Civil Procedure
Fall 2016
Professor Lonny Hoffman

Section 2
(CM Pages 60 – 159)

Notice Pleading
Questions for Discussion

Notice pleading used to be a nice, not overly taxing way of introducing students to the subject of federal civil procedure. However, thanks to the Court's decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, things have gotten a great deal more complicated. Here are some questions you may find useful to think about as you read through the materials and prepare for class.

1. How does modern pleading in the Federal Rules of Civil Procedure differ from common law pleading?

2. How does it differ from Code Pleading?

3. Broadly stated, what were the drafters' purposes in 1938 in modernizing pleading?

4. Describe some of the common types of instances in which allegations were found to be insufficient before the Court's decisions in *Twombly* and *Iqbal*?

5. What is the new pleading test from *Twombly* and *Iqbal*?

6. What does the Supreme Court mean by saying an allegation is conclusory? What about the following allegations? Do you think they are conclusory?

   a. Defendant violated my constitutional rights.

   b. Defendant violated my constitutional right to equal protection under the law.

   c. On Dec 5, 2011, Defendant fired me because of my race, in violation of my constitutional right to equal protection under the law.

   d. On Dec 5, 2011, Defendant fired me because of my race and replaced me with Mr. John Smith, a less qualified white male, in violation of my constitutional right to equal protection under the law.

7. What is a court to do when it determines that allegations are conclusory?

8. What does the Supreme Court mean by saying allegations are not plausible? What is a court to do when it determines that allegations are not plausible?

9. What is the broadest interpretation of the Court's cases? What is the narrowest?

SUPREME COURT OF THE UNITED STATES

No. 00–1853

AKOS SWIERKIEWICZ, PETITIONER *v.*
SOREMA N. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[February 26, 2002]

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. Rule Civ. Proc. 8(a)(2).

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old.[1] In April 1989, petitioner began working for respondent Sorema N. A., a reinsurance company headquartered in New York and principally owned and controlled by a

[1] Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint. See, *e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993).

French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, François M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulo, a 32-year-old who, like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulo as CUO. Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." App. 26. Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.* (1994 ed. and Supp. V), and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.* (1994 ed. and Supp. V). App. 28. The United States District Court for the Southern District of New York dismissed petitioner's

complaint because it found that he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." *Id.*, at 42. The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas*, *supra*, at 802. See, *e.g.*, *Tarshis* v. *Riese Organization*, 211 F. 3d 30, 35–36, 38 (CA2 2000); *Austin* v. *Ford Models, Inc.*, 149 F. 3d 148, 152–153 (CA2 1998). The Court of Appeals held that petitioner had failed to meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." 5 Fed. Appx. 63, 65 (CA2 2001). We granted certiorari, 533 U. S. 976 (2001), to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases,[2] and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. See 5 Fed. Appx., at 64–65. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1)

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[2] The majority of Courts of Appeals have held that a plaintiff need not plead a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), in order to survive a motion to dismiss. See, *e.g.*, *Sparrow* v. *United Air Lines, Inc.*, 216 F. 3d 1111, 1114 (CADC 2000); *Bennett* v. *Schmidt*, 153 F. 3d 516, 518 (CA7 1998); *Ring* v. *First Interstate Mortgage, Inc.*, 984 F. 2d 924 (CA8 1993). Others, however, maintain that a complaint must contain factual allegations that support each element of a prima facie case. In addition to the case below, see *Jackson* v. *Columbus*, 194 F. 3d 737, 751 (CA6 1999).

membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Ibid.*; cf. *McDonnell Douglas*, 411 U. S., at 802; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253–254, n. 6 (1981).

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and allocation *of proof* in a private, non-class action challenging employment discrimination." 411 U. S., at 800 (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. See *Burdine*, *supra*, at 252–253 ("In [*McDonnell Douglas*,] we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination" (footnotes omitted)); 450 U. S., at 255, n. 8 ("This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law").

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constric[t] the role of the pleadings." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 283, n. 11 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, *e.g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) ("When a

federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978); see also *McDonnell Douglas*, *supra*, at 802, n. 13 ("[T]he specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Teamsters* v. *United States*, 431 U. S. 324, 358 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); *Ring* v. *First Interstate Mortgage, Inc.*, 984 F. 2d 924, 927 (CA8 1993)

("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See *id.*, at 47–48; *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168–169 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure §1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake.[3] This Court, however, has declined to

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[3] "In all averments of fraud or mistake, the circumstances constitut-

extend such exceptions to other contexts. In *Leatherman* we stated: "[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius*." 507 U. S., at 168. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U. S. C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).[4]

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before respond-

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ing fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

[4]These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

ing. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley*, *supra*, at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. App. 28. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. *Id.*, at 24–28. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley*, *supra*, at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34–40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman*, *supra*, at 168. Furthermore, Rule 8(a) establishes a

pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U. S., at 236.

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AKOS SWIERKIEWICZ, Plaintiff,	:	CIVIL ACTION NO. 99-CV
v.	:	
SOREMA N.A., Defendant.	:	JURY TRIAL DEMANDED

COMPLAINT

1. This is an employment discrimination action brought by Akos Swierkiewicz to recover damages against SOREMA N.A. ("SOREMA") for the violation of his rights under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. ("Title VII") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. ("ADEA").

JURISDICTION AND VENUE

a. Jurisdiction over Mr. Swierkiewicz's Title VII claim is conferred by 42 U.S.C. §2000e-5(f)(3). Jurisdiction over his ADEA claim is conferred by 29 U.S.C. §626(c)(1).

b. Venue is proper in this district pursuant to the general venue statute, 28 U.S.C. §1391, and under Title VII's special venue statute, 42 U.S.C. §2000e-5(f)(3).

PARTIES

2. Plaintiff, Akos Swierkiewicz, resides at 821 Hudson Drive, Yardley, Pennsylvania 19067.

3. Defendant SOREMA is a New York corporation headquartered at 199 Water Street, 20th Floor, New York, New York 10038.

4. At all times relevant hereto, SOREMA has resided and conducted business in this judicial district.

5. At all times relevant hereto, SOREMA has been an employer within the meaning of Title VII and the ADEA.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

6. On or about July 11, 1997 Mr. Swierkiewicz filed a Charge of Discrimination against SOREMA with the Philadelphia District Office of the Equal Employment Opportunity Commission ("EEOC"), Charge No. 170971447, charging it with unlawful national origin and age discrimination in connection with his dismissal from employment.

7. By notice dated May 3, 1999 and which he received on May 5, 1999, Mr. Swierkiewicz was notified by the EEOC of his right to file a civil action against SOREMA.

8. This lawsuit has been timely filed within 90 days of Mr. Swierkiewicz's receipt of the EEOC's right-to-sue notice.

FACTUAL ALLEGATIONS

9. Mr. Swierkiewicz is a native of Hungary. He became a United States citizen in 1970.

10. Mr. Swierkiewicz is 53 years old. His date of birth is July 25, 1946.

11. SOREMA was formed in 1989. It is a reinsurance company principally owned and controlled by a French parent corporation. At all times relevant hereto, SOREMA's Chief Executive Officer has been François M. Chavel, a French national.

12. From 1970 to 1986, Mr. Swierkiewicz was employed by INA which after its merger in 1982 with Connecticut General, became CIGNA Insurance Company. His last position at CIGNA was Vice President of Special Risk Facilities.

13. From 1986 to 1989, Mr. Swierkiewicz was employed by SCOR U.S., a reinsurance company, as Senior Vice President for Research and Special Risks.

14. On April 17, 1989 Mr. Swierkiewicz began his employment with SOREMA in the position of Senior Vice President and Chief Underwriting Officer ("CUO").

15. In all respects, Mr. Swierkiewicz performed his job in a satisfactory and exemplary manner.

16. Despite plaintiff's stellar performance, in February 1995 Mr. Chavel demoted him from his CUO position to a marketing and services position and transferred the bulk of his underwriting responsibilities to another French national, Nicholas Papadopoulo, who was 32 years old at the time (and 16 years younger than plaintiff).

17. Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).

18. A year later, in or about February 1996, Mr. Chavel formally appointed Mr. Papadopoulo as SOREMA's CUO.

19. Mr. Papadopoulo was far less experienced and less qualified to be SOREMA's CUO than was Mr. Swierkiewicz. Indeed, Mr. Papadopoulo had just one year of underwriting experience prior to being appointed CUO by Mr. Chavel. By contrast, plaintiff had more than 26 years of broad based experience in the insurance and reinsurance industry.

20. At the time Mr. Papadopoulo assumed plaintiff's duties as CUO, Mr. Chavel stated that he wanted to "energize" the underwriting department – clearly implying that plaintiff was too old for the job.

21. In light of Mr. Papadopoulo's inexperience, Mr. Chavel brought in Daniel Peed from SOREMA's Houston, Texas office to support him in his CUO duties. Mr. Peed, like Mr. Papadopoulo, was in his early 30s. Shortly after his transfer to SOREMA's office in New York City, Mr. Chavel promoted Mr. Peed to the position of Senior Vice President of Risk Property.

22. Prior to his transfer, Mr. Peed had been a Second Vice President reporting to plaintiff.

23. Not long after plaintiff's demotion, SOREMA hired another French national, Michel Gouze, as Vice President in charge of Marketing. Mr. Gouze, unlike plaintiff, had very little prior experience in the insurance/reinsurance business.

24. Because of his inexperience, Mr. Gouze needed to rely on Mr. Swierkiewicz to perform his marketing duties for SOREMA.

25. Mr. Gouze's marketing duties at times overlapped with those of plaintiff. Despite Mr. Swierkiewicz's requests to better coordinate their duties, Mr. Chavel refused to accommodate those requests or to have Mr. Gouze report to plaintiff.

26. Mr. Swierkiewicz was isolated by Mr. Chavel following his demotion, excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA.

27. Efforts by Mr. Swierkiewicz to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subjected following his demotion proved unsuccessful.

28. On April 14, 1997, following two years of ongoing discrimination on account of his national origin and age, Mr. Swierkiewicz sent a memo to Mr. Chavel outlining his grievances and requesting a severance package to resolve his disputes with SOREMA.

29. Mr. Chavel did not respond to Mr. Swierkiewicz's memo.

30. In the morning, on Tuesday April 29, 1997, Mr. Chavel and Daniel E. Schmidt, IV, SOREMA's General Counsel, met with Mr. Swierkiewicz and gave him two options: either resign his job (with no severance package) or be fired.

Mr. Swierkiewicz refused to resign his employment with SOREMA.

As a result, he was fired by Mr. Chavel, effective that very day (April 29, 1997).

31. SOREMA had no valid basis to fire Mr. Swierkiewicz.

32. Plaintiff's age and national origin were motivating factors in SOREMA's decision to terminate his employment.

33. Unlike plaintiff who was fired without cause and without any severance pay or benefits, SOREMA has provided generous severance packages to a number of former executives for whom it had cause to terminate their employment. These include, but are not limited to, the following individuals: Jay Kubinak, Thilo Herda, Douglas Zale, Nigel Harley and Marcus Corbally.

34. As a direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered and will continue to suffer a substantial loss of earnings to which he otherwise would have been entitled. This includes, but is not limited to, the loss of his salary, bonus, automobile allowance and pension credits as well as the loss of his medical and dental insurance, life insurance, short and long term disability insurance and the insurance he had for accidental death and dismemberment.

35. As a further direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered damage to his reputation and harm to his career. He has also experienced physical pain and suffering, mental anguish, and the loss of enjoyment of life's pleasures.

36. SOREMA acted willfully and in reckless disregard of Mr. Swierkiewicz's rights under Title VII and the ADEA by discharging him from employment on account of his age and national origin.

STATEMENT OF CLAIMS

COUNT I: VIOLATION OF TITLE VII

37. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 40 of the Complaint as if they were set forth in full.

38. SOREMA terminated Mr. Swierkiewicz's employment on account of his national origin and thereby violated his right to equal employment opportunity as protected by Title VII.

COUNT II: VIOLATION OF THE ADEA

39. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 42 of the Complaint as if they were set forth in full.

40. SOREMA terminated Mr. Swierkiewicz's employment on account of his age and thereby violated his right to equal employment opportunity as protected by the ADEA.

PRAYER FOR RELIEF

WHEREFORE, Mr. Swierkiewicz respectfully requests the Court to enter judgment in his favor and against SOREMA, and to accord him the following relief:

(a) Back pay with prejudgment interest and all the fringe benefits to which he is entitled;

(b) Front pay and benefits to the extent reinstatement is not feasible;

(c) Compensatory damages for his non-economic injuries in an amount authorized by Title VII;

(d) Punitive damages to punish and deter SOREMA from future acts of employment discrimination in an amount authorized by Title VII;

(e) Liquidated damages in an amount equal to twice Mr. Swierkiewicz's back pay losses as authorized by the ADEA;

(f) An award of reasonable counsel fees and costs to compensate Mr. Swierkiewicz for having to prosecute this action against SOREMA; and

(g) Such other legal and equitable relief or may be just and proper under the circumstances.

JURY DEMAND

Mr. Swierkiewicz demands a trial by jury on all the issues in this action that are triable by law.

Respectfully submitted,

RAYNES, MCCARTY, BINDER, ROSS & MUNDY

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Dated: August 3, 1999

SUPREME COURT OF THE UNITED STATES

No. 07–1015

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS *v.* JAVAID IQBAL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 18, 2009]

JUSTICE KENNEDY delivered the opinion of the Court.

Respondent Javaid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a

claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 1, 11–12 (Apr. 2003) (hereinafter OIG Report), http://www.usdoj.gov/oig/special/0306/full.pdf?bcsi_scan_61073EC0F74759AD=0&bcsi_scan_filename=full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges; and

a 184-member subset of that group was deemed to be "of 'high interest'" to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112–113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal* v. *Hasty*, 490 F. 3d 143, 147–148 (CA2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.*, at 148. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. *Ibid.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.*, at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who

were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04–CV–1809 (JG)(JA), ¶¶10–11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.*, ¶113, App. to Pet. for Cert. 176a; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, *id.*, ¶¶143–145, App. to Pet. for Cert. 182a; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists," *id.*, ¶154, App. to Pet. for Cert. 184a.

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." *Id.*, ¶47, at 164a. It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶69, at 168a. Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his]

religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶96, at 172a–173a. The pleading names Ashcroft as the "principal architect" of the policy, *id.*, ¶10, at 157a, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation." *Id.*, ¶11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 136a–137a (relying on *Conley* v. *Gibson*, 355 U. S. 41 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly*'s applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F. 3d, at 155. It concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.*, at 157–158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established consti-

tutional law. *Id.*, at 174.

Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise ... between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.*, at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic"—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.*, at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.*, Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity." *Id.*, at 178. We granted certiorari, 554 U. S. ___ (2008), and now reverse.

III

In *Twombly, supra*, at 553–554, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 66 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." 534 U. S., at 68. See also *Wilkie*, 551 U. S., at 549–550. That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis* v. *Passman*, 442 U. S. 228 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush* v. *Lucas*, 462 U. S. 367 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under Rev. Stat. §1979, 42 U. S. C. §1983." *Hartman*, 547 U. S., at 254, n. 2. Cf. *Wilson* v. *Layne*, 526 U. S. 603, 609 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for

the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Iqbal Brief 46 ("[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*"). See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691 (1978) (finding no vicarious liability for a municipal "person" under 42 U. S. C. §1983); see also *Dunlop* v. *Munroe*, 7 Cranch 242, 269 (1812) (a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Robertson* v. *Sichel*, 127 U. S. 507, 515–516 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability is inapplicable to *Bivens* and §1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540–541 (1993) (First Amendment); *Washington* v. *Davis*, 426 U. S. 229, 240 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979). It instead involves a decisionmaker's undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Ibid.* It follows that, to state a claim based on a violation of a

clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." Iqbal Brief 45–46. That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a §1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

We turn to respondent's complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U. S. 544, the pleading standard Rule 8 announces does

not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555 (citing *Papasan* v. *Allain*, 478 U. S. 265, 286 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U. S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557.

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 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a com-

plaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F. 3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U. S. C. §1. Recognizing that §1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 775 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another." 550 U. S., at 551 (internal quotation marks omitted). The complaint also alleged that the defendants' "parallel course of conduct . . . to prevent competition" and inflate prices was indicative of the unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a "'legal conclusion'" and, as such, was not entitled to the assumption of truth. *Id.*, at 555. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.*, at 565–566. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.*, at 567. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed. *Id.*, at 570.

B

Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible." *Ibid.*

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶96, App. to Pet. for Cert. 173a–174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, *id.*, ¶10, at 157a, and that

Mueller was "instrumental" in adopting and executing it, *id.*, ¶11, at 157a. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, 550 U. S., at 555, namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U. S., at 279. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly*, *supra*, 550 U. S., at 554–555. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry,'" *id.*, at 551, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." Complaint ¶47, App. to Pet. for Cert. 164a. It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶69, at 168a. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. 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.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as "of high interest." Complaint ¶69, App. to Pet. for Cert. 168a. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before

us, may have labeled him a person of "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "'cleared' by the FBI." *Ibid.* Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U. S., at 570.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly*, the complaint alleged general wrongdoing that extended over a period of years, *id.*, at 551, whereas here the complaint alleges discrete wrongs—for instance, beatings—by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly*, where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state

of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. Iqbal Brief 37–38. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U. S., at 554. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U. S., at 555–556, and n. 3.

2

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." Iqbal Brief 27. We have held,

discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. Iqbal Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [*his*] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶96, App. to Pet. for Cert. 172a–173a. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind

[to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. See 5A C. Wright & A. Miller, Federal Practice and Procedure §1301, p. 291 (3d ed. 2004) ("[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) . . . should control the second sentence of Rule 9(b)"). And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

The Rise and Fall of Plausibility Pleading?

*Adam N. Steinman**

I. *TWOMBLY*, *IQBAL*, AND THE RISE OF "PLAUSIBILITY PLEADING"

This Part describes federal pleading standards beginning with the adoption of the Federal Rules of Civil Procedure in 1938. It outlines Supreme Court case law setting forth the well-known notice-pleading approach, and then details the Court's decisions in *Twombly* and *Iqbal*. It concludes by summarizing the initial reaction to *Twombly* and *Iqbal* and the early impact of those decisions in the lower federal courts.

A. Pleading Standards During the Federal Rules' First Seven Decades

Rule 8 of the Federal Rules of Civil Procedure provides that, in order to state a claim, a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[19] This pleading standard was a core feature of the Federal Rules when they were initially adopted in 1938.[20] It was meant to provide a simpler approach than had traditionally been required under either common-law pleading or code pleading, in order to facilitate determinations of cases on their merits.[21]

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18. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007).

19. FED. R. CIV. P. 8(a)(2).

20. Charles E. Clark, *Simplified Pleading*, *in* 2 FED. RULES DECISIONS 456, 462 (1941) ("Simplified pleading is basic to any program of civil procedural reform . . . . That is the course of the new Federal Rules of Civil Procedure . . . .").

