In re Chocolate Confectionary Antitrust Litigation

801 F.3d 383 (3d Cir. 2015)

FISHER, Circuit Judge.

In these consolidated antitrust conspiracy cases, [the Plaintiffs] appeal the District Court's summary judgment in favor of defendants, The Hershey Company ("Hershey"); Hershey Canada, Inc.; Nestlé USA, Inc.; and Mars, Inc. and Mars Snackfood U.S., LLC (collectively, "Mars") (all appellees are collectively referred to as "the Chocolate Manufacturers").

According to the Plaintiffs, the Chocolate Manufacturers conspired to raise prices on chocolate candy products in the United States three times between 2002 and 2007. . . . [T]his case is about how courts should view evidence of a contemporaneous antitrust conspiracy in a foreign market when that evidence is offered to prove the existence of an antitrust conspiracy in the U.S. market. Here the foreign conspiracy involved the Chocolate Manufacturers' Canadian brethren: Hershey Canada, Mars Canada, Inc., and Nestlé Canada (collectively, "the Canadian Chocolate Manufacturers"), as well as others.

We agree with the District Court that the Canadian conspiracy evidence is ambiguous and does not support an inference of a U.S. conspiracy for two simple reasons. First, the people involved in and the circumstances surrounding the Canadian conspiracy are different from those involved in and surrounding the purported U.S. conspiracy, and second, the evidence that the Chocolate Manufacturers in the United States knew of the unlawful Canadian conspiracy is weak and, in any event, relates only to Hershey. Because we also conclude that the Plaintiffs' other traditional conspiracy evidence is insufficient to create a reasonable inference of a U.S. price-fixing conspiracy, we will affirm.[2]

I.

A. The U.S. Chocolate Industry

The U.S. chocolate confectionary market is dominated by three companies: Hershey, Mars, and Nestlé USA.

Hershey is a publicly traded company based in Hershey, Pennsylvania, and sells such famous brands as Hershey's Milk Chocolate Bar and Reese's Peanut Butter Cups.

Mars is a privately held company headquartered in Virginia and is the parent company of Mars Snackfood U.S. Among Mars's most notable brands are M&Ms and Milky Way.

Nestlé USA is a U.S.-based company wholly owned by Switzerland-based Nestlé S.A. Nestlé USA sells such popular brands as Nestlé Crunch and Butterfinger.

Besides offering a variety of chocolate candy brands, the Chocolate Manufacturers offer a variety of sizes. Some sizes, such as single- and king-size bars ("singles" and "kings"), are for immediate consumption, while others, including bags containing miniature or bite-size candies, are for future consumption. This case focuses on immediate consumption candy sizes.

The U.S. chocolate market is highly concentrated. During the relevant period, these three companies controlled more than 75% of the U.S. market, with Hershey controlling approximately 42%, Mars controlling approximately 28%, and Nestlé USA controlling roughly 8%.

The primary raw materials for the various chocolate products at issue are generally the same: cocoa, sugar, dairy products, peanuts, almonds, fats, and oils. Naturally, the costs of these ingredients affect the prices of the chocolate products. To hedge against cost increases for these ingredients, the Chocolate Manufacturers take advantage of futures exchanges. . . .

Parallel price increases—in which one company raises prices and its rivals follow—are not uncommon in this industry. Although the price increases have not followed a consistent playbook—some have involved changes in candy weight while others have involved delays between the initial and subsequent pricing actions—the Chocolate Manufacturers raised prices together in 1979, 1981, 1984, 1986, 1991, and 1995.

B. The Purported U.S. Conspiracy

According to the Plaintiffs, the Chocolate Manufacturers conspired to raise U.S. list prices on chocolate candy products three times between 2002 and 2007.

On December 7, 2002, following a seven-year period of stagnant prices, Mars announced list price increases on singles and six packs by 3.5 cents per bar effective December 9, 2002. On December 9, Hershey announced an identical price increase on singles and a slightly lesser price increase on six packs; in addition, Hershey announced price increases on kings and ten packs (all effective January 2003). On December 11, Nestlé USA's prices moved too, effectively matching Mars and Hershey's price increases on singles, Hershey's price increase on kings, and Mars's greater price increase on six packs. Days later, Mars matched Hershey's increase on kings and exceeded Hershey's increase on ten packs.

