TESTIMONY OF

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H.R. 4115

OPEN ACCESS TO THE COURTS ACT OF 2009

INTRODUCTION

Good afternoon Chairman Johnson, Ranking Member Coble, and Members of the Subcommittee. My name is Eric Schnapper, and I am a profess or law at the University of Washington School of Law. I appreciate this opportunity to testify regarding H.R. 4115 and the action needed to assure that litigants will continue to have access to the federal courts to enforce their rights under federal statutes and the Constitution.

I am here today to express only my own views; I do not represent any group or organization. But my testimony reflects the work I have done over the course of the last forty years representing in federal court plaintiffs who were the victims of discrimination on the basis of race, national origin, gender, religion, and disability. The largest number of the cases I have handled involved employment discrimination. For approximately twenty-five years I worked as an associate counsel for the NAACP Legal Defense and Educational Fund, Inc. Since joining the faculty of the University of Washington in 1995, I have devoted a large portion of my professional life to representing civil rights plaintiffs, primarily at the appellate level, and most frequently in the Supreme Court of the United States. This body of experience provides the context in which I have attempted to assess the problems that have given rise to H.R. 4115.

FROM *CONLEY* TO *TWOMBLY* AND *IQBAL*

Two hundred years ago civil litigation in American courts was governed by the exceedingly intricate rules known as common law pleading, under which the outcome of much litigation turned largely on the skill of attorneys in mastering arcane legal concepts and categories of forms of action. That unfortunate system was replaced in the nineteenth century by what became known as code pleading, beginning with the adoption of the Field Code by New York in 1848. Code pleading, however, lead to a new set of problems; the courts came to impose ever changing and more detailed requirements about what particularized allegations had to be contained in a complaint.

The problems of now discredited code pleading are illustrated by the decision in *Gillespie v. Goodyear Service Stores*, 258 N.C. 487 (1963), in which the plaintiff alleged that "[o]n or about May 5, 1959, and May 6, 1959" the defendants had "trespassed upon the premises occupied by the plaintiff as a residence," "assaulted the plaintiff" "by use of . . . physical force," caused her "to be seized . . . and to be confined in a public jail." 258 N.C. at 488. The Supreme Court of North Carolina dismissed this complaint, holding that these allegations did not meet the requirements of code pleading.

> The complaint states no facts upon which these legal conclusions may be predicated. Plaintiff's allegations do not disclose *what* occurred, *when* it occurred, *where* it occurred, *who* did *what*, the relationships between the defendants and plaintiff or of defendants *inter se*,

> or any other factual data that might identify the occasion or describe the circumstances of the alleged wrongful conduct of defendants.

258 N.C. at 490 (emphasis in original). Under the standards of code pleading, the statement that the plaintiff had been "confined in a public jail" was deemed a "legal conclusion" not an assertion of a "fact," and the statement that the wrongful conduct occurred "[o]n or about May 5, 1959 or May 6, 1959," was too vague to constitute an allegation of "when" the events occurred. Unsurprisingly both the national government and the states repudiated code pleading, and adopted instead the sort of simplified requirements now found in the Federal Rules of Civil Procedure.

It was for the very purpose of ending the evils of code pleading that the Federal Rules of Civil Procedure adopted an avowedly undemanding standard for what must be contained in a complaint. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.Civ.Pro. 8(a). The Federal Rules of Civil Procedure provide a variety of effective tools for testing the legal sufficiency of a plaintiff's claim and for ascertaining whether a plaintiff had sufficient evidence to warrant proceeding to trial.

For half a century the reigning and entirely uncontroversial interpretation of Rule 8(a) was the unanimous decision in *Conley v. Gibson*, 355 U.S. 41 (1957).

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

355 U.S. at 45-46. This passage from *Conley* is one of the most widely applied formulations in civil procedure; it is quoted so often that a Westlaw search for the phrase indicates that it appears more than 10,000 times in federal decisions. In the twelve months prior to the decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this phrase was quoted 1631 times in the lower federal courts.

Conley's interpretation of Rule 8(a) expressly established the "notice pleading" standard. 355 U.S. at 47. A complaint was acceptable so long as it was sufficiently clear and specific that a defendant would know how to frame an answer. In the year before *Twombly* the phrase "notice pleading" appeared 1821 times in lower federal court decisions. Until the spring of 2007 this area of the law was entirely uncontroversial, even uninteresting. A complaint could be challenged under Rule 12(b)(6) if the circumstances it alleged simply were not illegal (such as a claim under Title VII of discrimination on the basis of party affiliation). But for the purposes of a motion to dismiss all the allegations of a complaint were assumed to be true. Rule 12(b)(6) could not be used to challenge a complaint on the grounds that the wrong which it alleged had not actually occurred, except in the

case of an allegation that bordered on the fantastic, such as a claim that the defendant was beaming death rays into the brain of the plaintiff.

Half a century of stable, workable, and widely understood law regarding what must be contained in a complaint--one of the most fundamental and hitherto uncontroversial aspect of civil litigation--has been thrown into a state of turmoil by the decisions in *Twombly* and most recently *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *Twombly* somewhat summarily discarded the "no set of facts" standard in *Conley* that had long guided federal pleading, rejecting with it one of the most fundamental and successful principles of modern procedure, that a complaint is sufficient if it provides a defendant with notice of the nature of the plaintiff's claims. The phrase "notice pleading," once a staple of the Court's account of federal pleading[1], is emphatically absent from the new formulation.

The decisions in *Twombly* and *Iqbal*, ending notice pleading as the measure of the adequacy of a complaint, establishes a new regime whose purpose is to require a plaintiff, on pain of dismissal, to demonstrate in the complaint itself that his or her

[1]E.g., *Christopher v. Harbury*, 536 U.S. 403, 419 n. 17 (2002); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002)("simplified notice pleading standard", "liberal notice pleading of Rule 8(a)"); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)("the liberal system of 'notice pleading' set up by the Federal Rules"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

claim is not "speculative." *Twombly*, 550 U.S. at 555. *Twombly* and *Iqbal* lay down three new principles for determining whether a complaint can withstand dismissal.

First, the factual allegations of a complaint are no longer all accepted as true. Certain allegations, which the Court denotes "conclusions," are not assumed to be true; in determining the sufficiency of a complaint, these allegations are essentially disregarded. A factual allegation is a "conclusion" stripped of the presumption of accuracy if the fact alleged is a necessary element of the plaintiff's complaint. Thus an allegation of conspiracy is a "conclusion" in an antitrust case, and an allegation of racial motivation is a "conclusion" in a discrimination case. See *Iqbal*, 129 S.Ct. at 1949-50.

