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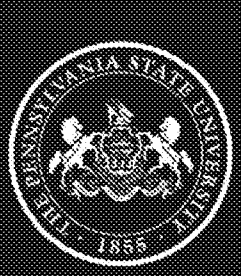

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Conley v. Gibson's "No Set of Facts" Test: Neither Cancer Nor Cure

Wendy Gerwick Couture*

I. INTRODUCTION

In Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, the Supreme Court instituted a "plausibility" standard for assessing the sufficiency of a plaintiff's complaint—in the process disavowing Conley v. Gibson's "no set of facts" test.[1] Reaction to the new "plausibility" standard has been generally critical, leading to calls for the reinstatement of the "no set of facts" test. This essay argues that the "no set of facts" test is a legal sufficiency test and thus inapplicable to the factual sufficiency challenges in Twombly and Iqbal. As a consequence, the "no set of facts" test is neither the cancer maligned by Twombly nor the cure to Iqbal. Rather, this essay draws from the analytical distinction between legal and factual sufficiency to propose a new factual sufficiency test: Does the complaint allege sufficient facts to allow the court to assess the legal sufficiency of the complaint?

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1. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Part II of this essay explains the distinction between legal and factual sufficiency challenges to a complaint and applies this distinction to Twombly and Iqbal. Part III demonstrates that the Conley "no set of facts" standard is a legal sufficiency test. Part IV explains why Twombly did not need to overrule the "no set of facts" test to institute a "plausibility" standard, and Part V explains why the "no set of facts" test is not a solution to the "plausibility" standard. Part VI draws from the preceding sections to propose a new factual sufficiency test that would work symbiotically with the legal sufficiency standard, and Part VII briefly concludes.

II. THE DISTINCTION BETWEEN LEGAL AND FACTUAL SUFFICIENCY

Under Federal Rule of Civil Procedure 8(a)(2), a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[2] A pleading that fails to satisfy this test is subject to dismissal under Rule 12(b)(6) for "fail[ing] to state a claim upon which relief can be granted."[3]

A pleading can fall short of this standard in two analytically distinct ways: (1) by failing to assert a legally actionable claim (i.e., legal insufficiency); and (2) by failing to allege enough facts (i.e., factual insufficiency).[4] Twombly and Iqbal addressed the latter standard—not the former.

A. Legal Sufficiency

A pleading fails a legal sufficiency challenge if the complainant's allegations, even if true, are not legally actionable.[5] In Neitzke v.

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

3. FED. R. CIV. P. 12(b)(6); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1356 (3d ed. 2009) ("Thus, the provision [Rule 12(b)(6)] must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court and calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Only when the plaintiff's complaint fails to meet this liberal pleading standard is it subject to dismissal under Rule 12(b)(6).") (citing authority).

4. See Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990) ("Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."); STEPHEN C. YEAZELL, CIVIL PROCEDURE 363 (7th ed. 2008) ("Pleading problems fall roughly into two groups. In one group the underlying dispute is about the substantive law: What facts justify relief for this kind of claim? In the other group there is no dispute about the content of substantive law, but there is a disagreement about whether the facts pleaded justify relief under that law.").

5. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1215 (3d ed. 2009) ("If the plaintiff does plead particulars, and they show he has no claim, then the plaintiff has pleaded himself out of court.").

Williams, the Supreme Court described this standard as follows: "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."[6] Courts and commentators have characterized successful legal sufficiency challenges as "relatively unusual"[7] and "extraordinary,"[8] but, in fact, courts routinely dismiss claims at the pleading stage for legal insufficiency. Recent examples include the following:

- Dismissal of a claim asserted under 30 U.S.C. § 185(r)(2)(A) because the statute does not create a private right of action.[9]
- Dismissal of claims asserted under §§ 11 and 12(a) of the Securities Act because the alleged misrepresentations are immaterial as a matter of law.[10]
- Dismissal of a negligence claim because Indiana's economic loss doctrine precludes an action in tort for economic losses arising from breach of contract.[11]
- Dismissal of a claim for intentional infliction of emotional distress because the alleged conduct is not sufficiently outrageous to be actionable.[12]
- Dismissal of a claim for negligent misrepresentation because "Virginia law does not recognize such a tort."[13]

As recognized by the Supreme Court in Neitzke, dismissal of claims for legal insufficiency "streamlines litigation by dispensing with needless discovery and factfinding."[14]

B. Factual Sufficiency

A pleading fails a factual sufficiency challenge if the complainant fails to allege sufficient facts in support of the asserted claims. Until Twombly and Iqbal, courts dismissed a pleading for factual insufficiency only if it failed to "give the defendant fair notice of what the plaintiff's

6. Neitzke v. Williams, 490 U.S. 319, 326 (1989).

7. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE & PROCEDURE § 1357 (3d ed. 2009).

