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REPORT

ANTITRUST

A flurry of recent antitrust decisions are likely to have implications across all class actions in which there are motions to dismiss based on the U.S. Supreme Court's 2007 decision in *Twombly* and the existence of guilty pleas, say attorneys Lawrence A. Sucharow and Gregory S. Asciolla in this BNA Insight.

In antitrust cases, the authors observe, ''it is not uncommon for plaintiffs in private actions, including class actions, to file lawsuits after learning of guilty pleas, indictments, or the opening of a grand jury or civil investigation by a federal agency into alleged anticompetitive conduct.'' Decisions in the antitrust arena, the attorneys predict, ''will have implications across all class actions in which there are motions to dismiss based on *Twombly* and guilty pleas. While antitrust cases have led the way in analyzing this issue, likely because *Twombly* was an antitrust case, the *Iqbal* decision makes clear that the new plausibility standard introduced in *Twombly* is not restricted to antitrust claims.''

How Courts Analyze Guilty Pleas and Government Investigations When Considering the Plausibility of an Antitrust Conspiracy After *Twombly*

BY LAWRENCE A. SUCHAROW AND GREGORY S. ASCIOLLA

In *Bell Atlantic Corp. v. Twombly*,[1] the Supreme Court changed the course of law regarding the proper pleading standard under Rule 8 of the Federal Rules of Civil Procedure.[2] No longer is the standard ''any set of facts'' as articulated by the Court over 50

[1] 550 U.S. 544 (2007).

[2] Rule 8 requires that a pleading stating a claim for relief must contain (1) ''a short and plain statement of the grounds for the court's jurisdiction''; (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.'' Fed. R. Civ. P. 8(a).

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years ago in *Conley v. Gibson*.[3] Instead, the *Twombly* Court ''retired'' the oft-cited language in *Conley* and invoked a new standard where there must be sufficient facts alleged to state a ''plausible'' claim for relief. *Twombly*, 550 U.S. at 570. The plausibility standard was then re-visited by the Court two years later in *Ashcroft v. Iqbal*,[4] in which the Court further construed its application.

In the wake of the *Twombly* and *Iqbal* decisions, defendants in a wide variety of cases filed a spate of so-called ''*Twombly* motions,'' in which they moved to dismiss complaints on the ground that plaintiffs had not met the new ''heightened'' pleading standard requiring enough facts to support a plausible claim. Particularly in antitrust actions brought under Section 1 of the Sherman Act,[5] which forbids contracts, combinations and conspiracies in restraint of trade, defendants routinely contended that plaintiffs had not alleged a plausible conspiracy among defendants, relying heavily on *Twombly* which was itself an antitrust conspiracy case.

This resulted in numerous decisions rendered by district courts, several of which were subsequently reviewed by circuit courts, analyzing the new standard in the context of pleading a plausible antitrust conspiracy. One issue that has frequently arisen is how to weigh plaintiffs' allegations of guilty pleas and government investigations involving the same or similar conduct by defendants as that alleged by plaintiffs. In antitrust cases, it is not uncommon for plaintiffs in private actions, including class actions, to file lawsuits after learning of guilty pleas, indictments, or the opening of a grand jury or civil investigation by a federal agency into alleged anticompetitive conduct. The existence and nature of the guilty pleas, indictments or investigations are commonly alleged in a plaintiff's complaint to support its claims of the existence of a conspiracy. Notwithstanding their entry of guilty pleas to felony violations of Section 1 of the Sherman Act, defendants regularly move to dismiss civil complaints on the basis that plaintiffs failed to meet the notice pleading standard because they did not allege a plausible conspiracy claim under *Twombly*.

Courts considering such motions have reached fairly consistent outcomes. In evaluating allegations of a defendant's guilty plea entered in a criminal antitrust conspiracy action, courts, with few exceptions, have held that such guilty pleas, together with other allegations of conspiratorial conduct, are sufficient to raise an inference of a plausible conspiracy at the pleading stage in a related civil antitrust action alleging the *same* anticompetitive conduct in the *same* product market to which the defendant pleaded guilty. However, in matters where plaintiffs have contended that a defendant's guilty plea to an antitrust conspiracy in one product market is sufficient to raise an inference of a plausible conspiracy in a civil antitrust action involving a *related* product market, courts have reached varying results. In instances where there is overlap between the companies and individuals involved in the alleged conspiracies in the related markets, courts have given weight to such allegations when considering whether a plausible conspiracy was pleaded. In cases where there was no overlap, courts have found such allegations are insufficient to support the inference of a conspiracy.

When it comes to allegations of government investigations into possible anticompetitive conduct, by both U.S. and foreign antitrust authorities, the results have been generally consistent as well. Courts considering such allegations have routinely rejected them, holding that they are insufficient to raise an inference of a plausible conspiracy at the pleading stage in a related civil antitrust action. However, at least one court has found such allegations relevant for other purposes.

These decisions in the antitrust arena will have implications across all class actions in which there are motions to dismiss based on *Twombly* and guilty pleas. While antitrust cases have led the way in analyzing this issue, likely because *Twombly* was an antitrust case, the *Iqbal* decision makes clear that the new plausibility standard introduced in *Twombly* is not restricted to antitrust claims.

The Supreme Court's *Twombly* Decision Introduces a New Pleading Standard

Twombly was an antitrust class action brought on behalf of a class of subscribers of local telephone and/or high speed Internet services alleging an unlawful conspiracy among a number of competitors, namely Incumbent Local Exchange Carriers (ILECS), that provided such services in local markets following the divestiture of AT&T. The complaint alleged that, among other things, the ILECS conspired to engage in parallel conduct in their respective service areas to inhibit the growth of competitive local exchange carriers.

