STATEMENT OF JONATHAN L. RUBIN

BEFORE THE HOUSE SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

Hearing on: H.R. 4115, the "Open Access to Courts Act of 2009"

PRESENTED ON DECEMBER 16, 2009

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Mr. Chairman, Ranking Member, Members of the Committee:

Thank you for the opportunity to testify today regarding H.R. 4115, the "Open Access to Courts Act of 2009." My name is Jonathan Rubin, and I am a practicing lawyer here in Washington, D.C. I appear today as an individual—and not in any capacity representing my law firm or any of its clients. The views I express are solely my own.

As a practitioner in the area of antitrust litigation, I have observed the practical effects of the new pleading standard established by the Supreme Court's decision two terms ago in *Bell Atlantic v. Twombly*.[1] In this statement I will discuss what I believe the *Twombly* standard to be, what I believe to be its principal effects on federal civil litigation, and what I believe to be the best approach to a legislative remedy.

To be sure, the *Twombly* decision generates both benefits and costs. The advantages of requiring a plaintiff to meet the demands of the *Twombly* standard include significantly clarifying the pleadings and the legal theories presented and promoting the early weeding-out of non-meritorious claims. However, not all plaintiffs, including those with meritorious claims, can satisfy the standards of *Twombly* at the very inception of their case and without the benefit of discovery. The cost of the *Twombly* decision, therefore, as the proponents of the Open Access to Courts Act of 2009 recognize, is that it denies a judicial remedy to plaintiffs with meritorious claims unable to plead them in accordance with the stricter *Twombly* standards. Exacerbating

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

matters is that the new standard disproportionately penalizes cases most likely to generate positive externalities from private enforcement, such as the correction of a market imperfection, the remediation of an unsafe environmental condition, the shuttering of a fraudulent business operation, in short, any relief that promotes sound public policy and deters undesirable conduct. By limiting the authority of courts to oversee investigatory discovery in cases based only on a well-founded suspicion and known facts consistent with liability, the principal effect of the *Twombly* standard is to impair private enforcement and its contribution to the regulation of business and other conduct affecting the public interest.

Restoring the investigatory function of the federal courts in connection with private enforcement after *Twombly* will require an amendment to the Federal Rules of Civil Procedure or the enactment of correcting legislation. I believe that granting plaintiffs a statutory option in lieu of dismissal with prejudice on *Twombly* grounds to pursue targeted discovery followed by amendment of the pleading in question would alleviate the most significant undesirable effect of the *Twombly* plausibility standard on open access to the courts while retaining its benefits.

1. A Brief Summary of the *Twombly* "Plausibility" Standard

Rule 8 of the Federal Rules of Civil Procedure requires civil pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In the 1957 case of *Conley v. Gibson*,[2] the Supreme Court interpreted these words to mean that civil cases should not be dismissed "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." This standard is an "implausibility" standard, because it directs courts not to dismiss a claim unless it is implausible, that is, unless no

[2] 355 U.S. 41 (1957).

set of facts could be adduced to support it. This standard has been an important benchmark for notice pleading in the federal courts for half a century.

Twombly overruled this test for what Rule 8 requires to be pleaded. Although it reaffirmed *Conley* in all other respects, the *Twombly* Court repudiated the "no set of facts" formulation and in its place articulated a new, stricter standard for what constitutes adequate notice of the plaintiff's claim.

The new standard has two prongs. The first, or substantive, prong requires pleadings to state a particular set of facts that provide the basis for the lawsuit. The Court called this the "Rule 8 entitlement requirement."

The second prong is evidentiary in nature and requires the plaintiff to allege evidence that would be probative, if proven, of the set of facts entitling plaintiff to relief. As the Court confirmed in *Ashcroft v. Iqbal*,[3] this part of the standard requires courts to disregard "conclusory allegations," assume the remaining factual allegations to be true, and then disregard ambiguous or neutral circumstantial evidence not pleaded in a sufficiently suggestive factual context.

Pleadings that satisfy both the substantive and evidentiary prongs of the *Twombly* standard allege a "plausible" claim to relief. One way of summarizing the plausibility standard is to say that pleadings must completely express the grounds for the plaintiff's entitlement to seek relief and a description of evidence sufficient to prove it.

. This plausibility standard clearly requires judges to examine pleadings for requirements that did not exist under *Conley*. Judges must now determine whether the plaintiff has set forth *a particular set of facts* rather than *a consistent set of facts* showing an entitlement to relief, and they must also determine whether the facts alleged are sufficiently suggestive or probative.