Second, a complaint must now allege particular "facts," a requirement that resurrects one of the central pillars of the old, discredited code pleading system. See *Iqbal*, 129 S. Ct. at 1249-50; *Twombly*, 550 U.S. at 556.

Third, the facts alleged must "plausibly suggest" that a violation has occurred. *Iqbal*, 129 S. Ct. at 1951. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. A complaint must be dismissed if the facts only permit the court to infer "the mere possibility" of unlawful action. *Id.*; see *Twombly*, 550 U.S. at 556.

THE IMPACT OF *TWOMBLY* AND *IQBAL* ON LITIGATION IN THE LOWER COURTS

The decisions in *Twombly* and *Iqbal* have brought about sweeping changes in the lower courts[2], all for the worse. The

[2] In *Ocasio-Hernandez v. Fortuno-Burset*, the district judge candidly acknowledged that the case would not have been dismissed under the legal standard that existed prior to *Iqbal*. Indeed, the judge pointed out that the defendants counsel had not even moved for dismissal until *Iqbal* was decided.

> The court notes that its present ruling, although draconianly harsh to say the least, is mandated by the recent *Iqbal* decision. The original complaint . . . , filed before *Iqbal* was decided by the Supreme Court, . . . clearly met the pre-*Iqbal* pleading standard. As a matter of fact, counsel for defendants, experienced beyond cavil in political discrimination litigation did not file a 12(b)(6) motion to dismiss the original complaint because the same was properly pleaded under the then existing, pre-*Iqbal* standard.

639 F.Supp. 2d at 226 n. 4.

In *Kyle v. Holinka*, 2009 WL 1867671 (W.D.Wis. 2009), the plaintiff, alleging racial segregation at the federal prison where he was confined, filed suit against six federal defendants, including three high ranking officials--the warden, regional director, and national director. The court initially permitted the case to go forward against all of the defendants. Following the decision in *Iqbal*, the Department of Justice moved to dismiss the complaint against the two highest ranking officials.

> I agree with defendants that my conclusion must be revisited in light of *Iqbal*, which extended the pleading standard enunciated in . . . *Twombly* . . . to encompass discrimination claims and implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion. . . Under the Supreme Court's new standard, an allegation of discrimination needs to be more specific.

2009 Wl 1867671 at *1.

In dismissing the complaint in *Ansley v. Florida Dept. of Revenue*, 2009 WL 1973548 at *2 (N.D.Fla.), the court explained that "These allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal*. But now they do not."

In applying *Iqbal* to a counterclaim in *Carpenters Health and*

impact of those decisions on civil rights claims has been particularly serious, both because *Twombly* and *Iqbal* are especially likely to prevent litigation of those claims, and because enforcement of the Constitution and of federal laws against invidious discrimination are of unique importance to the nation.

The Pre-Filing Evidence Requirement

The *Twombly*/*Iqbal* requirement that a complaint allege facts showing that the plaintiff's claim is plausible is a requirement that--prior to filing suit (and before obtaining discovery)--the plaintiff must already have evidence sufficient to meet the new "plausibility" standard.

In discrimination cases this will often be an insurmountable barrier. Discriminatory officials understand what they are doing is unlawful; they will ordinarily take prudent measures to avoid engaging in actions or making statements that would reveal their illegal purposes, especially to the intended victims.

> Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. Thought they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. . . . It has become

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Welfare Fund of Philadelphia v Kia Enterprises, Inc., 2009 WL 2152276 (E.D.Pa.), the court recognized that "The Supreme Court's clarification of federal pleading standards in *Twombly* and *Iqbal* has raised the bar for claims to survive a motion to dismiss." 2009 WL 2152276 at *3.

> easier to coat various forms of discrimination with the appearance of propriety. . . In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind. As one court has recognized, "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it."

Aman v. Cort Furniture Rental Corp., 85 F. 3d 1074, 1081-82 (3d Cir. 1996)(*quoting Riordan v, Kempiners*, 831 F. 2d 690, 697 (7th Cir. 1987)). If discriminatory officials do a good job covering their tracks, under *Iqbal* and *Twombly* they can cut off any legal challenge before discovery is available to unearth their records or force them to answer questions under oath.

Much of the most probative evidence of discrimination, evidence which in some cases may be the only solid proof of an invidious purpose, can be obtained solely through discovery; under *Twombly* and *Iqbal*, however, discovery is only available if a plaintiff already has substantial evidence of discrimination to describe in his or her complaint. Statistical evidence, for example, is often relied on to prove the existence of discrimination.[3] In *Bazemore v. Friday*, 478 U.S. 385, 394 (1986), the plaintiffs offered a compelling analysis of the defendants' payroll information; that analysis was only possible after discovery could be used to obtain the underlying data. An unsuccessful applicant for a job or promotion is entitled to

[3]See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)("statistics as to petitioner's employment policy and practice may be helpful").

support a discrimination claim with proof that he or she was better qualified than the individual who got the disputed position[4]; but such a plaintiff will usually be unable, without discovery, to obtain a copy of the successful applicant's resume, application, or personnel file. In a discriminatory discipline case the manner in which the employer dealt with workers, outside the protected group in question, who engaged in comparable or more serious misconduct would be "especially relevant."[5] But that evidence too is unlikely to be available except through discovery. A review of an employer's files may indeed reveal a smoking gun or exceptionally probative evidence; for example, in *Kolstad v. American Dental Ass'n*, 108 F. 3d 1431 (D.C.Cir. 1997), discovery revealed that the job description for the position denied to the female plaintiff had been "cut-and-paste[d]" from job description of the male applicant who won the job, and that the applicant had had a series of private meetings with the selecting officials. 108 F. 3d at 1436.

Actual experience under *Iqbal* and *Twombly* demonstrates how those decisions can be used to deny discrimination plaintiffs access to the evidence they need, and thus to deny them meaningful access to the courts.

In *Logan v. SecTek, Inc.*, 632 F. Supp. 2d 179 (D.Conn. 2009),

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[4] *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989).

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804.

the plaintiff alleged that an employer expressly refused to hire him because of an earlier back injury, and asserted that the employer regarded the plaintiff as substantially limited in his ability to work, an allegation which if true would have placed the plaintiff within the protections of the Americans With Disabilities Act. After holding that the complaint lacked sufficient factual allegations from which to infer that the employer regarded the plaintiff as limited in that manner, the judge commented that "if Logan had alleged that [the hiring official or other company] managers made remarks that people with back injuries could not perform most jobs, then Logan might have been able to present a plausible ADA claim." 632 F. Supp. 2d at 184. But Logan was not a current employee; he was a job applicant who had only a single conversation with the hiring official and (presumably) had never even met the other company managers. It was utterly impossible for the plaintiff to obtain the type of evidence proposed by the court without access to discovery to question those managers or other company employees who--unlike the plaintiff--would have been in a position to hear such remarks.

