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## Tightening Twiqbal: Why Plausibility Must Be Confined to the Complaint

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### INTRODUCTION

The Supreme Court formally retired *Conley v. Gibson*'s<sup>1</sup> “no set of

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1. 355 U.S. 41, 45-46 (1957).

facts” pleading standard seven years ago.<sup>2</sup> In its place, the Court moved to the more demanding plausibility pleading regime<sup>3</sup> first articulated in *Bell Atlantic Corp. v. Twombly*<sup>4</sup> and later applied in *Ashcroft v. Iqbal*.<sup>5</sup> Facing its retirement, however, the *Conley* standard did not drive its Oldsmobile down to Florida for a life of community center bingo and early-bird specials. Rather, its applicability—in the context of affirmative defenses<sup>6</sup>—remains an unsettled issue dividing this nation’s federal district courts.<sup>7</sup> And with no federal appellate tribunal providing guidance on this issue to date, the *Conley* standard continues to be gainfully employed within several federal circuits.<sup>8</sup> Indeed, while the majority of federal district courts initially

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2. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007) (reasoning that *Conley*’s pleading standard had “earned its retirement” after being “explained away long enough”).

3. See, e.g., *Twombly*, *supra* note 2, at 570 (dismissing appellee’s claim on the pleadings because it did not include “enough facts to state a claim to relief that is plausible on its face”); Melanie A. Goff & Richard A. Bales, *A “Plausible” Defense: Applying Twombly and Iqbal to Affirmative Defenses*, 34 AM. J. TRIAL ADVOC. 603, 611 (2011) (“Through *Twombly* and *Ashcroft v. Iqbal*, the Court began applying a standard of plausibility to its application of Rule 8.”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 444 (2008) (“Such a system of plausibility pleading requires that the complaint set forth facts that are not merely consistent with liability; rather, the facts must demonstrate “plausible entitlement to relief.”) (quoting *Twombly*, 550 U.S. at 556); Marc I. Steinberg & Diego E. Gomez-Cornejo, *Blurring the Lines Between Pleading Doctrines: The Enhanced Rule 8(a)(2) Plausibility Pleading Standard Converges with the Heightened Fraud Pleading Standards Under Rule 9(b) and the PSLRA*, 30 REV. LITIG. 1, 4-5 (2010) (“Notice pleading, as understood by federal courts, practitioners, and law students for over fifty years, has been effectively overhauled by the U.S. Supreme Court through two recent decisions.”).

4. *Twombly*, *supra* note 2, at 544.

5. 556 U.S. 662 (2009).

6. Affirmative defenses “plead matters extraneous to the plaintiff’s prima facie case, which deny plaintiffs right to recover, even if the allegations of the complaint are true.” *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 262 (E.D. Cal. 1987); *Roberge v. Hannah Marine Corp.*, No. 96-1691, 1997 U.S. App. LEXIS 21655, at \*7. (6th Cir. Aug. 13, 1997) (“An affirmative defense, under the meaning of Fed. R. Civ. P. 8(c), is a defense that does not negate the elements of the plaintiff’s claim, but instead precludes liability even if all of the elements of the plaintiff’s claim are proven.”); see also Peter M. Durney & Jonathan P. Michaud, *Fending Off the Use of A Rule 12(f) Motion to Strike Affirmative Defenses*, 79 Def. Couns. J. 438, 440 (2012) (quoting *Main Hurdman*). Where an affirmative defense is proven, “[it] will defeat the plaintiff’s claim.” 5 Charles Allen Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1270 (3d ed. 2011). Rule 8(c)(1) provides a non-exhaustive list of nineteen affirmative defenses including statute of limitations, laches, and assumption of risk.

7. Goff & Bales, *supra* note 3, at 623 (“Among the courts which have determined whether the plausibility pleading standard requires similar pleading of affirmative defenses, two opposing schools of thought have emerged.”); Cf. *Riemer v. Chase Bank USA*, 274 F.R.D. 637, 640 n.3 (N.D. Ill. 2011) (stating that more than one hundred federal cases have decided on whether the *Twombly* standard applies to affirmative defense pleading).

8. *Francisco v. Verizon S., Inc.*, 3:09CV-737, 2010 WL 2990159 (E.D. Va. July 29, 2010) (“Since *Twombly* and *Iqbal*, however, neither the Fourth Circuit nor any other court of appeals has ruled on the question presented: whether *Twombly* and *Iqbal* extended the federal pleading requirements to a defendant’s affirmative defenses.”).

applied Twiqbal<sup>9</sup> plausibility to affirmative defenses, the tide is slowly shifting in favor of applying the *Conley* standard.<sup>10</sup> This paper argues that returning to *Conley* in the context of affirmative defenses is more faithful to the text of Rule 8,<sup>11</sup> fair to defendants,<sup>12</sup> and efficient for the judiciary.<sup>13</sup>

The remainder of this paper analyzes the arguments in favor of, and also against, extending the Twiqbal plausibility standard to affirmative defenses. First, Part I provides an overview of the Supreme Court's jurisprudence from *Conley* through *Iqbal*. This historical background is necessary to understand the debate at the center of this paper. Second, Part II examines the current division of views over the appropriate pleading standard to apply to a defendant's affirmative defenses, using two conflicting federal cases as examples. Third, Part III advances arguments in favor of applying the *Conley* standard and responds to the most persuasive critiques offered by opposing courts. Finally, Part IV recommends that the current disagreement among this nation's district courts should be resolved in favor of applying the *Conley* standard and considers future implications. Regardless of which position ultimately prevails, however, one simple truth remains: the choice of a pleading standard to apply to affirmative defenses can determine the outcome of a case. This decidedly grey area of procedural law would benefit from black and white appellate guidance.

#### THE PATH TOWARD PLAUSIBILITY

With the adoption of the Federal Rules of Civil Procedure in 1938, the flexible "notice pleading" standard replaced a more rigid code pleading regime.<sup>14</sup> Emblematic of this transition, the notably simple requirements of

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9. For the remainder of this paper, the term "Twiqbal" will be used to refer to the *Twombly* and *Iqbal* decisions together. Most often, this term will be used as shorthand for the "Twiqbal plausibility standard," which refers to the heightened plausibility pleadings standard announced and applied in those two opinions.

10. See, e.g., *Tiscareno v. Frasier*, No. 2:07-CV-336, 2012 WL 1377886, at \*17 n.4 (D. Utah Apr. 19, 2012) ("[T]he majority approach has been to apply the *Twombly/Iqbal* pleading standard to affirmative defenses . . . . [I]t is unclear whether that approach is still a majority position."); see also Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275, 285 (2013) ("[A]lthough a majority of early courts applied the heightened standard, [the *Conley* standard] is now the minority approach.").

11. See *infra* Section III.A.

12. See *infra* Section III.B.

13. See *infra* Section III.C.

14. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3 (2010) ("When adopted in 1938, the Federal Rules of Civil Procedure represented a major break from the common law and code systems."); see also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003) ("The drafters of the Federal Rules, chiefly Charles E. Clark, wanted a sharp break from the former common law and code pleading regimes."); David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395-96 (1980) (The key provision, rule 8(a),

Rule 8 were meant to de-emphasize pleadings and refocus on the merits of a claim.<sup>15</sup> Under the text of the Rule, a plaintiff was required only to provide a “short and plain statement” of the court’s jurisdiction, the claim, and the grounds for relief.<sup>16</sup> This dramatic departure from past pleading practices was cemented by *Conley*, where the Supreme Court held that a pleading providing a “defendant [with] fair notice of what the plaintiff’s claim is and the grounds upon which it rests” should survive a motion to dismiss.<sup>17</sup> Only where it “appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts” to support his claim would dismissal be appropriate.<sup>18</sup> Under this liberalized pleading standard, the time for fact revelation and issue formulation would come during later pretrial proceedings.<sup>19</sup>

“No Set of Facts:” From *Conley* to *Swierkiewicz*

In the decades following *Conley*, the decision served as the foundation for the Supreme Court’s new pleading paradigm. For example, in *Scheuer v. Rhodes*,<sup>20</sup> the estates of college students killed on campus during a clash with the Ohio National Guard brought a section 1983 action against various state officials. The complaints alleged that these officials caused an unnecessary Guard deployment on the campus and ordered the lethal response that ultimately led to student deaths.<sup>21</sup> The court of appeals affirmed the district court’s dismissal of the complaints, finding them to be barred, *inter alia*, by the Eleventh Amendment.<sup>22</sup> But the Supreme Court reversed, reminding the lower courts that reviewing the sufficiency of a complaint is a “limited” task.<sup>23</sup> Even where the likelihood of recovery seemed “very remote and unlikely” on the face of the pleadings, the

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abolished fact pleading and . . . was designed to avoid the distinctions drawn under the codes among evidentiary facts, ultimate facts and conclusions.”).

