No. __-___

IN THE

SUPREME COURT OF THE UNITED STATES

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EVERGREEN PARTNERING GROUP, INC.,

Petitioner,

v.

PACTIV CORPORATION, a corporation, *et al.*

Respondents.

_____

On Petition for a Writ Of Certiorari To the United States Court Of Appeals For The First Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("*Matsushita*"), the Supreme Court held, on claims of a long-running predatory pricing conspiracy, that to survive a motion for summary judgment in an antitrust case, a plaintiff seeking damages for a violation of Section 1 of the Sherman Act must show that the inference of conspiracy from circumstantial evidence is reasonable in light of competing inferences of independent action and collusive action. The Court in *Matsushita* further held, however, given its general skepticism of predatory pricing claims and its finding of procompetitive conduct and no rational, economic motive to collude, that the plaintiff had to present circumstantial evidence that "tends to exclude the possibility of independent conduct." In *Eastman Kodak Industry Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) ("*Kodak*"), the Court narrowed the application of *Matsushita*'s 'tends to exclude' standard. The Court clarified that where the alleged conduct is not inherently procompetitive or economically or otherwise irrational, the conventional summary judgment standards of Rule 56 of the Federal Rules of Civil Procedure – where the defendant "bears a substantial burden" and must demonstrate that an inference of unlawful conduct is "unreasonable" – apply, and not *Matsushita*'s apparently heightened 'tends to exclude' standard. Despite this clarification, however, some Circuits have ignored *Kodak*,

including the First Circuit on the concerted refusal to deal claim in this case, and interpreted *Matsushita* as requiring judges to ask whether the circumstantial evidence tends to exclude the possibility of independent conduct even where the conduct is not inherently procompetitive or economically or otherwise irrational. In contrast, other Circuits have instead followed *Kodak*'s narrower interpretation of *Matsushita*, requiring the plaintiff simply to show a reasonable inference of conspiracy. In support of this latter view, application of the 'tends to exclude' standard to an alleged conspiracy that is economically rational and not procompetitive has been described as requiring plaintiffs to prove a "sweeping negative" – an almost impossible standard that substitutes the court for the trier of fact and 'cuts off the plaintiff's air supply' in the 90 percent of cases based on circumstantial evidence. On this view, judicial restraint is required because a court is not equipped to make fine distinctions in weighing competing inferences on summary judgment.

The question presented is whether Kodak's Rule 56 standard or the more stringent "tends to exclude the possibility of independent action" standard articulated in *Matsushita* applies where the alleged conduct, unlike in *Matsushita*, is not inherently procompetitive and is not economically or otherwise irrational.

2. Did the court of appeals in this case improvidently apply the heightened "tends to exclude" test to Petitioner's concerted refusal to deal claim, in circumstances in which it is not warranted, and thus erroneously deny the plaintiff its right to have its case heard by the trier of fact?

PARTIES TO THE PROCEEDINGS

1. Evergreen Partnering Group, Inc. is the Petitioner here and was the plaintiff below.

2. Pactiv Corporation, Solo Cup Company, Dolco Packaging, Dart Container Corporation and the American Chemistry Council are the Respondents and were defendants below.

3. Genpak, LLC was a defendant below. Evergreen's claims against Genpak were resolved before the appeal.

RULE 29.6 DISCLOSURE

The Petitioner has no parent company and is a privately held company, with no public company owning 10% or more of the shares of stock of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Evergreen Partnering Group ("Evergreen") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals ("App. A") is reported at 832 F.3d 1 (1st Cir. 2016). The order of the court of appeals denying the petition for rehearing ("App. C") is not reported. The order of the district court ("App. B") is reported at 116 F. Supp. 3d 1 (D. Mass. 2015).

JURISDICTION

The court of appeals entered its judgment on August 2nd, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

• Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

> nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

- Rule 56 of the Federal Rules of Civil Procedure.

INTRODUCTION

This case poses the long-running question of what evidence an antitrust plaintiff alleging a violation of Section 1 of the Sherman Act must present to defeat a motion for summary judgment. The decision of the Court of Appeals for the First Circuit conflicts with decisions of several other circuit courts of appeal, highlighting a significant circuit split regarding the proper interpretation and application of Rule 56 of the Federal Rules of Civil Procedure on summary judgment in antitrust cases. The court's decision offers the Supreme Court an opportunity to correct significant legal error and provide further guidance on this recurrent evidentiary issue in antitrust cases and thus limit further consumer harm resulting from this error, consistent with the Court's teaching in *Kodak*.

Petitioner Evergreen Partnering Group ("Evergreen") alleges that the respondents, manufacturers-converters of polystyrene food service products (e.g., cups, trays, etc.) and their trade association, engaged in a concerted refusal to deal with Evergreen for its closed-loop, sustainable recycling of such products, by agreeing to limit the terms on which to deal with it, in violation of Section 1. In a decision issued on August 2, 2016, the Court of Appeals for the First Circuit affirmed summary judgment dismissal by the district court, concluding that "Evergreen failed to present evidence that tended to exclude the possibility that each

polystyrene manufacturer independently chose not to partner with Evergreen as required by [*Matsushita*]." In an order dated October 18, 2016, the court of appeals denied without opinion a petition by Evergreen for rehearing by the panel or *en banc*.

Evergreen contends, as the court of appeals correctly states, that "the defendants conspired to prevent its recycling model involving commission payments from becoming viable by universally rejecting any agreements that involved commissions and blocking its access to other customers through the promotion of PDR." App. A-11.

The decision is incorrect, with significant implications for summary judgment. The First Circuit's rationale is based on a significant misinterpretation of *Matsushita*, putting it in direct conflict with this Court's decision in *Kodak* and the decisions of other courts of appeal. Under the First Circuit's reasoning, it would appear that only 'smoking gun' evidence or internal documents referring to an explicit agreement could get a case to a jury. This is not the law.

- First, where defendants allege no plausible procompetitive benefits from their conduct and there is a rational motive to collude, other courts, as directed by the Court in *Kodak*, interpret *Matsushita*'s 'tends to exclude' test more liberally than in *Matsushita* itself and like cases, for in these circumstances there is

no danger of chilling possibly procompetitive conduct. Here, there are no such procompetitive benefits; the court expressly rejected defendants' request that it find that they had no rational economic motive to collude; and, notably, defendants engaged in systematic communications through their trade association over a four-to-five year period about the very subject at issue – a classic 'plus-factor'. The court failed to apply, let alone even acknowledge, *Kodak*'s limiting principles to *Matsushita*.

- Second, the court systematically drew inferences against the non-moving party, the petitioner, contrary to *Matsushita*.

- Third, the court erroneously required authentication of – and excluded – minutes of meetings among the defendants that it also said would be probative of the alleged conspiracy *if* they were admissible.

- Fourth, the court improperly dismissed one piece of direct evidence proffered by Evergreen of a concerted refusal to deal by the respondents, and completely ignored another. Even assuming, however, contrary to Evergreen's contentions, that the court was correct in these determinations on direct evidence, the circumstantial evidence alone offered the court of appeals an independent

> ground to find for Evergreen, had the court properly interpreted and applied *Matsushita* in light of *Kodak*.

This case represents a clear example of how antitrust laws are being eroded by misinterpretation and misapplication of prior Supreme Court rulings by lower courts, leading to impossible odds of surviving summary judgment. The court's misinterpretation of *Matsushita*, if broadly applied in the circuits, would effectively cut off the air supply for plaintiffs on summary judgment in the 90 percent of cases based on circumstantial, rather than direct, evidence of antitrust conspiracy. This may further encourage companies to engage in anticompetitive conduct with the assurance that they will likely prevail on summary judgment as long as they do not leave a 'smoking gun'.

The actions of the defendants in this case, whose disposable PSFS products are in widespread use, have caused significant economic and environmental harm to the public, particularly cash-strapped schools and other government institutions, by causing them to pay unnecessary waste disposal fees or switch to more costly alternative products. Unless reversed, the court's judgment will result in harm to competition and consumer welfare, possibly not confined to the First Circuit alone.

STATEMENT OF THE CASE

A. Factual Background

PSFS products comprise a significant portion of the food service packaging market, accounting for billions of dollars of sales annually and extremely high waste hauling costs. PSFS products are easily recognizable by their light weight and foam appearance.

PSFS products have received much criticism by public officials, environmental advocates and consumers due to their single use and the lack of any viable recycling programs, which have been proven no sustainable on resin sales alone. To combat the lack of producer responsibility by the PS industry, more than 100 communities nationwide have taken the drastic step of prohibiting the sale and use of PSFS products, and the number of bans continues to grow. The defendants acknowledge that these bans threaten their business.

Evergreen's founder, Michael Forrest, was a 30-year veteran of the food service business, selling various disposable packaging including PSFS products to schools and institutional cafeterias. Understanding the limited service life and lack of recycling options, he foresaw that the long-term survival of the PSFS industry depended on a sustainable recycling solution.

Forrest knew that in the 1990s the polystyrene (PS) industry had spent more than $80 million on a recycling initiative, the National Polystyrene Recycling Company (NPRC), SA0004,[1] which failed because it depended entirely on the value of recycled resin. Forrest spent 10 years working with Novacor (a virgin PS supplier), Sysco (a national distributor) and various school systems to develop an economically sustainable recycling program. He concluded that the PSFS industry needed to create demand for food service recycled resin and find other sources of revenue to offset the high collection, transportation and processing costs, and that the only solution was to produce food-grade, post-consumer resin and incorporate it into the same types of products from which it came, thus creating a "closed loop process" producing "green products."

Without creating market demand, recycled resin is limited to low-end, low-value non-food uses; thus, as the NPRC experience clearly demonstrated, such bare 'recycling' programs, depending solely on the value of the resin produced, are unsustainable. In contrast, Evergreen's model commercialized the production of food-grade, post-consumer resin for use in new PSFS products, and used shared waste disposal savings from end-users (e.g., school systems) and commissions from 'green foam' sales to cover the difference between the value of the resin and the cost

[1] "SA" and "JA" herein refer to the Sealed Appendix and Joint Appendix in the record.

to produce it, rendering the program sustainable over the long term.

Evergreen successfully implemented its business model in the Boston Public School (BPS) beginning in 2002, purchasing resin from BPS's recycling facility, using a portion of this resin in new lunch trays sold back to the BPS system and the remainder in other green foam products, SA2086, SA0008. Evergreen expanded its program in 2003 to the Providence Public Schools, working with national food service provider Sodexho. SA0009.

Based on its initial success and increasing demand for green products by major food service distributors such as Sysco, Evergreen sought to roll out its program nationally, establishing its own recycling plant in Norcross, Georgia in 2006, anchored by used PSFS products collected from the Gwinnett County, Georgia Public Schools, SA2090, SA2013. To manufacture green products on a national scale, Evergreen needed the participation of at least one of the five manufacturing defendants, which controlled 90 percent of the PSFS market. Evergreen proposed its innovative business method to the defendants to establish, for the first time, a long sought-after sustainable recycling program. SA2086-SA2087. Two of the smaller defendants, Genpak and Dolco, initially committed to Evergreen's program because they saw it as an attractive, advantageous business opportunity but backed out after industry pressure.

Defendants engaged in a pattern and course of conduct of close cooperation and regular communications on matters affecting their industry, as demonstrated by some 40 meetings/conference calls held through their trade association during the relevant 2005-2009 period. SA2097-2098. Although they were competitors, each dominated a particular market segment, SA2088, and the record evidences tight cooperation on a number of decision-making issues, including, as defendants freely acknowledge, 'what to do about recycling'. For them this was, indisputably, a matter for group decision and a topic of intense, abiding attention given the onslaught of municipal bans.

Thus, when Evergreen approached the defendants, first, severally, and then, at their request, as a group, they were representing to the public that they supported recycling, but in fact they had already agreed on – or at least were developing – a collective industry position against sustainable recycling. In early March 2007, a small inner group of key manufacturers, resin suppliers and ACC officials met to strategize 'what to do or not do' regarding PSFS recycling. SA0619-25 (the "Recycling Task Group". These executive members discussed and agreed on a short-term strategy of 'buying time' (i.e., no action) through lobbying/advocacy with a long-term strategy of an 'industry controlled' recycling program. Evergreen's model conflicted with both their short and long term strategies.

In order to create a public perception that they supported recycling , the Defendants worked closely with Packaging Development Resource (PDR), whose business model was to produce recycled resin and, it hoped, sell it at a cost competitive with virgin resin; this was a proposition that the defendants could tolerate in the short run at least because it did not challenge the status quo, although they knew that any program dependent solely on the value of the resin would fail, just like NPRC, and as PDR ultimately did.

The defendants, through their trade association, specifically requested a proposal from Evergreen in May 2007 to build a PSFS recycling facility in Los Angeles due to an onslaught of recent and proposed bans in California and interest from the Los Angeles Unified School District. The defendants then collectively discussed and voted to reject Evergreen's proposal, although Evergreen had first approached several of them individually, and they decided instead to move forward with PDR and two other small firms. Although defendants Genpak and Dolco subsequently agreed to provide a small amount of funds to Evergreen and purchase recycled resin through a joint funding agreement, this was clearly an attempt to cover their participation in this group boycott and reversal of interest since they had access to Evergreen's financials and knew that Evergreen needed to receive commissions on green products to make the program sustainable.

B. Proceedings Below

1. The District Court's Rulings

Evergreen filed the complaint in this case in May 2011. The district court granted the defendants' motion to dismiss and the court of appeals reversed in *Evergreen Partnering Group v. Pactiv Corp.*, 720 F.3d 33 (1st Cir. 2013) ("*Evergreen I*").

Discovery ensued. On defendants' joint motion for summary judgment, the district court concluded in reliance on *Matsushita* that Evergreen failed to present evidence that tended to exclude the possibility that each PSFS manufacturer independently chose not to partner with Evergreen.

2. The Court of Appeals' Summary Judgment Ruling

The court of appeals agreed with the reasoning of the district court and affirmed the grant of summary judgment. The court first addressed, in part, Evergreen's proffer of direct evidence. Petitioner offered two pieces of direct evidence.[2] The court of appeals rejected the first – testimony of a member of the defendants' Recycling Task Group that it "picked

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[2] In order to defeat a request for summary judgment on direct evidence, the nonmovant need only ask that its evidence be taken as true. In contrast, "circumstantial evidence, is not testimony to the specific fact being asserted, but testimony to other facts and circumstances from which the jury may infer that the fact being asserted does or does not exist." *United States v. Henderson*, 693 F.2d 1028, 1031 (11th Cir. 1982).

a winner" among recyclers – and ignored the second – the defendants' collective rejection of Evergreen's proposal, which they solicited, to build a recycling plant in Los Angeles. SA0646-0647, SA0662, SA2164-2174. Although such evidence primes any circumstantial evidence, the erroneous finding by the court is secondary to its erroneous assessment of the circumstantial evidence; the court's decision indeed *turned* on that assessment, which is therefore the subject of this petition.[3]

The court of appeals examined Evergreen's circumstantial evidence and concluded under *Matsushita* that this evidence, individually and as a whole, did not tend to exclude the possibility of independent conduct on the part of the defendants. The court made key findings on the defendants' economic motive (App. A–18-21), industry animus (id. at 22-28), their trade association as a means to collude (id. at 28-29), and PDR's 'sham' status (id. at 29-31). As to each of these categories of evidence, the court applied *Matsushita*'s 'tends to exclude test' and concluded that Evergreen did not present evidence raising a reasonable inference of unlawful action.[4]

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[3] Evergreen's arguments that the court erred in rejecting this direct evidence are detailed in its appellate briefs; *see, e.g.,* Petition for Rehearing , App. D.

[4] Evergreen filed a motion to supplement the record, which the court denied. App. E and F.

REASONS FOR GRANTING THE PETITION

I. THE PROPER MEANING OF *KODAK* AND *MATSUSHITA*

The correct interpretation and application of *Matsushita*, as later refined by this Court in *Kodak*, lie at the heart of this petition.

The plaintiffs in *Matsushita* asserted a 20-year predatory pricing conspiracy that the Court found was "economically senseless." They also sought an inference of conspiracy from price-cutting (as part of the alleged below-cost pricing) and rebates, which the Court found to be inherently procompetitive. As the Court explained in *Kodak*, discussing *Matsushita*, "[b]ecause the defendants had every incentive not to engage in the alleged conduct which required them to sustain losses for decades with no foreseeable profits, the Court found an 'absence of any rational motive to conspire'." *Kodak*, 504 U.S. at 468.

The Court further explained in *Kodak* that "[b]ecause cutting prices to increase business is 'the very essence of competition,' the Court [in *Matsushita*] was concerned that mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws were designed to protect . . . .'" *Id.* at 478. It was on those facts, and in that context alone, that the Court in *Matsushita* "held that a reasonable jury could not return a verdict for the plaintiffs and that summary judgment

would be appropriate against them unless they came forward with more persuasive evidence to support their theory." *Id.* at 468. And the quantum of evidence that the plaintiffs would have to show on such facts, to overcome this presumption, was "evidence that tends to exclude the possibility" that the defendants acted independently." *Matsushita*, 475 U.S. at 588, 597-98.

In *Kodak*, the Court clarified and limited its ruling six years earlier in *Matsushita*, holding that *Matsushita*'s "presumption in favor of summary judgment" applied *only* in antitrust cases in which the plaintiff's theory is implausible – whether because economically senseless or otherwise – and the inferences sought to be drawn are based on procompetitive conduct by the defendants; that is, if the theory is plausible and the conduct is not procompetitive – contrary to the facts in *Matsushita* itself – the ordinary summary judgment rules apply. *Kodak*, 504 U.S. at 467, 478-79. And to satisfy the ordinary summary judgment standard under Rule 56 in an antitrust case, the defendant "bears a substantial burden" and must demonstrate that an inference of unlawful conduct is "unreasonable." *Id.*, 504 U.S. at 469.

Consequently, to defeat a summary judgment motion in an antitrust case under the ordinary Rule 56 standard, a plaintiff is *not* required to present evidence that tends to exclude the possibility of independent conduct, except in the circumstances

present in *Matsushita*; the plaintiff is required instead to present evidence such that a reasonable jury could return a verdict for the plaintiff, i.e., evidence that reasonably tends to prove its theory – a substantially lower standard than the "tends to exclude" burden.

Kodak thus made it clear that the defendants in *Matsushita* were afforded a legal presumption in favor of summary judgment – in the absence of a rational motive, where the alleged scheme would be "economically senseless," and given the lower prices to consumers over 20 years – because of the likelihood that permitting inferences of conspiracy would deter or penalize procompetitive behavior. In *Kodak* itself, however, the Court denied Kodak the same legal presumption in favor of summary judgment because it determined that *Matsushita*'s deterrence concerns were not implicated by a challenged policy that it found to be facially anticompetitive and "exactly the harm the antitrust laws aim to prevent" on the facts of that case. *Kodak*, 504 U.S. at 478.

The Court in *Kodak* made it clear that courts must weigh two competing factors on summary judgment in antitrust cases – "the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished." *Id.* at 479. And in weighing these risks, the balance tips in favor of summary judgment only when the challenged conduct "appears always or

almost always to enhance competition." *Id.* Accordingly, the Court formulated a presumption against summary judgment and against placing any limits on otherwise permissible inferences where there is no significant likelihood of punishing or deterring procompetitive conduct. *Id.* at 478.

Matsushita's 'tends to exclude the possibility of independent conduct' test was introduced as an elaboration of the conventional Rule 56 evidentiary standard in circumstances where the challenged conduct always or almost always appears to enhance competition. The Court in *Kodak* clarified that these factors – the absence of a rational (usually economic) motive and the existence of procompetitive conduct – circumscribe *Matsushita*'s 'tends to exclude' test, and that, instead, where a plausible motive exists and there is no procompetitive conduct, the plaintiff is not held to that higher burden but must simply show evidence such that a reasonable jury could return a verdict for it, i.e., that reasonably tends to prove its theory.

The Court in *Matsushita* itself highlighted the particularity of the circumstances of that case and why and how they circumscribe the 'tends to exclude' test derived from it. Regarding its concern with discouraging legitimate price competition, the Court explained that "[i]n most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished" – but this balance was "*unusually one-sided*" in *Matsushita* itself and

similar cases in which the defendants "had no rational economic motive to conspire." *Matsushita*, 475 U.S. at 593 (emphasis added). It was, again, in this particularized context that the Court held that plaintiffs were required to present evidence that tends to exclude the possibility that "[defendants] underpriced [plaintiffs] to compete for business rather than to implement an economically senseless conspiracy." *Id.* at 597-98.

A plaintiff's normal burden under Rule 56 to show evidence that reasonably tends to prove its theory differs critically from its burden under the higher standard in *Matsushita*, and this difference is essential to the questions presented herein. Judge Richard Posner, a leading authority on antitrust, has described the "tends to exclude" standard as effectively requiring antitrust plaintiffs to disprove the defendants' case with a "sweeping negative" (Richard Posner, *Antitrust Law*, 100 (2d ed. 2001), and has characterized the effect of having to exclude the possibility of independent action as higher than the standard of proof for alleged criminal conduct:

> That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude

> would leave a possibility that the defendant was innocent.

In re Brand Name Prescription Drugs Litig., 186 F.3d 781 (7th Cir. 1997).

Judge Posner has added another important – albeit apparently obvious – gloss to the correct interpretation of Rule 56 in antitrust cases: It is not the task of the court on summary judgment to decide the merits of the case, of course, but instead to determine whether the evidence is sufficient to reach the trier of fact, who then decides the merits. This is a two-phase process, and the roles and tasks must not be blurred, although they often are. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614, 615 (7th Cir. 1997) (Posner, C.J.), *cert. denied*, 522 U.S. 1153 (1998) (reversing summary judgment and rejecting the contention that the defendants' proffered innocent explanations entitled them to summary judgment, noting that "[t]he defendants' interpretations may be correct; they are not inevitable;" and that "defendants' [. . .] evidence suggesting that [they] had not played a role in the conspiracy did "not erase the factual question of whether they joined the conspiracy [– i]t is just evidence to be weighed in the balance by the trier of fact."). And in making this preliminary assessment on summary judgment, the court is required, just as the Court instructed in *Matsushita*, to draw all reasonable inferences in favor of the non-moving party. *Matsushita*, 475 U.S. at 587-88 (citing *United*

States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.").

This, then, is the second point: on summary judgment, a court must not weigh the evidence or assess the credibility of witnesses; this is the exclusive responsibility of the trier of fact, and any such weighing or assessment by the court at the summary judgment stage is an improper encroachment on the responsibility of the trier of fact, and should be grounds for reversal.

