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Notice Pleading in Exile

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According to the conventional wisdom, the Supreme Court's 2009 decision in Ashcroft v. Iqbal *discarded notice pleading in favor of plausibility pleading. This Article—part of a symposium commemorating the* Iqbal *decision's tenth anniversary—highlights decisions during those ten years that have continued to endorse notice pleading despite* Iqbal. *It also argues that those decisions reflect the best way to read the* Iqbal *decision. Although* Iqbal *is a troubling decision in many respects, it can be implemented consistently with the notice-pleading framework that the original drafters of the Federal Rules of Civil Procedure had in mind.*

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INTRODUCTION

Symposia like this one, which recognize the anniversary of a significant event or Supreme Court decision, often reflect on the ways things have changed as a result. This Article's goal, by contrast, is to highlight how the Supreme Court's decision in *Ashcroft v. Iqbal*[1] did not change things. Or at least, my goal is to show why *Iqbal*—and its predecessor, *Bell Atlantic Corp. v. Twombly*[2]—should not be interpreted to require a restrictive change in the federal pleading standard set forth in Rule 8 of the Federal Rules of Civil Procedure.[3]

This is not the conventional understanding. Much of the scholarly attention devoted to *Iqbal* and *Twombly* has noted (and typically decried) the Supreme Court's rejection of the lenient notice-pleading standard that most of this symposium's contributors learned in law school.[4] I agree with the many policy-oriented critiques of restrictive pleading standards and applaud the virtues of more lenient ones.[5] But there is a crucial antecedent question of what sort of pleading standard *Iqbal* and *Twombly* actually demand.

Among the hundreds of thousands of federal court citations to *Iqbal* and *Twombly*,[6] one finds an interesting cadre of judicial opinions where notice pleading lives. These decisions continue to embrace *Conley v. Gibson*'s command from more than a half-century ago that "all the Rules require is 'a short and plain statement of the claim' that will give the

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1 556 U.S. 662 (2009).

2 550 U.S. 544 (2007).

3 *See* FED. R. CIV. P. 8(a)(2).

4 *See infra* note 37.

5 *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18–23 (2010) [hereinafter Miller, *Double Play*].

6 As of September 2015, *Iqbal* and *Twombly* had each been cited in more than 100,000 federal court opinions, making them the third-most (*Twombly*) and fourth-most (*Iqbal*) frequently cited Supreme Court decisions of all time. *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 389–93 (2016) [hereinafter Steinman, *Rise and Fall*].

defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests."[7] They continue to rely on the Court's twenty-first-century endorsement of notice pleading in *Swierkiewicz v. Sorema N.A.*[8] And they continue to rely on pleading forms from the original Federal Rules of Civil Procedure—which had been used to "illustrate the simplicity and brevity that these rules contemplate"[9] but were controversially removed from the text of the Federal Rules in 2015.[10] I believe that this band of exiles is not only righteous, but right. The best way for courts to interpret and apply the *Iqbal* decision—as it enters its second decade—is in a way that preserves notice pleading.

Part I of this Article briefly summarizes Rule 8's pleading standard and the notice-pleading approach that the Supreme Court embraced during the Federal Rules' first seventy-plus years. Part II describes post-*Iqbal* decisions in the lower federal courts that have continued to endorse notice pleading. Part III addresses the federal pleading forms, which were included in the initial Federal Rules to provide useful exemplars of notice pleading but were abrogated in 2015, and identifies federal courts that have continued to utilize the forms despite *Iqbal* and despite their post-*Iqbal* extraction from the text of the Federal Rules. Part IV examines the two-step pleading framework that *Iqbal* articulated and explains how that framework can—and should—be implemented to save notice pleading.

I. A BRIEF HISTORY OF NOTICE PLEADING

The textual source of the federal pleading standard has remained essentially unchanged since the Federal Rules of Civil Procedure were adopted in 1938. Rule 8 instructs that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."[11] This standard came to be known as

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7 355 U.S. 41, 47 (1957) (emphasis added).

8 534 U.S. 506 (2002); *see infra* notes 21–27 and accompanying text (discussing *Swierkiewicz*).

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

10 *See infra* notes 69–76 and accompanying text (discussing the forms and the 2015 amendment).

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

"notice pleading,"[12] although some resisted that moniker during the Federal Rules' early years.[13] This initial disagreement may have reflected differing perceptions of what "notice pleading" actually entailed. As Charles Clark—the chief drafter of the initial Federal Rules—observed:

> The usual modern expression, at least of text writers, is to refer to the *notice function* of pleadings; notice of the case to the parties, the court, and the persons interested. This is a sound approach so far as it goes; but *content must still be given to the word "notice."*[14]

That insight does prompt a crucial question—both descriptive and normative—regarding notice pleading: notice of *what*?[15] The Supreme Court's engagement with that question began with its landmark 1957 decision in *Conley*.[16] *Conley* declared that "all the Rules require is a short and plain statement of the claim that will give the defendant *fair notice* of

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12 *See, e.g.*, James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179, 1179 (1938) ("The generality of allegation contemplated by the Rules indicates the influence of the newer concept of 'notice pleading.'"); James M. Douglas & Charles E. Clark, *The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 162–63 (1952) (comments of John W. Willis) (noting that the original Federal Rules advisory committee had "adopt[ed] the concept of notice pleading"); *id.* at 160 (noting that Mr. Willis "of the Federal Rules Service, Washington, D.C. . . . is an expert who, by virtue of his position in reporting all of the decisions, has perhaps as complete a picture as anyone can expect"); Irving R. Kaufman, *Some Observations on Pre-Trial Examinations in Federal and State Courts*, 12 F.R.D. 363, 365 (1952) (noting that "in most cases under our federal rules 'the function of the pleadings extends hardly beyond notification to the opposing parties of the general nature of a party's claim or defense'" and that "[t]he term 'notice pleading' has been applied to this underlying concept").

13 *See, e.g.*, Charles Alan Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909, 926 (1953) ("The truth is that the Federal and other modern pleading systems no more allow 'notice-pleading,' in the sense in which that term has been traditionally used, than does the Pennsylvania system."); Gunnar H. Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 109 (1956) ("Most courts and textwriters agree that Rule 8 does not countenance mere notice pleading.").