The district court dismissed the complaint, concluding that allegations of parallel business conduct, without more, do not state a claim under Section 1 of the Sherman Act. *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003). The Second Circuit reversed. Relying on *Conley*, the Second Circuit held that plaintiffs' allegations of parallel conduct were sufficient to withstand a motion to dismiss, without the need to plead ''plus factors'' or additional facts tending to exclude independent conduct as an explanation for defendants' parallel behavior, because defendants failed to show there was no set of facts that would permit plaintiffs to demonstrate that the particular parallel conducted alleged was due to collusion rather than coincidence. *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 144 (2005).

The Supreme Court reversed the Second Circuit's decision and held that the complaint must be dismissed. As explained in more detail below, the Court ultimately found that the plaintiffs did not plead sufficient facts to support a ''plausible'' antitrust conspiracy claim.

In reaching its holding, the Court re-visited the question of what a plaintiff must plead in order to state a claim, *i.e.*, it re-evaluated Rule 8's pleading requirement of ''a short and plain statement of the claim showing that the pleader is entitled to relief.'' *Twombly*, 550 U.S. at 554-55. The Court determined that Rule 8 requires that a complaint allege ''enough facts to state a claim to relief that is plausible on its face.'' *Id.* at 570. It found that the factual allegations ''must be enough to raise a right to relief above the speculative level.'' *Id.* at 555. Notwithstanding, the Court noted that this new standard ''[did] not impose a probability requirement at the

[3] 355 U.S. 41 (1957).
[4] 129 S. Ct. 1937 (2009).
[5] 15 U.S.C. § 1.

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pleading stage.'' *Id*. at 556. In sum, it held that plaintiffs must allege sufficient facts to ''nudge their claims across the line from conceivable to plausible,'' else risk early dismissal. *Id*. at 570.

In articulating its new pleading standard, the Court retired Justice Black's oft-quoted passage in *Conley v. Gibson*, on its fiftieth anniversary, that 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 that would entitle him to relief.' '' *Id*. at 560-61, *citing Conley*, 355 U.S. at 45-46 (emphasis added). The Court reasoned that a literal reading of *Conley* would permit a wholly conclusory statement of a claim to survive a dispositive motion if it left open the possibility that a plaintiff may later discover facts to support recovery.

Finally, the Court stated that in reaching its conclusion, it ''[did] not apply any 'heightened' pleading standard,'' nor did it ''require heightened fact pleading of specifics.'' *Id*. at 569 n.14, 570.[6] In any event, while the Court did not specify what it meant by its statement that it did not apply a ''heightened'' pleading standard in *Twombly*, it appeared that the Court, in abrogating *Conley's* ''no set of facts'' language and introducing the element of plausibility, raised the bar for pleading a viable claim. The new plausibility standard seemed to fall somewhere between ''conceivable/possible'' and ''probable.'' Where exactly it fell remained unclear.

In applying its new standard to the allegations presented in *Twombly*, the Court found that plaintiffs merely alleged parallel conduct and, without more, or with merely a conclusory allegation of agreement, it held that plaintiffs failed to plead enough facts to state an antitrust conspiracy claim that was plausible on its face. *Id*. at 570.

The Supreme Court Attempts to Explain New Plausibility Standard in *Iqbal*

While *Twombly* clearly had immediate consequences on the law regarding pleading an adequate claim, the decision left unanswered several questions, including the amount and nature of the facts needed to be alleged to ''nudge'' a claim from conceivable to plausible and how to apply the new standard to a set of facts. The Supreme Court attempted to address these and related issues in *Ashcroft v. Iqbal*.[7] The case involved a Pakistani citizen and practicing Muslim arrested on criminal charges and detained in the wake of the September 11, 2001, terrorist attacks. The plaintiff alleged that certain federal officials adopted an unconstitutional policy that subjected detainees to harsh confinement conditions based on race, religion or national origin.

The Second Circuit affirmed the district court's denial of defendants' motion to dismiss. *Iqbal v. Hasty*, 490 F.3d 143, 177-78 (2d Cir. 2007). In considering whether plaintiffs' claims were sufficiently pleaded, the Second Circuit held that *Twombly* compelled a ''flexible'' plausibility standard which only called for amplified factual allegations to render a claim plausible in certain contexts, the present claim not being one of them. *Id*. at 157-58.

[6] This was confirmed a week later by the Supreme Court in *Erickson v. Pardus*, 551 U.S. 89 (2007), which reaffirmed the simplified pleading standard under Rule 8(a)(2).

[7] 129 S. Ct. 1937 (2009).

The Supreme Court reversed. First, it held that the new pleading standard articulated in *Twombly* applied in all civil litigation, not just antitrust matters. Then, in re-examining its reasoning in *Twombly*, the Court reiterated that while the Rule 8 pleading standard does not require detailed factual allegations, conclusory and formulaic allegations will not suffice. It held that ''[a] claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'' *Iqbal*, 129 S. Ct. at 1949. The Court also emphasized that while the ''plausibility standard is not akin to a 'probability requirement,' [ ] it asks for more than a sheer possibility that a defendant acted unlawfully.'' *Id*. The Court found that its *Twombly* decision rested on two fundamental principles: (1) that a court must accept all plaintiff's allegations as true is inapplicable to legal conclusions; and (2) a complaint must state a plausible claim for relief to survive a motion to dismiss. Ultimately, it dismissed plaintiff's claims because the pleadings did not comply with Rule 8 when read in light of *Twombly*.

