No. _____

In the Supreme Court of the United States

CYNTHIA PROSTERMAN, *et al.*,
Petitioners,

v.

AMERICAN AIRLINES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- Since this Court decided *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), Circuits are split as to its interpretation and Fed. R. Civ. P. 12(b)(6) dismissals of Sherman Act, § 1, 15 U.S.C. § 1, claims have dramatically increased, thereby substantially chilling private antitrust enforcement. The "uniformity needed [in *Twombly* interpretation] for the rule of law and equal justice to prevail is lacking." *In re Travel Agents Commission Antitrust Litigation*, 583 F.3d 896, 914 (6th Cir. 2009) (Merritt, C.J., dissenting). Should this Court clarify its decision in *Twombly* to settle § 1 "combination or conspiracy" pleading standards?
- Whether allegations that airline owners of ATPCO, a privately-held corporation which collects and distributes fare and fare-related data for the airline industry, together agreed to change an ATPCO rule governing airline fare structures, are sufficient to plead the element of "combination or conspiracy" that is illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1?
- Are allegations that: (a) the airline owners of ATPCO met online at a particular time to discuss structural changes to airfare pricing; (b) that on the same date as the meeting, the airline owners, using similar language, announced that together they changed airfare pricing structures to, "prevent combining nonrefundable local fares to create a connecting itinerary;" and (c) that the airlines implemented the announced changes to fare structures, thereby drastically increasing multi-city fare pricing, sufficient to state a claim under § 1 of the Sherman Act?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, Plaintiffs-Appellants below are:

CYNTHIA PROSTERMAN, JAN MARIE BROWN, CAROLYN FJORD, KATHERINE R. ARCELL, KEITH DEAN BRADT, JUDY BRAY, JOSÉ M. BRITO, ROBERT D. CONWAY, JUDY CRANDALL, ROSEMARY D'AUGUSTA, BRENDA K. DAVIS, PAMELA FAUST, DON FREELAND, DONNA FRY, GABRIEL GARAVANIAN, HARRY GARAVANIAN, YVONNE JOCELYN GARDNER, LEE M. GENTRY, VALARIE ANN JOLLY, GAIL S. KOSACH, JOHN LOVELL, MICHAEL C. MALANEY, LEN MARAZZO, LISA MCCARTHY, PATRICIA ANN MEEUWSEN, L. WEST OEHMIG, JR., DEBORAH M. PULFER, DANA L. ROBINSON, ROBERT A. ROSENTHAL, BILL RUBINSOHN, SONDRA K. RUSSELL, SYLVIA N. SPARKS, JUNE STANSBURY, CLYDE D. STENSRUD, WAYNE TALEFF, GARY TALEWSKY, ANNETTE M. TIPPETTS, DIANA LYNN ULTICAN, J. MICHAEL WALKER, PAMELA S. WARD, AND CHRISTINE WHALEN,

Respondents in this Court, Defendants-Appellees below, are:

AIRLINE TARIFF PUBLISHING COMPANY, AMERICAN AIRLINES, INC., DELTA AIR LINES, INC. and UNITED AIRLINES, INC.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case and that this Court reverse the decision of the Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals is Appendix to Petition for Writ of Certiorari ("App." 1-9). The opinions of the district court (App. 24-35, App. 36-37, App. 10-18, App. 19-23, and App. 38-39) are unreported.

JURISDICTION

The Court of Appeals rendered its decision on August 23, 2018. (App. 1-9). The court denied a timely Petition for Rehearing *En Banc* on October 16, 2018. (App. 40-41). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioners now file this Petition for Writ of Certiorari on January 14, 2019.

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which is implicated by this Petition, states, in pertinent part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari ("Petition") arises out of a complaint filed by forty-one travel agents and consumers of scheduled air passenger service in the United States ("Petitioners" or "Plaintiffs") in the United States District Court for the Northern District of California to enjoin Defendants' violations of § 1 of the Sherman Antitrust Act and for damages. This private antitrust action for injunctive relief and for damages was brought pursuant to §§ 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15, 26.

Plaintiffs alleged that in March 2016, American Airlines, United Airlines, and Delta Air Lines ("Airline Defendants" or "Defendants"), in combination with Airline Tariff Publishing Company ("ATPCO"), instituted a drastic change in the rule for pricing multi-city air travel.[1] The purpose and effect of the change was to prohibit multi-city travelers from combining fares for individual trip segments to achieve an overall fare, as had been the practice previously. Instead, multi-city travelers were required to pay much higher fares, even if certain legs of their trip were priced much

