

TAMING *TWOMBLY*: AN UPDATE AFTER *MATRIX*

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I

INTRODUCTION

For better or worse, my approach to *Twombly*¹ and *Iqbal*² has been one of accommodation rather than battle, seeking, in the common law tradition, to assimilate these decisions into the body of law of which they are a part. I have suggested strategies for lawyers to use in response to these decisions.³ I have also proposed a Rule amendment that I believe meets the primary concerns of both the plaintiff and defense bar.⁴ For these efforts, I have been called an optimist⁵—a charge to which I plead guilty.

I see little hope of these decisions being overruled.⁶ Unlike some areas, including federalism, the First Amendment, and substantive due process, where justices have adhered to their dissenting views and refused to accept their losses as binding precedent,⁷ no one on the Supreme Court seems inclined to refight

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This article is also available at <http://www.law.duke.edu/journals/lcp>.

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1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
2. *Ashcroft v. Iqbal*, 555 U.S. 662 (2009).
3. See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010).
4. See Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24 (2010).
5. See Kevin Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 840 n.69 (2010).
6. Cf. Luke Meier, *Why Twombly is Good Law (But Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. (forthcoming 2012), available at <http://ssrn.com/abstract=1734791>.
7. See, e.g., *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 163–64 (2003) (Kennedy, J., concurring in the judgment) (adhering to his view that earlier decisions “misapprehended basic First Amendment principles” and giving those decisions no precedential weight); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 431 (2003) (Ginsburg, J., dissenting) (adhering to her view regarding due process limitations on punitive damages); *Alderman v. United States*, 131 S. Ct. 700, 702 n.2 (2001) (Thomas, J., dissenting from denial of certiorari) (noting his adherence to his “previously stated views on the proper scope of the Commerce Clause”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting in part) (“I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.”); *Alden v. Maine*, 527 U.S. 706, 800 n.33, 814 (1999) (Souter, J., dissenting) (adhering to the view that the “Eleventh Amendment was never intended to bar federal-question suits against the States in federal court” and describing the majority’s approach as “probably . . . fleeting”); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (noting his “continuing adherence to the view that the so-called ‘negative’ Commerce Clause is an unjustified judicial invention, not to be expanded beyond

Twombly and *Iqbal*. In the past term, both Justice Ginsburg and Justice Sotomayor have authored opinions for the Court that rely on the *Twombly* and *Iqbal* precedents.⁸ With these Justices accommodating themselves to *Twombly* and *Iqbal*, overruling is nearly impossible to imagine. Nor have I seen anything suggesting that a Rule amendment repudiating them outright would have any traction, particularly with the Federal Judicial Center's report to the Judicial Conference Advisory Committee on Civil Rules unable to find any statistically significant increase in the rate at which motions to dismiss for failure to state a claim have been granted (except in cases challenging financial instruments).⁹ And despite my friend Steve Burbank's valiant efforts,¹⁰ I also think that the prospect of Congressional repudiation died with the 111th Congress, especially with the defeat of Senator Arlen Specter. As far as I can see, accommodation is the only game in town.

My route to this accommodationist approach is worth explaining. My work on this issue began with a presentation at the Thirty-Second Annual Judicial

its existing domain").

8. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1314 (2011) (Sotomayor, J., for a unanimous court) (holding that plaintiffs "have alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material"); *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (Ginsburg, J.) (stating that Rule 8(a)(2) "generally requires only a plausible 'short and plain' statement of the plaintiff's claim"). It is true that *Skinner* does not cite *Twombly* and *Iqbal*, but it does refer to the requirement of plausibility. And *Matrixx* prominently cites both decisions. 131 S. Ct. at 1323.

9. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011). The stability of a grant rate, of course, does not mean that *Twombly* and *Iqbal* are having no significant effect, because lawyers take those decisions into account in making litigation decisions and it may be that defense counsel are filing so many more motions to dismiss that they would not have previously filed that the grant rate remains stable. The FJC study does show an increase in filing motions, but cannot establish whether more cases are being dismissed because the data sets differ.

One study of *Twombly* takes into account that "in response to a legal change, plaintiffs and defendants may change their legal strategy" so that "[t]he rate at which plaintiffs or defendants prevail in litigation may not change, even after a sharp change in how courts decide cases." William H.J. Hubbard, *The Problem of Measuring Legal Change, with Application to Bell Atlantic v. Twombly* (Univ. of Chi., Olin Law & Econ. Program, Working Paper No. 575, 2011), available at <http://ssrn.com/abstract=1883831>. Hubbard finds "fairly precise zeros for the effects of *Twombly* on both the grant rate of motions to dismiss and the overall rate of dismissal among filed cases." *Id.* at 31. However, a forthcoming note that takes party selection into account suggests that *Twombly* and *Iqbal* are having an effect on at least eighteen percent of cases. Jonah B. Gelbach, *Locking the Doors to Discovery? Conceptual Challenges in and Empirical Results for Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. (forthcoming), available at <http://ssrn.com/abstract=1957363>.

My point is not that *Twombly* and *Iqbal* are having no effect, but rather that with substantial empirical study suggesting less effect than critics predicted, the rulemakers are likely to be rather hesitant to repudiate major Supreme Court decisions. See Civil Rules Advisory Committee, Draft Minutes, Apr. 4-5, 2011, 22 (suggesting that the "Court would be receptive if the Committee could show a major problem But that may not be likely[]"). Perhaps if Gelbach's findings are replicated, that may change.

10. See *Hearing on Whether the Supreme Court has Limited Americans' Access to Court Before the S. Comm. on the Judiciary*, 111th Cong. 22 (2009) (Prepared Statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) (arguing for passage of an Act of Congress responding to *Twombly* and *Iqbal*).

Conference of the United States District Court for the District of New Jersey in March of 2008. An academic who treated that audience of district judges, magistrate judges, and practicing lawyers to an argument that a Supreme Court decision was wrong-headed and illegitimate would have been of scant assistance to them. Of course, criticizing judicial decisions is one important role of legal academics, and one in which I happily engage.¹¹ But as I saw it, and continue to see it, another role of legal academics is to help judges and lawyers understand and deal with the legal doctrine that confronts them. For that reason, I am proud rather than embarrassed to be a co-author of a leading practice treatise,¹² a genre of legal writing that is as accommodationist as one can imagine.

