High Prices and Low-Level Conspirators

Christopher R. Leslie*

* Chancellor's Professor of Law, University of California, Irvine School of Law. The author thanks Kari Ferver and Tony Reese for comments on earlier drafts.

Introduction

Society routinely overlooks the importance of ordinary workers. Their contributions often go unappreciated. In one famous example, most of the Tiffany lamps and stained-glass artworks credited to Louis Tiffany were actually designed and crafted by Clara Driscoll and her team of over thirty women, who were denied recognition for their achievements for a century.[1] In art and in business, from the ateliers of the Renaissance masters to the boardrooms of modern corporate America, laborers do the necessary day-to-day work, but those at the top receive all the accolades and attention.

The same is true for criminal enterprises. Not everyone can be a kingpin. Conspiracies comprise layers. In organized crime syndicates, much of the day-to-day work is done by deputies, lieutenants, and other underlings tasked with carrying out the criminality. Many criminal ventures could not succeed but for the work of subordinates.

And so it is with price-fixing conspiracies. These conspiracies steal billions of dollars from consumers and deprive millions of people of food, medicine, and other necessities of life.[2] Anticompetitive collusion is not the work of corporations, but of people. Although generally initiated by senior executives, price-fixing cartels often depend on the work of middle managers and ordinary salespeople who exchange sensitive pricing plans and sales data, monitor compliance with illegal cartel agreements, negotiate fluctuations in the fixed prices, and help conceal conspiracies from antitrust officials and cartels' victims. While many laborers are unsung heroes in the American economy, these individuals are unsung villains.

Federal courts frequently fail to recognize the critical importance of low- and mid-level workers in criminal conspiracies when evaluating price-fixing claims. In antitrust litigation, some judges treat the senior executives as the only actors whose actions matter. As a result, courts routinely grant summary judgment to price-fixing defendants despite strong evidence that the defendants' lower-level employees have engaged in price-fixing and cartel-stabilizing activities. An unfortunate and misguided body of precedent instructs federal judges to diminish or disregard evidence that involves employees who lack pricing authority. As a result, courts are too quick to exonerate firms accused of illegal collusion.

This Article explores the critical role of lower-level employees in managing, enforcing, and concealing illegal price-fixing conspiracies. Part I explains the basics of antitrust liability for price fixing. Because price fixing

1. For a robust account of Clara Driscoll's life and work, see generally MARTIN EIDELBERG, NINA GRAY & MARGARET K. HOFER, A NEW LIGHT ON TIFFANY: CLARA DRISCOLL AND THE TIFFANY GIRLS (2007).

2. Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 885, 892–94 (2012).

is per se illegal, most price-fixing litigation turns on whether the plaintiffs can establish that the defendants did indeed agree to set prices through collusion. Direct evidence of agreement is generally unavailable because cartel members conceal their collusion. Because of this, courts allow plaintiffs to use circumstantial evidence to establish that the defendants agreed to fix prices. Plaintiffs generally do this by showing that the defendants engaged in parallel pricing and that there are "plus factors" that suggest that the defendants' parallel pricing is the product of collusion, not individual decisions. Although courts have recognized dozens of plus factors, Part I focuses on the plus factors relevant to this project, including the opportunity to conspire, inter-competitor communications, and exchanges of price information.

Part II examines how some courts have made it harder for antitrust plaintiffs to prove collusion through circumstantial evidence. Price-fixing defendants argue that inter-competitor communications between employees who did not possess pricing authority are not evidence of collusion. An influential line of antitrust cases has minimized the legal significance of lower-level employees' communications and activities. Even when these employees share confidential pricing plans with rivals, courts diminish—and often mischaracterize—these discussions as mere "chit chat" or "shop talk." These antitrust opinions are premised on the notion that price-fixing conspiracies do not rely on the labor of lower-level employees.

Part III explains how the pricing-authority line of cases discussed in Part II is based on a fundamental misunderstanding of how price-fixing cartels actually operate. Successful antitrust conspiracies generally perform a series of functions: forming the cartel and setting the initial fixed price; managing the cartel, including fluctuations in price; enforcing the cartel, by monitoring member prices and sales volume and penalizing members who deviate from the cartel agreement; and concealing the cartel's conspiracy from antitrust enforcers. Case studies demonstrate how all of these tasks can be—and are—performed by lower-level employees in actual price-fixing conspiracies.

Part IV details how the judicial failure to appreciate how price-fixing cartels operate has distorted antitrust jurisprudence. In addition to diminishing the significance of inter-competitor communications involving employees without pricing authority, some courts assume that lower-level employees do not possess relevant knowledge regarding their employers' illegal collusion. In a similar vein, other opinions minimize the content of incriminating evidence when the source of the evidence is not an executive with pricing authority. Finally, courts sometimes misapprehend the flow of information by focusing on—and exonerating—the receipt of competitively sensitive pricing information while ignoring the delivery of this same information. The net effect of these judicial errors is the construction of a

safe harbor whereby price-fixing firms can evade antitrust liability by using lower-level employees to perform cartel tasks.

Part V charts a path forward. When evaluating circumstantial evidence of collusion, courts should focus on the content of inter-competitor communications, not the identity of the messenger. This is particularly true when firms maintain corporate policies and practices that require their lower-level employees to discuss pricing plans with their counterparts at rival firms and to report back their findings. Instead of devaluing the importance of lower-level employees in antitrust litigation, courts should treat these individuals as valuable assets who possess inside information that can bring down illegal conspiracies.

I. Proving Price Fixing Through Circumstantial Evidence

Section One of the Sherman Act condemns agreements among competitors to restrain trade.[3] Some agreements are so inherently anticompetitive that courts condemn them as per se illegal, which means that defendants can offer no defense that will excuse their collusion.[4] Agreements to fix prices, reduce output, or divide markets all violate antitrust law's per se rule.[5] Antitrust violations create both civil and criminal liability.[6] Individuals convicted of price fixing can be sentenced to ten years in prison and corporations face criminal fines that can potentially measure in the billions of dollars.[7] Successful private plaintiffs are entitled to treble damages, which are generally three times the amount of the overcharges paid by consumers, as well as their attorneys' fees.[8]

Despite the high penalties for price fixing, firms continue to illegally collude. Yet because the civil and criminal penalties are so high, price-fixing conspirators take great efforts to conceal their collusion from their victims and antitrust enforcement agencies.[9] This means that direct evidence of

3. 15 U.S.C. § 1.

4. St. Bernard Gen. Hosp., Inc. v. Hosp. Serv. Ass'n of New Orleans, Inc., 712 F.2d 978, 986–87 (5th Cir. 1983) (noting that "pro-competitive justifications are no defense to per se price fixing violations").

5. *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1150 n.5 (9th Cir. 2019) ("[H]orizontal agreements among competitors to fix prices, restrict output, and divide markets[] are generally deemed to be per se unreasonable . . . .").

6. 15 U.S.C. § 1.

7. *Id.*; *see also In re* Treasury Sec. Auction Antitrust Litig., No. 15 MD 2673, 2017 WL 10991411, at *2 (S.D.N.Y. Aug. 23, 2017) (noting that at least three law firms have each "recovered billions of dollars in damages for injured plaintiffs" in antitrust cases).

8. 15 U.S.C. § 15(a).

9. Christopher R. Leslie, *How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence*, 2021 U. ILL. L. REV. 1199, 1205–34 (2021).

collusion is rarely available.[10] Consequently, most antitrust plaintiffs must use circumstantial evidence to prove that the defendants colluded to fix prices.[11]

A. The Role of Plus Factors in Proving Price Fixing

In price-fixing cases, plaintiffs generally employ a two-step process for proving collusion through circumstantial evidence. First, they show that the defendants engaged in similar conduct, referred to as "conscious parallelism."[12] Second, antitrust plaintiffs proffer evidence of "plus factors," which "when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy."[13] Courts are instructed to examine the plaintiffs' proffered plus factors holistically and not in isolation.[14] If the plaintiffs' body of plus factors would permit a reasonable jury to infer collusion, the plaintiffs' antitrust claims should survive summary judgment and be presented to a jury.[15]

The concept of plus factors covers a wide range of circumstantial evidence. Some plus factors explain how the defendants' market is particularly susceptible to cartelization, while other plus factors suggest that the defendants have engaged in conduct associated with cartel formation, management, and enforcement.[16] Although courts have recognized a wide range of plus factors, no comprehensive list exists.[17] Nor do courts require

10. Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 AM. U. L. REV. 1713, 1720–24 (2020).

11. *See In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010) ("Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy.").

12. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993). ("[C]onscious parallelism[] describes the process, not in itself unlawful, by which firms . . . share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.").

13. Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987).

14. *See, e.g.*, *In re* Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 58 (D.D.C. 2016) ("'Plus factors' must be evaluated holistically." (quoting SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 424 (4th Cir. 2015))); *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011) ("Plaintiffs' conspiracy allegations must be examined holistically.").

15. *See* Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998) (noting that a plaintiff must provide "direct or circumstantial evidence that reasonably tends to prove" the conspiracy "to survive a motion for summary judgment." (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984))).

16. *See* Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. 1581, 1584, 1590–1603 (2021) (elaborating the plus-factor categories of cartel susceptibility, formation, management, and enforcement).

17. *See In re* Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004) ("[W]hat are 'plus factors' that suffice to defeat summary judgment? There is no finite set of such criteria; no exhaustive list exists.").

that plaintiffs present evidence of any minimum number of plus factors to survive summary judgment or to prove collusion through circumstantial evidence.[18] Many plus factors relate to the various tasks that price-fixing cartels generally perform.

B. Plus Factors Implicated in Pricing Authority Jurisprudence

This Article shows how courts misapprehend circumstantial evidence involving the price-fixing activities of employees without pricing authority. While courts have recognized dozens of individual plus factors, only a handful are relevant to issues surrounding the role of lower-level employees in price-fixing conspiracies.[19] These include the opportunity to conspire, inter-competitor communications, the exchange of competitively sensitive information, suspicious statements, and cartel concealment measures.

Like most illegal conspiracies, price fixing is a function of motive and opportunity. The motive is generally self-evident: firms can increase their profits by replacing competition with collusion.[20] Courts recognize motive as a plus factor.[21] Similarly, the opportunity to conspire, including evidence of inter-competitor communications, constitutes a plus factor.[22] In order to be successful, price-fixing firms must communicate with one another to discuss price (and often output) restrictions and to manage changes of that price in response to fluctuations in consumer demand, in inputs, and in exchange rates.[23]

18. *See* Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 207 (3d Cir. 2017) (Stengel, C.J., dissenting) (first citing *Flat Glass*, 385 F.3d at 361 n.12; then citing Petruzzi's IGA Supermarkets, Inc. v. Darling–Del. Co., 998 F.2d 1224, 1242 (3d Cir. 1993)) ("While we often rely on the 'big 3' plus factors (motive, actions contrary to interest, and traditional conspiracy), the plus-factor inquiry is not intended to be rigid or formulaic.").

19. For a general overview and typology of plus factors in price-fixing litigation, see generally Leslie, *supra* note 16.

20. *In re* Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 992–93 (N.D. Ohio 2015) ("It is hard to imagine a horizontal price-fixing case in which a defendant would not have a desire to earn supracompetitive profits, which of course can be gained from unlawful collusion or from lawful parallel pricing.").

21. *See, e.g.*, Burtch v. Milberg Factors, Inc., 662 F.3d 212, 227 (3d Cir. 2011) (describing "evidence that the defendant had a motive to enter into a price fixing conspiracy" as a plus factor (quoting *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321–22 (3d Cir. 2010))).

22. *See, e.g.*, Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1033 (8th Cir. 2000) ("Courts have held that a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy."); Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999) (listing as a plus factor "whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy"); *Polyurethane Foam*, 152 F. Supp. at 983 ("Evidence of communications between competitors can serve as circumstantial evidence of price-fixing.").

23. *See* Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 825–34 (2011) (studying "the multitude of decisions that price-fixing conspirators must make in order to create and stabilize their illegal cartel").

While the existence of inter-competitor communications in general shows that the competitors had the opportunity to collude, the content of some communications is particularly probative of illegal collusion having happened. For example, when competitors exchange sensitive price information, such as pricing plans, this can be strong circumstantial evidence of price collusion because such exchanges are often part of cartel negotiations over what price to set in which markets.[24] When a cartel involves multiple products, co-conspirators sometimes exchange their confidential price sheets with each other.[25] This helps the cartel managers coordinate any planned price increases and builds trust among the cartel members, which can be critical to creating and maintaining an illegal price-fixing conspiracy.[26] Courts properly treat the inter-competitor exchange of sensitive information as an important plus factor for inferring collusion.[27]

Price-fixing conspirators also exchange information as part of the cartel's enforcement regime. Sharing price and sales data facilitates cartel enforcement, as members audit each other's pricing to determine whether any firm is cheating by charging a price lower than that set by the cartel.[28] Some cartels even employ price-verification arrangements in which firms accurately answer co-conspirators' inquiries as to prices charged on completed or proposed transactions.[29] Similarly, cartel partners sometimes share their production and sales data with each other in order to detect cheating on their agreement.[30] Because price-fixing conspirators share their

24. *See* Leslie, *supra* note 16, at 1626 (arguing that sharing of confidential pricing information is "always circumstantial evidence of conspiracy" but that "it just might not be sufficient evidence to prove a conspiracy without other circumstantial evidence").

25. *See, e.g.*, United States v. Therm–All, Inc., 373 F.3d 625, 628–29 (5th Cir. 2004) (affirming the conviction of fiberglass insulation manufacturers for an illegal price-fixing conspiracy in which they shared price sheets to better match prices).

26. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEXAS L. REV. 515, 572 (2004).

27. *See In re* Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 446–47 (9th Cir. 1990) (discussing the reasonable inferences that a finder of fact could draw from a defendant publicly sharing price-increase information); *In re* Tyson Foods, Inc. Sec. Litig., 275 F. Supp. 3d 970, 995 (W.D. Ark. 2017) (quoting Grasso Enters., LLC v. Express Scripts, Inc., No. 14CV1932, 2017 WL 365434, at *5 (E.D. Mo. Jan. 25, 2017)) ("[T]he broadcasting of sensitive business information . . . is . . . circumstantial evidence of a conspiracy among competitors . . . .").

28. ABA SECTION OF ANTITRUST LAW, ANTITRUST HEALTH CARE HANDBOOK 174 (4th ed. 2010) ("Exchanges of price information . . . facilitate[] the competitors' detecting others 'cheating' on their tacit agreement.").

29. *See* Leslie, *supra* note 16, at 1601 ("Some price exchanges involve price verification—the practice of a seller reporting to its competitors the details of completed transactions with specific customers."); United States v. Andreas, 216 F.3d 645, 653 (7th Cir. 2000) (noting the lysine cartel's use of a price-verification scheme); CHRISTOPHER HARDING & JENNIFER EDWARDS, CARTEL CRIMINALITY: THE MYTHOLOGY AND PATHOLOGY OF BUSINESS COLLUSION 179 (2015) (noting that the LCD panels cartel used price verification).

30. *See* JOHN M. CONNOR, GLOBAL PRICE FIXING 294–95 (2d ed. 2008) (discussing the vitamin B2 cartel); *id.* at 315 (noting that in the choline chloride cartel, "[c]hecking prices on transactions

sensitive pricing and sales information while true competitors do not,[31] such exchanges are a plus factor for inferring collusion.[32]

Statements made by the price-fixing defendants' employees can also constitute evidence of collusion. Indeed, an admission of guilt by a high-level employee with inside information is direct evidence of illegal price fixing.[33] But statements short of an outright confession are often important circumstantial evidence.[34] For example, letters and emails may contain incriminating language that memorializes or acknowledges an underlying agreement among rivals not to compete.[35] Even watercooler conversations can contain suspicious statements from which a reasonable jury could infer the participants' awareness of price fixing, if not an explicit admission. Thus, depending on their content and context, the casual statements of a defendant's employees could be powerful evidence of collusion.

