MEMORANDUM

DATE: March 29, 2011

TO: Civil Rules Committee
Standing Rules Committee

FROM: Andrea Kuperman[1]

SUBJECT: Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*

PREPARED FOR THE CONSIDERATION OF THE ADVISORY COMMITTEE ON CIVIL RULES

This memorandum addresses the application of the pleading standards after the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937 (2009). I have been asked to continue monitoring and reviewing the case law for the Civil Rules Advisory Committee's consideration. Below is a short summary of the case law, summaries of the holdings in *Twombly* and *Iqbal*, and descriptions of cases discussing and applying *Iqbal*.[2] The body of the memo addresses the circuit court cases, and the district court cases

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[1] Andrea Kuperman is the Rules Law Clerk to Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure. Kate David, temporary Rules Law Clerk to Judge Rosenthal, updated the memorandum to include cases decided between July 21, 2010 and December 10, 2010. Jeff Barr, attorney in the Office of Judges Programs at the Administrative Office of the U.S. Courts, updated the memorandum to include cases decided between December 10, 2010 and March 2, 2011.

[2] A search in Westlaw reveals that, as of March 17, 2011, *Iqbal* had been cited over 20,000 times, in case law alone. Westlaw's KeyCite function, in addition to showing any negative citing references for the case, indicates how extensively positive citing references examine the case. The depth-of-treatment categories include "examining," "discussing," "citing," and "mentioning." This memo includes appellate cases that are labeled in Westlaw as either "examining" or "discussing" *Iqbal*, as well as those listed as negative citing references (because, for example, they "decline to extend" or "distinguish" *Iqbal*), but excludes cases in these categories that do not substantively discuss the portion of *Iqbal* focusing on pleading requirements. This memo includes appellate cases through March 2, 2011, as well as Supreme Court decisions issued on March 7, 2011 and March 22, 2011.

With respect to district court cases, as of March 17, 2011, there were approximately 8,200 cases listed on Westlaw as either "examining" or "discussing" *Iqbal*. Because of the large number of citations, the appendix to this memo includes a sample of the district court cases, focusing largely on those that examine *Iqbal* in more detail. For the initial version of this memo, I also conducted searches for cases involving employment discrimination claims, cases addressing the adequacy of allegations of mental state, cases addressing pleading where information is in the opposing party's possession, and cases addressing whether pleading "on information and belief" is sufficient. While these searches were limited to cases addressing *Iqbal*, with these more pointed inquiries I did not limit the searches solely to those cases listed as "examining" or "discussing" *Iqbal*. Because these searches turned up many cases, particularly in the category

are described in the appendix.

The following cases are new to this version of the memo. The description of each of these cases is highlighted.

- ***Matrixx Initiatives, Inc. v. Siracusano***, --- S. Ct. ----, No. 09-1156, 2011 WL 977060 (Mar. 22, 2011). Page 15.
- ***Skinner v. Switzer***, --- S. Ct. ----, No. 09-9000, 2011 WL 767703 (Mar. 7, 2011). Page 19.
- ***Peñalbert-Rosa v. Fortuno-Burset***, 631 F.3d 592 (1st Cir. 2011). Page 21.
- ***Plumbers' Union Local 12 Pension Fund v. Nomura Asset Acceptance Corp.***, --- F.3d ----, No. 09-2596, 2011 WL 183971 (1st Cir. Jan. 20, 2011). Page 24.
- ***Litwin v. Blackstone Group, L.P.***, --- F.3d ----, No. 09-4426-cv, 2011 WL 447050 (2d Cir. Feb. 10, 2011). Page 38.
- ***Abulkhair v. Bush***, No. 10-2812, 2011 WL 453477 (3d Cir. Feb. 9, 2011) (unpublished) (per curiam). Page 127.
- ***Santiago v. Warminster Township***, 629 F.3d 121 (3d Cir. 2010). Page 128.
- ***City of Clinton, Ark. v. Pilgrim's Pride Corp.***, 632 F.3d 148 (5th Cir. 2010). Page 223.
- ***Williams v. Curtin***, 631 F.3d 380 (6th Cir. 2011). Page 248.
- ***Fabian v. Fulmer Helmets, Inc.***, 628 F.3d 278 (6th Cir. 2010). Page 249.
- ***Atkins v. City of Chicago***, 631 F.3d 823 (7th Cir. 2011). Page 267.

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of employment discrimination, this memo addresses examples drawn from those results.

Updates to this memo after the original submission on October 2, 2009 have focused largely on appellate cases because as the number of cases applying *Iqbal* has grown, it has seemed appropriate to focus on appellate cases, which will guide district courts as to how to apply *Iqbal* in different contexts.

Earlier versions of the memo updated citations for cases that were in a prior version of the memo as a Westlaw citation, but were later printed in the *Federal Reporter*, the *Federal Supplement*, or the *Federal Appendix*. In those earlier updates to the memo, the pinpoint citations were not updated for many of the cases from the Westlaw pinpoints to the reporter's pinpoint, but the Westlaw pagination can still be used to look up pinpoint citations in Westlaw. This version of the memo does not yet update citations that have now been published in the *Federal Reporter*, the *Federal Supplement*, or the *Federal Appendix*.

- ***In re Text-Messaging Antitrust Litigation***, 630 F.3d 622 (7th Cir. 2010). Page 271.
- ***Bausch v. Stryker Corp.***, 630 F.3d 546 (7th Cir. 2010). Page 274.
- ***Reynolds v. Dormire***, --- F.3d ----, No. 10-1473, 2011 WL 561982 (8th Cir. Feb. 18, 2011). Page 302.
- ***Ritchie v. St. Louis Jewish Light***, 630 F.3d 713 (8th Cir. 2011). Page 304.
- ***Starr v. Baca***, --- F.3d ----, No. 09-55233, 2011 WL 477094 (9th Cir. Feb. 11, 2011). Page 322.

SUMMARY OF THE CASE LAW

The cases recognize that *Twombly* and *Iqbal* require that pleadings contain more than legal conclusions and enough detail to allow the court to infer more than the mere possibility of misconduct. But the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency. Instead, the appellate courts are taking a context-specific approach to applying *Twombly* and *Iqbal* and are instructing the district courts to be careful in determining whether to dismiss a complaint. One appellate court has indicated that *Iqbal* made clear that the circuit's heightened pleading standard in cases brought under 42 U.S.C. § 1983 could no longer be applied. In a recent circuit court decision authored by Justice Souter (who also authored *Twombly*), the court explained that a "plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . . ." Other courts have emphasized that notice pleading remains intact. Many courts continue to rely on pre-*Twombly* case law to support some of the propositions cited in *Twombly* and *Iqbal*—that legal conclusions need not be accepted as true and that at least some factual averments are necessary to survive the pleadings stage. In addition, some of the post-*Iqbal* cases dismissing complaints note that those complaints would have been deficient

even before *Twombly* and *Iqbal*. And some courts discuss *Twombly* and *Iqbal* but dismiss based on the conclusion that the law does not provide relief, not based on a lack of plausible facts. The approach taken by many courts may suggest that *Twombly* and *Iqbal* are providing a new framework in which to analyze familiar pleading concepts, rather than an entirely new pleading standard.[3] Recent Supreme Court decisions exemplify careful application of pleading standards in two very different contexts, a prisoner civil rights claim and a securities claim.

At the same time, some cases state that *Twombly* and *Iqbal* have raised the bar for defeating a motion to dismiss based on failure to state a claim. Although some of the courts making such statements actually deny motions to dismiss and find the pleadings sufficient, there are also district court cases in which courts have expressly stated or implied that the claims might have survived before *Twombly* and *Iqbal*, but do not survive under current pleading standards.

Many of the circuit court cases emphasize that the *Iqbal* analysis is context-specific. Under this context-specific approach, courts appear to apply the analysis more leniently in cases where pleading with more detail may be difficult. For example, courts have continued to emphasize that *pro se* pleadings are evaluated more leniently than others, and courts continue to find pleading on "information and belief" to be appropriate when permitted under the rules and cases. Courts also continue frequently to grant leave to amend if the complaint's allegations are initially deemed insufficient. Continued monitoring will be important to determine the results on appeal when district courts do not grant leave to amend, and, if leave is granted, to determine whether the pleadings are

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[3] Courts are just beginning to examine whether the *Twombly*/*Iqbal* framework applies to affirmative defenses, but the issue has not yet been resolved by the courts of appeals. *See FTC v. Hope Now Modifications, LLC*, No. 09-1204 (JBS/JS), 2011 WL 883202, at *2, *3 (D.N.J. Mar. 10, 2011) (noting that "no Federal Circuit Court has yet considered whether to extend the pleading requirements of *Twombly* and *Iqbal* to affirmative defenses," and "join[ing] the two other Districts in [the Third] Circuit that have addressed this issue by holding that the heightened pleading standard of *Twombly* and *Iqbal* does not apply to affirmative defenses").

amended and the case continues to proceed.

THE *TWOMBLY* AND *IQBAL* DECISIONS

The *Twombly* Decision

On May 21, 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly*, the Court addressed the question of "whether a § 1 [of the Sherman Act] complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." *Id.* at 548. The complaint alleged that the "Incumbent Local Exchange Carriers" or "ILECs" had conspired to restrain trade by "'engag[ing] in parallel conduct' in their respective service areas to inhibit the growth of upstart CLECs [competitive local exchange carriers]," and by "allegedly . . . making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers." *Id.* at 550. The complaint also alleged "agreements by the ILECs to refrain from competing against one another," which could be "inferred from the ILECs' common failure 'meaningfully [to] pursu[e]' 'attractive business opportunit[ies]' in contiguous markets where they possessed 'substantial competitive advantages,' and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC ''might be a good way to turn a quick dollar but that doesn't make it right.'" *Id.* at 551 (internal record citations omitted).

The *Twombly* Court first discussed the requirements for pleading under Rule 8, noting that Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is

entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *See id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The Court explained that "[w]hile 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, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations, footnote, and emphasis omitted). The Court emphasized that "[w]hile, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant 'set out *in detail* the facts upon which he bases his claim,' *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion , of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 555 n.3 (citation omitted). The Court held that stating a § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. But the Court emphasized that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* (footnote omitted).

The Court cautioned that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'"

Id. (citation omitted). Because lawful parallel conduct is not enough to show an unlawful agreement, the Court concluded that an allegation of parallel conduct and an assertion of conspiracy were not sufficient, explaining that "[w]ithout more[,] parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556–57. The Court stated that its conclusion was consistent with Rule 8: "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) 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.'" *Twombly*, 550 U.S. at 557. The Court held that '[a]n 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.'" *Id.* (citation omitted).

The Court expressed concern with the expense of discovery on a baseless claim, stating that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ''this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.''" *Id.* at 558 (citations omitted). The Court seemed especially concerned with those costs in the context of antitrust litigation: "[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* (internal citation omitted). The Court also expressed doubts about discovery management being effective in preventing unmeritorious claims from requiring expensive discovery, stating that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the process through 'careful

case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Id.* at 559 (citation omitted). The Court continued:

> And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of the evidence at the summary judgment stage," much less "lucid instructions to juries"; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a § 1 claim.

Id. (internal citation omitted).

The *Twombly* Court also evaluated the language in *Conley v. Gibson* that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Twombly*, 550 U.S. at 561 (quoting *Conley*, 355 U.S. at 45–46). The Court explained that this statement in *Conley* could not be read literally: "On such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery. . . . It seems fair to say that this approach to pleading would dispense with any showing of a ''reasonably founded hope'' that a plaintiff would be able to make a case." *Id.* at 561–62 (citation omitted). The Court held that the "no set of facts" language from *Conley* should be retired and was "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." *Id.* at 563 (citations omitted).

Using the foregoing principles, the Court concluded that the plaintiff's complaint was insufficient. The Court contrasted the conclusory allegations in the complaint with the notice given by a complaint following Form 9:

> Apart from identifying a seven-year span in which the § 1 violations were supposed to have occurred . . . , the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

Id. at 565 n.10. The Court was careful to emphasize that it was not applying a heightened or particularized pleading standard, which is only required for those categories of claims falling under Rule 9, and explained its "concern [wa]s not that the allegations in the complaint were insufficiently 'particular[ized]'; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible." *Id.* at 569 n.14 (internal citation omitted). The Court concluded: "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

The *Iqbal* Decision

Two years after *Twombly*, the Supreme Court elaborated on the pleading standards discussed in *Twombly* in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In *Iqbal*, the plaintiff, a citizen of Pakistan

and a Muslim, was arrested on criminal charges and detained by federal officials. *Id.* at 1942. The plaintiff alleged that he was deprived of constitutional rights, and sued numerous federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller. *Id.* Ashcroft and Mueller were the only appellants. *Id.* The complaint alleged that "they adopted an unconstitutional policy that subjected the plaintiff to harsh conditions of confinement on account of his race, religion, or national origin." *Id.*

The *Iqbal* Court explained that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555). With respect to the "plausibility" standard described in *Twombly*, *Iqbal* explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). The *Iqbal* Court noted that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). "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.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). The Court explained:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [*Twombly*, 550 U.S.] at 555, 127 S. Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a

> factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556, 127 S. Ct. 1955. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. 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).

Id. at 1949–50 (second alteration in original).

The *Iqbal* Court set out a two-step procedure for evaluating whether a complaint should be dismissed:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 1950.

In analyzing the complaint in *Iqbal*, the Court noted that it alleged that Ashcroft and Mueller "'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'"; that Ashcroft "was the 'principal architect' of this invidious policy"; and that Mueller "was 'instrumental' in adopting and executing it." *Id.* at 1951 (citations omitted). The Court found these allegations to be conclusory, that they "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional

discrimination claim," and that they were not entitled to a presumption of veracity. *Id.* (citations omitted).

Turning to the factual allegations in the complaint, the *Iqbal* Court noted that the complaint alleged that the FBI, under Mueller's direction, arrested and detained thousands of Arab Muslim men as part of its investigation of the September 11 attacks, and that the policy of holding detainees in highly restrictive conditions until cleared by the FBI was approved by Ashcroft and Mueller. *Id.* The Court concluded that while these allegations were consistent with Ashcroft and Mueller designating detainees of "high interest" because of their race, religion, or national origin, there were more likely explanations that prevented the allegations from plausibly establishing a claim. *See id.* Because the September 11 attacks were perpetrated by Arab Muslim hijackers claiming to be members of Al Qaeda, an Islamic fundamentalist group, the Court found that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* The Court also noted that while there were additional allegations against other defendants, the only factual allegation against the appellants was that they "adopt[ed] a policy approving 'restrictive conditions of confinement' for post-September-11 detainees until they were ''cleared' by the FBI.'" *Iqbal*, 129 S. Ct. at 1952. The Court said this was not enough:

> Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners'

> constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U.S., at 570, 127 S. Ct. 1955.

Id.

The *Iqbal* Court also rejected the plaintiff's argument that because the Federal Rules allowed pleading discriminatory intent "generally," his complaint was sufficient. *Id.* at 1954. The Court explained:

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

Id. (internal citation omitted).

Finally, the *Iqbal* Court also confirmed that the pleading requirements described in *Twombly* are not limited to the antitrust context present in that case. *See id.* at 1953 (holding that the argument that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute . . . is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure"). The Court explained that "[t]hough *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8," which "in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'" *Id.* (citations omitted). The *Iqbal* Court also confirmed *Twombly*'s rejection of case-management as an appropriate alternative to disposing of implausible claims, particularly in the context of qualified

immunity:

> Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic." 490 F.3d[] at 179.

Iqbal, 129 S. Ct. at 1953 (internal citations omitted).[4]

Shortly after *Iqbal* was decided, the Senate introduced S. 1504, The Notice Pleading Restoration Act of 2009, which provided that a federal court cannot dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) or (e), except under the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). The House introduced H.R. 4115, The Open Access to Courts Act of 2009, which provided: "A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of

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[4] The Supreme Court found that Iqbal's complaint "fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners," and remanded to allow the "Court of Appeals [to] decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint." *Iqbal*, 129 S. Ct. at 1954. On remand, the Second Circuit noted that it was "accustomed to reviewing a district court's decision whether to grant or deny leave to amend, rather than making that decision . . . in the first instance," and found "no need to depart from the ordinary course . . . ." *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009) (per curiam). The Second Circuit remanded to the district court "for further proceedings in light of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937." *Id.* "'On September 29, 2009, the remaining parties in *Iqbal* filed a document in [the Second Circuit] stipulating that the appeal was to be 'withdrawn from active consideration before the Court . . . because a settlement ha[d] been reached in principle between Javaid Iqbal and defendant United States.'" *Arar v. Ashcroft*, 585 F.3d 559, 585 n.8 (2d Cir. 2009) (Sack, J., dissenting) (quoting *Iqbal v. Hasty*, No. 05-5768-cv (2d Cir. Sept. 30, 2009), "Stipulation Withdrawing Appeal from Active Consideration" dated September 29, 2009), *cert. denied*, --- S. Ct. ----, No. 09-923, 2010 WL 390379 (Jun. 14, 2010).

Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged."[5]

SUPREME COURT UPDATE

- ***Matrixx Initiatives, Inc. v. Siracusano***, --- S. Ct. ----, No. 09-1156, 2011 WL 977060 (Mar. 22, 2011). The Supreme Court examined the question of "whether a plaintiff can state a claim for securities fraud under § 10(b) of the Securities and Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5, based on a pharmaceutical company's failure to disclose reports of adverse events associated with a product if the reports do not disclose a statistically significant number of adverse events." *Id.* at *3 (internal citations omitted). The plaintiffs had asserted that Matrixx Initiatives, Inc. and three of its executives (collectively, "Matrixx") failed to disclose reports of a possible link between its cold remedy product (Zicam) and loss of smell (anosmia). *Id.* The Court's unanimous decision rejected the defendants' argument that the complaint did not adequately allege that Matrixx made a material representation or omission or that it acted with scienter because it did not allege that Matrixx knew of a statistically significant number of adverse events requiring disclosure. *Id.* The Court declined to adopt a bright-line rule, explaining that "[a]lthough in many cases reasonable investors would not consider reports of adverse events to be material information, respondents have alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material." *Id.* The Court noted that "Respondents have also alleged facts 'giving rise to a strong inference' that Matrixx 'acted with the required state of mind.'" *Id.* (citation omitted). The Court affirmed the Ninth Circuit's decision to reverse dismissal of the complaint.[6]

  The Court noted that the lower courts had properly assumed all facts alleged in the complaint to be true, citing *Iqbal*. *Matrixx*, 2011 WL 977060, at *4. The Court declined to adopt a

[5] The Senate bill stated that it applied "[e]xcept as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act." The House bill stated that it applied "except as otherwise expressly provided by an Act of Congress enacted after the date of the enactment of this section or by amendments made after such date to the Federal Rules of Civil Procedure pursuant to the procedures prescribed by the Judicial Conference under this chapter."

[6] For a full description of the Ninth Circuit's opinion and a more detailed description of the facts alleged in the complaint, see the discussion of the Ninth Circuit opinion later in this memo.

bright-line rule that lack of statistical significance of adverse event reports precluded those reports from being material to reasonable investors, explaining that the "contextual inquiry may reveal in some cases that reasonable investors would have viewed reports of adverse events as material even though the reports did not provide statistically significant evidence of a causal link." *Id.* at *11 (footnote omitted). The Court then held that the complaint adequately pleaded materiality:

> Applying *Basic*[*, Inc. v. Levinson*, 485 U.S. 224 (1988)]'s "total mix" standard in this case, we conclude that respondents have adequately pleaded materiality. This is not a case about a handful of anecdotal reports, as Matrixx suggests. Assuming the complaint's allegations to be true, as we must, Matrixx received information that plausibly indicated a reliable causal link between Zicam and anosmia. That information included reports from three medical professionals and researchers about more than 10 patients who had lost their sense of smell after using Zicam. Clarot [(Matrix's vice president for research and development)] told Linschoten [(a researcher treating someone who had lost their sense of smell after using Matrixx's product)] that Matrixx had received additional reports of anosmia. (In addition, during the class period, nine plaintiffs commenced four product liability lawsuits against Matrixx alleging a causal link between Zicam use and anosmia.) Further, Matrixx knew that Linschoten and Dr. Jafek [(a colleague of Linschoten who had observed patients suffering from anosmia after using Matrixx's product)] had presented their findings about a causal link between Zicam and anosmia to a national medical conference devoted to treatment of diseases of the nose. Their presentation described a patient who experienced severe burning in his nose, followed immediately by a loss of smell, after using Zicam—suggesting a temporal relationship between Zicam use and anosmia.
>
> Critically, both Dr. Hirsch and Linschoten had also drawn Matrixx's attention to previous studies that had demonstrated a biological causal link between intranasal application of zinc and anosmia. Before his conversation with Linschoten, Clarot, Matrixx's vice president of research and development, was seemingly unaware of these studies, and the complaint suggests that, as of the class period, Matrixx had not conducted any research of its own relating to anosmia. Accordingly, it can reasonably be inferred from the complaint that Matrixx had no basis for rejecting Dr. Jafek's findings out of hand.
>
> We believe that these allegations suffice to "raise a reasonable expectation that discovery will reveal evidence" satisfying the

materiality requirement, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and to "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S., at ----, 129 S. Ct., at ---- (slip op., at 14). The information provided to Matrixx by medical experts revealed a plausible causal relationship between Zicam Cold Remedy and anosmia. Consumers likely would have viewed the risk associated with Zicam (possible loss of smell) as substantially outweighing the benefit of using the product (alleviating cold symptoms), particularly in light of the existence of many alternative products on the market. Importantly, Zicam Cold Remedy allegedly accounted for 70 percent of Matrixx's sales. Viewing the allegations of the complaint as a whole, the complaint alleges facts suggesting a significant risk to the commercial viability of Matrixx's leading product.

It is substantially likely that a reasonable investor would have viewed this information "'as having significantly altered the ['']total mix['] of information made available.'" *Basic*, 485 U.S., at 232, 108 S. Ct. 978 (quoting *TSC Industries*, 426 U.S., at 449, 96 S. Ct. 2126). Matrixx told the market that revenues were going to rise 50 and then 80 percent. Assuming the complaint's allegations to be true, however, Matrixx had information indicating a significant risk to its leading revenue-generating product. Matrixx also stated that reports indicating that Zicam caused anosmia were "'completely unfounded and misleading'" and that "'the safety and efficacy of zinc gluconate for the treatment of symptoms related to the common cold have been well established.'" Importantly, however, Matrixx had evidence of a biological link between Zicam's key ingredient and anosmia, and it had not conducted any studies of its own to disprove that link. In fact, as Matrixx later revealed, the scientific evidence at that time was "'insufficient . . . to determine if zinc gluconate, when used as recommended, affects a person's ability to smell.'"

Assuming the facts to be true, these were material facts "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR § 240.10b-5(b). We therefore affirm the Court of Appeals' holding that respondents adequately pleaded the element of a material misrepresentation or omission.

Id. at *12–13 (footnotes and additional internal citations omitted) (omission in original). During its discussion of the adequacy of the pleadings, the Court noted that "to survive a motion to dismiss, respondents need only allege 'enough facts to state a claim to relief that

is plausible on its face.'" *Id.* at *12 n.12 (quoting *Twombly*, 550 U.S. at 570). The Court found the allegations plausible, holding that they "plausibly suggest[ed] that Dr. Jafek and Linschoten's conclusions were based on reliable evidence of a causal link between Zicam and anosmia," and that the existence of the studies cited in the complaint "suggest[ed] a plausible biological link between zinc and anosmia, which, in combination with the other allegations, [wa]s sufficient to survive a motion to dismiss." *Id.* at *12 nn.12–13.

The Court also concluded that "Matrixx's proposed bright-line rule requiring an allegation of statistical significance to establish a strong inference of scienter [wa]s just as flawed as its approach to materiality." *Matrixx*, 2011 WL 977060, at *13. The Court explained:

> The inference that Matrixx acted recklessly (or intentionally, for that matter) is at least as compelling, if not more compelling, than the inference that it simply thought the reports did not indicate anything meaningful about adverse reactions. According to the complaint, Matrixx was sufficiently concerned about the information it received that it informed Linschoten that it had hired a consultant to review the product, asked Linschoten to participate in animal studies, and convened a panel of physicians and scientists in response to Dr. Jafek's presentation. It successfully prevented Dr. Jafek from using Zicam's name in his presentation on the ground that he needed Matrixx's permission to do so. Most significantly, Matrixx issued a press release that suggested that studies had confirmed that Zicam does not cause anosmia when, in fact, it had not conducted any studies relating to anosmia and the scientific evidence at that time, according to the panel of scientists, was insufficient to determine whether Zicam did or did not cause anosmia.
>
> These allegations, "taken collectively," give rise to a "cogent and compelling" inference that Matrixx elected not to disclose the reports of adverse events not because it believed they were meaningless but because it understood their likely effect on the market. *Tellabs*[*, Inc. v. Makor Issues & Rights, Ltd.*], 551 U.S. [308,] 323, 324, 127 S. Ct. 2499 [(2007)]. "[A] reasonable person" would deem the inference that Matrixx acted with deliberate recklessness (or even intent) "at least as compelling as any opposing inference one could draw from the facts alleged." *Id.*, at 324, 127 S. Ct. 2499. We conclude, in agreement with the Court of Appeals, that respondents have adequately pleaded scienter. Whether respondents can ultimately prove their allegations and establish scienter is an altogether different question.

Id. at *14 (footnote omitted).

- ***Skinner v. Switzer***, --- S. Ct. ----, No. 09-9000, 2011 WL 767703 (Mar. 7, 2011). Skinner, a state prisoner who had been convicted of capital murder and sentenced to death, filed an action under 42 U.S.C. § 1983,[7] alleging that the district attorney's refusal to allow him access to biological evidence for purposes of DNA forensic testing violated his right to due process. The district court dismissed Skinner's suit for failure to state a claim, reasoning that post-conviction requests for DNA evidence may only be made in habeas corpus proceedings, not under § 1983. The Fifth Circuit affirmed. The Supreme Court reversed, 6-3, holding that Skinner had properly invoked § 1983. Justice Ginsburg delivered the opinion of the Court, in which Justices Roberts, Scalia, Breyer, Sotomayor, and Kagan joined. Justice Thomas filed a dissenting opinion, in which Justices Kennedy and Alito joined.

  The Supreme Court began its discussion by reviewing the standard governing consideration of a motion to dismiss for failure to state a claim. The Court stated:

  > Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was "not whether [Skinner] will ultimately prevail" on his procedural due process claim, *see Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), but whether his complaint was sufficient to cross the federal court's threshold, *see Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Skinner's complaint is not a model of the careful drafter's art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible "short and plain" statement of the plaintiff's claim, not an exposition of his legal argument. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1219, pp. 277–278 (3d ed. 2004 and Supp.2010).

  Skinner, 2011 WL 767703, at *6.[8]

  The dissenting opinion did not mention this passage or discuss any pleading issue.

- ***Ashcroft v. Al-Kidd***, No. 10-98, 131 S. Ct. 415 (Oct. 18, 2010). On October 18, 2010, the Supreme Court granted certiorari and agreed to review the Ninth Circuit's opinion in

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[7] Under § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983. This statute will be referred to in this memo as "§ 1983."

[8] The Court's citation of its prior opinion in *Swierkiewicz* may be noteworthy. In *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009), *infra*, the Third Circuit questioned the continuing vitality of *Swierkiewicz*, while several other courts have favorably cited *Swierkiewicz* since *Twombly* and *Iqbal*.

Ashcroft v. Al-Kidd, 580 F.3d 949 (9th Cir. 2009), discussed below. The Court will consider two questions:

1. Whether the court of appeals erred in denying petitioner absolute immunity from the pretext claim.

2. Whether the court of appeals erred in denying petitioner qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventatively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of respondent's arrest.

We will continue to monitor *Al-Kidd*.

First Circuit

- ***Peñalbert-Rosa v. Fortuno-Burset***, 631 F.3d 592 (1st Cir. 2011). Plaintiff Peñalbert was employed as a receptionist in an office building annexed to the Puerto Rico governor's mansion. She was discharged from commonwealth employment in February 2009, shortly after the governorship of the commonwealth changed hands from one political party to another. She then brought an action under § 1983 alleging that her position did not entail policy work or handling confidential information and that her termination resulted from her political affiliation and therefore violated her federal constitutional rights to free speech and association, due process, and equal protection. The complaint named as defendants the governor, the governor's chief of staff, and the administrator of the governor's mansion.

  The First Circuit's discussion was as follows:

> The complaint adequately alleges a claim that someone discharged Peñalbert in violation of the First Amendment. Presumably, whoever discharged her was acting as a state actor, and no basis has yet been asserted for exempting Peñalbert from the protections of *Branti* [*v. Finkel*, 445 U.S. 507 (1980)] and *Elrod* [*v. Burns*, 427 U.S. 347 (1976)]. While there may have been some reason independent of political party for the firing, the opposite inference may be drawn from the timing of the discharge, the lack of explanation and the replacement by a member of the opposing party.
>
> The trouble with Peñalbert's complaint is not that the charge is implausible; political firings after elections in Puerto Rico are not uncommon. But, save under special conditions, an adequate complaint must include not only a plausible claim but also a plausible defendant. Yet there is nothing in the complaint beyond raw speculation to suggest that the named defendants participated—either as perpetrators or accomplices—in the decision to dismiss Peñalbert.
>
> To be sure, the complaint asserts that Governor Fortuno "approves or disapproves of all personnel decisions [at the governor's mansion], including the personnel decisions concerning the termination of [Peñalbert]"; that the two named subordinate officials "participated" in these decisions; that the defendants "knew or assumed" that Peñalbert belonged to the [Popular Democratic Party ("PDP")] "and/or" was not a member of the [New Progressive Party ("NPP")]; and ultimately that all three conspired to dismiss Peñalbert because she was a member of the PDP. All except that conspiracy charge are at least couched in factual terms.

The plaintiff's factual allegations are ordinarily assumed to be true in passing on the adequacy of the complaint, which need not plead evidence. *See, e.g., Sepúlveda-Villarini v. Dep't of Educ.*,628 F.3d 25, 30 (1st Cir. 2010); *Sandler v. E. Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981) (per curiam). But "ordinarily" does not mean "always": some allegations, while not stating ultimate legal conclusions, are nevertheless so threadbare or speculative that they fail to cross "the line between the conclusory and the factual." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 n. 5, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Thus, in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), the complaint charged that two high-ranking government officials knowingly condoned harsh detention conditions for the plaintiff "as a matter of policy, solely on account of [his] religion, race, and/or national origin," *id.* at 1944 (quoting complaint). Although this was patently a factual claim about the named defendants' state of mind, the Supreme Court held that the bare allegation of intent was inadequate absent more specific factual assertions:

> To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of "'a contract, combination or conspiracy to prevent competitive entry,'" because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

Id. at 1951 (internal citation omitted).

Iqbal could be viewed as emergent law, *see, e.g.*, 129 S. Ct. at 1961 (Souter, J., dissenting), but *we ourselves had earlier said a complaint that rests on "bald assertions" and "unsupportable conclusions"* may be subject to dismissal, *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996); and our decisions since *Iqbal* have several times found unadorned factual assertions to be inadequate. Without trying to lay down a mechanical rule, it is enough to say that sometimes a threadbare factual allegation bears insignia of its speculative character and, absent greater concreteness, invites an early

challenge—which can be countered by a plaintiff's supplying of the missing detail.

Here, Peñalbert's complaint does allege that personnel decisions in the executive mansion are within the authority of the governor, but nothing beyond speculation supports the further assertion that the governor or his chief of staff participated in the decision to dismiss Peñalbert. Someone denominated the "administrator" of the governor's mansion might more plausibly be involved, but nothing in the complaint indicates the administrator's actual duties or that the administrator ordinarily passes on the selection or discharge of a receptionist.

A defendant could be liable, even without knowing of Peñalbert or her position, if (for example) on some generic basis that defendant authorized the impermissible firing of PDP supporters because of their party membership or beliefs. *Cf. Figueroa-Serrano v. Ramos-Alverio*, 221 F.3d 1, 8 (1st Cir. 2000) (discussing alleged statement by mayor of his "intention to rid City Hall of NPP employees"). But, again, mere possibility is not enough to state a claim and again no facts are stated in the complaint to show that in this instance any of the three gave such an order or that it is even plausible that they did.

If Peñalbert had any basis beyond speculation for charging any one of the named defendants with knowing participation in the wrong, it seems almost certain that this would have been mentioned—if not in the complaint at least in the opposition to the motion to dismiss. Specific information, even if not in the form of admissible evidence, would likely be enough at this stage; pure speculation is not. This may seem hard on a plaintiff who merely suspects wrongdoing, but even discovery requires a minimum showing and "fishing expeditions" are not permitted. *DM Research*, 170 F.3d at 55.

However, Peñalbert's position is in one respect different: the complaint adequately alleges—based on the non-conclusory facts already listed—that someone fired Peñalbert based on party membership. Of course, the factual allegations might be later undermined or countered by affirmative defenses, *e.g.*, *Cepero-Rivera v. Fagundo*, 414 F.3d 124, 132-33 (1st Cir. 2005); but at this stage the complaint adequately asserts a federal wrong by someone. So while the present complaint does not justify suit against the defendants actually named, an avenue for discovery may be open.

> *A plaintiff who is unaware of the identity of the person who wronged her can sometimes proceed against a "John Doe" defendant as a placeholder*. *E.g., Iqbal*, 129 S. Ct. at 1943; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390 n. 2, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); *see also* 5A Wright & Miller, *supra* note 1, § 1321, at 382 & n. 6. We have previously condoned the device, at least when discovery is likely to reveal the identity of the correct defendant and good faith investigative efforts to do so have already failed. *See Martínez- Rivera v. Sánchez Ramos*, 498 F.3d 3, 7-8 (1st Cir. 2007).
>
> Whether Peñalbert could make such a showing is not clear from the face of her complaint, and she has not sought this "John Doe" alternative. Rarely do we rescue a civil claim—even to the very limited extent now contemplated—on grounds not urged either on the district court or on us. But *Twombly* and *Iqbal* are relatively recent; developing a workable distinction between "fact" and "speculation" is still a work in progress; and while upholding the dismissal of the complaint against the named defendants, we think that the interests of justice warrant a remand to give Peñalbert a reasonable opportunity to move to amend the complaint to seek relief against a "John Doe" defendant.

Peñalbert-Rosa, 631 F.3d at 594–597 (emphasis added) (footnotes omitted).

- ***Plumbers' Union Local 12 Pension Fund v. Nomura Asset Acceptance Corp.***, --- F.3d ----, No. 09-2596, 2011 WL 183971 (1st Cir. Jan. 20, 2011). Three union pension and welfare funds filed a putative class action against eight trusts, the "depositor" that organized the trusts, the trusts' underwriters, and five officers of the depositor. Plaintiffs sought redress for losses suffered when they acquired trust certificates representing mortgage-backed securities. The gravamen of the plaintiffs' complaint was that the trusts' offering documents, i.e., the registration statements and prospectus supplements, contained false and misleading statements, and as a result plaintiffs purchased securities whose true value when purchased was less than what the plaintiffs paid for them. The district court dismissed all of the plaintiffs' claims, holding that on the face of the complaint, the plaintiffs did not sufficiently state any claim.

The First Circuit, noting *Iqbal* and *Twombly*, observed that "the usual difficulty of parsing and evaluating misrepresentation claims at the complaint stage in securities cases is further complicated by recent case law tightening the sieve through which a well-pled complaint must pass." The court went on to affirm the dismissal of most, but not all, of the plaintiffs' claims, reasoning as follows:

> This brings us to the individual charges of false or misleading

statements and to the specific allegations of the complaint. . . . [W]e consider the adequacy of the allegations charge by charge.

The underwriting guidelines. Plaintiffs first point to a set of statements in the offering documents implying that the banks that originated the mortgages used lending guidelines to determine borrowers' creditworthiness and ability to repay the loans. For example, the prospectus supplements for the two trusts at issue stated that First National Bank of Nevada ("FNBN"), one of the "key" loan originators for those trusts, used "underwriting guidelines [that] are primarily intended to evaluate the prospective borrower's credit standing and ability to repay the loan, as well as the value and adequacy of the proposed mortgaged property as collateral."

In fact, plaintiffs allege, FNBN "routinely violated" its lending guidelines and instead approved as many loans as possible, even "scrub[bing]" loan applications of potentially disqualifying material. Indeed, plaintiffs allege that this was FNBN's "business model," aimed at milling applications at high speed to generate profits from the sale of such risky loans to others. Thus, plaintiffs say, contrary to the registration statement, borrowers did not "demonstrate[ ] an established ability to repay indebtedness in a timely fashion" and employment history was not "verified."

Admittedly, warnings in the offering documents state, for example, that the "underwriting standards ... typically differ from, and are ... generally less stringent than, the underwriting standards established by Fannie Mae or Freddie Mac"; that "certain exceptions to the underwriting standards ... are made in the event that compensating factors are demonstrated by a prospective borrower"; and that FNBN "originates or purchases loans that have been originated under certain limited documentation programs" that "may not require income, employment or asset verification."

The district court ruled that, read together with such warnings, the complained-of assurances were not materially false or misleading, but we cannot agree. Neither being "less stringent" than Fannie Mae nor saying that exceptions occur when borrowers demonstrate other "compensating factors" reveals what plaintiffs allege, namely, a wholesale abandonment of underwriting standards. That is true too of the warning that less verification may be employed for "certain limited documentation programs designed to streamline the loan underwriting process." Plaintiffs' allegation of wholesale abandonment may not be proved, but—if accepted at this stage—it is

enough to defeat dismissal.

Defendants say that no detailed factual support is provided for the allegation and that it is implausible. Despite the familiar generalization that evidence need not be pled at the complaint stage, *see Twombly*, 550 U.S. at 555, 127 S. Ct. 1955, courts increasingly insist that more specific facts be alleged where an allegation is conclusory, *see Maldonado*, 568 F.3d at 266, 274; and the same is true for implausibility, at least where the claim is considered as a whole, *Twombly*, 550 U.S. at 570, 127 S. Ct. 1955; *see Arista Records LLC v. Doe 3*, 604 F.3d 110, 119-21 (2d Cir. 2010).

"Conclusory" and "implausible" are matters of degree rather than sharp-edged categories. *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. However, the practices alleged in this case are fairly specific and a number of lenders in the industry are widely understood to have engaged in such practices. The harder problem is whether enough has been said in the complaint—beyond conclusory assertions—to link such practices with specific lending banks that supplied the mortgages that underpinned the trusts. Similar complaints in other cases have cited to more substantial sources, including statements from confidential witnesses, former employees and internal e-mails.

This is a familiar problem: plaintiffs want discovery to develop such evidence, while courts are loath to license fishing expeditions. While this case presents a judgment call, the sharp drop in the credit ratings after the sales and the specific allegations as to FNBN offer enough basis to warrant some initial discovery aimed at these precise allegations. The district court is free to limit discovery stringently and to revisit the adequacy of the allegations thereafter and even before possible motions for summary judgment. *See, e.g., Miss. Pub. Emps.' Ret. Sys. v. Bos. Sci. Corp.*, 523 F.3d 75, 79 (1st Cir. 2008).

Appraisal practices. The complaint also alleges that the offering documents contained false statements relating to the methods used to appraise the property values of potential borrowers—the ratio of property value to loan being a key indicator of risk. For example, the April 19, 2006, registration statement and the prospectus supplements stated that "[a]ll appraisals" were conducted in accordance with the "Uniform Standards of Professional Appraisal Practice" ("USPAP"). These in turn require that appraisers "perform assignments with impartiality, objectivity, and independence" and

make it unethical for appraisers, among other things, to accept an assignment contingent on reporting a predetermined result.

The complaint alleges in a single general statement that the appraisals underlying the loans at issue here failed to comply with USPAP requirements; but there is no allegation that any specific bank that supplied mortgages to the trusts did exert undue pressure, let alone that the pressure succeeded. The complaint fairly read is that many appraisers in the banking industry were subject to such pressure. So, unlike the lending standard allegation, the complaint is essentially a claim that other banks engaged in such practices, some of which probably distorted loans, and therefore this may have happened in this case.

On this basis, virtually every investor in mortgage-backed securities could subject a multiplicity of defendants "to the most unrestrained of fishing expeditions." *Gooley v. Mobil Oil Corp*., 851 F.3d 513, 515 (1st Cir. 1988); *see also DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999). Accordingly, we agree with the district court that such an allegation—amounting to the statement that others in the industry engaged in wrongful pressure—is not enough. Several other district courts have reached precisely this conclusion.

. . . .

Seller or solicitor allegations. Section 12(a)(2) permits a plaintiff to sue only a defendant who either sold its own security to the plaintiff or (for financial gain) successfully solicited the sale of that security to the plaintiff. *Pinter*, 486 U.S. at 642-47, 650 & n. 21. The district court dismissed plaintiffs' section 12(a)(2) claims, concluding that they did not adequately allege that defendants sold the certificates to the plaintiffs or solicited the sales. This was apparently because the complaint used a more ambiguous phrase—that plaintiffs "acquired the [c]ertificates pursuant and/or traceable to" the offering documents—found insufficient by a number of courts. *E.g., Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co. Inc*., 714 F. Supp. 2d 475, 484 (S.D.N.Y. 2010); *Wells Fargo*, 712 F. Supp. 2d at 966.

But the complaint also alleged that plaintiffs "acquired . . . [c]ertificates from defendant Nomura Securities" and that the "[d]efendants promoted and sold the [c]ertificates to [the p]laintiffs and other members of the [c]lass" (emphasis added); these allegations are sufficient to state a claim under section 12(a)(2) so long as

material misstatements or misleading omissions are alleged. The district court's dismissal of plaintiffs' section 12(a)(2) claims for failure to allege defendants' requisite connections with the sale was in error.

Plumbers' Union, 2011 WL 183971, at *7–10 (emphasis added) (footnotes omitted).

- ***Sepúlveda-Villarini v. Dep't of Educ. of Puerto Rico***, 628 F.3d 25 (1st Cir. 2010). Public school teachers (Sepúlveda and Velázquez) sued the Puerto Rico Department of Education, its Secretary (Aragunde), and the school director (Oliveras), for failure to accommodate an employee's disability as required by Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794. Aragunde was sued in his official capacity; Oliveras was sued in his personal capacity. The district court dismissed for failure to state a claim. The First Circuit vacated and remanded.

  Sepúlveda alleged that he suffered a stroke while teaching and required heart by-pass surgery. For five years after the surgery, the school made accommodations for Sepúlveda, providing him a first floor classroom, a reduced number of pupils, and a rest period. Then Secretary Aragunde issued instructions to keep class size at a minimum of 20. Sepúlveda's class size was increased to 30, but a neophyte teacher was assigned to share Sepúlveda's duties. Sepúlveda claimed "that the new arrangement is an unreasonable refusal to accommodate, resulting in emotional consequences with physical symptoms requiring treatment." The district court dismissed Sepúlveda's claims of personal liability against the school director and all of his Title VII claims. It dismissed the Title I and Rehabilitation Act claims for failure to allege how smaller class size would allow Sepúlveda to go on teaching. The district court dismissed the Title II claim, relying on its ruling in a prior case that Title II did not reach employment-based claims and, alternatively, rejecting the Title II claim for failure to allege how smaller class size would allow Sepúlveda to go on teaching.

  Velázquez alleged that she suffered from a throat condition known as aphonia, with symptoms including excessive coughing and shortness of breath, which was allegedly aggravated by dust and debris stemming from construction at the school some years ago. For four years she was provided with reduced class size, until Secretary Aragunde issued his instructions to increase class size. She alleged "that ensuing emotional and physical stress required treatment." The district court dismissed her personal liability claims, all Title VII claims, and her Title II claim on the ground that Title II does not refer to employment discrimination. The court addressed defendants' sovereign immunity defense, which it did not reach in Sepúlveda's case, and sustained the defense, dismissing the Title I claim against the Department *in toto* and against the Secretary insofar as Velázquez sought money damages. The court then dismissed the Title I and Rehabilitation Act claims against the Secretary for failure to allege how the reduced class size would allow Velázquez to teach, but the larger class size would not.

  The First Circuit, in an opinion by Justice Souter, first noted that all claims of error were

waived, "except as to the sufficiency of allegations as stating claims that the Department and its Secretary are responsible under Title I or § 504 of the Rehabilitation Act for failures to make reasonable accommodations for disabilities."

The court then explained that:

> The statement of a claim of actionable failure to make reasonable employment accommodation for disability under either Title I of the ADA or §504 of the Rehabilitation Act must allege a disability covered by the statute, the ability of the plaintiff to do a job with or without accommodation as the case may be, and the refusal of the employer, despite knowledge of the disability, to accommodate the disability by reasonably varying the standard conditions of employment.

The court set forth the pleading standard:

> "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The make-or-break standard, as the district court recognized, is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950-51 (2009) (citing *Twombly*, 550 U.S. at 570); *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (footnote and citations omitted)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949 (citations omitted).

The court then decided that the district court erred by demanding "more than plausibility":

> We think that the district court demanded more than plausibility. Each set of pleadings includes two significant sets of allegations. First, for a period of four or five school years the school administration provided the reduced class size in response to the

> respective plaintiff's request, supported by some sort of medical certification attesting to its legitimacy. In each complaint, those years of requested accommodation are put forward as establishing, in effect, a base-line of adequacy under the statute in response to an implicit acknowledgment that a statutory disability required the provisions that were made.
>
> Second, each set of pleadings describes changed facts beginning in the 2007-08 year, in which instructions from the defendant Secretary resulted in raising the class size to 30 (with a young team teacher to share the load with Sepúlveda). Each complaint alleges that the plaintiff's emotional and physical health subsequently deteriorated to the point of requiring treatment, and each concludes that assigning 30 pupils was less than reasonable accommodation under the statute. To be sure, this sequence of alleged facts does not describe a causal connection in terms of the exact psychological or physiological mechanism by which each plaintiff's capacity continues to be overwhelmed. But reading the allegations with the required favor to the plaintiff means accepting the changes in class size as the only variable, from which one would infer that there probably is some causal connection between the work of a doubled class size and the physical and emotional deterioration of the disabled teacher. After all, for years the school authorities themselves apparently thought the small classes were the reasonable and appropriate size; it does not seem remarkable that a teacher would be worn down by doubling the size, even with a young helper, who will need to be supervised.

(footnotes omitted).

The court noted that the district court's "call for allegations explaining 'how' class size was significant'" was a "call for pleading the details of medical evidence in order to bolster the likelihood that a causal connection will prove out as fact." And explained that "*Twombly* cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor."

Finally, the court explained:

> None of this is to deny the wisdom of the old maxim that after the fact does not necessarily mean caused by the fact, but its teaching here is not that the inference of causation is implausible (taking the facts as true), but that it is possible that other, undisclosed facts may explain the sequence better. Such a possibility does not negate plausibility, however; it is simply a reminder that plausibility of allegations may not be matched by adequacy of evidence. *A plausible*

> *but inconclusive inference from pleaded facts will survive a motion to dismiss*, and the fair inferences from the facts pleaded in these cases point to the essential difference between each of them and the circumstances in *Twombly*, for example, in which the same actionable conduct alleged on the defendant's part had been held in some prior cases to be lawful behavior.

(emphasis added).

- ***Sanchez v. Pereira-Castillo***, 590 F.3d 31, 2009 WL 4936397 (1st Cir. Dec. 23, 2009). The plaintiff alleged that "while a prisoner at a Puerto Rico correctional institution, correctional officers subjected him to an escalating series of searches of his abdominal cavity that culminated in a forced exploratory abdominal surgery." *Id.* at *1. The plaintiff sued correctional officers for the Commonwealth of Puerto Rico Administration of Corrections ("AOC") and doctors from the Rio Piedras Medical Center ("Rio Piedras") under § 1983. *Id.* The complaint alleged violations of the plaintiff's constitutional rights and supplemental claims under Puerto Rico law. *Id.* The district court dismissed the complaint for failure to state a claim. The First Circuit reversed the dismissal of the Fourth Amendment claims against two of the correctional officers and the doctor who performed the surgery, reinstated the state law claims, and remanded. *Id.*

  The complaint alleged that after a handheld metal detector gave a positive reading when the plaintiff was scanned, the plaintiff was subject to increasingly invasive searches. *Id.* The plaintiff was allegedly sniffed by law-enforcement dogs, strip-searched, scanned with a metal detector while naked, subject to abdominal x-rays, placed under constant surveillance, forced to have bowel movements on the floor in front of correctional officers, subjected to two rectal examinations and lab tests at Rio Piedras, and eventually subjected to exploratory abdominal surgery that required the plaintiff to be under total anesthesia and remain in the hospital for two days of recovery. *See Sanchez*, 2009 WL 4936397, at *1–3. According to the complaint, none of the search methods employed after the original metal detector test revealed any evidence of contraband except that one doctor concluded that the x-rays revealed a foreign object in the plaintiff's rectum consistent with a cellular telephone. *See id.* Defendant Sergeant Cabán-Rosados ("Cabán") allegedly conducted the original search of the plaintiff's living quarters; asked an unknown doctor, labeled in the complaint as Dr. Richard Roe I, to order the x-rays; refused to produce a judicial order regarding the x-rays at the plaintiff's request; ordered the plaintiff to have bowel movements on the floor; ordered the plaintiff to be taken to the medical area at the prison; and coordinated the plaintiff's transport to Rio Piedras for a rectal examination and/or a medical procedure to remove a foreign object. *Id.* at *1–2. Dr. Richard Roe I was alleged to have taken the x-ray ordered by Cabán; Dr. Richard Roe II was alleged to have examined the x-ray results and determined that a foreign object was present in the plaintiff's rectum and to have issued a referral to the emergency room at Rio Piedras for further testing or intervention, despite the fact that a second bowel movement showed no foreign objects and over the plaintiff's objection, denial, and request for an additional x-ray; John Doe was a correctional officer alleged to have escorted the plaintiff to

the hospital and to have insisted on rectal examinations and the surgery; Dr. Richard Roe III was alleged to be a doctor at Rio Piedras who conducted the rectal examinations and ordered the lab tests; Dr. Richard Roe IV was alleged to be a superior of Dr. Richard Roe III who participated in the second rectal examination and who, together with Dr. Richard Roe III, requested a surgical consultation; Dr. Sandra Deniz was the surgeon who evaluated the plaintiff and conducted the exploratory surgery after she was made aware of the negative findings of the two rectal examinations, the normal results of the lab tests, the absence of foreign objects in the bowel movements, the plaintiff's denials of the allegations that he had a cell phone, and the plaintiff's requests for a second set of x-rays. *Id.* The complaint alleged that the plaintiff signed a consent form for the surgery only because of pressure from John Doe and only after Dr. Deniz agreed to perform another rectal examination before the surgery, which Dr. Deniz failed to do. *Id.* at *3. The surgery revealed no foreign objects, and this finding was confirmed by a subsequent x-ray. *Id.*

In addition to the Drs. Richard Roe I–IV, John Doe, Cabán, Commander Sanchez (who was never properly served), and Dr. Deniz, the complaint also named Puerto Rico's secretary of corrections and rehabilitation, the security director of the AOC, the director of the eastern region for the AOC, the security director of the eastern region of the AOC, and the superintendent of the prison (collectively, "administrative correctional defendants," and together with Cabán and John Doe, the "correctional defendants"). *Sanchez*, 2009 WL 4936397, at *3. The administrative correctional defendants and Cabán moved to dismiss the complaint for failure to state a claim, asserting that the administrative correctional defendants should be dismissed because respondeat superior liability was not available under § 1983 and that the correctional defendants were entitled to qualified immunity. *Id.* Dr. Deniz also requested dismissal, alleging that the plaintiff's medical rights were not violated by the surgery, that the plaintiff was limited to tort remedies for medical malpractice, and that she was entitled to Eleventh Amendment immunity in her official capacity and qualified immunity in her personal capacity. *Id.* The district court granted the motions, finding that because the defendants were sued in their personal capacity, sovereign immunity did not apply; the strip searches, x-rays, and rectal examinations were reasonable and did not violate the Fourth Amendment; the Fifth Amendment claim could not survive because that amendment applies only to actions of the federal government; the complaint did not state a claim against the correctional defendants with respect to the surgery because the decision regarding the surgery was made by Dr. Deniz; and that the claim against Dr. Deniz failed because she was not a state actor, but was instead acting as a doctor. *Id.* at *4 & n.3. The district court denied the plaintiff's requests for reconsideration and for leave to file an amended complaint. *Id.*

On appeal, with respect to the Fourth Amendment claim, the court found it "impossible to reconcile the allegations in the complaint with the district court's conclusion that these procedures were 'medical decisions made exclusively by physicians'" because "[a]ccording to the complaint, the procedures were carried out at the insistence of correctional officials for the purpose of finding a cell phone in plaintiff's rectum." *Id.* at *6. The court affirmed dismissal of the claims based on the strip searches and x-rays because the plaintiff did not pursue them on appeal, as well as the dismissal of Drs. Roe I and II because the complaint had

no allegations that those doctors were involved in the rectal examinations or the surgery. *Id.* at *6 n.4. The court explained that the complaint adequately alleged that the rectal examinations and the surgery were searches within the scope of the Fourth Amendment:

> The procedures were the direct culmination of a series of searches that began when a metal detector used to scan plaintiff's person gave a positive reading. The complaint describes the surgery as "medically unnecessary," and explains circumstances supporting that claim, namely that plaintiff had two normal bowel movements before the searches were conducted, that Dr. Roe III examined him upon arrival at the hospital and found him to be asymptomatic, and that several lab tests ordered by Dr. Roe III were found to be "within normal limits." Because the procedures described in the complaint were searches for evidence, they are properly analyzed under the framework of the Fourth Amendment.

Sanchez, 2009 WL 4936397, at *6. The court found that the rectal examinations were not unreasonable under the Fourth Amendment because "[t]he complaint describe[d] no abusive or otherwise unprofessional conduct on the part of the correctional officers or the doctors during the rectal exams" and did not "set forth any facts to suggest that the rectal examinations of plaintiff's person by medical professionals were more intrusive than similar exams carried out as a matter of policy by paraprofessionals at other prisons," and because the plaintiff did "not argue that the digital rectal searches were not related to a legitimate penological need" or "describe any circumstances surrounding the examinations that would [have] ma[de] the searches appear abusive." *Id.* at *8. The court concluded that "the rectal searches of plaintiff described in the complaint, carried out by medical professionals in the relatively private, sanitary environment of a hospital, upon suspicion that plaintiff had contraband in his rectum, and with no abusive or humiliating conduct on the part of the law enforcement officers or the doctors, were not unreasonable." *Id.* (footnote omitted). As a result, the court affirmed the dismissal of Drs. Roe III and IV because, "according to the complaint, they did not encourage or participate in the surgery." *Id.* at *8 n.6.

The court determined that the complaint adequately alleged an unreasonable search with respect to the surgery, noting that the complaint stated that the plaintiff "was forced to undergo dangerous, painful, and extremely intrusive abdominal surgery for the purpose of finding a contraband telephone allegedly concealed in his intestines, even though the basis for believing there was a telephone was slight, several tests had indicated the absence of any such object, and additional, far less intrusive testing could easily have obviated any need for such grievous intrusion." *Id.* at *9. The court disagreed with the district court's conclusion that the signed consent for surgery eliminated Fourth Amendment concerns, "reiterat[ing] that the district court was obligated . . . to accept the well-pleaded facts in the complaint as true." *Id.* at *10. The court concluded:

> Plaintiff was a prisoner who had been under constant

> surveillance for more than a day prior to the surgery, and had been forced to submit to searches, x-rays, and invasive rectal examinations prior to his signing the consent form. He had twice been forced to excrete on a floor in the presence of prison personnel. In light of these intimidating circumstances, plaintiff's claim that he was pressured and intimidated into signing the consent form is plausible.

Sanchez, 2009 WL 4936397, at *10. In addition, the court noted that according to the complaint, the plaintiff gave consent to the surgery only if Dr. Deniz would first conduct another rectal examination, which she did not do. *Id.* The court stated that "[v]iewing the plaintiff's well-pleaded factual allegations as true, [it] conclude[d] that 'society is prepared to recognize' that a prisoner has a reasonable expectation that he will not be forced to undergo abdominal surgery for the purpose of finding contraband, at least in these circumstances." *Id.* at *12. The court noted that the plaintiff "was surgically invaded for the purpose of searching for a cell phone when other, less-invasive means had already indicated the absence of such an object," "there [wa]s serious doubt whether the surgery was even 'likely to produce evidence of a crime,' and by far less drastic measures[,] the existence of the telephone could easily have been excluded." *Id.* (internal citation omitted). The court held that "the allegations in the complaint describe[d] an unreasonable search conducted under the color of state law." *Id.* (footnote omitted).

Having found that the plaintiff had "alleged facts which, if proved, would amount to a violation of his Fourth Amendment rights," the court turned to "the sufficiency of his claims that the various defendants in this action caused that violation." *Id.* After emphasizing that the evaluation of a complaint is a context-specific task, the court concluded that the claims against Cabán, John Doe, and Dr. Deniz had "'facial plausibility,'" but that the claims against the administrative correctional defendants did not. *Sanchez*, 2009 WL 4936397, at *12 (citing *Iqbal*, 129 S. Ct. at 1949). The court noted that under *Iqbal*, it could "'begin by identifying pleadings that, because they are no more than conclusions, are not entitled to an assumption of truth.'" *Id.* at *13 (quoting *Iqbal*, 129 S. Ct. at 1950). The court stated:

> Turning to plaintiff's complaint, we find that it does little more than assert a legal conclusion about the involvement of the administrative correctional defendants in the underlying constitutional violation. Parroting our standard for supervisory liability in the context of Section 1983, the complaint alleges that the administrative defendants were "responsible for ensuring that the correctional officers under their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff" and that "they failed to do [so] with deliberate indifference and/or reckless disregard of Plaintiff's federally protected rights." This is precisely the type of "the-defendant-unlawfully-harmed-me" allegation that the Supreme Court has determined should not be given credence when standing alone.

Id. (citing *Iqbal*, 129 S. Ct. at 1949) (alterations in original). The court continued:

> The sole additional reference to the administrative correctional defendants' role in the surgery is the complaint's statement that "[t]he pushiness exerted by John Doe [upon the doctors] followed . . . the regulations and directives designed by [Puerto Rico's Secretary of Corrections and Rehabilitation] Pereira and construed and implemented by all of the other Supervisory Defendants." However, the only regulations described in the complaint are the strip search and x-ray regulations promulgated by Pereira. The deliberate indifference required to establish a supervisory liability/failure to train claim cannot plausibly be inferred from the mere existence of a poorly-implemented strip search or x-ray policy and a bald assertion that the surgery somehow resulted from those policies. We conclude, therefore, that the "complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief'" from the administrative correctional defendants. *Iqbal*, 129 S. Ct. at 1950 (quoting FED. RULE CIV. PROC. 8(a)(2)). Although it did so on different grounds, the district court was correct to dismiss the claims against those defendants.

Id. (first, second, and fourth alterations in original) (footnote omitted). The court noted that "[t]he complaint contain[ed] more specific factual allegations about the administrative correctional defendant[s'] supervisory responsibility for the strip and x-ray searches," but that "[b]ecause [the court] f[ound] there to be no underlying constitutional violation arising from the strip and x-ray searches of plaintiff, the claims for supervisory liability arising from those searches must fail." *Id.* at *13 n.9.

However, with respect to Cabán and John Doe, the court found the plaintiff's allegations "sufficient to allow [it] 'to draw the reasonable inference that [each] defendant [wa]s liable for the misconduct alleged.'" *Id.* at *14 (quoting *Iqbal*, 129 S. Ct. at 1949) (second alteration in original). The court explained:

> Although the claims against John Doe and Cabán also rest on a form of supervisory liability in the sense that neither one actually performed the surgery on plaintiff, those claims do not depend on a showing by plaintiff of a failure to train amounting to deliberate indifference to his constitutional rights. Instead, plaintiff succeeds in pleading that the defendants were liable as "primary violator[s] . . . in the rights-violating incident," thereby stating a sufficient claim for relief.

Sanchez, 2009 WL 4936397, at *14 (citation omitted). The court found the claims against Cabán plausible:

> Plaintiff's complaint specifically alleges that Cabán was directly

> involved in all phases of the search for contraband, and in the ultimate decision to transport plaintiff to the hospital "for a rectal examination and/or a medical procedure to remove the foreign object purportedly lodged in Plaintiff's rectum." The complaint goes on to allege that John Doe, acting pursuant to "orders imparted by Cabán," pressured the doctors to conduct a medical procedure to remove the illusory cell phone from plaintiff's bowels. Given these allegations, it is a plausible inference that Cabán caused plaintiff to be subjected to the deprivation of his Fourth Amendment rights. *See* 42 U.S.C. § 1983.

Id. at *14 (footnote omitted). Because "an actor is 'responsible for 'those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties,'" and because the court "read the plaintiff's complaint to state that Cabán affirmatively set in motion the trip to the hospital for the purpose of removing the alleged contraband from within plaintiff's body, with a resort by medical professionals to whatever procedure was required to achieve that goal," the plaintiff had adequately stated a claim against Cabán. *Id.* (citations omitted). With respect to John Doe, the court held:

> The complaint alleges that plaintiff arrived at the hospital emergency room "accompanied by John Doe." The complaint further states that "[a]t all times John Doe insisted that plaintiff was hiding a cellular phone in his rectum and pressured the medical personnel at the emergency room . . . to conduct a medical procedure to remove it." Thus, the complaint charges John Doe with affirmatively causing the violation of plaintiff's rights by insisting at the hospital that the doctors perform a medical procedure to remove the suspected contraband from his stomach. Like Cabán, he is alleged to be a primary violator of plaintiff's Fourth Amendment rights.

Id. (alteration in original).

The court next considered whether the plaintiff had adequately pleaded state action with respect to Dr. Deniz. (It was undisputed that the correctional defendants were state actors. *Id.* at *15 n.12.) The plaintiff argued that Dr. Deniz was a state actor under the state compulsion test, which provides that a party is a state actor "'when the state 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [challenged conduct] must in law be deemed to be that of the State.'" *Id.* at *15 (citation omitted). The court concluded that the complaint, "which describe[d] 'the insistence and pressure exerted by John Doe upon all of the physicians that examined him at the Rio Piedras Medical Center,' sufficiently allege[d] facts that m[et] the state compulsion test." *Sanchez*, 2009 WL 4936397, at *15.

The court concluded that Cabán and John Doe were not entitled to qualified immunity because "the surgery described in the complaint and its attendant circumstances were so

outrageous, [the court] could comfortably conclude that a reasonable officer would understand that, under the particular facts of this case, the surgery violated plaintiff's clearly established right to be free from an unreasonable search." *Id.* at *16 (citation omitted). The court determined that Dr. Deniz also was not entitled to qualified immunity, explaining that "a reasonable doctor should have understood that the surgery at issue here, performed at the insistence of the correctional authorities and not for plaintiff's benefit, violated plaintiff's Fourth Amendment right to be free of unreasonable searches and seizures." *Id.* at *18. Finally, because the court found that some of the federal claims should not have been dismissed, it reinstated the supplemental state law claims and remanded. *Id.*

- ***Maldonado v. Fontanes***, 568 F.3d 263 (1st Cir. 2009). Residents of public housing complexes brought a civil rights suit under § 1983 against the mayor of Barceloneta, Puerto Rico, alleging that their rights had been violated by the seizures and cruel killings of their pet cats and dogs. *Id.* at 266. The pets were taken in two separate raids after the Municipality of Barceloneta assumed control of the public housing complexes. *Id.* Prior to that transfer, the plaintiffs had been allowed to keep pets in the housing complexes. *Id.* A few days before the raids, the residents were told to surrender their pets or face eviction. *Id.* The plaintiffs alleged that after their pets were seized, the pets were violently killed. *Id.* The mayor, in his personal capacity, moved to dismiss all damages claims against him on the ground of qualified immunity. *Maldonado*, 468 F.3d at 266. The district court denied the motion to dismiss, and the mayor took an interlocutory appeal. *Id.* The First Circuit affirmed the denial of the motion for qualified immunity on the Fourth Amendment and Fourteenth Amendment procedural due process claims, but applied *Iqbal* to reverse the denial of qualified immunity to the mayor as to the Fourteenth Amendment substantive due process claims. *Id.* The mayor also moved to dismiss for failure to state a claim, and the district court granted the motion as to some claims and denied it as to the Fourth and Fourteenth Amendment claims and pendent state law claims, but that order was not appealable. *Id.* at 267 n.1.

  With respect to the substantive due process claim, the First Circuit stated: "[A]nalyzing the pleadings under *Iqbal*, we hold that the allegations of the complaint do not allege a sufficient connection between the Mayor and the alleged conscience-shocking behavior—the killing of the seized pets—to state the elements of a substantive due process violation." *Id.* at 273. Specifically, the court noted that the mayor's alleged liability did not involve a policy of the municipality and was not based on the mayor's personal conduct, but instead was based on the allegation that the mayor promulgated a pet policy for the public housing complexes and was present at and participated in one of the raids. *Id.* The court concluded that this was insufficient to find the mayor liable because there was nothing conscience-shocking about the pet policy itself, which did not address how prohibited pets were to be removed, and because the complaint alleged no policy authorizing the killing of the pets and no such policy authorized by the mayor. *Id.* The court noted that the complaint alleged an informal policy from the repeating of the raids, but held that a single repetition was not sufficient to show the mayor's endorsement of an informal policy, stating that it would "reject such ''naked assertion[s]' devoid of 'further factual enhancement.'"" *Maldonado*, 568 F.3d at 273 n.6 (quoting *Iqbal*, 129 S. Ct. at 1950 (quoting *Twombly*, 550 U.S. at 557)).

The court also concluded that there was no allegation that the mayor was personally involved in any of the conscience-shocking behavior. *Id.* at 274. The court noted that while the complaint alleged that the mayor was present at the first raid and observed it, he was "not named as the individual who directly planned, supervised, and executed the raids," and there was no allegation that he participated in the killings or directed the private contractor who captured the pets. *Id.* Instead, the complaint only alleged that "he supervised, directly or indirectly, the agencies involved." *Id.* The court noted the "generalized" allegation that the mayor "planned, personally participated in, and executed the raids in concert with others," but stated that "the others are named as the persons with specific administrative responsibilities as to the public housing complexes." *Id.* The court concluded that "'[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional [tort],' *Iqbal*, at 1951 (quoting *Twombly*, 550 U.S. at 55, 127 S. Ct. 1955), and [we]re insufficient to push the plaintiffs' claim beyond the pleadings stage." *Id.* (second alteration in original). The court continued: "[T]he complaint alleges, without any more details, that the Mayor was among all the other public and private employees 'snatching pets from owners.' Although these bare allegations may be 'consistent with' a finding of liability against the Mayor for seizure of the same pets, such allegations 'stop[ ] short of the line between possibility and plausibility of 'entitlement to relief' on the larger substantive due process claim." *Maldonado*, 568 F.3d at 274 (quoting *Iqbal*, 129 S. Ct. at 1960 (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted)) (second alteration in original). The court held that the allegations against the mayor did not show "that his involvement was sufficiently direct to hold him liable for violations of the plaintiffs' substantive due process rights." *Id.*

Finally, the court concluded that the allegations did not support a theory of supervisory liability because "supervisory liability lies only where an ''affirmative link' between the behavior of a subordinate and the action or inaction of his supervisor' exists such that ''the supervisor's conduct led inexorably to the constitutional violation,'" and the allegations did not support finding such a link. *See id.* at 274–75 (citations omitted).

The court also concluded that there was no liability under a theory of deliberate indifference because such liability "'will be found only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights,'" but "the Mayor's promulgation of a pet policy that was silent as to the manner in which the pets were to be collected and disposed of, coupled with his mere presence at one of the raids, [wa]s insufficient to create the affirmative link necessary for a finding of supervisory liability, even under a theory of deliberate indifference." *Id.* at 275 (citation omitted). The court concluded that qualified immunity on the Fourteenth Amendment substantive due process claim was warranted. *Id.*

Second Circuit

- ***Litwin v. Blackstone Group, L.P.***, --- F.3d ----, No. 09-4426-cv, 2011 WL 447050 (2d Cir. Feb. 10, 2011). The plaintiffs brought a putative securities class action on behalf of

themselves and all others who purchased the common units of the Blackstone Group ("Blackstone") at the time of its IPO. They sought remedies under the Securities Act for alleged material omissions from, and misstatements in, Blackstone's registration statement and prospectus.

Blackstone, the Second Circuit explained, is one of the largest independent alternative asset managers in the world, with total assets under management of approximately $88.4 billion as of 2007. Blackstone receives a substantial portion of its revenues from two sources: (1) a 1.5% management fee on its total assets under management, and (2) performance fees of 20% of the profits generated from the capital it invests on behalf of its limited partners. Under certain circumstances, when investments perform poorly, Blackstone may be subject to a "claw-back" of already-paid performance fees. In other words, it may be required to return fees which it has already collected.

The plaintiffs alleged that, at the time of Blackstone's IPO and unbeknownst to non-insider purchasers of Blackstone common units, two of Blackstone's portfolio companies (FGIC Corp. and Freescale), as well as its real estate fund investments, were experiencing problems. Blackstone allegedly knew of these problems and reasonably expected these problems to subject it to reduced future performance fees and a claw-back of past performance fees, thereby materially affecting its future revenues. The plaintiffs alleged that Blackstone was required to disclose these material adverse developments in its registration statement, but did not. The plaintiffs further alleged that Blackstone omitted material information regarding the downward trend in the real estate market and its likely input on Blackstone's real estate investments. The plaintiffs alleged that Blackstone's registration statement contained the following affirmative material misstatement:

> The real estate industry is also experiencing historically high levels of growth and liquidity driven by the strength of the U.S. economy . . . and the availability of financing for acquiring real estate assets. . . . The strong investor demand for real estate assets is due to a number of factors, including persistent, reasonable levels of interest rates . . . and the ability of lenders to repackage their loans into securitizations, thereby diversifying and limiting their risk. These factors have combined to significantly increase the capital committed to real estate funds from a variety of institutional investors.

In addition, the plaintiffs alleged that Blackstone's unaudited financial statements for the three-month periods ending March 31, 2007 and March 31, 2006, respectively, which were included in its registration statement, violated generally accepted accounting principles ("GAAP") and materially overstated the values of Blackstone's real estate investments and its investment in FGIC. The plaintiffs also alleged that Blackstone's disclosure of certain risk factors was too general and failed to inform investors adequately of the then-existing specific risks related to the real estate and credit markets.

The district court dismissed the plaintiffs' complaint for failure to state a claim. The district court's opinion found that the alleged omissions and misstatements concerning FGIC, Freescale, and Blackstone's real estate investments were not material. First, the district court analyzed the relative scale or quantitative materiality of the alleged FGIC and Freescale omissions. After noting the Second Circuit's and the SEC's acceptance of a 5% threshold as an appropriate "starting place" or "preliminary assumption" of immateriality, the district court noted that "Blackstone's $331 million investment in FGIC represented a mere 0.4% of Blackstone's [total] assets under management at the time of the IPO." The district court then addressed the plaintiffs' argument that the materiality of the omissions is best illustrated by the effect the eventual $122.2 million drop in value of Blackstone's FGIC investment had on Blackstone's 2007 annual revenues. The district court found that the decline in FGIC's investment value was quantitatively immaterial as compared with Blackstone's $3.12 billion in total revenues for 2007.

The district court next looked at the quantitative materiality of the Freescale omissions, again comparing Blackstone's investment to its total assets under management. The court stated that "the $3.1 billion investment in Freescale represented 3.6% of the total $88.4 billion [that Blackstone] had under management at the time of the IPO." The district court found it significant that the complaint did not (and likely could not) allege that Freescale's loss of its exclusive supplier relationship with Motorola would cause Blackstone's investment in Freescale to lose 100% of its value.

The district court then pointed to the structure of the Blackstone enterprise as further support for the immateriality of the alleged omissions. According to the district court, because the performance of individual portfolio companies only affects Blackstone's revenues after investment gains or losses are aggregated at the fund level, the poor performance of one investment may be offset by the strong performance of another. Accordingly, "there is no way to make a principled distinction between the negative information that Plaintiff[s] claim[ ] was wrongfully omitted from the Registration Statement and information . . . about every other portfolio company." The district court found that requiring disclosure of information about particular portfolio companies or investments would risk "obfuscat[ing] truly material information in a flood of unnecessary detail, a result that the securities laws forbid."

The district court acknowledged that this quantitative analysis is not dispositive of materiality, but found that only one of the qualitative factors that the Second Circuit or the SEC often consider was present in this case. Specifically, the court found that: (1) none of the omissions concealed unlawful transactions or conduct; (2) the alleged omissions did not relate to a significant aspect of Blackstone's operations; (3) there was no significant market reaction to the public disclosure of the alleged omissions; (4) the alleged omissions did not hide a failure to meet analysts' expectations; (5) the alleged omissions did not change a loss into income or vice versa; and (6) the alleged omissions did not affect Blackstone's compliance with loan covenants or other contractual requirements. The district court noted that the one qualitative factor it did find present in this case—that the alleged omissions had the effect of increasing Blackstone's management's compensation—was not enough, by itself,

to make the omissions material. Accordingly, the district court held that the alleged omissions concerning FGIC and Freescale were immaterial as a matter of law.

The district court separately analyzed the alleged omissions and misstatements regarding Blackstone's real estate investments. It first noted that the complaint failed to "identify a single real estate investment or allege a single fact capable of linking the problems in the subprime residential mortgage market in late 2006 and early 2007 and the roughly contemporaneous decline in home prices (which are well-documented by the [complaint]) to Blackstone's real estate investments, 85% of which were in commercial and hotel properties." According to the district court, without further factual enhancement as to how the troubles in the residential mortgage markets could have a foreseeable material effect on Blackstone's real estate investments, the plaintiffs' allegations fell short of the plausibility standard set forth in *Twombly*. In addition, the district court found that the plaintiffs had failed to allege any facts that, if true, would render false those statements alleged to be affirmative misrepresentations. The district court further found that insofar as the plaintiffs alleged that Blackstone was required to disclose general market conditions, such omissions are not actionable because Sections 11 and 12(a)(2) do not require disclosure of publicly available information: "The omission of generally known macro-economic conditions is not material because such matters are already part of the 'total mix' of information available to investors." Finally, the district court noted that the complaint contained no allegations that Blackstone knew that market conditions "were reasonably likely to have a material effect on its portfolio of real estate investments," and stated that "generalized allegations that problems brewing in the market at large made it 'foreseeable' that a particular set of unidentified investments would sour are insufficient to 'nudge[ ] [the] claims across the line from conceivable to plausible.'"

On appeal, the Second Circuit noted that the plaintiffs' complaint explicitly did not allege fraud. Instead, the complaint alleged that Blackstone acted negligently in preparing its registration statement and prospectus. Further, Blackstone did not argue on appeal that the plaintiffs' claims were premised on allegations of fraud. Accordingly, the Second Circuit found that the plaintiffs' claims were not subject to the heightened pleading standard of FED. R. CIV. P. 9(b).

The Second Circuit, through the following lengthy analysis, identified the core issue as whether the downward trend and uncertainty in the real estate market, already known and existing at the time of the IPO, was reasonably likely to have a material impact on Blackstone's financial condition:

> Section 11 of the Securities Act imposes liability on issuers and other signatories of a registration statement that, upon becoming effective, "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Section 12(a)(2) imposes liability under similar circumstances on

issuers or sellers of securities by means of a prospectus. *See id*. § 77l(a)(2). So long as a plaintiff establishes one of the three bases for liability under these provisions—(1) a material misrepresentation; (2) a material omission in contravention of an affirmative legal disclosure obligation; or (3) a material omission of information that is necessary to prevent existing disclosures from being misleading, *see In re Morgan Stanley Info. Fund Sec. Litig*., 592 F.3d 347, 360 (2d Cir. 2010)—then, in a Section 11 case, "the general rule [is] that an issuer's liability . . . is absolute." . . . The primary issue before us is the second basis for liability; that is, whether Blackstone's Registration Statement and Prospectus omitted material information that Blackstone was legally required to disclose.

Required Disclosures Under Item 303 of Regulation S-K

Plaintiffs principally contend that Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii), provides the basis for Blackstone's disclosure obligation. Pursuant to Subsection (a)(3)(ii) of Item 303, a registrant must "[d]escribe any known trends or uncertainties ... that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations." Instruction 3 to paragraph 303(a) provides that "[t]he discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." 17 C.F.R. § 229.303(a) instruction 3. The SEC's interpretive release regarding Item 303 clarifies that the Regulation imposes a disclosure duty "where a trend, demand, commitment, event or uncertainty is both [1] presently known to management and [2] reasonably likely to have material effects on the registrant's financial condition or results of operations."

Although the District Court opinion and the parties on appeal primarily focus on the materiality of Blackstone's alleged omissions, Blackstone does urge that plaintiffs' complaint fails to adequately allege that Blackstone was required by Item 303 to disclose trends in the real estate market for the purpose of Sections 11 and 12(a)(2). We disagree. Plaintiffs allege that the downward trend in the real estate market was already known and existing at the time of the IPO, and that the trend or uncertainty in the market was reasonably likely to have a material impact on Blackstone's financial condition. Therefore, plaintiffs have adequately pleaded a presently existing trend, event, or uncertainty, and the sole remaining issue is whether the effect of the "known" information was "reasonably likely" to be

material for the purpose of Item 303 and, in turn, for the purpose of Sections 11 and 12(a)(2).

Litwin, 2011 WL 447050, at *6–7 (internal citation omitted).

The court then held that the plaintiffs met their pleading burden to plausibly allege that the information Blackstone omitted from its offering documents was "material":

> In this case, the District Court confronted a Rule 12(b)(6) motion, a motion for which plaintiffs need only satisfy the basic notice pleading requirements of Rule 8. So long as plaintiffs plausibly allege that Blackstone omitted material information that it was required to disclose or made material misstatements in its offering documents, they meet the relatively minimal burden of stating a claim pursuant to Sections 11 and 12(a)(2), under which, should plaintiffs' claims be substantiated, Blackstone's liability as an issuer is absolute. Where the principal issue is materiality, an inherently fact-specific finding, the burden on plaintiffs to state a claim is even lower. Accordingly, we cannot agree with the District Court at this preliminary stage of litigation that the alleged omissions and misstatements "are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance."
>
> *Materiality of Omissions Related to FGIC and Freescale*
>
> As to the materiality of the omissions related to FGIC and Freescale, Blackstone first argues that the relevant information was public knowledge, and thus could not be material because it was already part of the "total mix" of information available to investors. Specifically, Blackstone contends that, as the complaint itself alleges based on citations to news articles and analysts' calls, the shift in FGIC's strategy toward a less conservative approach to bond insurance and Freescale's loss of its exclusive contract with Motorola were facts publicly known at the time of the IPO.
>
> It is true that, as a general matter, the "'total mix' of information may . . . include information already in the public domain and facts known or reasonably available to [potential investors]." *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1199 (2d Cir. 1993) (internal quotation marks omitted). But case law does not support the sweeping proposition that an issuer of securities is never required to disclose publicly available information.

In this case, the key information that plaintiffs assert should have been disclosed is whether, and to what extent, the particular known trend, event, or uncertainty might have been reasonably expected to materially affect Blackstone's investments. And this potential future impact was certainly not public knowledge, particularly in the case of FGIC, which was not even mentioned in Blackstone's Registration Statement and thus cannot be considered part of the "total mix" of information already available to investors. Again, the focus of plaintiffs' claims is the required disclosures under Item 303—plaintiffs are not seeking the disclosure of the mere fact of Blackstone's investment in FGIC, of the downward trend in the real estate market, or of Freescale's loss of its exclusive contract with Motorola. Rather, plaintiffs claim that Blackstone was required to disclose the manner in which those then-known trends, events, or uncertainties might reasonably be expected to materially impact Blackstone's future revenues.

While it is true that Blackstone's investments in FGIC and Freescale fall below the presumptive 5% threshold of materiality, we find that the District Court erred in its analysis of certain qualitative factors related to materiality. First, the District Court and Blackstone place too much emphasis on Blackstone's structure and on the fact that a loss in one portfolio company might be offset by a gain in another portfolio company. Blackstone is not permitted, in assessing materiality, to aggregate negative and positive effects on its performance fees in order to avoid disclosure of a particular material negative event. *Cf.* SAB No. 99, Fed.Reg. at 45,153 (noting in the context of aggregating and netting multiple misstatements that "[r]egistrants and their auditors first should consider whether each misstatement is material, irrespective of its effect when combined with other misstatements"). Were we to hold otherwise, we would effectively sanction misstatements in a registration statement or prospectus related to particular portfolio companies so long as the net effect on the revenues of a public private equity firm like Blackstone was immaterial. The question, of course, is not whether a loss in a particular investment's value will merely affect revenues, because even after aggregation of gains and losses at the fund level, it will almost certainly have some effect. The relevant question under Item 303 is whether Blackstone reasonably expects the impact to be material. We see no principled basis for holding that an historically "private" equity company that has chosen to go public is somehow subject to a different standard under the securities disclosure laws and regulations than a traditional public company with numerous subsidiaries. *See* Mohsen Manesh, *Legal Asymmetry and the End of*

Corporate Law, 34 DEL. J. CORP. L. 465, 482 (2009) (noting that Blackstone, as a publicly listed entity, is "substantively indistinguishable from [its] publicly traded corporate counterparts"). In a case of pure omissions, to the extent that the securities laws require information to be disclosed and the information in question is material in the eyes of a reasonable investor, Blackstone must disclose the information. Blackstone's structure is no defense on a motion to dismiss.

Second, the District Court erred in finding that the alleged omissions did not relate to a significant aspect of Blackstone's operations. In discussing "considerations that may well render material a quantitatively small misstatement," SAB No. 99 provides that "materiality . . . may turn on where [the misstatement] appears in the financial statements:" "[S]ituations may arise . . . where the auditor will conclude that a matter relating to segment information is qualitatively material even though, in his or her judgment, it is quantitatively immaterial to the financial statements taken as a whole." SAB No. 99, 64 Fed.Reg. at 45,152. SAB No. 99 also provides that one factor affecting qualitative materiality is whether the misstatement or omission relates to a segment that plays a "significant role" in the registrant's business. *Id.* In this case, Blackstone makes clear in its offering documents that Corporate Private Equity is its flagship segment, playing a significant role in the company's history, operations, and value. Blackstone states that its Corporate Private Equity fund is "among the largest . . . ever raised," and that its "long-term leadership in private equity has imbued the Blackstone brand with value that enhances all of [its] different businesses and facilitates [its] ability to expand into complementary new businesses." Because Blackstone's Corporate Private Equity segment plays such an important role in Blackstone's business and provides value to all of its other asset management and financial advisory services, a reasonable investor would almost certainly want to know information related to that segment that Blackstone reasonably expects will have a material adverse effect on its future revenues. Therefore, the alleged misstatements and omissions relating to FGIC and Freescale were plausibly material.

Furthermore, with respect to Freescale in particular, Blackstone's investment in the company accounted for 9.4% of the Corporate Private Equity segment's assets under management, and the investment was nearly three times larger than the next largest investment in that segment as reported in Blackstone's Prospectus. Even where a misstatement or omission may be quantitatively small

compared to a registrant's firm-wide financial results, its significance to a particularly important segment of a registrant's business tends to show its materiality. *See In re Kidder Peabody*, 10 F. Supp. 2d at 410–11 (noting that while amount of "false profits may have been minor compared to GE's earnings as a whole, they were quite significant to" a subsidiary's profits, which, "in turn, represented a significant portion of GE's balance sheet"). Viewed in that light, we cannot hold that the alleged loss of Freescale's exclusive contract with its largest customer and the concomitant potential negative impact on one of the largest investments in Blackstone's Corporate Private Equity segment was immaterial.

Finally, the District Court failed to consider another relevant qualitative factor—that the omissions "mask[ ] a change in earnings or other trends." SAB No. 99, 64 Fed.Reg. at 45,152. Such a possibility is precisely what the required disclosures under Item 303 aim to avoid. Here, Blackstone omitted information related to FGIC and Freescale that plaintiffs allege was reasonably likely to have a material effect on the revenues of Blackstone's Corporate Private Equity segment and, in turn, on Blackstone as a whole. Blackstone's failure to disclose that information masked a reasonably likely change in earnings, as well as the trend, event, or uncertainty that was likely to cause such a change.

All of these qualitative factors, together with the District Court's correct observation that the alleged omissions "doubtless had 'the effect of increasing management's compensation,'" *see* SAB No. 99, 64 Fed.Reg. at 45,152, show that the alleged omissions were material. Accordingly, we hold that plaintiffs have adequately pleaded that Blackstone omitted material information related to FGIC and Freescale that it was required to disclose under Item 303 of Regulation S-K.

Materiality of Omissions and Misstatements Related to Real Estate Investments

We also find that the District Court erred in its analysis of the alleged omissions and misstatements related to Blackstone's real estate investments. First, the District Court's opinion implies that to state a plausible claim, plaintiffs' complaint had to identify specific real estate investments made or assets held by Blackstone funds that might have been at risk as a result of the then-known trends in the real estate industry. This expectation, however, misses the very core of plaintiffs' allegations, namely, that Blackstone omitted material

information that it had a duty to report. In other words, plaintiffs' precise, actionable allegation is that Blackstone failed to disclose material details of its real estate investments, and specifically that it failed to disclose the manner in which those unidentified, particular investments might be materially affected by the then-existing downward trend in housing prices, the increasing default rates for sub-prime mortgage loans, and the pending problems for complex mortgage securities. That is all Item 303 requires in order to trigger a disclosure obligation: a known trend that Blackstone reasonably expected would materially affect its investments and revenues. Plaintiffs allege that they were unaware of, but legally entitled to disclosure of, the very information that the District Court held had to be specified in plaintiffs' complaint.

Moreover, there are two problems with the District Court's finding that plaintiffs' claims fail because they cannot establish any "link[ ]" between the declining residential real estate market and Blackstone's heavy investments in commercial real estate. *See id.* at 544. First, the offering documents indicate, and Blackstone admits, that Blackstone has at least one modest-sized residential real estate investment, and, drawing all reasonable inferences in plaintiffs' favor, its residential real estate holdings might constitute as much as $3 billion and 15% of the Real Estate segment's assets under management. *See supra* n. 6. This alone is enough on a Rule 12(b)(6) motion to establish a plausible link between the alleged trend in the residential real estate market and Blackstone's real estate investments. Second, even if the overwhelming majority of Blackstone's real estate investments are commercial in nature, it is certainly plausible for plaintiffs to allege that a collapse in the residential real estate market, and, more importantly, in the market for complex securitizations of residential mortgages, might reasonably be expected to adversely affect commercial real estate investments. Blackstone's own disclosures in its Registration Statement make this link clear, given that it admits that "the ability of lenders to repackage their [residential] loans into securitizations" is one factor contributing to the "significant[ ] increase [in] the capital committed to [predominantly commercial] real estate funds."

Finally, the District Court erred when it stated that "Plaintiff[s] fail[ ] to allege any *facts* . . . that if true, would render false the few statements alleged to be affirmative misrepresentations." To the contrary, plaintiffs provide significant factual detail about the general deterioration of the real estate market and specific facts that, drawing all reasonable inferences in plaintiffs' favor, directly

contradict statements made by Blackstone in its Registration Statement. First, the chart in plaintiffs' complaint illustrating the seasonally adjusted price change in the U .S. housing market contradicts Blackstone's representation that the "real estate industry [was] . . . experiencing historically high levels of growth," because the chart shows that the rate of price appreciation began to decline significantly beginning in late 2005. In addition, Blackstone's representation that "strong investor demand for real estate assets is due [in part] to . . . persistent, reasonable levels of interest rates" is refuted by plaintiffs' allegations that "[a]s key short-term and the prime rates rose [beginning in June 2004], other interest rates rose as well, including those for most residential mortgage loans" and that "[t]his rise in interest rates made it more difficult for borrowers to meet their payment obligations." Also, Blackstone's statement that "lenders [were able] to repackage their loans into securitizations, thereby diversifying and limiting their risk," is at least impliedly refuted by plaintiffs' detailed allegations as to how the increasing sub-prime mortgage loan defaults were going to impact negatively the existing and future uses of, and value associated with, CDOs, RMBSs, and CDSs.

Absent these errors, the materiality of the alleged omitted and misstated information related to Blackstone's real estate investments becomes clear. First, Blackstone's real estate segment played a "significant role," SAB No. 99, 64 Fed.Reg. at 45,152, in Blackstone's business. While Blackstone's real estate segment may not be as prominent to the company's traditional identity as its Corporate Private Equity segment, Blackstone's real estate segment nevertheless constituted 22.6% of Blackstone's total assets under management. A reasonable Blackstone investor may well have wanted to know of any potentially adverse trends concerning a segment that constituted nearly a quarter of Blackstone's total assets under management. Second, the alleged misstatements and omissions regarding real estate were qualitatively material because they masked a potential change in earnings or other trends. Finally, the alleged misstatements and omissions, if proven, had "the effect of increasing management's compensation," *id*. For all these reasons, we conclude that the District Court erred in dismissing plaintiffs' allegations relating to Blackstone's real estate investments. Plaintiffs plausibly allege that Blackstone omitted material information that it was required to disclose and that it made material misstatements in its IPO offering documents.

. . . .

> In sum, we hold that the District Court erred in dismissing for failure to state a claim plaintiffs' complaint brought pursuant to Sections 11, 12(a)(2), and 15 of the Securities Act because (1) plaintiffs plausibly allege that Blackstone omitted from its Registration Statement and Prospectus material information related to its investments in FGIC and Freescale that Blackstone was required to disclose under Item 303 of Regulation S-K; (2) plaintiffs plausibly allege that Blackstone both omitted material information that it was required to disclose under Item 303 and made material misstatements in its offering documents related to its real estate investments; and (3) plaintiffs' remaining GAAP and risk disclosure allegations are derivative of their primary allegations, and therefore these secondary allegations are sufficient to state a claim.

Litwin, 2011 WL 447050, at *8–14 (internal citations omitted).

- ***DiFolco v. MSNBC Cable L.L.C.***, 622 F.3d 104 (2d Cir. 2010). Following the termination of her employment as a correspondent for MSNBC, Plaintiff DiFolco sued MSNBC, its President (Kaplan), and an Executive Producer (Leon) for breach of contract, defamation, and tortious interference with prospective business relations. *Id.* at 106.

  Defendants filed a motion to dismiss the complaint for failure to state a claim. *Id.* at 109. The district court dismissed DiFolco's complaints. *Id.* It concluded that DiFolco repudiated her contract in an exchange of emails and, therefore, that MSNBC had no financial obligations to DiFolco under the terms of her contract. *Id.* In reaching that conclusion, the district court found that the contract was "unambiguous in its requirement that [DiFolco] was to be at MSNBC's disposal for a two-year period" and that the August 23 and August 31 emails from DiFolco unambiguously "constituted repudiation of the Contract and relieved MSNBC of future obligations." *Id.* The district court also dismissed DiFolco's defamation claims because it concluded that two of the claims were based on true statements and the third consisted of non-actionable opinion. *DiFolco*, 622 F.3d at 110. And it dismissed her tortious interference with prospective business relations claim because it was predicated on the tortious interference claim. *Id.* The Second Circuit reversed as to the breach of contract and defamation claims, but affirmed the dismissal of the tortious interference with prospective business relations claim.

  In support of her breach of contract claim, DiFolco made the following allegations:

  > 38. While she expressed her hopes to have maintained a productive working relationship with the Company and "be a part of [Kaplan's] team for a long time to come," Ms. DiFolco realized the Defendants Leon and Brownstein continued to cancel her shoots and force her off the air. As such, she indicated to Defendant Kaplan that they should

"discuss [her] exit from the shows." This was Ms. DiFolco's way of expressing to Kaplan her desire not to disrupt the shows on which she worked.

39. Defendant Kaplan agreed to meet with her as proposed to further discuss the matters raised in her email.

40. That same day, Ms. DiFolco informed Defendant Leon that she planned to meet with Defendant Kaplan on September 1, 2005. She also stated that she hoped to record the shows for early September out of New Jersey since she had to be in New York to cover "Fashion Week," noting that it would save the Company time and money on airfare if she simply remained on the East coast for that entire time period. Defendant Leon agreed to this arrangement.

41. The next day, on August 24, 2005, Defendant Leon responded by abruptly informing her that they "decided to change the direction of the fashion week coverage" and planned to send the New York Times style editor to cover the shows instead of Ms. DiFolco.

42. Ms. DiFolco immediately contacted Defendant Kaplan, forwarding Defendant Leon's most recent example of his ongoing effort to force her off the air and asked to know why she was being taken off the scheduled shoots. She specifically inquired whether Defendant Kaplan had made Defendant Leon aware of her previous request for a meeting, fearing that Defendant Leon had canceled her participation in Fashion Week in retaliation for approaching his superior and that her email would be misinterpreted.

43. Ms. DiFolco clearly expressed that "[she] did not resign yesterday" and confirmed their agreed meeting scheduled for September 1, 2005.

44. Defendant Kaplan acknowledged that he made Defendant Leon aware of her previous email. His email stated, "My complete impression is that you have resigned," and then continued, "sooner is better since your obvious intent is to leave."

45. While Ms. DiFolco was in flight from California, Defendant Leon left her a voicemail message that her meeting with Kaplan was canceled. At the same time, Defendant MSNBC sent Ms. DiFolco a proposed separation and release agreement through her agent, claiming that she had resigned.

Id. at 107-08.

In support of her defamation claim, DiFolco's complaint alleged that "one or more Defendants began making ... defamatory statements about Ms. DiFolco on the Internet and to various media outlets." *Id*. at 108. DiFolco alleged that the defamatory statements were "made by, with the participation of and/or under the authority and direction of one or more of Defendants." *Id*. The allegedly defamatory statements were (1) that "DiFolco had resigned, broken her contract and/or deserted her co-anchor;" (2) that DiFolco had resigned "in the middle of her contract;" and (3) that "[l]uscious Claudia DiFolco has quit MSNBC in the middle of her contract, leaving Sharon Tay as the sole host of 'Entertainment Hotlist' and 'At the Movies.'" *DiFolco*, 622 F.3d at 108. DiFolco claimed that these statements "could only have originated from MSNBC officials given the confidential nature of her contract dispute." *Id*. DiFolco also claimed that defendants caused another defamatory message about her to be posted on a website. *Id.* The message stated that DiFolco:

> [B]elieve[d] that cleavage, over time [sic] in the makeup chair and a huge desire to become a star is ... how to pay your dues" and that "throughout her irrelevant career at MSNBC, she constantly ignored directions from news producers during live shots, refused to do alternate takes for editing purposes, pouted like a child and never was a team player."

Id. at 108-09 (alterations in original).

In support of her tortious interference claim, DiFolco alleged that "[d]efendants intentionally interfered with Plaintiff's professional relationships and opportunities for employment" and that "[d]efendants actions permanently injured Plaintiff's business relationships in the [news and entertainment] industry." *Id.* at 115.

The Second Circuit set forth the standard of review from *Twombly* and *Iqbal*:

> In its formulation of the *Twombly-Iqbal* requirements for a statement of claim, the Supreme Court has established the following order to be followed in determining whether the pleading is adequate: "When there are well-pleaded factual allegations, a court should assume their veracity and *then* determine whether they plausibly give rise to an entitlement to relief."

Id. at 111 (quoting *Iqbal*, 129 S. Ct. at 1950).

The court next considered whether the lower court properly considered DiFolco's emails and explained that, in considering a 12(b)(6) motion to dismiss, a district court may consider:

> [T]he facts alleged in the complaint, documents attached to the

> complaint as exhibits, and documents incorporated by reference in the complaint. Where a document is not incorporated by reference, the court may never[the]less consider it where the complaint "relies heavily upon its terms and effect," thereby rendering the document "integral" to the complaint.

DiFolco, 622 F.3d at 111 (quoting *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006)) (internal citations omitted). An "integral" document should be considered, however, only if there is no dispute about the authenticity and accuracy of the document and there are no material disputed issues of fact regarding the relevance of the document. *Id.*

The Second Circuit determined that the August 23 email could be considered because DiFolco referred to it in her complaint (*id.* at 112), but that the district court erred in considering the August 31 e-mail because it "was not attached to the complaint, was not incorporated by reference in the complaint, and was not integral to the complaint." *Id.* at 113.

In any event, the court disagreed that the emails showed conclusively that DiFolco had resigned. *Id.* The court noted that, under New York law, "a repudiation can be determined to have occurred only when it is shown that 'the announcement of an attention not to perform was positive and unequivocal.'" *DiFolco*, 622 F.3d at 112 (quoting *Tenavision, Inc. v. Neuman*, 379 n.E.2d 1166, 1168 (1978)). And that the issue of repudiation is generally an issue of fact. *Id.* Then the court examined the language of DiFolco's emails and disagreed that she unambiguously expressed an intention to leave as a matter of law: "There are at least factual issues as to whether DiFolco had made a final and definite communication of an intent to forego performance or had indicated her refusal to perform in a clear and unqualified way such as to justify a conclusion that she had repudiated her contract." *Id*. at 112-13. The court reinstated DiFolco's breach of contract claim. *Id.* at 113.

The court then considered DiFolco's defamation causes of action. It explained that, under New York law, a defamation claim may be based on a "writing which tends to disparage a person in the way of [her] office profession, or trade." *Id.* at 114 (quoting *Nichols v. Item Publishers, Inc.*, 132 N.E.2d 860, 862 (1956)). The court decided that DiFolco's complaint "sets forth the necessary elements to make out a claim for defamation in New York, including the element of malice" and reinstated the defamation claims. *Id.*

Turning to the tortious interference claim, the Second Circuit concluded that: " [a]side from the fact that these allegations are too conclusory, vague, and lacking in a factual basis to make out DiFolco's tortious interference claim, the complaint fails entirely to describe any third party with whom DiFolco had prospective business relations to be interfered with." *DiFolco*, 622 F.3d at 114-15.

- ***Kiobel v. Royal Dutch Petroleum***, 621 F.3d 111 (2d Cir. 2010) (per curiam). Plaintiffs, residents of Nigeria, alleged that Dutch, British, and Nigerian corporations engaged in oil

exploration and production had aided and abetted the Nigerian government in committing violations of the law of nations. *Id*. at 117. Specifically, plaintiffs brought claims of aiding and abetting (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction. *Id*. at 123. The district court dismissed the following claims for failure to state a claim: aiding and abetting property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security, and association. *Id*. at 124. The district court denied defendants' motion to dismiss with respect to the remaining claims of aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment. *Id*. The district court certified its entire order for interlocutory appeal. *Id*. The Second Circuit affirmed in part and reversed in part, holding that it lacked subject matter jurisdiction over all of the plaintiffs' claims because corporate liability is not a "rule of customary international law." *Kiobel*, 621 F.3d at 120, 145.

The court first determined that it had jurisdiction under the ATS only if corporations were subject to tort liability under the ATS. *See id.* at 117, 126. The court then examined international law to determine the scope of liability. *See id.* at 131-145. The court looked to the history and conduct of international tribunals (*id.* at 132-37), international treaties (*id.* at 137-41), and works of scholars and jurists (*id.* at 142-144) and concluded that:

> Together, those authorities demonstrate that imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*. Because corporate liability is not recognized as a "specific, universal, and obligatory" norm, it is not a rule of customary international law that we may apply under the ATS. Accordingly, insofar as plaintiffs in this action seek to hold only corporations liable for their conduct in Nigeria (as opposed to individuals within those corporations), and only under the ATS, their claims must be dismissed for lack of subject matter jurisdiction.

Kiobel, 621 F.3d at 145 (internal citation omitted).

Judge Leval filed a concurring opinion. He disagreed with the majority that corporations are not subject to international law. *See id.* at 150 (Leval, J., concurring). But would have dismissed Kiobel's complaint for the alternative reason that it "fail[ed] to state a proper legal claim of entitlement to relief." *Id.* at 153. He explained:

> [T]he pertinent allegations of the Complaint fall short of mandatory standards established by decisions of this court and the Supreme Court. We recently held in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), that liability under the ATS for aiding and abetting in a violation of international

> human rights lies only where the aider and abettor acts with a purpose to bring about the abuse of human rights. *Id.* at 259. Furthermore, the Supreme Court ruled in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), that a complaint is insufficient as a matter of law unless it pleads specific facts that "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. When read together, *Talisman* and *Iqbal* establish a requirement that, for a complaint to properly allege a defendant's complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses. The allegations against Appellants in these appeals do not satisfy this standard. While the Complaint plausibly alleges that Appellants knew of human rights abuses committed by officials of the government of Nigeria and took actions which contributed indirectly to the commission of those offenses, it does not contain allegations supporting a reasonable inference that Appellants acted with a purpose of bringing about the alleged abuses.

Kiobel, 621 F.3d at 188 (Leval, J., concurring) (second alteration in original). Judge Leval discussed the pleading standard from *Twombly* and *Iqbal*:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)). "Facial plausibility" means that the plaintiff's factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint that pleads facts that are "merely consistent with" a defendant's liability is not plausible. *Id.*
>
> Conclusory allegations that the defendant violated the standards of law do not satisfy the need for plausible factual allegations. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (holding that "courts are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)); *see also Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir.2006) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss." (internal quotation marks and citation omitted) (second alteration in original)). This requirement applies to pleadings of intent as well as conduct. *See Iqbal*, 129 S.Ct. at 1954.

Kiobel, 621 F.3d at 191 (Leval, J., concurring) (alterations in original).

Kiobel alleged that (1) "Shell itself aided and abetted the government of Nigeria in the government's commission of various human rights violations against the Ogoni," (2) alternatively, that Shell is liable on either of two theories for the actions of its subsidiary SPDC - either as SPDC's alter ego, or as SPDC's principal on an agency theory. *Id.* at 191. With respect to his claim that Shell was directly involved as an aider and abetter, Kiobel pleaded that Shell:

> willfully ... aided and abetted SPDC and the Nigerian military regime in the joint plan to carry out a deliberate campaign of terror and intimidation through the use of extrajudicial killings, torture, arbitrary arrest and detention, military assault against civilians, cruel, inhuman and degrading treatment, crimes against humanity, forced exile, restrictions on assembly and the confiscation and destruction of private and communal property, all for the purpose of protecting Shell property and enhancing SPDC's ability to explore for and extract oil from areas where Plaintiffs and members of the Class resided.

Id. at 191-92. And also that "the Nigerian military's campaign of violence against the Ogoni was 'instigated, planned, facilitated, conspired and cooperated in' by Shell." *Id.* at 192. Judge Leval opined that "[s]uch pleadings are merely a conclusory accusation of violation of a legal standard and do not withstand the test of *Twombly* and *Iqbal*. They fail to "state a claim upon which relief can be granted." *Id.* (quoting FED. R. CIV. P. 12(b)(6)).

Kiobel also asserted:

> (1) that SPDC and Shell met in Europe in February 1993 and "formulate[d] a strategy to suppress MOSOP and to return to Ogoniland," (2) that "[b]ased on past behavior, Shell and SPDC knew that the means to be used [by the Nigerian military] in that endeavor would include military violence against Ogoni civilians," and (3) that "Shell and SPDC" provided direct, physical support to the Nigerian military and police operations conducted against the Ogoni by, for example, providing transportation to the Nigerian forces; utilizing Shell property as a staging area for attacks; and providing food, clothing, gear, and pay for soldiers involved.

Id. (alterations in original). Judge Leval also considered these allegations legally insufficient "because they do not support a reasonable inference that Shell provided substantial assistance to the Nigerian government *with a purpose to advance or facilitate* the Nigerian government's violations of the human rights of the Ogoni people." *Kiobel*, 621 F.3d at 192 (Leval, J., concurring) (emphasis in original).

Judge Leval next considered Kiobel's allegations that Shell "provided financial support and other assistance to the Nigerian forces with knowledge that they would engage in human rights abuses," and pointed out that:

> [T]he Complaint fails to allege facts (at least sufficiently to satisfy the *Iqbal* standard) showing a purpose to advance or facilitate human rights abuses. The provision of assistance to the Nigerian military with knowledge that the Nigerian military would engage in human rights abuses does not support an inference of a purpose on Shell's part to advance or facilitate human rights abuses. An enterprise engaged in finance may well provide financing to a government, in order to earn profits derived from interest payments, with the knowledge that the government's operations involve infliction of human rights abuses. Possession of such knowledge would not support the inference that the financier acted with a purpose to advance the human rights abuses. Likewise, an entity engaged in petroleum exploration and extraction may well provide financing and assistance to the local government in order to obtain protection needed for the petroleum operations with knowledge that the government acts abusively in providing the protection. Knowledge of the government's repeated pattern of abuses and expectation that they will be repeated, however, is not the same as a purpose to advance or facilitate such abuses, and the difference is significant for this inquiry.

Id. at 193. Judge Leval concluded that:

> In sum, the pleadings do not assert facts which support a plausible assertion that Shell rendered assistance to the Nigerian military and police for the purpose of facilitating human rights abuses, as opposed to rendering such assistance for the purpose of obtaining protection for its petroleum operations with awareness that Nigerian forces would act abusively. In circumstances where an enterprise requires protection in order to be able to carry out its operations, its provision of assistance to the local government in order to obtain the protection, even with knowledge that the local government will go beyond provision of legitimate protection and will act abusively, does not without more support the inference of a purpose to advance or facilitate the human rights abuses and therefore does not justify the imposition of liability for aiding and abetting those abuses.

Id. at 193-94.

- ***Hollander v. Copacabana Nightclub***, 624 F.3d 30, 2010 WL 3419954 (2d Cir. Sept. 1,

2010) (per curiam). Plaintiff brought a Section 1983 action against nightclub operators and promoters, alleging that "Ladies Night" promotions, charging women discounted admission, constituted sex discrimination in violation of his equal protection rights. *Id.* at *1. The district court dismissed after concluding that the nightclubs were not state actors and the Second Circuit affirmed. *Id.*

The court first discussed the plausibility standard from *Twombly* and *Iqbal*:

> To survive a motion to dismiss, the complaint must set out only enough facts to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). This standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "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."'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955).

Id. And the court explained that, to assert a Section 1983 claim, a "plaintiff must allege that the state was involved in the *activity that caused the injury* giving rise to the action" *Id.* at *2 (quoting *Sybalski v. Independent Group Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008) (per curiam)) (emphasis in original). The court decided that the only state action alleged – state issuance of a liquor license – was an insufficient basis to establish nightclubs were "state actors" for purposes of a Section 1983 action. *Id.* at *3.

- ***Mortimer Off Shore Services, Ltd. v. The Federal Republic of Germany***, 615 F.3d 97 (2d Cir. 2010). Plaintiff Mortimer filed an action under the Federal Sovereign Immunities Act ("FSIA") to enforce against the Federal Republic of Germany ("FRG") 351 bearer bonds valued at over $400,000,000. *Id.* at 98. The bonds were initially issued in 1928, by private banks within the state of Prussia – territory that later constituted West Germany and East Germany, which have since been reunified to make up the present-day FRG. *Id.* at 99. Mortimer alleged that the FRG assumed liability for the bonds. *Id.* The district court denied FRG's motion to dismiss for lack of subject matter jurisdiction and granted FRG's motion to dismiss for failure to state a claim. *Id.* at 104. The district court noted that "unlike private parties, sovereigns can *only* assume liability for debt of predecessor states through explicit acts that leave traces in legal documents." *Id.* (emphasis in original). The district court concluded that "Mortimer did not affirmatively plead the source of [the FRG]'s obligation to satisfy the bonds, and thus failed to 'state a claim of relief that is plausible on its face.'" *Mortimer*, 615 F.3d at 104 (quoting *Twombly*, 550 U.S. at 570) (internal citations omitted). Mortimer filed motions to amend the judgment and for leave to file an amended complaint. *Id.* The district court denied the motions. *Id.* Mortimer appealed the dismissal of its complaint for failure to state a claim, and the denial of its motions to amend the judgment

and for leave to file an amended complaint. *Id.* at 105. The FRG cross-appealed, challenging the district court's holding that it had subject matter jurisdiction. *Id.* The Second Circuit affirmed.

The Second Circuit explained that the FSIA "is the sole source for subject matter jurisdiction over any action against a foreign state," (*id.* (quoting *Cabiriri v. Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999))), and that it "provides that a foreign sovereign 'shall be immune from the jurisdiction of the courts of the United States,' unless one of the FSIA's exceptions applies." *Mortimer*, 615 F.3d at 105. (quoting 28 U.S.C. § 1604). The court discussed bonds issued by banks in the territory that became West Germany separately from the bonds issued by the banks in the territory that became East Germany. *Id.* The court's analysis turned on whether the FRG had assumed liability for the bonds, thus falling within the FSIA "commercial activity exception." *Id.* at 105-06. Because the FRG "agreed that it had assumed liability for properly validated West German bonds," the court determined that the FSIA exceptions applied to the West German bonds. *Id.* at 107-08.

With respect to the East German bonds, "Mortimer's proposed amended complaint ... alleged that upon unification, the FRG assumed liability for East Germany's debts, including the East German bonds." *Id.* at 112. The Second Circuit noted that, under the Unification Treaty, the FRG assumed indebtedness for East Germany's state debts, but pointed out that Mortimer failed to allege "how East Germany assumed liability for bonds issued by private banks located in the state of Prussia." *Id.* "Thus, Mortimer's allegation that the Unification Treaty alone provides no basis for liability beyond speculation that East Germany assumed liability for the bonds. A claim based on such speculation is implausible." *Mortimer*, 615 F.3d at 112. The court decided that Mortimer's original complaint contained "mere conclusory statements" that the FRG assumed liability for the East German bonds. *Id.* And agreed with the district court that "leave to amend would have been futile" since Mortimer's proposed amended complaint did not cure these deficiencies. *Id.*

After determining that it had subject matter jurisdiction over the West German bonds, the court considered Mortimer's claim as to those bonds on the merits. *Id.* The court determined that Mortimer was required to comply with certain validation procedures before it could recover. *Mortimer*, 615 F.3d at 115. Mortimer did not comply with the validation procedures or explain why its delay in doing so was excusable. *Id.* at 117. Thus, the Second Circuit held that "Mortimer, by not satisfying either criterion, has failed to set forth a plausible basis in either the complaint or the proposed amended complaint for enforcing the West German Bonds." *Id.* The court also affirmed the district court's denial of leave to amend with respect to the West German bonds because the proposed amended complaint also failed to set forth a plausible basis for enforcing the West German bonds. *Id.*

- ***DiPetto v. U.S. Postal Serv.***, No. 09-3203-cv, 2010 WL 2724463 (2d Cir. Jul. 12, 2010) (unpublished summary order). The *pro se* plaintiff appealed the district court's decision to dismiss his employment discrimination claims *sua sponte*. *Id.* at *1. The Second Circuit noted that "[a]lthough a district court may dismiss a complaint *sua sponte* for failure to

comply with Rule 8, '[d]ismissal . . . is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.'" *Id.* (second alteration and omission in original) (quoting *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir. 1995)). The court stated that it had "recently addressed the application of . . . *Iqbal* . . . to *pro se* pleadings and noted that, even after . . . *Twombly* . . . , [it] remain[ed] obligated to construe *pro se* complaints liberally." *Id.* (citing *Harris v. Mills*, 572 F.3d 66, 71–72 (2d Cir. 2009)). The court stated that "while *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, we should look for such allegations by reading *pro se* complaints with 'special solicitude' and interpreting them to raise the 'strongest [claims] that they *suggest*.'" *Id.* (alteration in original) (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474–75 (2d Cir. 2006) (emphasis in original)). The court further noted that "[w]ith respect to discrimination claims, [it had] explained in *Boykin* [*v. KeyCorp*, 521 F.3d 202, 212 (2d Cir. 2008)] that plaintiffs are not required 'to plead facts sufficient to establish a prima facie disparate treatment claim' under Title VII, because 'the *McDonnell Douglas* burden-shifting framework 'is an evidentiary standard, not a pleading requirement,' and that to require more than Rule 8(a)'s 'simplified notice pleading standard' would unjustifiedly impose a heightened pleading requirement on the plaintiff.'" *Id.* (quoting *Boykin*, 521 F.3d at 212). The court cited a pre-*Twombly* case law to emphasize that it had "held there is no heightened pleading requirement for civil rights complaints alleging racial animus, and ha[d] found such claims sufficiently pled when the complaint stated simply that the plaintiffs '[were] African-Americans, describe[d] defendants' actions in detail, and allege[d] that defendants selected [plaintiffs] for maltreatment 'solely because of their color.'"" *DiPetto*, 2010 WL 2724463, at *1 (second, third, fourth, and fifth alterations in original) (quoting *Phillip v. Univ. of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003)). The court found the amended complaint's allegations sufficient under these standards:

> [R]eading Appellant's amended complaint to raise the strongest claims that it suggests, we find that Appellant stated he was Caucasian, described specific discriminatory actions that had been taken against him by his supervisor, and alleged that he was treated differently, *inter alia*, on the basis of his race. While Appellant did not explicitly state that he was filing a Title VII claim, federal employees are restricted to challenges under Title VII when complaining about employment discrimination. Accordingly, we conclude that Appellant's amended complaint, unlike his original complaint, which did not provide relevant details about his race or the race of relevant persons involved with the employment actions, gave fair notice to Appellee that he was raising a claim, pursuant to Title VII, on the basis that, because he was Caucasian, he received less overtime and work breaks than other employees, and that sick and annual leave policies were applied differently to him. *See Erickson*, 551 U.S. at 93 (holding that a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests"

(ellipsis in original)).

Id. at *2 (footnote omitted). The court rejected the argument that dismissal was appropriate because the plaintiff failed to attach a right-to-sue letter from the EEOC, explaining that the plaintiff "was not required to demonstrate at the pleading stage that his claims were administratively exhausted," and that, as a federal employee, he was not required to obtain a right-to-sue letter. *Id.* (citations omitted). The court stated that "the district court erred when it concluded that Appellant failed to give fair notice of his claims as required under Rule 8(a)(2), because his 'allegations, taken as true, indicate the possibility of discrimination and thus present a plausible claim of disparate treatment.'" *Id.* (quoting *Boykin*, 521 F.3d at 215–16; and citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

- ***Ruston v. Town Bd. for Skaneateles***, 610 F.3d 55, No. 09-4480-cv, 2010 WL 2680644 (2d Cir. Jul. 8, 2010). The court applied *Iqbal* to a "class of one" equal protection claim and determined that *Iqbal* effectively overruled earlier Second Circuit precedent regarding pleading a "class of one" claim. The plaintiffs alleged that they owned a 27-acre lakefront lot in the Town of Skaneateles (the "Town"), but outside the Village of Skaneateles (the "Village"). *Id.* at *1. The plaintiffs asserted that the Town and the Village unconstitutionally frustrated their plans to develop their land. *Id.* Specifically, in 1990, the plaintiffs presented the Town with a plan to subdivide their lot and build a new housing development, and the Town required the plaintiffs to get permission from the Village to connect the new homes to the Village sewer system. *Id.* The Village denied this request. *Id.* Then, in 2000, the plaintiffs sought permission from the Town to subdivide their property to build a development with 14 residential units, but the complaint alleged that "the Town delayed and raised a series of obstacles to their application." *Id.* The plaintiffs twice sought to connect the new homes to the Village sewer system, but both requests were denied. *Ruston*, 2010 WL 2680644, at *1. The plaintiffs filed a renewed application with the Town, but the Town delayed consideration for over a year, by which time a new zoning law had become effective. *Id.* The plaintiffs alleged that the law was designed to block their proposed development and that the Town cited the new law in denying their development application. *Id.* The plaintiffs filed suit under §§ 1983 and 1985 against the Village, the Town Board, the Town Planning Board, and members of the Town Board and the Town Planning Board. *Id.* The complaint asserted a conspiracy to violate the plaintiffs' civil rights, violation of due process, and violation of equal protection rights, as well as claims against the Town defendants alleging that the new zoning law was unconstitutionally vague and violated their substantive due process rights and their equal protection rights. *Id.* The complaint also asserted a state law claim to enforce vested property rights. Upon motion by the Village and the Town defendants, the district court dismissed the § 1985 conspiracy claims against all defendants with prejudice; the substantive due process claim against the Village with prejudice; and the equal protection claim against the Village without prejudice. *Id.* The plaintiffs "filed an amended complaint, renewing all claims against the Town defendants (except the § 1985 conspiracy claims), and re-casting the equal protection claim against the Village." *Ruston*, 2010 WL 2680644, at *2. The district court dismissed with prejudice all federal claims against the Town defendants and the Village, and also dismissed the state law claim without

prejudice after declining to exercise supplemental jurisdiction. *Id.*

On appeal, the plaintiffs primarily asserted error in the dismissal of their equal protection claim. *Id.* The Second Circuit summarily rejected their claims of error with respect to the substantive due process claim and the claim challenging the facial constitutionality of the new zoning law. *Id.* at *2 n.2. The court explained that "[a]s to their substantive due process claim, they had no federally protected property right to approval of the sewer hookups or the development itself (as approval of either required a favorable exercise of discretion), and they did not allege governmental behavior that 'may fairly be said to shock the contemporary conscience . . . .'" *Id.* (internal citations omitted). "As to the facial constitutionality of the new zoning law, [the court held that] the Rustons failed to allege that ''no set of circumstances exist[ed] under which the [law] would be valid.''" *Id.* (third alteration in original) (citation omitted).

The Second Circuit began by noting that "[t]he Supreme Court ha[d] recently clarified the pleading standard required to withstand a motion to dismiss," and by emphasizing that determining whether a complaint states a plausible claim for relief is a context-specific task. *Ruston*, 2010 WL 2680644, at *2 (citing *Iqbal*, 129 S. Ct. at 1950). The court noted that "[d]istrict courts within [the Second] Circuit differ[ed] as to the impact of this pleading standard on a 'class of one' equal protection claim," explaining that "[t]his uncertainty [wa]s attributable to the tension between [i] [the Second Circuit's] decision in *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003), which held under a now-obsolete pleading standard that a 'class of one' claim is adequately pled ('albeit barely' so) even without specification of others similarly situated, and [ii] the Supreme Court's recent clarifications, which require that a complaint allege facts sufficient to establish 'a plausible claim for relief.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950; and citing *Twombly*, 550 U.S. at 566). The court held that "the pleading standard set out in *Iqbal* supersedes the 'general allegation' deemed sufficient in *DeMuria* . . . ." *Id.* at *3.

The court concluded that the facts alleged in the complaint were insufficient to meet the *Iqbal* standard:

> The Rustons' complaint fails to allege facts that "plausibly suggest an entitlement to relief." As to the Town defendants, the Rustons' argument appears to be that the Town refused to consider their application while considering applications submitted by those similarly situated. However, the Rustons do not allege specific examples of the Town's proceedings, let alone applications that were made by persons similarly situated. The equal protection claim as to the Town defendants therefore fails for lack of factual allegations to support the legal conclusion.
>
> As to the Village, the Rustons argue that other, similarly situated properties were allowed to connect to the Village's sewer

system. The Rustons do identify several properties that allegedly were allowed to connect to the Village's sewer system, all of them individual homes or businesses that (like the Rustons' land) were outside the Village but within the Town. We credit, as we must, the factual allegations that these other properties received sewer access while the Rustons' property did not. Nevertheless the complaint fails to state a claim that would support relief.

"[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir.2006). "Accordingly, to succeed on a class-of-one claim, a plaintiff must establish that (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake." *Id.* (internal quotation marks omitted).

Under this standard, none of the properties cited by the Rustons suffice: a house built in 1987; a country club that was renovated in "the early 1990's"; two neighboring properties—"connected to the Village sewer system for decades"—that are not further described; a house built "in or around 2004"; a "luxury spa" built "in the late 1990's"; and a "large commercial building." None of these properties is similar to the Rustons' proposed 14-home development, let alone so similar that no rational person could see them as different: some are commercial properties versus the residential properties at issue, *see Campbell v. Rainbow City*, 434 F.3d 1306, 1314–15 (11th Cir. 2006) (properties that differed in land use were not prima facie similarly situated); *see also Clubside, Inc.*, 468 F.3d at 159, and the residential connections were single homes, not a new development as proposed by the Rustons, *see id.* at 159–60 (projects involving "different types of housing and density levels" were not similarly situated as a matter of law).

As the Rustons fail to allege that properties sufficiently similar to theirs were treated more favorably by either the Village or the Town, they have failed to state a "class of one" equal protection claim.

Id. at *3–4 (alterations in original).

- ***Vaughn v. Air Line Pilots Ass'n, Int'l***, 604 F.3d 703, No. 08-4173-cv, 2010 WL 1930278 (2d Cir. May 14, 2010). More than 100 U.S. Airways pilots, over or approaching the age of sixty, sued the Air Line Pilots Association, International ("ALPA") and Duane Woerth, former president of ALPA, alleging violations of the duty of fair representation, among other claims. The district court dismissed the fourth amended complaint, and the Second Circuit affirmed.

  ALPA was the labor organization that represented U.S. Airways pilots. *Id.* at *1. Under the collective bargaining agreement in place in 2001, U.S. Airways maintained a defined benefit plan ("DB Plan") for the pilots, guaranteeing the pilots a certain level of pension benefits at retirement. *Id.* Under the Employee Retirement Income Security Act (ERISA), the plan was required to have sufficient funding to pay 80% of the promised benefits at all times, and if the funding dropped below that level, U.S. Airways was required to make contributions to ensure sufficient funding. *Id.* Although the DB Plan was fully funded or over-funded between 1999 and 2001, U.S. Airways reported in 2002 that the plan was only funded at 64%. *Id.* In the spring and summer of 2002, U.S. Airways negotiated with ALPA to obtain substantial concessions from the pilots on wages and benefits, claiming that the concessions were necessary to avoid bankruptcy. *Id.* U.S. Airways also obtained tentative approval of a $1 billion loan package guaranteed by the Air Transportation Stabilization Board ("ATSB"), "conditioned on U.S. Airways demonstrating that it could achieve certain revenue and cost reduction targets over a seven-year period." *Vaughn*, 2010 WL 1930278, at *1. U.S. Airways filed for Chapter 11 bankruptcy in 2002. *Id.* at *2. U.S. Airways obtained another loan, but after determining that it could not meet the revenue targets upon which that loan and the earlier loan were conditioned, asked ALPA for additional concessions from the pilots. *Id.* ALPA did not conduct an independent audit, but agreed to concessions, including modification of the DB Plan. *Id.* "When confronted by its failure to conduct an audit, ALPA erroneously stated to its members that it could not compel the company to disclose the financial condition of the DB Plan," while "[i]n fact, the collective bargaining agreement explicitly gave ALPA the right to conduct such an audit." *Id.* Despite the additional concessions, the DB Plan continued to have a deficit. *Id.* After efforts failed to solve the deficit problem, U.S. Airways and ALPA engaged in confidential negotiations that resulted in U.S. Airways agreeing to negotiate and create a follow-up pension plan if the DB Plan had to be terminated. *Vaughn*, 2010 WL 1930278, at *2. "The terms of this agreement were to remain confidential if and until the DB Plan was terminated, although ALPA members soon learned of the agreement, interpreting it as ALPA's tacit consent to the DB Plan's termination." *Id.* U.S. Airways then petitioned the bankruptcy court to "distress terminate" the DB Plan under ERISA. *Id.* ALPA objected, but "the bankruptcy court ruled that U.S. Airways met the requirements for a distress termination, recognizing that the $1 billion loan guarantee from ATSB was dependent on resolution of the pension funding deficit." *Id.* U.S. Airways and ALPA engaged in negotiations to terminate the DB Plan and create a follow-up plan, and during the negotiations, "several ALPA members received letters from two union officials, assuring the pilots that they would have an opportunity to vote on any proposal to terminate the DB Plan and implement a new plan." *Id.* (footnote omitted). Despite this notice, U.S. Airways and ALPA agreed to replace the DB Plan with a new defined

contribution plan ("DC Plan I"), without any vote by ALPA members. *Id.* The court explained the details of DC Plan I:

> Under the DC Plan I, U.S. Airways was required to make contributions at different rates for each pilot based on a complex formula aimed at helping pilots achieve a target benefit amount upon retirement. The formula provided for greater contributions to pilots approaching the mandatory retirement age of 60 than to younger pilots who had more time to accrue contributions. However, the higher contributions to older pilots were still limited to 100% of the pilot's salary, meaning that regardless of the higher contributions, pilots close to 60 were less likely to meet the targeted retirement amount than younger pilots. Plaintiffs also allege that under the plan, older pilots would also receive a significant amount of their contributions subject to immediate taxation whereas younger pilots would be able to defer their tax obligations. In contrast to the DB Plan, U.S. Airways was not required to guarantee a particular benefit level; rather, U.S. Airways only had to make the promised contributions according to the formula.

Vaughn, 2010 WL 1930278, at *3. Even after these measures, U.S. Airways filed for a second bankruptcy under Chapter 11, and ALPA then "agreed to further concessions, including an amendment to the defined contribution plan ('DC Plan II') that eliminated the formula and targeted benefit concept and instead required U.S. Airways to make contributions to each pilot's individual account at the same rate—10% of the pilot's salary—regardless of age, seniority, or any other factor." *Id.* "At around the same time, some pilots—but not all—received a Summary Annual Report stating that the DB Plan had been fully funded as of December 31, 2002, directly contradicting the statements U.S. Airways and ALPA had made at the time." *Id.*

The plaintiffs' complaint alleged breach of the duty of fair representation under the Railway Labor Act against ALPA and Woerth; violations of the Age Discrimination in Employment Act (ADEA) against ALPA and U.S. Airways; violations of ERISA against U.S. Airways; and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) against ALPA, U.S. Airways, and an entity that had given U.S. Airways a loan. *Id.* The plaintiffs voluntarily withdrew their claims against U.S. Airways, and the district court granted the motion by the remaining defendants to dismiss all claims. *Id.* This appellate opinion discussed only the duty of fair representation claims.[9]

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[9] The dismissal of the RICO claims was affirmed in a separate Second Circuit opinion. *See Vaughn v. Air Line Pilots Ass'n*, No. 08-4173-cv, 2010 WL 1932388 (2d Cir. May 14, 2010). The plaintiffs appealed "only the dismissal of those portions of the complaint alleging that ALPA committed racketeering acts premised on fraud-wire fraud, mail fraud and fraud in connection with a bankruptcy proceeding." *Id.* at *1. The court noted that predicate acts premised on fraud require pleading scienter, but that Rule 9(b) did not require pleading scienter with specificity. *See id.* The court cited

On appeal, the plaintiffs argued that the district court erred in dismissing their claims that ALPA breached its duty of fair representation. *Id.* at *4. The court noted that its "review of such allegations is 'highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities.'" *Vaughn*, 2010 WL 1930278, at *4 (alteration in original) (quoting *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991)). Proving a union has breached its duty of fair representation requires establishing that the union's actions or inactions "'are either 'arbitrary, discriminatory, or in bad faith'" and that there is "'a causal connection between the union's wrongful conduct and [the plaintiffs'] injuries.'" *Id.* (citations omitted). The court noted that "[a] union's actions are 'arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational,'" and that "'even negligence on the union's part does not give rise to a breach.'" *Id.* (citations omitted). The court held:

> Applying those standards here, we conclude that the district court did not err in dismissing counts I through III of the complaint. Count I alleges that ALPA's failure to conduct an audit, misrepresentation of its ability to do so, and later after-the-fact audit were a breach of the duty of fair representation. However, the allegations are only capable of supporting a finding that ALPA acted negligently. Since, even as alleged in the complaint, these events occurred against a particular "factual landscape"—after September 11, 2001, when U.S. Airways "suffered further severe economic

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a pre-*Twombly* case to noted that "'the relaxation of Rule 9(b)'s specificity requirement for scienter must not be mistaken for [a] license to base claims fo fraud on speculation and conclusory allegations,' and a plaintiff must still 'allege facts that give rise to a strong inference of fraudulent intent.'" *Id.* (alteration in original) (quoting *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (quotation marks and citations omitted)) (internal citation omitted). The Second Circuit rejected the plaintiffs argument that they had established a "strong inference of fraudulent intent":

> We cannot conclude that plaintiffs have provided a sufficient basis upon which to infer that ALPA had a motive for committing fraud and a clear opportunity to do so. In a nutshell, plaintiffs allege . . . that ALPA conspired with U.S. Airways to "exact hundreds of millions of dollars a year in pilot concessions—for each of several years," thus "decimat[ing]" pension benefits so that ALPA could receive management fees under the DC Plan and U.S. Airways could terminate the DB Plan. We cannot draw the requisite "strong inference" of fraudulent intent based on these allegations because: (1) the complaint does not allege that the fees were of such proportion to the amounts frittered away so as to make it plausible that ALPA would engage in the alleged scheme; and (2) ALPA is legally permitted to receive fees for a service. *See Rombach v. Chang*, 355 F.3d 164, 177 (2d Cir. 2004). In addition, the alleged circumstances of conscious behavior are insufficient to raise the strong inference of fraudulent intent for the same reasons those allegations fail to support plaintiffs' duty of fair representation claims.

Id. at *2 (alteration in original).

> losses on top of prior financial difficulties,"—we cannot conclude that ALPA's failure to conduct the audit was "so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal citations and quotation marks omitted).

Id. at *5 (footnote omitted). The court rejected the argument that "ALPA acted in bad faith by agreeing to the termination of the DB Plan so that it could reap lucrative fees for managing the follow-up plan," stating:

> As pled, we do not believe that the allegations "nudge [plaintiffs' claim] across the line from conceivable to plausible." *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 570). The complaint does not allege that the fees were of such proportion to the concessions so as to make it plausible that ALPA was improperly motivated by the fees when it agreed to the termination of the DB Plan. Plaintiffs have offered no plausible explanation for why ALPA would believe that such an arrangement would be in its self-interest. As for ALPA's alleged intentional misrepresentation of its right to conduct an audit, plaintiffs themselves allege that ALPA made the misrepresentation in an attempt to "legitimize ALPA's abdication of its responsibility," an allegation that supports a claim of negligence, not bad faith.

Id. (alteration in original) (footnote omitted). The court pointed out that "the mere collection of management fees in exchange for services legally rendered does not, without more, evidence an improper motive," noting that the cases the plaintiffs cited all involved illegal kickback schemes, but the plaintiffs had not alleged an illegal kickback scheme here. *Id.* The court also concluded:

> Moreover, plaintiffs have failed to allege a causal connection between ALPA's failure to conduct the audit and the termination of the DB Plan. When ALPA finally did hire an actuary to conduct an audit, the actuary confirmed U.S. Airways's numbers. Thus, it is unclear how the audit would have increased ALPA's bargaining power or changed the result of the negotiations. Plaintiffs argue that the later audit was insufficient because it "simply asked an actuary to use U.S. Airways' same models (indeed, their same computer and numbers) to make sure those numbers added up correctly." Yet, Plaintiffs themselves state in their complaint that the DB Plan was only funded at 64% in 2002. Thus, whether or not the later audit was sufficient, plaintiffs appear to agree with U.S. Airways that the DB Plan was substantially underfunded.

Vaughn, 2010 WL 1930278, at *5 (footnote and internal citation omitted). The court dismissed the plaintiffs' argument that the Summary Annual Report stated that the DB Plan

was fully funded in December 2002 and thus created a fact issue as to whether the DB Plan was actually underfunded in 2002, noting that "plaintiffs themselves do not allege that the plan was fully funded in 2002 and, indeed, allege the opposite—that it was underfunded at 64%." *Id.* at *5 n.7. The court stated that "Plaintiffs may not argue this both ways—they either believe that the DB Plan was underfunded or they believe it is an open question." *Id.*

In Count II, the plaintiffs made the same allegations as in Count I, "but further allege[d] that ALPA officials promised that termination of the DB Plan would be voted on by the membership, but notwithstanding this promise, no vote was held, and the plan was terminated." *Id.* at *6. With respect to causation, "this count alleged that 'ALPA's rapid turnaround on the ratification issue prevented pilots from having any say as to the terms of the proposed DC Plan and thus disadvantaged certain ALPA members,' and further that '[t]he promise of a ratification vote lulled the pilots into a false sense of security, with the result that they could do nothing but watch as their rights and their futures were traded away.'" *Id.* (alteration in original). The Second Circuit concluded that the complaint failed to plead causation adequately:

> Assuming that the allegations in count II, if true, would constitute bad faith, plaintiffs have failed to plead a causal connection between this claim and their injuries. Plaintiffs have not alleged that, had a vote occurred, the pilots would not have voted for the DB Plan. Nor do they allege that rejecting the agreement would have resulted in a plan more generous to older pilots. It is true that if plaintiffs had been informed that no vote would take place, they might have lobbied hard to prevent termination of the DC Plan I. But even then, there is no allegation that the DB Plan could have been saved, given the bankruptcy court's ruling that U.S. Airways qualified for distress termination. In short, plaintiffs have failed to plausibly allege that ALPA's alleged bad faith affected the outcome of the negotiations in any way.

Id. (footnote omitted).

In Count III, "plaintiffs allege[d] that ALPA discriminated against them by agreeing to the terms of the DC Plans, which 'impacted older pilots more harshly than younger pilots.'" *Vaughn*, 2010 WL 1930278, at *6 (citation omitted). Noting that "a union's acts are only discriminatory if they are 'intentional, severe, and unrelated to legitimate union objectives,'" the court held:

> Here, the DC Plan I actually benefitted older pilots by requiring U.S. Airways to make larger contributions to older pilots' plans, which directly contradicts plaintiffs' theory that ALPA intended to discriminate against them. Similarly, the DC Plan II guaranteed older and younger pilots pension benefits based on the same formula—10%

> of the pilot's salary. The fact that older pilots may have received fewer benefits under the plan is, as the district court explained in the context of plaintiffs' ADEA claims, "the result of basic economics, specifically the time value of money, and is not related to the older pilots' age."

Id. The court also noted that "there is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives." *Id.* The court concluded that "[g]iven that U.S. Airways could not successfully reorganize and emerge from bankruptcy protection without decreasing its pension obligations, it was inevitable that the resulting negotiations would affect some pilots more harshly than others," and that "[w]ithout additional evidence that the union intended to discriminate against plaintiffs, the mere fact that older pilots were disproportionately affected [wa]s not sufficient to show that ALPA acted in a discriminatory manner." *Id.*

- ***Kregler v. City of New York***, No. 09-3840-cv, 2010 WL 1740806 (2d Cir. May 3, 2010) (unpublished summary order).[10] The Second Circuit overturned the district court's dismissal of Kregler's complaint under § 1983. The court discussed the pleading standards after *Iqbal* and concluded:

> Kregler's amended complaint pleads facts sufficient to clear this threshold. He alleges that in response to his announced stance in support of a candidate in a heated local political campaign, employees of the New York City Fire Department induced contacts at the Department of Investigation to prevent his appointment as a City Marshal. This allegation is neither a legal conclusion nor asserts a claim that is implausible on its face. Kregler's claim that political animus caused certain defendants to lie about or mischaracterize Kregler's disciplinary record, and that that same political animus caused other defendants to accept their misrepresentations is not implausible on its face and therefore not susceptible to a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Id. at *1 (footnote omitted). The court noted that the district court had utilized a Rule 12(i) hearing[11] to examine the issue, but "express[ed] no opinion . . . as to the use of that procedure

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[10] A summary of the district court's opinion in this case was included in an earlier version of this memo, but has now been removed from the appendix because the decision was vacated on appeal.

[11] Rule 12(i)—formerly Rule 12(d) before the 2007 restyling—provides: "If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." FED. R. CIV. P. 12(i). According to one treatise, "Rule 12(i) allows a party to assert Rule 12(b) defenses and a Rule 12(c) motion for judgment on the pleadings before trial on the merits, contemplating the possible hearing and determination of jurisdictional or other issues in advance of trial. The

or the impact of the facts adduced therein." *Id.* at *1 n.1. The court held that "Kregler's motion for leave to amend, which was denied below as futile, should be granted upon remand." *Id.* at *2.

- ***Arista Records LLC v. Doe 3***, 604 F.3d 110, No. 09-0905-cv, 2010 WL 1729107 (2d Cir. Apr. 29, 2010). In this copyright infringement case, the district judge approved the magistrate judge's ruling denying the defendants' motion to quash a subpoena served on the defendants' Internet service providers seeking information disclosing the defendants' identities. *Id.* at *1. In considering the motion to quash, the magistrate judge looked at the allegations in the complaint and concluded that the defendants' qualified First Amendment right of anonymity was outweighed by the plaintiffs' allegations that the defendants were illegally downloading and/or distributing copyrighted music over the Internet and the plaintiffs' need for the information in order to enforce their rights. *Id.* On appeal, defendant Doe 3 argued that the allegations in the complaint were not sufficient to overcome his First Amendment right of anonymity and that the motion to quash was improperly referred to the magistrate judge. *Id.* The Second Circuit affirmed.

  The plaintiff recording companies' complaint alleged that the defendants had infringed the plaintiffs' copyrights by using an online file-sharing network to download and/or distribute the plaintiffs' copyrighted music. *Id.* The complaint attached an Exhibit A, which listed for

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district court is free to decide the best way to deal with the question, because neither the federal rules nor the statutes provide a prescribed course. The court's decision whether to hold a preliminary hearing or to defer the matter to trial on the merits may be set aside on appeal only for abuse of discretion." 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.50 at 12-142 (3d ed. 2009) (footnotes omitted). The treatise explains: "Because most of the defenses in Rule 12(b) that can be addressed by a preliminary hearing affect the court's jurisdiction, it is advisable to dispose of them before trial if at all possible, regardless of the court's power to defer them. On the other hand, if ruling on the defense entails substantial consideration of the merits, as is often the case, the question can most effectively be addressed during trial. Deferring matters until trial also allows a court to give consideration to matters with such grave consequences as motions for dismissal under Rule 12(b)(1)–(7) or a judgment on the pleadings under Rule 12(c)." *Id.* at 12-143. The treatise also notes that "[b]oth Rule 12's preliminary hearing and its discretionary deferral to trial are valuable but often overlooked tools in the court's arsenal." *Id.* at 12-143–44.

Another treatise has explained that in determining whether to exercise discretion to grant a preliminary hearing, as opposed to deferring the issues to trial, "the district court must balance the need to test the sufficiency of the defense or objection and the right of a party to have his defense or objection decided promptly and thereby possibly avoid costly and protracted litigation against such factors as the expense and delay the hearing may cause, the difficulty or likelihood of arriving at a meaningful result of the question presented by the motion at the hearing, and the possibility that the issue to be decided on the hearing is so interwoven with the merits of the case, which . . . can occur in various contexts, that a postponement until trial is desirable." 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1373 (3d ed. 2004) (footnotes omitted). This treatise also notes: "A district court cannot dismiss a complaint on the basis of a Rule 12(b) defense or objection without giving the plaintiff an opportunity to be heard; a dismissal without that opportunity has been properly characterized as a denial of due process. At a preliminary hearing, the court may consider affidavits and other documentary matter and if the decision turns on issues of credibility or disputed questions of fact, the district judge may hear oral testimony." *Id.* (footnotes omitted). The treatise further notes that "[i]f the issue is of so complex or uncertain a nature that witnesses are necessary, it would be wise for the court to defer the determination of the matter until trial." *Id.* (footnote omitted).

each defendant: the IP address at a stated date and time, the name of the file-sharing network used, the titles of 6–10 songs downloaded from the IP address, and which plaintiff was the copyright owner of each song. *Id.* The complaint requested damages and injunctive relief prohibiting further infringement of the copyrights. *Arista Records*, 2010 WL 1729107, at *1. The plaintiffs did not know the defendants' identities, and sought authorization to serve a subpoena on the defendants' common ISP, the State University of New York at Albany ("SUNYA"), to obtain each defendant's name, address, phone number, email address, and Media Access Control address identifying the device engaged in the online communication. *Id.* The plaintiffs ultimately voluntarily dismissed most of the defendants, and the remaining defendants filed a motion to quash, arguing that the First Amendment provided them with a qualified right to use the Internet anonymously and that under Rule 45(c)(3)(A)(iii), a subpoena must be quashed or modified if it "'requires disclosure of privileged or other protected matter, if no exception or waiver applies.'" *Id.* at *2. The defendants conceded that the First Amendment right to anonymity was not a license to infringe copyrights, but argued that their privilege could "'only be overcome by a substantial and particularized showing,' sufficient to 'plead a prima facie case of copyright infringement,'" a showing that the defendants argued was not made in the complaint. *Id.* The defendants argued that the heightened pleading standard imposed by *Twombly* required the plaintiffs to "'state, on personal knowledge, a specific claim for copyright infringement against each and every Doe defendant.'" *Id.* Specifically, the defendants asserted that the plaintiffs were required

> to present specific evidence, including a declaration from whoever examined the files available for download from each defendant's computer, listened to the files, verified that they were copyrighted songs, determined that the copyrights were registered (and to which plaintiffs), to list the songs that a particular defendant made available for download, and to annex corresponding copyright registration certificates for the songs.

Id. (quotation marks omitted). The defendants further argued that the complaint failed to allege actual distribution of song files to the public and that the plaintiffs were required to both show that their claims could withstand a motion to dismiss for failure to state a claim and produce sufficient evidence supporting each element of the claims. *Arista Records*, 2010 WL 1729107, at *2.

The magistrate judge evaluated five factors for balancing the First Amendment right to anonymity against a copyright owner's right to disclosure of the identity of a possible trespasser, including: the defendants' expectation of privacy, the prima facie strength of plaintiffs' claims of injury, the specificity of the discovery request, the plaintiffs' need for the information, and the availability of the information through other means. *Id.* at *3. The magistrate judge concluded that all five factors weighed against quashing the subpoena, and noted that the "plaintiffs had sufficiently pleaded copyright infringement claims, alleging ownership of the copyrights, copying, and distribution of the protected works by the Doe defendants without the consent of the owners." *Id.* The magistrate judge also noted that the

allegations of distribution were supported by Exhibit A, which specified the plaintiffs' investigator's sampling of some of the downloads. *Id.*

On review of the magistrate judge's decision, the district court rejected the contention that Doe 3's motion to quash was "in essence a motion to dismiss under Rule 12(b)(6) and hence was a dispositive motion, noting that the Rule, by its terms confers the right to move for dismissal for failure to state a claim on ''a party,'"" and that because the defendants had not yet been served, they were not yet "parties." *Id.* at *4. The court rejected the proposition that the magistrate judge lacked authority to rule on the motion. *Id.*

Doe 3's primary appellate argument was that the complaint did not state a claim sufficient to overcome his First Amendment privilege of anonymity. *Arista Records*, 2010 WL 1729107, at *4. The Second Circuit agreed that the motion to quash was not a dispositive motion, explaining that under the five-factor test the magistrate judge applied, the judge could have granted the motion "despite the sufficiency of the Complaint if it had found, for example, that the subpoena was unduly broad or that plaintiffs had easy access to the Doe defendants' identities through other means," and that "[q]uashing the subpoena on such a basis plainly would not have ended the action." *Id.* at *5. The court also noted that even if the motion to quash could be considered a dispositive motion, that would only have resulted in *de novo* review by the district court, and the district court had indicated that even under *de novo* review, it would have upheld denial of the motion. *Id.*

With respect to the challenge to the substantive ruling on the motion to quash, "Doe 3 contend[ed] that the court should have found that plaintiffs did not make a 'particularized showing' sufficient to overcome his qualified privilege." *Id.* at *7 (internal citation omitted). The Second Circuit held that "[n]either Doe 3's reliance on *Twombly*/*Iqbal* nor his contention that plaintiffs' allegations [we]re insufficiently specific ha[d] merit." *Id.* at *8. The court explained:

> [T]he notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, and declarations from the persons who collected the evidence is belied by the *Twombly* opinion itself. The Court noted that Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly*, 550 U.S. at 555 (other internal quotation marks omitted); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 512 (2002) (holding that, at the pleading stage, an employment discrimination plaintiff who alleges facts that provide fair notice of his claim need not also allege "specific facts establishing a prima facie case," for such a "heightened pleading standard . . . conflicts with Federal Rule of Civil Procedure 8(a)(2).").