Next, in November 2004, Mars initiated another price increase, this time on future consumption products. Nearly one month later, Hershey followed Mars's price increase on future consumption products and also raised prices on singles, kings, and six packs. Soon after, Mars matched Hershey's increases. Nestlé USA followed with nearly identical increases several days later.

Finally, on March 23, 2007, Mars initiated the final increase during the alleged conspiracy period when it increased prices on singles and kings. Hershey matched the increases on April 4, and Nestlé USA followed the next day.

The conspiracy was furthered, the Plaintiffs argue, by the Chocolate Manufacturers exchanging information on each other's planned price increases before publicly announcing those increases. For example, an internal Hershey document shows that Hershey had information as early as September 2002 that Mars was "considering a price increase due to rising cocoa costs, and in announcing the 2002 Mars price increase to the Hershey board of directors, Hershey's CEO, Rick Lenny, characterized the Mars increase as "roughly in line with expectations."

In addition, the Plaintiffs highlight various opportunities the Chocolate Manufacturers had to conspire. For example, in 2002, at a time when the U.S. chocolate market was not thriving, the Hershey Trust, Hershey's controlling shareholder, put Hershey up for sale. Hershey's rivals, including Nestlé and Cadbury, were among the interested buyers. Through the proposed sale process, Nestlé and Cadbury obtained information about Hershey's business, but the record is unclear to what extent Hershey's most sensitive information, such as commodities cost coverage, changed hands and who received it. The Hershey Trust terminated the sale process in September 2002, shortly before the first price increase in the purported conspiracy.

The Plaintiffs also point north to Canada, where the Canadian chocolate market was embroiled in its own antitrust conspiracy at the same time as the purported U.S. conspiracy. . . .

From 2002 to 2007, Mars Canada, Hershey Canada, Nestlé Canada, and Cadbury Adams Canada ("Cadbury Canada") allegedly conspired to limit competition on trade spend and to raise prices. [This alleged conspiracy was orchestrated by a direct purchaser and major distributor in Canada]. . .

Additionally, there is evidence suggesting a price-fixing conspiracy among the Canadian Chocolate Manufacturers, including secret meetings involving pricing discussions. In 2005, for example, Nestlé Canada CEO Bob Leonidas told Cadbury Canada President David Sculthorpe that Nestlé Canada would be increasing prices and proved it with a copy of a not-yet-issued price-increase announcement, and Sculthorpe promised that Cadbury Canada would follow.

The Canadian scheme was ultimately the subject of a criminal investigation by the Canadian Competition Bureau. Cadbury Canada cooperated with the investigation, and Hershey Canada did as well, with Hershey pleading guilty to one count of price fixing stemming from a 2007 incident and paying a $4 million (Canadian) fine. In 2013, Nestlé Canada, Mars Canada, [and others] were indicted in Canada. The Canadian case is still pending.

C. The Procedural History

The cases on appeal have a long history. They began as ninety-one separate civil actions that were filed against the Chocolate Manufacturers as well as their Canadian counterparts and several Cadbury entities. . . . [T]he actions brought claims under §§ 4 and 16 of the Clayton Act, alleging that the defendants engaged in a U.S. price-fixing conspiracy in violation of § 1 of the Sherman Act. In 2008, the Judicial Panel on Multidistrict Litigation consolidated the actions for pretrial proceedings in the U.S. District Court for the Middle District of Pennsylvania.

After the cases were consolidated, each of the defendants moved to dismiss the complaints for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, but on March 4, 2009, the District Court denied the motions. . . .

At the close of discovery, each of the Chocolate Manufacturers filed separate summary judgment motions. On February 26, 2014, the District Court granted summary judgment in favor of the Chocolate Manufacturers. . . . The Plaintiffs filed timely appeals.

II.

. . . Because substantive antitrust law is intertwined with our standard of review, we first discuss the underlying legal principles. The Plaintiffs' claims arise from § 1 of the Sherman Act. . . . Although its language is broad, § 1 only prohibits unreasonable restraints of trade. . . . Therefore, in some cases, courts must apply "the so-called rule of reason," a case-by-case inquiry designed to assess whether challenged conduct is an anticompetitive practice. . . .