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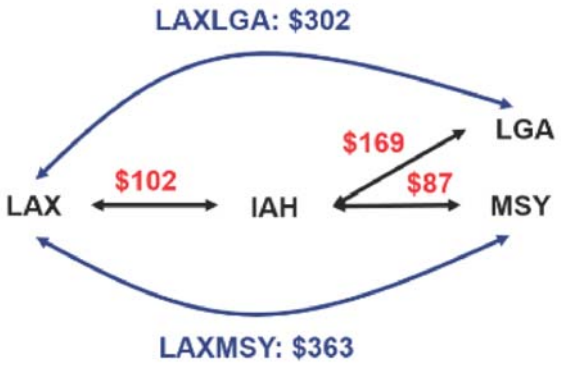
[1] A multi-city itinerary combines flights between several cities into a single reservation, eliminating the need to book one-way tickets between each city. Examples of multi-city trips are "Open-Jaw" and "Circle-trips." An "Open Jaw" trip is one in which "the destination and/or point of departure are not the same in both directions," e.g., "SFO to JFK (New York), plus DCA (Washington, D.C.) to SFO," and a "Circle Trip" is one that "involves more than a single destination, but which returns to the initial origin," e.g., "SFO to JFK, JFK to DCA, DCA to ORD [and] ORD to SFO." (App. 16, fn.5).

lower because the Airline Defendants were competing against Ultra Low-Cost Carriers ("ULCCs") on those legs. The consequence of the Airline Defendants' "contract…combination or conspiracy" was a restraint in violation of Section 1 of the Sherman Act. (II ER 00235-0236; Compl. at pp. 2-3).

From 2008 through 2016, a wave of mergers and acquisitions so concentrated the airline industry that now just four airlines control a staggering 86% of the air passenger transportation market in the U.S. (II ER 235). The Airline Defendants in this case, American, United, and Delta, control over 50% of the market. (II ER 244, ¶ 29). Today, the domestic airline passenger industry is a tight oligopoly that is already conducive to coordinated behavior. (II ER 244, ¶ 30; 245, ¶¶ 31-34).

The Airline Defendants, in turn, own and control Airline Tariff Publishing Company ("ATPCO") which publishes airfares for the airline industry in the U.S., acting as the industry's "clearinghouse." (II ER 235-236; 243, ¶¶ 24, 25). Part of ATPCO's stated mission is to "protect or increase airline revenue." (II ER 244, ¶ 26, 245, ¶ 35). The public is generally unaware of ATPCO's existence. (II ER 246, ¶ 40; 248, ¶ 47). Carriers, systems and ATPCO work together to create and manage system restrictions for the industry. (II ER 246-247, ¶¶ 42-43). ATPCO has more than 30 categories of rules pertaining to air travel, including its CAT-10 rule regulating combining airfares for multi-city air travel in the U.S. CAT-10 is one of the most complex of ATPCO's rule categories. (II ER 243, ¶ 28; II ER 251, ¶¶ 57-58).

In March 2016, the three Airlines Defendants changed the ATPCO CAT-10 fare rule to prohibit travelers from combining one-way, non-refundable airfares[2] for each leg of their multi-city itineraries and henceforth required them to pay one price for the entire trip, which immediately allowed the Airline Defendants to raise the prices for such trips by up to 700%. (II ER 251-252, ¶¶ 62-63). United illustrated the rule change in a diagram as follows:



(II ER 270). United's diagram illustrates that before the rule change, travelers could combine the lowest one-way fares on a trip from LAX to LGA for a cost of $271. After the rule change, the same trip cost $302. Similarly, the diagram explains that before the rule change, a ticket combining the lowest one-way fares from LAX to MSY would cost $189, but that after Defendants' rule change, the same trip would cost nearly twice as much, $363. *Id.*

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[2] These are typically the least costly airfares offered to the public.

A September 2015 ATPCO document revealed that an ATPCO member had demonstrated a desire to restrict "end-on-end" fare combinations ("our desire is to NOT to allow END-ON-END COMBINATION…" II ER 89). In response, ATPCO explained that the request would "require further research to… accommodate the business need" and that ATPCO had added it to the agenda for the "next Combinations (Category 10) Data Application Working Group scheduled for Second Quarter 2016" so that "an agreeable approach can be proposed and discussed…" *Id*.

On March 30, 2016, at 10:00 a.m., Eastern Time, ATPCO (jointly owned and controlled by the Airline Defendants) held its "Second Quarter 2016" "Combinations (Category 10) Data Application Working Group" meeting via an online webinar. (II ER 60; II ER 62).

The March 30 meeting's agenda stated that the purpose of the meeting was to, "Allow carriers to specify that when pricing One Way fares, if the journey meets the definition of an Open Jaw or Circle Trip, then it cannot be priced as an End-on-End solution," to "Provide full functionality to express restrictions on Side Trip combinations," and to "Align ATPCO and IATA definitions." (II ER 67).

