No. 20-1492

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PUTNAM BANK, ET AL.,

Plaintiffs-Appellants,

v.

INTERCONTINENTAL EXCHANGE, INC., ET AL.,

Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of New York, No. 19-cv-439
Hon. George B. Daniels

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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August 19, 2020

LIST OF PARTIES

Plaintiffs-Appellants

Putnam Bank, on behalf of itself and all others similarly situated
City of Livonia Employees' Retirement System
Hawaii Sheet Metal Workers Health & Welfare Fund, on behalf of themselves and all others similarly situated,
Hawaii Sheet Metal Workers Training Fund, on behalf of themselves and all others similarly situated
Hawaii Sheet Metal Workers Annuity Fund, on behalf of themselves and all others similarly situated
Hawaii Sheet Metal Workers Pension Fund, on behalf of themselves and all others similarly situated
City of Livonia Retiree Health and Disability Benefits Plan, on behalf of themselves and all others similarly situated

Defendants-Appellees

Intercontinental Exchange, Inc.
Intercontinental Exchange Holdings, Inc.
ICE Benchmark Administration Limited, FKA NYSE Euronext Rate Administration Limited
ICE Data Services, Inc.
ICE Pricing and Reference Data LLC
Bank of America Corporation, Bank of America N.A.
Merrill Lynch
Pierce Fenner & Smith Inc.
Citigroup Inc.
Citibank, N.A.
Citigroup Global Markets Inc.
JPMorgan Chase & Co.
JPMorgan Chase Bank, N.A.
J.P. Morgan Securities LLC
Barclays PLC
Barclays Bank PLC
Barclays Capital, Inc.
BNP Paribas SA
BNP Paribas Securities Corp.
Credit Suisse AG
National Westminster Bank PLC
SG Americas Securities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 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

The Supreme Court has called collusion the "supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). Accordingly, correct application of the standards for antitrust conspiracies is critical to effective cartel deterrence.

Colluding companies profit from their cartels. Even enforcement by the government and private plaintiffs backed by treble damages is not sufficient to eliminate this profit motive. These profits come at enormous costs to consumers

[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.

and markets. So long as cartels remain profitable, companies will continue to engage in them.

Detecting cartels is difficult. Cartels are, by definition, secret. And, cartelists have tremendous incentive and ability to hide their conduct. Discovery is often the only means for unearthing evidence of these secret, illegal agreements that harm consumers and markets. Access to discovery is, therefore, critical to ensure that companies that seek to collude instead of to compete are held accountable for their conduct.

Because it is widely recognized that direct evidence of antitrust conspiracies is rarely available to plaintiffs, particularly before discovery has taken place, courts have developed various methods to allow plaintiffs to plead antitrust conspiracies by alleging purely circumstantial facts that point to, but do not directly evidence, conspiracy. One such method, the one used here, is to rely on parallel conduct with plus factors. Parallel conduct with plus factors has been an accepted method for pleading, and proving, antitrust conspiracies for decades.

Twombly has not changed this acceptance. Indeed, *Twombly* reaffirmed that plaintiffs can survive a motion to dismiss by alleging only circumstantial facts. But *Twombly* also clarified that, at the motion to dismiss stage, plaintiffs' circumstantial evidentiary allegations must provide enough detail to "suggest" that the alleged facts result from conspiracy and not from benign conduct. In so clarifying,

the Court took pains to point out that it was not imposing a probability requirement on conspiracy complaints; whatever "suggests" means, it is something far short of "more likely than not." The Court also reaffirmed that, on a motion to dismiss, all of a plaintiff's factual allegations *must* be credited, the court *must* draw all available inferences in favor of plaintiffs, and the court *must not* displace the role of the factfinder.

In this case, the district court's analysis failed at every level. Most fundamentally, the court failed to credit Plaintiffs' factual allegations, improperly deeming them "conclusory" or faulting Plaintiffs' failure to supply evidence not required at the pleading stage. In analyzing Plaintiffs' alleged plus factors, rather than draw all reasonable inferences in Plaintiffs' favor, the court instead inserted itself in the role of the factfinder, weighing the competing inferences and making credibility judgments. Finally, the court imposed too high a bar on Plaintiffs at this stage of the litigation. The court dismissed Plaintiffs' claims because it found the alleged facts were *more likely* to be explained by legal conduct than by conspiracy. That is not the correct standard. All that is required at this stage is that the Plaintiffs allege facts that *would allow* a factfinder to infer a conspiracy.