The Court provided scant additional helpful language as to how to analyze the plausibility of a claim, leaving uncertain what it takes to nudge a claim from conceivable or possible (*i.e.*, dismissible) to plausible (*i.e.*, viable). It reasoned that such an analysis is a ''context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'' *Id*. at 1950. It then suggested a two-pronged approach for analysis: (1) identify those pleadings that are mere conclusions, because those are not entitled to an assumption of truth; and (2) assume the veracity of the remaining well-pleaded factual allegations (if any), and then determine whether they plausibly give rise to an entitlement of relief. *Id*.

Analyzing Allegations of Guilty Pleas in Antitrust Conspiracy Pleadings After *Twombly*

Following the *Twombly* and *Iqbal* decisions, numerous courts sought to define ''plausibility'' in the context of an antitrust conspiracy claim under Section 1 of the Sherman Act. Two recurring issues courts faced when analyzing the sufficiency of such claims were how to deal with allegations that (1) defendants had already pleaded guilty to criminal antitrust conspiracy charges involving the same or similar conspiracy claims as those alleged in a civil action; and (2) federal agencies were investigating the same or similar alleged anticompetitive conduct. Each of these is addressed in turn below.

Guilty Pleas Involving the Same Conduct

In evaluating allegations of a defendant's guilty plea entered in a criminal antitrust conspiracy action, courts, with few exceptions, have held that such guilty pleas, together with other allegations of conspiratorial conduct, are sufficient to raise an inference of a plausible conspiracy at the pleading stage in a related civil antitrust action alleging the same anticompetitive conduct in the same product market to which the defendant pleaded guilty.

For example, numerous class action lawsuits were filed against Korean Air Lines (Korean Air) and Asiana

Airlines (Asiana) following the U.S. Department of Justice's (DOJ) charging Korean Air with conspiring with an unnamed co-conspirator to fix prices on passenger flights from the United States to Korea. Korean Air pleaded guilty to charges of participating in an unlawful antitrust conspiracy and paid a substantial criminal fine. The plaintiffs in the consolidated class action lawsuit alleged substantially the same, *i.e.*, that defendants conspired to fix prices on passengers flights between the U.S. and Korea in violation of Section 1 of the Sherman Act. *In re Korean Air Lines Co. Ltd. Antitrust Litig.*, No. 2:07-cv-05107, Order Granting In Part and Denying in Part Defendants' Motions to Dismiss (C.D. Cal. June 25, 2008) at 2. Plaintiffs also alleged the following facts: the existence of the DOJ's charges, Korean Air's guilty plea and fine, the Korean Fair Trade Commission's raids on defendants' offices as part of an investigation into fuel surcharges relating to investigations in the U.S. and Europe, and that Asiana supplied requested information to the DOJ attendant with Korean Air's guilty plea. *Id*. at 2, 15-16. Defendants, despite Korean Air's guilty plea, moved to dismiss the complaint for failure to adequately allege a plausible conspiracy between Korean Air and Asiana.

The court denied the motion, holding that the plaintiffs plausibly alleged that Asiana participated in a price-fixing conspiracy with Korean Air. *Id*. at 16. The court found that ''the existence of [a price-fixing] conspiracy is beyond doubt in the present case given Korean Air's guilty plea.'' *Id*. It reasoned that at this stage in the litigation, plaintiffs need only make allegations that plausibly suggest that Asiana (which had not pleaded guilty) participated in the alleged conspiracy. The court further found that while plaintiffs' allegations ''standing alone, may not suffice to establish a conspiracy, taken together, against the backdrop of Korean Air's guilty plea, they render Plaintiffs' allegation of a price-fixing conspiracy encompassing travel from Korea to the U.S. between Defendants plausible.'' *Id*.

The court, however, held that plaintiffs did not plausibly allege a price-fixing conspiracy encompassing travel that includes a U.S.-Korea flight segment but where the original departure or ultimate arrival country is not Korea or the United States. Defendants argued that Korean Air's guilty plea was limited to travel from the U.S. to Korea, and that plaintiffs alleged no facts to plausibly suggest a broader conspiracy. The court agreed. It found that despite the guilty plea, the plaintiffs did not meet their pleading burden as to a broader conspiracy as they failed to allege any facts to support such claims. *Id*. at 17. Notwithstanding, the court noted that ''although the guilty plea appears limited to travel from the U.S. to Korea, such limitation is not fatal to plaintiffs' claims, as it is not uncommon for civil allegations based on the same nucleus of facts underlying a defendant's guilty plea to be broader than said plea.'' *Id*. at 17 n.18.

In *In re Air Cargo Shipping Services Antitrust Litigation*,[8] plaintiffs alleged a worldwide conspiracy among the world's major airlines to fix the prices of air cargo shipping services. Defendants moved to dismiss the complaint for failure to adequately plead a plausible conspiracy under *Twombly*. At the time the Magistrate Judge's decision was rendered in a Report & Recommendation (R&R), one defendant had entered the DOJ's corporate leniency program for its involvement in a conspiracy to fix air cargo shipping prices, and nine other defendants had entered guilty pleas in the United States and paid substantial fines to resolve criminal liability stemming from their admitted participation in a conspiracy to fix air cargo shipping prices.[9]

Notwithstanding, the Magistrate Judge granted defendants' motions to dismiss, holding that plaintiffs did not plead sufficient facts to support the existence of a plausible conspiracy. While the court noted the nine guilty pleas entered by defendants in its R&R, it provided no substantive analysis of them in reaching its decision. *Air Cargo*, 2008 WL 5958061 at *1. However, the court disagreed with plaintiffs' allegation that the acceptance of defendant Lufthansa into the DOJ's leniency program for involvement in antitrust violations in the air cargo industry underscored the plausibility of the alleged conspiracy as to all of the defendants. *Id*. at *9. It found that:

> the plaintiffs do not allege that the leniency application revealed that Lufthansa conspired with the named defendants. Their allegations provide no detail about Lufthansa's admitted anticompetitive activities that would tie them to the conspiracy allegations in the instant Complaint. Indeed, plaintiffs fail to allege that the price-fixing activity and/or other conduct potentially violative of Section 1 of the Sherman Act that Lufthansa reported to the DOJ forms the basis for plaintiffs' instant claims against Lufthansa.