After the meeting, on March 30 and two days later, the Airlines publicly announced and confirmed their agreement to change the industry's fare structure. (II ER 252, ¶ 63) [emphases added]:

> On March 30, 2016, United admitted that *"Multiple U.S. carriers recently made changes* to

> the CAT 10 domestic combinability fare rules impacting some one-way fares." (II ER 269) [emphases added];
>
> On April 1, 2016, American admitted that "*American Airlines, along with other U.S. carriers*, made changes to CAT10 domestic combinability fare rules that impact certain one-way fares. These changes prevent combining nonrefundable local fares to create a connecting itinerary." (II ER 267) [emphases added]; and
>
> On April 1, 2016, Delta admitted that it had "recently made a *change to the combinability of one-way fare products*" and that "End-on-end combinability of non-refundable fares has been restricted." (II ER 272) [emphases added].

This change also prohibited travel agents from attempting to obtain the least expensive fares for their customers by threatening them with penalties ("debit memos") and termination if they offered the low priced "sum of the segments" fares to their customers in the future. (II ER 255, 258, II ER 258, ¶¶ 88-89).

In addition to their public statements – in substantially the same words – that they had changed the industry rules for such fares, there were other facts pled by the Plaintiffs – so-called "plus factors" – which plausibly supported the conclusion that the Defendants had acted in concert to change the rule: 1) the new CAT-10 rule, which raised fares by up to 700%, was implemented at a time when the Airlines' fuel costs were at record lows and dropping (II ER 237, ¶ 2; 253, ¶¶ 70-71); the CAT-10 rule setting multi-city fares was one of the most complex in the industry, yet the Airline

Defendants adopted it all at once (II ER 243, ¶ 28; II ER 251, ¶¶ 57-59; II ER 252, ¶¶ 63-69, II ER 253, ¶ 72, II ER 254, ¶ 75); despite the enormous increases in multi-city airfares, not one of the Airline Defendants acted in its economic self-interest by attempting to take market share from its competitors by offering lower prices (II ER 253, ¶ 71, II ER 254, ¶¶ 76, 77).[3]

Course of Proceedings

On April 18, 2016, Plaintiffs filed a Complaint and an Ex Parte Application for a Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction, seeking to enjoin Defendants' rule change. (Dkt. No. 3). On that same date, District Judge Maxine M. Chesney ordered briefing on the motion and set a hearing on May 13, 2016, ordering Defendants to show cause why the rule change for multi-city airfares should not be enjoined. (Dkt. No. 7).

On May 13, 2016, the court held a hearing, and denied Plaintiffs' Motion for a Preliminary Injunction. (App. 38-39; and Tr. (5/13/16) 91:5-7; 91:12-13; 91:19-21).

On June 1, 2016, Defendants filed Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. Nos. 61 and 61). Plaintiffs opposed. (Dkt. No. 63). A hearing was held on Defendants' Motions on July 22, 2016. Judge Chesney granted the Motions to Dismiss with

[3] By changing the CAT-10 rule and then publicly announcing it at the same time, in essentially the same terms, the Airlines ensured that the rule change and price increases would "stick" without the attendant injury to goodwill that would result if less than all of them participated.

leave to amend the Complaint. (III ER 0330-332; Tr. (7/22/16) 52:15-20; 53:19-25; 54:11- 14).

On August 12, 2016, Plaintiffs filed their First Amended Complaint ("FAC") (II ER 0234-278). Defendants again filed Motions to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. Nos. 93 and 94). Plaintiffs opposed. (Dkt. No. 100).

Ultimately, the court granted Defendants' Motions to Dismiss and entered Judgment on December 8, 2016. (App. 24-35 and App. 36-37). Giving the Defendants' history of parallel conduct and the high concentration in the industry no weight and drawing inferences in favor of the Defendants, the court held that:

> In sum, plaintiffs have failed to "plead[ ] sufficient facts to provide a plausible basis from which [a court] can infer the alleged agreements' existence."

(App. 34).

On January 5, 2017, Plaintiffs filed a Motion to Vacate the Judgment and/or to Alter or Amend the Judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b), arguing that the district court did not consider the direct evidence alleged in the FAC and that the court did not properly weigh and consider all of the "plus factors" alleged in the FAC. (Dkt. Nos. 109 and 115). Defendants opposed. (Dkt. No. 111). The court denied Plaintiffs' Motion on February 13, 2017, holding that, "[P]laintiffs fail to identify any direct evidence alleged in the FAC…[and that] the Court fully considered the question of whether plaintiffs had alleged sufficient 'plus factors'…." (App. 21).

On March 15, 2017, Plaintiffs filed their Notice of Appeal. (II ER 0227).

