No. 22-573

IN THE

Supreme Court of the United States

BRFHH SHREVEPORT, L.L.C., DOING BUSINESS AS UNIVERSITY HEALTH SHREVEPORT,

Petitioner,

v.

WILLIS-KNIGHTON MEDICAL CENTER, DOING BUSINESS AS WILLIS-KNIGHTON HEALTH SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I. Introduction

Willis-Knighton's Brief in Opposition to the Petition for Certiorari of BRFHH Shreveport, L.L.C., d/b/a University Health Shreveport ("University Health" or "UHS"), confirms that the Fifth Circuit's decision cannot be defended, or its impact minimized, without violating multiple principles central to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as fundamental antitrust principles.

II. Willis-Knighton's Arguments Illustrate Why the Fifth Circuit's Section 1 Decision Deserves Review

Willis-Knighton attempts to defend the Fifth Circuit's ruling on UHS' Section 1 claims by casting it as a narrow, conventional assessment of UHS' allegations. But this ignores the Circuit Court's explicit rejection of UHS' numerous well-pleaded factual allegations, a role that is reserved for the trier of fact. Willis-Knighton is able to defend the decision only by claiming that UHS' factual allegations are conclusory. But this also violates the basic principles enunciated in *Twombly*.

Willis-Knighton's claim that the Fifth Circuit did not weigh the evidence is directly contrary to the court's statement that the alternate explanation the court posited was "the end" of the claim, rejecting the extensive contrary evidence as "wishful thinking" and "made-to-order." (*See* Pet. Appx. At 14a-15a.)[1] The Complaint

1. The fact that this "alternative explanation" was based on selective evidence outside of the Complaint is especially egregious, but not central to the case for review here.

specifically alleged that until the appointment of Dr. Ghali in the spring of 2016, which was after the July 2015 litigation between LSU and UHS which the Fifth Circuit believed explained LSU's refusal to cooperate with UHS, (*id.* at 13a-14a), LSU and UHS had "weekly meetings", (D. Ct. Dkt. 1, Complaint at ¶ 40), "enjoyed free and open communications", (*id.*), and "had successfully cooperated in recruiting many physicians . . . including a pediatric neurologist, a pediatric allergist, a pediatric pulmonologist and a radiation oncologist," (*id.* at ¶ 111). (*See also id.* at ¶ 41.) Dr. Ghali's newly hired subordinate then "directed that all communications from UHS go through him", "[t]he regular weekly meetings . . . were cancelled" and "LSU Health Shreveport refused to work with UHS to recruit additional physicians . . . unless UHS agreed to pay exorbitant . . . rates for these physicians . . . ." (*Id.* at ¶¶ 41, 111.) The Fifth Circuit did not attempt to reconcile this evidence with its proposed "alternative explanation." It simply rejected it.

There is no doubt that the Fifth Circuit did *not* accept UHS' well-pleaded factual allegations, only to conclude that they did not plausibly indicate the presence of the conspiracy. The Fifth Circuit's comments that these allegations were "wishful thinking" and "made-to-order" reflects a disbelief in their veracity and credibility. That is exactly what this Court has held in *Twombly* should not be done at the motion to dismiss phase. *See Twombly*, 550 U.S. at 555 ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."). The Fifth Circuit's rejection of UHS' evidence was also in stark contrast to this Court's admonition in *Twombly*, that a case should proceed "even if it strikes a savvy judge that actual proof of those facts is improbable." *Id.* at 556.

Nor did the Fifth Circuit even attempt to square its alternative explanation with the detailed and specific factual allegations concerning continuing competition between LSU and UHS at Conway Hospital. Conway was also a subject of the prior lawsuit, (Pet. Appx. 3a (citing Petition for Declaratory Judgment and Injunction, *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, No. 5:15-cv-2057 (W.D. La. Sept. 28, 2015), ECF No. 77-1 (copy of the July 10, 2015 breach notice, attached as part of a docket entry in the first antitrust suit)), but (because Willis-Knighton was not present in the market) substantial and effective cooperation occurred:

> At Conway, unlike the Shreveport hospital, the LSU administration worked closely with UHS in improving productivity, on recruitment and in other areas. ... [T]he productivity improvements at Conway have earned UHS millions of dollars annually in additional incremental profit. . . . [R]evenues from fiscal 2015-2017 increased by almost 50%. . . . If UHS had grown at the same rate as Conway during this period, it would have received at least $30 million in additional revenues, and therefore more than $10 million in additional incremental profit, as well as significant additional market share.

