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Narrower Is Better - The Third Circuit's Latest Word on Conscious Parallelism and the Problem of Plus Factors: In re Flat Glass

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NARROWER IS BETTER—THE THIRD CIRCUIT'S LATEST WORD ON CONSCIOUS PARALLELISM AND THE PROBLEM OF PLUS FACTORS: IN RE FLAT GLASS

I. INTRODUCTION

Surviving summary judgment in an antitrust suit alleging a conspiracy is considerably more difficult than in a typical case. The United States Supreme Court has narrowed the range of permissible inferences to be drawn from circumstantial evidence. When relying on circumstantial evidence, a plaintiff must provide evidence that "tends to exclude" the possibility of independent action. Although, the standard for granting summary judgment is technically the same—granted only when there is no genuine issue of material fact—the courts will apply a stricter interpretation of the evidence in order to prevent the discouragement of legitimate and competitive business practices.

In oligopolist markets, where a few firms dominate a particular market, a phenomenon exists in which markets may behave in a non-competitive manner resembling price fixing without any actual agreement or


2. See Matsushita, 475 U.S at 587-88 (limiting inferences in case of alleged predatory pricing schemes among competitors); Monsanto, 465 U.S. at 768 (limiting inferences in case of alleged vertical conspiracy between manufacturer and its distributors). For a discussion of the Supreme Court's higher inferential standard in antitrust conspiracy cases, see infra notes 30-42 and accompanying text.

3. See, e.g., Matsushita, 475 U.S. at 588 (holding that for a plaintiff to withstand motion for summary judgment "a plaintiff ... must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently" (quoting Monsanto, 465 U.S. at 764)). The Court in Matsushita held that mistaken inferences in antitrust cases were particularly costly because of the hindrance they would place on fair business conduct, which the antitrust laws were intended to encourage. See id. at 594 (justifying heightened standard where alleged conspiratorial acts could reflect competitive behavior).

4. See Fed. R. Civ. P. 56(c) (giving rule for granting summary judgment as appropriate when "there is no genuine issue as to any material fact"); see also Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1364 (3d Cir. 1992) (holding that general standard for summary judgment is same in antitrust cases); Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1405b (2d ed. 2003) (claiming that Matsushita did not change basic summary judgment principle, but simply altered inference of what reasonable jury could conclude).
conspiracy on the part of the competitors. This is known as "conscious parallelism." A seller may raise their prices in a supracompetitive market in anticipation that competitors will likely follow by also raising their prices, recognizing the extra profit to be made. Such "tacit agreement" has been termed "interdependent behavior" and is not itself unlawful.

Consistent with the higher burden in antitrust cases, a plaintiff cannot rely solely on parallel decision making by competitors to establish the existence of a conspiracy. A court cannot allow even extreme examples of parallel pricing standing alone to withstand summary judgment. There must be additional evidence that tends to show the parallel action among


6. See id. (same). Conscious parallelism is often referred to as a sharing of monopoly power or as "tacit agreement." See ABA SECTION OF ANTITRUST LAW, I ANTITRUST LAW DEVELOPMENTS 9 (5th ed. 2002) (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)) (describing conscious parallelism as sharing of monopoly power) [hereinafter ABA SECTION]; Turner, supra note 5, at 663 (asserting that "it is not at all preposterous . . . to classify what transpires as a 'tacit agreement,' and to conclude . . . that the agreement is unlawful"). For a further discussion of conscious parallelism, see infra notes 43-51 and accompanying text.

7. See Turner, supra note 5, at 661-62 (illustrating case example). Turner contrasts an oligopolist market with a market dominated by many competitors. See id. at 660 (asserting that in non-oligopolist market pressure on firms to lower prices is irresistible). Whereas, in a non-oligopolist market a price reduction by one firm is not likely to affect other competitor's market share, and thus they are not likely to respond; in an oligopolist market a firm can expect that if they reduce their prices other firms will respond similarly, thereby defeating the purpose of cutting prices. See id. at 660-61 (finding that firms in oligopolist market may raise prices recognizing their shared interests).

8. See Brooke Group, 509 U.S. at 227 (describing conscious parallelism as "not in itself unlawful"); AREEDA & HOVENKAMP, supra note 4, ¶ 1433a (stating that courts are "nearly unanimous" in finding that conscious parallelism alone is not unlawful conspiracy); Turner, supra note 5, at 663 (arguing that it is not "preposterous . . . to classify what transpires as 'tacit agreement'"); see also 15 U.S.C. § 1 (2000) (establishing that "conspiracy, in restraint of trade . . . is declared to be illegal").

9. See Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1300-01 (11th Cir. 2003) (applying heightened summary judgment standard to cases based on conscious parallelism); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 165 (3d Cir. 2003) (stating "plus factors" are required in allegations based conscious parallelism in order to "allay the concerns expressed by the Supreme Court"); Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1035 (8th Cir. 2000) (en banc) (same); Merck-Medco Managed Care v. Rite-Aid Corp., No. 98-2847, 1999 WL 691840, at *15 (4th Cir. Sept. 7, 1999) (unpublished per curiam opinion) (same); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1242 (3d Cir. 1993) ("[C]onscious parallelism cases are merely illustrations of the more general proposition that there are legal limitations upon the inferences which may be drawn from circumstantial evidence."). For a further discussion on how the heightened inferential standard applies to cases of conscious parallelism, see infra notes 49-51 and accompanying text.

10. See, e.g., In re Flat Glass Antitrust Litig., 385 F.3d 350, 355 (2004) (stating facts of cases, where five competitors raised their "list prices" for flat glass by same

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competitors was the result of agreement and not merely conscious parallelism.11 These “plus factors” generally include three categories: 1) evidence that the defendants acted contrary to self-interest; 2) evidence that the defendants had a motive to enter into a conspiracy; and 3) evidence pointing towards a traditional conspiracy.12

The circuit courts have all approached the problem of plus factors in roughly the same manner; however, the weight given to individual plus factors has varied significantly.13 This Casebrief analyzes the different approaches adopted by the circuit courts to address conscious parallelism and the problem of plus factors. Part II looks at the higher standard of proof required by plaintiffs in antitrust conspiracy cases.14 Specifically, it looks closely at the phenomenon of conscious parallelism and examines the two divergent approaches adopted by the circuit courts with regard to what summary judgment standard is applicable in conspiracy claims based on conscious parallelism.15 Part III examines the Third Circuit’s approach to the problem and its most recent case, In re Flat Glass Antitrust

amount in twelve days). For a discussion of the Third Circuit’s decision in In re Flat Glass, see infra notes 90-112 and accompanying text.

11. See In re Flat Glass, 385 F.3d at 360 (“plaintiffs basing a claim of collusion on inferences from consciously parallel behavior [must] show that certain ‘plus factors’ also exist’); Williamson Oil, 346 F.3d at 1301 (stating test that requires “price fixing plaintiffs” to demonstrate “plus factors”); Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (stating unlawful agreement can be inferred when accompanied by other factors); Blomkest Fertilizer, 205 F.3d at 1033 (same); Merck-Medco, 1999 WL 691840, at *9 (same).

12. See Areeda & Hovenkamp, supra note 4, ¶ 1434 (discussing common “plus factors”); see also In re Flat Glass, 385 F.3d at 360 (listing plus factors). A finding that the defendant took action against their self-interest is crucial, as any action consistent with good business judgment “disproves the existence of any conspiracy motivation.” See Areeda & Hovenkamp, supra note 4, ¶ 1413a (asserting that independent business justification for decision can be interdependent, which does not prove conspiracy but does provide motive to conspire). Courts have recognized that the “easiest” way to prove conspiracy is through evidence of traditional conspiracy. See, e.g., Petruzzi’s IGA, 998 F.2d at 1244 (noting that “plus factors” are required because “otherwise the evidence is equally consistent with legal behavior”) (citation omitted).

