U.S. at 567 n.12 (recognizing defendants should not be forced to engage in discovery “and otherwise fend off allegations of conspiracy” based on common trade-association membership). Courts consider allegations about trade-association participation as, at most, a plus factor, rather than evidence of parallel conduct—a

¹³ Conspicuously absent from the CAC is any allegation that any Defendant attended any specific trade-association meeting or discussed ecommerce platforms at any meeting. *See* App. 20-23; R. Doc. 104, at 20-23, ¶¶ 80, 85. Plaintiffs allege nothing more than association and board membership. And even these allegations are temporally irrelevant. The 2021 CAC alleges that the “ARA’s board of directors is *currently* chaired by Rod Wells of Growmark and includes board members from Defendants Nutrien, CHS, Winfield Solutions, Corteva, Growmark, Bayer, BASF, and Syngenta, *inter alia*.” App. 22-23, R. Doc. 104, at 22-23, ¶ 85 (emphasis added). But Plaintiffs allege the most recent supposedly nefarious activity involving the ARA occurred years earlier, in 2017. App. 23; R. Doc. 104, at 23, ¶ 86.

point recognized in Plaintiffs' own cases. *See* Br. at 18 (citing *Precision Rx Compounding, LLC v. Express Scripts Holding Co.*, No. 4:16-cv-0069, 2016 WL 4446801, at *3 (E.D. Mo. Aug. 24, 2016)); *see generally* Br. (citing *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 832 F.3d 1, 14 (1st Cir. 2016)); *see also* Section III.D, *infra* (discussing trade-association membership as a plus factor).

4. Plaintiffs' parallel conduct cases do not help them.

Plaintiffs string-cite five cases for the proposition that parallel conduct need not be exactly simultaneous and identical. Br. 17-18. None of these cases aid Plaintiffs because none disavow that parallel conduct requires acts that are both similar and near in time.

In *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 418-21 (4th Cir. 2015), table-saw manufacturers allegedly engaged in a group boycott by collectively refusing to enter into licensing agreements with the plaintiff for its safety technology. The court concluded the plaintiff adequately alleged parallel conduct by specifically alleging “‘who, what, when, and where’ in its complaint,” including specific instances of defendants pretextually discontinuing negotiations with plaintiff. *Id.* at 419-20, 431. Here, Plaintiffs do not allege even a single instance in which any particular Defendant refused to deal with an ecommerce platform in the United States, let alone when that refusal occurred.

The district court in *In re Broiler Chicken Antitrust Litigation*, 290 F. Supp. 3d 772, 791 (N.D. Ill. 2017) (“*Broilers*”), also in no way dispensed with the proximity requirement for parallel conduct. Instead, it found that the plaintiffs’ allegations of “two periods of production cuts [of chicken meat] of approximately one-two years each” were “sufficient to allege conduct that took place *at the same time.*” *Id.* (emphasis added). The plaintiffs alleged that immediately following a trade-association meeting attended by all defendants, three defendants publicly signaled for production cuts, and then five others “followed suit with their own production cuts”—most within three months and all within the calendar year—in a marked deviation from the “historic pattern of annual increases in . . . production.” *Id.* at 782.¹⁴ Here, in contrast, Plaintiffs do not allege *any* Defendant attended any trade-association meeting where the subject of the alleged conspiracy was discussed, let alone that all did. And, unlike in *Broilers*, Plaintiffs fail to allege a single action taken by all (or even most) Defendants in the immediate aftermath of any meeting.

Plaintiffs’ factual allegations likewise fall short of those found sufficient in *Precision Rx*. There, the plaintiffs alleged a conspiracy by four pharmacy-benefits managers (“PBMs”) to boycott compounding pharmacies. The district court found

¹⁴ While the defendants were alleged to have used various methods (e.g., producing less at existing plants versus closing entire facilities), the same ultimate action—production cuts—was common to all. The district court’s decision in *Broilers* thus, like *SD3*, may be in tension with this Court’s means-based method of analyzing parallel conduct applied in *Park Irmat*. See n.7, *supra*.

parallel conduct adequately pled when the plaintiffs alleged “each of the [four] co-conspirators” engaged in similar conduct aimed at compounding pharmacies that began at the same time: sending similar misleading letters to patients; adding policy requirements that created “significant, meritless obstacles” for reimbursement; conducting “abusive audits”; prohibiting the use of mail-delivery services; and terminating agreements “without cause or on the basis of pretext.”¹⁵ 2016 WL 4446801, at *3. Thus, even if parallel conduct need not be “identical,” as Plaintiffs posit (Br. at 18), *Precision Rx* recognizes that the alleged conduct must be similar, start at approximately the same time, and be engaged in by all Defendants. *Cf. Park Irmat*, 911 F.3d at 516-17 (affirming dismissal where complaint claiming PBM conspiracy lacked comparable details). Here, Plaintiffs allege nothing of the sort.

Plaintiffs’ other two cited cases are equally unavailing. *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and *Beltz Travel Service, Inc. v. International Air Transport Ass’n*, 620 F.2d 1360 (9th Cir. 1980), are both pre-*Twombly* cases having nothing to do with pleading standards. And in *General Motors*, the Supreme Court reviewed a district court’s findings of fact at trial pertaining to explicit agreements found to violate Section 1 and concluded that the

¹⁵ The entirety of the PBMs’ conduct took place within a year’s time (summer 2014 to spring 2015), with each individual parallel action occurring within just a few months. First Am. Compl. at ¶¶ 106, 108-10 (letters), ¶¶ 117, 119 (policy changes), ¶¶ 120, 130 (audits), ¶¶ 129, 130 (terminations), *Precision Rx Compounding, LLC v. Express Scripts Holding Co.*, No. 4:16-cv-00069 (E.D. Mo.), ECF No. 35.

proven conduct could “by no stretch of the imagination be described as ‘unilateral’ or merely ‘parallel.’” 384 U.S. at 145.

