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## Solving a Pleading Plague: Why Federal Courts Should Strike Insufficient Affirmative Defenses under the Twombly-Iqbal Plausibility Standard

Nathan A. Leber

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**SOLVING A PLEADING PLAGUE: WHY FEDERAL  
COURTS SHOULD STRIKE INSUFFICIENT  
AFFIRMATIVE DEFENSES UNDER THE *TWOMBLY-  
IQBAL* PLAUSIBILITY STANDARD**

NATHAN A. LEBER\*

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\* J.D. expected, Cleveland-Marshall College of Law, May 2013; B.S., Bowling Green State University. I would like to express my gratitude to Professor Kelly Curtis for her role in my development as a legal writer; to Ashley Boland for her constant support; and to my parents, Dick and Colleen Leber, for their unending dedication to my siblings (Richard, Mara, and Jena) and me.

I dedicate this Note to my late grandparents, James and Dolores Limbird.

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#### I. INTRODUCTION

Regina Palmer filed a three-count complaint against her former employer, Oakland Farms, in the Western District of Virginia.<sup>1</sup> Palmer alleged wrongful discharge from her position as a milker at Oakland Farms due to gender discrimination and retaliation for protected activity.<sup>2</sup> Oakland Farms responded with an answer asserting eighteen affirmative defenses.<sup>3</sup>

William Castillo filed a three-count complaint against his former employer, Roche Laboratories, in the Southern District of Florida.<sup>4</sup> Castillo alleged that he was wrongfully terminated from Roche based on his sexual orientation.<sup>5</sup> Roche countered with an answer including sixteen affirmative defenses.<sup>6</sup>

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<sup>1</sup> *Palmer v. Oakland Farms, Inc.*, No. 5:10CV00029, 2010 WL 2605179, at \*1 (W.D. Va. June 24, 2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Castillo v. Roche Lab. Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at \*1 (S.D. Fla. Aug. 2, 2010).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Roy Meas filed a four-count complaint against his former employer, CVS Pharmacy, in the Southern District of California.<sup>7</sup> Meas alleged that he was not properly compensated under the Fair Labor Standards Act.<sup>8</sup> Further, Meas claimed that he was wrongfully terminated from CVS after complaining about the alleged wage and hour violation.<sup>9</sup> CVS filed an answer containing twenty-eight affirmative defenses.<sup>10</sup>

These examples reveal what the federal courts already know—most answers contain a litany of affirmative defenses.<sup>11</sup> These affirmative defenses are almost always merely listed in the answer with no supporting factual specificity.<sup>12</sup> Many of the defenses are later found to be completely irrelevant to the case.<sup>13</sup> The costly, time-consuming task of sifting through the typical “grocery list” of affirmative defenses to determine which, if any, have merit falls on both plaintiffs and the courts.<sup>14</sup>

The plausibility standard is the remedy to the rampant pleading of meritless affirmative defenses in federal courts. Set forth in *Bell Atlantic Corp. v. Twombly*,<sup>15</sup> and later clarified in *Ashcroft v. Iqbal*,<sup>16</sup> the plausibility standard requires pleadings to contain sufficient factual allegations that give rise to a plausible claim for relief.<sup>17</sup> In both *Twombly* and *Iqbal*, the Supreme Court used the plausibility approach to dismiss factually-deficient complaints.<sup>18</sup> Applying the plausibility test to insufficient affirmative defenses produces the same result.<sup>19</sup>

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<sup>7</sup> Meas v. CVS Pharmacy, Inc., No. 11CV0823 JM JMA, 2011 WL 2837432, at \*2 (S.D. Cal. July 14, 2011).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*1.

<sup>11</sup> Romantine v. CH2M Hill Eng'rs, Inc., No. CIVA 09-973, 2009 WL 3417469, at \*1 (W.D. Pa. Oct. 23, 2009) (“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.”).

<sup>12</sup> Wells Fargo & Co. v. United States, 750 F. Supp. 2d 1049, 1051-52 (D. Minn. 2010). (“Affirmative defenses are almost always simply listed in answers; only rarely do defendants plead much in the way of facts in support of affirmative defenses.”).

<sup>13</sup> *See id.* (“In a typical case, it quickly becomes apparent that most of the affirmative defenses are not viable, and the parties simply ignore them.”).

<sup>14</sup> *See* discussion *infra* Parts III.C.1., III.C.3.

<sup>15</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>16</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

<sup>17</sup> *See* discussion *infra* Parts II.D.3-4.

<sup>18</sup> *See* discussion *infra* Parts II.D.3-4.

<sup>19</sup> *See, e.g.*, *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 232 (E.D.N.C. 2010) (striking eleven insufficient affirmative defenses analyzed under the plausibility standard); *Tracy v. NVR, Inc.*, No. 04-CV-6541L, 2009 WL 3153150, at \*8 (W.D.N.Y. Sept. 30, 2009) (striking six affirmative defenses analyzed under the plausibility standard); *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 690 (N.D. Ohio 2010) (striking four insufficient affirmative defenses analyzed under the plausibility standard).

The central proposition of this Note is that federal courts should analyze affirmative defenses under the *Twombly-Iqbal* plausibility standard. In order to provide context for this argument, it is first necessary to explain the process of pleading in the federal courts. By examining the development and framework of the Federal Rules of Civil Procedure, and discussing the historical and current state of the federal pleading standard, Part II of this Note is dedicated to this task.

District courts are split on whether the plausibility standard should apply to affirmative defenses.<sup>20</sup> Despite this divide, no Circuit Court of Appeals has directly ruled on this issue.<sup>21</sup> Part III of this Note provides these courts with the pragmatic and textual reasons to support extending the plausibility standard to affirmative defenses in the future.

## II. PLEADING IN THE FEDERAL COURTS

Part II of this Note supplies an overview of the process of pleading under the Federal Rules of Civil Procedure (the Federal Rules). Part II.A. discusses the historical development of the Federal Rules. Part II.B. explains the structure and purpose of Rule 8, the Federal Rule governing pleadings. Part II.C. provides context for a discussion on dismissing insufficient complaints by examining Federal Rule 12(b)(6). Part II.D. examines the evolution of the federal pleading standard, including a detailed discussion on both the *Twombly* and *Iqbal* decisions.

### A. Historical Development of the Federal Rules

In 1911, the American Bar Association first promulgated a resolution requesting a uniform system of federal procedural rules.<sup>22</sup> The resolution requested that the process of establishing the standardized system of civil rules be left to the Supreme Court.<sup>23</sup> Congress granted the Supreme Court this authority in 1934 by passing the Enabling Act.<sup>24</sup> The Enabling Act provided the Court with the authority to compose and promulgate federal rules of practice and procedure for civil cases.<sup>25</sup> Congress

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<sup>20</sup> *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1256 (D. Kan. 2011) (asserting that “district courts are split” as to whether the plausibility standard applies to affirmative defenses); *Meas v. CVS Pharmacy, Inc.*, No. 11CV0823 JM JMA, 2011 WL 2837432, at \*2 (S.D. Cal. July 14, 2011) (noting that “district courts are split” as to whether affirmative defenses should be analyzed under the *Twombly-Iqbal* standard); *Dann v. Lincoln Nat’l Corp.*, 274 F.R.D. 139 145 (E.D. Pa. 2011) (“District courts across the country have disagreed as to whether *Twombly*’s plausibility standard has raised the bar for affirmative defenses.”).

<sup>21</sup> *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010).

<sup>22</sup> 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1003 (3d ed. 2002).

<sup>23</sup> *Id.*

<sup>24</sup> 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509 (2d ed. 1996).

<sup>25</sup> *Id.* (discussing the power granted to the Supreme Court through the Enabling Act “to prescribe general rules governing the practice and procedure in civil cases in the federal courts.”).

reserved the right to reject, enact, or amend the federal rules once issued by the Court.<sup>26</sup>

With the rule-making authority under the Enabling Act, the Court established a commission in 1935 to begin drafting the first set of federal civil procedural rules.<sup>27</sup> The authors were committed to developing procedures that would provide open access to the courts for all parties.<sup>28</sup>

Without modification, Congress reported favorably on the Court's first proposed federal rules of civil procedure in 1938.<sup>29</sup> The Federal Rules came into effect on September 16, 1938.<sup>30</sup> The Federal Rules were designed "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."<sup>31</sup> Commentators have characterized the Federal Rules as a significant victory for legal reform.<sup>32</sup>

#### *B. Determining the Substantive Requirements of a Pleading—The Role of Rule 8*

One of the major changes implemented by the Federal Rules involved the process of pleading.<sup>33</sup> Pleadings are considered "only those papers which set up a matter going to the merits of the controversy."<sup>34</sup> Wright & Miller's treatise on federal civil practice opines that pleading serves four major functions: "(1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses."<sup>35</sup>

Pleading under the Federal Rules is primarily governed by Rule 8.<sup>36</sup> Rule 8(a) regulates pleading complaints, Rule 8(b) applies to the pleading of an answer, and Rule 8(c) controls the pleading of affirmative defenses.<sup>37</sup>

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<sup>26</sup> Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658 (1995).

<sup>27</sup> *Id.*

<sup>28</sup> Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989) ("The [Enabling Act] drafters' commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information.").

<sup>29</sup> See WRIGHT ET AL., *supra* note 22, § 1004.

<sup>30</sup> See WRIGHT ET AL., *supra* note 22, § 1004.

<sup>31</sup> See McCabe, *supra* note 26, at 1656 (quoting 28 U.S.C. § 1331).

<sup>32</sup> Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989).

<sup>33</sup> *Id.* at 2238.