The district court's erroneous decision places an improperly high burden on plaintiffs to plausibly allege an antitrust conspiracy, short-circuits the discovery

needed to unearth evidence of such an illegal agreement and, if allowed to stand, will undermine effective cartel deterrence.

ARGUMENT

I. THE COURT BELOW FAILED TO CREDIT PLAINTIFFS' FACTUAL ALLEGATIONS

The district court wrongly classified Plaintiffs' factual allegations as conclusory and, accordingly, failed to credit them. Two distinct errors underpin this failure. First, the court wrongly required that Plaintiffs support their factual allegations with evidence at the pleading stage. Second, the court disregarded Plaintiffs' factual allegations because it found them unbelievable. Both errors resulted in the same fundamental problem: the court did not credit Plaintiffs' well-pled factual allegations, directly contravening Supreme Court and Second Circuit precedent. The court's labelling of the allegations as "conclusory" cannot save the court's analysis; "conclusory" has a definite meaning which cannot be reasonably applied to these allegations.

This was a material error. Contrary to conclusory allegations, *i.e.*, those merely reciting a legal conclusion, all Plaintiffs' factual allegations must be credited on a motion to dismiss. *See e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (factual allegations must be "taken as true"); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("[I]n determining whether a complaint states a claim that is plausible, the court is required to proceed 'on

the *assumption that all the [factual] allegations in the complaint are true.*'") (quoting *Twombly*, 550 U.S. at 555) (emphasis and alteration in original).

The reason for this is straightforward: the purpose of a motion to dismiss is to weed out claims where, *even if* Plaintiffs are ultimately able to prove everything alleged in their complaint, they will still have failed to demonstrate that they are entitled to recover. This inquiry does not turn on the truth of Plaintiffs' allegations, but on the nature of what Plaintiffs have alleged.

The difficulty the Court sought to address in *Twombly* was this: if all plaintiffs' allegations are to be credited at the pleading stage, what is to stop plaintiffs from simply reciting the elements of their claim, stating that the elements are met, and declaring their notice pleading obligation fulfilled? *See Twombly*, 550 U.S. at 555. If allowed, that would defeat the purpose of the motion to dismiss—to weed out claims that fail to allege conduct that is redressable.[3]

The *Twombly* Court's solution to this problem was to create an exception from the overarching tenet that all of plaintiffs' factual allegations are to be credited. The Court held that allegations that do nothing more than recite the elements of the claim or state that the defendant's conduct meets those elements are not to be credited. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Although for the

[3] The Court was also concerned that such skeletal claims do not give Defendants sufficient notice of what they have allegedly done. *See Twombly*, 550 U.S. at 555 n.3.

purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Twombly*, 550 U.S. at 555). It dubbed these allegations "conclusory."

Accordingly, following *Twombly*, a court may disregard conclusory allegations. But that is a narrow category, encompassing only "legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678, citing *Twombly*, 550 U.S. at 555. Wrongly classifying factual allegations as conclusory is legal error. *See Anderson News*, 680 F.3d at 189 (ruling factual allegations conclusory is error).

The district court classified almost all of Plaintiffs' allegations as "conclusory." *In re ICE LIBOR Antitrust Litig.*, No. 19-cv-439, slip op. at 6 (S.D.N.Y. March 26, 2020) (hereinafter "Op.") ("[t]he amended complaint, however, is made up of almost entirely conclusory allegations…."). This was error. Plaintiffs' complaint is replete with well-pled factual claims that cannot be reasonably read as "legal conclusions couched as factual assertions." Specifically, Plaintiffs allege: ICE LIBOR rates are not based on actual market activity, Consolidated Amended Class Action Complaint at ¶¶ 397-412, *In re ICE LIBOR Antitrust Litig.*, No. 19-cv-439 (S.D.N.Y. July 1, 2019) (hereinafter "CAC"); Defendants submitted bids that were lower than finance principles would predict, as compared to other related rates, CAC ¶¶ 415-454; Defendants' bids contained statistical anomalies that are

