No. 22-CV-657

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
Appellant,

v.

AMAZON.COM, INC.,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COUT OF THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE D.C. CHAMBER OF COMMERCE IN SUPPORT OF APPELLEE

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All parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

The DC Chamber of Commerce ("DC Chamber") represents over 1100 member-businesses representing all segments of the local business community, from the District's very largest employers to scores of sole proprietorships and small business partnerships located in all eight wards of the District. Its mission has always been to be the most valuable resource and leading advocate for businesses throughout the District of Columbia and our vision is to create a vibrant, thriving economy that improves the quality of life for all in the District, establishing mutually beneficial partnerships between business, government, and the community.

It is an important function of both the U.S. Chamber and the DC Chamber (collectively, "Amici") is to represent the interests of their members in matters before Congress, the Executive Branch, and the courts. To that end, Amici regularly file amicus briefs in cases, like this one, that raise issues of concern to the nation's

and DC's business community.

The Amici and their members have a strong interest in this case. Amici's members are frequently named as defendants in civil suits, including antitrust suits. Amici's members have an interest in ensuring that the courts of the District of Columbia adhere to the plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* protects businesses by ensuring that they will not face costly discovery unless plaintiffs can plead facts plausibly demonstrating their entitlement to relief. The plausibility standard also protects our court system by preventing its resources from being overwhelmed by frivolous litigation. Adherence to *Twombly* is particularly important in antitrust cases like this one, in which denial of a motion to dismiss based on threadbare allegations could open the door to extraordinarily broad discovery. Further, the Amici and their members have an interest in ensuring that state and territorial courts adhere to *Twombly* to the same extent as federal courts, so as to avoid forum-shopping and inconsistent outcomes.

INTRODUCTION

Because D.C. Rule 8 is identical to Federal Rule 8, D.C. courts use *Twombly* to evaluate complaints at the motion-to-dismiss stage. The Superior Court correctly held that *Twombly*'s plausibility standard applies to the District's claims.

The District and its amici argue that *Twombly*'s plausibility standard is inapposite because this case is factually distinguishable from *Twombly*. In *Twombly*, the Supreme Court held that the plaintiff had not adequately alleged an agreement among the alleged conspirators, as opposed to parallel conduct. Here, the District has undisputedly alleged the existence of an agreement; the dispute centers on whether the District has plausibly alleged that the agreement is anticompetitive. The District claims that by pleading the existence of an agreement, it has satisfied *Twombly*'s plausibility requirement. This is an impermissibly narrow reading of *Twombly*'s holding and out of step with how it has been applied in D.C. and the federal courts. Just as *Twombly* requires plausible allegations of an anticompetitive *agreement*, it requires plausible allegations of an *anticompetitive* agreement.

A contrary ruling here would not only contradict binding D.C. precedent, but would risk exposing the D.C. courts and defendants to burdensome litigation. Further, the District's position, if adopted by this Court, would encourage plaintiffs to sue under D.C. law in order to avoid federal pleading obligations, transforming the Superior Court into a hotbed of lawsuits presenting speculative allegations. The Court should follow *Twombly* and federal courts interpreting it and hold that *Twombly*'s plausibility standard applies with full force.

ARGUMENT

I. D.C. Courts Interpret D.C. R. Civ. P. 8(a) Consistent with *Twombly*.

When a D.C. Rule is identical to a Federal Rule, D.C. courts "construe [that rule] 'in light of' the corresponding federal rule, taking guidance from both the advisory committee notes to the federal rule and federal court decisions interpreting the rule." *Gubbins v. Hurson*, 885 A.2d 269, 277 n.3 (D.C. 2005) (citation omitted). Here, D.C. Rule of Civil Procedure 8 is identical to Federal Rule of Civil Procedure 8. Hence, this Court has expressly "interpreted Superior Court Rule 8(a) to include" *Twombly*'s plausibility standard. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011); *accord Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016) (confirming that D.C. Courts "have adopted the pleading standard articulated by the Supreme Court in [*Twombly*]").

