No. _____

In The
Supreme Court of the United States

AUDUBON IMPORTS, LLC d/b/a
Mercedes Benz of Baton Rouge, et al.,

Petitioners,

v.

BAYERISCHE MOTOREN WERKE
AKTIENGESELLSCHAFT, (BMW AG), 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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QUESTION PRESENTED

To determine whether plaintiffs have met their burden to plead a plausible claim under § 1 of the Sherman Act, may the district court weigh whether an inference of an unlawful conspiracy is more likely than an inference of lawful conduct?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioners here and appellants below are Audubon Imports, LLC d/b/a Mercedes Benz of Baton Rouge, Autohaus Acquisition, Inc., Estate Motors, Inc., Powders Automobiles, Inc., f/k/a Powders Volkswagen Audi, Inc., f/k/a Powders Volkswagen, Inc., Team Imports, LLC d/b/a Team Audi and Team VW, Tom Schmidt, Wyoming Valley Motors, Inc. d/b/a Wyoming Valley BMW, and Bronsberg & Hughes Pontiac, Inc., d/b/a Porsche Wyoming Valley, individually and behalf of all others similarly situated.

The respondents here and appellees below are Bayerische Motoren Werke Aktiengesellschaft, (BMW AG), BMW (US) Holding Corp., BMW of North America, LLC, Volkswagen Group of America, Inc., Audi of America, Inc., Audi Aktiengesellschaft (Audi AG), Audi of America, LLC, Dr. Ing. h.c. F. Porsche AG, Porsche Cars of North America, Inc. Daimler Aktiengesellschaft, (Daimler AG), Daimler North America Corporation, Mercedes-Benz U.S. International, Inc., Mercedez-Benz Vans, LLC, Mercedes-Benz USA, LLC, Volkswagen AG.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 Petitions State as follows:

Autohaus Acquisition, Inc., Estate Motors, Inc., Powders Automobiles, Inc., f/k/a Powders Volkswagen, Inc., f/k/a Powders Volkswagen Audi, Inc., Wyoming Valley Motors, Inc. d/b/a Wyoming Valley BMW, and Bronsberg & Hughes Pontiac, Inc. d/b/a Porsche Wyoming Valley are privately owned corporations. They have no parent corporations and no publicly held corporations own 10% or more of their stock.

RELATED CASES

- *In re: German Automotive Manufacturers Antitrust Litigation*, No. 3:17-md-02796, U.S. District Court for the Northern District of California. Judgment entered on October 23, 2020.
- *Audubon Imports, LLC, dba Mercedes Benz of Baton Rouge, et al. v. Bayerische Motoren Werke Aktiengesellschaft*, (BMW AG), et al., No. 20-17139, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on October 26, 2021.
- *Glen Reder, et al. v. Audi Aktiengesellschaft, (Audi AG), et al.*, No. 20-17278, U.S. Court of Appeals for the Ninth Circuit. Notice of dismissal filed August 30, 2021.

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The opinion of the court of appeals is reproduced in the appendix to this petition ("Pet. App.") at Pet. App. 1 and is unreported. The orders of the district court granting Defendants' motions to dismiss are reproduced at Pet. App. 7, Pet. App. 37, and Pet. App. 70. The decision at Pet. App. 7 is reported at 392 F. Supp. 3d 1059. The decision at Pet. App. 37 is unreported. The decision at Pet. App. 70 is reported at 497 F. Supp. 3d 745.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 26, 2021. Pet. App. 1. A timely petition for rehearing and petition for rehearing en banc was denied on January 25, 2022. Pet. App. 99. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides, in relevant part:

> 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

Circuit courts are deeply divided on how to interpret the Supreme Court's most-cited case. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), the Court held that a plaintiff's complaint must allege "only enough facts to state a claim to relief that is plausible on its face." To state a plausible claim under § 1 of the Sherman Act, the complaint must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. The Court noted that this standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.*

The *Twombly* Court also answered when parallel conduct could support an inference of an agreement. To support such an inference, parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557. Parallel conduct alone "gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility. . . ." *Id.*

Since *Twombly*, the courts of appeal have split on where to draw the line between conduct that can possibly (not enough), probably (more than enough), and plausibly (just right) support an inference of an agreement. The First, Second Fourth, and Sixth Circuits have held that district courts should not weigh

competing inferences in assessing whether a complaint alleges a plausible anticompetitive conspiracy. Courts in those circuits do not determine at the motion-to-dismiss stage whether a conspiracy or some other, lawful conduct best explains the defendants' actions. By contrast, the Third, Ninth, and Tenth Circuits have held the district court may dismiss a complaint because it believes lawful conduct more plausibly explains the defendants' ambiguous conduct.