Id. (omissions in original). The court also noted that "[t]he *Twombly* plausibility standard, which applies to all civil actions, *see Iqbal*, 129 S. Ct. at 1953, does not prevent a plaintiff from 'pleading facts alleged 'upon information and belief,'' where the facts are peculiarly within the possession and control of the defendant, *see, e.g.*, *Boykin v. KeyCorp.*, 521 F.3d 202, 215 (2d Cir. 2008), or where the belief is based on factual information that makes the inference of culpability plausible, *see Iqbal*, 129 S. Ct. at 1949 . . . ." *Arista Records*, 2010 WL 1729107, at *8. The court pointed out that the *Twombly* court specifically stated that "'*we do not apply any 'heightened' pleading standard*,'" and "emphasized that its holding was consistent with its ruling in *Swierkiewicz* that 'a heightened pleading requirement,' requiring the pleading of ''specific facts' beyond those necessary to state [a] claim and the grounds showing entitlement to relief,' was 'impermissible.'" *Id.* at *9 (quoting *Twombly*, 550 U.S. at 569 n.14, 570 (alterations in original)). The court explained that *Iqbal* also did not raise the pleading requirements: "Nor did *Iqbal* heighten the pleading requirements. Rather, it reiterated much of the discussion in *Twombly* and rejected as insufficient a pleading that the *Iqbal* Court regarded as entirely conclusory." *Id.* "[A]lthough *Twombly* and *Iqbal* require ''factual amplification [where] needed to render a claim plausible,'" *id.* (alteration in original) (quoting *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009)), the court "reject[ed] Doe 3's contention that *Twombly* and *Iqbal* require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible," *id.* (first alteration in original). The court found "[e]ven less meritorious . . . Doe 3's contention that plaintiffs' showing in the present case was vague and conclusory." *Id.* The court noted that the defendant's brief omitted a crucial portion of the complaint—the citation to Exhibit A. *Arista Records*, 2010 WL 1729107, at *9. The court explained:

> To the extent that ¶ 22's allegations are made on information and belief, virtually all of them are supported by factual assertions in Exhibit A. For example, the allegation that each Doe defendant 'has used' file-sharing networks to download and distribute plaintiffs' music is supported by Exhibit A's lists of specific songs found in the respective Doe defendants' file-sharing folders, on the date shown, at the time indicated, on the specified online, peer-to-peer, file-sharing network. The allegation that there was "continue[d]" use is supported by, *inter alia*, the utter improbability that the songs observed by plaintiffs' investigators in a given Doe defendant's file-sharing folder at a particular time were there only at the precise instant at which they were observed, and not before and not afterwards; the inference of continued use is also supported by the facts that Exhibit A lists each of the "Doe" defendants as engaging in such file-sharing on a different date and that defendants' attorney has represented that some of the "Doe" defendants are in fact the same person. The principal assertion made only on information-and-belief is that defendants' copying and/or distribution of plaintiffs' music were without permission. *But no more definitive assertion as to lack of permission seems possible when the users remain anonymous*.

Id. at *10 (emphasis added) (alteration in original) (internal citations omitted). The court noted that "[p]age 3 of . . . Exhibit [A] makes assertions as to Doe 3 and could hardly be more specific." *Id.* The court explained that "[i]t specifie[d] that at '**IP address** [ ] 169.226.226.24' at 2:15:57 a.m. on April 12, 2007, the '**P2P Network** [ ] AresWarez' was in use (emphases in original); that a total of 236 audio files were present in a file-sharing folder at that IP address at that time; and that among those files were the following songs, whose respective copyrights were owned by the plaintiffs indicated: . . . ." *Id.* (third and fourth alterations in original). The court concluded that "[g]iven the factual detail in the Complaint and its Exhibit, plaintiffs' pleading plainly state[d] copyright infringement claims that [we]re plausible." *Id.* (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 920 (2005); *In re: Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003)). The court also noted that the declaration submitted in support of the subpoena "pointed out that Exhibit A list[ed] only samples of the numerous 'audio files that were being shared by [the Doe d]efendants at the time that the RIAA's agent . . . observed the infringing activity,' and that complete lists would be provided to the court upon request." *Id.* at *11 (alteration and omission in original) (internal citations omitted). The court stated that "[n]o greater specificity in the Complaint or in plaintiffs' submissions in support of their request for the subpoena to SUNYA was required." *Arista Records*, 2010 WL 1729107, at *11. The court rejected Doe 3's argument that the complaint did not adequately allege copyright infringement because "merely 'making . . . available' a work on a peer-to-peer network does not violate the copyright holder's distribution right absent proof of actual distribution," explaining that it did not "need [to] address the question of whether copyright infringement occurs when a work is simply made available . . . because the Complaint allege[d] not that defendants merely made songs available on the network but that defendants both actually downloaded plaintiffs' copyrighted works and distributed them." *Id.* (first omission in original). The court found that "the facts asserted in the Complaint [we]re adequate to support these allegations." *Id.* The court noted that it "need not decide whether the requirement [it] endorse[d] . . . , that a plaintiff seeking to subpoena an anonymous Internet defendant's identifying information must make a 'concrete showing of a prima facie claim of actionable harm,' would be satisfied by a well-pleaded complaint unaccompanied by any evidentiary showing" because "plaintiffs' Complaint, attached exhibit, and supporting declaration [we]re clearly sufficient to meet that standard." *Id.* The court affirmed the denial of the motion to quash.

- ***Shomo v. New York***, 374 F. App'x 180, No. 06-5434-pr, 2010 WL 1628771 (2d Cir. Apr. 22, 2010) (unpublished summary order). The district court *sua sponte* dismissed the *pro se* plaintiff's § 1983 complaint, with leave to amend, relying on Rules 8 and 10 and 28 U.S.C. § 1915(e).[12] *Id.* at *1. The court noted that it had not previously set forth a standard of review for *sua sponte* dismissal of a complaint under Rule 8 or Rule 10, but "conclude[d]

[12] 28 U.S.C. § 1915 addresses proceedings in forma pauperis, and subsection (e)(2) provides that a court shall dismiss the case under certain circumstances, including that the action is frivolous or malicious or fails to state a claim on which relief can be granted. *See* 28 U.S.C. § 1915(e)(2).

that, under either an abuse of discretion or *de novo* standard, the district court erred in dismissing Appellant's complaint, even with leave to amend, because many of Appellant's claims, if true, would be actionable under the Eighth Amendment, the American with Disabilities Act [(ADA)], . . . and section 504 of the Rehabilitation Act of 1973 . . . ." *Id.* The court found that "[w]hile the district court afforded Appellant the opportunity to amend his complaint, Appellant's complaint was not so deficient as to require its dismissal at such an early stage of litigation." *Id.*

The court discussed the standard for dismissal:

> The jurisprudence involving Rule 8, traced from our decision in *Salahuddin*[*v. Cuomo*, 861 F.2d 40 (2d Cir. 1988)] through the Supreme Court's recent *Iqbal* decision, is difficult to apply to the dismissal of a complaint containing *too much detail*, especially where the complaint is filed by a *pro se* litigant. On the one hand, pleadings "need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotation marks omitted), and a court has the power to dismiss a complaint that is "prolix" or has a "surfeit of detail," *Salahuddin*, 861 F.2d at 42–43. On the other hand, "[d]ismissal . . . is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Id.* at 42. A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009) (holding that Rule 8 calls for "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556).

Id. (emphasis added). The court emphasized that *pro se* complaints must be reviewed with leniency, stating that "even after *Twombly*, where a litigant is proceeding *pro se*, courts remain 'obligated' to construe *pro se* complaints liberally." *Id.* at *2 (citing *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009). The court explained that "while *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, courts should look for such allegations by reading *pro se* complaints with 'special solicitude' and interpreting them to raise the 'strongest [claims] that they *suggest*.'" *Shomo*, 2010 WL 1628771, at *2 (alteration in original) (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474–75 (2d Cir. 2006) (per curiam) (emphasis in original)). The court concluded that the complaint was sufficient:

> Notwithstanding the length and detail of Appellant's complaint, his claims enunciate recognizable unconstitutional behavior. The day-to-day events described by Appellant concern the activities of his daily living: his need to be fed, bathed, and aided with toileting. While citing to numerous federal statutes (a practice not uncommon for *pro se* litigants), Appellant's claims centered around his disability and the alleged deliberate indifference to his serious medical needs. He then amplified these claims, as required under *Twombly* and *Iqbal*, by making specific references to events that he claimed were evidence of such deliberate indifference. Insofar as he cited multiple civil rights statutes, "[t]he failure in a complaint to state a statute, or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters." *Albert v. Carovano*, 851 F.2d 561, 571 n.3 (2d Cir. 1988).
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> In fact, while not a model of clarity, Appellant's complaint is neither "unintelligible" nor "a labrynthian prolixity of unrelated and vituperative charges that defied comprehension." *Prezzi v. Schelter*, 469 F.2d 691, 692 (2d Cir. 1972). Significantly, we have recognized that it "is not unusual [for] a *pro se* litigant" to present "allegations [that are] not neatly parsed and include[ ] a great deal of irrelevant detail." *Phillips v. Girdich*, 408 F.3d 124, 130 (2d Cir. 2005). The details in Appellant's complaint are all "related" to his need to be aided in the activities of his daily living. Finally, Appellant's complaint arguably gave the State "fair notice" of his Eighth Amendment, ADA and Rehabilitation Act claims, allowing it to engage in motion practice or prepare for trial by reviewing Appellant's medical history, medical needs, and the care provided to him.

Id. (alterations in original).

With respect to the dismissal under section 1915(e), the court found the dismissal inappropriate "because the district court did not, in fact, review the merits of his claims to determine whether they were frivolous under the relevant civil rights statute, and, in fact, acknowledged that some of the claims had plausible merit." *Id.*

The court next disapproved of the district court's order that the plaintiff "confine his amended complaint to a certain number of pages and . . . sue no more than twenty defendants." *Id.* at *3. The court explained that "a district court may not impose pleading requirements on a complaint that exceed the floor set by Rule 8 of the Federal Rules of Civil Procedure, '[f]or then district courts could impose disparate levels of pleading requirements on different sorts of plaintiffs.'" *Id.* (quoting *Wynder v. McMahaon*, 360 F.3d 73, 78 (2d Cir. 2004)). The court explained that imposing such requirements would violate "'Rule 8's

purpose—to lower the entry barriers for federal plaintiffs and to establish prospectively a rule common to all litigants . . . .'" *Id.* (quoting *Wynder*, 360 F.3d at 78).

The court noted that although the district court had erred by imposing requirements on the complaint that went beyond the requirements in the civil rules, some aspects of the complaint might not survive dismissal. *Shomo*, 2010 WL 1628771, at *3. The court explained:

> "For one thing, there is a critical distinction between the notice requirements of Rule 8(a) and the requirement, under Rule 12(b)(6), that a plaintiff state a claim upon which relief can be granted." [*Wynder*, 360 F.3d at 78.] Thus, the district court will remain free to consider whether each claim in any amended complaint states a claim upon which relief can be granted or is otherwise frivolous.

Id. The Second Circuit remanded the case to the district court for reinstatement of the plaintiff's Eighth Amendment, ADA, and Rehabilitation Act claims. *Id.*

- ***Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.***, 602 F.3d 57, No. 09-2613-cv, 2010 WL 1337225 (2d Cir. Apr. 7, 2010). The district court dismissed the plaintiffs' copyright infringement complaint, finding that it failed to allege substantial similarity between the plaintiffs' architectural design and the allegedly infringing design, and the Second Circuit affirmed. The complaint alleged that the City of New Rochelle issued a request for development proposals for a mixed-use development in downtown. *Id.* at *1. The plaintiffs and the defendants agreed to jointly submit a proposal, with the plaintiffs designing the architectural plans and the defendants securing financing. *Id.* The City awarded the project to the group, and the plaintiffs then registered their designs with the U.S. Copyright Office. *Id.* Defendant Simone Church Street LLC entered into a memorandum of understanding with New Rochelle to serve as the developer for the project. *Id.* A dispute arose as to the defendants' payment to plaintiffs for the project, and the defendants then terminated their relationship with the plaintiffs and instead hired another architectural firm. *Id.* at *2. The complaint alleged that the defendants used the plaintiffs' copyrighted designs for the project, and identified 35 alleged similarities between the plaintiffs' design and the defendants' re-design. *Peter F. Gaito Architecture*, 2010 WL 1337225, at *2. The plaintiffs alleged violations of the Copyright Act and asserted claims for *quantum meruit* and unjust enrichment under state law. *Id.* The district court granted the defendants' motion to dismiss, finding that, assuming actual copying occurred, "there was no substantial similarity between defendants' re-design and the protectible elements of plaintiffs' design." *Id.* The district court then declined to exercise supplemental jurisdiction over the state law claims and dismissed them without prejudice. *Id.*

  The Second Circuit considered whether it was proper to determine whether there was a substantial similarity between the two designs at the pleadings stage. The court noted that "questions of non-infringement have traditionally been reserved for the trier of fact," but

stated that "[t]he question of substantial similarity is by no means exclusively reserved for resolution by a jury, however, and we have repeatedly recognized that, in certain circumstances, it is entirely appropriate for a district court to resolve that question as a matter of law, 'either because the similarity between the two works concerns only non-copyrightable elements of the plaintiff's work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar.'" *Id.* at *5 (citations omitted). The court explained that "[t]hese same principles hold true when a defendant raises the question of substantial similarity at the pleadings stage on a motion to dismiss." *Id.* The court noted that "[i]n copyright infringement actions, 'the works themselves supersede and control contrary descriptions of them,' including 'any contrary allegations, conclusions or descriptions of the works contained in the pleadings.'" *Peter F. Gaito Architecture*, 2010 WL 1337225, at *5 (internal citation omitted) (quoting 3-12 NIMMER ON COPYRIGHT § 12.10) (additional citations omitted). The court also noted that "[w]hen a court is called upon to consider whether the works are substantively similar, no discovery or fact-finding is typically necessary, because 'what is required is only a visual comparison of the works.'" *Id.* (quoting *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991)). The court concluded that "where, as here, the works in question are attached to a plaintiff's complaint, it is entirely appropriate for the district court to consider the similarity between those works in connection with a motion to dismiss, because the court has before it all that is necessary in order to make such an evaluation." *Id.* at *6. The court explained that "[i]f, in making that evaluation, the district court determines that the two works are 'not substantially similar as a matter of law,' *Kregos v. A.P.*, 3 F.3d 656, 664 (2d Cir. 1993), the district court can properly conclude that the plaintiff's complaint, together with the works incorporated therein, do not 'plausibly give rise to an entitlement to relief.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950; citing *Wiren v. Shubert Theatre Corp.*, 5. F. Supp. 358, 362 (S.D.N.Y. 1933)). The court was "mindful that a motion to dismiss does not involve consideration of whether 'a plaintiff will ultimately prevail' on the merits, but instead solely 'whether the claimant is entitled to offer evidence' in support of his claims," "acknowledge[d] that there can be certain instances of alleged copyright infringement where the question of substantial similarity cannot be addressed without the aid of discovery or expert testimony," and stated that "[n]othing in this opinion should be read to upset these settled principles, or to indicate that the question of non-infringement is always properly considered at the pleadings stage without the aid of discovery." *Id.* at *7. But the court concluded that "where, as here, the district court has before it all that is necessary to make a comparison of the works in question, . . . [there is] no error in the district court's decision to resolve the question of substantial similarity as a matter of law on a Rule 12(b)(6) motion to dismiss." *Id.*

In reviewing whether the two designs were substantially similar, the court noted that it was "principally guided 'by comparing the contested design's 'total concept and overall feel' with that of the allegedly infringed work,' as instructed by [the court's] 'good eyes and common sense.'" *Peter F. Gaito Architecture*, 2010 WL 1337225, at *8 (internal citation omitted) (quoting *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999)). On its *de novo* review of the designs, the court concluded that there was an "utter lack of similarity between the two designs." *Id.* The court stated that "[u]pon examining the 'total concept and feel' of the

designs with 'good eyes and common sense,' . . . [it could] confidently conclude that no 'average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'" *Id.* at *9 (citations omitted). The court held that "it [could not] be said that defendants misappropriated plaintiffs' specific 'personal expression' of the project, but instead merely used the unprotectible concepts and ideas contained in plaintiffs' designs." *Id.* at *11. The court held that "because plaintiffs ha[d] failed to allege that 'a substantial similarity exists between [defendants'] work and the protectible elements of [plaintiffs'],' the district court properly dismissed plaintiffs' federal copyright claim." *Id.* (second and third alterations in original) (internal citation omitted). The court also found no error in the district court declining to exercise supplemental jurisdiction over the state law claims, after the federal claim was dismissed. *Id.* The court concluded that the complaint did not "'state a claim to relief that [wa]s plausible on its face,'" and affirmed the dismissal. *Peter F. Gaito Architecture*, 2010 WL 1337225, at *11 (quoting *Iqbal*, 129 S. Ct. at 1949).

- ***Kuck v. Danaher***, 600 F.3d 159, No. 08-5368-cv, 2010 WL 1039273 (2d Cir. Mar. 23, 2010). The plaintiff alleged that his rights were violated when he attempted to renew his permit to carry a firearm with the Connecticut Department of Public Safety ("DPS"). *Id.* at *1. According to the complaint, after Kuck applied to renew his permit, a DPS employee requested that Kuck provide a U.S. passport, birth certificate, or voter registration card to prove his citizenship. *Id.* Kuck objected, arguing that he had submitted proof of citizenship when he first applied for a permit and that he had not been required to provide proof of citizenship with a previous renewal application. *Id.* Kuck alleged that "the DPS requirement was arbitrary, designed to harass, and, in any event, not authorized by state law." *Id.* Kuck refused to provide the documentation and his permit was denied. *Id.* Kuck, who served as Secretary of the Board of Firearms Permit Examiners, appealed to the Board. *Kuck*, 2010 WL 1039273, at *1. His appeal hearing was not scheduled for over eighteen months, and he was deprived of his permit during that time. *Id.* Just before his hearing, but after his lawsuit was filed, Kuck provided documentation, and his renewal request was granted. *Id.* Kuck "contend[ed] that DPS and the Board ha[d] acted to burden gun-owners' ability to obtain carry permits by improperly denying applications in the first instance and then subjecting applicants to unjustified and prolonged appeals." *Id.* at *2. Kuck asserted a violation of procedural due process, a violation of substantive due process, and a First Amendment retaliation claim. *Id.* Kuck filed the suit as a putative class action, "seeking to represent a class of individuals whose permits ha[d] been erroneously denied by DPS and ha[d] subsequently been subjected to a long-delayed appeal before the Board." *Id.* The district court dismissed, finding that "the hearing delay was not so long as to make the availability of review 'meaningless or nonexistent.'" *Kuck*, 2010 WL 1039273, at *2. The district court also denied Kuck's request to amend his complaint as futile. *Id.*

  With respect to the procedural due process claim, "Kuck's main contention [wa]s that the eighteen-month period he waited to receive an appeal hearing before the Board was, in light of the liberty interest at stake, excessive and unwarranted, and thus violated due process." *Id.* "Kuck further allege[d] that, as a matter of practice, DPS deliberately seeks to prolong the appeals process in order to unlawfully deprive citizens of pistol permits." *Id.* The

Second Circuit noted that under the Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court was required to balance three factors, and explained that "determining the moment at which state procedures become so untimely that they become meaningless is a matter of context, driven by the *Mathews* factors." *Kuck*, 2010 WL 1039273, at *3. The court determined that the first factor—the private interest at stake—"[t]hough not overwhelming or absolute, . . . remain[ed] significant." *Id.* at *5. With respect to the second factor—the risk of erroneous deprivation—the court noted that Kuck alleged that "the DPS frequently denies permit applications for bogus or frivolous reasons, thereby subjecting qualified applicants to a lengthy appeals process, only to grant the permit months or years later, just before the appeal hearing," and that "Kuck claimed that DPS was not entitled under state law to require proof of citizenship with his 2007 renewal application, and that his permit should not have been denied for lack of such documentation." *Id.* "Kuck offer[ed] figures suggesting that the number of appeals 'resolved' without a hearing [wa]s indeed far greater than those actually heard by the Board," and the court noted that "[t]his data [wa]s consistent with [Kuck's] allegation that many permits are granted or reinstated shortly before the Board is due to hear the applicant's appeal." *Id.* The court also noted that "Kuck . . . [wa]s in an unusual position to describe the process by which appeals [we]re resolved," explaining that "[be]cause he sits on the Board itself, his allegations ha[d] some additional plausibility at this early stage of the proceedings." *Id.* at *5 n.5 (citing *Iqbal*, 129 S. Ct. at 1950, for the proposition that "'[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task'"). Kuck alleged that the delay was not trivial, resulting in applicants waiting fourteen to twenty months to receive an appeal hearing. *Id.* at *5. The court held that "[t]ogether, these allegations plausibly allege[d] a state practice of delaying appeals, only to moot them at the very last minute, after the applicant has waited more than one year for a hearing." *Kuck*, 2010 WL 1039273, at *5 (citing *Iqbal*, 129 S. Ct. at 1949–50). The court concluded that the second *Mathews* factor weighed in favor of Kuck at the early stage of litigation. *Id.* With respect to the third factor—the governmental interest at stake—the court found the state's explanation for delay "far from overwhelming," noting that "the complaint suggest[ed] that the appeal sits gathering dust for nearly all of the interim period, awaiting a scheduled hearing date." *Id.* at *6. The court concluded that Kuck had properly stated a procedural due process claim, and noted that "[w]hether discovery will bear out his claim is a matter for the district court to determine on remand." *Id.*

Kuck also asserted a substantive due process claim, alleging that the "DPS imposed arbitrary requirements contrary to state law which, when combined with the lengthy appeals process, denied him substantive due process." *Id.* at *7. The appellate court agreed with the district court that "DPS's alleged misconduct was not so 'egregious, outrageous, or shocking to the contemporary conscience' that it violated substantive due process." *Id.* The court noted that "nothing in the complaint 'shocks the conscience' or suggests a 'gross abuse of governmental authority,'" and that "substantive due process does not entitle federal courts to examine every alleged violation of state law, especially ones that, while perhaps vexatious, are more routine than egregious." *Kuck*, 2010 WL 1039273, at *7. The court affirmed the dismissal of this claim.

Kuck also asserted "that his First Amendment rights were violated when he was threatened and harassed by a DPS officer, allegedly on account of his outspoken criticism of the agency and the appeals board." *Id.* The court concluded that "[w]hile Kuck ha[d] adequately alleged that he engaged in protected speech, he ha[d] not pleaded facts that suggest[ed] he was actually threatened by any of the defendants," explaining that "[a]t most, the allegations suggest[ed] that the DPS officer intended to strictly enforce laws limiting the sale of firearms at upcoming gun shows." *Id.* Because "retaliation cannot be established where no adverse action has been alleged," and because "nothing in the complaint suggest[ed] that Kuck's speech was 'actually chilled' as a result of the DPS officer's statements," the Second Circuit affirmed the district court's dismissal of this claim. *Id.*

The court did not reach the plaintiff's request to join additional defendants or his motion to amend, and directed the district court to consider these issues on remand. *Id.* at *8.

- ***Sanders v. Grenadier Realty, Inc.***, No. 09-2341-cv, 2010 WL 605715 (2d Cir. Feb. 22, 2010) (unpublished summary order). The plaintiffs, who served as president and vice president of their housing project's tenants' association, sued the housing project (Stevenson Commons) and Grenadier Realty, Inc. for violations of 42 U.S.C. § 1982, the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*, the First Amendment, and New York state law. *Id.* at *1. The district court dismissed the complaint under Rule 12(b)(6) and denied leave to amend. *Id.* The Second Circuit affirmed.

  In support of the section 1982 claim, the plaintiffs alleged that "'[u]pon information and belief, non-black residents have been granted subsidies and re-certifications while plaintiffs have been denied the same in the same period,'" and that "'[i]n light of the foregoing therefore, the defendants discriminated against plaintiffs on account of their race and national origin in violation of Title VIII, and sections 1982 and 1981.'" *Id.* The Second Circuit concluded that "[w]hile paragraph 17 d[id] allege facts consistent with a discrimination claim, *i.e.*, that non-black residents were granted subsidies, it nevertheless 'stop[ped] short of the line between possibility and plausibility of entitlement to relief' because plaintiffs d[id] not allege any facts supporting an inference of racial animus." *Id.* (internal citation to *Iqbal*, 129 S. Ct. at 1949, omitted). The court disapproved of the plaintiffs' use of pleading "on information and belief" under the circumstances:

  > Further, plaintiffs allege no basis for the "information and belief" on which their assertion that non-black residents were granted subsidies rests. "[P]leading on information and belief is not an appropriate form of pleading if the matter is within the personal knowledge of the pleader or 'presumptively' within his knowledge, unless he rebuts that presumption. Thus, matters of public record or matters generally known in the community should not be alleged on information and belief inasmuch as everyone is held to be conversant with them." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1224, at 300–01 (3d ed. 2004). Because the

> complaint does not illuminate the nature of the challenged re-certification process, we do not know whether this assertion is a matter of public record which plaintiffs should plead on personal knowledge. In any event, while pleadings may be based on "the best of the [attorney's] knowledge, information, and belief," that information and belief must be "formed after an inquiry reasonable under the circumstances." FED. R. CIV. P. 11.

Id. at *1 n.2 (alterations in original). The court held that the section 1982 claim was properly dismissed. *Sanders*, 2010 WL 605715, at *1.

In support of the plaintiffs' FHA claim, they "alleged that they were 'refused a recertification that would [have] granted [them] much needed rent subsidies' in violation of the FHA." *Id.* at *2 (alterations in original). The court held that the complaint "fail[ed] adequately to plead that plaintiffs 'were qualified to rent or purchase the housing,'" noting that the only support in the complaint consisted of the conclusory allegations that "'Sanders was . . . denied the right to subsidies that she is entitled to,'" and that "'[a]t all times plaintiffs were competent and able to pay their rent under the subsidies offered to [them] under the National Housing Act.'" *Id.* (third alteration in original). The court explained that "a necessary precondition to rent subsidies is a resident's submission of required reports as to her income and household composition within ten days of the landlord's written request," and that "[b]ecause plaintiffs ha[d] not alleged satisfaction of this requirement for the year at issue, [the court could not] conclude that the complaint plausibly allege[d] plaintiffs' entitlement to the subsidies that qualif[ied] them to pay their rent." *Id.* The court held that "[i]n light of this omission and plaintiffs' failure to allege what defendants did or did not do to deny them subsidies, [there was] no error in the district court's dismissal of plaintiffs' FHA claim." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949, for the proposition that "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice'").

The district court dismissed the First Amendment claim because the plaintiffs did not adequately plead that the defendants were state actors, and the appellate court found this dismissal proper. *See id.* The Second Circuit explained that "the complaint [wa]s ambiguous regarding the relationship between defendants' challenged conduct and decisions regarding government subsidies," and that "[p]laintiffs' allegation that 'they have also been threatened with eviction and refused a recertification that would [have] granted [them] much needed rent subsidies,' [wa]s insufficient to support an inference of state action because it d[id] not demonstrate state responsibility for tenants' recertification." *Sanders*, 2010 WL 605715, at *2 (second and third alterations in original) (internal citation omitted). In addition, the court noted that "the fact of government subsidy, by itself, [cannot] establish state action." *Id.* (citation omitted).

The Second Circuit also affirmed the denial of leave to amend, noting that the "plaintiffs were afforded two opportunities to amend before their complaint was dismissed" and "the district court reasonably concluded that leave to amend would be futile because the affidavits

plaintiffs submitted in support of their proposed additional claims contained the same deficient, conclusory allegations that led the district court to dismiss the complaint." *Id.* at *3.

- ***Samuel v. Bellevue Hosp. Ctr.***, No. 08-4635-cv, 2010 WL 537725 (2d Cir. Feb. 17, 2010) (unpublished summary order), *petition for cert. filed* (U.S. May 11, 2010) (09-10706). The plaintiff appealed the district court's dismissal of his employment discrimination lawsuit. *Id.* at *1. The Second Circuit noted that "the district court's method of dismissing part of Samuel's complaint by anticipating an inability to prevail on summary judgment was questionable," but concluded that the judgment could be affirmed on other grounds. *Id.* The court held that "[i]n the context of the fantastic and delusional nature of the majority of his complaint, Samuel failed to allege sufficient facts to render plausible his conclusory assertion that the defendants discriminated against him on the basis of his membership in a protected class," and that "[a]ccordingly, Samuel ha[d] not created a reasonable inference that Bellevue Hospital Center [wa]s liable for the misconduct alleged." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

- ***Hayden v. Paterson***, 594 F.3d 150 (2d Cir. 2010). The complaint challenged the validity of New York's constitutional provision that required the legislature to enact felon disenfranchisement laws and a New York election law that disenfranchised convicted felons who were incarcerated or on parole. *Id.* at 154. The plaintiffs alleged that these enactments violated their rights under the Voting Rights Act of 1965 (VRA); the First, Fourteenth and Fifteenth Amendments to the Constitution; the Civil Rights Acts of 1957 and 1960; and customary international law. *Id.* The defendants moved for judgment on the pleadings under Rule 12(c). *Id.* The district court dismissed the VRA claim, and the Second Circuit, sitting en banc, had previously affirmed that decision, finding that the VRA did not apply to prisoner disenfranchisement laws. *Id.* at 155. The district court also held that the factual allegations were not sufficient to state claims under the Fourteenth and Fifteenth Amendments because the allegations did not support finding that New York's constitutional provision requiring the legislature to disenfranchise felons was passed with discriminatory intent and because "New York's non-uniform legislative practice of disenfranchising only those felons sentenced to incarceration or serving parole '[wa]s entirely rationale.'" *Id.* The only issues on appeal were whether the district court erred in finding that the plaintiffs failed to allege facts to support the intentional discrimination and equal protection claims. *Hayden*, 594 F.3d at 155.

  The constitutional provision at issue "require[d] the legislature to 'enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime,'" and the state statute at issue "prohibit[ed] convicted felons from voting while they [we]re serving a prison sentence or while they [we]re on parole following a prison sentence." *Id.* The statute allowed felons to vote if they had completed their sentences or had never been sentenced to a term of imprisonment. *Id.* The complaint alleged that there was a history of racial discrimination in New York's disenfranchisement laws, that the state statute was disparately applied, and that there were racial disparities in the disenfranchisement rates of certain

minorities. *Id.* at 157. "[P]laintiffs contend[ed] that New York's constitutional provision mandating felon disenfranchisement was enacted with the intent to discriminate against persons on account of their race in violation of the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment." *Id.* "Plaintiffs further argue[d] that New York's felon disenfranchisement scheme violate[d] equal protection guarantees because it distinguish[ed] among felons in an unconstitutional manner by denying the right to vote only to those felons sentenced to incarceration or serving parole and not to those who ha[d] their prison sentence suspended or who [we]re sentenced to probation." *Id.* The Second Circuit described the complaint's factual allegations as follows:

> New York has historically used a wide variety of mechanisms to discriminate against minority voters. "Throughout the New York Constitutional Conventions addressing the right of suffrage, the framers made explicit statements of intent to discriminate against minority voters." "Delegates created certain voting requirements that expressly applied only to racial minorities and crafted other provisions with seemingly neutral language that they knew would have a discriminatory effect on racial minorities. The disenfranchisement of felons was one aspect of this effort to deprive minorities of the right to vote." For example, plaintiffs' complaint alleges that in 1777, the framers initially excluded minorities "by limiting suffrage to property holders and free men," but then as more Blacks became property holders and freemen, the legislature removed all property restrictions and instead expressly excluded Blacks from participating in the 1801 election of constitutional delegates.
>
> Furthermore, "[a]t the second New York Constitutional Convention in 1821, the delegates met to address the issue of suffrage generally and Black suffrage in particular"; the conversation "sparked heated discussions, during which many delegates expressed the view that racial minorities were essentially unequipped to participate in civil society," and "[s]ome delegates made explicit statements regarding Blacks' natural inferiority and unfitness for suffrage." For example, one delegate to the 1821 convention instructed his colleagues to "[l]ook to your jails and penitentiaries. By whom are they filled? By the very race, whom it is now proposed to cloth [sic] with the power of deciding upon your political rights." Another delegate urged his fellow delegates to "[s]urvey your prisons—your alms-houses—your bridewells and your penitentiaries, and what a darkening host meets your eye! More than one-third of the convicts and felons which those walls enclose, are of your sable population." Another argued that the "right of suffrage" should be "extended to White men only."

"Based on their belief in Blacks' unfitness for democratic participation, the delegates designed new voting requirements aimed at stripping Black citizens of their previously held right to vote." "Article II of the Constitution of 1821 incorporated the new discriminatory restrictions and contained new and unusually high property requirements that expressly applied only to men of color. Only [a tiny percentage of the total] Black population met these requirements. Article II also provided new citizenship requirements that applied only to men of color. *Id.*" As one delegate to the 1821 Constitutional Convention explained, while the new property qualification "did not directly restrict the right to vote to the 'White' male, as some had desired, nevertheless, the same result was accomplished by inserting property qualifications . . . that were not required for the White man." "Article II further restricted the suffrage of minorities by permitting the state legislature to disenfranchise persons 'who have been, or may be, convicted of infamous crimes.' N.Y. CONST. art. II, § 2. Through common law and legislative interpretation, 'infamous crimes' came to mean traditional felonies." In 1826, an amendment to the New York Constitution abolished all property qualifications for White male suffrage, but left intact the unduly onerous property requirements for Black males.

In 1846, at the third Constitutional Convention of New York, "heated debates over suffrage again focused on Blacks. Advocating for the denial of equal suffrage, delegates continued to make explicit statements regarding Blacks' unfitness for suffrage, including a declaration that the proportion of 'infamous crime' in the minority population was more than thirteen times that in the White population." "Felon disenfranchisement was further solidified in the Convention of 1846. As amended, the relevant constitutional provision stated: 'Laws may be passed excluding from the right of suffrage all persons who have been or may be convicted of bribery, of larceny, or of *any infamous crime* . . . .' N.Y. Const. art. II, § 2 (amended 1894) (emphasis added)." "When re-enacting the felon disenfranchisement provision and specifically including 'any infamous crime' in the category of convictions that would disqualify voters, the delegates were acutely aware that these restrictions would have a discriminatory impact on Blacks." At the 1866–1867 fourth Constitutional Convention of New York, "after engaging in heated debates," legislators "rejected various proposals to expand suffrage and instead chose to maintain racially discriminatory property qualifications."

New York's explicit racially discriminatory suffrage

> requirements were in place until voided by the adoption of the Fifteenth Amendment to the United States Constitution in 1870. Under § 1 of the Fifteenth Amendment, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." "[T]wo years after the passage of the Fifteenth Amendment, an unprecedented committee convened and amended the disenfranchisement provision of the New York Constitution to require the state legislature, at its following session, to enact laws excluding persons convicted of infamous crimes from the right to vote. N.Y. CONST. art. II, § 2 (amended 1894). Theretofore, the enactment of such laws was permissive."

Hayden, 594 F.3d at 157–59 (alterations in original) (internal citations and footnotes omitted). However, the court noted that "[u]nlike the allegations just described, plaintiffs' complaint include[d] no specific factual allegations of discriminatory intent that post-date 1874." *Id.* at 159. The court explained:

> For example, with regard to the present constitutional provision that remains in force today and that was enacted in 1894, plaintiffs simply state that "[i]n 1894, at the Constitutional Convention following the [1874 New York constitutional amendment], the delegates permanently abandoned the permissive language and adopted a constitutional requirement that the legislature enact disenfranchisement laws." Plaintiffs further allege that this is the constitutional provision "pursuant to which § 5-106 of the New York State Election Law was enacted and under which persons incarcerated and on parole for felony convictions are presently disenfranchised in New York State." As is apparent from this quoted language, plaintiffs' amended complaint does not allege any facts as to discriminatory intent behind the delegates' adoption of the 1894 constitutional provision, which is still in effect today. Nor do plaintiffs make any non-conclusory factual allegations of discriminatory intent with respect to the enactment of, and subsequent amendments to, New York's felon disenfranchisement *statute*.

Id. (alterations in original).

With respect to the allegation that New York's laws had a disparate impact on particular groups, the plaintiffs alleged that "Blacks and Latinos in New York are prosecuted, convicted, and sentenced to incarceration at rates substantially disproportionate to Whites," and cited statistics from the 2000 census. *Id.* at 159–60. The complaint also alleged that "'Blacks and Latinos are sentenced to incarceration at substantially higher rates than Whites, and Whites are sentenced to probation at substantially higher rates than Blacks and Latinos,"

again citing statistics to back up this assertion. *Id.* at 160.

The Second Circuit held that while "plaintiffs' allegations [were] sufficient with regard to the 1821, 1846, and 1874 constitutional provisions, . . . plaintiffs fail[ed] to allege any non-conclusory facts to support a finding of discriminatory intent as to the 1894 provision or subsequent statutory enactments." *Id.* at 161. The court "conclude[d] that plaintiffs fail[ed] to state a claim that [wa]s plausible on its face or, stated differently, that 'nudge[d] [their] claims of invidious discrimination across the line from conceivable to plausible.'" *Id.* (fourth alteration in original) (quoting *Iqbal*, 129 S. Ct. at 1951). The Second Circuit remanded to allow the plaintiffs to seek leave to amend. *Hayden*, 594 F.3d at 161.

The court began its analysis by identifying the conclusory allegations that were not entitled to an assumption of truth. The court stated:

> Plaintiffs allege, for example, that "[t]he disenfranchisement of felons was one aspect of [constitutional delegates adopting certain voting requirements] to deprive minorities of the right to vote," which is a "bare assertion[ ] . . . amount[ing] to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim," *Iqbal*, 129 S. Ct. at 1951 (internal quotation marks omitted) . . . . Similarly, plaintiffs' allegation that the 1821 Constitution "further restricted the suffrage of minorities by permitting the state legislature to disenfranchise persons 'who have been, or may be, convicted of infamous crimes'" is conclusory, for whether the facially neutral disenfranchisement provision "restricted the suffrage of minorities" in effect and intent is the very assertion that plaintiffs must prove. Finally, plaintiffs allege that New York Election Law § 5-106(2) "was enacted pursuant to . . . the New York State Constitution with the intent to disenfranchise Blacks," which is not only a bare assertion, but is the only allegation in plaintiffs' amended complaint that New York's felon disenfranchisement statutory provisions were enacted with discriminatory intent.

Id. at 161–62 (alterations and first and third omissions in original) (internal citations omitted). The court explained that after setting aside the conclusory allegations, it still found that the plaintiffs had alleged enough facts to show that the 1821, 1846, and 1874 constitutional provisions were enacted with a racially discriminatory purpose, but that, "fatal to plaintiffs' intentional discrimination claim, they ha[d] failed to allege that this invidious purpose motivated the enactment of either the 1894 constitutional provision or any of the statutory provisions." *Id.* at 162. The court also concluded that the "plaintiffs d[id] not plausibly allege that the 1971 or 1973 amendments to New York Election Law § 5-106(2) were enacted because of the 1894 Constitution's mandate that the legislature enact felon disenfranchisement laws." *Id.*

With respect to *Iqbal*'s second prong, the court concluded that although "plaintiffs undoubtedly ha[d] alleged sufficient facts to establish the disproportionate *impact* of New York's felon disenfranchisement laws on Blacks and Latinos, as compared with Whites[,] [t]he question remain[ed] . . . as to whether plaintiffs ha[d] sufficiently 'traced' that impact 'to a *purpose* to discriminate on the basis of race,' thereby stating a plausible claim of intentional race discrimination." *Id.* at 164 (internal citations omitted). The court explained:

> As an initial matter, we find that plaintiffs have alleged sufficient facts to support a plausible claim that the 1821, 1846, and 1874 felon disenfranchisement constitutional provisions were passed at least in part because of their adverse effects on Blacks. First, plaintiffs allege that during the New York Constitutional Convention in 1821, there were "heated discussions" during which delegates expressed the view that Blacks were "natural[ly] inferior[ ] and unfit[ ] for suffrage." Plaintiffs further allege that specific property and citizenship requirements tied to voting, which expressly applied only to Blacks, were incorporated in the Constitution of 1821. Second, plaintiffs assert that at the Constitutional Convention in 1846, "heated debates" continued regarding Blacks' unfitness for suffrage, "including a declaration that the proportion of [felonies committed] in the minority population was more than thirteen times that in the White population." Finally, plaintiffs state that New York's explicit discriminatory suffrage requirements were in place until voided by the adoption of the Fifteenth Amendment in 1870, but that "two years after the passage of the Fifteenth Amendment, an *unprecedented* committee convened and amended the disenfranchisement provision of the New York Constitution to require the state legislature, at its following session, to enact laws excluding persons convicted of infamous crimes from the right to vote." Drawing all reasonable inferences in favor of plaintiffs based on these well-pleaded factual allegations, we find that plaintiffs satisfy the *Iqbal* plausibility standard as to the alleged discriminatory intent behind the pre-1894 constitutional provisions.

Id. at 164–65 (alterations in original) (internal citations omitted). The court noted that "[a]lthough plaintiffs' allegations as to the 1874 enactment [we]re less direct than their allegations as to prior constitutional enactments, [it was] satisfied that the alleged close temporal proximity to the passage of the Fifteenth Amendment and the 'unprecedented' nature of the committee convened indicate[d] a '[d]eparture[ ] from . . . normal procedur[es],' which 'might afford evidence that improper purposes [we]re playing a role.'" *Hayden*, 594 F.3d at 165 n.13 (fifth, sixth, and seventh alterations and omission in original). But the court explained that the plausibility of the allegations regarding the pre-1894 constitutional provisions did not resolve the relevant issue:

> The issue we are confronted with here, though, is whether the enactment of the 1894 constitutional provision, albeit preceded by earlier provisions that plausibly admit of racist origins, can support an equal protection claim. More specifically, the issue here is whether plaintiffs adequately allege intentional discrimination where they have pleaded sufficient factual matter to plausibly show that the 1821, 1846, and 1874 enactments were motivated by a discriminatory purpose, but where they have not made any adequately supported factual allegations of impermissible motive affecting the delegates to the 1894 convention.

Id. at 165. The court concluded that "under these circumstances, plaintiffs fail[ed] to state a plausible claim of intentional discrimination as to the enactment of the 1894 constitutional provision, which continues in effect today." *Id.* at 165–66. The court stated:

> Here, the 1894 amendment to New York's constitutional provision was not inconsequential. The provision that existed until that time, as amended in 1874, provided that the legislature was required to pass a felon disenfranchisement law at its next session, but thereafter the passage of such laws was left to the legislature's discretion, as it had always been. In 1894, however, the constitutional delegates made permanent the mandatory aspect of the provision, and felon disenfranchisement laws have been required in New York ever since. This amendment served to substantively change how legislatures were permitted to consider, or no longer consider, whether felon disenfranchisement laws should be passed—such laws were mandated. Given this substantive amendment to New York's constitutional provision and the lack of any allegations by plaintiffs of discriminatory intent "reasonably contemporaneous with the challenged decision," we cannot hold that plaintiffs state a plausible claim of intentional discrimination as to the 1894 constitutional provision, which is the bridge necessary for plaintiffs to sufficiently trace any disparate impact of New York Election Law § 5-106(2) "to a purpose to discriminate on the basis of race[.]"

Id. at 167 (internal citations omitted). The court said it was not concerned about the possibility that lawmakers might avoid challenges by reenacting a law originally enacted with discriminatory intent, without significant changes, because "(i) plaintiffs ha[d] not alleged any such bad faith on the part of the 1894 delegates; (ii) the 1894 amendment was not only deliberative, but was also substantive in scope; and (iii) there [we]re simply no non-conclusory allegations of any kind as to discriminatory intent of the 1894 delegates . . . ." *Id.* The court noted that there was a more likely explanation for the constitution provision, citing both *Iqbal* and pre-*Twombly* case law:

> Moreover, not only is a discriminatory purpose not alleged with respect to the 1894 enactment, but an "'obvious alternative explanation'" exists to support the propriety of the 1894 enactment. *See Iqbal*, 129 S. Ct. at 1951–52 (quoting *Twombly*, 550 U.S. at 567, 127 S. Ct. 1955). As defendants contend, "prisoner disenfranchisement is more likely the product of legitimate motives than invidious discrimination," as demonstrated by its adoption in virtually every state, its affirmative sanction in § 2 of the Fourteenth Amendment, and its widespread support among New York politicians. In some cases, "notwithstanding [discriminatory] impact[,] the legitimate noninvidious purposes of a law cannot be missed." [*Pers. Adm'r of Mass. v.*] *Feeney*, 442 U.S. [256,] 275, 99 S. Ct. 2282 [(1979)] (explaining that the distinction made by the Massachusetts veterans preference law "is, as it seems to be, quite simply between veterans and nonveterans, not between men and women"); *see also Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir. 1983) (affirming dismissal of equal protection challenge to Secretary of Health and Human Services' failure to provide forms in Spanish because plaintiffs failed to suggest any evidence of discriminatory intent and legitimate noninvidious purpose was obvious), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984). Absent any adequately supported factual allegations as to discriminatory intent behind the enactment of the 1894 constitutional provision, we are compelled to find that the New York Constitution's requirement that the legislature pass felon disenfranchisement laws is based on the obvious, noninvidious purpose of disenfranchising felons, not Blacks or Latinos.

Id. at 167–68 (first and second alterations in original) (internal citations and footnote omitted). The court continued:

> Finally, there is another independent basis for our holding that plaintiffs fail to state a plausible claim of intentional discrimination. The 1894 constitutional provision, and all earlier constitutional provisions, simply authorize the New York legislature to enact felon disenfranchisement laws. That is, the constitutional provision does not operate to deny plaintiffs the right to vote, rather the statutory enactment pursuant to the constitutional provision does. Therefore, plaintiffs either must allege that the statutory enactments were motivated at least in part by discriminatory intent—which they have completely failed to do in their amended complaint—or they must state a plausible claim that New York Election Law § 5-106 and all of its prior amendments were in fact passed because of the 1894 constitutional provision's mandate. It is *possible* that the legislature

> has acted since 1894 to enact felon disenfranchisement laws because it was required to under the constitutional provision. But given the more likely explanations discussed above and the laws' obvious, noninvidious distinction between felons and non-felons, it is not *plausible*, at least as plaintiffs' allegations presently read, that the New York legislature would have rejected a felon disenfranchisement statute if the statute had not been constitutionally required.

Hayden, 594 F.3d at 168–69 (footnote omitted).

The court determined that the appropriate course was to remand to allow the plaintiffs to seek leave to amend:

> Accordingly, plaintiffs' amended complaint fails to state a plausible claim that New York's felon disenfranchisement laws were enacted with discriminatory intent. Although they have alleged sufficient facts to support a claim that the 1821, 1846, and 1874 constitutional provisions were motivated at least in part by discriminatory intent, they fail to allege any facts to support a claim that the 1894 constitutional provision or any of the New York legislature's statutory enactments were passed because of racial animus. However, in light of Federal Rule of Civil Procedure 15's suggestion that a "court should freely give leave [to amend] when justice so requires," FED. R. CIV. P. 15(a)(2), and our preference to allow a district court to evaluate such a motion by plaintiffs in the first instance, *see Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009) (per curiam), we will remand to the District Court to allow plaintiffs to seek leave to amend their deficient complaint as to this claim.

Id. at 169 (alteration in original).

With respect to the claim that New York's statute violated the Equal Protection Clause of the Fourteenth Amendment because it distinguishes among felons, the court found that under the relevant case law, rational basis review applied. *See id.* at 169–70. The legislative history explained the reasons for enactment of the statutes, and the Second Circuit concluded that the statutes passed the rational basis review, and that dismissal was appropriate. *See id.* at 171.

- ***Starr v. Sony BMG Music Entm't***, 592 F.3d 314 (2d Cir. 2010). The complaint alleged a claim under Section 1 of the Sherman Act, asserting a conspiracy by major recording labels to fix prices and terms under which their music would be sold over the Internet. *Id.* at 317. The complaint alleged: "Defendants produce, license and distribute music sold as digital files ('Digital Music') online via the Internet ('Internet Music') and on compact discs ('CDs'). Together, defendants EMI, Sony BMG Music Entertainment ('Sony BMG'), Universal

Music Group Recordings, Inc. ('UMG'), and Warner Music Group Corp. ('WMG'), control over 80% of Digital Music sold to end purchasers in the United States." *Id.* at 318. The complaint further alleged that "defendants Bertelsmann, Inc. ('Bertelsmann'), WMG, and EMI agreed to launch a service called MusicNet," and "Defendants UMG and Sony Corporation ('Sony') agreed to launch a service called Duet, later renamed pressplay," and that "[a]ll defendants signed distribution agreements with MusicNet or pressplay and sold music directly to consumers over the Internet through these ventures (the 'joint ventures')." *Id.* The complaint explained that "[t]o obtain Internet Music from all major record labels, a consumer initially would have had to subscribe to both MusicNet and pressplay, at a cost of approximately $240 per year," and that "[b]oth services required customers to agree to unpopular Digital Rights Management terms ('DRMs')." *Id.* The DRMs included limitations such as prohibiting customers from copying more than two songs from the same artist within a month, providing that music would expire unless repurchased, and prohibiting the transfer of songs from a customer's computer to portable music players. *Id.* According to the complaint, "[o]ne industry commentator observed that MusicNet and pressplay did not offer reasonable prices, and one prominent computer industry magazine concluded that 'nobody in their right mind will want to use' these services." *Id.* The complaint also alleged that despite the dramatic decrease in costs of selling music over the Internet as compared to selling CDs, "these dramatic cost reductions were not accompanied by dramatic price reductions for Internet Music, as would be expected in a competitive market." *Starr*, 592 F.3d at 318. "Eventually, defendants and the joint ventures began to sell Internet Music to consumers through entities they did not own or control," but "the entities could only sell defendants' music if they contracted with MusicNet to provide Internet Music for the same prices and with the same restrictions as MusicNet itself or other MusicNet licensees," and "[i]f the licensee attempted to license music from another company, defendants forced them to pay penalties or terminated their licenses." *Id.* The complaint also stated that "each defendant was paid shares of the total revenue generated by a joint venture licensee, rather than on a per song basis, linking each defendant's financial interest in the joint venture to the total sales of all labels rather than to its own market share." *Id.* at 318–19. In addition, the complaint alleged that "Defendants also used Most Favored Nation clauses ('MFNs') in their licenses that had the effect of guaranteeing that the licensor who signed the clause received terms no less favorable than the terms offered to other licensors," and that "Defendants attempted to hide the MFNs because they knew they would attract antitrust scrutiny." *Id.* at 319. Further, "[a]fter services other than defendants' joint ventures began to distribute defendants' Internet Music, defendants 'agreed' to a wholesale price floor of 70 cents per song, which they enforced in part through MFN agreements." *Id.* (footnote omitted). According to the complaint, "[w]hereas eMusic, the most popular online music service selling Internet Music owned by independent labels, currently charges $0.25 per song and places no restrictions on how purchasers can upload their music to digital music players (like the iPod) or burn to CDs, defendants' wholesale price is more than double, about $0.70 per song," and "all defendants refuse to do business with eMusic, the # 2 Internet Music retailer behind only the iTunes store." *Id.* The complaint also alleged that the defendants' activities were being investigated by the New York State Attorney General and the Department of Justice. *Starr*, 592 F.3d at 319.

The complaint asserted claims under Section 1 of the Sherman Act and state antitrust and unfair and deceptive trade practices statutes, and also asserted state common law claims for unjust enrichment. *Id.* at 320. At oral argument in the district court, the plaintiffs sought leave to amend paragraph 99 of the complaint to allege a parallel price increase. *Id.* The district court held that the complaint did not state a claim under *Twombly*, finding that the "plaintiffs did not challenge the existence or creation of the joint ventures and the operation of the joint ventures therefore did not yield an inference of illegal agreement," and that "the plaintiffs' 'bald allegation that the joint ventures were shams [wa]s conclusory and implausible.'" *Id.* The district court also concluded that the "plaintiffs did not challenge the joint ventures' 'explicit agreement,' and any inference 'of subsequent agreement based on prior, unchallenged explicit agreement [wa]s unreasonable'"; that "other circumstances alleged by plaintiffs were 'equivocal' and did not justify the inference of agreement"; and that "the imposition of the unpopular DRMs and pricing structure was not against defendants' individual economic self-interest when viewed against the backdrop of widespread music piracy." *Id.* The district court denied the motion for leave to amend as futile. *Id.* at 320–21.

The Second Circuit cited *Twombly* to differentiate between the standards for summary judgment and dismissal on the pleadings: "While for purposes of a summary judgment motion, a Section 1 plaintiff must offer evidence that 'tend[s] to rule out the possibility that the defendants were acting independently,' to survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only allege 'enough factual matter (taken as true) to suggest that an agreement was made.'" *Starr*, 592 F.3d at 321 (internal citation omitted). The court concluded that the district court had erred by dismissing the complaint under *Twombly*:

> Applying the language and reasoning of *Twombly* to the facts of this case leads us to conclude respectfully that the district court erred in dismissing the complaint for failure to state a Section 1 claim. The present complaint succeeds where *Twombly's* failed because the complaint alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants. As discussed above, the complaint contains the following non-conclusory factual allegations of parallel conduct. First, defendants agreed to launch MusicNet and pressplay, both of which charged unreasonably high prices and contained similar DRMs. Second, none of the defendants dramatically reduced their prices for Internet Music (as compared to CDs), despite the fact that all defendants experienced dramatic cost reductions in producing Internet Music. Third, when defendants began to sell Internet Music through entities they did not own or control, they maintained the same unreasonably high prices and DRMs as MusicNet itself. Fourth, defendants used MFNs in their licenses that had the effect of guaranteeing that the licensor who signed the MFN received terms no

> less favorable than terms offered to other licensors. For example, both EMI and UMG used MFN clauses in their licensing agreements with MusicNet. Fifth, defendants used the MFNs to enforce a wholesale price floor of about 70 cents per song. Sixth, all defendants refuse to do business with eMusic, the # 2 Internet Music retailer. Seventh, in or about May 2005, all defendants raised wholesale prices from about $0.65 per song to $0.70 per song. This price increase was enforced by MFNs.

Id. at 323 (footnote omitted). The court also held that "[b]ecause the proposed amendment to paragraph ninety-nine of the [complaint] contained, along with the remainder of the complaint, 'enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,' the district court erred in denying the motion to amend on the ground of futility." *Id.* at 323 n.3 (internal citation omitted). The court elaborated:

> More importantly, the following allegations, taken together, place the parallel conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955. First, defendants control over 80% of Digital Music sold to end purchasers in the United States. Second, one industry commentator noted that "nobody in their right mind" would want to use MusicNet or pressplay, suggesting that some form of agreement among defendants would have been needed to render the enterprises profitable. Third, the quote from Edgar Bronfman, the current CEO of WMG, suggests that pressplay was formed expressly as an effort to stop the "continuing devaluation of music."
>
> Fourth, defendants attempted to hide their MFNs because they knew they would attract antitrust scrutiny. For example, EMI and MusicNet's MFN, which assured that EMI's core terms would be no less favorable than Bertelsmann's or WMG's, was contained in a secret side letter. "EMI CEO Rob Glaser decided to put the MFN in a secret side letter because 'there are legal/antitrust reasons why it would be bad idea to have MFN clauses in any, or certainly all, of these agreements." According to the executive director of the Digital Music Association, seller-side MFNs are "inherently price-increasing and anticompetitive."
>
> Fifth, whereas eMusic charges $0.25 per song, defendants' wholesale price is about $0.70 per song. Sixth, defendants' price-fixing is the subject of a pending investigation by the New York State Attorney General and two separate investigations by the Department of Justice. Finally, defendants raised wholesale prices

> from about $0.65 per song to $0.70 per song in or about May 2005, even though earlier that year defendants' costs of providing Internet Music had decreased substantially due to completion of the initial digital cataloging of all Internet Music and technological improvements that reduced the costs of digitizing new releases.
>
> This complaint does not resemble those our sister circuits have held fail to state a claim under *Twombly*. *See, e.g.*, *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 975–976 (9th Cir. 2008) (dismissing Section 1 price fixing complaint under *Twombly* where complaint alleged only that defendant conspired with "numerous" banks to fix the price of credit and debit card processing fees and received kickbacks from "numerous" banks as consideration for its unlawful agreement); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048–50 (9th Cir. 2008) (where plaintiffs alleged no facts to support their theory that defendant banks conspired or agreed with each other, dismissing Section 1 claim because plaintiffs pleaded only legal conclusions, and "failed to plead the necessary evidentiary facts to support those conclusions").

Id. at 323–24 (internal citations omitted). The court rejected the defendants' arguments for dismissal:

> Defendants' arguments that plaintiffs have failed to state a claim are without merit. Defendants first argue that a plaintiff seeking damages under Section 1 of the Sherman act must allege facts that "tend[ ] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." This is incorrect. Although the *Twombly* court acknowledged that for purposes of summary judgment a plaintiff must present evidence that tends to exclude the possibility of independent action, 550 U.S. at 554, 127 S. Ct. 1955, and that the district court below had held that plaintiffs must allege additional facts that tended to exclude independent self-interested conduct, *id.* at 552, 127 S. Ct. 1955, it specifically held that, to survive a motion to dismiss, plaintiffs need only "enough factual matter (taken as true) to suggest that an agreement was made," *id.* at 556, 127 S. Ct. 1955; *see also* 2 Areeda & Hovenkamp § 307d1 (3d ed. 2007) ("[T]he Supreme Court did not hold that the same standard applies to a complaint and a discovery record. . . . The 'plausibly suggesting' threshold for a conspiracy complaint remains considerably less than the 'tends to rule out the possibility' standard for summary judgment.").
>
> Defendants next argue that *Twombly* requires that a plaintiff

> identify the specific time, place, or person related to each conspiracy allegation. This is also incorrect. The *Twombly* court noted, in dicta, that had the claim of agreement in that case not rested on the parallel conduct described in the complaint, "we doubt that the . . . references to an agreement among the [Baby Bells] would have given the notice required by Rule 8 . . . [because] the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." 550 [U.S.] at 565 n. 10. In this case, as in *Twombly*, the claim of agreement rests on the parallel conduct described in the complaint. Therefore, plaintiffs were not required to mention a specific time, place or person involved in each conspiracy allegation.
>
> Defendants then argue that inferring a conspiracy from the facts alleged is unreasonable because plaintiffs' allegations "are the very same claims that were thoroughly investigated and rejected by the Antitrust Division of the Department of Justice," which closed its inquiry in December 2003 and publicly announced that it had uncovered no evidence that the joint ventures had harmed competition or consumers of digital music. Even if we could consider this evidence on a motion to dismiss, defendants cite no case to support the proposition that a civil antitrust complaint must be dismissed because an investigation undertaken by the Department of Justice found no evidence of conspiracy. Second, this argument neglects the fact that the complaint alleges that the Department of Justice has, since 2003, launched two new investigations into whether defendants engaged in collusion and price fixing and whether defendants misled the Department about the formation and operation of MusicNet and pressplay.

Id. at 325 (first, second, third, and fourth alterations in original) (internal citations omitted). The court also rejected the defendants' argument that "the conduct alleged in the complaint 'would be entirely consistent with independent, though parallel, action.'" *Id.* at 327. The court explained that "[u]nder *Twombly*, allegations of parallel conduct that could 'just as well be independent action' are not sufficient to state a claim," but that "in this case plaintiffs ha[d] alleged behavior that would plausibly contravene each defendant's self-interest 'in the absence of similar behavior by rivals.'" *Starr*, 592 F.3d at 327. The court explained that "[f]or example, it would not be in each individual defendant's self-interest to sell Internet Music at prices, and with DRMs, that were so unpopular as to ensure that 'nobody in their right mind' would want to purchase the music, unless the defendant's rivals were doing the same." *Id.* The court remanded the case for additional proceedings. *Id.*

Judge Newman wrote a separate concurring opinion "to explore a perplexing aspect of the Supreme Court's decision in *Bell Atlantic v. Twombly* . . . ." *Id.* at 328 (Newman, J., concurring). Judge Newman was concerned about the statement in the *Twombly* opinion that

"'[w]hile a showing of parallel 'business behavior is admissible circumstantial evidence *from which the fact finder may infer agreement*,' it falls short of 'conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense.'" *Id.* (second and third alterations and omission in original) (quoting *Twombly*, 550 U.S. at 553). Judge Newman noted that the *Twombly* Court had relied on a case involving dismissal of an antitrust claim at the directed verdict stage:

> If, as the Court states in the first part of this sentence, a fact-finder is entitled to infer agreement from parallel conduct, one may wonder why a complaint alleging such conduct does not survive a motion to dismiss. The answer is surely not supplied by the remainder of the Court's sentence. That portion states the unexceptional proposition that parallel conduct alone is not *conclusive* evidence of an agreement to fix prices. To support that proposition, the Court cites *Theatre Enterprises*. But that case was an appeal by an antitrust plaintiff whose complaint had *survived* a motion to dismiss. Indeed, that plaintiff had been permitted to present its evidence to a jury, only to have the jury reject on the merits the claim of a section 1 violation. The plaintiff sought review on the ground that the trial court had erred in not granting a motion for a directed verdict in the plaintiff's favor. *See Theatre Enterprises*, 346 U.S. at 539, 74 S. Ct. 257. The Supreme Court understandably found no error. *See id.* at 539–42, 74 S. Ct. 257. In *Twombly*, the Court noted the extraordinary claim that the *Theatre Enterprises* plaintiff had made. "An antitrust conspiracy plaintiff with evidence showing nothing more than parallel conduct is not entitled *to a directed verdict*." *Twombly*, 550 U.S. at 554, 127 S. Ct. 1955 (emphasis added).
>
> The fact that an allegation of parallel conduct was held insufficient to require a directed verdict in the plaintiff's favor is hardly a basis for ruling that such an allegation is insufficient to survive a motion to dismiss for failure to state a claim on which relief may be granted.

Id. Judge Newman noted that the *Twombly* decision was based on the context of the claim at issue:

> In view of the Court's initial observation in *Twombly* that parallel conduct is sufficient to support a permissible inference of an agreement, the reason for the rejection of the complaint in *Twombly* must arise from something other than the plaintiff's reliance on parallel conduct. That reason is not difficult to find. It is the *context* in which the defendants' parallel conduct occurred. "[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a

> preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557, 127 S. Ct. 1955.
>
> The context in *Twombly* was the aftermath of the divestiture of A[T] & T's local telephone service, resulting in the creation of seven Regional Bell Operating Companies, the so-called "Baby Bells" or Incumbent Local Exchange Carriers ("ILECs"). *See id.* at 549, 127 S. Ct. 1955. Originally restricted to providing local telephone service, the ILECs were later permitted by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), to enter the long-distance market upon compliance with conditions concerning the opportunity for competitive local exchange carriers ("CLECs") to make use of an ILEC's network. *See Twombly*, 550 U.S. at 549, 127 S. Ct. 1955.
>
> In that context, it was entirely understandable for the Court to cast a jaundiced eye on the claim that the parallel conduct of these newly created ILECs would suffice to permit an inference of agreement.

Starr, 592 F.3d at 328–29 (Newman, J., concurring) (alteration in original). Judge Newman noted that the Court had reemphasized in *Iqbal* that the sufficiency of a complaint will depend on the context. *Id.* at 329. Judge Newman explained:

> I believe it would be a serious mistake to think that the Court has categorically rejected the availability of an inference of an unlawful section 1 agreement from parallel conduct. Even in those contexts in which an allegation of parallel conduct will not suffice to take an antitrust plaintiff's case to the jury, it will sometimes suffice to overcome a motion to dismiss and permit some discovery, perhaps leaving the issue for later resolution on a motion for summary judgment.
>
> In the pending case, . . . the context in which the defendants' alleged parallel conduct occurred, amplified by specific factual allegations making plausible an inference of agreement, suffices to render the allegation of a section 1 violation sufficient to withstand a motion to dismiss.

Id.

- ***Turkmen v. Ashcroft***, 589 F.3d 542, 2009 WL 4877787 (2d Cir. Dec. 18, 2009) (per curiam). Seven named plaintiffs, who were non-citizens detained on immigration charges following September 11, 2001, filed a putative class action alleging "that on account of their

Arab or Muslim background (or perceived background), they were subjected to excessively prolonged detention, abused physically and verbally, subjected to arbitrary and abusive strip searches, and otherwise mistreated while in custody." *Id.* at *1. The plaintiffs acknowledged that they were in the country illegally and subject to removal, but asserted constitutional violations based on the conditions of their confinement and the length of their detention, which they alleged was "illegally prolonged so that the Government could investigate any potential ties to terrorism." *Id.* Among the 31 identified defendants were the United States, former Attorney General John Ashcroft, FBI Director Robert Mueller, former Immigration and Naturalization Service Commissioner James Ziglar, and officials and corrections officers from the Metropolitan Detention Center. *Id.* "The United States, Ashcroft, Mueller, and Ziglar, as well as four high-ranking MDC officials . . . moved to dismiss certain claims on grounds that include[d] qualified immunity and failure to state a claim." *Id.* (footnote omitted). The district court denied the motions with respect to the conditions of confinement, but granted dismissal with respect to the length of detention. *Id.* Both sides appealed.

In considering the defendants' challenge to the denial of dismissal for the claims based on conditions of confinement, the court noted:

> The district court ruled on the defendants' motions to dismiss prior to the Supreme Court's decisions in *Twombly* and *Iqbal*. It applied a standard of review under which it would not dismiss a claim "unless it appears beyond doubt . . . that the plaintiff can prove no set of facts which would entitle him to relief." Now, following the district court's decision, *Twombly* and *Iqbal* require "a heightened pleading standard in those contexts where factual amplification is needed to render a claim plausible." *Ross v. Bank of America, N.A. (USA)*, 524 F.3d 217, 225 (2d Cir. 2008) (internal quotation marks, citations, brackets, and emphasis omitted). We could undertake to decide whether the challenged claims satisfy the pleading standard of *Twombly* and *Iqbal*; however, in the circumstances of this case—where plaintiffs have already announced their intent to file a Fourth Amended Complaint to preserve for the putative class the claims asserted only by the settling plaintiffs—we think it better to vacate that portion of the district court's order denying dismissal of the conditions of confinement claims on the ground that an outdated pleading standard was applied, and to remand the case for further proceedings consistent with the standard articulated in *Twombly* and *Iqbal*.

Turkmen, 2009 WL 4877787, at *2 (internal citation omitted). The court stated that the district court might, on remand, "grant plaintiffs leave to file the proposed Fourth Amended Complaint to satisfy the heightened pleading standard," but "decline[d] to consider whether plaintiffs should be allowed to replead yet again because '[i]n the ordinary course, [the court

was] accustomed to reviewing a district court's decision whether to grant or deny leave to amend, rather than making that decision for [itself] in the first instance.'" *Id.* at *3 (quoting *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009)). The court directed:

> If the district court denies leave to file the proposed Fourth Amended Complaint, it should evaluate the sufficiency of the Third Amended Complaint in light of the settlement and the heightened pleading standard. The district court can then address whether, under *Twombly* and *Iqbal*, the Third Amended Complaint fails to state a claim, or inadequately alleges the personal involvement of the moving defendants, or entitles the moving defendants to qualified immunity with respect to the conditions of confinement claims.

Id. The court emphasized that "[a]t this stage of proceedings, [the court] d[id] no more than vacate the order denying the motions to dismiss with respect to the conditions of confinement claims, and remand to the district court for further proceedings." *Id.*

With respect to the dismissed claims based on the length of detention, the court noted that these claims "allege[d] generally that defendants detained plaintiffs longer than necessary to effect their removal (or voluntary departure) from the United States." *Id.* The complaint alleged that the defendants used the plaintiffs' acknowledged "immigration violations 'as a cover, as an excuse' to investigate whether plaintiffs were tied to terrorism." *Id.* The complaint alleged that the detentions constituted a seizure under the Fourth Amendment, a violation of the Due Process Clause of the Fifth Amendment, and a violation of the equal protection right encompassed in the Fifth Amendment. *Turkmen*, 2009 WL 4877787, at *3 & n.4. By statute, aliens ordered removed are to be removed by the Attorney General within a 90-day "removal period," and "[t]he government is required to detain an alien ordered removed until removal is effected, at least for the removal period." *Id.* at *3. Relevant regulations provide that a review is conducted of the alien's record to determine whether detention is appropriate after the removal period, if removal cannot be completed during that period. *Id.* The Second Circuit noted that in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court "accorded a presumption of reasonableness to six months' detention for an alien subject to an order of removal," and that "thereafter, the alien's continued detention would be deemed unlawful 'if (1) an alien demonstrate[d] that there [wa]s no significant likelihood of removal in the reasonably foreseeable future and (2) the government [wa]s unable to rebut this showing.'" *Turkmen*, 2009 WL 4877787, at *4 (quoting *Wang v. Ashcroft*, 320 F.3d 130, 146 (2d Cir. 2003)) (footnote omitted). The court noted that "Turkmen, Sachdeva, and two of the settling plaintiffs were detained for less than six months," and that their detentions "thus were presumptively reasonable." *Id.* at *4 & n.5. The court explained the district court's analysis:

> The district court, relying on *Zadvydas* and *Wang*, concluded that plaintiffs failed to state a claim because "the complaint does not allege that during the period of their detention there was no

significant likelihood of removal in the reasonably foreseeable future." The complaint alleged simply that the detentions were "longer than necessary" to effectuate removal. As the district court reasoned, recognizing such a claim as a violation of due process would "flood the courts with habeas petitions brought by aliens seeking to be removed as soon as *they* deemed it practicable." The district court explained that:

> [Plaintiffs] assume that all that is required for the Attorney General to secure removal is a deportation order and an airplane. This assumption ignores legitimate foreign policy considerations and significant administrative burdens involved in enforcing immigration law in general, and, specifically, those concerns immediately following a terrorist attack perpetrated on the United States by non-citizens, some of whom had violated the terms of their visas at the time of the attack.

Id. at *4 (internal citations omitted) (alteration in original). On appeal, the plaintiffs "argue[d] that they were detained for a criminal investigation, and their detentions thus constituted separate seizures requiring their own justification and probable cause." *Id.* at *5. The plaintiffs "assert[ed] that the *Zadvydas* standard identifies constitutional violations only 'when removal is *impossible*'; they submit[ted] that it is inadequate to identify constitutional violations where, as alleged here, defendants employ[ed] 'detention *as an alternative to removal*.'" *Id.* (citation omitted). The Second Circuit disagreed:

> In *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), the Supreme Court held that a law enforcement official's actual motivation for the Fourth Amendment seizure of a person is constitutionally irrelevant if the seizure is supported by probable cause. To the extent plaintiffs challenge their *prolonged* detention after final orders of removal (or voluntary departure) were entered against them, it is clear from the complaint that such detention was supported by the IJs' findings of removability, which constitute a good deal more than probable cause. Because plaintiffs were thus lawfully detained as aliens subject to orders of removal (or voluntary departure), they could not state a claim for unconstitutionally prolonged detention without pleading facts plausibly showing "no significant likelihood of removal in the reasonably foreseeable future." *Wang*, 320 F.3d at 146; *see also Zadvydas*, 533 U.S. at 699. In the absence of such a pleading, plaintiffs' challenge to their detention was properly dismissed under Federal Rule of Civil Procedure 12(b)(6). Moreover, we need not

> decide whether or under what circumstances aliens subject to removal (or voluntary departure) orders could state claims for unconstitutional detentions without satisfying *Zadvydas*. To the extent plaintiffs' claims are not based on *Zadvydas*, the moving defendants are entitled to qualified immunity.

Id. The court continued:

> In light of the analysis above, plaintiffs can point to no authority clearly establishing a due process right to immediate or prompt removal (following an order of removal or voluntary departure). The moving defendants therefore are entitled to qualified immunity with respect to claim 2.
>
> Assuming *arguendo* that the Fourth Amendment applies to post-arrest detention, probable cause would be required only if the detentions at issue were not otherwise authorized. For reasons stated above, the moving defendants had an objectively reasonable belief that the detentions were authorized, and therefore are entitled to qualified immunity with respect to claim 1.
>
> Similarly, plaintiffs point to no authority clearly establishing an equal protection right to be free of selective enforcement of the immigration laws based on national origin, race, or religion at the time of plaintiffs' detentions. The moving defendants therefore are entitled to qualified immunity with respect to claim 5 (to the extent that claim 5 is based on the length of plaintiffs' detentions).

Turkmen, 2009 WL 4877787, at *5–6 (internal citations omitted).

- ***Arar v. Ashcroft***, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, --- S. Ct. ----, No. 09-923, 2010 WL 290379 (Jun. 14, 2010). The plaintiff filed suit against the Attorney General of the United States, the Secretary of Homeland Security, the Director of the FBI, and others, including senior immigration officials, after he was allegedly detained while changing planes in New York. *Id.* at 563. Arar alleged that he was mistreated for 12 days while in U.S. custody, then removed to Syria via Jordan with the understanding that he would be detained, interrogated, and tortured in Syria. *Id.* The complaint alleged violations of the Torture Victims Protection Act ("TVPA") and of his Fifth Amendment substantive due process rights based on the conditions of his detention in the United States, the denial of access to counsel and the courts in the United States, and his detention and torture in Syria. *Id.* The district court dismissed the complaint, and on appeal, the Second Circuit panel unanimously found that the district court had jurisdiction over the Attorney General, the former Acting Attorney General, and the Director of the FBI; that Arar failed to state a claim under the TVPA; and that Arar failed to establish subject matter jurisdiction over his request for a declaratory

judgment. *Id.* A majority of the panel dismissed Arar's *Bivens*[13] claims. *Id.* On rehearing en banc, the Second Circuit affirmed the district court's holding. *Arar*, 585 F.3d at 563.

On rehearing, the majority stated:

> We have no trouble affirming the district court's conclusions that Arar sufficiently alleged personal jurisdiction over the defendants who challenged it, and that Arar lacks standing to seek declaratory relief. We do not reach issues of qualified immunity or the state secrets privilege. As to the TVPA, we agree with the unanimous position of the panel that Arar insufficiently pleaded that the alleged conduct of United States officials was done under color of foreign law. We agree with the district court that Arar insufficiently pleaded his claim regarding detention in the United States, *a ruling that has been reinforced by the subsequent authority of* Bell Atlantic Corp. v. Twombly,[14] 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Our attention is therefore focused on whether Arar's claims for detention and torture in Syria can be asserted under *Bivens* . . . .

Id. (emphasis added).

Arar alleged that he was a dual citizen of Canada and Syria, and resided in Canada. *Id.* at 565. While on vacation in Tunisia, he was called back to work in Canada and had to change planes in New York. *Id.* During his stop in New York, Arar was detained by immigration officials and transferred the next day to a detention center in Brooklyn, where he was kept for a week and a half. *Id.* The INS began removal proceedings based on its conclusion that Arar belonged to a terrorist organization. *Id.* Despite Arar's request for removal to Canada, the INS ordered his removal to Syria, found that removal would be consistent with Article 3 of the Convention Against Torture ("CAT"), and barred Arar from reentering the United States for five years. *Arar*, 585 F.3d at 566. The INS Regional Director determined that Arar was a member of Al Qaeda and inadmissible in the United States, and the Deputy Attorney General stated that the removal to Syria would be consistent with the CAT, despite the fact that Arar stated that he feared torture in Syria. *Id.* According to the complaint, Arar was transferred to Jordan and then to Syria, where he remained for a year and where he was tortured. *See id.* "Arar allege[d] that United States officials conspired to send him to Syria for the purpose of interrogation under torture, and directed the interrogations from abroad by providing Syria with Arar's dossier, dictating questions for the Syrians to ask him, and

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[13] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized a cause of action for damages against federal officers for violation of the Fourth Amendment.

[14] The Second Circuit's note that *Twombly* was decided after the district court's decision in *Arar* shows that the district court found the allegations regarding the detention in the United States insufficient even under pre-*Twombly* standards, and that the Second Circuit majority agreed under post-*Twombly* standards.

receiving intelligence learned from the interviews." *Id.* Arar eventually signed a confession stating that he had been trained as a terrorist in Afghanistan. *Id.* Arar was later released to the custody of a Canadian embassy official. *Id.* at 566–67.

Arar's complaint contained four counts against federal officials and sought damages resulting from Arar's detention and torture. *Arar*, 585 F.3d at 567. The counts included claims for: (1) relief under the TVPA, (2) relief under the Fifth Amendment for torture in Syria, (3) relief under the Fifth Amendment for detention in Syria, and (4) relief under the Fifth Amendment for the detention in the United States prior to the removal to Syria. *Id.* Arar also sought a declaratory judgment that the defendants violated his "'constitutional, civil, and human rights.'" *Id.*

As to the first count, which alleged that the defendants conspired with Jordanian and Syrian officials to have Arar tortured in violation of the TVPA, the court noted that "[a]ny allegation arising under the TVPA requires a demonstration that the defendants acted under color of foreign law, or under its authority." *Id.* at 568 (citation omitted). The court held that Arar failed to state a claim under the TVPA:

> Accordingly, to state a claim under the TVPA, Arar must adequately allege that the defendants possessed power under Syrian law, and that the offending actions (*i.e.*, Arar's removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power. *The complaint contains no such allegation*. Arar has argued that his allegation of conspiracy cures any deficiency under the TVPA. But *the conspiracy allegation is that United States officials encouraged and facilitated the exercise of power by Syrians in Syria, not that the United States officials had or exercised power or authority under Syrian law*. The defendants are alleged to have acted under color of federal, not Syrian, law, and to have acted in accordance with alleged federal policies and in pursuit of the aims of the federal government in the international context. *At most, it is alleged that the defendants encouraged or solicited certain conduct by foreign officials. Such conduct is insufficient to establish that the defendants were in some way clothed with the authority of Syrian law or that their conduct may otherwise be fairly attributable to Syria*. We therefore agree with the unanimous holding of the panel and affirm the District Court's dismissal of the TVPA claim.[15]

[15] It appears that the court concluded that the conduct alleged was insufficient to state a claim for relief because the applicable law—the TVPA—provided no grounds for relief where "United States officials encouraged and facilitated the exercise of power by Syrians in Syria," not that the facts alleged were insufficiently detailed or implausible.

Id. (internal citation and footnote omitted) (emphasis added).

With respect to the fourth count, which alleged that the conditions of confinement in the United States and the denial of access to courts during the detention violated Arar's substantive due process rights, the district court dismissed the claim as insufficiently pleaded and gave Arar an opportunity to replead, which Arar declined. *Id.* at 569. The Second Circuit majority agreed that the claim was insufficiently pleaded:

> Arar alleges that "Defendants"—undifferentiated—"denied Mr. Arar effective access to consular assistance, the courts, his lawyers, and family members" in order to effectuate his removal to Syria. But he fails to specify any culpable action taken by any single defendant, and does not allege the "meeting of the minds" that a plausible conspiracy claim requires. He alleges (in passive voice) that his requests to make phone calls "were ignored," and that "he was told" that he was not entitled to a lawyer, *but he fails to link these denials to any defendant, named or unnamed*. Given this omission, and *in view of Arar's rejection of an opportunity to re-plead*, we agree with the District Court and the panel majority that this Count of the complaint must be dismissed.

Arar, 585 F.3d at 569 (emphasis added). The court "expressed no view as to the sufficiency of the pleading otherwise, that is, whether the conduct alleged (if plausibly attributable to defendants) would violate a constitutionally protected interest." *Id.*

Having dismissed the claims based on Arar's detention in the United States, the court noted that the "remaining claims s[ought] relief on the basis of torture and detention in Syria . . . ." *Id.* The court declined to definitively resolve complex jurisdictional questions because it determined that the case had to be dismissed for other reasons. *See id.* at 570–71. The court framed the remaining issue as "whether allowing this *Bivens* action to proceed would extend *Bivens* to a new 'context,' and if so, whether such an extension is advisable." *Id.* at 572. As to context, the court concluded that "the context of extraordinary rendition in Arar's case is the complicity or cooperation of United States government officials in the delivery of a non-citizen to a foreign country for torture (or with the expectation that torture will take place)," and concluded that this was a "new context" because "no court ha[d] previously afforded a *Bivens* remedy for extraordinary rendition." *Id.* The court concluded that "special factors" counseled against creation of a *Bivens* remedy in this context. *See Arar*, 585 F.3d at 573. Specifically, the court found that a *Bivens* action in the context of extraordinary rendition "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation," which "counsel[ed] hesitation" in creating a *Bivens* remedy. *Id.* at 574. The court explained that "[a]bsent clear congressional authorization, the judicial review of extraordinary rendition would offend the separation of powers . . . and inhibit this country's foreign policy." *Id.* at 576. The court also cited the fact that classified information was involved, *id.*; the fact that "reliance on information that cannot be introduced into the

public record is likely to be a common feature of any *Bivens* actions arising in the context of alleged extraordinary rendition," in view of the "preference for open rather than clandestine court proceedings," *id.* at 577; the fact that extending *Bivens* into the extraordinary rendition context would require assessing assurances made by foreign countries that the alien would not be tortured, *id.* at 578; the possibility that *Bivens* suits would "make the government 'vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the [government] to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine covert operations,' or otherwise compromise foreign policy efforts," *Arar*, 585 F.3d at 578–79 (alteration in original) (citation omitted); and its conclusion that "Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions—which are directly related to the security of the population and the foreign affairs of the country—should be subjected to the influence of litigation brought by aliens," *id.* at 580–81.

Several dissenting opinions were filed. Judge Sack dissented, joined by Judges Calabresi, Pooler, and Parker, and disagreed with the majority's finding that there was no *Bivens* remedy, finding that the majority reached its conclusion "by artificially dividing the complaint into a domestic claim that does not involve torture . . . and a foreign claim that does . . . ." *Id.* at 582–83 (Sack, J., dissenting). Judge Sack's dissent noted that after dividing the claims, "[t]he majority then dismisse[d] the domestic claim as inadequately pleaded and the foreign claim as one that cannot 'be asserted under *Bivens*' . . . ." *Id.* at 583. Judge Sack argued that even if the claim regarding Arar's treatment in the United States were treated separately, "it was adequately pleaded in [Arar's] highly detailed complaint." *Id.* But Judge Sack asserted that it was improper to consider the claim regarding Arar's treatment in the United States in isolation, and that, viewed in the context of the entire complaint, the allegations did "not present a 'new context' for a *Bivens* action." *Id.* Judge Sack's dissent also concluded that even if a new context were presented, the majority's approach to determining whether to create a *Bivens* remedy was improper. *See Arar*, 585 F.3d at 583 (Sack, J., dissenting). Judge Sack noted that Arar declined to replead his fourth claim because he wanted early appellate review of the dismissal of the first three claims. *See id.* at 590 n.13. Judge Sack asserted that "Arar should not have been required to 'name those defendants [who] were personally involved in the alleged unconstitutional treatment'" because under § 1983, courts "allow plaintiffs to 'maintain[ ] supervisory personnel as defendants . . . until [they have] been afforded an opportunity through at least brief discovery to identify the subordinate officials who have personal liability.'" *Id.* at 591 (alterations in original). Judge Sack's dissent explained the impact of *Iqbal*:

> To be sure, the Supreme Court has recently set a strict pleading standard for supervisory liability claims under *Bivens* against a former Attorney General of the United States and the Director of the FBI. *See Iqbal*, *supra*. We do not think, however, that the Court has thereby permitted governmental actors who are unnamed in a complaint automatically to escape personal civil rights liability. A

> plaintiff must, after all, have some way to identify a defendant who anonymously violates his civil rights. We doubt that *Iqbal* requires a plaintiff to obtain his abusers' business cards in order to state a civil rights claim. Put conversely, we do not think that *Iqbal* implies that federal government miscreants may avoid *Bivens* liability altogether through the simple expedient of wearing hoods while inflicting injury. Some manner of proceeding must be made available for the reasons we recognized in *Davis* [*v. Kelly*, 160 F.3d 917, 921 (2d Cir. 1998)].

Id. at 591–92. Judge Sack's dissent asserted that the complaint's allegations were sufficient:

> Whether or not there is a mechanism available to identify the "Doe" defendants, moreover, Arar's complaint *does* sufficiently name some individual defendants who personally took part in the alleged violation of his civil rights. The role of defendant J. Scott Blackman, formerly Director of the Regional Office of INS, for example, is, as reflected in the district court's explication of the facts, set forth in reasonable detail in the complaint. So are at least some of the acts of the defendant Edward J. McElroy, District Director of the INS.

Id. at 592 (internal citation and footnotes omitted). Judge Sack's dissent pointed out that the complaint alleged:

> Early on October 8, 2002, at about 4 a.m., Mr. Arar was taken in chains and shackles to a room where two INS officials told him that, based on Mr. Arar's casual acquaintance with certain named individuals, including Mr. Almalki as well as classified information, Defendant Blackman, Regional Director for the Eastern Region of Immigration and Naturalization Services, had decided to remove Mr. Arar to Syria. Without elaboration, Defendant Blackman also stipulated that Mr. Arar's removal would be consistent with Article 3 of CAT . . . .

Id. at 592 n.15 (quoting Arar's complaint at ¶ 47) (quotation marks omitted). The complaint also alleged:

> The only notice given [Arar's counsel prior to his interrogation late on the evening of Sunday, October 6, 2002] was a message left by Defendant McElroy, District Director for Immigration and Naturalization Services for New York City, on [counsel's] voice mail at work that same [Sunday] evening. [She] did not retrieve the message until she arrived at work the next day, Monday morning, October 7, 2002—long after Mr. Arar's interrogation had ended.

Arar, 585 F.3d at 592 n.16 (Sack, J., dissenting) (quoting Arar's complaint at ¶ 43) (quotation marks omitted) (alterations in original). The dissent found the allegations sufficient:

> [A]n identification of the unnamed defendants by their "roles" should be sufficient to enable a plaintiff to survive a motion to dismiss, and subsequently to use discovery to identify them. And while the majority is correct that the complaint does not utter the talismanic words "meeting of the minds" to invoke an agreement among the defendants, it is plain that the logistically complex concerted action allegedly taken to detain Arar and then transport him abroad implies an alleged agreement by government actors within the United States to act in concert.

Id. at 592 (internal citation omitted).

Judge Sack also argued that the denial of access to courts and counsel claim was improperly dismissed because such a claim requires pleading "(1) a 'nonfrivolous, arguable underlying claim' that has been frustrated by the defendants' actions, and (2) a continued inability to obtain the relief sought by the underlying claim," and Judge Sack thought the pleadings were sufficient. *Id.* at 592–93 Judge Sack explained:

> But taking the allegations in the complaint as true, as we must, the complaint clearly implies the existence of an underlying claim for relief under CAT. The defendants can hardly argue that under Arar's assertions, which we take to be true, they lacked notice of such a claim, since the complaint says that it was they who first notified Arar about it: Arar alleges that on October 8, 2002, "two INS officials told him that . . . Defendant Blackman . . . had decided to remove [him] to Syria," and "Defendant Blackman also stipulated that [such action] would be consistent with Article 3 of CAT." Compl. ¶ 47. Indeed, the complaint alleges that Arar asked defendants for reconsideration of that decision—i.e., relief from it—in light of the prospect of torture in Syria, but the officials said that "the INS is not governed by the 'Geneva Conventions.'" *Id.*

Id. at 593 (alterations in original). Judge Sack's dissent concluded:

> Contrary to the district court's ruling, then, Arar's complaint put the defendants on notice of claims seeking relief to bar his removal that were frustrated by the defendants' actions. Whatever the ultimate merits of those claims, they would not have been "frivolous." And absent a remedy for the rendition and torture themselves—the district court, and the majority, of course, conclude there is none—no

> contemporaneous legal relief is now possible except through the access to courts and counsel claim. The Fourth Claim for Relief therefore states a sufficient due process access claim.

Id. at 593–94 (internal citation omitted). Judge Sack's dissent explained that the allegations were sufficient under *Iqbal*:

> More generally, we think the district court's extended recitation of the allegations in the complaint makes clear that the facts of Arar's mistreatment while within the United States—including the alleged denial of his access to courts and counsel and his alleged mistreatment while in federal detention in the United States—were pleaded meticulously and in copious detail. The assertion of relevant places, times, and events—and names when known—is lengthy and specific. Even measured in light of Supreme Court case law post-dating the district court's dismissal of the fourth claim, which *instituted a more stringent standard of review for pleadings*, the complaint here passes muster. It does not "offer[ ] 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Nor does it "tender[ ] 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955). Its allegations of a constitutional violation are "'plausible on [their] face.'" *Id.* (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955). And, as we have explained, Arar has pled "factual content that allows the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). We would therefore vacate the district court's dismissal of the Fourth Claim for Relief.

Id. at 594 (emphasis added) (alterations in original).

With respect to the second and third claims, Judge Sack stated that even if the fourth claim were properly dismissed, the dissenters "would still not concur in [the majority's] crabbed interpretation of Arar's complaint in light of the facts alleged in it." *Arar*, 585 F.3d at 594 (Sack, J., dissenting). Judge Sack noted that although Arar pleaded his fourth claim for domestic detention separately from his other claims, the complaint had to be construed as a whole. *See id.* at 595. Judge Sack explained:

> According to the complaint: (1) Arar was apprehended by government agents as he sought to change planes at JFK; (2) he was not seeking to enter the United States; (3) his detention was for the purpose of obtaining information from him about terrorism and his

> alleged links with terrorists and terrorist organizations; (4) he was interrogated harshly on that topic—mostly by FBI agents—for many hours over a period of two days; (5) during that period, he was held incommunicado and was mistreated by, among other things, being deprived of food and water for a substantial portion of his time in custody; (6) he was then taken from JFK to the MDC in Brooklyn, where he continued to be held incommunicado and in solitary confinement for another three days; (7) while at the MDC, INS agents sought unsuccessfully to have him agree to be removed to Syria because they and other U.S. government agents intended that he would be questioned there along similar lines, but under torture; (8) U.S. officials thwarted his ability to consult with counsel or access the courts; and (9) thirteen days after Arar had been intercepted and incarcerated at the airport, defendants sent him against his will to Syria, where they allegedly intended that he be questioned under torture and while enduring brutal and inhumane conditions of captivity. This was, as alleged, all part of a single course of action conceived of and executed by the defendants in the United States in order to try to make Arar "talk."

Id. Judge Sack explained that while "[i]t may not have been best for Arar to file a complaint that structure[d] his claims for relief so as to charge knowing or reckless subjection to torture, coercive interrogation, and arbitrary detention in Syria (the second and third claims) separately from charges of cruel and inhuman conditions of confinement and 'interfere[nce] with access to lawyers and the courts' while in the United States (the fourth claim)[,] . . . such division of theories [wa]s of no legal consequence." *Id.* (third alteration in original). Judge Sack asserted that the factual allegations supporting the second and third claims were much more comprehensive when the complaint was viewed as a whole:

> The assessment of Arar's complaint must, then, take into account the entire arc of factual allegations that it contains—his interception and arrest; his interrogation, principally by FBI agents, about his putative ties to terrorists; his detention and mistreatment at JFK in Queens and the MDC in Brooklyn; the deliberate misleading of both his lawyer and the Canadian Consulate; and his transport to Washington, D.C. and forced transfer to Syrian authorities for further detention and questioning under torture. Such attention to the complaint's factual allegations, rather than its legal theories, makes perfectly clear that the remaining claims upon which Arar seeks relief are not limited to his "detention or torture in Syria," . . . but include allegations of violations of his due process rights in the United States. The scope of those claims is relevant in analyzing whether a *Bivens* remedy is available.

Id. at 595–96. After considering the complaint as a whole, Judge Sack's dissent concluded that the complaint did not present a new context for a *Bivens* remedy. *See id.* at 596. Even if the context were new, Judge Sack thought "it mistaken to preclude *Bivens* relief solely in light of a citation or compilation of one or more purported examples of . . . 'special factors.'" *Id.* at 600. Judge Sack disagreed with the majority's conclusion with respect to most of the special factors.[16] He felt that secrecy issues should be dealt with through the state secrets privilege. *Arar*, 585 F.3d at 603 (Sack, J., dissenting).

Judge Parker also filed a dissent, which was joined by Judges Calabresi, Pooler, and Sack. Judge Parker asserted that the majority's decision to dismiss the fourth count and "proceed[] as though the challenged conduct [wa]s strictly extraterritorial . . . [went] far beyond any pleading rule [the court was] bound to apply, and it [wa]s inconsistent with both Rule 8 of the Federal Rules of Civil Procedure and recent Supreme Court decisions." *Id.* at 616 (Parker, J., dissenting) (footnote omitted). Judge Parker explained:

> Even after *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009), which dismissed discrimination claims against policymakers on account of inadequate pleading, Claim Four readily exceeds any measure of "plausibility." Claim Four seeks to hold Defendants John Ashcroft, Larry Thompson, Robert Mueller, James Ziglar, J. Scott Blackman, Edward McElroy, and John Does 1-10 responsible for the extreme conditions under which Arar was held in the United States. While the majority finds that Arar failed to allege the requisite "meeting of the minds" necessary to support a conspiracy, *see* Maj. Op. 24, it ignores the fact that Arar pleaded multiple theories of liability. Formal conspiracies aside, he also alleges that the defendants commonly aided and abetted his detention and removal—that is, that the defendants were personally involved in his mistreatment both in the United States and abroad.

Id. (footnote and citations omitted). Judge Parker further stated:

> In support of his claim for mistreatment and due process violations while in American custody, Arar includes factual

[16] Judge Sack stated that the majority's finding that extending a *Bivens* remedy in this context would essentially be a constitutional challenge to executive policies was the strongest argument for denying a *Bivens* remedy. *Arar*, 585 F.3d at 602 (Sack, J., dissenting). Judge Sack noted that "[a]fter *Iqbal*, it would be difficult to argue that Arar's complaint can survive as against defendants who are alleged to have been supervisors with, at most, 'knowledge' of Arar's mistreatment" but concluded that this did "not dispose of the cases against the lower-level defendants." *Id.* (citation omitted). Judge Sack further noted that "[i]t also may be that to the extent actions against 'policymakers' can be equated with lawsuits against policies, they may not survive *Iqbal* either," but asserted that "the relief Arar himself [sought was] principally compensation for an unconstitutional implementation of [the extraordinary rendition] policy," and that "[t]hat is what *Bivens* actions are for." *Id.*

allegations that are anything but conclusory. Indeed, he provides as much factual support as a man held incommunicado could reasonably be expected to offer a court at this stage. The complaint alleges that Defendant McElroy was personally involved in Arar's failure to receive the assistance of counsel. It alleges that Defendants Blackman and Thompson personally approved Arar's expedited transfer from the United States to Syria, implicating these officials in his inability to access the courts. And it recounts statements by Arar's American interrogators that they were discussing his situation with "Washington D.C." More broadly, Arar details the harsh conditions under which he was held, including shackling, strip searches, administrative segregation, prolonged interrogation, and a near communications blackout. Notably, these are not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. They easily satisfy the requirements of both *Iqbal* and also Rule 8, whose "short and plain statement" remains the baseline for notice-pleading. *See* FED. R. CIV. P. 8(a)(2).

Moreover, as *Iqbal* made clear, *plausibility is "context-specific,"* requiring the reviewing court "to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. There, the Supreme Court rejected Iqbal's discrimination claims against high-ranking federal officials because his complaint lacked sufficient factual allegations supporting the inference of discriminatory intent. *Id.* at 1952. Central to the majority's decision was the fact that these officials faced a devastating terrorist attack "perpetrated by 19 Arab Muslim hijackers." *Id.* at 1951. Against this backdrop, the majority found Iqbal's claim overwhelmed by the "obvious alternative explanation"—that his arrest stemmed from a "nondiscriminatory intent to detain aliens . . . who had potential connections to those who committed terrorist acts." *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 567, 127 S. Ct. 1955). Apparently having their own views about the defendants' state of mind, the majority simply found Iqbal's discrimination claim incredible.

Plausibility, in this analysis, is a relative measure. Allegations are deemed "conclusory" where they recite only the elements of the claim. They become implausible when the court's commonsense credits far more likely inferences from the available facts. *Plausibility thus depends on a host of considerations: The full factual picture presented by the complaint, the particular cause of action and its elements, and the available alternative explanations*. *See Iqbal*, 129 S. Ct. at 1947–52. As Rule 8 implies, a claim should

> only be dismissed at the pleading stage where the allegations are so general, and the alternative explanations so compelling, that the claim no longer appears plausible. *See* FED. R. CIV. P. 8(a); *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955 (requiring simply "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claims).
>
> Arar's claim readily survives this test, particularly in light of the Court's obligation to "draw[ ] all reasonable inferences in the plaintiff's favor" on a motion to dismiss.

Id. at 616–17 (additional internal citations omitted) (emphasis added) (alterations in original). Judge Parker argued that "[t]he notion that high-ranking government officials like Defendants Ashcroft and Mueller were personally involved in setting or approving the conditions under which suspected terrorists would be held on American soil—and even oversaw Arar's detention and removal—is hardly far-fetched," *id.* at 617–18, and distinguished *Iqbal*:

> In contrast to *Iqbal*, it is the alternative here that is difficult to fathom. To think that low-level agents had complete discretion in setting the conditions for holding a suspected member of al Qaeda defies commonsense. It requires the Court to believe that, while high-level officials were involved in arranging Arar's removal to Syria—a premise the majority does not question—they were oblivious to the particulars of his detention. The majority was, of course, bound to credit all reasonable inferences from the allegations in the complaint, understanding that their factual basis would be thoroughly tested in discovery. *See Twombly*, 550 U.S. at 555, 127 S. Ct. 1955 (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"). The inference that, in 2002, high-level officials had a role in the detention of a suspected member of al Qaeda requires little imagination.
>
> Further, unlike *Iqbal*, Arar's due process claims do not ask the Court to speculate about the mental state of government officials. Rather, Claim Four rests on objective factors—the conditions of confinement and his access to the courts—that are independent of motive. *Compare Iqbal*, 129 S. Ct. at 1948 (claim of invidious discrimination requires the plaintiff to "plead and prove that the defendant acted with discriminatory purpose"), with *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (government conduct that is "arbitrary, conscience-shocking, or oppressive in a constitutional sense" violates substantive due process). The complaint contains more than sufficient factual allegations detailing

these deprivations.

> Finally, it should not be lost on us that the Department of Homeland Security's Office of Inspector General has itself confirmed the broad contours of Arar's mistreatment, producing a lengthy report on the conditions of his detention in American custody. This report provides a powerful indication of the reliability of Arar's factual allegations at this stage . . . .
>
> Ultimately, it is unclear what type of allegations to overcome a motion to dismiss by high-level officials could ever satisfy the majority. In refusing to credit Arar's allegations, the majority cites the complaint's use of the "passive voice" in describing some of the underlying events. This criticism is odd because the occasional use of the passive voice has not previously rendered pleadings defective, particularly where the defendants' roles can be easily ascertained from the overall complaint. *See . . . Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 561 (2d Cir. 1985) ("It is elementary that, on a motion to dismiss, a complaint must be read as a whole, drawing all inferences favorable to the pleader.") (citations omitted). Specifically, the majority faults Arar for not pinpointing the individuals responsible for each event set out in the complaint and for failing to particularize more fully when and with whom they conspired. The irony involved in imposing on a plaintiff—who was held in solitary confinement and then imprisoned for ten months in an underground cell—a standard so self-evidently impossible to meet appears to have been lost on the majority.

Id. at 618–19 (additional internal citations and footnotes omitted). Judge Parker expressed concern with the majority's approach:

> The flaws in the majority's approach are not unique to Arar, but *endanger a broad swath of civil rights plaintiffs*. Rarely, if ever, will a plaintiff be in the room when officials formulate an unconstitutional policy later implemented by their subordinates. Yet these closeted decisions represent precisely the type of misconduct that civil rights claims are designed to address and deter. Indeed, it is this kind of executive overreaching that the Bill of Rights sought to guard against, not simply the frolic and detour of a few "bad apples." *The proper way to protect executive officials from unwarranted second-guessing is not an impossible pleading standard inconsistent with Rule 8, but the familiar doctrine of qualified immunity*.

> Even if the majority finds that Arar's factual allegations fall short of establishing the personal involvement of Defendants Ashcroft and Mueller, they plainly state a claim against defendants such as Thompson, Blackman, McElroy, and John Doe FBI and ICE agents. The direct involvement of these defendants is barely contested by the appellees and barely mentioned by the majority. For this reason alone, there is no legal justification for the majority to dismiss Claim Four outright.

Arar, 585 F.3d at 619 (Parker, J., dissenting) (internal citations omitted) (emphasis added).

Judge Pooler separately dissented, joined by Judges Calabresi, Sack, and Parker. Judge Pooler asserted:

> I would hold the Arar should have a *Bivens* remedy—to reinforce our system of checks and balances, to provide a deterrent, and to redress conduct that shocks the conscience. I understand the majority's opinion today to be a result of its hyperbolic and speculative assessment of the national security implications of recognizing Arar's *Bivens* action, its underestimation of the institutional competence of the judiciary, and its implicit failure to accept as true Arar's allegations that defendants blocked his access to judicial processes so that they could render him to Syria to be tortured, conduct that shocks the conscience and disfigures fundamental constitutional principles. This is a hard case with unique circumstances. The majority's disappointing opinion should not be interpreted to change *Bivens* law.

Id. at 627 (Pooler, J., dissenting). Judge Pooler also disagreed with the majority's decision to dismiss the TVPA claim, noting that "[i]n the Section 1983 context, the Supreme Court has held that private individuals may be liable for joint activities with state actors even where those private individuals had no official power under state law." *Id.* at 628. Judge Pooler noted that "[b]ecause plaintiffs must meet a plausibility standard for claims against federal officials under *Ashcroft v. Iqbal*, *supra*, [she was] not concerned that subjecting federal officials to liability under the TVPA would open the floodgates to a waive of meritless litigation." *Id.* at 629 n.7.

Judge Calabresi filed a separate dissent, joined by Judges Pooler, Sack, and Parker. Judge Calabresi stated: "[B]ecause I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay, I add a few words of my own, ' . . . more in sorrow than in anger.'" *Id.* at 630 (Calabresi, J., dissenting) (quoting *Hamlet*, act 1 sc. 2). Judge Calabresi argued that the majority decided a constitutional question unnecessarily. *See id.* at 633–34. Judge Calabresi's dissent did not separately address pleading issues.

- ***Meijer, Inc. v. Ferring B.V. (In re DDAVP Direct Purchaser Antitrust Litig.)***, 585 F.3d 677 (2d Cir. 2009), *cert. denied*, --- S. Ct. ----, No. 09-1175, 2010 WL 1220530 (Jun. 28, 2010). The plaintiffs, direct purchasers of the antidiuretic prescription medication desmopressin acetate (DDAVP), filed a class action against Ferring B.V. and Ferring Pharmaceuticals (collectively, "Ferring") and Aventis Pharmaceuticals ("Aventis"), alleging that the defendants abused the patent system to unlawfully maintain a monopoly over DDAVP. *Id.* at 682. Ferring developed, patented, and manufactured DDAVP, and Aventis had FDA approval for DDAVP tablets and a license from Ferring to market and sell the drug. *Id.* The plaintiffs asserted that the defendants inflated the price of DDAVP by suppressing generic competition for the tablets, in violation of antitrust laws. *Id.* The district court dismissed the suit, finding that the plaintiffs lacked standing and that they failed to state a claim upon which relief could be granted. *Id.*

  Ferring had filed an earlier patent infringement suit against Barr Laboratories ("Barr"), which was heard by the same district court that dismissed the present suit. *Id.* Barr had filed an Abbreviated New Drug Application ("ANDA") for a generic version of the DDAVP drug, and filed a certification stating that Ferring's patent for the DDAVP drug (the "'398 patent") was invalid, unenforceable, and/or would not be infringed by Barr's generic version. *Meijer*, 585 F.3d at 682. Ferring's suit alleged patent infringement, but the district court found on summary judgment that the '398 patent was unenforceable due to inequitable conduct before the Patent and Trademark Office (PTO) by Ferring. *Id.* at 683. In "*Ferring I*," the Federal Circuit affirmed. *Id.* The '398 patent had initially been rejected by PTO examiners as anticipated by or obvious from another patent (the "'491 patent"), and this decision was affirmed by the Board of Patent Appeals and Interferences on different grounds. *Id.* at 683. Two Ferring employees then submitted declarations from several scientists stating that the '491 patent and another article did not suggest the '398 patent, but the employees failed to disclose that four of the five declarants "previously had either 'been employed or had received research funds from Ferring.'" *Id.* Based on the declarations, the PTO issued the '398 patent. *Id.* The district court found the failure to disclose the declarants' relation to Ferring to be inequitable conduct in the Barr litigation. On appeal in the Barr litigation, the Federal Circuit held that the undisclosed affiliations would have been material to the decision to issue the '398 patent and that the relationships were "'deliberately concealed.'" *Id.* The Federal Circuit affirmed the district court's decision to find the patent unenforceable as against Barr and all other parties. *Meijer*, 585 F.3d at 683.

  In the instant lawsuit, the plaintiffs alleged that the defendants' conduct made the '398 patent unenforceable and violated the antitrust laws. Specifically,

  > [t]hey allege[d] that defendants Ferring and Aventis "engaged in an exclusionary scheme" that included (1) "[p]rocuring the '398 patent by committing fraud and/or engaging in inequitable conduct before the PTO," (2) "[i]mproperly listing the fraudulently obtained '398 patent in the [FDA's] Orange Book," thereby enabling patent infringement claims against potential competitors, (3) prosecuting

> sham infringement litigation against generic competitors, and (4) "filing a sham citizen petition to further delay FDA final approval of Barr's ANDA."

Id. (citation omitted) (third, fourth, and fifth alterations in original). The plaintiffs alleged that "the lack of competing, generic versions of DDAVP injured them by forcing them to pay monopolistic prices for the drug." *Id.* The district court acknowledged that under *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 173 (1965), a patentee loses First Amendment immunity for obtaining and enforcing a patent, and can incur antitrust liability for enforcing a patent, if the patent was obtained by fraud on the PTO. *Id.* at 684. But the district court concluded that the plaintiffs failed to plead fraud on the PTO with particularity, "noting that fraud requires a greater showing of culpability than the inequitable conduct that can render a patent unenforceable." *Id.* Although the district court found this sufficient for dismissal, it also concluded that the plaintiffs lacked antitrust standing. *Id.* The district court also rejected the non-*Walker Process* claims, including the Orange Book listing, the sham infringement litigation, and the sham citizen's petition, finding that the defendants had "not acted 'in subjective bad faith.'" *Id.* The district court also dismissed the claims against Aventis because the plaintiffs had failed to sufficiently allege that Aventis was complicit in Ferring's fraud on the PTO. *Meijer*, 585 F.3d at 684.

In addressing jurisdiction, the Second Circuit found that it had jurisdiction because the plaintiffs' theory that the defendants failed to supplement, amend, or withdraw their citizen petition, which asked the FDA to conduct additional testing of the generic drug after the defendants knew that the patent was unenforceable, "could plausibly constitute a Sherman Act violation," and therefore "support[ed] a patent-independent theory of liability." *See id.* at 687 (citing *Twombly*, 550 U.S. at 566 ("suggesting that either 'action or inaction' could be plausibly alleged as an antitrust violation")). The Second Circuit also found that the plaintiffs had standing.

In considering the adequacy of the complaint, the Second Circuit found that the antitrust claim was plausible under *Iqbal*. The plaintiffs' first theory, *Walker-Process* fraud, required showing:

> (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.

Id. at 692 (quoting *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1069–70 (Fed. Cir. 1998)) (quotation marks omitted). The court noted that Rule 9 requires "[a] party 'alleging fraud or mistake . . . [to] state with particularity the circumstances constituting

fraud or mistake.'" *Id.* (quoting FED. R. CIV. P. 9(b)). The court found that the plaintiffs had "alleged a series of 'highly material' omissions, without which 'the '398 patent would not have issued,'" and that "[t]he Federal Circuit agreed on the 'high[] material[ity]' of the omissions when it found the '398 patent unenforceable." *Id.* (second and third alterations in original). The court further found that "[t]he *Ferring I* litigation also addressed the third element of intent, as the district court found 'clear and convincing evidence of an intent to mislead the examiners.'" *Id.* (citation omitted). Finally, the court found that "[r]eliance and injury, the fourth and fifth elements, [we]re straightforward here: the PTO was justified in relying on the information the defendants provided, and injury is a 'matter of course whenever the other four elements are met.'" *Meijer*, 585 F.3d at 692 (citation omitted). The Second Circuit rejected the defendants' argument that the district judge's involvement in both the patent litigation finding the patent unenforceable and the instant litigation "enabled him to validly conclude that his previous findings could not support a claim of fraudulent procurement in the instant case." *Id.* The Second Circuit described the defendants' argument as "a logical non sequitur," explaining that "[t]he district court could be correct in determining that inequitable conduct occurred and yet mistaken that such conduct did not amount to fraud," and that "the defendants' argument *ignore[d] the distinction between findings and pleadings*" because "[e]ven if the district court was correct that the earlier record did not show fraud, the record in this case could be different following discovery." *Id.* (emphasis added). The court also rejected the defendants' argument that "simply adding a conclusory allegation of fraud to the previous findings is inadequate to meet the plaintiffs' obligation to 'allege facts that give rise to a strong inference of fraudulent intent," noting that courts are "'lenient in allowing scienter issues to withstand summary judgment based on fairly tenuous inferences,' because such issues are 'appropriate for resolution by the trier of fact,'" and "[t]he same holds true for allowing such issues to survive motions to dismiss." *Id.* at 693 (quoting *Press v. Chem. Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999)). The court concluded that "[t]he district court found 'an intent to deceive' in the patent litigation," and that "[g]ranting the plaintiffs all favorable inferences as we must on a motion to dismiss, and given that the omissions at issue occurred repeatedly over a period of years, this intent is sufficient to plausibly support a finding of *Walker Process* fraud." *Id.*

The Second Circuit also rejected the defendants' argument that the plaintiffs needed to allege intent separate from the omission itself. *Id.* The court noted that "[w]hile a false or clearly misleading statement can permit an inference of deceptive intent, a misrepresentation in the form of an omission is more likely to be innocent and cannot support *Walker Process* fraud without 'evidence of intent separable from the simple fact of the omission.'" *Meijer*, 585 F.3d at 693 (quoting *Dippin' Dots, Inc. v. Mosey*, 476 F.3d 1337, 1347 (Fed. Cir. 2007)). The court further noted that "[t]he issue in the initial infringement litigation was inequitable conduct, not *Walker Process* fraud," and that "the district court in that litigation correctly noted that high materiality could overcome a lesser showing of intent." *Id.* The court concluded that "[w]hile such balancing is impermissible with *Walker Process* claims, we think the plaintiffs' allegations are nonetheless sufficient." *Id.* The court explained that "*Dippin' Dots* concerned findings, not pleadings; even if the district court's findings in the *Ferring I* litigation could not satisfy *Dippin' Dots*, *the plaintiffs' pleadings could plausibly*

lead to additional findings that would satisfy Dippin' Dots*, which is all that is required at this stage of the litigation*." *Id.* (internal citation omitted) (emphasis added).

The Second Circuit further rejected the defendants' argument that the allegations of materiality were insufficient to support a claim for *Walker Process* fraud. The defendants had argued that because the plaintiffs did not dispute the patentability of the '398 patent on the merits or claim that, but for the fraud, no patent could have issued to anyone, the plaintiffs' claim had to fail. *Id.* The court explained that "*Walker Process* fraud must concern a material issue of patentability; otherwise, a patent would have issued regardless of any fraud, and potential plaintiffs would have suffered the same monopoly effects (but legitimately)." *Id.* The court found that even though "the plaintiffs [did] not address patentability directly in their complaint, the issue [was] implicit in their allegations." *Meijer*, 585 F.3d at 693. The court explained:

> The defendants' allegedly fraudulent affidavits were attempts to explain away prior art. The Federal Circuit found them 'absolutely critical' to the defendants' overcoming the patent application's initial rejection. *Ferring I*, 437 F.3d at 1189. Whether or not these declarations, if accompanied by full disclosure, would have resulted in an enforceable patent is debatable, but we think that, *at the pleading stage, the fact of non-disclosure is sufficient to properly allege materiality*. Overall, then, the plaintiffs have sufficiently alleged *Walker Process* fraud to survive the defendants' motion to dismiss on the pleadings.

Id. at 693–94 (emphasis added).

The Second Circuit also concluded that the sham litigation claim was properly pleaded. This claim required alleging that "'the litigation in question is: (i) 'objectively baseless,' and (ii) 'an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process . . . as an anticompetitive weapon.'" *Id.* at 694 (quoting *Primetime 24 Joint Venture v. Nat'l Broadcasting Co.*, 219 F.3d 92, 100–02 (2d Cir. 2000)). The court found that "[b]ased on the same facts alleged to sustain a *Walker Process* claim, . . . in the circumstances of this case, the plaintiffs' allegations are also sufficient to make out a sham litigation claim," and that "[t]he defendants effectively concede[d] as much" by arguing that the sham litigation claim was duplicative of the patent fraud claim. *Id.* The court further concluded that the Orange Book claim could proceed, finding that "[h]aving determined that the *Walker Process* and sham litigation theories are still in play, . . . the plaintiffs ha[d] adequately alleged that the defendants improperly listed the '398 patent in the FDA's Orange Book." *Id.*

Finally, the Second Circuit concluded that the citizen petition theory was adequately pleaded. The court explained:

> The district court dismissed this theory on the basis that it concerned petitioning activity protected by the First Amendment. To reach this conclusion, the district court presumably reasoned that the plaintiffs could not plausibly show the petition to be a sham, i.e., objectively and subjectively baseless, a proposition with which we disagree. The FDA found that the citizen petition "had no convincing evidence" and lacked "any basis" for its arguments. In the *Ferring I* litigation, the district court suggested that the petition might have been "nothing more than a hardball litigation tactic, motivated by a desire to keep out competition for as long as possible after the expiration of the patent and raise transactional costs for Barr." *Ferring B.V.*, 2005 WL 437981, at *17. Together these findings indicate the plaintiffs could plausibly show the citizen petition to have been a sham.

Id. (internal citations omitted). The defendants argued that the citizen petition could not be the basis for antitrust liability because "it could not have impacted the FDA's decision, as the FDA ultimately rejected the petition." *Meijer*, 585 F.3d at 694. The court rejected that argument, explaining that it "ignore[d] the possibility that the sham petition caused a delay in generic competition, a possibility reinforced by the fact that the FDA approved the generic drug on the same day that it rejected the petition." *Id.* (citation omitted). The court found:

> Whether the '398 patent was valid on the date the petition was filed is immaterial to this theory's success, because the plaintiffs can plausibly show the patent to have been fraudulently procured. It may turn out at trial that this petition was not a sham, or that the FDA's approval of the generic drug was not delayed by the petition, but the *possibility that the petition was a sham, and that it impacted the FDA's decision, is sufficiently plausible to defeat the motion to dismiss*.

Id. at 694–95 (emphasis added). The court concluded that "[o]verall, the plaintiffs have stated an antitrust claim upon which relief may be granted," noting that "[b]ased on the pleadings, each of their four theories could plausibly succeed." *Id.* at 695.

The Second Circuit also found that the district court had erred by dismissing the claims against Aventis on the basis that the fraud had not been pleaded with sufficient particularity under Rule 9. The district court had concluded that the theory "'[t]hat Aventis would pay to license a patent which it knew to be unenforceable fl[ew] in the face of reason,'" but the Second Circuit found the "allegations plausible, and sufficient to survive a motion to dismiss on the pleadings." *Id.* The Second Circuit explained:

> At the time Aventis filed its [new drug application] and listed DDAVP in the Orange Book, the '398 patent's validity was already in question with the patent having been rejected twice, and the PTO

> having raised concerns of bias. Yet, the plaintiffs assert that Aventis apparently made no effort to independently investigate and attest to the validity of the '398 patent. Rule 9(b) requires only the circumstances of fraud to be stated with particularity; knowledge itself can be alleged generally. Especially considering the long-standing relationship between Aventis and Ferring, the plaintiffs have adequately stated circumstances that give rise to a plausible inference of knowledge and liability. At this early stage, the plaintiffs need only state a plausible claim of monopolization, and they have alleged enough for their suit against Aventis to proceed.

Id. (internal citation omitted).

- ***Selevan v. N.Y. Thruway Auth.***, 584 F.3d 82 (2d. Cir. 2009). The plaintiffs challenged an interstate highway toll policy that provided a discount to residents of a particular New York city. The defendant's policy allowed residents of Grand Island, New York to pay as little as nine cents per trip on the Grand Island Bridges, while others were required to pay 75 cents. *Id.* at 86–87. The plaintiffs, individuals who had paid the non-resident toll during trips through New York to New Jersey for shopping, tourism, and other activities, brought suit under § 1983, alleging that the policy violated the dormant Commerce Clause and the plaintiffs' rights under the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV of the Constitution, and the Equal Protection Clause of the New York Constitution. *Id.* at 87. The district court dismissed the complaint, finding that the plaintiffs lacked standing under the "prudential standing" doctrine[17] because the claims were not within the "zone of interests" protected by the Commerce Clause, the Fourteenth Amendment's Equal Protection Clause, or the Privileges and Immunities Clause of Article IV. *Id.* at 87–88. The district court did not consider whether the complaint stated a claim under the Privileges and Immunities Clause of the Fourteenth Amendment because the complaint merely recited that provision, and the court concluded that even if the plaintiffs had standing to bring their equal protection claim, they failed to state a claim. *Id.* at 88.

  On appeal, the Second Circuit held that the plaintiffs had met the Article III standing requirements. The court concluded that the district court had improperly dismissed the complaint for lack of prudential standing, noting that "the zone-of-interests requirement invoked by the District Court in this case is 'not a rigorous one.'" *Id.* at 91 (quoting *Nat'l Weather Serv. Employees Org., Branch 1-18 v. Brown*, 18 F.3d 986, 989 (2d Cir. 1994)) (additional citation omitted). The Second Circuit also noted that "[b]ecause this cause comes before us following a decision on a motion to dismiss, we need only consider whether the

[17] "The Supreme Court has held that 'prudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Selevan*, 584 F.3d at 91 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

complaint alleges a plausible claim that the regulation violates the Commerce Clause," *Selevan*, 584 F.3d at 92 (citing *Iqbal*, 129 S. Ct. at 1950), and that "*[w]hether the 75-cent toll is actually a burden on interstate commerce is a question left for later proceedings*." *Id.* (emphasis added). The Second Circuit also reasoned that dismissal was not appropriate based on the argument that the defendants were acting as "market participants." *Id.* at 93–94. "The [market participant] doctrine 'differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the [dormant] Commerce Clause.'" *Id.* at 93 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988)). The court concluded that "at least in this stage of the litigation, a finding that [the defendant] acted as a 'market participant' (rather than in its governmental capacity) is not warranted," explaining that "the toll may well be permissible, but, absent a finding that [the defendant] acted as a market participant, it is subject to scrutiny under the dormant Commerce Clause." *Id.* at 94.

In considering whether the complaint stated a claim under the dormant Commerce Clause, the court noted that the plaintiffs had alleged that the "toll policy discriminates against interstate commerce and that, in the alternative, it imposes a burden on interstate commerce that is not justified by any benefits it creates." *Id.* at 95. The court noted that "in order to state a claim for discrimination in violation of the Commerce Clause, a plaintiff must 'identify an[ ] in-state commercial interest that is favored, directly or indirectly, by the challenged statutes at the expense of out-of-state competitors,'" *id.* (quoting *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (internal quotation marks omitted)), and found that the plaintiffs had "failed to 'identify an[ ] in-state commercial interest that is favored,'" and had not "point[ed] to a particular 'out-of-state competitor' that [wa]s harmed by [the defendant's] toll policy." *Selevan*, 584 F.3d at 95. As a result, the court concluded that the plaintiffs had failed to allege that the "toll policy 'discriminates' against interstate commerce." *Id.*

The Second Circuit explained that while the district court had correctly determined that the plaintiffs failed to allege that the policy discriminated against interstate commerce, the district court had failed to inquire whether the policy otherwise violated the Commerce Clause. *Id.* The court noted that under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), "a nondiscriminatory regulation that 'regulates even-handedly to effectuate a legitimate local public interest,' is nevertheless unconstitutional if ''the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.''" *Id.* (internal citations omitted). The court found the allegations sufficient to survive dismissal:

> As noted, plaintiffs have alleged that [the defendant's] policy of charging non-residents of Grand Island tolls that are more than eight times greater than the tolls charged to Grand Island residents "place[s] burdens on interstate commerce that exceed any local benefit that allegedly may be derived from them." Because *at this state of a suit we are required to assume all "well-pleaded factual*

> *allegations" are true and assess the complaint only to "determine whether [the allegations] plausibly give rise to an entitlement to relief" at this stage of litigation*, *Iqbal*, 129 S.Ct. at 1950, we conclude that plaintiffs' allegations are sufficient to survive a motion to dismiss.

Id. (internal citation omitted) (emphasis added) (second and third alterations in original). The court further explained that although the lead plaintiffs in the putative class had alleged only a small injury to themselves, the court was "confident that neither the number of prospective class members nor the cumulative difference between the tolls they paid and those paid by Grand Island residents [wa]s negligible," and noted that "whether a state policy violates the dormant Commerce Clause does not depend on the extent of its impact on an individual plaintiff," but "must be judged by its overall economic impact on *interstate commerce* in relation to the putative local benefits conferred." *Id.* at 95–96 (citing *Pike*, 397 U.S. at 142).

The Second Circuit directed the district court on remand to "undertake the inquiry prescribed by the Supreme Court for determining whether a fee imposed by a governmental entity to defray the cost of facilities used by those engaged in interstate commerce violates the dormant Commerce Clause or the right to travel . . . ." *Selevan*, 584 F.3d at 96. Under the relevant Supreme Court precedent, "states are always permitted to require interstate travelers 'to bear a fair share of the costs of providing public facilities that further travel,'" *id.* (quoting *Evansville-Vanderburgh Airport Auth. District v. Delta Airlines, Inc.*, 405 U.S. 707, 712 (1972)), and "a fee is reasonable and constitutionally permissible 'if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce.'"[18] *Id.* (quoting *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 369 (1994)). The court noted that "[w]hether the fee schedule exception provided to Grand Island residents violates the dormant Commerce Clause will depend in part on whether the fee represents a fair approximation of that group's use of the bridge—an inquiry that *is too fact-dependent to be decided upon examination of the pleadings*." *Id.* at 98 (citing *Northwest Airlines*, 510 U.S. at 369) (emphasis added).

The Second Circuit also disagreed with the district court's determination that the complaint failed to assert a claim for violation of the right to travel under the Fourteenth Amendment's Privileges and Immunities Clause, finding that the "plaintiffs' complaint supplied a detailed description of [the defendant's] Grand Island Bridge toll policy," and "[u]nder the heading 'Causes of Action,' the complaint alleged that [the defendant's] toll policy deprived plaintiffs of 'their constitutional rights under the Privileges and Immunities Clause of Article IV and/or

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[18] The Second Circuit noted that it had already determined that the amended complaint failed to allege that the policy discriminated against interstate commerce, and that, as a result, unless the plaintiffs were given leave to amend their complaint, the district court only had to assess the other two factors on remand. *Selevan*, 584 F.3d at 98 n.4.

the Fourteenth Amendment by charging them more for traveling than [the defendant] charged certain New York State residents.'" *Id.* at 99. The court held that "[t]aken together, plaintiffs' allegations clearly implicate[d] a violation of plaintiffs' right to travel under the Fourteenth Amendment's Privileges and Immunities Clause . . . ." *Id.* The Second Circuit noted that the plaintiffs had not alleged that they routinely paid the full toll to commute to work or that the toll had some other significant financial impact on them, but only that they paid the toll on the way to New Jersey for shopping and other activities, and concluded that "[t]hese facts suggest at most a 'minor restriction' on plaintiffs' right to travel, rather than a 'penalty.'" *Id.* at 101 (footnote omitted). But the court held: "Nevertheless, plaintiffs' allegations implicate a possible violation of the right to travel in the context discussed in *Evansville* inasmuch as they contend that they have been charged an excessive toll for use of the Grand Island Bridge while residents of New York are charged substantially less." *Selevan*, 584 F.3d at 101–02. The court concluded that "the District Court erred in applying rational basis review to [the defendant's] toll policy," and directed the district court on remand to "determine whether the toll policy implicates the right to travel in the context discussed in *Evansville* and, if so, . . . to apply strict scrutiny." *Id.* at 102. The court further directed that if the district court "[found] that the toll [wa]s merely a 'minor restriction on travel' that d[id] not amount to the denial of a fundamental right, then the District Court [should] apply the *Northwest Airlines* test to determine if the toll discriminate[d] against interstate commerce." *Id.* (internal citation omitted).

Finally, the Second Circuit held that the district court had properly dismissed the claim alleged under the Privileges and Immunities Clause of Article IV by one of the plaintiffs, who was a U.S. citizen residing in Canada, because "neither the text nor the purpose of the Privileges and Immunities Clause of Article IV—integrating the various states into a coherent whole—would be served by extending its protection to residents of foreign countries, even U.S. citizens residing in foreign countries." *Id.* at 103.

- ***Panther Partners Inc. v. Ikanos Commc'ns, Inc.***, 347 F. App'x 617, No. 08-3398, 2009 WL 2959883 (2d Cir. Sept. 17, 2009) (unpublished summary order). The plaintiff alleged that defendant Ikanos, and various directors and underwriters, negligently made false statements in connection with the company's initial public offering and its secondary offering, in violation of the Securities and Exchange Act of 1933. *Id.* at *1. The district court dismissed the complaint under Rule 12(b)(6), denied leave to amend, and denied a request to reconsider. *Id.*

  The Second Circuit concluded that the standard applied by the district court was too strict, but nonetheless concluded that the complaint was not sufficient under the more lenient standard described in *Twombly*. *See id.* at *2. The complaint alleged that "'[b]y January 2006, Ikanos learned that the VDSL Version Four chips were failing,'" and that "'Ikanos determined that the VDSL Version Four chips had a failure rate of 25 % [to] 30%, which was extremely high.'" *Id.* (alteration in original). The Second Circuit found that the district court had improperly required the plaintiff to allege when Ikanos knew the failure rate was specifically 25 to 30%, and explained that the plaintiff only needed to allege that Ikanos

knew of abnormally high failure rates before the company published the registration statement accompanying its secondary offering. *Id.* The court explained: "The plausibility standard would not require that plaintiff assert, for example, exactly when the company knew the difference in defect rates between the VDSL chips and other chips was statistically significant. The plausibility standard, however, does require a statement alleging that they knew of the above-average defect rate before publishing the registration statement." *Id.* The court concluded that "the amended complaint failed to meet the plausibility requirements of *Twombly* because it did not allege facts sufficient to complete the chain of causation needed to prove that defendants negligently made false statements." *Panther Partners*, 2009 WL 2959883, at *2.

In reviewing the district court's denial of reconsideration, the Second Circuit noted that the proposed second amended complaint alleged additional facts, but none of those facts resolved the critical issue of when the company knew that the defect rates were unusually high. *Id.* at *3. However, the court found that amendment might cure the defect, stating: "[C]ourts may consider all possible amendments when determining futility. Because it seems to us possible that plaintiff could allege additional facts that Ikanos knew the defect rate was above average before filing the registration statement, and that this allegation, if made, would be sufficient to meet *the high standards* that *Iqbal* and *Twombly* require for pleadings, further amendment may not be futile." *Id.* at *4 (emphasis added). The court concluded: "[W]e recognize that *Iqbal* and *Twombly raised the pleading requirements substantially* while this case was pending," and vacated the district court's denial of the motion to reconsider its decision to deny leave to amend. *Id.* (emphasis added).

- ***Bruno v. Metro. Transp. Auth.***, 344 F. App'x 634, No. 08-1993-cv, 2009 WL 2524009 (2d Cir. Aug. 19, 2009) (unpublished summary order). The plaintiff sued his employer under the Federal Employers' Liability Act, which provides that a railroad engaged in interstate commerce will be liable "'to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," *id.* at *1 (quoting 45 U.S.C. § 51), and which requires "'the plaintiff [to] prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation,'" *id.* (quoting *Tufariello v. Long Island R.R.*, 458 F.3d 80, 87 (2d Cir. 2006)).

  The Second Circuit concluded that the plaintiff's claim that "he suffered 'severe and disabling injuries' as a result of the [defendant's] policy that requires its employees who are not on active work status to remain at home during working hours, unless they receive a 'no work' status" was "implausible on its face." *Id.* The court justified dismissal by noting that the complaint did not allege that the defendant had any duty to grant the "no work" status or that there was a causal link between the policy and the plaintiff's injuries, and that the plaintiff alleged "no facts apart from conclusory assertions as to how the MTA's denial of his no work status caused unspecified 'severe and disabling injuries.'" *Id.* The court concluded that the claim was frivolous. *Id.*

The Second Circuit concluded that the plaintiff's second claim, "that on or prior to September 13, 2001, the [defendant] assigned [the plaintiff] to work at or near the World Trade Center, and that he sustained 'severe and disabling injuries' by reason of the [defendant's] negligence," should also be dismissed. *Bruno*, 2009 WL 2524009, at *1. The court explained that the plaintiff had conceded that he was precluded from bringing this claim in the absence of fraud because of a release he signed, and that he had not pleaded fraud. *Id.*

- ***South Cherry Street, LLC v. Hennessee Group LLC***, 573 F.3d 98 (2d Cir. 2009). The plaintiff alleged breach of contract and violation of § 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated by the SEC, in connection with the defendant's alleged failure to learn and disclose that a hedge fund in which the plaintiff invested on the defendant's recommendation was part of a Ponzi scheme. *Id.* at 99–100. The district court dismissed the contract claim as barred by the Statute of Frauds, and dismissed the securities fraud claim on the ground that the complaint failed to plead scienter as required by the PSLRA. *Id.* at 100. The Second Circuit affirmed.

  The PSLRA requires that "'[i]n any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, *the complaint shall*, with respect to each act or omission alleged to violate this chapter, *state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind*.'" *Id.* at 110 (quoting 15 U.S.C. § 78u-4(b)(2)) (emphasis added by *South Cherry Street* court). The court explained that "'[a] plaintiff alleging fraud in a § 10(b) action . . . must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference.'" *Id.* at 111 (quoting *Tellabs*, 551 U.S. at 328) (emphasis added by *South Cherry Street* court). "And in determining whether this standard has been met, the court must consider whether '*all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.'" *Id.* (quoting *Tellabs*, 551 U.S. at 323). The court concluded that the complaint "lack[ed] sufficient factual allegations to give rise to a strong inference of either fraudulent intent or conscious recklessness." *South Cherry Street*, 573 F.3d at 112. The court found that the complaint failed to allege intentional misrepresentation because it alleged only that the defendant would have learned about the problems with the recommended funds if it had performed the due diligence it promised, and did not allege that the defendant had any knowledge that its representations about the funds were untrue. *See id.* The court also found that the complaint failed to allege recklessness because the complaint alleged only that the defendant breached its contractual obligation by failing to take obvious investigative steps and ignoring clear red flags, but did not allege that the defendant did not believe the funds' representations were accurate or any facts that the defendant knew that either made the falsity of the funds' representations obvious or that should have alerted the defendant that the representations were questionable. *Id.* The court concluded that while it might be plausible to infer that the defendant had acted negligently, it was "far less plausible to infer that an industry leader that prides itself on having expertise that is called on by Congress, that emphasizes its thorough due diligence process, that values

and advertises its credibility in the industry—and that evaluates 550 funds—would deliberately jeopardize its standing and reliability, and the viability of its business, by recommending to a large segment of its clientele a fund as to which it had made, according to South Cherry, little or no inquiry at all." *Id.* at 113.

Although the court was examining the heightened pleading requirements under the PSLRA, it focused on the plausibility standard and discussed the need to plead more than speculation in order to meet the requirements of Rule 8. The Second Circuit noted that the plaintiff's assertion on appeal that it would be appropriate to draw the inference that the defendant acted illegally appeared nowhere in the complaint and the plaintiff had conceded that the inference was speculative. *Id.* The court continued:

> [The plaintiff] argues that because such facts would be *peculiarly within the knowledge of the defendants*, it had no obligation to include such an allegation in the Complaint, intimating that it might hope to develop some such evidence in discovery. To be sure, South Cherry should not include such an allegation in its pleading without having a "factual basis or justification," FED. R. CIV. P. 11 Advisory Committee Note (1993). But "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct," *Twombly*, 550 U.S. at 564 n.8, 127 S. Ct. 1955; and a plaintiff whose "complaint is deficient under Rule 8 . . . is not entitled to discovery," *Iqbal*, 129 S. Ct. at 1954. South Cherry's confessed inability to offer more than speculation that there may have been such unlawful conduct underscores, rather than cures, the deficiency in the Complaint.

Id. at 113–14 (emphasis added).

- ***Harris v. Mills***, 572 F.3d 66 (2d Cir. 2009). The plaintiff, formerly licensed by the state of New York as a doctor of osteopathic medicine, had his medical license revoked because he committed fraud and engaged in improper medical practices. The New York State Education Department denied the plaintiff's petition to reinstate his license, and the plaintiff brought a *pro se* action under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and 42 U.S.C. § 1983, claiming that he was illegally denied a reasonable accommodation for his cognitive disabilities and unconstitutionally deprived of due process. *Id.* at 68. The district court dismissed the accommodation claims under the ADA and the Rehabilitation Act against the individual defendants because the statutes did not provide for individual liability, and dismissed the Rehabilitation Act claim and the remaining claims for failure to state a claim. The Second Circuit affirmed the finding that the claims were legally insufficient, "even when read with the lenity that must attend the review of *pro se* pleadings." *Id.*

  The plaintiff's first accommodation claim alleged that "the Education Department wrongly denied him an 'understanding of the impact of [his] disabilities,'" which deprived him of a

fair reinstatement hearing, and prevented the Department from properly assessing his "'rehabilitation.'" *Id.* at 74 (citation omitted). The Second Circuit noted that the complaint did not identify how the plaintiff's disabilities affected the behavior that caused the revocation of his license or how those disabilities could be accommodated to reform that behavior. *Id.* The court explained that "[g]enerally construed, this allegation amount[ed] only to the contention that Harris's medical licensing qualifications should be relaxed in light of his disability," but "[t]his [wa]s not a reasonable accommodation claim." *Id.*

The plaintiff's second accommodation claim—based on denial of the opportunity "to read to the Committee on Professions a written explanation so his case 'would be more organized and clearly presented'"—failed because, even liberally construed, there was no allegation that the plaintiff was denied the opportunity to read his statement "'by reason' of his disability, let alone 'solely by reason' of his disability, as the Rehabilitation Act requires." *Harris*, 572 F.3d at 74–75. It was also unclear how the requested accommodation would have helped, since the plaintiff alleged "'difficulty with comprehending the written word' and 'a related problem with written expression.'" *Id.* at 75 (citations omitted).

The plaintiff's due process claim was dismissed because the plaintiff "was given notice and an opportunity to be heard before his petition for reinstatement was denied," and state law provided an adequate post-deprivation hearing for the denial of his petition to reinstate his license. *Id.* at 76.

Finally, the court found dismissal appropriate for the "cause of action that the defendants' decisions were '[a]rbitrary and capricious' inasmuch as the defendants failed to follow their own procedural rules." *Id.* (citation omitted). The court found that "[i]nsofar as this [wa]s intended to be a stand-alone legal claim based solely on violations of state regulations, it [wa]s not actionable in federal court," and "therefore state[d] no claim upon which relief c[ould] be granted." *Id.*

Third Circuit

- ***Abulkhair v. Bush***, No. 10-2812, 2011 WL 453477 (3d Cir. Feb. 9, 2011) (unpublished) (per curiam). Plaintiff Assem Abulkhair filed a complaint challenging the denial by the U.S. Customs and Immigration Service of his application for naturalization as a U.S. citizen. Abulkhair sought monetary damages under *Bivens* against President Bush and a number of Customs and Immigration Service officials for violation of his constitutional rights. All of his claims were premised on his assertion that his application was denied because he is a "Moslem living in the U.S." The district court dismissed his complaint for failure to state a claim, and also granted a motion for summary judgment against him.

  The Third Circuit affirmed the dismissal for failure to state a claim, reasoning as follows:

  > The defendants moved to dismiss Abulkhair's *Bivens* claims based on, among other things, his failure to allege any facts that the

named federal defendants were personally involved in the alleged violations of his constitutional rights. We agree with the district court that Abulkhair failed to sufficiently plead a claim against any defendant under *Bivens*.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" [*Iqbal*, 129 S. Ct.] at 1949 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Further, to state a Bivens claim based on alleged unconstitutional discrimination, the petitioner "must plead sufficient factual matter to show that [a defendant] adopted and implemented the ... policies at issue not for a neutral . . . reason but for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 1948–49.

Abulkhair did not make specific claims against any of the named defendants. Rather, reading the complaint liberally, he appears to be asserting that the defendants adopted an unconstitutional policy of discrimination against Muslim applicants for naturalization. As in *Iqbal*, Abulkhair's conclusory assertions against the federal officials have not "nudged [his] claims of invidious discrimination across the line from conceivable to plausible," so as to be entitled to a presumption of truth, as is required to survive a motion to dismiss. *Id.* at 1950–51 (internal quotations omitted) (alteration in original). Accordingly, the district court appropriately dismissed these claims under Rule 12(b)(6).

Id. at *3–4.

- ***Santiago v. Warminster Township***, 629 F.3d 121 (3d Cir. 2010). Plaintiff Gloria Santiago filed a complaint under § 1983 and state tort law against Warminster Township and three of its senior police officers, including the police chief, alleging that she suffered a heart attack after being subjected to excessive force during a police raid on her home. Her claims against the police officers who actually conducted the raid—a group that operated under the moniker "Alpha Team"—were dismissed as untimely. Her remaining claims were against the Township and against three senior police officers who were not present at the raid but who allegedly planned and supervised the raid. The district court dismissed all of these claims for failure to state a claim.

  The purpose of the raid was to apprehend one of Santiago's grandsons, for whom the police had a warrant. According to the complaint, at the commencement of the raid, the occupants of Santiago's home were awakened by police using a public address system. Santiago, who

was 60 years old, looked through a window and saw an armored vehicle and police officers wearing combat uniforms and carrying automatic weapons. A police officer ordered everyone to exit the house one at a time. Santiago came out first and was commanded, at gun point, to raise her hands and walk toward the officers. When she did not raise them high enough, she was ordered to raise them higher or else be shot. When Santiago reached the officers, an officer conducted an invasive pat down search. He then restrained her hands behind her back and seated her on the ground next to the police vehicle. Santiago was frightened and complained of chest pain. She sat with her hands tied for approximately 30 minutes while her home was searched. She continued to complain of pain and told another of her grandsons that she felt pain in her heart. The grandson told the officers that Santiago was having a heart attack, and the officers summoned an ambulance to take her to the hospital.

The Third Circuit began by summarizing Santiago's allegations against the three police officers:

> Chief Michael Murphy is Police Chief of Warminster Township Police Department. . . . Although Chief Murphy was not present at the scene on May 13, 2006, he ordered and approved the plan to execute the arrest warrants. This early morning "surround and call out" operation specifically sought to have all occupants exit the Plaintiff's home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had been cleared and searched. Chief Murphy violated Plaintiff's Fourth Amendment rights in that this plan used excessive force in restraining Plaintiff, a non-target occupant who presented no threat or risk, for a lengthy period of time and used coercion in obtaining her consent to search the premises.
>
> Christopher Springfield was a police officer with Warminster Township Police Department. On May 13, 2006, he held the rank of Lieutenant and was in [sic] placed in charge of the "surround and call out" operation by Chief Murphy. . . . Lt. Springfield violated Plaintiff's Fourth Amendment rights in that he permitted the use of excessive force in restraining Plaintiff, a non-target occupant who presented no threat or risk, for a lengthy period of time and used coercion in obtaining her consent to search the premises.
>
> Lt. James Donnelly is an officer with the Warminster Township Police Department. . . . Chief Murphy ordered Lt. Donnelly to plan and help execute an early morning "surround and call out" operation which sought to have all occupants exit the Plaintiff's home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had

> been cleared and searched. Lt. Donnelly violated Plaintiff's Fourth Amendment rights in that this plan used excessive force in restraining Plaintiff, a non-target occupant who presented no threat or risk, for a lengthy period of time, and used coercion in obtaining her consent to search the premises. As Tactical Team Leader . . . , Lt. Donnelly was responsible for the actions of Alpha Team.

The Third Circuit affirmed the district court's dismissal of the complaint, reasoning as follows:

> We take as true all the factual allegations of the Third Amended Complaint and the reasonable inferences that can be drawn from them, *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 ([3d Cir.] 2010), but we disregard legal conclusions and "recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. "To survive a motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Sheridan*, 609 F.3d at 262 n. 27 (quoting *Iqbal*, 129 S. Ct. at 1949). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.*
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> . . . .
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> We address first the dismissal of Santiago's claims against the Supervising Officers. The District Court dismissed those claims because it held that Santiago had not pled any basis of liability in the Supervising Officers' own acts but, instead, had alleged only a theory of respondeat superior liability, which cannot serve as the basis of a claim for constitutional violations. *See Iqbal*, 129 S. Ct. at 1948 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior."). While we conclude that the Third Amended Complaint can be read as alleging liability based on the Supervising Officers' own acts, we will nevertheless affirm the District Court's ruling because those allegations fail to meet the pleading requirements set forth by the Supreme Court in *Twombly* and *Iqbal*.
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> . . . .
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> . . . . Santiago's allegations appear to invoke a theory of liability under which "a supervisor may be personally liable . . . if he or she participated in violating the plaintiff's rights, directed others to

violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations." *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004). Specifically, Santiago alleges that Chief Murphy and Lt. Donnelly developed a plan that "sought to have all occupants exit the Plaintiff's home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had been cleared and searched." The claim is thus that, through the creation and authorization of the plan, Chief Murphy and Lt. Donnelly "directed others to violate [Santiago's rights]." *A.M.*, 372 F.3d at 586. The related allegation that Lt. Springfield, as the person in charge of the operation, "permitted the use of excessive force" appears to be a claim that Lt. Springfield "acquiesced in his subordinates' violations." *A.M.*, 372 F.3d at 586.

Consequently, although the Third Amended Complaint seeks a species of supervisory liability, it is not respondeat superior liability.

That Santiago has alleged supervisory liability claims does not mean that she has supported those allegations with "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Sheridan*, 609 F.3d at 262 n. 27 (quoting *Iqbal*, 129 S. Ct. at 1949), as is required by the seminal Supreme Court decisions in *Iqbal* and *Twombly*. To determine the sufficiency of a complaint under the pleading regime established by those cases, a court must take three steps: First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Iqbal*, 129 S. Ct. at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.*

. . . .

To state a claim of supervisory liability against Chief Murphy and Lt. Donnelly, at least of the kind that it appears Santiago is advancing, she must plead that they "directed others to violate [her rights]," *A.M.*, 372 F.3d at 586. Of course, Chief Murphy and Lt. Donnelly could only be liable if the people they supposedly directed to violate her rights actually did so; otherwise, "the fact that [Chief Murphy and Lt. Donnelly] might have [directed] the use of constitutionally excessive force is quite beside the point." *City of Los*

Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). Thus, any claim that supervisors directed others to violate constitutional rights necessarily includes as an element an actual violation at the hands of subordinates. In addition, a plaintiff must allege a causal connection between the supervisor's direction and that violation, or, in other words, proximate causation.

Proximate causation is established where the supervisor gave directions that the supervisor "knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights." *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988); *see also Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990). Particularly after *Iqbal*, the connection between the supervisor's directions and the constitutional deprivation must be sufficient to "demonstrate a 'plausible nexus' or 'affirmative link' between the [directions] and the specific deprivation of constitutional rights at issue." *Hedges v. Musco*, 204 F.3d 109, 121 (3d Cir. 2000) (internal quotation marks and citation omitted). Therefore, to state her claim against Chief Murphy and Lt. Donnelly, Santiago needs to have pled facts plausibly demonstrating that they directed Alpha Team to conduct the operation in a manner that they "knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights." *Conner*, 847 F.2d at 397.

As to her claim against Lt. Springfield, Santiago must allege facts making it plausible that "he had knowledge of [Alpha Team's use of excessive force during the raid]" and "acquiesced in [Alpha Team's] violations." *A.M.*, 372 F.3d at 586.

Having identified the elements of Santiago's claims, *Iqbal* directs that the next step is to identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1950. In other words, "[we] must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Fowler*, 578 F.3d at 210–11. We also disregard "naked assertions devoid of further factual enhancement" and "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949.

Santiago alleges that the plan developed and authorized by Chief Murphy and Lt. Donnelly "specifically sought to have all occupants exit the Plaintiff's home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had been cleared and searched." Because this is

nothing more than a recitation of what Santiago says the Alpha Team members did to her, it amounts to a conclusory assertion that what happened at the scene was ordered by the supervisors. While the allegations regarding Alpha Team's conduct are factual and more than merely the recitation of the elements of a cause of action, the allegation of supervisory liability is, in essence, that "Murphy and Donnelly told Alpha team to do what they did" and is thus a "formulaic recitation of the elements of a [supervisory liability] claim," *Iqbal*, 129 S. Ct. at 1951 (internal quotation marks omitted)—namely that Chief Murphy and Lt. Donnelly directed others in the violation of Santiago's rights. Saying that Chief Murphy and Lt. Donnelly "specifically sought" to have happen what allegedly happened does not alter the fundamentally conclusory character of the allegation.