21. *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1584 (2014) ("In rejecting common law pleading, . . . the drafters of the 1938 Federal Rules embraced the insights of legal realism. Pleadings are an inferior method to find out what actually happened . . . ."); Miller, *Deformation of Federal Procedure*, *supra* note 4, at 288–89:

> [T]he distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation . . . . Because the rulemakers were deeply steeped in the history of the debilitating technicalities and rigidity that characterized the prior English and

The Federal Rules illustrated this simpler approach with several hypothetical complaints that were included in the Rules' appendix. One of them provided that a negligence complaint would satisfy Rule 8 by alleging: "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff."[22] A hypothetical patent infringement complaint, using the example of electric motors, provided that it would be sufficient to allege: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention."[23]

Judge Charles Clark, the chief drafter of the original Federal Rules, believed that these sample complaints were "the most important part of the rules" as far as illustrating Rule 8's pleading standard.[24] As of December 1, 2015, the forms that had long appeared in the Federal Rules' Appendix have been removed, and Rule 84—which had provided the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate"[25]—has been abrogated.[26] The Advisory Committee Note to this 2015 amendment states explicitly, however, that the elimination of the forms "does not alter existing

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> American procedural systems—that is, the common law forms of action and then the codes—the Rules established an easily satisfied pleading regime for stating a grievance that abjured factual triviality, verbosity, and technicality.

Charles E. Clark—who was the chief drafter of the original rules as well as dean of the Yale Law School and, later, a federal judge on the U.S. Court of Appeals for the Second Circuit—put it this way: "[I]n the case of a real dispute, there is no substitute anywhere for a trial. To attempt to make the pleadings serve as such substitute is in very truth to make technical forms the mistress and not the handmaid of justice." Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 319 (1938). For more on Clark's view of the proper role of pleading standards, see Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 179–89, 191–93, 196–97 (1958) [hereinafter Clark, *Pleading Under the Federal Rules*]; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–94 (2003); and Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917–19, 923–32 (1976).

22. FED. R. CIV. P. Form 11, ¶ 2 (2014), reprinted *infra* Appendix B. Until 2007, this form appeared as Form 9 and was drafted slightly differently. *See* Twombly, 550 U.S. at 575–76 (Stevens, J., dissenting) (quoting former Form 9: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 n.4 (2002) (same). The 2007 change occurred as part of a general restyling of the Federal Rules, which was intended "to be stylistic only" and "to make no changes in substantive meaning." FED R. CIV. P. 1 advisory committee's notes to 2007 amendment.

23. *See* FED. R. CIV. P. Form 18, ¶3 (2014), reprinted *infra* Appendix B. This language derived from Form 16 of the original rules, but became Form 18 in 2007.

24. Clark, *Pleading Under the Federal Rules*, *supra* note 21, at 181:

> What we require [in Rule 8] is a general statement of the case . . . . We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms.

25. FED. R. CIV. P. 84 (2014) (abrogated 2015).

26. FED. R. CIV. P. 84 advisory committee's notes to 2015 amendment.

pleading standards or otherwise change the requirements of Civil Rule 8."[27]

For the Federal Rules' first seven decades, Supreme Court case law elaborated on the simplified approach to pleading commanded by the text of Rule 8 and these illustrative forms. In 1957, *Conley v. Gibson* made clear that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[28] Rather, a complaint is sufficient as long as it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[29] During the half-century that followed *Conley*, the Court repeatedly quoted and applied the "fair notice" standard[30]—so much so that the federal approach enshrined in Rule 8 came to be known as "notice pleading."[31]

This approach, the Court would later emphasize, was compelled by the text of Rule 8 itself: "In *Conley v. Gibson*, . . . we said in effect that the Rule meant what it said."[32] When presented with arguments

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27. *Id.* As discussed in more detail *infra* note 163, long-standing forms such as the complaints in Form 11 and Form 18 should continue to inform federal courts' approach to pleading even though the Appendix of Forms has been deleted. Given their continued relevance—and because such abrogated content may be harder to find as electronic sources of information are updated to reflect the current Rules—several of the forms relevant to pleading standards are reproduced in Appendix B of this Article.

28. Conley v. Gibson, 355 U.S. 41, 47 (1957).

29. *Id.*

30. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (quoting *Conley*, 355 U.S. at 47); Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (same).

31. *E.g.*, *Swierkiewicz*, 534 U.S. at 511 (describing the federal approach as "a notice pleading system"); *Leatherman*, 507 U.S. at 168 (noting "the liberal system of 'notice pleading' set up by the Federal Rules"); Thomas v. Independence Twp., 463 F.3d 285, 295 (3d Cir. 2006) ("[T]he notice pleading standard of Rule 8(a) applies in all civil actions, unless otherwise specified in the Federal Rules or statutory law."); *see also* Mayle v. Felix, 545 U.S. 644, 669 (2005) (contrasting the Court's approach to habeas corpus petitions with "the generous notice-pleading standard for the benefit of ordinary civil plaintiffs under Federal Rule of Civil Procedure 8(a)"). It is worth noting that Charles Clark himself had some reservations about framing the pleading standard in terms of notice; he wrote:

> The usual modern expression, at least of text writers, is to refer to the notice function of pleadings . . . . This is a sound approach so far as it goes; but *content must still be given to the word "notice."* It cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance.

Clark, *supra* note 20, at 460 (emphasis added). For convenience, however, this Article will use the phrase "notice pleading" to refer to the pleading standard that prevailed before *Twombly*, if only because the Supreme Court itself has embraced that phrase. By contrast, the Court has still never used the phrase "plausibility pleading"; a Westlaw search for that phrase in the Supreme Court database returned zero cases.

32. *Leatherman*, 507 U.S. at 168:

> Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley v. Gibson*, . . . we said in effect that the Rule meant what it said: "The Federal Rules of Civil Procedure do not

that heightened pleading standards would be desirable for certain kinds of issues in certain kinds of cases, the Court invariably responded that such concerns—however justified as a practical matter—could not be squared with the Federal Rules as they were written, and therefore could only be implemented "by the process of amending the Federal Rules, and not by judicial interpretation."[33]

Indeed, the Court made one of its most robust reaffirmations of notice pleading just five years before *Twombly* came down. *Swierkiewicz v. Sorema N.A.*[34] was an employment-discrimination case decided in 2002. In a unanimous opinion authored by Justice Thomas, the Court concluded that it was sufficient for a plaintiff to allege that his "age and national origin were motivating factors in [the defendant's] decision to terminate his employment."[35] Emphasizing *Conley*'s "fair notice" standard,[36] Justice Thomas made clear that the pleading threshold did not require the plaintiff to show that he will ultimately prevail on his claim,[37] or that he has or will likely uncover evidence to support his allegations.[38] Justice Thomas explicitly recognized that the

require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (citations omitted).

33. *E.g.*, *Swierkiewicz*, 534 U.S. at 515 ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.' " (quoting *Leatherman*, 507 U.S. at 168)); *see also* Subrin & Main, *supra* note 4, at 1847 ("In 1993, and then again in 2002, the Supreme Court . . . found that only Congress or other rulemakers—not the courts—could deviate from the 'notice pleading' standard required by Federal Rule 8(a).").

34. 534 U.S. 506.

35. Amended Complaint at ¶ 37, Swierkiewicz v. Sorema N.A., No. 99 Civ. 12272 (S.D.N.Y. Apr. 19, 2000), *reprinted in* Joint Appendix, 2001 WL 34093952, at 27a; *see also Swierkiewicz*, 534 U.S. at 514 ("Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA.").

36. *Swierkiewicz*, 534 U.S. at 512:

> [I]mposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

37. *See id.* at 515 ("[The federal] pleading standard [is] without regard to whether a claim will succeed on the merits."); *accord* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974):

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

38. *See Swierkiewicz*, 534 U.S. at 511–12 (rejecting as "incongruous" with notice pleading a requirement to allege facts raising an inference of discrimination, because "direct evidence of discrimination" might be unearthed during discovery even though the plaintiff was concededly "without direct evidence of discrimination at the time of his complaint").

federal approach to pleading would "allow[] lawsuits based on conclusory allegations of discrimination to go forward."[39] But "[w]hatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits."[40]

Notice pleading was not a free pass, however. Even at the pleading stage, a defendant could challenge a claim's legal sufficiency.[41] If the substantive law does not provide a remedy for the conduct alleged, the complaint's statement of the claim does not "show[] that the pleader is entitled to relief" as required by Rule 8(a)(2).[42] And such a complaint "fail[s] to state a claim upon which relief can be granted," which justifies dismissal under Rule 12(b)(6).[43] Indeed, a pleading-stage motion to dismiss was—and remains—a suitable vehicle for resolving novel questions of substantive law.[44] Notice pleading was also understood to permit dismissal at the pleading stage when the plaintiff's own allegations reveal a fatal defect that defeats the claim on the merits. In other words, a plaintiff may "plead[] itself out of court"[45] by making allegations that conclusively undermine its claim for relief. If so, a Rule 12(b)(6) dismissal is proper.[46]

41. *See, e.g.*, Am. Postal Workers Union v. City of Memphis, 361 F.3d 898, 902 (6th Cir. 2004) (reviewing a dismissal "based purely on the legal sufficiency of a plaintiff's case"); Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002) ("A Rule 12(b)(6) motion tests the legal sufficiency of a complaint . . . ."); Int'l Mktg., Ltd. v. Archer-Daniels-Midland Co., 192 F.3d 724, 732 (7th Cir. 1999):

> [G]iven that the written agreements were, as a matter of law, the only valid agreements between IML and the defendants, and given that IML by its own admissions apparently failed to meet the payment terms that would have triggered the defendants' duty to perform, neither ADM nor Swift acted wrongfully . . . .;

see also Clyde Spillenger, *Teaching* Twombly *and* Iqbal*: Elements Analysis and the Ghost of Charles Clark*, 60 UCLA L. REV. 1740, 1745 (2013):

> "[N]otice pleading" did not alter the requirement that the complaint's allegations satisfy the elements of a recognized cause of action. The conceptual basis for assessing the legal sufficiency of a complaint that had prevailed prior to the [Federal Rules'] adoption remained in place: The complaint's allegations must be assessed in light of governing substantive law to ensure that they address the elements of some recognized claim.

42. FED. R. CIV. P. 8(a)(2).

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

44. *See generally, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (on appeal from the district court's denial of a Rule 12(b)(6) motion, deciding whether the federal Religious Land Use and Institutionalized Persons Act violated the Establishment Clause); Rosenbrahn v. Daugaard, 61 F. Supp. 3d 845 (D.S.D. 2014) (deciding in the context of defendants' motion to dismiss that South Dakota's ban on same-sex marriage was unconstitutional); Wyeth, Inc. v. Weeks, 159 So. 3d 649 (Ala. 2014) (on certification from a federal district court in connection with a Rule 12(b)(6) motion to dismiss, considering whether a name-brand drug manufacturer could be liable for failing to warn a purchaser of the generic version); *see also* Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990) (on appeal from a grant of a Rule 12(b)(6) motion, deciding "whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support").

45. Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 901 (7th Cir. 2004).

II. RECONCILING *TWOMBLY* AND *IQBAL* WITH NOTICE PLEADING

This Part examines the Court's reasoning in *Twombly* and *Iqbal* and the pleading framework they employ. Although the decisions are problematic in many respects, their approach to pleading can and should be reconciled with the notice-pleading approach that characterized federal practice for nearly seven decades. Section A proposes a basic understanding of the *Twombly/Iqbal* two-step analysis, and shows how that approach can be applied consistently with notice pleading. Section B examines *Twombly*'s "retirement" of the Supreme Court's statement in *Conley* 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 which would entitle him to relief,"[103] and explains why *Twombly*'s critique of *Conley* does not constitute a meaningful departure from notice pleading. Section C elaborates on what should constitute a "conclusory" allegation whose truth need not be accepted at the pleading phase.

A. Iqbal*'s Two Steps*

To reconcile the logic of *Twombly* and *Iqbal* with notice pleading, one must consider carefully the two-step analysis Justice Kennedy described in *Iqbal*. That analysis proceeds as follows: First, the court must identify allegations that are mere "legal conclusions" and disregard them for purposes of determining whether the complaint states a claim for relief.[104] Second, the court must assess whether the remaining allegations, accepted as true, plausibly suggest an entitlement to relief.[105] Under this framework, the real potential for mischief lies in the ability to disregard conclusory allegations. Only the first-step examination of "legal conclusions" can excise allegations from a complaint. The second-step "plausibility" inquiry allows a complaint to pass muster *even if* a substantive requirement of the plaintiff's claim is stated only in conclusory terms.[106]

Accordingly, calling the *Twombly* and *Iqbal* framework "plausibility pleading" is a significant over-simplification. Under the

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103. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

104. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); *see also supra* notes 78–80 and accompanying text (describing this part of the *Iqbal* opinion).

105. *Iqbal*, 556 U.S. at 678; *see also supra* notes 81–82 and accompanying text (describing this part of the *Iqbal* opinion).

106. *See* Steinman, *supra* note 8, at 1319 ("Conclusoriness is destructive; it justifies disregarding an allegation. Plausibility is generative; it justifies creating an allegation that is not validly made in the complaint itself (perhaps because it was alleged only in a conclusory manner).").

logic of *Twombly* and *Iqbal*, there is no need to assess plausibility if the nonconclusory allegations establish all of the requirements of a meritorious claim. *Twombly* recognized this, noting that an "independent" allegation of an agreement between the Baby Bell defendants would have sufficed.[107] And *Iqbal* recognized this, noting that it was paragraph 96's "conclusory nature"—not the fact that it was "chimerical" or "fanciful"—that allowed the Court to refuse to accept its truth.[108] As long as a complaint's nonconclusory allegations, accepted as true, establish a claim for relief, the complaint necessarily passes muster. To allow courts to second-guess such allegations under the guise of "plausibility" would contravene the requirement that nonconclusory allegations must be accepted as true at the pleading phase.[109]

What about *Iqbal*'s recognition that courts may refuse to accept the truth of conclusory allegations? One might argue that even to recognize that possibility is to impose a more restrictive pleading standard than had existed prior to *Twombly* and *Iqbal*. Well before *Twombly* and *Iqbal*, however, federal appellate courts had embraced the idea that a court was not required to accept mere legal conclusions.[110] Indeed, the power to disregard legal conclusions flows quite naturally from the core fair-notice requirement. If a complaint provides—in the language of *Iqbal*—merely an "unadorned, the-defendant-unlawfully-harmed-me accusation,"[111] or "a formulaic recitation of the elements of a cause of action,"[112] it has not provided "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[113]

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107. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564 (2007).

108. *Iqbal*, 556 U.S. at 681. Justice Kennedy also made clear that "[w]ere we required to accept [paragraph 96] as true, respondent's complaint would survive petitioners' motion to dismiss." *Id.* at 686.

109. Put another way, "when a complaint contains nonconclusory allegations on every element of a claim for relief, the plausibility issue vanishes completely," because "the court must assume the veracity of such nonconclusory allegations." Steinman, *supra* note 8, at 1316 (citation omitted). "If such allegations address each element that would be needed to ultimately prove the plaintiff's claim, then they do more than make an entitlement to relief plausible—they confirm an entitlement to relief, at least for purposes of the pleadings phase." *Id.* at 1316–17 (citation omitted).

110. *See, e.g.*, Achtman v. Kerby, McInerney & Squire, LLP, 464 F.3d 328, 337 (2d Cir. 2006) ("[C]onclusory allegations or legal conclusions . . . will not suffice to defeat a motion to dismiss." (citation omitted)); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) ("[T]he court is not required to accept legal conclusions . . . ." (citation omitted)).

111. *Iqbal*, 556 U.S. at 678 ("[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." (quoting *Twombly*, 550 U.S. at 555)).

112. *Id.* (quoting *Twombly*, 550 U.S. at 555).

113. Conley v. Gibson, 355 U.S. 41, 47 (1957). Indeed, one might perfectly align *Twombly* and *Iqbal* with notice pleading simply be defining the term "conclusory" to *mean* "failing to provide fair

The biggest challenge going forward from *Twombly* and *Iqbal* is to determine what *qualifies* as a conclusory allegation whose truth may be disregarded at the pleading phase. This inquiry is what makes *Twombly* and *Iqbal* so potentially disruptive to notice pleading, but it is also the key to saving notice pleading. One way to reconcile the *Twombly/Iqbal* framework with notice pleading would be with the following approach: an allegation qualifies as "conclusory"—and hence fails to provide "fair notice"—when it states a mere legal conclusion rather than identifying a real-world act or event.[114]

This approach should not cause alarm for proponents of notice pleading. Suppose, for example, that a complaint alleges merely: "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief"; or "the defendant violated the plaintiff's rights under Title VII of the 1964 Civil Rights Act"; or "the defendant breached a duty owed to the plaintiff under state law and this breach proximately caused damages to the plaintiff." These allegations would all state a claim for relief, in the sense that the plaintiff would prevail if these allegations were ultimately proven true. Yet even notice pleading would require something more. Why? Because they do not identify what actually occurred in the real world: What did the defendant do? What happened to the plaintiff? These hypothetical allegations epitomize the "unadorned, the-defendant-unlawfully-harmed-me accusation,"[115] or the "formulaic recitation of the elements of a cause of action,"[116] that can be disregarded as conclusory. One might call this a transactional approach to pleading—it is the failure to provide an adequate transactional narrative that permits the court to refuse to accept such allegations as true.

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notice of what the plaintiff's claim is and the grounds upon which it rests." Under the two-step framework set forth in *Iqbal*, the only basis for refusing to accept an allegation as true is that it is conclusory. *See supra* notes 78–82, 106–109 and accompanying text (summarizing *Iqbal* and emphasizing that the nonconclusory allegations must be accepted as true). If "conclusory" means nothing more than "failing to provide fair notice," the conflict with notice pleading disappears. *See* Steinman, *supra* note 8, at 1324–25 ("*Iqbal*'s recognition that conclusory allegations need not be accepted as true does not necessarily mean the end of notice pleading. It merely cloaks the notice inquiry in different doctrinal garb."); *id.* at 1325 ("To say that an allegation is 'conclusory' because it lacks X is no different than saying that 'fair notice' requires the defendant to be informed of X.").

114. *See* Steinman, *supra* note 8, at 1334:

> One way to reconcile *Twombly* and *Iqbal* with authoritative pre-*Twombly* texts and precedents is to define 'conclusory' in transactional terms. A plaintiff's complaint must provide an adequate transactional narrative, that is, an identification of the real-world acts or events underlying the plaintiff's claim. When an allegation fails to concretely identify *what* is alleged to have happened, that allegation is conclusory and need not be accepted as true at the pleadings phase.

115. *Iqbal*, 556 U.S. at 678.

116. *Id.* (quoting *Twombly*, 550 U.S. at 555).

I will elaborate in more detail below on how this transactional approach fits with the Supreme Court's reasoning in *Twombly* and *Iqbal*.[117] For now, it is important to note that this approach does not require a court to inquire how a plaintiff will ultimately *prove* her version of what happened, or to assess the likelihood that the plaintiff will ultimately succeed. The plaintiff need only provide *allegations* regarding the events underlying her claim. It thus avoids the informational "Catch-22" associated with a restrictive understanding of plausibility pleading. As long as the plaintiff can articulate a transactional narrative that, if true, would entitle her to relief, she can use the discovery process to uncover evidence to support that transactional narrative.