C. The CAC’s Canadian Allegations are Neither Relevant nor Parallel.

Unable to muster more than a handful of dissimilar actions taken by a few Defendants at different times in the United States, Plaintiffs rally around FBN’s 2018 acquisition of Yorkton Distributor, a Canadian retailer. App. 28; R. Doc. 104, at 28, ¶ 102. The CAC alleges that after FBN’s acquisition—five years after the alleged conspiracy began—Defendant Federated sent an email (to whom is not alleged) stating, “[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. 28; R. Doc. 104, at 28, ¶ 104 (alteration in original).¹⁶ Retailer “Univar” allegedly thereafter declared it would cease business with FBN. App. 29; R. Doc. 104, at 29, ¶¶ 105-06. And, lastly, manufacturers “Bayer” and “Corteva” and wholesalers “Cargill” and “Winfield” allegedly ceased sales to Yorkton over the course of four months. *Id.* at ¶ 107.

¹⁶ Defendant Federated is a Canadian cooperative that operates exclusively in Canada, and Plaintiffs allege no U.S. conduct by Federated. *See* App. 202; R. Doc. 280, at 11 n.15 (citing App. 28-29; R. Doc. 104, at 28-29, ¶¶ 102-07).

Plaintiffs suggest these Canadian allegations constitute parallel conduct. *See* Br. at 19-20, 26. Not so.¹⁷ Even leaving aside that these allegations concern conduct outside the alleged geographic market (App. 6; R. Doc. 104, at 6, ¶ 18) and that the Canadian Competition Bureau (“CCB”) ultimately found no evidence of conspiracy (Br. at 52 n.137; *see also* Section III.E, *infra*), the conduct alleged is by definition not “parallel” *as to the named Defendants*. Plaintiffs misleadingly use generic corporate family names—a practice they continue in their Brief—to identify the entities at issue. *See, e.g.*, App. 29; R. Doc. 104, at 29, ¶¶ 105-07 (opaquely referencing “Univar,” “Bayer,” “Corteva,” “Cargill,” and “Winfield”). However, the CAC admits that the CCB investigated a potential Yorkton boycott not by Defendants, but by “Defendants’ Canadian counterparts.”¹⁸ App. 33-34; R. Doc. 104, at 33-34, ¶ 117. Defendants here are separate and distinct legal entities from those Canadian entities, who are not defendants. Plaintiffs cannot attribute the alleged conduct of Canadian entities to American entities simply by grouping them together. *See In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2019) (explaining that “[t]he fact that two separate entities may have a corporate affiliation” does not negate the requirement that plaintiffs plead facts about each

¹⁷ The Canadian investigation also cannot be a plus factor. *See* Section III.E, *infra*.

¹⁸ The exception is Defendant Federated, as to whom Plaintiffs allege no U.S. conduct.

defendant’s individual involvement in an antitrust conspiracy). Additionally, only one Defendant, Federated, is implicated in the allegations regarding Yorkton, so its conduct cannot be “parallel” to that of other Defendants. *See Insulate*, 797 F.3d at 546 (holding complaint must be dismissed because, assuming the plaintiffs adequately alleged a conspiracy between one defendant and a non-defendant, they still failed to implicate other named defendants).

Grasping at straws, Plaintiffs stress that FBN’s co-founder stated that the response in the Canadian industry after FBN acquired Yorkton “was similar to the United States’ industry response when FBN first launched in 2014” Br. at 38 (quoting App. 29-30; R. Doc. 104, at 29-30, ¶ 108). But FBN’s co-founder’s vague reference to an “industry response” does not identify any act on the part of any Defendant. *See also In re Elevator Antitrust Litig.*, 502 F.3d at 52 (rejecting “if it happened there, it could have happened here” reasoning).

D. Plaintiffs’ Conclusory Allegations and Impermissible Group-Pleading Cannot Overcome Their Failure to Adequately Allege Parallel Conduct.

Plaintiffs’ remaining allegations are conclusory, non-factual, and do nothing further to establish parallel conduct—failing even to give each Defendant

meaningful notice of the basis of the claims against it.¹⁹ “A plausible claim must plead ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Propane 2018*, 893 F.3d at 1056 (quoting *Iqbal*, 556 U.S. at 678). *Twombly*’s pleading standard thus permits plaintiffs to state a claim for antitrust conspiracy without actually having to allege the specific “who, where, and when” *of the agreement*—but only if they can sufficiently allege facts that show parallel conduct. And to assess whether the alleged conduct is actually “parallel,” i.e., both similar and temporally proximate, it is axiomatic that these allegations must include “enough factual matter (taken as true) to suggest that an agreement was made,” *Twombly*, 550 U.S. at 556, so at least the “who,” “what,” and “when” *of that parallel conduct*.

Other than the few allegations of Defendant-specific, unilateral conduct discussed above, the CAC offers only conclusory and generic allegations directed toward unspecified Defendants. These allegations cannot state a claim. *See, e.g., City of Pontiac*, 92 F.4th at 407, 415 (affirming dismissal where complaint “use[d] labels like ‘threat’ and ‘intimidation’ without substance” to describe defendants’

¹⁹ Contrary to Plaintiffs’ suggestions (Br. at 21-22), nothing in *Propane 2017* suggests that conclusory allegations indiscriminately grouping Defendants together could survive dismissal. *See* pp. 16-18, *supra* (discussing specific allegations of conduct and communications in *Propane 2017*).

conduct, without differentiation, because “vague,” “ill-defined” allegations cannot plausibly state a claim).

Regarding Plaintiffs’ impermissible group pleading, “[a] plaintiff in a § 1 case cannot assemble some collection of defendants and then make vague, non-specific allegations against all of them as a group [T]he complaint must specify how these defendants [were] involved in the alleged conspiracy, without relying on indeterminate assertions against all ‘defendants.’” *SD3*, 801 F.3d at 422 (cleaned up). “Each defendant is entitled to know what he or she did that is asserted to be wrongful. . . . That is true even for allegations of conspiracy.” *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013) (Easterbrook, J.); *see also City of Pontiac*, 92 F.4th at 410 (“These allegations suffer from a flaw that is evident *passim*: they are generic and bundle together the Boycott Defendants or primary dealers.”).²⁰

Plaintiffs allege nothing about how and when each of the sixteen Defendants entered into the alleged conspiracy, nor how each participated in it. For many Defendants, Plaintiffs allege no conduct whatsoever. Such “[g]eneric pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*” *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th

²⁰ Plaintiffs dismiss *Knight* and a few other cases rejecting group pleading as “non-binding authority.” Br. at 28-34. Yet they cite no contrary authority from this Court, much less any good reason to create a circuit split.