II. THE LONG-STANDING CONFLICT AMONG THE CIRCUITS

A. Courts Properly Interpreting *Matsushita* and *Kodak*

The Second, Third, Seventh and Ninth Circuits Have Prominently Interpreted *Matsushita* in Light of *Kodak* as Imposing a Higher Burden on the Non-Movant Plaintiff in Summary Judgment Cases *Only* When the Plaintiff's Theory is Implausible and Based on Procompetitive Conduct by the Defendants.

Despite the Supreme Court's clarification of *Matsushita*, confusion and imprecise analysis continue to plague the courts, resulting in an

inconsistent judicial landscape on the all-important question of what quantum of circumstantial evidence a plaintiff must present in order to survive summary judgment. Had the courts in this case followed *Kodak* – here, where there is no finding of procompetitive conduct and it was economically and otherwise rational for the defendants to engage in a concerted refusal to deal – they would have applied the conventional Rule 56 standard and found that a reasonable jury could return a verdict for the petitioner.

The Second, Third, Seventh and Ninth Circuits have clearly followed *Kodak* and on the evidence of this case would very likely have denied summary judgment. Other circuits as well have agreed.

In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 510 U.S. 994 (1993), plaintiffs alleged that the defendants conspired to avoid competing for accounts to keep prices they paid supplier-customers artificially low. Reversing, the Third Circuit found sufficient evidence to defeat summary judgment. The court identified plausibility and deterrence concerns as the two principal factors underlying *Matsushita*'s "tends to exclude" test. Given that the plaintiff's theory was implausible and "the defendants' challenged activities [were] not pro-competitive," the court explained that "more liberal inferences from the evidence should be permitted than in *Matsushita*

because the attendant dangers from drawing [such] inferences [were] not present." *Id.* at 1232. Citing *Kodak*, the court explained that *Matsushita* "did not hold that an antitrust defendant is entitled to summary judgment merely by providing *an* economic theory to justify its behavior," but "simply stressed that to survive summary judgment in the absence of direct evidence, or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible." *Id.* at 1231 (citing *Matsushita*, 475 U.S. at 593-94). Further, "the Court [in *Matsushita*] stated that the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiff's theory and the dangers associated with such inferences." *Id.* at 1232 (citing *Matsushita*, 475 U.S. at 587, 594.).

In decisions since *Petruzzi*'s, the Third Circuit has consistently interpreted *Matsushita* in the light of *Kodak* to impose a higher burden on the non-movant plaintiff on summary judgment in antitrust cases under the 'tends to exclude' standard *only* when the plaintiff's theory is implausible and challenges procompetitive conduct. *See, e.g., In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 358 (3d Cir. 2004, *cert. denied*, 544 U.S. 948 (2005); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994) ("if the alleged conduct is 'facially anticompetitive and exactly the harm the antitrust laws aim to prevent,' no special care need be taken in assigning inferences to circumstantial evidence (quoting *Kodak*, 112 S.Ct. at 2088)), *cert. denied*, 514

U.S. 1063 (1995); *Advo, Inc. v. Phila. Newspapers, Inc.*, 51 F.3d 1191, 1196-97, 1205 (3d Cir. 1995); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466-67 (3d Cir. 1998), *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999).[5]

The Seventh Circuit has also authoritatively recognized that *Kodak* qualifies *Matsushita*. *See, e.g., In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 661 (7th Cir. 2002) (Posner, J.) (interpreting *Matsushita* as requiring a sliding evidentiary scale in which "[m]ore evidence is required the less plausible the charge of collusive conduct," reversing the district court's grant of summary judgment, and stating that the district court erroneously "require[d] that a substantial inference be drawn in order to have evidentiary significance"), *cert denied*, 537 U.S. 118 (2003).

Regarding the proper assessment of circumstantial evidence of conspiracy, Judge Posner also warned of several judicial 'traps', now generally acknowledged in antitrust case law. The first trap that a court should avoid is to weigh conflicting evidence, which is "the job of the jury." *Id.* at 655. The second "is [for the court] to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole

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[5] *But see In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396-97 (3d Cir. 2015).

cannot defeat summary judgment." *Id.* Posner explains:

> It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise, what need would there ever be for a trial. The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.

Id. at 655-66. It is the courts that ignore *Kodak*'s qualification of *Matsushita* that seem to fall into Posner's 'traps', as the First Circuit did in this case.

JTC Petroleum Co. v. Plasa Motor Fuels, Inc., 190 F.3d 775 (7th Cir. 1999), a concerted refusal to deal case, is particularly instructive for how a court should assess the evidence – without falling into the trap of weighing it – on summary judgment. Judge Posner, reversing the district court and writing for the panel, found sufficient circumstantial evidence that the defendant road repair contractor applicators sought to enlist a captive market of co-defendant suppliers in enforcing a cartel by punishing plaintiff

applicator JTC through either coercion or economic inducement. JTC, a maverick, alleged that the defendant applicators enlisted the producers in a conspiracy to police the applicators' cartel by refusing to sell to applicators such as JTC which defied the cartel. Judge Posner explored several explanations for why it might *not* make sense for the producers to have shored up a cartel of their customers (the applicators), such as raising the price of asphalt and thus possibly reducing demand for it (possibly hurting the producers), but also for why under the circumstances it would have made sense. Notably, Posner drew no conclusions as to this conflicting evidence except to make threshold assessments of the competing claims, and applied the conventional Rule 56 standard:

> There may be an innocent explanation for why producers would charge lower prices elsewhere or why they refused to sell to JTC. *But the only issue for us*, in reviewing the grant of summary judgment for these defendants, is whether a rational jury, having before it the evidence developed to date, could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the producers' refusal to deal with JTC was that they were in cahoots with the cartel to discourage competition in the applicator market. Given the evidence

> of [various suspicious behavior] and the pretextual character of the reasons the producers gave for the refusal to deal, a rational jury could conclude that JTC was indeed the victim of a producers' boycott organized by the applicator defendants.

Id. at 779 (emphasis added).

Posner did not apply *Matsushita*'s "tends to exclude" standard or assess whether the innocent and not-innocent explanations of the conduct were in equipoise; he simply found the not-innocent explanations to be sufficiently plausible that a rational jury could find for the plaintiff. This approach is implicitly based on recognition of the need for judicial restraint and limits – that no court can with mathematical exactitude discern on summary judgment whether competing inferences are truly in equipoise. To assume otherwise is a legal fiction and, a *fortiori*, *Kodak*'s tight limitations on the *Matsushita* test therefore must be rigorously respected. This is an entirely different exercise than the assessment undertaken by some other circuits, including the First Circuit in the instant case; there, even in the absence of procompetitive conduct and despite evidence of a rational motive for conspiracy, the courts fall into the evidentiary 'traps', weighing the evidence (beyond mere plausibility), imposing the virtually unattainable 'tends to exclude' burden on the plaintiff, and substituting their judgment for that

of a jury on whether it might reasonably find for the plaintiff.

Foreshadowing *Kodak*, a panel of the Ninth Circuit in *In re Coordinated Pre-Trial Proceedings in Petroleum Product Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991), emphatically delineated the summary judgment standard the Supreme Court clarified two years later. The court of appeals, reversing the district court, held that genuine issues of material fact existed as to whether the defendant petroleum companies conspired to fix or stabilize prices and to restrict supply, precluding summary judgment. The panel said that in emphasizing the dangers of permitting inferences from certain types of ambiguous evidence, the Court in *Matsushita* "purported to *limit* the application of the traditional summary judgment rules in the antitrust context; it did not intend to abolish them and replace them with an entirely different set, one which raises troubling seventh amendment concerns." *Petroleum Products*, 906 F.2d. at 438.

The Ninth Circuit panel expressly rejected the proposition that unless the plaintiff presents evidence that tends to exclude the possibility of independent conduct, summary judgment should be granted "whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible." *Id.* at 438. There are two major problems with this proposition. First, as a

procedural matter, with significant Seventh Amendment implications,

> allowing the court to make [such a] decision would lead to a dramatic encroachment on the province of the jury. 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. at 438.

Second, as a logical matter, the court of appeals further explained:

> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. *Such*

> *an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case.* After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences. [. . .] Thus, such an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy. *Since direct evidence will rarely be available, such a reading would seriously undercut the effectiveness of the antitrust laws.*

Id. at 439 (emphasis added).[6]

The Second Circuit also has rejected the broad reading of *Matsushita* adopted by the First Circuit in this case and by several other circuits (discussed

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[6] Other panel decisions of the Ninth, Third and Eleventh Circuits, however, reflect even *intra*-circuit splits on the appropriate reading of *Matsushita*. *See, e.g., In re Citric Acid Litigation*, 191 F.3d 1090, 1096-97 (9th Cir. 1990) (rejecting panel's approach in *Petroleum Products* and dismissing it as dicta because of direct evidence – although, Petitioner herein notes, the panel in *Petroleum Products* itself clearly limited the direct evidence to just the independent sector of the market), 906 F.2d at 460, n.22), *cert. denied*, 529 U.S. 1037 *sub nom. Gangi Bros. Packaging v. Cargill*; *In re Chocolate*, 801 F.3d 383, 396-97 (3d Cir. 2015); *Williamson Oil Co., Inc. v. Phillip Morris, USA*, 346 F.3d 1287 (11th Cir. 2003).

below). *See, e.g., In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 55, 63 (2d Cir. 2012) (where district court found that plaintiffs "failed to offer sufficient evidence to dispel the possibility that [defendants] acted independently," reversing summary judgment as to two of the defendants because "[r]equiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference.") As a leading antitrust treatise has explained:

> It is important not to be misled by *Matsushita*'s statement . . . that the plaintiff's evidence, if it is to prevail, must "tend . . . to exclude the possibility that the alleged conspirators acted independently." The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.

Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law,* § 14.03(b), at 14–25 (4th ed. 2011) (footnotes omitted)).

Other Courts: Several other circuits have also rejected a broad reading of *Matsushita*. *See, e.g., City of Tuscaloosa v. Harcross Chemicals, Inc.*, 158 F.3d, 548, 572 (11th Cir. 1998); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1082 (10th Cir. 2006); *see also In re Vitamins Antitrust Litigation*, 320 F. Supp. 2d 1, 13, 23 (D.D.C.2004) (applying 'sliding scale' approach and interpreting Matsushita to mean that if the alleged conspiratorial actions do not merit a presumption of precompetitive conduct, the "[p]laintiffs are entitled to the benefit of a jury determing inferences rather than the Court doing so as the summary judgment stage").

B. Courts in the Fourth, Sixth and Eighth Circuits, Like the First Circuit in This Case, Have Ignored *Kodak* and Continued to Read *Matsushita* as Requiring Plaintiffs' Evidence to Outweigh Defendants' Evidence to Survive Summary Judgment, Even if the Plaintiff's Theory is Plausible and There is No Showing of Procompetitive Conduct

Several circuits, contrary to the Court's guidance in *Kodak*, have applied *Matsushita*'s 'tends to exclude' standard even where the plaintiff's theory is plausible and there is no showing of procompetitive conduct, similar to the First Circuit. For instance,

the Fourth Circuit in several cases has articulated a standard based on *Matsushita* (1) that is *not* limited to facts where the plaintiff's theory is inherently implausible or economically senseless, or where the conduct is procompetitive, (2) under which, if an inference of innocence is at a minimum possible then the court is required to draw it and (3) wherein the plaintiff, to prevail on summary judgment, must proffer evidence that conclusively excludes – not just tends to exclude – the possibility of independent conduct. *See, e.g., Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (citing *Matsushita* but not *Kodak*); *Merck-Medco Managed Care, LLC v. Rite AM Corp.*, 57 F.3d 1317 (4th Cir. 1999).

Representative of the Eighth Circuit's approach is *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107 (8th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998), in which the court expressly rejected the approaches of the Third and Ninth Circuits and stated that it "read[s] *Matsushita* more broadly" than those circuits. *Id.* at 1109 (applying the "tends to exclude" standard without regard to whether the plaintiff's theory was implausible or the suspect conduct was procompetitive and without mentioning *Kodak*); *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir.), *cert. denied*, 531 U.S. 815 (2000).

The Sixth Circuit also takes a broader view of *Matsushita*, also without regard to whether defendant's conduct is procompetitive. *See, e.g.*, *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 739 (6th Cir.) (rejecting plaintiff's circumstantial evidence because it "d[id] not exclude a non-conspiratorial explanation for the [group's] action"), *cert. denied*, 528 U.S. 871 (1999).

III. THE FIRST CIRCUIT APPLIED A STANDARD THAT CONFLICTS WITH *KODAK* AND A NUMBER OF OTHER CIRCUITS

Ignoring *Kodak*, the Court of Appeals Erroneously Applied *Matsushita*'s 'Tends to Exclude' Test with No Finding that Plaintiff's Theory was Economically Senseless or of Procompetitive Conduct by the Defendants.

The court of appeals examined what it viewed as the critical alleged circumstantial evidence and subjected it to *Matsushita*'s 'tends to exclude' higher summary judgment evidentiary test, but without any qualification from the absence of procompetitive conduct or the existence of a rational motive on the part of the defendants to engage in a concerted refusal to deal. In these circumstances, however, as the Court made clear in *Kodak*, Evergreen is required under the law only to show that a jury could reasonably find in its favor on the record facts. Evergeen's evidence reasonably should have sufficed

to defeat summary judgment on the conventional Rule 56 standard.

Economic Motive: With respect to economic motive, the court said that on a finding that the challenged conduct is 'as consistent with permissible competition as with illegal conspiracy, Evergreen had to present evidence that tends to exclude the possibility that the alleged conspirators acted independently. But the court made a series of factual and legal errors stemming from its erroneous legal standard. First, the court misreads Evergreen's appellate arguments: it has not, contrary to the court, abandoned its claims of cost-neutrality or that the defendants had a rational, economic motive to agree to deal with Evergreen only on limited terms:

- Contrary to the court (App. A-5), Evergreen did not envision or assert that there would be any 'premium' for its green foam model. Instead, it consistently maintained that it was cost-neutral, i.e., that the overall costs that the defendants would pay Evergreen for post-consumer resin and brokerage commissions would be the same as they already paid for virgin resin and commissions under their traditional cost structure. *See* SA2294, SA 2094.
- As Evergreen has explained, contrary to the court, the *defendants* – not Evergreen – viewed the model as more expensive than using only virgin resin. Given the *defendants'* perception of higher costs, while also needing to maintain group discipline to resist bona fide recycling in the face of the bans, it

was rational for them to reject Evergreen's commission model and to support PDR's resin-sales only model; this would for a time help them fend off the bans, by appearing to support recycling even as they knew that PDR's model was not commercially sustainable. Similarly, the court itself acknowledged that "there may be a colorable argument that the defendants feared that local governments would instead mandate the use of recycled products, and [that defendants] would thus wish to prevent any expensive recycling methods from becoming viable," App.-19, n.10. The court's express refusal to reach defendants' argument that they *lacked* any rational motive to collude, id., the court's contrary suggestion that indeed they might have had a rational motive to do so, Evergreen's assertion of a rational motive, and the absence of procompetitive conduct, should reasonably have permitted more permissive inferences of collusion and tipped the balance against summary judgment on the issue of motive under the conventional Rule 56 standard, as required by the Court in *Kodak*. But the court's 'tends to exclude' standard, erroneously invoked in these circumstances, could admit no such reasonable inferences, even in the face, paradoxically, of the court's own acknowledgement of rational motive.

- The court found that the "defendants' desire to avoid [the anticipated] costs was especially understandable in light of the overwhelming evidence that they each experienced significant quality problems with Evergreen's resin" (App. A-19). In reaching this conclusion, the court ignored

significant contrary evidence that Evergreen sold over 600,000 pounds of recycled resin that was used successfully by the defendants to produce green PSFS products, generating several million dollars in in revenue, contrasted with PDR's alleged production of a mere 11,000 pounds. This record fact plausibly outweighs any dissatisfaction they may have had – and raised on summary judgment – with the product. App. A–18-21; *see* below. A jury could reasonably conclude from the aggregate evidence that the desire to "avoid the costs" instead derived more (or at least plausibly) from the group resistance to Evergreen's closed-loop recycling model than from any of the defendants' concerns about product quality. The court thus improperly weighed the evidence and made credibility determinations on summary judgment wholly inappropriate to a case reflecting economic motive and no procompetitive conduct.

Meeting Minutes Reflect Industry Animus Against Recycling: The court found Evergreen's evidence of "industry animus" or motive also to be "insufficient to create an inference of conspiracy" because it "does not tend to exclude the possibility of independent action." App. A-28. The court devalued Evergreen's motive evidence and assessed it in isolation. In this context, the court made another critical legal error: it ruled that minutes from a March 18, 2005 Plastics Group meeting "asking whether the industry could 'win out' against its critics without having to recycle" were inadmissible hearsay, not qualifying for the business records exception, because they were not

authenticated. The ruling is incorrect: the minutes do not require authentication[7] and they surely reflect an industry animus and motive on the part of the defendants. Comments by Dart's General Counsel and Pactiv's Food Service General Manager quoted in the minutes reflect an industry position developed or developing against recycling, foreshadowing and leading into some 40 trade association meetings over five years, intensely focused on how to address the bans and what to do about recycling. To rule the minutes inadmissible was not only incorrect but also suggests how an erroneous, over-aggressive application of the 'tends to exclude test can trigger derivative legal errors.

Pactiv Pressure on Genpak: As further evidence of motive, Evergreen alleged that Genpak, susceptible to pressure from the much larger Pactiv, "engaged in various behaviors when dealing with Gwinnett Schools suggesting that it was reluctant to bid with its tray[s] made from Evergreen's resin against Pactiv." App. A-27. Evergreen cited deposition

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[7] The notes were clearly written by Michael Levy, PSPC director, who took all of the notes of the PSPC/PFPG meetings, and were produced by defendant ACC. *See* C.A. Wright, 31 Fed. Prac. & Proc. Evid. § 7109 (1st ed. Apr. 2014 update); see also *Mohawk Constr. & Supply Co.*, 577 F.3d 1164, 1171 (10th Cir. 2009); *Attorney General of the United States v. Irish Northern Aid Committee*, 530 F. Supp. 241, 252 (S.D.N.Y. 1981) (if the "exhibits are reproductions of documents obtained from defendant's files, their authenticity cannot be seriously disputed"), *aff'd*, 668 F. 2d 159 (2d Cir. 1982).

testimony of a Gwinnett County Schools official stating that he felt Reilly (of Genpak) was reluctant to "battle with another competitor" (Pactiv). The court found "Genpak's last-minute attempt to withdraw its bid . . . potentially suspicious" but, given Genpak's concerns over product quality, concluded that Genpak's "reluctance to compete against Pactiv" was "equally consistent with conspiracy as independent action such that it does not tend to exclude the possibility of independent action." App. A-28. First, the court here favors speculation over fact – the undisputed evidence that Genpak bought and successfully used 300,000 pounds of Evergreen's resin – and ignores the school officials' unqualified satisfaction with the product. Second, the court again falls into Posner's first 'trap', of weighing the evidence: the question is not whether it is susceptible of an innocent interpretation, such as found by the court, but whether there is sufficient evidence to create a jury issue. *See, e.g., In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff"), *cert. denied*, 133 S.Ct. 940 (2013).

Systematic Communications through Trade Association as 'Plus-factor': Looking through the improper lens of the 'tends to exclude' standard, the court failed to credit the undisputed evidence of some 40 meetings among the defendants through the PFPG (and its antecedents) during the 2005-2009

time period. On the court's unremarkable proposition that "a mere opportunity to conspire does not, standing along, plausibly suggest an illegal agreement," App. A-29 (quoting *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009), *cert. denied*, 562 U.S. 1134 (2011)), it is quite wrong to reject the defendants' 40 meetings and systematic communications as a classic plus-factor. Nowhere has Evergreen suggested that the meetings should be considered "standing alone" but rather, on the contrary, following the guidance of this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), that this plus-factor evidence should not be "tightly compartmentalized," as a basis for the reasonable inference that defendants' behavior was not mere parallel conduct. To reject here an inference of uniformity caused by information exchanges and find defendants' "'presence at such trade meetings [. . .] more likely . . . explained by their lawful, free-market behavior'," App. A-29, is to favor pure theoretical possibility over hard facts and construe reasonable inferences *against* the non-moving party.

The Court Misconstrued the Evidence about PDR: The court concluded that Evergreen "failed to produce evidence creating a reasonable inference that PDR was a sham." App. A-29. Evergreen contended that PDR performed poorly, if at all, but that it satisfied the defendants' near-term objective of making it appear that they were committed to recycling in order to buy time and stave off the bans,

when in fact they were collectively resisting sustainable recycling. PDR was not what it was purported to be, *see* SA3336-38 – a company producing recycled food-grade resin – and in this sense clearly was a sham. And, although the court said the evidence does not support a reasonable inference that PDR was "never operational," it never was.[8] Noting that Dart entered into a purchase agreement with PDR (App. A-30), the court inexplicably ignores the far more telling facts that in June 2008 Dart rejected a shipment from PDR of over 12,000 lbs. of recycled resin due to contamination, SA3175-77 (Preston testimony), and that PDR never sold it any commercially usable resin.[9] Thus, to find that Evergreen has not raised a reasonable inference that PDR was not 'operational' (the Court's characterization) renders the term meaningless. To conclude, in the face of PDR's executives' own damning testimony, that a reasonable factfinder could not find that PDR was a sham, in the sense of not being meaningfully operational, is to require the petitioner to prove a "sweeping negative" – a virtually impossible burden to satisfy – but that is just what the court did.[10]

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[8] *See, e.g.,* co-founder Preston**'s** testimony that "we [PDR] never sold clean stream [i.e., FDA requirements for food use] that was accepted by a customer." SA3187.

[9] Even assuming PDR produced 11,000 pounds of material, that is a miniscule amount over four years, especially when contrasted with Evergreen's average production of 30,000 pounds per month for two consecutive years.

[10] Indeed, counsel for petitioner is unaware of any case in which a court has found on the "tends to exclude" standard that

- *Court Drew Further Inferences Against Evergreen on the Basis of Speculation in the Face of Hard Fact:* The court in several instances draws inferences *against* Evergreen from defendants' purchase and successful use of a substantial quantity of its recycled resin and Evergreen's earlier success. Had the court instead applied the correct test to the evidence, as *Kodak* instructs, and not fallen into the trap of substituting its own judgment for that of the trier of fact, it would likely have concluded that a reasonable jury could find for Evergreen on these issues.