In per se cases like this one, the plaintiff need only prove that the defendants conspired among each other and that this conspiracy was the proximate cause of the plaintiff's injury. . . . Without proof of concerted action, the plaintiff's claim fails because the very essence of a Section 1 claim is the existence of an agreement. Therefore, proof of a "unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement" is required. Such proof may come in the form of direct evidence, *e.g.*, an explicit admission from a participant that an antitrust conspiracy existed, or circumstantial evidence. An important corollary to the agreement requirement is that § 1 liability cannot be predicated on a defendant's unilateral actions, no matter its anticompetitive motivations. . . .

Returning to our standard of review, the summary judgment standard in antitrust cases is generally no different from the standard in other cases. Here as elsewhere, summary judgment is appropriate when the evidence "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). . . .

[There is, however, an important distinction in antitrust cases. "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). . . . The purpose of this standard is to avoid mistaken inferences that could impose liability for lawful conduct and, consequently, chill the very conduct the antitrust laws are designed to protect.

Under *Matsushita*, the range of acceptable inferences that may be drawn from ambiguous or circumstantial evidence varies with the plausibility of the plaintiffs' theory and the dangers associated with such inferences. If the plaintiff's theory "makes no economic sense" and if drawing inferences in its favor would deter procompetitive conduct, the plaintiff must produce "more persuasive evidence" to support its claim.

Importantly, even when armed with a plausible economic theory, a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment. . . .

III.

The Plaintiffs build their case on a logical enough foundation: three parallel price increases by the Chocolate Manufacturers between 2002 and 2007. Moreover, the Plaintiffs' theory—that the Chocolate Manufacturers conspired to fix prices at supracompetitive levels—makes perfect economic sense. If true, the alleged conduct is also not procompetitive. But despite the facial plausibility of the Plaintiffs' theory and the circumstantial evidence supporting it, we must be cautious. The U.S. chocolate market is a textbook example of an oligopoly, and we cannot infer too much from mere evidence of parallel pricing among oligopolists.

Our caution is based on the economic theory of interdependence, which recognizes the differences between competitive markets (markets with many smaller firms) and oligopolistic markets (concentrated markets with only a few firms). In competitive markets, the theory goes, any one firm's change in output or price would go unnoticed by its competitors because the effects of that firm's increased sales would be so diffused among its numerous competitors. In a concentrated or oligopolistic market, by contrast, a single firm's change in output or price will have a noticeable impact on the market and on its rivals. Therefore, the theory of interdependence posits that any rational decision by an oligopolist must take into account the anticipated reaction of the other firms. The upshot is that oligopolists may maintain supracompetitive prices through rational, interdependent decision-making, as opposed to unlawful concerted action, if the oligopolists independently conclude that the industry as a whole would be better off by raising prices.

Even though this practice of parallel pricing, known as "conscious parallelism," produces anticompetitive outcomes, it is lawful under the Sherman Act for two reasons. First, conscious parallelism is not an agreement. . . . Second, conscious parallelism is lawful not because it is desirable (it is not), but because courts have no effective remedy for the problem.

Accordingly, evidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy. . . . To move the ball across the goal line, a plaintiff must also show that certain plus factors are present. . . . Plus factors are proxies for direct evidence because they tend to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors. Although we have not identified an exhaustive list of plus factors, they may include (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.

Yet in cases alleging parallel price increases, as opposed to some other form of concerted action, the first two factors largely restate the phenomenon of interdependence. . . . Evidence of a motive to conspire means the market is conducive to price fixing, and evidence of actions against self-interest means there is evidence of behavior inconsistent with a competitive market. . . . By nature, oligopolistic markets are conducive to price fixing and will often exhibit behavior that would not be expected in competitive markets. Therefore, these factors are neither necessary nor sufficient to preclude summary judgment, at least where the claim is price fixing among oligopolists.

That leaves traditional non-economic evidence of a conspiracy as the most important plus factor in cases like this one. This plus factor looks for proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

IV.

Lacking direct evidence, the Plaintiffs rely on circumstantial evidence to raise a reasonable inference of a conspiracy. . . . [T]he Plaintiffs presented sufficient evidence of parallel pricing. Therefore, our analysis focuses on whether there are sufficient plus factors to defeat summary judgment.