[3] 129 S. Ct. 1937 (2009).

Whereas, before *Twombly* courts were advised not to dismiss complaints unless they were *im*plausible, courts after *Twombly* must dismiss complaints unless they are plausible, that is, satisfy the significant new pleading requirements established by the Court.

2. Three Observations about the New Pleading Standard

A. The plausibility standard affects a subset of cases that vindicate important public policies but where the plaintiff lacks essential information

The cases that are denied a judicial remedy by virtue of the *Twombly* standard are those in which the plaintiff does not know the full particulars of the defendants' wrongful acts. Although capable of alleging facts consistent with an entitlement to a claim for relief, the claimant is unable to allege the basis of his entitlement with the particularity called for by the Rule 8 entitlement requirement. This is likely to occur in factually complex cases, in cases involving abstract economic or financial subject matter and in cases such as a conspiracy or discrimination, in which the culpable conduct is committed in private or under a cloak of secrecy.

This category of cases includes antitrust conspiracies, fraudulent financial schemes, employment discrimination, civil rights, and other substantive areas of the law in which private enforcement, in addition to compensating the immediate victim of actionable conduct, is particularly useful in remediating public wrongs, promoting sound public policy and deterring similar wrongdoing by others. As a consequence, the *Twombly* standard bars a class of potentially meritorious claims from the courthouse in precisely those circumstances in which judicial intervention may be most necessary and beneficial.

B. The plausibility standard gives judges less, not more, discretion to dismiss, or not to dismiss, complaints

Under the standards prevailing before *Twombly*, judges read pleadings and evaluated them based on their experience and common sense for whether the defendant had been provided with reasonable notice of the basis of the plaintiff's entitlement to seek relief against him. A material gap occurring in the grounds alleged as the basis of the plaintiff's entitlement for relief, or the lack of specific allegations of facts probative of those grounds, was accommodated through a process of common-sense "gap filling" by judges.

Under the *Twombly* plausibility standard, by contrast, courts must apply a new, complex and nuanced standard to evaluate the adequacy of pleaded claims. The requirement for a specific narrative supporting liability and the disqualification of "conclusory" or "factually neutral" allegations repeal common-sense judicial "gap filling." The *Twombly* standard removes from the discretion of the court the right to retain what may be a meritorious claim pleaded with facts consistent with liability but unable to satisfy the stricter requirements of *Twombly*.

C. A legislative remedy should mitigate the costs of *Twombly* while retaining its benefits

The Court implicitly embraced in *Twombly* the view that closing the courthouse doors on some meritorious claims is less harmful than some non-meritorious claims surviving a motion to dismiss and proceeding to discovery. But, if the rationale behind the *Twombly* standard is to reduce the burden of non-meritorious claims, a less restrictive means of doing so would still afford the plaintiff an opportunity to conduct discovery commensurate to the needs of his pleading and the ultimate ends of justice, and neither exclude an important category of civil litigation nor expose defendants to the burdens of unbounded discovery. This alternative,

however, was expressly rejected by the *Twombly* Court, which takes a dim view of the efficacy of judicial case management.

The investigatory capacity of the federal courts in connection with private enforcement can be restored by enacting legislation designed to reinstate the civil pleading standard as it prevailed before *Twombly*—such as the Open Access to Courts Act of 2009. But, because the pre-*Twombly* standard rests on a more fulsome jurisprudence beyond *Conley v. Gibson*, doing so is a challenging legislative task. In my view, Congress should decline to engage directly in writing or interpreting the Federal Rules of Civil Procedure.

The principal undesirable effect of *Twombly*, the erosion of the investigatory function of federal civil litigation, could be mitigated by a statutory option granted to a plaintiff in lieu of dismissal with prejudice on *Twombly* grounds to proceed to targeted discovery followed by the filing of an amended pleading and post-discovery re-review. The opportunity for such "proceedings in aid of pleading" would substantially alleviate the problem of placing a judicial remedy out of the reach of cases based on a well-founded suspicion of wrongdoing but where the allegations cannot be pleaded to the satisfaction of the *Twombly* plausibility standard. At the same time, such an option would retain the advantages engendered by *Twombly*'s enhanced and more disciplined standards of pleading.

I thank the committee for its attention and for the opportunity to share my views on this important subject. I have submitted my recent paper entitled "*Twombly* and its Children" and would ask that it be introduced as part of my written statement.

I look forward to answering your questions.

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