



Direct Evidence of a Sherman Act  
Agreement

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## DIRECT EVIDENCE OF A SHERMAN ACT AGREEMENT

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The Supreme Court once said, “[C]ircumstantial evidence is the lifeblood of antitrust law.”<sup>1</sup> That was in a merger case, but the observation could also apply to price-fixing litigation under Section 1 of the Sherman Act.<sup>2</sup> Claims of price fixing and other per se violations of Section 1 usually turn on whether circumstantial evidence proves that the defendants formed an agreement—the “contract, combination . . . or conspiracy” the statute requires.<sup>3</sup> Motions for summary judgment test the legal sufficiency of the plaintiffs’ evidence of agreement.<sup>4</sup> Under *Matsushita*, courts resolving these motions usually rely on a framework of “plus factors”<sup>5</sup> to evaluate whether the plaintiff’s circumstantial evidence raises a plausible inference of agreement, one that “tends to exclude the possibility”<sup>6</sup> the defendants were simply pricing interdependently, as oligopolists typically (and lawfully) do.<sup>7</sup> Under *Twombly*, courts faced with

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<sup>1</sup> *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973) (White, J.).

<sup>2</sup> 15 U.S.C. § 1. One of the cases *Falstaff* cited as authority for its “lifeblood” claim was *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939), a seminal case on proof of agreement under Section 1 by circumstantial evidence.

<sup>3</sup> *See, e.g., Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) (“[T]he essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it.”).

<sup>4</sup> FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

<sup>5</sup> *See, e.g., Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (“[P]rice fixing plaintiffs must demonstrate the existence of ‘plus factors’ that remove their evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism.”).

<sup>6</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587 (1986) (quoting *Montano Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)).

<sup>7</sup> *See, e.g., In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396–98 (3d Cir. 2015) (“Although we have not identified an exhaustive list of plus factors, they may include (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that

motions to dismiss for failure to state a claim, evaluate the plausibility of inferring agreement from circumstantial evidence the complaint alleges.<sup>8</sup>

In these cases, courts usually begin by saying that, as usual in Section 1 cases, the plaintiff has no direct evidence of agreement—evidence like a “recorded phone call”<sup>9</sup> that is “explicit and requires no inferences to establish” that the necessary direct communications occurred.<sup>10</sup> Direct evidence is rare, they explain, because conspirators, fearing detection and penalties, will try hard not to create any.<sup>11</sup> Even with access to dis-

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the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.”) (citations and internal quotations omitted); ABA ANTITRUST LAW SECTION, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 82–106 (2d ed. 2019) [hereinafter PROOF OF CONSPIRACY] (surveying 9 commonly cited plus factors); William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 414–35 (2011) (arguing for recognition of a set of “super plus factors” that strongly indicate agreement).

<sup>8</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring the complaint to allege facts sufficient to “state a claim to relief that is plausible on its face”). *Twombly* interpreted FED. R. CIV. P. 8(a) (requiring the complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief”); FED. R. CIV. P. 12(b)(6) (authorizing motions for failure of the complaint “to state a claim upon which relief can be granted” under the standard of Rule 8(a)). See, e.g., *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 n.22 (3d Cir. 2010) (holding *Twombly* “necessarily rejected the proposition that plaintiffs may plead conspiracy on the basis of mere parallelism—and thus necessarily required the pleading of plus factors . . . although a plaintiff still need not plead specific evidence.”).

<sup>9</sup> *Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). Other common hypothetical examples include “an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price,” *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) (Posner, J.); “a document or conversation explicitly manifesting the existence of the agreement in question,” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010); and “documents, meetings, and participant testimony . . . that the defendants exchanged commitments or otherwise collaborated by some means other than to make a marketplace decision,” 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 70 (4th ed. 2017).

<sup>10</sup> *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). See also *Theatre Enters., Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 539–40 (1954) (“Admittedly, there is no direct evidence of illegal agreement . . . .”); *Superior Offshore Int’l, Inc. v. Bristow Group, Inc.*, 490 F. App’x 492, 497 (3d Cir. 2012) (“Given the relatively lighter burden afforded to a plaintiff putting forth direct evidence of concerted action, the difference between direct and circumstantial evidence in an antitrust case assumes heightened significance.”).

<sup>11</sup> See, e.g., *Citigroup*, 709 F.3d at 136 (“[I]n many antitrust cases, this type of ‘smoking gun’ can be hard to come by, especially at the pleading stage.”); *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir. 2004) (“Direct evidence is extremely rare in antitrust cases and is usually referred to as the ‘smoking gun.’”) (quoting *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003)); *United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006) (“[C]onspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with [ ] precision.”); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633 (5th Cir. 1981) (“[S]olemnized covenants to conspire are difficult to come by in any price fixing case.”); *Gen. Chems., Inc. v. Exxon Chem. Co.*, 625 F.2d 1231, 1233 (5th Cir. 1980) (“Even a successful antitrust plaintiff will seldom be able to offer a direct evidence of a conspiracy and such evidence is not a requirement.”); *S. Side Drive-In Co. v. Warner Bros. Pictures Distrib. Co.*, 30 F.R.D. 32, 35 (E.D. Pa. 1962) (“It is virtually impossible to prove a conspiracy of this nature by direct evidence; it must usually be done circumstantially.”).

covery, plaintiffs usually fail to find any direct evidence, despite their best efforts.<sup>12</sup>

When plaintiffs claim to have found direct evidence, the courts usually disagree and treat all of the plaintiff's evidence as circumstantial.<sup>13</sup> But, as I will show, courts sometimes do find that plaintiffs have produced (or pleaded) direct evidence of agreement. A close look at these cases, I argue, helps clarify what courts mean by a Section 1 agreement and how they expect plaintiffs to prove that one exists.

In the next Part, I consider the relationships among the concepts of direct evidence, agreement, and sufficiency. In Part II, I show that, in general, courts place evidence on the spectrum of direct and circumstantial based on how completely and clearly the evidence represents the alleged agreement. I also show how that same choice affects the courts' analysis of the sufficiency of the evidence (or allegations) on motions for summary judgment and motions to dismiss. In Part III, I examine decisions in each of the categories of evidence that courts have characterized as direct—documents, recordings, testimony, and admissions. Finally, I argue that, even when direct evidence is not present, the courts' applications of the concept of direct evidence can provide a model for evaluating the sufficiency of circumstantial evidence of communications as a decisive plus factor in the proof of agreement. Circumstantial evidence then becomes, as some courts have said, “proxies for direct evidence.”<sup>14</sup>

## I. DEFINING AGREEMENT AND PROVING AGREEMENT

The decisive issue in most antitrust cases alleging one of the per se offenses is the existence of an agreement among the defendants to eliminate competition among themselves or to exclude a rival. Straightforward as it sounds, this issue is extraordinarily complex, both legally and factually. If the case survives a motion to dismiss, the process of discovery and decision (or settlement) can take years, at great expense to the parties and the court. And there is a lot at stake—some of these cases are bet-the-company affairs, in which the bets depend on the parties' estimates of their chances of success on the issue of agreement at critical stages of the litigation. There are both factual

<sup>12</sup> See, e.g., *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 804 (N.D. Ill. 2017) (“Any direct evidence of the agreement will only be uncovered through discovery.”).

<sup>13</sup> See, e.g., *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872–79 (7th Cir. 2015) (finding emails describing a price increase as “col[li]usive” were too ambiguous to be either direct evidence or even sufficient circumstantial evidence); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662–63 (7th Cir. 2002) (Posner, J.) (finding evidence of communication was too ambiguous to be direct, but, viewed with other circumstantial evidence, raised an inference of agreement) (Posner, J.).

<sup>14</sup> See, e.g., *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004).

and legal reasons for the intractability of the issue, but the concept, if not the reality, of direct evidence can play a role at every stage of the process.

#### A. WHAT IS AN AGREEMENT?

To identify direct evidence of an agreement, courts need to know what a Section 1 agreement is. The Supreme Court has made clear that agreement is *not* merely interdependent parallel conduct like oligopoly pricing—what economists call tacit collusion. In *Valspar*, the Third Circuit recently summarized the familiar rationale for excluding this sort of noncompetitive conduct from the reach of Section 1:

“[O]ligopolistic rationality” can cause supracompetitive prices because it discourages price reductions while encouraging price increases. A firm is unlikely to lower its price in an effort to win market share because its competitors will quickly learn of that reduction and match it, causing the first mover’s profits to decline and a subsequent decline in the overall profits of the industry. Similarly, if a firm announces a price increase, other market participants will know that if they do not increase their prices to the first-mover’s level, the first-mover may be forced to reduce its price to their level. Because each of the other firms know this, each will consider whether it is better off when all are charging the old price or the new one. They will obviously choose the new price when they believe that it will maximize industry profits.<sup>15</sup>

Even though this sort of conduct means consumers pay more, the court continued, it is not a Sherman Act agreement because it would be “impossible” to “order a firm to set its prices without regard to the likely reactions of its competitors.”<sup>16</sup>

Under *Twombly*, if the plaintiff alleges facts that raise only an inference of “oligopolistic rationality,” the defendant is entitled to a dismissal for failure to state a claim.<sup>17</sup> If the plaintiff manages to allege an agreement but is only able to find evidence of oligopoly behavior during discovery, then the defendant is entitled to summary judgment under *Matsushita*.<sup>18</sup> In both settings, the plaintiff must produce something more—allegation or evidence—that raises a plausible inference of agreement.

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<sup>15</sup> *Valspar Corp. v. E.I. Du Pont De Nemours and Co.*, 873 F.3d 185, 191 (3d Cir. 2017) (internal citations and quotations omitted).

<sup>16</sup> *Id.* at 191–92 (quoting *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.)).

<sup>17</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) (“Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”).

<sup>18</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 597 n.21 (1986) (“[C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.”).

But courts are not very specific about what a Sherman Act agreement is. The Supreme Court in *Twombly* recognized that an agreement may be “tacit or express,”<sup>19</sup> but never explained what that meant. What distinguishes agreement from simple oligopoly cannot be a “unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme,”<sup>20</sup> because rivals can reach that kind of mutual understanding by lawful oligopoly behavior, or tacit collusion.<sup>21</sup> The meaning of horizontal agreement only becomes clear in the numerous decisions of the federal courts classifying conduct as either an agreement or mere interdependence.<sup>22</sup> Those cases show that what matters is whether the rivals reached their understanding by privately communicating about their assurances or intentions about future competitive conduct.

Rivals form express agreements by privately exchanging *promises* about their future actions.<sup>23</sup> The Supreme Court apparently had this category in mind when it suggested that parallel conduct is unlawful if the evidence shows it is pursuant to a “preceding agreement”<sup>24</sup>—in other words, if the parties formed a complete verbal agreement, then put it into effect. “Tacit agreement” has been harder to define, but I have argued that parties form a tacit agreement by privately communicating their *intentions* (for example on pricing), then confirming their expressions of intent by subsequent actions.<sup>25</sup> The parties coordinate their interdependent behavior by private communications of their intent,

<sup>19</sup> *Twombly*, 550 U.S. at 553.

<sup>20</sup> *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010) (citations omitted).

<sup>21</sup> See LOUIS KAPLOW, *COMPETITION POLICY AND PRICE FIXING* 34 (2013).

<sup>22</sup> *Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 135–36 (2d Cir. 2013) (stating that “[t]he ultimate existence of an ‘agreement’ under antitrust law . . . is a legal conclusion” based on inferences from evidence).

<sup>23</sup> See, e.g., Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 179 (1993) (defining agreement as a “process to which the law objects: a negotiation that concludes when the firms convey mutual assurances that the understanding they reached will be carried out”).

<sup>24</sup> *Twombly*, 550 U.S. at 557 (“[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”).

<sup>25</sup> William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593, 597–98 (2017). See, e.g., *White v. R.M. Packer Co.*, 635 F.3d 571, 576 (1st Cir. 2011) (defining tacit agreement as “‘uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision.’”) (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996)). For another recent analysis of tacit agreement, see Wentong Zheng, *A Knowledge Theory of Tacit Agreement*, 9 HARV. BUS. L. REV. 399 (2019).

not by acting with mutual awareness of market conditions or by publicly communicating with the market, as they would in the case of tacit collusion.<sup>26</sup>

So, the distinguishing feature of both forms of horizontal agreement is private communication among rivals about their future actions:<sup>27</sup> communication of promises in the case of express agreement, and communication of competitive intentions in the case of tacit agreement. Not every kind of private communication will form either kind of agreement—only those that serve no benign purpose. Courts now view tacit collusion as normal, rational, and unavoidable conduct by oligopolists. Consequently, private communications among rivals that have a beneficial purpose, like those in most trade association meetings, are also part of the same lawful process. Whenever courts classify rivals' communications as beneficial or (plausibly) collusive, they make a policy decision that further shapes the definition of agreement.<sup>28</sup>

#### B. THE PROBLEM OF PROVING AGREEMENT

These definitions of a Sherman Act agreement and their associated communications help explain the factual challenges of proving agreement mentioned earlier. The legal standard guides which factual issues are “of consequence in determining the action,” and therefore what evidence will be relevant in

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<sup>26</sup> See, e.g., *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 984 (N.D. Ohio 2015) (“[D]irect and secret price discussion between competitors is more probative of a conspiracy than are indirect and public communications, ostensibly undertaken by the conspiring competitors to ‘signal’ to one another.”). For discussion of public signaling more generally, see William H. Page, *Signaling and Agreement Under Section 1 of the Sherman Act*, in GLOBAL ANTITRUST ECONOMICS: CURRENT ISSUES IN ANTITRUST AND LAW & ECONOMICS 81 (Douglas H. Ginsburg & Joshua D. Wright, eds. 2016).

<sup>27</sup> See, e.g., *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1373 (N.D. Ga. 2017) (observing that “invitations to collude” that supported a finding of conspiracy have “almost universally been private communications, not public disclosures like the [defendant’s] comments at issue in this case,” which were “made publicly on a quarterly earnings call with [defendant’s] analysts and investors [and] concerned a topic that was of interest to the airline industry at the time”), *aff’d sub nom. Siegel v. Delta Air Lines, Inc.*, 714 F. App’x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019). *Delta/Airtran* acknowledged that “public remarks” might support liability if they served no public purpose. *Id.* For analysis of documentary evidence of communication through a semipublic intermediary, see *In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 248 (E.D. Pa. 2016) (analyzing evidence that defendants “communicat[ed] sensitive information to [analysts] only for those analysts to reprint that information verbatim in reports that other Defendants obtained”); see also Page, *supra* note 25, at 633 (“In rare instances [ ] the content and context of a formal public announcement may make it functionally private, without a comparable consumer benefit.”) (discussing cases).

<sup>28</sup> See, e.g., *Kleen Prods. LLC v. Georgia-Pacific LLC*, 910 F.3d 927, 938–39 (7th Cir. 2018) (finding 20 calls between rivals around the time of a price increase were “not enough” to suggest an agreement, because “[w]e cannot put much stock in the frequency of contacts, given the amount of [legitimate] trading that was taking place among the firms”). The court added that “we hesitate to impugn the companies’ intentions solely from the timing of the contacts,” and the plaintiffs’ “speculation about the content of the frequent interfirm contacts is not enough to create a jury issue.” *Id.* at 939.

resolving the issues.<sup>29</sup> Because rivals can only form an agreement by communicating, the most obviously relevant and probative evidence will in some way represent those very communications. But, because the communications must be private, evidence of them will be sparse. Conspirators have hefty incentives to leave no vestiges of their actions—by avoiding email and other durable media and hoping their co-conspirators live by the ancient creed that if nobody talks, everybody walks. And, sadly, conspirators who do find direct evidence of agreement in their files may be tempted to destroy it.<sup>30</sup>

Nevertheless, despite their best efforts, conspirators sometimes do leave traces, particularly if the conspiracy is among large corporations. Participants may talk.<sup>31</sup> Participants may tell others, who may talk. Modern leniency programs can create pressure on individual conspirators to break ranks and testify before a grand jury.<sup>32</sup> Conspirators, perhaps surprisingly, may leave an electronic trail. They may also give directions to employees, who then may leave records. As I show in more detail below, these traces can provide direct or very good circumstantial evidence of the agreement.

Parties shape their pleadings, discovery, and trial strategies with the concept (or hope) of direct evidence in mind.<sup>33</sup> They know what can happen if the plaintiff discovers evidence the court will see as direct. And the issues they face at trial and on motions to dismiss, motions to compel production, and motions for summary judgment all recognize direct evidence, or less specific evidence of communications, might exist. Invariably, some of the document requests will focus on the defendants' records of communications, or even

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<sup>29</sup> FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

<sup>30</sup> See, e.g., *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 83 (3d Cir. 2019) (affirming sanctions for spoliation where evidence showed an executive “deliberately deleted an unknown number of emails in response to ‘pending [antitrust] litigation’ and urged others to do the same”); *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2012 WL 5199388, at \*1 (E.D. Pa. Oct. 22, 2012) (affirming magistrate judge’s award of sanctions for spoliation against a party who “suppressed relevant documents within its control . . . after it was reasonably foreseeable Plaintiffs would seek the documents”); Press Release, U.S. Dep’t of Justice, Auto Parts Industry Executive Pleads Guilty to Obstruction of Justice (Feb. 2, 2017) (describing guilty pleas to charges defendants “conspired . . . to delete emails and electronic records and to destroy documents referring to communications with competitors, in contemplation of a federal investigation”).

