The Summary Judgment Standard in Antitrust Conspiracy Cases and in Re Travel Agency Commission Antitrust Litigation

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THE SUMMARY JUDGMENT STANDARD IN ANTITRUST CONSPIRACY CASES AND IN RE TRAVEL AGENCY COMMISSION ANTITRUST LITIGATION

SKYE M. MCQUEEN

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I. INTRODUCTION

In February of 1995, seven major U.S. airlines individually announced decisions to cap travel agent commissions at twenty-five dollars for one-way tickets and fifty dollars for round-trip tickets. In response, the American Society of Travel Agents, inter alia, filed a class action complaint against those airlines on April 7, 1995, alleging that the airlines engaged in anti-competitive behavior by conspiring to cap travel agent commissions. Thus, the plaintiffs claimed that the airlines violated sections 1 and 2 of the Sherman Act.

The plaintiffs asserted that a commission cap would have been economically detrimental to each airline had they acted individually. If one or two of the airlines capped commissions, the travel agents would have directed sales to other airlines, causing the airlines that imposed a cap to suffer economic loss. Therefore, the travel agents claimed the airlines must have conspired to ensure united action to achieve the greatest economic benefit.

Each airline, on the other hand, maintained that it acted independently and denied all allegations of a conspiracy. Furthermore, the airlines asserted that the plaintiffs did not possess enough evidence to reach a jury, much less to actually prove that a conspiracy existed. Consequently, the airlines filed several motions for summary judgment. Specifically, they claimed that in antitrust conspiracy cases, when there is no direct evidence of a conspiracy, the plaintiffs must meet a strict, and ar-

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guably heightened, standard to defeat a defendant’s motion for summary judgment.

Under this “heightened” summary judgment standard, if a defendant offers evidence of independent decision-making, the plaintiffs are required to introduce evidence that tends to exclude the possibility of such independent action. In response, the plaintiffs maintained that according to the Supreme Court in *Eastman Kodak Co. v. Image Technical Services*, they need not meet a heightened standard to defeat summary judgment in antitrust cases. A close look at the case law, however, reveals that the standard necessary to defeat summary judgment is, at best, unclear.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment may be granted if it can be shown that there is “no genuine issue as to any material fact.” If this is shown, the moving party will be entitled to “judgment as a matter of law.” The purpose of Rule 56 is to determine whether both parties have enough evidence to justify the expense and burden of a trial. The court, in *In re Travel Agency Commission Antitrust Litigation*, denied the airlines’ motions for summary judgment. Basing its decision on the Rule 56 summary judgment standard, the court held that the nonmoving party’s inferences must only be reasonable in order to reach a jury. This discussion calls into question the summary judgment standard in antitrust litigation, and highlights the potential confusion in determining what evidence will defeat a defendant’s motion for summary judgment in the context of an antitrust conspiracy case.

This Comment will discuss the summary judgment standard in antitrust conspiracy cases in the context of the airline travel

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4 FED. R. CIV. P. 56(c).
5 Id.
7 In re Travel Agency Comm’n Antitrust Litig., 898 F. Supp. 685, 690 (D. Minn. 1995). Note that most of the court documents and evidence presented in support and defense of summary judgment was sealed by the court.
8 Id. at 690.
9 In re Travel was settled in 1996. The airlines agreed to pay the travel agents a total of $86 million. The commission caps remain in place and have become a reality that the travel agents must face. Therefore, whether the airlines actually conspired will not be legally settled. Alan Fredericks, *The Caps Settlement; Commission Caps*, TRAVEL WKLY., Sept. 12, 1996, at 30; Jim Barlow, *Airlines Win Travel Agent War*, HOUS. CHRON., Sept. 8, 1996, at 1.
agency litigation. This Comment will begin by addressing the current state of the airline industry and the economic motivation for imposing a commission cap. The Comment will then discuss the standard for summary judgment, analyzing past case law and the arguments presented by both the airlines and the travel agents in this regard. Based on recent case law, this Comment will assert that courts do not have a clear standard by which to determine whether to grant summary judgment in antitrust conspiracy cases. Nevertheless, the Comment will conclude that the "tends to exclude" language should apply in certain circumstances.

II. THE AIRLINE INDUSTRY: UNDERSTANDING THE SOURCE OF CONSCIOUS PARALLELISM

A. ECONOMIC CONSIDERATIONS IN THE AIRLINE INDUSTRY

Before the decision to cap commissions, U.S. airlines had suffered economically since deregulation. From January 1978 to December 1993, major U.S. airlines sustained cumulative net losses of $9.3 billion. The airlines sustained gross losses of $2.6 billion in 1992 and $12.8 billion in 1993. U.S. airlines "carried] a debt burden of $35 billion, or more than eight times the industry's total accumulated profit from the beginning of commercial aviation in the 1920s, until 1988." A solution to this problem is not certain given the enormous costs associated with airline operation. The industry faces great economic risks due to high input costs, extremely cyclical demand and intense competition. Because the airlines have little control over cyclical demand and competition, they are only capable of reducing input costs in an attempt to improve their economic situation.

One commentator suggests that high input costs are the primary reason for poor industry performance since deregulation. From 1978 to 1990, U.S. airlines' operating costs rose by ninety-four percent, with equipment rentals and travel agent commissions rising the most from 1980 to 1990. In fact, travel agent commissions cost the airlines hundreds of millions of dol-

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11 Id.
12 Id.
13 Id. at 20.
15 Id.
Although the airlines achieved record profits during the second quarter of 1995, Robert Crandall, Chairman of AMR Corporation, the parent company of American Airlines, expressed his concern for the airline industry shortly after the announced commission caps. He suggested that carriers will not be able to continue to maintain their recent profitability unless they are able to reduce costs.

Therefore, reducing input costs may be essential to improving the airlines' economic situation. The airline industry can be divided into thirds based on a cost to profit ratio with the bottom one-third representing low-cost carriers. The expenditures of the low-cost portion are five percent lower than the high-cost portion. The reduction of labor costs, as well as travel agent commission costs, could result in the high-cost airline carriers entering the realm of low-cost carriers. Therefore, the issue becomes how the airline industry can effectively reduce input costs.

B. Reducing Input Costs: The Airlines' Decision to Cap Commissions

On February 9, 1995, Delta Air Lines, Inc. sought to reduce its input costs by keeping the commission rate at ten percent but capping travel agent commissions at $25 per one-way ticket over $250 and $50 per round-trip ticket over $500. By February 13, 1995, American, Northwest, United, USAir, Continental, and TWA had announced similar commission caps. As a result, the airlines succeeded in paying $40 million less in commissions between April and June of 1995 than they paid during the same period in 1994. This translated into a loss of almost $1 million

17 Id.
18 Terry Maxon, Crandall Defends Fee Cap: Travel Agents Paid Well, American Chairman Says, DALLAS MORNING NEWS, Sept. 9, 1995, at 3F.
19 Lanik, supra note 14, at 513.
20 Id.
21 Id.
22 Maxon, supra note 18, at 3F; Joint Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 10, In re Travel (No. 4-95-107).
23 Joint Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 10, In re Travel (No. 4-95-107).
24 Terry Maxon, Travel Agent Commission Caps Boost Airlines' Profits: Top 10 Save $40 million in 2nd Quarter Commissions, DALLAS MORNING NEWS, Aug. 27, 1995, at 1H.
per day to the travel agency industry. Consequently, the travel agents asserted that the airlines conspired to cap commissions and that this conspiracy caused the travel agency industry’s losses.

C. CONCERTED ACTION OR OLIGOPOLISTIC BEHAVIOR?

The airlines’ decision to cap commissions was described as a “bold first step towards utilizing the oligopsony power it wields over an industry providing an essential factor input . . . .” In fact, the airline industry is both an oligopoly and an oligopsony. There are few actors in the industry, and as a result, the airlines are capable of effecting prices in the market.

The airlines, as sellers, can effect the price at which consumers buy, thus acting as an oligopoly. Because there are few sellers in the market, a price reduction that results in a substantial output gain for one airline will result in a substantial contraction in the output of another. This causes other airlines to respond quickly and reduce prices in order to compete.

Because there is a likelihood of quick reaction by competitors within the market, an oligopolist will be less likely to engage in significant price reductions. Oligopolists are thus “interdependent” in their pricing. There is a tendency to avoid vigorous price competition because actors base their pricing decisions in part on anticipated reactions by other actors. Therefore, parallel action by members of an oligopoly is arguably a function of their economic situation, and not the result of concerted action that violates section 1 of the Sherman Act.

Parallel action can also occur in an oligopsony. When the airlines as buyers can effect the price at which producers sell, an oligopsony exists. By capping commissions, the airlines acted, in effect, as an oligopsony by limiting the price at which travel agents could charge for their services. If one assumes that, as

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26 Lanik, supra note 14, at 530.
27 Id. at 531.
28 Id.
31 Posner, supra note 29, at 1564.
32 Id.
rational, profit-maximizing members of an oligopsony, airlines are interdependent, each airline would follow another airline's decision to cap commissions to achieve reduced input costs. Perhaps, then, the decision by all of the major airlines to limit commission caps within such a short period of time is merely the result of the interdependence that exists between the airlines as members of an oligopsony. Accordingly, each airline may have acted independently for its own benefit, although in response to competitor airlines' decisions.