Because this Court had adopted the Supreme Court's interpretation of Rule 8, it may "look to federal court decisions in interpreting the federal rule as persuasive authority." *Clement v. D.C. Dep't of Hum. Servs.*, 629 A.2d 1215, 1219 n.8 (D.C. 1993). For example, this Court very recently relied on federal case law to hold that under *Twombly*, "general factual allegations of injury" are insufficient to establish standing, and instead the plaintiff must make factual allegations that satisfy *Twombly*'s plausibility requirement. *See Fraternal Order of Police Metro. Police*

Dep't Labor Comm. v. District of Columbia, 290 A.3d 29, 37 n.1 (D.C. 2023) (quotation marks omitted). Here, too, the Court should look to federal case law to assess *Twombly*'s scope.

II. *Twombly*'s Plausibility Standard Applies to All Antitrust Cases.

The District maintains that *Twombly*'s "plausibility discussion has no application in this case." D.C. Br. at 35. It seeks to limit *Twombly*'s reach only to those cases where there is "uncertainty . . . about the terms of the [antitrust] agreement." *Id.* at 24 (quoting *Robertson*, 679 F.3d at 289); *see also* Professors' Amicus Br. at 2 ("[*Twombly*] is inapposite to cases (like this one) that involve a challenge to a written contract term."). Not so. *Twombly* "expounded the pleading standard for all civil actions." *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (internal quotation marks omitted). Regardless of the underlying claims, a complaint must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Here, *Twombly* requires plausible allegations not only that an agreement *exists*, but that the agreement is *anticompetitive*.

Section 1 of the Sherman Act prohibits "unreasonable restraints of trade" that are "effected by a contract, combination, or conspiracy." *Twombly*, 550 U.S. at 553 (quotation marks omitted). *Twombly* presented the "question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act." *Id.* at 554-55. The

Court held that under Federal Rule of Civil Procedure 8, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal quotation marks and alteration omitted). Instead, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* "[A]pplying these general standards to a § 1 claim," the Supreme Court held that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556.

The District insists that this case is "essentially the inverse of *Twombly*" because in *Twombly*, unlike here, there was no contract or other tangible evidence of an agreement. D.C. Br. at 36. The District is correct that the complaint in *Twombly* failed because the plaintiffs in that case failed to sufficiently allege a plausible conspiracy. But *Twombly* made clear that it cannot be confined to its specific facts. The Court held that the "need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" 550 U.S. at 557 (quoting Fed. R. Civ. P. 8(a)(2)). This reasoning applies to all civil cases, not just a subset of antitrust claims. Indeed, consistent with that holding, this Court has applied *Twombly*'s plausibility

standard to dismiss complaints in myriad non-antitrust cases. *See, e.g.*, *Potomac Dev. Corp.*, 28 A.3d 531 (takings); *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123 (D.C. 2015); *Fraternal Order of Police Metro.*, 290 A.3d at 27 (civil rights); *Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262 (D.C. 2015) (tort).

Moreover, federal appellate courts have applied *Twombly* to uphold the dismissal of antitrust claims where plaintiffs failed to allege unreasonable restraints of trade, even when there was no dispute as to the existence of an agreement between defendants. For example, in *Jacobs v. Tempur-Pedic International, Inc.*, the plaintiff alleged that Tempur-Pedic and its distributors had violated Section 1 of the Sherman Act by entering into vertical resale price maintenance agreements. 626 F.3d 1327 (11th Cir. 2010). There was no dispute that the agreements existed, yet the court dismissed the plaintiff's claim because he failed to plausibly allege any unreasonable restraint on trade. *Id.* at 1339. Without adequate allegations of "specific damage done to consumers in the market," *id.* (internal quotation marks omitted), the court concluded that the plaintiff had not surpassed *Twombly*'s plausibility standard.