extremely unlikely in naturally occurring bids, CAC ¶¶ 455-462; Defendants' funding desks were responsible for submitting each bank's ICE LIBOR rates, and the managers overseeing the funding desks stood to gain financially from lower ICE LIBOR rates, CAC ¶¶561-570; Defendants met and communicated regularly and repeatedly over the period at issue, and discussed ICE LIBOR at those meetings, CAC ¶¶ 515-558, 576-581; Defendants' processes for submitting ICE LIBOR bids violated processes put in place to improve transparency and accuracy, CAC ¶¶ 465-471; an artificially depressed ICE LIBOR rate could be more effectively achieved through collaboration than through Defendants' independent action, CAC ¶¶ 583-584; and Defendants have previously engaged in and been investigated for similar collusive behavior, CAC ¶¶ 587-626. Plaintiffs further include copious details about these allegations, including dates, times, and attendees of meetings, pages of financial data, and quotes from numerous statements by Defendants describing these facts. None of these allegations reasonably can be characterized as mere "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

A. The District Court Wrongly Demanded that Plaintiffs Provide Evidence of Their Allegations at the Pleading Stage

The district court disregarded many of these facts because they were, in the court's words, "devoid of any evidence." Op. at 6. This reasoning betrays a fun-

damental misunderstanding of Plaintiffs' obligations at the motion to dismiss stage. Plaintiffs are not required to support their factual allegations with evidence to survive a motion to dismiss. And a lack of such evidence at the pleading stage does not render factual allegations "conclusory." *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (contrasting summary judgment, where "plaintiff must offer evidence," with the motion to dismiss stage where "a plaintiff need only allege 'enough factual matter (taken as true) to suggest that an agreement was made'"). By faulting Plaintiffs for a lack of evidence to support their factual allegations and, on that basis, deeming those allegations conclusory, the court committed legal error.

The court deemed Plaintiffs' allegations "almost entirely conclusory" on the basis that they were unsupported by "evidence." *See e.g.*, Op. at 6 ("The amended complaint, however, is made up of almost entirely conclusory allegations and is essentially devoid of any evidence, direct or circumstantial, to support the conclusion that Defendants colluded with one another."). This was no slip of the pen; the court cited plaintiffs' lack of "evidence" at least 18 times in its short opinion. And, every time it called allegations "conclusory," the court referred to this supposed lack of evidence. Op. at 5 n.9 ("conclusory" because "devoid of any factual basis or evidence"), 6 ("conclusory" because "essentially devoid of any evidence"), 6 ("conclusory" because "Plaintiffs point to no evidence").

The court's leap from "lacking evidence" to "conclusory" conflates two distinct concepts. Whether an allegation is conclusory or factual turns on the content of the allegation and whether it contains legal conclusions or factual claims, regardless of whether the claims ultimately are proven true or false. *See Twombly*, 550 U.S. at 555 (distinguishing well-pled factual allegations from allegations consisting of "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" or "a legal conclusion couched as a factual allegation"). On the other hand, whether an allegation is supported by evidence goes to the truth of the underlying claims and whether they will ultimately be provable, which is a question reserved for later stages of the litigation. *See Anderson News*, 680 F.3d at 190 ("[T]he choice between or among plausible interpretations of the evidence will be a task for the factfinder.")

A court's decision on a motion to dismiss should not—indeed, cannot—turn on the truth or falsity of the plaintiffs' allegations, because no evidence is before the court and, typically, no discovery has yet occurred. This is, essentially, the distinction between the burden of pleading and the burden of production. *See* William H. Page, *Pleading, Discovery, and Proof of Sherman Act Agreements: Harmonizing* Twombly *and* Matsushita, 82 ANTITRUST L.J. 123, 126 (2018) ("The practical difference between the burdens of pleading and production is discovery."). The latter burden cannot and should not be placed on plaintiffs at the plead-

ing stage, because it is unreasonable to expect it to be met when discovery has yet to occur. *See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) ("The plaintiffs have conducted no discovery…. All that we conclude at this early stage in the litigation is that the district judge was right to rule that the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery.").