In *Ibrahim v. Department of Homeland Sec.*, 2009 WL 2246194 (N.D.Cal.), the plaintiff had been detained and arrested by San Francisco authorities. The court concluded that the complaint lacked the needed specific factual allegations to support Ibrahim's claim that she was the victim of discrimination on the basis of religion and national origin. The district judge

commented on the unfairness of the rule he was required to apply.

> A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law a laid down by the Supreme Court.

2009 WL 2246194 at *10.

In *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217 (D.P.R. 2009), fourteen former domestic and maintenance workers at the Governor's mansion in Puerto Rico alleged that they had been fired because of their political affiliation. They sued the new governor, the mansion's Chief of Staff, and the mansion's Administrator. The letter dismissing the plaintiffs had been signed by the Administrator. The court held the complaint insufficient to state a claim against the Governor and Chief of Staff because it contained no specific allegations regarding their role (if any) in the termination decision set out in the letter from the Administrator.

> Because of the positions that these [other] defendants hold within the governor's mansion, plaintiffs make an implicit assumption that defendants participated in the decision to terminate the plaintiffs' employment. However, there are no additional factual allegations . . . to tie [the other officials] to the decision to terminate the plaintiffs' employment

639 F. Supp. 2d at 221-22. If the Governor or Chief of Staff had been involved in the decision, that would have occurred during confidential conversations or communications with the Administrator, events that would assuredly have occurred when the

plaintiffs were not in the room, or involving memos or emails that would not have been sent to the plaintiffs. The effect of the decision was that all relevant written materials were protected from discovery, and none of the officials was asked under oath if the Administrator had ever communicated with the Governor or Chief of Staff about the issue.[6]

The district judge in *Ocasio-Hernandez* candidly recognized that *Iqbal* would close the federal courts to complaints except in those exceptional cases in which a plaintiff already had compelling evidence before the suit was ever filed.

> As evidenced by this opinion, even highly experience counsel will henceforth find it extremely difficult, if not impossible, to plead a . . . political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain direct and/or circumstantial evidence needed to sustain the First Amendment allegation. . . . This no longer being the case, counsel in political discrimination cases will now be forced to file suit in Commonwealth court, where *Iqbal* does not apply and post-complaint discovery is, thus available. Counsel will also likely only raise local law claims to avoid removal to federal court where *Iqbal* will sound the death knell.

639 F. Supp. 2d at 226 n. 4.

[6]The plaintiffs also alleged that the First Lady had been involved in the terminations, pointing to a statute which made the First Lady the chair of the Committee (including the Administrator) that was to oversee maintenance work at the mansion. Those facts were also insufficient to prevent dismissal of the complaint regarding the First Lady since "no additional facts are alleged to suggest that she in fact participated in the decision." 639 F. Supp. 2d at 222. Here too the dismissal of the claim under *Iqbal* and *Twombly* precluded the obvious, and likely limited discovery that would have shed light on the claim.

In *Adams v. Lafayette College*, 2009 WL 1777312 (E.D.Pa. 2009), the plaintiff pointed out that requiring him to allege in his complaint specific facts sufficient to support an inference of discrimination would "limit a plaintiff's ability to raise a discrimination claim by requiring the plaintiff to muster the crucial evidence, which is most often in the defendants' hands, *before* discovery." 2009 WL 1777312 at *4 (emphasis in original). The court held, however, that under *Iqbal* the plaintiff was not entitled to obtain discovery because the facts alleged in the complaint, based on the limited evidence the plaintiff was able to gather without discovery, were not "sufficient facts to nudge his claim from conceivable to plausible." *Id.*

In *Ansley v. Florida, Dept. of Revenue*, 2008 WL 1973548 at *2 (N.D.Fla.), the plaintiff alleged that because of his gender he had been treated worse than others who were similarly situated. The court dismissed the complaint in part because the complaint did not "allege a factual basis for the conclusion that the others who were treated better were similarly situated." Although proof of dissimilar treatment of comparable workers can be an important method of demonstrating discrimination, that dismissal prevented the plaintiff from obtaining the needed evidence as to how female workers had been treated.

The discovery (and evidence) bar of *Twombly* and *Iqbal* operates in a decidedly haphazard manner. If a plaintiff happens to have significant evidence of discrimination (or other

illegality), he or she can defeat a motion to dismiss the complaint and use discover to unearth other evidence and prevail at trial, even though the evidence used to avoid dismissal proved inaccurate and was never relied on after the denial of the dismissal motion. Similarly, if a plaintiff has two claims, and only one is dismissed under *Twombly* and *Iqbal*, the plaintiff may thereafter use discovery regarding the surviving claim to obtain evidence sufficient to resuscitate the dismissed claim; several lower courts have permitted plaintiffs to do this.[7] But a

[7] In *Kyle v. Holina*, 2009 WL 1867671 (W.D.Wis. 2009), the plaintiff sued a number of federal prison officials, alleging that they had approved a policy of racial segregation. Applying *Iqbal*, the district court dismissed the claims against the warden, regional director, and director, but permitted the case to go forward against three prisons officials, all of whom had expressly endorsed the segregation practice in statements to the plaintiff. The court held that "plaintiff is free to engage in discovery to determine whether [the remaining] defendants . . . were following a discriminatory policy." 2009 WL 1867671 at *2. "[I]f the discovery process reveals evidence that [the warden, regional director, or director] *are* responsible for discriminatory treatment against plaintiff, he may seek leave to amend his complaint at that time to include them as defendants again." *Id.* (emphasis in original); see *id.* ("plaintiff may amend his complaint if the discovery process provides support for [his claims against the dismissed defendants]"), *id.* at 3 (claims dismissed against higher level officials "without prejudice to plaintiff's filing an amended complaint if discovery reveals a basis for his claim against them.")

In *Ibrahim v. Department of Homeland Sec.*, 2009 WL 2246194 (N.D.Cal.), the court held that *Iqbal* required dismissal of the plaintiff's discrimination complaints; the defendants had not challenged the sufficiency of the allegations of a separate Fourth Amendment violation. The court held that Ibrahim could therefore use discovery in her still pending Fourth Amendment claim to seek to resuscitate her discrimination claim.

> Counsel for the [remaining defendants] admit that plaintiff's Fourth Amendment claim can go forward. That means that discovery will go forward. During discovery, Ibrahim can inquire into facts that bear on

plaintiff who has only a single claim does not have this opportunity.

