Twombly, *Iqbal*, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses

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"The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms."[1]

INTRODUCTION

For almost fifty years, the Federal Rules of Civil Procedure[2] have required parties simply to provide each other with fair notice of their claims or defenses.[3] However, in 2007, the Supreme Court interpreted Rule 8 to mean something quite different.[4] In *Bell Atlantic Corp. v. Twombly*[5] and *Ashcroft v. Iqbal*,[6] the Supreme Court changed the pleading standard from one requiring the complaint to provide the defendant with "fair notice" of the claim,[7] to one requiring the complaint to contain

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1 Judith Resnick, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

2 Hereinafter, unless stated in full, the Federal Rules of Civil Procedure will be referred to simply as "the Rules."

3 *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) ("[A]ll 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." (quoting FED. R. CIV. P. 8(a)(2))), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). *See also* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) ("An affirmative defense is subject to the same pleading requirements as is the complaint.").

4 Rule 8 governs complaints and affirmative defenses in federal courts. *See* FED. R. CIV. P. 8(a) (governing complaints); FED. R. CIV. P. 8(c) (governing affirmative defenses).

5 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

6 Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

7 This "fair notice" standard was fairly simple for a plaintiff to meet. *See* Green Country Food Mkt., Inc. v. Bottling Grp., LLC, 371 F.3d 1275, 1279 (10th Cir. 2004) (holding that a complaint must give the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests' . . . [but that a] plaintiff should not be prevented from pursuing a claim simply because of a failure to set forth in the complaint

"enough facts to state a claim to relief that is plausible on its face."[8] Yet, while the Court may have announced the standard for *complaints*, it was silent as to what to do with affirmative defenses pled in an answer.[9] Must a defendant continue to simply provide the plaintiff with fair notice of the affirmative defense?[10] Or, must the defendant's answer now "contain sufficient factual matter, accepted as true, to 'state a[n affirmative defense] that is plausible on its face[?]'"[11] Without an answer to these questions, defendants seeking to assert an affirmative defense will have little guidance as to what they must now include in their answers. These questions and issues have inspired this Comment, which will examine how *Twombly* and *Iqbal* apply to affirmative defenses. Ultimately, this Comment proposes that a defendant must "plead an adequate factual basis for [his or her] affirmative defense[],"[12] without having to give rise to an affirmative defense which is 'plausible on its face.'"[13] To require a defendant to make a plausibility assessment prior to pleading an affirmative defense would discourage defendants from pleading otherwise legitimate defenses out of fear that they may lack sufficient support to prove their plausibility.[14]

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a theory on which the plaintiff could recover . . . ." (quoting *Conley*, 355 U.S. at 47, *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))). Thus, under this "notice" standard, facts were not necessarily required to be pled, and a plaintiff's mere allegations may be enough. *See, e.g.*, Comet Enters. Ltd. v. Air-A-Plane Corp., 128 F.3d 855, 860 (4th Cir. 1997) (upholding a complaint against a motion to dismiss despite failing to plead "that its claims are authorized by license" because even on a motion to dismiss, "a plaintiff need not come forward with all of the facts supporting its claim for relief"); Atchinson v. District of Columbia, 73 F.3d 418, 421 (D.C. Cir. 1996) (holding that under a notice standard, complaints do "not [need] to state in detail the facts underlying a complaint"); Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 686–87 (2002) (noting that after *Conley*, pleadings were no longer used to develop the facts of a case).

8 *Twombly*, 550 U.S. at 570. *See also Iqbal*, 129 S. Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions . . . .'" (quoting FED. R. CIV. P. 1)).

9 *See infra* Part III (noting the multitude of standards on which district courts have relied out of an uncertainty as to what the correct standard is to apply to an affirmative defense).

10 Prior to *Twombly* and *Iqbal*, this was the standard required of affirmative defenses. *See, e.g.*, Davis v. Sun Oil Corp., 148 F.3d 606, 614 (6th Cir. 1998) (Boggs, J., dissenting) ("An affirmative defense may be pleaded in general terms and will be held to be sufficient . . . 'as long as it gives plaintiff fair notice of the nature of the defense.'" (emphasis omitted) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1381 (3d ed. 2010))).

11 *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

12 Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009). This would be the standard that a judge would apply on a Rule 12(f) motion to strike. *See* FED. R. CIV. P. 12(f).

13 *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

14 An insufficiently pled affirmative defense is subject to being stricken under Rule 12(f), which allows a plaintiff to move the court to strike an affirmative defense from the pleadings and the case. *See* FED. R. CIV. P. 12(f) ("The court may strike from a pleading an

Part I will discuss how common law and code pleading gave way to the Federal Rules of Civil Procedure.[15] Part II will trace the Court's interpretation of Rule 8 from *Conley v. Gibson*[16] to the *Twombly* and *Iqbal* decisions, as well as their effects on complaints and affirmative defenses.[17] Part III will examine the standards that district courts are currently applying to affirmative defenses under Rule 8(c) in light of *Twombly* and *Iqbal*.[18] Lastly, Part IV will propose how district courts should assess affirmative defenses today, taking into account such factors as the textual differences between Rule 8(a) and 8(c), the policies behind the *Twombly* and *Iqbal* decisions, as well as the overall fairness to a defendant and a plaintiff.[19]

I. FROM THE COMMON LAW TO THE CODES TO THE RULES

Pleading regimes in the United States are largely derived as a reaction to the archaic and overly technical pleading standards of the common law.[20] At common law, the pleadings were used as a mechanism to narrow the issues in dispute into one issue that could be decided by a judge or a jury.[21] Each cause of action had

insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act . . . on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading."). Thus, determining what exactly must be included in a responsive pleading by the defendant is an important topic for both litigators and defendants.

15 *See infra* Part I (describing common law and code pleading standards).

16 Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

17 *See infra* Part II (discussing the *Twombly* and *Iqbal* decisions).

18 *See infra* Part III (describing the different standards courts have adopted to assess the sufficiency of affirmative defenses pled in the answer).

19 *See infra* Part IV (discussing that an approach requiring facts to be pled is not only most fair to a defendant, but is most in line with the policies underlying the *Twombly* and *Iqbal* decisions).

20 *See* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 98 (2001) (noting that the Rules were a "reaction to arcane common law pleading in England"); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1109 (2010) ("[N]otice pleading developed in the 1930s as a reaction to arcane common law pleading rules and rigid code pleading."). As will be discussed, code pleading was meant to replace the "technical common law," and federal notice pleading was meant to replace "cumbersome" code pleading. Doug Rendleman, *Simplification—A Civil Procedure Perspective*, 105 DICK. L. REV. 241, 243 (2001). *See also* John Hasnas, *What's Wrong With a Little Tort Reform?*, 32 IDAHO L. REV. 557, 567 (1996) (describing code pleading as "arcane," which is why it was replaced "in favor of more liberalized notice pleading.").

21 *See* Thomas P. Gressette, Jr., *The Heightened Pleading Standard of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 404 (2009) ("The . . . pleading scheme was premised on the assumption that by proceeding through numerous stages of denial, avoidance, or demurrer, a case eventually would be reduced to a single dispositive issue of fact or law." (quoting Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554 (2002))). *See also* ROY L. BROOKS, CRITICAL PROCEDURE 80 (Carolina Academic Press 1998) ("Issue formulation was the centerpiece of common law pleading."); WILLIAM F. WALSH, OUTLINES

its own separate pleading requirements.[22] If the pleader failed to plead the cause of action properly, the pleader had to start all over again.[23] Although there may have been benefits to such single issue pleading,[24] a pleading regime which "stake[s] the outcome of litigation on the accuracy of a forecast that its merits will properly turn on the resolution of a single issue specifically

OF THE HISTORY OF ENGLISH AND AMERICAN LAW 494 (New York University Press 1995) (describing how pleading at common law required parties to plead back and forth until one "precise issue" essential to the case was determined); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35, 56 (1983) (noting that at common law, the pleadings were used as a mechanism to narrow the "litigation to a single issue"); Howard T. Markey, *Real-World Rules: Easing the Life of Litigation*, 62 ST. JOHN'S L. REV. 421, 423 n.4 (1987–1988) ("At common law, pleadings served several purposes: giving notice of the nature of the claim, stating the facts, narrowing the issues to be litigated, and providing a means of quickly disposing of frivolous claims and meritless defenses.").

22 *See* A.M. WILSHIRE, M.A., LL.B., PRINCIPLES OF THE COMMON LAW 10 (Sweet & Maxwell, Ltd. 1944). A party wishing to file a complaint (or a declaration as it was known) had to follow the desired cause of action's particular writ. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 10–11 (Little, Brown and Co. 1977). Each writ contained different requirements, which must be accurately pleaded or else the pleader failed and would be unable to proceed further with the writ. *See* Koan Mercer, *"Even in These Days of Notice Pleadings": Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1168 (2004) ("The common law pleading practice that developed in England between the thirteenth and sixteenth centuries required plaintiffs to choose a single writ under which to bring their claims. Each writ triggered a different form of action with distinct procedural, evidentiary, and jurisdictional requirements."). Much of the displeasure stemming from common law pleading was a result of the technical requirements of these writs. *See, e.g.*, Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1487 (1993) ("Common law pleading was prefigured and technical, shaped by the twelfth-century system of writs and formalistic pleading requirements.").

23 JAMES & HAZARD, *supra* note 22, at 11. Once a plaintiff and attorney decided on the proper cause of action, a myriad of pleading exchanges with the defendant followed. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986). Upon receiving the declaration, the defendant could demur, that is, admit the factual allegations, but deny that any legal basis existed for the claim, or plead to the declaration. *See* C. H. S. FIFOOT, M.A., ENGLISH LAW AND ITS BACKGROUND 153 (WM. W. Gaunt & Sons, Inc. 1993). By doing this, if the defendant raised a new fact not originally brought forth, the plaintiff would now have to proceed as the defendant first did by admitting, denying, demurring, or pleading to it. *See* HERBERT BROOM, M. A., COMMENTARIES ON THE COMMON LAW, DESIGNED AS INTRODUCTORY TO ITS STUDY 177–78 (Fred B. Rothman & Co. 1997). This would proceed anew if the plaintiff now raised a fact not raised by the declaration or by the defendant's response. *Id.* The pleadings would only cease if a fact raised by one is denied by the other, or an issue of law is asserted by one, but denied by the other. *Id. See also* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 454–55 (2003) ("The system required an intricate network of highly technical rules designed to aid or force the parties' dispute to converge upon a single issue of law or fact.").

24 For example, such single issue pleading allowed a lay juror easily to resolve the main issue in the dispute, because instead of having to focus on multiple complex issues, the juror was left with one single issue which one party asserted and the other denied. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 413 (Little, Brown and Co. 1956) (explaining that if the single issue left is one of fact, "then the parties will have ascertained a material fact which one asserts and the other denies in terms so precise that a jury will have no difficulty in hearing evidence on the matter and finding the truth of it").

designated in advance, will be bound to cause many a miscarriage of justice."[25]

To break from this approach, many states adopted code pleading, which has its beginnings in the New York Code, known distinctly as the "Field Code."[26] Code pleading required parties to plead factual support for their claims or defenses,[27] and necessarily focused on using the pleadings as a mechanism in which to develop facts.[28] This assisted litigants greatly when it came to discovery as each side already had the factual basis for the other's claims or defenses.[29] Thus, code pleading, through factual development, focused on narrowing the issues for discovery and trial, without necessarily requiring that there be only one issue of law or fact left, as was required at common law.[30]

Although code pleading narrowed the scope of discovery, oftentimes it was simply a difficult hurdle for litigators to overcome.[31] "[T]he pleader faced the problem of distinguishing

25 Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 981 (1998) (quoting Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899, 903 (1961)). For a discussion of the difficulties of common law pleading, see CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 33 (2002) (describing pleading at common law as "a system of rigid formalism").

26 *See* 4 B. E. WITKIN, CALIFORNIA PROCEDURE, PLEADING § 1 (5th ed. 2008).

27 *See* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1024, 1026 n.25 (1989) ("Code states adopted the infamous requirement that pleaders set forth the 'ultimate facts,' rather than 'conclusions of law' or 'evidentiary facts.'").

28 *See* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 100 (1994). *See also* Harry Emmanuel Scozzaro, Jr., Note, *Notice Pleading Under the Federal Rules of Civil Procedure Following* Swierkiewicz v. Sorema N.A.*: Standing on the Shoulders of* Conley *and* Leatherman, 26 AM. J. TRIAL ADVOC. 385, 411 (2002) ("Code pleading replaced the common law writ with facts and the form of action with the cause of action." (emphasis omitted)).

29 *See* Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 642 (1993). Thus, code pleading largely assisted parties in determining the legitimacy of the other party's claims or defenses. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 939 (1987) (describing the purpose of code pleading as redressing the "legal rights subsisting between man and man in general") (internal quotation marks omitted).

30 Amelia F. Burroughs, Comment, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 78 (2001–2002). Compared with common law pleading, which was not as concerned with factual development as it was with issue formulation, code pleading marked a significant break from the common law. Molot, *supra* note 25, at 982–83 (explaining how at common law, issue formulation did not also necessarily entail factual development).

31 *See* Tony L. Wilcox, Schmidt v. McIlroy Bank & Trust*: An Old Twist to a New Rule*, 46 ARK. L. REV. 433, 437 (1993) ("The drafters of the code believed that code pleading would allow the pleader more freedom in bringing his action and would rid the court of the technical form and repetition of the common law system. Yet, even though code pleading was much simpler, pleading problems persisted. While the rigid forms of

facts from evidence and conclusions of law. Many statements fit into both categories, and often it was impossible to make the distinction."[32] In 1938, however, the Federal Rules of Civil Procedure were enacted and took a drastic turn from the technical common law and the fact pleading requirements of the code regimes.[33]

II. THE EVOLVING STANDARDS OF FEDERAL PLEADING: FROM A "NOTICE" STANDARD TO A "PLAUSIBILITY" STANDARD

At the heart of pleading under the Federal Rules of Civil Procedure is Rule 8(a), which requires all complaints to contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[34] In *Conley v. Gibson*,[35] the Supreme Court interpreted Rule 8 to require that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[36] Affirmative defenses, on the

action were abolished, there was no change in the substantive rights of the parties."). *See also* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003) (noting that code pleading, like common law pleading, concerned itself with technicalities such as differentiating between facts and conclusions of law). A pleading was insufficient if it merely pled conclusions, and was devoid of any factual basis. *See* Wilcox, *supra* at 437–38 (explaining how under a code pleading regime, parties must only plead facts). In an abundance of caution, parties often would plead too many facts in an attempt to avoid a demurrer. *Id.* This "overpleading" led to high costs and delays and, thus, instead of providing the actual factual support for a claim or defense, a party was simply left with a myriad of facts, but little direction as to which actually applied. *Id.*

32 Wilcox, *supra* note 31, at 437. Despite these concerns, twenty-eight states currently maintain a code pleading system in one form or another. HEPBURN, *supra* note 25, at 92–113. Specifically, the states are: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming. *Id.*

33 *See* Sanjuan v. Am. Bd. of Psychiatry & Neurology Inc., 40 F.3d 247, 251 (7th Cir. 1994) (holding that the Federal Rules of Civil Procedure eliminated any need to plead facts in the complaint), *amended by* No. 94-1585, 1995 U.S. App. LEXIS 565 (7th Cir. Jan. 11, 1995). As code and common law pleading were often criticized for focusing on the technical requirements of the pleadings, rather than the substantive merits of the claim, the Rules were a notable response to these criticisms, and emphasized simple pleading with broad and easy access to discovery, which is much more adept at uncovering the facts and issues of a case. *See* JAMES & HAZARD, *supra* note 22, at 22 (noting that an important function under the Rules is its "simplicity and liberal amendment in pleading and motion practice"); Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMP. L. REV. 27, 52 (2001) ("One of the central reforms of the . . . Rules was to abandon the lengthy and technical requirements of earlier common law and code pleading. Because the Rules' drafters believed that those forms of pleading had been a primary cause of litigation delay, expense, inconvenience, and emphasized procedural games over the substantive merits of the disputes, they embraced notice pleading, with its bare bones and easy to satisfy requirements for stating a claim.").

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

35 Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

36 *Conley*, 355 U.S. at 47. Furthermore, according to *Conley*, complaints are sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in

other hand, are governed by Rule 8(c), which requires a defendant to "affirmatively state any avoidance or affirmative defense . . . ."[37] Under the pre-*Twombly* standards, affirmative defenses were held to the same *Conley* notice requirements as was the complaint.[38] Thus, raising an affirmative defense in the answer was meant simply to provide the opposing party with notice and allow that party to use the tools of discovery to further develop the basis of the defense.[39] Despite subsequent Supreme Court decisions affirming this notice standard,[40] in 2007, the

support of his claim which would entitle him to relief." *Id.* at 45–46. *See also* Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555, 568 n.64 (1996) (noting that *Conley* rejected a requirement that the pleadings contain all the necessary facts of the claim or defense). The purpose of this lax standard was to allow parties an easy means of access to discovery and thereby give the parties control over which facts and issues are uncovered. *See* Sherman J. Clark, *To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine*, 49 HASTINGS L.J. 565, 584 (1998) (explaining that under the *Conley* notice standard, parties did not have to concern themselves with setting forth facts and establishing their claims or defenses prior to discovery). Thus, contrary to common law and code pleading concerns about narrowing the issues for trial, federal pleading, prior to *Twombly* and *Iqbal*, was much more concerned with preventing a party from forgoing a legitimate claim on the doubt that that party lacked factual specificity at the time of filing the complaint. *Id.* Pleading under the Rules was not meant to trap or trick a party, but was only meant to act as a means to achieve an end to the litigation which was decided on the truth of the issues. *See* Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2207 (1989).

