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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

LOREN DATA CORP.,
Petitioner,
v.

GXS, INC.,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Atlantic Bell Corp. v. Twombly*, 550 U.S. 544 (2007), a district court faced with a motion to dismiss a Section 1 antitrust claim is permitted to weigh competing, reasonable inferences arising from the complaint's well-pleaded facts.

LIST OF PARTIES TO THE PROCEEDING

The parties to the judgment from which review is sought are the Petitioner, Loren Data Corp., and the Respondent, GXS, Inc.

CORPORATE DISCLOSURE STATEMENT

Loren Data Corp. certifies that it has no parent companies, subsidiaries or affiliates that have issued shares to the public and that no publicly held corporation, whether or not a party to the present litigation, has a direct financial interest in the outcome of this case by reason of a franchise, lease, other profit sharing agreement, insurance, indemnity agreement or otherwise.

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OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court in an unpublished opinion, *Loren Data Corp. v. GXS, Inc.*, No. 11-2062, 2012 WL 6685771, (Dec. 26, 2012), which is reproduced at App. at 1-21a.

GROUND FOR JURISDICTION

The Court of Appeals issued its opinion and entered judgment on December 26, 2012. Petitioner Loren Data Corp. (“Loren Data”) filed a timely petition for rehearing, which the Fourth Circuit

denied on January 23, 2013. App. at 65a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court and Court of Appeal pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1 (Sherman Antitrust Act, Section 1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...

FED. R. CIV. P. 8 (in relevant part):

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

* * *

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

(2) **Alternative Statements of a Claim or Defense.** A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) **Inconsistent Claims or Defenses.** A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) **Construing Pleadings.** Pleadings must be construed so as to do justice.

FED. R. CIV. P. 12(b)(6):

(b) **How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

* * *

(6) failure to state a claim upon which relief can be granted;

* * *

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

PETITION FOR WRIT OF CERTIORARI

In the wake of this Court's landmark decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the federal courts have struggled to apply and define the new "plausibility" standard for assessing the legal sufficiency of complaints, especially in antitrust cases. The Second Circuit called out for further guidance in its *Iqbal* opinion, explaining that "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created" by *Twombly*. *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007), *rev'd*, 556 U.S. 662 (2009).

Yet even after the Court later clarified and extended *Twombly* to all federal claims in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the lower courts have continued to reach divergent conclusions as to its application. One district court has observed with some consternation that "even the official Federal Rules of Civil Procedure Forms...have been cast into doubt by *Iqbal*." *Doe ex rel Gonzalez v. Butte Valley Unified Sch. Dist.*, No. Civ. 09-245, 2009 WL 2424608 at *8 (E.D. Cal. Aug. 6, 2009); see Nicholas Tymoczko, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 506, 539 (2009-2010) ("*Iqbal* confirmed the general applicability of the plausibility standard, but failed to clarify the meaning [of] 'plausibility.' Instead, it endorsed a series of conflicting signals in *Twombly* that can be read to suggest that pleading standards have been raised significantly. The result is both an abiding confusion at the heart of the procedural system created by the Federal Rules and greater license for courts to dismiss potentially meritorious claims.")

This case merits this Court's review because it presents the opportunity to resolve a split that has arisen amongst the circuits and put an end to the strikingly inconsistent application of *Twombly* which has undermined the uniformity of results so important to our federal court system. The Court held in *Twombly* that to withstand a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Id.* at 570. Essentially overruling the long-established standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"), the *Twombly* "plausibility" criterion nonetheless was presented as consistent with the simple notice pleading requirement of FED. R. CIV. P. 8. However, contrary to the Court's expectations, cases like this one reveal that some lower courts have used the apparent change in the level of scrutiny accorded to federal complaints as a means to dispose of cases by impermissibly rejecting, for Rule 12(b)(6) purposes, the truth of a plaintiff's well-pleaded factual allegations.