Civil Rights Claims Against Cities and Counties

In a section 1983 action under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), a city or county is only liable for constitutional violations by its employees if that violation arises out of municipal or county policy or custom. In police misconduct cases, this usually requires proof of a practice of inadequate training or supervision of employees, or a knowing tolerance of repeated unconstitutional actions. A victim of a particular constitutional violation would rarely if ever have access to information about such practices without discovery.

Lower court decisions applying *Iqbal* and *Twombly* to these cases mechanically dismiss claims against cities and counties--precluding discovery into the relevant policies and practices--because the plaintiffs do not, almost by definition could not, have such evidence when their complaints are framed. For example, in *Williams v. City of Cleveland*, 2009 WL 2151778 (N.D.Ohio), the

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> the incident, including why her name was on the [no fly] list. If enough facts emerge, then she can move to amend and to reassert her discrimination claims at that time.

2009 WL 2246194 at *10.

court dismissed the complaint against the city by a man who had been held in jail for eight months even though city officials had critical exculpatory evidence.

> Plaintiff makes no factual allegations that can support the conclusion that the City has a policy or custom of ignoring exculpatory evidence and continuing with prosecutions. . . . Plaintiff must allege facts, which if true, demonstrate the city's policy, such as examples of past situations where law enforcement officials have been instructed to ignore evidence. . . . Plaintiff . . . has alleged facts sufficient to demonstrate that exculpatory evidence was ignored in his case, but he has not alleged facts from which it can be inferred that this conduct is recurring . . . . Accordingly, the amended complaint would not state a claim cognizable under federal law.

2009 WL 2151778 at *4. The type of evidence which the court indicated was needed to support a claim against the city was precisely the sort of information that could only be gleaned through discovery. A court in *Young v. City of Visalia*, 2009 WL 2567847 (E.D.Cal.) dismissed a police misconduct civil rights claim against the city on similar grounds.

> The complaint does not identify what the training and hiring practices were, how the training and hiring practices were deficient, or how the training and hiring practices caused Plaintiffs' harm.

2009 WL 2567847 at *7.[8] That was precisely the type of evidence

[8] *Gelband v. Hondo*, 2009 WL 1686832 at *6 (D.Me.)(dismissing claim based on filing false reports about the plaintiff's arrest and failing to provide treatment for his head injuries); *Jackson v. County of San Diego*, 2009 WL 3211402 at *1 (S.D.Cal) (dismissing claim by inmate who allegedly been severely beaten by jail guards because he had asked for a different set of jail clothes when those had been given did not fit).

which the plaintiff could only obtain through discovery.

The effect of such lower court decisions applying *Twombly* and *Iqbal* to municipal and county lability claims has been to recreate the very pleading requirement that the Supreme Court rejected in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). In *Leatherman* the Fifth Circuit had rejected the plaintiff's claim against the defendant county agency because the plaintiff's complaint failed to satisfy that Circuit's "heightened pleading" standard for civil rights claims.

> Under the heightened pleading standard, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including . . . , in cases like this one, facts that support the requisite allegation that the municipality engaged in a policy or custom for which it can be held responsible.

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 954 F. 2d 1054, 1055 (5th Cir. 1992). The court of appeals dismissed the complaint because "it fails to state any facts with respect to the adequacy (or inadequacy) of the police training." 954 F. 2d at 1058. The Supreme Court, in rejecting a requirement of such detailed allegations, held that it would be "impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. at 168. With the notice pleading standard now abandoned by *Twombly* and *Iqbal*, lower courts have resumed applying the very standard

which the Supreme Court unanimously rejected in 1993.

The Plausibility Standard

Iqbal and *Twombly* direct federal judges to make a determination as to whether the factual allegations in the complaint (excluding the factual allegations disregarded because they are "conclusions") would support an inference that the claimed violation is "plausible." In making that determination the judge is also to consider "judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950. This new authority to dismiss complaints is fraught with potential for unequal justice.

This new standard creates a novel, somewhat peculiar judicial role. The judge is not to apply decide whether after considering all the admissible evidence a reasonable jury could find for the plaintiff, the well established standard used for Rule 56 summary judgment motions under Rule 56 and for Rule 50 motions for judgment as a matter of law. Some, maybe most of the evidence, remains unknown until and unless the complaint is sustained and discovery is permitted. Rather, the judge must decide if the evidence renders plausible a claim regarding which more evidence remains to be discovered. "Plausibility" seems an apt phrase here, because the judge--emphatically *not* knowing all the evidence that may exist--has to consider whether (in light of what little the plaintiff already can show) the violation asserted is the kind of thing that is particularly likely to occur at all. This

undertaking is like listening to a random portion of a trial and then trying to predict whether the plaintiff has a good or poor chance of winning.

What judges know (or think they know) about the plausibility of a particular type of claim would almost have to be part of this analysis. Given otherwise similar and limited evidence of discrimination in employment, for example, any sensible person in assessing whether a claim was "plausible" would want to know if a plaintiff claiming national origin discrimination was alleging discrimination against Mexican-Americans or discrimination against, say, Swedish-Americans. The plausibility of a claim of religious discrimination on the basis of religion might be different if the alleged victim was a Muslim or a Lutheran. But it is wholly inappropriate that the survival of a discrimination complaint would thus turn, for example, on whether a judge happens to think the racial discrimination is happily rare or deplorably common.

This problem is illustrated all too well by the dispute in *Iqbal* itself. Five members of the Court found implausible, on the facts of that case and a reading of the domestic events in the wake of the attack of September 11, 2001, a claim of anti-Arab or anti-Muslim bias on the part of the Attorney General or the Director of the FBI. Perhaps the average American would agree with that evaluation; conceivably most lawyers attending a convention of the Federalist Society would think that the

allegations in *Iqbal* were implausible. But it seems fair to guess that that allegation might be regarded as more plausible by delegates to a convention of the ACLU or the Arab-American Anti-Discrimination Committee. I express no view as to which assessment would be correct, but it seems wholly inappropriate to confide responsibility for that unavoidably speculative assessment to federal judges.

In making the plausibility determination authorized by *Iqbal* and *Twombly*, federal judges have at times been remarkably unwilling to see inculpatory significance in the facts alleged.

In *Ocasio-Hernandez* the plaintiffs, in support of the asserted that the First Lady had been involved in the decision to dismiss workers at the Governor's mansion who were members of the opposing party, and alleged in support of that claim that she had been overheard by one of the plaintiffs stating that "they were going to 'clean up the kitchen.'" 639 F. Supp. 2d at 222 n. 1. The court held that this was insufficient to support a plausible inference that the First Lady was involved in the dismissals, or that they were part of a political purge, because it was "an ambiguous remark that does not necessarily refer to the dismissals at issue in this case." *Id*. The remark was not "necessarily" about dismissals; the First Lady might have been asserting an intention to go to the kitchen with someone else (perhaps the Governor) to wash dirty dishes or mop the floor. But surely that is a far less plausible than the more likely interpretation that

she was involved in a plan to purge the kitchen staff.