<sup>31</sup> Cf. BENJAMIN FRANKLIN, *POOR RICHARD’S ALMANAC* (1735) (“Three may keep a secret if two of them are dead.”), quoted in *THE OXFORD DICTIONARY OF PROVERBS* 211 (Jennifer Speake ed., Oxford Univ. Press 6th ed. 2015)).

<sup>32</sup> See generally Robert B. Bell & Kristin Millay, *The Antitrust Division’s Corporate Leniency Program: Learn from the Past or Be Condemned to Repeat It*, 34 CRIM. JUST. 14 (2019).

<sup>33</sup> See, e.g., DAVID A. BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* 81 (1984) (“The distinction between direct and circumstantial evidence is critical to fact investigation. If one has direct evidence, one need not analyze it in order to determine what element it establishes.”).



references to communications that may arguably meet the standard for direct evidence.<sup>34</sup>

But the task of finding it is daunting. Discovery may require the most advanced technological means to review the voluminous electronically stored information in defendants' and third parties' files.<sup>35</sup> Although there are procedural and technological means to control costs,<sup>36</sup> the process is inevitably expensive and time consuming. Document "retention" policies can hinder the search and may raise issues of their own.<sup>37</sup> Bare lists of the relevant evidence of communications in a Section 1 case can run many pages.<sup>38</sup> Throughout the process, both the parties and the court are looking for direct evidence of

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<sup>34</sup> See, e.g., *In re Dairy Farmers of Am. Cheese Antitrust Litig.*, 801 F.3d 758, 766 (7th Cir. 2015) (Appellants "merely request leave to cast a wider net with the apparent hope that, with it, they would uncover direct evidence of conspiracy."); *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872 (7th Cir. 2015) (describing discovery focused "on the information exchange orchestrated by the trade association, the change in the defendants' pricing structures and the defendants' ensuing price hikes, and the possible existence of the smoking gun"); *In re Nat'l Ass'n of Music Merchs. Musical Instruments & Equip. Antitrust Litig.*, MDL No. 2121, 2011 WL 3702453 at \*8 (S.D. Cal. Aug. 22, 2011) ("Discovery should be limited to who attended or participated in meetings alleged in the amended consolidated complaint and what was said or agreed to there."); *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 458 F. Supp. 2d 263, 265–66 (E.D. Pa. 2006) (requiring plaintiffs to disclose to defendants secret recordings of conversations that allegedly "reveal that defendants have been caught 'red handed,' and that the statements expose a price-fixing scheme that 'unambiguously' violates federal antitrust law").

<sup>35</sup> See, e.g., Tracy Greer, Senior Counsel, Antitrust Div., U.S. Dep't of Justice, Presentation at the ABA Spring Meeting, Avoiding E-Discovery Accidents & Responding to Inevitable Emergencies: A Perspective from the Antitrust Division I, 9 (Mar. 2017), [www.justice.gov/atr/page/file/953381/download](http://www.justice.gov/atr/page/file/953381/download).

<sup>36</sup> See, e.g., Edward D. Cavanaugh, *The 2015 Amendments to the Federal Rules of Civil Procedure: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?*, ANTI-TRUST SOURCE (Apr. 2014) (arguing that the proportionality standard, judicial management, cooperative planning by counsel, and "prompt resolution of discovery disputes, especially those involving electronic discovery" can contain costs), [www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/apr14\\_full\\_source.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr14_full_source.pdf).

<sup>37</sup> How courts view evidence of actual destruction of files depends on the circumstances. Compare *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873 (7th Cir. 2015) (finding that one executive's request that another "delete several emails in the chain" was "consistent with his not wanting to be detected by his superiors criticizing their management of the company" and did not suggest spoliation) with *In re Korean Ramen Antitrust Litig.*, 281 F. Supp. 3d 892, 903 (N.D. Cal. 2017) (finding that sanctions were unwarranted but, "construing the evidence in plaintiffs' favor, there is an inference that defendants intended or otherwise benefitted from the destruction of adverse evidence under their existing or newly implemented document destruction policies"). Cf. *Trist v. First Fed. Sav. & Loan Ass'n*, 466 F. Supp. 578, 589–90 (E.D. Pa. 1979) (finding that evidence of spoliation would not by itself support an inference of conspiracy but might do so if considered with plaintiff's other evidence).

<sup>38</sup> See, e.g., *In re Domestic Drywall Antitrust Litig.*, MDL No. 2437 & 13-MD-2437, 2019 WL 3254090, at \*3–23 (E.D. Pa. July 19, 2019) (providing a "[f]actual chronology relating to alleged conspiratorial conduct," with references to exhibits); *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 1007–21 (N.D. Ohio 2015) (summarizing "[c]ommunications between and among Defendants" in an appendix).

agreement, but courts are not surprised if the plaintiff fails to produce it.<sup>39</sup> In that case, as I show in Part IV, courts on motions for summary judgment want to see the next best thing, some noneconomic circumstantial evidence of communication that suggests agreement.

### C. WHAT (IF ANYTHING) IS DIRECT EVIDENCE?

Although the Federal Rules of Evidence do not mention direct or circumstantial evidence, courts rely on the distinction in a variety of contexts, including Section 1 conspiracy cases. In doing so, they usually state the familiar distinction between direct evidence, which requires “no inferences” to establish a fact in issue (like agreement), and circumstantial evidence, which requires inferences.<sup>40</sup> But, as others have long recognized, “All evidence depends upon some inferences.”<sup>41</sup>

<sup>39</sup> *In re Flat Glass Antitrust Litig. (II)*, MDL No. 1942, 2012 WL 5383346, at \*4 n.3 (W.D. Pa. Nov. 1, 2012) (“Although Defendants assign importance to the lack of direct evidence of conspiracy after voluminous discovery, several courts have noted that ‘smoking guns’ are rare in antitrust conspiracy cases.”); *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997) (“As in most price-fixing cases, the Defendants have not admitted that they fixed prices, and discovery has not unearthed direct evidence of an agreement to do so.”), *aff’d*, 166 F.3d 581 (3d Cir. 1999). Courts will not infer spoliation simply because a search fails to produce direct evidence. *See, e.g., In re Delta/Airtran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1311 (N.D. Ga. 2011) (“Just because these e-mails and other documents that were produced by Delta may not be as helpful to Plaintiffs’ theory of the case as Plaintiffs would like, it does not follow that other, more incriminating documents existed but were destroyed.”). For an early example, see *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 612 (1914) (“[I]t is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown [but] [i]t is elementary [ ] that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done . . . .”).

<sup>40</sup> Many courts state or quote the “no inferences” formulation. *See, e.g., Llacua v. W. Range Ass’n*, 930 F.3d 1161, 1174 n.24 (10th Cir. 2019); *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010); *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir. 2004); *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003); *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1155 (9th Cir. 2001). *But cf. In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661–62 (7th Cir. 2002) (Posner, J.) (suggesting the district court “judge may have been confused by the [“no inferences”] language found in” *Baby Food (In re Baby Food Antitrust Litig.)*, 166 F.3d 112, 118 (3d Cir. 1999)), and suggesting instead that direct evidence is “tantamount to an acknowledgment of guilt”). Courts also distinguish direct and circumstantial (or indirect) in other antitrust contexts. *See, e.g., Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (“Direct evidence of anticompetitive effects would [include] reduced output, increased prices, or decreased quality in the relevant market,” while “[i]ndirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.”); *see also Lyman Ray Patterson, The Types of Evidence: An Analysis*, 19 VAND. L. REV. 1, 5–8 (1965) (distinguishing direct and circumstantial evidence in functional terms). Some sources limit it to eyewitness testimony. *See, e.g., BLACK’S LAW DICTIONARY* 675 (10th ed. 2014) (“Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.”).

<sup>41</sup> DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 15 (4th ed. 2018).

Our brains function by gathering sense impressions, integrating those impressions into meaningful patterns, and drawing inferences from those patterns. Sometimes this process happens so quickly and intuitively that the inferences are hard to detect; we call the resulting evidence “direct” evidence. Other times the inferences are more obvious and we call the evidence “circumstantial.” But there is no clear line between direct and circumstantial evidence.<sup>42</sup>

Richard Greenstein similarly writes that “all testimony requires interpretation—i.e., inferences—to give it meaning; consequently, the connection between direct evidence and the ‘material fact’ it ‘proves’ is every bit as inferential as is the case with circumstantial evidence.”<sup>43</sup>

A factfinder cannot travel back in time to experience an event, and, even if it could, it would be limited to a single perspective. Its only access to the event is by inference from traces provided by witnesses, documents, and physical objects that have some connection to the event. But none of this evidence can represent the event’s full complexity. The language of oral testimony or written documents, and the images and sounds in video or sound recordings, will inevitably reduce the event in ways that introduce ambiguities and therefore require inference. Testimony may summarize past actions or conversations, or leave the content, dates, or participants in conversations unspecified. Even verbatim accounts or recordings leave room for interpretation of what the speakers (or writers) meant in a prior context, with all the cues that were available then. Even a signed “agreement” among rivals is not itself *the* agreement, but evidence of the agreement, evidence that will leave some room for interpretation.

These observations are especially true for the “fact” of a Sherman Act agreement. The term “direct evidence” can refer to the proof of any fact, while “direct evidence of agreement” requires evidence of a complex set of related facts.<sup>44</sup> Parties form an agreement only by a series of communications that bring them to a common understanding on terms the law forbids. The ultimate issue of agreement will require an inference of whether the communications brought the parties to the necessary mental state, or whether they had some benign purpose. If the direct evidence is in the form of an admission, interpreting any ambiguity in its phrasing will also require inference. Courts often reject plaintiffs’ attempts to characterize evidence as direct on these grounds, relegating the evidence to the circumstantial category.<sup>45</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 Hous. L. Rev. 1801, 1807 (2009).

<sup>44</sup> As I show later, some courts use “weak direct evidence of agreement” to characterize direct evidence of fewer than all of the elements of or participants in an illegal agreement. *See infra* note 79.

<sup>45</sup> *See infra* notes 188–189.

Nevertheless, from a legal realist perspective, “direct evidence” exists, because courts routinely find it in litigation.<sup>46</sup> Courts classify evidence pragmatically: evidence is direct if it proves facts with few and obvious inferences. Some courts suggest that evidence forms a kind of continuum, depending upon the number and character of the inferences it requires to find a fact in issue:

When judges and lawyers refer to “direct” evidence, they are simply using shorthand to refer to evidence that is on the stronger end of the continuum, and when they refer to “circumstantial” evidence, they are likewise using shorthand to refer to evidence that is on the weaker end of the continuum. Thus, “direct” evidence is not the opposite of “circumstantial” evidence; it is, instead, very strong circumstantial evidence.<sup>47</sup>

As I show in Part III, courts regularly characterize the least ambiguous evidence, whatever its form, as direct.

The parties’ competing interpretations of evidence can also influence courts’ classifications. One court, for example, recognized that “[a]lthough it is possible to construct ambiguity in almost any statement,” the plaintiffs’ evidence was direct because the defendants could “not offer us any other discrete interpretation of this statement that would move it into the category of circumstantial evidence.”<sup>48</sup> In other words, evidence of agreement is direct if the only reasonable inference from it is that the defendants agreed. Even if the evidence requires an inference, the defendant must show that the ambiguity raises a reasonable competing inference that the defendants’ actions were not conspiratorial.

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<sup>46</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”). Cf. Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 779 (2013) (characterizing Holmes as “a precursor of Realism because he believed that legal categories and legal doctrine were the best sources of prediction of judicial behavior”).

<sup>47</sup> *Darke v. Lurie Besikof Lapidus & Co.*, 550 F. Supp. 2d 1032, 1041 (D. Minn. 2008). See also *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (Posner, J.) (describing direct evidence as “tantamount to an acknowledgment of guilt” and circumstantial evidence as “everything else including ambiguous statements”); *Package Shop, Inc. v. Anheuser Busch, Inc.*, 675 F. Supp. 894, 903 n.2 (D.N.J. 1987) (observing that “[a]ll evidence falls somewhere along a continuum between the irrelevant and the conclusive,” but in antitrust law direct evidence has the “particularized meaning” of “oral or written communications in which defendants expressly discussed the creation or maintenance of [an illegal agreement like] exclusive territories”). Cf. *Snider v. Greater Nevada, LLC*, No. 3:07-CV-00583-RCJ-RAM, 2009 WL 3319802, at \*9 (D. Nev. 2009) (comparing comments that are direct evidence of discriminatory animus with “stray remarks” at the “other end of the spectrum” that are only circumstantial evidence).

<sup>48</sup> *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1083 n.9 (10th Cir. 2006).

Courts often characterize direct evidence as a “smoking gun.”<sup>49</sup> On the surface, the metaphor doesn’t work, because a smoking gun in the hands of a suspect is only circumstantial evidence that the suspect shot anyone.<sup>50</sup> But it makes sense as a reference to Watergate. Of the hundreds of times federal courts have applied the smoking gun metaphor to direct evidence, all of them apparently have occurred since Watergate became a household word.<sup>51</sup> In the parlance of that scandal, the notorious “smoking gun” was a White House tape of a conversation in “June 1972 in which Nixon and his chief of staff, H.R. Haldeman, concocted a plan to instruct the deputy chief of the [CIA] to tell the FBI director to call off the bureau’s probe into the Watergate burglary.”<sup>52</sup> The tape required some inferences to prove a conspiracy to obstruct justice, but not many. As we will see, similar recordings sometimes exist in antitrust cases.<sup>53</sup>

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<sup>49</sup> See, e.g., *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628–29 (7th Cir. 2010) (describing direct evidence as “the smoking gun in a price-fixing case”); *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993) (stating “plaintiff in a section 1 case does not have to submit direct evidence, i.e., the so-called smoking gun”); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1117 (5th Cir. 1979) (“Rarely, if ever, can a plaintiff point to a ‘smoking gun’ in [conspiracy] cases [so] a plaintiff must convince the court that it is reasonable to infer the existence of the gun from the facts shown.”); *In re Pork Antitrust Litig.*, No. 18-1776 (JRT/LIB), 2019 WL 3752497, at \*6 (D. Minn. Aug. 8, 2019) (“Courts must often consider whether complaints which fall short of alleging the ‘smoking gun’ nevertheless allege sufficient circumstantial facts to plausibly establish that defendants agreed to engage in the given anticompetitive conduct.”); *Hogan v. Pilgrim’s Pride Corp.*, No. 16-cv-02611-RBJ, 2018 WL 1316979 (D. Colo. Mar. 14, 2018) (“Where there is no ‘smoking gun’ to establish an agreement, courts assess whether complaints contain sufficient circumstantial evidence of an agreement.”).

<sup>50</sup> See, e.g., *Petruzzi’s, Inc.*, 998 F.2d at 1229 n.4 (“[C]ontrary to popular thought a smoking gun might be mere circumstantial evidence unless the witness saw it fired.”); *In re Processed Egg Prod. Antitrust Litig.*, 206 F. Supp. 3d 1033, 1048 n.6 (E.D. Pa. 2016) (“A ‘smoking gun,’ in truth, is circumstantial evidence of a shooting as it requires certain additional inferences, namely, seeing the post-trigg[er] pulling, puffs of smoke and deducing the immediate preceding events.”). The phrase apparently has its origin in the Sherlock Holmes story, “The Gloria Scott,” in which a murder suspect is described holding a “smoking pistol” when the narrator entered the room. See William Safire, *The Way We Live Now: 1-26-03: On Language; Smoking Gun*, N.Y. TIMES MAGAZINE (Jan. 26, 2003).

<sup>51</sup> *But cf.* *Haupt v. United States*, 330 U.S. 631, 640 (1947) (illustrating the meaning of “testimony to the overt act” under U.S. CONST. art. III, § 3, by a hypothetical witness who testified he heard a “report” and saw “a smoking gun in the hand of defendant and [saw] the victim fall”).

<sup>52</sup> Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CAL. L. REV. 1277, 1303 (2018) (citations omitted).

