United States Court of Appeals

for the

Seventh Circuit

Case No. 24-8013

IN RE: T-MOBILE USA, INC.,

Petitioner.

ON PETITION FOR PERMISSION TO APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, CASE NO. 1: 22-CV-03189 HONORABLE THOMAS M. DURKIN, DISTRICT COURT JUDGE

BRIEF OF AMICUS CURIAE THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)

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Appellate Court No: 24-8013

Short Caption: T-Mobile US, Inc. v. Anthony Dale, et al.

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Kellie Lerner Date: April 25, 2024

Attorney's Printed Name: Kellie Lerner

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INTEREST OF AMICUS CURIAE[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The Supreme Court has long recognized the key role private litigants play in enforcing federal antitrust laws. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."). This role would be jeopardized by the imposition of overly burdensome constraints and pleading standards on private parties seeking remedies for anticompetitive conduct.

The Committee to Support the Antitrust Laws ("COSAL") is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct through the

[1] Plaintiffs-Respondents Anthony Dale, Brett Jackson, Johnna Fox, Benjamin Borrowman, Ann Lambert, Robert Anderson, and Chad Hohenbery, and Defendant-Petitioner T-Mobile US, Inc. have consented to the filing of this amicus brief.

enactment, preservation, and enforcement of a strong body of antitrust laws.[2] COSAL submits this amicus brief in support of Plaintiffs-Respondents because the goals of the antitrust laws will be undermined if this Court grants extraordinary review solely to entertain latent advocacy for a yet-more onerous Rule 8 pleading standard. COSAL has filed this brief pursuant to its motion for leave to do so, and all parties consent to its filing.

REASONS FOR DENYING THE PETITION FOR INTERLOCUTORY REVIEW

This Court should deny interlocutory review of the district court's denial of T-Mobile's motion to dismiss. The district court properly held that Plaintiffs' allegations of proximate cause were plausible pursuant to Rule 8 after appropriately crediting Plaintiffs' allegations tethering T-Mobile's merger to Plaintiffs' injuries (*i.e.*, paying higher prices for mobile services). Contrary to T-Mobile's argument, the mere presence of *possible* alternative explanations for Plaintiffs' injuries does not make

[2] Amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than COSAL—has contributed money that was intended to fund its preparation or submission. In addition, no COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

less plausible Plaintiffs' detailed factual allegations connecting T-Mobile's alleged antitrust violations to Plaintiffs' payment of higher prices. Indeed, crediting such alternative explanations would require the court to engage in impermissible fact finding before discovery. T-Mobile's hypothetical explanations for Plaintiffs' injuries do not subsume the plausibility of Plaintiffs' detailed causal facts, and this Court should deny T-Mobile's attempt to manufacture such an issue for interlocutory appeal.

Nor should this Court take up T-Mobile's request for interlocutory review merely to determine whether *Twombly*, a case about *procedural* pleading requirements, overturned or superseded *Gypsum*, a case about *substantive* antitrust standing requirements. Furthermore, this Court should ignore T-Mobile's arguments on this point because they are waived: T-Mobile did not argue at the motion to dismiss stage that *Twombly* changed the meaning, viability, or elements of antitrust standing, as it does before this Court for the first time.

ARGUMENT

I. Because T-Mobile's Arguments Regarding the Application of Rule 8 to Antitrust Standing Would Significantly Depart from *Twombly*'s Requirements, This Court Should Deny Review.

T-Mobile asks this Court to grant extraordinary, interlocutory review to expand Rule 8's pleading requirements. Carried to its logical conclusion, T-Mobile's argument would hold that as long as a defendant can conceive of a *hypothetical*, alternative reason why prices *may* have increased, then a plaintiff's well-pleaded facts that tether price increases to the defendant's alleged antitrust violation would never suffice under Rule 8, regardless of *how plausible*, or even probable, they are. This Court has already ruled that this is not what *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), meant by the existence of an "obvious alternative explanation." *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

T-Mobile seeks to impose a pleading regime in which a defendant's hypothetical, "possible" facts trump a plaintiff's plausible factual allegations. T-Mobile posits that Plaintiffs have not met the *Twombly* standard because "it is *possible* . . . that th[e] pricing decisions [of Plaintiffs' service providers, and T-Mobile's competitors, AT&T and

Verizon] are attributable to rising costs amid widespread inflation, capital expenditures required to build new 5G networks, COVID-related demand increases and supply-chain disruptions, or any number of other intervening factors that arose in the two years after the merger." Def. Pet. at 23-24 (emphasis added). But *Twombly* did not create a regime in which a court must compare a plaintiff's well-pled plausible facts against any hypothetical alternative explanation the defendant can conjure, particularly at the pleading stage before discovery has developed the factual record.