The complaint in that case alleged that (a) within two months after the inauguration of the new governor the Administrator of the Governor's mansion had dismissed the 14 plaintiffs, all members of the opposition party, (b) that the Administrator had neither given them a reason for the dismissal nor attempted to evaluate the quality of their work, (c) that the Administrator had given the press an untruthful explanation of the reason for the dismissal, and (d) that that official had then promptly replaced them with workers who were members of the new governors party. 639 F. Supp. 2d at 220. The court held that those factual allegations were "unpersuasive" and thus insufficient under *Iqbal* and *Twombly* to support the claim that the plaintiffs had been dismissed for poitical reasons. 639 F. Supp. 2d at 223.

In *Logan v. SecTek, Inc.*, 632 F. Supp. 2d 179 (D.Conn. 2009), the complaint alleged that the defendant regarded the plaintiff as disabled, and that its refusal to hire the defendant thus violated the Americans With Disabilities Act. The company official who rejected the plaintiff candidly explained that he did so because the plaintiff earlier "had been out of work due to [a back] injury." 632 F.Supp. 2d at 182. In dismissing the complaint under *Iqbal*, the judge explained that she found this evidence insufficiently persuasive.

> In the present case, it is possible that [the employer] perceived Logan's back injury to substantially limit his ability to work. . . . [But the hiring official]

> spoke of Logan's injury in the past tense and did not mention Logan's health or ability to work. Therefore, it is merely possible, but not plausible, that [the official] perceived Logan to be disabled in accordance with the ADA definition.

632 F. Supp. 2d at 183-84. If the hiring official thought Logan was completely and permanently cured, and would have no further back problems, it would have made no sense for the official to give the back injury as a reason for not hiring the plaintiff; the only plausible explanation for the official's remark was that he believed that the past injury would affect the applicant's ability to work in the future.

In *Kyle v. Holinka*, 2009 WL 1867671 (W.D.Wis. 2009), the black plaintiff alleged that when he arrived at a particular federal prison he was told by a guard that he could not share a cell with a white inmate because "inmates of different races couldn't live together." When plaintiff complained to the unit manager, he was told "This is the way *we* do it here." 2009 WL 1867671 at *1 (emphasis added). The plaintiff then complained about this race-based housing assignment to the assistant warden, who told him she was "aware of it being practiced" at the prison "but that it was 'self imposed' by the prisoners." *Id.* The explanation was obviously disingenuous, since the plaintiff had complained that a guard and a manager--not a fellow prisoner--had ordered the segregation. The plaintiff sued the guard, unit manager, assistant warden, and warden; he alleged that the warden (and higher BOP officials) were aware of and permitted these

segregation practices. After the decision in *Iqbal*, the judge dismissed the claim against the warden, explaining that "plaintiff fails to allege any facts showing that [the warden] has implemented a discriminatory policy." 2009 WL 1867671 at *2. But the plaintiff had alleged specific facts indicating that officials up to the level of assistant warden had sanctioned a policy of segregation. It was entirely plausible that the warden knew what was going on, both because the assistant warden would not and could not have kept the systemic segregation secret from the warden, and because the warden would have noticed segregation (which assertedly including parts of the prison other than the cells) merely by walking through the institution. The possibility that the prison staff was operating a segregated prison which the warden never noticed, or that they would have continued to do so if the warden had ever seriously ordered an end to the practice, borders on the fantastic.

Special Ad Hoc Specificity Requirements

The condemnation in *Iqbal* and *Twombly* of "conclusions" and "conclusory" allegations has prompted the lower courts, in an as yet an unpredictable manner, to require plaintiffs to make specific allegations about particular facts singled out by the district judge. The practice bears a certain resemblance to the days of code pleading, when judges developed ever growing and changing lists of things that had to be alleged in a particular

category of case.

In *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217 (D.P.R. 2009), the plaintiffs who contended that they had been dismissed because of their membership in one political party alleged that every one of the 14 individuals who were immediately hired as replacements were members of the opposing political party, which had recently taken power. The court held that allegation insufficient because "plaintiffs do not provide any factual allegations to indicate how they are aware of their replacements' political affiliations, or of the immediacy of their replacements." 639 F. Supp. 2d at 220. The judge also rejected the allegations that the plaintiffs had been replaced by members of the other party because "plaintiffs do not identify who replaced any or all of the plaintiffs, nor the date of the replacements; plaintiffs merely present a conclusory statement that this occurred as to all of the plaintiffs." 639 F. Supp. 2d at 222. The complaint also alleged that all of the individual defendants had questioned each of the plaintiffs regarding when they were hired, a quaere apparently calculated to identify the plaintiffs party affiliation based on who was in power when they were hired. This allegation too was dismissed as insufficient. "The allegation that all of the defendants asked all of the plaintiffs about how and when they began working [at the government job in question] is a generic allegation, made without reference to specific facts that might make it 'plausible on its

face.'" *Iqbal*." 617 F.Supp. 2d at 222.

In *Adams v. Lafayette College*, 2009 WL 2777312 (E.D.Pa. 2009), the plaintiff alleged that he had been disciplined more harshly for asserted misconduct that had younger workers. The court held that allegation insufficient under *Iqbal* because complaint failed to specify exactly how he had been disciplined.

> No mention or discussion has even been presented on the kinds of penalties Adams has already received for prior infractions, facts with which he would be intimately familiar. . . . Adams failure to highlight the alleged discriminatory treatment he has suffered as compared to his younger co-workers leaves those allegations without the factual support necessary to survive the motion to dismiss.

2009 WL 277312 at *3-*4.

In *Argeropoulos v. Exide Technologies*, 2009 WL 2132443 (E.D.N.Y.), the plaintiff alleged that he had been harassed on a "daily and continuous basis because he is Greek." 2009 WL 2132443 at *6. The court held that this allegation would have been sufficient under *Conley* to state a claim for national origin harassment, but that it was insufficient under the new standard in *Iqbal*.

> [T]his kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old "no set of facts" standard for assessing motions to dismiss. See *Conley* . . . . But it does not survive the Supreme Court's "plausibility standard," as most recently clarified in *Iqbal*. . . . [T]he Court need not accept as true Plaintiff's conclusory and entirely non-specific allegation that similar conduct occurred on a "daily and continuous basis because he is Greek." Rather, Plaintiff must plead sufficient "factual content" to allow the Court

> to draw a reasonable inference" that Plaintiff suffered from a hostile work environment. *Iqbal*, 129 S. Ct. at 1949. And Plaintiff has not done so. At most, Plaintiff's national origin hostile work environment claim is "conceivable." *Id.* at 1951. But without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court cannot conclude that Plaintiff's claim is "plausible.' *Id*.

