When Teamwork Warrants a Red Card: An Analysis of Concerted Action when Alleging Conspiracy Among Member Associations

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ABSTRACT

U.S. antitrust law is the ultimate protector of free market competition. The backbone of U.S. antitrust law is the Sherman Antitrust Act. Section 1 of the Sherman Act prohibits unreasonable restraints of trade. Unrestrained market competition protects consumer welfare by preventing monopolistic practices.

A Section 1 violation requires concerted activity between independent actors. Concerted activity is conduct involving two or more independent actors who have an agreement. Currently, a circuit split exists regarding the pleading standard for concerted action in a Section 1 claim.

The circuit split can be divided into two categories: lower pleading standards and higher pleading standards. The pleading standards in each category have limitations that outweigh their benefits, making them inadequate. The limitations produce inflexibility across varying contexts, ambiguity in Section 1 violations, and ultimately, unjust outcomes. Further, the existence of varying standards for the same cause of action contradicts well-settled rules of law. These limitations call for the Supreme Court to address the circuit split.

To address the limitations generated by the circuit split, this Comment recommends that the Supreme Court adopt a uniform, intermediate pleading standard that features the benefits of both standards while overcoming their limitations. The basis of the proposed pleading standard for concerted action stipulates: the promulgation of an association rule, together with a member's prior agreement to abide by the

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association's will establishes the requisite concerted action, if the member either: (1) actively participated in creating the rule, or (2) enforced the rule in some capacity.

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I. INTRODUCTION

F.C. Barcelona and Real Madrid are two of the most notorious soccer teams in the world.[1] Their rivalry, infamously known as "El Clásico," dates back 120 years and is considered by soccer fans to be one of the fiercest competitions in sports.[2] Historically, soccer fans living outside of Spain have been limited to either watching El Clásico on television or traveling to Spain to attend the match in person.[3] Relevent Sports ("Relevent"), a U.S. television promoter, attempted to fix this predicament for Central American soccer fans and host El Clásico in Miami, Florida.[4] Relevent's attempt initially failed due to a policy created by the Fédération

1. *See* Ritabrata Banerjee, *El Clasico: Real Madrid vs Barcelona – A Rivalry Like no Other,* GOAL (Apr. 29, 2022), https://perma.cc/7ABZ-JWX8.
2. *Id.*
3. *See id.*
4. *See* Daniel Kaplan, *U.S. Soccer, FIFA's Efforts to Block International League Games in U.S. Goes Back to Court,* THE ATHLETIC (Mar. 7, 2023), https://perma.cc/Z7H5-YG3X.

Internationale de Football Association ("FIFA").[5] The policy, coined the 2018 policy, restricted where teams could play their in-season games.[6] According to Relevent, FIFA's alleged anticompetitive policy and United States Soccer Federation's ("USSF") membership in FIFA constituted a conspiracy to restrain trade in violation of Section 1 of the Sherman Antitrust Act ("Sherman Act").[7]

The Sherman Act is one of several U.S. federal antitrust laws that protect free market competition.[8] Justice Burton stressed "'[t]he heart of our national economic policy long has been faith in the value of competition,' and the U.S. antitrust laws have stood as the ultimate protector of competition in our free market economy."[9] In 1890, Congress enacted the Sherman Act to promote market competition and keep a check on trusts.[10] Trusts are arrangements by which multiple actors combine resources to gain a market advantage.[11] Section 1 of the Sherman Act makes trusts and other agreements that unreasonably restrain trade illegal.[12] To successfully plead a Section 1 claim, a plaintiff must establish concerted action.[13]

Concerted action is an agreement made between two or more independent actors.[14] Determining what constitutes concerted action may appear straightforward, but controversy persists regarding what conduct fulfills this requirement.[15] A circuit split exists concerning whether to apply a lower or higher pleading standard when assessing the element of concerted action.[16] Arguments on both sides of the split carry validity, but

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5. *See id.*

6. *See id.*

7. *See id; see also* 15 U.S.C § 1.

8. *See* Kaplan, *supra* note 4; *see also* 15 U.S.C § 1.

9. U.S. DEP'T OF JUST. & FTC, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 1 (2017) (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951)).

10. *See* Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C § 1); *see also* 15 U.S.C. § 1 (stating that restraints of trade are illegal without providing any specific examples).

11. *See Sherman Anti-Trust Act (1890),* NAT'L. ARCHIVES: MILESTONE DOCUMENTS [hereinafter U.S. Nat'l Archives and Recs. Admin.], https://perma.cc/JRB7-LVSM (last updated Mar. 15, 2022).

12. *See* 15 U.S.C. § 1.

13. *See* Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991) (indicating that unilateral conduct is not within the scope of a section 1 Sherman Act claim).

14. *See* Michele Floyd et al., *Antitrust Claims: Identification and Analysis*, LEXISNEXIS, https://perma.cc/WSH5-YT4Y (current as of Apr. 18, 2024).

15. *See* Heather Boushey & Helen Knudsen, *Guide to Antitrust Laws,* WHITE HOUSE (July 9, 2021), https://perma.cc/W264-VAP3 (explaining that antitrust law is a complex and intricate area of law).

16. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 310 (2d Cir. 2023); *see also* Osborn v. Visa Inc., 797 F.3d 1057, 1067 (D.C. Cir. 2015); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010); SD3, LLC v. Black & Decker

each position also possesses limitations which make the pleading standards inadequate.[17]

To highlight the benefits and overcome the limitations of each proposed pleading standard, this Comment meticulously examines the circuit split.[18] This Comment recommends the Supreme Court adopt an intermediate pleading standard to establish uniformity in Section 1 litigation.[19] In short, a uniform, intermediate pleading standard for concerted action is necessary to improve flexibility, clarity, and justice in antitrust litigation.[20]

Part II of this Comment discusses the history and background of U.S. antitrust legislation.[21] First, Part II describes the evolution of U.S. antitrust legislation and its purpose.[22] Part II then explains the inner workings of the Sherman Act and emphasizes the importance of concerted action in a Section 1 claim.[23] Lastly, Part II summarizes the pertinent cases addressing concerted action in the circuit split.[24]

Part III demonstrates the need for the Supreme Court to adopt a uniform pleading standard.[25] Part III then evaluates the limitations of both categories of pleading standards currently applied.[26] Finally, Part III recommends that the Supreme Court adopt an intermediate pleading standard for determining concerted action in a Section 1 claim.[27] The basis of the proposed pleading standard for concerted action stipulates: the promulgation of an association rule, together with a member's prior agreement to abide by the association's will establishes the requisite concerted action, if the member either: (1) actively participated in creating the rule, or (2) enforced the rule in some capacity.[28]

(U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008).

17. *See infra* Section III.B.
18. *See id*.
19. *See infra* Section III.C.
20. *See id*.
21. *See infra* Part II.
22. *See infra* Section II.A.
23. *See infra* Section II.B.
24. *See infra* Section II.C.
25. *See infra* Section III.A.
26. *See infra* Section III.B.
27. *See infra* Section III.C.
28. *See id.*

II. BACKGROUND

To better understand this Comment's recommended pleading standard for concerted action, knowing the historical underpinnings of federal antitrust legislation is advantageous.[29]

A. *History and Background of U.S. Antitrust Legislation*

In the 1870s, the Civil War sparked drastic economic changes that transformed the United States' primarily agrarian economy to an industrial economy.[30] The transformation inspired the formation of trusts, which gained unfair advantages in market power due to their ability to pool funds.[31] Trusts are arrangements by which stockholders of several companies transfer their shares to a single set of trustees in exchange for a share of the jointly managed companies' consolidated earnings.[32] Trusts wielded greater market power than other businesses, suppressing competition across the country.[33] Prior to federal antitrust legislation, states utilized a patchwork of statutory and common law doctrines to regulate private economic power.[34] The patchwork of laws ultimately proved inadequate to deal with the growing market power big businesses wielded.[35] In response, consumers increasingly pressured politicians to draft federal antitrust laws.[36]

Healthy market competition underlies a well-functioning economy.[37] Legislators feared that large businesses with excessive economic power posed a risk of monopolizing markets with unfair business tactics.[38] Thus,

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29. *See* Rudolph J. Peritz, *Frontiers of Legal Thought I: A Counter History of Antitrust Law*, 1990 DUKE L.J. 263, 316 (1990) (discussing the relevance of the history of antitrust law to understanding modern antitrust law).

30. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation,* 81 FORDHAM L. REV. 2279, 2281–82 (2013) (discussing the transition of the United States' economy from agrarian to industrial).

