No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.
Petitioners,

v.

WILLIAM TWOMBLY, ET AL.
Respondents.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

With more than 405,000 members, the American Bar Association ("ABA") is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States.[2] Its members come from each of the fifty states, the District of Columbia, and the U.S. territories. Membership is voluntary and includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, law professors, law students, and non-lawyer associates in related fields. ABA members represent the full spectrum of public and private litigants, including plaintiffs and defendants. Among the ABA entities is the Section of Antitrust Law, with over 9,000 members.

The question presented in this case is whether mere allegations of parallel conduct by competitors coupled with a bare bones allegation of conspiracy are sufficient to state the material element of conspiracy for purposes of a Section 1 Sherman Act claim. The ABA submits that the experience of courts and practitioners addressing claims arising under Section 1 of the Sherman Act warrants a negative answer.[3] The

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] The American Bar Association is addressing only the pleading standard articulated by the Second Circuit and takes no position on whether petitioners or respondents should prevail.

ABA's mission is, in part, to serve the public and the profession by promoting rule of law principles that – consistent with Congress's intent – harmonize the need to promote the adjudication of meritorious claims with the need to reduce delay and excessive costs in litigation. The ABA believes that Fed. R. Civ. P. 12(b)(6) requires dismissal of a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act that fails to allege facts constituting more than mere parallel conduct.[4] Because the ABA represents a uniquely broad spectrum of the American legal community, we believe that our perspective on the central issue in this case may be helpful to this Court.

SUMMARY OF ARGUMENT

The Second Circuit articulated a standard that permits an allegation of the element of conspiracy under Section 1 of the Sherman Act to survive a motion to dismiss that undermines the requirement of Rule 12(b)(6) to state a claim upon which relief can be granted and conflicts with basic antitrust principles. The ABA urges this Court to reject the Second Circuit's rule that a pleading of facts indicating parallel conduct by the defendants suffices to state a claim of conspiracy

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[4] The ABA House of Delegates has adopted a policy position "[e]ncourag[ing] all courts, court supervisory bodies, and state and local bar associations to take an active role in reducing delay and excessive costs in litigation." ABA Judicial Division, *Report and Recommendation to the House of Delegates*, Report No. 100A (Aug. 1981). The action of the House of Delegates adopting the report is at 106 ABA Reports 884 (1981). More specifically, the ABA House of Delegates has adopted a policy position "[u]rging that Fed. R. Civ. P. 12(b)(6) be interpreted to require that a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act must allege facts constituting more than mere parallel conduct and ordinary business behavior." ABA Section of Antitrust Law, *Report and Recommendation to the House of Delegates*, Report No. 307 (Aug. 2006). The action of the House of Delegates adopting the report is at Daily Journal of the ABA House of Delegates (Aug. 8, 2006), p. 28 (available at http://www.abanet.org/leadership/2006/annual/home.html).

unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[5] Instead, the experience of the courts and lawyers resolving antitrust disputes counsels that to survive a motion to dismiss, a Section 1 Sherman Act complaint must allege facts that provide a reasonable basis to believe that there is an agreement. Mere parallel conduct and invocation of the words "agreement" or "conspiracy" do not suffice as parallel conduct alone does not provide a reasonable basis to believe there is an agreement. Indeed, parallel but independent conduct is expected in a perfectly competitive market.

The standard articulated by the Second Circuit would impose sizeable costs on defendants and courts in situations in which there is no apparent reason to conclude that unlawful activity occurred. In addition, the risk of actions based solely on parallel conduct would impede businesses from operating in the most efficient manner by raising the cost and risk of unilateral conduct, and ironically would undermine procompetitive decisions that parallel those of competitors. Moreover, as lawyers we see the need for rules of law that can be understood and applied by persons running a business. Without clear rules that differentiate between legal and illegal conduct, lawyers face difficulty adequately responding to clients seeking advice on how to operate in the marketplace. Nor is the permissive standard stated by the Second Circuit

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[5] The Second Circuit stated: "The pleaded factual predicate must include conspiracy in the realm of 'plausible' possibilities in order to survive a motion to dismiss. *Nagler* suggests that a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy . . . . Thus, to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *See* Pet. App. at 25a (citation omitted).

necessary to ensure that meritorious claims proceed beyond the pleading stage. To survive a Rule 12(b)(6) motion to dismiss, the antitrust laws and Federal Rules of Civil Procedure require a Section 1 Sherman Act complaint to allege something more than parallel conduct.

