Nos. 18-16188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. FROST; JOSE RA,

Plaintiffs-Appellants,

v.

LG ELECTRONICS, INC.; LG ELECTRONICS USA, INC; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG ELECTRONICS AMERICA, INC.,

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of California, Nos. 5:16-cv-05206-BLF;
5:16-cv-05586-BLF; and 5:16-cv-05673-BLF
Hon. Beth Labson Freeman

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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May 11, 2020

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Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

This petition concerns this Circuit's pleading standard for complaints alleging antitrust conspiracies. Plaintiffs-Appellants Frost and Ra ("Plaintiffs") are former employees of LG Electronics U.S.A. Inc. ("LGE-USA") seeking to represent a class of current and former employees challenging an alleged conspiracy between LGE-USA's parent company, LG Electronics, Inc. ("LG"), and Samsung Electronics Co., Ltd. ("Samsung"). Plaintiffs allege that LG and Samsung (collectively,

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[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Advisory Board or their law firms represent Plaintiffs-Appellants, but they played no role in AAI's deliberations with respect to the filing of the brief.

"Defendants") entered into a naked, horizontal "no-poaching" agreement in which the two firms pledged not to hire one another's employees in violation of Section 1 of the Sherman Act.

A no-poaching agreement is a type of cartel agreement among buyers in a labor market. Employers agree not to compete with one another to hire and retain workers, thereby preventing market forces from setting competitive wages, benefits, and other terms of employment. The U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) treat no-poaching agreements as "serious criminal conduct" that is "per se illegal under the antitrust laws." DOJ & FTC, Antitrust Guidance for HR Professionals 3, 6 (Oct. 2016) ("DOJ & FTC Guidance"), *available at* https://www.justice.gov/atr/file/903511/download. In effect, "[t]hese types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers." *Id*. at 4; *see also* Statement of Interest of the United States 22-23, *Seaman v. Duke University*, No. 15-cv-00462 (M.D.N.C. March 7, 2019) (noting employee no-solicitation and no-hiring agreements cause the same harm as customer- and market-allocation agreements and citing numerous criminal prosecutions of the latter).

After limited jurisdictional discovery, the Court granted Defendants' motion to dismiss Plaintiffs' complaint on the basis that it did not sufficiently allege a conspiracy. Plaintiffs appealed, and a divided panel affirmed. In a bare, unpublished

opinion for the Court, Judge Nelson ruled that Plaintiffs failed to state a claim on which relief may be granted because their complaint did not establish "'who, did what, to whom (or with whom), where, and when[].'" Slip op. at 3 (quoting *Kendall v. Visa U.S.A., Inc*., 518 F.3d 1042, 1048 (9th Cir. 2008)). Judge Molloy, concurring, wrote separately to note that, though he felt bound to follow this Circuit's pleading standard, he doubts that it is correct. *Id*. at 4. Judge Fletcher dissented, stating that, if Ninth Circuit law requires dismissal in this case, then it conflicts with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Id*. at 5.

En banc rehearing is necessary because only the en banc Court can clarify this Circuit's standard for pleading antitrust conspiracies and bring it into conformance with the Federal Rules of Civil Procedure and Supreme Court precedent. Ninth Circuit precedent conflicts with the Federal Rules and *Twombly* because (1) it requires a plaintiff alleging an antitrust conspiracy to plead particular details to adequately state a claim, *Kendall*, 518 F.3d at 1048; and (2) it artificially limits a plaintiff's methods of showing he is entitled to relief to allegations of direct evidence or of parallel conduct with plus factors. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193–94 & n.6 (9th Cir. 2015).

1. A heightened pleading standard for antitrust conspiracies that demands specific factual allegations has no foundation in the Federal Rules and has been expressly disclaimed by the Supreme Court. A complaint is sufficient at the motion-

to-dismiss stage if the plaintiff's non-conclusory allegations give the defendant "fair notice of what the … claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

2. A plaintiff may plausibly plead an antitrust conspiracy using circumstantial evidentiary allegations that are independent of parallel conduct and plus factor allegations. Judge Nelson erred in holding that evidentiary allegations of knowledgeable consultants and employees, including high-ranking executives, referencing an alleged no-poaching agreement in writing, conversations and print publications, and relying on it as the basis for their actions, ER 72–73 ¶¶ 88-99, and high-ranking executives of a party admitting to the agreement in a print publication, ER 73-74 ¶¶ 98-99, required an inference to suggest a no-poaching conspiracy. But regardless, the parallel-conduct-with-plus-factors rubric is not the only way to plausibly plead a conspiracy, even without direct evidentiary allegations. *Twombly* allows plaintiffs to plead independent allegations of an actual agreement with direct or circumstantial evidence.