13. Compare Williamson Oil, 346 F.3d at 1301 (“D[efendants may rebut the inference of collusion by presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price fixing conspiracy.”), with In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655 (7th Cir. 2002) (noting that court must avoid trap of weighing conflicting evidence and supposing that “if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment”). See also Thomas A. Piraino, Jr., Regulating Oligopoly Conduct Under the Antitrust Laws, 89 MINN. L. REV. 9, 30-31 (2004) (discussing Seventh Circuit’s break from majority of circuits in interpretation of Supreme Court standard).

14. For a discussion of the plaintiff’s higher inferential burden in antitrust cases, see infra notes 50-42 and accompanying text.

15. For a discussion of conscious parallelism and the circuit courts’ interpretation of the antitrust summary judgment standard in the context of conscious parallelism, see infra notes 43-76 and accompanying text.
Lastly, Part IV concludes that the Third Circuit and other circuits' narrow approach to the Supreme Court's standard of permissible inferences in antitrust cases is the better approach.

II. CONSCIOUS PARALLELISM AND THE PROBLEM OF PLUS FACTORS

Section One of the Sherman Act states that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." In order to establish an illegal restraint of trade it must be shown that there is some type of agreement among competitors. Price fixing among competitors, for example, has been declared a per se violation of Section One of the Sherman Act. But it is difficult for a plaintiff to ever directly prove the existence of an express agreement of horizontal price fixing. Thus, circumstantial evi-

16. 385 F.3d 350 (3d Cir. 2004). For a discussion of the Third Circuit's approach to conscious parallelism, see infra notes 77-119 and accompanying text.

17. For a discussion of how the narrower approach is the better approach, see infra notes 120-36 and accompanying text.

18. 15 U.S.C. § 1 (2000). The Supreme Court has held that only "unreasonable" restraints of trade are unlawful. See Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911) (asserting that because beneficial business contracts could be seen as restraint of trade, Section One only forbids those which are "unreasonably restrictive of competitive conditions"); ABA ANTITRUST SECTION, MONOGRAPH No. 23, THE RULE OF REASON 1 (1999) (citing Standard Oil, 221 U.S. at 1) (discussing Section One of Sherman Act) [hereinafter RULE OF REASON].


20. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("[P]rice-fixing agreements . . . are all banned because of their actual or potential threat to the central nervous system of the economy."); United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993) (affirming principle that agreement to fix or control prices is per se violation). Other examples of per se violations of Section One include bid-rigging and market allocation. See ABA SECTION, supra note 6, at 53-57 (asserting that per se violations are used in cases which rarely have plausible procompetitive justifications) (citations omitted). In contrast to per se unlawful restraints of trade under Section One, there is "a rule of reason," which looks at the effects of actions on competition to determine if such action is an unreasonable restraint of trade. See RULE OF REASON, supra note 18, at 1 (stating that per se rules have been limited in recent cases) (citation omitted); see also ABA SECTION, supra note 6, at 60, 73-77 (stating that circuit courts have created various burden shifting approaches to "rule of reason").

21. See In re Flat Glass Antitrust Litig., 385 F.3d 350, 368 (3d Cir. 2004) (relying solely on circumstantial evidence); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1299 (11th Cir. 2003) (citing City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 569 (11th Cir. 1998)) (recognizing that it is rare for plaintiff to
dence must often suffice. The United States Supreme Court has, however, identified a problem in making inferences from circumstantial evidence about alleged anti-competitive behavior. The Court has narrowed the range of permissible inferences so as not to discourage what is actually competitive behavior.

This heightened standard is applied when deciding whether to grant a defendant's motion for summary judgment. The Supreme Court has held that unlawful anti-competitive behavior cannot be inferred from ambiguous evidence. This principle is often applied in cases of conscious parallelism. Numerous circuit courts have addressed the problem of granting summary judgment in suits based on conscious parallelism and have generally required plaintiffs to establish plus factors to withstand summary judgment. Nevertheless, two different approaches have evolved to interpret the Supreme Court's standard and the treatment of plus factors.

have direct evidence of conspiracy); ABA Section, supra note 6, at 6-7 (noting court's general recognition that direct evidence of conspiracy is rare) (citations omitted); Michael K. Vaska, Comment, Conscious Parallelism and Price Fixing: Defining the Boundary, 52 U. Chi. L. Rev. 508, 508 (1985) (noting that evidence of conscious parallelism is frequently important in proving conspiracy).

22. See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993) (stating that plaintiffs do not have to submit direct evidence, but can rely on circumstantial evidence); ABA Section, supra note 6, at 6 (acknowledging that, lacking direct evidence, circumstantial evidence is typically dispositive); Piraino, supra note 13, at 14 (stating that circumstantial evidence is generally only evidence available in cases of tacit price fixing).


24. See Matsushita, 475 U.S. at 588 (stating that inferences of conspiracy cannot be allowed where behavior is consistent with permissible behavior); Monsanto, 465 U.S. at 764 (holding that there must be evidence that tends to exclude possibility of independent action).

25. See, e.g., In re Flat Glass, 385 F.3d at 357 (discussing limited inferential summary judgment standard); Williamson Oil, 346 F.3d at 1300 (asserting that in accordance with heightened summary judgment standard evidence must support conspiracy more than it supports conscious parallelism); Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1033 (8th Cir. 2000) (discussing heightened summary judgment standard); In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999) (same).

26. For a discussion of the Supreme Court limitation of permissible inference from circumstantial evidence, see infra notes 30-42 and accompanying text.

27. For a discussion of conscious parallelism as one example of the higher burden of evidence, see infra notes 48-65 and accompanying text.

28. For a discussion of the various approaches the circuit courts have used in applying plus factors, see infra notes 52-76 and accompanying text.

29. For a discussion of the two approaches the circuit courts have taken in applying the Supreme Court standard to plus factors, see infra notes 52-76 and accompanying text.
A. Monsanto and Matsushita

The Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.* and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.* announced that plaintiffs in antitrust suits must bear a heavier burden to survive summary judgment. The Supreme Court, in narrowing the range of permissible inferences that can be drawn from circumstantial evidence, did not, however, change the actual standard of summary judgment from that of an ordinary case. This higher standard of evidence protects innocent conduct, which may appear to be concerted but is not proscribed under the Sherman Act.

In *Monsanto*, the Supreme Court dealt with an alleged conspiracy between a manufacturer of corn herbicide and its distributors. The plaintiff, a distributor, alleged that the manufacturer, Monsanto, terminated its distributorship in response to complaints by other distributors about the plaintiff’s price-cutting. The Court was concerned that “permitting an agreement to be inferred merely from the existence of complaints... could deter or penalize perfectly legitimate conduct.”

32. *See id.* at 588 (stating “antitrust law limits the range of permissible inferences from ambiguous evidence”); *Monsanto*, 465 U.S. at 763-64 (holding that court cannot allow agreement to be inferred from ambiguous information).
33. *See Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (holding plaintiff’s burden is no different in antitrust case); AREEDA & HOVENKAMP, supra note 4, ¶ 1405b (claiming *Matsushita* did not change underlying summary judgment principle); *see also Matsushita*, 475 U.S. at 588 (holding that in deciding on motions for summary judgment inferences from facts must be viewed in light most favorable to opposing party and that antitrust law limits those inferences). Summary judgment is appropriate when “there is no genuine issue as to any material fact.” *Fed. R. Civ. P.* 56(c).
34. *See Matsushita*, 475 U.S. at 596 (finding motivation to enter into alleged conspiracy crucial to proving such conspiracy); *Monsanto*, 465 U.S. at 763 (claiming that allowing inferences may “penalize perfectly legitimate conduct”); *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004) (stating “higher threshold” is required to protect action that enhances competition). Commentators have recognized *Matsushita* as holding that absent a motivation to enter into a conspiracy, combined with a plausible theory of conspiracy itself, inferences of conspiracy should not be allowed from ambiguous evidence. *See AREEDA & HOVENKAMP, supra note 4, ¶ 1412b2 (discussing Matsushita precedent).*
35. *See Monsanto*, 465 U.S. at 756 (stating facts). The plaintiff, Spray-Rite, had been a distributor of Monsanto herbicides from 1957 to 1968. *See id.* (same). In 1968, when Monsanto declined to renew Spray-Rite’s distributorship, Spray-Rite was the tenth largest distributor, out of approximately 100 distributors. *See id.* at 757 (same).
36. *See id.* (stating facts). The plaintiff further alleged that Monsanto and its distributors had conspired to fix the resale prices of Monsanto’s herbicides. *See id.* (same). The lower court found that “proof of termination following competitor complaints is sufficient to support an inference of concerted action.” *Id.* at 758 (quoting Spray-Rite Serv. Corp. v. Monsanto Co. 684 F.2d 1226, 1238 (7th Cir. 1982)).
37. *See id.* at 763 (finding lower court mistakenly permitted such inference).
itly held that “there must be evidence that tends to exclude the possibility of independent action . . .”\textsuperscript{38}

