Nos. 15-14160-AA, 15-14162-AA, 15-14178-AA, 15-14179-AA, 15-14180-AA

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

QUALITY AUTO PAINTING CENTER OF ROSELLE, INC.,
Traded as Prestige Auto Body,
Plaintiff-Appellant,

v.

STATE FARM INDEMNITY COMPANY, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida, Orlando Division
Case Nos. 6:14-cv-06012, 6:14-cv-06013, 6:14-cv-06018,
6:14-cv-06019, 6:14-cv-06022 (Hon. Gregory A. Presnell)

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES' PETITIONS FOR REHEARING *EN BANC*

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October 4, 2017

In re: Auto Body Shop Antitrust Litigation
Nos. 15-14160-AA, 15-14162-AA, 15-14178-AA, 15-14179-AA, 15-14180-AA

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1.1, the undersigned counsel certifies that, in addition to persons named in the Certificates of Interested Persons included within Defendants-Appellees' Petitions for Rehearing *En Banc*, the following persons or entities may have an interest in the outcome of this litigation:

(1) Washington Legal Foundation (*amicus curiae*)

(2) Cory L. Andrews (attorney)

(3) Richard A. Samp (attorney)

The undersigned counsel further states that WLF is a nonprofit, tax-exempt corporation organized under § 501(c)(3) of the Internal Revenue Code; it has no parent corporation, issues no stock, and no publicly held company enjoys a 10% or greater ownership interest.

DATE: October 4, 2017

/s/ Cory L. Andrews
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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d 1327, 1342 (11th Cir 2010).

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether an antitrust plaintiff must plead facts that tend to exclude an innocent explanation for the defendants' parallel conduct in order to proceed to summary judgment on a "plausible" conspiracy claim under § 1 of the Sherman Act.

DATE: October 4, 2017

/s/ Cory L. Andrews
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STATEMENT OF THE ISSUE

Whether an antitrust plaintiff must plead facts that tend to exclude an innocent explanation for the defendants' parallel conduct to proceed to summary judgment on a "plausible" conspiracy claim under § 1 of the Sherman Act.

STATEMENT OF FACTS

WLF adopts Defendants-Appellees' statement(s) of relevant facts.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts in cases deciding the proper scope of federal antitrust law. *See, e.g.*, *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006). WLF has also been at the forefront of public-interest legal groups recognizing the need for plausible pleading standards to limit the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* WLF states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

burdensome costs of frivolous litigation. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

WLF believes that the object of federal antitrust law should be to promote free-market competition and thereby provide consumers with better goods and services at lower prices. WLF is concerned that the panel's decision—by requiring antitrust defendants to litigate to summary judgment § 1 conspiracy claims in the absence of *any* factual allegation that plausibly demonstrates a "meeting of the minds"—is contrary to Supreme Court and Eleventh Circuit precedent and creates enormous uncertainty for the business community. For the reasons that follow, WLF urges this Court to grant rehearing *en banc*.

SUMMARY OF ARGUMENT

In evaluating the sufficiency of an antitrust complaint under § 1 of the Sherman Act, the Supreme Court has emphasized that "[t]he inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554. By excusing Appellants' from the need to allege facts that tend to exclude lawful explanations for parallel conduct, the panel majority's ruling conflicts with *Twombly* and significantly erodes this Court's own precedent in *Jacobs v. Tempur-Pedic*

International, Inc., 626 F.3d 1327, 1342 (11th Cir 2010) (holding that "under the pleading standards of *Twombly* and *Iqbal*," antitrust plaintiffs have "the burden to present allegations showing why it is ***more plausible*** that [defendants] would enter into an illegal price-fixing agreement *** to reach the same result realized by purely rational profit-maximizing behavior") (emphasis added).

Although *Twombly* and *Jacobs* could not be clearer that plausibility requires more than a sheer possibility that a defendant acted unlawfully, the panel majority decided that discovery is the proper mechanism for ferreting out meritless antitrust claims. As the district court rightly held (and Judge Anderson's erudite dissent demonstrates), the complaints' conclusory assertions that Appellees agreed to industry-wide price fixing are fully consistent with, and most plausibly reflect, independent and legitimate business decisions. Yet the gravamen of the panel's decision is that a court evaluating a motion to dismiss an antitrust complaint under § 1 need only consider whether a conspiracy seems "plausible" in the abstract, without attending to whether the plaintiff has pled any actual facts that would tend to exclude innocent, alternative explanations of the defendants' conduct. Given how easy it is to allege a conspiracy based on activity that just as plausibly manifests perfectly lawful activity (such as, in this case, seeking to reduce costs and maintain competitive rates), and given the exploding cost of antitrust discovery as recognized in *Twombly*, the panel decision cries out for rehearing *en banc*.