In *Iqbal*, the Court articulated a two-pronged approach to assess whether a complaint is subject to dismissal. First, the complaint must satisfy Rule 8 and assert facts sufficient to support legal conclusions set out therein. *Iqbal*, 556 U.S. at 679. Second, "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.'" *Id.* at 678 quoting *Twombly*, 550 U.S. at 557. Yet, neither *Iqbal* nor *Twombly* defined the precise contours of the plausibility standard. The lower courts have as a consequence scrambled to craft their

own definitions of that standard, and two vastly different approaches have emerged. Indeed, a significant and worrisome split has arisen amongst the circuits. Some courts engage in a weighing of competing inferences when evaluating plausibility, whereas other courts frown upon such an approach. Those circuits permitting the weighing of contradictory inferences have employed a particularly rigorous and formalistic standard of pleading. These disparate standards have produced inconsistent results, demonstrating the need for further guidance from this Court.

STATEMENT OF THE CASE

This case involves claims of unlawful contract, combinations, and/or conspiracy in restraint of trade, attempted monopolization, and monopolization under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2. Petitioner Loren Data alleged that Respondent GXS, Inc. (“GXS”) entered into agreements with other networks in its market to restrict a particular type of data “transit” which is at the core of Loren Data’s innovative business model. Amended Compl., ¶¶ 15-18, Ex.A (Pet. App. 75-76a, 81-82a). The district court dismissed the complaint with prejudice pursuant to Rule 12(b)(6), finding that Loren Data had not alleged a “plausible” claim for relief in light of *Twombly*. *Id.* at 41a. The Fourth Circuit affirmed, reasoning that, despite GXS’s admission of current contracts with all other competitors restricting activity at the core of Loren Data’s business model, Loren Data had not set forth “any” plausible facts suggesting concerted conduct on the part of GXS and other competitors in the industry. App. at 11-12a.

The Electronic Data Interchange Industry

The factual claims in this case arise out of the Electronic Data Interchange (“EDI”) industry. Both of the parties to this action, Loren Data and GXS, operate Value Added Networks (“VANs” or “Networks”) in the EDI industry. Compl. ¶ 1 (App. 87a). EDI consists of the transfer and exchange of business data between computer systems using a standard digital format. *Id.* at ¶ 2 (App. at 87-88a). VANs are the secure, private data networks upon which EDI messages travel. *Id.* Business computing systems generate, send, and receive EDI messages between one another. *Id.* EDI messages often comprise business information such as invoices and purchase orders. *Id.* at ¶ 1 (App. at 87a). There are two types of competitors in the markets: VANs as mentioned above and EDI (or Electronic Commerce) Service Providers (“ECSPs”). Amended Compl. ¶¶13-14 (App. at 74-75a). To a customer they are essentially the same; the only difference is in how they connect to each other. *Id.*

The EDI market services the infrastructure of our economy by managing millions of business transactions (orders, invoices, shipping notices, etc.) between hundreds of thousands of companies every day, representing billions of dollars of commerce. EDI users include most of the Fortune 500 and their suppliers, including Wal-Mart, Home Depot, Ford, UPS, Amazon and many others.

As with making telephone calls, every EDI user naturally expects to be able to exchange EDI messages with any other EDI user, no matter the service providers each chooses. Compl. at ¶ 2 (App. at 87-88a). This requires that every competitor provide

as part of its core service the ability to send and receive EDI messages with every other EDI user, no matter which system they are on. *Id.* To satisfy this customer requirement, a necessary component of service in any networked industry, competitor VANs agreed many years ago to set up cooperative interconnects, where their respective customers' messages are exchanged between systems. Compl. at ¶ 3 (App. at 88-89a); Amended Compl. at ¶ 3 (App. at 71a). Interconnects are mutually beneficial to all competitors because they facilitate both the sending and receiving of EDI data between systems, enabling all competitors to satisfy their contractual obligations to their respective customers. *Id.* at ¶ 8-9 (App. at 73a). Interconnects are thus the cornerstone of the EDI market. *Id.*

EDI messages traverse Networks in one of two ways—via non-settlement “peer interconnects” (*id.*) or through commercial mailboxes (Compl. at ¶ 13; App. at 93a). The peer interconnect is the industry standard for traffic traveling between VANs of scale. Compl. at ¶ 13 (App. at 93a); Amended Compl. at ¶ 9 (App. at 73a). When a peer interconnect is used, each VAN is responsible for its own costs of data transmission and does not charge the corresponding VAN for the data transmission. Compl. at ¶¶ 3-4 (App. at 88-90a). An ECSP uses a commercial mailbox rather than a peer interconnect, paying a VAN to transfer data to other local mailboxes and transit to all other VANs and ECSPs. *Id.* at ¶ 13 (App. at 93a).