8. Corsican Prods. v. Pitchess, 338 F.2d 441, 442 (1964) (quoting WRIGHT, FEDERAL COURTS 250 (1963)).

9. Riviera Drilling & Exploration. Co. v. Gunnison Energy Corp., No. 08-CV-02486-REB-CBS, 2009 WL 3158163, at *3 (D. Colo. Sept. 20, 2009).

10. Landmen Partners Inc. v. Blackstone Group, L.P., 659 F. Supp. 2d 532, 544 (S.D.N.Y 2009).

11. Hasse Construction Co. v. Gary Sanitary District Bd. of Comm'rs, No. 2:06-CV-322-PRC, 2008 WL 2169000, at *6 (N.D. Ind. May 23, 2008).

12. Hamilton v. Prudential Financial, No. 2:07-CV-00944-MCE-DAD, 2007 WL 2827792, at *4 (E.D. Cal. Sept. 27, 2007).

13. JTH Tax, Inc. v. Whitaker, No. 2:07-CV-170, 2007 WL 2821830, at *3 (E.D. Va. Sept. 27, 2007).

14. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989).

claim is and the grounds upon which it rests."[15] Under this standard, a plaintiff was merely required to give "fair notice of the operative facts or the gravamen of the statement for relief."[16] For example, courts dismissed complaints under the "fair notice" standard in the following cases predating Twombly and Iqbal:

Dismissal of gender discrimination claim where the plaintiff's complaint failed to "identify her gender" or "allege any fact from which to infer that she was subjected to unequal treatment because she is a woman."[17]

Dismissal of a claim that "appear[ed] to be a legal malpractice claim" where the plaintiffs failed to "identify the case which the defendants allegedly failed to prosecute."[18]

Affirming the dismissal of a First Amendment retaliation claim where the plaintiff failed "to identify any activity on his part, even in the most general terms, that triggered his termination."[19]

Dismissal of a variety of claims based on alleged illegality of bank loans where the complaint failed to "assert any details specifically against each individual Defendant," "to allege that he was a customer of each Defendant," "to identify the loans extended to him by each Defendant," and "to identify any loans on which the Defendants foreclosed."[20]

As explained by the Supreme Court in Swierkiewicz v. Sorema N.A., which predates Twombly and Iqbal, "[t]his simplified notice pleading

15. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1215 (3d ed. 2009) ("In federal practice, the test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

16. Kyle v. Morton High Sch., 144 F.3d 448, 456 (7th Cir. 1999) (citing supportive authority); see CHARLES 5 ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1215 ("Of course, great generality in the statement of these circumstances will be permitted as long as the defendant is given fair notice of what is claimed; nonetheless, Rule 8(a)(2) does require that the pleader disclose adequate information concerning the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.").

17. Baldwin v. LIJ N. Shore Health Sys., 392 F. Supp. 2d 479, 483-84 (E.D.N.Y. 2005) ("This claim must fail because the plaintiff has not alleged facts which give the defendant fair notice of her gender discrimination claim and the grounds upon which it rests.").

18. Schwartz v. Steven Kramer & Assocs., No. 90-4943, 1991 WL 133507, at *2 (E.D. Pa. July 17, 1991) ("Count 3 fails to place the defendants on adequate notice as to the plaintiffs' claim.").

19. Kyle, 144 F.3d at 457 ("Kyle's complaint fails to give fair notice to the court and the opposing party of the operational facts of his complaint.").

