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)

EN BANC BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES, URGING AFFIRMANCE

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June 28, 2018

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

Amicus curiae Washington Legal Foundation (WLF) certifies under 11th Cir. R. 26.1.1 that it is unaware of any interested persons apart from those already identified in the parties' *en banc* briefs.

Under Fed. R. App. P. 26.1, WLF states that it 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: June 28, 2018

/s/ Cory L. Andrews
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IDENTITY AND INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as an *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.*, 570 U.S. 136 (2013); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006). WLF was at the forefront of public-interest legal groups urging adoption of a "plausibility" pleading standard to cabin the burdensome costs of frivolous litigation. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The central aim of federal antitrust law is to promote free-market competition, which provides consumers with better goods and services at lower prices. This appeal highlights a persistent problem in antitrust litigation: it is often difficult to distinguish vigorously competitive acts from anticompetitive ones. Yet if a company's legitimate efforts to reduce costs and lower prices can provide a basis for protracted, baseless antitrust litigation, firms may well decide to refrain from engaging in certain competitive practices that benefit consumers.

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[*] Under Fed. R. App. P. 29(a)(4)(E), WLF states that no counsel for any party authored this brief in whole or in part; no one, apart from WLF or its counsel, funded the preparation or submission of this brief.

WLF believes that a decision requiring antitrust defendants to litigate an antitrust conspiracy claim to summary judgment when *no* factual allegation plausibly shows a "meeting of the minds" would contravene Supreme Court and Eleventh Circuit precedents. Not only would that lax pleading standard punish perfectly rational, competitive behavior among firms (by forcing them to bear untenable discovery costs), but it also would encourage the filing of meritless antitrust claims calculated to extract a settlement. For the following reasons, WLF urges the Court to affirm the dismissal below.

STATEMENT OF THE ISSUES

In its April 20, 2018 Memorandum, the Court directed the parties to focus their *en banc* briefs on two issues:

(1) Can the Court plausibly infer a *per se* illegal price-fixing agreement or conspiracy among the several defendant-insurers from the allegations of the complaints in the several cases on appeal? If so, identify the allegations from which the Court plausibly may infer such an agreement or conspiracy, and discuss whether any asserted inference of agreement or conspiracy is "just as much in line with a wide swath of rational competitive business strategy prompted by common perceptions of the market," *Twombly*, 550 U.S. at 554, or whether that inference is supported by allegations tending "to rule out the possibility that the defendants were acting independently." *Id.*

(2) Can the Court plausibly infer a *per se* illegal agreement or conspiracy to boycott the Plaintiffs' body shops among the several defendant-insurers from the allegations of the complaints in the several cases on appeal? If so, identify the allegations from which the Court plausibly may infer such an agreement or conspiracy, and discuss whether any asserted inference of agreement or conspiracy is "just as much in line with a wide swath of rational competitive business strategy prompted by common perceptions of the market," *Twombly*, 550 U.S. at 554, or whether that inference is supported by allegations tending "to rule out the possibility that the defendants were acting independently." *Id.*

INTRODUCTION & SUMMARY OF ARGUMENT

Clarifying the pleading threshold for alleging a plausible antitrust claim under § 1 of the Sherman Act, *Bell Atlantic Corp. v. Twombly* emphasizes 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." 550 U.S. at 554. That salient insight into antitrust law is the key to resolving this appeal.

As in *Twombly*, the Plaintiffs here allege a *per se* violation of § 1 of the Sherman Act. Also as in *Twombly*, every fact the Plaintiffs allege is fully consistent with perfectly lawful, competitive behavior. The Plaintiffs allege that

the defendant-insurers each tied their body-shop reimbursement rates to State Farm's rates and "steered" policyholders from body shops that charge excessive rates to those that don't. But even if all that the Plaintiffs say is so, none of it plausibly suggests a conspiracy. To the contrary, the Defendants' behavior more plausibly reflects a lawful motive free from any desire to restrain trade: maximizing profits and market share in a highly competitive industry. As *Twombly* reminds us, unless the Defendants' conduct arises from an *agreement*, it can't possibly violate § 1 of the Sherman Act. That is this case.

