HAUSFELD LLP

202.540.7200 ph
202.540.7201 fax

1700 K Street, NW
Suite 650
Washington, DC 20006

December 2, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

RE: Has the Supreme Court Limited Americans' Access to Courts?

Dear Senators Leahy, Specter, and Whitehouse,

I offer these comments for inclusion in the record for the Committee's hearing, "Has the Supreme Court Limited Americans' Access to Courts?" I am grateful for your leadership in holding this hearing to consider this very important issue.

I strongly support legislation that would repair the damage done by the Supreme Court's decisions in *Twombly* and *Iqbal*. The question posed today—whether the Supreme Court has limited access to the courts by imposing a stringent pleading standard found nowhere in the Federal Rules—is an important one that goes to the heart of our civil justice system. Although many of my comments and examples arise from antitrust litigation, the threat that these decisions pose to access to justice is much, much broader.

As an initial matter, I agree completely with the premise of this hearing: *Twombly* and *Iqbal* have already, in their short tenure, limited access to courts for far too many Americans. Timely legislative action is paramount. No doubt the Committee has already received lengthy histories of the civil pleading standard and detailed examples of *Conley*, *Twombly*, and *Iqbal* at work; the aim of these comments is merely to identify a few of the many problems that litigants and trial courts now face.

As many district courts have already acknowledged, *Twombly*'s "plausibility" standard is murky at best.[1] Though there may well be disagreement about the *Conley* standard, there can be no question that plaintiffs, defendants, and courts alike understood the "no set of facts" standard—and understood it well. In contrast, *Twombly* and *Iqbal* have sowed confusion with their command that the plausibility standard "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 an illegal agreement."[2] Compounding judicial confusion is *Iqbal*'s suggestion that the trial court draw on "judicial experience and common sense" in determining whether a complaint states a claim for relief.[3] Of course, plausibility, reasonable expectations, judicial experience, and common sense vary greatly from one trial judge to the next. Indeed, *Twombly* and *Iqbal*'s instructions have led to disparate, inconsistent results where uniformity was once the norm. Some district courts now demand that every complaint be suffused with specific fact allegations, while others maintain essentially that *Conley* is still good law. Litigants, meanwhile, can only speculate about what to expect from each district court.

Recent antitrust decisions illustrate the confusion. In the immediate wake of *Twombly*, many courts recognized the demise of *Conley* but nevertheless understood Rule 8 to have endured, distinguishing *Twombly* by limiting its holding to conscious parallelism in antitrust cases.[4] Since *Twombly*, numerous district courts have upheld complaints alleging

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[1] *E.g.,* Hon. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts after Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 851-868 (2008).

[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added).

[3] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

[4] *E.g., In re Static Random Access Memory (SRAM) Antitrust Litig*., 580 F.Supp.2d 896, 900 (N.D. Cal. 2008) ("*SRAM*") (complaint need only present a short and plain statement of the claim; no detailed factual recitations are needed); *In re Pressure Sensitive Labelstock Antitrust Litig*., 566 F.Supp.2d 363, 370 (M.D. Pa. 2008) (Rule 8 pleading standards continue to apply after *Twombly*; no heightened pleading standard is applied to antitrust complaints); *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575, 582 (E.D. Pa. 2008) (denying motion to dismiss complaint alleging parallel conduct and plus factors that tend to negate independent action); *In re Intel Corp. Microprocessor Antitrust Litig*., 496 F.Supp.2d 404, 408 n.2 (D. Del. 2007) (reading *Twombly* liberally in declining to dismiss certain indirect purchaser antitrust claims); *City of Moundridge v. Exxon Mobil Corp*., 250 F.R.D. 1, 5 (D.D.C. 2008) ("a complaint need not be dismissed where it does not 'exclude the possibility of independent business action.' . . . Such a requirement at this stage in the litigation would be counter to Rule 8's requirement of a short, plain statement with 'enough heft to "sho[w] that the pleader is entitled to relief"'"); *In re Flash Memory Antitrust Litig*., 643 F.Supp.2d 1133, 1141 (N.D. Cal. 2009) ("*Flash Memory*") (specific factual allegations are unnecessary; the statement in a complaint need only give the defendants fair notice of what the claim is and the grounds upon which it rests); *Fair Isaac Corp. v. Equifax, Inc*., No. 06-4112 ADM/JSM, 2008 WL 623120, at *6 (D. Minn. Mar. 4, 2008) (*Twombly* does not require specific pleading of the evidentiary details of a conspiracy); *Flying J Inc. v. TA Operating Corp*., No. 1:06CV00030, 2007 WL 3254765, at *1 (D. Utah Nov. 2, 2007), *interlocutory appeal denied*, 2007 WL 4165749, at *2 (D. Utah Nov. 20, 2007) (*Twombly* imposed no heightened pleading standard; a short and plain statement of a claim is still all that is needed); *Trans World Technologies, Inc. v. Raytheon Co*., No. 06-