The only way to compete in the EDI market is to have the ability to send and receive to all EDI users regardless of the system to which they subscribe. Compl. at ¶¶ 4, 9 (App. at 89-90a, 91-92a). Without

such an ability, effective competition in the market is not possible. *Id.* Relations among firms in the EDI market have always taken two forms: (1) those directly interconnected to each other as peers, and (2) those transiting through a peer-interconnected VAN. Compl. at ¶ 3 (App. at 88-89a); Amended Compl. at ¶ 14. (App. 74-75a). The former are the VANs, the latter ECSPs. Barring statutory or regulatory constraints, of which there are none in the EDI market, the choice whether to use the direct (VAN) or indirect (ECSP) model is a business decision that should be made by each firm.

Loren Data Corp. and GXS, Inc.

Petitioner Loren Data is a small but disruptive player in the EDI market. Compl. at ¶ 20 (App. at 96a); Amended Compl. Summ. at ¶ j (App. at 78a). In comparison to the large firms in the industry, Loren Data offers a wholesale business model by which end users can access EDI services, via Loren Data's retail customers, with lower prices and more features for end user customization. Compl. at ¶ 20 (App. at 96a). Like all EDI firms, however, Loren Data must connect its VAN with other VANs to establish routes over which information is exchanged among Loren Data's wholesale customers and their end users. *Id.* at ¶ 2 (App. 87-88a). Loren Data's model of selling services to ECSPs is unique only in its innovative technological approach and focus; Loren Data has *not* introduced a new construct of "daisy chaining" to the market. Amended Compl. at ¶¶ 14, 18 (App. at 74-76a).

Respondent GXS has long been the unrivaled market leader in the EDI industry. Compl. at ¶ 5 (App. at 90a). In 2005, GXS acquired the Information Exchange division of IBM. *Id.* at ¶ 7 (App. at 91a).

In 2010, GXS merged with another leading EDI Network competitor, Inovis, Inc. *Id.* GXS now boasts a client base of 65% to 80% of Fortune 500 companies in key industries such as automotive manufacturing, banking and retail. Amended Compl. at ¶ 5 (App. at 71-72a).

Given a basic understanding of the economics of this “network effects” market, it is evident that one cannot effectively compete without being able to exchange EDI documents with users on GXS’s system. Compl. ¶¶ at 2-9 (App. at 87-92a). To do so would be analogous to attempting to run a telephone company without offering customers the ability to complete calls to customers on Verizon’s telephone system. As Loren Data alleged, “[t]he EDI communications market is similar to the telephone market where each user chooses a particular phone company thereby gaining ubiquitous access to any other telephone user on any telephone service.” Compl. at ¶ 2 (App. at 88a). Because GXS controls over half the users in the market, competitive entrants will inexorably have to exchange EDI documents with users on the GXS system. Compl. at ¶¶ 7-9 (App. at 91-92a).

Since November 2000, Loren Data has been negotiating with GXS to obtain peer interconnection to the latter’s flagship network, TGMS. Compl. at ¶ 11 (App. at 92a). During the initial negotiating period, GXS allowed Loren Data only a commercial mailbox. *Id.* at ¶¶ 12-15 (App. at 92-94a). By August 2001, GXS had expressly denied Loren Data’s request for a peer interconnect. *Id.* at ¶ 16 (App. at 94a). GXS thereafter continued to deny Loren Data peer interconnection to TGMS. Amended Compl. at ¶ 7 (App. at 72a). GXS has made it known that the reason Loren Data was

denied a peer interconnection is that GXS objects to Loren Data's "business model" of servicing the EDI networking needs of Electronic Commerce Service Providers ("ECSPs"). Amended Compl. at Summ ¶ j (App. at 78a).

