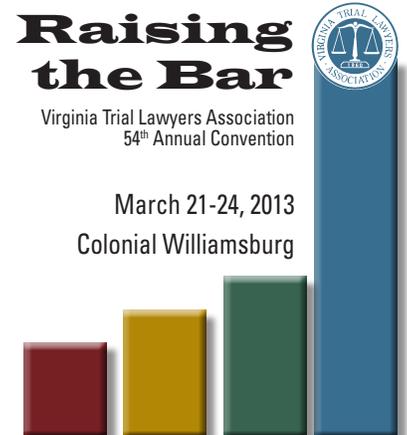


Pleading in the Age of *Twombly & Iqbal*

A. Benjamin Spencer
Professor of Law and Director
Frances Lewis Law Center
Washington & Lee University School of Law
204 West Washington Street
Sydney Lewis Hall
Lexington, VA 24450
(540) 458-8219
spencerb@wlu.edu



Federal Civil Pleading Standards Update

March 2013

Professor A. Benjamin Spencer, *Washington & Lee University School of Law*

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Federal Civil Pleading Standards Update—Outline

March 2013

Professor A. Benjamin Spencer, Washington & Lee University School of Law

A. Background on Pleading Doctrine Reform

- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)
 - The ability to access expensive discovery on the basis of thin pleading warrants a pleading standard that requires a showing that liability is *plausible*, not simply *possible*. However, that does not require a showing that liability is *probable*. *Twombly*, 550 U.S., at 556.
 - Plausibility means going beyond an equivocal complaint, equally consistent with liability and non-liability; 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.’” *Twombly*, 550 U.S., at 557.
 - The *Conley* rule, permitting a dismissal for failure to state a claim only if there were no set of facts that could be proven that would entitle the pleader to relief, was retired. *Twombly*, 550 U.S., at 563.
 - Detailed factual allegations are not required, but Rule 8(a) does call for sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S., at 555, 570.
 - A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S., at 556.
- *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
 - The rule of *Twombly* applies to all cases, not just to antitrust cases.
 - Although detailed facts are not necessary, *Twombly* demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Iqbal*, 556 U.S., at 678.
 - The tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory statements. Thus, a court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. *Iqbal*, 556 U.S., at 663, 664.
 - After identifying and disregarding conclusory allegations, a court must accept the remaining factual allegations as true and assess whether they pass the plausibility test. Determining whether a complaint states a plausible claim is

context-specific, requiring the reviewing court to draw on its experience and common sense. *Iqbal*, 556 U.S., at 679.

B. Pleading Doctrine Generally in the Fourth Circuit

- *Standard of Review, the Assumption of Truth, and Pro-Plaintiff Inferences.* Courts remain obligated to assume the truth of the facts alleged in a complaint. “We review de novo a district court’s Rule 12(b)(6) dismissal, focusing only on the legal sufficiency of the complaint, and accepting as true the well-pled facts in the complaint and viewing them in the light most favorable to the plaintiff.” *Cook v. Howard*, 2012 WL 3634451 (4th Cir. Aug. 24, 2012).
- *Factual specificity required.*
 - “[*Twombly* and *Iqbal*] require more specificity from complaints in federal civil cases than was heretofore the case.” *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 288 (4th Cir.2012).
 - “Pursuant to *Twombly* and *Iqbal*, a complaint will survive a motion to dismiss only if it contains factual allegations in addition to legal conclusions. Factual allegations that are simply labels and conclusions, and a formulaic recitation of the elements of a cause of action are not sufficient. . . . [C]ourts need not accept the legal conclusions drawn from the facts alleged in a complaint, and they need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *Cook v. Howard*, 2012 WL 3634451 (4th Cir. Aug. 24, 2012) (citations and internal quotation marks omitted).
- *Facts must move case beyond speculative level.*
 - “Facts that are merely consistent with liability do not establish a plausible claim to relief. In addition, although we must view the facts alleged in the light most favorable to the plaintiff, we will not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments.” *U.S. v. Takeda Pharmaceuticals*, No. 11-2077 (4th Cir. Jan. 11, 2013) (citations and internal quotation marks omitted).
 - “The complaint must contain enough facts to state a claim to relief that is plausible on its face. That is to say, the factual allegations must be enough to raise a right to relief above the speculative level. Instead, the allegations must be sufficient to permit the court to infer more than the mere possibility of misconduct based upon its judicial experience and common sense.” *Cook v. Howard*, 2012 WL 3634451 (4th Cir. Aug. 24, 2012) (citations and internal quotation marks omitted).
 - “This requires that the plaintiff do more than plead[] facts that are merely consistent with a defendant's liability; the facts pled must allow [] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Romeo v. APS Healthcare Bethesda, Inc.*, --- F. Supp. 2d ----, 2012 WL 1852264 (D. Md. 2012) (citations and internal quotation marks omitted).

C. Recent Supreme Court Case: *Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309 (March 22, 2011)

- *Issue:* whether a plaintiff can state a claim for securities fraud under § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5, 17 CFR § 240.10b-5 (2010), based on a pharmaceutical company's failure to disclose reports of adverse events associated with a product if the reports do not disclose a statistically significant number of adverse events.
- *Holding:*
 - Statistical significance is not the determiner of materiality; determining materiality is context-specific inquiry into what a reasonable investor might consider material information.
 - Allegations of medical reports showing a connection between the product and adverse events are sufficient to satisfy *Twombly*'s plausibility standard because consumers would likely view the risks (loss of the sense of smell) as not worth the benefit (alleviating cold symptoms) given the existence of alternative products in the market.
 - The defendant's cold remedy was 70% of its sales, making these reports a significant risk to the defendant's commercial viability, making the information likely something that would alter a reasonable investor's assessment of the company.
 - There were enough facts alleged tending to support the notion that the defendant was reckless with respect to its non-disclosure of the adverse medical reports to satisfy the PSLRA's heightened pleading standard.

D. Recent Fourth Circuit Cases

- *U.S. v. Takeda Pharmaceuticals*, No. 11-2077 (4th Cir. Jan. 11, 2013): the Fourth Circuit Court of Appeals affirmed the district court's decision to dismiss a qui tam action under the False Claims Act (FCA) against a pharmaceutical company involving allegations of off-label marketing. To adequately plead an FCA claim, a complaint must meet both *Iqbal*'s plausibility standard and FRCP Rule 9(b)'s particularity requirement, including plausible allegations of presentment itself. The court held that the relator could not meet this standard with general facts and tendencies requiring inferences—even a relatively small inference that a Medicare patient filled a prescription billed to Medicare.
- *Cook v. Howard*, 2012 WL 3634451 (4th Cir. Aug. 24, 2012): Allegations of death while in custody of defendants' subordinate officers alone are insufficient to plead supervisory liability.
- *Walters v. McMahan*, 684 F.3d 435 (4th Cir. July 05, 2012): Allegations that "since 2006, [the hiring clerk defendants] have personally hired hundreds of workers (and more than 10 per year, each) with actual knowledge that the workers . . . had been brought into the country with the assistance of others on their illicit journey across the U.S.-Mexico border. . . ." is insufficient to satisfy the

Twombly/Iqbal standard because it provides no factual basis for the claims that it makes. It is merely a formulaic recitation of the elements of the offense. Although this may have been sufficient under *Conley*, after *Twombly* it fails.

- *Mayfield v. National Assn for Stock Car Auto Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012): Applying the *Iqbal* standard to this case, we find that the Appellants have not stated a claim. To begin with, Appellants' assertion that Appellees' statements "were known by [them] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity" is entirely insufficient. This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegations that *Twombly* and *Iqbal* rejected.
- *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010): Here, although Coleman's complaint conclusorily alleges that Coleman was terminated based on his race, it does not assert facts establishing the plausibility of that allegation. The complaint alleges that Jones and Broccolina began their campaign against Coleman in retaliation for his investigation of Jones's conflict with Shue. The complaint further alleges that Coleman "was treated differently as a result of his race than whites" and specifically identifies Broccolina as a white person who was not disciplined despite having "outside business involvements." However, the complaint fails to establish a plausible basis for believing Broccolina and Coleman were actually similarly situated or that race was the true basis for Coleman's termination. The complaint does not even allege that Broccolina's "outside business involvements" were improper, let alone that any impropriety was comparable to the acts Coleman was alleged to have committed. Absent such support, the complaint's allegations of race discrimination do not rise above speculation.

E. Interesting Western District of Virginia Case: *Branham v. Dolgencorp, Inc.*, Civ. No. 6:09-CV-00037 W.D. Va. 2009). Complaint pleading slip-and-fall in a retail store dismissed for insufficiency (see written materials).

F. Special Issue: *Twombly/Iqbal* and Affirmative Defenses

- Most of the district courts in the Fourth Circuit have held that the pleading requirements of *Twombly* and *Iqbal* apply to affirmative defenses. These courts have generally relied on "considerations of fairness, common sense and litigation efficiency underlying *Twombly* and *Iqbal*." *Top-line Solutions Inc. v. Sandler Systems Inc.*, 2010 WL 2998836, at *1 (D. Md. July 27, 2010).
- However, courts have reached mixed conclusions on whether the new pleading standard applies to affirmative defenses. *Lopez v. Asmar's Mediterranean Food Inc.*, 2011 WL 98573, at *2 (E.D. Va. Jan. 20, 2011).
- Although the better arguments suggest that *Twombly* and *Iqbal* should not apply to affirmative defenses, the safer practice would be to plead them in compliance.

• Making the Most of Twombly/Iqbal in Product Liability Cases

PRODUCT LIABILITY

New pleading standards, articulated by the U.S. Supreme Court in *Twombly* and *Iqbal*, remain an oft-used, potentially potent weapon in the courtroom, attorneys Anand Agneshwar and Paige Sharpe say. The authors offer practical advice on when litigators should file a “*Twiqbal*” motion in product liability cases, as well as best practices for drafting the motion.



By Anand Agneshwar and Paige Sharpe

Anand Agneshwar, a partner in Arnold & Porter LLP's New York office, co-chairs the firm's Product Liability Litigation Practice Group. He can be reached at Anand.Agneshwar@aporter.com.

Paige Sharpe, a litigation associate in Arnold & Porter's Washington, D.C., office, focuses her practice on complex commercial litigation, including product liability cases. She can be reached at Paige.Sharpe@aporter.com.

Five years have elapsed since the U.S. Supreme Court articulated a new iteration of the pleading standard under Federal Rule of Civil Procedure 8(a) in *Bell Atlantic Corp. v. Twombly*,¹ and three years have passed since the Court clarified the scope and application of *Twombly* in *Ashcroft v. Iqbal*.² Those cases generated immediate buzz among academics, practitioners, and legislators. While the torrent of commentary appears to be slowing in the academic and legislative spheres,³ *Twombly* and *Iqbal* remain an oft-used, potentially potent weapon in the courtroom. In the products realm in particular, defense attorneys repeatedly have employed *Twiqbal* motions to win dismissals of complaints or to force plaintiffs to say in their complaints—and not after discovery—precisely what they seek to prove. This article discusses the analysis in which counsel should engage in deciding whether to file a *Twiqbal* motion as well as best practices for drafting the motion.

¹550 U.S. 544, 75 U.S.L.W. 4337, 2007 BL 3900 (2007).

²556 U.S. 662, 77 U.S.L.W. 4387, 2009 BL 107113 (2009).

³ For example, a recent Westlaw search shows that in 2010, the year after *Iqbal* was handed down, law reviews and journals published some 91 articles with “*Iqbal*” in the title. That number dropped to 35 or so in 2011, and just eight such articles have been published in the first four months of 2012. On the legislative front, Senator Arlen Specter's effort to overturn *Iqbal* through congressional action died after introduction, as did a similar proposal by Rep. Jerrold Nadler. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bills/111/s1504>; Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bills/111/hr4115>.

The *Twiqbal* Two-Step

First, a refresher. Under Rule 8(a), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁴ For more than 50 years before *Twombly*, the oft-quoted language of *Conley v. Gibson* provided the standard for evaluating a motion to dismiss: “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.”⁵ *Twombly* retired the “no set of facts” language of *Conley*, and in its place issued a plausibility standard under which plaintiffs must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”⁶ In order to “nudge[] their claims across the line from conceivable to plausible,” plaintiffs must provide a complaint with “enough heft to show that the pleader is entitled to relief.”⁷ As justification for its holding, the court cited the need “to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence.”⁸

Fed. R. Civ. P. 8(a).

⁵*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

⁶Twombly, 550 U.S. at 555.

⁷*Id.* at 557, 570 (internal quotation and alteration omitted).

⁸*Id.* at 559 (internal quotation and alteration omitted).

Twombly involved antitrust claims, raising questions about whether its pleading directives applied in all civil cases in federal court.⁹ The court answered in the affirmative in *Iqbal*,¹⁰ and further reiterated that “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”¹¹ As a result, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”¹² Based on these principles, *Iqbal* set forth a two-step process for assessing the sufficiency of a complaint. The analysis begins “by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”¹³ After weeding out conclusory assertions, a court should consider whether the remaining “well-pleaded factual allegations . . . plausibly give rise to an entitlement to relief.”¹⁴

⁹ The circuit courts split in their response. The U.S. Court of Appeals for the Sixth Circuit, for example, applied *Twombly* to all civil claims. See *e Total Benefits Planning Agency Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 434 n.2, 2008 BL 281228 (6th Cir. 2008) (“This Court has cited the heightened pleading standard of *Twombly* in a wide variety of cases, not simply limiting its applicability to antitrust actions.”). The majority of circuits, however, adopted a “flexible” standard or “sliding scale,” whereby more facts were needed to support complex causes of action such as RICO and antitrust claims. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), overruled by *Iqbal*, 556 U.S. 662.

¹⁰See *Iqbal*, 556 U.S. at 684 (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions.’” (citing Fed. R. Civ. P. 1)).

¹¹*Id.* at 678.

¹²*Id.* (citing *Twombly*, 550 U.S. at 555).

¹³*Id.* at 679.

¹⁴*Id.*

Twombly Motions in Products Cases

The sheer number of cases applying *Twombly* and *Iqbal* makes it a challenge to keep abreast of developments in the case law,¹⁵ even in a discrete practice area such as product liability litigation. Empirical analyses chiefly have looked at the impact of *Twombly* and *Iqbal* across federal civil litigation as a whole,¹⁶ and their conflicting methodologies and interpretive frameworks have generated mixed reviews of trends in the case law.¹⁷ A 2011 law review article, for example, which focused on pharmaceutical and medical device litigation, concluded that “*Iqbal* is not having a dramatic impact on this cohort, although its impact cannot be conclusively dismissed as inconsequential either.”¹⁸ The author found that the deciding court relied on *Iqbal* in granting a dismissal in about 21 percent of the 264 cases studied,¹⁹ but noted a pattern of reducing incidence, no obviously explainable geographic concentrations, and a frequent grant of amendment opportunities.²⁰

¹⁵ As of May 1, 2012, Westlaw reported 60,817 cases citing *Twombly* and 38,804 cases citing *Iqbal*.

¹⁶See, e.g., Joe S. Cecil et al., Fed. Judicial Ctr., *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules* (2011); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. Rich. L. Rev. 603 (2012); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 Am. U. L. Rev. 553 (2010); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 *Notre Dame L. Rev.* 1811 (2008).

¹⁷ For example, Professor Hatamyar Moore finds a statistically significant increase in the chances of a Rule 12(b)(6) motion being granted under *Iqbal* versus *Conley*, while a report to the Judicial Conference Advisory Committee on Civil Rules finds such an increase only in cases involving financial instruments. Compare Hatamayer Moore, *supra* note 16, at 604, with Cecil, *supra* note 16, at 5.

¹⁸ William M. Janssen, *Iqbal “Plausibility” in Pharmaceutical and Medical Device Litigation*, 71 *La. L. Rev.* 541, 645 (2011).

¹⁹*Id.*

²⁰*Id.* at 643.

Such empirical analyses cannot account for more subtle impacts that *Twombly* and *Iqbal* may be having in the products field. For example,

plaintiff's counsel presumably are aware of the new pleading standard and may be drafting complaints designed to withstand Twiqbal motions. Whether or not the success rate has changed, defense counsel may be filing more motions to dismiss than in the past and challenging complaints that would easily have met the prior "no set of facts" standard, resulting in more net wins as a whole. It is, moreover, not uncommon for a defendant to agree to withdraw such a motion and give the plaintiff an opportunity to amend; such circumstances may not be captured by studies that examine the outcome of motions to dismiss.

There are suggestions, however, that products litigators are successfully capitalizing on the Twiqbal standard. The Drug & Device Law blog reviewed 354 Twiqbal motions in August 2009 and concluded both that "there's precedent out there for dismissing virtually any product liability-related claim under Iqbal/Twombly—provided the complaint is vague enough," and that "the pace and scope of Iqbal/Twombly dismissals in product liability cases is increasing."²¹ The blog keeps a "Twiqbal cheat sheet" with a running tab of outcomes covering a range of claims, from negligence to warranty to strict products liability, and listed more than 90 wins as of the end of April 2012.²²

²¹ James M. Beck & Mark Herrmann, Twombly/Iqbal And Product Liability: How Much Progress Is There?, Drug & Device L. Blog (Aug. 9, 2009, 4:50 PM), <http://druganddevicelaw.blogspot.com/2009/08/twomblyiqbal-and-product-liability-how.html>.