14 Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460 (1943) (emphasis added).

15 Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1324 (2010) [hereinafter Steinman, *Pleading Problem*] ("Judge Clark's observation confirms that a notice-pleading framework is not inherently a lenient one. It depends on what 'content [is] given to the word "notice."'" (quoting Clark, *supra* note 14, at 460)); *id.* at 1340 (proposing an approach to pleading that "attempt[s] to further refine what 'notice' a defendant is entitled to at the pleadings phase").

16 355 U.S. 41 (1957).

what the plaintiff's claim is and the grounds upon which it rests."[17] This standard "do[es] not require a claimant to set out in detail the facts upon which he bases his claim."[18] The Court also explained 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."[19]

The Supreme Court frequently reaffirmed this understanding during the Federal Rules' first seven decades, fully embracing the term "notice pleading."[20] In *Swierkiewicz*[21]—an important 2002 decision—the Court found that a plaintiff's allegation that his "age and national origin were motivating factors in [the defendant's] decision to terminate his employment" was sufficient to prevent dismissal of his employment discrimination claim.[22] The Court recognized that Rule 8's "simplified notice pleading standard"[23] might "allow[] lawsuits based on conclusory allegations of discrimination to go forward."[24] As written, however, the Federal Rules "rel[y] on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[25] The unanimous *Swierkiewicz* opinion wrote that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."[26] Imposing a stricter pleading standard, the Court

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17 *Id.* at 47 (emphasis added) (internal quotations omitted).

18 *Id.*

19 *Id.* at 45–46.

20 *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002) (describing the federal approach as "a notice pleading system"); *id.* at 512 (describing *Conley*'s "simplified notice pleading standard"); Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (noting "the liberal system of 'notice pleading' set up by the Federal Rules"); *see also* Mayle v. Felix, 545 U.S. 644, 669 (2005) (contrasting the Court's approach to habeas corpus petitions with "the generous notice-pleading standard for the benefit of ordinary civil plaintiffs under Federal Rule of Civil Procedure 8(a)"). Even before *Conley*, the Supreme Court described the Federal Rules as "restrict[ing] the pleadings to the task of general notice-giving." Hickman v. Taylor, 329 U.S. 495, 501 (1947).

21 534 U.S. 506.

22 Amended Complaint ¶ 37, *Swierkiewicz*, 534 U.S. 506 (No. 00-1853), 2001 WL 34093952, at *27a.

23 *Swierkiewicz*, 534 U.S. at 512.

24 *Id.* at 514.

25 *Id.* at 512.

26 *Id.* at 514 (citing Conley v. Gibson, 355 U.S. 41, 48 (1957)).

explained, could be done only by "amending the Federal Rules, . . . not by judicial interpretation."[27]

What a difference a decade makes. The 2000s began with *Swierkiewicz*'s whole-hearted reaffirmance of notice pleading. In 2007, however, *Twombly* first articulated the controversial "plausibility" inquiry,[28] ordering the dismissal of an antitrust conspiracy claim against major telecommunications companies.[29] The *Twombly* majority put into "retirement"[30] some aspects of the *Conley* decision (although it did *not* challenge *Conley*'s "fair notice" standard[31]), prompting Justice Stevens to argue in dissent that the majority's approach was "irreconcilable with Rule 8 and with our governing precedents."[32] And in 2009, *Iqbal* made clear that the *Twombly* approach reflected Rule 8's general pleading standard,[33] applying to all civil cases in federal court and requiring the dismissal of Mr. Iqbal's claims of intentional discrimination against

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

[28] *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

[29] *Id.* at 564 ("When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short.").

[30] *See id.* at 561–63 (stating that *Conley*'s observation 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" had "earned its retirement," noting concerns about a "focused and literal reading" of that phrase (quoting *Conley*, 355 U.S. at 45–46)); *see also infra* note 108 (discussing this aspect of *Conley* and *Twombly*'s handling of it).

[31] *See infra* notes 38–41 and accompanying text.

[32] *Twombly*, 550 U.S. at 586 (Stevens, J., dissenting); *see also id.* at 572–73 ("Under rules of procedure that have been well settled . . . , a judge ruling on a defendant's motion to dismiss a complaint 'must accept as true all of the factual allegations contained in the complaint.' But instead of requiring knowledgeable executives . . . to respond to these allegations by way of sworn depositions or other limited discovery—and indeed without so much as requiring [defendants] to file an answer denying that they entered into any agreement—the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. . . . [T]he Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case." (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002)) (other internal citation omitted)).

[33] Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (quoting FED. R. CIV. P. 1)).

Attorney General John Ashcroft and FBI Director Robert Mueller arising from his treatment by federal officials in the wake of the 9/11 attacks.[34] *Iqbal* also elicited a vigorous dissent, in which Justice Souter—the author of the *Twombly* majority opinion—argued that the *Iqbal* majority "misapplie[d] the pleading standard under [*Twombly*],"[35] and that Mr. Iqbal's claim should not have been dismissed because "[t]aking the complaint as a whole, it gives Ashcroft and Mueller 'fair notice of what the claim is and the grounds upon which it rests.'"[36]

Following *Twombly* and *Iqbal*, much academic commentary declared the end of notice pleading.[37] Numerous federal courts have continued to embrace it, however. The following Parts of this Article highlight these decisions and explain why they are implementing the best reading of *Twombly* and *Iqbal*.

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[34] *Id.* at 666.

[35] *Id.* at 688 (Souter, J., dissenting).

[36] *Id.* at 698–99 (internal quotation marks and ellipses omitted) (quoting *Twombly*, 550 U.S. at 555).