William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co., 588 F.3d 659 (9th Cir. 2009) provides another example. There, the plaintiff, a wholesale gasoline purchaser, alleged that major oil producers had entered into a conspiracy to limit the supply of gasoline and drive-up prices. *Id.* at 661. To support the allegation of

collusion, the plaintiff pointed to exchange agreements between the various gasoline companies. *Id.* Again, the defendants did not dispute the contracts existed. *Id.* Instead, they successfully argued that the case failed to plead a plausible claim for antitrust violation because there were not sufficient allegations that the agreements actually restrained trade. *Id.* at 665.

Here, too, the Court should hold that the District bears the burden of showing that their allegations of an unreasonable restraint on trade satisfy *Twombly*'s plausibility requirement. The District has not discharged its duty of pleading plausible allegations merely by pleading the existence of a contract.

III. *Twombly*'s Policy Justifications Apply in All Antitrust Cases.

Twombly was grounded not only in the Supreme Court's interpretation of Rule 8, but also the Court's concerns regarding the burdensome nature of antitrust discovery. Those policy concerns apply just as strongly here as in *Twombly*.

In imposing a rigorous plausibility requirement, the Supreme Court stated bluntly that "proceeding to antitrust discovery can be expensive." 550 U.S. at 558. This remains true today. "A defendant involved in complex antitrust litigation can expect attorneys' fees and costs to often exceed [one] million [dollars] per year, with such fees and costs increasing substantially if the case proceeds past an early motion to dismiss and into fact discovery." Paul H Saint-Antoine, Joanne C Lewers, Lee

Roach, Lucas B Michelen, John S Yi & Amanda M Pasquini, Private Antitrust Litigation in the United States: Overview (2019).

As such, the *Twombly* Court held that a "district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 550 U.S. at 558 (quotation marks omitted). The Court cited authority stating that the "costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Id.* (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984). And the Court emphasized that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* at 559; *accord Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (noting the ills of permitting "a plaintiff with a largely groundless claim to 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." (internal quotation marks and alteration omitted)).

The Supreme Court held that these considerations applied in deciding whether the plaintiff had adequately alleged an anticompetitive *agreement*. But they apply

just as strongly when deciding whether the plaintiff has alleged an *anticompetitive* agreement. Indeed, it is easy to see why rigorous enforcement of *Twombly*'s plausibility standard is needed to avoid excessive antitrust litigation, even when an agreement is adequately pleaded. In many cases, it is trivially easy for a plaintiff to plead the existence of an agreement. Businesses enter into innumerable agreements. They form joint ventures. They offer licenses to competitors, subcontractors and customers. They negotiate contracts with other businesses up and down the supply chain. All of these arrangements involve "agreements." Of course, the vast majority of agreements are not anticompetitive. To the contrary, most agreements are pro-competitive; a functioning economy requires enforceable contracts. *Cf. Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 687–88 & n.10 (1978) (noting that every contract restrains trade in a sense); *Standard Oil Co. v. United States*, 221 U.S. 1, 63 (1911) (rejecting limitless reading of the Sherman Act that would prohibit "every contract, act, or combination of any kind or nature" and thus "would be destructive of all right to contract or agree combine in any respect whatever"). The hard part for a plaintiff is not alleging that an agreement exists (often it indisputably does), but that the agreement is anticompetitive in violation of antitrust law. If plaintiffs could surpass a motion to dismiss merely by pleading that an "agreement" exists, plus general, speculative allegations that the agreement is anticompetitive,

there would be no end to antitrust litigation. Rigorous enforcement of *Twombly*'s plausibility standard as to all aspects of a plaintiff's claim is necessary to avoid overwhelming defendants and courts.

IV. Loosening *Twombly*'s Pleading Standard Would Turn the District's Courts Into a Hotbed of Meritless Antitrust Litigation.