Moreover, there has been no shortage of legal academics heaping criticism on the Court. There has been, however, a real shortage of scholarship that might help lawyers and judges to avoid the injustices that those critics feared.

For similar reasons, I do not think that the audience at this conference, consisting primarily of plaintiff's lawyers, would find much value (apart perhaps from the emotional inspiration akin to that from a campaign rally) in hearing yet another critique of *Twombly* and *Iqbal*. Instead, I think the most useful contribution I can make is to provide a bit of a status report on the how efforts to tame *Twombly* and *Iqbal* are faring. My hope is to convince you both to try my strategies and to support my proposal—or at least to tell me why not.

II

WHAT IS CONCLUSORY? WHAT IS PLAUSIBLE?

The basic framework for evaluating a complaint that emerges from these decisions is as follows: A court distinguishes between factual allegations and conclusory allegations. It assumes the truth of the factual allegations, but not the conclusory allegations. Finally, it assesses, using common sense and judicial experience, whether the claim is plausible.¹³

Under this framework, the distinction between factual allegations and conclusory allegations is crucial, for it marks the line between what will be

11. See, e.g., Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553 (2005); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999); Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735 (2003). The last-listed of these articles contributed to a bit of a constitutional crisis in New Jersey earlier this year. See Edward A. Hartnett, *Seeking a Path to Restore Order in the New Jersey Supreme Court*, THE STAR-LEDGER, Dec. 15, 2010, available at 2010 WLNR 24793041; Paul Mulshine, *In This Schoolyard Fight, Christie Could Have Fun During Recess*, THE STAR-LEDGER, Dec. 14, 2010 available at 2010 WLNR 24780246.

12. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE (9th ed. 2007).

13. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“[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.”).

assumed to be true and what will not be assumed to be true. Some have argued that the distinction is incoherent,¹⁴ and some fear an infinite regress: any allegation can be considered “conclusory” in the sense that one can always ask for the underlying information that supports an allegation.¹⁵ I have argued that the label “conclusory,” in the context of *Twombly* and *Iqbal*, should be limited to allegations that are essentially equivalent to the elements of a right of action. So understood, the distinction is not incoherent, and it avoids the risk of an infinite regress.¹⁶ Instead, it works to insist that a plaintiff, in the words of Charles Clark, take “one step further back” from the “final and ultimate conclusion which the court is to make in deciding the case for him.”¹⁷

Some feared that the plausibility test would license judges to evaluate the believability of any (or all) allegations in a complaint. I have argued instead that the plausibility test can be understood as equivalent to the traditional insistence that the inferences that a plaintiff asks a court to draw must be reasonable.¹⁸ So understood, a court separates the factual allegations from the conclusions as to each element of the right of action, assumes the former to be true, and then asks whether the latter (the conclusions as to each element of the right of action) can reasonably be inferred from the former (the factual allegations).

How are these arguments faring in the lower courts? Although I make no claim to have read all of the thousands of cases that cite *Twombly* and *Iqbal*,¹⁹ I have seen numerous cases that use the term “conclusory” to describe allegations that are essentially equivalent to the elements of a right of action and scant evidence in these courts of any move toward the feared infinite regress.²⁰ Professor Alex Reinert catalogues a number of cases that he views as

14. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 867 (2010).

15. See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1318 (2010) (explaining the “endless cascade of inquiry” that could result if “[e]ach allegation that might be offered to ‘plausibly suggest’ some other allegation would itself require support, and so on and so on”).

16. See Hartnett, *supra* note 3, at 491–92.

17. *Id.* at 491 (quotations omitted) (citing Clark).

18. *Id.* at 484–85.

19. A Westlaw search for “*Twombly* /p *Iqbal*”—which is surely an underinclusive search—returned 14,648 hits on July 29, 2011. A particularly valuable resource for anyone trying to keep track of cases discussing and applying *Twombly* and *Iqbal* is the periodically revised memorandum by Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure, available on the United States Courts web page. See Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to Civil Rules Comm. & Standing Rules Comm. (Mar. 29, 2011) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_March_2011.pdf.

20. See, e.g., *Santiago v. Warminster Twp.*, 629 F.3d 121, 131 (3d Cir. 2010) (treating an allegation that was, in essence, that the supervisory defendants told other defendants to do what they did as a formulaic recitation of the elements of a supervisory liability claim and hence conclusory); *Hayden v. Paterson*, 594 F.3d 150, 162 (2d Cir. 2010) (identifying as conclusory those allegations that are “in effect and intent . . . the very assertion that plaintiffs must prove”); *Pa. Prison Soc’y v. Cortes*, 622 F.3d 215, 233 (3d Cir. 2010) (treating an allegation that a state constitutional amendment “impose[d] additional punishment” as conclusory) (internal quotations omitted); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 362 (3d Cir. 2010) (treating as conclusory an allegation of agreement); *Brookhart v. Rohr*, 385 F. App’x 67, 70 (3d Cir. 2010) (treating as conclusory an allegation of pattern of racketeering activity);

reflecting confusion in the lower courts about what kinds of allegations are properly labeled conclusory.²¹ I do not doubt that there is some confusion and conflict. However, it is worth noting that the same allegation might properly be considered conclusory in one case, and not in another, because the conclusory nature of an allegation should not be judged in the abstract, but in the context of a particular right of action. What is *conclusory* depends on the *conclusions* that are necessary for relief under a particular right of action. I do not pretend that this reconciles all the cases, but rather that it offers a path out of the confusion and conflict.