31. *See* The U.S. Nat'l Archives and Recs. Admin., *supra* note 11.

32. *See id.*

33. *See* Collins, *supra* note 30, at 2289–2292 (discussing the difficulties faced by smaller business entities due to the rise of trusts during the United States's economic transition).

34. *See* Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy,* WHITE HOUSE (July 9, 2021) [hereinafter *Importance of Competition*], https://perma.cc/W264-VAP3. Basic economic theory demonstrates that competition leads to lower prices, higher quality goods and services, greater variety, and more innovation. Where there is insufficient competition, businesses can use market power to charge more, decrease quality, and block competitors. *See id.*

35. *See id.*

36. *See* Collins, *supra* note 30, at 2339 (explaining that a statute was necessary if the federal government was to address the problem of anticompetitive combinations because federal courts do not have criminal jurisdiction over common law crimes).

37. *See* Boushey & Knudsen, *Importance of Competition*, *supra* note 34 (explaining how competition in the market generates optimal economic outcomes for consumers).

38. *See id.*

legislators enacted federal antitrust laws to prohibit anticompetitive conduct depriving consumers of the benefits of competition.[39] Federal antitrust law strives to protect the benefits from competition and counterbalance private economic power.[40]

Antitrust law classifies violations in several categories.[41] Anticompetitive conduct can be classified as either coordinated or unilateral, and further categorized as horizontal or vertical.[42] Coordinated conduct results from an agreement between two or more parties.[43] Horizontal conduct refers to conduct between or among competitors.[44] Generally, coordinated horizontal conduct poses the greatest risk of antitrust violation, while unilateral vertical conduct poses the least risk.[45] Other important considerations for identifying anticompetitive conduct include a business' relevant market,[46] market share,[47] market power,[48] and monopoly power.[49] Enforcers of antitrust law carefully evaluate each of these traits to eliminate anticompetitive conduct.[50]

Both the Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ) Antitrust Division enforce federal antitrust law.[51] These two departments manage different areas of expertise but share the common

39. *See* The Antitrust Laws, U.S. DEP'T OF JUST.,), https://perma.cc/A5RJ-FUPF (last updated Aug. 31, 2023 (discussing the benefits of competition).

40. *See* Boushey & Knudsen, *Importance of Competition*, *supra* note 34.

41. *See Fundamentals of U.S. Antitrust Law Presentation,* LEXISNEXIS, https://perma.cc/L6PZ-6W6Q (current as of June 7, 2024) (explaining the different dichotomies to antitrust litigation).

42. *See id.* (defining unilateral action as actions "that a party takes on its own" and vertical conduct as conduct between entities at different levels in the chain of distribution).

43. *See id.* (stating that coordinated actions typically carry greater risk of antitrust infringement).

44. *See id.* (stating that horizontal conduct typically carries greater risk under antitrust laws).

45. *See id*.

46. *See id*. (defining relevant market as the "boundaries of products or services that compete with each other"). Relevant market considers both the product market, which is the products or services that compete, and the geographic market, which is the area where competition takes place. *See id.*

47. *See id*. (defining market share as how much of the market a specific firm covers, which can be measured by dollar sales, volume, or capacity).

48. *See id*. (defining market power as a firm's ability to raise prices above competitive rates in the market). A firm's market shares typically must be greater than 30% for courts to consider them to have market power. *See id.*

49. *See id*. (defining monopoly power as a firm's "power to control prices or exclude competition").

50. *See* Thomas G. Krattenmaker et. al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 242 (2021) (discussing the importance of considering the relevant market, market share, market power, and monopoly power in antitrust litigation).

51. *See* The Enforcers: The Federal Government, FTC, https://perma.cc/93PF-E6AX (last visited Oct. 11, 2023) (explaining that both the FTC and DOJ Antitrust Division have expertise in different markets of antitrust law).

goal of preserving unrestrained competition.[52] The consumer welfare standard drives antitrust enforcement.[53] The consumer welfare standard focuses on preserving benefits for consumers over preserving benefits for competitors or addressing other public policy issues.[54] The three fundamental federal antitrust laws are the Sherman Act,[55] Clayton Act,[56] and FTC Act.[57] Each act prioritizes consumer welfare to preserve a healthy competitive economy.[58] This Comment specifically analyzes the Sherman Act.[59]

B. The Sherman Act

The Sherman Act is vital to antitrust law.[60] As the nation's oldest federal antitrust law, the Sherman Act forms the backbone of the antitrust system.[61] Sections of the Sherman Act are very short but far-reaching, requiring extensive judicial interpretation to ascertain what conduct is illegal.[62] The Sherman Act established a strong foundation for antitrust regulation, and it continues to protect unrestrained competition today.[63]

Congress passed the Sherman Act as the first federal law to prohibit trusts.[64] Many states implemented similar prohibitive laws at the time; however, these laws only applied to matters of intrastate business.[65] Legislatures created the Sherman Act as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[66] The overarching objective of the Sherman Act is to

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52. *See id*.

53. *See* Fundamentals of U.S. Antitrust Law Presentation, *supra* note 41.

54. *See id.*

55. *See* 15 U.S.C § 1.

56. *See id.* §§ 3, 7, 8.

57. *See* Fundamentals of U.S. Antitrust Law Presentation, *supra* note 41; *see* also 15 U.S.C §§ 41–58.

58. *See* The Antitrust Laws, FTC, https://perma.cc/C68A-CAZX (last visited Oct. 11, 2023).

59. *See* 15 U.S.C § 1.

60. *See* The Antitrust Laws, *supra* note 39.

61. *See Antitrust Law Fundamentals,* LEXISNEXIS, (current as of Feb. 26, 2024), https://perma.cc/38AZ-DLFU.

62. *See* LAW JOURNAL PRESS, ANTITRUST BASICS § 1.02: THE ANTITRUST LAWS, (2024).

63. *See* 15 U.S.C. § 1.

64. *See* Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C § 1); *see also* 15 U.S.C. § 1 (stating that restraints of trade are illegal without providing any specific examples).

65. *See* Collins, *supra* note 30, at 2300 (citing Anderson v. Jett, 12 S.W. 670, 672, (1889); *see also Anderson*, 12 S.W. at 672 (holding that public policy favors competition and any action with the objective of impeding competition is void); Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 672 (1880) (holding that public policy favors competition for consumer benefit).

66. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

protect the public from failures of the market rather than to protect businesses from the workings of the market.[67]

The core provisions of the Sherman Act are sections 1 and 2.[68] Section 1 prohibits unreasonable restraints of trade between parties.[69] Section 2 prohibits monopolization.[70] Both sections can be enforced civilly or criminally.[71] This Comment focuses on Section 1 of the Sherman Act.[72]

1. Section 1 of the Sherman Act

Section 1 of the Sherman Act states, "[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 hereby declared to be illegal."[73] Section 1 violations require: (1) concerted action that; (2) unreasonably restrains trade; and (3) affects interstate or foreign commerce.[74] This Comment primarily focuses on the first element and briefly explains the second and third elements.[75] Understanding the second and third elements helps to grasp the critical nature of the first element to a Section 1 claim.[76]

The third element of a Section 1 claim, interstate commerce, is grounded in the Constitution.[77] To determine whether conduct affects interstate commerce, courts apply either the "flow of commerce" test or the "affecting commerce" test.[78] Both tests require the alleged conduct to adversely impact interstate commerce.[79] While identifying interstate commerce is often straightforward, detecting unreasonable restraints of trade is less clear.[80]

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67. *See* Spectrum Sports v. McQuillan, 506 U.S. 447, 458 (1993) (highlighting the consumer welfare standard as the Sherman Act's primary focus).

68. *See* 15 U.S.C. §§ 1, 2.

69. *See id.* § 1.

70. *See id.* § 2.

71. *See* Antitrust Law Fundamentals*, supra* note 61.

72. *See infra* Sections II.B.1.–C.

73. *Id.* § 1.

74. *See* Floyd, *supra* note 14.

75. *See infra* Sections II.A.–C.

76. *See id.*

77. *See* U.S. CONST. art I, § 8, cl. 3. (stating that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States").

78. Standard Oil v. FTC, 340 U.S. 231, 237 (1951) (applying the flow of commerce test by asking whether goods or services crossed state lines); *see also* Las Vegas Merch. Plumbers Ass'n. v. United States, 210 F.2d 732, 739 (9th Cir. 1954) (applying the affecting commerce test when purely intrastate conduct potentially affects interstate commerce in a substantial or not insubstantial way).