²² James M. Beck, Twiqbal Cheat Sheet, Drug & Device L. Blog (May 13, 2010, 3:27 PM), <http://druganddevicelaw.blogspot.com/2010/05/twiqbal-cheat-sheet.html>.

To File or Not to File

Evaluate the Judge

Although it may be difficult to spot clear trends in the litigation, any given federal judge—unless new to the bench—almost certainly has applied Twiqbal more than a handful of times. The first step in evaluating a complaint is thus assessing your assigned judge's inclinations. Whether your judge has ruled on a Twiqbal motion in another products case in particular is, of course, valuable information in deciding whether to file such a motion.

Beyond simply running a search for citations to Twombly and Iqbal by your judge, you may have other resources at your disposal to determine whether the judge would likely grant your motion. To the extent one of your goals may be to educate the judge about the underlying facts, see discussion *infra*, it would be useful to know whether the judge is likely to embrace the opportunity to learn about the case or to disregard background information. Even if your judge has not ruled on a Twiqbal motion in the products arena, other district judges in the jurisdiction—or even the appellate court—may have issued such rulings.²³

²³ The Fifth, Sixth, and Eleventh Circuits have upheld dismissals of products claims in drug or medical device cases. See *Funk v. Stryker Corp.*, 631 F.3d 777,782, 2011 BL 23881 (5th Cir. 2011) (affirming dismissal of a manufacturing defect claim when the complaint failed to plead how the manufacturing process failed, how it deviated from FDA specifications, and the causal connection between the violation and the plaintiff); *Patterson v. Novartis Pharmaceuticals Corp.*, 451 Fed. Appx. 495,497-98, 2011 BL 217163 (6th Cir. 2011) (affirming dismissal of products claims because the plaintiff did not sufficiently identify the drug taken); *Bailey v. Janssen Pharmaceutica Inc.*, 288 Fed. Appx. 597,609, 2008 BL 158093 (11th Cir. 2008) (affirming dismissal of a failure to warn claim because the complaint nowhere recited the contents of the warning label or the information available to the plaintiff's physician). But see *id.* (finding that the plaintiff had adequately alleged a design or manufacturing defect claim and reversed the district court on that point). An appeal in a pharmaceutical products case, dismissed with prejudice by the D.C. district court, has been fully briefed and is pending before the D.C. Circuit Court of Appeals. See *Rollins v. Wackenhut Services*, 802 F. Supp. 2d 111, 2011 BL 206695 (D.D.C. 2011), appeal docketed, No. 11-7094 (D.C. Cir. Sept. 9, 2011).

Evaluate the Complaint

In order to assess the strength of a potential Twiqbal motion—and as a pre-drafting exercise—you should assess the strength of the individual claims of the complaint. Pre-Iqbal case law typically provides that a complaint must adequately allege the individual elements of the claim on which the plaintiff's theory of liability is based.²⁴ After Iqbal, a court must conduct a close comparison between the essential elements of proof and the factual allegations in a complaint to determine whether the plaintiff has adequately stated a claim. Dismissals of products cases under the Twiqbal regime typically are based on the plaintiff's failure to allege facts to support an essential element of a claim, such as how a product is defectively designed (design defect claim) or what about the product labeling is insufficient (failure to warn claim).²⁵ A complaint that is missing essential elements of a claim—or that contains only conclusory allegations regarding those elements—is vulnerable to attack.

²⁴ See, e.g., *Gagliardi v. Sullivan*, 513 F.3d 301,305, 2008 BL 11432 (1st Cir. 2008) (a complaint must "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery") (internal quotation omitted); *Johnson v. Riverside Healthcare System*, 534 F.3d 1116,1122, 2008 BL 157871 (9th Cir. 2008) ("At the motion to dismiss stage . . . [a] complaint must allege sufficient facts to state the elements of [the relevant] claim."); *Rios v. City of Del Rio*, 444 F.3d 417,420-21 (5th Cir. 2006) (a complaint must contain sufficient allegations on "every material point necessary to sustain a recovery"); *Stern v. General Electric Co.*, 924 F.2d 472,476 (2d Cir. 1991) ("[A] motion to dismiss must be granted if the pleadings fail adequately to allege the elements of the claim on which the plaintiff's theory of liability is based.")

²⁵ See, e.g., *Rollins v. Wackenhut Services*, 802 F. Supp. 2d 111, [2011 BL 206695 (D.D.C. 2011) (finding that the plaintiff failed to state a claim for manufacturing defect, design defect, or failure to warn under Restatement (Second) of Torts § 402A); *Frey v. Novartis Pharmaceuticals Corp.*, 642 F. Supp. 2d 787,795, 2009 BL 157197 (S.D. Ohio 2009) (dismissing a design defect claim because plaintiffs "simply provided a formulaic recitation of the elements of a claim under the statute"); *Mills v. Bristol-Myers Squibb Co. (Mills I)*, No. CV 11-

968-PHX-FJM, 2011 BL 209710, at *3-4 (D. Ariz. Aug. 12, 2011) (dismissing claims ranging from strict products liability and misrepresentation to breach of express and implied warranties because the complaint was “completely devoid of any facts linking the behavior of defendants to plaintiff”); *Lewis v. Abbott Labs*, No. 08 Civ. 7480, slip op. at 1-3 (S.D.N.Y. July 24, 2009) (dismissing products liability claims due to the plaintiff’s failure to allege facts to support essential elements).

This assessment requires casting a critical eye on the complaint. Disregard its length: A 100-paragraph pleading replete with boilerplate language is as subject to a Twiqli motion as a skimpy 10-paragraph complaint.²⁶ Resist relying on your familiarity with the facts behind an allegation. For example, a generic citation to promotional materials in a failure to warn case should be insufficient if the plaintiff never identifies specific advertisements and how they are relevant to his or her claims, e.g., because he or she viewed them and relied on them in using the product. A blanket statement that the risk of the product outweighs its benefits is a conclusory allegation that does not advance a design defect claim.

²⁶ The complaint in *Mills v. Bristol-Myers Squibb Co.*, for example, comprised 123 paragraphs and 29 pages. Plaintiff’s First Am. Compl., *Mills v. Bristol-Myers Squibb Co.*, No. 2:11-cv-00968 (D. Ariz. Jan. 1, 2011). The court nonetheless dismissed because the plaintiff’s allegations were conclusory and lacked factual content. *Mills I*, 2011 BL 209710, at *3. After the plaintiff filed a proposed amended complaint that failed to correct the deficiencies, the court dismissed the case with prejudice. *Mills v. Bristol Myers Squibb Co. (Mills II)*, No. CV 11-00968-PHX-FJM, 2011 BL 260049, at *4 (D. Ariz. Oct. 7, 2011).

On the other hand, if the motion does not seem strong in light of a well-crafted complaint, opening the case with a losing pleading motion is not helpful, so choose your battles carefully.

Evaluate Your Goals

A Twiqli motion can have ancillary benefits beyond the grant or denial of the motion, and these should go into the analysis of whether to file. First, a plaintiff may offer to amend if the motion is withdrawn or the court may grant leave to amend rather than dismiss with prejudice. In either circumstance, the net result is a complaint with facts on the table. Second, a motion might limit a case by resulting in partial dismissal; for example, design defect claims may be dismissed because the plaintiff has not cited a feasible alternative design, but failure to warn claims may proceed because the plaintiff has specifically alleged a purported deficiency in the product labeling. Third, the motion can allow you to preview coming arguments and develop themes, thereby educating the judge on the substance of the case and creating opportunities to emphasize your position. Note that this opportunity also puts a premium on early preparation; counsel must get up to speed quickly on the underlying facts, the applicable law, and the defense theory of the case.

A Twiqli motion conversely can have unintended negative effects, which you should also consider. Just as the motion can educate the judge, it can tip your hand to the plaintiff, giving him or her an early opportunity to begin developing an opposing strategy to your specific arguments. The motion also may provide the plaintiff with a roadmap for how to amend the complaint in a way that makes it more substantive and focused, resulting in a pleading that is more difficult to defeat. Moreover, an adverse decision risks unfavorable law of the case that could weaken a later summary judgment motion. Finally, you should limit the motion to matters contained in the complaint, with perhaps some citation to matters of public record,²⁷ or you risk having it converted prematurely into a motion for summary judgment.

²⁷ Federal courts may consider publicly available information in ruling on a motion to dismiss. See, e.g., *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (“A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment.”) (internal quotation omitted); *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991) (“A district court may take into consideration documents incorporated by reference to the pleadings” and “may also take judicial notice of matters of public record.”); *Horne v. Novartis Pharmaceuticals Corp.*, 541 F. Supp. 2d 768, 776-77, 2008 BL 60683 (W.D.N.C. 2008) (pharmaceutical package insert considered on a motion to dismiss a failure to warn claim).

The Motion

Once you have decided to draft the motion, but before putting pen to paper, check and double-check the local rules and the judge’s standing orders. Such guides not only provide technical requirements such as page limits and margin settings, but also may impose rules on how motions to dismiss are filed.²⁸ Judges may require that the moving party first meet and confer with opposing counsel, or may obligate the moving party to seek permission of the court to file the motion. Local rules and standing orders thus may inform decisions about when to file and whether, for example, to allow the plaintiff a shot at amendment in advance of the motion.

²⁸ See, e.g., Individual Practices of U.S. District Judge Victor Marrero, S.D.N.Y. (Sept. 1, 2010), available at <http://www.nysd.uscourts.gov/judge/Marrero> (requiring a pre-motion conference and a letter from the defendant to the plaintiff setting forth the pleading deficiencies and providing that the plaintiff may seek leave to amend).

The background section of the motion provides an ideal opportunity to educate the judge about the product involved and associated qualities, such as the breadth of its use and the adequacy of its warnings. You may consider attaching the product label to the motion or citing, in a prescription drug case, to the drug approval history by FDA.²⁹ If other courts have considered and dismissed similar claims, especially claims involving your product, those cases deserve a citation here.

²⁹ FDA has a dedicated website that provides drug labels and approval histories. See <http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm>.

In regard to the legal standard and argument, Iqbal itself provides the two-step roadmap for a Twiqbal motion. Explain which allegations the judge should disregard as conclusory, and how the remaining factual allegation fails to address essential elements of the plaintiff's claim.

You may want to preview the plaintiff's likely arguments in order to draw the sting, or you may prefer to see whether the plaintiff in fact raises such points and then address them, if need be, in the reply. Consider whether to seek dismissal with prejudice in your opening brief or, upon the plaintiff's failure to address the complaint's defects in the opposition, make the case for dismissal with prejudice in the reply.

Finally, you should strategically order multiple arguments, especially to the extent that you are seeking dismissal of multiple claims. Does it make sense to attack the claims in the order in which they are presented in the complaint, or do you lead with your strongest position? Do you leave your weakest argument for last, or do you bury it in the middle? Can you group claims because they all are subject to the same attack? For example, in a state that abrogates common law products liability claims,³⁰ you may want to address any and all non-statutory claims by simply stating that they are not viable. Also consider whether and when to raise arguments in the alternative, e.g., your motion may address both the plaintiff's standing to bring a claim and his or her failure to plead the claim adequately. You will need to decide which to argue first and whether your points may dovetail.

³⁰ For example, the Louisiana Products Liability Act (the "LPLA") "expressly provides 'the exclusive theories of liability for manufacturers for damage caused by their products.' . . . Thus, Louisiana law eschews all theories of recovery in this case except those explicitly set forth in the LPLA." *Jefferson v. Lead Industry Association Inc.*, 106 F.3d 1245, 1248 (5th Cir. 1997) (quoting La. R.S. 9:2800.52).

The Reply

A few words regarding the reply. Given the rapid pace of Twiqbal decisions, case law developments may well have occurred since the time that you filed your opening brief. It is especially important in the Twiqbal context, therefore, that you recheck the cases you cited in the opening and run a search for any new opinions.

Your strategic considerations should focus on which opposition points to rebut and which of your arguments the opposition concedes or does not address. If the opposition fails to explain how the plaintiff would cure any defects, consider arguing futility as the basis for dismissal with prejudice.³¹ If the opposition requests leave to amend, check the local rules to see whether the plaintiff complied with any applicable requirements and whether case law allows dismissal with prejudice for non-compliance.³²

³¹ See, e.g., *Rollins*, 802 F. Supp. 2d at 125 n.10 (denying leave to amend as futile when the plaintiff failed to file a motion for leave to amend and thereby failed to indicate that she would be able to plead sufficient facts to state a claim for relief).

³² See, e.g., *Baker v. Library of Congress*, 260 F. Supp. 2d 59, 68 (D.D.C. 2003) (denying leave to amend when the motion was unaccompanied by a proposed amended complaint as required under Local Civil Rule 15.1).

If the opposition suggests that the plaintiff needs discovery in order to allege claims adequately, return to Twombly and Iqbal: They require adequate pleading before exposing a defendant to the burden and expense of discovery.³³

³³ See *Twombly*, 550 U.S. at 557-60 (discussing at length the importance of weeding out deficient complaints prior to discovery); *Iqbal*, 556 U.S. at 678-79 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

PUBLISHED

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

UNITED STATES ex rel. NOAH
NATHAN, On Behalf Of The United
States Government and the States,

Plaintiff-Appellant,

v.

TAKEDA PHARMACEUTICALS NORTH
AMERICA, INCORPORATED; TAKEDA
PHARMACEUTICALS AMERICA,
INCORPORATED,

Defendants-Appellees.

No. 11-2077

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Anthony J. Trenga, District Judge.
(1:09-cv-01086-AJT-JFA)

Argued: October 25, 2012

Decided: January 11, 2013

Before MOTZ and KEENAN, Circuit Judges, and
James K. BREDAR, United States District Judge
for the District of Maryland,
sitting by designation.

Affirmed by published opinion. Judge Keenan wrote the opinion,
in which Judge Motz and Judge Bredar joined.

COUNSEL

ARGUED: Jeffrey A. Lamken, MOLOLAMKEN, LLP, Washington, D.C., for Appellant. William F. Cavanaugh, Jr., PATTERSON, BELKNAP, WEBB & TYLER, New York, New York, for Appellees. **ON BRIEF:** Michael G. Pattillo, Jr., Martin V. Totaro, MOLOLAMKEN, LLP, Washington, D.C., for Appellant. Susan R. Podolsky, THE LAW OFFICES OF SUSAN R. PODOLSKY, Alexandria, Virginia; Daniel S. Ruzumna, Sean H. Murray, Aileen M. McGill, PATTERSON, BELKNAP, WEBB & TYLER, New York, New York, for Appellees.

OPINION

BARBARA MILANO KEENAN, Circuit Judge:

Noah Nathan (Relator), a sales manager for Takeda Pharmaceuticals (Takeda), brought this *qui tam* action against his employer under the False Claims Act (the Act), 31 U.S.C. §§ 3729 through 3733. Relator alleges that Takeda violated § 3729(a)(1)(A) of the Act by causing false claims to be presented to the government for payment under Medicare and other federal health insurance programs.¹ After allowing Relator to file a third amended complaint (the amended complaint), the district court dismissed Relator's claims under Federal Rule of Civil Procedure 12(b)(6). In this appeal, Relator argues that the district court erred in concluding that Relator did not plausibly allege in the amended complaint that false claims had been presented to the government for payment, or that Takeda caused the presentment of any such false claims. Relator also contends that the district court abused its discretion in denying Relator's request for leave to file a fourth amended complaint.

¹Relator does not appeal the district court's dismissal of Relator's separate claim brought under 31 U.S.C. § 3729(a)(1)(B).

Upon our review, we hold that the district court did not err in dismissing the amended complaint, because Relator failed to plausibly allege that any false claims had been presented to the government for payment. We further hold that the district court did not abuse its discretion in denying Relator leave to file a fourth amended complaint.

I.

Among other things, the Act prohibits any person from knowingly "caus[ing] to be presented" to the government false claims for payment or approval. 31 U.S.C. § 3729(a)(1)(A). A false statement is actionable under the Act only if it constitutes a "false or fraudulent *claim*." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (emphasis added). Importantly, to trigger liability under the Act, a claim actually must have been submitted to the federal government for reimbursement, resulting in "a call upon the government fisc." *Id.*; see also *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1325-26 (11th Cir. 2009).

Relator alleges in the amended complaint that prescriptions written for certain medical uses, which have not been approved by the Food and Drug Administration (the FDA) or included in statutorily specified compendia, are not reimbursable under federal health insurance programs. Such uses commonly are referred to as "off-label" uses. Relator further alleges that because the cost of prescriptions for off-label uses is not subject to reimbursement by the federal government, the presentation of these types of claims for payment constitutes a violation of the Act.²

²Nevertheless, physicians are permitted to prescribe drugs for off-label uses. See 21 U.S.C. § 396. However, under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, pharmaceutical companies are not permitted to promote their drugs for uses not approved by the FDA. See *Wash. Legal Found. v. Henney*, 202 F.3d 331, 332-33 (D.C. Cir. 2000).