Id.

Plaintiffs appealed. The district court reversed that portion of the R&R that dismissed the antitrust conspiracy claims. Instead, the court found that plaintiffs had pleaded sufficient facts under *Twombly* to establish plausible grounds to infer an agreement among defendants to artificially inflate the price of air cargo shipping services. *In re Air Cargo Shipping Services Antitrust Litigation*, No. 1:06-md-01775, Order (E.D.N.Y. Aug. 21, 2009) at 2.

The court based its decision, in part, on the existence of the guilty pleas. In considering the guilty pleas, the court reasoned that ''[t]he additional fact that numerous defendants have pled guilty to criminal charges of fixing prices on air cargo shipments further supports that conclusion.'' *Id*. The court noted that in the intervening months between the time the R&R was issued and its review, the number of defendants who had pleaded guilty had risen to 15, and three more had entered the DOJ's leniency program and ''thus have no doubt admitted their involvement in price-fixing.'' *Id*. In addition, the court reacted to defendants' contention that the guilty pleas do not ''confirm'' the existence of an overarching conspiracy: ''Maybe so, but the admissions of price-fixing by so many defendants certainly 'are suggestive enough to render a § 1 conspiracy plausible.' '' *Id*., *citing Twombly*, 550 U.S. at 556.

[8] 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008). Labaton Sucharow LLP is co-lead counsel in this matter.

[9] The nine guilty pleas and related criminal fines occurred after the filing of plaintiffs' consolidated amended complaint. Plaintiffs informed the court of the existence of the guilty pleas in subsequent letters to the court.

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Similarly, in *In Re Marine Hose Antitrust Litigation*,[10] the court was presented with several guilty pleas. Following a number of DOJ indictments and a corporate leniency application involving price-fixing in the marine hose industry, several civil antitrust lawsuits were filed alleging a price-fixing conspiracy among the manufacturers of marine hose. Guilty pleas by several defendants followed. Notwithstanding, many of the corporate and individual defendants moved to dismiss the civil complaint for failure to adequately allege a plausible conspiracy.

The court considered the motions to dismiss of several of the individual defendants alleged to have participated in the conspiracy.[11] With respect to Francesco Scaglia, plaintiffs alleged that he was criminally charged with conspiring to eliminate competition for marine hose in the United States. The court held that ''a general allegation of a criminal indictment without underlying details as to the specific acts purported taken by the defendant is of no consequence to the sufficiency of the complaint.'' *Id*. at 23 n 22. The court dismissed the claims against Scaglia as insufficient because it found that plaintiffs only alleged his attendance at one conspiracy meeting within a 20-year conspiracy. *Id*. at 23.

With respect to Val Northcutt, plaintiffs alleged, among other things, that Northcutt was also indicted by the government and charged with conspiring to eliminate competition for marine hose in the United States. Similar to its decision with respect to Scaglia, the court found that plaintiffs failed to allege how Northcutt joined the conspiracy and played some role. Thus, the court dismissed the claims against Northcutt as insufficient as well. *Id*. at 27.

With respect to Robert Furness, plaintiffs alleged, among other things, that he pleaded guilty to criminal charges for his role in a marine hose price-fixing conspiracy, served jail time with respect to his guilty plea and paid a fine. The court recognized that some courts have found that guilty pleas by defendants support an inference of participation in a conspiracy. *Id*. at 28. However, the court held that ''the general allegation that Defendant Furness has agreed to plead guilty and serve jail time does not allege the particular conduct that he was admitting. In other words, the allegation stops short of providing the underlying details of Defendant Furness's conduct.'' *Id*. at 28-29. Thus, the court granted his motion to dismiss.

Finally, with respect to Charles Gillespie, plaintiffs alleged, among other things, that Gillespie pleaded guilty to criminal charges involving price-fixing of marine hose. The court held that even though plaintiffs have ''sufficiently plead (sic) a plausible conspiracy overall,'' ''[w]ithout more, a guilty plea is insufficient since Plaintiffs have failed to allege what specific conduct Defendant Gillespie has purportedly admitted in his plea, which would subject him to civil liability . . . .'' *Id*. at 29-30. The court granted his motion to dismiss too.[12] However, notwithstanding its holdings with respect to the aforementioned individual defendants, the court found generally that ''Plaintiffs have sufficiently plead (sic) the alleged conspiracy so as to satisfy the 'plausible inference of an agreement' for purposes of *Twombly*.' '' *Id*. at 25, *citing Twombly*, 127 S. Ct. at 1965-66.

In *In re TFT-LCD (Flat Panel) Antitrust Litigation*,[13] plaintiffs brought an antitrust class action against manufacturers, sellers and distributors of thin film transistor liquid crystal display (TFT-LCD) panels involving a price-fixing conspiracy in violation of the Sherman Act. Defendants moved to dismiss the plaintiffs' amended complaint, which included, among other things, allegations involving guilty pleas entered by three of the defendants. Defendants moved to dismiss on several grounds, including that the case should be limited to the 2001-2006 time period, the same time period covered by the related guilty pleas. The court noted that, notwithstanding their entry of guilty pleas to felony violations of the Sherman Act, the three defendants joined in the motions to dismiss the complaint for failure to meet notice pleading requirements. *Id*. at 1183 n. 3.