Due to antitrust law's steep penalties, price-fixing conspirators engage in myriad methods to conceal their illegal activity. Conspirators engage in covert tactics such as using aliases and code names, holding secret meetings, creating fake trade associations, destroying incriminating documents and

was not feasible, so the major technique for detecting cheating was for the members to share their internal sales records with each other at the quarterly meetings"); *id.* at 152 (noting that the citric acid cartel exchanged sales data to "confirm adherence to the [market] share agreements"); *see also* William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 424 (2011) ("The conveyance of firm-specific production and sales information is important for monitoring compliance with many cartel agreements."); Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LITERATURE 43, 86 (2006) ("Successful cartels develop mechanisms for sharing information, making decisions, and manipulating incentives through self-imposed carrots and sticks.").

31. *See, e.g.*, CONNOR, *supra* note 30, at 281 (discussing the vitamins cartel); *In re* Plywood Antitrust Litig., 655 F.2d 627, 631–33 (5th Cir. 1981) (affirming the convictions of conspirators sharing information on delivery charges and describing their open communications channels).

32. *See In re* Flat Glass Antitrust Litig., 385 F.3d 350, 368–69 (3d Cir. 2004) (explaining the relevance of evidence that defendants exchanged pricing information); *Petroleum Prods.*, 906 F.2d at 452 ("[T]he evidence in the present case amply supports an inference that the exchange of price information by the appellees was done with the purpose and effect of allowing greater coordination and stabilization of prices."); United States v. Apple Inc., 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013) ("Plus factors commonly considered by courts include . . . information sharing." (citing Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001))); *Todd*, 275 F.3d at 198 ("Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement."); *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 369 (S.D.N.Y. 2011) (explaining how the evidence in the currency conversion fee litigation supports an inference that credit card companies discussed pricing information); *see also* Gelboim v. Bank of Am. Corp., 823 F.3d 759, 782 (2d Cir. 2016) (treating defendant's "knowledge of other banks' confidential individual submissions in advance" as circumstantial evidence of conspiracy).

33. *See In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654 (7th Cir. 2002) ("Because price fixing is a per se violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs.").

34. *See* Leslie, *supra* note 16, at 1585–86 (discussing most plaintiffs' reliance on circumstantial evidence in price-fixing cases).

35. *E.g.*, *Flat Glass*, 385 F.3d at 364–66.

forging exculpatory ones, developing cover stories to explain price increases, and lying to government officials and customers.[36] Because such concealment measures are more consistent with collusion than competition, courts treat concealment efforts as a plus factor.[37]

In short, in price-fixing litigation, the activities and statements of the defendants' employees can constitute critical evidence of collusion. Although price fixing is often conceived of as corporate misconduct, the actual price fixers are individual employees.[38] The actions of individuals can constitute important circumstantial evidence of collusion. And innocent people within the firm may observe illegal, collusive behavior by their co-workers and superiors.[39] Yet, as Part II explains, many courts may determine the weight of employee-based evidence in a manner that deprives some circumstantial evidence of its probative value.

II. The Role of Price Authority in Antitrust Jurisprudence

Despite the fact that most antitrust plaintiffs must rely on circumstantial evidence to prove collusion, several antitrust opinions have undermined the plus factors discussed in Part I by overemphasizing the issue of who within a defendant's firm had actual authority to set prices. When arguing that courts should discount or ignore evidence of collusion involving lower-level employees, some price-fixing defendants contend "that a conspiracy cannot be inferred from 'chance encounters' between competitors' employees, particularly where the employees have no pricing authority."[40] Defendants routinely emphasize that inter-competitor meetings at which strategic or confidential information was exchanged involved individuals "without the authority to bind their respective companies."[41] In some cases, defendants simply speculate in their motions that meetings among rivals involved

36. Leslie, *supra* note 9, at 1206–31.

37. *See, e.g.*, *In re* Urethane Antitrust Litig., 913 F. Supp. 2d 1145, 1154–56 (D. Kan. 2012) (recognizing the defendants' efforts to conceal their communications as a plus factor).

38. This may change as firms use pricing algorithms that may be able to effect price fixing without any actual human interaction. *See generally* Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 2017 U. ILL. L. REV. 1775 (2017) (addressing the ways artificial intelligence and computerized technologies may foster anticompetitive collusion and raise significant legal and ethical challenges); Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016) (providing background on the commercial changes taking place due to algorithm-driven prices and discussing the consequences of those changes on antitrust law).

39. *See infra* notes 252–55 and accompanying text.

40. *In re* Cal. Indirect Purchaser X-Ray Film Antitrust Litig., No. 960886, 1998 WL 1031494, at *7 (Cal. Super. Ct. Oct. 22, 1998).

41. United States v. Nippon Paper Indus. Co., 62 F. Supp. 2d 173, 184 (D. Mass. 1999).

individuals without pricing authority.[42] Often, they try to diminish the evidentiary significance of so-called lower-level employees who exchanged pricing data with rivals. For example, in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*,[43] the plaintiffs sought to survive summary judgment by highlighting the testimony of J.F. Rogers, a pricing manager at the Atlantic Richfield Company (ARCO), who swore that he called his counterpart at Mobil to confirm rumors of Mobil increasing its prices.[44] On appeal, ARCO "attempt[ed] to belittle this evidence by suggesting that Rogers was a 'low-level' employee."[45] It is now a common strategy for antitrust defendants to downplay the exchange of price information as unauthorized and done by employees without pricing authority.[46] This Part examines how some judges have created a toggle in which circumstantial evidence of collusion is credited if it involves senior executives and discounted if it involves lower-level employees.

A. Communications and Information Exchanges Among Senior Executives

In many antitrust cases, plaintiffs present evidence of how senior executives of competing firms have engaged in communications, sometimes sharing sensitive information.[47] Most courts recognize that the exchange of confidential price information among senior executives of competing firms is probative of illegal price fixing.[48] Thus, when parallel price movements are

42. *See, e.g.*, *id.* ("Mr. Hinoki testified not only that there was no agreement, but that he himself lacked ultimate price authority to bind Honshu. NPI argues that there is no reason to think any of the other attendees had any more authority than he.").

43. 906 F.2d 432 (9th Cir. 1990).

44. *Id.* at 453.

45. *Id*.

46. *See, e.g.*, Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053, 1058 (D.N.J. 1988) ("Defendants claim . . . the information exchange was not authorized by executives of Falcon Jet, but the practice merely evolved over time among sales engineers, who had or have no pricing authority.").

47. *See, e.g.*, *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 368–69 (3d Cir. 2004) ("[T]here is evidence tending to show that the exchanges occurred at a higher level of the flat glass producers' structural hierarchy."); *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011) (concluding that the presence of "senior in-house counsel" at a meeting with competitors, along with a simultaneous price hike "within days" of that meeting, provided sufficient evidence for plaintiffs to survive summary judgment on their price-fixing claim).

48. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 408 (3d Cir. 2015) (discussing *Flat Glass* and noting that "[t]he evidence in *Flat Glass* showed that the information exchanges occurred among the conspiring companies' upper ranks and that the exchanges affected prices"); *In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 67 (2d Cir. 2012) ("[T]he causal link is presumed to be particularly strong when, as alleged here, the agreement is between executives at rival companies, each of whom has final pricing authority."); *In re* Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 984–85 (N.D. Ohio 2015) (discussing the significance of "communications between high-level competitor employees, almost all of who[m] had pricing

coupled with "direct evidence of communication between high-level personnel on pricing policy," courts hold this sufficient to prove a circumstantial case for price fixing.[49] For example, in *Gainesville Utilities Department v. Florida Power & Light Co.*,[50] the Fifth Circuit reversed a jury verdict for the defendants in a collusion case because the "continuous exchange of [correspondence] between high executives of [competing companies] . . . border[ed] on a blatant agreement to divide the market."[51] The court treated inter-competitor communications among senior executives as highly indicative of collusion.

When plaintiffs can proffer evidence of high-level executives exchanging information, courts are more likely to deny defendants' motion for summary judgment on price-fixing claims.[52] Courts in such scenarios have reasoned that "price information exchanges among companies' upper ranks that affect pricing decisions permit an inference of conspiracy."[53] For example, in *In re Publication Paper Antitrust Litigation*,[54] the Second Circuit reversed a grant of summary judgment for the defendants on a price-fixing claim because "the causal link is presumed to be particularly strong when, as alleged here, the agreement is between executives at rival companies, each of whom has final pricing authority."[55] Similarly, courts often deny summary judgment to price-fixing defendants when plaintiffs proffer evidence of "the private exchange of sensitive business information between senior

authority"); *In re* Blood Reagents Antitrust Litig., 266 F. Supp. 3d 750, 776–78 (E.D. Pa. 2017) ("[P]rice information exchanges among companies' upper ranks that affect pricing decisions permit an inference of conspiracy . . . ."); Stanislaus Food Prods. Co. v. USS–POSCO Indus., No. 09–CV–00560, 2013 WL 595122, at *12 (E.D. Cal. Feb. 15, 2013) ("Exchanges of information among high-level executives who have pricing authority bolster an inference of conspiracy."), *aff'd*, 803 F.3d 1084 (9th Cir. 2015); *see also* William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593, 611 (2017) ("Communications by individuals with pricing or other relevant decisionmaking authority are, of course, most probative.").

49. *In re* Plywood Antitrust Litig., 655 F.2d 627, 634 (5th Cir. 1981).

50. 573 F.2d 292 (5th Cir. 1978).

51. *Id.* at 300–01.

52. Allegations that senior leaders of competing firms met can also help plaintiffs survive a motion to dismiss. *See, e.g.*, *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010) (noting that "[t]he complaint further alleges that the defendants, along with two other large sellers of text messaging services, constituted and met with each other in an elite 'leadership council' within the association—and the leadership council's stated mission was to urge its members to substitute 'co-opetition' for competition," and affirming the denial of the motion to dismiss for failure to state a claim); *In re* Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 14–md–2508, 2015 WL 11658702, at *3 (E.D. Tenn. Dec. 31, 2015) (denying the defendants' motion to dismiss because the plaintiffs identified meetings at which the "[d]efendants' executives with pricing authority met").

53. *Blood Reagents*, 266 F. Supp. 3d at 776–78 (citing *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 368–69 (3d Cir. 2004)).

54. 690 F.3d 51 (2d Cir. 2012).

55. *Id.* at 67.

competitor employees with pricing authority."[56] This makes sense because the participation of "high-ranking executives" can increase the probative value of evidence of inter-competitor communications.[57]

B. Communications and Information Exchanges Among Lower-Level Employees

In contrast to the *Gainesville Utilities* and *In re Publication Paper Antitrust* cases, which involved executive-level communications, several antitrust cases have discussed communications and information exchanges among lower-level employees. When plus-factor activity is committed by employees without pricing authority, courts routinely discount this evidence. The Third Circuit issued the quintessential opinion inviting courts to devalue evidence involving the activities of lower-level employees in *In re Baby Food Antitrust Litigation*.[58] In *Baby Food*, a group of wholesalers, supermarkets, and other purchasers sued Gerber, Beech–Nut, and Heinz for illegally conspiring to raise the prices of their baby food.[59] The plaintiffs presented evidence that the manufacturers were raising prices in unison in a "highly concentrated nationwide industry," in which the three defendants controlled over 98% of the market.[60] Among several plus factors,[61] evidence was provided that sales representatives of the various defendants maintained a communications network in which they exchanged their employers' confidential pricing plans.[62] The plaintiffs explained that the sales representatives passed this sensitive information along to their respective superiors.[63]

The Third Circuit minimized the significance of these price exchanges because they were done by low-level employees without pricing authority. The court began by noting that the district court "determined that the nature of the exchanges of information among the defendants' sales representatives amounted to mere 'chit chat' at chance meetings or trade shows among persons with no pricing authority."[64] The appellate panel endorsed this

56. *In re* Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 991 (N.D. Ohio 2015); *see also In re* TFT–LCD (Flat Panel) Antitrust Litig., No. C 09–5840, 2012 WL 4808425, at *1 (N.D. Cal. Oct. 9, 2012) (holding that if executives with pricing authority meet "to exchange competitively sensitive supply and pricing information," that is indicative of collusion).

57. *See In re* Urethane Antitrust Litig., 913 F. Supp. 2d 1145, 1155 (D. Kan. 2012) (denying defendant's motion for summary judgment, in part because "the suspect communications and meetings involved high-ranking executives . . . who could and did influence pricing").

58. 166 F.3d 112 (3d Cir. 1999).

59. *Id.* at 116.

60. *Id.*

61. *See infra* notes 200–02 and accompanying text.

62. *Baby Food*, 166 F.3d at 119, 123.

63. *Id.* at 123.

64. *Id.* at 133.

approach, emphasizing that there was "no evidence of record showing reciprocal exchange of information by any executive of the defendants with price-fixing authority."[65]

The judges seemed to believe that the exchange of pricing information is not suspicious unless the plaintiffs could prove that high-powered executives communicated without any use of intermediaries. For example, the court at one point emphasized that "[n]o evidence . . . shows that any executive of any defendant exchanged price or market information with any other executive."[66] The court implied that only senior executives can illegally collude or participate in a price-fixing conspiracy by distinguishing out-of-circuit cases in which upper-level executives exchanged price information.[67]

The Third Circuit did not issue the first antitrust opinion to diminish the legal significance of rival salespeople exchanging sensitive price information,[68] but its *Baby Food* decision has proved to be the most influential. Subsequent Third Circuit opinions have interpreted *Baby Food* as holding that "price discussion among low level sales people has little probative weight."[69] Citing the need to follow Third Circuit precedent, one Pennsylvania district judge explicitly refused to "consider[] Plaintiffs' evidence of suspicious intercorporate and internal communications among manufacturers' low-level employees."[70] Outside of the Third Circuit, courts have applied *Baby Food* to hold that "discussions about pricing or market conditions between low-level salesmen who lack pricing authority is not probative of conspiracy."[71] Antitrust opinions from the Third, Seventh, and Ninth Circuits, as well as a smattering of district courts, all diminish the

65. *Id.* at 137.

66. *Id.* at 135.

67. *See id.* at 125 n.8 (distinguishing *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990) and *Rosefielde v. Falcon Jet Corp.*, 701 F. Supp. 1053 (D.N.J. 1988) because those cases involved the active participation of "upper level executives").

68. *See* Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1357–58 (9th Cir. 1982) (affirming the district court's dismissal of the plaintiffs' price-fixing claim and accepting the district court's characterization of the inter-competitor communications as "no more than idle 'shop talk' such as often occurs between persons in the same field of endeavor").

69. *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 368–69 (3d Cir. 2004) (citing *Baby Food*, 166 F.3d at 125 & n.8); *see also In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 408 (3d Cir. 2015) (citing *Baby Food*, 166 F.3d at 125–26 & n.8) ("For information that came from low level employees, we viewed it as less worrisome than if it had come from upper-level executives.").

70. *In re* Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175, 237 n.40 (E.D. Pa. 2016) (first citing *Flat Glass*, 385 F.3d at 368; and then citing *Baby Food*, 166 F.3d at 125).