<sup>53</sup> Courts commentators also use a meeting in a “smoke-filled room” as a traditional paradigm of cartel behavior. The anachronistic smoke in the room lends a suggestion of villainy. *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010) (“Plaintiffs need not allege the existence of collusive communications in ‘smoke-filled rooms’ in order to state a § 1 Sherman Act claim.”); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 316 (N.D. Ga. 1993). (“The conspiracy that plaintiffs charge in the present action is far from the traditional price fixing case where competitors meet in ‘smoke-filled rooms’ to set prices and agree on retaliatory consequences.”); Randal C. Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 164–65 (“[I]n antitrust, plaintiffs are rarely invited to the proverbial smoke-filled rooms in which price-fixing conspiracies are hatched.”); George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 452

D. WHY DOES DIRECT EVIDENCE MATTER? CREDIBILITY  
VERSUS SUFFICIENCY

As the last section explained, there is no bright line in principle between direct and circumstantial evidence, because all evidence requires inferences or “interpretation” by both the witness and the factfinder;<sup>54</sup> the distinction is between shorter or longer chains of inference. Why then make the distinction at all? Why not focus only on the strength of the inferences or the probative value of the evidence?<sup>55</sup> One answer lies in the role of the court in evaluating the legal sufficiency of evidence, especially on motions for summary judgment.

First, consider the factfinder’s role in evaluating evidence. After a bench trial in the *Apple eBooks* civil litigation, the district court cited “powerful direct evidence corroborated by compelling circumstantial evidence” that Apple had participated in a conspiracy with book publishers.<sup>56</sup> It pointed to Steve “Jobs’ admissions . . . in contemporaneous e-mails pulled from the files of Apple, the Publishers, Amazon, and others; in the web of telephone calls among Publisher Defendants’ CEOs surrounding each turning point in the presentation and execution of the Agreements [with Apple]; and as compellingly, in the circumstantial evidence.”<sup>57</sup> This catalog includes several prototypical forms of direct evidence—admissions, text communications, and testimony of participants—but adds circumstantial evidence, which the court emphasized was just as compelling as direct evidence.<sup>58</sup> The court could have explained its findings just as easily without the distinction. Similarly, some

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(1982) (“The prototype of formal collusion is the smoke-filled room in which all the rivals engage in face-to-face communication, although in an era of conference calls and computers that can talk to one another, less dramatic settings can be employed to the same end.”).

<sup>54</sup> Greenstein, *supra* note 43, at 1804 (“All facts are a function of interpretation, and this unavoidability of interpretation makes all facts a matter of inference and all evidence, whether called ‘direct’ or ‘circumstantial,’ nothing more or less than a contribution to that inferential process.”).

<sup>55</sup> See, e.g., *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661–62 (7th Cir. 2002) (describing the “distinction between direct and circumstantial evidence” as “confusing (and, as it seems to us, largely if not entirely superfluous)”).

<sup>56</sup> *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 697 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015).

<sup>57</sup> *Id.* at 693.

<sup>58</sup> Circumstantial evidence can be far more probative. See, e.g., *Sylvester v. SOS Children’s Vill. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006) (Posner, J.) (“Perhaps on average circumstantial evidence requires a longer chain of inferences, but if each link is solid, the evidence may be compelling—may be more compelling than eyewitness testimony, which depends for its accuracy on the accuracy of the eyewitness’s recollection as well as on his honesty.”); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 252–55 (2006) (presenting data showing DNA or ballistics evidence is far more reliable than eyewitness identifications); BINDER & BERGMAN, *supra* note 33, at 80 (“[D]og tracks in the mud,” are more probative than “the sworn testimony of 100 witnesses that no dog passed by.”) (quoting WILLIAM PROSSER, *THE LAW OF TORTS* 212 (4th ed. 1971)).

courts instruct juries that they should consider all evidence regardless of the distinction between direct and indirect.<sup>59</sup> In doing so, juries are free to weigh the evidence and to assess witnesses' credibility.<sup>60</sup> Whether they are good at these tasks is a separate issue.<sup>61</sup>

The distinction between direct and circumstantial evidence is far more important in resolving motions that test the legal sufficiency of the plaintiff's case. As I show in more detail in the next Part, in per se cases that turn on the issue of agreement, the court's only task on a summary judgment motion is to decide whether the evidence, viewed in the light most favorable to the plaintiff, "tends to exclude" simple interdependence<sup>62</sup> and raises a "plausible" inference of tacit or express agreement.<sup>63</sup> The court must accept plaintiff's evidence as true, especially any direct evidence, whose probative value hinges on its credibility or weight.<sup>64</sup> If inferences from evidence are few and obvious,

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<sup>59</sup> FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, Instruction 1.12 (2017 rev.) ("The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence."), [www.ca7.uscourts.gov/pattern-jury-instructions/7th\\_cir\\_civil\\_instructions.pdf](http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf). See also ABA SECTION OF ANTITRUST LAW, ABA MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, B-3 (2005 ed.) ("Direct proof of an agreement may not be available. A conspiracy may be disclosed by the circumstances or by the acts of the members. Therefore, you may infer the existence of an agreement from what you find the alleged members actually did, as well as from the words they used.").

<sup>60</sup> See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 582 (1997) (arguing that the justice "system has become more and more willing over time to declare that the jury—and not the oath—has the job of screening untrustworthy evidence from the decisionmaking process").

<sup>61</sup> See, e.g., Heller, *supra* note 58, at 244 ("[R]esearch . . . has consistently found that jurors dramatically undervalue circumstantial evidence and just as dramatically overvalue direct evidence.").

<sup>62</sup> See, e.g., Kleen Prods. LLC v. Georgia-Pacific LLC, 910 F.3d 927, 934 (7th Cir. 2018) (holding plaintiffs must produce "evidence that would allow a trier of fact to nudge the ball over the 50-yard line and rationally to say that the existence of an agreement is more likely than not"); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396 (3d Cir. 2015) (emphasizing that, in making the determination, the court should consider the "record as a whole and in the light most favorable to the nonmovant, drawing reasonable inferences in its favor").

<sup>63</sup> When plaintiffs are alleging an "implausible" conspiracy—one to lower prices with small hope of recoupment, for example—they must produce correspondingly more persuasive evidence to raise a jury issue of agreement. *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 102 (2d Cir. 2018) (holding that, because alleged agreement was irrational, "[t]he kind of broad inferences Anderson urges upon us and that would be permitted if the conspiracy were economically sensible are not appropriate here"), *cert. denied*, 139 S. Ct. 1375 (2019); *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("[W]here a plaintiff's theory of recovery is implausible, it takes strong direct or circumstantial evidence to satisfy *Matsushita's* 'tends to exclude' standard.").

<sup>64</sup> The Supreme Court has emphasized these limitations in its summary judgment jurisprudence. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). See also *id.* at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine

there will be no issue of their reasonableness.<sup>65</sup> *Matsushita* “authorize[d] an inquiry on summary judgment into the ‘implausibility’ of inferences from circumstantial evidence, particularly in antitrust conspiracy cases, not an inquiry into the credibility of direct evidence.”<sup>66</sup> Moreover, “arguments concerning the weight to be given [to] . . . testimony are not appropriate at the summary judgment stage, at which the evidence must be viewed in the light most favorable to plaintiffs.”<sup>67</sup> One court, for example, denied summary judgment because “a jury considering [the direct evidence] could believe it and reasonably conclude that agreements not to compete did exist. . . . The possibility that a jury might not believe the direct evidence does not, in itself, mean that the jury should not consider it.”<sup>68</sup> After a trial on remand, the jury found for the defendant, evidently not believing the plaintiff’s evidence—a result fully consistent with its role in evaluating credibility.<sup>69</sup>

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issue for trial.”). The Court recently reminded courts of appeals of this constraint on their discretion. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (“The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. . . . By weighing the evidence and reaching factual inferences contrary to [the plaintiff’s] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.”); *id.* at 658 (“By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly ‘weigh[ed] the evidence’ and resolved disputed issues in favor of the moving party.”) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

<sup>65</sup> *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (stating that because “no inferences are required from direct evidence to establish a fact . . . a court need not be concerned about the reasonableness of the inferences to be drawn from such evidence”).

<sup>66</sup> *McLaughlin v. Liu*, 849 F.2d 1205, 1207 (9th Cir. 1988). *See also* *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626 (9th Cir. 1987):

[T]he inquiry [on a motion for summary judgment] focuses on whether the nonmoving party has come forward with sufficiently “specific” facts from which to draw reasonable inferences about other material facts that are necessary elements of the nonmoving party’s claim. Were we to construe the Court’s statements as requiring a court to ask whether a jury could find in favor of the nonmoving party viewing all of the evidence—both that presented by the nonmoving party and that presented by the moving party—such a construction would contradict the clear instruction that a court may not weigh the evidence or assess its credibility.

*Id.* at 631 n.3.

<sup>67</sup> *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1154 (D. Kan. 2012).

<sup>68</sup> *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008).

<sup>69</sup> *See* *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 386 F. App’x 214, 223 (3d Cir. 2010) (distinguishing “the duty of a district court to deny a motion for a judgment as a matter of law if the evidence, viewed in the light most favorable to the nonmoving party, is sufficient for presentation to a jury to determine its credibility and weight” from the jury’s duty to determine “whether the plaintiff’s direct evidence of an unlawful agreement has been proved . . . by a preponderance of the evidence”).



## II. THE CLASSIFICATION AND SUFFICIENCY OF DIRECT EVIDENCE OF AGREEMENT

In the last Part, I explained why direct evidence is important on motions testing the sufficiency of the plaintiff's evidence to raise a jury issue. Direct evidence raises straightforward inferences of a fact, so challenges to the evidence are usually limited to questions of credibility, which are always for the jury. In this section, I consider how courts classify evidence and allegations as direct and how they evaluate its sufficiency.

### A. SUFFICIENCY OF DIRECT EVIDENCE ON MOTIONS FOR SUMMARY JUDGMENT

Some courts have said that producing direct evidence of agreement by itself satisfies the plaintiff's burden on a motion for summary judgment and takes the case entirely out of the *Matsushita* framework.<sup>70</sup> One court has even defined direct evidence in terms of legal sufficiency: "Direct evidence [of agreement] is that which can defeat a request for summary judgment if 'taken as true,' whereas circumstantial evidence can defeat a summary judgment motion only if inferences are drawn in the nonmovant's favor."<sup>71</sup> This definition combines the standard definition of direct evidence (it requires no inferences to prove a fact at issue) with the special role of direct evidence in evaluating the legal sufficiency (that the court must assume its truth). Other courts require a showing of a tendency to exclude independent action, "whether it be by circumstantial or direct evidence."<sup>72</sup> Based on passages like these, some

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<sup>70</sup> Rossi v. Standard Roofing, 156 F.3d 452, 466 (3d Cir. 1998) ("Under our jurisprudence, the *Matsushita* standard only applies when the plaintiff has failed to put forth direct evidence of conspiracy."). Most of these statements are dicta because the courts go on to find no direct evidence. See, e.g., Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1300–01 (11th Cir. 2003) ("In the unusual case where the plaintiff is able to muster direct evidence of price fixing, summary judgment is categorically inappropriate.") (dicta); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 160 (3d Cir. 2003) (referring to a "direct evidence exception") (dicta). Other cases use similar language in dicta. See, e.g., Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 192 n.2 (3d Cir. 2017) (dicta); *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 397 n.9 (3d Cir. 2015) (dicta); *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 357 n.7 (3d Cir. 2004) (dicta); *Petruzzi's*, 998 F.2d at 1234 (dicta). The Third Circuit has adopted a similar rule on motions to dismiss. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323 (3d Cir. 2010) ("[C]onsistent with summary judgment analysis, plus factors need be pled only when a plaintiff's claims of conspiracy rest on parallel conduct. Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate.").

<sup>71</sup> Toscano v. Prof'l Golfers Ass'n, 258 F.3d 978, 983 (9th Cir. 2001).

<sup>72</sup> Nitro Distrib., Inc. v. Alticor, Inc., 565 F.3d 417, 423 (8th Cir. 2009) (internal citation omitted). See also *id.* at 424 ("Although the presentation of direct evidence of an unlawful conspiracy will likely preclude a lawful explanation, it does not follow that the possibility of independent action need not be excluded when direct evidence is provided.").

have reasonably concluded that there is a circuit split over the applicability of *Matsushita* to direct evidence.<sup>73</sup>

But not all direct evidence is the same. Direct evidence represents the communications among rivals necessary to form the alleged agreement, but this standard is a matter of degree—how few inferences from the evidence are necessary to prove the agreement.<sup>74</sup> The number of inferences depends on two characteristics of the evidence. First, it depends on the relative clarity or ambiguity of the evidence. Evidence differs, for example, in how fully it represents the contents of a communication. Second—and equally important—classification depends on the relative completeness with which the evidence represents the full range of facts in issue on the questions of agreement. Evidence is only direct evidence of what it represents. Evidence may clearly represent a communication, but not the full temporal and spatial scope or all the participants in the alleged agreement. In that case, as I explain more fully in this section, it may be direct evidence of parts of the alleged agreement, but only circumstantial evidence of others.

Where the court places the evidence on these two continuums will determine whether it classifies it as direct evidence of the full agreement or of relevant facts that fall short of the full agreement. That decision, in turn, will influence whether the evidence is sufficient by itself or only in combination with other circumstantial evidence. The two decisions interact: the court can choose to classify the evidence in different ways, or even in alternative ways, depending upon its relationship to other circumstantial evidence. And there is choice involved, so not every court will see the same pattern of evidence in the same way.

Most courts find that unambiguous evidence of the terms of the alleged agreement itself, or unambiguous evidence of communication that addresses all aspects of an alleged agreement, satisfies the standard of sufficiency. In *Wellbutrin*, for example, the court found that a “signed agreement is direct evidence of a conspiracy” and “the existence of the *Wellbutrin* Settlement—

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<sup>73</sup> See, e.g., PROOF OF CONSPIRACY, *supra* note 77, at 187–88 (suggesting that the Third, Fifth, Ninth, and Eleventh Circuits hold that *Matsushita* does not apply where the plaintiff has produced direct evidence, but Eighth and Tenth Circuits hold otherwise).

<sup>74</sup> *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012) (“All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though “[p]erhaps on average circumstantial evidence requires a longer chain of inferences.”) (quoting *Sylvester v. SOS Children’s Vill. Ill., Inc.*, 453 F.3d 900 (7th Cir. 2006) (Posner, J.)). The court found that “the totality of the evidence, viewed in the light most favorable to plaintiffs and with proper regard for the *Matsushita* standards, could support a reasonable inference of illegal collusive behavior.” *Id.* The court added that “Whether or not this testimony—a co-conspirator’s acknowledgment that he understood his numerous communications . . . to reflect a price-fixing agreement—admits any ambiguity . . . the testimony is surely strong evidence of a collusive scheme . . .” *Id.*

an agreement—is sufficient evidence for a reasonable jury to find that GSK participated in the alleged conspiracy,” without further analysis under *Matsushita*.<sup>75</sup> Written instruments, of course, are not themselves the agreement at issue; they are direct evidence of the agreement—perhaps the best kind.

Courts might require all direct evidence to spell out the full scope and terms of the agreement. Any evidence or pattern of evidence that fell short of that degree of clarity and thoroughness would then be relegated to the circumstantial category. Many courts, however, use the category of direct evidence in a more flexible and qualified sense for these other patterns. This more flexible approach still assumes an unmet ideal of explicit evidence of the full agreement but recognizes the strengths and weaknesses of less-than-ideal evidence.

Courts sometimes accept relatively ambiguous evidence of communications as direct. One example is *Toledo Mack*, quoted earlier.<sup>76</sup> There, the direct evidence was borderline: testimony describing statements of dealers that they “did not compete on price” and other testimony dealers had a “gentlemen’s agreement” or “unwritten understandings”<sup>77</sup> not to compete in one other’s territories. These kinds of statements, which do not describe direct communications or the terms of the agreement, are arguably consistent with lawful tacit collusion. Nevertheless, the court found the evidence was direct and alone sufficient to raise a jury issue, even though “Toledo’s inability to present the details of any agreement among dealers [might] leave a jury unpersuaded that such agreements did in fact exist.”<sup>78</sup>

Calling these conclusory statements direct evidence of agreement is a stretch. Another court characterized similar testimony referring to an “unwritten understanding” as “weak direct evidence” that should be evaluated along with still more ambiguous evidence, but still held it sufficient.<sup>79</sup> As I show in Part IV, other courts characterize similar evidence as noneconomic circumstantial evidence of “traditional conspiracy,” which can be the decisive plus factor necessary to avoid summary judgment. Still more ambiguous evidence

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<sup>75</sup> *In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 3d 734, 770 (E.D. Pa. 2015) (dicta), *aff’d on other grounds*, 868 F.3d 132 (3d Cir. 2017). The district court granted summary judgment for the defendants on grounds of, for example, lack of anticompetitive effect, but considered the issue of agreement “in an effort to be complete.” *Id.* at 769 n.51.

<sup>76</sup> *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008).

<sup>77</sup> *Id.* at 220.