Cir. 2008); *see also Elevator Antitrust Litig.*, 502 F.3d at 50-51 (affirming dismissal where general conspiratorial conduct was alleged “without any specification of any particular activities by any particular defendant”). Accordingly, “[p]ost-*Twombly* authorities overwhelmingly hold that a complaint that provides no basis to infer the culpability of the *specific* defendants named in the complaint fails to state a claim.” *In re Mex. Gov’t Bonds Antitrust Litig.*, 412 F. Supp. 3d 380, 388 (S.D.N.Y. 2019). Here, Plaintiffs’ “failure to specify the anticompetitive conduct of particular defendants is a theme of the entire Amended Complaint that undermines many of its allegations.” *City of Pontiac*, 92 F.4th at 407 (rejecting “vague allegations that attribute conduct or motives to the group [plaintiffs] designate the Boycott Defendants—or to a subset thereof, or to some larger group of which they are a part”) (citation omitted).²¹

Take, for example, Plaintiffs’ allegation that the “Retailer and Wholesaler Defendants induced the Manufacturer Defendants—who rely on the Wholesaler and Retailer Defendants to recommend and sell their products to farmers—to cut off the

²¹ Plaintiffs argue that “the CAC ties each Defendant to the conspiracy by identifying specific acts of conspiratorial conduct by each Defendant.” Br. at 31. But without explaining *how* any of their allegations allege parallel conduct, Plaintiffs follow this statement by simply offering a litany of citations to the CAC (Br. at 31-33), comprising: non-parallel specific actions, discussed above (*see* Sections II.B.1 & II.C, *supra*); trade-association membership (*see* Section II.B.3, *supra*); and purported plus factors rather than conduct, none of which pass muster (*see* Section III, *infra*).

supply of Crop Inputs to ecommerce Crop Inputs sales platforms.” App. 25-26; R. Doc. 104, at 25-26, ¶ 93. The CAC fails to identify which Wholesaler and Retailer Defendants “induced” which Manufacturer Defendants to cut off supply to which platforms. Nor do Plaintiffs allege how or when this occurred.

Plaintiffs’ other barebones allegations fare no better. *See, e.g.*, App. 17; R. Doc. 104, at 17, ¶ 69 (“Defendants purposefully structured the Crop Inputs market to be both secretive and opaque”); App. 26; R. Doc. 104, at 26, ¶ 96 (“When ecommerce Crop Inputs sales platforms attempted to purchase Crop Inputs from the Manufacturer and Wholesaler Defendants, they all refused and offered only pretextual excuses for their refusal.”); App. 27; R. Doc. 104, at 27, ¶ 98 (“Retailers who failed to comply with the group boycott were penalized by the Defendants.”). Courts have deemed similar allegations insufficient. *See, e.g., City of Pontiac*, 92 F.4th at 410, 414 n.15 (deeming allegations that are “generic and bundle together” defendants as “flaw[ed],” and holding allegations of “pretext[ual]” refusal to deal “devoid” of facts and thus insufficient “even at the pleading stage”).

Though they do not appeal the district court’s stay of discovery pending its decision on the motion to dismiss, Plaintiffs repeatedly blame the stay for their failure to identify actual actions taken by each Defendant. *See* Br. at 10-11, 16, 28, 30, 44, 55. The district court acted well within its discretion staying discovery. *See Contracting Nw., Inc. v. City of Fredericksburg*, 713 F.2d 382, 387 (8th Cir. 1983).

But, in any case, Plaintiffs have it backwards. *Twombly* does not permit a “discovery-first, plead later approach.” *Ass’n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 835 (7th Cir. 2021); *see also Twombly*, 550 U.S. at 558 (courts must “insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed”) (quoting *Associated Gen. Contractors*, 459 U.S. at 528 n.17); *Insulate*, 797 F.3d at 543 (noting “the unusually high cost of discovery in antitrust cases”) (quoting *Twombly*, 550 U.S. at 558). Plaintiffs were not entitled to discovery to allow them to survive Rule 12(b) scrutiny; instead, they were entitled to discovery only if the CAC could survive such scrutiny. It cannot.

III. Plaintiffs Fail to Allege “Plus Factors” That Would Render a Conspiracy Plausible.

Because Plaintiffs “fail[] to plausibly plead parallel conduct, no discussion of any ‘plus factors’ is necessary,” *Park Irmat*, 911 F.3d at 517, and this Court can affirm on this ground alone. But if this Court finds that Plaintiffs adequately allege parallel conduct, Defendants agree with Plaintiffs (Br. at 54) that in the interest of judicial economy this Court should address whether Plaintiffs adequately allege the required “plus factors” because the failure to allege “plus factors” is an independent ground for dismissal. *Twombly*, 550 U.S. at 556-57; *see also Slaughter ex rel. Slaughter v. Levine*, 855 F.2d 553, 554 (8th Cir. 1988) (“It would serve no useful purpose to pass the issue to the district court, thereby probably generating another

appeal . . .”). Such a review would make plain that none of Plaintiffs’ alleged plus factors raise a plausible inference of conspiracy rather than lawful, unilateral behavior. *Twombly*, 550 U.S. at 556-57.

Plaintiffs offer the following alleged plus factors: (i) high market concentration; (ii) common motive to conspire; (iii) actions against self-interest; (iv) high level of interfirm communications and opportunities to conspire; and (v) government investigations. Br. at 49-53. None suggests a conspiracy.

A. Alleged Market Concentration Does Not Support an Inference of Conspiracy.

Market concentration is not a plus factor, and even if it were, Plaintiffs do not plausibly allege a concentrated market.