Rather than allow a plaintiff to plead a *per se* antitrust conspiracy based on circumstances that reflect perfectly lawful activity, *Twombly* requires a complaint—to survive a motion to dismiss—to include more than allegations of parallel or interdependent conduct. To "enter the realm of plausible liability" under § 1, a complaint must allege "something more," 550 U.S. at 560, that is, something "plausibly suggest[ive of] (not merely consistent with) agreement," *id.* at 557.

Twombly's "plausibility" pleading standard follows logically from the Supreme Court's earlier decision in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which clarifies an antitrust plaintiff's *evidentiary* burden for prevailing on summary judgment. Just as "antitrust law limits the range of permissible inferences" a court may draw at the summary judgment stage, *Matsushita*, 475 U.S. at 588, it also limits the range of permissible

inferences a court may draw when weighing the sufficiency of a complaint's allegations at the pleading stage. To prevail on summary judgment under *Matsushita*, a plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588. Likewise, to survive a motion to dismiss under *Twombly*, a plaintiff must allege facts that (if later supported by evidence) would satisfy that burden.

The Plaintiffs' view of antitrust pleading does violence to *Twombly*, which lays bare the failure of the Plaintiffs' complaints to support a "plausible inference of conspiracy." *Twombly*, 550 U.S. at 556 n.4. The upshot of the Plaintiffs' litigating position is that a court evaluating a motion to dismiss an antitrust complaint need only consider whether a § 1 conspiracy seems "plausible" in the abstract—without attending to whether a plaintiff has pleaded any facts that tend to exclude an innocent, alternative account of the defendants' conduct. But *Twombly* expressly rejects that "sporting chance" approach to antitrust pleading.

Such an approach not only conflicts with *Twombly*, but it also contravenes this Court's holding in *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d 1327 (11th Cir 2010). Relying on *Twombly* and *Matsushita*, *Jacobs* confirms that an antitrust plaintiff bears "the burden to present allegations showing why it is *more plausible* that [the defendants] would enter into an illegal price-fixing agreement * * * to reach the same result realized by purely rational profit-maximizing

behavior." 626 F.3d at 1342 (emphasis added). Each of the Plaintiffs' complaints flunks that test.

Though *Twombly* and *Jacobs* couldn't be clearer that plausibility requires more than a sheer possibility of a § 1 conspiracy, the Plaintiffs insist that burdensome discovery is the proper means for ferreting out dubious antitrust claims. If adopted, that flawed pleading standard would effectively impose a presumption of guilt on antitrust defendants in the face of factually neutral allegations. What's worse here, all the facts underlying the Plaintiffs' allegations of a conspiracy among insurers to fix reimbursement rates and boycott body shops are more consistent with, and *most plausibly* reflect, the Defendants' independent and legitimate business decisions.

The Plaintiffs contend that two "plus" factors supply the plausibility *Twombly* requires. As the Defendants and the now-vacated panel dissent explain, these alleged "plus" factors—matching prices and sharp dealing—are, at best, claims of mere parallel conduct. Beyond that, however, the Plaintiffs' supposed "plus" factors are negated by two insurmountable "minus" factors. *First*, the Plaintiffs allege the existence not just of a cartel, but of an *outsized* cartel. Logic and game theory teach that any such cartel will be nearly impossible to form and virtually impossible to maintain. And the Antitrust Division's savvy leniency program, which encourages a "race to confess," makes any conspiracy less

plausible by motivating each cartel member to snitch on its co-conspirators. The Plaintiffs offer no plausible reason how or why the cartel they allege overcomes these obstacles.

Second, the Plaintiffs allege that the Defendants formed a cartel to organize behavior that market forces have long generated spontaneously. Insurers have always faced intense pressure to cut prices, and the auto-repair market has long been undifferentiated, atomized, and oversaturated. These forces have led to resentments by auto-repair shops over alleged mistreatment by insurers, for decades. Yet the Plaintiffs offer no plausible reason why *now*, suddenly, insurers—in a fit of irrationality—have elected to form an illegal cartel to promote market phenomena that already exist organically.

Finally, if this Court were to relieve the Plaintiffs of their burden to allege facts that tend to exclude lawful explanations for the Defendants' conduct, the precedential import of that ruling would wreak havoc on businesses inside (and outside) the Eleventh Circuit. In contrast, affirming the district court's dismissal will prevent the severe market disruption sure to follow if a firm's pro-competitive behavior can serve as the sole basis for burdensome antitrust discovery and protracted litigation. Ultimately, such a disruption would not only deter competitive business practices, but it also would harm consumers by saddling them with higher costs for goods and services, undermining the goal of antitrust law.