<sup>78</sup> *Id.*

<sup>79</sup> See *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 527 F. Supp. 2d 1257, 1301, 1315 (D. Kan. 2007) (holding testimony that “there was an unwritten understanding that [managed care providers] would not be extending managed care contracts to specialty hospitals” like the plaintiff, was only “weak direct evidence” and that still less specific statements referring to agreements were circumstantial evidence, but that, considered together, the evidence was sufficient to avoid summary judgment).

of communications—those equally likely to have a purely benign interpretation—are likely to be found insufficient to avoid summary judgment.<sup>80</sup>

Clear but less complete evidence might be direct evidence of some part of the agreement at issue, but only circumstantial evidence of the completed agreement. When courts find that the evidence falls short of the proof of a completed agreement, they may still say that there is direct evidence of a component fact, such as communications,<sup>81</sup> an invitation to collude,<sup>82</sup> or one side of an allegedly conspiratorial phone call.<sup>83</sup> In cases like these, the evidence may be direct, in the sense that it establishes a fact through a document or the direct observation of the witness, but it is, at most, circumstantial evidence of the alleged agreement. In other instances, as I say, courts may find there is direct evidence of an agreement, but not the full scope of the agreement the plaintiff alleges. For example, evidence of private communications among three defendants might be direct evidence of their participation in the agreement, but not direct evidence of a fourth defendant's participation.<sup>84</sup>

A few courts have used the term “weak direct evidence” or similar language to characterize direct evidence of part of the alleged agreement.<sup>85</sup> In

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<sup>80</sup> See, e.g., *Superior Offshore Int'l, Inc. v. Bristow Group, Inc.*, 490 F. App'x 492, 498 & 500 (3d Cir. 2012) (finding testimony of a witness that he did “not recall the exact words . . . [of] the alleged illicit conversation” but had “a general sense that there was something wrong about” it was too vague to be either direct or circumstantial evidence of conspiracy).

<sup>81</sup> See, e.g., *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (finding “direct evidence of communications” was circumstantial evidence supporting the FTC's inference of horizontal agreement among toy companies (at the urging of Toys “R” Us) to boycott warehouse clubs); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 121 (3d Cir. 1999) (finding plaintiffs' “direct evidence evince[d] only an exchange of information among the defendants”).

<sup>82</sup> See, e.g., *U.S. Horticultural Supply, Inc. v. Scotts Co.*, No. 04-5182, 2009 WL 89692, at \*10 (E.D. Pa. 2009) (finding a note that “memorialize[d] an offer made by Griffin to limit its suppliers in return for Scotts' limitation of distributors” was not direct, because to “stand as proof of conspiracy, a jury would need to infer that this offer was accepted”).

<sup>83</sup> *Superior Offshore Int'l, Inc. v. Bristow Group Inc.*, No. 1:09-CV-00438-LDD, 2010 WL 11470613, at \*5 (D. Del. Dec. 1, 2010) (finding allegations that a witness overheard one side of a conversation about making a major price increase were “direct evidence only of what [the witness] now believes [that side] said in 2001”).

<sup>84</sup> A defendant is liable only if sufficient evidence links it to the conspiracy. See, e.g., *In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999) (finding that, despite guilty pleas by four of its rivals, “we can find nothing in the record that establishes, without requiring any inferences, that Cargill participated in the citric acid price-fixing conspiracy”). In *Citric Acid*, the district court had found direct evidence that Cargill did not participate. *In re Citric Acid Litig.*, 996 F. Supp. 951, 955 (N.D. Cal. 1998) (finding “most persuasive” the testimony of a conspirator “that no one from Cargill attended any of the meetings at which the conspirators allocated market share”), *aff'd*, 191 F.3d 1090 (9th Cir. 1999). Courts also found direct evidence of agreement among fewer than all the named defendants in *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 472 (3d Cir. 1998) and *In re Citric Acid*, 996 F. Supp. at 956.

<sup>85</sup> See, e.g., *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 779 (7th Cir. 1999) (finding circumstantial evidence was sufficient, but adding the plaintiff had “some direct evidence as well [that] strikes us as equivocal, and we have not thought it necessary to discuss it; but we do not mean to suggest that it should not be admitted at the trial”).

*Champagne Metals*, for example, the court found evidence that an existing distributor warned a supplier its dealings with the plaintiff were “not in the best interest of the industry, and would cause other distributors in that area of the country to source their metals from other mill sources”<sup>86</sup> was “explicit,” but was nevertheless only “weak direct evidence” of an agreement among distributors, because, among other shortcomings, it did not name other distributors that were part of the agreement.<sup>87</sup> Consequently “additional circumstantial evidence [was] required to overcome a motion for summary judgment.”<sup>88</sup> The same testimony could as easily, and with the same result, have been treated as noneconomic circumstantial evidence of the agreement.

A court, especially one anticipating review, may also evaluate the evidence on alternative grounds: either as direct if viewed separately, or as circumstantial if viewed as part of a complex pattern. In *Urethane*,<sup>89</sup> for example, a class of urethane buyers alleged that the manufacturers, including Dow, the only non-settling defendant, had conspired to fix prices. On a motion for summary judgment, the “most substantial direct evidence of an agreement to fix prices”<sup>90</sup> was the testimony of a Dow executive that she had attended meetings at which her superior said repeatedly that “he had met with [named competitors] and reached agreements to set prices and make price increases stick.”<sup>91</sup> She also testified another Dow executive told her a rival was “unhappy because Dow was not charging the full amount of a recent price increase with a particular customer,” and warned her that, if she “told anyone about their conversation, he would deny it and call her a liar.”<sup>92</sup> And she got a call from a competitor who said, “I just want to let you know we’re being good.”<sup>93</sup> Dow tried to refute the testimony with denials by the named execu-

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<sup>86</sup> *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1083 (10th Cir. 2006).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1884. After remand, the district court found that the evidence was “not overwhelming,” but viewed “cumulatively and in the light most favorable to the plaintiff,” it established “the existence of a genuine issue of fact as to whether the Established Distributors entered into a conspiracy.” *Champagne Metals v. Ken-Mac Metals, Inc.*, No. CIV-02-0528-HE, 2007 WL 4115994, at \*1–2 (W.D. Okla. July 27, 2007). Similarly, in *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 468 (3d Cir. 1998), the court found that plaintiff’s testimony that a rival claimed to have an agreement with another rival and threatened to cut off the plaintiff’s supplies was direct evidence. Nevertheless, the court found plaintiff’s evidence was “not enough by itself to satisfy [the plaintiff’s] burden in opposing summary judgment” in favor of all the defendants, particularly a primary supplier. *Id.* at 469. It denied summary judgment only after a detailed analysis of all the circumstantial evidence. *Id.* at 472 (“Looking at all of the evidence Rossi has assembled . . . we conclude that he has satisfied his burden in opposing summary judgment on the concerted action prong.”).

<sup>89</sup> *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1154 (D. Kan. 2012).

<sup>90</sup> *Id.* at 1153.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

tives, but the court responded that “[s]uch arguments concerning the weight to be given this testimony . . . are not appropriate at the summary judgment stage, at which the evidence must be viewed in the light most favorable to plaintiffs.”<sup>94</sup>

The court recognized that “some of this testimony might be characterized as circumstantial instead of direct evidence—the second and third incidents” described above, but “the remainder of this testimony does constitute direct evidence of an agreement, in the form of admissions by persons with knowledge of the agreement. No additional inference is necessary to get to the existence of an agreement.”<sup>95</sup> Despite this last finding, the district court covered all the bases by adding that “even if none of this evidence constituted strong direct evidence that could defeat summary judgment by itself, each piece of evidence supports the other, such that a reasonable jury could find that an agreement existed from this testimony taken together.”<sup>96</sup> Other circumstantial evidence, both references to more ambiguous communications and economic plus factors, also corroborated the direct evidence.<sup>97</sup>

#### B. SUFFICIENCY OF ALLEGATIONS OF DIRECT EVIDENCE ON MOTIONS TO DISMISS

The distinction between direct and circumstantial evidence also affects the evaluation of the plausibility of allegations under *Twombly*'s pleading standard. The courts recognize the differences between the two contexts: at the pleading stage, plaintiffs have not ordinarily had access to discovery, but may still allege the existence of evidence they have already or hope to find during discovery,<sup>98</sup> within the bounds of Rule 11.<sup>99</sup> If plaintiffs do allege direct (or

<sup>94</sup> *Id.* at 1154.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1155–56. Dow proposed a number of legitimate justifications for its actions, but the court refused to consider them because of the existence of some direct evidence. *Id.* at 1157.

<sup>98</sup> *See, e.g.,* *Starr v. Sony BMG Music Entm't.*, 592 F.3d 314, 325 (2d Cir. 2010) (“Although the *Twombly* court acknowledged that for purposes of summary judgment a plaintiff must present evidence that tends to exclude the possibility of independent action . . . it specifically held that, to survive a motion to dismiss, plaintiffs need only enough factual matter (taken as true) to suggest that an agreement was made.”) (internal quotations and citations omitted); *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 804 (N.D. Ill. 2017) (“Any direct evidence of the agreement will only be uncovered through discovery. Allegations that each defendant participated in the parallel conduct, participated in the meetings that provided the opportunity to collude, participated in [a statistical exchange program], and participated in variable contracts or exports, are sufficient to allege participation in the agreement.”). *Cf. In re Cathode Ray Tube Antitrust Litig.*, No. C-07-5944-SC, 2013 WL 5425183, at \*2 (N.D. Cal. Sept. 26, 2013) (applying more stringent pleading standards after plaintiff in an MDL had access to discovery in related litigation).

<sup>99</sup> FED. R. CIV. P. 11(b)(3) (providing that presenting a complaint represents to the court that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”).

very probative circumstantial) evidence agreement, courts assume the alleged facts to be true and deny the motion to dismiss.<sup>100</sup> Discovery, however, may well fail to locate testimony or documentary evidence to back up the allegations, so plaintiffs often survive a motion to dismiss only to lose on summary judgment.<sup>101</sup>

Even recognizing the differences in context, courts describe the pleading requirements using many of the same terms that courts use on motions for summary judgment. Courts, for example, interpret *Twombly* to require antitrust plaintiffs to allege a version of the plus factors necessary to avoid summary judgment.<sup>102</sup> They also use language drawn from the summary judgment context, like the “no inferences” definition of direct evidence, to evaluate allegations of direct evidence on a motion to dismiss.<sup>103</sup> In *Twombly*, the Court adapted *Matsushita*’s inferential standards to motions to dismiss a complaint’s allegations of agreement.<sup>104</sup> In doing so, it distinguished complaints that allege

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<sup>100</sup> See, e.g., *Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010) (“If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled.”); *Rochester Drug Co-op., Inc. v. Biogen Idec U.S.*, 130 F. Supp. 3d 764, 769 n.2 (W.D.N.Y. 2015) (“[U]nder *Twombly*, while a Sherman Act § 1 complaint premised on direct evidence of an agreement requires ‘time, place, or person’ allegations regarding the claimed illegal agreement, complaints premised on circumstantial evidence, which are the lion’s share of the pleadings in the antitrust arena, do not require such factual matter.”).

<sup>101</sup> *Compare Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 187 (2d Cir. 2012) (“The [complaint] alleges actual agreement; it alleges not just that all of the defendants ceased, in virtual lock-step, to deal with [a rival], but alleges that on various dates within the preceding two-week period defendants . . . had met or communicated with their competitors and others and made statements that may plausibly be interpreted as evincing their agreement to attempt to eliminate [rivals] . . . and to divide [the] market”), with *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 113 (2d Cir. 2018) (“Although some of the evidence discussed above is suggestive of an agreement . . . the evidence [as a whole] does not sufficiently ‘tend to exclude’ the possibility that defendants acted permissibly.”), *cert. denied*, 139 S. Ct. 1375 (2019).

<sup>102</sup> See, e.g., *Quality Auto Painting Ctr. v. State Farm Indem. Co.*, 917 F.3d 1249, 1267 (11th Cir. 2019) (en banc) (applying the “tends to exclude” standard on a motion to dismiss); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 n.22 (3d Cir. 2010) (holding that *Twombly* “necessarily rejected the proposition that plaintiffs may plead conspiracy on the basis of mere parallelism—and thus necessarily required the pleading of plus factors”). A similar standard applied in some circuits even before *Twombly*. See, e.g., *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253–54 (2d Cir. 1987) (“[The] plaintiff must show the existence of additional circumstances, often referred to as ‘plus’ factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.”).

<sup>103</sup> See, e.g., *In re N.J. Tax Sales Certificates Antitrust Litig.*, No. 12-1893 (MAS) (TJB), 2014 WL 5512661, at \*4 n.7 (D.N.J. Oct. 31, 2014) (“Although [the] definition of direct evidence of conspiracy comes from a case discussing the standard for proving a conspiracy on summary judgment . . . the standard has been applied in cases involving a motion to dismiss.”) (citing *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999)).

<sup>104</sup> Courts must first identify plaintiff’s factual allegations and then determine the plausibility of inferences of collusion from the alleged facts, assumed to be true, in much the same way they must determine the sufficiency of inferences of collusion from circumstantial evidence under *Matsushita*. See *TruePosition, Inc. v. LM Ericsson Tel. Co.*, 844 F. Supp. 2d 571, 584 (E.D. Pa. 2012) (“We find that *Twombly* requires a level of factual detail that makes it more likely that the

only parallel conduct from those that include “independent allegation[s] of actual agreement among” defendants.<sup>105</sup> Some lower courts have interpreted this language to mean “[a]llegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate.”<sup>106</sup> For example, one court recently rejected a defendant’s argument that witnesses’ “alleged confessions [were] ‘nonsensical’” because the court could not “ignore well-pleaded allegations of fact (that the executives admitted the agreement), and then credit an inference in Defendants’ favor.”<sup>107</sup>

And here too, courts usually find plaintiffs have failed to allege direct evidence.<sup>108</sup> For example, a “conclusory” allegation that unnamed employees of rivals “reached an agreement” on a particular date to raise prices on two products was “insufficiently detailed to constitute direct evidence suggesting that an agreement was made.”<sup>109</sup> Nevertheless, courts have found direct evidence in sufficiently specific allegations of phone calls or emails,<sup>110</sup> meetings,<sup>111</sup> or

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Defendants’ conduct was the result of an unlawful agreement rather than some other independent and lawful explanation and that such requirement is not a ‘probability’ requirement.”). *But see* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 340 (2013) (“I always thought ‘more likely’ meant a fifty-one percent likelihood or more. How is that not a probability requirement, which is precisely what *Twombly* and *Iqbal* said is not required to establish a complaint’s plausibility?”).

<sup>105</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007).

<sup>106</sup> *Insurance Brokerage*, 618 F.3d at 323. The court added that, “after *Twombly*, if a plaintiff expects to rely exclusively on direct evidence of conspiracy, its complaint must plead ‘enough fact to raise a reasonable expectation that discovery will reveal’ this direct evidence.” *Id.* at 324. *See also* *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 43–44 (1st Cir. 2013) (*Twombly* “elicited considerable confusion” about pleading agreement “in the absence of direct evidence.”); *Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010) (“If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled.”).

<sup>107</sup> *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d 931, 952 (N.D. Ill. 2018).

<sup>108</sup> *See, e.g., Tichy v. Hyatt Hotels Corp.*, 376 F. Supp. 3d 821, 834 (N.D. Ill. 2019) (agreeing with defendant’s argument that the complaint did not plead direct evidence because “[t]here are not even factual allegations of any communications”); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885, 896–97 (S.D.N.Y. 2018) (stating that plaintiff could plead direct evidence by alleging a “recorded phone call or email in which competitors agreed to fix prices,” but finding that allegations of text messages among defendants were too ambiguous to constitute direct evidence).

<sup>109</sup> *In re Mylan N.V. Secs. Litig.*, 379 F. Supp. 3d 198, 209 (S.D.N.Y. 2019).

<sup>110</sup> *See, e.g., In re Iowa Pub. Emp. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F. Supp. 3d 285, 318 (S.D.N.Y. 2018) (finding that allegation that one executive stated “on a recorded . . . conference call” that he and a rival executive had “agreed that Morgan Stanley and Goldman Sachs needed to ‘get a hold of this thing’” by excluding the rival “qualified as direct”).

<sup>111</sup> *See, e.g., Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) (finding sufficient allegations that (1) a rival carpet dealer met with a carpet supplier’s managers to form a plan to exclude the plaintiff by denying needed supplies, and (2) that actual refusals to sell in three later years “stemmed from” the earlier agreement); *Lease Am. Org. Inc. v. Rowe Int’l Corp.*, No. 13-40015-TSH, 2014 WL 1330928, at \*2 (D. Mass. March 31, 2014) (finding allegations that defendant association “convened a meeting” at which “it was



admissions,<sup>112</sup> if the alleged communications include the necessary promises or statements of intent. Although some allegations are extraordinarily specific,<sup>113</sup> less specific allegations can be sufficient before any discovery.<sup>114</sup> At least one court has applied the category of “weak direct evidence” to characterize allegations on a motion to dismiss.<sup>115</sup> I consider some of these cases in the next Part.