1. Concentration does not render a conspiracy plausible.

Plaintiffs cite out-of-circuit cases purporting to recognize concentrated markets as a plus factor, but these decisions cannot be reconciled with *Twombly*. While an unconcentrated market may be incompatible with plausible conspiracy allegations, the converse is not true; nothing about market concentration suggests that parallel conduct is the product of a conspiracy. Indeed, in *Twombly*, the Supreme Court recognized that a “common reaction of firms in a concentrated market” is to “recogniz[e] their shared economic interests,” and reach similar competitive decisions independently. 550 U.S. at 553-54 (internal quotations omitted). Although in *Twombly* the telecommunications markets were highly

concentrated, this could not push the complaint’s parallel conduct allegations over the threshold of plausibility: “nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance.” *Id.* at 566.

Because “extreme market concentration” tends to make lawful, consciously parallel behavior more likely, *In re Dynamic Random Access Memory Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 52 (9th Cir. 2022), more is required to show that the behavior can plausibly be interpreted as unlawful. As one court has noted:

[I]t cannot be the case that allegations that a market is oligopolistic and a product is homogeneous are sufficient to survive a motion to dismiss. If that were so, an antitrust complaint targeting any industry with those features would survive a motion to dismiss regardless of whether there were any additional facts suggesting an agreement.

Wash. Cnty. Health Care Auth., Inc. v. Baxter Int’l Inc., 328 F. Supp. 3d 824, 841 (N.D. Ill. 2018) (citing *Twombly*); *see also Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1317 (11th Cir. 2003) (rejecting as a plus factor allegations that “are simply indicia that the . . . industry is an oligopoly, which is perfectly legal”).

2. The CAC does not plausibly allege a concentrated market.

Even if market concentration could be a plus factor, Plaintiffs do not plausibly allege a concentrated market. Plaintiffs allege that “[t]he relevant market for this lawsuit is the market for Crop Inputs in the United States” (App. 6; R. Doc. 104, at 6, ¶ 18), and “is highly concentrated” (App. 43; R. Doc. 104, at 43, ¶ 146). The

CAC never explains how a wide variety of non-interchangeable products falling under their definition of “Crop Inputs” (e.g., different seeds for various crops and different chemicals for various uses) (App. 2; R. Doc. 104, at 2, ¶ 3), are part of the same market. For example, a seed is not interchangeable with a fungicide. The alleged market for “Crop Inputs” is therefore not plausible because “[t]he relevant product market should include products that have reasonable interchangeability for the purpose for which they are produced.” *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 596 (8th Cir. 2009) (internal quotations omitted); *see also FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1240 (8th Cir. 2011) (“Determining a product market requires identifying the choices available to consumers, focusing on whether consumers will shift from one product to the other in response to changes in their relative cost.” (internal quotations omitted)). Because Plaintiffs do not and cannot allege, for example, that farmers buy fungicides instead of seeds when the price of seeds goes up, the market for “Crop Inputs” is improper.²²

²² Multiple courts have found that the relevant markets in which to analyze antitrust claims are far narrower than the alleged “Crop Inputs” market. *See, e.g., Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 583 (N.D. Miss. 2004) (considering separate soybean seed and cotton seed markets), *aff’d and remanded*, 459 F.3d 1328 (Fed. Cir. 2006); *United States v. LSL Biotechs.*, No. 00-cv-529, 2002 WL 31115336, at *3-4 (D. Ariz. Mar. 28, 2002), *amended* (May 23, 2002) (finding separate markets for different tomato seeds with different shelf lives), *aff’d*, 379 F.3d 672 (9th Cir. 2004).

Plaintiffs’ conclusory allegation of a nationwide geographic market (App. 6; R. Doc. 104, at 6, ¶ 18), fares no better. A “relevant geographic market . . . consists of the area in which consumers can practically seek alternative sources of the product.” *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007) (internal quotations omitted). But the CAC nowhere explains why the market is national, and why, for example, a Nebraska farmer would look to an Alabama retailer for its seed supply. Indeed, the CAC acknowledges that the markets have historically operated locally, not nationally. *See, e.g.*, App. 31; R. Doc. 104, at 31, ¶ 111 (“artificially inflated prices for Crop Inputs purchased from local retailers”); App. 22; R. Doc. 104, at 22, ¶ 83 (alleging a “price war” on pesticides in Iowa). Plaintiffs’ alleged nationwide market thus fails as a matter of law.

Without a properly defined product and geographic market, Plaintiffs’ allegations regarding market concentration are meaningless because “[m]arket share must be established in a well-defined market.” *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999).

Further, even if “Crop Inputs” were a proper market—and it is not—the CAC offers nothing to show that the market is concentrated. Plaintiffs do not allege any measure of concentration in the market as defined, instead offering shares in segments that are *not* the market alleged, such as soybean seed, corn seed, and cotton seed markets. App. 43; R. Doc. 104, at 43, ¶ 146. Plaintiffs also allege concentration

of a “wholesale market” only, which likewise is not the market alleged.²³ *Id.* Allegations regarding different markets than the one alleged are irrelevant. *See FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 309 (D.D.C. 2020).

B. An Alleged “Common Motive to Conspire” Does Not Plausibly Suggest Conspiracy.

An alleged “common motive to conspire” similarly does not make allegations of conspiracy more plausible. In *Twombly*, the plaintiffs’ claim that a “‘compelling common motivation’ to thwart the [competitors’] competitive efforts naturally led them to form a conspiracy,” 550 U.S. at 551, did not render their allegations plausible. *See id.* at 566 (“there was just no need for joint encouragement” to do what each defendant already had incentive to do).

Every firm is motivated to increase its profits and fight off competitive threats. Thus, treating a “common motive to conspire” as sufficient to allow any conspiracy claim to go forward would read the plausibility requirement out of *Twombly*.

[C]ommon motive does not suggest an agreement. Any firm that believes that it could increase profits by raising prices has a motive to reach an advance agreement with its competitors. Thus, alleging “common motive to conspire” simply restates that a market is interdependent (i.e., that the profitability of a firm’s decisions regarding pricing depends on competitors’ reactions). Interdependence, however, does not entail collusion, as interdependent firms

²³ The CAC is silent regarding concentration at the retail level—the level at which Plaintiffs purchased and FBN competed. But Plaintiffs allege slim margins at this level (App. 21-22; R. Doc. 104, at 21-22, ¶¶ 81-82), indicating a highly competitive marketplace.

may engage in consciously parallel conduct through observation of their competitors' decisions, even absent an agreement.