In \textit{Matsushita}, the Supreme Court reaffirmed and clarified the principles announced in \textit{Monsanto}.\textsuperscript{39} The Court identified two concerns justifying the limitation on permissible inferences from ambiguous evidence.\textsuperscript{40} First, the alleged conspirators had no plausible motivation to engage in the conspiracy; and second, the alleged conspiracy was itself implausible and closely resembled competitive behavior.\textsuperscript{41} The Court stressed that the predatory price-cutting scheme alleged in this case would be a highly speculative venture for a firm and that allowing inferences of conspiracy from price-cutting could deter what the Court described as the “essence of competition.”\textsuperscript{42}

\textbf{B. Conscious Parallelism}

Related to the higher standard announced in \textit{Monsanto} and \textit{Matsushita} is the phenomenon known as conscious parallelism.\textsuperscript{43} Conscious parallelism may occur in situations, whereby, competitors in a market that is controlled by a small number of firms can predict the responses of other

\textsuperscript{38}Id. at 768. The Court found that there was sufficient evidence in this case that allowed an inference of conspiracy. See id. (criticizing lower court’s standard). There was testimony from a Monsanto manager that it threatened other price-cutting distributors if they did not maintain prices and a newsletter that called for playing by the “rules of the game.” See id. at 766 (finding it reasonable to infer that newsletter referred to agreement to maintain prices).

\textsuperscript{39}See \textit{Matsushita}, 475 U.S. at 588 (citing language from \textit{Monsanto} that evidence must “tend[ ] to exclude the possibility” of independent action). The allegation in this case involved a price-cutting scheme in which the defendants, Japanese owned manufacturers of consumer electronics, conspired to drive American firms out of the business by maintaining low prices in the United States, while at the same time maintaining high prices in Japan. See id. at 577-78 (stating facts).

\textsuperscript{40}See id. at 588-95 (discussing lack of motive to enter into price-cutting scheme that was unlikely to yield greater long-term profits, and that danger of mistaken inferences in price-cutting schemes is greater); see also \textit{Arenda & Hovenkamp, supra} note 4, ¶ 1412b2 (discussing \textit{Matsushita} precedent).

\textsuperscript{41}See \textit{Matsushita}, 475 U.S. at 588-95 (finding that without motivation, implausible predatory pricing schemes are self-deterring because they require defendants to incur losses). The Court found that the need for identifying and punishing illegal conspiracy should be balanced against chilling competitive behavior. See id. at 594 (finding balance one-sided in cases such as this).

\textsuperscript{42}See id. at 594-97 (quoting \textit{Fed. R. Civ. P. 56(e)}) (finding economic realities tend to make predatory pricing schemes self-deterring and that absence of plausible motive is highly relevant to finding “genuine issue for trial”).

\textsuperscript{43}See Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1300-01 (11th Cir. 2003) (applying principles of \textit{Monsanto} and \textit{Matsushita} to cases of conscious parallelism); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 165 (3d Cir. 2003) (stating plus factors are required in allegations based conscious parallelism in order to “allay the concerns expressed by the Supreme Court”); see also Piraino, \textit{supra} note 13, at 29 (stating that “[t]he \textit{Monsanto/Matsushita} approach places oligopoly regulation on its head”).
competitors to its business decisions, such as pricing.\textsuperscript{44} If one firm decides to raise their prices in an oligopolistic market, that firm can, in effect, hope that the other firms will recognize the extra profit to be gained by similarly raising their prices and by avoiding a price war.\textsuperscript{45} This has been described as a form of “tacit agreement,” “tacit collusion,” or “interdependent decision-making.”\textsuperscript{46} Although there are some commentators who argue that this type of action is essentially no different from a traditional conspiracy and should be illegal under Section One of the Sherman Act, 

\textsuperscript{44} See Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (defining conscious parallelism as “the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions”); AREEDA & HOVENKAMP, supra note 4, ¶ 1429 (asserting that interdependent decisions can reach same result as cartels); see also Turner, supra note 5, at 656 (describing phenomenon as “oligopoly pricing”). This type of decision-making has been termed “interdependent” and has given rise to the “theory of interdependence.” RICHARD A. POSNER, ANTITRUST LAW 55-60 (2d ed. 2001) (criticizing “interdependence theory of oligopolistic pricing”).

\textsuperscript{45} See Turner, supra note 5, at 661 (stating that this situation is impossible in market dominated by large number of firms because drop in price by one competitor is unlikely to effect another competitor). But see POSNER, supra note 44, at 57-60 (asserting that oligopoly pricing theory fails to consider that firm in concentrated market may still have incentive to cut prices). Turner discusses the case of American Tobacco Co. v. United States, 328 U.S. 781 (1946), where from 1928 to 1940 all three manufacturers of cigarettes charged identical prices for cigarettes and any price change by one manufacturer was immediately followed by another. See id. at 804-05 (detailing how big three cigarette manufacturers were found to have conspired in selling cigarettes to dealers); Turner, supra note 5, at 661 (discussing American Tobacco as example of non-competitive behavior in oligopoly situation). This case, Turner claims, is a classic oligopoly pricing case, where the cigarette makers knew that if they raised their prices the other firms would respond accordingly; thus, as was the case, the manufactures substantially increased their profits even with declining sales. See id. (same). Parallel behavior does not, however, always reflect interdependent decision-making. See id. at 658 (stating that conscious parallelism is not even evidence of tacit agreement unless it would not be in individual’s self-interest notwithstanding all competitors taking similar action). Turner claims the situation in Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954), illustrates a case where parallel behavior may not have been the result of interdependent decision-making. See Turner, supra note 5, at 658-59 (asserting that situation is possible where all business came to same conclusion based on their own self-interest). In Theatre Enterprises, the plaintiff alleged that movie producer-distributors conspired to limit “first run” movies to downtown Baltimore theatres. See id. at 657 (discussing facts). Nevertheless, as Turner notes, rational and completely independent decisions by the movie distributors could have brought about the same result. See id. at 659 (noting that occasionally even identical prices may be result of truly independent decisions in stable industries).