[37] *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (describing "the Court's choice to replace minimal notice pleading with a robust gatekeeping regime"); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 262 (2009) ("[N]otice pleading has died."); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) (arguing that *Twombly* and *Iqbal* "have changed the old notice pleading standard to a new 'plausibility' regime"); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 346 (2013) ("The Supreme Court has moved the system from a notice pleading structure, which is what Rule 8 was designed to be, to a fact pleading structure, which is exactly what the Federal Rules were drafted to reject."); Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1207 (2014) ("Until *Twombly* and *Iqbal*, the Supreme Court maintained a relatively consistent commitment to *Conley*'s notice pleading rule . . . . The role of pleading changed with the Court's decisions in *Twombly* and *Iqbal*."); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 528 (2010) (arguing that *Iqbal* "rejects the concept of notice pleading"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) ("Notice pleading is dead. Say hello to plausibility pleading."); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1848 (2014) (arguing that *Twombly* and *Iqbal* "replaced notice pleading with a scheme labeled plausibility pleading").

II. NOTICE PLEADING AFTER *IQBAL*

The most compelling support for the vitality of notice pleading is hiding in plain sight. The majority opinion in *Twombly* explicitly endorsed notice pleading, quoting *Conley* for the following proposition: "Rule . . . 8(a)(2) requires only [that the complaint] 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[38] Just three weeks after the *Twombly* decision, the Supreme Court's per curiam opinion in *Erickson v. Pardus*[39] explicitly cited *Twombly*'s invocation of *Conley*'s fair-notice standard.[40] The Court wrote:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[41]

The *Iqbal* majority did not purport to do anything more than follow the approach laid out in *Twombly*. It cited *Twombly* exclusively in describing what is required "[t]o survive a motion to dismiss."[42] It then identified the "[t]wo working principles" that "underlie [its] decision in *Twombly*"[43] and described how the "decision in *Twombly* illustrates the two-pronged approach."[44] And in concluding that Mr. Iqbal's complaint was insufficient, the *Iqbal* majority stated that it did so "[u]nder *Twombly*'s construction of Rule 8."[45] Accordingly, if providing "fair notice" was sufficient under *Twombly*, it should likewise be sufficient under *Iqbal*. Or at least, that is the logical implication of the Supreme Court's own words.

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38 *Twombly*, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

39 551 U.S. 89 (2007).

40 *Id.* at 93.

41 *Id.* at 93 (quoting *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47)).

42 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (first quoting *Twombly*, 550 U.S. at 556; then quoting *id.* at 557; and then quoting *id.* at 570).

43 *Id.* at 678.

44 *Id.* at 679. This "two-pronged approach" is described *infra* Section IV.A.

45 *Id.* at 680 ("Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not 'nudged his claims' of invidious discrimination 'across the line from conceivable to plausible.'" (brackets omitted) (quoting *Twombly*, 550 U.S. at 570)).

Indeed, numerous post-*Iqbal* federal-court decisions have emphasized *Twombly*'s endorsement of *Conley*'s fair-notice standard. A unanimous panel decision from the U.S. Court of Appeals for the Eighth Circuit wrote—in remarkably short and plain terms[46]—"*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2)."[47] A unanimous Federal Circuit decision stated that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the ground upon which it rests.'"[48]

The Tenth Circuit's decision in *Khalik v. United Air Lines* is also illustrative.[49] The court of appeals reasoned: "As the Court held in [*Erickson*], which it decided a few weeks after *Twombly*, under Rule 8, 'specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the ground upon which it rests."'"[50] The court wrote that under the *Twombly*/*Iqbal* approach, "heightened fact pleading" is "expressly rejected;"[51] that "[t]here is no indication the Supreme Court intended a return to the more stringent pre-Rule 8 pleading requirements;"[52] and that "Rule 8(a)(2) still lives."[53] The Tenth Circuit also quoted the Supreme Court's observation from *Swierkiewicz* that "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."[54]

Another important circuit court examination of *Iqbal* came from Judge Diane Wood, who wrote the unanimous Seventh Circuit decision in *Brooks v. Ross*.[55] Citing *Swierkiewicz*, she wrote that Rule 8 "reflects a

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46 *Cf.* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.").

47 Hamilton v. Palm, 621 F.3d 816, 817 (8th Cir. 2010).

48 Disc Disease Sols. Inc. v. VGH Sols., Inc., 888 F.3d 1256, 1260 (Fed. Cir. 2018) (ellipses in original) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555)).

49 671 F.3d 1188 (10th Cir. 2012).

50 *Id.* at 1192 (ellipses in original) (brackets omitted) (quoting *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555)).

51 *Id.* at 1191 (quoting Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008)).

52 *Id.*

53 *Id.*

54 *Id.* at 1191–92 (brackets omitted) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002)).

55 578 F.3d 574 (7th Cir. 2009).

liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court."[56] She also reasoned that the Supreme Court's *Erickson* decision "put to rest" the notion that *Twombly* "had repudiated the general notice-pleading regime of Rule 8," emphasizing that *Erickson* had "reiterated that 'specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.'"[57] And finally: "[t]his continues to be the case after *Iqbal*."[58]

One year later, in *Swanson v. Citibank, N.A.*,[59] Judge Wood authored another important Seventh Circuit opinion. She reasoned that two core pre-*Twombly* principles remained good law after *Iqbal*. First, "all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity."[60] And second, "a basic objective of the rules is to . . . require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved."[61]

The *Swanson* decision held that *Twombly* and *Iqbal* had not "undermined these broad principles."[62] Judge Wood explained:

> The [Supreme] Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes. We know that because it said so in *Erickson*: "the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[63]

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[56] *Id.* at 580 (quoting *Swierkiewicz*, 534 U.S. at 514).

[57] *Id.* at 581 (ellipses omitted) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007)).

[58] *Id.*

[59] 614 F.3d 400 (7th Cir. 2010).

[60] *Id.* at 404 (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215, at 165–73 (3d ed. 2004)).

[61] *Id.* (quoting 5 WRIGHT & MILLER, *supra* note 60, § 1215, at 165–73).

[62] *Id.*

[63] *Id.* (ellipses in original) (brackets added) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007)). Judge Wood also noted "[t]he Supreme Court's explicit decision to reaffirm the validity of [*Swierkiewicz*], which was cited with approval in *Twombly*." *Id.* (citations omitted).