On August 11, 2017, after discovering new evidence, Plaintiffs filed a motion under Fed. R. Civ. P. 62.1, entitled, "Motion for an Order Indicating Court Will Entertain Plaintiffs' Rule 60(b) Motion." (Dkt. No. 120). On October 5, 2017, the Court denied Plaintiffs' Motion. (ER 0001). In ruling on Plaintiffs' post-judgment motion, which was based on new evidence that the Defendants had held a meeting on March 30, 2016, the same day that United made its announcement and two days before American and Delta made similar announcements, the district court held that:

> Assuming, arguendo, the three airline defendants attended the online meeting organized by ATPCO, any such attendance is not, by itself, sufficient to support a finding that defendants entered into an unlawful agreement. See In re Musical Instruments, 798 F.3d at 1196 ([…] holding "mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement").

(App. 16). The lower court concluded that, "[i]n sum, plaintiffs have failed to show the newly discovered evidence, if alleged in a Second Amended Complaint, would be sufficient to defeat a motion to dismiss. Under such circumstances, … an amended pleading would serve no purpose as such amendment would be futile." (App. 17).

On October 9, 2017, Plaintiffs filed an Amended Notice of Appeal to include the district court's October 5, 2017, Order. (II ER 0022).

The Ninth Circuit, erroneously likening this case to corner gas stations monitoring competitors' prices posted across the street, affirmed the district court, holding that "even viewed collectively, Plaintiffs' plus factors suggest only conscious parallelism in an interdependent oligopoly." (App. 7). It wholly ignored Defendants' written announcements admitting that they had acted together in changing the CAT-10 fare rule and explained that the court has "long been skeptical that participation in a trade organization is suggestive of collusion." *Id*. The Panel further concluded that the Defendants' meeting, "does nothing to make a conspiracy more plausible. Instead, it suggests that the airlines independently decided to disallow sum-of-sector pricing…" *Id.* The Ninth Circuit's decision relied substantially on its earlier decision in *In re Musical Instruments*, 798 F.3d 1186 (9th Cir. 2015).

Plaintiffs hereby seek review of the decision by the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

Since this Court decided *Twombly,* Sherman Act § 1 pleading standards are unsettled and there is a substantial disparity in *Twombly's* application in and among the Circuits. The Ninth Circuit's approach erects barriers to the pleading of § 1 claims by private antitrust litigants that were never intended or contemplated by this Court's decision in *Twombly*. The Ninth Circuit's decision conflicts with decisions in the

Seventh Circuit, the Second Circuit, and the District of Columbia Circuit. This Petition presents the Court with an opportunity to provide much-needed clarification and guidance with regard to the sufficiency of "combination or conspiracy" allegations under § 1 of the Sherman Act.

I. THE NINTH CIRCUIT'S DECISION ILLUSTRATES THE SPLIT AMONG CIRCUITS INTERPRETING THE "COMBINATION OR CONSPIRACY" ELEMENT OF § 1 OF THE SHERMAN ACT

A. Fed. R. Civ. P. 12 Dismissals of Antitrust Claims Have Ballooned Because of Erroneous Interpretations of *Twombly* by Lower Courts

This Court's decision in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), overruled *Conley v. Gibson*, 355 U.S. 41, 47 (1957) and its "no set of facts" standard for evaluating antitrust claims at the pleading stage. It, on the one hand, instructs that "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations (citations omitted)," while, on the other, holds that, "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. The Court continues: "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is

improbable, and that a recovery is very remote and unlikely." *Id.*

Before this Court's decision in *Twombly,* 550 U.S. 544, antitrust claims were not so regularly dismissed at the pleading stage. In the *post-Twombly* era, antitrust claims are now dismissed in over 50% of cases, before a defendant is ever required to file an answer and admit or deny conspiracy allegations.[4]

Twombly itself was a class action on behalf of local telephone and high speed internet subscribers against regional telephone companies or Incumbent Local Exchange Carriers ("ILECS") for forming a combination or conspiracy in violation of § 1 of the Sherman Act. *Id*. at 549. The complaint alleged that the ILEC defendants engaged in parallel conduct to inhibit the growth of competing local exchange carriers ("CLECs") by overcharging them, entering into unfair agreements with them, providing inferior network connections, and billing in ways to undermine the CLECs relationships with its customers. *Id*. at 550-551. The Twombly plaintiffs alleged that there was a common motive among the defendants to thwart competition from CLECs because had any one of them not worked to inhibit CLEC growth, "the resulting greater competitive inroads into that [defendants'] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id*. In addition, the complaint pled that the

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[4] Searby, Edmund W., *United States: Private Antitrust Litigation: Class Actions,* The Antitrust Review of the Americas 2015, August 2014, p. 45.

defendants had agreed to refrain from competing with each other as demonstrated by their collective failure to pursue substantial business opportunities in adjacent markets. *Id.*

In analyzing the *Twombly* complaint, this Court noted that, 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 [defendants]." *Twombly*, 550 U.S. at 564. This Court reasoned that the sufficiency of the Twombly plaintiffs' allegations then turned on "the suggestions raised by this conduct when viewed in light of common economic experience." *Id.* at 565. The *Twombly* Court determined that, "nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each [defendant] intent on keeping its regional dominance." *Id*. at 566.