ARGUMENT

I. UNDER *TWOMBLY* AND *JACOBS*, AN ANTITRUST PLAINTIFF'S FAILURE TO PLEAD FACTS THAT TEND TO EXCLUDE INNOCENT EXPLANATIONS FOR THE DEFENDANTS' CONDUCT MANDATES DISMISSAL.

The Supreme Court "has never held that proof of parallel business behavior conclusively establishes agreement" or "that such behavior itself constitutes a Sherman Act offense." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Though Rule 12(b)(6) doesn't require a district court to find that a complaint's factual allegations are likely provable, *Twombly* recognizes that a district judge can't assess the plausibility of an antitrust conspiracy complaint without measuring it against the governing substantive law.

Just as an antitrust-conspiracy claim ultimately can't succeed on the merits without *evidence* that tends to exclude a lawful explanation, such a claim can't survive a motion to dismiss without *allegations* that also tend to do so. But as this Court made clear in *Jacobs*, if the only facts alleged are just as consistent with lawful business behavior, then any claim of conspiracy is implausible and must be dismissed.

A. *Twombly* Clarifies That a Court May Not Infer a § 1 Conspiracy If the Pleaded Allegations Are Just as Consistent with Independent Action as with Concerted Action.

Whether a plaintiff has stated a plausible claim for relief turns on what the governing law requires that plaintiff to prove on the merits. Under the Sherman

Act, the existence of an agreement is the crux of any antitrust conspiracy claim. If a plaintiff's non-conclusory allegations of a conspiracy fail to exclude innocent explanations for the same conduct, that plaintiff has failed to allege facts that plausibly bespeak an agreement. That is why *Twombly* instructs a district court to determine if an inference of agreement is "just as much in line with a wide swath of rational competitive business strategy prompted by common perceptions of the market," *Twombly*, 550 U.S. at 554, or instead if that inference is based on allegations tending "to rule out the possibility that the defendants were acting independently," *id.*

Twombly's § 1 pleading threshold flows naturally from the Supreme Court's earlier holding in *Matsushita*, which requires a § 1 plaintiff—to prevail at the summary judgment and directed verdict stages—to adduce evidence tending to exclude innocent explanations. *See Matsushita*, 475 U.S. at 587-88. Though inferences from disputed facts at summary judgment "must be viewed in the light most favorable to the party opposing the motion," *Matsushita* insists that "antitrust law limits the range of permissible inferences" a court may draw for § 1 claims resting on circumstantial evidence that the defendants conspired. *Id.* at 588.

Under *Matsushita*, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Instead, a plaintiff "must present evidence 'that tends to exclude

the possibility' that the alleged conspirators acted independently." *Id.* (internal citations omitted). Otherwise, as *Matsushita* explains, antitrust law would pose too great a danger of chilling ordinary business conduct.

Because "antitrust law limits the range of permissible inferences" at every stage of a § 1 antitrust case, 475 U.S. at 588, it follows that—to survive a motion to dismiss—a complaint must similarly allege facts "that tend to exclude the possibility that the alleged conspirators acted independently," *id*. And that is precisely what *Twombly* requires. Explaining that *Matsushita* "made it clear that neither parallel conduct nor conscious parrallelism, taken alone, raise the necessary implication of conspiracy," *Twombly* undertakes "a fresh look at adequacy of pleading when a claim rests on parallel action." *Twombly*, 550 U.S. at 561 n.7.

Twombly's analysis begins by emphasizing how the Supreme Court's antitrust precedents have long "hedged against false inference from identical behavior at a number of points in the trial sequence." 550 U.S. at 554 (citing *Matsushita*, 475 U.S. at 574). The Court explicitly draws on *Matsushita* to clarify "the antecedent question of what a plaintiff must *plead* in order to state a claim under § 1 of the Sherman Act." *Id*. at 554-55 (emphasis added). "A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's

commercial efforts stays in neutral territory." *Id.* at 557.