3. Ninth Circuit law should be brought in line with Supreme Court precedent and the other federal circuits to ensure that no-poaching agreements and other forms of cartel behavior are adequately deterred. Adequate cartel deterrence is critically important to the U.S. economy and the welfare of U.S. consumers and workers, but it is sorely lacking because secret cartel agreements are inordinately

difficult to detect. In the rare instances where actual agreements are uncovered, deterrence is especially important.

ARGUMENT

I. THE NINTH CIRCUIT'S PLEADING STANDARD FOR ANTITRUST CONSPIRACIES CONFLICTS WITH THE FEDERAL RULES AND *TWOMBLY*

Neither Rule 8 nor *Twombly* imposes a requirement that plaintiffs plead specific facts in every antitrust case. Yet, this Circuit in *Kendall* has held that no antitrust conspiracy complaint can survive a motion to dismiss unless it includes detailed allegations about "who, did what, to whom (or with whom), where, and when." *Kendall*, 518 F.3d at 1048. *Kendall* conflicts with the Federal Rules and Supreme Court precedent and therefore should be abrogated.

A. The Federal Rules Do Not Require Specific Facts to Show the Pleader Is Entitled to Relief

The federal pleading rules are intentionally devoid of checklists like the one adopted by the Ninth Circuit. Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2).[3] This standard was adopted in the 1938 Federal Rules to "encourage a

[3]Rule 9 imposes heightened pleading standards for certain types of claims and defenses, but not antitrust and conspiracy claims. Fed. R. Civ. P. 9(b). This confirms that the Federal Rules do not require heightened or particular pleading for antitrust conspiracy claims. *See Leatherman v. Tarrant Co. Narcotics Intelligence and*

more flexible approach" and "was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions'…. which were a source of considerable confusion." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004).

The revised formulation has the advantage of simplicity, but it was also adopted out of recognition that each case will be unique and the evidence will be incomplete at the pleading stage. *See* Fed. R. Civ. P. 11(b)(3) (allowing an attorney to sign a pleading based on a belief that its factual contentions "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery"); *Twombly*, 550 U.S. at 563 ("once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint").

So long as a complaint shows why the plaintiff is entitled to relief, it complies with Rule 8. *Erickson*, 551 U.S. at 93.

B. *Twombly* Did Not Impose a Heightened Pleading Standard for Antitrust Conspiracy Claims

Kendall cites to *Twombly* as the basis for its insistence that antitrust conspiracy complaints must satisfy a checklist of factual allegations, but *Twombly* and progeny do not support the Court's rule. The majority in *Twombly* took pains to

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Coordination Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading standard because type of claim not listed in Rule 9(b)).

note that it was not faulting the plaintiffs for a lack of specificity in their complaint and unequivocally rejected the argument that it was imposing a heightened burden on plaintiffs to plead specific facts. 550 U.S. 544, 555–57, 569–70 ("[W]e do not require heightened fact pleading of specifics …."). Indeed, the Court has no authority to alter the pleading requirements for antitrust cases or any others, as it readily acknowledged. *Id.* at 569 n.14 ("[W]e do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." (internal quotation marks omitted)).

Accordingly, the Court's subsequent decisions have confirmed that *Twombly* does not impose a heightened pleading standard in antitrust cases. *Erickson*, 551 U.S. at 93 ("Specific facts are not necessary"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require 'detailed factual allegations'") (quoting *Twombly*, 550 U.S. at 555); *id.* at 684 ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8.").

So have the decisions of the federal circuits, including, contra *Kendall*, this Circuit. *See, e.g.*, *Moss v. U.S. Secret Service*, 572 F.3d 962, 968 (9th Cir. 2009) ("[s]pecific facts are not necessary for pleadings to satisfy Rule 8(a)(2)" (quoting

Erickson, 551 U.S. at 93)); *Concord Assocs., L.P. v. Entm't Properties Trust*, 817 F.3d 46, 52 (2d Cir. 2016) ("[T]here is no heightened pleading standard in antitrust cases."); *SD3 v. Black & Decker*, 801 F.3d 412, 426 (4th Cir. 2015) (same); *Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc.*, 777 F.3d 756, 760 (5th Cir. 2015) (same).