While reasonable minds may differ as to which interpretation is correct, two things are certain: First, courts[1] and commentators[2] alike recognize that the

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[1] *See*, *e.g.*, *In re Disposable Contact Lens Antitrust*, 215 F. Supp. 3d 1272, 1290 (M.D. Fla. 2016) ("The Circuit Courts of Appeal are split on the question of whether competing inferences may be balanced at the motion to dismiss stage."); *Pfountz v. Navient Sols., LLC*, No. 4:17CV2753JCH, 2018 WL 534434, at *4 (E.D. Mo. Jan. 24, 2018) (rejecting out-of-circuit case law that allows district courts to weigh competing inferences in favor of the in-circuit decisions that do not).

[2] *See*, *e.g.*, Vivek Ghosal & D. Daniel Sokol, *The Rise and (Potential) Fall of U.S. Cartel Enforcement*, 2020 U. Ill. L. Rev. 471, 497 (2020) ("There are both strict and more lenient readings of *Twombly* across circuits with regard to how much additional evidence is necessary" to distinguish agreement and interdependence. (footnotes omitted)); Lisa Jose Fales & Paul Feinstein, *Make Up Your Mind Already: Circuit Splits Regarding the Role of Inferences at the Pleading Stage and Summary Judgment*, 34 Antitrust Magazine (Fall 2019) ("One specific issue that has arisen post-*Twombly*—and one on which several circuit courts disagree—is whether a court is permitted to weigh competing inferences in assessing the 'plausibility' of an alleged conspiracy under *Twombly*."); William H. Page, *Pleading, Discovery, and Proof of Sherman Act Agreements: Harmonizing Twombly and Matsushita*, 82 Antitrust L.J. 123, 138 (2018) ("Courts apply *Twombly* with a range of degrees of stringency, but, for clarity, I will group

circuit split exists. And second, the circuit split has resulted in irreconcilable case law that the Supreme Court must address.

This case offers an opportunity to do so. Petitioners, Plaintiffs below, are a putative class of automotive dealerships that purchase cars directly from Defendants for resale in the United States. And their Second Amended Complaint contains detailed factual allegations plausibly asserting claims that Germany's leading luxury automobile manufacturers—Volkswagen, Audi, Porsche, Daimler (Mercedes), and BMW (collectively, "Defendants")—conspired to (1) allocate the market for German Luxury Cars by limiting any one firm's ability to innovate and gain competitive advantage, (2) join the steel manufacturers' price-fixing conspiracy so that Defendants can pass on surcharges on to Plaintiffs, and (3) restrict the development of electric vehicles to preserve Defendants' investment in diesel technologies.

The factual allegations are supported by two findings by European competition authorities that

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them into only two: stringent and lenient."); Natalma "Tami" McKnew, *I Just Love A Good Debate! Twombly and Iqbal Five Years Later*, 33 Franchise L.J. 33, 47 (2013); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 334 n.187 (2013) (noting that *Twombly* has resulted in inconsistent outcomes in the courts of appeal); *id.* at 339-40 & nn.203-04 (comparing a district court opinion that applied a "more likely" standard with two cases that applied a "[f]ar more benign" standard that did not allow the district court to choose between two plausible inferences).

Defendants engaged in anticompetitive conspiracies, almost a billion Euros in fines for those violations, Defendants' admissions to the conduct, and groundbreaking work of German investigative reporters, who have seen the original documents and Volkswagen's leniency proffer to competition authorities. Taken together, Plaintiffs' allegations more plausibly allege conspiracies that injured American automobile dealerships.

And yet, time and time again, the courts below expanded its inquiry from plausible to whether Plaintiffs' allegations were "more" or "less" plausible than factual circumstances posited by the Court. This recasting of the plausibility standard renders it capricious and turns the complaint into a Rorschach test for a judges' favored narrative. Enough is enough.

I. Factual Background

Defendants secretly banded together to form a cartel that they called the "Circle of Five." 3-ER-311.[3] The Circle of Five suppressed competition among themselves while maintaining a façade of competition. *Id.* Their managers and engineers met hundreds of times in "working groups" covering diesel engines, gasoline engines, clutches, air suspension, seat systems, brake controls, and mechanical attachments. 3-ER-311-12. The working groups' guiding principle was to avoid an "arms race"—which meant that the Circle of Five

[3] Citations to "3-ER-___" refer to the page number of the Second Amended Complaint in Volume 3 of the record on appeal in No. 20-17139.

would not compete against each other to gain market share through technological innovation. 3-ER-312.

A. Defendants agreed to avoid a technological arms race.

As an example, Defendants agreed to develop and falsely promote their outdated diesel technology as "clean" and compliant with emissions regulations rather than compete to develop greener luxury cars (electric vehicles). 3-ER-312-29. Defendants developed a method to neutralize the nitrogen oxide produced by their diesel cars by injecting a fluid known as "AdBlue" into the engine. 3-ER-313-14, 322. But Defendants' solution presented commercially insurmountable problems—either install unwieldy and expensive tanks to hold AdBlue, or drivers would have to constantly refill their AdBlue tanks to keep emissions within legal limits. 3-ER-313-14, 322-23.