In the almost twelve years since this Court's ruling, *Twombly* has been repeatedly invoked by antitrust defendants to bludgeon private enforcement of the antitrust laws into toothlessness. *Twombly* was a case that was clearly grounded in parallel conduct. The complaint said so. Since *Twombly*, a multitude of lower courts have so misinterpreted and distorted its holding that well-pled, plausible factual allegations of antitrust conspiracy are now fatally mislabeled as nothing more than "conscious parallelism."

The case before this Court is a prime example of the persistence of the *Twombly* problem. Here, the FAC included admissions by the Airline Defendants that together they changed ATPCO's CAT-10 fare rule. (II ER 267, 269, 272). American said it most clearly:

"*American Airlines, along with other U.S. carriers*, made changes to CAT10 domestic combinability fare rules that impact certain one-way fares. *These changes prevent combining nonrefundable local fares to create a connecting itinerary*." (II ER 267) [emphases added]. Giving American's words their plain and ordinary meanings, the only proper reading of the phrase "along with U.S. carriers" is that the changes were made in concert.[5] American's description of the change as "prevent[ing] [the] combining [of] nonrefundable local fares to create a connecting itinerary" is unambiguous. The *Twombly* Court's conclusion that, "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway" is irrelevant in the face of express admissions by Defendants to the contrary. 550 U.S. at 566. The Ninth Circuit gave the Defendants' admissions no weight in its analysis, signaling that lower courts are so confused about § 1 pleading standards that they can no longer recognize a categorical admission for what it is – direct evidence of an unlawful agreement.

The *Twombly* problem extends to interpretations of the impact of trade association meetings on the plausibility § 1 allegations. This is also illustrated by the Ninth Circuit's decision in this case. Here, Plaintiffs proposed amending the complaint to add allegations that the Defendants met on a specific date, March 30, 2016, at 10:00 a.m. Eastern, online, to discuss allowing carriers to "specify that when pricing One Way fares, if the journey meets the definition of an Open Jaw or Circle Trip, then it cannot be priced as an

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[5] Along – "in company, as a companion," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/along.

End-on-End solution." (II ER 67). No similar meeting allegation was pled in *Twombly*. Nevertheless, the Ninth Circuit concluded that the "online meeting does nothing to make a conspiracy more plausible. Instead, it suggests that the airlines independently decided to disallow sum-of-sector pricing…" (App. at 9). The Ninth Circuit noted that it has "long been skeptical that participation in a trade organization is suggestive of collusion." (App. at 7).[6] It has long been established that evidence of a meeting between competitors to discuss the subject of the alleged agreement is sufficient to state a claim.[7] Cabining the allegations in this case within *Twombly* can only be accomplished by seriously misinterpreting *Twombly* and extending it well beyond its intended bounds. Because the improper application of *Twombly* to § 1 claims abounds todays, further guidance by this Court is both critical and necessary.

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[6] The Court of Appeals decision is inconsistent with Adam Smith's observation that, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public." The Wealth of Nations (1776), Book 1, Chap. 10, part 1, 148 (New York Modern Library, 2000).

[7] *See C-O-Two Fire Equipment, Co., v. United States*, 197 F.2d 489, 493 (9th Cir. 1952) (holding "an opportunity … to discuss and agree upon prices and pricing policies on an industry-wide basis" is an important "plus factor[]…"); *Esco Corp. v. U.S.*, 340 F.2d 1000, 1007 (9th Cir. 1965) ("[I]t remains a question for the trier of fact to consider and determine what inference appeals to it (the jury) as most logical and persuasive, after it has heard all the evidence as to what these competitors had done before such meeting, and what actions they took thereafter, or what actions they did not take.")

A potent dissent by Sixth Circuit Judge Gilbert S. Merritt, Jr., in *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896 (6th Cir. 2009), identified the brewing *Twombly* problem nearly a decade ago. In that case the dissent argued that if *Twombly* was close to stating a claim but insufficient, that "allegations concerning [] in unison, affirmative behavior of the airlines" create "an overwhelming case for the plaintiff to get by a motion to dismiss on the pleading." *Id*. at (Merritt, C.J., dissenting). Circuit Judge Merritt warned:

> That said, district court judges across the country have dismissed a large majority of Sherman Act claims on the pleadings misinterpreting standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act. (citations omitted).
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> ***
>
> There are many, including my colleagues, whose preference for an unregulated laissez faire market place is so strong that they would eliminate market regulation through private antitrust enforcement. Under the new *Twombly* pleading rule, it is possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence. As in this case, the proponents of this strategy propose to require either an express written agreement among competitors or a transcribed oral agreement to fix prices. Nothing less will do. Insider testimony, a strong motivation to collude, and aggressive, lock-step unanimity by

> competitors in pricing become insufficient to state a case. Over time, the antitrust laws fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices.