15. See Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 2-3 (1988) (Opining that when the Federal Rules were adopted, “they were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through”); see also Fairman, *supra* note 14; Goff & Bales, *supra* note 3, at 606-07.

16. FED. R. CIV. P. 8(a).

17. 355 U.S. 41, 47 (1957).

18. *Id.* at 45-46 (citing *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), *Continental Collieries v. Shober*, 130 F.2d 631 (3d Cir. 1942) and *Leimer v. State Mutual Life Assur. Co.*, 108 F.2d 302 (8th Cir. 1940)).

19. Miller, *supra* note 14, at 4.

20. 416 U.S. 232, 232 (1974).

21. *Id.*

22. *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972) (affirming the judgment of the district court that the suits were barred by the Eleventh Amendment because the allegations were, as a matter of law, against the State of Ohio, or, alternatively, were against the state officials who were immune from liability), rev’d sub nom. *Scheuer v. Rhodes*, 416 U.S. 232 (1974)..

23. *Scheuer*, 416 U.S. at 236.

allegations were to be construed in the light most favorable to the pleader.<sup>24</sup> Citing *Conley*, the *Scheuer* Court reemphasized that a complaint does not fail to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts” to support his allegations and entitle him to relief.<sup>25</sup>

When a former associate alleged that her law firm violated Title VII’s ban on sex-based discrimination by failing to name her a partner, the Court again reaffirmed *Conley*.<sup>26</sup> In *Hishon v. King & Spalding*, the Court of Appeals affirmed the district court’s dismissal of the plaintiff’s complaint, holding that Title VII did not apply to the selection of partners.<sup>27</sup> The Supreme Court reversed, however, finding that under *Conley*’s “no set of facts” pleading standard, the plaintiff had alleged that “consideration for partnership was one of the ‘terms, conditions, or privileges of [plaintiff’s] employment’ as an associate with” the defendant, and therefore, “partnership consideration must be without regard to sex.”<sup>28</sup> Regardless of the court’s views on the merits of her allegations, the plaintiff was “entitled to her day in court” in attempting to prove her claim.<sup>29</sup>

In the 1990s, the *Conley* standard was notably tested in the context of another section 1983 action, in which Texas homeowners sued municipal governments and local officials in their official capacities.<sup>30</sup> In *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, the court of appeals affirmed the district court’s dismissal of the plaintiffs’ Fourth Amendment-based claims under a “heightened pleading standard” for assessing municipal liability.<sup>31</sup> Finding this more demanding pleading standard to be “impossible to square . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules,” the Supreme Court cited *Conley* in reversing the dismissals below.<sup>32</sup> Summary judgment and discovery controls, the Court reasoned, would filter out unmeritorious claims during

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24. *Id.*

25. *Id.*

26. *Hishon v. King & Spalding*, 467 U.S. 69, 72 (1984).

27. *See Hishon v. King & Spalding*, 678 F.2d 1022,1024 (11th Cir. 1982), *rev’d*, 467 U.S. 69 (1984) (Court of appeals opinion); *Hishon v. King & Spaulding*, No. C80-326A, 1980 WL 342 (N.D. Ga. Nov. 28, 1980), *aff’d sub nom. Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), *rev’d*, 467 U.S. 69 (1984) (District court opinion).

28. *Hishon*, 467 U.S. at 73-74, 76.

29. *Id.* at 78-79.

30. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993).

31. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992), *rev’d*, 507 U.S. 163 (1993); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 755 F. Supp. 726, 728 (N.D. Tex. 1991), *aff’d*, 954 F.2d 1054 (5th Cir. 1992), *rev’d*, 507 U.S. 163 (1993).

32. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

later pretrial proceedings.<sup>33</sup>

Finally, as the Court entered the new millennium, the *Conley* standard seemed firmly entrenched. In *Swierkiewicz v. Sorema N.A.*, the court of appeals affirmed the district court's dismissal of the plaintiff's allegations under a heightened pleading standard used by the Second Circuit in the employment discrimination context.<sup>34</sup> But a unanimous Supreme Court reversed, consistent with *Conley*, *Scheuer*, *Hishon*, and *Leatherman*, and found the heightened pleading standard to be in "conflict[] with Federal Rule of Civil Procedure 8(a)(2)."<sup>35</sup> Eliminating any doubt, Justice Thomas emphasized that "Rule 8(a)'s simplified pleading standard applies to all civil actions" outside of a limited set of exceptions like pleading fraud or mistake under Rule 9(b).<sup>36</sup> Almost fifty years after being decided, *Conley* was cited approvingly by the unanimous *Swierkiewicz* Court. The philosophy underlying the Federal Rules, one that *Conley* came to embody, appeared poised to govern another generation of litigants. But what a difference five years can make.

#### *Twombly and the Plausibility Paradigm*

The Supreme Court decided *Bell Atlantic Corp. v. Twombly* in 2007.<sup>37</sup> The plaintiffs in the putative class action alleged that established communications providers had violated section 1 of the Sherman Antitrust Act by engaging in parallel conduct aimed to prevent new market entrants.<sup>38</sup> According to the plaintiffs, the established providers agreed to refrain from competing against each other outside of their respective markets.<sup>39</sup> As a result of this alleged parallel conduct, trade was restrained, competition impaired, and prices inflated.<sup>40</sup>

The United States District Court for the Southern District of New York originally dismissed the plaintiffs' claim.<sup>41</sup> Even accepting the allegations as true, Judge Lynch reasoned, the complaint alleged "nothing more than parallel conduct" wholly consistent with the individual economic

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33. *Id.* at 168-69.

34. 534 U.S. 506, 509 (2002).

35. *Id.* at 512.

36. *Id.* at 513. *See also* FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.")

37. 550 U.S. 544 (2007).

38. *Id.* at 548-49.

39. *Id.* at 550-51.

40. *Id.*

41. *See Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003) ("The allegations of plaintiffs' complaint provide no reason to believe that defendants' parallel conduct was reflective of any agreement.")

incentives of each defendant.<sup>42</sup> The Court of Appeals for the Second Circuit reversed, however, finding the District Court’s requirement of “plus factors” for Sherman Antitrust Act claims to be reversible error.<sup>43</sup> Indeed, after tracing the fifty-year development of *Conley* and its progeny, the Second Circuit result seemed consistent with—and correct under—the Supreme Court’s pleading standard jurisprudence. But the Supreme Court reversed the judgment of the Second Circuit in an opinion that is both infamous and controversial.<sup>44</sup>

Writing for a divided Court, Justice Souter laid the seeds for a new era of pleading practices. Stating a claim under section 1, he wrote, would require a complaint “with enough factual matter . . . to suggest that an agreement was made.”<sup>45</sup> The first step in assessing the sufficiency of the complaint, therefore, was separating the plaintiffs’ factual allegations from their conclusory statements.<sup>46</sup> Second, in assessing the factual allegations, the plaintiffs’ claim had to be “plausible” and “possess enough heft to ‘sho[w] that the pleader [wa]s entitled to relief.’”<sup>47</sup> Under this newly articulated pleading standard,<sup>48</sup> the *Twombly* plaintiffs’ complaint failed to state a claim.<sup>49</sup>

The majority acknowledged that this bifurcated “plausibility” analysis seemed inconsistent with common understandings of the *Conley* standard developed and reaffirmed over a fifty-year span. But these understandings were attributed to lower courts and commentators taking *Conley*’s “no set of facts” language out of context.<sup>50</sup> After the majority “pile[d] up” citations demonstrating that the *Conley* standard had been “questioned, criticized, and explained away long enough,” Justice Souter reasoned that the language had “earned its retirement.”<sup>51</sup> Yet, in dismissing the complaint for

42. *Id.*

43. *See* *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2005) (“But plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.”).

44. *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007).

45. *Id.* at 556.

46. *Id.* at 555-57.

47. *Id.* at 556-57 (alteration in original).

48. Of course, the majority denied that they were articulating anything “new.” *See, e.g., Id.* at 557-58 (“We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005)...”).

49. *Id.* at 564.

50. *See, e.g., Id.* at 561 (“This ‘no set of facts’ language can be read in isolation . . . and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard.”); Goff & Bales, *supra* note 3, at 614-15 (“Recognizing the confusion caused by this passage, the Court announced that the phrase should no longer be considered authoritative precedent for pleadings.”).

51. *Twombly*, 550 U.S. at 562-63.

not being “plausible on its face,”<sup>52</sup> the *Twombly* majority seemingly created more questions than it answered.