Judge Wood's *Swanson* decision did elicit a dissent from Judge Richard Posner.[64] But Judge Wood had the votes.[65] Indeed, the Seventh Circuit's *Swanson* decision prompted an Indiana district court judge to declare that "notice pleading remains the law of the land."[66]

In highlighting these examples, I do not mean to dispute that there are also numerous lower court decisions that cast doubt on the viability of notice pleading in the wake of *Iqbal*.[67] And empirical studies have reported the impact of *Iqbal* on both judicial decisions and litigant behavior.[68] It is important, however, to shine a light on federal court decisions that have continued to apply a notice-pleading standard.

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[64] *See id.* at 407 (Posner, J., dissenting) ("I join the majority opinion except with respect to reversing the dismissal of the plaintiff's claim of housing discrimination. I have difficulty squaring that reversal with *Ashcroft v. Iqbal*.").

[65] *See In re* Skupniewitz, 73 F.3d 702, 705 (7th Cir. 1996) ("A panel decision is binding on another court panel unless overruled with the approval of the en banc court."); *see also* United States v. Martinez, 821 F.3d 984, 990 (8th Cir. 2016) ("Although I agree with Judge Colloton's dissent in *United States v. Taylor*, 803 F.3d 931, 933–34 (8th Cir. 2015), our panel is bound by the contrary decision of the panel majority in *Taylor*." (Loken, J., concurring)); United States v. Custis, 988 F.2d 1355, 1364 (4th Cir. 1993) ("It should not need to be remarked that it is the opinion of the panel majority that binds and governs district courts within this circuit."); *cf.* Christopher Jackson, Daveed Diggs, Lin-Manuel Miranda & Okieriete Onaodowan, Atlantic Records, *Cabinet Battle #1*, YOUTUBE (Apr. 20, 2017), https://www.youtube.com/watch?v=dSYW61XQZeo [https://perma.cc/2X9Z-BQYL] ("You don't have the votes.").

[66] A.B. *ex rel.* Kehoe v. Hous. Auth. of S. Bend, No. 3:11 CV 163 PPS, 2011 WL 4005987, at *4 (N.D. Ind. Sept. 8, 2011) (citing Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010)); *see also* EEOC v. Scrub, Inc., No. 09 C 4228, 2009 WL 3458530, at *1 (N.D. Ill. Oct. 26, 2009) ("*Iqbal* and *Twombly* did not repudiate general notice-pleading." (citing Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009))).

[67] *See, e.g.*, Marcus v. Leviton Mfg. Co., 661 F. App'x 29, 31 (2d Cir. 2016) (unpublished) (contrasting "the relaxed 'notice pleading' standards applied by New York state courts" with "the more demanding plausibility standard established by the Supreme Court in [*Twombly*] and [*Iqbal*]"); Clarendon Am. Ins. Co. v. All Bros. Painting, Inc., No. 6:13-CV-934-ORL-22DAB, 2013 WL 5921538, at *5 (M.D. Fla. Nov. 4, 2013) ("In [*Twombly*] and [*Iqbal*], the Supreme Court enunciated a new, heightened pleading standard, abrogating the notice pleading standard stated in [*Conley*]."); *see also* Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278, 288 (4th Cir. 2012) ("It is true that [*Twombly* and *Iqbal*] require more specificity from complaints in federal civil cases than was heretofore the case."); Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (discussing "[t]he demise of *Swierkiewicz*"). *But cf.* Steinman, *Pleading Problem*, *supra* note 15, at 1345 & n.300 (noting that the Third Circuit in *Fowler* "squarely rejected the idea that a complaint must somehow suggest the truth or provability of the allegations contained therein").

[68] *See, e.g.*, Christina L. Boyd, David A. Hoffman, Zoran Obradovic & Kosta Ristovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J.

III. THE CONTINUED RELEVANCE OF THE ABROGATED PLEADING FORMS

In addition to explicitly endorsing the continued validity of notice pleading after *Iqbal*, numerous federal courts have continued to embrace the pleading forms that illustrated the drafters' initial vision. These forms were part and parcel of the Federal Rules of Civil Procedure both at their inception and when the Supreme Court decided *Twombly* and *Iqbal*. As Rule 84 instructed, the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."[69] One oft-cited example was Form 11, which provided that the following negligence allegation was sufficient under Rule 8: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."[70] Form 11 did not require a plaintiff to allege in the complaint precisely *why* the defendant's driving was negligent, or what *evidence* it would use to prove negligence.[71]

EMPIRICAL LEGAL STUD. 253, 254 (2013); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2306–07 (2012); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2145 (2015).

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

70 FED. R. CIV. P. Form 11, ¶ 2 (2014) (abrogated 2015), *reprinted in* Steinman, *Rise and Fall*, *supra* note 6, at 395. Prior to 2007, the form negligence complaint was depicted in Form 9; the pre-2007 sample allegation was, "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 576 (2007) (Stevens, J., dissenting) (quoting FED. R. CIV. P. Form 9 (2007) (abrogated 2015)); *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 n.4 (2002) (same).

71 Another example from the Federal Rules' pleading forms was Form 18's complaint for patent infringement. Using a patent for electric motors as an example, Form 18 deemed it sufficient to allege: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention . . . ." FED. R. CIV. P. Form 18, ¶ 3 (2014) (abrogated 2015). Form 18 did not require allegations regarding how the defendant's motors embodied the plaintiff's patented invention.

Form 11 was a paradigm of notice pleading.[72] In Charles Clark's view, those forms were "the most important part of the rules."[73] Discussing Rule 8's pleading standard, he wrote: "We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms."[74]

In 2015, however, Rule 84 and the accompanying pleading forms were abrogated.[75] That the forms have been removed from the current text of the Federal Rules, however, does not make them irrelevant. According to the advisory committee note that accompanied the 2015 amendment, the purpose of the abrogation was that the forms "are no longer necessary" because "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled."[76] It logically follows—and the advisory committee explicitly clarified—that the removal of the forms "does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8."[77]

Given the stated rationale of the 2015 amendment, it would be a mistake to read the pleading forms that existed for nearly eighty years as no longer relevant.[78] Indeed, even in the wake of *Twombly*, *Iqbal*, and the 2015 amendments, federal courts have continued to rely on now-

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[72] *See* Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1106–07 (2015) ("As Charles Clark stated, the forms were intended to give meaning to the rules. . . . Because of Rule 84, Rule 8 and Form 11 are one and the same."); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 40 (2016) [hereinafter Steinman, *End of an Era*] (noting the "iconic pleading forms, which had long stood as exemplars of the lenient approach to pleading that the drafters of the original rules envisioned"); *see also* Miller, *Double Play*, *supra* note 5, at 40 (calling Form 11 "the paradigm negligence complaint").