Id. at 914-916 (Merritt, C.J., dissenting). The dissent concluded with a clear call to action that, "[T]his direction is unlikely to be changed unless the Supreme Court steps in to make it clear that *Twombly* may not be used, as my colleagues propose, as a cover for repealing regulation of the marketplace through private antitrust enforcement." *Id*. at 916. *Twombly's* burden on the private right of action cannot be reconciled with this Court's prior rulings emphasizing Congress's clear intention to encourage vigorous private enforcement of the antitrust laws. *See Hawaii v. Standard Oil Co. of Cal.,* 405 U.S. 251, 262 (1972); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (acknowledging "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws…")

An important rationale that drove this Court to depart from its long-standing decision in *Conley,* 355 U.S. 41, *overruled* by *Twombly*, 550 U.S. 544, was that "proceeding to antitrust discovery can be expensive…" *Id*. at 558. If keeping litigation costs down for defendants was the Court's objective, then it has been an overwhelming success, when considering the lower courts now bar over half of all antitrust cases brought by plaintiffs.

Twombly's undeniable suppression of private antitrust enforcement merits reconsidering that decision as it is now being applied, or, at a minimum,

providing further guidance for pleading standards under § 1 of the Sherman Act. Petitioners respectfully submit that this case is the proper vehicle to do so.

B. Ninth Circuit Authority Governing § 1 Pleading Standards Conflict with the Seventh Circuit's Standards in *In Re Text Messaging I*

The *Twombly* problem is illustrated by the disparity between the Ninth Circuit's ruling in this case and the Seventh Circuit's ruling in *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010) ("*Text Messaging I*"). In *Text Messaging I*, the Seventh Circuit heard an interlocutory appeal under 28 U.S.C. § 1292(b) to determine the sufficiency of allegations that the defendants conspired to fix prices of text messaging services in violation of § 1 of the Sherman Act. *Id*. at 624. There, the court explained that it agreed to hear the interlocutory appeal because, *Twombly's* "scope [is] unsettled (especially in light of its successor, *Iqbal*—from which the author of the majority opinion in *Twombly* dissented; and two of the Justices who participated in those cases have since retired)..." and that "[p]leading standards in federal litigation are in ferment after *Twombly* and *Iqbal*…" *Id*. at 626-627. Federal pleading standards remain in disarray today.

In *Text Messaging I*, Judge Posner noted that the complaint in that case alleged, "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion," that ultimately stated a claim. *Id*. at 627-629. Here, the FAC's allegations are similar to those in *Text Messaging I*. Whereas the court in *Text Messaging I* held that the

plaintiffs had stated a plausible claim, this case was dismissed under Fed. R. Civ. P. 12(b)(6).

The court's analysis in *Text Messaging I* started with allegations of industry structure, acknowledging that, "an industry structure that facilitates collusion constitutes supporting evidence of collusion." *Id*. at 627-628. The *Text Messaging I* complaint alleged that, the "defendants [sold] 90 percent of U.S. text messaging services." *Id.* The court reasoned that this was important because, "it would not be difficult for such a small group to agree on prices and to be able to detect 'cheating' (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities." *Id*. Similarly, here the FAC alleged a high level of industry concentration, with four major airlines controlling 86% of the U.S. market. (II ER 235, 244, 245). But in contrast to *Text Messaging I*, the Ninth Circuit's decision gave industry concentration no weight and instead rationalized that, "with a market comprised of a few dominant players…it is no surprise that consumer fares remain uniform across the industry." (App. 1-2).

The *Text Messaging I* court found the complaint's allegations that "the defendants belonged to a trade association and exchanged price information directly at association meetings" and that trade association's "leadership council's stated mission was to urge its members to substitute 'co-opetition' for competition" to be of import. 630 F.3d at 628. Likewise, here, the FAC alleged that the Defendants co-own ATPCO, the "industry clearinghouse," that allows them to

instantaneously share pricing and fare information with each other. (II ER 243, ¶¶ 24, 25; 244, ¶¶ 26, 27; 235-241 ¶¶ 34-51). ATPCO's stated mission is to "protect or increase airline revenue." (II ER 244, ¶¶ 26). Nevertheless, the court held that, "the FAC here contains no factual allegations sufficient under Twombly to suggest that ATPCO coordinated collusive behavior." (App. 7). Plaintiffs also proposed to amend the complaint to add allegations that the Defendants had met on March 30, 2016, at 10:00 a.m., through an ATPCO online webinar, where they discussed, "Allow[ing] carriers to specify that when pricing One Way fares, if the journey meets the definition of an Open Jaw or Circle Trip, then it cannot be priced as an End-on-End solution." (II ER 67). The Ninth Circuit concluded, however, that the, "online meeting does nothing to make a conspiracy more plausible." (App. 9). Under *Text Messaging I's* analysis, facts pleading such a meeting would have weighed heavily in favor of plausibility.