The difference between demanding evidence, as the district court did, and requiring that a plaintiff allege facts, as the standard requires, is stark and consequential. For example, the court acknowledged that, regarding motive, "[p]laintiffs allege that the funding desks in particular benefit from a lower rate, that the individuals running the desk are motivated by potential bonuses resulting from their profitability, and that the other units within the panel banks are 'generally indifferent to the USD ICE LIBOR rate.'" Op. at 10. These are *not* conclusory allegations; these are *factual allegations* of the type the court must credit on a motion to dismiss. Nevertheless, the court found plaintiffs "have not sufficiently demonstrated that Defendants were motivated to engage in price fixing," because they "provide *no evidence that this is true*, nor do they assert *anything beyond bare-boned allegations* that the funding desks were responsible in orchestrating the panel banks in a manner so that they personally might benefit." Op. at 10. Refusing

to credit factual allegations unless plaintiffs supply evidence contravenes the tenet reaffirmed in *Twombly* that plaintiffs' factual allegations must be credited.

The authorities relied on by the district court do not support the court's approach. In dismissing plaintiff's complaint for a lack of "evidence," the court cited to summary judgment cases. *See, e.g.*, Op. at 9 (citing *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 62 (2d Cir. 2012)). At summary judgment, unlike at the motion to dismiss stage, the non-moving party *is* required to put forward evidence, *i.e.*, to meet the burden of production. The district court also cited to motion to dismiss cases to support its demand for "evidence," but omitted the critical language in those cases referring to "*allegations of* evidence" or "*assert[ions] of* evidence." *See, e.g., Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) ("a plaintiff may … *assert* direct evidence"), *id.* ("*[a]llegations* of direct evidence of an agreement … are independently adequate") (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323-24 (3d Cir. 2010)). None of these cases require, as the district court demanded here, that plaintiffs produce evidence to support its *factual allegations* to survive a motion to dismiss or to have their factual allegations credited by the court.

Indeed, the district court quotes *Starr* for the (correct) proposition that "an allegation of parallel conduct coupled with only a bare assertion of conspiracy is not sufficient to state a Section 1 claim." Op. at 8. But the district court then con-

cludes a sentence later: "Plaintiffs, therefore, cannot rely solely on the similar rates and assertions not based in fact *or evidence* to support their claim." Op. at 8 (emphasis added). *Starr* in no way supports, and indeed directly contradicts, the court's reasoning. The court in *Starr* deliberately cautioned: "While *for purposes of a summary judgment motion*, a Section 1 plaintiff must offer *evidence* …, to survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only allege 'enough factual matter (taken as true) to suggest than an agreement was made.'" *Starr*, 592 F.3d at 321 (quoting *Twombly*, 550 U.S. at 556).

By wrongly disregarding Plaintiffs' factual allegations as conclusory and by refusing to credit Plaintiffs' allegations due to want of evidence, the district court applied the wrong standard to Plaintiffs' claims. It did not, as it was obligated to do, credit all of Plaintiffs' non-conclusory factual allegations. The decision below should be overturned based on this legal error alone.

B. The Court Wrongly Engaged in a Credibility Analysis of Plaintiffs' Factual Allegations

The district court rejected Plaintiffs' factual allegations because it found them "unreliable and dubious." Op. at 11. In so doing, the court wrongly injected a credibility determination into its motion to dismiss analysis.

A court may not deem factual allegations conclusory because it finds them unbelievable or improbable. *See Iqbal*, 556 U.S. at 681 ("It is the conclusory nature of respondents allegations, rather than their extravagantly fanciful nature, that

disentitles them to the presumption of truth."); *Anderson News*, 680 F.3d at 185 ("Even if their truth seems doubtful, 'Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations.'") (quoting *Twombly*, 550 U.S. at 555). Indeed, as discussed above, at the motion to dismiss stage, the court must assume that all of plaintiffs' factual allegations are true. *See Anderson News*, 680 F.3d at 185.

But this court did not assume Plaintiffs' factual allegations are true; it instead inserted itself as a factfinder and asked whether it found the allegations believable. This was improper.

For example, the district court characterized Plaintiffs' statistical allegations as "unreliable and dubious because they simply assert that there should be certain, specific relationships between ICE LIBOR and other financial metrics, but do not cite to any empirical or academic sources to support these assertions." Op. at 11. These assertions of relationships between the various metrics are not legal conclusions; they are factual allegations. *All* that plaintiffs are required to do at the motion to dismiss stage is to "simply assert" them. And, the court is required to credit them, even if it finds them dubious. *See Anderson News*, 680 F.3d at 185 ("[I]n determining whether a complaint states a claim that is plausible, the court is required to proceed 'on the *assumption that all the [factual] allegations in the complaint are true.*' Even if their truth seems doubtful, 'Rule 12(b)(6) does not

countenance … dismissals based on a judge's disbelief of a complaint's factual allegations.'") (quoting *Twombly*, 550 U.S. at 555-566).