37 FED. R. CIV. P. 8(c)(1).

38 *See* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999). *See also* Instituto Nacional De Comercializacion Agricola (Indeca) v. Cont'l Il. Nat'l Bank and Trust Co., 576 F. Supp. 985, 988 (N.D. Ill. 1983) (holding that affirmative defenses are "subject to the general pleading requirements of Rules 8(a), 8(e) and 9(b), generally requiring only a short and plain statement of the facts but demanding particularity as to the circumstances constituting fraud and mistake").

39 *See* Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 189 (D.C. Cir. 2001). *See also* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 250 (5th ed. 2001) (explaining that Rule 8(c) is only meant to give the plaintiff fair notice of the affirmative defense planned to be asserted at trial).

40 *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002) (holding that, in an employment discrimination suit brought "under a notice pleading system," the facts establishing plaintiff's claim are not required to be pled); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (holding that a heightened pleading requirement in a civil rights action is inconsistent "with the liberal system of 'notice pleading' set up by the Federal Rules"). For a discussion on the relationship between *Swierkiewicz*, *Leatherman*, and *Conley*, see Scozzaro, *supra* note 28, at 432 ("In light of *Conley*, *Leatherman*, and now *Swierkiewicz*, a full scale amending of Rule 8 seems unlikely"). There are also a host of lower federal appellate courts affirming and applying this notice standard. *See, e.g.*, Miller v. Am. Heavy Lift Shipping, 231 F.3d 242, 247 (6th Cir. 2000) ("There can be no dispute that our modern rules of civil procedure are based on the concept of 'simplified notice pleading . . . .'" (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)) (internal quotations omitted)); C.H. v. Oliva, 226 F.3d 198, 206 (3d Cir. 2000) (holding that complaints only need to provide the defendant with "fair notice of . . . the plaintiff's claim . . . ." (quoting *Conley*, 355 U.S. at 47, *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))); Monahan v. N.Y.C. Dep't of Corr., 214 F.3d 275, 283 (2d Cir. 2000) (holding that under the Rules, the opposing party is only required to be provided with "notice of the claim or defense to be litigated . . . ." (citing *Conley*, 355 U.S. at 47–48,

Supreme Court interpreted Rule 8 to require a plausibility standard, not a notice requirement.[41] In *Twombly*, while ruling on the sufficiency of an antitrust complaint, the Court held that "[t]he need at the pleading stage for allegations plausibly suggesting . . . agreement reflects Rule 8(a)(2)'s threshold requirement that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'"[42] The Court cited concerns over the cost of litigation and reasoned that such a heightened pleading requirement is necessary to prevent excessive and unnecessarily expensive discovery in cases with no "reasonably founded hope that the discovery process will reveal relevant [information] . . . ."[43]

Following *Twombly*, there was uncertainty in lower federal courts as to the exact standard to apply to *all* complaints, not simply those involving an antitrust claim.[44] Then, in *Ashcroft v. Iqbal*,[45] the Court definitively closed the door on *Conley*, at least

abrogated by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

41 *See infra* notes 47–50 and accompanying text (describing *Twombly*'s and *Iqbal*'s plausibility requirement).

42 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

43 *Id.* at 559. This reasoning is a drastic departure from *Conley*, which concerned itself not with controlling the scope of discovery, but with providing litigants with a means to access discovery. *See Conley*, 355 U.S. at 47–48 (holding that the ease of access to discovery under the Rules is meant to provide parties with the ability to uncover the factual basis for the other's claims or defenses and it is because of this that the Rules adopt notice pleading), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Thus, *Conley* and its progeny believed that the pleadings should not be used for factual and issue development, but rather, that the litigants, with the tools of discovery, would do this themselves. *See* Taylor v. Belger Cartage Serv., Inc., 102 F.R.D. 172, 180–81 (W.D. Mo. 1984) (discussing that attorneys need the liberal discovery processes of the Rules "to explore and develop facts to support established or reasonable extensions of established legal theories"); James E. Brown, Note, *Civil Procedure—Standing and Direct Review in Appellate Court*—Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1322 (D.C. Cir. 1986), 60 TEMP. L.Q. 1045, 1056 n.97 (1987) (describing *Conley*'s intentions to use discovery, not pleadings, for factual development). However, with the *Twombly* and *Iqbal* decisions, the complaint will now be used as a form of factual development, in lieu of discovery. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (holding that a complaint must now contain some factual basis).

44 *See, e.g.*, TalentBurst, Inc. v. Collabera, Inc., 567 F. Supp. 2d 261, 269–70 (D. Mass. 2008) (applying *Twombly* to a tortious interference complaint); Dahl v. Bain Capital Partners, L.L.C., 589 F. Supp. 2d 112, 117 (D. Mass. 2008) (holding that *Twombly* only applies to "a claim under § 1 of the Sherman Act."). Considering some of the language used in the *Twombly* decision, it is difficult to fault the courts for their uncertainty. *See Twombly*, 550 U.S. at 556 ("In applying these general standards to a *§ 1 claim*, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." (emphasis added)); *Id.* at 554–55 ("This case presents the antecedent question of what a plaintiff must plead in order to state a *claim under § 1 of the Sherman Act*." (emphasis added)). *See also* Ettie Ward, *The After-Shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 906–10 (2008) (discussing the problems that lower federal courts will have to grapple with in a post-*Twombly* world).

45 *Iqbal*, 129 S. Ct. at 1944.

as applied to complaints.[46] In *Iqbal*, the Court clarified that "*Twombly* expounded the pleading standard for 'all civil actions . . . .'"[47] The Court further explained that Rule 8(a) requires complaints to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[48] This is a two-part analysis, which first requires the court to determine the statements that are factual support for the complaint, which are treated as true, and the statements that are merely conclusory allegations, which the court will not treat as true.[49] Having identified those statements that are afforded the benefit of truth, the reviewing court must determine whether the factual allegations state "a plausible claim for relief," which will require the "court to draw on its judicial experience and common sense."[50] Although the Court in *Iqbal* clarified that the heightened pleading requirement of *Twombly* applies to all complaints, the decision was silent as to whether this standard applies to affirmative defenses.[51] With this uncertainty, defendants and lower federal courts have been left to determine

46 *Id.* at 1953 (holding that *Twombly*'s plausibility standard applies to all complaints); *Twombly*, 550 U.S. at 563 (holding that *Conley*'s notice standard did not set forth the "minimum standard of adequate pleading" for complaints). As will be discussed though, many courts are still adhering to *Conley*'s notice pleading standard when assessing an affirmative defense. *See infra* Parts III(B)–(C)(i).

47 *Iqbal*, 129 S. Ct. at 1953 (quoting FED. R. CIV. P. 1).

48 *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570).

49 *Id.* Although legal conclusions may be necessary to frame a complaint, "they must be supported by factual allegations." *Id.* at 1950.

50 *Id.* Whatever precisely this plausibility standard will require of a district court judge is an issue beyond the scope of this Comment. This Comment does not focus on what the plausibility test actually *means*, but rather, what test should apply to an affirmative defense. For a discussion of what the test does or should mean, see Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 29 (2008) (describing the plausibility standard as one that will necessarily fluctuate depending on the type of case presented); Schwartz & Appel, *supra* note 20, at 1127 (arguing that a plausibility standard is not a concrete standard on which to assess a complaint); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010) (arguing that the plausibility standard is inconsistent with the Rules and prior Supreme Court decisions); Nicholas Tymoczko, Note, *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, 530 (2009) ("The plausibility standard is best understood as an inferential standard unrelated to notice that is used to assess the substantive sufficiency of a complaint.").

51 *See infra* notes 144–45 and accompanying text (noting the lack of language in *Twombly* and *Iqbal* that would indicate that those decisions were meant to apply to affirmative defenses). *See also* Manuel John Dominguez, William B. Lewis & Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of* Twombly *and* Iqbal *to Affirmative Defenses*, 84 FLA. B.J. 77, 77 (2010) ("*Twombly*'s application to affirmative defenses has not been widely discussed."); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 101 (2010) ("Somewhat uncertain, however, are Twombly's and Iqbal's applicability to denials and affirmative defenses."); Ryan Mize, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1260–61 (2010) (noting that courts after *Iqbal* have to determine what standard applies to affirmative defenses).

what must be pled in an affirmative defense. Without clear guidance though, the lower courts have split and are not applying one clear uniform standard, thus leaving the affirmative defense in a current state of disarray.[52]

III. IN LIGHT OF *TWOMBLY* AND *IQBAL*, DISTRICT COURTS ARE APPLYING A MULTITUDE OF STANDARDS TO AFFIRMATIVE DEFENSES

Although over sixty district courts have ruled on the applicability of *Twombly* and *Iqbal* to affirmative defenses,[53] as of this publication, no Court of Appeals has directly ruled on the issue.[54] District courts, however, have developed a multitude of standards to assess an affirmative defense in light of *Twombly* and *Iqbal*.[55] Due to this lack of uniformity, the majority of courts do not apply the plausibility standard. Rather, the courts' decisions can be parsed into one of the following categories: (1) district courts which apply *Twombly* and *Iqbal*'s plausibility and fact pleading requirements;[56] (2) district courts which reject *Twombly* and *Iqbal* because Rule 8(a) and 8(c) do not have

52 Despite the uncertain state of the affirmative defense, there is little scholarly work on the issue. Two articles argue for the extension of the plausibility standard to affirmative defenses. *See* Melanie A. Goff & Richard A. Bales, *A "Plausible" Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. (forthcoming Spring 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846918; Joseph Seiner, *Plausibility Beyond the Complaint*, 53 WM & MARY L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721062. One article argues that the plausibility standard should not be extended to affirmative defenses. *See* Anthony Gambol, *The* Twombly *Standard and Affirmative Defenses: What is Good for the Goose is Not Good for the Gander*, 79 FORD. L. REV. 2173, 2205 (2011). However, Gambol differs from this Comment as Gambol argues that the affirmative defense standard should not be modified at all, and should remain as the *Conley* notice standard. This Comment, however, argues that such a standard is unfair to the plaintiff, and thus, the affirmative defense pleading standard must be modified.

53 *See infra* Part III (describing the different approaches courts have taken in assessing the sufficiency of an affirmative defense pled in an answer).

54 *See* Falley v. Friends Univ., No. 10-1423-CM, 2011 WL 1429956, at *1 (D. Kan. Apr. 14, 2011) (noting that no appellate court has decided the issue of whether the pleading standards of *Twombly* and *Iqbal* apply to affirmative defenses); FTC v. Hope Now Modifications, LLC, No. 09-1204, 2011 U.S. Dist LEXIS 24657, at *5 (D.N.J. Mar. 10, 2011) ("[T]he Court's research confirms, that no Federal Circuit Court has yet considered whether to extend the pleading requirements of *Twombly* and *Iqbal* to affirmative defenses."); Racick v. Dominion Law Assocs., No. 5:10-CV-66-F, 2010 U.S. Dist LEXIS 107105, at *10 (E.D.N.C. Oct. 6, 2010) ("Neither the Fourth Circuit Court of Appeals, nor any other circuit court of appeals, has addressed whether *Twombly* and *Iqbal* should be interpreted as applying to affirmative defenses."); Del-Nat Tire Corp. v. A To Z Tire & Battery, Inc., No. 2:09-cv-02457-JPM-tmp., 2009 WL 4884435, at *2 (W.D. Tenn. Dec. 8, 2009) ("Neither the Sixth Circuit Court of Appeals nor any of the other Court of Appeals have addressed this issue . . . .").

55 *See infra* Part III.

56 *See infra* Part III(A) (describing various courts' applications of the plausibility standard to affirmative defenses).

identical language;[57] and (3) district courts which do not explicitly accept or reject *Twombly* and *Iqbal*, but rather adopt a standard inconsistent with those decisions.[58]

A. District Courts That Explicitly Adopt *Twombly* and *Iqbal* Are Holding Affirmative Defenses to a Plausibility Standard

A number of district courts interpreted *Twombly* and *Iqbal* as announcing a universal pleading standard and, thus, apply the two-part plausibility standard to affirmative defenses.

In *Grovernor House, L.L.C., v. E.I. Du Pont De Nemours and Co.*,[59] the plaintiff filed a motion to strike an affirmative defense pled by the defendant which simply alleged: "[Plaintiff] assumed the risk associated with the design of the canopy."[60] In holding that *Twombly*'s and *Iqbal*'s plausibility standard applies to affirmative defenses, the court reasoned that affirmative defenses, like complaints, are subject to Rule 8(a) and its pleading requirements.[61] Thus, the court was adopting the reasoning of pre-*Twombly* courts that affirmative defenses and complaints are subject to the same requirements,[62] despite the fact that different rules govern each pleading.[63] In assessing the particular affirmative defense at issue in this case, the court granted the motion to strike because the defense was a "bare legal conclusion."[64] By failing to plead any facts, the pleading failed "to suggest that a defense is plausible on its face."[65]

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57 *See infra* Part III(B) (describing how certain courts have rejected the *Twombly* and *Iqbal* requirements as the Rules do not set forth the same standard for an affirmative defense as they do for a complaint).

58 *See infra* Part III(C). This category can be further sub-divided into courts which adopt: (i) a notice pleading standard; (ii) a fact pleading standard; or (iii) a standard which makes the factual particularity required depend on the defense pled. For a discussion arguing that the majority of district courts are adopting a plausibility standard, while a minority are rejecting the plausibility standard, or applying a hybrid of both, see Dominguez et al., *supra* note 51, at 77.

59 Grovernor House, L.L.C., v. E.I. Du Pont De Nemours and Co., No. 09-21698-Civ-COOKE/BANDSTRA, 2010 U.S. Dist LEXIS 91905 (S.D. Fla. Aug. 12, 2010).

60 *Id.* at *11.

61 *Id.* at *4.

62 *See* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999).

63 *Compare* 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 . . . ."), *with* FED. R. CIV. P. 8(c)(1) ("In responding to a pleading, a party must *affirmatively state* any avoidance or affirmative defense . . . ." (emphasis added)).

64 *Grovernor House*, *L.L.C.*, 2010 U.S. Dist LEXIS 91905 at *11.

65 *Id.* at *12. This is certainly a *Twombly* and *Iqbal* analysis as it required the court to "draw on its judicial experience and common sense" in making its plausibility determination. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). Furthermore, this analysis mirrors one that a judge would perform on a Rule 12(b)(6) motion to dismiss a complaint. *See, e.g.*, Wilson v. Price, 624 F.3d 389, 391–92 (7th Cir. 2010) (holding that when faced with a 12(b)(6) motion to dismiss, if the complaint does not state a plausible claim for relief, "the plaintiff pleads itself out of court" (quoting Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008))); Hinton v. Dennis, 362 F. App'x 904, 906 (10th Cir.

Furthermore, in *Safeco Insurance Co. of America v. O'Hara Corp.*,[66] the court expounded on some of the policy reasons behind adopting the *Twombly* and *Iqbal* requirements for affirmative defenses.[67] In applying the *Twombly* and *Iqbal* standard,[68] the court reasoned that by simply allowing the defendant to list any affirmative defense without providing factual support, the defendant was creating "unnecessary work" for the court and the plaintiff.[69] As such defenses require discovery, allowing any legal conclusion to be sufficient will require every plaintiff to determine "which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution."[70]

Perhaps the most illustrative example of this concern over discovery issues occurred in the following decision. In *Palmer v. Oakland Farms, Inc.*,[71] the defendant pled *eighteen* affirmative defenses, and the court struck eleven for being conclusory.[72] In applying the *Twombly* and *Iqbal* rule, the court reasoned that discovery should not be used to determine the legitimacy of a defense, but instead should be used to uncover additional facts supporting the defense.[73]

A number of cases expressed unease in having separate pleading standards for plaintiffs and defendants as it would not only be unfair, but would make it difficult for the court to determine the sufficiency of an affirmative defense on a motion to strike.[74] In *Castillo v. Roche Laboratories, Inc.*,[75] the court struck

2010) (holding that when ruling on a 12(b)(6) motion to dismiss, the complaint must contain "specific factual allegations that support a plausible legal claim for relief"); Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007) (holding that when faced with a 12(b)(6) motion to dismiss, the complaint must contain "specific allegations" supporting a plausible claim for relief (quoting Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007))), *appeal dismissed*, 500 F.3d 1214 (10th Cir. 2007); Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) ("[T]he mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.").