To hide those problems, Defendants held clandestine meetings in which they agreed not to engage in a tank-size "arms race." 3-ER-314-19. They agreed in those meetings to cap AdBlue dosing ratios and deceive consumers and authorities about the emissions from their supposed "clean" diesel luxury cars emitted in normal driving conditions. 3-ER-314-319, 321-22, 325-26. Although Defendants have not disclosed the documents that they provided to government regulators, the ones reported in the news paint a detailed picture of Defendants' collusion.

In one example, an internal Volkswagen memo of a secret meeting among Defendants states the Circle of Five wanted a limit on the amount of AdBlue dosing, meaning the amount of AdBlue used to clean diesel emissions. 3-ER-315. But, they each agreed to keep secret the "true motivation for this limitation"—avoiding an arms race—from environmental regulators in the United States. *Id.* (quotation marks omitted).

In another example, Audi in April 2007 circulated a memo among Defendants titled "Diesel USA-SCR System." 3-ER-316-17. The memo, written on BMW letterhead, stated it was "jointly developed by BMW, [Mercedes], and [Audi] to validate the cap for AdBlue dosing quantity." *Id.* (quotation marks omitted). The proposal distinguished between two "operation modes" in exhaust emissions: a default mode that failed emissions standards under real-world driving conditions and another mode active only during testing conditions that allowed their cars to pass emissions tests. 3-ER-310, 315-22, 325. The memo has a warning that "under no circumstances [should] it be shown to the authorities in this degree of detail!" 3-ER-317 (quotation marks omitted). Defendants also agreed upon pretextual reasons for the "online dosing mode" if spotted by U.S. authorities. *Id.*

An October 2007 internal document notes the "urgent need for cooperation" to implement their agreements. 3-ER-317-18 (quotation marks omitted). A December 2007 internal memo regarding the AdBlue dosing modes states "mission accomplished." 3-ER-317-18 (quotation marks omitted).

An internal Audi memo from January 2008 candidly states under the heading "AdBlue consumption," "My assessment: *We won't make it entirely without cheating*." 3-ER-318 (emphasis added) (quotation marks omitted). The memo reflected the consensus view of the Circle of Five's "OEM taskforce," a group of executives from each Defendant. *Id.* In one 2008 document, an Audi manager confirmed to Volkswagen's management that "this topic will not be mentioned in any form to the US authorities." *Id.* (quotation marks omitted).

Another document from 2008 states that executives at VW, Audi, Mercedes, BMW, and a supplier (Bosch) discussed the fact that AdBlue technology did not meet clean emissions standards but the attendees agreed "not to mention this issue in any form to the U.S. authorities EPA [Environmental Protection Agency] and CARB [California Air Resources Board] so as to not jeopardize the launch in the U.S." 3-ER-318-19 (quotation marks omitted). And when U.S. regulators demanded AdBlue tanks that would ensure a driving distance of 10,000 miles, Defendants agreed that tanks that big would be unmarketable and required a "coordinated scenario" for the future. 3-ER-321.

While this case was on appeal, the European Commission fined Defendants €875 million for conspiring to restrict technology. *See* Dkt. 39, 42.[4] The Commission released its decision after the Ninth Circuit had

[4] Citations to "Dkt. ___" refer to the docket numbers on appeal in No. 20-17139.

ruled on Plaintiffs' appeal. It found—and Defendants have now admitted in "clear and unequivocal terms"—that Defendants entered into a naked restraint on innovation:

> The agreements and/or concerted practices concluded by DAIMLER, VW and BMW in respect of their SCR-systems included the coordination of AdBlue tank sizes and refill ranges, as well as the exchange of assumed average AdBlue-consumption for their new diesel passenger car models with SCR-system in the relevant period. For this purpose, they had regular contact and exchanged competitively sensitive information on current and future strategies.

Commission Decision of 8.7.2021, No. AT.40178 (published Nov. 12, 2021), https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf. The decision also found that Defendants' "agreed on AdBlue refill ranges of approximately 10,000 km to ensure that there would be no competing offers with significantly longer refill ranges." *Id.* ¶ 127. And it repeatedly emphasizes that Defendants' agreement "by its very nature" restricted innovation, limited consumer choice, and was not ancillary to achieving any alleged competitive benefits. *Id.* ¶¶ 7, 125, 139, 140, 244 (agreement "by its very nature" anticompetitive); *id.* ¶¶ 7, 90, 125, 139, 160 (agreement limited consumer choice); *id.* ¶¶ 127, 133, 136, 175 (agreement not ancillary to competitive benefits).

B. Defendants agreed with steel manufacturers to fix steel prices.

Defendants also conspired with steel manufacturers to raise prices for the steel that was used to make essential components in the Class Vehicles. 3-ER-330-37. This price-fixing conspiracy inflated the prices that Plaintiffs paid for the Class Vehicles. 3-ER-337.