What about plausibility—the second step in the *Twombly/Iqbal* framework? The plausibility inquiry might perform a number of functions that do not invite the troubling consequences that would flow from a more restrictive reading of those decisions. First, as *Twombly* and *Iqbal* both indicate, plausibility could allow courts to infer things that were not themselves alleged in the complaint—or that were alleged purely in a conclusory manner. Many have criticized the Supreme Court's reasoning regarding how a court should decide whether certain allegations *do* "plausibly suggest" some missing requirement of a viable cause of action.[118] These critiques are well taken, but it is crucial to recognize that a plaintiff need not rely on "plausibl[e] suggest[ions]" if the complaint's nonconclusory allegations, accepted as true, establish a

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117. *See infra* Section II.C (elaborating on how "conceptualiz[ing] what counts as 'conclusory' in transactional terms . . . reconcile[s] the Court's conclusions in *Twombly* and *Iqbal* with pre-*Twombly* notice-pleading precedents"); *see also* Steinman, *supra* note 8, at 1298–99, 1328–39 (describing the transactional approach).

118. *See, e.g.*, Miller, *Deformation of Federal Procedure*, *supra* note 4, at 334:

> [*Twombly*] requires facts—not conclusions—"showing" (a word in the Rule never previously judicially focused on or accorded any significance) a "plausible" claim, with little guidance as to what that means. And what does it mean? Justice Souter's *Twombly* opinion only tells us plausibility is something more than purely speculative or possible, but it can be less than probable. Of course, that's not very helpful.

(footnotes omitted); Burbank, *supra* note 95, at 118 (criticizing "[t]he *Iqbal* Court's reliance on 'judicial experience and common sense' " as "an invitation to 'cognitive illiberalism' " (citing Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009)). Additional confusion regarding plausibility stems from seemingly contradictory language on the relationship between plausibility and the likelihood of uncovering supporting evidence during discovery. On one hand, *Twombly* stated that "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations." *Twombly*, 550 U.S. at 563 n.8. On the other hand, it stated that the plausibility inquiry "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. This tension is discussed *infra* note 297.

meritorious claim.[119] As a logical matter, the potential for the plausibility inquiry to salvage complaints where the requirements of a meritorious claim are addressed only by conclusory allegations makes the pleading framework *more* forgiving, not less.[120] Again, it is only the ability to disregard conclusory allegations that allows courts to second-guess the truth of a complaint's allegations.

Second, plausibility can encompass the sort of legal-sufficiency inquiries that have long been an accepted aspect of notice pleading.[121] Even if a complaint describes with unquestionable clarity the events that are the basis for the plaintiff's cause of action, it should not survive the pleading phase if those events would fail, as a matter of law, to justify any relief for the plaintiff. It would correctly be said that the complaint does not "state[] a plausible claim for relief."[122] One subset of this scenario is where the plaintiff has "pled itself out of court" by including allegations that conclusively undermine a viable claim.[123] In this situation, the plaintiff's own allegations would confirm that the complaint does not "state[] a plausible claim for relief."[124]

Under this view of the plausibility inquiry,[125] plausibility plays no role when a complaint's nonconclusory allegations, accepted as true, establish a claim for relief. Because those nonconclusory allegations must be accepted as true, such a complaint necessarily would survive the plausibility inquiry. The complaint must be examined as if all of those nonconclusory allegations have been proven. If those nonconclusory allegations make out a meritorious claim, there is no role for a free-floating assessment of those allegations' "plausibility."

C. Twombly, Iqbal, *and the Power to Disregard Conclusory Allegations*

For all of the reasons explained earlier, *Twombly* and *Iqbal*'s most significant potential impact lies in courts' ability to disregard allegations in a complaint on the grounds that they state only "legal conclusions."[143] Because *Iqbal* itself recognizes that nonconclusory allegations must be accepted as true, a court may second-guess a complaint's allegation only if it finds that the allegation is conclusory. I argue here that as long as the complaint's allegations identify the basic events that establish the plaintiff's entitlement to relief, those allegations are nonconclusory—the plaintiff should not be required to include allegations indicating how it will prove those allegations.

Admittedly, the *Twombly* and *Iqbal* decisions themselves fail to provide concrete guidance on what makes an allegation impermissibly "conclusory." One reason for this difficulty is that the Court does not reconcile its refusal to accept some allegations in those cases with its willingness to accept others.[144] In *Iqbal*, for example, the Court deemed it sufficiently nonconclusory to allege that "[i]n the months after September 11, 2001, the Federal Bureau of Investigation ('FBI'), under

the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,"[145] and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001."[146] If there is a principle that explains why these allegations must be accepted as true but the allegation in paragraph 96 does not, the Court does not explain what it is.[147]

In deciding how best to navigate this terrain, it is significant that neither *Twombly* nor *Iqbal* overrule *Swierkiewicz* or any other aspect of pre-*Twombly* pleading except for *Conley*'s "beyond doubt . . . no set of facts" language.[148] As discussed above, *Twombly* took issue only with an extremely literal reading of that phrase.[149] The pre-*Twombly* notice-pleading framework did not depend on the contorted reading of *Conley* that *Twombly* correctly retired.[150] That *Twombly* took pains to challenge that one particular reading of one particular phrase in *Conley* buttresses the view that other tenets of the long-standing notice-pleading framework should remain intact. Again, *Twombly* embraced *Conley*'s "fair notice" standard.[151] It would be perverse to read *Iqbal* as implicitly rejecting that standard when its analysis was based on the *Twombly* decision that had explicitly reaffirmed "fair notice."[152]

Moreover, the Supreme Court has repeatedly instructed that its decisions should not be read to overrule earlier decisions implicitly. Only the Supreme Court has the "prerogative of overruling its own decisions."[153] Until the Court itself has done so, lower courts continue to be bound by those prior decisions.[154] Caution seems especially

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145. *Iqbal* Complaint, *supra* note 83, at ¶ 47; *see also Iqbal*, 556 U.S. at 681 (quoting the complaint).

146. *See Iqbal* Complaint, *supra* note 83, at ¶ 69; *see also Iqbal*, 556 U.S. at 681 (quoting the complaint).

147. *See* Steinman, *supra* note 8, at 1329 (comparing the allegations that the Court disregarded in *Iqbal* with the ones that the Court accepted as true).

148. *See supra* notes 60–135 and accompanying text.

149. *Supra* notes 126–133 and accompanying text; *see also* Steinman, *supra* note 6, at 1757 ("*Twombly* jettisoned only a very problematic, borderline-nonsensical understanding of this phrase . . . .").

150. *See* Steinman, *supra* note 6, at 1757 ("No serious jurist had ever read *Conley* as imposing such a meaningless standard . . . .").

151. *See supra* note 60 and accompanying text.

152. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

153. Agostini v. Felton, 521 U.S. 203, 237 (1997) (internal quotation marks omitted).

154. *See id.* at 238 (emphasizing that lower courts are bound to follow Supreme Court holdings "unless and until [the Supreme] Court reinterpreted the binding precedent"); *see also* Scheiber v.

warranted where, as here, the later decisions cite and reaffirm the earlier decisions that they have supposedly overruled.[155]

The approach proposed earlier—which would conceptualize what counts as "conclusory" in *transactional* terms[156]—is able to reconcile the Court's conclusions in *Twombly* and *Iqbal* with pre-*Twombly* notice-pleading precedents.[157] First, consider paragraph 51 of the *Twombly* complaint:

> In the absence of any meaningful competition between the [defendants] in one another's markets, and *in light of the parallel course of conduct* that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.[158]

As a logical matter, an agreement to engage in parallel conduct must come before the parallel conduct itself. Yet paragraph 51 suggests that the conspiracy derives from the parallel conduct, rather than the other way around. The *Twombly* majority emphasized precisely this fact in finding that while "a few stray statements [in the complaint] speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations."[159] Accordingly, Justice

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Dolby Labs., Inc., 293 F.3d 1014, 1018 (7th Cir. 2002) (Posner, J.) ("[W]e have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court's current thinking the decision seems.").

155. *See supra* notes 60–62 and accompanying text.

156. *See supra* notes 113–117 and accompanying text.

157. It may be worth interrogating the presumption that the Supreme Court's ultimate conclusion on a particular issue—such as whether paragraph 51 of the *Twombly* complaint or paragraph 96 of the *Iqbal* complaint should be accepted as true at the pleading phase—generates obligations on future courts as a matter of stare decisis. *See* Steinman, *supra* note 6, at 1742 (examining whether stare decisis should "requir[e] future courts to infer obligations from the mere results of cases"). As explained above, neither *Twombly* nor *Iqbal* provided any clarifying principle that would require courts to disregard allegations that would have passed muster for purposes of notice pleading. If stare decisis requires courts to read *Twombly* and *Iqbal* as creating broader authority to disregard allegations at the pleading phase, then courts are—by necessity—being forced to infer from those bare results new principles that the precedent-setting decisions never themselves articulated. *See id.* at 1783–90. Although result-based stare decisis may foster consistency in a very loose sense, it carries with it the risk that courts will be required to read decisions far more sweepingly than is justified. *See id.* at 1742. For these reasons, I have argued elsewhere that—as a matter of institutional design—a better approach to stare decisis would not require courts to justify, reconcile, or explain the bare results reached by superior courts. *Id.* at 1783–86.

158. *Twombly* Complaint, *supra* note 51, at ¶ 51.

159. *Twombly*, 550 U.S. at 564–66 (explaining that "the complaint *first* takes account of the alleged absence of any meaningful competition between the ILECs in one another's markets, the parallel course of conduct that each ILEC engaged in to prevent competition from CLECs, and the other facts and market circumstances alleged earlier" and that " '*in light of' these*, the complaint

Souter concluded that the *Twombly* plaintiffs had merely "rest[ed] their § 1 claim on descriptions of parallel conduct and not on any *independent* allegation of *actual* agreement among the ILECs."[160]

Now consider the key paragraph of the *Iqbal* complaint. Paragraph 96 alleged that Ashcroft, Muller, and nine other defendants "each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin."[161] The problem with this paragraph is not necessarily the allegation that Ashcroft and Mueller acted "solely on account of [Iqbal's] religion, race, and or national origin." If it were, *Iqbal* would indeed be hard to square with *Swierkiewicz* (where the complaint contained a similarly cursory allegation regarding the defendant's intent),[162] as well as former Form 11 (which states without elaboration that the defendant was driving "negligently").[163]

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concludes that the ILECs have entered into a contract, combination or conspiracy to prevent competitive entry into their markets and have agreed not to compete with one another." (emphasis added)) (quoting *Twombly* Complaint, *supra* note 51, at ¶ 51) (other quotation marks and alterations omitted)).

160. *Id.* at 564 (emphasis added). One can certainly take issue with the Court's reading of paragraph 51. The placement and phrasing of that paragraph could have been an attempt to indicate, consistent with Rule 11, "that the conspiracy allegation was one that did not *currently* have evidentiary support but 'will *likely* have evidentiary support after a reasonable opportunity for further investigation or discovery.' " Steinman, *supra* note 8, at 1338–39 (quoting FED. R. CIV. P. 11(b)(3)). For the *Twombly* plaintiffs, it is unfortunate that the Court failed to consider this possibility. But the fact remains that the *Twombly* majority's concern with paragraph 51 was that it did not constitute an "*independent* allegation of *actual* agreement" but rather a mere "legal conclusion[ ] *resting* on the prior allegations." *Twombly*, 550 U.S. at 564 (emphasis added). Had the complaint provided such an "independent allegation of actual agreement," it would have—in the language of *Iqbal*—qualified as a nonconclusory allegation that must be accepted as true.

161. *Iqbal* Complaint, *supra* note 83, at ¶ 96.

162. *See supra* notes 34–40 and accompanying text (describing *Swierkiewicz*).

163. *See supra* note 22 and accompanying text (describing Form 11). The 2015 amendments to the Federal Rules of Civil Procedure eliminated nearly all of the Forms that had appeared in the Federal Rules' Appendix, including all of the sample complaints. *See supra* notes 22–27 and accompanying text (describing the sample complaint for negligence and the sample complaint for patent infringement). The Advisory Committee Note makes clear, however, that the elimination of the forms "does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8." FED. R. CIV. P. 84, advisory committee note. Indeed, the impetus for eliminating the forms confirms that no substantive change to the Federal Rules is intended; rather, the committee note explains that the Forms "are no longer necessary" because "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled." *Id.* As an interpretive matter, it would be nonsensical to use the fact that the Forms' "purpose" has been "fulfilled" as justification for an approach to pleading (or any other topic governed by the Federal Rules) that flies in the face of those same Forms. Given the explicit instruction in the proposed committee note, and the fact that no amendments were made to the rules that govern pleading and pleading motions (such as Rule 8 and Rule 12), pleading forms that have occupied the Federal Rules for its first eight decades remain the best indicator of the pleading framework contemplated by the drafters, and they should continue to be followed unless and until the Court commands a

But there is another way to understand what made paragraph 96 conclusory. It failed to state what Ashcroft and Mueller actually did *vis-à-vis* Iqbal. Given the Court's understanding of what was required for *Bivens* liability—that "each Government-official defendant, through the official's own individual actions, has violated the Constitution"[164]—Ashcroft's and Mueller's individual conduct was crucial as a matter of substantive law. Yet up until this key allegation in the *Iqbal* complaint, Ashcroft's and Mueller's role in Iqbal's confinement seemed to be solely their approval of the hold-until-cleared policy. This policy was never alleged to have been adopted for invidious reasons—a point that Justice Kennedy made explicitly in his opinion.[165] Insofar as paragraph 96 did not allege that discriminatory animus drove Ashcroft and Mueller to take any particular, concrete, real-world action, one might legitimately conclude that—at least as to Ashcroft and Mueller—the allegation in paragraph 96 is "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[166]

A proper application of *Iqbal* could yield a different outcome, therefore, if a hypothetical complaint alleged:

> Ashcroft and Mueller ordered that all post-September-11th detainees who are Arab or Pakistani Muslim men be subjected to harsh conditions of confinement, and they issued this order because of its adverse effect on this particular group. Iqbal was subjected to harsh conditions of confinement pursuant to this policy.

Or perhaps:

> Ashcroft and Mueller knew Iqbal personally and they ordered that he be subjected to harsh conditions of confinement because he was a Pakistani Muslim man.

In both instances, the allegation of the defendants' state of mind is no less cursory than in *Iqbal* itself.[167] But these hypothetical allegations state more than mere legal conclusions because they describe—admittedly in "short and plain" fashion[168]—what actions Ashcroft and

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different approach. Several of the forms relevant to pleading standards are reproduced in Appendix B of this Article.

164. Ashcroft v. Iqbal, 556 U.S 662, 676 (2009).

165. *Id.* at 683.

166. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

167. *See* Steinman, *supra* note 8, at 1341 (arguing that under a proper understanding of *Iqbal*, "an allegation may contain some language that, in isolation, might be characterized as conclusory without the allegation being deemed 'conclusory' for purposes of *Iqbal* step one").

168. FED. R. CIV. P. 8(a)(2) (requiring "a *short and plain* statement of the claim showing that the pleader is entitled to relief" (emphasis added)).

Mueller took.[169] Therefore, they should be accepted as true without any assessment of their "plausibility."[170]

This approach also makes sense of *Swierkiewicz* and the sample negligence complaint (former Form 11)[171] that occupied the Rules' Appendix for nearly eight decades. Although *Swierkiewicz*—like *Iqbal*—involved a defendant's discriminatory intent, the *Swierkiewicz* complaint provided a straightforward transactional narrative: the plaintiff was employed by the defendant, and the plaintiff was fired because of his age (fifty-three) and national origin (Hungarian). Former Form 11 also concretely identified the liability-generating conduct and event: the defendant negligently driving his car against the plaintiff.[172] This is more than the sort of "unadorned, the-defendant-unlawfully-harmed-me accusation" that *Iqbal* declared should be disregarded as a mere legal conclusion, even though it does not elaborate on precisely how the defendant was negligent.[173]

III. The Supreme Court's Post-*Iqbal* Pleading Decisions

For the reasons described in Part II, the best reading of *Twombly* and *Iqbal* does not impose on the federal judiciary a new plausibility-pleading regime. The framework developed in *Twombly* and *Iqbal* does not, in fact, make an assessment of the complaint's "plausibility" the crucial inquiry in deciding whether it survives a motion to dismiss. Nor do *Twombly* and *Iqbal* compel a more restrictive pleading standard than the notice-pleading framework that existed in pre-*Twombly* years. We now have the benefit of additional input from the Supreme Court, which has addressed federal pleading standards on numerous occasions during the last five years. This Part will describe the six most significant post-*Iqbal* Supreme Court decisions that address pleading standards.

D. Fifth Third Bancorp v. Dudenhoeffer

In June 2014, the Court decided *Fifth Third Bancorp v. Dudenhoeffer*.[223] The case focused primarily on the substantive law governing ERISA duty-of-prudence claims. The unanimous opinion by Justice Breyer began by rejecting the defendant's argument that certain kinds of ERISA fiduciaries (those of an employee stock

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217. *Id.* at 2070.

218. *Id.* (emphasis added).

219. *Id.* at 2069; *see also supra* text accompanying note 215.

220. *Wood*, 134 S. Ct. at 2068–69.

221. *See supra* notes 45–46 and accompanying text; *see also* Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 901 (7th Cir. 2004) (noting that a plaintiff "pleads itself out of court" when its complaint "admits all the ingredients of an impenetrable defense").

222. *Wood*, 134 S. Ct. at 2070.

223. 134 S. Ct. 2459 (2014).

ownership plan, or ESOP) should enjoy a "presumption of prudence."[224] In remanding the case, however, Justice Breyer stated that a motion to dismiss a duty-of-prudence claim "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently."[225] Discussing some of the relevant considerations, the Court clarified several aspects of the substantive law governing ERISA duty-of-prudence claims depending on whether the alleged lack of prudence was based on publicly available information known to the fiduciary or inside information known to the fiduciary.

With respect to the first category, the Court explained that "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances."[226] But the Court refused to rule out the possibility that "a plaintiff could nonetheless plausibly allege imprudence on the basis of publicly available information by pointing to a special circumstance affecting the reliability of the market price as an unbiased assessment of the security's value in light of all public information that would make reliance on the market's valuation imprudent."[227]

With respect to the second category (where the use of inside information might run afoul of securities laws), the Court wrote that "to state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[228]

> [L]ower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.[229]

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224. *Id.* at 2463; *see also id.* at 2470 ("The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats.").

225. *Id.* at 2471.

226. *Id.*

227. *Id.* at 2472.

228. *Id.*

229. *Id.* at 2473.