A. Motive

. . . Given the market concentration and high barriers to entry, the U.S. chocolate confectionary market was ripe for collusion. But evidence of motive without more does not create a reasonable inference of concerted action because it merely restates interdependence.

B. Actions Against Self–Interest

. . . [A]s discussed above, evidence of actions against self-interest means there is evidence of behavior that is inconsistent with a competitive market. . . . [T]he Plaintiffs' economic experts uniformly opined that cost increases could not explain the price increases. . . . Therefore, we agree with the Plaintiffs: . . . the U.S. chocolate market may not have been acting consistently with a competitive market.

This is not to say that the record evidence uniformly supports the Plaintiffs' position; to the contrary, there is substantial support for the Chocolate Manufacturers' contention that their actions were consistent with, and the result of, competition. For example, there is evidence showing that the price increases were taken *in anticipation of* rising costs; that costs actually did go up during the conspiracy period; [etc.].

But the Plaintiffs' victory on this point is a hollow one. As previously noted, given this factor's purpose of identifying conduct inconsistent with a competitive market, it often restates interdependence. . . . To prove a conspiracy here, the evidence must go beyond mere interdependence. . . . The Plaintiffs have fallen well short of this standard. . . .

C. Traditional Conspiracy Evidence

We now consider the most important plus factor in this case: whether there is enough traditional conspiracy evidence to create a reasonable inference that the Chocolate Manufacturers conspired to fix prices. The Plaintiffs identify several categories of traditional conspiracy evidence, but the most important is evidence of the contemporaneous Canadian conspiracy. We therefore discuss the Canadian conspiracy evidence first, followed by the Plaintiffs' other traditional conspiracy evidence.

1. The contemporaneous Canadian conspiracy

The [Plaintiffs argue that] it is reasonable to infer a domestic conspiracy from the evidence of a Canadian conspiracy based on the fact that the Canadian market is a similar adjacent market involving the same participants. . . .

We have not considered what inferences may be permissibly drawn from evidence of a foreign antitrust conspiracy about the existence of a domestic antitrust conspiracy. [The leading treatise, however, provides that] "illegal behavior elsewhere in time or place does not generally allow the inference of an immediate conspiracy." . . .

The Second and Eleventh Circuits have taken [this position]. In *In re Elevator Antitrust Litigation*, 502 F.3d 47, 51–52 (2d Cir. 2007), the Second Circuit concluded that a claim of a domestic or worldwide conspiracy in the elevator and elevator services markets was unsupported by allegations of a conspiracy in the European elevator market given the absence of "any evidence of linkage between" the foreign and domestic conduct. Without such a link, the plaintiffs' argument was merely "if it happened there, it could have happened here." Similarly, in *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1316–17 (11th Cir. 2003), the Eleventh Circuit held that a district court [could reasonably exclude] evidence of contemporaneous foreign conspiracies involving cigarette manufacturers that were also charged with a domestic antitrust conspiracy. The court reasoned that without "some palpable tie between these overseas activities and [the manufacturers'] pricing actions in the United States, the foreign undertakings ... do not tend to exclude the possibility of independent action in the setting of domestic cigarette prices."

We are persuaded by [this] sensible approach. . . . A conspiracy elsewhere, without more, generally does not tend to prove a domestic conspiracy, especially when the conduct observed domestically is just as consistent with lawful interdependence as with an antitrust conspiracy. . . .

Based on our review of the record, we conclude that the Plaintiffs have not adequately linked the Canadian conspiracy to the purported U.S. conspiracy to justify using the former to support an inference of the latter. . . .

2. Possession of advance pricing information

The Plaintiffs also highlight evidence that they argue shows that the Chocolate Manufacturers exchanged pricing information before they publicly announced the price increases.

The "mere possession of competitive memoranda" is not evidence of concerted action to fix prices. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126 (3d Cir. 1999). In *Baby Food*, the plaintiffs also relied on the defendants' possession of documents that contained competitor pricing information in advance of any public announcements. Low-level employees gathered some of the information, but the defendants provided no explanation as to how they obtained other information. Still, we decided that this evidence did not support the plaintiffs' conspiracy claim. For information that came from low-level employees, we viewed it as less worrisome than if it had come from upper-level executives. We also insisted on proof that such information "had an impact on pricing decisions." *Id.* at 125. Even for the advance information from unexplained sources, we noted that "it makes common sense to obtain as much information as possible of the pricing policies and marketing strategies of one's competitors." *Id.* at 126.