Similarly, I see little evidence that the plausibility test is being used by judges to evaluate the believability of any (or all) allegations in a complaint. Overwhelmingly, courts recognize that the plausibility test is about the reasonableness of inferences from factual allegations to conclusions, not about

Rhodes v. Prince, 360 F. App'x 555, 559 (5th Cir. 2010) (treating an allegation of arrest as conclusory “[b]ecause an ‘arrest’ is a legal conclusion under the Fourth Amendment and a necessary element of a false arrest claim”); *In re NM Holdings Co.*, 622 F.3d 613, 623 (6th Cir. 2010) (treating as conclusory an allegation that was at most a formulaic recitation of the causation element of a professional negligence claim); Telesaurus VPC, L.L.C. v. Power, 623 F.3d 998, 1005 (9th Cir. 2010) (treating as conclusory an allegation that the defendant was a common carrier); Mecca v. United States, 389 F. App'x 775, 780 (10th Cir. 2010) (treating as conclusory an allegation that defendants “agreed, by words or conduct, to accomplish an unlawful goal or accomplish a goal through unlawful means”) (internal quotations omitted); Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1338–39 (11th Cir. 2010) (treating as conclusory an allegation that visco-elastic foam mattresses comprise a relevant product market); Speaker v. U.S. Dep't of Health & Human Servs. Ctr. For Disease Control & Prevention, 623 F.3d 1371, 1381 (11th Cir. 2010) (stating that the plaintiff “must do more than recite these statutory elements in conclusory fashion”); Edwards v. Prime, Inc., 602 F.3d 1276, 1300–01 (11th Cir. 2010) (treating as conclusory an allegation that plaintiff “was subjected to a hostile discriminatory environment on the basis of his race”) (internal quotations omitted); Arar v. Ashcroft, 584 F.3d 559, 617 (2d Cir. 2009) (en banc) (Parker, J., dissenting) (“Allegations are deemed ‘conclusory’ where they recite only the elements of the claim.”); McTernan v. City of York, Pa., 577 F.3d 521, 532 (3d Cir. 2009) (treating as conclusory allegations that a ramp was a public forum, that defendants inhibited plaintiffs from exercising their religion, and that defendants’ actions constituted a substantial burden on plaintiffs’ religious exercise); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 259 (4th Cir. 2009) (referring to a “conclusory allegation of an element of the immunity claim”); Floyd v. City of Kenner, La., 352 F. App'x 890, 898 (5th Cir. 2009) (treating as conclusory an allegation that defendant participated in, approved, and directed the filing of false and misleading affidavits); Hensley Mfg. v. ProPride, Inc. 579 F.3d 603, 611 (6th Cir. 2009) (treating as conclusory an allegation that defendant created “a strong likelihood of confusion in the marketplace as to the source of origin and sponsorship of the goods”) (internal quotations omitted); Brooks v. Ross, 578 F.3d 574, 582 (7th Cir. 2009) (treating as conclusory an allegation that defendant knowingly, intentionally, and maliciously prosecuted plaintiff in retaliation for exercising his rights); McAdams v. McCord, 584 F.3d 1111, 1114 (8th Cir. 2009) (treating as conclusory an allegation that plaintiff’s loss was “a direct and proximate result of Defendants’ fraudulent misrepresentations and omission of material facts”) (internal quotations omitted); Delta Mech., Inc., v. Garden City Grp., 345 F. App'x 232, 234–35 (9th Cir. 2009) (Ikuta, J., concurring in part and dissenting in part) (treating as conclusory an allegation that the plaintiff is an intended third-party beneficiary); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1266 (11th Cir. 2009) (treating as conclusory an allegation that paramilitary security forces acted under color of state law); Chao v. Ballista, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (“Allegations become ‘conclusory’ where they recite only the elements of the claim”); cf. Peñalbert-Rosa v. Fortuño-Burset, 631 F.3d 592, 595 (1st Cir. 2011) (describing an allegation as to state of mind as a factual allegation rather than an “ultimate legal conclusion[]” but still treating it as conclusory).

21. Alex Reinert, *Pleading As Information-Forcing*, 75 LAW & CONTEMP. PROBS., no. 1, 2012 at 1, 10.

the believability of factual allegations.²² There are occasional exceptions, where judges find factual allegations so outlandish as to be beyond belief, but in doing so, they rely on Justice Souter's dissenting opinion in *Iqbal*, and its discussion of time travel and little green men from Mars.²³

Ironically, the biggest threat I see to the prospect of confining the category of conclusory allegations to those that are equivalent to the elements of the right of action comes from Justice Sotomayor's recent opinion in *Matrixx*.²⁴ The *Matrixx* case involved a securities fraud claim under section 10(b) and Rule 10b-5²⁵ against the manufacturer of an over-the-counter medication, Zicam. The plaintiffs alleged that the manufacturer's failure to reveal reports that linked Zicam to anosmia (the loss of smell) was a material omission. The Court observed that one element of such a claim was "a material misrepresentation or omission by the defendant" and that materiality is satisfied when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."²⁶ It held that the complaint should not have been dismissed because the plaintiffs "alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material."²⁷

So far, so good. Although the complaint included an allegation that "defendants materially misled the investing public, thereby inflating the price of *Matrixx* common stock, by publicly issuing false and misleading statements and omitting to disclose material adverse facts regarding Zicam, necessary to make defendants' statements, as set forth herein not false and misleading,"²⁸ the Court did not simply assume that allegation to be true. If it had, the opinion could have been quite short, simply announcing that, assuming that this allegation were true, the omissions were material. Instead, without specifically advertng to this allegation—and not including it in the recitation of the "facts . . . which the courts below properly assumed to be true"²⁹—it treated this allegation as conclusory and asked whether the factual allegations plausibly supported this conclusion of materiality. Once it concluded that the factual allegations plausibly supported the conclusion of materiality, it held that the complaint

22. See, e.g., *Speaker*, 623 F.3d at 1386 (11th Cir. 2010) (noting that the plaintiff "need not prove his case on the pleadings," but "merely provide enough factual material to raise a reasonable inference, and thus a plausible claim" that the defendant was the source of the disclosures at issue).

23. See *Tooley v. Napolitano*, 586 F.3d 1006, 1009–10 (D.C. Cir. 2009); cf. *Atkins v. City of Chicago*, 631 F.3d 823, 830–32 (7th Cir. 2011) (finding some factual allegations unrealistic or nonsensical, others contradictory, and others "not impossible" but "highly implausible," and concluding that a district court "has to consider all these features of a complaint en route to deciding whether the complaint has enough substance to warrant putting the defendant to the expense of discovery").

24. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

25. 15 U.S.C. § 78j(b) (2006); 17 C.F.R. § 240.10b-5 (2011).