66 Safeco Ins. Co. of Am. v. O'Hara Corp., No. 08-CV-10545, 2008 WL 2558015 (E.D. Mich. June 25, 2008).

67 *Id.* at *1.

68 *Id.* (affirmative defense "must state 'enough facts to state a claim to relief that is plausible on its face'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007))).

69 *Id.*

70 *Id.*

71 Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179 (W.D. Va. June 24, 2010).

72 *Id.* at *1, *6.

73 *Id.* at *5. Furthermore, in *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, the defendant pled *twenty-four* affirmative defenses consisting largely of "conclusory statements." 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010). The court held these to the *Twombly* and *Iqbal* standard and struck thirteen of them. *Id.* at 1173.

74 *See* United States v. Quadrini, No. 2:07-CV-132227, 2007 WL 4303213, at *4 (E.D.

the defendant's affirmative defense for failing to meet the plausibility requirements of *Twombly* and *Iqbal*.[76] One defense simply stated: "Plaintiff's [c]omplaint fails, in whole or in part, to state a claim upon which relief may be granted,"[77] and was struck for being a "bare-bones, conclusory statement[] without any factual allegations."[78] The court dismissed the argument that it is unfair to hold a defendant, who has only days to answer, to the same standard as a plaintiff, who may have prepared his or her case for years.[79] As "boilerplate defenses . . . require significant unnecessary discovery,"[80] the court has to hold a high amount of pretrial conferences and respond to ill-founded summary judgment motions.[81] With a basis of the underlying facts needed to support the affirmative defenses, the court has much greater control over the discovery process.[82]

Mich. Dec. 6, 2007). *See also* Racick v. Dominion Law Assocs., 270 F.R.D. 228, 234 (E.D.N.C. 2010) ("'[T]he considerations of fairness, common sense and litigation efficiency' underlying *Twombly* and *Iqbal*' mandate that the same pleading requirements apply equally to complaints and affirmative defenses." (quoting Francisco v. Verizon S. Inc., No. 3:09cv737, 2010 U.S. Dist LEXIS 77083, at *7 (E.D. Va. July 29, 2010))); Topline Solutions, Inc. v. Sandler Sys., Inc., No. L-09-3102, 2010 WL 2998836, at *1 (D. Md. July 27, 2010) ("[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."); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) ("It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses.").

75 Castillo v. Roche Labs., No. 10-20876-CIV, 2010 WL 3027726 (S.D. Fla. Aug. 2, 2010).

76 *Id.* at *1.

77 *Id.*

78 *Id.* at *3 (emphasis omitted).

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* For courts employing similar reasoning, see HCRI TRS Acquirer, L.L.C. v. Iwer, III, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) ("Boilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints."); Francisco v. Verizon S., Inc., No. 3:09cv737, 2010 WL 2990159, at *7 (E.D. Va. July 29, 2010) ("An even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery."); Bradshaw v. Hilco Receivables, L.L.C., 725 F. Supp. 2d 532, 536 (D. Md. 2010) ("The application of the *Twombly* and *Iqbal* standard to defenses will . . . discourage defendants from asserting boilerplate affirmative defenses that are based upon nothing more than 'some conjecture that [they] may somehow apply.'" (quoting Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (2009))); Carretta v. May Trucking Co., No. 09-158-MJR, 2010 WL 1139099, at *1 (S.D. Ill. Mar. 19, 2010) (holding that affirmative defenses "must be 'plausible,' raising 'a reasonable expectation that discovery will reveal evidence' supporting the allegations" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007))); Burget v. Capital W. Sec., Inc., No. CIV-09-1015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009) ("An even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery.").

The courts adopting this standard are focused on judicial economy through narrowing the scope of discovery at the pleading phase.[83] This clearly mirrors the Court's concerns in *Twombly* and *Iqbal* as applied to a plaintiff, because to have to sort through a host of affirmative defenses to determine which actually have validity is costly and burdensome to a plaintiff.[84]

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83 Instead of allowing parties to simply list affirmative defenses, as was allowed prior to *Twombly*, these decisions in an effort to narrow the scope of discovery are requiring enough factual support to state a plausible affirmative defense. *See, e.g.*, Teirstein v. AGA Med. Corp., No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Mar. 16, 2009) (noting that "in some cases, merely pleading the name of the affirmative defense . . . may be sufficient"). However, as will be discussed, this standard has not been uniformly accepted.

84 *See* Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. June 24, 2010) ("[A] plaintiff [should] not be left to the formal discovery process to find-out whether the defense exists [but should], instead, use the discovery process for its intended purpose of ascertaining the additional facts which support a well-pleaded claim or defense."). In addition to *Palmer*, for additional district court decisions which hold that *Twombly* and *Iqbal* apply to affirmative defenses, see Groupon Inc. v. MobGob L.L.C., No. 10 C 7456, 2011 WL 2111986, at *2 (N.D. Ill. May 25, 2011) ("[D]espite potentially valid policy arguments for holding affirmative defenses to a lower pleading standard than complaints . . . the Court must apply the same standards, including those expressed recently by the Supreme Court in *Twombly* and *Ashcroft v. Iqbal* . . . ." (citations omitted)); Sanders v. Cont'l Collection Agency, Ltd., No. 11-cv-00448-CMA-MJW, 2011 WL 1706911, at *1 (D. Co. May 5, 2011) (holding that *Iqbal* and *Twombly* apply to affirmative defenses); Shaw v. Prudential Ins. Co. of America, No. 10-03355-CV-W-DGK, 2011 WL 1050004, at *2 (W.D. Mo. Mar. 21, 2011) (holding *Iqbal* and *Twombly* apply to affirmative defenses); United States S.E.C. v. Sachdeva, No. 10-C-747, 2011 WL 933967, at *1 (E.D. Wis. Mar. 16, 2011) (holding *Twombly* and *Iqbal* apply to affirmative defenses); Lucas v. Jerusalem Café, LLC, No. 4:10-cv-00582-DGK, 2011 WL 1364075 (W.D. Mo. Apr. 11, 2011) (holding that *Iqbal*'s and *Twombly*'s plausibility standard applies to affirmative defenses); School of the Ozarks, Inc. v. Greatest Generations Found., No. 10-3499-CV-S-ODS, 2011 WL 1337406, at *1 (W.D. Mo. Apr. 7, 2011) (applying the plausibility standard to affirmative defenses); U.S. v. Brink, No. C-10-243, 2011 WL 835828, at *3 (S.D. Tex. Mar. 4, 2011) (holding that *Twombly* and *Iqbal* apply to affirmative defenses); Burns v. Dodeka, L.L.C., No. 4:09-CV-19-BJ, 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) (striking affirmative defenses that "are wholly conclusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Bell Atlantic Corp. v. Twombly* . . . "); OSF Healthcare Sys. v. Banno, No. 08-1096, 2010 WL 431963, at *2 (C.D. Ill. Jan. 29, 2010) (holding that *Twombly* and *Iqbal* "dealt with whether a complaint's allegations satisfied pleading requirements, but their statements seem equally applicable to affirmative defenses, given that affirmative defenses are subject to those same pleading requirements"); AET Rail Grp., L.L.C. v. Siemens Transp. Sys., Inc., No. 08-CV-6442, 2009 WL 5216960, at *4 (W.D.N.Y. Dec. 30, 2009) ("*Twombly* does not require that the complaint (or here, the Answer with affirmative defenses) provide 'detailed factual allegations,' . . . however, it must 'amplify a claim with some factual allegations . . . to render the claim plausible.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (quoting Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009))); Premium Standard Farms, L.L.C. v. Travelers Prop. & Cas. Co. of Am., No. 09-0699-CV-W-GAF, 2009 WL 4907063, at *1 (W.D. Mo. Dec. 14, 2009) (holding defendant "has stated plausible affirmative defenses . . . "); Bank of Montreal v. SK Foods, L.L.C., No. 09 C 3479, 2009 WL 3824668, at *3 (N.D. Ill. Nov. 13, 2009) (striking affirmative defenses for being implausible); Tracy v. NVR, Inc., No. 04-CV-6541L, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) ("[T]he *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense under Rule 12(f)."); *In re* Mission Bay Ski & Bike, Inc., Nos. 07 B 20870, 08 A 55, 2009 WL 2913438, at *6 (Bankr. N.D. Ill. Sept. 9, 2009) ("Affirmative

B. District Courts That Explicitly Reject *Twombly*'s and *Iqbal*'s Plausibility Standard Are Applying *Conley*'s Notice Pleading Standard

Focusing on the textual differences between Rule 8(a) and Rule 8(c), the following decisions explicitly rejected the *Twombly* and *Iqbal* standard.

In *FTC v. Hope Now Modifications*, the court rejected an argument that an affirmative defense must be pled with plausible support because "the Federal Rules of Civil Procedure distinguish the level of pleading required between a plaintiff asserting a claim for relief under Rule 8(a) and a defendant asserting an affirmative defense under Rule 8(c)."[85] When a defendant pleads an affirmative defense, the defendant does not seek a "claim for relief" within Rule 8(a).[86] Thus, the simple Rule 8(c) standard should apply, and a defendant need only "state" the affirmative defense.[87]

In *McLemore v. Regions Bank*,[88] the court allowed an affirmative defense to stand despite the fact that it only stated that: "Plaintiffs' fault is comparatively greater than any fault of [defendant's]."[89] The court held that the *Twombly* and *Iqbal* decisions did not affect the pleading standard for affirmative defenses.[90] The court reasoned that the Supreme Court in *Twombly* and *Iqbal* was not interpreting Rule 8(c), but rather was only interpreting Rule 8(a)(2)'s requirement that a complaint be stated with "a short and plain statement of the claim showing that the pleader is entitled to relief."[91] Although Rule 8(b) and Rule 8(a) both require an answer or a complaint to be stated in "short and plain terms," Rule 8(c) is the applicable standard

defenses are pleadings and so are subject to all pleading requirements under the Federal Rules. . . . [Thus,] [t]he facts alleged must be sufficient not only to give notice of the nature of the claim but to show the claim 'is plausible on its face.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009))); Magicon, L.L.C. v. Weatherford Int'l, Inc., Nos. 4:08-cv-03639, 4:08-cv-03636, 2009 U.S. Dist LEXIS 126500, at *6 (S.D. Tex. Aug. 10, 2009) (holding affirmative defenses "must contain sufficient factual matter, accepted as true" to state a plausible defense); JPMorgan Chase Bank, N.A. v. Mal Corp., No. 07 C 2034, 2009 U.S. Dist LEXIS 23540, at *5 (N.D. Ill. Mar. 26, 2009) ("[A]n affirmative defense need only articulate 'a plausible set of underlying facts.'" (quoting SEG Liquidation Co., L.L.C. v. Stevenson, No. 07 C 3456, 2008 WL 623626, at *2 (N.D. Ill. Mar. 6, 2008))).

85 FTC v. Hope Now Modifications, L.L.C., No. 09-1204 (JBS/JS), 2011 WL 883202, at *3 (D.N.J. Mar. 10, 2011).

86 *Id.*

87 *Id.* at *2.

88 McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092 (M.D. Tenn. Mar. 18, 2010).

89 *Id.* at *12.

90 *Id.* at *13.

91 *Id.* (quoting FED. R. CIV. P. 8(a)(2) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))).

when assessing an affirmative defense, not Rule 8(b).[92] Thus, the above-pled affirmative defense was sufficient because it only needs to be pled in "'general terms.'"[93]

Furthermore, in *Charleswell v. Chase Manhattan Bank, N.A.*,[94] the court upheld an affirmative defense, which only alleged that "Plaintiffs' claims are barred in whole or in part by Plaintiffs' contributory and/or comparative negligence."[95] As in *McLemore*, the court reasoned that *Twombly* was interpreting the word "showing" in Rule 8(a), and under Rule 8(c) the defendant does not have to "show" anything.[96] Thus, the plausibility standard does not apply to a defendant's affirmative defenses pled under Rule 8(c).[97]

A number of courts were troubled by the inherent unfairness in requiring a defendant to plead enough facts to prove an affirmative defense plausible on its face.[98] Specifically, in *Holdbrook v. SAIA Motor Freight Line, L.L.C.*,[99] the court upheld an affirmative defense which merely alleged: "Plaintiff has been the cause of his own damages . . . ."[100] The court reasoned that affirmative defenses are not held to a heightened pleading standard as it is entirely reasonable to hold a plaintiff who may

92 *Id.* This decision is focusing not on the underlying policies of the *Twombly* and *Iqbal* decisions, but rather on a simple textual analysis of the Rules. Strictly speaking, the court is correct in this regard as the text of Rule 8(a) and 8(c) clearly differ. *Compare* 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 . . . ."), *with* FED. R. CIV. P. 8(c)(1) ("In responding to a pleading, a party must *affirmatively state* any avoidance or affirmative defense." (emphasis added)). In applying the same pre-*Twombly* standard to affirmative defenses though, the court is taking an approach inconsistent with the new direction of the Supreme Court. As will be discussed further below, this Comment's proposed standard takes into account the textual differences between Rule 8(a) and 8(c), as well as the underlying policies of the *Twombly* and *Iqbal* decisions. In so doing, the correct medium is attained, and the concerns of these district court decisions and those of the *Twombly* and *Iqbal* decisions are effectively harmonized.

93 *McLemore*, 2010 WL 1010092, at *13 (quoting Lawrence v. Chabot, 182 F. App'x 442, 456 (6th Cir. 2006), *aff'd sub nom.* Lawrence v. Welch, 531 F.3d 364 (6th Cir. 2008)).

94 Charleswell v. Chase Manhattan Bank, N.A, No. 01-119, 2009 WL 4981730, at *4 (D. Va. Dec. 8, 2009).

95 *Id.* at *6.

96 *Id.* at *4. Similarly, in *Henson v. Supplemental Health Care Staffing Specialists*, the court upheld an affirmative defense which only alleged: "[t]he doctrines of waiver and/or estoppel preclude the Plaintiff's right to recover in whole or in part." No. CIV-09-0397-HE, 2009 U.S. Dist LEXIS 127642, at *2 (W.D. Okla. July 30, 2009). When the complaint and the defense are examined together, the defense provides the plaintiff with enough to be informed "of the nature of the defense . . . ." *Id.* at *4.

97 *Chase Manhattan Bank*, 2009 WL 4981730, at *4. *See also* Romantine v. CH2M Hill Eng'rs, Inc., No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009) ("This court does not believe that *Twombly* is appropriately applied to either affirmative defenses under 8(c), or general defenses under Rule 8(b) . . . .").

98 *See infra* notes 99–101 and accompanying text.