In *Flat Glass,* we distinguished *Baby Food* and held that the evidence showing possession of advance pricing information supported an inference of conspiracy. The evidence in *Flat Glass* showed that the information exchanges occurred among the conspiring companies' upper ranks and that the exchanges affected prices. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004). . . .

On the spectrum of advance pricing evidence, the Plaintiff's evidence here is much closer to the evidence in *Baby Food* than to the evidence in *Flat Glass.* The Plaintiffs have no direct or strong circumstantial evidence that the information came from Hershey's competitors, much less their upper-level executives. . . .

In sum, gathering the price information of competitors can be just as consistent with lawful interdependence as with a price-fixing conspiracy. The evidence . . . does not support an inference of a conspiracy.

3. Opportunity and improper communications

The Plaintiffs also contend that the Chocolate Manufacturers had opportunities to conspire during the proposed sale of Hershey and at trade show meetings. The Plaintiffs' evidence is essentially that the executives from the Chocolate Manufacturers were in the same place at the same time, which is insufficient to support a reasonable inference of concerted activity. . . . This evidence of mere opportunities to conspire stands in stark contrast to the evidence of secret meetings and communications in the Canadian conspiracy and cannot alone support an inference of a conspiracy.

[The plaintiffs further argued that] there is evidence of improper communications among the Chocolate Manufacturers' employees and that these communications support an inference of a conspiracy. [The evidence, however, consists of] sporadic communications among individuals without pricing authority are insufficient to create a reasonable inference of a conspiracy. . . . Accordingly, we will not infer a conspiracy from this evidence.

4. Departure from pre-conspiracy conduct

The Plaintiffs argue further that the Chocolate Manufacturers departed from their pre-conspiracy conduct by deciding to follow price increases during the conspiracy period and that this is traditional conspiracy evidence. For a change in conduct to create an inference of a conspiracy, the shift in behavior must be a "radical" or "abrupt" change from the industry's business practices. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000). The Plaintiffs have failed to show such a shift here. . . .

5. Pretextual explanations for price increases

Finally, we address the Plaintiffs' argument that the Chocolate Manufacturers' pretextual explanations for their price increases support a reasonable inference of a conspiracy. *See Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985) (recognizing that pretextual explanations for disputed conduct "would disprove the likelihood of independent action"). The Chocolate Manufacturers publicly explained their price increases by citing rising costs. The Plaintiffs contend these cost-based explanations were cover for the real reason—to advance a price-fixing conspiracy.

The . . . Chocolate Manufacturers lied when they gave their cost-based explanations for their price increases. The Plaintiffs acknowledge that raw materials costs went up during this period; they simply dispute whether the increases were enough to justify the price increases. . . . [T]o the extent the Plaintiffs' pretext argument is that costs were going up but not enough to justify a price increase, their showing of pretext is weak.

But even if the evidence of pretext were stronger, it would still be insufficient to survive summary judgment because pretext alone does not create a reasonable inference of a conspiracy. . . . Requiring something more than pretext to survive summary judgment makes particular sense in cases like this one. In their pretext argument, the Plaintiffs rely on the same evidence they did in arguing that the Chocolate Manufacturers acted contrary to their interests—evidence which we have already said is insufficient to defeat summary judgment. That evidence is also insufficient here. That rising costs may not have been the full or even real reason for increasing prices does not show whether the real reason was interdependence or a conspiracy. Therefore, allegations of pretext must be accompanied by other traditional conspiracy evidence or economic evidence to create a reasonable inference of a conspiracy. Because such other evidence is lacking here, any evidence of pretext is insufficient to preclude summary judgment.

D. Summary of the Evidence as a Whole

Considering the evidence as a whole, the Plaintiffs have failed to create a reasonable inference that the Chocolate Manufacturers more likely than not conspired to fix prices in the U.S. chocolate market. . . .

V.

For the foregoing reasons, we will affirm the District Court's summary judgment.