Although oligopolistic behavior is often a function of natural market pressures, can this behavior constitute a violation of the antitrust laws? In addressing this issue, it is important to consider whether such "natural behavior" is actually a form of concerted action. In fact, "coordination of pricing policies to maximize joint profits is not easy, especially when costs and market share disparities engender conflicting price and output preferences among industry members." Therefore, the activities of an oligopoly that facilitate coordination could amount to concerted action. These activities include: "free and rapid interfirm communication, repetitive transactions, [and] the cultivated expectation that price cuts will be promptly countered." If a plaintiff challenges this activity, it must determine how to survive a defendant's motion for summary judgment.

III. CHALLENGING THE OLIGOPOLISTIC BEHAVIOR OF U.S. AIRLINES

A. Allegations of an Antitrust Conspiracy

Following the announcement by the seven major airlines to cap travel agent commissions on one-way and round-trip airline tickets, the American Society of Travel Agents filed suit against the airlines on its own behalf, as well as on the behalf of its

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33 It is interesting to note that all airlines, before reducing commission caps, paid the same commission of 10% per ticket. Maxon, supra note 18, at 3F. This uniform commission level in the industry was never challenged. Perhaps the uniform rate exemplifies the interdependence that exists within an oligopoly/oligopsony.

34 This economic discussion reveals the difficulty in determining whether the airlines actually conspired to cap commissions. It is important to consider, however, that in order for the airlines to achieve a benefit from reducing commission caps, each airline had to limit travel agent commissions. This limitation strengthens the plaintiffs' argument that each airline could not have capped commissions without first ensuring that its competitors would follow.

35 SCHERER, supra note 30, at 157.

36 Id.
members, alleging violations of sections 1 and 2 of the Sherman Act. The plaintiffs claimed that the airlines engaged in a "continuing combination and conspiracy to restrain competition among themselves," which consisted of a "common understanding and concerted course of conduct." The plaintiffs' complaint heavily relied on the immediate response to Delta's initial commission cap announcement. Less than twenty-four hours after Delta made its decision public, American Airlines announced its plan to cap commissions. The plaintiffs asserted that Northwest issued a press release only minutes after the American announcement. The remaining defendant airlines followed suit within days of these initial decisions.

The plaintiffs further alleged that market forces would have defeated independent action on the part of an airline to cap travel agent commissions. The complaint asserted that without joint action, a decision to "cut sharply travel agents' commissions" would have given travel agents a strong incentive to direct customers to airlines that paid full commissions. Therefore, the plaintiffs claimed that the airlines must have conspired to lower the compensation paid to travel agents. As a result of this conspiracy, the long-standing travel agent commission rate of ten percent was replaced by caps that according to the plaintiffs were artificial and contrary to normal marketing practices.

37 Plaintiffs' Amended Complaint at 1, In re Travel (No. 4-95-107).
38 Id. at 25-28. Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994).

Section 2 of the Sherman Act says that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony ...." 15 U.S.C. § 2 (1994).
39 Plaintiffs' Amended Complaint at 20, In re Travel (No. 4-95-107).
40 Id. at 22.
41 Id.
42 Id. It is important to note that Trans World Airlines also capped commissions, but was not a part of this lawsuit at the summary judgment stage because it settled with the plaintiffs in the case. The court granted final approval of the settlement on August 16, 1995. In re Travel, 898 F. Supp. at 687 n.3.
43 Id.
44 Id.
B. PROVING A CONSPIRACY: THE USE OF INDIRECT AND CIRCUMSTANTIAL EVIDENCE

In order to support a claim of conspiracy in violation of the Sherman Act, the Supreme Court has held that a plaintiff is not required to provide direct evidence. For example, in *Interstate Circuit, Inc. v. United States*, the Supreme Court held that plaintiffs may establish a conspiracy with indirect or circumstantial evidence provided that the evidence creates an inference of agreement among the defendants. Because "no formal agreement is necessary to constitute an unlawful conspiracy," courts recognize the difficulty in presenting direct evidence of a conspiratorial agreement among competitors. Therefore, indirect evidence of business behavior is admissible circumstantial evidence from which an agreement may be inferred.

The Eighth Circuit Court of Appeals also concluded that because of the nature of conspiracy cases, direct evidence is not required. In *ES Development, Inc. v. RWM Enterprises, Inc.*, the Eighth Circuit held that indirect evidence may establish a conspiracy in violation of the Sherman Act. In *ES Development*, the plaintiff, a real estate developer, alleged that various automobile dealers conspired to prevent automobile manufacturers from granting franchises to competitors in a proposed auto mall. The court, in addressing the evidentiary requirements, acknowledged that in order to establish an antitrust violation, a plaintiff

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45 306 U.S. 208 (1939). In this case, two movie theater chains sent eight film distributors identical letters, demanding that the distributors cease to supply first-run films to exhibitors who did not meet a schedule of minimum prices or who showed these films as part of a double feature. Although there was no direct evidence of a conspiracy, "[i]t taxe[d] credulity to believe that the distributors would have independently adopted "such far reaching changes in their business methods without some understanding that all were to join . . . . " *Id.* at 223. Interestingly, the market was oligopolistic in nature and, consequently, each distributor was aware of the practices of its major competitors.

46 *Id.* at 221, 225. The Court was influenced by the defendants' failure to call as witnesses the corporate officers who were in a position to know whether their company had acted pursuant to an agreement. Once the plaintiff's indirect evidence created an inference of concerted action, the Court shifted the burden of proof to the defendants to provide affirmative proof of independent action. See also *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364, 393, 401 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Masonite Corp.*, 316 U.S. 265 (1942).


48 *Id.* (citing *Theatre Enter., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

must prove the existence of a contract, combination, or conspiracy among the defendants.\textsuperscript{50} The evidence must also show that the defendants conspired to "achieve an unlawful objective."\textsuperscript{51}

The difficulty does not lie in providing evidence of concerted action, but rather in establishing that the defendants acted to achieve an unlawful end. The court stated that "it is axiomatic that the typical conspiracy is 'rarely evidenced by explicit agreements,' but in typical cases must be proved by 'inferences that may be drawn from the behavior of the alleged conspirators.'"\textsuperscript{52}

Because of this difficulty, indirect evidence may be essential in proving a conspiracy in violation of sections 1 and 2 of the Sherman Act.

Although a plaintiff may present indirect evidence to prove an alleged antitrust violation, "[a]ntitrust law . . . limits the range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy."\textsuperscript{53} Conduct that is as consistent with lawful activity as with an illegal conspiracy will not, by itself, prove a violation of antitrust laws.\textsuperscript{54} If a defendant can establish a pro-competitive explanation for its actions, circumstantial evidence may not create an inference of a conspiracy.\textsuperscript{55}

C. Conscious Parallelism and Oligopolistic Behavior as Indirect Evidence of a Conspiracy

Evidence of conscious parallelism is often introduced by plaintiffs in antitrust conspiracy cases as proof of concerted parallel action. Conscious parallelism or tacit collusion is a process by which firms in a concentrated market recognize their price and output interdependence by implicitly sharing their monopoly power and setting prices at a profit-maximizing, supracompetitive level.\textsuperscript{56} As previously discussed, this behavior is typical

\textsuperscript{50} Id. at 553 (citing International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1265 (8th Cir.), cert. denied, 449 U.S. 1063 (1980)).
\textsuperscript{51} Id. (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)).
\textsuperscript{52} Id. (quoting H.L. Moore Drug Exch. v. Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981)).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993). See also Barry v. Blue Cross, 805 F.2d 866, 869 (9th Cir. 1986) (reasoning that if a plaintiff alleges a horizontal agreement to fix prices involving conscious parallelism, "[e]conomic interdependence exists only if an industry has relatively
in an oligopoly.\textsuperscript{57} In order to prove conscious parallelism that amounts to a violation of section 1 of the Sherman Act,\textsuperscript{58} the evidence must show that "each participant knew that concerted action was contemplated and invited, gave its adherence to and participated in the scheme, and understood that cooperation was essential to the plan."\textsuperscript{59}

Evidence of conscious parallelism alone is not enough to prove a conspiracy unless the additional factors, such as knowledge of the scheme and a willingness to participate, are present. In addition, if the plaintiff presents a theory of conscious parallelism to prove a conspiracy, the plaintiff must show that the "defendants engaged in consciously parallel action . . . which was contrary to . . . good faith business judgment."\textsuperscript{60} Accordingly, if the defendants succeed in asserting an independent business justification for their action, the allegation of conspiracy will fail.\textsuperscript{61} Therefore, parallel action, even if conscious on the part of the defendants, does not establish a violation of section 1 of the Sherman Act.\textsuperscript{62} Conscious parallelism is "not in itself unlawful."\textsuperscript{63}

