WRITTEN TESTIMONY OF PROFESSOR JOSHUA P. DAVIS

THE HOUSE OF REPRESENTATIVES
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SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

HEARING ON H.R. 4115, THE "OPEN ACCESS TO COURTS ACT OF 2009"
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I am a full professor at the University of San Francisco ("USF") School of Law, and Director of USF's Center for Law and Ethics. I have taught Civil Procedure and related classes for the last ten years, and write scholarship addressing issues in civil procedure and antitrust, among other areas. I also have experience in the practice of complex litigation and class actions in general and in antitrust cases in particular. I have argued cases in various state and federal courts, often focusing on procedural issues and substantive antitrust law. Although my role as a scholar and teacher is a full-time commitment, I continue to assist in the litigation of class actions and other complex cases, particularly in the area of antitrust.

I have three main points to make. First, private enforcement of the law—in general and in antitrust in particular—serves important purposes. Second, recent Supreme Court decisions pertaining to pleading standards, as interpreted by the lower courts, have undermined private enforcement of the law. Third, these recent Supreme Court decisions are unjustified: (1) they attempt to solve a problem that probably does not exist (2) by imposing a new pleading standard that is expensive and inefficient (2) in a manner that reflects and encourages what might be called "judicial activism."

I. Private Enforcement of Law—in General and in Antitrust in Particular—Serves Valuable Purposes.

Private antitrust litigation serves valuable purposes. In the vast majority of circumstances, only private actions compensate the victims of antitrust violations. Government litigation makes very little effort to provide recompense to victims. Further, private enforcement of the antitrust laws provides a powerful deterrent. In part because of budget constraints and in part because government tends to pursue only the most egregious antitrust violations, in many cases of illegal activity only private litigation occurs. And in other cases civil liability provides an important complement to the threat and fact of government action.

The contribution of private litigation in these regards is substantial. Professor Robert Lande, Venable Professor of Law at the University of Baltimore School of Law, and I studied forty successful antitrust cases that were completed after 1990. The article we wrote based on that effort is attached as Exhibit A. We determined that these cases alone provided over $18 billion in compensation, well over $5 billion from foreign actors targeting American victims. In an article we are currently drafting, we argue that the aggregate deterrent effect of these private cases is greater than even the deterrent effect of

the Department of Justice's excellent work pursuing criminal prosecution of antitrust violations. The current draft of the article on deterrence is attached as Exhibit B.

II. *Twombly* and *Iqbal*, Especially as Interpreted by Some Lower Courts, Undermine Private Enforcement of the Laws.

As interpreted by the lower courts, *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] undermine private enforcement of the law. Depending on how *Twombly* is read, it empowers judges to dismiss cases that they do not find "plausible."[3] A significant number of lower courts have interpreted this standard as imposing a high bar for antitrust plaintiffs simply to get past the pleadings and enter the discovery phase of a legal action. That interpretation impedes private enforcement in at least two ways. First, courts have dismissed the legitimate cases of some private plaintiffs who might well have prevailed at trial. Second, the anticipated expense of litigating complicated motions to dismiss and the risk of losing even meritorious cases—on top of the pre-existing high costs of prosecuting private litigation—together discourage the filing of the lawsuits necessary to vindicate the rights of antitrust victims.

Two cases illustrate these points. First, in *In re Air Cargo Antitrust Litigation*,[4] the Magistrate Judge recommended dismissing private litigation for failure to state a "plausible" claim under *Twombly* despite the guilty pleas of numerous of the defendants in criminal litigation arising from the same conduct. The District Court Judge ultimately rejected the Magistrate Judge's recommendation in this regard, but the parties and the courts still bore the cost of litigating an issue that should never have been raised. Second, the Sixth Circuit dismissed another private antitrust case, *In re Travel Agent Commission Antitrust Litigation*,[5] despite allegations of concerted behavior strongly suggesting an antitrust conspiracy. In all likelihood we will never know—just as we do not in *Twombly* itself—whether what appears to have been an illegal conspiracy in fact occurred.

In general, there are three natural consequences from the interpretations some lower courts have given to *Twombly* and *Iqbal*. First, potential wrongdoers will be emboldened by the difficulty of prosecuting private rights of action, leading to an increase in antitrust violations, harming the economy and consumers and putting honest businesses at a competitive disadvantage. Second, plaintiffs will be discouraged from filing meritorious cases by the increased cost of litigation and the prospect that even a meritorious case may be dismissed. Third, defendants will file motions to dismiss in cases where they would not have done so in the past,[6] hoping to obtain a dismissal

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[1] 550 U.S. 544 (2007).
[2] 129 S. Ct. 1937 (2009).
[3] *See, e.g.*, *Twombly*, 550 U.S. at 556-57.
[4] 06-MD-1775 (JG) (VVP) (E.D.N.Y).
[5] 583 F.3d 896 (6th Cir. 2009).
[6] Consider *In re Nuvaring Products Liability Litigation*, 4:08-MD-1964 RWS at 2, n. 2 (E.D. Mo. Dec. 11, 2009) (recounting that the defendants explained they moved to dismiss in federal court but not in the related state court proceedings because the state courts employ "notice pleading") (denying motions to dismiss).

whatever the merits of plaintiffs' claims or to gain a strategic advantage by imposing costs on plaintiffs and protracting litigation.

