

**TWOMBLY AND PARALLEL CONDUCT—HOW THE SIXTH
CIRCUIT GROUNDED *IN RE TRAVEL AGENT
COMMISSION ANTITRUST LITIGATION***

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IN *IN RE TRAVEL Agent Commission Antitrust Litigation*, the Sixth Circuit held that (1) United Airlines' decision to maintain its zero-percent-commission policy after emerging from bankruptcy was not a continuing antitrust violation, and (2) allegations against the remaining defendant airlines were insufficient to state a claim for antitrust conspiracy.¹ In so doing, the majority placed a difficult burden on the plaintiffs, ultimately imposing a probability requirement that was inappropriate and unrealistic for a 12(b)(6) motion to dismiss. The Sixth Circuit holding in this case misapplied the *Twombly* standard and set a dangerous precedent that could "slowly eviscerat[e] antitrust enforcement under the Sherman Act."² The appropriate action would have been to grant a rehearing on the defendants' motion to dismiss, thereby preserving the distinctive burdens of 12(b)(6) motions and summary judgment.

The plaintiffs, owners of forty-nine travel agencies, filed a complaint against the defendant airlines for "illegally agreeing to cap, cut, and eliminate base commissions in violation of § 1 of the Sherman Antitrust Act."³ To establish a conspiracy in violation of Section 1, the plaintiffs needed to show a conspiracy between the defendants that imposed an unreasonable restraint of trade.⁴ The plaintiffs contended that the conspiracy began in

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¹ *Tam Travel, Inc. v. Delta Airlines, Inc.* (*In re Travel Agent Comm'n Antitrust Litig.*), 583 F.3d 896 (6th Cir. 2009), *cert. denied*, 79 U.S.L.W. 3399 (U.S. Jan. 10, 2011) (No. 09-1138).

² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *In re Travel Agent*, 583 F.3d at 914 (Merritt, J., dissenting).

³ *In re Travel Agent*, 583 F.3d at 900 (majority opinion).

⁴ *Hall v. Am. Airlines, Inc.*, 118 F. App'x 680, 682 (4th Cir. 2004).

1995 when the airlines, playing follow-the-leader, cut commissions at the same time and same rate five straight times, until they had reduced commissions to zero.⁵ The complaint alleged that in 1981 and 1983, United and American attempted to lower travel agent commission rates, but after other airlines failed to follow, they resumed the industry-standard 10% commission rate.⁶ But, in 1995, the airlines tried again and were ultimately successful in eliminating travel agent commissions.⁷ In 1995, Delta, American, Northwest, United, and Continental each announced a \$25 and a \$50 cap on base commissions for one-way domestic tickets and round-trip domestic tickets, respectively.⁸ In September 1997, November 1998, and October 1999, United announced it would immediately reduce its commission rate or commission caps, and within days each of the defendants followed to match each of United's cuts exactly.⁹ In August 2001, American announced new caps on commission rates, and again, each of the defendants followed American within ten days.¹⁰ Finally, in March 2002, Delta announced it would eliminate airline commissions altogether, and within ten days, each of the defendants followed.¹¹

In addition to this parallel conduct, the plaintiffs offered the deposition of a former American executive who testified that "‘industry consensus’ was necessary industry-wide for commission cuts to hold," and that American needed to "match commission cuts exactly or [American] would undercut the movement."¹² The plaintiffs also pointed to several meetings between the defendants over the period in which the airlines were acting in unison, providing both motive and opportunity to conspire: In mid-1999, a Northwest executive and an American executive "met for three hours in a Dallas hotel conference room," and in 2001, a Delta executive "met for a weekend of golf and socializing at the home of an American executive responsible for setting American's commission rates."¹³ Additionally, during the course of the alleged conspiracy, executives from American,

⁵ *In re Travel Agent*, 583 F.3d at 899.

⁶ *Id.* at 900; Final Brief of Appellants at 8–9, *In re Travel Agent*, 583 F.3d 896 (No. 07-4464).

⁷ *In re Travel Agent*, 583 F.3d at 899.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 900.