\textsuperscript{46} See AREEDA & HOVENKAMP, supra note 4, ¶ 1410b (stating that oligopolists can “tacitly coordinate” prices just by observing market); POSNER, supra note 44, at 53 (stating preference of calling conscious parallelism “tacit collusion”); George A. Hay, Oligopoly, Shared Monopoly, and Antitrust Law, 67 CORNELL L. REV. 439, 440 (1982) (identifying common terminology); Piraino, supra note 13, at 10 (claiming oligoplists “consensus pricing” is growing problem); Turner, supra note 5, at 663 (arguing that conscious parallelism may not be “agreement” in “traditional” sense, however, competitors are knowingly taking advantage of interdependence).
the Supreme Court and circuits courts have uniformly found otherwise, as have numerous other commentators.\(^4\)

Before the Supreme Court's holdings in \textit{Monsanto} and \textit{Matsushita}, the problem of conscious parallelism had been identified and solutions had been proposed.\(^4\) The consensus approach has been for courts to look for additional plus factors in conjunction with parallel behavior in order to allow an inference of conspiracy.\(^4\) These plus factors typically include: evidence that the defendant had a motive to enter into a conspiracy, evidence that the defendant acted against their self interest and other evidence which points to a traditional conspiracy.\(^5\) The first two of these

\(^4\) \textit{See Theatre Enters.}, 346 U.S. at 540-41 (holding that parallel business behavior is not itself violation of Sherman Act); \textit{In re Flat Glass Antitrust Litig.}, 385 F.3d 350, 360 (8th Cir. 2004) (finding conscious parallelism alone is not proscribed by Sherman Act); Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1300-01 (11th Cir. 2003) (same); Blomkest Fertilizer v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc) (same); Merck-Medco Managed Care, LLC v. Rite-Aid Corp., No. 98-2847, 1999 WL 691840, at *15 (4th Cir. Sept. 7, 1999) (unpublished per curiam opinion) (same); \textit{In re Citric Acid Litig.}, 191 F.3d 1090, 1102 (9th Cir. 1999) (same); Mitchell v. Intracorp, Inc., 179 F.3d 847, 859 (10th Cir. 1999) (same); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (same); Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987) (same); \textit{see also Areeda & Hovenkamp}, supra note 4, ¶ 1432a-g (identifying problems with equating tacit agreement with express agreement, such as no equitable remedy and that oligopolist may be forced into conspiracy); Turner, \textit{supra} note 5, at 671 (stating that conscious parallelism may be considered “agreement,” but should not be considered “unlawful agreement”). \textit{But see Posner, supra} note 44, at 55-56 (criticizing distinction between “tacit” and “explicit” collusion); Piraino, \textit{supra} note 13, at 15 (“[T]acit collusion should be illegal on its face, because it harms consumers without any offsetting economic benefit.”). Posner criticizes Turner’s argument that there can be no effective remedy to conscious parallelism. \textit{See Posner, supra} note 44, at 57-59 (asserting that Turner’s arguments are based on “interdependence theory of oligopolist pricing,” which Posner regards as inadequate).

\(^4\) \textit{See Theatre Enters.}, 346 U.S. at 540-41 (holding that parallel business behavior is not itself violation of Sherman Act); \textit{Am. Tobacco}, 328 U.S. at 781 (same); \textit{see also} Turner, \textit{supra} note 5, at 671-73 (concluding that consciously parallel pricing should not be unlawful under Sherman Act and some “other evidence” that points to “something more” should be necessary to survive motion to dismiss by defendant). Some commentators have argued that the circuit courts’ current treatment of conscious parallelism is inconsistent with pre-\textit{Monsanto}/\textit{Matsushita} Supreme Court decisions. \textit{See Piraino, supra} note 13, at 29 (“The lower federal courts’ interpretation of \textit{Monsanto} and \textit{Matsushita} flies in the face of the Supreme Court’s historical willingness to infer the existence of a horizontal price-fixing conspiracy from circumstantial evidence.”).

\(^4\) \textit{See Areeda & Hovenkamp}, \textit{supra} note 4, ¶ 1434 (asserting that courts have rarely allowed finding of conspiracy without such plus factors).

\(^5\) \textit{See, e.g., In re Flat Glass}, 385 F.3d at 360 (stating three categories of plus factors); \textit{Areeda & Hovenkamp}, \textit{supra} note 4, ¶ 1434 (discussing common plus factors).
plus factors, however, often simply restate the phenomenon of conscious parallelism.\textsuperscript{51}

C. Circuit Courts

Conscious parallelism and the problem of plus factors has not been addressed by the Supreme Court in light of its rulings in \textit{Monsanto} and \textit{Matsushita}; however, the majority of the circuit courts have struggled with the proper burden to place on plaintiffs.\textsuperscript{52} The lower courts’ interpretation of the raised standard has often proved insurmountable by plaintiffs in cases alleging horizontal price fixing in an oligopolist market.\textsuperscript{53} Nevertheless, two divergent approaches have emerged: one following a broad, strict interpretation of the \textit{Monsanto/Matsushita} standard and another applying a narrow, more relaxed standard.\textsuperscript{54}

1. A Broad Interpretation: The Eleventh and Eighth Circuits

Two recent decisions in the United States Courts of Appeals for the Eighth and Eleventh Circuits have tightly adhered to the language in \textit{Matsushita} requiring evidence that “tends to establish a conspiracy more than it indicates conscious parallelism.”\textsuperscript{55} The Eleventh Circuit in \textit{Williamson}

\textsuperscript{51} See \textit{AREEDA & HOVENKAMP}, \textit{supra} note 4, \textit{\S} 1434c (recognizing that conspiratorial motivation and acts against self-interest merely restate theory of interdependence).

\textsuperscript{52} See generally \textit{In re Flat Glass}, 385 F.3d at 359-60 (discussing summary judgment standard); \textit{Williamson Oil}, 346 F.3d at 1301 (same); \textit{In re High Fructose Corn Syrup Antitrust Litig.}, 295 F.3d 651, 655 (7th Cir. 2002) (same); \textit{Blomkest Fertilizer}, 203 F.3d at 1032 (same); see also Robert W. Doyle, Jr. & Andre P. Barlow, \textit{Avoiding Summary Judgment in Antitrust Conspiracy Cases: Is the Seventh Circuit Pro-Enforcement?}, SJ054 ALI-ABA 581, 586 (2004) (concluding that most circuit courts’ interpretation of \textit{Monsanto/Matsushita} standard imposes difficult obstacle to plaintiffs’ claims).

\textsuperscript{53} See \textit{Williamson Oil}, 346 F.3d at 1291 (affirming grant of summary judgment); \textit{Blomkest Fertilizer}, 203 F.3d at 1035 (finding documents alluding to price fixing were “at most, ambiguous”); \textit{In re Baby Food Antitrust Litig.}, 166 F.3d 112, 118 (3d Cir. 1999) (finding suspicious internal documents not sufficient to defeat summary judgment); see also Doyle, \textit{supra} note 52, at 586 (concluding that most courts have imposed difficult burden); Piraino, \textit{supra} note 15, at 29 (stating that under prevailing view of \textit{Monsanto/Matsushita} standard, plaintiffs will not get to jury unless they come up with direct uncontradicted evidence).

\textsuperscript{54} Compare \textit{Williamson Oil}, 346 F.3d at 1301 (asserting that districts court’s duty is not to assess credibility of evidence but to determine if evidence tends to establish conspiracy more than it indicates conscious parallelism) (quotations from original omitted), \textit{with In re High Fructose Corn Syrup}, 295 F.3d at 663 (finding evidence “highly suggestive” of conspiracy sufficient to withstand summary judgment). See also Doyle, \textit{supra} note 52, at 586 (stating that Seventh Circuit has interpreted \textit{Matsushita} more narrowly than other circuits); David L. Meyer, \textit{The Seventh Circuit’s High Fructose Corn Syrup Decision—Sweet for Plaintiffs, Sticky for Defendants, 17 ANTITRUST 67, 67 (2002) (same).