[73] Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

[74] *Id.*

[75] *See* FED. R. CIV. P. 84 advisory committee's note to 2015 amendment. *See generally* Steinman, *End of an Era*, *supra* note 72, at 22, 27 (summarizing the elimination of the pleading forms and the accompanying advisory committee note).

[76] FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

[77] *Id.*

[78] *See* Steinman, *End of an Era*, *supra* note 72, at 40–42; *see also* Catherine T. Struve, *Phantom Rules*, 117 COLUM. L. REV. ONLINE 70, 86 (2017) ("Given the Committee Note's explicit statement that Rule 8(a)(2)'s pleading requirement is unaltered by Rule 84's abrogation, and given the weight that some pre-2015 case law had accorded to the forms, claimants are likely to urge that courts continue to rely upon the forms when assessing a pleading's sufficiency.").

abrogated forms such as Form 11. One district court, in finding that a claim for negligent medical treatment was sufficiently pled,[79] stated that it "[drew] comfort from the fact that the old forms attached to the back of the Federal Rules of Civil Procedure did not require much for negligence claims."[80] It added that "[n]o one has suggested that the Supreme Court abrogated the forms—including Form 11—in *Iqbal* and *Twombly*."[81]

Another district court has written that the forms—including Form 11—reflected "simple, intuitive claims that could be pled with little detail while still putting defendants on notice of the alleged conduct of which they were accused."[82] The court wrote that *Twombly* and *Iqbal* "seem not to cast doubt on this role. Indeed, the Court in *Twombly* took pains to say that their decision was not meant to raise pleading standards."[83] Nor did the 2015 amendments undermine the relevance of the forms: "The abrogation of Rule 84 and the Appendix of Forms eliminated the most obvious *landmarks* for this line of thought, but it did not eliminate the *rationale itself*."[84]

As with the previous Part's discussion, this sample of decisions is not meant to be exhaustive.[85] And there are certainly cases that take the

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79 Begay v. United States, 188 F. Supp. 3d 1047, 1089 (D.N.M. 2016).

80 *Id.* at 1089 n.47 (citing and quoting FED. R. CIV. P. Form 11 (2014) (abrogated 2015)).

81 *Id.*

82 John Keeler & Co. v. Heron Point Seafood, Inc., No. 1:14 CV 1652, 2017 WL 3705863, at *9 (N.D. Ohio Aug. 28, 2017) (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).

83 *Id.*

84 *Id.* at *10 (emphasis added); *see also* Whitcraft v. Scaturo, No. 5:16-2385-JFA, 2017 WL 371037, at *2 n.4 (D.S.C. Jan. 26, 2017) (stating that, in adopting a Magistrate Judge's report and recommendation, the district court had "removed Fed. R. Civ. P. 84 and App. Form 11 from its consideration as these were abrogated in 2015" but noting that "this abrogation occurred because Rule 84 and the Appendix of Forms were no longer necessary and the abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8" and that therefore "the Magistrate Judge's analysis remains correct" (citations and internal quotation marks and brackets omitted)).

85 Other examples of post-2015 decisions that rely on the abrogated pleading forms include Torres v. Inteliquent, Inc., No. 17-10022, 2018 WL 5809246, at *6 & n.37 (E.D. La. Nov. 6, 2018) (citing and quoting Form 11 to support the proposition that, at the pleading phase, federal courts accept "the factual allegation that a defendant was negligent"); Rosado-Acha v. Rosado, No. 17-1031 (SEC), 2018 WL 1444202, at *8 (D.P.R. Mar. 19, 2018) ("[A] complaint modeled on Form 11 of the Appendix of the Federal Rules of Civil Procedure which contains sufficient facts to make

opposite position—that the abrogated forms are no longer relevant to the federal pleading standards.[86] For the reasons discussed above, however, there is a straightforward argument that the abrogation of the forms should not be read to make a substantive change in the pleading standard in light of the clear advisory committee note accompanying the 2015 amendment.[87] And because those forms illustrated the sort of notice-pleading approach that was envisioned by the Federal Rules' original drafters and implemented by the Supreme Court during the Rules' first seven decades, the reliance on those forms by some lower federal courts reflects a continued embrace of notice pleading.[88]

IV. HOW *IQBAL* CAN PRESERVE NOTICE PLEADING

This Part argues that federal courts that have continued to embrace notice pleading after *Iqbal* are doing exactly what they should be doing. Section A takes a close look at the two-step framework that *Iqbal* articulated. Section B explains how that two-step approach can be implemented in a way that preserves notice pleading. And Section C argues that Supreme Court's post-*Iqbal* decision in *Johnson v. City of*

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the claim plausible is ordinarily enough to surpass the standard prescribed under *Twombly-Iqbal*.").

86 *See, e.g.*, Robern, Inc. v. Glasscrafters, Inc., 206 F. Supp. 3d 1005, 1007 n.3 (D.N.J. 2016) ("Plaintiff incongruously argues that while Rule 84 and Form 18 have been abrogated, the pleading standards . . . have not changed.").

87 *See supra* notes 75–78 and accompanying text.

88 Some federal courts took the view that the pleading forms were fundamentally in conflict with the pleading standard reflected by *Twombly* and *Iqbal*, and therefore viewed particular forms as creating "exceptions" from *Twombly* and *Iqbal* for particular claims. *See, e.g.*, Tannerite Sports, LLC v. Jerent Enters., LLC, No. 6:15-cv-00180-AA, 2016 WL 1737740, at *10 (D. Or. May 2, 2016) (describing Form 18's "patent infringement exception to the civil pleading requirements set forth in *Twombly* and *Iqbal*"). Following the 2015 abrogation of the forms, therefore, some courts viewed the advisory committee note's reference to "existing pleading standards" as imposing the *Twombly*/*Iqbal* approach to claims that had previously been subject to a more lenient, form-based standard. *See* Webasto Thermo & Comfort N. Am., Inc. v. BesTop, Inc., No. 16-cv-13456, 2017 WL 4535290, at *11–12 (E.D. Mich. Oct. 11, 2017). The better understanding—as elaborated in Part IV of this Article—is that what was sufficient before *Twombly* and *Iqbal* (notice pleading, as reflected by the pleading forms) is *still* sufficient today. Properly understood, *Twombly* and *Iqbal* do not mandate a stricter approach to pleading, and neither does the abrogation of the pleading forms.