In the amended complaint, Relator additionally alleges that Takeda marketed its prescription drug Kapidex, a proton pump inhibitor used to treat various gastric conditions, for off-label uses.³ Relator alleges that two of Takeda's marketing practices caused presentation of false claims to the government. The identified marketing practices were: (1) Takeda's promotion of Kapidex to rheumatologists, who typically do not treat patients having conditions for which Kapidex has been approved; and (2) Takeda's practice of marketing high doses of Kapidex for the treatment of conditions for which only a lower dose has been approved by the FDA.

In particular, Relator alleges that 60 mg doses of Kapidex have been approved by the FDA only for the treatment of the active condition of erosive esophagitis (EE). However, Kapidex has been approved by the FDA at a lower 30 mg dose to treat the more common condition of gastroesophageal reflux disease (GERD), as well as for the maintenance of already "healed" cases of EE. Relator alleges that Takeda has provided doctors with samples of Kapidex exclusively in 60 mg doses, irrespective whether such physicians treat active cases of EE. As Relator further alleges, by this sampling practice, Takeda improperly implies that a 60 mg dose of Kapidex is the only available dosage of that drug, thereby causing doctors to prescribe 60 mg doses for unapproved conditions.⁴ Relator also alleges that Takeda sales representatives regularly misled physicians by deflecting or dismissing their questions about proper dosages, and by making misrepresentations concerning the available dosages.

Additionally, Relator alleges that the motivation for Take-

³Relator alleges that Kapidex has been renamed Dexilant. Because the amended complaint refers to the drug at issue exclusively as Kapidex, we do the same here.

⁴Relator alleges that although Takeda sought government approval for higher dosages of Kapidex, including a 60 mg dose to treat GERD, the Food and Drug Administration rejected this request.

da's alleged fraudulent marketing stems from Takeda's desire to replicate the success of its previously approved drug, Prevacid, the patent for which was set to expire in 2009. Prevacid has been approved to treat 13 conditions, including GERD. Prevacid also has been approved to provide gastric protection and to treat gastric ulcers, indications relevant to rheumatology patients who regularly take anti-inflammatory pain medications. In contrast, Kapidex is not approved for these two conditions. Relator alleges that because the patent expiration date for Prevacid was approaching, Takeda promoted Kapidex to "fill the Prevacid void."

The district court dismissed the amended complaint on two independent grounds: (1) the amended complaint failed to allege the "presentment" of a false or fraudulent claim to the government for payment or approval under 31 U.S.C. § 3729(a)(1)(A); and (2) the amended complaint failed to allege adequately that Takeda "caused" the issuance of off-label prescriptions.⁵ The district court also denied Relator's request to amend his complaint for a fourth time. Because we conclude that the district court properly dismissed the amended complaint based on Relator's failure to allege presentment of a false claim, we do not reach the additional question whether Relator alleged sufficient facts to support the required causation element for a claim asserted under the Act. We further hold that the district court did not abuse its discretion in denying Relator's motion for leave to file a fourth amended complaint.

II.

We review de novo the district court's dismissal of a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Harrison*, 176 F.3d at 783. To survive a Rule

⁵Because Relator does not appeal the district court's decision declining to exercise supplemental jurisdiction over Relator's state law claims, we do not address those claims here.

12(b)(6) motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Facts that are "merely consistent with" liability do not establish a plausible claim to relief. *Id.* (citation omitted). In addition, although we must view the facts alleged in the light most favorable to the plaintiff, we will not accept "legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (citation and internal quotation marks omitted).

Before addressing the substantive allegations in the amended complaint, we first state the pleading requirements for fraud-based claims brought under the Act. In addition to meeting the plausibility standard of *Iqbal*, fraud claims under the Act must be pleaded with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. *Harrison*, 176 F.3d at 783-85. Rule 9(b) provides:

In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

To satisfy Rule 9(b), a plaintiff asserting a claim under the Act "must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (citation and internal quotation marks omitted).

The parties dispute the proper application of Rule 9(b) in this case. In Relator's view, to meet the requirements for pleading a fraud claim under the Act, a relator need only allege the existence of a fraudulent scheme that supports the inference that false claims were presented to the government

for payment. In contrast, Takeda argues that Rule 9(b) requires that a relator plead facts plausibly alleging that particular, identifiable false claims actually were presented to the government for payment.

In view of the rationale underlying Rule 9(b), we decline to adopt Relator's argument for a more lenient application of the Rule. We have adhered firmly to the strictures of Rule 9(b) in applying its terms to cases brought under the Act. *See, e.g., Wilson*, 525 F.3d at 379-80 (explaining the requirements of Rule 9(b) and affirming dismissal for failing to comply); *Harrison*, 176 F.3d at 784, 789-90 (same). The multiple purposes of Rule 9(b), namely, of providing notice to a defendant of its alleged misconduct, of preventing frivolous suits, of "eliminat[ing] fraud actions in which all the facts are learned after discovery," and of "protect[ing] defendants from harm to their goodwill and reputation," *Harrison*, 176 F.3d at 784 (citation omitted), are as applicable in cases brought under the Act as they are in other fraud cases. Indeed, such purposes may apply with particular force in the context of the Act, given the potential consequences flowing from allegations of fraud by companies who transact business with the government. Moreover, we have emphasized that a claim brought under the Act that "rest[s] primarily on facts learned through the costly process of discovery . . . is precisely what Rule 9(b) seeks to prevent." *Wilson*, 525 F.3d at 380; *see also Harrison*, 176 F.3d at 789. For these reasons, nothing in the Act or in our customary application of Rule 9(b) suggests that a more relaxed pleading standard is appropriate in this case.

Neither are we persuaded by Relator's contention that allegations of a fraudulent scheme, in the absence of an assertion that a specific false claim was presented to the government for payment, is a sufficient basis on which to plead a claim under the Act in compliance with Rule 9(b). As the Supreme Court has cautioned, the Act "was not designed to punish every type of fraud committed upon the government." *Harrison*, 176 F.3d at 785 (citing *United States v. McNinch*, 356 U.S. 595,

599 (1958)). Instead, the critical question is whether the defendant caused a false claim to be presented to the government, because liability under the Act attaches only to a claim actually presented to the government for payment, not to the underlying fraudulent scheme. *Id.* (citing *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)). Therefore, when a relator fails to plead plausible allegations of presentment, the relator has not alleged all the elements of a claim under the Act. *See United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1313 (11th Cir. 2002) ("[W]e cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit.").

We agree with the Eleventh Circuit's observation that the particularity requirement of Rule 9(b) "does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." *Id.* at 1311. Rather, Rule 9(b) requires that "some indicia of reliability" must be provided in the complaint to support the allegation that an actual false claim was presented to the government. *Id.* Indeed, without such plausible allegations of presentment, a relator not only fails to meet the particularity requirement of Rule 9(b), but also does not satisfy the general plausibility standard of *Iqbal*. *See Clausen*, 290 F.3d at 1313 ("If Rule 9(b) is to carry any water, it must mean that an essential allegation and circumstance of fraudulent conduct cannot be alleged in such conclusory fashion."); *cf. United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (requiring relator to "provide some representative examples of [the defendants'] alleged fraudulent conduct").

Our conclusion is not altered by the cases cited by Relator, in which courts have held that the requirements of Rule 9(b) can be satisfied in the absence of particularized allegations of

specific false claims. Based on the nature of the schemes alleged in many of those cases, specific allegations of the defendant's fraudulent conduct necessarily led to the plausible inference that false claims were presented to the government.

For example, in *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009), the relator alleged a conspiracy by doctors to seek reimbursement from governmental health programs for services that never were performed. The court concluded that, because the complaint included the dates of specific services that were recorded by the physicians but never were provided, such allegations constituted "more than probable, nigh likely, circumstantial evidence that the doctors' fraudulent records caused the hospital's billing system in due course to present fraudulent claims to the Government." *Id.* at 192. Accordingly, the court further concluded that it would "stretch the imagination" for the doctors to continually record services that were not provided, but "to deviate from the regular billing track at the last moment so that the recorded, but unprovided, services never get billed." *Id.*; see also *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 30 (1st Cir. 2009) (holding that, in scheme alleging kickbacks to health care providers, allegations regarding "the dates and amounts of the false claims filed by these providers with the Medicare program" met the standard imposed by Rule 9(b)).⁶

Applying these principles, we hold that when a defendant's actions, as alleged and as reasonably inferred from the allega-

⁶In another case cited by Relator, the Tenth Circuit held that "claims under the [False Claims Act] need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010). In *Lemmon*, however, it was clear that the relator had pleaded specific details of false claims, including the dates of the alleged violations, the dates payment requests were submitted, details of the purported violations, and the allegedly false certification language.

tions, *could* have led, but *need not necessarily* have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment. To the extent that other cases apply a more relaxed construction of Rule 9(b) in such circumstances, we disagree with that approach.

In reaching this conclusion, we acknowledge the practical challenges that a relator may face in cases such as the present one, in which a relator may not have independent access to records such as prescription invoices, and where privacy laws may pose a barrier to obtaining such information without court involvement. Nevertheless, our pleading requirements do not permit a relator to bring an action without pleading facts that support all the elements of a claim. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) (noting "the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim"). We further emphasize, however, that the standard we articulate today does not foreclose claims under the Act when a relator plausibly pleads that specific, identifiable claims actually were presented to the government for payment. Of course, whether such factual allegations in a given case meet the required standard must be evaluated on a case-specific basis.

III.

Employing the above pleading standard, we turn to consider the sufficiency of the amended complaint in this case. Relator relies on four categories of allegations in the amended complaint, which he contends state with particularity that Takeda caused false claims to be presented to the government for payment. We address each set of allegations in turn, and conclude that, individually as well as collectively, Relator's allegations fail to allege an essential element of a claim under the Act.

First, Relator alleges in the amended complaint that Takeda promoted Kapidex to rheumatologists, who do not treat the conditions for which Kapidex has been approved.⁷ According to Relator, when promoting Kapidex to rheumatologists, Takeda sales representatives equated Kapidex with Prevacid, even though Kapidex was not approved for 10 of the 13 indications for which Prevacid was approved, including the gastric conditions commonly suffered by rheumatology patients. Relator further alleges that Takeda sales representatives were instructed to promote Kapidex to rheumatologists without disclosing that the drug is not approved for the gastric condition often experienced by rheumatology patients.

These allegations concerning the promotion of Kapidex to rheumatologists fall far short of the pleading standards set forth in Rule 9(b) and in *Iqbal*. Fatal to the claim, Relator does not allege in the amended complaint that the targeted rheumatologists wrote any off-label prescriptions that were submitted to the government for payment, a critical omission in a case brought under the Act.⁸ See *United States ex rel.*

⁷According to Relator, rheumatologists do not treat GERD or EE, the two indications for which Kapidex is approved. Rheumatology patients may use Prevacid for gastric protection, a need associated with long-term ingestion of anti-inflammatory drugs such as Advil. However, as discussed above, Kapidex is not approved for gastric protection.

⁸After filing the amended complaint, Relator submitted to the district court a supplemental affidavit with attachments, which allegedly showed that two rheumatologists in Relator's sales territory wrote Kapidex prescriptions during a particular month. However, Relator cannot cure pleading deficiencies in the amended complaint with later-filed supporting documentation. See *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 448-49 (4th Cir. 2011) (explaining that "matters beyond the pleadings . . . cannot be considered on a Rule 12(b)(6) motion"); *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (stating the documents that may be considered in evaluating a Rule 12(b)(6) motion). Moreover, we agree with the district court's observation that, even if these allegations had been included in the amended complaint, "there is nothing that prevents a rheumatologist from prescribing Kapidex for an approved condition at an approved dosage," and there was no indication in the record of the prescriptions' dosage, the conditions for which they were written, or that the prescriptions were submitted to the government for reimbursement.

Rost v. Pfizer, Inc., 507 F.3d 720, 733 (1st Cir. 2007) (holding that a complaint does not meet the requirements of Rule 9 when the complaint did not "give notice to [the defendant] of false claims submitted by others for federal reimbursement of off-label uses, only of illegal practices in promotion of the drug"), *overruled on other grounds by Allison Engine Co. v. United ex rel. Sanders*, 553 U.S. 662 (2008). Accordingly, Relator has not plausibly alleged that Takeda caused rheumatologists to write Kapidex prescriptions for off-label uses that actually were presented to the government for payment.

Second, in the amended complaint, Relator identifies 16 primary care physicians (PCPs) who received 60 mg samples of Kapidex from Takeda and collectively wrote 98 prescriptions for the drug that were submitted to the government for reimbursement. Although Relator alleges that these claims were presented to the government for payment, Relator does not plausibly allege that the prescriptions were written for off-label uses.

Rather, Relator alleges in the amended complaint that because PCPs generally do not treat active cases of EE, the only condition for which a 60 mg dose is indicated, any 60 mg prescriptions written by PCPs necessarily were for off-label uses. Notably, however, Relator does not allege facts that specifically address the dosage level of any of the 98 prescriptions. Instead, Relator relies on speculative contentions regarding the 98 prescriptions he has identified. Relator alleges that physicians tend to prescribe drugs in the same dose as the sample the patient has received and that, therefore, the identified PCPs must have prescribed 60 mg doses because they received only 60 mg samples. The allegations in the amended complaint contain the additional speculative assertion that at least 90 percent of the 98 prescriptions must have been written at the 60 mg level, because 93 percent of the overall sales of Kapidex are for dosages of 60 mg.

As the district court observed, Relator fails to state any plausible allegation connecting these general statistics to the

98 prescriptions identified or to prescriptions written by PCPs generally. To the contrary, drawing on the language in the amended complaint, it is logical to assume that a much lower-than-average percentage of the 98 prescriptions were written for 60 mg doses, given that PCPs purportedly do not treat the condition for which the higher 60 mg dose is indicated. Relator also fails to allege directly that any of the identified prescriptions were for off-label uses, instead requiring that a court draw an implausible inference linking general statistics to the 98 prescriptions for Kapidex. *Cf. United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (upholding dismissal of False Claims Act claim for lack of particularity because statistical studies cited by the relator did not "directly implicate defendants").

Moreover, even if Relator had pleaded adequately that the 98 prescriptions were written at the 60 mg dosage level, the existence of a 60 mg prescription written by a PCP would not itself constitute a plausible allegation that the prescription was for an off-label use. PCPs can still prescribe a 60 mg dose for an approved use, even though such physicians allegedly do not typically treat the approved condition. This possibility highlights the weakness in the amended complaint, namely, Relator's attempt to draw inferences from general facts, such as that PCPs generally do not treat active cases of EE and that Kapidex generally is prescribed in 60 mg doses, to reach the conclusion that the 98 prescriptions identified in the amended complaint were for off-label uses. We conclude that such inferences are implausible and unsupported by the stated facts and, thus, that the allegations relating to the PCPs do not state with particularity that any false claims were submitted to the government for payment.

Third, Relator alleges in the amended complaint that about 9,000 Kapidex prescriptions were submitted to the government for reimbursement in two of Takeda's sales districts during certain one-year periods. Again, Relator does not allege the dosages of these prescriptions, nor, as the district court

observed, do these generalized statistics "identify the types of doctors issuing the prescriptions, the types of illnesses for which they issued the prescriptions at issue, or whether the doctors were subjected to Takeda's sample distribution practices." Thus, the references in the amended complaint to these 9,000 prescriptions do not constitute plausible allegations that Takeda caused presentment of a false claim to the government.

Fourth, in the amended complaint, Relator relies on allegations that are based on the affidavits of two gastroenterologists and one PCP, who averred that they prescribed 60 mg dosages of Kapidex to treat GERD in Medicare patients and were unaware that the drug was available in a 30 mg dosage due to Takeda's sampling practices. However, the amended complaint does not include any details about the particular prescriptions these physicians wrote for Medicare patients, such as approximate dates or patient information, nor does the amended complaint contain allegations that the Medicare patients ever "filled" these prescriptions or that corresponding claims for reimbursement ever were submitted to the government.⁹

As previously discussed, liability under the Act attaches only to false claims actually submitted to the government for reimbursement. General allegations such as those made here, that unidentified Medicare patients received prescriptions for off-label uses, do not identify with particularity any claims that would trigger liability under the Act. In the absence of the required specific allegations, a court is unable to infer that a Medicare patient who has received a prescription for an off-

⁹In a supplemental affidavit, Dr. Michael Yaffe, the PCP, averred that he had personal knowledge that some of his Medicare patients filled the off-label Kapidex prescriptions because the patients contacted his office to seek prescription refills. Once again, it is improper for Relator to attempt to buttress his faulty complaint with supplemental affidavits submitted later in the litigation, in this case, in opposition to Takeda's motion to dismiss.

label use actually filled the prescription and sought reimbursement from the government. Indeed, "[i]t may be that physicians prescribed [the drug] for off-label uses only where the patients paid for it themselves or when the patients' private insurers paid for it." *Rost*, 507 F.3d at 733. We therefore disagree with Relator's assertion that, if a patient is insured under a government program, we reasonably may infer that any prescription the patient received for an off-label use was filled and that a claim was presented to the government. For these reasons, we conclude that Relator's allegations in the amended complaint relating to the three physician affidavits do not adequately state that any false claims were presented to the government for payment.