79. *See* Floyd, *supra* note 14.

80. *See id.*

a. Unreasonable Restraints of Trade

A literal interpretation of Section 1 would outlaw the entire body of contract law because all contracts restrain trade.[81] Therefore, Section 1 only prohibits unreasonable restraints on trade.[82] Courts generally apply one of three standards to determine whether conduct unreasonably restrains trade in violation of Section 1.[83]

One standard courts apply is the "per se" rule.[84] Courts apply the "per se" standard to conduct they have held is practically always anticompetitive.[85] Conduct considered "per se" illegal under Section 1 includes conduct presumed to unreasonably restrain trade without need for a critical analysis of the harm caused or the business purpose.[86] Because these restraints "always or almost always" restrict competition, they do not require a showing of market power or an anticompetitive effect.[87] Once a court deems a defendant's business practice illegal "per se", the analysis ends there.[88]

When conduct is not considered illegal "per se", courts apply the rule of reason.[89] The rule of reason is the most common standard for concerted action challenges.[90] Applying this standard, courts consider all relevant circumstances and weigh the threat of harm to competition against the

81. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) (explaining that a literal application of section 1 would prohibit contracts because all contracts restrain trade in some fashion).

82. *See* Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984) (explaining that Section 1 must be read to only prohibit unreasonable restraints of trade).

83. *See* LAW JOURNAL PRESS, ANTITRUST BASICS § 1.03, MODES OF ANTITRUST ANALYSIS, (2024) (explaining that the "per se" rule, the rule of reason, and quick-look analysis can be used to determine whether conduct unreasonably restrains trade).

84. *See id.*

85. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

86. *See id.* (applying the per se standard when the defendant excluded competitors by using preferential routing agreements and its substantial economic power to unreasonably restrain trade); *see also* Floyd, *supra* note 14 (explaining that horizontal agreements to fix prices, horizontal agreements to divide markets, group boycotts, and tying arrangements are common per se section 1 violations).

87. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985); *see also* Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272, 1284 (7th Cir. 1983) (citing Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 49–50 (1977)).

88. *See Nw. Wholesale Stationers, Inc*., 472 U.S. at 289.

89. *See* Floyd, *supra* note 14 (explaining that the rule of reason standard is applied when conduct does not unequivocally restrain competition).

90. *See* ANTITRUST BASICS § 1.03, *supra* note 83 (explaining that the rule of reason is more commonly used due to the controversiality of antitrust violations that are not "per se" violations); *see also, e.g.*, *Cont'l T.V.*, 433 U.S. at 49; *In re* Processed Egg Prods. Antitrust Litig., 962 F.3d 719, 726 (3d Cir. 2020).

likelihood of procompetitive effects.[91] The critical determination is whether the challenged conduct is overall procompetitive or anticompetitive.[92]

Courts must consider whether procompetitive benefits could be achieved by less restrictive means, however, antitrust law does not require businesses to implement the least restrictive means.[93] Factors in the unreasonableness analysis include "specific information about the relevant business, [the businesses'] condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[94] Contrary to the "per se" rule, the rule of reason standard requires the most analysis of the three standards.[95]

For cases in which conduct is not "per se" illegal but a full rule of reason analysis is not required, courts apply a quick-look analysis.[96] In these cases the anticompetitive effects are easily detectable.[97] When a quick-look analysis is appropriate, the court presumes the challenged restraint is anticompetitive, shifting the burden of proof to the defendant.[98] The defendant must then show the procompetitive benefits are greater than the anticompetitive effects of the challenged practice.[99]

Litigants must understand the various standards courts use to find unreasonable restraints of trade.[100] However, claimants must successfully prove the first element—concerted action—before courts consider potential unreasonable restraints of trade.[101]

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91. *See* Nat'l Soc'y of Pro. Eng'rs. v. United States, 435 U.S. 679, 691 (1978) (explaining that courts will consider conduct unlawful if the practice suppresses competition rather than promoting competition).

92. *See* Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

93. *See* Impax Labs., Inc. v. FTC, 994 F.3d 484, 497–98 (5th Cir. 2021).

94. State Oil Co. v. Barkat U. Khan and Khan & Assoc., Inc., 522 U.S. 3, 10 (1997).

95. *See* Floyd, *supra* note 14 (explaining that the "per se" rule requires less analysis than the rule of reason because of the obviousness of anticompetitive outcomes).

96. *See* Cal. Dental Ass'n. v. FTC, 526 U.S. 756, 669 (1999); *see also* Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 82 (1984) (holding that a naked restraint on price and output requires some competitive justification even absent market analysis).

97. *See Cal. Dental Ass'n.*, 526 U.S. at 669; *see also* Nat'l. Soc'y. of Pro. Eng'rs. v. United States, 435 U.S. 679, 692 (1978) (holding that no elaborate industry analysis was required to demonstrate the anticompetitive character of horizontal agreements which refuse to discuss prices or withdraw certain services).

98. *See Cal. Dental Ass'n.*, 526 U.S. at 776.

99. *See id.*

100. *See* Floyd, *supra* note 14.

101. *See* Fisher v. City of Berkeley, Cal., 475 U.S. 260, 265 (1986) (explaining that there can be no liability under Section 1 without the element of concerted action).

b. Concerted Action

Concerted action is an essential element to a Section 1 claim.[102] Concerted action has two sub-elements: (1) an activity involving at least two independent actors and (2) an agreement between those independent actors.[103]

Section 1 prohibits parties from entering into agreements that unreasonably restrain trade.[104] For purposes of a Section 1 claim, both parties must be independent actors.[105] Identifying whether alleged co-conspirators are independent actors is straightforward in actions involving agreements between clear competitors within an industry.[106] However, agreements between subsidiaries and affiliates complicate the analysis.[107] The general rule is that a parent company may not conspire with a wholly-owned subsidiary.[108] Furthermore, "a corporation cannot conspire with its employees, officers, or agents who are acting in the ordinary course of their duties."[109] Some courts recognize an exception if the employees, officers, or agents have a personal stake in achieving the conspiracy's objective.[110]

The independent actors analysis becomes fact-specific when uncertainty exists as to whether the subsidiaries or affiliates are wholly owned by the parent company.[111] In this situation, the primary consideration is whether consumers and competitors perceive the entities as a single entity or as independent parties acting separately.[112] Once the court establishes the two entities as independent actors, it analyzes the second sub-element: an agreement between the independent actors.[113]

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102. *See* Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991) (indicating that unilateral conduct is not within the scope of a Section 1 Sherman Act claim).

103. *See* Floyd, *supra* note 14.

104. *See* 15 U.S.C. § 1.

105. *See* Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp., 786 F.2d 564, 572 (3d Cir. 1986).

106. *See* Floyd, *supra* note 14.

107. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) (stating there is a general rule and exceptions to that rule).

108. *See id.* (holding that a wholly owned subsidiary must be viewed as a single enterprise).

109. Floyd, *supra* note 14.

110. *See* H & B Equip. Co. v. Int'l Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978).

111. *See* Floyd, *supra* note 14 (explaining that in cases more ambiguous than a wholly owned subsidiary scenario, courts conduct a fact specific analysis).

112. *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 200 (2010) (explaining that the important inquiry is whether the entities' decisions are made independently from one another's combined interest).

113. *See* Floyd, *supra* note 14 (explaining that in cases more ambiguous than a wholly owned subsidiary scenario, courts conduct a fact specific analysis).

An agreement can take the form of a contract, combination, or conspiracy.[114] A conspiracy exists when two or more independent actors have a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."[115] A conspiracy does not need to be formal or written, so long as there is "a conscious commitment to a common scheme designed to achieve an unlawful objective."[116]

The Sherman Act categorizes concerted action as either a horizontal agreement or a vertical combination.[117] Horizontal agreements occur between competitors at the same level of market structure, whereas vertical combinations involve entities upstream or downstream of one another.[118] Horizontal violations involve a tacit or express agreement among competitors, established by direct or circumstantial evidence.[119] When evidence of direct, explicit agreements supporting an alleged conspiracy are not apparent, claimants must rely on inferences from circumstantial evidence to establish antitrust combinations.[120] Common forms of circumstantial evidence include the parties' conduct and course of dealing.[121]

Bare allegations of conscious parallelism are insufficient to plead conspiracy.[122] Conscious parallelism occurs when competitors act uniformly, but independently, following logical self-interests.[123] Additionally, parallel conduct stemming from common stimuli is not

114. *See* 15 U.S.C § 1.

115. Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).

116. PLS.com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 842 (9th Cir. 2022) (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)).

117. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972); *see also,* Expert Masonry, Inc. v. Boone Cnty., Ky., 440 F.3d 336, 345 (6th Cir. 2006).

118. See White Motor Co. v. United States, 372 U.S. 253, 260 (1963) (referencing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 181–84 (1940) and United States v. Parke, Davis, & Co., 362 U.S. 29, 55 (1960) as examples of both horizontal and vertical agreements that violate antitrust law).

119. *See* Tam Travel, Inc. v. Delta Airline, Inc., 583 F.3d 896, 903 (6th Cir. 2009); *see also Monsanto Co.*, 465 U.S. at 764.

120. *See Monsanto Co.*, 465 U.S. at 764; *see also* Am. Tobacco Co. v. United States, 328 U.S. 752, 768 (1946).

121. *See Monsanto Co.*, 465 U.S. at 764–66.

122. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that an allegation of parallel conduct and a bare assertion of conspiracy is insufficient to establish concerted action).

123. *See* Norman A. Armstrong et al., *Sherman Act Section 1 Fundamentals,* LEXISNEXIS, https://perma.cc/AT9G-H5QE (current as of Feb. 1, 2024); *see also* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (defining conscious parallelism as "the process, not in itself unlawful, by which firms . . . [may] share monopoly power, setting their prices at a profit-maximizing . . . level by recognizing their shared economic interests and their interdependence with respect to price and output decisions").

illegal, despite generating an anticompetitive result.[124] To establish concerted action, courts have held that additional evidence, often dubbed plus factors, must support conscious parallelism.[125] Plus factors are facts and circumstances which imply that two parties' parallel conduct was not independently motivated.[126] Common examples of plus factors include "facts alleging inter-firm communications or other opportunities to collude[;] [r]aising prices during times of surplus[;] [u]nprecedented, uniform pricing changes[;] [e]vidence of motive to enter into conspiracy[; and] [c]onduct contrary to the defendant's interests."[127] Essentially, plus factors substitute for direct evidence of an agreement.[128]

Plus factors provide clarity in most cases requiring circumstantial evidence, but do not provide clarity in all cases.[129] The federal circuit courts are currently split on what conduct can be alleged to sufficiently plead the agreement sub-element in a Section 1 action.[130] This division

124. *See* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) (explaining that conscious parallelism is not per se illegal); *see also In re* Local TV Adver. Antitrust Litig. No. 18 C 6785, 2020 U.S. Dist. LEXIS 208215, at *32 (N.D. Ill. Nov. 6, 2020) (explaining that parallel conduct, also known as parallel behavior, is when competitors follow the same course of action).

125. *See Bell Atl. Corp.*, 550 U.S. at 557.

126. *See* Petruzzi's IGA Supermarkets, Inc. v. Darling Del. Co., Inc., 998 F.2d 1224, 1242 (3d Cir. 1993).

127. Michele Floyd et al., *Sherman Antitrust Act Section 1 Claims Checklist,* LEXISNEXIS [hereinafter *Section 1 Checklist*], https://perma.cc/UU6W-JBD3 (last visited Feb. 2, 2024).

128. *See In re* Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004); *see also* Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984) (holding that when dealing with circumstantial evidence, evidence must exclude the possibility of independent action by the parties); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (limiting the scope of inferences that can be drawn from ambiguous evidence of conspiracy).

129. *See generally* Relevent Sports, LLC v. U.S. Fed'n., Inc., 61 F.4th 299, 310 (2d Cir. 2023) (exemplifying a case in which plus factors did not clarify whether the promulgation of an anticompetitive policy and membership in an association constituted direct evidence of an agreement).

130. *See id.* (holding that when an associate member surrenders himself completely to the control of an association, it constitutes sufficient evidence of an agreement); *see also* Osborn v. Visa Inc., 797 F.3d 1057, 1067 (D.C. Cir. 2015) (holding that an agreement to adhere to an association's rules and some de minimis participation is sufficient evidence of an agreement). *But see In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010) (holding that neither the defendant's membership in the association nor their common adoption of the parent association's suggestions created a conspiracy); SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015) (holding that asserting certain members of an association made a collective anticompetitive decision did not establish conspiracy among all members of the association); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008) (holding that members of a consortiums agreement to follow fees set by the consortium were insufficient to plead conspiracy).

continues to produce uncertainty and extensive litigation, prompting two petitions for certiorari to resolve the circuit split.[131]

C. The Circuit Split: What Constitutes Concerted Action?

A circuit split exists regarding the concerted action element in a Sherman Act Section 1 conspiracy violation.[132] The split concerns whether association members who agree to adhere to their parent association's rules, without additional action, have engaged in sufficient concerted action for purposes of a Section 1 claim.[133] The D.C. and Second Circuits adopted more lenient pleading standards for concerted action than the Third, Fourth, and Ninth Circuits.[134] The Supreme Court previously granted certiorari to resolve this split; however, the Court dismissed the case as improvidently granted.[135] Nine years later and still unresolved, the circuit split has widened.[136]

1. Lower Pleading Standards for Concerted Action: The D.C. and Second Circuits

The D.C. and Second Circuits apply lower pleading standards than the Third, Fourth, and Ninth Circuits to establish concerted action.[137] Despite both applying lower standards, each circuit addresses concerted action differently.[138]

The D.C. Circuit addressed the pleading standard for concerted action in *Osborn v. Visa Incorporated.*[139] In *Osborn*, users and operators of ATMs alleged Visa, Mastercard, and certain member banks violated

131. *See* Brief for Petitioner at 29, U.S. Soccer Fed'n., Inc. v. Relevant Sports No. 23-120 (2d Cir. Aug. 4, 2023) (explaining that this issue was previously petitioned for certiorari).

132. *See Relevent Sports, LLC*, 61 F.4th at 310; *see also Osborn*, 797 F.3d at 1067. *But see In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349; *SD3, LLC*, 801 F.3d at 437; *Kendall*, 518 F.3d at 1048.

133. *See Relevent Sports, LLC*, 61 F.4th at 310; *see also Osborn*, 797 F.3d at 1067; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349; *SD3, LLC*, 801 F.3d at 437; *Kendall*, 518 F.3d at 1048.

134. *See Relevent Sports, LLC*, 61 F.4th at 310; *see also Osborn*, 797 F.3d at 1067. *But see In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349; *SD3, LLC*, 801 F.3d at 437; *Kendall*, 518 F.3d at 1048.

135. *See* Visa Inc., v. Osborn 580 U.S. 993, 993 (2016) (explaining that the petitioner relied on a different argument than in their merits briefing).

136. *See* Brief for Petitioner, *supra* note 131, at 29 (explaining that the circuit split was previously petitioned for certiorari).

137. *See Relevent Sports, LLC*, 61 F.4th at 310 (holding that when an association member surrenders himself completely to the control of an association, it constitutes sufficient evidence of an agreement); *see also Osborn*, 797 F.3d at 1067 (holding that an agreement to adhere to an association's rules and some de minimis participation is sufficient evidence of an agreement).

138. *See Relevent Sports, LLC*, 61 F.4th at 310; *see also Osborn*, 797 F.3d at 1067.

139. *See Osborn*, 797 F.3d at 1067.

Section 1 of the Sherman Act.[140] Certain banks became members of Visa and Mastercard, which are bankcard associations.[141] The bankcard associations required members to follow the associations' rules.[142] One type of rule, known as Access Fee Rules, imposed a condition for ATM operators to access the bank associations' networks.[143] The Access Fee Rules established that ATM operators could not charge customers more expensive access fees for Visa or MasterCard transactions than other ATM networks.[144] Upon reviewing the unfair pricing regime, the D.C. Circuit held "a group of retail banks fix[ing] an element of access fee pricing through bankcard association rules" constituted concerted action for purposes of a Section 1 claim.[145]

The court's analysis focused on the defendant banks' membership in the bankcard associations.[146] The court highlighted that "mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations."[147] However, the court noted in *Osborn,* the plaintiff did much more than allege "mere membership."[148]

First, the plaintiff alleged member banks "agreed to" adhere to the bankcard associations' rules.[149] This agreement supported the member banks' involvement in concerted activity with the bankcard associations.[150] Second, the plaintiff demonstrated member banks used the bankcard associations to adopt the anticompetitive policy.[151] The member banks' "enforce[ment of] a supracompetitive pricing regime for ATM access fees," surpassed "mere membership" and evidenced actual participation in the conspiracy.[152] Lastly, the plaintiff alleged that "member banks appointed representatives to the bankcard associations' Board of Directors, [who then] established the anticompetitive [policy] with the cooperation and assent of the member banks."[153] The member