Shelby reflects precisely such an approach to federal pleading standards after *Iqbal*.

A. *Understanding* Iqbal*'s Two Steps*

Although it may seem surprising to argue that *Iqbal* preserves notice pleading, that is the best reading of the two-step framework that the *Iqbal* majority endorsed. The first step, according to *Iqbal*, is to identify allegations that are mere "legal conclusions" and disregard them for purposes of determining whether the complaint states a claim for relief.[89] The *Iqbal* majority provided little guidance regarding why the crucial allegations in the *Iqbal* complaint qualified as unacceptably conclusory, except to emphasize that a complaint requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation,"[90] or "a formulaic recitation of the elements of a cause of action."[91] Although the lack of meaningful guidance on this issue is a frustrating aspect of the Court's reasoning in *Iqbal*,[92] this shortcoming permits an elegant way to reconcile *Iqbal* with notice pleading. An allegation qualifies as conclusory—as a mere legal conclusion—when it fails to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[93]

What about *Iqbal*'s second step, the infamous "plausibility" inquiry? Although *Iqbal*'s plausibility requirement has garnered the lion's share of scholarly criticism, its role in *Iqbal*'s doctrinal framework is often misunderstood. Most crucially, when a court assesses a complaint's "plausibility," it must *accept as true* all of the nonconclusory allegations: "When there *are* well-pleaded factual allegations, a court should *assume*

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89 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

90 *Id.* at 678.

91 *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

92 *See* Steinman, *Rise and Fall*, *supra* note 6, at 358 ("[T]he *Twombly* and *Iqbal* decisions themselves fail to provide concrete guidance on what makes an allegation impermissibly 'conclusory.'").

93 Conley v. Gibson, 355 U.S. 41, 47 (1957); *see* Steinman, *Rise and Fall*, *supra* note 6, at 352 n.113 (arguing that "one might perfectly align *Twombly* and *Iqbal* with notice pleading" by "defining the term 'conclusory' to mean 'failing to provide fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (emphasis omitted)).

their veracity and *then* determine whether they plausibly give rise to an entitlement to relief."[94]

According to the Supreme Court's own words, an allegation can never be disregarded because it is not plausible. It can be disregarded only because it is conclusory.[95] To allow courts to second-guess a *non*conclusory allegation under the guise of "plausibility" would contravene the requirement that nonconclusory allegations must be accepted as true at the pleading phase. Accordingly, if all substantive requirements of a meritorious claim are covered by nonconclusory allegations, then the complaint has *more* than just "plausibly give[n] rise to an entitlement to relief."[96] It has confirmed an entitlement to relief—at least at the pleading phase.[97]

Surprisingly, then, the plausibility step in the *Iqbal* test makes it more *forgiving* than it would otherwise be. It permits a complaint "to pass muster *even if* a substantive requirement of the plaintiff's claim is stated only in conclusory terms."[98] Without the plausibility inquiry a complaint's failure to provide nonconclusory allegations for every element for a meritorious claim would be fatal. Under *Iqbal*'s first-step, conclusory allegations are not entitled to the presumption of truth, so a complaint that addresses a key element *only* with a conclusory allegation would not pass muster. The plausibility inquiry—on the Court's own terms—leaves open the possibility that a complaint that fails to provide nonconclusory allegations for every substantive requirement of a meritorious claim might, nonetheless, "*plausibly* suggest an entitlement to relief."[99]

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[94] *Iqbal*, 556 U.S. at 679 (emphasis added); *see also* Steinman, *Rise and Fall*, *supra* note 6, at 352 ("To allow courts to second-guess such allegations under the guise of 'plausibility' would contravene the requirement that nonconclusory allegations must be accepted as true at the pleading phase.").

[95] *See supra* text accompanying note 94.

[96] *Iqbal*, 556 U.S. at 679.

[97] Steinman, *Pleading Problem*, *supra* note 15, at 1316–17.

[98] Steinman, *Rise and Fall*, *supra* note 6, at 351 (emphasis added).

[99] *Iqbal*, 556 U.S. at 681 (emphasis added); *see also* Steinman, *Rise and Fall*, *supra* note 6, at 355 ("As a logical matter, the potential for the plausibility inquiry to salvage complaints where the requirements of a meritorious claim are addressed only by conclusory allegations makes the pleading framework *more* forgiving, not less.").

Properly understood, the plausibility inquiry would also help to coherently situate aspects of the federal pleading standard that were not squarely incorporated into pre-*Twombly* case law. For example, although this Article embraces a continuing role for *Conley*'s fair-notice standard, *Conley*'s actual articulation of that standard was not entirely complete. Recall *Conley*'s statement that "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[100] Standing alone, this language does not incorporate the possibility of a pure legal-sufficiency challenge. It is not *necessarily* sufficient merely to provide "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[101] Such a claim—even if it is stated with "unquestionable clarity"[102]—should nonetheless be dismissed if that claim would fail as a matter of law.[103] The plausibility inquiry explicitly folds legal sufficiency into the overarching pleading standard. When a complaint fails to state a viable legal claim—even if *all* allegations are accepted as true—it does not "state[] a plausible claim for relief."[104]

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[100] Conley v. Gibson, 355 U.S. 41, 47 (1957); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (ellipses in original) (quoting *Conley*, 355 U.S. at 47)).

[101] *Conley*, 355 U.S. at 47 (internal quotation marks omitted).

[102] Steinman, *Rise and Fall*, *supra* note 6, at 355.