Our conclusion in this regard is dictated by the Supreme Court's decision in *Iqbal*. The plaintiff's claim in that case required proving that the defendants, Attorney General John Ashcroft and FBI Director Robert Mueller, had "adopted a policy because of, not merely in spite of, its adverse effects upon an identifiable group." 129 S.Ct. at 1951. The Court disregarded allegations that "petitioners knew of, condoned, and willfully and maliciously agreed to subject [respondent] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin" and that "Ashcroft was the principal architect of this invidious policy, and that Mueller was instrumental in adopting and executing it." *Id.* (internal quotation marks omitted). The Supreme Court called those allegations "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Id.* (internal quotation marks omitted). The Court emphasized that the claims required dismissal not because they were fanciful, but because they were conclusory. *Id.* Likewise, in this case where Santiago is required to prove that the Supervising Officers directed others to use excessive force, an allegation that the plan "specifically sought" that use of force is nothing more than a formulaic recitation of the elements of a supervisory liability claim and hence is not entitled to the assumption of truth. The same is true for Santiago's allegation that Lt. Springfield "permitted the use of excessive force," which is nothing more than a conclusory statement that he acquiesced in his subordinates' violations.

In short, Santiago's allegations are "naked assertion[s]" that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in the allegedly excessive manner that they did and that Lt.

Springfield acquiesced in Alpha Team's acts. As mere restatements of the elements of her supervisory liability claims, they are not entitled to the assumption of truth. However, it is crucial to recognize that our determination that these particular allegations do not deserve an assumption of truth does not end the analysis. It may still be that Santiago's supervisory liability claims are plausible in light of the non-conclusory factual allegations in the complaint. We therefore turn to those allegations to determine whether the claims are plausible.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. . . .

. . . .

. . . . [T]he allegations against Alpha Team are that the officers ordered everyone to exit the house one at a time; that Santiago exited first under threat of fire; that Santiago was patted down in a demeaning fashion, found to be unarmed, and subsequently handcuffed; that the remaining occupants of the home then exited, some of whom were handcuffed while others were not; that Santiago's daughter was coerced into consenting to a search of the home; and that Santiago was left restrained for thirty minutes while her home was searched, during which time she had a heart attack.

The question then becomes whether those allegations make it plausible that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in a manner that they "knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights," *Conner*, 847 F.2d at 397, or that Lt. Springfield "had knowledge [that Alpha Team was using excessive force during the raid]" and "acquiesced in [Alpha Team's] violations." *A.M.*, 372 F.3d at 586.

First, with respect to Chief Murphy and Lt. Donnelly, we consider whether the fact that they planned the operation coupled with the fact that the operation resulted in excessive force against Santiago makes it plausible that the plan called for the use of excessive force. We conclude that it does not. Santiago has only alleged that excessive force was used against her. The complaint does not allege that any other occupant was threatened with fire. It specifically states that the other women were not handcuffed. It does

allege that the two grandsons were handcuffed, but one of them was the subject of the arrest warrant and there are no allegations stating whether the other was found to be armed or a risk of flight. Consequently, there is no basis in the complaint to conclude that excessive force was used on anyone except Santiago. Even if someone else had been subjected to excessive force, it is clear that the occupants were not being treated uniformly. Thus, Santiago's allegations undercut the notion of a plan for all occupants to be threatened with fire and handcuffed. While it is possible that there was such a plan, and that Alpha Team simply chose not to follow it, *"possibility" is no longer the touchstone for pleading sufficiency after* Twombly *and* Iqbal. *Plausibility is what matters*. Allegations that are "merely consistent with a defendant's liability" or show the "mere possibility of misconduct" are not enough. *Iqbal*, 129 S. Ct. at 1949–50 (internal quotation marks omitted). Here, given the disparate treatment of the occupants of the home, one plausible explanation is that the officers simply used their own discretion in determining how to treat each occupant. In contrast with that "obvious alternative explanation" for the allegedly excessive use of force, the inference that the force was planned is not plausible. *Id*. at 1951-52 (quoting *Twombly*, 550 U.S. at 567, 127 S. Ct. 1955).

Where, as here, an operation results in the use of allegedly excessive force against only one of several people, that use of force does not, by itself, give rise to a plausible claim for supervisory liability against those who planned the operation. To hold otherwise would allow a plaintiff to pursue a supervisory liability claim anytime a planned operation resulted in excessive force, merely by describing the force used and appending the phrase "and the Chief told them to do it." *Iqbal* requires more.

We next ask whether the allegation that Lt. Springfield was placed in charge of the operation, coupled with what happened during the operation, makes it plausible that Lt. Springfield knew of and acquiesced in the use of excessive force against Santiago. Again, we conclude that it does not. The complaint implies but does not allege that Lt. Springfield was present during the operation. Assuming he was present, however, the complaint still does not aver that he knew of the allegedly excessive force, nor does it give rise to the reasonable inference that he was aware of the level of force used against one individual. *See McKenna v. City of Philadelphia*, 582 F.3d 447, 460 (3rd Cir. 2009) (holding that a supervisor's presence "in the vicinity of the arrest at some point after [plaintiff] was handcuffed . . . is not a legally sufficient evidentiary basis" to find knowledge and

acquiescence). Consequently, the allegations are insufficient to "nudge [Santiago's] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S. Ct. 1955.

In sum, while Santiago's complaint contains sufficient allegations to show that the Supervising Officers planned and supervised the operation and that, during the operation, Alpha Team used arguably excessive force, her allegations do nothing more than assert the element of liability that the Supervising Officers specifically called for or acquiesced in that use of force. As a result, her allegations may "get[ ] the complaint close to stating a claim, but without further factual enhancement [they] stop[ ] short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955 (internal quotation marks and alterations omitted). Because the Third Amended Complaint does not give rise to a plausible claim for relief against the Supervising Officers, the District Court did not err in dismissing the claims against them.

We now turn to the dismissal of Santiago's claim against Warminster [Township]. The District Court dismissed that claim because Santiago had failed to allege that Chief Murphy was a final policymaker, which, under *Monell*, was necessary to the survival of her claim against the Township. Santiago offers two arguments for why the dismissal was improper. First, she argues that, while she may not have used the words "final policymaker," "the factual averments of the complaint are more than sufficient to show that Chief Murphy was the 'final policymaker' with respect to the tactical decisions made here." Second, she argues that the District Court applied the wrong standard—considering whether Chief Murphy was a final policymaker as a factual question instead of a legal one, as required under Supreme Court precedent. Not only are those arguments inconsistent, they miss the point. The dispositive point is that, whether or not Chief Murphy is a final policymaker, Santiago has failed to plead facts showing that his plan caused her injury.

Under *Monell*, for municipal liability to attach, any injury must be inflicted by "execution of a government's policy or custom." 436 U.S. at 694, 98 S. Ct. 2018. Drawing all factual inferences in favor of Santiago, as is required at this juncture, we nevertheless cannot conclude that the Third Amended Complaint alleges municipal liability. The complaint does not allege that Chief Murphy had policymaking authority, nor does it allege what action he took that could fairly be said to be policy. The allegation that Chief

> Murphy ordered a plan to execute arrest warrants does not imply the existence of an official policy in violation of Santiago's constitutional rights. *See McTernan v. City of York*, 564 F.3d 636, 658 (3d Cir. 2009) (a claimant "must identify a custom or policy, and specify what exactly that custom or policy was"); *see also McGreal v. Ostrov*, 368 F.3d 657, 685 (7th Cir. 2004) ("[T]he plaintiff must first allege that a defendant is a final policymaker. Only then can a court proceed to the next question of whether the single act or single decision of that defendant constituted municipal policy."). More to the point, though, we have already held that Santiago's pleadings fail to plausibly allege that Chief Murphy directed others to violate her rights. Thus, even if Chief Murphy were a final policy maker and his plan were deemed to be official Warminster policy, Santiago has failed to properly plead that the plan was the source of her injury. Therefore, she has not shown that her injury was inflicted by "execution of [Warminster's] policy or custom," *Monell*, 436 U.S. at 694, 98 S. Ct. 2018, and she has no claim against the Township.

Santiago, 629 F.3d at 128–35 (emphasis added) (footnotes and internal citations omitted).

- ***West Penn Allegheny Health System, Inc. v. UPMC***, 627 F.3d 85, 2010 WL 4840093 (3d Cir. Nov. 29, 2010). West Penn Allegheny Health System, Pittsburgh's second-largest hospital system, alleged that Pittsburgh's dominant hospital system (UPMC) and dominant insurer (Highmark) violated sections 1 and 2 of the Sherman Act by forming a conspiracy to protect one another from competition. *Id.* at *1. The district court dismissed for failure to state a claim. *Id.* The Third Circuit reversed. *Id.*

  In its opinion dismissing the complaint, the district court stated that "judges presiding over [antitrust] cases have a duty to act as gatekeepers" and must subject pleadings in such cases to heightened scrutiny. *Id.* at *6-7. The Third Circuit disagreed:

  > Although *Twombly* acknowledged that discovery in antitrust cases "can be expensive," 550 U.S. at 558, it expressly rejected the notion that a " 'heightened' pleading standard" applies in antitrust cases, *id.* at 569 n. 14, and *Iqbal* made clear that Rule 8's pleading standard applies with the same level of rigor in "'all civil actions,'" 129 S.Ct. at 1953. *See also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993) (rejecting Fifth Circuit's adoption of a heightened pleading standard for civil rights cases alleging municipal liability); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1221 (3d ed.2004) (noting that Rule 8's pleading standard applies with the same degree of rigor "in every case, regardless of its size, complexity, or the numbers of

parties that may be involved").

> It is, of course, true that judging the sufficiency of a pleading is a context-dependent exercise. *See Iqbal*, 129 S.Ct. at 1950; *Twombly*, 550 U.S. at 567-68; *Phillips,* 515 F.3d at 232. Some claims require more factual explication than others to state a plausible claim for relief. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 320 n. 18 (3d Cir.2010). For example, it generally takes fewer factual allegations to state a claim for simple battery than to state a claim for antitrust conspiracy. *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 13-18 (2009). But, contrary to the able District Court's suggestion, this does not mean that *Twombly's* plausibility standard functions more like a probability requirement in complex cases.
>
> We conclude that it is inappropriate to apply *Twombly's* plausibility standard with extra bite in antitrust and other complex cases. We now turn to address whether West Penn's complaint satisfies the plausibility standard.

Id. at *7-8.

The court first considered the conspiracy claims. With respect to the Section 1 claims, the court explained:

> Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal." Despite its seemingly absolute language, section 1 has been construed to prohibit only unreasonable restraints of trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir.1993). Some agreements are so plainly anticompetitive that they are condemned *per se*; that is, they are conclusively presumed to unreasonably restrain trade. *E.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-400 (1927) (horizontal agreements to fix prices); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam) (horizontal agreements to divide markets). Other agreements are condemned only if evaluation under the fact-intensive rule of reason indicates that they unreasonably restrain trade. *E.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (vertical agreements to maintain resale prices).

West Penn, 2010 WL 4840093 at *8. With respect to the Section 2 claims, liability is

imposed on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *Id.* (quoting 15 U.S.C. § 2).

Defendants argued that the complaint failed to allege an agreement, which is required for both the Section 1 and 2 claims. *Id.* With aspect to the agreement between UPMC and Highmark, West Penn alleged that:

> West Penn asked Highmark to refinance the loan that was used to fund the 2000 merger, that Highmark agreed that refinancing was a good idea, but that Highmark would not sign off on the refinancing. Highmark explained that if it helped West Penn out financially, UPMC, which was "obsessed" with driving West Penn out of business, would retaliate against it for violating their agreement - an agreement that Highmark admitted was "probably illegal." Indeed, UPMC had sent Highmark a letter warning that if it extended financial assistance to West Penn, UPMC would enter a provider agreement with a Highmark competitor, thus reducing Highmark's dominance in the insurance market. The complaint also alleges that in 2005 and 2006, West Penn asked Highmark to increase its reimbursement rates, that Highmark acknowledged that the rates were too low and suggested that it would raise them, but that Highmark refused to follow through, explaining that if it increased West Penn's rates, UPMC would retaliate against it for violating their agreement. Finally, the complaint alleges that at an employees' meeting, UPMC's CEO admitted that he decided to shrink UPMC Health Plan as a result of "negotiations" with Highmark, during which Highmark had agreed to take Community Blue off the market.

Id. at *9. The court concluded that "these allegations of direct evidence are sufficient to survive a motion to dismiss on the agreement element." *Id.* The court next determined that the complaint alleged that the conspiracy unreasonably restrained trade:

> Here, the complaint alleges that the relevant markets are, on one hand, the Allegheny County market for specialized hospital services and, on the other hand, the Allegheny County market for health insurance. The complaint plausibly suggests that by denying West Penn capital, the conspiracy caused West Penn to cut back on its services (including specialized hospital services) and to abandon projects to expand and improve its services and facilities. The complaint also plausibly suggests that by shielding Highmark from competition, the conspiracy resulted in increased premiums and reduced output in the market for health insurance. These allegations are sufficient to suggest that the conspiracy produced anticompetitive

effects in the relevant markets.

Id. at *10 (footnote omitted).

The court next considered whether the complaint alleged antitrust injury. *West Penn*, 2010 WL 4840093 at *10. The court explained that "[a]n antitrust injury is an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful.'" *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)) (second alteration in original). Plaintiff alleged that "three aspects of the conspiracy caused it antitrust injury." *Id.* The court rejected West Penn's argument that it was "injured as a result of Highmark's decision to take a low-cost insurance plan [used by West Penn, but not by UPMC] off the market because "West Penn participates in the insurance market not as a consumer or a competitor but as a supplier" and a supplier's losses are "merely byproducts of the anticompetitive effects of the restraint." *Id.* at *11. The court also rejected West Penn's argument that it sustained an anti-trust injury based on Highmark's refusal to refinance a loan it made to West Penn before the alleged conspiracy began. *Id.* The court noted that "[b]ecause Highmark was just one of many possible sources of financing, we conclude that - even if it acted with anticompetitive motives - Highmark's refinancing refusals could not have been 'competition-*reducing* aspect[s] ... of the conspiracy, and thus did not give rise to an antitrust injury.'" *Id.* (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990)) (second alteration and emphasis in original). However, the court then decided that West Penn's assertion that Highmark artificially depressed reimbursement rates, resulting in underpayments, did allege an antitrust injury:

> Here, the complaint suggests that Highmark has substantial monopsony power. It alleges that Highmark has a 60%-80% share of the Allegheny County market for health insurance, that there are significant entry barriers for insurers wishing to break into the market (including UPMC's unwillingness to deal competitively with non-Highmark insurers), and that medical providers have very few alternative purchasers for their services. The complaint also alleges that Highmark paid West Penn depressed reimbursement rates, not as a result of independent decisionmaking, but pursuant to a conspiracy with UPMC, under which UPMC insulated Highmark from competition in return for Highmark's taking steps to hobble West Penn. In these circumstances, it is certainly plausible that paying West Penn depressed reimbursement rates unreasonably restrained trade. Such shortchanging poses competitive threats similar to those posed by conspiracies among buyers to fix prices, and other restraints that result in artificially depressed payments to suppliers - namely, suboptimal output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run.

Id. at *12 (citations omitted).

The court next considered whether West Penn's claims were barred by the statute of limitations. The court explained that a limitations defense may be raised in a Rule 12(b)(6) motion to dismiss. *West Penn*, 2010 WL 4840093 at *14, n.13. To prevail, "the plaintiff's tardiness in bringing the action must be apparent from the face of the complaint." *Id.* The court decided that West Penn's case was timely "even though the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period." *Id.* at *15.

Turning to West Penn's allegation that "UPMC violated section 2 of the Sherman Act by attempting to monopolize the Allegheny County market for specialized hospital services," the court explained that "[t]he elements of attempted monopolization are (1) that the defendant has a specific intent to monopolize, and (2) that the defendant has engaged in anticompetitive conduct that, taken as a whole, creates (3) a dangerous probability of achieving monopoly power." *Id.* at *16. And noted that "anticompetitive conduct can include a conspiracy to exclude a rival." *Id.* at *17. The court concluded that the following allegations, "viewed as a whole," plausibly suggested that UPMC had engaged in anticompetitive conduct:

> First, the defendants engaged in a conspiracy, a purpose of which was to drive West Penn out of business. Second, UPMC hired employees away from West Penn by paying them bloated salaries. UPMC admitted to hiring some of the employees not because it needed them but in order to injure West Penn; UPMC could not absorb some of the employees and had to let them go; and UPMC incurred financial losses as a result of the hiring. .... Relatedly, UPMC tried unsuccessfully to lure a number of employees away from West Penn; UPMC could not have absorbed the additional employees, and although the employees remained with West Penn, they did so only after West Penn raised their salaries to supracompetitive levels. Third, UPMC approached community hospitals and threatened to build UPMC satellite facilities next to them unless they stopped referring oncology patients to West Penn and began referring all such patients to UPMC. Nearly all of the community hospitals caved in, which deprived West Penn of a key source of patients. Moreover, under pressure from UPMC, several of the community hospitals have stopped sending any of their tertiary and quaternary care referrals to West Penn and have begun sending them all to UPMC. Finally, on several occasions, UPMC made false statements about West Penn's financial health to potential investors, which caused West Penn to pay artificially inflated financing costs on its debt.

Id. at 18.

- ***Shahin v. Delaware Dep't. of Transportation***, No. 10-1699, 2010 WL 4630242 (3d Cir. Nov. 17, 2010) (per curiam) (unpublished). Plaintiff Shahin alleged that the Delaware Department of Transportation discriminated against her on the basis of her age and national origin by refusing to employ her. *Id.* at *1. The Department filed a motion to dismiss the complaint for failure to state a claim and Shahin did not file a response. *Id.* The district court granted the motion without prejudice and gave Shahin thirty days to file an amended complaint before the dismissal became with prejudice. *Id.* Shahin did not file an amended complaint, but did file a notice of appeal. *Id.* The Third Circuit affirmed. *Id.*

  The Third Circuit explained that "[i]n order to state a claim of employment discrimination, Shahin must allege (1) that she belongs to a protected class; (2) that she applied for a position for which the employer was seeking applicants and was qualified for that position; (3) she was rejected; and (4) the employer continued to seek applicants of her qualifications." *Shahin*, 2010 WL 4630242 at *1. Shahin's claim failed because she "did not identify her membership in a protected class, any position for which she applied, or her qualifications. *Id.* And she did not allege that any application was rejected." *Id.* The court rejected Shahin's contention that the first two elements were established by her job application and the complaint procedures at the Departments of Transportation and Labor because these details were not included in her complaint. *Id.* at *2. The court noted that Shahin might have been able to cure these deficiencies, but she chose to not file a response to the motion to dismiss or an amended complaint. *Id.* The court concluded that, "[u]nder *Iqbal*, it is not sufficient to simply recite the elements of a cause of action and support them with conclusory statements. Here, Shahin has done even less." *Id.* (internal citation omitted).

- ***Antoine v. Star Ledger of New Jersey***, No. 10-2588, 2010 WL 4342308 (3d Cir. Nov. 3, 2010) (per curiam) (unpublished). Plaintiff Antoine, proceeding *pro se*, filed a complaint against the New York Morning Ledger Company, publisher of The Star-Ledger, and Reporter Brubaker for alleged violations of his First, Fourth, Fifth, and Fourteenth Amendment rights; and various federal and state laws, regulations and protocols. *Id.* at *1. Defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). *Id.* The District Court granted defendants' 12(b)(6) motion with respect to Antoine's federal claims and declined to exercise supplemental jurisdiction over the remaining state law claims. *Id.* Antoine appealed and the Third Circuit affirmed.

  The court explained that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quoting *Iqbal*, 129 S.Ct at 1949). The Third Circuit agreed with the district court that "Antoine failed to sufficiently allege that defendants acted under color of state law – an allegation essential to maintain an action under 42 U.S.C. § 1983." *Id.* And also "agree[d] with the district court's analyses and conclusions with respect to the remaining federal claims asserted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *et. seq.*, federal antitrust law, and the Federal Video Privacy Protection Act, and will not repeat them here." *Antoine*, 2010 WL 4342308 at *1.

- ***PA Prison Society v. Cortes***, 622 F.3d 215 (3d Cir. 2010). Plaintiffs challenged the constitutionality of an amendment to the Constitution of the Commonwealth of Pennsylvania that altered the voting procedure employed by the Pennsylvania Board of Pardons to require unanimity in recommending pardons and commutations for life-sentenced prisoners to the Governor. *Id.* at 219. The district court ruled that the amendment violated the *Ex Post Facto* clause of the United States Constitution for prisoners sentenced to a term of life imprisonment prior to its effective date. *Id.* The Third Circuit reversed and remanded. *Id.*

  The court first explained the pleading standard from *Twombly* and *Iqbal*:

  > "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)). In deciding a motion to dismiss, a court must determine whether the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 1950.

  Plaintiffs alleged that:

  > The changes in the pardons process effectuated by the Amendment impose additional punishment on the Prisoner Plaintiffs since there is distinctly less of an opportunity to obtain a pardon or commutation. Plaintiffs also allege that prior to the Amendment, it was distinctly more likely that the Prisoner Plaintiffs could obtain a pardon or commutation. However, since the Amendment became law, the Prisoner Plaintiffs are virtually shut out from that opportunity.

  Id. at 233 (quotations and citations omitted). The court found these allegations insufficient:

  > These allegations fail to state a viable claim as a matter of law because the legal conclusion that the "Amendment impose[s] additional punishment" is not supported by any of the factual allegations in the Second Amended Complaint. The 1997 Amendment does not lengthen the sentences imposed upon the prisoners represented by the Pennsylvania Prison Society, who have been sentenced to serve a term of life imprisonment without parole.

  Id. The court decided that "[t]here is no *ex post facto* violation where the retroactively applied law does not make one's punishment more burdensome, but merely creates a

disadvantage." *Cortes*, 622 F.3d at 233 (quoting *Spuck v. Ridge*, 347 F. App'x 727, 729 (3d Cir. 2009).

The court explained that

> The *Ex Post Facto* Clause of the Constitution, U.S. Const. art. I §§ 9 and 10, forbids the government from passing any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) (internal quotation omitted). The *Ex Post Facto* Clause is intended to provide fair warning about new punishments and to discourage arbitrary and oppressive legislation. *Weaver*, 450 U.S. at 28, 101 S.Ct. 960. To fall within the ex post facto prohibition, "two critical elements must be present ...: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id*. at 29, 101 S.Ct. 960 (footnotes omitted).

And agreed with defendants that there were "three distinct reasons why Plaintiffs' *ex post facto* claim is not viable." *Id.* at 234.

> First, the 1997 Amendment is not an *ex post facto* law "[g]iven the *ad hoc* nature of [executive] clemency, the retroactive application of the amendment cannot, as a matter of law, have any widespread effect on the period of incarceration for prisoners serving life sentences...."
>
> Second, "[P]laintiffs cannot show that the passage of the Amendment has resulted or will result in a longer period of incarceration for life sentenced prisoners" because a life sentence, absent the executive grant of a commutation, is still a life sentence and nothing more. The adoption of the 1997 Amendment did not increase the punishment. A term of life imprisonment is no less than and no more than natural life.
>
> Third, the 1997 Amendment does not trigger an *ex post facto* inquiry because changes in the law that alter procedures for obtaining commutation, but do not eliminate the possibility of commutation, are procedural and thus not ex post facto laws.

Cortes, 622 F.3d at 234 (alterations in original) (internal citations omitted).

- ***Mayercheck v. Judges of the Pennsylvania Supreme Court***, No. 09-3575, 2010 WL 3258257 (3d Cir. Aug. 18, 2010) (per curiam) (unpublished). Plaintiff Mayercheck,

proceeding *pro se*, sued his former wife and judges in their divorce proceedings for conspiring to deprive him of his federal constitutional rights during the divorce proceedings. *Id*. at *1. Defendants filed motions to dismiss, which the magistrate recommended that the district court grant, finding that the district court lacked jurisdiction over Mayercheck's claims and that, "even if the court did have subject matter jurisdiction, Mayercheck failed to state a claim for civil rights violations on which relief could be granted under Federal Rule of Civil Procedure 12(b)(6)." *Id.* The district court accepted the magistrate's recommendations. *Id.* The Third Circuit affirmed. *Id.*

With respect to the 12(b)(6) dismissal, the Third Circuit instructed that "[t]o survive dismissal under Rule 12(b)(6), a complaint must contain more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Id.* at *3 (quoting *Iqbal*, 129 S.Ct. at 1949) (second alteration in original). The court agreed that Mayercheck "failed to sufficiently plead a claim against any defendant under the doctrine in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)" because a *Bivens* claim must be brought against a federal agent. *Mayercheck*, 2010 WL 3258257 at *3. Mayercheck made no allegations about a federal agent and thus failed to plead a plausible claim for relief under *Bivens*. *Id.* The Third Circuit also concluded that Mayercheck failed to plead sufficient facts to allow an inference that the judicial defendants were not acting within their judicial capacity. *Id.*

The court next concluded that Mayercheck failed to state a claim under 42 U.S.C. §§ 1983, 1985, or 1986 because (1) Mayercheck did not show that defendants were acting under color of state law; (2) Mayercheck's assertions of conspiracy were "mere conclusory allegations;" and (3) Mayercheck's claims under sections 1985 and 1986 were speculative. *Id.*

- ***In re Ins. Brokerage Antitrust Litig.***, 618 F.3d 300 (3d Cir. 2010). Purchasers of commercial and employee benefit insurance filed numerous federal actions against insurers and insurance brokers, alleging unlawful schemes to allocate purchasers among particular groups of insurers. *Id.* at 308. The private actions were transferred by the Judicial Panel on Multidistrict Litigation to the District Court of New Jersey for consolidated pretrial proceedings. *Id.* at 309. The district court split the actions into two consolidated dockets – the first pertaining to claims regarding property and casualty insurance (the "Commercial Case"), and the second pertaining to claims regarding employee benefits insurance (the "Employee Benefits Case"). *Id.* Plaintiffs filed amended complaints in each of the Commercial and Employee Benefits cases. *Id.* Each complaint alleged violations of the Sherman Act and the RICO Act, as well as violations of various state-law antitrust statutes and common law duties. *Id.* Defendants moved to dismiss the Sherman Act and RICO Act claims in both cases under Rule 12(b)(6). *In re Ins. Brokerage*, 618 F.3d at 309. The district court granted the motions and dismissed the claims without prejudice because "it found the complaints lacked the requisite factual specificity." *Id.* at 310. The Second Circuit noted that "[i]n granting leave to amend, the District Court instructed plaintiffs to file in each case a supplemental statement of particularity for their federal antitrust claims and an amended RICO case statement for their RICO claims." *Id.* Plaintiffs did so, and the district

court again granted 12(b)(6) motions to dismiss, and again allowed plaintiffs an opportunity to amend their pleadings. *Id.* Plaintiffs filed a Second Amended Complaint and a Revised Particularized Statement and Amended RICO Case Statement augmenting the Second Amended Complaint's allegations. *Id.* The district court again dismissed the antitrust and RICO claims, this time with prejudice. *Id.* It applied the pleading standard set forth in *Twombly*, which had been decided after the court's second dismissal order, and "concluded that plaintiff's allegations in both the Commercial and the Employee Benefits cases were insufficient with respect to both the Sherman Act and RICO claims." *In re Ins. Brokerage*, 618 F.3d at 310. The Third Circuit affirmed in part, vacated in part, and remanded. While the Third Circuit agreed that purchasers failed to allege horizontal broker-centered conspiracies as to claims not involving bid-rigging and as to global conspiracy claims, it decided that purchasers had alleged horizontal conspiracies, actionable enterprise, and actionable conduct as to bid-rigging.

The Third Circuit noted that the complexity of the case:

> Plaintiffs' pleadings are of a substantial volume. The complaint in each case is more than 200 pages (including attached exhibits), and to this total must be added the pages in the Revised Particularized Statements and Amended RICO Case Statements. Significantly, the District Court allowed discovery to proceed while the motions to dismiss were pending. Plaintiffs' amended pleadings were thus able to draw on documents produced and depositions taken pursuant to these discovery orders, as well as material unearthed in the course of the public investigations.
>
> As reflected by the length of this opinion - and of the caption - this is extraordinarily complex litigation involving a large swath of the insurance provider and brokerage industries, elaborate allegations of misconduct, and challenging legal issues. The District Court skillfully managed the consolidated proceedings. We take particular note of the court's thorough treatment of defendants' motions to dismiss, which comprised five separate opinions examining three successive rounds of pleadings. The court's patient and meticulous analysis has greatly aided our review.

Id. at 311.

The court first examined the legal standards for making a plausible antitrust claim. It explained that, to state a claim under Section 1 of the Sherman Act, a plaintiff must show (1) that the defendant was a party to "some form of concerted action" and (2) that the conspiracy to which the defendant was a party "imposed an unreasonable restraint on trade." *Id.* at 315. There are three standards for determining whether a challenged practice unreasonably restrains trade: rule of reason, *per se*, and quick look. *See id.* at 315-18. The court

explained that the rule of reason was the "usual standard" and required the plaintiff to show "that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant geographic market." *Id.* at 315 (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005)). The *per se* standard is applicable to practices that "have redeeming competitive benefits so rarely that their condemnation does not require application of the full-fledged rule of reason," such as "horizontal agreements among competitors to fix prices or to divide markets." *Id.* at 316. Under the *per se* standard, "plaintiffs are relieved of the obligation to define a market and prove market power." *In re Ins. Brokerage*, 618 F.3d at 316. However, the court explained that, if a plaintiff pleads exclusively *per se* violations and the court determines that the restraint at issue is "sufficiently different from the *per se* archetypes to require application of the rule of reason, the plaintiff's claims will be dismissed." *Id.* at 317. The quick look standard is applied to restraints of trade that are "highly suspicious" yet "sufficiently idiosyncratic that judicial experience with them is limited.." *Id.* Under a quick look analysis, "competitive harm is presumed and the defendant must set forth some competitive justification for the restraints." *Id.* at 317-18 (quoting *Gordon*, 423 F.3d at 210).

Plaintiffs abjured "a full-scale rule of reason analysis" and claimed that defendant's behavior was *per se* unlawful, or alternatively, that the court should apply a "quick look" analysis. *Id.* at 318. "Plaintiffs do not dispute that in order to succeed under either of these approaches, they need to show the existence of a horizontal agreement, that is, an agreement between 'competitors at the same market level.'" *Id.* (quoting *In re Pharmacy Benefit Managers Antitrust Litig.*, 582 F.3d 432, 436 n.5 (3d Cir. 2009)).

The court determined that, "[i]n the factual context of this case," a horizontal agreement means

> an agreement among the insurers in the broker-centered conspiracies, and an agreement among either the brokers or the insurers in the global conspiracy. Agreements between brokers and insurers, on the other hand, are vertical and would have to be analyzed under the traditional rule of reason, which plaintiffs have disclaimed.

In re Ins. Brokerage, 618 F.3d at 318-19. The court then explained that plaintiffs' obligation to show the existence of a horizontal agreement "is not only an ultimate burden of proof but also bears on their pleadings":

> "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955 (quoting FED. R. CIV. P. 8(a)(2)). Because Federal Rule of Civil Procedure 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief," courts evaluating the viability of a complaint under Rule 12(b)(6) must look beyond conclusory statements and determine

> whether the complaint's well-pled factual allegations, taken as true, are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 & n. 3, 127 S.Ct. 1955. The test, as authoritatively formulated by *Twombly*, is whether the complaint alleges "enough fact[ ] to state a claim to relief that is plausible on its face," *id*. at 570, 127 S.Ct. 1955, which is to say, " 'enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity],' " *Arista Records, LLC v. Doe* 3, 604 F.3d 110, 120 (2d Cir.2010) (quoting Twombly, 550 U.S. at 556, 127 S.Ct. 1955) (alteration in *Arista Records*).
>
> As we have recognized, this plausibility standard is an interpretation of Federal Rule of Civil Procedure 8. *Phillips*, 515 F.3d at 234; *see Twombly*, 550 U.S. at 557, 127 S.Ct. 1955 (stating that the plausibility standard "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.' " (alteration in original)).

In re Ins. Brokerage, 618 F.3d at 319-20 (footnotes omitted) (alterations in original).

The court then noted *Twombly's* increased relevance in this case: "*Twombly's* importance to the case before us, however, goes beyond its formulation of the general pleading standard. *Twombly* is also an essential guide to the application of that standard in the antitrust context, for in *Twombly* the Supreme Court also had to determine whether a Sherman Act claim alleging horizontal conspiracy was adequately pled." *Id.* at 320.

The court examined *Twombly* and determined that "allegations of conspiracy are deficient if there are 'obvious alternative explanation[s]' for the facts alleged." *Id.* at 322-23 (quoting *Twombly*, 550 U.S. at 567). The court determined that, "by rejecting the Court of Appeal's conclusion that parallel conduct alone was sufficient to plead a § 1 conspiracy," *Twombly* necessarily required plaintiffs who plead conspiracy on the basis of mere parallelism to plead "plus factors." *Id.* at 323 n.22. Plus factors are "circumstances under which ... the inference of rational independent choice [is] less attractive than that of concerted action." *Id*. at 323 (quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977)) (alteration in original).

To determine what kind of allegations would satisfy *Twombly's* plausibility standard, the court examined the shortcomings identified in the *Twombly* complaint:

> The *Twombly* plaintiffs proffered two basic theories of anticompetitive collusion. First, they charged that the defendant regional telephone companies (ILECs) conspired to "inhibit the growth of upstart" competitors (CLECs). 550 U.S. at 550, 127 S.Ct. 1955. Second, they asserted that the ILECs agreed not to compete

with one another so as to preserve the preexisting regional monopoly each enjoyed. *Id*. at 551, 127 S.Ct. 1955.

At the outset of its analysis, the Court remarked that the complaint's sufficiency would "turn[ ] on the suggestions raised by [defendants' alleged] conduct when viewed in light of common economic experience." *Id.* at 565, 127 S.Ct. 1955. Under this lens, the complaint's first theory immediately revealed its inadequacy because "nothing in the complaint intimate[d] that the resistance to the upstart [CLECs] was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance.... [T]here [was] no reason to infer that the companies had agreed among themselves to do what was only natural anyway...." *Id.* at 566, 127 S.Ct. 1955. A rudimentary economic analysis also fatally undermined the complaint's second charge, namely that the ILECs agreed not to enter one another's markets. The Court recognized that "[i]n a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement." *Id.* at 567, 127 S.Ct. 1955. But in the telecommunications industry at issue in *Twombly*, monopoly had been "the norm ..., not the exception." *Id.* at 568, 127 S.Ct. 1955. Noting that "[t]he ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword," the Court found that "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing." *Id.* In fact, "the complaint itself" bolstered this conclusion. *Id.* Not only did it "not allege that competition [against other ILECs] as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period," but "the complaint [was] replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements" of federal law. *Id.* In short, both "common economic experience" and the complaint's own allegations showed that each defendant ILEC was independently motivated to behave in the ways alleged. Accordingly, neither of plaintiffs' theories successfully pled a § 1 conspiracy because in each case, defendants' parallel conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) (summarizing *Twombly*).

In re Ins. Brokerage, 618 F.3d at 325-26 (alterations in original). The court concluded:

> *Twombly* makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if "common economic experience," or the facts alleged in the complaint itself, show that independent self-interest is an "obvious alternative explanation" for defendants' common behavior.

Id. at 326. The court then examined plaintiffs' allegations.

Plaintiffs' "'broker-centered conspiracies' are alleged as hub-and-spoke conspiracies, with the broker as the hub and its insurer-partners as the spokes." *Id.* at 327. The court noted that, with respect to the broker-centered schemes, plaintiffs' allegations fall into two different categories:

> First, plaintiffs assert that the very nature of the contingent commission agreements between the broker and each of its insurer-partners implies an agreement among the brokers. Second, plaintiffs rely on specific details about the operation of the customer steering schemes, particularly the "devices" used to ensure that a particular piece of business was placed with the designated insurer.

Id. The Third Circuit agreed with the district court that most of plaintiffs' allegations "did not give rise to a plausible inference of horizontal conspiracy," but disagreed with respect to the Marsh-centered commercial conspiracy. *Id.* The court first considered and rejected plaintiffs' assertions that the "very nature" of the contingent agreements between the broker and each of its insurer-partners implied an agreement:

> Contrary to plaintiffs' arguments, one cannot plausibly infer a horizontal agreement among a broker's insurer-partners from the mere fact that each insurer entered into a similar contingent commission agreement with the broker. As the District Court concluded, the first stage of the alleged broker-centered conspiracies - the consolidation of the groups of insurers to which each broker referred business - evinces nothing more than a series of vertical relationships between the broker and each of its "strategic partners."
>
> According to the complaints, the defendant brokers decided to consolidate the pool of insurers to which they referred business in order to improve efficiency and extract higher commissions from each of their insurer-partners. As defendants point out, "[o]nce a broker decided to organize its business in this fashion, each insurer had sound, independent business reasons to pay contingent commissions to become and remain a 'preferred insurer.' Paying such commissions helped the insurer to compete for and retain a larger share of its partners' business than if it had no such vertical

relationships." In short, the obvious explanation for each insurer's decision to enter into a contingent commission agreement with a broker that was consolidating its pool of insurers was that each insurer independently calculated that it would be more profitable to be within the pool than without. The complaints themselves reinforce this conclusion with their portrait of a concentrated brokerage market, in which a handful of brokers controlled the majority of client business, and an unconcentrated, more competitive market of insurers vying for premium dollars. According to plaintiffs' own account, "[t]he Insurer Defendants are thus largely dependent on the Broker Defendants to assure access to business and protect their market share." Given this economic landscape, each insurer had an obvious incentive to enter into the "strategic partnerships" offered by the defendant brokers, irrespective of the actions of its competitors.

Refusing to concede this point, plaintiffs argue that the parallel decisions of insurers to join the broker-centered conspiracies plausibly imply a horizontal agreement among the insurers because "an insurer would not pay enormous contingent commissions in order to access premium volume if its major rivals were getting the same access for free." This contention is implausible. Although each insurer would be motivated to achieve the best deal possible with the broker - and would doubtless like to obtain terms at least as favorable as those negotiated by other insurers - the determinative consideration would be whether the insurer is better off paying contingent commissions for privileged access to the broker's clients than it would be saving those payments and foregoing the broker's assistance in winning and retaining business. Especially in light of the market dynamics alleged by plaintiffs, the obvious explanation for the decision of the defendant insurers to enter into contingent commissions agreements with the consolidating brokers is that each insurer found that the benefits justified the costs. In fact, the complaints relate incidents in which insurers who were reluctant to conform to the contingent commission demands of a broker nonetheless did so when faced with the prospect of losing their privileged access to the broker's book of business. These anecdotes only strengthen the obvious conclusion that no horizontal agreement was necessary to induce the insurers to become "strategic partners."

Moreover, plaintiffs' argument proves too much. If the parallel decisions by several insurers to pay contingent commissions imply a horizontal agreement, then it is difficult to see why parallel decisions to pay standard commissions (that is, a fixed percentage of each policyholder's premium payment) would not also imply an

> agreement. For that matter, plaintiffs' logic would divine a horizontal agreement from virtually any parallel expenditures for marketing services, on the mistaken ground that a firm would not pay for advertising, for example, in the absence of an agreement with its competitors to enter into similar contracts with the advertising company. *Cf. Twombly*, 550 U.S. at 566, 127 S.Ct. 1955 (noting that "resisting competition is routine market conduct," and that "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing"). The District Court correctly found that the brokers' alleged consolidation of the insurers with which they did business did not plausibly imply an agreement susceptible to per se condemnation.

In re Ins. Brokerage, 618 F.3d at 327-28 (alterations in original) (citations and footnotes omitted). The court next considered plaintiffs' allegations that "devices" and "techniques" used to conduct the customer-steering schemes gave rise to a plausible inference of horizontal conspiracy:

> According to the complaints, several of the devices that allegedly facilitated the schemes are common to all of the broker-centered conspiracies. For instance, plaintiffs allege that brokers often afforded insurer-partners "first looks" and "last looks" in bidding on policies. Once again, however, the practices identified by plaintiffs are strictly vertical in nature. On the complaint's own account, first and last looks were techniques utilized by brokers to ensure that a given client's policy was placed (or remained) with a designated insurer-partner. The complaints describe "[t]he close bond between broker and client," which "gives brokers tremendous influence, and often decisive control, over the placement of their clients' insurance business. Given the high degree of financial investment and trust placed in their broker, clients will rarely if ever seek quotes from insurers other than those recommended by the broker." In other words, the complaints themselves provide obvious reasons to conclude that the brokers were able to steer clients to preferred insurers without the need for any agreement among the insurers. Whatever the vices of these steering techniques, they do not give rise to a plausible inference of horizontal conspiracy.

Id. at 334-35. The court then considered allegations of "bid manipulation" and other strategies used by brokers and insurers and held that these allegations were also insufficient to allege a horizontal agreement.

> Also insufficient are two allegations of certain "bid

> manipulation" within the broker-centered conspiracies in the Employee Benefits Case. In the first example, the complaint asserts only that a broker unilaterally refused to submit an insurer's bid to the client. In the second, a broker successfully persuaded one of its insurer-partners not to withdraw a bid the insurer had come to view as unacceptably low. If the insurer had withdrawn the bid, another, non-partner insurer would have become a "finalist," an outcome the broker wished to avoid. To allay the insurer-partner's concerns, the broker assured it that it would not end up winning the contract because another insurer had submitted an even lower bid. Shortly afterward, the broker placed a large account with the insurer-partner. Neither example provides a plausible basis for inferring anything more than vertical agreements between brokers and individual insurers.
>
> In the Employee Benefits Case, plaintiffs allege that defendant insurers used similar strategies to evade their obligation to report contingent commission payments on Form 5500. But the asserted fact that the insurers intended to violate their reporting obligations, and that they all adopted the same deceptive reporting model, does not plausibly suggest a horizontal agreement. If anything, the allegations suggest that each insurer would be independently motivated to evade the requirement, and that each had access to the same effective model of how to accomplish this deception. The insurers would be disinclined to expose their competitors' reporting violations for fear of calling attention to their own self-interested deception. *Cf. Twombly*, 550 U.S. at 568, 127 S.Ct. 1955 (finding that the failure of the defendants to compete in one another's regions was most plausibly explained by the fact that the defendants "liked the world the way it was, and surely knew the adage about him who lives by the sword").

In re Ins. Brokerage, 618 F.3d at 335 (alteration in original) (citations omitted).

The court next considered the Marsh-centered commercial conspiracy, in which "plaintiffs provide detailed allegations of bid rigging by the insurer-partners." *Id.* at 336. The court noted that "Bid rigging - or more specifically, as alleged in this case, bid rotation - is quintessentially collusive behavior subject to *per se* condemnation under § 1 of the Sherman Act." *Id.* The court noted that "defendants do not dispute that the bid-rigging allegations plausibly imply a horizontal agreement among insurers," however, defendants "contend that plaintiffs have no standing to challenge this activity because plaintiffs do not assert that the bids were rigged on any of the policies they purchased." *Id.* The court rejected defendants' argument because it concluded that plaintiffs' bid-rigging allegations adequately support the more general allegation of an agreement among the defendant insurers to allocate customers

in the Marsh-centered commercial conspiracy. *Id.*

The court then considered plaintiffs' claim of a "global conspiracy" in which the defendant brokers, "with the complicity of the Defendant Insurers," agreed "to conceal from the general public and other brokers" the existence of the broker-centered controversies. *Id.* at 348. The Third Circuit agreed with the district court that "the complaints' factual allegations fail to plausibly imply horizontal non-disclosure agreements among the defendant brokers or defendant insurers" because none of the plaintiffs' "plus factors" plausibly implied a horizontal agreement among the brokers. The court explained why the allegations in the Commercial complaint failed to state a claim:

> The Commercial complaint alleges that the defendant brokers "issued substantially similar purported 'disclosure' statements modeled after the CIAB's position statement" advising brokers on how to respond to questions regarding contingent commissions. According to plaintiffs, these statements misleadingly disguised the existence and effect of the contingent commission agreements. But neither defendants' membership in the CIAB, nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy. *Cf. Twombly*, 550 U.S. at 567 n. 12, 127 S.Ct. 1955 (rejecting the contention that the defendants' common membership in a trade union, combined with parallel conduct, plausibly suggests conspiracy); *Elevator Antitrust Litig.*, 502 F.3d at 51 (finding that allegations that the defendants used similar contractual language did not plausibly imply conspiracy because "similar contract language can reflect the copying of documents that may not be secret"). While these allegations indicate that the brokers had an opportunity to conspire, they do not plausibly imply that each broker acted other than independently when it decided to incorporate the CIAB's proposed approach as the best means of protecting its lucrative arrangements from hostile scrutiny. *See Petruzzi's*, 998 F.2d at 1242 n. 15 ("Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." (internal quotation marks omitted)).
>
> Even if we read the complaint to assert that the defendant brokers collaborated in crafting these allegedly misleading disclosures (insofar as these defendants allegedly "control the affairs of ... CIAB," which produced the "position statement" allegedly incorporated into defendants' disclosures to clients), this still would be insufficient to show a horizontal agreement not to disclose one another's contingent commissions. If proven, this allegation would plausibly show that defendants agreed to work together to determine the best way of disguising activity in which each engaged. But this

> allegation would not plausibly imply that the decision to disguise that activity (namely, the alleged use of contingent commissions as part of a scheme to steer customers to particular insurers) was itself the product of an agreement-not, at least, in the face of the complaint's many allegations showing that each defendant had ample independent motive to conceal its own contingent commission arrangements. A contrary holding would be tantamount to finding that any collaborate effort to refine a "pernicious industry practice," *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2892700, at *24 (so describing the conduct alleged by plaintiffs), plausibly suggests a conspiracy among all industry participants not to reveal the fact that other participants engage in the same practice. Where, as here, the "obvious alternative explanation" for such an industry practice is that each member of the industry believes its profits would suffer without the practice, it is not plausible to infer that each member's decision not to expose its competitors' use of the practice - that is, not to engage in mutually assured destruction - is the product of an agreement.

In re Insurance Brokerage, 618 F.3d at 349-50 (footnotes omitted).

The court then considered the allegations in the Employee Benefits case and determined that they also failed to state a claim:

> In the Employee Benefits Case, plaintiffs allege that "Defendants executed substantially similar disclosure policies regarding contingent compensation matters, including failing to disclose contingent compensation information to ERISA plan administrators on Form 5500s, as required by governmental regulations." Plaintiffs also allege instances in which defendants exchanged information about how they accounted for, and reported, this compensation. These allegations, like the other allegations of shared information and similar disclosure practices, are insufficient. They imply only that each defendant had a similar motive to obfuscate the structure of the brokers' compensation, and that they sought the most effective means to achieve this obfuscation. They do not provide a "reason to infer that the [defendants] had agreed among themselves to do what was only natural anyway." *Twombly*, 550 U.S. at 566, 127 S.Ct. 1955.

In re Ins. Brokerage, 618 F.3d at 350 (footnote omitted). The court concluded:

> Having reviewed the entirety of the Global Conspiracy pleadings, we concur with the District Court's conclusion: "While Plaintiffs present facts to support the possibility of inadequate disclosures by the

> brokers to the insureds, the Complaints are bereft of allegations to demonstrate that this was more than brokers adopting sub-par disclosure methods to protect their own, lucrative agreements." 2007 WL 2533989, at *19. Plaintiffs' attack on the pervasive use of contingent commissions to exploit insurance brokers' power over their clients - and the use of similar techniques to disguise this activity - may allege a "pernicious industry practice," but they do not plausibly imply an industry-wide conspiracy.

In re Ins. Brokerage, 618 F.3d at 351.

The court next considered whether the defendants' alleged conduct was exempt from antitrust regulation under the McCarran-Ferguson Act, and decided that it was not. *Id.* at 351-61. Because the McCarran-Ferguson Act does not bar plaintiffs' claims, the court concluded that the big-rigging allegations should be reinstated, summarizing its "*Twombly* analysis" of plaintiffs' conspiracy claims as follows:

> The Supreme Court has made clear that courts confronted with a motion to dismiss must assess whether the complaint contains "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. "Determining whether a complaint states a plausible claim to relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950; *see also Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir.2009) (Parker, J., dissenting) ("Plausibility . . . depends on a host of considerations: The full factual picture presented by the complaint, the particular cause of action and its elements, and the available alternative explanations [for the facts alleged]."), *cert. denied*, --- U.S. ----, 130 S. Ct. 3409, 177 L. Ed. 2d 349 (2010). Some claims will demand relatively more factual detail to satisfy this standard, while others require less.
>
> In the context of claims brought under § 1 of the Sherman Act, plausibility is evaluated with reference to well-settled antitrust jurisprudence that "limits the range of permissible inferences from ambiguous evidence." *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348. In particular, "when allegations of parallel conduct are set out in order to make a § 1 claim," that conduct must be placed in "some setting suggesting the agreement necessary to make out a § 1 claim." *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955. In other words, the complaint must allege some "further circumstance," "something more than merely parallel behavior," "pointing toward a meeting of the minds." *Id.* at 557, 560, 127 S.Ct. 1955. If, in the circumstances

> alleged, the asserted "parallel conduct ... could just as well be independent action," then the complaint has failed to plead a § 1 claim. *Id.* at 557, 127 S.Ct. 1955.
>
> Here, the bid-rigging allegations supply the requisite "further circumstance." Because they plausibly suggest an unlawful horizontal conspiracy not to compete for incumbent business, plaintiffs have adequately met Rule 8(a)(2)'s requirement for setting forth a § 1 claim against those defendants in the asserted Marsh-centered commercial conspiracy who are alleged to have participated in bid rigging. This agreement to divide the market, if proven, would be a naked restraint of trade subject to per se condemnation. *See Leegin*, 551 U.S. at 886, 127 S.Ct. 2705; *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 310-11 (3d Cir.1983) (observing that "a horizontal agreement to allocate customers" is "ordinarily ... a per se violation" (citing *United States v. Topco Assocs.*, 405 U.S. 596, 606-12, 92 S.Ct. 1126, 31 L. Ed. 2d 515 (1972))), *rev'd on other grounds sub nom. Matsushita*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).
>
> With respect to the remaining antitrust claims, however, plaintiffs have failed to plead facts plausibly supporting their allegations of horizontal conspiracies to unreasonably restrain trade, notwithstanding their conclusory assertions of agreement. Given plaintiffs' exclusive reliance on a per se or quick look analysis, the absence of a horizontal agreement is fatal to their § 1 claims. Accordingly, these antitrust claims must be dismissed, as the District Court concluded.

Id. at 361-62 (footnotes omitted).

The court then considered plaintiffs' RICO claims. It explained that "[t]o plead a RICO claim under § 1962(c), 'the plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Id.* at 362 (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004)). In the Commercial Case, plaintiffs alleged the existence of one legal-entity enterprise, the Council of Insurance Agents and Brokers (CIAB), and six association-in-fact enterprises corresponding to the six broker-centered antitrust conspiracies. In the Employee Benefits Case, plaintiffs plead five association-in-fact enterprises corresponding to the broker-centered conspiracies alleged in their antitrust claims. *Id.* Defendants argued that "plaintiffs had failed adequately to plead the enterprise and conduct elements of their § 1962(c) claims, and that they had failed adequately to plead predicate acts of racketeering." *Id.* at 364. The Third Circuit agreed, except with respect to the Marsh-centered enterprise alleged in the commercial complaint. *Id.* at 374. The court relied extensively on *Boyle v. United States*, --- U.S. ----, 129 S.Ct. 2237 (2009), which was

decided after the district court dismissed plaintiffs' claims, and after the Tenth Circuit heard argument in this appeal. *In re Ins. Brokerage*, 618 F.3d at 365. It explained:

> With respect to all but the Marsh-centered enterprise alleged in the Commercial complaint, we agree with the District Court that plaintiffs' allegations of broker-centered enterprises are fatally defective. In our analysis of the antitrust claims, we determined that, with the exception of the alleged Marsh-centered commercial conspiracy, the facts alleged in the complaints do not plausibly imply a horizontal agreement among the insurer-partners. In seeking to establish a "rim" enclosing the insurer-partners in the alleged RICO enterprises, plaintiffs rely on the same factual allegations we found deficient in the antitrust context: that each insurer entered into a similar contingent-commission agreement in order to become a "strategic partner"; that each insurer knew the identity of the broker's other insurer-partners and the details of their contingent-commission agreements; that each insurer entered into an agreement with the broker not to disclose the details of its contingent-commission agreements; that the brokers utilized certain devices, such as affording "first" and "last looks," to steer business to the designated insurer; and that, in the Employee Benefits Case, insurers adopted similar reporting strategies with regard to Form 5500. As noted, these allegations do not plausibly imply concerted action-as opposed to merely parallel conduct-by the insurers, and therefore cannot provide a "rim" enclosing the "spokes" of these alleged "hub-and-spoke" enterprises.
>
> Even under the relatively undemanding standard of *Boyle*, these allegations do not adequately plead an association-in-fact enterprise. They fail the basic requirement that the components function as a unit, that they be "put together to form a whole." *Boyle*, 129 S.Ct. at 2244 (internal quotation marks omitted). Because plaintiffs' factual allegations do not plausibly imply anything more than parallel conduct by the insurers, they cannot support the inference that the insurers "associated together for a common purpose of engaging in a course of conduct." *Id.* (quoting *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524); *see id.* at 2245 n. 4 (stating that "several individuals" who "engaged in a pattern of crimes listed as RICO predicates" "independently and without coordination" "would not establish the existence of an enterprise"); *Elsevier*, 692 F. Supp. 2d at 307 (stating that, as with a § 1 Sherman Act claim, a RICO claim pleading "nothing more than parallel conduct by separate actors" is insufficient: "there has to be something that ties together the various defendants allegedly comprising the association in fact into a single

> entity that was formed for the purpose of working together-acting in concert-by means of" racketeering acts); Gregory P. Joseph, Civil RICO: A Definitive Guide 106 (3d ed. 2010) (stating that a "rimless hub-and-spoke configuration would not satisfy the 'relationships' prong of *Boyle's* structure requirement"); *see also Rao*, 589 F.3d at 400 (finding the plaintiff had failed to plead an association-in-fact enterprise because the "allegations do not indicate how the different actors are associated and do not suggest a group of persons acting together for a common purpose or course of conduct"). Were the rule otherwise, competitors who independently engaged in similar types of transactions with the same firm could be considered associates in a common enterprise. Such a result would contravene *Boyle's* definition of "enterprise."

In re Ins. Brokerage, 618 F.3d at 375-75.

The court then determined that the bid-rigging allegations in the Commercial complaint adequately pled the enterprise element fo the RICO claim. *Id.* at 375. It explained:

> As with the antitrust claims, we reach a different conclusion with respect to the claims alleging bid rigging - the bid-rigging allegations in the Commercial complaint suffice to plead a "Marsh-centered enterprise." As *Boyle* clarified, a RICO "enterprise" must have a structure, but it need not have any particular structural features beyond "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle*, 129 S.Ct. at 2244. We think the allegations of bid rigging provide the "rim" to the Marsh-centered enterprise's hub-and-spoke configuration, satisfying *Boyle's* requirements. The Commercial complaint alleges that Marsh prepared "broking plans" governing the placement of insurance contracts that came up for renewal. According to plaintiffs, "[t]he broking plans assigned the business to a specific insurer at a target price and outlined the coverage. The broking plans also included instructions as to which preferred Insurers would be asked to provide alternative [i.e., intentionally uncompetitive, or sham] quotes. If the incumbent Insurer hit the 'target,' it would get the business and then [Marsh employees] would solicit 'alternative' ... quotes from other members of the conspiracy." The complaint also alleges the reasons why the insurers agreed to provide sham bids. For example, it relates a statement by a former employee of a defendant insurer that his employer had agreed to "provide[ ] losing quotes" to Marsh in exchange for, among other things, Marsh's "getting 'quotes from other [insurance] carriers that would support the [employer, at least

> when it was the incumbent carrier] as being the best price.' " This statement plausibly evinces an expectation of reciprocity and cooperation among the insurers.
>
> In at least one sense, plaintiffs' allegations regarding the "Marsh-centered enterprise" exceed *Boyle's* requirements. *Boyle* explicitly disavowed the need for any particular organizational structure. *Boyle*, 129 S.Ct. at 2245-46. It upheld the conviction of a "loosely and informally organized" group of bank robbers that neither "had a leader [n]or hierarchy," nor "ever formulated any long-term master plan or agreement"; the group would meet before each robbery to "assign the roles that each participant would play (such as lookout and driver)." *Id.* at 2241. Here, by contrast, plaintiffs allege a hierarchical structure according to which Marsh, in accordance with its "broking plan," decided from which insurer each sham bid would be requested. Plaintiffs adequately allege a "common interest" or "purpose," *id.* at 2244, namely to increase profits by deceiving insurance purchasers about the circumstances surrounding their purchase. The alleged reciprocal bid rigging also adequately suggests "relationships among" the insurers "associated with the enterprise[s]"; if proved, it would plausibly demonstrate the insurers "joined together" in pursuit of the aforementioned common purpose. *Boyle*, 129 S.Ct. at 2244 (internal quotation marks omitted). Finally, the complaint alleges that the bid rigging occurred over a period of several years, plausibly alleging "that the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through 'a pattern of racketeering activity.' " *Id.* (quoting § 1962(c)). Accordingly, plaintiffs have adequately pled the enterprise element of the RICO claims based on the alleged Marsh-centered commercial enterprise.

In re Ins. Brokerage, 618 F.3d at 375-76 (alterations in original) (footnotes omitted). The court next considered the "conduct" element of the RICO claims and decided that "plaintiffs have adequately pled that defendants engaged in activities constituting participation in the conduct of the enterprise." *Id.* at 378. It explained:

> [B]ased on the complaint's allegations, plaintiffs have adequately pled that defendants engaged in activities constituting participation in the conduct of the enterprise. The allegations that defendant broker Marsh directed the placement of insurance contracts and solicited rigged bids from insurers plausibly imply that Marsh "participated in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 183, 113 S.Ct. 1163. And by allegedly supplying the sham bids, Marsh's insurer-partners are also adequately alleged to have

> "operated" the enterprise within the meaning of *Reves*. *Cf. id.* at 184, 113 S.Ct. 1163 (stating that "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management"); *e.g., MCM Partners, Inc. v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 978-79 (7th Cir.1995) (finding that two businesses participated in the conduct of an association-in-fact enterprise "by knowingly implementing decisions" by the enterprise's managers to commit crimes). We thus find plaintiffs have sufficiently pled that defendants in the Marsh-centered enterprise satisfied the "conduct" requirement set forth in *Reves*.

Id. at 378-79 (second alteration in original).

The court next addressed Plaintiffs' allegations in the Commercial Case that the Council of Insurance Agents and Brokers (CIAB) was a RICO enterprise. *Id.* at 379. After describing the "significant questions" it had about whether plaintiffs had adequately pled these claims, the court vacated the dismissal of the CIAB-based claims because "[n]one of these questions was squarely addressed by the parties on appeal, and we believe the District Court is best positioned to decided them in the first instance." *Id.* at 383.

- ***Great Western Mining & Mineral Co. v. Fox Rothschild LLP***, 615 F.3d 159 (3d Cir. 2010). Having lost in state court, Great Western Mining and Mineral Company brought a civil rights action in federal court under 42 U.S.C. § 1983, alleging deprivations of procedural and substantive due process. *Id*. at 161-62.

  Great Western's claims arose out of a Pennsylvania lawsuit and arbitration award. *Id*. In the state court litigation, Active Entertainment, Inc. retained Brownstein & Vitale, P.C. ("B&V") to represent it against an entity that Active had hired to build a miniature golf course. *Id.* Following that litigation, Active brought a malpractice suit against B&V and the individual lawyers representing him, Brownstein and Vitale. *Id.* The parties agreed to binding arbitration before Rutter and his company, ADR Options. *Id.* "According to the Complaint, ADR Options is the largest provider of alternative dispute services in Pennsylvania, New Jersey, and Delaware" and "many of ADR Options's arbitrators are former federal and state judges." Wiley represented Active; Paradise, a partner at Fox Rothschild, represented Vitale. *Id.* The arbitration resulted in an award for Brownstein, Vitale, and B&V. *Great Western*, 615 F.3d at 161-62. Great Western became the assignee of Active's interest. *Id.* at 162. Great Western filed a petition in Pennsylvania state court to vacate the arbitration award on the ground of improper failure to disclose potential conflicts because the managing partner at Fox Rothschild, Fryman, was concurrently employed at ADR Options as an arbitrator, and Paradise maintained a professional relationship with Rutter. *Id.* The state court ruled against Great Western and affirmed the arbitration award. *Id.* The Supreme Court of Pennsylvania denied Great Western's petition for allowance of appeal. *Id.* Great Western filed another state action against defendants and it was denied as collaterally estopped. *Id.* Great Western

alleged that, shortly thereafter, defendants' counsel informed Great Western's counsel that "[t]here [was] no way that a Philadelphia court [was] ever going to find against Rutter given his relationship with the Philadelphia court system." *Great Western*, 615 F.3d at 162.

In its § 1983 complaint, Great Western alleged that "the Pennsylvania state-court decisions were corrupted by the improper influence of Defendants, arising both from the Pennsylvania courts' reliance on Rutter's services and from Pennsylvania judges' prospect of future employment with ADR Options. *Id.* The district court granted Defendants' motion to dismiss for failure to state a claim, holding that Great Western had not sufficiently alleged that Defendants acted under color of state law. *Id.* Great Western filed a motion for reconsideration and for leave to amend its complaint and attached a draft amended complaint. *Id.* at 162-63. Before the court ruled, Great Western filed a second, and then third, motion for leave to amend, each time seeking to substitute a new amended complaint, and each time attaching the proposed amended complaint. *Id.* at 163. In the third motion, Great Western presented new evidence – Rutter's admission under oath in another lawsuit that some of the judges who had ruled against Great Western had already approached Rutter about the prospect of employment upon leaving the bench. *Id.* The district court denied the motion for reconsideration and all three motions for leave to amend. *Great Western*, 615 F.3d at 163. In ruling on the motion for reconsideration, the district court considered the second proposed amended complaint, but not the third, because "[t]o allow plaintiff to repeatedly submit drafts of its complaint while plaintiff's original motions are still pending would be prejudicial to defendants." *Id.* The Second Circuit affirmed.

With respect to the motion for leave to amend, the court explained that Federal Rule of Civil Procedure 15(a) instructs that "The court should freely give leave [to amend] when justice so requires." *Id.* at 174. The court relied upon the Supreme Court's interpretation of 15(a):

> In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 174 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). And decided that the district court's refusal to consider the third proposed amended complaint was erroneous because allowing Great Western to amend would not prejudice defendants. *Id.* But it nevertheless affirmed on the ground that granting leave to amend would have been futile. *Id.* The Second Circuit explained that, "[u]nder Rule 15(a), futility of amendment is a sufficient basis to deny

leave to amend. Futility 'means that the complaint, as amended, would fail to state a claim upon which relief could be granted.' *Great Western*, 615 F.3d at 174-75 (quoting *In re Merck & Co. Sec., Derivative, & ERISA Litig.*, 493 F.3d 393, 400 (3d Cir. 2007)). In determining that the substitution of the third proposed amended complaint would have been futile, the court considered the merits of Great Western's reconsideration and the additional allegation in the third proposed amended complaint. *Id.* at 175.

The court explained that "[t]o prevail on a § 1983 claim, a plaintiff must allege that the defendant acted under color of state law, in other words, that there was a state action." *Id.* at 175-76. And that "acting under color of state law" includes private parties who corruptly conspire with a judge in connection with an official judicial act. *Id.* at 176. "Thus, in order to state a claim under § 1983, Proposed Amended Complaint 3 must have adequately pled the existence of a conspiracy between Defendants, who are private parties, and the judges of the Pennsylvania court system." *Id.* And "to properly plead an unconstitutional conspiracy, a plaintiff must assert facts from which a conspiratorial agreement can be inferred." *Id.* at 178. The Second Circuit noted that "[t]his holding remains good law following *Twombly* and *Iqbal*, which in the conspiracy context, require 'enough factual matter (taken as true) to suggest that an agreement was made,' in other words, 'plausible grounds to infer an agreement.'" *Great Western*, 615 F.3d at 178 (quoting *Twombly*, 550 U.S. at 556). The court then decided that the third proposed amended complaint failed to meet the standard. *Id.* In reaching this conclusion, the court, following *Iqbal*, refused to consider any conclusory allegations of conspiracy, agreement, or understanding. *Id.* Instead, it explained that "Great Western must plead an agreement between the state court judges and Defendants to rule in favor of ADR Options and Rutter. To properly plead such an agreement, 'a bare assertion of conspiracy will not suffice.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

Great Western's claim rested on the following factual allegations: "(1) according to [Great Western's counsel], on or about March 1, 2006, Tintner stated that there was 'no way that a Philadelphia court is ever going to find against Thomas Rutter given his relationship with the Philadelphia court system'; (2) ADR Options is the largest provider of ADR services in Pennsylvania, has a large roster of former judges employed as arbitrators, and pays its arbitrators handsomely; and (3) in May 2009, Rutter testified at a deposition that some of the judges who had ruled for ADR Options and against Great Western had already approached him about employment after they leave the bench." *Id.*

The Second Circuit determined that

> At most, Great Western has alleged that Pennsylvania state-court judges hoped to secure employment with ADR Options after leaving the bench and thus had an incentive to rule in the company's favor. *Id.* Fatal to this claim, however, Great Western failed to make any factual contentions concerning conduct by Rutter or any of the other Defendants.

Great Western, 615 F.3d at 178. The Second Circuit also noted that "Great Western has not pleaded any facts that plausibly suggest a meeting of the minds between Rutter and members of the Pennsylvania judiciary," but sets forth merely conclusory allegations of agreement. *Id.* at 179. And concluded that: "Great Western's Proposed Amended Complaint 3 lacks sufficient factual allegations to create "plausible grounds to infer an agreement," as is required by *Twombly*. Any effort to amend by substituting Proposed Amended Complaint 3 therefore was futile, and we in turn affirm the District Court's denial of leave to amend on that ground." *Id.* (internal citation omitted).

- ***Bob v. Kuo***, No. 10-1615, 2010 WL 2825644 (3d Cir. Jul. 20, 2010) (unpublished) (per curiam). Plaintiff Bob was a detainee at a detention facility operated by Corrections Corporation of America ("CCA"). *Id.* at *1. Bob filed a *Bivens* action against CCA, the warden (Collins), and a physician who cared for him (Kuo). *Id.* Bob alleged that Kuo deliberately disregarded his medical needs by refusing to prescribe Celebrex for his complaints of swelling, stiffness, and a poor range of motion in his hand due to an old, work-related injury. *Id.* According to the complaint, Kuo refused to prescribe Celebrex due to the risk of serious side effects and instead offered to prescribe two other pain relievers. *Id.* When Bob complained that he could not tolerate the alternate medications, Kuo suggested soaking his hand in warm water. *Id.* The district court dismissed the complaint, concluding that "Bob's 'allegations demonstrate[d] that Dr. Kuo did not violate his rights under the Eighth Amendment,' that Bob 'made no allegations whatsoever concerning Warden Collins,' and that *Bivens* does not provide a cause of action against a private corporation such as CCA." *Bob*, 2010 WL 2825644, at *1.

  The Third Circuit affirmed. It held that "[t]here [wa]s nothing in the complaint's specific allegations from which [it could] plausibly infer that the defendants were deliberately indifferent to Bob's serious medical needs." *Id.* at *2. The court noted that "'claims of negligence or medical malpractice, without some more culpable state of mind, do not constitute 'deliberate indifference.'" *Id.* (citation omitted). Because Bob did "not allege that he was intentionally denied medical treatment for his pain"; "the allegations contained in the complaint, taken as true, simply assert[ed] inadequate treatment because Dr. Kuo would not prescribe the specific medication Bob desired"; and "Bob's own allegations also reveal[ed] a medical reason for Dr. Kuo's refusal to prescribe the requested medication," Bob's claims against Kuo could not survive. *Id.* The court noted that disagreement with a medical decision is not enough to establish an Eighth Amendment violation. *Id.* The court also affirmed the dismissal of the claims against Collins because the complaint contained no allegations regarding Collins, and under *Iqbal*, "'vicarious liability is inapplicable to *Bivens* and § 1983 suits, [and] a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1948). The court also affirmed dismissal of CCA because the Supreme Court has refused to extend *Bivens* actions to private corporations. *Bob*, 2010 WL 2825644, at *2 (citation omitted).

- ***Culinary Serv. of Delaware Valley, Inc. v. Borough of Yardley***, No. 09-4182, 2010 WL

2600683 (3d Cir. Jun. 30, 2010) (unpublished). Plaintiff Culinary Services distributed amusement, arcade, and redemption games to establishments licensed by the Pennsylvania Liquor Control Board ("PLCB"). *Id.* at *1. The plaintiffs entered into an agreement with the Knowles-Doyle American Legion in Yardley, Pennsylvania ("Yardley American Legion") for the Yardley American Legion to lease two games from Culinary Services in exchange for fifty-percent of the net revenue from the games. *Id.* The agreement contained an automatic termination provision in the event authorities provided notice that the games were prohibited. *Id.* Before entering into the agreement, the plaintiffs tried to obtain opinions from several Pennsylvania regulatory agencies as to the legality of the games, but received no substantive responses. *See id.* Before installing the games, one of the plaintiffs informed the local police chief of his intent to install the games and of the fact that the plaintiffs had received a "no comment" opinion from the state police's Bureau of Liquor Code Enforcement as to the legality of the games. *Id.* After the plaintiffs installed the games, the Borough Manager "informed the board of directors of the Yardley American Legion that the Games had been 'deemed illegal by Yardley Borough, Yardley Borough Police Department, and the Pennsylvania State Police.'" *Culinary Serv.*, 2010 WL 2600683, at *1. Upon official notification of the illegality of the games, the contract between the plaintiffs and the Yardley American Legion was effectively terminated. *Id.* at *2. After the plaintiffs requested further investigation, they were informed by the Borough Solicitor that "'The Borough of Yardley [wa]s in no position to make a determination as to the legality of the[Games] and the effect of possible use of the [Games] in the [Yardley] American Legion hall,'" but the Borough continued to refuse to rescind the official notification. *Id.* (second, third, and fourth alterations in original). The plaintiffs alleged:

> As a consequence of the Borough's actions, Plaintiffs lost their only contract in Pennsylvania and have since been unable to enter into additional contracts. Although several other potential customers have indicated their willingness to enter into agreements with Plaintiffs, they have declined to do so because of the Borough's assessment of the Games. As a result, Plaintiffs have been unable to distribute its inventory of fifty-four Games and have been deterred from manufacturing "hundreds more."

Id. Based on these allegations, the plaintiffs sued the Borough and several of its officers, asserting a § 1983 claim for violation of procedural due process against all defendants; tortious interference with contract against the Borough Manager and the Police Chief; commercial disparagement against the Borough Manager, the Police Chief, and President of the Borough Council; and a request for declaratory relief against all defendants that the games were "'games of skill that [we]re legal under the laws of the Commonwealth of Pennsylvania.'" *Id.* The district court dismissed the complaint, finding that the plaintiffs failed to identify a protected property or liberty interest to support the § 1983 procedural due process claim and that the defendants were entitled to qualified immunity on that claim; that the individual defendants were entitled to statutory immunity on the tortious interference and commercial disparagement claims; and that the plaintiffs failed to join indispensable parties

for the declaratory relief claim. *Id.* at *3. The district court also denied leave to amend. *Culinary Serv.*, 2010 WL 2600683, at *3.

On appeal, the court summarized the relevant pleading standards, noting that "[a]t this stage of the litigation, we focus on whether the non-moving party sufficiently pled its claims, not whether it can prove its claims." *Id.* (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009). The Third Circuit agreed with the district court that the plaintiffs failed to plead a property or liberty interest protected by the Fourteenth Amendment sufficient to maintain their § 1983 procedural due process claim. The plaintiffs argued that the defendants "deprived them of their property and liberty interest in the right to engage in a legitimate business free from arbitrary state deprivation." *Id.* at *4. The court explained that "[e]ntitlements . . . are not established by the Constitution; rather, they are created and defined by existing rules or understandings that stem from an independent source, such as state law." *Id.* Because the "Plaintiffs cite[d] no statute, regulation, government policy, or mutually explicitly understanding in their complaint that would demonstrate an entitlement to pursue their business interests," and because they had not "cited any source for their entitlement to th[e] Court," the court concluded that "Plaintiffs pled only a unilateral expectation of an interest in operating their business, which is not sufficient to plead an entitlement to a property interest under the Fourteenth Amendment." *Id.* With respect to the liberty interest, the court noted that it had "recognized a relevant liberty interest—the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference," but explained that "the Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation; state actions that exclude a person from one particular job are not actionable in due process claims." *Id.* at *5 (citations omitted). The court further explained that "it is the liberty interest to pursue a calling or occupation, not the right to a specific job, that is secured by the Fourteenth Amendment," and that "Plaintiffs must allege an inability to obtain employment within the field, not just a particular job or at a specific location or facility." *Culinary Serv.*, 2010 WL 2600683, at *5. The court noted that "[a]ssuming Plaintiffs' allegations [we]re true, they ha[d] been unable to lease additional Games in Pennsylvania because of Defendants' official notification letter . . . [and] several businesses ha[d] acknowledged their willingness to enter into commercial relationships with Plaintiffs but for Defendants' declaration that the machines [we]re illegal." *Id.* The court concluded that "at best, Plaintiffs ha[d] been precluded from distributing only two Games, and counsel conceded at argument that Plaintiffs [could] sell other Games in other locations," and that "[a]s such, Plaintiffs ha[d] only been deprived of the specific job of distributing the Games in Pennsylvania, but they [could] still engage in the general distribution business, to say nothing of their ability to lease Games in other states." *Id.* (citations omitted). As a result, the court held that the plaintiffs had "failed to assert a protected property or liberty interest, an essential element to their procedural due process claim," and affirmed this holding of the district court. *Id.* The court noted that because it had concluded that the plaintiffs did not identify a protected property or liberty interest, they had not alleged violation of a constitutional right, and that it could therefore alternatively dismiss the procedural due process claim based on qualified immunity. *Id.* at *5 n.5.

With respect to the tort claims, the court noted that the relevant inquiry involved the applicability of an exception to statutory immunity that applied if an act of the employee caused the injury and the act constituted a crime, actual fraud, actual malice, or willful misconduct. *Id.* at *6. The court stated that its "inquiry focuse[d] on whether Plaintiffs pled sufficient facts to show these Defendants desired the termination of the Agreement or to cause Plaintiffs to suffer pecuniary loss, or that Defendants knew or should have known that those results were substantially certain to follow. *Culinary Serv.*, 2010 WL 2600683, at *6 (citations omitted). The court concluded that "[w]ith regard to the tortious interference claim, Plaintiffs ma[de] bare assertions that Manager Winslade and Chief O'Neill acted willfully to bring about the termination of the Agreement, which is not sufficient under *Iqbal*." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950, 1953). Because the plaintiffs "merely allege[d] that the Agreement automatically terminated after Defendants notified the Yardley American Legion that the Games [we]re illegal," which did "not reveal that Manager Winslade or Chief O'Neill desired or was substantially certain the Agreement would terminate as a result of his conduct," "the allegations fail[ed] to show an entitlement to relief." *Id.* With respect to the commercial disparagement claim, the court explained that the allegations were insufficient under *Iqbal* to invoke the exception to statutory immunity:

> Plaintiffs allege that President Hunter adopted Manager Winslade's and Chief O'Neill's actions, and that the adoption was published on the Borough's website. They further allege that Defendants refused to rescind the official notification notwithstanding Solicitor McNamara's disclaimer of authority. Plaintiffs then make a bare assertion that Defendants engaged in this conduct to cause, or should have known their conduct would cause, Plaintiffs to suffer pecuniary loss. Plaintiffs assert no facts to support this alleged intent and, therefore, they failed to show an entitlement to relief. [*Iqbal*, 129 S. Ct. at 1950, 1953.] Accordingly, we will affirm the dismissal of Counts II and III.

Id.

With respect to the claim for declaratory relief, the court rejected the argument for abstention, *see id.* at *7–8, and concluded that the district court had erred in holding that certain parties were indispensable, *id.* at *8–9. As a result, the court vacated the dismissal of the claim for declaratory relief and remanded for the district court to consider whether it wished to continue to exercise jurisdiction over this claim and whether it should exercise its discretion and decline to grant declaratory relief. *See Culinary Serv.*, 2010 WL 2600683, at *6 & n.6, *9.

In analyzing the motion for leave to amend, the court stated that "[i]f a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment, even if the party does not request leave, unless such an amendment would be inequitable or futile." *Id.* The court agreed with the district court that the proposed amendment was futile, explaining

that "[t]he amended complaint still d[id] not identify a protected liberty or property interest essential to Plaintiffs' procedural due process claim" and "the amended complaint still only ma[de] bare assertions that the conduct of President Hunter, Manager Winslade, and Chief O'Neill constituted willful misconduct." *Id.* at *10. The court noted that "Plaintiffs allege[d] that their new allegations establish[ed] that the conduct was 'unlawful' and 'unreasonable,' but nothing they allege[d] show[ed] that these Defendants desired the termination of the Agreement or desired to cause pecuniary loss, or that they were substantially certain such results would occur." *Id.* (citations omitted). The court concluded that the defendants would "remain entitled to immunity under Pennsylvania law" under the allegations of the amended complaint, and noted that the claim for declaratory relief was not included in the amended complaint. *Id.*

- ***Brookhart v. Rohr***, No. 10-1449, 2010 WL 2600694 (3d Cir. Jun. 30, 2010) (unpublished) (per curiam). The case arose out of the foreclosure and Sheriff's sale of the plaintiff's property. Brookhart sued various individuals who were involved in the foreclosure and Sheriff's sale, "[a]lleging fraud, conspiracy, bank fraud, and violations of the Hobbs Act, 18 U.S.C. § 1951, the Racketeer Influenced and Corrupt Organizations Act ('RICO'), 18 U.S.C.§§ 1961–1968, and the civil rights statutes, 42 U.S.C. §[§] 1983, 1985(3), and 1986 . . . ." *Id.* at *1. "Brookhart claimed that Perry County officials conspired with employees and attorneys of PNC Bank and the purchaser to deprive him of his property." *Id.* After all defendants moved to dismiss, the district court "dismissed the complaint without leave to amend against the state court judge who presided over a hearing to resolve a declaratory judgment action involving Brookhart," reasoning that the judge "did not act in the clear absence of jurisdiction and thus was immunized from a suit for money damages." *Id.* The district court dismissed the claims against the remaining defendants, but granted leave to amend "to provide factual allegations in support of [Brookhart's] claims." *Id.* Brookhart filed a response to the dismissal order "complain[ing] that Judge Rehkamp should not have been dismissed and . . . [seeking] to clarify each defendant's role in the foreclosure and sale of his property . . . [by] contend[ing] that the judgment in the state mortgage foreclosure action was fraudulent because of the absence of an 'original wet ink signature' on the 'Note front and back.'" *Id.* The district court granted the defendants' renewed motion to dismiss, "reasoning that the fraud claim had not been pled with particularity as required by Rule 9(b), FED. R. CIV. PRO., and Brookhart's other allegations were equally conclusory or speculative." *Brookhart*, 2010 WL 2600694, at *1.

  Brookhart appealed *in forma pauperis*. The Third Circuit dismissed the appeal as frivolous, noting that "the *in forma pauperis* statute provides that the Court shall dismiss the appeal at any time if the Court determines that it is frivolous.'" *Id.* (citing 28 U.S.C. § 1915(e)(2)(B)(i)). The court explained: "The District Court reasoned, and we agree, that Brookhart failed to allege any facts from which to infer any kind of fraud or conspiracy in the foreclosure action and Sheriff's sale of his property." *Id.*

  With respect to the claims under § 1983, the court found that "the majority of the defendants [we]re private citizens and not state actors," and that while "[l]iability would attach if a

private party conspired with a state actor, . . . the District Court properly concluded that the vague allegations of a conspiracy to defraud Brookhart of his property did not satisfy the plausibility standard of Rule 12(b)(6)." *Id.* at *2 (citing *Iqbal*, 129 S. Ct. at 1949) (internal citation omitted). The court also held that "[a]s to the remaining defendants—the sheriff and the court officials— . . . Brookhart's conclusory allegations that his constitutional rights were violated fail[ed] to state a plausible claim." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949). The court also held that "judges are absolutely immunized from a suit for money damages arising from their judicial acts," and that "[t]heir orders may not serve as a basis for a civil action for damages." *Id.* (citations and footnote omitted).

With respect to the § 1985 claims, the court concluded that "Brookhart did not allege that he was a member of a protected class, and his conclusory allegations of a deprivation of his constitutional rights [we]re insufficient to state a section 1985(3) claim." *Brookhart*, 2010 WL 2600694, at *2. In addition, "[b]ecause Brookhart failed to allege a section 1985(3) violation, he could not assert a cause of action under . . . § 1986," which requires the existence of a § 1985 conspiracy. *Id.*

The court explained that the Hobbs Act claim was properly dismissed because the statute provided only criminal sanctions, not civil relief. *Id.* The RICO claim failed because the statute only "authorize[d] civil suits by any person injured in his business or property by reason of a violation of 18 U.S.C. § 1962, but Brookhart failed to allege (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity." *Id.* (internal citation omitted). The court cited a pre-*Twombly* case to explain that "[c]onclusory allegations of a pattern of racketeering activity, in this case, a fraudulent scheme, are insufficient to survive a Rule 12(b)(6) motion." *Id.* (citing *Lum v. Bank of Am.*, 361 F.3d 217, 223–24 (3d Cir. 2004)).

- ***Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.***, 602 F.3d 237 (3d Cir. 2010). The appeal involved two related antitrust cases (*Hess* and *Jersey Dental*). The plaintiffs in both cases were two dental laboratories, and one of the defendants in both cases was Dentsply International, Inc., a manufacturer of artificial teeth sold to the plaintiffs and other labs through a network of dealers (the "Dealers"). *Id.* at 244. Several of the Dealers were named as defendants only in the *Jersey Dental* case. *Id.* "In both cases, the Plaintiffs essentially allege[d] that Dentsply 'foreclosed its competitors' access to [D]ealers by explicitly agreeing with some [D]ealers that they [would] not carry certain competing brands of teeth and by inducing other [D]ealers not to carry those competing brands of teeth' and that Dentsply 'by agreement [with] its [D]ealers, . . . set[ ] the [D]ealers' resale prices.'" *Id.* (omission and second, third, fifth, sixth, seventh, eighth, and ninth alterations in original) (citation omitted). The plaintiffs alleged that "Dentsply 'caused [the] Plaintiffs to purchase Dentsply's teeth at artificially high prices and lose profits from unrealized sales of Dentsply's competitors' teeth.'" *Id.* (alteration in original) (citation omitted). "The Plaintiffs brought the *Hess* suit against Dentsply in 1999, alleging several antitrust conspiracies and seeking both monetary and injunctive relief." *Id.* The district court granted summary judgment on the damages claim in favor of Dentsply in *Hess*, finding that the plaintiffs lacked standing under *Illinois*

Brick Co. v. Illinois, 431 U.S. 720 (1977). *Howard Hess Dental Labs.*, 602 F.3d at 244. The plaintiffs brought the *Jersey Dental* case in 2001 against Dentsply and several of its Dealers, alleging several antitrust conspiracies, and seeking damages and injunctive relief. *Id.* The district court dismissed the damages claims based on *Illinois Brick* and denied leave to amend because it concluded that amendment would have been futile. *Id.* In an interlocutory appeal, the Third Circuit held that the plaintiffs could not recover any damages in *Hess* and most damages in *Jersey Dental*. *Id.* On remand, the plaintiffs filed an amended complaint in *Jersey Dental*, alleging conspiracies to restrain trade in violation of Section 1 of the Sherman Act and conspiracies to monopolize under Section 2 of the Sherman Act. *Id.* at 244–45. The district court denied the plaintiffs' motion for summary judgment in *Hess* and granted the defendants' motions to dismiss in *Jersey Dental*. *Id.* at 245. The district court also denied the plaintiffs' motion for reconsideration in *Hess*, and suggested that the parties enter a stipulation or submit proposed orders to close the *Hess* case. *Howard Hess Dental Labs.*, 602 F.3d at 245. The defendants in *Hess* then moved for dismissal of the complaint. *Id.* The plaintiffs opposed the motion to dismiss, but also submitted a proposed order to dismiss the case with prejudice, to comply with the district court's request. *Id.* The district court dismissed the *Hess* complaint by approval of the plaintiffs' proposed order. *Id.*

On appeal, the Third Circuit affirmed the denial of the plaintiffs' motion for summary judgment in the *Hess* case on the monopolization claims against Dentsply. *See id.* at 251. The court also affirmed the denial of the motion for reconsideration in *Hess*. *See id.* at 252. With respect to the district court's subsequent dismissal of the complaint in *Hess*, the Third Circuit stated that "[t]o the extent the Plaintiffs thought that the District Court's denial of their summary judgment motion entitled them to pursue their claims any further, they were mistaken, as a plaintiff asserting antitrust claims does not get to a jury simply by filing a complaint and hoping for the best." *Howard Hess Dental Labs.*, 602 F.3d at 252 (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467–69 (1992); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 481 (3d Cir. 1992) (en banc)).

In *Jersey Dental*, the plaintiffs alleged a conspiracy to monopolize in violation of Section 2 of the Sherman Act and a conspiracy to restrain trade in violation of Section 1. *Id.* at 253. The district court dismissed the four counts on various grounds, including that the plaintiffs did not sufficiently allege specific intent by the Dealers, as required for a Section 2 claim, and that the plaintiffs failed to allege the agreement element of the Section 1 and Section 2 claims. *Id.* The Third Circuit noted that "[t]he plaintiffs s[ought] to revive their conspiracy claims essentially by reference to their allegations that 'every Dealer agreed to the same plan—Dealer Criterion 6'; that 'every Dealer knew that every other Dealer agreed, or would agree, to this same plan'; and that 'it . . . was obvious to each Dealer that—only if all of the other Dealers complied—would the purpose of Dealer Criterion 6 be achieved.'" *Id.* at 254. The court noted that Section 1 claims always require an agreement, and that the Section 2 claim here—conspiracy to monopolize—also required an agreement. *Id.* (alteration in original). The court stated that "[t]o allege such an agreement between two or more persons or entities, a plaintiff must allege facts plausibly suggesting 'a unity of purpose or a common

design and understanding, or a meeting of minds in an unlawful arrangement.'" *Id.* (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (quotation omitted)). The court described the allegations of conspiracy:

> The amended complaint in this case alleges a two-tiered conspiracy. First, it alleges that the defendants conspired to "maintain Dentsply's monopoly of the manufacture of artificial teeth and/or premium artificial teeth for sale in the United States, to restrain trade for the sale of artificial teeth and/or premium artificial teeth in the United States by the implementation of an exclusive dealing arrangement, and to exclude Dentsply's competitors from the markets for such teeth in the United States[.]" Second, it alleges that the defendants conspired "to sell such teeth to dental laboratories at anticompetitive prices determined by Dentsply and agreed to by the Dealer Defendants." To carry out this conspiracy, Dentsply allegedly has sold teeth to the Dealers on the condition "that [the Dealers] restrict their dealings with rival manufacturers[.]" The Dealers, the Plaintiffs allege, "knew that this exclusive dealing arrangement was and is an illegal restraint of trade designed to maintain Dentsply's monopoly."

Howard Hess Dental Labs., 602 F.3d at 254 (alterations in original) (internal citations omitted). The court "understood the Plaintiffs to allege a hybrid of both vertical and horizontal conspiracies," which it explained is also called a "hub-and-spoke" conspiracy. *Id.* at 254–55. The court found the allegations of agreement insufficient:

> Here, even assuming the Plaintiffs have adequately identified the hub (Dentsply) as well as the spokes (the Dealers), we conclude that the amended complaint lacks any allegation of an agreement among the Dealers themselves. The amended complaint states only in a conclusory manner that all of the defendants—Dentsply and all the Dealers included—conspired and knew about the alleged plan to maintain Dentsply's market position. The amended complaint alleges, for instance, that "Dentsply made clear to each . . . dealer that every other Dentsply dealer was . . . required to agree to the same exclusive dealing arrangement, and that every other Dentsply dealer had so agreed." Iterations of this allegation are sprinkled throughout the amended complaint. But to survive dismissal it does not suffice to simply say that the defendants had knowledge; there must be factual allegations to plausibly suggest as much. *See Twombly*, 550 U.S. at 564, 127 S. Ct. 1955. There are none here. In other words, the "rim" connecting the various "spokes" is missing.

Id. at 255 (omissions in original) (internal citations omitted). The court concluded that the

inference suggested by the plaintiffs was not warranted, explaining:

> Instead of underscoring factual allegations plausibly suggesting the existence of an agreement, the Plaintiffs invite us to infer that the Dealers were aware of each other's involvement in the conspiracy because, as market participants, they all knew that Dentsply was the dominant player in the artificial tooth market and because they all had an economic incentive to create and maintain a regime in which Dentsply reigned and the Dealers did its bidding. In that regime, the Plaintiffs tell us, the Dealers would all benefit from Dentsply's policies because they would all be able to charge dental laboratories artificially inflated prices for teeth in their various regions of operation. We do not disregard the logical appeal of this argument. Certainly, the objective of many antitrust conspiracies is to control pricing with an eye to increasing profits. But simply because each Dealer, on its own, might have been economically motivated to exert efforts to keep Dentsply's business and charge the elevated prices Dentsply imposed does not give rise to a plausible inference of an agreement among the Dealers themselves. *Cf. Twombly*, 550 U.S. at 566, 127 S. Ct. 1955 (noting the "logic" of the complaint's allegation of an agreement but finding it insufficient because it did not suggest actual joint action). Notwithstanding *Twombly*'s requirement that an antitrust plaintiff state "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement[,]" *id.* at 556, 127 S. Ct. 1955 (footnote omitted), the Plaintiffs' allegations do not offer even a gossamer inference of any degree of coordination among the Dealers. Those allegations are not "placed in a context that raises a suggestion of a preceding agreement" among the Dealers. *Id.* at 557, 127 S. Ct. 1955. Instead, they do no more than intimate "merely parallel conduct that could just as well be independent action." *Id.* As a consequence, the Plaintiffs have fallen short of their pleading obligations.

Id. at 255–56 (alteration in original) (footnote omitted).

The court also rejected the plaintiffs' alternative argument that "even if they ha[d] not alleged an overarching conspiracy between and among Dentsply and all of its Dealers, they at least ha[d] adequately alleged several bilateral, vertical conspiracies between Dentsply and the Dealers." *Id.* at 256. The court explained that it did not need to decide whether the alternative theory could legally proceed:

> [W]e need not weigh in on the alternative theory the Plaintiffs now press, for even assuming it is legally viable or even relevant here, the Plaintiffs cannot pursue it under the circumstances of this case

> because the amended complaint cannot be fairly understood to allege the existence of several unconnected, bilateral, vertical conspiracies between Dentsply and each Dealer. While pleading in the alternative is, of course, authorized by the Federal Rules of Civil Procedure, *see* FED. R. CIV. P. 8(a)(3), we have an obligation to read allegations not in isolation but as a whole and in context, *see Chabal v. Reagan*, 822 F.2d 349, 357 (3d Cir.1987); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1026 (3d Cir. 1987). As we read the amended complaint, we see no indication of the Plaintiffs' intention to allege that every single agreement between Dentsply and each Dealer had anticompetitive effects. All throughout the amended complaint are substantially similar variations on the allegation that the "Defendants have agreed, *each with all of the others*, to implement an exclusive dealing arrangement[.]" Indeed, the amended complaint is rife with additional references to "the conspiracy" between "[t]he Defendants, . . . *each with all of the others[.]*" These allegations are just not the stuff of several mini-agreements lacking a horizontal tether. In other words, the Plaintiffs simply did not draft their amended complaint to encompass their alternative legal theory. In short, the Plaintiffs are bound by the four corners of their amended complaint, which clearly seeks to allege one conspiracy to which Dentsply and all of the Dealers, as a collective, were parties. To the extent the Plaintiffs are recasting their allegations in an effort to circumvent a motion to dismiss, we must reject that approach. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907–08, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 533 F.3d 1, 5 (1st Cir. 2008).

Id. at 256–57 (alterations in original) (internal citations omitted). The court concluded that "[t]he Plaintiffs ha[d] failed to allege any facts plausibly suggesting a unity of purpose, a common design and understanding, or a meeting of the minds between and among Dentsply and all of the Dealers," and affirmed the determination that the plaintiffs had not adequately alleged an agreement. *Howard Hess Dental Labs.*, 602 F.3d at 257.

The court also affirmed the district court's decision to dismiss the conspiracy to monopolize claims on the alternative ground that they failed to adequately allege specific intent by the Dealers. *Id.* at 257–58. The court noted that "[s]pecific intent in the antitrust context may be inferred from a defendant's unlawful conduct," but concluded that the inference was not warranted in these circumstances:

> Here, the Plaintiffs point us to their allegations that the defendants "have acted with the specific intent to unlawfully maintain a monopoly[,]"; that "the intended effect of th[e] exclusive dealing arrangement . . . has been the elimination of any and all

> competition[,]"; and that the defendants "knew that this exclusive dealing arrangement was and is an illegal restraint of trade designed to maintain Dentsply's monopoly[,]". In essence, the Plaintiffs allege that Dentsply's pricing policies were unlawful, that the Dealers knew as much, and that they signed on to those policies knowing full well they were unlawful. But that allegation, in its many iterations, is conclusory. There are no facts behind it, so it does not plausibly suggest knowledge of unlawfulness on the Dealers' part. We could feasibly infer the Dealers' specific intent to further Dentsply's monopolistic ambitions if the Plaintiffs had stated enough factual matter to suggest some coordination among the Dealers, something to suggest that they knew that Dentsply was spearheading an effort to squash its competitors by pressing the Dealers into its service and keeping prices artificially inflated. We have already determined, however, that the Plaintiffs' allegations that the Dealers conspired with Dentsply are deficient, so we cannot infer the Dealers' specific intent from their mere participation in the conspiracy, as the Plaintiffs urge. In fact, the only actual conduct the Plaintiffs have alleged on the part of the Dealers is that each one of them, acting on its own, signed a bilateral dealing agreement with Dentsply. The only plausible inference from that conduct is that each Dealer sought to acquire, retain and/or increase its own business. Significantly, the antitrust laws do not prohibit such conduct. At bottom, the Plaintiffs' allegations of specific intent rest not on facts but on conclusory statements strung together with antitrust jargon. It is an axiom of antitrust law, however, that merely saying so does not make it so for pleading-sufficiency purposes. *See Twombly*, 550 U.S. at 555, 127 S. Ct. 1955 ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" (internal quotation marks, alteration and citation omitted)).

Id. at 257–58 (alterations and omission in original) (internal citations and footnote omitted).

The court also held that the coconspirator exception to the *Illinois Brick* doctrine did not apply because "the amended complaint d[id] not adequately allege that the Dealers [we]re members of a conspiracy with Dentsply." *Id.* at 258–59. The court explained that "the Plaintiffs could come within *Illinois Brick*'s coconspirator exception only if the Dealers were precluded from asserting claims against Dentsply because their participation in the conspiracy was 'truly complete,'" but "the amended complaint d[id] not give rise to a plausible inference that the Dealers' involvement in the conspiracy was truly complete." *Id.* at 259. Because the plaintiffs could not come within the coconspirator exception, they were "in essence . . . asserting their claims against the Dealers as mere middlemen," which was prohibited under the relevant case law. *See id.*

- ***Mann v. Brenner***, No. 09-2461, 2010 WL 1220963 (3d Cir. Mar. 30, 2010) (unpublished). The plaintiff appealed the dismissal of his claims under § 1983 against the City of York, its agents, and York College. *Id.* at *1. The Third Circuit affirmed. Mann owned a house in York that York College sought to purchase to use for student housing, but the parties could not agree on a price. *Id.* Mann's home was later cited for violation of the City code and was declared "blighted" by the City. *Id.* The City began condemnation proceedings against Mann in the Court of Common Pleas for York County. *Id.* Mann stipulated to the blight determination, but argued that the City and York College had conspired to harass and intimidate him into selling his property for a reduced price. *Id.* The Court of Common Pleas found the taking to be proper and concluded that the City had not acted in bad faith or committed fraud by pursuing condemnation proceedings against Mann. *Mann*, 2010 WL 1220963, at *1. At the conclusion of the condemnation proceedings, Mann was paid $166,000 for his property. *Id.*

  Mann's district court complaint alleged, under § 1983, that the defendants conspired to intimidate and harass him into accepting a significantly reduced price for his property. *Id.* Mann asserted that "'[t]heir plan, plainly put, was to drive [me] crazy.'" *Id.* (alterations in original). The district court granted the defendants' motion to dismiss, but granted leave to amend. *Id.* Mann filed two amended complaints, and the third version of his complaint was dismissed and the subject of the appeal. *Id.* On appeal, Mann argued that the district court applied the wrong standard to dismiss his complaint, erred in dismissing his complaint under that standard, and improperly stayed discovery pending ruling on the motions to dismiss. *Mann*, 2010 WL 1220963, a t*1.

  The Third Circuit held that the district court had applied the correct standard by noting that motions to dismiss are governed by Rule 12(b)(6) as interpreted in *Twombly* and *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). *Mann*, 2010 WL 1220963, at *2. The court noted that "Mann fail[ed] to cite either *Twombly* or the 'plausibility standard it ushered in, instead choosing to rely on the now defunct 'no-set-of-facts' standard of *Conley v. Gibson*, which the Supreme Court squarely rejected in *Twombly*." *Id.* at *2 n.3 (internal citation omitted). The Third Circuit also rejected the argument that the district court improperly applied the standard.

  Mann asserted a First Amendment retaliation claim, asserting that after he defended himself in court against $2,000 in fines for code violations, one of the City defendants cited him with another $2,000 in fines in retaliation for his successful defense. *Id.* The court noted that "[n]owhere in Mann's third amended complaint d[id] he allege facts that could reasonably support the necessary 'causal link' between his protected speech (successfully defending the initial fines) and the unlawful retaliation (an additional $2,000 fine)." *Id.* The court explained that "[i]nstead, Mann ma[de] vague and conclusory allegations that he was assessed some unreasonable fine for some unspecified violation, in retaliation for 'cho[osing] to use legal process as a way to protect and extend his rights.'" *Id.* (third alteration in original) (citing *Iqbal*, 129 S. Ct. at 1950). The court held that "[t]hese allegations f[e]ll far short of what is required to put the defendants on notice of the claims and the bases for

them." *Id.* (citations omitted). The court affirmed dismissal of the First Amendment retaliation claim.

Mann also asserted a claim under the Fourth Amendment for malicious prosecution against certain of the City's agents, alleging that they cited him with thousands of dollars in fines and brought other "'frivolous criminal charges'" against him. *Mann*, 2010 WL 1220963, at *3. The Third Circuit concluded that "[e]ven though on its third iteration, Mann's complaint wholly fails to allege that the defendants acted without probable cause in citing him for code violations," and that "Mann did not allege that he suffered a 'deprivation of liberty consistent with the concept of a seizure' as a result of the criminal citation proceedings." *Id.* (citation omitted). The court noted that "[t]he only deprivation Mann claims to have suffered is 'legal fees, court costs, and interminable inconvenience,'" and explained that "[s]uch deprivations are insufficient to establish that Mann was the victim of a malicious prosecution under the Fourth Amendment." *Id.* (citing *DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005)). The court affirmed the dismissal of the malicious prosecution claim.

Mann also asserted a substantive due process claim "based on the defendants' unlawful agreement 'to deprive [him] of his rights through the unlawful use of state authority as a way to coerce him into compliance with their wishes.'" *Id.* (alteration in original). The court concluded that the allegation that the plaintiff was unlawfully harassed into a condemnation proceeding was barred by collateral estoppel, explaining that the "record ma[de] clear that the identical issue Mann s[ought] to raise on appeal was actually litigated in the state condemnation proceeding." *Id.* at *4 (footnote omitted).

Finally, Mann raised a "class of one" equal protection claim, relying on "general allegations that 'he was subjected to unequal and unauthorized mistreatment on a selective basis because of the defendant[']s unlawful desire for his property,' in violation of his right to equal protection." *Id.* (alteration in original). The court noted that "[a]lthough [Mann] allege[d] that '[o]ther citizens are not treated in this fashion, particularly the political leaders of the City of York,' Mann fail[ed] to plead that he was treated differently than other similarly situated individuals, that is, other property owners of blighted structures in the City of York." *Mann*, 2010 WL 1220963, at *4 (third alteration in original) (internal record citation omitted). The court explained that "[w]hile [*Village of Willowbrook v.*] *Olech*[, 528 U.S. 562 (2000) (per curiam)] may not require plaintiffs to 'identify in the complaint specific instances where others have been treated differently,' the complaint [wa]s still deficient." *Id.* (internal citation omitted). The court cited both a post-*Twombly* case and a pre-*Twombly* case to conclude that "[w]ithout any allegation regarding other blighted property owners, Mann simply [could not] 'nudge [his] claims across the line from conceivable to plausible.'" *Id.* (third alteration in original) (citing *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 570); *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006) ("'class of one' claim failed because plaintiff, a Borough Manager, did 'not allege the existence of similarly situated individuals—i.e., Borough Managers—who [the Mayor] treated differently than he treated [plaintiff]'") (alterations in original)). The court found that "Mann's bald assertions that the defendants violated his right to equal protection because 'he was selectively and

vindictively cited and prosecuted by the City in an effort to force him into cooperation with York College' 'amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1951) (citation omitted). The court affirmed dismissal of the equal protection claim.

With respect to Mann's objection to the district court's refusal to allow discovery before deciding the motions to dismiss, the Third Circuit noted that "[i]n certain circumstances it may be appropriate to stay discovery while evaluating a motion to dismiss where, if the motion is granted, discovery would be futile." *Id.* at *5 (citing *Iqbal*, 129 S. Ct. at 1954 ("'Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery.'")). The court found this to be such a case, explaining that "none of Mann's claims entitle him to relief." *Id.* The court cited a case decided just before *Twombly*, and noted that Mann's contention that "he could have produced 'a litany of facts' substantiating his claims if he had more time to conduct discovery, misses the mark." *Mann*, 2010 WL 1220963, at *5 (citing *Mitchell v. McNeil*, 487 F.3d 374, 379 (6th Cir. 2007)) (internal citation omitted). The court cited pre-*Twombly* case law to explain that "[a] motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim, and therefore may be decided on its face without extensive factual development." *Id.* (citing *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989) ("the purpose of Rule 12(b)(6) is to 'streamline[ ] litigation by dispensing with needless discovery and factfinding.'") (alteration in original); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("'A motion to dismiss based on failure to state a claim for relief should . . . be resolved before discovery begins.'"); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("the idea that discovery should be permitted before deciding a motion to dismiss 'is unsupported and defies common sense [because t]he purpose of F.R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery'") (alterations in original)). The court concluded that the district court did not abuse its discretion in staying discovery. *Id.*

The Third Circuit also noted that the district court did not abuse its discretion in denying leave to amend, explaining that "[b]ecause Mann was permitted to [amend] twice before the present motions to dismiss were filed, . . . the District Court was well within its discretion in finding that allowing Mann a fourth bite at the apple would be futile." *Id.* at *5 n.9.

- ***Franco-Calzada v. United States***, No. 09-4409, 2010 WL 1141384 (3d Cir. Mar. 25, 2010) (unpublished) (per curiam). The district court dismissed *sua sponte* the plaintiff's prisoner civil rights complaint for failure to state a claim under 28 U.S.C. § 1915A(b)(1)–(2).[19] *Franco-Calzada*, 2010 WL 1141384, at *1. The Third Circuit dismissed the appeal under

[19] Under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). Subsection (b) provides grounds for dismissal, including if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b).

28 U.S.C. § 1915(e)(2)(B).[20] Franco-Calzada fell from a ladder in prison and fractured two fingers. *Id.* He alleged that the ladder was too small for an adult and that it caused his fall and injuries. *Id.* He alleged, on information and belief, that at least two other inmates had fallen because of the ladder problem, and asserted that the defendants failed to inspect the ladders and rectify the problem. *Id.* Franco-Calzada also claimed that his medical treatment was unnecessarily delayed in deliberate indifference to his serious medical needs. *Id.* Specifically, he alleged that the defendants failed to send him to the emergency room on the night of his fall, that they took no x-rays until the following Monday, and that they delayed his surgery to fix the fractures for two weeks. *Id.* He also claimed that the plaintiffs made him purchase pain medication, after first providing it for free, and that he suffered permanent stiffness and pain in his fingers. *Franco-Calzada*, 2010 WL 1141384, at *1.

The magistrate judge recommended dismissal, finding that "Franco-Calzada had no *Bivens* claim because the factual allegation of a thirteen-day delay in obtaining surgery, alone, was 'inadequate to allege deliberate indifference on the part of any defendant.'" *Id.* The magistrate judge also treated the slip-and-fall allegations as a *Bivens* claim, and concluded that "Franco-Calzada 'again fail[ed] to allege any facts that would permit an inference of deliberate indifference.'" *Id.* The district court adopted the magistrate judge's report and dismissed the complaint. *Id.*

The Third Circuit concluded that dismissal was appropriate, explaining:

> There is nothing in the Complaint's specific allegations from which we can plausibly infer that the defendants were deliberately indifferent to Franco-Calzada's serious medical needs or to prison conditions pertaining to the use of an allegedly unsafe ladder in his cell. The protections afforded prisoners by the Due Process Clause of the Fourteenth Amendment are not triggered by the mere negligence of prison officials. *See Daniels v. Williams*, 474 U.S. 327, 330–31 (1986). Likewise, Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986). Regarding medical mistreatment claims in particular, "[i]t is well-settled that claims of negligence or medical malpractice, without some more culpable state of mind, do not constitute 'deliberate indifference.'" *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir.1999); *see also White v. Napoleon*, 897 F.2d 103, 108 (3d Cir.1990) (concluding that mere medical malpractice cannot give rise to a violation of the Eighth Amendment). Only "unnecessary and wanton infliction of pain" or "deliberate indifference to the serious

[20] Section 1915 addresses proceedings *in forma pauperis*, and subsection (e)(2)(B) provides that a court shall dismiss the case if the action or appeal "is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

> medical needs" of prisoners is sufficiently egregious to rise to the level of a constitutional violation. *White*, 897 F.2d at 108–09 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Here, the allegations contained in the Complaint, taken as true, assert a simple negligence claim at most, and thus, do not state a claim of a constitutional violation under the Eighth Amendment.

Id. at *2. The Third Circuit noted that the district court did not consider granting leave to amend, but saw no need to remand because amendment would have been futile. *Id.* at *3. The court explained:

> Here, no additional allegations would cure the defects in the Complaint as to the slip and fall claim. Moreover, the BOP's grievance responses that Franco-Calzada attached to his Complaint, lead to the plausible inference that the medical staff treated Franco-Calzada promptly and without unnecessary delay. The medical defendants treated . . . him with first-aid and started him on antibiotics on the day he was injured. The orthopedic specialist evaluated Franco-Calzada's injuries on January 6, 2009. After a pre-operative visit on January 12, Franco-Calzada underwent surgery on January 15, 2009.

Franco-Calzada, 2010 WL 1141384, at *3. The Third Circuit affirmed dismissal.

- ***Donnelly v. O'Malley & Langan, PC***, No. 09-3910, 2010 WL 925869 (3d Cir. Mar. 16, 2010) (unpublished) (per curiam). The plaintiff appealed dismissal of his legal malpractice claim and other claims asserted against his workers compensation attorneys. The appellate court affirmed. The defendants represented the plaintiff in a workers compensation claim that ultimately settled. *Id.* at *1. The complaint alleged that the attorneys failed to investigate the plaintiff's claim before settling, disclosed his letter of resignation to his employer before settlement, and improperly obtained and disclosed confidential information about him. *Id.* After terminating his contract with the defendants, the plaintiff filed a *pro se* penalty petition claiming that his employer failed to send him his settlement check at the proper time. *Id.* The employer then delivered the check to the plaintiff's former attorneys, who allegedly opened it without permission and threw away the envelope. *Id.* "Donnelly claimed that the O'Malley defendants deliberately interfered with the penalty proceedings by destroying the envelope, which, according to him, constituted material evidence in his case," and that "when they no longer represented him, the O'Malley defendants obtained a copy of the settlement hearing transcript and improperly discussed his case ex parte with an employment attorney, a workers compensation judge, and the employer's lawyer." *Id.* The *pro se* district court complaint asserted claims for invasion of privacy under state law, breach of contract, legal malpractice, and violation of state and federal constitutional rights. *Donnelly*, 2010 WL 925869, at *1.

The Third Circuit held that to the extent the plaintiff sought to pursue a claim that his privacy was violated under the Freedom of Information Act (FOIA), the court "agree[d] with the District Court that the FOIA applies only to the release of government records by the federal government, and, thus, Donnelly's claim fail[ed] as a matter of law." *Id.* at *1 n.2. The court also found that Donnelly had "no meritorious claim under the Privacy Act, which protects individuals from the misuse of identifying information contained in computer information systems that are maintained by federal agencies." *Id.* (internal citation omitted).

The district court dismissed the breach of contract/legal malpractice claim because the plaintiff failed to file a certificate of merit, as required by a local rule. *Id.* The district court also held that Donnelly failed to state an invasion of privacy claim under state law, "reject[ing] as meritless Donnelly's claim that the O'Malley defendants invaded his privacy by obtaining information about him from the Department of Labor & Industry, which was needed in order to represent him in workers compensation proceedings, and by procuring the transcript of the workers compensation hearing, a matter of public record." *Id.* "As for his claim of ex parte communications between the O'Malley defendants (whose services had been terminated) and an employment attorney, a workers compensation judge, and the employer's lawyer, the District Court held that Donnelly's 'naked assertions' were insufficient to show that any private facts had been disseminated to the public or that he was placed in a false light as a result of such communications." *Id.* With respect to the federal constitutional claim, which the district court treated as a claim under § 1983, the district court held that Donnelly failed to show that the defendants "acted 'under color of state law.'" *Donnelly*, 2010 WL 925869, at *2. For similar reasons, the district court dismissed the state constitutional claim, explaining that the relevant provision "'govern[ed] only the actions of the state government.'" *Id.* (citation omitted).

The Third Circuit held that the district court applied the appropriate standard of review to the complaint and properly dismissed the claims. However, with respect to the dismissal based on failure to submit a certificate of merit under the relevant local rule, the court found that involuntary dismissal under that rule is not a dismissal with prejudice, and modified that dismissal to be without prejudice. *Id.* The court saw "no need to remand the matter for amendment of the Complaint regarding Donnelly's privacy and § 1983 claims because amendment would be futile," explaining that "no additional allegations would cure the defects in the Complaint regarding the state action requirement under § 1983," and that "Donnelly relie[d] on pure conjecture . . . and there [wa]s nothing in th[e] record indicating that he could have amended his Complaint to state a viable invasion of privacy claim." *Id.* at *3 n.3.

- ***Laffey v. Plousis***, 364 F. App'x 791, No. 08-1936, 2010 WL 489473 (3d Cir. Feb. 12, 2010) (unpublished). Laffey was a court security officer assigned to a United States courthouse and employed by MVM, Inc., a private company working under contract with the Marshals Service. *Id.* at *1. He was also president of the Security Officers, Police and Guards Union, Local No. 1536, and in that capacity, opposed the transfer of another court security officer

(Torriero) to the plaintiff's courthouse. *Id.* Laffey alleged that after he opposed the transfer, "MVM and the Marshals Service harassed and retaliated against him." *Id.* Specifically, he alleged:

> [H]e was told that the Deputy Chief United States Marshal for the District of New Jersey, Donald Rackley, wanted Torriero to work in Camden, blamed Laffey for blocking the transfer, and instructed Laffey's supervisor "to do something about Officer Laffey or have something done to him." In November 2004, Laffey allegedly was told that "things would get worse and worse until" Rackley, James Plousis (the United States Marshal for the District of New Jersey), and MVM "get you." Laffey also alleged that James Elcik, a Marshals Service employee who liaised with MVM, told him that Rackley was "upset with him because he would not allow Torriero to transfer." Finally, Laffey claimed that in the fall of 2004, Elcik criticized him for mishandling CSO time sheets and told him not to attend security meetings at the Camden courthouse.
>
> In January 2005, Plousis allegedly asked Elcik: "what are we going to do now" about punishing Laffey? Laffey also alleged that MVM investigated Laffey's performance at the request of the Marshals Service in early January 2005. According to Laffey, "most" of the charges against him were "not sustained." Laffey concludes that this campaign of retaliation resulted in his suspension without pay for over two weeks in January 2005 and his removal from the LC SO position by MVM in February 2005.

Id. Based on these allegations, Laffey sued Plousis, Rackley, and Torriero in their individual capacities under *Bivens*, alleging violations of his First Amendment rights to freedom of speech and freedom of association. *Id.* at *2. The district court granted the defendants' motion to dismiss, "finding that Laffey's complaint failed to allege that Plousis, Rackley, Torriero, or any Marshals Service employee either was directly involved in Laffey's suspension and demotion or had the ability to control or influence disciplinary actions taken by MVM," and also denied Laffey's motion to amend the complaint. *Laffey*, 2010 WL 489473, at *2.

The Third Circuit noted that "Laffey did not allege any specific facts which identif[ied] any employee of the Marshals Service who was directly involved in Laffey's demotion or suspension," and that he also did not "allege that Plousis, Rackley, or Elcik were able to intervene in MVM's internal disciplinary proceedings." *Id.* The court noted that under *Iqbal*, vicarious liability was inapplicable in *Bivens* actions, and that "'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1948). The court found that "the complaint did not allege that the individual defendants were personally and directly involved

in any retaliatory employment actions taken against Laffey, as *Iqbal* requires." *Id.* (citing *Iqbal*, 129 S. Ct. at 1948). The court noted that under *Iqbal*, allegations that are merely consistent with unlawful conduct are not sufficient:

> Laffey did allege that Plousis and Rackley were displeased with his opposition to Torriero's transfer request and that they told Laffey's supervisor to "do something" to or about Laffey. He also alleged that Elcik criticized his handling of CSO time sheets and prevented him from attending courthouse security meetings. Such allegations are consistent with a conclusion that Plousis, Rackley, and Elcik sought to retaliate against Laffey. But *Iqbal* makes clear that allegations that are "merely consistent with" liability are insufficient to "state a claim for relief that is plausible on its face" in a *Bivens* action. *Id.* at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Under this standard, Laffey's complaint is deficient because it fails to allege specific facts suggesting that Plousis, Rackley, and Elcik actually did—or even could—personally intervene to cause MVM to discipline Laffey in violation of his First Amendment rights.

Id. at *3.

The Third Circuit declined to accept Laffey's suggestion that the court adopt an approach used by several other circuits in the § 1983 context, in which "one can be held liable for a constitutional violation by 'setting in motion' certain events which he knows or should know will result in a constitutional violation." *Id.* The court was "hesitant to adopt this standard following *Iqbal*, a *Bivens* action in which the Supreme Court emphasized 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Laffey*, 2010 WL 489473, at *2 (quoting *Iqbal*, 129 S. Ct. at 1948). The court noted that "although Laffey argues that Plousis, Rackley, and Elcik 'pressured' MVM into disciplining him, his complaint alleges insufficient facts to support such an inference." *Id.*

Laffey sought leave to amend his complaint to allege that he was denied a promotion in retaliation for his opposition to Torriero's transfer, and to add Elcik, a Marshals Service employee, as a defendant. *Id.* at *4. The Third Circuit held that the district court's denial of leave to amend was not an abuse of discretion because "Laffey failed to allege sufficient facts to show that Elcik or any other Marshals Service employee was directly involved in MVM's decision to discipline him[,] . . . [making] any amendment adding Elcik as a defendant or alleging that MVM denied Laffey a promotion . . . futile." *Id.*

- ***Boring v. Google Inc.***, 362 F. App'x 273, No. 09-2350, 2010 WL 318281 (3d Cir. Jan. 28, 2010) (unpublished), *cert. denied*, 131 S.Ct. 150 (2010). The complaint was originally brought in state court and asserted claims against Google for invasion of privacy, trespass,

injunctive relief, negligence, and conversion. *Id.* at *1. The claims arose from Google's "Street View" program, which "offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States." *Id.* "To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street." *Id.* The complaint alleged that Google had taken, without permission, colored photographs of the plaintiffs' residence, including the pool, from a vehicle in their driveway. *Id.* The Borings alleged that their road is marked as "Private Road, No Trespassing," and that Google invaded their privacy by driving on the road to take photographs and by making them available to the public. *Id.*

The case was removed to federal court, the Borings amended their complaint to substitute an unjust enrichment claim for the conversion claim, and the district court dismissed all of the claims. *Boring*, 2010 WL 318281, at *1. With respect to the invasion of privacy claim, the district court found that "the Borings were unable to show that Google's conduct was highly offensive to a person of ordinary sensibilities." *Id.* The district court dismissed the negligence claim, finding that Google did not owe a duty to the Borings. *Id.* The district court dismissed the trespass claim because "'the Borings ha[d] not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass.'" *Id.* The district court dismissed the unjust enrichment claim because the parties had no contractual relationship and the Borings did not confer anything of value on Google. *Id.* Finally, the district court "held that the Borings had failed to plead a plausible claim for injunctive relief under Pennsylvania's 'demanding' standard for a mandatory injunction, and dismissed the punitive damages claim because the Borings failed to 'allege facts sufficient to support the contention that Google engaged in outrageous conduct.'" *Id.* The district court found that amendment would be futile. *Boring*, 2010 WL 318281, at *1. On reconsideration, the court clarified its holding on the trespass claim, stating that "it had dismissed the trespass claim because the Borings had 'failed to allege facts sufficient to support a plausible claim that they suffered any damage as a result of the trespass' and because they failed to request nominal damages in their complaint." *Id.* at *2.

On appeal, the court explained that while Pennsylvania state law recognizes four invasion of privacy torts, the two relevant torts were "unreasonable intrusion upon the seclusion of another" and "unreasonable publicity given to another's private life." *Id.* at *3. The court cited a pre-*Twombly* state court case to note that an intrusion upon seclusion claim requires pleading certain facts: "To state a claim for intrusion upon seclusion, plaintiffs must allege conduct demonstrating 'an intentional intrusion upon the seclusion of their private concerns which was substantial and highly offensive to a reasonable person, and aver sufficient facts to establish that the information disclosed would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities.'" *Id.* (quoting *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 247 (Pa. 2002)). The court concluded that "[n]o person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there." *Id.* The court explained:

> Indeed, the privacy allegedly intruded upon was the external view of the Borings' house, garage, and pool—a view that would be seen by any person who entered onto their driveway, including a visitor or a delivery man. Thus, what really seems to be at the heart of the complaint is not Google's fleeting presence in the driveway, but the photographic image captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive.

Id. (footnote omitted). The court found it significant that the Borings did not allege that they were viewed inside their home. *Boring*, 2010 WL 813281, at *4. The court cited a pre-*Twombly* case to note that "[c]ourts do in fact, decide the 'highly offensive' issue as a matter of law at the pleading stage when appropriate." *Id.* The appellate court also rejected the Borings' challenge to the district court's expression of skepticism "about whether the Borings were actually offended by Google's conduct in light of the Borings' public filing of the present lawsuit," noting that the district court's comments were made after it had already concluded that Google's conduct would not be highly offensive to a person of ordinary sensibilities and that the district court had properly applied an objective standard in determining whether the conduct was highly offensive. *Id.* The court concluded that the intrusion on seclusion claim failed as a matter of law. *Id.* With respect to the claim based on publicity given to private life, the Third Circuit agreed that "the Borings ha[d] failed to allege facts sufficient to establish the third element of a publicity to private life claim, *i.e.*, that the publicity would be highly offensive to a reasonable person," and concluded that "accepting the Borings' allegations as true, their claim for publicity given to private life would not be highly offensive to a person of ordinary sensibilities." *Id.* at *4–5.

The Third Circuit concluded that the district court had erred in making damages an element of the trespass claim, although the district court claimed not to have done so. *Id.* at *5. The court found that "the Borings ha[d] alleged that Google entered upon their property without permission" and noted that "[i]f proven, that is a trespass, pure and simple." *Boring*, 2010 WL 318281, at *5. The court concluded: "[I]t may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring, but that is for another day. For now, it is enough to note that they 'bear the burden of proving that the trespass was the legal cause, *i.e.*, a substantial factor in bringing about actual harm or damage' if they want more than a dollar." *Id.* (internal citation and footnote omitted).

The Third Circuit agreed that "the facts alleged by the Borings provide[d] no basis for an unjust enrichment claim against Google," and explained:

> The complaint not only fails to allege a void or unconsummated contract, it does not allege any benefit conferred upon Google by the Borings, let alone a benefit for which the Borings could reasonably expect to be compensated. The complaint alleges that Google

> committed various torts when it took photographs of the Borings' property without their consent. The complaint does not allege, however, that the Borings gave or that Google took anything that would enrich Google at the Borings' expense. An unjust enrichment "claim makes sense in cases involving a contract or a quasi-contract, but not, as here, where plaintiffs are claiming damages for torts committed against them by [the] defendant[ ]."

Id. at *6 (alterations in original) (citation and footnote omitted).

The court also affirmed the dismissal of the request for injunctive relief, stating:

> The District Court held that the complaint failed to set out facts supporting a plausible claim of entitlement to injunctive relief. We agree that the Borings have not alleged any claim warranting injunctive relief. The complaint claims nothing more than a single, brief entry by Google onto the Borings' property. Importantly, the Borings do not allege any facts to suggest injury resulting from Google's retention of the photographs at issue, which is unsurprising since we are told that the allegedly offending images have long since been removed from the Street View program.

Id. at *7.

Finally, the court affirmed dismissal of the request for punitive damages, explaining:

> The Borings' complaint fails to allege conduct that is outrageous or malicious. There is no allegation that Google intentionally sent its driver onto their property or that Google was even aware that its driver had entered onto the property. Moreover, there are no facts suggesting that Google acted maliciously or recklessly or that Google intentionally disregarded the Borings' rights.

Id. The court rejected the argument that punitive damages must always be determined by a jury after discovery, and noted that "under the pleading standards we are bound to apply, there is simply no foundation in this complaint for a demand for punitive damages." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 556). The court affirmed dismissal of the claims for invasion of privacy, unjust enrichment, injunctive relief, and punitive damages; reversed the dismissal of the trespass claim; and remanded to allow the trespass claim to proceed. *Id.*

- ***Arango v. Winstead***, 352 F. App'x 664, No. 09-3506, 2009 WL 3863335 (3d Cir. Nov. 19, 2009) (unpublished) (per curiam), *cert. denied*, No. 09-9772, 130 S. Ct. 3331, 2010 WL

1180647 (May 24, 2010). A state prisoner, proceeding *pro se*, filed a civil rights action against the prison's superintendent, alleging that the plaintiff's civil rights were violated when prison officials wrongly accused her of sexual harassment, failed to follow proper procedures in investigating, punished her with a 30-day cell restriction, and removed her from participating in a Sex Offender Program for six months. *Id.* at *1. The district court dismissed the complaint, finding that it was not cognizable under section § 1983 because the "favorable termination rule" provided that "a § 1983 plaintiff cannot seek damages for harm caused by actions that implicate the validity of the fact or length of her confinement, unless she can prove that the sanction has been reversed, invalidated, or called into question by a grant of federal habeas corpus relief." *Id.* "[C]laims that relate only to the conditions, and not the fact or duration, of incarceration are not subject to the favorable termination rule." *Id.* (citations omitted). The Third Circuit concluded that the district court had erred in applying the favorable termination rule because the challenged actions did not alter the length of the plaintiff's incarceration. *Id.* at *2. But the court affirmed on another ground, finding that the complaint did not state a claim for relief. The court explained:

> The Supreme Court has recognized that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Asquith v. Dep't of Corr.*, 186 F.3d 407, 410 (3d Cir. 1999) (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983)). Due process applies only where the conditions of confinement impose "atypical and significant hardship[s] on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 484 (1995). Placement in administrative segregation for days or months at a time or transfers to more restrictive custody do not implicate a protected liberty interest. *See Torres*, 292 F.3d at 150; *Fraise v. Terhune*, 283 F.3d 506, 522–23 (3d Cir. 2002). Nor does removal from a prison program, as restriction from participation in prison programs is among the conditions of confinement that an inmate may reasonably anticipate during her incarceration. *See James v. Quinlan*, 866 F.2d 627, 629 (3d Cir. 1989). Therefore, Arango's complaint, alleging that she was removed from a program and placed in thirty days restrictive housing, did not state a plausible violation of a protected liberty interest.[21]

Id. (alterations in original).

- ***United States ex rel. Lobel v. Express Scripts, Inc.***, 351 F. App'x 778, No. 09-1047, 2009

[21] Although the court concluded that the complaint did not state a "plausible" claim, it appeared to base its decision on the fact that the law did not provide for the relief requested, not based on a lack of plausible facts.

WL 3748805 (3d Cir. Nov. 10, 2009) (unpublished). The plaintiff, a former employee of the defendant pharmacy benefit manager, claimed that the defendant had falsely certified its compliance with a regulation governing filling prescriptions. *Id.* at *1. The district court dismissed under Rule 12(b)(6), and the Third Circuit affirmed. The Third Circuit explained that to state a claim under the False Claims Act, the plaintiff "must allege that: (1) defendant violated the regulation; (2) defendant certified its compliance with the regulation to a federal payor in spite of its violation of the regulation; and (3) defendant's certification of compliance was a condition of payment." *Id.* (citation omitted). The express certification claim failed because the complaint did not "identify a single claim submitted by ESI in which it represented falsely to the Government that it complied with regulations that affect its eligibility for payment." *Id.* The court noted that the case law clearly did not provide a cause of action without such an identification. *See id.* The district court also found that the implied certification claim failed, noting that the plaintiff relied on *Conley*, which had been overruled by *Twombly*. *Id.* The court concluded: "Lobel's failure even to cite *Twombly* and *Iqbal* in either of his two briefs is a telling omission. When Lobel's amended complaint is analyzed under the more exacting standard established by those cases, it falls well short." *Id.* The court explained that of the seven paragraphs that the plaintiff relied upon to state a claim, two merely quoted the False Claims Act; four "allege[d] in a conclusory fashion that [the defendant] violated the False Claims Act by submitting claims for prescriptions filled in violation of § 1306.05," and therefore were not presumed to be true under *Iqbal*, and the one alleging materiality was "a legal conclusion which the District Court was not obliged to accept as true." *Lobel*, 2009 WL 3748805, at *2 (citing *Iqbal*, 129 S. Ct. at 1949). The court also found the allegations legally deficient, noting that "[i]n addition to these factual deficiencies, . . . we agree with [the defendant] that the violation of § 1306.05 Lobel alleges cannot, as a matter of law, give rise to liability under the False Claims Act because compliance with the regulation is not a 'condition of payment.'" *Id.* (citation omitted).

- ***Twillie v. Ohio***, 351 F. App'x 596, No. 09-3182, 2009 WL 3683782 (3d Cir. Nov. 6, 2009) (unpublished) (per curiam). The *pro se* complaint against various FBI field offices "alluded generally to 'retaliation tactics' and 'harassment.'" *Id.* at *1. The claims arose out of "circumstances that precipitated [the plaintiff's] arrest for indecent assault in Pennsylvania, his sentence for the crime, his decision to go to California after his sentencing, and his subsequent arrest and extradition in Pennsylvania." *Id.* The district court construed the complaint as seeking relief under *Bivens* for harassment and retaliation against the FBI, and dismissed because a *Bivens* claim cannot be maintained against a federal agency. *Id.* The district court denied leave to amend, finding that any amendment to state a *Bivens* claim would be futile. *Id.* On appeal, the Third Circuit found that the district court had "explicitly and obviously construed Twillie's claims liberally, affording him the allowances due a *pro se* litigant," and then found, "[s]imilarly construing the complaint liberally," that "Twillie presented claims against a federal agency, not against individual officers or agents of a federal agency," and that such claims could not "be raised under *Bivens*." *Id.* at *2 (citation omitted). Although the court found the allegations legally insufficient, it also noted that an alternative basis for affirming the district court was that the claims were not plausible. *See Twillie*, 2009 WL 3683782, at *2. The court concluded that the "allegations, rife with

suppositions (he even uses the word 'guess' in presenting one aspect of his claim) and lacking in specificity, are simply not plausible." *Id.* The court held that "[t]he facts he plead[ed], even construed liberally, d[id] not allow [the court] to infer more than the mere possibility of misconduct, which d[id] not show [the court] that he [wa]s entitled to relief." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950). The Third Circuit also affirmed the denial of leave to amend, finding that the FBI could not be sued under *Bivens* and that "it [wa]s not apparent how Twillie could transform his implausible claims into plausible claims." *Id.* The court concluded that "[t]o the extent that Twillie makes us aware, through his informal brief, of claims that he would have wanted to present in an amendment, we note that those claims are similarly speculative and implausible." *Id.*

- ***Shahin v. Darling***, 350 F. App'x 605, No. 09-3298, 2009 WL 3471297 (3d Cir. Oct. 29, 2009) (unpublished) (per curiam), *petition for cert. filed*, (Mar. 31, 2010) (No. 09-10032). The *pro se* complaint asserted claims against nine Delaware judges, two law firms, and two court reporters, and sought damages for alleged violations of the plaintiff's federal and constitutional rights. *Id.* at *1. The plaintiff alleged that in connection with three lawsuits she had filed in Delaware state court, the "defendants engaged in coercion, criminal conspiracy, retaliation, and witness tampering, resulting in rulings against Shahin in all three actions." *Id.* (footnote omitted). The district court dismissed the complaint and denied leave to amend. The Third Circuit affirmed. With respect to the judges, the court found that they were absolutely immune from suits for monetary damages, absent allegations of bad faith or malice, and "there [we]re no facts in the complaint to support inferences that any of the named judges acted outside the scope of his or her judicial capacity or in the absence of jurisdiction." *Id.* (citing *Mireles v. Waco*, 502 U.S. 9, 11 (1991)). The claims against the law firms and the court reporters failed because the "complaint fail[ed] to allege any facts to support [the plaintiff's] federal or constitutional claims." *Id.* The court explained:

  > Shahin alleges that during the state proceedings, one lawyer was substituted for another lawyer, a lawyer filed a motion without affording her proper notice, and a lawyer engaged in ex parte communications with the presiding judge. Even taking the allegations as true, the complaint does not contain any facts that would allow one to reasonably infer that the defendants violated federal or constitutional law. Shahin's conclusory allegations are insufficient to plausibly demonstrate that any of the defendants violated Shahin's civil or constitutional rights. *See Iqbal*, 129 S. Ct. at 1949.

  Id. (footnote omitted). The Third Circuit agreed that amendment would have been futile, "[g]iven that . . . there [we]re no facts to infer that any of the defendants violated Shahin's federal or constitutional rights . . . ." *Id.* at *2.

- ***Merritt v. Fogel***, 349 F. App'x 742, No 08-3622, 2009 WL 3383257 (3d Cir. Oct. 22, 2009) (unpublished) (per curiam). The plaintiff, a Pennsylvania state prisoner serving a life

sentence, filed a *pro se* lawsuit against medical professionals and Department of Corrections employees under § 1983, asserting that the defendants were deliberately indifferent to the plaintiff's medical needs, in violation of the Eighth Amendment, and asserting a state law claim for medical malpractice. *Id.* at *1. The complaint alleged that the plaintiff had Hepatitis C and had been repeatedly refused treatment. *Id.* The magistrate judge recommended that the Eighth Amendment claim be dismissed for failure to state a claim, that the state law claim be dismissed for failure to comply with a state certificate of merit requirement, and that the motions to amend be denied. *Id.* at *2. The district court accepted these recommendations. *Id.* The Third Circuit first noted that the district court had improperly dismissed the complaint because it should have construed the plaintiff's initial motion for leave to amend as an amended complaint, given that the plaintiff was entitled to file his first amended complaint as of right, and that the amended complaint would have rendered the defendants' motions to dismiss moot. *Id.* Despite this procedural error, the Third Circuit considered the merits, and also found that the district court had improperly dismissed on that basis. *Merritt*, 2009 WL 3383257, at *3.

With respect to the Eighth Amendment claim, the district court had found that the allegations of deliberate indifference were inadequate. "Deliberate indifference . . . requires more than mere malpractice or disagreement with a particular course of treatment," and "the Magistrate Judge reasoned that Merritt's allegations show[ed] that he merely disagree[d] with defendants' medical judgment and insist[ed] on the treatment of his choice." *Id.* But the Third Circuit explained that the plaintiff had alleged much more:

> If that were all that Merritt alleged, then the Magistrate Judge would be right. Merritt, however, makes many other specific factual allegations that the Magistrate Judge did not discuss and that, taken as true as they must be at this stage, raise an inference of deliberate indifference. For example, Merritt alleges that one of defendants' own specialists recommended him for treatment as long ago as 1996 but that defendants fraudulently concealed that information from him until he finally filed suit. He also alleges that he is within the protocol for treatment, though various defendants have falsely told him otherwise. Thus, as Merritt argues, he claims to seek, not merely the treatment of his own choice, but treatment that has been recommended by a specialist and that is called for by the Department of Corrections protocol.
>
> Moreover, his allegations permit the inference that defendants may have nonmedical reasons for refusing to provide this treatment. For example, he alleges that defendant Falor told him both that medical staff merely "shrug their shoulders, indicating nothing" when the subject of HCV treatment arises at staff meetings and that Merritt would not receive treatment though his liver numbers were "all out of wack" and that he should instead "pray." He also alleges that he

> overheard a physician's assistant admit to having shredded his sick call requests. Finally, he alleges that has been denied treatment for at least five different reasons over the years, most of which he alleges were fabricated.
>
> Taken together, and in light of Merritt's *pro se* status, we believe that these specific factual allegations permit the inference that at least some defendants have acted with deliberate indifference to Merritt's medical needs. Thus, for pleading purposes, Merritt's factual allegations have "'nudged his claim . . . across the line from conceivable to plausible.'" *Iqbal*, 129 S.Ct. at 1951 (quoting *Twombly*, 550 U.S. at 570). For that reason, the District Court should not have dismissed Merritt's complaint without leave to amend and should not have denied his motions for leave to amend as futile. Accordingly, we will vacate the dismissal of Merritt's complaint and remand with an instruction to allow him to file an amended complaint.

Id. at *3–4 (footnote omitted).

- ***Lawson v. Nat'l Continental-Progressive Ins. Co.***, 347 F. App'x 741, No. 09-2239, 2009 WL 3182930 (3d Cir. Oct. 6, 2009) (unpublished) (per curiam). After the plaintiff's state court suit alleging that the defendant had wrongfully terminated an insurance policy held by the plaintiff's bus company was dismissed, the plaintiff filed a *pro se* complaint against the same defendant insurance company in federal court. *Id.* at *1. The federal complaint alleged the same breach of contract claim brought in state court, and asserted claims under the First, Fourth, Eighth, and Fourteenth Amendments, as well as violations of 42 U.S.C. § 1881, 1855, 1982, 1986, and 1988. *Id.* The district court dismissed the complaint on the defendant's motion, finding that the complaint failed to allege any facts to support the federal and constitutional claims, and that the breach of contract claim was barred by res judicata. *Id.* The Third Circuit agreed that the federal and constitutional claims lacked factual support:

  > We agree with the District Court that Lawson's complaint fails to allege any facts to support his federal or constitutional claims. While Lawson alleges that National Insurance denied Nate's Transportation insurance coverage and added a premium without reason, the complaint does not contain any facts that would allow one to reasonably infer that its actions violated federal or constitutional law. Lawson's conclusory allegations are insufficient to plausibly demonstrate that National Insurance violated Lawson's civil or constitutional rights.

  Id. at *2. The appellate court also agreed that the breach of contract claim was barred by res judicata. *Id.* The Third Circuit concluded that leave to amend would be futile, "[g]iven that

. . . Lawson previously litigated th[e] breach of contract claim in New Jersey Superior Court and there [we]re no facts to infer that National Insurance violated his federal or constitutional rights . . . ." *Lawson*, 2009 WL 3182930, at *2.

- ***Bates v. Paul Kimball Hosp.***, 346 F. App'x 883 (3d Cir. 2009) (unpublished) (per curiam). The plaintiff filed suit against Monmouth Ocean Hospital Services Corp. ("Monoc"), the Jackson Township Police Department ("Jackson Township"), the State of New Jersey ("the State"), Kimball Medical Center ("Kimball"), and St. Barnabas Health Care System ("St. Barnabas"), alleging that he was deprived of constitutional rights through his involuntary civil commitment. *Id.* at 884. The complaint specified that "'nine Jackson Township police cars along with one civilian car with a social worker' arrived at his residence and requested that he come with them to Kimball"; "he was taken from his house 'against [his] will,'"; "he was detained for eight days at both Kimball and St. Barnabas"; and "he was 'forced to take medication, being told all alone [sic], if you resist we will write you up as uncooperative and you will be here longer.'" *Id.* (alterations in original). The district court dismissed all of the claims, either through dismissal on the pleadings or through summary judgment, finding that the defendants were immune from liability and that Bates failed to allege bad faith on the part of the defendants and failed to assert any theory of liability against the State. *Id.* The appellate court determined that the district court erred by finding the defendants immune from suit, and evaluated the merits of the claims.

  With respect to Monoc, the Third Circuit found "[m]ost persuasive . . . Monoc's indication that it is never specifically mentioned outside the caption of Bates' amended complaint." *Id.* at 886. The complaint "refer[red] to Monoc only by implication in describing his transport from one medical facility to the next, and in complaining that he was unjustly 'billed for the ambulance service which delivered [the plaintiff] from Kimball Hospital to St. Barnabas." *Id.* The court found that the allegations "fail[ed] to state a claim of a constitutional violation that is plausible on its face as against Monoc" because the complaint was "devoid of factual allegations concerning Monoc that would support a claim under § 1983." *Bates*, 346 F. App'x at 886 (citing *Iqbal*, 12 S. Ct. at 1949, 1950).

  With respect to the claims against Jackson Township, the court found the pleadings insufficient to survive summary judgment, noting that "[w]hile a municipality may be liable for establishing a policy or custom that results in a constitutional violation, the allegations in Bates' amended complaint do not even imply the existence of such a policy or custom in Jackson Township." *Id.* Bates also "failed to show the existence of a genuine issue of material fact or that he was entitled to judg[]ment as a matter of law." *Id.*

  With respect to the claims against the State, the court held that the claims should have been dismissed because the district court lacked jurisdiction over them based on the Eleventh Amendment. *Id.* at 886–87.

  With respect to the claims against the Kimball and Barnabas, the court held that "[t]he allegations in Bates' amended complaint [we]re wholly insufficient to carry his burden of

demonstrating that the Medical Facilities acted under color of state law [as required to state a claim under § 1983] in conjunction with his involuntary confinement . . . ." *Id.* at 887.

- ***Gelman v. State Farm Mutual Auto. Ins. Co.***, 583 F.3d 187 (3d Cir. 2009). The plaintiff's putative class action complaint alleged that the defendant violated the Fair Credit Reporting Act (FCRA) by obtaining a copy of the plaintiff's credit report from a credit reporting agency and using it to select the plaintiff to receive materials regarding insurance products that the plaintiff might want. *Id.* at 188–89. The plaintiff "contend[ed] that the State Farm mailing [wa]s nothing more than promotional material soliciting him to contact State Farm regarding its various insurance products and that it [wa]s therefore not the kind of firm offer of insurance that would legitimize State Farm's access to his credit report under federal law." *Id.* at 189. The district court dismissed the complaint, holding that "Gelman failed to state a claim for his false pretenses and permissible purpose claims because State Farm's mailer constituted an offer of insurance under the FCRA, and that was a 'permissible purpose' for disclosing Gelman's credit report." *Id.* at 190.

  The Third Circuit agreed that the false pretenses and permissible purpose claims failed, rejecting the plaintiff's argument that the mailer did not have any value to him and therefore did not constitute a firm offer of insurance. *Id.* at 193–94. Besides the fact that the plaintiff did not "explain what 'value' the mailer should have provided him," the court found that the statute did "not mention 'value,' or anything akin to it." *Gelman*, 583 F.3d at 194. The court also explained that "even assuming *arguendo* that Congress intended to limit a firm offer to one that has value pursuant to the analysis in [another case], Gelman's argument would still be undermined by subsequent decisions limiting the reach of [that other case] to circumstances that do not exist here." *Id.* The court noted that the statute defined a "firm offer" as "'any offer of . . . insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report, to meet the specific criteria used to select the consumer for the offer.'" *Id.* at 195 (quoting 15 U.S.C. § 1681a(l)). "The mailer . . . stated that the offer of insurance contained therein would be honored if Gelman met certain criteria." *Id.* The court noted that "Gelman did not allege that he responded to State Farm's mailing and was denied insurance even though he satisfied the pre-screening criteria," noting that "[t]hat would present a very different scenario that we need not now consider." *Id.* The Third Circuit affirmed the district court's dismissal.[22] *Id.* at 196.

- ***Cann v. Hayman***, 346 F. App'x 822, No. 08-3032, 2009 WL 3115752 (3d Cir. Sept. 30, 2009) (unpublished) (per curiam), *cert. denied*, 130 S. Ct. 2411 (2010). A state prison inmate filed a *pro se* lawsuit against several prison officials under § 1983, alleging violations of his civil rights, including First Amendment retaliation, Fourth Amendment unreasonable search, Eighth Amendment cruel and unusual punishment, and Fourteenth Amendment due process/equal protection claims. *Id.* at *2. The district court dismissed the complaint for

[22] Although the Third Circuit cited *Iqbal* in its discussion of the standard of review for motions to dismiss, the dismissal appeared to be on the grounds that the law provided no relief for the asserted claims, not that the factual allegations were implausible. The court did not cite *Iqbal* in the "discussion" portion of its opinion.

failure to state a claim; the Third Circuit affirmed and found that granting leave to amend would be futile. The plaintiff alleged that he had filed a grievance in which he accused prison officials of tampering with his inmate account. *Id.* at *1. The plaintiff further alleged that nearly two months after the grievance was filed, he set off a metal detector three times and then refused to comply with an officer's order regarding another search method. *Id.* Based on this refusal, the plaintiff was placed in a special cell and subjected to additional searches, but none of these measures resulted in finding contraband. *Id.* The plaintiff was charged with disciplinary infractions for failure to comply with the officer's order. In reviewing the complaint, the Third Circuit noted that *pro se* pleadings are liberally construed. *Id.* at *2 (citing *Erickson v. Pardus*, 551 U.S. 89 (2007)). The court found that the complaint "lack[ed] facial plausibility because the complained-of actions by the prison officials were not improper, let alone unconstitutional, given Cann's 'triple-triggering' of the metal detector in the yard and his subsequent refusal to comply with Martain's order . . . ." *Cann*, 2009 WL 3115752, at *2 (internal citation to *Iqbal*, 129 S. Ct. at 1949, omitted). The court held that "[t]he responsive actions take[n] by prison officials were rationally related to legitimate penological interests and goals," and concluded that the district court had appropriately dismissed the complaint. *Id.*

- ***Miles v. Twp. of Barnegat***, 343 F. App'x 841, No. 08-1387, 2009 WL 2840733 (3d Cir. Sept. 4, 2009) (unpublished) (per curiam). The plaintiffs, siblings who inherited six contiguous properties in the Township of Barnegat, alleged that the Township created public rights of way on their property, approved plans for water drainage from adjacent properties, and granted easements to private development corporations for water drainage on their property. *Id.* at *1. The overflow from detention basins allegedly flooded the plaintiffs' property, creating a wetland, and the county's underground storm tunnels allegedly contributed to the flooding. *Id.* The plaintiffs also alleged that neighboring landowners improperly encroached on their property and granted easements to the property; that cable and electric companies placed utility lines, cables, and telephone wires on their property without consent; that the surveyor defendants omitted or misstated information to diminish the plaintiffs' property value; and that the engineering defendants encroached on their property by placing detention basins too close to the boundary, causing water runoff to flood their land. *Id.* The plaintiffs filed suit under § 1983, alleging violations of their Fifth Amendment rights under the Takings Clause, violations of procedural due process, and a § 1983 conspiracy to encroach on and diminish the property. *Id.* The plaintiffs also alleged that the Township fraudulently changed the boundaries of their property on Township maps. *Id.* The district court dismissed the takings claims for lack of jurisdiction because they were unripe; dismissed the procedural due process claims because New Jersey provided a judicial mechanism for challenging the Township's decision to build a road on their property; and dismissed the remainder of the § 1983 claims for failure to state a plausible claim of state action by private party defendants. The district court declined to exercise jurisdiction over the pendant state law claims. *Miles*, 2009 WL 2840733, at *2. The Third Circuit affirmed.

  After describing the pleading standards in *Twombly* and *Iqbal*, the Third Circuit concluded that the district court had properly dismissed the procedural due process claims because

"[v]iewing the allegations as true, the factual matter f[ell] far short of permitting [the court] to infer a plausible connection among the private party defendants and a governmental agency or official such that their private actions would constitute 'state action.'" *Id.* at *3 (citations omitted). "[T]he single-sentence conclusory allegations of a conspiracy contained in the Amended Complaint [we]re insufficient to allege a plausible conspiracy among the defendants to deprive the Plaintiffs of their constitutional rights under § 1983." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949; *Kost v. Kozakiewicz*, 1 F.3d 176, 185 (3d Cir. 1993)).