-- Thus, on Forrest's contention that Reilly (of Genpak)'s requirement of group support was "a way of maintaining group course of action," the Court concluded that Reilly "may have been acting independently [. . .] [i]n light of the resin quality issue," and "Evergreen has not presented evidence that tends to exclude this possibility of independent action." App. A-20, n.12. The court took no note in this context of Genpak's purchase of 300,000 pounds of recycled resin from Evergreen and successful use

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plaintiff's evidence, short of direct evidence of conspiracy, tends to exclude the possibility of independent conduct. Even assuming a handful of such cases could be found, the point remains, and the reason is that it is a virtually unattainable standard. In this light, it is all the more compelling why it should therefore be clearly limited, just as *Kodak* requires. *See also Petruzzi's*, 998 F.2d at 1230 (holding that plaintiff need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the mere scintilla standard).

it in green products, which clearly suggests that Reilly's requirement of group support may well *not* have stemmed from the resin quality issue. SA0398.
-- The court ignored evidence of Evergreen's earlier success with supplying 'green products' to Boston Public Schools for more than eight years and also to other schools in Massachusetts, Rhode Island, Connecticut and New Jersey, with customer satisfaction on product quality and performance reliability, enabling it to get SBA financing to build the recycling facility in Norcross, Georgia.
-- The Court's statement that Sysco "eventually backed out" after Dolco made a formal proposal to it in December 2005, App. A-7, accepts Dolco Senior V-P Patterson's deposition testimony but ignores Forrest's contrary deposition testimony that Dolco backed out of the deal, not Sysco. *See* JA1329, SA1515-18. Patterson also testified that Evergreen "never produced anything" when in fact it sold more than 250,000 pounds to Dolco alone in the period 2005-2008. JA1331. Given the reasonable inference that Patterson's testimony is therefore suspect, the court erred in assessing and reaching a conclusion about Patterson's credibility, instead of leaving it to the trier of fact.

Funding Agreement: The Court found that "the continued purchase of Evergreen's resin by [Dolco and Genpak]" pursuant to [their July 2007] funding agreement was "inconsistent with conspiracy" and that such purchases "would be irrational if a conspiracy in fact existed" because "these agreements

allowed Evergreen to continue operations." App. A-22. But the court substituted its own interpretation of the agreement, as allowing Evergreen to "continue operations," in the face of evidence reflecting a more limited purpose. The agreement expressly provided for most of the $75,000 in funding from each firm to Evergreen to be used to pay its existing debt obligations, listed on an exhibit thereto, and required that Evergreen send weekly financial activity reports to Dolco and Genpak. Both defendants were thus well aware of Evergreen's dire financial situation, even as of July 2007, unless it received brokerage commissions, which of course this funding did not provide. They therefore could reasonably expect that the $150,000 would not enable Evergreen to continue operations without the requested commissions.

Forrest was not shy about making known Evergreen's need for commissions for the model to work, or about voicing his suspicions about why the defendants were not accepting his proposals. Evergreen was 'dogged' and the funding was the proverbial bone thrown to it – in this case, to buy peace from Evergeen: the funding provided Dolco and Genpak with legal cover for their participation in the group rejection of Evergreen's proposal for the Los Angeles plant just two months earlier, and for their reversal of prior commitments to Evergreen to buy recycled resin for green foam products and pay industry-standard commissions. One can readily imagine Judge Posner, as he did in *JTC*, finding plausible both innocent and not-innocent

explanations for the conduct, and therefore concluding that it is a matter for the trier of fact to decide – not for the court on summary judgment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 17, 2017

United States Court of Appeals
For the First Circuit

No. 15-1839

EVERGREEN PARTNERING GROUP, INC.,
Plaintiff, Appellant, MICHAEL FORREST,
Plaintiff, v.
PACTIV CORPORATION; SOLO CUP COMPANY, a corporation;
DOLCO PACKAGING, a Tekni-Plex Company, a corporation;
DART CONTAINER CORPORATION;
AMERICAN CHEMISTRY COUNCIL, INC., an association,

Defendants, Appellees, GENPAK, LLC., a/k/a Genpack, LLC, Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Richard G. Stearns, U.S. District Judge]

Before
Howard, Chief Judge,
Torruella and Barron, Circuit Judges.

Richard Wolfram, with whom Jan R. Schlichtmann, Orestes G. Brown and Metaxas Brown Pidgeon LLP, were on brief, for appellant.

John M. Faust, with whom Law Office of John M. Faust, PLLC, William E. Lawler, III, Ralph C. Mayrell and Vinson & Elkins LLP, were on brief, for appellees Dart Container Corporation and Solo Cup Company.

Steven M. Cowley, with whom Duane Morris, LLP, was on brief, for appellee Dolco Packaging.

Richard A. Sawin, Jr., Richard E. Bennett and Michienzie & Sawin LLC, on brief for appellee Pactiv Corporation.

Ralph T. Lepore, III, Michael T. Maroney, Benjamin M. McGovern, Scott A. Moore and Holland & Knight LLP, on brief for appellee American Chemistry Council.

August 2, 2016

TORRUELLA, Circuit Judge. Plaintiff-Appellant Evergreen Partnering Group, Inc. ("Evergreen") appeals a summary judgment from the United States District Court for the District of Massachusetts against its Sherman Act section 1, 15 U.S.C. § 1, claim. Under its business model,

Evergreen collected used polystyrene products, processed them into a recycled polystyrene resin ("recycled resin"), and sold its resin to converters to use in a "green foam" line of products. According to Evergreen, the five largest converters of polystyrene products -- Dart Container Corporation ("Dart"), Dolco Packaging ("Dolco"), Genpak, LLC ("Genpak"), Pactiv Corporation ("Pactiv"), and Solo Cup Company ("Solo") -- through the trade association American Chemistry Council ("ACC") (hereinafter referred to collectively as "the defendants") refused in concert to deal with Evergreen in order to prevent polystyrene recycling from becoming viable and maintain their respective market positions.[1] On summary judgment, the district court concluded that Evergreen failed to present evidence that tended to exclude the possibility that each polystyrene manufacturer independently chose not to partner with Evergreen as required by Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

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1 Although Genpak was a defendant in this case, it is not an appellee. Genpak settled with Evergreen prior to summary judgment.

We agree with the district court's reasoning and affirm.

I.[2]

A. Industry Overview

Michael Forrest founded Evergreen in 2000. Prior to the advent of Evergreen, other companies tried to recycle polystyrene products but had difficulty turning a profit. Evergreen envisioned that it could succeed where others had failed by obtaining revenue from three different sources.

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2 The facts in this case are taken from the defendants' Local Rule 56.1 Joint Statement of Undisputed Material Facts, the Plaintiff's Corrected Local Rule 56.1 Statement of Material Facts, and, when appropriate, the record. The defendants argue we should accept all of their facts as true because Evergreen failed to file a paragraph-by-paragraph response, instead providing its own counterstatement of the facts. Massachusetts Local Rule 56.1 does not require paragraph-by-paragraph rebuttal. See McGrath v. Tavares, 757 F.3d 20, 26 n.10 (1st Cir. 2014). It is sufficient for the party opposing summary judgment to file a statement of facts it believes are still under dispute. See id. (finding plaintiff complied with Local Rule 56.1 by filing own statement of disputed material facts because "[t]he District of Massachusetts simply requires '[the] party opposing [a motion for summary judgment] . . . include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation.'" (alteration in original) (quoting D. Mass. L. R. 56.1)). We follow the district court's approach of accepting any of the defendants' facts Evergreen fails to contest, but consider any evidence Evergreen has cited as creating a dispute and draw all reasonable inferences in Evergreen's favor. See Cochran v. Quest Software, Inc., 328 F.3d 1, 12 (1st Cir. 2003).

First, Evergreen would charge an "environmental fee" to large end users (such as school districts that used polystyrene food trays in their cafeterias) for collecting their used polystyrene products. Because these institutions often paid waste disposal fees to transport their used polystyrene products to landfills, Evergreen believed they would be willing to pay the environmental fee. After collecting the used polystyrene products, Evergreen would transport them to its recycling plants to process into a recycled resin. Selling this recycled resin to polystyrene converters would form the basis of Evergreen's second revenue stream. These converters would use Evergreen's resin to create new polystyrene products and sell them to customers. As its third revenue stream (and of particular relevance to its lawsuit), Evergreen sought to charge converters a commission on the products sold containing its resin. Evergreen hoped the commission would keep the price of its resin competitive with virgin resin and believed the commission reflected the market's willingness to pay a premium for "green" products. Evergreen also believed its green foam products would bring the converters new customers because many of the suppliers of the used polystyrene products would also be interested in purchasing recycled products.

In furtherance of its goal to produce recycled resin, Evergreen began setting up its first independent recycling plant in Norcross, Georgia, in February 2005. [3] Starting in 2006, Gwinnett County

Public Schools ("Gwinnett Schools"), also in Georgia, began paying Evergreen to collect its used polystyrene lunch trays.[4]

At the same time, Evergreen sought out partnerships with polystyrene converters. Between 2002 and 2005, Evergreen reached out to several small polystyrene converters but had little success. Evergreen then began targeting what it believed to be the five main national polystyrene converters -- Dart, Dolco, Genpak, Pactiv, and Solo -- the defendants in this case.

Early on, Dolco and Genpak showed interest in working with Evergreen. In July 2005, Forrest approached Dolco's General Manager for the Midwest Division, Norman Patterson, about the distribution company Sysco's interest in an "Earth Plus" product line containing Evergreen's resin. Initially, Patterson appeared receptive and representatives from Sysco, Dolco, and Evergreen met

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3 Prior to 2005, Evergreen operated using a slightly different business model with Boston Public Schools. Participating schools collected their polystyrene products and processed them into resin using Evergreen's equipment. Evergreen then purchased this resin and sold it to polystyrene converters who (with Evergreen's assistance) used the pellets to make new polystyrene products.

4 Also starting in 2006, Evergreen collected trays from several other southeastern United States school districts as well as the Publix grocery store chain. None of these customers ever purchased products made using Evergreen's recycled resin.

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about a possible deal in November 2005. Dolco made a formal proposal to Sysco in December and told Evergreen it would be willing to pay a royalty to use its recycled resin as long as the relationship could be profitable. Sysco, however, eventually backed out and the deal fell through.

Additionally, towards the end of 2006, Evergreen met with Genpak. Genpak began making lunch trays with Evergreen's resin and submitted a bid to Gwinnett Schools (who was already paying Evergreen to remove their trays) to supply it with trays for the 2007-2008 academic year. Gwinnett Schools subsequently selected Genpak's $16.97 per case bid over Pactiv's $18.97 per case bid.[5]

B. The Alleged Conspiracy[6]

In 2007, Forrest approached Genpak's president, Jim Reilly, about financing a new Evergreen recycling plant in California as well as upgrades to Evergreen's Norcross facility.

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5 Despite the savings Gwinnett Schools received from having Evergreen remove its trays, it did not factor this in to its calculations when selecting a bid. Gwinnett Schools officials explained that they were obligated to select the lowest bid.

6 Before the district court, Evergreen alleged an alternative starting date, March 18, 2005, for the conspiracy. The district court rejected this argument and Evergreen has not advanced it on appeal. We therefore focus our analysis exclusively on the May

31, 2007, conference call conspiracy claim.

Reilly told Forrest he should submit his funding proposal to the Plastics Foodservice Packaging Group ("Plastics Group").

The Plastics Group is a subgroup of the ACC that focused on promoting plastic foodservice packaging. All five of the converter defendants were members of the Plastics Group at one time or another. By 2007, the Plastics Group was particularly concerned with local and state initiatives to ban polystyrene products due to the perception that polystyrene was not recyclable.

On May 14, 2007, the Plastics Group held a conference call with Forrest to discuss Evergreen's intention to expand to California. About a week later, Forrest submitted two proposals to the Plastics Group's Senior Director, Michael Levy, requesting that the Plastics Group help Evergreen expand its operations to California.[7]

The Plastics Group held a conference call between its members on May 31, 2007, to discuss Forrest's proposals.

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7 In both proposals, Evergreen requested that the Plastics Group help Evergreen with the start-up costs for a Los Angeles recycling facility and financing upgrades to the Norcross facility. One proposal, totaling $500,000, would also have committed the Plastics Group's members to helping Evergreen with operating and maintenance costs as well as to paying commissions on products sold containing Evergreen's resin. The other proposal,

totaling $3.1 million, would have committed the Plastics Group's members to purchasing all of the recycled resin Evergreen produced. Forrest later separately sent a third proposal that requested a $500,000 subsidy and a commitment to purchase a set amount of Evergreen's resin.

Evergreen alleges that during this conference call, the defendants not only rejected funding Evergreen's proposals, but also agreed that no individual converter would enter any deal with Evergreen that involved the payment of commissions. In addition, Evergreen alleges that at this meeting the defendants agreed to promote a sham competitor called Packaging Development Resources of California, LLC ("PDR") -- a California-based polystyrene recycler whose business model relied entirely on selling its recycled resin and had no commission component -- to block Evergreen's access to polystyrene end users.

C. Events After the Alleged Conspiracy Began

Following the May 31, 2007, conference call, Levy notified Forrest that the Plastics Group had rejected all of his proposals. Forrest submitted two additional proposals to the Plastics Group, which were also rejected. Without funding, Evergreen did not build a California recycling plant.

In the intervening months, Evergreen continued to negotiate with the defendants to try to obtain an agreement that included both the purchase of resin and the payment of commissions. Genpak and Dolco entered a joint funding agreement with

Evergreen in July 2007, each agreeing to provide Evergreen with $75,000 and to purchase any "acceptable quality" resin that Evergreen produced for $0.85 per pound but rejecting any commission requirement.

Evergreen also began negotiations with Solo. Solo purchased resin to test in May 2008 but stated it would not accept any deal that included a commission payment. In addition, Pactiv and Dart tested samples of Evergreen's resin throughout 2008 and 2009 without reaching an agreement.

Evergreen also found itself largely unable to attract customers who would pay Evergreen to remove their waste products or pay a premium for polystyrene products containing recycled resin. Although Genpak bid to supply Gwinnett Schools with trays containing Evergreen's resin for the 2008-2009 school year, it raised its price. Pactiv, in contrast, lowered its bid and won. No further purchase agreements between Evergreen, Genpak, or Dolco were executed.

In May 2008, Evergreen shut down its Norcross facility and opened a smaller recycling plant in Lawrenceville, Georgia. Evergreen subsequently shut down the smaller plant in October 2008 and ceased operations.

II.

In May 2011, Evergreen and Forrest filed a complaint in district court alleging that the defendants agreed to boycott Evergreen in violation of section 1 of the Sherman Antitrust Act,

15 U.S.C. § 1. The district court granted the defendants' motion to dismiss, which Evergreen (but not Forrest) appealed to this court.

We reversed in Evergreen Partnering Group v. Pactiv Corp. ("Evergreen I"), 720 F.3d 33 (1st Cir. 2013). Our opinion highlighted several facts that we viewed, if proven, as sufficient "to establish a context for plausible agreement in the form of industry information and facilitating practices." Id. at 48. These facts included Evergreen's allegations that the polystyrene industry was "highly concentrated"; that the defendants' membership in the Plastics Group served "as a facilitating practice"; and that the defendants' behavior appeared to be against self-interest -- both because Evergreen claimed its business model was cost-neutral and because PDR was a sham competitor. Id. At 48-50. Accordingly, we vacated and remanded to the district court. Following discovery, the defendants moved for summary judgment, which the district court granted. This timely appeal followed.

III.

The crux of Evergreen's claim is that the defendants conspired to prevent its recycling model involving commission payments from becoming viable by universally rejecting any agreements that involved commissions and blocking its access to other customers through the promotion of PDR. Evergreen argues that these actions constitute a group boycott prohibited by section 1 of the Sherman Act.

"Section 1 [of the Sherman Act] may be violated 'when a group of independent competing firms engage in a concerted refusal to deal with a particular supplier, customer, or competitor. '"Id. at 42 (quoting González–Maldonado v. MMM Healthcare, Inc., 693 F.3d 244, 249 (1st Cir. 2012)). Section 1 "reaches only 'agreements'" and "does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors." White v. R.M. Packer Co., 635 F.3d 571, 575 (1st Cir. 2011).

These antitrust principles influence our review on summary judgment. We review a district court's summary judgment decision de novo. Id. In order to survive summary judgment, a plaintiff "must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiff] to suffer a cognizable injury." Matsushita, 475 U.S. at 585-86 (citing Fed. R. Civ. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. at 587 (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

"[W]e 'draw[] all reasonable inferences in favor of the non-moving party while ignoring conclusory allegations, improbable inferences, and unsupported speculation.'" Alicea v. Machete Music, 744 F.3d 773, 778 (1st Cir. 2014) (second alteration in original) (quoting Smith v. Jenkins, 732 F.3d 51, 76 (1st Cir. 2013)). Moreover, "antitrust law limits the range of permissible inferences from ambiguous evidence in a

§ 1 case." Matsushita, 475 U.S. at 588. "[A] plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Id. (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)). "Such evidence could show 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'" White, 635 F.3d at 577 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 577 n.4 (2007)). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 588.

IV.

Evergreen first claims that the record shows that the Plastics Group decided during the May 31 call to favor PDR to Evergreen's detriment, providing unambiguous evidence of conspiracy. This in turn, Evergreen argues, bolstered the inferences that could have been drawn from all of the ambiguous evidence it presented.

Evergreen relies primarily on a deposition statement made by Robert Kingsbury of Dow Chemical[8] that the Plastics Group "wanted to pick a winner" during the May 31, 2007, conference call. Evergreen argues that Kingsbury's statement must be interpreted as meaning that the Plastics Group

intended to pick PDR as the winner and, conversely, Evergreen as the loser -- i.e., the defendants agreed to promote PDR to Evergreen's detriment to deny Evergreen access to end users of polystyrene products.

We agree with the district court that, when read in context, Kingsbury's statement does not have the meaning Evergreen ascribes. The full context of Kingsbury's deposition testimony is as follows:

> Q: Did you have any agenda when you were on the [Plastics Group], as the representative of Dow, that you favored one company or one idea over the other?
> A: No.
> Q: Did you give everybody a fair shot –
> A: Absolutely.
> Q: -- for their proposals --
> A: Absolutely.
> Q: -- and their submissions?
> A: Absolutely. We wanted to pick a winner. Everybody wants to pick the winning horse.

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8 Dow Chemical is also a member of the Plastics Group. Evergreen did not name it as a defendant to this suit.

We do not think Kingsbury's statement about picking a winner can reasonably -- let alone unambiguously -- be construed as meaning that the Plastics Group decided to throw its support behind PDR to Evergreen's detriment during the conference call. In

context, Kingsbury's statement cannot be interpreted as referring to winners and losers in any kind of anticompetitive sense. Rather, Kingsbury simply meant that the Plastics Group wanted to support proposals that would be successful -- i.e., those that would be successful in combating polystyrene bans by showing that polystyrene was recyclable.

Our interpretation of Kingsbury's statement is not changed by other statements cited by Evergreen that it interprets as showing that Senior Director Levy maneuvered to position PDR favorably before the May 31 call. Evergreen first claims that in documents leading up to meeting, Levy described PDR more favorably as an "opportunity" while Evergreen was referred to as simply having a "proposal." It also cites an email it views as showing that Levy instigated the placement of a favorable (and misleading) story about PDR in a trade newspaper prior to the May 31 call; in that same email, Levy stated he wanted to "ease our guys into getting interested and making contact with . . . PDR." Finally, Evergreen cites minutes from a March 2007 Plastics Group meeting stating that it discussed "what to do with [Evergreen]."

Reviewing these documents, we do not think a reasonable factfinder would view them as supporting an inference of favoritism towards PDR. With respect to the "opportunity" language, Levy's correspondence shows that he was still familiarizing himself with PDR and hoping to learn more about their business. Unlike Evergreen, PDR, as of May 2007, was not seeking assistance from the Plastics Group such that

it had no formal "proposal" to consider. The use of the word "proposal," however, made sense with respect to Evergreen given that Forrest had submitted funding proposals. Moreover, all of the documents Evergreen points us toward state that PDR would be discussed at a separate meeting, and nothing in the record contradicts this.

With respect to the favorable and misleading[9] article about PDR, we note that Evergreen fails to cite any evidence showing that anyone from the Plastics

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9 We accept Evergreen's contention that a reasonable factfinder could conclude the article was misleading. One of PDR's founders, Tom Preston, stated at his deposition that the article portrayed PDR as further along in its operations than it was at the time. Nonetheless, because Evergreen cannot tie this article to the Plastics Group, let alone cite any facts showing the misrepresentations were deliberate, we do not find the fact it was misleading supports an inference of conspiracy.

Group was involved with the article. At most, the email Evergreen cites shows that Levy approved of a non-Plastics Group member's idea to put PDR in touch with the trade newspaper. Without more, it would be pure speculation to conclude that the favorable news story about PDR was intended to sabotage Evergreen.

As to the March 2007 meeting, the full agenda item in the meeting minutes states, "What to do with [Evergreen], Recycling Professionals & Timbron regarding these recycling pilot programs and taking it further? . . . timing? [sic] Or How [sic] do we make it

work as a long term solution." We do not believe a rational factfinder could conclude that this item suggested the Plastics Group was considering sabotaging Evergreen. Rather, these minutes simply state the Plastics Group discussed whether or not to provide support to several polystyrene recyclers, including Evergreen.

After reviewing the context surrounding the May 31, 2007, conference call, we do not view Kingsbury's statement as direct evidence of a conspiracy against Evergreen. Without this statement, Evergreen's argument that the Plastics Group, in fact, favored PDR over Evergreen is considerably weakened. Evergreen claims that the Plastics Group prevented it from obtaining access to polystyrene end users who could either supply used polystyrene products (which Evergreen could recycle into resin) or purchase polystyrene products containing Evergreen's recycled resin. All Evergreen cites, however, is evidence that the Plastics Group introduced PDR to polystyrene users -- there is no evidence that the Plastics Group discouraged these users from working with Evergreen, let alone maneuvered to block Evergreen's access. We note that antitrust laws allow trade associations to make nonbinding recommendations about businesses and products. See Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 292 (5th Cir. 1988) ("We hold that a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not per se violate section 1 when, for whatever reason, it fails to

evaluate a product favorably to the manufacturer."). We do not view the Plastics Group's action as improper and therefore reject Evergreen's contention that it presented unambiguous evidence of conspiracy.

V.

Evergreen acknowledges that all other evidence it cites is not direct but argues that, taken together, this evidence creates a reasonable inference of conspiracy. Evergreen begins with citing the fact that each of the converter defendants refused to pay commissions on any products sold containing Evergreen's recycled resin and argues each converter had economic motive to collude.