Id. The first asserted defect under *Iqbal* was that the complaint alleged that the harassment was "daily," which was somehow insufficient to provide information about the "frequency" of the harassment. The second defect was the failure to spell out the particulars of the anti-Greek remarks or other biased acts.

In *Ansley v. Florida, Dept. of Revenue*, 2009 WL 1973548 (W.D.Fla.) the plaintiff alleged he was discriminated against and ultimately fired because of his gender and his medical condition. In holding that the complaint was insufficient after *Iqbal*, the first asserted defect in the complaint, according to the court which dismissed the complaint, was that it "does not say what the alleged reason--the pretextual reason--for the firing was." 2009 WL 1973548 at *2.

In *Adams v. Lafayette College*, 2009 WL 2777312 (E.D.Pa. 2009), the court noted that in resolving a Rule 12(b)(6) motion "a federal court must . . . accept all factual allegations in the complaint as true." 2009 WL 2777312 at *2. The plaintiff alleged that "he was penalized or suspended for minor infractions while younger employees would not receive such treatment for similar violations." *Id*. at *3. The court refused to accept that

allegation as true on the ground that the assertion was not a "factual allegation" at all.

> These are legal conclusions and are properly disregarded. . . . Adams' statements that younger employees were treated differently on several occasions and that he received harsher treatment because of his age are merely legal conclusions. Without some factual basis, they . . . are not entitled to be assumed to be true.

2009 WL 2777312 at *3.

The Viability of Swierkiewicz

Prior to the decisions in *Twombly* and *Iqbal*, the Supreme Court decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), had governed challenges to complaints in discrimination cases. *Swierkiewicz* held that a discrimination complaint need not allege facts constituting a prima facie case, and reiterated the application of the notice pleading standard to such cases. 534 U.S. at 510. The Court in *Twombly* insisted that its decision was consistent with the decision in *Swierkiewicz* that a plaintiff need not allege a prima facie case, but made no mention of the notice pleading standard accepted in *Swierkiewicz*. The majority in *Iqbal* did not refer to *Swierkiewicz* at all.

In the wake of these decisions the lower courts are confused as to whether *Swierkiewicz* is still good law, in whole or in part. In *Francis v. Giacomelli*, 2009 WL 4348830 at *9 n. 4 (4th Cir), the Fourth Circuit held that "[t]he standard that the plaintiffs

quoted from *Swierkiewicz* . . . was explicitly overruled in *Twombly*," referring to the portion of *Swierkiewicz* that had relied on *Conley*. In *Fowler v. UPMC Shadyside*, 578 F. 3d 203, 211 (3d Cir. 2009), the Third Circuit held that "because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*."[9] Other lower courts have reasoned that *Swierkiewicz* remains good law.[10]

[9]See *id.* ("[t]he demise of *Swierkiewicz*."); *U.S. v. Nobel Learning Communities, Inc.*, 2009 WL 3617734 at *2 n.6 (E.D.Pa.)(rejecting plaintiff's reliance on *Swierkiewicz* because "the Third Circuit found *Iqbal* and *Twombly* to have effectively overruled *Swierkiewicz* to the extent that it concerns pleading requirements. *Fowler*"); *Guirguis v. Movers Specialty Services, Inc.*, 2009 WL 3041992 at *2 n. 7 (3d Cir.)(quoting *Fowler*); *Brown v. Castleton State College*, 2009 WL 3248106 at *9 n. 8 (D. Vt.)("*Swierkiewicz* itself has questionable status after *Twombly* . . . and especially after *Iqbal*").

[10]*Harper v. New York City Housing Authority*, 2009 WL 3861937 at *4 (S.D.N.Y.)("nothing in *Iqbal* indicates that the Supreme Court intended that decision to affect the continued applicability of *Swierkiewicz*, and the courts in this district have continued to apply *Swierkiewicz* in employment discrimination claims subsequent to the Supreme Court's decision in *Iqbal*")(citing cases); *EEOC v. Universal Brixius, LLC*, 2009 WL 3400940 at *3 (E.D.Wis.)("As *Swierkiewicz* makes clear, a plaintiff is not required to set forth the elements of a prima facie case of sexual discrimination in a complaint. *Twombly* and *Iqbal* did not change this"); *Gillman v. Inner City Broadcasting Corp.*, 2009 WL 2003244 at *3 (S.D.N.Y.)("*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*"); cf. *Kasten v. Ford Motor Co.*, 2009 WL 3628012 at *7 (E.D.Mich.)("it remains to be seen whether *Swierkiewicz*'s rejection of a heightened pleading requirement in civil rights cases, and its implicit endorsement of a liberal pleading standard, can be reconciled with *Iqbal*'s plausibility pleading standard").

The Federal Rules of Civil Procedure Forms

When the Supreme Court adopted the Federal Rules of Civil Procedure, it also adopted an Appendix of Forms, which, like the Rules themselves, has been amended from time to time. Twelve of those officially approved forms are model complaints regarding particular types of claims.

At least half of the Forms contain precisely the type of language which *Iqbal* and *Twombly* now label merely conclusory allegations, with none of the factual allegations which those decisions require. Form 11, a "Complaint for Negligence" contains only a single sentence regarding the defendant's asserted misconduct: "On [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff." "[N]egligently drove" is precisely the sort of conclusory statement of an element of a negligence claim that *Iqbal* and *Twombly* insist is insufficient. Form 12, "Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible," is essentially the same.[11] Form 14, "Complaint for Damages Under the Merchant Marine Act" calls for an allegation modeled on Rule 11.[12] The Forms for

[11]Paragraph 2 reads "On [date], at [place], defendant [name] or defendant [name] or both of them willfully or reckless or negligently drove, or caused to be driven, a motor vehicle against the plaintiff."

[12]Paragraph 6 states "As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured . . . ."

complaints regarding patent infringement, copyright infringement, and conversion are similarly conclusory.[13]

The validity of the Forms themselves has been repeatedly called into question in light of *Iqbal* and *Twombly*. In one case the defendant argued "that *Iqbal* supersedes all previous jurisprudence on the issue of pleading requirement, including Form 18 of the Federal Rules of Civil Procedure."[14] *Doe ex rel. Gonzales v. Butte Valley Unified School Dist.*, 2009 WL 2424608 at *8 (E.D.Cal.), noted that

> even the official Federal Rules of civil Procedure Forms, which were touted as "sufficient under the rules and . . . intended to indicate the simplicity and brevity of the statement which the rules contemplate," F.R.Civ.Proc. 84, have been cast into doubt by *Iqbal*.