26. *Matrixx*, 131 S. Ct. at 1317–18 (2011) (internal quotation marks and citations omitted).

27. *Id.* at 1314.

28. Consolidated Amended Complaint at ¶ 59, *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009) (No. 06-15677).

29. *Matrixx*, 131 S. Ct. at 1314.

adequately alleged materiality.

However, the opinion also addresses the plausibility of a causal link between Zicam and anosmia. It cites *Twombly* and *Iqbal* immediately before stating, “The information provided to Matrixx by medical experts revealed a plausible causal relationship between Zicam Cold Remedy and anosmia.”³⁰ Moreover, it cites *Twombly* (and recites its plausibility standard) before stating that plaintiffs’ “allegations plausibly suggest that [two medical professionals] conclusions were based on reliable evidence of a causal link between Zicam and anosmia.”³¹ In addition, it notes that the complaint alleges that studies confirmed the toxicity of zinc (one of the ingredients in Zicam) and that “the existence of the studies suggests a plausible biological link between zinc and anosmia.”³²

Of course, in a tort action against the manufacturer by someone who lost his sense of smell, such causation would be an element of the right of action. But in a 10b-5 case, that causation is not an element, and addressing the plausibility of that causal link suggests that the Court might be applying the plausibility requirement more broadly to other allegations of a complaint.

A more limited reading is nonetheless possible, and preferable: If an element of a right of action depends on a chain of inferences, then in order for the ultimate conclusion regarding that element to be plausible, each link in the chain of inference must be plausible. In *Matrixx*, the chain of inferences regarding materiality was something like this:

Medical experts suspect that there is a causal link between Zicam and anosmia.



Consumers, regulators, and doctors would be concerned about the suspected causal link between Zicam and anosmia, thereby hurting sales.



Reasonable investors would think that the suspected causal link between Zicam and anosmia is important.

Viewed this way, the discussion of the plausibility of a causal link in *Matrixx* is included only to evaluate the plausibility of the ultimate inference that reasonable investors would think the claimed causal link to be important. If the claimed causal link were itself implausible (the Court seems to assume), then consumers, regulators, and doctors would not be concerned, and neither would reasonable investors.

Matrixx is helpful in one regard: It seems to make clear that the determination of plausibility is to be made on an element-by-element basis. *Twombly* and *Iqbal* referred to the plausibility of the claim, but in each case, only one element was at issue; upon finding one element implausible, the claim

30. *Id.* at 1323; *see also id.* at 1322 (“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.”).

31. *Id.* at 1322 n.12.

32. *Id.* at n.13.

failed. *Matrixx* involved two elements, materiality and scienter, and the Court evaluated them separately, determining the sufficiency of the element of materiality under the plausibility standard of *Twombly* and *Iqbal*, and the sufficiency of the element of scienter under the standard set by the Private Securities Litigation Reform Act (PSLRA).³³ Significantly, after determining that the allegations regarding each element were sufficient, it did not evaluate the plausibility of the 10b-5 claim taken as a whole, but simply concluded that the court of appeals was correct that the complaint should not have been dismissed. This is significant, not only as a clarification of the approach lower courts should take, but also because the alternative of evaluating the plausibility of the claim as a whole could lead to the dismissal of more complaints if courts adopted a version of the product rule.³⁴ If a court were to evaluate the plausibility of the claim as a whole, it might determine that each of (say) six elements was itself plausible, but that the simultaneous combination of all six elements was not plausible—just as the likelihood of any particular child being a girl is $\frac{1}{2}$, while the likelihood of having a family of six girls is $\frac{1}{64}$ ($\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$ times $\frac{1}{2}$).

Some contend that assessing plausibility inherently involves a comparative analysis of competing inferences.³⁵ This is certainly true for scienter under the PSLRA, which requires that the inference of scienter be “at least as compelling as any opposing inference one could draw from the facts alleged.”³⁶ It may well be true at trial, when one is choosing the best inference, and typically true at other stages of litigation when adversaries are offering competing inferences.³⁷

I am not fully convinced that determining plausibility is *necessarily* comparative. It seems to me that if an inference is sufficiently in accord with common experience, it might well be judged plausible even without comparing it to other conceivable inferences. Likewise, if an inference is sufficiently out of whack with common experience—such as inferring from the fact that I am Derek Jeter’s second cousin once removed to the conclusion that I am a star Major League Baseball player—it can be rejected as implausible without comparing it to other conceivable inferences. (Perhaps some would say that the comparison is implicit and unarticulated.) Nevertheless, in deciding whether a suggested inference is plausible, it is certainly commonplace to consider

33. *Id.* at 1317–25 (discussing the element of materiality in Part IIA of the opinion and the element of scienter in Part IIB of the opinion).

34. See generally David McCord, *A Primer for the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond*, 47 WASH. & LEE L. REV. 741 (1990) (explaining the product rule). Another reason to decline to take this route is that courts would face the difficult if not insurmountable problem of determining the extent to which the individual elements are independent of each other.

35. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) (“Judgments about the plausibility of a complaint are necessarily comparative.”).

36. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007).

37. See *United States v. Beard*, 354 F.3d 691, 692–93 (7th Cir. 2004); Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 611 (1994).

alternative inferences.

Consider a complaint involving a traffic accident on I-95:

Plaintiff was driving southbound on I-95 in Florida on March 26, 2011.

A car in front of plaintiff's car stopped short.

Plaintiff was able to stop her car in time to avoid hitting the car in front of her.

Defendant was driving a car behind the plaintiff and did not stop until colliding with plaintiff's car.

In failing to stop before colliding with the plaintiff's car, the defendant purposefully and intentionally assaulted the plaintiff because of the plaintiff's sexual orientation.³⁸

I expect that you found the conclusion of purposeful assault based on sexual orientation rather jarring. Rule 8(b) permits an allegation of state of mind to be made generally, but *Iqbal* refuses to require that courts credit such an allegation and insists that it plausibly follow from the other allegations in the complaint.³⁹ The point is not that no one who crashed a car into someone else ever did so because of the victim's sexual orientation and that courts should assume that no one ever will. Even highly unusual things happen sometimes. Instead, the point is that if a plaintiff alleges that this is what actually happened to him, the plaintiff must provide some allegation—other than just a general allegation regarding the defendant's state of mind—plausibly suggesting that it did.