If allowed to stand, the decision below will produce enormous uncertainty, not only for the automobile insurance industry, but for the greater business community as a whole. The panel majority's flawed decision highlights a persistent problem in antitrust litigation: it is often very difficult to distinguish vigorous competition from acts that undermine competition. Yet if companies fear that their efforts to reduce costs and lower prices may result in their having to litigate unmeritorious antitrust claims, they may be deterred from engaging in many competitive practices that benefit consumers. *En banc* review is thus needed not only to address the unfairness visited upon the individual defendants in this case, but to prevent the larger market disruption that is sure to follow if a firm's pro-competitive activity is allowed to serve as the sole basis for burdensome antitrust discovery and protracted litigation.

Rehearing *en banc* is also warranted given the enormous unjustified expense that Appellees will incur if they are forced to defend this suit through the discovery phase. The gatekeeping function of Rule 12(b)(6) is particularly salient in the antitrust context, where allowing unmeritorious antitrust litigation to proceed beyond the pleading stage imposes extraordinary and unwarranted costs on defendants. To cabin the incentives that the panel majority's opinion creates for plaintiffs to bring speculative antitrust claims in the hopes of extracting a settlement, this Court should grant *en banc* rehearing.

ARGUMENT

I. *EN BANC* REVIEW IS WARRANTED TO PROVIDE MUCH NEEDED CERTAINTY TO MARKET PARTICIPANTS.

A. To Operate Efficiently and Competitively, Businesses Require Clear Threshold Pleading Requirements for § 1 Claims

Whether an antitrust plaintiff must plead facts that tend to exclude an innocent explanation for the defendants' parallel conduct in order to proceed to summary judgment on a plausible conspiracy claim is of critical importance, not only to the automobile insurance industry, but to the wider business community as well. As this case vividly illustrates, it is all too easy to plead facts that are consistent with an antitrust conspiracy if *Twombly*'s requirement to include facts tending to exclude lawful explanations for defendants' conduct is ignored. As a result, the panel majority's decision creates enormous uncertainty for market competitors trying to assess their potential litigation exposure to § 1 claims under the Sherman Act.

Existing and potential antitrust defendants simply cannot operate efficiently without authoritative guidance as to what federal law requires an antitrust plaintiff to plead before it will be permitted to advance to burdensome discovery. In the wake of the panel majority's decision, antitrust defendants in this Circuit are effectively obliged to litigate to summary judgment claims for perfectly innocent conduct that Congress never intended the Sherman Act to cover. In the absence of

a definitive Eleventh Circuit antitrust pleading standard—the sort that *Twombly* and *Jacobs* were supposed to provide—the business community will be unable to structure its conduct in advance so as to avoid the increased risk and expense of frivolous antitrust litigation. The petitions present the Court with an opportunity to clarify the law for all affected stakeholders, which—under the Sherman Act's liberal venue provision—includes almost all firms doing business in the United States. *See* 15 U.S.C. § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.").

Such uncertainty imposes a high cost, forcing companies to make highly consequential business decisions without knowing what the law requires or how it might be used against them by a potential rival or the plaintiffs' bar. Under the panel majority's approach, if a firm's actions—no matter how independent or economically rational—constitute parallel conduct, that firm must now bear the burden of proving a negative when that burden properly lies with the party bringing the antitrust claim. As Judge Anderson noted in dissent, "under the standard announced today, the mere existence of an industry-wide practice permits an antitrust plaintiff to establish a plus factor" and thus to withstand a motion to dismiss. Slip. Op. at 51.

B. If Allowed to Stand, the Panel Majority's Decision Will Likely Chill Pro-Competitive Conduct at the Expense of Consumers

The panel majority's decision is inconsistent with the fundamental purpose of antitrust law: to promote competition. Because the threat of unfounded yet expensive antitrust litigation often deters firms from engaging in the vigorous competition that the antitrust laws were meant to encourage, the panel's holding threatens to chill pro-competitive conduct by firms in a wide array of markets. Yet it would ultimately harm consumers if a lack of clear guidance resulted in a firm's reluctance to employ the most efficient distribution systems, insist upon cost-cutting measures by vendors, or steer its customers to preferred providers for the most competitive rates—solely to avoid the burden and expense of protracted litigation.

Many commentators have lamented the fact that an increased threat of antitrust liability exposure can actually deter competition. *See, e.g.*, William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1921 n.8 (2003) ("If plaintiffs can extract sizable settlements by filing frivolous lawsuits capable of surviving motions to dismiss, potential defendants will avoid engaging in any behavior that could be construed as anticompetitive, further dampening these firms' incentives to compete aggressively."); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV.

551, 555-603 (1991) (describing how the exorbitant cost of defending even unfounded antitrust litigation can have a chilling effect on otherwise pro-competitive conduct).

