No. 22-CV-657

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT

*v.*

AMAZON.COM, INC.,
APPELLEE

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

# BRIEF FOR AMICUS CURIAE FEDERAL CITY COUNCIL SUPPORTING APPELLEE AND AFFIRMANCE

DAVID L. MEYER
LAW OFFICE OF DAVID L. MEYER
1105 S Street N.W.
Washington, D.C. 20009
202-294-1399
David@MeyerLawDC.com

*Attorney for Federal City Council*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rule 26.1 of the District of Columbia Court of Appeals, the Federal City Council states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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## INTEREST OF AMICUS

Amicus is the Federal City Council (known as "FC2"), a nonprofit, nonpartisan, membership-based organization formed in the District of Colombia in 1954 with a mission of advancing civic life in the nation's capital. In the ensuing decades, FC2 has supported numerous initiatives aimed at improving the District's social, economic, and physical infrastructure, with a particular focus on education, public safety, transportation, and other conditions that contribute to economic growth and the ability to attract businesses to the city.

FC2 expresses no view in this case on the merits of the District's claims that Amazon's practices violate the antitrust laws. FC2's interest is in assisting the Court in understanding the potential consequences for the District were the Court to accept the arguments of Appellant and its amici regarding the pleading standard applicable to claims brought in District of Columbia courts. FC2 fears that a change in the pleading standard of the sort urged here would make the District a magnet for plaintiffs asserting a wide variety of potential legal claims that could not survive dismissal in other jurisdictions, and would, in turn, make it harder for the District to attract and retain businesses capable of providing the economic growth and employment that contribute to the District's economic prosperity and the quality of its civil life.

FC2's by-laws provide it with the authority to submit this brief, and all parties have consented to the filing of this brief.[1]

## INTRODUCTION

The requirement that plaintiffs plead sufficient facts in support of each element of a civil claim is well established under District of Columbia law. Among other things, a plaintiff must plead facts that make each such element not merely "possible" but "plausible." The Superior Court undertook this inquiry and found Appellant's allegations of anticompetitive effects wanting.

Appellant seeks to reverse that finding by arguing that the "plausibility standard" does not apply whenever a written agreement is alleged. Federal City Council urges the Court not to alter the District's law in this way. Doing so would encourage all manner of speculative and ill-supported claims to be brought in District of Columbia courts, diverting the resources of those courts away from meritorious claims and creating a legal environment that would not be conducive to the efforts of the District – supported by FC2 – to attract businesses that contribute to the District's economic vitality and civic life.

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[1] No party financed the preparation of this brief.

## ARGUMENT

1. In their effort to overturn the Superior Court's ruling in this case, Appellant and its supporting amici urge the Court to alter the standard applicable in District courts for determining when factual allegations are sufficient to survive a motion to dismiss under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. That standard is well established. This Court has determined that Superior Court Rule 8(a) incorporates the "plausibility standard" developed by the U.S. Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007).

In *Potomac Development Corp.* v. *District of Columbia*, 28 A.3d 531, 544-45 (D.C. 2011), this Court explained at length how D.C. courts should apply the plausibility standard, quoting extensively from the Supreme Court's explication in *Iqbal* and *Twombly*:

> "'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." … A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. …. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of "entitlement to relief."'"

28 A.3d at 544 (emphasis added) (quoting *Iqbal,* 556 U.S. at 678, and *Twombly,* 550 U.S. at 570); *see also, e.g., Bereston v. UHS of Delaware, Inc.,* 180 A.3d 95, 99 (D.C. 2018) (same); *Close It! Title Services, Inc., v. Nadel*, 248 A.3d 132, 138 (D.C. 2021) (reciting pleading standard).

2. The Superior Court's decision here laid out this standard and proceeded to apply it to the factual allegations of the First Amended Complaint. JA 364-76. FC2 is concerned that the arguments advanced by Appellant and its supporting amici seek to have this Court alter D.C. law in a manner that would read the plausibility standard out of existence in most cases.

Appellant argues point blank that "*Twombly*'s plausibility discussion has no application to this case." Appellant Br. at 35. The thrust of the argument appears to be that, unlike in *Twombly*, where plaintiffs sought to infer a conspiracy from allegations of circumstantial facts, the agreements alleged in this case involve undisputed "written contracts" between Amazon and its sellers and suppliers. Appellant Br. at 36. Appellant argues that the *Twombly* case "addressed whether the plaintiffs had plausibly alleged an agreement, not whether that agreement was plausibly anticompetitive." Appellant Br. at 35. To similar effect is the argument of the law professors and economists who support Appellant. They argue that the

*Twombly* case "is inapposite in cases (like this one) that involve a challenge to a written contract term."[2]

3. Appellant and its amici are incorrect about the reach of the plausibility standard. They appear to ignore the fact that the plausibility standard as adopted in *Twombly* and *Iqbal* was *not* one that applied narrowly only to complaints alleging the existence of an antitrust conspiracy. Indeed, the Supreme Court said so expressly in *Iqbal*, where it rejected the contention that the "decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute." 556 U.S. at 684. The Court explained:

> "This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.' Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."