71. *In re* Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 983–84 (N.D. Ohio 2015) (citing *Baby Food*, 166 F.3d at 125–26); *see also In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011) (citing *Baby Food*, 166 F.3d at 125); *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07–md–01819, 2010 WL 5138859, at *7 (N.D. Cal. Dec. 10, 2010) (citing *Baby Food*, 166 F.3d at 124–26).

probative value of evidence involving lower-level employees.[72] The Eighth Circuit has gone one step further, apparently disregarding the low-level/high-level distinction of the *Baby Food* opinion in order to support the broader proposition that "there is nothing suspicious about oligopolists exchanging non-public price information."[73]

For many courts, however, pricing authority operates as a toggle. For example, some federal judges have interpreted *Baby Food* as holding that although "price discussions among low level employees did not show a conspiracy[,] . . . if high-level executives had been involved, it would have constituted evidence of conspiracy."[74] Other judicial opinions suggest that rivals' possession of each other's nonpublic pricing information is not probative of price fixing unless the information was exchanged by "upper-level executives."[75] Under this approach, the inter-competitor exchange of pricing information is probative when done by high-level executives but not when done by low-level employees.[76]

This binary approach is troublesome because it risks depleting some important forms of circumstantial evidence of their legal significance altogether. This ratchet effect—in which probative value is magnified when pricing authority is present but is diminished when that pricing authority is absent—is detrimental because it is based on false premises about how price-fixing conspiracies function. By focusing on the messenger instead of the message, courts misapprehend the probative value of critical evidence. Part III explores both the structure of illegal price-fixing cartels and the roles played in those conspiracies by lower-level employees without pricing authority.

III. How Price-Fixing Cartels Actually Operate

Antitrust jurisprudence that overemphasizes the pricing authority of participants fails to appreciate how price-fixing conspiracies actually operate. Price-fixing conspiracies are often complicated webs of relationships among senior executives, managers, salespeople, and other employees scattered

72. *E.g.*, *In re* Text Messaging Antitrust Litig., 782 F.3d 867, 876, 879 (7th Cir. 2015); *Baby Food*, 166 F.3d at 125 & n.8; *Krehl*, 664 F.2d at 1357; *Polyurethane Foam*, 152 F. Supp. 3d at 983; *see also Currency Conversion Fee*, 733 F. Supp. 2d at 370; *SRAM*, 2010 WL 5138859, at *7.

73. Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1048 (8th Cir. 2000) (Gibson, J., dissenting) (critiquing the majority's reliance on *Baby Food* for this proposition).

74. *Id.*

75. *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 408 (3d Cir. 2015).

76. *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 368–69 (3d Cir. 2004) ("[P]rice discussion among low level sales people has little probative weight; we distinguished the far different situation where upper level executives have secret conversations about price."); *Polyurethane Foam*, 152 F. Supp. 3d at 983 (quoting *Flat Glass*, 385 F.3d at 368–69) ("Contrast . . . low-level chatter with the 'far different situation where upper level executives [with pricing authority] have secret conversations about price'; such discussions may support an inference of conspiracy.").

across a company's organizational charts. Participants in a conspiracy serve different functions and perform different roles.

Cartel leaders often delegate. This Part discusses four major cartel tasks: formation, management, enforcement, and concealment of the conspiracy. The following sections will explain how these cartel functions are not the exclusive province of senior corporate executives with pricing authority. Indeed, empirically, lower-level employees have performed these functions in actual cartels.

A. Cartel Tasks

Creating and maintaining a stable price-fixing cartel entails many steps. First, decision-makers across rival firms must agree in concept that they will replace competition with collusion. Even before the details of a price-fixing conspiracy are negotiated, the competitors need to communicate a mutual willingness to collude. Next, the co-conspirators must reach a consensus on the particular form of collusion they will employ. Price fixing can be as simple as rival firms agreeing to charge a particular price or increasing prices by an agreed-upon percentage.[77] Price-fixing schemes, however, can also be relatively complex. The Supreme Court has defined price fixing broadly to include any inter-competitor agreements with the purpose or effect of raising price.[78] For instance, antitrust conspirators may agree to reduce production, destroy stock, or otherwise reduce output, which will increase the prices paid by consumers.[79] All such agreements are per se illegal.[80]

Second, conspirators intent on maintaining a long-lasting cartel often develop mechanisms for managing fluctuations in the cartel price, which may have to be adjusted in response to changes in interest rates, exchange rates, prices of inputs, or consumer demand.[81] Cartel members may also need to watch for signs of new entry into the cartelized market because the conspiracy's artificially inflated price may encourage new firms to enter the market. Consequently, a cartel may need to lower its price to make new entry less profitable and, thus, less likely.[82] In addition to vigilance, conspirators

77. *See, e.g.*, *In re* Auction Houses Antitrust Litig., 193 F.R.D. 162, 164 (S.D.N.Y. 2000) (involving defendants accused of price fixing after they allegedly agreed "to employ a common rate schedule").

78. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 & n.59 (1940).

79. United States v. Andreas, 216 F.3d 645, 667 (7th Cir. 2000) ("A prototypical output restriction raises prices by reducing supply below demand.").

80. *See In re* Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1009 (7th Cir. 2012) (noting that "an agreement to restrict output and therefore raise price is the per se illegal offense of price fixing").

81. *See* Hovenkamp & Leslie, *supra* note 23, at 832–33 (noting why cartels may need to adjust fixed prices).

82. *Cf.* ROBERT C. MARSHALL & LESLIE M. MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS 150 n.16 (2012) (noting how a 1930s nitrogen-export cartel capped prices sufficiently low to discourage domestic production).

may discuss how to deter market entry or how to respond should new firms enter the market.[83]

Third, conspirators often develop cartel enforcement mechanisms. Although all cartel members are collectively better off in the long run if they all abide by their illegal agreement, individual firms may maximize their short-term profits by cheating on their cartel partners. For example, a firm may charge less than the cartel's agreed-upon price in order to sell more than its cartel quota.[84] Because cartels are more likely to deter and survive bouts of cheating if cheaters are punished, some cartel managers implement enforcement mechanisms to ensure that all of the cartel members either honor the accord or get appropriately penalized.

Fourth, because conspiring with rivals to raise price exposes the conspirators to imprisonment, criminal fines, and treble damages to private plaintiffs, many price fixers go to great lengths to conceal their illegal collusion.[85] Cartels use code names and secret assignations in order to communicate unobserved.[86] They develop cover stories to justify their public meetings, such as creating fake trade associations.[87] Cartel members destroy incriminating documents and fabricate exculpatory ones.[88] They agree to lie to their own attorneys, the FBI, and antitrust authorities.[89] Through omission and commission, the conspirators hide their collusion from outsiders.

Not every price-fixing conspiracy contains all these steps or performs all these functions. Some cartels are created without any plans for cartel management, enforcement, or concealment. None of these tasks are required

83. *See generally* C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1207 (2013) (arguing for the importance of "parallel exclusion"—that is, "conduct, engaged in by multiple firms, that blocks or slows would-be market entrants"—in antitrust law).

84. In addition to fixing prices, cartels often assign sales quotas for their members to ensure that every firm profits from the cartel arrangement and to reduce every firm's incentive to cheat on the agreement by charging less than the cartel-fixed price. *See* United States v. Andreas, 39 F. Supp. 2d 1048, 1071 (N.D. Ill. 1998) ("[B]y allocating sales volume . . . , the competitors could police the lysine conspiracy to ensure that competitors did not secretly circumvent the price agreement and sell lysine at discounted prices."). If a firm sells more than its sales quota, that will trigger a cartel's enforcement mechanism.

85. Leslie, *supra* note 9, at 1202.

86. *See, e.g.*, MICHAEL A. UTTON, CARTELS AND ECONOMIC COLLUSION: THE PERSISTENCE OF CORPORATE CONSPIRACIES 56 (2011) ("Considerable effort went into disguising the true nature of their meetings, to the extent that they used code names for companies and individual executives."); Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 121 (4th Cir. 1995) (explaining that a price fixer testified "that all meetings were in person, prearranged, and conducted away from the office in parking lots, restaurants, or private automobiles"); *In re* Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 1005 (N.D. Ohio 2015) (noting that "[d]efendants used shorthand or code to refer to competitor employees and price discussions"); Leslie, *supra* note 9, at 1206–13 (describing the code names and secret assignations used by executives in price-fixing conspiracies).

87. Leslie, *supra* note 9, at 1213–15.

88. *Id.* at 1219–28.

89. *Id.* at 1228–33.

to form a cartel or to violate antitrust law. Nonetheless, many exposed price-fixing cartels performed these various functions, and evidence of these activities is highly probative of illegal collusion. The following discussion explains the role of lower-level employees in performing these tasks.

B. The Labor of Low-Level Employees in Price-Fixing Conspiracies

Price-fixing conspiracies can take many different forms. Simple collusion does not require a lot of participants; felonious price fixing can be as straightforward as two CEOs secretly agreeing to raise their prices.[90] But many price-fixing conspiracies are more complicated affairs, especially when overlapping cartels control international markets in over a dozen related-but-distinct products, such as various vitamins or electrical equipment.[91] For these more complex (and sometimes byzantine) cartel structures, price-fixing firms often maintain hierarchal structures in which different employees within a firm's organizational chart perform different duties for the cartel.

Cartel managers within each member firm determine which employees perform each of the cartel functions. While some of the decisions and actions necessary for a durable price-fixing conspiracy must be made by executives in positions of power, most cartel functions can be executed by lower-level employees. This section reviews how lower-level employees perform many cartel responsibilities.

1. Formation and the Initial Fixed Price.—In most markets, the initial agreement to collude is best achieved through individuals with pricing authority. For example, when Robert Crandall, the president of American Airlines, called Howard Putnam, the president of Braniff Airlines, and suggested that both executives raise their fares 20%, Crandall had the authority to raise American's prices should his counterpart at Braniff agree to this proposal.[92] This is the type of invitation to collude that is suited for senior executives with power over pricing. A ticketing agent or a pilot would have no credibility if she telephoned her counterpart at a competing airline

90. *See* United States v. Am. Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984) (describing a phone call on which the president of American Airlines proposed to the president of Braniff Airlines that both airlines raise their fares by 20%).

91. *See, e.g.*, *In re* Vitamins Antitrust Litig., 320 F. Supp. 2d 1, 5 (D.D.C. 2004) (noting interrelated price-fixing conspiracies in the markets for "Vitamin A, Vitamin B1 (Thiamine), Vitamin B2 (Ribloflavin), Vitamin B3 (Niacin), Vitamin B4 (Choline Chloride), Vitamin B5 (CalPan), Vitamin B6 (Pyridoxine), Vitamin B9 (Folic Acid), Vitamin B12, Vitamin C, Vitamin D, Vitamin E, Vitamin H (Biotin), Astaxanthin, Beta Carotene, Canthaxonthin, Apocarotenal, and vitamin premix"); JOHN G. FULLER, THE GENTLEMEN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY 61 (1962) ("Other cases, some of larger impact on the public and taxpayer, some smaller, unfolded at the same time, with the companies and executives involved overlapping and intertwining with each other like spaghetti.").

92. *Am. Airlines*, 743 F.2d at 1116.

and offered to commit the crime of price fixing. Price-fixing conspiracies are unlikely to get off the ground without at least the tacit approval of high-level executives.

The active involvement of senior executives at the outset, however, does not negate the critical role of lower-level employees during the early phases of cartel formation. Indeed, the initial price increase may be negotiated through executives without pricing authority. For example, between 2000 and 2009, Immucor and Ortho raised the price of blood reagent products twentyfold.[93] Hospitals and blood donor centers use blood reagents to determine whether a donor's blood is compatible with a potential recipient. The artificially inflated prices for blood reagents resulted in consumers being overcharged by $650 million.[94] These price increases were driven by collusion, not market forces. In 2000, Immucor's President, Ed Gallup, instructed Judy Thorne, Immucor Director of Marketing, to communicate with Ortho's regional vice president, David Gendusa, about coordinating price increases.[95] Although Thorne was a senior executive, she did not have pricing authority. Gallup asked her to work with Gendusa not because of her position within Immucor but because of her friendship with Gendusa. Friendships and personal relations that create a sense of mutual trust can be more important for coordinating price collusion than the messenger's status within their firm.[96] Shortly after their discussions, the price of blood reagents increased significantly.[97] The blood reagent conspiracy demonstrates the important role that employees without pricing authority can play during a cartel's infancy. Even when a company's president initiates a price-fixing conspiracy, that president may then order subordinates to commence the collusion with a rival.[98]

2. Cartel Management.—Although senior executives often take a leading role in planning and directing cartel operations,[99] once the rival firms have agreed to conspire, the senior executives can delegate most cartel tasks to their underlings who lack independent authority to set prices. Most cartel

93. *In re* Blood Reagents Antitrust Litig., 266 F. Supp. 3d 750, 754–55 (E.D. Pa. 2017). The facts for this paragraph are taken from the court's recitation of the plaintiffs' allegations.

94. *Id.* at 755.

95. *Id.* at 758.

96. Leslie, *supra* note 26, at 565–68.

97. *Blood Reagents*, 266 F. Supp. 3d. at 759.

98. *See, e.g.*, *id.* at 776–78 ("In this case, the explicit transfer of price information between relatively high-ranking employees of Ortho and Immucor, at the behest of Immucor's President, was followed shortly by significant price increases by both Ortho and Immucor.").

99. *See, e.g.*, MARSHALL & MARX, *supra* note 82, at 32 n.11 ("According to the EC decision in *Vitamins* . . . , 'the collusive arrangements in the various vitamins were not spontaneous or haphazard developments, but were planned, conceived and directed by the same persons at the most senior levels in Roche and the other undertakings.'").

management functions are untethered to pricing authority. To prove this point, the following discussion examines cartel hierarchies and the various cartel management functions that low-level employees perform within these organizational pyramids of price fixing.

Price-fixing conspiracies often fashion multitiered organizational structures.[100] At the top of the org chart reside senior executives who meet at a frequency between quarterly and annually.[101] Cartels use colorful nomenclature to identify these individuals, such as "'Top Guy', 'Masters', 'Top level', 'Bosses' meetings, the 'Directors club' and the 'Sanco club.'"[102] These high-level executives meet to build trust among the business rivals and "to demonstrate their respective companies' commitment to the cartel."[103] For example, within the international vitamin cartel, a group of senior managers met annually at multiday summits where they would plot out the price increases and relative sales volumes for each member of the cartel.[104]

Below these so-called bosses, a cartel's org chart is populated with lower-level employees, sometimes denominated within the cartel as "'contact' groups, 'working level', 'Sherpa' and 'Global product marketing level' 'working level/management level/job arrangement' meetings."[105] In the Japanese consumer electronics cartel, for example, the so-called Palace Group comprised the senior managing directors of Hitachi, Sanyo, Sharp, and Toshiba, among others, while the Palace Preparatory Group served as a lower-level group that "screened and funneled issues to the Palace Group."[106] The lower-level cartel "working groups" tend to meet more often than the senior executives. For example, while the top-tier conspirators of the vitamins cartel met annually, "lower-level executives, who were charged with the implementation of the global cartel, met with their counterparts around the world on at least a quarterly basis to ensure that the cartel ran

100. *See, e.g.*, FULLER, *supra* note 91, at 106 (discussing an example of a tiered cartel in power transformers).

101. MARK JEPHCOTT, LAW OF CARTELS 16 (2d ed. 2011).

102. *Id.*; *see also* HARDING & EDWARDS, *supra* note 29, at 145 (noting how in the pre-insulated pipes cartel, members of the senior-level group were referred to as "The Popes").

103. JEPHCOTT, *supra* note 101, at 16; *see also* Leslie, *supra* note 26, at 546–601 (discussing the importance of trust for price-fixing cartels).