The court held that the amended complaints more than adequately alleged the involvement of each defendant in the conspiracy in light of *Twombly*. The court identified a number of the allegations to support the existence of a conspiracy, including ''facts of the guilty pleas entered by four defendants for fixing prices of TFT-LCD.'' *Id*. at 1184.

Defendants also contended that plaintiffs did not allege any facts to support a plausible inference of anticompetitive conduct prior to 2001, a time period prior to which defendants pleaded guilty. Plaintiffs argued that, not only were there numerous allegations that cover the period prior to 2001, but also that there are any number of plausible reasons why the criminal guilty pleas would still allow for civil liability during the 1996-2001 time period, such as criminal statutes of limitation and higher burdens of proof in criminal cases. The court agreed, holding that the complaints sufficiently alleged

[10] No. 1:08-md-01888, Omnibus Order on Motions to Dismiss (S.D. Fl. Jan. 28, 2009). Labaton Sucharow LLP is co-lead counsel in this matter.

[11] The court did not rule on several of the corporate defendants' motions to dismiss as they had subsequently settled with plaintiffs. *Id*. at 31-32.

[12] In light of the court's ruling, Plaintiffs filed an amended complaint. In considering the re-newed motions to dismiss by Messrs. Scaglia and Northcutt, the Court held that plaintiffs alleged sufficient facts to satisfy the pleading standard under *Twombly*. *See* Order on Motions to Dismiss Second Amended Class Action Complaint (S.D. Fl. May 26, 2009) at 4-6. While the court identified a number of facts to support its decision, it made no mention of the allegations of defendants' indictments in reaching its conclusion. The motions to dismiss of Messrs. Furness and Gillespie, who had pleaded guilty, were not renewed as they had subsequently settled with plaintiffs.

[13] 599 F. Supp. 2d 1179 (N.D. Cal. 2009).

anticompetitive conduct during the 1996-2001 time period. *Id*. at 1185.

Following *Twombly*, courts have nearly always found that allegations of guilty pleas entered by defendants involving the same anticompetitive conduct as alleged in a private action, together with other factual allegations, can support an inference that an antitrust conspiracy is plausible and sufficient to satisfy *Twombly*.

In sum, following *Twombly*, courts have nearly always found that allegations of guilty pleas entered by defendants involving the same anticompetitive conduct as alleged in a private action, together with other factual allegations, can support an inference that an antitrust conspiracy is plausible and sufficient to satisfy *Twombly*.[14]

Guilty Pleas Involving Similar Conduct

Courts have also upheld complaints under *Twombly* where plaintiffs have alleged the entry of guilty pleas by the same defendants in related, but not the same, conspiracies. For example, in *In re Static Random Access Memory (SRAM) Antitrust Litigation* (''*SRAM*''),[15] the court denied defendants' motion to dismiss plaintiffs' SRAM price-fixing conspiracy claim. In applying *Twombly*, the court held plaintiffs pleaded sufficient facts to plausibly suggest a price-fixing conspiracy.

Prior to plaintiffs filing their complaint in *SRAM*, several companies announced that they had received grand jury subpoenas related to a DOJ criminal investigation into the SRAM industry. In addition, the DOJ brought criminal charges against several manufacturers for price-fixing in the dynamic random access memory (DRAM) market, to which some of the same defendants in *SRAM* entered guilty pleas. Plaintiffs pleaded these facts, among others, to support the existence of a conspiracy in the SRAM market. Defendants moved to dismiss.

Defendants contended that plaintiffs could not rely on the guilty pleas entered by various entities in the DRAM litigation because any such reliance would be necessarily based upon an impermissible inference that ''the existence of a DRAM price-fixing conspiracy plausibly implies that such a conspiracy exists for SRAM.'' *Id*. at 903. The court did not agree. Rather, it reasoned that ''although the allegations regarding the DRAM guilty pleas are not sufficient to support Plaintiffs' claims standing on their own, they do support an inference of a conspiracy in the SRAM industry.'' *Id*. The court based its decision on the fact that plaintiffs alleged that the same individuals from certain defendants were responsible for marketing both SRAM and DRAM. Ultimately, the court held that plaintiffs pleaded sufficient facts to plausibly suggest a price-fixing conspiracy under the Sherman Act, based on, among other things, the existence of the DRAM guilty pleas and other facts such as defendants' ongoing agreement to exchange price information in order to stabilize and increase prices. *Id*.

The court reached a similar conclusion in *In re Flash Memory Antitrust Litigation* (*Flash Memory*).[16] Plaintiffs brought an antitrust class action against manufacturers, sellers and distributors of NAND flash memory for conspiring to fix the price of flash memory in violation of federal antitrust laws. This type of memory is distinguishable from DRAM and SRAM. Plaintiffs' complaint included numerous allegations of collusion in the market for flash memory, including:

- The DOJ had launched investigations into the DRAM and SRAM markets;
- In the *DRAM* matter, two of the defendants pleaded guilty to price-fixing and paid large fines, and those companies were also defendants in *Flash Memory*;
- Five of the defendants were under investigation by the DOJ and/or were the subject of civil lawsuits relating to SRAM;
- The illegal pricing activity alleged in *SRAM* and *DRAM* is probative of and intertwined with defendants' allegedly illegal activities in the flash memory market;
- The same employees of the defendant companies (including those who pleaded guilty to criminal felonies in the DOJ's DRAM investigation) were responsible for pricing DRAM, SRAM and NAND flash memory sold in the United States;
- The DOJ confirmed that it was investigating potential antitrust violations with respect to the NAND flash memory market; and
- Three of the defendants received grand jury subpoenas in connection with DOJ's NAND flash memory investigation.