Case law under the D.C. Antitrust Act is relatively sparse, particularly in D.C. courts. This is primarily because of the close similarity between the D.C. Antitrust Act and the federal Sherman Act. By statute, D.C. courts are required to use federal Sherman Act jurisprudence "as a guide" to interpreting the D.C. Antitrust Act. D.C. Code § 28-4515; *see, e.g.*, *Boyle v. Giral*, 820 A.2d 561, 568-69 (D.C. 2003) ("Since the federal antitrust law is a 'source' for the District of Columbia Antitrust Act, … we will follow the Second Circuit's interpretation"). Hence, most private antitrust plaintiffs tend to sue in federal court under the federal Sherman Act. When private plaintiffs do bring D.C. Antitrust Act claims, they tend to accompany federal Sherman Act claim under federal courts' supplemental jurisdiction. *See, e.g.*, *Cheeks of N. Am., Inc. v. Fort Myer Const. Corp.*, 807 F. Supp. 2d 77, 88 (D.D.C. 2011), *aff'd*, No. 11-7117, 2012 WL 3068449 (D.C. Cir. July 26, 2012).

If this Court accepts the District's interpretation of Rule 8, everything will change. Plaintiffs with speculative antitrust claims, who could not surpass a motion

to dismiss in federal court, will flock to the D.C. Superior Court. Of course, the plaintiffs will have to plead an antitrust violation in the District in order to state a claim. But it is common for plaintiffs to plead that a defendant violated antitrust law in all or almost all states as well as the District. *See, e.g.*, *In re Namenda Indirect Purchaser Antitrust Litigation*, No. 15-cv-6549, 2021 WL 2403727, at *39 (S.D.N.Y. June 11, 2021) (observing that D.C. Antitrust Act, as well as similar antitrust acts from several states, "simply prohibit potential *defendants* from acting 'in restraint of trade or commerce' within the state," and finding that "where the market for [pharmaceutical] was nationwide and reached approximately $1.5 billion by 2013, it is safe to assume that [seller]'s products (and therefore the consequences of its allegedly illegal behavior) reached all of the states implicated").

Not only will these plaintiffs plead claims under D.C. law, but they will attempt to bring in claims under other states' laws. Rule 8 is a rule of procedure, not a substantive doctrine. As such, Rule 8 applies in all cases brought in Superior Court, regardless of the source of law of the claim being asserted. If the Court loosens procedural requirements for bringing antitrust claims, plaintiffs will bring any antitrust claim under any state's law they can so long as they can establish personal jurisdiction and venue in the District.

These lawsuits will impose significant burdens on the Superior Court.

Antitrust suits are complex and hard to manage. They frequently involve difficult discovery disputes and even more difficult trial management problems.

Even worse, the District's approach, if adopted by this Court, will invite the *worst* antitrust suits. Plaintiffs with plausible allegations will file federal Sherman Act suits in federal court. Plaintiffs with implausible or speculative allegations, who merely have general suspicion that the defendant is violating antitrust law, will file in the Superior Court, because that is the only way the plaintiff will get to discovery—and extract a settlement. The Court should not adopt a pleading rule that would transform the already-busy courts of the District into a hotbed of speculative antitrust litigation.

The District's proposed pleading rule would also conflict with the D.C. Council's stated goal of "uniformity." D.C. Code § 28-4515. As noted above, the Council's "intent" was for courts to "use as a guide interpretations given by federal courts to comparable antitrust statutes." *Id.* Yet, as a practical matter, the District's proposed rule would make D.C. law dramatically more plaintiff-friendly than federal law. To be sure, the District's argument focuses on Rule 8, rather than on substantive provisions of the Antitrust Act. But in the context of antitrust law, when getting past a motion to dismiss is frequently enough for the plaintiff to extract a settlement, pleadings standards are as, if not more, important than the substantive rules

governing liability. The Legislature's intent was to enact legislation that would not rock the antitrust-litigation boat, yet the District's position, if adopted by this Court, would accomplish exactly that.

CONCLUSION

The Superior Court was correct to apply *Twombly*'s plausibility standard when analyzing the District's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, I electronically filed the foregoing brief with the Court's electronic filing system. I further certify that all participants in this case are registered, and that service will be accomplished via the Court's electronic filing system.

May 1, 2023

Respectfully submitted,

/s/ Adam G. Unikowsky