21-11547

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MSP RECOVERY CLAIMS, SERIES LLC, MSPA CLAIMS 1, LLC, and MAO-MSO RECOVERY II, LLC, SERIES PMPI,
Plaintiffs/Appellants,

v.

METROPOLITAN GENERAL INSURANCE COMPANY, METROPOLITAN CASUALTY INSURANCE COMPANY, METROPOLITAN GROUP PROPERTY & CASUALTY INSURANCE CO., METLIFE AUTO & HOME GROUP, and METROPOLITAN P&C INSURANCE COMPANY,
Defendants/Appellees.

Appeal from the United States District Court
for the Southern District of Florida
20-cv-24052-RNS (Honorable Robert N. Scola)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE FLORIDA JUSTICE REFORM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR REHEARING OR REHEARING *EN BANC*

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August 15, 2022

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, *Amici Curiae* Chamber of Commerce of the United States of America and Florida Justice Reform Institute (collectively, "*Amici*") respectfully submit the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. Allen, D. Matthew (counsel for *Amici*);
2. Chamber of Commerce of the United States of America (*Amicus Curiae*)
3. Cortiñas, Angel A. (counsel for Defendants-Appellees);
4. Dentons US LLP (counsel for Defendants-Appellees);
5. Farmers Insurance Exchange (80% owner of Defendant-Appellee Metropolitan Property and Casualty Insurance Company);
6. Fire Insurance Exchange (10% owner of Defendant-Appellee Metropolitan Property and Casualty Insurance Company);
7. Florida Justice Reform Institute (*Amicus Curiae*)
8. Goodman, Jonathan (U.S. Magistrate Judge, S.D. Fla.);

9. Gunster (counsel for Defendants-Appellees);

10. Hanover, Mark, L. (counsel for Defendants-Appellees);

11. Kaskel, Jonathan H, (counsel for Defendants-Appellees);

12. Lang, Joseph H., Jr. (counsel for *Amici*);

13. Levy, Steven, M. (counsel for Defendants-Appellees);

14. MAO-MSO Recovery II, LLC, Series PMPI (Plaintiff-Appellant);

15. Metlife Auto & Home Group (Defendant-Appellee);

16. MetLife, Inc. (NYSE ticker: MET) (sole owner of Defendant-Appellee Metropolitan General Insurance Company);

17. Metropolitan Casualty Insurance Company (Defendant-Appellee);

18. Metropolitan General Insurance Company (Defendant-Appellee);

19. Metropolitan Group Property & Casualty Insurance Company (Defendant-Appellee);

20. Metropolitan P&C [Property and Casualty] Insurance Company (Defendant-Appellee);

21. MSP Recovery Claims, Series LLC (Plaintiff-Appellant);

22. MSP Recovery Law Firm (counsel for Plaintiffs-Appellants);

23. MSP Recovery Services, LLC (sole member of Plaintiff-Appellant MSPA Claims 1, LLC);

24. MSP Recovery, LLC (member of Plaintiff-Appellant MAO-MSO Recovery II, LLC, Series PMPI);

25. MSPA Claims 1, LLC (Plaintiff-Appellant);

26. Pendley, Baudin & Coffin, LLP (counsel for Plaintiffs-Appellants);

27. RD Legal Finance, LLC (member of Plaintiff-Appellant MAO-MSO Recovery II, LLC, Series PMPI);

28. Ruiz, John H. (counsel for Plaintiffs-Appellants);

29. Scola, Robert N. (U.S. District Judge, S.D. Fla.);

30. Truck Insurance Exchange (10% owner of Defendant-Appellee Metropolitan Property and Casualty Insurance Company);

31. Turner, Tracy L. (counsel for Plaintiffs-Appellants);

32. Urick, Jonathan D. (counsel for *Amici*);

33. Varcoe, Andrew R. (counsel for *Amici*);

34. VRM MSP Recovery Partners, LLC (sole member of Plaintiff-Appellant MSP Recovery Claims, Series LLC);

35. Zincone, Francesco A. III (counsel for Plaintiffs-Appellants).

* * * *

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Florida Justice Reform Institute is not publicly held, has no parent corporation, and is not a subsidiary or affiliate of a publicly owned corporation that has issued shares of stock to the public.

/s/ Joseph H. Lang, Jr.
Joseph H. Lang, Jr.

RULE 35-5(c) STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel majority decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

/s/ Joseph H. Lang, Jr.
Joseph H. Lang, Jr.