The defendants moved to dismiss the complaint, contending that plaintiffs failed under the *Twombly* standard to allege a plausible conspiracy in the market for NAND flash memory. The court disagreed. It held that plaintiffs alleged numerous facts that, taken as a whole, were sufficient to suggest that defendants conspired to manipulate pricing for NAND flash memory, including the relationship between the DRAM, SRAM and NAND flash memory conspiracies, the exchange of information between competitors, market concentration, supply shortages, price stability, joint ventures and cross-licensing agreements and trade shows and trade association meetings.

[14] Plaintiffs have also relied on the existence of government enforcement actions to support the existence of a conspiracy. In *Hyland v. Homeservices of America*, defendants moved for reconsideration after the complaint alleging a conspiracy to fix commissions in the Louisville real estate market was initially upheld (prior to the *Twombly* decision). The court denied the motion for reconsideration, holding that, in light of *Twombly*, plaintiffs had '' 'nudged' their conspiracy claims across the line from conceivable to plausible.'' 2007 WL 2407233 (W.D. Ky. Aug. 17, 2007) at *3. The court noted that in support of the existence of a conspiracy, plaintiffs alleged that enforcement actions had been brought by the DOJ involving the same conduct. *Id*.

[15] 580 F. Supp. 2d 896 (N.D. Cal. 2008).

[16] 643 F. Supp. 2d 1133 (N.D. Cal. 2009).

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Specifically, with respect to the relationship between the DRAM, SRAM and NAND flash memory conspiracies, the defendants contended that the DRAM and SRAM conspiracies were irrelevant for purposes of establishing a conspiracy in the NAND flash memory market because plaintiffs failed to establish a nexus. The court relied on both pre- and post-*Twombly* authority to support its reasoning that evidence concerning a prior conspiracy may be relevant and admissible to show the background and development of a current conspiracy.[17] The post-*Twombly* case relied upon by the court was *SRAM*, where that court found that, as discussed above, the DRAM guilty pleas, while insufficient to support plaintiffs' claims standing on their own, supported an inference of a plausible conspiracy in the related SRAM market.

The court also rejected defendants' argument that because the employees who pleaded guilty to price-fixing DRAM worked for only two of the defendant companies in *Flash Memory*, one could not infer a plausible conspiracy among all of the defendants. The court found that while that may be true, the two companies involved collectively controlled the majority of the flash memory market and together paid fines approaching half a billion dollars. In addition, the court found that seven of the employees involved were alleged to have had responsibility for NAND flash memory pricing. The court concluded: ''Given these employees' overlapping involvement in controlling DRAM and flash memory pricing, coupled with the significant market power wielded by their employers, it is reasonable to infer that their involvement in the DRAM conspiracy had at least some connection to the alleged [flash memory] conspiracy.'' *Id*. at 1149.

Finally, the court rejected defendants' contention that the conduct involved in the two conspiracies was factually distinguishable and therefore one conspiracy could not support an inference of plausibility in the other. Instead, it found that even if the flash memory scheme focused more on restricting supply versus raising prices:

> the fact remains that the purpose of both conspiracies was to artificially control and impact the memory market in order to generate or preserve profits. At bottom, while these facts may not prove the existence of a conspiracy with respect to NAND flash memory, they are properly pleaded for the purpose of establishing the plausibility that such a conspiracy existed.

Id. Thus, the court held that the complaint alleged enough facts to state a claim for relief that was plausible on its face under *Twombly*. *Id*. at 1150.

In contrast to the *SRAM* and *Flash Memory* decisions is the court's holding in *In re Hawaiian and Guamanian Cabotage Antitrust Litigation* (''*Hawaiian Cabotage*'').[18] In *Hawaiian Cabotage*, plaintiffs (shippers) brought a class action against carriers alleging a conspiracy to increase fuel surcharges, among other things, for transporting freight on ocean routes between continental United States and Hawaii and/or Guam.

Prior to the filing of the complaint, in early 2008, the DOJ announced that it had begun an investigation into possible anticompetitive practices involving the shipping trade between the continental United States and Puerto Rico. Several days later, one of the defendants disclosed it had received a grand jury subpoena in conjunction with the investigation. Six months later, four individuals pleaded guilty to antitrust charges relating to the DOJ's Puerto Rico investigation. Three of the pleas were entered by executives of Horizon Lines Inc., a defendant in both the Puerto Rican and Hawaiian cabotage cases. Only one of these three Horizon executives, however, had any involvement with Horizon's Guam or Hawaii routes. There were press reports that more indictments were likely to follow.

All of the above facts relating to the Puerto Rican cabotage government case were alleged in the *Hawaiian Cabotage* civil complaint. However, the court rejected plaintiffs' attempts to ''cross-fertilize'' facts from the Puerto Rican cabotage case with that of the Hawaiian cabotage case. *Id*. at 1258. It found that plaintiffs did not allege that the guilty plea of the one individual who overlapped in both cases implicated the Guam or Hawaii routes in any way. *Id*. And it found that the press reports claiming more indictments provided no link between the Hawaii and Puerto Rico routes. *Id*.

The court also distinguished the *Flash Memory* and *SRAM* cases relied on by the plaintiffs for their contention that it was reasonable for the court to infer so-called cross-fertilization. It found those cases involved defendants with overlapping involvement in different markets, a factual scenario it determined was not pleaded in *Hawaiian Cabotage*. *Id*. at 1258-59. The Court ultimately concluded that plaintiffs pleaded nothing more than parallel activity and a bare assertion of conspiracy, which was insufficient under *Twombly*. *Id*. at 1261.