\textsuperscript{55} See \textit{Williamson Oil}, 346 F.3d at 1301 (discussing district court’s duty of weighing evidence); \textit{Blomkest Fertilizer}, 203 F.3d at 1032 (claiming to be with majority of circuits that apply \textit{Matsushita} standard broadly).
Oil Co. v. Phillip Morris USA,56 and the Eighth Circuit in Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,57 have taken the guidance from the Supreme Court and created a three-step summary judgment analysis in suits alleging price fixing.58 First, a plaintiff has to establish evidence that the defendants have engaged in parallel pricing.59 Second, a plaintiff must show the existence of one or more plus factors that tends to exclude the possibility of independent action.60 Third, the establishment of these first two factors creates a rebuttable presumption of price fixing, which the defendant can defeat with their own evidence.61

The Eighth Circuit’s treatment of alleged plus factors in Blomkest Fertilizer is illustrative of this approach.62 In that case the plaintiffs alleged

56. 346 F.3d 1287 (11th Cir. 2003).
57. 203 F.3d 1028 (8th Cir. 2000).
58. See Williamson Oil, 346 F.3d at 1301 (fashioning test by which plaintiff can “demonstrate the existence of ‘plus factors’ that remove their evidence from the realm of equipoise”); Blomkest Fertilizer, 203 F.3d at 1033 (citing Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 n.30 (11th Cir. 1991)) (“A plaintiff has the burden to present evidence of consciously paralleled pricing supplemented with one or more plus factors.”).
59. See Williamson Oil, 346 F.3d at 1301 (stating first step in summary judgment analysis); Blomkest Fertilizer, 203 F.3d at 1033 (same). This requirement is similar to the Third Circuit, which requires a plaintiff to establish a pattern of parallel behavior among the defendants, that the defendants were aware of each other’s conduct and that it served as a basis for their decision. See Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1242-43 (3d Cir. 1993) (stating three-step test for surviving summary judgment in cases of conspiracy based on conscious parallelism).
60. See Williamson Oil, 346 F.3d at 1301 (stating second step in summary judgment analysis); Blomkest Fertilizer, 203 F.3d at 1033 (same). The court in Williamson Oil identified some specific plus factors, which included: showing the defendants’ behavior would not be in their economic self interest if there were not a conspiracy to fix prices and any other showing that “tends to exclude the possibility of independent action.” See Williamson Oil, 346 F.3d at 1301 (citing City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 571 n.35 (11th Cir. 1998)) (stating “plus factors”). It has been recognized by courts and commentators that actions taken by a defendant contrary to their self-interest is a restatement of the phenomenon of conscious parallelism. See In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004) (acknowledging that actions by defendant against self-interest restate theory of interdependence); see also Posner, supra note 44, at 100 (asserting that listing actions taken contrary to self-interest as plus factor creates ambiguity by inviting “defendants to argue that they were not competing because it was not in their self-interest to compete”).
61. See Williamson Oil, 346 F.3d at 1301 (holding that defendant can defeat presumption of price fixing by “presenting evidence establishing that no reasonable factfinder could conclude that they entered into a price fixing conspiracy”); Blomkest Fertilizer, 203 F.3d at 1033 (stating that once plaintiff meets its initial burden court must still determine whether evidence tends to exclude independent action); see also Todorov, 921 F.2d at 1456 n.30 (stating that plus factors only create rebuttable presumption of conspiracy) (citation omitted).
62. See Blomkest Fertilizer, 203 F.3d at 1033 (stating plaintiff’s allegations). Blomkest Fertilizer involved allegations that six Canadian and two American potash companies conspired to raise the price of potash. See id. at 1031 (stating facts). The primary allegation stemmed from the negotiations of a Suspension Agree-
three plus factors along with evidence of the defendant's parallel pricing behavior: (1) high level interfirm communications about price information; (2) actions against self-interest by not cutting prices; and (3) expert testimony that prices were above the expected market value without collusion. The court dismissed all three alleged plus factors as speculative, by positing possible alternative justifications for the actions or, in the case of the expert testimony, dismissing it as "fundamentally unreliable." Similarly, the court in Williamson Oil went through an exhaustive examination of each of the plaintiffs' alleged "plus factors" and determined that none of them independently, or in concert, amounted to an actual plus factor.

2. A Narrow Interpretation: The Seventh Circuit

In contrast to the broad approach of other circuits, the Seventh Circuit has approached oligopolist price coordination more loosely, in what commentators have termed a "narrow" interpretation of the Monsanto/Matsushita standard. In In re High Fructose Corn Syrup Antitrust Litigation between the Potash Corporation of Saskatchewan and the United States Department of Commerce after a finding that the defendant had been engaged in dumping potash in the United States market. See id. at 1031-32 (same). This Suspension Agreement had the immediate effect of raising potash prices, however, prices continued to rise above the minimum price required by the Agreement. See id. at 1032 (same).

63. See id. (outlining alleged plus factors). The interfirm communication involved "meetings at trade shows and conventions, price verification calls, discussions regarding a Canadian potash export association, and the like." Id. at 1033. The court found that there was no evidence that the exchanges of pricing information impacted pricing decisions. See id. at 1035 (discounting the evidence as speculative).

64. See id. at 1035-38 (analyzing evidence of plus factors). The dissent in this case criticized the court's treatment of the evidence. See id. at 1039 (Gibson, J., dissenting) (alleging that majority "rejects circumstantial evidence of conspiracy and requires direct evidence to withstand summary judgment in an antitrust case"). The dissent also noted that the potash market was conducive to oligopolistic pricing because the demand for potash is highly inelastic, meaning that purchasers will buy the same amount of potash whether the price goes up or down. See id. (Gibson, J., dissenting) (describing potash market).

65. See Williamson Oil, 346 F.3d at 1319 (asserting that plaintiffs have only established that tobacco industry is classic oligopoly). The court considered eleven factors that the appellants raised:

- (1) signaling of intentions;
- (2) permanent allocations programs;
- (3) monitoring of sales;
- (4) actions taken contrary to economic self-interest . . .
- (5) nature of the market;
- (6) strong motivation;
- (7) reduction in the number of price tiers;
- (8) opportunities to conspire;
- (9) pricing decisions made at high levels;
- (10) the smoking and health conspiracy; and
- (11) foreign conspiracies.

Id. at 1305 (citation omitted). The court, in dismissing each of the plus factors submitted by plaintiffs, relied heavily on alternative possible explanations of each individual claim. See id. at 1305-19 (analyzing alleged plus factors).

66. See Doyle, supra note 52, at 586 (claiming Seventh Circuit interprets Matsushita more narrowly); Meyer, supra note 54, at 67 (asserting Seventh Circuit allows "almost any shred of evidence providing support for such a conspiracy . . . sufficient to send the case to the jury").
tion," Judge Posner held that Matsushita's heightened inferential standard does not apply when an oligopolist market behaves like classic interdependent “tacit” price coordination. This holding translates into a heavy dependence on economic evidence to show that prices were higher than could be expected without coordination, and that the defendants behaved counter to their self-interest if not for the existence of an agreement. This analysis, Judge Posner admits, is consistent with a tacit agreement—conscious parallelism. Therefore, there must be some additional evidence of an explicit agreement; however, the evidence need not exclude the possibility of independent action nor rule out alternative explanations.

The defendants in In re High Fructose Corn Syrup were manufacturers of high fructose corn syrup, who were alleged to have conspired to fix prices. After going through an extensive economic analysis, Judge Posner discussed the circumstantial evidence of an express agreement to conspire. This evidence amounted to a series of communications by representatives of the defendant corporations, which were highly sugges-