Even district courts within the Ninth Circuit have rejected *Kendall*'s "who-what-when" requirement. *See, e.g., In re Fresh and Process Potatoes Antitrust Litig.*, 834 F.Supp. 2d 1141, 1163 (D. Idaho 2011) (applying the standard loosely and collecting cases where it has been outright rejected); *see also In re Southeastern Milk Antitrust Litig.*, 555 F.Supp. 2d 934 (E.D. Tenn. 2008) (holding complaints sufficient that "while not answering all specific questions about 'who, what, when and where,' do put defendants on notice concerning the basic nature of their complaints against the defendants and the grounds upon which their claims exist"); *In re Packaged Ice*, 723 F.Supp. 2d 987, 1007 (E.D. Mich. 2010) (same).

Nonetheless, *Kendall* purports to require checklist pleading in antitrust conspiracy cases. And as Judge Nelson's opinion and Judge Molloy's concurrence show, the *Kendall* checklist is now regarded as settled law in the Ninth Circuit. Slip op. at 3; *id*. at 4 (Molloy, J. concurring) ("I am not convinced that [*Kendall*] is a proper application of the pleading standard set forth in [*Twombly*] and [*Iqbal*]. But as binding law in this Circuit, *Kendall* compels the result in this case.").

Yet, as every other court has recognized, checklist pleading cannot be reconciled with *Twombly*.[4] To juxtapose, as Judge Nelson does, the Supreme Court's disavowal of heightened pleading with *Kendall*'s "who, did what, to whom" language only throws the Ninth Circuit's practice and the established law into stark relief. *Id*. at 3. The panel majority dismissed a complaint that presented numerous statements from knowledgeable percipient witnesses and executives of the Defendants explicitly referencing an agreement that, if proven, would be illegal. It found Plaintiffs "failed to plausibly allege agreement" because these statements "do not establish 'who, did what, to whom (or with whom), where, and when.'" *Id.* at 3 (citing *Kendall*, 518 F.3d at 1048). Simply put, the Ninth Circuit's law, against clear Supreme Court precedent, imposes a heightened pleading standard in antitrust cases.[5]

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[4] The *Kendall* panel seized on footnote 10 of *Twombly* as the basis for its who-what-when checklist. *Kendall*, 518 F.3d at 1048. But footnote 10 addressed a hypothetical counterfactual and is therefore dicta. *Twombly*, 550 U.S. at 565 n.10 ("If the complaint had not explained that the claim of agreement rested on the parallel conduct described …"); *see, e.g., Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 325 (2d Cir. 2010) (holding that this language from *Twombly* is dicta); *see also U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 n.11 (1993) (reminding litigant "about the need to distinguish an opinion's holding from its dicta").

[5] At oral argument, Judge Nelson made the revealing statement that, notwithstanding *Twombly*'s clear disavowal, "everybody and his dog knows that the Supreme Court applies different pleading standards in *Twombly, Iqbal*, and *Dura Pharmaceutical* than they do in ordinary cases. I mean, it's just the world in which we live." Video: Panel Argument in *Frost v. LG Electronics, Inc.* (9th Cir. Jan. 22,

II. ANY INDEPENDENT ALLEGATION OF AN ACTUAL AGREEMENT CAN SUGGEST A CONSPIRACY

Ninth Circuit law also conflicts with the Federal Rules and Supreme Court precedent by limiting how an antitrust plaintiff may show she is entitled to relief. As Judge Nelson held, citing *Musical Instruments*, antitrust conspiracy plaintiffs "may meet their burden by alleging parallel conduct among competitors and certain 'plus factors,'" or, "[a]lternatively, plaintiffs may meet their burden by putting forth direct evidence of an agreement." Slip op. at 3 (citing 798 F.3d at 1193–94 (9th Cir. 2015)). This binary approach is contrary to established law and assumes away non-conclusory evidentiary allegations on the impermissible basis that they require an inference.

A. Federal Law Places No Limits on How a Complaint Shows the Pleader Is Entitled to Relief

Unlike Rule 8 and *Twombly,* Ninth Circuit law allows only one way that an antitrust plaintiff who lacks direct evidence of an agreement may show she is entitled to relief, namely to allege parallel conduct and plus factors. This limitation is baseless.

"Plus factors" are properly understood as motive and context allegations that are useful to establish a conspiracy "[i]n the case of oligopolies." William E.

2020) at 0:44, *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016875.

Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 395 (2011); *see id*. at 415 (listing Posner's "fourteen plus factors"). Agreements can be difficult to detect in these cases because "[f]irms in an oligopolistic industry recognize their mutual interdependence, understand that they are players in a repeated game, and act accordingly." *Id*. at 395. Thus, parallel pricing, which may look like collusive pricing in an oligopoly setting, instead "can emerge from firms acting noncollusively where they understand their role as players in the repeated oligopoly game." *Id*.