Indeed, this Court criticized this same district court for this same error in April of this year. *Sonterra Capital Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 534-35 (2d Cir. 2020) ("[A]t the motion to dismiss stage, Plaintiffs need not prove the allegations in their complaint 'definitively'. The complaint adequately alleges that Yen LIBOR is routinely used to price Yen FX forwards, and Plaintiffs provide detailed supporting allegations, including an explanation of the role Yen LIBOR plays in the generic pricing formula. No more is required at this stage.") (appeal from Daniels, J.). Deeming these factual allegations "unreliable and dubious" due to a lack of empirical support, as the court did here, is the opposite of the court's obligation: namely, to "assume [them] to be true." *Compare* Op. at 5 *to* Op. at 11.

While *Twombly* does require the court to assess the plausibility of inferring a conspiracy from the alleged facts, *Twombly* in no way authorizes courts to engage, as the court did here, in assessing the plausibility of the factual allegations themselves. The plausibility requirement imposed by *Twombly* concerns whether, *assuming the factual allegations in the complaint are true*, it is plausible to infer a conspiracy from them. *See* Page, *supra* at 132 ("Crucially, in [Twombly's formulation of the motion to dismiss standard], it is the plaintiff's *explanation* for the assumed facts that must be plausible, not the facts themselves."). But, if anything,

Twombly only reinforces the mandate that the court must assume the truth of the alleged facts and is not allowed to insert its own credibility determinations in assessing them.

II. THE DISTRICT COURT FAILED TO DRAW ALL REASONABLE INFERENCES IN FAVOR OF THE PLAINTIFFS IN LIGHT OF THE ALLEGED PLUS FACTORS

The district court's analysis of Plaintiffs' plus-factor allegations was flawed in at least two ways. First, the district court dismissed or discounted several of Plaintiffs' alleged plus factors because it found that they did not imply the existence of a conspiracy. This approach misunderstands the role of plus factors in a motion to dismiss analysis and demands too much of them; plus factors provide context that enables, but does not require, the finder of fact to infer a conspiracy from the alleged parallel conduct. Second, and related to the first error, the district court applied too high a bar to Plaintiffs' conspiracy allegations, demanding that Plaintiffs show that a conspiracy was likely when, even post-*Twombly*, all that is required is a showing that a conspiracy is plausible.

A. The Presence of Plus Factors Is What Makes the Inference of a Conspiracy from Parallel Conduct Plausible

The root of the district court's flawed plus-factor analysis was its failure to appreciate that the role of plus factors is to, collectively, make the inference of a conspiracy from parallel conduct reasonable. "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. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 395 (2011). 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*. In *Twombly* terms, plus factors are what nudge parallel conduct allegations from the realm of indicating a "possible" conspiracy to a "plausible" conspiracy.

The Supreme Court accepts allegations of parallel conduct when accompanied by sufficient plus factor allegations as plausibly supporting an inference of a conspiracy 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 Prods. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014) ("Perhaps there are 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."). The court does not accept plus factors because a conspiracy can be inferred from any given plus factor. Rather, the court accepts plus factors because the presence of plus factors alters the permissible inferences from the alleged parallel conduct.

The court in this case failed to understand the contextual role of plus factors. Instead, it repeatedly dismissed Plaintiffs' alleged plus factors (or gave them "little to no weight") because it determined the factor alone was insufficient to allow the court to "lead to an inference of conspiracy." Op. at 11, 13. This is wrong. It is a mistake to demand that any plus factor, standing alone, allows an inference of conspiracy. That is not how plus factors work.

While in some circumstances a single plus factor can provide sufficient context to nudge parallel conduct allegations over the line from possible to plausible, more often plus factors only operate in conjunction with other factors. Indeed, it is often a combination of factors, not a single factor alone, that allows a court to decide that discovery may well lead to evidence of a conspiracy. Kovacic, *supra* at 407 ("[S]ome constellations of factors have competitive significance that cannot be understood by looking at each factor in isolation."). Simply put, with plus factors, the sum can be greater than its parts. *Starr*, 592 F.3d at 323 ("More importantly, the following allegations, taken together, place the parallel conduct 'in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that

could just as well be independent action.'"). Accordingly, the court was wrong to evaluate the alleged plus factors in isolation.