67. 295 F.3d 651 (7th Cir. 2002).
68. See id. at 661 (asserting that high fructose corn syrup market was conducive to price fixing and that defendant’s actions limited competition, thus, Matsushita’s strict requirements do not apply); see also Herbert Hovenkamp, The Rationalization of Antitrust, 116 HARV. L. REV. 917, 926 (2003) (“Under Posner’s approach, once one determines that the market is conducive to collusion and has some of the suspicious practices that suggest collusion, little of nothing in the way of additional ‘explicit’ evidence of collusion is required.”); Piraino, supra note 13, at 31 (claiming In re High Fructose Corn Syrup lowered standard of evidence based on plausibility of collusive conduct). Judge Posner’s approach has also been criticized. See Meyer, supra note 54, at 70 (“The HFCS decision turns this approach [the Matsushita standard] upside down by allowing the plaintiff to avoid summary judgment with evidence only ‘one plausible’ interpretation of which supports the plaintiffs’ conspiracy hypothesis.”).
69. See In re High Fructose Corn Syrup, 295 F.3d at 655 (stating that “economic evidence is important in a case such as this”); see also Doyle, supra note 52, at 587 (noting Judge Posner relied heavily on finding market conducive to collusion and that defendants were not competing against each other); Hovenkamp, supra note 68, at 926 (stating that Judge Posner has deviated from other circuit’s “unfortunate misinterpretation” of Matsushita); Piraino, supra note 13, at 31-32 (noting Judge Posner’s departure from strict following of Matsushita in oligopoly price fixing cases).
70. See In re High Fructose Corn Syrup, 295 F.3d at 661 (stating that question is whether there is enough evidence presented to allow reasonable juror to find explicit agreement).
71. See id. at 663 (stating that evidence was “highly suggestive of the existence of an explicit though of course covert agreement to fix prices”).
72. See id. at 655 (stating facts). There are six major manufacturers of high fructose corn syrup: Archer Daniels Midland (ADM), A.E., Staley, Cargill, American Maize-Products and CPC International. See id. at 655 (same). CPC settled and was not a party to this litigation. See id. at 654 (same).
73. See id. at 661-63 (summarizing statements made by employees of five manufacturers).
tive of price fixing. The court was particularly clear in stating that the evidence was to be considered as a whole, concluding: "[t]he evidence is not conclusive by any means—there are alternative interpretations of every bit of it—but it is highly suggestive of the existence of an explicit though of course covert agreement to fix prices." It is almost certain that this amount of evidence would not have been sufficient in the Eighth or Eleventh Circuits to withstand summary judgment.

III. THE THIRD CIRCUIT'S APPROACH AND IN RE FLAT GLASS

A. A History of the Third Circuit's Approach to Conscious Parallelism

The United States Court of Appeals for the Third Circuit has consistently held that consciously parallel behavior is not itself a violation of the Sherman Act. Before the Supreme Court announced the higher standard of permissible inferences in Monsanto and Matsushita, the Third Circuit treated conscious parallelism alone as insufficient to support an inference of conspiracy and required some additional evidence of conspiracy. Nevertheless, after Monsanto and Matsushita the Third Circuit began to analyze the treatment of plus factors and the standard of permissible inferences with regard to this heightened standard. The

74. See id. at 663 (summarizing circumstantial evidence). In one document the president of a firm stated, "our competitors are our friends. Our customers are the enemy." See id. at 662 (same). Another document referred to new competitors entering the market and stated they will "play by the rules." See id. (same).

75. Id. at 663.

76. For a discussion of the standard applied by the Eighth and Eleventh Circuit, see supra notes 55-65 and accompanying text.


78. See, e.g., In re Japanese Elec. Prod., 723 F.3d at 304 (finding conscious parallelism on its own insufficient to permit inference of conspiracy); Schoenkopf, 637 F.2d at 208 (noting that conscious parallelism when supported by other evidence can suffice to allow inference of conspiracy).

79. See InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 165 (3d Cir. 2003) (requiring "plus factors" to satisfy concerns of Monsanto and Matsushita); In re Baby Food, 166 F.3d at 122 (stating that because conscious parallelism is circumstantial, plus factors are required to avoid punishing legal independent conduct); Petruzzi's
Third Circuit, however, began to depart conceptually from analyzing cases of conscious parallelism under the higher standard and, most recently in *In re Flat Glass*, appears to have adopted the narrow interpretation of *Matsushita*.80

The Third Circuit developed its current approach to allegations of conspiracy based on conscious parallelism in *Petruzzi’s IGA Supermarket, Inc. v. Darling-Delaware Co.*81 In *Petruzzi’s IGA*, the court recognized that “an antitrust plaintiff can establish concerted action through the defendant’s behavior standing alone.”82 Nevertheless, the court noted that consciously parallel behavior is merely circumstantial evidence that has to be supplemented with additional evidence, plus factors, in order to prove a conspiracy.83 In this regard, the Third Circuit is firmly in line with the majority of the circuit courts’ interpretation of the *Monsanto/Matsushita* standard.84

The Third Circuit’s analysis in *Petruzzi’s IGA*, however, departed from the majority of circuits, finding that more liberal inferences from circumstantial evidence can be made where the concerns of *Matsushita*—implausibility of conspiracy theory and hindering procompetitive behavior—were 80.

*IGA*, 998 F.2d at 1242 (holding that plus factors are derived from concerns of *Matsushita*).

81. 998 F.2d 1224 (3d Cir. 1993). The defendants in this case were rendering companies who purchased meat scraps from supermarkets and butcher shops. See *id.* at 1228 (stating facts). The plaintiffs alleged that the defendants conspired to: (1) refrain from soliciting other competitors’ accounts; (2) submit collusive bids to certain accounts; (3) settle “allocation disputes”; and (4) urge others to join in the conspiracy. See *id.* (same).

82. *Id.* at 1242; see also *Schonkopf*, 637 F.2d 205, 208 (3d Cir. 1980) (stating conscious parallelism can be basis for conspiracy claim).

83. See *Petruzzi’s IGA*, 998 F.2d at 1242 (finding that illegal conspiracy can, in addition to being proven by direct evidence and economic evidence, be proven by conscious parallelism); see also *In re Flat Glass*, 385 F.3d at 360 (discussing development of theory that interdependent behavior is not “agreement” under Sherman Act); *Intervest*, 340 F.3d at 165 (finding conspiracy can be proven under theory of conscious parallelism when plaintiff can establish necessary elements); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 121-22 (3d Cir. 1999) (noting that “interdependent parallelism can be a necessary fact of life but be the result of independent pricing decisions”).

84. See, e.g., *Williamson Oil, Inc. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (requiring plus factors); Blomkest Fertilizer v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1033 (8th Cir. 2000) (same); *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999) (same); *Areeda & Hovenkamp, supra* note 4, ¶ 1434 (stating that majority of courts require plus factors).
not present. The court found that neither of the concerns identified in *Matsushita* that justified the heightened standard were implicated in this case. Therefore, the court held that more liberal inferences were permissible. The Third Circuit continued to follow this precedent in *In re Baby Food Antitrust Litigation*, stating, "[t]he acceptable inferences which we can draw from circumstantial evidence vary with the plausibility of the plaintiff's theory and the danger associated with such inferences."

**B. The Latest Word: In Re Flat Glass**

1. **Facts and Procedural History**

In *In re Flat Glass*, the Third Circuit made a comprehensive re statement of the applicable summary judgment standard in cases of conspiracy based on evidence of conscious parallelism. This case arose out of the firing of two executives of Libbey-Owens-Ford Company ("LOF") who, while under indictment for conspiracy, mail and wire fraud and money laundering, alleged that LOF had conspired with its competitors to fix prices in the glass products industry. Several antitrust lawsuits were

85. See *Petruzzi's IGA*, 998 F.2d at 1242 (noting that *Matsushita* reflects concern not to curb "procompetitive behavior"); see also *In re Flat Glass*, 385 F.3d at 357 (finding concerns of *Matsushita* not applicable where conspiracy theory is not implausible and action could not be mistaken for competitive behavior); *Intervest*, 340 F.3d at 161-62 (following *Petruzzi's IGA*'s holding, but finding it not applicable); *In re Baby Food*, 166 F.3d at 122 (finding concern for inferring illegal agreement from conscious parallelism stems from concern in *Matsushita* not to punish unilateral action).

86. See *Petruzzi's IGA*, 998 F.2d at 1232 (stating summary judgment standard). The two concerns were: (1) that the plaintiff's theory was implausible; and (2) permitting an inference of conspiracy could deter competitive behavior. See id. (discussing *Matsushita* precedent) (citation omitted). The court stated that the plaintiff's theory of conspiracy made "perfect economic sense" and that the challenged activities—refusing to bid on accounts—cannot be labeled as "the very essence of competition." See id. at 1232 (same). Other circuits have also suggested that a looser standard may be applied when the concerns identified in *Matsushita* are not present. See Merck-Medco Managed Care, LLC v. Rite Aid Corp., No. 98-2847, 1999 WL 691840, at *15 (4th Cir. Sept. 7, 1999) (unpublished per curium opinion) (same); Michael v. Intracorp, Inc., 179 F.3d 847, 858 (10th Cir. 1999) (same).