As corroborated by a letter from a senior GXS executive annexed to Loren Data's Amended Complaint, GXS has "current interconnect agreements" with other VANs which "expressly prohibit" transit traffic arrangements which GXS pejoratively calls "daisy chaining." Amended Compl. Ex. A (App. at 81-82a) This prohibition, in concert with GXS's policy of denying peer interconnection to competitors servicing ECSPs serves to (a) block innovative VANs such as Loren Data from participating as full peers, and (b) prevent new ECSPs from entering the market as VANs. *Id.*

The Pleadings and Proceedings Below

On December 13, 2010, Loren Data filed a complaint against GXS in the United States District Court for the District of Maryland, asserting violations of Sections 1 and 2 of the Sherman Act.¹ The complaint alleged that GXS unlawfully refused, individually and in combination with other EDI providers, to interconnect with Loren Data's VAN in order to exclude appellant as an effective competitor in the EDI market. Compl. at ¶ 28 (App. at 98a). It did so by repeatedly denying Loren Data's requests for such a "peer" interconnect and, instead, restricting Loren Data to a commercial mailbox. *Id.* at ¶¶ 11-19 (App. at 92-95a). The complaint further alleged that, in doing so, GXS treated Loren Data—and

¹ Loren Data did not appeal the dismissal of the state law claims, which are accordingly not before the Court.

among all national EDI firms *only* Loren Data—as a customer, not an EDI “peer” competitor. *Id.* at ¶¶ 6, 20, 21 (App. at 90a, 96a).

Count I of the complaint asserted that GXS entered into anticompetitive agreements with other EDI providers to boycott Loren Data by prohibiting Loren Data from gaining anything but crippled access to the core GXS network. *Id.* at ¶¶ 27-8 (App. at 98a). The Amended Complaint went on to assert that GXS, through express contracts, agreed with other EDI networks to prohibit the use of its peer interconnection for the “daisy chaining” of ECSP EDI traffic to the GXS network. Amended Compl. at ¶¶ 18-19 (App. at 76a).

Count II alleged that GXS’s acquisitions of market share over the past five years, coupled with its exclusion of Loren Data via denial of peer interconnects, constituted an attempt to monopolize in violation of Section 2 of the Sherman Act. Compl. at ¶¶ 29-33 (App. at 99-100a). In support, Loren Data asserted that GXS’s refusal to grant a peer interconnect was motivated by a desire to keep “wholesale innovators out of the market,” to stop “novel operators from bringing to market new technologies that would allow on demand delivery models,” and generally to “disable and harm an innovative competitor.” Compl. at ¶ 20 (App. at 96a). To demonstrate that GXS’s motivation was anti-competitive, *i.e.*, not based on efficiency or legitimate business reasons, Loren Data included factual allegations showing that a peer interconnect would benefit, not harm, GXS financially. Amended Compl. at ¶ 8 (App. at 73a).

Loren Data additionally alleged facts establishing GXS’s greater than 50% market share and the various mergers and acquisitions that allowed it to

garner that great share of the market. Compl. at ¶¶ 5, 7, 18. (App. at 90-91a, 95a). Loren Data's monopolization allegations principally relied upon the "essential facilities" doctrine, asserting that the VANs operated by GXS are essential to competition in the EDI market and that GXS had refused denied reasonable access to the facilities it controlled and which could not feasibly be replicated. Compl. ¶¶ 9, 33, 35-36 (App. at 91-92a, 99-100a). As with its attempted monopolization claim, Loren Data also alleged that GXS's denial of an interconnect was motivated by a desire to eliminate a technologically innovative, disruptive and lower-priced competitor from the EDI Market. Compl. at ¶ 20 (App. at 96a).

On August 9, 2011, the district court, without oral argument, granted GXS's motion to dismiss. In its opinion, the court concluded that Loren Data's Section 1 claim presented only conclusory allegations and did not allege "adequate facts to establish that GXS contracted, combined, or conspired with other VANs to boycott Loren Data." App. at 41a. The court held that the complaint was defective because it did not "identify the parties with whom GXS agreed to restrain trade, the time or place at which such an agreement was reached, or the specific contours of such agreement." *Id.* at 13. The district court did not address the GXS letter attached to the amended complaint, rejecting as vague and conclusory Loren Data's assertion that GXS had "made clear" that it would not permit interconnected EDI competitors to deal with "resale" EDI providers like Loren Data. App. at 41a n.2. The district court's opinion also concluded that Loren Data failed to allege facts that could plausibly support claims for monopolization or attempted monopolization. App. at 53-56a.

Loren Data's subsequent appeal to the Fourth Circuit raised two principal issues. First, whether the district court misinterpreted or misapplied this Court's recent precedents establishing a new plausibility standard for Rule 12(b)(6) motions. Second, whether the district court correctly held that, as a matter of law, Loren Data's amended complaint did not allege plausible claims for unreasonable restraint of trade, attempted monopolization, or monopolization.