Based on our consideration of the facts stated in the amended complaint, we observe that Relator essentially has alleged that some claims must have been presented to the government for payment, because prescriptions of this kind frequently and routinely are obtained by persons who participate in health care programs sponsored by the federal government, or because federally insured patients received off-label prescriptions. As we have explained, allegations of this type are insufficient because they are inherently speculative in nature. In contrast to cases such as *Grubbs*, 565 F.3d 180, Relator's claim does not involve an integrated scheme in which presentation of a claim for payment was a necessary result. We therefore hold that Relator has failed to plead with particularity a plausible claim that any off-label prescriptions were presented to the government for payment.

IV.

Finally, Relator challenges the district court's denial of his motion for leave to amend his complaint for a fourth time. We review the district court's denial of this motion for abuse of discretion. *Wilson*, 525 F.3d at 376. Federal Rule of Civil Procedure 15(a)(2) provides that a court "should freely give leave" to amend a complaint "when justice so requires."

Despite this general rule liberally allowing amendments, we have held that a district court may deny leave to amend if the amendment "would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc) (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)).

Relator has amended his complaint three times. A decision granting him leave to amend yet again would have resulted in a fifth complaint filed in this case. We also observe that two years have elapsed between the filing of the original complaint and the district court's dismissal of the amended complaint currently before us in this appeal. The granting of leave to file another amended complaint, when Relator was on notice of the deficiencies before filing the most recent amended complaint,¹⁰ would undermine the substantial interest of finality in litigation and unduly subject Takeda to the continued time and expense occasioned by Relator's pleading failures. In view of the multiple opportunities Relator has been afforded to correct his pleading deficiencies and the deference due to the district court's decision, we conclude that the district court did not abuse its discretion in denying him leave to file a fourth amended complaint.

V.

For these reasons, we hold that the district court properly dismissed the amended complaint under Rule 12(b)(6) for

¹⁰In May 2011, the district court dismissed Relator's second amended complaint for failure to state a claim, but granted leave to amend. In its order, the district court noted the lack of specific allegations regarding actual presentation of false claims to the government. Although the amended complaint before us includes considerably more detail, this fundamental defect was not addressed adequately by the last amendment. The district court also cautioned Relator that any evidence provided outside the amended complaint could not be considered in an attempt to avoid dismissal under Rule 12(b)(6).

failure to state a claim, and did not abuse its discretion in denying Relator leave to file a fourth amended complaint.

AFFIRMED

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF AMHERST

HOLLY BRANHAM,

Plaintiff,

v.

DOLGEN CORP, INC.
d/b/a/ Dollar General Store
a Kentucky Corporation
SERVICE REGISTERED AGENT
Corporation Service Company
11 South 12th Street
Richmond, Virginia 23219

0 9 0 0 7 4 4 9

Defendant.

COMPLAINT

1. On June 8, 2007, the Plaintiff, was severely and permanently injured when she fell at Dollar General Store at 171 Ambriar Plaza in Amherst County, Virginia. The store was owned and operated by the Defendant and employees and agents of the Defendant.
2. The Plaintiff fell due to the negligence of the Defendants agents and employees who negligently failed to remove the liquid from the floor and had negligently failed to place warning signs to alert and warn the Plaintiff of the wet floor. The Defendants thru its employees breached their duty to warn the Plaintiff of the dangerous wet floor.
3. As a direct result of the negligence of the Defendants agents and employees, acting in the scope of their employment, the Plaintiff was severely and permanently injured. She lost many of the pleasures of life. She suffered pain. She has incurred medical and hospital bills. Her ability to earn an income was dissipated.
4. The Plaintiff seeks a judgment in the amount of Three Hundred Thousand Dollars (\$300,000.00) against the Defendant.

HOLLY BRANHAM





COUNSEL FOR PLAINTIFF 13936 bAV
Robert S. Ganey, Esq.
P.O. Box 174
Hanover, VA 23069
(804) 627-2723

Filed in Clerk's Office
Amherst Circuit Court

JUN 8 2009

Roy C. Mayo, III
Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

HOLLY BRANHAM,

Plaintiff,

v.

DOLGENCORP, INC.,

Defendant.

CIVIL NO. 6:09-CV-00037

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

This matter is before the Court on the Defendant's Motion to Dismiss (docket no. 3). The motion has been fully briefed, and because I grant the Defendant's motion but give the Plaintiff leave to amend the Complaint, I find that this matter may be adequately resolved without a hearing.

I. BACKGROUND

This is a slip and fall case that was removed from state court by the Defendant on the basis of diversity jurisdiction. The Complaint contains few factual allegations, but it appears that the Plaintiff's claim arises out of a fall at a Dollar General store in Amherst County, Virginia. The Plaintiff alleges that there was liquid on the floor of the store, and alleges that the Defendant negligently failed to remove the liquid or to warn her of its presence. The Plaintiff alleges that as a result of her fall, she was severely and permanently injured, suffered pain, and incurred medical expenses. The Defendant moves to dismiss the Complaint for failure to state a claim under the pleading standard established by *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). See Fed. R. Civ. P. 12(b)(6).

II. STANDARD OF REVIEW

“The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint,” not to “resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 243–44 (4th Cir. 1999). In considering a Rule 12(b)(6) motion, a court must accept all allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *See id.* at 244; *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 254–55 (W.D. Va. 2001). The plaintiff must allege facts in the amended complaint that “state a claim to relief that is plausible on its face” and that “nudges [her] claims across the line from conceivable to plausible.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if the complaint contains “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” and if there is “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

III. DISCUSSION

The Defendant argues that the Plaintiff has failed to allege sufficient facts to allow the Court to draw the reasonable inference that the Defendant is liable in this case. For example, the Defendant argues that the Complaint lacks any allegation of how the Plaintiff slipped and fell, any allegation of the nature of the liquid on the floor of the store, any allegation that the liquid caused the Plaintiff’s fall, and any specific allegations regarding the injuries she suffered as a result of the fall. Therefore, the Defendant argues, the Complaint fails to include factual allegations relating to various elements of the Plaintiff’s claim of negligence.

Sitting in diversity, federal courts apply the law of the forum state. *See Gauldin v. Virginia Winn-Dixie, Inc.*, 370 F.2d 167, 169 (4th Cir. 1966) (“We look to the laws of Virginia to determine the extent of the duty and degree of care which defendant, engaged in the business of

operating a supermarket, owed to plaintiff as an invitee.”); *see also Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

Accordingly, I look to Virginia law to determine what the Plaintiff must allege in order to state a claim of negligence.

In Virginia, in order to establish negligence, a plaintiff must show to show the existence of a legal duty, a breach of the duty, and proximate causation resulting in damage.” *Atrium Unit Owners Ass’n v. King*, 585 S.E.2d 545, 548 (Va. 2003). Under Virginia law, store owners or occupiers are not insurers of their customers’ safety. *Gauldin*, 370 F.2d at 169. However, store owners owe their customers “the duty to exercise ordinary care . . . as [their invitees] upon [their] premises.” *Colonial Stores v. Pulley*, 125 S.E.2d 188, 190 (Va. 1962). “Ordinary care” means having the premises in a reasonably safe condition; removing foreign objects from the floors within a reasonable time, which the store owner placed there, or knew or should have known were there; and warning customers of unsafe conditions that were unknown to the customer but that were known or should have been known to the store owner. *Id.*

Where there is no evidence that the store owner caused the dangerous condition at issue, the plaintiff must establish that the defendant had actual or constructive notice of the dangerous condition on its premises and failed to remove it within a reasonable time or to warn the plaintiff of its presence. *Id.*; *Winn-Dixie Stores v. Parker*, 396 S.E.2d 649, 651 (Va. 1990); *Ashby v. Faison & Associates*, 440 S.E.2d 603 (Va. 1994). “[C]onstructive knowledge or notice of a defective condition of a premise or a fixture may be shown by evidence that the defect was noticeable and had existed for a sufficient length of time to charge its possessor with notice of its defective condition.” *Grim v. Rahe, Inc.*, 434 S.E.2d 888, 890 (Va. 1993); *see also Pulley*, 125 S.E.2d at 190.

Finally, “[i]t is incumbent upon the plaintiff to show why and how the accident happened.

If that is left to conjecture, guess or random judgment, the plaintiff is not entitled to recover.” *Murphy v. Saunders, Inc.*, 121 S.E.2d 375, 378 (Va. 1961); *see also Pulley*, 125 S.E.2d T 190 (“There was no evidence from which the jury could determine how, when, or by whom the bottle was placed on the floor. The verdict, therefore, could have been reached only as the result of surmise, speculation and conjecture. This being true, it was error for the trial judge to refuse to set it aside.”).

In this case, the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff’s accident occurred. Without such allegations, the Plaintiff cannot show that she has a “right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. While consistent with the possibility of the Defendant’s liability, the Plaintiff’s conclusory allegations that the Defendant was negligent because there was liquid on the floor, but that the Defendant failed to remove the liquid or warn her of its presence are insufficient to state a plausible claim for relief. *See id.* at 570.

IV. CONCLUSION

Because the Plaintiff has failed to allege sufficient facts to state a claim for relief, the Defendant’s Motion to Dismiss will be granted. However, the Plaintiff is granted leave to amend the Complaint within 15 days of the date of entry of this Opinion and the accompanying Order.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

ENTERED: This ____ Day of August, 2009.



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

VIRGINIA:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
VIRGINIA, LYNCHBURG DIVISION

HOLLY BRANHAM,

Plaintiff,

v.

Civil Action #6:09-cv-00037

DOLGENCORP, INC.
D/B/A Dollar General Store
A Kentucky Corporation

Defendant,

AMENDED COMPLAINT

1. On June 8, 2007 the Plaintiff was shopping at the dollar general store at 171 Ambriar Plaza in Amherst Virginia.
2. Dollar General store was owned and operated by the Defendant and employees and agents of the Defendant.
3. The Plaintiff had entered the store to shop for clothespins. She was told by an employee (“Jessica”) that she had to go to the rear of the store and turn left at the last aisle to find the clothespins. The Plaintiff learned on June 8, 2007 that “Jessica’s” position at the store was assistant manager.
4. The Plaintiff went to the rear of the store and turned left as instructed by “Jessica”.
5. Just as the Plaintiff turned left she stepped on water that was on the floor and directly in front of her.
6. The water on the floor was not visible to the plaintiff prior to her fall.
7. When the Plaintiff stepped on the water she fell.

8. As a direct result of water on the floor and her fall, the Plaintiff was seriously and permanently injured. She lost many of the pleasures of life. She suffered pain. She has incurred medical and hospital bills. Her ability to earn income was dissipated.
9. After she fell the Defendants' employee who identified herself as assistant store manager "Jessica" told the Plaintiff that she had just mopped the floor in the area where the Plaintiff fell.
10. After she fell the plaintiff identified that it was water on the floor, which she had stepped on and caused her to fall.
11. The Plaintiff told "Jessica" that she had fallen on the water, as she turned left at the last aisle at the back of the store.
12. As "Jessica" and the Plaintiff began walking back to the front of the store "Jessica" took the Plaintiff several aisles to the left where a sign indicating wet floor was lying flat on the floor that sign was not visible to the Plaintiff when the Plaintiff had walked several aisles over to the rear of the store for clothespins. There was no sign visible to the Plaintiff to warn her of the wet floor.
13. The Plaintiff alleges that the Defendants agent, employee "Jessica" acting in the scope of her employment, was negligent because she failed to remove the water from the floor as she mopped the floor.
14. The Plaintiff alleges that the Defendant's agent, employee "Jessica" acting in the scope of her employment breached the Defendant's duty to warn the Plaintiff of the dangerous water on the floor where the plaintiff fell.

15. The Plaintiff seeks judgment in the amount of \$300,000 (three hundred thousand dollars) against the Defendant.

Holly Branham
By Counsel
Robert S. Ganey
P.O. Box 174
Hanover, Virginia 23069
Telephone # 804-627-2723
Email: robertsganey@aol.com
Virginia Bar # 13936

CERTIFICATE OF SERVICE

I Robert Ganey hereby certify that a true copy of the foregoing complaint was sent by Email to James G. Muncie Jr. jmuncie@midkifflaw.com and by first class mail to James G. Muncie 300 Arboretum Place Richmond, Virginia 23236 on 9/8/2009.

Robert S. Ganey

Federal Lawyer
July, 2012

***56 DO TWOMBLY AND IQBAL APPLY TO AFFIRMATIVE DEFENSES?**

[Leslie Paul Machado](#), [C. Matthew Haynes](#) [FN1]

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***57** In the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* [FN1] and *Ashcroft v. Iqbal*, [FN2] an interesting question has been perplexing judges in federal district courts around the country: Do the pleading requirements announced in those decisions apply to affirmative defenses? Because “[n]either *Twombly* nor *Iqbal* expressly addressed the pleading requirements applicable to affirmative defenses,” [FN3] and neither the Supreme Court nor any federal appellate court has ruled on this question, [FN4] district courts addressing it have reached contradictory conclusions-- often in the same circuit and sometimes in the same district!

Using decisions from the district courts in the U.S. Court of Appeals for the Fourth Circuit [FN5] as an example, this article will examine the developing split among the courts on this question [FN6] and then provide recommendations for the practitioner.

Background

“Prior to the Supreme Court's decisions in *Twombly* and *Iqbal*, the United States Court of Appeals for the Fourth Circuit held that general statements of affirmative defenses were sufficient provided they gave plaintiffs fair notice of the defense.” [FN7]

In *Twombly*, the Court held that, to survive a motion to dismiss, a complaint must contain facts sufficient to “state a claim to relief that is plausible on its face.” [FN8] Although the plaintiff need not include “detailed factual allegations” to satisfy Rule 8(a)(2), more than bald accusations or mere speculation is required to survive a motion to dismiss. [FN9] Thus, a complaint that provides no more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action,” is insufficient under Rule 8. [FN10]

The Court clarified *Twombly* in its *Iqbal* opinion, holding that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to plead a claim. [FN11] Instead, the Court held, the complaint must “plausibly give rise to an entitlement to relief” which requires “more than the mere possibility of misconduct.” [FN12] “To date, neither the Supreme Court nor the Fourth Circuit has indicated whether the heightened pleading standard of *Twombly* and *Iqbal* applies to affirmative defenses.” [FN13]

The Majority View

Most of the district courts in the Fourth Circuit have held that the pleading requirements of *Twombly* and *Iqbal* apply to affirmative defenses. These courts have generally relied on “considerations of fairness, common sense and litigation efficiency underlying *Twombly* and *Iqbal*.” [FN14]

These courts have reasoned that “what is good for the goose is good for the gander,” [\[FN15\]](#) because “it neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit a defendant under another pleading standard simply to suggest that some defense may apply in the case.” [\[FN16\]](#) Rather, they explain, “[p]leading requirements are intended to ensure that an opposing party receives fair notice of the factual basis for an assertion contained a claim *or defense*.” [\[FN17\]](#) Thus, “the interests of consistency and fairness are furthered by holding defendants to the plausibility standard, and plaintiffs are entitled to receive proper notice of defenses in advance of the discovery process and trial.” [\[FN18\]](#)

These courts also “cite the importance of litigation efficiency, explaining that boilerplate defenses serve only to ‘clutter the docket and ... create unnecessary work’ by requiring opposing counsel to conduct unnecessary discovery.” [\[FN19\]](#) As a district court in Maryland stated, “*Twombly* and *Iqbal* recognize the fairness and efficiency concerns highlighted by district courts that have subsequently applied those standards to affirmative defenses” [\[FN20\]](#) All pleading requirements exist to ensure that the opposing party receives fair notice of the nature of a claim or defense.” [\[FN21\]](#)

Finally, at least two courts have relied on the fact that a sample affirmative defense form that is appended to the Federal Rules of Civil Procedure includes factual detail in support of a statute of limitations defense. [\[FN22\]](#)

The Minority View

A minority of district courts in the Fourth Circuit considering the same issue, however, has held that the pleading requirements of *Twombly* and *Iqbal* do not apply to affirmative defenses. These courts primarily ground their decision in the different language in the Federal Rules of Civil Procedure describing affirmative defenses:

[Federal Rule of Civil Procedure 8\(a\)\(2\)](#) requires that “claims for relief,” including complaints, contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” But [Rule 8\(b\)\(1\)\(A\)](#), governing affirmative defenses, merely requires that a responding party “state in short and plain terms its defenses to each claim asserted against it.” Notably absent is a required “showing that the pleader is entitled to relief.” Yet Plaintiffs’ argument would have this Court read such a requirement in to [Rule 8\(b\)\(1\)\(A\)](#) on the basis of *Twombly* and *Iqbal*. Those opinions afford little reason for doing so. [\[FN23\]](#)

Thus, in *Lopez v. Asmar’s Mediterranean Food Inc.*, the court held that, because *Twombly* and *Iqbal* interpreted “language that is not present in [Rule 8\(b\)\(1\)\(A\)](#),” it would “not import that language, nor *Twombly* and *Iqbal*’s interpretation of it, to a different rule that lacks that language.” [\[FN24\]](#)