(D. Ct. Dkt. 1, Complaint at ¶¶ 45, 47, 110, 114.)

The Fifth Circuit also did not attempt to explain how the ten specific factual allegations regarding LSU's actions against interest make sense as rational unilateral conduct, notwithstanding any prior disputes, when those actions cost LSU millions of dollars. (D. Ct. Dkt. 1,

Complaint at ¶¶ 85-136.) The Fifth Circuit similarly did not attempt to reconcile with its theory the allegations that according to LSU executive Victor Yick, Willis-Knighton "conceptually agreed" to the payment of funds to LSU after LSU ceased cooperating with UHS, and that LSU advocated a "partnership" with Willis-Knighton, rather than to "collaborate" with UHS, in order to obtain Willis-Knighton's "mother lode" of funds. (*Id.* at ¶¶ 73, 79-80.) Finally, the Fifth Circuit did not address the reference in the same email to LSU having entered into contracts with other hospitals "for cover." (*Id.* at ¶ 81.) Instead, the Fifth Circuit simply chose to disbelieve these factual allegations.

The Circuit Court necessarily concluded that no reasonable trier of fact could believe these allegations. But without assessing all the evidence, including the credibility of testimony, after discovery, no reasonable trier of fact could decide this issue. The Fifth Circuit usurped that factual role based only on a preliminary sketch of what the evidence might show at trial.

The Fifth Circuit's analysis also directly contradicts this Court's conclusion in *Twombly* that dismissal is appropriate only where there is an "*obvious* alternative explanation" for the behavior, 550 U.S. at 567 (emphasis added), meaning that "nothing in the complaint intimates" that the behavior "was anything more than the natural unilateral reaction" of each party. *Id.* at 566. Here, as described above, the Complaint was replete with facts contrary to that conclusion.

Willis-Knighton asserts that the Fifth Circuit was justified because there was no direct evidence of an actual threat by Willis-Knighton. (Opposition at 16-17.) But that

is an effort to rewrite the law of conspiracy, which does not require such direct evidence even at trial. *See Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 612 (1914) ("It is elementary, however, that [antitrust] conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done."). Nor is this assertion factually correct. (*See* Petition at 8 (explanation of why "cooperation with Willis-Knighton entailed a refusal to work with UHS.").)

Contrary to the Opposition, the Complaint included significant "'direct evidence' that . . . the contributions [and] LSU's . . . noncooperative acts were tied to BRF's claimed conspiracy." (Opposition at 16; *see* reference to Yick statements, *supra*, and Petition at 9-10.) The Fifth Circuit also effectively rejected the alleged admission by LSU Health's Chancellor that it refused cooperation with UHS in one instance specifically because that strategy would upset Willis-Knighton's CEO. (*Id*. at ¶¶ 85-93.)

Willis-Knighton claims that the Fifth Circuit properly rejected UHS' allegations as "conclusory." But this is a dramatic change in the *Twombly* standard. These allegations are nothing like the "conclusory allegation of agreement" rejected in *Twombly*, 550 U.S. at 556. This Court has made clear that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." 550 U.S. at 551. The allegations here are far "more than labels and conclusions" *Id*. If the facts alleged here were deemed to be conclusory, then virtually every well-pleaded complaint would be so condemned.

Willis-Knighton argues that the ten examples of LSU's rejection of cooperation that would have cut its

costs or increased its revenues were not against its self-interest because it "could just as easily have unilaterally concluded that non-cooperation was the best way to secure further financial support from Willis-Knighton." (Opposition at 16-17.) But if Willis-Knighton demanded acquiescence by LSU in order to obtain financial support, and LSU therefore agreed to a "partnership" with Willis-Knighton "rather than to collaborate with BRF" in order to obtain Willis-Knighton's "mother lode" of funds, (D. Ct. Dkt. 1, Complaint at ¶¶ 79-80), this plausibly suggests agreement, i.e. "a conscious commitment to a common scheme." *Monsanto Co. v. Spray-Rite Serv Corp.*, 465 U.S. 752, 764 (1984). To call this unilateral is to rewrite the law of conspiracy.