The Court's discussion of the potential role pleading motions might play in the context of ESOP duty-of-prudence claims does not suggest a fundamentally more restrictive approach to pleading. While the Court indicates that certain things must be "plausibly alleged," the only concrete "implausibility" examples the Court provides are theories that fail as a matter of law. As a matter of law, holding stock is not imprudent if selling that stock based on inside information would violate securities laws. As a matter of law, holding or buying a particular stock is not imprudent simply because the price of that stock was dropping, because, absent special circumstances, fiduciaries may prudently rely on the premise that the market price accurately reflects publicly available information. As a matter of law, failing to stop new purchases is not imprudent if doing so would have done more harm than good, such as by signaling to the market that the stock is a bad investment and leading to a drop in the stock price that would hurt existing holdings. Where a complaint does allege a legally sufficient theory, however, nothing in *Fifth Third* suggests that a court may second-guess the underlying allegations based on a perceived lack of plausibility.[230]

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230. As this Article was in its final editing stages, the Supreme Court issued a per curiam decision in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016), a case that had previously been remanded to the Ninth Circuit for further consideration in light of *Fifth Third*. *See* Amgen Inc. v. Harris, 134 S. Ct. 2870 (2014). Prior to *Fifth Third*, the Ninth Circuit had found that the *Amgen* complaint had adequately stated an ESOP duty-of-prudence claim based on the defendants' "continuing to provide Amgen common stock as an investment alternative when they knew or should have known that the stock was being sold at an artificially inflated price." *See* Harris v. Amgen, Inc., 770 F.3d 865 (9th Cir. 2014). After *Fifth Third*, on remand from the Supreme Court, the Ninth Circuit "reiterated its conclusion that the complaint states such a claim." *Amgen*, 136 S. Ct. at 758; *see also Harris v. Amgen, Inc.*, 788 F.3d 916, 919 (2014) ("The opinion filed on October 30, 2014, and published at 770 F.3d 865, is hereby amended and replaced by the amended opinion filed concurrently with this order."); *id.* at 929 ("On reconsideration in light of *Fifth Third*, we again reverse the district court's dismissal."). The Supreme Court then found that the Ninth Circuit's post-*Fifth Third* ruling had "failed to properly evaluate the complaint" because it "failed to assess whether the complaint in its current form has plausibly alleged that a prudent fiduciary in the same position could not have concluded that the alternative action would do more harm than good." 136 S. Ct. at 759 (internal quotation marks omitted). The Supreme Court then stated, without elaboration: "Having examined the complaint, the Court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence." *Id.* It did, however, "leave[] to the District Court in the first instance whether the stockholders may amend it in order to adequately plead a claim for breach of the duty of prudence guided by the standards provided in *Fifth Third*." *Id.*

As with the *Fifth Third* decision itself, the Court did not specify in *Amgen* what would be required to adequately allege that a particular alternative action would not have "done more harm than good." Although the Court found the *Amgen* complaint to be insufficient, that complaint did not contain any allegations regarding whether removing Amgen common stock from the list of investment alternatives would have led to adverse consequences that might outweigh the benefits to the plan participants. *See* Amended Complaint at ¶¶ 288–292, Harris v. Amgen, No. No. 2:07-cv-05442-PSG-PLA (C.D. Cal. Mar. 23, 2010), *available at* 2010 WL 11401029. As described above,

F. Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund

Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund[240] involved a false registration claim under § 11 of the 1933 Securities Act. As in *Fifth Third*, the Court in *Omnicare* focused primarily on the governing substantive law, but it then indicated the role that pleading standards might play on remand. The plaintiffs in *Omnicare* asserted that the issuer's statement of an opinion in a registration statement was actionable because the issuer had "omitted to state facts necessary to make its opinion . . . not misleading."[241] Specifically, the *Omnicare* plaintiffs challenged the issuer's belief that its arrangements with pharmaceutical manufacturers complied with federal and state law.[242]

Writing for the majority, Justice Kagan rejected the defendant's argument that an issuer's statement of opinion can never be grounds for a § 11 "omission" claim.[243] Instead, she recognized: "[A] reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about . . . the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience."[244] Put another way: "if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability."[245]

Because a viable cause of action in this context exists "only when an issuer's failure to include a material fact has rendered a published statement misleading,"[246] Justice Kagan emphasized (citing *Iqbal*) that

240. 135 S. Ct. 1318 (2015).

241. *Id.* at 1327; *see also* 15 U.S.C. § 77k(a) (2012) (creating a cause of action if a registration statement "omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading"). *Omnicare* also recognized that an opinion would violate § 11's prohibition on making an "untrue statement of a material fact," 15 U.S.C. § 77k(a), if the speaker did not hold the belief she professed, or if a supporting fact the speaker used to support her belief was false. 135 S. Ct. at 1327 ("[L]iability under § 11's false-statement provision would follow . . . not only if the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue."). The allegations in *Omnicare* did not support that theory. *Id.* (noting that the plaintiffs "cannot avail themselves of either of those ways of demonstrating liability" because the allegedly false sentences were "pure statements of opinion" and the plaintiffs "do not contest that Omnicare's opinion was honestly held").

242. *Omnicare*, 135 S. Ct. at 1323.

243. *Id.* at 1328–29.

244. *Id.* at 1328.

245. *Id.* at 1329.

246. *Id.* at 1332.

"an investor must allege that kind of omission—and not merely by means of conclusory assertions."[247] That is, the complaint must "identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."[248] Justice Kagan did not, however, indicate that a court may refuse to accept the truth of such an allegation at the pleading phase—the plaintiff's obligation is merely to "identify" the omitted facts that form the basis for a claim that the issuer's statement was misleading.[249] If the court is able to determine as a matter of law that the omitted fact does *not* "show that Omnicare lacked the basis for making those statements that a reasonable investor would expect,"[250] that is no different than the usual inquiry into legal sufficiency that was traditionally proper fodder for motions to dismiss.

In remanding the case, Justice Kagan recognized that the complaint in *Omnicare* had alleged "that an attorney had warned Omnicare that a particular contract 'carried a heightened risk' of legal exposure under anti-kickback laws."[251] However, she observed that "[i]nsofar as the omitted fact at issue is the attorney's warning, that inquiry entails consideration of such matters as the attorney's status and expertise and other legal information available to Omnicare at the time."[252] Whether Omnicare's opinion was misleading may also depend on "whatever facts Omnicare did provide about legal compliance, as well as any other hedges, disclaimers, or qualifications it included in its registration statement."[253]

These considerations are consistent with examining the legal sufficiency of a § 11 false registration claim at the pleading phase. Depending on the allegations, a court might properly conclude as a matter of law that the opinion was not misleading in light of *other* information contained in the registration statement—not just "hedges, disclaimers, or qualifications" but also, as in *Omnicare*, information in

247. *Id.* Accordingly, Justice Kagan explained: "The Funds' recitation of the statutory language—that Omnicare 'omitted to state facts necessary to make the statements made not misleading'—is not sufficient; neither is the Funds' conclusory allegation that Omnicare lacked 'reasonable grounds for the belief it stated respecting legal compliance." *Id.* at 1333.

248. *Id.* at 1332.

249. *Id.*; *see also id.* at 1333 ("[The plaintiff] cannot proceed without identifying one or more facts left out of Omnicare's registration statement.").

250. *Id.* at 1333.

251. *Id.*

252. *Id.*

253. *Id.*

the registration statement that there *was* a risk of legal exposure.[254] In listing these considerations, Justice Kagan did not indicate that courts should be undertaking a more rigorous inquiry than is ordinarily proper to determine whether a claim fails as a matter of law. Indeed, the Supreme Court has indicated that issues relating to such securities law claims often present mixed questions of law and fact that are properly left to the ultimate fact-finder.[255]

IV. BEYOND PLAUSIBILITY PLEADING

The preceding Parts of this Article show that (1) *Twombly* and *Iqbal* should not have been read to impose a plausibility-pleading regime that was more restrictive than the long-standing notice-pleading approach; and (2) recent Supreme Court decisions on pleading confirm the view that *Twombly* and *Iqbal* should be applied in a way that preserves notice pleading and pre-*Twombly* Supreme Court case law. Confusion continues in the lower federal courts, however, and it is worth addressing a few points that have arisen as courts have struggled to make sense of *Twombly* and *Iqbal*.

As described in Part II, it is possible to reconcile the idea that courts may disregard so-called "conclusory" allegations with the pre-*Twombly* notice-pleading approach. It is crucial, however, to understand what makes an allegation a mere "legal conclusion" whose truth need not be accepted at the pleading phase. A statement is not conclusory for pleading purposes simply because it contains some language that might be called conclusory in other contexts.[265] The key allegation in former Form 11, for example, must be accepted as true even though one might call it conclusory to allege that the defendant was driving "negligently."[266] The allegation regarding the defendant's discriminatory intent in *Swierkiewicz* must be accepted as true even though one might call it conclusory to allege that Mr. Swierkiewicz's "age and national origin were motivating factors in [the defendant's] decision to terminate his employment."[267] These allegations are not conclusory in the transactional sense—and therefore are sufficient to give defendants fair notice—because they provide a basic identification of the liability-generating events or transactions and the defendant's role in those events or transactions. In addition to making sense of *Twombly* and *Iqbal*,[268] this approach gives effect to Rule 9(b)'s instruction that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[269]

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265. *See supra* notes 161–173 and accompanying text.

266. *See supra* note 22 and accompanying text (describing Form 11). As discussed *supra* note 163, Form 11 remains instructive regarding federal pleading standards even though it and other forms in the Federal Rules' Appendix were eliminated in December 2015. Former Form 11 (and other forms relevant to pleading standards) are reproduced in Appendix B of this Article.

267. *See supra* note 35.

268. *See supra* notes 161–166 and accompanying text.

269. FED. R. CIV. P. 9(b); *see supra* note 169.

Post-*Iqbal* lower court decisions have been inconsistent when handling these sorts of allegations.[270] There have, however, been some encouraging examples of a more sensible approach—even before the Supreme Court's more recent pleading decisions described in Part III. In *Swanson v. Citibank, N.A.*,[271] for example, the U.S. Court of Appeals for the Seventh Circuit found that a complaint for discrimination under the Fair Housing Act was sufficient because it "identifie[d] the type of discrimination that [the plaintiff] thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint."[272] Under the approach proposed in this Article, that is the correct way to understand federal pleading standards after *Twombly* and *Iqbal*, and it is consistent with both pre-*Twombly* and post-*Iqbal* Supreme Court case law.

Another important question going forward is how much detail a complaint must provide in describing the relevant events or transactions in order to avoid being labeled conclusory. Notice pleading may not be dead, but even Charles Clark—the chief drafter of the original Federal Rules—recognized that some "content" must be given to the word "notice."[273] As Clark also recognized, notice "cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance."[274] This spirit should continue to inform federal pleading standards. An allegation should not be treated as conclusory—or as failing to provide fair notice—simply because it does not provide "exact dates, times, locations, or which particular employees or officers of an institutional or corporate party were involved."[275] As long as the complaint provides a "short and plain"[276] identification of what is alleged to have happened, there is no need for courts to insist at the pleading phase on detail for detail's sake.

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270. *See* Alex Reinert, *Pleading As Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 12–13 & nn.83–86 (citing cases).

271. 614 F.3d 400, 405 (7th Cir. 2010).

272. *Id.* at 404; *see also* Samovsky v. Nordstrom, Inc., 619 Fed. Appx. 547, 548 (Mem) (7th Cir. Oct. 28, 2015) (reversing Rule 12(b)(6) dismissal of an employment discrimination claim as "premature" because " 'I was turned down for a job because of my race' is all a complaint has to say").

273. *See supra* note 31 (citing Clark, *supra* note 20, at 460).

274. Clark, *supra* note 20, at 460.

275. Steinman, *supra* note 8, at 1343.

276. FED. R. CIV. P. 8(a)(2).

Twombly and *Iqbal*, in fact, both recognize that Rule 8 does not require "detailed factual allegations."[277]

On this issue as well, courts since *Iqbal* have adopted conflicting stances. One example has arisen in the context of Fair Labor Standards Act (FLSA) claims for failure to pay overtime wages. In *Landers v. Quality Communications, Inc.*,[278] the U.S. Court of Appeals for the Ninth Circuit recently found that it was insufficient for an FLSA complaint to allege that the plaintiff had worked more than forty hours per week but had not received overtime pay for those hours; rather, it was necessary to identify the particular weeks overtime hours were not paid.[279] Other courts, however, have held that such detail is not required.[280]

In determining what constitutes a "conclusory" allegation that can be disregarded at the pleading phase, there is an unavoidable level-of-generality problem. Why, for example, is it sufficient for a plaintiff to allege that the defendant in former Form 11 "negligently drove" rather than to require the plaintiff to allege the particular aspect of the defendant's driving that constituted negligence? On the other hand, if the pleading standard tolerates "negligently drove," must it also tolerate "tortiously drove," or "drove in a manner that makes the defendant liable to the plaintiff?" These are difficult questions that may elude perfectly coherent answers. It should be recognized, however, that notice pleading was not immune from these level-of-generality problems; again, some content must be given to the word "notice."[281]

One possible guidepost for resolving these issues may be the substantive contours of the plaintiff's claim. To say that the defendant drove "tortiously" may be impermissibly conclusory because the substantive law itself delineates between different kinds of tortious behavior. An intentional tort and a negligence tort are distinct legal claims. They are subject to distinct legal standards that, at trial, would

277. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require 'detailed factual allegations' . . . ." (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007))); *Twombly*, 550 U.S. at 555 ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . .").

278. 771 F.3d 638 (9th Cir. 2014).

279. *Id.* at 644–46.

280. *See, e.g.*, Pope v. Walgreen Co., No. 3:14–CV–439, 2015 WL 471006, at *5 (W.D. Tenn. Feb. 4, 2015) ("To require the present plaintiffs to each specify in their complaint a particular week in which they worked more than 40 hours without overtime pay would, again, be rigidly harsh and inconsistent with *Iqbal* and *Twombly*.")

281. *See supra* note 31 (citing Clark, *supra* note 20, at 460).

invite distinct instructions to the jury.[282] On this view, an adverb like "tortiously" is problematic because it glosses over these distinctions with a catch-all legal conclusion. Such an approach would not be insurmountable for plaintiffs, however. Even if the more general adverb "tortiously" is too conclusory to be accepted as true in and of itself, a plaintiff could still pursue relief under both a negligence theory and an intentional tort theory. The Federal Rules unequivocally authorize plaintiffs to plead claims in the alternative—even claims that are inconsistent with one another.[283]

Recognizing the substantive contours of particular claims can also explain what might seem to be a tension between former Form 11 and the Court's post-*Iqbal* decisions in *Fifth Third* and *Omnicare*. If it is sufficient to allege that the defendant "negligently" drove, how can *Fifth Third* suggest that it is insufficient to allege simply that an ESOP fiduciary "imprudently" bought or failed to sell company stock? And how can *Omnicare* suggest that it is insufficient to allege simply that *Omnicare* "lacked 'reasonable grounds'" for its belief?

One answer is that the *Fifth Third* and *Omnicare* decisions clarify the substantive law in ways that establish new substantive requirements for pursuing the claims at issue in those cases. After *Fifth Third*, there is no longer a generic ERISA "imprudence" claim against an ESOP fiduciary with respect to their decision to buy or hold their own company's stock. Such claims depend on what information would have alerted the fiduciary that its behavior was imprudent. If it was public information, then the claim is legally insufficient unless—at the very least—special circumstances reveal that the market price was failing to account for that information.[284] If it was private information, then the claim is legally insufficient unless taking the purportedly prudent course of action would be consistent with securities laws against insider trading and would not have harmed the fund in other ways.[285] As in the car-accident example above,[286] a plaintiff might pursue multiple theories—either together or in the alternative. But a

282. *See, e.g.*, N.Y. PATTERN JURY INSTR.—CIVIL 2:10–2.12 (various instructions relating to negligence); N.Y. PATTERN JURY INSTR.—CIVIL 3:1–3.3 (various instructions relating to intentional torts).

283. *See* FED. R. CIV. P. 8(d)(2) ("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."); FED. R. CIV. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency.").

284. *See supra* notes 226–227 and accompanying text.

285. *See supra* notes 228–229 and accompanying text; *see also supra* note 230 (describing the Court's per curiam decision in *Amgen*, a follow-up to *Fifth Third*).

286. *See supra* note 283 and accompanying text.

blanket allegation that the defendant acted "imprudently" need not be accepted as true.

Similarly, *Omnicare* means that there is no longer a generic claim that the expression of an opinion in a registration statement was a "false statement." Rather, there are distinct claims that (1) the speaker did not actually hold the opinion stated in the registration statement; (2) the speaker supported its opinion with a fact that was false; or (3) a reasonable investor would understand the opinion to convey facts about the speaker's basis for that opinion, but the real facts are otherwise and are not provided in the statement.[287] Where—as in *Omnicare*—a plaintiff pursues the third theory, it must at least identify the facts whose omission make the statement of the opinion without those facts misleading.[288] And again, the plaintiff is free to pursue multiple theories of liability as alternative claims.[289]

To survive the sort of legal-sufficiency inquiry that has always been proper at the pleading phase, a complaint's "statement of the claim" must have allegations that—accepted as true—cover each of the substantive requirements articulated in *Fifth Third* and *Omnicare*. Courts should be sensitive to how much detail is required when describing the events underlying the plaintiff's claim,[290] but it is not inconsistent with notice pleading to require allegations that, assuming they are proven true, would make out a viable claim for relief. When the Court states that such allegations must "plausibly" satisfy the substantive requirements of a viable claim, this should be understood to allow screening for *legal* insufficiency, as described above.[291] The plausibility inquiry should not permit a court to insist that the complaint itemize subsidiary facts or evidence that the plaintiff plans to use to support those allegations.

Finally, it is important to address the relationship between pleading standards and discovery. There is, of course, an important

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287. *See supra* note 241 and accompanying text.

288. *See supra* notes 246–247 and accompanying text.

289. *See supra* note 283 and accompanying text.

290. *See supra* notes 273–280 and accompanying text.

291. *See supra* notes 121–124 and accompanying text. This approach makes sense of the Court's post-*Iqbal* statements that certain matters must be "plausibly" alleged. *See, e.g.*, *supra* notes 201–208, 214–222, 226–230 & 259–263 and accompanying text (discussing *Matrixx*, *Wood*, *Fifth Third*, and *Dart Cherokee*). As the Court explained in *Johnson*, this inquiry focuses on a claim's "substantive plausibility." *Johnson*, 135 S. Ct. at 347. It is only if a complaint lacks a substantively necessary requirement of a meritorious claim (or addresses it merely with a "conclusory," "unadorned, the-defendant-unlawfully-harmed-me accusation," *Iqbal*, 556 U.S. at 678) that a court should inquire whether the remaining allegations in a complaint "plausibly suggest" its truth. *See supra* notes 118–120 and accompanying text; *see also supra* notes 83–87 and accompanying text (discussing Justice Kennedy's reasoning in *Iqbal*).

practical relationship between the two. Because the pleading standard determines whether the case will proceed to the discovery phase, finding the proper balance between the costs and benefits of court-supervised discovery has been a central feature of the pleading debate.[292] Too lenient a pleading standard might impose unwarranted discovery costs on innocent defendants,[293] yet too strict a pleading standard could thwart meritorious claims by plaintiffs who cannot satisfy the pleading standard without obtaining the information needed to do so through the discovery process.[294]

The *Twombly* and *Iqbal* opinions do contain a number of comments regarding potential discovery burdens, although most are simplistic and empirically unsupported.[295] *Twombly* and *Iqbal* do not, however, employ a pleading standard that depends on a case-specific assessment of the likely burdens or benefits of discovery. The *Twombly* and *Iqbal* framework insists that nonconclusory allegations be accepted as true,[296] regardless of whether it appears likely that supporting evidence will be found during discovery: again, "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.' "[297]

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292. *See* Steinman, *supra* note 8, at 1311 ("At the core of this consequentialist debate over pleading standards is a struggle to balance the costs and benefits of pre-trial discovery.").