<sup>34</sup> See 27 TRACY BATEMAN FARRELL ET AL., FEDERAL PROCEDURE LAWYERS EDITION § 62:6 (2008); see also DAVID F. HERR ET AL., FUNDAMENTALS OF LITIGATION PRACTICE § 7:2.2 (2011 ed.) ("Rule 7(a) recognizes only six pleadings—the complaint, the answer (including any counterclaims or cross-claims), a reply to a counterclaim, a reply to a cross-claim, a third-party complaint, and an answer to a third-party complaint.").

<sup>35</sup> WRIGHT ET AL., *supra* note 22, § 1202 (quoting *Francis v. Giacomelli*, 588 F.3d 186, 192 n.1 (4th Cir. 2009)).

<sup>36</sup> FED. R. CIV. P. 8.

The basic requirements for pleading under Rule 8 are textually similar between the relevant sections. Rule 8(a)(2) mandates that a complaint contain a “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>38</sup> Rule 8(b)(1)(A) requires that an answer “state in short and plain terms its defenses to each claim asserted against it.”<sup>39</sup> Rule 8(c)(1) dictates that to properly plead an affirmative defense in a responsive pleading a party must also “affirmatively state any avoidance or affirmative defense.”<sup>40</sup>

### C. Challenging the Sufficiency of a Complaint—Rule 12(b)(6)

Rule 12 describes the proper procedure for responding to a pleading.<sup>41</sup> A Rule 12(b)(6) motion is the vehicle for challenging the sufficiency of a complaint under Rule 8(a)(2).<sup>42</sup> For purposes of a 12(b)(6) motion, all factual allegations of the complaint are taken as true and all reasonable inferences are construed in favor of the non-moving party.<sup>43</sup> To succeed on a Rule 12(b)(6) motion, the moving party must demonstrate that the complaint does not facially demonstrate a right to relief.<sup>44</sup>

The Supreme Court’s standard for determining the factual detail necessary in a complaint to satisfy the language of Rule 8(a)(2) has evolved since the adoption of the Federal Rules. The following discussion details this progression, culminating in an explanation of the current standard set forth in *Iqbal*.<sup>45</sup>

### D. The Evolving Pleading Standard Under the Federal Rules

Section D reviews the evolution of the federal pleading standard. Section D.1. examines how the federal pleading standard transitioned from a technical approach to a more liberal standard following adoption of the Federal Rules. Section D.2. details the Supreme Court’s confirmation of this liberal pleading standard in *Conley v. Gibson*. Section D.3. describes the establishment of the plausibility standard in *Twombly*. Section D.4. explores the definition of “plausibility” as clarified in *Iqbal*.

#### 1. The Move Towards Functional Pleading

Pleading prior to the adoption of the Federal Rules required a rigid, highly technical style.<sup>46</sup> Common law rules dictating pleading standards demanded that a

<sup>37</sup> FED. R. CIV. P. 8(a)-(c).

<sup>38</sup> FED. R. CIV. P. 8(a)(2).

<sup>39</sup> FED. R. CIV. P. 8(b)(1)(A).

<sup>40</sup> FED. R. CIV. P. 8(c)(1).

<sup>41</sup> FED. R. CIV. P. 12.

<sup>42</sup> DAVID F. HERR ET AL., MOTION PRACTICE § 9.06 (5th ed. 2009).

<sup>43</sup> See WRIGHT ET AL., *supra* note 22, § 1357; see also Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (reviewing the legal sufficiency of a complaint by “assum[ing] the truth of the material facts as alleged in the pleading”).

<sup>44</sup> See HERR ET AL., *supra* note 42 (“[W]here a plaintiff’s complaint is on its face legally hopeless, courts are quite happy to grant dismissal motions . . .”).

<sup>45</sup> Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 662 (2007).

<sup>46</sup> See HERR ET AL., *supra* note 34, § 7:2.3.

party detail each claim with supporting factual specificity.<sup>47</sup> Failure to meet the mandated technical requirements often resulted in dismissal of the claim, regardless of the substantive merits of the case.<sup>48</sup>

Compared to the strict, technical requirements of common law pleading, the Federal Rules provide a simplified approach.<sup>49</sup> Under the Federal Rules, a claimant must only plead “a short and plain statement of the claim showing that the pleader is entitled to relief” in order to survive a motion to dismiss.<sup>50</sup> This standard requires the plaintiff to simply inform “the defendant and the court of the general nature and basis of the claim.”<sup>51</sup> By replacing the common law approach, the drafters of the Federal Rules sought to eliminate confusion and encourage flexibility when determining the sufficiency of a complaint.<sup>52</sup>

## 2. Seeking “Fair Notice”—*Conley v. Gibson*

Courts were initially reluctant to accept the more liberal, simplified pleading standard of the Federal Rules.<sup>53</sup> But the Supreme Court’s 1957 decision in *Conley v. Gibson*<sup>54</sup> clearly endorsed this more tolerant approach.<sup>55</sup> *Conley* involved a claim brought by black union members alleging that their union engaged in discriminatory

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<sup>47</sup> See HERR ET AL., *supra* note 34, § 7:2.3 (“Common law forms of pleading typically required a party to state with specificity the details of a claim and to conform to very technical, formalistic rules.”).

<sup>48</sup> See HERR ET AL., *supra* note 34, § 7:2.3.

<sup>49</sup> Nicholas Tymoczko, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 507 (2009); see also A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434 (2008) (“[T]he Federal Rules ushered in a simplified pleading system . . .”).

<sup>50</sup> FED. R. CIV. P. 8(a)(2); see also Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

<sup>51</sup> See Tymoczko, *supra* note 49, at 508.

<sup>52</sup> See WRIGHT ET AL., *supra* note 22, § 1216 (“The draftsmen of the federal rules obviously felt that the use of a new formulation would . . . encourage a more flexible approach by the courts in defining the concept of claim for relief.”).

<sup>53</sup> See HERR ET AL., *supra* note 34, § 7:2.3; see also Spencer, *supra* note 49, at 435 (“[T]here was early resistance among bench and bar to the simplified pleading system of the Federal Rules.”).

<sup>54</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>55</sup> See Spencer, *supra* note 49, at 435; see also Alana C. Jochum, *Pleading in Ohio After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 58 CLEV. ST. L. REV. 495, 501 (2010) (“The key case that defined the pleading standard at the federal level for half a century was *Conley v. Gibson*.”); Tymoczko, *supra* note 49, at 507 (“*Conley v. Gibson* endorsed the liberal ethos embodied by the Federal Rules, and, in doing so, gave substance to Rule 8.”); WRIGHT ET AL., *supra* note 22, § 1357 (“The test most often applied to determine the sufficiency of the complaint was set out in the leading case of *Conley v. Gibson*, decided in the formative years of the federal rules . . .”).

practices.<sup>56</sup> The union moved to dismiss the suit challenging that their members' complaint did not adequately set forth a claim for which relief could be granted.<sup>57</sup>

In denying the union's motion, the Supreme Court set forth two *laissez-faire* prerequisites to satisfy the pleading dictates of Federal Rule 8(a)(2). First, the Court asserted 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."<sup>58</sup> Also, the Court avowed 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."<sup>59</sup> The Court termed this simplified approach "notice pleading."<sup>60</sup>

The *Conley* Court affirmed that the Federal Rules imposed only a notice-giving function to the statement of the claim component of the complaint.<sup>61</sup> Under the notice pleading approach, a pleader must only provide "fair notice" to the opposing party of the claims or defenses.<sup>62</sup> The pleader has no burden to recite the elements of a claim or the evidentiary facts necessary to prove those claims.<sup>63</sup> A complaint asserted with sparse factual specificity would comply with the notice pleading approach as long as the defendant was adequately placed "on notice of the nature and grounds of [the] plaintiff's claims."<sup>64</sup>

Through the *Conley* decision, the Supreme Court intended to quell any continuing resistance to the less formalistic pleading standards of the Federal Rules.<sup>65</sup> For the next fifty years, the Supreme Court did not deviate from this liberal

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<sup>56</sup> *Conley*, 355 U.S. at 42-43.

<sup>57</sup> *Id.* at 45.

<sup>58</sup> *Id.* at 45-46 (emphasis added). Some commentators have suggested that this famous language from the *Conley* decision was "arguably dicta." See Jochum, *supra* note 55, at 502 n.47 ("The [*Conley*] Court actually reversed the case by holding that it was error for the lower courts to have dismissed the complaint for lack of jurisdiction . . . [t]here was no need for the Court to have reached the motion to dismiss issue, but the Court went on to consider the issue anyway.").

<sup>59</sup> *Conley*, 355 U.S. at 48. (emphasis added).

<sup>60</sup> *Id.*

<sup>61</sup> See Spencer, *supra* note 49, at 435.

<sup>62</sup> See HERR ET AL., *supra* note 34, § 7:2; see also 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY RULE 8 (2009) ("Plaintiffs did not need to plead all of their facts or legal theories, but instead only needed to allege enough to give the defendant fair notice of what the claim was and the grounds upon which it rested.").

<sup>63</sup> See HERR ET AL., *supra* note 34, § 7:2; see also WRIGHT ET AL., *supra* note 22, § 1216 ("[T]he complaint, and other relief-claiming pleadings need not state with precision all of the elements that are necessary to give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided to the opposing party.").

<sup>64</sup> See HERR ET AL., *supra* note 34, § 8:2 ("[E]ven a relatively bare bones complaint was considered sufficiently definite as long as it adequately put the defendant on notice of the nature and grounds of plaintiff's claim.").

