

DOCKET NO. 12-56674

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re: MUSICAL INSTRUMENTS AND EQUIPMENT
ANTITRUST LITIGATION,

JOSHUA RAMSEY, et al.,
Plaintiffs – Appellants

v.

NATIONAL ASSOCIATION OF MUSIC MERCHANTS, INC., et al.,
Defendants – Appellees

Appeal from an Order of the United States District Court
for the Southern District of California by the Honorable Larry A. Burns

**AMICUS BRIEF OF PROFESSORS MICHAEL E. WATERSTONE,
GEORGENE VAIRO, AND DEBRA LYN BASSETT
IN SUPPORT OF PETITION FOR EN BANC REVIEW**

Decision: August 25, 2015

Before the Honorable Circuit Judges: Harry Pregerson,
Richard C. Tallman, and Carlos T. Bea

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
ARGUMENT	1
CONCLUSION	5
CERTIFICATE OF COMPLIANCE	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Bell Atlantic v. Twombly</i> , 550 U.S. 544 (2007).....	1, 2, 4
<i>Iqbal v. Ashcroft</i> , 556 U.S. 662 (2009).....	1, 2, 4

AMICUS BRIEF IN SUPPORT OF EN BANC REVIEW

INTEREST OF AMICI

The parties to this amicus brief are law school professors with specific expertise in Federal Civil Procedure. This brief is filed on our own behalf and not on behalf of our academic institutions. We do not represent any of the parties and have no vested interest in the outcome of this litigation.¹ We write in support of *en banc* review due to our concern for the proper development of the legal standards applicable to motions to dismiss at the pleading stage, specifically the application of Federal Rule of Civil Procedure 12(b)(6), as interpreted by the Supreme Court's most recent pronouncements in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Iqbal v. Ashcroft*, 556 U.S. 662 (2009).

Counsel for defendants/appellees have consented to the filing of this amicus brief.

ARGUMENT

It is our view that the panel's majority has erroneously applied a heightened pleading standard that necessarily implicates the weighing of evidence and the drawing of inferences in favor of the moving parties in the underlying action. The

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5)(C), the Court is hereby advised that attorneys at Kesselman Brantly Stockinger LLP provided input and assisted in the filing of this brief. Kesselman Brantly Stockinger LLP does not represent any of the parties in this matter.

panel decision, if allowed to stand, would create the potential for confusion and the inconsistent application of the *Twombly/Iqbal* pleading standard within this Circuit. See Fed. R. App. Proc. 35(b)(1)(A) (en banc review appropriate to “secure and maintain uniformity of the court’s decisions”).

We write to commend *en banc* review so that the Court can reaffirm, consistent with applicable Supreme Court precedents, the proper standards for reviewing a motion to dismiss at the pleading stage: (1) plaintiffs need only plead sufficient facts which, if “plausible on its face,” supports the legal claim; and (2) courts must accept factual allegations in the complaint as true, and all inferences should be construed in a light most favorable to the non-moving party. *Twombly*, 550 U.S. at 555-57.

In our view, the panel dissent correctly points out that the majority departs from these bedrock principles and misapplied the *Twombly/Iqbal* standard by imposing a heightened standard of review that appears more appropriate for summary judgment than an analysis at the pleading stage. (Slip Op. at 28.)

As set forth in the panel decision’s recitation of the facts, we understand that the plaintiffs are consumers who filed this putative class action and allege that five leading guitar manufacturers, at the urging of the largest retailer of musical instruments in the United States, entered into a price-fixing agreement. Specifically, plaintiffs allege that each of the defendant guitar manufacturers

“adopted similar advertising policies (‘parallel conduct’) under circumstances that suggest the manufacturers agreed among themselves to adopt those policies (‘plus factors’).” (Slip Op. at 5.) The price fixing agreement is alleged to have been orchestrated at industry trade association meetings. (Slip Op. at 6-7.) Plaintiffs apparently filed suit on the heels of a Federal Trade Commission (“FTC”) investigation, with similar allegations of price fixing, that resulted in a consent decree requiring that the defendants cease and desist from facilitating exchanges of pricing information, including advertising prices. (Slip Op. at 7-8.)

We further understand that the plaintiffs, in alleging the existence of a price fixing agreement, have pleaded that six additional so-called “plus factors” beyond parallel pricing behavior gives rise to the inference of agreement: “(1) defendants shared a common motive; (2) the manufacturer defendants acted against their self-interest; (3) the manufacturer defendants simultaneously adopted substantially similar MAP policies; (4) the FTC’s investigation and consent decree; (5) the defendant’s participation in NAMM [trade association]; and (6) retail prices for guitars and guitar amplifiers rose during the class period as the number of units sold fell.” (Slip Op. at 16.)

In evaluating the plaintiffs’ allegations, and specifically the six plus factors, the panel majority imposes what can only be characterized as a heightened pleading standard – which is inconsistent with the Supreme Court’s teachings. As

the dissent points out, rather than evaluate the plus factors collectively, and construe the evidence in a light most favorable to the plaintiffs, the panel majority separately evaluates each plus factor and explains that lawful, alternative explanations can be inferred in each instance. (Slip Op. at 25-29.)

The panel majority's approach, if allowed to stand, can be read to impose a new burden at pleading stage, whereby lower courts apply inferences in favor of the non-moving party, and further determine whether the allegations in an operative complaint are "probable" rather than merely "plausible." In *Twombly*, the Supreme Court made clear that there is no "probability requirement" at the pleading stage:

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. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."

550 U.S. at 556.

While taking no position on the panel majority's pronouncements on substantive antitrust law, the undersigned law professors believe that en banc review is necessary because the allegations in the complaint were not evaluated under the proper procedural standards under Federal Rule of Civil Procedure 12(b)(6), as interpreted by controlling Supreme Court precedents in *Twombly* and *Iqbal*.

CONCLUSION

The petition for rehearing en banc should be granted.

DATED: September 18, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B)-(C) and Circuit Rules 35-4 and 40-1, Amici Curiae Professors hereby certifies that the attached brief is proportionately spaced, has a typeface of 14-points and contains 966 words, excluding cover pages and tables, and is within the 4,200 word limit pursuant to FRAP 32(a)(7)(A).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on September 18, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants on the attached SERVICE LIST.

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