- ***McTernan v. City of York***, 577 F.3d 521 (3d Cir. 2009). The complaint alleged that the plaintiffs have devout religious beliefs, including a belief that their religion requires them to share their beliefs with others, and that based on these beliefs, they protested against abortions outside a Planned Parenthood facility (the "Facility"). *Id.* at 524. The Facility was next to a public sidewalk and had a ramp leading to its front entrance that ran parallel to the sidewalk. *Id.* The plaintiffs alleged that a survey they conducted showed that 2.9 feet of this ramp were constructed on the public right of way. *Id.* The plaintiffs also alleged that they contacted the Commissioner of the city police department to request that the encroaching portion of the ramp be removed. *Id.* Because the ramp and a banner allegedly encroached on the public right of way, the plaintiffs asked a city policy officer if they could go on the ramp to communicate with clients entering the Facility. *Id.* The officer refused and stated that he would arrest the plaintiffs if they entered the ramp. *McTernan*, 577 F.3d at 524. The plaintiffs sued the officer, the commissioner of the police department, and the city, claiming violations of their rights to free exercise of religion, peaceful assembly, and freedom of speech. *Id.* The defendants moved to dismiss, relying on regulations under the ADA that placed certain restrictions on the ramp at issue. *Id.* at 524–25. The district court denied the plaintiffs' request for a preliminary injunction, and dismissed the complaint based on finding that the ramp was a nonpublic forum and that plaintiffs had not suffered any constitutional injury. *Id.* at 525–26. The Third Circuit affirmed.

  The Third Circuit rejected the plaintiffs' argument that the district court was required to accept as true the statement in the complaint that the ramp was a public forum. *Id.* at 531. Relying on *Iqbal*, the court found that this statement was a legal conclusion that did not need to be accepted as true. *Id.* The finding that the ramp was nonpublic was supported by attachments to the complaint that depicted the ramp and its overlap with the public sidewalk. *McTernan*, 577 F.3d at 531. The court concluded that "[i]f Plaintiffs were not excluded from a public forum, they ha[d] failed ''to state a [First Amendment] claim to relief that [wa]s plausible on its face.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949).

  The Third Circuit also concluded that the claim of a violation of the plaintiffs' right to free exercise of religion failed because:

  > In the complaint, Plaintiffs do not allege that they are treated differently than others, and instead claim only that "Defendants' actions target and are intended to chill, restrict, and inhibit Plaintiffs from exercising their religion in this way" and that "Defendants'

> actions constituted a substantial burden on Plaintiffs[’] religious exercise, and Defendants lacked a compelling justification.” App. at 48. Once again, these are merely conclusory allegations, and, as the Court stated in *Iqbal*, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

Id. at 532 (alterations in original) (footnote omitted).

- ***Fowler v. UPMC Shadyside***, 578 F.3d 203 (3d Cir. 2009). The plaintiff was employed by UPMC as a janitor at the Shadyside Hospital. She was injured and placed on Family/Medical Leave and short-term disability, and eventually given a clerical position. *Id.* at 206. UPMC eliminated the plaintiff’s clerical position, and the plaintiff alleged that before her position was eliminated, she applied for a similar job but was never contacted about that position. *Id.* The district court dismissed the complaint because the Rehabilitation Act’s two-year statute of limitations had run, the restriction to sedentary work did not constitute a disability under the Rehabilitation Act, and the class action allegations were not appropriate claims under the Rehabilitation Act. *Id.* The Third Circuit vacated the dismissal and remanded.

  The Third Circuit noted that it was “obligated to discuss recent changes in pleading standards.” *Id.* at 209. The court stated:

  > Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court’s opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), continuing with our opinion in *Phillips* [*v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008)], and culminating recently with the Supreme Court’s decision in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1955, 173 L. Ed. 2d 868 (2009), pleading standards have *seemingly shifted from simple notice pleading to a more heightened form of pleading*, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

  Id. at 209–10 (emphasis added). The court described *Iqbal*’s holding:

  > The Supreme Court’s opinion [in *Iqbal*] makes clear that the *Twombly* “facial plausibility” pleading requirement applies to all civil suits in the federal courts. After *Iqbal*, it is clear that conclusory or “bare-bones” allegations will no longer survive a motion to dismiss: “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949. To prevent dismissal, all civil complaints must now set out

> "sufficient factual matter" to show that the claim is facially plausible. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1948. The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See* [*i*]*d.* at 1949–50; *see also Twombly*, 550 U.S. at 555, & n.3, 127 S. Ct. 1955.

Fowler, 578 F.3d at 210. The court continued:

> *Iqbal* additionally provides the final nail-in-the-coffin for the "no set of facts" standard that applied to federal complaints before *Twombly*. *See also Phillips*, 515 F.3d at 232–33. Before the Supreme Court's decision in *Twombly*, and our own in *Phillips*, the test as set out in *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), permitted district courts to dismiss a complaint for failure to state a claim only if "it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* Under this "no set of facts" standard, a complaint effectively could survive a motion to dismiss so long as it contained a bare recitation of the claim's legal elements.
>
> The Supreme Court began its rejection of that test in *Twombly*, holding that a pleading offering only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955; *Phillips*, 515 F.3d at 232. In *Phillips*, we discussed the appropriate standard for evaluating Rule 12(b)(6) or 12(b)(1) motions in light of the anti-trust context presented in *Twombly*, holding that the acceptable statement of the standard remains: "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips*, 515 F.3d at 233 (internal quotations and citation omitted). The Supreme Court's opinion in *Iqbal* extends the reach of *Twombly*, instructing that all civil complaints must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct. at 1949.
>
> Therefore, after *Iqbal*, when presented with a motion to dismiss for failure to state a claim, *district courts should conduct a two-part analysis*. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal

> conclusions. *Id.* Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. *See Phillips*, 515 F.3d at 234–35. As the Supreme Court instructed in *Iqbal*, "[w]here 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.'" *Iqbal*, 129 S. Ct. at 1949. This "plausibility" determination will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Id. at 210–11 (emphasis added) (alterations in original).

The *Fowler* court then examined the effect of *Twombly* and *Iqbal* on the holding in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), in which the Supreme Court held that "a complaint alleging unlawful employment discrimination did not have to satisfy a heightened pleading requirement." *Fowler*, 578 F.3d at 211. The court explained that the continuing vitality of some of the holdings in *Swierkiewicz* might be questionable:

> The Supreme Court in *Swierkiewicz* expressly adhered to *Conley*'s then-prevailing "no set of facts" standard and held that the complaint did not have to satisfy a heightened standard of pleading. *Id.* *Swierkiewicz* and *Iqbal* both dealt with the question of what sort of factual allegations of discrimination suffice for a civil lawsuit to survive a motion to dismiss, but *Swierkiewicz* is based, in part, on *Conley*, which the Supreme Court cited for the proposition that Rule 8 "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." 534 U.S. at 512, 122 S. Ct. 992. We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.

Id.

The Third Circuit found that the complaint in *Fowler* had "alleged sufficient facts to state a plausible failure-to-transfer claim," noting that "[a]lthough Fowler's complaint is not as rich with detail as some might prefer, it need only set forth sufficient facts to support plausible claims." *Id.* at 211–12 (footnote omitted). The court explained:

> Taking her allegations as true, we find (1) that she was injured

> at work and that, because of this injury, her employer regarded her as disabled within the meaning of the Rehabilitation Act; (2) that there was an opening for a telephone operator at UPMC, which was available prior to the elimination of her position and for which she applied; (3) that she was not transferred to that position; (4) that UPMC never contacted her about the telephone operator position or any other open positions; and (5) that Fowler believed UPMC's actions were based on her disability. Under the "plausibility paradigm" . . . , these averments are sufficient to give UPMC notice of the basis for Fowler's claim. The complaint pleads how, when, and where UPMC allegedly discriminated against Fowler. She avers that she was injured on the job and that her doctor eventually released her to perform "sedentary work." She pleads that UPMC gave her a light-duty clerical position. She also avers that before the elimination of her light duty clerical position, she applied for a telephone operator position, but "was never contacted by UPMC regarding that position." Fowler further alleges that she contacted "Susan Gaber, a Senior Human Resources Consultant with the Defendant, UPMC Shadyside, regarding [a] number of vacant sedentary jobs," but that she was "never contacted by UPMC regarding any open positions." Fowler's complaint alleges that UPMC "failed to transfer" her to another position in September of 2003. Fowler further pleaded that she was "terminated because she was disabled" and that UPMC discriminated against her by failing to "transfer or otherwise obtain vacant and funded job positions" for her. The complaint repeatedly references the Rehabilitation Act and specifically claims she was terminated because of her disability. Therefore, she has nudged her claims against UPMC "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The factual allegations in Fowler's complaint are "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 564, 127 S. Ct. 1955. We have no trouble finding that Fowler has adequately pleaded a claim for relief under the standards announced in *Twombly* and *Iqbal*, *supra*.

Id. at 212 (internal citation omitted) (second alteration in original).

The Third Circuit concluded that the district court had erred by relying on *Conley* in finding that the plaintiff had insufficiently pleaded that she was disabled, and by relying on a case (and the cases cited therein) that had disposed of claims either at the summary judgment stage or at the judgment as a matter of law stage. *Id.* at 212–13. The court explained that the standard at these later stages is much more rigid, while "'[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable and that a recovery is very remote and unlikely.'" *Id.* at 213 (quoting *Twombly*, 550 U.S. at

556 (internal quotations omitted)). The court discussed the focus at the pleadings stage:

> At this stage of the litigation, the District Court should have focused on the appropriate threshold question—namely whether Fowler pleaded she is an individual with a disability. The District Court and UPMC instead focused on what Fowler can "prove," apparently maintaining that since she cannot prove she is disabled she cannot sustain a *prima facie* failure-to-transfer claim. A determination whether a *prima facie* case has been made, however, is an evidentiary inquiry—it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination. *See Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999) (overruled on other grounds). Even post-*Twombly*, it has been noted that a plaintiff is not required to establish the elements of a *prima facie* case but instead, need only put forth allegations that "raise a reasonable expectation that discovery will reveal evidence of the necessary element." *See Graff v. Subbiah Cardiology Associates, Ltd.*[,] No. 08-207, 2008 WL 2312671 (W.D. Pa. June 4, 2008) [(]citing *Phillips*, 515 F.3d at 234[)]. Under the Federal Rules of Civil Procedure, *an evidentiary standard is not a proper measure of whether a complaint fails to state a claim*. *Powell*, 189 [F.3d] at 394.

Fowler, 578 F.3d at 213 (emphasis added). The Third Circuit emphasized that the plaintiff was not required "at this early pleading stage, to go into particulars about the life activity affected by her alleged disability or detail the nature of her substantial limitations." *Id.* Instead, the complaint was sufficient because it "identifie[d] an impairment, of which UPMC allegedly was aware and allege[d] that such impairment constitute[d] a disability under the Rehabilitation Act." *Id.* The court found that the plaintiff's "alleged limitation to sedentary work plausibly suggest[ed] that she might be substantially limited in the major life activity of working." *Id.* (citations omitted). The court explained that the plaintiff would of course ultimately have to prove that she was substantially limited in a major life activity, but that at the pleadings stage, the allegation regarding disability was sufficient. *Id.* at 214 (citation omitted). The court emphasized that "[t]his [wa]s so even after *Twombly* and *Iqbal*." *Id.*[23]

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[23] In a more recent case, the Third Circuit confirmed that the holdings of *Twombly* and *Iqbal* apply to employment discrimination complaints. *See Guirguis v. Movers Specialty Servs., Inc.*, 346 F. App'x 774, No. 09-1104, 2009 WL 3041992, at *1 n.6 (3d Cir. Sept. 24, 2009) (unpublished) ("We have applied *Twombly* and *Iqbal's* pleading requirements to employment discrimination claims, but the quantum of facts that a discrimination complaint should contain must bear further development.") (internal citations omitted). The court did not resolve the facts needed for a discrimination complaint because "[t]h[e] case . . . provide[d] a poor vehicle for that task because Guirguis relie[d] in large measure upon bare legal conclusions that would likely have been insufficient even under the pre-*Twombly* pleading standard." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("holding, prior to *Twombly*, that courts were not required to accept the truth of legal conclusions contained in a plaintiff's complaint")). The court concluded that the allegations "that Guirguis is an Egyptian native of Arab descent, that [the defendant] discharged him, and that his termination occurred in violation of his civil rights," were "certainly deficient in the post-*Twombly* era," and that the last allegation was

- ***Hodges v. Wilson***, 341 F. App'x 846, No. 08-4868, 2009 WL 2445114 (3d Cir. Aug. 11, 2009) (unpublished) (per curiam). The plaintiff, an inmate at a prison run by the Pennsylvania Department of Corrections (the "DOC"), filed a civil rights complaint under § 1983, asserting that DOC employees violated his First, Eighth, and Fourteenth Amendment rights. *Id.* at *1. The complaint alleged that the plaintiff originally had his own cell because he had "'"'Z' code'" status, but that this status was revoked and the plaintiff then had to share a cell. *Id.* The complaint also alleged that the plaintiff's security status was elevated, which prevented him from being eligible for certain jobs, and that the defendants changed his security status in retaliation for the plaintiff stating that he intended to file a lawsuit. *Id.* The plaintiff claimed that he suffered psychological and physical harm from sharing a cell and that his new cell mate assaulted him. *Id.* The district court adopted the magistrate judge's recommendation to dismiss defendant Dr. Saavedra and to grant summary judgment in favor of the other defendants. *Id.*

  With respect to Dr. Saavedra, the complaint alleged that he "'supported' the prison's decision to revoke [the plaintiff's] 'Z' code status," that his "male secretary impersonated him during [the plaintiff's] examinations[,] and that Dr. Saavedra allowed prison officials to view [the plaintiff's] medical records for the purpose of making a determination about [the plaintiff's] cell status." *Hodges*, 2009 WL 2445114, at *2. The Third Circuit held that "[a]bsent any assertion of attendant harm, Hodges' allegation that an imposter stood in for Dr. Saavedra d[id] not raise a federal claim," noting that the plaintiff did "not allege that Dr. Saavedra failed to provide treatment or disregarded a known risk of harm." *Id.* (citations omitted). With respect to the allegations that Dr. Saavedra conspired with the other defendants to revoke the plaintiff's "Z" code status and that he put the plaintiff at risk by allowing others to access the plaintiff's psychiatric records, the court found that the plaintiff "fail[ed] to plead sufficient factual content to allow [it] to 'draw the reasonable inference that the defendant [wa]s liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949). The court explained:

  > Hodges never states who was given access to his medical information, nor does he allege that Dr. Saavedra's actions put him at risk of harm from the prison population. He does not specify what harm he faced, other than the revocation of his "Z code" status. It is apparent that his claim against Dr. Saavedra hinges upon his belief that he has a liberty interest in being single-celled. As explained in greater detail below, Hodges does not have a liberty interest in being single-celled. As a result, he does not state a claim against Dr.

"precisely the type of factually unsupported legal conclusion that is inadequate to surmount a Rule 12(b)(6) challenge." *Id.* at *1 n.6, *2. The court noted that "the complaint never intimate[d] in any way why Guirguis believe[d] that national origin motivated [the termination]." *Id.* at *2. The court recognized that it had previously reassessed *Swierkiewicz* in *Fowler*, but noted that "*Swierkiewicz* remains instructive because Guirguis's complaint contain[ed] significantly less factual content than the pleading at issue in that case . . . , bolstering [the court's] conclusion that his claims would not have survived under the pre-*Twombly* pleading regime." *Id.* at *2 n.7.

Saavedra.

Id. The court also affirmed the district court's denial of the plaintiff's motion for leave to file an amended complaint and his motion to amend the complaint because the proposed amendment to add a defendant and claim that the defendant "violated his rights by permitting non-medical prison staff members to review his psychiatric records for the purpose of reviewing his cell status" was "without merit for the same reasons . . . [explained] with respect to Dr. Saavedra." *Id.* at *1 n.3.

With respect to the other defendants, the plaintiff alleged that they violated the plaintiff's Fourteenth Amendment due process rights by revoking his "Z" code status and placing him in a shared cell. *Id.* at *2. The court noted that "[i]t [wa]s well-settled that prisoners do not have a due process right to be single-celled," and "agree[d] with the District Court that Hodges ha[d] not been subjected to atypical and significant hardship because his 'Z' code status ha[d] been revoked and he must now share a cell." *Hodges*, 2009 WL 2445114, at *2 (footnote omitted). The court also concluded that the allegations of an Eighth Amendment violation were not supported, "agree[ing] with the District Court that Hodges' complaints of depression, paranoia, and physical discomfort d[id] not rise to the level of an Eighth Amendment violation." *Id.* at *3. The court also found that "[t]he single, two year-old incident with [the plaintiff's] cell mate that [the plaintiff] assert[ed] d[id] not establish that prison officials 'kn[e]w of and disregard[ed] an excessive risk to [his] health or safety." *Id.* (sixth, seventh, and eighth alterations in original). Finally, the Third Circuit agreed with the district court's grant of summary judgment on the plaintiff's retaliation claim "[b]ecause the uncontested evidence show[ed] that Hodges' temporary placement in segregated housing and the change in his work status were the result of his own misconduct . . . ." *Id.* The court dismissed the appeal under 28 U.S.C. § 1915(c), denied the plaintiff's motion for an injunction to return him to a single cell, and denied the plaintiff's motion for a return of legal documents. *Id.* (footnote omitted).

- ***Marangos v. Swett***, 341 F. App'x 752, No. 08-4146, 2009 WL 1803264 (3d Cir. Jun. 25, 2009) (unpublished) (per curiam). The plaintiff sued his ex-wife, the state judge presiding over his divorce, and a variety of financial institutions that participated in refinancing the plaintiff's home mortgage. *Id.* at *1. The plaintiff alleged that his ex-wife conspired with the state judge to obtain favorable rulings in the divorce proceeding, and that she conspired with the refinancing defendants to obtain the proceeds from the refinanced home. *Id.* The plaintiff further alleged that "the refinancing defendants failed to inform him of a lis pendens [the plaintiff's ex-wife] had placed on the marital home before he signed a loan agreement for refinancing, held the refinancing proceeds in escrow instead of giving the money to him, and ultimately paid out the majority of the proceeds to [the ex-wife] and to the Child Support Agency with no notice to him." *Id.* The plaintiff alleged violations of § 1983, the Federal Truth in Lending Act (TILA), and civil RICO. *Id.* The plaintiff also brought state law claims against all defendants, alleging violations of New Jersey's Unfair and Deceptive Acts and Practices Act, intentional and/or negligent infliction of emotional distress, fraud, deception, and violation of privacy laws, as well as "'malicious abuse, misuse, and use of

process'" by his ex-wife and the judge. *Id.* Finally, the plaintiff alleged "'Public Employee Wrongfully Enforcing the Law'" and "'Continuous Tort'" claims. *Id.* The district court dismissed the claims against the judge as barred by absolute immunity, and dismissed the remaining claims for failure to state a claim. The Third Circuit affirmed.

The Third Circuit found that the plaintiff failed to state a claim under § 1983 as to the title company, the mortgagor, the loan servicer, and the ex-wife. *Marangos*, 2009 WL 1803264, at *2. The court noted that there was no factual content in the complaint showing that the loan servicer or the mortgager were involved in the divorce proceedings. *Id.* The only relevant allegation was that the state judge made two phone calls in chambers during family court hearings to the title company to confirm the amount held in escrow. *Id.* The court concluded that "[v]iewing these allegations as true, the factual matter f[ell] far short of permitting [the court] to infer a plausible connection among [the title company, the mortgagor,] and/or [the loan servicer], all private corporations, and a governmental agency or official such that their private actions would constitute 'state action.'" *Id.* (footnote omitted).

The Third Circuit also concluded that the facts in the complaint were not sufficient to allege a plausible connection or conspiracy among the defendants to deprive him of his constitutional rights under § 1983. *Id.* at *3 (citing *Twombly*, 550 U.S. at 556–57; *Kost v. Kozakiewicz*, 1 F.3d 176, 185 (3d Cir. 1993)). The court also held that the claims that the plaintiff's ex-wife used the court system to ruin the plaintiff and that the state judge unlawfully issued decisions in favor of the plaintiff's ex-wife failed to state a claim. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 28 (1980) ("noting that 'merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge'")).

To the extent that the plaintiff sought relief against the title company, the mortgagor, or the loan servicer under TILA, the court concluded that "Marangos failed to state a claim for relief that [wa]s plausible on its face" (even assuming the claims were not time-barred) because TILA requires creditors to meaningfully disclose all credit terms to consumers in order to avoid the uninformed use of credit, but Marangos did not allege that these defendants failed to comply with the statute's disclosure requirements. *Marangos*, 2009 WL 1803264, at *3.

The Third Circuit also found dismissal of the civil RICO claims appropriate because such claims require "'a pattern of racketeering activity that include[s] at least two racketeering acts,'" and Marangos alleged theft and wire and mail fraud as predicate acts, but the theft allegations did not constitute predicate acts under RICO, and the mail and wire fraud allegations required pleading with particularity under Rule 9(b). *See id.* The court emphasized that it did not need to accept legal conclusions couched as factual allegations as true, giving this example from the complaint: "'Defendants Swett, Land Options, and Judge Guadagno, are involved in a cover-up and criminal and civil conspiracy to violate Plaintiff's Due Process and Equal Protection Rights, along with violating his fundamentally secured

Property Rights.'" *Id.* at *4. The court explained that this statement was "merely a recitation of legal terms that enjoys no assumption of veracity." *Id.* The court noted that the complaint contained no facts to allow the court to reasonably infer, under Rule 9(b), that the title company, the mortgagor, and the loan servicer engaged in wire or mail fraud. *Id.* The court also noted that the complaint alleged that the judge spoke on the phone with the title company and had *ex parte* communications with the ex-wife, but found that "[a]ssuming, *arguendo*, that these allegations me[t] the standard of particularity required by Rule 9(b), and assuming their veracity, [it] agree[d] with the District Court that they [we]re insufficient under the less rigid pleading standard set forth in Rule 8(a)(2) to permit a plausible inference of a scheme or an intent to defraud . . . ." *Id.*

- ***Lopez v. Beard***, 333 F. App'x 685, No. 08-3699, 2009 WL 1705674 (3d Cir. Jun. 18, 2009) (unpublished) (per curiam). The *pro se* plaintiff alleged that various officers in the Pennsylvania Department of Corrections violated his rights under the ADA and the Eighth and Fourteenth Amendments. *Id.* at *1. Specifically, the plaintiff alleged that he had HIV/AIDS, that the prison officials and inmates knew this, that on one occasion his family was denied a contact visit with him, that on another occasion his family was erroneously told that they were not on the visitors list, and that individuals not named as defendants made disparaging statements about the plaintiff's medical condition. *Id.* The magistrate judge recommended that the claims against four of the defendants be dismissed for failure to allege any personal involvement; that the claims against the remaining defendants be dismissed because denial of visitation did not rise to the level of a constitutional violation and the plaintiff had failed to allege physical injury in connection with his emotional distress; and that the ADA claims be dismissed for failure to allege any nexus between the denials of visitation and his disability. *Id.* The district court allowed the plaintiff to file an amended complaint, in which he alleged that he was deliberately denied contact with family members "'in retaliation and discrimination of plaintiff being HIV-AIDS positive and having a history of problems with staff, including the filing of numerous complaints against staff.'" *Id.* at *2. "The only specific claim [the plaintiff] made with respect to any individually-named defendant was that Correctional Officer Alvarez made 'belittling and discriminating remarks and gestures about plaintiff to his then-girlfriend' and altered his approved visitors list, thus preventing his sister and brother-in-law from visiting him." *Id.* The amended complaint also alleged that the prison officials falsified their grievance response "to cover up their bad acts." *Id.* The district court dismissed the complaint, and the Third Circuit affirmed. The Third Circuit explained:

  > What Lopez has alleged in his complaint and amended complaints are theories and conclusions, not facts. While Lopez claims that he has been subject to "prejudice, discrimination and retaliation" at the hands of certain defendants, and that Officer Alvarez made "belittling and discriminating remarks and gestures about plaintiff to his then-girlfriend," he does not offer any specifics about these alleged incidents which would permit a court to reach the conclusion that they were discriminatory. *See Iqbal*, 129 S. Ct. at

> 1952 ("He would need to allege more by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'"). Accordingly, we agree that the District Court properly dismissed his claims of violations of his rights under the First, Eighth and Fourteenth Amendments of the U.S. Constitution and Title II of the ADA for failure to state a claim.

Lopez, 2009 WL 1705674, at *3 (footnote omitted) (alteration in original).

Fourth Circuit

- ***Foster v. Wintergreen Real Estate Company***, 363 F. App'x 269, No. 08-2356, 2010 WL 325959 (4th Cir. Jan. 29, 2010) (unpublished) (per curiam). The plaintiffs brought a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) against Wintergreen Real Estate Company ("WREC"), Richard Carroll, Timothy Hess, and Kyle Lynn. *Id.* at *1. The district court dismissed the complaint and denied leave to amend, and the Fourth Circuit affirmed. *Id.*

  The complaint alleged that during a period of three years, the plaintiffs, who were real estate investors, purchased and sold properties in the Wintergreen Resort ("Resort") using the services of WREC and the other defendants. *Id.* The court stated:

  > Plaintiffs allege that, during the course of their business dealings, Defendants made various false statements and/or concealed material facts, which include, generally: that Defendants are members of the Multiple Listing Service ("MLS") and that all of the properties would be listed on the MLS (hereinafter "MLS scheme"); that WREC is the dominant real estate company in the Resort; that Carroll is the top real estate agent at WREC; that WREC engages in an "effective marketing program"; that Defendants fraudulently assured Plaintiffs that the Summit House property was the "last piece of developable multifamily land left at [the] Resort"; that Defendants failed to disclose that there was a noisy stump grinder operating next to property Plaintiffs purchased in the Stoney Creek area of the Resort; and that Defendants violated dual representations restrictions and other realtor standards of conduct.

  Id. (alteration in original) (internal citations and footnotes omitted). The plaintiffs alleged that at least some of these acts were done "through interstate communication via the mail and wire, and were perpetrated on 'hundreds' of other out-of-state clients," and that "all of these acts were committed so that Defendants would earn a higher commission, at the expense of potential profit for Plaintiffs." *Id.* The complaint contained the following claims: (1) conducting or participating in a RICO enterprise; (2) investment of proceeds of racketeering activity; (3) conspiracy to violate RICO; and (4) false advertisement in violation of the

Lanham Act. *Foster*, 2010 WL 325959, at *1. The district court dismissed because the plaintiffs did not allege facts supporting the RICO claims and did not have standing to assert the Lanham Act claim. *Id.* at *2. After the district court dismissed, the plaintiffs moved for reconsideration and for leave to amend. The court explained the proposed amendments:

> The Amended Complaint contained the same basic allegations made in the Complaint, with greater detail and certain notable additions: it included additional details about the properties allegedly involved in the MLS scheme; charged that the MLS scheme took place for eight years instead of three years and that Defendants perpetrated the scheme on hundreds of other clients; included the names and addresses of some of these persons; included allegations of how each individual Defendant was personally involved in the scheme; included an affidavit from Wesley C. Boatwright . . . ; and included an affidavit from Ivo Romanesko . . . , attesting that "the use of marketing tools, such as including properties in MLS . . . are essential" and "the standard in the industry."

Id. (internal citations omitted). The district court denied reconsideration and leave to amend, finding that the amendment would be futile because "'the additional allegations [we]re insufficient to show that the alleged scheme extended beyond the Plaintiffs in scope or degree adequate to constitute a pattern of racketeering activity.'" *Id.*

On appeal, the Fourth Circuit noted: "Although Plaintiffs allege[d] multiple instances of mail and wire fraud over the course of an arguably substantial period of time, 'we are cautious about basing a RICO claim on predicate acts of mail and wire fraud because it will be the unusual fraud that does not enlist the mails and wires in its service at least twice.'" *Id.* at *4 (citation omitted). The court concluded that the case involved only "'garden-variety fraud'" because the plaintiffs alleged that the defendants misrepresented their efforts to market properties, misrepresented or failed to disclose material facts about specific properties, and breached fiduciary duties. *Id.* The court found that "[t]hese [we]re quintessential state law claims, not a 'scheme[ ] whose scope and persistence set [it] above the routine.'" *Foster*, 2010 WL 325959, at *4 (third and fourth alteration in original) (citation omitted). The court explained:

> This conclusion is bolstered by the fact that Plaintiffs failed to plead with particularity that any other persons were similarly harmed by Defendants' alleged fraud, and thus failed to show "a distinct threat of long-term racketeering activity." The Complaint summarily draws the conclusion that other persons were harmed by the MLS scheme because "a comparison of the MLS listings for Nelson County with the Nelson County property transfer records during the relevant period reveals hundreds of properties . . . which were, on information and belief, listed with Defendants but were not

> included in MLS." Based on this fact and the vague reference to "interview[s] [with] a number of sellers," Plaintiffs argue that Defendants "did not obtain those sellers' consent to the omission of those properties from MLS." However, a complaint must plead sufficient facts to allow a court to infer "more than the mere possibility of misconduct." *Iqbal*, 129 S. Ct. at 1950.

Id. (internal citations omitted). The court concluded that the proposed amended complaint would not fix these deficiencies:

> Plaintiffs attempted to rectify this deficiency in the Amended Complaint by including lists of properties handled by Defendants that were not listed on MLS and the names and addresses of the sellers associated with those properties. However, regardless of these lengthy exhibits, Plaintiffs nevertheless fail to plead with particularity that any specific person was defrauded other then themselves, much less give any particulars of the fraud. Therefore, "[t]hese allegations lack the specificity needed to show a 'distinct' threat of continuing racketeering activity." *Menasco* [*Inc. v. Wasserman*], 886 F.2d [681,] 684 [(4th Cir. 1989)].

Id. at *5 (first alteration in original). The court held that the case was "'not sufficiently outside the heartland of fraud cases to warrant RICO treatment,'" and that "[t]he district court thus did not err in granting the motion to dismiss." *Id.* (citation omitted).

The Fourth Circuit also affirmed dismissal of the Lanham Act claim, noting that "as consumers, Plaintiffs lack[ed] standing to sue under the Lanham Act . . . ." *Id.*

Finally, the Fourth Circuit affirmed the denial of leave to amend, explaining that "neither the Complaint nor the Amended Complaint allege a pattern of racketeering activity sufficient to support a RICO claim, nor did the Amended Complaint cure Plaintiffs' lack of standing under the Lanham Act." *Id.* at *6.

- ***Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.***, 591 F.3d 250, 2009 WL 5126224 (4th Cir. Dec. 29, 2009). Defendant Consumeraffairs.com "operate[d] a website that allow[ed] customers to comment on the quality of businesses, goods, and services." *Id.* at *1. The plaintiff was a company that sold or serviced cars and that received negative reviews on the defendant's website. *See id.* The plaintiff sued for defamation and tortious interference with a business expectancy, and the defendant moved to dismiss on the basis of section 230 of the Communications Decency Act of 1996 (the "CDA"), which "precludes plaintiffs from holding interactive computer service providers liable for the publication of information created and developed by others." *Id.* (footnote and citations omitted). The district court dismissed the complaint and granted leave to amend. *Id.* The defendant moved to dismiss the amended complaint on the basis of section 230 of the CDA, and the district court granted

dismissal because "'the allegations contained in the Amended Complaint [did] not sufficiently set forth a claim asserting that [Consumeraffairs.com] authored the content at issue," and because "'the allegations [we]re insufficient to take th[e] matter outside of the protection of the Communications Decency Act.'" *Id.* (record citation omitted). The Fourth Circuit affirmed.

Section 230 of the CDA "prohibits a 'provider or user of an interactive computer service' from being held responsible 'as the publisher or speaker of any information provided by another information content provider.'" *Nemet*, 2009 WL 5126224, at *2 (quoting 47 U.S.C. § 230(c)(1)). The court explained that "[a]ssuming a person meets the statutory definition of an 'interactive computer service provider,' the scope of § 230 immunity turns on whether the person's actions also make it an 'information content provider,'" which is defined as "'any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.'" *Id.* (quoting 47 U.S.C. § 230(f)(3)). The court explained that "[t]aken together, these provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties." *Id.* (citation omitted). The court emphasized that it "aim[s] to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'" *Id.* (citation omitted). The plaintiff acknowledged that Consumeraffairs.com was an interactive computer service provider, but argued that Consumeraffairs.com was also an information content provider with respect to the twenty posts at issue in the litigation, and therefore was not immune from liability under § 230. *Id.* at *3.

The Fourth Circuit noted that the district court had dismissed the complaint before *Iqbal*, but that on appeal, the court was obligated to follow the law as it existed at the time of the appeal. *Id.* at *3 n.5 (citation omitted). In examining the appropriate legal standard, the Fourth Circuit noted that while "a court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff," it "conclude[d] from the analysis in *Iqbal* that legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes." *Nemet*, 2009 WL 5126224, at *3 (citing *Iqbal*, 129 S. Ct. at 1949). The court framed the issue before it: "We must determine, in a post-*Iqbal* context, whether the facts pled by Nemet, as to the application of CDA immunity, make its claim that Consumeraffairs.com is an information content provider merely possible or whether Nemet has nudged that claim 'across the line from conceivable to plausible.'" *Id.* at *4 (quoting *Iqbal*, 129 S. Ct. at 1951). The court explained the appropriate framework under *Iqbal*:

> Following the example set by the Supreme Court in *Iqbal* we begin our analysis by "identifying the allegations" of the amended complaint that are either extraneous or "not entitled to the assumption of truth." 129 S. Ct. at 1951. We then proceed to determine the plausibility of the factual allegations of Nemet's amended complaint

> pertaining to Consumeraffairs.com's responsibility for the creation or development of the comments at issue.

Id.

The complaint alleged in the "Development Paragraph":

> Upon information and belief, Defendant participated in the preparation of this complaint by soliciting the complaint, steering the complaint into a specific category designed to attract attention by consumer class action lawyers, contacting the consumer to ask questions about the complaint and to help her draft or revise her complaint, and promising the consumer that she could obtain some financial recovery by joining a class action lawsuit. Defendant is therefore responsible, in whole or in part, for developing the substance and content of the false complaint . . . about the Plaintiffs.

Id. (record citation and quotation marks omitted). The plaintiff argued that this paragraph of its complaint "show[ed] Consumeraffairs.com's culpability as an information content provider either through (1) the 'structure and design of its website,' or (2) its participation in 'the preparation of' consumer complaints: *i.e.*, that Consumeraffairs.com 'solict[ed]' its customers' complaints, 'steered' them into 'specific categor[ies] designed to attract attention by consumer class action lawyers, contact[ed]' customers to ask 'questions about' their complaints and to 'help' them 'draft or revise' their complaints, and 'promis[ed]' customers would 'obtain some financial recovery by joining a class action lawsuit.'" *Id.* (record citation omitted) (alterations in original).

The Fourth Circuit first analyzed the plaintiff's argument that the structure and design of the website prevented granting immunity to the defendant, explaining that "the facts pled . . . d[id] not show Consumeraffairs.com developed the content of the posts by the structure and design of its website." *Id.* at *5. In contrast to a case relied on by the plaintiff, *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008), which involved a website that "required users to input illegal content as a necessary condition of use," the court found that the plaintiff here had "merely alleged that Consumeraffairs.com structured its website and its business operations to develop information related to class-action lawsuits." *Nemet*, 2009 WL 5126224, at *5. The court explained that "there [wa]s nothing unlawful about developing this type of content; it [wa]s a legal undertaking: Federal Rule of Civil Procedure 23, for instance, specifically provide[d] for class-action suits." *Id.* The court held: "Even accepting as true all of the facts Nemet pled as to Consumeraffairs.com's liability for the structure and design of its website, the amended complaint 'd[id] not show, or even intimate,' that Consumeraffairs.com contributed to the allegedly fraudulent nature of the comments at issue." *Id.* (citing *Iqbal*, 129 S. Ct. at 1952). The court explained that "as to these claimed facts in the Development Paragraph, Nemet's pleading not only fail[ed] to show it [wa]s plausible that Consumeraffairs.com [wa]s an information content provider,"

but it also failed to show "that it [wa]s even a likely possibility." *Id.*

The court next analyzed the arguments that Consumeraffairs.com was "an information content provider because it contacted 'the consumer to ask questions about the complaint and to help her draft or revise her complaint.'" *Id.* (record citation omitted). The court concluded:

> Nemet fails to make any cognizable argument as to how a website operator who contacts a potential user with questions thus "develops" or "creates" the website content. Assuming it to be true that Consumeraffairs.com contacted the consumers to ask some unknown question, this bare allegation proves nothing as to Nemet's claim Consumeraffairs.com is an information content provider.

Id. at *6. The court further held:

> The remaining claim, of revising or redrafting the consumer complaint, fares no better. Nemet has not pled what Consumeraffairs.com ostensibly revised or redrafted or how such affected the post. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. Nemet's claim of revising or redrafting is both threadbare and conclusory.

Nemet, 2009 WL 5126224, at *6. The court noted:

> Moreover, in view of our decision in *Zeran* [*v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)], Nemet was required to plead facts to show any alleged drafting or revision by Consumeraffairs.com was something more than a website operator performs as part of its traditional editorial function. *See* 129 F.3d at 330. It has failed to plead any such facts. "Congress enacted § 230's broad immunity 'to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.' 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." *Id.* at 331.
>
> We thus conclude that the Development Paragraph failed, as a matter of law, to state facts upon which it could be concluded that it was plausible that Consumeraffairs.com was an information content provider. Accordingly as to the Development Paragraph, the district

> court did not err in granting the Rule 12(b)(6) motion to dismiss because Nemet failed to plead facts sufficient to show Consumeraffairs.com was an information content provider and not covered by CDA immunity.

Id.

The plaintiff argued that even if the Development Paragraph was insufficient to allow the case to proceed, "as to eight of the twenty posts, the amended complaint pled other facts which show[ed] Consumeraffairs.com [wa]s an information content provider." *Id.* With respect to these eight posts, "Nemet pled as to each that '[b]ased upon the information provided in the post, [Nemet] could not determine which customer, if any, this post pertained to.'" *Id.* (record citation omitted) (alterations in original). The complaint alleged in the "Fabrication Paragraph":

> "Because Plaintiffs cannot confirm that the [customer] complaint . . . was even created by a Nemet Motors Customer based on the date, model of car, and first name, Plaintiffs believe that the complaint . . . was fabricated by the Defendant for the purpose of attracting other consumer complaints. By authoring the complaint . . . the Defendant was therefore responsible for the substance and content of the complaint."

Id. at *7 (footnote omitted) (alteration in original). The Fourth Circuit noted that "Nemet's *sole* factual basis for the claim that Consumeraffairs.com [wa]s the author, and thus an information content provider not entitled to CDA immunity, [wa]s that Nemet [could not] find the customer in *its* records based on the information in the post." *Id.* The court explained:

> Because Nemet was unable to identify the authors of these comments based on "the date, model of car, and first name" recorded online, Nemet alleges that these comments were "fabricated" by Consumeraffairs.com "for the purpose of attracting other consumer complaints." But this is pure speculation and a conclusory allegation of an element of the immunity claim ("creation . . . of information"). 47 U.S.C. § 230(f)(3). Nemet has not pled that Consumeraffairs.com created the allegedly defamatory eight posts based on any tangible fact, but *solely* because it (Nemet) can't find a similar name or vehicle of the time period in Nemet's business records. Of course, the post could be anonymous, falsified by the consumer, or simply missed by Nemet. There is nothing but Nemet's speculation which pleads Consumeraffairs.com's role as an actual author in the Fabrication Paragraph.

Nemet, 2009 WL 5126224, at *7 (internal citation omitted). The court also rejected the plaintiff's argument that supporting allegations "show[ed] [that] the Fabrication Paragraph plead[ed] adequate facts that Consumeraffairs.com [wa]s the author of the eight posts." *Id.* The court explained:

> These allegations include (1) that Nemet has an excellent professional reputation, (2) none of the consumer complaints at issue have been reported to or acted upon by the New York City Department of Consumer Affairs, (3) Consumeraffairs.com's sole source of income is advertising and this advertising is tied to its webpage content, and (4) some of the posts on Consumeraffairs.com's website appeared online after their listed creation date. Nemet's allegations in this regard do not allow us to draw any reasonable inferences that would aid the sufficiency of its amended complaint.
>
> That Nemet may have an overall excellent professional reputation, earned in part from a paucity of complaints reported to New York City's Department of Consumer Affairs, does not allow us to reasonably infer that the particular instances of consumer dissatisfaction alleged on Consumeraffairs.com's website are false. Furthermore, Nemet's allegations in regard to the source of Consumeraffairs.com's revenue stream are irrelevant, as we have already established that Consumeraffairs.com's development of class-action lawsuits does not render it an information content provider with respect to the allegedly defamatory content of the posts at issue. Finally, the fact that some of these comments appeared on Consumeraffairs.com's website after their listed creation date does not reasonably suggest that they were fabricated by Consumeraffairs.com. Any number of reasons could cause such a delay, including Consumeraffairs.com's review for inappropriate content. *See Iqbal*, 129 S. Ct. at 1951.
>
> We are thus left with bare assertions "devoid of further factual enhancement," which are not entitled to an assumption of truth. *Id.* at 1949. Such conclusory statements are insufficient as a matter of law to demonstrate Nemet's entitlement to relief. *See id.* As recently emphasized by the Supreme Court, Rule 8 requires "more than conclusions" to "unlock the doors of discovery for a plaintiff." *Id.* at 1950. Viewed in the correct "factual context," *id.* at 1954, Nemet's stark allegations are nothing more than a "formulaic recitation" of one of the elements of its claims. *Id.* at 1951. A plaintiff must offer more than "[t]hreadbare recitals of the elements of a cause of action" and "conclusory statements," however, to show its entitlement to relief. *Id.* at 1949.

Id. at *7–8 (footnote omitted) (alteration in original). The court noted that the amended complaint contained allegations regarding several comments made by Consumeraffairs.com on its website, in which it provided commentary on the other posts, but stated that "[b]ecause Nemet failed to argue in its opening brief that these comments contributed to the sufficiency of its amended complaint, [the court] would not consider them in th[e] appeal." *Id.* at *8 n.7.

The court concluded:

> Viewed in their best light, Nemet's well-pled allegations allow us to infer no more than "the mere possibility" that Consumeraffairs.com was responsible for the creation or development of the allegedly defamatory content at issue. Nemet has thus failed to nudge its claims that Consumeraffairs.com is an information content provider for any of the twenty posts across the line from the "conceivable to plausible." As a result, Consumeraffairs.com is entitled to § 230 immunity and the district court did not err by granting the motion to dismiss.

Id. at *8 (internal citations omitted).

Judge Jones filed a separate opinion, concurring in part and dissenting in part. Judge Jones agreed that the complaint was insufficient with respect to the twelve posts that the plaintiff connected to its customers because "[t]he facts alleged d[id] not show that as to these posts it [wa]s plausible that Consumeraffairs.com [wa]s an information content provider within the meaning of the Communications Decency Act." *Id.* at *8 (Jones, J., concurring in part and dissenting in part). But with respect to the other eight posts, Judge Jones disagreed with the majority's conclusion, stating that "the allegations of the Amended Complaint adequately set forth a claim that Consumeraffairs.com was responsible for the eight posts from fictitious customers." *Nemet*, 2009 WL 5126224, at *9 (Jones, J., concurring in part and dissenting in part). Judge Jones stated:

> In the first place, we are required to accept as true, at least at this stage of the case, Nemet's allegation that these eight posts did not represent real customers. Nemet alleged that it documented each vehicle sale with forms that give the customer's full name, address, description of the vehicle sold, and the date of sale, as well as other information. Each of the eight posts described in the Amended Complaint gave the first name and hometown of the putative customer as well as the make and model of the vehicle sold by Nemet. All of the posts were dated and all but one set forth the alleged date of the sale. In spite of Nemet's careful documentation of each sale and comparison with the information provided in the posts, Nemet was unable to connect any of these posted complaints with a real transaction.

> Moreover, these were not the sole pertinent factual allegations. Nemet also alleged the following in its Amended Complaint:
>
> (1) The eight complaints at issue were never reported to the New York City Department of Consumer Affairs, which, according to Nemet, is responsible for policing consumer issues where Nemet does business, and which has recently pursued highly publicized consumer litigation against other car dealers. (Am. Compl. ¶¶ 12-14, J.A. 49.);
>
> (2) Consumeraffairs.com's website encourages consumers to complete complaint forms, but the website does not contain a place for positive reviews. (Am. Compl. ¶ 28, J.A. 53.);
>
> (3) The website "entices visitors with the possibility of participating in a class-action lawsuit, with the potential for a monetary recovery," by promising to have "class action attorneys" review all submitted complaints. (Am. Compl. ¶ 29, J.A. 53.);
>
> (4) Consumeraffairs.com earns revenue by selling ads tied to its webpage content, including the content posted by consumers. (Am. Compl. ¶¶ 21, 22, J.A. 51.);
>
> (5) Consumeraffairs.com wrote derogatory statements about Nemet on the website in connection with the alleged consumer complaints . . . .

Id. Judge Jones thought these allegations were sufficient under *Iqbal*:

> While *Twombly* and *Iqbal* announced a *new, stricter pleading standard*, they did not merge the pleading requirements of Rule 8 with the burden of proof required for summary judgment. In fact, the Court in *Twombly* stated that "[a]sking for plausible grounds to infer" a claim's existence "does not impose a probability requirement at the pleading stage." *Twombly*, 550 U.S. at 556. The plausibility standard "simply calls for enough fact to raise a reasonable expectation that discovery" will lead to information supporting the plaintiff's claim. *Id.* Nemet's pleading accomplishes this. By stating sufficient factual assertions, Nemet has created the reasonable inference that Consumeraffairs.com wrote the eight posts to attract additional complaints.
>
> It is true that there may be alternative explanations for these

> posts that show that they are not attributable to Consumeraffairs.com. Nemet may have simply overlooked eight actual customers in its review of the company sales documents. The fictitious posts may have come from mischief makers unrelated to Consumeraffairs.com, or from real consumers who wished to remain anonymous by falsifying the details of their transactions. But I don't believe that any of these alternatives are any more plausible than Nemet's claim.
>
> It cannot be the rule that the existence of any other plausible explanation that points away from liability bars the claim. Otherwise, there would be few cases that could make it past the pleading stage. Indeed, as *Iqbal* teaches, it is only where there are "more likely explanations" for the result that the plausibility of the claim is justifiably suspect. *Iqbal*, 129 S. Ct. at 1951.
>
> While *the present federal pleading regime is a significant change from the past*, it remains true that a plaintiff in federal court need not allege in its initial pleading all of the facts that will allow it to obtain relief. Otherwise, the summary judgment process under Rule 56 would have little meaning. Of course, I don't know whether Nemet could have ultimately prevailed on its claim that Consumeraffairs.com made up the eight posts in question, or even if it could have withstood a motion for summary judgment, but under the circumstances it ought to have been allowed to attempt to prove its case.

Id. at *10 (emphasis added) (alteration in original).

- ***Francis v. Giacomelli***, 588 F.3d 186, 2009 WL 4348830 (4th Cir. Dec. 2, 2009). The mayor of Baltimore, Martin O'Malley, terminated the employment of the city's police commissioner, Kevin Clark, as well as two of Clark's deputies, Joel Francis and Anthony Romano. *Id.* at *1. O'Malley and City Solicitor Ralph Tyler sent members of the police department to Clark's offices to retrieve Clark's, Francis's, and Romano's "badges, police identifications, firearms, computers, and other official property, and to escort them from the building." *Id.* Clark sued O'Malley and the City Council in state court, seeking reinstatement and damages based on violation of the city's laws and breach of contract. *Id.* "The Maryland Court of Appeals ultimately concluded that, despite Commissioner Clark's contract with the Mayor and City Council of Baltimore, which authorized the Mayor to discharge the Commissioner without cause, Clark had not been discharged in accordance with Baltimore City Public Local Law, which required cause." *Id.* Clark and his deputies also sued in federal court, "alleging that the Mayor, the City Solicitor, and several members of the Baltimore City Police Department violated their constitutional rights by seizing property from the Commissioner and his deputies and by seizing them and removing them from Police Department offices." *Id.* The complaint alleged "that the plaintiffs' Fourth and

Fourteenth Amendment rights were violated insofar as the searches of the plaintiffs' offices and the seizures of the plaintiffs and their personal property were not justified by any criminal charges or any warrant and were, therefore, unreasonable." *Francis*, 2009 WL 4348830, at *3. In the second count, "Clark and Francis, who are African-American, claim[ed] conclusorily that they were removed from their offices and terminated from their positions because of their race, in violation of 42 U.S.C. § 1981." *Id.* In Count III, the plaintiffs alleged "that they were denied due process insofar as their employment was terminated without prior notice and a prior hearing," and "in Count IV, the plaintiffs allege[d] conclusorily that the defendants conspired to violate their civil rights based on the acts otherwise alleged, in violation of 42 U.S.C. § 1985." *Id.* The district court dismissed because the complaint did not state plausible claims for relief and because the Mayor was entitled to qualified immunity with respect to Clark's allegation that the Mayor denied him due process. *Id.* at *1. The Fourth Circuit affirmed.

On appeal, the plaintiffs argued that a motion to dismiss "must be denied unless ''it is clear that no relief could be granted under any set of facts that could be proved consistent with the [well-pleaded] allegations' in the Complaint,'" *id.* at *3 (quoting *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002)) (alteration in original), but the court noted that "[t]he standard that the plaintiffs quoted from *Swierkiewicz* . . . was explicitly overruled in *Twombly*," *id.* at *3 n.1. The plaintiffs also argued that "it was error to dismiss a complaint alleging civil rights violations unless it appear[ed] 'to a certainty that the plaintiff[s] would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.'" *Francis*, 2009 WL 4348830, at *3 (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)) (second alteration in original).

In discussing the appropriate legal framework, the Fourth Circuit explained that providing notice to the defendant is only one of the many purposes of adequate pleadings:

> Even though the requirements for pleading a proper complaint are substantially aimed at assuring that the defendant be given adequate notice of the nature of a claim being made against him, they also provide criteria for defining issues for trial and for early disposition of inappropriate complaints. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1202, at 88 (3d ed. 2004). Overlooking the broad range of criteria stated in the Federal Rules for a proper complaint, some have suggested that the Federal Rules, when adopted in 1938, simply created a "notice pleading" scheme, pointing for support to Rule 8(a)(2), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," and Rule 8(d)(1), which provides that "[n]o technical form [for stating allegations] is required." But the *"notice pleading" characterization may itself be too simplistic*, failing to recognize the many other provisions imposing requirements that permit courts to evaluate a complaint for

> sufficiency early in the process. Rule 8 itself requires a *showing of entitlement* to relief. Rule 9 requires that allegations of fraud, mistake, time, place, and special damages be specific. Rule 11 requires that the pleading be signed and provides that the signature "certifies" (1) that the claims in the complaint are not asserted for collateral purposes; (2) that the claims asserted are "warranted"; and (3) that the factual contentions "have evidentiary support." And Rule 12(b)(6) authorizes a court to dismiss any complaint that does not state a claim "upon which relief can be granted." *The aggregation of these specific requirements reveals the countervailing policy that plaintiffs may proceed into the litigation process only when their complaints are justified by both law and fact*.

Id. at *4 (first and third emphasis added) (alterations in original). The court noted that "[i]n recent years, with the recognized problems created by 'strike suits,'[24] and the high costs of frivolous litigation, the Supreme Court ha[d] brought to the forefront the Federal Rules' requirements that permit courts to evaluate complaints early in the process." *Id.* (internal citation to 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, at 46 & n.9 omitted).

In evaluating Count I, the Fourth Circuit noted that the complaint "allege[d] that members of the Baltimore City Police Department, under the direction of Mayor O'Malley and City Solicitor Tyler, 'broke into and entered' the Police Commissioner's offices, seized personal property, and 'detained, held in custody and seized' the Police Commissioner and his deputies while ordering them to 'surrender their weapons, badges, identification cards' and similar property—all without the benefit of criminal charges or a warrant," in violation of the plaintiffs' Fourth and Fourteenth Amendment rights. *Id.* at *5. The court found that no plausible claim had been stated, explaining:

> While the Commissioner and his deputies conclusorily alleged that the searches and seizures violated their constitutional rights because no charges had been filed against them, nor had any warrant issued, their complaint did not allege that the defendants were engaged in a law-enforcement effort. Indeed, the facts show to the contrary, that the defendants' actions against the plaintiffs were employment actions based on the Mayor's perceived right to fire the Police Commissioner without cause, as stated in the Memorandum of Understanding between Commissioner Clark and Baltimore City.
>
> . . . .

[24] The court explained that "[a] 'strike suit' is an action making largely groundless claims to justify conducting extensive and costly discovery with the hope of forcing the defendant to settle at a premium to avoid the costs of the discovery." *Francis*, 2009 WL 4348830, at *4 n.2 (citations omitted).

> The plaintiffs' complaint relies on the allegations that no criminal charges had been filed and no warrant had issued in order to state a violation of the Fourth Amendment. But this assertion is both conclusory and erroneous, especially when the complaint itself does not allege that the searches and seizures were law-enforcement related. On the contrary, the complaint suggests throughout that the searches and seizures were taken in furtherance of Mayor O'Malley's employment action of firing Commissioner Clark.[25]

Id. The court noted that "[t]he plaintiffs allege[d] nowhere that these actions were inconsistent with the Mayor's efforts to terminate the plaintiffs' employment," and that "it is common practice for an employer to take the employer's property away from discharged employees and to deny them access to the place of employment." *Id.* The court further noted that while the City had an interest in protecting the police department's property and in removing discharged employees, "the complaint fail[ed] to allege any countervailing privacy interests that would outweigh the City's interests," and instead "relie[d] simply on the absence of any charges or any warrant, which [wa]s irrelevant in the factual context of th[e] complaint." *Francis*, 2009 WL 4348830, at *6. The court also concluded that the fact that the state court of appeals had found that the firing was inconsistent with Baltimore's local laws did "not alone support the claim that the searches and seizures conducted in connection with the Mayor's effort to terminate Clark's employment violated the Fourth Amendment." *Id.* at *7.

In support of the discrimination claim under section 1981, "the only factual allegations asserted . . . [we]re (1) that Commissioner Clark and Deputy Francis are African-American males; (2) that the defendants are all white males; and (3) that the defendants ha[d] never initiated or undertaken the actions of terminating employment and physically removing the employee against white members of the Police Department." *Id.* The Fourth Circuit found that "[t]hese allegations [we]re not only conclusory and insufficient to state a § 1981 claim, *see Jordan* [*v. Alternative Resources Corp.*, 458 F.3d 332, 345 (4th Cir. 2006)], they [we]re patently untrue, given that Deputy Romano, who [wa]s not alleged to be within a protected class, complained of the exact same treatment in every other count of the complaint, belying any claim of discriminatory treatment." *Id.* (footnote omitted). The court held that "[t]he allegations in this count [we]re nothing more than the sort of unadorned allegations of wrongdoing to which *Twombly* and *Iqbal* [we]re directed," and that "Count II d[id] not on its face state a plausible claim for relief." *Id.*

With respect to the claim that the plaintiffs' due process rights were violated, the Fourth Circuit agreed with the district court that qualified immunity applied, because even though the state court later determined that the contract "was subservient to the requirements of the

[25] The court seemed to rely on the fact that the law did not provide relief for the conduct alleged, rather than a lack of factually specific details.

Public Local Law of Baltimore City, at the time that Mayor O'Malley fired Commissioner Clark, no law or decision had determined that the contract between Clark and the City of Baltimore was not enforceable." *Id.* at *8.

With respect to the fourth count, the complaint "allege[d] that the defendants conspired to violate the plaintiffs' civil rights, in violation of 42 U.S.C. § 1985," but made "no other allegations and contain[ed] no facts to support the conspiracy alleged." *Francis*, 2009 WL 4348830, at *8. The court cited pre-*Twombly* case law to note that pleading a violation of section 1985 requires "demonstrat[ing] with specific facts that the defendants were 'motivated by a specific class-based, invidiously discriminatory animus to [ ] deprive the plaintiff[s] of the equal enjoyment of rights secured by the law to all.'" *Id.* (quoting *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995)) (second and third alterations in original). The court held: "Since the allegation in Count IV amounts to no more than a legal conclusion, on its face it fails to assert a plausible claim." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950; *Gooden v. Howard County, Md.*, 954 F.2d 960, 969–70 (4th Cir. 1992) (en banc)).

Finally, with respect to the argument that the district court erred in denying leave to amend, the Fourth Circuit noted that although the plaintiffs concluded their opposition to the motion to dismiss by stating that if the motion was granted, the plaintiffs requested leave to amend or to file an amended complaint, they "filed no separate motion, and they attached no proposed amendment or statement indicating how they might wish to amend their complaint." *Id.* at *9. The plaintiffs had violated a local district court rule which required a party requesting leave to amend to provide a copy of the proposed amendment, and the Fourth Circuit held that "[i]n the circumstances, . . . the district court did not abuse its discretion in failing to give the plaintiffs a blank authorization to 'do over' their complaint." *Id.*

- ***Monroe v. City of Charlottesville, Va.***, 579 F.3d 380 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1740 (2010). The plaintiff sued the city and individual police officers under § 1983, alleging violations of the Fourth and Fourteenth Amendments, because he was approached at his home by a police officer and asked to give a DNA sample because he matched the description of a serial rapist given by victims who described their assailant as "a youthful-looking black male." *Id.* at 382. The plaintiff alleged that his equal protection rights were violated because he was stopped based on his race, and because officers did not perform similar stops when victims describe an assailant as white. *Id.* The plaintiff also alleged that he was subject to an unreasonable seizure when the officer came to his home and when the plaintiff gave a sample for DNA analysis. *Id.* The district court concluded that the plaintiff could not proceed on his equal protection claim based on being stopped on account of his race because the Equal Protection Clause is not violated when the police limit their investigation to those matching a victim's description, but found that the plaintiff could proceed on the claim that the City did not investigate crimes in the same way when the assailant is described as white. *Id.* at 382–83. The district court dismissed the seizure claim based on the officer coming to the plaintiff's home because "Monroe failed to state facts sufficient to show the consensual encounter escalated to a seizure," but his claim that his

bodily fluids were unreasonably seized was allowed to proceed. *Id.* at 383. The plaintiff amended his complaint, and the defendant again moved to dismiss. The district court again dismissed the portion of the equal protection claim asserting that the officers only approached him based on his race, but allowed the rest of the equal protection claim to proceed; dismissed the claim that the plaintiff was unreasonably seized because "the newly alleged facts did not cure the original deficiencies"; and allowed the seizure claim based on the officer's taking bodily fluids to proceed. *Monroe*, 579 F.3d at 383. The plaintiff appealed the dismissal of his Fourth Amendment claim and the dismissal of his equal protection claim; the Fourth Circuit affirmed.

On appeal, the plaintiff asserted that the district court improperly "required him to plead facts sufficient to *prove* his claim, instead of merely requiring 'enough facts from which the trial court could *infer* a basis for [Monroe's] claim' when viewed in conjunction with the potentially discoverable facts . . . ." *Id.* at 385 (alteration in original). Citing a pre-*Twombly* case, the Fourth Circuit noted that "the court 'need not accept legal conclusions drawn from the facts, and [ ] need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.'" *Id.* at 385–86 (quoting *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006)) (alteration in original).

With respect to the seizure claim, the court noted that the plaintiff had alleged that "he 'was visited in his home and coerced into giving a DNA sample'"; "[t]he encounter was not consensual because 'Monroe had both an objectively and subjectively reasonable belief that he was not free to decline the officer's request or otherwise terminate the encounter"; "[t]he officer was in uniform and did not tell Monroe that he could terminate the encounter"; "[t]he encounter was at Monroe's home and he was concerned neighbors would view him 'as a snitch'"; "Monroe, based on his and others' interactions with police, believed he had to comply with the officers, and the fact that he was approached at his home meant he 'was not free to terminate the interaction'"; and "Monroe's belief that he could not terminate the encounter was objectively reasonable based on '[t]he state of relations between law enforcement and members of the minority communities.'" *Id.* at 386 (fourth alteration in original). The Fourth Circuit noted that "[t]o elevate . . . an encounter to a seizure, a reasonable person must feel he is not free to disregard the officer and terminate the encounter," and that because the inquiry is an objective one, the plaintiff's subjective beliefs were irrelevant. *Id.* The court rejected the plaintiff's theory that it was enough to plead that a sufficient proportion of the population shared his beliefs, stating that "[t]o agree that Monroe's subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor would result in a rule that all encounters between police and minorities are seizures." *Id.* at 386–87. The court concluded that "while Monroe's subjective beliefs may be facts, they are irrelevant facts that neither plausibly give rise to a right to relief nor suggest there are discoverable facts that may plausibly give rise to a right to relief." *Monroe*, 579 F.3d at 387. The court found that the remaining allegations in the complaint did not meet the *Twombly* standard:

> The remaining facts in the complaint regarding the alleged

> seizure do not satisfy the *Twombly* test either. First, Officer Mooney's failure to tell Monroe that he could terminate the encounter has been rejected as a means of establishing a seizure, and does not imply there are discoverable facts that establish otherwise. Second, the allegations that Monroe was "coerced," that his belief was "objectively reasonable," and that the encounter "was not [ ] consensual" are legal conclusions, not facts, and are insufficient. The remaining two facts—that Officer Mooney was in uniform and he approached Monroe at his home—merely describe many consensual encounters, are insufficient to survive a Rule 12(b)(6) motion, and do not imply there are other discoverable facts that "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. Thus, the district court did not err in dismissing Monroe's Fourth Amendment claim.

Id. (internal citations omitted) (alteration in original).

With respect to the equal protection claim, the Fourth Circuit concluded that the officer did not approach the plaintiff based on his race, but based on the victims' descriptions. The court noted that an equal protection claim requires "'express racial classification,' which occurs when *the government* distinguishes among the citizenry on the basis of race," and concluded that "it [wa]s clear that the officers in this case made no such distinction when establishing the suspect's characteristics—any descriptive categorization came from the rape victims who described their assailant." *Id.* at 388. The court found this conclusion supported by *Iqbal*, where the Supreme Court "noted that Arab-Muslim men were responsible for the September 11 attacks, and '[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims . . . .'" *Id.* at 389 (quoting *Iqbal*, 129 S. Ct. at 1951) (alteration in original).

- ***Walker v. Prince George's County***, 575 F.3d 426 (4th Cir. 2009). The owners of a pet wolf initiated suit in state court against the county animal control officer and the county after the officer seized their pet wolf. The plaintiffs alleged civil trespass, violation of the Maryland Constitution, and violation of their Fourth Amendment rights under § 1983. *Id.* at 428. The defendants removed the case to federal court and moved for summary judgment. *Id.* The district court granted the defendants' motion for summary judgment because the officer was entitled to qualified immunity and the complaint failed to adequately plead a claim against the county under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), by failing to allege the county's policy, custom, or practice. *Walker*, 575 F.3d at 428. The plaintiffs appealed the grant of the defendants' motion for summary judgment on the Fourth Amendment § 1983 claim and the denial of their own motion for summary judgment on that claim, and also argued that they were entitled to summary judgment. *Id.* at 428–29. The Fourth Circuit affirmed.

In discussing the *Monell* claim, the Fourth Circuit noted that "a municipality's liability 'arises only where the constitutionally offensive actions of employees are taken in furtherance of some municipal 'policy or custom,'" *id.* at 431 (citation omitted), but that the plaintiffs "'failed to make any allegations in their complaint in regards to the existence of the County's policy, custom, or practice, therefore failing to plead' a viable *Monell* claim," *id.* (citation omitted). The court rejected the plaintiffs' assertion that "a County policy to seize animals without inquiring whether their owners have valid permits for those animals '[could] be inferred from Officer Jacobs' testimony' and that it should be 'presumed that the County never checks to see if owners lawfully possess wild or exotic animals before seizing them,'" because the plaintiffs "fail to explain the basis of their inference or the justification for their presumption." *Id.* The court noted: "Critically lacking is any support for the proposition that Officer Jacobs' common practice 'implemented an official government policy or custom.'" *Id.* (citation omitted). The court concluded that the allegations "'d[id] not permit [it] to infer more than the mere possibility of misconduct," *Walker*, 575 F.3d at 431 (citing *Iqbal*, 129 S. Ct. at 1950), and "[t]his mere possibility [wa]s inadequate to subject the County to appellants' suit for monetary damages," *id.*

- ***Shonk v. Fountain Power Boats***, 338 F. App'x 282 (4th Cir. 2009) (unpublished) (per curiam). The plaintiff brought a breach of warranty case based on defects in a boat he purchased. *Id.* at 283. The plaintiff sued Fountain Power Boats ("Fountain"), the manufacturer of the boat; Yanmar American Corporation ("Yanmar"), the manufacturer of the boat's engines; and Mercury Marine ("Mercury"), the manufacturer of the boat's stern drives. *Id.* The complaint asserted breach of warranty under the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act (the "MMWA"), breach of warranty under the Maryland Uniform Commercial Code–Sales (the "Maryland UCC"), and unfair or deceptive trade practices under the Maryland Consumer Protection Act (the "Maryland CPA"). *Id.* The district court granted dismissal under Rule 12(b)(6) of the claims against Yanmar and Mercury, denied leave to amend, and granted summary judgment in favor of Fountain on the MMWA claim. *Id.* at 284.

  The complaint alleged one count under the MMWA, one count under the Maryland UCC, and one count under the Maryland CPA, and each count "indiscriminately used the term 'Defendant.'" *Id.* After the district court had dismissed the claims against Yanmar and Mercury, the plaintiff sought to file a Second Amended Complaint, which "newly alleged that Fountain manufactured the Boat, Yanmar manufactured the Boat's engines, and Mercury manufactured the Boat's stern drives"; "listed Shonk's claims under the MMWA against Fountain, Yanmar, and Mercury in separate counts"; and left the remaining claims "lumped together." *Shonk*, 338 F. App'x at 285. In the proposed Second Amended Complaint, "Shonk's claims against Yanmar and Mercury under the MMWA, the Maryland CPA, and the Maryland UCC continued to focus solely upon the Boat." *Id.* The district court overturned the magistrate judge's decision to allow filing of the Second Amended Complaint, finding, among other things, that amendment would be futile. *Id.*

  With respect to the claims against Yanmar and Mercury under the MMWA, the district court

had dismissed "because the Initial Complaint failed to identify a consumer product supplied or manufactured by Yanmar or Mercury." *Id.* at 287. The plaintiff argued on appeal that "'when a specific boat is identified, Yanmar and Mercury should be able to determine what role they played in the manufacture of the specific boat by tracing a serial number or otherwise.'" *Id.* The Fourth Circuit rejected this argument:

> Shonk's contention is fatally flawed in two respects. First, it ignores his burden at the Rule 12(b)(6) stage to allege sufficient factual matter "to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. At best, Shonk's allegations in the Initial Complaint pertaining to his claims under the MMWA against Yanmar and Mercury constitute "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," which decisively fail to meet his pleading burden. *Iqbal*, 129 S. Ct. at 1940. Second, Shonk's contention ignores Rule 10(b)'s mandate to state, in a separate count, each claim founded on a separate transaction or occurrence, "[i]f doing so would promote clarity." FED. R. CIV. P. 10(b). Given the fact that Fountain manufactured the Boat, Yanmar manufactured the Boat's engines, and Mercury manufactured the Boat's stern drives, each claim under the MMWA against Fountain, Yanmar, and Mercury should have been stated in a separate count. Accordingly, it cannot be doubted that the district court properly dismissed Shonk's claims against Yanmar and Mercury under the MMWA, as pleaded in the Initial Complaint. We, therefore, affirm the district court's dismissal of those claims.

Id. (alterations in original).

With respect to the claims against Yanmar and Mercury under the Maryland CPA, the Fourth Circuit noted that the claims "all pertain[ed] to the sale of the Boat," and that "each violation of the Maryland CPA alleged by Shonk in the Initial Complaint require[d] that the defendant have made the untrue representation about a '[c]onsumer good [ ].'" *Shonk*, 338 F. App'x at 287–88 (second and third alterations in original). The district court dismissed these claims because "the Initial Complaint failed to identify a consumer good sold to Shonk by Yanmar or Mercury." *Id.* at 288. The Fourth Circuit affirmed, explaining that the complaint could not "be reasonably read to identify a consumer good sold to Shonk by Yanmar or Mercury." *Id.*

With respect to the breach of warranty claims against Yanmar and Mercury under the Maryland UCC, the district court dismissed the claims because the complaint "failed to identify a good warranted by Yanmar or Mercury." *Id.* The plaintiff raised the same argument that Yanmar and Mercury ought to be able to determine their role by tracing a serial number, but the Fourth Circuit "remain[ed] unimpressed with such arguments and

reject[ed] them on the same grounds that [it] previously rejected them in the context of [the plaintiff's] claim under the MMWA and the Maryland CPA against Yanmar and Mercury." *Id.*

The Fourth Circuit also affirmed the district court's denial of leave to amend, even though "the Proposed Second Amended Complaint [wa]s far more detailed than the Initial Complaint or the Proposed First Amended Complaint." *Id.* at 289. The court explained that the additional detail did not avoid the futility of the amendment because "Shonk's claims against Yanmar and Mercury under the MMWA, the Maryland CPA, and the Maryland UCC *continued to focus solely upon the Boat*." *Shonk*, 338 F. App'x at 289. The court continued:

> For example, although Shonk set forth his breach of warranty claim against Yanmar under the MMWA in a separate count, he did not allege that the Boat's engines were consumer products under the MMWA. Rather, he alleged that *the Boat* (which the Proposed Second Amended Complaint identifies Fountain as having manufactured and warranted) is a consumer product under the MMWA. Because neither Yanmar nor Mercury manufactured nor warranted the Boat (per Shonk's allegations in the Proposed Second Amended Complaint), Shonk's sole focus on the Boat in his claims against Yanmar and Mercury rendered the Proposed Second Amended Complaint futile. Accordingly, we uphold, as not an abuse of discretion, the district court's refusal to grant Shonk leave to proceed under the Second Amended Complaint.

Id. The court also affirmed the grant of summary judgment in favor of Fountain. *See id.* at 289–90.

Fifth Circuit

- ***City of Clinton, Ark. v. Pilgrim's Pride Corp.***, 632 F.3d 148 (5th Cir. 2010). Defendant Pilgrim's Pride Corp. owned a facility in the City of Clinton, Arkansas for growing and processing poultry. Pilgrim's had acquired this facility in 2004 from another poultry processing company, ConAgra. In 2008, Pilgrim's announced that it would close its facility and its operations in the City of Clinton. Subsequently, Pilgrim's filed for bankruptcy relief under Chapter 11. The closure of the facility caused economic distress for the City of Clinton, which had difficulty repaying bond debts it had incurred in the construction of a water purification system designed to meet the needs of Pilgrim's poultry plant. The City sued Pilgrim's, alleging fraud, promissory estoppel, unjust enrichment, and violation of the Arkansas Deceptive Trade Practices Act. The district court dismissed the City's complaint for failure to state a claim.

  In support of its claims, the City's complaint relied entirely upon two oral statements, one made by an officer of ConAgra, the prior owner of the facility and not a party to the case, and

the other made by a Pilgrim's officer. The ConAgra officer, Hooper, when asked by a City councilman in 1985 how the City would repay the 40-year municipal bonds it had issued if ConAgra "pulled up stakes and left," allegedly responded, "We will not go off and leave you holding the bag." Later, in 2004, the Pilgrim's officer, Hendrix, allegedly stated at a meeting that Pilgrim's would "have a long-term commitment to the City of Clinton" as its "community partner." The City alleged that by this statement, Pilgrim's ratified ConAgra's earlier promise.

The Fifth Circuit, while citing the *Twombly* plausibility standard, stated that "[f]raud claims must also meet the heightened pleading standard of Rule 9(b)." The court then explained why the City's fraud claims did not meet that standard:

> First, the City's amended complaint fails to sufficiently plead that there has been a false representation of a material fact, because the statements by Hooper and Hendrix upon which the City relies simply do not contain any material facts. Because a false statement is, by definition, material only "if a reasonable person would attach importance to and be induced to act on the information," we have held that statements that are so inherently vague and ambiguous cannot be material. *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1033 (5th Cir. 2010). Hooper's January 1985 statement that ConAgra "will not go off and leave you holding the bag," even when considered in the context of the meeting at which it was stated, is inherently vague because it admits of a variety of interpretations. For example, an equally plausible meaning to the one the City urges is that ConAgra was promising not to close the plant right away after the City issued the bonds; indeed, the plant did not close for over twenty-three years after the statement was allegedly made. Hendrix's January 2004 statement that Pilgrim's would "have a long-term commitment to the City of Clinton" as its "community partner" is even more vague—it not only contains no facts on its face, but also is devoid of context that would link it to the water system expansion in any way. This court has held similarly vague and attenuated statements to be insufficient to survive a motion to dismiss under the standards of Rules 12(b)(6) and 9(b). *See, e.g. Potter*, 607 F.3d at 1033. ("[Plaintiff] did not plead that [Defendant] presented any detailed, corroborating information, facts or figures to support the statement [that the company was in sound financial condition] that might entice a reasonable person to attach importance to the statement. Further, the statement is significantly attenuated from the execution of [the contracts at issue] which occurred, respectively, seven and ten months later").
>
> Moreover, the City does not allege any facts to provide a basis

> for its claim that Hendrix's oral statement constituted a "ratification" by Pilgrim's of the oral statement made nineteen years early by Hooper, as a representative of ConAgra. Indeed, the City does not allege any facts indicating that Hendrix was even aware that Hooper's 1985 statement had been made. The City has failed to allege a basis for holding Pilgrim's liable for a ConAgra plant manager's alleged oral "promise" made nineteen years previously.
>
> Even if the context surrounding Hooper's 1985 statement could be seen as providing the requisite specificity for the statement, the City's fraud claim would still fail because the statements, which do not purport to be promises at all, in any event wholly relate to future events, which cannot form the basis of a fraud action. *See Distrib. Co. v. Miller Brewing Co.*, 366 Ark. 560, 237 S.W.3d 63, 74 (2007). There is an exception to this rule where the plaintiff can show that the defendant knew the promise was false when made, but the City has insufficiently alleged that Hooper had any knowledge that the statement was false at the time it was made. While the City alleges that "[a]t the time the representation and promise was made, Mr. Hooper and ConAgra intended to 'leave the City holding the bag' of indebtedness . . . at the time the poultry processor closed the plant," this allegation is meaningless absent any factual allegations concerning any then intent to close the plant, and the allegation is essentially nothing more than a conclusory statement of the element of the cause of action, and therefore lacks sufficient specificity. *See Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 339 (5th Cir. 2008) ("simple allegations that defendants possess fraudulent intent will not satisfy Rule 9(b)"). While Rule 9(b) provides that intent and knowledge "may be alleged generally," this is not license to base claims of fraud upon conclusory allegations.

The court did not explicitly state whether the City's other claims—for promissory estoppel, unjust enrichment, and violations of the Arkansas Deceptive Trade Practices Act—also were properly analyzed under Rule 9(b) rather than under Rule 8. In any case, the court affirmed their dismissal on the basis of the same reasoning quoted above. The court found that "[l]ike the fraud cause of action, the promissory estoppel cause of action fails because the statements by Hooper and Hendrix, upon which the City bases its claims, are impermissibly vague and ambiguous. Such vague and attenuated statements cannot be considered to be promises that the defendant would reasonably expect to induce action." Furthermore, "[b]ecause the meanings of the statements were vague and ambiguous, and because the statements were so attenuated from the eventual closure of the facility, they do not amount to a sufficient 'operative act'" or other circumstance necessary to support an unjust enrichment claim. Finally, the court affirmed the dismissal of the City's claims under the Arkansas Deceptive Trade Practices Act "because the statements by Hooper and Hendrix are too vague and

ambiguous to satisfy the specificity requirements of Rule 12(b)(6). These alleged statements simply had no capacity to deceive a reasonable consumer, and no facts are alleged which plausibly suggest otherwise." (citing *Twombly*, 127 S. Ct. at 1966.).

- ***Gentilello v. Rege***, 627 F.3d 540, 2010 WL 4868151 (5th Cir. December 1, 2010). Tenured professor Gentilello brought § 1983 action against supervisors, alleging that he was wrongfully demoted from two chair positions without due process of law in violation of the Fourteenth Amendment. *Id.* at *1 The district court granted supervisors' motion for judgment on the pleadings and denied professor leave to file an amended or supplemental complaint. *Id.* at *2. The Fifth Circuit affirmed.

  The court first noted that it evaluated a 12(c) motion using the same standard as a 12(b)(6) motion to dismiss. *Id.* It next explained that it was undisputed that the tenured professor had a protected property interest in continuing employment. *Id.* at *3. But that "the due process clause does not protect Gentilello's specific job duties or responsibilities absent a statute, rule, or express agreement reflecting an understanding that he had a unique property interest in those duties or responsibilities." *Id.*

  The court concluded that Gentillelo never identified his alleged property interest in the chair positions:

  > Nowhere in Gentilello's Complaint, filed September 13, 2007, his Amended Complaint, filed October 22, 2007, or his proposed Supplemental Complaint, filed April 21, 2009, did Gentilello plead the factual basis for his alleged property interest in the Chair Positions. In his Amended Complaint, Gentilello alleged the bare legal conclusion that the Defendants "wrongfully removed Plaintiff from his [Chair Positions], positions in which Plaintiff had a constitutionally protected property interest in occupying for a previously-determined period of time." He further alleged that "Defendants' conduct caused Plaintiff to be deprived of his vested, constitutionally protected property right in his [Chair Positions]," and as a result, that he "was not merely deprived of duties and responsibilities, but rather, was deprived of the economic interests in and benefits associated with such positions." Gentilello did not substantiate these allegations by pointing to any ordinance, official policy, state or local law, contract, or other enforceable agreement to support his claim of entitlement to the Chair Positions. Therefore, his pleadings fail to state a due process claim. *See Blackburn v. City of Marshall*, 42 F.3d 925, 940 (5th Cir.1995) ("Because [plaintiff] does not allege that his property interest ... stems from a state statute or regulatory scheme, a contract, or any other independent source, we find that [plaintiff] has failed to allege a property interest protected by the Due Process Clause of the Fourteenth Amendment.").

> Nor did Gentilello alert the district court to the factual basis for his claim of entitlement to the Chair Positions in his extensive briefing in opposition to Defendants' motion for judgment on the pleadings. At best, Gentilello asserted that he had a property interest in the Chair Positions "based upon letters from Defendants," the contents of which he has not disclosed to the district court or even (when we made inquiry at oral argument) to this court. Apparently as a result of these letters, Gentilello asserted that he had a contract with UT Southwestern "which was subject to certain rules and regulations" - which Gentilello has not identified - "that required 'good cause' before his chaired positions could be terminated." Contrary to Gentilello's contentions, these "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a due process claim. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

Gentilello, 2010 WL 4868151, at *3-4 (alterations in original). The court next determined that the district court did not err in refusing to allow a second amendment more than a year after Gentilello initially amended his complaint: "At some point a court must decide that a plaintiff has had a fair opportunity to make his case; if, after that time, a cause of action has not been established, the court should finally dismiss the suit." *Id.* at *4 (quoting *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986)). Finally, the court found that the district court did not err in denying Gentilello's request for leave to supplement his pleadings because Gentilello provided no justification for delaying months after the action giving rise to his new claim before seeking leave to supplement. *Id.* at *5.

- ***Castro ex rel. R.M.G. v. United States***, 608 F.3d 266 (5th Cir. 2010) (per curiam). The plaintiff, on her own behalf and on behalf of her minor daughter, filed suit under the Federal Tort Claims Act (FTCA), alleging that the government negligently caused the wrongful deportation of her daughter, R.M.G., a United States citizen. *Id.* at 267. The government moved to dismiss under Rule 12(b)(1) or, alternatively, for summary judgment. *Id.* at 267–68. The district court held that the government was protected from suit under the discretionary function exception of the FTCA, dismissed the tort claims for lack of subject matter jurisdiction, and dismissed the constitutional and injunctive claims as moot. *Id.* at 268. A Fifth Circuit panel reversed and remanded, but the court granted rehearing en banc, vacating the panel opinion. *Id.*

  As explained by Judge Stewart in his dissent, Border Patrol agents took R.M.G. into custody, despite knowledge of her United States citizenship, when they arrested her undocumented father (Gallardo) and detained him for removal. *Id.* at 270 (Stewart, J., dissenting). Castro, a United States citizen, pleaded with the Border Patrol to return her daughter to her and allow her daughter to remain in the United States. *Castro*, 608 F.3d at 270 (Stewart, J., dissenting). "But on the very same day that R.M.G. and Gallardo were detained, and although Gallardo

did not have a custody order in his favor, the Border Patrol deported R.M.G. and Gallardo to Mexico," and "Castro could not locate her daughter for the next three years." *Id.* On rehearing, the majority affirmed the district court's decision to dismiss the FTCA claims for want of jurisdiction, "essentially for the reasons given by the district court," and also agreed with the district court that the constitutional claims and the claim for injunctive relief were moot. *Id.* at 268 (majority opinion).

Judge Dennis concurred in the judgment in part and dissented in part. Judge Dennis asserted that there was federal jurisdiction over the plaintiffs' claims for abuse of process, assault, and false imprisonment because the government has waived immunity through the FTCA's law enforcement proviso, and that the district court had therefore erred by dismissing those claims under Rule 12(b)(1) for lack of subject matter jurisdiction. *Id.* at 269 (Dennis, J., concurring in judgment in part and dissenting in part). Because it was not clear whether the claims for abuse of process and assault would survive a Rule 12(b)(6) motion to dismiss, Judge Dennis would have remanded those claims. *Id.* But with respect to the false imprisonment claim, Judge Dennis would have dismissed under Rule 12(b)(6) because "the plaintiffs ha[d] clearly failed to state a claim on which relief [could] be granted." *Id.* Judge Dennis asserted that R.M.G. was a baby and could not consent independently, but that her father could and did consent on her behalf to her remaining with him. *Castro*, 608 F.3d at 269 (Dennis, J., concurring in judgment in part and dissenting in part). Judge Dennis concluded that "[b]ecause R.M.G.'s presence in the Border Patrol station was not without consent, it did not amount to false imprisonment." *Id.* With respect to the remaining claims, which did not fall within the law enforcement proviso, Judge Dennis agreed with Judge Stewart that the discretionary function exception to the FTCA "does not encompass actions by government agents that are 'unconstitutional, proscribed by statute, or exceed the scope of an official's authority.'" *Id.* (citations omitted). As a result, Judge Dennis believed that the district court erred by "failing to consider whether the Border Patrol agents' actions violated any statutory or constitutional requirements before it decided that the plaintiffs' claims were barred by the discretionary function exception." *Id.* at 269–70. But Judge Dennis believed that the claims not covered by the law enforcement proviso should have been dismissed for lack of subject matter jurisdiction because they were barred by the discretionary function exception, explaining that "[t]he facts as alleged by the plaintiffs d[id] not disclose any constitutional or statutory violations that would make the discretionary function exception inapplicable." *Id.* at 270. Judge Dennis explained that the Border Patrol had merely maintained the status quo by allowing Gallardo to keep R.M.G. with him, and it could not have made a custody decision to transfer the baby to Castro without a court order or other legal authority. *Id.*

In Judge Stewart's dissent, he asserted that Castro plausibly alleged that the Border Patrol exceeded the scope of its authority under the Immigration and Nationality Act of 1953 (INA) and the Fourth and Fifth Amendments, and that the majority therefore erred by applying the discretionary function exception without analyzing whether the Border Patrol agents acted outside their authority. *Castro*, 608 F.3d at 271 (Stewart, J., dissenting). Judge Stewart also asserted that the majority "erroneously applie[d] the principles of Rule 12(b) according to

. . . *Twombly* . . . and . . . *Iqbal* . . . , and disregard[ed] the Supreme Court's instruction to 'narrowly construe[ ] exceptions to waivers of sovereign immunity . . . in the context of the sweeping language of the [FTCA].'" *Id.* at 270 (second and third alterations and fifth omission in original) (citation omitted). Judge Stewart explained:

> The majority acknowledges that we have before us a Rule 12(b)(1) dismissal, but it erroneously concludes that Castro has not met her burden under *Twombly* and *Iqbal*. To the contrary, based on the allegations contained in Castro's complaint, the Border Patrol agents' actions in detaining and deporting R.M.G. implicate both statutory and constitutional concerns. The facts included in the complaint—in particular the undisputed fact that the Border Patrol agents knew R.M.G[.]'s citizenship status and did not doubt that she was a United States citizen—support a plausible claim that the Border Patrol agents exceeded the scope of their statutory and constitutional authority and their actions were therefore non-discretionary.

Id. at 272–73. Judge Stewart believed that Castro's complaint alleged a plausible violation of the Fourth Amendment right to be free from seizure and the Fifth Amendment right to due process, noting that the complaint alleged:

> Defendant United States' detention of Plaintiff R.M.G. without due process violated her Fourth Amendment constitutional interest in remaining free from bodily seizure. . . . Detention of Plaintiff R.M.G. was not due to an act of wrongdoing that warranted detention nor was detention based on an emergency. The United States did not and cannot show that seizure of the minor child was necessary to protect Plaintiff R.M.G.'s health, safety and welfare; indeed, Defendant United States placed R.M.G. in imminent danger by deporting her with a man it knew was wanted in connection with a homicide.
>
> . . . Plaintiff Castro made a claim of citizenship to Defendant United States on behalf of her minor child, Plaintiff R.M.G. Despite that claim, and despite Defendant's recognition of Plaintiff R.M.G.'s status as a U.S. citizen, Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' right to procedural due process guaranteed by the Fifth Amendment.
>
> . . . Defendant United States willfully detained R.M.G. without her consent or the consent of her U.S. citizen parent, and the detention was without legal authority or justification. . . . From the

> moment Defendant United States knew or should have known that R.M.G. was a U.S. citizen and that a U.S. citizen parent was present to take possession of her and did not release her, Defendant United States had no legal authority or justification to continue its detention of the child.

Id. at 273 (quotation marks omitted) (omissions in original). Judge Stewart further pointed out that the complaint alleged that "the Border Patrol agents acted outside of their statutory grant of authority under the INA, averring that '[n]o section of [the INA] provides authority for the United States to detain or remove a U.S. citizen.'" *Id.* (alterations in original). Judge Stewart argued that "[d]espite the Border Patrol agents' conceded knowledge of R.M.G.'s citizenship and Castro's plausible allegations of constitutional and statutory violations, the district court opinion—relied upon by the majority—failed to address whether the Border Patrol agents exceeded their scope of authority," and that "[t]his crucial omission in the district court's Rule 12(b)(1) analysis allow[ed] any actions taken by the Border Patrol agents in excess of their authority to nonetheless benefit from the protection of the discretionary function exception." *Id.* at 274. Because "[t]he majority opinion weaken[ed] a critical, inherent safeguard of the discretionary function exception and neglect[ed] Castro's patently plausible allegations of unauthorized actions by the Border Patrol agents in addressing the 12(b)(1) dismissal," Judge Stewart would have vacated the district court's order and remanded for a ruling on whether the Border Patrol agents acted within the scope of their authority. *Id.*

- ***Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter***, 607 F.3d 1029 (5th Cir. 2010) (per curiam). Plaintiff Shandong Yinguang Chemical Industries Joint Stock Co., Ltd. ("Yinguang") sold explosive chemicals to Beston Chemical Corporation ("Beston"). *Id.* at 1031. Beston was wholly owned by Michael Potter. *Id.* After Beston failed to make payments on two contracts and declared bankruptcy, Yinguang sued Potter for common law fraud and fraudulent inducement, and sought to pierce the corporate veil. *Id.* The district court dismissed the complaint, finding that Yinguang failed to meet Rule 9(b)'s pleading requirements for the fraud claim and did not have standing to bring the veil-piercing claim. *Id.* The Fifth Circuit affirmed.

  According to the complaint, Beston and Yinguang entered into eight contracts. *Id.* Beston made untimely payments for the first six contracts, but the dispute arose with respect to the last two contracts. *See Yinguang*, 607 F.3d at 1031. The complaint alleged that Potter made two types of misrepresentations during the negotiation of the last two contracts: "First, on July 20, 2003, Potter represented that Beston was in 'sound financial condition' and that Beston would pay for current and future shipments. Second, Potter represented repeatedly that Beston would make regular payments on its purchases." *Id.* "Despite Potter's assurances, he omitted to tell Yinguang that Beston had been unprofitable in 2003," and "Beston made no regular payments on either contract." *Id.* at 1032. After Beston filed for bankruptcy and left Yinguang with an unsecured claim, Yinguang sued Potter personally in federal court, alleging that Potter committed fraud and fraudulent inducement by lying to

Yinguang's president to entice Yinguang to enter into the contracts. *Id.* Yinguang also sought to impose Beston's contractual liability on Potter by piercing the corporate veil through allegations that Potter used Beston to perpetrate a fraud by funneling money out of Beston into other Potter-owned corporate entities. *Id.*

On appeal, the Fifth Circuit explained that "[t]he court's task [in ruling on a Rule 12(b)(6) motion] is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949). In addition, with respect to the fraud and fraudulent inducement claims, the court noted that the plaintiff must meet the requirements of Rule 9(b), which requires "'stat[ing] with particularity the circumstances constituting the fraud.'" *Yinguang*, 607 F.3d at 1032.

In considering the fraud claim, the court noted that "Yinguang allege[d] that Potter committed fraud both by affirmative misrepresentation and by omission," and "assert[ed] that Potter's statement that Beston was in 'sound financial condition' was a misrepresentation because Beston was unprofitable in 2003 and failed to obtain a line of credit." *Id.* The court concluded that "Yinguang's allegations fail[ed] to meet the pleading requirements of Rule 9(b) as to several of the fraud elements." *Id.* at 1033. The court explained that the alleged statement was "inherently vague and ambiguous," noting that "Yinguang did not plead that Potter presented any detailed, corroborating information, facts or figures to support the statement that might entice a reasonable person to attach importance to the statement"; that the "statement [wa]s significantly attenuated from the execution of Contract Nos. 7 and 8"; that "the statement was made during a meeting to assure Yinguang that a late payment on Contract No. 6 would be forthcoming"; and that "in the parties' course of dealing on prior contracts, Beston's payments had repeatedly been late although it 'generally' met its obligations to Yinguang." *Id.* The court concluded that "[u]nder all of these circumstances, Yinguang's bare assertion of materiality r[ang] hollow." *Id.* The court also found that Yinguang failed to properly allege that the statement was false when made, explaining that the facts "[t]hat Beston was unprofitable for the year 2003 and unable to obtain a line of credit sometime in 2004 d[id] not support a conclusion [that] Beston was not in 'sound financial condition' in July 2003." *Id.* The court rejected Yinguang's attempt to rely on statements regarding Beston's current and future willingness to pay, explaining that the theory that they were false when made "suffer[ed] from a lack of supporting details from which an inference of falsity could derive" because "Yinguang offer[ed] no contemporary financial data undercutting Potter's assertion about the company's willingness to pay." *Yinguang*, 607 F.3d at 1033. The court also rejected the alternative theory that Beston had no intention of paying, explaining that while "'funneling' money from one entity to another could be 'slight circumstantial evidence of fraud,' . . . Yinguang's pleadings d[id] not rise above the level of a conclusory description," and "[p]leading standards demand 'more than an unadorned, the defendant-unlawfully-harmed-me accusation.'" *Id.* at 1034 (quoting *Iqbal*, 129 S. Ct. at 1949). The court further explained that "Rule 9(b) imposes an additional burden on the plaintiff to detail facts and lay out . . . 'the who, what, when, where, and how of a fraud.'" *Id.* (citation omitted). The court concluded that the allegations were insufficient under the applicable pleading standards:

> That Potter transferred money away from Beston is not, standing alone, sufficient under Rule 9(b) and *Iqbal*. Moving money from one company to another may be consistent with fraud, but it does not create a reasonable inference that Potter is liable for fraud. Beston could have had legitimate or illegitimate reasons for transferring money. Yinguang has alleged no details that would corroborate a fraudulent scheme, such as when or why Potter moved the money, how much money was transferred, or whether this action was inconsistent with the company's past practices.

Id. (footnote omitted). The court also emphasized that Yinguang pleaded evidence that contradicted a fraudulent intent not to perform. *See id.* The court concluded that although the case might be a close one in light of a Texas Supreme Court case indicating that "slight circumstantial evidence" of fraud is enough to find fraudulent intent, "given the heightened pleading requirements of Rule 9(b), and the equipoise, on all the facts pleaded read as a whole, between an inference of fraud and one of Beston's business as usual, we conclude that Yinguang's allegations do not plausibly plead fraudulent intent not to pay at the time of Potter's representations." *Id.* at 1035.

The court also rejected Yinguang's assertion that Potter committed a fraud by omission by failing to disclose Beston's financial condition. *Yinguang*, 607 F.3d at 1035. The court explained that a duty to disclose arises when a party learns that his previous affirmative statement was false or misleading. *Id.* (citations omitted). The court concluded that the statements that Beston was in sound financial condition and that no letter of credit was needed were not pleaded to be false when made. *Id.* Although Potter admitted at a later date that Beston was having financial difficulties, the court stated that "[f]or this statement to have involved a fraudulent omission, Yinguang would have to assert facts showing its obvious insufficiency and patent insincerity (amounting to fraudulent intent)," and concluded that "[v]iewed in the totality of the parties' dealings—frequent late payments, full eventual payment on the first six contracts, no relevance to the execution (in February) of Contract No. 7—and the absence of corroborating financial facts aside from the eventual default, [the court] [wa]s reluctant to transform this admission into a fraudulent omission claim." *Id.*

The court concluded that the veil-piercing claim should be dismissed because Yinguang failed to allege an actual fraud, and failed to provide a basis for holding Potter personally liable, as required for a veil-piercing claim under the relevant statute. *See id.* at 1035–36.

- ***Burns v. Mayes***, No. 09-20126, 2010 WL 445629 (5th Cir. Feb. 8, 2010) (unpublished) (per curiam). The plaintiffs brought claims under § 1983 and various state torts against a Texas state judge. The lawsuit was commenced after the plaintiff was stopped by a law enforcement officer for speeding, which led to the discovery of cocaine in the plaintiff's possession. *Id.* at *1. He was charged with possession of a controlled substance, and his case was assigned to Judge Mayes. *Id.* Burns pleaded guilty, received deferred adjudication,

and agreed to three years of probation instead of incarceration. *Id.* Burns agreed to certain conditions, including that he would not consume alcohol or narcotics and would submit to monthly urinalyses to verify compliance. *Id.* The agreed conditions stated that a diluted urine sample would be presumed to be a violation, and that community supervision might be revoked as a result. *Id.* During the following year, two urinalyses revealed that Burns had violated the terms of his probation. *Id.* at *2. After the second violation, Burns was jailed for a week and had to undergo a drug and alcohol treatment program, and Judge Mayes modified the terms of Burns's probation by extending the probation for one year and requiring Burns to participate in a lengthy substance-abuse recovery program (the "SAP Program") that Judge Mayes had developed. *Burns*, 2010 WL 445629, at *2. The terms of the SAP Program provided that a diluted urine sample would result in immediate jailing. *Id.* Burns eventually submitted a diluted urine sample, the first in over a year of urinalysis, and Judge Mayes had Burns arrested and jailed, and ordered him to refrain from contact with family or friends during his incarceration. *Id.* In his complaint, Burns alleged that he was not notified that he would not be able to receive visits or calls from family and friends during his incarceration, that he was not notified of the standard as to what would constitute a diluted urine sample, and that he suffered from low creatinine in his urine. *Id.* The state later moved to revoke Burns's probation and Burns was sentenced to 365 days in jail, with credit for time served when he was on probation. *Id.* at *3. Judge Mayes and the County moved to dismiss Burns's claims against them, Burns moved to compel depositions, and upon the defendants' request, the district court stayed all deadlines. *Id.* The district court granted the defendants' motion to dismiss, but gave Burns the opportunity to replead the injunctive claims. *Burns*, 2010 WL 445629, at *3. "Burns instead re-asserted his original claims and added more, without supplementing the original facts alleged," and the district court dismissed all claims against Judge Mayes and the County. *Id.*

In evaluating whether absolute judicial immunity applied, the court noted that Burns failed to allege facts regarding whether the judge was acting in his judicial capacity and had "utterly failed to identify even a scintilla of evidence that Judge Mayes's actions were taken in anything but his capacity as the judge charged with adjudicating and overseeing the terms of Burns's probation as a defendant properly appearing in the court that had jurisdiction over him and his case." *Id.* at *4. The court explained that "Burns's unsupported, conclusional assertions that Judge Mayes acted in an 'administrative' or 'ultra vires' capacity [we]re therefore unavailing." *Id.* (citing *Twombly*, 550 U.S. at 555). The court also found that "the very fact that Burns ha[d] served his time and [wa]s no longer chafing against the conditions of community supervision imposed by Judge Mayes support[ed] the district court's dismissal of his claims for declaratory and injunctive relief on grounds of mootness." *Id.*

With respect to the claims against the County, the court concluded that "[t]he overwhelming majority of the facts advanced by Burns firmly establish[ed] that the SAP Program was designed by Judge Mayes in his capacity as a Texas state judge responsible for one of the state's drug-court programs." *Id.* The court rejected Burns's arguments that the SAP Program was a County policy because "(1) County law enforcement officers carried out Judge Mayes's orders, (2) a description of the SAP Program appear[ed] on a County website,

and (3) a description of the SAP Program on Judge Mayes's website b[ore] the copyrights of both Judge Mayes *and* the County." *Burns*, 2010 WL 445629, at *4. The court explained that Burns described "the SAP Program as one 'created' by Judge Mayes 'in the 410th District Court,'" and concluded that "[a]s a protocol of the 410th Judicial District applicable to criminal defendants appearing before a judge of the 410th Judicial District, the SAP Program [wa]s clearly a state judicial policy, not a County policy." *Id.* The court also noted that "[f]or identical reasons, Burns ha[d] not adduced facts which suggest[ed] that the SAP Program [wa]s a 'persistent widespread practice' that may be properly attributed to the County." *Id.* The court concluded: "Burns has not 'plead[ed] the factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* at *5 (quoting *Iqbal*, 129 S. Ct. at 1949).

- ***Hole v. Tex. A&M Univ.***, 360 F. App'x 571, No. 09-40311, 2010 WL 148656 (5th Cir. Jan. 13, 2010) (unpublished) (per curiam), *cert. denied*, --- S. Ct. ----, No. 09-1269, 2010 WL 1607370 (Jun. 7, 2010). The plaintiffs sued Texas A&M University ("TAMU") and several of its officers under § 1983, seeking to recover attorneys' fees and costs they incurred in a state court action that the plaintiffs initiated and lost. *Id.* at *1. The district court dismissed the complaint and the Fifth Circuit affirmed.

  The appellees had received a complaint that a TAMU student organization was hazing its recruits, and the appellees initiated disciplinary proceedings against members of the organization, including the appellants. *Id.* Before the disciplinary proceedings were complete, the appellants filed a state court suit alleging constitutional violations. *Id.* The state court enjoined the appellees from pursuing disciplinary actions and from enforcing any sanctions, but the state appellate court reversed on the grounds that the suit was not ripe because no appellant had completed TAMU's disciplinary process. *Id.* After the state trial court's decision, but before the state appellate court's reversal, the appellants filed suit in federal court, seeking injunctive relief under § 1983, compensatory damages under § 1988, including attorneys' fees and expenses, and declaratory relief under 28 U.S.C. § 2201. *Id.* The district court stayed proceedings until the state appellate court reversed the state trial court's judgment. *Hole*, 2010 WL 148656, at *1. The district court then granted the defendants' motion for judgment on the pleadings, finding that the dispute never ripened into an actual case or controversy, that the appellants had graduated from TAMU, that the state appellate court's dismissal made the request for injunctive or declaratory relief moot, and that because the appellants did not prevail in state court, they could not receive attorneys' fees under § 1988. *Id.*

  The Fifth Circuit concluded that the appellants' attorneys' fees and costs from the state court suit did not constitute a legally-cognizable injury to confer standing under § 1983 because the relevant case law provided that "a party who voluntarily initiates litigation and does not win a judgment cannot then sue to recover attorney's fees as a compensable injury." *Id.* at *2. The court also rejected the appellants' argument that their damages were not limited to attorneys' fees and costs because their complaint alleged that their damages "include" attorneys' fees and expenses. *Id.* at *3. The court pointed out that "[a]lthough the Amended

Complaint hint[ed] at other damages—injuries to Appellants' reputations, liberty interests, and educations—these hints d[id] not reach the level of specificity required in a complaint." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950). The court also held that because the appellants did not have an enforceable judgment from their state court action and because they were not the prevailing party in that action, they were not entitled to recover attorneys' fees under § 1988. *Id.*

- ***Rhodes v. Prince***, 360 F. App'x 555, No. 08-10794, 2010 WL 114203 (5th Cir. Jan. 12, 2010) (unpublished) (per curiam). The plaintiff sued under § 1983, alleging that the defendants violated his Fourth Amendment right to be free from false arrest. *Id.* at *1. The district court dismissed because the plaintiff failed to allege an arrest under the Fourth Amendment and the defendants were entitled to qualified immunity. *Id.*

  Rhodes was the civilian crime scene investigator for the Investigative Services Bureau of the Arlington Police Department (the "Department"), and alleged that after he raised concerns about the standards, procedures, and personnel in the Department, members of the Crime Scene Unit conspired to frame him by obtaining his fingerprints and putting them at the scene of a burglary. *Id.* Certain of the defendants notified Rhodes that he was a suspect in the burglary and that Defendant Roach would conduct a criminal investigation. *Id.* Rhodes was placed on administrative leave, and internal affairs investigators interviewed him. *Id.* The complaint alleged that Rhodes appeared at the police station for questioning, that he was fingerprinted and palm printed, and that Roach questioned him for two hours, but did not allege that he appeared involuntarily or that Roach restrained him. *Rhodes*, 2010 WL 114203, at *1.

  On appeal, the Fifth Circuit noted that *Iqbal* had set out a "two-pronged approach" to determine whether a complaint states a plausible claim and that the task of applying this approach is "context-specific." *Id.* at *2. The court rejected the defendants' argument that Rhodes could not have been "seized" under the Fourth Amendment without a formal arrest because of Rhodes's employment relationship with the police department. *Id.* at *3. The court noted that the objective inquiry into whether a reasonable person in Rhodes's position would have believed he was the subject of a criminal or administrative investigation is fact-intensive. *Id.* at *4 (citation omitted). The court stated that under *Iqbal*, its first task was to determine which allegations in the complaint were entitled to a presumption of truth. *Id.* (citing *Iqbal*, 129 S. Ct. at 1951). The court explained that some of the allegations were legal conclusions:

  > Rhodes alleges that Defendant Roach "intentionally and falsely arrested" him, "when he knew such conduct was a violation of [his] Fourth Amendment right to be free from unlawful search and seizures," and that Defendant Roach did so with the support of the other Defendants. Because an "arrest" is a legal conclusion under the Fourth Amendment and a necessary element of a false arrest claim, Rhodes's allegation of "arrest" is "nothing more than a 'formulaic

> recitation of the elements' of a constitutional . . . claim . . . . and [is] not entitled to be assumed true." *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 555).
>
> Rhodes describes Defendant Roach's questioning as an "interrogation." "Interrogation" is a word with mixed connotations in the law, typically used to describe the questioning of a person while in custody. Rhodes's use of "interrogation" to describe the questioning by Defendant Roach does not necessarily equate to an arrest because, absent facts indicative of a Fourth Amendment seizure, Rhodes's description amounts to little more than a matter of word choice, without additional legal weight. *Cf. Iqbal*, 129 S. Ct. at 1951.

Id. (alterations and omissions in original) (internal citations omitted). But the court noted that the factual allegations were entitled to a presumption of truth:

> Some of the alleged facts in Rhodes's Rule 7(a) reply are, however, entitled to a presumption of truth. Rhodes alleges that on December 4, 2003, Defendants Krohn, Carroll, and Roach notified him that he was a suspect in the burglary, and that he asserted his Fifth Amendment right to remain silent. Defendant Roach advised Rhodes that he would head a criminal investigation into the matter. The Department then informed Rhodes that he was subject to an internal affairs investigation, placed him on administrative leave and conducted an interview on the matter. Rhodes further alleges that he was fingerprinted and palm printed "without consent" before Defendant Roach questioned him. Rhodes alleges that the questioning lasted approximately two hours. Although it is not clear from the Rule 7(a) reply, Rhodes's counsel appears to have been present during the questioning.

Rhodes, 2010 WL 114203, at *5. The court concluded that "[v]iewing the pleadings in the light most favorable to Rhodes, . . . he ha[d] not sufficiently pled that he was 'seized' under the Fourth Amendment" because the district court required Rhodes to come forward with factual allegations in his Rule 7(a) reply[26] to overcome the qualified immunity claim but Rhodes had not met his burden to show that an objective person would not have felt free to leave the exchange with Roach. *Id.* The court explained:

> Significantly, Rhodes never alleged that he appeared at the Eastside Police Station involuntarily or felt that he was being

[26] A court may order a reply to an answer to a complaint under Rule 7(a). *See* FED. R. CIV. P. 7(a)(7).

> detained. Rhodes also does not allege any show of force by the police. The taking of fingerprints and palm prints traditionally accompany an arrest, but standing alone, they do not suffice to establish an arrest. Rhodes was aware of both the criminal and administrative investigations and, in his Rule 7(a) reply, Rhodes had the burden to distinguish between his compliance with workplace obligations and a show of police force sufficient to demonstrate a Fourth Amendment arrest. Rhodes failed to do so. Even viewing the pleadings in the light most favorable to Rhodes, we find that a reasonable person would have felt free to leave the encounter. Thus, Rhodes has not sufficiently alleged that he was "seized" under the Fourth Amendment.

Id. (internal citation omitted). The court affirmed the dismissal of the Fourth Amendment claim.

- ***Oceanic Exploration Co. v. Phillips Petroleum Co. ZOC***, 352 F. App'x 945 (5th Cir. 2009) (unpublished) (per curiam), *cert. denied*, --- S. Ct. ----, No. 09-1091, 2010 WL 887291 (May 17, 2010). The Fifth Circuit affirmed the district court's dismissal under Rule 12(c) of a complaint under the Racketeer Influenced and Corrupt Organizations Act (RICO). In 1974, Oceanic received an exclusive concession from Portugal to explore for and extract oil and gas in the Timor Gap, a disputed area of seabed north of Australia and south of the eastern part of the island of Timor. *Id.* at 947. The border across surrounding ocean was settled by a treaty between Indonesia and Australia, but the border between East Timor and Australia was not settled. *Id.* At the time Oceanic received its exploration rights from Portugal, East Timor was a Portugese colony. *Id.* However, "[i]n 1975, Indonesia invaded and annexed East Timor, effectively thwarting Oceanic's rights in the Timor Gap." *Id.* Although the United Nations refused to recognize the annexation, Australia and Indonesia collaborated to exploit oil and gas in the Timor Gap. *Id.* In 1989, Australia and Indonesia created a "Joint Authority," which awarded Timor Gap exploration and extraction rights to ConocoPhillips. *Oceanic Exploration*, 352 F. App'x at 947–48. According to the complaint, ConocoPhillips had extracted large quantities of oil and gas from the Timor Gap, and known reserves at the Timor Gap were valued at over $50 billion. *Id.* at 948. In 1999, East Timor obtained independence from Indonesia, and was temporarily governed by the United Nations through the United Nations Transitional Administration of East Timor ("UNTAET"). *Id.* "UNTAET agreed essentially to step into Indonesia's shoes as Australia's counterpart in administering and receiving revenues from the Joint Authority." *Id.* In 2002, East Timor entered into a treaty with Australia that created a "Designated Authority" to replace the Joint Authority. *Id.* (footnote omitted). "One of the Designated Authority's first acts was to enter into numerous production sharing contracts with ConocoPhillips, facilitating ongoing extraction efforts that were predicted to provide billions of dollars of revenue to East Timor." *Id.* According to the complaint, "[t]here was no bidding or reassessment; all Designated Authority production sharing contracts were awarded to organizations with previous contracts under the Australian-Indonesian Joint Authority." *Oceanic Exploration*, 352 F.

App'x at 948. Oceanic approached officials in East Timor and sought to implement a different plan. *Id.* Oceanic's plan "would have involved a suit in the International Court of Justice (ICJ), asking the court to declare a border between East Timor and Australia, such that East Timor would acquire sole rights over lucrative production areas in the Timor Gap." *Id.* The East Timorese officials rejected Oceanic's plan, and Australia later withdrew from the maritime boundary jurisdiction of the ICJ. *Id.* at 948–49. Oceanic engaged in numerous efforts, explained in the complaint, to obtain rights to be involved in Timor Gap oil and gas operations, but with no success. *See id.* at 949. Oceanic ultimately filed an amended complaint that was not based on historical interests related to the Portuguese concession, but which "assert[ed] that East Timorese independence abrogated ConocoPhillips's rights in the Timor Gap, and that Oceanic was positioned to pull East Timor away from ConocoPhillips, but that ConocoPhillips prevented this by bribing East Timorese officials." *Id.* Oceanic alleged that "'East Timorese political leaders, including [Prime Minister] [Alkatiri], were adamant that East Timor would not recognize any interest that had been awarded in the Timor Gap while Indonesia occupied East Timor, including the ConocoPhillips defendants' production sharing contracts.'" *Oceanic Exploration*, 352 F. App'x at 949 (second alteration in original) (footnote omitted). According to the complaint "ConocoPhillips delivered millions of dollars in cash and goods to East Timorese officials in secret transactions and transactions disguised as humanitarian aid. . . . [because] it feared the political transition could upset its lucrative operations in the Timor Gap." *Id.* at 950. The complaint raised seven causes of action, with the following at issue on appeal: "(1) violation and (2) conspiracy to violate [RICO], (3) violation of the Robinson-Patman Act, and common law (4) intentional interference with prospective economic advantage and (5) unfair competition." *Id.* (footnote omitted). The district court dismissed Oceanic's claims on the pleadings, finding that Oceanic failed to plead proximate causation. *Id.* The Fifth Circuit affirmed.

The Fifth Circuit explained the district court's analysis:

> The district court below concluded that Oceanic failed to plead proximate causation because the alleged bribery, assuming it occurred, could only have caused the alleged harm to Oceanic by means of a highly improbable series of hypothetical events and decisions by the affected countries and entities. It determined that in order for Oceanic to prevail,
>
> > [the] facts must be that if ConocoPhillips had not bribed East Timor: (a) East Timor would have chosen to abrogate the concessions, (b) Australia would have acquiesced, (c) East Timor would have reopened bidding, (d) Oceanic would have been permitted to bid, (e) Oceanic would have won the bid, and (f) Oceanic would have correctly developed the concession so that it was profitable.

> 2008 WL 1777003[,] at *4. The court concluded that the Complaint failed to adequately plead any of these circumstances.

Id. at 951 (first alteration in original). The Fifth Circuit agreed that "at least some of these circumstances [we]re not plausibly pleaded in Oceanic's Complaint, and conclude[d] that Oceanic's failure to properly plead one of them in particular require[d] affirmance." *Id.* (footnote omitted). The court explained that "Oceanic's claims fail[ed] to rise above the speculative level, because they fail[ed] to address the interests and influence of Australia." *Oceanic Exploration*, 352 F. App'x at 951. The court continued:

> Oceanic repeatedly alleges that, absent bribery of Alkatiri, Oceanic would have been allowed to bid, and would successfully have bid, to displace ConocoPhillips's ongoing, multibillion-dollar operations in the Timor Gap. In particular, Oceanic claims in conclusory terms that the East Timor Constitution abrogated ConocoPhillips's contracts, and that Alkatiri had unilateral power to determine whether those contracts would be renewed. These allegations fail the test of common sense plausibility when considered together with other allegations in the Complaint concerning Australia. The quoted portion of the East Timor Constitution merely indicates that contracts over *East Timor's* natural resources were obviated unless reaffirmed. But, as pleaded in the Complaint, the Timor Gap is a "gap" because the border between East Timor and Australia is uncertain—the two countries claim overlapping territory.
>
> Assuming, absent bribery, that East Timor was willing to consider replacing ConocoPhillips with Oceanic, the Complaint presents no reason to believe Australia would have allowed this to happen. To the contrary, the Complaint describes Oceanic and Australia as adversaries at every historical stage. It alleges that Australia defied international opinion and subverted Oceanic's Portuguese concession by collaborating with Indonesia after an illegitimate invasion. It alleges that Oceanic supported an unsuccessful ICJ suit to declare that Portugal, rather than Indonesia and Australia, had rights to the Timor Gap. And it alleges, more recently, that Oceanic tried to convince East Timor to turn its back on Australia and build a pipeline to East Timor and a liquified natural gas facility on East Timorese soil, rather than accepting proceeds from a pipeline leading to a new facility in Australia. The Complaint provides no plausible grounds to believe Australia would have desired—or tolerated—disruption of its long-standing, extremely lucrative collaboration with ConocoPhillips in response to East Timor, which Oceanic describes as a "new and impoverished island

> nation," replacing Indonesia as its counterpart across the Gap. Thus, even assuming ConocoPhillips attempted to influence East Timor through bribery, the Complaint provides no plausible grounds to conclude that, absent such bribery, Oceanic could have usurped ConocoPhillips's operations.

Id. at 951–52 (footnote omitted). The court noted that "the Complaint implicitly acknowledge[d] that Oceanic had no genuine expectation of disrupting Australia's relationship with ConocoPhillips; it instead allege[d] that Oceanic tried to convince East Timor to start a formal border dispute and claim large portions of the Timor Gap for itself"; that "Portugal previously tried to assert rights to the Timor Gap in the ICJ, but that the ICJ rejected the suit because Indonesia did not submit to its jurisdiction"; and that "Oceanic's plan involved an ICJ suit against Australia, and that shortly after Oceanic presented the plan, Australia announced its withdrawal from the jurisdiction of the ICJ maritime boundaries." *Id.* at 952. The court cited a pre-*Twombly* case to note that it had "often said that a party cannot state a claim by pleading legal conclusions." *Id.* (citing *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007)). The court explained that "[i]t t[ook] conclusory pleading to new levels to have proximate causation rest on a politically disruptive, hypothetical lawsuit between nations." *Id.* The court held: "Because Oceanic fails to plead facts plausibly demonstrating that it would have had an opportunity to replace ConocoPhillips in the Timor Gap in the absence of bribery, we conclude that the causal link is 'overly attenuated,' and that the alleged violation did not 'le[a]d directly to the plaintiff's injuries.'" *Id.* (alteration in original) (internal citations omitted). Because proximate causation was not adequately alleged, the Fifth Circuit affirmed the grant of the motion for judgment on the pleadings. *Id.* at 953.

- ***Jebaco, Inc. v. Harrah's Operating Co.***, 587 F.3d 314 (5th Cir. 2009). The plaintiff brought federal antitrust claims against Pinnacle Entertainment, Harrah's Operating Company, and several subsidiaries of Harrah's. The district court dismissed under Rule 12(c), finding the claims barred by the state action doctrine and *Noerr-Pennington* petitioning immunity. *Id.* at 315–16. The complaint alleged that under a contract with Harrah's predecessor, the plaintiff was entitled to receive a portion of the rent at two berths in Lake Charles, Louisiana. *Id.* at 316. The rent was a per-patron fee. *Id.* Harrah's eventually took over the payment obligation. *Id.* After Hurricane Rita damaged one of Harrah's riverboats docked at the berths, Harrah's ceased operating at that location, stopped its per-patron fee payments to the plaintiff, and solicited bids for two riverboats, the associated gaming licenses, and the real property associated with the berths. *Id.* Jebaco placed a bid, but Harrah's sold to Pinnacle for $70 million, which Jebaco asserted was greater than the property's value. *Jebaco*, 587 F.3d at 316. "Jebaco's complaint alleged that Harrah's and Pinnacle violated the Sherman Act, 15 U.S.C. §§ 1–2, by dividing the Louisiana casino market and by monopolizing, attempting to monopolize, and conspiring to monopolize that market. Jebaco assert[ed] [that] this alleged anticompetitive conduct deprived it of both the revenue from a casino operating at Jebaco's berths and the ability to purchase Harrah's assets." *Id.* at 317. Jebaco also asserted state law claims, but the district court declined to exercise supplemental

jurisdiction over those claims after it dismissed the federal claims under Rule 12(c). *Id.* at 317–18.

The Fifth Circuit did not decide whether the state action doctrine or *Noerr-Pennington* petitioning immunity applied, but affirmed the dismissal on the alternate ground that the complaint did not establish a plausible claim of antitrust standing. *Id.* at 318 (citing *Iqbal*, 129 S. Ct. at 1949–50). Notably, "[n]either Pinnacle nor Harrah's contend[ed] that Jebaco's allegations of Sherman Act violations [we]re insufficiently detailed to 'state a claim to relief that [wa]s plausible on its face,'" and the Fifth Circuit "assume[d] that Jebaco's allegations [we]re legally sufficient under FED. R. CIV. P. 8." *Id.* at 318 n.8 (quoting *Iqbal*, 129 S. Ct. at 1949). Standing required showing: "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit . . . ." *Id.* at 318 (quoting *Doctor's Hospital of Jefferson, Inc. v. Southeast Med. Alliance*, 123 F.3d 301, 305 (5th Cir. 1997)) (quotation marks omitted). With respect to the antitrust injury element, the Fifth Circuit noted that Jebaco alleged that "Harrah's and Pinnacle's alleged market division deprived Jebaco of the per-patron fee it used to receive before Harrah's ceased operating at the Lake Charles berths in which Jebaco had an interest," and that "Jebaco was deprived of the opportunity to compete by purchasing Harrah's Lake Charles assets because only Pinnacle could provide Harrah's with the opportunity to engage in anticompetitive conduct." *Jebaco*, 587 F.3d at 319. The Fifth Circuit held that "[n]either allegation fit[] comfortably within a 'classical' antitrust fact pattern, and both fail[ed] to allege antitrust injury." *Id.*

The court noted that the first allegation related to Jebaco's position as a landlord/supplier of a berth, and that "Jebaco characterize[d] the loss of its per-patron fee 'interest' as injury to its 'competitive position,'" but stated that "how it was competing or against whom in receipt of the fees is a blank." *Id.* at 320. The court noted that "[u]nder *Twombly*, . . . we must accept Jebaco's factual allegations but are not bound to its legal conclusions." *Id.* The court found that "[t]he closest, albeit imperfect, market analogies to the Jebaco-casino operator relationship are those of landlord-tenant or supplier customer," but that "[t]hose relationships, when terminated or modified as a byproduct of 'downstream' anticompetitive conduct, have rarely been held to inflict antitrust injury." *Id.* (citation omitted). The court further explained that in the present case, "the market division ha[d] little or nothing to do with Jebaco's lost per-patron fees" because "[h]ad Pinnacle remained at Jebaco's preferred berths and kept paying the fees, the alleged market division would still have occurred, and Jebaco would be uninjured." *Id.* The court also explained that "[a]lternatively, if a different firm had purchased Harrah's assets, it too might have chosen not to operate at Jebaco's preferred berths," and "[n]o antitrust violation would have occurred, but Jebaco would have suffered the same injury." *Jebaco*, 587 F.3d at 320 (citation omitted). The court concluded that "Pinnacle's choice to change berths, a choice wholly independent of any antitrust violation, was the cause of Jebaco's injury." *Id.* The court stated:

> The federal antitrust laws protect competition, not competitors. A lessor's or supplier's injury is not injury to competition except, for

> instance, where the injury is the direct result of an illegal refusal to deal or a tying violation. Jebaco did not allege that Pinnacle's choice to reposition its licenses in Lake Charles was itself an anticompetitive act.

Id. at 320–21. Because "Jebaco's loss of its per-patron fees [wa]s neither the type of injury antitrust law was designed to prevent, nor did it flow from any anticompetitive conduct of Harrah's and Pinnacle[,] . . . Jebaco did not have antitrust standing to sue." *Id.* at 321.

Jebaco also "characteriz[ed] itself, in wholly conclusional terms, as a 'potential competitor' of Harrah's and Pinnacle [as] a 'potential bidder' for the casino assets," and "assert[ed] that their market division conspiracy eliminated its ability to enter the market utilizing its Lake Charles berthing interest." *Id.* The court stated that "[c]ertain theoretical objections" could be "raised against this claim":

> For instance, potential competitors must meet a threshold of preparedness to enter a market before they may seek damages from anticompetitive exclusion. *Jayco Systems, Inc. v. Savin Business Machines Corp.*, 777 F.2d 306, 313–16 (5th Cir. 1985) (citing *Martin v. Phillips Petroleum Company*, 365 F.2d 629, 633 (5th Cir. 1966)). Such threshold proof is necessary to protect antitrust litigation from frivolous claims. Following *Twombly* and *Iqbal*, *it is likely that Jebaco's mere allegations of potential competitor status, without any facts to demonstrate its financial status or its ability to fulfill the demanding requirements of Louisiana gaming law, are insufficiently pled*. Further, any potential competitor's antitrust claim would have to be viewed skeptically in a market where entry is fully controlled by a regulatory body.

Id. (emphasis added). Despite the theoretical objections, the court "assume[d] *arguendo* that Jebaco satisfactorily pled its preparedness and ability to compete in the casino operating market," *Jebaco*, 587 F.3d at 321, but still found the allegations insufficient. The court held that "[e]ven as a potential competitor, . . . Jebaco's injury did not 'flow [ ] from' an antitrust law violation," *id.* (citation omitted) (second alteration in original), because "Jebaco would have suffered the same harm whether Harrah's retained its Lake Charles assets or sold them to any party other than Pinnacle." *Id.* The court further held that "Harrah's selection of Pinnacle from among a number of bidders [wa]s distinct from the decision to maintain or reject berths where Jebaco owned an interest, and it [wa]s that interest alone which support[ed] Jebaco's status as a potential competitor." *Id.* at 322. The court concluded: "Put differently, any conspiracy between Harrah's and Pinnacle to dominate the casino market operated independently of Jebaco's interest. Jebaco, even as a potential competitor, was at most a collateral casualty of the Harrah's-Pinnacle market division agreement." *Id.*

- ***Floyd v. City of Kenner, La.***, 351 F. App'x 890, No. 08-30637, 2009 WL 3490278 (5th Cir.

Oct. 29, 2009) (unpublished) (per curiam). The plaintiff brought a civil rights action against the City of Kenner and four police officers. *Id.* at *1. The plaintiff was the City's chief administrative officer and oversaw a center that distributed food and supplies after Hurricane Katrina. *Id.* The complaint alleged that in delivering items, the plaintiff ran into then-Chief of Police Nick Congemi, and the two had a verbal exchange based on Congemi viewing the plaintiff as a political nemesis. *Id.* The next day, National Guardsman from the center complained that the plaintiff was illegally distributing some supplies. *Id.* One of the National Guardsman was patrolling the plaintiff's neighborhood and, together with another defendant, entered the plaintiff's property, allegedly in response to a house alarm, and saw relief items in plain view. *Id.* Based on this incident, a search warrant was procured, the police seized the supplies from the plaintiff's home, and the plaintiff was arrested, but never prosecuted. *Floyd*, 2009 WL 3490278, at *1. The plaintiff's complaint named the City, the then-police chief of investigations (Caraway), Congemi, the police detective who filed the affidavits in support of the search and arrest warrants (Cunningham), and the police officer who entered the plaintiff's property with the National Guardsman (Deroche). *Id.* The plaintiff sued the police officers in both their official and individual capacities, and these defendants asserted a defense of qualified immunity. *Id.* at *1–2.

The court noted that in reviewing the claims against the officers, it was "guided both by the ordinary pleading standard and by a heightened one." *Id.* at *2 (citing *Schultea v. Wood*, 47 F.3d 1427, 1433–34 (5th Cir. 1995) (en banc)). The court "emphasize[d] that this heightened pleading standard applie[d] only to claims against public officials in their individual capacities," explaining that "[t]he Supreme Court's decision in *Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit*, 507 U.S. 163 (1993), made clear that a heightened pleading standard was inapplicable to suits against municipalities." *Id.* at *2 n.2. The court also noted that "the heightened pleading standard [wa]s inapplicable to claims against public officials in their official capacity," because "'official-capacity lawsuits are typically an alternative means of pleading an action against the governmental entity involved . . . .'" *Id.* (quoting *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996)). The court explained that "once a defendant asserts the defense of qualified immunity, a district court may order the plaintiff to submit a reply after evaluating the complaint under the ordinary pleading standard"; that "more than mere conclusions must be alleged"; that "'a plaintiff cannot be allowed to rest on general characterizations, but must speak to the factual particulars of the alleged actions, at least when those facts are known to the plaintiff and are not peculiarly within the knowledge of defendant'"; and that "'[h]eightened pleading requires allegations of fact focusing specifically on the conduct of the individual who caused the plaintiff's injury.'" *Floyd*, 2009 WL 3490278, at *2 (citations omitted).

With respect to Deroche, the district court held that although there was a possible constitutional violation, qualified immunity applied because the conduct "'was not objectively unreasonable in light of clearly established law.'" *Id.* at *3. The Fifth Circuit held that the plaintiff adequately responded in his reply to Deroche's statement in his answer that Deroche had only responded to an alarm, explaining that the reply "directly challenge[d] the claim that the alarm created the probable cause for Deroche to go to Floyd's residence."

Id. The court rejected the argument that Deroche's actions had to be considered in light of the chaos that followed Hurricane Katrina, finding that there may be no support for the plaintiff's claims that Deroche took advantage of the chaos, "[b]ut the claim exists." *Id.* at *4. The court noted that in certain cases, it may be appropriate to grant discovery before dismissing a claim:

> In *Schultea*, we adopted the rationale that, "in some cases, such as in search cases, probable cause and exigent circumstances will often *turn on facts peculiarly within the knowledge of the defendants*. And if there are conflicts in the allegations regarding the actions taken by the police officers, discovery may be necessary." *Schultea*, 47 F.3d at 1432 (citing *Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Here, the Defendants ask us to accept that Deroche entered the property for the sole purpose of determining if relief items were present. At the time, Deroche alleged he entered because of the alarm. Floyd asserts that Deroche knew that Floyd was not misappropriating relief items; instead, the entry into the property was all about embarrassing Floyd because of his past run-ins with then-Chief of Police Congemi.

Id. (emphasis added). The court concluded that "[t]his is the type of conflict that warrants discovery," and that "[t]he district court should not have dismissed the claim." *Id.*

With respect to Cunningham, the district court held that the complaint did not allege sufficient facts to support a constitutional violation. *Floyd*, 2009 WL 3490278, at *5. The Fifth Circuit concluded that the allegation that "an affiant intentionally acted by way of an omission in order to cause a constitutional violation" was a claim in which "state of mind is a critical element . . . ." *Id.* The court held that "[a]t a later stage, Floyd w[ould] be required to 'produce specific support for his claim of unconstitutional motive,'" but that "[a]t the pleading stage, his allegation that Cunningham's actions were spurred by Congemi's ill will suffice[d]." *Id.* (citation omitted). The court concluded that while some allegations were insufficient, the allegations as a whole stated a claim against Cunningham:

> To be sure, certain portions of Floyd's *Schultea* reply are insufficient to state a plausible claim. Floyd, for example, averred that Cunningham's affidavit contained "statements of which he had no personal knowledge" that were "sworn to by him in reckless disregard of the truth." The Supreme Court emphasized in *Iqbal* that such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." 129 S. Ct. at 1949.
>
> But viewed in their entirety, Floyd's pleadings contain more. The *Schultea* reply points out that Cunningham's affidavit stated that

> Floyd was observed loading supplies in a City of Kenner truck on September 19, 2005, at the center, which is located at 2500 Williams Boulevard. Cunningham's affidavit also stated that the items seen in plain view by Deroche at Floyd's home "were identical to the ones observed on the bed of the City of Kenner truck" at the center on September 19. Floyd's pleadings allege that Cunningham knew this statement to be false because the center was relocated from 2500 Williams Boulevard on September 17 and 18, so a City of Kenner truck certainly was not present at 2500 Williams Boulevard on September 19. Floyd further alleges that Cunningham knew Floyd was the managing supervisor of the center and that he possessed "full authority to handle[,] dispose and deliver all hurricane supples." It is said that Cunningham nonetheless left this relevant if not critical information out of his affidavit in order to mislead the magistrate.
>
> Taken as true, these facts are sufficient at least to survive Rule 12(b)(6) dismissal. Floyd's complaint alleges, with factual specificity, the type of harm that was found unconstitutional in *Franks* [*v. Delaware*, 438 U.S. 154 (1978)]. Accordingly, the alleged violation was "clearly established" at the time Cunningham acted. In addition, Cunningham's alleged intentional actions were not objectively reasonable. We therefore reverse the district court's dismissal of the claims against Cunningham.

Id. (first and second alterations in original).

With respect to Caraway, Floyd alleged that Caraway participated in the applications for the arrest and search warrants based on facts he knew were false, which resulted in Floyd's arrest without probable cause. *Id.* at *6. Floyd also alleged that Caraway failed to return the items seized from Floyd's property. *Id.* The court noted that "'[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Floyd*, 2009 WL 3490278, at *6 (quoting *Iqbal*, 129 S. Ct. at 1948). Citing *Schultea*, a pre-*Twombly* case, the court stated it had to "determine whether Floyd alleged the 'factual particulars' necessary to state a valid Fourth Amendment claim against Caraway." *Id.* The court examined *Iqbal*, noted that "[i]t [wa]s clear, . . . that in the arena of qualified immunity (but surely not solely in this arena), discovery [wa]s not the place to determine if one's speculations might actually be well-founded," and concluded that "[c]onsistent with [its] holding in *Schultea*, the pleadings must have sufficient precision and factual detail to reveal that more than guesswork is behind the allegation." *Id.* at *7 (citing *Schultea*, 47 F.3d at 1434). The court noted that limited discovery can, at times, be appropriate before ruling on a defense of qualified immunity, but explained:

> The importance of discovery in such a situation is not to allow

> the plaintiff to discover if his or her pure speculations were true, for *pure speculation is not a basis on which pleadings may be filed*. Rule 11 requires that any factual statements be supported by evidence known to the pleader, or, when specifically so identified, "will likely have evidentiary support" after discovery. FED. R. CIV. P. 11(b)(3) (emphasis added). There has to be more underlying a complaint than a hope that events happened in a certain way. Instead, in the "short and plain" claim against a public official, "a plaintiff must at least chart a factual path to the defeat of the defendant's immunity, free of conclusion." *Schultea*, 47 F.3d at 1430. Once that path has been charted with something more than conclusory statements, limited discovery might be allowed to fill in the remaining detail necessary to comply with *Schultea*. *Id.* at 1433–34.

Id. (emphasis added). The court concluded that the allegations against Caraway were insufficient:

> Under these standards, Floyd's allegations against Caraway amount to nothing more than speculation. The conclusory assertion that Caraway "participated in, approved and directed" the filing of false and misleading affidavits is consistent with finding a constitutional violation, but it needed further factual amplification. *See Iqbal*, 129 S.Ct. at 1949. *Floyd might not know everything about what occurred, but the bare allegation does not make it plausible that he knows anything*. Unlike his allegations against Cunningham, this bare assertion does not provide any detail about what Caraway, as chief of investigations, did to seek to control Cunningham's filing of an affidavit. Put differently, the conclusion presents nothing more than hope and a prayer for relief.

Id. at *8 (emphasis added). The court held that because "Floyd ha[d] shown nothing in his complaint to indicate a basic plausibility to the allegation[,] . . . [h]is Section 1983 claim premised on a Fourth Amendment violation . . . fail[ed]." *Id.* With respect to the allegation that Caraway had failed to return Floyd's property, the court concluded that Louisiana provided a remedy, barring relief under § 1983. *Floyd*, 2009 WL 3490278, at *8. Because Floyd "failed to allege specific facts that constitute[d] a deprivation of either his Fourth or Fourteenth Amendment rights," the court found that "the district court's dismissal with respect to the claims against Caraway was correct." *Id.* at *9.

With respect to Congemi, Floyd alleged that Congemi personally directed efforts to have the false affidavits filed, and that the affidavits led to Floyd's arrest. *Id.* at *9. The district court held, and the Fifth Circuit agreed, that "'none of the 'facts' alleged as to Congemi amount[ed] to a violation of a clearly established constitutional right.'" *Id.* The Fifth Circuit explained:

> Floyd has failed to provide sufficient factual detail concerning Congemi's alleged attempts at personally directing his subordinate officers to file misleading affidavits. Other than a general background of why Congemi would have animosity towards Floyd, no facts are alleged that reveal any specifics of how Congemi personally told other officers to conspire against Floyd. Moreover, Floyd's sweeping statement that Congemi attempted to persuade the district attorney to prosecute him, even though Congemi knew that Floyd was authorized to handle the supplies, does not shed further light on the subject. The claims against Congemi lack the detail needed to render them plausible. *See Iqbal*, 129 S. Ct. at 1949. Accordingly, they were appropriately dismissed.

Id.

Finally, with respect to the claims against the City, the court concluded that "Floyd ha[d] alleged no facts that would support an inference that the police offers acted pursuant to a policy or custom," and that the claim against the City was properly dismissed. *Id.*

- ***Gonzalez v. Kay***, 577 F.3d 600 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1505 (2010). The plaintiff alleged that one of the defendants sent him a collection letter that violated the Fair Debt Collection Practices Act (FDCPA). The district court dismissed the case for failure to state a claim, but the Fifth Circuit reversed. "Gonzalez asserted in his complaint that the letter was deceptive in that the Kay Law Firm 'pretended to be a law firm with a lawyer handling collection of the Account when in fact no lawyer was handling the Account or actively handling the file.'" *Id.* at 602. The Fifth Circuit explained that "Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that used the imprimatur of a law firm to intimidate debtors into paying their debts." *Id.* at 602–03. The FDCPA, in relevant part, "prohibits '[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney,'" and "'[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.'" *Id.* at 603–04 (citing 15 U.S.C. §§ 1692e(3), 1692e(10)) (alterations in original). There was "no dispute that Gonzalez [wa]s a 'consumer' under the FDCPA and that Kay and the Kay Law Firm [we]re 'debt collectors' under the [FDCPA]." *Id.* at 604 (citing 15 U.S.C. § 1692a(3), (6)).

  The court discussed the *Twombly*/*Iqbal* standard for dismissal in the "standard of review" section of the opinion, but did not cite those cases later in the opinion. The court examined the case law regarding letters under the FDCPA, and concluded that "the main difference between the cases is whether the letter included a clear prominent, and conspicuous disclaimer that no lawyer was involved in the debt collection at that time." *Id.* at 606. The court explained that some letters were not deceptive as a matter of law, some were so deceptive and misleading as to violate the FDCPA as a matter of law, and others fell in the

middle. *Gonzalez*, 577 F.3d at 606–07. The Fifth Circuit concluded that the letter at issue fell in the middle ground, and that the district court had therefore prematurely dismissed the complaint. *Id.* at 607.

Sixth Circuit

- ***Williams v. Curtin***, 631 F.3d 380 (6th Cir. 2011). Petitioner Michael Anthony Williams, a state inmate proceeding *pro se*, alleged that he "was subject to Cruel and Unusual Punishment" when prison officers used a "chemical agent to disable him and gain his compliance" in the process of transferring him from one prison unit to another. Williams alleged that upon being ordered to "pack up" his cell, he responded, "What for, sir?" At that point, an officer stated, "order you [sic] to leave this cellblock." Officers then entered the cellblock with an "assault squad" and released a "chemical agent," which caused Williams "to cough" and resulted in a "shortage of oxygen."

  The district court dismissed Williams's complaint on two grounds. First, the district court found that Williams's alleged injuries were *de minimis*. Second, the district court found that the prison officers' conduct was reasonable, since they applied the chemical agent in a good-faith effort to maintain or restore discipline, not to maliciously or sadistically cause harm. The district court reasoned that Williams had admitted in his complaint that he was noncompliant with the officers' orders.

  The Sixth Circuit, citing the *Twombly* plausibility standard, reversed the dismissal of Williams's complaint:

  > With regard to the subjective component of an Eighth Amendment claim, Petitioner has sufficiently alleged that Respondents acted with a culpable state of mind. Contrary to the statements of the district court, Petitioner does not admit that he disobeyed a direct order. Petitioner alleges that, when instructed to "pack up," he inquired, "What for, sir?," at which point an "assault team" entered the cell and used a chemical agent on him. These facts, if true, may permit a finding that the use and/or amount of force was unnecessary, which may suggest that Respondents' actions were not taken in good faith and were perhaps motivated by the malicious purpose of causing harm.
  >
  > Likewise, with regard to the objective component of an Eighth Amendment claim, Petitioner has sufficiently alleged that Respondents inflicted "sufficiently serious" pain. Although the district court found that Petitioner's allegations of injury – namely, coughing and shortage of oxygen—constitute a "de minimus [sic] injury," this finding is an insufficient basis upon which to dismiss the Complaint. *See Wilkins* [*v. Gaddy*], 130 S. Ct. [1175,] 1178 [(2010)

(per curiam)]. If it were a sufficient basis, as the Supreme Court has explained, "the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." *Hudson* [*v. McMillian*], 503 U.S. [1,] 9, 112 S. Ct. 995 [(1992)]. Indeed, the Supreme Court recently reversed a sua sponte dismissal of a prisoner's Eighth Amendment claim, where the lower court did so on the basis of *de minimis* injury. *See Wilkins*, 130 S. Ct. at 1178–80. The Court rejected the argument that the Eighth Amendment requires a showing of significant injury, holding instead that the judicial inquiry should focus on "the nature of the force rather than the extent of the injury." *Id*. at 1177.

> The district court thus should have considered the degree of force applied. Here, Petitioner alleges that an "assault squad" used a "chemical agent to disable" him. Viewing Petitioner's Complaint in the light most favorable to him—and assuming he can prove that Respondents acted with a culpable state of mind—his allegations of a violent extraction, complete with use of a chemical agent that caused some degree of injury to Petitioner, are adequate to plead that the pain inflicted was "sufficiently serious." *See id.* at 1178–79 ("Injury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.").

Williams, 631 F.3d at 384 (footnote omitted).

- ***Fabian v. Fulmer Helmets, Inc.***, 628 F.3d 278 (6th Cir. 2010). Robert Fabian, suing as a representative of a putative class, sought recovery from a motorcycle helmet manufacturer for misrepresenting the safety of its helmets. The district court dismissed the complaint for failure to state a claim. The complaint alleged that the helmets come in at least two sizes, large and small. In 2000, the National Highway Traffic Safety Administration ("NHTSA") tested the large helmets, which passed each component of the test. In 2002, the NHTSA tested the small helmets, which failed two components of the test. The helmet company took no action in response to this 2002 test. The district court held that Fabian failed to state a claim because he had purchased two large helmets, and only small helmets failed the 2002 test.

  The Sixth Circuit reversed the dismissal of the complaint, explaining that in the face of competing inferences, it had to allow the case to proceed:

  > In granting the motion to dismiss, the district court used the following chain of reasoning: (1) NHTSA performed a safety test on

a large AF-50 helmet in 2000, and the helmet passed all components of the test; (2) NHTSA performed a safety test on a small AF-50 helmet in 2002, and the helmet failed at least one component of the test; and (3) because Fabian premises his claim on the purchase of large AF-50 helmets, his claim is implausible on its face given that Fulmer Helmets passed a 2000 NHTSA test on a large AF-50 helmet.

The problem with this chain of reasoning is that it turns on potential inferences, not necessary ones. There are at least two legitimate ways to think about the significance of the NHTSA tests, and they point in opposite directions when it comes to the merits of this lawsuit. One is that the difference between the 2000 and 2002 test results turns on differences between the performance of the small and large AF-50 helmets. If so, that would support the district court's ruling that the disparity between the size of the helmet bought and the size of the helmet tested is fatal to Fabian's claims. The other reasonable inference, however, is that helmets of the same model, even if differently sized, perform the same. Two differently sized helmets, for example, may be no more distinct as a matter of performance than two differently sized pairs of shoes or two differently sized pairs of pants. If so, the failed 2002 test potentially exposed a defect in all AF-50 helmets, no matter their size.

In the absence of further development of the facts, *we have no basis for crediting one set of reasonable inferences over the other. Because either assessment is plausible, the Rules of Civil Procedure entitle Fabian to pursue his claim* (at least with respect to this theory) to the next stage—to summary judgment or, if appropriate, a trial after the parties have engaged in any relevant discovery to support one or the other interpretation. So long as we can "draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 129 S. Ct. at 1949, a plaintiff's claims must survive a motion to dismiss. That inference is reasonable here because "common sense," *id*. at 1950, tells us that a mass-manufactured consumer product, whether it is shoes, pants or helmets, may utilize the same design (and carry the same flaw) regardless of its size.

Fulmer Helmets stresses that Fabian's large helmet has "passed all tests" and that the 2002 test is irrelevant. Fulmer Helmets Br. 16. But that does not necessarily end the inquiry. The company may have changed its design or manufacturing process for all AF-50s between 2000 and 2002, giving rise to a defect in all of its helmets and negating the relevance of the successful 2000 test result. Or the same test conducted on two randomly selected helmets (otherwise

> exactly the same) might yield different outcomes due to nothing more than natural statistical variances. The successful 2000 test thus may reflect an aberration unrelated to helmet size, while the failed 2002 test may point to a real flaw in all AF-50s. Because Fabian has "nudged his claims . . . across the line from conceivable to plausible," *Iqbal*, 129 S.Ct. at 1950-51, he deserves a shot at additional factual development, which is what discovery is designed to give him.

Fabian, 628 F.3d at 280–81 (emphasis added).

- ***In re NM Holdings Co.***, 622 F.3d 613 (6th Cir. 2010). Stuart Gold, as the trustee in bankruptcy for a group of companies collectively known as Venture, alleged that Venture's former auditor, Deloitte & Touche LLP (1) negligently performed its audits by failing to uncover and report unsound related-party transactions entered into by Venture's sole shareholder and CEO, and (2) aided and abetted the CEO's breach of his fiduciary duty to Venture. *Id.* at 615. Deloitte filed a motion to dismiss pursuant to Rule 12(b)(6). *Id.* The district court granted Deloitte's motion and the Sixth Circuit affirmed. *Id.*

  Gold alleged that, for a number of years before Venture filed for bankruptcy, Winget, the CEO of Venture and the sole beneficiary of the trust owning Venture, "caused Venture to enter into a series of transactions with companies that were wholly owned or controlled by Winget." *Id.* at 616. And that "Venture received little or no consideration and/or less than reasonably equivalent value in these related party transactions." *Id.* Gold also alleged that Venture's public financial statements "contained false and materially misleading statements and information about the numerous related party transactions.... Many of the related party transactions were not disclosed at all, and, as to those that were partially disclosed, the financial statements falsely stated that the transactions were fair to Venture from a financial standpoint." *In re NM Holdings Co.*, 622 F.3d at 616. Gold alleged that Venture's auditor, Deloitte, "violated Generally Accepted Auditing Standards (GAAS) by failing (1) to properly design its audits in order to determine whether Venture's financial statements contained false statements, (2) to utilize appropriate procedures for analyzing related-party transactions, and (3) to properly qualify its opinions on Venture's financial statements from 1995 until 2001." *Id.* Gold also alleged that Deloitte "knew of Winget's impropriety in entering into the related-party transactions." *Id.* Finally, Gold alleged that "Deloitte's auditing failures were the proximate cause of Venture's precarious financial situation and ultimate bankruptcy." *Id.* Gold also alleged that "Venture's independent "Fairness Committee," which was established pursuant to one or more of the loan agreements, was similarly unaware of the harmful transactions and would have acted to stop Winget had it been informed of them.." *Id.*

  With respect to his professional negligence claim, Gold alleged that "Deloitte committed professional negligence by failing to properly conduct its audits of Venture." *Id.* at 618. The court explained that, to succeed on a professional-negligence claim under Michigan law, Gold must show: "(1) a duty owed by Deloitte to Venture, (2) a breach of that duty, (3)

causation, and (4) damages." *In re NM Holdings Co.*, 622 F.3d at 618. The court noted that the third prong, causation, was the "source of the instant dispute between the parties." Specifically, the parties disagreed about whether Venture must prove reliance to establish causation. *Id.* The court agreed with the district court that proof of reliance was necessary in this case. *Id.* at 618-20. And explained that, in a professional-negligence case:

> Proof of causation requires both cause in fact and legal, or proximate, cause. Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.

Id. at 618-19 (quoting *Haliw v. Sterling Heights*, 627 N.W.2d 581 (Mich. 2001)). The court noted that, while proof of reliance is not *per se* an element of professional negligence, "proof of reliance is necessary here in order to show that Deloitte's allegedly deficient audits were the cause in fact of Venture's tenuous financial position and resulting bankruptcy." *Id.* at 619.