Musical Instruments, 798 F.3d at 1194-95 (citing *Twombly*, 550 U.S. at 556-57). In short, “common motive” is “insufficient to support the inference of conspiracy.” *Mayor of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 139 (2d Cir. 2013); *see also White v. R.M. Packer Co.*, 635 F.3d 571, 582 (1st Cir. 2011) (rejecting “motive to conspire” to “earn supracompetitive profits” as a plus factor).

C. Plaintiffs Do Not Plausibly Allege “Actions Against Self-Interest.”

Plaintiffs claim that Defendants' alleged refusals to deal with ecommerce platforms were against each Defendant's independent economic self-interest because the platforms presented an opportunity to expand sales and simplify distribution. App. 44; R. Doc. 104, at 44, ¶ 150; Br. at 50-51. Similar allegations failed in *Twombly*. There, the allegation that the defendants “passed up ‘especially attractive business opportunities’” by declining to enter each other's territories did not render a conspiracy plausible when there was “an obvious alternative explanation”: each defendant unilaterally deciding that it did not want to alter its long-established distribution model because each “liked the world the way it was.” 550 U.S. at 567-68.

Plaintiffs allege that Defendants would have been forced to reduce prices and earn lower profits if Defendants had allowed sales through ecommerce platforms.

App. 35; R. Doc. 104, at 35, ¶ 121 (lower prices); App. 18; R. Doc. 104, at 18, ¶ 71 (lower profits). Thus, the CAC itself explains precisely why each Defendant “liked the world the way it was” and why any reluctance to change established distribution patterns was entirely consistent with unilateral self-interest: no Defendant would want to earn lower profits. “It is decidedly not indicative of a conspiracy that a group of similarly situated market participants would object, individually and separately, to a significant market development that could cut into their profits—a broad point applicable to the alleged boycott conspiracy writ large.” *City of Pontiac*, 92 F.4th at 409.

Plaintiffs also acknowledge other concerns specific to the Manufacturer Defendants, namely that ecommerce platforms do not provide value-added services such as pesticide application. *See, e.g.*, App. 18; R. Doc. 104, at 18, ¶ 73. These legitimate concerns are why the Supreme Court has long recognized that it is rational for manufacturers not to deal with retailers whose business model is to lower prices by eliminating value-added services. *See Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977) (“[Retailer] services affect a manufacturer’s goodwill and the competitiveness of his product.”).²⁴

²⁴ These economic realities are particularly pronounced with respect to regulated agricultural products. *See, e.g.*, 40 C.F.R. §§ 152.160-.175 (requiring certified applicators for certain pesticides); Mo. Rev. Stat. § 266.031.1 (requiring permit for seed sellers). These regulations further enhance a manufacturer’s interest “to exert

Plaintiffs additionally allege, without offering any details, that unspecified Retailer and Wholesaler Defendants responded to ecommerce platforms by telling Manufacturer Defendants that they “risked the loss of substantial sales if they did not agree” to boycott ecommerce platforms. App. 25-26; R. Doc. 104, at 25-26, ¶¶ 93, 94. But “complaints about price-cutters are natural—and from the manufacturer’s perspective, unavoidable—reactions by distributors to the activities of their rivals” and, even if acted upon, “do not indicate illegal concerted action.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) (internal quotations omitted).

Plaintiffs’ own allegations thus confirm the economic logic of industry participants complaining about possible new competition. Plaintiffs allege that FBN’s presence in the marketplace had the potential to disrupt the traditional agricultural supply chain. *See, e.g.*, App. 23; R. Doc. 104, at 23, ¶ 86. Thus, “each [Defendant] had good reason to independently discourage . . . development of a new trading paradigm that threatened, some day, to cannibalize their . . . profits.” *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 464 (S.D.N.Y. 2017).

control over the manner in which [these] products are sold and serviced.” *Cont’l T.V.*, 433 U.S. at 55 n.23.

D. Trade-Association Participation Does Not Plausibly Suggest Conspiracy.

In addition to incorrectly arguing that trade-association participation can establish parallel conduct, Plaintiffs argue that participation in a trade association should be considered a plus factor. Br. at 51-52 (citing *Precision Rx*, 2016 WL 4446801). In the lone case they cite, *Precision Rx*, “[t]he alleged parallel conduct directly followed the three [trade-association] meetings, providing a correlation to support an inference of a plausible relationship between the [defendants’] meetings and their concerted actions.” 2016 WL 4446801, at *3.²⁵ Here, there is no allegation that the alleged group boycott “directly followed” trade-association meetings, nor could there be. Plaintiffs allege that a conspiracy began “at least as early as January 1, 2014” App. 2; R. Doc. 104, at 2, ¶ 2. But the first allegation regarding a trade-association meeting involves a 2017 ARA meeting and a statement by a non-Defendant “consultant.” App. 23; R. Doc. 104, at 23, ¶ 86. Nor do Plaintiffs tie any Defendant to that meeting—even by virtue of attendance. A

²⁵ In *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010), relied upon by the *Precision Rx* court, the Seventh Circuit cited allegations that defendants “exchanged price information directly” at trade-association meetings and that some met in a sub-group where they “urge[d] its members to substitute ‘co-opetition’ for competition.” Nothing remotely similar is alleged here.

communication by a non-Defendant three years after the conspiracy was allegedly hatched is not a plus factor suggesting a conspiracy.²⁶

In fact, Plaintiffs allege only that ten of the sixteen Defendants are even *members* of various trade associations.²⁷ That falls far short. Even if Plaintiffs had alleged Defendants attended any trade-association meetings together (and they do not), alleged co-conspirators’ “presence at . . . trade meetings is more likely explained by their lawful, free-market behavior” and thus “does not, standing alone, plausibly suggest conspiracy.” *Park Irmat*, 310 F. Supp. 3d at 1015. Courts across the country agree. *See, e.g., Honey Bum, LLC v. Fashion Nova, Inc.*, 63 F.4th 813, 823 (9th Cir. 2023) (“[T]o qualify as a plus factor, [] communications must go beyond the ‘standard fare’ of business and trade-association practice.”); *Evergreen Partnering*, 832 F.3d at 14 (holding that “a defendant’s mere participation” in a trade association is insufficient); *Moore v. Boating Indus. Ass’n*s, 819 F.2d 693, 712 (7th Cir. 1987) (“[M]ere membership in a trade association [and] attendance at trade

²⁶ Plaintiffs also allege that unidentified members of CropLife America’s PACE Advisory Council—on which *no* representative from any Defendant is alleged to sit—voiced concerns about FBN during a 2017 meeting. App. 21-22; R. Doc. 104, at 21-22, ¶ 82.