Twombly aligns the antitrust pleading standard with *Matsushita*'s summary judgment standard in one crucial respect: An antitrust plaintiff relying on circumstantial evidence of a *per se* illegal agreement must allege "something more than merely parallel behavior," 550 U.S. at 560, that is, something "plausibly suggest[ive of] (not merely consistent with) agreement," *id.* at 557. But no "plausible grounds to infer an agreement" exist if a complaint's allegations are equally consistent with the "obvious alternative explanation" that the defendants are independently pursuing their own interests. *Id.* at 556, 567. In other words, even if all the complaint's non-conclusory allegations later proved true but *Matsushita* would still require judgment for the defendants, that complaint hasn't stated a plausible claim for relief under § 1.

Twombly also cautions that a complaint must contain "more than labels and conclusions" to survive a motion to dismiss. 550 U.S. at 555. To "enter the realm of plausible liability," a complaint's allegations must cross two lines: the line between "the conclusory and the factual" and the line between "the factually neutral and the factually suggestive." *Id.* 557 n.5. If an equally plausible "alternative explanation" other than an agreement exists for the facts alleged, it is reversible error to permit the complaint to go forward based on an inference that an unlawful agreement exists. *Id.* at 567.

Twombly reminds lower courts that "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a violation against almost any group of competing businesses would be a sure thing." 550 U.S. at 566. Mindful of that principle, the district court below 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). Though they had every chance to amend their complaints to add any omitted facts that might help them cross the line from "the factually neutral" to "the factually suggestive," the Plaintiffs opted instead to ask this Court for a "sure thing." The Court should decline that invitation.

B. This Court's *Jacobs* Decision Confirms That an Antitrust Conspiracy Claim Based on Factually Neutral Allegations Must Be Dismissed.

This Court's own decision in *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d at 1343, faithfully implements *Twombly*'s directive that a court not divorce § 1's pleading standard from what substantive antitrust law requires. In affirming the dismissal of a complaint alleging that a mattress manufacturer facilitated a horizontal conspiracy among its distributors to set minimum prices, *Jacobs* explicitly reads *Twombly* to require a district judge to compare the strength of competing inferences that arise from the facts alleged—much like the analysis that *Matshushita* requires at the summary judgment stage.

Above all, *Jacobs* requires a district court deciding a motion to dismiss a § 1 claim to "juxtapose[] the inference of independent economic self-interest" against "the inference of conspiracy." 626 F.3d at 1343 (citing *Matsushita*, 475 U.S. at 596-97). "[U]nder the pleading standard of *Twombly*," an antitrust plaintiff has "the burden to present allegations showing why it is *more plausible* that [the defendants] would enter into an illegal price-fixing agreement * * * to reach the same result realized by purely rational profit-maximizing behavior." *Id.* at 1342 (emphasis added). But when, as here, a plaintiff pleads no facts suggesting that conspiracy is a "more plausible" inference than lawful, independent conduct, dismissal is mandatory. *Id*. at 1342-43.

Given the fatal deficiencies of the complaints at issue here, this Court can't reverse the district court's dismissal without severely abrogating its widely cited panel opinion in *Jacobs*. Nor is there anything idiosyncratic—much less flawed—about *Jacobs*'s straightforward application of *Twombly*'s pleading standard. Other circuits equally understand *Twombly* to require dismissal if nothing in the complaint "makes it any *more likely* that the Defendants' parallel conduct was the result of an unlawful agreement" rather than "independent, rational and wholly lawful decisions by each Defendant." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011) (emphasis added).

Even in the more plaintiff-friendly Ninth Circuit, "[a]llegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008). Or, as the Sixth Circuit has cogently explained in distilling *Twombly*'s essence, "the plausibility of [a] plaintiffs' conspiracy claim is inversely correlated to the magnitude of [the] defendants' economic self-interest" in undertaking the alleged conduct. *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 909 (6th Cir. 2009). So too here.

II. NOT ONLY ARE THE PLAINTIFFS' "PLUS" FACTORS ILLUSORY, THEY ARE ENTIRELY NEGATED BY TWO KEY "MINUS" FACTORS.

The Defendants, in their briefs, and Judge Anderson, in his now-vacated panel dissent, show why the Plaintiffs' two main "plus" factors—that is, the only "plus" factors not rejected by the entire panel—are illusory. Neither price uniformity ("plus" factor 1) nor sharp tactics ("plus" factor 2) suggest a conspiracy any more than they suggest independent competitive behavior.