Relying on its own "plausibility standard" derived from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Fourth Circuit concluded, after minimal discussion, that the district court correctly applied *Twombly* in finding that Loren Data's complaint failed to state a claim on which relief could be granted. App. at 8a. The court noted that *Twombly* precludes a district court from "simply credit[ing] conclusory allegations of conspiracy" and requires it to "determine whether the well-pleaded, non-conclusory factual allegations give rise to 'a plausible suggestion of conspiracy.'" *Id.*, quoting *Twombly*, 550 U.S. at 565-66.

Turning to the application of *Twombly*, the court reasoned that "[t]o adequately plead a Section 1 conspiracy, the complaint must allege a factual basis plausibly suggesting that concerted activity led to an agreement to restrain trade." App. at 9a. The court concluded that Loren Data's complaint presented a scenario in which the "concerted conduct is a matter of inference" and that, as such, "a plaintiff must include evidence that places the parallel conduct in a 'context that raises a suggestion of a preceding agreement' as 'distinct from identical, independent action'" *Id.* quoting *Twombly*, 550 U.S. at 549, 556.

Loren Data had argued that the September 3, 2010 GXS letter annexed to the Amended Complaint on its face met the *Twombly* pleading burden with regard to the concerted action requirement of Section 1 of the Sherman Act. *Id.* Yet the Fourth Circuit held that “[m]erely pleading or pointing to an express contract is not enough to show that an actual conspiracy to restrain trade is afoot...” *Id.* The court relied on *Matsushita Electric Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-64 (1984), explaining that, in the absence of evidence of an “economic motive” to conspire, “[t]he evidence must tend to exclude the possibility that the alleged co-conspirators acted independently, and the alleged conspiracy must make practical, economic sense.” App. at 10a.

Despite the uncontradicted fact that GXS had entered into peer interconnect agreements that expressly prohibited what it termed “daisy chaining,” the court nonetheless held that “the September 3, 2010 letter is hardly suggestive of an unlawful conspiracy or an agreement to boycott Loren Data.” *Id.* at 11a. The court principally relied on GXS’s contention that a conspiracy could not be inferred because Loren Data was still able to carry on business with the other networks even in spite of the GXS ban. *Id.* Because Loren Data was able to remain in business and interconnect with *other* networks, the court reasoned, GXS’s conduct could not be anything other than unilateral action. *Id.* It thereby found that given how the defendant characterized “the fact that Loren Data was able to interconnect freely with so many other Networks, the letter of September 3, 2010 cannot plausibly be read as evidence of concerted action.” *Id.* at 12a.

REASONS FOR GRANTING THE PETITION**I. A CIRCUIT SPLIT EXISTS AS TO WHETHER UNDER *TWOMBLY*, A COURT FACED WITH A MOTION TO DISMISS A SECTION 1 CLAIM IS PERMITTED TO WEIGH COMPETING, REASONABLE INFERENCES ARISING FROM THE COMPLAINT'S WELL-PLEADED FACTS**

The reasoning of the Fourth Circuit in finding that the complaint failed to set forth a plausible claim for a civil antitrust violation stands in contrast to the holdings of other circuits and exemplifies the inconsistency with which lower courts are applying the “plausibility” standard announced in *Twombly*. The courts of appeals are divided over whether district courts are required, or are indeed even permitted, to weigh competing inferences when evaluating the plausibility of a legal claim. Circuits that endorse such a “weighing of inferences” approach have created a stricter pleading standard that places the impermissible burden on plaintiffs of anticipating and negating adverse inferences which may be drawn from the facts alleged in support of their claims. Conversely, circuits which decline to impose such a rubric have adopted a more forgiving approach. This split in methodology would unquestionably result in the same case being dismissed in some circuits while moving to trial in others.