293. *See id.* ("If pleading standards are too lenient, plaintiffs without meritorious claims could force innocent defendants to endure the costs of discovery and, perhaps, extract a nuisance settlement from a defendant who would rather pay the plaintiff to make the case go away.").

294. *See id.* at 1311–12. This, of course, is the "Catch-22" described *supra* notes 94–95 and accompanying text.

295. *See* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (describing the need to avoid "disruptive discovery" that "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources"); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) ("Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citations omitted)); *id.* at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle."). In fact, empirical studies confirm that disproportionately burdensome discovery is the rare exception in federal court. *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 773 (2010).

296. *See supra* Part II.

297. *Twombly*, 550 U.S. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). This notion is not undermined by *Twombly*'s comment that the plausibility inquiry "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* As discussed *supra* notes 157–160 and accompanying text, *Twombly* undertook the plausibility inquiry only because the complaint had failed to make an "*independent* allegation of *actual* agreement." *Id.* at 564 (emphasis added). Had the complaint provided such an "independent allegation of actual agreement," it would have qualified as a nonconclusory allegation that must be accepted as true. *See id.* That would have rendered the plausibility inquiry—and any need for additional "fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement"—unnecessary. *Id.* at 556. This is confirmed not only by the logic of the *Twombly* opinion itself, but also by *Twombly*'s reliance on Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S.

Even on *Twombly* and *Iqbal*'s own terms, the pleading standard is not an invitation for courts to make off-the-cuff assessments about discovery burdens based solely on the allegations in the complaint. Discovery expense is a valid concern, but it is one that is already accounted for in the discovery rules themselves. The Federal Rules explicitly state that discovery will not be permitted unless it is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[298] Procedurally, parties can request ex ante limits on the kind, quantity, and sequence of discovery, and they can also make a-la-carte objections to particular discovery requests at the time those requests are made.[299] The structure of the discovery rules ensures that parties are never forced to comply with an unduly burdensome discovery request without an opportunity for the court to consider whether the request is proper.

Indeed, there are functional reasons to insist that this inquiry occur as part of the discovery process rather than in the context of a Rule 12(b)(6) motion. A Rule 12(b)(6) motion allows a defendant to obtain dismissal of the complaint without even having to deny the truth of the plaintiff's allegations.[300] A Rule 12(b)(6) motion merely targets

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336 (2005), for the proposition that a complaint should not survive the pleading phase if there is no "reasonably founded hope that the [discovery] process will reveal relevant evidence." *Id.* at 559–60 (quoting *Dura*, 544 U.S. at 347). For *Dura*, there *would* have been such "reasonably founded hope" as long as the complaint had provided "some indication of the loss and the causal connection that *the plaintiff has in mind*." *Dura*, 544 U.S. at 347 (emphasis added). All *Dura* required, then, was a mere articulation of events connecting the defendant's conduct to the loss suffered by the plaintiff—not some affirmative indication that supporting evidence would, in fact, be found. *See* Steinman, *supra* note 8, at 1334–35 (describing *Dura* as consistent with a transactional approach to pleading).

298. *See* FED. R. CIV. P. 26(b)(1). Prior to the 2015 amendments to Rule 26, proportionality considerations were addressed in Rule 26(b)(2)(C)(iii). The 2015 amendments "rearranged" the previously codified proportionality considerations "slightly" and added an explicit reference to "the parties' relative access to relevant information." FED. R. CIV. P. 26 advisory committee's note to 2015 amendment ("The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.").

299. *See* FED. R. CIV. P. 16(c)(2)(F) (authorizing the court to "take appropriate action on . . . controlling and scheduling discovery"); FED. R. CIV. P. 26(b)(2) (authorizing the court to order limitations on discovery); FED. R. CIV. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order."); FED. R. CIV. P. 37 (describing the process for resolving discovery disputes).

300. *See* FED. R. CIV. P. 12(a)–(b) (authorizing the defense of "failure to state a claim" to be asserted "by motion" prior to having to serve an answer); *see also Twombly*, 550 U.S. at 572 (Stevens, J., dissenting) (noting that the *Twombly* complaint was dismissed "without so much as requiring [the defendants] to file an answer denying that they entered into any agreement").

whether the complaint adequately *states* a claim. Therefore, the defendant can file such a motion free from Rule 8's obligation to "admit or deny the allegations asserted against it by an opposing party,"[301] as well as Rule 11's obligation that a defendant may deny such allegations only when an "inquiry reasonable under the circumstances" reveals that "denials of factual contentions are warranted on the evidence" (or at least "are reasonably based on belief or lack of information").[302] What difference does this make? If information surfaces that confirms the plaintiff's allegations *after* a Rule 12(b)(6) dismissal, it is unlikely that there will be any potential recourse against the defendant. But if the defendant improperly denies an allegation in its answer or improperly withholds relevant information during the discovery process, and this ultimately leads to a judgment against the plaintiff (either at summary judgment or at trial), Rule 60(b) can be used to reopen the case.[303]

Even if a court is concerned about discovery burdens, it is hard to see why at least some basic discovery is not warranted in all cases where the complaint provides a simple transactional narrative that, if accepted as true, would establish a legally viable claim. Narrowly tailored discovery—some number of relevant interrogatories, requests for identifiable, relevant documents, and depositions of key witnesses—would admittedly impose some litigation costs on the defendant. But so does litigation over pleading sufficiency at the Rule 12(b)(6) phase,[304] which can invite amended complaints that are then followed by additional Rule 12(b)(6) motions challenging the sufficiency of those pleadings.[305] Defendants are often happy to incur those costs if the potential result is a pre-answer dismissal of the complaint. For the system as a whole, however, it seems better to have pre-trial activity focus on the discovery of relevant information—and a direct assessment of what type and quantity of discovery is warranted—than on pre-

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301. FED. R. CIV. P. 8(b)(1)(B).

302. FED. R. CIV. P. 11(b)(4).

303. *See* FED. R. CIV. P. 60(b)(3) ("[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."); *see, e.g.*, Summers v. Howard Univ., 374 F.3d 1188, 1193 (D.C. Cir. 2004) ("As several circuits have held, failure to disclose or produce materials requested in discovery can constitute misconduct within the purview of Rule 60(b)(3)." (citations and internal quotation marks omitted)).

304. *See* Steinman, *supra* note 8, at 1355:

> [T]he argument that a stricter pleading standard is needed to control discovery costs overlooks the costs that heightened pleading standards can add to the pleadings phase itself. . . . [A] stricter pleading standard can encourage costly, time-consuming litigation over pleading sufficiency. The perception that *Twombly and Iqbal* raised the bar for federal pleading standards seems to have had precisely this effect.

305. *See, e.g.*, Santiago v. Warminster Twp., 629 F.3d 121, 133–34 (3d Cir. 2010) (considering whether the plaintiff's Third Amended Complaint passes muster under *Twombly* and *Iqbal*).

answer briefs and motions scrutinizing every jot and tittle of the plaintiff's complaint. As Charles Clark observed: "we cannot expect the proof of the case to be made through the pleadings" because "such proof is really not their function."[306]

CONCLUSION

From the original drafters of the Federal Rules of Civil Procedure to the twenty-first century critics of *Twombly* and *Iqbal*, scholars have long recognized the importance of pleading standards to an effective, well-functioning system of civil justice. The initial pleading is the key to the courthouse door. A claim that cannot survive the pleading phase is effectively no claim at all.

This realization drove the federal courts' approach to pleading during the first seven decades of the Federal Rules. Although *Twombly* and *Iqbal* disrupted the traditional framework, they need not be interpreted in a way that imposes a newly restrictive pleading standard. The *Twombly* and *Iqbal* decisions had many flaws, but it was—and still is—possible to read them in a way that would retain the notice-pleading approach set forth in the text of the Federal Rules and confirmed by pre-*Twombly* case law. More recent Supreme Court decisions refute the conventional wisdom that *Twombly* and *Iqbal* installed a plausibility-pleading regime that gives courts greater power to second-guess a plaintiff's allegations at the pre-answer motion-to-dismiss stage. This is a positive development, but it may have little impact unless it receives the same attention that accompanied the *Twombly* and *Iqbal* decisions themselves.

APPENDIX A: MOST FREQUENTLY CITED SUPREME COURT DECISIONS

The following chart lists the one hundred most-frequently cited Supreme Court decisions of all time, in terms of citations by federal courts and tribunals. The citation counts are based on the Shepard's citation service primary database as of September 9, 2015.[307]

306. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

307. Reprinted with the permission of LexisNexis. Sincere thanks to Frear Simons and Praveen Nuthakki for compiling this information.

Rank	Case	Federal Court Citing References
1	Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	195,159
2	Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	183,365
3	Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)	127,521
4	Ashcroft v. Iqbal, 556 U.S. 662 (2009)	104,712
5	Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	94,229
6	Strickland v. Washington, 466 U.S. 668 (1984)	70,312
7	Thomas v. Arn, 474 U.S. 140 (1985)	68,944
8	Conley v. Gibson, 355 U.S. 41 (1957)	60,389
9	Slack v. McDaniel, 529 U.S. 473 (2000)	51,901
10	Haines v. Kerner, 404 U.S. 519 (1972)	51,029
11	McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	44,833
12	Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)	44,577
13	Neitzke v. Williams, 490 U.S. 319 (1989)	42,084
14	Richardson v. Perales, 402 U.S. 389 (1971)	41,975
15	Estelle v. Gamble, 429 U.S. 97 (1976)	41,044
16	Williams v. Taylor, 529 U.S. 362 (2000)	40,156
17	Farmer v. Brennan, 511 U.S. 825 (1994)	37,406
18	Miller-El v. Cockrell, 537 U.S. 322 (2003)	35,293
19	Erickson v. Pardus, 551 U.S. 89 (2007)	28,298
20	Harlow v. Fitzgerald, 457 U.S. 800 (1982)	26,999
21	United States v. Booker, 543 U.S. 220 (2005)	26,818
22	Coleman v. Thompson, 501 U.S. 722 (1991)	25,669
23	Jackson v. Virginia, 443 U.S. 307 (1979)	24,940
24	Anders v. California, 386 U.S. 738 (1967)	24,858
25	Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	24,085
26	Scheuer v. Rhodes, 416 U.S. 232 (1974)	22,728
27	Heck v. Humphrey, 512 U.S. 477 (1994)	22,348
28	Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)	21,394

2014 WL 51290
S.D. Texas,
Houston Division.

Perry COLEMAN, Plaintiff,
v.
JOHN MOORE SERVICES, INC., Defendant.

Jan. 7, 2014.

MEMORANDUM AND OPINION

LEE H. ROSENTHAL, District Judge.

*1 The plaintiff, Perry Coleman, sued his former employer, John Moore Services LP, alleging violations of the Fair Labor Standards Act for failure to pay overtime for hours worked in excess of 40 hours in a workweek. John Moore has moved to dismiss Coleman's amended complaint for failure to state an FLSA violation or FLSA employer status under Federal Rule of Civil Procedure 12(b)(6) and Rule 8(a)'s pleading standards.

Based on the pleadings; the motion, response, and reply; and the applicable law, this court finds that the complaint's allegations are inadequate and grants the motion to dismiss, without prejudice and with leave to amend.

I. The Allegations in the Amended Complaint

Coleman's amended complaint is terse. His FLSA allegations in his amended complaint are as follows:

> 6. The Plaintiff worked for Defendant from on or about January 2008 to on or about May 2012 as an electrician.
>
> 7. During one or more weeks of Plaintiff's employment with Defendant, Plaintiff worked in excess of forty (40) hours (overtime hours).
>
> 8. During one or more weeks of Plaintiff's employment with Defendant wherein Plaintiff worked overtime hours, Defendant failed to pay Plaintiff one and one-half times his regular rate of pay for each overtime hour worked.
>
> 9. The acts described in the preceding paragraph violate the Fair Labor Standards Act, which prohibits the denial of overtime compensation for hours worked in excess of forty (40) per workweek. Defendant willfully violated Plaintiff's rights under the FLSA.

Coleman seeks actual and compensatory damages. He also seeks liquidated damages for a willful FLSA violation.

John Moore moves to dismiss under Rule 12(b)(6) based on recent case law applying *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) to similar bare-bones FLSA allegations. John Moore argues that Coleman's allegations that he worked in excess of 40 hours per week without being paid overtime are insufficient because they "merely parrots" the FLSA's text without supporting the overtime allegations with sufficient facts.

*2 In response, Coleman argues that the case law before and after *Twombly* and *Iqbal* support the sufficiency of his FLSA-violation allegations. He does not address the challenge to the coverage allegations. Coleman argues that the additional details can be obtained through discovery. John Moore replies by pointing out that some of the cases Coleman relies on are from 2009 and the more recent cases denying motions to dismiss had considerably more detailed pleadings than Coleman's complaint.

II. Analysis

On a Rule 12(b)(6) motion, a court must take the facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. The court will not dismiss any claims unless the plaintiff has failed to plead sufficient facts to state a claim to relief that is facially plausible, *Bell Atl. Corp.*, 550 U.S. at 570, that is, one that contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged," *Iqbal,* 556 U.S. at 678. The plaintiff must allege facts showing "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555.

A. The Allegation of an FLSA Violation

The FLSA states that for "employees engaged in interstate commerce ... no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). To show a violation of the FLSA's overtime requirements, a plaintiff must allege (1) that he was employed by the defendant; (2) that his work involved interstate activity; and (3) that he performed work for which he was undercompensated. John Moore argues that Coleman's complaint fails to allege his claims or coverage with sufficient factual specificity. John Moore relies on two recent circuit cases, *DeJesus v. HF Management Services, LLC,* 726 F.3d 85 (2d Cir.2013) and *Pruell v. Caritas Christi,* 678 F.3d 10, 13 (1st Cir.2012).

In *DeJesus,* the Second Circuit agreed with the district court that the plaintiff failed to allege sufficient facts supporting allegations that she worked overtime without proper compensation. DeJesus "alleged only that in "some or all weeks" she worked more than 'forty hours' a week without being paid '1.5' times her rate of compensation." *Dejesus,* 726 F.3d at 89. Those allegations were "no more than [a] rephrasing [of] the FLSA's formulation specifically set forth in section 207(a)(1)." *Id.* Because the "complaint [merely] tracked the statutory language of the FLSA, lifting its numbers and rehashing its formulation, but alleging no particular facts" her complaint was properly dismissed. *Id.* Plaintiff merely "repeated the language of the [FLSA]," without "estimat[ing] her hours in any or all weeks or provid[ing] any other factual context or content," *Id.*

***3** Although plaintiffs are not required to provide an approximation of uncompensated overtime hours to survive a motion to dismiss FLSA overtime claims, the Second Circuit required the plaintiff to at least "allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours," and noting that an approximation of hours "may help draw a plaintiff's claim closer to plausibility," but was clear that such an approximation was not required.

Before the Second Circuit's analysis in *DeJesus,* district courts in the Second Circuit allowed threadbare paraphrasing of the FLSA's statutory requirements to survive a motion to dismiss. *DeJesus* approved a district court's decision to require some factual content or context beyond the elements of the statute. Cases decided in district courts in the Second Circuit after DeJesus have applied this requirement.

***4** Here, by contrast, Coleman's complaint has no allegations that provide any factual context that form the basis for his claimed FLSA violation. The complaint merely alleges that "[during] one or more weeks of Plaintiff's employment, Plaintiff worked in excess of forty (40) hours" and that during "one or more weeks ... Defendant failed to pay Plaintiff" the overtime rate. For the same reasons as the Second Circuit in *DeJesus,* this court finds that more is required of a plaintiff than an "all purpose pleading template" with allegations providing no factual context and no way for the court to determine that the plaintiff has stated a claim as opposed to repeating the statutory elements of the cause of action. The *DeJesus* court was careful to note that it was not requiring a plaintiff to plead a specific number of hours worked; "mathematical precision" was not the standard. But the court did not find it unfair or burdensome to require some factual allegations. "[I]t is employees' memory and experience that lead them to claim in federal court that they have been denied overtime in violation of the FLSA in the first place. Our standard requires that plaintiffs draw on those resources in providing complaints with sufficiently developed factual allegations ." *Dejesus,* 726 F.3d at 88–91. Similarly, Coleman should be able to use his memory to flesh out the complaint with a factual context, before discovery has taken place.

John Moore points out that while Coleman cites cases denying motions to dismiss FLSA claims, the complaints in those cases provided facts that fairly put the defendant on notice of the basis of the claims but in [those cases] the plaintiff's allegations indicated that her overtime claim was based on alleged misclassification as an independent contractor. Accordingly, the motion to dismiss the FLSA violation claim is granted, without prejudice and with leave to amend the complaint to provide a factual context, consistent with this opinion.

B. The Allegation of FLSA Coverage

John Moore contends that the complaint does not allege facts but rather merely recites the statutory elements of FLSA coverage. Coleman does not respond to this argument. His amended complaint alleges the following:

> At all times pertinent to this complaint, Defendant John Moore, LP was an enterprise engaged in interstate commerce. At all times pertinent to this Complaint, Defendant regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by § 3(r) and 3(s) of the Act, 29 U.S.C. § 203(r) and 203(s). Additionally, Plaintiff was individually engaged in commerce, and his work was essential to Defendant's business.

***5** To survive a motion to dismiss, a complaint must allege facts that show coverage under the FLSA. "The FLSA guarantees overtime pay to employees engaged in the production of goods for commerce ('individual coverage') or employed in an enterprise engaged in commerce or in the production of goods for commerce ('enterprise coverage')." *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir.1992). "Commerce," under the FLSA, "means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S .C. § 203(b).

The court agrees that the complaint does not sufficiently allege facts demonstrating individual or enterprise coverage. Rather than pleading specific facts that establish individual or enterprise coverage, Coleman recites the statutory elements of FLSA coverage or asserts generalized facts that do not relate to the coverage issue.

Because Coleman has failed to allege facts that, if taken as true, establish coverage under the FLSA, John Moore's Rule 12(b)(6) motion to dismiss is granted, without prejudice and with leave to amend to provide a sufficient factual basis consistent with this opinion.

End of Document

2014 WL 4722706
N.D. Texas,
Dallas Division.

Kurtiss KIDWELL, Plaintiff,
v.
DIGITAL INTELLIGENCE SYSTEMS, LLC, d/b/a Disys, Defendant.

Signed Sept. 22, 2014.

MEMORANDUM OPINION AND ORDER

JANE J. BOYLE, District Judge.

*1 Before the Court is the Motion to Dismiss for Failure to State a Claim or, in the Alternative, Motion for a More Definite Statement, filed by Defendant Digital Intelligence Systems, LLC, d/b/a DISYS on March 17, 2014. After considering the Motion and the related briefings, the Court **GRANTS** Defendant's Motion to Dismiss but permits Plaintiff leave to amend his complaint to include allegations sufficient to inform Defendant of the parties' coverage under the FLSA. Accordingly, the Court **DENIES** Defendant's Motion for a More Definite Statement as moot.