In the absence of any other information, is purposeful assault based on sexual orientation a plausible inference? Not compared to the inference of insufficient attention, inadequate car maintenance, or too-slow reflexes, or even an accident that the defendant simply could not avoid. In rejecting the plausibility (in the absence of other information) of a purposeful assault based on sexual orientation, it would be natural to describe the competing inferences as more likely. And in expressing their rejection of the plausibility of the inferences that the plaintiffs sought to draw in *Twombly* and *Iqbal*, the Court similarly referred to other inferences as more likely.⁴⁰

But that should not be read to mean that the only inference that is plausible is the one that is more likely than any other—for that would be to try the case on the complaint. Moreover, *Iqbal* insists that the “plausibility standard is not

38. See *Brofman v. Fla. Hearing Care Ctr. Inc.*, 703 So. 2d 1191 (Fla. Dist. Ct. App. 1997) (involving a civil suit under the Florida hate crimes statutes, FLA. STAT. § 775.085 (2010)).

39. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009) (“Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners’ discriminatory intent ‘generally,’ which he equates with a conclusory allegation. It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him ‘on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’ Were we required to accept this allegation as true, respondent’s complaint would survive petitioners’ motion to dismiss. But the Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context 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.”) (alteration in original) (internal citations omitted).

40. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007) (“obvious alternative explanation”); *Iqbal*, 129 S. Ct. at 1951 (“more likely explanations”).

akin to ‘a probability requirement,’⁴¹ so it would be wrong to read *Iqbal* to require that the plaintiff’s proposed inference be more likely than competing inferences.⁴² Instead, these passages in *Twombly* and *Iqbal* should be understood simply to reflect that part of what can make an inference implausible is the existence of significantly better competing inferences.

III

SUGGESTIONS FOR DRAFTING AND DEFENDING COMPLAINTS

In light of all this, how should a plaintiff go about drafting a complaint? It might be thought that a plaintiff should simply avoid conclusory allegations. I do not think so, for as Justice Kennedy explained in *Iqbal*, conclusory allegations can provide the framework for a complaint.⁴³ They provide a framework by establishing what—at least as the plaintiff understands the substantive law—the elements of the right of action sued upon by the plaintiff are. I understand that it is frequently said that a complaint under the Federal Rules need not state all of the elements of a right of action. Indeed, Justice Ginsburg, writing for the court in *Skinner*, noted that “under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff’s claim for relief to a precise legal theory.”⁴⁴ The opinion in *Matrixx*, on the other hand, lists the five elements of a 10b-5 action and then evaluates whether the plaintiffs “have failed to plead both the element of a material misrepresentation or omission and the element of scienter,”⁴⁵ evidently taking for granted that such elements had to be pleaded.

Even if the complaint itself need not reveal a legal theory, in order to survive a 12(b)(6) motion, counsel must provide one.⁴⁶ And in *Skinner*, Justice

41. 129 S. Ct. at 1949.

42. See *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010) (noting that because conflicting inferences were both plausible, dismissal was inappropriate); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (“For cases governed only by Rule 8, it is not necessary to stack up the inferences side by side and allow the case to go forward only if the plaintiff’s inferences seem more compelling than the opposing inferences.”); *Hamilton v. Palm*, 621 F.3d 816, 819 (8th Cir. 2010) (“[The Plaintiff’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.”); *Courie v. Alcoa Wheel & Forged Prod.*, 577 F.3d 625, 630 (6th Cir. 2009) (finding the allegation of settlement agreement plausible based on the attachment of an unsigned settlement proposal as an exhibit to the complaint); *Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir. 2009) (en banc) (Parker, J., dissenting) (“[Allegations] become implausible when the court’s commonsense credits far more likely inferences from the available facts”); *W. Pa. Allegheny Health Sys., Inc. v. U.P.M.C.*, 627 F.3d 85, 98 (3d Cir. 2010) (rejecting idea that “*Twombly*’s plausibility standard functions more like a probability requirement in complex cases”); *Escuadra v. Geovera Specialty Ins. Co.*, 739 F. Supp. 2d 967, 981 (E.D. Texas 2010) (“Requiring a plaintiff’s theory to be more plausible than alternatives would mean that Rule 8’s pleading standard is *more* demanding than the PSLRA. It also would disregard both *Twombly* and *Iqbal* which made clear that Rule 8 does not establish a probability requirement.”).

43. 129 S. Ct. at 1950.

44. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

45. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011).

46. See *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) (stating that “plaintiffs . . . don’t have to plead legal theories,” but that if “defendants filed a motion to dismiss . . . it

Ginsburg added that the complaint in that case was “not a model of the careful drafter’s art.”⁴⁷ For that reason, I believe that it is the general practice of the bar, or at least those members of the bar who strive to practice the careful drafter’s art, to reveal a legal theory by including allegations of each element of a right of action in the complaint. And I suggest that the wisdom of doing so is underscored by *Twombly*, *Iqbal*, and now *Matrixx*.

By including such allegations, a plaintiff not only makes clear his understanding of the legal theory or theories upon which the complaint relies (both to the reader and to himself) but can also point to them as the conclusory allegations not entitled to a presumption of truth, and distinguish them from the factual allegations that are entitled to the presumption of truth.

The plaintiff must also, however, be sure to include factual allegations from which the conclusory allegations regarding each element of the right of action can reasonably be inferred. I would suggest that a well-crafted complaint should make clear, at least through its structure, which allegations are intended to be factual allegations entitled to the presumption of truth, and which are intended to be elements of the right of action that can reasonably be inferred from those factual allegations.⁴⁸ Indeed, it may be useful, in a post-*Twombly* and *Iqbal* world, to structure a complaint to make clear which factual allegations support which conclusions.