140. *See id.* at 1060.
141. *See id.* at 1066–67.
142. *See id.*
143. *See id.* at 1061.
144. *See id.* (explaining that under the Access Fee Rules, operators could not charge more money for Visa and MasterCard transactions than other ATM networks).
145. *Id.* at 1066–67.
146. See *id.* at 1067.
147. *Id.* (quoting Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n, 663 F.2d. 253, 265 (D.C. Cir. 1981)).
148. *Id*.
149. Complaint at 81, Osborn v. Visa Inc., 797 F.3d 1057, 1067 (2015) (No. 14-7004) (stating that the agreement was sufficient to satisfy the plausibility standard).
150. *See id*.
151. *See Osborn*, 797 F.3d at 1067.
152. *Id.*
153. Complaint at 81, Osborn v. Visa Inc., 797 F.3d 1057, 1067 (2015) (No. 14-7004) (stating that this conduct was sufficient to satisfy the plausibility standard).

banks' role in the associations' governance bolstered an indication of participation in the conspiracy, and therefore constituted concerted action.[154]

As demonstrated in *Osborn*, plaintiffs can successfully establish concerted action in the D.C. Circuit if (1) members previously agreed to be bound by the association's rules and (2) the association is used to further an anticompetitive policy.[155] While more lenient than other circuits in the split, the D.C. Circuit's standard requires more support than the standard applied by the Second Circuit.[156]

The Second Circuit addressed the pleading standard for concerted action in *Relevent Sports, LLC v. United States Soccer Federation, Incorporated.*[157] United States Soccer Federation ("USSF") is the FIFA-authorized association for the United States.[158] FIFA mandates USSF to follow their directives and decisions and ensure that USSF members respect FIFA's policies.[159] In 2018, FIFA created a policy requiring the official season games of teams in the members' respective territories to be played within their home territory.[160] Upon reviewing the restrictive policy, the Second Circuit held "'promulgation of [an anticompetitive] rule, in conjunction with the members' surrender[] . . . to the control of the association' sufficiently demonstrate[d] concerted action."[161]

The court's analysis focused on whether the members' mere surrender to the association's rules sufficiently established an agreement supporting concerted action.[162] Specifically, the court relied on the holding in *Associated Press v. United States* to determine what constituted concerted activity.[163] The court in *Associated Press* held that if a member surrenders themselves to the control of an association in the restraint of trade, then a rule that imposes duties on members' conduct is an agreement for purposes of Section 1.[164] *Associated Press* guided the Second Circuit to determine that "the adoption of a binding association rule designed to

154. *See Osborn*, 797 F.3d at 1067.

155. *See id*.

156. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 307 (2d Cir. 2023); *see also Osborn*, 797 F.3d at 1067; *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010); SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008).

157. *See Relevent Sports, LLC*, 61 F.4th at 307.

158. *See id.*

159. *See id.*

160. *See id.* at 304 (explaining that the game must be played within the territory of the respective member association).

161. *Id.* at 309 (citing Associated Press v. United States, 326 U.S. 1, 19 (1945)).

162. *See id.*

163. *See id.* at 307.

164. *See Associated Press*, 326 U.S. at 12.

prevent competition is direct evidence of concerted action."[165] The *Relevant* court reasoned that members needed not agree to any particular subsequent rule to be bound by it.[166] Further, the court explained the promulgation of the policy itself constituted direct evidence of concerted action because Relevent challenged the 2018 policy directly.[167]

As demonstrated in *Relevent*, plaintiffs can successfully establish concerted action in the Second Circuit if an association adopted an anticompetitive rule after "a member . . . [previously] agreed to abide by all association rules." [168] In *Relevent*, the Second Circuit applied the lowest pleading standard for concerted action among the circuits.[169] The Third, Fourth, and Ninth Circuits enforce much higher pleading standards.[170]

2. Higher Pleading Standards for Concerted Action: The Third, Fourth, and Ninth Circuits

The Third, Fourth, and Ninth Circuits apply higher pleading standards to establish concerted action in a Section 1 claim.[171] Although these circuits implement higher standards than the D.C. and Second Circuits, each circuit addresses concerted action differently.[172]

The Third Circuit addressed the pleading standard for concerted action in *In re Insurance Brokerage Antitrust Litigation*.[173] In *Insurance Brokerage*, the plaintiff-insureds alleged the defendant-insurers and brokers violated Section 1 of the Sherman Act.[174] The plaintiffs claimed

165. *Relevent Sports, LLC*, 61 F.4th at 307*; see also, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99 (1984) (holding that the policies of the NCAA gave rise to a horizontal restraint on competition); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 683 (1978) (finding evidence of an unlawful agreement in a society's code of ethics).

166. *See* Brief for Petitioner, *supra* note 131, at 11–12.

167. *See Relevent Sports, LLC*, 61 F.4th at 309 (explaining that challenging the overarching conspiracy rather than specific standards or an inferred policy rather than one specifically written does not constitute direct evidence of concerted action for purposes of a section 1 claim).

168. *See* Brief for Petitioner, *supra* note 131 at 11–12.

169. *See Relevent Sports, LLC*, 61 F.4th at 307; *see also* Osborn v. Visa Inc., 797 F.3d 1057, 1067 (D.C. Cir. 2015); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010); SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008).

170. *See Relevent Sports, LLC*, 61 F.4th at 307; *Osborn*, 797 F.3d at 1067; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349; *SD3, LLC*, 801 F.3d at 437; *Kendall v. Visa U.S.A., Inc.*, 518 F.3d at 1048.

171. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349; *see also SD3, LLC*, 801 F.3d at 437; *Kendall*, 518 F.3d at 1048.

172. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349.

173. *See id.*

174. *See id.* at 309.

the defendants participated in both broker-centered and global conspiracies.[175] This Comment focuses on the global conspiracy claim.[176]

The global conspiracy claim alleged that all broker-defendants simultaneously agreed not to disclose one another's contingent commission arrangements with the insurer-defendants.[177] The plaintiffs asserted the broker-defendants' membership in the Council of Insurance Agents and Brokers ("CIAB") evidenced concerted action concerning the alleged anticompetitive policy.[178] Upon reviewing the simultaneous conduct, the Third Circuit held that even an additional allegation stating the defendants "collaborated in crafting" the association's rule for mutual silence was insufficient to show a horizontal agreement for purposes of Section 1.[179]

The court's analysis focused on whether a bare allegation of collaborated effort through an association was sufficient to establish concerted action.[180] In their analysis, the Third Circuit highlighted the lack of plus factors provided by the plaintiff.[181] While the defendants' membership in the association and common adoption of the trade group's suggestions revealed an opportunity to conspire, the plaintiffs failed to plausibly imply that each broker did not act independently while remaining silent about one another's fee arrangements.[182] Additionally, the court articulated that the obvious alternative explanation for the industry-wide practice was that each member believed its profits would suffer without the practice.[183] As demonstrated in *Insurance Brokerage,* plaintiffs cannot successfully establish concerted action in the Third Circuit with mere assertions of association membership and conscious parallelism in conduct, absent additional plus factors.[184]

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175. *See id.* at 311–14 (explaining the broker-centered conspiracy consisted of broker-defendants deceptively directing purchasers to specific defendant-insurers and insurer-defendants concealing commissions paid to the defendant brokers in return).

176. *See id.* at 313.

177. *See id.* (explaining that defendants agreed to mutually beneficial silence out of fear that their own arrangement would be exposed).

178. *See id.* (explaining that membership in the trade association offered opportunities for defendants to share information and adopt collective policies).

179. *Id.* at 349 (explaining that neither the defendants' membership in the association nor the defendants' adoption of the trade group's suggestions plausibly suggests conspiracy).

180. *See id.* at 350.

181. *See id.*

182. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349, (citing Petruzzi's IGA Supermarkets v. Darling-Del. Co., 998 F.2d 1224, 1242 n.15); *see also Petruzzi*, 998 F.2d at 1242 n.15 ("Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place.").

183. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 349 (explaining that an agreement between parties cannot be inferred from each member's decision to keep secret its competitors' use of a particular practice).