We have previously stated that, in the context of price- fixing schemes, "[m]ere parallelism . . . does not even create a prima facie conspiracy case." White, 635 F.3d at 580. This principle is equally applicable to group boycotts -- that is to say, universal refusals to deal alone are insufficient to support an inference of conspiracy. Moreover, even if "in isolation, [a] defendant's refusal to deal might well have sufficed to create a triable issue," "the refusal to deal ha[s] to be evaluated in its factual context." Matsushita, 475 U.S. at 587 (citing First Nat'l Bank of Ariz., 391 U.S. at 277).

Our decision in Evergreen I hinged in large part on our presumption that the defendants' refusal to deal with Evergreen was economically irrational. See Evergreen I, 720 F.3d at 50 (citing In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321-22 (3d

Cir. 2010)). In its complaint, Evergreen alleged that its model was "cost-neutral," that the commissions it requested were "standard in the industry," and that "shifting to recycled polystyrene would have produced abundant savings to customers and resulted in a higher volume of customer sales due to the attractiveness of potential savings and environmental benefits." Id. Evergreen no longer makes any of these contentions. Instead, Evergreen argues that the defendants opposed its business model because the defendants "did not want to pay more for recycled resin than for virgin resin" and its business model involving commissions would disrupt the defendants' respective market shares if it became viable.[10]

This theory, however, acknowledges that any agreement with Evergreen would cause the defendants to incur additional costs. The defendants' desire to avoid these costs is especially understandable in light of the overwhelming evidence that they each experienced significant quality problems with Evergreen's resin. Both Dolco and Genpak, defendants who entered into a funding agreement with Evergreen, complained to Evergreen that its resin had a bad odor; Genpak's Patterson also notified Evergreen

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10 We decline to address the defendants' argument that Evergreen's conspiracy claim is economically irrational, which would, in turn, require Evergreen to present stronger conspiracy evidence. See Matsushita, 475 U.S. at 596-97 ("Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational

economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."). We acknowledge the defendants' point that driving a viable recycler such as Evergreen out of business would be a risky proposition given that some local governments could respond by banning polystyrene outright. Nonetheless, there may be a colorable argument that the defendants feared that local governments would instead mandate the use of recycled products, and would thus wish to prevent any expensive recycling methods from becoming viable.

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that its resin had high levels of bacterial contamination.[11] Dart, Solo, and Pactiv also tested Evergreen's resin between 2008 and 2009 and found it did not meet their standards. Where the challenged conduct is "as consistent with permissible competition as with illegal conspiracy," a plaintiff "must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588 (quoting Monsanto, 465 U.S. at 764); see also AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 235 (2d Cir. 1999) (per curiam) (stating where "the challenged conduct of each . . . defendant is as consistent with the defendant's legitimate, independent business interests as with an illegal combination in restraint of trade" a plaintiff must "submit evidence tending to exclude the possibility that the defendants acted independently.").[12] As a result, Evergreen was required to produce

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11 We also note that Evergreen received complaints from Dolco before the conspiracy allegedly began, weakening any inference that these complaints were post hoc justifications.

12 Evergreen also contends that Reilly referred Forrest's funding proposals to the Plastics Group as a "way of maintaining group course of action." In light of the resin quality issues, however, Reilly may have been acting independently, referring Forrest because Genpak did not want to bear the investment risk alone. Evergreen has not presented evidence that tends to exclude this possibility of independent action.

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evidence that tends to exclude the possibility of independent action.

VI.

We thus now turn to the "plus factors" Evergreen alleges support an inference of conspiracy. Plus factors are "proxies for direct evidence of an agreement." Evergreen I, 720 F.3d at 46 (quoting In re Flat Glass Antitrust Litig., 385 F.3d 350, 359-60 (3d Cir. 2004)). Nonetheless, "many so-called plus factors simply'demonstrate that a given market is chronically non-competitive,'" without explaining whether agreement is the cause. White, 635 F.3d at 581 (quoting Michael D. Blechman, Conscious Parallelism, Signalling and Facilitation Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N.Y.L. Sch. L. Rev. 881, 898 (1979)). More persuasive is "'traditional' conspiracy evidence of the type that helps to distinguish between conscious

parallelism and collusion," such as communications between defendants. Id. at 583.13

The production of traditional conspiracy evidence seems particularly important in Evergreen's case because we agree with the district court that there is substantial evidence inconsistent

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13 We note that the concentrated nature of the polystyrene market falls within the former category of evidence of an anticompetitive market.

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with conspiracy: specifically, the continued purchase of Evergreen's resin by several of the defendants. In July 2007, Evergreen entered into a contract with Dolco and Genpak granting them exclusive rights to use any resin produced by Evergreen's Norcross facility for egg cartons and school trays, respectively. Additionally, Solo purchased 15,000 pounds of resin from Evergreen for testing. Evergreen argues that this conduct is nonetheless consistent with conspiracy because Plastics Group members agreed not to deal with Evergreen on a specific term (commission payments) and antitrust law does not require a complete boycott. Even if this is correct, Dolco, Genpak, and Solo's resin purchases would be irrational if a conspiracy in fact existed. Regardless of whether the funds came from commission payments or resin purchases, these agreements allowed Evergreen to continue operations. Such an outcome seems inconsistent with the alleged conspiratorial end

of preventing Evergreen from being viable and disrupting the status quo. In order to survive summary judgment, Evergreen needed to produce more evidence than simply pointing to the fact that the polystyrene market was anticompetitive.

As discussed below, Evergreen argues many so-called- plus-factors make its conspiracy claim viable: statements it views as reflecting animus towards recycling and its business, the existence of a trade association, and PDR's "sham" status. This evidence, however, viewed in context, is either not traditional conspiracy evidence or does not have the meaning Evergreen ascribes to it.

A. Industry Animus

Evergreen argues that it presented evidence showing that the polystyrene industry was anti-recycling and therefore the converter defendants had motive to conspire. The defendants argue that this evidence is largely inadmissible hearsay contained in either unverified documents or Forrest's affidavit.14 Even if we considered this evidence, we have previously rejected "motive to conspire" standing alone as sufficient. White, 635 F.3d at 582. "[E]vidence showing defendants have 'a plausible reason to conspire' does not create a triable issue as to whether there was a conspiracy." Id. (quoting Matsushita, 475 U.S. at 596-97); see also

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14 This evidence consists of (1) a 2005 article posted on the ACC's website stating polystyrene recycling was infeasible; (2) minutes from a March 18, 2005, Plastics Group meeting asking whether the industry could "win out" against its critics without having to recycle; and (3) representatives of Pactiv and Dart standing up during the middle of a 2005 Plastics Group meeting and stating they did not want to recycle. The district court found both the minutes and Forrest's statements regarding the 2005 meeting inadmissible. We agree that the notes are not subject to Federal Rule of Evidence 801(d)(2)'s business records exception because they were not authenticated. We also agree with the district court's conclusion that Forrest's statements about what Patterson heard at the 2005 Plastics Group meeting are being used for the truth of the matter asserted and do not fit into any hearsay exception.

Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 272 (5th Cir. 2008) ("[C]ommon dislike is not the same as an explicit understanding to conspire, so we accordingly review [the plaintiff's] claim under the stricter standard required for circumstantial evidence."). The defendants' desire to avoid recycling speaks only to their motive to conspire and is thus insufficient.

We give more consideration, however, to evidence Evergreen claims shows that representatives of the converter defendants were told not to deal with Evergreen. If this evidence were admissible and

Evergreen's inferences reasonable, it would fit within the traditional conspiracy evidence we described in White. These statements, however, are largely inadmissible hearsay or taken out of context. "'It is black-letter law that hearsay evidence cannot be considered on summary judgment' for the truth of the matter asserted." Hannon v. Beard, 645 F.3d 45, 49 (1st Cir. 2011) (quoting Dávila v. Corporación de P.R. Para La Difusión Pública, 498 F.3d 9, 17 (1st Cir. 2007)). Evergreen uses a claim that a representative of the distribution company Eastern Bag told Forrest that Solo's president and CEO said that he "was told by [his] people not to work with Evergreen or Forrest" for this purpose. Yet, this statement is not corroborated by the declaration of Solo CEO Robert Korzenski. What Korzenski recalled was that he instructed his staff to work through the distributor and not deal with Evergreen directly because he believed the distributor had a better relationship with Evergreen and his staff had reported Forrest had a difficult personality. Because Forrest's affidavit relaying the words of a declarant is the only evidence that Solo's president was told not to work with Evergreen, we may not consider it as evidence.[15] See Fed. R. Evid. 801. For similar reasons, we reject Evergreen's claim that a representative of the distribution company Sodexo told Forrest that Pactiv "sent an e-mail to Sodexo threatening to reduce their annual rebates" if they worked with Evergreen. This statement is hearsay and Evergreen fails to cite any admissible evidence in the record to support it.

Evergreen also cites statements by Dolco that it believes suggest that Dolco was susceptible to anti-recycling pressure by Pactiv and Dart.[16] Even if we accepted Evergreen's statements at face value,

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15 Evergreen attempts to corroborate Forrest's affidavit by citing the deposition testimony of Eastern Bag representative Kenneth Rosenberg. During the deposition, Rosenberg was shown a copy of Evergreen's complaint, which stated that "Solo's president and CEO, Bob Korzenski, told Eastern Bag and Paper's president, Meredith Reuben, that he had been told by his people not to work with Evergreen or Michael Forrest." Rosenberg stated he "remember[ed] [Korzenski] saying something similar, or that they didn't want to work with him or something." Rosenberg's testimony is unhelpful because it is also hearsay.

16 This evidence consists of (1) Forrest's affidavit stating that Patterson told Forrest that Dolco "did not want to compete against Pactiv" after a November 2005 meeting among Dolco, Evergreen, and Sysco; (2) a December 2005 draft proposal to Sysco that stated Dolco was not in the "Pactiv style business" and if it was, Pactiv "could run [Dolco] underground with ease"; and (3) the deposition testimony of Dolco's Director of Operations Gaffe Villegas, acknowledging that Pactiv was larger than Dolco and "a big company can do a lot of harm to a smaller company." We note that the latter two statements, when read in context, actually create an inference against conspiracy. Both the proposal and Villegas state that Dolco could not compete against Pactiv on cost or volume-- before mentioning Pactiv, the proposal states that "the 'Earth Plus' products give both [Evergreen] and Dolco the opportunity to provide environmentally responsible packaging along with some stock product sales," suggesting that Dolco viewed recycling as a way to differentiate its products to successfully compete against Pactiv. Even if any of this evidence was admissible, we also note that Evergreen fails to cite any evidence contradicting statements made by Dolco

representatives that the Earth Plus line fell through because Sysco backed out.

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its evidence does not show "a tacit or express agreement," but merely that one alleged conspirator "might be rendered more pliable." White, 635 F.3d at 585. And, as we stated above, evidence that a market is anticompetitive -- such as the ability of a few large competitors to exert pressure on other competitors -- is not sufficient at the summary judgment stage.

Finally, Evergreen alleges that Genpak engaged in various behaviors when dealing with Gwinnett Schools suggesting that it was reluctant to bid with its tray made from Evergreen's resin against Pactiv. Evergreen claims Reilly (unsuccessfully) tried to retract Genpak's first bid for the Gwinnett Schools Contract in 2007.17 Evergreen also cites the deposition testimony

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17 The district court declined to accept this contention as true because the only evidence cited by Evergreen was Forrest's affidavit and an e-mail saying Forrest told someone Genpak retracted its bid. This conclusion impermissibly weighs evidence at the summary judgment stage. Although Matsushita places limits on the inferences courts may draw from ambiguous evidence, it does not change the summary judgment standard that courts "may neither evaluate the credibility of witnesses nor weigh the evidence." Hicks v. Johnson, 755 F.3d 738, 743 (1st Cir. 2014).

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of Gwinnett Schools official Brad Coury stating that he felt Reilly was reluctant to "battle against another competitor" when asked about Genpak's interest level in supplying Gwinnett Schools with trays for the following school year.

Although Genpak's last-minute attempt to withdraw its bid is potentially suspicious, as stated above, Genpak experienced problems with Evergreen's resin. Genpak may have been reluctant to commit to supplying a product when it had concerns about its quality. We perceive its reluctance to compete against Pactiv as being equally consistent with conspiracy as independent action such that it does not tend to exclude the possibility of independent action. We therefore view Evergreen's motive evidence as a whole to be insufficient to create an inference of conspiracy.

B. Trade Association as Means to Collude

As an additional plus factor, Evergreen cites our statement in Evergreen I that trade association "meetings between defendants have the potential to enhance the anticompetitive effects and likelihood of uniformity caused by information exchange." Evergreen I, 720 F.3d at 49 (alteration and internal quotation marks omitted). Although the existence of a trade association remains a plus factor, a defendant's mere participation in one does not create a triable issue. See In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1196 (9th Cir. 2015) ("[M]ere participation in trade-organization

meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement."); In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 911 (6th Cir. 2009) ("[A] mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement because [the defendants'] presence at such trade meetings is more likely explained by their lawful, free-market behavior.").

C. PDR's "Sham" Status

Finally, Evergreen cites to the Plastics Group's promotion of a "sham" competitor. In Evergreen I, we stated PDR's sham status "would be particularly telling because the alleged conduct goes beyond rejecting a new entrant in favor of the benefits of the status quo." 720 F.3d at 48. Evergreen, however, has failed to produce evidence creating a reasonable inference that PDR was a sham.

Evergreen contends that PDR was not actually operational and landfilled the trays it collected. Evergreen first cites documents that it interprets as showing that PDR did not produce resin despite entering into agreements with Pactiv and Dart between 2006 and 2008. Evergreen also cites deposition testimony by one of PDR's founders, Tom Preston, admitting that PDR landfilled the lunch trays it collected (rather than turning them into a recycled resin) and its converter partners were never able to sell a product containing its resin. Evergreen further cites observations of PDR's facility by both

Forrest and Levy in 2007 finding it padlocked and nonoperational.

We start by addressing Preston's deposition testimony. All this testimony establishes is that PDR landfilled trays when it first started operating and again when it began shutting down. As explained by Preston, the trays had a limited time frame in which they could be converted into resin. Beginning in 2006, PDR collected trays from the San Diego Unified School District. But because PDR did not have the capacity to process all of the trays and turn them into resin within the given time period, it had to landfill many of the trays it collected. Preston also acknowledged, that in late 2008, PDR was again landfilling most of the trays it collected because it was running a "skelet[al] operation." These statements about PDR's start-up and end stages do not create a reasonable inference that PDR was never operational.

Similarly, even accepting as true that PDR showed no signs of activity when Forrest and Levy visited (in May 2007 and June 2007 respectively), two nonoperational days alone do not create a reasonable inference that PDR was never operational, particularly when all other evidence in the record shows that PDR produced recycled resin.[18] PDR produced resin for Dart to test in both 2006 and 2007, the latter batch of which was of sufficiently high quality that Dart entered into a purchase agreement. PDR subsequently produced 500 pounds of resin that Dart used to create sample plates and containers. Similarly, billing records show that Pactiv received at least 11,000 pounds of recycled PDR resin in August

and September of 2008. PDR admitted that it experienced difficulties in scaling up its operations to create large enough batches for commercial sales. Nonetheless, nothing in the record suggests that Pactiv and Dart did not work with PDR in good faith or that PDR's scaling problems were inevitable. We therefore conclude that a reasonable factfinder could not find that PDR was a sham.

Viewing, in combination, all the admissible evidence that the parties submitted, and drawing all reasonable inferences in Evergreen's favor, we conclude that Evergreen has failed to provide evidence that suffices to raise a reasonable inference of unlawful action.

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18 The record establishes that PDR was still in the start-up phase in 2007 such that PDR did not operate every day.

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VII.

Because we find no genuine issue of material fact as to whether a conspiracy existed, we need not go further and address the defendants' various alternative bases for affirmance. For the foregoing reasons, we affirm the district court's grant of summary judgment.

Affirmed.

UNITED STATES DISTRICT COURT DISTRICT
OF MASSACHUSETTS

CIVIL ACTION NO. 11-10807-RGS EVERGREEN
PARTNERING GROUP, INC. v.
PACTIV CORPORATION;
DOLCO PACKING a TECKNI-PLEX COMPANY, a
corporation; SOLO CUP COMPANY, a corporation;
DART CONTAINER CORPORATION; and
AMERICAN CHEMISTRY COUNCIL, an association

MEMORANDUM AND ORDER ON DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

July 10, 2015

STEARNS, J.

In this antitrust case, plaintiff Evergreen Partnering Group, Inc., seeks to prove that its business failed because of a conspiracy orchestrated by the defendant polystyrene converters and their trade association, the American Chemistry Council.

This court granted a motion to dismiss Evergreen's Complaint on June 7, 2012. Evergreen Partnering Grp., Inc. v. Pactiv Corp., 865 F. Supp. 2d 133 (D. Mass. 2012). The First Circuit reversed and remanded the case. Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33 (1st Cir. 2013).[1] Discovery now complete, before the court are defendants' motions for summary judgment.[2]

BACKGROUND[3]

Evergreen was the brainchild of Michael Forrest. He envisioned a profitable business model based on the conversion of polystyrene lunch trays into raw, food-grade resin, which could be used in the manufacture of "green" polystyrene

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1 More specifically, the First Circuit reversed this court's dismissal of Evergreen's Sherman Act claim, and ordered that discovery be taken. The Court of Appeals also remanded a claim brought under the Massachusetts Unfair Trade Practices Act, Mass. Gen. Laws ch. 93A, for further consideration. This court dismissed the Chapter 93A claim on January 28, 2014 (Dkt #174).

2 Also before the court are motions filed by defendants to strike: (1) the report and testimony of plaintiff's expert, Francesca Scarito (Dkt #218); and (2) portions of the affidavit of Michael Forrest, certain exhibits, various deposition excerpts, and portions of Evergreen's statement of material facts (Dkt #248). These motions will be discussed where relevant in this memorandum.

3 Three statements of undisputed material facts have been submitted by the parties. The first was filed jointly by

defendants (DSOF, Dkt #239). The second was filed by Evergreen and is not, strictly speaking, a response to the DSOF; rather, it states additional facts that Evergreen proffers as having a material bearing on the litigation (ESOF, Dkt #241). Finally, the defendants have filed a joint response to Evergreen's filing (RSOF, Dkt #250). The pertinent Local Rule provides that "[m]aterial facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties." D. Mass. L.R. 56.1.

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products.[4] To succeed, the model required a partnership between Evergreen and at least one established polystyrene converter.

Evergreen's Founding

In the early 1990s, Nova Chemicals began an experimental program in the Boston Public Schools (BPS), collecting polystyrene waste and converting it into recycled resin. DSOF ¶ 8; ESOF ¶¶ 7-8; Defs.' Ex. 41 at 10779 (TAP in Action article, no date). Nova used the recycled resin itself or sold it to manufacturers of non-food related products. DSOF ¶ 8. Forrest arranged with Nova to purchase its excess recycled resin. Id. ¶ 9; Defs.' Ex. A at 48-49 (Forrest Dep.). By 2000, Nova had lost interest in the experiment and made a gift of the recycling equipment to BPS. DSOF ¶ 10. Nova also gave Forrest an exclusive license to purchase the recycled

resin produced by BPS with the gifted equipment. Id.; ESOF ¶ 9; Defs.' Ex. A at 45 (Forrest Dep.).

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4 Polystyrene is a polymer plastic formed from styrene, a liquefied hydrocarbon (petroleum). Often confused with Styrofoam, a Dow Chemical Company brand of insulation, polystyrene's principal commercial use is in the manufacture of food containers and protective packaging. Because it is biodegradation resistant, it is an environmentally controversial packaging medium. "Green" polystyrene is, in the industry's phrase, simply "Post- Consumer Recycled Content." It has the same chemical composition as polystyrene in its processed form and has no greater degradability. There is no formal industry or regulatory standard governing the percentage of recycled content a polystyrene product must contain to be labeled "green."

Evergreen was incorporated by Forrest in 2000. Forrest Aff. ¶ 9.[5] Evergreen's mission was to develop new product lines using the BPS resin, while promoting recycling in other school districts.[6] In 2001, Evergreen received a "Non-Objection" letter from the Food and Drug Administration (FDA) sanctioning the use of "food-grade" recycled resin harvested through "controlled source collection." Defs.' Ex. 5 (FDA Non-Objection letter). From 2003 to 2005, Evergreen paid Commodore Plastics to manufacture food trays from the BPS recycled resin,

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5 Defendants move to strike those portions of Forrest's affidavit that express an opinion as to the viability of Evergreen's business model, arguing that such statements are

inadmissible as Forrest has not been qualified to offer an expert opinion on the polystyrene market. Under the Federal Rules of Evidence, a business owner is generally permitted to offer an opinion as to his business' value or its future profitability. See Fed. R. Evid. 701 (advisory committee notes) ("[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert.") (citing as an example, Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993)). The admissibility of the opinion and the weight it is to be given are, however, separate issues.

6 At the time he incorporated Evergreen, Forrest believed that it was only a matter of time until "the market would require that PS [polystyrene] food service products contain recycled content or be banned from the marketplace." Forrest Aff. ¶ 13. The only school system that came to require recycled content in food service products was BPS. Other school systems that considered the requirement rejected it because of the cost. See, e.g., Defs.' Ex. G at 39 (Coury Dep.).

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which it then sold back to BPS.[7] DSOF ¶ 16; ESOF ¶ 10; Defs.' Ex. A at 77-78 (Forrest Dep.). The recycling program was later expanded to public schools in Providence, Rhode Island. DSOF ¶ 17; Defs.' Ex. A at 75 (Forrest Dep.).

Evergreen's Business Model

The experience in Boston and Providence led Forrest to reimagine his business on a national scale. The national business model envisioned three revenue streams for Evergreen. First, the institution contributing polystyrene waste would pay

Evergreen an "environmental fee" for recycling the waste lunch trays.[8] Second, the polystyrene converter would pay for the recycled resin Evergreen produced. And third, the converter would pay a commission or royalty to Evergreen on every sale of a product containing Evergreen's resin.[9] DSOF ¶ 13; Defs.' Ex. A at 56 (Forrest Dep.).

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7 Evergreen sold the trays to a distributor, Eastern Bag, which in turn sold them to BPS.

8 Although Evergreen does not explicitly state why schools would be willing to pay this fee, the supposition is that the school would rebate the savings gained through lower drayage fees because of the diversion of some of the waste to Evergreen.