Having decided that reliance was "a critical part of establishing causation in this professional-negligence action," the court next determined that Winget's knowledge could be imputed to Venture so as to bar any recovery by Venture. *Id.* The court explained that, under Michigan law, the knowledge of a corporate agent can be imputed to the entire corporation:

> A corporation can only act through its employees and, consequently, the acts of its employees, within the scope of their employment, constitute the acts of the corporation. Likewise, knowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.

In re NM Holdings Co., 622 F.3d at 620 (quoting *Upjohn Co. v. N.H. Ins. Co.*, 476 N.W.2d 392, 400 (Mich. 1991)). But there is an exception where the corporate officer's actions were adverse to the corporation's interests. *Id*. And there is an exception to the exception, the "sole actor rule":

> The sole actor rule is an exception to the adverse interest exception.... The sole actor rule comes into play where the wrongdoer is, in essence, the corporation (the "sole actor"). Indeed, it has its

> roots in cases where the agent and the principal are literally the same person (literally a "sole actor") and thus information obtained by a person in his role as an agent is treated as also being obtained in his role as principal, even if his activities as agent are contrary to his interests as a principal. Therefore, where the wrongdoer acts contrary to the interests of the corporation, under the adverse interest exception the wrongdoer's conduct would not ordinarily be imputed to the corporation. But where the wrongdoer is a sole actor, the adverse interest exception is not applied and his wrongdoing is nevertheless imputed to the corporation.

Id. at 620-21 (quoting *MCA Fin. Corp. v. Grant Thornton, L.L.P.*, 687 N.W.2d 850, 860 (Mich. 2004)). The court explained that where, for example "a sole shareholder loots the corporation of its assets [,] the adverse interest exception will not apply" and the knowledge of the shareholder will be imputed to the corporation. *In re NM Holdings*, 622 F.3d at 621 (quoting *MCA Fin. Corp.*, 687 N.W.2d at 860.).

Gold alleged that Winget, as the sole beneficiary of a trust owning all of the equity interest in Venture, used his power to cause Venture to enter into the related-party transactions. *Id.* at 615, 622. Gold also alleged that Winget's transactions were "solely in his own interest and entirely against the interests of Venture." *Id.* at 622. Deloitte argued that Winget was clearly a "sole actor" so that the adverse interest exception did not apply. *Id.* The court agreed, noting that "Gold does not seriously dispute that Winget was the sole actor," but contends that the adverse interest exception should apply because "Venture's creditors and the Fairness Committee were innocent decision-makers because they had the authority to stop Winget from entering into the related-party transactions." *Id*. And "given the presence of these innocent parties, Winget cannot be considered to be Venture's sole actor, ... Winget's knowledge should not be imputed to Venture so as to bar any recovery by Venture." *Id.* The court noted that "no Michigan court has thus far adopted the innocent-decision-maker exception," but decided that Gold's claim would be insufficient "even if the Michigan courts would apply the innocent-decision-maker exception" because Gold did not make a plausible claim of reliance, which was necessary to satisfy the causation element for a professional-negligence claim. *See In re NM Holdings Co.*, 622 F.3d at 622.

With regard to the reliance by the Fairness Committee via its "sole and independent member, Maurice Williams," Gold alleged that

> 312. Section 4.12 of [the NBD loan indenture agreement] ... required the formation of a "Fairness Committee" to review related party transactions. The Indentures required at least one member of the Fairness Committee to be independent of Venture and its principals, which independent member effectively wielded veto power over related party transactions.
> ....

> 320. Not only would timely and proper disclosure of these transactions have caused NBD, the noteholders and indenture trustees to force Winget to cease the unfair related party transactions, but ... such disclosures would have caused the independent member of the Fairness Committee to act to avoid or at the very least reduce the corporate injury suffered by Venture as a result of Winget's improper related party transactions.
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> 321. As required under certain of its indentures and loan agreements ..., Venture maintained a Fairness Committee, which had a sole and independent member, Maurice Williams, who was empowered to evaluate and approve or disapprove of any related party transactions undertaken by Winget. Because Venture was required to retain an independent member of the Fairness Committee, Mr. Williams ... could not be terminated at the whim of Winget without placing Venture in default under various agreements. In this capacity, Mr. Williams possessed greater corporate power than an officer or director of Venture, because he had the unilateral and absolute authority to prevent Winget from undertaking or continuing any unfair related party transactions. On information and belief, Mr. Williams was innocent of Winget's misconduct ..., and was able to prevent it had the misconduct been known.
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> 322. Deloitte was fully aware of the existence and powers of the Fairness Committee. Deloitte obtained minutes of the meetings of the Fairness Committee, knew of Mr. Williams' identity and role, and was fully able to communicate with Mr. Williams about the related party transactions it was auditing.

Id. at 622-23. The court decided that these allegations were "insufficient in a critical way: They contain no statement that Williams actually relied on Deloitte's audits in choosing not to act. Even more fundamental, there is no allegation that Williams ever saw the audits." *Id*. at 623. The court concluded that Gold's allegations of reliance by the Fairness Committee were insufficient:

> The amended complaint does allege that properly conducted audits "would have caused the independent member of the Fairness Committee to act," but this statement is, at most, a mere "formulaic recitation" of the causation element of a professional-negligence claim and is not sufficient to state a claim for relief. *See Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citation omitted) (holding that the plaintiff's complaint failed to state a claim for relief because it contained conclusory allegations that

were not entitled to the assumption of truth). An allegation that Williams in fact saw and relied on the audits would be the "further factual enhancement" that is needed to support this "naked assertion." *See id.* (citation omitted). In sum, Gold's amended complaint can hardly "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" if it does not even allege that Williams saw the audits. *See id.* (citation and internal quotation marks omitted).

This deficiency is especially glaring in comparison to the explicit statements regarding creditor reliance. The amended complaint, for example, alleged that Deloitte "issued certain opinions directly to NBD Bank and to the noteholders," that "Venture was obligated to supply audited financial statements to the noteholders," and that Deloitte "directly reported" to Venture's creditors. In addition, the amended complaint alleged that Deloitte specifically represented to the creditors "that it was not aware of any violation of applicable covenants, including covenants prohibiting Venture from making distributions to Winget." Most importantly, the amended complaint alleged that "the noteholders relied upon Deloitte's representations in determining whether Venture was in compliance with the covenants set forth in the indenture." These specific allegations of creditor reliance are in sharp contrast to the allegations regarding the Fairness Committee.

Particularly striking is the fact that Gold amended his complaint to add specific examples of creditor reliance. In Gold's original complaint, there were no allegations of reliance on the audits by anyone. Deloitte subsequently filed a motion to dismiss Gold's original complaint, arguing that because the complaint did not (and could not) allege that Venture itself relied on the audits, Gold had failed to state a claim. Presumably in response to this contention, Gold amended his complaint to add allegations of reliance. These new allegations, however, related only to reliance by Venture creditors, not by Williams as the sole member of the Fairness Committee.

Williams, in other words, might or might not be considered an innocent decision-maker within Venture for the purpose of overcoming the sole-actor rule. But without any allegations that Williams relied on Deloitte's audits, Gold has failed to satisfy the causation element for a professional-negligence claim even if Williams were so considered.

Id. at 623-24. The court next examined whether reliance on the audits by Venture's creditors would establish causation. *Id.* The court decided that it could not, adopting the reasoning of the Fifth Circuit in *FDIC v. Ernst & Young*, 967 F.2d 166 (5th Cir. 1992):

> The FDIC argues that even if neither Woods [, as Western's sole shareholder,] nor Western relied upon the audit, [EY's] alleged negligence caused the losses because had the audits been accurate, someone, such as Western's creditors or government regulators, would have "rescued" Western. This argument is flawed because it is not an appropriate argument for Western, or its assignee, to make. Western cannot claim it should recover from EY for not being rescued by a third party for something Western was already aware of and chose to ignore. Neither can Western's assignee make the claim. The FDIC in its own capacity or Western's creditors might be able to make this claim, but the FDIC brought this suit only on Western's behalf.

In re NM Holdings, 622 F.3d at 624-25 (alterations in original).

Having decided that Gold's amended complaint failed to state a claim for professional negligence, the court turned to Gold's aiding and abetting claim and agreed with the district court that this claim was time-barred. *Id.* at 625.

- ***Albrecht v. Treon***, 617 F.3d 890 (6th Cir. 2010). Plaintiffs alleged that the defendant coroner's retention and destruction of their son's brain, without their knowledge, deprived them of the right to dispose of the brain, in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 892. The question of whether the Plaintiffs had a constitutionally protected property interest in their son's brain was an issue of first impression in Ohio, so the district court certified the question to the Ohio Supreme Court, which decided that there is no protected property interest in human remains retained by the state of Ohio for criminal investigation purposes. *Id.* In accordance with this ruling, the district court held that the Plaintiffs had no property interest in the brain and that defendants were entitled to judgment on the pleadings. *Id.* The Sixth Circuit affirmed. *Id*. at 893.

  The court explained that it was analyzing the motion for judgment on the pleadings under the standard set forth in *Iqbal* and *Twombly*:

  > "Motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) are analyzed under the same de novo standard as motions to dismiss pursuant to Rule 12(b)(6)." *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir.2008). Courts "must construe the complaint in the light most favorable to plaintiff," *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir.2007) (citation omitted), "accept all well-pled factual

> allegations as true[,]" *id.*, and determine whether the "complaint states a plausible claim for relief[,]" *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). However, the plaintiff must provide the grounds for its entitlement to relief, *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir.2001), and that "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A plaintiff must "plead [ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. A plaintiff falls short if she pleads facts "merely consistent with a defendant's liability" or if the alleged facts do not "permit the court to infer more than the mere possibility of misconduct ...." *Id*. at 1949, 1950.

Albrecht, 617 F.3d at 893 (alterations in original). The court then explained that "[f]ederal law is clear that the states define property rights in their respective jurisdictions." *Id*. at 898. And noted that the "Ohio Supreme Court explicitly delineated the lack of property rights in this case." *Id.* The Sixth Circuit concluded that the Albrechts' claim "fail[ed] as a matter of law. '[I]f state actors ... do not infringe on the life, liberty, or property of the plaintiffs, there can be no due process violation.'" *Id*. (quoting *Whaley v. County v. Tuscola*, 58 F.3d 1111, 1113 (6th Cir. 1995)).

- ***White v. United States***, 601 F.3d 545, No. 09-3158, 2010 WL 1404377 (6th Cir. Apr. 9, 2010). The plaintiffs challenged the anti-animal fighting provisions of the Animal Welfare Act (AWA), in a suit against the United States, the Secretary and Department of Agriculture, the Attorney General and Department of Justice, and the Postmaster General and the United States Postal Service. *Id.* at *1. The district court dismissed for lack of standing and the Sixth Circuit affirmed.

  The plaintiffs sought a declaratory judgment that the AWA's provisions were unconstitutional "insofar 'as they apply to game-fowl or activities and products relating to game-fowl,' and an injunction prohibiting enforcement of these provisions." *Id.* The relevant subsection "restricted (and continues to restrict) various activities associated with animal fighting that involve interstate travel and commerce, but did not (and does not) itself prohibit animal fighting, including cockfighting." *Id.* at *2. All fifty states have legislation that prohibits cockfighting, although it remains legal in some U.S. territories and in Puerto Rico. *Id.* The court noted that it would accept the factual basis of the alleged injuries as true because the suit was dismissed at the pleading stage. *Id.* (citing *Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008)). The plaintiffs each alleged individual injuries, and also alleged "that they collectively ha[d] suffered and will continue to suffer violations of various constitutional rights because of the AWA." *White*, 2010 WL 1404377, at *3. The court explained the collective allegations:

> First, the plaintiffs argue that the AWA creates an "unconstitutional impairment of plaintiffs' Fifth Amendment liberty interests in their right to travel," by prohibiting them "from taking the property they own from a place where they have the right to own, possess, and enjoy it to another place where they have the right to own, possess, and enjoy it," and chilling the right to travel with chickens intended for non-fighting purposes. Second, the AWA allegedly impinges the plaintiffs' First Amendment association rights by making it impossible for the plaintiffs to travel to the events at which they ordinarily would associate with like-minded people. Third, the plaintiffs argue that the AWA inflicts punishment on them and other members of the gamefowl community without a judicial trial and therefore is a bill of attainder. Finally, the plaintiffs argue that the AWA violates principles of federalism embodied, inter alia, in the Ninth, Tenth, and Eleventh Amendments to the United States Constitution by impermissibly favoring the domestic policies of those states that have enacted cockfighting bans over those of states that have not.

Id. The district court "consolidated the injuries into two basic 'premises': first, that the plaintiffs feared false prosecution under § 2156, and second, that they had suffered economic injuries because of the AWA." *Id.* at *4. The district court concluded that "the plaintiffs' fear of false prosecution did not constitute an 'injury in fact' sufficient to confer constitutional standing . . . because the '[p]ossibility of future harm [was] neither actual nor imminent, but [was] conjectural at best,'" and therefore "'[was] not within the purview of disputes that the federal courts are permitted to adjudicate.'" *Id.* (first alteration in original) (citation and additional quotation marks omitted). The district court also concluded that "because cockfighting is now illegal in all fifty states and in the District of Columbia, there would be no domestic market for cockfighting even if § 2156 were declared unconstitutional," and that "any economic injuries the plaintiffs had suffered were not traceable to the AWA nor redressable by the declaratory or injunctive relief sought . . . ." *Id.*

In discussing the standard of review, the Sixth Circuit noted that "[g]eneral factual allegations of injury may suffice to demonstrate standing, 'for on a motion to dismiss we presum[e] that general allegations embrace the specific facts that are necessary to support the claim.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted)). But the court cited both a pre-*Twombly* case and *Iqbal* to note: "'[S]tanding cannot be inferred . . . from averments in the pleadings, but rather must affirmatively appear in the record,' *Spencer v. Kemna*, 523 U.S. 1, 10–11, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), nor will 'naked assertion[s] devoid of further factual enhancement suffice, *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted)." *White*, 2010 WL 1404377, at *4 (omission and second alteration in original). The court confirmed that the plausibility requirement applied to standing allegations by noting that "the complaint must contain 'sufficient factual matter,

accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949).

In considering the claims of economic injuries, the court noted that "[t]he plaintiffs argue[d] that the district court was compelled to accept as true their allegations that there [we]re states and territories where cockfighting remain[ed] legal . . . ." *Id.* at *5. But the Sixth Circuit found that "[c]ontra the plaintiffs' argument, the district court was not compelled to accept their legal conclusions as true." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949). The court concluded that because cockfighting is banned in all fifty states and the District of Columbia, "the plaintiffs' alleged economic injuries due to restriction on cockfighting are not traceable only to the AWA." *Id.* (citation omitted). The court also found that "these injuries [would not] be redressed by the relief plaintiffs s[ought], since the states' prohibitions on cockfighting would remain in place notwithstanding any action we might take in regard to the AWA." *Id.* Although "the defendants concede[d] that cockfighting remain[ed] legal in Puerto Rico and some territories of the United States, this concession d[id] not aid the plaintiffs" because "[t]he complaint d[id] not allege that the plaintiffs h[ad] ever derived any income from or engaged in any trade with individuals in Puerto Rico or U.S. territories" and "d[id] . . . not claim that the plaintiffs ha[d] any intent to do so in the future." *White*, 2010 WL 1404377, at *6. The court concluded that "[a]bsent any allegation that the plaintiffs ha[d] lost or will lose income because of the AWA's restrictions on interstate commerce with these locales, the bald assertion that plaintiffs have suffered economic injury due to the AWA is not sufficient to confer standing based on the continued legality of cockfighting there." *Id.* (citing *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 522 (6th Cir. 2008); *Iqbal*, 129 S. Ct. at 1949) (footnote omitted).

With respect to the fear of false prosecution, the court concluded that the injury was too speculative. *Id.* The court noted that the district court erred by "emphasiz[ing] that none of the plaintiffs alleged any intention to engage in conduct prohibited by the AWA," explaining that "[w]hether or not the plaintiffs alleged an intention to engage in prohibited conduct [wa]s not relevant to their allegations that they risk[ed] false prosecution under the AWA even if they engage[d] only in lawful conduct." *Id.* But the court concluded that the allegations were still too speculative, noting that "[t]he plaintiffs' allegations of potential false prosecution amount[ed] to a claim that, if they transport or sell chickens across state lines for non-fighting purposes and if they are stopped by law enforcement authorities, the authorities may misinterpret the plaintiffs' intent and may wrongly prosecute them." *Id.* The court found the facts similar to a Supreme Court case in which the allegations were found too speculative to confer standing. *See id.* (citing *O'Shea v. Littleton*, 414 U.S. 488 (1974)). The court also concluded that the alleged "'chill' on the plaintiffs' right of travel, right of association, and 'right to be free of bills of attainder,' which the plaintiffs claim[ed] result[ed] from their fear of false prosecution, [did not] suffice for standing." *White*, 2010 WL 1404377, at *7. The court noted that the law "assume[d] that only the chilling of First Amendment rights may confer standing," and that even then, "a subjective fear of chilling will not suffice for standing absent a real and immediate threat of future harm." *Id.* (citations omitted).

The plaintiffs also asserted that "[b]y prohibiting the sale and transportation of chickens for fighting purposes, the AWA violates (or so the complaint argue[d]) the plaintiffs' rights of travel and association, their 'rights to due process in the deprivation of their rights to property and liberty,' and their 'right to be free from bills of attainder.'" *Id.* The court agreed with the plaintiffs that "they need not allege an intention to violate the AWA in order to have standing based on these alleged violations of their constitutional rights," but stated that "they still must demonstrate an injury-in-fact to a legally protected interest that is actual or imminent and that satisfies the other prongs of the constitutional standing test." *Id.* at *8. The court concluded that "[e]ven if the plaintiffs' allegations that they would sell chickens for fighting purposes but for § 2156 [we]re sufficient to demonstrate a significant possibility of future harm, none of the purported 'constitutional' injuries actually implicate[d] the Constitution." *Id.* (citation omitted). The court explained:

> [Section] 2156 neither prohibits travel nor prevents individuals from associating for the purposes of animal fighting in locations where animal fighting remains legal. Nor does it deprive the plaintiffs of property or liberty without due process. If the plaintiffs violate the AWA and are arrested for doing so, there is no reason to think they will not receive the procedural protections of the federal criminal justice system. By the same token, because the AWA does not impose any penalties without a judicial trial, it is not a bill of attainder. Because none of these alleged injuries actually implicates the Constitution, none is sufficient to confer standing.

Id. (internal citation omitted).

Finally, the court found the allegation that the AWA "violate[d] the principles of federalism contained in the Ninth, Tenth, and Eleventh Amendments by favoring the policies of those states that ban cockfighting in a manner that impose[d] burdens on those states that ha[d] not enacted such bans," insufficient to confer standing. *White*, 2010 WL 1404377, at *8. The court held that "[e]ven assuming the plaintiffs [we]re correct that a constitutional violation ha[d] occurred, they d[id] not have standing to challenge it [because] [a] party invoking the court's jurisdiction must show that he has 'personally suffered' some actual or threatened injury." *Id.* (citations omitted). Because "[a]ny injury . . . [wa]s to the impacted states, and perhaps to their citizens or the citizens of the United States in general, . . . the plaintiffs [could not] be said to have 'personally suffered' the alleged federalism violation in a manner that would confer standing." *Id.* (citation omitted).

- ***Tam Travel, Inc. v. Delta Airlines, Inc.*** (***In re Travel Agent Comm'n Antitrust Litig.***), 583 F.3d 896 (6th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3566 (U.S. Mar. 18, 2010) (No. 09-1138). The plaintiffs were travel agencies who alleged a § 1 conspiracy under the Sherman Antitrust Act, based on a series of uniform base commission cuts adopted by the defendants over a seven-year period. *Id.* at 898–99. The Plaintiffs alleged that one industry leader airline would reduce the commissions paid to travel agents, that competitor airlines

would shortly follow suit, and that this pattern happened several times until eventually the commissions were reduced to zero. *See id.* at 899–900. The plaintiffs further alleged that the decision to cut commissions was contrary to the individual defendants' economic self-interests, and that the defendants had numerous opportunities to conspire. *Id.* at 900. The district court dismissed the complaint, finding that with respect to some of the defendants, the plaintiffs failed to allege any conduct other than sporadic parallel conduct; that the plaintiffs failed to allege any parallel conduct as to one of the defendants; that several of the defendants had emerged from bankruptcy and their claims were therefore discharged; that the plaintiffs failed to allege sufficient facts to plausibly suggest an illegal agreement with respect to other defendants; and that the plaintiffs alleged no facts with respect to a holding company that did not itself pay any commissions. *Id.* at 900–01. The Sixth Circuit affirmed.

The Sixth Circuit explained that "conscious parallelism" is not prohibited under § 1, and that "[a] district court's early assessment of the sufficiency of a § 1 claim under FED. R. CIV. P. 12(b)(6) or FED. R. CIV. P. 12(c) addresses the dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits." *Id.* at 903–04. The court rejected the plaintiffs' attempt to distinguish *Twombly*, concluding that the allegation of an agreement was "nothing more than a legal conclusion 'masquerading' as a factual allegation." *Tam Travel*, 583 F.3d at 904–05 (citing *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007)). The court also found that the allegations regarding meetings in which the defendants had the opportunity to conspire did "not necessarily support an inference of illegal agreement." *Id.* at 905. The court noted that with respect to two of the defendants, the plaintiffs had alleged nothing more than parallel conduct, and that several other defendants were not even mentioned in the body of the complaint or described as linked to the conspiracy. *Id.* The court explained that if these latter defendants "'[sought] to respond to plaintiffs' [ ] allegations in the § 1 context, [they] would have little idea where to begin.'" *Id.* (quoting *Twombly*, 550 U.S. at 564 n.10) (alterations in original).

The Sixth Circuit also rejected the argument that the allegations were sufficient to infer that discovery would reveal circumstantial evidence to suggest a conspiracy. *See id.* at 906–08. The court found that the defendants had asserted a "reasonable, alternative explanation for their parallel pricing behavior"—specifically, that new, alternate methods for purchasing airfare provided greater economic incentive to cut commission rates on a trial-and-error basis, and that it was simple and inexpensive for a leader airline to test the market with cuts and hope that its competitors would follow. *Id.* at 908. The court explained:

> We therefore hold that plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, 129 S. Ct. at 1950. Pursuant to *Twombly*, district courts must assess the plausibility of an alleged illegal agreement

> before parties are forced to engage in protracted litigation and bear excessive discovery costs. *Twombly*, 550 U.S. 558–59. In this regard, we note that the plausibility of plaintiffs' conspiracy claim is inversely correlated to the magnitude of defendants' economic self-interest in making the cuts. We are not persuaded by plaintiffs' argument that defendants would not seek to reduce base commissions independently, especially during the late 1990s and into 2002, where changes in the marketplace provided consumers with alternate ticket-purchasing options. As the Court stated in *Twombly*, "there is no reason to infer that [these defendants] had agreed among themselves to do what was only natural anyway." 550 U.S. at 566.

Tam Travel, 583 F.3d at 908–09 (footnotes and additional internal citation omitted) (alteration in original). The court concluded: "[E]ach defendant's decision to match a new commission cut was arguably a reasoned, prudent business decision. Moreover, if each defendant asked 'itself' whether it was 'better off' paying base commissions (paid by all) or not paying base commissions (eliminated by all), each defendant would plausibly elect the latter (from a purely economic standpoint)." *Id.* at 910. The court also rejected the allegations based on opportunity to conspire, finding that "[t]he fact that American and Continental gathered at industry trade association meetings during the seven-year period when defendants reduced commission rates should not weigh heavily in favor of suspecting collusion," and noting that a similar argument had been rejected in *Twombly*. *Id.* at 910–11. The court also held that "a mere opportunity to conspire d[id] not, standing alone, plausibly suggest an illegal agreement because American's and Continental's presence at such trade meetings [wa]s more likely explained by their lawful, free-market behavior." *Id.* at 911 (citing *Iqbal*, 129 S. Ct. at 1950).

In dissent, Judge Merritt asserted that *Twombly* and *Iqbal* had not radically changed pleading standards:

> In the recent *Twombly* and *Iqbal* cases, quoted and discussed at length by my colleagues in their majority opinion, the Supreme Court has *started to modify somewhat, but not drastically, the notice pleading rules* that have reigned under *Conley v. Gibson*, 355 U.S. 41, 45 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). These two cases *now require more than simple notice and conclusory statements of ultimate facts about the case*. Instead plaintiffs must plead "sufficient factual matter" to state a legal claim or cause of action that is not only "conceivable" but also "plausible," independently of the notice given and the legal conclusions stated—in short, a set of "well-pleaded factual allegations" that make the cause of action "plausible." *Iqbal*, 129 S.Ct. at 1949–51 (2009). *The*

> *Supreme Court majority has made clear that it is not making a major change in the law of pleading with* Twombly *and its progeny*.

Id. at 911–12 (Merritt, J., dissenting) (footnote omitted) (emphasis added). Judge Merritt argued that the majority had misapplied the pleading standard:

> As with any other new, general legal standard, the nature and meaning of the newly modified standard can be understood and followed only by analyzing how the standard is applied in actual cases like this case. Here my colleagues have seriously misapplied the new standard by requiring not simple "plausibility," but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case and excluding any possibility that the defendants acted independently and not in unison. My colleagues are requiring the plaintiff to offer detailed facts that if true would create a clear and convincing case of antitrust liability at trial without allowing the plaintiff the normal right to conduct discovery and have the jury draw reasonable inferences of liability from strong direct and circumstantial evidence.

Id. at 912. Judge Merritt explained that "[i]f the *Twombly* pleading issue was 'close,' but insufficient, based only on similar stand-pat nonfeasance toward each other's historical territory, the allegations concerning the in unison, affirmative behavior of the airlines in this case [we]re obviously sufficient," and noted that "[t]he factual allegations in this case create[d] an overwhelming case for the plaintiff to get by a motion to dismiss on the pleading." *Id.* Judge Merritt stated:

> To summarize, the complaint alleges that price cuts could not be made absent unilateral, follow-the-leader action by all of the defendants. It provides specific times and locations of numerous meetings attended by the defendants. Finally, and most importantly, the complaint ties the dates of those meetings with industry-wide simultaneous rate cuts that followed immediately thereafter. Reading these allegations as a whole, the complaint clearly satisfies the *Twombly* standard. In fact, the Supreme Court in *Twombly* noted that multiple competitors making "complex and historically unprecedented changes in pricing structure . . . for no other discernible reason" would properly state a claim under § 1 of the Sherman Act. 550 U.S. at 557 n.4. That appears to be exactly the situation here.

Tam Travel, 583 F.3d at 913 (Merritt, J., dissenting). Judge Merritt expressed concern that although few antitrust cases had been decided since *Twombly* and *Iqbal*, "district court judges across the country have dismissed a large majority of Sherman Act claims on the

pleadings[,] misinterpreting the standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act." *Id.* at 914 (citing *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. Aug. 18, 2009); *Bailey Lumber & Supply Co. v. Ga.-Pac. Corp.*, No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. Aug. 10, 2009); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009)). Judge Merritt further explained that "[t]he uniformity needed for the rule of law and equal justice to prevail is lacking," and that "[t]his irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims." *Id.* (citations omitted). The dissent elaborated:

> There are many, including my colleagues, whose preference for an unregulated laissez faire market place is so strong that they would eliminate market regulation through private antitrust enforcement. Using the new *Twombly* pleading rule, it is possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence. As in this case, the proponents of this strategy propose to require either an express written agreement among competitors or a transcribed oral agreement to fix prices. Nothing less will do. Insider testimony, a strong motivation to collude, and aggressive, lock-step unanimity by competitors in pricing become insufficient to state a case. Over time, the antitrust laws fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices. This case is just one small step in that direction. But this direction is unlikely to be changed unless the Supreme Court steps in to make it clear that *Twombly* may not be used, as my colleagues propose, as a cover for repealing regulation of the marketplace through private antitrust enforcement.

Id. at 915.

- ***Hensley Mfg. v. ProPride, Inc.***, 579 F.3d 603 (6th Cir. 2009). The plaintiff asserted claims for trademark infringement and unfair competition under the Lanham Act, common law trademark infringement, breach of contract against one of the defendants, misappropriation of trade secrets against two other defendants, and tortious interference with business relations. *Id.* at 607. The district court dismissed the trademark infringement and unfair competition claims, finding that the fair use exception applied; dismissed the breach of contract claim, finding that it had to be based on a valid claim for trademark infringement; and declined to exercise supplemental jurisdiction over the remaining state law claims. *Id.* at 608.

  In analyzing the trademark infringement claim, the Sixth Circuit found there to be

insufficient factual allegations to support finding a likelihood of confusion:

> Here, the complaint does not allege facts sufficient to show that ProPride's use of the "Hensley" name creates a likelihood of confusion as to the source of its products. Hensley Manufacturing does not claim that ProPride has marked its trailer hitch products with the trademarks "Hensley," "Hensley Arrow," or even "Jim Hensley." The name of ProPride's product, the "Pivot Point Projection Hitch" or "3P Hitch," is not even remotely similar to the "Hensley" trademark. Instead, the complaint challenges ProPride's use of Jim Hensley's name in connection with its advertising of the 3P Hitch. Although Hensley Manufacturing alleges that this creates "a strong likelihood of confusion in the marketplace as to the source of origin and sponsorship of the goods of the Plaintiff and the Defendant," such a conclusory and "formulaic recitation" of the elements of a trademark infringement cause of action is insufficient to survive a motion to dismiss. *See Iqbal*, 129 S. Ct. at 1954 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss.").

Id. at 610–11. The court also found that even if the plaintiff had adequately alleged likelihood of confusion, the claim would fail under the fair use doctrine because "the complaint and attached exhibits show[ed] that ProPride's uses of Jim Hensley's name [we]re descriptive" and the plaintiff "did not allege facts from which any inference of bad faith c[ould] be drawn . . . ." *Id.* at 612. The court also explained that because "the facts Hensley Manufacturing alleged in its complaint, as well as the attached exhibits, demonstrated that there was no likelihood of confusion and that the fair use defense conclusively applied as a matter of law," dismissal was appropriate. *See id.* The court found insufficient the plaintiff's argument that "'facts *may exist* that establish a level of consumer confusion' and that 'facts *may exist* that establish that 'Hensley' is not being used fairly and in good faith,'" because "mere speculation is insufficient." *Hensley Mfg.*, 579 F.3d at 613. The court concluded: "Simply put, Hensley Manufacturing failed to state a claim for relief that is 'plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570; citing *Iqbal*, 129 S. Ct. at 1949).

- ***Courie v. Alcoa Wheel & Forged Prods.***, 577 F.3d 625 (6th Cir. 2009). The plaintiff sued his employer and his union, alleging that they discriminated against him by settling his union grievance with an agreement that "branded him a racist." *Id.* at 628. The district court dismissed the complaint and the Sixth Circuit affirmed. *Id.* The complaint alleged that after the plaintiff called a fellow employee a derogatory name in front of management, his employer sent him a warning that it considered the term "'racially offensive.'" *Id.* The plaintiff filed a grievance with his union, "stating that he was not a racist and that other . . . employees of various races had also used the term." *Id.* The plaintiff sued in federal court, claiming his employer breached anti-discrimination provisions of the collective bargaining agreement, and that his union breached its duty of fair representation to him by entering into

a settlement agreement; that the settlement violated Ohio state law; that he was defamed; and that the defendants were liable under the tort of intentional infliction of emotional distress when they settled the dispute without his consent. *Id.* at 629. The plaintiff's wife alleged loss of consortium. *Courie*, 577 F.3d at 629.

In discussing the pleading requirements, the Sixth Circuit noted that "[t]he Supreme Court recently *raised the bar for pleading requirements* beyond the old 'no-set-of-facts' standard of *Conley* . . . that had prevailed for the last few decades." *Id.* (citing *Iqbal*, 129 S. Ct. at 1979; *Twombly*, 550 U.S. at 555) (emphasis added). The court explained that "*Conley* itself had reflected a change away from 'code pleading' to 'notice pleading,' and the standard it announced was designed to screen out only those cases that patently had no theoretical hope of success." *Id.* (footnote omitted) (citing *Conley*, 355 U.S. at 45–46 ("'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"); *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting) ("observing that '[t]he sole exception' to the *Conley* rule was for 'allegations that [were] sufficiently fantastic to defy reality as we know it; claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel'")) (alterations in original).

In analyzing the complaint at issue, the Sixth Circuit explained that the complaint met the *Iqbal* standard with respect to pleading the existence of the settlement agreement, explaining:

> The Couries' legal arguments rest wholly upon the existence of a "settlement agreement" that possibly does not exist: all we have is an unsigned proposal from the [union] to [the employer]. Yet a complaint need only "contain sufficient factual matter" to be "plausible," *Iqbal*, 129 S. Ct. at 1949, and we cannot dismiss for factual implausibility "even if it [would] strike[ ] a savvy judge that . . . recovery is very remote and unlikely," *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955 (internal quotation marks and citation omitted); *see also Iqbal*, 129 S. Ct. at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). Here, Courie has alleged that this settlement agreement exists and has provided an unsigned settlement proposal as an exhibit to his complaint in support. For purposes of his motion to dismiss, that is "sufficient" detail for us to assume that the agreement existed.

Id. at 630 (third and fourth alterations in original). But the court concluded that the claim that the union breached its duty of fair representation failed because "[t]here was . . . nothing improper about the union negotiating an agreement whereby Courie admitted that he should not have called his coworker [the derogatory term] in exchange for the warning to be *stricken*

from his record," and "[b]argaining for such an exchange was reasonable union action." *Id.* at 631. The court also concluded that the claim that the plaintiff's employer breached the collective bargaining agreement failed first because the other half of his hybrid Labor Management Relations Act claim failed, but also because he could not "prove discrimination because he [could not] prove that he was singled out for discriminatory treatment considering that he was the only one who had been warned, and we already know, per his state claim, that the warning itself was permissible." *Id.* The court concluded that "[a]s a result[, the plaintiff] [could not] point to any similarly situated employee who had been treated better, and settling his grievance, save something outrageous, was thus permissible." *Courie*, 577 F.3d at 631. The court held that "[t]he district court properly found that Courie has not stated a claim to relief under § 301 that is plausible on its face." *Id.* The remaining claims could not prevail in light of the court's conclusion that the settlement agreement was not discriminatory. *Id.* at 632. The Sixth Circuit also concluded that the district court did not err in denying leave to amend because none of the plaintiff's proposed amendments would have made the claims viable. *See id.* at 633.

Seventh Circuit

- ***Atkins v. City of Chicago***, 631 F.3d 823 (7th Cir. 2011). Plaintiff Atkins alleged that he was so badly treated at Stateville state prison that he was deprived of liberty without due process of law. The district court dismissed the complaint for failure to state a claim.

The Seventh Circuit discussed Atkins's four successive complaints at some length:

> The complaint alleges that when [Atkins] arrived at Stateville he was wearing a diamond stud in one of his ears. He swallowed it "to prevent the defendants from stealing his property." He was then "placed in a cell naked without a mattress, sheets, blankets, or water until [he] defecated his earring." We haven't been told why the prison wanted the earring, but probably prisoners are forbidden to wear jewelry, as it would invite theft and brawls, and jewelry often has sharp edges or a sharp pin and so can be used as a weapon. *Rowland v. Jones*, 452 F.2d 1005, 1006 (8th Cir. 1971) (per curiam). The complaint does not question the propriety of the defendants' insistence on recovering the earring, only the indignities allegedly inflicted on Atkins in the four days that he spent in a "dry cell" before the earring emerged.
>
> The most serious indignities alleged—the only ones that might state a claim of constitutional magnitude—are that he was "denied drinking water and/or food for several days." Depriving a person of food for four days would impose a constitutionally significant hardship, *Reed v. McBride*, 178 F.3d 849, 853–54 (7th Cir. 1999); *Foster v. Runnels*, 554 F.3d 807, 814–15 and n. 5 (9th Cir. 2009);

Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998); depriving him of all liquids for four days would be far worse. "A human can be expected to survive for weeks without food, but a thirsty person deprived of water would last [only] a matter of days."

Although "several days" could as a semantic matter be more than four, the allegation that Atkins was "placed in a cell naked without a mattress, sheets, blankets, or water *until* [he] defecated his earring" (emphasis added) implies that these deprivations would end when the earring finally emerged, and that, the complaint alleges, was on the fourth day. The complaint also alleges that Atkins "agreed to drink milk to cause the defecation, though he was lactose intolerant," so he was not denied liquids for four days; his complaint contains an internal contradiction. If he defecated on the fourth day, he must have drunk milk earlier that day, or on a previous day.

The allegation that he was deprived of food and water for several days is not inconceivable, which is the traditional standard for rejecting factual allegations in a complaint out of hand and dismissing the suit, as illustrated by *Best v. Kelly*, 39 F.3d 328, 330 n. 3 (D.C. Cir. 1994), which approved the dismissal of a claim that a "Branch of the Government, took my Face off of my Head, went into my Scull & Put a Computer Chip of some kind & a Camera System which makes me Project Images or Pitchers, many Feet in Front of me." And in *Lee v. Clinton*, 209 F.3d 1025, 1025 (7th Cir.2000), we upheld the dismissal of "two insane complaints charging the United States and China with a conspiracy to 'bio-chemically and biotechnologically infect and invade' various people including Lee with a mind reading and mental torture device that Lee calls 'Mind Accessing and Torturing via Remote Energy Transferring (MATRET).' To elude MATRET, Lee claims to have developed a variety of space technologies, oddly including an email system and nanny services, that will enable the victims of MATRET to relocate to MATRET-free planets." The claims described in *Best* and *Lee* fall into the category of the "essentially fictitious," a category of claims that does not engage the jurisdiction of the federal courts. *Bailey v. Patterson*, 369 U.S. 31, 33, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962); *see Hagans v. Levine*, 415 U.S. 528, 536–37, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). It would be strange to think that such cases could not be dismissed without putting the parties to the burden of further pleading, of discovery, and perhaps even of trial (though such trials would be fun).

The allegation about Atkins's being deprived of food and

water for four days is not in that class. It is not impossible; it is merely implausible. But it is highly implausible. Remember that the indignities to which the prison guards allegedly subjected Atkins are said to have been incidental to their desire to recover his earring. Deprivation of food and liquids would retard rather than accelerate the fulfillment of that desire. And we know that he was not denied all liquids, which is the pertinent category (not water), because the complaint alleges that he drank milk. In addition there is no allegation that he incurred any physical injury from the alleged deprivations.

All three amended complaints imply, fantastically, that Atkins was forced to remain naked for the entire 37 days of his incarceration, for they state that the defendants violated his civil rights by "forcing him to *remain* naked in a cell" (emphasis added). But even if all that is meant is that he was intermittently forced to remain naked, this is hard to believe. Nor is the nakedness alleged merely incidental to the conducting of frequent strip searches, for that is a separate allegation, and the allegation that he was forced to remain naked is bracketed with an allegation that the defendants "den[ied] him clothes."

There is also a curious evolution of allegations in successive iterations of the complaint. The initial complaint, though it alleged that Atkins had been denied drinking water until he defecated his earring, did not mention any deprivation of food but instead alleged that "for the first couple of days at Statesville [*sic*], [he] did not eat because the defendants wrongfully desired to obtain [his] earring." This suggests that any deprivation of food was short-lived and self-inflicted.

The four successive complaints are riddled with contradictions. And they are not pro se complaints. They were drafted by the plaintiff's lawyer. We have noted that the original complaint didn't mention deprivation of food by the prison as distinct from Atkins's refusing to eat for two days. The first amended complaint dropped all reference to deprivation of food or drink, while the second amended complaint restored the claim that Atkins had been "denied drinking water" but said nothing about food. Not until the third amended complaint do we read that Atkins was denied "food and/or water," which still leaves unclear whether it was one or both. And the response to the defendants' motion to dismiss that complaint muddied the waters further by stating that the defendants had "deprived him of water and/or food for several days and [made] him drink milk." Milk is not water, but it is a substitute for water. The

> plaintiff's final submission to the district court listed all the ways in which the "defendants forced [Atkins] to endure unconstitutional mistreatment" but did not include in the list deprivation of food or water.

Atkins, 631 F.3d at 829–31(internal citations omitted).

After detailing the requirements set out in *Iqbal* and *Twombly*, the court continued:

> When the Court said in *Iqbal* "we do not reject these bald allegations on the ground that they are unrealistic or nonsensical," *id*. at 1951, *it didn't mean that nonsensical allegations can survive a motion to dismiss; that wasn't the rule even before* Twombly *and* Iqbal. The point was rather that the allegations in *Iqbal*, though somewhat paranoid, were not nonsensical; nevertheless the Court ordered dismissal.
>
> After *Twombly* and *Iqbal* a plaintiff to survive dismissal "must plead some facts that suggest a right to relief that is beyond the 'speculative level.'" *In re marchFIRST Inc*., 589 F.3d 901, 905 (7th Cir. 2009). And (another rule that antedates *Twombly* and *Iqbal*) he can plead himself out of court by pleading facts that show that he has no legal claim. *Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008); *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773, 777 (7th Cir. 2007); *Orthmann v. Apple River Campground*, 757 F.2d 909, 915 (7th Cir. 1985); *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006). So suppose some of the plaintiff's factual allegations are unrealistic or nonsensical and others not, some contradict others, and some are "speculative" in the sense of implausible and ungrounded. The district court has to consider all these features of a complaint en route to deciding whether it has enough substance to warrant putting the defendant to the expense of discovery, *Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. at 558–59; *Francis v. Giacomelli*, 588 F.3d 186, 193 and n. 2 (4th Cir. 2009), or, in a case such as this (like *Iqbal* itself), burdening a defense of immunity. *Ashcroft v. Iqbal, supra*, 129 S. Ct. at 1953–54; *Smith v. Duffey*, 576 F.3d 336, 339–40 (7th Cir. 2009); *Amore v. Novarro*, 624 F.3d 522, 529–30 (2d Cir. 2010); *Fletcher v. Burkhalter*, 605 F.3d 1091, 1095–96 (10th Cir. 2010).
>
> We are left in darkness as to whether the plaintiff is actually alleging that Atkins was denied food or water for four days, or for a lesser, but still constitutionally significant, length of time. The plaintiff's lawyer has had four bites at the apple. Enough is enough.

United States ex rel. Garst v. Lockheed-Martin Corp., 328 F.3d 374, 378–79 (7th Cir. 2003).

Id. at 832 (emphasis added).

Judge Hamilton concurred in part and concurred in the court's judgment, but his opinion did not address the majority's *Twombly*/*Iqbal* discussion.

- ***In re Text-Messaging Antitrust Litigation***, 630 F.3d 622 (7th Cir. 2010). The plaintiffs brought a class action suit, consolidated for pretrial proceedings in the district court, charging the defendants with conspiring to fix prices of text messaging services in violation of federal antitrust law. The district court allowed the plaintiffs to file a second amended complaint, and declined to dismiss that complaint for failure to state a claim. The district court granted the defendants' request to certify, for interlocutory appeal under 28 U.S.C. § 1292(b), the question of the adequacy of the second amended complaint. The Seventh Circuit granted the application for interlocutory appeal.

  The Seventh Circuit affirmed the district court's refusal to dismiss the complaint. The court reasoned:

> The complaint in *Twombly* alleged that the regional telephone companies that were the successors to the Bell Operating Companies which AT & T had been forced to divest in settlement of the government's antitrust suit against it were engaged in "parallel behavior." Bluntly, they were not competing. But section 1 of the Sherman Act, under which the suit had been brought, does not require sellers to compete; it just forbids their agreeing or conspiring not to compete. So as the Court pointed out, a complaint that merely alleges parallel behavior alleges facts that are equally consistent with an inference that the defendants are conspiring and an inference that the conditions of their market have enabled them to avoid competing without having to agree not to compete. The core allegations of the complaint in *Twombly* were simply that "In the absence of any meaningful competition between the [defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [other carriers] within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.* at 551.

Our defendants contend that in this case too the complaint alleges merely that they are not competing. But we agree with the district judge that the complaint alleges a conspiracy with sufficient plausibility to satisfy the pleading standard of *Twombly*. It is true as the defendants contend that the differences between the first amended complaint, which the judge dismissed, and the second, which he refused to dismiss, are slight; but if his refusal to dismiss the second complaint is properly described as a reconsideration of his ruling on the first, so what? Judges are permitted to reconsider their rulings in the course of a litigation.

The second amended complaint alleges a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion. There is nothing incongruous about such a mixture. If parties agree to fix prices, one expects that as a result they will not compete in price—that's the purpose of price fixing. Parallel behavior of a sort anomalous in a competitive market is thus a symptom of price fixing, though standing alone it is not proof of it; and an industry structure that facilitates collusion constitutes supporting evidence of collusion. An accusation that the thousands of children who set up makeshift lemonade stands all over the country on hot summer days were fixing prices would be laughed out of court because the retail sale of lemonade from lemonade stands constitutes so dispersed and heterogeneous and uncommercial a market as to make a nationwide conspiracy of the sellers utterly implausible. But the complaint in this case alleges that the four defendants sell 90 percent of U.S. text messaging services, and it would not be difficult for such a small group to agree on prices and to be able to detect "cheating" (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities.

Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings. This allegation identifies a practice, not illegal in itself, that facilitates price fixing that would be difficult for the authorities to detect. The complaint further alleges that the defendants, along with two other large sellers of text messaging services, constituted and met with each other in an elite "leadership council" within the association—and the leadership council's stated mission was to urge its members to substitute "co-opetition" for competition.

The complaint also alleges that in the face of steeply falling costs, the defendants increased their prices. This is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price. And there is more: there is an allegation that all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third. The change in the industry's pricing structure was so rapid, the complaint suggests, that it could not have been accomplished without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption.

A footnote in *Twombly* had described the type of evidence that enables parallel conduct to be interpreted as collusive: "Commentators have offered several examples of parallel conduct allegations that would state a [Sherman Act] § 1 claim under this standard . . . [namely,] 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties' . . . [;] 'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.' The parties in this case agree that 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason' would support a plausible inference of conspiracy." *Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. at 557 n. 4 (citations omitted). That is the kind of "parallel plus" behavior alleged in this case.

What is missing, as the defendants point out, is the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price. The second amended complaint does allege that the defendants "agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services," but does not allege direct evidence of such an agreement; the allegation is an inference from circumstantial evidence. Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L.

Ed. 2d 775 (1984); *Miles Distributors, Inc. v. Specialty Construction Brands, Inc.*, 476 F.3d 442, 449 (7th Cir. 2007); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 661–62 (7th Cir. 2002); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir. 2004); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998); *Johnson v. Hospital Corp. of America*, 95 F.3d 383, 392 (5th Cir. 1996). *We need not decide whether the circumstantial evidence that we have summarized is sufficient to compel an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's "plausibility."*

> The Court said in *Iqbal* that the "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." 129 S. Ct. at 1949. This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; *the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote*.
>
> The plaintiffs have conducted no discovery. *Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability. All that we conclude at this early stage in the litigation is that the district judge was right to rule that the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery*.

In re Text Messaging, 630 F.3d at 627–29 (emphasis added).

- ***Bausch v. Stryker Corp.***, 630 F.3d 546 (7th Cir. 2010). Plaintiff Bausch alleged that she was injured by a medical device—a hip replacement system called "the Trident"—allegedly manufactured in violation of federal law. She brought state common law claims, for strict product liability and negligence, against the manufacturer, distributor, and seller of the Trident. The district court granted a motion to dismiss under Rule 12(b)(6), holding that Bausch's state claims were preempted by federal law. The district court did not allow Bausch a requested opportunity to amend her complaint, but instead immediately entered final judgment dismissing the action with prejudice. The district court then denied Bausch's

motion to vacate the judgment and for leave to file an amended complaint. The district court reasoned, among other things, that the amended complaint was futile on the merits because its claims would still be preempted.

The Seventh Circuit reversed the district court's finding that Bausch's state claims were preempted. The court also ruled that Bausch's claim was sufficiently pleaded. The court emphasized that when the plaintiff lacks access to the relevant information, discovery must be allowed before requiring more detailed pleading:

> In applying [the *Twombly*/*Iqbal*] standard to claims for defective manufacture of a medical device in violation of federal law, . . . district courts must keep in mind that much of the product-specific information about manufacturing needed to investigate such a claim fully is kept confidential by federal law. *Formal discovery is necessary before a plaintiff can fairly be expected to provide a detailed statement of the specific bases for her claim*. Accordingly, the district court erred in this case by dismissing plaintiff's original complaint and by denying her leave to amend her complaint.
>
> . . . .
>
> According to the original complaint, the defendants manufacture the Trident brand ceramic-on-ceramic hip replacement system. It is a Class III medical device subject to the authority of the FDA. Plaintiff had right total hip replacement surgery on March 21, 2007, in which a Trident device was implanted. The original complaint alleged that the Trident product was unreasonably dangerous, causing plaintiff to suffer an unstable right hip, pain, suffering, disability, and what is euphemistically called "revision" surgery—in Bausch's case a second major operation in which the Trident product was removed and replaced with a different product.
>
> The original complaint also alleged facts indicating that defendants knew, or at least should have known, before plaintiff's original surgery that the Trident implanted in her was defective. According to the original complaint, by early 2005, the defendants received complaints that the Trident was failing after it was implanted. Defendants recalled a batch of Trident components in March 2006 because of "dimensional anomalies." The FDA conducted an inspection at the defendants' Ireland manufacturing facility from October 31 to November 3, 2006, and, following the inspection, informed the defendants of "numerous deficiencies [in the Trident] manufacturing and inspection processes." Six days before

plaintiff Bausch's surgery, "after several months of inadequate response to the FDA findings by the defendants," the FDA issued a letter to defendants on March 15, 2007 warning that the Trident was "adulterated due to manufacturing methods . . . not in conformity with industry and regulatory standards." A device, bearing the same catalogue number as the device allegedly not in compliance with regulations, was then implanted in Bausch's body the next week. The device in Bausch's body failed and the same device was later recalled.

The original complaint served the purposes of Rule 8 of giving the defendants fair notice of the nature of the claim against them and of stating a claim for relief that was "plausible on its face" as required by *Iqbal* and *Twombly*. In deciding whether a complaint can survive a motion to dismiss, we have consistently said: "As a general rule . . . *notice pleading remains the standard*." *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Financial Services*, 536 F.3d 663, 667 (7th Cir. 2008). Pursuant to Rule 8, *pleading is meant to "'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court*." *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009), quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). *We give the plaintiff "the benefit of imagination, so long as the hypotheses are consistent with the complaint*." *Bissessur v. Indiana Univ. Bd. of Trs.*, 581 F.3d 599, 603 (7th Cir. 2009), quoting *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994). "*Together, these rules ensure that claims are determined on their merits rather than on pleading technicalities*." *Christensen v. County of Boone*, 483 F.3d 454, 458 (7th Cir. 2007).

We do not see a fatal defect in the original complaint that would have justified its dismissal, let alone entry of a final judgment dismissing the action with prejudice. The only significant issue we see with the original complaint is that it alleges not only violations of "regulatory" standards, but also violations of "industry" standards. To the extent that the claims are based upon violations of "industry standards" that are different from or in addition to the federal regulatory standards (which have the force of law), those claims would be preempted under section 360k. Yet complaints that combine legally valid and invalid claims are common. *When a complaint asserts claims that are legally valid and those that are not, the correct judicial response is not to dismiss the complaint, let alone with prejudice. It's not even necessary to require a plaintiff to file a "cleaner" amended complaint. The case may proceed under the original complaint, with the understanding, provided by the court if*

necessary, as to the proper scope of claims that can survive the legal challenge.

Defendants object that the original complaint does not specify the precise defect or the specific federal regulatory requirements that were allegedly violated. *Although the complaint would be stronger with such detail, we do not believe the absence of those details shows a failure to comply with Rule 8 of the Federal Rules of Civil Procedure or can support a dismissal under Rule 12(b)(6)*. First, Rule 9(b) does not impose any special requirement that such a claim be pled with particularity, as it does for fraud claims, for example.

Second, the victim of a genuinely defective product—for example, an air bag that fails to inflate in a serious automobile collision, or an implantable cardiac defibrillator that delivers powerful electric shocks to a heart that is functioning normally—*may not be able to determine without discovery and further investigation whether the problem is a design problem or a manufacturing problem*. It is common, for example, for injured plaintiffs to plead both defective manufacture and defective design and to pursue discovery on both theories, as occurred in *Riegel* itself, for example. 552 U.S. at 320–21; *accord, e.g., Gardner v. Tristar Sporting Arms, Ltd.*, 2010 WL 3724190 (S.D. Ind. Sept. 15, 2010) (granting summary judgment for defendant on design defect claim but denying summary judgment on manufacturing defect claim); *Show v. Ford Motor Co.*, 697 F. Supp. 2d 975 (N.D. Ill. 2010) (granting summary judgment for defendant on both design defect and manufacturing defect claims); *Gaskin v. Sharp Electronics Corp*., 2007 WL 2819660 (N.D. Ind. Sept. 26, 2007) (granting summary judgment for defendant on design defect claim but denying summary judgment on manufacturing defect claim); *In re Air Crash Disaster at Sioux City, Iowa*, 781 F. Supp. 1307 (N.D. Ill. 1991) (in airliner crash case, denying motions for summary judgment for defendants on plaintiffs' claims of manufacturing and design defects against different defendants); *see generally, e.g., Bennett v. Schmidt*, 153 F.3d 516, 519 (7th Cir. 1998) ("Litigants are entitled to discovery before being put to their proof").

Third, *in the context of Class III medical devices, much of the critical information is kept confidential as a matter of federal law*. The specifications of the FDA's premarket approval documents, for example, are confidential, and *there is no public access to complete versions of these documents. An injured patient cannot gain access to that information without discovery*. *See* 21 C.F.R. § 814.9; *Medtronic Leads*, 623 F.3d at 1211, n. 7 (Melloy, J., dissenting). If

the problem turns out to be a design feature that the FDA approved, section 360k will protect the manufacturer. *Riegel*, 552 U.S. at 330. But if the problem turns out to be a failure to comply with the FDA's legally enforceable conditions for approval of the device, section 360k will not protect the manufacturer.

As noted earlier, one of the only two other circuits to examine the application of *Riegel* to medical device preemption is the Eighth Circuit in *Medtronic Leads*, where the majority concluded that the plaintiffs had waived discovery early in the proceedings. The majority upheld the district court's refusal to grant the plaintiffs discovery to respond to the motion to dismiss. There the court acknowledged the plaintiffs' argument that the district court held them to an "impossible pleading standard" because the FDA's premarket approval application was accessible only to the FDA and the manufacturer. The court found that "this argument—which focuses on the timing of the preemption ruling—would have considerable force in a case where a specific defective Class III device injured a consumer, and the plaintiff did not have access to the specific federal requirements in the [premarket approval application] prior to commencing the lawsuit." *Medtronic Leads*, 623 F.3d at 1206. That is exactly the situation in this case. *Here, there has not yet been an opportunity for discovery, and Bausch never waived discovery. For her to plead with any more detail that her claims were "based entirely on a specific defect in the Trident that existed outside the knowledge and regulations of the FDA," she would need access to the confidential materials in the premarket approval application setting forth the medical device's specifications. This is simply not possible without discovery. It is also unreasonable to expect that Bausch could have pled more specifically without access to the failed Trident itself, but accessing the Trident outside of a discovery process would risk charges of spoliation of evidence*, as Bausch's counsel acknowledged at oral argument. As Judge Melloy noted in *Medtronic Leads*: "If plaintiffs must allege that the defendant violated a particular FDA-approved specification before discovery, then it is difficult to appreciate how any plaintiff will ever be able to defeat a Rule 12(b)(6) motion." *Id.* at 1212 (Melloy, J., dissenting). We think Judge Melloy said it well in suggesting that, in analyzing the sufficiency of pleadings, "a plaintiff's pleading burden should be commensurate with the amount of information available to them." *Id.* Here, Bausch pled sufficiently given the amount of information to which she had access.

Bausch, 630 F.3d at 558–61 (emphasis added).

- ***Reynolds v. CB Sports Bar, Inc.***, 623 F.3d 1143, 2010 WL 4137569 (7th Cir. 2010). Plaintiff Reynolds alleged that two other bar patrons, Brenda Russell and Casey Carson, induced her to become intoxicated in Jerzey's, a bar owned by CB Sports Bar, Inc., and attempted to take her back to their apartment for "sexual exploitation." *Id.* Reynolds escaped, but was injured when she was struck by a car. *Id.* Reynolds sued CB Sports Bar for negligence. *Id.* She alleged in her second amended complaint that the bar, through its bartenders, knew of Russell and Carson's plans and negligently failed to protect her from the attack. *Id.* The district court dismissed the negligence count against CB Sports Bar for failure to state a claim, finding that CB Sports's duty to protect its business invitees did not extend "to such distances or circumstances as are involved in this case," and that "there is no reason CB Sports could have reasonably foreseen that there was a danger that one of their patrons would be hit by a vehicle while escaping from criminal activity by another Jerzey's patron after leaving the bar-or any other harm of that general nature." *Id.* at 1-2. The Seventh Circuit concluded that Reynolds's claim was broad enough to encompass a viable theory of negligence against CB Sports Bar, and reversed and remanded. *CB Sports*, 2010 WL 4137569 at *1.

  Reynolds complaint alleged:

  > That Defendant Jerzey's at least knew or should have known that Defendants Russell and Carson were getting Plaintiff Loretta Reynolds intoxicated for the purpose of sexual exploitation. At worst, Defendant Jerzey's and its employ/agent bartender was an active accomplice in the attempt to ensnare Plaintiff Loretta Reynolds into an unsavory and unwelcome sexual situation.

  Id. She also alleged that CB Sports Bar knew or should have known that she would try to escape and that CB Sports Bar "had a duty to protect the welfare of its customers, including Plaintiff Loretta Reynolds from situations such as that being plotted by Defendants Russell and Carson." *Id.*

  The Seventh Circuit first explained that, although the Illinois Dram Shop Act "does not provide a cause of action for injuries sustained by the intoxicated person himself," it "does not give a bar immunity for tortious conduct; the Act preempts actions based on the provision of alcohol. A plaintiff may still bring a cause of action against a bar for acts that are independent of alcohol." *Id*. at *2-3.

  Next, the court turned to the issue of whether Reynolds could supplement her complaint on appeal with facts that she did not include in her complaint. *Id.* The court noted that "[p]rior to *Iqbal* and *Twombly*, it was clear that 'a plaintiff [was] free on appeal to give us an unsubstantiated version of the events, provided it is consistent with the complaint, to show that the complaint should not have been dismissed.'" *Id.* (quoting *Dawson v. General Motors Corp.*, 977 F.2d 369, 372 (7th Cir. 1992)). And then concluded that *Iqbal* and

Twombly, "while raising the bar for what must be included in the complaint in the first instance, did not eliminate the plaintiff's opportunity to suggest facts outside the pleading, including on appeal, showing that a complaint should not be dismissed." *CB Sports*, 2010 WL 4137569 at *3. Therefore, once a plaintiff pleads sufficient factual material to state a plausible claim, "nothing in *Iqbal* or *Twombly* precludes the plaintiff from later suggesting to the court a set of facts, consistent with the well-pleaded complaint, that shows that the plaintiff should not be dismissed." *Id*. The court noted that Reynolds made the following allegations: (1) that the bartender refused to help her get a taxicab and told her she would have to get a ride back to her hotel from another patron, (2) that the bartender assisted Russell and Carson in getting Reynolds intoxicated knowing their ill intentions, (3) that CB Sports Bar "at least knew or should have known that Defendants Russell and Carson were getting Plaintiff Loretta Reynolds intoxicated for the purpose of sexual exploitation," and (4) "that Defendant [CB Sports Bar] had a duty to protect the welfare of its customers...from situations such as that being plotted by Defendants Russell and Caron." *Id*. It found "these allegations sufficient to raise a plausible claim of negligence against CB Sports." *Id*. at *4. Because Reynolds made a "sufficient showing in the first instance," the Seventh Circuit decided that she was "free on appeal to suggest additional facts that would demonstrate to [the court] why her complaint should not be dismissed for failing to state a claim." *Id*. The court therefore considered the "additional factual allegations that Reynolds has raised on appeal, including the allegation that the bartenders told her that it would be safe for her to ride home with Russell and Carson." *Id.*

The court applied Illinois substantive law because jurisdiction was based on diversity of citizenship. *CB Sports*, 623 F.3d at *4. The court explained, that, to state a claim for negligence under Illinois law:

> '[A] plaintiff must plead a duty owed by a defendant to that plaintiff, a breach of that duty, and injury proximately caused by the breach of duty.' *Bell v. Hutsell*, 931 N.E.2d 299, 302 (2010). There is normally no duty to protect someone from criminal attacks by third parties. However, a landowner will have a duty to protect lawful entrants against criminal attacks *on the premises* if the parties stand in a special relationship-such as between a business invitor and invitee-and the criminal attack was reasonably foreseeable.
> ....
>
> Even if there is a special relationship and the criminal attack is foreseeable, courts must still decide whether to impute a duty to protect against the attack. Courts will consider a number of factors in deciding whether to impose a duty on someone to protect another, including '(1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant.' *Marshall v. Burger King Corp.*, 856 N.E.2d 1048,

1057 (2006).

CB Sports, 623 F.3d at *4. (internal citations omitted) (emphasis in original).

After accepting as true Reynolds' allegation that CB Sports "at least knew or should have known that Defendants Russell and Carson were getting Plaintiff Loretta Reynolds intoxicated for the purpose of sexual exploitation," the court concluded that "the subsequent unrealized criminal attack on Reynolds was reasonably foreseeable to CB Sports." *Id.* at *8.

Having decided that the attack was reasonably foreseeable, the court turned to whether the bar had a duty to protect Reynolds against the attack. *Id.* And examined "the likelihood of any injury, the burden on the defendant of guarding against the injury, and any consequences of placing the burden to protect on the bar." *Id.* First, it noted that "[t]he likelihood of injury under these circumstances was very high." *Id.* Then it decided that was it not "overly burdensome to require a bar to protect against criminal attacks of the kind in this case if it knows they will be perpetrated." *Id.* Finally, it noted that "two limiting principles, drawn from Illinois courts' decisions ... make imposing a more limited duty on CB Sports consistent with established Illinois law." *CB Sports*, 623 F.3d at *8. The two limitations were that (1) the bar was under no duty to investigate the plans or intentions of its patrons and (2) the bar had a duty to protect against only those criminal attacks occurring far from its physical premises that it knew would occur. *Id.* The court concluded

> Reynolds has sufficiently pled that CB Sports owed her a duty to protect her against the criminal attack by Russell and Carson if it actually knew of their alleged plan to sexually exploit her off premises. She also has sufficiently pled the remaining elements of her negligence claim. Thus, we need not (and should not) decide at this stage of the litigation what CB Sports could have done to discharge its duty, nor whether CB Sports's inaction (such as failing to warn her or give her a phone book) or action (such as telling her to get a ride from someone at the bar or vouching for Russell and Carson) breached that duty.

Id. at *9.

Judge Ripple dissented because he did not agree with the majority's application of Illinois law on business invitor liability. *Id.* at *10 (Ripple, J., dissenting).

- ***Bonte v. U.S. Bank, N.A.***, 624 F.3d 461, 2010 WL 4068952 (7th Cir. Oct. 19, 2010). The Bontes alleged that U.S. Bank succeeded a mortgage lender that violated the Truth in Lending Act ("TILA") by misstating certain charges related to the Bontes' mortgage and sought mortgage rescission. *Id.* The district court granted U.S. Bank's motion to dismiss after concluding that the Bontes failed to respond to U.S. Bank's contention that none of the misstatements identified in the complaint were "material," as required by TILA for mortgage

rescission. *Id.* The Seventh Circuit affirmed.

The court explained that, to assert a claim for rescission under TILA, the Bontes' "must demonstrate that the lender failed to make a required 'material' disclosure." *Id.* at *2. TILA's implementing regulation, Regulation Z, identifies eighteen pieces of information to be disclosed to borrowers in credit transactions such as the Bontes' mortgage. *Id.* The court noted that "[o]f these eighteen disclosures, the following five qualify as 'material' so as to support rescission for up to three years: (1) the annual percentage rate; (2) the finance charge; (3) the amount financed; (4) the total of payments; and (5) the payment schedule." *Id.* The court acknowledged that the Bontes alleged that the disclosure statement misstated the finance charge, annual percentage rate, and amount finance, but pointed out that "the Bontes never explain *how* the ten allegedly misstated charges are related to the finance charge, the APR, and the amount financed." *Bonte*, 2010 WL 4068952 at *2. After reviewing U.S. Bank's arguments, the court concluded that "none of the ten errors are in fact related to the amount financed, the finance charge, and the applicable APR, notwithstanding the Bontes' unsupported legal statement to the contrary." *Id.* at *3-4. Applying *Iqbal*, the court determined that the complaint did not "plausibly give rise to an entitlement to relief." *Id.* And concluded that Bontes' failure to respond to U.S. Bank's characterization of the ten errors was a concession that the charges identified in their complaint are not "material" disclosures that would warrant rescission under TILA. *Id.* at *5.

- ***Swanson v. Citibank, N.A.***, 614 F.3d 400 (7th Cir. 2010). Swanson, proceeding *pro se,* sued lender (Citibank), appraiser (PCI Appraisal Services), and appraiser's employee (Lanier), for discriminating against her on the basis of her race when Citibank denied her application for a home-equity loan. *Id.* at 402. The district court dismissed her complaint for failure to state a claim. *Id.* at 403. The Seventh Circuit affirmed in part and reversed in part, agreeing that Swanson failed to state a fraud claim, but holding that Swanson stated a claim for racial discrimination under the FHA.

  The court first explained the pleading standards:

  > It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, might suggest that something has happened to her that might be redressed by the law. *Cf. Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), *disapproved by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ("after puzzling the profession for 50 years, this famous observation [the 'no set of facts' language] has earned its retirement"). The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), and *Ashcroft v. Iqbal*,--- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). This is not an

easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a "plausibility" standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(2).

Critically, in none of the three recent decisions—*Twombly*, *Erickson*, or *Iqbal*—did the Court cast any doubt on the validity of Rule 8 of the Federal Rules of Civil Procedure. To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window. It is therefore useful to begin with a look at the language of the rule:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
>
> * * *
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief....

FED. R. CIV. P. 8(a)(2). As one respected treatise put it in 2004,

> all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity.... [T]his portion of Rule 8 indicates that a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved....

5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1215 at 165-173 (3d ed. 2004).

Nothing in the recent trio of cases has undermined these broad principles. As *Erickson* underscored, "[s]pecific facts are not necessary." 551 U.S. at 93, 127 S.Ct. 2197. The Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes. We know that because it said so in *Erickson*: "the statement need only

give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Id.* Instead, the Court has called for more careful attention to be given to several key questions: what, exactly, does it take to give the opposing party "fair notice"; how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and in what way is the pleader expected to signal the type of litigation that is being put before the court?

This is the light in which the Court's references in *Twombly*, repeated in *Iqbal*, to the pleader's responsibility to "state a claim to relief that is plausible on its face" must be understood. *See Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *Iqbal*, 129 S.Ct. at 1949. "Plausibility" in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal*, "the plausibility standard is not akin to a probability requirement." 129 S.Ct. at 1949 (quotation marks omitted). As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself could these things have happened, not did they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences. *Compare Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir.2008) (applying PSLRA standards).

The Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), which was cited with approval in *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. A plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an entirely plausible scenario, whether or not it describes what "really" went on in this plaintiff's case. A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected. Finally, as the Supreme Court warned in *Iqbal* and as we acknowledged later in

> *Brooks v. Ross*, 578 F.3d 574 (7th Cir.2009), "abstract recitations of the elements of a cause of action or conclusory legal statements," 578 F.3d at 581, do nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law. Such statements therefore do not add to the notice that Rule 8 demands.

Swanson, 614 F.3d at 403-05. The court then analyzed Swanson's Fair Housing Act and fraud claims against Citibank. *Id.* at 405. It explained that "[t]he Fair Housing Act prohibits businesses engaged in residential real estate transactions, including '[t]he making ... of loans or providing other financial assistance ... secured by residential real estate,' from discriminating against any person on account of race." *Id.* (quoting 42 U.S.C. § 3605(a), (b)(1)(B)). And concluded that Swanson adequately alleged an FHA claim against Citibank:

> Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint.

Id. The court then considered Swanson's fraud claim against Citibank. And explained that the fraud claim must satisfy Rule 9(b) and "plead actual damages arising from [Swanson's] reliance on a fraudulent statement." *Id.* at 406. The court decided that the district court properly dismissed Swanson's fraud claim against Citibank:

> Swanson asserts that Citibank falsely announced plans to make federal funds available in the form of loans to all customers, when it actually intended to exclude African-American customers from those who would be eligible for the loans. Swanson relied, she says, on that false information when she applied for her home-equity loan. But she never alleged that she lost anything from the process of applying for the loan. We do not know, for example, whether there was a loan application fee, or if Citibank or she covered the cost of the appraisal. This is the kind of particular information that Rule 9 requires, and its absence means that the district court was entitled to dismiss the claim.

Id.

The court then turned to Swanson's claims against the appraiser (PCI) and its employee (Lanier). *Swanson*, 614 F.3d at 406. It explained that the FHA makes it "unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race...." *Id.* (quoting 42 U.S.C. § 3605(a)). And that the statute defined the term "residential real estate-related transaction"

to include "the selling, brokering, or appraising of residential real property." *Id.* (quoting 42 U.S.C. § 3605(b)(2)).

Swanson alleged that the appraisal defendants "skew[ed] their assessment of her home because of her race." *Id.* The court decided that this was enough to survive a Rule 12(b)(6) motion. *Id.* at 406-07. The court then considered Swanson's common-law fraud claim against Lanier and PCI and concluded that: "[s]he has not adequately alleged that she relied on their appraisal, nor has she pointed to any out-of-pocket losses that she suffered because of it." *Id.* at 407.

Judge Posner dissented, concluding that Swanson's "hypothesis of racial discrimination does not have substantial merit; it is implausible." *Swanson*, 613 F.3d at 407. (Posner, J., dissenting in part). He argued that the majority's decision not to dismiss Swanson's FHA claims was inconsistent with *Iqbal,* that this case was "even stronger for dismissal" than *Iqbal*, and that this case would have been dismissed even before *Twombly* and *Iqbal*:

> This case is even stronger for dismissal because it lacks the competitive situation-man and woman, or white and black, vying for the same job and the man, or the white, getting it. We had emphasized this distinction, long before *Twombly* and *Iqbal*, in *Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712 (7th Cir.1998), like this a case of credit discrimination rather than promotion. "Latimore was not competing with a white person for a $51,000 loan. A bank does not announce, 'We are making a $51,000 real estate loan today; please submit your applications, and we'll choose the application that we like best and give that applicant the loan.'" *Id.* at 714. We held that there was no basis for an inference of discrimination. *Noland v. Commerce Mortgage Corp.*, 122 F.3d 551, 553 (8th Cir.1997), and *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1558 (5th Cir. 1996), rejected credit-discrimination claims because there was no evidence that similar applicants were treated better, and *Boykin v. Bank of America Corp.*, 162 Fed. Appx. 837, 840 (11th Cir. 2005) (per curiam), rejected such a claim because "absent direct evidence of discrimination, there is no basis for a trier of fact to assume that a decision to deny a loan was motivated by discriminatory animus unless the plaintiff makes a showing that a pattern of lending suggests the existence of discrimination."
>
> There is no allegation that the plaintiff in this case was competing with a white person for a loan. It was the low appraisal of her home that killed her chances for the $50,000 loan that she was seeking. The appraiser thought her home worth only $170,000, and she already owed $146,000 on it (a first mortgage of $121,000 and a home-equity loan of $25,000). A further loan of $50,000 would thus

> have been undersecured. We must assume that the appraisal was a mistake, and the house worth considerably more, as she alleges. But errors in appraising a house are common because "real estate appraisal is not an exact science," *Latimore v. Citibank Federal Savings Bank, supra*, 151 F.3d at 715 - common enough to have created a market for "Real Estate Appraisers Errors & Omissions" insurance policies. *See, e.g.*, OREP (Organization of Real Estate Professionals), "E&O Insurance," www. orep. org/ appraisers- e& o. htm (visited July 11, 2010). The Supreme Court would consider error the plausible inference in this case, rather than discrimination, for it said in *Iqbal* that "as between that 'obvious alternative explanation' for the [injury of which the plaintiff is complaining] and the purposeful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion." *Ashcroft v. Iqbal, supra, 129 S.Ct. at 1951-52*, quoting *Twombly*, 550 U.S. at 567, 127 S.Ct. 1955.
>
> Even before *Twombly* and *Iqbal*, complaints were dismissed when they alleged facts that refuted the plaintiffs' claims. *See, e.g., Tierney v. Vahle*, 304 F.3d 734, 740 (7th Cir.2002); *Thomas v. Farley*, 31 F.3d 557 (7th Cir.1994); *Lightner v. City of Wilmington*, 545 F.3d 260, 262 (4th Cir.2008). Under the new regime, it should be enough that the allegations render a claim implausible. The complaint alleges that Citibank was the second bank to turn down the plaintiff's application for a home-equity loan. This reinforces the inference that she was not qualified. We further learn that, subject to the appraisal, which had not yet been conducted, Citibank had approved the $50,000 home-equity loan that the plaintiff was seeking on the basis of her representation that her house was worth $270,000. But she didn't think it was worth that much when she applied for the loan. The house had been appraised at $260,000 in 2004, and the complaint alleges that home values had fallen by "only" 16 to 20 percent since. This implies that when she applied for the home - equity loan her house was worth between $208,000 and $218,400 - much less than what she told Citibank it was worth.

Swanson, 614 F.3d at 408-09 (Posner, J., dissenting in part). Judge Posner noted that "*Iqbal* establishes a general requirement of 'plausibility' applicable to all civil cases in federal courts." *Id.* at 410. He explained:

> It does so, however, in opaque language: "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." 129 S.Ct. at 1949. In statistics the range of probabilities is from 0 to 1, and

> therefore encompasses "sheer possibility" along with "plausibility." It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn't think a plaintiff's case is more likely than not to be a winner (that is, doesn't think p > .5), as long as it is substantially justified that's enough to avert dismissal. *Cf.* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). But when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible.

Id. Judge Posner then highlighted the concern about discovery burdens underlying *Twombly* and *Iqbal* and the possible effect of those burdens on this case:

> Behind both *Twombly* and *Iqbal* lurks a concern with asymmetric discovery burdens and the potential for extortionate litigation (similar to that created by class actions, to which Rule 23(f) of the civil rules was a response, *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir.2001); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir.1999); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162-65 (3d Cir.2001); *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir.2009); FED. R. CIV. P. 23(f) Committee Note) that such an asymmetry creates. *Ashcroft v. Iqbal, supra*, 129 S.Ct. at 1953; *Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. at 557-59, 127 S.Ct. 1955; *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir.2009); *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir.2009); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-47 (9th Cir.2008). In most suits against corporations or other institutions, and in both *Twombly* and *Iqbal* - but also in the present case - the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant's records (and, through depositions, the minds of the defendant's employees) to obtain evidence of wrongdoing. With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant's operations. If no similar costs are borne by the plaintiff in complying with the defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff.
>
> It is true, as critics of *Twombly* and *Iqbal* point out, that district courts have authority to limit discovery. *E.g., Griffin v. Foley*,

542 F.3d 209, 223 (7th Cir. 2008); *Searls v. Glasser*, 64 F.3d 1061, 1068 (7th Cir.1995); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir.1984); *Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005). But especially in busy districts, which is where complex litigation is concentrated, the judges tend to delegate that authority to magistrate judges. And because the magistrate judge to whom a case is delegated for discovery only is not responsible for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the factual inquiry in the case to roam to enable him to decide it, the magistrate judge is likely to err on the permissive side. "One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it. Pursuit of factual and legal issues that will not matter to the outcome of the case is a source of enormous unnecessary costs, yet it is one hard to conquer in a system of notice pleading and even harder to limit when an officer lacking the power to decide the case supervises discovery." Frank H. Easterbrook, "Discovery as Abuse," 69 B.U. L. REV. 635, 639 (1989); *see also* Milton Pollack, "Discovery-Its Abuse and Correction," 80 F.R.D. 219, 223 (1979); Virginia E. Hench, "Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action," 67 TEMPLE L. REV. 179, 232 (1994).

This structural flaw helps to explain and justify the Supreme Court's new approach. It requires the plaintiff to conduct a more extensive precomplaint investigation than used to be required and so creates greater symmetry between the plaintiff's and the defendant's litigation costs, and by doing so reduces the scope for extortionate discovery. If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir.2003) (en banc); *Coss v. Playtex Products, LLC*, No. 08 C 50222, 2009 WL 1455358 (N.D. Ill. May 21, 2009); Edward A. Hartnett, "Taming Twombly, Even After Iqbal," 158 U. PA. L. REV. 473, 507-14 (2010); Suzette M. Malveaux, "Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases," 14 LEWIS & CLARK L. REV. 65 (2010). No one has suggested such a resolution for this case.

Swanson, 614 F.3d at 411-12 (Posner, J., dissenting). Judge Posner concluded:

> The plaintiff has an implausible case of discrimination, but she will now be permitted to serve discovery demands that will compel elaborate document review by Citibank and require its executives to sit for many hours of depositions. (Not that the plaintiff is capable of conducting such proceedings as a pro se, but on remand she may - indeed she would be well advised to - ask the judge to help her find a lawyer.) The threat of such an imposition will induce Citibank to consider settlement even if the suit has no merit at all. That is the pattern that the Supreme Court's recent decisions are aimed at disrupting.

Id. at 412.

- ***Walton v. Walker***, 364 F. App'x 256, No. 09-2617, 2010 WL 376322 (7th Cir. Feb. 3, 2010) (unpublished order). "In a sprawling, 82-page complaint naming 24 defendants, Walton alleged that Chicago police officers colluded with prosecutors to falsely arrest and convict him in retaliation for filing a previous civil-rights suit against prison officials." *Id.* at *1. He also alleged that once he was in prison, "a variety of prison officials—from the state Director of the Department of Corrections down to individual prison guards—engaged in a broad conspiracy to kill him or encourage other prisoners to kill him." *Id.* He alleged other conspiracies regarding false disciplinary charges, interference with mail, lack of access to legal materials, and arbitrary handling of his grievances and disciplinary hearings. *Id.* The plaintiff brought the complaint under § 1983, and the district court screened the complaint under 28 U.S.C. § 1915A, and dismissed it as frivolous. *Id.* The Seventh Circuit affirmed.

  On appeal, Walton argued that dismissal was "inappropriate because the district court improperly rejected his allegations as fantastic [and] . . . erred by not construing his allegations of conspiracy in a more favorable light." *Id.* The Seventh Circuit "agree[d] with the district court that Walton's allegations [we]re not backed by sufficient factual development to make them plausible enough to state a claim." *Walton*, 2010 WL 376322, at *2. The court held that "Walton's complaint—and the 184 pages of exhibits that accompan[ied] it—contain[ed] nothing more than unsupported allegations that a wide variety of state and local officials over many months conspired to violated his rights." *Id.* The complaint made only "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,' *Iqbal*, 129 S. Ct. at 1949, and these [we]re just the sort of 'naked assertions' that the Supreme Court has counseled are not sufficient to avoid dismissal, *see Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009)." *Id.* (first alteration in original). The court noted that the district court was "entitled to draw upon its familiarity with Walton's prior meritless litigation (again describing sprawling conspiracies) to conclude that his complaint consisted only of 'claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar.'" *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 328 (1989)).

- ***Kaye v. D'Amato***, 357 F. App'x 706, No. 09-1091, 2009 WL 4546948 (7th Cir. Dec. 4, 2009) (unpublished order). The plaintiff alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO) and the corresponding state law, the Wisconsin Organized Crime Control Act (WOCCA). *Id.* at *1. The plaintiff, who was an attorney and real estate developer, alleged that "he was wrongfully denied the opportunity to purchase a certain parcel of land owned by the City of Milwaukee because of Defendants' participation in an illicit land swap agreement" and "that Defendants conspired to rig a neighborhood association election in order to maintain control over decisions regarding the development of land in Milwaukee's East Village Neighborhood." *Id.* The complaint asserted that the defendants were board members of entities that handled decisions regarding city-owned real estate. *Id.* The plaintiff allegedly attempted to purchase a city-owned property called Kane Place, but several of the entities handling the city's real estate allegedly refused to sell him the property because the land had been promised to the commissioner of one of these entities, even though the plaintiff's bid was $500 higher than the commissioner's. *Id.* The plaintiff also alleged that at the same time it sold Kane Place, the City Planning Commission sold another city-owned property to a company owned by the commissioner of another entity that controlled the city's real estate for $10,000, "despite the existence of a $250,000 bid from a competing developer who had already secured financing and invested money in redevelopment plans." *Id.* at *2. The complaint alleged that the plaintiff complained publicly about the involvement of one of the defendants in selling city-owned land to one of the commissioners, and that this defendant then publicly announced at a park dedication that the plaintiff was "blacklisted" from buying city property in the future. *Kaye*, 2009 WL 4546948, at *2. The complaint separately alleged that "Defendants engaged in misconduct stemming from the enactment of a zoning ordinance in the East Village Neighborhood." *Id.* One of the defendants allegedly removed a sign from the lawn of the spokesperson for the group opposing a proposed zoning ordinance and called the spokesperson to tell her that her employer was looking for the person who posted the sign. *Id.* The complaint further alleged that in connection with the next board election for the East Village Association ("EVA"), the defendants "schemed via email to have their own candidates elected over the objection of the majority." *Id.* "The alleged scheme was executed by changing the voting method from the simple majority vote required by the EVA bylaws, to a single transferable voting method." *Id.* The change in voting procedures was allegedly carried out through an email stating: "'We need to vote in this order for At Large nominations: 1. Mark, 2. Todd, 3. Ginger, 4. Norbert—do not deviate from that order. DO NOT vote for anyone else.'" *Id.* At the new neighborhood association's inaugural meeting, three Milwaukee police officers and the son of one of the directors of the EVA "allegedly stood at the entrance of the building in order to keep unidentified 'disfavored citizens' from entering the meeting." *Kaye*, 2009 WL 4546948, at *3.

  The district court dismissed the complaint and imposed sanctions on the plaintiff. *Id.* On appeal, the Seventh Circuit declined to hear the appeal for lack of jurisdiction. On remand, the plaintiff filed an amended complaint. The district court dismissed again, "finding (1) that Kaye had pleaded only two predicate acts which amounted to isolated events; and (2) that the two events did not demonstrate the continuity necessary to establish a pattern of

racketeering." *Id.*

In discussing the applicable pleading standards, the Seventh Circuit noted that "[w]hile dismissal of a RICO claim is appropriate if the plaintiff fails to allege sufficient facts to state a claim that is plausible on its face, the adequate number of facts varies depending on the complexity of the case." *Id.* (citing *Limestone Dev. Corp v. Vill. of Lemont, Il.*, 520 F.3d 797, 803 (7th Cir. 2008)). The court noted that a RICO plaintiff must prove: "(1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity." *Id.* at *4 (citation omitted).

The plaintiff alleged that the city entities in charge of the city's real estate amounted to enterprises, but the Seventh Circuit noted that "[n]one of these by itself amount[ed] to a separate RICO enterprise, which requires both interpersonal relationships and a common interest." *Id.* (citation omitted). The court explained that "[a]lthough Kaye label[ed] each of these organizations an enterprise, none of the allegations in his amended complaint suggest[ed] the organizations themselves had any interest in Defendants' misconduct," and that "his allegations merely establish[ed] that the Defendants, though associated with these organizations, operated collectively in their individual capacities." *Kaye*, 2009 WL 4546948, at *4. However, because the court was "required to make all reasonable inferences in Kaye's favor, and because there [we]re clearer reasons Kaye's claims fail[ed], [the court] generously infer[red] from his allegations an association-in-fact among Defendants." *Id.*

With respect to predicate acts, the court noted that the allegations included extortion, bribery, and fraud. *Id.* at *5. The alleged extortion included: "(1) [Defendant] D'Amato's public 'blacklisting' of Kaye from future real estate dealings with the City; (2) Milwaukee police officers' threats to arrest 'disfavored citizens' who tried to enter a public neighborhood association meeting; and (3) D'Amato's removal of Jill Bondar's yard sign and follow-up phone message." *Id.* The first allegation met "Wisconsin's extortion definition because it plausibly could involve the threat of financial injury to Kaye, made by a defendant with the intent to prevent Kaye from engaging in lawful criticism of a public official." *Id.* As to the second alleged act of extortion, the Seventh Circuit "believe[d] the district court was excessively generous" in inferring that "D'Amato was responsible even though he was not personally present at the meeting, because one of his aides was a witness to the event." *Id.* The court explained:

> In order to find a predicate act of extortion from these allegations, we must infer not only that D'Amato was responsible from his aide's presence, but also that the officers actually barred someone from entering. Kaye alleged in his complaint that "disfavored citizens" were barred from the meeting, but he did not identify a single person who was actually barred. While we are required to make all reasonable inferences in Kaye's favor, the complaint does not contain facts to support these inferences, and without them the claim is not plausible. *See Iqbal*, 129 S. Ct. at 1944.

Kaye, 2009 WL 4546948, at *5. However, the court concluded that because the RICO claim failed for other reasons, it would assume that banning unnamed citizens constituted a predicate act. *Id.* Finally, the court stated that it did "not see how removing an illegally posted sign, and leaving a message requesting information about the identity of the person who posted it, m[et] the statutory definition of extortion." *Id.* at *6.

The complaint also alleged that two of the defendants "steered the sales of city-owned Kane Place and Humboldt Boulevard to one another as part of an illicit agreement," and that "this constitute[d] two acts of bribery" under Wisconsin law. *Id.* The court found that the allegations were insufficient to support this allegation:

> The district court found, and we agree, that Kaye's bribery allegations lack the factual support to constitute sufficiently alleged predicate acts. Kaye fails to allege even a single communication between Fowler and Kohler or any other fact which would support a reasonable inference of an illicit agreement or that one sale was compensation for the other. Kaye asked the court to infer such an agreement based on his allegations that he offered a "better proposal and higher bid" on Kane Place and that another developer offered a bid twenty-five times higher than what Fowler paid for Humboldt Boulevard, but the district court concluded that the city sold Kane Place to Kohler because her proposed project would be more beneficial to city development and tax revenues, and sold Humboldt Boulevard to Fowler because he was the only bidder.

Id. The court concluded that "Kaye's bribery accusations were wholly unsupported by factual allegations sufficient to meet the *Twombly* standard," and that the district court appropriately took judicial notice of public records regarding the sales. *Id.* at *7. The court concluded: "Without additional factual allegations—at a minimum, an allegation of some communication between Fowler and Kohler indicating an agreement to 'swap' the land—Kaye ha[d] not 'nudged his claims . . . across the line from conceivable to plausible.'" *Kaye*, 2009 WL 4546948, at *7 (quoting *Iqbal*, 129 S. Ct. at 1952).

With respect to the fraud allegation, the Seventh Circuit agreed with the district court that "Kaye ha[d] not alleged a situation in which anyone was misled or fraudulently induced to engage in activity to their detriment." *Id.* at *8. The court continued:

> Although Kaye's allegations, if true, may amount to questionable conduct on the part of Defendants, "[n]ot all conduct that strikes a court as sharp dealing or unethical conduct is a 'scheme or artifice to defraud'" as those terms are used in the mail and wire fraud statutes. Kaye's allegation of wire fraud is supported by a single e-mail sent to supporters of the new voting method, and contained no misrepresentations or false statements. This is not

> enough to sufficiently allege a predicate act of wire fraud. Kaye also alleges various acts of honest services fraud relating several transactions surrounding the alleged land swap. However, the allegations fail to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. Specifically, Kaye failed to allege facts including who, what, when, where, and how, for each of his honest services fraud allegations.

Id. (internal citations omitted) (alteration in original).

The Seventh Circuit assumed that two predicate acts had been adequately alleged, but concluded that the plaintiff had failed to show continuity, as required for a RICO claim. *Id.* The court explained that demonstrating "closed-ended continuity," required alleging "'a series of related predicates extending over a substantial period of time,'" *id.* at *9 (citation omitted), and that "Kaye ha[d] not satisfied closed-ended continuity because he ha[d] only sufficiently pleaded two predicate acts, the duration of which was only about seven months," and the court had "repeatedly found this and greater periods of time insufficient," *id.* at *10. The court noted that "[a]ll of the acts alleged by Kaye were wrapped up in one general scheme to control the sale and development of specific city-owned land," and that "[o]nce this was accomplished, the scheme would have ended, and so his allegations d[id] not meet RICO's continuity requirement." *Id.* The court concluded that "[b]ecause [Kaye] failed to show continuity[,] the district court correctly dismissed Kaye's complaint." *Id.* Finally, the court noted that "the real victim of the alleged land swap would [have] be[en] the City of Milwaukee, not Kaye," because "Kaye [could]not demonstrate that the city would have sold him the Kane Place property had they not decided to sell it to Kohler." *Kaye*, 2009 WL 4546948, at *10. The Seventh Circuit also affirmed the imposition of sanctions, noting that the "well-established fact [that Congress enacted RICO to target long-term criminal activity, not as a means of resolving routine criminal disputes] should have been clear to any attorney, including Kaye, after minimal research." *Id.* at *11.

- ***Cooney v. Rossiter***, 583 F.3d 967 (7th Cir. 2009), *cert. denied*, --- S. Ct. ----, No. 09-908, 2010 WL 342184 (May 24, 2010). The plaintiff lost custody of her two sons after a state court found that she suffered from "Munchausen syndrom by proxy." *Id.* at 969. She sued the state court judge (Judge Nordquist), the court-appointed representative for the children (Bischoff), the court-appointed psychiatrist for the children (Rossiter), the children's therapist (Klaung), and her ex-husband's attorney (Cain), alleging constitutional violations. The complaint alleged that "Bischoff 'orchestrated' a court order appointing defendant Rossiter as the children's psychiatrist and began a 'witch hunt' against Cooney by telling Rossiter that 'this may be a situation of Munchausen syndrome (on the part of the Mother).'" *Id.* The psychiatrist later completed his report and concluded that the plaintiff was showing signs of Munchausen syndrome by proxy, and Judge Nordquist granted the petition for protection of the children and temporarily transferred custody to the children's father. *Id.* at 969–70. The complaint alleged that "'numerous other conspiratorial acts occurred,'" including that Klaung "'made false statements'" to the Department of Children and Family

Services that led to a finding that the plaintiff committed child abuse. *Id.* at 970. The Seventh Circuit concluded that Judge Nordquist was entitled to absolute immunity, and that Rossiter and Bischoff were also entitled to absolute immunity because the acts the plaintiff complained about all occurred in the course of Rossiter's and Bischoff's court-appoint duties, and the plaintiff did not allege that "Rossiter or Bischoff engaged in misconduct outside that course . . . ." *Id.* at 969, 970.

The court explained that because Cain and Klaung were private persons, the plaintiff could only sue them under § 1983 by alleging that they agreed with a state officer to deprive her of her constitutional rights. *Cooney*, 583 F.3d at 970. The court examined the proper means of pleading such an agreement:

> *Even before* Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007), and* Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009), a bare allegation of conspiracy was not enough to survive a motion to dismiss for failure to state a claim*. *E.g.*, *Loubser v. Thacker*, 440 F.3d 439, 443 (7th Cir. 2006); *Walker v. Thompson*, 288 F.3d 1005, 1007–08 (7th Cir. 2002); *Boddie v. Schneider*, 105 F.3d 857, 862 (2d Cir. 1997); *Young v. Biggers*, 938 F.2d 565, 569 (5th Cir. 1991). It was too facile an allegation. But it was a narrow exception to the notice-pleading standard of Rule 8 of the civil rules—a rare example of a judicially imposed requirement to plead facts in a complaint governed by Rule 8.
>
> In *Bell Atlantic* the Supreme Court went further, holding that in complex litigation a complaint must, if it is to survive dismissal, make plausible allegations. In *Iqbal* the Court extended the rule of *Bell Atlantic* to litigation in general. *Brooks v. Ross*, 578 F.3d 574, 2009 WL 2535731, at *5 (7th Cir. Aug. 20, 2009); *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 2009 WL 2778220, at *8 n.4 (6th Cir. Sept. 3, 2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 2009 WL 2501662, at *4 (3d Cir. Aug. 18, 2009); *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 n.7 (9th Cir. 2009).

Id. at 970–71 (emphasis added). That court explained that the "specific concern in *Bell Atlantic* was with the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement," and that in *Iqbal*, the Court was concerned that "allowing implausible allegations to defeat a motion to dismiss" would make "inroads into the defense of official immunity—which is meant to protect the officer from the burden of trial and not merely from damages liability." *Id.* at 971 (citing *Smith v. Duffey*, 576 F.3d 336, 339–40 (7th Cir. 2009)). The Seventh Circuit explained that "as the Court said in *Iqbal*, 'determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (citing *Iqbal*, 129 S. Ct. at 1950; *Courie v. Alcoa Wheel & Forged*

Products, 577 F.3d 625, 2009 WL 2497928, at *2 (6th Cir. Aug. 18, 2009)).

The Seventh Circuit emphasized that the level of pleading required depends on the context:

> In other words, *the height of the pleading requirement is relative to circumstances*. We have noted the circumstances (complexity and immunity) that raised the bar in the two Supreme Court cases. This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid pro se litigation, arising out of a bitter custody fight and alleging, as it does, a vast, encompassing conspiracy; and before defendants in such a case become entangled in discovery proceedings, the plaintiff must meet a high standard of plausibility.
>
> *Even before the Supreme Court's new pleading rule, as we noted, conspiracy allegations were often held to a higher standard than other allegations; mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her was not enough*. The complaint in this case, though otherwise detailed, is bereft of any suggestion, beyond a bare conclusion, that the remaining defendants were leagued in a conspiracy with the dismissed defendants. *It is not enough (and would not have been even before* Bell Atlantic *and* Iqbal*) that the complaint charges that "Bischoff and Dr. Lyle Rossiter, with the aid of Judge Nordquist, Dan Cain, and Brian Klaung continued the ongoing violations of Plaintiff, Deborah's Constitutional rights." That is too vague*. With regard to Cain, the only specific allegations in the complaint are that he encouraged Bischoff to tell Rossiter to complete his report "expeditiously"; that he received Rossiter's report before Cooney did; and that he "took control" of the meeting in camera in which all the attorneys discussed the report with Judge Nordquist. The only specific allegation regarding Klaung is that he reported Cooney to the child welfare authority several months after she lost custody of the children. *No factual allegations tie the defendants to a conspiracy with a state actor*.

Id. (citations omitted) (emphasis added). The Seventh Circuit affirmed dismissal of the complaint.

- ***Brooks v. Ross***, 578 F.3d 574 (7th Cir. 2009). The plaintiff was a member of the Illinois Prison Review Board who voted in favor of parole for Harry Aleman, was indicted for misconduct and wire fraud in connection with the parole hearing, and was later acquitted. *Id.* at 577–78. The plaintiff filed suit under § 1983 and state law against various officials involved in the criminal action against him. *Id.* at 578. The district court dismissed the

complaint for failure to state a claim, and the Seventh Circuit affirmed. *Id.* In analyzing the § 1983 due process claim, the Seventh Circuit examined the recent pleading decisions and concluded that notice pleading remains intact:

> We begin with Rule 8, which states in relevant part: "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." FED. R. CIV. P. 8(a). The Rule reflects a *liberal notice pleading regime*, which is intended to "focus litigation on the merits of a claim" rather than on technicalities that might keep plaintiffs out of court. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).
>
> In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Court turned its attention to what was required of plaintiffs at the pleading stage. It concluded that plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555, 127 S. Ct. 1955. The Court was careful to note that this did not impose a probability requirement on plaintiffs: "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 556, 127 S. Ct. 1955. The Court did require, however, that the plaintiffs' claim be "plausible." In other words, "it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" supporting the plaintiff's allegations. *Id.*

Id. at 580–81 (emphasis added) (alteration in original). The court concluded that any concern that *Twombly* had repudiated notice pleading "was put to rest two weeks later, when the Court issued *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)." *Id.* at 581. The court elaborated:

> *Erickson* reiterated that "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (internal quotation marks omitted) (omission in original). This court took *Twombly* and *Erickson* together to mean that "at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007).
>
> *This continues to be the case after* Iqbal. That case clarified that *Twombly*'s plausibility requirement applies across the board, not

> just to antitrust cases. In addition, *Iqbal* gave further guidance to lower courts in evaluating complaints. It noted that a court need not accept as true "legal conclusions[, or t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *We understand the Court in* Iqbal *to be admonishing those plaintiffs who merely parrot the statutory language of the claims that they are pleading (something that anyone could do, regardless of what may be prompting the lawsuit), rather than providing some specific facts to ground those legal claims*, that they must do more. *These are the plaintiffs who have not provided the "showing" required by Rule 8*.
>
> So, what do we take away from *Twombly*, *Erickson*, and *Iqbal*? First, *a plaintiff must provide notice* to defendants of her claims. Second, courts must accept a plaintiff's factual allegations as true, but *some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice* to defendants of the plaintiff's claim. Third, in considering the plaintiff's factual allegations, courts should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements.

Brooks, 578 F.3d at 581 (emphasis added) (alterations in original). The court concluded that allegations that the defendants produced investigative reports, gave interviews, and were present and assisted in interviews were "just as consistent with lawful conduct as [they were] with wrongdoing," and that "[w]ithout more, [the plaintiff's] allegations [were] *too vague to provide notice* to defendants of the contours of his § 1983 due process claim." *Id.* at 581–82 (emphasis added).

The Seventh Circuit examined another paragraph in the complaint, which it concluded actually contained allegations of wrongdoing, but only in the form of conclusions. The paragraph from the complaint stated:

> Plaintiff is informed, believes and alleges that the Defendants while acting in concert with other State of Illinois officials and employees of the Attorney General's Office, Department of Corrections and Prisoner Review Board did knowingly, intentionally and maliciously prosecute Plaintiff and Ronald Matrisciano in retaliation for Plaintiff and the said Ronald Matrisciano exercising rights and privileges under the Constitutions and laws of the United States and State of Illinois.

Id. at 582 (quotation marks omitted). The court concluded that although this paragraph adequately pleaded personal involvement and unlawful conduct, it failed under *Iqbal* "because it [wa]s merely a formulaic recitation of the cause of action and nothing more," and

"[i]t therefore d[id] *not put the defendants on notice of what exactly they might have done* to violate Brooks's rights under the Constitution, federal law, or state law." *Id.* (emphasis added).

- ***Smith v. Duffey***, 576 F.3d 336 (7th Cir. 2009). The plaintiff sold a controlling interest in his company to a closely-held corporation (Dade Behring, Inc.), in exchange for, among other things, options to purchase 20,000 shares of Dade Behring's common stock at $60 a share. *Id.* at 336. The plaintiff also became an employee of the company, but his employment ended with the signing of an agreement in which "he received $1.4 million in cash and retained his stock options with their $60 exercise price, although the appraised value of the stock was only $11." *Id.* at 336–37. Dade Behring declared bankruptcy a few months later, and the plaintiff's stock options were extinguished in the reorganization. *Id.* at 337. The plaintiff sued the officers of Dade Behring who had negotiated the agreement with him, asserting that they knew about the impending bankruptcy that would propose cancelling his stock options and had a duty to disclose this to him. *Id.* The plaintiff alleged two theories: (1) that had he been told that the company was going to declare bankruptcy and that his stock options would be extinguished, he would have required more money to sign the termination agreement; and (2) that he was entitled to the value of the shares in the reorganized company that he would have owned had he been issued stock options in the reorganized company on the same terms as before the reorganization. *Id.* The Seventh Circuit found the latter theory "preposterous," and explained: "The company was broke, and the extinction of equity interests is the usual consequence of bankruptcy. Smith could not have enforced his options once bankruptcy was declared, and he had no right to receive stock and options in the reorganized company and would not have had that right even if he had continued as an employee." *Id.* With respect to the first theory, the court described it as the "only remotely plausible argument," but concluded that it was unlikely the plaintiff would have succeeded in receiving more cash because "[h]ad the defendants told him the company was about to declare bankruptcy, he would have realized, if he didn't already, that his bargaining position was weak, because in bankruptcy he probably would get nothing at all." *Smith*, 576 F.3d at 337. The court explained that "the likeliest explanation of why the defendants did not tell Smith about the bankruptcy is that they assumed, and assumed he assumed, that the parlous state of the company—known to all and symbolized by the disparity between the appraised value of the stock ($11) and the exercise price of the stock options ($60)—made his retention of the stock options of no conceivable significance." *Id.* at 338.

The Seventh Circuit explained that it did not need to rely on *Twombly* or *Iqbal* to decide that the complaint was insufficient:

> In our initial thinking about the case, however, we were reluctant to endorse the district court's citation of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), fast becoming the citation du jour in Rule 12(b)(6) cases, as authority for the dismissal of this suit. The Court held that in complex litigation (the case itself was an antitrust suit)

> the defendant is not to be put to the cost of pretrial discovery—a cost that in complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak—unless the complaint says enough about the case to permit an inference that it may well have real merit. The present case, however, is not complex. Were this suit to survive dismissal and proceed to the summary judgment stage, it would be unlikely to place on the defendants a heavy burden of compliance with demands for pretrial discovery. . . .
>
> But *Bell Atlantic* was extended, a week after we heard oral argument in the present case, in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)—over the dissent of Justice Souter, the author of the majority opinion in *Bell Atlantic*—to all cases, even a case (*Iqbal* itself) in which the court of appeals had "promise[d] petitioners minimally intrusive discovery." *Id.* at 1954. Yet *Iqbal* is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery "provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." *Id.* (emphasis added).
>
> *So maybe neither* Bell Atlantic *nor* Iqbal *governs here*. It doesn't matter. It is apparent from the complaint and the plaintiff's arguments, without reference to anything else, that his case has no merit. That is enough to justify, under any reasonable interpretation of Rule 12(b)(6), the dismissal of the suit.

Id. at 339–40 (emphasis added) (alteration in original).

- ***Hecker v. Deere & Co.***, 569 F.3d 708 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1141 (2010). The plaintiffs were employees who alleged that their employer, and a 401(k) plan trustee and investment advisor, breached fiduciary duties under the Employee Retirement and Income Security Act (ERISA). On rehearing of its order affirming the district court's dismissal of the complaint, the court explained that the fact that the *Iqbal* opinion had been issued since its original decision did not change the result:

> Applying the pleading standards enunciated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), we concluded [in the original opinion] that these plaintiffs failed to state a claim for the kind of fiduciary misfeasance the Secretary describes. At the time we wrote, the Court had not yet handed down

> *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *Iqbal* reinforces *Twombly's* message that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. The Court explained further that "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)." *Id.* at 1950.

Id. at 710–11 (second and third alterations in original). The court concluded that: "*this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim upon which relief can be granted." *Id.* at 711.

- ***Brown v. JP Morgan Chase Bank***, 334 F. App'x 758, No. 08-1890, 2009 WL 1761101 (7th Cir. Jun. 23, 2009) (unpublished order). The plaintiff sued under § 1985(3), asserting that the defendant creditors conspired to violate his civil rights based on his race. The claims were based on the creditors moving in state court to vacate a foreclosure decree seven months after a bankruptcy dismissal, claiming they had just discovered that the automatic stay was in effect at the time of the foreclosure action. *Id.* at *1. The district court dismissed for failure to state a claim and the Seventh Circuit affirmed. The Seventh Circuit explained:

> Brown's complaint does not allow a plausible inference that the defendants are liable under § 1985. As is relevant here, a claim under § 1985 requires a racially motivated conspiracy to violate or interfere with a plaintiff's federally protected rights. Brown has not explained how either Chase's allegedly false statement or its unsigned certificate of service in its request to vacate the foreclosure decree, both filed several months after the bankruptcy action ended, violated or interfered with any federal right.
>
> Brown's grievance that Chase violated his civil rights by not dismissing the foreclosure action in August 2005 also does not state a claim. We have not held that the automatic stay imposes on creditors an affirmative duty to dismiss pending lawsuits, though at least one other circuit has so held. But in any case Brown's complaint does not "contain any factual allegation to plausibly suggest [that defendants had] discriminatory state of mind." *See Iqbal*, 129 S. Ct. at 1952. In *Iqbal*, the plaintiff filed a *Biven*[]*s* action against government officials claiming that they detained and abused him after the terrorist attacks of September 11, 2001, "on account of his religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 1954 (internal quotation marks omitted).

> The Court held that Iqbal's bare-bones allegations were legal conclusions and therefore insufficient to state a claim for discrimination. *Id.* Brown's claim is at least as deficient: He gives us no "factual context," *see Iqbal*, 129 S. Ct. at 1954, or reasons to support his unexplained legal conclusion that Chase discriminated against him because of his race when, consistent with the stay, it refrained from moving ahead with its foreclosure action and merely neglected to dismiss it.

Id. at *2 (first alteration in original) (internal citations omitted).

Eighth Circuit

- ***Reynolds v. Dormire***, --- F.3d ----, No. 10-1473, 2011 WL 561982 (8th Cir. Feb. 18, 2011). Missouri prison inmate Jack Reynolds brought a complaint under § 1983, pleading various violations of the Eighth Amendment. Reynolds alleged that two Northeast Correctional Center correctional officers ("COs") refused to remove his restraints during a day-long journey to Jefferson City Correctional Center ("JCCC") for a medical appointment and refused his requests to use the restroom without restraints. He also alleged that five JCCC COs were deliberately indifferent to his safety by parking the prison van too close to a sally port pit (a trench that serves as a secure entryway into a prison) and by failing to help him exit the van, which resulted in his falling approximately five feet into the pit and sustaining injuries. Finally, Reynolds claimed that Dave Dormire, the warden of JCCC, violated his Eighth Amendment rights by failing to eliminate the obviously hazardous nature of the sally port pit and failing to better train his subordinates.

  The district court dismissed the complaint, before service, for failure to state a claim. The Eighth Circuit affirmed the dismissal as to five of the seven COs and as to the warden, but reversed the dismissal of the complaint as to the remaining two COs. The Eighth Circuit reasoned as follows:

  > We conclude that Reynolds failed to state an Eighth Amendment claim with regard to his allegations against the two Northeast Correctional Center COs. His pleadings are devoid of any allegation suggesting that the two COs acted with deliberate indifference to his safety in restraining him throughout the day. Also, to the extent that Reynolds alleged that the restraints prevented him from relieving himself, his complaint acknowledged that he could have used the bathroom, albeit with some difficulty, at any time during his sojourn at JCCC.
  >
  > As to the Eighth Amendment claims arising from his fall at the sally port, we conclude that Reynolds failed to state a claim against three of the five JCCC COs . . . who, according to Reynolds's

complaint, violated his constitutional rights simply by being on duty in the vicinity of his accident at the time he injured himself. *See Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985) (holding that, in order for a claim to be cognizable under § 1983, plaintiff must allege that the defendant "was personally involved in or had direct responsibility for incidents that injured him").

Reynolds's claims against the remaining two JCCC COs, defendants King and John Doe I, are a different matter, however. King was tasked with transporting prisoners within JCCC and, according to Reynolds's complaint, parked the van too close to the sally port pit. John Doe I was the CO on duty at the sally port supervising the prisoners exit[ing] the van when Reynolds fell. As an initial matter, there appears to be no dispute that Reynolds made sufficient factual allegations that a substantial risk to his safety existed. The only question is whether his pleadings could support an inference that the defendants manifested deliberate indifference to that risk. Although "naked assertion[s]" that King and John Doe I "knew . . . that in all probability plaintiff would back-up and fall" do not state a claim to relief that is plausible on its face, *see Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)), Reynolds's complaint and attached copies of grievances he had submitted contain sufficient allegations to withstand dismissal. The complaint alleged that King parked "approximately three feet" from the edge of the sally port pit. The complaint then alleged that Reynolds, his legs shackled and his arms secured by a "black box," was obliged to back out of the van, using a stool to descend from the vehicle. As Reynolds exited the van, John Doe I allegedly "started backing away" rather than assisting him, at which point Reynolds lost his footing and fell into the pit.

While such allegations, standing alone, appear to support a finding of mere negligence, Reynolds's complaint also alleged that "[f]urther, investigation will more than likely show that plaintiffs [sic] falling into this pit is not an isolated incident." In his grievance attached to the complaint, Reynolds elaborated that "the JCCC corrections personel [sic] knew about the hazard of this JCCC sally-port pit, as one other person had already, that very same day, fell [sic] into this very same JCCC sally-port pit." Moreover, the grievance also alleged that, immediately following the accident, an unnamed correctional officer said, "I warned you people[ ] that this would happen, if you parked so close to the sally-port pit." Taking all these allegations as true and drawing all reasonable inferences in the

> plaintiff's favor, we conclude that Reynolds sufficiently alleged that King and John Doe I were aware of the substantial risk to his safety and that they recklessly disregarded that risk by parking the van too close to the sally port pit (in King's case) and by failing to help Reynolds descend from the van (in John Doe I's case).
>
> Finally, we conclude that the district court properly dismissed Reynolds's claims against JCCC's Warden Dormire. With regard to Reynolds's claim against the warden in his individual capacity, the complaint first alleged that the warden neglected to eliminate or warn of the hazardous conditions at the sally port. It is settled, however, that "a warden's general responsibility for supervising the operations of a prison is insufficient to establish personal involvement." *Ouzts v. Cummins*, 825 F.2d 1276, 1277 (8th Cir. 1987) (per curiam). And to the extent Reynolds pleaded that Warden Dormire personally failed to rectify the sally port conditions, he made no allegation permitting an inference that the warden himself knew of, but recklessly disregarded, the risk of accident. The claim that the warden inadequately trained his staff also was properly dismissed; as above, Reynolds alleged no facts suggesting that the risk of serious harm due to the negligence of the personnel on duty at the sally port was so obvious to the warden that he acted in a deliberately indifferent manner by failing to better train them.

Reynolds, 2011 WL 561982, at *2–3 (footnotes and internal citations omitted)

- ***Ritchie v. St. Louis Jewish Light***, 630 F.3d 713 (8th Cir. 2011). Lisa Ritchie, a former employee of the St. Louis Jewish Light hospital filed a complaint against the hospital and her supervisor under the Fair Labor Standards Act (FLSA), alleging that her employment was terminated in retaliation for her insisting on recording her overtime work. The district court dismissed her complaint on the ground that the FLSA makes unlawful only retaliation for formal complaints raised under the FLSA, and does not cover informal FLSA complaints made to one's employer.

  The Eighth Circuit affirmed on the ground that Ritchie's complaint failed to state a claim, even assuming that the FLSA does make it unlawful for an employer to retaliate against an employee for raising purely informal FLSA complaints.

  Ritchie's complaint, as summarized by the Eighth Circuit, alleged that:

  > 7. Starting on or about May or June 2009, [Ritchie's supervisor] Levin asked Ritchie to perform work ("Work") [formerly] performed by two employees by herself which Ritchie commenced to do.

> 8. Levin asked Ritchie to perform the Work without recording overtime.
>
> 9. The Work required that Ritchie perform overtime hours (more than 40 hours in a week) ("Overtime") which Ritchie recorded.
>
> 10. Levin complained to Ritchie about her recording the Overtime and again requested that she perform the Work without recording overtime.
>
> 11. When Ritchie continued to record the Overtime, she was terminated by Levin . . . .

Ritchie, 630 F.3d at 716 (quotation marks omitted).

The court explained its decision to affirm dismissal as follows:

> Even assuming that informal complaints are sufficient to trigger the anti-retaliation provision of the FLSA, a legal conclusion we do not make, Ritchie failed to allege sufficient facts to indicate that she made even an informal complaint to either Levin or St. Louis Jewish Light. The only complaining asserted in her pleading goes the other way—Levin complaining to Ritchie. Ritchie asserts that she complained pursuant to the FLSA when she gave "Levin notice that she believed Levin's instructions were a violation of the law because she, in fact, recorded the overtime hours in writing despite his orders not to record them." In fact, rather than constituting an affirmative complaint that would trigger the anti-retaliation provision of the FLSA, her recording of her overtime could be nothing more than mere insubordination, she having been instructed to the contrary. Insubordination is not protected under the FLSA, and insubordination is not sufficient to trigger the anti-retaliation provision in 29 U.S.C. § 215(a)(3). As appellees' counsel noted at oral argument, if merely recording one's overtime is a "complaint" that triggers the anti-retaliation provision of the FLSA, an employer would not be able to discipline an employee for working unauthorized overtime so long as the employee recorded the overtime.
>
> As the Supreme Court has recently said, the plausibility standard, which requires a federal court complaint "to state a claim to relief that is plausible on its face, . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks omitted). "[W]here 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.'" *Id*. at 1950 (quoting FED. R. CIV. P. 8(a)(2)).
>
> To establish a prima facie case of retaliation under the FLSA, Ritchie would have to show that she participated in statutorily protected activity, that the appellees took an adverse employment action against her, and that there was a causal connection between Ritchie's statutorily protected activity and the adverse employment action. *See Grey v. City of Oak Grove*, 396 F.3d 1031, 1034–35 (8th Cir. 2005). The facts pleaded in Ritchie's complaint do not permit us to infer more than the mere possibility of misconduct. Thus, Ritchie's complaint merely alleged, but did not show, that Ritchie is entitled to relief.

Id. at 716–17 (footnote and internal citations omitted).

- ***Hamilton v. Palm***, 621 F.3d 816 (8th Cir. 2010). Plaintiff Hamilton filed a diversity negligence action against the Palms, alleging that he fell and was seriously injured while doing construction work on the Palms's property. *Id*. at 817. The Palms moved to dismiss, arguing that Hamilton could not recover on his claim as an independent contractor based on the inherently-dangerous-activity theory of landowner liability. *Id*. Hamilton responded that he was not suing as an independent contractor and that his complaint alleged that he was "employed" by the Palms. *Id*. The Palms replied that Hamilton did not adequately plead a master-servant relationship necessary to establish employer liability. *Id*. The district court agreed and dismissed the complaint because Hamilton "merely alleges generally that he was Defendants' employee and has not alleged facts to plausibly support such a conclusion." *Id*. The Eighth Circuit reversed, finding that "this was an unwarranted extension of the pleading standards of [*Twombly*] and [*Iqbal*]." The Eighth Circuit explained:

  > Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." *Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2). Rather, those decisions confirmed that Rule 8(a)(2) is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949; *see Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). However, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949 (*quoting Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). A pleading that merely pleads "labels and conclusions," or a "formulaic recitation" of the elements of a cause of action, or "naked assertions" devoid of

> factual enhancement will not suffice. *Id.,* (quoting *Twombly)*. Determining whether a claim is plausible is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

Hamilton, 621 F.3d at 817-18. The court then instructed that: "[u]nder Missouri law, to establish a common law claim of employer liability, Hamilton must prove that the Palms negligently breached the employer's duty to maintain a safe workplace, and that this negligence was the direct and proximate cause of Hamilton's injuries." *Id.* at 818. And determined that the only element of the claim at issue was "whether Hamilton's complaint sufficiently alleged that the Palms were his employers." *Id.* Then the court explained that it "need look no further" than Rule 84 of the Federal Rules of Civil Procedure and Form 13. Rule 84 provides that: "The forms in the Appendix suffice under these rules." *Id.* And Form 13 in the Appendix to the Federal Rules of Civil Procedure, entitled, "Complaint for Negligence Under the Federal Employers' Liability Act," includes the allegation that: "During this work, the defendant, as the employer, negligently put the plaintiff to work...." *Id.* The court decided that "[a]s incorporated by Rule 84, Form 13 makes clear that an allegation in any negligence claim that the defendant acted as plaintiff's 'employer' satisfies Rule 8(a)(2)'s notice pleading standard for this element." *Id.* The court determined that, even without Rule 84, the result would be the same because "[c]ommon sense and judicial experience counsel that pleading this issue does not require great detail or recitation of all potentially relevant facts in order to put the defendant on notice of a plausible claim." *Id.* at 819. The court then addressed defendant's argument that plaintiff's allegations showed he was an independent contractor and decided that it did not matter: "Hamilton's complaint raised plausible inferences of both employee and independent contractor status. Which inference will prove to be correct is not an issue to be determined by a motion to dismiss." *Hamilton*, 621 F.3d at 819.

- ***Detroit General Retirement System v. Medtronic, Inc.***, 621 F.3d 800 (8th Cir. 2010). Plaintiffs, Detroit General Retirement System (DGRS), alleged that Medtronic, Inc. engaged in securities fraud by misleading investors as to the seriousness of the problem with the Fidelis Lead, a Food and Drug Administration (FDA)-approved device wire that connects an internally implanted defibrillator to a patient's heart and delivers electricity if a shock is needed. *Id.* at 803-04. Medtronic responded with a Rule 12(b)(6) motion to dismiss for failure to state with particularity a legitimate basis for the claims of fraud. *Id.* at 804. The district court dismissed the case and the Eighth Circuit affirmed. *Id.*

  Medtronic designed, manufactured, marketed and sold the Fidelis lead, which "quickly became the most popular defibrillator lead on the market" and was implanted in more than 260,000 patients by 2007. *Id.* at 803. In February 2007, a doctor informed Medtronic that he was concerned about the failure rate of the Fidelis leads at his heart clinic and provided Medtronic with a study he and his colleagues had completed at the clinic, which he planned to publish in a prominent medical journal. *Id.* The study found that Fidelis leads "were prone to early failure because of a tendency to fracture." *Medtronic*, 621 F.3d at 803. And

"recommended against use of the device." *Id.* Medtronic subsequently filed an application with the FDA to modify the design of the Fidelis lead, but continued to sell the Fidelis lead until October 2007. *Id.* at 803-04. After Medtronic recalled the Fidelis lead, its stock price dropped just over 11%.

The court explained that Plaintiffs' claims must satisfy heightened pleading standards:

> The [Private Securities Litigation] Reform Act provides that, to survive a motion to dismiss, a securities plaintiff must satisfy two heightened pleading standards. 15 U.S.C. § 78u-4(b)(3). First, the plaintiff must plead falsity by specifying each allegedly misleading statement and the reasons why each statement is misleading. 15 U.S.C. § 78u-4(b)(1). If falsity is alleged based upon information and belief, the complaint must state with particularity all facts on which the belief is formed. *Id*. In addition, the plaintiff must plead scienter by "stat[ing] with particularity facts giving rise to a strong inference that the defendants acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

Id. at 805 (quoting *In re Cerner Corp. Sec. Litig.*, 425 F.3d 1079, 1083 (8th Cir.2005).) And that "[i]n order to satisfy the Reform Act's falsity pleading standard, a complaint may not rest on mere allegations that fraud has occurred. Instead the complaint must indicate why the alleged misstatements would have been false or misleading at the several points in time in which it is alleged they were made. In other words, the complaint's facts must necessarily show that the defendant's statements were misleading." *Id.*

DGRS argued that Medtronic "materially misled" investors via the"dear doctor letter" it sent in March 2007:

> Dear Doctor,
>
> Medtronic has received reports from a limited number of implanting physicians indicating they have experienced higher than expected conductor fracture rates in their centers with Sprint Fidelis leads. While current overall Sprint Fidelis performance is consistent with other leads, Medtronic is actively investigating these reports, has reviewed them with our Independent Physician Quality Panel, and would like to share what we know at this time.
>
> Through detailed assessment of reported fractures, we have identified two primary locations where conductor fractures have occurred: 1) distal portion of the lead and 2) near the anchoring sleeve tie down. The distal conductor fractures affect the anode (ring electrode) and fractures that occur around the anchoring sleeve affect the cathode

> (helix tip electrode). Fractures at both locations appear to present clinically as over-sensing, increased interval counts and inappropriate shocks. Medtronic has worked closely with physicians who have experienced fractures and conducted significant bench testing in an attempt to reproduce the fractures and identify a root cause. At this point, our investigation suggests that variables within the implant procedure may contribute significantly to these fractures.
>
> For distal conductor fractures, our investigation has identified severe bending or kinking of the distal end of the lead over the lead body while passing through tortuous vasculature as a significant contributing factor ... Medtronic recommends avoiding severe bending or kinking of the lead during implantation. If you encounter excessive resistance resulting in severe bending or kinking while advancing the lead, please remove the lead and return it to Medtronic.
>
> For conductor fractures that occur around the suture sleeve, our preliminary investigation suggests that under certain implant techniques, the lead appears to be exposed to severe bending or kinking in the pectoral area ... Medtronic recommends the lead be re-sutured and/or pocket reassembled per guidelines in the Medtronic lead implant manual. In addition, positioning the anchoring sleeve against or near the vein may be helpful.
>
> Sprint Fidelis lead model 6949, 6948, 6931, and 6930 were market released in the U.S. and internationally in September and October 2004. Performance of model 6949, the Sprint Fidelis lead currently followed in our System Longevity Study, indicated survival is 98.9% at two years. Sprint Fidelis 6949 performance based upon return products analysis shows 99.86% chronic fracture-free survival at two years. Both evaluation methods suggest performance is in line with other Medtronic leads and consistent with lead performance publicly reported by other manufacturers.

Id. at 805-06. DGRS alleged that this letter "falsely reassured investors that the damage was due to doctor error and that the Fidelis model failure rate was in line with that of other leads." *Medtronic*, 621 F.3d at 806. The court rejected this argument because "[i]t is difficult to see how a letter disclosing a possible problem and an investigation into that problem was materially misleading." *Id.* DGRS also alleged that "Medtronic had a duty to disclose other information on the Fidelis fracture rates, the exclusion of which rendered the statements in the letter materially misleading." *Id.* But the court pointed out that "DGRS fail[ed] to allege facts showing Medtronic possessed the information at the time the supposedly inconsistent statements were made" and "even if Medtronic was aware of the information, the information itself is not inconsistent with Medtronic's statements to the public and to

investors." *Id.*

The court then agreed with the district court's finding that "Medtronic's failure to disclose statistically insignificant information could not have been misleading in light of the information disclosed in the letter" because "DGRS has failed to allege any facts proving the omitted information would have put investors on notice at that time that either doctor error was not a significant contributing factor in the device failures or the overall failure rate of the device was higher than that of other devices." *Id.* at 807.

The court then addressed DGRS's remaining allegations and found them all insufficient to show that Medtronic "materially misled" investors because "DGRS has not alleged facts sufficient to show there was a problem with the Fidelis leads at the time those statements were made." *Id.* at 808. And "most of the statements DGRS lists are from product advertising materials and are so vague that an investor could not reasonably rely on them for any information related to the soundness of the investment." *Medtronic*, 621 F.3d at 808. The court then addressed scienter, and decided that, because DGRS did not show that the statements were false, it also failed to show that Medtronic or its officers knew the statements to be false. *Id.*

Having decided that DGRS failed to sufficiently plead material falsity or scienter, the court turned to whether it should have been given an opportunity to amend its complaint. *Id.* at 809. DGRS sought to amend its complaint to allege that "Medtronic failed to disclose that there were actually four, instead of two, ways in which the devices had been reported to fracture." *Id.* But the court noted that, even if this was true, it would have "no bearing on the material question, which is whether Fidelis devices were known to exceed acceptable failure rates overall." *Id.* DGRS also requested leave to amend the complaint "to include the allegation that 40% of the fractures in Medtronic's returned products data involved a hardware malfunction resulting in a break that could affect electrical performance of the lead." *Id.* But the court determined that this allegation would not cure the complaint's deficiencies: "The number of expected failures that result from mechanical problems is not relevant to the overall performance of the device. Even if 100% of the returned devices were mechanical failures, Fidelis would still be a viable product as long as the number of returned devices were within the acceptable failure rate." *Medtronic*, 621 F.3d at 809. Finally, the court decided that adding allegations that "Medtronic requested permission from the FDA to modify the design of the Fidelis leads during the class period" would not cure the complaint's deficiencies because it "would not solve the fatal defect in the complaint," which was the lack of an allegation that "Medtronic was aware that the physical failure was causing fractures in higher than acceptable numbers across the market." *Id.* at 810.

- ***C.N. ex rel. J.N. v. Willmar Public Sch., Indep. Sch. Dist. No. 347***, 591 F.3d 624 (8th Cir. 2010). The lawsuit arose out of actions taken by school officials while C.N. was in elementary school. After undergoing testing, C.N. was "designated as developmentally delayed with speech and language impairment." *Id.* at 627. As a result, "C.N. had an individualized education program (IEP) geared toward addressing her special needs," which

"included a behavior intervention plan (BIP), which authorized the use of restraint holds and seclusion when C.N. exhibited various target behaviors." *Id.* After C.N. exhibited behavioral problems, the district had her examined by an outside evaluator, and the evaluation resulted in the district transferring her to another school (Lincoln) and revising her IEP and BIP. *Id.* at 627–28. C.N.'s mother, J.N., allegedly objected to the BIP's continued authorization of restraint holds and seclusion. *Id.* at 628. During her time at Lincoln, C.N. worked with a special education teacher (Lisa Van Der Heiden). *Id.* The complaint alleged that Van Der Heiden misused the techniques authorized in C.N.'s BIP and mistreated C.N. *C.N.*, 591 F.3d at 628. The complaint specified that:

> Van Der Heiden allegedly made C.N. sit at a "thinking desk" and hold a physical posture for a specified time, or else face restraint or seclusion. Van Der Heiden also allegedly yelled and shouted at C.N., demeaned and belittled C.N., once pulled C.N.'s hair when she would not hold a posture at the thinking desk and once denied C.N. use of the restroom, causing an accident. C.N. also reported to J.N. that Van Der Heiden "choke[d] her and that the restraints hurt her very much."

Id. When C.N. was in third grade, a paraprofessional reported Van Der Heiden to the Minnesota Department of Education's (MDE) Maltreatment of Minors Division based on Van Der Heiden's mistreatment of C.N. *Id.* After learning of this report and two other reports against Van Der Heiden, J.N. filed a complaint with the MDE's Accountability and Compliance Division. *Id.* "[A]ccording to the complaint, the MDE investigations concluded that Van Der Heiden violated a number of C.N.'s rights as a child with a disability and also maltreated C.N. by denying her access to the restroom." *Id.* The school district also conducted its own investigation of allegations that Van Der Heiden mistreated C.N. and another student. *Id.* The school district allegedly had conducted two previous investigations, but had found no misconduct. *C.N.*, 591 F.3d at 628. "This time, the District found evidence that Van Der Heiden denied C.N. access to the restroom, but attributed the incident to a lapse in judgment." *Id.* "Thus, Van Der Heiden was never disciplined by the District for any maltreatment allegations." *Id.* (footnote omitted). J.N. requested that the school district's superintendent notify her if Van Der Heiden returned to Lincoln, but the superintendent responded that she had no obligation to provide that information. *Id.* at 629. J.N. later withdrew C.N. from Lincoln and enrolled her in a private school for the rest of the year. *Id.* C.N. requested an administrative hearing and "filed a complaint with the MDE, challenging the adequacy of the educational services provided by the District," but the Administrative Law Judge dismissed the request because C.N. was no longer enrolled in the district and had transferred to another district without requesting a hearing. *Id.* C.N. appealed to the district court and asserted federal and state claims against the district, the district board chairman in his official capacity, and Van Der Heiden, the superintendent, Lincoln's principal, and the supervisor of special education programming, in both their individual and official capacities. *C.N.*, 591 F.3d at 629. The relevant federal claims included claims under the Individuals with Disabilities Education Act (IDEA), section 504 of the Rehabilitation Act, and § 1983 for violations of the Fourth and Fourteenth Amendments. *Id.* The district court dismissed

the IDEA claim because C.N. did not request a hearing before leaving the school district, dismissed the remaining federal claims for failure to state a claim, and declined to exercise jurisdiction over the state law claim. *Id.* The Eighth Circuit affirmed.

On appeal, the Eighth Circuit affirmed the dismissal of the IDEA claim, noting that under the relevant case law, the claim could not proceed because C.N. did not request an administrative hearing until after she had left the district. *See id.* at 631. The court rejected the argument that the claim should be allowed to proceed notwithstanding C.N.'s failure to request a hearing before leaving the district, noting that "[a]pplying our prior precedents in this case, [the court was] likewise bound to affirm dismissal of C.N.'s IDEA claim." *Id.* at 632. The court also affirmed dismissal of the Rehabilitation Act claim because the same exhaustion requirements that IDEA requires applied and because C.N. had only "broadly assert[ed] that the district court erred in dismissing this claim for failure to exhaust, but limit[ed] her remaining arguments to her constitutional claims." *Id.* at 631 n.7.

The constitutional claims alleged violations of C.N.'s Fourth Amendment right to be free from unreasonable seizures and her Fourteenth Amendment right to substantive due process. *C.N.*, 591 F.3d at 632. "The district court dismissed those claims as to the District after concluding the complaint failed to identify an unconstitutional District policy or custom that caused the alleged injuries." *Id.* The district court also found that "the individual defendants were entitled to qualified immunity because C.N. failed to allege either a Fourth Amendment or a substantive due process violation." *Id.* The Eighth Circuit found no error in these conclusions and affirmed. *Id.*

With respect to the Fourth Amendment claim against the individual defendants, "[t]he district court concluded C.N. failed to allege a Fourth Amendment violation because C.N.'s IEP authorized the use of restraints and seclusion to manage her behavior and thus, even if such actions amounted to seizures, they were not constitutionally unreasonable." *Id.* at 632–33. Applying the relevant Fourth Amendment case law, the Eighth Circuit explained that the dismissal was proper:

> Assuming C.N. was seized within the meaning of the Fourth Amendment when Van Der Heiden employed those methods, we agree with the district court that any such seizures were not unreasonable. We have held that an authorized professional's treatment of a disabled person within the state's care is reasonable if his or her actions are "not a substantial departure from accepted professional judgment, practice, or standards." *Heidemann v. Rother*, 84 F.3d 1021, 1030 (8th Cir. 1996). Here, C.N.'s IEP authorized the use of restraints and seclusion and we agree with the district court that the IEP "set the standard for accepted practice." And although J.N. contends she objected to the use of those methods, she did not request a hearing to challenge those methods while C.N. attended school in the District. Because C.N.'s IEP authorized such methods, Van Der

> Heiden's use of those and similar methods like the thinking desk, even if overzealous at times and not recommended by [the outside evaluator], was not a substantial departure from accepted judgment, practice or standards and was not unreasonable in the constitutional sense. Indeed, as the Tenth Circuit recently observed, we would place educators in a very difficult position if we did not allow them "to rely on a plan specifically approved by the student's parents and which they are statutorily required to follow." For these reasons, the district court correctly concluded Van Der Heiden's use of those procedures did not violate C.N.'s Fourth Amendment rights.

Id. at 633 (footnote and internal citation omitted). The Eighth Circuit also rejected C.N.'s argument that "the district court ignored her abuse allegations in concluding she failed to allege a Fourth Amendment violation," as well as C.N.'s suggestion that "those allegations state[d] a claim for excessive force." *C.N.*, 591 F.3d at 634. The Eighth Circuit explained that it had "generally analyzed claims alleging excessive force by public school officials under the rubric of substantive due process, . . . and not the Fourth Amendment," and concluded that the district court had properly found that C.N. failed to allege a Fourth Amendment violation and that the individual defendants were entitled to qualified immunity. *Id.*

In analyzing the substantive due process claim, the Eighth Circuit noted that C.N. "must allege actions by a government official which 'violated one or more fundamental constitutional rights' and were 'shocking to the contemporary conscience.'" *Id.* (citation omitted). The Eighth Circuit explained that the standard for alleging substantive due process was high. *Id.* C.N. argued that she met this high standard, "pointing again to her allegations that Van Der Heiden physically and verbally abused the disabled children in her care, and the other individual defendants failed to stop that conduct." *Id.* The Eighth Circuit explained that these allegations were not sufficient:

> As the Supreme Court has recently reiterated, however, "[a] pleading that offers [merely] 'labels and conclusions'" or "'naked assertion[s]' devoid of 'further factual enhancement'" does not plausibly establish entitlement to relief under any theory. *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (third alteration in original) (quoting *Twombly*, 550 U.S. at 555, 557, 127 S. Ct. 1955). *Judged against these standards, C.N.'s complaint does not state a viable substantive due process claim*. Some of the abuse allegations do not even identify C.N. as the victim of the alleged mistreatment—rather, the complaint simply asserts that on unspecified dates and under circumstances not described, Van Der Heiden allegedly mistreated unidentified disabled children in a variety of ways. *Such vague allegations neither provide the Appellees with fair notice of the nature of C.N.'s claims and the grounds upon which*

> *those claims rest nor plausibly establish C.N.'s entitlement to any relief. Twombly*, 550 U.S. at 555 n. 3, 570, 127 S. Ct. 1955; *see also id.* at 565 n.10, 127 S. Ct. 1955 (disapproving of factual allegations which fail to mention times, places, or persons involved in the specified events, and noting that a defendant seeking to respond to such "conclusory" allegations "would have little idea where to begin."). And even those allegations that are specific to C.N. are little more than general assertions of harm, lacking elaboration as to the context of the alleged incidents or resulting injuries. "[T]he scope of substantive due process is carefully circumscribed," *Flowers* [*v. City of Minneapolis*], 478 F.3d [869,] 875 [(8th Cir. 2007)], and the pleading standard established by Federal Rule of Civil Procedure 8(a)(2) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. The vague allegations set forth in C.N.'s complaint do not plausibly state a claim for a violation of her substantive due process rights, and the individual defendants are entitled to qualified immunity on this claim as well.

Id. at 634–35 (emphasis added) (first second and third alteration in original). The court sympathized with the plaintiff's difficulty in pleading, explaining:

> We are not unsympathetic to C.N.'s arguments that her ability to provide additional factual allegations has been hampered by her communicative problems and the fact she has not been provided complete access to the District's records. *We are, however, bound by the Supreme Court's directive that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Twombly*, 550 U.S. at 570, 127 S. Ct. 1955. C.N.'s vague allegations fall far short of that standard.

C.N., 591 F.3d at 635 n.11 (emphasis added).

With respect to the § 1983 claim, the court noted that "[t]he touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution . . . ." *Id.* at 635 (citation and internal quotation marks omitted). The court concluded that "[b]ecause C.N. ha[d] not alleged a violation of her constitutional rights, it follow[ed] that the District [could not] be liable under § 1983." *Id.* (citations omitted).

The Eighth Circuit affirmed the dismissal, but noted that C.N. could "of course, proceed with her state claims, which were dismissed without prejudice by the district court." *Id.*

Judge Colloton concurred, noting that Minnesota law had changed since the relevant

case—*Thompson ex rel. Buckhanon v. Board of the Special School District No. 1*, 144 F.3d 574 (8th Cir. 1998)), stating that an IDEA claim failed when a due process hearing was not requested before leaving the district—had been decided. *C.N.*, 591 F.3d at 636 (Colloton, J., concurring). Judge Colloton noted that the new statute "provide[d] that a due process hearing must be conducted by the State rather than by the school district in which the student is enrolled," and that "[t]o the extent that *Thompson* rested on the lack of authority for a new school district to order relief from a former school district, that rationale likely ha[d] been superseded by statute and rule." *Id.* Judge Colloton explained, however, that the court's opinion had correctly noted that *Thompson*'s rationale of providing notice to the school district of a problem was still applicable. *Id.* C.N. had argued that even if the rationale of *Thompson* still applied, there should be an exception to the notice requirement if "continued enrollment in the school district likely would result in physical harm or serious emotional harm to the student." *Id.* at 636–37. Judge Colloton agreed with the court's decision that such an exception should not apply in this case:

> I agree with the court, on this record, that no exception to *Thompson* is warranted, because C.N. has not pleaded facts that plausibly support a reasonable inference that continued enrollment at the Willmar school during the course of a due process hearing under the IDEA was likely to result in physical harm or serious emotional harm. *See ante*, at 632 n.8; *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949–50, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The court's decision, however, deals only with the facts of this action, *ante*, at 632 n.8, and does not foreclose the recognition of an equitable exception to the judicially-created *Thompson* rule on an appropriate set of facts.

Id. at 637.

- ***Braden v. Wal-Mart Stores, Inc.***, 588 F.3d 585, No. 08-3798, 2009 WL 4062105 (8th Cir. Nov. 25, 2009). The plaintiff was a Wal-Mart employee and a participant in Wal-Mart's employee retirement plan (the "Plan"). The plaintiff sought to bring a class action against Wal-Mart and its executives involved in managing the Plan, alleging that the defendants violated fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA). *Id.* at *1. The district court dismissed the complaint because it concluded that the plaintiff lacked constitutional standing to assert claims based on breaches of fiduciary duty before he first contributed to the Plan and that he failed to state a plausible claim for relief. *Id.* The Eighth Circuit reversed and remanded. *Id.*

  The complaint contained 5 causes of action, and "[t]he gravamen of the complaint [wa]s that [the defendants] failed adequately to evaluate the investment options included in the Plan." *Id.* Specifically, the complaint asserted that "the process by which the mutual funds were selected was tainted by [the defendants'] failure to consider trustee Merrill Lynch's interest

in including funds that shared their fees with the trustee," and that "[t]he result of these failures . . . [wa]s that some or all of the investment options included in the Plan charge[d] excessive fees." *Id.* The court explained that the factual allegations were detailed:

> Braden alleges extensive facts in support of these claims. He claims that Wal-Mart's retirement plan is relatively large and that plans of such size have substantial bargaining power in the highly competitive 401(k) marketplace. As a result, plans such as Wal-Mart's can obtain institutional shares of mutual funds, which, Braden claims, are significantly cheaper than the retail shares generally offered to individual investors. Nonetheless, he alleges that the Plan only offers retail class shares to participants. Braden also avers that seven of the ten funds charge 12b-1 fees, which he alleges are used to benefit the fund companies but not Plan participants.
>
> Braden alleges further that the relatively high fees charged by the Plan funds cannot be justified by greater returns on investment since most of them underperformed lower cost alternatives. In support of this claim, he offers specific comparisons of each Plan fund to an allegedly similar but more cost effective fund available in the market. In comparison to an investment in index funds, Braden estimates that the higher fees and lower returns of the Plan funds cost the Plan some $140 million by the end of 2007.
>
> Finally, the complaint also alleges that the mutual fund companies whose funds were included in the Plan shared with Merrill Lynch portions of the fees they collected from participants' investments. This practice, sometimes called "revenue sharing," is used to cover a portion of the costs of services provided by an entity such as a trustee of a 401(k) plan, and is not uncommon in the industry. Braden alleges, however, that in this case the revenue sharing payments were not reasonable compensation for services rendered by Merrill Lynch, but rather were kickbacks paid by the mutual fund companies in exchange for inclusion of their funds in the Plan. The Plan's trust agreement requires appellees to keep the amounts of the revenue sharing payments confidential.

Braden, 2009 WL 4062105, at *2. The claims included: (1) a claim for breach of fiduciary duty; (2) a claim that the defendants failed to adequately monitor those responsible for managing the Plan; (3) a claim for breach of the "duty of loyalty by failure to inform Plan participants of certain information relating to the fees charged by the Plan funds, as well as the amounts of the revenue sharing payments made to Merrill Lynch"; (4) a claim that the defendants with oversight responsibility were liable for the breaches of their cofiduciaries; and (5) a claim that the revenue-sharing payments were prohibited under ERISA. *See id.*

The Eighth Circuit concluded that the district court erred in finding that the plaintiff lacked standing, explaining that the plaintiff had "alleged injury in fact that [wa]s causally related to the conduct he s[ought] to challenge on behalf of the Plan." *See id.* at *3–5. The court then turned to evaluating the sufficiency of the complaint, and explained that "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Id.* at *6 (citing *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C. Cir. 2009)). The court also emphasized that evaluating a complaint is "'a context-specific task.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950). With respect to the breach of fiduciary duty claim, the Eighth Circuit noted that only the issue of breach was disputed. *Id.* "[T]he district court found the complaint inadequate because it did not allege sufficient facts to show how [the defendants'] decision making process was flawed." *Braden*, 2009 WL 4062105, at *7. The Eighth Circuit found that the district court improperly applied Rule 8 because, accepting the factual allegations as true, the plaintiff had stated a claim for breach of fiduciary duty. *Id.* The Eighth Circuit explained that the district court erred by "ignor[ing] reasonable inferences supported by the facts alleged" and by "d[rawing] inferences in [the defendants'] favor, faulting Braden for failing to plead facts tending to contradict those inferences." *Id.* The court noted that "[e]ach of these errors violate[d] the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party," *id.* (citing *Northstar Indus. v. Merrill Lynch & Co.*, 576 F.3d 827, 832 (8th Cir. 2009)), and that "*Twombly* and *Iqbal* did not change this fundamental tenet of Rule 12(b)(6) practice," *id.* The court explained:

> The first of these errors stems from the mistaken assumption that Braden was required to describe directly the ways in which appellees breached their fiduciary duties. Thus, for example, the district court faulted the complaint for making "no allegations regarding the fiduciaries' conduct." Rule 8 does not, however, require a plaintiff to plead "specific facts" explaining precisely how the defendant's conduct was unlawful. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). Rather, it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled "'give the defendant fair notice of what the claim is and the grounds upon which it rests,'" *id.* (quoting *Twombly*, 550 U.S. at 555) (alteration omitted), and "allow[ ] the court to draw the reasonable inference" that the plaintiff is entitled to relief. *Iqbal*, 129 S. Ct. at 1949.
>
> Braden has satisfied these requirements. The complaint alleges that the Plan comprises a very large pool of assets, that the 401(k) marketplace is highly competitive, and that retirement plans of such size consequently have the ability to obtain institutional class shares of mutual funds. Despite this ability, according to the allegations of the complaint, each of the ten funds included in the Plan offers only retail class shares, which charge significantly higher

> fees than institutional shares for the same return on investment. The complaint also alleges that seven of the Plan's ten funds charge 12b-1 fees from which participants derive no benefit. The complaint states that appellees did not change the options included in the Plan despite the fact that most of them underperformed the market indices they were designed to track. Finally, it alleges that the funds included in the Plan made revenue sharing payments to the trustee, Merrill Lynch, and that these payments were not made in exchange for services rendered, but rather were a quid pro quo for inclusion in the Plan.

Id. (alteration in original) (footnote omitted). The court noted that the reasonable inferences drawn from the facts alleged supported a viable claim:

> The district court correctly noted that none of these allegations directly addresses the process by which the Plan was managed. It is reasonable, however, to infer from what is alleged that the process was flawed. Taken as true, and considered as a whole, the complaint's allegations can be understood to assert that the Plan includes a relatively limited menu of funds which were selected by Wal-Mart executives despite the ready availability of better options. The complaint alleges, moreover, that these options were chosen to benefit the trustee at the expense of the participants. If these allegations are substantiated, the process by which appellees selected and managed the funds in the Plan would have been tainted by failure of effort, competence, or loyalty. Thus the allegations state a claim for breach of fiduciary duty.

Braden, 2009 WL 4062105, at *8 (citation and footnotes omitted). The court further explained:

> These are of course only inferences, and there may well be lawful reasons [the defendants] chose the challenged investment options. It is not Braden's responsibility to rebut these possibilities in his complaint, however. The district court erred by placing that burden on him, finding the complaint inadequate for failing to rule out potential lawful explanations for appellees' conduct. It stated that [the defendants] "could have chosen funds with higher fees for any number of reasons, including potential for higher return, lower financial risk, more services offered, or greater management flexibility." That may be so, but *Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct*.

Id. (emphasis added). The court stated that "a plaintiff may need to rule out alternative

explanations in some circumstances in order to survive a motion to dismiss," noting that the *Iqbal* case had provided such circumstances. *See id.* The court explained that "[i]t is in this sort of situation—where there is a concrete, 'obvious alternative explanation' for the defendant's conduct—that a plaintiff may be required to plead additional facts tending to rule out the alternative." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1951; citing *Twombly*, 550 U.S. at 566). But the court explained that "[s]uch a requirement [wa]s neither a special rule nor a new one." *Id.* "It [wa]s simply a corollary of the basic plausibility requirement. An inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged." *Id.* The court further explained:

> Not every potential lawful explanation for the defendant's conduct renders the plaintiff's theory implausible. Just as a plaintiff cannot proceed if his allegations are "'merely consistent with' a defendant's liability," *id.* at 1949 (quoting *Twombly*, 550 U.S. at 557), so *a defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct*. And that is exactly the situation in this case. Certainly appellees could have chosen funds with higher fees for various reasons, but this speculation is far from the sort of concrete, obvious alternative explanation Braden would need to rebut in his complaint. Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the "complaint is construed most favorably to the nonmoving party," *Northstar Indus.*, 576 F.3d at 832, and would impose the sort of "probability requirement" at the pleading stage which *Iqbal* and *Twombly* explicitly reject. *See Iqbal*, 129 S. Ct. at 1949–50.
>
> To recognize that the pleading standard established by Rule 8 applies uniformly in "all civil actions," *id.* at 1953 (quoting FED. R. CIV. P. 1), is not to ignore the significant costs of discovery in complex litigation and the attendant waste and expense that can be inflicted upon innocent parties by meritless claims. *See Twombly*, 550 U.S. at 558–60. Here, however, we must be attendant to ERISA's remedial purpose and evident intent to prevent through private civil litigation "misuse and mismanagement of plan assets."