### III. FORMS OF DIRECT EVIDENCE OF AGREEMENT

In this article I have been arguing that courts call evidence direct if it represents the communications that formed the alleged agreement relatively completely and unambiguously. Direct evidence almost always satisfies *Matsushita* and allegations of it almost always satisfy *Twombly*, either by themselves or with other evidence. Evidence that is somewhat less clear or that represents parts or elements of the alleged agreement might be classified as direct in a qualified sense. In this Part, I consider how courts have applied this concept of direct evidence to the forms of evidence that commonly appear

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decided to boycott [another defendant] if it continued to allow [plaintiff] to sell direct,” and that the association then made the planned threat, “more than made out a plausible claim of direct evidence of an illegal agreement”).

<sup>112</sup> See, e.g., *In re Dealer Mgmt. Sys. Antitrust Litig.*, 362 F. Supp. 3d 510, 535–36 (N.D. Ill. 2019) (finding that an executive’s admission that “[W]e’ve entered into an agreement” with named rivals and “we’re working collaboratively to remove all hostile integrators from our DMS system” was direct evidence). For a broader interpretation of direct evidence allegations, see *B & R Supermarket, Inc. v. Visa, Inc.*, No. C 16-01150 WHA, 2016 WL 5725010, at \*6–7 (N.D. Cal. Sept. 30, 2016) (holding that an allegation that a credit card vice president said that “the card brands are not going to delay the liability shift date” was direct evidence of a conspiracy (to shift liability to merchants if they failed to adopt chip technology), because she “could not speak so confidently on behalf of all networks save and except for her knowledge of collusion, for true competition would have driven one or more networks to break ranks and offer more competitive terms”).

<sup>113</sup> See, e.g., *In re N.J. Tax Certificates Antitrust Litig.*, No. 12-1893 (MAS) (TJB), 2014 WL 5512661, at \*5 (D.N.J. Oct. 31, 2014) (finding the plaintiffs alleged “direct evidence of conspiracy regarding the individual auctions, combined with allegations of statewide collusion” by “provid[ing] the date and location of each alleged instance of collusion [in nearly 50 municipal auctions], as well as the identities of the conspirators” and their roles “in advancing the conspiracy”).

<sup>114</sup> See, e.g., *Markson v. CRST Int’l, Inc.*, No. 5:17-cv-01261-VAP-SPx, 2019 WL 6354400, at \*4 (C.D. Cal. Mar. 7, 2019) (“Defendants’ argument that Plaintiffs [having pleaded direct evidence of a no-poaching conspiracy] must specifically allege which persons, on behalf of Defendants, consummated the conspiracy and exactly when they did so goes beyond the pleading requirement—otherwise, those subjected to a conspiracy would almost never be able to survive a motion to dismiss because, by definition, they were not privy to such transactions and discovery would be required to reveal any more specific evidence.”).

<sup>115</sup> *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1074–75 (D. Colo. 2016) (holding that an allegation that a defendant’s representative “admitted that there was an understanding between all of the Sponsors to pay standard au pairs the same amount” equal to the government-set minimum, among other statements, was “‘weak’ direct evidence” because it did not identify the speaker; additional allegations of circumstantial evidence satisfied *Twombly*).

in Section 1 litigation.<sup>116</sup> In Part IV, I will argue that courts' understanding of direct evidence in cases like these also guides the evaluation of circumstantial evidence in analogous contexts.

#### A. DOCUMENTARY EVIDENCE OF AGREEMENT

The Eleventh Circuit recently said that “a contract can serve as the basis for a Section 1 claim only if it embodies an agreement to unlawfully restrain trade.”<sup>117</sup> Although the court was not talking about direct evidence, it can be understood in those terms: any written contract is evidence of an agreement, but it is only direct evidence of Section 1 agreement if it fully represents the agreement alleged in the complaint to be unlawful. In *Androgel*, for example, the court wrote:

In this case, the settlement agreements specifically address the conduct the Plaintiffs argue is unlawful. The parties negotiated and agreed that in exchange for dropping the patent litigation, providing some services, and delaying generic introduction until 2015, the Generics would receive compensation. Whether that common objective—dropping the patent litigation in exchange for compensation—was an illegal restraint of trade is a separate question. But if it was, then the settlements are clear, direct evidence of an agreement to unlawfully restrain trade. Not only is there enough evidence for a jury to find that there was an agreement, it is doubtful that a reasonable jury could find otherwise.<sup>118</sup>

Notice that the court emphasized that the settlement is the product of negotiation and, on its face, reflects their express agreement.

Modern pay-for-delay patent settlements are not the only agreements that can fit this description. In the early years of antitrust, rivals were known to spell out the details of cartel agreements in written contracts. In *United States v. Addyston Pipe & Steel Co.*, for example, the government alleged six pipe producers formed a bid rigging and market allocation agreement in violation of Section 1.<sup>119</sup> The court considered a range of economic and documentary evidence, including passages from the minutes of the producers' association, to illustrate the practical operation of the arrangement, both as an “auction pool” and as a system of “reserved” cities designating members of the association as winning bidders. But Judge Taft held that the producers' written “contract of association,” which spelled out the terms of the agreement, was “on its face an extensive scheme to control the whole commerce among 36

<sup>116</sup> See also PROOF OF CONSPIRACY, *supra* note 77, at 63–65 (surveying “witness testimony,” “documents showing an agreement,” “guilty pleas,” and “admissions by a defendant”).

<sup>117</sup> *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1081 (11th Cir. 2016).

<sup>118</sup> *In re Androgel Antitrust Litig. (No. II)*, No. 1:09-MD-2084-TWT, 2018 WL 2984873, at \*8 (N.D. Ga. June 14, 2018).

<sup>119</sup> 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

states in cast-iron pipe, and that the defendants were fully aware of the fact whether they appreciated the application to it of the anti-trust law or not.”<sup>120</sup>

In more recent Supreme Court decisions, like *Professional Engineers*,<sup>121</sup> *Maricopa*,<sup>122</sup> and *NCAA*,<sup>123</sup> formal arrangements satisfied the agreement element so clearly that defendants did not contest the existence of agreement but instead argued it was lawful under some version of the rule of reason—the “separate issue” the court mentioned in *Androgel*. Similarly, in *Palmer v. BRG of Georgia, Inc.*,<sup>124</sup> a national bar review course provider signed a written agreement with BRG, a Georgia bar review provider, under which the parties agreed the national provider “would not compete with BRG in Georgia and that BRG would not compete with [the national provider] outside of Georgia.”<sup>125</sup> The Supreme Court found the agreement per se illegal in an unsigned, per curiam opinion. As the dissenting judge in the court of appeals wrote, the “explicit written agreement between two competitors allocating markets and interfering with independent price setting” was “direct evidence” of the illegal agreement.<sup>126</sup>

The category of written direct evidence of agreement may include multiple agreements with a common objective. In one case, a series of written resolutions in which rivals adopted unified positions in rate negotiations with a government agency was “direct evidence of an express agreement between defendant hospitals” that justified summary judgment for the plaintiff on the issue of agreement.<sup>127</sup> Similarly, a resolution of local dental associations recommending that their members not participate in Blue Shield, followed by “mass withdrawals of participation,” amounted to “direct, frequent, public, on-the-record evidence of improper concerted action.”<sup>128</sup>

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<sup>120</sup> *Id.* at 301; see also *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 292–97 (1897) (quoting the text of a written cartel agreement).

<sup>121</sup> *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 684 (1978) (describing engineers’ admitted agreement “to abide by canons of ethics prohibiting the submission of competitive bids”).

<sup>122</sup> *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 335 (1982) (describing “agreements among competing physicians setting, by majority vote, [their] maximum fees”).

<sup>123</sup> *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 91–92 (1984) (describing the NCAA’s Television Plan, approved by vote of its members, that limited the number of college football games broadcast).

<sup>124</sup> 498 U.S. 46 (1990), *rev’g* 874 F.2d 1417 (11th Cir. 1989).

<sup>125</sup> *Id.* at 47.

<sup>126</sup> 874 F.2d at 1431 (Clark, J., dissenting).

<sup>127</sup> *United States v. N. Dakota Hosp. Ass’n*, 640 F. Supp. 1028, 1036 (D. N.D. 1986).

<sup>128</sup> *Pa. Dental Ass’n v. Med. Serv. Ass’n of Pa.*, 815 F.2d 270, 273–74 (3d Cir. 1987). See also *Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr.*, No. CIV. 11-1290 RMB KMW, 2012 WL 1390249, at \*2 (D.N.J. Apr. 19, 2012) (finding “direct evidence. . . Defendants’ conduct was coordinated with its alleged coconspirators, not independent,” including “a written agreement” and a “written e-mail between all the parties to the alleged conspiracy” that were alone sufficient to show defendants’ “participation in the alleged conspiracy”).

Other written direct evidence may be hot documents in corporate files clearly representing the operation of an agreement with a rival. One court found that an internal memorandum describing a meeting of an auto dealers' association was direct evidence of a conspiracy to prevent the plaintiff from receiving a franchise.<sup>129</sup> More recently, a court found that "statements and emails . . . indicating that the casinos had entered into a 'gentlemen's agreement' to not deal with" plaintiff's web site and that one casino "had to terminate its relationship with [the site] as a result of the casinos' agreement at the May 30, 2001 meeting" were "if credited, direct evidence" of the alleged boycott.<sup>130</sup>

#### B. VIDEO OR VOICE RECORDINGS AND CONVERSATIONS BY TEXT OR SOCIAL MEDIA

In a frequently cited passage, the Second Circuit offered as a paradigm of direct evidence of agreement "a recorded phone call in which two competitors agreed to fix prices at a certain level."<sup>131</sup> Precedents characterizing video or voice recordings as direct evidence are more common in drug conspiracies,<sup>132</sup> but recordings have played an important and comparable role in Section 1 cases as well.<sup>133</sup> High-quality recordings of conversations in which identi-

<sup>129</sup> *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987).

<sup>130</sup> *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410–11 (5th Cir. 2007). The court remanded for the district court to determine whether the emails were admissible and whether the admissible evidence sufficiently suggested agreement. *Id.* at 411. *See also* *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010) (allegations of a letter between the defendants and the CEO's admission of concerted action were direct evidence). Written evidence of communications, of course, may not be direct or even suggestive of agreement. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 121 (3d Cir. 1999) (finding plaintiffs' "direct evidence evince[d] only an exchange of information among the defendants"); *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 272 (5th Cir. 2009) ("[H]ere the emails actually reveal disagreement among the Appellees.").

<sup>131</sup> *Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013).

<sup>132</sup> Video evidence is regularly used in prosecutions of drug conspiracies. *See, e.g., United States v. Becerra*, 942 F.2d 794 (9th Cir. 1991) (table), opinion at No. 89-10424, 1991 WL 162175, at \*2 (9th Cir. June 11, 1991) (finding videotape of meeting of the defendant discussing drug transactions with a government informant was direct evidence of the conspiracy); *United States v. Jones*, 275 F.3d 673, 681 (8th Cir. 2001) (finding videotape was direct evidence of defendant's role in a drug conspiracy).

<sup>133</sup> *See, e.g., Citigroup*, 709 F.3d at 136 (holding plaintiffs may rely on "direct evidence that the defendants entered into an agreement," exemplified by "a recorded phone call in which two competitors agreed to fix prices"); *Obron Atl. Corp. v. Barr*, 990 F.2d 861, 864–65 (6th Cir. 1993) (permitting use in judicial proceedings of tape recordings of price-fixing conversations made by an Obron executive while under government supervision). *Compare In re Iowa Pub. Emps. Retirement Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F. Supp. 3d 285, 318 (S.D.N.Y. Sept. 27, 2018) (characterizing as direct the complaint's allegation of "a recorded conference call" in which an executive admitted he had "agreed that [their firms] needed to 'get a hold of this thing'" by excluding a rival), *with In re Mylan N.V. Secs. Litig.*, 379 F. Supp. 3d 198, 209 (S.D.N.Y. 2019) (finding allegation of "a single April 23, 2014 phone call" that did

able rivals exchange promises to act in concert can result in guilty pleas.<sup>134</sup> For example, in the *Marine Hose* investigation, a leniency applicant “provided the location” of a planned meeting, “so the [Antitrust] Division could place a video camera in the room and record the meeting [at which a] paid organizer of the cartel made a presentation of how successful the cartel had been for the members.”<sup>135</sup> The episode led to immediate arrests and guilty pleas of most participants soon afterward. If it were litigated, courts would almost certainly have found the tapes were direct evidence of agreement among most of those in attendance. .

But not all those in attendance. As Richard Greenstein writes, even though “a videotape is the epitome of direct evidence,” it still can’t “record intentions directly.”<sup>136</sup> In *Marine Hose* itself, a jury acquitted a defendant visible in one of the tapes after it heard evidence that he “attended one meeting of the conspiracy (in the eight years the conspiracy was in place), that he did not really understand what the meeting was about until he was there, and that he did not actively engage in the meeting.”<sup>137</sup>

Analogously, text message, chat room, social media, or email conversations that rivals use to coordinate an agreement can also be direct evidence, if the technologies record the communications used to form the agreement.<sup>138</sup> For

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“not identify which employees were involved, where the call took place, or the contours of the alleged agreements” was not direct).

<sup>134</sup> See, e.g., *Archer Daniels Midland Co. v. Whitacre*, 60 F. Supp. 2d 819, 827 (C.D. Ill. 1999) (“[B]ased in part on the tape recordings made by Whitacre, ADM pleaded guilty to price-fixing and paid a fine of \$100 million.”) (citing *United States v. Andreas*, 39 F. Supp. 2d 1048, 1055–56 (N.D. Ill. 1998), *aff’d*, 216 F.3d 645 (7th Cir. 2000)). Cf. *Can Erutku & Vincent A. Hildebrand, Conspiracy at the Pump*, 53 J.L. & ECON. 223, 223–24 (2010) (“The analysis of the intercepted communications [obtained by court-authorized wiretaps in Canada, and leading to fines and guilty pleas] revealed the presence of cartel ringmasters, many of them present in more than one of the targeted markets, who coordinated a specific price increase for most of the local retail gasoline outlets at a particular time.”).

<sup>135</sup> Donald C. Klawiter, *Antitrust Criminal Sanctions: The Evolution of Executive Punishment*, COMPETITION POL’Y INT’L, Spring 2012, at 90, 98. See also Press Release, U.S. Dep’t of Justice, Three United Kingdom Nationals Plead Guilty to Participating in Bid Rigging Conspiracy in the Marine Hose Industry (Dec. 12, 2007), [www.justice.gov/archive/opa/pr/2007/December/07\\_at\\_995.html](http://www.justice.gov/archive/opa/pr/2007/December/07_at_995.html).

<sup>136</sup> Greenstein, *supra* note 43, at 1820.

<sup>137</sup> Mark Rosman & Jeff VanHooreweghe, *What Goes Up, Doesn’t Come Down: The Absence of the Mitigating-Role Adjustment in Antitrust Sentencing*, ANTITRUST SOURCE 1, 6 n.26 (Aug. 2012), [www.wsgr.com/PDFSearch/rosman-august-12.pdf](http://www.wsgr.com/PDFSearch/rosman-august-12.pdf). For the minute entry of acquittal, see *United States v. Scaglia*, No. 0:07-cr-60220-DTKH (S.D. Fla. Sept. 13, 2007) (ECF 226).

<sup>138</sup> Any transcript of conversations that formed the alleged agreement would fit this category. *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 319 (6th Cir. 2014), for example, found that rivals’ transcribed statements at a hearing were too ambiguous to be direct (or circumstantial) evidence of a conspiracy to fix real estate commissions. But a verbatim transcription of clearer descriptions would qualify. See, e.g., *Kjessler v. Zaappaaz, Inc.*, No. 4:18-0430, 2019 WL 3017132 (S.D. Tex. 2019), in which the complaint alleged, among other evidence, that the defendants communicated by texts, Facebook messages, WhatsApp groups, and face-to-face meet-

example, in the *Foreign Exchange Benchmark Rates* litigation, the court characterized the allegations that “banks used various electronic communications platforms, particularly chat rooms and instant messaging, to share ‘market-sensitive information with rivals’ including price-information, customer information and their net trading positions before the setting of the Fix[ ]” as “direct evidence akin to [a] ‘recorded phone’” in which rivals fix prices.<sup>139</sup> In much the same way as by phone, the banks allegedly agreed “‘in chat rooms and instant messages’ to use collusive trading strategies across banks [to] . . . manipulate[ ] the Fix to the price that they desired.”<sup>140</sup> The complaint was sufficient, even without “specific allegations identifying the exact date and time of each illicit act.”<sup>141</sup>

ings to fix the prices of customized wristbands, one of several “customized promotional products.” *Id.* at \*5. The court denied motions to dismiss, finding the complaint included allegations of direct evidence (including screen shots) of an agreement to fix prices of wristbands and circumstantial evidence of a larger conspiracy:

The Complaint contains text and social media platform conversations where [some defendants] admit to the cartel’s existence and implicate each other. . . . The Complaint alleges specific, recorded meetings between [some defendants] discussing CPP pricing and coordinating future meetings to discuss pricing. . . . It is true, within this direct evidence, that it is unclear which CPPs are the subject of the price fixing and that only customized wristbands are specifically mentioned. But at this stage, the Complaint must be liberally construed in Plaintiffs’ favor . . . and it is improper “to prejudge the scope of the conspiracy” . . . Additionally, allegations sufficient to demonstrate a price fixing conspiracy related to certain products or practices within an industry permit an inference of a larger conspiracy covering other products or practices.