Several other decisions have expressed the same concern, particularly regarding Form 18 which is used for patent claims.[15]

A complaint which rigidly adheres to the specific language in

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[13]Forms 15, 18, and 19.

[14]*Mark IV Industries Corp. v. TransCore, L.P.*, 2009 WL 4403187 at *4 (D.Del. 2009).

[15]*Sharafabadi v. University of Idaho*, 2009 WL 4432367 at *3 n. 5 (D.Idaho) ("[t]his court agrees with the sentiment expressed by at least one other district court that it is difficult to reconcile Form 18 with the Supreme Court's guidance in [*Iqbal* and *Twombly*]")(patent case); *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374 at 82 (N.D.Cal. 2009)("It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*. . . . Under Rule 84 . . . , however, a court must accept as sufficient any pleading made in conformance with the forms"); *Anthony v. Harmon*, 2009 WL 4282027 at *2 (E.D.Cal.)("[e]ven the official Federal Rules of Civil Procedure Forms . . . have been cast into doubt by *Iqbal*").

these forms probably could not be dismissed based on the interpretation of Rule 8(a) in *Twombly* and *Iqbal*. Rule 84 states expressly that "[t]he forms contained in the Appendix of Forms are sufficient under the rules." On the other hand, a complaint which merely used some elements of a Form (or even all of it), might now be subject to challenge if the complaint also included other material.

But the very existence of the Forms highlights the intolerable disparity in the standards of pleading now applied to different types of claims. A plaintiff whose claim happens to be among the claims covered by an official Form is not subject to the harsh strictures of *Iqbal* and *Twombly*; that plaintiff can frame its complaint in an entirely conclusory manner so long as the complaint uses the particular conclusory language of a Form. There are, however, no official Forms for claims of discrimination or constitutional violations. The Forms exempt from the *Iqbal/Twombly* standards plaintiffs alleging claims for negligence, conversion, patent infringement, copyright infringement, specific performance of a contract to convey land, damages under the Merchant Marine Act, and "to cover a sum certain." But the claims of all other plaintiffs are subject to dismissal if they cannot satisfy the requirements of *Iqbal* and *Twombly*.

Application of Iqbal and Twombly to Defendants' Pleadings

Defendants have repeatedly insisted that defendants themselves should be exempt from the stringent pleading standards in *Twombly* and *Iqbal*. This issue arises when a defendant asserts a claim (e.g., a counterclaim) against another party, or when its answer asserts an affirmative defense. Defendants argue that they should continue to be governed only by the traditional *Conley* notice pleading standard.

> The plaintiff contends that all of the affirmative defenses should be stricken . . . because they are conclusory statements which contain no facts specifying how the affirmative defenses apply to this action. In response, the defendant argues that it is only required to give the plaintiff "fair notice" of the defenses being advanced. . . . The parties dispute whether the pleading standard recently outlined in . . . *Twombly* . . . applies to affirmative defenses.

Voeks v. Wal-Mart Stores Inc., 2008 WL 89434 at *5-*6 (E.D.Wis.)[16]. There is significant dispute among the lower courts about whether a double standard should be applied, exempting defendants themselves from the requirements of *Twombly* and *Iqbal*. This issue has arisen most frequently in commercial litigation, in which both parties are corporations.

Lower courts have generally applied *Twombly* and *Iqbal* to pleadings in which defendants themselves assert that assert claims

[16]*Sun Microsystems v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 408 n. 8 (D.Del. 2009)("[t]he parties dispute whether . . . *Twombly*. . . applies to pleading affirmative defenses").

against the plaintiffs or other, e.g. counterclaims, cross claims, and third-party complaints.[17] Whether defendants themselves are exempt from *Twombly* and *Iqbal* has arisen most often with regard to affirmative defenses. A number of lower court decisions have held that defendants can plead affirmative defenses in conclusory, fact-free language.[18]

[17]See *Nesselrotte v. Allegheny Energy, Inc.*, 2007 WL 3147038 at *2, *6 (W.D.Pa.)(applying *Twombly* to counterclaims of contract violation and breach of fiduciary duty); *Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 404 (D.Del. 2009) (applying *Twombly* and *Iqbal* to counterclaim); *Carpenters Health and Welfare Fund of Philadelphia v. Kia Enterprises, Inc.*, 2009 WL 2152276 at *3 (E.D.Pa.)(applying *Iqbal* to counterclaim).

[18]*First Nat. Ins. Co. of America v. Camps Services, Ltd.*, 2009 WL 22861 at *2 (E.D.Mich.)("*Twombly* . . . is inapplicable to . . . Rule 8(c)[pleading of affirmative defenses]") The Answer to which *Twombly* was held inapplicable contained nine affirmative defenses stated in the following language:

1. Any damages suffered by Plaintiff were due solely to intervening cases.
2. Plaintiff failed to state a claim upon which relief can be granted.
3. Plaintiff failed to mitigate its damages, if any, which resulted from any alleged conduct by Camps.
4. Plaintiff's claims ar barred, in whole or in part, by their own actions.
5. Defendants have not breached any contractual relationship with Plaintiff.
6. Plaintiff's complaint must be dismissed because Plaintiff has incurred no damages as a result of any alleged contractual breach of contractual relationship with Camps.
7. Plaintiff's claimed damages, if any, were caused by the acts, errors, or omissions of other persons.
8. Plaintiff's claim may be barred, in whole or in part, by the statute of limitations.
9. Plaintiff's claims may be barred, in whole or in party,by their own actions.

2009 WL at 22861 at *1.

Romantine v. CH2M Hill Engineers, Inc., 2009 WL 3417469 (W.D.Pa.)("[t]his court does not believe that *Twombly* is appropriately applied to either affirmative defenses under 8(c),

Other decisions have refused to adopt such a double standard.

In *United States v. Quadrini*, 2007 WL 4303213 (E.D.Mich.), for example, the defendants filed an amended answer listing several affirmative defenses. The district court refused to exempt defendants from the requirements in *Twombly*. *Twombly*

> cannot be a pleading standard that applies only to plaintiffs. It must also apply to defendants in pleading affirmative defenses, otherwise a court could not make a Rule 12(f) determination on whether an affirmative defense is adequately pleaded under Rules 8 and/or 9 and could not determine whether the affirmative defense would withstand a Rule 12(b)(6) challenge. Thus, a wholly conclusory affirmative defense is not sufficient. . . . [A] defendant must plead sufficient facts to demonstrate a plausible affirmative defense, or one that has a "reasonably founded hope" of success.