The *Text Messaging I* court also explained that the complaint's allegation that, "in the face of steeply falling costs, the defendants increased their prices…" pled "anomalous behavior" because, "falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price." 630 F.3d at 628. By contrast, in the face of nearly identical allegations, the Ninth Circuit held that "conscious parallelism also explains the Airline Defendants' decision to change their rules in such a

way as to increase prices notwithstanding 'steeply falling costs.'"[8] (App. 5).

And finally, the *Text Messaging I* court, credited the complaint's allegations that, "defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third," explaining that the "change in the industry's pricing structure was so rapid…that it could not have been accomplished without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption." 630 F.3d at 628. Here, the Ninth Circuit held that the "simultaneity" of the rule change by Defendants "'does not reveal anything more than similar reaction to similar pressures within an interdependent market, or conscious parallelism.'" (App. 6). The Panel also made a factual finding at odds with the allegations that, "the airlines' decisions to eliminate sum-of-sector pricing are not so complex as to suggest an agreement." (App. 6).[9]

The *Text Messaging I* court concluded that the complaint's allegations, taken together, "provide[d] a

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[8] The Ninth Circuit's analysis also conflicts with this Court's decision in *American Tobacco Co. v. U.S.*, 328 U.S. 781, 804-805 (1946) (recognizing defendants increases in prices of cigarettes in the face of declining tobacco costs as "circumstantial evidence of the existence of a conspiracy.")

[9] This finding specifically contradicts admissions alleged in the FAC by ATPCO's Director of Customer Service, Joanna C. Bryant that, "'ATP[] considers Cat-10 to be one of the most complicated categories' of its 32 rule categories." (II ER 251, ¶¶ 57, 58).

sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery." 630 F.3d at 629. Here, the lower court affirmed the "district court's decision to grant the motion to dismiss." (Op. at 7). Had the Ninth Circuit undertaken the analysis adopted by the Seventh Circuit in *Text Messaging I,* it would have been *required* to reverse the lower court's decision in this case. Instead, the court read *Twombly* to encourage it to ignore the well-pled allegations which established the plausibility of Plaintiffs' claims.

C. Ninth Circuit § 1 Pleading Analysis Conflicts with the Second Circuit's Decision in *Anderson News, LLC, v. American Media, L.L.C.*

The serious issues with *Twombly* are also highlighted in the Second Circuit's analysis in *Anderson News, LLC v. American Media, L.L.C.*, 680 F.3d 162 (2d Cir. 2012). In *Anderson News*, the plaintiffs alleged that magazine publishers and distributors conspired to drive Anderson, a wholesaler, out of business in violation of § 1 of the Sherman Act. *Id*. at 167-168. The district court dismissed the complaint in that case and denied leave to file an amended complaint. *Id*. at 167.

In reversing the district court, the Second Circuit reasoned that, "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." *Anderson News*, 680 F.3d 162 at 189. The *Anderson* court explained that, "The view of the district court here that 'it is plausible that each of the

publisher Defendants unilaterally stopped shipping magazines to Anderson [the plaintiff] (citation omitted),' was thus not a proper basis for finding that Anderson had not pleaded a claim that was plausible." *Id*. at 190.

In this case, the Ninth Circuit, in relying on its earlier decision in *In re Musical Instruments*, 798 F.3d 1186 (9th Cir. 2015),[10] determined that conscious parallelism was the most plausible explanation for the facts alleged in Plaintiffs' complaint:

> Each of Plaintiffs' proposed plus factors is a restatement of the conscious parallelism endemic to oligopoly. Under In re Musical Instruments, allegations of a 'common motive" are insufficient to state a claim because "alleging 'common motive to conspire' simply restates that a market is interdependent." (citation omitted). The same analysis applies to allegations the airlines acted against self-interest. While a company acting against self-interest can sometimes be a plus-factor, in an interdependent oligopoly it may be in a company's interest to raise prices in the hope that its competitors play 'follow the leader.' In re Musical Instruments, 798 F.3d at 1195. In this way, conscious parallelism also explains the Airline Defendants'

[10] That case was decided by a panel split 2-1, with a very strong dissent written by Judge Pregerson. *Id*. at 1198-1201. Thus, applicable Ninth Circuit (*In re Musical Instruments*, 798 F.3d 1186) and Sixth Circuit authority (*In re Travel Agent Comm'n Antitr. Litig.*, 583 F.3d 896) on these issues hinge on narrowly decided 2-1 decisions with compelling dissents.

> decision to change their rules in such a way as to increase prices notwithstanding 'steeply falling costs.' (citations omitted).

(App. 5).