Braden, 2009 WL 4062105, at *9 (footnotes and citation omitted) (emphasis added). The court noted that the Secretary of Labor had submitted an amicus curiae brief that "expressed concern over the erection of 'unnecessarily high pleading standards' in ERISA cases." *Id.* at *9 n.8.

The court found it important that the plaintiff had limited access to information supporting his claims:

> No matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences. Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, *we must also take account of their limited access to crucial information*. If plaintiffs cannot state a claim without pleading facts which *tend systemically to be in the sole possession of defendants*, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations *counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief*.

Id. at *9 (emphasis added). The court concluded that the plaintiff adequately pleaded his breach of fiduciary duty claim, noting that "the district court erred in dismissing [that claim] because it misapplied the pleading standard of Rule 8, most fundamentally by failing to draw reasonable inferences in favor of the non-moving party as is required." *Id.*

The Eighth Circuit also found that the plaintiff had adequately pleaded his claim for breach of the duty of loyalty because "he ha[d] alleged sufficient facts to support an inference that nondisclosure of details about the fees charged by the Plan funds and the amounts of the revenue sharing payments would 'mislead a reasonable [participant] in the process of making an adequately informed decision regarding' allocation of investments in the Plan." *Id.* at *12 (citation omitted) (second alteration in original).

With respect to the claim that the revenue-sharing payments were prohibited under ERISA, the Eighth Circuit noted that the district court "concluded . . . that Braden's claims failed because he had not pled facts raising a plausible inference that the payments were unreasonable in relation to the services provided by Merrill Lynch and thus had failed to show they were not exempted by § 1108." *Id.* The Eighth Circuit explained that "[t]his was wrong because the statutory exemptions established by § 1108 are defenses which must be proved by the defendant," and that "Braden d[id] not bear the burden of pleading facts showing that the revenue sharing payments were unreasonable in proportion to the services rendered . . . ." *Braden*, 2009 WL 4062105, at *12. The Eighth Circuit noted that its conclusion was supported by the language of the statute, which "is plain, and . . . allocates the burdens of pleading and proof," and was "in keeping with traditional principles of trust law, which inform . . . interpretation of ERISA." *Id.* at *13. The court noted that "Braden could not possibly show at this stage in the litigation that the revenue sharing payments were unreasonable in proportion to the services rendered because the trust agreement between Wal-Mart and Merrill Lynch required the amounts of the payments to be kept secret," and that "[i]t *would be perverse to require plaintiffs bringing prohibited transaction claims to plead facts that remain in the sole control of the parties who stand accused of wrongdoing*." *Id.* at *14 (emphasis added).

Because the district court did not consider the merits of the second and fourth claims, having dismissed them as derivative of other claims, the Eighth Circuit remanded those claims for the district court to consider. *Id.*

- ***McAdams v. McCord***, 584 F.3d 1111 (8th Cir. 2009). The plaintiffs sued several executives of a provider of mortgage lending and brokerage services (UCAP) and UCAP's outside auditor, claiming that the defendants fraudulently induced them to invest in UCAP by misrepresenting UCAP's financial situation. *Id.* at 1113. The district court dismissed the complaint, finding that the investors did not meet the heightened pleading required under Rule 9 and the Private Securities Litigation Reform Act of 1995 (PSLRA). On appeal, the Eighth Circuit agreed that the investors failed to state a claim for federal securities fraud. Claims under the relevant securities statutes required "(1) a material misrepresentation or omission, (2) scienter, i.e., a wrongful state of mind, (3) a connection with the purchase or sale of a security; (4) reliance, (5) economic loss, and (6) loss causation." *Id.* Rule 9 and the PSLRA require stating with particularity the circumstances of the alleged fraudulent statement, and "[t]he complaint must also 'state 'with particularity' facts giving rise to a 'strong inference' that the defendant acted with the scienter required for the cause of action.'" *Id.* (citation omitted). The district court dismissed the complaint because it failed to plead with particularity the circumstances of the alleged fraud and the facts giving rise to a strong inference of scienter. *Id.* The only issue on appeal was whether the investors stated a claim against the auditor for federal securities fraud.

  With respect to the auditor, the court noted that while the complaint made numerous allegations of false statements by UCAP's executives and alleged that the auditor assisted the executives in distorting UCAP's financial statements, the statute only imposed liability on those who make misstatements or omissions, not those who aid in making misstatements or omissions. *Id.* at 1114. The court further noted that the complaint alleged two misstatements by the auditor—that the audit was conducted in accordance with generally accepted accounting principles and that UCAP's financial statements fairly presented UCAP's financial condition. *McAdams*, 584 F.3d at 1114. The court also noted that the complaint alleged that the auditor "issued 'clean' audit opinions when it knew UCAP's financial statements were not accurate," and that the auditor therefore "allegedly made false statements with scienter." *Id.* But the court found that it did not need to decide whether the complaint adequately alleged with particularity facts giving rise to a strong inference of scienter because the complaint failed to adequately plead loss causation. *Id.* "To adequately plead loss causation, the complaint must state facts showing a causal connection between the defendant's misstatements and the plaintiff's losses." *Id.* (citation omitted). The court held that the plaintiffs failed to adequately plead loss causation:

  > The complaint alleges that McAdams invested over $3 million in UCAP, that Homm invested over $6 million, and that Smyth invested $2 million. The complaint then broadly alleges that "as a direct and proximate result of Defendants' fraudulent misrepresentations and omission of material facts, Plaintiffs have

been damaged in amounts to be determined at trial but which exceed $10 million." This threadbare, conclusory statement does not sufficiently allege loss causation. It does not specify how two statements by [the auditor], as compared to the complaint's long list of alleged misrepresentations and omissions by the executives, proximately caused the investors' losses.

The complaint alleges that the investors suffered damages because they purchased stock at "artificially inflated prices." This allegation is insufficient under *Dura* [*Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005)]. Specifically, a stock's subsequent loss in value can reflect a variety of factors other than the earlier misstatement. The complaint states that the truth about UCAP's financial position was revealed on April 23, 2004, when UCAP announced that it would need to restate several financial statements. However, the complaint does not state the value of UCAP's stock when the investors made their investments, or its value right before, or right after, the need for the restatement was announced.

Without these facts, the complaint does not show that the investors' losses were caused by MSF's misstatements. This failure is revealing because UCAP's financial troubles were public knowledge before the announcement of the need for a restatement in April 2004. Specifically, in November 2003, UCAP disclosed in an 8-K announcement that its wholly-owned, principal operating subsidiary was in imminent danger of losing its only line of credit and that UCAP had sold a controlling share of its stock to avoid the subsidiary's bankruptcy. The complaint's lack of specific allegations of the value of UCAP stock defeats the plausibility of the investors' claim that MSF's audit opinions in January 2002 and 2003 caused their losses.

Id. at 1115 (internal citation and footnote omitted).

Ninth Circuit

- ***Starr v. Baca***, --- F.3d ----, No. 09-55233, 2011 WL 477094 (9th Cir. Feb. 11, 2011). Plaintiff Dion Starr brought an action under § 1983 for damages resulting from a violent attack he allegedly suffered while an inmate in the Los Angeles County Jail. Starr's complaint alleged that on or about January 27, 2006, a group of inmates gathered at his cell door and threatened to inflict physical harm on him. He yelled for the deputies guarding the jail to come to his aid. Instead of protecting him, a deputy opened Starr's cell gate in order to allow the group of inmates to enter. The inmates entered the cell and repeatedly stabbed Starr and his cellmate with knife-like objects. They stabbed Starr 23 times while Starr

screamed for help and protection. After the attacking inmates left the cell, several deputies went to Starr. Starr lay on the floor of his cell, seriously injured, bleeding and moaning in pain. One deputy yelled at him using derogatory language and kicked his face, nose, and body numerous times, causing pain, bleeding and a nose fracture. Other deputies allegedly stood by and watched. The deputy who kicked Starr allegedly interfered with Starr's ability to obtain medical treatment for his injuries. Starr alleged that he continued to suffer from and receive treatment for his injuries.

Starr's complaint named as defendants the prison deputies directly involved in the attack as well as Los Angeles County Sheriff Leroy Baca. Starr's claims against the deputies were not at issue in the appeal. Against Sheriff Baca, Starr alleged supervisory liability on a theory of deliberate indifference to unconstitutional conditions of confinement. He alleged that Sheriff Baca was liable in his individual capacity because he knew or should have known about the dangers in the Los Angeles County Jail, and that he was deliberately indifferent to those dangers.

After giving Starr several chances to plead his claim against Sheriff Baca, the district court dismissed the claim with prejudice under Rule 12(b)(6). The district court held that Starr's allegations against Sheriff Baca were insufficient to state a claim for supervisory liability because the complaint's recital of prior incidents and accompanying allegations did not sufficiently state a causal connection between Sheriff Baca's action and inaction and the alleged injury to Starr. The district court explained that Starr "does not allege that Baca himself directly participated in any way in the January 27, 2006 incident or that he was involved in any review or investigation of it." The district court also held that Starr did not allege any specific policy implemented by Sheriff Baca that caused the violation.

The Ninth Circuit, in a 2-1 decision, reversed the dismissal of Starr's complaint against Sheriff Baca. The court gave the following account of the relevant allegations set out in Starr's complaint:

> Starr claims that Sheriff Baca failed to act to protect inmates under his care despite his knowledge that they were in danger because of culpable acts of his subordinates and despite his ability to take actions that would have protected them. That is, to use language from our prior opinions, Starr claims that Sheriff Baca "knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known would cause . . . constitutional injury." *Dubner*, 266 F.3d at 968. Or, to state it slightly differently, Starr claims that Sheriff Baca is "liable in his individual capacity for his own culpable action *or inaction* in the training, supervision, or control of his subordinates[.]"
>
> It is somewhat tedious to recount the many allegations in the complaint detailing what Sheriff Baca knew or should have known,

and what Sheriff Baca did or failed to do. But given our colleague's conclusion that Starr's complaint has not satisfied Rule 8(a), we feel obliged to do so.

In paragraph 36, Starr alleges that the United States Department of Justice ("DOJ") initiated an investigation into conditions at Los Angeles County Jails in June 1996. On September 5, 1997, the DOJ "gave BACA, then a supervisor, clear written notice in a 'findings letter' of a continued and serious pattern and practices of constitutional violations including[ ] abuse of inmates by sheriff's deputies working in the jail and inmate on inmate violence."

In paragraph 37, Starr alleges that Sheriff Baca receives "weekly reports from his subordinates responsible for reporting deaths and injuries in the jails," and receives "ongoing reports of his Special Counsel and Office of Independent Review."

In paragraph 38, Starr alleges that in 1999, "under threat of a lawsuit by the DOJ, BACA and the COUNTY submitted to a Memorandum of Understanding ("MOU") with the DOJ which required BACA and the COUNTY to address and correct the continuous constitutional violations to which inmates were being subjected, particularly inmates suffering from mental problems. BACA personally signed the MOU. However, after years of monitoring the County Jail system, under the authority of the MOU, in 2006, the DOJ experts issued a report which still found noncompliance with many of its recommendations regarding the abuse of inmates and the deficiencies which continue at county jails[.]"

In paragraph 39, Starr alleges that on July 6, 2002, "Ramon Gavira was severely beaten by a female deputy and later . . . was killed in his cell at [the] county jail. Deputies and staff testified that they were not investigated nor disciplined for lapses in supervision of Mr. Gavira and allegations that Mr. Gavira had been physically abused by deputies. BACA was personally advised of the failure to investigate and no discipline being imposed[.]"

In paragraph 40, Starr alleges that on March 23, 2003, "BACA was . . . again made aware of Hispanic inmate gangs attacking African Americans and the failure to provide reasonable security when the COUNTY and LASD [Los Angeles County Sheriff's Department] approved a settlement in a civil action where Ahmad Burrell, Rory Fontanelle, and Aaron Cunningham were attacked over

a three day period, sustaining serious injuries. Although the deputies had known that Hispanic gangs were going to attack African Americans, . . . the deputies failed to provide reasonable security and Burrell was attacked in the housing dormitory and the attackers were able to stab him twenty-four (24) times, some causing serious and permanent injury to his abdomen and head."

In paragraph 41, Starr alleges that on October 21, 2003, "inmate Ki Hong was killed by three inmates who entered the dayroom where Hong was housed.... Notice of numerous violations showing deputies failing to provide reasonable security and abandoning their duties, their lax discipline and failure to supervise were given to BACA by his in-house lawyers, yet the inmate on inmate violence continued. This was the first of five inmate-on-inmate killings that occurred in the jail system over a six-month period."

In paragraph 42, Starr alleges that on December 6, 2003, "Inmate Prendergast was beaten periodically over several hours from about 6:00 p.m., to early next morning by . . . two of his three cellmates. . . . Again, notice of numerous violations showing deputy failing to provide reasonable security to the entire cell block, lax discipline and failure to supervise were presented to BACA, yet the inmate on inmate violence continued."

In paragraph 43, Starr alleges that on December 9, 2003, "inmate Mario Alvarado . . . was killed in a holding cell. . . . Deputies responsible for providing reasonable security failed to . . . do so, and the inmates who beat Alvarado had so much time they [were able to] conceal[ ] his dead body under clothes and trash. . . . Again, notice of numerous violations showing deput[ies] failing to provide reasonable security to the holding cell, lax discipline and failure to supervise were presented to BACA[.]"

In paragraph 44, Starr alleges that on December 13, 2003, a deputy falsified the contents of a statement by a pre-trial detainee, Jose Beas, so that the falsified statement recounted that Beas had admitted to inappropriate touching of a minor. Beas was classified as an inmate who should be kept away from the general prison population, and was "given a wrist band that identified him as such," but he was placed in a holding tank with "general population inmates." "Beas was immediately beaten by the other inmates and suffered brain damage. BACA was named as a defendant in that civil case and knew of the allegations of failure to provide reasonable

security to the holding cell, lax discipline and failure to supervise[,] and [he] approved the settlement[.]"

In paragraph 45, Starr alleges that on January 12, 2004, "inmate Kristopher Faye was stabbed to death by several inmates with jail-made knives. . . . Fay[e] was African American and the attackers were Hispanic. Deputies responsible for keeping the cell gates in the housing module close[d] allowed all the cell gates in the module to remain open which increased the danger of violence and was in violation of LASD policy. . . . Numerous violations showing errors in classification, placing highly dangerous inmates with histories of violence with nonviolent inmates presenting low security risk, deput[ies] failing to provide reasonable security to the holding cell, lax discipline and failure to supervise were again presented to BACA in official reports[.]"

In paragraph 46, Starr alleges that on April 20, 2004, "inmate Raul Tinajero was killed in his cell in the jail, by inmate Santiago Pineda. Pineda had a history of prior misconduct in the jail[.] . . . Tinajero was to be a witness in a criminal case against Pineda. . . . Due to the monitoring failures of the deputies and inadequate procedures with regard to the escorting of inmates, Pineda was able to enter Tinajero's cell unchallenged by the deputies responsible for providing reasonable security, kill Tinajero undetected, [and] remain in Tinajero's cell for five hours undetected by deputies. Numerous violations showing errors in classification, deputies failing to provide reasonable security to the housing cells, lax discipline and failure to supervise were again presented to BACA in official reports[.]"

In paragraph 47, Starr alleges that on May 23 or 24, 2004, inmate Antonio Fernandez was killed by other inmates in the dormitory. "The deputy that was assigned to monitor the dormitory had abandoned her duties and left her post unattended, and the post was vacant for approximately 20 minutes during which time the assault occurred. . . . [T]he failure to provide reasonable security to [the] housing area, lax discipline and failure to supervise were again presented to BACA[.]"

In paragraph 48, Starr alleges, "BACA received notice from The Special Counsel to the Los Angeles County Sheriff's Department, in the 17th Semiannual Report (February 2004) and the 18th Semiannual Report (August 2004) of increasing levels of inmate violence in the jails."

In paragraph 49, Starr alleges that in "February 2005 BACA received notice from The Special Counsel to the Los Angeles County Sheriff's Department, in the 19th Semiannual Report that his deputies[']conduct was . . . costing county tax payers millions of dollars annually in payments of civil judgments and settlements, in cases where the internal investigations had found no wrong doing. In all, BACA was notified by his Special Counsel that . . . of twenty-nine (29) cases involving police misconduct [that] settled for $100,000 or more over the past five years, only eight resulted in any type of discipline to the involved officers or policy change in the Department."

In paragraph 50, Starr alleges that on February 3, 2005, Special Counsel Merrick Bobb presented to BACA a finding of inmate abuse, contained in a report to the Los Angeles County Board of Supervisors. The report found "that 'Los Angeles County's largest jail is so outdated, understaffed and riddled with security flaws that it jeopardizes the lives of guards and inmates.' The Special Counsel's report criticized the County Jail in downtown Los Angeles for 'failing to prevent dangerous inmates from being housed with lower-risk inmates. . . .' The report concluded that Men[']s[ ] Central Jail 'is nightmarish to manage' and suffers from 'lax supervision and a long-standing jail culture that has shortchanged accountability for inmate safety and security.'"

In paragraph 52, Starr alleges that on October 24, 2005, Chadwick Shane Cochran was booked into county jail for a nonviolent misdemeanor. Due to mental health difficulties, Cochran was classified to be placed in a mental health facility located within the jail. "Due to errors by staff his protective housing was terminated and he was sent to general population on November 16, 2005, where he was beaten to death a few hours later that day. Deputies compounded the error of removing Cochran from protective status and left a red color identification card which led the attacking inmates to believe that he was a 'snitch' or informant. The deputies responsible for the safety of inmates abandoned their post and supervision of the locked day room in which 40 other inmates, some of whom were classified as violent 'high risk' accused murderers and gang members, and known violent offenders. Cochran was screaming and many other inmates were yelling for them to stop, but no deputy resumed their responsibility to provide reasonable security until the inmates had grown tired of beating Cochran and hid his body under clothing and food trays. The numerous errors in classification, deputies failing to provide reasonable security to the day room

> housing cells, lax discipline and failure to supervise were again presented to BACA in official reports[.]"
>
> In paragraphs 13 through 19, Starr alleges that he was attacked three months after Cochran was killed. . . .
>
> In paragraph 32, Starr alleges that Sheriff "BACA knew or reasonabl[y] could have known[ ] of his subordinates' ongoing constitutional violations . . ., of the failure to provide reasonable security at the jail, failure to prevent inmate on inmate violence, failure to monitor inmates, lax or no supervision by his subordinate supervisors, use of excessive force on inmates, failure to investigate incidents . . . involving inmate on inmate violence, failure to protect, failure to implement indicated policies and procedures regarding, including but not limited to[,] the use of inmates as trustees[.] BACA failed to act to prevent his subordinates['] ongoing unconstitutional conduct [;] . . . he acquiesced, condoned or ratified a custom, practice or policy of ongoing misconduct by his subordinate deputies and supervisors." In paragraph 35, Starr alleges that "Sheriff BACA . . . became aware, or should have become aware, and should have taken corrective actions to prevent repeated incidents" of derelictions of duty by his subordinates.

Starr, 2011 WL 477094, at *6–9 (internal citation omitted)

The Ninth Circuit went on to conclude that these allegations, read together, were adequate to satisfy the standard of Rule 8(a):

> The juxtaposition of *Swierkiewicz* and *Erickson*, on the one hand, and *Dura*, *Twombly*, and *Iqbal*, on the other, is perplexing. Even though the Court stated in all five cases that it was applying Rule 8(a), it is hard to avoid the conclusion that, in fact, the Court applied a higher pleading standard in *Dura*, *Twombly* and *Iqbal*. The Court in *Dura* and *Twombly* appeared concerned that in some complex commercial cases the usual lenient pleading standard under Rule 8(a) gave too much settlement leverage to plaintiffs. That is, if a non-specific complaint was enough to survive a motion to dismiss, plaintiffs would be able to extract undeservedly high settlements from deep-pocket companies. In *Iqbal*, by contrast, the Court was concerned that the usual lenient standard under Rule 8(a) would provide too little protection for high-level executive branch officials who allegedly engaged in misconduct in the aftermath of September 11, 2001. To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to

know in cases that come before us whether we should apply the more lenient or the more demanding standard.

But whatever the difference between these cases, we can at least state the following two principles common to all of them. First, allegations in a complaint or counterclaim must be sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it. Second, the allegations must be sufficiently plausible that it is not unfair to require the opposing party to be subjected to the expense of discovery.

. . . .

Viewed in the light of all of the Supreme Court's recent cases, we hold that the allegations of Starr's complaint satisfy the standard of Rule 8(a). We do not so hold merely because Starr's complaint, like the complaint in *Erickson*, alleges deliberate indifference in violation of the Eighth and Fourteenth Amendments. Rather, we so hold because his complaint complies with the two principles just stated.

First, Starr's complaint specifically alleges numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable actions of the subordinates of Sheriff Baca. The complaint specifically alleges that Sheriff Baca was given notice of all of these incidents. It specifically alleges, in addition, that Sheriff Baca was given notice, in several reports, of systematic problems in the county jails under his supervision that have resulted in these deaths and injuries. Finally, it alleges that Sheriff Baca did not take action to protect inmates under his care despite the dangers, created by the actions of his subordinates, of which he had been made aware. These allegations are neither "bald" nor "conclusory." *Iqbal*, 129 S. Ct. at 1951. Rather, they are sufficiently detailed to give notice to Sheriff Baca of the nature of Starr's claim against him and to give him a fair opportunity to defend against it.

Second, the allegations in Starr's complaint are plausible. They may or may not ultimately be proven by evidence. *But the question is not truth or even probability*. Rule 8(a) "does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" to support the allegations. *Twombly*, 550 U.S. at

556.

Id. at *13–14 (emphasis added).

Judge Trott dissented from the majority's ruling, stating that he would affirm the district court's dismissal of Starr's complaint for the reasons stated by the district court. Judge Trott explained:

> In the main, [Starr's] complaint has all the hallmarks of an attempted end run around the prohibition against using the vicarious liability doctrine of respondeat superior to get at the boss.
>
> . . . Yes, we have held that "acquiescence or culpable indifference" may suffice to show that a supervisor "personally played a role in the alleged constitutional violations," *Menotti v. City of Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005); but simply alleging generally that the Sheriff is "answerable for the prisoner's safekeeping" doesn't cut it. *Id.* Plaintiff's complaint does nothing more than allege raw legal conclusions with insufficient facts to support them. Starr's complaint runs afoul of our Circuit's rule that to establish a claim for individual supervisory liability, a plaintiff must allege facts, not simply conclusions; and those facts must show that the individual sued was personally involved in the alleged deprivation of the plaintiff's civil rights. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Otherwise, the action fails for failure to state a viable claim. *Id.* Even if Judge Fletcher is correct that "supervisory liability" survives *Iqbal*, a plaintiff must still allege *facts* to get into court.
>
> Here, I pause for a moment to underscore and to highlight a critical aspect of the causation aspect of this issue that too often is lost in the undertow of the jailhouse activities of which the plaintiff complains: this part of Starr's case is a claim not under *Monell* for an actionable governmental policy or custom or practice, but a claim for *individual* responsibility—not agency or department or political unit responsibility, but *individual* responsibility. It follows as night the day that the individual under scrutiny must have personally engaged in identifiably actionable behavior. . . .
>
> . . . .
>
> When we cease to look at the Los Angeles Sheriff's Department (LASD) as an abstraction and look at the reality, we see good reasons for requiring facts before permitting lawsuits against the Sheriff himself: the agency is gigantic. The LASD is the largest

Sheriff's Department in the world. It covers 3,171 square miles, 2,557,754 residents, and by contract 42 of the 88 incorporated cities in Los Angeles County. The Department employs 8,400 law enforcement officers and 7,600 civilians and is responsible for 48 courthouses and 23 substations. The Men's Central Jail alone houses a revolving population of 5,000 inmates. In addition, the Department operates the Twin Towers Correctional Facility, the Mira Loma Detention Facility, the Pitchess Detention Center, and the North County Correctional Center. Persons charged with or convicted of crimes are in over one hundred different locations. The layers of administration and management between what happens in a jail are many and they are complex. To infer that specific incidents which occur in a jail are necessarily known by the Sheriff is to engage in fallacious logic. None of this complexity absolves the Department of responsibility for respecting the constitutional rights and general well-being of its charges, but it does show how inappropriate it is to sue the Sheriff individually unless in terms of causation the Sheriff can be personally tied to the actionable behavior at issue. Just being a disappointing or even an insufficiently engaged public servant is not enough. Those issues are for the ballot box and the County Board of Supervisors, not the courts.

. . . .

Another concession appeared when counsel said, "We're still at the pleading stage where we are just saying do we have a right to go to Mr. Baca and do discovery and try to prove our case." Counsel's statement here collides with what the Supreme Court said in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009): "Rule 8 . . . does not unlock the doors for a plaintiff armed with nothing more than conclusions." *Id.* at 1949–50.

. . . .

Judge Fletcher's Opinion, with all respect, is difficult to reconcile with *Iqbal*. . . .

. . . .

Although *Iqbal* puts considerable meat on this wise rule's bones, *it is not new*. In 1988, for example, we said in *Taylor v. List*, a failed lawsuit against Nevada's Attorney General and the Director of the Nevada State Prison alleging their "knowledge of and failure to prevent the alleged constitutional violations by their subordinates,"

the following:

> > Liability under section 1983 arises only upon a showing of *personal participation* by the defendant. A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.
>
> 880 F.2d 1040, 1043, 1045 (9th Cir. 1989) (emphasis added) (internal citation omitted).

> *The days of pleading conclusions without factual support accompanied by the wishful hope of finding something juicy during discovery are over. Wisely, we have moved up judgment day to the complaint stage rather than bog down the courts and parties with pre-summary judgment combat*.

Id. at *14–19 (Trott, J., dissenting) (emphasis added).

- ***Hebbe v. Pliler***, --- F.3d ----, 2010 WL 4673711 (9th Cir. Nov. 19, 2010). Hebbe, a prisoner proceeding *pro se*, sued the California State Prison-Sacramento C-Facility ("CSP"); Pliler, Warden of the CSP; and Vance, Correctional Captain of the CSP, under 42 U.S.C. § 1983. *Id.* at *1. Hebbe alleged that prison officials (1) violated his constitutional right of court access because they denied him use of the prison law library without providing any alternative means of legal research assistance during the limited time period in which he was permitted to appeal his state criminal court conviction and (2) that prison officials violated his Eighth Amendment right to be free from cruel and unusual punishment because they forced him to choose between two constitutional rights, his right to exercise and his right of court access, by allowing him out of his cell only two hours per day, four days per week, for a period of eight months. *Id.* The district court dismissed his complaint under Federal Rule of Civil Procedure 12(b)(6). *Id.* The Ninth Circuit reversed and remanded. *Id.*

  In an amended opinion[27], the Ninth Circuit applied the plausibility standard from

[27] The only significant change in the Amended Opinion relates to *Twombly* and *Iqbal*. In the July 29, 2010 opinion, the court declined to apply the *Iqbal* standard for reviewing complaints to a complaint filed by a *pro se* prisoner. *Hebbe v. Pliler*, 611 F.3d 1202, 1205 (2010). The court reasoned that "Because *Iqbal* incorporated the *Twombly* pleading standard and *Twombly* does not alter courts' treatment of *pro se* filings, we continue to construe *pro se* filings liberally." *Id.* The court clarified, in the Amended Opinion, that it *was* applying the *Iqbal* standard, but that *Iqbal* did not alter a court's obligation to give *pro se* filings the "benefit of the doubt": "*Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of *pro se* filings; accordingly, we continue to construe *pro se* filings liberally when evaluating them under *Iqbal*. While the standard is higher, our 'obligation' remains, 'where the petitioner is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.'" *Hebbe*, 2010 WL 4673711, at *3 (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc))

Twombly/Iqbal, noting that, post-*Iqbal*, courts treatment of *pro se* filings remained unchanged:

> Because Hebbe is an inmate who proceeded *pro se*, his complaint "must be held to less stringent standards than formal pleadings drafted by lawyers," as the Supreme Court has reaffirmed since *Twombly*. *See Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam). *Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of pro se filings; accordingly, we continue to construe *pro se* filings liberally when evaluating them under *Iqbal*. While the standard is higher, our "obligation" remains, "where the petitioner is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en banc).

Id. at *3 (footnote omitted).

Applying this standard, the court determined that Hebbe sufficiently alleged an access claim. *Id.* at *3. The court explained:

> In 1977 the United States Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977). Nineteen years later, in *Lewis v. Casey*, the Court reiterated that penal institutions have a duty to afford prisoners "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." 518 U.S. 343, 351 (1996) (citing *Bounds*, 430 U.S. at 825). However, the *Lewis* Court narrowed the scope of *Bounds* by holding that there is no "abstract, freestanding right to a law library or legal assistance. [A]n inmate ... must ... demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Id.* at 351, 353 n. 3.
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> The Court explained that its "actual injury" requirement meant that the state was not required to provide library access to "enable the prisoner to *discover* grievances" that might be aired, *id*. at 354 (emphasis in original), but rather was required to provide such access

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(footnote omitted).

> to facilitate the prisoner's pursuit of a certain "type of frustrated legal claim," such as "direct appeals from the convictions for which [he] w[as] incarcerated" or "actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'" *Id*. (citing *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)). Thus, the "tools" that *Lewis* and *Bounds* "require[ ] to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Id*. at 355. Hebbe's claim that he was frustrated in his desire to use the law library facilities to research the pro se brief that he wished to file on direct appeal of his state court conviction plausibly alleges exactly the type of "actual injury" discussed in Lewis. Hebbe did not wish to go on a "fishing expedition" to discover grievances, rather he wished simply to appeal his conviction, as was his fundamental right.

Hebbe, 2010 WL 4673711, at *3 (alterations in original). The court also concluded that Hebbe's Eighth Amendment claim survived: "[f]orcing a prisoner to choose between using the prison law library and exercising outdoors is impermissible because 'an inmate cannot be forced to sacrifice one constitutionally protected right solely because another is respected.'" *Id*. at *4 (quoting *Allen v. City and County of Honolulu*, 39 F.3d 936, 940 (9th Cir. 1994)).

Judge Friedman concurred to point out that, in order to recover damages in his § 1983 suit, Hebbe "would have to show that, had it not been for the two alleged constitutional violations to which he was subjected, he probably would have succeeded in overturning his conviction." *Hebbe*, 2010 WL 4673711 at *5 (Friedman, J., concurring). Judge Friedman noted that "[i]t seems unlikely that he could make that showing." *Id*. at *6.

- ***Telesaurus VPC, LLC v. Power***, 623 F.3d 998 (9th Cir. 2010). Telesaurus alleged that Radiolink, a private mobile service provider, violated provisions of the Federal Communications Act of 1934 ("FCA"), and was also liable for conversion, unjust enrichment, and intentional interference with prospective economic advantage under Arizona law. *Id.* at 1002. Radiolink filed a motion to dismiss for failure to state a claim under Rule 12(b)(6), arguing that the FCA provides a private cause of action only against "common carriers," not against private mobile service providers such as Radiolink. *Id.* The district court held that Radiolink was not a common carrier as a matter of law, dismissed Telesaurus's complaint with prejudice, and denied Telesaurus's motion for leave to amend. *Id.* The court further held that Radiolink's state-law claims were expressly preempted by the FCA. *Id.* The Ninth Circuit affirmed in part, reversed in part and remanded.

  First, the court held that the district court properly disposed of Telesauraus's FCA claims because Radiolink was not a common carrier. *Id*. at 1003. The Ninth Circuit explained:

  > The FCA's general definition of "common carrier" appears in §

> 153(10), which defines the term as: "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy...." 47 U.S.C. § 153(10). Despite this general definition, a mobile service such as Radiolink is a common carrier only if it meets the more specific definition of "common carrier" set forth in § 332(c)(1). This section provides that "[a] person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier" for purposes of the FCA. *Id*. § 332(c)(1)(A). Any mobile service "that is not a commercial mobile service or the functional equivalent of a commercial mobile service" is defined as a "private mobile service," and therefore not a common carrier for purposes of the FCA. *Id*. §§ 332(c)(2), (d)(3); *see In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services: Second Report and Order*, 9 F.C.C.R. 1411, 1425-1454 (Mar. 7, 1994) (FCC regulations further defining these terms). The FCA defines "commercial mobile service" as "any mobile service ... that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission...." 47 U.S.C. § 332(d)(1). "Interconnected service," in turn, is defined as "service that is interconnected with the public switched network ... or service for which a request for interconnection is pending...." 47 U.S.C. § 332(d)(2). In sum, a mobile service provider such as Radiolink qualifies as a "common carrier" under the FCA only to the extent it is "engaged in the provision of a service" that is: (1) for profit; (2) interconnected (or pending interconnection) with the public switched network; and (3) available to the public or other specified users. *Id*. §§ 332(d)(1)-(2).

Telesaurus, 623 F.3d at 1004.

With respect to Radiolink's common carrier status, Telesaurus's complaint alleges: (1) that "Radiolink as a common carrier, knowingly violated 47 U.S.C. §§ 308 and 309, and other section[s of] the Communications Act"; (2) that Radiolink "used the Converted Frequencies for commercial, common-carrier (as defined by the FCC) two-way radio service involving charging various customers for use of mountain-top and other high radio repeater sites to provide wireless communications in the greater Phoenix region"; and (3) that Radiolink "carried on this for-profit common carrier[ ] wireless service" for many years. *Id.* at 1004.

The Ninth Circuit concluded that Telesaurus "failed to make a plausible allegation that Radiolink is [a common] carrier." *Id.* at 1005. The court explained:

> We do not assume the truth of the complaint's bare legal conclusion that Radiolink is a common carrier, *Iqbal*, 129 S.Ct. at 1950, but instead consider whether the complaint's well-pleaded facts are sufficient to state a claim. Telesaurus's complaint plausibly alleges that Radiolink is a for-profit endeavor, thus satisfying one of the elements required to meet the definition of a common carrier. *See* 47 U.S.C. § 332(d)(1)-(2). But the complaint does not adequately allege that Radiolink's service is interconnected or pending interconnection, as defined in § 332(d)(2), or that it is provided to the public or the other users specified in § 332(d)(1). *Id*. As such, we lack "sufficient factual matter, accepted as true" to establish that Radiolink is a common carrier. *Iqbal*, 129 S.Ct. at 1949.
>
> Telesaurus argues that Radiolink must be deemed to be a common carrier because it was using the VPC Frequencies, which the FCC designated for use only by commercial mobile services. We reject this tautology. As explained above, the definition of "commercial mobile services" does not turn on the nature of the frequencies being used, but rather on whether the service being provided meets certain criteria. *See* 47 U.S.C. § 332(d)(1)-(2); *see also S.W. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir.1994) ("Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance.").

Telesaurus, 623 F.3d at 1004-05. But the Ninth Circuit concluded that the district court abused its discretion by denying Telesaurus leave to amend. *Id*. at 1005. The district court denied leave to amend because it concluded that the "Regulatory Status: PMRS" notation on Radiolink's license was a determination by the FCC, entitled to *Chevron* deference, that Radiolink was not a common carrier for purposes of Telesaurus's suit. *Id*. The Ninth Circuit pointed out that the parties had not identified any authority that the FCC's notation constitutes an interpretation entitled to *Chevron* deference. *Id.* The court also noted that there was an "absence of any reasoned analysis by the FCC explaining the 'PMRS notation,'" and that "it is far from clear that the bare notation 'PMRS' on Radiolink's license, without more, even represents the FCC's considered judgment that Radiolink is a 'private mobile service' for purposes of Telesaurus's suit." *Id.* at 1006. "Because the district court's basis for denying leave to amend was incorrect, and Radiolink has not identified any other reason that amendment would be futile, we conclude that the district court abused its discretion by denying Telesauraus leave to amend." *Id.*

- ***Market Trading, Inc. v. AT & T Mobility, LLC***, No. 09-55445, 2010 WL 2836092 (9th Cir. Jul. 20, 2010) (unpublished). The class action complaint against AT & T alleged that AT & T breached its contract with Market Trading and violated California's Unfair Competition Law, "based on the allegation that, if Market Trading shifted from its present cell phone plan

to one providing fewer monthly minutes of service, AT & T would not permit the transfer of all of the 'rollover minutes' that Market Trading had accumulated under its present plan." *Id.* The complaint alleged that Market Trading had accumulated 10,000 rollover minutes. *Id.* The district court dismissed the complaint and the Ninth Circuit affirmed. The Ninth Circuit explained that the district court's dismissal was appropriate:

> The district court dismissed the amended complaint, as it had the original complaint, for failing to plead factual allegations from which one could reasonably infer that AT & T had caused Market Trading to suffer actual harm, a requisite element of the stated claims. The district court calculated from the original complaint that, to accumulate 10,000 rollover minutes, Market Trading had been using its cell phone an average of 17 minutes per day. If it changed from its 850-minute monthly plan to AT & T's smallest 450-minute monthly plan, Market Trading would have to increase its regular cell phone usage immensely in order to make any use of accumulated rollover minutes. The complaint contained no factual allegations supporting such an increase of use. The complaint accordingly did not present a plausible claim of harm.
>
> We agree with the district court. Other than the bare allegation that Market Trading "was preparing to significantly increase the monthly number of [minutes it] used," no facts are alleged in the complaint that make it plausible that Market Trading would increase its average monthly usage 26-fold, from 17 minutes to more than 450 minutes, the point at which it would have tapped its supply of rollover minutes.[28] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). "Threadbare recitals of the elements of a cause of action," such as those in the amended complaint, "supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). Accordingly, the district court properly dismissed the amended complaint.

Id. at *1 (alteration in original) (footnote omitted). The court also concluded that the district court did not err in refusing to grant leave to amend because "[t]he factual allegations in the proposed second amended complaint, like the allegations in the previous complaints, [could

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[28] The court had earlier noted that the district court calculated that Market Trading had been using its cell phone an average of 17 minutes per day, not per month. If that was the case, then presumably Market Trading would still have exceeded the 450-minute monthly plan even without an increase in its usage and would have a use for at least some of the rollover minutes. The district court's opinion appears to have concluded that to have accumulated 10,000 rollover minutes, Market Trading would have only used an average of 17 minutes per month.

not] support a reasonable inference that, as Market Trading argues on appeal, the 'injury suffered was forfeiture of its accumulate [sic] roll over minutes.'" *Id.* (third alteration in original) (footnote omitted). The court explained that the amendment would have been futile because "[t]he factual allegations in the proposed complaint [we]re in all material respects *identical* to those in the complaint it purport[ed] to amend," and "Market Trading ha[d] placed three successive complaints before the district court without stating a plausible claim for relief." *Id.*

- ***Caviness v. Horizon Cmty. Learning Ctr.***, 590 F.3d 806 (9th Cir. 2010). The district court had held that defendant Horizon Community Learning Center ("Horizon") and its executive director (Lawrence Pieratt), were not functioning as state actors under § 1983 when they took negative employment actions against the plaintiff, an employee at the defendants' charter school. *Id.* at 808. On appeal, the court affirmed "[b]ecause the allegations in Caviness's complaint [we]re insufficient to raise a reasonable inference that Horizon was a state actor and thus acted under color of state law in taking the alleged actions after Caviness was terminated." *Id.*

  The complaint alleged that Caviness was a high school physical education teacher, health teacher, and track coach at Horizon for six years. *Id.* at 810 (footnote omitted). After a student filed a complaint against Caviness alleging that "the student-teacher boundary had been crossed," Horizon put Caviness on administrative leave and began an investigation. *Id.* After the investigation, Horizon's board determined that Caviness had used questionable judgment in his personal communications with the student, kept him on paid administrative leave through the school year, and did not renew his contract. *Id.* Pieratt allegedly wrote a letter to Caviness and sent copies to the board members and the Arizona Department of Education, which allegedly "'contained numerous false and defamatory statements and private information which Pieratt misused to purposely place . . . Caviness in a bad light.'" *Caviness*, 590 F.3d at 810 (omission in original). When Caviness tried to apply for a teaching and coaching position in the Mesa School District, Pieratt refused to provide an evaluation, and Mesa decided not to hire Caviness. *Id.* Caviness alleged that the Pieratt's statement to Mesa was "'purposely false and incomplete and was intended to harm' Caviness, since Pieratt 'knew that Caviness had an excellent 6-year record as a teacher and coach and it was reasonable and appropriate for [Pieratt] to respond accordingly rather than decline to provide information.'" *Id.* at 810–11 (alteration in original).

  Caviness filed a complaint under § 1983 against Horizon, alleging:

  > Horizon, acting under color of state law, deprived Caviness of his liberty interest in finding and obtaining work without due process by making "several false statements about" him "in connection with his employment, which . . . cause[d] serious damage to Caviness's standing and associations in [the] community or, alternatively, imposed on Caviness a stigma . . . that has . . . interfered with his freedom to take advantage of other employment opportunities,'

without providing Caviness with notice or a name-clearing hearing."

Id. at 811 (alterations and omissions in original). "Caviness also alleged that Horizon violated his First Amendment right to freedom of association 'by ordering him not to freely associate at certain public events.'" *Id.* (footnote omitted). The district court dismissed the complaint, rejecting the "arguments that Horizon was a state actor because of its statutory characterization as a 'public school,' and because it performed a public function in providing public education." *Id.* "Because there was 'no evidence, with respect to [Caviness's] specific employment claims, that Horizon acted in concert or conspired with state actors, was subject to government coercion or encouragement, or was otherwise entwined or controlled by an agency of the State,' the district court held that Horizon was not functioning as a state actor in executing its employment decisions regarding Caviness." *Caviness*, 590 F.3d at 811 (alteration in original).

On appeal, the Ninth Circuit noted the "special situation of a private nonprofit corporation running a charter school that is defined as a 'public school' by state law," and explained that because the conduct of a private corporation was at issue, the question of whether there was a close nexus between the state and the challenged action required examining the specific conduct at issue. *Id.* at 812 (citation omitted). The court stated that the complaint "object[ed] to Horizon's failure to instruct its employees to cease making statements about Caviness's performance as a teacher, and its refusal to provide him with a name-clearing hearing," as well as "to Horizon's order forbidding Caviness from having contact with students during the paid administrative leave period." *Id.* at 813. Because "[a]ll these actions were taken by Horizon in connection with its role as Caviness's employer, . . . the relevant inquiry in this case [wa]s whether Horizon's role as an employer was state action." *Id.* (citation omitted).

In determining whether the factual allegations "'plausibly g[a]ve rise to an entitlement to relief,'" the court noted that the "complaint allege[d] only that Horizon [wa]s a non-profit corporation, 'an Arizona charter school[,] and [an] Arizona public school operating in Maricopa County,' and that Pieratt was acting as president, CEO, or executive director of Horizon." *Id.* (second and third alterations in original). The court noted that Caviness did not argue that the facts in his complaint made Horizon a state actor, but instead argued that under Arizona law, all charter schools are state actors. *Id.* The court held that the Arizona statute's characterization of charter schools as public schools did not answer the question because private entities can be state actors for some purposes but not for others. *Caviness*, 590 F.3d at 814.

The court next rejected the argument that Horizon was a state actor because it provided a public education, a function usually performed by the state, finding the argument foreclosed by a relevant Supreme Court case. *See id.* at 814–16. The court noted that Caviness did not "expressly argue that Horizon [wa]s a state actor by virtue of 'public entwinement in the management and control of ostensibly separate trusts or corporations,'" but that "[s]uch an argument in this case would fail, as the complaint [wa]s devoid of allegations that any state

actors were involved in Horizon's governing board, or that Horizon's sponsor played any role in the employment decisions of the school." *Id.* at 816 n.6. The court also rejected the argument that Horizon was a state actor because Arizona regulated personnel matters at charter schools, finding that under the relevant case law, "'the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State.'" *Id.* at 816 (citation omitted).

The court also rejected the argument made for the first time on appeal that Caviness was a tenured certified teacher who was entitled to certain due process rights set out in state statutes. *Id.* at 816 n.7. The court noted that the complaint did not include an allegation regarding Caviness's status as a tenured certified teacher, and that Caviness asked the court to "infer that he held this status from the allegations in the complaint stating that he had an employment contract with a specified term, he was given a hearing by Horizon, and he was placed on paid administrative leave after the hearing—requirements that are also mandated under Arizona law for tenured certified teachers." *Id.* The court concluded that "[t]he fact that Horizon implemented certain employment procedures in Caviness's case does not, without more, give rise to the inference that Caviness had a state-recognized status that gave him legal and constitutional entitlements to such procedures, or to further the inference that Horizon was legally obligated to provide them." *Caviness*, 590 F.3d at 816 n.7. The court cited *Iqbal* to conclude that it would not make the requested inference. *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

The court also rejected the argument that Horizon was a state actor because charter schools are permitted to participate in the state's retirement system under state law, noting that the relevant case law permitted the state to subsidize operating and capital costs of a private entity without turning those acts into state action. *See id.* at 817 (citation omitted).

The fact that Horizon's sponsor had the authority to approve and review the school's charter did not constitute state action because the relevant case law provided that approval or acquiescence by the state was not sufficient. *Id.* at 817–18.

The court noted that the complaint did not allege that the state was involved in the employment actions, and concluded that "Horizon's actions and personnel decisions were 'made by concededly private parties, and turn[ed] on judgments made by private parties without standards established by the State.'" *Id.* at 818 (alteration in original).

The court held that "[b]ecause the allegations in Caviness's complaint [we]re insufficient to raise a reasonable inference that Horizon was a state actor and thus acted under color of state law in taking the alleged actions after Caviness was terminated," it was proper to affirm the dismissal. *Id.*

- ***William O. Gilley Enters., Inc. v. Atlantic Richfield Co.***, 588 F.3d 659, No. 06-56069, 2009 WL 4282014 (9th Cir. Dec. 2, 2009) (per curiam). The district court dismissed an antitrust claim based on section 1 of the Sherman Act, "holding that 1) *Aguilar v. Atlantic Richfield*

Co., 24 P.3d 493 (Cal. 2001), preclude[d] the allegations made in the operative pleading; 2) Defendants' exchange agreements c[ould] not be aggregated to establish market power and anticompetitive effect; and 3) even if the exchange agreements could be aggregated, the absence of a conspiracy to limit supply and raise prices eliminate[d] a causal connection between the exchange agreements and anticompetitive effect." *Id.* at *1. The Ninth Circuit affirmed.

The plaintiff brought a class action lawsuit "on behalf of himself and other wholesale purchasers of CARB gasoline in the state of California." *Id.* CARB gas was a cleaner-burning fuel, and the only gas that could be sold in California since 1996. *Id.* "The complaint alleged that Defendants-Appellees, major oil producers, violated § 1 of the Sherman Act by entering into a conspiracy to limit the supply of CARB gasoline and to raise prices." *Id.* The case was stayed pending resolution of a similar state court case (*Aguilar*), which alleged violation of the Cartwright Act, California's equivalent to the Sherman Act. *Id.* After the court in *Aguilar* granted summary judgment to the defendants because there was insufficient evidence to find a conspiracy to limit supply and raise prices among the gas companies, the defendants in the federal action sought summary judgment on the basis of collateral estoppel. *William O. Gilley*, 2009 WL 4282014, at *1. The plaintiff filed an amended complaint, which the district court deemed insufficient, but the court granted leave to amend. *Id.* The district court then granted summary judgment on the next amended complaint, "holding that Gilley was precluded by *Aguilar* from relitigating whether a conspiracy existed to limit supply and raise prices," but granted further leave to amend "to allege that 'each of the bilateral agreements, entered into independently between various defendant gasoline companies, ha[d] anticompetitive effects and therefore violate[d] the Sherman Act.'" *Id.* at *2. The plaintiff filed another amended complaint, "alleging that forty-four bilateral exchange agreements had the effect of unreasonably restraining trade in violation of § 1 of the Sherman Act and in violation of CAL. BUS. & PROF. CODE § 17200." *Id.* The district court granted the defendants' motion to dismiss with prejudice, "explain[ing] that[, with respect to the section 1 claim,] Gilley had not alleged any theory as to how any individual exchange agreement, which account[ed] for a small percentage of the relevant market, [wa]s able to inflate the price of CARB gasoline." *Id.* The Ninth Circuit reversed and remanded, finding that the plaintiff should have been given leave to amend to cure the newly identified deficiencies. *Id.* The plaintiff thereafter filed the Second Amended Complaint, which the district court dismissed because the plaintiffs "failed to allege that the exchange agreements, when considered individually, would be capable of producing significant anticompetitive effects." *William O. Gilley*, 2009 WL 4282014, at *2. The appeal concerned this last dismissal.

In considering collateral estoppel, the Ninth Circuit noted that "[*t*]*he core of the plaintiff's claims in Aguilar* was a per se claim based on an alleged unlawful conspiracy among petroleum companies." *Id.* at *3. The court noted that one portion of *Aguilar* held "that the plaintiff had failed to demonstrate the existence of a conspiracy that was per se illegal under the Sherman Act." *Id.* The Ninth Circuit agreed with the district court's reading of the Second Amended Complaint "as not alleging that the bilateral agreements 'violate[d] the

anti-trust laws due to their anti-competitive effect,' but rather that the agreements facilitate[d] coordinated action by the defendants that unlawfully restrain[ed] trade." *Id.* at *5. The court explained:

> This distinction is critical. If the bilateral agreements in themselves have an illegal effect on competition (when aggregated), then the bilateral agreements constitute the "contract, combination or conspiracy" required for a claim under § 1 of the Sherman Act. If, however, the bilateral agreements only facilitate coordinated activity, then to maintain a claim under § 1 of the Sherman Act, Gilley must show some meeting of the minds, some "contract, combination or conspiracy," between those defendants whom Gilley alleges coordinated their actions. Although a plaintiff might well be able to do so in the abstract, here, Gilley is precluded by *Aguilar* from asserting that the defendants so conspired.

Id. The court noted that "[t]he Second Amended Complaint implicitly, if not explicitly, assert[ed] a conspiracy." *Id.* The court quoted two paragraphs from the complaint:

> Chevron's intent and purpose in entering into these exchange agreements was to limit refining capacity for CARB gas and/or to keep CARB gas out of the spot market and away from unbranded marketers.
>
> Through the use of these exchange agreements, **coupled with its own refining capacity and that of its contracting partners**, Chevron has obtained sufficient market power to limit the supply of CARB gas to unbranded marketers and to raise the price at which it sells CARB gas in Northern California to supracompetitive levels. These agreements have had the effect of raising CARB gas prices in Northern California above competitive levels, without any countervailing procompetitive benefit.

William O. Gilley, 2009 WL 4282014, at *6 (quoting the Second Amended Complaint) (quotation marks omitted). The court noted that "[t]hese paragraphs reveal[ed] how Gilley propose[d] to meet the market power requirement for a claim under § 1 of the Sherman Act, but they l[eft] the reader uninformed as to how the individual exchange agreements allegedly violated the Sherman Act 'without a conspiracy to control supply or to set prices.'" *Id.* The court concluded: "In sum, the [Second Amended Complaint], plainly and fairly read, is not limited to alleging that bilateral exchange agreements are themselves restraints of trade. Instead, its broad allegations encompass conspiracy claims that are precluded by *Aguilar*." *Id.* at *7. The court noted that "[t]he breadth of the [Second Amended Complaint] [wa]s inconsistent with the spirit of *Twombly*." *Id.* The court explained that in *Twombly*,

> [t]he *Supreme Court reaffirmed its earlier decisions* holding that "something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people with the right to do so representing an *in terrorem* increment of the settlement value," and that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court."

Id. (emphasis added). The court "read the [Second Amended Complaint] as not asserting that the bilateral agreements, in themselves, restrain[ed] trade, but that they facilitate[d] or ma[d]e it easier for the defendants to coordinate their actions to restrain trade." *Id.* at *8. The Ninth Circuit relied on the district court's explanation:

> Even if a single defendant and all of the defendants who contracted with that defendant cumulatively had sufficient market power to substantially impair competition, Plaintiffs would need to make the further showing that all of these defendants worked together through the use of the exchange agreements and strategic shutdowns or decreased production to stabilize the spot market and avoid the depression of gasoline prices . . . .

William O. Gilley, 2009 WL 4282014, at *8 (quotation marks omitted). The court found that "[t]his is the type of '*in terrorem* increment of the settlement value' that the Supreme Court mentioned in *Twombly*." *Id.* The court held that "when viewed in the light of the preclusive effect of *Aguilar*, the [Second Amended Complaint] simply 'd[id] not raise a claim of entitlement to relief.'" *Id.* (citation omitted). The court explained:

> There can be little doubt that the broad scope of the [Second Amended Complaint] was intentional. Gilley has known since 2002 that following *Aguilar*, he was precluded from alleging a conspiracy. Nonetheless, he has thrice been given the opportunity to amend his complaint to limit it to a claim based solely on the alleged anti-competitive effect of the individual exchange agreements absent a conspiracy, and has thrice proffered amended complaints that continue to assert, albeit ever more subtly, the existence of a conspiracy. It might be possible for Gilley to allege an antitrust claim limited to issues that are not precluded by *Aguilar*, but he has declined to do so. Accordingly, the district court properly struck the [Second Amended Complaint].

Id. The Ninth Circuit also found that "the district court's final denial of leave under the circumstances of this case was not an abuse of discretion," noting that "assuming Gilley

could, in the abstract, amend his complaint to state a claim that [wa]s not precluded by *Aguilar*, his repeated failure to do just that suggest[ed] that it would be futile to offer him another chance to do so." *Id.* at *8 & n.8 (footnote omitted).

The court summarized its holdings as follows:

> Gilley, in order to state a § 1 claim, must plead "a contract . . . by which the persons or entities intended to harm or restrain trade." Despite its length and detail, the [Second Amended Complaint] does not clearly assert which individual agreement or agreements constitute in themselves a "contract . . . by which the persons or entities intended to harm or restrain trade." Rather, the [Second Amended Complaint] is fairly read as alleging the existence of a network of exchange agreements that arguably allowed the defendants to unlawfully coordinate their production and output. But given the preclusive effect of *Aguilar*, Gilley cannot show such coordination. The [Second Amended Complaint] is not saved by the argument that it could be read to encompass a claim that the individual agreements in themselves constitute a restraint of trade because the [Second Amended Complaint] does not provide the defendants fair notice of such a claim and the grounds upon which it rests. *See Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. Moreover, aggregation does not save the [Second Amended Complaint] because it does not show that the defendants' adjustments of CARB production were part of any agreement or conspiracy, rather than independent efforts to maximize profits. *See Twombly*, 550 U.S. at 566, 127 S. Ct. 1955. For these reasons, we affirm the district court's dismissal of the Second Amended Complaint without leave to amend, and we affirm the court's dismissal of Plaintiffs' state law claim brought pursuant to CAL. BUS. & PROF. CODE § 17200.

Id. (omissions in original).

- ***Siracusano v. Matrixx Initiatives, Inc.***, 585 F.3d 1167 (9th Cir. 2009), *aff'd*, --- S. Ct. ----, No. 09-1156, 2011 WL 977060 (Mar. 22, 2011).[29] The complaint alleged that Matrixx, a pharmaceutical company that sold Zicam Cold Remedy ("Zicam") through a wholly-owned subsidiary, made material misrepresentations regarding Zicam's safety, in violation of federal securities laws. The class action complaint sought relief against Matrixx and three of its executives (Johnson, Hemelt, and Clarot) under the Private Securities Litigation Reform Act of 1995 (PSLRA). The complaint asserted that Matrixx and its executives failed to disclose that Zicam causes anosmia—a loss of the sense of smell. *Id.* at 1169–70. The district court

[29] The Supreme Court's opinion is discussed earlier in this memo, under "Supreme Court Update."

dismissed the complaint, and the Ninth Circuit reversed and remanded. *Id.* at 1170.

Chief among the allegations was the assertion that Matrixx filed a November 12, 2003 Form 10-Q report that stated that the company "may incur significant costs resulting from product liability claims." *Id.* at 1172 (quoting the complaint) (quotation marks and emphasis omitted). The plaintiff alleged that the statements in the 10-Q "were materially false and misleading because [the defendants] 'failed to disclose that a lawsuit alleging that Zicam caused anosmia had already been filed and, given the findings of the researchers at the University of Colorado [that zinc sulfate caused loss of smell,] it was highly likely that additional suits would be filed in the future.'" *Id.* (quoting the complaint). Matrixx later filed a Form 8-K on February 19, 2004, stating "that it had 'convened a two-day meeting of physicians and scientists to review current information on smell disorders,'" and that "'[i]n the opinion of the panel, there [wa]s insufficient scientific evidence at th[e] time to determine if zinc gluconate, when used as recommended, affect[ed] a person's ability to smell.'" *Id.* at 1174 (first alteration in original). In a later Form 10-K, filed March 19, 2004, Matrixx acknowledged that "'numerous suits alleged that its Zicam product(s) caused anosmia had been filed.'" *Siracusano*, 585 F.3d at 1175. The complaint alleged that "'[a]ccording to Matrixx's own SEC filings, from late 2003 through October 2004 Matrixx ha[d] been sued by approximately 284 individuals in 19 different lawsuits alleging that Zicam caused damage to their sense of smell,' and included in the complaint a table detailing the lawsuits." *Id.* (first alteration in original). The plaintiff "alleged that the financial information contained in Matrixx's Form 10-Q filed on November 12, 2003, was false and misleading and violated SEC rules and the Generally Accepted Accounting Principles ('GAAP') promulgated by the Financial Accounting Standards Board ('FASB')." *Id.* The complaint further alleged that the materially misleading statements led to artificially inflated prices. *Id.* at 1176. The complaint alleged that the defendants acted with scienter:

> [D]efendants acted with scienter in that defendants knew that the public statements or documents issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, defendants, by virtue of their receipt of information reflecting the true facts regarding Matrixx, their control over, and/or receipt and/or modification of the Company's alleged materially misleading misstatements and/or their associations with the Company which made them privy to confidential proprietary information concerning Matrixx, participated in the fraudulent scheme alleged herein.
>
> Defendants were aware since at least September of 2003, that numerous users of their Zicam product had experienced a rare

> condition known as anosmia or loss of smell. Findings of post treatment anosmia were reported by Dr. Bruce Jafek, Miriam R. Linschoten and Bruce W. Morrow of the University of Colorado School of Medicine, Department of Otolaryngology at a medical conference in September of 2003. At the time, Dr. Jafek had reported 10 cases of anosmia after Zicam use. As of April of 2004, Dr. Jafek had evaluated over 100 such cases. On September 12, 2003, over one month before the start of the Class Period, Matrixx informed Dr. Jafek that "as a legal matter" he did "not have their permission to use their company name or product trademarks" in the poster reporting Dr. Jafek's research. In order to avoid threatened legal action from the Company, Dr. Jafek deleted any reference to Zicam or Matrixx from the poster which he used to present his research at a medical conference.

Id. (quoting the complaint) (quotation marks and footnote omitted) (alteration in original). The district court "dismissed the complaint without prejudice, reasoning . . . that the allegations of user complaints were not material because they were not statistically significant . . . [and] that [the plaintiffs] had failed sufficiently to allege scienter." *Id.* at 1177. The district court "stated that any amendment would be futile '[a]bsent allegations Defendants *knew* there was a definitive and statistically significant link between Zicam and anosmia *during the Class Period* that was 'sufficiently serious and frequent to affect future earnings.'" *Siracusano*, 585 F.3d at 1177 (alteration in original).

On appeal, the Ninth Circuit noted that to allege a claim under Rule 10b-5, "'a plaintiff must [allege] '(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss,'" *id.* (alteration in original) (citation omitted), but because the district court dismissed based on the first two elements, the Ninth Circuit would only address those two as well, *id.* The Ninth Circuit held that "the district court erred in relying on the statistical significance standard to conclude that [the plaintiffs] failed adequately to allege materiality." *Id.* at 1178. The court explained:

> In relying on the statistical significance standard to determine materiality, the district court made a decision that should have been left to the trier of fact. Instead, we agree with the approach of the court in *In re Pfizer Inc. Securities Litigation*, 584 F. Supp. 2d 621 (S.D.N.Y. 2008), where the United States District Court for the Southern District of New York rejected the defendant pharmaceutical company's argument that the plaintiffs failed to plead materiality, which was based on the contention that three studies revealing adverse effects of the company's drug were not statistically significant. The court reasoned that it "cannot determine as a matter of law whether such links were statistically insignificant because

statistical significance is a question of fact." *Id.* at 635–36.

Id. at 1179. The Ninth Circuit listed the numerous statements from the complaint that showed that Matrixx was aware of a possible link between Zicam and anosmia, and found that they were "sufficient to meet the pleading requirement under the PSLRA, which require[d] that . . . 'the complaint . . . specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information or belief, . . . state with particularity all facts on which that belief is formed.'" *Id.* at 1179–80 (quoting 15 U.S.C. § 78u-4(b)(1)). The court also found the allegations sufficient "as well, to 'nudge[ ] [the plaintiffs'] claims across the line from conceivable to plausible.'" *Siracusano*, 585 F.3d at 1180 (first alteration in original).

With respect to scienter, the court explained that it first had to "'determine whether any of the plaintiff's allegations, standing alone, [we]re sufficient to create strong inference of scienter,'" and if not, it would then "'conduct a 'holistic' review of the same allegations to determine whether the insufficient allegations combine[d] to create a strong inference of intentional conduct or deliberate recklessness.'" *Id.* (citation omitted). The Ninth Circuit concluded that the complaint adequately alleged scienter:

> The district court here concluded that the [complaint] failed to allege the requisite scienter because it "fail[ed] to allege any motive or state of mind with relation to the alleged omissions." In order adequately to allege scienter, [the plaintiffs] rely on their allegations that [the defendants] knew about the problems with Zicam but chose not to reveal them. [The plaintiffs] also argue that the importance of Zicam to Matrixx's business supports the inference that [the defendants] intentionally withheld information of the link between Zicam and anosmia. [The plaintiffs] also point to the revelations following the close of the class period that, contrary to their statements during the class period, Matrixx actually did not know if Zicam caused anosmia and decided to conduct studies after they had already vouched for the safety of Zicam.
>
> Matrixx's first allegedly misleading statement was its October 22, 2003, press release, announcing the 163% net sales increase, attributed to Zicam, and stating that the Zicam brand was "poised for growth." The second statement was the conference call on October 23, 2003, again attributing the company's positive results to Zicam and projecting further growth. By the time of the press release and the conference call, [the Neurological Director of the Smell & Taste Treatment and Research Foundation, Ltd. (Linschoten)] had called the customer service line regarding one patient, Clarot had spoken with [a researcher at the University of Colorado Health Sciences

> Center] regarding customer complaints, Jafek had presented his report of eleven patients, and the first lawsuit against Matrixx had been filed. [The defendants] accordingly were aware of at least fourteen complaints regarding Zicam and anosmia at the time they made these statements. In addition, [the defendants] alleged that Clarot told Linschoten in the September 2002 phone call that "Matrixx had received customer complaints of loss of smell as early as 1999." [The plaintiffs] then alleged that the November 12, 2003, Form 10-Q was misleading because it spoke of the risk of product liability actions against the company without revealing that a lawsuit already had been filed.

Id. at 1180–81 (footnote omitted). The court explained that "the passage in the Form 10-Q sp[oke] about the risks of product liability claims in the abstract, with no indication that the risk 'may already have come to fruition'"; that the complaint "allege[d] facts sufficient for a jury to find that Clarot was aware of the potential anosmia problem"; and that "the inference that high-level executives such as Johnson, Hemelt, and Clarot would [have] know[n] that the company was being sued in a product liability action [wa]s sufficiently strong to survive a motion to dismiss." *Id.* at 1181. Although the plaintiffs did not allege that the defendants "engaged in unusual or suspicious stock sales at the same time that they were attempting to downplay the reports of anosmia, . . . 'the absence of a motive allegation [wa]s not fatal.'" *Id.* at 1182 (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007)). The court also concluded that it was appropriate to view the complaint as a whole in determining whether the allegations were sufficient:

> On a holistic review of the [complaint], the following picture is alleged. Matrixx received some customer complaints about Zicam and anosmia from 1999 to 2002. In 2002, Clarot was sufficiently concerned that he called Linschoten about one of her patients who had complained and then called to ask if she would participate in studies. In September 2003, Matrixx knew that Jafek and his colleagues were presenting findings about ten or eleven patients who developed anosmia after Zicam use and did not allow Jafek to use Matrixx's or Zicam's name in the presentation. In October 2003, Matrixx touted the potential for growth and profitability of Zicam in a press release and an earnings conference call. A lawsuit alleging anosmia in one Zicam user was filed in October 2003. In November 2003, Matrixx filed a Form 10-Q, but did not disclose the lawsuit in the section entitled "Risk Factors."
>
> More lawsuits were filed in December 2003 and January 2004.
>
> On February 2, 2004, Matrixx issued a press release

> responding to the January 30, 2004, Dow Jones report that the FDA was investigating Zicam and anosmia. This press release called the report "completely unfounded and misleading" and asserted that clinical trials had established the safety of zinc gluconate. On February 6, 2004, Good Morning America reported on the possible link between Zicam and anosmia, and Matrixx issued another press release asserting that zinc gluconate's safety was well established in clinical trials, even though it was subsequently reported that Matrixx had not conducted such studies. In a February 19, 2004, filing with the SEC, Matrixx stated that it had convened a panel of physicians and scientists to review the information and asserted that there was insufficient evidence to determine whether zinc gluconate affected the sense of smell. On March 4, 2004, a news article reported that Matrixx would begin studies to determine if Zicam caused anosmia.
>
> Viewing the [complaint] as a whole, the inference of scienter is "cogent and at least as compelling" as any "plausible non-culpable explanation [ ]" for [the defendants'] conduct. *Tellabs*, 551 U.S. at 324, 127 S. Ct. 2499. Withholding reports of adverse effects of and lawsuits concerning the product responsible for the company's remarkable sales increase is "an extreme departure from the standards of ordinary care" and "presents a danger of misleading buyers or sellers." We therefore conclude that the inference that [the defendants] withheld the information intentionally or with deliberate recklessness is at least as compelling as the inference that [the defendants] withheld the information innocently.

Id. at 1182–83 (footnote and internal citation omitted) (third alteration in original).

- ***Al-Kidd v. Ashcroft***, 580 F.3d 949 (9th Cir. 2009), *rehearing en banc denied*, 598 F.3d 1129 (9th Cir. Mar 18, 2010), *cert. granted*, 2010 WL 2812283 (U.S. Oct. 18, 2010) (No. 10-98). Al-Kidd and his wife were the subjects of FBI surveillance as part of a broad anti-terrorism investigation allegedly aimed at Arab and Muslim men. *Id.* at 952. In connection with the indictment of a different man (Sami Oman Al-Hussayen) by a federal grand jury for visa fraud and making false statements to U.S. officials, the U.S. Attorney's Office submitted an application to arrest al-Kidd as a material witness. *Id.* The application was supported by an affidavit executed by an FBI agent, which asserted that al-Kidd had received "'in excess of $20,000'" from Al-Hussayen, that al-Kidd had "'met with Al-Hussayen's associates'" after returning from a trip to Yemen, that al-Kidd had contacts with officials of the Islamic Assembly of North America (which Al-Hussayen was affiliated with), and that "'[d]ue to Al-Kidd's demonstrated involvement with the defendant . . . he is believed to be in possession of information germane to this matter which will be crucial to the prosecution.'" *Id.* at 952–53 (alteration and omission in original). The affidavit also asserted that al-Kidd was scheduled to take a one-way, first class flight to Saudi Arabia, and that the United States

government was concerned about securing his appearance at trial if he traveled to Saudi Arabia. *Id.* at 953. In fact, al-Kidd had a round-trip coach ticket to study Arabic and Islamic law on a scholarship at a Saudi university. *Id.* at 952–53. Based on the affidavit, a material witness warrant was issued and al-Kidd was arrested at the airport before he left on his trip to Saudi Arabia. *Al-Kidd*, 580 F.3d at 953. Al-Kidd was detained for 16 days at a variety of detention centers, transfer centers, and jails, was allegedly strip searched on multiple occasions, confined to high-security units, handcuffed and shackled during transfers between facilities, only allowed out of his cell one to two hours per day, and kept in a cell that was lit 24 hours a day. *Id.* After petitioning to the court, al-Kidd was released on the conditions that he live at his in-laws' home in Nevada, limit his travel to Nevada and three other states, report regularly to his probation officer and consent to home visits, and give up his passport. *Id.* Al-Kidd allegedly lived under these conditions for almost a year before being allowed to obtain his own residence. *Id.* Three months later he was fully released at the end of Al-Hussayen's trial. *Id.* Al-Kidd was never called as a witness in the Al-Hussayen trial. *Id.* Al-Kidd alleged that he separated from his wife, lost his job due to denial of security clearance from his arrest, and was unable to find steady employment. *Id.* at 954.

Al-Kidd asserted that Ashcroft, as Attorney General, "developed and promulgated a policy by which the FBI and DOJ would use the federal material witness statute as a pretext 'to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further.'" *Al-Kidd*, 580 F.3d at 954 (footnote omitted). Al-Kidd's complaint relied on Ashcroft's statement at a press conference that: "'Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist aliens. These measures form one part of the department's strategy to prevent terrorist attacks by taking *suspected terrorists* off the street . . . Aggressive *detention* of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying new attacks.'" *Id.* (omission in original) (citation omitted) (emphasis added in complaint). The complaint also cited internal Department of Justice (DOJ) memoranda quoted in a report by the DOJ's Office of the Inspector General and public statements of DOJ and White House officials stating that suspects were held under material witness warrants to investigate the suspects. *Id.* at 954–55. The complaint also alleged "that the policies designed and promulgated by Ashcroft ha[d] caused individuals to be 'impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena,' in violation of the terms of § 3144." *Id.* at 955. The complaint also cited FBI Director Robert Mueller's statements, made in testimony before Congress, that listed "'major successes' in the FBI's efforts toward 'identifying and dismantling terrorist networks,'" including the arrest of al-Kidd. *Id.* Finally, the complaint alleged a policy of mistreatment of material witnesses and that Ashcroft "'knew or reasonably should have known of the unlawful, excessive, and punitive manner in which the federal material witness statute was being used,' and that such manner 'would also foreseeably subject' detainees 'to unreasonable and unlawful use of force, to unconstitutional conditions of confinement, and to punishment without due process.'" *Id.*

Al-Kidd sued, among others, Ashcroft, the United States, the FBI agents named in the affidavit used to support Al-Kidd's arrest, and government agencies and officers in their official capacities. *Al-Kidd*, 580 F.3d at 955. The complaint sought damages under *Bivens*, alleging violations of al-Kidd's Fourth and Fifth Amendment rights, and alleging a direct violation of the material witness statute. *Id.* at 956. The district court denied Ashcroft's Rule 12(b)(2) motion, finding that there were sufficient facts to establish personal jurisdiction over Ashcroft in Idaho, and denied Ashcroft's Rule 12(b)(6) motion, rejecting claims of absolute and qualified immunity. *Id.* Ashcroft appealed, and the Ninth Circuit affirmed in part and reversed in part.

In denying Ashcroft's claim of absolute prosecutorial immunity, the Ninth Circuit stated:

> We hold, therefore, that when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another's trial, the prosecutor is entitled at most to qualified, rather than absolute, immunity. We emphasize that our holding here does not rest upon an unadorned assertion of secret, unprovable motive, as the dissent seems to imply. *Even before the Supreme Court's decision in* Bell Atlantic v. Twombly *and* Ashcroft v. Iqbal, *it was likely that conclusory allegations of motive, without more, would not have been enough to survive a motion to dismiss*. *See, e.g.*, *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (facts pled must be accepted as true, but conclusory allegations need not be). *Twombly's* general requirement that "[f]actual allegations must be enough to raise a right to relief above the speculative level," 550 U.S. 555, applies with equal force to allegations that a prosecutor's actions served an investigatory function. In this case, however, al-Kidd has averred ample facts to render plausible the allegation of an investigatory function . . . .

Id. at 963 (emphasis added) (alteration in original) (footnote omitted).

In analyzing Ashcroft's claim of qualified immunity with respect to the alleged Fourth Amendment violations, the Ninth Circuit concluded that al-Kidd had adequately pled violations of his Fourth Amendment rights:

> Al-Kidd alleges that he was arrested without probable cause pursuant to a general policy, designed and implemented by Ashcroft, whose programmatic purpose was not to secure testimony, but to investigate those detained. Assuming that allegation to be true, he has alleged a constitutional violation. Contrary to the dissent's alarmist claims, we are not probing into the minds of individual officers at the scene; instead, we are inquiring into the programmatic

> purpose of a general policy . . . , and finding that the purpose of the policy alleged in al-Kidd's first amended complaint is impermissible under the Fourth Amendment.

Id. at 969. The Ninth Circuit concluded that "al-Kidd's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established in 2003." *Id.* at 973.

In considering the alleged violation of the material witness statute, the Ninth Circuit discussed the plausibility standard set out in *Twombly* and extended by *Iqbal*:

> Prior to *Bell Atlantic Company v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, we held that a plaintiff "does not need to show with great specificity how each defendant contributed to the violation of his constitutional rights. Rather, he must state the allegations generally so as to provide notice to the defendants and alert the court as to what conduct violated clearly established law." Ashcroft argues that al-Kidd's allegations as to Ashcroft's personal involvement in the § 3144 Claim amount simply to "sheer speculation," and are insufficient to state a claim under *Twombly*.
>
> In *Twombly*, the Supreme Court held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15 U.S.C. § 1. While the Court expressly disclaimed any intention to require general "heightened fact pleading of specifics," and reaffirmed the holding of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (rejecting a fact pleading requirement for Title VII employment discrimination), it stated that, to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must aver "enough facts to state a claim to relief that is plausible on its face."
>
> Since the argument and initial briefing in this case, the Supreme Court, in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), has clarified *Twombly's* reach to cases such as these. *Iqbal* concerned claims against a number of defendants, including FBI Director Mueller and Attorney General Ashcroft, made by Javaid Iqbal, a Muslim Pakistani who was part of the mass roundup of Muslim aliens on immigration charges following the September 11 attacks. Iqbal claimed that Mueller and Ashcroft were responsible for selectively placing detainees in their restrictive conditions on account of their race and religion. The Supreme Court found the allegations in the complaint insufficient to state a discrimination claim under the above-discussed *Twombly*

> "plausibility" standard. The Court held that a pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim under Rule 8 of the Federal Rules of Civil Procedure.

Al-Kidd, 580 F.3d at 974 (internal citations omitted). The court found that unlike the complaint in *Iqbal*, al-Kidd's complaint alleged sufficient facts for his claim alleging violation of the material witness statute to survive:

> In reviewing the complaint in *Iqbal*, the Court noted that the complaint did not contain any factual allegations claiming that Mueller or Ashcroft may have intentionally discriminated on the basis of race or religion. The Court concluded that bare assertions regarding an invidious policy were not entitled to the assumption of truth because they amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." The Court noted that the alleged facts, even if accepted as true, were more compatible on their face with lawful conduct.
>
> Here, unlike Iqbal's allegations, al-Kidd's complaint "plausibly suggest[s]" unlawful conduct, and does more than contain bare allegations of an impermissible policy. While the complaint similarly alleges that Ashcroft is the "principal architect" of the policy, the complaint in this case contains specific statements that Ashcroft himself made regarding the post-September 11th use of the material witness statute. Ashcroft stated that enhanced tactics, such as the use of the material witness statute, "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street," and that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks." Other top DOJ officials candidly admitted that the material witness statute was viewed as an important "investigative tool" where they could obtain "evidence" about the witness. The complaint also contains reference to congressional testimony from FBI Director Mueller, stating that al-Kidd's arrest was one of the government's anti-terrorism successes—without any caveat that al-Kidd was arrested only as a witness. Comparatively, Iqbal's complaint contained no factual allegations detailing statements made by Mueller and Ashcroft regarding discrimination. The specific allegations in al-Kidd's complaint plausibly suggest something more than just bare allegations of improper purpose; they demonstrate that the Attorney General purposefully used the material witness statute to detain suspects whom he wished to investigate and detain preventatively, and that al-Kidd was subjected to this policy.

> Further, unlike in *Twombly* and *Iqbal*, where the plaintiffs alleged a conspiracy or discriminatory practice in the most conclusory terms, al-Kidd does not rely solely on his assertion that Ashcroft ordered, encouraged, or permitted "policies and practices [whereby] individuals have also been impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been [im]practicable to secure their testimony voluntarily or by subpoena." His complaint notes "one account" of material witness practices stating that "nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify." In a declaration filed in another proceeding well before al-Kidd's arrest, a DOJ official admitted that, of those detained as material witnesses, "it may turn out that these individuals have no information useful to the investigation."

Id. at 974–75 (first, second, and third alterations in original) (internal citations and footnote omitted). The court concluded that the complaint did not merely contain bare allegations that Ashcroft knew of the policy, but instead contained "allegations that plausibly suggest[ed] that Ashcroft purposely instructed his subordinates to bypass the plain reading of the statute," and that the allegations "clearly 'nudge[d]' al-Kidd's claim of illegality 'across the line from conceivable to plausible.'" *Id.* at 976 (quoting *Iqbal*, 129 S. Ct. at 1952). The court explained that the facts pleaded were more than sufficient to support the claim of illegal use of the material witness statute:

> [A]l-Kidd pleads facts that go much further than merely showing that he was detained under the material witness statute and did not testify. The pleadings show that Ashcroft explicitly stated that enhanced techniques such as the use of the material witness statute "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street." Other top DOJ officials stated that the material witness statute was viewed as an important "investigative tool," and that al-Kidd's arrest was touted as one of the government's anti-terrorism successes, without any mention that he was being held as a material witness. We disagree with the dissent, and hold that al-Kidd has plead[ed] that Ashcroft's "concerted strategy" of misusing the material witness statute plausibly led to al-Kidd's detention.

Id. at 977. The Ninth Circuit did note that "[p]ost-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints," explaining that Rule 8 "'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions,'" *id.* (quoting *Iqbal*, 129 S. Ct. at 1950), and that "[t]his concern applie[s] with great force in the civil rights context, where '[t]he basic thrust of the qualified-immunity

doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery,'" *id.* (third alteration in original) (quoting *Iqbal*, 129 S. Ct. at 1953), but concluded that "al-Kidd has met his burden of pleading a claim for relief that is plausible, and that his suit on the § 3144 claim should be allowed to proceed," *al-Kidd*, 580 F.3d at 977 (citing *Iqbal*, 129 S. Ct. at 1950). The court emphasized that the result might be different on summary judgment:

> *Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's burden. "Asking for plausible grounds to infer" the existence of a claim for relief "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to prove that claim. *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955. In this case, we hold that al-Kidd has pled "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

Id.

With respect to al-Kidd's claim that he was mistreated while confined, the court concluded that the claim failed because it contained only conclusory allegations, similar to those rejected in *Iqbal*. The court explained:

> [A]l-Kidd claims here that Ashcroft promulgated and approved the unlawful policy which caused al-Kidd "to be subjected to prolonged, excessive, punitive, harsh, unreasonable detention or post-release conditions." Contrary to the § 3144 claim, however, the complaint does not allege any specific facts—such as statements from Ashcroft or from high ranking officials in the DOJ—establishing that Ashcroft had personal involvement in setting the conditions of confinement.

Id. at 978. Although the complaint alleged that media reports and courts had noted the harsh conditions of confinement for material witnesses, the Ninth Circuit found that "[w]hile it is possible that these reports were sufficient to put Ashcroft on notice by spring of 2003 that there was a systemic problem at the DOJ with respect to its treatment of material witnesses, the non-specific allegations in the complaint regarding Ashcroft's involvement fail to nudge the *possible* to the *plausible*, as required by *Twombly*." *Id.* at 978–79. The court differentiated the pleadings with respect to the material witness statute, stating that "[u]nlike the § 3144 Claim, which specifically avers facts which could sustain the inference that Ashcroft 'set[ ] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury' regarding the illegal use of the material witness statute, the complaint's more conclusory allegations regarding Ashcroft's involvement in settling the harsh conditions of confinement (which are very similar to the allegations in *Iqbal*), are deficient under Rule 8." *Id.* at 979 (alteration in original) (internal citation omitted). The Ninth Circuit held that "al-Kidd ha[d] not alleged

adequate facts to render plausible Ashcroft's personal involvement in setting the harsh conditions of his confinement, and ha[d] therefore failed to state a claim for which relief c[ould] be granted." *Id.*

Judge Bea concurred in part and dissented in part. Judge Bea would have held that qualified immunity protected Ashcroft from al-Kidd's claim of constitutional violations because there was no Fourth Amendment violation, and even if there was, "al-Kidd's right not to be arrested on an objectively valid, but pretextual arrest warrant was not 'clearly established' in March 2003 . . . ." *Al-Kidd*, 580 F.3d at 983 (Bea, J., dissenting). With respect to al-Kidd's claim that his detention violated the Fourth Amendment and the terms of the material witness statute because of material misrepresentations and omissions in the affidavit supporting the warrant application, Judge Bea would have held that "as with his claim that Ashcroft is liable for the claimed wretched conditions of al-Kidd's confinement, as to which all of us agree his claim fails—al-Kidd has failed to allege facts sufficient to establish Ashcroft's personal liability for such conduct." *Id.* (citing *Iqbal*, 129 S. Ct. 1937).[30]

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[30] The Ninth Circuit subsequently denied rehearing en banc. *See Al-Kidd v. Ashcroft*, 598 F.3d 1129, No. 06-36059, 2010 WL 961855 (9th Cir. Mar. 18, 2010), *petition for cert. filed* (U.S. Jul. 16, 2010) (No. 10-98). Judge Smith concurred in the denial of rehearing, and concluded that "the holding [of the panel] fully complies with the Court's instruction in *Ashcroft v. Iqbal*, that 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id.* at *7 (Smith, J., concurring) (quoting *Iqbal*, 129 S. Ct. at 1937). Judge Smith noted that "[u]nder *Iqbal*, al-Kidd had to 'plead sufficient factual matter to show that [Ashcroft] adopted and implemented the detention policies at issue' not for some neutral, lawful reason but for an unlawful purpose." *Id.* (alteration in original) (citing *Iqbal*, 129 S. Ct. at 1948–49). Judge Smith explained:

> The complaint claims Ashcroft created, adopted and implemented a policy of using the material witness statute for an unlawful end. The complaint contains numerous factual allegations supporting that theory, specifically referring to Ashcroft's liability for his own personal involvement with creating, implementing, and enforcing the alleged policy at issue in this case. The complaint also contains statements made by Ashcroft himself in support of such a policy, including his statements that law enforcement was to use "every available law enforcement tool" to arrest persons "who participate in, or lend support to, terrorist activities," that it was the government's policy "to use . . . aggressive arrest and detention tactics in the war on terror," and that "[a]ggressive detention of lawbreakers and material witnesses [was] vital to preventing, disrupting or delaying new attacks." Thus, al-Kidd's § 3144 claim is not based upon allegations that Ashcroft simply knew or should have known that federal agents were actually violating or had the potential to violate the material witness statute in connection with the alleged policy; rather the complaint is based upon allegations of Ashcroft's own misconduct in sanctioning and promulgating a nationwide policy that systematically authorized the misuse of the material witness statute to arrest and detain suspected terrorists for whom the government had insufficient evidence of any wrongdoing.

Id. (alterations in original). Judge Smith noted that because the case came to the court on a Rule 12(b)(6) motion, the court had an obligation to assume the allegations in the complaint were true, "whether discovery would bear them out or not." *Id.* (citing *Twombly*, 550 U.S. at 556).

In a dissent by Judge O'Scannlain, joined by Judges Kozinski, Kleinfeld, Gould, Tallman, Callahan, Bea, and

- ***Delta Mech., Inc. v. Garden City Group, Inc.***, 345 F. App'x 232, No. 08-15429, 2009 WL 2610796 (9th Cir. Aug. 26, 2009) (unpublished memorandum). The district court dismissed the plaintiff's complaint because it found that the plaintiff was not a third-party beneficiary to a settlement agreement, and therefore was not entitled to bring a lawsuit for alleged breach of that agreement. *Id.* at *1. The Ninth Circuit found this to be error because "[t]he evidentiary record on this issue [of whether the plaintiff was a third-party beneficiary] demonstrate[d] at this early stage of the case that whether Delta was or was not a third-party beneficiary [wa]s a genuine issue of material fact that might survive summary judgment." *Id.* The Ninth Circuit held that "[t]he factual content of the complaint and reasonable inferences therefrom [we]re plausibly suggestive of a claim entitling Delta to relief." *Id.* (citing *Moss v. U.S. Secret Serv.*, No. 07-36108, 2009 WL 2052985, at *1–2 (9th Cir. July 16, 2009) (citing *Twombly*, 550 U.S. 544)).

  Judge Ikuta dissented, stating that *Iqbal* requires applying a two-step process of identifying conclusions in the pleadings that are not entitled to an assumption of truth and then considering whether the factual allegations plausibly suggest entitlement to relief, and that under that test, there were not sufficient facts alleged to survive a motion to dismiss. *Id.* at *3 (Ikuta, J., dissenting) (citing *Iqbal*, 129 S. Ct. at 1950, 1951). Judge Ikuta elaborated:

  > Setting aside Delta's conclusory legal allegation that it is an intended third-party beneficiary of the Class Action Settlement Agreement, the essence of Delta's factual allegations is that 1) defendants failed to issue certificates to eligible class members, 2) such failure was a breach of the Settlement Agreement, and 3) as a result, Delta was not compensated. *See* Settlement Agreement, Section 8.2.3. Because Delta does not allege that the Settling Defendants agreed in the Settlement Agreement to incur an obligation to Delta, the complaint's factual allegations do not allow the court to draw the reasonable inference that Delta was an intended third-party beneficiary of the Settlement Agreement or that the defendants are

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Ikuta, Judge O'Scannlain noted that al-Kidd did not "allege that Ashcroft *personally* swore any false testimony," and that "it was Ashcroft's *subordinates* who provided the testimony that al-Kidd allege[d] was false." *Id.* at *11 (O'Scannlain, J., dissenting). Judge O'Scannlain stated that "[i]n light of *Iqbal's* holding that 'each Government official, his or her title notwithstanding, is only liable for his or her own misconduct,' al-Kidd's complaint fails to allege facts sufficient to establish a cause of action against Ashcroft." *Al-Kidd*, 2010 WL 9611855, at *11 (O'Scannlain, J., dissenting) (internal citation omitted). Judge O'Scannlain noted that al-Kidd did not allege that Ashcroft encouraged prosecutors to lie in the applications for material witness warrants and that al-Kidd did not claim that Ashcroft knew that his subordinates were submitting false affidavits. *Id.* at *12. Judge O'Scannlain concluded that "[a]t most, al-Kidd claim[ed] that Ashcroft's policies encouraged his subordinates to use material witness warrants to detain individuals within the maximum extent authorized by law," and argued that "[b]y permitting al-Kidd's claim that Ashcroft has violated *Franks* [*v. Delaware*, 438 U.S. 154 (1978),] to proceed, the majority permit[ted] al-Kidd to seek damages from Ashcroft for his subordinates' alleged misconduct, a result indisputably at odds with *Iqbal*." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

> liable to Delta for a breach of that agreement. The language in Section 8 of the Settlement Agreement quoted by the majority does not "plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1950. Accordingly, the district court did not err in dismissing Delta's complaint.

Id. at *3.

- ***Moss v. U.S. Secret Serv.***, 572 F.3d 962 (9th Cir. 2009). The plaintiffs alleged that two Secret Service Agents violated their First Amendment rights by ordering that a demonstration critical of then President George W. Bush be relocated. *Id.* at 964. The plaintiffs sued under *Bivens*, alleging violations of their First, Fourth, and Fifth Amendment rights. According to the complaint, anti-Bush protesters assembled in front of an inn where President Bush was expected to visit, and just before the President's arrival, state and local police cleared the alleyway behind the inn and began restricting the movements of some of the demonstrators. *Id.* at 965. The complaint alleged that at the same time, police allowed hotel guests and diners to remain inside the inn without conducting a security screening. *Id.* A pro-Bush demonstration assembled one block west of the anti-Bush demonstration and one block immediately west of the inn. *Id.* The Secret Service Agents allegedly directed state and local law enforcement to clear the street in front of the inn—where the plaintiffs were protesting—and move the people in that area east of the street on the east side of the inn. *See id.* The Agents stated that this was to ensure that nobody came within handgun or explosive range of the President. *Id.* The anti-Bush demonstrators were pushed by state and local police to the east side of Fifth Street, more than a block away from the inn (and farther than instructed by the Agents). *See id.* The plaintiffs alleged that the police used violent means to move the demonstrators, and that the pro-Bush demonstration continued without disruption. *Moss*, 572 F.3d at 965–66. The plaintiffs alleged that "the Agents' treatment of the anti-Bush demonstration in Jacksonville was but one instance of an officially authorized, *sub rosa* Secret Service policy," and that the Secret Service's guidelines and rules prohibiting discrimination based on protestors' views was an attempt to hide the actual policy from review. *Id.* at 966. The defendants moved to dismiss on the basis of qualified immunity, but the district court denied their motion to dismiss and the defendants filed an interlocutory appeal. The Ninth Circuit concluded that the complaint failed under the *Twombly*/*Iqbal* standards, but ruled that the plaintiffs should have a chance to replead under those standards.

  The Ninth Circuit first discussed "recent developments in the Supreme Court's pleading jurisprudence, first in *Twombly*, then the Court's clarification of that holding in *Iqbal*." *Id.* at 968. The court explained that in *Twombly*, "[t]he Court cautioned that *it was not outright overruling* Conley v. Gibson, *the foundational 'notice pleading' case construing Federal Rule of Civil Procedure 8(a)(2)*, but explained that *Conley*'s oft-cited maxim that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, *read literally*, set the bar too low." *Id.* (emphasis added) (footnote and internal citation omitted). Under these principles, the Ninth Circuit framed the question before it to

be "whether Plaintiffs' allegation that the Agents ordered the relocation of their demonstration *because of* its anti-Bush message is plausible, not merely possible." *Id.* at 970. The Ninth Circuit explained the two-step process set out in *Iqbal*, and used that process to evaluate the complaint. *See id.*

The court concluded that several of the allegations were conclusory and not entitled to a presumption of truth, including the allegation of the Agents' impermissible motive, the allegation that "the Agents acted in conformity with an officially authorized *sub rosa* Secret Service policy of suppressing speech critical of the President," and the allegation of systematic viewpoint discrimination. *Moss*, 572 F.3d at 970. The court explained that "[t]he allegation of systematic viewpoint discrimination at the highest levels of the Secret Service, without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate, and thus does nothing to enhance the plausibility of Plaintiffs' viewpoint discrimination claim against the Agents." *Id.* Turning to the factual allegations, the Ninth Circuit noted that the plaintiff had pleaded that the Agents ordered the relocation of the anti-Bush demonstrators but not of the pro-Bush demonstrators, and that the guests in the inn were not subjected to security screening or asked to leave, despite their proximity to the President. *Id.* at 971. The court found that these assertions did not amount to a plausible claim:

> The complaint alleges that the Agents instructed state and local police to move "all persons" between Third and Fourth streets to the east side of Fourth Street, a position *roughly the same distance from the Inn's patio dining area as the Pro-Bush demonstration*, and that in issuing that order, the Agents explained their desire to ensure that no protesters remained in handgun or explosive range of the President. If the Agents' motive in moving Plaintiffs away from the Inn was—contrary to the explanation they provided to state and local police—suppression of Plaintiffs' anti-Bush message, then presumably, they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn then the position that the pro-Bush demonstrators occupied. Instead, according to the complaint, the Agents simply instructed state and local police to move the anti-Bush protestors *to a location situated a comparable distance from the Inn as the other demonstrators*, thereby establishing a consistent perimeter around the President. This is not a plausible allegation of disparate treatment.
>
> Plaintiffs allege that they were ultimately driven more than three blocks away from the Inn, surrounded, and subjected to abusive police tactics, but *nowhere does their complaint allege, or even imply, that [the Secret Service Agents] had anything to do with how the local police carried out the initial order*. Without any allegation

> tying the Agents to the actions of the local police, we may not assume that either did anything beyond ordering Plaintiffs moved to the east side of Fourth Street. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (stating that courts are not required to make "unreasonable inferences" or "unwarranted deductions of fact" to save a complaint from a motion to dismiss).
>
> Plaintiffs' allegation that the diners and guests inside the Inn were allowed to remain in close proximity to the President without security screening does not push their viewpoint discrimination claim into the realm of the plausible. Again, the crux of Plaintiffs' complaint is that the differential treatment of similarly situated pro-Bush and anti-Bush demonstrators reveals that the Agents had an impermissible motive—suppressing Plaintiffs' anti-Bush viewpoint. The differential treatment of diners and guests in the Inn, who did not engage in expressive activity of any kind and were not located in the public areas outside of the Inn, however, offers little if any support for such an inference. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1130 (9th Cir. 2005) (holding that security zone exceptions permitting shoppers and employees, but not protestors, to enter a restricted area did not amount to discrimination on the basis of viewpoint because the two groups were not similarly situated).
>
> We conclude that Plaintiffs' complaint fails to plead facts plausibly suggesting a colorable *Bivens* claim against the Agents. The facts do not rule out the possibility of viewpoint discrimination, and thus at some level they are consistent with a viable First Amendment claim, but *mere possibility is not enough*. The factual content contained within the complaint does not allow us to reasonably infer that the Agents ordered the relocation of Plaintiffs' demonstration because of its anti-Bush message, and it therefore fails to satisfy *Twombly* and *Iqbal*.

Id. at 971–72 (emphasis added) (original emphasis and internal record citations omitted).

Although the Ninth Circuit concluded that the complaint was insufficient, it held that the plaintiffs should have the opportunity to amend their complaint, noting that pleading standards had recently changed. The court explained that:

> Prior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts consistent with a claim entitling the plaintiff to relief. *See Conley*, 355 U.S. at 45–46, 78 S. Ct. 99. Under the Court's latest pleadings cases, however, the facts alleged in a complaint must state a claim that is plausible on its face. As many

> have noted, *this is a significant change, with broad-reaching implications*. *See, e.g.*, A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 433 (2008) (characterizing *Twombly* as an abrupt and significant departure from the long-standing tradition of liberal notice pleading in the federal courts). Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that *Twombly* and *Iqbal* require.

Id. at 972.

Tenth Circuit

- ***Gee v. Pacheco***, --- F.3d ----, 2010 WL 4909644 (10th Cir. Dec. 2, 2010). Gee, a state prisoner proceeding *pro se*, filed a 42 U.S.C. § 1983 claim against Wyoming State Penitentiary (WSP) officials alleging that they violated his First, Eighth, and Fourteenth Amendments. *Id.* at *1. Defendants moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6). *Id.* The district court granted the motion and dismissed the complaint with prejudice, concluding that Gee had failed to state a claim upon which relief could be granted and that his complaint was frivolous. *Id.* The Tenth Circuit affirmed the dismissal with prejudice of several claims because they were barred by the statute of limitations or claim preclusion, but it reversed the dismissal of other claims because "[s]ome of the allegations sufficiently alleged § 1983 claims and should have been allowed to proceed" and defects in other claims might be cured by amendment. *Id.*

  With respect to his First Amendment claims, Gee alleged that Defendants:

  > (1) had violated his right to communicate with persons outside the prison; (2) had violated his right to access the courts by (a) confiscating his legal files and hindering his access to them, (b) hindering his communications with a jailhouse lawyer and denying access to a law library, (c) reviewing his legal files, and (d) interfering with his legal mail; and (3) had violated his right to be free from retaliation for having exercised his First Amendment rights.

  Gee, 2010 WL 4909644, at *1.

  With respect to his Eight Amendment Claims, Gee alleged that Defendants:

  > (1) had transferred him to out-of-state prisons where he suffered conditions amounting to cruel and unusual punishment; (2) had subjected him to inhumane transport and cell conditions in Wyoming, including the denial of basic necessities; (3) had denied him medical

> treatment or rendered inadequate medical treatment for various conditions, including a sleepwalking disorder; and (4) had assaulted him while transferring him within the prison.

Id.

And with respect to his Fourteenth Amendment Claims, Gee alleged that Defendants:

> (1) challenged Defendants' decisions (a) to transfer him to prisons in other states, (b) to place him in an isolation cell and in segregation at WSP, and (c) to place information in his file and classify him at certain levels; (2) challenged particular disciplinary actions and hearings; (3) alleged that he had been deprived of property; and (4) alleged that he had been subjected to harassment, discrimination, and equal-protection violations.

Id.

The Tenth Circuit first discussed the pleading standard announced in *Twombly*:

> For many years the federal courts followed the rule that a claim can be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. In 2007, however, the Supreme Court retired the *Conley* standard, stating that "*Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough." *Twombly*, 550 U.S. 544, 562(2007). "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." *Id.* at 563, 127 S.Ct. 1955. Although restating the fundamental rule that the court, on a motion to dismiss, must assume that all factual "allegations in the complaint are true (even if doubtful in fact)," *id.* at 555, 127 S.Ct. 1955, it said the plaintiff must provide "more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action," and "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.* The Court suggested that the test is one of plausibility....

Gee, 2010 WL 4909644, at *2. The court then repeated the Supreme Court's holding in *Iqbal* that the "plausibility" standard should also be applied to prisoner complaints:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is

> plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. 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.

Id. at *4 (quoting *Iqbal*, 129 S. Ct. at 1949) (internal quotation and citations omitted). The court then discussed the application of the plausibility standard to prisoner civil-rights claims:

> *Iqbal* establishes the importance of context to a plausibility determination. The allegations in *Iqbal's* complaint had to be read in light of the events of September 11. Nowhere in the law does context have greater relevance to the validity of a claim than prisoner civil-rights claims. Prisons are a unique environment, and the Supreme Court has repeatedly recognized that the role of the Constitution within their walls is quite limited. Government conduct that would be unacceptable, even outrageous, in another setting may be acceptable, even necessary, in a prison. Consequently, a prisoner claim will often not be plausible unless it recites facts that might well be unnecessary in other contexts. For example, as we will discuss more fully below, a prisoner claim may not be plausible unless it alleges facts that explain why the usual justifications for the complained-of acts do not apply. When every prison places legitimate restrictions on prisoner mail, a First Amendment claim of interference with mail ordinarily is not plausible absent factual allegations showing at least that the alleged interference violated prison rules or that the applicable rule was invalid, either generally or in the specific context of the claim. Without such further allegations, the prisoner's First Amendment claim is no more plausible than an antitrust claim based solely on allegations of parallel conduct.

Gee, 2010 WL 4909644, at *4. The court noted that one of the chief concerns of critics of the plausibility standard is that plaintiffs will be denied proper access to the courts if not able to engage in discovery where there is "asymmetry of information, with the defendants having all of the evidence." *Id.* at *5. It explained that this concern rarely applies to prisoners claiming constitutional violations: "Not only do prisoners ordinarily know what has happened to them; but they will have learned how the institution has defended the challenged conduct when they pursue the administrative claims that they must bring as a prerequisite to filing suit." *Id.* But the court explained that "if the complaint alleges that the prisoner received no explanation in the grievance process (or was coerced into not pursuing a

grievance), the claim that an officer's conduct lacked justification may become plausible. To be sure, a *pro se* prisoner may fail to plead his allegations with the skill necessary to state a plausible claim even when the facts would support one. But ordinarily the dismissal of a *pro se* claim under Rule 12(b)(6) should be without prejudice" *Id.*[31]

The court then considered the question of what materials can be reviewed on motions under Rule 12(b)(6). *Id.* And decided that the district court improperly relied upon documents Defendants used to support their motion to dismiss. *Id.* But the court explained that this was not reversible error: "[t]he failure to convert a 12(b)(6) motion to one for summary judgment where a court does not exclude outside materials is [not] reversible error [if] the dismissal can be justified without considering the outside materials." *Gee*, 2010 WL 4196034, at *6 (quoting *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997)).

The Tenth Circuit first addressed Gee's claims that sufficiently alleged a constitutional violation. With respect to his First Amendment claims, the court explained that, in accordance with *Turner v. Safley*, 482 U.S. 78, 89 (1987): "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Gee*, 2010 WL 4909644, at *6. To state an adequate First Amendment claim under *Iqbal* and *Turner*, the court decided that Gee "must include sufficient facts to indicate the plausibility that the actions of which he complains were *not* reasonably related to legitimate penological interests." *Id.* Stated another way, "[i]t is sufficient that he plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest." *Id.* The court found that Gee's allegations that "Defendant Lopez intentionally, and for the purpose of harassing him, confiscated and destroyed letters sent to him by persons outside the prison 'under the guise' of sticker and perfume violations" stated "plausible claims of violations of Gee's First Amendment Rights" because "there is no legitimate penological reason to restrict mail simply to harass inmates or to confiscate mail that complies with prison policy." *Id.* at *7. The court also found that Gee's allegation that "Defendants Lopez returned to him outgoing letters that had 'appropriate postage affixed ... without reason for not sending [them] to the Post Office' for mailing" stated "plausible claims" of First Amendment violations because Defendant Lopez gave no reason for not processing his mail. *Id.* The court then consider Gee's allegations regarding mail from his sister. *Id.* Gee alleged that while he was "in an isolation cell on incommunicado status, during which he was not allowed to send out or receive personal mail," a letter from his estranged sister was given to him and then confiscated because of his incommunicado status, before he court read it. *Gee*, 2010 WL 4196034, at *7. The letter was never returned to Gee. *Id.* The court noted that "[t]here are certainly legitimate penological reasons for isolating a prisoner for limited periods of time,

[31] This case was originally decided on October 26, 2010. *See Gee v. Pacheco*, 624 F.3d 1304 (10th Cir. 2010). The December opinion is largely unchanged, but did add this sentence: "Of course, if the complaint alleges that the prisoner received no explanation in the grievance process (or was coerced into not pursuing a grievance), the claim that an officer's conduct lacked justification may become plausible." *Gee*, 2010 WL 4909644, at *5.

but it is not apparent why a prisoner should be permanently deprived of a letter from an estranged family member solely because it arrived during such temporary isolation." *Id.* The court concluded that "[a]lthough Mr. Gee did not allege that prison officials provided no reason for the permanent confiscation of his sister's letter, we think that such confiscation is on its face sufficiently problematic that the claim deserves to proceed beyond the pleading stage." *Id.* Gee also alleged that Defendants retaliated against him for exercising him First Amendment Rights. *Id.* at *8. The Tenth Circuit agreed with the district court that most of the retaliation claims failed to state a claim, but also decided that some of the allegations stated a First Amendment retaliation claim by:

> (1) indentify[ing] constitutionally protected activity in which Mr. Gee engaged (filing specific grievances against Defendants and filing a particular habeas petition with the court); (2) describ[ing] a responsive action that would 'chill a person of ordinary firmness from continuing to engage in that activity' (transfer to an out-of-state supermax prison); and (3) recit[ing] facts indicating that the action 'was substantially motivated as a response to [his] exercise of constitutionally protected conduct.' (that Defendants were aware of his protected activity, that his protected activity complained of Defendants' actions, and that the transfer was in close temporal proximity to the protected activity).

Id. (quoting *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007)).

The court then considered Gee's Eighth Amendment Claim. Gee alleged that "as he was being transported between prisons, he informed Pacheco and Everett that he had not had food or water for more than 24 hours, but Everett said "'he didn't care,' and both Defendants restrained him with a stun belt, belly chains, handcuffs, and a black box covering the handcuffs, which prevented him from accessing the food and water provided to the other prisoners being transported." *Gee*, 2010 WL 4196034, at *8. The court decided that Gee "allege[d] sufficient facts to establish both elements of an Eighth Amendment claim - the objective prong of sufficiently serious deprivation and the subjective prong of deliberate indifference." *Id.* Defendants argued that this claim should nevertheless be dismissed because it was filed two days after the four-year statute of limitations had run. *Id.* at *9. The Tenth Circuit noted that Gee contended that he was entitled to equitable tolling and decided that, "given that the delay was only two days past the statutory deadline, the claim should not have been dismissed without giving Mr. Gee an opportunity to describe with greater specificity why equitable tolling should apply" and remanded to the district court to determine whether Gee's allegations justified equitable tolling. *Id.*

The court next explained why some of the allegations in Gee's complaint were insufficient to state a claim. It disposed of Gee's First Amendment allegations concerning treatment imposed when he was not in Defendants' physical custody, but in an out-of-state prison, because Gee did not allege "sufficient facts to show that Defendants should be liable for his

treatment at the hands of non-Defendants." *Id.* The court also decided that Gee's "bare allegations (1) of brief delays in mailing or receiving his correspondence and (2) of denial of his right to communicate with persons outside the prison when he was placed in isolation for approximately 25 hours on February 28, 2002, do not rise to the level of constitutional violations." *Id.* "As for his complaints that one letter was censored and that Defendants withheld and forced him to dispose of magazines to which he subscribed, such restrictions are sufficiently commonplace in the prison setting, that his claim is not plausible absent allegations showing that the restrictions were imposed in violation of prison regulations or that the regulations invoked were unconstitutional in the circumstances. And Mr. Gee's allegation that Defendants transferred him to Nevada to prevent him from communicating with outside persons (because Nevada does not provide stamps to indigents) is too conclusory and speculative to satisfy *Iqbal* standards." *Id.* (internal citation omitted).

The court also disposed of some of Gee's access claims. *Gee*, 2010 WL 4909644, at *10. Gee alleged "that Defendants engaged in confiscating, reviewing, and hindering access to his legal files, hindering his communications with a jailhouse lawyer, denying him access to a law library, and interfering with his legal mail." *Id.* The Tenth Circuit agreed with the district court's holding that "a prisoner must demonstrate actual injury from interference with his access to the courts - that is, that the prisoner was frustrated or impeded in his efforts to pursue a nonfrivolous legal claim concerning his conviction or his conditions of confinement." *Id.* And held that Gee had failed this test. *Id.* The court also disposed of allegations that "did not connect a deprivation to an injury at all" and allegations that were "vague and conclusory." *Id.*

The court next determined that some of Gee's Eighth Amendment allegations failed to state a claim. *Id.* The court decided that some of the complaint's allegations "contain insufficient factual information to conclude that a constitutional violation is plausible, rather than merely possible." *Gee*, 2010 WL 4196034, at *11. These allegations included paragraphs "describ[ing] Defendants' confiscating Mr. Gee's canteen items, depriving him of hygiene items for approximately 25 hours, and incarcerating him for four weeks in an isolation cell with limited outdoor recreation and lack of access to hygiene items." *Id.* The Tenth Circuit agreed with the district court's observation that, with respect to Gee's allegations concerning Dr. Coyle, "some allegations indicate not a lack of medical treatment, but a disagreement with Dr. Coyle's medical judgment in treating a condition with certain medications rather than others. For example, Mr. Gee alleges that he was not given the medications he desired for his headaches; but he admits being given other medications, so his complaint amounts to merely a disagreement with Dr. Coyle's medical judgment concerning the most appropriate treatment." *Id.* The court explained that "[d]isagreement with a doctor's particular method of treatment, without more, does not rise to the level of an Eighth Amendment violation." *Id.* The court disposed of the other claims against Dr. Coyle as insufficient or "vague and conclusory." *Id.* The Tenth Circuit also decided that Gee's allegation "that he was assaulted while being transported within WSP" was not "sufficiently specific to identify an Eighth Amendment violation" because he did not explain what Defendants allegedly did and might have been complaining about a "mere unwelcome

touching." *Id.* at *12.

The court decided that all of Gee's allegations of violations of the Fourteenth Amendment failed to state a claim. *Gee*, 2010 WL 4196034, at * 12. Some of these allegations were time-barred. *Id.* And with regard to Gee's allegations of being deprived of liberty without due process, the court determined that Gee failed to establish the existence of a protected liberty interest:

> As a matter of law, he has no liberty interest in being incarcerated in a particular institution, *see Meachum v. Fano*, 427 U.S. 215, 223-25(1976), or in discretionary classification decisions by prison officials, *see Cardoso v. Calbone*, 490 F.3d 1194, 1197-98 (10th Cir. 2007). Nor does he have a liberty interest in his conditions of confinement (including placement in isolation and segregation), unless the facts show that the conditions "impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also Cosco v. Uphoff*, 195 F.3d 1221, 1224 (10th Cir.1999) (applying *Sandin* to regulations concerning prison conditions). In most instances, Mr. Gee pleaded no facts to support a claim of atypical and significant deprivation, and in the few instances when he did plead any facts, he did not plead enough facts to make it plausible that he suffered an atypical and significant hardship. Finally, with regard to his allegations of false information in his base file, it is not enough to allege that a government agency or official has published false or defamatory information. *See Paul v. Davis*, 424 U.S. 693, 712 (1976). Rather, to establish a constitutional violation, a plaintiff must show that an additional action taken on the basis of the information deprived him of a liberty or property interest. *See id.* Mr. Gee does not plead facts that meet this standard.

Gee, 2010 WL 4909644, at *12. Gee also failed to "plead sufficient facts to state a claim of deprivation of property without due process, because he does not allege the lack of an adequate state remedy for that deprivation." *Id.* at *13. The court explained:

> [A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available," and "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy."

Id. (quoting *Hudson v. Palmer*, 468 U.S. 517, 533 (1984)). The Tenth Circuit agreed with the district court's determination that Gee's claims regarding disciplinary proceedings in

March and April 2002 failed because they were adjudicated in another lawsuit, and therefore barred by claim preclusion. *Id.* Next, the court rejected Gee's complaint that officials violated his Fourteenth Amendment rights by not allowing Gee to observe the search of his cell because "he does not have a Fourteenth Amendment right to observe his cell search" and "he did not allege any injury from being able to watch the cell search." *Id.* Then the court rejected Gee's "remaining allegations of racism, discrimination, equal-protection violation, and retaliation" as "entirely conclusory." *Gee*, 2010 WL 4909644, at * 13.

Finally, the court determined that the district court should not have dismissed the entire complaint without prejudice, and remanded to give Gee "an opportunity to seek leave to file an amended complaint that satisfied *Twombly* and *Iqbal*, except for those claims that are barred by preclusion or the statute of limitations so that amending those claims would be futile. *Id.*

- ***United States ex rel. Lemmon v. Envirocare of Utah, Inc.***, 614 F.3d 1163 (10th Cir. 2010). Former employees of a government contractor, Envirocare, brought *qui tam* claims under False Claims Act (FCA), alleging that Envirocare repeatedly violated its contractual and regulatory obligations by improperly disposing of hazardous waste and falsely representing to the government that it had fulfilled its obligations. *Id.* at 1165-66. The district court dismissed three of Plaintiffs' complaints without prejudice and with leave to file an amended complaint. *Id.* at 1166. In the third dismissal, "the district court provided an extensive analysis of the deficiencies of Plaintiffs' (second amended) complaint and gave guidance for filing legally sufficient claims." *Id.* Responding to the district court's analysis, Plaintiffs filed a third amended complaint, reducing the number of claims and adding substantial factual allegations. *Id.* The district court dismissed the third amended complaint with prejudice "for substantially the same reasons" it dismissed the second amended complaint. *Id.* at 1167. The district court stated that Plaintiffs "may well have pleaded various regulatory violations," but because Plaintiffs did not allege that the regulations require complete regulatory compliance before certification for payment," Plaintiffs failed to tie those allegations to an identifiable, plausible 'false claim' within the meaning of the False Claims Act. *Lemmon*, 614 F.3d at 1167 (internal quotations omitted). The Tenth Circuit reversed and remanded.

  Plaintiffs asserted claims under § 3729(a)(1) and (2) fo the FCA and alleged that Envirocare breached its obligations by

  > (1) ignoring its reporting, recording, regulatory, and maintenance requirements, (2) violating the contractual and regulatory disposal requirements pertaining to location and size of buried debris, (3) violating the contractual and regulatory disposal requirements pertaining to exposed waste materials, (4) failing to remediate and report waste spills, (5) disposing of waste without proper work orders, (6) violating disposal requirements regarding the construction

> and maintenance of waste-containing cells, and (7) failing to report the improper mixing of waste.

Id. at 1166.

The court explained that, under the FCA:

> [L]iability can attach when a government payee submits either a legally or factually false request for payment. Claims arising from factually false requests generally require a showing that the payee has submitted "'an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.'" *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (quoting *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir.2001)). Claims arising from legally false requests, on the other hand, generally require knowingly false certification of compliance with a regulation or contractual provision as a condition of payment. *See id.*

Lemmon, 614 F.3d at 1168. The court noted that Plaintiffs asserted FCA claims based on both implied and express false-certification theories and explained that:

> Claims under an express-false-certification theory arise when a payee "falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Conner*, 543 F.3d at 1217 (quoting *Mikes*, 274 F.3d at 698). The payee's "certification" need not be a literal certification, but can be any false statement that relates to a claim. *Id.*; *see, e.g., United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 (9th Cir.2006) ("So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.").
>
> While express-false-certification claims may presumably arise under any subsection of § 3729(a), we have held that implied-false-certification claims can arise under § 3729(a)(1) but not under § 3729(a)(2). *Shaw*, 213 F.3d at 531-32. In so finding, we recognized that § 3729(a)(1) requires "only the presentation of a false or fraudulent claim for payment or approval" without the additional § 3729(a)(2) requirement of a "false record or statement." *Id.* (internal quotation marks and citations omitted). Thus, claims under an implied-false-certification theory do not require courts to examine a payee's statements to the government. Rather, "the analysis focuses

> on the underlying contracts, statutes, or regulations themselves to ascertain whether they make compliance a prerequisite to the government's payment." *Conner*, 543 F.3d at 1218. "If a contractor knowingly violates such a condition while attempting to collect remuneration from the government, he may have submitted an impliedly false claim." *Id.*
>
> In this circuit, the nature of claims advanced under an implied-false-certification theory has been addressed most directly in *Shaw*. 213 F.3d at 531-33. In *Shaw*, and later in *Conner*, we recognized that the key attribute of implied-false-certification claims - and what most clearly differentiates them from express-false-certification claims - is that the payee's request for payment lacked an express certification. *Id*. Thus, we found that the pertinent inquiry for such claims is not whether a payee made an "affirmative or express false statement," but whether, through the act of submitting a claim, a payee knowingly and falsely implied that it was entitled to payment. *Id*. at 532-33; *see also Conner*, 543 F.3d at 1218.
>
> Though implied claims differ from express claims, they nonetheless share some common elements, including a materiality requirement. This requirement necessitates showing that the false certification was "material to the government's decision to pay out moneys to the claimant." *Conner*, 543 F.3d at 1219 (internal quotation marks and citations omitted). Thus, a false certification - regardless of whether it is implied or express - is actionable under the FCA only if it leads the government to make a payment which, absent the falsity, it may not have made. *Id.*

Id. at 1168-69.

The court decided that the third amended complaint contained sufficient factual allegations to support Plaintiffs' implied-false-certification claims:

> First, they documented a series of instances in which they personally observed Envirocare violate its contractual and statutory obligations. For the alleged violations, Plaintiffs detailed the violative activity, the regulation or contractual provision violated, the date on which the alleged violation occurred, and the Plaintiff that witnessed or, at Envirocare's direction, participated in the activity. Next, Plaintiffs explained how Envirocare was aware of the violations, listing specific instances in which Plaintiffs documented and/or informed their superiors of the violations. With regard to government payments,

> Plaintiffs provided the dates, numbers, and amounts of Envirocare's requests for payment under its contracts with the government. Plaintiffs stated that they had reviewed "all" of Envirocare's requests for payment during the pertinent period and that none disclosed any violations of Envirocare's contractual or regulatory obligations. Plaintiffs further alleged that each request for payment submitted during the pertinent time period was paid in full by the government. Finally, addressing the materiality requirement, Plaintiffs cited specific contractual provisions under which the government, had it been aware of the violations, may have refused or reduced payment to Envirocare. Plaintiffs also showed that the violations undercut the purpose of the contracts-the safe and permanent disposal of waste. Based on the contractual provisions, Plaintiffs contended that, had it been aware of the violations, the government may not have paid in full.
>
> Viewing Plaintiffs' allegations, it is difficult to discern the purported Rule 12(b)(6) deficiencies. As noted above, the district court did not mention the implied-false-certification claims. Instead, the district court's order faulted Plaintiffs for not "tying the alleged incidents with an identifiable certification of regulatory compliance." As explained above, implied-false-certification claims do not involve - let alone require - an explicit certification of regulatory compliance.
>
> The district court found that Plaintiffs failed to allege that the state and federal regulations "require complete regulatory compliance before certification for payment." Yet Plaintiffs' third amended complaint makes clear that the alleged regulatory violations also constituted material breaches of Envirocare's contractual obligations. Even if Plaintiffs failed to state a claim arising directly from Envirocare's regulatory obligations, Plaintiffs' allegations provided more than enough factual detail to support their contract-based claims.

Id. at 1169-70 (internal citations omitted).

The court next considered Plaintiffs' express-false-certification claims, and found that they were also sufficiently alleged:

> Plaintiffs' third amended complaint sufficiently alleges that Envirocare knowingly submitted legally false requests for payment to the government and that the government paid the requests. Thus, in order to sustain their express-false-certification claims, Plaintiffs need only to have alleged - with sufficient factual basis - that the requests

> contained a false statement and that the statement was material to the government's decision to pay. Plaintiffs' third amended complaint addresses the false-statement requirement by pointing to the payment requests' certification that "the payments requested were only for work performed in accordance with the specifications, terms and conditions of the contract...." Because Envirocare's work was not performed in accordance with the contractual requirements, Plaintiffs allege, the certifications were false.

Id. at 1170-71.

The court then explained that Plaintiffs were also required to comply with Rule 9(b):

> Rule 9(b) supplements 8(a) in setting forth the pleading requirements under the FCA. Rule 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Our pre-*Twombly* cases required plaintiffs pursuing claims under the FCA to plead the "who, what, when, where and how of the alleged [claim]." This language has been read to require plaintiffs to identify the time, place, content, and consequences of the fraudulent conduct. Though *Twombly* and *Iqbal* clarified 9(b)'s requirements, the Rule's purpose remains unaltered. Namely, "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based...." Thus, claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme.

Id. at 1171 (internal citations omitted). The court concluded that Plaintiffs' FCA claims were sufficient because they "provid[ed] factual allegations regarding the who, what, when, where and how of the alleged claims:"

> With regard to the who, Plaintiffs alleged the names and positions of Envirocare employees who observed the contract-and-regulation-breaching activity, the names of the Envirocare supervisors to whom they reported, and the names of the Envirocare employees responsible for submitting the false claims to the Government. Addressing the what, Plaintiffs alleged a series of contractual and regulatory breaches, pointing to specific obligations that Envirocare breached. For contractual violations, Plaintiffs listed the contracts that were purportedly violated. They also listed payment requests submitted, including the date of submission, the amount sought, and where applicable the language of the express

> certification contained in each request. In pleading the when, Plaintiffs documented the dates on which specific violations took place and the dates on which payment requests were submitted. For the where, Plaintiffs provided the location of the waste disposal site for the alleged violations-including, at times, the specific site area where the violations occurred. Finally, with regard to the how, Plaintiffs included extensive factual detail regarding how the violations occurred, adding, in many instances, the conduct that led to the violation, the reason the result constituted a violation, and a description of the effect of the violation. Plaintiffs also offered a detailed description of Envirocare's alleged efforts to conceal the violations, including, for example, the names of the Envirocare supervisors who instructed one Plaintiff to stop documenting violations.

Id. at 1172 (internal citations omitted).

- ***Mecca v. United States***, No. 09-1569, 2010 WL 2893617 (10th Cir. July 26, 2010) (unpublished). Plaintiff Mecca pleaded claims under the Federal Tort Claims Act (FTCA) and *Bivens*. *Id.* at *1. The district court dismissed the case. *Id.* at *2. It ruled that it lacked subject matter jurisdiction over the FTCA claims because "the FTCA imposes liability in accordance with state law, but the complaint cited no source of substantive state liability." *Id.* The court also noted that the FTCA civil conspiracy claim failed to state a claim absent any facts "suggesting a meeting of the minds between defendants as to the object of the conspiracy." *Id.* And that the *Bivens* claim was deficient under Rule 12(b)(6) because it failed to allege a constitutionally recognized property or liberty interest. *Id.* The Tenth Circuit affirmed the district court's judgment, but remanded the case with instructions to modify dismissal of the FTCA claims to be without prejudice. *Mecca*, 2010 WL 2893617 at *1.

  Dr. Mecca worked under contract as a civilian radiologist at an army hospital. *Id.* A year after obtaining staff privileges, Mecca misdiagnosed a patient. *Id.* Starkey, Chief of Radiology, advised Mecca that "he could resign without adverse consequences or face investigation, suspension, and referral to the National Practitioners Data Bank and state licensing authorities." *Id.* Mecca resigned, but Starkey nevertheless went ahead with proceedings to hold his privileges in abeyance pending the outcome of an investigation and peer review. *Id.* Mecca was then notified that his privileges had been suspended because he resigned during the investigation. *Id.* Following the suspension, Dr. Mecca sued because was unable to find a new job. *Id.*

  With respect to the FTCA claims, the court noted that the FTCA granted a limited waiver of sovereign immunity for claims against the government which included only state law claims. *Mecca*, 2010 WL 2893617 at *2. Because Plaintiff claimed only violations of federal regulations, which "cannot impose liability under the FTCA," the court held that the claims

were not within the scope of the FTCA's waiver of sovereign immunity and thus Plaintiff failed to invoke the court's jurisdiction. *Id.*

The court then turned to Plaintiff's civil conspiracy claim and held that it also failed. *Id.* at *3. The court explained that, in Colorado, the elements of a civil conspiracy claim are "(1) an object to be accomplished; (2) an agreement by two or more persons on a course of action to accomplish that object; (3) in furtherance of that course of action, one or more unlawful acts which were performed to accomplish a lawful or unlawful goal, or one or more lawful acts which were performed to accomplish an unlawful goal; and (4) damages to the plaintiff as a proximate result." *Id.* Plaintiffs' complaint did not plead "enough facts to state a claim to relief that is plausible on its face," (quoting *Twombly*, 550 U.S. at 570) because it "alleges nothing to plausibly suggest defendants agreed on an object of the putative conspiracy." *Id.* The complaint generally claims that defendants "agreed, by words or conduct, to accomplish an unlawful goal or accomplish a goal through unlawful means." *Id.* But the court decided that this was a mere "formulaic recitation of Colorado's minimum pleading standard for civil conspiracy claims." *Mecca*, 2010 WL 2893617 at *3 (citations omitted). The court pointed to Plaintiff's "strongest allegation" – that Defendants "caused adverse action to be taken against him in furtherance of the goal of revoking his privileges" – and explained that it failed to suggest a meeting of the minds. *Id.* "At most, this might suggest the suspension was unlawful, but we cannot infer from defendants' independent acts an agreement to realize that goal." *Id.*

The court then turned to the nature of the dismissal of Plaintiff's claims. *Id.* at *4. It explained that where an action is dismissed for lack of jurisdiction, "the dismissal must be without prejudice." *Id.* (quoting *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006)). The court thus remanded with instructions to enter dismissal of the FTCA claims without prejudice.

With respect to the *Bivens* claims. The court first addressed the due process claim and explained that

> A successful procedural due process claim requires a plaintiff to show (1) the deprivation of a liberty or property interest and (2) the absence of due process. *Stears v. Sheridan Cnty. Mem'l Hosp. Bd. of Trs.*, 491 F.3d 1160, 1162 (10th Cir.2007). Protected property interests require "a legitimate claim of entitlement," created not by the Constitution but by independent sources such as statute, municipal ordinance, or contract. *Nichols v. Bd. of County Comm'rs*, 506 F.3d 962, 969-70 (10th Cir.2007) (quotation omitted). "However, if an employee voluntarily relinquishes a property interest, then no procedural due process violation has occurred." *Narotzky v. Natrona Cnty. Mem'l Hosp.*, 610 F.3d 558, 2010 WL 2510659, at *5 (10th Cir. June 23, 2010).

Id. The court noted that Plaintiff "does not contend his contract created a property interest." *Id.* at *5. Instead, he contended that a federal regulation conditioning the government's authority to alter his staff privileges on unsatisfactory patient care "constitute[d] a protected property interest because they restrict the Army's ability to adversely affect his privileges." *Mecca*, 2010 WL 2893617 at *5. The court rejected this argument because Plaintiff did not plead these allegations in his amended complaint. *Id.*

The court also held that dismissal of Plaintiff's liberty interest claim was proper. *Id.* The court explained that, to show a deprivation of one's liberty interest in professional reputation, a plaintiff must demonstrate "(1)'statements [that] impugn the good name, reputation, honor, or integrity of the employee'; (2) 'the statements [were] false'; (3) the 'statements ... occur[red] in the course of terminating the employee or must foreclose other employment opportunities'; and (4) 'the statements [were] published.'" *Id.* (quoting *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 579 (10th Cir.1996)) (alterations in original). Plaintiff's claim was that "hospitals decline[d] to hire him when they learn[ed] of his suspension and he [could not] find work due to defendant's actions." *Id.* The court found that this allegation did not meet *Twombly's* plausibility standard, which requires "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," because there was no indication who published the information about Plaintiff's suspension. *Id.* (quoting *Iqbal*, 129 S.Ct. at 1949). "Vague allegations against the entire Army do not suffice." *Mecca*, 2010 WL 2893617 at *5.

- ***Mink v. Knox***, 613 F.3d 995, No. 08-1250, 2010 WL 2802729 (10th Cir. Jul. 19, 2010). The court addressed whether the complaint's allegations plausibly stated the violation of an established constitutional right that would prevent the application of qualified immunity. Plaintiff Thomas Mink was a student at the University of Northern Colorado when he created a fictional character named "Junius Puke" for the editorial column of his internet-based journal. *Id.* at *1. The column allegedly contained altered photographs of Junius Peake, a professor at the University, and contained language that Peake would have been unlikely to use. *Id.* Peake contacted the police, who began investigating whether the publication violated Colorado's criminal libel statute. *Id.* The detective in charge prepared an affidavit to obtain a search warrant and presented it to Susan Knox, the defendant and deputy district attorney. *Id.* After the affidavit and matching warrant were approved by a magistrate judge, the police searched Mink's home and confiscated his personal computer and written materials referencing his online publication. *Id.* After Mink sued various officials and obtained a temporary restraining order, the district attorney issued a "no file" decision, concluding that the statements in Mink's publication could not be prosecuted under the state criminal libel statute. *Mink*, 2010 WL 2802729, at *1. The district court originally granted Knox's motion to dismiss the complaint based on absolute immunity, but that decision was reversed by the Tenth Circuit. *Id.* at *1–2. On remand, the district court again dismissed the complaint based on qualified immunity. *Id.* at *2. The Tenth Circuit reversed and remanded.

  The Tenth Circuit noted, without substantial discussion, that *Iqbal*'s plausibility standard applied and that in reviewing a decision on a motion to dismiss, it accepted all factual

allegations as true and drew all reasonable inferences in favor of the nonmoving party. *Id.* The court first examined whether the complaint adequately alleged the requisite causal connection between Knox's actions and the alleged violation of Mink's constitutional rights. "Mr. Mink alleged that Ms. Knox caused the issuance of a search warrant that lacked probable cause and particularity, thereby causing a violation of his Fourth Amendment rights." *Id.* at *3. The court concluded that the district court erred by construing the complaint as failing to allege direct participation in the constitutional violation. *Id.* The court explained that § 1983 liability does not require direct participation, and that a "plaintiff may demonstrate causation by showing an affirmative link between the constitutional deprivation and the officer's exercise of control or discretion." *Mink*, 2010 WL 2802729, at *4. The court noted that in *Iqbal*, the Supreme Court had held that "'each Government official . . . is only liable for his or her own misconduct,'" and that the dissenters in *Iqbal* "viewed this pronouncement as 'eliminating . . . supervisory liability entirely.'" *Id.* at *4 n.5 (omissions in original) (citations omitted). Although both views had "'generated significant debate about the continuing vitality and scope of supervisory liability, not only in *Bivens* actions, but also in § 1983 suits,'" the court found it unnecessary to take a position because "Mink ha[d] pled sufficient facts to state a facially plausible claim that Ms. Knox's input into and advice concerning the affidavit and warrant directly caused the purportedly unconstitutional search of his house." *Id.* (quoting *Lewis v. Tripp*, 604 F.3d 1221, 1227 n.3 (10th Cir. 2010)). The court also rejected the district court's "*sua sponte* conclusion that the complaint should be dismissed because it did not specifically allege that Ms. Knox reviewed the warrant as well as the affidavit," noting that the affidavit and the search warrant were both attached to the complaint and Knox's own affidavit indicated that she had reviewed the warrant. *Id.* at *4. The court explained that the complaint's allegations sufficiently alleged a causal connection between Knox's actions and the alleged constitutional violations:

> More importantly, taking Mr. Mink's allegations as true, viewing them in the light most favorable to him, and making all reasonable inferences in his favor, as we are required to do, persuades us that the amended complaint plausibly asserted the requisite casual connection between Ms. Knox's conduct and the search and seizure that occurred at Mr. Mink's home. The amended complaint not only alleged that Ms. Knox "reviewed and approved the affidavit submitted to the state district court in support of the warrant to search . . . Mink's home," it also alleged that she "authorized and caused an unlawful search[,]" that "[a] reasonable prosecutor would have known that the *warrant* failed to meet the particularity requirement of the Fourth Amendment[,]" (emphasis added), and that "[a] reasonable prosecutor would have known that the affidavit failed to establish probable cause to search and seize *the items described in the warrant*." (emphasis added). These allegations, coupled with the attachment of the warrant and affidavit to the complaint, support the reasonable factual inference that Ms. Knox reviewed the warrant as well as the affidavit, and that her approval set in motion a series of

> events that she knew or reasonably should have known would cause others to deprive Mr. Mink of his constitutional rights.

Id. (alterations in original) (internal record citations omitted).

After concluding that the complaint adequately alleged causation, the court concluded that the allegations, if true, established a constitutional violation by adequately alleging issuance of the warrant without probable cause and without the requisite particularity. *See id.* at *5–12. The court analyzed the relevant First Amendment precedents and held that "[b]ecause a reasonable person would not take the statements in the editorial column as statements of facts by or about Professor Peake, no reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink's property." *Mink*, 2010 WL 2802729, at *11. The court also concluded that Mink had alleged that the warrant lacked particularity as required under the Fourth Amendment, noting that "[t]he warrant authorized the search and seizure of all computer and non-computer equipment and written materials in Mr. Mink's house, without any mention of any particular crime to which they might be related, essentially authorizing a 'general exploratory rummaging' through Mr. Mink's belongings for any unspecified 'criminal offense.'" *Id.* at *12 (citations omitted). The court held: "[V]iewing the amended complaint in the light most favorable to the nonmoving party, Mr. Mink, and drawing all reasonable inferences in his favor, we conclude the complaint plausibly alleged that Ms. Knox violated Mr. Mink's constitutional right not to be served with an overbroad warrant lacking any particularity." *Id.* (internal citation omitted). Because the court also concluded that the law was clearly established at the time of the alleged violations, it held that qualified immunity was not an appropriate basis for dismissal. *See id.*

- ***Glover v. Mabrey***, No. 08-7048, 2010 WL 2563032 (10th Cir. Jun. 28, 2010) (unpublished). Glover Construction Company and its owner filed suit under § 1983 against the Oklahoma Department of Transportation ("ODOT") Commissioners and six department officials, alleging that the defendants retaliated against Glover in violation of its First and Fourteenth Amendment rights. *Id.* at *1. The district court denied the defendants' motion to dismiss and rejected their affirmative defenses based on absolute and qualified immunity. *Id.* The Tenth Circuit affirmed in part, reversed in part, and remanded.

  The complaint alleged that Glover had contracted with ODOT to perform construction work for nearly 30 years and that it was a prequalified bidder. *Id.* Over the years, Glover and ODOT had various disagreements, including a contentious dispute over the construction of Highway 64. *Id.* After Glover was awarded the contract for the construction of Highway 64, various problems with the project led to a dispute between Glover and ODOT that was widely publicized. *Id.* ODOT allegedly revoked Glover's prequalification status despite a court order enjoining revocation. *Glover*, 2010 WL 2563032, at *1. The complaint alleged the following counts:

  > Count I, retaliation for the exercise of First Amendment rights to

> petition for the redress of grievances; Count II, retaliation for the exercise of Fourteenth Amendment rights to due process and a First Amendment right to speak on matters of public importance; Count III, violation of Glover's Fourteenth Amendment right to equal protection; and Count IV, retaliation for Glover's exercise of First Amendment right to free speech.

Id. The district court denied the defendants' motion to dismiss, stating that it was a "close call," but that Glover had alleged sufficient facts to support its claims. *Id.* at *2. The district court also found that the defendants were not entitled to qualified immunity because retaliation for exercising First Amendment rights is a clearly established constitutional violation, and denied absolute immunity because the record was not sufficiently developed. *Id.*

On appeal, the Tenth Circuit began by discussing the relevant pleading standards. The court explained that "[t]he purpose of this 'plausibility' requirement [in *Twombly*] is 'to weed out claims that do not in the absence of additional allegations have a reasonable prospect of success [*and*] inform the defendants of the actual grounds of the claim against them.'" *Id.* at *3 (second alteration in original) (quoting *Robbins v. Okla. ex. rel. Dep't of Soc. Servs.*, 519 F.3d 1242, 1248 (10th Cir. 2008) (emphasis added)). The court emphasized that "[t]he necessary degree of specificity is *highly dependent on the context and type of case*." *Id.* (emphasis added) (citing *Robbins*, 519 F.3d at 1247). The court stated that "[t]he complaint 'must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Glover*, 2010 WL 2563032, at *3 (quoting *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008) (quotations omitted)). The court stated that it would disregard some of the statements in the complaint under the *Iqbal* framework:

> Many allegations in Glover's complaint are conclusory statements providing no concrete way of identifying what actions were taken, when, or in some instances by whom. A number of allegations refer generally to "ODOT," "ODOT officials," and "top executives," or "an ODOT executive." Without more, these allegations provide no indication which defendant must defend against the charge. In addition, other allegations provide no dates or other information with which one might put the alleged activities in some sort of temporal context. We will not consider these general and/or conclusory allegations. *See Iqbal*, 129 S. Ct. at 1950 ("*a court . . . can . . . begin by identifying pleadings that . . . are not entitled to the assumption of truth*"). We consider whether the remaining factual allegations are sufficient to "nudge [these] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Id. at *4 (alteration and omissions in original) (internal record citations omitted).

With respect to the claim of First Amendment retaliation for public criticism, the court explained that under the relevant legal framework, Glover had to allege that its speech involved a matter of public interest. *Id.* at *5. "Glover allege[d] its comments to the media blamed the increased costs of the Highway 64 project on ODOT's faulty design . . . [and] claim[ed] the speech concerned 'when and how a public roadway fail[ed] . . . [and] relate[d] to the expenditure of tax funds by government officials.'" *Id.* (fourth, fifth, and sixth alterations and second omission in original) (citation omitted). The court concluded that "Glover sufficiently alleged its public comments regarding ODOT's poor design of Highway 64 was protected speech." *Id.* (citation omitted). With respect to the second factor under the relevant legal framework—that the employee's interest in the expression outweighs the government employer's interest in regulating the speech—the court noted that ODOT had "not argued it ha[d] an overriding interest in limiting Glover's protected speech," and that "[w]ithout more from ODOT, the asserted public interest in learning the true cause of possibly inefficient or wasteful public expenditures would normally outweigh ODOT's interest in suppressing these comments." *Id.* With respect to the third factor—whether the speech was a substantial factor driving the challenged governmental action—the court considered the allegations with respect to each of the individual defendants separately. *Id.*

The court first considered the claim that ODOT investigator Skip Nicholson initiated an investigation against Glover in violation of ODOT policy. *Glover*, 2010 WL 2563032, at *6. The complaint alleged:

> Nicholson encouraged [ODOT general counsel] Hill to seek a search warrant for Glover's "home and/or office" knowing there was no probable cause; Nicholson encouraged law enforcement officers to subpoena records from hotels where Mr. Glover stayed on vacation; Nicholson investigated insurance claim allegations unrelated to ODOT; Nicholson once called an environmental agency because trash was burned on Mr. Glover's property and; Nicholson and Hill caused Glover to be audited by the IRS.

Id. The court explained that these allegations were not enough to meet the requirement that the claim assert specific injuries caused by the individual defendants:

> Other than the IRS audit, Glover does not allege Nicholson's (or Hill's) actions actually caused a third party to take any action against it. The complaint does not allege Nicholson's "encouragement" led to the issuance of a warrant or subpoena or a response from the (unknown) environmental agency. It does not allege Nicholson's insurance investigation involved contact with Glover or resulted in harm. The complaint does not claim these activities had any impact on the report recommending Glover's debarment. Merely "encouraging" or engaging in action is not an actionable constitutional violation unless it results in some harm to the plaintiff.

Id. The court cited both a pre-*Twombly* case and a post-*Twombly* case to support the rule that "[a] claim must assert specific injuries-in-fact caused by the individual defendants." *Id.* (citing *Pignanelli v. Pueblo Sch. Dist. No. 60*, 540 F.3d 1213, 1219 (10th Cir. 2008); *Loving v. Boren*, 133 F.3d 771, 772–73 (10th Cir. 1998)). With respect to the IRS audit, the court noted that although Glover stated that Nicholson, Hill, and other defendants unlawfully caused the audit, he did not state when or how this was done. *Id.* The court held that even assuming the cost and time spent complying with an audit could satisfy the injury-in-fact requirement, the complaint did "not allege the IRS investigation was without cause—a necessary element of his claim." *Id.* The court cited *Hartman v. Moore*, 547 U.S. 250 (2006), for the proposition that when the defendant is a nonprosecutor, but is an official who may have influenced the prosecutorial decision, "a plaintiff must plead and prove 'that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.'" *Glover*, 2010 WL 2563032, at *7 (quoting *Hartman*, 547 U.S. at 262). The court further explained: "In other words, '[s]ome sort of allegation . . . is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity.'" *Id.* (omission in original) (quoting *Hartman*, 547 U.S. at 263). After explaining that *Hartman* had previously been extended to circumstances similar to the facts of this case, the court concluded that "[t]he authority of the IRS to—and its decision to in fact—conduct an audit triggers the multi-layered causation pleading requirements," and that Glover had to "allege (and ultimately prove) that the officials who undertook the allegedly adverse action, IRS agents, lacked cause to do so." *Id.* The court held that "[t]he blanket allegation of 'unlawfully caus[ing]' does not allege with sufficient specificity that the IRS lacked cause to conduct any audit which took place," and that "[b]ecause the complaint fail[ed] to allege Nicholson's investigation caused harm to Glover, the First Amendment retaliation claim against Nicholson fail[ed] to state a constitutional violation." *Id.* (second alteration in original).

The court next considered the claim that ODOT engineer Darren Saliba "'adopted an arbitrary and unreasonable policy of never approving any claims by [Glover], no matter how reasonable, after [Glover] had been awarded a contract with ODOT.'" *Id.* (citation omitted). The complaint contained two examples and alleged that Saliba's actions "were in retaliation for Glover's claim ODOT had poorly designed defective roads . . . ." *Id.* The court explained that "[w]hile Glover is not required to prove its case the pleadings, the complaint must allege *facts* which plausibly support the allegation that Saliba's alleged actions involved a retaliatory motive." *Glover*, 2010 WL 2563032, at *8. The court explained that the allegations were insufficient:

> The complaint alleges that each defendant acted "in concert" with each other, presumably to link the commissioners' and other defendants' retaliatory intent to Saliba. However, there are no factual allegations connecting Saliba to the commissioners or any other defendant. For instance, there are no allegations Saliba regularly works with the ODOT commissioners, Hill, Ridley or Evans or that

> he speaks with one or more of them with any regularity. It does not allege he has ever worked in proximity to them. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. If it were reasonable to assume Saliba worked in concert with these defendants, it would also be reasonable to assume any employee from any of the twenty-seven Central Office Divisions . . . or any of the eight field divisions from across the state . . . also worked in concert with them. Such an assumption strains credulity.
>
> Even assuming the complaint alleges a plausible connection between Saliba and these defendants, it fails to allege any level of temporal proximity between Saliba's alleged policy against Glover and Glover's public speech. While it is safe to assume the two contract disputes occurred after the public fight over Highway 64, we have no indication of whether Saliba's actions took place within days, weeks, or even years of Glover's public statements. The complaint provides nothing which actually ties the Highway 64 comments and Saliba's actions together except the categorical statement that Saliba "took [his] course of action in retaliation for [Glover] seeking redress in court and because Glover published [derogatory comments on Highway 64]." In sum, as the complaint is worded, it contains no allegation of a connection between Saliba's work and the commissioners or even an explanation of how Saliba's decisions related to Glover's public comments. The facts—two alleged contract disputes—do not rule out the possibility of retaliatory motive, "and thus at some level they are consistent with a viable First Amendment claim, but mere possibility is not enough." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 971–72 (9th Cir. 2009). Glover fails to "nudge[ ][his] claims across the line from conceivable to plausible.["] *Twombly*, 550 U.S. at 570.

Id. (first, second, third, and fourth alterations in original) (internal record citations omitted).

The court then considered the claim that ODOT construction engineer George Raymond—who had discretionary power to award contracts and recommend termination of certificates to do business with ODOT—became hostile, recommended that Glover be suspended from ODOT contracts, and stated that Glover would not get a contract with ODOT in the future. *Id.* at *9. The court concluded that this claim failed for reasons similar to those that caused the claim against Saliba to fail. *Id.* The court explained:

> Most importantly, the complaint contained no allegation Raymond's actions were based on Glover's public criticism of ODOT[;] instead

> it alleged Raymond's statements were the result of his frustration with Glover's litigiousness. . . . Even inferring a dual motive on Raymond's part, there is no allegation regarding the time frame or the recipient of any "recommendations" made by Raymond. Critically, there is no allegation that Raymond was involved in the report to the Commissioners or took any actions based on his alleged statements. There is no allegation connecting Raymond to Glover's loss of a certificate to do business with ODOT due to his public comments on ODOT's performance. In other words, Glover has failed to allege Raymond was personally involved in any violation of Glover's First Amendment rights.

Id.

Finally, the court considered the claim that ODOT CEO Gary Ridley, ODOT Director Gary Evans, and ODOT general counsel Hill prepared a report that recommended that Glover be designated as an "irresponsible bidder" and suspended from obtaining work from ODOT because of Glover's comments to the media regarding the Highway 64 project. *Id.* The complaint alleged that "'a large portion of the report was concerning an investigation of Highway 64 wherein ODOT was being blamed for poor design.'" *Glover*, 2010 WL 2563032, at *9 (footnote and citation omitted). The court concluded that "[t]his allegation, while tenuous, connects Glover's statements to the media during the Highway 64 dispute to Ridley, Evans and Hill's motivation to recommend Glover's debarment in an official report." *Id.* The court further noted that the complaint "allege[d] the ODOT Commissioners unanimously adopted this report even though 'it listed lawfully protected acts' as a basis for suspension," and concluded that although it did "not know precisely what 'lawfully protected acts' were listed, [it could] reasonably infer Glover's public criticism was among them." *Id.* The court held: "Thus construed, the complaint alleges Ridley, Evans and Hill authorized the report in retaliation for Glover's speech and the Commissioners, knowing the retaliatory basis for the recommendation, approved the recommendation and suspended Glover from working for ODOT. These allegations are sufficient to state a claim for retaliation in violation of Glover's First Amendment right of freedom of speech." *Id.*

With respect to the claim of retaliation for filing petitions for redress, the complaint "allege[d] the report specifically referred to Glover's prior judicial and administrative challenges (Glover's petitions for redress) as 'a primary factor' for its recommendation Glover be disqualified from bidding." *Id.* at *10. Noting a split of authority, the court agreed with the Eighth Circuit's approach that required a public employee's claim for retaliation based on a right to petition to state that the petition involved a matter of public concern. *Id.* at *10–11. The court held that because "Glover allege[d] only private contract disputes with ODOT based on the terms of its contracts . . . [and] allege[d] nothing which may elevate the issues to a matter of public concern[,] it . . . failed to state a claim on which relief [could] be granted." *Glover*, 2010 WL 2563032, at *11.