ARGUMENT

I. TO SURVIVE A MOTION TO DISMISS, A SECTION 1 SHERMAN ACT COMPLAINT MUST ALLEGE FACTS THAT PROVIDE A REASONABLE BASIS TO SHOW THAT THERE IS AN AGREEMENT

A. Allegations of Parallel Conduct Alone Do Not Adequately Plead the Element of Conspiracy

Rule 12(b)(6) tests the legal sufficiency of a complaint and requires that it state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In all cases this requires a complaint to allege conduct in violation of law.[6] No different rule applies to antitrust claims. Thus, Section 1 of the Sherman Act requires pleading facts sufficient to allege "conspiracy" in a manner that shows the complainant is entitled to relief. Conclusory invocation of the word "conspiracy" is not sufficient.[7] Nor, the ABA submits,

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[6] A complaint, at a minimum, must contain enough information from which each element of a claim for relief can be identified. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1228, at 3211 (3d ed. 2004); *id.* at § 1216; Fed. R. Civ. P. 8. Only in this manner does notice pleading meet the constitutional dictates of due process by providing adequate notice to enable a meaningful opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

[7] *See Bell Atlantic Corp. v. Twombly,* Pet. App. at 16a. Moreover, this Court noted, in upholding dismissal under Rule 12(b)(6), that "[i]t is not ... proper to assume that the [plaintiff] can prove facts it has not alleged or that the defendants have violated the antitrust laws in ways that have

contrary to the articulated standard of the Second Circuit, does adding allegations of parallel conduct state grounds for showing that the complainant is entitled to relief.[8]

This Court's precedent recognizing the difficulty of distinguishing legal, unilateral conduct from illegal, collusive action informs the analysis of the factual predicate that must be alleged to state a claim. The distinction between unilateral conduct and conspiracy is of paramount significance to defining a claim under Section 1 of the Sherman Act because this law does not proscribe conduct that is "wholly unilateral." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)). Similarly, the Court has cautioned that the effects from unilateral and collective conduct may be indistinguishable. *See* 467 U.S. at 775 ("because the Sherman Act . . . prohibit[s] . . . only restraints effected by a contract, combination or conspiracy – it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be *indistinguishable in economic effect from the conduct of two firms* subject to § 1 liability.") (emphasis added); *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986) ("[e]ven where a single firm's restraints directly affect prices and have the *same economic effect as concerted action might have*, there can be no liability under § 1 in the absence of an agreement.") (emphasis added).

Thus, this Court long has held that proof of "parallel business behavior" does not establish the element of conspiracy for purposes of Section 1 of the Sherman Act. *See Thea-*

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not been alleged." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

[8] As previously noted, the American Bar Association takes no view on the facts of the instant case.

tre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("conscious parallelism, ... [is] not in itself unlawful."). *See also* ABA Section of Antitrust Law, *Antitrust Law Developments* p. 10 (5th ed. 2002) ("Based on these Supreme Court decisions, lower courts have consistently held that conscious parallelism, by itself, will not support a finding of concerted action.").

The insufficiency of parallel conduct as a basis for an antitrust claim, even when such conduct is consciously interdependent, is premised on sound economic theory and business reality.[9] As the Court observed in *Brooke Group Ltd.*, "conscious parallelism, ... [is] not in itself unlawful, [even though, the] firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." 509 U.S. at 227; *c.f., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986); (the inference of conspiracy must be reasonable in light of the competing inferences of independent action or collusive action); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (to prove conspiracy requires facts that "tend[s] to exclude the possibility of independent action by the parties."); Robert A. Milne and Jack E. Pace III, *The Scope of Expert Testimony on the Subject of Conspiracy in a Sherman Act Case*, Antitrust, Spring 2003 at 36 ("tacit collusion amounting to mere 'conscious parallelism' without actual agreement, is not prohibited under Sec-

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[9] *See also* 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 1405a, at 21 (2d. ed. 2003) ("[p]roblematically, parallel conduct is often forced by circumstance: under such circumstances a 'rational' profit-maximizing firm will always act in a way that is similar to its rivals.").