Arguably, the decision to cap commissions involved a complicated analysis of business considerations, including the reduction of input costs. The Third Circuit Court of Appeals held in \textit{Houser v. Fox Theatres Management Corp.}\textsuperscript{64} that where the defendant's challenged decisions were based on a complicated estima-

\begin{footnotesize}
\textsuperscript{57} See supra text accompanying notes 27-35.
\textsuperscript{58} Note that most claims are actually pursued under section 1 of the Sherman Act because of the difficulty of establishing a section 2 violation.
\textsuperscript{60} Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980), \textit{cert. denied}, 454 U.S. 927 (1981).
\textsuperscript{61} Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989).
\textsuperscript{63} \textit{Brooke Group}, 509 U.S. at 227 (1993). In \textit{Brooke Group}, a cigarette manufacturer brought an antitrust action against a competitor, alleging a violation of the Robinson-Patman Act. Specifically, the plaintiff alleged that the defendant had engaged in a predatory pricing scheme. Although this case did not involve an alleged section 1 antitrust conspiracy claim, the Supreme Court's discussion of conscious parallelism is important to consider in this context.
\textsuperscript{64} 845 F.2d 1225 (3d Cir. 1988).
\end{footnotesize}
tion of potential costs and benefits, the defendant's actions fell within its broad discretion to make business decisions.65

The previous discussion presents important issues in determining the summary judgment standard in antitrust conspiracy cases. If the plaintiff relies on circumstantial evidence of a conspiracy, is there a heightened standard to defeat a defendant's motion for summary judgment? The following discussion considers the summary judgment standard in general and then determines how courts interpret this standard in antitrust conspiracy cases. Specifically, this Comment considers the arguments for and against summary judgment in the travel agency litigation and whether the court applied the proper standard in denying summary judgment.

IV. DEFEATING THE MOTION FOR SUMMARY JUDGMENT IN THE TRAVEL AGENCY LITIGATION: THE SUMMARY JUDGMENT STANDARD IN ANTITRUST CONSPIRACY CASES

The airlines, in an attempt to avoid costly and what they believed to be unnecessary litigation, moved for summary judgment, claiming that there was not sufficient evidence before the court to warrant a trial on the merits.66 The court, however, denied the motion for summary judgment on August 23, 1995.67 The arguments, both in support of and in opposition to the motion for summary judgment, as well as the court's order, raise important questions regarding the current standard for summary judgment in antitrust conspiracy cases.

A. THE STANDARD FOR SUMMARY JUDGMENT GENERALLY

Rule 56(c) of the Federal Rules of Civil Procedure establishes when a court may grant summary judgment in favor of the moving party prior to trial. If, on the basis of depositions, affidavits, and other materials, it can be shown that "there is no genuine issue as to any material fact," the moving party will be entitled to judgement as a matter of law.68 The advisory committee notes

65 Id. at 1232.
67 In re Travel, 898 F. Supp. at 691.
68 Fed. R. Civ. P. 56(c).
to Rule 56 state that the purpose of the summary judgment procedure "is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." 69

The Supreme Court established the standard for a Rule 56 motion for summary judgment in Celotex Corp. v. Catrett. 70 If a reasonable jury could return a verdict for the nonmoving party, summary judgment should not be granted. 71 Courts will not make findings of fact, but will look for a genuine issue of fact that warrants a trial. The moving party is not required to introduce evidence that negates the nonmoving party's allegations, but must establish an absence of evidence supporting an essential element of the claim. 72 Consequently, summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 73

Furthermore, in determining whether to grant summary judgment, "the non-moving party is always entitled to the benefit of all favorable inferences and that all genuine issues of fact must be resolved by a jury." 74 All reasonable questions as to the existence of alleged facts should be resolved in favor of the nonmoving party. 75 The nonmoving party, however, must introduce evidence showing there is a genuine issue for trial. 76 In other

69 Fed. R. Civ. P. 56(c) advisory committee's note.
70 477 U.S. 317 (1986). In Celotex, the plaintiff alleged that her husband died as a result of exposure to products containing asbestos which were manufactured or distributed by the defendants. The plaintiff alleged negligence, breach of warranty and strict liability. Although the district court granted summary judgment in favor of the defendant, the Court of Appeals reversed. The Supreme Court, in reversing the Court of Appeals' decision, stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327 (quoting Fed. R. Civ. P. 1).
72 Celotex, 477 U.S. at 323.
73 Id. at 322.
75 Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., 669 F.2d 1026, 1031 (5th Cir. 1982).
76 Fed. R. Civ. P. 56(e). Rule 56(e) defines the burden on the nonmoving party, stating that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the ad-
words, the court considers the entire record, not just the allegations or denials made in the pleadings, in determining whether to grant a summary judgment motion.\textsuperscript{77} The opposing party's inferences do not need to be more probable than those of the moving party, but they must be able to be reasonably inferred from the facts.\textsuperscript{78} In the final determination, the judge must consider whether "there is reason to believe that the better course would be to proceed to a full trial."\textsuperscript{79} Summary judgment "is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances."\textsuperscript{80} Therefore, the moving party must make a strong showing that there is no genuine issue to be resolved by a jury trial.

B. The Initial Debate: Is Summary Judgment Appropriate in Antitrust Conspiracy Cases?

Before \textit{Celotex}, courts were reluctant to grant summary judgment in antitrust litigation. This hesitancy was exemplified by \textit{Poller v. Columbia Broadcasting System, Inc.}\textsuperscript{81} In \textit{Poller}, CBS had a network agreement with the plaintiff, a Milwaukee UHF station. CBS, however, anticipated an amendment to the Federal Communications Commission's multiple ownership rules, which would allow CBS to purchase UHF stations. Therefore, CBS acquired an option to purchase another UHF station. Once the amendment took effect, CBS exercised the option and subsequently terminated its contract with the plaintiff. Accordingly,

\begin{itemize}
  \item \textsuperscript{77} Austin Prods. Co. v. Workers' Compensation Insurers' Rating Assoc., 867 F.2d 1552, 1560 (8th Cir.), \textit{cert. denied}, 492 U.S. 920 (1989).
  \item \textsuperscript{78} WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988) (citing Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 495 (5th Cir. 1982)).
  \item \textsuperscript{79} Anderson, 477 U.S. at 255 (citing Kennedy v. Silas Mason Co., 334 U.S. 249 (1948)).
  \item \textsuperscript{80} Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143, 1148 (8th Cir. 1979) (citing Unlaub Co. v. Sexton, 568 F.2d 72, 76 (8th Cir. 1977); Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 209-10 (8th Cir. 1976)).
  \item \textsuperscript{81} 368 U.S. 464 (1962).
\end{itemize}
the plaintiff alleged that the defendant conspired to eliminate the plaintiff from the broadcast field in Milwaukee.\textsuperscript{82}

The trial court granted the defendants' motion for summary judgment and the court of appeals affirmed. The Supreme Court, however, criticized the decision to grant summary judgment in the case given the complex nature of antitrust litigation. The Supreme Court stated:

We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."\textsuperscript{83}

Therefore, the Court found that there was a genuine issue of material fact to be addressed by a jury.\textsuperscript{84}

The Supreme Court subsequently reaffirmed its position that summary judgment should be granted sparingly in antitrust cases. In \textit{Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.},\textsuperscript{85} the Court reversed a decision to grant summary judgment, although the plaintiffs had not introduced direct evidence of concerted action on the part of the defendants.\textsuperscript{86} The plaintiff, a retailer of burial monuments and bronze grave markers, claimed that the defendants conspired to monopolize the manufacture and sale of bronze grave markers, thus violating sections 1 and 2 of the Sherman Act.\textsuperscript{87} Specifically, the plaintiff alleged that the defendants engaged in various activities aimed at decreasing the plaintiff's sales. Nevertheless, the district court granted summary judgment in favor of the defendants.\textsuperscript{88}

The Supreme Court, in reviewing the case, noted the circumstantial evidence that had been presented, including: (1) all of the memorial parks refused the installation of the plaintiff's markers; (2) the plaintiff was required to pay a fee for installing its markers, while other lot owners were not required to pay such a fee; (3) one of the defendants visited many of the memo-

\begin{itemize}
\item \textsuperscript{82} Id. at 466.
\item \textsuperscript{83} Id. at 473 (citation omitted).
\item \textsuperscript{84} Id. at 467.
\item \textsuperscript{85} 394 U.S. 700 (1969).
\item \textsuperscript{86} Id. at 704.
\item \textsuperscript{87} 15 U.S.C. §§ 1, 2 (1994).
\item \textsuperscript{88} \textit{Norfolk}, 394 U.S. at 701.
\end{itemize}
rrial parks on numerous occasions; and (4) one of the defendant's pamphlets on cemeteries suggested practices which had the effect of erecting competitive barriers to retailers other than the cemeteries themselves. The plaintiff challenged the business justifications offered by the defendants for these actions. The Supreme Court found that this circumstantial evidence allowed an inference of conspiracy. Citing Poller's words of caution that summary judgment should be used sparingly in antitrust cases, the Court held that summary judgment in the defendants' favor was improper.