The Third and Eleventh Circuits have held that when a district court is presented with pleadings that allege conduct that which may have more than one plausible explanation, it is acceptable for the court to weigh the competing explanations, and grant a 12(b)(6) dismissal if they find that the explanation espoused offered by the plaintiff is less “plausible”

than competing explanations, *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (11th Cir. 2010); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212 (3rd Cir., 2011). The Second, Fifth, and Eighth Circuits, in sharp contrast, have held that it is improper at the 12(b)(6) stage to weigh the plausibility of competing explanations for alleged conduct. *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 162 (2d. Cir. 2012); *Lormand v. Us Unwired, Inc.*, 565 F.3d 228 (5th. Cir., 2009); *Whitney v. Guys, Inc.*, 700 F.3d 1118 (8th Cir., 2012). The Sixth and Seventh Circuits have generated internal splits, issuing inconsistent opinions approving and prohibiting the “weighing of inferences” approach. *Watson Carpet & Floor Covering Inc. v. Mohawk Indus. Inc.*, 648 F.3d 452 (6th Cir., 2011); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009); *Richards v. Mitcheff*, 696 F.3d 635 (7th Cir., 2012); *McCauley v. City of Chicago*, 671 F.3d 611 (7th Cir., 2011). It is therefore crucial that this Court act to harmonize the approaches taken by courts engaged in *Twombly* plausibility analysis.

A. The “Weighing of Inferences” Approach

Some circuits have suggested that it is proper for a court to engage in the weighing of inferences when presented with multiple competing explanations for alleged conduct. This approach apparently has roots in *dicta* from *Twombly* in which the Court observed that, “[i]n a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation.” *Twombly*, 550 U.S. at 947-8. The same

language was later reiterated in *Iqbal*.² 556 U.S. at 682.

Whatever its origin, these circuits allow consideration of alternative explanations for conduct that is deemed more “plausible” than that which was which was pled by the plaintiff. The Seventh Circuit, for instance, has ruled that when factual allegations are “entirely consistent with lawful conduct,” they cannot plausibly suggest discriminatory intent. *McCauley*, 671 F.3d at 619. Perhaps the most troubling example of such a “weighing of inferences” is from *Jacobs v. Tempur-Pedic Int’l, Inc.*, in which the Eleventh Circuit decided that it was the plaintiff’s burden at the pleading stage to “present allegations” showing why it was “more plausible” that defendants would enter into an illegal agreement rather than arrive at the same result via “purely rational profit-maximizing behavior.” *Jacobs*, 626 F.3d at 1342.

By permitting a district court to consider (indeed to fashion *sua sponte*) alternative explanations, these circuits have placed a higher burden on plaintiffs at the pleading stage than appears to have been contemplated by *Twombly*. These circuits also conflate *Twombly* and *Matsushita*, with no discernible acknowledgment that the former dealt with summary judgment and the latter a 12(b)(6) motion. *E.g.* *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d at 1343.

² It must be noted that in *Iqbal*, this Court ultimately found the Plaintiffs proposed allegation of purposeful discrimination was not simply less plausible than Defendant’s obvious alternative explanation, but rather implausible. *Id.* (“As between that “obvious alternative explanation” for the arrests, *Twombly*, supra, at 567, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.”)

(“Here, like the *Twombly* Court, we fail to find in the complaint ‘facts that are suggestive enough to render a § 1 conspiracy plausible,’ 550 U.S. at 556, 127 S.Ct. at 1965, when the inference of conspiracy is juxtaposed with the inference of independent economic self-interest.”), citing *Matsushita* 550 U.S. at 596-97; *In re Travel Agent Com’n Antitrust Litigation*, 583 F.3d at 909 (“In this regard, we note that the plausibility of plaintiffs’ conspiracy claim is inversely correlated to the magnitude of defendants’ economic self-interest in making the cuts.”) citing *Matsushita* 550 U.S. at 574.

B. The “Mere Plausibility” Approach

Other courts, such as the Second, Fifth, Sixth, Seventh, and Eighth Circuits, have prohibited the weighing of competing plausible explanations for conduct at the 12(b)(6) stage. *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012); *Watson Carpet & Floor Covering Inc. v. Mohawk Indus. Inc.*, 648 F.3d 452, 458 (6th Cir. 2011); *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012); *Whitney v. Guys, Inc.*, 700 F.3d 1118 (8th Cir., 2012). As articulated by the Second Circuit, “[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.” *Anderson News*, 680 F.3d at 185. According to the Fifth Circuit, “... under Rules 8(a)(2) and 12(b)(6), at the pleading stage, the plaintiff is only required to plead a plausible cause of action; we are not authorized or required to determine whether the plaintiff’s plausible inference of loss causation is equally or more plausible than other competing inferences...” *Lormand*, 565 F.3d at 267 (citations omitted). Similarly, the Sixth Circuit has held that,

“[f]erret[ing] out the most likely reason for the defendants’ actions is not appropriate at the pleadings stage.” *Watson Carpet*, 648 F.3d at 458.