III. *Twombly* and *Iqbal* Changed the Law Without an Empirical Basis by Imposing a Costly New Rule in a Questionable Manner.

In modifying the pleading standard the Supreme Court in *Twombly* declared facts without any empirical basis. The Court's opinion appeared to rely in part on two assertions: (1) plaintiffs bring cases lacking any merit with some frequency and (2) defendants settle these cases with some frequency to avoid the costs and disruption of litigation.[7] But the Court cited no empirical support for these propositions. Merely declaring facts does not make them so. This apparently unnecessary change comes at a high cost. It has created great uncertainty in the law, adding to the frequency and cost of litigating motions to dismiss. It is also the product of and contributes to procedural improprieties: the Court acted without following the appropriate protocol for amending the Federal Rules of Civil Procedure; and its new standard—based on "plausibility"—invites judges to bring their political views to bear in deciding which plaintiffs will be given access to the courts.

A. The New Pleading Standard Attempts To Solve a Problem that Probably Does Not Exist.

As far as I know—and I have spent a considerable amount of time and effort researching the issue—there is no empirical evidence that plaintiffs often file and defendants often settle antitrust claims that have no significant merit. My research with Professor Lande, in contrast, suggests that at least a significant number of private antitrust cases do have merit. It is not credible that the defendants would have settled those cases—each involving a recovery of at least tens of millions of dollars and some recoveries of billions of dollars—unless defendants feared they would lose on the merits. Litigation costs cannot explain payments in those large amounts. But there is no similar effort of which I am aware to document any material number of private cases in which the plaintiffs' claims had no merit, but defendants nonetheless settled for a large sum.

Of course, those who are accused of running afoul of the antitrust laws—and, indeed, those who are found liable for doing so—at times claim that unmeritorious or frivolous cases are common. So do the lawyers and lobbyists who represent them. But unsubstantiated anecdotes about supposed meritless cases are not an appropriate predicate for modifying the law.

Moreover, the litigation costs that worried the Supreme Court in *Twombly* do not provide a strong basis for restricting access to the courts. In my experience, courts have various ways to maintain control over litigation,[8] including through phased discovery and motions for summary judgment on particular issues. Given the host of obstacles courts

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[7] *Id*. at 558-60.

[8] *See, e.g.*, Jack Weinstein, *What Discovery Abuse? A Comment on John Setear's the Barrister and the Bomb*, 69 B.U. L. REV. 649, 653-54 (1989).

have put in place to private antitrust enforcement in recent years—from weakening antitrust law to making it easier for defendants to win at summary judgment and class certification[9]—concerns about meritless cases involving great discovery costs are probably greatly exaggerated.

Indeed, when defendants incur substantial costs in discovery, that is often a problem of their own making. They generally possess all or the overwhelming majority of the relevant information. They could provide that information in a streamlined manner to plaintiffs. But they choose not to do so, all too often burying plaintiffs in irrelevant materials so as to make it difficult to find the key evidence or, in the alternative, stonewalling, playing word games, and otherwise resisting disclosure of the information to which plaintiffs are entitled. For defendants to complain, then, about the costs of discovery is not compelling.

Moreover, as a matter of theory, it is not particularly plausible that antitrust plaintiffs often bring meritless cases and antitrust defendants often pay large sums to settle them. First of all, antitrust defendants tend to be large, sophisticated corporations with great assets, well-situated to protect their legal rights. Large corporations also have incentive to acquire a reputation for being aggressive in litigation. So do the attorneys who represent them. And defense counsel generally bill by the hour, benefiting from protracted litigation.

In contrast, the reality is that plaintiffs' attorneys take the risks in most private antitrust litigation, particularly class actions. Those cases are expensive and time-consuming. And plaintiffs' attorneys recover only if they prevail. If they bring cases without merit, they can lose hundreds of thousands or even millions of dollars of their own cash, and millions of dollars of their time. A plaintiffs' attorney who brings bad cases with any regularity will quickly go out of business.

In short, early settlement of private litigation is unlikely, unless the defendant and defense counsel fear that discovery will prove highly damaging. And the supposed problem of strike suits—of meritless cases resulting in settlements—is probably insignificant. We should certainly not assume otherwise without seeing evidence.

B. The New Pleading Standard Is Expensive and Inefficient.

[9] The Supreme Court has decided fifteen antitrust cases in a row against plaintiffs, some limiting substantive antitrust rights and others increasing procedural barriers. See *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (2009); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Weyerhaeuser Co. v. Ross-Simmons Lumber Co.*, 549 U.S. 312 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Ill. Tool Works Inc. v. Indep. Ink*, Inc., 547 U.S. 28 (2006); *F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (2004); *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1998); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

The new pleading standard is expensive and inefficient. This is so in part simply because it is new. Litigants and judges knew what to expect under the old pleading standard. The rules of pleading had sorted themselves out. Now parties and courts spend a great deal of resources in trying to figure out what the appropriate standard is, not to mention attempting to apply it to particular cases. No one is sure what the new rule is or, to put the same point differently, many claim to know what it means but they all tend to disagree with one another.