Similarly, in *Odyssey Imaging LLC v. Cardiology Associates of Johnston LLC*, the court refused to apply *Twombly* and *Iqbal* to affirmative defenses, holding that “[Rule 8](#)’s language governing the pleading of defenses does not track the language of [Rule 8\(a\)](#) governing the pleading of claims, the focus of those decisions.” [\[FN25\]](#) Thus, “[b]ecause [Rules 8\(b\)](#) and [8\(c\)](#) do not require a party to ‘show’ that it is entitled to a defense, the court decline[d] to hold affirmative defenses to the same pleading standards required by [Rule 8\(a\)](#).” [\[FN26\]](#)

*58 The *Lopez* court also responded to the fairness argument by noting that there “are countervailing considerations of whether it is fair to apply the same pleading standard to plaintiffs, who have far more time to develop factual support for their claims, as to defendants, who have 21 days to respond to a complaint, who did not initiate the lawsuit, and who risk waiving any defenses not raised.” [\[FN27\]](#) Similarly, the *Odyssey* court noted that “[k]nowledge at the pleading stage is often asymmetrical, disproportionately favoring the pleading of a claim by a plaintiff who has had the opportunity to time its filing.” [\[FN28\]](#) The *Odyssey* court further noted that “[w]hile the plaintiff often can conduct an investigation before filing the complaint to ensure its allegations are adequately supported, the defendant must respond quickly after being served.” [\[FN29\]](#)

Recommendations

Until this issue is resolved by an appellate court, parties interposing affirmative defenses (whether in response to a complaint or a counterclaim) should make every effort to meet the *Twombly* and *Iqbal* pleading requirements. Although this may be a change for some, one court has noted that “*Twombly* and *Iqbal* require only minimal facts establishing plausibility, a standard that this Court presumes most litigants would apply when conducting the abbreviated factual investigation necessary before raising affirmative defenses in any event.” [FN30] As a district court in Maryland stated,

“a defense asserted in an answer will satisfy the elevated plausibility standard announced in those cases if it: (1) contains a brief narrative stating facts sufficient to give the plaintiff ‘fair notice of what the defense is and the grounds upon which it rests,’ *Twombly*, 550 U.S. at 555; and (2) the facts stated plausibly suggest,’ *Iqbal*, 129 S.Ct. at 1951, cognizable defenses under applicable law.” [FN31] Said another way, “[a]ffirmative defenses are insufficient under this standard if they are stated ‘in a conclusory manner and fail to provide fair notice to the plaintiff of the factual grounds upon which they rest.’” [FN32]

Even though this will require more effort than simply listing affirmative defenses seriatim, “the heightened pleading standard does not require the assertion of all supporting evidentiary facts [FN33] ‘At a minimum, however, some statement of the ultimate facts underlying the defense must be set forth, and both its non-conclusory factual content and the reasonable inferences from that content, must plausibly suggest a cognizable defense available to the defendant.’” [FN34]

Many courts applying *Twombly* and *Iqbal* to affirmative defenses have noted that a party can move to amend its pleading under Rule 15 if it learns of additional facts, and that this remedy protects parties who learn of information supporting an affirmative defense later in the case. [FN35] Attorneys should be aware of this rule and use it.

Finally, even if the practitioner is before a judge who has refused to apply the *Twombly* and *Iqbal* pleading standard to affirmative defenses, counsel should take little solace in that fact, because affirmative defenses may nevertheless be subjected to extra scrutiny. For example, in *Odyssey*, the court, after refusing to apply the pleading standards of *Twombly* and *Iqbal* to affirmative defenses, nevertheless reviewed them to determine if they were “contextually comprehensible” and, under this standard, struck 17 out of 19 affirmative defenses. [FN36] For this reason, it is best to assume that the *Twombly* and *Iqbal* standard will be applied and proceed accordingly.

[FN^a1]. *Leslie Paul Machado is a partner in the Washington, DC, office of LeClairRyan, a national law firm. C. Matthew Haynes is an associate in the Alexandria, Va., office of the same firm. Both Machado and Haynes practice extensively in federal district and appellate courts. Machado can be reached at (202) 659-6736 or at leslie.machado@leclairryan.com. Haynes can be reached at (703) 647-5919 or at matthew.haynes@leclairryan.com. The authors gratefully acknowledge the assistance of Andy Clark of LeClairRyan, the FBA's vice president for the fourth circuit, on this article.*

[FN1]. [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544 (2007).

[FN2]. [Ashcroft v. Iqbal](#), 129 S. Ct. 1937 (2009).

[FN3]. [Barry v. EMC Mortgage](#), 2011 WL 4352104, at *3 (D. Md. Sept. 15, 2011).

[FN4]. *See, e.g., J&J Sports Production Inc. v. Romero*, 2012 WL 1435004, at *2 (E.D. Cal. Apr. 25, 2012) (“to date, no circuit court has issued a decision regarding the applicability of the heightened pleading standard to affirmative defenses”) (citation omitted). In [Herrera v. Churchill McGee LLC](#), 2012 WL 1700381 (6th Cir. May 16, 2012), the court acknowledged the disagreement but found that it did not need to decide this issue: “[b]ecause we find no

unfair surprise, we need not address the sufficiency under [Federal Rule of Civil Procedure 8\(c\)](#) of Churchill McGee's rather barebones pleading of the affirmative defense of preclusion. We therefore have no occasion to address, and express no view regarding, the impact of [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544 (2007) and [Ashcroft v. Iqbal](#), 556 U.S. 662 (2009), on affirmative defenses." *Id.* at n.6.

[FN5]. The Fourth Circuit covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

[FN6]. The split among the district courts in the Fourth Circuit is by no means unique. Rather, a survey of the other circuits shows a similar split, including in the Second Circuit: compare [Whitserve LLC v. GoDaddy.com Inc.](#), 2011 WL 5825712, at *2 (D. Conn. Nov. 17, 2011) ("the heightened pleading standard set forth in *Twombly* and *Iqbal* does not apply to a Motion to Strike affirmative defenses") with [Tracy v. NVR Inc.](#), 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) ("the *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense under Rule 12(f)"); Fifth Circuit: compare [EEOC v. Courtesy Bldg. Servs. Inc.](#), 2011 WL 208408, at *2 (N.D. Tex. Jan. 21, 2011) (declining "in the absence of complete briefing and guidance from the Fifth Circuit or the Supreme Court, to extend the *Iqbal* and *Twombly* plausibility standard to the pleading of affirmative defenses") with [Burns v. Dodeka LLC](#), 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) ("the Court concludes the defendant's affirmative defenses of proximate cause and failure to mitigate are wholly conclusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny"); Sixth Circuit: compare [Swift v. City of Detroit](#), 2012 WL 32683, at *2 (E.D. Mich. Jan. 6, 2012) (declining to "apply the more demanding *Iqbal/Twombly* standard in determining the viability of Defendant's affirmative defenses") with [Microsoft Corp. v. Lutian](#), 2011 WL 4496531, at *2 (N.D. Ohio Sept. 27, 2011) ("the court finds that the heightened pleading standards required by *Twombly* and *Iqbal* apply to affirmative defenses"); Seventh Circuit: compare [Louisiana Firefighters' Retirement System v. Northern Trust Investments N.A.](#), 2012 WL 601861, at *5 (N.D. Ill. Feb. 23, 2012) ("This court, like most district courts, applies *Twombly*'s standards to motions to strike affirmative defenses") with [Cottle v. Falcon Holdings Management LLC](#), 2012 WL 266968, at *2 (N.D. Ind. Jan. 30, 2012) ("This Court agrees with those cases declining to apply the 'plausibility' standard of *Iqbal* and *Twombly* to affirmative defenses"); Eighth Circuit: compare [Smithville 169 v. Citizens Bank & Trust Co.](#), 2012 WL 13677, at *1 (W.D. Mo. Jan. 4, 2012) ("This Court, like a majority of district courts, has held that the *Iqbal* standard applies to affirmative defenses") with [U.S. Bank Nat. Ass'n v. Education Loans Inc.](#), 2011 WL 5520437, at *6 (D. Minn. Nov. 14, 2011) ("The undersigned agrees with the cases holding that *Twombly* and *Iqbal* do not apply to affirmative defenses"); Ninth Circuit: compare [Trustmark Ins. Co. v. C&K Market Inc.](#), 2011 WL 587574, at *2 (D. Ore. Feb. 10, 2011) (declining to extend *Twombly*'s pleading requirements to affirmative defenses) with [Barnes v. AT&T Pension Benefit Plan-Nonbargained Program](#), 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (holding the heightened pleading standard of *Twombly* and *Iqbal* applies to affirmative defenses); Tenth Circuit: compare [Tiscareno v. Frasier](#), 2012 WL 1377886, at *14 (D. Utah. April 19, 2012) ("The court, however, finds the reasoning of those courts that have declined to apply a heightened pleading standard to affirmative defenses persuasive") with [Smith v. Mustang, Independent School Dist. No. 1-69](#), 2012 WL 10848, at *2 (W.D. Okla. Jan. 3, 2012) ("the Court finds that the affirmative defenses at issue in this case must satisfy the pleading standards set forth in *Twombly* and *Iqbal*"); and Eleventh Circuit: compare [In re Checking Account Overdraft Litigation](#), 2012 WL 1134483, at *9 (S.D. Fla. April 3, 2012) ("Affirmative defenses must meet the pleading standards in *Iqbal* and *Twombly*") with [Security Life of Denver Ins. Co. v. Shah](#), 2011 WL 3300320, at *1 (S.D. Ga. Aug. 1, 2011) (holding that 'heightened 'plausibility' standards simply cannot apply to affirmative defenses).

[FN7]. [Francisco v. Verizon South Inc.](#), 2010 WL 2990159, at *6 (E.D. Va. July 29, 2010) (citing [Clem v. Corbeau](#), 98 Fed. Appx. 197, 203 (4th Cir. 2004); [Ferguson v. Guyan Mack Co.](#), 1995 WL 20793, at *5 (4th Cir. Jan. 20, 1995)).

[FN8]. [Twombly](#), 550 U.S. at 570.

[FN9]. *Id.* at 555.

[FN10]. *Id.*

[FN11]. *Iqbal*, 129 S. Ct. at 1949.

[FN12]. *Id.* at 1950. In July 2009, then Sen. Arlen Specter (R-Pa.) introduced legislation to revert to the former “notice” pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957). In November 2009, Rep. Jerrold Nadler (D-N.Y.) introduced a similar bill. Both bills failed in committee.

[FN13]. *Ulyssix Technologies Inc. v. Orbital Network Engineering Inc.*, 2011 WL 631145, at *14 (D. Md. Feb. 11, 2011).

[FN14]. *Racick v. Dominion Law Associates*, 270 F.R.D. 228, 234 (E.D.N.C. 2010) (citation omitted). *See also Topline Solutions Inc. v. Sandler Systems Inc.*, 2010 WL 2998836, at *1 (D. Md. July 27, 2010) (“the considerations of common sense and efficiency that underlie *Twombly* and *Iqbal* suggest that their heightened pleading standards should apply to affirmative defenses”).

[FN15]. *Racick*, 270 F.R.D. at 233.

[FN16]. *Palmer v. Oakland Farms Inc.*, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010). *See also Topline Solutions*, 2010 WL 2998836, at *1 (“it would be incongruous and unfair to require a plaintiff to operate under one standard and to permit the defendant to operate under a different, less stringent standard”).

[FN17]. *Bradshaw v. Hilco Receivables LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010) (emphasis added). *See also Haley Paint Co. v. E.I. DuPont de Nemours & Co.*, 2012 WL 380107, *3 (D. Md. Feb. 3, 2012) (holding that *Twombly* and *Iqbal* “requires that affirmative defenses be pled in such a way as to ‘ensure that an opposing party receives fair notice of the factual basis for an assertion contained in a defense’” (citation omitted)).

[FN18]. *Bradshaw*, 725 F. Supp. 2d at 536.

[FN19]. *Barry*, 2011 WL 4352104, at *3 (citation omitted). *See also Racick*, 270 F.R.O. at 233 (“boilerplate defenses clutter the docket and ... create unnecessary work and extend discovery”); *Bradshaw*, 725 F. Supp. 2d at 536 (“The application of the *Twombly* and *Iqbal* standard to defenses will also promote litigation efficiency and will discourage defendants from asserting boilerplate affirmative defenses that are based on nothing more than ‘some conjecture that they may somehow apply’” (citation omitted)); *Monster Daddy LLC v. Monster Cable Products Inc.*, 2010 WL 4853661, at *7 (D.S.C. Nov. 23, 2010) (holding that the *Twombly/Iqbal* pleading standard applied to affirmative defenses because “subjecting affirmative defenses to the plausibility standard of pleading preserves judicial economy and efficiency by discouraging defendants from raising a myriad of boilerplate affirmative defenses”); but *see Odyssey Imaging LLC v. Cardiology Associates of Johnston LLC*, 752 F. Supp. 2d 721, 727 n.6 (W.D. Va. 2010) (“the fact that the plausibility of these defenses has not been briefed illustrates the court's concern with applying the stringent pleading standards that apply to claims under [Rule 8\(a\)](#) to defenses pleaded under [Rules 8\(b\)](#) or [8\(c\)](#). Requiring the intermittent briefing of all comprehensible and conceivable affirmative defenses would add the type of unnecessary delay and cost to the pretrial litigation process that *Iqbal* and *Twombly* sought to minimize”).

[FN20]. *Barry*, 2011 WL 4352104, at *4.

[FN21]. *Id.*

[FN22]. *See, e.g., Aguilar v. City Lights of China Restaurant Inc.*, 2011 WL 5118325, at *3 (D. Md. Oct. 24, 2011) (“Additionally, Form 30, appended to the Federal Rules pursuant to Rule 84, strongly suggests that bare-bones as-

sertions of at least some affirmative defenses will not suffice, as the Form's illustration of a statute of limitations' defense sets forth not only the name of the affirmative defense, but also facts in support of it"); [Francisco v. Verizon South Inc.](#), 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010) ("Finally, Form 30, appended to the Federal Rules of Civil Procedure pursuant to Rule 84, underscores the notion that a defendant's pleading of affirmative defenses should be subject to the same pleading standard as a plaintiff's complaint because it includes factual assertions in the example it provides").

[FN23]. [Lopez v. Asmar's Mediterranean Food Inc.](#), 2011 WL 98573, at *2 (E.D. Va. Jan. 20, 2011) (emphasis removed). Another judge in the same court, although observing that "the language of the Federal Rules of Civil Procedure differs, suggesting requirements as to pleadings that may differ as well," [Francisco](#), 2010 WL 2990159, at *8, held that the *Twombly/Iqbal* requirements applied to affirmative defenses for fairness reasons. *Id.* at *7-8. Other courts applying *Twombly/Iqbal* to affirmative defenses have also acknowledged the differences in the language of the Rules. *See, e.g., Ulyssix Technologies Inc.*, 2011 WL 631145, at *14 (recognizing "that there are differences in the language of [Rule 8\(a\)](#), [Rule 8\(b\)](#), and [Rule 8\(c\)](#), which could suggest that the plausibility standard is inapplicable to affirmative defenses," but holding that "these differences do not persuade me to reject the plaintiff's position" that *Twombly* and *Iqbal* applied to affirmative defenses); [Barry](#), 2011 WL 4352104, at *3 (applying *Twombly/Iqbal* to affirmative defenses because, "[w]hile the language of [Rules 8\(a\)](#) and [8\(b\)](#) is certainly not identical, those sections contain important textual overlap, with both subsections requiring a 'short and plain' statement of the claim or defense"); [Aguilar](#), 2011 WL 5118325, at *3 (same).

[FN24]. [Lopez](#), 2011 WL 98573, at *2.

[FN25]. *Odyssey Imaging* at 725.

[FN26]. *Id.*

[FN27]. [Lopez](#) at *2 n.5 (E.D. Va. Jan. 20, 2011).

[FN28]. *Odyssey Imaging*, 752 F. Supp. 2d at 726 (citing [Fed. R. Civ. P. 12\(a\)\(1\)\(A\)](#)).

[FN29]. *Id.*

[FN30]. [Francisco v. Verizon South Inc.](#), 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010).

[FN31]. [Piontek v. Service Centers Corp.](#), 2010 WL 4449419, at *3 (D. Md. Nov. 5, 2010).

[FN32]. [Barnett v. Uniformed Services University of the Health Sciences](#), 2011 WL 3511049, at *12 (D. Md. Aug. 9, 2011).

[FN33]. [Ulyssix Technologies Inc.](#), 2011 WL 631145, at *15; *see also* [Palmer](#), 2010 WL 2605179, at *5 ("A defense may be stated simply and briefly").

[FN34]. *Id.* (citation omitted).