²⁷ Plaintiffs do not allege which of the two named Bayer or GROWMARK entities is a member. Cargill, Pioneer, Univar, and Federated are also not alleged to be trade-association members.

association meetings . . . are not, in and of themselves, condemned or even discouraged by the antitrust laws.”) (brackets in original).

E. Unrelated Government Investigations Are Not a Plus Factor.

The final plus factor Plaintiffs urge is the existence of investigations by the CCB and the Federal Trade Commission (“FTC”). App. 4, 13-14, 33-35; R. Doc. 104, at 4, 13-14, 33-35, ¶¶ 11, 56, 117-20. Neither suggests the existence of the conspiracy alleged in the CAC.

1. A now-closed Canadian investigation finding no evidence of conspiracy cannot be a plus factor.

The CCB investigation is the impetus of Plaintiffs’ lawsuit. *See* App. 41; R. Doc. 104, at 41, ¶¶ 139-40 (alleging that Plaintiffs received “notice” of the “existence of the conspiracy” “shortly before filing their Complaints” when the “[CCB] launched its inquiry and issued subpoenas in February 2020”). But Plaintiffs’ reliance was ill-founded, because the CCB later concluded that the evidence did *not* “establish an agreement or arrangement between competitors” regarding supply of crop inputs. App. 208; R. Doc. 280, at 17 (cleaned up).²⁸

²⁸ This Court may judicially notice that on March 15, 2022, the CCB publicly announced it had closed its investigation because it found no evidence of a conspiracy. *See, e.g., Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016) (court may judicially notice the contents of government websites); *Richardson RFPD, Inc. v. Nexus Techs., Inc.*, No. 20-cv-02754, 2021 WL 4264380, at *5, n.3 (N.D. Ill. Sept. 20, 2021) (judicially noticing Canadian government website). As described in the CCB’s press release, “the Bureau determined that the evidence does not sufficiently demonstrate that an agreement

Moreover, even if the CCB had not reached this conclusion, a Canadian investigation into Canadian conduct by non-Defendants would not make allegations regarding a conspiracy in the United States more plausible.²⁹ “A conspiracy elsewhere, without more, generally does not tend to prove a domestic conspiracy, especially when the conduct observed domestically is just as consistent with lawful interdependence as with an antitrust conspiracy. To hold otherwise would sanction the use of unabashed propensity reasoning” *Chocolate Confectionary*, 801 F.3d at 403; *see also Elevator Antitrust Litig.*, 502 F.3d at 52 (“Without an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs’ conclusory allegations do not ‘nudge [their] claims across the line from

exists between competitors in relation to FBN.” Competition Bureau Completes Investigation of Alleged Anticompetitive Behaviour in Canada’s Agricultural Sector (March 15, 2022), available at <https://www.canada.ca/en/competition-bureau/news/2022/03/competition-bureau-completes-investigation-of-alleged-anticompetitive-behaviour-in-canadas-agricultural-sector.html>.

²⁹ Of the entities that Plaintiffs allege the CCB investigated (App. 33-34; R. Doc. 104, at 33-34, ¶¶ 117-18), only Federated is a Defendant. Plaintiffs fail to allege any Federated conduct in the United States. All the entities are Canadian, except possibly Corteva Inc., which is described ambiguously as “Corteva Inc. and/or its affiliates.” The Bayer CropScience Inc. entity referenced is not the American entity of the same name included as a Defendant but a Canadian entity, as reflected on Canadian government websites. *See* Notice of Submission from Monsanto Canada ULC (Dec. 15, 2020), available at <https://inspection.canada.ca/plant-varieties/plants-with-novel-traits/notices-of-submission/mon94100/eng/1607633138607/1607633252648>.

conceivable to plausible.” (brackets in original) (quoting *Twombly*, 550 U.S. at 570)).

Plaintiffs cite *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538 (M.D. Pa. 2009), to justify their reliance on the CCB investigation. But the district court in *Chocolate Confectionary* relied on the following critical facts: the transport of product across the U.S.-Canadian border; cross-border communications; “integrated distribution systems”; price increases in both jurisdictions; a “saturated, declining market”; and similar market structures in the United States and Canada. *Id.* at 576-77. Plaintiffs plead none of these facts. And on appeal after summary judgment, the Third Circuit confirmed that “[a] conspiracy elsewhere, without more, generally does not tend to prove a domestic conspiracy.” *Chocolate Confectionary*, 801 F.3d at 403.

A pending investigation does not render allegations of a conspiracy plausible. See *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 561 (S.D.N.Y. 2016) (“[T]he mere fact that regulatory entities are investigating the possibility of . . . misconduct . . . is not a ‘plus factor.’”); see also *Mex. Gov’t Bonds*, 412 F. Supp. 3d at 390 (“It is far from clear that an ongoing government investigation involving Defendants would, in the absence of more substantial allegations, weigh in favor of the complaint’s plausibility.”). If an open investigation is not a plus

factor, surely an investigation closed with a finding that there was no conspiracy cannot be a plus factor.³⁰

2. The FTC’s investigation of (and subsequent case against) two Defendants for unrelated conduct is not a plus factor.

Plaintiffs also allege that one Defendant, Corteva, received a subpoena from the FTC. App. 34; R. Doc. 104, at 34, ¶ 120. They do not allege the FTC’s investigation relates in any way to a group boycott. And subsequent developments, which this Court may judicially notice, establish that the FTC’s investigation had nothing to do with the CAC’s allegations.