87. See *Petruzzi's IGA*, 998 F.2d at 1232 (discussing appropriate standard of summary judgment). But see *Meyer*, supra note 54, at 71 (claiming that *Petruzzi's IGA* did not go so far as to suggest that ambiguous evidence should be treated differently merely because of oligopolistic interdependence).

88. 166 F.3d 112 (3d Cir. 1999).

89. Id. at 124.

90. See *In re Flat Glass*, 385 F.3d at 356-61 (discussing application of summary judgment in cases alleging per se violation of Section One of Sherman Act, as it applies in context of standard announced in *Matsushita* and theory of interdependence). The court affirmed in part and reversed in part the decision of the district court to grant the defendant summary judgment. See id. at 353 (summarizing case procedure).

91. See *Petruzzi's IGA*, 998 F.2d at 1232 (citing *In re Flat Glass Antitrust Litig.*, 288 F.3d 83, 86 (3d Cir. 2002)) (stating facts).
There were two separate allegations against PPG. The first was based on a conspiracy to fix and maintain the price of flat glass. In the flat glass market, five manufacturing firms accounted for over ninety percent of the flat glass sold in the United States. The allegation revolved around a series of three closely timed and nearly identical increases in the firms' list prices for flat glass. Each of these three price increases was surrounded by communications between the firms and statements that suggested an agreement between the firms. The second allegation was based on a conspiracy to align and stabilize the price of automotive replacement glass by using the same "National Auto Glass Specifications (NAGS) Calculator" to set truckload prices. The Third Circuit affirmed the district court's grant of summary judgment on this second claim, but reversed the first claim.

2. Reasoning

The Third Circuit began its analysis by laying out the general framework of a Section One claim of horizontal price fixing under the Sherman Act. The court, following Petruzzi's IGA, distinguished the present case from the line of cases following Matsushita's higher evidentiary thresh-
old. Summarizing the theory of interdependence, Judge Chertoff found that caution must still be used in making inferences from circumstantial evidence, and that any claim of conspiracy based on conscious parallelism must establish certain plus factors.

In *In re Flat Glass*, the court listed three plus factors: “(1) evidence that the defendant has a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.” Judge Chertoff described the flat glass market as a “textbook” example of a market susceptible to collusion, which he found gave the defendant sufficient motive to enter into an agreement. Moreover, he found that the defendant’s price increases were contrary to its self-interests.

In addition, the court discussed four pieces of evidence, which it held established enough evidence of conspiracy to survive summary judgment. First, the court dealt with evidence submitted by one of PPG’s competitors, “which described an agreed upon, across the board price increase for the entire United States.” The court noted that the admission did not specifically mention PPG, however, the court rejected PPG’s argument that evidence of conspiracy among other competitors is irrelevant. The other three pieces of evidence involved the timing and communications between the five firms surrounding three price increases spanning a period of two years. In particular, the court examined the exchange of pricing information among the defendants and concluded

100. See id. at 357-58 (following Petruzzi’s IGA precedent in finding concerns justifying decision in Matsushita not present). The court specifically found that “[h]ere, like in Petruzzi’s, plaintiffs’ theory of conspiracy—an agreement among oligopolists to fix prices at a supracompetitive level—makes perfect economic sense. In addition, absent increases in marginal cost or demand, raising prices generally does not approximate—and cannot be mistaken as—competitive conduct.” Id. at 358.

101. See id. at 359-60 (stating that ultimate question becomes "what are 'plus factors' that suffice to defeat summary judgment").

102. Id. at 360. The court required the third factor because, as the court acknowledged, the first two simply restate the phenomenon of conscious parallelism. See id. (discussing plus factors).

103. See id. at 361 (analyzing flat glass market).

104. See id. at 362 (finding price increases were not justified by increased costs or demand).

105. See id. at 363-67 (discussing plaintiff’s evidence).

106. See id. at 368 (describing plaintiff’s evidence) (citation omitted).

107. See id. (finding evidence of conspiracy among competitors relevant, “especially so if the sister firm’s behavior mirrored that of the five conceded coconspirators”). *Contra In re Citric Acid Litig.*, 191 F.3d 1090, 1106 (9th Cir. 1999) (finding evidence that defendant’s competitors in citric acid market conspired to fix prices “does not tend to exclude the possibility of independent action”). The court in *In re Citric Acid*, found that the defendant had “offered reasonable legitimate explanations” for its pricing. See id. (same).

108. See *In re Flat Glass*, 385 F.3d at 364-68 (analyzing series of identical price increases and communications between flat glass producers). For a discussion of the individual price increases, see *supra* note 94 and accompanying text.
that it was reasonable to infer these exchanges served as a basis for the defendant’s pricing decisions.109

In summary, the Third Circuit concluded that all of this evidence, taken together, was sufficient—a reasonable fact-finder could conclude PPG had conspired.110 The court firmly rejected PPG’s suggestion that each piece of evidence should be analyzed separately, and that if the court could “feasibly interpret [the evidence] as consistent with the absence of an agreement to raise prices” then the evidence should be disregarded.111 The defendants’ arguments, the court stated, were “well-suited for an argument before a jury.”112

C. The Third Circuit Test

What has emerged in the Third Circuit is a relatively simple three-part test for courts to follow when faced with allegations of illegal conspiracy based on conscious parallelism.113 First, ask was the defendants’ behavior parallel?114 Second, were the defendants aware of each other’s conduct, and was such awareness an element in their decision-making process?115 Third, can the plaintiff establish certain plus factors?116

The Third Circuit has recognized three general categories of plus factors: (1) a motivation to enter into a conspiracy; (2) actions taken contrary to defendant’s self-interest; and (3) evidence of a traditional conspiracy.117 In recognition that the first two plus factors merely restate the

109. See id. at 368-69 (noting mere presence of pricing information is not sufficient evidence). The court distinguished the exchanges of information in this case from those in In re Baby Food, on the grounds that these exchanges occurred among executives and that here, there was evidence suggesting the information was used to set prices. See id. at 369 (discussing evidence).

110. See id. at 368 (summarizing evidence).

111. Id.

112. Id.


114. See, e.g., Petruzzi’s IGA, 998 F.2d at 1243 (outlining three element test).

115. See id. (same).

116. See In re Flat Glass, 385 F.3d at 360 (finding there is “no finite set” of plus factors); In re Baby Food, 166 F.3d at 122 (claiming that once parallel pricing has been supplemented with plus factors rebuttable presumption of conspiracy exists); Petruzzi’s IGA, 998 F.2d at 1242 (discussing possible plus factors); see also William C. Holmes, 1992 Antitrust Law Handbook § 1.103[3], at 154 (asserting wide range of possible plus factors).