<sup>65</sup> Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998).

approach to pleading.<sup>66</sup> This was despite criticism from defendants that insufficient complaints too often survived a motion to dismiss. These defendants claimed that they were frequently exposed to the costs and nuisance of the discovery process based on claims that were likely to fail at a later stage of the proceedings.<sup>67</sup> Addressing these concerns, the Supreme Court finally reevaluated the *Conley* standard in 2007 in *Twombly*.<sup>68</sup>

### 3. The Origin of the Plausibility Standard—*Bell Atlantic Corp. v. Twombly*

*Twombly* involved a class action suit brought by William Twombly and Lawrence Marcus on behalf of all subscribers of local telephone and/or high speed internet services.<sup>69</sup> The defendants were Incumbent Local Exchange Carriers (ILECs), a system of regional telephone and internet service monopolies created following the divestiture of AT&T in 1984.<sup>70</sup> Under a scheme devised by Congress in 1994, ILECs were obligated to share their network with competitors.<sup>71</sup> These competitors were referred to as “Competitor Local Exchange Carriers” (CLECs).<sup>72</sup>

The plaintiffs alleged that the ILECs violated the antitrust provisions of Section 1 of the Sherman Act.<sup>73</sup> This contravention of the Sherman Act allegedly occurred in two ways.<sup>74</sup> First, the Complaint charged that the ILECs “engaged in parallel conduct . . . to inhibit the growth of upstart CLECs.”<sup>75</sup> To support this claim, the plaintiffs claimed that the ILECs “ma[de] unfair agreements with the CLECs, . . . overcharg[ed], . . . and bill[ed] in ways designed to sabotage the CLECs relations with their own customers.”<sup>76</sup> Second, the complaint asserted that the ILECs purposely failed to pursue business opportunities in “competitor” ILEC markets.<sup>77</sup>

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<sup>66</sup> Spencer, *supra* note 49, at 436; *see also* HERR ET AL., *supra* note 34, § 7:2.3 (“The Court had historically been fairly consistent in rebuffing attempts to impose more onerous pleading requirements.”); Michael R. Huston, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415, 420 (2010) (“*Conley*’s vision of notice pleading maintained its position as the standard interpretation of Rule 8(a)(2) for five decades.”).

<sup>67</sup> *See* HERR ET AL., *supra* note 34, § 8:2 (“Defendants complained that where a complaint too easily survived a motion to dismiss, it subjected defendants to the inconvenience and expense of discovery on the basis of even visibly weak claims.”).

<sup>68</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 544.

<sup>69</sup> *Id.* at 550.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing 15 U.S.C. § 1 (2006)) (prohibiting “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Both actions allegedly led to inflated charges for local users of telephone and high-speed Internet services.<sup>78</sup>

The Southern District of New York dismissed the claim based on a motion to dismiss for failure to state a claim for relief filed by the ILECs.<sup>79</sup> The district court found that allegations of parallel business conduct alone do not suffice to state a valid claim under the Sherman Act.<sup>80</sup> The court concluded that the ILECs individual interests in their own territories completely explained the “parallel conduct” of the local service providers.<sup>81</sup>

Concluding that the district court applied the wrong standard, the Second Circuit Court of Appeals reversed.<sup>82</sup> Citing the *Conley* standard, the Court of Appeals asserted that, to dismiss the complaint, the district court would have had to find that the plaintiffs could prove “no set of facts” demonstrating that the parallel conduct was not “mere coincidence.”<sup>83</sup> According to the Second Circuit, the plaintiffs surpassed this “no set of facts” test.<sup>84</sup>

Thus, the central issue before the Supreme Court in *Twombly* was what a plaintiff must plead in order to state a claim for relief under the Sherman Act.<sup>85</sup> Responding to this question, the Court asserted that the plaintiff must provide sufficient factual detail in the complaint to demonstrate the “grounds” for relief under Rule 8(a)(2).<sup>86</sup> The Court stressed that demonstrating the grounds for relief requires more than pleading “labels and conclusions” and a “recitation of the elements of a cause of action.”<sup>87</sup> The Court emphasized that factual support in a complaint was needed so the plaintiff can meet the *Conley* burden of providing “fair notice” of the nature of the claim.<sup>88</sup>

The Court articulated that the plaintiff must not only provide factually supported allegations, but the factual allegations must support a right to relief that is more than merely speculative.<sup>89</sup> Thus, the factual allegations in the complaint must rise to the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 552 (citing *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 1799 (S.D. N.Y. 2003)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (quoting *Twombly v. Bell Atlantic Corp.*, 425 F.2d 99, 114 (3d Cir. 2005) (“[T]o survive a motion to dismiss . . . a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 554.

<sup>86</sup> *Id.* at 555.

<sup>87</sup> *Id.* at 555.

<sup>88</sup> *Id.* at 556 n.3.

<sup>89</sup> *Id.* at 555.

“plausible level” in order to meet the dictates of Rule 8(a)(2).<sup>90</sup> Under this plausibility standard, a plaintiff’s claim would not survive a motion to dismiss if the factual allegations suggest an illegal activity but equally suggest another harmless explanation.<sup>91</sup> The Court avowed that the plausibility approach should not be considered a heightened pleading standard.<sup>92</sup>

The Court specified that the plausibility standard does not require a plaintiff to plead facts that demonstrate relief is “probably” entitled.<sup>93</sup> In the antitrust context, a plaintiff would only need to plead sufficient facts to demonstrate that discovery would reasonably lead to evidence of illegal conspiracy between the parties.<sup>94</sup> The *Twombly* plaintiffs’ bare allegations of parallel conduct, without any factual bases that supported an illegal conspiracy, did not meet this standard.<sup>95</sup>

The Court recognized that the *Conley* “no set of facts” standard could not coexist with the plausibility standard.<sup>96</sup> Under the *Conley* standard, a literal reading of “no set of facts” meant that a plaintiff could survive a motion to dismiss by pleading nothing more than completely conclusory allegations in the complaint.<sup>97</sup> The *Twombly* Court was unambiguous in its effort to banish the *Conley* standard.<sup>98</sup> The Court asserted that the “no set of facts” language had “earned its retirement” and was “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”<sup>99</sup>

Pragmatic concerns regarding the costs of discovery provided the Court’s justification for the creation of the plausibility standard.<sup>100</sup> The Court asserted that wholly insufficient claims should be disposed of at the pleading stage due to the “costs of modern federal litigation and the increasing caseload of the federal courts . . .”<sup>101</sup> The Court cautioned that defendants may choose to settle weak claims before

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<sup>90</sup> *Id.* at 556; *see also* WRIGHT ET AL., *supra* note 22, § 1357 (“[T]he Court in *Twombly* created a new factual plausibility standard by requiring facts that ‘raise the right to relief above the speculative level’ to the plausible level . . .”).

<sup>91</sup> *See* Spencer, *supra* note 49, at 436 (“[A] plaintiff may no longer survive a motion to dismiss if she pleads facts that are equivocal, meaning the allegations are consistent both with the asserted illegality and with an innocent alternate explanation.”).

<sup>92</sup> *Twombly*, 550 U.S. at 570; *see also* GENSLER, *supra* note 62 (“[N]othing in *Bell Atlantic* suggests a return to fact pleading or that pleaders must now plead all of their facts. Notice pleading remains the norm.”).

<sup>93</sup> *Twombly*, 550 U.S. at 554.

<sup>94</sup> *Id.* at 556.

<sup>95</sup> *Id.* at 564-71.

<sup>96</sup> *Id.* at 563.

<sup>97</sup> *Id.* at 561 (“On . . . a focused and literal reading of *Conley*’s ‘no set of facts,’ a wholly conclusory statement of claim would survive a motion to dismiss . . .”).

<sup>98</sup> *Id.* at 563.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 557-59.

<sup>101</sup> *Id.* at 558 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *see also* HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 690 (N.D. Ohio 2010) (“[T]he holdings of *Twombly* and *Iqbal* were designed to eliminate the potential high costs of discovery associated with meritless claims.”).

being subjected to the costly process of discovery if courts wait to dismiss insufficient claims during summary judgment.<sup>102</sup>

Following *Twombly*, two central questions emerged. First, uncertainty existed as to whether the plausibility standard extended to all cases or only to cases dealing with antitrust law.<sup>103</sup> In addition, *Twombly* left an unclear definition of “plausibility.”<sup>104</sup> In 2005, the Supreme Court addressed, and answered, both of these questions in *Ashcroft v. Iqbal*.<sup>105</sup>

#### 4. The Meaning of “Plausibility”—*Ashcroft v. Iqbal*

*Iqbal* involved a Bivens action originally filed against over thirty federal officials in the Eastern District of New York.<sup>106</sup> Two of the named defendants were Attorney General John Ashcroft and Federal Bureau of Investigation (FBI) Director Robert Mueller.<sup>107</sup> The allegations against these two high-level officials were the only relevant allegations before the Supreme Court.<sup>108</sup>

The plaintiff, Javid Iqbal, was arrested following the September 11, 2001 terrorist attacks in New York City.<sup>109</sup> Iqbal’s arrest was related to an expansive Department of Justice investigation following the attacks.<sup>110</sup> The FBI interviewed over 1,000 individuals with suspected ties to the attacks or links to terrorism.<sup>111</sup> The FBI detained 184 of these individuals as persons of “high interest.”<sup>112</sup> These subjects were held in highly restrictive conditions.<sup>113</sup> Iqbal was one of these detainees.<sup>114</sup>

Following his release from custody, Iqbal filed the action against Mueller and Ashcroft.<sup>115</sup> The complaint alleged that Iqbal and “thousands of other Arab Muslim

<sup>102</sup> *Twombly*, 550 U.S. at 559 (recognizing that the plausibility standard is necessary to avoid “cost-conscious defendants” from settling even “anemic cases”).

<sup>103</sup> See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 477 (2010) (“One approach has been to argue that the requirement of plausibility is best understood as an aspect of substantive antitrust law.”).

<sup>104</sup> Tymoczko, *supra* note 49, at 513 (“Widespread confusion followed in the wake of *Twombly*. Courts and commentators alike struggled to determine the applicability and meaning of the plausibility standard and its relation to notice pleading.”); see GENSLER, *supra* note 62 (“One of the mysteries of *Bell Atlantic* was what the court meant when it used the phrase “a claim for relief that is plausible on its face.”); see also HERR ET AL., *supra* note 34, § 7:2.3 (asserting that the *Twombly* Court’s plausibility standard “is a somewhat murky test”).