104. James M. Griffin, Deputy Assistant Att'y Gen., Antitrust Div. of U.S. Dep't of Just., An Inside Look at a Cartel at Work: Common Characteristics of International Cartels, Speech at Omni Shoreham Hotel, Washington, D.C. (Apr. 6, 2000), *in* 1 CARTELS 115, 125 (Margaret C. Levenstein & Stephen W. Salant eds., 2007); UTTON, *supra* note 86, at 47.

105. JEPHCOTT, *supra* note 101, at 16.

106. DAVID SCHWARTZMAN, THE JAPANESE TELEVISION CARTEL: A STUDY BASED ON *MATSUSHITA V. ZENITH* 87 (1993).

smoothly."[107] So, what do these lower-level employees do at their cartel-management meetings? The short answer is everything.

Studying actual price-fixing conspiracies shows that lower-level employees who lack pricing authority often perform at least four tasks related to cartel management: sharing information, communicating assurances, evaluating market conditions, and fine-tuning the cartel price. Each of these is discussed in turn, with examples from actual conspiracies.

First, cartel partners need to share information related to pricing plans, costs, production, and market conditions. Cartel decision-makers use information supplied by lower-level employees to fix prices.[108] In one case involving an alleged conspiracy to depress nurses' wages, the district court noted that hospital systems used lower-level employees who "lacked ultimate wage-setting authority" to exchange wage information among competitors.[109] The court explained that these lower-level employees "were participants in the process leading up to the decisions made by those who possessed this authority, and that at least some of the data they gathered played a role in this process."[110] It is relatively common for lower-level employees of cartel firms to exchange pricing plans in an effort to stabilize or raise prices.[111]

The information shared among lower-level employees often winds up in the grasp of higher-level executives who do have pricing authority. Senior executives sometimes order their subordinates to exchange price information with their competitors.[112] In many cases, the price information exchanged by sales staff is shared with senior executives, who use a competitor's price data in setting their prices.[113]

107. Griffin, *supra* note 104, at 126; *see* HARDING & EDWARDS, *supra* note 29, at 177–78 (noting that in the LCD panel cartel, "meetings came in two forms – high level, which were occasionally referred to as 'Green Meetings' and were populated by high-ranking members of each company's management team, and working level or commercial meetings").

108. *See, e.g.*, *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011) (noting that lower-level employees in foreign exchange fee conspiracy exchanged information prior to credit card companies increasing their fees).

109. Cason–Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 633 (E.D. Mich. 2012); *see also* Page, *supra* note 48, at 629 n.165 (discussing *Cason–Merenda*).

110. *Cason–Merenda*, 862 F. Supp. 2d at 633.

111. *See, e.g.*, *Currency Conversion Fee*, 773 F. Supp. 2d at 370 (discussing a conspiracy to raise foreign exchange fees and the exchange of information by lower-level employees that occurred before various credit card companies increased their fees); Page, *supra* note 48, at 619–20 (discussing conspiracy to stabilize or raise the price of Static Random Access Memory (SRAM)).

112. *See, e.g.*, *In re* Blood Reagents Antitrust Litig., 266 F. Supp. 3d 750, 776–78 (E.D. Pa. 2017) (noting that "[t]he transfer of price information occurred or was ordered at the behest of higher level executives").

113. *See, e.g.*, Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053, 1064 (D.N.J. 1988) ("Plaintiffs have also introduced evidence that the senior executives of Falcon Jet and other business jet manufacturers were aware of the price information exchange and considered the data obtained by

This inter-competitor exchange of sensitive information by lower-level employees is often critical to cartel success and stability. For example, in the citric acid cartel, lower-level employees ran the day-to-day cartel operations.[114] The cartel had wide-reaching effects, as citric acid is used in the manufacture of a variety of food products, soft drinks, detergents, and pharmaceuticals.[115] For the first half of the 1990s, the international market was controlled by a handful of large producers, who illegally divided the globe among themselves and restricted sales in order to raise the price of citric acid.[116] The cartel's operatives were classified as either "masters" or "Sherpas."[117] The former were "top executives" who "allocated market shares to within a tenth of a percent."[118] While "[t]he masters monitored each other by exchanging their monthly sales figures over the telephone[,] . . . [t]he conspiracy was implemented by lower-level corporate officials known as 'Sherpas.'"[119] These underlings exchanged sensitive price information and ran the day-to-day cartel operation. And with their active assistance, the citric acid conspirators raised the price of citric acid by over 33%.[120]

Second, beyond exchanging factual information and projections, cartel partners often use lower-level employees to communicate their assurances that each firm will, in fact, abide by the cartel agreement. For example, in the air cargo price-fixing conspiracy—run by many of the world's major airlines, including Air France-KLM, Alitalia, American Airlines, British Airways, Delta, and Lufthansa—lower-level employees would communicate through phone calls and emails with their counterparts at competing airlines to ensure

the sales engineers to set the price of business jets."). Describing the organization of the vitamins cartel, Professor Utton observes:

> At a slightly lower level, heads of the respective vitamin divisions met to review the past year's profitability and ensure that overachievers compensated the underachievers by selling them their product at cost. Finally, regional managers would meet quarterly to exchange and compare prices and sales data, which would be passed up to their global sales managers.

UTTON, *supra* note 86, at 47.

114. Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LITERATURE 43, 73 & n.82 (2006) (citing Kurt Eichenwald, *U.S. Wins a Round Against Cartel*, N.Y. TIMES, Jan. 30, 1997, at D1).

115. *In re* Citric Acid Litig., 191 F.3d 1090, 1092 (9th Cir. 1999) ("Citric acid is a corn derivative with a wide variety of uses in the manufacture of food, soft drinks, detergents, and pharmaceuticals."); CONNOR, *supra* note 30, at 113.

116. CONNOR, *supra* note 30, at 123–24, 128–31.

117. JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND 192 (2000) ("The conspirators [in the citric acid cartel] called themselves masters and sherpas. Masters were the big-picture people who made decisions and set policy. Sherpas took orders and did the low-level detail work.").

118. *In re* Citric Acid Litig., 996 F. Supp. 951, 953 (N.D. Cal. 1998).

119. *Id.*

120. *See id.* ("During the time of the conspiracy, the price of citric acid rose from $0.63/lb to $0.85/lb.").

that every cartel member would increase their fuel surcharge by the agreed-upon amount.[121] Upon receiving the requested assurances from their counterparts at other firms, the lower-level employees would inform their superiors that all the participating airlines were on board.[122] Using lower-level employees in this fashion, the conspiracy overcharged consumers by billions of dollars.[123]

In order to prevent any miscommunication about price movements, cartel partners keep each other apprised of their planned, or hoped-for, changes in price. In many price-fixing conspiracies, member firms inform each other of their pricing plans in order to prevent their co-conspirators from incorrectly inferring that a cartel member is either cheating on the cartel agreement or abandoning it in some way.[124] Open communication reduces the risk that a firm's actions will be misinterpreted by its co-conspirators and accidentally trigger a price war or subject the firm to cartel sanctions.[125]

Third, lower-level employees keep abreast of market conditions. As consumer demand, interest rates, exchange rates, or prices of inputs fluctuate, cartel managers monitor the situation and determine whether such fluctuations warrant any changes in the cartel's fixed prices or market allocations.[126] Many cartels seek to fix a price that is not so high as to encourage new market entry by firms that are not in the cartel.[127] Sitting in the corporate crow's nest and watching the horizon for new competitors is a task most efficiently performed by employees lower in the chain of command. Just as a ship's captain generally spends no time in the crow's

121. D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 785–86, 786 n.3 (2014) (discussing *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008)).

122. *Id.* at 786.

123. *Id.* at 786, 791.

124. Leslie, *supra* note 26, at 581.

125. *Id.* at 579–81.

126. *See* John M. Connor & Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PA. ST. L. REV. 813, 856 (2008) ("Cartels that . . . aim to fix prices in two or more regions with different national currencies cannot control currency exchange rates. As a consequence, private international cartels must prevent geographic arbitrage through frequent realignment of national prices if their control over price is to succeed."); *id.* at 834 (noting how the vitamins "cartel was managed through three levels of managers" and that "the lowest level had quarterly face-to-face meetings to adjust prices in several currencies").

127. *See, e.g.*, MARSHALL & MARX, *supra* note 82, at 150 n.16 ("The 1938 agreement of the Nitrogen Cartel provided that 'prices in export markets should be maintained at a level low enough to discourage the development of domestic production.'"); JESSE W. MARKHAM, COMPETITION IN THE RAYON INDUSTRY 183 (1952) (noting how "rayon producers collectively could, through their price policy, conceivably keep profits suppressed below the attraction rate and thereby limit the number of producers"). An individual firm in a cartel would not want to engage in limit pricing on its own for two reasons. First, if one's cartel partners are still charging too high a price, this could still encourage market entry. Second, co-conspirators might perceive any individual member's move to reduce prices as an attempt to cheat on the cartel agreement.

nest, neither CEOs nor senior executives monitor the market for potential new entrants. Those details are best handled by lower-level employees, those without pricing authority, but whose reports of potential danger ahead can be passed up the chain of command.

Fourth, lower-level employees often fine-tune the cartel's fixed price. Cartel management entails overseeing the fluctuations in price that are common in cartelized markets. Over time, colluding firms may raise prices several times.[128] Indeed, the sheer number of parallel price increases constitutes its own plus factor.[129] While the cartel members' desire to increase prices as high—and as often—as possible is intuitive, under certain circumstances, cartel managers may direct members to lower their prices. For example, if the cartel price is so high that it encourages new firms to enter the market, the cartel members may agree to lower their prices in order to make market entry less tempting.[130] Economists call this limit pricing, which refers to the strategy of charging the maximum price that will not induce market entry.[131]

In light of the information transmitted among cartel partners, price-fixing conspirators will often need to adjust their fixed prices. This is often not executive-level work. If the initial fixed prices need to be adjusted in response to changes in foreign exchange rates, for example, this can be done by lower-level employees who report back to the cartel. While some cartels entrusted only high-level executives with price adjustments,[132] in others, lower-level employees played a role in setting cartel prices even if they lacked pricing authority at their firms. For example, in the conspiracy to fix the price of Static Random Access Memory (SRAM), "an employee who was indisputably 'involved in setting prices' (even though he personally lacked 'ultimate pricing authority') 'relayed regular reports about competitors'

128. *See, e.g.*, *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 166 (D. Conn. 2009) (noting that competitors' "parallel conduct" consisted of "six lockstep price increases").

129. *See, e.g.*, *In re* Titanium Dioxide Antitrust Litig., 959 F. Supp. 2d 799, 825 (D. Md. 2013) ("The sheer number of parallel price increases, when coupled with the other evidence in this case, could lead a jury to reasonably infer a conspiracy."); *In re* Se. Milk Antitrust Litig., 555 F. Supp. 2d 934, 944 (E.D. Tenn. 2008) (noting that it seems "only logical that the more individual instances of parallel conduct" that plaintiffs allege "the stronger the inference that can be drawn from those acts of parallel conduct to support an illegal conspiracy and the less likely it is that these parallel acts occurred unilaterally without any conspiracy or agreement").

130. *See supra* note 127 and accompanying text.

131. Christopher R. Leslie, *Foreign Price-Fixing Conspiracies*, 67 DUKE L.J. 557, 588 n.172 (2017).

132. *See* CONNOR, *supra* note 30, at 314 ("The cartels almost always involved top managers with the authority to implement significant changes in a cartel's strategy.").

pricing and production directly to pricing authorities.'"[133] By exchanging information with managers at other firms, he "exercised direct influence over the prices that buyers paid for SRAM."[134] Employees without pricing authority sometimes actually negotiate the cartel's price fluctuations. For example, in the polyurethane foam price-fixing conspiracy, lower-level employees would coordinate price increases with competitors and, for two of the companies at least, the president and CEO "would 'bless' proposed flexible foam price increases" advocated by their subordinates who had coordinated those price increases.[135]

This fine-tuning process is particularly important in bid-rigging conspiracies, a type of price-fixing conspiracy in which rival firms collude when bidding on large (often government) contracts. The conspirators must agree on who will win each contract and what the winning and losing bids will be. Empirically, these conspiracies rely on lower-level employees to "coordinate the collusive bidding procedure."[136] For example, the high-level group in the electrical equipment bid-rigging cartel was filled with vice presidents, as well as division and department managers.[137] They met infrequently and did not debate the minute details of who would win each government contract at what precise bid or how high the losing bids would be.[138] In contrast, the conspiracy's working-level group "consisted of assistant general managers, marketing and sales managers, and they carried out the specific details of the agreements."[139] This lower-level group met every two to three weeks and did the heavy lifting and decision-making for the conspiracy.[140] Without their work, the bid-rigging conspiracy would not have succeeded for as long as it did. Bid-rigging rings offer more evidence that for virtually every form of anticompetitive collusion, there is a role for employees without pricing authority.

In sum, even when illegal collusion is initiated by a handful of senior executives, these conspiracies often expand to include more employees who

133. *In re* Delta/Airtran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1376 (N.D. Ga. 2017) (quoting *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07–MD–01819, 2010 WL 5138859, at *6 (N.D. Cal. Dec. 10, 2010)), *aff'd sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018).

134. *SRAM*, 2010 WL 5138859, at *6.

135. *In re* Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968, 988 (N.D. Ohio 2015).

136. HARDING & EDWARDS, *supra* note 29, at 147 (discussing pre-insulated pipes cartel).

137. FULLER, *supra* note 91, at 106.

138. *See id.* (stating how the working-level group, rather than the high-level group, met frequently to discuss the details of agreements and set up the new price lists to prevent buyers from having a break in moderate prices).

139. *Id.*

140. *Id.*

are needed to run the cartel operations efficiently.[141] The high-level decisions of price-fixing cartels are generally implemented and monitored by so-called Sherpas or working groups comprised of employees who lack both pricing authority and the power to bind their companies. Thus, even though cartel leaders may keep most of their legitimate workforce in the dark,[142] they rely on lower-level employees to manage the cartel's day-to-day operations.[143]

3. Cartel Enforcement.—In addition to setting a price, many price-fixing conspiracies develop enforcement methods. Enforcement systems generally entail two components: detection of cheating and punishment of cheating. Neither function requires the direct involvement of senior executives. For instance, an employee does not need pricing authority to observe the prices charged by rival firms that are members of the price-fixing conspiracy. Cartels monitor compliance through a variety of mechanisms. Cartel members often report their price and sales data to each other or to an agreed-upon auditor.[144] Cartel monitoring sometimes involves price verifications, in which cartel partners keep each other apprised as to the prices charged on completed sales.[145] When implemented as intended, price-verification systems can reassure co-conspirators that all firms are abiding by the cartel agreement.[146] Empirically, many cartels have employed forms of price

141. *See* CONNOR, *supra* note 30, at 10 ("The global cartels that were discovered and prosecuted after 1995 . . . were formed and operated by the company's top executives . . . . Initially, only two or three officers were involved in the planning and execution of the conspiracies, but eventually each company would contribute at least ten men to a cartel's maintenance.").

142. *See* Sokol, *supra* note 121, at 804 ("For a cartel to avoid detection by a participating firm's employees, there typically needs to be some level of management that actively participates in the cartel and other employees who either are unaware of or turn a blind eye to such behavior.").