On September 29, 2022, the FTC and certain state attorneys general filed suit against Corteva and Syngenta. *FTC v. Syngenta Crop Protection AG, et al.*, No. 22-cv-828 (M.D.N.C.). They alleged that “two major manufacturers of crop-protection products have employed anticompetitive loyalty discount programs. These programs allegedly exclude generic competition from the market even after the products’ patent . . . protections have expired, thereby leading to supracompetitive

³⁰ Plaintiffs’ allegation that “the United States Department of Justice is monitoring the Competition Bureau’s investigation and is deciding whether to launch its own investigation” (App. 34; R. Doc. 104, at 34, ¶ 119), does not even allege an investigation and thus is not a plus factor either—especially given the CCB’s decision to close its investigation. *See In re Graphics Processing Units*, 527 F. Supp. 2d at 1024 (holding that a DOJ investigation “carries no weight in pleading an antitrust conspiracy claim,” especially when “[i]t is unknown whether the investigation will result in indictments or nothing at all”). Moreover, Plaintiffs identify no DOJ activity to date, more than three years after the CAC’s filing.

prices for farmers.” *FTC v. Syngenta Crop Protection AG*, 711 F. Supp. 3d 545, 556 (M.D.N.C. 2024). The FTC action relates to six specific pesticides, each of which is alleged to be a separate market. *Id.* at 559. The FTC’s case does not allege a group boycott or price fixing, nor does it mention ecommerce platforms. And the Judicial Panel for Multidistrict Litigation rejected private plaintiffs’ request to consolidate cases with allegations similar to the FTC’s into the Crop Inputs MDL, *see In re Crop Input Antitrust Litig.*, MDL No. 2993 (J.P.M.L.), Docket 162, finding they were “not appropriate for inclusion,” *id.*, Docket 164.

The FTC’s allegations regarding unrelated conduct involving a handful of products sold by two of sixteen Defendants do not make Plaintiffs’ allegations of an industry-wide conspiracy involving all “Crop Inputs” more plausible. “Illegal behavior elsewhere in time or place does not generally allow the inference of an immediate conspiracy.” *Chocolate Confectionary*, 801 F.3d at 402 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 1421a, at 160 (3d ed. 2010)); *see also Bookends & Beginnings LLC v. Amazon.com, Inc.*, No. 21-cv-02584, 2022 WL 18144916, at *11 (S.D.N.Y. Aug. 24, 2022), *report and recommendation adopted*, 2022 WL 4586213 (S.D.N.Y. Sept. 29, 2022) (rejecting relevance of allegations regarding the same defendants but a different alleged conspiracy).

IV. This Court’s Review Does Not Depend on the District Court’s Reasoning But, in Any Case, the District Court Applied the Correct Standard.

To deflect from their pleading failures, Plaintiffs open their brief with an argument that the district court applied the wrong standard in reviewing the CAC for failure to state a claim. Br. 13-17.³¹ For all the reasons above, this Court should affirm the district court’s dismissal, regardless of the reasoning underlying it, because Plaintiffs fail to allege either parallel conduct or plus factors.

Regardless, Plaintiffs’ broadside on the district court is unfounded. Their attack ignores that the court began its discussion of Plaintiffs’ Section 1 allegations with a lengthy recitation of the proper standard of review under Rule 12(b)(6), including its obligation to construe the CAC liberally and draw all reasonable inferences in Plaintiffs’ favor. App. 198-99; R. Doc. 280, at 7-8. From there, the court carefully analyzed Plaintiffs’ allegations over sixteen pages and correctly concluded that five allegations of dissimilar and temporarily distant conduct by only a few Defendants did not establish parallel conduct. App. 198-213; R. Doc. 280, at 7-22.

³¹ Plaintiffs also fault the court for dismissing their allegations as too “slight” to infer a conspiracy because “[o]nce a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient to prove the defendant’s involvement.” Br. at 21 (quoting *In re Bulk Popcorn Antitrust Litig.*, 783 F. Supp. 1194, 1197 (D. Minn. 1991)). But this assumes that Plaintiffs’ allegations establish a conspiracy. For all the reasons explained, they do not.

Plaintiffs nevertheless claim “gotcha” because at the tail-end of the district court’s discussion of the antitrust claim, it observed that Plaintiffs’ “allegations do not plausibly rebut the inference that Defendants’ conduct served their respective individual, legitimate business interest to maintain a profitable market structure.” App. 213-14; R. Doc. 280, at 22-23 (citing *Twombly*, 550 U.S. at 554) (“[A] § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.”). Plaintiffs argue that this wording demonstrates the district court improperly applied a summary judgment standard to their motion to dismiss. But a passing quotation to *Twombly*’s reference to the summary judgment standard deep into the district court’s analysis does not mean the district court applied that standard to the CAC.

Indeed, the district court’s analysis, viewed holistically, belies that conclusion. The court did not, as Plaintiffs claim, draw impermissible inferences in Defendants’ favor or require Plaintiffs to rebut inferences that Defendants’ conduct was legitimate business behavior. Br. at 15. Rather, when discussing Plaintiffs’ few specific allegations, the court simply noted on occasion that the conduct alleged was consistent with and explainable by ordinary, lawful business activity. App. 203; R. Doc. 280, at 12. This is no more than the Supreme Court did in *Twombly* when pointing out that the alleged parallel conduct had an “obvious alternative explanation” consistent with lawful independent activity. 550 U.S. at 567-68.

Plaintiffs also fault the district court for parsing each allegation individually and not reading the CAC “as a whole.” Br. at 14 (quoting *Warmington v. Bd. of Regents of Univ. of Minn.*, 998 F.3d 789, 795 (8th Cir. 2021)). But the court both painstakingly scrutinized each allegation *and* explicitly considered those allegations as a whole. *See* App. 213; R. Doc. 280, at 22 (“The Court has examined all of the paragraphs cited”); *id.* (“[h]aving considered the CAC’s allegations as a whole”). In short, the district court applied the correct standard, and its well-reasoned decision provides a compelling explanation of why Plaintiffs fail to state a claim.