¹³ *Id.*

United, Northwest, Continental, and Delta were all on the board of directors for Orbitz, an online reservation company jointly owned by the five largest competitors in the airline industry.¹⁴ Finally, the plaintiffs asserted that American CEO Robert Crandall, who approved the commission cut from 8% to 5% in 1997, had attempted this type of price-fixing scheme before and was likely to do so again.¹⁵

Plaintiff Tam Travel and forty-eight other travel agencies filed a complaint against the defendant airlines alleging conspiracy in violation of the Sherman Antitrust Act.¹⁶ The plaintiffs amended their complaint after the Supreme Court decided *Twombly*.¹⁷ The district court granted the defendants' joint motion to dismiss the amended complaint under Rule 12(b)(6) and held that: (1) the plaintiffs failed to show sufficient parallel conduct as to America West, Alaska, Frontier, Horizon, and KLM; (2) "the emergence of Northwest, United, and Delta from bankruptcy discharged the plaintiffs' claims" against those defendants; (3) the plaintiffs failed to state a claim under *Twombly* with regard to United and Continental; and (4) the plaintiffs did not allege any facts against AAG, a holding company that does not pay commissions.¹⁸ The district court denied the plaintiffs' motion for reconsideration.¹⁹ The Sixth Circuit, in a divided decision, denied a rehearing *en banc*, and the plaintiffs filed a petition for certiorari.²⁰

The Sixth Circuit needed to determine: (1) what effect, if any, bankruptcy had on the plaintiffs' claims when they alleged that United rejoined the scheme after its reorganization; and (2) whether the plaintiffs had met their burden of satisfying the *Twombly* pleading standard required to survive a 12(b)(6) motion.²¹ Defendant Frontier filed for Chapter 11 bankruptcy during litigation, staying any judicial action; similarly, the parties dismissed defendants Delta, Northwest, and KLM by stipulation

¹⁴ Final Brief of Appellants, *supra* note 6, at 15–16; *AAI and 15 Consumer Organizations Urge Rejection of Orbitz Airline Joint Venture*, AM. ANTITRUST INST., <http://www.antitrustinstitute.org/node/10406> (last visited Mar. 7, 2011).

¹⁵ Final Brief of Appellants, *supra* note 6, at 13.

¹⁶ *In re Travel Agent*, 583 F.3d at 900.

¹⁷ *Id.*

¹⁸ *Id.* at 900–01.

¹⁹ *Id.* at 901.

²⁰ *Id.* at 896; Petition for Writ of Certiorari, *In re Travel Agent*, 583 F.3d 896 (No. 09-1138).

²¹ *In re Travel Agent*, 583 F.3d at 901-02.

during oral argument.²² Regarding United, the court concluded that because the final act of the alleged conspiracy “occurred in 2002, long before United emerged from bankruptcy,” any later effects of United’s acts were irrelevant in establishing the plaintiffs’ “continuing violation” theory.²³ In determining whether the plaintiffs’ claims could withstand the defendants’ 12(b)(6) motion, the court, citing *Twombly*, first concluded that mere conscious parallel conduct was not sufficient to state a Section 1 claim.²⁴ Then, the court looked to the factual allegations in the complaint and found that the plaintiffs’ amended complaint failed to “raise a reasonable expectation that discovery would reveal evidence of an illegal agreement.”²⁵

The majority found that “because defendants’ conduct was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior,” the plaintiffs failed to allege sufficient facts beyond parallel conduct to suggest a conspiracy.²⁶ The court looked to *Monsanto Co. v. Spray-Rite Service Corp.* as the standard to evaluate parallel conduct.²⁷ Under *Monsanto*, the Supreme Court concluded that to prove a Section 1 conspiracy, “there must be evidence that tends to exclude the possibility of *independent* action.”²⁸ The court relied on American executive Michael Gunn’s testimony that “an independent reduction in commission rates would [have] advance[d] each defendant’s economic self-interest” and concluded that this was a reasonable alternative to support the airlines’ parallel-pricing behavior.²⁹ The majority dismissed Gunn’s statement that American “had to match commission cuts exactly or [it] would undercut the movement” by concluding that it was “just as likely” that American was reducing its commission in the hopes that its competitors would follow, as it was that American was involved in a conspiracy.³⁰ Additionally, the court was swayed by the Fourth Circuit’s decision in *Hall v. United Air Lines, Inc.* (upholding a district court decision), in which a travel agency class action alleged an identical Section 1 claim against

²² *Id.* at 901 n.5.

²³ *Id.* at 902.

²⁴ *Id.* at 904.

²⁵ *Id.* at 909.

²⁶ *Id.* at 908 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)).

²⁷ *Id.* at 907 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)).

²⁸ *Id.* (quoting *Monsanto*, 465 U.S. at 752).

²⁹ *Id.* at 908.