143. *See, e.g.*, Susan B. Garland & Emily Thornton, *Justice's Cartel Crackdown*, BUS. WK., July 27, 1998, at 50–51 ("In the ADM lysine case, for example, prosecutors charge that senior executives attended only those meetings necessary to solve big problems, such as volume-allocation issues, while regional sales managers of competitor companies met to work out details on prices in local markets."); Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 833 (2004) ("The cartel was organized into a 'top-level' group and a 'working-level' group. The top-level meetings included primarily company presidents and managing directors and were designed to set policies. Lower-level managers, who met more frequently, worked out the details of the agreement and its implementation."); Stephen Labaton, *The World Gets Tough on Fixing Prices*, N.Y. TIMES (June 3, 2001), https://www.nytimes.com/2001/06/03/business/the-world-gets-tough-on-fixing-prices.html [https://perma.cc/N3ZT-X8G7] (noting that "executives and lower-level managers put the plan in place" to fix prices for graphite electrodes, which are rods used in steelmaking).

144. Leslie, *supra* note 26, at 613–14.

145. Leslie, *supra* note 16, at 1601–02; *see also* United States v. Container Corp. of Am., 393 U.S. 333, 335 (1969) (stating that the sharing of information between competitors about the most recent price charged or quoted is evidence of conspiracy).

146. *See* Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1047 (8th Cir. 2000) (Gibson, J., dissenting) (noting that "if there were a cartel, it would be crucial for the cartel members

verification to stabilize their cartel arrangements, including those that sought to increase or stabilize prices in the markets for wool, cement, and sugar.[147]

Employees without pricing authority may perform price verifications among competitors. They can, for example, inquire about prices that a rival charged on a particular set of completed transactions. Similarly, an employee at the responding firm can answer the inquiry, even if that employee played no role in setting the prices for those completed transactions. The presence of such a price-verification scheme is an important plus factor that necessarily entails inter-competitor communications.[148] But the identity and price-setting authority of the individuals actually transmitting the price information are irrelevant to the power of price-verification systems to stabilize a cartel arrangement. Indeed, it would be odd for higher-level executives to perform such a pedestrian task.

When a cartel detects cheating, cartel enforcers need to punish cheaters. Cartel scholars have long explained how cartels create methods for compensating firms that sell less than their cartel quota and fining firms that exceed their quota.[149] Some cartels impose monetary penalties on their members who sell below the cartel price or sell more than their cartel allotment.[150] Some cartels require their members to prepay their fines into an escrow account for later distribution, while others instruct oversellers to make direct money payments to undersellers.[151]

Some price-fixing conspiracies use inter-competitor sales as a mechanism for cartel members who sold more than their cartel allotment to compensate their co-conspirators who sold less than their allotment.[152] This method of payment has several benefits. First, it balances the books and penalizes any cartel member who sold more than its cartel quota. Second, it

to cooperate in telling each other about actual prices charged in order to prevent the sort of widespread discounting that would eventually sink the cartel").

147. Leslie, *supra* note 26, at 575–76.

148. *See supra* notes 29–32 and accompanying text.

149. *See, e.g.*, ERVIN HEXNER, INTERNATIONAL CARTELS 34 (1945) (noting that international cartels provided for "[c]ompensation for producing less than determined quota and fines for exceeding quotas"). *See supra* note 84 (explaining the rationale behind cartel quotas).

150. Leslie, *supra* note 26, at 616 ("Historically, some cartels enforced their established quotas through fines paid to a trustee. Representative examples include the cartels in nitrogen, salt, steel, and coal." (footnotes omitted)); KURT RUDOLF MIROW & HARRY MAURER, WEBS OF POWER: INTERNATIONAL CARTELS AND THE WORLD ECONOMY 72 (1982) (noting that members of the 1930s international petroleum cartel "agreed to punish any failure to meet established sales quotas — by selling either too much or too little — by a standard cartel device, a sliding scale of fines that would be levied on the oversellers and distributed to the undersellers"); *see also* ARTHUR ROBERT BURNS, THE DECLINE OF COMPETITION: A STUDY OF THE EVOLUTION OF AMERICAN INDUSTRY 191–92 (1936) (discussing the "imposition of fines upon producers in excess of agreed quotas and the payment of subsidies to producers falling short of agreed quotas").

151. Leslie, *supra* note 26, at 616–17.

152. Christopher R. Leslie, *Balancing the Conspiracy's Books: Inter-Competitor Sales and Price-Fixing Cartels*, 96 WASH. U. L. REV. 1, 19–23 (2018).

can compensate any cartel member who sold less than its cartel allotment and, thus, has not received its predesignated share of the cartel's illegal profits. Third, inter-competitor sales look less suspicious than direct payments of money between competitors.[153]

All of these accounting measures can be performed by employees without pricing authority. Under a system of fines, cartel functionaries calculate sales and determine compliance, and then distribute those fines to cartel members who sold less than the cartel allotment. For example, in the international vitamin cartels, high-level managers decided the cartel members' market shares and fixed the cartel prices, but lower-level employees who headed various vitamin divisions "met to review the past year's profitability and ensure that overachievers compensated the underachievers by selling them their product at cost."[154] When using inter-competitor sales to balance the cartel's books, an employee does not need pricing authority to purchase products from a rival; yet these transactions and their surrounding circumstances could be rife with circumstantial evidence that exposes the underlying price-fixing conspiracy.

In addition to executing penalties against cartel members, lower-level employees can level threats designed to deter competitive behavior. Employees without pricing authority may convey the ultimatums of their bosses. For example, in *United States v. Empire Gas Corp.*,[155] a predatory pricing case, the Eighth Circuit recognized that a firm's employees can deliver threats designed to affect the target-competitor's future pricing. The government accused the defendant, Empire Gas Corp. (Empire), of using threats of predatory pricing to influence its rivals' pricing.[156] The district court reasoned that threats of price predation delivered to Empire's competitors by Empire employees who lacked "any real or apparent authority with respect to pricing" were not probative.[157] The Eighth Circuit rejected such reasoning, explaining that "[w]hether Empire's managers had authority to set prices or were acting as mere conduits between competitors and Empire officials who did have such authority makes no difference" since "[t]he circumstantial evidence establishes that lower level employees, in these instances at least, had authority to convey Empire's wishes and threats."[158]

153. *Id.* at 11–14. *Cf*. Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard to Do: Determinants of Cartel Duration*, 54 J.L. & ECON. 455, 475–76 (2011) ("However, side payments leave a paper trail that increases the likelihood of antitrust prosecution."); Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 394 (2011) ("Side payments are widely accepted as evidence of coordinated oligopolistic price elevation, for why else would a competitor make a payment to a rival for no consideration.").

154. UTTON, *supra* note 86, at 47.

155. 537 F.2d 296 (8th Cir. 1976).

156. *Id.* at 299.

157. *Id.* at 301.

158. *Id.* at 301–02.

This same reasoning applies to threats delivered within a price-fixing conspiracy, such as threats that members who cheat on the cartel agreement will be punished.

4. Cartel Concealment.—Because price fixing triggers both criminal penalties and treble damages, conspirators affirmatively conceal their collusion. Those senior executives with pricing authority will often use fake names, meet with competitors in secret locations, or communicate through encrypted emails.[159] While these particular methods involve the senior executives themselves, many other common concealment strategies require individuals without pricing authority to play important roles in hiding the price-fixing conspiracy from the outside world. For example, cartel members often craft cover stories to justify being together, such as by creating fake trade associations that are primarily designed to provide a cover for competitors to get together and fix prices.[160] Lower-level employees can help create and run such Potemkin trade associations to give them the patina of legitimacy. In addition to helping with such formal concealment schemes, lower-level employees of a price-fixing company often know about the illegal collusion and can affirmatively conceal the conspiracy from their own general counsel.[161]

Lower-level employees can manage the cartel's documents, both authentic and falsified. Cartels generally enact multifaceted document policies to prevent the creation of accurate documents that implicate the co-conspirators and to manufacture the creation of false documents that exonerate them.[162] Price-fixing conference participants are often forbidden from taking notes at or removing documents from cartel meetings.[163] Additionally, many price-fixing conspirators undertake systematic efforts to falsify and forge exculpatory documents.[164] For example, cartel managers create fake agendas for their bogus trade association meetings to make them appear legitimate[165] and doctor their meeting minutes to excise collusive

159. Leslie, *supra* note 9, at 1206–13.

160. *Id.* at 1213–15; *see, e.g.*, United States v. Andreas, 216 F.3d 645, 654 (7th Cir. 2000) ("The [lysine] cartel met in Atlanta in January 1995, using a major poultry exposition as camouflage for the producers being in the same place at the same time.").

161. Griffin, *supra* note 104, at 120–21; Leslie, *supra* note 9, at 1228–33.

162. Leslie, *supra* note 9, at 1219–28.

163. *Id.* at 1220–21.

164. *Id.* at 1225–28.

165. CONNOR, *supra* note 30, at 11 ("Cartels frequently utilized industry trade associations as covers for their illegal meetings, prepared false agendas and false minutes, and took many other steps to hide their conspiracies.").

discussions.[166] Lower-level employees can assist cartel participants who fabricate their travel and expense reports in order to misrepresent their destination, the purpose of their meetings, and the identity of those they met.[167] They can also help destroy incriminating documents, as when assistants at ADM shredded documents to prevent the FBI from seizing them during a raid to find evidence of ADM's (later confessed) illegal price-fixing activities.[168]

Furthermore, senior executives may use lower-level employees to perform cartel responsibilities in order to keep themselves one step removed from the illegality. For example, when the executives running the price-fixing cartel in the market for thin-film transistor, liquid crystal display (TFT-LCD) panels feared that some of their customers had become suspicious of price fixing, the cartel leaders began sending their lower-level employees to cartel meetings in their stead.[169] In this fashion, top executives used their underlings as a shield in order to maintain plausible deniability in case the cartel was exposed.[170] More importantly, the senior executives who use this tactic are setting up their subordinates to be the fall guys, who will be scapegoated and fired when prosecutors come knocking.[171] For example, when the DOJ finally discovered the infamous electrical equipment cartel of the 1950s–1960s, General Electric terminated its lower-level employees who had been functionaries of the cartel.[172] Thus, in addition to knowing about the cartel by helping with general concealment efforts, lower-level employees may

166. Leslie, *supra* note 9, at 1225–26; *see, e.g.*, David Genesove & Wallace P. Mullin, *Rules, Communication, and Collusion: Narrative Evidence from the Sugar Institute Case*, 91 AM. ECON. REV. 379, 379 (2001) (noting that a cartel meeting attendee "regularly destroyed [his detailed meeting notes] upon receiving the much less revealing *official* minutes").

167. Leslie, *supra* note 9, at 1226–27; *see, e.g.*, *In re* Urethane Antitrust Litig., 913 F. Supp. 2d 1145, 1156 (D. Kan. 2012) (noting how a conspirator created a meal expense report that omitted the presence of co-conspirators); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 161 (D. Conn. 2009) (noting how a conspirator modified travel expense reports to not accurately reflect the purpose of the trip); FULLER, *supra* note 91, at 13 (noting how bid-rigging conspirators "made their expense accounts out for one city, and showed up in another an equivalent distance away").

168. LIEBER, *supra* note 117, at 326–27.

169. THOMPSON REUTERS, CORPORATE COUNSEL'S ANTITRUST DESKBOOK § 1:2 (2021).

170. *See also* FULLER, *supra* note 91, at 138–39 (highlighting the tension between top executives and employees in the General Electric cartel, and noting that "Burens was fighting a one-man, losing battle for honest competition[,]" and that "[h]e complained to Stehlik, as Stehlik reports, that Vinson did not take his side or attempt to defend him against the attacks of the other division managers, who were all for the price-rigging game").

171. Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1677 (2008).

172. *See* Gilbert Geis, *White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961*, *in* CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 139, 141, 146 (Marshall B. Clinard & Richard Quinney eds., 1967) (describing the federal grand jury indictments in 1959 and General Electric's termination of some implicated employees).

become aware of the cartel's activities because senior executives are using them as sacrificial lambs.[173]

Finally, employees without pricing authority can play critical roles in advising price-fixing conspirators how to employ various concealment measures.[174] Upon taking leadership of the international lysine cartel, ADM had its employee Terry Wilson attend cartel meetings even though Wilson knew little about lysine or lysine markets.[175] While Wilson had no pricing authority over lysine and could not make price commitments to the other members of the cartel, he had played a leadership position in the international citric acid cartel and instructed the lysine manufacturers on how to run and to conceal their illegal cartel.[176] For example, Wilson convinced the cartel members to create a fake trade association as a cover for the conspirators to meet together and fix prices while pretending to engage in legitimate business activity. [177]

C. Summary

Most cartel tasks can be performed by employees without pricing authority. Notably, employees without pricing authority can: calculate and negotiate the optimal cartel price, perform management functions, serve as cartel enforcers, and help conceal the conspiracy from antitrust enforcement officials and the victims of the price-fixing conspiracy. Even if lower-level employees cannot independently conspire without some involvement by those with pricing authority, they can perform these critical functions—and often do.

IV. Judicial Misconceptions of Price-Fixing Cartels

Because astute cartel members conceal all direct evidence of their conspiracies, plaintiffs bringing price-fixing claims must generally rely on circumstantial evidence. In many cases, this circumstantial evidence comes from the activities and statements of lower-level employees. Too many courts, however, hold that if the parties who exchanged prices or engaged in other suspicious activities did not have the authority to set prices for their companies, then these actions are not probative of collusion and do not constitute plus factors. For example, courts have held that evidence of inter-

173. *See* FULLER, *supra* note 91, at 167 (discussing General Electric's participation in the bid-rigging cartel and how "the top executives of these electrical companies have thrown the lower ranks to the wolves").

174. *See* Leslie, *supra* note 131, at 604–05 (discussing how a foreign executive without pricing authority in the U.S. market could show his American counterpart in the same corporation how to operate a U.S. cartel, in the context of a chocolate confectionary cartel).

175. *Id.* at 605.

176. *Id*.

177. Griffin, *supra* note 104, at 131–32.

competitor price verifications—a common cartel enforcement method—is unpersuasive or irrelevant when those verifications are performed by a salesperson who "had no pricing authority."[178] Such holdings misapprehend how price-fixing cartels operate. This Part itemizes some of these judicial errors and shows how they distort antitrust doctrine.

A. Minimizing Significance of Low-Level Communications: "Chit Chat" Versus Collusion

Despite the fact that inter-competitor communications—and especially the exchange of confidential pricing plans—are plus factors indicative of collusion,[179] many courts minimize the legal significance of this evidence when salespeople are the messengers for such an exchange. Most famously, or infamously, the Third Circuit in *Baby Food* held that "[e]vidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment."[180] The court reasoned, in part, that antitrust plaintiffs must prove "that the exchanges of information had an impact on pricing decisions."[181] That is wrong as a matter of law.[182] The inter-competitor exchange of price information is circumstantial evidence of collusion, regardless of whether that exchange raised prices.[183]

More importantly for our purposes, the *Baby Food* court minimized the significance and importance of price exchanges among rival field representatives by characterizing such discussions as "shop talk," "chit-chat," and "casual conversations at trade shows or while stocking shelves," all "far removed from a concerted reciprocal exchange of important pricing and marketing information by the officers of major companies."[184] This characterization ignores the possibility that low-level employees could receive information from a rival firm and then pass it on to executives with pricing authority.

Factually, the Third Circuit's assertion that the inter-competitor price exchanges were merely sporadic "shop talk" mischaracterized those exchanges. Despite this belittling label, the court's opinion clearly recounts

178. *E.g.*, Reserve Supply Corp. v. Owens–Corning Fiberglas Corp., 799 F. Supp. 840, 843 (N.D. Ill. 1990) (characterizing the salesperson as having "acted contrary to instructions not to discuss prices with competitors"), *aff'd*, 971 F.2d 37 (7th Cir. 1992).

179. *See supra* note 22 and accompanying text.

180. *In re* Baby Food Antitrust Litig., 166 F.3d 112, 125 (3d Cir. 1999).