V. The District Court Properly Dismissed Plaintiffs’ Claims With Prejudice.

A “decision to dismiss with prejudice without granting leave to amend” is reviewed for abuse of discretion. *Hennessey v. Gap, Inc.*, 86 F.4th 823, 831 (8th Cir. 2023) (quotation omitted) (affirming dismissal with prejudice). “Dismissal with prejudice is appropriate where a party never submitted a proposed amended complaint or clarified what one might have contained.” *Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1034 (8th Cir. 2012) (internal quotations omitted).

Plaintiffs never moved to amend in the district court, described what amendments they proposed, or attempted to explain how those changes would make their complaint viable—despite ample opportunity to do so. As the district court noted, Plaintiffs were on notice of their pleading deficiencies even before they filed

the CAC because Defendants moved to dismiss a similar pleading in the Southern District of Illinois four months before Plaintiffs filed the CAC. *See Par v. Wolfe Clinic, P.C.*, 70 F.4th 441, 449 (8th Cir. 2024) (“[Plaintiff] was on notice about the deficiencies in his complaint when the [defendant] filed its motion to dismiss.”). Plaintiffs also could have sought leave to amend during the nearly three years that the motion to dismiss the CAC was pending, but never did. And, even after dismissal, Plaintiffs failed to “file a post-judgment motion to vacate under Rule 60(b) seeking leave to file an amended complaint, and submit a proposed amended complaint with the motion.” *Hennessey*, 86 F.4th at 831. Accordingly, the issue of leave to amend “was not properly preserved.” *Id.* at 832.

Plaintiffs’ fleeting references to amendment in the district court were insufficient to preserve the issue. “[M]erely conclud[ing] [a] response to [the defendant’s] motion to dismiss with a request for leave to amend,” without “offer[ing] a proposed amended complaint or even the substance of the proposed amendment,” is inadequate. *In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 884-85 (8th Cir. 2009) (fourth alteration in original) (quoting *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 460 (8th Cir. 1985)); *see also Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 911, 913-14 (8th Cir. 2002) (affirming dismissal with prejudice and denial of leave to amend where the plaintiff only requested amendment “in his response brief” and “failed to specify the proposed new

allegations”). Plaintiffs here barely mentioned amendment in opposing dismissal and never submitted a proposed amended pleading or explained what amendments they would make. In concluding their responses to two individual Defendants’ motions to dismiss, Plaintiffs conditionally (and briefly) requested leave to amend if the district court were to find their allegations insufficient. R. Doc. 166, at 19; R. Doc. 167, at 18. And in response to the Joint Motion to Dismiss, Plaintiffs argued in a footnote that the district court should grant leave to amend if it dismissed Plaintiffs’ state-law claims, but they made no such request regarding their *federal* claims. *See* R. Doc. 164, at 65 n.19. None of that properly preserves the issue of amendment. *See Novastar*, 579 F.3d at 884-85; *Meehan*, 312 F.3d at 911, 913-14; *Wolgin v. Simon*, 722 F.2d 389, 394-95 (8th Cir. 1983).

Plaintiffs’ arguments to the contrary are unavailing. They fault the district court for supposedly “inferring futility” without “engag[ing] in any [futility] analysis” Br. at 55. That puts the cart before the horse. Plaintiffs never disclosed the substance of any proposed amendments, so there was nothing for the district court to analyze. Accordingly, this Court “need not reach the question of futility here because [it] can affirm the court’s denial of leave to amend on the alternate basis that [Plaintiffs] failed to offer a proposed amended complaint to the district court.” *Novastar*, 579 F.3d at 884. Even before this Court, Plaintiffs’ argument concerning amendment includes not one word about what amendments they propose. *See* Br. at

54-56. And Plaintiffs cannot—for the first time in this multi-year litigation—introduce new proposed amendments in their reply brief. *See Starkey v. Amber Enters., Inc.*, 987 F.3d 758, 764 (8th Cir. 2021) (noting the court does “not entertain belated arguments raised for the first time on appeal in reply briefs”). Futility is thus not properly before this Court, just as it was not before the district court.³²

Finally, Plaintiffs’ contention that they have not committed “persistent pleading failures” is beside the point. Br. at 56. Plaintiffs misapply *Michaelis v. Nebraska State Bar Ass’n*, 717 F.2d 437, 439 (8th Cir. 1983), and conflate this Court’s standards for dismissal for failure to comply with *Rule 8* with dismissal under *Rule 12(b)(6)*. *See Phoenix Entm’t Partners, LLC v. Star Music, Inc.*, No. 16-cv-4078, 2017 WL 5714021, at *5 (D. Minn. Nov. 28, 2017) (explaining that the plaintiff was taking “the language of *Michaelis* out of context” because *Michaelis* “was not addressing a dismissal for failure to state a claim under [Rule 12(b)(6)]” and was instead addressing failure to comply with Rule 8). Nor does it matter that “the Order was the first judicial determination on the adequacy of Plaintiffs’ claims.” Br. at 56. This Court has made clear that where a plaintiff fails to submit a proposed amended complaint or clarify what it would have contained, a district court does “not abuse its discretion in dismissing the complaint with prejudice

³² Amendment would be futile in any case because Plaintiffs cannot cure the multiple pleading deficiencies identified *supra*.

without giving [the plaintiff] an opportunity to amend.” *Mitchell v. Kirchmeier*, 28 F.4th 888, 903 (8th Cir. 2022); *see also Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009) (rejecting argument “that the district court erred in dismissing [the] complaint with prejudice rather than allowing [plaintiff] to file a first amended complaint,” where the plaintiff did not “submit[] a proposed amended complaint”).

CONCLUSION

Plaintiffs fail to adequately plead parallel conduct where they allege only a few dissimilar acts by only a few Defendants at different times over the course of years. They likewise fail to adequately plead plus factors where the conduct they do allege bears all the hallmarks of rational, unilateral responses to new competition. Accordingly, this Court should affirm the district court’s dismissal with prejudice.

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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) because the brief contains 12,609 words, excluding the 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 Version 2308, in 14-point Times New Roman. Pursuant to Eighth Circuit Rule 25, I certify that this brief has been scanned for viruses and is virus-free.

Dated: March 10, 2025

/s/ Sharon B. Rosenberg

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2025, I electronically filed the foregoing 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.

Dated: March 10, 2025

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