[FN35]. *See, e.g., Bradshaw*, 725 F. Supp. 2d at 536-537 ("Under Rule 15(a), a defendant may seek leave to amend its answers to assert any viable defenses that may become apparent during the discovery process. Trial courts liberally grant such leave in the absence of a showing that an amendment would result in unfair prejudice to the opposing party"); [Palmer](#), 2010 WL 2605179, at *5 ("By way of *caveat* it must be noted that litigants do not always know all the facts relevant to their claims or to their defenses until discovery has occurred. [Rule 15 of the Federal Rules of](#)

[Civil Procedure](#) contemplates that motions to amend pleadings on the basis of relevant facts learned during discovery, and such motions should be liberally granted”); [Racick, 270 F.R.D. at 234](#) (“The court also notes that applying the same pleading requirements to defendants should not stymie the presentation of a vigorous defense, because under [Rule 15\(a\) of the Federal Rules of Civil Procedure](#), a defendant may seek leave to amend its answers to assert defenses based on facts that become known during discovery”); [Haley Paint Co., 2012 WL 380107, at *3](#) (“when affirmative defenses are stricken, the defendant should normally be granted leave to amend”) (citations omitted).

[FN36]. [Odyssey Imaging, 752 F. Supp. 2d at 727](#).

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TAMING *TWOMBLY*: AN UPDATE AFTER *MATRIX*

EDWARD A. HARTNETT*

I

INTRODUCTION

For better or worse, my approach to *Twombly*¹ and *Iqbal*² has been one of accommodation rather than battle, seeking, in the common law tradition, to assimilate these decisions into the body of law of which they are a part. I have suggested strategies for lawyers to use in response to these decisions.³ I have also proposed a Rule amendment that I believe meets the primary concerns of both the plaintiff and defense bar.⁴ For these efforts, I have been called an optimist⁵—a charge to which I plead guilty.

I see little hope of these decisions being overruled.⁶ Unlike some areas, including federalism, the First Amendment, and substantive due process, where justices have adhered to their dissenting views and refused to accept their losses as binding precedent,⁷ no one on the Supreme Court seems inclined to refight

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This article is also available at <http://www.law.duke.edu/journals/lcp>.

* Richard J. Hughes Professor for Constitutional and Public Law and Service, Seton Hall University School of Law. Thanks to Charles Sullivan, Stephen Burbank and Judge Denise Cote for their comments.

1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
2. *Ashcroft v. Iqbal*, 555 U.S. 662 (2009).
3. See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010).
4. See Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24 (2010).
5. See Kevin Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 840 n.69 (2010).
6. Cf. Luke Meier, *Why Twombly is Good Law (But Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. (forthcoming 2012), available at <http://ssrn.com/abstract=1734791>.
7. See, e.g., *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 163–64 (2003) (Kennedy, J., concurring in the judgment) (adhering to his view that earlier decisions “misapprehended basic First Amendment principles” and giving those decisions no precedential weight); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 431 (2003) (Ginsburg, J., dissenting) (adhering to her view regarding due process limitations on punitive damages); *Alderman v. United States*, 131 S. Ct. 700, 702 n.2 (2001) (Thomas, J., dissenting from denial of certiorari) (noting his adherence to his “previously stated views on the proper scope of the Commerce Clause”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting in part) (“I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.”); *Alden v. Maine*, 527 U.S. 706, 800 n.33, 814 (1999) (Souter, J., dissenting) (adhering to the view that the “Eleventh Amendment was never intended to bar federal-question suits against the States in federal court” and describing the majority’s approach as “probably . . . fleeting”); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (noting his “continuing adherence to the view that the so-called ‘negative’ Commerce Clause is an unjustified judicial invention, not to be expanded beyond

Twombly and *Iqbal*. In the past term, both Justice Ginsburg and Justice Sotomayor have authored opinions for the Court that rely on the *Twombly* and *Iqbal* precedents.⁸ With these Justices accommodating themselves to *Twombly* and *Iqbal*, overruling is nearly impossible to imagine. Nor have I seen anything suggesting that a Rule amendment repudiating them outright would have any traction, particularly with the Federal Judicial Center's report to the Judicial Conference Advisory Committee on Civil Rules unable to find any statistically significant increase in the rate at which motions to dismiss for failure to state a claim have been granted (except in cases challenging financial instruments).⁹ And despite my friend Steve Burbank's valiant efforts,¹⁰ I also think that the prospect of Congressional repudiation died with the 111th Congress, especially with the defeat of Senator Arlen Specter. As far as I can see, accommodation is the only game in town.

My route to this accommodationist approach is worth explaining. My work on this issue began with a presentation at the Thirty-Second Annual Judicial

its existing domain").

8. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1314 (2011) (Sotomayor, J., for a unanimous court) (holding that plaintiffs "have alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material"); *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (Ginsburg, J.) (stating that Rule 8(a)(2) "generally requires only a plausible 'short and plain' statement of the plaintiff's claim"). It is true that *Skinner* does not cite *Twombly* and *Iqbal*, but it does refer to the requirement of plausibility. And *Matrixx* prominently cites both decisions. 131 S. Ct. at 1323.

9. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011). The stability of a grant rate, of course, does not mean that *Twombly* and *Iqbal* are having no significant effect, because lawyers take those decisions into account in making litigation decisions and it may be that defense counsel are filing so many more motions to dismiss that they would not have previously filed that the grant rate remains stable. The FJC study does show an increase in filing motions, but cannot establish whether more cases are being dismissed because the data sets differ.

One study of *Twombly* takes into account that "in response to a legal change, plaintiffs and defendants may change their legal strategy" so that "[t]he rate at which plaintiffs or defendants prevail in litigation may not change, even after a sharp change in how courts decide cases." William H.J. Hubbard, *The Problem of Measuring Legal Change, with Application to Bell Atlantic v. Twombly* (Univ. of Chi., Olin Law & Econ. Program, Working Paper No. 575, 2011), available at <http://ssrn.com/abstract=1883831>. Hubbard finds "fairly precise zeros for the effects of *Twombly* on both the grant rate of motions to dismiss and the overall rate of dismissal among filed cases." *Id.* at 31. However, a forthcoming note that takes party selection into account suggests that *Twombly* and *Iqbal* are having an effect on at least eighteen percent of cases. Jonah B. Gelbach, *Locking the Doors to Discovery? Conceptual Challenges in and Empirical Results for Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. (forthcoming), available at <http://ssrn.com/abstract=1957363>.

My point is not that *Twombly* and *Iqbal* are having no effect, but rather that with substantial empirical study suggesting less effect than critics predicted, the rulemakers are likely to be rather hesitant to repudiate major Supreme Court decisions. See Civil Rules Advisory Committee, Draft Minutes, Apr. 4-5, 2011, 22 (suggesting that the "Court would be receptive if the Committee could show a major problem But that may not be likely[]"). Perhaps if Gelbach's findings are replicated, that may change.

10. See *Hearing on Whether the Supreme Court has Limited Americans' Access to Court Before the S. Comm. on the Judiciary*, 111th Cong. 22 (2009) (Prepared Statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) (arguing for passage of an Act of Congress responding to *Twombly* and *Iqbal*).

Conference of the United States District Court for the District of New Jersey in March of 2008. An academic who treated that audience of district judges, magistrate judges, and practicing lawyers to an argument that a Supreme Court decision was wrong-headed and illegitimate would have been of scant assistance to them. Of course, criticizing judicial decisions is one important role of legal academics, and one in which I happily engage.¹¹ But as I saw it, and continue to see it, another role of legal academics is to help judges and lawyers understand and deal with the legal doctrine that confronts them. For that reason, I am proud rather than embarrassed to be a co-author of a leading practice treatise,¹² a genre of legal writing that is as accommodationist as one can imagine.

Moreover, there has been no shortage of legal academics heaping criticism on the Court. There has been, however, a real shortage of scholarship that might help lawyers and judges to avoid the injustices that those critics feared.

For similar reasons, I do not think that the audience at this conference, consisting primarily of plaintiff's lawyers, would find much value (apart perhaps from the emotional inspiration akin to that from a campaign rally) in hearing yet another critique of *Twombly* and *Iqbal*. Instead, I think the most useful contribution I can make is to provide a bit of a status report on the how efforts to tame *Twombly* and *Iqbal* are faring. My hope is to convince you both to try my strategies and to support my proposal—or at least to tell me why not.

II

WHAT IS CONCLUSORY? WHAT IS PLAUSIBLE?

The basic framework for evaluating a complaint that emerges from these decisions is as follows: A court distinguishes between factual allegations and conclusory allegations. It assumes the truth of the factual allegations, but not the conclusory allegations. Finally, it assesses, using common sense and judicial experience, whether the claim is plausible.¹³

Under this framework, the distinction between factual allegations and conclusory allegations is crucial, for it marks the line between what will be

11. See, e.g., Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553 (2005); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999); Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735 (2003). The last-listed of these articles contributed to a bit of a constitutional crisis in New Jersey earlier this year. See Edward A. Hartnett, *Seeking a Path to Restore Order in the New Jersey Supreme Court*, THE STAR-LEDGER, Dec. 15, 2010, available at 2010 WLNR 24793041; Paul Mulshine, *In This Schoolyard Fight, Christie Could Have Fun During Recess*, THE STAR-LEDGER, Dec. 14, 2010 available at 2010 WLNR 24780246.

12. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE (9th ed. 2007).

13. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“[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.”).

assumed to be true and what will not be assumed to be true. Some have argued that the distinction is incoherent,¹⁴ and some fear an infinite regress: any allegation can be considered “conclusory” in the sense that one can always ask for the underlying information that supports an allegation.¹⁵ I have argued that the label “conclusory,” in the context of *Twombly* and *Iqbal*, should be limited to allegations that are essentially equivalent to the elements of a right of action. So understood, the distinction is not incoherent, and it avoids the risk of an infinite regress.¹⁶ Instead, it works to insist that a plaintiff, in the words of Charles Clark, take “one step further back” from the “final and ultimate conclusion which the court is to make in deciding the case for him.”¹⁷

Some feared that the plausibility test would license judges to evaluate the believability of any (or all) allegations in a complaint. I have argued instead that the plausibility test can be understood as equivalent to the traditional insistence that the inferences that a plaintiff asks a court to draw must be reasonable.¹⁸ So understood, a court separates the factual allegations from the conclusions as to each element of the right of action, assumes the former to be true, and then asks whether the latter (the conclusions as to each element of the right of action) can reasonably be inferred from the former (the factual allegations).

How are these arguments faring in the lower courts? Although I make no claim to have read all of the thousands of cases that cite *Twombly* and *Iqbal*,¹⁹ I have seen numerous cases that use the term “conclusory” to describe allegations that are essentially equivalent to the elements of a right of action and scant evidence in these courts of any move toward the feared infinite regress.²⁰ Professor Alex Reinert catalogues a number of cases that he views as

14. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 867 (2010).

15. See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1318 (2010) (explaining the “endless cascade of inquiry” that could result if “[e]ach allegation that might be offered to ‘plausibly suggest’ some other allegation would itself require support, and so on and so on”).

16. See Hartnett, *supra* note 3, at 491–92.

17. *Id.* at 491 (quotations omitted) (citing Clark).

18. *Id.* at 484–85.

19. A Westlaw search for “*Twombly* /p *Iqbal*”—which is surely an underinclusive search—returned 14,648 hits on July 29, 2011. A particularly valuable resource for anyone trying to keep track of cases discussing and applying *Twombly* and *Iqbal* is the periodically revised memorandum by Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure, available on the United States Courts web page. See Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to Civil Rules Comm. & Standing Rules Comm. (Mar. 29, 2011) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_March_2011.pdf.

20. See, e.g., *Santiago v. Warminster Twp.*, 629 F.3d 121, 131 (3d Cir. 2010) (treating an allegation that was, in essence, that the supervisory defendants told other defendants to do what they did as a formulaic recitation of the elements of a supervisory liability claim and hence conclusory); *Hayden v. Paterson*, 594 F.3d 150, 162 (2d Cir. 2010) (identifying as conclusory those allegations that are “in effect and intent . . . the very assertion that plaintiffs must prove”); *Pa. Prison Soc’y v. Cortes*, 622 F.3d 215, 233 (3d Cir. 2010) (treating an allegation that a state constitutional amendment “impose[d] additional punishment” as conclusory) (internal quotations omitted); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 362 (3d Cir. 2010) (treating as conclusory an allegation of agreement); *Brookhart v. Rohr*, 385 F. App’x 67, 70 (3d Cir. 2010) (treating as conclusory an allegation of pattern of racketeering activity);

reflecting confusion in the lower courts about what kinds of allegations are properly labeled conclusory.²¹ I do not doubt that there is some confusion and conflict. However, it is worth noting that the same allegation might properly be considered conclusory in one case, and not in another, because the conclusory nature of an allegation should not be judged in the abstract, but in the context of a particular right of action. What is *conclusory* depends on the *conclusions* that are necessary for relief under a particular right of action. I do not pretend that this reconciles all the cases, but rather that it offers a path out of the confusion and conflict.

Similarly, I see little evidence that the plausibility test is being used by judges to evaluate the believability of any (or all) allegations in a complaint. Overwhelmingly, courts recognize that the plausibility test is about the reasonableness of inferences from factual allegations to conclusions, not about

Rhodes v. Prince, 360 F. App'x 555, 559 (5th Cir. 2010) (treating an allegation of arrest as conclusory “[b]ecause an ‘arrest’ is a legal conclusion under the Fourth Amendment and a necessary element of a false arrest claim”); *In re NM Holdings Co.*, 622 F.3d 613, 623 (6th Cir. 2010) (treating as conclusory an allegation that was at most a formulaic recitation of the causation element of a professional negligence claim); Telesaurus VPC, L.L.C. v. Power, 623 F.3d 998, 1005 (9th Cir. 2010) (treating as conclusory an allegation that the defendant was a common carrier); Mecca v. United States, 389 F. App'x 775, 780 (10th Cir. 2010) (treating as conclusory an allegation that defendants “agreed, by words or conduct, to accomplish an unlawful goal or accomplish a goal through unlawful means”) (internal quotations omitted); Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1338–39 (11th Cir. 2010) (treating as conclusory an allegation that visco-elastic foam mattresses comprise a relevant product market); Speaker v. U.S. Dep't of Health & Human Servs. Ctr. For Disease Control & Prevention, 623 F.3d 1371, 1381 (11th Cir. 2010) (stating that the plaintiff “must do more than recite these statutory elements in conclusory fashion”); Edwards v. Prime, Inc., 602 F.3d 1276, 1300–01 (11th Cir. 2010) (treating as conclusory an allegation that plaintiff “was subjected to a hostile discriminatory environment on the basis of his race”) (internal quotations omitted); Arar v. Ashcroft, 584 F.3d 559, 617 (2d Cir. 2009) (en banc) (Parker, J., dissenting) (“Allegations are deemed ‘conclusory’ where they recite only the elements of the claim.”); McTernan v. City of York, Pa., 577 F.3d 521, 532 (3d Cir. 2009) (treating as conclusory allegations that a ramp was a public forum, that defendants inhibited plaintiffs from exercising their religion, and that defendants’ actions constituted a substantial burden on plaintiffs’ religious exercise); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 259 (4th Cir. 2009) (referring to a “conclusory allegation of an element of the immunity claim”); Floyd v. City of Kenner, La., 352 F. App'x 890, 898 (5th Cir. 2009) (treating as conclusory an allegation that defendant participated in, approved, and directed the filing of false and misleading affidavits); Hensley Mfg. v. ProPride, Inc. 579 F.3d 603, 611 (6th Cir. 2009) (treating as conclusory an allegation that defendant created “a strong likelihood of confusion in the marketplace as to the source of origin and sponsorship of the goods”) (internal quotations omitted); Brooks v. Ross, 578 F.3d 574, 582 (7th Cir. 2009) (treating as conclusory an allegation that defendant knowingly, intentionally, and maliciously prosecuted plaintiff in retaliation for exercising his rights); McAdams v. McCord, 584 F.3d 1111, 1114 (8th Cir. 2009) (treating as conclusory an allegation that plaintiff’s loss was “a direct and proximate result of Defendants’ fraudulent misrepresentations and omission of material facts”) (internal quotations omitted); Delta Mech., Inc., v. Garden City Grp., 345 F. App'x 232, 234–35 (9th Cir. 2009) (Ikuta, J., concurring in part and dissenting in part) (treating as conclusory an allegation that the plaintiff is an intended third-party beneficiary); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1266 (11th Cir. 2009) (treating as conclusory an allegation that paramilitary security forces acted under color of state law); Chao v. Ballista, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (“Allegations become ‘conclusory’ where they recite only the elements of the claim”); cf. Peñalbert-Rosa v. Fortuño-Burset, 631 F.3d 592, 595 (1st Cir. 2011) (describing an allegation as to state of mind as a factual allegation rather than an “ultimate legal conclusion[]” but still treating it as conclusory).