I.
BACKGROUND

This is an action for unpaid overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et. seq.* Plaintiff Kurtiss Kidwell ("Kidwell") alleges that he was employed by Defendant Digital Intelligence Systems, LLC d/b/a DISYS ("DISYS") as a national accounts recruiter from November 2012 through April 2013. Kidwell claims that during "one or more weeks" of his employment he worked in excess of forty hours but was not paid overtime. *Id.* Accordingly, he filed suit in this Court on October 8, 2013. Several months later, on February 3, 2014, Kidwell filed his First Amended Complaint, seeking actual and compensatory damages, liquidated damages, as well as attorneys' fees and costs. On March 17, 2014, DISYS filed its present Motion to Dismiss, or in the Alternative, Motion for a More Definite Statement.

II.
LEGAL STANDARD

A. Rule 12(b)(6) Motion to Dismiss

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Rule 12(b)(6) authorizes the court to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir.2007). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* When well-pleaded facts fail to achieve this plausibility standard, "the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks and alterations omitted).

B. Rule 12(e) Motion for a More Definite Statement

*2 Rule 12(e) allows a party to "move for a more definite statement of a pleading to which a responsive pleading is allowed" when it is "so vague or ambiguous that the party cannot reasonably prepare a response." Fed.R.Civ.P. 12(e). "When a party moves for a more definite statement, a court must determine whether the complaint is such that a party cannot reasonably be required to frame a responsive pleading." *Ash Grove Tex., L.P. v. City of Dallas*, No. 3:08–CV–2114–O, 2009 WL 3270821, at *7 (N.D.Tex. Oct.9, 2009). "[M]otions for a more definite statement are generally disfavored," and district courts have

"significant discretion" when considering them. *Id.* (internal citations and quotations omitted).

III.
ANALYSIS

DISYS seeks dismissal, or alternatively, a more definite statement, because Kidwell "failed to plead facts ... sufficient to support his claims for individual relief" under the FLSA. Specifically, DISYS argues Kidwell does not offer sufficient facts regarding DISYS's employer status, the alleged overtime violations, and coverage under the FLSA.

A. The Allegations of Employer Status under the FLSA

The Court first considers DISYS's argument that Kidwell has failed to plead sufficient facts to demonstrate that an employer-employee relationship existed between them. DISYS contends that Kidwell's allegations fail to satisfy the "economic reality" test set out by the Fifth Circuit and do not provide facts establishing DISYS's employer status.

In order "[t]o be bound by the requirements of the Fair Labor Standards Act, one must be an 'employer.' " *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971 (5th Cir.1984) (citing 29 U.S.C. §§ 206–07). Under the FLSA, the term "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." *Lee v. Coahoma Cnty.*, 937 F.2d 220, 226 (5th Cir.1991) (quoting 29 U.S.C. § 203(d)). The Supreme Court has determined that the FLSA's definition of "employer" is to be interpreted expansively. *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973). Thus, "[t]he term employer includes individuals with managerial responsibilities and 'substantial control over the terms and conditions of the [employee's] work.' " *Lee*, 937 F.2d at 226 (quoting *Falk*, 414 U.S. at 195).

**3 The Fifth Circuit uses the "economic reality" test to evaluate whether an individual or entity possesses such operational control with respect to the employment relationship. *Gray v. Powers*, 673 F.3d 352, 354, 357 (5th Cir.2012). In applying this test, the court considers whether the alleged employer: "(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 355 (citations omitted). "While each element need not be present in every case," the individual must have control over at least certain aspects of the employment relationship. *Id.* at 357 ("While the Fifth Circuit 'has on several occasions found employment status even though the defendant-employer had no control over certain aspects of the relationship,' it does not follow that someone who does not control any aspect of the employment relationship is an employer.").

While Kidwell's Amended Complaint does not provide details describing how DISYS oversaw his work, the Court concludes that the allegations are sufficient to support a reasonable inference of operational control by DISYS and an employer-employee relationship between the parties. Kidwell alleges he "worked for Defendant from November 2012 through April 2013 as a national accounts recruiter"; "his work was essential to Defendant's business"; and "[d] uring ... Plaintiff's employment with Defendant ... Defendant failed to pay Plaintiff." At the very least, Kidwell has asserted that he was employed by DISYS, DISYS was in control of his method of payment, and DISYS failed to pay him. *See Hoffman v. Cemex, Inc.*, No. H–09–3144, 2009 WL 4825224, at *3 (S.D.Tex. Dec.8, 2009) (finding that similarly simple allegations in an FLSA complaint were "all factual allegation[s]—not legal conclusions—and, if proven, they give rise to a plausible claim for relief"). Kidwell's allegations, taken as true, are sufficient to qualify DISYS as an employer under the FLSA, and therefore state a claim against it.

Accordingly, the Court finds that Kidwell has alleged sufficient facts to demonstrate that an employer-employee relationship existed between him and DISYS.

B. The Allegations of FLSA Overtime Violations

**4 The Court next considers DISYS's argument that Kidwell has failed to satisfy the pleading requirements for the alleged FLSA overtime violations because he offers no factual context for his claims and "must at least allege an estimate of the number of hours worked without adequate compensation." In response, Kidwell insists that he pled sufficient facts to put DISYS on notice that it is being sued for overtime wage violations.

Allegations of a complaint must be sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "Moreover, it cannot be the case that a plaintiff must plead specific instances of unpaid overtime before being allowed to proceed to discovery to access the employer's records." *Solis v. Time Warner Cable San Antonio, L.P.*, No.

10–CA–0231–XR, 2010 WL 2756800, at *2 (W.D.Tex. July 13, 2010).

Taking Kidwell's factual allegations regarding the overtime violations as true, the Court finds that Kidwell has pled "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570.[2] In his pleadings, Kidwell has specified the name of the employee asserting the statutory violation, the employee's job title while working for DISYS, and the six-month time period during which he allegedly worked over forty hours without being paid time-and-a-half. Doc. 5, Pl.'s Am. Comp. 1–2 (noting that "Plaintiff worked for Defendant from November 2012 through April 2013"). Kidwell's complaint presents similar allegations regarding overtime pay and is therefore sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly,* 550 U.S. at 555 (quoting *Conley,* 355 U.S. at 47).

C. The Allegations of FLSA Coverage

*5 The Court turns to the issue of the parties' coverage under the FLSA, examining both Kidwell's individual coverage and DISYS's enterprise coverage. "The FLSA guarantees overtime pay to employees engaged in the production of goods for commerce ('individual coverage') or employed in an enterprise engaged in commerce or in the production of goods for commerce ('enterprise coverage')." *Martin v. Bedell,* 955 F.2d 1029, 1032 (5th Cir.1992) (citing 29 U.S.C. § 207(a)(1)). "Either individual or enterprise coverage is enough to invoke FLSA protection." *Id.* (emphasis omitted). Because coverage is an element of an FLSA claim, a plaintiff must allege facts that show coverage under the FLSA in order to survive a motion to dismiss.

Kidwell alleges both individual and enterprise coverage. Doc. 5, Pl.'s Am. Comp. 1–2. In addition to stating that he worked for DISYS as a national accounts recruiter, the relevant portion of the Amended Complaint states:

> [a]t all times pertinent to this complaint, DIGITAL INTELLIGENCE SYSTEMS, LLC d/b/a DISYS, LLC, was an enterprise engaged in interstate commerce. At all times pertinent to this Complaint, Defendant regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by § 3(r) and 3(s) of the Act, 29 U.S.C. § 203(r) and 203(s). Additionally, Plaintiff was individually engaged in commerce and his work was essential to Defendant's business.

Id. DISYS argues Kidwell's allegations supporting the overtime claim are insufficient because the Amended Complaint does not allege any specific facts regarding interstate commercial activity, but merely recites the statutory elements of FLSA coverage.

1. Individual Coverage

The Court first addresses the issue of Kidwell's individual coverage under the FLSA. To demonstrate that individual coverage exists, Kidwell must allege facts that give rise to a reasonable inference that he was engaged in commerce or in the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a); *Morrow,* 2011 WL 5599051, at *3. The test to determine whether an employee is "engaged in commerce" inquires "whether the work is so directly and vitally related to the functioning or an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it rather than an isolated activity." *Williams v. Henagan,* 595 F.3d 610, 621 (5th Cir.2010).

*6 Even though Kidwell's Amended Complaint indicates "national accounts recruiter" as his job title, Kidwell has failed to plead specific facts that establish individual coverage. Despite the presence of the term "national" in his job title, Kidwell offers neither a description of the nature of his work nor a clarification as to how such work engaged him in interstate commerce. *See Foreman v. Foodtronix, LLC,* No. 3:14–CV–0656–BF, 2014 WL 2039055, at *2 (N.D.Tex. May 16, 2014) (finding that plaintiff's allegation that he worked as a "technical support agent" and his assertion that his employer engaged in interstate commerce did not demonstrate that plaintiff's work engaged him in interstate commerce); *Morrow,* 2011 WL 5599051, at *3 (holding that plaintiff's allegation that he provided electrician services to defendants' clients sufficiently described his work but did not demonstrate "how that work engage[d] him in interstate commerce"). Kidwell recites the elements of coverage as articulated in the FLSA, but he fails to relate them to the specifics of his work responsibilities. Thus, the Court concludes that the Amended Complaint fails to allege sufficient facts to establish individual coverage.

2. Enterprise Coverage

Lastly, the Court examines the issue of enterprise coverage under the FLSA. To satisfy the pleading requirement, Kidwell must allege facts that give rise to at least a reasonable inference that DISYS is an "enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a). An "enterprise that engages in commerce or in the production of goods for commerce" is an enterprise that:

> (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated) [.]

*7 29 U.S.C. § 203(s)(1)(A).

To demonstrate the existence of coverage under the FLSA, Kidwell alleges that "[a]t all times pertinent to [the Complaint], [Defendant] was an enterprise engaged in interstate commerce" and "regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by ... 29 U.S.C. § 203(r) and § 203(s)."

Kidwell does not otherwise allege that any other of DISYS's employees engaged in interstate commerce or handled, sold, or worked on goods or materials that have been moved in or produced for commerce. 29 U.S.C. § 203(s)(1)(A)(i). Rather, Kidwell solely alleges that DISYS was "engaged in interstate commerce." Doc. 5, Pl.'s Am. Comp. 1. These allegations provide no factual context for Kidwell's claims and are merely "formulaic recitations" of the elements of an FLSA cause of action. *Twombly*, 550 U.S. at 555 (citations omitted). Therefore, the Court finds that Kidwell has not articulated grounds from which individual or enterprise coverage under the FLSA can be discerned.

In sum, because Kidwell has failed to plead sufficient facts that, if taken as true, would establish coverage under the FLSA, he has failed to state a claim upon which relief can be granted. Accordingly, DISYS's Motion to Dismiss is **GRANTED.**

IV.
CONCLUSION

For the reasons stated above, DISYS's Motion to Dismiss is hereby **GRANTED.** Normally, courts will afford a plaintiff the opportunity to overcome pleading deficiencies, unless it appears that the defects are incurable. Since this Order is the Court's first review of Kidwell's allegations, the Court concludes that Kidwell should be given the opportunity to overcome the deficiencies in its pleadings.

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2013 WL 2189952
S.D. Texas,
Victoria Division.

Jose O GUZMAN, Plaintiff,
v.
HACIENDA RECORDS AND RECORDING STUDIO, INC., et al, Defendants.

May 20, 2013.

MEMORANDUM AND ORDER

GREGG COSTA, District Judge.

*1 This is a copyright infringement case involving two Tejano songs. Plaintiff José O. Guzman alleges that Defendants copied the "original lyrics and music" in his song, "Triste Aventurera," by producing, selling, and distributing records containing a substantially similar, yet differently named song, "Cartas de Amor." Docket Entry No. 1 ¶¶ 13, 16. Defendants now seek dismissal pursuant to Rule 12(b)(6), or alternatively a more definite statement pursuant to Rule 12(e), on the ground that Guzman failed to plead the infringement allegations with sufficient specificity. Having reviewed the parties' briefs and the applicable case law, the Court **DENIES** Defendants' motion.

The crux of Defendant's motion is whether Guzman's Complaint meets the pleading standard set forth by the Federal Rules of Civil Procedure. Rule 8(a)(2) requires that a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). To survive a motion to dismiss under Rule 12(b)(6), a claim for relief must be "plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly,* 550 U.S. at 556).

Defendants argue that Guzman's Complaint fails to meet this standard, because it does not identify the exact elements of "Triste Aventurera" that "Cartas de Amor" copied. But by identifying the two works at issue and alleging that Defendants copied the original lyrics and music in his copyrighted work, Guzman pleaded a claim that was plausible on its face. *Kelly v. L.L. Cool J.,* 145 F.R.D. 32 (S.D.N.Y.1992), is informative. In that case, the court rejected arguments nearly identical to Defendants' when evaluating a complaint alleging that L.L. Cool J. copied parts of plaintiff's song "Jingling Baby" in his 1991 hit "Mama Said Knock You Out":

> Broad, sweeping allegations of infringement do not comply with Rule 8. Plaintiff's complaint however, narrows the infringing act to the publishing and distribution of two songs, "Mama Said Knock You Out" and "Jingling Baby" in 1991, which is sufficiently specific for the purpose of Rule 8. Defendant argues that it is not possible to determine from the complaint the nature of the claimed infringement. However, such a level of specificity is not required in a complaint.

Id. at 36 n. 3 (citations omitted).

Though *Kelly* was decided before the Supreme Court clarified the federal pleading standard in *Twombly* and *Iqbal,* under those decisions "the height of the pleading requirement is relative to circumstances." *Cooney v. Rossiter,* 583 F.3d 967, 971 (7th Cir.2009) (Posner, J.); *see also Kadmovas v. Stevens,* 706 F.3d 843, 844 (7th Cir.2013) (noting that "some [claims] require more explanation than others to establish their plausibility" (citations omitted)); *Hamilton v. Palm,* 621 F.3d 816, 817 (8th Cir.2010) (*"Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2)."). Complex claims, like those in *Twombly* and *Iqbal,* require more specificity than simple ones, such as Kelly's and Guzman's. This makes sense given that *Twombly* and *Iqbal* are "designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." *In re Text Messaging Antitrust Litig.,* 630 F.3d 622, 625 (7th Cir.2010). To the extent *Twombly* and *Iqbal* are animated by concerns that vague allegations will lead to broad, "fishing expedition" discovery, that concern is not present here because the complaint provides notice of an allegation

limited to the copying of a three-minute song. The complaint cabins discovery to discrete items, such as the sales data relating to the allegedly infringing song, the creation and production of the allegedly infringing and infringed songs, and not much else.

*2 Defendants have cited no post-*Iqbal* cases imposing a higher pleading requirement in the copyright context than the *Kelly* court did. After Guzman filed his response to Defendants' motion, the Court held a telephone conference in which defense counsel represented that, in a recent case in this District involving Beyoncé, the court required plaintiffs to identify the constituent elements copied in an allegedly infringed song in order to meet the federal pleading standards. The Court allowed Defendants to file a supplemental brief containing the Beyoncé case and any similar cases, but Defendants' brief only cited *Armour v. Knowles,* No. 4:05–cv–2407 (S.D.Tex.), in which the plaintiff voluntarily amended her complaint against Beyoncé. Docket Entry No. 25 at 5. Contrary to Defendants' position, "even post-Twombly, Rule 8 requires only the pleading of the basic elements of an infringement claim, albeit allegations that rise above the speculative level. There is no heightened pleading requirement for copyright-infringement claims." 6 *Patry on Copyright* § 19:3 (2013); *see also Schneider v. Pearson Educ., Inc.,* No. 12 Civ. 6392(JPO), 2013 WL 1386968, at *3 (S.D.N.Y. Apr.5, 2013) (ruling that plaintiff's infringement allegations, "though not brimming with details, are specific enough to meet the requirements of Rule 12(b)(6) and Rule 8" and citing cases).

In sum, Guzman has adequately stated a claim for copyright infringement. He has pleaded sufficient content to establish the elements of a copyright claim—namely, ownership of a valid copyright and copying of constituent elements of his original work. *See Positive Black Talk Inc. v. Cash Money Records Inc.,* 394 F.3d 357, 367 (5th Cir.2004) (stating elements of copyright infringement claim), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010). The Complaint provides sufficient notice to allow Defendants to defend against the claim and to limit discovery. Accordingly, Defendants' Motion to Dismiss and in the Alternative, Motion for More Definite Statement (Docket Entry No. 20) is **DENIED.**

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Practice Problem for Notice Pleading – Problem #1

Essay Question #1 (from Fall 2009 exam)
(total – 33 1/3 points)

Adel Guirguis brought suit in federal district court against his former employer, Movers Specialty Services, Inc. ("Movers"), alleging violations of Title VII of the Civil Rights Act of 1964. Guirguis, who is of Arab descent and a native of Egypt, contends that Movers terminated his employment on the basis of his national origin.

Paragraphs 7 through 9 of the complaint, which read as follows, contain the entirety of Guirguis's factual averments:

> 7. Plaintiff began working for the defendant in 2000 in the accounting department. Plaintiff was employed by the defendant from that day until February 14, 2006, when he was terminated by the defendant in violation of his civil rights.
>
> 8. Plaintiff is foreign born, is an Arab, having been born in Egypt on June 20, 1947.
>
> 9. On February 14, 2006, plaintiff was terminated by the defendant in violation of his rights due to his national origin, having been born in Egypt.

Movers sought dismissal, charging that his complaint failed to state a claim upon which relief could be granted. How should the trial court rule?

Practice Problem For Notice Pleading- Problem # 2

From Fall 2012 Exam

Question 2 (worth 40% of grade). Your answer should not exceed 1500 words.

Plaintiff brings a complaint in federal district court. She alleges the following:

1. On June 8 2010, Plaintiff was severely and permanently injured when she fell at Dollar General Store at 171 Ambriar Plaza in Amherst County, Virginia. The store was operated by Defendant Dollar General.

2. Plaintiff fell due to the negligence of Defendant and its employees who failed to remove the liquid from the floor and had negligently failed to place warning signs to alert and warn Plaintiff of the wet floor. Defendant, through its employees, breached its duty to warn Plaintiff of the dangerous wet floor.

3. As a direct result of Defendant's employee's negligence, acting in the scope of their employment, Plaintiff was severely and permanently injured. She has incurred medical and hospital bills and suffered great pain. Also, her ability to earn an income has been hindered.

4. Plaintiff seeks a judgment in the amount of $300,000 against Defendant Dollar General.

Defendant moves to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In its motion, Defendant argues that the complaint lacks any allegation of how the liquid came to be on the floor and that it does not allege that Defendant knew or should have known about the liquid in advance of the plaintiff's alleged fall.

Under Virginia law, store owners owe their customers the duty to exercise ordinary care as their invitees upon their premises. Ordinary care is not met as to an owner who knew or should have known of a dangerous condition on the premises and failed to exercise due care to warn others of the dangerous condition or remove it within a reasonable time. However, a landowner is under no duty to a person reasonably expected to be on the premises to warn against an open and obvious condition on the premises.