*Applying Plausibility: Ashcroft v. Iqbal*

The most important question left unanswered by *Twombly*—whether the more demanding “plausibility standard” extended beyond the antitrust context—was resolved just two short years later.<sup>53</sup> In *Ashcroft v. Iqbal*, the plaintiff brought a Bivens action<sup>54</sup> against federal officials including John Ashcroft and Robert Mueller.<sup>55</sup> The allegations claimed that the plaintiff was subjected to certain conditions of confinement (to which the general inmate population was not subjected) because of his Pakistani citizenship and Islamic faith.<sup>56</sup> Ashcroft and Mueller, the plaintiff alleged, played key roles in developing the unconstitutional policy that led to his confinement based on his religion and national origin.<sup>57</sup> After the court of appeals affirmed the denial of the defendants’ motions to dismiss, the Supreme Court granted certiorari.<sup>58</sup>

In a 5-4 decision, Justice Kennedy wrote for the majority, applying *Twombly*’s two-part “plausibility” analysis for the first time outside of the antitrust context.<sup>59</sup> At the first step, he found the plaintiff’s allegations that Ashcroft was the “principal architect” of the unconstitutional policy, and that Mueller was “instrumental” in the policy’s execution, to be conclusory and not entitled to a presumption of truth.<sup>60</sup> After excluding these implausible conclusory statements, the complaint’s factual allegations were

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52. *Id.* at 570.

53. See, e.g., Marc I. Steinberg & Diego E. Gomez-Cornejo, *Blurring the Lines Between Pleading Doctrines: The Enhanced Rule 8(A)(2) Plausibility Pleading Standard Converges with the Heightened Fraud Pleading Standards Under Rule 9(B) and the PSLRA*, 30 REV. LITIG. 1, 11 (2010) (“Two years later, in *Ashcroft v. Iqbal*, the U.S. Supreme Court decidedly resolved the question as to whether this stricter plausibility standard applied in civil cases generally or only in antitrust cases.”).

54. See generally *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (providing the seminal example of what became known, thereafter, as a Bivens action).

55. 556 U.S. 662, 666 (2009).

56. *Id.*

57. *Id.*

58. *Id.* The above description of the procedural posture is kept simple to keep the focus on the topic at-issue. In actuality, the district court dismissed some of the claims in the complaint. See *Elmaghraby v. Ashcroft*, No. 04 CV 1809 JG SMG, 2005 WL 2375202, at \*35 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part and remanded sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Also, on interlocutory appeal from that judgment, the court of appeals largely (but not entirely) affirmed. See *Id.* at 177-78 (“[T]he order of the District Court is affirmed as to the denial of the Defendants’ motions to dismiss all of the Plaintiff’s claims, except for the claim of a violation of the right to procedural due process, as to which we reverse.”), *rev’d sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

59. *Iqbal*, 556 U.S. at 677-81.

60. *Id.* at 680-81, 686.

found to fail to “nudge[]” the plaintiff’s claims “across the line from conceivable to plausible.”<sup>61</sup> Using “its experience and common sense,” the Court found that “more likely explanations” existed to explain the allegations contained in the complaint.<sup>62</sup> Because the plaintiff’s allegations were not the most likely explanation for his confinement and detainment, his allegations against Ashcroft and Mueller could not survive.<sup>63</sup>

To outside observers, the *Twombly* and *Iqbal* decisions seemed like wholesale departures from the notice pleading practices developed under *Conley* and its progeny.<sup>64</sup> After *Iqbal*, it was clear that plausibility pleading was to be applied to all civil actions. Yet, “experience and common” sense—both seemingly absent from the Court’s violent swing away from *Conley*—were the only guideposts provided to the lower courts who suddenly found themselves thrown into a new plausibility paradigm.

#### THE REACH OF PLAUSIBILITY: APPLICATION TO AFFIRMATIVE DEFENSES

In the wake of *Twombly* and *Iqbal*, lower courts struggled to faithfully apply the plausibility pleading standard.<sup>65</sup> To add to the morass, district court judges were soon confronted with a separate issue of scope left unanswered by *Iqbal*’s extension of plausibility pleading outside of the antitrust context.<sup>66</sup> Before the ink dried on Justice Kennedy’s opinion, lower courts had to decide whether the new plausibility pleading standard applied beyond Rule 8(a)(2) to a defendant’s affirmative defenses.<sup>67</sup> Affirmative

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61. *Id.* at 680 (citing *Twombly*, 544 U.S. at 569).

62. *Id.* at 663-64, 681.

63. *Id.* at 681.

64. *See, e.g.*, Steinberg & Gomez-Cornejo, *supra* note 53, at 25-26 (“Federal courts and legal scholars, however, are still trying to understand this notion of ‘plausibility’ and the extent to which it has enhanced the basic pleading requirements of Rule 8(a)(2).”); *see also* Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 853 (2008) (“We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.”); Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893 (2008) (discussing different approaches that federal district courts took in assessing the sufficiency of complaints after *Twombly*).

65. *See, e.g.*, McMahon, *supra* note 64, at 852 (opining that, from a Federal District Court judge’s perspective, plausibility pleading “radically changed one of the iconic rules of civil procedure, while overturning or modifying one of the most often cited cases in the United States Reports”).

66. *See supra* Part I.C.

67. *See, e.g.*, Perez v. Gordon & Wong Law Grp., P.C., No. 11-CV-03323-LHK, 2012 WL 1029425, at \*8 (N.D. Cal. Mar. 26, 2012) (noting that the Supreme Court, along with Federal Courts of Appeal, have not answered this question); James V. Bilek, *Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 CHAP. L. REV. 377, 378 (2011) (“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.”).

defenses, those defenses that go beyond simple denials of a plaintiff's allegations,<sup>68</sup> "defeat a plaintiff's claim" where proven.<sup>69</sup> Left without guidance on this consequential issue, the majority of district courts initially answered it affirmatively—*Twiqbal* plausibility pleading was applied to affirmative defenses.<sup>70</sup> Yet, with the benefit of additional time, a growing majority of federal district courts has now declined to extend plausibility to affirmative defenses under Rules 8(b) and 8(c).<sup>71</sup> The cases analyzed below serve as exemplars of the competing approaches courts have taken to assess affirmative defenses. With no federal appellate tribunal providing definitive guidance on the issue, these cases also represent the most authoritative articulations of the competing positions presently available.<sup>72</sup>

*Extending Plausibility: Dion v. Fulton Friedman & Gullace LLP*

In the post-*Twiqbal* world, many federal district courts have applied the plausibility pleading standard to a defendant's affirmative defenses.<sup>73</sup>

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68. See, e.g., *Rivertree Landing LLC v. Murphy*, 246 F.R.D. 667, 668 (N.D. Ill. 2007) ("It is improper to assert something as an affirmative defense that is nothing more than a denial of an allegation contained in the complaint."); *Instituto Nacional de Comercializacion Agricola (Indeca) v. Cont'l Illinois Nat'l Bank and Trust Co.*, 576 F. Supp. 985, 989 (N.D. Ill. 1983) (same); see also 61 A Am. Jur. 2d, *Pleading*, § 301 (quoting *Rivertree Landing* for the same proposition).

69. 5 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 1270 (3d ed. 2011); see also *Roberge v. Hannah Marine Corp.*, No. 96-1691, 1997 U.S. App. LEXIS 21655, at \*7 (6th Cir. Aug. 13, 1997) ("An affirmative defense, under the meaning of FED. R. CIV. P. 8(c), is a defense that does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven."). *But see* *United States v. Hartssock*, 347 F.3d 1, 8 (1st Cir. 2003) (separating affirmative defenses into three categories).

70. Mayer, *supra* note 10, at 279 ("In the years immediately following *Twombly* and *Iqbal*, most of the district courts that considered affirmative defense pleading standards extended plausibility pleading from complaints to defenses.")

71. See, e.g., *Tiscareno v. Frasier*, No. 2:07-CV-336, 2012 WL 1377886, at \*17 n.4 (D. Utah Apr. 19, 2012) ("[T]he majority approach has been to apply the *Twombly/Iqbal* pleading standard to affirmative defenses . . . . [I]t is unclear whether that approach is still a majority position."); *Hansen v. R.I.'s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122 (D. Mass. 2012) (noting that while most district courts initially applied *Twiqbal* plausibility to affirmative defenses, "this is now the minority approach."); see also Mayer, *supra* note 10, at 285 (citing *Hansen* and explaining that while "a majority of early cases applied the heightened standard, [the *Conley* standard] now seems to be the majority approach").

72. *Godson v. Eltman, Eltman & Cooper, P.C.*, 285 F.R.D. 255, 257 (W.D.N.Y. 2012) ("[T]he applicability of *Twombly* and *Iqbal* to affirmative defenses [is] a dispute that has been brewing in the district courts . . . . [and] not one court of appeals has considered this issue."); see also Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (3d ed. 1998 & Supp. 2011) (describing the split among federal district courts).