Such circuits limit their *Twombly* inquiries to the “mere” finding of plausibility, reasoning that the weighing of competing plausible explanations can and should be left to the later stages of litigation. *E.g.*, (*Anderson News*, 680 F.3d at 185) (“to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment”), citing *Matsushita*, 475 U.S. at 597–98. In these circuits, once a plaintiff’s allegations are found to be plausible, the inquiry, for 12(b)(6) purposes, is at an end. *Whitney*, 700 F.3d at 1130 (“‘plausible’ means plausible and that is all we are to assess”).

This approach properly recognizes that the level of factual allegations and proof required at later stages of litigation (that is, summary judgment or trial) are not appropriately imposed upon a plaintiff who has not yet had the benefit of discovery. Therefore, while these circuits understand that the *Twombly* plausibility standard requires plaintiffs to rise above the level of mere conclusory allegations, they also insist that it does not impose upon plaintiffs a quasi-evidentiary burden that has been traditionally left to the later stages of federal litigation. The Seventh Circuit has even gone so far as to suggest that requiring a plaintiff to preemptively plead against plausible alternative explanations for the conduct alleged would run afoul of *Gomez v. Toledo*, 446 U.S. 635 (1980), which held that plaintiffs need not

anticipate defenses and attempt to defeat them at the pleading stage. *Richards*, 696 F.3d at 637 (“What a complaint must plead is enough to show that the claim for relief is plausible. Complaints need not anticipate defenses and attempt to defeat them”), citing *Gomez v. Toledo*, 446 U.S. at 640-641.

C. The Fourth Circuit’s Application of Plausibility in Loren Data’s Case

In its amended complaint, Loren Data included a letter from a senior GXS executive that conceded, among other things, that “[o]ur current VAN interconnect agreements expressly prohibit daisy chaining, which is the core of your business model.” Amended Compl. ¶¶ 17-18 & Exh. A. (App. at 76a, 81-82a.) The letter was annexed in support of Loren Data’s allegation that GXS had entered into concerted action with other VANs. (Compl. ¶ 28) (App. at 98a.) Nonetheless, the Fourth Circuit concluded that “the letter of September 3, 2010 cannot plausibly be read as evidence of concerted action.” App. at 12a. Instead, the court inferred that the letter simply “reflect[ed] GXS’s unilateral business judgment as to the parameters under which it was willing to deal with Loren Data, an entity which it viewed as having an incompatible business model.” *Id.* Like other circuits that have adopted the “weighing of plausibility” approach, in evaluating the plausibility of Loren Data’s allegation, the Fourth Circuit not only relied on *Twombly*, but also on this Court’s *Matsushita* decision. App. at 10a.

Unlike *Twombly*, which was decided on the pleadings, the *Matsushita* case dealt with a motion for summary judgment. While the reasoning in *Matsushita* certainly informed some of this Court’s judgment in *Twombly*, the former’s evidentiary-based

analysis was never incorporated into the pleading standard to be used when evaluating a motion to dismiss. *Twombly*, 550 U.S. at 570 (“Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”) The Fourth Circuit did not credit this distinction, however, and instead held Loren Data to a standard that inexplicably required that “*the evidence* must tend to exclude the possibility that the alleged co-conspirators acted independently, and the alleged conspiracy must make practical, economic sense.” App. at 10a, citing *Matsushita*, 475 U.S. at 597-98 (citations omitted and emphasis added). In other words, Loren Data was held to an *evidentiary* standard of plausibility, long before it had the chance to conduct discovery and thus find evidence.