How should the court rule?

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Domico Madrigal,

Plaintiff,

v.

Kerry Inc., a foreign corporation, d/b/a Kerry Specialty Ingredients,

Defendant.

Court File No. 05-CV-01673 JNE/JGL

DEFENDANT'S ANSWER TO THE COMPLAINT

Kerry Inc. ("Kerry"), by its attorneys, hereby answers Plaintiff's Complaint.

1. Kerry admits the allegations in paragraph 1.

2. Kerry denies that "Kerry Specialty Ingredients" has been registered as an assumed name or that Kerry has not registered with the Minnesota Secretary of State as a foreign corporation. Kerry is without knowledge or information sufficient to form belief as to truth of the allegation that it is conducting business "throughout" the State of Minnesota in that such terminology is unclear. Kerry admits it does business in Minnesota and admits the remaining allegations of paragraph 2.

3. Kerry denies that Plaintiff became employed by it at its Albert Lea facility on or about February 4, 1984. Kerry admits that Plaintiff was employed by Freeborn Foods on or about that date. Kerry is without knowledge or information sufficient to form a belief as to the position in which Freeborn Foods originally employed Plaintiff. Kerry admits that when it purchased the Albert Lea facility from Armour Foods, Inc. in October, 2000, it hired Plaintiff.

4. Kerry admits that during the time Plaintiff was employed by it he performed his job in a manner sufficient to retain his position. Kerry is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 4.

5. Kerry is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 in that the "job" referenced is not identified. Kerry admits that prior to approximately November 22, 2004 Plaintiff could perform the essential functions of the jobs he held with or without reasonable accommodation.

6. Kerry admits that records in its possession apparently generated during Plaintiff's employment with Freeborn Foods indicate that on or about June 22, 1989 Plaintiff injured the L-5 disc, that he sought and received workers' compensation benefits, had back surgery, and returned to work at Freeborn Foods under medical work restrictions. Kerry is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 6.

7. Kerry is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7.

8. Kerry denies that Plaintiff was terminated. Kerry admits that until Plaintiff's layoff on or about November 22, 2004, he worked in the "Intake" position referenced.

9. Kerry admits that in September 2004, in an economy measure, Kerry eliminated the job position previously held by Plaintiff, and at least one other job position held by other persons. Kerry admits that, pursuant to the requirements of the applicable collective bargaining agreement with Plaintiff's union, it posted a Notice of Job Openings for a "Janitor/Intake Operator." This new position combined the Janitor and Intake Operator jobs. The intake operator component of the position included a requirement, as an essential function of the job, that incumbents, upon occasion, perform lifting of as much as 55 lbs. Kerry admits further that, following negotiations with Plaintiff's union, on or about December 17, 2004 it modified the

41. Kerry denies the allegations of paragraph 41.

AFFIRMATIVE DEFENSES

1 To the extent Plaintiff's Complaint alleges injuries covered by the Minnesota Workers' Compensation Act (Minn. Stat. Section 176 et seq.), he is barred by the exclusivity provisions of that Act (Minn. Stat. Section 176.031).

2 Plaintiff's prayer for back pay and/or for monetary damages is barred in whole or in part by his failure to mitigate his damages.

3 To the extent Minnesota law does not allow trial by jury, Plaintiff's request for a jury trial should be stricken.

4 Plaintiff's claim is barred in whole or in part since, pursuant to the applicable Collective Bargaining Agreement with his union, on or about December 17, 2004, he bid on two open positions which he apparently believed were within his medical restrictions, but did not receive either position because he was not the senior bidder.

WHEREFORE, Defendant Kerry, Inc., prays that Plaintiff's Complaint be dismissed with prejudice, and that Kerry be awarded its costs, attorneys' fees, and other relief the court deems fit.

DATED: August 12, 2005

KERRY INC. d/b/a KERRY SPECIALTY INGREDIENTS, Defendant

s/ John J. McDonald, Jr.
John J. McDonald, Jr. (#136815)
Bradley J. Lindeman (#0298116)
MEAGHER & GEER P.L.L.P.
33 South Sixth Street, Suite 4200
Minneapolis, Minnesota 55402-3788
(612) 338-0661

and

Exercise On Timing and Waiver for Answer and Pre-Answer Defenses

Assume the following facts:
Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, you, Dugan's lawyer, file a pre-answer motion in which you assert the defense that process was not properly served. About a week later, you realize that Dugan has a potentially viable defense of lack of personal jurisdiction he could have asserted. You also conclude that another potential party, Trudy, is arguably an indispensable party who should be in the case. You have not yet filed an answer on Dugan's behalf and the court has not yet ruled on the motion you filed. Questions:

1. Can you assert the defense of lack of personal jurisdiction in another pre answer motion?

2. Can you assert the defense of failure to join an indispensable party in another pre answer motion?

3. Could you instead assert either defense in the answer?

4. Would it matter whether, at the time you filed the pre answer motion to dismiss for insufficient service that neither you nor your client were aware of the facts on which the additional defenses would be based?

Now change the facts, above, as follows:
Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, on behalf of Dugan you, his lawyer, file a pre-answer motion in which you assert the defense that venue is improper. When that motion is denied, you file an answer on Dugan's behalf. Six months later, you realize that there is no subject matter jurisdiction. Questions:

1. Can you assert this defense in a motion to dismiss? If so, what specific rule would you use?

2. What if you didn't realize the problem with subject matter until after the case had gone to trial and a verdict was entered against Dugan? Could you make this argument for the first time on appeal?

Now change the facts, above, as follows:
Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, on behalf of Dugan you, his lawyer, file an answer. A month later, however, you realize that there is a defense of insufficiency of service of process and another defense of failure to state a claim on which relief can be granted. Are you allowed to raise either of these defenses now? If so, how would you do so?

Rule 11
Questions to Discuss

1. What is the primary function of Rule 11?

2. Are there other professional standards that govern lawyer conduct beyond Rule 11? What are they?

3. What is the scope of Rule 11? To what things does it apply?

4. What is Rule 11's certification requirement?

5. In what ways is the 1993 version of Rule 11 (current version) less restrictive of lawyer and client activity than the 1983 version? (There are at least 5 or 6)

6. In what ways is the 1993 version of Rule 11 more restrictive of lawyer and client activity than the 1983 version? (There are 2 or 3)

7. Contrast the current version of Rule 11 with the legislation that has been proposed a number of times in Congress known as the Lawsuit Abuse Reduction Act (your materials discuss the LARA of 2011). What are the differences you see between LARA and Rule 11?

8. Do you think the following example would satisfy Rule 11(b)(3)?

   P brings suit against D claiming that D, his neighbor, caused P to develop cancer by spraying a chemical pesticide on his flowers. P does not allege that any medical evidence links his cancer to the pesticides that were sprayed.

9. Do you think the following example would satisfy Rule 11(b)(4)?

   P brings suit against D for injuries caused by a defective product that D manufactured. Assume that an internal investigation D conducted before suit revealed that its manufacture of the product was defective. If P was not aware of that internal investigation at the time she brought suit, may D deny the allegation under Rule 11(b)(4)?

10. May P make the allegation of a defective product under Rule 11(b)(3) if P was not aware of that internal investigation, and P had no other evidentiary support for the allegation that D's product was defectively manufactured?

11. What limits does Rule 11(c) impose on the consequences of violating the certification requirements of the rule?

12. How does the safe harbor of Rule 11(c) work?

THE CASE AGAINST THE LAWSUIT ABUSE REDUCTION ACT OF 2011

Lonny Hoffman[*]

I. INTRODUCTION

On March 9, 2011, Lamar Smith, Chairman of the House of Representatives Committee on the Judiciary, introduced H.R. 966, the Lawsuit Abuse Reduction Act.[1] On the same day Charles Grassley, the ranking Republican member of the Senate Judiciary Committee, sponsored an identical measure in the upper chamber.[2] Animated by concern over rising costs and abuses in federal civil cases, the bills stiffen penalties against lawyers who file sanctionable papers in federal court by legislatively amending Rule 11 of the Federal Rules of Civil Procedure, the general certification and sanctions standard for federal civil cases.[3]

This is not the first time that Congress has tried to reform the federal sanctions rule as a means of curbing litigation costs and abuse. Since 1995, bills regularly have been introduced that would toughen Rule 11, but to date, none have been successfully enacted.[4]

However, buoyed by sweeping victories last November that gave Republicans majority control of the House and a much greater voice in the Senate,[5] the prospects for legislative reform of Rule 11 are better now than they have ever been before.

Enacted in 1938 as part of the original rules, Rule 11 remained unchanged for half a century.[6] Then, in 1983, spurred by perceptions of a growing litigation crisis, judicial rulemakers proposed significant amendments to the rule.[7] One of the most important changes was that the rule was made mandatory so that courts were required "to impose sanctions whenever a violation of the rule was found to have occurred."[8] This and other amendments in 1983 signaled that the rule was now meant to hold lawyers more accountable for improper conduct in federal cases.[9] It soon became apparent, however, that the 1983 version of Rule 11 not only failed to deter groundless litigation practices but actually led to greater litigation costs and abuses in many cases by incentivizing voluminous, wasteful satellite litigation over sanctions. Finally convinced that the 1983 experiment with Rule 11 was ill-advised,

rulemakers amended the rule again a decade later to soften its sharpest edges.[10] Although most in the legal profession welcomed the 1993 amendments, some thought the revisions to the rule weakened a powerful deterrent against wrongful litigation practices.[11] Seizing on these concerns, the Republican Party made reform of Rule 11 one of the highlighted parts of the sweeping legislative reforms they proposed in the Contract with America leading up to the 1994 mid-term elections.[12]

With awareness of this history, and frustrated by their repeated failures over the last fifteen years to stiffen penalties against lawyers, sponsors introduced the Lawsuit Abuse Reduction Act of 2011 (LARA) with high hopes of finally succeeding in their ambitions. The first of the changes LARA makes to Rule 11 is to require the imposition of sanctions whenever the district judge finds that the rule was violated, mirroring the mandatory form of the 1983 version of the rule.[13] This sanction provision is a significant change to existing law. Indeed, except for the decade in which the 1983 version of Rule 11 was in force, federal judges have always been vested with discretion to decide which violations of the rule warrant punishment and which do not.[14] LARA's second retrogressive reform eliminates the existing safe harbor provision in the current rule.[15] The safe harbor, put in place in 1993, protects against the imposition of sanctions if the filing alleged to be in violation of the rule is withdrawn in a timely manner.[16] The third reform would make the sanctions rule even more potent than it was thirty years ago. The proposed legislation does so by adding an express proviso authorizing—the better word may be *encouraging*—judges to award monetary sanctions, including attorney's fees and costs incurred by the other side, when the rule is violated.[17] This change departs drastically not only from current law but even from that earlier version of the rule inasmuch as compensation never has been the express purpose of the rule.[18] Indeed, one of the main criticisms of the 1983 version of Rule 11 that prompted its revision was that, notwithstanding that rulemakers intended the rule to be for deterrence, litigants and courts frequently misused it for compensatory, cost-shifting purposes.[19]

II. Extensive Empirical Research on Rule 11 Demonstrates that a Return to the 1983 Version of the Rule Would Increase Costs and Delays and Foster Greater Litigation Abuse

A vast body of empirical evidence has been collected relating to the 1983 version of Rule 11. As Georgene Vairo observes in her leading treatise on Rule 11, "Few amendments to the Federal Rules of Civil Procedure have generated the controversy and study occasioned by the 1983 amendments to Rule 11."[20] As a result, we are fortunate today not to have to consider amendments to the rule in the same empirical vacuum in which the rulemakers in 1983 previously operated. There have been at least nine major empirical studies and numerous reports of the 1983 version of Rule 11.[21] Several books, a great many law review articles, and a myriad of legal and lay newspaper stories have also examined it.[22] Of course, there were also literally thousands of reported judicial opinions on the subject,[23] though more than anything else these probably serve best to underscore the difficulties wrought by the 1983 amendments. In any event, drawing on all of these sources today, there is much we can say with a great deal of certainty about the 1983 Rule 11 experience. Indeed, the available empirical evidence is so persuasive that it has produced a remarkable degree of agreement across the political spectrum that the 1983 sanctions rule was one of the most ill-advised procedural experiments ever tried. This moment is one of those occasions, regrettably rare, when we do not have to legislate blindly; history can be our guide.

A. *The 1983 Version of the Rule Produced an Avalanche of Unwelcome Satellite Litigation*

If the objective was to substantially increase the sheer volume of requests for sanctions, then by that measure the 1983 version of Rule 11 certainly did not disappoint. In less than ten years, the rule generated nearly 7,000 reported sanctions decisions.[24] And those were just the cases that were easily identified because they were reported. When unreported decisions are taken into account, the actual amount of Rule 11 activity dwarfed the reported figures, as the country's most respected legal practitioner on the subject, Greg Joseph, has emphasized.[25] Indeed, a task force organized by the Third Circuit to study Rule 11 by looking at both reported and unreported cases found that in the Third Circuit less than 40% of the Rule 11 decisions were published or available on Lexis or Westlaw.[26] The

contrast with the paucity of decisions under the original version of Rule 11 could not have been sharper. Moreover, these figures also stand in contrast with the marked drop off in Rule 11 cases since the 1993 amendments to Rule 11 went into effect (more on that, in Part III, below).

Sanctions practice took on a life of its own under the 1983 rule. After passage of the 1983 amendments, a cottage industry arose with lawyers routinely battling over the minutiae of all of the new obligations imposed. All too often this produced satellite litigation within the case itself over one or the other lawyer's (or both lawyers') alleged noncompliance with the rule. One side would move to sanction his opponent who might respond, in kind, by filing a sanctions motion on the basis that the filing of the original sanctions motion was, itself, sanctionable.[27] And on and on it would go. All of this would take place as a side show to the trial of the case itself, with limited resources and time spent dealing with these tertiary sanctions issues. Georgene Vairo summarized the "avalanche" of satellite litigation unleashed by the 1983 amendments:

> Beginning in 1984, the volume of cases decided under the rule increased dramatically. By the end of 1987, the number of reported Rule 11 cases had plateaued. Even though the number of reported cases leveled off, motions under the amended rule continued to be made routinely, especially by defense counsel, as many attorneys were unable to pass up the opportunity to force their adversaries to justify the factual and legal bases underlying motions and pleadings. Indeed, one study found that in a one-year period, almost one-third of the respondents to the survey reported being involved in a case in which Rule 11 motions or orders to show cause were made. The same study showed that almost 55% of the respondents had experienced either formal or informal threats of Rule 11 sanctions.[28]

The reasons that explain the significant increase in sanctions motions that occurred are varied but certainly at least include that Rule 11 in its 1983 form came to be seen—contrary to the rulemakers' intent—as a fee-shifting device that could be used for compensatory purposes. In consequence, even the rule's strongest backers began to realize that the satellite litigation the rule was causing, and the compensatory fee-shifting effect that

the frequent award of monetary damages was producing, were greatly troubling developments.[29]

B. The 1983 Rule Was Applied Inconsistently and Inequitably

1. Civil Rights and Employment Discrimination Plaintiffs, in Particular, Were Impacted the Most Severely Under the 1983 Version of Rule 11. The available empirical evidence persuasively demonstrates the profound discriminatory effects of the 1983 version of Rule 11. Sanctions were sought and imposed against civil rights and employment discrimination plaintiffs, in particular, more often than other litigants in the civil courts, with the greatest disparities in treatment observed in the first five years of the amended rule's existence. In a study conducted in 1988, researchers with the Federal Judicial Center (FJC) found that civil rights and employment discrimination plaintiffs were the subject of sanctions motions more than 22% of the time, well out of proportion to the percentage of such cases filed.[30] Civil rights and employment discrimination plaintiffs were sanctioned more than 70% of the time sanctions were sought, a significantly higher rate than in cases against other kinds of plaintiffs.[31]

One reason why civil rights claimants and other resource-poor plaintiffs, like employment discrimination claimants, faced much tougher treatment under the 1983 rule is that, as applied by many courts, the 1983 version was used as a cost-shifting device. The Advisory Committee itself eventually realized that under the 1983 rule, the poorest victims and their lawyers faced the greatest threat from monetary sanctions. In its discussions about amending the rule to overcome the prior experience, the Advisory Committee recognized the particular problem cost-shifting could create in "cases involving litigants with greatly disparate financial resources."[32] In addition, the 1993 Advisory Committee

Notes make reference to the problems posed by cost-shifting for "an impecunious adversary."[33]

The 1983 experience also reflects that judges disproportionately enforced the prefiling factual investigation requirement of the rule against civil rights plaintiffs and their lawyers.[34] In many of these decisions, sanctions were awarded even though factual information vital to asserting a claim was in the sole possession of the defendant. There are many illustrations of this perverse problem, as Professor Carl Tobias carefully documented in a series of penetrating articles about the rule's disparate impact on civil rights claimants.[35] Professor Tobias recognized that lack of access to proof was a problem that bedeviled these claimants especially:

> Civil rights actions, in comparison with private, two-party contract suits, implicate public issues and involve many persons. Correspondingly, civil rights litigants and practitioners, in contrast to the parties and lawyers they typically oppose, such as governmental entities or corporate counsel, have restricted access to pertinent data and meager resources with which to perform investigations, to collect and evaluate information, and to conduct legal research.[36]

As he documented, courts often did not take the imbalance in access to proof into account in deciding whether to impose sanctions under the 1983 version of the rule.[37] One illustration of this is *Johnson v. United States*, a case involving the sexual assault of an infant, in which the dissent took the majority to task for imposing an unrealistic pleading burden on the plaintiff, given her obvious lack of access to proof before discovery:

> The [majority] opinion notes that the complaint does not state facts indicating that Ojeda had "committed past offenses or manifested previous aberrant behavior that his employers should have detected." . . .
>
> Nowhere does the majority suggest how plaintiff, presuit, could ever obtain such information. One authoritative source, Ojeda's personnel file, is in the government's control, but it usually would be regarded as quasi-confidential and unavailable to an outsider. As a practical matter, therefore, plaintiff's attorney would probably be unable to obtain the information required by the majority to satisfy Rule 11 without some form of compelled discovery, discovery which would be available only if the action should survive the inevitable Rule 12 motion by the government. As a result, requiring plaintiff to plead the additional information mentioned in the majority opinion erects a "Catch 22" barrier: no information until litigation, but no litigation without information.[38]

A still further factor that contributed to the discriminatory impact of the 1983 version of Rule 11 was that a sanctions legal standard is inherently flexible, which is to say it is highly susceptible to different interpretations. Of course, indeterminacy is not unique to sanctions rules, but for reasons that are perhaps still not entirely understood, the failure of the law in this area to develop evenly and coherently fell particularly hard on civil rights and employment discrimination plaintiffs.[39] As discussed below in Part III, these problems would have continued to exist with the 1993 rule but for the adoption of the safe harbor provision in that rule, which ameliorates at least some of the harsh effects of the rule's inherent indeterminacy.