To be sure, soon after the Supreme Court decided *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this Court held that the plausibility standard "does not imply that the district court should decide whose version to believe, or which version is more likely than not." *Swanson*, 614 F.3d at 404. "For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences." *Id*. A defendant's ability to present possible, albeit unsubstantiated, alternative explanations for its conduct in a

motion to dismiss brief does not make the well-pled facts in a plaintiff's complaint any less plausible under *Twombly*.

Twombly's reference to "an obvious alternative explanation" did not create a world in which a plaintiff fails to satisfy Rule 8 where possible alternative explanations for price increases exist. Rather, this Court has already determined, "[o]nly *obvious* alternative explanations must be overcome at the pleadings stage, and only by a plausible showing that such alternative explanations may not account for the defendant's conduct." *Hughes v. Northwestern Univ.*, 63 F.4th 615, 629 (7th Cir. 2023). In *Hughes*, this Court rejected that plaintiffs must "*rule out* every possible alternative explanation," holding instead that "[w]here alternative inferences are in equipoise—that is, where they are all *reasonable* based on the facts—the plaintiff is to prevail on a motion to dismiss." *Id.* (emphasis added). The Court reasoned,

> This is because, at the pleadings stage, we must accept all well-pleaded facts as true and draw reasonable inferences in the plaintiff's favor. A court's role in evaluating pleadings is to decide whether the plaintiff's allegations are plausible—*not which side's version is more probable*.

Id. at 630 (emphasis added); *see also Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement 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.").

Here, nothing in the record suggests that T-Mobile's "possible" alternative explanations for AT&T and Verizon's price increases are "more probable" than Plaintiffs' well-pled facts explaining them. And nothing suggests that Plaintiffs' allegations are not "reasonable." Even if a defendant's alternative facts are themselves plausible, a complaint will satisfy Rule 8 as long as the *plaintiff's* facts are plausible. *See Hughes*, 63 F.4th at 629. Therefore, the district court did not need to "reject" alternative possibilities to deny Defendants' motion to dismiss. The court merely needed to find that the inferences favoring Plaintiffs' allegations are reasonable based on the facts—despite the presence of alternative inferences based on possible additional facts. *Id.*

And the district court did so. Pursuant to *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 627-28 (7th Cir. 2003), which establishes a plaintiff's ability to claim "umbrella" damages when an antitrust violator's conduct results in higher prices in the affected market in general, the district court correctly held that Plaintiffs

plausibly alleged substantial anticompetitive effects pursuant to Section 1, and an appreciable danger of anticompetitive effects in the relevant market pursuant to Section 7. *Dale v. Deutsche Telekom AG*, No. 1:22-CV-03189, 2023 WL 7220054, at *14-15 (N.D. Ill. Nov. 2, 2023). The court recognized that the Supreme Court allows such claims to be alleged with either direct or indirect evidence. *Id.* at *14 (citing *Ohio v. Am. Express Co.*, 585 U.S. 529, 542 (2018)). The district court enumerated several facts that, if true, qualify as *direct evidence* under *Ohio*,[3] supporting a reasonable inference of substantial anticompetitive effects flowing from the merger, including:

- The steady decline in quality-adjusted pricing leading up to the merger;
- The sharp jump in quality-adjusted pricing just a few months after the merger's close;
- AT&T and Verizon slowed their aggressiveness in responding to prices after the merger's announcement and closure;

[3] "Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition." 585 U.S. at 542 (cleaned up).

- AT&T's and Verizon's increased prices in 2022;
- T-Mobile took advantage of "loopholes" in their regulatory agreements, including:
    - Increasing taxes, fees, and surcharges;
    - Passing through increases in the cost of third-party benefits;
    - Modifying or canceling third-party benefits; and
    - Increasing the cost of device and headset offerings and protection plans.

See id. The district court also recognized Plaintiffs' allegations of *indirect evidence*, including:

- The merger consolidated an already highly-concentrated market from four to three mobile network operators;
- The merger eliminated the two "maverick" firms that were responsible for much of the price competition and innovation among the carriers;
- Before the merger, T-Mobile and Sprint aggressively competed with the bigger brands (AT&T and Verizon) through offering discounts and new plans;
- Sprint was financially viable and would have continued to

compete vigorously absent the merger;

- By making the newly merged T-Mobile's scale and cost structure more like the other two big players, the merger curtailed its incentive to compete;
- In a market with high barriers to entry, transparent pricing, and signaling between competitors, these structural changes exacerbated the risk of price coordination; and
- In the two years following the merger, DISH failed to fill Sprint's role as an active fourth competitor, instead losing hundreds of thousands of subscribers.