73. See, e.g., *Aguilar v. City Lights of China Restaurant, Inc.*, No. DKC 11-24162011, U.S. Dist. LEXIS 122531, at \*5-6 (D. Md. Oct., 24, 2011) ("[T]he majority of district courts . . . have concluded that the *Twombly - Iqbal* approach does apply to affirmative defenses."); *Gessele v. Jack in the Box, Inc.*, No. 3:10-cv-960-ST, 2011 U.S. Dist. LEXIS 99419, at \*4 (D. Or. Sept. 2, 2011) ("[T]he majority of district courts across the country have extended *Twombly's* plausibility standard to affirmative defenses."); *Dilmore v. Alion Science & Technology Corp.*,

The justifications typically advanced for doing so focus on broad themes of fairness, balance, and the language of the Federal Rules. For example, in *Dion v. Fulton Friedman & Gullace LLP*,<sup>74</sup> the plaintiff brought claims under the federal Fair Debt Collection Practices Act<sup>75</sup> against a New York law firm that formerly represented him.<sup>76</sup> He alleged that the defendants unlawfully filed a state court action attempting to collect an illusory debt from him, making deceptive misrepresentations throughout the state court litigation.<sup>77</sup> In response to the plaintiff's deceptive debt collection practices allegations, the defendants asserted fifteen affirmative defenses in their answer.<sup>78</sup> But the plaintiff responded by filing—and the court later granted—a motion to strike all fifteen affirmative defenses pursuant to Federal Rule of Civil Procedure 12(f).<sup>79</sup>

Before granting the plaintiff's 12(f) motion, the court acknowledged that there was a “difference of opinion among federal district courts that has followed in the wake of the *Twombly/Iqbal* sea change in federal pleading standards.”<sup>80</sup> Although the Supreme Court and the Ninth Circuit had not decided whether plausibility pleading extended to the affirmative defenses in a defendant's answer, Judge Conti found the reasoning in support of extending plausibility to be more persuasive.<sup>81</sup> He explained that extending the heightened standard would “weed out the boilerplate listing of affirmative defenses” that is far too common in defensive pleadings.<sup>82</sup> Requiring plausible defenses would also promote the “underlying purpose of Rule 12(f)” and balance the burdens on plaintiffs and defendants.<sup>83</sup> Striking poorly asserted affirmative defenses early in a litigation would not produce unintended consequences, the court reasoned, because a defendant could always seek leave to amend under Rule 15.<sup>84</sup> Therefore, because the defendants in *Dion* provided “labels and conclusions” in place of plausible,

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No. 11-722011, U.S. Dist. LEXIS 74285, at \*13-14 (W.D. Pa. July 11, 2011) (“[T]he emerging majority of district courts apply the *Twombly/Iqbal* standards to affirmative defenses.”).

74. No. 11-2727 SC, 2012 U.S. Dist. LEXIS 5116 (N.D. Cal. Jan. 17, 2012).

75. 15 U.S.C. §§ 1692, et seq; the plaintiff also brought claims under California's Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788 et seq.

76. *Dion*, 2012 U.S. Dist. LEXIS 5116, at \*1-2.

77. *Id.* at \*2.

78. *Id.*

79. *Id.* at \*2, \*10.

80. *Id.* at \*4.

81. *Id.* at \*5.

82. *Id.* at \*6 (quoting *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010)).

83. *Dion v. Fulton Friedman & Gullace*, No. 11-2727 SC, 2012 U.S. Dist. LEXIS 5116 (N.D. Cal. Jan. 17, 2012)

84. *Id.* at \*9-10 (citing FED. R. CIV. P. 15(a)(2); FED. R. CIV. P. 15(b)(1); FED. R. CIV. P. 15(c)(1)(B)).

factually-supported defenses, all of their affirmative defenses were stricken.<sup>85</sup> As a result, the Northern District of California joined the early majority of districts deciding to extend plausibility to defenses under Rule 8(c).

*Declining to Extend Plausibility: Bayer CropScience AG v. Dow AgroSciences LLC*

Today, the majority of federal district courts have declined the invitation to extended *Twiqbal*'s heightened standard to affirmative defenses.<sup>86</sup> While these "fair notice" courts often weigh the same broad considerations as the "extension courts" referenced above, their analyses arrive at an opposite conclusion. For example, in *Bayer CropScience AG v. Dow AgroSciences LLC*, the plaintiff brought a claim for patent infringement, and the defendant answered by asserting various counterclaims and affirmative defenses.<sup>87</sup> The plaintiffs filed a motion to strike the defendant's fifth and seventh affirmative defenses pursuant to Rule 12(f).<sup>88</sup>

First, the court acknowledged the split over the applicability of the plausibility pleading standard beyond Rule 8(a).<sup>89</sup> Second, after noting that the Third Circuit had not decided the issue, Judge Bumb elected to join the growing majority of courts declining to extend plausibility.<sup>90</sup> She provided nine separate bases for his decision, including textual differences in the applicable Rules, the time constraints placed on a defendant's answer, and "the risk that a defendant will waive a defense at trial by failing to plead it at the early stage of the litigation."<sup>91</sup> Turning to the defendant's affirmative defense of patent misuse, the court found that the answer "provide[d] fair notice under the liberal pleading standards of the Rule."<sup>92</sup> Fair notice was all that was required, and Judge Bumb explicitly stated that courts should "not apply *Twombly/Iqbal* to affirmative defenses."<sup>93</sup> The remainder of this paper argues in favor of this position.

CONFINING PLAUSIBILITY: TEXTUAL, FAIRNESS, AND EFFICIENCY

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85. *Id.*

86. *See supra* note 71 and accompanying text.

87. No. 10-1045 RMB/JS2011, U.S. Dist. LEXIS 149636, at \*2, 2011 WL 6934557, at \*1-2 (D. Del. Dec. 30, 2011).

88. *Id.* at \*1.

89. *Id.*

90. *Id.* at \*4.

91. *Id.* at \*2.

92. *Id.* at \*12.

93. *Id.* at \*11.

## JUSTIFICATIONS

Both camps in the battle to define the proper scope of *Twiqbal* plausibility are fighting using the same weapons of persuasion. From the first cases decided in the wake of *Iqbal*, to the more recent cases that have entrenched the views of various circuits, common types of arguments connect the divergent decisions of federal district courts. Whether novel or pervasive, virtually all arguments advanced by “extension” and “fair notice” courts can be organized into three basic buckets: text-based, fairness-based, and efficiency-based arguments. The Sections below analyze each of these types of arguments in turn, and conclude that *Twiqbal* plausibility should not be extended to a defendant’s affirmative defenses.

*The Textual Basis for Confining Plausibility*

The *Twombly* and *Iqbal* decisions focused on Rule 8(a)(2).<sup>94</sup> Both opinions were grounded in the text of the Rule itself.<sup>95</sup> A logical starting place for the current debate, therefore, is the text of the relevant Federal Rules. Specifically, Rule 8(a) governs claims for relief, while Rule 8(c) governs affirmative defenses.<sup>96</sup> In comparing Rules 8(a)(2) and 8(c), even a cursory review reveals serious differences in language.<sup>97</sup> As the “fair

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94. See *Davis v. Indiana State Police*, 541 F.3d 760, 763-64 (7th Cir. 2008) (reasoning that when *Twombly* “restated the requirements of FED. R. CIV. P. 8, the Justices did not revise the allocation of burdens concerning affirmative defenses; neither *Erickson* nor *Bell Atlantic* mentions affirmative defenses . . . .”); *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 662–63 (M.D. Ala. 2012) (quoting footnote three from the *Twombly* majority opinion which responded to the dissent by reasoning that “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief”); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (“We turn to respondent’s complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (“This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief . . . .”); *Durney & Michaud*, *supra* note 6, at 446 (“The holdings of *Twombly* and *Iqbal* applied to the pleading requirements of a plaintiff’s Complaint under the ‘short and plain statement’ requirement of Federal Rule 8(a)(1), when attacked by a Rule 12(b)(6) motion to dismiss.”).

95. See *Iqbal*, 556 U.S. at 678-79 (“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 ‘show[n]’—that the pleader is entitled to relief.’ FED. RULE CIV. PROC. 8(a)(2).”); *Twombly*, 556 U.S. 555-56 (“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions . . . .”).

96. See FED. R. CIV. P. 8(a), 8(c). FED. R. CIV. P. 8(b) governs pleading defenses, but more specifically, admissions and denials within an answer. The “showing” language is absent from Rule 8(b) as well.