<sup>105</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1937 (2009).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1944.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1943.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

men” were subjected to the harsh conditions of confinement “on account of [their] religion, race, and/or national origin and for no legitimate penological interest.”<sup>116</sup> Iqbal articulated in his complaint that Ashcroft and Mueller “each knew of, condoned, and willfully and maliciously agreed to subject” the Arab men to the discriminatory policy.<sup>117</sup>

The defendants filed a Rule 12(b)(6) motion in the district court alleging that the complaint did not sufficiently demonstrate their involvement in unconstitutional conduct.<sup>118</sup> Applying the *Conley* “no set of facts” standard, the district court denied the defendants’ motion to dismiss. Reasoning that the substantive issues did not require the “amplification” of plausibility pleading, the Appeals Court affirmed.<sup>119</sup>

The high-profile case landed in the Supreme Court. Before analyzing Iqbal’s claim, the Supreme Court explained a two-pronged approach to use to assess whether a complaint should withstand a Rule 12(b)(6) motion.<sup>120</sup> First, courts should identify and dismiss pleadings containing merely conclusory allegations without any factual support.<sup>121</sup> The Court reiterated that “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are not sufficient to meet the *Twombly* standard.<sup>122</sup> These unsubstantiated claims are not entitled to a presumption of truth upon challenge from a 12(b)(6) motion.<sup>123</sup> Reflecting the policy arguments underlying *Twombly*, the Court asserted that defendants should not be able to expose defendants to the costly process of discovery with nothing more than conclusory allegations.<sup>124</sup>

The second prong requires courts to recognize those pleadings that are supported by sufficient factual allegations.<sup>125</sup> For these pleadings, courts should consider all facts as true and then determine whether the facts plausibly give rise to a claim for relief.<sup>126</sup> To be considered “plausible,” the facts in the complaint must permit the court to infer more than a possibility of wrongdoing.<sup>127</sup> Courts should dismiss pleadings that do not plausibly grant a right to relief before permitting discovery on

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<sup>116</sup> *Id.* at 1944.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1949-50.

<sup>121</sup> *Id.* at 1950.

<sup>122</sup> *Id.* at 1949.

<sup>123</sup> *Id.* at 1950.

<sup>124</sup> *Id.* (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

<sup>125</sup> *Id.* at 1950.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

factually-deficient claims.<sup>128</sup> This assessment requires a court to “draw on its judicial experience and common sense.”<sup>129</sup>

Iqbal’s claim failed under this two-part test.<sup>130</sup> The Court found that the allegation that Mueller and Ashcroft conspired to subject the detainees to harsh confinement simply based on their “religion, race, and/or national origin” was nothing more than a conclusory recitation of the elements of a discrimination claim.<sup>131</sup> This allegation failed the first prong of the two-part test because it contained no supporting factual detail.<sup>132</sup>

The claims that were supported with facts were also found to be insufficient under the second prong of the plausibility test.<sup>133</sup> For purposes of this analysis, the Court accepted as true the factual allegations that Ashcroft and Mueller approved a policy that led to the post-September 11th detention of thousands of Arab men.<sup>134</sup> But the Court deemed Iqbal’s discrimination claim not plausible because the complainants were more likely detained for lawful reasons, such as their connection to terrorism, than the discriminatory reasons set forth by Iqbal.<sup>135</sup> Thus, the Court deemed Iqbal’s entire complaint insufficient and subject to Rule 12(b)(6) dismissal.<sup>136</sup>

By ruling on the merits of Iqbal’s claim, the Court silenced any argument that the *Twombly* standard was limited to antitrust cases. The Court specifically addressed this argument by asserting that “[o]ur decision in *Twombly* expounded the pleading standard for all ‘civil actions’” and further proclaiming that “the [*Twombly*] decision was based on our interpretation and application of Rule 8.”<sup>137</sup>

### III. THE CASE FOR EXTENDING *TWOMBLY* AND *IQBAL* TO AFFIRMATIVE DEFENSES

Part III explains the central proposal of this Note—why the plausibility standard should apply to affirmative defenses. The first three sections provide needed context for this discussion. Part III.A. examines the pleading of affirmative defenses under Rule 8(c). Part III.B. surveys the process of striking an insufficient affirmative

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1951.

<sup>131</sup> *Id.* (“These bare assertions . . . amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”) (internal quotations omitted).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1951-52.

<sup>134</sup> *Id.* at 1951.

<sup>135</sup> *Id.* at 1951-52 (“It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”).

<sup>136</sup> *Id.* at 1952.

<sup>137</sup> *Id.* at 1953; see also Hartnett, *supra* note 103, at 479 (“[T]his attempt to limit the scope of *Twombly* [to antitrust cases] has failed. Indeed, it did not attract a single vote on the Supreme Court in the *Iqbal* case.”).

defense under Rule 12(f). Part III.C. reviews the widespread abuse of pleading insufficient affirmative defenses in federal courts.

The remaining sections present the principal arguments of this Note. Part III.D. evaluates the pragmatic justifications for applying the plausibility standard to affirmative defenses. Part III.E. refutes the formalistic arguments typically advanced by those challenging a claim that an affirmative defense should meet the plausibility standard.

#### A. Pleading Affirmative Defenses—Rule 8(c)

Affirmative defenses are governed by Rule 8(c).<sup>138</sup> Affirmative defenses provide a basis for avoiding judgment in favor of the plaintiff without refuting the elements of the claim.<sup>139</sup> Rule 8(c) provides an illustrative list of nineteen common affirmative defenses.<sup>140</sup> Failure to plead an affirmative defense in the answer may result in waiver of that defense.<sup>141</sup> However, the defendant is typically permitted to amend the answer to add any affirmative defenses not initially raised in the original response.<sup>142</sup>

#### B. Striking Insufficient Affirmative Defenses—Rule 12(f)

A court may strike an affirmative defense as a matter of law under Rule 12(f) if the defense is “insufficient.”<sup>143</sup> Similar to Rule 8, a defense is insufficiently pled if it fails to provide “fair notice” to the plaintiff of the nature of the defense.<sup>144</sup> An affirmative defense meets the fair notice standard when it contains enough factual detail that the plaintiff is “not a victim of unfair surprise.”<sup>145</sup> A plaintiff claiming that an affirmative defense does not meet this standard must move to strike the insufficient defense within twenty-one days of receipt of the answer.<sup>146</sup>

By striking defenses at the pleading stage that are certain to fail at a later phase of the proceedings, Rule 12(f) motions avoid the time-consuming, costly process of discovery on meritless claims.<sup>147</sup> Despite this valuable purpose, federal courts do not

<sup>138</sup> FED. R. CIV. P. 8(c).

<sup>139</sup> GENSLER, *supra* note 62. Compare FED. R. CIV. P. 8(c), with FED. R. CIV. P. 8(b) (defenses that negate the elements of a plaintiff’s claim).

<sup>140</sup> FED. R. CIV. P. 8(c).

<sup>141</sup> HERR ET AL., *supra* note 34, § 9:2.

<sup>142</sup> FED. R. CIV. P. 15; *see also* HERR ET AL., *supra* note 34, § 9:2 (explaining the process of adding affirmative defenses to the answer through amendment).

<sup>143</sup> FED. R. CIV. P. 12(f) (Rule 12(f) also provides the ability to strike “redundant, immaterial, impertinent, or scandalous matter.”).

<sup>144</sup> *Barnes v. AT&T Pension Benefit Plan Non-Bargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010).

<sup>145</sup> *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc’ns, Inc.*, No. CIV A 05-CV-0233-WWJ, 2008 WL 4391396, at \*1 (W.D. Tex. Sept. 22, 2008) (quoting *Home Ins. Co. v. Matthews*, 998 F.2d 305, 309 (5th Cir.1993)).

<sup>146</sup> FED. R. CIV. P. 12(f)(2).

<sup>147</sup> *See Barnes*, 718 F. Supp. 2d at 1170 (“The purpose of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues.”).

favor striking affirmative defenses.<sup>148</sup> Courts view striking an affirmative defense under a Rule 12(f) motion as a “drastic remedy.”<sup>149</sup> Courts that restrict the use of Rule 12(f) motions often cite the effect of the motions on judicial resources.<sup>150</sup> In addition, courts disfavor Rule 12(f) motions because they can be used to delay the litigation process.<sup>151</sup>

Despite the motions being disfavored, courts still have “liberal discretion” to strike insufficient defenses under Rule 12(f).<sup>152</sup> Defendants are typically provided leave to amend any affirmative defense struck by a Rule 12(f) motion.<sup>153</sup>

*C. “Hooks Without Bait”—The Widespread Abuse of Pleading Insufficient Affirmative Defenses in Federal Courts*

Before addressing why affirmative defenses should be limited by the plausibility standard, it is first necessary to recognize the “widespread abuse” of Rule 8(c) defenses in federal courts.<sup>154</sup> Most answers contain a litany of Rule 8(c) defenses.<sup>155</sup>

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<sup>148</sup> *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at \*3 (E.D. Mich. Dec. 6, 2007) (“[Rule 12] motions are ‘generally regarded’ with disfavor because of the limited importance of pleading in federal practice . . . .”); *Stoffels*, 2008 WL 4391396, at \*1 (“Motions to strike are . . . disfavored and infrequently granted.”).

<sup>149</sup> *Harris v. USA Ins. Cos.*, No. CIV.A. 11 201, 2011 WL 3841869, at \*1 (E.D. La. Aug. 30, 2011).