*Id.* at \*11 (internal citations omitted). Another recent example is *In re GSE Bonds Antitrust Litigation*, 19-CV-1704 (JSR), 2019 WL 5791793, at \*4 (S.D.N.Y. Oct. 15, 2019), which found allegations of transcripts of chat room conversations were direct evidence of all the defendants’ participation in a conspiracy to fix prices of bonds of government-sponsored entities, and indirect evidence of the conspiracy’s scope and duration; the court found it “implausible on its face that [the specifically discussed] agreement would be limited to certain kinds of GSE bonds, and not to others”). *Cf. In re Disposable Contact Lens Antitrust Litig.*, No. 3:15-md-2626-J-20JRK, 2019 WL 6463343 (M.D. Fla. Nov. 27, 2019) (finding sufficient evidence of horizontal conspiracy based in part on defendants’ participation in a secret Facebook group to report violations of “unilateral price policies”).

<sup>139</sup> *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 591 (S.D.N.Y. 2015) (*Forex*); *Sullivan v. Barclays PLC*, No. 13-cv-2811 (PKC), 2017 WL 685570, \*75 (S.D.N.Y. Feb. 21, 2017) (finding allegations of “communications in which ‘an agreement was made’ between defendants to submit false Euribor quotes, for the benefit of at least one defendant . . . [were] not ‘merely consistent’ with the existence of an agreement, but plausibly allege direct evidence of ‘a meeting of minds in an unlawful arrangement’ to fix the Euribor.”).

<sup>140</sup> *Forex*, 74 F. Supp. 3d at 591. There were allegedly chat rooms named The Cartel, The Mafia, and The Bandit’s Club involving other traders. *Id.* at 592. *See also In re London Silver Fixing, Ltd.*, Antitrust Litig., 332 F. Supp. 3d 885, 901–02 (S.D.N.Y. 2018) (finding the “chat messages included in the [complaint] are direct evidence of an anticompetitive agreement to manipulate the silver markets” because they included “exchanges of current pricing information by horizontal competitors . . . [and other] paradigmatic examples of communications relevant to a horizontal price-fixing scheme.”) (internal citations omitted).

<sup>141</sup> *Forex*, 74 F. Supp. 3d at 594. *But cf. In re Commodity Exch., Inc.*, 328 F. Supp. 3d 217, 229 (S.D.N.Y. 2018) (finding that quoted chats, unlike those in *Forex*, did not raise an inference of conspiracy where “[t]he chat messages in the [complaint did] not evidence sharing of informa-

## C. TESTIMONY OF CO-CONSPIRATORS

Another form of direct evidence is testimony of witnesses with first-hand knowledge of conspiratorial conversations.<sup>142</sup> Criminal convictions and guilty pleas in the United States often are based on testimony of immunized co-conspirators.<sup>143</sup> A well-known litigated example was *United States v. Taubman*, in which a jury convicted the presidents of Sotheby's and Christie's of conspiring to fix sellers' commissions on auctioned artworks.<sup>144</sup> The government had offered detailed testimony and memoranda of Alfred Taubman's co-conspirators (the immunized CEOs of the auction houses) as well as records of numerous meetings between the presidents. Seeking a new trial, Taubman argued that, because the trial court did not instruct the jury that there were lawful reasons for the two men to meet, the jury may have improperly inferred

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tion that would have been necessary to a fix-suppression scheme, or sharing of that information close in time to the fixing itself").

<sup>142</sup> *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, No. 1:09-cv-00560-LJO-BAM, 2013 WL 595122, at \*8 (E.D. Cal. 2013) ("testimony from percipient witnesses that defendants agreed at a certain meeting to fix prices or not to compete constitutes direct evidence of an agreement to restrain trade"), *aff'd*, 803 F.3d 1084 (9th Cir. 2015). Testimony detailing out-of-court admissions by conspirators can also be direct evidence. *See, e.g., In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1153 (D. Kan. 2012) (finding that direct evidence included testimony by Dow executive "that on more than ten occasions, [another executive] stated that he had met with competitors Bayer and BASF and reached agreements to set prices and make price increases stick" was the "most substantial direct evidence of an agreement").

<sup>143</sup> *See, e.g., United States v. Cavataio*, 1 F.3d 1242 (6th Cir. 1993) (table), opinion at No. 92-2484, 1993 WL 300327, at \*1 (affirming a sentence of a defendant who pleaded guilty after an immunized co-conspirator testified before a grand jury and "confirmed the existence of a price-fixing scheme"); *United States v. Harford*, 870 F.2d 655 (table), opinion at No. 88-5139, 1989 WL 21563, at \*2 (4th Cir. Jan. 11, 1989) (affirming convictions based on immunized "testimony from other officers and employees of both companies about meetings and agreements as to price," testimony that was "supported by various documents" and "believed by the jury"); *United States v. Berger Indus., Inc.*, 1983 WL 725, at \*3 (E.D. Pa. 1983) ("The government's witness . . . testified specifically and in great detail about numerous price-fixing conversations with [the defendant] during [the relevant] period."). *Cf. United States v. Ga. Waste Sys., Inc.*, 731 F.2d 1580, 1581-82 (11th Cir. 1984) (holding a witness's account of a conspirator's description "of a meeting at which the defendants and other co-conspirators organized and solidified their arrangement" did not violate the conspirator's right to confrontation).

Criminal antitrust enforcement strongly emphasizes direct evidence. *See, e.g., D. Daniel Sokol, Reinventing Criminal Antitrust*, 60 WM. & MARY L. REV. 1545, 1597 (2019) ("Criminal enforcement for a generation has been limited to those cases that involve 'naked' collusion—the so called 'hard-core' cartels where there is direct evidence of illegal activity."); Hays Gorey, Jr. & Henry A. Einhorn, *The Use and Misuse of Economic Evidence in Horizontal Price-Fixing Cases*, 12 J. CONTEMP. L. 1, 12 n.47 (1986) ("Almost all criminal antitrust cases are based upon direct evidence supplied by actual participants in the conspiracy.") The government lost three exceptional criminal cases based entirely on circumstantial evidence. *Id.* at 15-19 (describing *United States v. Chas. Pfizer & Co.*, 426 F.2d 232, *modified*, 437 F.2d 957 (2d Cir. 1970), *aff'd by an equally divided Court*, 404 U.S. 548 (1972); *United States v. Eli Lilly & Co.*, 1959 Trade Cas. (CCH) ¶ 69,536 (D.N.J. 1959); *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949)).

<sup>144</sup> *United States v. Taubman*, No. 01 CR 429 (GBD), 2002 WL 548733 (S.D.N.Y. Apr. 11, 2002), *aff'd*, 297 F.3d 161 (2d Cir. 2002).

that Taubman conspired from the mere existence of the meetings. But the court pointed out that the CEOs of the two companies had “unequivocally testified that they were directed by their respective chairmen to work out the specifics of the illegal agreement,”<sup>145</sup> providing “direct evidence that Taubman and [the president of Christie’s] met to discuss fixing prices, agreed to fix prices, and ordered their respective CEOs to carry out and execute that illegal scheme.”<sup>146</sup> Consequently, “The jury was never asked to speculate regarding the criminal nature of the meetings between” the defendants;<sup>147</sup> “[h]aving found [the CEOs] to be credible witnesses, the jury was free to accept the direct evidence of their representation as to the unlawful purpose and content of the meetings.”<sup>148</sup> Immunity agreements or similar arrangements are,<sup>149</sup> of course, a basis for challenging credibility of witnesses at trial, but again, the jury can decide whether to believe the testimony.<sup>150</sup>

In *United States v. Therm-All, Inc.*, there was detailed testimony describing telephone conversations and other communications among rivals to form and enforce a price-fixing agreement.<sup>151</sup> For example, according to a witness, one rival complained to another on the telephone about “dog-eat-dog” competition, then related that he had agreed with a third rival to sell at higher, nearly identical prices on published prices sheets; the rival on the telephone then “immediately agreed” to the plan.<sup>152</sup> Rivals “faxed each other price sheets, and spoke on the phone ‘to get the pricing in line with each other . . . within a couple of dollars of each other in each [pricing] bracket,’ trying not to use the

<sup>145</sup> *Id.* at \*1; see also *United States v. Taubman*, 297 F.3d 161, 165 (2d Cir. 2002) (“Taubman’s knowledge of and participation in the conspiracy to fix prices was not established by circumstantial evidence, it was established by direct evidence—the testimony of [the CEOs] that Taubman and Tennant had met with one another on several occasions and agreed to, inter alia, fix prices.”).

<sup>146</sup> *Taubman*, 2002 WL 548733, at \*8.

<sup>147</sup> The court added that the immunized co-conspirators’ “testimony, and notes of those meetings, were the evidence in the record directly reflecting the purpose and nature of the meetings.” *Id.* at \*10

<sup>148</sup> *Id.* at \*12; see also *United States v. Beaver*, 515 F.3d 730, 730 (7th Cir. 2008) (affirming a conviction for price fixing where witnesses testified that the defendant “(1) was present at the October 2003 meeting at Nuckols’s horse barn; (2) participated in discussions on how to limit the price of concrete; (3) did not object to the net-price-discount limit; (4) agreed to confront other conspiracy members if he found them cheating on the agreement; and (5) agreed on additional pricing constraints” then later “volunteered to contact [a rival] and ‘get him the message on what we agreed on.’”); *United States v. Giordano*, 261 F.3d 1134, 1139 (11th Cir. 2001) (affirming a conviction where witnesses testified the defendants attended meetings and “agreed to specific prices for various grades of scrap”).

<sup>149</sup> The president of Sotheby’s cooperated with the prosecution based on an agreement to recommend leniency. See John J. Goldman, *Ex-President of Sotheby’s Gets Probation*, L.A. TIMES (Apr. 30, 2002), [www.latimes.com/archives/la-xpm-2002-apr-30-na-brooks30-story.html](http://www.latimes.com/archives/la-xpm-2002-apr-30-na-brooks30-story.html).

<sup>150</sup> *United States v. Murray*, 468 F. App’x 104, 107–08 (3d Cir. 2012) (stating that immunity agreements may “inform the jury’s assessment of witness credibility and bias”).

<sup>151</sup> *United States v. Therm-All, Inc.*, 373 F.3d 625, 628 (5th Cir. 2004).

<sup>152</sup> *Id.*



‘exact’ same prices so that customers would not get suspicious.”<sup>153</sup> They “policed” the agreement by calling cheaters and asking for explanations of noncompliant prices.<sup>154</sup> The court of appeals held that, given this “direct testimony,” the jury could reasonably have found that the rivals conspired, even though there was evidence that they continued to compete with one another for business during the conspiracy period.<sup>155</sup>

Recall that some courts say evidence that represents less than the full scope of an agreement is “weak direct evidence.” In *Champagne Metals*, one of the cases I cited earlier, the court found direct evidence that aluminum distributors had agreed to use their market power in the purchasing market to persuade aluminum mills not to supply the plaintiff, a “new, aggressive entrant.”<sup>156</sup> One of the mills’ employees testified that a representative of one of plaintiff’s rivals told him that the relationship between the mill and the plaintiff “was damaging to the industry” and that “we would be putting other business with potential customers at risk” by developing it.<sup>157</sup> The court saw this testimony as direct evidence because, “[v]iewed in the light most favorable to Champagne, this statement indicates an agreement among service centers to take collective action.”<sup>158</sup> It was “weak” because it did not identify the participating distributors but, combined with circumstantial evidence, it was sufficient to avoid summary judgment. After a hearing on remand, the district court found that the direct and circumstantial evidence established the conspiracy by a preponderance of the evidence, permitting the introduction of (otherwise) hearsay statements of co-conspirators against the defendants.<sup>159</sup>

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<sup>153</sup> *Id.* at 629.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 631; see also *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 468–69 (3d Cir. 1998) (finding plaintiff’s testimony that one of his rivals threatened that [that rival and another] “would do anything they could, stop supplies, cut the prices, whatever they had to do they were going to do to keep me out of business” was direct evidence); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 527 F. Supp. 2d 1257, 1301 (D. Kan. 2007) (finding that an insurer’s manager’s testimony “that ‘kind of the understanding, unwritten but understood’ amongst managed care organizations was that managed care organizations would not be extending managed care contracts to specialty hospitals,” *id.* at 1288, was weak direct evidence that supported denial of summary judgment, because it “indicates” with sufficient clarity that “an agreement among [managed care organizations] to work collectively to exclude Heartland,” although it did not say who the co-conspirators were).

<sup>156</sup> *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1086 (10th Cir. 2006).

<sup>157</sup> *Id.* at 1083.

<sup>158</sup> *Id.* at 1084.

<sup>159</sup> *Champagne Metals v. Ken-Mac Metals, Inc.*, No. CIV-02-0528-HE, 2008 WL 5205204, at \*3 (W.D. Okla. 2008) (holding that plaintiff’s “very credible economic theory,” “direct evidence of collusive action,” and “circumstantial evidence . . . suffice[d] to demonstrate by a preponderance of the evidence the existence of at least a tacit agreement among all defendants and the mills to take collective action to exclude new entrants from the market”). See FED. R. EVID. 801(d)(2)(E) (“A statement . . . is not hearsay [if it is] offered against an opposing party and . . . was made by the party’s coconspirator during and in furtherance of the conspiracy.”).

Sufficiently specific testimony can be direct evidence of the communications necessary to form a tacit agreement, but other evidence is necessary to prove the completion of an agreement. Tacit agreement requires communication of intentions, but also actions consistent with the stated intent. Because of the requirement of further action, direct evidence of communications alone cannot establish a tacit agreement. Nevertheless, direct evidence of the necessary communications can provide the grounding for the inference of agreement based on subsequent actions. For example, one issue in the early *U.S. Steel* case was the legality of so-called Gary dinners and the ensuing meetings among most of U.S. Steel's rivals in various lines of steel fabrication.<sup>160</sup> The plan of Judge Gary, the president of U.S. Steel, was not to form explicit price agreements, but for each manufacturer simply to announce its intended prices at dinners or meetings.<sup>161</sup> Gary mistakenly thought this ingenious arrangement would inoculate it against a Sherman Act challenge.

In extensive testimony, executives testified that they “assembled” and “declared purposes as to prices,” then “left, each relying upon the other that that price would be observed by them,”<sup>162</sup> at least until “we found reason to change it,” in which case “we would notify our competitors, or talk with them about it, when another meeting would be held and conditions discussed.”<sup>163</sup> Based on these and similar passages (and evidence of the firms’ pricing following the meetings) the court found that, even though “there was no positive and expressed obligation; [and] no formal words of contract were used . . . most of those who took part in these meetings went away knowing that prices had been named and feeling bound to maintain them until they saw good reason to do otherwise[.]”<sup>164</sup> The court added that “[t]he final test, we think, is the object and the effect of the arrangement, and both the object and effect were to maintain prices, at least to a considerable degree.”<sup>165</sup> The testimony was not on the subject of specific statements in a single conversation, but a summary of conversations at multiple meetings of a committee. Nevertheless, the testi-

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<sup>160</sup> *United States v. United States Steel Corp.*, 223 F. 55, 154 (D.N.J. 1915) (“These dinners—which were business meetings with a social aspect—began in November, 1907, and were held at irregular intervals during the next 15 months, . . . [and were followed by] committee meetings, also with some other gatherings, which were held infrequently until early in 1911.”), *aff’d*, 251 U.S. 417 (1920).

<sup>161</sup> *Id.* at 158–59 (“I stated distinctly \* \* \* at that time that, as they all understood, we could not make any agreement, express or implied, directly or indirectly, which bound us to maintain prices or restrict territory or output; it must leave us free to do as we pleased, and must rely upon a disposition of all others to do what they considered fair and right and for the best interests, not only of themselves, but all others who had any interest in that or any other work.”).

<sup>162</sup> *Id.* at 159.

<sup>163</sup> *Id.* at 160.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 160–61. For further discussion, see William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 SMU L. REV. 597 (2009).

mony is at the direct end of our spectrum, at least as to the meetings, because witnesses with first-hand knowledge unambiguously described the operation of Gary's scheme. Managers described the gist of the private communications of pricing intentions by other managers, with no suggestion by defendant of a legitimate purpose.