97. The language of Rule 8(a)(2) has remained unchanged since 1938. Rule 8(c), as originally adopted, stated in part: “In pleading to a preceding pleading, a party shall set forth

notice” courts argue, these differences cannot be ignored in deciding whether plausibility pleading should be extended.<sup>98</sup>

Rule 8(a)(2) requires “a short and plain statement of the claim *showing* that the pleader is *entitled to relief*.”<sup>99</sup> This language was relied on heavily by the *Twombly* and *Iqbal* majorities to frame the heightened plausibility standard as being neither novel nor different. According to those decisions, plausibility pleading simply recognized Rule 8(a)(2)’s threshold requirement that the plain statement possess enough heft to “sho[w] that the pleader is entitled to relief.”<sup>100</sup> In contrast, Rule 8(c) does not contain any comparable language requiring defendants to make a “showing.” The rule instead directs defendants to “affirmatively *state* any avoidance or affirmative defense.”<sup>101</sup> Central to any comparison of the relevant Rules’ text, therefore, is the difference between 8(a)(2)’s “showing” language and 8(c)’s “stating” language.<sup>102</sup> Arguing that “showing” entitlement to relief does not require something more demanding than simply “stating” an affirmative defense is an untenable position. After all, if the drafters of the Federal Rules intended for the same standard to govern rules 8(a)(2) and 8(c), they could have easily used the same language in both provisions.<sup>103</sup> They did not, however, and if the word

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affirmatively accord and satisfaction, . . . waiver, and any other matter constituting an avoidance or affirmative defense.” After the 2007 restyling of the Federal Rules of Civil Procedure, Rule 8(c)(1) was changed to include its current “affirmatively state” language. As the 2007 Committee Note indicates, this rewording was “intended to be stylistic only.” 2007 Committee Note to Rule 8.

98. See, e.g., *Cottle v. Falcon Holdings Mgmt., LLC*, No. 2:11-CV-95-PRC, 2012 U.S. Dist. LEXIS 10478, at \*8-9 (N.D. Ind. Jan. 30, 2012) (“The requirement of a ‘showing that the pleader is entitled [9] to relief’ in Rule 8(a) is not contained within the requirements of 8(b) for ‘defenses’ or 8(c) for ‘affirmative defenses,’ and an affirmative defense is not a claim for relief.”); *Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, CN SA CV 11-1161 DOC, 2012 U.S. Dist. LEXIS 6745, at \*4-6 (C.D. Cal. Jan. 20, 2012) (“When read together, the sub-parts of the rule appear to demand more from a party stating a claim for relief, i.e., the party stating a claim must show he or she is entitled to relief.”); *Dilmore v. Alion Science & Technology Corp.*, No. 11-72, 2011 U.S. Dist. LEXIS 74285, at \*14 (W.D. Pa. July 11, 2011) (“Rule 8(b) and 8(c) do not require a showing, which leads this Court to the conclusion that, at least under current Third Circuit law, *Twombly* and *Iqbal* are not applicable to defensive pleadings.”).

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

100. *Twombly*, 550 U.S. at 557 (alteration in original).

101. FED. R. CIV. P. 8(c)(1) (emphasis added).

102. See, e.g., *Enough for Everyone. v. Provo Craft & Novelty*, No. SA CV 11-1161, 2012 WL 177576, at \*2 (C.D. Cal. Jan. 20, 2012) (“[T]he party stating a claim must show he or she is entitled to relief. In contrast, a party stating a defense need not show he or she is entitled to relief, but need only state any defense . . .”) (emphasis omitted); *Durney & Michaud*, *supra* note 6, at 446 (“In comparing the relevant federal rules, courts have found a distinction between Rule 8(a)(2), which requires the pleader to show entitlement to relief, and Rule 8(b)(1), which only requires a statement of affirmative defenses ‘in short and plain terms.’”).

103. See, e.g., *EEOC v. Joe Ryan Enters., Inc.*, 281 F.R.D. 660, 663 (M.D. Ala. 2012) (“If the drafters of Rule 8 intended for defendants to plead affirmative defenses with the factual specificity required of complaints, they would have included the same language . . . [to] govern[]

“show” is the textual justification for requiring factual heft in a complaint, then “stating” an affirmative defense necessarily requires something less (or at least different). Recognizing the mismatch between the language of Rule 8 and their logic, several extension courts have relied on an alternative textual argument to salvage their position.

Although *Twombly* and *Iqbal* only addressed Rule 8(a), extension courts point to the similar language governing both pleading claims in a complaint and defenses in an answer.<sup>104</sup> First, these courts argue that the “short and plain statement” language of Rule 8(a), and the “short and plain terms” required by Rule 8(b), are essentially identical.<sup>105</sup> Second, and as a result, these courts reason that Rule 8 is meant provide a uniform standard to govern all types of pleadings: “fair notice.”<sup>106</sup> Finally, because the Supreme Court reinterpreted the requirements of “fair notice” in *Twombly*, this reinterpretation applies to both complaints and affirmative defenses.<sup>107</sup> But the “fair notice” requirement that extension courts rely on to articulate this attenuated position is not included anywhere in the text of Rule 8. Rather, “fair notice” is the philosophy that has served as the foundation for notice pleading practices under the Federal Rules since *Conley*. The extension courts’ textual argument, therefore, begins with the language of the Rules, but ends with a strained abstraction to a general, governing

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answers and affirmative defenses.”) (alterations in original)).

104. Mayer, *supra* note 10, at 282 for the proposition that “[d]espite the fact that *Twombly* and *Iqbal* focused specifically on Rule 8(a), the plausibility courts argue that “[s]imilar language is used in Rule 8 to describe the requirements for pleading both claims in a complaint and defenses in an answer” (citing *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536–37 (D. Md. 2010)).

105. See, e.g., *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (“Rule 8’s requirements with respect to pleading defenses in an answer parallels the Rule’s requirements for pleading claims in a complaint . . . . The court can see no reason why the same principles applied to pleading claims should not apply to the pleading of affirmative defenses.”).

106. See *Perez v. Gordon & Wong Law Grp.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at \*7 (N.D. Cal. Mar. 26, 2012) (“Given that *Twombly* and *Iqbal* have since displaced *Conley*’s interpretation of the fair notice pleading standard for complaints, the Court ‘can see no reason why the same principles applied to pleading claims should not apply to the pleading of affirmative defenses which are also governed by Rule 8’”) (internal citation omitted); *Barnes*, 2012 WL 359713, at \*2 (“*Twombly*’s rationale of giving fair notice to the opposing party would seem to apply as well to affirmative defenses given the purpose of Rule 8(b)’s requirements for defenses.”); see also Mayer, *supra* note 10, at 282 (citing *Perez* and explaining that courts applying plausibility to affirmative defenses argue that “Rules 8(a) and 8(b) both require litigants to . . . give the opposing party ‘fair notice,’ . . . [so] if *Twombly* generally redefined ‘fair notice’ to require plausibility pleading, then plausibility applies to complaints and defenses alike.”).

107. See, e.g., *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009) (“In both instances [whether complaints and affirmative defenses], the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case.”).

principle. This argument is neither intellectually honest nor logically sound.

Instead of engaging in these interpretive gymnastics, extension courts should be faithful to traditional canons of statutory construction. As the Supreme Court has made clear, courts interpreting the Federal Rules must “refrain from concluding[] that [various Rules’] differing language . . . has the same meaning.”<sup>108</sup> While extension courts seek to minimize the textual differences between Rule 8(a) and 8(c), or ascribe them “to a simple mistake in draftsmanship,”<sup>109</sup> the interpretive rule of *expressio unius est exclusio alterius*<sup>110</sup> counsels against this interpretation.<sup>111</sup> Under the canon, inclusion of the unique “showing” language in Rule 8(a)(2) implies the exclusion of that language from Rule 8(c)(1).<sup>112</sup> Because the Federal Rules require a “showing” under Rule 8(a), the defendant’s duty of “stating” affirmative defenses under Rule 8(c) must be interpreted to have a separate and distinct meaning.<sup>113</sup> If *Twombly* decided that a “showing” requires plausibility, then courts cannot interpret “stating” to denote an identical requirement.<sup>114</sup> The Federal Rules, as interpreted by canons of statutory construction and common sense, lead to this conclusion. As a result, attempts to extend plausibility based on the language of Rule 8 rely more on pretext than textualism.

#### *Fairness Considerations in Confining Plausibility*

The text of Rule 8 seems to confine plausibility pleading to complaints. But that is not the end of the inquiry. There must be some other consideration driving the attempts of extension courts to apply the heightened standard to defensive pleadings. Beyond the language of Rule 8,

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108. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002). *cf.* *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 123 (1989) (“We give the Federal Rules of Civil Procedure their plain meaning.”); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750, n. 9 (1980) (“The Federal Rules should be given their plain meaning.”).

109. *Barnhart*, *supra* note 107.