The court below paid lip service to the idea that plus factors should be evaluated collectively, Op. at 14 ("even when viewed in conjunction with the alleged parallel conduct and other 'plus factors,'…."), but only after having already critiqued and dismissed the plus factors one by one for failing to imply a conspiracy. For example, the court rejected Plaintiffs' allegation that the regular meetings between the banks provided an opportunity to conspire, a plus factor, because "simply alleging an opportunity to conspire without providing any evidence whatsoever that any such discussions actually took place is insufficient to survive a motion to dismiss." Op. at 10-11. As a result, the court it "holds little to no weight" as a plus factor. Op. at 11.

But such regular meetings and communications are widely accepted as a plus factor, not because they alone demonstrate a conspiracy—as the district court seems to demand—but because the existence of such meetings provides background and context to make conspiracy more plausible. Indeed, the reason why regular meetings or communications, such as those alleged here, are considered plus factors, is because some channel of communication is thought a necessary, but not sufficient, element of any conspiracy. *See In re Text Messaging Antitrust Litig.*, 630 F.3d at 628 (characterizing membership of alleged conspirators in a

trade organization with regular meetings as a plus factor because it is "a practice, not illegal in itself, that facilitates price fixing that would be difficult for the authorities to detect").

To take another example, as discussed above, the district court rejected Plaintiffs' allegations that Defendants had previously engaged in a similar conspiracy, another plus factor, because Plaintiffs did not claim "any connection between any prior violations and their current claim…[except] similar structural characteristics in prior schemes." Op. at 13. This was not sufficient because, according to the district court, a plus factor "must still lead to an inference of conspiracy." Op. at 13 (quoting *Mayor and City Council of Baltimore, Md.*, 709 F.3d at 137).

Again, this misunderstands the role of plus factors. Past participation in similar conduct is considered a plus factor, because it evidences the wherewithal to engage in such a conspiracy, a necessary but not sufficient condition to the conspiracy alleged. Recidivism alone is not a sufficient basis to infer conspiracy from parallel conduct. But it is still a plus factor because, together with other factors, it makes a conspiracy more likely. Although the court's quotation of *Mayor of Baltimore* was technically accurate, it missed the point of the passage quoted, which addressed the need for plus factors *collectively*, in conjunction with parallel conduct, to "lead to an inference of a conspiracy." *Mayor and City Council of Baltimore, Md.*, 709 F.3d at 137; *see also Continental Ore Co. v. Union Carbide &*

Carbon Corp., 370 U.S. 690, 699 (1962) ("[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."); *United States v. Apple, Inc.*, 791 F.3d 290, 319 (2d Cir. 2015) ("In antitrust cases, the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.") (citations and quotations omitted).

Throughout its decision, the district court dismissed or minimized alleged plus factors because each one alone did not preclude the possibility of independent action. Basically, the court refused to count any allegation as a plus factor unless it alleged direct evidence of a conspiracy. This approach negates the long-established and widely-accepted doctrine that antitrust conspiracies can be alleged (and even proven) via circumstantial evidence. *See, e.g.*, *In re Text Messaging*, 630 F.3d at 629 ("Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy.") (Posner, J.). Indeed, this court has "rejected the view that circumstantial evidence is inherently weaker than direct evidence." *Norton v. Sam's Club*, 145 F.3d 114, 119 (2d Cir. 1998).

B. The Court Improperly Acted as Fact-Finder and Held Plaintiffs to an Incorrect Standard on a Motion to Dismiss

Even to the extent the court did credit Plaintiffs' plus factors and assess the evidence collectively, the court below still failed to apply the correct standard to its

inquiry. Although it evoked the right words at times, the clear import of the court's analysis of the Plaintiffs' allegations was that it held them to a standard more appropriate at summary judgment than on a motion to dismiss.

To survive a motion to dismiss, a plaintiff alleging an antitrust conspiracy must allege enough facts to make the conspiracy plausible. Courts, including this circuit and the Supreme Court, have emphasized that plausible does not mean certain or even probable. *See Gelboim v. Bank of America Corp.*, 823 F.3d 759, 782 (2d Cir. 2016) (LIBOR conspiracy) ("[A]t the motion-to-dismiss stage, appellants must only put forth sufficient factual matter to plausibly suggest an inference of conspiracy, *even if* the facts are susceptible to an equally likely interpretation.").