For decades, a 1951 European treaty allowed steel manufacturers to coordinate with respect to steel surcharges and pass those surcharges to customers like Defendants in this case. 3-ER-330. The treaty expired in 2002. 3-ER-331. Without the treaty's safe harbor, the steel manufacturers had to compete against each other for sales, and their profits declined significantly. *Id.* Customers, like Defendants, used the competitive process to negotiate lower steel prices. 3-ER-332.

Faced with falling profits, the steel manufacturers renewed their (now unlawful) price-fixing agreements. 3-ER-332-33. Steel manufacturers agreed that they would implement surcharges in late-2003 to pass on every cost increase to their customers. *Id.*

And Defendants in 2004 agreed to accept those higher prices. 3-ER-333-34. Defendants recognized that they could accept higher prices so long as they all agreed to accept the same prices. 3-ER-344. They met with the steel producers twice a year at trade association meetings "to implement and enforce" the agreement. 3-ER-537-38. At these meetings, Defendants also "assured and encouraged each other to continue to adhere" to the agreement. 3-ER-538.

The German competition authority, the Bundeskartellamt, found these agreements illegal. 3-ER-333. It fined the steel manufacturers €205 million for conspiring to fix long-steel prices—the type of steel that is used in the Plaintiffs' vehicles. *Id.* The Bundeskartellamt also fined Defendants €100 million for joining that conspiracy, noting that Defendants' agreement "eliminated" competition because "key components of the purchase price . . . were no longer negotiated individually." 3-ER-333, 538. Defendants cooperated with the investigation and admitted to participating in the conspiracy. *Id.*

II. The Proceedings Below

Plaintiffs allege that Defendants violated § 1 of the Sherman Act in three ways. First, plaintiffs allege that Defendants agreed to restrict output by restricting the development of diesel emissions systems. 3-ER-309-330, 357-58, 368-70. Second, Plaintiffs allege that Defendants agreed to fix prices when they agreed to join the steel manufacturers' price-fixing conspiracy. 3-ER-330-37, 370-71.

And third, Plaintiffs allege that these first two conspiracies reveal a broader agreement to allocate the market by foreclosing competitive avenues. 3-ER-366-68. By agreeing that they would not compete on the quality, development, or introduction of new technology, Defendants prevented each other from differentiating their vehicles enough to upset their market share. *Id.* Similarly, Defendants coordinated the release of new models of the class vehicles and

model refreshes so that no manufacturer would release a "new" or "refreshed" model in a way that would affect the status quo. *Id.* Likewise, Defendants eliminated competition for the lowest steel prices by joining the steel manufacturers' price-fixing cartel. 3-ER-330-37, 370-71. So long as they each paid the same amount, Defendants agreed to pay illegal surcharges that the steel manufacturers tacked on. *Id.* By agreeing to pay the same price for steel, rather than negotiate for lower prices, Defendants removed another mechanism through which they could have differentiated themselves on price. *Id.*

A. The district court's opinions

Both direct purchasers and indirect purchasers brought suits against the Defendants for the injuries they suffered because of Defendants' anticompetitive conduct. On October 5, 2017, the United States Judicial Panel on Multidistrict Litigation centralized the litigation in the Northern District of California. On March 15, 2018, Plaintiffs filed a Consolidated Complaint. Defendants moved to dismiss, and on June 17, 2019, the district court dismissed the complaint with leave to amend. Pet. App. 7.

Plaintiffs then filed their First Amended Complaint on August 15, 2019. 5-ER-866-958. Defendants again moved to dismiss, and on March 31, 2020, the district court granted their motion. Pet. App. 37. In so doing, the district court rejected Plaintiffs' allegation that Defendants entered into a market-allocation

agreement. *Id.* at 59, 63-64. While likewise rejecting Plaintiffs' steel conspiracy allegations, the district court nevertheless granted Plaintiffs leave to amend the steel conspiracy to address the court's concerns. *Id.* at 65-68.

1. The district court found that Plaintiffs pled an agreement to restrict AdBlue tank sizes, dosing rates, and particulate filters. *Id.* at 25, 46-48, 57. It noted that Plaintiffs' complaint "contain[ed] detailed factual allegations describing Defendants' 'coordination' of AdBlue dosage rate and tank size, including the content of Defendants' agreements (including direct quotes from allegedly criminal negotiations), the positions of the conspirators within Defendants' corporate hierarchies, and where and when the agreements were made." *Id.* at 45 (citations and quotation marks omitted). For those agreements at least, Plaintiffs had alleged "who, did what, to whom (or with whom), where, and when. . . ." *Id.* at 57-58 (quotation marks omitted).