The danger of such overdeterrence is especially acute where, as here, the distinction between competitive and anticompetitive activity can be inherently difficult to discern. As two leading experts have explained, "one problem haunting most antitrust litigation *** is that vigorous competition may look very similar to acts that undermine competition. The resulting danger is that courts will prohibit *** acts that *appear* to be anticompetitive but really are the opposite." William J. Baumol & Alan S. Blinder, ECONOMICS: PRINCIPLES AND POLICY 425-26 (8th ed. 2000) (emphasis in original). This is not merely ironic; it is corrosive to the workings of our economy and calls for judicial vigilance at the pleading stage.

Any business unable to predict with any reasonable degree of certainty whether its behavior will later be deemed illegal is vulnerable to settlement shakedowns. The panel majority's novel approach to antitrust pleading, if allowed to stand, will exacerbate this problem. The panel's decision sweeps too broadly, erroneously allowing bare allegations of conduct that cannot fairly be described as anticompetitive to advance to summary judgment. Ultimately, it is consumers who will pay the price in the form of lower wages and increased prices for goods and

services. By granting rehearing *en banc*, this Court can provide the clarity and certainty that affected stakeholders so desperately need.

II. *EN BANC* REVIEW IS WARRANTED TO VINDICATE THE VITAL GATEKEEPING FUNCTION OF RULE 12(B)(6).

As *Twombly* makes clear, the bare allegations in Appellants' complaints—even if entirely true—do not give rise to a "plausible inference of conspiracy." *Twombly*, 550 U.S. at 556 n.4. Rehearing *en banc* is especially warranted given the crucial procedural posture of this case. The district court merely dismissed the complaints without prejudice under Rule 12(b)(6), an "important mechanism for weeding out meritless claims." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). Although Appellants had every opportunity to amend their complaints to add any additional facts that may have been omitted from their original pleadings, they opted instead to appeal.

Permitting meritless claims to proceed past the pleading stage, particularly in antitrust cases, forces a defendant—or multiple defendants—to "bear [a] substantial 'discovery and litigation' burden." *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). Indeed, the unique attributes of antitrust litigation under the Sherman Act underscore the vital role that Rule 12(b)(6) plays in weeding out legally suspect claims. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30, at 519 (2004) ("Antitrust litigation can *** involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and

technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money."); Wagener, *supra*, at 1893 ("Strategically minded plaintiffs recognize that defendants risk incurring onerous discovery costs if an antitrust case progresses beyond the pleading stage.").

Because antitrust suits routinely require defendants to spend millions of dollars simply to obtain summary judgment—extracting precious time and resources from counsel, clients, and the courts—"it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Twombly*, 550 U.S. at 558. That is why *Twombly* emphasizes the need for district courts to draw on their "judicial experience"—along with "common sense"—in disposing of legally untenable antitrust suits at the proper time: *before* the court forces the defendant to undertake intrusive and burdensome discovery. *Id*. at 557-60.

Allowing factually deficient antitrust claims to advance to summary judgment not only wastes substantial resources but creates unwelcome incentives for bringing speculative claims in the hopes of extracting a settlement. Because antitrust discovery is so daunting and expensive, antitrust lawsuits can amass substantial settlement value once they survive a Rule 12(b)(6) motion to dismiss. *See, e.g.*, Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1011 (1986) (describing "the threat of

forcing litigation costs on one's adversary in order to induce a favorable settlement"). And the availability of treble damages under the Sherman Act further enhances the potential for an unjustified settlement. *See, e.g.*, Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 809 (1987) ("The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed.").

When properly granted, however, as the district court did in this case, Rule 12(b)(6) motions help "to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *Am. Bank v. City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010). "The price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome." *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999).

Where, as here, legally speculative and untenable claims are deemed on appeal to survive a Rule 12(b)(6) motion to dismiss, rehearing *en banc* serves both the interests of judicial efficiency and the interests of justice. If allowed to stand, the panel's decision will increase markedly the likelihood that a plaintiff in this Circuit "with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the

settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence." *Dura Pharm, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)). To forestall such a result, and to vindicate the essential gatekeeping function of Rule 12(b)(6), the Court should grant rehearing *en banc*.

CONCLUSION

For the foregoing reasons, the Court should grant Appellees' Petitions for Rehearing *En Banc*.

Dated: October 4, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because this brief contains exactly 2,599 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

Dated: October 4, 2017

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c)(1)(D) and 11th Cir. R. 25-3, I hereby certify that on October 4, 2017, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. All participants in the case who are registered CM/ECF users will be served electronically by the CM/ECF system.

I also certify that I deposited with an overnight delivery service 13 paper copies of the brief addressed to the Clerk of this Court.

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