With respect to the claim of retaliation for exercising due process, the court concluded that "[t]o the extent Glover argue[d] retaliation for his *past* petitions for redress, this [wa]s simply an attempt to dress First Amendment claims in Fourteenth Amendment garb," and the court declined to readdress the First Amendment issues in this new context. *Id.* at *12. To the extent Glover was claiming a due process violation in the debarment proceedings, the court noted that the case law required a liberty or property interest in the outcome of the proceedings, that there was no protected property interest when the government official has complete discretion over the outcome, and that the relevant Oklahoma law provided that the prequalified bidder determination was within the Commission's sole discretion. *Id.* The court also rejected Glover's reliance on an Oklahoma case that Glover asserted held that a contractor has a property interest if it has or should have been accepted as the lowest possible bidder, explaining that "Glover's claims concern[ed] the removal of prequalified status" and Oklahoma law provided that prequalification to bid on contracts does not constitute a license essential in the pursuit of a livelihood. *Id.*

With respect to the equal protection claim, the complaint alleged a "class of one" theory that the "'defendants singled out [Glover] for disparate treatment from others similarly situated for no rational reason . . . [other than] their personal animosity against [Glover]' in violation of the Fourteenth Amendment's guaranty of equal protection." *Id.* at *13 (alterations in original). The court concluded that this claim failed because "Glover . . . failed to allege, as it must, the identity or characteristics of other similarly situated contractors and how those similarly situated contractors were treated differently." *Id.* at *14 (citation omitted). The court elaborated on the deficiencies of the claim, stating:

> Glover does not identify any contractor who was treated differently. The complaint contains no instance where Saliba granted similar requests made by other contractors, no similar circumstances where another contractor was not investigated, and no specific action taken by top executives that would not have been taken by supervisors. Nor does it identify a single similarly-situated contractor which did not lose its prequalification status after numerous legal challenges or statements to the media. Without additional information, Glover's class-of-one equal protection claim fails to state a claim as to any defendant.

Glover, 2010 WL 2563032, at *14.

Finally, the court concluded that the defendants were not entitled to qualified immunity, explaining that "Glover alleged the report, the recommendation and the Board's adoption of the recommendation were in retaliation for its protected speech," and "freedom from retaliation for protected activity was clearly established when the defendants acted and they [we]re not entitled to qualified immunity." *Id.*

The court affirmed in part and reversed in part, and remanded for further proceedings. With

respect to the claims that the court deemed properly dismissed, it directed the district court to address whether to grant leave to amend on remand. *Id.* at *14 n.11.

- ***Barrett v. Orman***, No. 10-7000, 2010 WL 1499586 (10th Cir. Apr. 15, 2010) (unpublished). A state inmate filed a *pro se* complaint under § 1983 against David Orman, the mailroom administrator at the Oklahoma State Penitentiary; Marty Sirmons, the warden; Debbie L. Morton, the director's designee of the Oklahoma Department of Corrections ("ODOC"); and Max Williams, the director of the Oregon Department of Corrections, alleging violations of his free speech rights under the First Amendment and his due process rights under the Fourteenth Amendment, when his mail was rejected without notice and an opportunity to be heard. *Id.* at *1. Defendants Orman, Sirmons, and Morton moved to dismiss, arguing that:

  > the violation of prison procedure alone does not constitute a constitutional violation; Mr. Barrett allegedly tried to extort a settlement; the complaint did not personally link Defendants Sirmons and Morton to the alleged constitutional violation; Mr. Barrett allegedly tried to extort a settlement; the complaint did not personally link Defendants Sirmons and Morton to the alleged constitutional violation; and Defendants were entitled to immunity under the Eleventh Amendment.

  Id. Williams moved to dismiss based on lack of personal jurisdiction and his lack of any personal participation. *Id.* The district court granted both motions to dismiss, finding that the complaint failed to allege any personal participation by Williams and failed to state a claim against the other defendants. *Id.* The district court had concluded that the complaint only alleged that the defendants failed to follow a prison regulation, and that "'violation of a prison regulation cannot rise to the level of a constitutional violation.'" *Id.* The district court denied leave to amend. *Barrett*, 2010 WL 1499586, at *1.

  On appeal, the Tenth Circuit held that "[a]lthough a violation of a prison regulation is not automatically a constitutional violation, Mr. Barrett nonetheless stated a valid constitutional claim even without the liberal pleading standards typically accorded to pro se litigants." *Id.* at *2 (footnote and internal citation omitted). The court explained that the complaint "clearly and repeatedly couched [Barrett's] claim in terms of *constitutional* violations," and that "[n]either the original nor the amended complaint ever mentioned a violation of prison regulations." *Id.* The court emphasized that *pro se* pleadings should be construed liberally and that *pro se* litigants should be given a reasonable opportunity to remedy any problems in their pleadings. *See id.* at *2 n.2. The court pointed out that "[o]f course, even under the more stringent *Twombly*/*Iqbal* pleading standard, Mr. Barrett did not need to cite specific cases in his complaint to survive a Rule 12(b)(6) motion," but that instead "a complaint's facts must state a plausible claim." *Id.* (citing *Twombly*, 550 U.S. at 570). The court concluded that "[t]he alleged facts in Mr. Barrett's complaints—that specific incoming mail was being rejected without any notice, statement of reasons, or opportunity to be heard—at least stated a plausible claim" under the relevant Supreme Court case addressing prisoners'

right to receive uncensored correspondence. *Id.* The court held that "the facts alleged 'nudged' [Barrett's] claim against Defendants Orman, Workman, and Morton 'across the line from conceivable to plausible.'" *Barrett*, 2010 WL 1499586, at *2 (quoting *Twombly*, 550 U.S. at 570).

In contrast, the court determined that there were insufficient facts to sustain a claim against Williams, stating:

> The amended complaint alleges Mr. Williams's position as director of the Oregon Department of Corrections and recites his personal participation in and liability for the constitutional violations. Such a "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks and citation omitted). Allegations of Mr. Williams's involvement are no more than "naked assertion[s]." *Twombly*, 550 U.S. at 557. Because the allegations against Mr. Williams do not show an affirmative link between the constitutional deprivation and his personal participation, Mr. Barrett failed to state a claim on which relief could be granted against Mr. Williams.

Id. at *3 (alteration in original) (internal citations omitted).

The Tenth Circuit held that the district court did not abuse its discretion in denying leave to amend because the motion for leave did not comply with the local rules. *Id.* The court affirmed the grant of Williams's motion to dismiss, affirmed the denial of the plaintiff's motion to amend, and reversed the grant of the motion to dismiss by Orman, Workman, and Morton. *Id.*

- ***Arocho v. Nafziger***, No. 09-1095, 2010 WL 681679 (10th Cir. Mar. 1, 2010) (unpublished) (per curiam). The plaintiff brought a prisoner civil rights action alleging that he was denied recommended treatment for a Hepatitis C infection that was damaging his liver and causing him pain. *Id.* at *1. The district court dismissed the claims on the pleadings, "holding that the complaint (1) failed to establish the court's personal jurisdiction over defendant Harley G. Lappin ('BOP Director Lappin'), and (2) failed to state a constitutional claim against defendants Steven Nafziger ('Clinical Director Nafziger') and Ron Wiley ('Warden Wiley'), entitling them to qualified immunity from damages in their individual capacities and precluding injunctive relief against them in their official capacities." *Id.* The Tenth Circuit reversed the dismissal of the claim against Lappin, affirmed the dismissal of the claim against Wiley, and modified the dismissal of the claim against Nafziger to a dismissal without prejudice. *Id.*

  According to the complaint, Arocho had Hepatitis C, and blood tests ordered by Clinical Director Nafziger recommended treatment with Interferon/Ribavirin. *Id.* Arocho underwent psychological evaluation and was found mentally stable and thus able to take the

recommended medication, which had a possible side effect of depression. *Id.* Several months later, Arocho asked Nafziger about the treatment, but received no response. *Arocho*, 2010 WL 681679, at *1. After another inquiry several more months later, Nafziger said he was waiting for approval of the medication from the BOP in D.C. *Id.* Arocho alleged that he continuously requested his medication, but never received it, and that this resulted in pain and suffering and exposure to life-threatening liver damage that may render him unable to respond to future treatment. *Id.*

The Eighth Amendment claim against BOP Director Lappin alleged that there was no doubt when the medication request was sent to Lappin that Arocho's situation was serious, and that Lappin still refused treatment. *Id.* The complaint also asserted that "Lappin 'fail[ed] to intervene and correct' the situation after receiving a copy of an administrative grievance Mr. Arocho filed at Florence in November 2007, and 'ignored his duty imposed by his authority . . . to stop plaintiff['s] pain suffering, to prevent and correct the violations, [and] to enforce the institutional rules, regulations, and policy . . . and constitutional mandates . . . [for] medical care and treatment.'" *Id.* (alterations and omissions in original).

The Eighth Amendment claim against Nafziger alleged that he "'failed to act for immediate treatment of plaintiff['s] condition with deliberate indifference,' put off Mr. Arocho's repeated follow-up inquiries, sometimes telling him 'to be patient' and on other occasions simply 'ignor[ing] [his] complaints and request[s],' and 'did nothing to prevent' the delay and denial of proper treatment." *Id.* at *2 (alterations in original). The complaint did "not specify what it is that Nafziger could and should have done to secure the treatment he had recommended, given BOP Director Lappin's alleged refusal to approve it." *Id.*

The Eighth Amendment aspect of Arocho's claim against Warden Wiley was that:

> Wiley allegedly (1) knew of Nafziger's denial of treatment but ignored his duty as warden to intervene "to enforce the rules, regulations, program statement and institutional policy that include pain assessment[,] prescribed medication and proper treatment in a timely manner"; and (2) responded to an administrative grievance from Mr. Arocho regarding the recommended Interferon/Ribavirin treatment by incorrectly stating that "it will be schedule[d] as soon as the Clinical Director['s] patient load allow[s]."

Arocho. 2010 WL 681679, at *2 (alterations in original). The claim against Wiley also contained an equal protection aspect, alleging that "'other inmates have received the treatment with my same situation in [a] timely manner'" and that "Wiley 'violate[d] plaintiff['s] rights and the Equal Protection [C]lause that prohibits . . . selectively denying the plaintiff proper health care, medical treatment, [and] medication.'" *Id.* (alterations in original).

The complaint requested an injunction requiring the defendants to provide the recommended

treatment; compensatory and punitive damages for pain, suffering, and irreparable harm caused by lack of treatment; and transfer to prison in Puerto Rico. *Id.* The district court concluded that it lacked personal jurisdiction over Lappin, but the Tenth Circuit disagreed. In considering personal jurisdiction, the Tenth Circuit noted that "the more specific thrust of Mr. Arocho's claim against BOP Director Lappin is that he was actively and directly responsible for the denial of the medical treatment recommended for Mr. Arocho by prison medical personnel," and that "[t]his [wa]s simply not a situation where an official is being haled into an out-of-state court merely because he has a remote supervisory relationship to the parties or the subject matter of the case." *Id.* at *3. The court stated that it did not "necessarily take issue with th[e] general principle" used by the district court (citing both a pre-*Twombly* and a post-*Twombly* case) that "an official's supervisory responsibility over operations and facilities in other states does not, standing alone, constitute a sufficient basis for personal jurisdiction with respect to injuries resulting therefrom," *id.*, and noted that "given a recent Supreme Court pronouncement, the basic concept of § 1983 or *Bivens* supervisory liability itself may no longer be tenable," *id.* at *3 n.4 (citing *Iqbal*, 129 S. Ct. at 1949). The court also noted that "[a]fter *Iqbal*, circuits that had held supervisors liable when they knew of and acquiesced in the unconstitutional conduct of subordinates have expressed some doubt over the continuing validity of even that limited form of liability." *Arocho*, 2010 WL 681679, at *3 n.4. The court concluded that Arocho had pleaded sufficient facts to establish personal jurisdiction over Lappin:

> The complaint alleges that BOP Director Lappin refused to approve the medication recommended for Mr. Arocho's Hepatitis C infection by his treating physician. Whether or not that decision is ultimately found to have violated Mr. Arocho's Eighth Amendment rights, it is clearly pled as an intentional act. And it was aimed at the forum state: Lappin did not allegedly issue some generalized prohibition on Interferon/Ribavirin treatment in federal prisons; he denied a specific treatment request by a Colorado prison physician, precluding use of the requested medication to an inmate in the federal facility in Florence, Colorado. Finally, under the circumstances, it can hardly be denied that Lappin knew the brunt of the injury would be felt in Colorado.

Id. at *5. The court explained that "[o]f course, the question of personal jurisdiction [could] always be revisited at a post-pleading stage of the proceedings, where the evidence [might] show that the relevant facts [we]re other than they ha[d] been pled," but concluded that "for present purposes, the requisite 'purposeful direction' [wa]s more than adequately pled in the complaint." *Id.* After analyzing the other relevant factors, the Tenth Circuit held that the district court erred by dismissing the action against Lappin on the basis of lack of personal jurisdiction. *Id.* at *7.

In considering the possibility of dismissal of the claim against Lappin based on failure to state a claim, the court rejected the argument that "'there was no allegation that Defendants

Wiley or Lappin—who are not doctors—knew that Mr. Arocho required access to this specific treatment [i.e., Interferon/Ribavirin], and on an emergency basis, or that failure to approve that treatment would seriously and irreparably harm him.'" *Id.* (alteration in original). The court explained:

> On the contrary, as our prior review of the complaint shows, the crux of the claim against Lappin is that he knew the serious disease Mr. Arocho suffers from and knew that Clinical Director Nafziger recommended treatment of the condition with Interferon/Ribavirin, and yet refused to approve the treatment. The facts alleged make out a plausible case of deliberate indifference. That Lappin is not a doctor does not undermine such a claim; rather it only focuses the claim on a long-recognized scenario of deliberate indifference: acts by lay officials that prevent access to treatment recommended or prescribed by medical personnel.
>
> Of course, Lappin may still attempt to show that he had a constitutionally legitimate justification for denying treatment. But, at this stage, Mr. Arocho has stated a plausible claim of deliberate indifference against him. *Factual challenges to that claim must be pursued through summary judgment*.

Id. (emphasis added) (internal citations and footnote omitted). The court also noted that the district court erred by considering an affidavit submitted by the defendants because "it is improper to decide a motion to dismiss on the basis of evidence submitted by the defendant—that is what summary judgment is for." *Arocho*, 2010 WL 681679, at *7 n.12.

With respect to Nafziger, the Tenth Circuit noted that the allegations in the complaint would tend to show that Nafziger was not liable, but that there were less explicit allegations that warranted further examination:

> The general theme of the complaint, attributing primary responsibility for the denial of treatment to Lappin, appears to supply Nafziger with grounds for exoneration rather than liability: Nafziger discovered the immediate threat posed by the Hepatitis C, concluded that Interferon/Ribavirin treatment was appropriate, and recommended that Lappin approve the treatment. As the district court concluded, this "does not evidence the degree of neglect sufficient to find that Defendant Nafziger was deliberately indifferent to Plaintiff's medical needs. Indeed, it evidences no neglect at all."
>
> But there is a second, counter-theme evident, though less prominent, in the claim directed specifically at Nafziger. Mr[.] Arocho attributes the continuing delay in obtaining the recommended

> treatment, at least in part, to Nafziger's own inaction and indifference. He alleges that since his favorable psychological assessment for the treatment in September 2007, he has "contact[ed] . . . the health care service, S. Nafsinger [sic], requesting the treatment—medication—status of his case and complaint about symptoms of the Hepatitis C as pain and other symptoms and they answered to be patient and in other oc[c]asions have ignored [his] complaints and request[s]—intentionally—with deliberate indifference." And, though Nafziger recommended the Interferon/Ribavirin regimen, he then "failed to act for plaintiff's im[m]ediate treatment" and is at least partially responsible for the subsequent delay, which he "did nothing to prevent."

Id. at *8 (second, third, fourth, fifth, and sixth alterations and omission in original) (internal citations omitted). The court concluded that the factual allegations were not sufficient:

> These are factually thin allegations. Indeed, the only facts stated concern the insensitive response given to Mr. Arocho's inquiries about the status of his recommended treatment. But complaints about poor patient-communication do not, at least standing alone, evince deliberate indifference to a serious medical need. So long as Nafziger adequately pursued the treatment recommended for Mr. Arocho's medical condition, an Eighth Amendment claim cannot be made out on the basis that he simply neglected to keep Mr. Arocho fully apprised of the status of the recommendation. Of course, Mr. Arocho also considers Nafziger partly to blame for the delay and ultimate denial of the recommended treatment, as the more general allegations quoted above reflect. But he offers no suggestion, much less a plausible factual specification, as to what Nafziger failed to do in making and medically supporting his recommendation or in prompting a more appropriate response to its exigency.
>
> "[T]he pleading standard Rule 8 [of the Federal Rules of Civil Procedure] announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation omitted). A complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and where its allegations "are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotations omitted). Here, the most that can be said about Nafziger's

> alleged actions—recommending the Interferon/Ribavirin treatment upon discovering that Hepatitis C was damaging Mr. Arocho's liver, and then waiting on approval of the treatment by the authorities—is that they *do not necessarily preclude his liability for the alleged delay and denial of medical treatment*. *But such liability is nothing more than a theoretical possibility in the absence of other, unnamed acts about which the court can only speculate at this point*. We therefore agree with the district court that Mr. Arocho has not stated a claim for relief against Nafziger.

Id. (emphasis added) (alterations in original). Although the court found the facts pleaded as to Nafziger insufficient, it nonetheless found that the case's unique factual background warranted maintaining the claim against Nafziger for the time being:

> But there are additional considerations here, particularly given our reinstatement of the case against BOP Director Lappin, that weigh in favor of providing Mr. Arocho an opportunity to cure this pleading deficiency. *While the conclusory allegations regarding Nafziger's role in the delay/denial of treatment fall short of stating a claim, when viewed in light of the litigation position espoused by BOP Director Lappin, they nevertheless warrant the exercise of some caution in foreclosing the possibility of liability on Nafziger's part*. The claims against these two defendants are to some degree in direct opposition, creating a "zero-sum game" of liability: the stronger the claim that Nafziger failed to properly support or press for treatment, the weaker the claim that Lappin should be held liable for not approving it; conversely, the more Nafziger did to satisfy his duty to secure the necessary treatment, the stronger the claim against Lappin for denying it. And the litigation positions separately advanced by these defendants do seem to exploit (however innocently) this situation. Nafziger notes that he recommended Interferon/Ribavirin and insists his "efforts to gain approval of this medication for Mr. Arocho are not indicative of negligence, but rather of diligence." But, as we have seen, Lappin's position is that he was not aware that this particular treatment was needed, or that the need for treatment was urgent, or that Mr. Arocho could suffer serious and irreparable harm if Lappin failed to approve it. All of which begs the crucial question: what did Nafziger convey to Lappin about Mr. Arocho's condition, the need for Interferon/Ribavirin, and the harm involved if the treatment was denied or delayed?

Id. at *9 (emphasis added) (internal citations omitted). The court emphasized that the plaintiff did not have the relevant information to plead further details:

> Obviously, the facts known to and alleged by Mr. Arocho cannot settle that question. *He knows only what he has experienced and what he has been told by defendants*, i.e., that Hepatitis C is causing him pain and damaging his liver, that Nafziger recommended he be treated with Interferon/Ribavirin, and that Lappin refused to approve the treatment. *The nature and extent of the exchange between Nafziger and Lappin, which may exonerate one (or both) while implicating the other (or both), is known only by defendants*. *In such circumstances, to dismiss the claim against Nafziger without one more chance at amendment following the reinstatement of the claim against Lappin could lead to a real injustice*: after the dismissal, Lappin could oppose the claim against him by submitting evidence on summary judgment indicating that all of the fault lay, rather, with Nafziger who, having been dismissed with prejudice from the case, could not be brought back in to answer for his now-demonstrated liability.

Id. (emphasis added). The court concluded: "Under the unique circumstances here, and particularly given our reinstatement of the case against BOP Director Lappin, we deem it appropriate to afford Mr. Arocho an opportunity to amend his pleadings on remand to state a claim, if possible, against Nafziger." *Id.*

With respect to the claim against the warden, the court concluded that it was appropriately dismissed with prejudice. *Arocho*, 2010 WL 681679, at *10. The court explained that the "allegation that Wiley erroneously denied a grievance [Arocho] had filed regarding his Hepatitis C treatment d[id] not state an actionable claim" because the relevant case law held that denial of such grievances was not sufficient to establish personal participation. *Id.* The court noted that "the complaint fail[ed] to allege the grounds on which Warden Wiley could be held responsible for the medical decisions involved here." *Id.* The court concluded that the allegation that Wiley failed to properly supervise the medical facility was inadequate because "[t]he traditional standard for supervisory liability in this circuit 'requires allegations of personal direction or of actual knowledge and acquiescence' in a subordinate's unconstitutional conduct," and "the Supreme Court's recent discussion of supervisory liability [in *Iqbal*] casts doubt on the continuing vitality of even this limited form of such liability." *Id.* (citation omitted). The court explained:

> In any event, Mr. Arocho's allegations do not satisfy our extant standard. His claim here is that "warden [Wiley] was in the position to correct plaintiff['s] rights violation and fail[ed] to do so." To the extent the rights violation was a function of BOP Director Lappin's decision, Lappin is obviously not Wiley's subordinate and any allegation that Wiley was in a position to "correct" Lappin's decision would be facially implausible. With respect to Nafziger, there are no facts alleged to suggest that Wiley knew of and acquiesced in any act

> of deliberate indifference by Nafziger, who had tested Mr. Arocho, recommended treatment, and was simply waiting for approval. The complaint bespeaks nothing more than a warden's reasonable reliance on the judgment of prison medical staff, which negates rather than supports liability.

Id. at *11 (alterations in original) (internal citation omitted). The court also concluded that the equal protection claim against Wiley failed:

> Mr. Arocho's claim that Wiley violated his right to equal protection is patently deficient. The sole allegation in this respect is: "Other inmate's [sic] have received the treatment [presumably Interferon/Ribavirin] with my same situation in [a] timely manner." In addition to its utterly conclusory nature, this allegation does not remotely suggest a plausible factual basis for attributing such differential treatment to the warden of the prison, who is not responsible for the recommendation of medical treatment or the approval of such treatment.

Id. (alterations in original) (internal citation omitted).

The court reversed the dismissal of the claims for injunctive relief because the district court's basis for dismissal—that Arocho failed to state a claim against any of the defendants—had been altered by the Tenth Circuit's holdings. *Arocho*, 2010 WL 681679, at *11. The court noted that "[i]njunctive relief from Lappin [wa]s obviously no longer legally foreclosed, and the dismissal of the claim for injunctive relief against Nafziger should be without prejudice." *Id.*

- ***Bixler v. Foster***, 596 F.3d 751 (10th Cir. 2010). Minority shareholders of Mineral Energy and Technology Corp. ("METCO") sued the company's directors and lawyers, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) by the transfer of METCO's assets to an Australian corporation. *Id.* at 754. The district court dismissed for failure to state a claim, and the Tenth Circuit affirmed because "(1) the plaintiffs lacked standing under RICO to assert shareholder derivative claims; (2) allegations of securities fraud do not establish predicate acts under RICO; and (3) the 'continuity' requirement of RICO [wa]s not satisfied by the allegations in the complaint." *Id.*

  The complaint alleged that the defendants, as directors and majority shareholders of METCO, traded METCO's uranium mining claims to subsidiaries of Uranium King, Ltd. ("UKL"), for which several of the defendants also served as directors. *Id.* at 755. UKL then merged with Monaro Mining NL ("Monaro"). *Id.* The complaint alleged that the agreement provided for METCO to receive $6.5 million and stock in UKL, which would be distributed pro rata to the shareholders. *Id.* The plaintiffs alleged that after METCO transferred its uranium claim deeds to UKL, UKL never paid the money or transferred the UKL stock, and

as a result, the plaintiffs lost the value of their investment in METCO. *Bixler*, 596 F.3d at 755. The complaint further alleged that the defendants were highly compensated for arranging the transaction. *Id.* The plaintiffs alleged that "the defendants defrauded them of their share of the UKL stock and rendered their METCO investment virtually worthless," and that "the UKL-Monaro merger was a fraudulent means of transferring the mining claims to a third entity." *Id.* The complaint further asserted that the attorney defendants represented the other defendants in order to file frivolous lawsuits against the plaintiffs to keep them from pursuing claims to METCO's assets. *Id.* The plaintiffs asserted a conspiracy to deprive them of their value of METCO shares by predicate acts, in violation of RICO. *Id.* "The district court held that plaintiffs did not have standing to bring RICO claims on METCO's behalf and that the Private Securities Litigation Reform Act (PSLRA) precluded RICO claims based on securities fraud." *Id.*

The Tenth Circuit agreed that the plaintiffs lacked RICO standing, explaining that "the law is that conduct which harms a corporation confers standing on the corporation, not its shareholders," and that this rule "'is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment.'" *Bixler*, 596 F.3d at 756–57 (footnote omitted) (citing *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)). The court noted that there was an exception for shareholders with a direct, personal interest in the cause of action, but found that the "allegations . . . merely assert[ed] the minority shareholders suffered a diminution in value of their corporate shares without receiving the same monetary compensation the majority shareholders received." *Id.* at 757. The court explained that "[s]uch an injury is not direct and personal for RICO purposes but is, rather, an injury to the corporation." *Id.* The plaintiffs argued that they were personally injured because the defendants diluted the plaintiffs' proportionate corporate ownership and pursued abusive litigation against the plaintiffs. *Id.* The court concluded that the plaintiffs had not shown that their proportionate ownership was diluted under the relevant case law because they "ha[d] made no showing that more shares were issued or that the value of the majority shareholders' shares increased more than theirs," instead relying on the allegation that the majority shareholders were compensated for the transactions. *Id.* at 757–58. The court rejected the argument that the plaintiffs could have amended their complaint to omit the allegations of securities fraud and insider trading, explaining that "amendment would have been futile because withdrawing the specific allegations of securities fraud and insider trading would not have altered the essential nature of plaintiff's claims, which were based on their status as minority METCO shareholders whose shares lost value." *Id.* at 758 (footnote and citation omitted). The court also held that the abusive litigation claim did not state a RICO predicate act because the court "ha[d] refused to 'recogniz[e] abusive litigation as a form of extortion [because doing so] would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim.'" *Bixler*, 596 F.3d at 758 (second and third alterations in original) (citing *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003)). The court concluded that "[b]ecause plaintiffs' injuries were based on the diminution of the value of their METCO shares, and not on direct injury to them, . . . their claims [we]re

derivative of the corporation's," and held that the plaintiffs did not have RICO standing. *Id.* at 758–59. The court also held that the plaintiffs' claims fell within the PSLRA, which barred the alleged actions from constituting predicate acts for RICO purposes. *Id.* at 759–60.

The court also concluded that dismissal was also appropriate because the complaint did not state a claim of "continuity" of the RICO scheme. *Id.* at 760. The court noted that the "complaint allege[d] that defendants engaged in a single scheme to accomplish the discrete goal of transferring METCO's uranium mining interests to another corporation (UKL, which then allegedly transferred them to Monaro)," and concluded that "'[t]he facts as alleged fail[ed] to show any threat of 'future criminal conduct,'" and that "the complaint was subject to dismissal for failing to 'allege[ ] the type of activity that RICO was enacted to address.'" *Id.* at 761 (fourth alteration in original) (citation omitted).

The plaintiffs also claimed that the district judge was biased against them, in part because the district court dismissed the case "at the pleading stage, in part, so as not to 'force defendants to go through the burden and expense of conducting discovery before they [we]re afforded their first real opportunity to seek the dismissal of groundless claims.'" *Id.* at 762. The Tenth Circuit noted that "*Twombly* recognized that discovery can be expensive, and that 'the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage,'" and that *Iqbal* stated that "'[t]he question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.'" *Bixler*, 596 F.3d at 762 (citations omitted). The court concluded that "[t]he district court's consideration of discovery expenses and abuses does not support a claim of judicial bias," and that "[t]o the extent plaintiffs argue that bias was shown by the district court's failure to invite them to file an amended complaint, [the Tenth Circuit had concluded] that amendment would have been futile." *Id.*

- ***Phillips v. Bell***, 365 F. App'x 133, No. 08-1420, 2010 WL 517629 (10th Cir. Feb. 12, 2010) (unpublished). The complaint was brought under *Bivens* and alleged that employees of the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") violated the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Federal Wiretap Act"). *Id.* at *1. The complaint alleged that ATF agents arrested Ronald Young under an outstanding Colorado warrant, that Young consented to searches in four locations, and that in conducting those searches the ATF agents seized recorded telephone conversations between Young and Phillips that Young had recorded without Phillips's permission. *Id.* The complaint further alleged that the ATF agents released copies of the seized recordings to numerous state and federal law enforcement officers; that an ATF agent in Arizona (Agent Bell) disclosed the contents of the recordings to other law enforcement officers who identified the voices in the recordings as Young's and Phillips's; that Agent Bell caused the contents of the recordings to be disclosed and used in a search warrant for Phillips's home and in the supporting affidavits; and that Agent Bell participated in the search of Phillips's home. *Id.* The parties later explained that the contents of the recordings revealed that Phillips agreed to pay Young to murder her ex-husband and that the timeliness of her payments was disputed, but the court noted that the complaint did not contain these

allegations. *Id.* Phillips also alleged that Agent Bell assisted an ATF public affairs employee (Lluberes) in disclosing the contents of the conversations to the media, and that Agent Bell disclosed the contents of the conversations in an interview with an unidentified private citizen. *Id.* at *2. Based on these facts, Phillips asserted that Agent Bell and Lluberes violated her rights under the Fourth Amendment and the Federal Wiretap Act. *Phillips*, 2010 WL 517629, at *2. The district court dismissed the Fourth Amendment claim because Phillips possessed alternative claims for damages under the Federal Wiretap Act, but denied the defendants' request to dismiss the claim under the Federal Wiretap Act because "it was not evident whether the Act's 'one-party consent' exception foreclosed [the plaintiff's] claims because it was not clear if Mr. Young had a criminal or tortious purpose in making the recordings and if Appellants knew of that purpose." *Id.* On appeal, the defendants argued that Phillips's allegations that Young recorded the conversations with a criminal or tortious purpose were not plausible and offered other noncriminal and nontortious reasons as to why Young may have recorded the conversations. *Id.*

In discussing the pleading standards, the Tenth Circuit noted that "[i]n the past, we 'generally embraced a liberal construction of [the] pleading requirement [in Rule 8(a)(2)],' and held 'a complaint containing only conclusory allegations could withstand a motion to dismiss unless its factual impossibility was apparent from the face of the pleadings . . . .'" *Id.* at *4 (citation omitted). But the court noted that "the Supreme Court has recently 'clarified' this standard, stating that 'to withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'"" *Id.* (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). But the court noted that "[o]n the other hand, [it] ha[d] also held [that] 'granting a motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.'" *Id.* (quoting *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)).

Phillips alleged that Young recorded their conversations "'for the purpose of *committing a criminal or tortious act*, including without limitation, invasion of privacy, extreme and outrageous conduct, intentional infliction of emotional distress, defamation of character, and/or improper recording of private communications for improper use and disclosure.'" *Phillips*, 2010 WL 517629, at *7. The court concluded that "[o]ther than providing the essential elements of the [Federal Wiretap] Act by claiming Mr. Young committed a 'criminal or tortious act' and citing a string of possible scenarios in a conclusory fashion, it is evident the complaint offers little in terms of factual allegations or 'further factual enhancement.'" *Id.* The court found that "as in *Iqbal*, [it was] provided 'a 'formulaic recitation of the elements' of a . . . claim' where the allegations are 'conclusory' and therefore 'not entitled to be assumed true.'" *Id.* (omission in original) (quoting *Iqbal*, 129 S. Ct. at 1951). In addition, the court found that the claims were not plausible:

> However, even if we view the facts in Ms. Phillips's complaint as true and, thus, in a light most favorable to her, the complaint also fails to meet the plausibility requirement. Ms.

> Phillips's recitation of the statutory elements and string of possible reasons for Mr. Young's recording of their conversations is "so general that [it] encompass[es] a wide swath of conduct," *Robbins*, 519 F.3d at 1247, and lacks the necessary factual enhancements to get it from the "possibility" of misconduct to a "plausibility" of such misconduct required for relief. *Twombly*, 550 U.S. at 557. This is because disclosure of the recordings' contents for the purposes Ms. Phillips claims, while possible, would have clearly inculpated Mr. Young in the crime of murdering her ex-husband. As a result, it is fairly implausible he would use such self-damning information for the purposes she contends, including invading her privacy, intentionally inflicting emotional distress, or defaming her character.
>
> As the government points out, *more plausible reasons exist* for Mr. Young making the recordings, including to protect himself against any future conduct by Ms. Phillips in implicating him alone in her husband's murder. In the event Ms. Phillips did implicate him or he was later arrested, it is also plausible he sagaciously made the recordings to provide himself leverage with the government for a reduced sentence if he assisted in proving Ms. Phillips's participation in the murder. It is also possible he made the recordings for the purpose of ensuring she paid him for the murder he committed, which, admittedly, amounts to extortion or other criminal conduct, but which is not alleged in the complaint. Thus, while Ms. Phillips's complaint mentions certain possible reasons for Mr. Young making the recordings, *none of her alleged facts take us beyond pure speculation to plausibility*. Considering the circumstances another way, we are provided no additional factual allegations to support Ms. Phillips's contention Mr. Young made the recordings to invade her privacy, intentionally inflict emotional distress, or defame her character, so we are without sufficient "fact[s] to raise a reasonable expectation that discovery will reveal evidence of" the type of misconduct for which she requests relief. *Twombly*, 550 U.S. at 556.

Id. at *7 (alterations in original) (emphasis added). The court also noted that the complaint failed to allege sufficient facts to show that the defendants disclosed the conversations with knowledge or reason to know the communication was illegally intercepted, and cited a pre-*Twombly* case:

> Even if we assume Mr. Young made the recordings "for the purpose of *committing a criminal or tortious act*," the Act requires that those, such as the Appellants, who intentionally disclose or use the contents of any such illegally intercepted communication, do so *"knowing or having reason to know*" the communication was intercepted in

> violation of the Act. 18 U.S.C. § 2511(1)(c) and (d) (emphasis added). We have said that in asserting the material elements under these provisions a complaint must allege the defendants knew: "(1) the information used or disclosed came from an intercepted communication, and (2) *sufficient facts concerning the circumstances of the interception* such that the defendant[s] could, with presumed knowledge of the law, determine that the interception was prohibited in light of" the Act. *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992) (emphasis added).

Id. at *8 (alteration in original). The court explained:

> In this case, Ms. Phillips alleges that "[b]y virtue of their employment as special agents with the ATF Bureau, [Appellants] knew or had reason to know that the seized recordings of [her] oral communications had been improperly and illegally intercepted" by Mr. Young under the Federal Wiretap Act. However, like the allegations in *Iqbal* that one of the defendants was "the principle architect of [an] invidious policy" and another was "instrumental in adopting and executing it," 129 S. Ct. at 1951, this allegation is conclusory because Ms. Phillips points to no fact other than the Appellants' positions of employment for the proposition they knew or should have known of Mr. Young's alleged misconduct or of the "circumstances of the interception." *Thompson*, 970 F.2d at 749. Nothing in the complaint indicates either Agent Bell, who was located in Arizona, or Mr. Lluberes, who was located in Washington, D.C., were involved in Mr. Young's Florida arrest and interview, or the Broward County search of four locations resulting in discovery of the tapes. Merely because one holds a law enforcement position does not establish he knew the criminal intent of someone he has never met or investigated. The complaint similarly provides no additional material facts concerning the circumstances of the interception to conclude Appellants could somehow determine Mr. Young recorded the conversations for the purpose of "committing a criminal or tortious act." Instead, given the plausibility that Mr. Young would not incriminate himself with the recordings, we cannot agree with Ms. Phillips's contention Appellants, merely because of their positions with ATF, knew or should have known that Mr. Young recorded their conversations for the purpose of "committing a criminal or tortious act."

Id. (alterations in original) (internal citations omitted). The Tenth Circuit reversed the denial of the motion to dismiss and remanded.

- ***Williams v. Sirmon***, 350 F. App'x 294 (10th Cir. 2009) (unpublished). An Oklahoma state prisoner filed a *pro se* civil rights complaint under § 1983 against the Warden and the Director of the Oklahoma Department of Corrections ("ODOC"), and in amending his complaint, added ten additional employees of the ODOC as defendants in their official and/or individual capacities. *Id.* at 296 (footnote omitted). The district court dismissed the complaint and the Tenth Circuit affirmed.

  The complaint alleged that "the Defendants violated [the plaintiff's] constitutional rights by subjecting him to 'racial discrimination, deliberate indifference treatment and cruel and unusual punishment.'" *Id.* The complaint asserted three claims:

  > (1) Defendants pursued frivolous misconduct violations against [the plaintiff] in reprisal for his exercise of the ODOC grievance procedures; (2) Defendants conspired to have bodily injury inflicted upon [the plaintiff] in retaliation for his exercise of the ODOC grievance procedures; and (3) Defendants denied him adequate and prompt medical treatment and falsified his medical records to conceal injuries he sustained. Williams said he sought administrative relief but the ODOC employees "refuse[d] to adhere to [ODOC regulations] in order to impede administrative exhaustion."

  Id. (third and fourth alterations in original). The district court dismissed the complaint because the plaintiff had failed to exhaust his claims, as required by the Prison Litigation Reform Act. *See id.* at 297. The Tenth Circuit affirmed the finding that the plaintiff failed to exhaust administrative remedies, noted that the *pro se* complaint would be read liberally, and concluded that "[e]ven charitably read, Williams' complaint fail[ed] to meet" the standard in *Twombly* and *Iqbal*. *See id.* at 296 n.1, 299. The court also noted that the complaint "fail[ed] to 'plead that each Government-official defendant, through [his] own individual actions, ha[d] violated the Constitution,' which is a requirement under *Iqbal*." *Id.* at 299 (second alteration in original) (citation omitted).

- ***Hall v. Witteman***, 584 F.3d 859 (10th Cir. 2009). The plaintiff alleged that his rights were violated when he paid a local newspaper to run an advertisement opposing the election of a local judge twice, but the newspaper only ran the advertisement once. *Id.* at 862. Instead of running the plaintiff's ad a second time, the newspaper ran an ad supporting the judge (the "Responsive Ad"), paid for by a group of attorneys, including the county attorney (Witteman). *Id.* The plaintiff's suit asserted claims against the newspaper, the judge, the attorneys submitting the Responsive Ad, and a few others. *Id.* The complaint asserted claims under §§ 1983 and 1985 and federal RICO, as well as state law claims. *Id.* "The heart of the allegations in the complaint's 153 paragraphs [wa]s that after Mr. Hall placed his advertisement, the defendants unlawfully convinced the paper's publisher to pull the second running of his advertisement in favor of their own, which contained defamatory remarks about him." *Id.* The plaintiff alleged that the defendant's actions violated his free speech rights under the First Amendment, as applied to the states through the Fourteenth

Amendment, and his Fourteenth Amendment right to equal protection. *Hall*, 584 F.3d at 862. The district court dismissed the federal claims for failure to state a claim, denied leave to amend, and declined to exercise supplemental jurisdiction over the state-law claims." *Id.* The Tenth Circuit affirmed, finding that the "civil-rights claims fail[ed] because [the plaintiff] did not allege state action, and [the] RICO claims fail[ed] because he did not allege a threat of continuing racketeering activity." *Id.*

With respect to the § 1983 claim, the court noted that a plaintiff must "'show that the alleged deprivation [of rights secured by the Constitution and the laws of the United States] was committed by a person acting under color of state law,'" and that "[i]n the context of § 1983 claims based on violations of the Fourteenth Amendment, . . . the under-color-of-state-law requirement in § 1983 is equivalent to the Fourteenth Amendment's state-action requirement." *Id.* at 864. The court noted that "Mr. Hall appear[ed] to concede that his § 1983 claim depend[ed] entirely on Mr. Witteman's involvement in the defendant's actions." *Id.* The court found that the relevant allegations "fail[ed] to describe any use of governmental power by Mr. Witteman (or anyone else)," and that "[a]ll the complaint contain[ed] in that regard [we]re conclusory allegations, such as 'Defendant[s] decided to use the power of Witteman's Kansas State Office as Coffey County Attorney,' and 'Witteman using and misusing the power of his offices . . . , impermissibly interfering with Plaintiff's right to publish a second time . . . .'" *Id.* at 865 (omissions and fifth alteration in original) (internal record citations omitted). The court emphasized that "the paragraph of the complaint alleging how the defendants 'coerced' the newspaper (through defendant Faimon, apparently the editor or publisher) not to run Mr. Hall's second ad does not include any allegation of abuse of the power of Mr. Witteman's government position." *Hall*, 584 F.3d at 865. The court explained that "Mr. Hall's essential concern about Mr. Witteman's official position [wa]s not that Mr. Witteman was exercising any of his official *powers*, but that his official *title* gave him prestige that would influence voters reading the Responsive Ad," and that "[t]his is not the stuff of which state action is made." *Id.* at 866. The court concluded that the complaint did not allege state action:

> In the case before us, there is no allegation of any act by Mr. Witteman in which he abused, or even used, any power that he possessed by virtue of state law. In particular, there is no allegation that he threatened or hinted at any possibility of his future action as county attorney if The Republican ran Mr. Hall's second ad or did not run the Responsive Ad. Mr. Hall's complaint does allege that the Responsive Ad had particular clout because a voter would believe that "'if Doug (Witteman) our County Attorney thinks [the judge] is ok, that is good enough for me to vote for Fromme also." But this is not a claim of use of state power. Exploiting the personal prestige of one's public position is not state action absent at least some suggestion that the holder would exercise governmental power. No reader of the Responsive Ad could reasonably believe that Mr. Witteman was threatening to use the power of his office against those

who did not vote for [the judge].

Id. at 866–67 (internal citations omitted). The court concluded that the section 1985 claim "suffer[ed] from the same defect as his § 1983 claim in that § 1985(3) d[id] not offer protection against the type of private conspiracy alleged in [the] complaint." *Id.* at 1987 (citations omitted). The court held that "[l]ike his § 1983 claim, Mr. Hall's § 1985 claim fail[ed] because of the absence of well-pleaded factual allegations that Mr. Witteman's alleged misconduct was state action." *Id.*

With respect to the RICO claim, the court held that the complaint did "not adequately allege a 'pattern' of racketeering activity because it fail[ed] to allege sufficient continuity to sustain a RICO claim." *Id.* The court agreed with the district court's analysis:

> At best, what plaintiff alleges is a closed-ended series of predicate acts constituting a single scheme to accomplish a discrete goal [publication of the Responsive Advertisement in lieu of Plaintiff's Advertisement] directed at only one individual [the plaintiff] with no potential to extend to other persons or entities.

Id. at 867–68 (alterations in original) (quoting the district court) (quotation marks omitted).

The Tenth Circuit found no abuse of discretion in the district court's denial of leave to amend because the plaintiff failed to attach a proposed amendment and "nowhere explained how a proposed amendment would cure the deficiencies identified by the district court," and because district courts are not required "'to engage in independent research or read the minds of litigants to determine if information justifying an amendment exists.'" *Id.* at 868 (citation omitted).

Eleventh Circuit

- ***Jacobs v. Tempur-Pedic Int'l, Inc.***, --- F.3d ----, 2010 WL 4880864 (11th Cir. Dec. 2, 2010). Mattress purchaser brought antitrust action against Tempur-Pedic North America, Inc. ("TPX") alleging that TPX created an "unreasonable restraint on trade" in violation of the Sherman Act, 15 U.S.C. § 1, in two ways: "by enforcing the vertical retail price maintenance agreements with its distributors and by engaging with its distributors in horizontal price fixing." *Id.* at *1. The district court dismissed for failure to state a claim and denied leave to amend. *Id.* The Eleventh Circuit affirmed. *Id.*

  TPX manufactures and sells eighty to ninety percent of the visco-elastic foam mattresses sold in the United States. *Id.* It sets the minimum retail prices distributors can charge for its mattresses and adheres to those minimum prices in the sales it makes through its website. *Id.* Jacobs purchased a TPX mattress from a distributor at a price equal to or above the minimum price set by TPX and then brought this action. *Id.*

The court explained the standard for reviewing a motion to dismiss an antitrust claim:

> As the Supreme Court instructed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), in a case brought under § 1 of the Sherman Act, we must determine whether the complaint, in asserting a conspiracy or agreement in restraint of trade, contains "allegations plausibly suggesting (not merely consistent with) [a conspiracy or] agreement," that is, whether the complaint "possess[es] enough heft to show that the pleader is entitled to relief." *Id.* at 557, 127 S.Ct. at 1966 (quotations and alteration omitted). Plausibility is the key, as the "well-pled allegations must nudge the claim 'across the line from conceivable to plausible.' " *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir.2009) (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974). And to nudge the claim across the line, the complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65).

Jacobs, 2010 WL 4880864, at *1.

The court explained that "Section One plaintiffs must define both (1) a geographic market and (2) a product market. " *Id.* at *4. It first explained how the relevant product market is determined:

> Defining the relevant product market involves identifying producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or services. The market is composed of products that have reasonable interchangeability. Most importantly, we should look to the uses to which the product is put by consumers in general.
>
> A relevant product market can exist as a distinct subset of a larger product market. The Supreme Court has provided "practical indicia" that can determine the contours of the submarket, such as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. A court should

> pay particular attention to evidence of the cross-elasticity of demand and reasonable substitutability of the products, because if consumers view the products as substitutes, the products are part of the same market.

Id. at *4-5 (omitting internal quotations and footnotes). And decided that Jacobs had not sufficiently pled that"visco-elastic foam mattresses" were a "separate relevant product submarket":

> The district court relied on *Cellophane* in its product market analysis, holding that because visco-elastic foam mattresses and traditional innerspring mattresses are both "product[s] on which people sleep," the two products are interchangeable parts of the larger mattress market, a market as to which Jacobs did not allege any anticompetitive effects. Jacobs correctly points out that unlike this case, *Cellophane* was based on a voluminous record, detailed in several published appendices, from which the Court could draw data on market share and substitutability of goods. 351 U.S. 405-12, 76 S.Ct. 1012-16. Here, because the district court dismissed his complaint based on its legal insufficiency, Jacobs argues that he did not have the chance to add facts in discovery which would have established visco-elastic foam mattresses as a separate relevant product submarket.
>
> We cannot accept this argument, however, because it would absolve Jacobs of the responsibility under *Twombly* to plead facts "plausibly suggesting" the relevant submarket's composition. Jacobs's skimpy allegations of the relevant submarket do not meet this obligation. The complaint alleges, without elaboration, that "[v]isco-elastic foam mattresses comprise a relevant product market, or sub-market, separate and distinct from the market for mattresses generally, under the federal antitrust laws." This conclusional statement merely begs the question of what, exactly, makes foam mattresses comprise this submarket. The complaint provides no factual allegations of the cross-elasticity of demand or other indications of price sensitivity that would indicate whether consumers treat visco-elastic foam mattresses differently than they do mattresses in general. Consumer preferences for visco-elastic foam mattresses versus traditional innerspring mattresses, and the costs associated with their sale, may vary widely, may vary little, or may not vary at all. Jacobs's complaint, however, gives no indication of which of these is the case. The allegations that visco-elastic foam mattresses are more expensive than traditional innerspring mattresses and that visco-elastic foam mattresses have "unique attributes" are similarly

> of little help. They do not indicate the degree to which consumers prefer visco-elastic foam mattresses to traditional mattresses because of these unique attributes and differences in price. Would, for example, a consumer whose innerspring mattress was due for replacement be more likely to purchase another innerspring mattress or substitute a visco-elastic foam model for it? Are visco-elastic foam mattresses put to different uses (as luxury goods, such as in fine hotels and within higher income brackets) than are traditional mattresses? These types of questions, which our precedent makes clear are crucial to understanding whether a separate market exists, go unanswered in the complaint.
>
> Moreover, "the broader economic significance of a submarket must be supported by demonstrable empirical evidence." *U.S. Anchor*, 7 F.3d at 998. While we acknowledge that Jacobs did not have the chance to undertake extensive discovery because this case was dismissed on a Rule 12(b)(6) motion, he nevertheless had the obligation under *Twombly* to indicate that he could provide evidence plausibly suggesting the definition of the alleged submarket. Such an indication is conspicuously lacking here; in its place is the unsupported assertion that visco-elastic foam mattresses constitute a distinct submarket of the larger mattress market.

Jacobs, 2010 WL 4880864, at *5.

The court next determined that the complaint failed to allege actual or potential harm to competition. *Id.* at *6. The court explained that actual harm "is indicated by a factual connection between the alleged harmful conduct and its impact on competition in the market," and "the plaintiff claiming it should point to the specific damage done to consumers in the market." *Id.* (internal quotation omitted). And decided that Jacobs "did not provide allegations plausibly suggesting actual harm to competition": "beyond the bald statement that consumers lost hundreds of millions of dollars, there is nothing establishing the competitive level above which TPX's allegedly anticompetitive conduct artificially raised prices." *Id.*

Turning to whether Jacobs sufficiently alleged potential harm, the court explained that "in addition to having failed to allege the relevant product market (as explained above), Jacobs has failed to establish the connection between TPX's power in the visco-elastic foam mattress market and harm to competition in that market." *Id.*

The court next decided that Jacobs's allegations of horizontal price fixing were not plausible under *Twombly*:

> We noted earlier that under the pleading standards of

Twombly and *Iqbal*, plausibility is the key. Given this standard, Jacobs had the burden to present allegations showing why it is more plausible that TPX and its distributors - assuming they are rational actors acting in their economic self-interest - would enter into an illegal price-fixing agreement (with the attendant costs of defending against the resulting investigation) to reach the same result realized by purely rational profit-maximizing behavior. Put another way, the potential costs of fixing prices with its distributors would outweigh any benefits that TPX would realize by doing so, particularly where independent economic activity would yield the same benefits with none of the costs.

In fact, the pleading standard enunciated in *Twombly* built upon the Court's rejection of an argument similar to the one Jacobs makes. The *Twombly* plaintiffs' complaint against incumbent local exchange long-distance carriers did not survive a motion to dismiss because any actions those carriers took to resist incursion by upstart carriers was "fully explained" by their "own interests in defending [their] individual territory." *Twombly*, 550 U.S. at 552, 127 S.Ct. at 1963 (quotations omitted) (approving the district court's dismissal of the complaint because "allegations of parallel business conduct, taken alone, do not state a claim under § 1"). The plaintiffs' complaint led to competing inferences of conscious parallelism and independent business judgment, and the Court held that more allegations were required at the motion to dismiss stage ....

Here, like the *Twombly* Court, we fail to find in the complaint "facts that are suggestive enough to render a § 1 conspiracy plausible," *id.* at 556, 127 S.Ct. at 1965, when the inference of conspiracy is juxtaposed with the inference of independent economic self-interest. *See Matsushita*, 475 U.S. at 596-97, 106 S.Ct. at 1361 ("[I]f [the defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."). Moreover, even if tacit collusion were, in fact, the more plausible inference, tacit collusion is "not in itself unlawful." *Brooke Group*, 509 U.S. at 227, 113 S.Ct. at 2590. Jacobs would have had to provide further allegations that, in addition to tacitly colluding, TPX and its authorized distributors somehow signaled each other on how and when to maintain or adjust prices. *See id.* at 227-28, 113 S.Ct. at 2590. The complaint contains no such allegations. There is no indication, for example, of dates on which distributors moved prices together, or the amounts by which the prices moved, if in fact they did.

Jacobs, 2010 WL 4880864, at *9-10. The court next decided that the district court did not err in denying Jacobs leave to amend his complaint. *Id.* at *11.

Judge Ryscamp dissented, arguing that the majority "goes too far in its application of *Twombly* and essentially requires Jacobs to prove his case in his complaint." *Id.* (Ryscamp, J., dissenting).

- ***Speaker v. U.S. Dep't. of Health & Human Servs. Centers for Disease Control & Prevention*,** 623 F.3d 1371, 2010 WL 4136634 (11th Cir. Oct. 22, 2010). Plaintiff Speaker alleged that the United States Department of Health and Human Services Centers for Disease Control and Prevention (CDC) violated the Privacy Act by disclosing his identity and confidential medical information relating to the treatment of his tuberculosis. *Id*. at *1. The CDC filed a motion for summary judgment, arguing that (1) Speaker failed to satisfy the elements of a Privacy Act claim and (2) under Eleventh Circuit precedent, Speaker could not recover non-pecuniary damages under the Privacy Act. *Id*. at *3. The CDC attached a "statement of material facts about which there is no genuine dispute" and various exhibits, including the CDC's statements at press conferences and the contents of newspaper articles. *Id*. In response, Speaker filed a motion opposing the summary judgment and supplied a "statement of material facts" and a "response to defendant's statement of facts," along with a Rule 56(f) affidavit requesting discovery. *Id.* The district court conducted a telephonic status conference with counsel for the parties. *Id.* at *4. The CDC relied on *Twombly* and *Iqbal* as a rationale to deny Speaker's Rule 56(f) discovery request. *Id.* The CDC contended that Speaker had not properly alleged the statutory elements of a Privacy Act violation, nor had he identified the nature of the wrongful disclosure. *Speaker*, 2010 WL 4136634 at *4. The district court denied Speaker's request for discovery and temporarily stayed the case. *Id.* The court, however, allowed Speaker the option of filing an amended complaint to add the factual specificity necessary to survive a Rule 12(b)(6) motion under the pleading standards set forth in *Twombly* and *Iqbal*. *Id.* Speaker filed an amended complaint, and the CDC filed a motion to dismiss or, in the alternative, a motion for partial summary judgment. *Id*. Along with its motion to dismiss, the CDC attached another "statement of material facts about which there is no dispute," in addition to essentially the same exhibits that were attached to its earlier motion for summary judgment. *Id.* The district court granted the CDC's motion to dismiss Speaker's Amended Complaint under Rule 12(b)(6) for failure to state a claim. *Id.* The court denied the CDC's other motions as moot. *Speaker*, 2010 WL 4136634 at *4. The Eleventh Circuit reversed and remanded.

  Plaintiff Speaker first tested positive for tuberculosis in March 2007. *Id.* at *1. In April 2007, after undergoing tests and treatments, Speaker received a preliminary susceptibility test result suggesting an elevated diagnosis of multidrug-resistant tuberculosis ("MDR-TB"). *Id.* During the course of Speaker's treatment, CDC employees became aware of his intention to travel to Europe in May 2007 for his wedding and honeymoon. *Id.* CDC officials were also aware that Speaker's doctor at the Fulton County Health Department Tuberculosis Program was advising further care at the National Jewish Medical and Research Center in Denver upon Speaker's return from Europe. *Id.* While Speaker was in Europe, the CDC lab

received test results indicating increased resistance to drug treatments and reclassified Speaker's tuberculosis as extensively drug-resistant tuberculosis ("XDR-TB"). *Id.* Speaker was contacted in Europe by the CDC about the change in test results, but informed that, while his treatment options would change, he remained non-contagious. *Speaker*, 2010 WL 4136634 at *1. Nevertheless, the CDC forbade Speaker from flying on a commercial airliner, but also informed him that the CDC did not have money in its budget to pay for a charter flight. *Id.* Faced with the prospect of indefinite detainment in Italy, and relying upon the statements of health officials that he was not contagious, Speaker elected to disregard the CDC's travel instructions and booked a flight to Montreal on a commercial airliner. *Id.* Speaker then crossed the border by car into the United States, notifying the CDC of his whereabouts. *Id.* Speaker followed the CDC's instruction to check himself into Bellevue Hospital in New York City, where Speaker was served with a federal quarantine order, the first imposed on a United States citizen since 1963. *Id.* After he was hospitalized, Speaker alleges that "the CDC caused personally identifiable information about [him] to be improperly disclosed without his consent to law enforcement officials, the news media, and the general public as a result of the deliberate actions of the CDC and its employees or agents." *Id*. at *2. Ultimately, Speaker's XDR-TB diagnosis proved erroneous, and his tuberculosis was downgraded back to MDR-TB. *Speaker*, 2010 WL 4136634 at *2.

The Eleventh Circuit set forth the pleading standard under *Twombly* and *Iqbal*:

> In *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), the United States Supreme Court instructed that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. at 45-46, 78 S.Ct. at 102. In 2007, the Supreme Court in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), retired *Conley's* "no set of facts" test in favor of a new formulation of Rule 12(b)(6)'s pleading standard. *Id*. at 562-63, 127 S.Ct. at 1969.
>
> In *Twombly*, the Supreme Court distinguished "plausible" claims from allegations that were merely "conceivable," and stated that the Court "[did] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id*. at 570, 127 S.Ct. at 1974. The Supreme Court explained that a complaint "does not need detailed factual allegations," but the allegations "must be enough to raise a right to relief above the speculative level." *Id*. at 555, 127 S.Ct. at 1964-65. Furthermore, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id*. at 556, 127 S.Ct. at 1965 (quotation marks omitted).

> Subsequently, in *Iqbal* the Supreme Court clarified that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949; *see also Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007) ("The Court has instructed us that the rule 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element.") (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965).

Speaker, 2010 WL 4136634 at *5-6.

With respect to Speaker's claim under the Privacy Act, the Eleventh Circuit explained that he must establish these four elements: (1) the CDC failed to fulfill its record-keeping obligation, (2) it did so deliberately; (3) Speaker suffered an adverse effect from this disclosure; and (4) Speaker suffered actual damages. *Id.* at *7 (applying test set out in *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 872 (11th Cir. 2009)). In addition, to satisfy the pleading standards announced in *Twombly* and *Iqbal*, "Speaker must do more than recite these statutory elements in conclusory fashion. Rather, his allegations must proffer enough factual content to 'raise a right to relief above the speculative level.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

The Eleventh Circuit decided that Speaker's allegations satisfied elements two, three and four and then did a detailed analysis of the first element. *Id.* at *8. The court explained that, under 5 U.S.C. § 552a(b) (outlining the CDC's record-keeping obligation), the CDC did not fulfill its record-keeping obligation if it disclosed:

> (a) any item, collection, or grouping of information (b) that contains (and is retrievable by) Speaker's name or an identifying number, symbol, or other identifying particular assigned to Speaker (c) within its system of records (d) by any means of communication (e) to any person or agency.

Id. (footnote omitted). Speaker made the following allegations: (1) that the CDC disclosed an "item, collection, or grouping of information" about Speaker; (2) that the CDC disclosed his confidential medical history; and (3) that "the Defendant CDC maintained a system of documents and records containing sensitive private information, including medical history and other protected health information, *identifiable to specific individuals including [Speaker]*." *Id.* at *9 (emphasis added in opinion). Speaker also alleged that the unauthorized disclosures were made to "person[s]," particularly, "law enforcement officials," "members of the media," and "the general public." *Speaker*, 2010 WL 4136634 at *9. The court rejected the CDC's "main argument . . . that Speaker's Amended Complaint impermissibly equivocated on the issue of whether the CDC itself disclosed his name,"

deciding that the CDC was reading the amended complaint "far too narrowly." *Id.* The CDC's argument was based on the Speaker's allegation that "the CDC *caused* personally identifiable information about Mr. Speaker to be improperly disclosed." *Id.* (emphasis in opinion). The court disagreed with the district court's statement that "[w]hat is clear from the allegation itself is that Speaker's identity was not disclosed by the CDC," because the statement "does not fully take into account the instances throughout the Amended Complaint in which Speaker alleges a direct disclosure by the CDC." *Id.* The court explained that Speaker's allegations satisfied *Twombly*:

> Plaintiff Speaker has pleaded enough factual content to "nudge[ ] [his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974. Importantly, Speaker's allegations are not barren recitals of the statutory elements, shorn of factual specificity. *See id.* at 555, 127 S.Ct. at 1964-65 (stating that "a plaintiff's obligation to provide grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" (quotation marks and brackets omitted)).
>
> Rather, Speaker alleges what the CDC disclosed; namely, "personally identifiable information," including information relating to his "medical history and his testing and treatment for tuberculosis." Moreover, he alleges when the CDC disclosed this information: namely, "during the time frame of said public press conferences." Speaker's Amended Complaint narrows the time frame of the CDC's initial disclosures to a short period in late May 2007. Speaker also expressly identifies one news organization to whom disclosure was made; namely, the Associated Press, which he claims received the leaked information between May 29 and May 31. *Id.* Importantly, Speaker has also alleged with factual specificity how the CDC came into possession of this information. Even the CDC does not dispute that it had the information that Speaker alleges was impermissibly disclosed. And there is no doubt that some entity, or its employees, disclosed Speaker's identity, since not even the CDC contends that Speaker himself revealed this information before the AP's May 31 article.
>
> Defendant CDC asserts that the factual scenario in this case largely mirrors the factually-insufficient pleadings in *Twombly*. We disagree. *Twombly* involved a claim by plaintiffs that telecommunications providers violated the Sherman Act, 15 U.S.C. § 1, by conspiring to enter into agreements not to compete in each other's respective territories. 550 U.S. at 548-50, 127 S.Ct. at 1961-62. The Supreme Court stated that mere parallel activity that is unfavorable to

> competition, "absent some factual context suggesting agreement," was insufficient to withstand Rule 12(b)(6) dismissal, since such parallel activity was equally consistent with lawful independent action. *Id*. at 548-49, 567-69, 127 S.Ct. at 1961, 1972-73. In *Twombly*, doubt encompassed not merely who entered into an agreement, but whether such agreement existed at all. The only lingering uncertainty here, by contrast, concerns whether it was a federal agency (namely, the CDC) or a very limited number of other health institutions that divulged Speaker's identity.
>
> Speaker provides greater factual specificity than the *Twombly* plaintiffs (and, by extension, a more plausible claim), such as by alleging an extremely determinate and compressed span of time in which the violations took place. For example, a fair reading of the Amended Complaint indicates that the CDC allegedly leaked his identity to the media sometime between the day it found out about his elevated diagnosis (May 18, 2007) and the day the AP publicly revealed his identity (May 31, 2007), and most likely during the period between its first press conference (May 29, 2007) and the AP story (May 31, 2007). This contrasts markedly with the long and nebulous seven-year time frame in which an agreement was alleged to have occurred in *Twombly* - a broad window which would have necessitated "sprawling, costly, and hugely time-consuming" discovery. *Twombly*, 550 U.S. at 560 n.6, 127 S.Ct. at 1967 n.6.
>
> Moreover, the short time frame alleged by Speaker is not only factually specific, but it is also more suggestive of a causal nexus between the CDC's press interaction and the exposure of Speaker's identity. Although several health institutions treated Speaker in Atlanta, there are, at this juncture at least, no allegations of press conferences or such press interaction by those other Atlanta entities around the time his identity was revealed. This close temporal relationship between the time of the CDC's press interaction and the discovery of Speaker's identity is far removed from the factual allegations in *Twombly*.

Speaker, 2010 WL 4136634 at *10-11 (internal citations and footnotes omitted). The court concluded: "Speaker need not prove his case on the pleadings - his Amended Complaint must merely provide enough factual material to raise a reasonable inference, and thus a plausible claim, that the CDC was the source of the disclosures at issue. Speaker has met this burden." *Id.* at *11.

- ***Hopkins v. Saint Lucie County School Board***, No. 10-11252, 2010 WL 3995824 (11th Cir. Oct. 13, 2010) (unpublished) (per curiam). Plaintiff Hopkins, an African-American male

former teacher, proceeding *pro se*, alleged racial and gender discrimination and retaliation both during and after teacher's employment. *Id.* at *1. Defendants, St. Lucie School Board and several school administrators, moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6). *Id.* Hopkins filed a response and the matter was referred to a magistrate judge, who recommended that the district court dismiss Hopkins' complaint without leave to amend. *Id.* The district court adopted the magistrate's recommendation and dismissed. *Id.* The Tenth Circuit affirmed.

Hopkins alleged claims for disparate treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), 42 U.S.C. § 1981, and 42 U.S.C. § 1983. *Id.* The court explained that "[t]he analysis of a disparate treatment claim is the same" under all three statutes. *Hopkins*, 2010 WL 3995824, at *1. "[E]vidence must be presented which is 'sufficient to create an inference of discrimination.'" *Id.* (quoting *Holifield v. Reno*, 115 F.3d 1555, 1564 (11th Cir. 1997)). "A plaintiff can establish that inference by showing: (1) he was a member of a protected class; (2) he was qualified for the job; (3) he suffered an adverse employment action; and (4) his employer treated similarly situated employees outside the protected class more favorably." *Id.*

The court described the "motivating factor" behind Hopkins's complaint as his assignment as a "floating teacher," moving from "classroom to classroom to teach Spanish, instead of being assigned to only one classroom for the entire day." *Id.* at *2. The court noted that his complaint "exhaustively details the various inconveniences and petty difficulties [Hopkins] encountered during his brief employment." *Id.* These allegations included that (1) "Hopkins was required to teach in a classroom while another teacher was present"; (2) Hopkins "was not immediately issued a laptop computer carrying bag" and had to use his own bag for several days; (3) "a fellow teacher would not share bulletin board space"; (4) students were "occasionally rude and disruptive"; and (5) Hopkins's "last class was interrupted by the afternoon announcements." *Id.* The court pointed out that "[m]ost of these inconveniences were the result of actions of third parties, such as fellow teachers and students, instead of actions by the School Board or the individual defendants." *Id.* And that "Hopkins himself admits that the school had other floating teachers, all of whom were female and none of whom were African-American." *Hopkins*, 2010 WL 3995824, at *2. The court concluded that Hopkins "provides no facts that would allow a court to infer that the school district treated those outside the class of African-American males more favorably. Instead, his complaint lists conclusory allegations of discrimination and fails to provide, as required by *Twombly* and *Iqbal*, the "sufficient factual matter" to establish a prima facie case." *Id.*

Turning to Hopkins's retaliation claims, the court explained that, to establish a retaliation claim under Title VII or Section 1981, Hopkins must show "(1) that he engaged in statutorily protected expression; (2) that he suffered a materially adverse action; and (3) that there is some causal relation between the two events. *Id.* at *2 (discussing the elements required to establish a Title VII retaliation claim (citing *McCann v. Tillman*, 526 F.3d 1370, 1375 (11th Cir. 2008) and *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2008)) (internal quotations omitted) and *3, n.2 (explaining that the elements required to establish

a Section 1981 claim are the same as the elements required to establish a Title VII claim). The court decided that Hopkins' complaint "fails to state the first requirement of such a claim, because it does not allege sufficient facts to establish that he was engaged in a statutorily protected form of expression when he was fired in October 2007." *Id.* at *3. The only "statutorily protected" activity Hopkins alleged was employment complaints filed with the Florida Commission on Human Rights and the Equal Employment Opportunity Commission. *Id.* "But both of those administrative complaints were filed months after the school district fired him." *Id.* (emphasis in original). The court then discussed Hopkins's claim "that the defendants retaliated against him by failing to provide him with job references" and decided that it was deficient because Hopkins "alleged no facts that would suggest a causal connection between his administrative complaints and the defendants' actions." *Hopkins*, 2010 WL 3995824, at *3. "His claim thus founders on the third requirement to establish a prima facie case of retaliation and for that reason fails to meet *Iqbal's* requirement that a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570)).

- ***Jemison v. Wise***, No. 09-15997, 2010 WL 2929692 (11th Cir. July 28, 2010) (unpublished) (per curiam). Plaintiff Jemison, an Alabama prisoner proceeding *pro se*, brought an action under Section 1983, alleging that Defendant, Warden Wise, retaliated against him for exercising his First Amendment right to free speech. *Id.* at *1. The district court dismissed his complaint *sua sponte*, for failure to state a claim. *Id.* The Eleventh Circuit vacated and remanded. *Id.*

  Jemison alleged that "several correctional officers beat him because he had filed numerous complaints against prison officials." *Id.* He filed a lawsuit against the officers, and also named Wise as a defendant for failing to protect him from abuse. *Id.* Jemison alleged that "Wise took great offense" at being named a defendant and retaliated by transferring Jemison to a prison with a higher level of security. *Id.* He also alleged that, days before he was transferred, Wise gave him a threatening letter. *Id.*

  Before Wise received service of process, the magistrate judge recommended that the court *sua sponte* dismiss Jemison's complaint for failure to state a claim upon which relief could be granted. *Id.* The magistrate determined that Jemison's complaint was insufficient because Jamison "did not plead specific facts from which the court reasonably could infer that Wise acted with a retaliatory motive when he transferred Jemison." *Id.* Jemison field objections to the magistrate's report and recommendation, in which he alleged "that Wise had been 'greatly upset' that Jemison had filed a lawsuit against him, and that Wise verbally had expressed his anger to Jemison in a face-to-face interaction." *Id.* at *2. In his objections, Jemison also asserted "that all of his incoming and outgoing mail was 'censored' by prison officials." *Id.* The district court adopted the magistrate's report and recommendation and dismissed Jemison's claim under the Prisoner Litigation Reform Act, 28 U.S.C. § 1915A (PLRA), for failure to state a claim upon which relief may be granted:

> The court found that the fact that Jemison had filed a lawsuit before he was transferred, standing alone, did not permit an inference that Wise had acted with a retaliatory motive when he ordered Jemison's transfer to Donaldson. The court also found that, while Jemison alleged in his objections to the report and recommendation that Wise verbally had expressed his anger regarding Jemison's complaint, this allegation was too vague to raise more than an inference of a "possibility" that Wise had acted unlawfully. Based on its finding that the complaint permitted an inference of only the mere possibility of misconduct, the court determined that Jemison's complaint should be dismissed.

Id. at *2.

The Eleventh Circuit determined that Jemison should have been given an opportunity to amend his complaint. It discussed the elements of a retaliation claim:

> "The First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech." *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003). An inmate raises a First Amendment claim of retaliation if he shows that the prison official disciplined him for filing a grievance or lawsuit concerning the conditions of his imprisonment. *Wildberger v. Bracknell*, 869 F.2d 1467, 1468 (11th Cir.1989). Even though a prisoner does not have a liberty interest in not being transferred to another prison, he may state a retaliation claim by alleging that he was transferred due to his filing of a grievance or lawsuit concerning his conditions of his confinement. *See Bridges v. Russell*, 757 F.2d 1155, 1156-57 (11th Cir.1985). To establish a retaliation claim, the inmate must show, *inter alia*, a causal connection between his protected conduct and the prison official's action. *Farrow*, 320 F.3d at 1248-49. In other words, the prisoner must show that, as a subjective matter, a motivation for the defendant's adverse action was the prisoner's grievance or lawsuit. *Smith v. Mosley*, 532 F.3d 1270, 1278 (11th Cir.2008).

Id. at *4. And concluded that Jemison should have been given an opportunity to amend because his objections to the magistrate's report and recommendation indicated that he had a plausible retaliation claim:

> [T]he district court abused its discretion by dismissing Jemison's complaint with prejudice before providing him with an opportunity to amend his complaint. *See* Fed. R. Civ. P. 41(b); Fed. R. Civ. P. 15(a). Because Wise had not filed a responsive pleading at the time

> that the court dismissed Jemison's complaint under § 1915A, Jemison had the right to amend his complaint as a matter of course, pursuant to Fed.R.Civ.P. 15(a). *See Troville*, 303 F.3d at 1260 n. 5. While Jemison did not expressly state that he wished to amend his complaint, he alleged additional facts in his objections to the report and recommendation that were relevant to the causation element of his retaliation claim-namely, that Wise expressed his anger regarding Jemison's lawsuit in a personal conversation with Jemison, and that Jemison's mail was censored by prison officials, thus indicating the plausibility that prison officials learned about Jemison's lawsuit by viewing his mail. *See Boxer X*, 437 F.3d at 1112 & n. 4.
>
> By alleging these additional facts in his objections to the report and recommendation, Jemison indicated that he could state a plausible claim that Wise acted with a retaliatory motive by describing the content of his conversation with Wise, and by detailing the unusual circumstances surrounding his transfer to Donaldson. *See Ashcroft*, 556 U.S. at ----, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1965. Accordingly, regardless of whether Jemison's retaliation claim ultimately has merit, the district court erred by dismissing Jemison's complaint with prejudice before providing him with an opportunity to amend.

Id.

- ***Azar v. Nat'l City Bank***, No. 09-16052, 2010 WL 2381049 (11th Cir. Jun. 15, 2010) (unpublished) (per curiam). Azar, a licensed attorney proceeding *pro se*, sued his bank for fraudulent inducement and negligent misrepresentation after he defaulted on his mortgage payments. *See id.* at *1. Azar sued National City Bank "seeking to restructure the principal and terms of his mortgage, and/or rescind and cancel his mortgage, and enjoin National City from instituting foreclosure proceedings." *Id.* The claims alleged included fraud, fraudulent inducement, fraudulent misrepresentation, negligence, breach of fiduciary duty and failure to disclose, and injunctive relief. *Id.* The complaint asserted that "'a confidential and trusting relationship' existed between [Azar] and National City's employees, and that he had trusted National City 'to make good and proper decisions' regarding the mortgage loans." *Id.* The complaint also alleged "that National City employees had intentionally falsified his income without his knowledge to secure [two of the] loans." *Id.* The district court dismissed the complaint under Rule 12(b)(6). It dismissed the breach of fiduciary duty claim because the allegations showed only "'an arms-length, lender-borrower relationship.'" *Azar*, 2010 WL 2381049, at *1. It also dismissed the claim that the bank acted negligently by failing to follow sound banking practices in processing the loans. *Id.* With respect to the fraud claims, the district court noted that the only false statement alleged was that the bank stated on Azar's loan application that his income was three times higher than the actual amount, and concluded that this statement could only have been intended to induce the lender to loan Azar

money, not to induce Azar to borrow money. *Id.* The district court also concluded that Azar could not have relied on the statement because he knew the amount of his own income and his complaint stated that he did not know his income had been falsified. *Id.* The district court denied Azar's request to file a third amended complaint to replead his fraudulent inducement and fraudulent misrepresentation claims, and to add new claims for negligent misrepresentation and breach of contract, describing the motion as frivolous. *Id.* at *2.

On appeal, Azar argued that the district court erred in dismissing his fraudulent inducement claim because it ignored the alleged misrepresentation that Azar qualified for the loans and met underwriting standards for loan approval. *Id.* Azar argued that this misrepresentation caused him to take the loans, "on the belief that National City had determined he could afford to repay the loans and was willing to incur the risk of such loans." *Azar*, 2010 WL 2381049, at *2. The Eleventh Circuit agreed with the district court's analysis:

> [T]he district court correctly found that Azar failed to plead a plausible claim of fraudulent inducement. Azar contends that, by approving his loans, National City misrepresented that he "qualified" for the loans and met underwriting standards. The mere fact that his loans were approved, however, does not constitute a false statement of fact. Otherwise, every loan approval could potentially result in a claim for fraudulent inducement. Likewise, Azar's personal belief that the loan approvals meant the bank believed he could repay the loan does not constitute a misrepresentation of fact that was made by National City. Even if National City employees had told Azar that they believed he could repay the loan, such a statement is merely an opinion, which cannot support a cause of action for fraud.

Id. at *3 (citation omitted). The court concluded that the statement also did not fall into the exception for opinions by someone with superior knowledge of the subject who knew or should have known that the statement was false because "[e]ven though the bank employees had access to certain financial documents of Azar's, Azar did not allege that National City had superior knowledge of his financial status or that it knew his business would continue to decline, which is the reason Azar alleged he could not make his mortgage payments." *Id.* The court also agreed with the district court's conclusion that the alleged falsification of Azar's income did not support a fraudulent inducement claim:

> We agree with the district court that this misrepresentation, even if true, reflects an intent to induce the lender to grant the loan, not to entice Azar to take the loan. The only evidence of inducement in Azar's complaint is his bare allegation that National City would financially benefit from loaning the money to him. Not only is this assertion devoid of any factual support, but it defies common sense to believe that a bank would profit from loaning money to someone it knows cannot repay it. Although Azar suggests on appeal that the

> bank employees would receive commissions and additional money from making the loans, he did not make this allegation in his complaint. Accordingly, we conclude that Azar's factual allegations of fraudulent inducement are insufficient "to raise a right to relief above the speculative level" and were thus properly dismissed pursuant to Rule 12(b)(6). *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.

Id. at *4.

Azar asserted on appeal that his fraudulent misrepresentation claim was really a negligent misrepresentation claim, relying on his allegation that the bank told him he qualified for the loans and met underwriting standards. *Id.* The court stated that while it "generally construe[s] pleadings liberally for a *pro se* litigant, [it could not] do so [in this case] because Azar [wa]s a licensed attorney." *Id.* The court declined to consider the negligent misrepresentation issue on appeal because Azar failed to raise it in the district court. *Azar*, 2010 WL 2381049, at *4.

- ***Randall v. Scott***, 610 F.3d 701, No. 09-12862, 2010 WL 2595585 (11th Cir. Jun. 30, 2010). Randall was hired as an investigator after Jewel Scott was elected as the district attorney of Clayton County. *Id.* at *1. Randall decided to run for the position of Chairman of the Clayton County Board of Commissioners. *Id.* Although Jewel Scott initially expressed approval of Randall's candidacy, Randall learned that Jewel's husband, Lee Scott, planned to run for the position and was angry about Randall's decision to run. *Id.* After Randall refused to withdraw from the race, Lee Scott allegedly asked Jewel Scott to fire Randall. *Id.* Jewel Scott then allegedly told Randall that her husband was pressuring her to fire Randall and told him to look for another job. *Id.* at *2. After Jewel Scott received an invitation to Randall's fundraiser, she terminated Randall's employment. *Randall*, 2010 WL 2595585, at *2. Randall filed suit in state court, asserting a First Amendment retaliation claim under § 1983 against Jewel Scott in her individual and official capacities, and a tortious interference claim against Lee Scott. *Id.* After the case was removed to federal court, the district court granted Jewel Scott's motion to dismiss, concluding that "'in light of the heightened pleading standard applicable in § 1983 cases, the mere fact that Randall decided to run for political office and held an event in connection with his candidacy is not enough to trigger First Amendment protection.'" *Id.* (record citation omitted). The district court alternatively held that even if the allegations were sufficient to state a First Amendment retaliation claim, Scott was entitled to qualified immunity because she did not violate clearly established law. *Id.* The Eleventh Circuit reversed the decision that the complaint did not state a First Amendment violation, finding that the district court erred in applying a heightened pleading standard, and affirmed the decision on qualified immunity.

  The Eleventh Circuit began by addressing the history of the heightened pleading requirement for § 1983 cases. The court first noted that "[g]enerally, under the Federal Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing

that the pleader is entitled to relief,'" *id.* at *3 (quoting FED. R. CIV. P. 8(a)(2)), and emphasized that under *Twombly*, "[t]o survive a 12(b)(6) motion to dismiss, the complaint 'does not need detailed factual allegations.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). The court cited *Conley* to note that the complaint "must 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Randall*, 2010 WL 2595585, at *3 (quoting *Conley*, 355 U.S. at 47). The court explained that some courts have required something more for § 1983 complaints to survive dismissal:

> Over two decades ago, "in an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts . . . tightened the application of Rule 8 to § 1983 cases." *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 309 (11th Cir. 1989). Under this heightened pleading standard, plaintiffs were required to provide "some factual detail" in addition to plain statements showing that they were entitled to relief. *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992). We found such additional factual detail useful in § 1983 cases in order to make qualified immunity determinations at the motion to dismiss stage and to prevent public officials from enduring unnecessary discovery.

Id. The court then set out the Supreme Court's pleading decisions, explaining that until *Iqbal*, none had addressed whether the heightened pleading standard for § 1983 claims against individual defendants survived:

> In 1993, the Supreme Court decided *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), a § 1983 case involving a *municipal entity defendant*. In *Leatherman*, the Supreme Court stated that "it is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 168, 113 S. Ct. at 1163 (citing FED. R. CIV. P. (8)(a)(2)).
>
> Since *Leatherman*, we have yet to decide whether *Leatherman's* holding applies in cases against individual defendants. *See, e.g. GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367–68 (11th Cir. 1998) (stating that "heightened pleading . . . is the law of this circuit" when § 1983 claims are asserted against government officials in their individual capacities.). We read *Leatherman's* holding as limited to § 1983 actions against entities.

See Swann v. Southern Health Partners, Inc., 388 F.3d 834, 838 (11th Cir. 2004) ("*Leatherman* overturned our prior decisions to the extent that those cases required a heightened pleading standard in § 1983 actions against entities that cannot raise qualified immunity as a defense.").

In 1998, the Supreme Court decided *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), in which it addressed how a § 1983 plaintiff must allege unconstitutional motive. The Court stated:

> In the past we have consistently . . . refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, or requiring pleadings of heightened specificity in cases alleging municipal liability . . . . As we have noted, the Court of Appeals adopted a heightened proof standard in large part to reduce the availability of discovery in actions that require proof of motive. To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.

Id. at 595, 118 S. Ct. at 1595 (internal citations omitted). In 2002, the Supreme Court decided *Swierkiewicz v. Sorema*, 534 U.S. 506, 513, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002), an employment discrimination case, and held that "complaints . . . must satisfy only the simple requirements of Rule 8(a)." The Court stated:

> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b) for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. In *Leatherman* we stated: "The Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983" . . . Just as Rule 9(b) makes no mention of municipal liability under [§ 1983] neither

> does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).
>
> *Id.* (footnotes omitted)[.]
>
> While a number of circuits relied upon the language in *Crawford-El* and *Swierkiewicz* to reject a heightened pleading standard in § 1983 individual-official cases, our circuit did not. *See Swann*, 388 F.3d at 838 (reaffirming the heightened pleading standard in § 1983 cases that involve parties eligible for qualified immunity after *Crawford-El* and *Swierkiewicz*).

Id. at *3–5 (emphasis added) (first alteration and omissions in original) (footnote omitted).

The court rejected Randall's argument that the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199 (2007), in which the Court "rejected the contention that Prison Litigation Reform Act (PLRA) plaintiffs were required to affirmatively plead exhaustion of administrative remedies," overturned the Eleventh Circuit's heightened pleading requirement for § 1983 claims. *Randall*, 2010 WL 2595585, at *5. The court explained that "[w]hile the *Jones* case *dicta* does speak broadly regarding pleading standards, the holding is restricted to PLRA plaintiffs and PLRA pleadings," and concluded that "*Jones* d[id] not overrule [the Eleventh Circuit's] precedent regarding heightened pleading requirements in § 1983 actions involving individuals able to assert qualified immunity as a defense." *Id.*

But the court reached a different conclusion with respect to *Iqbal*, concluding that *Iqbal* did overrule prior circuit court decisions imposing a heightened pleading standard in § 1983 cases:

> In short, while the *Iqbal* opinion concerns Rule 8(a)(2) pleading standards in general, the Court specifically describes Rule 8(a)(2) pleading standards for actions regarding an unconstitutional deprivation of rights. The defendant federal officials raised the defense of qualified immunity and moved to dismiss the suit under a 12(b)(6) motion. The Supreme Court held, citing *Twombly*, that the legal conclusions in a complaint must be supported by factual allegations, and that only a complaint which states a plausible claim for relief shall survive a motion to dismiss. *The Court did not apply a heightened pleading standard.*
>
> While *Swann*, *GJR*, and *Danley* [*v. Allen*, 540 F.3d 1298 (11th Cir. 2008)] reaffirm application of a heightened pleading standard for § 1983 cases involving defendants able to assert qualified immunity, we agree with Randall that those cases were effectively overturned by

> the *Iqbal* court. Pleadings for § 1983 cases involving defendants who are able to assert qualified immunity as a defense shall now be held to comply with the standards described in *Iqbal*. A district court considering a motion to dismiss shall begin by identifying conclusory allegations that are not entitled to an assumption of truth—legal conclusions must be supported by factual allegations. The district court should assume, on a case-by-case basis, that well pleaded factual allegations are true, and then determine whether they plausibly give rise to an entitlement to relief.

Id. at *7 (emphasis added) (footnote omitted). The court concluded that "the district court erred in applying a heightened pleading standard to Randall's complaint," explaining that "[a]fter *Iqbal it is clear that there is no 'heightened pleading standard' as it relates to cases governed by Rule 8(a)(2), including civil rights complaints*," and that "[a]ll that remains is the Rule 9 heightened pleading standard." *Id.* at *8 (emphasis added). The court noted that although it had already applied *Iqbal* to a § 1983 suit against defendants raising a qualified immunity defense in *Keating v. City of Miami*, 598 F.3d 753 (11th Cir. 2010), the *Keating* opinion's equation of the *Iqbal* pleading standard with the Eleventh Circuit's heightened pleading standard was merely *dicta*. *See id.* at *5 n.2. The court continued:

> We now say explicitly what *Keating* implied: whatever requirements our heightened pleading standard once imposed have since been replaced by those of the *Twombly-Iqbal* plausibility standard. As we recently emphasized in *American Dental Ass'n v. Cigna Corp.*, "The [Supreme] Court in *Iqbal* explicitly held that the *Twombly* plausibility standard applies to all civil actions . . . because it is an interpretation of Rule 8." 605 F.3d 1283, 1290 (11th Cir. 2010) (emphasis added). Thus, like complaints in all other cases, complaints in § 1983 cases must now "'contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Bryson v. Gonzales*, 534 F.3d 1282 (10th Cir. 2008) (*quoting In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. Unit A 1981), *quoted with approval in*, *Twombly*, 550 U.S. at 562, 127 S. Ct. 1955 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (*quoting In re Plywood Antitrust Litig.*, 655 F.2d at 641))).

Id. (alteration and omission in original)

With respect to the First Amendment claim, the court surveyed the case law and concluded that "[a] plaintiff's candidacy cannot be burdened because a state official wishes to discourage that candidacy without a whisper of valid state interest," and that "[a]n interest in candidacy, and expression of political views without interference from state officials who wish to discourage that interest and expression, lies at the core of values protected by the

First Amendment." *Randall*, 2010 WL 2595585, at *12. The court found the relevant analysis to be that "[t]he dismissal of Randall's complaint [could] only be affirmed if the state's interest in permitting Scott to fire Randall [wa]s of sufficient importance to justify the infringement of Randall's First Amendment right to run for Chairman of the Clayton County Board of Commissioners." *Id.* The court concluded that "[s]ince Scott's interest in firing Randall was, as alleged in the complaint, for purely personal reasons, the state ha[d] no interest in preventing Randall from running for office." *Id.* Since "Randall's decision to run for office enjoy[ed] *some* First Amendment protection, . . . [c]omparing this level of protection to the state's interest—manifestly none—the dismissal of Randall's complaint [could not] be affirmed on the failure to state the denial of a First Amendment right." *Id.*

Although the court concluded that Randall had sufficiently stated a First Amendment violation, it explained that "[s]ince federal law provides government officials a qualified immunity when sued individually for an alleged violation of a constitutional right, if Scott [could] establish qualified immunity, then the individual capacity claim against her [had to] be dismissed." *Id.* at *13. The court examined the relevant case law and concluded that Randall's rights were not clearly established under broad case law or under materially similar facts and that "Scott's alleged unconstitutional act of working to prevent Randall from running for office was not 'obviously' clear." *Id.* at *13–14. Because "any such right to run for office was not heretofore clearly established, . . . Scott . . . enjoy[ed] individual qualified immunity protection for her alleged violations of Randall's First Amendment rights." *Randall*, 2010 WL 2595585, at *14. The court affirmed the judgment on the qualified immunity issue regarding the individual capacity claim against Scott. *Id.* The decision on the official capacity claim was reversed. *Id.*

- ***Lubin v. Skow***, Nos. 10-10011, 10-10068, 2010 WL 2354141 (11th Cir. Jun. 14, 2010) (unpublished) (per curiam). A bankruptcy trustee for a holding company sought to impose liability on the officers of the holding company and its failed subsidiary bank. *Id.* at *1. The district court dismissed the complaint and the Eleventh Circuit affirmed, finding that the trustee lacked standing to sue officers of the bank and failed to sufficiently plead a claim against the officers of the holding company. *Id.*

  Integrity Bancshares, Inc. (the "Holding Company") was the parent of Integrity Bank (the "Bank"). *Id.* The Bank initially did well, but ultimately suffered significant losses and was closed and placed under FDIC supervision. *Id.* The Holding Company filed for bankruptcy and the bankruptcy trustee filed an adversary proceeding against the defendants, seeking damages for breach of fiduciary duty and negligence. *Id.* "The Complaint generally allege[d] that, through mismanagement and risky lending practices, the defendants harmed the Holding Company and endangered the capital it provided to the Bank." *Lubin*, 2010 WL 2354141, at *1. "The Trustee claim[ed] that because the Holding Company raised the money to increase the Bank's lending capital and expand its operations mostly through debt issuances, those debt issuances 'materially encumbered and put at risk the equity interests of the [Holding Company's] stockholders.'" *Id.* (alteration in original). The complaint further alleged that "the Holding Company and its stockholders 'had and have direct

equitable, if not legal, interests in the business practices, proper management, and profits of the Bank.'" *Id.* The FDIC intervened, arguing it had sole ownership of the claims against the defendants, and the defendants and the FDIC moved to dismiss. *Id.* at *2. The district court granted the motion. *Id.*

With respect to the claims against the officers of the Bank, the complaint alleged that these defendants "impaired the Bank's work capital and wasted its assets so as to cause economic loss to the Holding Company as well as the Holding Company's ultimate bankruptcy." *Id.* at *3. The court explained that "[t]his [wa]s a classic derivative harm, as '[t]he wrong done by the defendants, if any, was a wrong done to the corporation.'" *Id.* (third alteration in original) (citation omitted). Because the FDIC had succeeded to all of the Bank's legal rights under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the court found that only the FDIC could sue the Bank officers for the alleged breach of fiduciary duty to the Bank. *Lubin*, 2010 WL 2354141, at *3. The court held that the trustee lacked standing to bring a derivative suit against the Bank's officers. *Id.* Although FIRREA would not bar standing "if the Trustee [could] establish a direct harm to the Holding Company caused by the Bank officers," the court concluded that the complaint did not adequately plead such a nonderivative claim. *Id.* The court reviewed the pleading standard set out in *Twombly* and *Iqbal* and held that "[t]he district court correctly observed that whether the claims alleged in the Complaint are direct or derivative is a legal, not factual, determination, which we are not bound to accept." *Id.* (internal citation omitted) (citing *Iqbal*, 129 S. Ct. at 1949). The court rejected the trustee's argument that "*Iqbal* is limited to cases resolving qualified immunity against a constitutional tort claim," explaining that the court had "consistently applied *Iqbal* beyond that limited scope." *Id.* at *3 n.7 (citations omitted). The court noted that "[u]nder Georgia law, a direct claim is distinguishable from a derivative claim if the shareholder is 'injured in a way which is different from the other shareholders or independently of the corporation," and concluded that "[w]hile the Complaint generally allege[d] that the Bank officers caused a direct harm to the Holding Company, '[i]t [wa]s the nature of the wrong alleged and not the pleader's designation or stated intention that control[led] the court's decision.'" *Id.* at *3 (second alteration in original) (quoting *Phoenix Airline Servs., Inc. v. Metro Airlines, Inc.*, 397 S.E.2d 699, 701 (Ga. 1990); and citing *Gaudet v. United States*, 517 F.2d 1034, 1035 (5th Cir. 1975)). The court found that "[w]ithin the four corners of the Complaint, the Trustee ha[d] only alleged a derivative claim disguised as a direct claim." *Lubin*, 2010 WL 2354141, at *3. The court explained:

> The alleged harm to the Holding Company stems from the Bank officers' management of Bank assets. This harm is inseparable from the harm done to the Bank. That the Bank officers' poor business choices reduced the value of the Holding Company's investment does not alter the fact that the harm is decidedly a derivative one.
>
> While the Complaint alleges that the Holding Company

> suffered a unique harm because it assumed $34 million of debt to finance the Bank's expanded operations, debt is not an intrinsic harm. The Bank's insolvency, which precluded the Holding Company from repaying the $34 million, is what forced the Holding Company into bankruptcy. In the Complaint, the Trustee acknowledges that repayment of this debt depended upon the success of the Bank. As the Seventh Circuit observed, "the fact that the plaintiffs borrowed money to [fund their investment] and are now on the hook to pay those personal debts does not alter the nature of their claims." *Massey v. Merrill Lynch & Co.*, 464 F.3d 642, 648 (7th Cir. 2006). Thus, the Holding Company's harm, and even its ultimate bankruptcy, is derivative of the harm to the Bank.
>
> Because the Complaint alleges derivative harm, recovery from which is preempted by FIRREA, the district court properly dismissed the Complaint against Ballard, Skeen, and Skow as officers of the Bank.

Id. at *4 (alteration in original) (footnote and internal citations omitted).

With respect to the claims against the officers of the Holding Company, the court noted that FIRREA did not bar standing, but the complaint failed to adequately plead breach of fiduciary duty. *Id.* at *4–5. "The Complaint allege[d] that the officers of the Holding Company 'caus[ed], authoriz[ed], approv[ed], raif[ied] or otherwise allow[ed] the Bank to persist in the deficient condition and unsound practices,' and that they 'failed to exercise that degree of care and competence required by ordinarily prudent persons holding similar positions under similar circumstances.'" *Id.* at *5 (second, third, fourth, fifth, and sixth alterations in original). The court held that the complaint "simply recite[d] the elements of breach of duty in the 'unadorned, the-defendant-unlawfully-harmed me' manner *Iqbal* prohibits." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949). Although the district court concluded that even if some of the defendants owed a fiduciary duty to the Holding Company, the complaint still only alleged a breach of duty in their roles as officers of the Bank, the Eleventh Circuit gave "the Trustee the benefit of the inference that Skow and Long, as officers of the Holding Company, had oversight responsibilities for the Bank, and thus are partly to blame for the Bank's mismanagement." *Id.* But the court concluded that "[w]hile the losses of the Bank are staggering, a simple recitation of those amounts together with generalized statements of blame do not state a legal claim for breach of fiduciary duties to the Holding Company." *Lubin*, 2010 WL 2354141, at *5. The court "express[ed] no opinion about whether Skow or Long might have breached their duties as Holding Company officers by failing to inform the Holding Company board about bank mismanagement or by failing to influence the Holding Company (as sole shareholder of the Bank) to respond to this mismanagement by changing the Bank management," explaining that "[n]either of these allegations, nor any other allegations regarding these defendant[s'] conduct as Holding Company officers, appear[ed] in the Complaint." *Id.* The court held that "[b]ecause the Complaint fail[ed] to

plead sufficient facts connecting any act or omission by the defendants with a harm to the Holding Company that [wa]s distinct from the harm the Holding Company suffered when its investment in the Bank soured, the Complaint state[d] no claim for which the Trustee [could] recover." *Id.*

- ***Am. Dental Ass'n v. Cigna Corp.***, 605 F.3d 1283, No. 09-12033, 2010 WL 1930128 (11th Cir. May 14, 2010). The court addressed "whether, under FED. R. CIV. P. 9(b) and the pleading standard recently articulated by the Supreme Court in . . . *Twombly* . . . and *Iqbal* . . . , Plaintiffs/Appellants ('Plaintiffs') have sufficiently pled factual allegations in their RICO complaint to survive a motion to dismiss," and affirmed the district court's dismissal of the complaint. *Id.* at *1.

  Three dentists and the American Dental Association sued dental insurance companies that the plaintiffs contracted with to provide dental services to the defendants' members through dental service managed care plans. *Id.* The plaintiffs asserted violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and state law claims. *Id.* The plaintiffs "allege[d], on behalf of themselves and a putative class of similarly-situated dentists, that Defendants 'engaged in a systematic, fraudulent scheme to diminish payments to Class Plaintiffs through automatic downcoding, Current Dental Terminology ('CDT') code manipulation and improper bundling.'" *Id.* The district court dismissed all of the RICO claims without prejudice because the RICO enterprise allegations were deficient. *Id.* The plaintiffs filed an amended complaint, which the defendants moved to dismiss, but the case was transferred to another judge who denied all pending motions with leave to refile in order to assess the status of the case. *See Am. Dental Ass'n*, 2010 WL 1930128, at *1. During this time, the Supreme Court decided *Twombly* and the plaintiffs filed a second amended complaint. *Id.* The second amended complaint contained six counts: (1) RICO conspiracy; (2) aiding and abetting RICO violations; (3) a substantive RICO claim under 18 U.S.C. § 1962(c); (4) a claim for declaratory relief under 18 U.S.C. § 1964(a) and 28 U.S.C. § 2201 for RICO violations; (5) breach of contract; and (6) tortious interference with contractual relations and with existing and prospective business expectancies. *Id.* at *2. The defendants moved to dismiss all claims other than the breach of contract claim, and the district court granted the motion without prejudice, finding that the substantive RICO allegations were deficient under *Twombly*, the conspiracy claim "did 'not contain sufficient factual allegations about the Defendants agreeing with other entities and/or persons to engage in the ongoing criminal conduct of an enterprise,'" and the remaining RICO claims were deficient for similar reasons. *Id.* The district court provided another chance to file an amended complaint, directing the plaintiffs to "'conform with the pleading requirements announced in *Twombly*'" and applied by the Eleventh Circuit in two subsequent cases. *Id.* The plaintiffs sought an extension of time to file another amended complaint, but the district court denied the motion, stating: "'Because the plaintiffs are operating under newer, more stringent pleading requirements, the Court decided to afford them one last bite at the proverbial apple . . . . At this point, the factual averments necessary to satisfy *Twombly* are either readily included in yet another amended complaint, or simply do not exist.'" *Id.* at *2–3. The plaintiffs never filed a third amended complaint, and the district court dismissed

all counts but the breach of contract claim with prejudice and declined to exercise supplemental jurisdiction over the contract claim. *Am. Dental Ass'n*, 2010 WL 1930128, at *3. The appeal involved the dismissal of the RICO and RICO-related claims. *Id.*

The Eleventh Circuit began by describing the Supreme Court's opinions in *Twombly* and *Iqbal* because "[t]he present case reflect[ed] the concerns that motivated the Supreme Court to adopt a new pleading standard in *Twombly* and *Iqbal* . . . ." *Id.* In discussing *Twombly*, the court noted that "[i]n rejecting that [no-set-of-facts] language [from *Conley*], the Court in *Twombly* noted that courts had read the rule so narrowly and literally that 'a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.'" *Id.* (quoting *Twombly*, 550 U.S. at 561). In discussing *Iqbal*, the court explained that "[i]mportantly, the Court held in *Iqbal*, as it had in *Twombly*, that courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Id.* at *4 (second alteration in original) (citing *Iqbal*, 129 S. Ct. at 1951–52).

The court first examined the allegations of predicate acts of a pattern of racketeering under 18 U.S.C. § 1962(c) and noted:

> Because Plaintiffs' section 1962(c) claim is based on an alleged pattern of racketeering consisting entirely of the predicate acts of mail and wire fraud, their substantive RICO allegations must comply not only with the plausibility criteria articulated in *Twombly* and *Iqbal* but also with FED. R. CIV. P. 9(b)'s heightened pleading standard, which requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

Id. at *6 (alteration in original) (citation omitted). The court noted that under Rule 9(b), "a plaintiff must allege: '(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud.'" *Am. Dental Ass'n*, 2010 WL 1930128, at *6 (citation omitted).

The court described the allegations:

> Plaintiffs' complaint alleges that "[d]efendants represented in their on-line advertising, in their provider agreements and in their fee schedules that their in-network providers would be compensated for covered procedures based on commonly accepted dental practice, standard coding practice and Defendants' fee schedules." Plaintiffs argue that these advertisements, agreements, and fee schedules were fraudulent because they indicated benefits payments lower than what Plaintiffs believed were due to them under their fee-for-service

> agreements with Defendants, which Plaintiffs argue had promised them timely specified payments "in accordance with standard dental coding procedures." In other words, Plaintiffs contend that they performed multiple procedures worthy of multiple or larger benefits payments, but that Defendants bundled and downcoded the procedures into fewer claims worthy of smaller payments. Additionally, Plaintiffs allege that the only way the alleged scheme of downcoding and bundling claims could work is if Defendants "agree[d]" to employ the "same" devices and tactics. Thus, Plaintiffs do not allege parallel schemes among competing dental insurers; they allege a single scheme consisting of identical conduct in which all Defendants agreed to participate. Therefore, not only did Plaintiffs need to plausibly and particularly allege facts showing related instances of mail and wire fraud, but also plausibly allege facts showing that a conspiracy created the alleged scheme. Though the complaint sets out at least six examples of e-mail and letter communications between Defendants and Plaintiffs, including online advertisements, fee schedules, contracts, and Explanations of Benefits ("EOBs") documents, *Plaintiffs do not point to a single specific misrepresentation by Defendants regarding how Plaintiffs would be compensated in any of these communications, nor do they allege the manner in which they were misled by the documents, as they are required to do under Rule 9(b)*. We have held that a plaintiff must allege that some kind of deceptive conduct occurred in order to plead a RICO violation predicated on mail fraud. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1065 (11th Cir. 2007) (affirming dismissal of plaintiff's substantive RICO claims where complaint did not allege that defendants made any affirmative misrepresentations in the mailings).[32] Here, Plaintiffs' complaint provides a list of mailings and wires, without ever identifying any actual fraud. If the specific misrepresentations do not exist, it follows that the complaint has not alleged a right to relief that is "plausible on its face." *See Twombly*, 550 U.S. 570, 127 S. Ct. at 1974, 167 L. Ed. 2d 929.

Id. (emphasis added) (alterations in original) (citations omitted). The court noted that "[f]or example, Plaintiffs d[id] not allege any misrepresentations in the EOBs because Plaintiffs allege in their complaint that the EOBs expressly informed Plaintiffs when their claims were going to be bundled or downcoded and gave the reasons for doing so," and that the plaintiffs had "not shown how they were misled by the EOBs if the language in the EOBs notified them about any bundling or downcoding of particular procedures." *Id.* The court also explained that the complaint did not allege any misrepresentation in the online

[32] The *Martinez* case was decided before *Twombly*.

advertisements because "[t]here [we]re no allegations anywhere that the quoted language of the advertisements [wa]s false" and "[r]ead as a whole, they amount[ed] at most to puffery, not fraud." *Id.* at *7 (citation omitted). The court noted that the plaintiffs made "no allegations as to who, if anyone, read the advertisements and was misled by them." *Id.* The court also noted that "the complaint d[id] not connect the allegedly fraudulent communications to any particular acts of bundling or downcoding that Plaintiffs f[ound] unacceptable." *Id.*

The court rejected the plaintiffs' argument that the "lack of particularity should be excused because they were at an 'informational disadvantage' as to exactly how Defendants' software bundled and downcoded submitted procedures." *Am. Dental Ass'n*, 2010 WL 1930128, at *7. The court found "it telling that the three named plaintiffs . . . each received EOBs explaining the reimbursement of specific procedures they had performed, yet the complaint never offer[ed] any examples of which claims were bundled and downcoded." *Id.* The court stated that "the closest Plaintiffs c[a]me to alleging a specific instance of fraud [wa]s in paragraph 49 of the complaint, where they allege[d] that '[d]efendants regularly sent EOBs [to Plaintiffs] that inappropriately and automatically bundled x-ray procedures with other procedures,'" but noted that the plaintiffs did "not allege other procedures with which the x-ray codes were bundled." *Id.* (fourth and fifth alterations in original). The court found that "[t]his [wa]s at most an allegation of possible parallel conduct without any allegation of an agreement as to how Defendants would process x-ray billing codes as part of a greater scheme." *Id.* The court continued: "In fact, Plaintiffs do not allege how Defendants agreed to employ any of these procedures as part of a long-term criminal enterprise predicated on acts of mail and wire fraud. Simply specifying particular dates and contents of communications cannot automatically constitute a valid claim that a defendant violated 18 U.S.C. § 1962(c) without also plausibly alleging the existence of a long-term criminal enterprise." *Id.*

The court concluded that the claim did not meet the standards of *Twombly* or of Rule 9(b):

> In sum, the Second Amended Complaint does not plausibly, under *Twombly*, or particularly, under Rule 9(b), allege a pattern of racketeering activity predicated on a scheme to commit acts of mail and wire fraud. We find no specific misrepresentations in any of the communications Plaintiffs referenced, no connection between the alleged misrepresentations and any particular acts of downcoding or bundling, and no allegations as to how Defendants agreed to engage in an illegal scheme to defraud dental providers. Plaintiffs may have a difference of opinion from Defendants regarding the coding that was used in processing their claims, but *we cannot infer a scheme-driven deception from a complaint that provides no details of fraud or conspiracy*. Accordingly, we conclude that the district court did not err in dismissing the substantive RICO claim in the Second Amended Complaint for failure to state a claim.

Id. (emphasis added) (footnote omitted).[33]

The court then turned to the allegations of conspiracy under 18 U.S.C. § 1962(d) and concluded that "the allegations in Plaintiffs' complaint d[id] not support an inference of an agreement to the overall objective of conspiracy or an agreement to commit two predicate acts." *Am. Dental Ass'n*, 2010 WL 1930128, at *8. The court eliminated "conclusory statements such as '[d]efendants have not undertaken the above practices and activities in isolation, but instead have done so as part of a common scheme and conspiracy,' and '[e]ach Defendant and member of the conspiracy, with knowledge and intent, agreed to the overall objective of the conspiracy, agreed to commit acts of fraud to relieve Class Plaintiffs of their rightful compensation, and actually committed such acts.'" *Id.* (alterations in original) (internal citation omitted). The court found that "[t]hese [we]re the kinds of 'formulaic recitations' of a conspiracy claim that the Court in *Twombly* and *Iqbal* said were insufficient." *Id.* (citing *Twombly*, 550 U.S. at 557; *Iqbal*, 129 S. Ct. at 1950–51). The court also excluded from consideration the allegation that "'[i]n order for the fraudulent schemes described above to be successful, each Defendant and other members of the conspiracy had to agree to enact and utilize the same devices and fraudulent tactics against the Class Plaintiffs,'" explaining that the court was "'not required to admit as true this unwarranted deduction of fact.'" *Id.* (alteration in original) (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009)). "After eliminating the wholly conclusory allegations of conspiracy, [the court] turn[ed] to Plaintiffs' remaining factual allegations." *Id.* The court noted:

> Plaintiffs attempt to bolster their conspiracy allegations by describing the following "collective" or parallel actions taken by Defendants, from which they now argue the existence of an agreement may be inferred: the collective development and use of automated processes to manipulate CDT codes, *i.e.* downcoding and bundling; the use of the same claims procedures, including the data that dentists are required to provide in submitting claims, the forms on which dentists must submit their data, and the coding that dentists use to submit their data; and Defendants' participation in trade associations and private, jointly owned partnerships and corporations.

Id. The court concluded that the proposed inferences were not warranted:

> Assuming for the sake of argument that parallel conduct has actually been alleged here, and accepting these factual allegations as true, as

[33] The court noted that the plaintiffs also argued that the district court erred by dismissing their substantive RICO claims not on the basis that they did not meet the Rule 9(b) standard, but on the basis that the allegations were not plausible under *Twombly*. *Am. Dental Ass'n*, 2010 WL 1930128, at *7 n.3. The Eleventh Circuit disagreed, but noted that even if the district court had relied solely on the plausibility standard in dismissing the substantive RICO claims, the judgment could be affirmed on the basis that the plaintiffs had not pleaded with sufficient particularity under Rule 9(b). *Id.*

> we are required to do under *Iqbal*, *see* 129 S. Ct. at 1950, we think that the Supreme Court's holding in *Twombly* forecloses any possibility that Plaintiffs' allegations of parallel conduct plausibly suggest a conspiracy. The Court stated in *Twombly* that "when allegations of parallel conduct are set out . . . they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." 550 U.S. at 557, 127 S. Ct. at 1966. The Court held that allegations of parallel conduct, accompanied by nothing more than a bare assertion of a conspiracy, do not plausibly suggest a conspiracy, stating that "without that further circumstance pointing to a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id.*

Am. Dental Ass'n, 2010 WL 1930128, at *8 (footnotes omitted).[34]

The court stated that "[t]hese conclusions are especially true where, as here, there is an 'obvious alternative explanation' for each of the collective actions alleged that suggests lawful, independent conduct." *Id.* at *9 (citing *Twombly*, 550 U.S. at 568; *Iqbal*, 129 S. Ct. at 1951–52). The court explained that "[a]s for Plaintiffs' allegation that Defendants downcoded and bundled some submitted claims, insurance companies must use computers and software to efficiently process claims, and the use of downcoding and bundling may be proper in order to decrease physicians' costs and potentially increase profits," and noted that "Plaintiffs' brief only decrie[d] the use of 'improper' bundling, which implie[d] that some bundling of claims [wa]s commonly acceptable." *Id.* The court also noted that "the Department of Health and Human Services ha[d] taken the position that the inverse processes of 'upcoding' and 'unbundling' [we]re fraudulent billing practices under Medicare, which supports the use of automated claims processing systems." *Id.* The court concluded that "[t]he use of automated systems that bundle and downcode may just as easily have developed from independent action in a competitive environment as it would from an illegal conspiracy, because each insurer would have an economic interest in decreasing physicians' costs and increasing profits." *Id.* As a result, the court held that "[t]he complaint d[id] not plausibly suggest that by using similar methods to downcode and bundle claims, Defendants ha[d] acted in any way inconsistent with the independent pursuit of their own economic self-interest," and that "Defendants' parallel conduct [wa]s equally indicative of rational independent action as it [wa]s concerted, illegitimate conduct and thus 'stay[ed] in the neutral territory.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "As for Plaintiffs' allegation that a conspiracy may be inferred from Defendants' participation in trade associations and other professional groups," the court noted that "it was well-settled before *Twombly* that

[34] The court recognized that the *Twombly* Court acknowledged certain examples of parallel conduct that might be sufficient to imply a conspiracy, but concluded that the alleged conduct did not fall into any of the categories described by the *Twombly* Court. *Am. Dental Ass'n*, 2010 WL 1930128, at *8 n.5.

participation in trade organizations provides no indication of conspiracy." *Am. Dental Ass'n*, 2010 WL 1930128, at *9. The court concluded:

> Plaintiffs have not plausibly alleged sufficient facts regarding Defendants[']agreement with other entities or persons to engage in the ongoing criminal conduct of an enterprise. Plaintiffs' allegations of Defendants' parallel conduct, absent a plausibly-alleged "meeting of the minds," fail to "nudge[ ] their claims across the line from conceivable to plausible." *See Twombly*, 550 U.S. at 557, 570, 127 S. Ct. at 1966, 1974. Accordingly, we conclude that the district court did not err in dismissing the RICO conspiracy claim in the Second Amended Complaint.

Id. at *10 (second alteration in original).[35]

The court summarized its holdings as follows:

> The RICO allegations in Plaintiffs' Second Amended Complaint "stop[ ] short of the line between possibility and plausibility." *See Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966. As explained above, Plaintiffs failed to sufficiently plead a pattern of racketeering activity predicated on a scheme to commit acts of mail and wire fraud. Plaintiffs also failed to plausibly allege a conspiracy to commit RICO violations, as they merely offered conclusory allegations of agreement accompanied by statements of parallel behavior, which just as easily suggest independent, lawful action.

Id. (alteration in original).[36]

- ***Edwards v. Prime, Inc.***, 602 F.3d 1276, No. 09-11699, 2010 WL 1404280 (11th Cir. Apr. 9, 2010). Former employees of a Ruth's Chris Steak House franchise asserted claims against the restaurant and its owner, operator, and franchisor under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, and Alabama common law, alleging that the restaurant "knowingly provided illegal aliens with names and social security numbers of American citizens to use for illegal employment, unlawfully took employees' tips, discriminated on the basis of race, and retaliated against

[35] The court recognized that other circuits have held that failure to state a claim of a primary RICO violation is fatal to a civil RICO conspiracy claim, but found it unnecessary to resolve that issue because the conspiracy allegations failed to state a claim under *Twombly* and *Iqbal*. *Am. Dental Ass'n*, 2010 WL 1930128, at *10 n.6.

[36] With respect to the aiding and abetting RICO claim and the claim for declaratory relief under RICO, the court noted that the appellate arguments were extremely limited and concluded that the district court properly dismissed those claims for the same reasons it dismissed the claims made under §§ 1962(c) and (d). *Id.* at *10 n.7.

employees who challenged those and other practices." *Id.* at *1. The district court dismissed four of the fifteen counts and certified those rulings as partial final judgments under Rule 54(b). *Id.* The Eleventh Circuit reversed the dismissal of the RICO claim, affirmed the other judgments certified under Rule 54(b), and dismissed for lack of jurisdiction the appeal of rulings that were not certified. *Id.*

In describing the allegations, the Eleventh Circuit noted that "[a]t this stage we must and do assume that any well-pleaded allegations in the amended complaint are true." *Id.* Count I alleged a pattern of racketeering activity under RICO, based on a criminal enterprise to violate federal immigration laws. *Id.* According to the complaint, "Prime [(the franchisee that owned and operated the restaurant)] knowingly hired and employed illegal aliens, allowed them to work under the names of former Ruth's Chris employees who were United States citizens, and provided them with the former employees' social security numbers." *Id.* The defendants also allegedly "gave the illegal aliens more time than federal law permits to produce paperwork establishing their eligibility to work in this country and sometimes did not require the illegal aliens ever to produce the paperwork." *Edwards*, 2010 WL 1404280, at *1. "Prime's management asked the illegal aliens employed in the restaurant whether they knew of any other illegal aliens who were interested in working there." *Id.* Prime also allegedly paid the illegal aliens in cash and preferred them over U.S. citizens. *Id.* The company also gave the illegal aliens name tags that had names that were not their own. *Id.*

Counts 2–6 alleged that the defendants violated the FLSA by unlawfully taking and keeping the plaintiffs' tips. The complaint alleged:

> Because Prime paid the plaintiffs as "tipped employees," it claimed a "tip credit" and paid them an hourly wage below the minimum wage that otherwise would have applied. As a standard practice Prime withheld a percentage of servers' tips, and a portion of that money was paid to "the house." The rest was placed into a "tip pool," which Prime used to pay other employees, including some who were not eligible to participate in the tip pool. When a manager or supervisor believed that a customer had tipped an employee too much, the manager or supervisor persuaded the customer to reduce the amount of the tip to the employee or not to tip at all. Those practices, it is claimed, rendered defendants' use of the tip credit unlawful under the FLSA, requiring them to pay direct wages for the full minimum wage and to return the tips.

Id. at *2. The complaint further alleged that Prime required the plaintiffs to perform excessive non-serving tasks, occasionally "clocked out" the plaintiffs even if they were still working, sometimes docked the plaintiffs' hours, and did not keep accurate records of the time the employees worked. *Id.* The plaintiffs requested "injunctive and declaratory relief, all unlawfully taken tips, lost minimum and overtime wages, liquidated damages matching the amount of lost tips and wages, and reasonable attorney's fees." *Edwards*, 2010 WL

1404280, at *2.

Count 7 alleged that the defendants intentionally interfered with the business relationship between the employees and the patrons of the restaurant who tip and between the employees who contributed to or received money from the tip pool. *Id.* Specifically, the plaintiffs alleged that the defendants "intentionally interfered with those business and contractual relations 'by taking amounts of money' from the plaintiffs 'based on such gratuities paid to servers *regardless* of whether Defendants otherwise complied with the FLSA in compensating employees.'" *Id.* Count 8 alleged that this conduct amounted to conversion under state law. *Id.*

The final seven counts included claims of unlawful discrimination and retaliation, but only some were at issue on appeal. *Id.* at *3. In Count 12, plaintiff Edwards, a Caucasian, alleged that Prime subjected him to a hostile work environment based on his race, in violation of § 1981. Specifically, Edwards alleged:

> While working at Ruth's Chris, Edwards was targeted by Hispanic and Latino employees who repeatedly threatened him at the restaurant. One employee cursed Edwards and threatened to cut his throat. He complained to Prime's management about the hostile work environment, but they failed to take any action "because Prime disfavored Caucasian Edwards in favor of its Hispanic and Latino employees and did not want to upset them out of fear of disrupting its supply of cheap illegal labor." In addition to being threatened, Edwards was also shunned. One Hispanic employee threatened Edwards, telling him that it was "going to be bad" for the person who was complaining about Prime's employment of illegal aliens.

Id. In Count 13, Edwards claimed, on his own behalf and on behalf of similarly situated employees, that after his attorney gave a copy of the proposed complaint to the restaurant's manager, he was "subjected to added scrutiny at work, and the defendants took 'no effective action to prevent . . . Edwards' hostile work environment including another employee's additional threat to Edwards after [he] had complained about a threat.'" *Edwards*, 2010 WL 1404280, at *3 (alteration and omission in original). The restaurant also reduced Edwards's hours and prevented him from participating in the retirement plan. *Id.* In addition, Prime allegedly began referring to the withheld percentage of the tips as a service charge on reports filled out by servers, which Edwards claimed amounted to retaliation in violation of the FLSA and § 1981. *Id.* In Count 14, another employee (Key) claimed that Prime unlawfully retaliated against her by terminating her health care benefits and then firing her after this lawsuit was filed, in violation of the FLSA and § 1981. *Id.* at *3–4.

The district court dismissed with prejudice Counts 1, 7, 8, and 12, concluding that the RICO claim failed to allege a pattern of racketeering activity, the tort claims were preempted by the FLSA, and Edwards's § 1981 hostile work environment claim failed to allege that he was

discriminated against because of his race. *Id.* at *4. The district court also dismissed with prejudice Counts 2–6 to the extent they requested declaratory and injunctive relief, finding that the FLSA did not provide for equitable relief. *Id.* The district court also dismissed Counts 13–14 with prejudice to the extent that Edwards and Key requested punitive damages, finding that such damages were unavailable under 28 U.S.C. § 215. *Edwards*, 2010 WL 1404280, at *4. Counts 1, 7, 8, and 12 were certified under Rule 54(b). *Id.* The Eleventh Circuit held that its jurisdiction extended only to those four certified claims. *See id.* at *5–7.

With respect to Count I, the RICO claim, the court noted that "racketeering activity" under RICO included any violation of § 274 of the Immigration and Nationality Act (INA), provided that the act was committed for financial gain. *Id.* at *9. The court explained the plaintiffs' claim:

> In this case the plaintiffs allege that the defendants engaged in "racketeering activity" by violating several provisions of INA § 274, which is codified at 8 U.S.C. § 1324, and that they did so for financial gain. Specifically, the plaintiffs allege that the defendants violated: (1) 8 U.S.C. § 1324(a)(3)(A), which makes it a federal crime for any person to "knowingly hire[ ] for employment at least 10 individuals with actual knowledge that the individuals are [illegal] aliens" during a 12-month period; (2) 8 U.S.C. § 1324(a)(1)(A)(iv), which makes it a federal crime for any person to "encourage[ ] or induce[ ] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law"; (3) 8 U.S.C. § 1324(a)(1)(A)(iii), which makes it a federal crime for any person to knowingly or recklessly "conceal[ ], harbor[ ], or shield[ ] from detection, or attempt[ ] to conceal, harbor or shield from detection" an alien who "has come to, entered, or remains in the United States" illegally; and (4) 8 U.S.C. § 1324(a)(1)(A)(v), which makes it a federal crime for any person to conspire to commit, or to aid and abet, any violation of § 1324(a)(1)(A)(i)–(iv). According to the amended complaint, the defendants have committed "tens and scores if not hundreds," of these predicate acts.

Id. (alterations in original).

In considering the alleged violation of § 1324(a)(3)(A), which would constitute a predicate act under RICO, the court distinguished between that statute and § 1324a, the violation of which would not constitute a predicate act:

> If an employer hires 10 or more illegal aliens with knowledge that they are unauthorized aliens who have been illegally brought into this

> country, § 1324(a)(3)(A) applies and the employer may be fined, sentenced to as much as 5 years in prison, or both. And that crime would be a RICO predicate act. By contrast, if an employer knowingly hires aliens not authorized to work in this country, without knowledge that they were brought into this country illegally, only § 1324a would be violated. For a violation of § 1324a only civil penalties are available, unless there is a "pattern or practice" in which case a conviction may result in a fine and a sentence of up to six months. And that crime would not be a RICO predicate act.

Id. at *10 (internal citations omitted). The district court concluded that the complaint failed to allege that Prime or its employees had actual knowledge that the unauthorized aliens they hired had been "'brought into the United States' in violation of § 1324." *Edwards*, 2010 WL 1404280, at *10. The Eleventh Circuit agreed:

> [T]he plaintiffs have never alleged that any of the defendants knew the aliens who were hired had been illegally brought into the United States. The closest the plaintiffs come is their allegation that "Prime hired and allowed employees to remain employees despite the fact that . . . they were known by Prime's management as unauthorized or ineligible to work *or even be in this Country*." Am. Complaint ¶ 26 (emphasis added). Perhaps that allegation "gets the [§ 1324(a)(3)(A)] complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966 (internal quotation marks omitted). An employer may know that it hired illegal aliens without knowing how they made their way into the United States. As the district court recognized in this case, "Individuals who enter this country legally may overstay their welcome and become unauthorized to work without ever having been brought in illegally, whether by others or by themselves." Likewise, they may have entered this country illegally on their own instead of having been "brought into" it. Because the "brought into" element is essential to § 1324(a)(3)(A), plaintiffs who do not allege it have not alleged a predicate act under that provision. They may have alleged a violation of § 1324a(a)(1)(A), but that is not a predicate act for RICO purposes.

Id. (alterations in original) (internal citations omitted). The court noted that "[a]lthough in some cases a plaintiff who fails to allege the 'brought into' element necessary for a § 1324(a)(3)(A) violation might be entitled to a second chance to plead it, these plaintiffs have already had their second chance." *Id.* at *11 (internal citation omitted). When the district court dismissed the RICO claim in the original complaint, it emphasized that the plaintiffs failed to plead the "brought into" element, and "[i]n drafting their amended complaint, the

plaintiffs had an opportunity to fix the problem, assuming they were able to do so without violating Rule 11." *Id.* Because the plaintiffs' amended complaint did not fix this defect, the Eleventh Circuit held that the plaintiffs could not state a predicate act under § 1324(a)(3)(A). *Id.*

With respect to the alleged violation of § 1324(a)(1)(A)(iv), the defendants argued that the plaintiffs failed to sufficiently plead that the defendants "'encouraged or induced' illegal aliens to reside in this country." *Id.* at *12. "The district court concluded the plaintiffs had not pleaded that element even though they had alleged that the defendants had knowingly supplied the aliens with jobs and with social security numbers to facilitate their employment," concluding that the "alleged actions d[id] not amount to encouragement or inducement for purposes of § 1334(a)(1)(A)(iv)." *Edwards*, 2010 WL 1404280, at *12. The Eleventh Circuit disagreed, noting that the Circuit had "given a broad interpretation to the phrase 'encouraging or inducing' in this context, construing it to include the act of 'helping' aliens come to, enter, or remain in the United States." *Id.* (citations omitted). The court noted that "[t]he amended complaint allege[d] not only that the defendants hired and actively sought out the individuals known to be illegal aliens but also that the defendants provided them with names and social security numbers to facilitate their illegal employment," and concluded that this was sufficient under the relevant case law. *Id.* at *13. The court rejected the defendants' argument that "the amended complaint d[id] not allege that the aliens were in possession or even had knowledge of the social security numbers under which they were allowed to work," noting that "[t]he amended complaint allege[d] that Prime 'even provided' the illegal alien employees with the names and social security numbers of former Ruth's Chris employees," and holding that "[c]onstruing that allegation in the light most favorable to the plaintiffs, Prime gave the social security numbers to the illegal aliens, allowing them to use the numbers for the purpose of getting and holding jobs." *Id.* at *14. The court summarized:

> The meat of the matter is that the amended complaint adequately pleads that the defendants encouraged or induced an alien to reside in the United States, and either knew or recklessly disregarded the fact that the alien's residence here was illegal, in violation of § 1324(a)(1)(A)(iv). It thereby states a predicate act of racketeering. And because the amended complaint also alleges that the defendants did that "far more times than two," it adequately pleads the pattern of racketeering activity necessary to state a RICO claim.

Id. (citation omitted).

Although it concluded that the plaintiffs could survive the Rule 12(b)(6) stage based on their allegations of violations of § 1324(a)(1)(A)(iv), because that theory may or may not prevail and because the court had "no way of knowing what the evidence will show about that theory of the case . . . ," it also addressed the other theories of racketeering. *Id.* With respect to the

alleged violations of § 1324(a)(1)(A)(iii), the court noted that "the question presented by this theory of racketeering is whether knowingly providing an illegal alien with employment and a social security number is enough to constitute concealing, harboring, or shielding the alien from detection . . . ." *Edwards*, 2010 WL 1404280, at *14. The court concluded that the statutory history indicated that the hiring of an alien while knowingly or recklessly disregarding his illegal status probably constituted concealing, harboring, or shielding from detection. *Id.* at *15–16. But the court stated that it did not need to decide whether knowingly employing illegal aliens was enough because "the allegations [we]re that the defendants not only knowingly employed illegal aliens, but also that they provided them with social security numbers and names, and paid them in cash in order to conceal, harbor, and shield the aliens from detection," and that was enough to state a violation of § 1324(a)(1)(A)(iii), which constituted a predicate act under RICO. *Id.* at *16.

With respect to the alleged violation of § 1324(a)(1)(A)(v), "[t]he amended complaint sa[id] the defendants violated that provision 'by engaging in conspiracies to commit, and aiding and abetting others to commit, the preceding violations [of §§ 1324(a)(1)(A)(iii) and (iv)].'" *Id.* at *17 (third alteration in original). The Eleventh Circuit "agree[d] . . . with the district court that the conspiracy and aiding and abetting allegations d[id] not pass muster under *Twombly*." *Id.* The court explained that "[t]he mere use of the words 'conspiracy' and 'aiding and abetting' without any more explanation of the grounds of the plaintiffs' entitlement to relief is insufficient," and affirmed the finding that the alleged violations of § 1324(a)(1)(A)(v) did not state a predicate act. *Id.* (citing *Twombly*, 550 U.S. at 555; *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009)).

With respect to Count 12—Edwards's hostile work environment claim—"[t]he district court decided that the 'conclusory allegations only describe[d], albeit ambiguously, discrimination based on employment status, not race, and certainly d[id] not meet the pleading standards for a racially hostile [work] environment.'" *Edwards*, 2010 WL 1404280, at *18 (fourth alteration in original). The plaintiff argued on appeal that the district court "should have given more weight to the opening sentence of Count 12, which assert[ed] that '[i]n his work for Prime, Plaintiff Edwards was subjected to a hostile discriminatory environment on the basis of his race, in violation of 42 U.S.C. § 1981.'" *Id.* (second alteration in original). The court explained that this statement did not deserve more weight:

> That broad statement, however, is merely a "formulaic recitation of the elements" of a § 1981 claim and, standing alone, does not satisfy the pleading standard of Federal Rule of Civil Procedure Rule 8. *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965; *see Iqbal*, 129 S. Ct. at 1949 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Instead, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*,

> 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974); *see Sinaltrainal*, 578 F.3d at 1261; *Rivell* [*v. Private Health Care Sys., Inc.,*] 520 F.3d [1308,] 1309 [(11th Cir. 2008)]; *Fin. Sec. Assurance*[*, Inc. v. Stephens, Inc.,*] 500 F.3d [1276,] 1282 [(11th Cir. 2007)]. An introductory conclusion cannot take the place of factual allegations in stating a plausible claim for relief.

Id. (first alteration in original). The court continued:

> Although the amended complaint does allege that Edwards was threatened, assaulted, and shunned by his Hispanic and Latino co-workers, which created a hostile work environment, it does not plausibly allege that he was harassed because he is Caucasian. To the contrary, the allegations are that he was threatened by a Hispanic co-worker because he complained about Prime's employment of illegal aliens. *See* Am. Complaint ¶ 124 ("Plaintiff Edwards was threatened on the job again by [a] Hispanic Latino of Defendant Prime, who told Edwards it was 'going to be bad' for the person who was complaining about Prime's employment of illegal aliens."). The amended complaint also alleges that Prime failed to intervene because it did not want to upset the Hispanic and Latino employees and compromise its ability to hire cheap illegal labor. That allegation, like the other one, suggests that Prime discriminated against Edwards because he had complained, or because his co-workers believed he had complained, about Prime's employment of illegal aliens—not because of his race. The facts that Edwards is Caucasian and that the co-workers who were threatening and shunning him were Hispanic or Latino, by themselves, do not state a plausible claim of race discrimination. Those factual allegations are not "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.

Id. (alteration in original) (footnote omitted).

With respect to Counts 7 and 8, the state law claims for wrongful interference with a business relationship and conversion, the district court dismissed on the grounds of preemption, but the Eleventh Circuit held that it did not need to reach the preemption issue because the complaint failed to adequately plead these claims. *See id.* at *19. As to the wrongful interference with a business relationship claim, the court noted that "the burden [was] on the plaintiff to establish (or at this stage to plead) that the defendant was a stranger to the protected business relationship with which the defendant interfered," and that the complaint failed to allege any facts indicating that the defendants were strangers to the business relationships at issue. *Id.* at *19–20. The court concluded: "Prime and Oswald were essential parties to the business relationships alleged in Count 7. They were involved

in creating those relationships; without them the plaintiffs would have had no relationship with the patrons of the restaurant or with their co-workers." *Edwards*, 2010 WL 1404280, at *20 (citations omitted). As a result, Count 7 did not state a claim under Alabama law. *Id.* The court concluded that the conversion claim failed because there was no allegation that the defendants "took specific money that could be identified," as required by Alabama law. *Id.* at *21. "The plaintiffs argue[d] that it [wa]s enough that the amended complaint allege[d] the defendants 'converted specific and identifiable amounts of money' and that 'the amounts taken [were] and [are] identified by, calculated and based on tips and gratuities paid to servers,'" and "insist[ed] that [the court] must accept those allegations as true given the procedural posture of th[e] case." *Id.* (fourth and fifth alterations in original) (footnote omitted). But the court explained that under Alabama law, "specific money capable of identification" must be converted, and the plaintiffs only "allege[d] that the defendants converted identifiable *amounts* of money." *Id.* at *22. The court concluded that "it would be implausible to suggest, and [the plaintiffs] ha[d] not alleged, that Prime and Oswald ha[d] [the plaintiffs'] particular tips stored in a bag somewhere, much less segregated in a fashion that would permit matching them up to each individual plaintiff." *Id.* Because "[t]he amended complaint d[id] not allege that the withheld tips were ever 'sequestered' from other monies collected by the defendants," the court concluded that Count 8 failed to state a conversion claim under Alabama law. *Edwards*, 2010 WL 1404280, at *22–23.

- ***Granda v. Schulman***, No. 09-12564, 2010 WL 1337716 (11th Cir. Apr. 7, 2010) (unpublished) (per curiam). The district court dismissed the plaintiff's prisoner *pro se* complaint *sua sponte* under 28 U.S.C. § 1915A, upon the recommendation of the magistrate judge. *Id.* at *1. The Eleventh Circuit agreed that the complaint failed to state a claim under § 1983 and found that the district court did not err in declining to exercise supplemental jurisdiction over the state law claims. *Id.*

  Granda alleged that after he received gunshot wounds inflicted by the Special Response Team of the Miami-Dade Police Department, he was transferred to a hospital where he underwent emergency surgery. *Id.* According to the complaint, the doctor who performed the surgery left bullet fragments in Granda's chest and shoulder, and a bullet in his left thigh. *Id.* Granda alleged that Dr. Schulman, who did not perform the surgery and was the only named defendant, approved of the surgeon leaving the bullet and bullet fragments in Granda's body. *Id.* Granda further alleged that after his surgery, "Dr. Schulman gave him 'an extremely perfunctory examination'" and prescribed various medications. *Granda*, 2010 WL 1337716, at *1. The complaint stated that Dr. Schulman discharged Granda to an infirmary only nine hours after his surgery, and that he "was deliberately indifferent to [Granda's] medical needs by violating the proper standard of medical care, the Hippocratic Oath, and his fiduciary duty, which resulted in a breach of trust when he discharged Granda." *Id.* Granda also alleged that "he received injuries, including disfiguring scars, because Dr. Schulman failed to ensure, following his discharge, that 'medical personnel [or] staff that [had] care [or] custody of [him]' properly cleaned and treated his wounds, as ordered, changed his dressings 'daily and consistently,' and gave him the prescribed medications." *Id.* (alterations in original). "Granda also claimed that he suffered a bacterial skin infection

and painful abscesses in his wounds from such deficient treatment," and that "although Dr. Schulman authorized his release into the Metro-Dade West Infirmary, Granda 'instead was placed in a classification unit where [he] received absolutely no medical care.'" *Id.* (alteration in original).

The court noted that it liberally construed *pro se* pleadings, but that "this obligation 'is not the equivalent of a duty to re-write [a complaint] for [the plaintiff].'" *Id.* at *2 (quoting *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006) (alteration in original)). The court discussed the *Twombly* and *Iqbal* cases, noted that "[c]ourts must view the complaint in the light most favorable to the plaintiff, accepting all of the plaintiff's well-pleaded facts as true," and noted that "[t]he Supreme Court recently clarified the level of specificity required to state a plausible claim for relief . . . ." *Id.* (citations omitted). The court cited a pre-*Twombly* case for the proposition that "[a] prisoner must allege the state actor's subjective intent to punish *by pleading facts that would show* that he acted with deliberate indifference." *Granda*, 2010 WL 1337716, at *3 (emphasis added) (citing *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000)). The court explained that Granda's pleadings were insufficient:

> As an initial matter, it is unclear whether Dr. Schulman was acting under color of state law during the relevant time period, or whether he was acting solely as a private physician. Granda did not allege that Jackson Memorial Hospital was a state-owned facility, and he did not allege that a contractual relationship existed between Dr. Schulman and state prison officials to provide prisoners with medical care. However, because Granda is a *pro se* litigant, *we must construe his complaint liberally*. Even assuming that Dr. Schulman acted under color of state law, Granda failed to allege facts sufficient to support a plausible deliberate indifference claim against him under the Fourteenth Amendment.
>
> First, accepting as true Granda's claim that Dr. Schulman approved the operating surgeon's decision to leave bullet fragments and an entire bullet in Granda's body, this fact alone cannot nudge his claim across the line from conceivable to plausible without further allegations that would show an impermissible motive behind Dr. Schulman's decision. *Iqbal*, 129 S. Ct. at 1949. Likewise, Granda's claim that Dr. Schulman discharged him when he was not stable, following an "extremely perfunctory" examination and after only nine hours in the hospital, does not support a reasonable inference that he received grossly inadequate care. Granda admitted that he received treatment in the form of surgery and sutures, that Dr. Schulman oversaw the surgery, and that Dr. Schulman prescribed various medications, including painkillers and antibiotics, before approving his discharge. Second, Granda claimed that he remained under Dr. Schulman's care after his discharge from the hospital and his release

> into the custody of the corrections center, and that Dr. Schulman was liable for failing to provide him with any of the prescribed treatment for four days following his discharge. These are conclusory assertions insufficient to raise his "right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965. Third, while Granda claimed that corrections center personnel interfered with Dr. Schulman's prescribed course of treatment and delayed his receipt of proper treatment for four days following his discharge from the hospital, which allegedly caused him to suffer permanent injuries, he named no such personnel as defendants. Further, he failed to allege a causal connection in this regard sufficient to state a claim against Dr. Schulman.

Id. at *4 (emphasis added) (internal citations omitted). The court affirmed dismissal of the constitutional claims for failure to state a claim and affirmed the dismissal of the pendent state law claims to allow refiling in state court. *Id.* at *5.

- ***Keating v. City of Miami***, 598 F.3d 753, No. 09-10939, 2010 WL 703000 (11th Cir. Mar. 2, 2010), *petition for cert. filed* (U.S. May 28, 2010) (No. 10-51). The plaintiffs brought an action under § 1983, alleging that their First and Fourth Amendment rights were violated when they protested outside the Free Trade Area of the Americas (the "FTAA") meeting in Miami in November 2003. *Id.* at *1. "Specifically, the Protesters allege[d] that Chief John Timoney ('Timoney'), Deputy Chief Frank Fernandez ('Fernandez'), and Captain Thomas Cannon ('Cannon'), all members of the Miami Police Department, violated the Protesters' First Amendment rights under a theory of supervisory liability when they directed their subordinate officers to disperse a crowd of allegedly peaceful demonstrators, including the Protesters." *Id.* "The Protesters also allege[d] that Timoney, Fernandez, Cannon, and Major Adam Burden ('Burden') of the Miami Police Department violated their First Amendment rights under a theory of supervisory liability when they failed to stop their subordinate officers from dispersing a large crowd of allegedly peaceful demonstrators, including the Protestors." *Id.* The plaintiffs also alleged, under a theory of supervisory liability, that their Fourth Amendment rights were violated when Timoney, Fernandez, Cannon, and Burden's subordinate officers "herded" the Protesters out of the demonstration area. *Id.* The district court denied qualified immunity for Timoney, Fernandez, Cannon, and Burden on the First Amendment claims, and determined that the "herding" constituted an unlawful seizure under the Fourth Amendment, but granted qualified immunity on the Fourth Amendment claims because the right was not clearly established. *Id.* The Eleventh Circuit affirmed the denial of qualified immunity to Timoney, Fernandez, and Cannon on the First Amendment claims; reversed the denial of qualified immunity to Burden on the First Amendment claim; and dismissed the appeal of the Fourth Amendment claims for lack of jurisdiction. *Keating*, 2010 WL 703000, at *1.

  The complaint alleged:

> [W]hile peacefully demonstrating outside the FTAA meeting on Biscayne Boulevard in Miami, a police line appeared and engaged the demonstrators, including the Protesters. The Protesters allege that law enforcement officers began "herding" the demonstrators, using their batons to beat unarmed demonstrators, spraying pepper spray up and down the police line, and discharging bean bags, pepper spray balls, tear gas, and other projectiles. The Protesters allege that they were injured as a result of the law enforcement conduct. The skirmish line continued with the "herding" of demonstrators and the Protesters by pushing them northward out of the area. The Protesters further allege that the unconstitutional acts, including "herding," encirclement, and use of excessive force, were witnessed, condoned, and directed by, *inter alia*, Timoney, Fernandez, and Cannon in their supervisory capacities. The Protesters also allege that Timoney, Fernandez, Cannon, and Burden, in their supervisory capacities, could have intervened at any time to prevent the continued constitutional violations against the Protesters, but they failed to do so.

Id. at *2 (internal citations omitted).

The court discussed the pleading standards for § 1983 cases and cited a pre-*Twombly* case to explain that the Eleventh Circuit requires more detailed pleading in such cases:

> Although Rule 8 "allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, *has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims*, requiring that a § 1983 plaintiff *allege with some specificity the facts which make out its claim*." *GJR Invs., Inc.* [*v. County of Escambia*], 132 F.3d [1359,] 1367 [(11th Cir. 1998)]. Thus, a plaintiff *must allege some factual detail as the basis for a § 1983 claim*. *Id.* In other words, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Therefore, in a § 1983 action, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 1948.

Id. at *6 (emphasis added). The defendants argued that the plaintiffs "failed to allege sufficient facts to establish a causal connection between their supervisory actions and the alleged constitutional violations by the subordinate officers." *Id.*

The court found that the complaint adequately pleaded a supervisory liability claim as to

Timoney, Fernandez, and Cannon by pleading that these defendants were authorized decision-makers present at the time of the alleged events. *Id.* at *6–7. The court explained:

> Specifically, the Protesters allege that Timoney, who is the Chief of the Miami Police Department, approved orders permitting the police line to advance while beating unarmed demonstrators and discharging projectiles and tear gas. The Protesters allege that Fernandez, Deputy Chief of the Miami Police Department and second in command to Timoney, made the decision to utilize "herding techniques" to corral the demonstrators by personally directing the police lines to march northward. The Protesters allege that Cannon, a Captain in the Miami Police Department, directed the police lines to begin discharging weapons at the unarmed demonstrators.

Id. at *7 (internal citations omitted). The defendants argued that the plaintiffs "were required to allege that [the defendants] directed specific officers to discharge weapons and identify the specific police officers who injured the Protesters," but the court found this argument "without merit because it is irrelevant which officer inflicted injury or the constitutional violation, so long as the violation was at the direction of Timoney, Fernandez, or Cannon, in his supervisory capacity." *Keating*, 2010 WL 703000, at *7 (citation omitted). The court cited two pre-*Twombly* cases to conclude that the plaintiffs' allegations "satisfied the heightened pleading requirement for a § 1983 claim under a supervisory liability theory by alleging a causal connection established by facts that support an inference that Timoney, Fernandez, and Cannon directed the subordinate officers to act unlawfully." *Id.* (citing *Dalrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1561 (11th Cir. 1993)). The court noted that the plaintiffs "allege[d] that Timoney, Fernandez, and Cannon committed a violation of the Protesters' First Amendment rights because their commands caused the subordinate police officers to disperse a crowd of peaceful demonstrators, including the Protesters, who were exercising their freedom of expression." *Id.*

With respect to the claim that the defendants violated the plaintiffs' First Amendment rights by failing to stop the unlawful acts, "the Protesters allege[d] that Timoney and Burden were together when the Protesters were assaulted, standing less than 100 feet from the skirmish line with an unrestricted view of the 'herding' of the demonstrators and discharge of the projectiles and tear case, yet failed to stop the police action," and that when the plaintiffs were assaulted, "Fernandez and Cannon were close to the rear of the skirmish line with an unrestricted view of the 'herding' of the demonstrators and discharge of the projectiles and tear gas, yet failed to stop the police action." *Id.* at *8. The court distinguished the claim against Burden from the claims against the other defendants, finding that only Burden was entitled to dismissal. The court explained:

> Because Timoney, Fernandez, and Cannon had the authority, and exercised that authority, to direct the subordinate officers to

> engage in unlawful acts to violate the Protesters' First Amendment rights, they likewise had the authority to stop the subordinate officers from exercising such unlawful acts. Therefore, because Timoney, Fernandez, and Cannon knew that the subordinate officers would engage in unlawful conduct in violation of the Protesters' First Amendment rights by directing such unlawful acts, they also violated the Protesters' First Amendment rights by failing to stop such action in their supervisory capacity. Thus, their alleged failure to stop the subordinate officers from acting unlawfully caused the First Amendment violations . . . .
>
> However, Burden's alleged failure to stop the subordinate officers' unlawful activity did not cause the violations of the First Amendment because Burden did not have the authority to stop the subordinate officers from violating the Protesters' First Amendment rights, even though he was an authorized decisionmaker. Burden did not direct the subordinate officers to engage in unlawful conduct that violated the Protesters' First Amendment rights. Burden's ranking as a Major in the Miami Police Department is subordinate to that of Chief Timoney, and Chief Timoney directed the subordinate officers to engage in unlawful conduct. Burden and Timoney stood next to each other during the demonstration. It would be unreasonable to have expected Burden to stop the subordinate officers' conduct after Timoney directed the subordinate officers to engage in unlawful acts because Burden did not have any authority to contravene Timoney's orders. Additionally, the Protesters only allege that Burden was present when the subordinate officers engaged in the unlawful activity. Therefore, Burden did not violate the Protesters' First Amendment rights by failing to stop the subordinate officers from conducting such unlawful activity because his inaction did not cause the constitutional violations. The Protesters failed to allege a constitutional violation against Burden, and thus, Burden is entitled to qualified immunity.

Id. The court concluded that "it should have been obvious to Timoney, Fernandez, and Cannon that their conduct would violate the Protesters' First Amendment rights," and that they therefore violated the plaintiffs' clearly established constitutional rights. *Id.* at *10. The court held that these three defendants were "not entitled to qualified immunity as to the Protesters' First Amendment claims for directing unlawful actions and failing to stop unlawful actions under a theory of supervisory liability." *Keating*, 2010 WL 703000, at *10.

- ***Waters Edge Living, LLC v. RSUI Indemnity Co.***, 355 F. App'x 318, No. 08-16847, 2009 WL 4366031 (11th Cir. Dec. 3, 2009) (unpublished) (per curiam). The lawsuit involved a dispute between competing claimants to an insurance policy. *Id.* at *1. Plaintiff Waters

Edge had purchased an apartment complex from a real estate trust controlled by Prime Income Asset Management, Inc. ("Prime"), and as part of the deal, Prime agreed that the property would remain covered for Waters Edge's benefit under Prime's master property insurance policy for nine months. *Id.* The master policy had a primary policy with a $10 million limit and two layers of excess coverage, one with a $10 million limit and a second with an $80 million limit provided by defendant RSUI. *Id.* Hurricane Katrina destroyed the apartments that Waters Edge had bought as well as Prime's covered properties in Louisiana, which were valued at more than the $100 million policy limit. *Id.* The primary insurer paid the policy limit to Prime, which in turn paid Waters Edge $1.8 million for the value of Waters Edge's lost rents. *Id.* Waters Edge attempted to recover the remainder of its losses from RSUI, and it was determined that Waters Edge's property loss was approximately $30.9 million. *Waters Edge Living*, 2009 WL 4366031, at *1. The complaint alleged that through a series of communications, RSUI's adjuster agreed to pay the $30.9 million, "subject to policy provisions." *Id.* at *2. Prime became concerned that it would not be able to recover for its losses because the policy limit was insufficient to cover the damage at all of the covered properties. *Id.* "Prime insisted that only it could receive payment under the terms of the RSUI policy and that it would therefore have to sign off as the policyholder on any payments made to Waters Edge." *Id.* Meanwhile, the first excess insurer paid the full $10 million limit to Prime, and Waters Edge then sued RSUI. *Id.* Because it was receiving conflicting claims from Prime and Waters Edge, RSUI sent one check to Waters Edge for the agreed $30.9 million less the $1 million policy deductible and a second check to cover Waters Edge's lost rents. *Id.* Both checks included Prime as a co-payee, and because Prime would not sign off on the payments, Waters Edge could not receive the proceeds. *Waters Edge Living*, 2009 WL 4366031, at *2. The parties agreed to place the funds in a custodial fund until an agreement could be reached, but RSUI continued to pay Prime for its losses, which eventually left only $17,582,939 of the policy proceeds, which RSUI deposited into the custodial account. *Id.* RSUI then filed counterclaims interpleading the funds in the custodial account. *Id.* Waters Edge and Prime agreed to settle the interpleader claim, with Waters Edge receiving $24 million and Prime receiving the remainder of the custodial account, leaving Waters Edge with approximately $6 million less than RSUI had agreed to pay to Waters Edge. *Id.* Waters Edge reserved its claims against RSUI, and the complaint asserted claims for: "(1) breach of a settlement agreement; (2) failure to timely pay a settled loss in violation of the Texas Insurance Code; (3) breach of the duty of good faith; and (4) misrepresentation." *Id.* at *3.