tion 1 of the Sherman Act . . ."); Roger D. Blair and Jill Boylston Herndon, *Inferring Collusion from Economic Evidence*, Antitrust, Summer 2001 at 17 ("In the antitrust literature, tacit collusion is sometimes referred to as conscious parallelism. Since the case law indicates that proof of an *actual agreement* is a necessary predicate for a Section 1 violation and since there is no agreement, as that term is defined, there can be no successful antitrust prosecution of tacit collusion."); Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 Antitrust L.J. 41, 47-48 (1996) (noting that judicial practice has based findings of agreement "on the totality of circumstantial evidence that the parties have done more than merely watch each other's market behavior and respond to it independently, as leaders and followers. . . . [A]greement does not describe a result or equilibrium, but one particular process of reaching supracompetitive marketplace outcomes – what may be termed the 'forbidden process' of negotiation and exchange of assurances. The forbidden process consists of behavior that can be enjoined. Thus, if oligopoly reaches a high price equilibrium through the forbidden process that the law calls an agreement, Sherman Act Section 1 has been violated. If the same result were reached through leader-follower behavior, no agreement on price will be found.")

Parallel business behavior often is a sign of an efficient market and is extremely common. "Mere parallelism . . . is widely present, especially in perfectly competitive markets and is not itself a compelling subject for legal control." 6 Areeda & Hovenkamp ¶ 1417(g), at 115. Parallel business behavior does not suggest collusion. Rather, "it is important to recognize that similar simultaneous actions merely reflect independent responses to common business problems." *Id.* ¶ 1425, at 172; *see also* Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory*, 71 Antitrust L.J. 719, 779 (2004) ("Something more than interdependence must be

shown before agreement can be inferred. Interdependence is normal and innocent in oligopoly. Rational oligopolists typically monitor rivals closely and react to their price changes or other strategic moves. There is nothing even remotely suspicious about such actions."); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962) ("The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts.").

B. Rule 12(b)(6) Provides a Valuable Filter From Which Antitrust Cases Merit No Exemption

The ABA supports fully applying Rule 12(b)(6) to permit actions that present meritorious claims to proceed while speedily dismissing those that do not. The Rule strikes a balance between competing policy concerns. On the one hand, to survive a motion to dismiss, plaintiffs are not required to provide a detailed factual underpinning for their claims. This has particular salience when the best evidence of the validity of the claim likely lies in the hands of the defendants, as is often the case with antitrust conspiracy allegations. On the other hand, the allegations must identify a violation of law – something that is illegal, which parallel conduct is not.

Proper application of Rule 12(b)(6) in the antitrust context thus requires no more than in other cases. As an allegation of breach of contract must provide a factual predicate to identify the contract and breach,[10] an allegation of antitrust

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[10] *See generally* forms outlining the factual predicates to allege claims for damages for breach of contract set forth in Williston, *A Treatise on the Law of Contracts* (4th ed. 2004) §§ 64F-71F. Absent references to a written, executed agreement, the factual predicates outlined provide clear notice of the alleged offer, acceptance and terms of the agreement. For example, "on or about _____, at the request of defendant, plaintiff

conspiracy must provide a factual predicate that provides a reasonable basis to believe there is an agreement. *Cf.* 5 *Federal Practice and Procedure*, § 1228, at 317-18 ("Thus, it should now be settled that there is no heightened pleading standard in antitrust cases. On the other hand, the complexity of most antitrust cases inevitably leads to lengthier and more detailed pleadings"); 2 James Wm. Moore, et al., *Moore's Federal Practice* § 8.04[1][a], at 8-24.1 (3d ed. 2006) ("Whether a statement of claim is sufficient to give fair notice depends in part on the complexity of the case."). Rejecting the Second Circuit's permissive standard would not unduly deter meritorious cases. Substantive antitrust law makes clear that a conspiracy can be proven by direct or indirect evidence, and allegations based on either could provide the reasonable basis that the ABA believes should underlie a complaint.

The courts, lawyers, and scholars have observed various aspects of antitrust litigation that reinforce the propriety of applying the principles of Rule 12(b)(6) to dismiss antitrust claims that do not provide a reasonable basis to believe there is an agreement. Plaintiffs who bring claims for antitrust violations generally require substantial resources from courts and opposing parties, including obtaining broad discovery and presenting often complex issues for pretrial management.[11] This discovery process is often unavoidable because

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agreed to _____ [*set forth acts or duties whose performance was promised by plaintiff*]." *Id.* at § 64F:16