#### D. GUILTY PLEAS AND OTHER ADMISSIONS

Guilty pleas, of course, establish the pleader's guilt, but it is less clear what they mean for other alleged conspirators. In general, a guilty plea by one defendant is inadmissible in a criminal case as substantive evidence of the guilt of an alleged co-conspirator.<sup>166</sup> Nevertheless, a guilty plea may be relevant in follow-on civil cases involving the same conduct.<sup>167</sup> A recent decision held that guilty pleas by officers of one corporate defendant were part of a pattern of allegations of contacts between rivals that the court characterized as direct evidence of a conspiracy with two other corporate defendants.<sup>168</sup> But courts "generally will limit the use of a guilty plea to the specific conduct admitted, and will not permit, 'if there, then here' arguments to prove other conspiracies."<sup>169</sup>

Less formal admissions by a defendant might also constitute direct evidence.<sup>170</sup> For example, in a recent case, the complaint alleged that an executive of one of the plaintiff's two primary rivals told the plaintiff that he was "in communications" with other rivals to join "in the agreement to block" independent firms like the plaintiff's from access to the market, and another executive of the same rival told the plaintiff on a different occasion that the two rivals had "agreed to 'lock you and the other parties out.'"<sup>171</sup> The court denied a motion to dismiss, finding that "[t]hese allegations straightforwardly suffice" because they are "direct-evidence allegations of the agreement: taken as true, the fact that two of Defendants' executives admitted an agreement to block [the plaintiff] and other integrators from accessing dealer data shows

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<sup>166</sup> *United States v. Gaev*, 24 F.3d 473, 476 (3d Cir. 1994).

<sup>167</sup> *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (guilty pleas in prior cases raised an inference of agreement in the instant case).

<sup>168</sup> *In re Generic Pharms. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404, 440 (E.D. Pa. 2018).

<sup>169</sup> PROOF OF CONSPIRACY, *supra* note 7, at 65; *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 492 (D. Conn. 2008) (finding allegations of conspiracy insufficient where "the defendants plead[ed] guilty to criminal conspiracy charges [but] those charges involved conduct on a different trade route and amounted to a conspiracy to unlawfully raise prices, while this case involves conspiracy claims of predatory pricing").

<sup>170</sup> *See, e.g., In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) (Posner, J.) (suggesting that direct evidence "would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price").

<sup>171</sup> *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d 931, 950–51 (N.D. Ill. 2018).

directly the existence of such an agreement. No further inference is required.”<sup>172</sup>

#### IV. “PROXIES FOR DIRECT EVIDENCE”: COMMUNICATIONS SUGGESTING A TRADITIONAL CONSPIRACY

Courts use the term direct evidence to describe a variety of forms evidence (and allegations) with the common characteristic that, if believed, they require very few inferences to establish a fact in issue. The classification of evidence of a Sherman Act agreement as direct is a matter both of its relative clarity and how completely it represents the scope of the alleged agreement. Only the most complete and unambiguous evidence—recordings, testimony, or documents, for example—will usually satisfy *Matsushita* by itself. A few courts call evidence further down the continuum “weak direct evidence” or something equally indefinite.

Still more ambiguous evidence or less complete evidence of communications is circumstantial evidence of the alleged agreement, but it still can provide a basis for denial of a motion to dismiss or summary judgment. As one court recognized, even if “no inferences are required from direct evidence to establish a fact,” it does not follow “that all circumstantial evidence should be treated alike.”<sup>173</sup> *Matsushita*, the court went on, did not distinguish direct and circumstantial evidence, it only required the plaintiff to produce evidence of agreement that was “sufficiently unambiguous,”<sup>174</sup> which is true of both direct evidence and strong circumstantial evidence.<sup>175</sup> This language suggests that

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<sup>172</sup> *Id.* at 951; see also *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010) (finding that the plaintiff hospital’s allegation that a defendant insurer admitted an agreement with a defendant hospital to drive plaintiff out of business, and that the defendant hospital had sent letter to the insurer warning it not to give any assistance to the plaintiff were “allegations of direct evidence” that were “sufficient to survive a motion to dismiss on the agreement element”).

<sup>173</sup> *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993).

<sup>174</sup> *Id.* (citation omitted).

<sup>175</sup> The plaintiff in *Petruzzi’s* had produced tapes that suggested one rival was trying to persuade a rival to “play by the rules.” *Id.* at 1236; see also *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661–62 (7th Cir. 2002) (statements that do not qualify as direct evidence “are not to be disregarded because of their ambiguity”); *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d 931, 951 (N.D. Ill. 2018) (“Even if . . . there was some ambiguity in the admissions, they are at a minimum ‘highly suggestive of the existence’ [of an] agreement to block [plaintiff] from accessing dealer data and thus out of the market.”); Louis Kaplow, *Direct Versus Communications-Based Prohibitions on Price Fixing*, 3 J. LEGAL ANALYSIS 449, 488 (2011) (“[O]nce one moves past crisp, smoking-gun internal evidence (e.g., a document referring to the meeting at the Sands Hotel on April 7, 2010 at which a firm’s vice president discussed and agreed with counterparties Smith from Rival 1 and Jones from Rival 2 to raise prices on May 1, 2010, from 100 to 120), one begins to enter the territory where one is also employing other evidence in attempting to make the requisite inference.”).

the range of clarity and completeness of evidence of agreement extends into the category of circumstantial evidence.

In this Part, I focus on this category of circumstantial evidence sufficient to avoid summary judgment. Some courts refer to these plus factors as “proxies for direct evidence of agreement.”<sup>176</sup> The phrase suggests courts are looking for evidence of suspicious communications among rivals, in addition to the usual economic evidence of oligopoly behavior. As the last Part illustrates, forms of unambiguous representations of the formation and terms of the alleged agreement are the most typical instances of direct evidence. And the same factors that guide the classification of those forms of evidence as direct, and the determination of their sufficiency, also guide decisions on the sufficiency of circumstantial evidence of similar forms of communications.

Plus factors are categories of economic and noneconomic circumstantial evidence of agreement. In cases involving oligopolies, most of the plus factors that show that an agreement is possible—market concentration, identical conduct, homogeneous products, and actions of rivals contrary to their individual self-interest, for example—are not enough by themselves to raise a plausible inference of agreement, because they only “restate interdependence,” as courts have said repeatedly, quoting Areeda and Hovenkamp’s treatise.<sup>177</sup> All of those factors are present if the defendants are acting interdependently, using publicly available information, as the passage from *Valspar* quoted in Part I illustrates.<sup>178</sup> Consequently, courts say the most important plus factor is “evidence suggesting a traditional conspiracy,” which might include “proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.”<sup>179</sup> The category is problematic, because it seems circular—“traditional conspiracy” is another term for the ultimate

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<sup>176</sup> The phrase originated in *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 360 (3d Cir. 2004) (“Existence of these plus factors tends to ensure that courts punish ‘concerted action’—an actual agreement—instead of the ‘unilateral, independent conduct of competitors.’ In other words, the factors serve as proxies for direct evidence of an agreement.” (citation omitted)).

<sup>177</sup> *White v. R.M. Packer Co.*, 635 F.3d 571, 581 (1st Cir. 2011) (observing that “many so-called plus factors simply ‘demonstrate that a given market is chronically non-competitive,’ without helping to explain whether agreement or conscious parallelism is the cause.”) (citation omitted). The court quoted an earlier edition of 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1434c1, at 276–77 (4th ed. 2017) (observing that these sorts of plus factors “restate interdependence”). See also *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 193 (3d Cir. 2017) (same).

<sup>178</sup> See *supra* text accompanying note 15.

<sup>179</sup> *Valspar*, 873 F.3d at 193 (quoting *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 398 (3d Cir. 2015)); *id.* at 193 (citation omitted). See also *In re Domestic Drywall Antitrust Litig.*, MDL No. 2437 & 13-MD-2437, 2019 WL 3254090, at \*27 (E.D. Pa. July 19, 2019) (“[T]raditional conspiracy evidence ends up becoming the most critical plus factor in cases of oligopolies.”).

issue of agreement, so it seems to say the decisive evidence of agreement is evidence of agreement. But I argue here the concept of direct evidence, and the forms of direct evidence described in the last Part, guide application of this category of circumstantial evidence.

Courts looking for evidence of traditional conspiracy focus on whether there is noneconomic evidence of the communications that formed the agreement—evidence that the defendants “got together” in the broad sense of using private communications to form an agreement.<sup>180</sup> Only certain communications suggest a traditional conspiracy because the courts recognize that oligopolists have legitimate (or at least non-conspiratorial) means or reasons to communicate. Public announcements to the market, for example, can inform rivals, but they are so central to the market mechanism, that courts will only rarely find it suspicious.<sup>181</sup> “Opportunities to collude” privately at trade association meetings (unless closely correlated with price increases) are usually insufficient, without more, to raise an inference that the rivals actually took the opportunity, because the communications in those meetings could well have been on legitimate subjects for trade association discussions.<sup>182</sup> Courts also often find elaborate information exchange programs insufficient, if they share

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<sup>180</sup> *Valspar*, 873 F.3d at 203 n.15. Economists have proposed that some patterns of economic evidence are sufficient to raise an inference of conspiracy, but courts have not been receptive. See, e.g., *Anderson News, L.L.C. v. Am. Media, Inc.*, 123 F. Supp. 3d 478, 499–500 (S.D.N.Y. 2015). For earlier discussion, see Robert A. Milne & Jack E. Pace III, *Conspiratologists at the Gate: The Scope of Expert Testimony on the Subject of Conspiracy in a Sherman Act Case*, ANTITRUST, Spring 2003, at 36, 39–40 (summarizing cases rejecting expert testimony on agreement). See also *City of Tuscaloosa v. Harcross Chems., Inc.*, 158 F.3d 548, 565 (11th Cir. 1998) (“As circumstantial evidence, [expert] testimony need not prove the plaintiffs’ case . . . [it] must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury.”).

<sup>181</sup> *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1036 (8th Cir. 2000) (“[E]vidence that the alleged conspirators were aware of each other’s prices, before announcing their own prices, is nothing more than a restatement of conscious parallelism, which is not enough to show an antitrust conspiracy.”) (internal quotation marks omitted); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991, 1001 (N.D. Ill. 2011) (finding statements during analyst calls that the firm is “in a very good position to see stable growth in this business going forward over the next three to five years” and that “the industry [is] now heading to a much more predictable phase of stability” did not propose an agreement). The same goes for intra-firm communications. *Valspar*, 873 F.3d at 200 (observing that “these e-mails show that the competitors were aware of the phenomenon of conscious parallelism and implemented pricing strategies in response to it”).

<sup>182</sup> *Valspar*, 873 F.3d at 199 (refusing to assume that, because the “TDMA meetings brought the competitors together . . . one should assume that they used the meetings to conspire”). *But cf. In re Generic Pharms. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404, 451 (E.D. Pa. 2018) (“While more specific detail regarding interfirm communications may be required . . . their allegations regarding defendants’ participation in industry groups and gatherings contribute to a finding that they have plausibly alleged that these Defendants had an opportunity to conspire.”); *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 799–800 (N.D. Ill. 2017) (finding allegations of “suspicious timing of important industry conferences” in relation to production cuts supported inference of agreement).

only retrospective, aggregated data.<sup>183</sup> Agreement requires private communications about the future—promises or statements of intention.

In *Valspar*, the majority's willingness to explain away evidence of communications led the dissenting judge to complain that "[t]oday's decision could easily be read to require direct evidence of an agreement in an oligopoly/antitrust case despite the fact that neither our prior jurisprudence (nor the Supreme Court's) has ever required such evidence."<sup>184</sup> The majority responded defensively that "our caselaw does not foreclose the possibility that a plaintiff can defeat summary judgment with only circumstantial evidence in the Section 1 oligopoly context," but that evidence must include "non-economic evidence of an actual agreement between the conspirators, and not just a restatement of the interdependent economic conduct that we must accept in an oligopolistic marketplace."<sup>185</sup> By implication, the court required circumstantial evidence of communications that suggested agreement, even though falling short of the categories of direct evidence described in the last Part. I suggest courts' concept of direct evidence, even in the absence of direct evidence in the record, provides the measure of those sorts of communications.

When courts evaluate the strength of inferences from noneconomic circumstantial evidence using the plus factors framework, they rely on an implicit understanding of what direct evidence of an agreement among the defendants would look like. Direct evidence represents the necessary communications unambiguously and completely; noneconomic circumstantial evidence of communications is a proxy for that. Once again, we can think of a continuum of clarity and completeness to understand the process of classification. As one court said, "[A]nalysis of inter-firm communications is not mechanical, and the probative value of such evidence depends on the participants, the informa-

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<sup>183</sup> *Valspar*, 873 F.3d at 199 (finding defendants' Global Statistics Program was benign because it "aggregated and blinded 'members' monthly sales, production, and inventory data worldwide," but never collected price information"); *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 639–41 (E.D. Mich. 2012) (finding direct sharing of nurses' wage information was insufficient to raise an inference of per se illegal price fixing, although it did establish an agreement to share information that might be anticompetitive under the rule of reason).

<sup>184</sup> *Valspar*, 873 F.3d at 212 (Stengel, J., dissenting).

<sup>185</sup> *Id.* at 203 n.15. Two other courts in the *Titanium Dioxide* litigation, viewing essentially the same record as the one in *Valspar*, found the evidence of communications sufficient to plausibly suggest agreement. *Home Depot, U.S.A., Inc. v. E.I. Du Pont de Nemours & Co.*, No. 16-cv-04865-BLF, 2019 WL 3804667, at \*10 (N.D. Cal. Aug. 13, 2019) ("While the Court agrees that the evidence does not establish direct communications about pricing, the Court also agrees with the *Haley Paint* court that evidence regarding the alleged conspirators' communications, is 'the kind of circumstantial evidence that, when viewed in conjunction with the massive record in this case, could lead a jury to reasonably infer a conspiracy in restraint of trade.'") (citing *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 830 (D. Md. 2013)). See also *id.* at \*1 (finding "that an antitrust plaintiff's burden to oppose summary judgment under Third Circuit law as articulated in *Valspar* is far more onerous than under Ninth Circuit law").

tion exchanged, and the context—specifically, the connection between the content and the price-fixing conspiracy alleged.”<sup>186</sup>

Consider first the most ambiguous noneconomic evidence, evidence courts find insufficient to suggest agreement.<sup>187</sup> A common ground for rejecting evidence of communication even as circumstantial evidence is that it is too ambiguous to suggest anything, particularly by comparison with direct evidence. One court, for example, found that plaintiff’s evidence of communication not only “lacked the clarity of the direct evidence proffered in other antitrust cases,” it was “at best evidence of an opportunity to conspire, not of concerted action.”<sup>188</sup> Or in *Text Messaging*, Judge Posner found emails of an employee that referred to a recent price increase as “col[li]usive” were neither direct evidence<sup>189</sup> nor sufficient circumstantial evidence, because (like the economic evidence) it could easily have reflected lawful tacit collusion.<sup>190</sup> Documents in corporate defendants’ files may also refer to “understandings,” “rules,” or other words suggesting coordination among rivals.<sup>191</sup> But, as Louis Kaplow has pointed out, references like these can often be interpreted as indications of lawful tacit collusion.<sup>192</sup> Documents may obliquely refer to communications among rivals, but the meaning of the communications’ content is unknown,<sup>193</sup>

<sup>186</sup> *In re Commodity Exch., Inc., Gold Futures and Options Trading Litig.*, 328 F. Supp. 3d 217, 228 (S.D.N.Y. 2018). *See also* *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 113 (2d Cir. 2018) (finding that “each defendant’s internal and interfirm communications, when properly viewed in the setting of each defendant’s conduct and industry conditions, equally support inferences of competition and conspiracy”), *cert. denied*, 139 S. Ct. 1375 (2019).

<sup>187</sup> *See, e.g.*, *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 272 (5th Cir. 2008) (finding emails were not direct evidence of agreement because they “actually reveal disagreement among” the defendants; “common dislike is not the same as an explicit understanding to conspire”); *Resco Prods., Inc. v. Bosai Minerals Group Co.*, 158 F. Supp. 3d 406, 419–20 (W.D. Pa. 2016) (finding defendants’ votes on proposals of export quotas were not direct evidence of conspiracy), *appeal dismissed*, No. 16-1412, 2017 WL 4012694 (3d Cir. June 16, 2017); *In re K-Dur Antitrust Litig.*, No. 01-cv-1652 (SRC) (CLW), 2016 WL 755623, at \*20 (D.N.J. Feb. 25, 2016) (finding bilateral agreements between drug companies were not direct evidence of a hub and spoke agreement to exclude generics); *U.S. Horticultural Supply, Inc. v. Scotts Co.*, No. 04-5182, 2009 WL 89692, at \*10 (E.D. Pa. Jan. 13, 2009) (finding a memorandum from Scotts to a distributor stating that those who are not “in sync” with Scott’s strategy “traveled the road of the dinosaurs” was not direct evidence because it required an inference that it referred to “a history of terminations by Scotts of relationships with distributors who were unwilling to follow Scotts’ pricing preferences”), *aff’d on other grounds*, 367 F. App’x 305 (3d Cir. 2010).