21. Alex Reinert, *Pleading As Information-Forcing*, 75 LAW & CONTEMP. PROBS., no. 1, 2012 at 1, 10.

the believability of factual allegations.²² There are occasional exceptions, where judges find factual allegations so outlandish as to be beyond belief, but in doing so, they rely on Justice Souter's dissenting opinion in *Iqbal*, and its discussion of time travel and little green men from Mars.²³

Ironically, the biggest threat I see to the prospect of confining the category of conclusory allegations to those that are equivalent to the elements of the right of action comes from Justice Sotomayor's recent opinion in *Matrixx*.²⁴ The *Matrixx* case involved a securities fraud claim under section 10(b) and Rule 10b-5²⁵ against the manufacturer of an over-the-counter medication, Zicam. The plaintiffs alleged that the manufacturer's failure to reveal reports that linked Zicam to anosmia (the loss of smell) was a material omission. The Court observed that one element of such a claim was "a material misrepresentation or omission by the defendant" and that materiality is satisfied when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."²⁶ It held that the complaint should not have been dismissed because the plaintiffs "alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material."²⁷

So far, so good. Although the complaint included an allegation that "defendants materially misled the investing public, thereby inflating the price of *Matrixx* common stock, by publicly issuing false and misleading statements and omitting to disclose material adverse facts regarding Zicam, necessary to make defendants' statements, as set forth herein not false and misleading,"²⁸ the Court did not simply assume that allegation to be true. If it had, the opinion could have been quite short, simply announcing that, assuming that this allegation were true, the omissions were material. Instead, without specifically advertng to this allegation—and not including it in the recitation of the "facts . . . which the courts below properly assumed to be true"²⁹—it treated this allegation as conclusory and asked whether the factual allegations plausibly supported this conclusion of materiality. Once it concluded that the factual allegations plausibly supported the conclusion of materiality, it held that the complaint

22. See, e.g., *Speaker*, 623 F.3d at 1386 (11th Cir. 2010) (noting that the plaintiff "need not prove his case on the pleadings," but "merely provide enough factual material to raise a reasonable inference, and thus a plausible claim" that the defendant was the source of the disclosures at issue).

23. See *Tooley v. Napolitano*, 586 F.3d 1006, 1009–10 (D.C. Cir. 2009); cf. *Atkins v. City of Chicago*, 631 F.3d 823, 830–32 (7th Cir. 2011) (finding some factual allegations unrealistic or nonsensical, others contradictory, and others "not impossible" but "highly implausible," and concluding that a district court "has to consider all these features of a complaint en route to deciding whether the complaint has enough substance to warrant putting the defendant to the expense of discovery").

24. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

25. 15 U.S.C. § 78j(b) (2006); 17 C.F.R. § 240.10b-5 (2011).

26. *Matrixx*, 131 S. Ct. at 1317–18 (2011) (internal quotation marks and citations omitted).

27. *Id.* at 1314.

28. Consolidated Amended Complaint at ¶ 59, *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009) (No. 06-15677).

29. *Matrixx*, 131 S. Ct. at 1314.

adequately alleged materiality.

However, the opinion also addresses the plausibility of a causal link between Zicam and anosmia. It cites *Twombly* and *Iqbal* immediately before stating, “The information provided to Matrixx by medical experts revealed a plausible causal relationship between Zicam Cold Remedy and anosmia.”³⁰ Moreover, it cites *Twombly* (and recites its plausibility standard) before stating that plaintiffs’ “allegations plausibly suggest that [two medical professionals] conclusions were based on reliable evidence of a causal link between Zicam and anosmia.”³¹ In addition, it notes that the complaint alleges that studies confirmed the toxicity of zinc (one of the ingredients in Zicam) and that “the existence of the studies suggests a plausible biological link between zinc and anosmia.”³²

Of course, in a tort action against the manufacturer by someone who lost his sense of smell, such causation would be an element of the right of action. But in a 10b-5 case, that causation is not an element, and addressing the plausibility of that causal link suggests that the Court might be applying the plausibility requirement more broadly to other allegations of a complaint.

A more limited reading is nonetheless possible, and preferable: If an element of a right of action depends on a chain of inferences, then in order for the ultimate conclusion regarding that element to be plausible, each link in the chain of inference must be plausible. In *Matrixx*, the chain of inferences regarding materiality was something like this:

Medical experts suspect that there is a causal link between Zicam and anosmia.



Consumers, regulators, and doctors would be concerned about the suspected causal link between Zicam and anosmia, thereby hurting sales.



Reasonable investors would think that the suspected causal link between Zicam and anosmia is important.

Viewed this way, the discussion of the plausibility of a causal link in *Matrixx* is included only to evaluate the plausibility of the ultimate inference that reasonable investors would think the claimed causal link to be important. If the claimed causal link were itself implausible (the Court seems to assume), then consumers, regulators, and doctors would not be concerned, and neither would reasonable investors.

Matrixx is helpful in one regard: It seems to make clear that the determination of plausibility is to be made on an element-by-element basis. *Twombly* and *Iqbal* referred to the plausibility of the claim, but in each case, only one element was at issue; upon finding one element implausible, the claim

30. *Id.* at 1323; *see also id.* at 1322 (“Assuming the complaint’s allegations to be true, as we must, Matrixx received information that plausibly indicated a reliable causal link between Zicam and anosmia.”).

31. *Id.* at 1322 n.12.

32. *Id.* at n.13.

failed. *Matrixx* involved two elements, materiality and scienter, and the Court evaluated them separately, determining the sufficiency of the element of materiality under the plausibility standard of *Twombly* and *Iqbal*, and the sufficiency of the element of scienter under the standard set by the Private Securities Litigation Reform Act (PSLRA).³³ Significantly, after determining that the allegations regarding each element were sufficient, it did not evaluate the plausibility of the 10b-5 claim taken as a whole, but simply concluded that the court of appeals was correct that the complaint should not have been dismissed. This is significant, not only as a clarification of the approach lower courts should take, but also because the alternative of evaluating the plausibility of the claim as a whole could lead to the dismissal of more complaints if courts adopted a version of the product rule.³⁴ If a court were to evaluate the plausibility of the claim as a whole, it might determine that each of (say) six elements was itself plausible, but that the simultaneous combination of all six elements was not plausible—just as the likelihood of any particular child being a girl is $\frac{1}{2}$, while the likelihood of having a family of six girls is $\frac{1}{64}$ ($\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$).

Some contend that assessing plausibility inherently involves a comparative analysis of competing inferences.³⁵ This is certainly true for scienter under the PSLRA, which requires that the inference of scienter be “at least as compelling as any opposing inference one could draw from the facts alleged.”³⁶ It may well be true at trial, when one is choosing the best inference, and typically true at other stages of litigation when adversaries are offering competing inferences.³⁷

I am not fully convinced that determining plausibility is *necessarily* comparative. It seems to me that if an inference is sufficiently in accord with common experience, it might well be judged plausible even without comparing it to other conceivable inferences. Likewise, if an inference is sufficiently out of whack with common experience—such as inferring from the fact that I am Derek Jeter’s second cousin once removed to the conclusion that I am a star Major League Baseball player—it can be rejected as implausible without comparing it to other conceivable inferences. (Perhaps some would say that the comparison is implicit and unarticulated.) Nevertheless, in deciding whether a suggested inference is plausible, it is certainly commonplace to consider

33. *Id.* at 1317–25 (discussing the element of materiality in Part IIA of the opinion and the element of scienter in Part IIB of the opinion).

34. See generally David McCord, *A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond*, 47 WASH. & LEE L. REV. 741 (1990) (explaining the product rule). Another reason to decline to take this route is that courts would face the difficult if not insurmountable problem of determining the extent to which the individual elements are independent of each other.

35. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) (“Judgments about the plausibility of a complaint are necessarily comparative.”).

36. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007).

37. See *United States v. Beard*, 354 F.3d 691, 692–93 (7th Cir. 2004); Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 611 (1994).

alternative inferences.

Consider a complaint involving a traffic accident on I-95:

Plaintiff was driving southbound on I-95 in Florida on March 26, 2011.

A car in front of plaintiff's car stopped short.

Plaintiff was able to stop her car in time to avoid hitting the car in front of her.

Defendant was driving a car behind the plaintiff and did not stop until colliding with plaintiff's car.

In failing to stop before colliding with the plaintiff's car, the defendant purposefully and intentionally assaulted the plaintiff because of the plaintiff's sexual orientation.³⁸

I expect that you found the conclusion of purposeful assault based on sexual orientation rather jarring. Rule 8(b) permits an allegation of state of mind to be made generally, but *Iqbal* refuses to require that courts credit such an allegation and insists that it plausibly follow from the other allegations in the complaint.³⁹ The point is not that no one who crashed a car into someone else ever did so because of the victim's sexual orientation and that courts should assume that no one ever will. Even highly unusual things happen sometimes. Instead, the point is that if a plaintiff alleges that this is what actually happened to him, the plaintiff must provide some allegation—other than just a general allegation regarding the defendant's state of mind—plausibly suggesting that it did.

In the absence of any other information, is purposeful assault based on sexual orientation a plausible inference? Not compared to the inference of insufficient attention, inadequate car maintenance, or too-slow reflexes, or even an accident that the defendant simply could not avoid. In rejecting the plausibility (in the absence of other information) of a purposeful assault based on sexual orientation, it would be natural to describe the competing inferences as more likely. And in expressing their rejection of the plausibility of the inferences that the plaintiffs sought to draw in *Twombly* and *Iqbal*, the Court similarly referred to other inferences as more likely.⁴⁰

But that should not be read to mean that the only inference that is plausible is the one that is more likely than any other—for that would be to try the case on the complaint. Moreover, *Iqbal* insists that the “plausibility standard is not

38. See *Brofman v. Fla. Hearing Care Ctr. Inc.*, 703 So. 2d 1191 (Fla. Dist. Ct. App. 1997) (involving a civil suit under the Florida hate crimes statutes, FLA. STAT. § 775.085 (2010)).

39. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009) (“Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners’ discriminatory intent ‘generally,’ which he equates with a conclusory allegation. 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.’ 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 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.”) (alteration in original) (internal citations omitted).

40. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007) (“obvious alternative explanation”); *Iqbal*, 129 S. Ct. at 1951 (“more likely explanations”).

akin to ‘a probability requirement,’⁴¹ so it would be wrong to read *Iqbal* to require that the plaintiff’s proposed inference be more likely than competing inferences.⁴² Instead, these passages in *Twombly* and *Iqbal* should be understood simply to reflect that part of what can make an inference implausible is the existence of significantly better competing inferences.

III

SUGGESTIONS FOR DRAFTING AND DEFENDING COMPLAINTS

In light of all this, how should a plaintiff go about drafting a complaint? It might be thought that a plaintiff should simply avoid conclusory allegations. I do not think so, for as Justice Kennedy explained in *Iqbal*, conclusory allegations can provide the framework for a complaint.⁴³ They provide a framework by establishing what—at least as the plaintiff understands the substantive law—the elements of the right of action sued upon by the plaintiff are. I understand that it is frequently said that a complaint under the Federal Rules need not state all of the elements of a right of action. Indeed, Justice Ginsburg, writing for the court in *Skinner*, noted that “under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff’s claim for relief to a precise legal theory.”⁴⁴ The opinion in *Matrixx*, on the other hand, lists the five elements of a 10b-5 action and then evaluates whether the plaintiffs “have failed to plead both the element of a material misrepresentation or omission and the element of scienter,”⁴⁵ evidently taking for granted that such elements had to be pleaded.

Even if the complaint itself need not reveal a legal theory, in order to survive a 12(b)(6) motion, counsel must provide one.⁴⁶ And in *Skinner*, Justice

41. 129 S. Ct. at 1949.

42. See *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010) (noting that because conflicting inferences were both plausible, dismissal was inappropriate); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (“For cases governed only by Rule 8, it is not necessary to stack up the inferences side by side and allow the case to go forward only if the plaintiff’s inferences seem more compelling than the opposing inferences.”); *Hamilton v. Palm*, 621 F.3d 816, 819 (8th Cir. 2010) (“[The Plaintiff’s] complaint raised plausible inferences of both employee and independent contractor status. Which inference will prove to be correct is not an issue to be determined by a motion to dismiss.”); *Courie v. Alcoa Wheel & Forged Prod.*, 577 F.3d 625, 630 (6th Cir. 2009) (finding the allegation of settlement agreement plausible based on the attachment of an unsigned settlement proposal as an exhibit to the complaint); *Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir. 2009) (en banc) (Parker, J., dissenting) (“[Allegations] become implausible when the court’s commonsense credits far more likely inferences from the available facts”); *W. Pa. Allegheny Health Sys., Inc. v. U.P.M.C.*, 627 F.3d 85, 98 (3d Cir. 2010) (rejecting idea that “*Twombly*’s plausibility standard functions more like a probability requirement in complex cases”); *Escuadra v. Geovera Specialty Ins. Co.*, 739 F. Supp. 2d 967, 981 (E.D. Texas 2010) (“Requiring a plaintiff’s theory to be more plausible than alternatives would mean that Rule 8’s pleading standard is *more* demanding than the PSLRA. It also would disregard both *Twombly* and *Iqbal* which made clear that Rule 8 does not establish a probability requirement.”).

43. 129 S. Ct. at 1950.

44. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

45. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011).

46. See *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) (stating that “plaintiffs . . . don’t have to plead legal theories,” but that if “defendants filed a motion to dismiss . . . it

Ginsburg added that the complaint in that case was “not a model of the careful drafter’s art.”⁴⁷ For that reason, I believe that it is the general practice of the bar, or at least those members of the bar who strive to practice the careful drafter’s art, to reveal a legal theory by including allegations of each element of a right of action in the complaint. And I suggest that the wisdom of doing so is underscored by *Twombly*, *Iqbal*, and now *Matrixx*.

By including such allegations, a plaintiff not only makes clear his understanding of the legal theory or theories upon which the complaint relies (both to the reader and to himself) but can also point to them as the conclusory allegations not entitled to a presumption of truth, and distinguish them from the factual allegations that are entitled to the presumption of truth.

The plaintiff must also, however, be sure to include factual allegations from which the conclusory allegations regarding each element of the right of action can reasonably be inferred. I would suggest that a well-crafted complaint should make clear, at least through its structure, which allegations are intended to be factual allegations entitled to the presumption of truth, and which are intended to be elements of the right of action that can reasonably be inferred from those factual allegations.⁴⁸ Indeed, it may be useful, in a post-*Twombly* and *Iqbal* world, to structure a complaint to make clear which factual allegations support which conclusions.

Some think that the demand for plausibility is a demand for factual specificity. To my mind, there is a no necessary connection between specificity and plausibility. Consider again the hypothetical complaint involving a traffic accident on I-95 and alleging purposeful assault because of the victim’s sexual orientation. Providing lots of specifics about the accident (time of day, precise location, speed of the cars, weather, even the VINs for each car) would do nothing to add to the plausibility of purposeful assault based on sexual orientation discrimination. Even specifics about the state of mind—were that possible—would do little to make the conclusion plausible. Rule 8(b) permits an allegation of state of mind to be made generally. *Iqbal* does not ask for more details about the state of mind; it asks for reasons to believe that state of mind existed. A demand for specificity asks, “Can you tell me about that in more detail?” A demand for plausibility asks, “Why should I think that?”

Some have worried that *Iqbal*, by instructing judges to determine plausibility based on common sense and judicial experience, invited

would not be responsive of the plaintiff to say that she was not ‘required at this stage of the litigation to specifically characterize or identify the legal basis of the claims in the complaint[.]’”).

47. 131 S. Ct. at 1296.

48. *Cf.* FED. R. CIV. P. 52(a)(1) (requiring a court to “find the facts specially and state its conclusions of law separately”). If the plaintiff has “personal knowledge of an element of a claim that he alleges . . . it is simplest to view such an allegation as not conclusory—because it is not expressing an inference at all. Alternatively, one could view it as conclusory and ask whether it is plausible to infer that the conclusion is true, given that a person with personal knowledge says that it is true, but (without making a forbidden credibility determination) the answer to that inquiry will always be yes.” Hartnett, *supra* note 3, at 494 n.104.

idiosyncratic and subjective decisionmaking. I, on the other hand, have argued that the reference to common sense and judicial experience should be understood as a description of the ordinary operation of inductive reasoning.⁴⁹ It seems to me that judges view themselves as applying ordinary inductive reasoning, rather than being authorized to act on idiosyncratic and subjective understandings. I admit, though, that here it is hard to be confident that the fear is misplaced, because ordinary inductive reasoning is rooted in baseline assumptions about the way the world usually works, and although such baseline assumptions are shaped by one's own experience, it is their nature to be perceived as widely accepted common sense. Accordingly, even if a judge's baseline assumptions are not widely accepted common sense, a judge is likely to think them so.

In recognition of the truth that inductive reasoning—and therefore the plausibility test—depends on baseline assumptions about the way the world usually works, I have suggested that lawyers, if they believe that a judge's own knowledge and experience would likely have led him to inaccurate baseline assumptions about the way the world usually works, present information designed to dislodge those inaccurate baseline assumptions. I confess that I do not see much evidence that lawyers have attempted to do so. It might be that I do not see such evidence because, if successfully deployed, judges will write as if they understood the truth all along, rather than explain that they were blind, but now they see. So it may be that lawyers are doing so all the time, but in a way that is largely invisible to those who read judicial opinions.⁵⁰

It is also possible that lawyers are rarely trying to do so. If this is what is happening, I would reiterate my suggestion: If you believe that a judge's own knowledge and experience would likely have led him to inaccurate baseline assumptions about the way the world usually works, present information designed to dislodge those inaccurate baseline assumptions.⁵¹

Some of you may be thinking that none of these suggestions meet the most frequent problem you have dealing with *Twombly* and *Iqbal*: the inability to plead factual allegations from which one can plausibly infer an element because you need discovery in order to make such factual allegations. Here, I have made two related suggestions, one of which has gotten some support on the bench, the other that seems not to have penetrated the bar at all.