20. Rudd v. Keybank, N.A., No. C2-05-CV-0523, 2006 WL 212096, at *3 (S.D. Ohio Jan. 25, 2006) ("Rudd fails to provide sufficient details to put Defendants on notice of the claims he asserts against them.").

standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[21]

C. Twombly and Iqbal

Neither Twombly nor Iqbal addressed the legal sufficiency of the complaint. In Twombly, it was undisputed that if, as alleged in the complaint, the defendants had entered into an agreement to "prevent competitive entry" into their markets and "not to compete with one another,"[22] they would have violated § 1 of the Sherman Act.[23] Similarly, in Iqbal, no one disputed that if, as alleged in the complaint, the defendants had "adopted an unconstitutional policy that subjected [the plaintiff] to harsh conditions of confinement on account of race, religion, or national origin,"[24] they would have been subject to Bivens liability.[25]

Rather, Twombly and Iqbal turned on the factual sufficiency of the plaintiffs' complaints. In Twombly, the issue was whether the plaintiff had alleged sufficient factual support for the existence of an unlawful agreement among the defendants,[26] and in Iqbal, the issue was whether the plaintiff had pleaded "sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue . . . for the purpose of discriminating on account of race, religion, or national origin."[27]

The first step in Twombly and Iqbal was to identify and disregard mere "legal conclusions."[28] Thus, in Twombly, the Court disregarded the plaintiffs' allegations that the defendants "entered into a contract,

21. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

22. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 551 (2007) (quoting the plaintiffs' complaint).

23. See id. at 571 (Stevens, J., dissenting) ("Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted individually, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful."); id. at 588 (Stevens, J. dissenting) ("The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws. Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws.") (citations omitted).

24. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

25. See id. at 1947-48 (recognizing the existence of a Bivens action "to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment" and "assum[ing], without deciding, that respondent's First Amendment claim is actionable under Bivens").

26. See Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at 1950.

27. Iqbal, 129 S. Ct. at 1948-49.

28. Twombly, 550 U.S. at 557; Iqbal, 129 S. Ct. at 1944.

combination, or conspiracy" and "agreed not to compete with one another."[29] Similarly, in Iqbal, the Court disregarded the plaintiff's allegations that the defendants "each knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to the confinement at issue "as a matter of policy, solely on account of religion, race, and/or national origin and for no legitimate penological interest;" that Ashcroft was the "principal architect" of the detention policy; and that Mueller was "instrumental in adoption, promulgation, and implementation."[30]

The second step in both cases was to identify the well-pleaded factual allegations, assume their truth, and assess whether they "plausibly give rise to an entitlement to relief."[31] In performing this plausibility analysis, the Court emphasized that factual allegations that are "merely consistent" with the element at issue are insufficient if a "more likely" explanation exists.[32] Thus, in Twombly, allegations of parallel conduct among the defendants failed to satisfy the plausibility standard.[33] The defendants' "resistance to the upstarts" was merely "the natural, unilateral reaction of each ILEC intent on keeping its regional dominance;" and the defendants' "competitive reticence" had "an obvious alternative explanation."[34] Similarly, in Iqbal, allegations that the FBI, under the defendants' direction, "arrested and detained thousands of Arab Muslim men" and that the defendants approved a "policy of holding post-September-11th detainees in highly restrictive conditions of confinement" were consistent with purposeful discrimination, but—"given more likely explanations"—the Court held that these allegations failed the plausibility standard. [35] In short,

29. Twombly, 550 U.S. at 551 (quoting the complaint); id. at 557 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."); id. at 564 ("Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on prior allegations.").

30. Iqbal, 129 S. Ct. at 1944 (quoting the plaintiff's complaint); id. at 1951 (disregarding these allegations as "conclusory and not entitled to be assumed true").

31. Id. at 1950.

32. See Twombly, 550 U.S. at 557 (recognizing "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement"); Iqbal, 129 S. Ct. at 1950 (describing the Court's reasoning in Twombly) ("Acknowleding that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior.").

33. See Twombly, 550 U.S. at 565 (stating the "nub of the complaint"); id. at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

34. Id. at 566-68.

35. Iqbal, 129 S. Ct. at 1951.

Twombly and Iqbal reinterpreted the "fair notice" standard for factual sufficiency as a "plausibility" standard.[36]

III. CONLEY V. GIBSON'S ANALYSIS OF FACTUAL AND LEGAL SUFFICIENCY

Conley v. Gibson's "no set of facts" test is central to the debate about Twombly and Iqbal. In Twombly, the Supreme Court, after articulating the plausibility standard, explicitly disavowed the "no set of facts" test.[37] Moreover, some opponents of Twombly and Iqbal have called for a return to the "no set of facts" test.[38]

Yet, the "no set of facts" test has been misunderstood by the Supreme Court and many—but not all[39]—commentators. As a detailed examination of the case background and the Conley Court's opinion demonstrate, the "no set of facts" test addresses legal sufficiency—not factual sufficiency. As a consequence, the "no set of facts" test is neither the cancer maligned by Twombly nor the cure to Iqbal.