Nonetheless, the court held that the agreements did not support a naked restraint on innovation because "agreements on AdBlue tank size and dosing rate alone do not plausibly support the existence of a broader conspiracy covering Defendants' entire diesel emissions control system." *Id.* at 48. The court further held that the agreements were not unreasonable restraints of trade because they "may have had procompetitive effects" and the Defendants "may have agreed to a standard that they believed would ultimately benefit all consumers." *Id.* at 51.

2. The district court dismissed the steel conspiracy because Plaintiffs had not pled a plausible antitrust injury. Despite finding that Plaintiffs had "plausibly alleged that steel manufacturers agreed with one another to fix steel prices" and that "Defendants agreed to accept standard surcharges rather than individually negotiate with steel manufacturers," the court accepted Defendants' contention that their steel conspiracy probably lowered prices. *Id.* at 94-95. The court held that "an agreement among competitors to negotiate collectively with suppliers is not price-fixing, even if those suppliers (here, the steel manufacturers) are engaged in price-fixing. . . . [S]uch an approach *could plausibly* have led to lower steel prices. . . ." *Id.* at 96 (emphasis added); *see also id.* at 96 n.6 ("[A] lack of individual negotiation among Defendants with steel manufacturers could have led to (but did not necessarily lead to) increased steel prices."); *id.* at 68 (finding that Defendants' conduct "even if unlawful, *most plausibly* led to lower prices" (emphasis added)).

The court further held that Plaintiffs had not alleged that Defendants agreed to pass increased steel prices. *Id.* at 97-98. The court reasoned that "there are many economically rational reasons why Defendants may have agreed to accept the steel surcharges, including ensuring a stable supply of steel and avoiding frequent renegotiating with the steel manufacturers." *Id.* at 97.

3. Finally, the court held that the agreements did not plausibly support a market-allocation agreement. The court reasoned it was "implausible to infer that

standardizing a few niche technical features would enable Defendants to keep their respective market shares stable. . . ." *Id.* at 58. The court also believed "it [was] unlikely that adopting similar formulas for the price of a single raw material (albeit an important one) would be enough to keep shares of the American market in an agreeable equilibrium." *Id.* at 58-59.

B. The Panel's opinion

The Panel's six-page opinion largely accepted the district court's decision without analysis. *First*, the Panel held that the district court properly dismissed the market-allocation conspiracy. Pet. App. 2-3. The Panel found that the agreement was "devoid of factual development," too narrow to establish a "conspiracy to restrict innovation on all, or most, aspects of vehicle development," or "could just as easily suggest rational, legal business behavior by the defendants as . . . an illegal conspiracy." *Id.* at 2-3 (quotation marks omitted).

Second, the Panel held that the district court properly dismissed Plaintiffs' claim that they paid inflated vehicle prices due to Defendants' steel price-fixing conspiracy. *Id.* at 3. The Panel found that Plaintiffs "did not plausibly allege a credible antitrust injury" because Plaintiffs "have not alleged any facts suggesting that the price of Defendants' vehicles increased while the alleged steel conspiracy was in effect or decreased after it ended." *Id.* at 3.

Third, the Panel held that the district court properly dismissed Plaintiffs' claim that Defendants conspired to adopt the same clean diesel technology and forego developing electric vehicles. *Id.* at 4. The Panel found that Plaintiffs contradicted their claim because they "acknowledge[d] that three Defendants launched plug-in/hybrid vehicles while the alleged conspiracy was in effect." *Id.* at 4 (quotation marks omitted). The Panel also found a "benign explanation for Defendants' conduct: Defendants had already invested heavily in diesel engines when the demand for low-emission vehicles began to rise." *Id.* at 4 (quotation marks omitted).

REASON FOR GRANTING THE PETITION

Section 1 of the Sherman Act "does not prohibit all unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy." *Twombly*, 550 U.S. at 553 (brackets and citation omitted). Plaintiffs asserting a § 1 claim must therefore plead "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556.

In *Twombly*, this Court determined the amount of factual allegations necessary to survive a motion to dismiss when a plaintiff's § 1 complaint rests entirely on parallel conduct. *Id.* at 564. The Court emphasized that "[w]ithout more, parallel conduct does not suggest conspiracy." *Id.* at 556-557. Instead, the "allegations of parallel conduct . . . must be placed in a context that

raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557.

The *Twombly* Court stressed that the plausibility standard "does not impose a probability requirement at the pleading stage." *Id.* at 556. It just "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* Indeed, "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.* (quotation marks and citation omitted).

Despite the Court's best efforts at clarifying the pleading standard for antitrust conspiracies, the courts of appeal are deeply divided on whether they can weigh competing inferences at the motion-to-dismiss stage.

I. The First, Second, Fourth, and Sixth Circuits follow a lenient *Twombly* interpretation.

The First, Second, Fourth, and Sixth Circuits interpret *Twombly* leniently and forbid district courts from weighing competing inferences to determine plausibility.