Willis-Knighton's effort to reconcile this case with the decisions in other circuits ignores these factual allegations. For example, as in *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33 (1st Cir. 2013), there were numerous specific facts alleged in this case concerning when agreement occurred. (D. Ct. Dkt. 1, Complaint ¶¶ 26, 39-41, 58, 73-81, 86-96, 111, 115.) There are also significant allegations that are "difficult to explain outside the context of a conspiracy," e.g. the cover-up, and linking a Willis-Knighton partnership to not collaborating with UHS. (*Id*. at ¶¶ 80-81, 85-136.)

Similarly, as in *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 187 (2d Cir. 2012), LSU's statements "conceptually agreeing," and reference to a "partnership" "may plausibly be interpreted as evincing . . . agreement." As in *SD3, LLC v. Black & Decker*, 801 F.3d 412, 432 (4th Cir. 2015), and in other cases cited in the Petition, this case specifically involved evidence that

defendants "attempted to hide their actions." In *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011), the Sixth Circuit, unlike the Fifth Circuit here, found that the district court's holding that there existed an "eminently plausible reason for the refusal to deal," did not provide a basis for dismissal.

Willis-Knighton argues that "BRF cannot point to a single statement of law in the Court of Appeals' opinion with which BRF, let alone any other court, disagrees." But the Fifth Circuit's statements that the existence of an alternative explanation mark "the end of [UHS'] Section 1 claim" articulated the legal principle that the mere existence of such an alternative explanation, despite numerous contrary factual allegations, is enough to render a claim implausible. The rejection of the specific factual allegations in the Complaint as "wishful thinking" and "made-to-order" articulate a willingness to weigh evidence and assess the credibility of evidence at the complaint stage.

This Court's Rule 10(a) states that among the factors considered for a writ of certiorari is whether a court of appeals has "entered a *decision* in conflict with the *decision* of another United States court of appeals on the same important matter." (Emphasis added.) That standard can, and often is, met without an express articulation by the Circuit Court of a conflicting legal standard. *See, e.g.*, *FTC v. Phoebe Health Sys., Inc.*, 568 U.S. 216, 227 (2013) (reversing the Court of Appeals' decision despite its facially accurate recitation of the state-action immunity doctrine's "foreseeable result" standard); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 198 (2010) (reversing the Court of Appeals' decision as "unpersuasive" despite its

accurate recitation of the principle that a sports league may, in some contexts, act more like a single entity immune from antitrust liability).

If this Court were to accept "lip service" to its precedents as dispositive, and to wait for a decision that explicitly proclaimed an obviously different standard than *Twombly*, the law would be transformed without any opportunity for review.

Finally, Willis-Knighton notes correctly that this Court has denied review of a number of petitions involving the application of *Twombly*. But, unlike those cases, here the issue is not simply a specific application of the "plausibility" standard. The Fifth Circuit explicitly chose to disbelieve extensive factual allegations. The Circuit Court's approach, if followed by other courts, would completely transform the standards applicable to motions to dismiss.

III. Willis-Knighton's Arguments on Section 2 Illustrate Why Review Is Warranted

Willis-Knighton's attempt to defend the Fifth Circuit's Section 2 ruling founders on its failure, and inability, to defend the imposition of an absolute foreclosure requirement to refusals to deal. Contrary to Willis-Kington's assertions, it is emphatically untrue that the Fifth Circuit applied the foreclosure rule to an exclusive dealing claim here. An exclusive dealing claim involves a relationship between a buyer and seller whereby one of them either purchases from or sells exclusively to the other. *See* Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1800a (2d ed. 2002) ("an exclusive dealing

arrangement is a contract between a manufacturer and a buyer forbidding the buyer from purchasing the contracted good from any other seller, or requiring the buyer to take all of its needs in the contracted good from the manufacturer.").