(Continued ...)

multi-year antitrust conspiracies with many actors, although in each case the complaint contained more factual detail than in *Twombly* or *Iqbal*.[5]

(… Continued)
5012 (RMB), 2007 WL 3243941, at * 4 (D.N.J. Nov. 1, 2007) ("[a]s long as the complaint alleges that the alleged co-conspirators had a plausible reason to participate in the conspiracy, the complaint is sufficient"); *Hyland v. Homeservices of America, Inc*., No. 3:05-CV-612-R, 2007 WL 2407233, at *3 (W.D. Ky. Aug. 17, 2007) (complaint sufficed if "[p]laintiffs had alleged more than parallel business conduct and a 'bare' assertion of a 'belief' of a conspiracy); *In re OSB Antitrust Litig*., No. 06-826, 2007 WL 2253419, at *3 (E.D. Pa. Aug. 6, 2007) (in denying a motion to dismiss a price-fixing conspiracy claim, "[p]laintiffs situate these allegations of parallel conduct in a context that suggests preceding agreement"); *In re Hypodermic Prods. Antitrust Litig*., No. 05-CV-1602 (JLL/CCC), 2007 WL 1959225, at *6, *8 (D.N.J. June 29, 2007) (liberal antitrust pleading standards apply after *Twombly*; allegations of anticompetitive exclusive dealing arrangements stated a claim under § 1 of the Sherman Act).

[5] In *Flash Memory*, for example, the court, in a ruling issued after *Twombly* but before *Iqbal*, upheld a complaint alleging a conspiracy against thirteen defendants to fix prices for NAND Flash memory and products containing such memory that lasted from 1999 to February of 2008. 643 F.Supp.2d at 1140, 1164. Similarly, in *In re TFT-LCD (Flat Panel) Antitrust Litig*., 599 F.Supp.2d 1179, 1193 (N.D. Cal. 2009), the court upheld a complaint alleging a conspiracy among 26 defendants to fix prices for TFT-LCD panels and products containing them from 1996 through late 2006. And in *SRAM*, another post-*Twombly*, pre-*Iqbal* decision, the court upheld a complaint alleging a conspiracy among 24 defendants to fix prices for various types of SRAM from 1996 through 2005. *See* 580 F.Supp.2d at 899 & nn. 2 & 4, 910.

In yet another post-*Twombly*, pre-*Iqbal* example, the court in *In re Chocolate Confectionary Prods. Antitrust Litig*., 602 F.Supp.2d 538, 574-77 (E.D. Pa. 2009), upheld a complaint alleging that members of four corporate families fixed prices for a variety of chocolate confectionary products over a five-year period. Likewise, in *In re Rail Freight Fuel Surcharge Antitrust Litig.,* 587 F.Supp.2d 27, 33 (D.D.C. 2008), again decided after *Twombly* but before *Iqbal*, the court upheld a complaint against railroads who controlled 90% of fright traffic in the United States and allegedly entered into a conspiracy dating back to 2003 to fix fuel surcharges. *Id*. at 29, 37. Similarly, in *Standard Iron Works v. Arcelormittal*, No. 08 C 5315, 639 F.Supp.2d 877 (N.D. Ill. 2009), rendered after *Iqbal*, the court upheld a complaint alleging a multi-year output-restriction conspiracy by United States steel producers. 639 F.Supp.2d at 879-82, 902-03.