The new pleading standard is also expensive and inefficient because it forces plaintiffs to write much longer complaints, often reciting evidence as if they were preparing to oppose summary judgment. And defendants—and defense counsel—are encouraged to file motions to dismiss in cases where they would have foregone that effort in the past.

C. The Questionable Legitimacy of the Supreme Court's Amendment of the Pleading Standard.

In the past the Supreme Court has repeatedly held that the judicial imposition of any heightened pleading standard would be procedurally improper. The appropriate method of reforming the law would be through the Federal Rules Advisory Committee. As recently as 2002, Justice Thomas writing for a unanimous Supreme Court in *Swierkiewicz v. Soreman N.A.*[10] held, "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[11] I do not believe that *Twombly* and *Iqbal*—particularly as interpreted by some lower courts—can be reconciled with *Swierkiewicz* or with the text of the Federal Rules of Civil Procedure, particularly Form 11 (formerly Form 9).

Equally troubling is the predicate for the Supreme Court's actions. It merely declared that plaintiffs bring meritless antitrust actions and defendants settle them. Judicial activism does not only involve judges making value judgments that are more appropriately left to other governmental institutions. It also occurs when courts effect changes in the law based on factual assertions without any adequate grounding—resolving factual issues that other governmental institutions are better able to assess. Abiding by the process for amending the Federal Rules of Civil Procedure might have allowed for a more careful assessment of the evidence.

And the pleading standard under *Twombly* and *Iqbal* invites activism by lower courts. The range of interpretations is greater under the new rule than under the old one. Some judges reason as if nothing has changed while others in effect impose a heightened pleading standard in some or all cases. Great discretion lies even in the hands of those judges who seize on the Supreme Court's reference to "plausibility." What is plausible and implausible varies with the eye of the beholder. As a result, the political

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[10] 534 U.S. 506 (2002).

[11] *Id.* at 515 (quoting *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)).

predispositions of judges—rather than the merits—can dictate which plaintiffs will have their day in court and which plaintiffs will never have a chance to try to prove their case.

IV. Conclusion.

Twombly and *Iqbal*—at least as interpreted by the lower courts—attempt to solve a problem that probably does not exist in a way that imposes heavy costs on parties and the judiciary as result of a rule change with dubious legitimacy. We would do better to return to the standard that existed before this innovation. Parties and courts understood what to expect in litigation and the process was less expensive and more predictable. Moreover, private attorneys were in a much better position to assist government in enforcing our laws in general and in policing our free markets in particular. Legislative action could greatly assist private attorneys general in pursuing these valuable efforts.

Moreover, we should act promptly. Under the current standard, antitrust violators have a new license to violate the law and their victims face a significant impediment to recovery. As long as wrongdoers do not confess their actions—and only the obvious outward manifestations of their wrongdoing become apparent—many meritorious cases will not be brought and others will get dismissed. We should act soon to protect the rules essential to a robust free market.

Nor is waiting before passing legislation apt to serve any meaningful purpose. Complaints about alleged frivolous litigation have circulated for decades. But I am not aware of any evidence that has been amassed to demonstrate it occurs with any frequency. And we are unlikely to gain new insight into the problems created by *Twombly* and *Iqbal* with the passage of time. How will we ever learn about cases that are not brought but should have been? How will we ever know whether dismissed cases had merit, including cases like *Air Cargo* and *Twombly*? This is so even if litigation under the old rules would have proven that someone violated the law or would have secured a large settlement because defendants knew that discovery would reveal damaging evidence. Delay can do great harm, but it is unlikely to do much good.

A final note is in order. Some commentators worry about the effect of reversing *Twombly* and *Iqbal* on potential claims by terrorists. Terrorism is a grave issue. But civil claims by terrorists constitute only the tiniest percentage of cases. If those cases warrant a heightened pleading standard, that could be addressed by specialized legislation. Indeed, any other approach is dangerous. It could, for example, deprive U.S. victims of foreign terrorists of any ability to obtain discovery if they bring claims for their grievances.[12] The point is that the highly specific issue of terrorism should play no role in formulating a general pleading standard.

[12] This is no mere theoretical possibility. Defendants in litigation arising from the terrorist attacks on September 11, 2001 have in fact moved to dismiss, relying in part on *Iqbal*. *See In re Terrorist Attacks on September 11, 2001*, 03-MDL-1570 (GBD). I am not sufficiently familiar with this litigation to take any position on its merits. My point is only that altering the rules of procedure in all cases merely because a handful of alleged terrorists could bring cases in U.S. courts could have unintended and perverse results.