Both Poller and Norfolk highlight the Supreme Court's early concern regarding summary judgment in antitrust cases. The Supreme Court placed a high burden on the moving party to establish that the evidence did not give rise to an inference of conspiracy. As a result, many courts simply did not grant summary judgment in antitrust cases. Courts were generally concerned that a trial on the merits was the only way to achieve a proper result given that conspiracy cases focus on the state of mind of the defendants. Therefore, because antitrust cases often involve the establishment of intent and motive in a complex factual context, summary judgment was granted only in extreme situations.

Nevertheless, the Supreme Court upheld summary judgment in First National Bank v. Cities Service Co. The plaintiffs alleged that seven oil companies maintained an oil cartel and conspired to boycott Iranian oil in all markets. In 1951, Iran nationalized properties held by the Anglo-Iranian Oil Co. The defendants allegedly hoped to boycott Iranian oil until Iran returned the Anglo-Iranian property rights.

Before the nationalization of Anglo-Iranian property, the plaintiff obtained a contract with the National Iranian Oil Com-

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89 Id. at 701-02.
90 Id. at 703.
91 Id. at 704. Norfolk reaffirmed the probative significance of conscious parallelism, giving great weight to parallel action in conspiracy cases. 1 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 59 (1978). This Comment suggests that although conscious parallelism may have probative value when combined with other facts, mere conscious parallelism alone does not defeat a defendant's motion for summary judgment.
93 Id. at 259-61.
94 Id. at 260.
95 Id.
pany (NIOC) in which NIOC would sell fifteen million metric tons of crude oil to plaintiff and some of his associates. The plaintiff claimed that the defendants conspired to prevent him from selling any oil obtained under the contract with NIOC. Furthermore, Cities Service allegedly broke off negotiations with the plaintiff and joined the conspiracy after receiving an offer to buy crude oil from Kuwait at an even lower price than the plaintiff could offer. This conspiracy allegedly undercut the plaintiff's ability to sell oil under his contract with NIOC.

The Supreme Court held that the plaintiff failed to introduce evidence creating an inference of a conspiracy on the part of Cities Service. The Court found that Cities Service's business decision to cease negotiations with the plaintiff was an independent business judgment and not an action in furtherance of an illegal conspiracy. Furthermore, the evidence established that entering into a contract with plaintiff would have produced negative consequences for Cities Service.

The Court stated, "not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable." If the probative evidence establishes an inference of independent business motive that is more probable than the inference of concerted action, summary judgment may be granted.

Cities Service is one of the first examples of the Supreme Court's willingness to grant summary judgment in antitrust conspiracy cases. Furthermore, even though Poller and Norfolk discouraged summary judgment in antitrust cases, lower federal

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96 Id.
97 Id. at 260-61.
98 Id. at 288.
99 Id. at 277.
100 Id. at 280.
101 Id. After nationalization, the possessed company announced its intention to sue any purchaser of Iranian oil. Therefore, oil purchasers, such as Cities Service, refused to purchase Iranian oil. The Court found this explanation of Cities' conduct more plausible than plaintiff's theory of a boycott directed against him. Id. at 278.
102 Courts typically state that ambiguity from competing inferences should be viewed in the light most favorable to the nonmoving party. Celotex, 477 U.S. at 323. In Cities Service, however, the plaintiff was required to overcome the ambiguity of the evidence, even though the court should have resolved the ambiguity in the plaintiff's favor.
courts are beginning to follow a different trend\(^{108}\) by granting summary judgment in certain antitrust cases.\(^{104}\) Recent case law suggests that the Supreme Court is also shifting from its previous reluctance to grant summary judgment in antitrust litigation.\(^{105}\) Although the standard is not clearly defined and the burden of proof may depend on the evidence presented by the plaintiff to prove conspiracy, a plaintiff can no longer assume that summary judgment will be used sparingly.

Must a plaintiff meet a stricter or "heightened" standard to defeat summary judgment in antitrust conspiracy cases? Some courts insist that there is not a heightened standard for summary judgment in complex antitrust cases. On the other hand, if the nonmoving party is relying solely on indirect, circumstantial evidence of a conspiracy, it may be required to meet an arguably stricter standard in antitrust litigation in order to defeat a motion for summary judgment. A nonmoving party may be required to offer evidence that tends to exclude the possibility that the moving parties acted independently.

\(^{108}\) For example, in Lamb's Patio Theatre, Inc. v. Universal Film Exchange Inc., 582 F.2d 1068, 1069 (7th Cir. 1978), the Seventh Circuit affirmed the district court's decision to grant summary judgment against the plaintiff. A theater brought suit challenging a motion picture distributor's rejection of the theater's bid for a film. The district court found that the distributor had legitimate business considerations for rejecting the plaintiff's offer, noting that the plaintiff failed to introduce evidence that countered the defendant's explanation of independent action. Therefore, the plaintiff was required to introduce more than a departure from competitive bidding as evidence of a conspiracy, and because the plaintiff did not, the district court granted summary judgment. Independent business justifications outweighed an inference of concerted action. \textit{Id.} at 1070.

\(^{104}\) See, e.g., Midwest Radio Co. v. Forum Publ'g Co., 942 F.2d 1294, 1296 (8th Cir. 1991); \textit{see also} Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978), \textit{cert. denied}, 440 U.S. 982 (1979). In \textit{Lupia}, the Seventh Circuit recognized the potential importance of allowing summary judgment in antitrust conspiracy cases. It stated:

\textit{[T]he very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation . . . . The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.}

\textit{Lupia}, 586 F.2d at 1167.

\(^{105}\) \textit{See infra} notes 106-153 and accompanying text.
C. THE ARGUMENT FOR A STRICTER STANDARD TO DEFEAT SUMMARY JUDGMENT

1. Defining the Standard

In their motions for summary judgment, the airlines argued that if the plaintiffs were relying on circumstantial evidence to prove a conspiracy, and they were, then the plaintiffs were required to meet a stricter standard of proof to defeat the motion.¹⁰⁶ In support of this argument, the airlines cited Matsushita Electric Industrial Co. v. Zenith Radio Corp.,¹⁰⁷ in which the Supreme Court held that, in certain situations, evidence used to defeat a summary judgment motion must tend to exclude the possibility that the defendants acted independently. The Court stated:

[c]onduct 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 or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence “that tends to exclude the possibility” that the alleged conspirators acted independently. [The nonmoving parties] in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the nonmoving parties].¹⁰⁸

Accordingly, the airlines asserted that the travel agents, in relying on circumstantial evidence, were required to introduce evidence that tended to exclude the possibility that the airlines did not act independently in capping travel agent commissions.¹⁰⁹

In Matsushita, the plaintiffs, Zenith and National Union Electric, claimed that Japanese television manufacturers conspired to raise and maintain artificially high prices for television receivers sold by the plaintiffs in Japan, and conversely, set low prices for television receivers exported and sold in the United States. This conspiracy allegedly resulted in substantial losses for the plaintiffs. The district court granted the defendant's motion for
summary judgment.\textsuperscript{110} The court found that “the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it.”\textsuperscript{111}

The Third Circuit Court of Appeals reversed the district court’s decision, first ruling that much of the excluded evidence was actually admissible.\textsuperscript{112} This evidence established a possible inference of conspiracy and as a result, summary judgment was improper in the case.\textsuperscript{113} The Third Circuit recognized, however, that “there are legal limitations upon the inferences which may be drawn from circumstantial evidence . . . .”\textsuperscript{114}

The Supreme Court, in review of this decision, found that predatory pricing schemes, such as the one alleged, usually harm those who enter into them.\textsuperscript{115} The Court observed, “any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them.”\textsuperscript{116} After an extensive economic analysis of predatory pricing, the Court held that “the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a ‘genuine issue for trial’ exists within the meaning of Rule 56(e).”\textsuperscript{117}

In defining a summary judgment standard, the Court suggested that “if the factual context renders respondents’ claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”\textsuperscript{118} This statement suggests that the Court could require a stricter standard of proof to defeat summary judgment in certain antitrust conspiracy cases, as the airlines suggested in their motion for summary judgment. The pivotal factor in Matsushita, however, was the lack of a plausible economic motive for the defendants to engage in a conspiracy. The Court did not discuss whether a

\begin{footnotes}
\item[110]\textit{Matsushita}, 475 U.S. at 579. It is important to note that the district court ruled that a majority of the plaintiff’s evidence was inadmissible. \textit{Id.} at 578.
\item[111]\textit{Id.} at 579.
\item[112]\textit{Id.} at 580.
\item[113]\textit{Id.}
\item[114]\textit{Id.} (quoting \textit{In re Japanese Elec. Prods. Antitrust Litig.}, 723 F.2d 238, 304 (3d Cir. 1983)).
\item[115]\textit{Id.} at 589.
\item[116]\textit{Id.} at 588.
\item[117]\textit{Id.} at 596.
\item[118]\textit{Id.} at 587 (emphasis added).
\end{footnotes}
heightened standard would apply if circumstantial evidence supported both a conspiracy and independent action. In dictum, however, the Court indicated that the plaintiffs may be required to meet a strict standard even if they have advanced a plausible economic motive to conspire on the part of the defendants. The Court stated:

We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.* . . . establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.119

Although this was not the case in *Matsushita*, the Court suggested that even if a conspiracy is economically plausible, the nonmoving party may be required to meet a stricter standard if the evidence is ambiguous.