<sup>150</sup> *Meas v. CVS Pharmacy, Inc.*, No. 11CV0823 JM JMA, 2011 WL 2837432, at \*3 (S.D. Cal. July 14, 2011) (“[A] heightened pleading standard [for affirmative defenses] may require the court to address multiple motions to amend the answer as discovery reveals additional defenses.”); *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at \*1 (S.D. Fla. May 29, 2008) (“[S]everal courts have characterized such motions as ‘time wasters.’”); *Lane v. Page*, 272 F.R.D. 581, 596 (D.N.M. 2011) (“[M]otions to strike, in most cases, waste everyone’s time.”).

<sup>151</sup> *See Jeepers of Auburn, Inc. v. KWJB Enter., L.L.C.*, No. 10-13682, 2011 WL 1899195, at \*2 (E.D. Mich. Mar. 16, 2011) (quoting *Quadrini*, 2007 WL 4303213, at \*3) (“[Rule 12(f)] motions are generally regarded with disfavor because . . . they are often used as a delaying tactic.”); *see also Fed. Trade Comm’n v. Hope Now Modifications, LLC*, No. CIV. 09-1204 JBS/JS, 2011 WL 883202, at \*3 (D.N.J. Mar. 10, 2011) (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001)) (explaining that Rule 12(f) motions are disfavored because they are often used as a ‘dilatatory tactic.’”).

<sup>152</sup> *Jeepers’*, 2011 WL 1899195, at \*1; *see also Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 649 (D. Kan. 2009) (“The decision to strike an affirmative defense is within the sound discretion of the district court.”).

<sup>153</sup> *Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-CV-335-JPS, 2008 WL 4443805, at \*2 (W.D. Wis. Sept. 25, 2008) (“[D]efendant can amend its affirmative defenses as a ‘matter of course’ pursuant to Rule 15.”); *see also Barnes v. AT&T Pension Benefit Plan Non-Bargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010) (permitting amendment of thirteen insufficiently pled affirmative defenses); *Hayne*, 263 F.R.D. at 652 (“The majority of cases applying the Twombly pleading standard to affirmative defenses . . . have permitted the defendant leave to amend.”).

<sup>154</sup> *Quadrini*, 2007 WL 4303213, at \*6.

<sup>155</sup> *Romantine v. CH2M Hill Eng’rs, Inc.*, No. CIV.A 09-973, 2009 WL 3417469, at \*1 (W.D. Pa. Oct. 23, 2009) (“Defendant in this case, not unlike defendants in most answers

In most of these cases, the affirmative defenses are completely irrelevant and ignored by all parties.<sup>156</sup> Some of these defenses are not even related to the plaintiff's case.<sup>157</sup> Almost all affirmative defenses are pled with no supporting factual detail.<sup>158</sup> Courts have equated this technique of pleading a rote list of insufficient affirmative defenses to "tossing . . . a fish hook without bait."<sup>159</sup>

*D. Practical Reasons for Extending the Plausibility Standard to Affirmative Defenses*

Section D presents the pragmatic reasons for extending the plausibility standard to affirmative defenses. Section D.1. explains that unneeded discovery costs for plaintiffs could be limited by applying the plausibility standard to affirmative defenses. Section D.2. illustrates that the actual purpose of discovery is best served by applying plausibility pleading to affirmative defenses. Section D.3. describes the positive impact on judicial economics realized by extending the *Twombly-Iqbal* standard to affirmative defenses. Section D.4. discusses extending the plausibility standard to affirmative defenses out of concern for maintaining fairness between plaintiffs and defendants.

1. Analyzing Affirmative Defenses Under the Plausibility Standard Saves Plaintiffs from Unnecessary Discovery Costs

The same policy concern central to the *Twombly* and *Iqbal* courts in implementing the plausibility standard for complaints justifies applying the same standard to affirmative defenses. Both *Twombly* and *Iqbal* suggested that the costs of developing cases during discovery was a sufficient reason to require plausibility pleading.<sup>160</sup> Unsupported, "boilerplate" affirmative defenses have the same negative impact on litigation costs as insufficiently pled complaints.<sup>161</sup>

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received by this court, set forth a list of affirmative defenses to Plaintiff's complaint."); *Lane*, 272 F.R.D. at 596 ("[C]ounsel often plead vast numbers of affirmative defenses . . .").

<sup>156</sup> *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1052 (D. Minn. 2010) ("In a typical case, it quickly becomes apparent that most of the affirmative defenses are not viable, and the parties simply ignore them.").

<sup>157</sup> See, e.g., *Hayne*, 263 F.R.D. at 648 (recognizing a completely non-applicable product liability affirmative defense); *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 692 (N.D. Ohio) (identifying an affirmative defense that made "no sense" in the context of the case).

<sup>158</sup> *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1256 ("[T]he content of defendant's answer is not unlike many others this court sees. Without factual detail, defendant asserts several affirmative defenses . . ."); see also *Shinew v. Wszola*, No. CIV.A. 08-14256, 2009 WL 1076279, at \*2 (E.D. Mich. Apr. 21, 2009) (asserting that the defendant pled a "grocery list" of affirmative defenses "with no effort to state facts which might support them.").

<sup>159</sup> *Hayne*, 263 F.R.D. at 651.

<sup>160</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 557-79 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950; James E. von der Heydt, *Ripple Effects: The Unintended Change to Jurisdictional Pleading Standards After Iqbal*, 60 CLEV. ST. L. REV. 799, 817 (2012) ("The goal in each case was to protect preoccupied defendants from expensive fact finding . . .").

<sup>161</sup> *HCRI TRS Acquirer, LLC*, 708 F. Supp. 2d at 691; see also *Nixson v. The Health Alliance*, No. 1:10-CV-00338, 2010 WL 5230867, at \*2 (S.D. Ohio Dec. 16, 2010)

Without the limitations imposed by plausibility pleading, plaintiffs are left to file interrogatories, take depositions, and request documents in an attempt to determine which affirmative defenses actually have merit.<sup>162</sup> This “shot in the dark” discovery technique raises the overall costs of litigation—the exact pragmatic concern addressed in *Twombly* and *Iqbal*.

Evaluating the actual costs of discovery in a federal civil suit reveals the necessity of applying the plausibility standard to affirmative defenses. The litigation costs in a “typical” federal civil suit were recently estimated at nearly \$15,000 for plaintiffs.<sup>163</sup> Cases involving e-discovery or large corporations can result in discovery expenses far exceeding these numbers.<sup>164</sup> Discovery involving e-data can average costs of “tens or hundreds of thousands of dollars” in even average cases.<sup>165</sup> Further, more complex cases involving large corporations can average \$700,000 in discovery costs per case.<sup>166</sup> A plaintiff may fail to bring a meritorious case when faced with these types of exorbitant costs during litigation.<sup>167</sup> In addition, excessive discovery expenditures can also be used as a “tool to force settlement.”<sup>168</sup>

Applying the plausibility standard to affirmative defenses at the pleading stage would allow plaintiffs to avoid the costly discovery process on meritless affirmative defenses. Requiring affirmative defenses to satisfy the *Twombly-Iqbal* test would permit courts to “weed out” meritless affirmative defenses before proceeding to unnecessary, costly discovery.<sup>169</sup> Limiting needless discovery costs through

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(“[B]oilerplate [affirmative defenses] can lead to the same costly effect on litigation as inadequate complaints.”).

<sup>162</sup> *Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at \*1 (E.D. Mich. June 25, 2008); *see also Barnes v. AT&T Pension Benefit Plan Non-Bargained Program*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (recognizing that responding to insufficiently pled affirmative defenses would require the plaintiff to “conduct expensive and potentially unnecessary and irrelevant discovery.”).

<sup>163</sup> *See WILLIAM H. HUBBARD, THE COSTS AND BURDENS OF CIVIL DISCOVERY 4* (Dec. 13, 2011), *available at* <http://judiciary.house.gov/hearings/pdf/12132011Hubbard.pdf>.

<sup>164</sup> *See Scott A. Moss, Litigation Discovery Cannot be Optimal but Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 *DUKE L.J.* 889, 894 (2009).

<sup>165</sup> *Id.*

<sup>166</sup> *See HUBBARD, supra* note 163, at 5.

<sup>167</sup> AM. COLL. OF TRIAL LAYERS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYER’S TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (Mar. 11, 2009), *available at* <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>.

<sup>168</sup> AM. COLL. OF TRIAL LAWYERS, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYER’S TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM A-4 (Aug. 1, 2008), *available at* [http://www.actl.com/AM/Template.cfm?Section=All\\_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650](http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=3650) (citing an attorney survey in which 71% of respondents indicated that discovery can be used to force a settlement).

<sup>169</sup> *Fed. Deposit Ins. Corp. v. Bristol Home Mortg. Lending, LLC*, No. 08-81536-CIV, 2009 WL 2488302, at \*2 (S.D. Fla. Aug. 13, 2009).

application of the two-part *Twombly-Iqbal* test is increasingly important “due to the growing tendency to assert . . . boilerplate defenses.”<sup>170</sup>

## 2. The Purpose of the Discovery Process is Best Served by Striking Insufficient Affirmative Defenses During Pleading

As discussed in the preceding section, without the ability to analyze insufficiently pled affirmative defenses under the plausibility standard, plaintiffs are left to use the costly channels of discovery to determine whether the defenses have any merit.<sup>171</sup> Some courts are content with this process, claiming that plaintiffs have “ample opportunity” during discovery to determine which affirmative defenses have merit.<sup>172</sup>

These courts fail to recognize that the purpose of discovery is not to discover the “bare minimum facts” of a claim or defense.<sup>173</sup> The intended function of discovery is to “find out additional facts about a *well-pleaded* claim, not to find out whether such a claim exists.”<sup>174</sup> The typical affirmative defense does not meet this “well-pleaded” standard. Thus, the actual function of discovery is safeguarded by analyzing and striking insufficient affirmative defenses under the two-part *Twombly-Iqbal* test during pleading.<sup>175</sup> Applying the plausibility standard to affirmative defenses not only limits unneeded discovery costs for plaintiffs, but also better effectuates the true purpose of discovery in the federal courts.