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Florida Justice Reform Institute ("Institute") is Florida's leading organization of concerned citizens, business owners and leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. The Institute represents a broad range of participants in the business community who share a substantial interest in a litigation environment that treats plaintiffs and defendants evenhandedly.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), undersigned counsel represents that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*

curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE

Whether the panel's majority opinion deviated from established Supreme Court precedent by allowing plaintiffs' complaint to survive dismissal by simply pleading the elements of the cause of action without any factual allegations stating a claim.

STATEMENT OF FACTS

Amici adopt the petition's statement of facts.

ARGUMENT

The panel decision conflicts with controlling Supreme Court precedent requiring factual support for complaints based on pre-filing diligence. Moreover, it opens the floodgates to thousands of MSP Recovery cases being filed in this Circuit with no factual support and no pre-filing diligence.

Judge Jordan, who concurred in the judgment, concurred with the majority's holding that the district court should have considered the exhibit to the complaint on a motion to dismiss, but not with the majority's reasoning that the exhibit satisfied the standard. He correctly stated that plaintiffs "were testing the Rule 8(a)/Rule 12(b)(6) waters to

see what they could get away with in terms of pleading detail." (Concurrence at 26). He explained: "The less the plaintiffs have to do to draft a complaint and/or its exhibits, the less they will spend on litigation, and the more they stand to recover if they prevail on their claims." *Id.* "That might be a good business model for the plaintiffs," he observed, "but it is not one that we should countenance." *Id.*

Amici agree with Judge Jordan. This Court should not countenance plaintiffs' business model and the effect that that model will have on courts in this Circuit. The panel decision, however, countenances filings without support, in contravention of the Supreme Court's *Twombly* and *Iqbal* decisions. If the reasoning of the panel decision stands, this Circuit will be an outlier in permitting MSP Recovery cases to proceed past the pleading stage based on no factual allegations.

I. Plaintiffs' business model requires litigation in bulk without conducting pre-filing diligence or pleading factual support for their claims.

Plaintiffs are not Medicare Advantage Organizations ("MAOs"). *They provide no medical or insurance services to Medicare beneficiaries.* Rather, plaintiffs are "collection agencies that specialize in recovering funds on behalf of various actors in the Medicare Advantage system." *MSP Recovery Claims, Series, LLC v. ACE Am. Ins. Co.*, 974 F.3d 1305,

1308 (11th Cir. 2020). MSP Recovery asserts in an "investor presentation" published on its website that MSP "is disrupting the antiquated healthcare reimbursement system, using data and analytics to identify and recover massive amounts of improper payments made by Medicare, Medicaid, and Commercial insurers from responsible parties."[1] MSP's self-proclaimed "financial opportunity" is to "discover[], quantify[], and settl[e] the billed-to-paid gap in mass financial scale," positioning MSP to "generate substantial annual recovery revenue at high profit margins."[2] As of March 31, 2022, MSP claims to have purchased **$1.5 trillion** in assigned recovery rights from more than 150 assignors in all 50 states.[3]

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[1] https://d1io3yog0oux5.cloudfront.net/lionheartacquisitioncorp/files/pages/lionheartacquisitioncorp/db/933/business_description/LCAP+2+and+MSP+Investor+Presentation+July+2021.pdf, slide 5 (accessed August 14, 2022).

[2] *Id.*

[3] https://investors.msprecovery.com/node/7151/html ("Our Recovery Model") (accessed August 14, 2022).

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As the Seventh Circuit explained the economic incentives in *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 871 (7th Cir. 2021) ("*State Farm II*"):

> On the demand side, entities like the plaintiffs here see financial opportunity in effectively becoming debt collectors for MAOs. This arrangement can be lucrative because of the Medicare Act's double damages provision. If debt collectors—or more accurately assignees of the MAO—can identify unreimbursed conditional payments and successfully bring suit under the Act, they can collect twice as much on a particular assigned receivable. But again, because it is not always clear which assigned receivables in fact reflect conditional payments, taking on this debt collection role brings with it financial uncertainty. And, just like the MAOs, a third-party assignee may not know at the time of the initial assignment which or how many conditional payments should actually be reimbursed by a primary payer.