99 Holdbrook v. SAIA Motor Freight Line, L.L.C., No. 09-cv-02870-LTB-BNB, 2010 WL 865380 (D. Colo. Mar. 8, 2010).

100 *Id.* at *1.

have years to investigate his or her claims to a higher standard than a defendant who has only twenty-one days to respond to the complaint.[101]

Thus, these decisions explicitly rejected the policy rationales underlying the *Twombly* and *Iqbal* decisions.[102] Instead, they focused on the textual differences between Rule 8(a) and 8(c), as well as fairness concerns, and held that the plausibility standard is not applicable to affirmative defenses.[103]

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101 *Id.* at *2. Consider also, the court in *Baum v. Faith Technologies*, which held that it is unfair to "expect defendants to be aware of all the necessary facts" required to make up an affirmative defense, as the defendant has not yet had an opportunity to conduct discovery. No.10-CV-0144-CVE-TLW, 2010 WL 2365451, at *3 (N.D. Okla. June 9, 2010). Besides, when taken together, a complaint and an answer provide a plaintiff with sufficient notice of the defense. *Id.* Thus, a court should look at both the answer and the complaint because "[i]t would be absurd to require a defendant to re-plead every fact relevant to an affirmative defense." *Id.*

102 *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

103 Thus, at least to these decisions, *Conley* is not entirely irrelevant as a pleading standard; rather, it only applies to an affirmative defense. Therefore, *Conley* is truly not "bad law" as these decisions are clearly adopting this standard. If *Conley* is to somehow remain applicable after the *Twombly* and *Iqbal* decisions, it would most likely have to be through an affirmative defense. For additional decisions which reject the plausibility standard, see Bowers v. Mortgage Electronic Registration Systems, No. 10–4141–JTM–DJW, 2011 WL 2149423, at *4 (D. Kan. June 1, 2011) (holding that affirmative defenses "are not subject to the rationale and holdings of *Iqbal* and *Twombly*."); Schlief v. Nu-Source, Inc., No. 10-4477 (DWF/SER), 2011 WL 1560672, at *9 (D. Minn. Apr. 25, 2011) ("The Court concludes that the pleading standard set forth in *Twombly* and *Iqbal* does not apply to affirmative defenses."); Falley v. Friends University, No. 10-1423-CM, 2011 WL 1429956, at *4 (D. Kan. Apr. 14, 2011) ("[T]he pleading standards of *Twombly* and *Iqbal* should be limited to complaints—not extended to affirmative defenses."); Tyco Fire Products LP v. Victaulic Co., No.10-4645, 2011 WL 1399847, at *1 (E.D. Pa. Apr. 12, 2011) ("*Twombly* and *Iqbal* do not apply to affirmative defenses."); *In re* Washington Mutual, Inc. Securities, Derivative & ERISA Litigation, No. 08-md-1919 MJP, 2011 WL 1158387, at *1 (W.D. Wa. Mar. 25, 2011) (holding *Twombly* and *Iqbal* do not apply to affirmative defenses); Jeeper's of Auburn, Inc. v. KWJB Enterprise, L.L.C., No. 10-13682, 2011 WL 1899195, at *2 (E.D. Mich. Mar. 16, 2011) (holding that since *Iqbal* and *Twombly* do not expressly apply to affirmative defenses, then they should not be extended as such); Sewell v. Allied Interstate, Inc., No. 3:10-CV-113, 2011 WL 32209, at *7 (E.D. Tenn. Jan. 5, 2011) (holding that since *Twombly* and *Iqbal* do not expressly apply to affirmative defenses, then they should not be extended as such); Ameristar Fence Products., Inc. v. Phoenix Fence Co., No.CV-10-299-PHX-DGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010) ("[T]he pleading standards enunciated in *Twombly* and *Ashcroft v. Iqbal* . . . have no application to affirmative defenses pled under Rule 8(c)."); Jackson v. City of Centreville, 269 F.R.D. 661, 662 (N.D. Ala. 2010) ("The Supreme Court desired to prevent plaintiffs with groundless claims from wasting judicial and other legal resources . . . . Neither *Twombly* nor *Iqbal* address Rules 8(b)(1)(A) and 8(c) which pertain to affirmative defenses." (citations omitted)); First National Insurance Co. of America v. Camps Services, Ltd., No.08-cv-12805, 2009 U.S. Dist LEXIS 149, at *5 (E.D. Mich. Jan. 5, 2009) ("*Twombly*'s analysis of the 'short and plain statement' requirement of *Rule 8(a)* is inapplicable to this motion under *Rule 8(c)*."); Westbrook v. Paragon Systems, Inc., No. 07-0714-WS-C, 2007 U.S. Dist LEXIS 88490, at *2 (S.D. Ala. Nov. 29, 2007) ("*Twombly* was decided under *Rule 8(a)*, . . . and plaintiff has identified no case extending it to *Rule 8(b)* or *(c)*." (citation omitted)). In addition to the above, a number of decisions implicitly rejected *Twombly*'s and *Iqbal*'s pleading requirements. *See* Chatelaine, Inc. v. Twin Modal, Inc., No. 3:10-CV-676, 2010 U.S. Dist LEXIS 89348, at *5 (N.D. Tex. Aug. 27,

C. District Courts That Do Not Explicitly Adopt or Reject *Twombly* and *Iqbal* Are Applying Standards Inconsistent with Those Decisions

A number of district courts have explicitly neglected to decide the *Twombly* and *Iqbal* issue, but rather simply adopt a different standard or revert to *Conley*'s notice standard. Thus, these decisions, although not explicit, are rejecting the *Twombly* and *Iqbal* rule as they are applying standards inconsistent with the plausibility test.

i. District Courts That Apply a Notice Pleading Standard

These decisions simply cite *Twombly* or *Iqbal* and then conclude that the proper standard is one of only providing the plaintiff with "fair notice" of the defense, not of providing the plaintiff with any factual basis for the defense.[104]

In *BJ Energy, L.L.C. v. PJM Interconnection, L.L.C.*,[105] the court declined to strike an affirmative defense which simply stated: "[Plaintiff] has failed to mitigate any damages it purports to have suffered."[106] Despite failing to allege any factual basis for why or how the plaintiff failed to mitigate damages, "fair notice of the nature of the defense" is all that is required as the discovery process, not the pleadings, are the proper mechanism in which to uncover the factual basis for the defenses.[107] This is

2010) (holding affirmative defenses were sufficiently pled and that "any facts supporting these [affirmative defenses] can and should be fleshed out through discovery"); Pezzuto v. Premier Hosp. Mgmt., Inc., No. 10-CV-068-JHP, 2010 WL 2788163, at *1 (E.D. Okla. July 14, 2010) (holding that affirmative defenses should be read in conjunction with the complaint because "an answer . . . will contain fewer factual assertions than a complaint and still be sufficient"); Kaufmann v. Prudential Ins. Co., No.09-10239-RGS, 2009 WL 2449872, at *1 n.1 (D. Ma. Aug. 6, 2009) (holding that Rule 8(c)(1) defenses need only be pled as *listed* because the "plaintiff, as the instigator of the litigation, has the initial good faith burden to investigate and verify the validity of her claims").

104 *See, e.g.*, Local 165 v. DEM/EX Grp. Inc., No. 09-1356, 2010 WL 971811, at *2 (C.D. Ill. Mar. 11, 2010) ("[T]here must be enough to give the opposing party notice of the basis for the claim or defense." (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

105 BJ Energy, L.L.C. v. PJM Interconnection, L.L.C., Nos. 08-3649, 09-2864, 2010 WL 1491900 (E.D. Pa. Apr. 13, 2010).

106 *Id.* at *4.

107 *Id.* at *2, *5. A true *Twombly* and *Iqbal* analysis would most certainly have struck this. For starters, there are literally no factual allegations in the defense. *See Iqbal*, 129 S. Ct. at 1949 ("[A] complaint *must* contain sufficient *factual* matter, accepted as true, to 'state claim to relief that is plausible on its face.'" (emphasis added) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))). A plaintiff trying to focus the scope of discovery would have to broadly determine the defendant's reasons, if any, for asserting the defense. This would require ascertaining what the defendant thinks, which necessarily can be a wide range of topics. *See* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) ("Since discovery extends under Rule 26 to anything 'relevant to the subject matter,' relevance must be ascertained by some other mechanism. The only effective alternative is discovery itself."). This will only protract

clearly antithetical to *Twombly*'s and *Iqbal*'s intentions of denying a party access to discovery by merely pleading legal conclusions, which may provide notice of the claim, but are devoid of any factual basis.[108] Thus, this decision and others cited, revert to notice pleading, a much lower bar for a defendant to surpass, which accomplishes little in reducing the costs of discovery.[109]

litigation and add to its costs. *See* Andrew P. Morriss & Jason Korosec, *Private Dispute Resolution in the Card Context: Structure, Reputation, and Incentives*, 1 J.L. ECON. & POL'Y 393, 403 (2005) (explaining that under a notice pleading regime limitations on the parties' abilities to conduct lengthy discovery is not very limited as the parties must attempt to determine what can be relevant to the vaguely stated claim or defense); Ettie Ward, *Will the Proposed Amendments to the Federal Rules of Civil Procedure Improve the Pretrial Process?*, 72 N.Y. ST. B.A. J. 18, 24 (2000) (discussing the effect of depositions on discovery costs); Michael G. Dailey, Comment, *Preemption of State Court Class Action Claims for Securities Fraud: Should Federal Law Trump?*, 67 U. CIN. L. REV. 587, 595 (1998–1999) (explaining how the expensive costs of discovery can cause a defendant to settle instead of attempting to bear these costs).

108 *See Iqbal*, 129 S. Ct. at 1950 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before even reaching [pretrial] proceedings."). For the remaining decisions which apply this standard, see Local 165 v. DEM/EX Grp. Inc., No. 09-1356, 2010 WL 971811, at *2 (C.D. Ill. Mar. 11, 2010) ("[T]here must be enough to give the opposing party notice of the basis for the claim or defense." (citing *Twombly*, 550 U.S. at 555)); Tara Prods., Inc. v. Hollywood Gadgets, Inc., No. 09-61436-CIV-COHN/SELTZER, 2009 U.S. Dist LEXIS 121709, at *3 (S.D. Fla. Dec. 11, 2009) ("Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must give the plaintiff 'fair notice' of the nature of the defense and the grounds upon which it rests."); Darnell v. Hoelscher, Inc., No. 09-204-JPG, 2009 WL 4675884, at *1 (S.D. Ill. Dec. 4, 2009) ("[T]he [defense] need only give fair notice of what the claim is and the grounds upon which it rests." (citing *Twombly*, 550 U.S. at 555)); CTF Dev., Inc. v. Penta Hospitality, L.L.C., No. C 09-02429 WHA, 2009 WL 3517617, at *8 (N.D. Cal. Oct. 26, 2009) (holding that *Iqbal* only requires the defendant to provide the plaintiff with "fair notice" of the affirmative defense); FDIC v. Bristol Home Mortg. Lending, L.L.C., No. 08-81536-CIV, 2009 WL 2488302, at *2 (S.D. Fla. Aug. 13, 2009) ("Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must give the plaintiff 'fair notice' of the nature of the defense and the grounds upon which it rests."); New York v. Micron Tech., Inc., No. C 06-6436, 2009 U.S. Dist LEXIS 1624, at *12 (N.D. Cal. Jan. 5, 2009) ("The 'fair notice' pleading requirement is met if the defendant 'sufficiently articulated the defense so that the plaintiff was not a victim of unfair surprise.'" (quoting Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999))); Greenheck Fan Corp. v. Loren Cook Co., No. 08-cv-335-jps, 2008 WL 4443805, at *1 (W.D. Wis. Sept. 25, 2008) ("The issue is . . . whether [the] plaintiff has been placed on notice of defendant's grounds for raising the defense.").

109 *See* Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1804 (2002) (discussing how discovery under notice pleading "can entail pretrial practice out of any sensible relationship to the stakes or needs of relatively simple litigation"); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 639 (1989) (describing how notice pleading often entails discovery costs which are ultimately irrelevant to the merits of the case); Michael F. Urbanski & James R. Creekmore, *Antitrust and Trade Regulation Law*, 32 U. RICH. L. REV. 973, 986 (1998) (discussing how discovery under a notice regime "can often be extensive, expensive and burdensome" (quoting DEE-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 982 F. Supp. 1138, 1150 (E.D. Va. 1997)).

ii. District Courts That Require an Adequate Factual Basis or Factual Particularity to Be Pled Are Not Adopting the Plausibility Standard

These decisions were fractured from Part III(A) because the cases in this category do not apply both the factual *and* plausibility elements of the *Twombly* and *Iqbal* decisions.[110] Rather, these cases require facts to be pled, but not necessarily enough to give rise to a defense "that is plausible on its face."[111] Notably, in *Holtzman v. B/E Aerospace, Inc.*,[112] the court held that nine of the defendant's seventeen affirmative defenses pled "insufficient allegations of fact."[113] Citing *Twombly*, the court reasoned that factual support must be pled in an affirmative defense because a plaintiff should not simply have to guess as to what the basis is for the defendant's assertions.[114] However, the court stopped short of requiring the defense to be plausible, but rather only required that factual support be provided.[115]

Thus, this decision and others cited were not assessing the sufficiency of factual support provided under a plausibility standard, but were simply assessing whether or not *any* facts were pled.[116]

110 *Iqbal*, 129 S. Ct. at 1949 ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)).

111 *Id. See also infra* notes 112–12 and accompanying text.

112 Holtzman v. B/E Aerospace, Inc, No. 07-80551-CIV, 2008 WL 2225668 (S.D. Fla. May 29, 2008).

113 *Id.* at *2.

114 *Id.* (quoting Stoner v. Walsh, 772 F. Supp. 790, 800 (S.D.N.Y. 1991)).

115 *Id.*

116 Therefore, this did not encompass the two part plausibility requirement, but rather only required some factual basis. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). For the remaining decisions applying this standard, see Luvata Buffalo, Inc. v. Lombard General Insurance Co. of Canada, No. 08-CV-00034(A)(M), 2010 WL 826583, at *8 (W.D.N.Y. Mar. 4, 2010) ("Affirmative defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy." (quoting Shechter v. Comptroller of N.Y.C., 79 F.3d 265, 270 (2d Cir. 1996))); Cosmetic Warriors, Ltd. v. Lush Boutique, L.L.C., No. 09-6381, 2010 U.S. Dist LEXIS 16392, at *4 (E.D. La. Feb. 1, 2010) ("[A] defendant must plead an affirmative defense with . . . factual particularity."); IndyMac Venture, L.L.C. v. Silver Creek Crossing, L.L.C., C09-1069Z, 2010 U.S. Dist LEXIS 34275, at *11 (W.D. Wash. Mar. 18, 2010) ("Courts have stricken defenses that were unsupported by facts entitling defendants to relief . . . and when defenses rely on facts that, even if true, would not provide a valid defense to the claims asserted" (citations omitted)); EEOC v. Hibbing Taconite Co., 266 F.R.D 260, 268 (D. Minn. 2009) ("[T]he defendant [must] plead an adequate factual basis for affirmative defenses, where the basis is not apparent by the defense's bare assertion."); Solis v. Zenith Capital, L.L.C., No. C 08-4854 PJH, 2009 U.S. Dist LEXIS 43350, at *6 (N.D. Cal. May 8, 2009) ("Where an affirmative defense simply states a legal conclusion or theory without the support of facts explaining how it connects to the instant case, it is insufficient and will not withstand a motion to strike."); Stoffels v. SBC Communications, No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008) (holding that affirmative defenses must "provide the grounds for entitlement to relief and requires 'more than labels and conclusions'" and must be pled with "factual particularity" (quoting Bell Atl.

iii. One District Court Applied Both the Plausibility Standard and the Fair Notice Standard to Affirmative Defenses

The parties in *Voeks v. Wal-Mart Stores, Inc.*,[117] debated over whether the *Twombly* standard should apply or if the fair notice standard outlined in *Woodfield v. Bowman* should apply.[118] The court held that in fact *both* should apply because "*Twombly* and *Woodfield* are not materially different."[119] The proper test is not that "specific facts are [] necessary; [but, that] the statement need only 'give . . . fair notice of what the . . . claim is and the grounds upon which it rests."[120] The amount and specificity of facts which are required to be pled turn on the defense pled, and the specific case in which it is pled.[121] Although this decision was not adopting a plausibility standard,[122] it did require the answer at least to provide the grounds on which the defense rests, which may include certain facts depending on the particular defense pled.[123]

Corp. v. Twombly, 550 U.S. 544, 570 (2007))); Home Mgmt. Solutions, Inc. v. Prescient, Inc., No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007) (holding that because "a defendant must . . . plead an affirmative defense with enough specificity or factual support to give the plaintiff 'fair notice' of the defense," by failing to plead the elements of the defense or any facts to support those elements, the defendant failed to provide the plaintiff with fair notice).

117 Voeks v. Wal-Mart Stores, Inc., No. 07-C-0030, 2008 WL 89434 (E.D. Wis. Jan. 7, 2008).

118 Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) (holding that a defendant "must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced").

119 *Voeks*, 2008 WL 89434, at *6.

120 *Id.* (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

121 *Id.* The court upheld a statute of limitations defense because although "not pled with much detail," it is essentially "self-explanatory." *Id.*

122 *Id.* ("*Twombly* and *Woodfield* are not materially different"). The court also required the elements of equitable defenses to be pled. *Id.* Other courts take a similar approach to equitable defenses. *See, e.g.*, Bartashnik v. Bridgeview Bancorp, Inc., No. 05 C 2731, 2005 WL 3470315, at *4 (N.D. Ill. Dec. 15, 2005) ("[E]quitable defenses . . . must be pled with the specific elements required to establish the defense." (quoting Yash Raj Films Inc. v. Atl. Video, No. 03 C 7069, 2004 WL 1200184, at *3 (N.D. Ill. May 28, 2004))).

123 *Voeks*, 2008 WL 89434, at *6. There were also a number of decisions that applied a "cannot succeed under any circumstances test." *See* United States v. The Boeing Co., No. 05-1073-WEB, 2009 U.S. Dist LEXIS 71625, at *8 (D. Kan. Aug. 13, 2009) ("A defense is considered insufficient if it cannot succeed, as a matter of law, under any circumstances."); Champion Bank v. Reg'l Dev., L.L.C., No. 4:08CV1807 CDP, 2009 WL 1351122, at *4 (E.D. Mo. May 13, 2009) (Motions to strike "should not be granted 'unless as a matter of law, the defense cannot succeed under any circumstances'" (quoting FDIC v. Coble, 720 F. Supp. 748, 750 (E.D. Mo. 1989))); Wilhelm v. TLC Lawn Care, Inc., No. 07-2465-KHV, 2008 U.S. Dist LEXIS 13221, at *4 (D. Kan. Feb. 19, 2008) ("A defense is insufficient if it cannot succeed, as a matter of law, under any circumstances."); Robertson v. LTS Mgmt. Servs. L.L.C., 642 F. Supp. 2d 922, 933 (W.D. Mo. 2008) ("[T]he Court is unable to state definitely that this defense could not succeed under any circumstances."); Mark v. Gov't Props. Trust, Inc., No. 8:06CV769, 2007 WL 1319712, at *3 (D. Neb. Apr. 5, 2007) (holding that a court "must be convinced . . . that under no set of circumstances can

D. Summary of the Current State of the Affirmative Defense

Overall, the *Twombly* and *Iqbal* standard has not been uniformly applied to affirmative defenses, and the majority of courts dealing with the issue have not applied the plausibility standard.[124] Some may explicitly adopt or reject the standard, while many simply dodge the issue and apply a different standard.[125] As the current state of the affirmative defense is marred with a multitude of varying rules and rationales, the true question becomes: What standard should ultimately be adopted? In order to answer this question properly, a reconciliation must be had between the *Twombly* and *Iqbal* decisions, the textual language of the Rules, and the practical implications of adopting a certain standard.