[103] *Id.* (noting that "legal-sufficiency inquiries . . . have long been an accepted aspect of notice pleading"); *see also id.* at 342 ("Even at the pleading stage, a defendant could challenge a claim's legal sufficiency. If the substantive law does not provide a remedy for the conduct alleged, the complaint's statement of the claim does not show that the pleader is entitled to relief as required by Rule 8(a)(2). And such a complaint fails to state a claim upon which relief can be granted, which justifies dismissal under Rule 12(b)(6)." (footnotes, internal quotation marks, and brackets omitted)).

[104] *Iqbal*, 556 U.S. at 679 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."). The same could be said about a complaint in which "the plaintiff has 'pled itself out of court' by including allegations that conclusively undermine a viable claim." Steinman, *Rise and Fall*, *supra* note 6, at 355; *see also id.* at 342–43 & nn.45–46 (citing cases supporting the idea that dismissal is warranted at the pleading phase). That is, the plaintiff's own allegations would reveal no "plausible claim for relief." *Iqbal*, 556 U.S. at 679.

B. *The Key Issue: What Is (and Is Not) Conclusory?*

Once the plausibility inquiry is properly situated and understood, the crucial question becomes how to assess which allegations qualify as conclusory. As discussed above, *Iqbal* permits courts to deny the presumption of truth only to conclusory allegations—not allegations that lack plausibility.[105] One way to reconcile notice pleading with *Iqbal* is with what can be called a transactional approach. What makes an allegation *conclusory* is its failure to ground the allegation in some real-world event or transaction:

> Suppose, for example, that a complaint alleges merely: "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief"; or "the defendant violated the plaintiff's rights under Title VII of the 1964 Civil Rights Act"; or "the defendant breached a duty owed to the plaintiff under state law and this breach proximately caused damages to the plaintiff."[106]

Allegations like this should not be sufficient standing alone to avoid a pleading-stage dismissal—even under a notice-pleading regime. They quite obviously fail to provide "fair notice of what the [plaintiff's] claim is and the grounds upon which it rests."[107] And they can quite sensibly be called "conclusory" for purposes of *Iqbal*'s pleading framework.[108]

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105 *See supra* notes 89–97 and accompanying text.

106 Steinman, *Rise and Fall*, *supra* note 6, at 353.

107 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration added) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

108 These hypothetical allegations also reveal why notice pleading is not undermined by *Twombly*'s decision to "retire[]" *Conley*'s statement 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." *Twombly*, 550 U.S. at 561 (quoting *Conley*, 355 U.S. at 45–46); *see supra* note 30. *Twombly*'s concern was an overly "focused and literal reading" of that phrase that would prevent dismissal "whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Twombly*, 550 U.S. at 561 (internal quotations and brackets omitted). Indeed, a bare allegation "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief" would not show that there is "no set of facts" that would support a viable claim. Accordingly, to follow such a "focused and literal reading" of that language from *Conley* would deem such an

What makes these allegations problematic is that they are not tethered to concrete events—"they fail to provide an adequate transactional narrative."[109] The now-abrogated Form 11, by contrast, identified the conduct and event that gave rise to the plaintiff's claim: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."[110] If that allegation is ultimately proven true, the defendant would be liable as a matter of substantive law. The allegation in Form 11 may not describe precisely *how* the defendant's driving was negligent, but this is not what "fair notice" requires—at least not at the pleading stage. Nor should such an allegation be deemed "conclusory" under *Iqbal*.

The same is true for the employment-discrimination complaint that was at issue in the *Swierkiewicz* case. The plaintiff alleged the various positions he held at the company,[111] his age (fifty-three),[112] his nationality (Hungarian),[113] and that "Plaintiff's age and national origin were motivating factors in [defendant's] decision to terminate his employment."[114] If those allegations are proven true, the defendant would be liable as a matter of substantive law. Although this allegation did not specify how the plaintiff intended to *prove* that discriminatory intent motivated his firing, it made clear the transactions giving rise to his claim. Such allegations are sufficient to provide "fair notice" and, likewise, they should not be disregarded as "conclusory" under *Iqbal*.

What about the decisions in *Twombly* and *Iqbal*? To be clear, it would be entirely reasonable to conclude—contrary to the *Twombly* and *Iqbal* majorities—that the key allegations in those cases had provided a

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allegation sufficient—even though it clearly fails to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47; *see also* Steinman, *Rise and Fall*, *supra* note 6, at 353–57 (noting that a complaint that "alleged nothing more than 'the planet Earth is round'" could not be dismissed under *Twombly*'s "nonsensically literal understanding of [*Conley*'s 'no set of facts'] phrase"). It would be quite perverse, therefore, to read *Twombly*'s rejection of *Conley*'s "no set of facts" language as also rejecting *Conley*'s fair-notice standard—*especially* when that same *Twombly* decision *endorses Conley*'s fair-notice standard. *See supra* notes 38–41 and accompanying text.

109 Steinman, *Pleading Problem*, *supra* note 15, at 1334.

110 FED. R. CIV. P. Form 11, ¶ 2 (2014) (abrogated 2015), *reprinted in* Steinman, *Rise and Fall*, *supra* note 6, at 395.

111 *See* Amended Complaint, *supra* note 22, ¶¶ 17, 19.

112 *See id.* ¶ 13.

113 *See id.* ¶ 12.

114 *See id.* ¶ 37.

sufficient transactional narrative that they should have been accepted as true; and if they had been accepted as true, those complaints should not have been dismissed.[115] There are, however, some ways in which those allegations are distinct from the exemplars of notice pleading—or at least they were perceived as such by the Supreme Court.