But WLF wishes to press the case against the Plaintiffs' "plus" factors even further. The Plaintiffs' supposed signs of a conspiracy aren't unconvincing only in themselves; they are belied by at least two overwhelming "minus" factors. These "minus" factors take the likelihood of a conspiracy here from the realm of implausibility to the land of fantasy.

A. The Plaintiffs Allege the Existence of a Cartel That (Quite Implausibly) Defies the Laws of Logic and Game Theory.

The Plaintiffs have sued *eighty-nine* defendants. Many of the individual lawsuits underlying this multi-district litigation involve dozens of insurance companies. The Plaintiffs allege not a comparatively simple conspiracy among two or three major market players, but a complex—indeed, an astonishingly complex—cartel. In trying to plead plausible allegations, an antitrust plaintiff claiming so intricate and large a conspiracy faces several unique problems—problems that the Plaintiffs can't possibly overcome.

1. *The Problem of Formation*. A business owner with only two competitors can establish a cartel by persuading those two firms to break the law with him. If he succeeds in bringing his two competitors into his scheme, his firm stands to collect around one-third of the oligopoly rents collected by the cartel. The two competitors are enticed to join the cartel because they too can each collect one-third of the cartel's total supra-competitive revenue.

But what if, as alleged here, the cartel must contain a dozen or more competitors? It hardly needs saying that "the frequency of collusion" is "inversely associated with numbers of firms." Christopher Leslie, *Trust, Distrust, Antitrust*, 82 Tex. L. Rev. 515, 564 (2004). A firm with that many competitors would need to work feverishly, and bear tremendous risk, to contact, "feel out," and enlist many others into the cartel. At the same time, the firm would need to assume this greater

effort and risk for less gain; if the cartel gets off the ground, many more firms will share in the supra-competitive rents. And the firm would need to proceed despite the fact that, if only a few competitors refused to join, the cartel would become pointless. Those holdouts would soak up all the business the cartel now stands to lose from having raised prices.

The Plaintiffs' complaints fail entirely to explain, nor can they, how dozens of insurers overcame these first-mover disincentives to form such an implausible cartel. Nor can the Plaintiffs explain how a first-mover, if one existed, could persuade so many other firms to join an illegal conspiracy.

2. *The Problem of Enforcement*. "Each firm" in a cartel "has a strong incentive to cheat." Leslie, *supra*, 82 Tex. L. Rev. at 525. This is the famous "prisoners' dilemma": Though the members of the cartel would do best by collectively maintaining an artificially elevated price, the dominant strategy for each firm individually—that is, the approach with the highest expected payoff—is to undercut the cartel price and thereby expand market share.

"The greater the number of firms in a cartel, the more likely that some members will cheat." Leslie, *supra*, 82 Tex. L. Rev. at 564. This is because the members of an overlarge cartel can't effectively communicate, monitor one another, or detect cheating.

That problem is especially excruciating here, where the alleged cartel members stand accused of engaging in *disparate methods* of mistreating body shops. It would be hard enough for a large cartel to implement a uniform regime of sharp dealing. But how could such a cartel possibly implement and police a *varied* regime? Disparate forms of "steering," for instance, skirt the line of legality to different degrees. How does so large a cartel orchestrate—never mind enforce—a regime in which some members volunteer to engage in riskier behavior than others? A cartel doesn't survive by passing a collection plate. It can't simply invite each self-interested member to contribute or sacrifice only as much as it feels like contributing or sacrificing.

Beyond these concrete coordination problems, such a cartel faces the more intangible difficulty of maintaining social capital—in a word, trust. "Smaller numbers create a more intimate environment, one in which the participants can generally come to know and trust one another." Leslie, *supra*, 82 Tex. L. Rev. at 565. Greater numbers, of course, create the opposite. One need not be Robin Dunbar (the expositor of Dunbar's number) to appreciate the difficulty of maintaining trust across large and complex firms of any kind, never mind *dozens* of firms that are simultaneously (1) market competitors and (2) illicit co-conspirators. *Cf.* R.I.M. Dunbar, *Coevolution of Neocortical Size, Group Size and Language in Humans*, 16 Behav. & Brain Sci. 681 (1993); Emerging

Technology from the arXiv, *Your Brain Limits You to Just Five BFFs*, MIT Tech. Rev., https://perma.cc/6WU4-W4W5 (Apr. 29, 2016).