184. *See id.*

The Fourth Circuit addressed the pleading standard for concerted action in *SD3, LLC v. Black & Decker Incorporated.*[185] In *SD3*, the plaintiff alleged members of Power Tool Institute, a power tool trade association, conspired to adopt safety standards that avoided using the plaintiff's technology in their products.[186] Upon reviewing the safety standards, the Fourth Circuit held that a bare allegation of association membership and promulgation of association standards, without more, did not establish concerted action.[187]

The court focused on whether alleging the association made a collective decision regarding standards with anticompetitive effects suffices to establish concerted action.[188] The court explained that an association making "wrong" or poor decisions when promulgating standards does not indicate concerted action.[189] Further, the court reasoned that evidence of membership and adherence to a policy alone cannot sufficiently establish concerted action.[190] The court clarified that successful claims, those which successfully establish concerted action in a standard-setting context, typically reveal some sort of external pressure applied to the standard-setting body to achieve the anticompetitive end.[191] Also, the court noted other non-anticompetitive explanations remained, lowering the likelihood of concerted action.[192] As demonstrated in *SD3,* plaintiffs cannot successfully establish concerted action in the Fourth Circuit with evidence of association membership and the association's promulgation of a standard having anticompetitive effects, absent additional plus factors.[193]

The Ninth Circuit addressed the pleading standard for concerted action in *Kendall v. Visa United States of America, Incorporated.*[194] In *Kendall*, merchants alleged consortiums of credit card companies and banks conspired to fix credit card sales fees.[195] The court held that alleging defendant-member banks merely adopted a rule governing fees was

185. *See* SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015).
186. *See id.* at 419–21.
187. *See id.* at 435–36.
188. *See id.* at 437.
189. *Id.* (explaining that standard setting bodies sometime err, but a simple error unsupported by other evidence does not establish concerted action).
190. *See id*. at 435.
191. *See id.* at 435–36 (explaining that freely voting similarly is parallel conduct, which is consistent with legal behavior).
192. *See id.* (explaining that alternative explanations for adopting a standard mitigate the possibility of establishing concerted action).
193. *See id*. at 436–37.
194. *See* Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008).
195. *See id.*

insufficient to establish concerted action, even when defendants agreed to follow the rule.[196]

The court's analysis focused on the lack of additional evidence proffered by the plaintiffs.[197] The court explained that the plaintiff failed to provide evidence of "who did what, to whom (or with whom), where, and when."[198] Additionally, the court determined that the defendant's participation in the association's board of directors did not sufficiently establish concerted action.[199]

Specifically, the court relied on the holding in *Kline v. Coldwell Banker & Company* to ascertain what constituted concerted action.[200] The Ninth Circuit, in *Kline,* held that membership in an association does not automatically render an association's members liable for antitrust violations committed by the association.[201] From *Kline*'s holding, the court determined that the plaintiff's mere agreement to follow the anticompetitive policy was insufficient to establish concerted action.[202] As demonstrated in *SD3,* plaintiffs can successfully establish concerted action in the Ninth Circuit if a plaintiff pleads that a member not only participated in the anticompetitive practice, but also participated "in an individual capacity."[203]

As exhibited in *Insurance Brokerage*, *SD3*, and *Kendall*, courts often need supplementary evidence of an agreement between parties to identify concerted action.[204] However, the courts in *Osborn* and *Relevant* maintain lower standards to substantiate concerted action.[205] One undeniable commonality between all circuits that have addressed concerted action is that the element is primary to a Section 1 claim.[206]

Court decisions regarding Section 1 claims have a substantial effect on interstate commerce and consumer welfare.[207] Reducing confusion

196. *See id.* at 1048.
197. *See id.*
198. *Id.*
199. *See id.*
200. *See* Kline v. Coldwell Banker & Co., 508 F.2d 226, 232 (9th Cir. 1974) (holding that membership in an association does not render an association's members automatically liable for antitrust violations committed by the association).
201. *See id.*
202. *See Kendall*, 518 F.3d at 1048.
203. *Id.*
204. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (holding that an allegation of parallel conduct and a bare assertion of conspiracy is insufficient to establish concerted action).
205. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 307 (2d Cir. 2023); *see also* Osborn v. Visa Inc., 797 F.3d 1057, 1067 (D.C. Cir. 2015); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010); SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015); *Kendall*, 518 F.3d at 1048.
206. *See* Armstrong et al., *supra* note 123 (stating that section 1 claims only address concerted activity).
207. *See* 15 U.S.C. § 1.

surrounding which standard applies in Section 1 litigation is imperative to maintain optimal market outcomes and safeguard consumer welfare.[208] Therefore, to preserve the "heart of our national economic policy," the Court must consider properly analyzing the circuit split and creating an intermediate, uniform pleading standard for concerted action.[209]

III. ANALYSIS

The Sherman Act has long served as the fundamental protector of unrestrained competition in the United States.[210] Section 1 of the Sherman Act prohibits parties from entering into agreements that unreasonably restrain trade.[211] The keystone of a Section 1 claim is the concerted action element.[212] The primacy of concerted action calls for a uniform pleading standard, regardless of jurisdiction.[213]

A. The Need for a Federal Pleading Standard

Appellate courts have addressed the concerted action pleading standard and adopted two inconsistent positions.[214] The core difference between the lower and higher pleading standards is whether evidence of a member's prior agreement to adhere to an association's rules, without more, is sufficient to plead concerted action in a Section 1 claim.[215] This difference is problematic and warrants further action to develop a uniform federal pleading standard.[216]

First, the circuit split is problematic because associations are abundant in the U.S. economy.[217] Association members are vulnerable to antitrust litigation resulting from their associations' conduct.[218] If the circuit split persists, members will face different pleading standards

208. *See* FTC, ANTITRUST LS., *supra* note 58.

209. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978) (showing the first time the Supreme Court used the quick-look analysis); *see also* ANTITRUST BASICS § 1.01: FUNDAMENTAL CONCEPTS OF ANTITRUST ANALYSIS, (Law Journal Press 2024).

210. *See* 15 U.S.C. § 1.

211. *See id.*

212. *See* Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991) (indicating that unilateral conduct is not within the scope of a section 1 Sherman Act claim).

213. *See id.*

214. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 307 (2d Cir. 2023); *see also* Osborn v. Visa Inc., 797 F.3d 1057, 1067 (D.C. Cir. 2015); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010); SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008).

215. *See* Brief for Petitioner, *supra* note 131, at 2.

216. *See id.* at 19–21.

217. *See* IRS, *Data Book* (2023), https://perma.cc/G5EV-TEFC (stating that there are nearly 60,000 business leagues in the year 2023).

218. *See Relevent Sports, LLC*, 61 F.4th at 307; *see also Osborn*, 797 F.3d at 1067.

depending on where a plaintiff sues.[219] Various circuits applying different pleading standards will lead to disparate results for members of the same association who are charged with the same Section 1 violation.[220] Members facing identical lawsuits but receiving disparate treatment because of where the plaintiff sued is inequitable.[221] Therefore, the Supreme Court must resolve the circuit split to attain more equitable outcomes in Section 1 cases.[222]

Second, the circuit split is problematic because concerted action is a threshold issue in a Section 1 claim.[223] Threshold issues are crucial to plaintiffs attempting to overcome dismissal at the pleading stage.[224] Defendants commonly argue threshold issues in motions to dismiss, which occur early in the litigation process.[225] Particularly in antitrust litigation, motions to dismiss for failure to plead concerted action are the "flashpoints" of Section 1 lawsuits.[226]

The distinction in pleading standards provides an advantage to either the plaintiff or the defendant depending on where the claim is made.[227] As noted in *Bell Atlantic Corporation v. Twombly,* the purpose of a pleading standard is to "give the defendant fair notice of . . . what the claim is and the grounds upon which it rests." [228] Applying different pleading standards in different circuits does not offer a defendant fair notice of the claim or

219. *See* Brief for Petitioner, *supra* note 131, at 22.

220. *See* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556 (2002) (stating that unpredictability in applying different pleading standards leads to "whole categories of cases [being] deemed frivolous").

221. *See* People v. Guerrero, 164 N.E.3d 1267, 1283 (Ill. App. Ct. 2020) ("Our supreme court has found that fundamental fairness requires that 'similarly situated' codefendants, who were involved in the same crime, should not 'receive grossly disparate sentences.'") (quoting People v. Fern, 723 N.E.2d 207, 212 (Ill. 1999)).

222. *See* Brief for Petitioner, *supra* note 131, at 21 (arguing that association members need clarity on the consequences of agreeing to adhere to an association's rules).

223. *See* Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991) (indicating that unilateral conduct is not within the scope of a section 1 Sherman Act claim).

224. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) (stating that a court must insist upon some specificity in pleading before permitting a massive factual controversy to progress).

225. *See, e.g.*, *id.* at 555 (holding that in a section 1 claim, the plaintiff must include enough factual matter to suggest an agreement was made to survive a motion to dismiss).

226. SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 444–45 (4th Cir. 2015) (Wilkinson, J., concurring).

227. *See, e.g.*, Hailey Konnath, *Promoter Urges High Court to Let FIFA Antitrust Suit Proceed,* Law 360 (Oct. 10, 2023), https://perma.cc/3SBS-HT88 (explaining that claims made in circuits applying a lower pleading standard are advantageous to plaintiffs whereas claims made in circuits applying a higher pleading standard are advantageous to defendants).

228. *Bell Atl. Corp.*, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

its grounds because the grounds for the claim are not uniform.[229] Therefore, the Court must resolve the circuit split to improve clarity for parties involved in Section 1 litigation.[230]

B. Limitations of Existing Pleading Standards

The circuit split requires a resolution to improve, among other things, equity and clarity of Section 1 claims.[231] Each side of the circuit split has adopted standards which produce both benefits and limitations.[232] Crucially, neither side of the split is perfect.[233]

1. Limitations of Lower Pleading Standards

The D.C. and Second Circuits apply lower concerted action pleading standards.[234] Despite the overall limitations of lower standards, their application produces a few beneficial outcomes.[235] One benefit of applying a lower standard is that courts hold association members to a higher level of accountability, reducing the potential for Section 1 violations.[236] Another benefit is its straightforward application, enabling courts to effortlessly determine what conduct constitutes concerted action.[237] While applying a lower standard produces some beneficial outcomes, these benefits are outweighed by unavoidable limitations.[238]

One limitation of a lower standard is it diminishes the "conscious commitment" requirement established in *Monsanto v. Service Spray-Rite Service Corporation*.[239] Under a lower standard, litigants establish concerted action merely by showing a member agreed to adhere to an association's rules.[240] Under this assumption, a member who agreed to

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229. *See, e.g.*, Konnath, *supra* note 227 (explaining that grounds in a lower pleading standard circuit will not pass muster in a higher pleading standard circuit).

230. *See supra* notes, 78, 97, 183 and accompanying text.

231. *See supra* Section II.C.2.

232. *See supra* Section II.A.

233. *See supra* Section III.A.

234. *See supra* notes, 78, 97, 183 and accompanying text.

235. *See supra* Section III.B.1.

236. *See* Brief for Petitioner, *supra* note 131, at 21 (arguing that increasing members' accountability for their associations' conduct will incentivize members to better understand what conduct violates section 1 and to make informed decisions about whether to withdraw from or join associations).

237. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 307 (2d Cir. 2023) (holding that any member that previously agreed to abide by an association's rules could be held liable for violation of section 1 if that association promulgates an anticompetitive policy).

238. *See infra* Section III.B.1.

239. Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

240. *See Relevent Sports, LLC*, 61 F.4th at 307 (holding that any member that previously agreed to abide by an association's rules could be held liable for violation of section 1 if that association promulgates an anticompetitive policy).

adhere to an association's rules more than 100 years before the association adopted an anticompetitive policy is susceptible to liability under Section 1.[241]

The potential liability of the member in this example raises the question of whether an agreement made more than 100 years before the anticompetitive policy's creation can genuinely reflect the member's conscious commitment today.[242] The member's conscious commitment at the time the member agreed to abide by the association's rules is indisputable.[243] However, whether the member's conscious commitment in a prior moment, without further action, extends to an association's anticompetitive policy created a decade later is far less conclusive.[244] Therefore, the lower pleading standards fail by disregarding fundamental Supreme Court precedent, thereby reaching improper results.[245]

Lower pleading standards also lead to unwarranted punishments.[246] Under a lower pleading standard, liability attaches to members who neither promulgated nor enforced the anticompetitive rule.[247] Assigning liability to members for conduct out of their control is unjust.[248] If a member did not engage in violative conduct, the lower pleading standard merely renders them guilty by association.[249] The Supreme Court has continuously disapproved of guilt by association.[250] Therefore, lower pleading standards create undeserved punishments.[251]

Lastly, lower pleading standards may discourage prospective members from joining associations, which often produce procompetitive

241. *See* Brief for Petitioner, *supra* note 131, at 25 (stating that USSF agreed to abide by FIFA's rules in 1914 and can be held liable for violating section 1 via an anticompetitive policy passed by FIFA in 2018).

242. *See Monsanto*, 465 U.S. at 768.

243. *See* Am. Tobacco Co**.** v. United States, 328 U.S. 781, 810 (1946) (stating that circumstances must show "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement").

244. *See id***.**

245. *See Monsanto*, 465 U.S. at 768.

246. *See* Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008) (requiring a defendant to make a commitment to the challenged conduct).

247. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 307 (2d Cir. 2023) (holding that any member that previously agreed to abide by an association's rules could be held liable for violation of section 1 if that association promulgates an anticompetitive policy).

248. *See* Elfbrandt v. Russell, 384 U.S. 11, 22 (1966) (holding that guilt by association is impermissible).

249. *See id*.

250. *See id.*; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 929 (1982); Healy v. James, 408 U.S. 169, 193 (1972).

251. *See* Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008) (requiring a defendant to make a commitment to the challenged conduct).

effects.[252] If members could be held liable for any conduct of their parent association, the potential repercussions of membership might deter prospective members from joining associations.[253] If the threat of liability increasingly deters membership in associations, associations may eventually disappear, along with their procompetitive benefits.[254] In short, lower pleading standards discourage membership in associations, subsequently reducing their procompetitive innovations.[255]

The limitations of lower pleading standards for concerted action are apparent, which make it inadequate to become the uniform pleading standard.[256] Likewise, higher pleading standards have glaring limitations.[257]

2. Limitations of Higher Pleading Standards

The Third, Fourth, and Ninth Circuits apply higher pleading standards.[258] Like lower pleading standards, higher pleading standards also possess many limitations.[259] Nonetheless, higher pleading standards produce a few beneficial outcomes.[260] One benefit produced by a higher pleading standard is that it filters out less meritorious claims.[261] Increasing the difficulty of pleading ensures that only claims with a genuine potential to violate Section 1 will justify the time and resources expended during litigation.[262] The higher pleading standard's natural filtration of weaker claims will save both parties money by ending less promising claims early

252. *See* Maple Flooring Mfrs.' Ass'n. v. United States, 268 U.S. 563, 566 (1925) (stating that many associations engage in activities that are beneficial to industries and consumers); *see also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (stating that members' collaboration "can have significant procompetitive advantages").

253. *See* Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 273 (5th Cir. 2008) (citing Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 297 (5th Cir. 1998) (holding that fear of damages would discourage useful industry standards made by associations)).

254. *See id.*

255. *See Maple Flooring Mfrs.' Ass'n.*, 268 U.S. at 566.

256. *See supra* Section III.B.

257. *See infra* Section III.B.2.

258. *See In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 349 (3d Cir. 2010); *see also* SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 437 (4th Cir. 2015); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008).

259. *See supra* Section III.B.1. (discussing the issues with a lower pleading standard).

260. *See id.*

261. *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 190–91 (2010) (explaining that the concerted action requirement determines which allegations are "inherently" "fraught with anticompetitive risk").

262. *See Kendall*, 518 F.3d at 1047 (explaining that discovery in antitrust cases can be costly).

in the litigation process.[263] Additionally, courts' efficiency will improve by only deliberating cases potentially violative of Section 1, thereby filtering unlikely violations.[264] Although higher pleading standards produce some benefits, those benefits are outweighed by their limitations.[265]

One limitation of a higher standards is its deviation from the convenience of contract law.[266] When a member agrees to adhere to all of an association's rules, the member surrenders to the association's control.[267] If a member previously agreed to abide by the will of the association and the association later adopts a rule, the member also adopts that rule.[268] The freedom to contract is a fundamental principle of contract law.[269] A member may freely abide by any rule passed by the association to which it belongs, just as the member may freely disobey any rule. A member's conscious commitment to abide by the association's rules reflects the member's intentions.[270] Requiring members to agree to each new rule adopted by an association would undermine the efficiency of a membership contract.[271] Therefore, the higher pleading standard deviates from the convenience of contract law.[272]

Another limitation of a higher pleading standard is that not all Section 1 cases necessitate a higher pleading standard.[273] For example, "standard-setting associations have traditionally been objects of antitrust

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263. *See id.* (explaining that discovery in antitrust cases can be costly); *see also* Fed. R. Civ. P. 12(b)(6).