Like those circuits that impose a burden upon the plaintiff to anticipate and plead against defenses, the Fourth Circuit implemented a plausibility standard that goes far beyond the bounds of the requirements traditionally applied in federal courts at the pleading stage. Indeed, its misuse of the *Matsushita* precedent is consistent with the similarly strict approaches taken by the Eleventh Circuit in *Jacobs v. Tempur-Pedic Int’l Inc.* (*Jacobs*, 626 F.3d at 1342-3) and the Third Circuits in *Burtch v. Milberg Factors, Inc.* (*Burtch*, 662 F.3d at 229). The critical question faced by the Fourth Circuit below was whether GXS’s contracts with other EDI firms that “expressly prohibit” the data transmission method Loren Data employs were sufficient to “plausibly” allege concerted action for purposes of a Section 1 conspiracy claim. Yet by construing the letter merely as “suggest[ing] that GXS was unwilling to contract with Loren

Data on the terms it sought,”³ (App. at 11a), the Court of Appeals clearly drew an inference from the letter that GXS had acted unilaterally and, further, that there were legitimate business reasons supporting its decision. *Id.* To the contrary, Loren Data alleged specifically and in some detail that the cost, reliability and other explanations proffered by GXS for its conduct were factually untrue. Amended Compl. at ¶ 16 (App. at 75a). In any event, once Loren Data showed that GXS had entered into contracts with other VANs that restricted the transit of EDI transactions, the concerted action element of a Section 1 claim was satisfied as a matter of law.

It might be possible to conclude that Loren Data had not adequately alleged a single, unitary conspiracy among all firms in the industry to boycott its network.⁴ But the classification of GXS’s agreements as a *per se* offense like group boycott, or instead as a rule of reason Section 1 combination, is immaterial to the subsidiary question of concerted action. Indeed, the *Matsushita* language relied on by the Court of Appeals applies only to complaints

³ App. at 11a. (“The letter merely suggests that GXS was unwilling to contract with Loren Data on the terms it sought and provides no evidence that others agreed to boycott Loren Data.”) (emphasis added).

⁴ Though even if such a conclusion was made, it would not be fatal to Loren Data’s Section 1 claim. (see *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939) (“It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”) (citations omitted).

alleging a tacit conspiracy by way of circumstantial evidence, a situation not at issue in this case. App. at 10a (“[C]ourts should not permit fact finders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.”), citing *Matsushita*, 475 U.S. 593, and *Spray-Rite*, 465 U.S. at 762-64. An agreement between as few as two or many firms in a relevant market can constitute a *per se* group boycott as a matter of law. *Oksanon v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) (“Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities.”) Once an express agreement is plausibly alleged—as it clearly was here—the only remaining Section 1 issue for 12(b)(6) purposes is whether that agreement may be unlawful. By merging the two inquiries into a single question, the Fourth Circuit erred on both.

Most significantly, the Court of Appeals in effect shifted to the plaintiff in this case the burden of negating defenses in its complaint. The existence of a legitimate business justification is a potential defense to a rule of reason (but not *per se*) Section 1 claim. By crediting an inference drawn from its letter that GXS acted merely to protect the reliability of its network and customers—rather than, as alleged by Loren Data, to exclude from the market a small rival that pioneered a new business model which threatened to challenge GXS’s dominant market position—the Fourth Circuit weighed inferences adversely to Loren Data and required that a complaint anticipate and refute possible legal defenses. See App. at 5a. (Loren Data’s business model did not “provide the value associated with other Networks, which GXS contended are focused on growing the overall EDI

market”); *id.* at 11a (“When read in its entirety, the letter explains that Loren Data’s daisy chain business model raises service quality concerns for the GXS Network.”)

Under the more permissive approach of *Anderson News*, *Whitney v. Guys*, *Watson Carpet & Floor Covering*, and *Richards*, such an evaluation of competing explanations should play no part in a *Twombly* plausibility analysis. Moreover, consistent with *Matsushita* and in light of *Gomez v. Toledo*, 446 U.S. at 640-61, where as here a Section 1 plaintiff plausibly alleges an express agreement by a defendant with other competitors, a district court may not require that the complaint also rebut potential defenses to the claim that such agreement(s) violate the Sherman Act.

In short, this petition presents the Court with a pure motion to dismiss matter in which the proper application of *Twombly* plausibility is dispositive and on which the courts of appeal are unfortunately in sharp conflict. It thus raises “an important question of federal law that has not been, but should be, settled by this Court,” as well as a situation in which the lower courts of appeals have rendered conflicting answers on that same important federal question. Under SUP. CT. R. 10., the case warrants this Court’s review on both grounds.

CONCLUSION

For the foregoing reasons, the Petitioner, Loren Data, respectfully requests that this Honorable Court grant this petition for a writ of *certiorari* in order to resolve the proper application of its decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Respectfully submitted,

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