9 In 2003, Evergreen attempted unsuccessfully to obtain a method patent for aspects of its business model. Defs.' Ex. 833 (Feb. 3, 2005 Patent Application Publication No. US 2005/0027555 A1 (showing a provisional application date of July 30, 2003)). The patent was rejected for a final time in 2011. Defs.' Ex. A at 1734 (Forrest Dep.). Prior to the final rejection, Forrest kept the application alive for purposes of this lawsuit. Defs.' Ex. 40 (July 11, 2011 e-mail from George McCormack to Forrest).

According to Evergreen's expert witness, Francesca Scarito, without all three of these revenue streams, "[Evergreen] could not generate sufficient cash to meet ongoing capital requirements or scale the business." Scarito Rep. (Dkt #221, Ex. B) at 3.

Although not explicitly stated by Evergreen, there were other contingencies that also had to be met for the business model to succeed. First, school

districts had to agree to the model, which required a pairing of waste haulage costs with supply contracts. Second, because Evergreen did not have the capacity or ability to manufacture and distribute a final polystyrene product, it would have to successfully partner with one or more of the established polystyrene converters. That in turn depended on the ability of Evergreen to produce recycled resin at a price competitive with that of virgin resin.[10] DSOF ¶ 15. Finally, the converter would have to agree

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10 Scarito, Evergreen's expert, posited that Evergreen's resin could turn a profit at a price point of $0.60 per pound, assuming that the other contingencies were also met. Scarito Rep. at 3. The expert report does not take into account fluctuations in the world price of oil. (The price of polystyrene moves in tandem with the oil market, that is, the lower the price of oil, the cheaper virgin resin is to manufacture). It is undisputed that Evergreen was never able to produce recycled resin at a price lower than $2.00 per pound. DSOF ¶ 35; Defs.' Ex. I at 384 (LoRe Dep.).

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to pay a commission or royalty to Evergreen on the sale of "green" polystyrene products containing Evergreen's resin.

Early attempts to put together deals

Between 2002 and 2005, Evergreen attempted to partner with several established converters in order to fund the expansion of its business. In particular, Forrest solicited the aluminum giants, Alcoa and Reynolds, both of which had a small presence in the

polystyrene foodservice products market. DSOF ¶¶ 21-22. Neither company expressed an interest in Evergreen's business model. In 2005, Forrest approached two small polystyrene converters, Fabri-Kal and Placon. They too declined to partner with Evergreen. DSOF ¶¶ 24-25.

In 2005, there were five polystyrene converters with a national market presence: Pactiv Corporation, Dolco Packing, Solo Cup Company, and Dart Container Corporation (collectively the producer defendants), and Genpak, LLC (which settled with Evergreen after the Court of Appeals issued its decision, Dkt #207). Forrest Aff. ¶ 15. Insofar as Forrest was concerned, Evergreen's ultimate success depended on its ability to partner with one of these "big five" polystyrene producers. Id. ¶ 14. However, Forrest came to believe by early 2005 that the big five were implacably opposed to recycling. He reports being told by Sodexo, "a food service facility management and procurement group," that Dart and Pactiv in particular had zero interest in producing a "green" polystyrene line using Evergreen's recycled resin. Id. ¶ 17.

In 2005, Evergreen came up with sufficient financing to open a facility in Norcross, Georgia, to recycle food trays collected from the Gwinnett County School System (Gwinnett Schools). Id. ¶ 20; ESOF ¶ 20.[11] Simultaneous with the opening of the Norcross facility, Evergreen agreed with Sysco, a distributor of food service polystyrene, to jointly produce "green"

polystyrene food containers (among other items) to be marketed as part of Sysco's projected "Earth Plus" product line. Forrest Aff. ¶ 21; Pl.'s Ex. 1034 (Aug. 23, 2005 letter from Maurice Malone of Sysco to Forrest).

In July of 2005, Forrest pitched the Sysco venture to Norm Patterson, the General Manager of the Midwest Division of Dolco.[12] Forrest Aff. ¶ 22; DSOF ¶ 185. Forrest, Patterson, and a Sysco representative met in

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11 The BPS facility was owned and operated by BPS, with Evergreen having the exclusive right to purchase the recycled resin. The Georgia facility was the first recycling plant actually owned and operated by Evergreen. DSOF ¶ 27.

12 At about the same time, Evergreen obtained a commitment from Patterson for the purchase of $75,000 worth of Evergreen recycled resin at $0.45 per pound. DSOF ¶¶ 196-197; Defs.' Exs. 651 (July 13, 2005 e-mail from Forrest to Patterson) and 652 (Aug. 9, 2005 e-mail from Patterson to Forrest). Dolco never actually received the resin. DSOF ¶ 198; Defs.' Ex. 653 (Evergreen invoices).

November of 2005 and made progress towards reaching an agreement. Forrest Aff. ¶ 23. According to Forrest, Sysco believed that a deal might result in sales of upwards of $50 million in "green" polystyrene products. Id. Despite the promising start, Forrest says that he was later told by Patterson that the heads of Dolco and Dart had opposed the recycling effort at a meeting of the Plastics Food Packaging Group (Plastics Group). *Id.* ¶ 24. Patterson also allegedly

said that Dolco was unwilling to compete with Pactiv. *Id.*

Despite Patterson's misgivings, in early December of 2005, Dolco extended a formal offer to Sysco.[13] DSOF ¶ 206; Defs.' Ex. 657 (Dec. 6, 2005 Dolco proposal to Sysco). However, no final agreement was ever forged. According to Forrest, "it became clear that Patterson would not do a 'green' foam deal with Sysco, although Patterson was eager to purchase recycled resin made by [Evergreen]." Forrest Aff. ¶ 26. Dolco places the blame for the collapse of the deal on Sysco, stating that Sysco had backed away from producing a line of recycled content products.[14] DSOF ¶ 213.

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13 The proposal incorporated the most controversial aspect of Evergreen's business model, that is, Dolco offered to pay Evergreen a royalty for the use of its recycled resin. Forrest Aff. ¶ 23; DSOF ¶ 207; Defs.' Ex. 658 (Nov. 30, 2005 e-mail from Patterson to Forrest).

14 Patterson reported that Sysco had hit a "bump in the road" in unveiling an environmental line of polystyrene containers. Namely, Sysco had backed away from "green activities" because of a controversy about a misleading claim that it had made regarding the content of one its products. DSOF ¶ 213; Defs.' Ex. B at 105-107 (Patterson Dep.).

Although Evergreen's Norcross facility had begun processing polystyrene trays from the Gwinnett Schools in 2005,[15] it was not able to convert the recovered resin into usable pellets until 2006 when Dolco agreed to sell it an extruder. DSOF ¶ 29; Defs.'

Ex. B at 365-366 (Patterson Dep.). In November of that year, Forrest contacted Genpak's president, Jim Reilly, with a proposal that Genpak manufacture a product for Sysco's proposed Earth Plus line using Evergreen's recycled resin. Forrest Aff. ¶ 31. According to Forrest, Reilly (like Patterson before him), expressed initial interest in partnering with Evergreen, as well as a willingness to pay Evergreen the stipulated royalty. *Id.* However, no firm commitment or further negotiations among Evergreen, Genpak, and Sysco followed.

In January of 2007, Evergreen and Genpak began negotiations over a deal to produce lunch trays for the Gwinnett Schools.[16] *Id.* ¶ 34. (The trays

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15 Before its demise, the Norcross facility also processed polystyrene waste collected from the Pasco County Schools, Florida, and occasional loads from the DeKalb County Schools, Rockdale Schools, and Newton County Schools, all in Georgia. DSOF ¶ 31. The facility also processed some waste from Publix, a large, Southern-based grocery chain. *Id.*

16 As with the aborted Dolco deal, the proposal included an agreement by Genpak to pay Evergreen a royalty for the use of Evergreen's recycled resin in the lunch trays. Pl.'s Ex. 1029 (January 17, 2007 e-mail exchange between Reilly and Forrest); Pl.'s Ex. 1036 (no date e-mail from Jeff [LNU] to Reilly and Tim O'Connor of Genpak).

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had previously been manufactured by Pactiv. DSOF ¶ 32; Pl.'s Ex. 906 at 439 (Coury Dep.)). Genpak submitted a bid for a tray made with virgin resin and another for a tray incorporating Evergreen's recycled resin. Forrest alleges that Reilly sought to pull the rug out from under the deal by withdrawing Genpak's bid at the last minute.[17] Forrest Aff. ¶ 34. Despite the attempt, Genpak and Evergreen won the bidding.[18]

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17 Forrest alleges that Reilly's conduct was "directly correlated to the March 6/7, 2007 group meeting," although he offers no particulars about the alleged meeting. Forrest Aff. ¶ 34. Evergreen's own exhibits indicate that the attempted bid retraction in fact occurred a month later in mid- April 2007. Pl.'s Ex. 1035 (April 16, 2007 e-mail chain between Forrest and unidentified individuals at Southeastern Paper Group).

18 The Evergreen/Genpak bid was identical in price to Pactiv's bid. DSOF ¶ 32; Defs.' Ex. G at 235 (Coury Dep.). The Gwinnett Schools, however, refused to accede to Evergreen's demands that it require all trays purchased contain recycled content, and that it rebate any savings on waste haulage to Evergreen. DSOF ¶ 33; Pl.'s Ex. 906 at 445 (Coury Dep.). Ultimately, apart from BPS, none of the schools that Evergreen approached was willing to require that purchased trays contain recycled content. DSOF ¶ 34 (citing refusals by the Atlanta Public Schools, Cobb County Public Schools, DeKalb County Public Schools, New York Public Schools and Orange County Public Schools). Similarly, Evergreen was unable to extract an environmental fee (one of its three essential revenue streams) from any school. *Id.*; Defs.' Ex. 39 (Aug. 1, 2009 e-mail from Scarito to Forrest).

The Plastics Group

The Plastics Group had been established by the ACC to act as the industry's spokesperson in countering negative publicity about the environmental impact of polystyrene. DSOF ¶¶ 347-348; Defs.' Ex. M at 15-19 (Levy Dep.). It described itself as being "dedicated to educating the public about the importance and benefits of plastic foodservice packaging." DSOF ¶ 348. Its day-to-day activities were overseen by Senior Director Michael Levy and focused on lobbying against efforts to ban polystyrene products. *Id.* ¶¶ 348-349. One of the talking points in these lobbying efforts was polystyrene's recycling potential. *Id.* ¶ 350. The Plastics Group stated a willingness to engage with recyclers in the effort to defeat the polystyrene prohibitionists, so long as any entity it enlisted for this purpose "was actually recycling." DSOF ¶ 369; Defs.' Ex. M at 95-96 (Levy Dep.).

In May of 2007, the Plastics Group formed a subgroup called the Recycling Task Force (Task Force). Forrest Aff. ¶ 38; DSOF ¶ 353. The Task Force was composed of four of the national converters, Pactiv, Solo, Dolco, and Genpak, with Dow Chemical Company as a fifth member.[19] See Pl.'s Ex. 1014 (July 10, 2007 [Plastics Group] Recycling Task Force Update). According to defendants, the Task Force was created because "political pressure to enact polystyrene bans was on the upswing in places

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19 Dart, for some reason, was not named to the Task Force.

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like California." Joint Defs.' Mem. at 17. The mission of the Task Force was "specifically to identify and report back to the [Plastics Group] on examples of viable polystyrene recyclers that could be helpful in the effort to defeat proposed bans." *Id.*

Shortly before the Task Force was created, Reilly suggested that Evergreen seek financial support from the members of the Plastics Group to open a recycling facility in California. Forrest Aff. ¶ 35. On March 28, 2007, Forrest made a presentation to the Plastics Group describing in detail Evergreen's business model. DSOF ¶ 371; Defs.' Ex. A at 1395 (Forrest Dep.). On May 21, 2007, Forrest submitted a formal proposal to the Plastics Group. Defs.' Ex. 212 (May 21, 2007 Evergreen proposal to Plastics Group). It laid out two options, both of which depended on a financial subsidy. The first – and leanest – alternative required a $500,000 payment upfront to Evergreen by the Plastics Group and a promise that its members would pay "green commissions [to Evergreen] from environmentally friendly products [produced] by the member converters." *Id.* at 4. The second option required Plastic Group members to "provide the upfront capital to set up the recycling facilities" (in exchange for dropping the royalty payments provision). *Id.* This latter option contemplated a down payment of $500,000, and over time, the infusion of $2.6 million in additional funds into the California facility. Id. at

5. Forrest revised the proposal on May 30, 2007, to include a third option that called for a $500,000 initial subsidy and a commitment that each converter purchase a set amount of resin from Evergreen over the life of the plant. DSOF ¶¶ 384-385; Defs.' Ex. 214 (May 30, 2007 e-mail from Levy to Plastics Group senior executives).

On May 31, 2007, the Plastics Group met in a conference call to discuss Forrest's various proposals. Levy opined that Forrest's request that the Plastics Group subsidize his business model rendered the proposals "non-starters." DSOF ¶ 386; Defs.' Ex. 200 at ¶ 29 (Levy Decl.). The members of the Group concurred. Levy conveyed the Plastic Group's negative reaction to Forrest, who responded with another proposal that proved as heavily dependent on subsidies as the earlier ones. DSOF ¶¶ 387-388; Defs.' Ex. 215 (June 15, 2007 e-mail from Forrest to Levy). On June 20, 2007, the Task Force held a conference call to discuss Forrest's latest proposal. DSOF ¶ 389. The members proved no more amenable, prompting Levy to inform Forrest that the Plastics Group was unwilling to go forward with any one of his alternative proposals. DSOF ¶ 390; Defs.' Ex. 217 (June 20, 2007 letter from Levy to Forrest).

Packaging Development Resources

Around this time, Evergreen became aware of a potential competitor, Packaging Development Resources (PDR). Tom Preston and Tom

Cantwell, the founders of PDR, had, in 2005, approached Forrest offering to assist Evergreen's efforts to expand its fledgling recycling business to other city school systems. The discussions ended without any agreement. Forrest Aff. ¶ 18; DSOF ¶ 26. Preston and Cantwell believed that Evergreen's business model would not work outside of Boston and Providence because, in most localities, schools "were constrained by law to select the cheapest product for each type of product they purchased," and could not pay Evergreen a premium for recycled content. DSOF ¶ 26. Nor were they permitted to offset the price for products containing recycled resin with projected savings on waste haulage. *Id.* Preston and Cantwell proposed as an alternative that Evergreen simply sell its recycled content resin directly to converters for general use (which would have eliminated the revenue stream that Evergreen hoped to derive from royalties paid on finished "green" products). Although Forrest rejected this pared-down strategy, it became the business model for PDR. DSOF ¶ 26 and 65.

PDR was incorporated in California in 2006. DSOF ¶ 57. Preston and Cantwell compared PDR's business model to that of the national resin producers, stating that, like them, PDR did not tax its customers with "any type of license fee or royalty, or payback of a certain amount of sales." DSOF ¶ 65; Defs.' Ex. E at 195 (Preston Dep.); Defs.' Ex. L at 173-174 (Cantwell Dep.). PDR in short order won contracts in California with the San Diego, Long Beach, Burbank, Torrance, Chula Vista, Orange, and San Ysidro school systems

to collect and recycle their polystyrene waste during the 2006-2007 school year. DSOF ¶ 69.

On May 21, 2007, an industry publication, Plastics News, published an article praising PDR for its successes in diverting polystyrene school lunch trays from landfills by recycling their resin content. Forrest Aff. ¶ 43; Defs.' Ex. 219 (May 21, 2007, Plastics News, "PDR Finds Uses for Difficult to Recycle PS"); see also DSOF ¶¶ 400-406. Forrest stated that he was "shocked" by the article because he was unaware of any prior industry recognition of PDR, and that prior to the article, Evergreen had been acknowledged as operating the only going facility producing food-grade recycled resin. Forrest Aff. ¶ 44.

Forrest decided to conduct his own investigation of PDR. He paid a visit to the site of PDR's facility in Santa Ana, California, where he claims to have spoken with truck drivers delivering trays collected from the San Diego schools. *Id.* ¶ 45.[20] The drivers told him that the trays were not being recycled by PDR, but were instead being dumped into landfills. *Id.* Forrest relayed his findings to Levy, who made a site visit of his own on June 18, 2007. *Id.* ¶ 46. Levy found the PDR facility locked with no one present. Defs.' Ex. 221 (June 18, 2007 memo to file from Levy). Levy reported the results of his visit to the Task Force. *Id.* Despite his and Levy's "findings," Forrest alleges that the Plastics Group continued to promote PDR at Evergreen's expense and assisted PDR in landing accounts with

additional school districts in California, Philadelphia, and New York City. Forrest Aff. ¶ 48.

Activities post the May 31, 2007 Plastics Group meeting

Later that same year, in August of 2007, Dolco and Genpak entered into a funding agreement with Evergreen under which each advanced Evergreen $75,000 and committed to sustained purchases of recycled resin from Evergreen's Georgia facility. DSOF ¶¶ 29 and 120; Defs.' Ex. 43 (July 27, 2007 Dolco-Genpak-[Evergreen] funding agreement). Between 2006 and 2008, Dolco purchased 250,000 pounds of Evergreen's resin. Forrest Aff. ¶ 28. Similarly, between 2007 and 2008, Genpak purchased 300,000 pounds. *Id.* ¶ 36. During this same period, Pactiv tested a sample of Evergreen's resin and began negotiating a contract, but could not

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20 None of the drivers are listed by name, nor are dates given when the alleged interviews took place, or whether anyone else was present.

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come to terms with Evergreen's demand for a royalty or licensing fee on all sales of Pactiv's finished "green" products using Evergreen's resin.[21] DSOF ¶¶ 137-149.

Between May and November of 2008, Forrest entered into negotiations with Solo. Evergreen provided 20,000 pounds of recycled resin to Solo for testing. Forrest Aff. ¶ 51. Forrest alleges that Solo's

president later informed him that Solo had been told by an unnamed person, presumably someone from the Plastics Group, not to do business with Evergreen. *Id.*[22]

PDR was also actively soliciting business from Plastics Group members during this same time period. Dart entered into a letter of intent

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21 Demonstrating the value that Forrest placed on the royalty component of Evergreen's business model, he estimates that every $10 million in "green" sales would have resulted in $400,000 in royalty payments to Evergreen. Forrest Aff. ¶ 29. Pactiv, for its part, had told Forrest that, "[g]iven [the] narrow margins on this product [school lunch trays]," it would be "unable to absorb any additional costs," which "would have to be passed on to the school district." Defs.' Ex. 835 (May 28, 2008, e-mail from Terry Coyne of Pactiv to Forrest). Because of the narrow margins on lunch trays, neither Solo nor Dart manufactured them. DSOF ¶¶ 247 and 297.

22 Like Pactiv, Solo contends that it was unable to come to terms with Evergreen because it found Evergreen's proposed pricing "confusing," and that based on the price of Evergreen's resin alone, before any royalty or commission was paid, Solo would face a 5% increase in its production costs. DSOF ¶¶ 265, 270-274, 277 and 289.

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with PDR in December of 2007 to purchase PDR's recycled resin. DSOF ¶ 75. Dart, however, rescinded the contract with PDR in June of 2008, after determining that PDR's resin did not meet its quality standards. *Id.* ¶ 76. In August of 2008, PDR entered into "a loan and materials purchase agreement with Pactiv," under which Pactiv extended PDR a loan

of $415,000, in exchange for a right of first refusal to purchase PDR's resin. *Id.* ¶¶ 78-79 and 135. PDR underwent a "stewardship" program with Pactiv to bring its resin into compliance with Pactiv's quality standards. *Id.* ¶ 80. PDR sold "tens of thousands of pounds of resin to Pactiv," and by October of 2008, PDR was producing 15,000 pounds of recycled resin a month. *Id.* ¶ 81. Pactiv was able to produce products containing high percentages of PDR resin, some with a recycled content approaching 100%. *Id.* ¶ 82. Solo also purchased 1,000 pounds of PDR resin for quality testing, but by the time the testing was complete, PDR was no longer in business. *Id.* ¶¶ 256-258.

Despite the dealings with PDR, the Plastics Group continued to promote Evergreen as a recycler, inviting it to make a presentation at a Group executive session on March 19, 2008. *Id.* ¶¶ 421-424. In April of 2008, it recommended Evergreen to Dolco as a recycling partner in New York.[23] *Id.* ¶ 425. In October of 2008, Levy sent Evergreen a letter of recommendation at Forrest's request "recognizing the success of [Evergreen's] closed-loop recycling system for polystyrene in New England and the Atlantic Coast Region." DSOF ¶ 432; Defs.' Ex. 232 (Oct. 7, 2008 letter from Levy to Forrest).

Failure of Evergreen and PDR

In 2008, Evergreen and Genpak lost the Gwinnett Schools lunch tray account to Pactiv. Evergreen blames Genpak for submitting a bid above

market (while Pactiv's bid was below market). Opp'n at 29; DSOF ¶ 129. As a result, Evergreen was forced to close the Norcross facility in May of 2008. DSOF ¶ 53. Although it opened a smaller facility in Lawrenceville, Georgia, by November of 2008 this facility was also no longer economically viable. *Id.* Despite Evergreen's loss of any actual production capacity, in February of 2009, Genpak's President Reilly wrote to Evergreen with the assurance that: "At Genpak we understand [Evergreen's] need to make ["Green Products"] a revenue stream and are willing to pay this additional fee." Forrest Aff. ¶ 32. The following month, Pactiv presented Evergreen with a letter of intent to purchase a minimum of 300,000 pounds of its recycled resin yearly, although

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23 At least one member (Dart), recommended Evergreen to a client, Publix, when the grocery chain was seeking a polystyrene recycler. DSOF ¶ 332.

Evergreen never signed the letter. DSOF ¶ 142; Defs.' Ex. 840 (March 28, 2008 letter from Terry Coyne of Pactiv to Forrest).

PDR was also forced out of business in the first quarter of 2009 as virgin resin prices continued to plummet (to $0.50 per pound as of October 2008)[24] while the production costs of PDR's recycled resin were many multiples higher ($8.10 per pound as of October 2008), a price well above what any converter was willing to pay. DSOF ¶¶ 85-88.[25]

Procedural Background

Evergreen filed suit in the federal district court on May 9, 2011, alleging violations of the antitrust laws. On June 7, 2013, this court granted defendants' motions to dismiss, after determining that the factual allegations contained in the Complaint did not "possess enough heft" to amount to "a plausible entitlement to relief" under the holding of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). *Evergreen*, 865 F. Supp. 2d at 138.

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24 The world price of oil dropped precipitously in the second half of 2008. DSOF ¶ 84.

25 It will be recalled that Evergreen was never able to produce recycled resin at a cost of less than $2 per pound. *See* n.10, *supra*.