## 3. Requiring Defendants to Plead with Factual Specificity Reduces Court Delay

The current “logjam” in the federal courts has led to some civil litigants “waiting years for their day in court.”<sup>176</sup> Adopting the *Twombly-Iqbal* standard for affirmative defenses aids in alleviating the overburdened federal dockets by eliminating meritless issues at the earliest possible stage of the case.<sup>177</sup>

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<sup>170</sup> *Castillo v. Roche Lab. Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at \*1 (S.D. Fla. Aug. 2, 2010).

<sup>171</sup> See discussion *supra* Part III.D.1.

<sup>172</sup> *Ash Grove Cement Co. v. MMR Constructors, Inc.*, No. 4:10-CV-04069, 2011 WL 3811445, at \*2 (W.D. Ark. Aug. 29, 2011).

<sup>173</sup> *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at \*2 (S.D. Fla. May 29, 2008).

<sup>174</sup> *Id.* (quoting *Stoner v. Walsh*, 772 F. Supp. 790, 800 (S.D.N.Y. 1991) (emphasis added)).

<sup>175</sup> *Palmer v. Oakland Farms, Inc.*, No. 5:10CV00029, 2010 WL 2605179, at \*5 (W.D. Va. June 24, 2010) (“[B]y applying the *Twombly-Iqbal* standard . . . to affirmative defenses, a plaintiff . . . [can] use the discovery process for its intended purpose of ascertaining the additional facts which support a well-pleaded claim or defense.”).

<sup>176</sup> Gary Fields & John R. Emshwiller, *Criminal Case Glut Impedes Civil Suits*, WALL ST. J., Nov. 10, 2011.

<sup>177</sup> *Fed. Deposit Ins. Corp. v. Bristol Home Mortg. Lending, LLC*, No. 08-81536-CIV, 2009 WL 2488302, at \*2 (S.D. Fla. Aug. 13, 2009) (recognizing the importance of eliminating insufficient defenses at the earliest possible stage of the proceedings).

The *Twombly* Court recognized the increasing caseload demands on the federal courts in adopting the plausibility approach for complaints.<sup>178</sup> Insufficiently pled affirmative defenses have the same detrimental effect on federal dockets as the factually-deficient complaint addressed in *Twombly*.<sup>179</sup> Unsupported, irrelevant affirmative defenses do nothing more than “clutter” federal dockets.<sup>180</sup> Courts often waste time dealing with factually-deficient affirmative defenses by being forced to identify the relevant issues through summary judgment motions and pretrial conferences.<sup>181</sup> Requiring affirmative defenses to be factually plausible removes the courts from this time-consuming role. Additionally, extending the plausibility standard to affirmative defenses would restrict defendants from delaying the entire litigation process by dragging out discovery on non-viable defenses.<sup>182</sup>

Thus, adopting the *Twombly-Iqbal* standard for affirmative defenses would both reduce the time courts spend in response to meritless affirmative defenses and decrease the overall length of time needed by the parties for discovery. Applying the plausibility standard to affirmative defenses is one step that courts could take to remedy the backlog of cases in the federal system.

Not all courts recognize that applying the *Twombly-Iqbal* standard to affirmative defenses would lead to more efficient court operations. Courts that have refused to strike insufficient affirmative defenses under the plausibility standard often cite the “disfavored” nature of Rule 12(f) motions to justify this decision.<sup>183</sup> Rule 12(f) motions are considered disfavored because of their potential to waste “judicial resources.”<sup>184</sup> The central concern of these courts is that applying the plausibility

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<sup>178</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 557-79 (2007) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“[T]he . . . increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”)).

<sup>179</sup> *Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at \*1 (E.D. Mich. June 25, 2008) (recognizing that the common practice of pleading unsupported, irrelevant affirmative defenses “create[s] unnecessary work” for the courts).

<sup>180</sup> *Id.*

<sup>181</sup> *Castillo v. Roche Lab. Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at \*3 (S.D. Fla. Aug. 2, 2010).

<sup>182</sup> See *Bristol Home Mortg. Lending, LLC*, 2009 WL 2488302, at \*2 (quoting *First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*, No. 08-81356-CIV-MARRA, 2009 WL 2169869, \*2 (S.D. Fla. July 20, 2009)) (“[W]eeding out legally insufficient defenses at an early stage . . . may be extremely valuable . . . in order to avoid the needless expenditures of time and money in litigating issues which can be seen to have no bearing on the outcome.”).

<sup>183</sup> *Meas v. CVS Pharmacy, Inc.*, No. 11CV0823 JM JMA, 2011 WL 2837432, at \*3 (S.D. Cal. July 14, 2011); *Lane v. Page*, 272 F.R.D. 581, 596 (D. N.M. 2011); *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011).

<sup>184</sup> *Greenheck Fan Corp.*, 2008 WL 4443805, at \*1; *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at \*1 (S.D. Fla. May 29, 2008) (citation omitted) (“Motions to strike under Rule 12(f) are disfavored, and several courts have characterized such motions as ‘time wasters.’”); *Lane*, 272 F.R.D. at 596 (“Motions to dismiss help resolve cases; motions to strike, in most cases, waste everyone’s time.”).

standard to affirmative defenses would result in a significant increase in the number of Rule 12(f) motions filed by plaintiffs.<sup>185</sup>

This narrow argument against applying the plausibility standard to affirmative defenses fails to recognize the utility of Rule 12(f) motions in the context of striking insufficient affirmative defenses. The purpose of a Rule 12(f) motion is to “avoid spending time and money litigating spurious issues.”<sup>186</sup> Using a Rule 12(f) motion to strike an insufficient affirmative defense accomplishes this goal by eliminating meritless issues prior to discovery and trial.<sup>187</sup> In this role, the Rule 12(f) motion is not used to delay or waste the court’s time—it is merely used as a mechanism to expedite discovery and to spare judicial resources.<sup>188</sup>

While adopting the plausibility standard for affirmative defenses could increase the number of Rule 12(f) motions, the expectation would be that defendants would adjust to the procedural change. This adaptation would include defendants either pleading affirmative defenses with factual specificity or failing to plead the defenses completely. In this scenario, Rule 12(f) motions would not increase because the defendants would recognize their proper burden under plausibility pleading. Even if Rule 12(f) motions did increase, the detrimental effect on judicial resources is arguably counterbalanced by both the time saved during discovery and the reduction of summary judgment motions on spurious issues.<sup>189</sup>

#### 4. Extending the Plausibility Standard to Affirmative Defenses Maintains Fairness in Pleading Between Plaintiffs and Defendants

Applying the plausibility standard solely to complaints, and not to affirmative defenses, unfairly favors defendants.<sup>190</sup> If affirmative defenses are not forced to meet the *Twombly-Iqbal* test, plaintiffs must adhere to a more stringent pleading standard than their adversaries.<sup>191</sup> This contrast makes little sense when the goal of

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<sup>185</sup> See *Lane*, 272 F.R.D. at 596; see also *Tyco Fire Prods. LP*, 777 F. Supp. 2d at 901 (“[R]equiring more detailed defensive pleading will inevitably lead plaintiffs to file more motions to strike.”).

<sup>186</sup> *Bottoni v. Sallie Mae, Inc.*, No. C 10-03602 LB, 2011 WL 3678878, at \*1 (N.D. Cal. Aug. 22, 2011).

<sup>187</sup> *Jeeper's of Auburn, Inc. v. KWJB Enter., L.L.C.*, No. 10-13682, 2011 WL 1899195, at \*1 (E.D. Mich. Mar. 16, 2011) (quoting *Sec. & Exch. Comm'n v. Thorn*, No. 2:01-CV-290, 2002 WL 31412440, at \*2 (S.D. Ohio Sept. 30, 2002)) (recognizing that a Rule 12(f) motion is proper “if it aids in eliminating spurious issues before trial, thereby streamlining the litigation.”).

<sup>188</sup> See *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989) (“But where . . . motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay.”).

<sup>189</sup> See *id.*

<sup>190</sup> *Topline Solutions, Inc. v. Sandler Sys., Inc.*, No. L-09-3102, 2010 WL 2998836, at \*1 (D. Md. July 27, 2010).

<sup>191</sup> See *id.* (“[I]t would be incongruous and unfair to require a plaintiff to operate under one standard and to permit the defendant to operate under a different, less stringent standard.”).

both complaints and affirmative defenses is to provide the opposing party with “fair notice” of the nature of the claim or defense.<sup>192</sup>

Some courts assert that requiring different pleading standards is not unfair because the statute of limitations is the only time limitation plaintiffs have in preparing the complaint.<sup>193</sup> This is different for defendants who, under Rule 12, typically only have twenty-one days to develop the facts required to file an answer in response to a complaint.<sup>194</sup> Several courts that rejected plausibility pleading for affirmative defenses claimed that it would be “unrealistic” to expect defendants to investigate and file factually-sufficient affirmative defenses within twenty-one days.<sup>195</sup> For these courts, pleading a rote list of affirmative defenses protects the defendant from the risk of waiving affirmative defenses that could factually develop during discovery.<sup>196</sup>

But this argument fails to take into account that defendants have the ability to amend the answer under Rule 15.<sup>197</sup> Courts have freely granted amendment in most cases where affirmative defenses were struck for failing to meet the *Twombly-Iqbal* standard.<sup>198</sup> Also, defendants, without hardship, can amend the answer to add

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<sup>192</sup> See *Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 929 (N.D. Cal. 2012) (“*Twombly*’s rationale of giving fair notice to the opposing party would seem to apply as well to affirmative defenses given the purpose of Rule 8(b)’s requirements for defenses.”); *Palmer v. Oakland Farms, Inc.*, No. 5:10CV00029, 2010 WL 2605179, at \*4 (W.D. Va. June 24, 2010) (“[I]t neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for [his] claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.”); *Lucas v. Jerusalem Café, LLC*, No. 4:10-cv-00582-DGK, 2011 WL 1364075, at \*2 (W.D. Mo. Apr. 11, 2011) (“It makes little sense to hold defendants to a lower pleading standard than plaintiffs when, ‘in both instances, the purpose of pleading requirements is to is to prove enough notice to the opposing party . . . .’”).

