March 9, 2022

Ninth Circuit Analyzes Parallel Conduct Allegations and Does Not Find "Something More" Suggesting an Antitrust Conspiracy

- On March 7, the Ninth Circuit affirmed a lower court's grant of a motion to dismiss a complaint alleging that manufacturers of dynamic random access memory (DRAM) conspired to reduce their output in violation of Section 1 of the Sherman Act.
- The court held that Plaintiffs' allegations of Defendants' parallel conduct and several "plus factors" were insufficient to plausibly infer a conspiracy. The court's "plus factor" analysis is instructive.

Under the Supreme Court's 2007 decision in *Bell Atlantic* v. *Twombly*, when plaintiffs bring antitrust conspiracy claims based on allegations of parallel conduct, in order to survive a motion to dismiss those allegations "must be placed in a context that raises a suggestion of a preceding agreement" rather than "merely parallel conduct that could just as well be independent action." Thus, a complaint predicated on parallel conduct allegations will often allege additional so-called "plus factors" suggesting that the existence of a conspiracy is plausible rather than simply possible.

Individual Purchaser Plaintiffs v. *Samsung Electronics Co. (In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litigation)* involves claims brought on behalf of a putative class asserting that manufacturers of DRAM agreed to reduce their output in violation of Section 1 of the Sherman Act. In this case, Plaintiffs alleged parallel conduct by the manufacturers and several plus factors suggesting, according to the Plaintiffs, that the Defendants entered into a conspiracy. On March 7, the United States Court of Appeals for the Ninth Circuit upheld the district court's decision finding that the Plaintiffs' allegations failed to plausibly allege the existence of a conspiracy. At issue in the appeal were the Plaintiffs' alleged plus factors – the parties did not dispute the district court's finding that Plaintiffs "adequately established parallel conduct by alleging that Defendants contemporaneously restricted their DRAM production." Ultimately, the court held that "[w]hile both parties' explanations for Defendants' actions are conceivable," Plaintiffs failed to "allege additional facts that push their theory over 'the line between possibility and plausibility.'" Thus, "Plaintiffs' factual allegations do not amount to the 'something more' required to support a plausible inference of conspiracy."

The court's opinion provides a useful analysis of the Plaintiffs' alleged plus factors.

- **Price signaling.** According to the court, the Plaintiffs' complaint alleged that one of the Defendants leaked its intention to raise prices to an industry analyst. This did not suffice to plausibly allege an agreement among Defendants because (1) the alleged conspiracy was to reduce output, not to increase prices; and (2) the leak was a "unilateral action [that] does not suggest a conspiracy under the Sherman Act."

- **Complex, simultaneous, and historically unprecedented decreases in capital investment.** Allegations that the Defendants announced within a period of two months that industry capital expenditures would decrease were "more consistent with conscious parallelism" than a conspiracy. In particular, the court reasoned that the Defendants' sequential announcements indicated that they "could have independently and rationally reached the same decision to follow market leader."

- **Supply cuts against Defendants' self-interest.** In evaluating Plaintiffs' argument that the Defendants' supply cuts were against their self-interest, the court took into account allegations in the complaint that one Defendant had allegedly reduced its supply prior to the formation of the alleged agreement. This, the court said, showed "that restraining supply without an agreement was not as perilous as Plaintiffs claim." The court also reasoned that it was economically rational for the market leader to independently cut supply and for the two other Defendants to follow the leader "and focus on profitability" notwithstanding the Plaintiffs' claim that it would also be economically rational for the other Defendants to try to capture market share from the leader.

- **Public statements encouraging supply cuts.** Plaintiffs pointed to various public statements by the Defendants regarding capacity, capital expenditures, predictions about the market, and strategies – including statements in response to questions on investor calls. However, the court concluded that the statements were "largely consistent with unilateral conduct in an interdependent market" and that "[i]f no conspiracy existed, Defendants would likely make the same public statements about their observations, predictions, and strategies for the future, particularly in response to investor and analyst questions."

- **Changed conduct between the start and end of the class period.** The court reasoned that just as the Defendants' supply reduction at the beginning of the class period was "consistent with conscious parallelism in an interdependent market," so too was the Defendants' subsequent increase in capacity at the end of the class period.

- **Information exchanges between Defendants regarding future supply and demand.** As is often the case in antitrust conspiracy cases, Plaintiffs alleged that Defendants' participation in trade associations and communications with third-party industry research firms supported an inference of an agreement. However, the court explained, "Plaintiffs do not allege facts demonstrating that Defendants actually communicated or exchanged information at these trade association meetings, much less that they entered an agreement to coordinate supply decisions while there." With respect to the issue of research firms, the court wrote that "Plaintiffs have not alleged that Defendants had any control over what was included in their industry reports or that the other Defendants read them."

- **High market concentration.** The court wrote that the Plaintiffs' allegations of high market concentration were consistent both with facilitating collusion and with facilitating conscious parallelism, and "allegations that are merely consistent with conspiracy are not enough."

- **Prior criminal convictions for price fixing.** Plaintiffs pointed to criminal price-fixing charges brought against the Defendants and others by the United States Department of Justice over a decade prior to the start of the alleged conspiracy at issue in the instant case. Two of the Defendants pleaded guilty. Here, in contrast to the other alleged plus factors, the court said that this factor "circumstantially supports Plaintiffs' theory."

Ultimately, the court concluded that "the totality of Plaintiffs' allegations does not suggest anything more than conscious parallelism" and that the "plus factors that Plaintiffs contend are most indicative of conspiracy—simultaneous capex decreases, 'perilous' supply cuts, public statements about the market forecast, and changed conduct between 2016 and 2018—are all consistent with Defendants, as competitors in a highly concentrated market, reacting to the same market pressures and taking parallel action to serve their interests."

This case is useful for understanding how courts might interpret circumstantial allegations asserted in support of a conspiracy where there is an absence of a direct allegation of an agreement. As the court noted, "[p]laintiffs bringing a claim under Section 1 often must rely on such circumstantial evidence of parallel conduct and plus factors to sustain a case past the pleading stage." In these cases, parties are in the position of persuading courts that the same actions are or are not indicative of a conspiracy. The court's reasoning is also useful in helping to evaluate the antitrust risk associated with particular business conduct.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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