In a similar vein, the court in *In re ATM Fee Antitrust Litig*., No. 04-02676 CRB, 2009 U.S. Dist. LEXIS 83199, at *22-25 (N.D. Cal. Sept. 4, 2009), another post-*Iqbal* case, the court ruled, in response to motions to dismiss by eleven banking entities accused of fixing interchange fees, that the amended complaint alleged a plausible conspiracy. And in *In re Air Cargo Shipping Servs. Antitrust Litig*., No. 06-MD-1775 (JG) (VVP) (E.D.N.Y. Aug. 21, 2009), yet another post-*Iqbal* ruling, the district court reversed the ruling of a magistrate judge granting motions to dismiss for failure to plead a plausible conspiracy by 34 airlines accused of participating in an international conspiracy to fix air cargo fuel surcharges. *See also In re Southeastern Milk Antitrust Litig*., 555 F.Supp.2d 934, 942-43 (E.D. Tenn. 2008) (denying motion to dismiss in antitrust conspiracy case).

Other federal courts, meanwhile, have taken a hard line after *Twombly*, dismissing even detailed complaints alleging antitrust conspiracies.[6] In a recent dissenting opinion in *In re Travel Agent Commission Antitrust Litigation*, an appeal to the Sixth Circuit affirming dismissal of an antitrust complaint, Judge Gilbert Merritt lamented the widespread misapplication of the new plausibility standard. Judge Merritt observed that "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."[7] "The uniformity needed for the rule of law and equal justice to prevail is lacking," Judge Merritt explained.[8] "This 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."[9]

As the dissent in *Travel Agent* makes clear, a restrictive interpretation of *Twombly* and *Iqbal* is at odds with the goals of private antitrust enforcement under the Sherman Act. Price-fixing conspiracies are self-concealing by nature and difficult if not impossible to uncover in any detail at the initial pleading stage.[10] Specific facts about the nature, scope, and duration of any given conspiracy are only known or knowable at the outset—before formal discovery or detailed public disclosure (arising from, e.g., investigative reporting or governmental indictment)—if one has access to inside information. This "information asymmetry" between plaintiffs and defendants erodes *Twombly*'s assumption that the plausibility standard will bar only complaints that have no "reasonably founded hope" of yielding relevant evidence in discovery.[11]

Because no one can be sure what the Court intended by *Twombly* and *Iqbal*, the decisions could be used to dismiss meritorious cases that aim to advance the law through

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[6] *See, e.g., Kendall v. Visa U.S.A, Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007); *In re Travel Agent Com'n Antitrust Litig.,* 583 F.3d 896 (6th Cir. Oct. 2, 2009) ("*Travel Agent*"); *Hinds County, Miss. v. Wachovia Bank, N.A.* 620 F.Supp.2d 499 (S.D.N.Y. 2009) ("*Hinds*"); *Arista Records LLC v. Lime Group LLC*, 532 F.Supp.2d 556 (S.D.N,Y. 2007); *In re California Title Ins. Antitrust Litig.*, No. C 08-01341 JSW, 2009 WL 1458025 (N.D.Cal. May 21, 2009); *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); *In re Less-Than-Truckload Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219 (N.D. Ga. 2009); *In re Digital Music Antitrust Litig.*, 592 F.Supp.2d 435 (S.D.N.Y. 2008); *In re Insurance Brokerage Antitrust Litig.*, No. 04-5184 & 05-1079, 2007 WL 2533989 (D.N.J. Aug, 31, 2007).

[7] *Travel Agent*, 583 F.3d at 914 (Merritt, J., dissenting).

[8] *Id.*

[9] *Id.*

[10] Scott Dodson, *Pleading Standards after Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. "In Brief" 135 (2007), *available at* www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf.

[11] *Twombly*, 550 U.S. at 556 (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

the use of novel legal theories. Indeed, under a "plausibility" regime, many landmark historical decisions might never have made it past the pleading stage. For example, *Brown v. Bd. of Education*[12] might be susceptible to attack under *Twombly*. Some, like the civil procedure professors amici in *Iqbal*,[13] have parsed *Twombly* to require plausibility of particular allegations; plausibility of inferences drawn from otherwise plausible allegations; and plausibility of entitlement to relief. But that last category, mixing "plausibility" and "relief," is dangerous: as subsequent lower courts use loose language, a requirement of 'plausible relief' begins to takes shape.[14] *Brown*, of course, is remarkable (among other reasons) because the relief that ultimately resulted was *highly* improbable. No contemporary trial court could have envisioned Chief Justice Warren's instructions to the district courts to retain jurisdiction and supervise the desegregation of this nation's schools. And in the absence of plausible relief, *Brown* might not today survive *Twombly*, at least as interpreted by the lower courts.