The Supreme Court accepts allegations of parallel conduct when accompanied by sufficient plus factor allegations because the clandestine nature of conspiracies means that such evidence often is the only evidence available to plaintiffs in such cases. *See In re Wholesale Grocery Prod. Antitrust Litig*., 752 F.3d 728, 734 (8th Cir. 2014) ("Perhaps there are some aspiring monopolists foolish enough to reduce their entire anticompetitive agreement to writing" but most "display a bit more guile" and "seal[] their true anticompetitive agreement with a knowing nod and wink"); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633 (5th Cir. 1981) ("It does not strain credulity that solemnized covenants to conspire are difficult to come by in any price fixing case.").

However, not every antitrust case is as complex as *Twombly* or presents the same prospect of "'competing inferences of independent action.'" *Twombly*, 550

U.S. at 586 (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)). As the Court recognized in *Twombly* itself, plaintiffs alleging per se violations are not limited to challenging conspiracies among multiple firms "in a concentrated market" with "shared economic interests" and "interdependence" in pricing and output decisions. *Id.* at 553 (citation and internal quotation marks omitted). Rather, they may independently allege that two firms simply struck an actual illegal agreement. *Id.* at 564 ("the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on *any independent allegation of actual agreement* among the ILECs") (emphasis added); *see also Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1244 (3d Cir. 1993) ("[W]ithout this evidence purporting to show a traditional agreement, we have stated that a plaintiff can survive summary judgment if it shows that the defendants had a motive to conspire and acted contrary to their self-interest."); *In re Fresh and Process Potatoes*, 834 F.Supp. 2d at 1161 (*Kendall* distinguishable where complaint included independent factual allegations that defendants met and agreed to scheme).

Judge Nelson erred in concluding that Plaintiffs' allegations of written, oral and print-publication evidence that the Defendants had a no-poaching agreement, ER 73–74 ¶¶ 98–99, "require[] inferences in order to support the existence of a conspiracy." Slip op. at 3. Such evidence is direct evidence in a no-poaching case.

See, e.g., DOJ & FTC Guidance, *supra*, at 3 (distinguishing evidence that an individual "agree[d] orally or in writing to limit employee compensation or recruiting" from "other circumstances – such as evidence of discussions or parallel conduct – that may lead to an inference …"); *cf.* Ninth Circuit Manual of Model Civil Jury Instructions § 1.12, at 14 (2017 ed.) ("Direct evidence is direct proof of a fact, such as testimony by a witness *about what that witness personally saw or heard or did*.") (emphasis added).

But that error should have been harmless. Whether independent evidentiary allegations of an actual agreement are properly classified as direct or circumstantial has no bearing on whether the allegations plausibly suggest a conspiracy. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 853 n.4 (9th Cir. 2002) ("circumstantial evidence is not inherently less probative than direct evidence" (quotation marks omitted)); *In re Citric Acid*, 191 F.3d 1090, 1093 (9th Cir. 1999) ("[Plaintiff] can establish a genuine issue of material fact by producing either direct evidence that Cargill conspired to fix citric acid prices or circumstantial evidence from which a reasonable factfinder could conclude that Cargill so conspired."); *cf.* Ninth Circuit Manual of Model Civil Jury Instructions, *supra*, § 1.12, at 14 ("The law makes no distinction between the weight to be given to either direct or circumstantial evidence.").

To be sure, evidentiary allegations, whether or not they require an inference, do not always lead to a finding of conspiracy at later stages of litigation. In this case, for example, Plaintiffs allege that a recruiter for Samsung said she understood she was not supposed to poach LG employees for Samsung because "[t]he two companies have an agreement that they won't steal each other's employees." ER 72 ¶ 90. It is certainly possible that discovery will uncover evidence showing that the recruiter was lying or that she misunderstood the situation. But that is not a basis for dismissing the complaint on the pleadings, because her alleged statement still *suggests* a conspiracy. *Evergreen Partnering Grp. v. Pactiv Corp.*, 720 F.3d 33, 45–46 (1st Cir. 2013) ("although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible" (citation omitted)); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (Posner, J.) ("We need not decide whether the circumstantial evidence that we have summarized is sufficient to *compel* an inference of conspiracy; the case is just at the complaint stage …").[6]