Some think that the demand for plausibility is a demand for factual specificity. To my mind, there is a no necessary connection between specificity and plausibility. Consider again the hypothetical complaint involving a traffic accident on I-95 and alleging purposeful assault because of the victim’s sexual orientation. Providing lots of specifics about the accident (time of day, precise location, speed of the cars, weather, even the VINs for each car) would do nothing to add to the plausibility of purposeful assault based on sexual orientation discrimination. Even specifics about the state of mind—were that possible—would do little to make the conclusion plausible. Rule 8(b) permits an allegation of state of mind to be made generally. *Iqbal* does not ask for more details about the state of mind; it asks for reasons to believe that state of mind existed. A demand for specificity asks, “Can you tell me about that in more detail?” A demand for plausibility asks, “Why should I think that?”

Some have worried that *Iqbal*, by instructing judges to determine plausibility based on common sense and judicial experience, invited

would not be responsive of the plaintiff to say that she was not ‘required at this stage of the litigation to specifically characterize or identify the legal basis of the claims in the complaint[.]’”).

47. 131 S. Ct. at 1296.

48. *Cf.* FED. R. CIV. P. 52(a)(1) (requiring a court to “find the facts specially and state its conclusions of law separately”). If the plaintiff has “personal knowledge of an element of a claim that he alleges . . . it is simplest to view such an allegation as not conclusory—because it is not expressing an inference at all. Alternatively, one could view it as conclusory and ask whether it is plausible to infer that the conclusion is true, given that a person with personal knowledge says that it is true, but (without making a forbidden credibility determination) the answer to that inquiry will always be yes.” Hartnett, *supra* note 3, at 494 n.104.

idiosyncratic and subjective decisionmaking. I, on the other hand, have argued that the reference to common sense and judicial experience should be understood as a description of the ordinary operation of inductive reasoning.⁴⁹ It seems to me that judges view themselves as applying ordinary inductive reasoning, rather than being authorized to act on idiosyncratic and subjective understandings. I admit, though, that here it is hard to be confident that the fear is misplaced, because ordinary inductive reasoning is rooted in baseline assumptions about the way the world usually works, and although such baseline assumptions are shaped by one's own experience, it is their nature to be perceived as widely accepted common sense. Accordingly, even if a judge's baseline assumptions are not widely accepted common sense, a judge is likely to think them so.

In recognition of the truth that inductive reasoning—and therefore the plausibility test—depends on baseline assumptions about the way the world usually works, I have suggested that lawyers, if they believe that a judge's own knowledge and experience would likely have led him to inaccurate baseline assumptions about the way the world usually works, present information designed to dislodge those inaccurate baseline assumptions. I confess that I do not see much evidence that lawyers have attempted to do so. It might be that I do not see such evidence because, if successfully deployed, judges will write as if they understood the truth all along, rather than explain that they were blind, but now they see. So it may be that lawyers are doing so all the time, but in a way that is largely invisible to those who read judicial opinions.⁵⁰

It is also possible that lawyers are rarely trying to do so. If this is what is happening, I would reiterate my suggestion: If you believe that a judge's own knowledge and experience would likely have led him to inaccurate baseline assumptions about the way the world usually works, present information designed to dislodge those inaccurate baseline assumptions.⁵¹

Some of you may be thinking that none of these suggestions meet the most frequent problem you have dealing with *Twombly* and *Iqbal*: the inability to plead factual allegations from which one can plausibly infer an element because you need discovery in order to make such factual allegations. Here, I have made two related suggestions, one of which has gotten some support on the bench, the other that seems not to have penetrated the bar at all.

The suggestion that has gotten some support on the bench is that discovery can proceed despite the pendency of a motion to dismiss under Rule 12(b)(6). I believe that argument is unassailable under the Federal Rules.⁵² Under Rule

49. Hartnett, *supra* note 3 at 498.

50. Some of the amicus briefs in *Matrixx* may have taught members of the Court how medical experts treat inferences of causation. See *Matrixx*, 131 S. Ct. at 1319–20 (citing amicus briefs in discussion of medical professionals relying on evidence of causation that is not statistically significant).

51. Cf. Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 184 n.192 (suggesting that advocates “might benefit from understanding the hidden factual assumptions at issue in various doctrines and might resurrect the idea of the ‘Brandeis brief[.]’”).

52. *But see* *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011)

26(d), discovery may commence as soon as the discovery planning conference pursuant to Rule 26(f) has been held. In contrast to the PSLRA, there is no provision in the Federal Rules that automatically stays discovery upon the filing of a motion to dismiss. Indeed, a court is specifically authorized by Rule 12(i) to defer ruling on a 12(b)(6) motion until trial; thus a defendant who wishes such a stay of discovery must move for a stay and show good cause under Rule 26.⁵³

Judge Posner has explicitly relied on my argument, explaining that “[i]f the plaintiff shows that he can’t conduct an even minimally adequate investigation without limited discovery, the judge can presumably allow that discovery, meanwhile deferring ruling on the defendant’s motion to dismiss.”⁵⁴ It is true that Judge Posner was writing in dissent, but he was dissenting from an opinion that reversed a 12(b)(6) dismissal and interpreted *Twombly* and *Iqbal* in a remarkably pro-plaintiff way, reading the plausibility test to require nothing more than “a story that holds together,” with the court asking itself, “*could* these things have happened[?]”⁵⁵ The Court of Appeals for the Third Circuit has also noted, while praising the district court’s management of the case, that discovery continued during the pendency of a 12(b)(6) motion.⁵⁶

Even when defendants move to stay discovery pending a motion to dismiss, some post-*Iqbal* district courts deny the motion.⁵⁷ Significantly, in doing so,

(“The plaintiff apparently can no longer obtain the factual detail necessary because the language of *Iqbal* specifically directs that *no* discovery may be conducted in cases such as this, even when the information needed to establish a claim . . . is solely within the purview of the defendant . . .”).

53. See Hartnett, *supra* note 3, at 507–08; see also 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, 123–24 (2010) (discussing the notion of “plausibility discovery” within the framework of Rule 26); cf. David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 141–43 (2010) (suggesting that the best way to “reconcile the Court’s decisions with the Rules is to read *Iqbal* and *Twombly* to implicitly recalibrate the showing of good cause Rule 26(c) requires to stay discovery pending resolution of a motion to dismiss,” but that, even understood this way, *Iqbal* did not cut off all pre-motion-to-dismiss discovery).

54. Swanson v. Citibank, N.A., 614 F.3d 400, 412 (7th Cir. 2010) (Posner, J., dissenting).

55. *Id.* at 404.

56. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 311 (3d Cir. 2010) (“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 The District Court skillfully managed the consolidated proceedings.”); cf. Mann v. Brenner, 375 F. App’x 232, 239–40 (3d Cir. 2010) (finding no abuse of discretion in district court’s decision to stay discovery). See also Allstate Ins. Co. v. Levy, No. CV-10-1652(FB)(VVP), 2011 WL 288511, at *1 (E.D.N.Y. Jan. 27, 2011) (“The pendency of the motion to dismiss does not provide an automatic basis to stay discovery.”); Civil Rules Advisory Committee, Minutes, Nov. 15–16, 2010, 24–25 (lawyers reporting conflicting experience with stays being granted and a judge stating, “I don’t stay discovery.”) (internal quotations omitted); Reinert, *supra* note 21, at 20 (“The Fifth Circuit, like many other circuits, also has held that limited discovery may be appropriate where the plaintiff suffers from informational asymmetry with respect to essential elements of his claim.”).

57. See, e.g., Baltayan v. Tito, No. 3:10-CV-1327(CFD), 2011 WL 1194305, at *2 (D. Conn. Mar. 30, 2011) (noting that the court had already ordered that discovery was not stayed pending decision on a motion to dismiss); Lopez v. Sanders, No. 2:10-cv-76-DPM, 2011 WL 2679603, at *2 (E.D. Ark. July 8, 2011) (agreeing that “the allegations are too thin” under *Iqbal*, but allowing time “to do some basic discovery” about the involvement of each defendant because “the undisputed fact remains that Lopez-Alvarado was beaten to death at the prison while some officers were on duty”).

some courts emphasize the likelihood that even if the motion to dismiss were to be granted, leave to amend would likely also be granted, and discovery would be useful in drafting that amended complaint.⁵⁸ One court has emphasized the particular importance after *Twombly* of avoiding an “overly lenient standard for granting motions to stay all discovery.”⁵⁹

The suggestion that seems to have gotten little traction among the bar is to abandon pleading on information and belief. The practice is a remnant from code pleading, particularly code pleading’s frequent commitment to verified pleadings. In a pleading regime marked by verified pleadings, pleading on information and belief was used to allow pleaders to allege matters that they could not verify. But the Federal Rules do not require verification. Today, while courts have found them permissible,⁶⁰ an allegation made on information and belief runs the risk of being treated as a conclusory allegation, not entitled to the presumption of truth.

If counsel’s pre-filing inquiry reveals an evidentiary basis for a factual allegation, then simply make the factual allegation. Do not dilute the force of the allegation with references to information and belief. But what if your pre-filing inquiry fails to reveal an evidentiary basis for a factual allegation, yet you think that discovery will reveal such an evidentiary basis? Then do what Rule 11(b)(3) explicitly instructs: Specifically identify the allegation as a factual contention that “will likely have evidentiary support after a reasonable opportunity for . . . discovery.”

The two suggestions are related: By explicitly identifying particular factual allegations pursuant to Rule 11(b)(3), the attention of counsel and the court can be focused on the need for—and propriety of—discovery as to that factual allegation. Rather than arguing in the abstract about the appropriateness of discovery pending a 12(b)(6) motion, counsel and the court can focus more precisely on a narrower question: whether to allow discovery to enable the plaintiff to obtain evidence to support particular factual allegations that have been specifically identified, in the manner explicitly provided for by the Federal Rules, as needing discovery. Moreover, the terms of the debate about that question will be shaped by terms of Rule 11(b)(3) itself: Can it reasonably be expected that discovery will produce evidence to support that allegation?

58. *S.F. Tech. v. Kraco Enter., L.L.C.*, No. 5:11-cv-00355 EJD, 2011 WL 2193397, at *2–*3 (N.D. Cal. June 6, 2011) (noting that the “Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery” and that “district courts tend to look unfavorably” upon them, and particularly emphasizing that “discovery would not be wasted” even if the motion to dismiss were granted because the plaintiff “could utilize the discovery responses to prepare an amended pleading”); *Cloverleaf Golf Course, Inc. v. FMC Corp.*, No. 11-cv-190-DRH, 2011 WL 2838178, at *4 (S.D. Ill. July 15, 2011) (refusing to stay discovery because the defendant had not met its burden to justify a stay, and noting that the court could not presume that the motion to dismiss would be granted and that even if it were granted, plaintiff would likely have an opportunity to amend).

59. *Trzaska v. Int’l Game Tech.*, No. 2:10-cv-02268-JCM-GWF, 2011 WL 1233298, at *4 (D. Nev. Mar. 29, 2011).

60. See *Arista Records L.L.C. v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010); *Boy Blue, Inc. v. Zomba Recording, L.L.C.*, No. 3:09-CV-483-HEH, 2009 WL 2970794, at *2 (E.D. Va. Sept. 16, 2009).

Perhaps such an inquiry might seem odd and difficult. But I would hope not. I would hope that it is similar to the thought process counsel engages in before deciding to take a case: “What makes me think, if I don’t already have it, that I’ll be able to get the evidence to prove all of the elements of the case?” Your reasons for so believing—your reasons for taking the case in the first place—can then be offered to the court as the reasons why the complaint should not be dismissed without allowing discovery as to those particular allegations.⁶¹

IV

A PROPOSED AMENDMENT

I believe that all of these methods of dealing with *Twombly* and *Iqbal* are permitted under the current Federal Rules of Civil Procedure. Yet I also readily admit that these suggestions are not complete solutions, in part because the Rules do not make clear how a judge is supposed to handle an allegation specifically identified pursuant to Rule 11(b)(3). A judge might exercise his discretion to simply stay discovery during the pendency of a motion to dismiss without grappling with the likelihood of obtaining discovery to support such an allegation. And given the skepticism with which *Twombly* and *Iqbal* treat careful case management, this might be the path of least resistance for some judges.⁶²

Accordingly, I have also suggested an amendment to Rule 12(b) that, I believe, reasonably accommodates the competing interests of plaintiffs who need discovery to support their case and defendants who fear massive discovery costs despite a meritless claim. As an accommodation of the competing interests that assumes the continued viability of *Twombly* and *Iqbal*, I believe that it also has a better chance of being adopted than proposals that seek to repudiate those decisions. If I am right that it reasonably accommodates the competing interests, please support the proposal. If it does not, please tell me.