IV. ADOPTING THE PROPER STANDARD REQUIRES STRIKING THE APPROPRIATE BALANCE BETWEEN THE *TWOMBLY* AND *IQBAL* DECISIONS, THE TEXT OF THE RULES, AND FAIRNESS CONCERNS TO A DEFENDANT AND PLAINTIFF

To reiterate, when ruling on how properly to assess an affirmative defense, district courts today are essentially left with three standards: (1) apply the *Twombly* and *Iqbal* plausibility

the defense succeed" (quoting Puckett v. United States, 82 F. Supp. 2d 660, 663 (S.D. Tex. 1999))). This standard is clearly inconsistent with the *Twombly* and *Iqbal* plausibility standard, as allowing a defense to survive a motion to strike simply because it can succeed under some conceivable circumstance certainly does not mean that the defense is necessarily plausible.

124 In addition to the above categories, a number of decisions assumed, but did not hold, that *Twombly* or *Iqbal* did or did not apply. *See* Ahle v. Veracity Research Co., 738 F. Supp. 2d 896, 925 (D. Minn. 2010) ("Even if the heightened pleading standards are not applicable to affirmative defenses, Plaintiffs have not been given adequate notice [of the affirmative defense]."); Lapic v. MTD Prods., Inc., No. 09-760, 2009 WL 3030305, at *3 (W.D. Pa. Sept. 17, 2009) ("[E]ven if the new standards of *Twombly* apply to affirmative defenses, Plaintiff has not demonstrated that Defendant's affirmative defenses fail to give him 'fair notice' of the nature of the defenses . . . .").

125 This conclusion differs from that of other commentators and courts that have concluded that the majority of courts actually do adopt the plausibility standard. *See* Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010) (holding that most courts "have extended *Twombly*'s heightened pleading standard to affirmative defenses"); Dominguez et al., *supra* note 51, at 77 ("The vast majority of district courts that have considered the issue . . . hold that *Twombly*'s plausibility standard applies to [the pleading of] affirmative defenses"); Mize, *supra* note 51, at 1260 (arguing that the majority of courts have applied the plausibility standard to affirmative defenses). This Comment's conclusion is based upon the fact that only the decisions discussed and cited in Part III(A) apply the two part plausibility test. It is not enough that a decision simply cites *Twombly* or *Iqbal*, but then goes on to apply a different standard. The plausibility standard is a two part standard requiring facts and a plausible defense. *See supra* notes 48–50 and accompanying text. Anything less is not a true *Twombly* and *Iqbal* analysis. Thus, this Comment concludes that based on the totality of the decisions not listed in Part III(A), the majority of district courts are not actually applying the *Twombly* and *Iqbal* standard to affirmative defenses.

standard;[126] (2) apply the *Conley* notice pleading standard;[127] or (3) apply the adequate factual basis standard.[128] This Comment proposes that the proper standard to be applied to an affirmative defense is one that requires "the defendant to plead an adequate factual basis for [his or her] affirmative defense[]."[129] This would not assess the plausibility of the defense, but only whether there is a factual basis for the defense.[130]

One may argue that such a standard is inconsistent with the Supreme Court's decision of *Swierkiewicz v. Sorema, N.A.*,[131] where the Court held that Rule 8's notice pleading standard is "inextricably linked" amongst the Rules.[132] However, even if *Swierkiewicz* is the Court's newest "notice pleading decision," *Twombly* and *Iqbal* are the Court's only plausibility pleading decisions.[133] The *Twombly* and *Iqbal* decisions explicitly overruled *Conley*'s notice pleading standard[134] and in so doing, broke any link a notice pleading regime may have had between Rule 8 and the other Rules.[135] Thus, to argue that *Swierkiewicz*

126 *See supra* Part III(A).

127 This encompasses those courts that explicitly rejected the plausibility standard and applied a notice standard and those which did not explicitly reject the plausibility standard, but applied a notice standard regardless. *See supra* Parts III(B)–(C)(i).

128 *See supra* Part III(C)(ii). To a lesser extent, this would encompass *Voeks v. Wal-Mart Stores, Inc*, as that decision required factual particularity to the extent the particular case and defense called for it. 2008 WL 89434, at *6.

129 Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D 260, 268 (D. Minn. 2009).

130 A fact-pleading standard would not assess the ability of the pleader to prove the defense pled. *See, e.g.*, 49A WILLIAM LINDSLEY, J.D. ET AL., CALIFORNIA JURISPRUDENCE 3D PLEADING § 77 (2010) ("A [pleader] need only plead facts showing that he or she may be entitled to some relief; a court is not concerned with the [pleader's] possible inability or difficulty in proving the allegations of the [pleading]."). Rather, a standard requiring facts to be pled, as this Comment's proposed standard would, only focuses on the defendant's ability to plead a factual basis for the affirmative defense. This does not require the reviewing judge to assess the plausibility of the defense, but it would still require the defendant to comply with Rule 11, and thus, the defendant could not simply conjure up some factual basis, which in reality never had any relevance to the defense. *See* FED. R. CIV. P. 11(b)(3) ("By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .").

131 Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002).

132 *Id.* at 513.

133 *See* Scozzaro, *supra* note 28, at 429–30 ("Where *Conley* addressed the pleading issue as an aside, *Swierkiewicz* took it head on and met it in the 'center ring.' . . . *Swierkiewicz* will supplant *Conley* as 'the' notice pleading decision."). *See also supra* Part II (discussing *Twombly*'s and *Iqbal*'s plausibility standard).

134 *See infra* notes 143–46 and accompanying text (noting that *Twombly* and *Iqbal* only interpreted Rule 8(a)).

135 *See* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 36 (2010) (noting that although not explicit, the *Twombly* and *Iqbal* decisions essentially overruled *Swierkiewicz*).

is anything more than a reminder that *Conley* was the proper standard for a complaint is to overlook the *Twombly* and *Iqbal* decisions' language and purpose.[136] When *Iqbal* explicitly announced that "Rule 8 . . . does not unlock the doors of discovery for a *plaintiff* armed with nothing more than conclusions," it not only defeated *Swierkiewicz*'s notice mandate, but it announced that the plaintiff *and* defendant are not inextricably linked to the same pleading standard.[137]

Thus, in light of *Twombly* and *Iqbal*, the issue becomes whether affirmative defenses should remain untouched or if a change is necessary. This Comment's proposed adequate factual basis standard is the proper solution to this issue due to: (1) the textual language of Rule 8; (2) the policies expressed in *Twombly* and *Iqbal*; and (3) overall fairness concerns to not only the defendant, but the plaintiff as well.

A. Rule 8 Does Not Set Forth the Same Standard for Complaints and Affirmative Defenses

Based on a simple textual reading of Rule 8(c) and Rule 8(a), it is clear that the rules do not set forth identical standards for affirmative defenses and complaints.[138] According to Rule 8(c) the defendant need only "*affirmatively state* any avoidance or affirmative defense."[139] In contrast, Rule 8(a)(2) provides that a

136 *See* Michael R. Huston, Note, *Pleading With Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415, 437 (2010) (discussing why *Twombly* and *Iqbal* show that the Court's attention has now turned to addressing "the costs and burdens of discovery in modern federal litigation").

137 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (emphasis added). In so holding, the Court was making it clear that its focus was now on controlling discovery, not allowing discovery. *See* Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLINE L. REV. 205, 241 (2010) (noting that the *Twombly* and *Iqbal* decisions display that the Court has now recognized that the costs of discovery may force parties to settle). This is clearly a break from the *Swierkiewicz* and *Conley* Court's rationale and focus on "liberal discovery." Thomas, *supra* note 135 at 36 (explaining that the *Iqbal* Court's focus on controlling the scope and costs of discovery is clearly inconsistent with the *Swierkiewicz* Court's emphasis on "liberal discovery" (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002))). *See also infra* notes 143–46 and accompanying text (discussing how *Twombly* and *Iqbal* were only meant to apply to complaints).

138 *See, e.g.*, FTC v. Hope Now Modifications, No. 09-1204, 2011 WL 883202, at *3 (D. N.J. Mar. 10, 2011) ("[T]he Federal Rules of Civil Procedure distinguish the level of pleading required between a plaintiff asserting a claim for relief under Rule 8(a) and a defendant asserting an affirmative defense under Rule 8(c)."); McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) (noting that although Rule 8(b) and Rule 8(a) both require an answer or a complaint, respectively, to be stated "'in short and plain terms' . . . . 'Rule 8(b) does not apply when a defendant asserts an affirmative defense."); First Nat'l Ins. Co. of Am. v. Camps Servs., LTD, No. 08-cv-12805, 2009 U.S. Dist LEXIS 149, at *4–5 (E.D. Mich. Jan. 5, 2009) (holding that *Twombly* was interpreting Rule 8(a), not 8(c)).

139 FED. R. CIV. P. 8(c) (emphasis added).

complaint "must contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief."[140] Thus, a defendant must only "affirmatively state"[141] an affirmative defense, while a plaintiff must "show" that he or she "is entitled to relief."[142] The Rules necessarily require *less* of a defendant pleading an affirmative defense than of a plaintiff pleading a claim for relief. Most instructive of this lack of commonality is that nowhere in *Twombly* or *Iqbal* does the Court mention either answers or affirmative defenses.[143] To be precise, *Iqbal* is strewn with language, which, at a bare minimum, heavily implies that it was only meant to apply to complaints:

> Where a *complaint* pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of '*entitlement to relief* . . . .'"
>
> . . . .
>
> [T]he tenet that a court must accept as true all of the allegations contained in a *complaint* is inapplicable to legal conclusions . . . . [O]nly a *complaint* that states a plausible *claim for relief* survives . . . . Determining whether a *complaint* states a plausible *claim for relief* will . . . be a context-specific task . . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the *complaint* has alleged—but it has not "*shown*"[144]—"that the pleader is entitled to relief."[145]

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140 FED. R. CIV. P. 8(a)(2) (emphasis added).

141 FED. R. CIV. P. 8(c).

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

143 A number of district courts explicitly recognized this lack of language in *Twombly* and *Iqbal*. Ameristar Fence Prods., Inc. v. Phoenix Fence Co., No. CV-10-299-PHX-DGC, 2010 WL 2803907, at *1 (D. Ariz. July 15, 2010) ("[T]he pleading standards enunciated in *Twombly* and *Ashcroft v. Iqbal* . . . have no application to affirmative defenses pled under Rule 8(c)."); McLemore v. Regions Bank, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) ("[*Twombly*] does not mention affirmative defenses or any other subsection of Rule 8. *Iqbal* also focused exclusively on the pleading burden that applies to plaintiffs' complaints."). The Court was not interpreting what a defendant must affirmatively state under Rule 8(c), but rather was only interpreting the word "showing" which exclusively appears in Rule 8(a) governing complaints. *See* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1359 (2010). Thus, as *Iqbal* held that only "a *complaint*" must be plausible, the Court was making it clear that it was only assessing the pleading requirements for complaints. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (emphasis added). *See also* Roger M. Michalski, *Assessing Iqbal*, HARV. L. & POL'Y REV. ONLINE (Dec. 8, 2010), http://hlpronline.com/2010/12/assessing-iqbal/ (discussing how *Twombly* and *Iqbal* are only concerned with Rule 8(a)); Sean Warjert, *Does the Twombly-Iqbal Pleading Standard Apply to Defenses Too?*, MASSTORTDEFENSE (Jan. 12, 2010), http://www.masstortdefense.com/2010/01/articles/does-the-twomblyiqbal-pleading-standard-apply-to-defenses-too/ ("The Supreme Court addressed in *Twombly* the requirements for a well-pled complaint under Fed.R.Civ.P. 8(a)'s 'short and plain statement' requirement. No such language, however, appears within Rule 8(c), the applicable rule for affirmative defenses. As such, *Twombly*'s analysis of the 'short and plain statement' requirement of Rule 8(a) is inapplicable to a motion under Rule 8(c)." (quoting FED. R. CIV. P. 8(a))).

144 Recall that Rule 8(a)(2) requires that "[a] pleading that states a claim for relief

Furthermore, consider the language used in *Twombly* to expound its holding:

> [S]tating such a *claim* requires a *complaint* with enough factual matter . . . to suggest that an agreement was made . . . . And, of course, a well-pleaded *complaint* may proceed even if it strikes a savvy judge that actual proof of those facts is improbable . . . .
>
> . . . .
>
> The need . . . for allegations plausibly suggesting . . . agreement reflects the threshold requirement of *Rule 8(a)(2)* that the "*plain statement*" possess enough heft to "*sho[w] that the pleader is entitled to relief*."[146] . . . An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 *complaint*: it gets the *complaint* close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "*entitle[ment] to relief*."[147]

Contrast this language with that of *Conley*, which is much more susceptible to a universal pleading interpretation:[148]

> Such simplified "notice *pleading*" is made possible by the liberal opportunity for discovery and the other pretrial procedures

must contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief . . . ." FED. R. CIV. P. 8(a)(2) (emphasis added). However, Rule 8(c)(1) requires only that "a party . . . affirmatively *state* any avoidance or affirmative defense . . . ." FED. R. CIV. P. 8(c)(1) (emphasis added).

145 *Iqbal*, 129 S. Ct. at 1949–50 (emphasis added) (citations omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (quoting Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009))). Furthermore, during oral arguments, the Court was exclusively discussing whether the *Twombly* standard applies outside the context of an antitrust claim. *See* Oral Argument, Ashcroft v. Iqbal 129 S. Ct. 1937 (2009), No. 07-1015, 2008 WL 5168391, at *21 (at oral arguments in *Iqbal*, Justice Stevens noted that if the Court in *Twombly* felt the claim was not plausible, then "this *claim* is implausible because it's got exactly the same problems . . . . It seems to me these cases are very similar" (emphasis added)).

146 *See supra* note 144 (noting the similarity of language used by the Court and Rule 8(a)).

147 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007) (emphasis added) (quoting FED. R. CIV. P. 8(a)(2)).
Additionally, *Twombly* went to extra bounds to only overrule that part of *Conley* which applies to complaints:

> We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood *in light of the opinion's preceding summary of the complaint's concrete allegations*, which the Court quite reasonably understood as amply stating a *claim for relief* . . . . The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a *claim* has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the *complaint*.

Twombly, 550 U.S. at 562–63 (emphasis added).

148 *See* Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) (holding that affirmative defenses, like complaints, are subject to *Conley*'s fair notice standard (citing Conley v. Gibson, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

> established by the *Rules* to disclose more precisely the basis of both claim *and* defense . . . . Following the simple guide of Rule 8(f) that "all *pleadings* shall be so construed as to do substantial justice," . . . "*[t]he Federal Rules* reject the approach that *pleading* is a game of skill . . . and accept the principle that the purpose of *pleading* is to facilitate a proper decision on the merits.[149]

When taken together, the Court in *Twombly* and *Iqbal* solely intended to determine what a complaint under Rule 8(a) needs to contain to survive a Rule 12(b)(6) motion to dismiss,[150] not what an affirmative defense under Rule 8(c) must contain to survive a Rule 12(f) motion to strike.[151] Nonetheless, this break from *Conley*'s notice standard necessarily raises the question of whether the policies and effects of *Twombly* and *Iqbal* will require a change to the standard applied to an affirmative defense.[152]

B. A Standard That Requires Facts to Be Pled Will Combat the *Twombly* and *Iqbal* Courts' Concerns Regarding the Cost and Broad Scope of Discovery

Although *Twombly* and *Iqbal* only raised the pleading standard for a complaint, the Court did set forth a principle that should apply to an affirmative defense.[153] An affirmative defense is not simply a denial, it is an assertion by the defendant bringing with it new facts and allegations, which, if true, will defeat the plaintiff's claim, regardless of the complaint's legitimacy.[154] As plaintiffs must investigate these assertions,

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149 Conley v. Gibson, 355 U.S. at 47–48 (1957) (emphasis added), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

150 *See Twombly*, 550 U.S. at 555 (holding that when faced with a Rule 12(b)(6) motion to dismiss, a complaint must contain "more than labels and conclusions"); *Iqbal*, 129 S. Ct. at 1949 (holding that a complaint will only survive a Rule 12(b)(6) motion to dismiss if the complaint "is plausible on its face") (quoting *Twombly*, 550 U.S. at 570).