³⁰ *Id.* at 909–10.

the same defendants.³¹ The *Hall* court granted summary judgment to the defendant airlines, finding that “commission cuts and caps . . . were just as likely the result of competitive conduct and natural changes in the market as of the illegal conspiracy alleged by the plaintiffs.”³²

Finally, the majority concluded that since Continental and American were the only defendants left in the complaint, any meetings between American, Delta, and Northwest were irrelevant to a Section 1 claim; similarly, the fact that American and Continental executives both belonged to various trade associations provided a mere opportunity to conspire and did not suggest an agreement between the two.³³ Even Crandall’s statement (“I have a suggestion for you. Raise your goddamn fares twenty percent. I’ll raise mine the next morning.”) would not support the plaintiffs’ claims because the statement, made more than twenty-five years ago and to the president of a now-defunct airline, was too remote to support an agreement about commissions.³⁴

The dissent took issue with the majority’s application of *Twombly*, forewarning that courts that continue to misinterpret the *Twombly* and *Iqbal* standards will “slowly eviscerat[e] antitrust enforcement under the Sherman Act.”³⁵ The dissent pointed out that the defendants’ unilateral, follow-the-leader action raised “a strong inference of agreement,” and that by tying the specific time and locations of numerous meetings with the industry-wide commission cuts that shortly followed, the complaint clearly satisfied the *Twombly* standard.³⁶

The Sixth Circuit majority misinterprets the *Twombly* standard, inappropriately conflating the requirements to survive a motion to dismiss with summary judgment requirements. Under *Twombly*, the Supreme Court held that to survive a 12(b)(6) motion, the complaint must “identify[] facts that are

³¹ *Id.* at 909 n.8 (citing *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652 (E.D.N.C. 2003), *aff’d sub nom.* *Hall v. Am. Airlines, Inc.*, 118 F. App’x 680 (4th Cir. 2004)).

³² *Id.* (quoting *Hall*, 296 F. Supp. 2d at 671).

³³ *Id.* at 910–11. The majority previously determined that the plaintiffs’ complaint included only bare assertions against Alaska, AAG, Horizon, and America West, and therefore the plaintiffs failed to state a claim as to these defendants. *Id.* at 905. Claims against defendants Delta, Northwest, KLM, and Frontier were also dismissed. *Id.* at 901 n.5.

³⁴ *Id.* at 911; Final Brief of Appellants, *supra* note 6, at 13 n.5.

³⁵ *Id.* at 914 (Merritt, J., dissenting).

³⁶ *Id.* at 913.

suggestive enough to render a § 1 conspiracy *plausible*.”³⁷ In *Iqbal*, the Supreme Court addressed the plausibility standard, stating that “[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³⁸

The majority, while paying lip service to *Twombly*, actually looked to two other cases for support, neither of which was decided under Rule 12(b)(6).³⁹ Although neither case addressed the issue of what a plaintiff must plead in order to state a claim, the court nevertheless looked to *Monsanto* and its application in *Re/Max International, Inc. v. Realty One, Inc.* for the majority’s proposition that to survive a 12(b)(6) motion, a plaintiff must provide “sufficient circumstantial evidence tending to exclude the possibility of independent conduct.”⁴⁰ This standard is inappropriate because both decisions were based on proof required at a later stage in litigation—*Re/Max* was decided at the summary judgment stage, and *Monsanto* addressed the ultimate standard of proof required to prevail.⁴¹

The majority’s evaluation of the claim based on standards from a point later in the trial sequence is inappropriate, especially considering that, at this stage, discovery has barely begun. The Supreme Court made this clear in *Twombly*, where the Court actually used *Monsanto* to distinguish the escalating burden requirements at different points during the trial sequence.⁴² The majority buttressed its decision with the Fourth Circuit’s decision in *Hall* (derived from a district court decision), where the court concluded that parallel conduct in reducing commission rates was “just as likely the result of competitive conduct and natural changes in the market as of the illegal conspiracy alleged by the plaintiffs.”⁴³ Again, the majority completely disregarded the fact that *Hall* was decided at the summary judgment stage after the plaintiffs had an opportunity

³⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added).

³⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

³⁹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999).

⁴⁰ *In re Travel Agent*, 583 F.3d at 907 (majority opinion) (citing *Re/Max*, 173 F.3d at 1025).

⁴¹ *Monsanto*, 465 U.S. at 768; *Re/Max*, 173 F.3d at 1025.

⁴² *Twombly*, 550 U.S. at 554.