181. *Id.*

182. *See* Leslie, *supra* note 10, at 1734–39 (explaining that inter-competitor communications are a plus factor for proving a price-fixing conspiracy through circumstantial evidence, even if not enough alone to prove agreement).

183. *Id.* at 1759–60.

184. *Baby Food*, 166 F.3d at 125, 135.

how a former Heinz sales representative and a former Heinz district sales manager provided testimony that "such exchanges among sales representatives were common in the baby food industry" and that "they were *required* to submit competitive activity reports to their superiors concerning baby food sales from information they picked up from competitor sales representatives."[185] The sales representative "testified that he exchanged future price information with various sales representatives of Beech–Nut and Gerber as to whether Heinz, Beech–Nut, and Gerber were planning to announce future price increases."[186] The Third Circuit acknowledged that, like Heinz, "Beech–Nut also *required* its sales representatives to gather competitive information."[187] In other words, by the court's own admission, this was neither mere shop talk nor chit-chat; this was corporate policy.

Moreover, the baby food manufacturers had their rivals' confidential pricing plans in their files. Some of this proprietary information must have originated from executives with pricing authority—rather than from low-level employees—because the brokers and sales force did not know about some of the planned price hikes contained in these documents.[188] In discussing how the price-fixing defendants possessed "documents that contained competitor pricing information in advance of any public announcements," the Third Circuit, reviewing *Baby Food* in a later case, noted that "[l]ow-level employees gathered some of the information, but the defendants provided no explanation as to how they obtained other information."[189] Yet the *Baby Food* court ignored the unexplained possession of rivals' confidential pricing plans while merely viewing the "information that came from low-level employees . . . as less worrisome than if it had come from upper-level executives."[190] But, of course, the unexplained transmissions of confidential information may have come from precisely such individuals. Bizarrely, the court ignored the probative value of highly suspicious evidence because *other* evidence involved low-level employees.

In addition, the *Baby Food* court diminished the legal significance of the salespeople's activity by overstepping its proper authority at the summary judgment stage and by interpreting and characterizing the conversations of

185. *Id.* at 118–19 (emphasis added).

186. *Id*.

187. *Id.* at 119 (emphasis added); *see also id.* ("In their depositions, Neils Hoyvald, President of Beech–Nut prior to 1988, and James Nichols, who succeeded Hoyvald, testified that it was company policy for sales representatives to gather and report pricing information of their competitors.").

188. *See id.* at 120 (noting an instance in which Gerber had advance knowledge of Beech–Nut's planned increases in its list prices "on all of its products" before Beech–Nut had officially noticed its own brokers and sales force).

189. *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 408 (3d Cir. 2015) (discussing *Baby Food*).

190. *Id.* (citing *Baby Food*, 166 F.3d at 125–26, 125 n.8).

fact witnesses who had yet to testify in court. In affirming the district court's grant of summary judgment to the defendants, the appellate panel in essence treated the exchanges of pricing plans as "mere shop talk" as a matter of law. For example, it completely credited the legal conclusions of one Heinz salesperson, Brian Anderson, who collected sensitive pricing plans from rival salespeople but denied price fixing.[191] The court emphasized that Anderson "had no authority to set the prices for the baby food he sold."[192] While emphasizing Anderson's lack of pricing authority, the Third Circuit then treated it as an established fact that Anderson's superior "never directed him to disseminate Heinz price information to competitors in the field."[193] But such a factual question—entirely separate from Anderson's own pricing authority—is for the jury to determine upon seeing Anderson testify in open court.[194]

Characterizing inter-competitor pricing discussions among lower-level employees as mere shop talk necessarily invades the province of the jury by engaging in fact-finding. There were two reasonable interpretations of the evidence: (1) the inter-competitor exchange of pricing plans was done as part of a conspiracy or (2) it was innocent chatter. The court weighed the evidence to determine which account it thought most likely. That is wrong for two reasons. First, federal judges should not weigh evidence at the summary judgment stage.[195] Second, the evidence should be interpreted in the light most favorable to the non-moving party,[196] which in this context was the plaintiffs. Although the Third Circuit claimed to draw all inferences in the plaintiffs' favor,[197] that is not true. For example, the panel seemed to afford no weight to the testimony of Marshall Gibbs, the former Heinz district sales manager who testified that his superiors required him to collect price information from his counterparts at Heinz's rivals and to submit reports detailing his discoveries.[198] Gibbs's testimony offers an explanation for how information exchanged by low-level employees who did not themselves have pricing authority could nonetheless have reached and influenced those employees' superiors who *did* have pricing authority. The court nevertheless construed the testimony about inter-competitor pricing discussions in the most pro-defendant way possible—by emphasizing the lack of pricing

191. *See Baby Food*, 166 F.3d at 118–19, 125 (describing Anderson's role in exchanging price information and stating that he characterized his status as "a little mouse").

192. *Id.* at 125.

193. *Id.* at 125–26.

194. *In re* Dana Corp., 574 F.3d 129, 152 (2d Cir. 2009).

195. Eat Right Foods Ltd. v. Whole Foods Mkt., Inc., 880 F.3d 1109, 1118 (9th Cir. 2018).

196. Tolan v. Cotton, 572 U.S. 650, 660 (2014).

197. *Baby Food*, 166 F.3d at 138.

198. *See id.* at 118–19 (describing Gibbs's testimony).

authority among the discussants.[199] This, however, was not the judges' prerogative at this point in the proceedings. If, after hearing the participants in these conversations testify on the witness stand, the jury were to conclude that these pricing discussions were "mere shop talk," that would be perfectly appropriate.

Furthermore, in characterizing the transmission of pricing plans as idle "chit chat," the court improperly isolated these pricing discussions from the other circumstantial evidence that the plaintiffs presented. In addition to the exchange of sensitive pricing information among lower-level employees, the plaintiffs proffered evidence that the market was highly concentrated with the three defendants controlling "over 98% of all baby food products manufactured and sold in the United States,"[200] what the court itself characterized as "extensive circumstantial evidence" of collusion,[201] and expert testimony explaining that the plaintiffs' evidence demonstrated the presence of collusion.[202] The Supreme Court has instructed lower courts not to compartmentalize the evidence proffered by antitrust plaintiffs.[203] By focusing on the conduit's lack of pricing authority, the Third Circuit violated its duty to consider the plaintiffs' evidence holistically. Looking at the big picture, a reasonable fact finder would have interpreted the exchange of price plans by lower-level employees as potentially just one part of a larger price-fixing conspiracy.[204]

Ultimately, the Third Circuit got it wrong in *Baby Food*.[205] The Third Circuit essentially immunized the exchange of confidential pricing plans so long as lower-level employees are used as conduits for that exchange. The court chastised the plaintiffs for failing to produce evidence that "any executive of any of the defendants with price-fixing authority communicated with executives of the other defendants, either by writing, telephone or

199. *See id.* at 125–26 (discounting significance of shared pricing information because salesperson was "a little mouse" who "had no authority to set the prices for the baby food he sold").

200. *Id.* at 116.

201. *Id.* at 118.

202. *Id.* at 122–23.

203. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962); Leslie, *supra* note 16, at 1587.

204. Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 317–18 (2010) (explaining how the *Baby Food* "court's own interpretation trumped both expert testimony and direct evidence of price coordination").

205. *See* Edward D. Cavanagh, Matsushita *at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?*, 82 ANTITRUST L.J. 81, 102 (2018) (criticizing *Baby Food* and arguing that "[p]articularly troublesome were the court's dismissiveness of evidence of the defendants' routine exchange of price information as 'shop talk' and its willingness to elide over the fact that such information filtered up to the highest echelons of the defendants' management").

meeting."[206] Such direct evidence of communications, however, is not necessary to prove price fixing.[207]

Despite its flaws, the *Baby Food* opinion has exerted outsized influence on the probative value of evidence involving lower-level employees. Relying on *Baby Food* as precedent, courts have held that the exchanges of nonpublic pricing plans by employees without pricing authority are not probative of price fixing. In *In re Chocolate Confectionary Antitrust Litigation*,[208] the Third Circuit considered a district court's grant of summary judgment to price-fixing defendants. The plaintiffs presented a broad array of plus factors to demonstrate that the defendants' parallel price hikes were the product of collusion, including market concentration,[209] motive[210] and opportunity to collude, inter-competitor communications,[211] parallel price increases unexplained by cost increases,[212] pretextual explanations for parallel price increases,[213] various actions against self-interest,[214] the same firms fixing prices in the Canadian market,[215] and the possession of rivals' confidential pricing documents.[216] Regarding the inter-competitor communications, the Third Circuit in *Chocolate Confectionary* noted three suspicious messages:

> (1) a 2004 email between Nestlé USA managers showing that a Hershey employee had given a Nestlé USA employee information about Hershey's pricing promotions on multipack products; (2) a January 2007 email between two Mars sales executives about a conversation with a Hershey manager and information learned about Hershey's promotional activities; and (3) a September 2007 email between Mars executives relaying that one had obtained information about costs from his counterpart at Hershey . . . .[217]

206. *Baby Food*, 166 F.3d at 137.

207. Leslie, *supra* note 10, at 1724.

208. 801 F.3d 383 (3d Cir. 2015).

209. *Id.* at 391.

210. The court isolated and discounted the motive plus factor because "evidence of motive without more does not create a reasonable inference of concerted action." *Id.* at 398.

211. *Id.* at 409.

212. *Id.* at 399.

213. *Id.* at 410–12.

214. *Id.* at 399–401.

215. *Id.* at 401–02; *see* Leslie, *supra* note 131, at 604–09 (explaining the mistakes in the *Chocolate Confectionary Antitrust* opinion regarding the legal significance of defendants' participating in foreign cartels).

216. *Chocolate Confectionary*, 801 F.3d at 407–08. The court isolated and discounted this evidence by asserting that "[t]he 'mere possession of competitive memoranda' is not evidence of concerted action to fix prices." *Id.* at 408 (quoting *In re* Baby Food Antitrust Litig., 166 F.3d 112, 126 (3d Cir. 1999)).

217. *Id.* at 409 (citations omitted).

The plaintiffs explained that "the Chocolate Manufacturers exchanged pricing information before they publicly announced the price increases."[218] The appellate court nevertheless affirmed summary judgment for the defendant by citing *Baby Food* for the proposition that such "sporadic communications among individuals *without pricing authority* are insufficient to create a reasonable inference of a conspiracy."[219]

By focusing on whether the people actually engaged in inter-competitor communications had pricing authority, the Third Circuit again missed the fact that the rival firms were exchanging pricing plans in a manner that increased market prices. For example, the plaintiffs noted how suspicious it was that even though "only a small group of Mars senior executives knew about the planned price increase in September, . . . Hershey reacted by changing its internal pricing system in anticipation of a price increase," which seems to indicate that Hershey had received information directly or indirectly from Mars senior executives.[220] The court deprived all such evidence of its probative value because it focused on the identity of the courier, replicating and magnifying the *Baby Food* court's error, and ignoring the potential that the Mars information obtained by a low-level Hershey employee was passed on to Hershey executives who had the power to change the company's internal pricing system.[221] The *Chocolate Confectionary* court ultimately interpreted Third Circuit law as depleting inter-competitor price exchanges of probative value unless "the information exchanges occurred among the conspiring companies' upper ranks and . . . the exchanges affected prices."[222]

Although *Baby Food* did not originate the mistake of depriving lower-level communications of probative value,[223] the *Chocolate Confectionary* opinion is but one example of how the *Baby Food* approach has proven overly influential. For example, the district court in *In re Domestic Drywall Antitrust Litigation*[224] interpreted Third Circuit precedent as preventing the court from even "considering Plaintiffs' evidence of suspicious intercorporate and internal communications among manufacturers' low-level employees."[225]

218. *Id.* at 407.

219. *Id.* at 409 (emphasis added) (citing *Baby Food*, 166 F.3d at 125).

220. *Id.* at 407; *see also id.* (citation omitted) ("That Hershey had advance warning of Mars's price increase is further supported, the Plaintiffs contend, by a memo from Hershey CEO Lenny to the Hershey board stating that the Mars 2002 price increase was 'roughly in line with expectations . . . .'").

221. *See In re* Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175, 194 (E.D. Pa. 2016) (noting how the *Chocolate Confectionary* opinion acknowledged the "three email exchanges among the competitors, but the court did not give them much weight" because of the *Baby Food* precedent).

222. *Chocolate Confectionary*, 801 F.3d at 408 (discussing *In re* Flat Glass Antitrust Litigation, 385 F.3d 350 (3d Cir. 2004)).

223. *See supra* note 68 and accompanying text.

224. 163 F. Supp. 3d 175 (E.D. Pa. 2016).

225. *Id.* at 237 n.40.

While the district judge in *Domestic Drywall* was bound by Third Circuit precedent, *Baby Food*'s diminishment of low-level conspirators has proven persuasive outside the Third Circuit as well.[226] Even when courts find that plaintiffs have presented sufficient evidence of "senior in-house counsel attend[ing meetings] . . . and engag[ing] in discussions on a far higher plane than mere 'shop talk' among low-level employees," judges still improperly treat "the *Baby Food* standard" as establishing a minimum threshold that plaintiffs must satisfy to survive summary judgment.[227]

Finally, some courts treat *Baby Food* as diminishing the probative value of all inter-competitor price exchanges, including those between high-level executives.[228] Courts too often discount high-level executives' meetings[229] or downplay evidence of other meetings between executives despite the involvement of key officials with decision-making authority.[230] Even when individuals with pricing authority meet and discuss prices before a parallel price hike, some courts will find a way to ignore this strong evidence of collusion.[231] Thus, despite evidence of price exchanges between executives with authority to fix prices, courts grant summary judgment to defendants.[232] This suggests that *Baby Food*'s error has been repeated and distorted to the point that it has tainted the probative value of inter-competitor communications writ large. As a result, it appears that some judges are

226. *See, e.g.*, *In re* Delta/Airtran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1375 (N.D. Ga. 2017) (quoting language from the *Baby Food* opinion that diminishes inter-competitor communications between employees without pricing authority), *aff'd sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018).

227. *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011).

228. *See, e.g.*, Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1048 (8th Cir. 2000) (Gibson, J., dissenting) ("In our case there is a wealth of evidence that high level executives . . . were directly involved in exchanging secret price information. Citing *In re Baby Food* in a case with this kind of evidence vitiates the distinction on which the Third Circuit relied.").

229. *See, e.g.*, *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 913 (6th Cir. 2009) (Merritt, J., dissenting) ("To suggest that they did not ever in all the meetings and personal contacts discuss their union of interests and how the cuts were working defies belief.").

230. *See, e.g.*, *In re* Nat'l Ass'n of Music Merchs., Musical Instruments & Equip. Antitrust Litig., No. 09cv2002, 2012 WL 3637291, at *5 (S.D. Cal. Aug. 20, 2012) (discounting "the fact that Defendants' key decision-makers met at trade shows and summits" because this merely showed that "Defendants' decision-makers had the opportunity to communicate or meet to reach agreements, or to enter into a conspiracy—not that they did"), *aff'd sub nom*. *In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186 (9th Cir. 2015).

231. *See, e.g.*, Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 213 (3d Cir. 2017) (Stengel, C.J., dissenting) (noting that the court ignored evidence that the CEO of one alleged conspirator and the president of another alleged conspirator met and discussed prices before a price increase).

232. *See Blomkest*, 203 F.3d at 1046 (Gibson, J., dissenting) ("These exchanges were often between high-level executives who were responsible for pricing decisions for their companies or who conveyed the price information to those who did set prices."); *see also id.* at 1033 (majority opinion) ("Taking the class's evidence as true, roughly three dozen price verifications occurred between employees, including high-level sales employees, of different companies, over at least a seven-year period.").

perhaps less concerned with the pricing authority of corporate actors than about preventing price-fixing cases from reaching a jury.