151 *See supra* notes 144–44 and accompanying text. *See also* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 829 n.34 (2010) (noting that the *Twombly* and *Iqbal* Courts were interpreting the word "showing" which is inapplicable under Rule 8(c)); Miller, *supra* note 51, at 101 ("Neither Rule 8(b) nor Rule 8(c) contains the magic word 'showing,' and both modes of defensive pleading typically are alleged in a formulary, conclusory, and uninformative fashion . . . .").

152 As stated, it is this Comment's proposal that, in light of *Twombly* and *Iqbal*, the correct standard should require "the defendant to plead an adequate factual basis for [his or her] affirmative defenses . . . ." Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009).

153 *See infra* notes 154–54 and accompanying text.

154 Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2d Cir. 2003). An affirmative defense is comparable to a complaint in that where the plaintiff has the burden to prove the allegations in the complaint, the defendant has the burden to prove an affirmative defense. *See* James River Ins. Co. v. Kemper Cas. Ins. Co., 585 F.3d 382, 385 (7th Cir. 2009) (holding that defendants have the burden of proof regarding an affirmative defense); Moore v. Kulicke & Soffa Indus., Inc., 318 F.3d 561, 566 (3d Cir. 2003) (holding that the defendant also has "the burden of production and the burden of persuasion for [an] affirmative defense"). This, however, does not render their pleading standard to be

affirmative defenses affect the scope of discovery as well.[155] Thus, the Court's intentions in *Twombly* and *Iqbal* to combat discovery costs through a heightened pleading requirement should apply, to some degree, to affirmative defenses.[156]

The *Twombly* Court was first to pronounce the Court's concern over discovery costs when it explained that the purpose of adopting a heightened pleading requirement is to relieve the parties of the high costs of discovery wasted on claims or defenses which are not actually grounded in a factual basis.[157] As *Iqbal* confirmed, the focus of the pleadings now is to ensure that Rule 8 is not simply the means to discovery for a party "armed with nothing more than conclusions."[158]

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the same. As noted above, the rules do not set forth the same standard, but rather, set forth a lower standard for an affirmative defense. *See supra* note 144.

155 Although raising the pleading standard for a plaintiff will narrow the scope of discovery, raising the standard for a defendant will narrow its scope even more, thereby reducing costs to both parties. Thus, simply put, the broader the scope of discovery, the more expensive discovery is; while the narrower the scope, the less expensive it becomes. *Compare* Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 209–10 (2005) (noting that when discovery's scope is broad, "pretrial costs normally far exceed those incurred at trial"), *with* Dwayne J. Hermes, Jeffrey W. Kemp & Paul B. Moore, *Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials*, 36 ST. MARY'S L.J. 879, 920 (2005) (noting that when the scope of discovery is limited, it "will often enable the dispute to reach trial sooner than otherwise possible, while reducing the discovery costs to the litigants . . . .").

156 *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) (holding that where a "complaint is deficient under Rule 8, [the complainant] is not entitled to discovery . . . ."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (holding that high discovery costs create problems in litigation as they may force parties to settle in lieu of facing these costs). Although it is true that this Comment concludes that the pleading standard should be lower for affirmative defenses, it does not follow that it should not be raised. As plaintiffs must seek discovery on affirmative defenses, in order to truly fulfill the Court's concern regarding the scope of discovery, the defendant should not simply be allowed to assert a host of affirmative defenses without providing the plaintiff with some direction as to their factual basis. *See* Susan S. DeSanti, *Whither Antitrust in the Supreme Court?*, 7 ANTITRUST SOURCE 1, 1 (2007) (noting that the Court in *Twombly* concluded that lower federal judges have been unable to control the costs of discovery in antitrust cases); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64 (2010) (noting that the Supreme Court changed the pleading standard due to its concern over "high discovery costs"); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1073 (2009) ("[T]he Court expressed a concern that discovery costs were only increasing and that lawsuits were being settled based on their *in terrorem* value rather than the actual merits of the case."). Consistent with the Court's rationale, many district courts, as noted, require facts to be affirmatively stated at the pleading stage. *See, e.g.*, Cosmetic Warriors, Ltd. v. Lush Boutique, L.L.C., No. 09-6381, 2010 U.S. Dist LEXIS 16392, at *4 (E.D. La. Feb. 1, 2010) (holding that a defendant must provide "factual particularity" in the affirmative defense); Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D 260, 268 (D. Minn. 2009) (holding that affirmative defenses must be pled with "an adequate factual basis"); Stoffels v. SBC Commc'ns, Inc., No. 05-CV-0233-WWJ, 2008 WL 4391396, at *1 (W.D. Tex. Sept. 22, 2008) (holding that affirmative defenses require "'more than labels and conclusions'" and must be pled with "factual particularity" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

157 *Twombly*, 550 U.S. at 559 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

158 *Iqbal*, 129 S. Ct. at 1950. *See also* Robert G. Bone, *Plausibility Pleading Revisited*

Thus, as *Twombly* pointed out, *Conley*'s requirement that mere notice will suffice[159] no longer serves its purpose of allowing parties to bring their meritorious claims to court.[160] Instead of fulfilling this goal, oftentimes pleadings were simply a mechanism to force another party to settle out of fear that discovery costs would make fighting a claim financially irresponsible.[161] These increased costs often meant that parties

and Revised: A Comment on Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 868 (2010) ("[A] screening goal requires greater specificity. The requisite level of specificity is set by the strictness of the pleading standard, which in turn reflects a policy decision about how much screening is optimal at the pleading stage.").

159 *See* Conley v. Gibson, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

160 Under *Conley*, pleading did not require parties to have specialized knowledge about technicalities and rules; rather, the pleadings were simply meant to "facilitate a proper decision on the merits." *Id.* at 48. However, with the increasing costs of discovery, allowing such easy access past the pleadings meant that the pleadings may now "push cost-conscious defendants to settle even anemic cases before even reaching pretrial proceedings." *Twombly*, 550 U.S. at 559. Thus, the overall concern of the *Twombly* Court was that *Conley*'s notice pleading allowed parties to abuse discovery "by substituting expenses for merits as the driving force behind litigation and settlement dynamics." Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 77 (1997). The Court's concern is actually echoed in the Rules themselves. Rule 1 provides that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. As discovery and litigation in general has grown more expensive though, this mandate by the Rules has become less feasible. *See* Elaine L. Spencer, *Common Sense Trial Preparation in a High-Tech World*, 15 THE PRAC. LITIGATOR 7, 7 (2004) ("Whether representing the plaintiff or the defendant, lawyers know that far from being 'just, speedy, and inexpensive,' the cost of litigation can bar plaintiffs from pursuing their claims and can force defendants to settle claims that really should be brought in front of a factfinder." (quoting FED. R. CIV. P. 1)).

161 B. Scott Daugherty, Comment, *Uncharted Waters: Securities Class Actions in Texas After the Securities Litigation Uniform Standards Act of 1998*, 31 ST. MARY'S L.J. 143, 160–61, (1999). Oftentimes then, a litigant with an otherwise meritorious claim would be faced with a choice of pursuing litigation and risking that the award would outweigh the costs of discovery, or simply settling, foregoing the costs of discovery. *See* Alistair Dawson, *House Bill 4 and the Future of Class Action Litigation*, 24 THE ADVOC. (TEX.) 60, 63 (2003) (noting that "regardless of the merits," in class action cases, oftentimes defendants would prefer to settle than to bear the high cost of discovery); Cameron S. Matheson, *Transvestite Cowboys, Thieving Brokers, and the Securities Litigation Uniform Standards Act: SLUSA's Trap for the Unwary Plaintiff*, 35 MCGEORGE L. REV. 121, 126 (2004) (noting that the high costs associated with discovery may allow a party with a frivolous suit to force the other party to settle); Sue Ann Mota, *Global Antitrust Enforcement: The Sherman Act Does Not Apply Without Any Direct Domestic Effect, But Discovery Assistance May Be Available to Aid a Foreign Tribunal, According to the U.S. Supreme Court*, 38 J. MARSHALL L. REV. 495, 510 (2004) (explaining that when discovery is involved in litigation, oftentimes its costs "may force parties to settle"); Mathias Reinmann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 817 n.351 (2003) (discussing why the high costs of discovery can work against a plaintiff as "those with small and medium-sized claims" may not be able to fully pursue these claims as the costs of discovery will often outweigh the small sum sought in the recovery); Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in* Zubulake *Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 295–96 (2004) (noting that high discovery costs create incentives to settle, even for meritorious suits). Furthermore, not only are discovery costs excessive, much of it

with meritorious claims, but small amounts sought in the recovery, would have to forgo their claims, as the amount sought would not outweigh the costs of discovery.[162] This is particularly true with electronic discovery in which "[t]he sheer volume of electronic data that may be responsive to a given document request can burden the responding party with tremendous costs."[163] Although the mere act of producing electronic discovery may not be significant, the data that is responsive to a particular discovery request must be screened for privileged information, which in turn can be complex and create high costs for the responding party.[164] With the increasing costs of discovery and

results from pure waste. *See* Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 551 (1998) [hereinafter Willging et al., *Empirical Study*] (concluding that when discovery costs are disproportionately high, much of the information obtained in discovery is ultimately irrelevant to the case).

162 *See* Christopher M. Grengs & Edward S. Adams, *Contracting Around Finality: Transforming* Price v. Neal *from Dictate to Default*, 89 MINN. L. REV. 163, 186 n.172 (2004). Instead of individually bringing a claim, high discovery costs may force the litigant to seek a class that can sue collectively, out of fear that the costs of discovery will outweigh any potential damage claims brought individually. *See* Barry Litt & Genie Harrison, *Rights for Wrongs*, L.A. LAW., Dec. 2005, at 27 (noting that in order to properly compensate victims with small sums sought in recovery, the only cost-effective way may be to bring a class action).

163 Thomas R. Mulroy & Kristopher Stark, Article, *A Suggested Rule for Electronic Discovery in Illinois Administrative Proceedings*, 3 DEPAUL BUS. & COM. L.J. 1, 6–7 (2004) (describing a case where one party "spent $1.75 million to restore backup tapes to retrieve email."). Thus, with the increase in electronic products available and the increased use of technology, comes a concomitant rise in the amount of information that is discoverable. *See* THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 7 (Jonathan M. Redgrave et al. eds., 2005) (noting that electronic documents have now surpassed the amount of paper documents which has increased "the amount of information available for potential discovery"); Mulroy & Stark, *supra*, at 1 (explaining how an increase in reliance on technology brings about an increase in the amount of information that may be discoverable during litigation); Sonia Salinas, *Electronic Discovery and Cost Shifting: Who Foots the Bill?*, 38 LOY. L.A. L. REV. 1639, 1640 (2005) (discussing that with the increased use of technology and computers, a dramatic rise in the cost of discovery has ensued. Now simply requesting a document "may include not only the paper copy of the document, but also various versions saved on a network or hard drive"); Paul Travis, *The Cost of E-Discovery*, NETWORK COMPUTING (May 9, 2009), http://www.networkcomputing.com/e-discovery/the-cost-of-e-discovery.php?type=article ("Businesses and other organizations spent more than $2.7 billion on electronic data discovery last year [EDD], and spending on EDD will grow to more than $4.6 billion by 2010 . . . .").

164 Ronald J. Hedges, *Discovery of Digital Information*, *in* ELECTRONIC RECORDS MANAGEMENT AND DIGITAL DISCOVERY 221, 258 (ALI-ABA Course of Study Materials SK071, 2005). *See also* Steven C. Bennett, Marla S.K. Bergman & Jones Day, *Ethical Issues in Electronic Discovery*, *in* ELECTRONIC DISCOVERY AND RETENTION GUIDANCE FOR CORPORATE COUNSEL 2005, 379, 386 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 733, 2005) (noting that due to the multitude of ways to now create and send information, a correlative increase in the costs of discovery has ensued); Richard Van Duizend, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information—What? Why? How?*, 35 W. ST. U. L. REV. 237, 240 (2007) (discussing how the high costs of discovery can be attributed to the "costs of experts" needed to prepare the information); Robert E. Altman & Benjamin Lewis, Note, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY.

electronic discovery, a pleading standard focused on providing factual support to the plaintiff will assist tremendously in narrowing the scope of discovery and, thus, reducing these costs.[165]

To be fair though, there is another side to the debate as to whether discovery costs truly are an issue today. Although there are studies that show discovery costs have gotten out of control,[166] some argue that it is only a small number of cases with high discovery costs which "generate[] the anecdotal 'parade of horribles'" causing such concern among those seeking changes to the discovery controls and procedures.[167] One recent study found

L. REV. 569, 571 (2009) ("[O]ne primary reason for the high costs of electronic discovery is simply the large volume of ESI [electronically stored information].").

165 *See* Robins, *supra* note 29, at 642 (arguing that by requiring facts to be pled, the opposing party at least has "knowledge of the basis for the claim [or defense], thus manifesting any known basis for the claim's legitimacy"); Marlaina S. Freisthler, Comment, *Unfettered Discretion: Is* Gonzaga University v. Doe *a Constructive End to Enforcement of Medicaid Provider Reimbursement Provisions?*, 71 U. CIN. L. REV. 1397, 1415–16 (2003) ("In fact, 'in civil cases, high discovery costs and legal fees render legal assistance beyond the financial reach of ninety percent of the nation.'" (citing Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1135 (1987))). Thus, the plaintiff should not be the sole bearer of a heightened pleading requirement; rather, it should be up to both pleadings to narrow the scope of discovery. *See* Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 75 (1995). Furthermore, in creating a heightened pleading requirement for both parties, access to the courts will be equalized in that both the wealthy and the average person will be more likely to be able to afford the costs of litigation. *See* Allegra J. Lawrence-Hardy & Nathan D. Chapman, *Clarity of Chaos?* Ashcroft v. Iqbal *One Year Later*, 4 BLOOMBERG L. REP. 39 (2010), *available at* http://www.sutherland.com/files/Publication/339b9dd3-0d19-4b34-8697-5c6869dc5655/Presentation/PublicationAttachment/e31d5169-f7c7-475e-88ea-61108cfae7e5/2010%20A%20%20Lawrence-Hardy%20N%20%20Chapman%20-%20Clarity%20or%20Chaos%20-%20Ashcroft%20v%20%20Iqbal%20One%20Year%20Lat.pdf ("[C]ourts have noted that the desire to avoid unnecessary discovery applies with equal force [to defendants] as well."); John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 617 (1999) (noting that most groups, even "corporate counsel," believe that discovery costs create inequities as the wealthy can bear the costs, but the average person cannot do so).

166 *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 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 (2008), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&CONTENTID=3650&TEMPLATE=/CM/ContentDisplay.cfm (finding that of those attorneys surveyed, "[o]ver 75% . . . agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery"). *See also* Michael P. Catina & Cindy M. Schmitt, Note, *Private Securities Litigation: The Need for Reform*, 13 ST. JOHN'S J. LEGAL COMMENT. 295, 303 (1998) (noting that when plaintiffs use discovery simply as a "fishing expedition[]" its costs will often cause defendants to settle in lieu of dealing with the continuous discovery requests); Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 367 (2000) (noting that as the amount of discoverable information continues to grow, discovery costs will do so as well).

167 Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685 (1998) (quoting James S. Kakalik et al., *Discovery Management:*

that the median discovery costs today are on par with those of the 1990s after adjustments are made for inflation, and that the "monetary stakes in the litigation represent the primary cost driver in most civil litigation."[168] Thus, the argument goes, the majority of cases today actually do not have to deal with high discovery costs,[169] and so there is no need to change the current pleading scheme or discovery rules.[170]

Whether it is only a small number of cases in which discovery costs are high, or whether discovery costs are high across the board, the fact is that discovery costs are *high*, and furthermore, the Supreme Court has announced its interpretation of Rule 8, along with its intention to use the pleadings as a mechanism to control discovery.[171] Requiring an adequate factual basis to be pled is consistent with this intention, as attorneys will now have to plead factual support for their defenses, which in turn means that the plaintiff will have a much more effective way to focus the scope of discovery, thereby reducing costs.[172] In fact, in a recent survey conducted by the

Further Analysis of the Civil Justice Reform Act Evaluation Data, 39 B.C. L. REV. 613, 636 (1998)).

168 Emory G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770–72 (2010). Thus, many studies have shown that for the most part, parties are fairly reasonable in their discovery requests, and do not use discovery as a means to harass the other side. *See* Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 202 n.116 (2006) (noting that the majority of research conducted actually finds that discovery costs are reasonable); Willging et al., *Empirical Study*, *supra* note 161, at 527 (concluding that high discovery costs are normally associated only with the most complex cases, and the average case is actually "conducted at costs that are proportionate to the stakes of the litigation . . . .").

169 Kakalik et al., *supra* note 167, at 636. Thus, these proponents argue that the data relied on by others skews the truth, in that it fails to display that the large costs of discovery are truly only borne by a small few who are engaged in complex litigation. *See* The Honorable John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat From Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 54–55 (2009).

170 *See* Sullivan, *supra* note 169, at 55.