The Court in *Matsushita* applied the standard to defeat a directed verdict established in *Monsanto Co. v. Spray-Rite Service Corp.*120 In *Monsanto*, Spray-Rite, a distributor of Monsanto chemical products, claimed that Monsanto and several of its distributors conspired to fix the resale prices of Monsanto products. As a result of this alleged conspiracy, Spray-Rite claimed that it was unable to purchase Monsanto’s products. Furthermore, Spray-Rite claimed that Monsanto canceled its distributorship and encouraged distributors to boycott Spray-Rite in furtherance of the conspiracy.121 The jury found that Monsanto had conspired with one or more of its distributors to set resale prices and to limit Spray-Rite’s access to Monsanto herbicides. Additionally, the jury found that Monsanto adopted compensation programs and shipping policies in furtherance of this conspiracy.122

The Supreme Court upheld the jury’s decision.125 In order to create a jury issue:

there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a con-

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119 Id. at 597 n.21 (citation omitted).
121 Id. at 757.
122 Id. at 757-58.
123 Id. at 759.
scions commitment to a common scheme designed to achieve an unlawful objective.\footnote{124} Therefore, the evidence must tend to exclude independent decision-making in order to defeat a directed verdict.

Following this decision, the Matsushita Court required the plaintiff to present evidence that tended to exclude the possibility that the defendant acted independently to defeat the motion for summary judgment. When does the Matsushita-Monsanto standard apply? Although the airlines asserted that Matsushita creates a stricter standard to defeat a summary judgment motion, the Matsushita Court did not clearly address this issue. Therefore, it is unclear when a plaintiff must introduce evidence that tends to exclude the possibility that the plaintiffs acted independently.

Other courts have relied on the Matsushita decision as support for summary judgment in antitrust cases. In Key Financial Planning Corp. v. ITT Life Insurance Corp.,\footnote{125} the Tenth Circuit Court of Appeals upheld summary judgment, reformulating the summary judgment standard in Matsushita as a two-part test. Plaintiff Key alleged that its termination as an agent for ITT was the result of a conspiracy to drive Key out of business. First, the court asked whether the plaintiffs evidence of a conspiracy was as consistent with the defendant's permissible independent interests as with an illegal conspiracy, and therefore ambiguous. Second, if the evidence was ambiguous, the court required that the plaintiffs introduce evidence that tended to exclude the possibility that the defendants were pursuing independent interests.\footnote{126}

\footnotetext[124]{Id. at 768. See Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991) ("[T]he mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy.") (citing Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 827 (11th Cir.), cert. denied, 495 U.S. 924 (1990)). See also Helicopter Support Sys. v. Hughes Helicopter Inc., 818 F.2d 1530, 1535 (11th Cir. 1987) (in order to defeat a properly supported motion for summary judgment, a plaintiff must present evidence that tends to exclude the possibility that the defendants acted independently).}

\footnotetext[125]{828 F.2d 635 (10th Cir. 1987).}

\footnotetext[126]{Id. at 640 (citing Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987)). In Gibson, a developer brought an antitrust claim against the city and one of the developer's competitors claiming that they had acted with conspiratorial motive in placing various restrictions on the developer's condominium and shopping mall projects. The court held that "[a]ll of the evidence presented by the plaintiffs is ambiguous: it can support either a permissible or a conspiratorial motive. There is no evidence that tends to exclude the possibility that the defendants were pursuing independent interests." Gibson, 818 F.2d at 725.}
Key introduced evidence of meetings and conversations about itself, plans to open new offices in their home city more than a month before the company’s termination and evidence of incentives given to Key’s agents to transfer to one of the defendant’s agencies. The defendant, however, asserted that it terminated Key’s contract because of inadequate production. The court found that the evidence introduced by the defendants supported this justification. Therefore, it held that it was possible that the defendants were acting independently. As a result, the evidence was ambiguous.

The court then discussed whether there was evidence that tended to exclude the possibility that the defendants acted independently. According to the court’s holding, ambiguous evidence alone does not exclude the possibility of independent action. Therefore, “the independent plausible explanations for the defendants’ conduct bring this case within the Matsushita test for awarding summary judgment in a case alleging a conspiracy to violate the antitrust laws.” As a result, the court granted summary judgment.

The Seventh Circuit Court of Appeals also applied the Matsushita summary judgment standard in an antitrust conspiracy case. In Market Force Inc. v. Wauwatosa Realty Co., the plaintiffs were required to introduce evidence that tended to exclude the possibility that the defendants acted for their own independent interests to defeat summary judgment. The plaintiff, a real estate broker who represented buyers, alleged that the defendants real estate agencies violated antitrust laws by conspiring to pay the buyer’s broker less than the listing broker’s commissions. The court, in applying the Matsushita standard, stated:

In antitrust cases, the analysis . . . permits a defendant to rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Once the defendant has met this initial burden, a plaintiff must provide specific factual support for its allegations of con-

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127 Key, 828 F.2d at 639.
128 Id. at 640.
129 Id.
130 Id. (quoting Gibson, 818 F.2d at 725).
131 906 F.2d 1167 (7th Cir. 1990).
132 Id. at 1170-71 (citing Monsanto, 465 U.S. at 768).
sporcy tending to show that the defendant was not acting independently.\textsuperscript{133}

Thus, the court suggested the application of a stricter standard. The evidence presented by the plaintiffs supported both the existence of a conspiracy and the existence of independent action on the part of the defendants.\textsuperscript{134} Nonetheless, the plaintiff argued that the defendants conspired through a series of informal communications about the intended future policy to pay a lower commission to buyer's brokers and that the defendants also made various hostile statements about the plaintiff, indicating a desire to conspire against it. The court noted, however, that the defendants introduced legitimate business reasons for the actions that the plaintiff suggested were part of an illegal conspiracy.\textsuperscript{135} Because the court determined that the evidence in the case was ambiguous, it stated, "the plaintiff may survive summary judgment only by putting forth 'evidence that tends to exclude the possibility that the defendants were pursuing . . . independent interests.'"\textsuperscript{136}

*Market Force*, therefore, supports the airlines' position that a plaintiff in an antitrust case must meet a stricter standard to defeat a motion for summary judgment. The court concluded:

The teaching of *Monsanto* and *Matsushita* is that, in order to survive a summary judgment motion, a plaintiff must put forward evidence that tends to exclude the possibility of independent action. A defendant is entitled to summary judgment when it "provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy."\textsuperscript{137}

The Ninth Circuit Court of Appeals, in *City of Long Beach v. Standard Oil Co.*,\textsuperscript{138} reaffirmed the position that a defendant may be entitled to summary judgment if the defendant offers evidence of a justifiable independent business motivation. If only indirect, circumstantial evidence is presented in an antitrust

\textsuperscript{133} Id. at 1171 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)).

\textsuperscript{134} Id. at 1173.

\textsuperscript{135} Id. The defendants reasoned that communication about their intention to pay a lower commission to buyer's brokers was a normal way to inform brokers of their changes in policies and that these policies were decided upon based on the different services that buyer's brokers provide in comparison to listing brokers.

\textsuperscript{136} Id. (quoting Gibson, 818 F.2d at 724) (alteration in original).

\textsuperscript{137} Id. at 1174 (quoting City of Long Beach v. Standard Oil Co., 872 F.2d 1401, 1406 (9th Cir. 1989), cert. denied sub. nom. Exxon Corp. v. City of Long Beach, 493 U.S. 1076 (1990)).

\textsuperscript{138} 872 F.2d 1401, 1406 (9th Cir. 1989).
conspiracy case, then "a defendant is entitled to summary judgment if it provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy."\textsuperscript{139} The City of Long Beach sued several oil companies claiming that they conspired to fix and maintain uniform, noncompetitive prices for crude oil which was produced by one of the city's oil fields.

Although the defendants introduced evidence in support of the assertion that their actions were lawful and motivated by legitimate business concerns, the plaintiffs asserted that market conditions should have caused the defendants to raise crude oil prices. The court held that the plaintiffs "presented significant evidence of an antitrust conspiracy that tends to exclude the possibility of independent action."\textsuperscript{140}

It is this standard that the airlines assert should have been applied in the travel agency litigation. The previous discussion suggests that if the plaintiffs are relying solely on circumstantial evidence that supports both a conspiracy and independent action, the plaintiffs must introduce evidence that tends to exclude the possibility that the defendants acted independently.