B. Assuming That Employees Without Price Authority Cannot Possess Relevant Information

In addition to discounting inter-competitor communications between low-level employees, courts sometimes assume that only employees with pricing authority can have any knowledge of the conspiracy. As a result, courts often discount the testimony of witnesses to collusion simply because those witnesses may not themselves be participants in the price-fixing conspiracy. For example, in *In re Text Messaging Antitrust Litigation*,[233] the plaintiffs alleged that the four major wireless communication service providers had conspired to raise prices for a particular type of text messaging.[234] In addition to parallel price increases, inter-competitor communications occurring through trade association meetings, and a market structure conducive to collusion,[235] the plaintiffs presented email messages to Lisa Roddy (T-Mobile's director of marketing planning and analysis) from Adrian Hurditch (T-Mobile's vice president of services and strategic pricing), in which he stated that the price increases were unrelated to costs and concluded "[t]he move was collusive[236] and opportunistic."[237] Hurditch requested Roddy destroy his emails to her.[238] In granting summary judgment to the defendants, the district court concluded these emails were neither direct evidence nor particularly strong circumstantial evidence of collusion because Hurditch, the author of the emails, did not have pricing authority at the time he authored these messages.[239] The Seventh Circuit affirmed, heartily endorsing the district court's reasoning.[240]

The court's approach is misguided. Hurditch had previously exercised pricing authority as the director of market planning and analysis at T-Mobile and had been involved in prior price hikes before being promoted to various vice president positions.[241] When the plaintiffs noted that "Hurditch was well informed and an 'active mentor' to Roddy 'in her role analyzing the price increases to $0.15 and $0.20,'" the district court asserted that this proved

233. 46 F. Supp. 3d 788 (N.D. Ill. 2014), *aff'd*, 782 F.3d 867 (7th Cir. 2015).

234. *Id.* at 792.

235. These are all plus factors. *See generally* Leslie, *supra* note 16 (categorizing and explaining the probative value of different plus factors).

236. The email contained a typo in which "collusive" was spelled "colusive." I have corrected the spelling in my discussion to avoid distraction.

237. *Text Messaging*, 46 F. Supp. 3d at 795 (emphasis removed).

238. *Id.* at 803–04.

239. *Id.* at 803 ("Hurditch was not involved in the pricing move that precipitated the e-mail.").

240. *In re* Text Messaging Antitrust Litig., 782 F.3d 867, 876, 879 (7th Cir. 2015).

241. *Text Messaging*, 46 F. Supp. 3d at 803.

Hurditch's irrelevance as a witness to collusion because it "highlights the fact that Hurditch was not *directly involved* with two of the three price increases at T–Mobile that are the subject of this dispute, even if Roddy was."[242] The court failed to appreciate that simply because an executive was not "directly involved" in a cartel does not mean that he does not possess direct knowledge—or credible secondhand knowledge—of the cartel's illegal activities. While Hurditch might not have been involved in the particular decision to raise prices, his familiarity with the company and its pricing processes gives weight to his contemporaneous judgment that the price increases by his colleagues resulted from collusion rather than an increase in costs.

The *Text Messaging* district court addressed this knowledge issue by asserting that "Hurditch's status as well informed within his company and as 'an active mentor' to Roddy do not qualify him as having knowledge of a conspiracy."[243] When the plaintiffs explained that Hurditch's knowledge of the conspiracy came from his frequent conversations with other high-level executives, the court dismissed this evidence because "[o]ne would expect" a senior vice president to talk to other high-level executives.[244] The judge misapprehended the significance of these communications entirely. Although it is not suspicious for a firm's executives to converse, it is highly suspicious and probative that *after* talking to his colleagues, Hurditch described the parallel price hikes as collusive in an interoffice email that he requested be destroyed. The request to destroy evidence of collusion is itself powerful evidence of collusion.[245] But the court found this, too, to be irrelevant because "there is no evidence that Hurditch was part of the claimed conspiracy."[246] Again, the court misses the point: the issue is not whether Hurditch participated in the conspiracy, but whether he *knew* about it when he described the price increase as collusive. The plaintiffs' attorneys should have been given the opportunity to cross-examine Hurditch on the witness stand in front of a jury, who would evaluate Hurditch's credibility in explaining the meaning of his email message, including his use of the word "collusive" and the reason for his request to destroy the e-mails.

Unfortunately, *Text Messaging* is not an isolated case. Other courts have also diminished the significance of alleged statements by lower-level employees of accused price-fixing firms. For example, in *Lazy Oil, Co. v.*

242. *Id.* at 803 (emphasis added) (citation omitted).

243. *Id.* at 803–04.

244. *Id.* at 804.

245. Leslie, *supra* note 9, at 1257.

246. *Text Messaging*, 46 F. Supp. 3d at 803–04; *see also id.* at 804 (noting that the instruction to destroy incriminating correspondence would be "admissible as a statement in furtherance of a conspiracy" only if Hurditch was a co-conspirator).

Witco Corp.,[247] objectors challenged a proposed class action settlement as insufficiently low because the plaintiffs' price-fixing case was relatively strong, as shown by the deposition testimony of one witness that when he asked an employee of Quaker State whether "Quaker State intended to react to Pennzoil's then recent price reduction, [she] replied, 'Somebody from here will get a hold of Pennzoil to see where to leave the price.'"[248] The court diminished the significance of the testimony, in part, because the Quaker State employee had "no pricing authority."[249] This is inappropriate because suspicious statements can be strong circumstantial evidence of collusion, even if the parties who make those statements do not personally possess pricing authority and may only have observed price-fixing activity rather than personally engaging in it.

The reasoning of these decisions is flawed. Simply because fact witnesses are not decision-makers does not mean that they're completely out of the loop. For example, if a stenographer were taking notes at a cartel meeting, those notes would be admissible evidence to prove illegal collusion even though the stenographer had no pricing authority. Similarly, any low-level employees in attendance at the meeting could testify about what transpired even though they had no pricing authority. Price-fixing conspiracies rely on the labor of numerous employees without pricing authority to perform cartel tasks.[250] They are often percipient witnesses to illegal activity. Furthermore, many employees of price-fixing firms are aware of the illegal conspiracy even if they do not participate in it, let alone have pricing authority.[251] The testimony or other evidence from these individuals is highly probative of collusion.

C. Confusing the Source of the Information and Its Content

Courts sometimes confuse the *source* of the incriminating insider information with the *content* of the evidence. For example, in *City of Tuscaloosa v. Harcros Chemicals, Inc.*,[252] the plaintiffs alleged a conspiracy to fix prices, rig bids, and allocate markets in repackaged chlorine used for the treatment of drinking water, sewage, and swimming pools.[253] As part of their circumstantial case, the plaintiffs proffered the affidavit of the widow

247. 95 F. Supp. 2d 290 (W.D. Pa. 1997), *aff'd*, 166 F.3d 581 (3d Cir. 1999).

248. *Id.* at 299–300, 309.

249. *Id.* at 309. The Quaker State employee denied making the inculpatory statement, thus creating a credibility issue for the jury if the court had rejected the proposed settlement. *Id.*

250. *See supra* subpart III(B).

251. *See, e.g.*, *In re* Vitamins Antitrust Litig., 320 F. Supp. 2d 1, 23 (D.D.C. 2004) (recognizing that lower-level "employees knew there were conspiracies involving vitamins other than choline").

252. 877 F. Supp. 1504 (N.D. Ala. 1995), *rev'd in part, aff'd in part, vacated in part, and remanded*, 158 F.3d 548 (11th Cir. 1998).

253. *Id.* at 1508, 1510.

of a former Harcros employee (Lloyd Krysti) who testified that her husband had told her that another employee, Joe Ragusa, "was 'getting together with his competitors and fixing the price of chlorine before bids were submitted.'"[254] The court deprived the evidence of all significance because "Lloyd Krysti did not have the authority to bid chlorine; Joe Ragusa did. Lloyd Krysti's statements, therefore, are not statements within his authority. They have no probative value."[255] The court's approach betrays an improper obsession with pricing authority. Mr. Krysti's lack of pricing authority is irrelevant; he had direct knowledge of the illegal conspiracy. Setting aside the hearsay problems with Ms. Krysti's affidavit,[256] the court's discussion of pricing authority is troubling. What does it mean that an individual's statements are not "within his authority"? The court seems to imply that if a lower-level employee directly observes an executive engaging in illegal price fixing with a competitor, that employee's testimony of what he observed has "no probative value" because he has no pricing authority and his statements regarding collusion are outside of his authority.

The court's logic is illogical. Under the district court's reasoning, people without a driver's license could not testify about an automobile accident that they witnessed because they themselves were not authorized to drive. That would be absurd. But it is no less absurd to imply that only those employees with pricing authority can testify about price-fixing activities that they have witnessed in their firms. So long as the statement is admissible (and the jury finds it credible), such statements have significant probative value and may, in some circumstances, constitute direct evidence of a price-fixing conspiracy.

The *Tuscaloosa* court also ruled that incriminating documents reflecting the actions of employees without pricing authority were inadmissible. The plaintiffs introduced evidence of marginalia written on a bid tabulation for a city contract.[257] The marginalia stated that the bid was purposefully too high to win because Woody Caine, a sales manager at defendant Industrial Chemicals, had been instructed to "pass contract on to Jones Chem.,"[258] a competitor of Industrial. The court held the notation to be inadmissible, in part, because Caine "had no authority over bids" and "had Mr. Caine said anything about the bid it was an unauthorized statement."[259] Of course, one

254. *Id.* at 1520.

255. *Id.* at 1520–21.

256. The district court noted that "[n]ot falling within any exceptions to the hearsay rule, the double hearsay testimony of Barbara Krysti is inadmissible." *Id.* at 1521. While this may render the court's mistakes on the pricing authority issue harmless error, it is still enlightening—and troubling—to see how the court addressed the issue.

257. *Id.* at 1519–20.

258. *Id.*

259. *Id.* at 1520.

would consider any employee statement memorializing illegal collusion to be "unauthorized," but that does not make it irrelevant or inadmissible.[260]

D. Misunderstanding the Flow of Information

Courts also make mistakes regarding the flow of price information from employees without pricing authority. First, some judges have imposed unreasonable burdens on plaintiffs to prove how employees without pricing authority relayed rivals' pricing plans to those executives with pricing authority. For example, in *American Floral Services, Inc. v. Florists' Transworld Delivery Ass'n*,[261] the district court presaged the *Baby Food* court's characterization of inter-competitor price discussions among lower-level employees as "chit-chat among industry acquaintances in the field,"[262] which do not have legal significance, in part, because "there is no evidence such information as passed between [the lower-level employees of competing floral delivery services] ever made its way back to those with authority to do something with it."[263] Given the fact that any such communications from lower-level employees to those with pricing authority would likely have been verbal, it would be well-nigh impossible for the plaintiff to prove these discussions transpired. Moreover, plaintiffs proving collusion through circumstantial evidence should not have to prove the chain of communication. Price fixers take great efforts to conceal evidence that would serve as links in this chain, including destroying incriminating documents and lying about their conversations.[264] If plaintiffs must prove the content of intrafirm verbal communications, price fixers will be able to evade antitrust liability.

Second, some courts have interpreted the *Baby Food* opinion as drawing a critical distinction between gathering information *from* rivals and giving information *to* rivals.[265] These courts reason that the "Third Circuit apparently saw a crucial difference between gathering information to use to one's own advantage and giving out information for one's competitors to use to their advantage (and one's own detriment)."[266] But this distinction is less

260. *See id.* ("At best Mr. Caine's testimony is hearsay. He has no first-hand knowledge of the procedures he recounts.").

261. 633 F. Supp. 201 (N.D. Ill. 1986).

262. *Id.* at 214.

263. *Id.* Yet even when plaintiffs can point to rivals' price information reaching those with authority, courts will ignore this evidence, as the *Baby Food* court did. *See supra* notes 197–98 and accompanying text.

264. Leslie, *supra* note 9, at 1221–23, 1228–33.

265. *See, e.g.*, Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1048 (8th Cir. 2000) (Gibson, J., dissenting) ("However gladly the baby food executives used information relayed to them, . . . [t]he Third Circuit [in *Baby Food*] expressly stated that Anderson, a salesman . . . , was *not* instructed to go around giving out advance pricing information about his own company.").

266. *Id.*

meaningful than it appears. Focusing on the rationality of receiving sensitive information overlooks the fact that—short of industrial espionage—one firm could not collect pricing information from a rival unless that other firm provided it. This delivery of sensitive pricing plans is highly probative of illegal collusion because it makes little sense unless the parties are colluding. The *Baby Food* court improperly focused on only one-half of the information exchange and found nothing suspicious from the recipient's perspective. But for each recipient, there was a willing provider who was also a codefendant in the case. Although the Third Circuit recognized that the *sharing* of nonpublic price information is suspicious, the court proceeded to ignore the imparting of sensitive information while exonerating its receipt.[267] This partial blindness obscures the probative value of highly suspicious conduct.

E. The Consequences of Judicial Errors: Safe Harbors for Collusion

The *Baby Food* opinion, its progeny, and its kin seem to require plaintiffs to prove that rival executives with pricing authority communicated directly, without using intermediaries. Under this approach, price-fixing conspirators can collude to eliminate competition while evading antitrust liability simply by relying on lower-level employees to transmit all of the cartel's inter-competitor communications. This line of authority essentially creates a safe harbor for anticompetitive collusion: implement a price-fixing conspiracy through low-level employees and escape antitrust liability. Part V discusses how to interpret and apply antitrust doctrine in a manner that does not reward those price-fixing conspiracies that rely on employees without pricing authority.

V. On the Proper Treatment of Pricing Authority in Antitrust Law Litigation

Antitrust opinions that diminish the probative value of suspicious conduct by lower-level employees provide a roadmap for price fixers to structure their cartel operations so as to maximize their illegal profits and minimize their antitrust exposure. These opinions encourage cartel managers to simply ensure that inter-competitor communications are exchanged through lower-level employees without pricing authority. This is precisely

267. Some experts emphasize that a one-way flow of information suggests a lack of collusion. *See* Roger D. Blair & Jill Boylston Herndon, *Inferring Collusion from Economic Evidence*, ANTITRUST, Summer 2001, at 17, 19 (discussing a case in which the plaintiffs' expert argued that the defendants exchanged price information, but where "there was no evidence of an actual *exchange*" because the acquisition by one defendant of a competitor's price list was "at least as consistent with competition as with collusion"). Treating the flow of information as unidirectional seems designed to make it seem unilateral, but even a one-way flow involves two parties: the transmitter and the recipient.

how the massive vitamins cartel operated.[268] Yet when plaintiffs have alleged a similar scheme—and proffered supporting evidence[269]—the courts have rejected the plaintiffs' theory of the case and refused to allow the plaintiffs to present their evidence of collusion to a jury. Clever conspirators will take note of these opinions and will replicate the cartel management models of those price-fixing defendants that secured summary judgments by pointing to the lack of pricing authority of their cartel correspondents.

Federal judges need to better understand how price-fixing conspiracies actually operate. Although knowing who within a firm had pricing authority—and how they exercised it—can be relevant to understanding how a particular price-fixing scheme operated, cartel structures are generally more complicated than senior executives simply agreeing in a single conversation to a high fixed price. Collusion often requires regular communications between rival firms. The inter-rival sharing of confidential pricing information is what matters, not which employees are transmitting that information.