Twombly and *Iqbal* have also, perhaps to some extent unwittingly, emboldened defendants as they seek to extinguish litigation long before any consideration of the merits. Armed with this new weapon, many defendants have redoubled their costly "motion practice" at the earliest possible stage of litigation, even where the allegations are supported by specific facts and are undoubtedly "plausible." For example, I have seen questions of plausibility arise in civil antitrust litigation filed *after* guilty pleas in a parallel criminal proceeding. In *In re Air Cargo Antitrust Litigation*,[15] seven large airline defendants pleaded guilty to participating in a global conspiracy to fix prices for air cargo rates. Despite their indictments and subsequent guilty pleas, all seven moved to dismiss the civil complaint for failure to state a plausible claim under *Twombly*. And the magistrate judge recommended dismissal because, he wrote, plaintiffs' claims are "insufficient to raise a plausible inference of an agreement."[16] Almost a year later, however, the district judge rejected the recommendation, reasoning that now, with 15 guilty pleas, plausibility was firmly established.[17]

The guilty-plea situation is particularly alarming. Where a company has acknowledged guilt by receiving conditional leniency from the United States Department of Justice, or has actually pleaded guilty to participation in a criminal conspiracy, there can be no question whether a complementary civil complaint is "plausible" in theory or fact.

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[12] 347 U.S. 483 (1954).

[13] *See* Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents in *Ashcroft v. Iqbal*, No. 07-1015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299191.

[14] *E.g., Segal v. Geisha NYC LLC*, 517 F.3d 501 (7th Cir. 2008) ("a complaint that satisfies Rule 8(a)'s pleading requirements might still warrant dismissal under Rule 12(b)(6) if the facts pled cannot result in any plausible relief").

[15] *In re Air Cargo Antitrust Litigation*, No. MD 06-1775 (JG) (VVP) (E.D.N.Y.).

[16] *In re Air Cargo Antitrust Litigation*, No. MD 06-1775 (JG) (VVP), 2008 WL 5958061 at *7 (E.D.N.Y. Sept. 26, 2008).

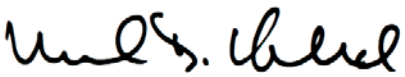
[17] *In re Air Cargo Shipping Servs. Antitrust Litig.,* No. 06-MD-1775 (JG) (VVP) (E.D.N.Y. Aug. 21, 2009 order).

These situations cry out for some opportunity for plaintiffs—the actual victims of the conspiracy admitted to—to discover missing information. Indeed, plaintiffs often lack certain details that might illuminate their civil pleadings because that information is under the control of the public enforcement agency. Whether by plea or amnesty, the government, pursuant to its investigatory authority, has possession of the essential information relating to the conspiracies. Citing the need to protect the prosecutorial process, agencies often refuse to share information until completion of their investigations or trials, leaving plaintiffs with little recourse before the courts.[18]

Finally, and perhaps most troubling, is the way in which the Supreme Court altered a long-settled procedural rule. Even assuming that *Twombly* raised questions meriting further exploration, a formal amendment to Rule 8, reached after informed deliberation, would have at least yielded Committee Notes to guide future courts and litigants. Instead, however, the court purported to leave intact Rule 8(a)(2), all the while radically transforming the pleading standard with little explanation of the new standard or the reason for the change.

These are, of course, only a few of the problems posed by *Twombly* and *Iqbal*. One can expect—and my partners and I have already seen—that an aggressive (and unpredictable) pre-discovery dismissal regime will lead to fewer meritorious cases filed, more meritorious cases dismissed, and less deterrence and redress of unlawful conduct.[19] But our civil litigation system requires a clear and uniform pleading standard. Anything less will impede justice. Unfortunately, the Supreme Court has replaced *Conley*, which satisfied both criteria, with *Twombly* and *Iqbal,* which satisfy neither.

Sincerely,



Michael D. Hausfeld
Chairman
Hausfeld LLP

[18] Civil defendants routinely request stays of discovery pending disposition of their motions to dismiss pursuant to *Twombly*/*Iqbal* motions.

[19] *See* Posting of Professor Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html (last visited November 30, 2009).