In reversing this court's dismissal, the First Circuit did not suggest a misapplication of the antitrust law. Rather, the First Circuit faulted the court's decision for importing summary judgment standards into the pleading stage. In sum, the First Circuit found that the facts alleged in the Complaint, viewed holistically in Evergreen's favor, made out a potential claim of an antitrust violation.

More specifically, the First Circuit identified the following facts, that when "taken together" provided "a sufficient basis to plausibly contextualize the agreement necessary for pleading a

§ 1 [Sherman Act] claim." Evergreen, 720 F.3d at 47. The First Circuit focused on the allegation that a meeting of the Plastics Group, said to have taken place in 2005 or 2006, established the "locus of agreement" among its members. *Id.* Moreover, the participation of all of the named defendants in the Plastics Group allegedly served to facilitate anticompetitive scheming. *Id.* at 47 and 49. The First Circuit also dwelt on allegations that two of the major polystyrene producers — Pactiv and Dart — made no secret of their antipathy to recycling, and together paid the bulk of the dues collected by the Plastics Group. This dues dominance, the First Circuit speculated, might have enabled Pactiv and Dart to exert undue pressure on the weaker members of the Group. *Id.* at 47. The First Circuit found further support

for this inference in the defendants' alleged "parallel conduct" following the "locus of agreement" meeting, which culminated in a "global failure" to embrace Evergreen's business model. According to the First Circuit's reading of the Complaint: "Dolco abruptly withdrew its interest in producing for Evergreen's closed-loop system after the meeting," while Genpak, Pactiv, and Solo refused to work with Evergreen despite being asked by their distributors to do so; Pactiv induced Sodexo to cancel its contract with Evergreen; Pactiv, Dart, and ACC instructed their customers that recycling was not feasible; and the Plastics Group and its members connived to deny Evergreen funds for expansion into California. *Id.* at

47-48. The First Circuit found particularly persuasive Evergreen's allegation that the Plastics Group had promoted a "sham" competitor, that is, PDR, at Evergreen's expense. *Id.* at 48. Finally, the First Circuit pointed to allegations that the defendants were undermining their own economic self- interest by refusing to embrace Evergreen's business model. *Id.* at 50.

The First Circuit faulted this court's opinion for drawing impermissible inferences in the defendants' favor. In particular, it held that the district court "either credited as true or inferred the truth of defendants' bases for rejecting dealings with Evergreen," including the assertions: "that while several of the producer defendants tested or purchased Evergreen's resin, they 'found the results disappointing for various and often different reasons'"; "that partnering with Evergreen would have 'significantly increased [defendants'] costs'"; "that Evergreen's [recycled resin] was, in fact, more expensive than virgin resin"; "that Evergreen's business plan stood to raise costs for the producer defendants and their consumers"; "that [Evergreen's plan] required the producer defendants to expand beyond their established market niches and disrupt a profitable status quo"; and finally, "that it would have undermined the producer defendants' existing and even more profitable environmentally conscious products." *Id.* at 42 and 50 (internal citations removed). As the discussion below will demonstrate,

all of the district court's inferences were borne out during discovery.

DISCUSSION

Summary judgment "acts 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.'" *Rodriguez-Pinto v. Tirado-Delgado*, 982 F.2d 34, 38 (1st Cir. 1993) (internal citation removed). It is appropriate when "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." Fed. R. Civ. P. 56(a). "In this context, 'genuine' means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Rodriguez- Pinto*, 982 F.2d at 38 (internal quotation marks and citation removed). "To succeed, the moving party must show that there is an absence of evidence to support the nonmoving party's position." *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir. 1990). If this is accomplished, the burden then "shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation and from which a reasonable jury could find for the [nonmoving party]." Id. The nonmoving party "must adduce specific, provable facts demonstrating that there is a triable issue." *Id.* (internal quotation marks and citation omitted); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly

supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (emphases in original).

As a general rule, on summary judgment "'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1985), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). But the rule is different in an antitrust context. "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 [Sherman Act] case." *Id.* at 588. In particular, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy . . . To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*, citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (internal citations removed).

Combination or Conspiracy

The challenge now faced by Evergreen is to demonstrate a factual basis for its assertion that there was a "combination . . . or conspiracy, in restraint of trade or commerce" that involved the producer defendants. 15 U.S.C. § 1. In order to do so, "the

antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto*, 465 U.S. at 764 (citations removed); *cf. Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (the plaintiff must present evidence that proves "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.").

It is on this crucial first element that Evergreen falters. In its attempt summon the specter of a conspiracy, Evergreen surmises: (1) that three of the defendants refused over time to deal with it out of fear of retribution by the fourth (Pactiv); (2) that the defendants took a unified position, instigated by Pactiv and Dart, against recycling in general and Evergreen's approach to recycling polystyrene waste in particular; and (3) that defendants promoted PDR as a competitor to Evergreen when they knew full well that PDR's business plan could not compete with Evergreen's superior business model. Opp'n at 3.

Refusals to deal with Evergreen

Evergreen suggests that the conspiracy sprung to life from the moment it sought to enter the national polystyrene market, that is, in 2005.[26] In attempting to marshal support for this theory, Evergreen cites

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26 Defendants argue that a number of Evergreen's allegations fail on statute of limitations grounds. The Sherman Act has a four-year statute of limitations. 15 U.S.C. § 15b. This limitation period begins to run "when a defendant commits an act that injures a plaintiff's business," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), although "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (internal quotation marks and citation removed). This becomes relevant only if a combination or conspiracy in fact formed in 2005. Because I find that there was no illegal combination, here is no need to determine whether later alleged overt acts may have retriggered the limitations period.

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the history of its failed business negotiations between 2005 and 2007. These, according to Evergreen, demonstrate a unity of opposition to recycling among Plastics Group members.[27] None of this survives scrutiny.

Evergreen first contends that its attempt to enter a joint venture with Dolco and Sysco in 2005 collapsed under pressure exerted by Pactiv. Evergreen argues that from the outset, Pactiv opposed recycling as a threat to the converters' economic interests.[28] In its Complaint, Evergreen alleges that a meeting took place "in or around late 2005 or early 2006," and that at the meeting, "John McGrath of Pactiv announced to the members of [the Plastics Group] that recycling polystyrene products was not an option in the industry's battle with polystyrene's critics. A

representative from Dart agreed." Sec. Am. Compl. ¶ 39. Unable to produce any evidence that such a

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27 Evergreen focuses on the failure of its prospective business partners to agree to pay it a royalty or commission for the use of its recycled resin (the third essential revenue stream contemplated by its business model). As will become apparent, several of the defendants were willing to consider partnering with Evergreen, but not on the terms Evergreen demanded.

28 For example, Forrest alleges in his affidavit that Sodexo told him that Pactiv and Dart refused its invitation to produce a green product line with Evergreen's resin in 2005. Forrest Aff. ¶ 17. There is no supporting evidence other than Forrest's say-so.

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meeting in fact occurred "in or around late 2005 or early 2006," Evergreen now dates the opening manifesto of the anti-recycling campaign to a March 18, 2005 conference call that included the defendants. See DSOF ¶¶ 359-361 (only two Plastics Group meetings took place in the period between late 2005 and the early spring of 2006; McGrath was not present at either; and the minutes do not reflect any discussion of recycling at either meeting). The only evidence pertaining to this March 18, 2005 conference call is an unattributed draft of notes entitled "CA Strategy Call – PS Foodservice Bans." Pl.'s Ex. 1025.[29] According to the notes, the call was joined by

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29 Defendants argue that the notes should be stricken because they are explicitly labeled as a draft and contain multiple levels of hearsay. Def. Mem. Mot. to Strike at 6 and 12. Only one witness was asked about these notes at deposition, namely an executive of Dow Chemical (not a defendant) whose name appears on the notes as an attendee. He testified that he could

not recall either having participated in the conference call or having ever seen the notes themselves. DSOF ¶ 115. Defendants cite to Livingstone Flomeh-Mawutor v. Banknorth, N.A., 350 F. Supp. 2d 314 (D. Mass. 2014), where the court refused to consider a draft copy of a letter on summary judgment because it was "not on letterhead, [was] unsigned and was not authenticated." Id. at 320. Evergreen in response argues that the minutes are "a party opponents' [sic] business record, produced by the ACC, containing its admissions regarding the core matters at issue and is not hearsay." Opp'n to Mot. to Strike, at 8 (citing Fed. R. Evid. 801(d)(2)). To establish the notes as the admission of an opposing party, Evergreen at a minimum would be required to authenticate them, which it has failed to do. See Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir. 2000) ("The law is well- established that '[d]ocuments supporting or opposing summary judgment must be properly authenticated.'") (citation omitted). In sum, the notes deserve little or no weight in the conspiracy calculus.

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representatives of Pactiv, Dart, and Dolco, as well as a lawyer from ACC. *Id.* at 1. Evergreen relies on the notes to support not only the proposition that the defendants shared an antipathy to recycling, but that they also resolved among themselves to choke off any tentative movement by the polystyrene industry in a "green" direction, with Dart and Pactiv acting as enforcers should any of the smaller defendants dare to break ranks.

The notes do not bear the load that Evergreen assigns them. Although the notes record comments that can be taken as critical of the costs of recycling,[30] there is nothing in the notes that lends itself to a plausible inference that the anonymous note taker witnessed the formation of a conspiracy

targeting Evergreen. At most, the notes reflect a reluctance, as one speaker phrased it, "to pick up [the] tab to subsidize [a] costly limited [polystyrene] foodservice recycling program."[31] *Id.* at 1.

It was shortly after this conference call, in the fall of 2005, that Forrest approached Patterson of Dolco about working with Sysco to develop

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30 Jim Lammers of Dart reportedly asked, "[D]o we get a sense from our opponents that we can 'win out' without having to offer [polystyrene] foodservice recycling as an answer[?]." Pl.'s Ex. 1025 at 1.

31 It is true that one speaker suggested that support of a litter reduction campaign might defuse some of the public hostility towards polystyrene products, although it is something of a stretch to detect the stirrings of a conspiracy in this rather common-sense recommendation.

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a "green" product line. Forrest alleges that the prospective deal fell through because "it became clear that Patterson would not do a 'green' foam deal with Sysco, although Patterson was eager to purchase recycled resin made by [Evergreen]."[32] Forrest Aff. ¶ 26. Dolco counters that Sysco had its own

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32 Evergreen attempts to explain the collapse of the deal by pointing to statements made by Patterson immediately after the meeting between Evergreen, Patterson, and Sysco in November of 2005. Forrest Aff. ¶ 24 (Patterson "said words to the effect 'f****g McGrath [referring to the head of Dolco] stood up in front of these – the [Plastics Group] meeting . . . and he said that – that they're not going to recycle and that Dart got up right behind him and said 'We're not going to recycle either.' Patterson then

said 'I am not going to compete with Pactiv. You understand that?'"). Defendants argue that this paragraph of Forrest's affidavit should be stricken because it involves multiple levels of hearsay and is contradicted by Forrest's prior testimony. Defs.' Mem. Mot. to Strike, at 4-8. Evergreen responds with the same argument it made with respect to the unauthenticated notes, that Patterson's statements are an admission by a party opponent and are offered not to prove that there was a meeting at which the statements were made, but rather to prove "Patterson's state of mind at the time about the unified action and fear of retribution." Opp'n to Mot. to Strike, at 12. Patterson denies having ever heard such a statement. DSOF ¶ 112. That denial aside, Evergreen's explanation makes little evidentiary sense. In the first place, Patterson is not an employee with a senior enough position in Dolco's corporate hierarchy to bind his employer. Second, Evergreen's assertion that it is not relying on the statements for their truth is either nonsensical or disingenuous. If Evergreen is not attempting to use the statements to prove that a concerted decision was taken by the leaders of Dolco and Dart to oppose recycling, and that the alleged decision explains Patterson's reluctance to go forward with the Sysco deal, then there is no reason for them to be offered at all. Moreover, Patterson's state of mind is irrelevant to the question of whether the alleged combination or conspiracy actually existed. That aside, a statement by some unidentified person at Dolco that the company did not want to recycle or compete in Pactiv's sector of the market does not prove a conspiracy. The antitrust laws do not require a company to compete with other actors in its market. A company is perfectly free under the antitrust laws to concentrate on its own chosen niche, leaving the broader market for others to exploit.

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reasons for backing away from "green activities," and Evergreen has produced no evidence to the contrary. DSOF ¶ 213. (It will be recalled that less than a month after Patterson's statements were allegedly

made Dolco put an offer on the table that acceded to every term that Evergreen had demanded).

Evergreen next points to its successful deal with Genpak in 2007 and its communications with Genpak's president, Jim Reilly, as proof of concerted opposition to recycling on the part of the producer defendants. Evergreen alleges that Genpak's attempt in March of that year to withdraw its bid on the lunch tray account with the Gwinnett Schools was the result of pressure from Pactiv.[33] If so, the gambit failed. Genpak's bid was not withdrawn and Genpak and Evergreen won the account over the other

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33 In support of its assertion that Genpak attempted to pull the bid, Evergreen points to an April 16, 2007 anonymous e-mail that states: "Michael has communicated that Jim Reilly retracted this price. Due to pressures from Kevin Kelly. We need discuss." Pl.'s Ex. 1035 (April 16, 2007 e-mail chain between Forrest and unidentified individuals at Southeastern Paper Group). The sender and recipient of the e-mail are, however, unidentified. Moreover, as apparent from the reference to "Michael," Forrest himself was the source of the allegation that Genpak had attempted to retract its bid. The email, in other words, proves little, if anything with respect to the existence of a conspiracy.

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bidders, including Pactiv.[34] It was within this same time frame that Reilly urged Evergreen to submit a proposal to obtain funding from the Plastics Group. Evergreen's argument, as I understand it, is that Reilly's invitation to Forrest to seek funding from the Plastics Group reveals a subliminal unwillingness on his part to enter into a deal with Evergreen without the blessing of the Plastics Group.[35] This gloss

crosses the border that demarcates the realm of permissible inference from the world of rank speculation.

Requiring unified action

Having failed to provide factual support for its allegation that Dolco and Genpak refused to deal with it (or dealt with it reluctantly) because of fear of retribution from Pactiv, Evergreen fares no better in attempting to

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34 Evergreen adds that yet another unidentified person at Pactiv made a "nasty" phone call to an official at the Gwinnett Schools saying that he would do "whatever is necessary to get that bid back." Pl.'s Ex. 911 at 61 (Laskowski Dep.). It is clear from the deposition testimony cited by Evergreen, however, that this conversation occurred in 2008 when Gwinnett Schools was soliciting bids on a new contract. Id. at 60. The court sees no connection between this later anonymous conversation and the 2007 Genpak deal.

35 Reilly, by contrast, testified that he made the suggestion because he felt Genpak could not provide the depth of financial support that Evergreen required to remain economically viable. Defs.' Ex. K at 171-173 (Reilly Dep.).

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prove that the defendants undertook at a Plastics Group or Task Force meeting to organize opposition to Evergreen's recycling efforts.

Evergreen argues that both the decision to create the Task Force and the discussion of Evergreen's proposals at the May 31, 2007 meeting

were part of a process to "determine which of the two food grade recyclers, [Evergreen] or PDR, the group would support as 'viable' or 'not viable'/'pick winners and losers.'"[36] Opp'n at 3. According to Evergreen, the meeting amounted to an effort by defendants "as a unified group, . . . to control the way and manner that Recyclers such as [Evergreen] could do business." Opp'n at 24. In other words, Evergreen, having failed to identify a meeting in 2005 or 2006 giving birth to a conspiracy, now proffers the May 31, 2007 meeting as an alternative cradle for the plot.[37]

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36 Defendants note that, even assuming that this meeting of the Plastics Group culminated in a determination that Evergreen was not an attractive option for its members, as a matter of law, trade associations are free to "evaluate competitors and make non-binding recommendations to their members," without violating the antitrust laws. Defs.' Joint Reply at 8. *See Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988); *Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 937 F. Supp. 435 (E.D. Pa. 1996), *aff'd*, 107 F.3d 1026 (3d Cir. 1997).

37 There is some confusion in the briefing between the Plastics Group and the Task Force. Compare Opp'n at 24 with Opp'n at 25. According to McGrath, the Task Force was created on May 31, 2007, during the conference call that considered Evergreen's proposals. Pl.'s Ex. 905 at 71-73 (McGrath Dep.). The Plastics Group had a broader membership than just polystyrene converters. Id. at 79. It was the Plastics Group that both considered Evergreen's proposals and formed the Task Force. Id. at 80. Evergreen's brief states that the Plastics Group, and not the Task Force, promoted PDR as a competitor. See, e.g., Opp'n at 25. This being said, Evergreen's Complaint limits the membership in the alleged conspiracy to the producer defendants

that made up the Task Force (Pactiv, Solo, and Dolco), plus one defendant that was not part of this smaller group (Dart) while excluding the fifth member of the Task Force (Dow Chemical).

Evergreen does not, however, offer any plausible evidence that defendants, through the Task Force or the larger Plastics Group, were attempting to suppress Evergreen. While Evergreen asserts that McGrath (the president of Pactiv) all but admitted in his deposition to the conspiratorial nature of the May 31, 2007 meeting, the most that McGrath said on the subject was that "the task force formed so we could identify potential solutions to propose to the State of California to help them understand that polystyrene could be recycled." Pl.'s Ex. 905 at 66 (McGrath Dep.).[38] He later added that the goal was to identify "recycling opportunities that were available to develop . . . [i]n the near term." Id. at 77-78. In this context, Evergreen's proposal that it establish a recycling facility in California (with the Plastic Group's money and purchasing

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38 The evidence cited by Evergreen confirms that the Plastic Group's deliberations were focused on a strategy for dealing with the threat of a polystyrene ban in California. Pl.'s Ex. 1013 (June 6, 2007 Levy memo) (Task Force was formed "to help develop RFPs (requests for proposals) for qualified bidders for a California [polystyrene] foodservice program").

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commitments) was thought not to be viable, at least in the short-term.[39]

Similarly, in arguing that the Plastics Group met "to pick winners and losers," Evergreen cites deposition testimony of Tony Kingsbury of Dow Chemical, but the full context makes clear that Kingsbury was saying quite the opposite of the spin that Evergreen gives:

Q. Did you give everybody a fair shot – A. Absolutely.
Q. – for their proposals –
A. Absolutely.
Q. – and their submissions?
A. Absolutely. We wanted to pick a winner. Everybody wants to pick the winning horse.
Q. When you did make a decision and discussed different avenues to support or assist when you were on the [Plastics Group], was there any discussion that individual manufacturers couldn't support Option A or Option B on their own?
A. That would have been an inappropriate discussion. I mean, you know, free enterprise says anybody can do whatever they want.

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39 "The members were then looking at being asked to fund a process that was really not commercial in its existing form and certainly not in the State of California, was being asked to evaluate that and commit – if I recall, the number was something like 3.1 million, with an M, million dollars – to put this thing in and to hope that (a) it would come on line quickly, (b) it would work, (c) that would be the necessary resistance, if you will, where the rest of the State of California would say, okay, now there's this recycling plant here and that's going to solve all of the recycling woes in the State of California, so the judgment of the members was that that's not a viable option." Pl.'s Ex.

905 at 74 (McGrath Dep.). McGrath later clarified that Evergreen's proposal was "[n]ot a viable solution for the State of California at the time [because] we were trying to reduce and discourage municipalities from banning polystyrene foam." Id. at 81.

Pl.'s Ex. 907 at 120 (Kingsbury Dep.).[40] In sum, the evidence does not even faintly support the allegation that the May 31, 2007 conference call served as the launching pad for a conspiracy to drive Evergreen out of the polystyrene recycling business.

Group Promotion of Competitor PDR

Evergreen argues that the conspiracy hatched during the May 31, 2007 conference call took further tangible form in efforts by the Plastics Group to actively promote PDR at Evergreen's expense. No evidence, however, is offered to back up this assertion.[41] Evergreen argues that attempts were made by the Plastics Group to help PDR secure accounts in Los Angeles, New York City, and Philadelphia, as well as with the Disney interests, although the only supporting document that Evergreen offers is a memorandum reflecting a conversation in which Tom Preston at PDR conveyed to the Plastic Group's Mike Levy a self-promotional account of PDR's successes in courting these potential clients. Pl.'s Ex. 1039 (Sept. 16,

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40 Kingsbury later confirmed that the Plastics Group "was happy to identify more than one winner who could be pointed to as a

viable recycler in efforts to lobby against municipal bans." Def. Ex. C at 123-24 (Kingsbury Dep.).

41 Evergreen does not identify the defendants or persons who participated in the alleged campaign to promote PDR. Defendants maintain, and Evergreen does not deny, that neither Dolco nor Solo had any involvement with PDR. DSOF ¶¶ 244 and 259.

2008 Levy memo to file).[42] The record, by contrast, portrays an effort by the Plastics Group to promote both Evergreen and PDR to the extent that it believed the interests of its members were thereby served.[43] It is telling, and Evergreen offers no evidence to the contrary, that PDR never received so much as a dollar in financial assistance from the Plastics Group. DSOF ¶ 61.

In an attempt at rebuttal, Evergreen argues that the Plastic Group's vocal support of PDR was innately suspicious. In this regard, Evergreen cites Forrest's opinion, based on his "investigation" of PDR's recycling

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42 Evergreen points to PDR's limited success in New York as an example of a tangible benefit that PDR received from the backing of the Plastics Group. The agreement between PDR and the New York City public schools ultimately consisted of little more than a pilot project to establish the feasibility of PDR's proposed recycling program. DSOF ¶ 70. Moreover, the critical fact is that Evergreen was never in the competition for the New York contract because its business model was a nonstarter in New York (or California) for the simple reason that public schools in these states "were not permitted to tie together their

potential [Evergreen]- related savings on trash hauling contracts to justify paying more for [Evergreen] school lunch tray purchases, or to specify that they would only purchase recycled trays." *Id.* ¶ 26.

43 Both Evergreen and PDR were invited to make presentations to the Plastics Group, both were identified by the Group as recyclers that "members should seek out to explore possible business opportunities," and both were the subjects of complimentary articles in Plastics News. DSOF ¶¶ 362, 370-71, 392-393, 400-04, 411, 421-23.