Similarly, in *In re Parcel Tanker Shipping Services Antitrust Litigation*,[19] the court originally denied defendants' motion to dismiss plaintiff's (a trustee of a bankrupt competitor) predatory pricing claims. Shortly after the court's decision, however, the Supreme Court de-

[17] The court relied on two pre-*Twombly* cases: *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000) (recognizing that evidence concerning a prior conspiracy in the citric acid market may be relevant to show the background and development of a current conspiracy in the related lysine market); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002).

[18] 647 F. Supp. 2d 1250 (W.D. Wa. 2009).

[19] 541 F. Supp. 2d 487 (D. Conn. 2008). Labaton Sucharow LLP is co-lead counsel in the related class action brought by shippers.

cided *Twombly*, and the defendants filed a motion for reconsideration in light of the new ''plausibility'' pleading standard. The court granted the motion for reconsideration.

The complaint alleged, among other things, that two of the defendants entered guilty pleas to participating in ''an international cartel to allocate customers, rig bids and fix prices on parcel tanker contracts of affreightment for the shipment of Liquid Bulk Products to and from the U.S. and elsewhere.'' *Id*. at 488-89. It further alleged that each of those defendants paid fines with respect to their respective guilty pleas. Defendants contended that their plea agreements involved different conduct than that alleged by plaintiffs in the civil action, *i.e.*, the criminal charges involved a conspiracy to raise prices while the claims in the civil case involved predatory pricing, or a conspiracy to lower prices.

The court, upon reconsideration, dismissed the complaint, holding that plaintiffs failed to allege plausible grounds to infer a conspiracy as required by *Twombly*. *Id*. at 492. With respect to the guilty pleas, the court agreed with the defendants and found that the guilty pleas involved different conduct (a conspiracy to raise prices versus one to lower prices) on different trade routes (the criminal charges involved deep sea routes while the civil claims involved Caribbean routes). *Id*.

Thus, in matters where plaintiffs have contended that a defendant's guilty plea to an antitrust conspiracy in one product market is sufficient to raise an inference of a plausible conspiracy in a civil antitrust action involving a *related* product market, courts have reached varying results. In instances where there is overlap between the companies and individuals involved in the alleged conspiracies in the related markets, courts have given weight to such allegations when considering whether a plausible conspiracy was pleaded. In cases where there was no demonstrable overlap, courts have found such allegations insufficient to support the inference of a conspiracy in the related market.

Analyzing Allegations of Government Investigations in Antitrust Conspiracy Pleadings After *Twombly*

While courts in civil antitrust actions are generally receptive to allegations of criminal guilty pleas involving the same or related conduct to support an inference of a plausible conspiracy, the same does not appear to hold true with respect to mere allegations of government antitrust investigations. In such cases, courts almost always reject such allegations as irrelevant. In one of the few situations where a court relied on such allegations, it was to support allegations involving the time period of the alleged conspiracy, not the plausibility of its existence.

For example, in *In re Graphics Processing Units Antitrust Litigation* (''*GPU*''),[20] plaintiffs alleged that defendants, producers of graphics processing units, conspired to fix prices and coordinate the release of new products. In support of their allegations, plaintiffs alleged, among other things, that the DOJ had opened a grand jury investigation into the GPU industry and had served defendants with related subpoenas.

[20] 527 F. Supp. 2d 1011 (N.D. Ca. 2007).

The court found that the existence of the investigation ''carries no weight in pleading an antitrust conspiracy claim.'' *Id*. at 1024. Specifically, the court reasoned:

> [i]t is unknown whether the investigation will result in indictments or nothing at all. Because of the grand jury's secrecy requirement, the scope of the investigation is pure speculation. It may be broader or narrower than the allegations at issue. Moreover, if the Department of Justice made a decision *not* to prosecute, that decision would not be binding on plaintiffs. The grand jury investigation is a non-factor.

Id. Because the court found the only other allegations of conspiracy were conclusory, it held that plaintiffs failed to plead a plausible conspiracy under *Twombly* and dismissed the complaint.

In *SRAM*, in addition to the DRAM guilty pleas and other allegations supporting the existence of a conspiracy as discussed above, the court also considered plaintiffs' allegations that the DOJ opened a grand jury investigation into the SRAM industry and served related subpoenas on a number of defendants. The court found, however, that allegations regarding the existence of DOJ's SRAM investigation did not support plaintiffs' antitrust conspiracy claims. *SRAM*, 580 F. Supp.2d at 903. The court relied on the reasoning articulated by the *GPU* court, to wit, because of the grand jury's secrecy requirement, the scope of the investigation is pure speculation. *Id*. Similarly, in *Flash Memory*, plaintiffs alleged that the DOJ had begun an investigation into the NAND flash memory industry. The court, relying on the analyses in *GPU* and *SRAM*, agreed with defendants that ''the mere fact that an investigation is under way is not by itself an appropriate consideration for purposes of determining the adequacy of the pleadings.'' *Flash Memory*, 643 F. Supp. 2d at 1149 n.11.

The court also found plaintiffs' invocation of the related DOJ investigation unavailing in *Hawaiian Cabotage*. The court, relying on *In re Tableware Antitrust Litigation*,[21] found that ''[a] plaintiff may surely rely on governmental investigations, but must also, under FRCP 11, undertake his own reasonable inquiry and frame his complaint with allegations of his own design . . . . Simply saying 'me too' after a governmental investigation does not state a claim.'' *Hawaiian Cabotage*, 647 F. Supp. 2d at 1258 n.2.[22]

In contrast, in *In re Flat Glass Antitrust Litigation (II)*,[23] plaintiffs alleged in their Consolidated Amended Complaint (CAC) that certain manufacturers of high quality flat glass conspired to fix prices in violation of the Sherman Act. Defendants moved to dismiss. Among other things, the plaintiffs alleged that the European Commission had launched raids upon several manufacturers in the European construction flat glass market.