With respect to the breach of a settlement agreement claim, the complaint alleged that the communications between the RSUI adjuster and Waters Edge resulted in a binding settlement agreement in which RSUI agreed to pay Waters Edge $29.9 million, which included the property loss less the deductible. *Id.* "Waters Edge claim[ed] that RSUI breached this settlement agreement when it included Prime as a co-payee on the checks tendered to Waters Edge, effectively stopping Waters Edge from receiving the settlement proceeds." *Waters Edge Living*, 2009 WL 4366031, at *4. The Eleventh Circuit concluded that this claim was sufficiently pleaded:

> The district court erred when it dismissed Count I of the complaint because Count I states a claim to relief that is plausible on its face. *See Iqbal*, --- U.S. ----, 129 S. Ct. at 1949. The factual content of the complaint, particularly the alleged exchange between Waters Edge and RSUI's adjuster, allows a reasonable inference that the parties reached a settlement agreement creating a contractual obligation independent of the policy. *See id.* It does not compel that inference, but it does allow a reasonable factfinder to draw the inference. If the factfinder does draw the inference, RSUI breached the independent agreement when it included Prime as a co-payee on the checks tendered to Waters Edge. Because Count I states a facially plausible claim for relief, the district court erred when it dismissed Count I for failure to state a claim on which relief can be granted.

Id.

With respect to the claim under the Texas Insurance Code, the district court dismissed the claim because it concluded that "Waters Edge had failed to plead factual allegations plausibly supporting the existence of a binding settlement agreement between RSUI and Waters Edge." *Id.* The Eleventh Circuit had already disagreed with that assessment in connection with the first claim, and held that "[b]ecause Waters Edge alleged that it entered a binding settlement agreement with RSUI and that RSUI did not make payment as required by that agreement, Waters Edge pleaded facts sufficient to state a claim for relief that [wa]s plausible on its face based on RSUI's failure to make timely payment of a settled loss." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

The Eleventh Circuit found that the claim for breach of the duty of good faith was not adequately pleaded:

> Count III alleges that RSUI breached its duty of good faith by improperly including Prime as a co-payee on the checks tendered to Waters Edge and by "skipping over [Waters Edge's] settled loss to pay Prime's unsettled losses, including amounts that were not and could never be due." Even viewed in the light most favorable to Waters Edge, the factual allegations in the complaint do not state a facially plausible claim of breach of the duty of good faith. The allegations that RSUI gave in to Prime's demand that it withhold payment to Waters Edge "in deference to its business relation with Prime" and that "RSUI treated [Waters Edge] unfairly, unreasonably preferring Prime among its coinsureds" are nothing more than conclusory statements. Under *Iqbal*, "naked assertions devoid of further factual enhancement" are not enough to overcome a Rule 12(b)(6) motion to dismiss. *Iqbal*, --- U.S. ----, 129 S. Ct. at 1949 (quotation marks and citation omitted).

Id. (alterations in original). The court explained that "[i]f you t[ook] out the labels, conclusions, and formulaic recitations, the factual allegations contained in the complaint actually indicate[d] that RSUI acted in good faith." *Id.* at *5 (internal citation to *Iqbal* omitted). The court stated that "[w]hile Waters Edge ha[d] stated a claim that RSUI breached the alleged independent settlement agreement, it ha[d] not pleaded factual allegations sufficient to allow [the court] to draw a reasonable inference that RSUI did so in bad faith," and concluded that "[t]he district court properly dismissed Count III." *Waters Edge Living*, 2009 WL 4366031, at *5.

The claim for misrepresentation alleged that "RSUI's insurance adjuster misrepresented to Waters Edge that Prime, as policyholder, would have to agree to any payment made to Waters Edge and that this misrepresentation caused Waters Edge to delay its demand for payment of the amount due under the settlement, 'prevent[ing] them from timely realizing the full benefit of their reasonable settlement.'" *Id.* (alteration in original). The Eleventh Circuit summarily dismissed Waters Edge's argument that it did not need to plead with particularity under Rule 9(b), finding the argument waived, but explained that even if Rule 9(b) did not apply, Waters Edge still failed to state a claim. *Id.* at *5 n.2. The court cited pre-*Twombly* case law and explained that "[d]espite the general leniency of pleading requirements under the Federal Rules of Civil Procedure, 'it is axiomatic that defendants remain entitled to know exactly what claims are being brought against them.'" *Id.* at *5 (quoting *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246, 1250 (11th Cir. 2003)). The court held that "[a] sentence in the complaint alleging that RSUI violated two unnamed chapters of the Texas Insurance Code by failing to timely pay a settled loss did not let RSUI know that Waters Edge was bringing a claim of misrepresentation against them based on particular provisions of the Texas Insurance Code." *Id.* The court similarly rejected Waters Edge's argument on appeal that it had stated a claim for common law misrepresentation based on negligence. *Id.* The court noted that the argument was waived, but that even without waiver, the claim did "not state a facially plausible claim for relief." *Waters Edge Living*, 2009 WL 4366031, at *6. Texas law required justifiable reliance on the misrepresentation, but the complaint alleged that Waters Edge's entitlement to the agreed amount was indisputable. *Id.* The court explained that "[i]f Waters Edge's entitlement to receive the agreed amount from RSUI was so clear, Waters Edge could not have justifiably relied on the adjuster's statement that Prime would have to agree to allow Waters Edge to receive payment from RSUI." *Id.* The court concluded: "Because Count IV does not allow a reasonable inference that Waters Edge justifiably relied on the adjuster's alleged misrepresentation, it does not state a claim of negligent misrepresentation that is plausible on its face." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

- ***Sinaltrainal v. Coca-Cola Co.***, 578 F.3d 1252 (11th Cir. 2009). The plaintiffs, who were trade union leaders, brought suit under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA), "alleging their employers—two bottling companies in Colombia—collaborated with Colombia paramilitary forces to murder and torture Plaintiffs." *Id.* at 1257 (footnotes omitted). The plaintiffs' complaint named, among others, two Coca-Cola companies, and alleged that they were connected to the Colombian bottlers, and their

employees, through alter ego and agency relationships. *Id.* "The [original] complaint alleged the systematic intimidation, kidnapping, detention, torture, and murder of Colombian trade unionists at the hands of paramilitary forces, who allegedly worked as agents of the Defendants." *Id.* at 1258. The plaintiffs ultimately filed four separate complaints. The plaintiffs did not allege that the defendants caused the violence, but asserted that the defendants capitalized on the hostile environment in Colombia and conspired with paramilitaries or local police to rid their bottling facilities of unions. *Id.* at 1265. The defendants moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, and the district court ultimately dismissed all four complaints, finding that "each fell short of pleading the factual allegations necessary to invoke the court's subject matter jurisdiction under the ATS and the TVPA," and that "the allegations in all four complaints insufficiently pled a conspiracy between the local facilities' management and the paramilitary officers." *Id.* at 1260.

In discussing the pleading standards, the court emphasized that "[f]actual allegations in a complaint need not be detailed but 'must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Id.* at 1261 (quoting *Twombly*, 550 U.S. at 555). The court also explained that "in *Iqbal*, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Sinaltrainal*, 578 F.3d at 1261 (quoting *Iqbal*, 129 S. Ct. at 1949). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

"For subject matter jurisdiction to entertain Plaintiffs' ATS claims, the complaints must sufficiently plead (1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law (or that the war crimes exception to the state action requirement applies) and (2) the Defendants, or their agents, conspired with the state actors, or those acting under color of law, in carrying out the tortious acts." *Id.* at 1266 (footnote omitted). With respect to pleading state action, the Eleventh Circuit held that the "conclusory allegation that the paramilitary security forces acted under color of law [wa]s not entitled to be assumed true and [wa]s insufficient to allege state-sponsored action"; that "Colombia's mere 'registration and toleration of private security forces d[id] not transform those forces' acts into state acts'"; that "[a]llegations [that] the Colombian government tolerated and permitted the paramilitary forces to exist [we]re insufficient to plead the paramilitary forces were state actors"; and that the "naked allegation [that] the paramilitaries were in a symbiotic relationship with the Colombian government and thus were state actors" was conclusory and did not need to be accepted as true. *Id.* (citing *Iqbal*, 129 S. Ct. at 1951). The court noted that there was "no suggestion the Colombian government was involved in, much less aware of, the murder and torture alleged in the complaints," and held that "[t]he plaintiffs' 'formulaic recitation' that the paramilitary forces were in a symbiotic relationship and were assisted by the Colombian government, absent any factual allegations to support this legal conclusion, [wa]s insufficient to state an allegation

of state action that [wa]s plausible on its face." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950) (internal citation omitted). For this reason, the court found that dismissal of three of the complaints for lack of subject matter jurisdiction was appropriate.

With respect to the fourth complaint, the plaintiffs alleged a conspiracy between local police and the bottling facility's management. *Id.* at 1267. The Eleventh Circuit concluded that the plaintiffs' "attenuated chain of conspiracy fail[ed] to nudge their claims across the line from conceivable to plausible," *id.* at 1268 (citing *Twombly*, 550 U.S. at 570), explaining:

> First, while the plaintiffs allege "Aponte's[37] plan necessarily required the cooperation and complicity of the arresting police officers," we are not required to admit as true this unwarranted deduction of fact. Second, the plaintiffs' allegations of conspiracy are "based on information and belief," and fail to provide any factual content that allows us "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Specifically, these plaintiffs allege "[t]he basis for the conspiracy was either that Aponte arranged to provide payment to the officers for their participation, or that the officers had a shared purpose with Aponte to unlawfully arrest and detain Plaintiffs because they were union officials and had been branded by Panamco officials as leftist guerillas." The premise for the conspiracy is alleged to be either payment of money or a shared ideology. The vague and conclusory nature of these allegations is insufficient to state a claim for relief, and "will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.
>
> Furthermore, the complaint fails to allege when or with whom Aponte entered into a conspiracy to arrest, detain, and harm the plaintiffs. The scope of the conspiracy and its participants are undefined. There are no allegations the treatment the plaintiffs received at the hands of the local police and in prison was within the scope of the conspiracy. Additionally, assuming Aponte even conspired with the local police to arrest the plaintiffs, this action alone is insufficient to form the basis of an ATS claim, and there is no allegation the subsequent six-month imprisonment and mistreatment was part of the conspiracy. The *Garcia* plaintiffs, thus, fail to state a plausible claim for relief against the Panamco Defendants for a violation of the law of nations. *See* 28 U.S.C. § 1350. We conclude the district court did not err in dismissing the

[37] Aponte was the chief of security at the bottling facility at issue. The complaint alleged that Aponte falsely told police that he found a bomb in the facility and that the plaintiffs had planted the bomb, and that the police subsequently arrested the plaintiffs, treated them violently, and locked them in a dirty and dangerous prison. *Sinaltrainal*, 578 F.3d at 1267–68.

> ATS claims in the *Garcia* complaint for lack of subject matter jurisdiction.

Sinaltrainal, 578 F.3d at 1268–69 (alteration in original) (internal citation omitted).

The plaintiffs alleged the same facts with respect to their TVPA claims. *Id.* at 1269. In accordance with its holdings regarding the ATS claims, the court found the facts to be insufficient to state a claim under the TVPA:

> [T]he *Gil*, *Galvis*, and *Leal* plaintiffs fail to sufficiently plead the paramilitary forces were acting under color of law. Mere toleration of the paramilitary forces does not transform such forces' acts into state acts; moreover there are no allegations the Colombian government was aware of, much less complicit in, the murder and torture Plaintiffs allege in their complaints. Additionally, the *Garcia* plaintiffs fail to sufficiently allege the Panamco Defendants, or their agents, conspired with the local police in carrying out the alleged torture. The *Garcia* plaintiffs' vague and conclusory allegations of a conspiracy do not state a claim for relief that is plausible on its face, *see Iqbal*, 129 S. Ct. at 1950, and they fail to detail any factual allegations "to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965. We, therefore, vacate the district court's dismissal of the TVPA claims for want of jurisdiction and instruct the court to dismiss the TVPA claims for failure to state a claim upon which relief can be granted.

Id. at 1270 (additional internal citation omitted).

D.C. Circuit

- ***United States ex rel. Miller v. Bill Harbert Int'l Construction, Inc.***, --- F.3d ----, 2010 WL 2487962 (D.C. Cir. Jun. 22, 2010) (per curiam). The court applied *Iqbal* in a False Claims Act (FCA) case to a request that the government's intervenor complaint and the relator's amended complaint relate back to the time of the relator's filing of the initial complaint for statute of limitations purposes.

  "Following the 1978 Camp David Accords, the United States had agreed to provide economic assistance to Egypt through the U.S. Agency for International Development (USAID), including funding for improving sewer systems in Cairo and Alexandria." *Id.* at *1. Plaintiff Richard Miller was a Vice President of J.A. Jones Construction Company ("Jones"), which was a partner in a series of joint ventures that bid on several of the sewer projects. *Id.* Miller sued under the FCA, alleging that:

  > in the course of his employment, he discovered that the defendants,

> other contractors, and a variety of related corporate entities and individuals were all members of a conspiracy to rig the bidding on contracts in Egypt. This so-called Frankfurt Club would meet to discuss upcoming contract bids in Frankfurt, Germany, the home of the conspiracy's leader, Jones's parent corporation, Holzmann, A.G. Miller's complaint focused on the bidding for one particular contract, Contract 20A, and named Holzmann, Jones, Harbert International, Inc. (HII)—Jones's partner on the other side of the joint venture—and several related corporations as defendants.

Id. As required by the FCA, Miller's complaint was placed under seal while the Government decided whether to intervene. *See id.* Although Miller's complaint was filed in 1995, the Government filed repeated motions to keep the complaint sealed while it criminally prosecuted some of the participants in the bid-rigging arrangements, and did not allow Miller's complaint to be unsealed until February 2001. *See id.* at *1–2. At that time, the Government filed its own complaint in intervention, which adopted the claims Miller had asserted on Contract 20A and added claims on Contracts 29 and 07, "which it characterized as part of the same Frankfurt Club conspiracy." *Miller*, 2010 WL 2487962, at *2. The Government's complaint also "charged all the defendants with substantive FCA violations for each of the three contracts and with participating in the overarching conspiracy." *Id.* Miller later amended his complaint to do the same. *Id.* "In essence, Miller and the United States alleged that prior to each contract, some or all of the bidders prequalified by the USAID met in Frankfurt to discuss the bidding. At these meetings or thereafter, the bidders reached an agreement that all but one would either bid high or refrain from bidding, and the winning bidder would pay these cooperators a 'loser's fee.'" *Id.* The court explained that three contracts were at issue:

> Contract 20A, the first of the three contracts and the only one identified in Miller's original complaint, covered installation of large-diameter, underground sewer pipe in densely populated Cairo neighborhoods. The plaintiffs alleged that the joint venture between HII and Jones (Harbert-Jones), one of three prequalified bidders, sought and received commitments from the other two companies to either overbid or not bid for the contract. Thanks to this agreement, Harbert-Jones ultimately won the contract for $115 million, subsequently paying the other two bidders $2.2 and $3 million for their cooperation. The plaintiffs further alleged that in order to hide $10 million in excess profits, the joint venture engaged in a sale/leaseback transaction with an affiliated corporation.
>
> Contract 29, the second contract, involved the construction of a wastewater treatment plant near Cairo. In this instance, Harbert-Jones allegedly met with the only other prequalified bidder and agreed to lose the bid in exchange for a $4 million loser's fee.

> The third contract, Contract 07, covered the construction of sewers in Alexandria. Because this time Harbert-Jones was apparently unable to reach a bid-rigging agreement with all other qualified bidders, it entered into a bilateral agreement with one other bidder. Under that deal, the party that won the contract would compensate the other with a loser's fee. Although the record is unclear on this point, the fee would have been either 1.5 million U.S. Dollars or 1.5 million German Deutschmarks.

Id. The complaints were followed by five years of pleadings, motions, and discovery. *Id.* at *3. Two of the defendants settled the claims against them, and after trial, the jury found for the plaintiffs on every count. *Miller*, 2010 WL 2487962, at *3.

The defendants had argued that the FCA's 6-year statute of limitations barred all of the Government's claims and Miller's claims concerning Contracts 07 and 29, but the district court held that those claims related back to Miller's initial complaint. *Id.* at *4. On appeal, the D.C. Circuit held that the statute of limitations did not bar the Government's claims on Contract 20A, but did bar both the Government's and Miller's claims regarding Contracts 07 and 29. *Id.* The court focused on an amendment to the FCA that was enacted after the trial, but before the appeal, addressing relation back. The amendment provided:

> "For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."

Id. (quoting 31 U.S.C. § 3731(c)). Because the defendants did "not argue the scope of the Government's claims concerning Contract 20A impermissibly expand[ed] beyond that of Miller's," the court held that "the Government's claims concerning Contract 20A [we]re not barred by the statute of limitations because they relate[d] back to Miller's original timely complaint." *Id.* at *6. But the court concluded that the claims on Contracts 07 and 29 did not relate back under the amendment to the FCA because they were not sufficiently related to Miller's claims on Contract 20A. *Id.* The court found the three contracts to have significant differences, and concluded that "[a]llegations concerning Contract 20A d[id] not fairly encompass Contracts 07 or 29 because each contract [wa]s unique and no two involved the same 'conduct, transaction[ ], or occurrence[ ].'" *Miller*, 2010 WL 2487962, at *8 (alterations in original). The court rejected the plaintiffs' arguments that "the use of the plural in Miller's complaint—'conspired to rig the bidding for construction *contracts* paid for by the [USAID]' (emphasis added)—together with the allegation there was a 'club[ ] organized to control prices' and the contention that 'discovery in this case will reveal[ ] other AID contracts,' broadened the scope of the complaint beyond Contract 20A," explaining that

"using the plural form does not cause new allegations to relate back when, as here, the new allegations do not involve 'conduct, transactions, or occurrences' common to the timely pleading." *Id.* (alterations in original) (citation omitted). The court found *Iqbal* relevant to this analysis, stating:

> Miller's allegations concerning any contracts beyond 20A were nothing more than "'naked assertion[s]' devoid of 'further factual enhancement,'" *viz.*, the existence of a price-fixing "club," and that discovery would reveal other rigged contracts. *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) (brackets in original). Allowing such broad and vague allegations to expand the range of permissible amendments after the limitation period has run would circumvent the statutory requirement in the FCA that the amendments "arise[ ] out of the conduct, transactions, or occurrences" in the original complaint, 31 U.S.C. § 3731(c); it would also, we note, circumvent the recent teachings of *Iqbal* and *Twombly* by allowing amendments to relate back to allegations that were themselves nothing more than "naked assertions." That potential for abuse is avoided by the relation back provision in the FCA, the amendment of which postdates *Twombly*, cabining the scope of otherwise untimely amendments by imposing the same "conduct, transactions, or occurrences" requirement. 31 U.S.C. § 3731(c).

Id. (alteration in original).

With respect to Miller's claims on Contracts 07 and 29, the court found them barred by the statute of limitations because he added them after the period had run and the relation back provision of the FCA applied only to the Government's pleadings. *Id.* at *9. The court stated that "[i]f his claims [we]re to relate back then they must [have] do[ne] so under Rule 15(c)(1)(B), which permits relation back for claims 'that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading," but found that it did not need to "decide whether Rule 15(c)(1)(B) applies to claims made by a relator in litigation under the FCA because [it had] determined the claims concerning Contracts 07 and 29 d[id] not meet that standard, which for [the court's] purposes [wa]s substantially the same as the standard in the amended FCA." *Id.*

The dissent disagreed with the majority on the issue of relation back, arguing that Miller's original complaint sufficiently alleged that more than just Contract 20A was at issue:

> Yet in the very first sentence in which Miller described the conduct at issue, he left no doubt that he was accusing the defendants of fraud spanning more than one USAID project: "Defendants conspired to rig

> the bidding for construction *contracts* paid for by the United States Agency for International Development." Emphasizing that he was alleging fraud involving more than one contract, he continued, "The particular transaction *about which most is known* is Contract 20A." After detailing the bid rigging on Contract 20A, Miller again made clear that the conspiracy he was alleging was not limited to that particular contract: "Plaintiff has received information that there was a 'club' in Frankfurt, Germany of contractors qualified to perform AID contracts in Egypt; the club was organized to control prices in what should have been full and open competition for AID contracts." Indeed, Miller predicted that discovery would uncover additional rigged contracts: "Upon information and belief, discovery in this case will reveal that other AID contracts in Egypt were subject to similar and related collusive agreements on price that resulted in the submission of other false or fraudulent claims to the U.S. Government." Finally, in the complaint's formal counts, Miller neither mentioned Contract 20A nor limited his claim for damages to the allegedly false claims on that contract (estimated earlier in the complaint at $40 million). Instead, he "incorporate[d] the allegations of" the preceding paragraphs by reference, including the allegation of "other false or fraudulent claims" arising from "other AID contracts in Egypt," and sought "actual damages in an amount to be proven at trial."
>
> From the face of Miller's complaint, it is thus clear that the "conduct, transactions, or occurrences set forth, or attempted to be set forth" encompassed bid-rigging not just on Contract 20A (identified by Miller in his original complaint) but also on Contracts 29 and 07 (later added by the Government in its complaint in intervention). The Government's claims on Contracts 29 and 07 "arise[ ] out of" the Frankfurt-based bid rigging conspiracy originally alleged by Miller—indeed, the "collusive agreements" on these contracts were precisely what Miller predicted discovery would unearth. For this reason, the Government's claims relate back to Miller's original complaint and are therefore not barred by the FCA's statute of limitations. As we have said, "an amendment offered for the purpose of adding to or amplifying the facts already alleged in support of a particular claim may relate back." *United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002).

Id. at *33–34 (Tatel, J., dissenting) (alterations in original) (internal record citations omitted). The dissent emphasized that the differences between the contract did not matter because "[w]hat matters for relation back purposes is that the three contracts were all part of the

'conduct,' i.e., the Frankfurt-based bid-rigging conspiracy, alleged in Miller's original complaint." *Miller*, 2010 WL 2487962, at *34 (Tatel, J., dissenting). Judge Tatel also pointed out that "[t]he three contracts . . . are not nearly as different as the court suggests." *Id.* In addition, Judge Tatel argued that "the Government's theory of liability on Contracts 29 and 07 [wa]s identical to that first pleaded by Miller, namely that the defendants entered into a Frankfurt-based conspiracy to rig the bidding on USAID contracts in Egypt, and that through that conspiracy, the defendants rigged the bidding not just on Contract 20A, but also on Contracts 29 and 07." *Id.* at *35. The dissent found the majority's application of *Twombly* and *Iqbal* inappropriate:

> My colleagues also rely on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, ---U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), in which the Supreme Court held that to survive a motion to dismiss, a complaint must provide more than "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 557). Characterizing Miller's conspiracy allegation as such an assertion, the court concludes that it cannot support relation back of the Government's claims on Contracts 29 and 07. This argument suffers from two fundamental defects. To begin with, the defendants raised it neither here nor in the district court, and as we have repeatedly said, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Second, and setting aside the fact that the allegations in Miller's original complaint, which identified the conspiracy as based in Frankfurt, described the scope of its operations (USAID contracts in Egypt), and detailed its bid-rigging on Contract 20A, are a far cry from the "naked assertions" that doomed the complaints in *Twombly* and *Iqbal*, those two cases have no applicability to the question before us. In *Twombly* and *Iqbal* the Supreme Court interpreted Federal Rule of Civil Procedure 8(a)(2), which sets the standard that a complaint must satisfy to survive a motion to dismiss. Nothing in either case even hints that the Supreme Court intended Rule 8(a)'s standards to apply to relation back, which is governed by the entirely different language of Rule 15(c), now incorporated into the FCA. In fact, my colleagues' invocation of *Twombly* and *Iqbal* contradicts the FCA's plain text, which provides that claims relate back not only to "conduct, transactions, or occurrences set forth," in an earlier complaint, but also to "conduct, transactions, or occurrences . . . *attempted to be set forth*." 31 U.S.C. § 3731(c) (emphasis added); *cf. Krupski v. Costa Crociere S.p.A.*, 560 U.S. ----, No. 09-337, slip op. at 13 (June 7, 2010) (emphasizing, with respect to relation back of

> parties, that Rule 15 "plainly sets forth an exclusive list of requirements for relation back," and "*mandates* relation back once the Rule's requirements are satisfied" (emphasis added)). Indeed, two other circuits have expressly held, in language we have cited with approval, that an "amended claim arises from the same conduct and occurrences upon which the original claim was based," and therefore relates back, even if (unlike here) "the original claim contained insufficient facts to support it." *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002); *see also id.* ("One purpose of an amended claim is to fill in facts missing from the original claim."); *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (an amendment that "seeks to correct a pleading deficiency by expanding the facts but not the claims alleged" in an earlier filing "would clearly fall within Rule 15(c)"); *Hicks*, 283 F.3d at 388 (quoting *Dean* and *Thomas*). In FCA cases, the time for defendants to file *Iqbal* motions, and thus to ensure that Rule 8(a)'s pleading standards are not "circumvent[ed]," Ct. Op. 18, is when the relator's complaint is unsealed. And where, as here, the Government files a complaint in intervention and the relator an amended complaint, it is those two complaints, not the relator's initial, sealed complaint, that are tested against the *Iqbal* standard.

Id. at *36 (alterations in original).

- ***Nattah v. Bush***, 605 F.3d 1052 (D.C. Cir. 2010). The lawsuit arose out of Nattah's employment by defendant L-3 Communications Titan Group ("L-3"). Nattah alleged that while attending an L-3 job fair, he was offered a job as an Arabic language interpreter and promised various working conditions, including that he would work only in Kuwait, that he would be given a luxury, air-conditioned apartment, and that "under no circumstances" would be sent to Iraq. *Id.* at 1054. The L-3 representatives also allegedly "told Nattah he could be fired only for misconduct, lack of work due to termination or diminution of L-3's contract with the United States government, or dereliction of duty." *Id.* The complaint alleged that Nattah accepted the offer in reliance on L-3's promises. *Id.* Nattah also signed a letter providing details about his employment, but the letter stated that it was not a contract for employment. *Id.* Nattah alleged that when he arrived in Kuwait, he was "sequestered in a military encampment located in the desert and required to live in a tent with forty soldiers, eat distasteful food, and live under substandard conditions." *Id.* Nattah also alleged that he was later sold as a slave to the U.S. military and taken to Iraq, where he was forced to serve on the front line of the Iraq invasion. *Nattah*, 605 F.3d at 1054–55. Nattah suffered injuries while in Iraq and while he was being treated, an L-3 representative visited his barracks in Iraq and told the soldiers that he was on leave without pay and "did not belong there." *Id.* at 1055. Based on these factual allegations, Nattah "alleged twenty separate claims against multiple defendants, including former President George W. Bush, former Vice President Richard Cheney, former Secretary of Defense Donald Rumsfeld, 'Six Unknown United

States Government Employees,' and L-3." *Id.* The district court dismissed the claims against Bush, Cheney, and Rumsfeld. *Id.* While L-3's motion to dismiss was pending, Nattah sought to file an amended complaint to add then-Secretary of the Army Francis Harvey as a defendant and to assert additional claims against the six unknown federal employees. *Id.* The proposed amended complaint "included claims of slavery, intentional infliction of emotional distress, fraud, breach of contract, and alleged violations of the Geneva Convention, Hague Convention, and United Nations Charter, as well as several other claims based on state and foreign law." *Id.* The district court granted the motion for leave to file the amended complaint in part, denied the motion to add additional defendants, and granted L-3's motion to dismiss. *Nattah*, 605 F.3d at 1055. On appeal, Nattah alleged error in the denial of his motion for leave to join Secretary Harvey and in the dismissal his claims against L-3.

The D.C. Circuit concluded that the district court had erred in denying the motion for leave to join Secretary Harvey because none of the defendants had filed an answer and Nattah was entitled to amend his complaint as a matter of right under Civil Rule 15. *Id.* at 1056. But the court considered whether the claims against Harvey would survive a motion to dismiss because if they would not, no remand was necessary. *Id.* The appellate court held that the district court had erred in finding that sovereign immunity applied because the immunity was waived under section 702 of the Administrative Procedures Act. *Id.* at 1056. The appellees also argued that the pleadings were insufficient under *Iqbal* because they were vague and did not establish a basis for the claims. *Id.* The court disagreed, stating:

> Although Nattah does not mention Secretary Harvey by name in each individual count of his amended complaint, we conclude his pleadings are sufficient. *See* First Am. Compl. ¶¶ 5 (stating Nattah brings Counts III, V, and VI against "all defendants"), 237 (stating "Army Intelligence officers" were aware Nattah would not voluntarily go into Iraq), 269 (stating the "United States Military" denied Nattah's right to travel), 355 (stating defendant Harvey violated Nattah's rights by requiring him to violate international law).

Id. at 1056–57. The court held that "[b]ecause Nattah's non-monetary claims against Secretary Harvey would survive a motion to dismiss—at least on the grounds relied upon by the district court and the federal Appellees—we remand for further proceedings on those claims." *Nattah*, 605 F.3d at 1057.

The D.C. Circuit also concluded that the district court had erred by dismissing the breach of contract claim against L-3. L-3 argued that Nattah's allegations were contradictory because he alleged an oral contract but specifically stated that he signed an employment contract or, alternatively, that his pleadings did not state a contract claim under *Twombly* and *Iqbal* because he did not name the individuals who made the alleged oral contract or establish that they had authority to contract on L-3's behalf. *Id.* The court rejected both arguments. With respect to the argument that the pleadings were insufficient, the court noted that "Nattah

allege[d] '[a]gents of defendant [L-3]' conveyed to him the terms of the oral contract, which included luxury apartment accommodations in Kuwait and assurances he would not be sent to Iraq." *Id.* at 1058 (alterations in original). The court noted that "L-3 attempt[ed] to use *Twombly* . . . and *Iqbal* . . . to enunciate a blanket rule that requires a plaintiff to plead every conceivable fact or face dismissal of his claim," but stated that "L-3 . . . point[ed] to no language in *Twombly* or *Iqbal* requiring a plaintiff to identify by name which employee(s) made the agreement when pleading a breach of contract claim." *Id.* (citation omitted). In addition, the court concluded that Nattah "allege[d] with specificity the several terms of the oral contract and how L-3 breached those terms," and held that "Nattah's complaint state[d] a claim against L-3 for breach of its oral contract with Nattah." *Id.*

The court affirmed dismissal of the intentional infliction of emotional distress ("IIED") claim, noting that "[a]lthough Nattah br[ought] his IIED claim under Iraqi and Kuwaiti law, he d[id] not address the elements of the claim under either law," and that "[h]is pleading consist[ed] of a single sentence stating he 'incorporates paragraph 1–95 above by reference.'" *Id.* The court concluded that "[t]hose paragraphs, primarily discussing the U.S. government's alleged deception involving weapons of mass destruction in Iraq, fail[ed] to satisfy FED. R. CIV. P. 8(a)(2)." *Nattah*, 605 F.3d at 1058.

The district court had dismissed Nattah's fraud claim against L-3 "because his 'assertions fail[ed] to set out with particularity a plausible claim for fraud,' as required by FED. R. CIV. P. 9(b)." *Id.* (alteration in original). The D.C. Circuit did not decide whether the pleadings were sufficient because it concluded that this claim was barred by the statute of limitations. *See id.*

"With respect to Nattah's other claims against L-3, his claims against the 'Six Unknown Government Employees,' and his motion for leave to file an amended complaint joining certain Iraqi defendants, [the court] affirmed for the reasons set forth in the district court's memorandum opinion . . . ." *Id.* at 1059.

- ***Mitchell v. Fed. Bureau of Prisons***, 587 F.3d 415 (D.C. Cir. 2009), *rehearing en banc denied*, (Mar. 31, 2010). The court considered a motion by the appellant to proceed *in forma pauperis* (IFP). After determining that IFP status was barred because the plaintiff's 65 prior unsuccessful lawsuits made him an abusive filer, *see id.* at 419, the court considered whether the plaintiff qualified for an exception based on imminent danger. In considering the alleged imminent danger, the court "reject[ed] the government's argument that [the court] should . . . subject [the plaintiff's] allegations to the pleading standard the Supreme Court set forth earlier this year in *Ashcroft v. Iqbal* . . . ." *Id.* at 420. The court explained that the holding in *Iqbal* that "'a complaint must contain sufficient factual matter,' alleged in non-conclusory terms, 'to state a claim to relief that is plausible on its face,'" *id.* (quoting *Iqbal*, 129 S. Ct. at 1949), "ha[d] no applicability to IFP proceedings where [the court] [was] exercising [its] discretion to grant or withhold a privilege made available by the courts," *id.* The court noted that "IFP proceedings are nonadversarial and implicate none of the discovery concerns lying at the heart of *Iqbal*." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950). The court also noted that "if IFP

status [wa]s granted, defendants remain[ed] free to rely on *Iqbal* in support of a motion to dismiss the underlying complaint[,] . . . [b]ut when considering IFP eligibility, [the court] shall continue using the traditional standards applicable to pleadings by pro se prisoners." *Mitchell*, 587 F.3d at 420. The court found that granting IFP status would be inappropriate because the plaintiff had not adequately alleged imminent danger. Specifically, with respect to the claim that the defendants had placed the plaintiff in a prison where it was known that snitches would be attacked, the court emphasized that the plaintiff had waited more than 17 months after the alleged attack to file for IFP status, and that neither the complaint nor the IFP motion alleged an ongoing threat. *Id.* at 420–21 (citation omitted). With respect to the claim that the plaintiff's hepatitis was not being treated, the court found that the allegations were "vague and unspecific," noting that the plaintiff never told the court "when he asked for assistance, what kind of treatment he requested, who he asked, or who denied it," and "never even clearly state[d] that medical attention was actually denied." *Id.* at 422. The court held that the allegations were insufficient, explaining that "even viewing [the plaintiff's] complaint through the forgiving lens applicable to pro se pleadings, [it] simply [could not] determine whether [the plaintiff] face[d] an imminent danger." *Id.*

- ***Tooley v. Napolitano***, 586 F.3d 1006 (D.C. Cir. 2009). The plaintiff filed suit against high-level federal officials, alleging that the officials conducted illegal surveillance of him and his family. The D.C. Circuit had previously vacated a dismissal of the complaint, finding that the plaintiff had adequately alleged standing. The government sought rehearing in light of the subsequent decision in *Iqbal*. *Id.* at 1007. "The government argue[d] that *Iqbal* extended *Twombly*, thus invalidating a construction of *Twombly* previously advanced by [the D.C. Circuit] in *Aktieselskabet AF 21 November 2001 v. Fame Jeans*, 525 U.S. 8 (D.C. Cir. 2008)." *Id.* "While [the D.C. Circuit] d[id] not reject the government's argument, upon reflection [it] believe[d] that [it] should affirm the district court . . . for reasons distinct from but not inconsistent with *Iqbal*." *Id.*

  The complaint alleged that the plaintiff called Southwest Airlines to book a flight in 2002, and upon being asked if he had any comments or suggestions, suggested that the airline screen 100 percent of everything brought on board, given the events of September 11th and the potential that someone could put a bomb on the plane. *Id.* The complaint alleged that the Southwest agent became alarmed. Thereafter, the plaintiff experienced telephone troubles, which he stated, on information and belief, were caused by illegal wiretaps. *Id.* at 1007–08. The plaintiff also alleged that he knew from experience on Capitol Hill that "'as long as the phone line is plugged into the wall in one's home, those listening to wiretaps can hear anything that goes on in the home.'" *Tooley*, 586 F.3d at 1008 (quoting an affidavit submitted by the plaintiff). The complaint also alleged that the government subjected the plaintiff's cars to Radio Frequency Identification Tags that monitored their movement. *Id.* The complaint further alleged that the plaintiff had been subject to strict searches every time he traveled. *Id.* The complaint also asserted that when the president was scheduled visit his hometown, the plaintiff made unflattering remarks to his family about the Administration and then noticed that an officer in a Ford Crown Victoria sat outside his home for six hours per day, "'as a threat of recrimination or persecution of political speech.'" *Id.*

After the plaintiff filed requests under the Freedom of Information Act (FOIA), which he believed were wrongly denied, he filed suit alleging violations of the Fourth Amendment and the constitutional right to privacy, as well as deprivation of First Amendment rights and retaliation for his comments to the Southwest representative, and seeking declaratory relief under FOIA. *Id.* After the plaintiff dismissed some of the defendants, the remaining defendants included the U.S. Attorney General, the Secretary of the Department of Homeland Security, and the Administrator of the Transportation Security Administration, each sued in their official capacities. *Id.* at 1007. The district court granted summary judgment to the defendants on the FOIA claims, and that ruling was not challenged on appeal. *Tooley*, 586 F.3d at 1008. The government sought dismissal of the remaining claims based on lack of standing, and the district court granted dismissal, finding, with respect to the claims based on wiretapping and physical surveillance, that "'it [wa]s altogether possible' that Tooley was the subject of 'entirely lawful wiretaps placed by state or local law enforcement agencies' and that Tooley could not show that it was a federal agent responsible for any of his alleged physical surveillance." *Id.* at 1008–09. The district court characterized the plaintiff's other claims as being based on his placement on a terrorist watch list, and found standing but dismissed based on lack of subject matter jurisdiction because the Court of Appeals had exclusive jurisdiction over directives issued by the Transportation Security Administration. *Id.* at 1009.

On rehearing, the D.C. Circuit noted that "[a] complaint may be dismissed on jurisdictional grounds when it 'is 'patently insubstantial,' presenting no federal question suitable for decision.'" *Id.* (quoting *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994), and citing *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting), for the proposition that "'[t]he sole exception to th[e] rule [that allegations must be credited at the pleading stage applies to] allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experience in time travel.'") (second and third alterations in original) (additional citation omitted). The court found that the claims against the federal officials were insufficient. The court stated that "[t]he alleged motivation . . . was nothing if not bizarre: the defendants, people charged with protecting the country's security, allegedly acted out of a desire to 'retaliate' against Tooley for his having offered a suggestion of additional measures that he claimed would enhance airline security." *Id.* The court noted that the plaintiff alleged that "[a]lternatively, some of the surveillance was evidently to persecute him for remarks critical of the Bush Administration, remarks likely indistinguishable from those of millions of Americans." *Id.* The court found that "the particular combination of sloth, fanaticism, inanity and technical genius alleged . . . seem[ed] . . . to move the[ ] allegations into the realm of claims 'flimsier than 'doubtful or questionable'— . . . 'essentially fictitious.'" *Tooley*, 586 F.3d at 1009 (quoting *Best*, 39 F.3d at 330) (third omission in original). The court concluded that the allegations were "not realistically distinguishable from allegations of 'little green men' of the sort that Justice Souter recognized in *Iqbal* as properly dismissed on the pleadings." *Id.* at 1009–10 (citing *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting)). The court also explained that the claims were similar to those in other cases where the courts had "dismissed for patent insubstantiality," and cited cases both before and after *Twombly*. The court held: "Because

the allegations of Tooley's complaint constitute the sort of patently insubstantial claims dismissed in these and other cases, we conclude that the district court was correct in its judgment of dismissal." *Id.* at 1010.

- ***Atherton v. District of Columbia Office of Mayor***, 567 F.3d 672 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 2064 (2010), *rehearing denied*, --- S. Ct. ----, No. 09-8739, 2010 WL 2243735 (Jun. 7, 2010), and *cert. denied*, *Zachem v. Atherton*, --- S. Ct. ----, No. 09-889, 2010 WL 285700 (May 17, 2010). Two days after the plaintiff was sworn in as a D.C. Superior Court grand juror, he was permanently removed from grand jury service when an Assistant U.S. Attorney ("AUSA") who was presenting evidence to the grand jurors reported to a supervising AUSA (Daniel Zachem) that the jurors were complaining about the plaintiff. *Id.* at 676. Zachem discussed the issue with the juror officer (Suzanne Bailey-Jones), and Bailey-Jones "summarily and permanently removed Atherton from the grand jury for being 'disruptive.'" *Id.* The plaintiff's *pro se* complaint alleged that he was unlawfully removed from grand jury service because of his deliberative judgments and his Hispanic ethnicity, and asserted claims against Bailey-Jones, Zachem, the Director of Special Operations at the Superior Court (Roy Wynn), several other city and federal officials, the District of Columbia, and the Department of Justice Office of the Attorney General. *Id.* at 677. The complaint alleged constitutional violations of due process and equal protection against the District of Columbia defendants and the federal defendants under §§ 1983, 1985(3), and 1986, and *Bivens*, as well as a common law fraud claim. *Id.* The district court dismissed the complaint for failure to state a claim, finding that it failed to allege that any defendants other than Bailey-Jones and Zachem were directly involved in his dismissal, and that the plaintiff had failed to state a claim for municipal liability against the District of Columbia. *Id.* The district court also dismissed the § 1985(3) claim without explanation; dismissed the § 1986 claim as time-barred; dismissed the official capacity claims under § 1983 against the municipality because Bailey-Jones was acting outside the scope of her authority in removing the juror; dismissed the individual capacity claims against the superior court clerk and Wynn because the allegations did not support any personal involvement by these defendants in the decision to remove Atherton from the jury; declined to exercise supplemental jurisdiction over the fraud claim alleged against the superior court clerk and Wynn; and found that the fraud claim against Zachem was barred by sovereign immunity because the Federal Tort Claims Act required substituting the United States for Zachem. *Atherton*, 567 F.3d at 680. Although the district court found that the complaint adequately stated due process and equal protection claims against Zachem and Bailey-Jones, it dismissed the claims against them under § 1983 and *Bivens* because they were entitled to absolute immunity. *Id.* The Eleventh Circuit reversed the dismissal of the due process claims against Bailey-Jones and Zachem because absolute immunity did not apply; affirmed the dismissal of the equal protection and § 1985(3) claims, and the due process claim against Wynn, for failure to state a claim; and affirmed the dismissal of the remaining claims. *Id.* at 677.

  The D.C. Circuit discussed the pleading standards and affirmed that notice pleading is still effective, first noting that Rule 8 requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to survive a motion to dismiss,'" *id.* at

681 (quoting FED. R. CIV. P. 8(a)(2)), and then that "[a] complaint must give the defendants notice of the claims and the grounds upon which they rest, but '[s]pecific facts are not necessary,'" *id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). With respect to a claim of invidious discrimination, the court pointed out that in *Iqbal*, the Supreme Court had required pleading that the defendant acted with discriminatory purpose, and that purposeful discrimination "'involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1948) (alteration in original). The court emphasized that "[a] *pro se* complaint . . . 'must be held to less stringent standards than formal pleadings drafted by lawyers,'" *id.* (quoting *Erickson*, 551 U.S. at 94), but that "even a *pro se* complaint must plead 'factual matter' that permits the court to infer 'more than the mere possibility of misconduct,'" *Atherton*, 567 F.3d at 681 (quoting *Iqbal*, 129 S. Ct. at 1950).

The court concluded that the equal protection claim under § 1983 was not supported by sufficient facts:

> The only factual allegations in Atherton's complaint on his equal protection claim are that: (1) after a witness who could not speak English testified before the grand jury, Atherton openly thanked the witness in Spanish, Compl. ¶¶ 64–65; (2) "based on information, Atherton was the only semi-fluent Spanish speaking grand juror," *id.* at ¶ 67; and (3) Atherton is "half Mexican," *id.* From these facts, Atherton alleges that, "based upon information," his removal without cause from the grand jury was an act of discrimination against him "and Hispanics in particular because there were no other Hispanics on the jury." *Id.* at ¶ 73. He also alleges that the defendants conspired to illegally remove him from the grand jury "for ethnic purposes." *Id.* at ¶ 68. These spare facts and allegations are not enough to survive a motion to dismiss under *Iqbal* and *Twombly*. The complaint and supporting materials simply do "not permit the court to infer more than the mere possibility of misconduct," *Iqbal*, 129 S. Ct. at 1950, and this is insufficient to show that Atherton is entitled to relief. *See* FED. R. CIV. P. 8(a)(2). As the Court noted in *Iqbal*, "[w]here 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." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks and citation omitted). We therefore reverse the District Court's finding that Atherton stated claims of equal protection violations by Bailey-Jones and Zachem.

Id. at 688 (alteration in original).

With respect to the § 1985(3) claims, the court noted that Atherton was required to allege "'(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person

or class of persons of the equal protection of the laws, . . . and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in her person or property or deprived of any right or privilege of a citizen of the United States,'" *id.* (quoting *Martin v. Malhoyt*, 830 F.2d 237, 258 (D.C. Cir. 1987)) (alteration in original), but that "Atherton's complaint and supporting materials merely allege[d] that Zachem, Bailey-Jones, and Wynn communicated about his removal before he was dismissed from the grand jury," *id.* The court concluded that "[t]hese bare facts clearly d[id] not raise an inference that Zachem, Bailey-Jones, and Wynn were conspiratorially motivated by some class-based, invidiously discriminatory animus." *Id.* The court noted that "[t]he complaint also assert[ed] that the defendants 'conspired under color of law to illegally remove Atherton . . . for ethnic purposes,' and that Atherton was illegally removed from the grand jury in violation of the Constitution and D.C. law," *id.* (omission in original) (internal record citation omitted), but concluded that "these '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice' to state a cause of action under § 1985(3)," *Atherton*, 567 F.3d at 688 (quoting *Iqbal*, 129 S. Ct. at 1949) (alteration in original).

APPENDIX

DISTRICT COURT CASE LAW INTERPRETING *IQBAL*[38]

District Court Case Law in the First Circuit

- ***Soto-Martinez v. Colegio San Jose, Inc.***, No. 08-2374 (JAG), 2009 WL 2957801 (D.P.R. Sept. 9, 2009). The plaintiff alleged that he was subject to a hostile work environment, retaliation, and termination as a result of his gender. *Id.* at *1. The court found that the hostile work environment claim failed because the conclusory assertion that the plaintiff was discriminated against because of his gender was not entitled to a presumption of truth, and "[t]he only factual allegations proffered by Plaintiffs [we]re that Soto-Martinez suffered from verbal harassment that insinuated that he was a homosexual." *Id.* at *3. The court relied on pre-*Twombly* cases to conclude that "[t]hese allegations [we]re certainly not enough to sustain a Title VII hostile work environment claim." *Id.* (citing *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258 (1st Cir. 1999)). The allegation that one of the defendants corrected the plaintiff's work in front of others was not sufficient to sustain a Title VII claim because the complaint did not allege that this act occurred because the plaintiff was a man. *Id.* at *4.

  In evaluating the claim that the plaintiff was terminated because of his gender, the court noted that "although heightened fact pleading of specifics is not required to properly allege a *prima facie* case of discrimination, there must be enough facts to state a claim to relief that is plausible on its face." *Id.* (citing *Twombly*, 550 U.S. at 569–70). The court dismissed this claim because in addition to failing to allege one of the elements of a *prima facie* case, the complaint failed to allege any facts to support the conclusion that the plaintiff was terminated based on his gender. *Soto-Martinez*, 2009 WL 2957801, at *5.

  The court also dismissed the retaliation claim because the allegations that the plaintiff engaged in protected conduct under Title VII were not sufficient. *Id.* at *6. The court explained that "Title VII does not protect against verbal harassment from fellow employees that insinuate that the person is a homosexual" and that "Title VII does not proscribe harassment simply because of sexual orientation." *Id.* The court concluded that the "complaint was not directed at an unlawful practice as it did not point out 'discrimination against particular individuals nor discriminatory practices by Defendants.'" *Id.* (citing *Higgins*, 194 F.3d at 259).

- ***Soukup v. Garvin***, No. 09-cv-146-JL, 2009 WL 2461687 (D.N.H. Aug. 11, 2009) (unpublished). The plaintiff sued an arresting officer and the officer's employer under §

[38] Any cases that were included in an earlier version of this memo but that have since been overturned on appeal have been deleted from the appendix.

1983, alleging violations of his civil rights under the Fourth and Fourteenth Amendments. *Id.* at *1. The plaintiff also asserted a common law claim for false imprisonment. *Id.* In considering a motion for judgment on the pleadings, the court concluded that allegations that the town's police department "'developed and maintained policies or customs exhibiting deliberate indifference to the constitutional rights of persons in the Town of Lisbon' and that it was the department's 'policy and/or custom . . . to fail to exercise reasonable care in supervising and training its police officers'" did not adequately plead the claim against the town because there were no supporting factual allegations. *Id.* at *2 (omission in original). The court concluded that the allegations would be insufficient both before and after *Twombly*/*Iqbal*:

> The debate over the extent to which *Twombly* and *Iqbal* have heightened the pleading standard under Rule 8 continues, and will undoubtedly fill law review articles, but is ultimately irrelevant to the disposition of this motion. Soukup cites *Conley's* maxim that a complaint requires notice only of "what the plaintiff's claim is and the grounds upon which it rests," 355 U.S. at 47, but elides the second requirement, arguing that "pleadings are intended to give notice to the defendant of the claims—not of the facts supporting them."
>
> This is incorrect. In fact, *even before* Twombly *and* Iqbal*, the court of appeals had repeatedly held that a complaint needs more than "bald assertions . . . [or] unsubstantiated conclusions*," *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990), *overruled on other grounds by Educadores Puertorriguenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004); *nor may a plaintiff "rest on subjective characterizations or conclusory descriptions of a general scenario*." *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995); *see also Redondo-Borges v. U.S. Dept. of Hous. and Urban Dev.*, 421 F.3d 1, 9 (1st Cir. 2005) ("The fact that notice pleading governs . . . does not save the plaintiffs' conclusory allegation."); *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005) (requiring pleadings to "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory") (emphasis added) (internal quotation marks omitted). Soukup's complaint offers nothing more than these.
>
> While Soukup attempts to argue otherwise, he is belled by his complaint which, as to the constitutional claims against the Town of Lisbon, *contains not a single assertion of fact*. Rather, Soukup's accusations are couched completely as legal conclusions, with the defendant's name merely plugged into the elements of a municipal liability claim. *Even if* Twombly *or* Iqbal *had never been decided,*

> *Soukup's complaint would fall short of the pleading requirements under prior First Circuit authority*; as it is, it certainly fails to avoid *Twombly's* warning that "formulaic recitation of a cause of action's elements will not do." 550 U.S. at 555. His complaint therefore fails to state a claim that the Town of Lisbon violated his federal constitutional rights.

Id. at *3 (emphasis added) (omission and alteration in original).

- ***Ocasio-Hernandez v. Fortuno-Burset***, 639 F. Supp. 2d 217 (D.P.R. Aug. 4, 2009). Former employees of the governor's mansion sued the governor, his wife, and other staff members under § 1983, alleging that their employment was terminated based on their political views. The claims against several of the defendants failed because there were no factual allegations tying the defendants to the deprivation of the plaintiffs' constitutional rights. *Id.* at 222. The court concluded that "[t]he allegation that all of the defendants asked all of the plaintiffs about how and when they began working at [the governor's mansion] is a generic allegation, made without reference to specific facts that might make it 'plausible on its face.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949). The claims against the governor's wife were supported only by citation to a law and an organization chart that gave her the power to oversee maintenance work at the mansion, and the court concluded that there were no facts alleged to suggest that she participated in the decision to terminate the plaintiffs. *Id.* The political discrimination claim was dismissed because the "plaintiffs . . . failed to make a fact-specific showing that a causal connection exists between their termination from employment and their political affiliation . . . ." *Id.* at 224. The due process claim was dismissed because the plaintiffs had no "property right to continued employment." *Id.* The equal protection claim was dismissed because there was no distinct basis for it beyond the allegations under the First Amendment claim; because the plaintiffs failed to "allege a minimally sufficient claim in even conclusory terms, let alone support the claim with facts raising a plausible claim to relief"; and because the plaintiffs failed to explain why the "class-of-one" equal protection doctrine should be applied to a claim for employment discrimination. *Ocasio-Hernandez*, 639 F. Supp. 2d at 225. The state law claims were dismissed because the alleged facts were insufficient to plead discriminatory animus and there was no other factual basis to find a violation of state law. *Id.* at 225–26. In dismissing the complaint, the court explained:

  > The court notes that its present ruling, although draconianly harsh to say the least, is mandated by the recent *Iqbal* decision construing Rules 8(a)(2) and 12(b)(6). The original complaint, filed before *Iqbal* was decided by the Supreme Court, as well as the Amended Complaint, *clearly met the pre*-Iqbal *pleading standard under Rule 8*. As a matter of fact, counsel for defendants, experienced beyond cavil in political discrimination litigation, did not file a 12(b)(6) motion to dismiss the original complaint because the same was properly pleaded under the then existing, pre-*Iqbal* standard. . . .

> As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstan[t]ial evidence needed to sustain the First Amendment allegations. If the evidence was lacking, a case would then be summarily disposed of. This no longer being the case, *counsel in political discrimination cases will now be forced to file suit in Commonwealth court*, where *Iqbal* does not apply and post-complaint discovery is, thus, available. *Counsel will also likely only raise local law claims to avoid removal to federal court where* Iqbal *will sound the death knell*. Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.

Id. at 226 n.4 (emphasis added) (internal record citations omitted).

- ***Chao v. Ballista***, 630 F. Supp. 2d 170 (D. Mass. 2009). The plaintiff alleged that prison officials failed to protect her from sexual abuse, and sought to recover under § 1983 for the officials' failure to investigate and prevent the abuse. *Id.* at 173. The court rejected the defendants' argument that the plaintiff alleged only conclusory allegations regarding the alleged failure to train, supervise, and investigate. *Id.* at 177. The court explained:

> *Notice pleading, however, remains the rule in federal courts*, requiring only "a short and plain statement of the claim." *See* FED. R. CIV. P. 8(a). While a plaintiff's claim to relief must be supported by sufficient factual allegations to be "plausible" under *Twombly*, *nothing requires a plaintiff to prove her case in the pleadings*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Plausibility, as the Supreme Court's recent elaboration in *Ashcroft v. Iqbal* makes clear, is a highly contextual enterprise—dependent on the particular claims asserted, their elements, and the overall factual picture alleged in the complaint. --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) ("[T]he court's assessment of the pleadings is context-specific, requiring the reviewing court to draw on its judicial experience and common sense.") (internal quotation marks omitted).

Id. (emphasis added) (alteration in original). The court elaborated:

> Plausibility, in this view, is a relative measure. Allegations become "conclusory" where they recite only the elements of the claim

> and, at the same time, the court's commonsense credits a far more likely inference from the available facts. This analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations. *Yet in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible*. *See Thomas v. Rhode Island*, 542 F. 3d 944, 948 (1st Cir. 2008) (juxtaposing Rule 8(a)'s fair notice and plausibility requirements, as interpreted in *Twombly*).

Id. (emphasis added) (additional internal citations omitted). The court concluded that the factual allegations were more than sufficient to state a plausible claim to relief. *Id.* at 177–79. The court stated: "To be sure, discovery may ultimately reveal an alternative picture, showing that the Defendants made every reasonable effort to prevent the alleged abuse. But Chao has presented sufficient facts, at a stage where her factual allegations must be taken as true, to overcome that alternative for the time being." *Chao*, 630 F. Supp. 2d at 178.

District Court Case Law in the Second Circuit

- ***Gillman v. Inner City Broadcasting Corp.***, No. 08 Civ. 8909(LAP), 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009). The plaintiff asserted age discrimination and retaliation claims, alleging that he was fired as a result of his age and in retaliation for his reporting sexual harassment, and also asserted a claim for sexual harassment. The court confirmed that the *Iqbal* standard applies in employment discrimination cases:

> The *Iqbal* plausibility standard applies in conjunction with employment discrimination pleading standards. According to *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), *employment discrimination claims need not contain specific facts establishing a* prima facie *case of discrimination*. Rather, "a complaint must include . . . a plain statement of the claim . . . [that] give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 512 (internal quotation marks and citations omitted); *see also Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007). Iqbal *was not meant to displace* Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in* Twombly*, which heavily informed* Iqbal*, the Supreme Court explicitly affirmed the vitality of* Swierkiewicz. *See Twombly*, 550 U.S. at 547 ("This analysis does not run counter to *Swierkiewicz* . . . . Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); *see also Iqbal*, --- U.S. ----, 129 S. Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for all

> civil actions, and it applies to antitrust and discrimination suits alike." (internal quotation marks and citations omitted)). Accordingly, while a complaint need not contain specific facts establishing a *prima facie* case of employment discrimination to overcome a Rule 12(b)(6) motion to dismiss, it must nevertheless give fair notice of the basis of Plaintiff's claims, and the claims must be facially plausible.

Id. at *3 (emphasis added) (alterations and omissions in original) (footnote omitted) . The court also noted:

> [A]lthough decided before the Supreme Court's *Iqbal* decision, *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008), describes the interrelation of *Swierkiewicz* and *Twombly* and concludes that "the Supreme Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."

Id. at *3 n.9 (quoting *Boykin*, 521 F.3d at 213 (internal quotation marks omitted)).[39]

The court concluded that the plaintiff had adequately pleaded a claim for hostile work environment:

> The facts alleged in the Complaint Letter are sufficient to make out a plausible claim that Plaintiff was forced to work in an environment where he felt sexually threatened. Plaintiff alleges that at least since 1993, Cheryl Sutton, a member of the Defendant's

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[39] *See also Peterec-Tolino v. Commercial Elec. Contractors, Inc.*, No. 08 Civ. 0891(RMB)(KNF), 2009 WL 2591527, at *2 (S.D.N.Y. Aug. 19, 2009) (noting in the "legal standard" portion of the opinion that "'[a]n employment discrimination plaintiff . . . must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests,'" and that "'[t]he pleading requirements in discrimination cases are very lenient, even *de minimis*" (omission in original) (quoting *Kassner v. 2d Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007); *Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir. 2003); and citing *Boykin*, 521 F.3d at 212–16)). The *Peterec-Tolino* court concluded that the plaintiff had adequately stated a claim of disability discrimination under the ADA by alleging that the defendant was his employer; that the plaintiff had physical impairments, including scoliosis and asthma, that substantially limited one or more major life activities; that the plaintiff had notified his employer of his medical conditions and requested a reasonable accommodation; that he was able to do his job and his performance had always been excellent; that the defendants failed to accommodate his disability; and that he was harassed, threatened, and terminated. *Id.* at *5. The court also concluded that the plaintiff had adequately alleged a claim of age discrimination under the Age Discrimination in Employment Act by alleging that he was 46 years old; that he was able to do his job; that the plaintiffs harassed, threatened, and terminated him; and that another employee warned the plaintiff that "he should 'not . . . be in this industry.'" *Id.* at *6 (omission in original). The court concluded that "'[s]uch allegations by a pro se plaintiff are sufficient to withstand a motion to dismiss.'" *Id.* (quoting *Legeno v. Corcoran Group*, 308 F. App'x 495, 497 (2d Cir. 2009)).

> Board of Directors and sister of the Chairman, made unwanted advances toward Plaintiff in the form of invitations to travel with her, requests to work late when no employees would be in the workplace, and unsolicited gifts. *Whether or not those acts actually qualify as discriminatory conduct severe or pervasive enough to create an objectively hostile or abusive work environment is a question to be determined at a later stage of this action*. The record reflects that they were sufficiently troubling to Plaintiff to warrant a complaint to the Chairman of the Company in 1993 and in late 2007. And the fact that Plaintiff was terminated relatively soon after complaining to the offending Board Member seems not to be in dispute. Taking Plaintiff's factual allegations as true, Plaintiff suffered an alteration to the conditions of his work environment. Accordingly, Plaintiff's allegations present at least a minimally plausible and articulate discrimination claim.

Id. at *4 (emphasis added) (footnote omitted).

But the court concluded that the allegations regarding the age discrimination claim were insufficient, noting that most of the facts alleged were irrelevant to whether the plaintiff was fired based on his age. *Id.* at *5. The one allegation that might support the age discrimination claim—that 13 other individuals were fired after reaching age 40—was not sufficient "without more information about the reasons for their termination or specific employment practices by the Defendant . . . " because "merely alleging that a disparate impact occurred or pointing to a *generalized* discriminatory policy is insufficient to make out a plausible age discrimination claim." *Id.* at *6.

With respect to the retaliation claim, the court concluded that it was sufficiently pleaded because the plaintiff alleged that he complained about unwanted advances in late 2007 and was terminated in February 2008. *Gillman*, 2009 WL 3003244, at *6. The court held that "[c]onsidering that Plaintiff has made out a plausible hostile work environment claim, . . . these additional factual allegations, minimal as they might be, are sufficient to show (1) Plaintiff's opposition to the allegedly discriminatory treatment, (2) that Defendant was aware of Plaintiff's opposition—assuming Cheryl Sutton's knowledge may be imputed to the Company, (3) that Defendant took adverse action against Plaintiff by terminating him, and (4) that a retaliatory motive allegedly played a part in the adverse employment action." *Id.*

- ***Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC***, 637 F. Supp. 2d 185 (S.D.N.Y. 2009). The plaintiff brought suit alleging breach of contract, account stated, unjust enrichment, quantum meruit, and promissory estoppel in connection with services that the plaintiff provided to a non-party. The plaintiff alleged that it was a third-party beneficiary of the contracts at issue. The court granted the defendants' motion to dismiss all of the claims, but also granted leave to file an amended complaint. The court found that the breach of contract claim failed because the plaintiff was not a third party beneficiary, and the unjust

enrichment, quantum meruit, and promissory estoppel claims failed because there were express contracts preventing quasi-contractual remedies. *Id.* at 195–96.

With respect to the account stated claim, the court concluded that the plaintiff had not alleged enough facts to state a plausible claim under *Iqbal*, particularly with respect to alleging the required state of mind. *See id.* at 198. Regarding the first element of the account stated claim—that an account was presented—the court noted that the complaint alleged an agency theory but the plaintiff "did not direct the Court to any language in the Leases granting . . . representatives with the authority to accept and review statements or otherwise supervise billing and payments." *Id.* The court found that "the Complaint d[id] not sufficiently allege facts supporting the legal conclusion that ACG functioned as Ambac's approved agent for the purpose of receiving presented statements such that presentation of a statement to ACG was the equivalent of its presentation to Ambac." *Id.* at 198–99. With respect to the second element of the account stated claim—that the account was accepted as correct—the court found that this element was sufficiently pleaded because the plaintiff alleged that the debtor never objected to the account stated, which could amount to an implied acceptance. *See id.* at 199. But the third element of the account stated claim—that the debtor promised to pay the amount stated—was deemed insufficiently pleaded. *Air Atlanta*, 637 F. Supp. 2d at 199. The court found that even if there was indebtedness, the plaintiff's "cryptic statement that 'Ambac confirmed its intention to pay AAAE' [wa]s not a sufficient pleading under *Iqbal*." *Id.* at 200. The court explained: "AAAE essentially makes a conclusory allegation as to Ambac's state of mind and its intentions. However, AAAE fails to specify the form of the alleged confirmation; who made the confirmation; how, where, or when the confirmation took place; or any other details about this confirmation." *Id.* (citing *Iqbal*, 129 S. Ct. at 1952). The court continued: "[I]n the context of this case, a blanket statement that a defendant 'confirmed an intention to pay' without any factual details supporting that allegation does not state a plausible claim for relief. While *such allegations may have provided sufficient notice pleading in the past*, *Twombly* and *Iqbal* provide clear instructions that conclusory statements about a party's alleged intentions should be accompanied with supporting factual allegations where circumstances so demand." *Id.* (emphasis added).[40]

- ***Argeropoulos v. Exide Techs.***, No. 08-CV-3760 (JS), 2009 WL 2132443 (E.D.N.Y. Jul. 8,

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[40] Another case in the Second Circuit analyzing pleading the defendant's state of mind is *Talley v. Brentwood Union Free School District*, No. 08-790, 2009 WL 1797627 (E.D.N.Y. Jun. 24, 2009). In *Talley*, in analyzing whether the plaintiff had adequately alleged equal protection violations based on termination of her probationary teaching contract, the court noted that the facts alleged to support the claim were that "(1) plaintiff is white whereas [defendant school board member] Del Rio is Hispanic and [defendant school board member] Kirkham is white; and (2) at the October 20, 2007 meeting 'Kirkham stated on the record that there should be more 'minority teachers' teaching in [the District] as it is a minority district' and is 'widely known in the district as advocating for more minority teachers to fill positions within the [District].'" *Id.* at *7 (third and fourth alterations in original). The court concluded that "[a]lthough not overwhelmed with this factual support, [it found the complaint] sufficient to state a race based Equal Protection claim as against Kirkham only." *Id.* The court explained that "[a]s to Del Rio and [defendant board member] Fritz, the amended complaint simply 'd[id] not contain any factual allegations sufficient to plausibly suggest [their] discriminatory state of mind.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1952) (fourth alteration in original).

2009). The plaintiff sued his employer and another employee, alleging discrimination under Title VII and state law claims for violations of the New York Human Rights Law. *Id.* at *1. The plaintiff alleged that he was subject to discrimination and harassment because of his national origin and perceived sexual orientation. *Id.* The Title VII claims against the employee were dismissed as frivolous because individuals are not subject to liability under Title VII. *Id.* at *3. With respect to the plaintiff's discrimination claims based on perceived sexual orientation and sexual harassment, those claims were dismissed because Title VII does not prohibit harassment or discrimination based on sexual orientation. *Id.* Although Title VII protects against sexual harassment, the plaintiff failed to adequately plead facts supporting a claim for same-sex harassment. *Id.* at *4. The court emphasized that "[b]ecause he [wa]s at the motion to dismiss stage, Plaintiff obviously ha[d] no evidentiary burden to establish any of those methods [of showing sexual harassment]," but concluded that "Plaintiff plead[ed] no facts (or, for that matter, even conclusory allegations) to suggest" same-sex harassment. *Argeropoulos*, 2009 WL 2132443, at *4. The court concluded that the only possible inference from the pleaded facts was that the plaintiff was harassed because of his sexual orientation, but that Title VII provides no remedy for such harassment. *Id.*

With respect to the plaintiff's claims based on national origin discrimination, the court noted that "[u]nlike with respect to sexual harassment, Plaintiff d[id] at least plead *some* facts to suggest that he experienced hostility because of his Greek national origin," but that the two incidents discussed in the complaint did not establish discrimination under either a disparate treatment or hostile work environment theory. *Id.* With respect to disparate treatment, the claim failed "because Plaintiff d[id] not plead that he suffered any adverse employment action, much less an adverse employment action that occurred due to Defendants' anti-Greek animus." *Id.* The allegations of constructive discharge failed because the plaintiff was still an employee of the employer defendant, even if he alleged that he had no plans to return to active work after his disability leave. *Id.* The hostile work environment claim failed because although the plaintiff pleaded "two incidents that could arguably be considered national origin harassment . . . a few 'isolated incidents,' especially when only verbal and not physical, do not suffice to plead a hostile work environment claim." *Id.* at *5 (citations omitted). The court said it was insufficient that the complaint alleged that the two incidents were only examples of daily discrimination, noting that "*this kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard* for assessing motions to dismiss, . . . [b]ut *it does not survive the Supreme Court's* '*plausibility standard*,' as most recently clarified in *Iqbal*." *Argeropoulos*, 2009 WL 2132443, at *6 (emphasis added) (internal citation omitted). The court explained that "[a]t most, Plaintiff's national origin hostile work environment claim [wa]s 'conceivable[,]' . . . [b]ut without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court [could not] conclude that Plaintiff's claim [wa]s 'plausible.'" *Id.* (citing *Iqbal*, 129 S. Ct. at 1951). The court granted leave to amend this claim "in a manner consistent with *Iqbal*'s requirements . . . ." *Id.*

With respect to the plaintiff's retaliation claim, the court noted that the plaintiff "fail[ed] to

plead any facts documenting this alleged retaliation," and that "[a]t most, Plaintiff claim[ed] that, after he complained about the alleged harassment he suffered, 'the harassment got worse' and Plaintiff 'became the subject of discriminatory retaliation.'" *Id.* But the court noted that the plaintiff "plead[ed] *nothing* to document *how* the harassment 'got worse' or how Plaintiff suffered 'discriminatory retaliation.'" *Id.* The court explained that "[*e*]*ven before* Iqbal*, the federal rules required a plaintiff to do more than just plead 'labels and conclusions, and a formulaic recitation of the elements of a cause of action*.'" *Id.* (quoting *Twombly*, 550 U.S. at 555) (emphasis added).

District Court Case Law in the Third Circuit

- ***Young v. Speziale***, No. 07-03129 (SDW-MCA), 2009 WL 3806296 (D.N.J. Nov. 10, 2009). The plaintiff filed a *pro se* action under § 1983, asserting that his constitutional rights were violated when he received inadequate medical care as a pretrial detainee of the United States Marshals Service. *Id.* at *1. The complaint alleged that the plaintiff twisted his knee while at the county jail and was eventually diagnosed with a torn medial meniscus. *Id.* The treating physician ordered physical therapy twice a week for six weeks, but defendant Hanton, a nurse consultant in the Office of Interagency Medical Services in the Marshals Service Headquarters, approved only a physical therapy evaluation and a one physical therapy visit. *Id.* A request for arthroscopic surgery on the plaintiff's knee was later forwarded to Hanton, but she denied the request. *Id.* The plaintiff sued a variety of officials, and Hanton moved to dismiss, or alternatively, for summary judgment. *Id.* The court determined that the motion ought to be treated as a motion to dismiss, rather than a motion for summary judgment. *Young*, 2009 WL 3806296, at *2. Hanton argued that the plaintiff "fail[ed] to make a prima facie showing of inadequate care under either the Eighth or Fourteenth Amendments and that even if Plaintiff asserted a viable claim, Defendant Hanton [wa]s protected by the qualified immunity doctrine." *Id.* at *3. The court recognized "the importance of resolving immunity questions at the earliest possible stage in litigation," and therefore turned to that issue first. *Id.* (citation and internal quotation marks omitted). However, because "the first step of the qualified immunity analysis 'is not a question of immunity at all, but is instead the underlying question of whether there is even a wrong to be addressed in an analysis of immunity,'" the court explained that "the substantive issues raised by Defendant's motion to dismiss [we]re effectively subsumed within the immunity analysis." *Id.* (citations omitted).

  To prevail on his claim of denial of medical care, the plaintiff had to show: "(1) the existence of a serious medical need, and (2) behavior on the part of the defendant officials that constitute[d] deliberate indifference to that need." *Id.* at *5. The court found that the complaint adequately alleged a serious medical need, explaining:

  > Plaintiff's torn meniscus was not only recognized by two physicians as requiring medical treatment, but its debilitating effects, as alleged in the Second Amended Complaint, would easily be recognizable to a layperson as requiring medical attention. According to the Second

> Amended Complaint, to this date, Young still suffers from pain as a result of his knee injury. Furthermore, Plaintiff has gained a significant amount of weight due to the inactivity resulting from his injury, and he occasionally falls because his injury does not permit him to maintain balanced footing. As alleged in his complaint, Plaintiff's medical need is serious.

Id. (internal citations to the complaint omitted). With respect to the deliberate-indifference prong, the court noted that the plaintiff alleged that Hanton exhibited indifference both when she refused to order the amount of physical therapy recommended and when she denied his surgery. *Young*, 2009 WL 3806296, at *6. The court held that the reduced physical therapy did not constitute deliberate indifference because, according to the complaint, "Hanton, after receiving a recommendation from a physician, approved sufficient physical therapy so that plaintiff could learn the necessary exercises to perform himself." *Id.* (citation omitted). However, the allegations regarding the denial of surgery were "at this stage in the litigation, . . . sufficient to state a § 1983 claim." *Id.* The court rejected Hanton's argument that the allegations were insufficient under *Iqbal* because they "merely parrot[ed] the legal requirements of a § 1983 claim and [we]re implausible":

> In *Iqbal*, the Supreme Court held that a plaintiff seeking to impose supervisory liability on a § 1983 defendant must allege more than that the particular defendant "knew of, condoned, and willfully and maliciously agreed to" violate a plaintiff's constitutional rights. Although such allegations were held to be insufficient in *Iqbal*, the plaintiff's claims there are distinguishable from those of Young. Specifically, the plaintiff in *Iqbal* brought a *Bivens* action for discrimination in violation of the First and Fifteenth Amendments. Such claims require a plaintiff to plead and prove that the defendant acted with discriminatory purpose. *As a result of this particular requirement*, the Supreme Court concluded that mere knowledge on the part of the supervisor was an insufficient basis for *Bivens* liability, which it treated as equivalent to § 1983 liability. *There is no such requirement for a § 1983 claim for inadequate medical care arising under either the Eighth or Fourteenth Amendments*. *See Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (outlining requirements necessary to plead a § 1983 claim for inadequate medical care). The Supreme Court, in *Iqbal*, even prefaced its analysis of this issue by recognizing that "[t]he factors necessary to establish a *Bivens* [or § 1983] violation will vary with the constitutional provision at issue." *Iqbal*, 129 S. Ct. at 1948. *Iqbal* thus *does not support the proposition that general allegations are never sufficient to support a § 1983 claim*. *See id.* at 1949 ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned,

> the-defendant-unlawfully-harmed-me accusation.") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Id. at *7 (emphasis added) (alterations in original) (additional internal citations omitted). Besides finding *Iqbal* to be distinguishable, the court found that the allegations were sufficiently specific:

> In any event, Young's Second Amended Complaint goes further and specifically alleges that "[a]s a proximate result of defendant['s] denial of medical care to the plaintiff, he suffered direct physical harm as well as residual physical injury due to the long-term cumulative effects of being forced to walk on his severely injured knee." (Second Am. Compl. ¶ 39.) It is plausible (and can be inferred from the well-pleaded facts) that these long term effects resulted, at least in part, because "Defendant Hanton denied the request for surgery outright." (*Id.* ¶ 21.); *see also Lanzaro*, 834 F.2d at 346–47 ("[d]eliberate indifference is also evident where prison officials erect arbitrary and burdensome procedures that 'result[ ] in interminable delays and outright denials of medical care to suffering inmates"); *Iqbal*, 129 S. Ct. at 1950. Consequently, this Court finds that Plaintiff's pleadings adequately allege that Hanton was deliberately indifferent to Plaintiff's serious medical needs.

Id. (alterations in original). The court explained that more would be required at the summary judgment stage, but that the allegations were sufficient to survive the pleadings stage:

> While, upon a motion by Defendants for summary judgment, Plaintiff will have to come forward with evidence demonstrating that Defendant Hanton knew about Plaintiff's injury and personally interfered, for non-medical reasons, with Plaintiff's treatment, *at this stage*, the pleadings adequately state a claim against Defendant Hanton.
>
> Likewise, Defendant Hanton may come forward at a later time (after Plaintiff has had a chance to engage in further discovery) with evidence undermining Plaintiff's allegations; however, *at this stage in the litigation*, the Court finds that Plaintiff has adequately alleged that Defendant was deliberately indifferent to his medical needs. *See Spruill* [*v. Gillis*], 372 F.3d [218,] 237–38 [(3d Cir. 2004)] ("[s]ince at this stage we are making no judgment about what actually happened, but only about the sufficiency of the pleadings, we must take [Plaintiff's] factual allegations, and the reasonable inferences, therefrom, as true.").

Id. at *8 (emphasis added) (fourth and fifth alterations in original) (footnote omitted).

In considering qualified immunity, the court found that the allegations in the complaint were sufficient to conclude "that it would have been clear to a reasonable officer that [Hanton's] actions would have violated a 'clearly established' constitutional right." *Young*, 2009 WL 3806296, at *8 (citation omitted). The court stated:

> Plaintiff has alleged that Hanton denied his request for medically necessary surgery that was approved by a physician, and that as a result of said denial, Plaintiff's medical condition deteriorated and led to further serious injury. In light of Third Circuit precedent holding that *Estelle's* deliberate indifference standard is satisfied "where knowledge of the need for medical care is accompanied by the intentional refusal to provide that care[,]" and that "the threat of tangible residual injury can establish deliberate indifference," the Court finds that a reasonable officer would have known that the denial of Plaintiff's surgery request would have violated Plaintiff's rights under the Fourteenth Amendment.

Id. (internal citations omitted) (alteration in original). The court noted that qualified immunity could be asserted again later in the case, but could not be applied at the pleadings stage. *See id.* ("While the issue of qualified immunity may be revisited in a later motion for summary judgment, *at this stage of the litigation*, where the Court must credit Plaintiff's factual allegations and construe the Complaint in the light most favorable to Plaintiff, the Court finds that Defendant is not entitled to qualified immunity.") (emphasis added). Despite the fact that qualified immunity usually prevents discovery, the court concluded that "at this juncture, discovery [wa]s needed to, at a minimum, determine the players involved in the denial of Plaintiff's request for surgery." *Id.* at *9. The court explained:

> Although it "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government, . . . [l]itigation [may be] be necessary to ensure that officials comply with the law." *Iqbal*, 129 S. Ct. at 1953; *see also id.* at 1961 (finding that while it is important to prevent unwarranted litigation from interfering with the proper functioning of the government, "the law, after all, provides other legal weapons designed to prevent unwarranted interference" such as beginning discovery with lower level government officials before determining whether a case can proceed to allow discovery related to higher level government officials) (Breyer, J. dissenting).

Id. (alterations in original).

- ***Taylor v. Pittsburgh Mercy Health Sys., Inc.***, No. 09-377, 2009 WL 2992606 (W.D. Pa. Sept. 17, 2009). The court denied a motion for more definite statement, noting that "*Twombly* and *Iqbal* notwithstanding, the notice pleading standard still applies in federal court." *Id.* at *2. The court noted that "[a]lthough Defendants assert that the details regarding Plaintiffs' alleged pre- and postliminary work and/or training may excuse FLSA liability, these arguments are better suited for resolution at a later stage in the proceedings." *Id.* at *2 n.1 (internal record citation omitted).

- ***Vorassi v. US Steel***, No. 09cv0769, 2009 WL 2870635 (W.D. Pa. Sept. 3, 2009). The court dismissed employment discrimination claims as time-barred. *Id.* at *1. The court cited pre-*Twombly* case law for the proposition that "a court will not accept bald assertions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations." *Id.* (citing *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 215 (3d Cir. 2002); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 n.8 (3d Cir. 1997)). The court noted that "a plaintiff must put forth sufficient facts that, when taken as true, suggest the required elements of a particular legal theory," *id.* at *2 (citation omitted), but explained that "*this standard does not impose a heightened burden on the claimant above that already required by Rule 8*, but instead calls for fair notice of the factual basis of a claim while 'rais[ing] a reasonable expectation that discovery will reveal evidence of the necessary element.'" *Id.* (emphasis added) (alteration in original) (citation omitted); *see also Koynok v. Lloyd*, No. 06cv1200, 2009 WL 2981953, at *3 (W.D. Pa. Sept. 11, 2009) (same).

- ***Adams v. Lafayette College***, No. 09-3008, 2009 WL 2777312 (E.D. Pa. Aug. 31, 2009). In an employment discrimination case based on alleged age discrimination, the court concluded that the plaintiff's pleading was insufficient because it was conclusory and devoid of factual details, and better explained by lawful conduct. *Id.* at *3–4. The court rejected the plaintiff's argument, based on "the liberal pleading discussion in *Swierkiewicz*," that requiring more detailed pleading "would improperly limit a plaintiff's ability to raise a discrimination claim by requiring the plaintiff to muster the crucial evidence, which is most often in the defendants' hands, *before* discovery." *Id.* at *4 (citations omitted). The court explained that "[c]ontrary to plaintiff's position, the *Fowler* decision specifically noted the Supreme Court's indirect repudiation of the *Swierkiewicz* ruling to the extent it relies on *Conley* and its 'no set of facts' requirements." *Id.* (citation omitted). But the court explained that the complaint was deficient even under *Swierkiewicz*:

> More importantly, Adams overlooks the key factual distinctions between his case and *Swierkiewicz*. In that case, the Court specifically noted the complaint easily satisfied the requirements of Rule 8(a) because it "detailed the events leading to termination, provided relevant dates, and included the ages . . . of at least some of the relevant persons involved with his [adverse employment action]." *Swierkiewicz*, 534 U.S. at 514. On the other hand, Adams's complaint['s] factual allegations are scant and rely primarily on his own averments that he has been treated differently

> because of his age. Though Adams has sufficiently plead[ed] he was suspended for one day for turning his back to his supervisor, he has failed to allege sufficient facts to nudge his claim from conceivable to plausible.

Id. (omission and first alteration in original) (footnote omitted). The court emphasized that the facts necessary to survive the pleadings stage are minimal:

> My ruling should not be construed as requiring potential plaintiffs to muster all facts necessary for their claim before the complaint is filed. As discussed earlier, *the Federal Rules of Civil Procedure have consistently been interpreted as providing a liberal pleading standard*. To be sure, the *Twombly* and *Iqbal* decisions have *clarified* the minimal pleading standards by rejecting formulaic recitations of the elements of a cause of action as well as allegations consisting only of labels or conclusions. Additionally, the complaint must . . . recite facts sufficient to show a plausible claim of relief.
>
> Here, the complaint is dismissed because it fails to clear minimal procedural hurdles. Careful analysis of the allegations reveal they are only conclusory restatements of the elements of an employment discrimination claim. Adams has certainly stated facts for a conceivable claim but falls short of demonstrating a plausible claim of relief.

Id. at *4 n.2 (emphasis added).

- ***Garczynski v. Countrywide Home Loans, Inc.***, 656 F. Supp. 2d 505, No. 08-5128, 2009 WL 2476622 (E.D. Pa. Aug. 12, 2009). The court concluded that the factual allegations were insufficient to allege that the defendant violated the state unfair trade practices and consumer protection law, finding that they were "essentially no more than a restatement of the elements of the statute." *Id.* at *6. The court stated: "Plaintiffs cannot adequately plead that Countrywide violated the UTPCPL simply by pasting the language of the statute into their Amended Complaint." *Id.* The court commented:

> Although *Twombly* and *Iqbal* have been criticized as both ignoring the liberal concept of notice pleading and representing an unwarranted change in Supreme Court jurisprudence on the adequacy of pleadings, *the Complaint in the present case is a good example of why allowing a case to proceed simply on its allegations of statutory elements, which some might equate with notice pleading, can be unfair in some cases*. The relationship between the parties in this case is based on contract. If Plaintiffs had grounds to believe that Defendants had violated the contract, a claim for breach of contract

> would surely be proper. However, Plaintiffs' claims are based solely on alleged oral representations, which Plaintiffs claim induced them to enter into the mortgage agreement. If, as Plaintiffs allege, they did not understand the mortgage agreement, they should not have signed it or sought services of a lawyer or written clarification from Countrywide. *Allowing a claim of this nature to proceed when the terms of the written documents are clearly contrary to the Plaintiffs' allegations would not only violate* Iqbal *and* Twombly*, but other long-standing principles of federal jurisprudence*.

Id. at *6 n.6 (emphasis added) (citation omitted).

- ***Carpenters Health & Welfare Fund of Philadelphia v. Kia Enters. Inc.***, No. 09-116, 2009 WL 2152276 (E.D. Pa. Jul. 15, 2009). The plaintiffs sued to collect money allegedly owed under a collective bargaining agreement and related trust agreements, and the defendant filed a counterclaim, alleging that in seeking to collect the payments, the plaintiffs had violated the Civil Rights Act of 1866. *Id.* at *1. The court concluded that the counterclaim was insufficient under *Iqbal*:

> The Supreme Court's clarification of federal pleading standards in *Twombly* and *Iqbal* has *raised the bar for claims to survive a motion to dismiss* by emphasizing that a plaintiff cannot rely on legal conclusions or implausible inferences from factual allegations to state a claim. Measured against this clarified standard, Kia's amended counterclaim fails.
>
> The amended counterclaim's allegations that the Carpenter's Union has a "longstanding pattern and practice" of discriminating against minorities and minority-owned businesses and the allegations that the plaintiffs' actions were intentional and motivated by racial animus and a desire to exclude minorities and minority-owned businesses from the construction industry are all legal conclusions that under *Iqbal* and *Twombly* are not entitled to be assumed to be true.
>
> The factual allegations in the amended counterclaim concern actions by the plaintiffs to collect the payments they claim Kia owes them. The amended counterclaim alleges that the plaintiffs took steps to make a claim against Kia's performance bond, sought to persuade a city agency to withhold payments to Kia, and demanded to audit Kia's books and records. These actions are entirely consistent with a lawful attempt by the plaintiffs to collect unpaid CBA obligations that they are owed. By themselves, these allegations are "not only compatible with, but more likely explained by," lawful behavior and

> therefore cannot "plausibly suggest" actionable wrongdoing. *Iqbal*, 129 S. Ct. at 1950. Kia's allegations that the plaintiffs took similar steps against another minority-owned business . . . are also entirely consistent with lawful actions by the plaintiffs to collect unpaid CBA payments.
>
> Kia has attempted to plead sufficient additional facts to "nudge" its allegations of discrimination across the "line from conceivable to plausible" by alleging, *on information and belief*, that the plaintiffs do not make similar efforts to collect unpaid CBA obligations from non-minority-owed businesses. Kia, however, *offers no specific facts in support of the plaintiffs' alleged disparate treatment of minority and non-minority businesses*. In the absence of any more specific allegations identifying particular instances of disparate treatment, these allegations are merely "legal conclusions couched as factual allegations," which under *Twombly* and *Iqbal* cannot be taken as true.
>
> Kia's allegations that the Carpenter's Union refused to cooperate with the Mayor's Advisory Commission and has a "historical and present day antipathy" to racial minorities are also not enough to make Kia's discrimination claims plausible. Even if taken as true, these allegations are not probative to the question of whether the specific actions taken by the plaintiffs against Kia can be plausibly alleged to have been motivated by discrimination.

Id. at *3 (emphasis added).

District Court Case Law in the Fourth Circuit

- ***FTC v. Innovative Mktg., Inc.***, 654 F. Supp. 2d 378, 2009 WL 2959680 (D. Md. Sept. 16, 2009). The Federal Trade Commission (FTC) brought suit under the Federal Trade Commission Act (FTCA) for alleged deceptive conduct in connection with the sale of software. *Id.* at *1. In response to the FTC's argument that "the *Iqbal* decision does not represent a 'sea change in the law of pleading,'" the court noted that "*Iqbal*'s importance cannot be minimalized," and that *Twombly* and *Iqbal* "represent a new framework for reviewing the sufficiency of complaints under Rule 8." *Id.* at *2 n.2. In denying the motion to dismiss, the court found that the factual allegations were sufficient, and rejected the defendant's assertion that a stricter pleading standard applied:

  > In the face of such thorough pleading, D'Souza advocates for this Court to apply an *unduly stringent* pleading standard and dismiss the Complaint. Indeed, Defendant seems to argue for a pleading standard akin to the particularity requirement prescribed for claims of

> fraud under FED. R. CIV. P. 9(b)—a heightened standard that does not apply [to] section 5(a) claims under the FTC Act. Twombly *and* Iqbal *may have raised the bar for stating a claim under Rule 8, but not to the extent proposed* by D'Souza. *Rule 8 remains a liberal standard*—a complaint need only set forth a "short and plain statement" that gives a defendant fair notice of plaintiff's grounds for entitlement for relief. FED. R. CIV. P. 8(a)(2). Indeed, in *Iqbal*, the Court emphasized the appropriate approach under the plausibility standard by noting that it was not a "'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556). Stated otherwise, a plaintiff need only plead sufficient facts to "nudg[e]" a claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Id. at *7 (emphasis added) (second alteration in original) (additional internal citations omitted). The court denied the motion to dismiss, finding that "[t]hrough its extensive factual pleadings, the FTC has positioned its claims against Marc D'Souza safely within the realm of plausibility." *Id.*

- ***Boy Blue, Inc. v. Zomba Recording, L.L.C.***, No. 3:09-CV-483-HEH, 2009 WL 2970794 (E.D. Va. Sept. 16, 2009). The court examined whether pleading on information and belief can be appropriate, and explained:

> This Court must therefore consider whether a pleading "upon information and belief," without further factual support, is sufficient to state an actionable claim. Pleading "upon information and belief" is appropriate when the factual basis supporting a pleading is only available to the [opposing party] at the time of pleading. *See, e.g.*, *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (holding that pleading upon "information and belief" is appropriate when the information is in the opposing party's possession); *Johnson v. Johnson*, 385 F.3d 503, 531 n.19 (5th Cir. 2004) ("'information and belief' pleadings are generally deemed permissible under the Federal Rules, especially in cases in which the information is more accessible to the defendant."). The Court finds that any facts establishing [one of the elements of tortious interference] could, at this stage of the proceedings, be entirely within the possession of the opposing parties. In this circumstance, a pleading "upon information and belief" survives a 12(b)(6) challenge. The dignity accorded "information and belief" pleadings has more limited application in other contexts.

Id. at *2. The court noted that with respect to the allegations regarding the other elements of the claim, "[t]hey [we]re nothing more than a listing of the required element with

Defendant Zomba's or Sony Music's name inserted as the offending party," and concluded that "[s]tripped of such legal incantation, these allegations provide[d] no factual support for the remaining elements of Plaintiff's tortious interference claim." *Id.* at *3.

- ***Fletcher v. Philip Morris USA Inc.***, No. 3:09CV284-HEH, 2009 WL 2067807 (E.D. Va. Jul. 14, 2009). The plaintiff alleged race and gender discrimination and retaliation under Title VII and race discrimination under § 1981 against his employer. The court concluded that the plaintiff had inadequately alleged discrimination under Title VII and § 1981 because although the plaintiff alleged an adverse employment action, there were no specific factual allegations that similarly situated employees, who were not members of a protected class, received more favorable treatment, or that the defendants acted with discriminatory intent. *Id.* at *6. The court found that "it would be difficult for a reasonable person to conclude that the factual allegations in the Amended Complaint even give rise to the *suggestion* of discrimination," noting that the decisionmakers involved in the adverse employment decisions were members of the same race as the plaintiff, and one was also a male, and the defendants replaced the plaintiff with a person of the same race and gender as the plaintiff. *Id.* at *7. The court found the retaliation claim insufficient as well because the court could "find no indication from the facts as pled that Plaintiff's race or gender played any role in the low-performance ratings that led to Plaintiff's internal complaint," and the complaint therefore did not constitute a protected activity under Title VII. *Id.* at *8. The plaintiff's EEOC charge did constitute a protected activity, but the retaliation claim still failed because the alleged adverse actions either did not rise to the level of a true adverse action or there was no causal connection alleged between the adverse action and the alleged retaliation. *Id.* at *9–10.

District Court Case Law in the Fifth Circuit

- ***Lehman Bros. Holdings, Inc. v. Cornerstone Mortgage Co.***, No. H-09-0672, 2009 WL 2900740 (S.D. Tex. Aug. 31, 2009). The court dismissed a counterclaim for attorneys' fees under state law, noting that the "allegations as to the breach [of contract supporting the request for attorneys' fees] [we]re scant." *Id.* at *5. The court concluded:

> To the extent Cornerstone alleges breach of contract, *it fails to plead sufficiently under the standards that applied even before* Twombly *and* Iqbal. Cornerstone has simply alleged that a contract was breached by a failure properly to service the loans and to give notice. *This bare-bones allegation neither provides fair notice of the claim nor of the grounds on which it rests*. Because the Rule 8 standard is not satisfied, dismissal with leave to amend under Rule 12 is appropriate.

Id. (emphasis added).

District Court Case Law in the Seventh Circuit

- ***Mounts v. United Parcel Serv. of Am., Inc.***, No. 09 C 1637, 2009 WL 2778004 (N.D. Ill. Aug. 31, 2009). The plaintiffs, retired drivers for UPS, alleged retaliation and discrimination in connection with their formation of an organization that assisted current and retired UPS employees with filing complaints with the EEOC and with securing medical and retirement benefits. In considering the retaliation claims, the court noted that "[t]he level of facts required varies with the type of claim asserted," and that "[c]omplaints 'alleging illegal retaliation on account of protected conduct must provide some specific description of that conduct beyond the mere fact that it is protected.'" *Id.* at *4 (quoting *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 781 (7th Cir. 2007)). The court noted that the remaining plaintiffs had alleged that they helped another plaintiff in the investigation regarding his charge of discrimination and that UPS removed them from the health plan for retired employees because of that assistance. *Id.* at *5. The court concluded that because the plaintiffs alleged that their assistance related to another plaintiff's discrimination under the ADEA and the ADA, and retaliation under Title VII, the allegations were sufficient to state a claim for retaliation under those statutes. *Id.* The court also concluded that the remaining plaintiffs had adequately alleged discrimination under the ADEA because they alleged that they were over 40 years old and that UPS found them ineligible to participate in the health plan because of their age. *Id.* The court found that the plaintiffs failed to state a claim for discrimination under the ADA because they did not allege that they suffered from an impairment, let alone an impairment that substantially limited their ability to perform a major life activity. *Id.* at *6. The court denied leave to replead the discrimination claim under the ADA because the plaintiffs conceded that they were not UPS employees, and retired employees had no right to bring discrimination suits under Title I of the ADA. *Mounts*, 2009 WL 2778004, at *6.

- ***Fulk v. Village of Sandoval***, No. 08-843-GPM, 2009 WL 1606897 (S.D. Ill. Jun. 9, 2009). Police officers claimed they were fired in retaliation for reporting the mayor's misconduct. *Id.* at *1. The defendants claimed that the police officers were speaking pursuant to their official duties and that as a result, their words enjoyed no First Amendment protection. *Id.* at *2. The court concluded that although the plaintiffs pleaded that they complained as private citizens, not as part of their official duties, "[t]he bare allegation that they made the statements as private citizens [wa]s not sufficient to move th[e] allegation from 'conceivable' to 'plausible' under the *Ashcroft* standard." *Id.* However, "[b]ecause of the recent change in federal pleading standards," the court granted leave to amend "to allege sufficient facts to show they acted as private citizens." *Id.*

District Court Case Law in the Eighth Circuit

- ***Turner v. Sikeston Police Dep't***, No. 1:09CV92 LMB, 2009 WL 2836513 (E.D. Mo. Aug. 31, 2009). The plaintiff brought claims under § 1983, alleging violations of his constitutional rights. The plaintiff alleged that he was falsely arrested, that his home was unlawfully searched, that he was unlawfully retained in the county jail, that a police officer used a false affidavit that prompted the prosecutor's office to initiate a malicious prosecution,

that after his arrest he was placed in unpleasant conditions, and that other defendants failed to properly supervise and train the police officer who searched the plaintiff's home and created the allegedly false affidavit. *See id.* at *2. The court noted that in evaluating a complaint, *Iqbal* requires engaging in a two-step inquiry. *Id.* at *1. The court explained that the plaintiff's "allegations are mostly conclusory and such conclusory allegations need not . . . be given an assumption of truth." *Id.* at *2 (citing *Iqbal*, 129 S. Ct. at 1950–51). The court noted that the complaint did not "identify whether the members of the prosecutor's office knew that defendant [police officer] Rataj's affidavit was purportedly false," and that the plaintiff's "allegations of misconduct with regard to the prosecutor's office [we]re stated on 'information and belief.'" *Id.* The court concluded that the plaintiff's claims of false imprisonment, false arrest, and malicious prosecution failed to state a claim because "[a] prisoner may not recover damages in a § 1983 suit where the judgment would necessarily imply the invalidity of his conviction, continued imprisonment, or sentence unless the conviction or sentence is reversed, expunged, or called into question by issuance of a writ of habeas corpus." *Id.* (citations omitted). Regardless of this conclusion, the court found that the malicious prosecution claims against the prosecutors could not proceed because the plaintiff had "not alleged any facts supporting his assertions that he was maliciously prosecuted," and because the prosecutors were entitled to absolute immunity. *See Turner*, 2009 WL 2836513, at *3 (citation omitted). The claims against the police department failed because the police department was not an entity that could be sued. *Id.* The claims regarding the conditions of the plaintiff's confinement failed because the plaintiff did not allege a person responsible and did not allege "that the purported deprivations denied him the minimal civilized measure of life's necessities and that defendants were deliberately indifferent to excessive risk to his health or safety." *Id.* (citations omitted). Finally, the court concluded that the claims of inadequate training failed to state a plausible claim because they were based on conclusory allegations. *See id.* (citing *Iqbal*, 129 S. Ct. at 1950–51). The court allowed the claim that the police officer illegally searched the plaintiff's home to go forward. *Id.*

District Court Case Law in the Ninth Circuit

- ***Westerfield v. Spinks***, No. 2:08-CV-1970-RCF, 2009 WL 3042418 (E.D. Cal. Sept. 15, 2009). In evaluating a *pro se* prisoner complaint alleging inadequate medical treatment, the court concluded that the complaint's allegation that the plaintiff was "left for dead by MTA Spinks" after he had a heart attack and was later rushed to the hospital and received medical treatment, was "both inadequate and implausible." *Id.* at *2. The court explained that "[a]lthough ignoring an individual suffering a heart attack creates a condition posing a risk of serious harm, Westerfield does not offer any allegations concerning Spinks' knowledge of the danger or how he was brought to a hospital if he was being ignored." *Id.* The court concluded that "'[a] conclusory allegation to the effect that [Spinks] knew that [Westerfield] had a heart attack is insufficient. [Westerfield] must allege specific facts 'plausibly showing' that [Spinks] had the requisite mental state.'" *Id.* (second, third, fourth, and fifth alterations in original) (quoting *Brown v. Lewis*, No. 2:07-cv-2433, 2009 WL 1530681, at *1 (E.D. Cal.

Jun. 1, 2009)).[41]

- ***Elan Microelectronics Corp. v. Apple, Inc.***, No. C 09-01531, 2009 WL 2972374 (N.D. Cal. Sept. 14, 2009). In a patent infringement action, the court noted that "Apple's allegation of infringement in all three of the challenged counterclaims consist[ed] of nothing more than a bare assertion, made 'on information and belief that Elan 'has been and is currently, directly and/or indirectly infringing, in violation of 35 U.S.C. § 271' the specified patents 'through its design, marketing, manufacture and/or sale of touch sensitive input devices or touchpads, including but not limited to the Smart-Pad.'" *Id.* at *2. The court explained that "[w]hile the line between facts and legal conclusions is not always easy to draw, this pleading plainly f[ell] within the prohibition against '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Id.* (third alteration in original) (quoting *Iqbal*, 129 S. Ct. at 1949). With respect to the "plausibility" aspect of *Twombly*/*Iqbal*, the court noted that "[a]t this juncture, the allegations of fact [we]re so sparse that it [wa]s difficult to analyze plausibility, although nothing in what ha[d] been alleged raise[d] any significant plausibility concerns," but concluded that "[b]ecause the claims fail[ed] under *Iqbal's* 'first' principle, the Court [did not] need [to] further address this point." *Id.* The court noted that the Federal Circuit, in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007), had concluded that a *pro se* pleading based on conclusory allegations survived dismissal, relying on the pleading form for patent infringement. *Elan Microelectronics*, 2009 WL 2972374, at *2. The court concluded that "[i]t is not easy to reconcile Form 18 [for direct patent infringement] with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a 'short and plain statement,' it offers little to 'show' that the pleader is entitled to relief," but noted that "[u]nder Rule 84 of the Federal Rules of Civil Procedure, however, a court must accept as sufficient any pleading made in conformance with the forms." *Id.* (footnote omitted). The court found that since Form 18 addresses only direct infringement, and Apple asserted direct and/or indirect infringement, neither the *McZeal* case nor Form 18 supported allowing Apple's counterclaims to proceed. *Id.*

  In considering the impact of Rule 11(b)(3), the court noted that "*regardless of what knowledge may lie exclusively in the possession of Elan or others*, Apple should be able to articulate at least *some facts* as to why it is reasonable to believe there is infringement," and concluded that "[s]imply *guessing or speculating* that there may be a claim *is not enough*." *Id.* at *4 (emphasis added) (footnote omitted). But the court cautioned:

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[41] In *Brown v. Lewis*, the prisoner's complaint under § 1983, which alleged that the prison's medical technician and nurse failed to diagnose the plaintiff with a heart attack, was insufficient to allege the requisite mental state of deliberate indifference because the plaintiff must show that the defendants knew of and disregarded an excessive risk to the plaintiff's health. 2009 WL 1530681, at *1. The court also found that the complaint failed to allege whether the plaintiff was ever diagnosed with a heart attack or what led him to believe he had a heart attack, and did not describe how the alleged misdiagnosis injured him. *Id.* Finally, the complaint alleged no facts connecting the nurse to the incident. *Id.* Despite dismissing the complaint for the second time for failure to state a claim, the court granted leave to amend. *Id.* at *2.

> This is not to say that Apple necessarily must *plead* any or all such facts to state a claim; indeed some of them could be protected by privilege or the work product doctrine. However, in at least some situations, a party might be able to plead a great number of circumstantial facts supporting a belief of wrongdoing, while still needing discovery to "confirm the evidentiary basis" of the allegations.

Id. at *4 n.5.

- ***McClelland v. City of Modesto***, No. CV F 09-1031 AWI dlb, 2009 WL 2941480 (E.D. Cal. Sept. 10, 2009), *order corrected*, 2009 WL 2982850 (E.D. Cal. Sept. 14, 2009). The plaintiff brought a civil rights action based on the execution of a search warrant at the plaintiff's home that resulted in injury to the plaintiff. *Id.* at *1. The plaintiff alleged that her Fourth and Fourteenth Amendment rights were violated under § 1983. *Id.* at *2. In evaluating the motions to dismiss, the court noted that "[a]lthough there is some debate as to whether the Supreme Court's decision in *Twombly* worked 'a sea change in the law of pleadings,' the fact remains that, since *Twombly*, *the requirement for fact pleading has been significantly raised*." *Id.* at *5 (citing *Moss*, 572 F.3d at 972) (emphasis added). The court dismissed some of the claims, but granted leave to amend. *Id.* In refusing to dismiss the plaintiff's negligence claim against the individual defendants, the court held that "[w]hile it [wa]s certainly possible that Plaintiff could have pled causation and duty of care with more particularity, the fact remain[ed] that Plaintiff ha[d] pled *facts* which, if proven, could support a determination by the finder of fact that the individual officers executing the search warrant acted unreasonably and without due care for Plaintiff's physical limitations." *Id.* at *10.

- ***Young v. City of Visalia***, 687 F. Supp. 2d 1141, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847 (E.D. Cal. Aug. 18, 2009). The plaintiffs asserted civil rights violations under § 1983, alleging a search that exceeded the scope of a warrant and unlawful detention. *See id.* at *1–2. The court noted that "'[c]ontext matters in notice pleading. Fair notice under [Rule 8(a)] depends on the type of case.'" *Id.* at *2 (alterations in original) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008); citing *Iqbal*, 129 S. Ct. at 1950). The court noted that prior Ninth Circuit precedent regarding pleading municipal liability under § 1983 appeared to have been abrogated by *Iqbal*:

  > [W]ith respect to municipal liability, the Ninth Circuit has held that, "a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice." *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007). However, *Iqbal* has made clear that conclusory, "threadbare" allegations that merely recite the elements of a cause of action will not defeat a motion to dismiss.

> *See Iqbal*, 129 S.Ct. at 1949–50. In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. "bare allegations") is no longer viable.[42]

Id. at *6. The court dismissed the claim "[b]ecause the Complaint contain[ed] insufficient facts that plausibly indicate[d] a valid *Monell* claim . . . ." *Id.* at *7.

- ***Doe ex rel. Gonzales v. Butte Valley Unified Sch. Dist.***, No. 09-245 WBS CMK, 2009 WL 2424608 (E.D. Cal. Aug. 6, 2009). The plaintiff brought suit under § 1983 against his teacher and the school district's superintendent, alleging violations of his civil rights because of sexual abuse and harassment allegedly committed by other students. *Id.* at *1. The plaintiff also sued the school district, alleging sexual discrimination, and asserted a state law negligence claim against the teacher and superintendent. *Id.* The teacher and superintendent moved to dismiss the § 1983 claim.

  The court granted the motion with respect to the substantive due process claim asserted on the basis of an exception to the rule that failure to protect from harm does not create a due process violation, finding that the conclusory allegation that the defendants had a special relationship with the plaintiff was not sufficient to establish the "special relationship" exception. *Id.* at *3. With respect to another exception—the "danger creation" exception—the court granted the teacher's motion to dismiss because there were no allegations of an affirmative act by the teacher that created or exposed the plaintiff to the risk of harm, but denied the superintendent's motion on this issue because the plaintiff alleged affirmative conduct and the superintendent's only response was that he was taking action pursuant to state law by educating the accused students. *Id.* at *4–5. The court dismissed the procedural due process claim because "nowhere d[id] plaintiff allege that he had a property interest in a safe school or that defendants' conduct amounted to a deprivation of that interest without proper procedural safeguards." *Id.* at *5.

  With respect to the equal protection claim, the court found that the "bare legal assertion that [the defendants] 'intentionally discriminated' again[st] him [wa]s insufficient to satisfy Rule 8 . . . and [could not] withstand a motion to dismiss." *Doe*, 2009 WL 2424608, at *6. The court also found the allegation that the superintendent "'fail[ed] to provide or obtain education for [the teacher]' d[id] not sound in unconstitutional discrimination toward plaintiff." *Id.* at *7 (first alteration in original). The court speculated as to a possible theory for liability, but explained, "[o]f course, plaintiff may very well have a different theory or no theory at all, and for this reason, the Supreme Court has made clear that district courts are

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[42] *See also Lewis v. City of Fresno*, No. CV-F-08-1062, 2009 WL 2905738, at *10 (E.D. Cal. Sept. 4, 2009) (concluding that prior to *Twombly* and *Iqbal*, the allegation that "'Defendants . . . used and/or allowed official policies, procedures and/or practices to discriminate against Plaintiff on the basis of his race'" would have been sufficient to survive a motion to dismiss because the Ninth Circuit had held that "an allegation based on nothing more than a bare averment that the official's conduct conformed to official policy, custom or practice suffice[d] to state a *Monell* claim under § 1983," but that such an allegation was not sufficient under *Twombly* and *Iqbal*).

not free to coax a hapless complaint into compliance with federal pleading standards." *Id.* (citing *Twombly*, 550 U.S. at 561–63). The court granted the motion to dismiss with respect to the equal protection claims. *Id.*

In considering whether to grant leave to amend, the court noted *Iqbal*'s effect on pleading standards and the federal forms:

> Although *Iqbal*'s majority opinion itself did not intimate any seachange, jurists and legal commentators have observed that *the decision marks a striking retreat from the highly permissive pleading standards* often thought to distinguish the federal system from "the hyper-technical, code-pleading regime of a prior era," 129 S. Ct. at 1949. *See, e.g.*, *Moss v. U.S. Secret Serv.*, --- F.3d ----, No. 07-36018, 2009 WL 2052985, at *8 (9th Cir. July 16, 2009); Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10.
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> Prior to *Iqbal*, many courts—including this court and, apparently, the Supreme Court itself—read Rule 8 to express a "willingness to 'allow [ ] lawsuits based on conclusory allegations . . . to go forward,'" *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)) (alteration in original). Indeed, for over half a century, district courts had been instructed that the "short plain statement" required by Rule 8 "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz*, 534 U.S. at 514 (quoting *Conley*, 355 U.S. at 47). Now, however, even the official Federal Rules of Civil Procedure Forms, which were touted as "sufficient under the rules and . . . intended to indicate the simplicity and brevity of the statement which the rules contemplate," FED. R. CIV. PROC. 84, have been cast into doubt by *Iqbal*. *See, e.g.*, FED. R. CIV. P. Form 9 (setting forth a complaint for negligence in which the plaintiff simply states, "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway").[43]

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[43] *Twombly* seemingly approved of the adequacy of pleading under Form 9, distinguishing the notice given in the model form from the notice given in the complaint in *Twombly*. *See Twombly*, 550 U.S. at 565 n.10 (noting that the lack of notice in the complaint in *Twombly* "contrasts sharply with the model form for pleading negligence," and that "[w]hereas the model form [9] alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place"). The Court explained that "[a] defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer;

Id. at *8 (emphasis added) (alteration and omissions in original). The court dismissed the complaint, but granted leave to amend. *Id.* at *9.

- ***Ibrahim v. Dep't of Homeland Sec.***, No. C 06-00545 WHA, 2009 WL 2246194 (N.D. Cal. Jul. 27, 2009). The plaintiff sued because her name was placed on a "no-fly list" and she encountered numerous difficulties as a result. In part, the plaintiff's suit involved discrimination claims against the San Francisco Airport, the City and County of San Francisco, the San Francisco Police Department, and two San Francisco police officers (collectively, the "San Francisco defendants"), and John Bondanella, an employee of the private corporation United States Investigations Services, Inc. The plaintiff alleged that the San Francisco defendants and Bondanella discriminated against her on the basis of her national origin and religious beliefs by detaining her. *Id.* at *8. The court concluded that the allegation that the plaintiff was placed on the non-fly list did not support the discrimination claim against these defendants because the list was compiled and maintained by the federal government, not the defendants. *Id.* at *9. The court found that the allegations that the plaintiff was arrested because she was Muslim and a Malaysian citizen and that the defendants acted in a discriminatory manner, with the intent to discriminate based on the plaintiff's religion and national origin, were conclusory statements that were not sufficient to survive a motion to dismiss. *Id.* The court explained:

> Ibrahim has not pleaded that defendants took action because of and not merely in spite of her being a Muslim and a Malaysian citizen. That plaintiff was Muslim and detained is not enough to draw an inference of discrimination under the *Iqbal* standard. No additional facts, such as derogatory statements, are alleged. Accordingly, as pled, the discrimination claims against San Francisco officers or Bondanella are insufficient.

Id. at *10. The court questioned whether *Iqbal* imposed a harsh standard:

> *A good argument can be made that the* Iqbal *standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court*. Yet, the harshness is mitigated here. Counsel for the San Francisco defendants and Bondanella admit that plaintiff's Fourth Amendment claim can go forward. This means that discovery will go forward. During discovery, Ibrahim can inquire into facts that bear on the incident, including why her name was on the list. If enough facts emerge, then she can move to amend and to reassert her

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a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin." *Id.*

discrimination claims at that time.

Id. (emphasis added). The court also concluded that the allegation that one of the officers temporarily removed the plaintiff's hijab to search underneath did not adequately plead an equal protection violation. *Ibrahim*, 2009 WL 2246194, at *10.

- ***Consumer Prot. Corp. v. Neo-Tech News***, No. 08-1983-PHX-JAT, 2009 WL 2132694 (D. Ariz. Jul. 16, 2009). The plaintiff alleged a violation of the Telephone Consumer Protection Act of 1991 (TCPA), civil conspiracy, and aiding and abetting a violation of the TCPA, based on the plaintiff's receipt of an unsolicited fax advertising a stock. *Id.* at *1. The court cited both *Twombly* itself and pre-*Twombly* case law for the proposition that "a 'plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 555; citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court applied the two-prong approach suggested in *Iqbal*, and concluded that while some allegations were conclusory, the allegations that the defendant knew the faxes were advertisements, participated in the preparation of the faxes, provided or obtained the fax numbers of the plaintiff and other class members, paid a third party for transmission, and/or knew that the faxes were not authorized, were factual and entitled to a presumption of truth. *Id.* at *2. The court explained that "unlike in *Ashcroft*, the factual allegations d[id] not describe parallel conduct; rather they describe[d] a clear violation of the TCPA." *Id.* The court also noted that "[o]n a motion to dismiss, we are required to assume that all general allegations embrace whatever specific facts might be necessary to support them," and concluded that the plaintiff was not required to detail how the fax constituted an advertisement. *Id.* at *3. With respect to the civil conspiracy claim and the aiding and abetting claim, the court found that the facts alleged, taken as true, supported both of those claims and were incompatible with any lawful behavior. *Consumer Prot. Corp.*, 2009 WL 2132694, at *4. The motion to dismiss was denied.

- ***Padilla v. Yoo***, 633 F. Supp. 2d 1005 (N.D. Cal. 2009). The plaintiff's claims arose out of his designation as an "enemy combatant" and his resulting detention. *See id.* at 1012. The plaintiff alleged that the defendant, the Deputy Attorney General in the Office of Legal Counsel for President George W. Bush, was responsible for the harsh treatment plaintiff received as an enemy combatant, which allegedly resulted from policies implemented under the defendant's counsel. *See id.* at 1014–15. Among the violations of rights that the plaintiff alleged were: denial of access to counsel, denial of access to court, unconstitutional conditions of confinement, unconstitutional interrogations, denial of freedom of religion, denial of the right to information, denial of the right to association, unconstitutional military detention, denial of the right to be free from unreasonable seizures, and denial of due process. *See id.* at 1016–17. The court concluded that the plaintiff had stated a sufficient *Bivens* claim. *Id.* at 1030. In considering qualified immunity, the court found that the allegations contained "sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights." *Id.* at 1034. The court distinguished *Iqbal*, explaining that "[h]ere, in contrast, Padilla allege[d] with

specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla allege[d] were unlawful." *Padilla*, 633 F. Supp. 2d at 1034 (footnote omitted). With respect to the allegations of constitutional violations, the court concluded that "[t]he allegation that Padilla was denied any access to counsel for nearly two years [wa]s sufficient to state a claim for violation of his access to courts"; that Padilla had stated a claim for violation of the Eighth Amendment (although the claim had to be analyzed under the Due Process Clause of the Fourteenth Amendment); and that "[b]ecause there [wa]s no allegation in the complaint . . . that Padilla was ever made to be a witness against himself or that his statements were admitted as testimony against him in his criminal case, he ha[d] not stated a claim for violation of the Self-Incrimination Clause of the Fifth Amendment." *Id.* at 1035–36. The court concluded that qualified immunity did not apply because the violations alleged involved clearly established constitutional rights, and a reasonable federal officer could not have believed the conduct was lawful. *Id.* at 1038.

District Court Case Law in the Tenth Circuit

- ***Masters v. Gilmore***, 663 F. Supp. 2d 1027, No. 08-cv-02278-LTB-KLM, 2009 WL 3245891 (D. Colo. Oct. 5, 2009). The claims arose out of the plaintiff's conviction in a case involving the murder of Peggy Hettrick. Masters, who was fifteen at the time of the murder, was arrested more than eleven years after the murder, and was convicted and sentenced to life in prison. *Id.* at *2. Nearly a decade later, Masters's conviction was vacated based on post-conviction motions, and the charges against him were dismissed. *Id.* In his complaint, Masters asserted claims against VanMeveren (the district attorney for the Eighth Judicial District during the time of the murder and Masters's conviction), Abrahamson (VanMeveren's successor), Gilmore (a deputy district attorney who assisted in the investigation of the murder and was lead counsel in the prosecution and trial of Masters), and Blair (a deputy district attorney who worked on the murder case and was second chair in the prosecution and trial of Masters). *Id.* The complaint contained numerous allegations against the defendants, including, among other allegations, that Gilmore and/or Blair engaged in misconduct such as targeting only Masters as a suspect; withholding the results of a 1988 surveillance of Masters that contradicted the theory that Masters was guilty; failing to investigate several other potential suspects; failing to recuse themselves from the case despite the fact that Gilmore and Blair had connections to one of the other potential suspects; authorizing the release and destruction of evidence relating to other potential suspects; manufacturing expert opinions by disclosing only selected evidence and withholding exculpatory evidence; and ignoring, hiding, withholding and/or destroying the opinions proffered by other experts as well as other potentially exculpatory evidence. *See id.* at *2–6. The complaint alleged that VanMeveren was regularly and thoroughly briefed on the investigation and prosecution of Masters, consulted closely with Gilmore and Blair throughout the investigation and prosecution, was informed of the results of the 1988 surveillance and the conflict of interest that Gilmore and Blair had with another potential suspect, agreed not to investigate one of the other potential suspects, allowed the destruction of evidence, failed to recuse the district from the case, and failed to take action to address

doubts as to Masters's guilt raised by a police detective. *See id.* at *6. The complaint also alleged that VanMeveren failed to adequately train and supervise his subordinates and had customs, policies, and/or actual practices that allowed the alleged misconduct. *See id.* at *7. With respect to Abrahamson, the complaint alleged that he was responsible for managing the district's personnel, that he was responsible for assigning deputy district attorneys to the post-conviction investigation, and that his customs, policies, and/or actual practices allowed the alleged misconduct. *Masters*, 2009 WL 3245891, at *7. The complaint made similar allegations against the Eighth Judicial District. *Id.* at *8.

Masters asserted claims under § 1983 for malicious prosecution, destruction and/or hiding of exculpatory evidence, manufacture of inculpatory evidence, unreasonable seizure/arrest without probable cause, false imprisonment, fundamental unfairness of his criminal trial in violation of his rights under the Fourth and Fourteenth Amendments, and conspiracy to violate his civil rights. *Id.* The defendants moved to dismiss, largely relying on absolute prosecutorial immunity, qualified immunity, and Eleventh Amendment immunity. *Id.*

With respect to Gilmore, the court concluded that he was entitled to absolute prosecutorial immunity as to his involvement in the preparation and filing of the affidavit supporting the 1998 arrest warrant, his alleged failure to conduct an investigation of the murder separate from the police department, and conduct following Masters's arrest and at trial, but concluded that the allegation that Gilmore destroyed exculpatory evidence was not covered by prosecutorial immunity, regardless of when it occurred. *Id.* at *10, *18. The court also concluded that Gilmore was not entitled to qualified immunity. *Id.* at *16. The false arrest and false imprisonment claims failed because Masters was arrested pursuant to a warrant. *Masters*, 2009 WL 3245891, at *16. The court declined to dismiss the claim against Gilmore based on the fundamental unfairness of Masters's trial in violation of his substantive due process rights, concluding that the allegations, taken as true, shocked the court's conscience. *Id.* at *17. The court also declined to dismiss the claims alleging destruction and/or hiding of exculpatory evidence, manufacture of inculpatory evidence, and unfairness of the criminal trial, on the argument that they were duplicative of the malicious prosecution claim, finding it inappropriate "to dismiss them solely to streamline the litigation at this early stage in the proceedings." *Id.*

With respect to Blair, the court found her to be absolutely immune for her involvement in the preparation and filing of the affidavit supporting the 1998 arrest warrant, her failure to conduct an independent investigation of the murder, and her conduct following the arrest, except the destruction of evidence. *Id.* at *22. The complaint contained other allegations regarding Blair's misconduct occurring before the affidavit supporting the arrest or involving destruction of evidence, and the court rejected Blair's argument that those allegations had to be dismissed as insufficiently specific. *Id.* at *18. The court explained:

> Mr. Masters has alleged that Ms. Blair worked with other Defendants to manufacture probable cause that Mr. Masters committed the Hettrick murder before a decision to charge him for the crime was

> made. Mr. Masters has further alleged specific acts and omissions by Ms. Blair that would serve this objective including her alleged hiding, ignoring and/or destruction of exculpatory evidence. *Although Mr. Masters' Amended Complaint does not set forth specific dates on which Ms. Blair performed specific acts, the pleading standards under FED R. CIV. P. 8 as recently refined by* Twombl[]y*,* supra*, and* Ashcroft*,* supra*, do not require this level of specificity*. *See Twombl[]y*, 550 U.S. at 555 (plaintiff need not provide "detailed factual allegations" to survive motion to dismiss).

Id. (emphasis added). The court permitted the malicious prosecution claim against Blair to proceed based on her alleged knowing fabrication of probable cause and incriminating expert opinions. *Masters*, 2009 WL 3245891, at *20. The claim based on destruction and/or hiding of an exculpatory expert report could proceed despite Blair's argument that the expert opinions were obtained before she was involved in the murder case because "the time when Dr. Tsoi provided his opinions regarding the case and when the evidence of these opinions was allegedly destroyed [we]re not specified in the Amended Complaint, and it [wa]s plausible that the alleged destruction occurred sometime after April of 1998 [when Blair began work on the case]." *Id.* Prosecutorial immunity did not apply to the § 1983 claim for relief based on the alleged manufacture of inculpatory evidence because the complaint alleged "that there was no probable cause to arrest [the plaintiff] at the time [the expert] began working on the Hettrick murder case sometime before December of 1997 and for some period of time thereafter," and "[d]uring this period of time, it c[ould not] be said that [the expert's] work on the case was done in preparation for trial such that the immunity typically afforded prosecutors in dealing with trial witnesses [wa]s applicable." *Id.* The court found that the claims for false arrest and false imprisonment failed because Blair was entitled to absolute immunity and because Masters was arrested pursuant to a warrant. *See id.* at *21. The court also concluded that Blair was not entitled to prosecutorial immunity with respect to the claims regarding fundamental unfairness of the criminal trial and conspiracy. *Id.* at *22.

With respect to VanMeveren, the court rejected his argument that the claims against him were insufficient under *Twombly* and *Iqbal*. The court explained:

> Mr. Masters alleges that Mr. VanMeveren (1) was regularly and thoroughly briefed by and consulted closely with Defendants Gilmore and Blair throughout the investigation and prosecution of Mr. Masters; (2) was specifically aware of the results of the 1988 surveillance and the conflict of interest that Defendants Gilmore and Blair had with any investigation of [another potential suspect]; (3) allowed Mr. Gilmore to participate in [this other suspect's] investigation and to offer [the other potential suspect's wife] immunity; and (4) *upon information and belief*, agreed not to investigate [this other potential suspect] as a suspect, allowed for the

> destruction of evidence in the case, and failed to recuse the Eighth Judicial District from the Hettrick murder case.
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> Mr. VanMeveren argues that *Ashcroft* dictates that a plaintiff seeking to impose supervisory liability on a § 1983 defendant must allege more than that the particular defendant "knew of, condoned, and willfully and maliciously agreed to" violate a plaintiff's constitutional rights. Although such allegations were held to be insufficient in Ashcroft, the plaintiffs' claims there are distinguishable from those of Mr. Masters. Specifically, the plaintiff in *Ashcroft* brought a *Bivens* action for discrimination in violation of the First and Fifteenth Amendments. Such claims require a plaintiff to plead and prove that the defendant acted with discriminatory purpose. *Ashcroft*, 129 S.Ct. 1948. *As a result of this particular requirement, the Supreme Court concluded that mere knowledge on the part of the supervisor was an insufficient basis for* Bivens *liability, which it treated as equivalent to § 1983 liability*. The Supreme Court prefaced its analysis of this issue by recognizing that "[t]he factors necessary to establish a *Bivens* [or § 1983] violation *will vary with the constitutional provision at issue*."
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> *Ashcroft* thus *does not support the general proposition that allegations of knowledge, acquiescence, and agreement on the part of a supervisory defendant are never sufficient to support a § 1983 claim*. In any event, Mr. Masters' Amended Complaint goes further and alleges that Mr. VanMeveren "consulted closely" and plausibly participated with Defendants Gilmore and Blair throughout the investigation and prosecution of Mr. Masters.

Id. at *23 (emphasis added) (fourth and fifth alterations in original) (internal citations omitted). The court held that "[i]n view of Mr. VanMeveren's substantial personal participation with the investigation and prosecution of Mr. Masters as alleged in the Amended Complaint, . . . Mr. Masters ha[d] adequately pled the required elements of supervisory liability under § 1983," and had provided "fair notice of the nature of Mr. Masters' claims against [VanMeveren]." *Masters*, 2009 WL 3245891, at *24. The court concluded that VanMeveren was absolutely immune for involvement in the preparation and filing of the affidavit supporting the 1998 arrest warrant, alleged failure to conduct an investigation of the Hettrick murder independent of the police department, and conduct following Masters's arrest and at trial, except any involvement in the destruction of evidence. *Id.* at *25. The court also dismissed the claims predicated on VanMeveren's role as a supervisor responsible for training and/or creating the policies, practices, and customs of the district, after the plaintiff conceded that they could not proceed, and dismissed the false imprisonment and false arrest claims because they were predicated on conduct done pursuant to a warrant and for which VanMeveren was absolutely immune. *See id.*

Finally, with respect to the claims against Abrahamson and the Eighth Judicial District, the court dismissed the false arrest and false imprisonment claims for failure to state a claim based on the existence of a warrant, but found that Eleventh Amendment immunity did not apply, and, because these claims were not for individual liability under § 1983, "none of the limitations recognized on the remaining claims against the other DA Defendants [we]re applicable to these Defendants." *Id.* at *27.

- ***Bell v. Turner Recreation Comm'n***, No. 09-2097-JWL, 2009 WL 2914057 (D. Kan. Sept. 8, 2009). In a Title VII case alleging unlawful discrimination and retaliation, the court rejected the defendants' argument that the complaint failed to allege enough facts under *Iqbal*.[44] The court noted that:

> With respect to her discrimination claim, plaintiff alleges that her supervisor, Becca Todd, routinely treated plaintiff less favorably than she treated similarly situated white employees by assigning plaintiff less desirable tasks; reducing plaintiff's hours while increasing the hours of white employees; subjecting plaintiff to heightened scrutiny in her job performance; and requiring plaintiff to adhere strictly to her work schedule while permitting white employees to arrive late and take extended breaks. She further alleges that her supervisor refused to socialize with plaintiff but routinely socialized with white employees and that her supervisor excluded plaintiff from certain activities that were made available to white employees. Finally, she contends that she received two written reprimands on February 7, 2009 on the basis of her race and that she was suspended and ultimately terminated on the basis of her race.

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[44] The Northern District of Oklahoma has also confirmed that *Twombly* and *Iqbal* apply to employment discrimination cases. *See Coleman v. Tulsa County Bd. of County Comm'rs*, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009). In *Coleman*, the court cited pre-*Twombly* case law for the propositions that conclusory allegations need not be accepted as true and that factual averments are necessary to adequately state a claim. *See id.* at *2 (citing *Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1154–55 (10th Cir. 2001); *Hall v. Bellmon*, 935 F.2d 1106, 1109–10 (10th Cir. 1991)). In considering the plaintiff's claims of retaliation and hostile work environment, the court noted that the complaint did "not reference a single date on which any event occurred, nor [did] it identify which of defendant's employees harassed her or describe any of the harassing statements," and that although the plaintiff alleged that the defendant took "'unreasonabl[e] disciplinary action' against her and subjected her to adverse employment action," she did not explain the disciplinary action. *Id.* at *3. The court stated that "[w]hile plaintiff is correct that *Twombly* does not impose a demanding pleading standard, she must still state a claim that is plausible on its face and allege enough facts to support a claim that defendant has unlawfully discriminated against her." *Id.* The court noted that the plaintiff did not provide "any factual allegations describing the alleged hostile work environment and, for her retaliation claims, she d[id] not even state how defendant allegedly retaliated against her." *Id.* The court found that "while *Twombly is not a demanding standard*, it does require plaintiff to allege some facts in support of her claims." *Id.* (emphasis added). The court noted that the complaint might have survived under *Conley*, but that "[t]he allegations . . . [w]ere so general that it [wa]s not possible for the Court to determine if plaintiff ha[d] stated a claim." *Coleman*, 2009 WL 2513520, at *3. The court granted leave to amend. *Id.*

Id. at *3. The court found that these allegations were "more than sufficient to satisfy the pleading standards set forth in *Twombly* and *Iqbal*." *Id.* With respect to the retaliation claim, the court noted that the plaintiff alleged that she complained to her supervisor that she was being treated less favorably than the white lifeguards; that she complained in writing to her supervisor's supervisor that she was subject to racial discrimination; that one hour and fifteen minutes after the latter complaint, she was suspended; and that she was terminated upon returning to work after suspension. *Id.* The court concluded that "Plaintiff, then, ha[d] clearly alleged specific facts showing that she was treated less favorably than similarly situated white employees and that she suffered an adverse action and, with respect to her retaliation claim, that she complained to her employer about racial discrimination in the work place and that she suffered an adverse employment action as a result of that complaint." *Id.* The court explained that "[*n*]*othing more is required under the law*" and that "it is difficult to imagine what more the court could require of plaintiff in terms of pleading her claims with specificity." *Id.* (emphasis added).

- ***Clark v. Nweke***, No. 04-cv-02414-LTB-KMT, 2009 WL 3011117 (D. Colo. Sept. 16, 2009). The plaintiff alleged violations of the Eighth Amendment in connection with medical treatment he received in state prison. The plaintiff alleged that a prison doctor failed to provide necessary surgery in a timely manner, but the court concluded that the claim could not proceed because the plaintiff "failed to allege any facts showing that he had a need for 'immediate surgery' that was 'so obvious that even a lay person would easily recognize' it," *id.* at *4 (quoting *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000)), and had therefore "failed to sufficiently allege that he had an objectively serious medical need for 'immediate surgery' . . . ," *id.* The court also concluded that the plaintiff failed make any allegations that the doctor "had 'sufficiently culpable state of mind.'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 (1970)).[45]

District Court Case Law in the Eleventh Circuit

- ***NCI Group, Inc. v. Cannon Servs., Inc.***, No. 1:09-CV-04410-BBM, 2009 WL 2411145 (N.D. Ga. Aug. 4, 2009). The plaintiff, a business that manufactures metal buildings, metal components, and metal coil coatings, alleged that the defendants operated several schemes to defraud the plaintiff and its clients. *Id.* at *1. The complaint detailed the alleged schemes, which included kickbacks paid to the plaintiffs' employees. *See id.* at *2. The complaint asserted claims for fraud, conversion, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with contractual or business relations, negligence, violations of the Federal Civil Racketeer Influenced and Corrupt Organizations Act, and

[45] *See also Johnson v. Liberty Mutual Fire Ins. Co.*, 653 F. Supp. 2d 1133, 1145 (D. Colo. 2009) (In considering a complaint alleging that the plaintiffs' insurance company acted in bad faith in destroying evidence that the plaintiffs needed in a later lawsuit against a driver who hit one of the plaintiffs, the court noted that "[t]he only clear allegation by the Plaintiffs of Liberty's state of mind [wa]s the allegation that Liberty 'knew, or should have known, of [the] evidentiary significance of the Johnsons' claims' of the taillights," and concluded that, as explained in *Twombly* and *Iqbal*, this "entirely conclusory" allegation was not sufficient under Rule 12(b)(6). (third alteration in original)).

violations of the Georgia Racketeer Influenced and Corrupt Organizations Act. *Id.* at *3. Among other arguments, one group of defendants (the "Goldin Defendants") argued that the complaint failed to properly assert the federal RICO claims because it "failed to adequately allege the existence of (1) an enterprise; (2) a pattern of racketeering activity; (3) predicate acts; (4) relatedness; (5) continuity; and (6) relationship." *Id.* at *7. The court rejected that argument:

> The court finds that NCI has sufficiently pled claims against the Goldin Defendants for violations of federal RICO, 18 U.S.C. § 1962(b)–(d) so as to survive the Motion to Dismiss. NCI has alleged facts supporting the existence of an enterprise—asserting that "the Defendants were operating several related schemes to defraud NCI and the Clients," and describing with particularity the overlapping participation of individuals in the schemes, as well as specific acts undertaken by Defendants "as part of the NCI-Targeted Scheme." The underlying acts alleged, *inter alia*, violations of 18 U.S.C. §§ 1957 [(which prohibits "'[e]ngaging in monetary transactions in property derived from specified unlawful activity'")] and 2320 [(which prohibits "'[t]rafficking in counterfeit goods or services'")], . . . constitute racketeering activity pursuant to 18 U.S.C. § 1961(1)(B). Likewise, NCI has asserted and described that the pattern of racketeering the Goldin Defendants engaged in constituted two or more acts within the last ten years, as required by the statute. The continuity element is satisfied, as NCI has alleged that the NCI-Targeted Scheme "operated continually from approximately 1995 until 2006." Consequently, in its Amended Complaint, NCI sets forth ample factual allegations, accepted as true for the purposes of this Motion, which are sufficient to state a claim for violations of 18 U.S.C. § 1962(b)–(d). *See M.T.V.*[*v. DeKalb County Sch. Dist.*], 446 F.3d [1153,] 1156 [(11th Cir. 2006)]; *Iqbal*, 129 S. Ct. at 1949. As a result, NCI's Amended Complaint gives the Goldin Defendants "fair notice of what the . . . claim[s] [are] and the grounds upon which [they] rest [ ]." *Twombly*, 550 U.S. at 555. Therefore, the court denies the Goldin Defendants' Motion to Dismiss the federal RICO claims found in Count 8 of NCI's Amended Complaint.

Id. at *10 (second, fourth, eighth, ninth, tenth, and eleventh alterations in original) (footnotes and additional internal citations omitted). The court noted:

> In arguing for dismissal of NCI's claims, the Goldin Defendants *repeatedly seek to hold NCI to a standard that is unrealistic given the current posture of the case*. At the Motion to Dismiss stage, discovery *has not yet been conducted*. "[T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it

> demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949 (citation and internal quotations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face . . . [or] plead [ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citations and internal quotations omitted).

NCI Group, 2009 WL 2411145, at *10 n.7 (first emphasis added) (alterations and omission in original).

The court also rejected the defendants' request for dismissal of the fraud claim, finding the allegations in the complaint sufficient:

> NCI alleges that the Defendants conspired and engaged in conduct constituting fraud, including but not limited to: (1) falsifying and manipulating MCG's and MCM's computer records; (2) developing, implementing, participating in, and profiting from the NCI-Targeted Scheme; (3) concealing the NCI-Targeted Scheme from NCI; (4) incorrectly designating or labeling coil as secondary or scrap; and (5) concealing evidence of kickbacks, bribes or other related benefits. It incorporates the allegations made previously in the Amended Complaint that describe in detail the Goldin Secondary Scheme. NCI alleges that the fraud occurred through false representations stemming from both affirmative acts and omissions, known to be false, and intentionally made to induce NCI to act or refrain from acting. NCI further states that as a result, it justifiably relied on these acts and omissions, and suffered damages in the course of this reliance. Taking its allegations to be true, NCI's Amended Complaint contains enough factual allegations to state a claim for fraud. In other words, NCI has "alleged enough facts to suggest, raise a reasonable expectation of, and render plausible," its fraud claim against the Goldin Defendants. *Watts*[*v. Fla. Int'l Univ.*], 495 F.3d [1289,] 1296 [(11th Cir. 2007)].

Id. at *11.

The court found the allegations supporting the Georgia RICO claim sufficient as well:

> NCI has sufficiently stated a claim for violations of Georgia RICO § 16-14-4(a)–(c) against the Goldin Defendants. NCI alleges that the Goldin Defendants engaged in at least two acts of racketeering activity, in furtherance of one or more incidents,

> schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission. O.C.G.A. § 16-14-3(8)(A). O.C.G.A. § 16-14-3(9)(A)(xxix) specifies that racketeering activity consists of "[a]ny conduct defined as 'racketeering activity' under 18 U.S.C. Section 1961(1)(A), (B), (C), and (D)," and the court has already found that NCI has properly alleged facts supporting the Goldin Defendants' violations of 18 U.S.C. § 1957 and 18 U.S.C. § 2320, which constitute racketeering activity under federal RICO. Therefore, NCI's allegations as to predicate acts pursuant to Georgia RICO are sufficient. NCI's factual allegations that the Goldin Defendants violated O.C.G.A. § 16-14-4(a)–(c) are sufficient to state a well-pleaded claim.

Id. at *13 (alteration in original) (footnotes omitted).

The conversion claim was held to be sufficient as well:

> NCI alleges that as part of the NCI-Targeted Scheme, Defendants removed and sold steel coils, without authorization, that they knew NCI or its clients owned or possessed. NCI further asserts that in turn, Defendants benefitted from the unauthorized removal of steel coils. It states that as part of this scheme, the Defendants exercised the right of ownership over and took possession of NCI's property, and/or exhibited acts of dominion over NCI's property or hostility toward NCI's property rights. As previously noted, NCI describes in detail the roles of each of the Goldin Defendants in the Goldin Secondary Scheme, and the specifics of this scheme. Taken as true for the purposes of this Motion, NCI has asserted facts that sufficiently alleged a claim for conversion against the Goldin Defendants.

Id. at *14 (internal citation omitted).

The claim for aiding and abetting breach of fiduciary duty was also adequately pleaded:

> In its Amended Complaint, NCI alleges that through improper action or wrongful conduct that was unauthorized, the Goldins acted to procure a breach of certain NCI employees. In its description of the Goldin Secondary Scheme, NCI makes clear that the Goldin Defendants made arrangements and agreements with Mr. Carroll that resulted in a breach of his fiduciary duties—namely directing employees to perform work on the Goldin Coils, incorrectly charging the Goldin Defendants, placing a fake Master Coaters' trademark on the coils, and receiving kickbacks for his actions. NCI further alleges

> that the Goldin Defendants knew that the NCI employees, in particular Mr. Carroll, owed NCI a fiduciary duty "by virtue of [his] employment" acting purposely and with malice and intent to injure NCI. Finally, NCI alleges that the Goldin Defendants' "wrongful conduct proximately caused damages to NCI."
>
> In alleging a claim for aiding and abetting breach of fiduciary duty, NCI has satisfied its burden of alleging "enough facts to suggest, raise a reasonable expectation of, and render plausible" its claim. *Watts*, 495 F.3d at 1296. The allegations, if true, state a claim for violation of Georgia's law prohibiting aiding and abetting breach of fiduciary duty.

Id. at *14–15 (alteration in original) (internal citation and footnote omitted).

The court also found that the allegations supporting the claim for tortious interference with contractual or business relations were sufficient:

> In its Amended Complaint, NCI has alleged a number of facts supporting its assertion of improper and wrongful conduct on the part of the Goldin Defendants due to their participation in the Goldin Secondary Scheme. NCI says that the Goldin Defendants "intentionally and maliciously carried out" the schemes to cause NCI damages. NCI alleges further that in so doing, the Goldins induced NCI employees to breach their contractual obligations with NCI. As has been described previously, NCI alleged that the Goldin Secondary Scheme involved the Goldin Defendants and Mr. Carroll, an employee of NCI. NCI explains that the contractual obligation to which it refers is Mr. Carroll's employment agreement with NCI, and the court similarly finds this to be sufficiently clear from the allegations in the Amended Complaint. NCI also alleges that the Goldin Defendants caused NCI's customers to discontinue or fail to enter into anticipated business relationships with NCI by virtue of the NCI-Targeted Scheme. Finally, NCI states that the Goldin Defendants' tortious conduct was the proximate cause of damage to it.
>
> NCI has adequately alleged facts which are sufficient to state a claim for tortious interference with business or contractual relations under Georgia law . . . .

Id. at *15 (internal citations and footnotes omitted). The court noted that the plaintiff had "not alleged any actual facts to support" its claim that the Goldin Defendants caused the plaintiff's customers to discontinue or fail to enter into anticipated business relationships

with the plaintiff as a result of one of the alleged schemes, *NCI Group*, 2009 WL 2411145, at *15 n.14 (citing *Twombly*, 550 U.S. at 555), but concluded that "because NCI ha[d] alleged facts sufficient to support its claim that the Goldin Defendants induced a breach of Mr. Carroll's contractual obligations with NCI, this failure [wa]s not fatal to the claim." *Id.*

Finally, the court found the allegations supporting the negligence claim sufficient. The plaintiff had incorporated previous factual allegations, and "allege[d] that the Goldin Defendants 'owed NCI a duty of good faith and fair dealing' as well as 'a duty of ordinary care'"; "assert[ed] that the Goldin Defendants breached these duties to NCI 'by participating in and profiting from the NCI-Targeted Scheme'"; and "allege[d] that as a result it ha[d] suffered damages." *Id.* at *16. The court noted that while "the duty of good faith and fair dealing is an implied duty imposed upon parties to a contract, applicable to the contract's 'performance and enforcement,'" NCI had "neither mentioned nor alleged the existence of a contract between itself and the Goldin Defendants." *Id.* (citation omitted). As a result, the court concluded that "NCI ha[d] not alleged facts which, if accepted as true, [could] support the idea that the Goldin Defendants owed NCI a duty of good faith and fair dealing." *Id.* But the court rejected the defendants' argument that the "negligence claim fail[ed] because 'the complaint charge[d] the Goldins only with *intentional* misconduct, not negligent misconduct.'" *Id.* (citation omitted). The court explained that the allegations were sufficient:

> [T]he Goldin Defendants have not provided, and the court is not aware of, any authority requiring NCI to specifically allege that the conduct was "negligent" in so many words. As set out above, a claim for negligence requires only the elements of duty, breach, causation, and injury. NCI has asserted factual allegations sufficient to support each of these elements, describing in detail the Goldin Defendants' alleged misconduct. Furthermore, the Federal Rules provide for alternative pleading, and parties routinely allege both fraud and negligence claims in their complaints. *See, e.g.*, FED. R. CIV. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); *Reynolds v. Fla. Highway Prods., Inc.*, No. CV507-78, 2008 WL 5430332, at *1 (S.D. Ga. Dec. 31, 2008) (asserting claims for negligence and fraud, both of which survived summary judgment). The court therefore finds that NCI has sufficiently stated a claim for negligence against the Goldin Defendants, and denies their Motion to Dismiss this claim.

NCI Group, 2009 WL 2411145, at *16 (internal citations omitted).

The court dismissed the counterclaims for attorneys' fees and costs. The court explained that

to the extent the claim was predicated on one provision of state statutory law, it could not proceed because the statute was "'unavailable to civil litigants in federal court.'" *Id.* at *17 (quoting *Bruce v. Wal-Mart Stores, Inc.*, 699 F. Supp. 905, 906 (N.D. Ga. 1988)). To the extent the claim was predicated on a state statute providing liability for abusive litigation, the claim was premature because the statute required termination of the proceeding in which the alleged abusive litigation occurred. *Id.* at *18 (citations omitted). The court also found that the defendants "ha[d] not provided, and the court [was] not otherwise aware of, any basis in 'federal law' through which [the defendants] would be entitled to state counterclaims solely for attorneys' fees and costs due to NCI's allegedly frivolous claims against them." *Id.* (footnote omitted).

The court then considered the request of one of the defendants for a more definite statement of cross-claims for contribution and indemnification. The court cited a pre-*Twombly* case for the proposition that a complaint must contain enough detail to provide notice of the claim:

> "While the requirements of pleading under the Federal Rules are 'liberal,' and a litigant need not allege a specific fact to cover every element or allege with precision each element of a claim . . . a pleader *must at least provide his opponent with 'fair notice of what [his] claim is and the grounds upon which it rests*.'"

Id. at *19 (emphasis added) (omission and alteration in original) (quoting *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1294 (N.D. Ga. 2005) (quoting *Conley*, 355 U.S. at 47)). The court cited the same pre-*Twombly* case to emphasize that "'a plaintiff should include in his pleading some brief factual description of the circumstances surrounding the acts or omissions upon which he bases his claim for relief.'" *Id.* (quoting *Parker*, 377 F. Supp. 2d at 1294). The court granted the motion for a more definite statement, finding that the cross-claimants "failed to identify 'the grounds upon which [their claims] rest[ ],'" *NCI Group*, 2009 WL 2411145, at *19 (alterations in original) (quoting *Parker*, 377 F. Supp. 2d at 1294), and explaining that "[f]or example, the cross-claims d[id] not specify whether Ms. Coker and Mr. Coots [sought] contribution under state or federal law," and "the cross-claims [did not] specify the nature of any duty owed by Mr. Byers to Ms. Coker and Mr. Coots which might be the basis for a contribution claim." *Id.*

- ***Ansley v. Florida, Dep't of Revenue***, No. 4:09cv161-RH/WCS, 2009 WL 1973548 (N.D. Fla. Jul. 8, 2009). The plaintiff's employment discrimination claims failed to allege sufficient facts. The court noted that *Swierkiewicz* does not require "a complaint [to] allege with precision all the elements of a cause of action," *id.* at *1 (citing *Swierkiewicz*, 534 U.S. at 514–15), but explained that the complaint was insufficient:

  > The plaintiff asserts claims of gender discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended and disability discrimination in violation of the Florida Civil Rights Act.

> But the plaintiff does not say what the alleged reason—the pretextual reason—for the firing was. He does not even allege the reason was false; a reason can be true but still pretextual if it was not the real reason for the decision. He does not allege a factual basis for the conclusion that the others who were treated better were similarly situated. He does not allege his medical condition and thus does not allege a factual basis for his claim that it—or the defendant's perception of it—entitled him to protection under the Florida Civil Rights Act. He does not allege a claim under the Family and Medical Leave Act and does not explain how his father's illness—also unexplained—entitled the plaintiff to protection under the Florida Civil Rights Act.

Id. at *2. The court noted that "*[t]hese allegations might have survived a motion to dismiss prior to* Twombly *and* Iqbal," but held that "now they do not." *Id.* (emphasis added). The court stated that an employment-discrimination plaintiff "must allege facts that are either (1) sufficient to support a plausible inference of discrimination, or (2) sufficient to show, or at least support an inference, that he can make out a prima facie case under the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny." *Id.* The court concluded that "[t]he plaintiff ha[d] not done so," but granted leave to amend. *Id.*