Even *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the foundational case that Willis-Knighton invokes, repeatedly refers to purchases and sales in its analysis. *See, e.g.*, 365 US at 322 ("it contracted with the respondents to *furnish* the expected coal requirements."); *id.* at 323 ("the amount of its coal *purchases*"); *id.* at 327 ("exclusive *supply* . . . contracts."); *id.* at 334 ("we seem to have only that type of contract which 'may well be of economic advantage to *buyers*, as well as to *sellers*.'").

Here, there was no buyer-seller relationship between any of the parties. Willis-Knighton merely provided funds to LSU. (*See* D. Ct. Dkt. 1, Complaint at ¶¶ 39, 61.) LSU physicians practiced at University Health, meaning that they saw patients there. There is no allegation that University Health bought any services from LSU, or that it sought to do so. (*Id.* at ¶¶ 10, 13-15.)

For this reason, the very concept of foreclosure does not even make sense in this context. Since Willis-Knighton did not attempt to purchase the services of LSU physicians, the purchase of those services by others could not be foreclosed. Contrary to the Opposition's argument, the Complaint never alleges that Willis-Knighton demanded that LSU doctors exclusively practice at Willis-Knighton.

The Opposition says that the Circuit Court reasoned that "the theorized agreement *amounted to* an exclusive

dealing arrangement." (Pet. Appx. at 17a-18a (emphasis added).) This was a legal judgment that completely ignored the well-pleaded factual allegations of the Complaint and the very definition of exclusive dealing.

Moreover, Willis-Knighton does not deny that even exclusive dealing contracts do not always cause harm through foreclosure, e.g. in the "raising rivals' costs" context. *See United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001) ("a monopolist's use of exclusive contracts may violate Section 2 'even though the contracts may foreclose less than the roughly 40% or 50% share usually required under Section 1 . . . By raising its rivals' costs, Microsoft was able to maintain its market position notwithstanding the availability of alternative but less efficient means of distribution for rivals."). *See also* Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 327 (2002) (raising rivals' costs can result from "foreclosure or otherwise"); *see also id.* at 362-363; *see* cases cited in Petition at 32-33. Willis-Knighton fails to even address the "raising rivals' costs" doctrine.

Because of the weakness of Willis-Knighton's argument, it resorts to an erroneous claim of waiver. But UHS has argued that "the threat was not intended to cause LSU Health to cut off all contacts with University Health; LSU Health physicians certainly could not readily completely cease practicing at the hospital at which they were based." (Petition at 33.) In other words, the Petition explained that Willis-Knighton is not alleged to have sought an exclusive arrangement with LSU.

Moreover, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly

included therein." S. Ct. R. 14(a). The second question presented in the Petition is: "To adequately allege anticompetitive conduct for purposes of a Section 2 claim involving a threatened refusal to deal, must plaintiffs allege a 'substantial foreclosure' of competition?" The Fifth Circuit applied a "substantial foreclosure" requirement, which it determined was a "prerequisite for every exclusive-dealing Section 2 claim." (Pet. Appx. at 18a.) The Fifth Circuit's analysis of this issue is plainly comprehended by the Petition.

Willis-Knighton finally argues that the Section 2 issue should not be heard by this Court because if the Fifth Circuit's Section 1 analysis were correct, Willis-Knighton's actions could not cause injury to UHS. But if this Court were to find that the Fifth Circuit's analysis of causation could be incorrect, but that the Section 1 issue did not provide sufficiently compelling reasons to grant certiorari, then it would be appropriate to determine if the Section 2 issue was worthy of this Court's attention. Moreover, if, as Willis-Knighton (incorrectly) argues, LSU Health's actions were unilaterally undertaken in order to obtain Willis-Knighton's funds, (Opposition at 16-17), then causation would be present here, and the Section 2 claim (but not the Section 1 claim) would be properly before this Court.

IV. This Case Is a Strong Vehicle for Supreme Court Review

Willis-Knighton's argument that this case is a poor vehicle for Supreme Court review misses the point. Because the Fifth Circuit expressly rejected so many well-pleaded factual allegations, this case is the perfect vehicle to decide whether it is appropriate to weigh evidence at

the motion to dismiss phase. Moreover, the application of a rigid foreclosure rule would cut off at their inception a host of well-recognized antitrust claims under Section 2. Review of those decisions would provide significant guidance to the courts.

Respectfully submitted,

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