[21] 363 F. Supp. 2d 1203, 1205 (N.D. Cal. 2005). Labaton Sucharow LLP is co-lead counsel in this matter.

[22] *See also In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) (''Allegations of anticompetitive wrongdoing in Europe . . . is merely to suggest (in defendants' words) that 'if it happened there, it could have happened here.' . . . Without an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs' conclusory allegations do not 'nudge [their] claims across the line from conceivable to plausible.' '').

[23] No. 2:08-mc-00180, Opinion and Order of Court (W.D. Pa. Feb. 11, 2009).

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Plaintiffs also alleged that defendants engaged in virtual lockstep pricing until the date of the European raids. The court found that ''this is not a case where Plaintiffs rely solely on the decision of the European Commission to assert a domestic conspiracy or a solely parallel conduct case.'' *Id*. at 4.

The court also found that ''it is of no moment'' that one of the defendants did not participate in the European conspiracy: ''The CAC is not simply asserting a theory of 'since it happened there, it happened here.' To the contrary . . . the CAC sets forth sufficient allegations, when read *in toto*, to set forth a § 1 claim. To that end, the facts surrounding the European conspiracy are relevant for, *inter alia*, timing.'' *Id*. at 5. Therefore, the court held that dismissal was not warranted and that the allegations in the complaint ''nudge over the line of sufficiency'' and complied with *Twombly* and Rule 8(a) by setting forth sufficient notice of an alleged conspiracy that, if true, would make an antitrust conspiracy plausible. *Id*. at 4, 5.

Most recently, in *Starr v. Sony BMG Music Entertainment*,[24] plaintiffs alleged a conspiracy by major record labels to fix the prices and terms under which their music would be sold over the Internet. In support of the existence of a conspiracy, plaintiffs alleged, among other things, a pending investigation by the Office of the New York State Attorney General regarding wholesale prices charged for Internet music, and two DOJ investigations into price-fixing, collusion and whether defendants misled DOJ about the formation of certain entities.

The Second Circuit vacated the district court's judgment of dismissal, finding there was enough factual matter when, taken as true, suggested the existence of an unlawful agreement. With respect to the allegations of government investigations, defendants argued that inferring a conspiracy from such allegations was unreasonable in light of the fact that DOJ investigated and ultimately rejected the very same claims. The court noted that ''defendants cite no case to support the proposition that a civil antitrust complaint must be dismissed because a criminal investigation undertaken by the Department of Justice found no evidence of a conspiracy.'' *Id*. at *8. The court further noted that the DOJ, since the close of its investigation, launched two new investigations into whether defendants engaged in collusion or price-fixing and whether defendants misled the Department about the formation and operation of MusicNet and pressplay.'' *Id*. The court did not explicitly state, however, that it relied on the allegations of government investigations in reaching its decision.

The Broader Implications of These Decisions

The above-discussed decisions in the antitrust class action context are likely to have implications across all class actions in which there are motions to dismiss based on *Twombly* and the existence of guilty pleas. The Supreme Court's *Iqbal* decision makes clear that the new plausibility standard introduced in *Twombly* applies to all civil actions and is not restricted to antitrust claims. *See Iqbal*, 129 S. Ct. at 1953. Indeed, as *Conley* had applied to all civil claims subject to Rule 8's notice pleading standard, its so-called retirement meant that all of those same claims would be subject to the new pleading standard articulated in *Twombly*.

As the number of pleading challenges under *Twombly* grows in the non-antitrust class action arena, courts will be looking to the antitrust body of law for guidance in analysis and application.

Because *Twombly* was an antitrust conspiracy case, courts adjudicating antitrust claims under the new pleading standard have been at the forefront in analyzing the effect of guilty pleas and government investigations on a *Twombly*-based plausibility challenge. As the number of pleading challenges under *Twombly* grows in the non-antitrust class action arena, courts will be looking to the antitrust body of law for guidance in analysis and application.

Conclusion

''Plausible'' is defined as ''having an appearance of truth or reason,'' or ''credible; believable.''[25] In analyzing the plausibility of antitrust conspiracy claims under the new *Twombly* pleading standard, courts have relied on allegations of guilty pleas to support the inference of a conspiracy. In general, courts have considered the relationship between the guilty plea and the alleged anticompetitive conduct in determining how much weight to give such allegations, *i.e.*, the greater the nexus between that to which the defendant pleaded guilty and the anticompetitive conduct alleged by the plaintiff, the greater the likelihood the allegations of a guilty plea will be found sufficient to support the inference of a plausible conspiracy.

Thus, when allegations involving a guilty plea are the same as the anticompetitive conduct alleged in a complaint, courts have routinely found such allegations sufficient to support an inference of a plausible conspiracy at the pleading stage. Courts should continue to do so, as statements or admissions made pursuant to a guilty plea that a particular defendant conspired to engage in anticompetitive conduct clearly support the credibility of the same conspiracy alleged in a civil action. In short, allegations of a conspiracy have ''an appearance of truth or reason'' when supported by allegations that an entity or individual pleaded guilty to the same conspiratorial conduct.

As for allegations of guilty pleas involving conduct that is related or similar to that alleged by a plaintiff in a civil action, courts have correctly held that these allegations have relevance as well at the pleading stage, particularly when there is ''cross-fertilization'' of defendants' employees in pricing the related products. Finally, while most courts have rejected allegations of government investigations as supporting the existence of a conspiracy because they tend to be secretive and

[24] 2010 WL 99346 (2d Cir. Jan. 13, 2010).

[25] http://dictionary.reference.com/browse/plausible.

their scope essentially speculative, courts should be mindful that such allegations may be relevant for other reasons, such as the timing of the conspiracy, as the *Flat Glass* court held.

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