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facility in California, that PDR was not a functioning entity.[44] Forrest Aff. ¶45. Evergreen also points to Levy's site visit on June 18, 2007, and his subsequent report to the Task Force, as further evidence that the Plastics Group knew (or should have known) that PDR was not a viable alternative to Evergreen.[45] Id. This proves too much and too little. At most it suggests that Levy had reason to suspect that PDR was not up and running by the day of his site visit. At the least, it suggests that any concerns that Levy had were eventually allayed, as he continued to promote both Evergreen and PDR as players in the California recycling campaign. Evergreen next cites the deposition of Joseph Doyle, Vice President and

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44 Evergreen also cites for support two e-mails sent from Michael Forrest to Michael Levy and Larry [LNU] warning of "red flags" associated with PDR. Pl.'s Ex. 1037 (May 3, 2007 e-mail from Forrest to Larry [LNU] and June 3, 2007 e-mail from Forrest to Levy). This self-referential "evidence" is puzzling as it consists of nothing more than Forrest's opinion that PDR was not everything it was cracked up to be – hardly a surprising assessment by one competitor of another. Evergreen's own

exhibits include an e-mail from Levy assessing PDR in April 2007 as being "beyond the 'pilot' stage." Although this e-mail indicates that PDR was still establishing itself as a business, nothing in it suggests that Levy believed it to be a "sham," as Evergreen asserts. Pl.'s Ex. 1006 (April 2007 e-mail chain between Mike Levy and Jane Adams).

45 Levy's initial assessment was the cautionary warning that if "[the PDR] facility is not recycling [polystyrene] and is landfilling the trays, [the Plastics Group] will need to prepare for negative media . . . and work to minimize any industry damage." Defs.' Ex. 221 (June 18, 2007 memo to file from Levy). There is no evidence offered by Evergreen that the landfilling accusation was ever verified by Levy or by any independent source.

General Counsel of Pactiv, who testified that he reviewed the financials compiled by PDR between the summer of 2007 and the summer of 2009, and did not find any records of resin sales. Pl.'s Ex. 913 at 54 (Doyle Dep.). Pactiv presented evidence, however, that it was actively involved in assisting PDR in improving its production standards, including loaning PDR $415,000, hardly what one would expect had Doyle determined PDR to be a "sham." DSOF ¶¶ 78, 80 and 135. Pactiv and PDR entered into a confidentiality agreement in March of 2007 and entered into a purchase agreement in 2008. Id. ¶¶ 78-79.[46]

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46 Beyond failing to prove that defendants thought PDR was a sham, Evergreen has failed to offer any convincing evidence that PDR was in fact a sham. PDR had 18 employees at its peak operation. DSOF ¶ 58. It had investors, including a bank loan of $850,000. *Id.* ¶ 60. It rented an 11,000 square foot facility and owned the equipment needed to recycle polystyrene.

Id. ¶ 68. PDR was producing 15,000 pounds per month by October of 2008, and it was of such a high quality that items containing 100% recycled resin could be made from it. *Id.* ¶¶ 81-82. In 2008, Evergreen by contrast had the equipment to produce no more than 115 to150 pounds of resin an hour, for a yearly production capacity of under 300,000 pounds. *Id.* ¶ 36. Defendants contend that Evergreen's resin was repeatedly found inferior, including a high rate of impurities, id. ¶¶ 37 and 42-43; odor problems, *id.* ¶¶ 38 and 51; too much moisture, *id.* ¶ 39; high levels of bacterial contamination, id. ¶ 40; and melt flow ranges that often made it unusable. *Id.* ¶ 41. At the time Evergreen made its May 31, 2007 proposal to the Plastics Group, it "had not even secured a location for a recycling facility in California, much less obtained permits and licenses or begun construction." *Id.* ¶ 119. Evergreen also has no answer to defendants' contention that Evergreen itself suggested that its resin be blended at a mixture of no more than 10% recycled resin to 90% virgin resin. Defendants question whether this is a sufficiently high content to justify making a "green" environmental claim about the final product. *See, e.g., id.* ¶¶ 199 and 262.

Subsequent lack of unified action

While events occurring between 2005 and May 31, 2007, fail to sustain even the faintest suggestion of a conspiracy, what followed is fatal to Evergreen's claims.[47] In August of 2007, Dolco and Genpak entered into a funding agreement to provide financing for and to purchase resin from Evergreen's Georgia facility. *Id.* ¶¶ 29 and 120. Both companies continued to buy resin from Evergreen through 2008. *Id.* Pactiv tested Evergreen's resin and discussed the terms of a long-term contract, though the negotiations never bore fruit because of Pactiv's refused to pay Evergreen a commission or royalties over and above

the price of the resin itself. *Id.* ¶¶ 137-149. Solo also tested Evergreen's resin and discussed business terms,

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47 The First Circuit found that at the motion to dismiss stage, this court "improperly weighted defendants' alleged inconsistent responses to Evergreen when it weighed the parties' respective accounts regarding the plausibility of a conspiracy. In fact, 'there is nothing implausible about coconspirators' starting out in a disagreement as to how to deal conspiratorially with their common problem.'" Evergreen, 720 F.3d at 51, quoting Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 191 (2d Cir. 2012). The factual record now demonstrates that these inconsistent responses amounted to more than the defendants starting out in disagreement. Rather, the defendants' inconsistent responses to Evergreen permeated the entire period of the alleged conspiracy demonstrates that the alleged coconspirators failed to ever reach an agreement, assuming such an attempt was made.

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but like Pactiv refused to pay the premiums that Evergreen demanded. Id. ¶¶ 262-291. All the while, the Plastics Group promoted Evergreen as a recycler, inviting it to make a presentation at a Group executive session on March 19, 2008, afterwards recommending Evergreen to Dolco as its choice of a recycler in New York, and providing a laudatory letter from Levy at Forrest's request "recognizing the success of [Evergreen's] closed-loop recycling system for polystyrene in New England and the Atlantic Coast Region." Id. ¶¶ 421-425 and 432; Def. Ex. 232 (Oct. 7, 2008 letter from Levy to Forrest). These facts belie any claim of a refusal to deal with Evergreen. The most that can be said is that defendants, in the long-term, were unable to swallow the demands of

Evergreen's business model. Nothing in the antitrust laws compels a business to act irrationally by agreeing to an unprofitable scheme that threatens its bottom line.

Permissible Parallel Conduct

While the facts fail to demonstrate "that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto*, 465 U.S. at 764 (citations removed), there is also considerable evidence supporting defendants' position that their responses to Evergreen are illustrative of lawful independent parallel action. *See White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011) ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") (internal quotation marks and citation removed).

The hard truth is that Evergreen's recycled resin was more expensive than its virgin counterpart (and became even more expensive as the price of oil began to drop in 2008). *See, e.g.*, DSOF ¶¶ 35, 85 and 277. Evergreen's own expert opined that Evergreen could not survive on the proceeds of recycled resin sales alone, and that in order for Evergreen's business model to succeed the marketplace would have to be willing to pay an "environmental fee," as well as a royalty on the sale of all of a converter's products containing Evergreen's resin. Scarito Rep. at 2-3.

Evergreen never succeeded in persuading a single customer (or potential customer) to pay the environmental fee. DSOF ¶ 34; Defs.' Ex. 39 (Aug. 1, 2009 e-mail from Scarito to Forrest). On the issue of royalties, while some defendants were willing to entertain the idea, they were either unable (in the earlier cases of Dolco and Genpak) or unwilling (in the later case of Pactiv and Solo)[48] to enter deals structured with all of the additional unprofitable components that Evergreen insisted upon.[49]

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48 Although Dart, at its own request, tested Evergreen resin, it was never approached by Evergreen with any proposed deal and thus never entered into a discussion of a contract. DSOF ¶¶ 333, 335 and 337.

Ultimately, discovery has demonstrated that Evergreen's business model failed because it could not thrive, or even survive, in a competitive capitalist economy. Antitrust law is simply not the appropriate vehicle for forcing environmental choices on a recalcitrant market, if indeed recycled polystyrene can be deemed an "environmental choice."[50]

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49 It is worth noting that other companies that are not alleged to have been part of any conspiracy also rejected deals with Evergreen because the terms of its business model made no economic sense. *See* DSOF ¶ 49 (Dow Chemical), ¶ 50 (Ineos-Nova, Darnel, Wincup), ¶ 51 (Cascades) and ¶ 52 (Wal-Mart).

50 Defendants further argue that Evergreen has also failed to prove that the alleged combination was "in restraint of trade or commerce . . ." 15 U.S.C. § 1. Antitrust claims ordinarily require

a multi-part showing: that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that these detriments outweighed any efficiencies or other economic benefits. This is the so-called "Rule of Reason" calculus. *See, e.g., E. Food Servs. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 5 (1st Cir. 2004); Fraser v. Major League Soccer, LLC, 284 F.3d 47, 59 (1st Cir. 2002). This calculus is bypassed if the collusive arrangement falls instead within one of several categories (e.g., naked horizontal price fixing) in which liability attaches without need for proof of power, intent or impact. *E. Food Servs.*, 357 F.3d at 4 & n.1. This is the so-called "per se" test. Evergreen alleges that it is a competitor with the four corporate defendants and attempts to shoehorn its claim into a "category of agreements sometimes labeled per se, namely, concerted refusals to deal or group boycotts." *E. Food Servs.*, 357 F.3d at 4; *see also Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465-467 (1941). The defendants argue that Evergreen was merely a supplier, not a competitor, and that this court's analysis must adhere to the "Rule of Reason" analysis. Because I find that there was no combination, there is no reason to decide the issue.

ORDER

For the foregoing reasons the defendants' Motions for Summary Judgment are ALLOWED. The clerk will enter judgment for all defendants and close the case.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 15-1839
EVERGREEN PARTNERING GROUP, INC.
Plaintiff - Appellant
MICHAEL FORREST
Plaintiff
v.
PACTIV CORPORATION; SOLO CUP COMPANY, a corporation; DOLCO PACKAGING, a Tekni-Plex Company, a corporation; DART CONTAINER, CORPORATION; AMERICAN CHEMISTRY COUNCIL, INCORPORATED, an association
Defendants - Appellees
GENPAK, LLC, a/k/a Genpack, LLC
Defendant

Before
Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron,
Circuit Judges.

ORDER OF COURT
Entered: October 18, 2016

Appellant Evergreen Partnering Group, Inc.'s motion for leave to file an oversized petition is allowed.
The petition for rehearing having been denied by the panel of judges who decided the case, and the

petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:
/s/ Margaret Carter, Clerk
cc:
George J. Skelly
Gregg A. Rubenstein
David Allan Martland
Kathleen Ceglarski Burns
Danielle M. McLaughlin
Eric B. Goldberg
Donald R. Pepperman
Jordan Lee Ludwig
Maxwell Michael Blecher
Shaun Khan
Richard Harold Wolfram
Jan Richard Schlichtmann
Keith L. Sachs
Orestes G. Brown
Richard A. Sawin Jr.
Richard E. Bennett
Sean M. Becker
John Martin Faust
William E. Lawler III
Yousri H. Omar
Ralph Mayrell
Steven M. Cowley
Kristy Shemille Morgan

Michael T. Maroney
Benjamin M. McGovern
Ralph T. Lepore
Scott A. Moore

United States Court of Appeals
For the First Circuit
No. 15-1839

EVERGREEN PARTNERING GROUP, INC.
Plaintiff - Appellant
MICHAEL FORREST
Plaintiff
v.
PACTIV CORPORATION; SOLO CUP COMPANY, a corporation; DOLCO PACKAGING, a Tekni-Plex Company, a corporation; DART CONTAINER CORPORATION; AMERICAN CHEMISTRY COUNCIL, INCORPORATED, an association
Defendants - Appellees
GENPAK, LLC, a/k/a Genpack, LLC
Defendant

On Appeal From a Judgment of the District Court
District of Massachusetts

APPELLANT'S PETITION FOR REHEARING

Respectfully submitted by:

/s/Richard Wolfram
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INTRODUCTION

Plaintiff-Appellant Evergreen Partnering Group alleges a concerted refusal to deal by the defendants in violation of Section 1 of the Sherman Act. In a decision issued on August 2, 2016, the Court of Appeals upheld summary judgment dismissal, concluding that "Evergreen failed to present evidence that tended to exclude the possibility that each polystyrene manufacturer independently chose not to partner with Evergreen as required by *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)." Evergreen respectfully submits this Petition for Rehearing by the Panel under Fed. R. App. P. Rule 40, with a suggestion for rehearing en banc under Fed. R. App. P. Rule 35, on the grounds that the Court overlooked and/or misapprehended (i) dispositive law, including the correct application of *Matsushita* on the proffered evidence, where defendants allege no plausible procompetitive benefits from their conduct, and (ii) significant evidence of conspiracy, both direct, requiring no inferences, and circumstantial, as to which the Court uniformly failed to draw reasonable inferences in favor of Evergreen. With respect to Fed. R. App. P. Rule 35, Evergreen submits that the Court's interpretation and application of *Matsushita* conflicts with Supreme Court law and requires consideration by the full Court in order to maintain legal uniformity. Evergreen requests that the Court reconsider its decision and reverse the summary judgment below.[1]

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[1] References herein are to Evergreen's appellate opening brief ("App. Br.") and reply brief ("Reply

I. THE COURT HAS MISAPPREHENDED AND MISAPPLIED THE RELEVANT LAW: MORE LIBERAL INFERENCES ARE REQUIRED UNDER *MASUSHITA* IN THE ABSENCE OF FACIALLY PROCOMPETITIVE BENEFITS.

The Court has imposed an excessively high burden on Evergreen to reverse the summary judgment decision, contrary to the law. Evergreen proffered substantial evidence showing a consistent course of conduct by the defendants, acting as a unit, in sync, developing a common strategy toward possible recycling of polystyrene food service (PSFS) products during the 2005-2009 time period. The defendants, facing bans on the use of their products made entirely of virgin resin, developed a short-term strategy of 'buying time' through 'consumer responsibility' and other advocacy and public relations, effectively forestalling sustainable recycling, with a longer-term view to industry control of recycling. Evergreen was the only viable, producing recycler during this time and inevitably became 'road-kill', as defendants instead supported PDR, whose operational capability was always dubious at best, which never produced and sold recycled resin, but which propped up the defendants' public relations campaign, consistent with their short-term strategy. Their conduct was consistent with a concerted refusal to deal with Evergreen on its proposed 'green foam' terms – that is, an

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Br."- Dkt No. 00116977934), and to its opposition to defendants' motions for summary judgment in the district court ("Opp.").

agreement to limit the terms on which to deal with Evergreen. But where Evergreen alleged concerted conduct, the Court saw merely interdependent, parallel conduct. Petitioner respectfully submits that under the Court's reasoning, apparently only smoking gun evidence or internal documents referring to an explicit agreement could get a case to a jury. This is not the law.

The Court's key misapprehension of *Matsushita*, as later interpreted by the Supreme Court in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), and other courts of appeal, lies in its application of the test regarding circumstantial evidence. *Matsushita* holds that regarding ambiguous evidence "as consistent with permissible competition as with illegal conspiracy, the defendant is entitled to summary judgment unless the plaintiff can present evidence that tends to exclude the possibility that the alleged conspirators acted independently." Here, the Court applied this test to each of the pieces of evidence it found ambiguous (i.e., not direct), and concluded for each that the balance tipped to defendants.

But the evidence here is critically distinguishable in antitrust terms. Defendants have alleged no plausible procompetitive benefits from their conduct. Evergreen has alleged some 40 meetings of the defendants through the PFPG and its predecessor association over the five years. In each of these respects, the facts of this case are critically distinguishable from the facts of *Matsushita* (finding alleged 20-year predatory pricing scheme with recoupment to be implausible where price-cutting was facially procompetitive) and

Monsanto. The Supreme Court's reasoning arose from a policy effort to restrain antitrust law from chilling facially procompetitive conduct – hence, the nod to defendants on facts "as consistent with permissible competition as with illegal conspiracy." And in *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011), applying *Matsushita* and *Monsanto*, the Court of Appeals rejected the alleged communications between the defendants as having any relevance to the price-fixing claim.

Here, however – and this is the critical misapprehension of the Court of Appeals – where the plaintiff's theory of collusion is supported by the proffered evidence and plausible, and the challenged activities are not procompetitive, "more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co.*, 998 F.3d 1224, 1232 (3d Cir. 1993).[2] *See* App. Br. 32, 36, 37; Reply Br. 14. All that *Matsushita* requires is that "the inferences drawn from the proffered evidence be reasonable." *Id.* at 1231 (citing *Eastman Kodak Co. v. Image Tech Srvs., Inc.*, 112 S.Ct. 2072, 2083 (1992); *Petruzzi's*, 998 F.2d at 1230 ("to raise a genuine issue of material fact, 'the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant, but simply must exceed the mere scintilla standard'.") (Reply Br. 14); *see also Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994 ("if the alleged conduct is

[2] This appears to be a matter of first impression or the First Circuit.

'facially anticompetitive and exactly the harm the antitrust laws aim to prevent,' no special care need be taken in assigning inferences to circumstantial evidence" (quoting *Kodak*, 112 S.Ct. at 2088); *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (for plus factors to satisfy Matsushita's evidentiary test, "requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference.") In other words, *Matsushita*'s restrictive approach toward ambiguous evidence is relegated to alleged conspiracies that are implausible or involve facially procompetitive conduct, and it therefore does not apply as strictly as the Court consistently applied it to Evergreen's claims and the evidence.

The Ninth Circuit explains, with particular application to how *Matsushita* has been misapprehended and misapplied in this case,

> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. *Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case.* After all, circumstantial evidence is nearly always evidence that is plausibly consistent

> with competing inferences. [. . . .] Thus, such an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy. Since direct evidence will rarely be available, such a reading would seriously undercut the effectiveness of the antitrust laws.

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990) (emphasis added) (noting also "the important difference between circumstantial evidence, in which a party asks that certain inferences be drawn in his favor, and direct evidence, where, in order to defeat a request for summary judgment, the nonmovant need only ask that his evidence be taken as true;" and that, accordingly, "the *Matsushita* inquiry is appropriate only where there is no direct evidence of conspiracy," *id.* at 441) (internal citations omitted)), *cert. denied*, 500 U.S. 959 (1991); and *see id.* at 439-41. Contrary to the Ninth Circuit's elucidation of *Matsushita*, this Court's application of the case appears to cut off the air supply for circumstantial evidence on summary judgment to the point that it would "seriously undercut the effectiveness of the antitrust laws."

In sum, ambiguous evidence can be sufficient to defeat summary judgment if it would "allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." Areeda & Hovenkamp, *Fundamentals of Antitrust Law* § 14.03[B], at 14-25 (4th ed. 2014 Supp.). This is a lower threshold than *Matsushita*'s 'tend to exclude' test (applicable only where there are facially procompetitive benefits). If properly applied here, taking into account the evidence overlooked or not

fully considered by the Court, including systematic communications among the defendants and no alleged plausible procompetitive benefits, it should lead to reversal of the district court's decision, *in addition* to the direct evidence of conspiracy which Evergreen alleged and argued and the Court overlooked. This petition now presents the Court with an opportunity to clarify and correct its application of *Matsushita* in the distinguishing circumstances of this action.

The Court has also overlooked and/or misapprehended material facts and points of law as follows:

II. DIRECT EVIDENCE

Chief among the dispositive facts that the Court ignored is the defendants' collective rejection in May 2007, acting through their trade association, of Evergreen's proposal to build a recycling plant in Los Angeles – a rejection that Evergreen contended, relying on direct and unequivocal evidence, constitutes a stand-alone concerted refusal to deal.

1. *The Collective Rejection of Evergreen's LA Plant Proposal is Direct Evidence of a Concerted Refusal to Deal.* The Court, in its most material, significant omission, makes no mention of Evergreen's contentions that the group's collective rejection of Evergreen's proposal for a plant in Los Angeles was a stand-alone concerted refusal to deal in violation of Section 1. Instead, the Court drapes its finding that Kingsbury's 'pick a winner' testimony was ambiguous over the May 31, 2007 call, focusing on the Court's own (incorrect) assertion that the

group decided during the call to favor PDR over Evergreen, and ignoring the collective rejection of Evergreen's proposal (Op. at 13-14.) This series of findings and reasoning by the Court is contradicted by extensive arguments and pleadings by Evergreen and is sufficient reason to grant this petition.

Evergreen has consistently characterized the May 31 collective rejection of its proposal as a discrete event and, standing by itself, a concerted refusal to deal by the defendants. *See, e.g.,* Reply Br. 15; SA0660-61, SA0646-47. Nowhere does Evergreen link Kingsbury's 'pick a winner' testimony about the RTF to the collective rejection by the larger entity, the PFPG, of Evergreen's proposal for an LA plant, nor is there any such link in Kingsbury's testimony itself.

Because the PFPG members' collective rejection of Evergreen's proposal is direct evidence, the *Matsushita* test regarding ambiguous evidence does not even apply. *See also* Reply Br. 14 (citing *In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999)).

Similarly, the reason for extensive briefing of *Tunica Web*, which the Court also did not address, was to explain that Evergreen did not solicit a joint response: it expected the manufacturers to decide individually but was instead asked to submit a proposal to the PFPG and its members for a plant in Los Angeles (SA2150), which it then did. Reply Br. 7-8, 15.

• Contrary to the Court (Op. at 7.), in 2007 Reilly (Genpak) suggested that Forrest come to the PFPG, not for financing a new plant in California but

instead regarding Evergreen's green foam model itself. And it was the PFPG Steering Group, in subsequent discussions with Evergreen, which asked Evergreen to submit a proposal to build a recycling plant in Los Angeles. Reply Br. 7-8; App. Br. 12, n.30.

• Reilly's 'suggestion' followed on the heels of a March 6-7, 2007 PFPG strategy meeting about what to do about PSFS recycling. Key defendants' executives, operating as a unit, collectively developing a unified strategy on recycling, agreed on a short-term strategy of buying time (i.e., no action) with a longer-term vision of industry-controlled recycling. App. Br. 16-17, Reply Br. 4-5. This set the stage for Reilly's suggestion that Evergreen bring its program to the PFPG, and the PFPG's response, for Evergreen's model conflicted with both the short-term and long-term strategies.

• Contrary to the Court (Op. at 8-9), Evergreen has not alleged that during the May 31, 2007 conference call the defendants "also agreed that no individual converter would enter any deal with Evergreen that involved the payment of commissions" and that they agreed at this meeting "to promote a sham competitor [PDR]." The course and pattern of conduct of rejecting Evergreen's green foam model took root in 2005 and continued through 2009, Reply Br. 4, and the PFPG started easing PDR into the picture as a recycler around May 2007 and continued to support it through 2008, App. Br. 18-19, n.56. This error is material because Evergreen has alleged a discrete concerted refusal to deal concerning the LA plant proposal.[3]

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[3] Contrary to the Court, there was only one proposal to build an LA plant, with three

• The Court states, referring to "Evergreen's argument that the Plastics Group . . . favored PDR over Evergreen" and declining to "view Kingsbury's statement as direct evidence of a conspiracy" (Op. 17), "We do not view the Plastic Group's action as improper and therefore reject Evergreen's contention that it presented unambiguous evidence of conspiracy." (Op. at 18.) This again ignores Evergreen's contentions that the May 31 call focused solely on accepting or rejecting Evergreen's proposal and it was separate from Kingsbury's statement as a member of the RTF.