264. *See Am. Needle, Inc.*, 560 U.S. at 190–91 (explaining that the concerted action requirement determines which allegations are "inherently" "fraught with anticompetitive risk").

265. *See infra* Section III.B.1.

266. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 8 (2006) (demonstrating a situation when freedom to contract is upheld).

267. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 309 (2d Cir. 2023).

268. *See id.*

269. *See Texaco Inc.*, 547 U.S. at 8 (demonstrating a situation when freedom to contract is upheld); *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735–36 (1988) (emphasizing the importance of freedom to contract).

270. *See* Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984) (highlighting the importance of a member's conscious commitment to participate in an alleged conspiracy).

271. *See Texaco Inc.*, 547 U.S. at 8 (demonstrating a situation when freedom to contract is upheld); *see also Bus. Elecs. Corp.*, 485 U.S. at 735–36 (emphasizing the importance of freedom to contract).

272. *See Texaco Inc.*, 547 U.S. at 8 (demonstrating a situation when freedom to contract is upheld).

273. *See* Relevent Sports, LLC v. U.S. Soccer Fed'n., Inc., 61 F.4th 299, 310 (2d Cir. 2023) (applying a lower pleading standard for concerted action involving sports associations); *see also* SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 435 (4th Cir. 2015) (explaining that standard-setting associations produce procompetitive effects by encouraging incentives to innovate).

scrutiny."[274] However, courts have rarely found standard-setting associations violative of antitrust law because of their voluntary membership and pro-competitive effects.[275] In the sports industry, however, members typically must preemptively agree to abide by the association's rules to be included in a league.[276] If a member agrees to abide by the association's will and the "plaintiff . . . alleges . . . the policy or rule [a]s the agreement itself, then [the plaintiff] need not allege any further agreement."[277] Therefore, the higher standards fail to account for varying types of associations and agreements.[278]

Thus, neither side of the circuit split is adequate by itself.[279] Each standard generates beneficial outcomes, but those benefits are outweighed by their respective limitations.[280] Consequently, the Court should adopt an intermediate pleading standard for concerted action in Section 1 claims.[281]

C. Proposal for an Intermediate Pleading Standard

This Comment recommends that the Supreme Court adopt a uniform, intermediate pleading standard that features the benefits of both standards while overcoming their limitations.[282] The uniform pleading standard should not be so lenient as to permit undeserved and inappropriate results, but also not too strict as to fail when applied in different Section 1 contexts.[283]

This Comment recommends the following pleading standard for concerted action: the promulgation of an association rule in conjunction with a member's prior agreement to abide by the association's will establishes the requisite concerted action, if the member either: (1) actively participated in creating the rule, or (2) enforced the rule in some capacity. If a member did not participate in promulgating the rule, the member shall have an opportunity to provide evidence they objected to the rule but were overruled by the association. If the association's membership is voluntary,

274. *SD3, LLC*, 801 F.3d at 435 (citing Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988); Princo Corp. v. Int'l Trade Comm'n 616 F.3d 1318, 1335 (Fed. Cir. 2010)).

275. *See SD3, LLC*, 801 F.3d at 435.

276. *See, e.g.*, *Relevent Sports, LLC*, 61 F.4th at 307 (citing Nat'l Collegiate Athletic Ass'n v. Alston, 141. S.Ct. 2141, 2156 (2021) ("[W]ithout some agreement among rivals, the very competitions that consumers value would not be possible.")).

277. *Id.* at 308.

278. *See id.* at 310 (applying a lower pleading standard for concerted action involving sports associations); *see also SD3, LLC*, 801 F.3d at 435 (explaining that standard-setting associations produce procompetitive effects by encouraging incentives to innovate).

279. *See supra* Section III.B.

280. *See id.*

281. *See infra* Section III.C.

282. *See id.*

283. *See supra* Sections II.B–C.

the plaintiff must plead "plus factors" to prove the defendant's conduct met the requisite level of participation.[284] Common examples of plus factors include "facts alleging inter-firm communications or other opportunities to collude, raising prices during times of surplus, unprecedented uniform pricing changes, evidence of motive to enter into conspiracy, and conduct contrary to the defendant's interests."[285]

This Comment's recommended pleading standard for concerted action resolves the limitations generated by both the lower and higher pleading standards.[286] Principally, the uniform pleading standard avoids undeserved outcomes for members generated by lower pleading standards.[287] For example, if a member did not help promulgate the rule and they did not enforce it, then they would not be liable. Only punishing those who actually participated in the anticompetitive conduct avoids instances of guilt by association while furthering the purpose of preserving unfettered trade.[288] Thus, members will not be held accountable for conduct wholly outside of their control.[289]

The proposed uniform standard also avoids inappropriate results generated by lower pleading standards.[290] Specifically, requiring that a member either participated in the creation of the rule or enforced the rule in some capacity avoids inappropriate results for members.[291] For example, if the member agreed to abide by an association's rules long before the association promulgated the anticompetitive rule, the member can avoid liability by either (1) not enforcing the rule, or (2) providing evidence that the member objected to the rule.[292] Under the proposed rule, defendants can mitigate potential liability for conduct which they did not consciously commit.[293]

The uniform pleading standard also resolves issues generated by higher pleading standards. The proposed pleading standard, unlike higher pleading standards, accounts for different contexts in Section 1 claims.[294] The uniform standard's exception for members who join associations

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284. *See* SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 435 (4th Cir. 2015) (explaining that voluntary membership associations typically have procompetitive effects).

285. Floyd, *Section 1 Checklist, supra* note 127.

286. *See supra* Section III.A.

287. *See id*.

288. *See* Elfbrandt v. Russell, 384 U.S. 11, 22 (1966) (holding impermissible guilt by association); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (stating the purpose of creating the Sherman Act was to be "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade").

289. *See supra* Section III.A.

290. *See id.*

291. *See id.*

292. *See supra* Section III.B.2.

293. *See* Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

294. *See supra* Section II.C.2.

voluntarily provides flexibility for different contexts of Section 1 claims.[295] For example, if a plaintiff claims a member of a voluntary association, such as a standard-setting association, engaged in the requisite level of concerted action, the plaintiff would need to bring additional evidence due to the nature of the association.[296] Requiring plus factors for members who are part of voluntary associations would offer greater protection to members of associations that typically produce procompetitive effects.[297] In turn, prospective members would not be deterred from joining these associations, furthering the purposes of antitrust law.[298]

The proposed uniform pleading standard fills the gaps left by the two existing standards.[299] Applying an intermediate standard incorporates the benefits produced by each side of the circuit split while overcoming their respective limitations.[300] The proposed standard is neither too lenient as to permit inappropriate and unwarranted results, nor too strict to adapt to different Section 1 contexts. [301] Rather, this Comment's proposed uniform pleading standard for concerted action offers courts greater flexibility and produces more just results than the two standards currently available.[302]

IV. CONCLUSION

Antitrust law serves as the ultimate protector of the United States' free market economy.[303] However, courts must develop antitrust law as the market develops for the laws to remain an effective safeguard against unreasonable restraints of trade.[304] While arguments on both sides of the circuit split hold validity, each position also possesses limitations which make their standards inadequate.[305] In short, a uniform, intermediate pleading standard for concerted action is necessary to improve flexibility, clarity, and justice in antitrust litigation.[306]

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295. *See id*.
296. *See supra* Section III.B.2.
297. *See supra* Section II.B.1.A.
298. *See* THE ANTITRUST LS., *supra* note 39 (highlighting the benefits of competition and the pro-competitive purposes of antitrust law).
299. *See supra* Section III.B.
300. *See id.*
301. *See id*.
302. *See id*.
303. *See* Antitrust Guidelines For Int'l Enf't and Coop., *supra* note 9.
304. *See* Collins, *supra* note 30, at 2339 (explaining that changes in economic activity warranted the development of laws to address the problem of anticompetitive combinations).
305. *See supra* Section III.B.
306. *See supra* Section III.C.

The Court can address the limitations produced by the circuit split by generating a uniform pleading standard for concerted action.[307] The ideal uniform pleading standard will capitalize on the benefits of each of the existing pleading standards and avoid their respective limitations.[308] The Supreme Court can improve flexibility, clarity, and justice in Section 1 litigation by adopting a pleading that stipulates: the promulgation of an association rule, together with a member's prior agreement to abide by the association's will establishes the requisite concerted action, if the member either: (1) actively participated in creating the rule, or (2) enforced the rule in some capacity. This intermediate, yet flexible pleading standard is better equipped to improve clarity and justice in antitrust litigation.[309]

307. *See id.*
308. *See id.*
309. *See id.*