2. Conscious Parallelism and a Heightened Standard

Evidence of conscious parallelism is not enough to prove a conspiracy.\textsuperscript{141} But will evidence of conscious parallelism defeat a defendant's motion for summary judgment? In determining whether to grant summary judgment, the Third Circuit Court of Appeals in \textit{Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.},\textsuperscript{142} held that "a plaintiff cannot withstand a summary judgment motion by establishing only consciously parallel behavior on the part of the defendants."\textsuperscript{143} The plaintiffs were required to introduce evidence that tended to exclude the possibility that the defendants acted independently.\textsuperscript{144} To meet this standard in a conscious parallelism case, "a plaintiff also must demonstrate the existence of certain 'plus' factors, for only when these

\textsuperscript{139} Id. (citing T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 632 (9th Cir. 1987)).
\textsuperscript{140} Id. at 1407.
\textsuperscript{141} See \textit{supra} notes 56-65 and accompanying text.
\textsuperscript{143} Id. at 1232.
\textsuperscript{144} Id.
additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently.145

What plus factors will tend to exclude the possibility that the defendants acted independently? The court in Petruzzi's IGA explained that a plaintiff could establish plus factors by introducing: "(1) actions contrary to the defendant's economic interests, and (2) a motivation to enter into such an agreement."146 Thus, the circumstantial evidence must create an inference of concerted action. Mere conscious parallelism is not enough.147

In the travel agency litigation, the airlines claimed that their actions prior to the commissions cap announcement did not amount to a conspiracy and that the plaintiffs introduced only evidence of conscious parallelism which, standing alone, does not establish an antitrust violation.148 Instead, the airlines maintained that they acted for their own economic benefit.149 Furthermore, the airlines denied that any of their actions before the announcement to cap commissions constituted plus factors that would defeat a motion for summary judgment.150 The airlines asserted that Delta never made any public statements to

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145 Id.
146 Id. See also WILLIAM C. HOLMES, 1992 ANTITRUST LAW HANDBOOK § 1.03[3], at 154 (noting that a wide range of circumstantial evidence can be used to establish the required plus factors).

For example, have they attended meetings or conducted discussions at which they had the opportunity to conspire; have they acted against their own economic best interests; have they engaged in parallel behavior that is economically irrational unless an agreement exists; has at least one participant expressly invited common action by the others . . . ?

Id.

147 Participants in a concentrated market anticipate other participants' actions. 6 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1428, at 174 (1986). "The courts approach unanimity in saying that mere interdependent parallelism does not establish contract, combination, or conspiracy required by the Sherman Act § 1." Id. ¶ 1433a, at 208-09; see, e.g., Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989). In Cayman Exploration, the court held that a plaintiff who attempts to prove the existence of a conspiracy with evidence of only conscious parallelism must also establish that "the defendants engaged in consciously parallel action . . . which was contrary to their economic self-interest so as not to amount to good faith business judgment." Cayman Exploration, 873 F.2d at 1361 (quoting Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980), cert. denied, 454 U.S. 927 (1981)).

148 Joint Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 5-6, In re Travel (No. 4-95-107).

149 Id. at 7-8.

150 Id. at 8-9.
signal the commission caps.\textsuperscript{151} In the alternative, if any statements were made concerning possible commission changes, they were in response to questions posed to the airlines by travel agents or the travel agent trade press.\textsuperscript{152} Thus, Delta did not attempt to signal future commission caps in the public media.

Furthermore, the defendants asserted that public statements have never been held to justify a finding of conspiracy. For example, in \textit{United States v. General Motors Corp.},\textsuperscript{153} the court held that "the public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire." Therefore, any general statement made by air carriers could not satisfy the plus factor requirement, which elevates conscious parallelism to a potential conspiracy. The airlines claimed that none of their actions tended to exclude the possibility that they acted independently. Accordingly, the airlines argued that the plaintiffs failed to meet the strict standard required to defeat summary judgment.

\textbf{D. The Argument Against A Strictly Standard to Defeat A Motion for Summary Judgment in Antitrust Conspiracy Cases}

In response to the airlines' assertions, the travel agents argued that there is not a strict standard of proof required to defeat summary judgment in antitrust cases,\textsuperscript{154} citing the Supreme Court's decision in \textit{Eastman Kodak Co. v. Image Technical Services, Inc.}\textsuperscript{155} as support for this proposition. In \textit{Kodak}, the plaintiffs, eighteen independent service organizations (ISOs) filed suit against Eastman Kodak Company claiming that Kodak adopted policies to limit the availability of parts used to service its equipment. The ISOs began servicing Kodak copying machines and micrographic equipment in the early 1980s and alleged that Kodak, by limiting the availability of parts, intended to make it more difficult for the ISOs to service Kodak machines. The district court granted Kodak's motion for summary judgment. The Ninth Circuit Court of Appeals, however, reversed. The Supreme Court granted certiorari to address the summary judgment standard in antitrust cases.

\textsuperscript{151} \textit{Id.} at 9.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} 1974-2 Trade Cas. (CCH) ¶ 75,253, at 97,667 to 97,671 (E.D. Mich. 1974).
\textsuperscript{154} See Plaintiffs' Memorandum of Points and Authorities in Opposition to the Motion for Summary Judgment at 4, \textit{In re Travel} (No. 4-95-107).
The Court in *Kodak* discussed the *Matsushita* decision and specifically focused on *Matsushita*’s holding that where an alleged conspiracy is not economically plausible, the plaintiff must introduce evidence that tends to exclude the possibility that the defendants acted independently.\(^{156}\) The Court rejected the proposition that this language creates a special burden in challenging a defendant’s motion for summary judgment. If a plaintiff’s economic theory is reasonable, there is no heightened summary judgment standard according to the Court.\(^{157}\) The opinion stated:

The Court’s requirement in *Matsushita* that the plaintiff’s claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless if its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party’s inferences be *reasonable* in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff’s theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.\(^{158}\)

Thus, evidence that creates a reasonable inference of a conspiracy will defeat a motion for summary judgment. Must the evidence also tend to exclude the possibility that the defendants acted independently? The Court did not address the issue of whether, if the plaintiffs rely solely on circumstantial evidence, the evidence must tend to exclude independent action.

It should be noted that *Kodak* did not involve a conspiracy claim. The primary concern was whether the absence of market power in the primary photocopier market entailed an absence of market power in the repair services aftermarket. Therefore, it is unclear whether the standard articulated in *Kodak* should be applied to an antitrust conspiracy case in which only circumstantial evidence is offered. The *Kodak* decision simply adds to the confusion surrounding summary judgment in antitrust conspiracy cases.

*Kodak* did not overrule *Matsushita*, but merely argued that the “tends to exclude” language does not create a heightened stan-

\(^{156}\) *Id.* at 468 (citing *Matsushita*, 475 U.S. at 587-88, 595-98).

\(^{157}\) *Id.*

\(^{158}\) *Id.* at 468-69 (emphasis added).
In fact, it can be argued that applying a heightened standard encroaches on the constitutional province of a jury. "A rule that sifted all evidence through a higher standard, such as 'more likely than not' or 'tends to exclude the possibility' would effectively require an antitrust plaintiff to survive scrutiny from the bench first at a standard higher than the jury itself would be asked to apply." Arguably, then, a plaintiff's case that relies solely on circumstantial evidence which creates a reasonable inference of a conspiracy should be considered by a jury.

Before *Kodak*, the Ninth Circuit Court of Appeals, in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* held that a conspiracy should not be inferred from circumstantial evidence if doing so would have an anti-competitive effect. The defendants were major oil companies, which produced crude oil, refined it into gasoline and sold it to various distributors, the bulk of whom were independently franchised service stations. The oil companies required the franchise dealers to purchase directly from the franchisor. The oil companies sold gasoline to each franchise at prices that were only occasionally changed. As a result of this structure, the plaintiffs alleged that the oil companies were able to control the price of gasoline. The oil companies allegedly conspired to raise and stabilize oil prices by (1) exchanging price and price-related information, (2) creating an artificial scarcity of crude oil and refined oil in the western United States, and (3) agreeing not to compete in bidding on the plaintiff's annual sale of petroleum, thus violating sections 1 and 2 of the Sherman Act. The district court, however, granted summary judgment for the defendants.