*Id.* (citations omitted).

This Court's adoption and application of the plausibility standard confirms that it applies broadly to all civil claims and to each element of such claims, not just allegations relating to the conspiracy element of antitrust claims. *See, e.g.,*

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[2] Brief for Amici Curiae Antitrust Law Professors and Economists Supporting Appellant and Reversal (filed Jan. 30. 2023) ("Professor Amici Br.") at 2.

*Potomac Development,* 28 A.3d at 544 (applying standard to allegations supporting takings and condemnation claims); *Bereston,* 180 A.3d at 99 (applying standard to allegations supporting wrongful discharge claims); *Close It! Title Services*, 248 A.3d at 138 (applying standard to allegations supporting RICO claim).

4. In this case, the Superior Court acknowledged the existence of written agreements between Amazon and its sellers and suppliers, and then proceeded to examine whether Appellant had sufficiently alleged facts that made it plausible that those agreements had the kinds of unreasonably anticompetitive market effects that would render them illegal. *See* JA 369-71.[3] This is plain from the Court's observation that each of Appellant's claims required "allegations of anti-competitive policies and effects" and that they were "dismissed because that condition had not been met." *Id.* at JA 371.

Appellant and its amici indeed acknowledge that Appellant was required to plead not only the existence of an agreement but the *anticompetitive effects* of such an agreement.[4] The plausibility standard applies to both of these elements, not

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[3] FC2 expresses no view on the question whether the plausibility standard, properly applied, should have resulted in the dismissal of the Amended Complaint.

[4] *E.g.,* Appellant Br. at 26 ("To state a claim under the rule of reason, a plaintiff must allege 'that the challenged restraint has a substantial anticompetitive effect that harms consumers.") (quoting *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018)); Professor Amici Br. at 11 ("an antitrust plaintiff must plead that the agreement actually creates an anticompetitive effect").

merely the agreement prong, as shown by the consistent practice of other courts applying that standard in assessing the sufficiency of antitrust complaints. They ask, first, whether facts were properly alleged rendering plausible the *existence of an agreement*, and then, separately, whether the complaint's factual allegations make it plausible that the alleged agreement had the requisite *anticompetitive effects*. *See, e.g., Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1333, 1336-40 (11th Cir. 2010) (applying *Twombly* and *Iqbal* in affirming dismissal where complaint failed to "provide allegations plausibly suggesting actual harm to competition" or establishing "the connection between [the defendant's] power in the … market and harm to competition in that market"); *Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278, 288-91 (4th Cir. 2012) (applying *Twombly* and *Iqbal* in reversing dismissal, finding that "plaintiffs state a plausible claim to relief under *Twombly,* asserting facts which plausibly suggest that the MLS rules harmed market competition"); *United American Corp. v. Bitmain, Inc.*, 530 F. Supp. 3d 1241, 1255-71 (S.D. Fla. 2021) (applying *Twombly* and *Iqbal* in dismissing complaint, including on grounds plaintiff failed "to plausibly allege that Defendants' conduct harmed competition in th[e] market"); *Pennsylvania v. National Collegiate Athletic Ass'n*, 948 F. Supp. 2d 416, 428-31 (M.D. Pa 2013) (applying *Twombly* and *Iqbal* in dismissing complaint for failure to plausibly allege unreasonable anticompetitive restraint: "The fact that Penn State will offer

fewer scholarships over a period of four years does not *plausibly* support its allegation that the reduction of scholarships at Penn State will result in a market-wide anticompetitive effect, such that the 'nation's top scholastic football players' would be unable to obtain a scholarship in the *nationwide* market for Division I football players.") (emphases in original).

5. To the extent Appellant and its amici make a narrower argument about specific language used by the Superior Court in describing how to apply the plausibility standard, they are wrong about that as well. Appellant contends that the Superior Court erred when it "conclude[d] that the agreements were not anticompetitive because they 'could be "explained by lawful, unchoreographed free market behavior."'" Appellant Br. at 35 (quoting Hearing Tr. (Mar. 18, 2022) at JA 247-48); *see also* JA 369 (addressing same point, quoting *Iqbal*, 556 U.S. at 680).