First Circuit. In *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 43 (1st Cir. 2013), the First Circuit recognized that the line drawn in *Twombly*

between merely parallel conduct and a plausible agreement has "elicited considerable confusion among the lower courts. . . ." In the First Circuit's view, citations to summary-judgment and post-trial cases have led to a "slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation[.]" *Id.* at 44 (quotation marks omitted). But pleading requirements should be "starkly distinguished from what would be required at later litigation stages[.]" *Id.* at 46 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954)). While courts assessing plausibility during summary judgment have access to a developed record, courts assessing a complaint "ha[ve] no substantiated basis in the record to credit a defendant's counterallegations." *Id.* at 45. And so, the court found it "imperative [to] correct this confusion and clarify the proper pleading requirements for sufficiently alleging agreement in § 1 complaints." *Id.* at 44.

The First Circuit found "that allegations contextualizing agreement need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action at the motion to dismiss stage." *Id.* at 47. Courts should not "decide, at the pleading stage, which inferences are more plausible than other competing inferences, since those questions are properly left to the factfinder." *Id.* at 45. Rather, plaintiffs must allege an agreement's "general contours" and support those allegations

"with a context that tends to make said agreement plausible." *Id.* at 46.

The First Circuit found that the lower court had improperly applied a heightened pleading standard in reviewing the plaintiff's complaint. *Id.* at 50. The plaintiff, Evergreen, alleged that polystyrene manufacturers and a trade association conspired to organize a group boycott of Evergreen's recycling service. *Id.* at 40. The district court in that case dismissed the plaintiff's Section 1 claim because "legitimate business reasons . . . can *as easily* explain defendants' refusal to deal with Evergreen or to compete with one another for market share *as can* any insinuation of a conspiratorial agreement[.]" *Id.* at 42 (quoting *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 865 F. Supp. 2d 133, 140 (D. Mass. 2012), *vacated and remanded*, 720 F.3d 33) (emphasis in original).

The First Circuit reversed the district court. *Id.* at 50-51. The court reasoned that the district court had "improperly occupied a factfinder role when it both chose among plausible alternative theories interpreting defendants' conduct and adopted as true allegations made by defendants in weighing the plausibility of theories put forward by the parties." *Id.* at 50.

Second Circuit. In *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 189 (2d Cir. 2012), the Second Circuit reversed a district court that applied the wrong plausibility standard. The district court had dismissed the plaintiff's complaint because "the possibility that each of the defendants had acted 'separately'

in deciding to stop supplying magazines to Anderson was '[t]he *most* plausible scenario[.]'" *Id.* at 190 (quoting *Anderson News, L.L.C. v. Am. Media, Inc.*, 732 F. Supp. 2d 389, 407 (S.D.N.Y. 2010), *vacated and remanded*, 680 F.3d 162). But "an innocuous interpretation of the defendants' conduct may be plausible . . . does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible." *Id.* The court noted that it cannot "dismiss the complaint on the basis of the court's choice among plausible alternatives." *Id.* That choice should "be a task for the fact-finder." *Id.* Once the plaintiff alleged a plausible conspiracy, the plaintiff had met its burden at the pleading stage. *See id.* The court reversed the district court's dismissal and allowed the plaintiff's case to proceed. *Id.*

Fourth Circuit. The Fourth Circuit also cautioned against "import[ing] the summary-judgment standard into the motion-to-dismiss stage." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015) (quoting *Twombly*, 550 U.S. at 554). At summary judgment, plaintiffs must produce evidence that "'tends to exclude the possibility of independent action.'" *Id.* (quoting *Twombly*, 550 U.S. at 554; *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010)). The pleading stage, however, concerns an "antecedent question": Does the complaint "'plausibly suggest[]'" an anticompetitive conspiracy? *Id.* at 425 (quoting *Twombly*, 550 U.S. at 557). That threshold "remains considerably less than the tends to rule out the possibility standard

for summary judgment. . . ." *Id.* (quoting *Starr*, 592 F.3d at 325) (quotation marks omitted).

To plausibly suggest an anticompetitive conspiracy at the pleading stage, plaintiffs must plead something "more" than just parallel conduct. *Id.* at 424 (quoting *Twombly*, 550 U.S. at 557). Courts assessing whether the plaintiff has met that burden need not search for "factual suppositions that might 'perhaps' explain the relevant parallel conduct." *Id.* at 430. Instead, plaintiffs must allege "further circumstance[s]" that point towards a meeting of the minds. *Id.* at 424 (quoting *Twombly*, 550 U.S. at 557). The court found that "weighing the competing inferences that can be drawn from the complaint" conflates plausibility with probability. *Id.* at 425. Accordingly, the court instructed against "determine[ing] 'whether a lawful alternative explanation appear[s] more likely' from the facts of the complaint" at the pleading stage. *Id.* at 425 (quoting *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015)).