<sup>188</sup> *Cosmetic Gallery, Inc., v. Schoeneman Corp.*, 495 F.3d 46, 53 (3d Cir. 2007).

<sup>189</sup> *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 876 (7th Cir. 2015).

<sup>190</sup> *Id.* at 872–79.

<sup>191</sup> *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 149 (3d Cir. 2003) (“[C]ases require that direct evidence of an illegal agreement be established with much greater clarity.”). *Id.* at 163 (“A vague reference to ‘rules’ is insufficiently explicit and requires ample inferences of illegal actions that would constitute a conspiracy among Cowen and other broker-dealers in violation of section 1 of the Sherman Act.”).

<sup>192</sup> *See* KAPLOW, *supra* note 21, at 34.

<sup>193</sup> *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 982 (N.D. Ohio 2015) (logs showing only fact of calls between rivals “standing alone is as consistent with lawful conduct



or they relate to lawful subjects.<sup>194</sup> In other instances they can be interpreted as referring to benign independent conduct<sup>195</sup> or to lawful vertical agreements.<sup>196</sup>

In other cases, however, courts find noneconomic evidence of communications sufficient to raise an inference of agreement, even if it falls short of the clarity or completeness necessary for direct evidence of the agreement. As Judge Posner said in *High Fructose*, direct evidence “is evidence tantamount to an acknowledgment of guilt,” while circumstantial evidence “is everything else including ambiguous statements,” which “are be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence.”<sup>197</sup> In *Flat Glass*, the case that coined the term “proxies for direct evidence,” the court pointed to a pattern of economic and noneconomic evidence, including evidence that one rival faxed to another “a copy of a planned future increase that it had not announced publicly, [the recipient] announced an identical increase before [the sender], and the rest of the flat glass producers followed with identical price increases.”<sup>198</sup> The court found that the evidence “in its totality, [was] sufficient to go to the jury.”<sup>199</sup>

There are other examples. In *Toys “R” Us*, the court found there was “direct evidence of communications” between Toys “R” Us and each of its toy suppliers that provided a key ground for inferring a per se illegal horizontal

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(e.g., a call to discuss purchase of a Defendant’s flexible foam plant) as it is with collusion (e.g., a call to discuss coordination of the next round of [price increases]).”

<sup>194</sup> *Eli Lilly & Co. v. Zenith Goldline Pharms., Inc.*, 172 F. Supp. 2d 1060, 1069 (S.D. Ind. 2001) (finding emails relating to a “clearly legal” issue could not reasonably be interpreted a direct evidence an agreement to refuse to deal); *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226–27 (4th Cir. 2012) (minutes of a meeting of an insurer and its medical advisory panel were not direct evidence of a conspiracy to impose policy coverage caps that injured the plaintiff). *See also supra* note 28.

<sup>195</sup> *Corr Wireless Commc’ns, L.L.C. v. AT&T, Inc.*, 893 F. Supp. 2d 789, 805 n.13 (N.D. Miss. 2012) (finding comments that there may be people in a standards-setting organization who would object to new wireless standards were not direct (or circumstantial) evidence of a conspiracy to delay the standards, because they not state or “infer” that “concerted action by any of Defendants caused or threatened such alleged delay”).

<sup>196</sup> *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 158 F. Supp. 3d 544, 553, 570–71 (E.D. La.) (finding (among other communications) an email stating that three manufacturers had “all agreed to the \$20K freight minimum with NO exceptions [and] I need to know if anyone does not comply” was not direct evidence of an agreement among manufacturers because it could have referred to agreements between each manufacturer and Pool; nor was it sufficient when considered the other circumstantial evidence), *appeal dismissed*, No. 16-30855 (5th Cir. Oct. 27, 2016).

<sup>197</sup> *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002). Posner found such a tissue in a lengthy analysis of economic and non-economic evidence, including statements that could suggest agreement, even though the “evidence is not conclusive by any means—there are alternative interpretations of every bit of it.” *Id.* at 663.

<sup>198</sup> *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004).

<sup>199</sup> *Id.*

agreement among the toy companies to boycott warehouse clubs.<sup>200</sup> In *Sulfuric Acid*, the court rejected the defendants' effort to "fault Plaintiffs for failing to produce direct evidence revealing anything more than arms-length negotiations and independent make-buy decisions," finding instead "circumstantial evidence tending to show that Defendants' negotiations went beyond commerce in acid to produce a cleverly disguised conspiracy"<sup>201</sup> to form purchase arrangements and reduce capacity. And in *Polyurethane Foam*, the court reviewed the plaintiff's voluminous evidence of communications, finding some benign<sup>202</sup> but others forming "a fairly dense web of communications between high-level competitor employees, almost all of who[m] had pricing authority."<sup>203</sup> Some communications included drafts of price increase announcements.<sup>204</sup> This evidence of communication, along with the economic circumstantial evidence, supported the denial of a motion for summary judgment. Even though it did not represent the content of the communications, the circumstances permitted the necessary inference.<sup>205</sup>

<sup>200</sup> Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000). The FTC found, after an administrative adjudication, that Toys "R" Us had "orchestrated a horizontal agreement among its key suppliers to boycott [warehouse] clubs" that threatened its market position in toy retailing. *Id.* at 932. Among the voluminous circumstantial evidence was one executive's testimony that "[w]e communicated to our vendors that we were communicating with all our key suppliers, and . . . made a point to tell each of the vendors that we spoke to that we would be talking to our other key suppliers." *Id.*

<sup>201</sup> *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 859 (N.D. Ill. 2010).

<sup>202</sup> *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 983–86 (N.D. Ohio 2015).

<sup>203</sup> *Id.* at 984.

<sup>204</sup> See also *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 788 (7th Cir. 1999) (finding sufficient "an internal memorandum of defendant . . . entitled 'Price Escalation Proposal,' [stating] 'the industry has generally agreed to informally keep its prices in line with CPI or CPI plus 1 to 2%,'" because "the interpretation of ambiguous documentary evidence of collusion is for the jury"); *Garot Anderson Mktg., Inc. v. Blue Cross & Blue Shield United*, 772 F. Supp. 1054 (N.D. Ill. 1990) (finding sufficient documents referring to "our agreement" and "Memorandum of Understanding").

<sup>205</sup> *In re Polyurethane*, 152 F. Supp. 3d at 986 ("[A] jury could find that many more Defendant communications lack . . . innocuous context."). See also *In re Generic Pharms. Pricing Antitrust Litig.*, 394 F. Supp. 3d 509, 521 (E.D. Pa. 2019) (denying dismissal where complaint alleged hundreds of phone and text conversations between generic drug manufacturers); *Tera Group Inc. v. Citigroup Inc.*, No. 17 Civ. 4302, 2019 WL 3457242, at \*20 (S.D.N.Y. July 30, 2019) (denying dismissal where the complaint alleged, among other plus factors, "significant communications that, in combination with allegations of common language and techniques used by Defendants in carrying out the boycott, contribute to the plausibility of the inference that the alleged parallel conduct flowed from a preceding agreement rather than unilateral action"); *In re Currency Conversion Fee Antitrust Litig.*, 773 F. Supp. 2d 351, 368–69 (S.D.N.Y. 2011) (finding "numerous inter-firm communications among the alleged conspirators in the first half of 1999" were plus factors, particularly where defendants "failed to offer a compelling rationale for why it would disclose such information."); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MDL 1368(CLB), 2006 WL 1317023, at \*4 (S.D.N.Y. May 15, 2006) ("While some information might have been gathered through innocuous customer chatter . . . there is evidence of direct, deliberate inter-corporate communications, such as the conversation which took place at the trade show [that one participant] characterized as 'inappropriate.'").

In the foregoing cases, documentary and testimonial evidence that did not represent the agreement with the clarity and completeness we see in the cases described in the last Part were still sufficiently suggestive, together with other circumstantial evidence, to raise a jury issue. A similar spectrum is apparent in cases involving voice recordings of alleged conspirators. High-quality voice recordings can be direct evidence of agreement, as we saw in the last Part, but less clear recordings may be circumstantial evidence<sup>206</sup> or inadmissible.<sup>207</sup> In *United States v. Andreas*, for example, the court affirmed the conviction of the president of Archer Daniels Midland in the lysine price-fixing conspiracy based in part on recordings made by the problematic government informant, Mark Whitacre.<sup>208</sup> Although the court did not characterize the tapes as direct evidence, it came close by holding that a “jury rationally could understand Andreas’ [recorded] words at this meeting only to indicate his knowledge of, participation in and control of the entire plot”<sup>209</sup> and that the jury “apparently, and reasonably, considered insincere and facetious Andreas’ occasional statements that ADM would not do anything illegal at a time when he was actively playing a vital role in achieving a criminal purpose.”<sup>210</sup> Similarly, in *Petruzzi’s*, the court found that secretly recorded tapes contained enough references to conversations between rivals (urging one not to take others’ accounts and referring to “play[ing] by the rules”), when considered with other evidence, to raise a jury issue of agreement among two of the three defendants.<sup>211</sup>

In some cases, the plaintiff has produced direct evidence of an agreement, but not the one at issue in the case; for the latter conspiracy, the evidence may be circumstantial. For example, in the last Part, we saw that written contracts embodying the agreement at issue can be direct evidence of the entire agreement. In other cases, plaintiffs may argue that superficially benign written agreements should be considered circumstantial evidence of a separate, per se

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<sup>206</sup> See, e.g., *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, No. DKC 12-0954, 2015 WL 4597529, at \*10 (D. Md. July 6, 2015) (finding that “the telephone recording on which [plaintiff] relies as direct evidence of concerted action is ambiguous, relies on inferences of a conspiracy orchestrated by [defendant], and does not establish direct evidence of a group boycott”).

<sup>207</sup> *Dee-K Enters., Inc. v. Heaveafil SDN. BHD.*, No. 3:98CV10-MU, 2001 WL 587858, at \*1 (W.D.N.C. Mar. 1, 2001) (excluding audio recordings as inadequately authenticated and “largely inaudible”).

<sup>208</sup> *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000). On Whitacre, see *id.* (describing Whitacre’s selective taping of price-fixing meetings); KURT EICHENWALD, *THE INFORMANT 565* (2000) (“While he turned in the price-fixers, he also turned on the FBI and his subsequent employer . . . [and] was willing to inform on the failures and crimes—both real and imagined—of everyone other than himself.”).

<sup>209</sup> *Andreas*, 216 F.3d at 670.

<sup>210</sup> *Id.*

<sup>211</sup> *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1235–36 (3d Cir. 1993).

illegal oral agreement among the parties. As the Second Circuit reasoned, if a soccer league challenged the U.S. Soccer Federation’s “Standards [defining tiers of leagues] themselves—in totality—as violative of the antitrust laws, then the USSF Board’s promulgation of them would constitute direct evidence of § 1 concerted action in that undertaking,” but “for the clearly alleged overarching conspiracy to restrain competition in markets for top-and second-tier men’s professional soccer leagues in North America, the promulgation of the Standards is circumstantial evidence of that conspiracy.”<sup>212</sup>

If the proven conspiracy occurred in a geographic market different from the one at issue, courts have usually found the distant conspiracy insufficiently related in its purpose or actors to be probative.<sup>213</sup> Other separate conspiracies may be more relevant to the one at issue. If the defendants engaged in price fixing in the same geographic area but in a different product market, courts may find it relevant for limited purposes.<sup>214</sup> Similarly, if there is direct evidence that the defendants engaged in price fixing in the past, then courts may find it is at least circumstantial evidence that the conspiracy continued into the period at issue. In *Therm-All*, for example, the court found that direct evidence of conspiratorial acts at the beginning of the statute of limitations period was circumstantial evidence that the conspiracy continued.<sup>215</sup>

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<sup>212</sup> *N. Am. Soccer League, LLC v. United States Soccer Fed’n, Inc.*, 883 F.3d 32, 41 (2d Cir. 2018). See also *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1147 (N.D. Cal. 2009) (finding sufficient allegations that flash memory producers used a “‘web’ of cross-licensing and joint venture agreements as a means to facilitate collusive behavior”; although “these allegations may not expressly state that the . . . agreements themselves were illegal”—in which case they would have been direct evidence of the conspiracy—“they nonetheless may be considered with the pleadings as a whole in determining the existence of a ‘plausible’ conspiracy”); *In re Dealer Mgmt. Sys. Antitrust Litig.*, 362 F. Supp. 3d 510, 535–36 (N.D. Ill. 2019) (“[T]o the extent the statements made by . . . executives refer to the 2015 written agreements . . . they indicate that the aim of those agreements was to block third-party integrators.”).

<sup>213</sup> See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 595–96 (1986) (“The ‘direct evidence’ on which the court relied was evidence of other combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents’ claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another.”); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 405–07 (3d Cir. 2015) (“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.”); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) (“Allegations of anticompetitive wrongdoing in Europe—absent any evidence of linkage between such foreign conduct and conduct here—is merely to suggest (in defendants’ words) that ‘if it happened there, it could have happened here.’”).

<sup>214</sup> *United States v. Andreas*, 39 F. Supp. 2d 1048, 1070 (N.D. Ill. 1998) (“Citric acid [direct] evidence was admissible [in a prosecution for fixing the price of lysine] because it arose from a series of transactions related to the lysine conspiracy and helped to explain the context of the conspirator’s conduct shown in the numerous audio and video tapes presented at trial.”), *aff’d*, 216 F.3d 645 (7th Cir. 2000).

<sup>215</sup> *United States v. Therm-All, Inc.*, 373 F.3d 625, 636 (5th Cir. 2004) (holding that “[t]he jury could have reasonably inferred that the conspiracy continued into the limitations period based

The cases in this Part show the relevance of the concept of direct evidence to the broader question of sufficiency of evidence, particularly the often-decisive category of plus factors, “evidence of traditional conspiracy.” That apparently circular question is best understood by analogy to the paradigm of direct evidence—the courts’ understanding of what direct evidence of competitive intentions or assurances look like in analogous cases. More ambiguous evidence of the agreement in issue—for example evidence of unexplained communications among rivals, or evidence of related agreements among rivals—can be sufficient to defeat summary judgment if they suggest the communications of intent or assurance occurred.

## V. CONCLUSION

Most would concede the standard definition of direct evidence—that it proves the fact in issue “without inferences”—can’t be right. All proof of a historical fact requires inference, so, by the standard definition, direct evidence cannot exist. But direct evidence not only does exist as a legal category, courts routinely use it to resolve whether there is sufficient evidence of agreement, the most important issue in the most common form of antitrust litigation.

I have argued that direct evidence of agreement represents the alleged agreement well-nigh unambiguously and fully. Courts may also classify evidence that less fully represents the agreement as direct evidence of some part of the agreement or of an agreement among fewer than all the alleged conspirators. More ambiguous evidence—like communications whose content is less clear—may be circumstantial evidence of agreement. Still more ambiguous evidence that suggests only lawful and benign conduct is insufficient or even irrelevant.

Direct evidence of agreement is a diverse category. Courts have found that a variety of forms or patterns of evidence are direct: writings that actually embody or refer to the agreement at issue, recordings or transcripts of conspiratorial conversations, testimony (often immunized) of participants in the agreement, and admissions by participants. These forms record, recall, or summarize the communications that formed the agreement, or express the terms of the agreement itself.

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on” what the court described as “direct evidence that the participants were involved in conspiratorial acts, i.e., the acts of setting prices at agreed-upon levels, [for one month] during the limitations period”). *See also* *United States v. Johns-Manville Corp.*, 245 F. Supp. 74, 78 (E.D. Pa. 1965) (“Although there was no direct evidence of a conspiracy after May 31, 1957, there was direct evidence from which a conspiracy could have been established prior to this date, from which a continuing conspiracy past this date could have been inferred.”).

Although direct evidence of agreement can be highly probative for a finder of fact, it has special importance on pretrial and post-trial motions that challenge the sufficiency of the evidence to raise a jury issue of agreement in cases alleging per se offenses like price fixing or market allocation. To resolve that often decisive question of law, the court must assume all evidence is true—a principle that means direct evidence will raise a jury issue of agreement, or at least go a long way in that direction. The “if true” condition means the court cannot assess credibility, so the case will likely have to go to trial, where the defendant can challenge direct evidence by questioning its credibility or by offering conflicting evidence. More often, of course, the case will be settled.

Admittedly, courts rarely find direct evidence of agreement. Often, the plaintiff contends it has direct evidence, but the court finds the evidence too ambiguous—it requires too many inferences to prove agreement—to justify the characterization. In other cases, courts begin the analysis of the evidence by saying there is no direct evidence of agreement. Only then do they consider whether the circumstantial evidence “tends to exclude the possibility” of lawful oligopoly conduct. Even in those cases, I argue in the last Part, the ideal of direct evidence can still guide the evaluation of circumstantial evidence of communications. The case law I have examined here is a library of those analogies.