171 *See supra* notes 154–156 and accompanying text. It should be fairly apparent that it is not up to the lower courts to second-guess the findings of the Supreme Court. *See* Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253, 1281 (11th Cir. 2004) (holding that lower federal courts "must follow" a "Supreme Court decision . . . regardless of whether [the lower court] would have arrived at a different approach."), *aff'd sub nom*. Gonzalez v. Crosby, 545 U.S. 524 (2005); Levine v. Heffernan, 864 F.2d 457, 459 (7th Cir. 1988) (holding that Supreme Court decisions must be followed by lower courts). Therefore, whichever side courts would like to fall on in the cost of discovery debate, the Supreme Court has already chosen a side, and lower courts must take the same side. Thus, the issue in this context is not whether the Supreme Court is right, but rather, the issue becomes one of how to properly implement its decision.

172 Molot, *supra* note 25, at 982–83. Fact pleading greatly assists litigants, as it requires more than a mere labeling of a claim or defense, but also the basis for that claim or defense. *See* Michele Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 675 (2003). This prevents attorneys from quickly filing boilerplate claims or defenses, as the attorney must investigate said claims or defenses and determine if there is any factual basis to them. *Id.* Having conducted this initial investigation, once the claim or defense is filed, the parties have less need to search for relevant facts or evidence

Institute for the Advancement of the American Legal System, "[o]ver 64% of [respondents] indicated that fact pleading can narrow the scope of discovery."[173] Therefore, a federal regime, which is now truly focused on using pleadings to control the scope and costs of discovery,[174] should adopt a pleading standard consistent with that purpose.[175]

to support the claim or defense. *Id.* With such basis in hand, a pleader has the ability to properly control the scope and costs of discovery. *See* Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 977 n.128 (1998) (discussing how adopting a heightened pleading standard will narrow the scope of discovery). *See also* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 334 (2001) ("[T]he badges of fact pleading included[:] . . . (ii) demanding 'specificity' or 'particularity' on each element of a claim or cause of action; (iii) expressing dissatisfaction with 'conclusory' allegations; [and] (iv) deploring the evil of 'frivolous' litigation . . . ."); Roger T. Brice & Penny Nathan Kahan, *Discovery Issues in Employment Discrimination Cases—Including Views From the Bench*, *in* 32ND ANNUAL INSTITUTE ON EMPLOYMENT LAW VOL. ONE 567, 613 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-696, 2003) (arguing that in order to decrease the costs of electronic discovery, the scope of discovery must be narrowed).

173 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 166, at A-3.

174 *See supra* Part II (describing the Supreme Court's shift from using pleadings as a means to access discovery to using pleadings as a means to narrow issues and lower the costs of discovery).

175 *See supra* note 165 and accompanying text. A pleading standard that will require all affirmative defenses to be pled with an adequate factual basis is consistent with this purpose. A fact pleading standard will create more specificity in the pleadings and less opportunity for deceit. Through these benefits, discovery costs will necessarily be decreased as the parties will have some semblance of an idea as to how to properly focus discovery. *See* Burroughs, *supra* note 30, at 78 (noting that fact "pleading[] serve[s] to narrow the issues in litigation, identify baseless claims, and present each party's position based upon the facts as known to them"); Bedora A. Sheronick, Comment, *Rock, Scissors, Paper: The Federal Rule 26(a)(1) "Gamble" in Iowa*, 80 IOWA L. REV. 363, 381 (1995) (discussing that a regime requiring facts to be pled from the beginning of litigation has two major benefits; namely (1) that discovery costs will be decreased; and (2) the issues for trial, as well as discovery, will be narrowed). Another incidental benefit of adopting such a fact-based standard for affirmative defenses would occur in the insurance litigation realm. *See* R. Nicholas Gimbel & Elizabeth W. Fox, *Key Discovery Battlegrounds Regarding Coverage Under CGL Policies*, *in* INSURANCE COVERAGE LITIGATION: RECOVERY IN THE 1990S AND BEYOND 305, 310 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-598, 1999) (discussing how insurance companies will allege affirmative defenses simply to "act as place keepers or reservations depending on what is uncovered during the course of discovery"). For fear of waiving an affirmative defense that may end up freeing the insurance company from liability, insurance companies will plead "every conceivable affirmative defense," even those with no factual support. *See* Richard D. Milone & Stephen R. Freeland, *The Kitchen Sink Approach*, CONN. L. TRIB., May 2008, at 1, *available at* http://www.kelleydrye.com/publications/articles/0371/_res/id=Files/index=0/0371.pdf. What is worse, is that insurance companies will "resist[] all efforts by the insured to obtain discovery of the factual basis for such alleged defenses." Amanda Hairston, *Insurer Ordered to Produce Facts Regarding Affirmative Defenses, Drafting History and Underwriting Testimony*, FARELLA BRAUN & MARTEL, LLP (Mar. 23, 2010), http://www.farellacoveragelaw.com/2010/03/insurer-ordered-to-produce-facts.html. Such practice has become standard, which has only resulted in higher costs for litigation, as the plaintiff has little direction in how to focus his or her discovery requests. *See* Ray E. Critchett, *Ferreting Out Affirmative Defenses*, 19 OHIO TRIAL 26, 26 (2009), *available at* http://www.buckeyelaw.com/team/e_ray_critchett/Affirmative_Defenses.pdf.

C. It Is Unfair to Hold a Defendant to a Plausibility Standard as a Defendant Has Only Twenty-One Days to Respond to a Complaint That May Have Been Prepared for Years

Although the *Twombly* and *Iqbal* Courts set forth a principle that should apply to an affirmative defense, applying the plausibility standard to a defendant is patently unfair.[176] Imagine you have been in a car accident in which the other driver has suffered substantial injuries. That driver, having taken two years to gather enough information about the accident, sues you in federal district court (assume there is diversity jurisdiction)[177] alleging that your negligence was the sole cause of the accident. That driver has you personally served with the summons and complaint.[178] You now have twenty-one days to respond.[179] It takes you a week to find a lawyer you can afford, and now your time to respond is only fourteen days.[180] Another week goes by, and your attorney decides to plead some affirmative defenses in hopes that one of them will apply, or at the least, will provide a basis for discovery.[181] Since you decline to include any factual support gathered during an initial investigation, your affirmative defense simply states: "Plaintiff's

176 *See supra* notes 152–155 and accompanying text (explaining why narrowing the scope of discovery should apply to a defendant as well as to a plaintiff).

177 Assume that the other driver is a citizen of another state and is suing you for $75,001. *See* 28 U.S.C. § 1332 (2006) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . .").

178 *See* FED. R. CIV. P. 4(c). Further assume that the driver has successfully pled enough facts to lead a judge to believe her complaint is plausible on its face. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

179 *See* FED. R. CIV. P. 12(a)(1)(A)(i) (noting that in the absence of waiver of summons, the defendant's time to answer is not extended beyond twenty-one days).

180 Rule 6 defines the standards for computing time. FED. R. CIV. P. 6. Under that rule:

> When the [time to respond] is stated in days or a longer unit of time: (A) exclude the day of the event that triggers the period; (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Id. Thus, for purposes of the above hypothetical, assume you were served on January 7, 2011. The deadline for your response would be January 28, 2011. FED. R. CIV. P. 12(a)(1)(A)(i).

181 It is common practice to plead all affirmative defenses which may apply in hopes of later ascertaining relevant evidence to rid the defendant of liability. *See* Gimbel & Fox, *supra* note 175, at 309–10 (1999) (describing how insurance companies plead any and all defenses in the hopes that one will apply). *See also* Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 979 (6th Cir. 2003) (noting that discovery under the Rules "provides that '[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . .'" (emphasis omitted) (quoting FED. R. CIV. P. 26(b)(1))).

negligence was the sole cause of the accident."[182] With two days before the twenty-one day timeline runs up, your attorney files your answer. Another two weeks go by, and the plaintiff files a motion to strike your affirmative defense.[183] What result?

Under this Comment's proposed standard, this affirmative defense would most certainly fail[184] as it lacks any factual basis to support it, and instead, pleads only a conclusory allegation.[185] By neglecting to provide the plaintiff with the facts used to support the defense, the plaintiff is stuck pondering the various ways the defendant may believe the plaintiff has been contributorily negligent.[186] One could hypothesize a multitude of ways this could be true: (1) Plaintiff may have been driving while intoxicated;[187] (2) Plaintiff may have been speeding;[188] (3) Plaintiff may have failed to drive on the right side of the road;[189] or (4) Plaintiff may have failed to yield the right of way.[190] The list could go on, but one can understand the difficulties a plaintiff

182 Rule 8(c)(1) lists a number of affirmative defenses including contributory negligence. FED. R. CIV. P. 8(c)(1).

183 *See* FED. R. CIV. P. 12(f).

184 However, it would very likely survive a pre-*Twombly* motion to strike, because merely listing the affirmative defense correctly was often acceptable. *See, e.g.*, Home Ins. Co. v. Matthews, 998 F.2d 305, 309 (5th Cir. 1993) ("A plea that simply states that complainant was guilty of contributory negligence . . . is sufficient.").

185 A number of district courts held that conclusory allegations in an affirmative defense are no longer acceptable. *See, e.g.*, Palmer v. Oakland Farms, Inc., No. 5: 10cv00029, 2010 WL 2605179, at *6 (W.D. Va. June 24, 2010) (striking the defendant's affirmative defenses for being conclusory); Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1172–73 (N.D. Cal. 2010) (striking affirmative defenses for consisting largely of "conclusory statements"); Burns v. Dodeka, L.L.C., No. 4:09-CV-19-BJ, 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) (striking affirmative defenses that "are wholly conclusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Bell Atlantic Corp. v. Twombly* . . . ."). Regardless of the standard ultimately adopted by courts, this appears to be a fairly common minimum standard and is something in which litigators should be aware. *See* David N. Anthony & Timothy J. St. George, *"Plausibility" Pleading After* Twombly *and* Iqbal, 21 THE PRAC. LITIGATOR 9, 13 (2010), *available at* http://www.troutmansanders.com/files/Uploads/Documents/iqbal2.pdf ("Since *Iqbal*[,] . . . certain courts are displaying an increasing tendency to scrutinize such 'bare-boned' averments on the basis that such pleading does not comport with the standards articulated in *Twombly* and *Iqbal*.").

186 *See* Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) (indicating that "the purpose of pleading requirements is to provide . . . some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case").

187 *See* Scott v. Thompson, 109 Cal. Rptr. 3d 846, 847 (2010) (alleging driver's intoxication constituted negligence), *modified*, No. G041860, 2010 Cal. App. LEXIS 996 (June 25, 2010).

188 *See* Rodkey v. City of Escondido, 67 P.2d 1053, 1055 (Cal. 1937) (holding driver negligent for driving over storm drain while speeding).

189 *See* People v. Thompson, 93 Cal. Rptr. 2d 803, 808 (2000) (stating that "failure to drive on right side of road" can constitute negligence), *modified*, No. H017519, 2000 Cal. App. LEXIS 282 (April 14, 2000).

190 *See* Jeld-Wen, Inc. v. Superior Court, 32 Cal. Rptr. 3d 351, 356 (2005) (alleging negligence for "failure to yield right of way").

would face if mere notice were required.[191] On the other hand, if *Twombly*'s and *Iqbal*'s plausibility standard were applied, the defendant would have to plead enough facts to raise the affirmative defense to a level of plausibility.[192] This may require an entire host of responses, such as alleging that the plaintiff had been drinking sometime in the day or alleging that the plaintiff had been drinking thirty minutes prior to the accident, for a specific length of time, which was the sole cause of the accident.[193] However, by only requiring "the defendant to plead an adequate factual basis for [the] affirmative defense[,]"[194] the

191 *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 517 (2000) ("[T]he information-gathering and issue-defining functions that discovery must perform in a notice-pleading regime require broad and often copious discovery that generates disputes that require judicial intervention to resolve. Depending on one's definition, this voluminous discovery may also lend itself to 'abuse.'"). One main concern about notice pleading, then, is that it largely left the other pleader in the dark. Deprived of any knowledge as to what basis there was for a claim or defense, the other party, quite understandably so, sought as much information as possible in discovery in order to protect him or herself. *See* Mark E. Chopko, *Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. REV. 1897, 1916 n.113 (2004) (discussing that under a system of notice pleading, "the parties might guess what discovery might bring"); Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 33 (2004) ("[T]he notice pleading system and discovery rules in the United States are so liberal that they allow plaintiffs to bring suits based on minimal facts with ample room to flesh them out later."); Marcus, *supra* note 23, at 492 (noting that notice pleading allows parties access to broad discovery which can easily lend itself to abuse); Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2001 (2004) (arguing that under a system of notice pleading, it is difficult for the opposing party to understand the factual basis for the other's claim or defense).

192 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

193 *See, e.g.*, Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007) (adopting the plausibility standard in civil rights actions, requiring the complainant to "allege[] enough facts to suggest, raise a reasonable expectation of, and render plausible the fact that he sincerely held the religious belief that got him fired"); Allison Sirica, Case Comment, *The New Federal Pleading Standard:* Ashcroft v. Iqbal*,* 129 S. Ct. 1937 (2009), 62 FLA. L. REV. 547, 554 (2010) (noting the difficulty in determining how many facts are required to be pled in order to render a claim plausible). As stated, this Comment does not criticize the plausibility standard as applied to a complaint. The purpose of this paragraph is only to display that whatever the particular requirements of the plausibility standard actually are, they are necessarily higher than that of a standard which only requires facts to be pled. *See* Michael Eaton, *The Key to the Courthouse Door: The Effect of* Ashcroft v. Iqbal *and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 314 (2011) (noting that "after *Iqbal* the pleading standard is notably higher. . . ."). *Compare Iqbal*, 129 S. Ct. at 1949 (holding that "a complaint must contain sufficient *factual matter*, accepted as true, to 'state a claim for relief that is *plausible on its face*'" (emphasis added) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))), *with* Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009) (holding that the defendant only needs "to plead an adequate factual basis for affirmative defenses, where the basis is not apparent by the defense's bare assertion"). For a discussion on the uncertainty a party faces when held to a plausibility standard, see Pamela Atkins, Twombly, Iqbal *Introduce More Subjectivity to Rulings on Dismissal Motions, Judge Says*, 78 U.S.L. WK. 2667, 2667 (2010) ("[T]he new approach calls for 'tremendous subjectivity' on the part of a judge reviewing motions to dismiss.").

194 *EEOC*, 266 F.R.D. at 268.

defendant is given much greater control over whether or not that defense will survive a motion to strike.[195]

The point is that a plaintiff may have years to decide when to file a complaint, [196] while a defendant only has twenty-one days to respond.[197] Responding to a complaint requires a host of actions by the defendant within this mere twenty-one day timeline, such as hiring an attorney, researching the complaint and applicable defenses, and communicating with the attorney regarding the appropriate strategy for the case.[198] Given the time disparities, it is not unreasonable to require more factual development of a plaintiff at the pleading stage.[199] Worse yet, if

195 The defendant has greater control because the judge is not required to assess the ability of the defendant to prove what is being pled. Rather, the defendant simply has to provide the factual basis for the defense so that the plaintiff can efficiently narrow the scope of his or her discovery. Thus, the defendant's attorney would know that he or she cannot merely assert any boilerplate defense, but would have to first uncover some factual basis for the defense. *See* Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) (asserting the importance of facts in affirmative defenses rather than mere conjectures that *may* apply); HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) (noting that boilerplate affirmative defenses can negatively impact litigation costs); Gambol, *supra* note 52, at 2198 (footnote omitted) (stating that providing a factual basis allows the adverse party to tailor discovery). Furthermore, by pleading an affirmative defense, the defendant is not somehow making discovery available to him or herself. It is the complaint that "unlock[s] the doors of discovery." *Iqbal*, 129 S. Ct. at 1950. *See also* FTC v. Hope Now Modifications, L.L.C., No. 09-1204, 2011 WL 883202, at *3 (D. N.J. Mar. 10, 2011). Thus, "should the [p]laintiff need to request the factual basis of an asserted affirmative defense . . . *Twombly* and *Iqbal* do not counsel otherwise." *Id.*

196 *See, e.g.*, Allstar Mayflower, L.L.C. v. United States, 93 Fed. Cl. 169, 171 (2010) (applying the three year statute of limitations under the Interstate Commerce Act); Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 579 (8th Cir. 2006) (holding that the statute of limitations under the Equal Pay Act is three years).

197 FED. R. CIV. P. 12(a)(1)(A)(i).

198 Michael A. Iannucci, *Changing the Game: The Effect of* Twombly/Iqbal *on Affirmative Defenses*, THE LEGAL INTELLIGENCER (Oct. 25, 2010), http://www.blankrome.com/pdf.cfm?contentID=37&itemID=2336.