110. This canon advises that “the mention of one thing implies the exclusion of the other.”

111. See *Mayer*, *supra* note 10, at 297 (“[S]ince the Court relied on the *expressio unius est exclusio alterius* canon in interpreting Rule 9, it makes sense for district courts to similarly employ the canon in determining whether *Twombly* applies to affirmative defenses.”).

112. *Id.*

113. *Id.*

114. To make this point clear, it is useful to consider what Rule 8(c)(1) would look if the Committee used language exactly parallel to that found in Rule 8(a)(2). The context of affirmative defenses should make obvious that the answer cannot possibly establish an “entitlement to relief.” Even using nearly parallel language, however, the Rule would have to require something close to the following: “In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense showing that the party’s opponent is not entitled to relief, including: . . .” Such a formulation would certainly not make it out of the Committee and would be rejected as surplusage.

post-*Twiqbal* courts are acutely concerned with how the Federal Rules function in practice.<sup>115</sup> Indeed, a rule that places an undue burden on a party can disturb the delicate balance of any litigation and prevent—rather than promote—the realization of justice.<sup>116</sup> And because no individual Federal Rule exists in a vacuum,<sup>117</sup> the relevant district court opinions filed after the *Twiqbal* revolution largely focus on a pragmatic concern: fairness to litigants.<sup>118</sup> With Rules 8(b) and 8(c) interacting within the larger, federal procedural framework, declining to extend plausibility to defensive pleadings is much fairer to defendants.

A fair result under Rule 8 must consider the time constraints imposed on both parties involved in litigation. Unlike plaintiffs, who often spend years investigating facts and developing legal theories before filing a complaint, defendants must answer within just twenty-one days.<sup>119</sup> “Fair

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115. See Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the “Discriminatory Motive” Under Title VII*, 60 CLEV. ST. L. REV. 1057, 1066-67 (2013) (“The ability to operationalize the social theory embodied in the law is highly relevant . . . [because t]o the extent that [a] hypothesis is poorly operationalized . . . [case] outcomes . . . will be unnecessarily error prone at best and unpredictably random at worst.”). For examples of this proposition relevant to the current debate, see *infra* note 114 and accompanying text.

116. Compare *Amerisure Ins. Co. v. Thomas*, No. 4:11CV642 JCH, 2011 U.S. Dist. LEXIS 79530, at \*6 (E.D. Mo. July 21, 2011) (“It makes little sense to hold defendants to a lower pleading standard than plaintiffs when, in both instances, the purpose of pleading requirements is to provide enough notice to the opposing party. . . .”) and *Francisco v. Verizon South, Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at \*17 (E.D. Va. July 29, 2010) (“The same logic holds true for pleading affirmative defenses as for pleading claims – without alleging facts the plaintiff can’t prepare adequately to respond.”) with *Adams v. JP Morgan Chase Bank, N.A.*, No. 3:11-cv-337-J-37MCR, 2011 U.S. Dist. LEXIS 79366, at \*10 (M.D. Fla. July 21, 2011) (“Whereas plaintiffs have the opportunity to conduct investigations prior to filing their complaints, defendants, who typically only have twenty-one days to respond to the complaint, do not have such a luxury.”) and *Falley v. Friends Univ.*, 787 F. Supp. 2d 1255, at 1258-59 (D. Kan. Apr. 14, 2011) (“A plaintiff may take years to investigate and prepare a complaint, limited only by the reigning statute of limitations. But once that complaint is served, a defendant has only 21 days in which to serve an answer.”).

117. See, e.g., Bernadette Bollas Genetin, *Summary Judgment and the Influence of Federal Rulemaking*, 43 AKRON L. REV. 1107, 1111 (2010) (“Professor Stephen Burbank and Professor Linda Mullenix enlarge the discussion to consider as well the impact of summary judgment on other aspects of the interconnected federal procedural system.”); see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (arguing that *Iqbal* destabilizes the federal procedural system creating a “foggy” legal standard); Glenn S. Koppel, *Toward A New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1192 (2005) (“The federal judiciary seeks to constrain forum shopping by applying the same procedural rules in all federal courts.”).

118. Anthony Gambol, Note, *The Twombly Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173, 2209 (2011) (Collecting cases and opining that “[p]rocedure, precedent, and policy have all discouraged the extension of the Twombly standard to affirmative defenses. Simple fairness does as well.”).

119. See FED. R. CIV. P. 12(a)(1)(A); see also New York State Bar Association Committee on Federal Procedure, *Whether The Heightened Pleading Requirements Of Twombly and Iqbal Apply To Pleading Affirmative Defenses* (March 12, 2012), available at

notice” courts recognize the practical implications of the disparate temporal requirements set by the Federal Rules, and account for them by applying the less-demanding *Conley* standard to affirmative defenses.<sup>120</sup> Even though defendants are often able to obtain thirty-day extensions for their answers, the filing of a complaint is only constrained by the relevant statute of limitations.<sup>121</sup> Requiring the same factual heft from a defendant after just twenty-one days, a level of plausibility that often goes unsatisfied by plaintiffs after several years, places a significantly more substantial burden on the shoulders of defendants.<sup>122</sup>

In response to these pragmatic concerns, extension courts often appeal to concepts of abstract fairness. Many of these courts assert that as a matter of fundamental fairness, all pleadings must give an opposing party notice of the plausible, factual allegations being made against him.<sup>123</sup> Because all

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[http://www.nysba.org/Sections/Commercial\\_Federal\\_Litigation](http://www.nysba.org/Sections/Commercial_Federal_Litigation) (“It would be unfair to defendants to require them to provide detailed factual allegations when they have only 21 days to respond to the complaint (see FED. R. CIV. P. 12(a)(1)(A)), whereas plaintiffs have a great deal more time to conduct an investigation prior to filing the complaint.”).

120. See, e.g., *Cottle*, 2012 U.S. Dist. LEXIS 10478, at \*10 (“[W]hereas a plaintiff generally has the benefit of the period of the statute of limitations, which may extend from many months to several years, to investigate and file a complaint, a defendant typically has only 21 days in which to serve an answer, including affirmative defenses, to the complaint.”); *Schlieff v. Nu-Source, Inc.*, No. 10-4477 (DWF/SER), 2011 U.S. Dist. LEXIS 44446, 2011 WL 1560672 (D. Minn. Apr. 25, 2011) (“In addition, a defendant typically has only 21 days in which to serve an answer to a complaint and is therefore in a much different position from that of a plaintiff.”) (citing *Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049 (D. Minn. 2010)); *Aros v. United Rentals, Inc.*, No. 3:10-CV-73 (JCH), 2011 U.S. Dist. LEXIS 125870, 2011 WL 5238829, at \*9-10 (D. Conn. Oct. 31, 2011) (“First, because plaintiffs’ time to prepare pleadings is limited only by the statute of limitations, whereas defendants’ time is limited to twenty-one days, it makes sense that plaintiffs’ claims would be required to meet a higher standard than defendants’ affirmative defenses.”); *Lane v. Page*, 272 F.R.D. 581, 595 (D.N.M. 2011) (“Courts that decline to extend *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*’s pleading standard to affirmative defenses reason that, given the limited time defendants have to file their answers, it is appropriate to impose asymmetric pleading requirements on plaintiffs and defendants.”); *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09-cv-02870-LTB-BNB, 2010 U.S. Dist. LEXIS 29377, 2010 WL 865380, at \*2 (D. Colo. Mar. 8, 2010) (“[I]t is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses.”).

121. See, e.g., *Aros*, *supra* note 118; New York Bar Association Committee on Federal Procedure, *supra* note 117.

122. See *Gambol*, *supra* note 116, at 2209 (“A defendant is at a gratuitous disadvantage in the acquisition of factual material at the pleading stage.”). Of course, certain affirmative defenses would not be particularly onerous for a defendant to plead with some level of detail. For example, it would not likely require a lengthy investigation to discern the particulars of the facts grounding the defenses of accord and satisfaction, or the statute of frauds.

123. See, e.g., *Amerisure Ins. Co. v. Thomas*, No. 4:11CV642 JCH, 2011 U.S. Dist. LEXIS 79530, at \*6 (E.D. Mo. July 21, 2011) (“It makes little sense to hold defendants to a lower pleading standard than plaintiffs when . . . the purpose of pleading requirements is to provide enough notice to the opposing party that there is some plausible, factual basis for the assertion.”); *Francisco v. Verizon South, Inc.*, No. 3:09cv7372010, U.S. Dist. LEXIS 77083, at \*17 (E.D. Va.

forms of pleading, whether offensive or defensive, share this common purpose, extension courts reason that the standard governing these documents under Rule 8 should be symmetrical.<sup>124</sup> But while fair notice and symmetry are desirable ends in the abstract, the response of extension courts is detached from a procedural reality that places plaintiffs in a privileged position when the same level of plausible factual support is required of all pleadings.<sup>125</sup> Under these circumstances, imposing an asymmetrical pleading standard on the parties—plausibility under Rule 8(a) and fair notice under Rule 8(c)—counterintuitively functions to facilitate fairness and equality of opportunity.<sup>126</sup> Instead of the nominal equality emphasized by extension courts, confining plausibility to complaints produces equality in practice. Extension courts sacrifice substance but remain constrained by form.