Once again, the Plaintiffs fail to explain how the alleged cartel, in the implausible event it could form, would not immediately collapse in a death spiral of cheating spurred by distrust spurred by cheating spurred by distrust.

3. *The Problem of Detection*. The Justice Department's Antitrust Division offers various forms of leniency to a firm that confesses its membership in a cartel. *See* Department of Justice, *Leniency Program*, https://www.justice.gov/atr/leniency-program (Feb. 20, 2018). The Plaintiffs' civil action doesn't disqualify a defendant-insurer from seeking leniency under this program. *See* Department of Justice, *Frequently Asked Questions About The Antitrust Division's Leniency Program and Model Leniency Letters* at 5, https://www.justice.gov/atr/page/file/926521/download (Jan. 26, 2017).

The key to obtaining leniency is being the first to confess. If the 89 insurers in this action have in fact formed a cartel, they are at this very moment stuck in an overcrowded, and thus perilous, prisoners' dilemma. "The more conspirators, the more witnesses there are to flip and the more ominous the prisoners' dilemma for a conspirator." Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1312 (2003). Apart from the sheer numbers, the just-discussed problem of social capital persists. More cartel members undermines trust. "Once trust breaks down, whoever gets to

the government first and confesses gets amnesty. This can create an unbearable pressure to race to confess." Leslie, *supra*, 82 Tex. L. Rev. at 640.

If a cartel existed as the Plaintiffs allege, dozens (or scores) of individual insurers would have an immense, irresistible incentive to go to the authorities. Yet nothing suggests that any of them has. And despite the sprawling size and vast scope of the conspiracy alleged here, the Plaintiffs cannot point to one shred of direct evidence of an agreement to bolster the allegations in their complaints. Nothing in the Plaintiffs' complaints explains how or why this is remotely plausible. In short, none of the Plaintiffs' supposed "plus" factors mitigates, much less addresses, the fact that the Plaintiffs allege a conspiracy of exceedingly implausible size and scope.

B. The Plaintiffs Allege the Existence of a Pointless and Highly Implausible Cartel—One That Conspires to Organize Behavior Long Established by Market Forces.

It would make no sense for a group of insurers to form an illegal cartel to organize behavior that market forces have fostered and maintained for decades. Yet the Plaintiffs allege precisely that.

The price pressures the Plaintiffs describe are nothing new. "The automotive repair industry and the automotive insurance industry are in a constant struggle." Michael Sacchetto, *Buyer Power Abuse in the Auto-Repair Industry: Is There a*

Remedy?, 38 Sw. L. Rev. 503, 503 (2009). One court, describing one State's illustrative experience almost 40 years ago, wrote:

> The recent economic struggle between so-called independent automobile body repair shops and the large insurers * * * has been waged * * * over a period of almost fifteen years, commencing in the late 1960's when the pressure on [insurers], exerted not only by its insureds but by the Insurance Commissioner of Delaware, to hold down spiraling insurance premiums, in turn forced [insurers] * * * to channel[] * * * claims to competitive shops preferred by [the insurers].

DeBonaventura v. Nationwide Mut. Ins. Co., 419 A.2d 942, 948 (Del. Ch. 1980).

Those price pressures remain strong down to this day. Body shops compete to sell relatively uniform products and services in an oversaturated and atomistic market. *See* Body Shop Business, *State of the Industry 2011-12* at 4-5, https://perma.cc/W2NH-CK98 (listing the total number of auto-repair shops in each State, including New Jersey (around 1,200), Missouri (around 1,100), Virginia (around 850), and Kentucky (around 750)); *id.* at 3 ("92 percent of the [body-shop] industry is still comprised of independent, single-store, family-owned shops."); *id.* at 2 (noting that "overcapacity * * * continue[s] to reshape the collision repair market"). And though there are doubtless fewer insurers than body shops, the number of insurers in this consolidated appeal confirms that plenty of robust competition exists among those with whom body shops transact.

Given these market realities, auto-repair shops' persistent inability to gain traction with antitrust suits is hardly surprising. Though body shops have sued insurance companies under the antitrust laws "on numerous occasions," they "have had no significant success." Sacchetto, *supra*, 38 Sw. L. Rev. at 512. They have lost again and again, for good reason. *Id.* at 512 & n. 81 (collecting authority).