As the Superior Court understood, however, this concept flows directly from the admonition in *Twombly* that facts that are "merely consistent with" a defendant's liability fail to establish plausibility. That admonition is not limited in application to allegations concerning the existence of an antitrust conspiracy. The same language has been invoked repeatedly *by this Court* in non-antitrust settings to describe the pleading standard applicable in District of Columbia courts: "Where a complaint pleads facts that are 'merely consistent with' a defendant's

liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[5]

And the same test was expressly applied by the Supreme Court in *Iqbal* in affirming the dismissal of a non-antitrust discrimination claim. As the Court there held, facts that are merely "consistent with" a predicate element of a claim do not suffice because they do no more than support a "mere possibility of misconduct." 556 U.S. at 679. Specifically, *Iqbal* involved claims that the defendants had engaged in purposeful, invidious discrimination. The Court identified allegations in the complaint that it found to be "*consistent with* petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. *But given more likely explanations*, they do not plausibly establish this purpose." *Id.* at 681 (emphasis added). The Court relied expressly on *Twombly* in concluding that "discrimination [was] not a plausible conclusion" "[a]s between th[e] 'obvious alternative explanation' for the arrests, … and the purposeful, invidious discrimination respondent asks us to infer." 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567).

6. At bottom, then, Appellant is asking this Court to materially alter the pleading standard applicable in this Court so as to read out of that standard –

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[5] *Potomac Development,* 28 A.3d at 544 (quoting *Iqbal,* 556 U.S. at 678, and *Twombly,* 550 U.S. at 570); *Bereston,* 180 A.3d at 99 (same).

except in an exceedingly narrow class of cases involving the conspiracy element in certain antitrust claims – any meaningful inquiry into the question whether the facts alleged do more than make it *possible* that the plaintiff is entitled to relief and instead push the allegations across the line into *plausibility*.

This change is unwarranted and could have adverse effects for the District and its court system. FC2 is concerned that revising District law in this manner would impose unjustified burdens on companies and individuals doing business in the District. This would undermine the District's efforts to attract new businesses to the community that would help to provide the economic growth and employment that contribute to the District's economic prosperity and the quality of its civic life.

The pleading standard Appellant advocates would make the District's courts a potential magnet for plaintiffs seeking to advance claims predicated on less robust or more speculative factual foundations than would be accepted in federal court – or would be accepted in this Court under present law – with the promise of enabling those litigants to burden the courts and force defendants to endure the costs of discovery. Indeed, the Supreme Court cited this same concern in its decision in *Twombly*:

> "We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with

> "'a largely groundless claim'" be allowed to "'take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.'" *Id.* at 347 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 741 (1975))."

*Twombly*, 550 U.S. at 557-58.[6]

The consequences for the District of such a change would be felt broadly. Encouraging the filing of speculative or groundless claims would burden the courts, making it more difficult for parties with valid claims to secure prompt access to justice. And by encouraging relatively more speculative claims to be filed in the District's courts in cases when defendants are susceptible to being sued here, it would discourage businesses from establishing and maintaining the kind of presence in the District that would subject them to such suits.[7] It is well known that businesses have fled or avoided certain other jurisdictions when perceptions about the fairness of the processes available in their courts made those jurisdictions relatively unattractive places to do business. FC2 is proud that the District's courts are viewed positively in today's world, and we encourage the Court not to use this

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[6] The Court went on to explain that this concern requires district courts to apply the plausibility standard at the motion to dismiss stage and that "it is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out" later in the litigation process. *Id*. at 559.

[7] *See Daimler AG v. Bauman*, 571 U.S. 117 (2014) (general personal jurisdiction over a corporation exists, except in rare situations, only in the state in which the corporation has its headquarters or its principal place of business).

case as a vehicle for altering current law in a manner that would diminish the scrutiny given to the sufficiency of complaints at the pleading stage.

## CONCLUSION

For the foregoing reasons, Federal City Council urges the Court to leave intact the "plausibility standard" established by this Court's precedents and reject Appellant's contention that the standard should be applied only in the narrow context where allegations of conspiracy are predicated on circumstantial evidence.

Respectfully submitted,

DAVID L. MEYER
LAW OFFICE OF DAVID L. MEYER
1105 S Street N.W.
Washington, D.C. 20009
202-294-1399
David@MeyerLawDC.com

*Attorney for Federal City Council*

May 1, 2023

## CERTIFICATE OF SERVICE

I, David L. Meyer, counsel for Amicus Federal City Council and a member of the Bar of this court, certify that, on May 1, 2023, a copy of the attached brief was filed and served through the court's electronic filing system on counsel for appellant and appellee.

David L. Meyer

May 1, 2023

# District of Columbia
# Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Signature

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Case Number(s)

David L. Meyer

Name

May, 1, 2023

Date

David@MeyerLawDC.com

Email Address