<sup>193</sup> *Lane v. Page*, 272 F.R.D. 581, 596 (D. N.M. 2011) (“Because a plaintiff can do a lot of pre-filing work, and a defendant generally cannot, there is a sound rationale for requiring more of plaintiffs than of defendants at the pleading stage.”); *Wells Fargo & Co v. United States*, 750 F. Supp. 2d 1049, 1051 (“[P]laintiffs and defendants are in much different positions” because “a plaintiff has months—often *years*—to investigate a claim before pleading that claim in federal court.”) (emphasis in original).

<sup>194</sup> See *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 901 (E.D. Pa. 2011) (recognizing that defendants only “have a short amount of time to develop the facts necessary” to answer a complaint); *Adams v. JP Morgan Chase Bank, N.A.*, No. 3:11-CV-337-J-37MCR, 2011 WL 2938467, at \*4 (M.D. Fla. July 21, 2011) (“Whereas plaintiffs have the opportunity to conduct investigations prior to filing their complaints, defendants, who typically only have twenty-one days to respond to the complaint, do not have such a luxury.”).

<sup>195</sup> *Meas v. CVS Pharmacy, Inc.*, No. 11CV0823 JM JMA, 2011 WL 2837432, at \*3 (S.D. Cal. July 14, 2011) (“To expect a defendant to investigate and to adequately prepare an answer containing all relevant affirmative defenses within 21 days of service of the complaint . . . would seem to be unrealistic . . . .”).

<sup>196</sup> See *Lane*, 272 F.R.D. at 596 (recognizing that defendants often plead numerous affirmative defenses so that the defense is preserved if discovery reveals factual support).

<sup>197</sup> FED. R. CIV. P. 15.

<sup>198</sup> *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 652 (D. Kan. 2009); see, e.g., *Powertech Tech., Inc. v. Tessera, Inc.*, No. C 10-945 CW, 2012 WL 1746848, at \*5 (N.D. Cal. May 16, 2012) (striking five affirmative defenses and granting the defendant fourteen days to

defenses realized during discovery because only a few defenses are waived if not asserted immediately.<sup>199</sup> There is no legitimate reason then for defendants to “window-dress” the answer by pleading a “grocery list” of affirmative defenses during the early stage of the proceedings.<sup>200</sup> Openly permitting leave to amend the answer greatly reduces any adverse effects to defendants of applying the plausibility standard to affirmative defenses.<sup>201</sup>

In addition, although defendants only have twenty-one days to prepare the initial answer, pleading sufficient facts to satisfy the *Twombly-Iqbal* standard is not demanding. A defendant does not need to plead all possible relevant facts in order to satisfy the *Twombly-Iqbal* two-part test.<sup>202</sup> The affirmative defense can still be pled “simply and briefly.”<sup>203</sup> The defendant need only provide enough factual detail that plausibly suggests a valid defense.<sup>204</sup>

Applying the plausibility standard to complaints and not to affirmative defenses is unfair to plaintiffs. The different time restrictions for plaintiffs and defendants during pleading do not justify this disparate treatment.

*E. Failing to Apply the Plausibility Standard to Affirmative Defenses is Not Warranted by Formalistic Concerns*

Courts refusing to apply the *Twombly-Iqbal* standard to affirmative defenses typically justify this decision based on formalistic arguments. These courts claim that applying the *Twombly-Iqbal* standard to affirmative defenses favors “pragmatic considerations rather than textual dictates.”<sup>205</sup>

Section E identifies, examines, and disputes these formalistic arguments. Section E.1. explains that even a strict reading of *Twombly* and *Iqbal* permits applying plausibility pleading to affirmative defenses. Section E.2. refutes any argument that

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amend the answer); *Trading Techs. Int'l Inc. v. CQG*, No. 05 C 4811, 2012 WL 5383199, at \*1 (N.D. Ill. Oct. 31, 2012) (striking two affirmative defenses and granting the defendant twenty-one days to amend the answer); *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d. 1167, 1176 (N.D. Cal. 2010) (striking nineteen insufficient affirmative defenses and granting the defendant thirty days to amend the answer); *Holtzman*, 2008 WL 2225668, at \*2 (striking nine insufficient affirmative defenses and granting the defendant ten days to amend the answer); *Palmer v. Oakland Farms, Inc.*, No. 5:10CV00029, 2010 WL 2605179, at \*4 (W.D. Va. June 24, 2010) (striking eleven insufficient affirmative defenses and granting twenty days to amend the answer); *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 232 (striking eleven insufficient affirmative defenses and granting fourteen days to amend the answer).

<sup>199</sup> *Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at \*1 (E.D. Mich. June 25, 2008).

<sup>200</sup> *Id.*

<sup>201</sup> *See Francisco v. Verizon S., Inc.*, No. 3:09CV737, 2010 WL 2990159, at \*8 (E.D. Va. July 29, 2010) (“[T]he flexibility of amendment softens any painful blow of heightened pleading standards.”).

<sup>202</sup> *Palmer*, 2010 WL 2605179 at \*5.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Lane*, 272 F.R.D. at 591.

the text of the Federal Rules does not support requiring factually supported pleading for affirmative defenses. Section E.3. discusses the historical authority that supports extending the plausibility standard to affirmative defenses.

### 1. The *Twombly* and *Iqbal* Opinions Enable Extending Plausibility Pleading to Affirmative Defenses

Courts often justify refusing to apply the plausibility standard to affirmative defenses by alleging that the *Twombly* and *Iqbal* opinions only referenced the pleading of complaints.<sup>206</sup> Espousing a narrow approach, these courts reject Rule 12(f) motions filed in response to factually-deficient answers because neither opinion expressly referenced affirmative defenses.<sup>207</sup>

But, even if textualism is paramount as these courts claim, the language used in both *Twombly* and *Iqbal* does lend itself to applying the plausibility standard to affirmative defenses. Instead of using the word “complaint” to describe the extent of the plausibility standard, both the *Twombly* and *Iqbal* courts used the word “pleading” to discuss the reach of the plausibility standard. For example, the *Twombly* Court asserted that “a district court must retain the power to insist upon some specificity in *pleading* before allowing a potentially massive factual controversy to proceed.”<sup>208</sup> Similarly, the *Iqbal* Court stated that “*pleadings* [which] . . . are no more than conclusions, are not entitled to the assumption of truth.”<sup>209</sup> Thus, even though *Twombly* and *Iqbal* did not explicitly recognize affirmative defenses, the language of both opinions does textually permit applying the plausibility standard to these pleadings.

### 2. The Federal Rules Indicate that Claims and Defenses Should be Held to the Same Pleading Standard

Other courts that deny applying plausibility pleading to affirmative defenses based on textual grounds often cite the differing language in the Federal Rules for complaints and defenses.<sup>210</sup> These courts highlight that *Twombly* and *Iqbal* both

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<sup>206</sup> See, e.g., *Sewell v. Allied Interstate, Inc.*, No. 3:10-CV-113, 2011 WL 32209, at \*7 (E.D. Tenn. Jan. 5, 2011) (“Because *Twombly* and *Iqbal* do not expressly apply to defenses . . . this Court declines to do so.”); *Romantine v. CH2M Hill Eng’rs, Inc.*, No. CIVA 09-973, 2009 WL 3417469, at \*1 (W.D. Pa. Oct. 23, 2009) (“The Supreme Court in *Twombly* was interpreting pleading requirements of Rule 8(a)(2) . . . and declines to so extend the Supreme Court ruling as requested by [the] Plaintiff.”).

<sup>207</sup> *Romantine*, 2009 WL 341769, at \*1; see also *McLemore v. Regions Bank*, No. 3:08-CV-0021, 2010 WL 1010092, at \*13 (M.D. Tenn. Mar. 18, 2010) (denying a Rule 12(f) motion because “the [*Twombly*] opinion does not mention affirmative defenses” and “*Iqbal* also focused exclusively on the pleading burden that applies to plaintiffs’ complaints.”).

<sup>208</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n.17 (1983)) (emphasis added).

<sup>209</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (emphasis added); see also *id.* at 1953 (“Our decision in *Twombly* expounded the pleading standard for all civil actions . . .”).

<sup>210</sup> See *Lane*, 272 F.R.D. at 592 (“Courts that have refused to extend the pleading standard to affirmative defenses . . . have generally found more support in the text of the rules . . .”).

only interpreted Rule 8(a), which solely applies to complaints.<sup>211</sup> A careful examination of the text of Rule 8 is required to understand, and refute, this argument.

Defenses are generally governed by Rule 8(b) of the Federal Rules. Under Rule 8(b), a defendant must “state in short and plain terms its defenses to each claim asserted against it . . . .”<sup>212</sup> Rule 8(c) requires that, in addition to the mandates of Rule 8(b), an affirmative defense is “affirmatively state[d]” in the answer.<sup>213</sup> Rule 8(a) governs complaints.<sup>214</sup> Under Rule 8(a), plaintiffs must include in the complaint “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>215</sup>

Some courts assert that different pleading standards are justified because *Twombly* and *Iqbal* focused on Rule 8(a)’s exclusive language.<sup>216</sup> Rule 8(a) requires that a plaintiff plead allegations “showing that the pleader is entitled to relief.”<sup>217</sup> Neither Rule 8(b) nor Rule 8(c), the two subsections of Rule 8 that govern defenses, contain that same requirement.<sup>218</sup> Thus, some courts maintain that factual specificity in pleading is only required when it is necessary to “show” that the party is “entitled to relief.”<sup>219</sup> For these courts, applying the plausibility standard to affirmative defenses is not a logical extension of *Twombly* and *Iqbal* because the text of subsections (b) and (c) does not contain this language.<sup>220</sup> Courts applying this approach find the text relating to defenses “markedly less demanding” than that of the language governing complaints.<sup>221</sup>

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<sup>211</sup> *Id.* at 593.