This is the same error identified by the Second Circuit in *Anderson News*. But unlike in *Anderson News*, the Ninth Circuit did not correct the district court's error –it adopted it. The Ninth Circuit determined that "conscious parallelism" was the more plausible explanation for Plaintiffs' allegations of "common motive," "actions against self-interest," and the "the Airline Defendants' decision to change their rules in such a way as to increase prices notwithstanding 'steeply falling costs' (citations omitted)." (App. 5). *In re Musical Instruments*, 798 F.3d 1186, and its progeny, including this case, create an implicit and erroneous presumption that all alleged coordinated conduct in an oligopolistic market is lawful. This presumption is in conflict with *Twombly*, because, as this Court acknowledged, allegations of coordinated conduct in an interdependent market get a complaint close to stating a claim. 550 U.S. at 546.

The Ninth Circuit has imposed a hurdle so high in oligopolistic markets that only written agreement or recorded evidence will withstand Rule 12 scrutiny. The district court's decision in this case is not in accord with *Twombly* and would never have survived the Second Circuit's *Anderson News* standards because "it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives." *Anderson News*, 680 F.3d at 190.

D. The Ninth Circuit's Decision Conflicts with the District of Columbia Court of Appeal's Decision in *Visa v. Osborn*

The Ninth Circuit's decision also conflicts with the United States Court of Appeals for the District of Columbia Circuit decision in *Osborn v. Visa*, 797 F.3d 1057 (D.C. Cir. 2015). In *Osborn,* users and operators of independent automated teller machines ("ATMs"), brought an action against Visa, Mastercard, and affiliated banks. *Id*. at 1060. The Osborn plaintiffs alleged that when someone uses an independent ATM, the cardholder pays a higher fee and the ATM operator earns a lower return because of Visa and Mastercard anti-steering rules. *Id*. The lower court held that the plaintiffs had failed to plead sufficient facts to establish the existence of concerted activity. *Id*. at 1066.

The DC Circuit held that even though anti-steering rules "were adopted by Visa and Mastercard as a single entity" that did not "preclude a finding of concerted action…The allegation here—that a group of retail banks fixed an element of access fee pricing through bankcard association rules – describe the sort of concerted action necessary to make out a Section 1 claim. (citations omitted)" *Osborn*, 797 F.3d at 1066-1067. In its analysis, the *Osborn* court noted that, "the member banks developed and adopted the Access Fee Rules when the banks controlled Visa and Mastercard." *Id.* Just as in *Osborn*, here, Plaintiffs alleged that the Defendants own and control a single entity, ATPCO, which publishes airfares and acts as the industry's clearinghouse. (II ER 235-236; 243, ¶¶ 24, 25). Plaintiffs also alleged that in March 2016, the three Airline Defendants changed ATPCO's CAT-10 fare rule

to prohibit travelers from combining one-way airfares for each leg of their multi-city itineraries in order to raise the cost for such trips. (II ER 251-252, ¶¶ 62-63). The *Osborn* court reasoned that, "the rules protected Visa and Mastercard from competition with lower-cost ATM networks, thereby permitting Visa and Mastercard to charge supra-competitive fees." *Id*. Similarly, Plaintiffs here have alleged that, the rule changes insulated the airlines from competition by Ultra-Low-Cost Carriers ("ULCC's") on one-way routes. (II ER 236).

The ultimate rule articulated by the court in *Osborn* is that, "a legally single entity violate[s] [Section] 1 when the entity [i]s controlled by a group of competitors and serve[s] in essence, as a vehicle for ongoing concerted activity." 797 F.3d 1066; *American Needle, Inc. v. National Football League*, 560 U.S. 183, 191(2010). Here, Plaintiffs met the D.C. Circuit's rule by alleging that ATPCO is controlled and owned by the Defendant Airlines and that they used ATPCO to implement a structural rule change for multi-city airfares that protected each of them from competition by ULCCs and extracted significantly higher prices from consumers.[11] On the other hand, the Ninth Circuit concluded that the "FAC here contains no factual allegations sufficient under Twombly to suggest that ATPCO coordinated collusive behavior." (App. 7). To reach that conclusion, the court completely ignored the Defendant's own words that they changed the CAT-10 fare rule "along with" other airlines. The Ninth Circuit

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[11] *See U.S. v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity.").

went so far as to conclude that the online meeting held to discuss the ATPCO CAT-10 rule changes "does nothing to make a conspiracy more plausible." (App. 8).

Had the Ninth Circuit conducted the analysis adopted in *Osborn*, it could have come to no other conclusion but to reverse the decision of the lower court.

The ability of private plaintiffs to perform their important role in enforcing the nation's antirust laws should not be dependent upon their choice of forum. As things now stand, *Twombly* has made the ability to enforce the antitrust laws dependent upon choice of venue and thereby rendering private rights of action more chimerical than practicable.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit hears more antitrust cases than many others, amplifying any erroneous interpretation of § 1 Sherman Act pleading standards. In light of the foregoing, Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari, clarify *Twombly's* meaning and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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