⁴³ *In re Travel Agent*, 583 F.3d at 909 n.8 (quoting *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652, 671 (E.D.N.C. 2003), *aff’d sub nom. Hall v. Am. Airlines, Inc.*, 118 F. App’x 680 (4th Cir. 2004)).

to conduct discovery.⁴⁴ By relying on these cases, the majority inappropriately imposed a probability requirement, in essence asking the plaintiffs to prove by their pleadings that parallel conduct was more likely the result of collusion than independent action.

The majority summarily dismissed factual allegations in the complaint, finding that they did not “raise a reasonable expectation that discovery [would] reveal an illegal agreement” between the defendants.⁴⁵ The majority also dismissed Crandall’s suggestion of price-fixing as too remote in time to support a plausible inference of agreement between defendants, specifically between American and Continental.⁴⁶ The majority’s analysis of the timeline is perplexing at best. It acknowledged that Crandall was CEO until 1998, but nevertheless determined that his departure was “at the very beginning of plaintiffs’ conspiratorial time line,” although the plaintiffs alleged the conspiracy began in 1995.⁴⁷ Furthermore, Crandall’s invitation to conspire with one airline executive provided at least some support to the plaintiffs’ claim that he was conspiring with other airline executives, including Continental. To dismiss the claim because it is unlikely that discovery will later reveal evidence of the conspiracy directly conflicts with the directive the Supreme Court gave in *Twombly*: “[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court’s assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.”⁴⁸ It was inappropriate for the majority to weigh whether the plaintiffs would ultimately prevail in deciding whether the plaintiffs alleged enough factual matter to suggest that the defendants had conspired.

The factual allegations provide more than enough support to “nudge [the plaintiffs’] claims across the line from conceivable to plausible.”⁴⁹ As shown by previous attempts, the scheme would not work without unilateral, follow-the-leader action. As the dissent pointed out, the complaint included specific time-

⁴⁴ See *Hall*, 296 F. Supp. 2d at 660–61 (discussing the plaintiff’s evidentiary burden to survive summary judgment).

⁴⁵ *In re Travel Agent*, 583 F.3d at 911.

⁴⁶ *Id.*

⁴⁷ *Id.* at 899, 911.

⁴⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.8 (2007).

⁴⁹ See *Twombly*, 550 U.S. at 570 (identifying the bar to survive a 12(b)(6) motion).

and-place factual allegations, in each case tying the meetings to industry-wide commission reductions.⁵⁰ Crandall's price-fixing invitation is especially probative, considering he was the executive responsible for setting American's commissions.⁵¹ Moreover, the systematic reductions were a marked departure from the industry's normal practice.⁵² Collectively, the factual allegations clearly satisfy the *Twombly* standard.

This case illustrates the circuit split in applying *Twombly*. For example, in *Starr v. Sony BMG Music Entertainment*, the Second Circuit rejected the argument that a plaintiff must allege facts tending to exclude self-interested conduct as a justification for the parallel behavior and held that, under *Twombly*, a plaintiff need only state "enough factual matter (taken as true) to suggest that an agreement was made."⁵³ Similarly, other district courts have also rejected the "dismemberment" approach taken by the Sixth Circuit, including a district court in the Third Circuit, which recognized that "a district court must consider a complaint in its entirety without isolating each allegation for individualized review."⁵⁴ The Supreme Court has denied certiorari in both *Starr* and *In re Travel Agent*, so the divergent treatment of parallel conduct will continue until the Court revisits the precedent-setting pleading standard set out in *Twombly* and clarifies the factual support necessary to suggest an agreement when parallel conduct is present.

By failing to acknowledge the different evidentiary requirements under a 12(b)(6) motion and summary judgment, the Sixth Circuit creates an unreasonable burden for claimants bringing antitrust suits. Rather than examine factual allegations piecemeal against each defendant, the court should have looked at the allegations as a whole to decide if enough factual matter had been stated to suggest a conspiracy. Until the Supreme Court clarifies the *Twombly* pleadings standard, it would be wise for claimants bringing antitrust suits to avoid the Sixth Circuit.

⁵⁰ *In re Travel Agent*, 583 F.3d at 913 (Merritt, J., dissenting).

⁵¹ *Id.*

⁵² *See id.*

⁵³ 592 F.3d 314, 325 (2d Cir. 2010), *cert. denied*, 79 U.S.L.W. 3120 (U.S. Jan. 10, 2011) (No. 10-263).

⁵⁴ *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008).