Sixth Circuit. In *Erie County, Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 869 (6th Cir. 2012), the Sixth Circuit held, "to state a Section One claim, a plaintiff need not allege a fact pattern that 'tends to exclude the possibility' of lawful, independent conduct." That standard "traces its provenance to . . . decisions dealing with summary judgment and the standard of proof required to submit an issue to the jury." *Id.*

The Sixth Circuit declined to extend that standard to the motion-to-dismiss stage. *Id.* To hold otherwise, the court reasoned, would be unfair to plaintiffs:

> If a plaintiff were required to allege facts excluding the possibility of lawful conduct, almost no private plaintiff's complaint could state a Section One claim. Rational people, after all, do not conspire in the open, and a plaintiff is very unlikely to have factual information that would exclude the possibility of non-conspiratorial explanations *before* discovery.

Id. at 869 (emphasis in original). Accordingly, the court held that "the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct." *Id.* at 868; *see also Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage. [T]he plausibility of [the defendants'] reason for the refusals to sell carpet does not render all other reasons implausible.").

II. The Third and Eleventh Circuits follow strict *Twombly* interpretation.

The opinions below accord with the strict *Twombly* interpretation held by the Third and Eleventh Circuits, which allows district courts to weigh competing inferences when assessing whether the plaintiff has pled a plausible § 1 claim.

Third Circuit. In *Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 322 (3d Cir. 2010) (internal citation omitted), the Third Circuit noted that *Twombly* did not expressly address "the relationship between th[e] summary judgment (and directed judgment) jurisprudence governing the kind of evidentiary facts necessary to support a finding of conspiracy, on the one hand, and the 'antecedent' issue of a § 1 plaintiffs pleading burden, on the other." The court, nonetheless, concluded that "*Twombly* aligns the pleading standard with the summary judgment standard . . . : Plaintiffs relying on circumstantial evidence of an agreement must make a showing at both stages . . . of 'something more than merely parallel behavior,' something 'plausibly suggest[ive of (not merely consistent with) agreement.'" *Id.* at 322 (quoting *Twombly*, 550 U.S. at 560) (brackets in original).

While *Twombly* "does not require . . . that the plaintiff plead facts supporting an inference of defendant's liability more compelling than the opposing inference," it does "make clear that . . . it is unreasonable to infer an agreement from allegations of parallel conduct that are equally consistent with independently motivated behavior." *Id.* at 341 n.42 (citing *Twombly*, 550 U.S. at 557, 60). In other words, the alleged conduct must be more consistent with a conspiratorial agreement than interdependence. *Cf. Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011) (affirming the district court's dismissal of a complaint that alleged "no factual detail in the Complaint that makes it any more likely that the Defendants' parallel conduct was

the result of an unlawful agreement than, instead, the result of independent rational, and wholly lawful decisions by each Defendant. . . .").

Eleventh Circuit. In *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d 1327, 1343 (11th Cir. 2010), the Eleventh Circuit held that *Twombly* requires that district courts compare competing inferences drawn from the complaint. The plaintiffs in that case alleged that a mattress manufacturer and its distributors conspired to set minimum prices. *Id.* at 1331-32. The Eleventh Circuit held that district courts must "juxtapose[ ] the inference of independent economic self-interest" against "the inference of conspiracy." *Id.* at 1343 (citing *Matsushita*, 475 U.S. at 596-97). As a result, the court held the plaintiff "had the burden to present allegations showing why it is *more* plausible that [the manufacturer] and its distributors . . . would enter into an illegal price-fixing agreement . . . to reach the same result realized by purely rational profit-maximizing behavior." *Id.* at 1342 (emphasis added). The Eleventh Circuit held that the plaintiffs pled no facts suggesting that conspiracy was a "more plausible" inference than lawful conduct and dismissed the complaint. *Id.* at 1342-43.

III. The Court should grant certiorari to resolve the circuit split.

This case sits at the heart of the circuit split. For each agreement that Plaintiffs alleged, the courts below weighed whether inferences derived from

hypothetical, innocent conduct could explain Defendants' conduct "more plausibly than" or "just as easily as" an illegal agreement.

For example, Plaintiffs alleged that Defendants coordinated product refreshes. The Complaint notes how BMW, Porsche, Mercedes, and Audi released updated versions of their SUVs in 2009 and their "mid-size luxury" sedans in 2009-10 and 2017-18. 3-ER-351-53. By releasing their model updates at the same time, Defendants avoided a shift in market share that would occur if one manufacturer had differentiated itself by releasing an updated model on an uncoordinated schedule. *Id*. The "alignment cannot be explained away by a simple 'tit-for-tat' strategy in which each competitor reacts and updates products in short order to follow the technological leader, as program development and planning is a multi-year, burdensome process undertaken by OEMs." *Id.*

The district court found that Plaintiffs' allegations of parallel conduct did not support plaintiffs' no-arms-race agreement because it "could just as easily (or even more plausibly) reflect legitimate conscious parallelism as opposed to collusion, [so] it does not support their 'no arms race' theory." Pet. App. 60-61. The district court reasoned, "the fact that they all released new products at similar times tends to suggest that they were competing with each other, rather than the opposite." *Id.* at 59. Likewise, the Panel found that the allegations "could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy." *Id.* at 61.