Also unaccounted for by extension courts' abstract appeals to fair notice are the practical differences in notice available to plaintiffs and defendants. As explained above, affirmative defenses "plead matters extraneous to the plaintiff's prima facie case, which deny plaintiff's right to recover, even if the allegations of the complaint are true."<sup>127</sup> That is, where the defendant proves an affirmative defense, "[it] will defeat the plaintiff's claim."<sup>128</sup> As any first-year law student comes to learn, therefore, affirmative defenses are necessarily asserted after the filing of the plaintiff's initial complaint.<sup>129</sup> Consequently, a plaintiff can combine his own

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July 29, 2010) ("The same logic holds true for pleading affirmative defenses as for pleading claims – without alleging facts the plaintiff can't prepare adequately to respond."); Shinew v. Wszola, No. 08-14256, 2009 WL 1076279, at \*3 (E.D. Mich. Apr. 21, 2009) (reasoning that symmetrical pleading standards are more fair).

124. *Id.*

125. *See, e.g.,* Gambol, *supra* note 116, at 2209. I must note that this concern loses some of its persuasive power in circumstance in which a defendant is privy to information concerning a specific type of defense that the plaintiff is not. In such a scenario, the defendant is advantaged by an information asymmetry. *See, e.g.,* Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12 (1959) ("The nature of a particular element may indicate that evidence relating to it lies more within the control of one party, which suggests the fairness of allocating that element to him.... Examples are payment, discharge in bankruptcy, and license, all of which are commonly treated as affirmative defenses.")

126. *See Lane, supra* note 120; *see also* Petroci v. Transworld Sys., Inc., No. 12-CV-00729 (A)(M), 2012 WL 5464597, at \*2 (W.D.N.Y. Oct. 19, 2012) (finding symmetrical pleading standards to place an asymmetrical burden falling more heavily on defendants), *report and recommendation adopted by* No. 12-CV-729A, 2012 WL 5464579 (W.D.N.Y. Nov. 8, 2012); Hahn v. Best Recovery Servs., No. 10-12370, 2010 WL 4483375, at \*2 (E.D. Mich. Nov. 1, 2010) (identifying this asymmetric burden as a reason why discovery should be granted before assessing the factual sufficiency of affirmative defenses).

127. Fed. Deposit Ins. Corp. v. Main Hurdman, 655 F. Supp. 259, 262 (E.D. Cal. 1987); *see also* Durney & Michaud, *supra* note 6, at 440 (2012) (quoting *Main Hurdman*).

128. 5 Charles Allen Wright and Arthur R. Miller, Federal Practice and Procedure, § 1270 (3d ed. 2011).

129. *See generally* FED. R. CIV. P. 8.

allegations with the specific affirmative defenses pled by defendant in order to achieve a level of notice unavailable to defendants served with a deficient complaint. Unlike naked allegations included in a complaint, plaintiffs seeking to argue against affirmative defenses have much more context from which notice should be inferred. With this practical reality in mind, affirmative defenses, “when read in conjunction with the Complaint, provide the plaintiff with sufficient notice required” by the Federal Rules.<sup>130</sup>

Next, a fair result under Rule 8 must also consider the strategic implications of extending plausibility. Under a symmetrical plausibility pleading regime, a defendant may be unable to sufficiently support meritorious affirmative defenses with plausible, factual allegations within a twenty-one day window.<sup>131</sup> Yet, under Rule 12(h), failing to include an affirmative defense in one’s answer risks permanently waiving that defense.<sup>132</sup> This result can have a profound effect on the course of a litigation. Indeed, “fair notice” courts have admonished extension courts for unreasonably expecting “a defendant to find a lawyer or mobilize in-house counsel, conduct an investigation, and then plead all relevant affirmative defenses in plausible factual detail within a mere twenty-one days of service . . . .”<sup>133</sup> And while any chilling effect produced by an extension of plausibility pleading may be cured by an individual court’s granting of leave to amend under Rule 15,<sup>134</sup> this indirect solution transforms the amendment process into a corrective mechanism never envisioned by the Rulemakers.<sup>135</sup> Rather than relying on leave to amend to ameliorate a

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130. Durney & Michaud, *supra* note 6, at 447.

131. See Gambol, *supra* note 116, at 2209 (“Some facts in support of affirmative defenses may only come out during discovery, and the scope of discovery is limited to the pleadings.”).

132. FED. R. CIV. P. 12(h). See also Lane, *supra* note 120, at 596 (“Moreover, defendants risk waiving affirmative defenses that are omitted from their answer.”); New York Bar Association Committee on Federal Procedure, *supra* note 119 (“Failure to plead an affirmative defense risks waiving that defense.”). Although courts and scholars have grounded this waiver argument in Rule 12(h), it is not clear that the Rule addresses this question. Federal Practice & Procedure § 1278 notes: “A number of federal courts have predicated the waiver of an unpleaded affirmative defense on the language of Rule 12(h). Although there was some textual basis in Rule 12(h) prior to 1966 for the waiver of affirmative defenses that were not pleaded in the answer, the 1966 amendment to the rule as well as the Advisory Committee Notes indicate that Rule 12(h) only controls the waiver of the defenses enumerated in Rule 12. The absence of a textual basis in Rule 12(h) is of little moment inasmuch as the waiver of affirmative defenses can be supported upon general statutory construction principles in view of the mandatory character of the language of Rule 8(c).” 5 Fed. Prac. & Proc. Civ. § 1278 (3d ed.) (footnotes omitted). This is not to say that the danger of waiver does not exist; simply that the treatment of waiver under these circumstances by certain federal courts may be misguided.

133. Mayer, *supra* note 10, at 286-87.

134. FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend a pleading] when justice so requires.”).

135. See, e.g., Gambol, *supra* note 116, at 2208 (“If motions to strike continue to be granted more liberally after the Twombly standard has been extended to affirmative defenses, then

judicially-create side effect of a strained interpretation of the Rules, extension courts should reverse their affirmative defense analyses in the interests of justice.

Finally, focusing on fairness under Rule 8 requires a consideration of the complex relationship between affirmative defenses and discovery.<sup>136</sup> Extending plausibility to affirmative defenses can lead to a chain of events, culminating in the defendant being walled off from information necessary to adequately defend against the plaintiff's allegations.<sup>137</sup> As the New York State Bar Committee on Federal Procedure explained:

a possibly meritorious affirmative defense will fall by the wayside because the defendant does not have sufficient facts allowing the defendant to allege the affirmative defense in its answer and those facts can only be learned through discovery from the plaintiff, which cannot be obtained because it relates to an affirmative defense which has not been alleged.<sup>138</sup>

Imagining a hypothetical affirmative defense where all of the facts necessary to plausibly state the defense are known or possessed exclusively by the plaintiff does not require a vivid imagination. Yet, because Rule 26(b)(1) limits the scope of discovery to material “that is relevant to any party’s claim or defense,” an unasserted defense may never become available through discovery.<sup>139</sup> As a result, extension courts are effectively limiting the scope of a defendant’s affirmative defenses to plausible, factual allegations based on information in his own possession, able to be asserted within twenty-one days. As a growing majority of federal district courts have found, this result is—quite simply—not fair.<sup>140</sup>

#### *Promoting Efficiency by Confining Plausibility*

The final reason to confine plausibility pleading to complaints is straightforward: doing so will promote efficiency. *Twombly* and *Iqbal* transformed the pleadings stage into an even more critical battleground, with several studies finding a 50% increase in 12(b)(6) motions filed post-

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every policy consideration against motions to strike weighs equally against an extension.”).

136. *But see* Mayer, *supra* note 10, at 287 (“The negative implications for discovery of such defenses dismissed

with leave to amend, however, are rarely explored.”); *id.* at 2209.

137. New York Bar Association Committee on Federal Procedure, *supra* note 119, at 13.

138. *Id.*

139. FED. R. CIV. P. 26(b)(1); *see also* Gambol, *supra* note 118, at 2209 (“The defendant may not be allowed to discover the facts necessary to assert defenses it would otherwise have pled and runs the risk of waiving those defenses.”).

140. *See supra* note 10, and accompanying text.