In *Proctor v. State Farm Mutual Auto. Insurance Co.*, 675 F.2d 308, 334 (D.C. Cir. 1982), for example, a group of auto-repair shops contended that insurers violated the Sherman Act by using "the same labor rate in writing estimates," having "similar arrangements with repair shops that agreed to do volume work at the low rates used in their estimates," conducting "surveys of repair shops to determine the average rate charged by shops in particular areas," and tending "to resist price increases by repair shops." None of this, the D.C. Circuit concluded, "create[d] an inference of conspiracy," because each practice was "in the economic self-interest of each of the individual" insurers. *Id.*

Body-shop owners may legitimately feel frustrated about the unremitting competitiveness of their industry. They may even on occasion have a legitimate complaint about an insurer's sharp dealing. What they do *not* have, however, is a legitimate claim, under the antitrust laws, to relief from the difficulties of competition. Antitrust law should "never, ever, [be] about the promotion of producers' welfare. What is good for small dealers and worthy men, in Justice

Peckham's phrase, usually is bad for everyone else." Frank Easterbrook, *Chicago on Vertical Restrictions*, 3 Competition Law International 3, 3 (2007).

Above all, the plausibility of an alleged conspiracy turns on how a plaintiff's allegations look "when viewed in light of common economic experience." *Twombly*, 550 U.S. at 565. The long history of price pressure and friction between auto-repair shops and insurers is part of that experience. Unless hundreds of insurers have, for decades, maintained *omertà* worthy of men in black studying aliens at Area 51, the long history of the market practices at issue here sinks the Plaintiffs' complaints. It is utterly implausible that the Defendants would form an illegal cartel to organize the very conduct that has long occurred in the market naturally.

Of course, anyone on the outside looking in at the insurers will acknowledge that a giant cartel *might* exist—there is always, strictly speaking, a non-zero chance. Given the weakness of the Plaintiffs' "plus" factors and the strength of the two "minus" factors shown above, however, that chance is infinitesimal. Possibility is not plausibility. And it is overwhelmingly implausible that the Plaintiffs' allegations, even if true, arise from a conspiracy rather than independent, pro-competitive behavior. *Twombly* and *Jacobs* mandate dismissal.

III. AFFIRMANCE WILL PROVIDE MUCH NEEDED CERTAINTY TO MARKET PARTICIPANTS.

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

Under the Plaintiffs' watered-down reading of *Twombly* and *Jacobs*, if a firm's actions—no matter how independent or economically rational—suggest interdependent or parallel conduct, that firm must now bear the burden of proving a negative when the burden properly lies with the Plaintiffs. As Judge Anderson noted in his dissent from the now-vacated panel opinion, under the standard the Plaintiffs advance here, "the mere existence of an industry-wide practice permits an antitrust plaintiff to establish a plus factor" and so to withstand a motion to dismiss. Slip Op. at 51. That can't possibly be right.

Whether an antitrust plaintiff must plead facts that tend to exclude an innocent explanation for the defendants' conduct to state a plausible conspiracy claim is of critical importance, not only to the automobile insurance industry, but to the wider business community as well. Existing and potential antitrust defendants simply can't operate efficiently without clear and predictive guidance on what federal law requires an antitrust plaintiff to plead before being allowed to advance to burdensome discovery. By contrast, under the Plaintiffs' view, 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.

If the Court jettisons *Twombly*'s and *Jacobs*'s requirement that, to survive a motion to dismiss, an antitrust complaint must include facts tending to exclude lawful explanations for the defendants' conduct, it will become all too easy in this Circuit to plead an antitrust conspiracy. Such a ruling would create enormous uncertainty for market competitors trying to assess their potential litigation exposure to § 1 claims under the Sherman Act. Under the statute's liberal venue provision, that includes nearly every firm doing business within 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.").

Without a commonsense antitrust pleading standard—the sort supplied by *Twombly* and *Jacobs*—businesses will be unable to structure their conduct in advance to avoid the increased risk and expense of antitrust litigation. That uncertainty imposes a steep cost, forcing companies to make highly consequential business decisions without knowing what the law requires or how a potential rival or the plaintiffs' bar might use it against them. In a highly competitive market in

which the most successful firms are those best able to predict "what comes next," it is impossible to overstate the harm that such uncertainty poses.