The Ninth Circuit Court of Appeals, in reviewing the lower court's decision, considered the *Matsushita* standard that the plaintiff must present "sufficiently unambiguous evidence" that "tends to exclude the possibility" that "the defendants were acting independently." The court hesitated to apply this standard in instances where inferences of both lawful action and conspiracy could be drawn, stating:

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160 Id. at 577.
162 Id. at 436.
163 Id. at 438 (quoting *Matsushita*, 475 U.S. at 597).
We do not take these latter comments as suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible. Allowing the district court to make that decision would lead to a dramatic judicial 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 . . . . 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.\(^{164}\)

The court rejected the emphasis placed on circumstantial evidence. Granting summary judgment because the evidence creates both an inference of conspiracy and an inference of innocent conduct "would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case . . . . Circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences."\(^{165}\) The court reasoned that a plaintiff relying solely on circumstantial evidence would not be able to effectively challenge actions that could violate antitrust laws. "Since direct evidence will rarely be available, such a reading [of *Matsushita*] would seriously undercut the effectiveness of the antitrust laws."\(^{166}\)

Notwithstanding these concerns, the court recognized the danger of allowing certain kinds of ambiguous evidence to create an inference of conspiracy.\(^{167}\) In *Matsushita*, the Supreme Court feared that allowing an inference of conspiracy from evidence of price cutting could deter competitive conduct because "cutting prices in order to increase business often is the very essence of competition."\(^{168}\) In response to that concern, the *Petroleum Products* court held that a conspiracy should not be inferred from circumstantial evidence if doing so might have an

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\(^{164}\) *Id.*  
\(^{165}\) *Id.* at 439.  
\(^{166}\) *Id.*  
\(^{167}\) *Id.*  
\(^{168}\) *Matsushita*, 475 U.S. at 594.
The trial court must determine whether the protection of independent conduct outweighs the costs associated with the decrease in the strict application of the antitrust laws. If so, the plaintiff must present unambiguous evidence that will not have an anti-competitive effect.169

The Petroleum Products court thus narrowed the application of the “tends to exclude” standard. When a plaintiff relies entirely upon circumstantial evidence of a conspiracy, the court may grant summary judgment if: (1) the defendant’s conduct is consistent with independent action, and (2) permitting an inference of conspiracy would significantly deter beneficial procompetitive behavior. Only if these elements are met must a plaintiff offer evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully.170

Furthermore, addressing the issue of circumstantial evidence versus direct evidence, the court held that because the deterrence of competitive behavior could only occur if an inference of conspiracy was established by circumstantial evidence, “the Matsushita standards do not apply when the plaintiff has offered direct evidence of conspiracy.”171 Therefore, according to Petroleum Products, if the plaintiffs have introduced direct evidence of a conspiracy, the court does not ask whether this evidence tends to exclude the possibility that the defendants acted independently. Accordingly, it is only when a plaintiff relies solely on ambiguous circumstantial evidence, a court must consider whether allowing an inference of illegal activity will infringe on procompetitive activity.

Petruzzi’s IGA, discussed previously, also exemplifies the lack of a clear standard for summary judgment. It is clear that evidence of conscious parallelism alone will not defeat summary judgment. The court rejected the application of a stricter standard, stating:

A non-movant’s burden in defending against summary judgment in an antitrust case is no different than in any other case. Rather, in all cases summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at

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169 Petroleum Products, 906 F.2d at 439.
170 Id. at 440.
171 Id. at 441.
trial and the moving party is entitled to judgment as a matter of law.\textsuperscript{172}

Therefore, circumstantial evidence of conscious parallelism does not create an inference of illegal activity. But, if the circumstantial evidence is ambiguous in that it supports both an inference of conspiracy and an inference of lawful conduct, a court must be careful that an inference of illegal activity does not infringe on procompetitive activity.\textsuperscript{173}

Furthermore, the court held that the \textit{Matsushita} decision did not authorize summary judgment if both inferences of illegal conduct and lawful conduct could be shown. In fact, "a nonmovant plaintiff in a section 1 case does not have to submit direct evidence, i.e., the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence."\textsuperscript{174} The court found that, according to \textit{Matsushita}, "to survive summary judgment in the absence of direct evidence or \textit{strong} circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible."\textsuperscript{175}

Since the \textit{Kodak} decision, the Third Circuit Court of Appeals, in addressing an antitrust conspiracy case, asserted that there is not a special burden on plaintiffs to defeat summary judgment.\textsuperscript{176} In \textit{Big Apple BMW}, the plaintiff claimed that BMW and some of its dealers conspired to prevent the plaintiffs from attaining a BMW franchise and that this action was "pursuant to a contract, combination or conspiracy with certain BMW dealers to fix, raise, maintain and stabilize prices of BMW automobiles in the United States."\textsuperscript{177} The district court granted summary judgment on two of the three alleged counts of conspiracy.\textsuperscript{178}

The Third Circuit reversed the district court's decision.\textsuperscript{179} In doing so, the court, citing \textit{Kodak}, asserted that a "non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case."\textsuperscript{180} Thus, all reasonable inferences must be drawn in a light most favorable to the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{172} \textit{Petruzzi's IGA}, 998 F.2d at 1230 (quoting \textit{Big Apple BMW v. BMW of N. Am., Inc.}, 974 F.2d 1358, 1363 (3d Cir. 1992), \textit{cert. denied}, 507 U.S. 912 (1993)).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 1231 (emphasis added).
\item \textit{Big Apple BMW, Inc. v. BMW of N. Am., Inc.}, 974 F.2d 1358 (3d Cir. 1992).
\item \textit{Id.} at 1360 (quoting the Plaintiff's Complaint at 34).
\item \textit{Id.} at 1361.
\item \textit{Id.} at 1383.
\item \textit{Id.} at 1363.
\end{enumerate}
\end{footnotesize}
non-movant, and if a reasonable jury could find for the nonmovant, summary judgment should not be granted. 181

Interestingly, however, the court acknowledged that possible inferences, "when drawn from ambiguous evidence, are circumscribed in antitrust cases because a fine line demarcates concerted action that violates antitrust law from legitimate business practices." 182 In fact, at trial, an antitrust plaintiff may be required to show that the alleged concerted action is distinguishable from legitimate independent conduct. Therefore, at the summary judgment stage, a plaintiff, although not required to "eliminate all possible independent justifications by the manufacturer," must introduce evidence that "tends to exclude the possibility of independent action." 183 Thus, the Third Circuit opinion suggested two conclusions: (1) a plaintiff, if relying on ambiguous evidence, must present evidence that tends to exclude the possibility of independent action, and (2) the "tends to exclude" language does not create a stricter or heightened standard, but is consistent with the standard enunciated in Celotex. Big Apple BMW, relying on Kodak, highlights the uncertainty surrounding summary judgment in antitrust conspiracy cases.

If the plaintiff’s theory is economically implausible, “a court must consider whether the plaintiff presented ‘sufficiently unambiguous’ evidence that the defendants conspired.” 184 Therefore, while the court did not exclude the possibility that circumstantial evidence could defeat summary judgment, it held that if the evidence is not strong, the theory of conspiracy offered by the plaintiff must be economically plausible and permitting an inference of conspiracy must not chill procompetitive behavior. Additionally, even though the court rejected a heightened standard, it said that the inferences drawn from the evidence must be reasonable and the "focus must remain on the evidence proffered by the plaintiff and whether that evidence ‘tends to exclude the possibility that [the defendants] were acting independently.’" 185 The court failed to articulate a standard, noting instead that a number of factors must be considered in making a summary judgment determination. Furthermore, the court did not completely reject the “tends to exclude” language.

181 Id.
182 Id.
183 Id. at 1365 (quoting Monsanto, 465 U.S. at 768).
184 Petruzzi's IGA, 998 F.2d at 1233.
185 Id. at 1232 (citing Monsanto, 465 U.S. at 764).
The plaintiffs in the travel agency litigation cited the previously discussed case law to establish that there is not a heightened summary judgment standard in antitrust conspiracy cases. If the theory of conspiracy is economically plausible, and the circumstantial evidence creates a reasonable inference of a conspiracy, the plaintiffs argued that they were not required to offer evidence that tended to exclude the possibility that the defendants acted independently.

The plaintiffs offered circumstantial evidence that arguably created a reasonable inference that the airlines' parallel action constituted a potential conspiracy. The plaintiffs alleged that: (1) Delta used the press and other avenues to signal its intention to cap commissions and to monitor the response of its competitors; (2) the defendant's knew in late January or early February that Delta was going to announce the commission caps and then made internal preparations to match the commissions; (3) the defendant's had numerous telephone contacts, meetings and discussions at "critical" times; (4) the defendants made repeat internal references to the need for an industry consensus or industry support with respect to lower commission and distribution costs; (5) the defendants could not have unilaterally imposed commission caps given that past failed attempts to do so; and (6) the plan would not have resulted in an economic benefit for each airline had they all not imposed commission caps.\footnote{Plaintiffs' Memorandum of Points and Authorities in Opposition to the Motion for Summary Judgment at 10, In re Travel Agency Commission Antitrust Litigation.}

In their memorandum, the plaintiffs stated that there was "substantial conduct evidence adduced in the case, (and evidenced in dozens of documents), which shows evidence of their conscious commitment to a coordinated reduction in base commissions."\footnote{Id. at 11.} Thus, the plaintiffs argued, there existed a genuine issue of material fact to be considered by a jury at trial.

E. THE ORDER DENYING THE MOTION FOR SUMMARY JUDGMENT

The court's order denying summary judgment in In re Travel Agency Commission Antitrust Litigation rejected the view that "Matsushita requires the plaintiffs to meet a stricter or heightened standard of proof to defeat summary judgment."\footnote{In re Travel, 898 F. Supp. at 690.} The court restated the proposition from Kodak that "Matsushita demands only that the nonmoving party's inferences be reasonable in or-
der to reach the jury, a requirement that was not invented, but merely articulated, in that decision."\textsuperscript{189} The court, however, did not address the evidence offered by the plaintiffs whether the plaintiffs' theory of conspiracy was economically plausible, or whether an inference drawn from circumstantial evidence would chill procompetitive behavior in the case. The court acknowledged:

Antitrust law limits the range of permissible inferences from ambiguous evidence in a section 1 [Sherman Act] case . . . . To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of section 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.\textsuperscript{190}

Despite this statement, the opinion did not specifically address whether the evidence was ambiguous or tended to exclude the possibility of independent action.