[6] Defendants' challenge to the recruiter statements relies on summary judgment cases. Defs. Merits Br. at 34 (citing *In re Text Messaging Antitrust Litig.*, 46 F.Supp. 3d 788, 801 (N.D. Ill. 2014); *Apex Oil Co. v. DiMauro*, 822 F.2d 246 (2d Cir. 1987)). This Court would do well to join the First Circuit in reminding antitrust litigants that "[p]leading requirements are … starkly distinguished from what would be required at later litigation stages[.]" *Evergreen Partnering Grp.*, 720 F.3d at 45; *see id.* at 44 ("The slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation has in part resulted from citations

To hold otherwise defies common sense. *See* Ninth Circuit Manual of Model Civil Jury Instructions, *supra*, § 1.12 cmt., at 14 (circumstantial evidence may admit of other explanations but still allows the factfinder to draw inferences "in the light of reason, experience and common sense").

Musical Instruments mistakenly treats parallel conduct cases as the *only* cases that do not involve direct evidentiary allegations. However, a reasonable factfinder can infer an "expectation that discovery will reveal evidence of an illegal agreement" from independent evidentiary allegations of an actual agreement, regardless of whether the allegations are direct or circumstantial. *Twombly*, 550 U.S. at 556.

B. Circumstantial Evidentiary Allegations of an Actual Agreement May Not Be Ignored at the Pleading Stage

The binary *Musical Instruments* approach also requires courts to disregard non-conclusory allegations, which is impermissible under *Iqbal*. The binary approach effectively holds that, if an inference is required to connect independent evidentiary allegations of an actual agreement to the existence of that agreement, then the allegations cannot make a conspiracy plausible and should be ignored. But this conclusion does not follow from the premise. Circumstantial evidentiary allegations are not equivalent to "conclusory allegations."

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to case law evaluating antitrust claims at the summary judgment and posttrial stages …." (internal citation omitted)).

Iqbal requires that all of a plaintiff's non-conclusory allegations that suggest agreement, even circumstantial evidentiary allegations, must be credited. *See Iqbal*, 556 U.S. at 678 (holding that a court need not credit legal conclusions or conclusory allegations in a complaint, but reaffirming that all other allegations must be accepted as true) (citing *Twombly*, 550 U.S. at 555). And, post-*Twombly*, all that is required to survive a motion to dismiss is fact allegations that nudge a conspiracy over the line from possible to plausible. *Twombly*, 550 U.S. at 570. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. There is no reason this standard cannot be met with circumstantial evidentiary allegations of an actual agreement.

III. SOUND PLEADING STANDARDS ARE CRITICAL FOR OPTIMAL CARTEL DETERRENCE

This Circuit's pleading standard for antitrust conspiracy claims is a question of exceptional importance for the U.S. economy, which is besieged by cartels. *See, e.g.,* DOJ, *Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or More* (last updated Mar. 4, 2020) (showing over $13 billion in fines since 1995), *available at* https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more. Despite the enormous policing efforts of

the DOJ and numerous private attorneys general, cartel behavior in the United States remains heavily under-deterred.

Optimal cartel deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught. *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 656 (1983) (antitrust damages should be equal to violation's expected net harm to others divided by probability of detection and proof of violation); Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 454 (1985) ("Multiplication is essential to create optimal incentives for would-be violators when unlawful acts are not certain to be prosecuted successfully.").

However, the collective efforts of the government and private plaintiffs do not come close to achieving this level of deterrence. Indeed, studies show that the median overcharge imposed by U.S. cartels amounts to 19% of the conspirators' sales, yet the median combined sanctions amount to 17% of sales, for an expected value of only 4% of sales when adjusted for the low likelihood of detection. John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 478 (2012). In other words, despite the Clayton Act's treble damages remedy, cartel behavior has proven to be a sound investment for aspiring white collar criminals. It is often net profitable *even if they are caught*.

By imposing specific, heightened pleading obligations on plaintiffs, artificially narrowing the range of acceptable evidentiary allegations in antitrust conspiracy cases, and making it harder for plaintiffs just to get through the courthouse door, current Ninth Circuit law exacerbates this serious social problem. It renders collusion—the "supreme evil of antitrust," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004)—an ever more lucrative and attractive business strategy for firms seeking to artificially boost profits at the expense of vulnerable consumers and workers.

To prevent the proliferation of the most harmful forms of cartel behavior, including no-poaching agreements, this Court must ensure that basic discovery is allowed to proceed in the rare cases alleging that an actual agreement has been detected.

CONCLUSION

For the foregoing reasons, Appellants' Petition for Rehearing En Banc should be granted.

Respectfully submitted,

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May 11, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Randy M. Stutz

Dated: May 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
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