Courts should not require proof that underlings who transmitted price or other sensitive information to rivals had pricing authority. Reasonable jurors can infer that employees tasked with acquiring competitors' pricing information will transmit that information back to executives with pricing authority. With that in mind, this Part explains how federal judges should treat evidence that the defendants' lower-level employees have shared sensitive information and other evidence related to the activities and testimony of individuals without pricing authority.

A. Focus on the Messages, Not the Messengers

The content of any communication should outweigh the identity of the messenger who delivered it. In the context of circumstantial evidence in price-fixing litigation, this means that the substance of inter-competitor communications is more important than the conduit used to transmit those messages. When lower-level employees of competing firms communicate with each other, this implicates the plus factor of opportunity to conspire.[270] If we know nothing about the content of these communications, then the identity of the speakers is important. Thus, conversations between rival salespeople have insignificant probative value if the subject matter is unknown.

In many price-fixing cases, however, we know the substance of the communications. In *Baby Food*, for example, the plaintiffs proffered evidence that the defendants' salespeople shared nonpublic information

268. *See supra* notes 104, 105–07 and accompanying text.

269. *See supra* subpart II(B) and Part IV.

270. *See supra* note 22 and accompanying text.

about planned future price increases.[271] The exchange of price information is its own separate plus factor, which is generally more probative than the plus factors of opportunity to conspire and inter-competitor communications.[272] When firms are exchanging confidential price information, the method of exchange—e.g., whether it is lower-level employees who are transmitting the proprietary pricing plans—is less relevant. For a price-fixing operation to run smoothly, it does not matter who exchanges information. This is especially true in a factual scenario like *Baby Food*, in which higher-level executives were requesting and receiving the nonpublic pricing information of their rivals.[273] When the contents of communications are indicative of collusion, evidence of those communications is probative even if the messengers lacked pricing authority.

Moving forward, courts should adopt the reasoning of antitrust opinions that recognize that cartel decision-makers can delegate tasks such as information gathering to lower-level employees. Recall the example from earlier in which the defendants in *Petroleum Products* argued that the activities of their pricing manager, J.F. Rogers, were irrelevant because he was "too low-level an employee."[274] The Ninth Circuit rejected this argument, noting that:

> With regard to the appellees' contention that Rogers was too low-level an employee to be of significance, we see no reason for concluding that such information gathering cannot be delegated to subordinates. Accordingly, the fact that Rogers did not himself have authority to make ARCO pricing decisions is not dispositive.[275]

This is the proper approach because cartels routinely use lower-level employees to perform cartel tasks. Similarly, in *United States v. Empire Gas Corp*., the Eighth Circuit correctly explained—in the context of a dominant firm that used threats of price wars to coerce rivals into raising their prices—that threats are legally probative even when delivered by employees without pricing authority.[276] Logically, the use of lower-level employees does not

271. *See supra* note 62 and accompanying text.

272. Leslie, *supra* note 16, at 1597.

273. *See supra* note 63 and accompanying text.

274. *In re* Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 453 (9th Cir. 1990); *see also supra* notes 43–45 and accompanying text.

275. *Petroleum Prods.*, 906 F.2d at 453.

276. United States v. Empire Gas Corp., 537 F.2d 296, 301 (8th Cir. 1976) ("Nor can we agree with the district court that the instances related are not probative because the Empire officers or employees who delivered threats to its competitors were not shown to have any real or apparent authority with respect to pricing.").

render the suspicious contents of these messages irrelevant or non-probative of collusion.[277]

When evaluating inter-competitor communications, courts should pay particular attention to corporate policies and practices. In *Baby Food*, the plaintiffs alleged that lower-level employees exchanged price information pursuant to a system directed by high-level executives of each of the baby food manufacturers.[278] Even while acknowledging the company policies regarding information gathering, the *Baby Food* opinion nevertheless devalued the role of lower-level employees acting in accordance with these policies.[279] For example, the Third Circuit noted that the district sales employees and district sales managers of Heinz "were required to submit competitive activity reports to their superiors concerning baby food sales from information they picked up from competitor sales representatives."[280] This information flowed two ways, as "supervising managers for Heinz informed district managers 'on a regular basis before any announcement to the trade as to when Heinz's competitors were going to increase [their] wholesale list prices.'"[281] Similarly, the president of Beech–Nut "testified that it was [Beech–Nut's] policy for sales representatives to gather *and report* pricing information of [Beech–Nut's] competitors."[282] The Eighth Circuit observed that "the *In re Baby Food* case is replete with evidence that pricing information was systematically obtained and directed to high-level executives of Gerber (including Gerber's vice president of sales), Beech–Nut and Heinz, the principal national competitors in the baby food industry."[283] If senior executives direct or receive the price exchanges between lower-level employees, courts should properly treat this as an exchange of information between senior executives. The medium of exchange is less important than the corporate awareness and encouragement of the exchanges.

As with verbal communications, documentary evidence should be evaluated more by the "what" than by the "who." If documents memorialize defendants' collusion, the substance of these documents is more important than whether the author personally possessed pricing authority or was "authorized" to make a statement.[284] Yet antitrust courts often elevate

277. *See, e.g.*, *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011) ("Amex is not insulated from liability merely because executives with pricing authority did not attend the May 25 Meeting.").

278. *In re* Baby Food Antitrust Litig., 166 F.3d 112, 123 (3d Cir. 1999).

279. *See id.* at 133 (determining that the exchange of information among the lower-level employees amounted to mere "chit chat" at chance meetings).

280. *Id.* at 118–19.

281. Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1035 (8th Cir. 2000) (quoting *Baby Food*, 166 F.3d at 119).

282. *Baby Food*, 166 F.3d at 119 (emphasis added).

283. *Blomkest*, 203 F.3d at 1035.

284. *See supra* notes 258–59 and accompanying text.

authorship over substance. For example, in *Baby Food*, the plaintiffs proffered evidence of an internal memorandum referring to a "truce" among the baby food manufacturers.[285] But the Third Circuit stripped this evidence of its probative value, in part because the memorandum's author lacked pricing authority.[286] That is misguided because, as the next section explains, employees without pricing authority often possess incriminating evidence about illegal conspiracies.

B. Treat Lower-Level Employees as a Valuable Resource

The judicial opinions discussed in subpart II(B) and Part IV treat lower-level employees as irrelevant in the context of price-fixing litigation. This is both factually wrong and short-sighted. Instead of minimizing the importance of employees without pricing authority, those employees should be recognized as both potential culprits and potential whistleblowers. Lower-level employees are often aware of cartel activities for three reasons. First, in many instances they are active participants.[287] They sometimes negotiate the fixed price; they exchange sensitive price and sales information; they monitor for cheating and potential new market entry; and they help conceal the conspiracy.[288] In sum, they often have direct knowledge of many aspects of a price-fixing conspiracy because they personally perform the day-to-day cartel tasks.

Second, price-fixing executives may need to bring their salespeople into the fold, lest the sales force compete too aggressively and create the impression that a firm is cheating on the cartel agreement.[289] For example, in one meeting of the amino acids cartel, "ADM alluded to the importance of a company controlling its sales force in order to maintain high prices, and explained that its sales people have the general tendency to be very competitive and that, unless the producers had very firm control of their sales people, there would be a price-cutting problem."[290]

285. *Baby Food*, 166 F.3d at 126–27.

286. *See id.* at 127 ("[T]he explanation for the use of the term ['truce'] by an employee without price-fixing authority is more plausibly explained as an exercise of independent business judgment by Heinz not to enter a new market."); Leslie, *supra* note 204, at 317–18 (noting how the *Baby Food* court "misconstrue[d] the import of the memorandum, which is that (according to one reasonable reading) it memorialized the existence of a price-fixing agreement regardless of whether the memorandum's author set the price").

287. *See supra* subpart III(B).

288. *See supra* subpart III(B).

289. See Leslie, *supra* note 171, at 1691 ("Uninformed employees can also undermine cartels by creating the risk of misunderstandings. For example, salespeople unaware of a price-fixing agreement may actually engage in competition. The other members of the cartel may interpret this as cheating on the cartel agreement . . . .").

290. MARSHALL & MARX, *supra* note 82, at 37 n.33 (quoting Commission Decision 2001/418, 2000 O.J. (L152) 24, 34 (EC)).

Third, lower-level employees are often percipient witnesses to the illegal collusion. For example, several General Electric employees, including those in such disparate departments as finance and engineering, knew that General Electric was illegally conspiring with its rivals.[291] And when the FBI executed its search warrant against notorious price fixer ADM, the company's spokesperson, Howard Buffett, witnessed two lower-level employees (including the CEO's assistant) sneak a box of documents out the back door, and he later observed a tub of shredded documents.[292] In sum, employees can understand that their firm is participating in a price-fixing cartel even if the individual employee is not directly involved in the conspiracy.[293]

Because of their insider knowledge, lower-level employees are assets in the fact-finding process. Some of these employees may be willing witnesses. Lower-level employees may have varying degrees of enthusiasm for participating in an illegal conspiracy. While flattery, money, and allusions to being a "team player" may suffice to achieve opt-in from many junior executives and salespeople, some cartel managers force employees to participate. For example, high-level General Electric executives ordered their subordinates to attend cartel meetings and to engage in illegal bid rigging.[294] Although General Electric maintained an official antitrust compliance policy, which it required all of its executives to sign, failure to violate this policy would result in those same employees being "summarily shunted off to a less profitable job"[295] or fired.[296] Underlings without pricing authority had to participate or lose their livelihoods. The fact that a major company would threaten its own employees to coerce them into participating in the conspiracy shows just how important these lower-level employees are to cartel success. But it also suggests that they are potential percipient witnesses who could provide direct evidence of illegal collusion.[297]

291. FULLER, *supra* note 91, at 194 (noting that at congressional hearings, "witness after witness had testified that the conspiracies were 'a way of life,' and that even finance, engineering, and production men knew about this going on constantly").

292. LIEBER, *supra* note 117, at 326–27.

293. *See* Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 208 (3d Cir. 2017) (Stengel, C.J., dissenting) ("[T]here are numerous statements from the manufacturers' employees (including DuPont) expressing an understanding that they 'would not undercut one another's prices' and that they were involved in an organization to control prices.").

294. *See* FULLER, *supra* note 91, at 109–10 (describing that one representative of General Electric claimed he "was ordered by his superiors to go to these meetings[,]" which was part of "an over-all company policy" and "way of life" at General Electric).

295. *Id.* at 87.

296. *See id.* at 58–59 ("[M]ore than one corporate official suddenly found himself on a siding after refusing to violate the criminal provisions of the law. You had to go along with the system—or you were out.").

297. *See* Leslie, *supra* note 171, at 1641–44 (providing multiple high-profile examples of agents betraying their principals and exposing illegal collusion).

Antitrust officials, private plaintiffs, and even federal judges should treat lower-level employees as potential informants for uncovering collusion and holding price-fixing conspirators accountable. Those judicial opinions that minimize the importance of employees without pricing authority foster a view that treats these employees as irrelevant in antitrust litigation. But an employee's authority to set prices is the greater irrelevancy. As one New York federal judge recently observed, "an employee need not work in a particular position to know of and describe his employer's collusive conduct."[298] Courts should not underestimate either the damage that lower-level employees do as cartel participants or the treasure trove of evidence that they can provide against price-fixing conspiracies.

C. Permit Broad Discovery

The misconception that only those employees with pricing authority are relevant to price-fixing inquiries can skew the way that courts approach matters of pretrial discovery. In some cases, courts seem primed to limit plaintiffs' discovery to defendants' employees who had the authority to set price.[299] This is shortsighted.

Courts should take an expansive approach to discovery—especially document production—in the context of price-fixing claims. Incriminating documents do not reside exclusively in the files of employees with actual price-setting authority.[300] Most cartels strive to hide their price-fixing activities from consumers and antitrust authorities, including by destroying documents.[301] An incriminating document may have, at one time, resided in multiple places within a price-fixing firm, including in the files of lower-level employees. These files are ripe for discovery because upper-level executives with actual pricing authority may be more adept at destroying incriminating documents than the salespeople, who may or may not understand the illegality—and criminality—of the scheme that they're participating in. If document discovery does not include the files and emails of these so-called lower-level employees, critical evidence may not make it into the hands of plaintiffs or before the eyes of judges and juries.

298. Iowa Pub. Emps.' Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 340 F. Supp. 3d 285, 318 (S.D.N.Y. 2018).

299. *See, e.g.*, Holiday Wholesale Grocery Co. v. Philip Morris Inc., 231 F. Supp. 2d 1253, 1273 (N.D. Ga. 2002) ("Plaintiffs also agreed that certain document production would pertain only to those employees with authority to set price."), *aff'd sub nom.* Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

300. *See* Cont'l Baking Co. v. United States, 281 F.2d 137, 148–49 (6th Cir. 1960) (analyzing the admissibility of "letters and reports from Continental's depot managers and other subordinate employees[,]" who lacked the authority to fix prices).

301. Leslie, *supra* note 9, at 1221–23.

Conclusion

In today's corporate world, many billion-dollar ideas are only as good as their execution. That implementation is the work of anonymous and unsung lower-level employees whose names go unknown and whose contributions go uncredited. In the context of price-fixing conspiracies, the work of employees without pricing authority is unappreciated in a different sense of the word. It is high time for courts to give these low-level employees their due.

Price-fixing conspiracies injure consumers and the economy. Congress enacted the Sherman Act in order to deter competitors from colluding on price and to disgorge the ill-gotten gains from price fixing when it occurs. Private antitrust lawsuits are intended to achieve these two goals, as well as to make whole the victims of collusion by compensating them for the overcharges they have paid. The antitrust regime, however, can function properly only when courts allow legitimate antitrust claims to survive summary judgment. When executives are confident that their price-fixing activities will not create antitrust liability, illegal collusion becomes more cost-beneficial and, hence, more likely.

Some federal antitrust opinions assume that all cartel decisions and important communications must necessarily involve high-level executives with actual authority over pricing. Such judges never provide any evidence or sound reasoning to support this assumption. This lack of evidence is not surprising because the premise is false. Price-fixing conspiracies routinely rely on lower-level employees to collect and transmit sensitive pricing data, implement cartel directives, and make daily on-the-ground decisions in response to changes in market conditions.

When federal judges diminish the significance of cartel activities by mid- and lower-level employees, they write a blueprint for senior executives considering—or engaging in—collusion with their competitors. The key to successful cartelization: simply use subordinates without actual price-fixing authority as messengers, enforcers, and all-around utility infielders. These lower-level workers can make cartels profitable and stable. And even if the employees' actions are detected and the conspiracy's victims bring antitrust lawsuits, judges too often drain the most suspicious conduct—the inter-competitor sharing of confidential pricing plans—of its probative value simply because it was carried out by lower-level employees.

When courts fail to appreciate the role of lower-level employees in performing cartel functions, deterrence of price fixing is reduced. Actual and would-be price fixers are emboldened. The line of cases discussed in this Article reduces the likelihood of antitrust liability for illegal price-fixing conspiracies, which in turn alters the cost–benefit calculation for firms considering whether to violate antitrust laws. Executives are more likely to conclude that the expected benefits of collusion outweigh the expected costs

because the expected costs become vanishingly low when courts forgive or devalue the collusive activities of lower-level employees.

Antitrust law should recognize that it is inherently suspicious when competitors share their confidential pricing plans or other sensitive data with each other, regardless of the manner in which they do so. Such inter-competitor exchanges of pricing information are particularly suggestive of price fixing when these same competitors have engaged in parallel price upturns that were not compelled by increases in the costs of necessary inputs. Courts should focus more on what the defendant firms have done and less on who within the defendant firms did it. When the message is collusive, the messenger does not matter.