B. Relaxing the Pleading Threshold for § 1 Claims Will Increase the Likelihood of *In Terrorem* Settlements in Meritless Suits.

Uncertainty also invites rent-seeking. A business that can't reliably predict its likely exposure to protracted litigation for pro-competitive behavior is uniquely vulnerable to settlement shakedowns. Permitting meritless claims to proceed past the pleading stage, particularly in antitrust cases, forces a defendant—or several defendants—to "bear [a] substantial 'discovery and litigation' burden." *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). Since antitrust suits routinely require a defendant to spend millions of dollars simply to obtain summary judgment—extracting precious time and treasure 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.

Given the prohibitive cost of litigation, a plaintiff's antitrust suit can easily amass a steep but irresistible settlement value once it survives 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 only 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.").

A decision allowing the Plaintiffs to advance to discovery on the basis of the allegations here would increase, exponentially, 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)).

That is why *Twombly* emphasizes the need for district courts to draw on their "judicial experience"—alongside their "common sense"—in disposing of legally untenable antitrust suits at the proper time: *before* forcing the defendant to undertake expensive and burdensome discovery. *Twombly*, 550 U.S. at 557-60. By allowing bare allegations of pro-competitive conduct to advance to summary judgment, the Plaintiffs' approach to antitrust pleading (if adopted) would exacerbate the very problem the Supreme Court intended *Twombly* to fix.

C. If Adopted, the Plaintiffs' Urged Pleading Standard Will Likely Chill Pro-Competitive Conduct at the Expense of Consumers.

The Plaintiffs' urged pleading standard is also inconsistent with the fundamental purpose of antitrust law—to promote competition. "[S]alutary and procompetitive conduct * * * might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978). If adopted, the Plaintiffs' view of antitrust law would subject lawful ventures to the formidable threat of antitrust discovery, thereby "chill[ing] the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594, and creating "irrational dislocations in the market." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

Because the threat of unfounded yet expensive antitrust litigation often deters firms from engaging in the vigorous competition that Congress intended the Sherman Act to foster, adopting the Plaintiffs' relaxed pleading threshold would chill pro-competitive conduct by firms in a wide array of markets. "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." 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).

The danger of such over-deterrence is most acute when, as here, the distinction between competitive and anticompetitive activity is inherently difficult to discern. "One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that *undermine* competition and support monopoly power. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that *appear* to be anticompetitive but really are the opposite." William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 241 (12th ed. 2012) (emphasis in original). This problem is not merely ironic; it is corrosive to the workings of our economy and requires judicial vigilance at the pleading stage.

A pleading rule that requires a district court to *presume* an illegal agreement in the face of interdependent or merely parallel conduct not only threatens to deter robust competition, but also is quite likely to raise premiums on consumers as well. Nor can it be lost on the Court that the Plaintiffs here insist that the Defendants' policyholders are charged *too little* for their auto-body repairs—and seek relief calculated to *raise* those prices. Simply put, it would ultimately harm consumers if the burden and expense of antitrust discovery forced firms to refrain from deploying the most efficient distribution systems or adopting sensible cost-cutting measures—solely to avoid the burden and expense of protracted litigation.

CONCLUSION

The Court should affirm the judgment below.

Dated: July 28, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This brief complies with the type-volume limits of 11th Cir. R. 35-7 and Fed. R. App. P. 29(a)(5) because it contains exactly 6,456 words under Fed. R. App. P. 32(a)(7)(B), 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 it has been prepared in a proportionally spaced serif typeface (Times New Roman) in 14-point font.

Dated: June 28, 2018

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CERTIFICATE OF SERVICE

Under Fed. R. App. P. 25(c)(1)(D) and 11th Cir. R. 25-3(a), I certify that on June 28, 2018, I electronically filed WLF's brief with the Clerk of the Court using the ECF system. The notice generated and e-mailed by the ECF system accomplishes service on all attorneys registered to use the ECF system.

I also certify that on June 28, 2018, I deposited 20 paper copies of the brief with an overnight delivery service for delivery to the Clerk of this Court no later than 5:00 p.m. EDT on June 29, 2018.

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