199 *See* Holdbrook v. SAIA Motor Freight Line, L.L.C., No. 09-cv-02870-LTB-BNB, 2010 WL 865380, at *2 (D. Colo. Mar. 8, 2010). It has been argued that in *Twombly* and *Iqbal* the Court was establishing "a gatekeeping test" for parties seeking to bring suit into court. Clermont, *supra* note 143, at 1360. As defendants do not initiate litigation, the argument goes that this test should not apply to them. *Id.* However, this Comment does not go as far to conclude that no change should be made to the pleading standard for affirmative defenses. This Comment does, though, note the inherent unfairness in requiring a defendant to file a response to a complaint, which may have been researched for years, within twenty-one days. *See* R. David Donoghue, *The Uneven Application of* Twombly *in Patent Cases: An Argument for Leveling the Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1, 12 (2008) (arguing that in patent cases, giving defendants either twenty days or sixty days to file a plausible defense is "unrealistic . . . . [because] [d]uring those three to eight weeks, a defendant must digest the complaint, hire counsel, analyze the patent and the alleged infringement, and at least sketch out a 'plausible' set of noninfringement and invalidity defenses, all while continuing to meet the obligations of defendant's business"). Thus, a balance needs to be struck, and it is this Comment's ultimate proposal that a pleading standard requiring a factual basis to be pled is this balance. Furthermore, a proper application of this Comment's proposed rule would examine the affirmative defense in conjunction with the complaint. This would best provide the reviewing court and the parties with the proper and most complete factual

the defendant fails to plead an affirmative defense, that defense is generally waived and likely to be permanently excluded from the case.[200] "[A]lthough the court, in its discretion, may give the defendant leave to amend" its insufficiently pled affirmative defense,[201] this is by no means a guarantee, and a defendant should attempt to plead as many applicable defenses as possible at the pleading stage.[202]

Of course a defendant could simply plead any and all affirmative defenses in the mere hope that one will survive a motion to strike.[203] This would be acceptable, but for Rule 11.[204] Rule 11, among other things, requires any pleading filed by an attorney to "have evidentiary support or . . . [to be] likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ."[205] Thus, a defendant who asserts an affirmative defense without reasonably believing the

basis for the defendant's affirmative defenses. *See* Baum v. Faith Techs., Inc., No. 10-CV-0144-CVE-TLW, 2010 WL 2365451, at *3 (N.D. Okla. June 9, 2010) (noting that when taken together, a complaint and an answer provide a plaintiff with sufficient notice of the affirmative defense).

200 Harris v. Sec'y, U.S. Dep't of Veterans Affairs, 126 F.3d 339, 343 (D.C. Cir. 1997) (quoting Dole v. Williams Enters., Inc., 876 F.2d 186, 189 (D.C. Cir. 1989)).

201 *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 297–98 (3d ed. 1999).

202 *See* JAMES ET AL., *supra* note 39, at 253. Thus, to be safe, it is generally advised, or at least was advised under *Conley*'s standard, that a defendant should plead any and all defenses that may apply in order to avoid missing out on a defense that may ultimately relieve the defendant of liability. *See* Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002) ("Parties are generally required to assert affirmative defenses early in litigation, so they may be ruled upon, prejudice may be avoided, and judicial resources may be conserved."); Campania Mgmt. Co. v. Rooks, Pitts & Poust, 290 F.3d 843, 852 (7th. Cir. 2002) (citing Grain Traders Inc. v. Citibank, N.A., 160 F.3d 97, 105 (2d Cir. 1998)); Ins. Co. of N. Am. v. Moore, 783 F.2d 1326, 1327–28 (9th Cir. 1986)) (holding that a party cannot assert an affirmative defense after failing to do so in the answer); SRAM Corp. v. Shimano, Inc., 25 F. App'x 626, 629 (9th. Cir. 2002) (citing Nw. Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 924 (9th Cir. 1988) ("Where a defendant fails to raise the defense in a pretrial order or prior to trial, the defense is waived."); Wilkes Assocs. v. Hollander Indus. Corp., 144 F. Supp. 2d 944, 951 (S.D. Ohio 2001) (stating that Rule 8(c) requires a defendant to plead all applicable affirmative defenses in the answer); FRIEDENTHAL ET AL., *supra* note 201, at 299 ("A careful pleader necessarily will set forth every conceivable fact that she might wish to prove as one never can be certain what a court will hold to be a 'surprise.'").

203 *See, e.g.*, Anthony & St. George, *supra* note 185, at 13 (noting that it is a "common litigation strategy" for attorneys to plead as many affirmative defenses as possible at the pleading stage); Richard G. Morgan & William N.G. Barron IV, *Evolving with Affirmative Defense Pleading Standard*, LAW360 (2010), http://www.bowmanandbrooke.com/files/News/c3d848bb-cc6e-42dc-985e-8f5f99ed161f/Presentation/NewsAttachment/6573e813-8556-46af-9071-91d09edf6477/Law360%20-%200310.pdf (explaining that the reason behind pleading all possible affirmative defenses is to avoid having those defenses waived and excluded from the case).

204 *See generally* FED. R. CIV. P. 11 (detailing how pleadings, motions, and other papers should be signed, the representations an attorney makes to the court and the use of sanctions).

205 FED. R. CIV. P. 11(b)(3).

defense to be "factually and legally justified" will likely subject him or herself to Rule 11 sanctions.[206]

Taken together with *Twombly* and *Iqbal*, a defendant's attorney is torn between risking the filing of an affirmative defense that reasonably is not, or could not be, plausible and thus subject to Rule 11 sanctions, and filing an affirmative defense that may surpass Rule 11's floor, but still fails to rise to a level of plausibility and, thus, is stricken permanently from the case.[207]

206 Kaplan v. DaimlerChrysler, A.G., 331 F.3d 1251, 1255 (11th Cir. 2003). *See* FTC v. Hope Now Modifications, L.L.C., No. 09-1204 (JBS/JS), 2011 WL 883202, at *4 (D. N.J. Mar. 10, 2011) (noting that "although *Twombly* and *Iqbal* do not require specificity in stating defenses," a defendant's counsel who pleads a frivolous defense may be subject to Rule 11 sanctions). Furthermore, a defendant's "subjective good faith" belief is not enough and there must be actual support for the affirmative defense. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985). For a list of possible sanctions for violating Rule 11, see FED. R. CIV. P. 11 advisory committee's note (noting that possible sanctions for violating Rule 11 include "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; [or] referring the matter to disciplinary authorities . . . ."). For cases where defendant's attorneys were sanctioned for filing affirmative defenses in violation of Rule 11, see Aetna Cas. & Sur. Co. v. Kellogg, 856 F. Supp. 25, 33 (D. N.H. 1994) (awarding sanctions because defendant's counsel failed "to make a reasonable inquiry" into the legal basis for the affirmative defense pled); Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff, 638 F. Supp. 714, 725–26 (S.D.N.Y. 1986) (awarding attorneys' fees for attorney filing a frivolous affirmative defense which caused plaintiff's counsel to expend funds in the investigation of the defense).

207 *See* D. Jeffrey Campbell & Jonathan R. Kuhlman, *Civil Justice Reform Act of 1990: An Experiment Gone Awry*, 60 DEF. COUNS. J. 17, 28 (1993) (explaining that Rule 11 can harm a defendant because the defendant likely does not have much factual support for an affirmative defense prior to discovery and thus when it does come time for discovery and the defendant is unable to produce evidence in support of the defense, the plaintiff may move for Rule 11 sanctions). For a discussion that Rule 11 should be used in lieu of a plausibility standard to deal with insufficient pleadings, see Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1254 (2008) ("[A]n allegation that is implausible may also be said to violate Rule 11(b)(3) . . . ."); Mize, *supra* note 51, at 1267 (arguing that Rule 11 can be used to "combat the frivolous and bothersome claims that were a partial reason for the Court raising the [pleading] standard"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 485–86 (2008) ("[T]he *Twombly* Court's statement that the plausibility standard would make sure that there is a 'reasonably founded hope that the [discovery] process will reveal relevant evidence' in support of the claim steps directly on the toes of Rule 11 because under that rule counsel already are certifying that asserted claims and allegations are warranted by the evidence . . . ." (footnote omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007))). The above-cited articles, admittedly, make a good argument that Rule 11 can be used as a screening tool for pleadings. *See* Koly v. Enney, 269 F. App'x 861, 864 (11th Cir. 2008) (noting the deterrence function of Rule 11). However, this fails to take into account that Rule 11 is only as good as the pleading standard that it enforces. Thus, if an affirmative defense is held to *Conley*'s notice standard, the Rule 11 deterrent function will necessarily be lesser than if affirmative defenses were held to *Twombly*'s and *Iqbal*'s plausibility standard. *See* Samuels v. Wilder, 906 F.2d 272, 274 (7th Cir. 1990) (holding that Rule 11 does not change the notice pleading standards of *Conley*); Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (holding that Rule 11 under a notice pleading regime does not require the parties to allege the facts on which the case is based). Therefore, Rule 11 may have some deterrent effect, but it cannot be treated as a substitute for a heightened pleading standard, but rather should be seen as a mechanism

These concerns are not equally present in a plaintiff who has been given years to decide when to file a complaint. Therefore, as a plausibility standard unduly burdens a defendant, a lower bar for a defendant is necessarily required to truly balance this inequity.[208]

D. It Is Unfair to the Plaintiff to Hold the Defendant to a Notice Standard Because the Plaintiff Still Needs to Conduct Discovery

A valid critique of this Comment's proposed rule is that if fairness to a defendant truly is the concern, then notice pleading should be adopted as its requirements can be met by merely labeling the affirmative defense correctly.[209] However, notice pleading allows the most liberal scope to be applied at the discovery stage.[210] A pleading system known for its ease of access to discovery[211] would allow a defendant adversely to affect a plaintiff by pleading numerous affirmative defenses with "no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support" the defense.[212] In the Institute for

in which to enforce the applicable pleading standard. *See* Stephen R. Brown, *Reconstructing Pleading:* Twombly*,* Iqbal*, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1298 (2010) (footnote omitted) (noting that Rule 11 is not a pleading standard).

208 *See* Donoghue, *supra* note 199, at 11 (noting the inequity for plaintiffs and defendants regarding the time to respond and file complaints under the Rules).

209 *See, e.g.*, Teirstein v. AGA Med. Corp., No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Mar. 16, 2009) (noting that simply listing the affirmative defense correctly may be sufficient under a notice standard).

210 *See* Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 370 (1994) (discussing how broad access to discovery can easily be abused and lead to the filing of claims with no merits). *See also* FRIEDENTHAL ET AL., *supra* note 201, at 388–89 (describing the Rule's broad discovery standards); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1879 (2002) (noting the ease of access to discovery under the Rules).

211 Rubenstein, *supra* note 210, at 1880. When compared to common law and code pleading regimes, which focus on issue and factual development respectively, notice pleading, which is not concerned with issue or factual development at the pleading stage, has the easiest access to discovery of the three regimes. *See* Howard H. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure,* 25 CARDOZO L. REV. 793, 806 (2003) (arguing that notice pleading is the broadest of the pleading regimes, as it easily allows a party to make it past the pleadings and into discovery).

212 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)). The concerns of the *Twombly* and *Iqbal* Courts regarding the costs of discovery do not disappear by simply raising the standard for a plaintiff only. The same issues that led the Court to abandon the notice pleading standard of *Conley* would still survive if affirmative defenses were not held to a higher standard. *See* Paul J. Cleary, *Summary Judgment in Oklahoma: Suggestions for Improving a "Disfavored" Procedure*, 19 OKLA. CITY U. L. REV. 251, 271 n.103 (1994) ("With notice pleading and liberal amendment of pleadings, the motion to dismiss is an ineffective tool for screening meritless cases."); Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3, 10 (2003) (arguing that fact pleading restricts what can be alleged and narrows

the Advancement of the American Legal System survey, "[n]early half the respondents said that notice pleading has become a problem because extensive discovery is required to narrow the claims and defenses . . . ."[213] Thus, such a notice standard would shift the scales dramatically and cause the plaintiff to be placed at a disparate disadvantage.[214] The plaintiff still needs to conduct discovery, and as "the desire to avoid unnecessary discovery applies with equal force" to plaintiffs and defendants,[215] the defendant should not simply be allowed to throw any and all defenses "up against a wall to see what sticks."[216] This mindset is inconsistent with the Court's current direction.[217] Thus, this Comment proposes a standard that will have both plaintiff and defendant providing factual support for their complaints and affirmative defenses, respectively.

CONCLUSION

Admittedly, proposing a standard that permits a defendant to plead less than a plaintiff is at odds with certain notions of fairness and equality. However, there are two definitive rules that can be taken away from the *Twombly* and *Iqbal* decisions: (1) *only* complaints are held to a plausibility standard;[218] and (2)

the issues into "rather specific allegations"); Paul J. McArdle, *A Short and Plain Statement: The Significance of* Leatherman v. Tarrant County, 72 U. DET. MERCY L. REV. 19, 45 (1994) ("It has been suggested that by reason of the increase in the number of civil filings, the frequency of meritless or frivolous suits and the expense of federal litigation, it is best that the notice pleading theory of Rule 8 and *Conley* be abandoned for a return to fact pleading . . . ."). However, a fact pleading standard for an affirmative defense will bring Rule 8(c) into line with the Court's concerns regarding baseless claims and hopeless discovery. *See* Taruffo, *supra* note 172, at 675 ("When . . . a strict fact pleading rule is applied, much work has to be done by lawyers before filing a claim, and to decide whether or not there are facts sufficient to support the claim.").

213 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 166, at 4. Furthermore, according to the same survey, "[m]ore than 76 percent said that answers to complaints likewise do not accomplish the goal of narrowing issues." *Id.*

214 *See* Mize, *supra* note 51, at 1260–61 (noting the imbalance in applying a lower standard to a defendant than to a plaintiff); Jane Perkins, *Pleading Standards After* Iqbal *and* Twombly, 43 CLEARINGHOUSE REV. 507, 513–14 (2010) (noting the inherent disparity in applying such different standards to defendants and plaintiffs).

215 Lawrence-Hardy & Chapman, *supra* note 165.

216 A. Jennings Stone, III, Twombly *and* Iqbal*: Good For Affirmative Defenses, Too?*, VIRGIN IS. L. BLOG (Nov. 16, 2010, 11:45 AM), http://lawblog.vilaw.com/2010/11/articles/litigation/twombly-and-iqbal-good-for-affirmative-defenses-too/.

217 Furthermore, the plaintiff, although with time to investigate, would still have to provide factual support to give a judge reason to believe the complaint is plausible, while the defendant would have to do little more than list the name of the affirmative defense correctly. *Compare* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (holding that a complaint must state "a plausible claim for relief"), *with* Teirstein v. AGA Med. Corp., No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Mar. 16, 2009) (holding that under a notice standard, simply labeling the affirmative defense correctly may suffice). This alone should cause one to hesitate to adopt such an inequitable standard for a defendant.

218 *See supra* Part IV(A) (noting the textual differences in *Twombly*, *Iqbal*, and *Conley*).

notice pleading is inadequate to deal with the costs of discovery today.[219] However, requiring a defendant to uncover enough facts in twenty-one days to plead a plausible affirmative defense is unfair as compared to a plaintiff who may have years in which to plead a plausible claim for relief.[220] Furthermore, holding an affirmative defense to a plausibility standard forces an attorney to make a decision between risking Rule 11 sanctions and risking the possibility that a desirable affirmative defense will not be plausible, and thus will be unavailable for trial and discovery.[221] As a defendant may lose the right to plead that defense if it is stricken or not pled from the outset,[222] forcing such a requirement upon a defendant will only serve to discourage a true "decision on the merits."[223] It is also true though that affirmative defenses cannot be held to a notice standard, as that will inevitably conflict with the Court's intention to use the pleadings to combat discovery costs and that would be grossly unfair to a plaintiff.[224] Therefore, in order to remain fair to the plaintiff and the defendant,[225] to combat discovery costs,[226] and to remain consistent with *Twombly* and *Iqbal*,[227] the only proper standard is to require "the defendant to plead an adequate factual basis for [his or her] affirmative defenses."[228]

219 *See supra* Part IV(D) (describing notice pleading's inability to combat discovery costs).

220 *See supra* notes 192–202 and accompanying text (noting that such a high standard is unfair to a defendant).

221 *See supra* notes 203–208 and accompanying text (discussing how Rule 11 and waiver of affirmative defenses place defendant's attorneys in difficult and unfair positions).

222 *See supra* notes 200–202 and accompanying text (noting that defendants should include any and all defenses in the responsive pleading because they may otherwise not be allowed in as a defense).

223 Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc., 200 F.3d 795, 802 (Fed. Cir. 1999) (quoting Conley v. Gibson, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

224 *See supra* notes 156–162 and accompanying text (noting the effects of adopting notice pleading for defendants).

225 *See supra* Part IV(C) (noting the unfairness in applying *Twombly* and *Iqbal* to affirmative defenses).

226 *See supra* Part IV(B) (explaining that the purpose and effect of pleading facts is to provide the opposing party with enough information to efficiently narrow the scope of discovery).

227 *See supra* Part IV(B) (noting that a fact pleading standard is most in line with the policies behind the *Twombly* and *Iqbal* decisions).

228 Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009).