2007 WL 4303213 at *4. A substantial number of other courts have rejected defense arguments that they should be exempted from the pleading standard in *Twombly* and *Iqbal*.[19]

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or general defenses under Rule 8(b)"); see 2008 WL 3417469 at *1 ("Defendants in this case, not unlike defendants in most answers received by this court, set forth a list of affirmative defenses to Plaintiff's complaint. These consist of a recitation of a legal defense without reference to the facts upon which such defense is based. Plaintiff is requesting that the court strike all 17 of these affirmative defenses.")

[19]In *Shinew v. Wszola*, 2009 WL 1076279 (E.D.Mich.), the court also rejected a double standard for plaintiffs and defendants.

> The *Twombly* decision . . . dealt with a claim for relief under Fed.R.Civ.P. 8(a). The instant case raises the question whether the same pleading standards apply to the assertion of defensive matters under F.R.Civ.P. 8(b) and (c). There is a substantial body of authority for the proposition that they do. "The general rules of pleading that are applicable to the

This issue is of substantial importance. Defendants generally include in their answers a laundry list of affirmative defenses with few if any factual allegations. Defense counsel often plead those affirmative defenses without having engaged in a factual investigation to determine if they have a factual basis, postponing until later in the litigation any effort to determine whether the asserted affirmative defenses are plausible. If *Twombly* and *Iqbal* apply to the pleading of affirmative defenses, that would require a major change in the manner in which defense

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> statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c)." Wright and Miller, *Federal Practice and Procedure*: Civil 3rd Section 1274.

2009 WL 1076279 at *2-4.

Safeco Insurance Co. of America v. O'Hara Corporation, 2008 WL 2558015 (E.D.Mich.), held that

> *Twombly* . . . states a principle that applies also in the context of a defendant asserting an affirmative defense. . . . This court requires more than the assertion of any and all defenses that *may* apply. Such defenses fall within the ambit of *Twombly*

2008 WL 2558015 at *1.

See *Holtzman v. B/E Aerospace, Inc.*, 2008 WL 2225668 at *2 (S.D.Fla.)("th[e] . . . logic [of *Twombly* holds true for affirmative defenses"); *Home Management Solutions, Inc. v. Prescient, Inc.*, 2007 WL 2412834 at *3 (S.D.Fla.)(applying *Twombly* to affirmative defenses); *In re Mission Bay Ski & Bike, Inc.*, 2009 WL 2913438 at *6 (Bkrtcy. N.D.Ill.)(applying *Twombly* and *Iqbal* to affirmative defenses); *Tracy v. NVR, Inc.*, 2009 WL 3153150 at *7 and n. 13 (W.D.N.Y.)(applying *Twombly* to affirmative defenses); *Aspex Eyewear, Inc. v. Clariti Eyewear Inc.*, 531 F. Supp. 2d 620, 621 (S.D.N.Y. 2008)(*Twombly* applies to counterclaims and affirmative defenses); *Greenheck Fan Corp. v. Loren Cook Co.*, 2008 Wl 4443805 at *1 (W.D.Wis.)(applying *Twombly* to affirmative defenses); *Stoffels ex rel. SBC Telephone Concession Plan v. SBC Communications, Inc.*, 2008 WL 4391396 at *1-*2 (W.D.Tex.)(applying *Twombly* to affirmative defense); *Home Management Solutions, Inc. v. Prescient, Inc.*, 2007 WL 2412834 at *3 (S.D.Fla.).

counsel plead and litigate cases.

On the other hand, the district courts which apply *Twombly* and *Iqbal* to affirmative defenses have declined to do so where the defendants--without access to discovery--would be unable to identify the facts supporting a proffered defense. See *Voeks v. Wal-Mart Stores, Inc.*, 2008 WL 89434 at *6 (E.D.Wis.)("[i]t would not be reasonable to expect the defendant to have detailed information about mitigation or offset at this early stage of the litigation"); *Stoffels v. SBC Communications, Inc.*, 2008 WL 4391396 at *2 n. 3 (W.D.Tex.)(exempting defendant from obligation to plead facts as part of its affirmative defense because it "cannot provide this detailed information at the pleading stage"). This more indulgent treatment of defendants is precisely the opposite of the manner in which *Twombly* and *Iqbal* are generally applied to plaintiffs, whose complaints are routinely dismissed because the plaintiffs were unable to obtain the needed evidence without discovery.

THE NEED FOR PROMPT LEGISLATIVE ACTION

Congress should act promptly to overturn *Iqbal* and *Twombly*, and return to the clear, well-established and equitable system of notice pleading that for more than five decades has governed civil litigation in the federal courts.

First, the decisions in *Iqbal* and *Twombly* have created intolerable obstacles to plaintiffs seeking redress in the federal

courts. The district judge who applied the *Iqbal* standard in *Ocasio-Hernandez v. Fortuno-Burset*, candidly described the *Iqbal* standard as "draconianly harsh to say the least."[20]

Second, the emerging practices governing pleading have created a haphazard system in which the application of *Iqbal* and *Twombly* varies in ways entirely unrelated to the merits of a claim. Plaintiffs who at trial would have prevailed on the basis of discovery-based evidence are barred because they have too little evidence when their complaints are written. Plaintiffs with far weaker claims can proceed to discovery and trial if they chanced to have more of that evidence before filing suit. Plaintiffs whose claims were dismissed without discovery under *Iqbal* and *Twombly* have a second chance to engage in discovery and resuscitate their claims if they happen to have a another claim which was not dismissed; plaintiffs with only a single claim are denied that opportunity.

Third, different pleading standards apply depending on whether a particular claim is the subject of one of the official Forms. A plaintiff in a diversity case who has a simple negligence claim can use Form 11 and file an entirely conclusory claim. A civil rights plaintiff, who alleges that his or her constitutional rights were violated as a result of reckless indifference by city policy makers, must run the gauntlet of *Iqbal*

[20]639 F. Supp. 2d at 226 n. 4,

and *Twombly*. A plaintiff suing for damages under the Merchant Marine Act can use Form 14; a plaintiff suing for damages under Title VII or the Americans With Disabilities Act has no such safe harbor.

Fourth, significant delay in addressing this problem will result in an ever growing number of plaintiffs whose complaints were unfairly dismissed under *Iqbal* and *Twombly*. As currently drafted H.R. 4115 applies only to cases pending on or after its date of enactment, not to cases previously dismissed under *Iqbal*. In another year or two, however, Congress will be under increasing pressure to include those dismissed cases in this legislation. Should that day come, the very organizations which are now urging Congress to postpone action on H.R. 4115 will then be insisting that covering those dismissed cases would be unfair, pleading that in reliance on the continued inaction of Congress they destroyed records and permitted memories to fade, and that they are no longer in a position to defend themselves against the improperly dismissed claims.