I propose adding a new subsection to the end of Rule 12:

Rule 12(j): Allegations Likely To Have Evidentiary Support After a Reasonable Opportunity for Discovery

If, on a motion under Rule 12(b)(6) or 12(c) that has not been deferred until trial, the claim sought to be dismissed includes an allegation specifically identified as provided in Rule 11(b)(3) as likely to have evidentiary support after a reasonable opportunity for discovery, the court must either (1) assume the truth of the allegation, or (2) decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery. In deciding whether an allegation is likely to have evidentiary support after a reasonable opportunity for discovery, the court must

61. *Cf. Guirguis v. Movers Specialty Servs., Inc.*, 346 F. App’x 774, 776 (3d Cir. 2009) (noting that the complaint conclusorily alleged that plaintiff was fired based on his national origin but never intimated in any way why the plaintiff believed that national origin motivated the firing).

62. District courts in the Sixth Circuit might no longer see themselves as having any discretion in the matter. *See New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046 (6th Cir. 2011) (“The plaintiff apparently can no longer obtain the factual detail necessary because the language of *Iqbal* specifically directs that *no* discovery may be conducted in cases such as this, even when the information needed to establish a claim . . . is solely within the purview of the defendant . . .”).

consider the parties' access to evidence in the absence of discovery and state on the record the reason for its decision.

If the court decides that the allegation is likely to have evidentiary support after a reasonable opportunity for discovery, it must allow for that discovery, under the standards of Rule 26, and deny the motion to dismiss. If the court decides that the allegation is not likely to have evidentiary support after a reasonable opportunity for discovery, the court must treat the motion as one for summary judgment under Rule 56, and provide all parties a reasonable opportunity to present all the material that is pertinent to the motion.

I believe that this proposal accommodates the interests of plaintiffs who lack evidentiary support for a particular allegation, by protecting them from their worst fear under *Twombly* and *Iqbal*: having their claims dismissed because any possible supportive evidence is in the hands of the defendant, without a court ever directly confronting the question of whether they would likely be able to get such supportive evidence if given the opportunity for discovery. If the court assumes the truth of the allegation and nonetheless dismisses, it will not be because of the inability to access supporting evidence. If the court does not assume the truth of the allegation, it must decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery and, if so, allow appropriate discovery. And in making this determination, the proposal specifically directs judges to consider the parties' access to evidence in the absence of discovery.

It accommodates the interests of defendants by providing a means of getting reasonably prompt judicial attention to the question of whether the defendant can avoid the costs of discovery, either because the plaintiff loses even if discovery turns up what he seeks or because there is no reason to think that discovery will turn up what he seeks.

And it gives both plaintiffs and defendants an incentive to focus their attention (and the court's) on what are likely to be the determinative issue or issues in the case. Those allegations identified under Rule 11(b)(3) are more likely than other issues to be determinative, or at least more likely to be determinative in the pretrial context. This can, I believe, promote the court's (and the public's) interest in efficiency.

The proposal is designed to protect plaintiffs who think they already have evidentiary support for a particular allegation, but realize that a judge might disagree. If identifying an allegation under Rule 11(b)(3) meant that a judge would simply disregard the allegation in deciding a 12(b)(6) motion when the judge thought that discovery would not likely lead to supporting evidence, plaintiffs might be rather wary of making such identifications. Under this proposal, if the judge refuses to allow discovery, the result is not that the allegation is disregarded; instead, plaintiffs have an opportunity to present the evidence they do have, in an effort to convince the court that there is a triable issue even without discovery on that point. Thus, plaintiffs would have an incentive to properly identify such allegations, because they would get the protection of the new provision. They have a countervailing incentive, however, to not identify too many of their allegations this way, for that would likely make

a judge rather skeptical.

Identifying an allegation as one made pursuant to Rule 11(b)(3) provides the pleader with a crucial advantage under my proposal: It requires the court either to assume that the allegation is true or to decide whether it is likely to have evidentiary support after an opportunity for discovery. A court cannot, as it might today and as happened in both *Twombly* and *Iqbal*, simply refuse to credit an allegation made on information and belief that it deems conclusory and never explicitly confront the question of whether discovery would likely yield evidentiary support. Nor does this inquiry simply replicate the plausibility analysis, because the reasonableness of inferring X is different from the reasonableness of finding evidence to support X—as criminal procedure’s distinction between sufficiency of the evidence to convict and probable cause to search demonstrates.⁶³

If the court reaches the question whether discovery is likely to produce evidence supporting an allegation, it must consider the parties’ access to the evidence without discovery. If a party has access to the evidence without discovery, but has not come up with it, it is less likely that discovery will produce that evidence than if the party did not have access to it without discovery. It is easier for a judge in the first situation than in the second to say, “If you haven’t come up with it yet, I don’t think discovery will help.”

V

CONCLUSION

I think that *Twombly* and *Iqbal* are here to stay, and that there are a variety of ways in which they can be tamed. I am largely encouraged that courts tend to be confining the label “conclusory” to allegations that are equivalent to the elements of a right of action, and inquiring whether that conclusion can reasonably be inferred from the factual allegations of the complaint, rather than broadly inquiring into the believability of each allegation. I have some worries about *Matrixx*, but think they are manageable as well. I would urge the bar to give up on “information and belief” and follow the instructions of Rule 11(b)(3), thereby focusing attention on the need for discovery and the discretion that district courts have to allow it, even pending a motion to dismiss. I would also urge the bar to be on the lookout for ways to provide information that could change a judge’s baseline assumptions about the way the world usually works and therefore alter his view of the plausibility of an inference.

I certainly do not claim that courts are uniformly acting in accord with these suggestions. My point is far more modest: These methods of taming *Twombly* and *Iqbal* remain viable, and therefore lawyers and judges should consider them. Finally, I would urge you to also consider whether my proposed amendment to Rule 12(b) meets the needs of the bar and the clients they represent.

63. See Hartnett, *Taming Twombly*, *supra* note 3, at 506–07.