117. See In re Flat Glass, 385 F.3d at 360 (stating plus factors); In re Baby Food, 166 F.3d at 122 (same). The Third Circuit first stated the requirement of these first two factors in Venzie Corp. v. U.S. Mineral Products Co., 521 F.2d 1309, 1314 (3d Cir. 1975). See also Vaska, supra note 21, at 529 (stating Third Circuit’s “Venzie” test was based on idea that behavior alone should not allow inferences of agreement.
phenomenon of conscious parallelism, the Third Circuit requires that some additional evidence of a traditional conspiracy be established.\textsuperscript{118} Most importantly, where the court finds conscious parallelism and the plaintiff's theory of conspiracy is plausible and does not reflect competitive behavior, the strict inferential standard of \textit{Monsanto} and \textit{Matsushita} will not be applied.\textsuperscript{119}

IV. NARROWER IS BETTER

The Third Circuit’s latest word on conscious parallelism in \textit{In re Flat Glass} appears to adopt a narrow interpretation of the \textit{Monsanto}/\textit{Matsushita} standard.\textsuperscript{120} This is an advisable movement, as the narrow approach puts proper weight on economic evidence and properly leaves the judging of conflicting evidence to a jury.\textsuperscript{121} The broad approach, in contrast, misinterprets \textit{Matsushita}, as well as places an almost impossible burden on plaintiffs.\textsuperscript{122}

except where in certain circumstances inference of rational independent choice is less attractive). Evidence of conscious parallelism is meaningless to proving an unlawful agreement without showing actions contrary to the defendant’s self-interest or any motivation to enter into an agreement. \textit{See Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1014 (3d Cir. 1994) (citing Venzie, 521 F.2d at 1314) (stating that actions taken consistent with self-interest in no way implies agreement). In Alvord-Polk, the court found that the defendant’s decision to forgo some business to keep its other retailers happy could rationally be concluded as consistent with its self-interest. See id. (noting that defendant would clearly benefit in long-term).

\textsuperscript{118} \textit{See In re Flat Glass}, 385 F.3d 360, 360 (stating that first two factors merely restate theory); \textit{In re Baby Food}, 166 F.3d at 122 (same); \textit{see also Posner, supra note 44, at 100 (same). In Petruzzi’s IGA, the court stated that a plaintiff can survive summary judgment without providing any evidence of a traditional conspiracy, if they can establish the first two factors. See 998 F.2d at 1244 (cautioning against applying these factors blindly). This may be treated as dicta, as in that case the court found there was evidence of traditional conspiracy. See id. (finding that testimony and economic evidence meet requirement). The Third Circuit has held traditional evidence is the best way to prove a conspiracy. See id. (noting “easiest” plus factor is evidence implying traditional conspiracy) (citation omitted).

\textsuperscript{119} For a discussion of the Third Circuit’s more liberal approach to circumstantial evidence under these conditions, see \textit{supra} notes 77-118 and accompanying text.

\textsuperscript{120} \textit{Compare In re Flat Glass}, 385 F.3d at 358 (holding more liberal inferences are permitted because concerns of \textit{Matsushita} are not present), with \textit{In re High Fructose Corn Syrup Antitrust Litig.}, 295 F.3d 651, 661 (7th Cir. 2002) (finding concerns of \textit{Matsushita} not applicable). \textit{See also Doyle, supra note 52, at 589 (asserting that in Seventh Circuit, heightened standard does not apply when plaintiff establishes plausible theory of collusion).

\textsuperscript{121} \textit{See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.}, 906 F.2d 432, 438 (9th Cir. 1990) (asserting that narrow approach essentially converts judge into thirteenth juror).

\textsuperscript{122} \textit{See Hovenkamp, supra note 68, at 925 (claiming courts have misinterpreted \textit{Matsushita}); Piraino, supra note 13, at 30 (claiming that under strict interpretation no plaintiff will be able to reach jury).
The circuit courts applying a broad interpretation have misinterpreted *Matsushita* as requiring circumstantial evidence that tends to exclude the possibility of independent action in every situation.123 The Court in *Matsushita* was clearly only concerned with inferences of conspiracy when the defendants lacked a motivation to conspire and the alleged conspiratorial actions were consistent with competitive behavior.124 The Eighth and Eleventh Circuits, for example, have disregarded these underlying concerns and applied the heightened standard in every case, as well as to every individual plus factor.125

This misinterpretation is compounded by these courts’ failure to distinguish between plus factors that indicate the existence of conscious parallelism and plus factors that indicate a traditional conspiracy.126 A plaintiff that can establish a conspiratorial motivation and acts against self-interest has simultaneously allayed the concerns of *Matsushita*.127 Thus, if an oligopolistic market is behaving as a classic example of conscious parallelism, there is no justification for requiring that additional evidence tend to exclude the possibility of independent action.128

The circuit courts following a broad approach have also given too much weight to possible alternative explanations of circumstantial evidence.129 They have, in effect, taken the job of the jury in weighing the evidence.130 For instance, the Eleventh Circuit in *Williamson Oil*, examining

123. See Hovenkamp, *supra* note 68, at 925 (claiming courts have misinterpreted *Matsushita*).

124. See *Matsushita Elec. Indus.

125. See *Williamson Oil, Inc. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (asserting that “plus factors” include any evidence that “tends to exclude the possibility of independent action”); *Blomkest Fertilizer v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032 (8th Cir. 2000) (same); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 571 n.35 (11th Cir. 1998) (same).

126. See *Blomkest Fertilizer*, 203 F.3d at 1043 (Gibson, J., dissenting) (declaring useful distinction between “background” plus factors, which establish market conditions making conspiracy likely and plus factors, which show agreement); AREEDA & HOVENKAMP, *supra* note 4, ¶ 1434c1 (distinguishing “conspiratorial motivation” and acts against self-interest from other plus factors).

127. See AREEDA & HOVENKAMP, *supra* note 4, ¶ 1434c1 (stating these two factors merely restate theory of interdependence). For a discussion of the theory of conscious parallelism, see *supra* notes 43-51 and accompanying text.

128. See id. (discussing conscious parallelism).

129. See *Williamson Oil*, 346 F.3d at 1301 (allowing establishment of “plus factors” to be rebutted by defendant); *Blomkest Fertilizer*, 203 F.3d at 1051 (Gibson, J., dissenting) (stating that court must take into account defendant’s explanation of their conduct); see also Doyle, *supra* note 52, at 589 (claiming courts have allowed “defendant’s legitimate business justifications to trump the plaintiffs interpretation of ambiguous evidence”).

130. See *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990) (discussing summary judgment standard in *Matsushita*). The Ninth Circuit averred:
ing the allegation that cigarette companies had signaled price changes, posited alternative economically sound justifications for each apparent signal. While the plaintiff's evidence may have been weak, a court should examine all of the evidence in concert and ask only whether or not a reasonable juror could conclude that the defendants had entered into a conspiracy.

The Third Circuit's approach recognizes that the higher Monsanto/Matsushita standard will not apply in many cases of conscious parallelism when there is a clear motive for the defendants to enter into a conspiracy and no concern of curbing pro-competitive behavior. A plaintiff in the Third Circuit will not face the impossible hurdle of providing circumstantial evidence that excludes independent action. In addition, the Third Circuit's test adequately protects competitive business behavior by placing importance on the establishment of conspiratorial motivation and acts contrary to self-interest.

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To read Matsushita as requiring judges to ask whether the circumstantial evidence is more "consistent" with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy only if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.

Id. This analysis of the summary judgment standard has been characterized as dicta. See In re Citric Acid Litig., 191 F.3d 1090, 1096 (9th Cir. 1999) (claiming In re Coordinated had relied on direct evidence).

131. See Williamson Oil, 346 F.3d at 1305-10 (examining pricing signals). In response to one alleged price signal, the court stated: "This general statement, like so many of those on which appellants focus, plainly is a rational response to the economic incentives ... and does not tend ... to establish a price fixing conspiracy." Id. at 1309.

132. See id. at 1305-10 (discussing evidence of price signaling).

133. See In re Flat Glass Antitrust Litig., 385 F.3d 350, 368 (3d Cir. 2004) (finding defendants' favorable interpretations of evidence "well-suited for an argument before a jury"); In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655 (7th Cir. 2002) (noting that court should avoid "trap" of weighing conflicting evidence).

134. See In re Flat Glass, 385 F.3d at 359 (holding that Matsushita does not apply).

135. See Piraino, supra note 13, at 29 (claiming that Monsanto/Matsushita standard is unworkable for courts trying to identify price-fixing conspiracies).

136. See In re Flat Glass, 385 F.3d at 360-61 ("These two plus factors are important ... because their existence tends to eliminate the possibility of mistaking the working of a competitive market.").