In *Twombly*—where the key issue was whether the defendants had agreed or conspired with one another—the majority insisted that the complaint had made no "*independent* allegation of actual agreement."[116] That is, the problem was not the failure to allege evidence to *support* the position that an agreement occurred; it was the failure to make a concrete allegation of *any* such agreement—rather than simply assuming that anticompetitive parallel conduct *itself* constituted an actionable conspiracy.[117] And in *Iqbal*, one might read the complaint as failing to identify what independent actions by Ashcroft and Mueller were motivated by a discriminatory purpose.[118] On this view, *Iqbal* does not indicate that every allegation of discriminatory intent is inherently conclusory—that would be impossible to square with *Swierkiewicz*. Rather, the complaint must adequately identify the liability-generating transactions that were tainted with such animus.[119]

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115 *See* Steinman, *Rise and Fall*, *supra* note 6, at 366 n.181 ("To accept the approach to pleading urged here, one need not necessarily agree with the Supreme Court's findings that the core allegations in the *Twombly* and *Iqbal* complaints should indeed have been disregarded as conclusory. Although there are some ways in which those allegations are less-than-ideal from a transactional standpoint, one could sensibly conclude otherwise." (citations omitted)).

116 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007) (emphasis added).

117 This may have been because the phrasing of the relevant paragraph in the complaint indicated that "the conspiracy derives from the [anticompetitive] parallel conduct" rather than that an agreement was reached to engage in the anticompetitive conduct. Steinman, *Rise and Fall*, *supra* note 6, at 360. Although I disagree that this is how the *Twombly* majority should have understood the *Twombly* complaint, *id.* at 361 n.160, that understanding was the premise of the majority's reasoning—and the majority suggested that an "independent allegation of actual agreement" would have been sufficient. *Twombly*, 550 U.S. at 564.

118 *See* Steinman, *Rise and Fall*, *supra* note 6, at 362.

119 *See id.* at 362–63. This understanding also gives effect to Rule 9(b)'s instruction that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). Although the allegation regarding *intent* may be alleged generally, it must be sufficiently tethered to an adequately identified, liability-generating event or transaction to avoid being deemed conclusory. *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

I have elaborated on these potential distinctions in greater detail elsewhere.[120] And I am sympathetic to the view that the *Twombly* and *Iqbal* majorities had misinterpreted the key allegations in the complaints in order to justify the results they reached in those cases.[121] The key point here, however, is that it is possible to reconcile the reasoning and results of *Twombly* and *Iqbal* with notice pleading.[122] Couple this with *Twombly*'s (and *Erickson*'s) explicit embrace of *Conley*'s fair-notice standard,[123] and one can see why the post-*Iqbal* decisions discussed earlier in this Article have it right: notice pleading lives. Or at least, notice pleading lives under the best reading of *Twombly* and *Iqbal*.[124]

C. *A Hint from the Supreme Court?* Johnson v. City of Shelby

The Supreme Court itself hinted at the continued vitality of notice pleading in a 2014 per curiam decision: *Johnson v. City of Shelby*.[125] The primary issue in *Johnson* was whether a plaintiff's failure to explicitly invoke a particular statutory cause of action—42 U.S.C. § 1983—in a complaint alleging due process violations required dismissal at the pleading stage.[126] As to that question, the Supreme Court held that the

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120 *See* Steinman, *Rise and Fall*, *supra* note 6, at 360–63; Steinman, *Pleading Problem*, *supra* note 15, at 1336–39.

121 *See, e.g.*, *Iqbal*, 556 U.S. at 697–99 (Souter, J., dissenting) (criticizing the majority's reading of the *Iqbal* complaint); *Twombly*, 550 U.S. at 589–90 (Stevens, J., dissenting) (criticizing the majority's reading of the *Twombly* complaint).

122 As a matter of case-law interpretation, it is not clear whether fidelity to stare decisis should require reconciling the bare results of cases, such as the *Twombly* and *Iqbal* majorities' ultimate findings that the allegations in those complaints were conclusory. *See* Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1742 (2013); *see also id.* at 1783–86 (arguing that stare decisis should not require courts to justify, reconcile, or explain the bare results reached by superior courts, as distinct from the principles articulated in reaching those results).

123 *See supra* notes 38–41 and accompanying text.

124 The corollary to this is: courts that read *Twombly* and *Iqbal* to impose a stricter standard than notice pleading are not following the best reading of those cases. *See* Steinman, *Rise and Fall*, *supra* note 6, at 366–67 ("[A] careful reading of *Twombly* and *Iqbal* not only permits, but compels them to be applied in a manner that preserves the preexisting notice-pleading framework.").

125 574 U.S. 10 (2014).

126 *Id.* at 11.

Johnson plaintiffs' failure to cite § 1983 was not fatal.[127] More significantly for this Article's focus, the Supreme Court went on to explain why the plaintiffs' complaint in *Johnson* complied with the federal pleading standard under *Iqbal*.[128]

Johnson recognized that *Twombly* and *Iqbal* require a plaintiff to "plead facts sufficient to show that her claim has substantive plausibility," but the Court found that the complaint in *Johnson* was "not deficient in that regard."[129] Why? Because the plaintiffs had "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city."[130] As the Court put it: "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."[131]

The Supreme Court's *Johnson* decision confirms that a "simpl[e]," "concise[]," and "direct[]" statement of the underlying "events" constitutes a sufficient "factual basis" under *Iqbal*.[132] And a plaintiff is "required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."[133] This reasoning fits quite well with the transactional understanding of notice pleading set out above. Indeed, the *Johnson* plaintiffs' substantive basis for their due process claim was "that they were fired by the city's board of aldermen, not for deficient performance, but because they brought to light criminal activities of one of the aldermen."[134] Like the claims in *Iqbal* and *Swierkiewicz*, the *Johnson* plaintiffs' claim depended on the defendants' state of mind. The *Johnson* decision bolsters the view that an allegation that a defendant had a certain state of mind (say, discriminatory intent) is not inherently conclusory. As discussed above, such an allegation should be accepted as true—including

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127 *Id.* at 11 (holding that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted").

128 *Id.* at 12 ("Our decisions in [*Twombly*] and [*Iqbal*] . . . concern the factual allegations a complaint must contain to survive a motion to dismiss. . . . Petitioners' complaint was not deficient in that regard.").

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 10.

its description of the defendant's state of mind—as long as it adequately identifies the liability-generating events or transactions.

Conclusion

Iqbal is a troubling decision in many respects. But whether *Iqbal* means the end of notice pleading is a matter of choice, not command. The federal court decisions that have chosen to read *Iqbal* to preserve notice pleading are right—not only as a matter of procedural policy, but as a matter of case-law interpretation.