*Iqbal*.<sup>141</sup> This steep jump in the number of 12(b)(6) motions filed forces federal judges to dedicate additional time and resources to deciding dismissal motions.<sup>142</sup> Courts that extend plausibility to affirmative defenses, therefore, encourage a similar increase in the number of Rule 12(f) motions filed.<sup>143</sup> While the purpose of a motion to strike under Rule 12(f) is to “minimize delay, prejudice and confusion,”<sup>144</sup> extending plausibility to defensive pleadings creates a substantial hurdle for defendants and places additional strain on an already overextended federal judiciary.<sup>145</sup> Motions to strike under Rule 12(f) have long been disfavored,<sup>146</sup> and applying Rule 8 in

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141. See Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483, 1533 (2013) (“Defendants sought dismissal 50% more often after *Iqbal* across all case categories the FJC examined.”); Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719, 721 (2013) (“Early studies by a variety of scholars suggest that the decisions resulted in an increase in the filing and granting of pre-trial motions to dismiss.”); see also Joe S. Cecil et. al., Fed. Jud. Ctr., *Motions to Dismiss for Failure to State a Claim after Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules* (Mar. 2011) available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (Comparing the rate of 12(b)(6) motions filed and granted post-*Iqbal*); Cf. Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 621 (2012) (“Under *Iqbal*, holding all other variables constant, the relative risk that a court would grant a 12(b)(6) motion with leave to amend, rather than deny, increased by a factor of 6.03 over *Conley*—six times more likely.”).

142. See Hon. T.S. Ellis, III & Nitin Shah, *Iqbal, Twombly, and What Comes Next: A Suggested Empirical Approach*, 114 PENN ST. L. REV. PENN STATIM 64(2010) (“One [sic] the one hand, increased threshold adjudication will clearly require increased judicial involvement in the early stages of litigation.”). Proponents of the plausibility pleading approach would respond that the extra time and resources judges now dedicate to the pleadings stage is balanced by the earlier dismissals of unmeritorious and frivolous allegations made possible under *Twiqbal*.

143. See, e.g., *Leon v. Jacobson Transp. Co.*, No. 10-C-4939, 2010 U.S. Dist. LEXIS 123106, at \*3 (N.D. Ill. Nov. 19, 2010) (“Third, the Court would like to avoid having to rule on multiple motions to amend the answer during the course of discovery as the defendant obtains additional information that would support those affirmative defenses (such as mitigation of damages) that defendant has no practical way of investigating before discovery.”); see also New York Bar Association Committee on Federal Procedure, *supra* note 117, at 12 (citing *Leon* and listing increased Rule 12(f) motions to strike as a reason to not extend plausibility pleading to affirmative defenses); Durney & Michaud, *supra* note 6, at 445-46 (“Thus, . . . applying the heightened pleading standard to a defendant’s affirmative defenses would only encourage motions to strike, which is entirely counter to the well-established standard that such motions are strongly disfavored.”).

144. See, e.g., *Bowers v. Mortgage Elec. Registration Sys.*, No. 10-4141-JTM-DJW, 2011 U.S. Dist. LEXIS 58537, at \*15 (D. Kan. June 1, 2011) (citing *Falley*, 2011 U.S. Dist. LEXIS 40921 at \*10 and reasoning that “granting these motions to strike may ‘encourage parties to bog down litigation by filing and fighting motions to strike answers or defenses prematurely’ which cuts against the purpose of Rule 12(f): ‘minimize delay, prejudice, and confusion’”).

145. See *Leon*, *supra* note 143; see also *Bayer*, *supra* note 87 at \*24 (citing “the fact that a heightened pleading requirement would produce more motions to strike, which are disfavored,” as a reason to not extend plausibility).

146. See, e.g., *Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *judgment vacated on other grounds*, 478 U.S. 1015 (1986) (“A motion to strike an affirmative defense is not favored and will not be granted unless it appears to a certainty that plaintiffs would

a manner that encourages this tactic turns history and efficiency on their heads.<sup>147</sup>

Proponents of extending plausibility respond that applying the heightened standard to affirmative defenses functions to promote efficiency.<sup>148</sup> According to extension courts, plausibility pleading helps to avoid boilerplate recitations of affirmative defenses in an answer.<sup>149</sup> Requiring greater factual heft, these courts argue, prevents the discovery abuses that can follow when defendants provide only vague references to affirmative defenses.<sup>150</sup> But as extension courts themselves concede in attempting to downplay the threat of waiver, leave to amend under Rule 15(a)(2) is freely granted when viable defenses become apparent during discovery.<sup>151</sup> Prematurely applying plausibility to underdeveloped affirmative defenses, therefore, will force courts to decide on additional motions to amend answers throughout the discovery process. When

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succeed despite any state of the facts which could be proved in support of the defense.”); *Bayer*, *supra* note 87; *Aros*, *supra* note 118, at \*3 (“Raising the standard for pleading affirmative defenses would encourage motions to strike, which are disfavored.”); *see also* *Durney & Michaud*, *supra* note 6, at 445 (“As a preliminary matter, defendants should emphasize that motions to strike pursuant to Rule 12(f) are disfavored.”).

147. *See, e.g.*, *Gambol*, *supra* note 116, at 2208 (“First, Rule 12(f) motions to strike will arise more frequently because courts will be perceived as more receptive to them.”).

148. *See Barnes*, 718 F. Supp. 2d at 1172 (reasoning that extending plausibility “serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply.”).

149. *See, e.g.*, *Ear v. Empire Collection Auths., Inc.*, No. 12-1695-SC, 2012 WL 3249514, at \*1 (N.D. Cal. Aug. 7, 2012) (“The plausibility standard ‘serve[s] to weed out the boilerplate listing of affirmative defenses which is commonplace in most defendants’ pleadings’ . . . [i]n doing so, it furthers the underlying purpose of Rule 12(f), which is to avoid spending time and money litigating spurious issues.”); *see also* *HCRI TRS Acquirer, LLC v. Iwer*, 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.”); *Safeco Ins. Co. of Am. v. O’Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at \*1 (E.D. Mich. June 25, 2008) (reasoning that a more demanding pleading standard for affirmative defenses will reduce the number of boilerplate, and thus, uninformative defenses on the docket.”).

150. *See Hansen v. R.I.’s Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 122–23 (D. Mass. 2012) (“*Twombly* aimed to eliminate the high costs of discovery associated with boilerplate claims and that boilerplate affirmative defenses have the same detrimental effect on the cost of litigation.”); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv000292010, U.S. Dist. LEXIS 63265, 2010 WL 2605179, at \*14 (W.D. Va. June 24, 2010) (“Moreover, ‘[b]oilerplate defenses clutter docket;’ they ‘create unnecessary work, and in an abundance of caution’ require significant unnecessary discovery.”).

151. *See Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536–37 (D. Md. 2010) (“Under Rule 15(a), a defendant may seek leave to amend its answers to assert any viable defenses that may become apparent during the discovery process. Trial courts liberally grant such leave in the absence of a showing that an amendment would result in unfair prejudice to the opposing party.”); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 651 (D. Kan. 2009) (“The Federal Rules of Civil Procedure contemplates that motions to amend pleadings may be appropriate, based upon facts first learned during discovery.”).

considered alongside the additional Rule 12(f) motions to strike encouraged under the extension approach, plausibility “almost certainly guarantees the waste that *Twombly* and *Iqbal* sought to eradicate.”<sup>152</sup> Without efficiency benefits to balance against the consequences of extending plausibility, the heightened pleading standard frustrates its own policy justifications when applied beyond its intended scope.

#### CONCLUSION

Declining to apply the plausibility standard to affirmative defenses is more faithful to the text of Rule 8, fair to defendants, and efficient for the judiciary. First, the “showing” language of Rule 8(a)(2) and the “stating” language of Rule 8(c) call for separate and distinct requirements. Applying a symmetrical pleading standard ignores these textual differences and disregards established canons of interpretation. Second, a defendant has only twenty-one days in which to answer a plaintiff’s complaint. Confining plausibility to complaints accounts for this practical reality, avoiding unjustifiable waivers and providing defendants with the opportunity to seek discovery over time. Finally, confining plausibility to complaints helps to prevent sharp increases in the number of Rule 12(f) motions to strike and Rule 15(a)(2) motions to amend filed. This emphasis on litigation efficiency is consistent with the underlying policy justifications advanced by the Supreme Court in *Twombly* and *Iqbal*. If plausibility—which connotes believability or credibility—is a workable standard when employed under Rule 8(a)(2), it flounders clumsily when extended beyond the confines of complaints. Far from being retired, the *Conley* standard should remain alive and well, carving out a lucrative second career in the context of affirmative defenses. Appellate tribunals should recognize its value and reaffirm its continued applicability.

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152. Durney & Michaud, *supra* note 6, at 449.