The suggestion that has gotten some support on the bench is that discovery can proceed despite the pendency of a motion to dismiss under Rule 12(b)(6). I believe that argument is unassailable under the Federal Rules.⁵² Under Rule

49. Hartnett, *supra* note 3 at 498.

50. Some of the amicus briefs in *Matrixx* may have taught members of the Court how medical experts treat inferences of causation. See *Matrixx*, 131 S. Ct. at 1319–20 (citing amicus briefs in discussion of medical professionals relying on evidence of causation that is not statistically significant).

51. Cf. Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 184 n.192 (suggesting that advocates “might benefit from understanding the hidden factual assumptions at issue in various doctrines and might resurrect the idea of the ‘Brandeis brief[.]’”).

52. *But see* *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011)

26(d), discovery may commence as soon as the discovery planning conference pursuant to Rule 26(f) has been held. In contrast to the PSLRA, there is no provision in the Federal Rules that automatically stays discovery upon the filing of a motion to dismiss. Indeed, a court is specifically authorized by Rule 12(i) to defer ruling on a 12(b)(6) motion until trial; thus a defendant who wishes such a stay of discovery must move for a stay and show good cause under Rule 26.⁵³

Judge Posner has explicitly relied on my argument, explaining that “[i]f the plaintiff shows that he can’t conduct an even minimally adequate investigation without limited discovery, the judge can presumably allow that discovery, meanwhile deferring ruling on the defendant’s motion to dismiss.”⁵⁴ It is true that Judge Posner was writing in dissent, but he was dissenting from an opinion that reversed a 12(b)(6) dismissal and interpreted *Twombly* and *Iqbal* in a remarkably pro-plaintiff way, reading the plausibility test to require nothing more than “a story that holds together,” with the court asking itself, “*could* these things have happened[?]”⁵⁵ The Court of Appeals for the Third Circuit has also noted, while praising the district court’s management of the case, that discovery continued during the pendency of a 12(b)(6) motion.⁵⁶

Even when defendants move to stay discovery pending a motion to dismiss, some post-*Iqbal* district courts deny the motion.⁵⁷ Significantly, in doing so,

(“The plaintiff apparently can no longer obtain the factual detail necessary because the language of *Iqbal* specifically directs that *no* discovery may be conducted in cases such as this, even when the information needed to establish a claim . . . is solely within the purview of the defendant . . .”).

53. See Hartnett, *supra* note 3, at 507–08; see also Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 123–24 (2010) (discussing the notion of “plausibility discovery” within the framework of Rule 26); cf. David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 141–43 (2010) (suggesting that the best way to “reconcile the Court’s decisions with the Rules is to read *Iqbal* and *Twombly* to implicitly recalibrate the showing of good cause Rule 26(c) requires to stay discovery pending resolution of a motion to dismiss,” but that, even understood this way, *Iqbal* did not cut off all pre-motion-to-dismiss discovery).

54. Swanson v. Citibank, N.A., 614 F.3d 400, 412 (7th Cir. 2010) (Posner, J., dissenting).

55. *Id.* at 404.

56. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 311 (3d Cir. 2010) (“Significantly, the District Court allowed discovery to proceed while the motions to dismiss were pending. Plaintiffs’ amended pleadings were thus able to draw on documents produced and depositions taken The District Court skillfully managed the consolidated proceedings.”); cf. Mann v. Brenner, 375 F. App’x 232, 239–40 (3d Cir. 2010) (finding no abuse of discretion in district court’s decision to stay discovery). See also Allstate Ins. Co. v. Levy, No. CV-10-1652(FB)(VVP), 2011 WL 288511, at *1 (E.D.N.Y. Jan. 27, 2011) (“The pendency of the motion to dismiss does not provide an automatic basis to stay discovery.”); Civil Rules Advisory Committee, Minutes, Nov. 15–16, 2010, 24–25 (lawyers reporting conflicting experience with stays being granted and a judge stating, “I don’t stay discovery.”) (internal quotations omitted); Reinert, *supra* note 21, at 20 (“The Fifth Circuit, like many other circuits, also has held that limited discovery may be appropriate where the plaintiff suffers from informational asymmetry with respect to essential elements of his claim.”).

57. See, e.g., Baltayan v. Tito, No. 3:10-CV-1327(CFD), 2011 WL 1194305, at *2 (D. Conn. Mar. 30, 2011) (noting that the court had already ordered that discovery was not stayed pending decision on a motion to dismiss); Lopez v. Sanders, No. 2:10-cv-76-DPM, 2011 WL 2679603, at *2 (E.D. Ark. July 8, 2011) (agreeing that “the allegations are too thin” under *Iqbal*, but allowing time “to do some basic discovery” about the involvement of each defendant because “the undisputed fact remains that Lopez-Alvarado was beaten to death at the prison while some officers were on duty”).

some courts emphasize the likelihood that even if the motion to dismiss were to be granted, leave to amend would likely also be granted, and discovery would be useful in drafting that amended complaint.⁵⁸ One court has emphasized the particular importance after *Twombly* of avoiding an “overly lenient standard for granting motions to stay all discovery.”⁵⁹

The suggestion that seems to have gotten little traction among the bar is to abandon pleading on information and belief. The practice is a remnant from code pleading, particularly code pleading’s frequent commitment to verified pleadings. In a pleading regime marked by verified pleadings, pleading on information and belief was used to allow pleaders to allege matters that they could not verify. But the Federal Rules do not require verification. Today, while courts have found them permissible,⁶⁰ an allegation made on information and belief runs the risk of being treated as a conclusory allegation, not entitled to the presumption of truth.

If counsel’s pre-filing inquiry reveals an evidentiary basis for a factual allegation, then simply make the factual allegation. Do not dilute the force of the allegation with references to information and belief. But what if your pre-filing inquiry fails to reveal an evidentiary basis for a factual allegation, yet you think that discovery will reveal such an evidentiary basis? Then do what Rule 11(b)(3) explicitly instructs: Specifically identify the allegation as a factual contention that “will likely have evidentiary support after a reasonable opportunity for . . . discovery.”

The two suggestions are related: By explicitly identifying particular factual allegations pursuant to Rule 11(b)(3), the attention of counsel and the court can be focused on the need for—and propriety of—discovery as to that factual allegation. Rather than arguing in the abstract about the appropriateness of discovery pending a 12(b)(6) motion, counsel and the court can focus more precisely on a narrower question: whether to allow discovery to enable the plaintiff to obtain evidence to support particular factual allegations that have been specifically identified, in the manner explicitly provided for by the Federal Rules, as needing discovery. Moreover, the terms of the debate about that question will be shaped by terms of Rule 11(b)(3) itself: Can it reasonably be expected that discovery will produce evidence to support that allegation?

58. *S.F. Tech. v. Kraco Enter., L.L.C.*, No. 5:11-cv-00355 EJD, 2011 WL 2193397, at *2–*3 (N.D. Cal. June 6, 2011) (noting that the “Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery” and that “district courts tend to look unfavorably” upon them, and particularly emphasizing that “discovery would not be wasted” even if the motion to dismiss were granted because the plaintiff “could utilize the discovery responses to prepare an amended pleading”); *Cloverleaf Golf Course, Inc. v. FMC Corp.*, No. 11-cv-190-DRH, 2011 WL 2838178, at *4 (S.D. Ill. July 15, 2011) (refusing to stay discovery because the defendant had not met its burden to justify a stay, and noting that the court could not presume that the motion to dismiss would be granted and that even if it were granted, plaintiff would likely have an opportunity to amend).

59. *Trzaska v. Int’l Game Tech.*, No. 2:10-cv-02268-JCM-GWF, 2011 WL 1233298, at *4 (D. Nev. Mar. 29, 2011).

60. See *Arista Records L.L.C. v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010); *Boy Blue, Inc. v. Zomba Recording, L.L.C.*, No. 3:09-CV-483-HEH, 2009 WL 2970794, at *2 (E.D. Va. Sept. 16, 2009).

Perhaps such an inquiry might seem odd and difficult. But I would hope not. I would hope that it is similar to the thought process counsel engages in before deciding to take a case: “What makes me think, if I don’t already have it, that I’ll be able to get the evidence to prove all of the elements of the case?” Your reasons for so believing—your reasons for taking the case in the first place—can then be offered to the court as the reasons why the complaint should not be dismissed without allowing discovery as to those particular allegations.⁶¹

IV

A PROPOSED AMENDMENT

I believe that all of these methods of dealing with *Twombly* and *Iqbal* are permitted under the current Federal Rules of Civil Procedure. Yet I also readily admit that these suggestions are not complete solutions, in part because the Rules do not make clear how a judge is supposed to handle an allegation specifically identified pursuant to Rule 11(b)(3). A judge might exercise his discretion to simply stay discovery during the pendency of a motion to dismiss without grappling with the likelihood of obtaining discovery to support such an allegation. And given the skepticism with which *Twombly* and *Iqbal* treat careful case management, this might be the path of least resistance for some judges.⁶²

Accordingly, I have also suggested an amendment to Rule 12(b) that, I believe, reasonably accommodates the competing interests of plaintiffs who need discovery to support their case and defendants who fear massive discovery costs despite a meritless claim. As an accommodation of the competing interests that assumes the continued viability of *Twombly* and *Iqbal*, I believe that it also has a better chance of being adopted than proposals that seek to repudiate those decisions. If I am right that it reasonably accommodates the competing interests, please support the proposal. If it does not, please tell me.

I propose adding a new subsection to the end of Rule 12:

Rule 12(j): Allegations Likely To Have Evidentiary Support After a Reasonable Opportunity for Discovery

If, on a motion under Rule 12(b)(6) or 12(c) that has not been deferred until trial, the claim sought to be dismissed includes an allegation specifically identified as provided in Rule 11(b)(3) as likely to have evidentiary support after a reasonable opportunity for discovery, the court must either (1) assume the truth of the allegation, or (2) decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery. In deciding whether an allegation is likely to have evidentiary support after a reasonable opportunity for discovery, the court must

61. *Cf. Guirguis v. Movers Specialty Servs., Inc.*, 346 F. App’x 774, 776 (3d Cir. 2009) (noting that the complaint conclusorily alleged that plaintiff was fired based on his national origin but never intimated in any way why the plaintiff believed that national origin motivated the firing).

62. District courts in the Sixth Circuit might no longer see themselves as having any discretion in the matter. *See New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046 (6th Cir. 2011) (“The plaintiff apparently can no longer obtain the factual detail necessary because the language of *Iqbal* specifically directs that *no* discovery may be conducted in cases such as this, even when the information needed to establish a claim . . . is solely within the purview of the defendant . . .”).

consider the parties' access to evidence in the absence of discovery and state on the record the reason for its decision.

If the court decides that the allegation is likely to have evidentiary support after a reasonable opportunity for discovery, it must allow for that discovery, under the standards of Rule 26, and deny the motion to dismiss. If the court decides that the allegation is not likely to have evidentiary support after a reasonable opportunity for discovery, the court must treat the motion as one for summary judgment under Rule 56, and provide all parties a reasonable opportunity to present all the material that is pertinent to the motion.

I believe that this proposal accommodates the interests of plaintiffs who lack evidentiary support for a particular allegation, by protecting them from their worst fear under *Twombly* and *Iqbal*: having their claims dismissed because any possible supportive evidence is in the hands of the defendant, without a court ever directly confronting the question of whether they would likely be able to get such supportive evidence if given the opportunity for discovery. If the court assumes the truth of the allegation and nonetheless dismisses, it will not be because of the inability to access supporting evidence. If the court does not assume the truth of the allegation, it must decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery and, if so, allow appropriate discovery. And in making this determination, the proposal specifically directs judges to consider the parties' access to evidence in the absence of discovery.

It accommodates the interests of defendants by providing a means of getting reasonably prompt judicial attention to the question of whether the defendant can avoid the costs of discovery, either because the plaintiff loses even if discovery turns up what he seeks or because there is no reason to think that discovery will turn up what he seeks.

And it gives both plaintiffs and defendants an incentive to focus their attention (and the court's) on what are likely to be the determinative issue or issues in the case. Those allegations identified under Rule 11(b)(3) are more likely than other issues to be determinative, or at least more likely to be determinative in the pretrial context. This can, I believe, promote the court's (and the public's) interest in efficiency.

The proposal is designed to protect plaintiffs who think they already have evidentiary support for a particular allegation, but realize that a judge might disagree. If identifying an allegation under Rule 11(b)(3) meant that a judge would simply disregard the allegation in deciding a 12(b)(6) motion when the judge thought that discovery would not likely lead to supporting evidence, plaintiffs might be rather wary of making such identifications. Under this proposal, if the judge refuses to allow discovery, the result is not that the allegation is disregarded; instead, plaintiffs have an opportunity to present the evidence they do have, in an effort to convince the court that there is a triable issue even without discovery on that point. Thus, plaintiffs would have an incentive to properly identify such allegations, because they would get the protection of the new provision. They have a countervailing incentive, however, to not identify too many of their allegations this way, for that would likely make

a judge rather skeptical.

Identifying an allegation as one made pursuant to Rule 11(b)(3) provides the pleader with a crucial advantage under my proposal: It requires the court either to assume that the allegation is true or to decide whether it is likely to have evidentiary support after an opportunity for discovery. A court cannot, as it might today and as happened in both *Twombly* and *Iqbal*, simply refuse to credit an allegation made on information and belief that it deems conclusory and never explicitly confront the question of whether discovery would likely yield evidentiary support. Nor does this inquiry simply replicate the plausibility analysis, because the reasonableness of inferring X is different from the reasonableness of finding evidence to support X—as criminal procedure’s distinction between sufficiency of the evidence to convict and probable cause to search demonstrates.⁶³

If the court reaches the question whether discovery is likely to produce evidence supporting an allegation, it must consider the parties’ access to the evidence without discovery. If a party has access to the evidence without discovery, but has not come up with it, it is less likely that discovery will produce that evidence than if the party did not have access to it without discovery. It is easier for a judge in the first situation than in the second to say, “If you haven’t come up with it yet, I don’t think discovery will help.”

V

CONCLUSION

I think that *Twombly* and *Iqbal* are here to stay, and that there are a variety of ways in which they can be tamed. I am largely encouraged that courts tend to be confining the label “conclusory” to allegations that are equivalent to the elements of a right of action, and inquiring whether that conclusion can reasonably be inferred from the factual allegations of the complaint, rather than broadly inquiring into the believability of each allegation. I have some worries about *Matrixx*, but think they are manageable as well. I would urge the bar to give up on “information and belief” and follow the instructions of Rule 11(b)(3), thereby focusing attention on the need for discovery and the discretion that district courts have to allow it, even pending a motion to dismiss. I would also urge the bar to be on the lookout for ways to provide information that could change a judge’s baseline assumptions about the way the world usually works and therefore alter his view of the plausibility of an inference.

I certainly do not claim that courts are uniformly acting in accord with these suggestions. My point is far more modest: These methods of taming *Twombly* and *Iqbal* remain viable, and therefore lawyers and judges should consider them. Finally, I would urge you to also consider whether my proposed amendment to Rule 12(b) meets the needs of the bar and the clients they represent.

63. See Hartnett, *Taming Twombly*, *supra* note 3, at 506–07.

Professor A. Benjamin Spencer joined Washington and Lee in 2008. One of the nation's rising stars in the field of civil procedure and federal jurisdiction, Professor Spencer has in a relatively short time built an impressive scholarly record by publishing in some of the most prestigious national law reviews and has developed a reputation among students as an excellent classroom teacher.

Professor Spencer recently was appointed to the West Publishing Company Law School Advisory Board, and in 2007 he was awarded the Virginia State Council of Higher Education “Rising Star” award, given to the most promising junior faculty member among all academic fields at all colleges and universities in Virginia. Professor Spencer was the first law professor to receive this award.

Professor Spencer has authored two books in the area of civil procedure, *Acing Civil Procedure* and *Civil Procedure: A Contemporary Approach*. Both are used widely by professors and students throughout the country.

Prior to joining the Washington and Lee faculty Professor Spencer was an Associate Professor of Law at the University of Richmond School of Law. He also formerly worked as an Associate in the law firm of Shearman & Sterling and as a Law Clerk to Judge Judith W. Rogers of the U.S. Court of Appeals for the D.C. Circuit.

Professor Spencer holds a B.A. from Morehouse College, a J.D. from the Harvard Law School and a Master of Science from the London School of Economics.

B.A. 1996, Morehouse College, summa cum laude, Phi Beta Kappa; MSc 1997, London

School of Economics (Marshall Scholar) with Distinction; J.D. 2001, Harvard;
Articles Editor, Harvard Law Review; admitted to practice in Virginia and
District of Columbia; law clerk, Judge Judith W. Rogers, U.S. Court of Appeals
for the District of Columbia, 2001-02; associate, Shearman & Sterling,
Washington, DC, 2002-04; Assistant Professor of Law, University of Richmond,
2004-07; Associate Professor of Law, 2007-; Visiting Professor of Law,
Washington and Lee University, 2007-08. Associate Professor of Law, Washington
and Lee University, 2008- .