994 F.3d at 872.

The Seventh Circuit also noted some realities associated with these economic incentives:

> Note the financial realities that exist for the debt collectors and MAOs alike. Both have financial incentives to expend as little as possible on the front end of these assignment arrangements. This is so because it is often unclear at the time of the initial assignment what, if any, value exists in the assigned receivables.
>
> We see this reality play out in the assignment contracts in the record before us in the following way: MAOs agree to assign their collection rights to large baskets of potential conditional payments in exchange for a percentage of

> anything recovered. For their part, the debt collectors agree to this fee sharing arrangement but do not pay much, if anything, up front for the assignation of collection rights. It is then on the assignee—effectively the debt collector—to do its best to collect and thereby realize value on the assignment. If the assignee is successful in recovering double damages through litigation, there is sufficient revenue to make the litigation and collection effort worth the collector's while, with proceeds remaining to share with the MAO. If nothing is recovered, the assignee loses only its litigation costs.

Id.

Notably, most MSP companies' lawsuits have been dismissed at the pleading stage. As their SEC filings acknowledge, the MSP companies "historically" have received "adverse rulings" such as dismissals (i) for failure to file within the applicable statute of limitations, (ii) because an assignment did not include the claim that was brought or was found to be invalid, (iii) for lack of standing, (iv) for lack of personal jurisdiction, (v) for lack of subject matter jurisdiction, and (vi) for pleading

deficiencies.[4] MSP admits that "due to the nature and volume of data, it may not be possible to identify with precision all such claims."[5]

In addition, despite their assertion of generating substantial annual recovery revenue at high profit margins, the MSP companies admitted in their SEC filings that they "have a history of net losses and no substantial revenue to date."[6]

At bottom, plaintiffs' business plan requires them to litigate their Medicare Secondary Payer Act claims *en masse*, pushing the envelope "to see what they [can] get away with." (Concurrence at 26). This is in derogation of the fundamental and traditional rules of litigation.

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[4] Amendment No. 3 to Form S-4, Registration Statement Under the Securities Act of 1933, Lionheart Acquisition Corporation II, Preliminary Proxy Statement/Prospectus.

https://www.sec.gov/ix?doc=/Archives/edgar/data/1802450/000114036122008991/ny20000825x6_s4a.htm#a, p. 30 ("Risks Related to MSP's Business and Industry") (accessed August 14, 2022).

[5] *Id.*, p. 31 (accessed August 14, 2022).

[6] *Id.*, p. 28–29 ("Summary Risk Factors" and "Risks Related to MSP's Business and Industry") (accessed August 14, 2022).

II. The panel decision permitting the complaint to survive dismissal without any factual support conflicts with controlling Supreme Court precedent.

Supreme Court precedent precludes the fact-free pleading approach countenanced by the panel decision. In *Twombly*, the Supreme Court abandoned the "no set of facts" standard of *Conley v. Gibson*, 355 U.S. 41 (1957), and announced that the complaint "must . . . contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." 550 U.S. at 570. A claim has "facial plausibility when the plaintiff pleads factual matter that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Here, Exhibit A fails to provide the "factual matter" that creates a plausible claim. Judge Jordan identified five specific deficiencies demonstrating that Exhibit A failed to provide fair notice to defendants of the claims against them, and it thus failed to provide the factual matter necessary to state a plausible claim. (Concurrence at 24).

III. The panel decision permitting the complaint without any factual support makes the Eleventh Circuit an outlier and conflicts with numerous decisions from other courts.

The panel decision not only violates *Twombly* and *Iqbal* but also conflicts with two decisions of the Seventh Circuit. In *MAO-MSO*

Recovery II, LLC v. State Farm Mut. Auto. Ins. Co., 935 F.3d 573 (7th Cir. 2019) (*"State Farm I"*), the MSP plaintiffs sought damages related to allegedly unreimbursed payments that State Farm should have made pursuant to personal injury policies. The district court dismissed for lack of standing, and the Seventh Circuit affirmed. The district court correctly required plaintiffs to identify specific examples of unreimbursed payments to demonstrate the existence of an actual injury and thus Article III standing. *Id.* at 579 (describing deficiencies in original and first amended complaints). The panel decision in this case conflicts with *State Farm I* by allowing this case to go forward without specific examples that actually demonstrate the existence of actual injury.

The panel decision conflicts with *State Farm II* even more sharply. In that analogous case, the MSP companies' first complaint contained no specifics of any purported violation. Plaintiffs accordingly "found themselves unable in the district court to do more than show an assigned right to recover *potentially* unreimbursed payments." 994 F.3d at 873. They only "could identify baskets of possible receivables arising from payments MAOs made for healthcare provided to someone enrolled in Medicare but could go no further." *Id.* They sought to use the litigation

process itself as their "pathway to identifying any value in the assigned receivables and then pursuing any available collections." *Id.* This description of the complaint in *State Farm II* aptly describes the complaint in this case.