III. CIRCUMSTANTIAL EVIDENCE

As the Court correctly noted, on summary judgment reasonable inferences are to be construed in favor of the non-moving party. But in its decision the Court consistently construed inferences from circumstantial evidence *against* Evergreen in the face of substantial evidence, and also overlooked or misapprehended dispositive points of fact and law. It also examined each piece of supporting evidence in isolation rather than taken together, as clearly required under Supreme Court law. App. Br. 32, n.110.

1. *The Green Foam Model was Cost-Neutral.* Contrary to the Court (Op. 5), Evergreen did not envision or assert that there would be any 'premium'. Instead, it consistently maintained that its model

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financing options. Op. 8, n.7. *See also* SA640-45; Opp. 24 (referencing Kingsbury/Dow e-mail reflecting impermissible group decision-making on pricing, thus further confirming the defendants' systematic collective conduct).

was cost-neutral, i.e., that the overall costs that the defendants would pay Evergreen for post-consumer resin and brokerage commissions would be the same as they already paid for virgin resin and commissions under their traditional cost structure. It sought simply to become the broker of record for the 'green products' and to receive the normal sales commission that would otherwise be paid to another broker who sold the defendants' products. *See* Reply Br. 3; *see also* SA2294, SA 2094.

• Evergreen has not backed away from its contentions that the green-foam model was cost neutral or "acknowledge[d] that any agreement with Evergreen would cause the defendants to incur additional costs" (Op. 19-20). Evergreen's statement that "the defendants opposed its business model because the defendants 'did not want to pay more for recycled resin than for virgin resin' and its business model involving commission would disrupt the defendants' respective market share if it became viable," (Op. 20, quoting Reply Br. 2), simply meant that the defendants – not Evergreen – viewed the model as more expensive than using virgin resin. *See* Reply Br. 8.

Given the *defendants'* perception of higher costs, it was rational for them to reject Evergreen's commission model and to support a resin-sales only model – PDR's purported model – which would for a time help them fend off the bans, by giving the appearance of supporting recycling, even as they knew it was not commercially sustainable. Reply Br. 11. This is consistent with the Court's statement that "there may be a colorable argument that the defendants feared that local governments would instead mandate the use of recycled products, and would thus wish to prevent any expensive recycling

methods from becoming viable," Op. 20, n.10 – the very argument, based on the defendants' own perceptions of cost, that Evergreen made but which the Court fails to credit to it.

• The Court's statement that the "defendants' desire to avoid these costs is especially understandable in light of the overwhelming evidence that they experienced significant quality problems with Evergreen's resin" (Op. 20-21), ignores significant contrary evidence of some 600,000 lb. of resin (compared to PDR's alleged 11,000 lbs.) purchased by the defendants and used to their satisfaction. App. Br. 12; Reply Br. 6; Opp. 18-21; *see* below.

2. *Evergreen Had a Clear Record of Success Before Approaching the Defendants and Also With its Sales to Genpak and Dolco.* The statement, "Between 2002 and 2005 Evergreen reached out to several small polystyrene converters but had little success," Op. 6, ignores evidence that it successfully partnered with Commodore, a small regional converter, supplying 'green products' to Boston Public Schools for more than eight years and also to national distributor Sodhexo for schools in Massachusetts, Rhode Island, Connecticut and New Jersey, including closed-loop systems in Providence and Boston Schools. Reply Br. 3-4. Evergreen's earlier *success* in product quality and performance reliability enabled it to get SBA financing to build a recycling facility in Norcross, Georgia – and to market to the national converters (albeit without success, due to the concerted refusal to deal).

• Similarly, the Court's statement that Sysco "eventually backed out" after Dolco made a formal proposal to it in December 2005, Op. 7, accepts

Patterson's deposition testimony but ignores Forrest's contrary deposition testimony that Dolco backed out of the deal, not Sysco. *See* JA1329, SA1515-18; Opp. 17-18**;** App. Br. 11-12. Evergreen showed that Patterson's testimony is suspect: he testified that Evergreen "never produced anything" (*see* Opp. 18) when in fact it sold more than 250,000 lbs. to Dolco alone in the period 2005-2008. JA1331.[4]

• Contrary to the Court (Op. 10), other customers were willing to pay an environmental fee (Sodexo, Gwinett County, GA schools, Pasco County, FL. schools) and buy green products (Sysco, Sodexo, Eastern bag). Reply Br. 6; SA0014, SA0009, JA1329, SA2817.

• With respect to Forrest's contention that Reilly's requirement of group support was "a way of maintaining group course of action," App. Br. 12, the Court's statement that Reilly "may have been acting independently" "[i]n light of the resin quality issue" (Op. 21, n.12) is strongly belied by the fact that Genpak bought 300,000 lbs. of recycled resin from Evergreen and successfully used it in green products. Reply Br. 6; SA0398.[5]

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[4] Contrary to the District Court and the Court's reference to Norman Patterson as "Dolco's Manager for the Midwest Division," Op. 6, Patterson was Senior Vice President in charge of national operations. App. Br. 53, n.122. The difference is material.

[5] The Court attributes Genpak's reluctance to bid against Pactiv for a renewed contract with Gwinnett Schools to Genpak's possible "reluctan[ce] to commit to supplying a product when it had concerns about its quality." Op. 28. This favors speculation over fact -- the undisputed evidence that Genpak bought and successfully used 300,000 lbs. of Evergreen's resin – and

3. *The Joint Funding Agreement Put Dolco and Genpak on Express Notice of Evergreen's Tenuous Financial Condition and its Inability to Survive Without the Commissions, Leading to a Reasonable Inference of Conduct Consistent with a Concerted Refusal to Deal.* The Court finds that "the continued purchase of Evergreen's resin by [Dolco and Genpak] pursuant to the funding agreement is "inconsistent with conspiracy" and that such purchases "would be irrational if a conspiracy in fact existed" because "these agreements allowed Evergreen to continue operations." Op. 22-23. The joint funding agreement in July 2007 (Op. at 9) expressly provided for most of the $75,000 in funding from each entity to Evergreen to be used to pay its existing debt obligations, listed on Exhibit A thereto, and required that Evergreen send them weekly financial activity reports; both defendants were thus well aware of Evergreen's dire financial situation, even as of July 2007, absent the receipt of brokerage commissions, which of course this funding did not provide. Reply Br. 11. As they knew of its dire financial condition even then, it is a reasonable inference that such successful, business-savvy companies could expect that the $150,000 would not enable Evergreen to continue operations without the requested commissions. This evidence, overlooked by the Court, substantially undercuts its finding: their conduct was indeed consistent with an agreement to limit the terms on which to deal with

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ignores Gwinett County Public School officials' unqualified satisfaction with product. (App. Br. 13-15.)

Evergreen – i.e., not on green foam terms.[6] Reply Br. 11.

4. *The March 2005 Minutes Do Not Require Authentication.* The Court offers no reason (Op. 24) for rejecting – and fails to acknowledge – Evergreen's reasoned, supported argument that the minutes of the March 18, 2005 Plastics Group meeting do not require authentication. Reply Br. 6, n.7. This is a matter of clear law. The notes are admissible. As for the Court's comment about motive (Op. 24), the quoted comments by Dart's General Counsel and Pactiv's Food Service General Manager clearly "reflect an industry position developed or developing against recycling," Reply Br. 6-7, foreshadowing and leading into some 40 trade association meetings over five years, intensely focused on how to address the bans and what to do about recycling. The quoted comments are also consistent with defendants' pretextual 'support' of recycling through its PR campaign with PDR serving as a convenient prop.

5. *Defendants' Systematic Communications Constitute Traditional Evidence of Conspiracy and a Classic Plus Factor.* Whereas the Court acknowledges that communications between defendants constitutes "'traditional' conspiracy evidence of the type that helps to distinguish between conscious parallelism and collusion," Op. 22, it fails to credit the undisputed evidence of some 40 meetings among the defendants through the PFPG

[6] The funding also provided them with legal cover for their participation in the group rejection of Evergreen's proposal just two months earlier. Reply Br. 11.

(and its antecedents) during the 2005-2009 time period. App. Br. 15-16, 55; Reply Br. 4. Given this evidence, and no plausible procompetitive benefits, neither *Matsushita* nor *White* applies, as explained above. To reject here an inference of uniformity caused by information exchanges – a classic plus factor – is to favor pure theoretical possibility over hard facts and construe reasonable inferences *against* the non-moving party.

6. *The Court Misconstrued the Evidence about PDR.* The Court's conclusion "that a reasonable factfinder could not find that PDR was a sham," Op. 31, disregards substantial contrary evidence and also misses the point. Evergreen contended that PDR performed poorly, if at all, and that "it fit with Defendants' overriding rejection of sustainable recycling but satisfied their near-term objective of making it appear that they were committed to recycling in order to buy time and stave off the bans . . . on a model that Defendants knew could not sustain itself." Reply Br. 11. But the Court does not address this essential argument, and instead seizes on whether PDR was a sham or "operational." PDR was not what it was purported to be (see SA3336-38, testimony of Cantwell regarding representations to school district officials) – a company producing recycled food-grade resin – and in this sense clearly was a sham. And, although the Court said the evidence does not support a reasonable inference that PDR was "never operational," in any case it never was: for instance, Preston testified that "we [PDR] never sold clean stream [i.e., FDA requirements for food use] that was accepted by a customer." SA3187. PDR may have been literally operational at some point but only in the most

vacuous sense that some machinery was in place and functioning, for at best a small amount of time, *but without ever producing commercially saleable resin*. The Court states that Dart entered into a purchase agreement with PDR (Op. 31) but excludes mention of the far more telling fact that in June 2008 Dart rejected a shipment from PDR of over 12,000 lbs. of recycled resin due to contamination, SA3175-77 (Preston testimony)[7] and PDR never sold it any commercially usable resin.[8] Given the evidence, to find that Evergreen has not raised a reasonable inference that PDR was not operational (the Court's characterization, in any case) renders the term meaningless. More importantly, as Evergreen has explained in both its appellate briefs, but which the Court has not acknowledged, PDR fit the bill for their PR strategy and rejection of economically sustainable recycling, and this point more than reasonably supports Evergreen's claim.

• Contrary to the Court regarding the Plastic News article about PDR (Op. 16-17), Evergreen has shown that someone from the Plastics Group – Levy,

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[7] Where the Court cites evidence not specifically alluded to by Evergreen before, Evergreen respectfully submits that it is in compliance with the limits of FRAP 40 in citing countering evidence that the Court appears to have missed, provided such evidence derives from the same source and relates to the same arguments previously relied on by Evergreen.

[8] Even assuming PDR produced 11,000 lbs. of material, that is a miniscule amount over four years, especially when contrasted with Evergreen's average production of 30,000 lbs. per month for two consecutive years. *See also* Reply Br. 12 (questioning trustworthiness of information from PDR).

director of defendant ACC and of the PFPG – "was involved with the article." He endorsed Society of the Plastic Industry Director Jane Adams' "idea to put PDR out there with . . . Plastic News." App. Br. 20; SA3577. This clearly ties the PFPG to the article. PDR co-founder Preston's testimony about PDR's non-performance and the significant discrepancy between the representations in the article and the underlying facts reasonably suggest that Levy, who favorably introduced PDR to the PFPG, App. Br. 18-20, had substantial reason to doubt PDR's representations of its status at the time and had other motives about the PR purposes – acknowledged by Defendants – that such a "recycler" would serve to the defendants. The PFPG's involvement through Levy and PDR's own admissions of non-performance reasonably suggest that it is not a matter of "pure speculation" that this incident could probatively contribute to the evidence, taken in the aggregate, making collusion more likely than not. *See also* App. Br. 22, SA3187, SA3563, SA3602, SA2325-26, SA2026.

IV. CONCLUSION

For the foregoing reasons, Evergreen respectfully requests that the Court reconsider its decision and reverse the summary judgment below.

Date: September 21, 2016
Respectfully submitted,
Evergreen Partnering Group, Inc.
By Its Attorney

/s/ *Richard Wolfram*
Richard Wolfram, Esq.

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CERTIFICATE OF COMPLIANCE

Plaintiff-Appellant hereby certifies that this Petition for Rehearing is proportionately spaced and has a typeface of 14-point. Under Fed. R. App. P. Rules 35 and 40, the Petition may not exceed 15 pages in length unless the Court or local rule permits otherwise. In conjunction with the filing of this 20-page Petition, Plaintiff-Appellant is filing a motion for leave to file an overlength Petition.

Dated: September 21, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Sean M. Becker
Richard E. Bennett
Kathleen Ceglarski Burns
Steven M. Cowley
John Martin Faust
Eric B. Goldberg
Christopher A. Kenney
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Ralph T. Lepore
Michael T. Maroney
David Allen Martland
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United States Court of Appeals
For the First Circuit

No. 15-1839

EVERGREEN PARTNERING GROUP, INC.,
Plaintiff, Appellant,
MICHAEL FORREST, Plaintiff,
v.

PACTIV CORPORATION; SOLO CUP COMPANY, a corporation; DOLCO PACKAGING, a Tekni-Plex Company, a corporation; DART CONTAINER, CORPORATION; AMERICAN CHEMISTRY COUNCIL, INCORPORATED, an association, Defendants, Appellees, GENPAK, LLC, a/k/a Genpack, LLC, Defendant.

ORDER OF COURT

Entered: April 4, 2016

Plaintiff-appellant's motion to seal motion to supplement the record is granted. The motion to supplement the record is denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
George J. Skelly Gregg A. Rubenstein David Allan Martland Kathleen Ceglarski Burns Danielle M. McLaughlin Eric B. Goldberg
Donald R. Pepperman Jordan Lee Ludwig Maxwell Michael Blecher Shaun Khan
Richard Harold Wolfram Jan Richard Schlichtmann Keith L. Sachs
Orestes G. Brown Richard A. Sawin Jr. Richard E. Bennett Sean M. Becker
John Martin Faust William E. Lawler III Yousri H. Omar
Ralph Mayrell Steven M. Cowley Kristy Shemille Morgan
Michael T. Maroney Benjamin M. McGovern Ralph T. Lepore
Scott A. Moore

United States Court Of Appeals
For The First Circuit
No. 15-1839

EVERGREEN PARTNERING GROUP, INC.
Plaintiff - Appellant
Michael Forrest
Plaintiff v.
PACTIV CORPORATION; SOLO CUP COMPANY, a corporation; DOLCO PACKAGING, a Tekni-Plex Company, a corporation; DART CONTAINER CORPORATION; AMERICAN CHEMISTRY COUNCIL, INCORPORATED, an association, Defendants – Appellees; GENPAK, LLC, a/k/a Genpack, LLC, Defendant

EMERGENCY MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

I am counsel to Plaintiff-Appellant Evergreen Partnering Group ("Evergreen") in this action. I am submitting this emergency motion on behalf of Evergreen to request leave to supplement the record prior to the March 28, 2016 deadline for the submission of Evergreen's Reply brief in response to Defendants' Opposition.

The reasons for my request are as follows:

The Defendants have produced certain documents which, for reasons detailed in the accompanying Affidavit of Michael Forrest, founder and president of Evergreen, were not put into the record in this case, in the District Court or on this appeal. The documents in question, attached hereto in Exhibits A and B, date primarily from 2005 (with several exceptions) and are material to the central issues on appeal. In particular, they reflect a pattern and course of dealing of collective conduct and decision-making by the Defendants that bear directly on the alleged concerted refusal to deal which is at the heart of this case. Plaintiff alleges that the concerted refusal to deal sprang from the Defendants' collective positioning on recycling polystyrene food service products. Without these documents in the record, which are mostly minutes of their trade association meetings, the Court will not be able to see the full extent of Defendants' many meetings and communications, dating from two years before their alleged concerted refusal to deal with Evergreen in 2007. Evergreen views these documents, which constitute direct or at least circumstantial evidence supporting its claims, as clearly reflecting a motive underlying Defendants' actions with respect to Evergreen.

With the documents in Exhibits A and B included in the record, Evergreen would be able more fully to show and explain how the concerted refusal to deal sprang from a clear course and pattern of conduct

and industry positioning by the Defendants acting in and through their trade association group/s. For instance, the Defendants asserted to the District Court, and have now asserted to this Court, that "the only trade group meeting minutes of any PSPC meetings in this timeframe (late 2005 or early 2006) relate to meetings on November 15, 2006 and December 11, 2006" and that "the meeting minutes do not indicate that recycling or recyclers were discussed at any of these meetings," SA 0118-19 – and the District Court expressly relied on these assertions, Evergreen Partnering Group, Inc. v. Pactiv Corp., 116 F.Supp.3d 1, 14-16 (D. Mass., July 10, 2015). Defendants' own documents that Evergreen now seeks to include in the record, however, indicate directly or by reference that there were at least 13 trade group meetings and conference calls in 2005 and 2006 prior to the two meetings acknowledged by the Defendants; and these documents further show that Defendants were focused on developing a collective industry response to polystyrene critics and the role, if any, of recycling. The inclusion or exclusion of these documents in the record could therefore very likely affect this Court's decision on Evergreen's appeal.

Furthermore, Defendants, in their Opposition dated February 5, 2016, raise the issue of the ACC/PFPG (their trade associations') pattern and course of dealing, stating that "Evergreen requested massive subsidies not in keeping with the trade group's budget or operating philosophy." Def. Br. at 39.

Regardless of the validity Defendants' characterization of Evergreen's request, this statement reflects on Defendants' pattern and course of dealing through their trade association groups, and opens the door to evidence bearing on the Defendants' collective positioning regarding recycling, as reflected in some of the documents in the attached exhibits.

In addition, several documents describe the status of PDR, a supposed recycler that Plaintiff alleges the Defendants supported through individual and collective action; these documents raise material issues of fact calling into question, if not repudiating, Defendants' assertions that PDR was a viable recycler and "better" than Evergreen. These issues are material not only because they go to the credibility of Defendants' assertions but also because Defendants rely on them in part to show that they supported recycling and did not collectively favor and support PDR over Evergreen, whereas Evergreen alleges to the contrary, and that the Defendants "picked a winner" for recycling – PDR.

Furthermore, as Defendants have already produced the documents in question, they will not be prejudiced if the record is supplemented to reflect a more complete, accurate picture of the facts – facts established from their very own documents.

Plaintiff has alleged harm to competition, resulting in harm not only to itself but to consumer welfare, on

the grounds that recycling, suppressed by the Defendants' conduct, could have yielded significant benefits to consumers and the environment. Not only was Evergreen denied the ability to introduce recycling due to Defendants' concerted refusal to deal with Evergreen, but consumers were consequently denied the fruits of Evergreen's business model in that they might otherwise have been able to choose recycled products, with beneficial effects for the environment; and this is, in the main, no different than recycling in various other consumer products, where the introduction of post-consumer recycled content (e.g., plastic bottles, batteries, etc.) has generated demand. Even if Evergreen itself is no longer in a position to re-introduce recycling, it remains important to show, judicially, that the conduct alleged herein does not pass legal muster and must not be allowed to stymie possible future such efforts.

As noted, the reasons for making this motion at this time relate to internal handling of discovery and determinations about what to include in the record by prior lead counsel. Although I have acted as counsel to Evergreen with respect to this action since 2012, I first made a formal appearance in the action shortly after the filing of Evergreen's appeal in late November 2015. Pursuant to direction from prior lead counsel, I played no role in discovery or the determination of what documents to include in the record for summary judgment, nor did I have any knowledge of the scope and identity of the documents

included therein. I was unaware of the existence of the documents at issue in this Motion until late 2015, and furthermore unaware that such documents were not included in the record until only a few weeks ago. My role has now changed over the last month, with the withdrawal of Messrs. Schlictmann and Brown, as detailed in the accompanying affidavit of Mr. Forrest, and I have assumed the responsibilities of lead counsel.

In the interests of a more accurate assessment of Plaintiff and Defendants' claims on this appeal, and for the public policy reasons described above, it is vitally important for the record to be supplemented with the attached documents to more fully reflect facts material to the decision below. I am mindful of the unusual nature of this motion, and of any request to supplement a record after a summary judgment decision below. But because the documents in question are material to the issues, may well affect the outcome, would cause no prejudice to the Defendants, and would enable the Court to assess the merits more accurately and completely for summary judgment determination, and because important public policy and consumer welfare issues are at stake, I believe that the exceptional circumstances warrant allowing the record to be supplemented as requested herein.

The documents in question are chronologically ordered and divided into two exhibits. They were all designated "Confidential" by Defendants pursuant to

a Protective Order in this case, and this Motion is therefore being filed under seal. The documents are highlighted in places. I directed that highlighting be done to draw the Court's attention to the most relevant passages bearing on the reasons for this Motion. In directing this highlighting, I am not waiving the attorney-client privilege or attorney work-product doctrine protection in any respect, as to these or any other documents or communications; the highlighting is included only for the specific, limited purpose of facilitating the Court's review of key passages in the documents with respect to the reasons set forth for the relief requested herein.

For the reasons set forth above, I respectfully request that the Court grant this Emergency Motion for leave to supplement the record with the documents attached in Exhibits A and B hereto and that the Court do so in time for Evergreen to include discussion of these documents in its Reply due March 28, 2016.

Accordingly, I respectfully request that the Court grant this Motion.

Dated: March 16, 2016

Respectfully submitted by,

/s/ Richard Wolfram

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CERTIFICATE OF SERVICE

I, Richard Wolfram, hereby certify that on March 16, 2016, the attached motion with accompanying exhibits was filed in person on behalf of Evergreen Partnering Group with the United States Court of Appeals for the First Circuit.

I certify that the following parties or their counsel of record will be served by regular mail and are being served by electronic mail on March 16, 2016:

George J. Skelly
Michael T. Maroney
Benjamin M. McGovern
Ralph T. Lepore
Gregg A. Rubenstein
David Allan Martland
Richard A. Sawin, Jr.
John Martin Faust
Christopher A. Kenney
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Sean M. Becker
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Kristy Shemille Morgan
William E. Lawler, III
Scott A. Moore
Danielle M. McLaughlin
Richard Wolfram

Dated: March 16, 2016

/s/ Richard Wolfram
Attorney for Plaintiff-Appellant Evergreen Partnering Group, Inc.