The courts below also dismissed Defendants' failure to develop electric vehicles because it could be explained by "a benign explanation" for Defendants' refusal to develop electric vehicles: "Defendants had already invested heavily in diesel engines. . . ." *Id.* at 45 (citing *Name.Space, Inc. v. Internet Corp. for Assigned Names and Nos.*, 795 F.3d 1124, 1130 (9th Cir. 2015) (quotation marks omitted). That suggests it is just as, if not more plausible that Defendants "arrive[d] at identical decisions independently, [because] they [were] cognizant of—and reacting to—similar market pressures." *Id.* at 64 (brackets in original) (quoting *In re Musical Instruments*, 798 F.3d 1186, 1193 (9th Cir. 2015)) (quotation marks omitted).

But this standard focuses on the wrong issue. The issue at the pleading stage is not whether interdependence or benign can explain Defendants' conduct equally or better than an illegal agreement. The Supreme Court rejected that approach in *Twombly* when it found that Rule 8(a) "*does not impose a probability requirement at the pleading stage*[.]" *Twombly*, 550 U.S. at 556 (emphasis added).

Rather, the issue is whether Plaintiffs have alleged sufficient context to "raise[] a suggestion" that the parallel conduct was the product of a conspiracy. *Id.* at 577. As the First, Second, Fourth, and Sixth Circuits have recognized, *Twombly* contemplates that there will be cases in which factual allegations beyond simple parallel conduct give rise to *multiple* plausible explanations, some consistent with illegal conduct, others with innocent activity. The Court instructed

that trial courts are not, however, to decide which plausible interpretation of the facts is the *most* plausible. *Id.* at 556 ("[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.").

Here, that context suggests that the parallel conduct was the product of a preceding agreement. The allegations that Defendants' parallel product refreshes arose out of an agreement to avoid an innovation arms race must be considered with, for example, Audi's May 2014 email warning that the other Defendants should not increase AdBlue tank size or dosing rates on its own because that would "expand into an arms race with regard to tank sizes, which we should continue to avoid at all costs." 3-ER-310 n.19, 318 n.48. So, too, must those allegations be considered in light of Defendants' October 2007 meeting where they discussed "an urgent need for cooperation," identified the need to agree on "uniform escalation logic" for increasing AdBlue tank size, and assigned their respective "drive managers" and "chassis managers" to carry out that agreement. 3-ER-317-18 & n.48 (quotation marks omitted).

The same is true "benign explanation" for Defendants' refusal to develop electric vehicles: "Defendants had already invested heavily in diesel engines. . . ." Pet. App. at 4-5 (citing *Name.Space, Inc.*, 795 F.3d at 1130) (quotation marks omitted). Context suggests that their "heavy investment" was itself the product of a conspiracy. Defendants agreed to lie to pass

emissions tests, rather than develop an electric car. 3-ER-315-26. Indeed, the complaint describes a January 2008 memo candidly stating Defendants' consensus view about their vehicles' ability to meet environmental regulations: "We won't make it entirely without cheating." 3-ER-318 (quotation marks omitted). Another document describing a 2008 meeting of Defendants' executives admits that AdBlue technology could not meet emissions standards, so they agreed "not to mention this issue in any form to the U.S. authorities EPA and CARB so as to not jeopardize the launch in the U.S." 3-ER-318-19 (quotation marks omitted).

What's more, through 2017, none of the Defendants publicly sought to sell all-electric vehicles. 3-ER-324-25. After the conspiracy ended, they suddenly changed strategies, abandoned diesel development, and invested heavily in all-electric vehicle development. 3-ER-326. Defendants also shut down their alliance to promote "clean" diesel and the EUGT research group that they exclusively controlled. 3-ER-327.

While the opinions below follow the circuits that permit weighing competing inferences at the pleading stage in some respects, they—and particularly the district court's opinion—take that standard further than any court has before. The district court found that Plaintiffs had pled multiple agreements and *still* resolve inferences in Defendants' favor. Specifically, the court found that Plaintiffs had pled (1) an agreement among steel manufacturers to fix steel prices, (2) an agreement among Defendants to accept the steel manufacturers' unilaterally set steel prices rather than

negotiate collectively, and (3) an agreement to develop diesel cars using AdBlue tanks, an agreement to cap AdBlue tank sizes and dosing rates, and an agreement on particulate filters. The court's analysis should have stopped there. Even though the Defendants may have alleged plausible benefits for those agreements, the district court cannot "dismiss the complaint on the basis of [its] choice among plausible alternatives." *Anderson News*, 680 F.3d at 190.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeal reversed.

Respectfully submitted,

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