Finally, it is worthwhile to say something about an additional factor involved in some civil rights cases that triggered disproportionate sanctions under the 1983 version of the rule: that is, the assertion by some of these claimants of novel theories of law. Although it is not clear how often civil rights claimants in the 1980s asserted legal theories that can be correctly characterized as "novel," the available empirical evidence demonstrates that judges were not very good at distinguishing legitimate assertions of new legal theories from failures to conduct adequate prefiling investigations.[40] What is also clear is that judges applying the 1983 rule were less likely to give civil rights claimants the benefit of the doubt, especially in the first five years after the rule's amendment.[41]

Further, the empirical evidence also suggests that the 1983 version of Rule 11 deterred the filing of meritorious cases. When asked, a substantial number of lawyers who were surveyed (nearly 20% of respondents) reported that as a result of increased use of the 1983 version of Rule 11, they were warier of bringing meritorious cases because of a fear that the rule would be inappropriately applied to them.[42] Based on similar survey results it obtained in its 1988 study, the FJC researchers were led to conclude that "whether it can be classified as a chilling effect or not, lawyers reported a cautionary effect of Rule 11."[43]

A last, related lesson to mention from the 1983 experience with Rule 11 is that by allowing sanctions to be sought after a case had been resolved on the merits, the 1983 rule further exacerbated the rule's discriminatory impact. One of the leading researchers in the civil litigation field, Thomas Willging, was the first to recognize that application of the rule was subject to the problem of "hindsight bias," as it is often called.[44] In his 1988 study of Rule 11 for the FJC, Willging commented that when sanctions are sought contemporaneously with or after the dismissal of a case on the

merits, "there may be a tendency to merge the sanctions issue with the merits" and that "[c]ommon sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions."[45] Another keen observer, Professor Charles Yablon, made the same point some years later:

> A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive.[46]

"Like a reader who already knows how the mystery turns out," Yablon analogized, "she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling. This hindsight can affect a judge's view of what constitutes 'reasonable inquiry.'"[47] By conflating how the case ultimately was resolved with what should have been a cabined assessment of what the party knew (or should have known) at the time of filing, the 1983 rule increased the risk that a civil rights or employment discrimination claimant would be sanctioned. Thankfully, this problem was ameliorated by the 1993 amendments and, specifically, the addition of the safe harbor provision in Rule 11(c).

2. Plaintiffs Were Targets of Sanctions Far More Often than Defendants and Were Sanctioned at Strikingly Higher Rates. The evidence also shows that under the 1983 version of Rule 11, plaintiffs were more often the target of sanctions motions than defendants. Far more troubling, the empirical evidence also shows that plaintiffs were sanctioned at strikingly higher rates. Notwithstanding possible legitimate explanations for the findings, the sheer magnitude of the disparity raises serious questions of fairness in terms of how the rule was applied that must be confronted.

A 1988 study found that plaintiffs were the target of sanctions motions in 536 of the 680 cases examined (or 78.8% of the total).[48] Of the reported Rule 11 cases, a violation was found 57.8% of the

time.[49] However, the 1988 study found that plaintiffs were ruled to be in violation of Rule 11 more frequently (46.9%) than defendants (10.9%).[50] The Third Circuit task force also found that under the 1983 version of the rule, plaintiffs overall were more likely to be sanctioned than defendants (finding a 3:1 ratio of sanctions imposed).[51] The starkest disparities were revealed by a later study conducted by the FJC in 1991 which looked at both reported and unreported cases in five different judicial districts.[52] Examining the cases in which sanctions were imposed, the FJC researchers found that plaintiffs were sanctioned at astonishingly higher rates than defendants. The table below from the 1991 FJC study[53] illustrates the disparities:

Table 20
Orders imposing Rule 11 sanctions: targeted "side" of litigation

	D. Ariz.	D. D.C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
Number of rulings imposing sanctions against:					
Plaintiff's side	35	17	34	33	34
Defendant's side	3	5	4	8	21
Other	6	0	4	0	1
Total	44	22	42	41	56
As percentage of all rulings imposing sanctions					
Plaintiff's side	80%	77%	81%	80%	61%
Defendant's side	7%	23%	9%	20%	38%
Other	14%	0%	9%	0%	2%

Whatever may be said about these findings, it is difficult to credibly defend a rule that produces such strikingly disparate results. Unavoidably, the findings raise serious fairness concerns about how the 1983 version was applied.

C. *The 1983 Version of Rule 11 Increased Costs and Delays by Encouraging Rambo-Like Litigation Tactics*

Yet another unfortunate result of the 1983 amendments is that they increased costs and delays by encouraging "[t]he Rambo-like use of Rule 11 by too many lawyers," as Professor Georgene Vairo explained.[54] Similarly, in their treatise, *The Law of Lawyering*, Geoffrey Hazard and William Hodes note that it was frequently said by critics of the 1983 rule that it "has been a major contributing factor in the rise of so-called 'Rambo tactics' and the breakdown of civility and professionalism."[55]

Representative of a view many shared at the time, one court in 1991 bemoaned the incentive the rule provided to litigators "to bring Rule 11 motions and engage in professional discourtesy, preventing prompt resolution of disputes, the trial court's primary function."[56] Another emphasized the distraction that the volume of satellite litigation over sanctions motions produced, commenting that "[t]he amendment of Rule 11 . . . has called forth a flood of . . . collateral disputes within lawsuits, unrelated to the ultimate merits of the cases themselves . . . ."[57] The sentiment was widely felt. The FJC's 1991 study found that more than half of the federal judges and lawyers surveyed thought that the 1983 version of Rule 11 made the problems of incivility among lawyers much worse.[58] The findings of the 1992 survey by the American Judicature Society showed that even higher percentages of lawyer respondents believed the 1983 version of the rule put great strain on relations among lawyers.[59]

In light of the rulemakers' professed desire in 1983 to improve the efficiency of civil litigation process, it is ironic that, by encouraging Rambo-litigation tactics by lawyers during this unfortunate decade, the 1983 version of Rule 11 had the effect of increasing costs and delays and impeding efficient merit-based resolution of cases.

D. *The 1983 Version of Rule 11 Was Not an Effective Means for Reducing Cost, Delay, and Abusive Litigation Activity*

Finally, and independently of the unintended consequences the rule's amendments produced, the empirical evidence also

shows that there is little reason to put faith in the assertion that the 1983 version of Rule 11 was effective in addressing the perceived cost, delay, and abuse problems that prompted reformers to act. A 1991 FJC study revealed that few judges polled thought the 1983 version of the rule was "very effective" in deterring groundless pleadings.[60] The FJC's 1995 study of Rule 11 similarly found that most federal judges and lawyers were opposed to returning Rule 11 to its 1983 version.[61] As will be seen below, a more recent study (in 2005) found even higher levels of consensus among judges that the 1983 version was not an effective means for reducing costs and delays and for addressing abusive litigation conduct.[62] Instead, judges and others in the profession report that separate procedural tools, including active judicial management of cases and expeditious rulings on motions to dismiss at the pleading stage or for summary judgment, are much more effective for dealing with the problems of cost, delay, and groundless litigation.[63]

III. THERE IS NO SUPPORT FOR THE ASSERTION THAT THE 1993 AMENDMENTS CAN BE BLAMED FOR ANY PROBLEMS THAT DO EXIST WITH FEDERAL CIVIL LITIGATION

We have seen the serious difficulties that attended the 1983 revision of Rule 11. In the next Part, I will show that LARA can also be opposed on the ground that sponsors fail to demonstrate that the 1993 amendments to Rule 11 can be blamed for any problems that do exist today with federal civil litigation.

In the years after the 1983 amendments of Rule 11 went into effect, criticism of it grew in volume and intensity.[64] By 1989, the Advisory Committee could not ignore the criticisms any longer. The Advisory Committee commissioned a second study by the FJC to evaluate the rule.[65] Then, in the summer of 1990, the

Committee announced a "Call for Comments" from the bench and bar, which produced more criticisms and suggestions than the Committee had ever received before in its half-century existence.[66] One of the primary criticisms lodged was that the 1983 version actually made the problem of costly litigation worse because of all of the satellite sanctions litigation unrelated to the merits of the underlying case.[67] A second, frequently voiced complaint was that the 1983 rule was applied nonuniformly and inconsistently by judges.[68] A third and fourth theme echoed over and over again was, respectively, that the rule disproportionately hurt civil rights plaintiffs and their counsel, and that the rule worsened civil relations among lawyers.[69]

In February 1991, the Committee held a public hearing in which testimony from judges, lawyers, and academics was taken.[70] The criticism had a powerful effect on the Committee, which promptly issued an interim report that concluded that "in light of the intensity of criticism—the process of possible revision should not be delayed."[71] The criticisms of the 1983 version of Rule 11, the Advisory Committee concluded, "have sufficient merit to justify considering specific proposals for change."[72] Accompanying its 1992 recommendation that the rule be amended again to remedy the prior revisions made, the Advisory Committee commented that among its many unfortunate effects, the 1983 version of Rule 11 "impacted plaintiffs more frequently and severely than defendants."[73] All too often, it resulted in the imposition of monetary sanctions, which had the effect of turning the rule into a *de facto* "cost-shifting" rule, a result that incentivized lawyers to abuse the sanctions rule. Occasionally, the rule proved problematic for those asserting novel legal theories or claims for which more factual discovery was necessary, and it disincentivized lawyers from backing away from positions they could no longer support. In addition, the rule sometimes caused conflicts between attorneys and clients and, more frequently, among lawyers.[74]

In light of their concerns, the rulemakers amended the rule in 1993 to ameliorate the documented effects of the prior version. What is most critical to point out here is that, in backing away from the 1983 version, the rulemakers did not regress to the pre-1983 rule, but instead sought "to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions."[75] Said more simply, the rulemakers improved upon the rule so that the rampant and abusive Rule 11 motion practices were curtailed while ensuring that the rule still could deter unwanted litigation practices.

One of the key changes in 1993 was to replace the mandate that sanctions must be imposed if a violation of the rule is found with a grant of discretion to federal judges to decide when to impose sanctions, and to what extent.[76] Additionally, if sanctions were to be imposed, the 1993 amendments emphasized that the purpose of sanctions is deterrence, not compensation.[77] This latter reform was significant because it was designed to discourage the incentive that the prior rule created to seek sanctions for monetary gain.

A further, key reform in 1993 was the addition of what is known as the "safe harbor" provision, which protects against the imposition of sanctions if the filing alleged to be sanctionable is withdrawn in a timely manner. The safe harbor does not protect against court-imposed sanctions or from the various other rules, statutes, and disciplinary authorities beyond Rule 11 that can be invoked to deter and punish counsel who act wrongfully in civil litigation.[78] Nevertheless, the addition of the safe harbor has been credited with successfully reducing the incidence of abusive Rule 11 sanctions practice, a salutary result felt especially by those claimants who were impacted most severely by the 1983 rule.[79] The addition of the safe harbor is also significant because it

fundamentally alters one key problem observed with the 1983 version of Rule 11—namely, that it had the effect of disincentivizing the withdrawal of sanctionable filings because, as the Advisory Committee put it, "parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11."[80]

Beyond these specific points, experience since 1993 has shown that the current rule works admirably well and has engendered little complaint. The evidence shows that the rate of filing of sanctions motions has dropped off considerably post-1993. While lawyers are still sanctioned for wrongful conduct under Rule 11, there is no longer a scourge of frivolous Rule 11 motions being filed.[81] At the same time, this drop in meritless Rule 11 motion practice has not been accompanied by an increase in groundless litigation practices. To this point in particular, evidence gathered by several researchers, including Danielle Kie Hart, demonstrates that after the current version of Rule 11 went into effect in 1993, there was an increased incidence of sanctions being imposed under other laws, including 28 U.S.C. § 1927 and pursuant to the court's inherent powers.[82] Meanwhile, Rule 11 has continued to be used as a means of regulating wrongful lawyer conduct that contravenes the rule. Consider, for instance, the data from one of the most active federal judicial districts. In the Southern District of New York, in the same time period that there were slightly fewer than two hundred § 1927 motions for sanctions, there were nearly twice as many Rule 11 motions sought.[83] This one example, which typifies the patterns found in other districts, underlines that both Rule 11 and other existing sanctioning and disciplinary laws are available for addressing wrongful lawyer conduct. Finally, as I discuss further in Part IV, we must also be mindful that beyond sanctions rules and laws, other—and far more effective—tools exist for dealing with cost and delay in litigation that are regularly employed by courts in managing their dockets.

Judges and lawyers overwhelmingly report that they oppose attempts to restore Rule 11 to its 1983 form. The FJC's 1995 study of Rule 11 showed that a majority of judges and lawyers are opposed to amending Rule 11 to bring back the 1983 version of the

rule.[84] Then a 2005 survey conducted by the FJC even more starkly illustrated the strong support within the profession that the current version of Rule 11 enjoys.[85] More than 80% of the 278 district judges surveyed shared the view that "Rule 11 is needed and it is just right as it now stands."[86] An even higher percentage (87%) preferred the existing rule to the 1983 version.[87] Equally strong support (86%) existed for the safe harbor provision in Rule 11(c), while more than 90% opposed changing the rule to make the imposition of sanctions mandatory for every Rule 11 violation.[88]

IV. LARA IS NOT NEEDED BECAUSE THERE ARE MANY AVAILABLE ALTERNATIVES FOR MANAGING CIVIL LITIGATION COSTS AND ABUSES

By focusing exclusively on Rule 11, LARA's sponsors overlook the fact that both the existing Rule 11, as well as many other provisions in the existing rules, serve the purpose of managing federal litigation and deterring, punishing, and otherwise addressing abusive litigation practices. Of course, problems with particular cases still exist and, unavoidably, will always exist. Rules, alone, cannot eliminate all difficulties. However, the fundamental point that LARA's sponsors miss is that existing rules can and are used effectively by courts every day to adequately monitor federal civil cases.

Since the focus of LARA is on sanctioning lawyers, we can start there. Existing Rule 11 requires that all factual contentions that are plead must contain "evidentiary support."[89] When a pleading is brought without evidentiary support, sanctions can be sought and imposed if the pleader does not withdraw the offending allegations.[90] Moreover, Rule 11 is not the only source of legal authority for regulating lawyer conduct. Rule 26(g), which was enacted in 1983 as part of the same package of amendments that stiffened Rule 11, imposes a steep certification obligation on lawyers with regard to discovery disclosures, requests, responses, and objections.[91] The provision was designed as a "deterrent to both

excessive discovery and evasion" and to require lawyers "to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[92] Although the 1983 version of Rule 11 was repealed, under Rule 26(g) sanctions are still mandatory for violations of this section.[93] In addition, after a motion to compel has been filed, sanctions for discovery abuse can be imposed under Rule 37.[94] More broadly still, lawyers are regulated through other law, including 28 U.S.C. § 1927, as well as under an array of other, even more specific provisions.[95] Of course, the court also possesses inherent power to impose sanctions when they are deemed appropriate.[96] In sum, there are a plethora of authorities by which lawyers are held accountable and may be sanctioned when their conduct warrants it, under existing law. These authorities, which LARA sponsors have failed to acknowledge, cannot be squared with the bald assertion that the existing Rule 11 is inadequate for regulating lawyer conduct in the federal courts.

But sanctions rules are far from the only means for managing litigation costs and abuses. The discovery rules themselves provide powerful means for controlling costs and abuses. For more than a decade, Rule 26 has required that parties make mandatory disclosures at various stages in the case.[97] These mandatory disclosures are expressly designed to reduce discovery costs and avoid unnecessary skirmishes over groundless objections to routine discovery.[98] Moreover, while the rules obviously contemplate liberal discovery, important restrictions exist on discovery rights. For instance, presumptive limits on the amount of discovery now exist, including limits on the number of written interrogatories and the number and length of oral depositions.[99]

Even more specifically, the rules authorize judges to protect parties from unnecessarily expensive and burdensome discovery. One way this goal is accomplished is by the foundational requirement in Rule 26(b)(2) that the discovery sought must be proportional with the burden imposed. Thus, when the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," the court has wide discretion to limit the discovery sought.[100] So too can it limit discovery when it is sought too late in the case.[101] Perhaps most importantly, Rule 26(b)(2)(C)(iii) provides that discovery can be limited when "the burden or expense of the proposed discovery outweighs its likely benefit."[102]

Another vital provision by which discovery is controlled is Rule 26(c), which allows for the entry of protective orders to protect against "annoyance, embarrassment, oppression, or undue burden or expense."[103] For instance, if documents are sought that cover a period of time longer than relevant to the claims in the case that has been brought, a protective order can be issued.[104] The rule also protects against production of information protected by, for example, trade secret protection. Courts effectively employ this rule to protect against discovery abuses.[105]

Even before the discovery phase, there are many procedural tools available for managing litigation and, where appropriate, dismissing cases even before the discovery stage is reached. If a pleading is filed that is too vague to understand, Rule 12(e) is available. If a pleader files a pleading that "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," this rule authorizes an order directing the party to plead a more definite statement of the claim.[106]

Separate from vagueness, Rule 12(b)(6) is another powerful procedural rule for obtaining dismissal before discovery. Indeed, it is nothing short of astonishing that in urging Rule 11's amendment, LARA's proponents do not mention that in the last few years the Supreme Court has increased the availability of dismissals before discovery under Rule 12(b)(6).[107] The decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* were justified by the Court—and, not coincidently, hailed by these same reformers—precisely because the motion to dismiss for failure to state a claim was seen as the appropriate rule for filtering out groundless cases before they reach the pleading stage.[108]

Beyond existing rules, the Judicial Conference continues to monitor the state of civil litigation practice through its Standing Committee and Advisory Committee.[109] The Judicial Conference remains closely engaged in the effort to ensure the federal courts are run efficiently and fairly. Consider, as one important example, the major Conference held last summer at Duke University that was organized by the Advisory Committee for the Civil Rules.[110] That Conference exemplifies the Advisory

Committee's serious focus on rulemaking and its commitment to solicit and receive input from the rich diversity of experience in the profession. Having heard concerns about costs, delays, and burdens of civil litigation in the federal courts, the Advisory Committee designed the Conference "as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation."[111] The result of these efforts was the production of a large body of empirical data, as well as much thoughtful commentary and discussions, by a diverse group of individuals and organizations.

One of the clearest messages the Committee took away from the Duke Conference was that participants (who represented a wide range of lawyers, business interests, judges, and academics) believed that better utilization of existing tools was vital for effective case management and weeding out of nonmeritorious litigation. The report of the Advisory Committee following the Conference makes this point:

> Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively.[112]

Of course, there was also measured support expressed for revising some of the existing rules (with the discussion primarily focused on the rules governing pleading and discovery practice), though even here most participants recognized that the existing procedural framework was fundamentally sound.[113] What may be most relevant, for present purposes, is that although the two-day Conference was attended by more than two hundred observers and invited guests (a group which included many members of the business community and defense bar), not a single one of the participants expressed any support—either in oral statements made at the Conference or in their written submissions—for strengthening Rule 11 along the lines contemplated by the proposed legislation.[114]

The lack of any serious discussion at the Conference about amending Rule 11 is not the least bit surprising. Although there are certainly strong divisions within the profession over civil litigation reform, the well-known experience with the prior rule has produced remarkable agreement across the political spectrum that the rule committee's decision in 1983 was an "ill-considered, precipitous step," as Professor George Cochran once succinctly described it.[115]