Unlike at the summary judgment stage, a plaintiff at the motion to dismiss stage is not required to allege facts that are irreconcilable with lawful independent conduct. *See Anderson News*, 680 F.3d at 184 ("[T]o present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigations stages such as a defense motion for summary judgment."); *see also In re Text Messaging*, 630 F.3d at 629 ("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 com-

plaint stage and the test for whether to dismiss a case at that stage turns on the complaint's 'plausibility.'").

Rather, plausible means that a finder of fact *could* infer the existence of a conspiracy from the facts alleged.[4] Notably, this does not mean that no other explanation for the alleged facts is possible.[5] *See Anderson News*, 680 F.3d at 190 ("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"). Nor does this standard entitle the court—as the court did here—to dismiss plaintiffs' complaint because it finds an innocent explanation of the alleged facts *more plausible* that the conspiracy alleged by Plaintiffs. *Id.* ("A court …may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.")

Rather, the court was "bound to view the evidence in the light most favorable to [the Plaintiffs] and to give [them] the benefit of all inferences which the evi-

[4] This is not the same as the no-set-of-facts standard abrogated by the Supreme Court in *Twombly*. That standard would require a court to deny a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Under the no-set-of-facts formulation, there is no burden on the pleader to allege the facts that permit an inference of conspiracy. Under *Twombly*, there clearly is such a burden.

[5] If Plaintiffs were required to plead sufficient facts to preclude all innocent explanations, then no antitrust conspiracy could *ever* be alleged via circumstantial factual allegations, because circumstantial evidentiary allegations are, *by definition*, allegations of facts that allow for alternative explanations. *See Black's Law Dictionary*, EVIDENCE (11th ed. 2019).

dence fairly supports, *even though contrary inferences might reasonably be drawn*." *Continental Ore*, 370 U.S. at 696 (emphasis added). In an antitrust conspiracy case, this means that the claim may only be dismissed if an inference of non-conspiracy provides an "obvious alternative explanation" for the collection of facts alleged. *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2d Cir. 2013) ("Moreover, the existence of other, competing inferences does not prevent the plaintiff's desired inference from qualifying as reasonable unless at least one of those competing inferences rises to the level of an 'obvious alternative explanation.'") (quoting *Twombly*, 550 U.S. at 567).

Here, instead of asking what favorable inferences *could* be drawn from Plaintiffs' allegations—*i.e.* asking whether they could support an inference of conspiracy—the district court instead weighed competing inferences and discounted or dismissed allegations that *could* be explained by something other than conspiracy. In so doing, the district court wrongly placed itself in the role of the factfinder instead of the gatekeeper. *See Anderson News*, 680 F.3d at 185 ("The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.").

The court found that, "despite Plaintiffs' claims regarding alleged 'plus factors,' Plaintiffs still fail to provide sufficient reason that this Court *should* infer that

there was a conspiracy or any collusion among Defendants." Op. at 9. But this answers the wrong question. As discussed above, the Court should have asked whether Plaintiffs had provided sufficient reason that the Court *could* infer a conspiracy or any collusion among Defendants. *See Anderson News,* 680 F.3d 162, 189 (2d Cir. 2012) ("The question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible."). The use of "should" by the court in this context reveals that the court is choosing between competing inferences, rather than asking what is the maximal set of inferences it can reasonably draw in Plaintiffs' favor. This was error.

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 July 24, 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 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. *See* 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 profitable *even if they are caught*.

By imposing heightened pleading obligations on plaintiffs, artificially narrowing the range of acceptable evidentiary allegations in antitrust conspiracy cases, and making it harder for plaintiffs to even get through the courthouse door, over-

readings of *Twombly* exacerbate this serious social problem. They render collusion—the "supreme evil of antitrust," *Trinko*, 540 U.S. at 408—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, this Court must ensure that basic discovery is allowed to proceed in cases alleging facts that suggest an actual agreement has been detected.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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August 18, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second 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/ Sharon K. Robertson

Dated: August 18, 2020

CERTIFICATE OF COMPLIANCE

2d Cir. Case Number 20-1492

I am the attorney or self-represented party.

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