The court held that the evidence offered by the plaintiffs permitted an inference of conspiracy. This evidence included a set of "occurrences, speeches, meetings, events, official and unofficial corporate utterances, and conferences at which information was exchanged."\textsuperscript{191} Although circumstantial, the court felt that the evidence raised an issue of triable fact, and therefore, denied summary judgment.\textsuperscript{192} A court may grant summary judgment for the defendants in an antitrust case, the opinion stated, if the "plaintiff's evidence is insufficient to present a triable case showing that the accused economic occurrence resulted from other than independent action."\textsuperscript{193}

Therefore, the plaintiff's evidence permitted two conclusions: (1) the defendants reached an explicit agreement to cap commissions, or (2) the defendants, following Delta's lead, took advantage of their oligopsonistic power, and sent messages to each other indicating that if they acted in concert, they would reap great economic benefit. Apparently, according to the court, the evidence introduced by the plaintiffs was credible and supported a reasonable inference of anticompetitive activity. As a result, the court denied the summary judgment motion.

\textsuperscript{189} \textit{Id}. (quoting \textit{Kodak}, 504 U.S. at 468).
\textsuperscript{190} \textit{Id}. (quoting \textit{Health Care Equalization Comm. v. Iowa Med. Soc'y}, 851 F.2d 1020, 1032 (8th Cir. 1988)).
\textsuperscript{191} \textit{Id}. at 691.
\textsuperscript{192} \textit{Id}.
\textsuperscript{193} \textit{Id}.
F. THE MOVE TOWARD DEFINING A STANDARD FOR SUMMARY JUDGMENT IN ANTITRUST CONSPIRACY LITIGATION

Although courts have moved away from their original reluctance to grant summary judgment in antitrust cases, the summary judgment standard is unclear. It is evident, however, that courts consider a number of factors in determining whether to grant summary judgment in an antitrust conspiracy case. The first question, as posed in *Matsushita*, is whether the theory of conspiracy is economically plausible. If it is not, according to the *Matsushita* decision, the plaintiffs must offer evidence that tends to exclude the possibility that the defendants acted independently. *Matsushita* leaves open this issue of which standard applies if the theory of conspiracy is economically plausible.

The courts in *Key* and *Market Force* held that if the evidence is ambiguous (because it creates both an inference of conspiracy and an inference of lawful activity), the plaintiff must meet the stricter standard established in *Matsushita*. In *Petroleum Products*, however, the court also considered whether permitting an inference of conspiracy would pose a significant deterrent to procompetitive behavior. If these elements are met, the plaintiffs must offer evidence that tends to exclude the possibility that the defendants acted independently.

Antitrust litigation is an expensive undertaking by both sides. Summary judgment in these cases is desirable if it reduces cost and spares defendants from unwarranted law suits. Because courts have held that ambiguous evidence will not establish a conspiracy, it follows that a plaintiff should be required to introduce additional evidence or else fail to defeat a motion for summary judgment. The question remains, what must this evidence establish? The defendants in the travel agency litigation would argue that this evidence must tend to exclude the possibility that the defendants acted independently. The plaintiffs, however, urge that the evidence need only create a reasonable inference of a conspiracy, thus creating a triable issue for a jury to consider. Consistent with the plaintiffs' argument, the court in the travel agency litigation believed that a plaintiff need only present a triable issue in order to reach a trial.194

194 *Id.* The order states:

The net teaching of *Celotex, Liberty Lobby, Matsushita, Eastman Kodak,* and *Health Care Equalization*, is that summary judgment is to be granted in favor of defendants in an antitrust case if plaintiffs' evidence is insufficient to present a triable case showing that the ac-
Antitrust conspiracy claims are often brought against defendants who are members of an oligopoly or oligopsony, such as the airlines in this case. The theory of oligopolistic interdependence suggests that in a market where there are few sellers, or few buyers, a price reduction that results in a substantial expansion of output for one actor will result in such a substantial contraction in the output of the other actors and that they will also respond with a reduction. Because a seller knows that such an action will result in a prompt reaction to his competitors, an oligopolist will be less likely to reduce prices. Therefore, actors in an oligopoly are limited by their interdependence with their competitors.

What happens in the case of an oligopsony, such as the airline industry, when buyers control the price at which they will pay for certain goods? In contrast to the case where a seller lowers prices and receives an immediate expansion in output, the travel agents argued that controlling the price at which a buyer purchases a product or service may not have the same effect. For example, by capping commissions and lowering the cost at which the airlines pay travel agents for their services, an airline would actually suffer great losses if not followed by its competitors. In their Memorandum in Opposition to the Motion for Summary Judgment, the plaintiffs called attention to Exhibit A in which the defendants apparently recognized that had most of the actors had not capped commissions, "the commission change would not 'stick,' and cost savings would not be realized," and that there would have been a great possibility of some sort of backlash against those who had capped commissions, even if the reductions were subsequently withdrawn. Therefore, it is possible that the airlines were using their oligopsonistic power to manipulate travel agency commissions and were not actually controlled by the appearance of oligopsonistic interdependence.

\[\text{Antitrust Summary Judgment} \]

\[\text{Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment at 1 n.1, In re Travel (No. 4-95-107).}\]
If, however, one believes that actors in an oligopsony are actually economically interdependent, and therefore unable to avoid parallel action, then it might be economically reasonable to require plaintiffs claiming an antitrust conspiracy violation to introduce evidence that tends to exclude the possibility that the defendants acted independently. In other words, plaintiffs would be required to present evidence indicating that the defendants actually agreed to take action. And, in fact, the travel agents may have satisfied that burden by introducing evidence that the defendants could not have acted independently without suffering great economic loss.

But the reality is that these complicated considerations simply contribute to the failure on the part of the courts to articulate an exact standard for summary judgment in antitrust conspiracy cases. It is difficult to draw the line between economic reality and illegal activity. The previous discussion indicates that courts often struggle with the need to promote procompetitive behavior and yet accept that often a conspiracy can only be shown with circumstantial evidence that could also support independent activity on the part of the defendants. A standard that effectively takes into account these competing interests will be difficult to articulate. Nevertheless, however difficult, the need to promote procompetitive conduct and defer to the business judgments of actors in an industry calls for caution in denying summary judgment in antitrust conspiracy cases.

V. CONCLUSION

In an antitrust conspiracy case, the question should not be whether there is a strict or heightened standard. Instead, the focus should be on what type of evidence will create a reasonable inference of a conspiracy. Arguably, as suggested by much of the case law, the evidence must tend to exclude the possibility of independent action. Direct evidence of a conspiracy will most likely meet this requirement. Only when the evidence is ambiguous must a plaintiff offer additional evidence. Thus, the inquiry is evidentiary in nature. No heightened standard is asserted or necessary.

The purpose of antitrust conspiracy law is to prevent unfair manipulation of a given market by a select few within that market. Antitrust conspiracy law, however, should not diminish procompetitive activity or disrupt the natural economic workings of an industry. Antitrust litigation can expose actors to great expense that may actually hurt the industry in the long
run. Therefore, plaintiffs should be required to demonstrate that a reasonable inference of a conspiracy can be drawn from the evidence. If only indirect ambiguous evidence of a conspiracy can be proffered, a plaintiff should also be required to present evidence that tends to exclude the possibility that the defendants acted independently.

This requirement ensures that defendants are not subject to the enormous cost of litigation simply because they are competing with other actors in the industry. As many courts have found, mere conscious parallelism is not enough to prove a conspiracy. Consequently, parallel action should not defeat a motion for summary judgment.

What happened in the travel agency litigation? It appears that although the judge did not apply a “tends to exclude” strict standard to defeat summary judgment, the outcome would have been the same. The evidence presented by the plaintiffs indicated that the parallel action taken by the airlines raised an inference of conspiracy. The evidence of meetings and possible signals did not exclude the possibility of independent action. But the plaintiffs made a powerful argument that should have been considered by a jury. Had only one or two of the airlines capped commissions, those airlines may not have received an economic benefit. The evidence suggested that, unless all airlines followed suit, a commission cap would have been ineffective, thus tending to exclude the possibility that the defendants acted independently.

The travel agency litigation posed a serious question: what must plaintiffs offer to successfully challenge oligopolistic behavior? To illustrate the confusion, consider the following statement recently made by the Supreme Court:

[A]ntitrust law forbids all agreements among competitors . . . that unreasonably lessen competition among or between them in virtually any respect whatsoever. Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might be desirable.\(^{198}\)

Accordingly, conscious parallelism and oligopolistic behavior, though historically not enough to establish a conspiracy, will be attacked in the future. The courts have a long way to go to es-

 establish a clear standard in antitrust conspiracy cases at the summary judgment stage.