[11] Antitrust claims that pass the filter of Rule 12(b)(6) typically proceed to scheduling and a discovery plan pursuant to Rule 26(f), which invariably involves reference to the complaint to determine "the subjects on which discovery may be needed." Fed. R. Civ. P. 26(f)(2). Discovery proceeds only after a party has pled that it is entitled to relief and the pleadings control the direction of the discovery plan. Rule 23 directives with regard to class action practice, which often apply in antitrust cases, similarly command a focused evaluation of the complaint. Fed. R. Civ. P. 23 looks to the complaint allegations on issues regarding whether

it may furnish the proof needed to prevail. As noted in the Manual for Complex Litigation: "Antitrust litigation can ... involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money, calling for the application of techniques and procedures for the management of complex litigation." Manual for Complex Litigation, Fourth, § 30, at 519 (2004); *id.* at n. 1730 (noting that many of the practices and procedures discussed in the manual were initially developed in antitrust litigation).

Lawyers regularly find that antitrust cases cost millions of dollars simply to litigate to the summary judgment phase and require an enormous time commitment from counsel, clients, and the courts. *Hoover v. Ronwin,* 466 U.S. 558, 580 n. 34 (1984) (when a complex antitrust case proceeds past the pleading stage, a defendant must "bear [a] substantial 'discovery and litigation' burden."); *c.f.* Deborah R. Hensler, Bonnie Dombey-Moore, Beth Giddens, Jennifer Gross, Erik K. Moller, Nicholas M. Pace, *Class Action Dilemmas: Pursuing Public Goals for Private Gain,* Rand Institute of Civil Justice 10, 31 (2000).[12]

Because discovery can be so daunting and expensive in antitrust class actions, these cases can assume substantial set-

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questions of fact are common to the class, whether the claims and defenses of the representatives are typical, and whether common questions predominate, and in defining any claims, issues or defenses certified.

[12] *See also Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 424-425 (S.D.N.Y. 2002) (estimating that costs of producing electronic discovery – just a sliver of the discovery pie would run nearly $10 million); *Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207 (1981).

tlement value as soon as they get past the 12(b)(6) stage[13] Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 205 (1999). Lawyers experience great pressure to advise their clients to settle even flimsy antitrust cases that proceed past the pleading stage. Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, ABA Antitrust, Fall 2005, Vol. 5, No. 1 at 26 ("the strong inducement to settle class actions – even those presenting weak claims on the merits – may give rise to some abuses"); Steven C. Salop and Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1011 (1986). A lack of adequate threshold requirements for proceeding to summary judgment thus not only may waste substantial resources but may create unfortunate incentives for parties to bring speculative claims with the expectation of achieving a settlement prior to the summary judgment stage. Indeed, the Second Circuit also acknowledged how these factors boost the nuisance value of antitrust cases. *See* Pet. App. at 30a.

This Court has recognized that the deterrence of nuisance suits is a legitimate concern at the pleading stage, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).[14] In

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[13] While important to deterring anticompetitive conduct, in antitrust cases under the Sherman Act the availability of treble damages heightens the potential for settlements that otherwise would be unjustified. Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 809 (1987) ("[t]he lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed."); *see also* Edward A. Snyder and Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 551-603 (1991) (private antitrust enforcement efforts currently encompass many claims that appear to be frivolous).

[14] *See also* Fed. R. Civ. P. Rule 1 (The rules are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action.")

Blue Chip Stamps, which involved a class action under Securities and Exchange Commission Rule 10b-5, this Court noted that "[t]he potential for abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may . . . exist . . . to a greater extent than they do in other litigation. [In these cases], the mere existence of an unresolved lawsuit has settlement value to the plaintiff, not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial." *Id.* at 742-43.

The attributes of antitrust litigation under the Sherman Act reinforce the important role that Rule 12(b)(6) plays in weeding out unmeritorious antitrust claims. *Reiter v. Sonotone*, 442 U.S. 330, 345 (1979) (noting that courts need to "exercise sound discretion and use the tools available" to dismiss baseless antitrust claims.) The Second Circuit's pleading standard, however, undermines Rule 12(b)(6) in Section 1 Sherman Act cases – a result that is inconsistent with the antitrust laws and not warranted by the Federal Rules of Civil Procedure. To survive a motion to dismiss, a complaint must allege facts that show that there is an agreement.

CONCLUSION

For the reasons stated, the ABA respectfully requests that this Court reaffirm that allegations of parallel business behavior are not sufficient to set forth the element of conspiracy under Section 1 of the Sherman Act necessary to survive a motion to dismiss under Rule 12(b)(6).

Respectfully submitted,

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