See id. at *11.

The district court duly considered Defendants' alternative explanations, *see id.* at *11, 15, but correctly determined that "the mere possibility that other factors affected AT&T and Verizon's pricing decisions does not negate the plausibility that the merger proximately caused those two companies to stop lowering their prices, stop offering new promotions, and start raising their prices." *Id.* at *11. *Twombly* requires no more. *See Hughes*, 63 F.4th at 629-30; *Swanson*, 614 F.3d at 404.

Because the district court correctly decided that the complaint satisfies both the pleading standard of Rule 8 and established Seventh Circuit precedent, interlocutory review is not warranted.

II. The District Court Properly Considered Whether Plaintiffs Pled Facts Sufficient to Allege Proximate Cause, Not Whether *Twombly* Changed Substantive Law.

The imprimatur of antitrust "standing" does not elevate the importance of the question presented because antitrust standing is merely the moniker used to denote old-fashioned proximate cause in antitrust cases. Viewed through this proper lens, Defendant's argument that *Twombly* did violence to *Gypsum* further unravels. *See Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 927 (7th Cir. 1995) ("Essentially, the doctrine of antitrust standing is the equivalent of the common-law tort limitation of proximate cause."); *see also Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735, 743 (7th Cir. 2018) ("In the antitrust context, the proximate causation requirement in the past has been termed 'antitrust standing[.]'"). It would be illogical to argue that *substantive* negligence law, by way of proximate cause, changed after *Twombly*, a case about *procedural* pleading standards.

Rather, what changed after *Twombly*, and what is at issue here, is the degree of factual specificity required to present a plausible, short, plain statement of proximate causation. *Gypsum*'s central holding—that customers of sellers who have not joined in an antitrust violation can establish antitrust injury through proof of price increases in the affected market, 350 F.3d at 627-28—is unaffected by *Twombly*'s simple directive that factual allegations regarding the violator's responsibility for such price increases must be plausible. This Court should not deploy its discretionary powers to investigate whether a case about pleading standards (*Twombly*) altered substantive law (*Gypsum*). *See In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625 (7th Cir. 2010) ("The main task of an appellate court, which is to maintain the coherence, uniformity, and predictability of the law, is not engaged by review of the application of a legal standard to a unique, nonrecurring set of particular facts."). This Court has ample opportunity to interpret the meaning and limits of Rule 8 and *Twombly* in the usual course of its business adjudicating unavoidable appeals as of right. This is not the right case or the right time to do that, especially where *Twombly* cannot

be used as a Trojan Horse to alter binding precedent establishing substantive law.

III. Defendants Waived Any Challenge to the Viability of *Gypsum* after *Twombly*, and Interlocutory Review Therefore Would Waste Significant Resources.

An interlocutory appeal on the *Twombly* issue, raised only in T-Mobile's briefs seeking interlocutory review, would encumber this litigation in a procedural morass on appeal. The district court's order denying T-Mobile's motion to dismiss did not consider the vitality of *Gypsum* after the Supreme Court's decision in *Twombly* because the parties did not argue that question in the original motion to dismiss. *See Dale*, 2023 WL 7220054, at *14-15. This issue is therefore waived on appeal. *See Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010) ("[A] party has waived the ability to make a specific argument for the first time on appeal when the party failed to present that specific argument to the district court, even though the issue may have been before the district court in more general terms.").

Consequently, at a minimum, if this Court were to grant interlocutory appeal to consider this *Twombly* issue, the parties would need to devote resources to litigating appellate waiver, and this Court

would be forced to expend its resources to assess whether the district court erred in certifying this issue for interlocutory appeal and whether it is the proper court and the appropriate time to hear this issue. *See also Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983) ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."). Such efforts would not materially advance the underlying litigation, and this Court should deny interlocutory appeal.

CONCLUSION

Based on the foregoing points and authorities, Amicus Curiae COSAL respectfully requests that this Court DENY T-Mobile's request for interlocutory review.

Respectfully submitted,

Dated: April 25, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Amicus Brief complies with Fed. R. App. P. 29(c) and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14 point Century Schoolbook font.

Dated: April 25, 2024

/s/ Kellie Lerner
Kellie Lerner

Attorney for *Amicus Curiae*,
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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2024, the forgoing Amicus Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 25, 2024

/s/ Kellie Lerner
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