In *State Farm II*, the Seventh Circuit noted with approval that the district court demanded more specificity. The MSP companies therefore filed an amended complaint naming a "specific illustrative beneficiary" who allegedly suffered injuries in a car accident and incurred accident-related expenses that State Farm purportedly failed to pay. The Seventh Circuit affirmed the district court's grant of summary judgment on this claim, however, because the payment in question had no connection to the beneficiary's car accident. *Id.* at 873–4.

In doing so, the Seventh Circuit rejected the MSP companies' argument that they "did not need to present an exemplar claim to establish standing at the summary judgment stage." *Id.* at 875. "Federal courts do not possess infinite patience, nor are the discovery tools of litigation meant to substitute for some modicum of pre-suit diligence." *Id.* at 878. The court noted its impression that the MSP companies "pull the litigation trigger before doing their homework"; "[t]hey sue to collect on

receivables they paid little or nothing for and then rely on the discovery process to show they acquired something of value and thus have an enforceable right to collect." *Id.* at 878. But "at the critical put up or shut up moment of summary judgment," they "once again failed to establish standing." *Id.* Ultimately, the Seventh Circuit concluded: "This lawsuit mirrors scores like it filed in federal courts throughout the country that have all the earmarks of abusive litigation and indeed have drawn intense criticism from many a federal judge. The plaintiffs should think hard before risking a third strike within our Circuit." *State Farm II*, 994 F.3d at 871.

The *State Farm II* court added that the MSP companies' litigation approach was "not sitting well with many judges, and multiple district courts have already commented on what they perceive as [the MSP companies'] rush to file litigation in the hope that discovery will show whether an actual case or controversy exists." *Id.* (citing *MSP Recovery Claims, Series LLC v. AIG Prop. Cas., Inc.*, 2021 WL 1164091, at *1 (S.D.N.Y. Mar. 26, 2021)); *MSP Recovery Claims, Series LLC v. New York Cent. Mut. Fire Ins. Co.*, 2019 WL 4222654, at *6 (N.D.N.Y. Sept. 5, 2019);

MSP Recovery Claims, Series LLC v. USAA Gen. Indem. Co., 2018 WL 5112998, at *13 (S.D. Fla. Oct. 19, 2018)).

Other cases filed by the MSP companies reach similar ends. *See MAO-MSO Recovery II, LLC v. The Farmers Ins. Exchange*, 2022 WL 1690151, *12 (C.D. Cal. May 25, 2022) (granting summary judgment to insurer on 118 claims, among other reasons, because "plaintiffs have not forth any evidence . . . showing that plaintiffs' assignors made payments to compensate medical providers for treatment"); *MSP Recovery Claims, Series LLC v. Hereford Ins. Co.*, 2022 WL 118387 (S.D.N.Y. Jan. 11, 2022) ("Exhibit A does not contain any information connecting any patient to a particular accident on a particular day").

The panel decision here upends this settled law and opens the floodgates. It permits plaintiffs to file hundreds if not thousands of complaints in this Circuit merely by attaching spreadsheets containing cryptic columns with no discernable meaning, and no pre-filing diligence, giving them a free-pass to proceed to discovery to determine whether they actually have a case. As Judge Jordan argued in his concurrence, this should not be countenanced.

It remains only to note that *amici* also agree with defendants' arguments that plaintiffs should not be allowed to amend their complaint in these circumstances. (Petition at 11–17). *Amici* note the unduly prejudicial nature of a process that forces their members to litigate motions to dismiss through to dismissal, only to face litigating them yet again when a post-dismissal amendment is allowed. Notwithstanding, even if plaintiffs should ultimately get leave to amend, the fact remains that the Court should nevertheless grant defendants' petition to correct the erroneous circuit precedent establishing a harmful rule.

CONCLUSION

Amici urge the Court to grant defendants' petition.

August 15, 2022

Respectfully submitted,

/s/ *Joseph H. Lang, Jr.*

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this *Amici Curiae* Brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this document contains 2,422 words, excluding the parts exempted by Eleventh Circuit Rule 29-3. The undersigned attorney also certifies that this *Amici Curiae* Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this *Amici Curiae* Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with Century Schoolbook 14-point font.

/s/ Joseph H. Lang, Jr.
Joseph H. Lang, Jr.

/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of August, 2022, I caused the foregoing *Amici Curiae* Brief to be electronically filed using the Court's CM/ECF System, thereby serving all registered users in this case by operation of that electronic filing system.

/s/ Joseph H. Lang, Jr.
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