<sup>212</sup> FED. R. CIV. P. 8(b)(1)(A).

<sup>213</sup> FED. R. CIV. P. 8(c)(1).

<sup>214</sup> FED. R. CIV. P. 8(a).

<sup>215</sup> FED. R. CIV. P. 8(a)(1).

<sup>216</sup> See, e.g., *Lane*, 272 F.R.D. at 593; *Charleswell v. Chase Manhattan Bank, N.A. No.*, CIV.A. 01-119, 2009 WL 4981730, at \*4 (D.V.I. Dec. 8, 2009) (refusing to apply the plausibility standard to defenses because “[t]here is no requirement under Rule 8(c) that a defendant ‘show’ any facts at all.”).

<sup>217</sup> FED. R. CIV. P. 8(a)(1).

<sup>218</sup> FED. R. CIV. P. 8(b); FED. R. CIV. P. 8(c).

<sup>219</sup> *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051 (D. Minn. 2010) (rejecting the plausibility standard for affirmative defenses because “neither Rule 8(a)(2) nor any other rule requires a defendant to plead facts ‘showing’ that the plaintiff is *not* entitled to relief (emphasis in original); see also *Powers v. Fifth Third Mortg. Co.*, No. 1:09-CV-2059, 2011 WL 3418290, at \*3 (N.D. Ohio July 18, 2011) (“As R. 8(c) does not require a defendant to show entitlement to relief, *Iqbal* and *Twombly* have no application to the pleading requirements of R. 8(c.”); von der Heydt, *supra* note 160, at 818 (“*Twombly* and *Iqbal* would be taken by many courts to alter the interpretation of Rule 8(a)(1) as well as Rule 8(a)(2). This extension of the doctrine, almost never explained, ignores the fact that (a)(1), unlike (a)(2), requires no ‘showing . . . .’”).

<sup>220</sup> *Wells Fargo & Co.*, 750 F. Supp. 2d at 1051; see also *Powers*, 2011 WL 3418290, at \*3; von der Heydt, *supra* note 160, at 818.

<sup>221</sup> *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, 1258 (D. Kan. 2011).

Limiting the plausibility standard to complaints is not fully supported by the text of the Federal Rules. It can be inferred from the language of Rule 8 that the requirements for pleading affirmative defenses are the same as for pleading claims.<sup>222</sup> Rule 8(c) affirmative defenses must meet the pleading dictates of Rule 8(b)<sup>223</sup> Both Rule 8(a) and Rule 8(b) contain the same requirement that the pleader make a “short and plain” statement of the claims or defenses.<sup>224</sup> Because this shared language is considered the “essence of the pleading standard,” it can be inferred that complaints and defenses were intended to meet the same pleading requirements—including the plausibility standard.<sup>225</sup> Considering the mutual language of Rules 8(a) and (b), and the requirement that Rule 8(c) meets the dictates of Rule 8(b), the Federal Rules textually support applying the *Twombly-Iqbal* standard to affirmative defenses.

In addition, case law and academic commentary set forth prior to the *Twombly* and *Iqbal* decisions demonstrates that affirmative defenses were intended to meet the same pleading standard as complaints. In 1999, the Fifth Circuit expressly concluded that affirmative defenses were subject to the same pleading requirements as the complaint.<sup>226</sup> Some district courts prior to *Twombly* and *Iqbal* even asserted that “[t]he standard for striking an affirmative defense is the mirror image of the standard for considering whether to dismiss for failure to state a claim.”<sup>227</sup> Similarly, academic commentators have remarked that “[t]he general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses under Federal Rule 8(c).”<sup>228</sup>

These examples of both case law and scholarly authority demonstrate that affirmative defenses and complaints were expected to be subjected to the same pleading standards. Failing to apply the *Twombly-Iqbal* standard to affirmative defenses directly contradicts this precedent.

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<sup>222</sup> Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009).

<sup>223</sup> United States v. Brink, CIV.A. C-10-243, 2011 WL 835828, at \*4 (S.D. Tex. Mar. 4, 2011) (“[I]n pleading their affirmative defenses Defendants still must satisfy the requirement of Rule 8(b)(1) . . .”).

<sup>224</sup> FED. R. CIV. P. 8(b)(1)(A); FED. R. CIV. P. 8(b)(1); see also Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (“Rule 8’s requirements with respect to pleading defenses in an answer parallels the Rules’s requirements for pleading claims in a complaint.”).

<sup>225</sup> HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010); see also PageMelding, Inc. v. ESPN, Inc., No. C 11-06263 WHA, 2012 WL 3877686, at \*3 (N.D. Cal. Sept. 6, 2012) (“Affirmative defenses are governed by the same pleading standards as claims.”).

<sup>226</sup> Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999); see also Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989) (determining that “[a]ffirmative defenses are pleadings” and should be subject to “all pleading requirements of the Federal Rules . . .”).

<sup>227</sup> Solvent Chem. Co. v. E.I. Dupont De Nemours & Co., 242 F. Supp. 2d 196, 212 (W.D.N.Y. 2002); see also FSP, Inc. v. Societe Generale, No. 02CV4786GBD, 2005 WL 475986, at \*8 (S.D.N.Y. Feb. 28, 2005) (“A motion to strike an affirmative defense . . . is also governed by the same standard applicable to a motion to dismiss . . .”).

<sup>228</sup> See WRIGHT ET AL., *supra* note 22, § 1274.

Despite the formalistic concerns discussed, the Federal Rules, case law, and academic authority all support extending the *Twombly-Iqbal* standard to affirmative defenses.

#### IV. CONCLUSION

Almost every answer received in federal courts contains a litany of affirmative defenses.<sup>229</sup> Many of these affirmative defenses are mere conclusory allegations with no supporting factual details.<sup>230</sup> Plaintiffs are typically left with the daunting task of attempting to determine which, if any, of these defenses have merit during the costly discovery process.<sup>231</sup> Courts expend scarce judicial resources to “weed out” these boilerplate affirmative defenses.<sup>232</sup>

The Supreme Court supplied the remedy to the affirmative defense plague in the form of the plausibility standard.<sup>233</sup> Originally set forth in *Twombly*, and later clarified in *Iqbal*, the plausibility standard requires that allegations contained in pleadings are facially plausible.<sup>234</sup> It is axiomatic that the commonly pled affirmative defense, supported with no factual specificity, does not meet this test.

*Twombly* and *Iqbal* both centered on the pleading of complaints.<sup>235</sup> For this reason, many courts refuse to apply the plausibility standard to affirmative defenses.<sup>236</sup> These courts fail to recognize that the same pragmatic concerns underlying the adoption of plausibility pleading for complaints warrant extension of the plausibility standard to affirmative defenses.<sup>237</sup> Additionally, the text of the *Twombly* and *Iqbal* opinions, and the specific language used in Federal Rule 8, permits applying the plausibility standard to affirmative defenses.<sup>238</sup>

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<sup>229</sup> *Romantine v. CH2M Hill Eng’rs, Inc.*, No. CIVA 09-973, 2009 WL 3417469, at \*1 (W.D. Pa. Oct. 23, 2009) (“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.”).

<sup>230</sup> *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051-52 (D. Minn. 2010) (“Affirmative defenses are almost always simply listed in answers; only rarely do defendants plead much in the way of facts in support of affirmative defenses.”).

<sup>231</sup> See discussion *supra* Part III.C.1.

<sup>232</sup> See discussion *supra* Part III.C.2.

<sup>233</sup> See discussion *supra* Parts II.D.3-4.

<sup>234</sup> See discussion *supra* Parts II.D.3-4.

<sup>235</sup> See discussion *supra* Parts II.D.3-4.

<sup>236</sup> See, e.g., *Sewell v. Allied Interstate, Inc.*, No. 3:10-CV-113, 2011 WL 32209, at \*7 (E.D. Tenn. Jan. 5, 2011) (“Because *Twombly* and *Iqbal* do not expressly apply to defenses . . . this Court declines to do so.”); *Romantine v. CH2M Hill Eng’rs, Inc.*, No. CIVA 09-973, 2009 WL 3417469, at \*1 (W.D. Pa. Oct. 23, 2009) (“The Supreme Court in *Twombly* was interpreting pleading requirements of Rule 8(a)(2) . . . and declines to so extend the Supreme Court ruling as requested by the Plaintiff.”).

<sup>237</sup> See discussion *supra* Parts III.D.1-3.

<sup>238</sup> See discussion *supra* Parts III.E.1-2.

Meritless affirmative defenses are pled with abandon in federal courts.<sup>239</sup> To limit this epidemic, and to provide equity between plaintiffs and defendants, federal courts should universally require affirmative defenses to meet the plausibility standard.

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<sup>239</sup> See *United States v. Quadrini*, No. 2:07-CV-13227, 2007 WL 4303213, at \*6 (E.D. Mich. 2007) (asserting that there is “widespread abuse” of affirmative defenses); see also *Romantine*, 2009 WL 3417469 at \*1 (W.D. Pa. Oct. 23, 2009) (“Defendant in this case, not unlike defendants in most answers received by this court, set forth a list of affirmative defenses to Plaintiff’s complaint.”); *Lane v. Page*, 272 F.R.D. 581, 596 (D.N.M. 2011) (“[C]ounsel often plead vast numbers of affirmative defenses . . .”).