A. Case Background

In Conley v. Gibson, the plaintiffs, African-American union members, filed a putative class action on behalf of similarly situated union members, against their union and some of its agents.[40] The plaintiffs alleged that the union, in violation of the Railway Labor Act, had discriminated against them on the basis of race or color by segregating them "into a local union of the craft in which they are cut off from and denied effective representation on a par equal to that afforded to white employees who are members of the same craft or class."[41] In

36. Id. 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.'") (quoting Twombly, 550 U.S. at 570).

37. See Twombly, 550 U.S. at 563.

38. See Part V infra.

39. Professor Stephen B. Burbank, after conducting an in-depth analysis of the Conley v. Gibson opinion, reaches the same conclusion as this author—that the "no set of facts" test addressed legal sufficiency, not factual sufficiency. Hearing on Whether the *Supreme Court has Limited Americans' Access to Court: Hearing Before the Committee* on the Judiciary, 111th Cong. 11 (Dec. 2, 2009) (prepared statement of Stephen B. Burbank), available at http://www.pennstatelawreview.org/iqbal-portal/; Hearing on *Whether the Supreme Court has Limited Americans' Access to Court: Hearing Before the* Committee on the Judiciary, 111th Cong. 13-16 (Dec. 2, 2009) (Stephen B. Burbank's Answers to Senator Arlen Specter's Post-Hearing Questions), available at http://www.pennstatelawreview.org/iqbal-portal/.

40. See Compl. § IV, Trans. of Record at 7, Conley v. Gibson, 355 U.S. 41 (1957) (No. 7).

41. Compl. § III, Trans. of Record at 6, Conley v. Gibson, 355 U.S. 41 (1957) (No. 7).

particular, the plaintiffs alleged that the union refused to represent their interests when their employer abolished 45 jobs held by African-American employees and then immediately rehired white employees and some of the previously fired African-American employees—with a loss of seniority.[42]

The defendants moved to dismiss the complaint on the following grounds: (1) the court lacked subject matter jurisdiction because the National Railroad Adjustment Board had exclusive jurisdiction over disputes involving collective bargaining agreements in the railroad industry; (2) the suit was missing an indispensible party defendant, the plaintiffs' employer; (3) the allegations about the agreement between the employer and the union failed "to present a justifiable issue;" and (4) the complaint "fail[ed] to state a claim upon which relief can be granted."[43]

The district court granted the motion to dismiss on the first asserted ground—lack of subject matter jurisdiction.[44] The Fifth Circuit Court of Appeals affirmed the judgment, without opinion,[45] and the Supreme Court granted the petitioners' petition for writ of certiorari.[46] In their Supreme Court briefing, the respondents reasserted the grounds raised in their motion to dismiss.[47] The Supreme Court, after rejecting the first two grounds,[48] addressed the respondents' sufficiency arguments, which challenged both the legal and the factual sufficiency of the complaint.

B. Conley's Analysis of Legal Sufficiency

First, the respondents challenged the legal sufficiency of the complaint, arguing that a union's duty to act without discrimination "cannot be extended to the field of policing or administering agreements and redressing individual grievances."[49] The respondents argued that the union's duty to act without discrimination extends only to the union's exclusive authority "to bind the individual employee in contract negotiations with the carrier."[50]

42. See Compl. § IV, Trans. of Record at 11-12, Conley v. Gibson, 355 U.S. 41 (1957) (No. 7).

43. Mot. to Dis., Trans. of Record at 17-18, Conley v. Gibson, 355 U.S. 41 (1957) (No. 7).

44. Conley v. Gibson, 138 F. Supp. 60, 62 (S.D. Tex. 1955).

45. Conley v. Gibson, 229 F.2d 436 (5th Cir. 1956).

46. Conley v. Gibson, 352 U.S. 818 (1956).

47. Brief for Respondents, Conley v. Gibson, 355 U.S. 41 (1957), available at 1957 WL 87662, at *4-5 (U.S. Oct. 2, 1957).

48. Conley v. Gibson, 355 U.S. 41, 44-45 (1957).

49. Brief for Respondents, Conley v. Gibson, 355 U.S. 41 (1957), available at 1957 WL 87662, at *30 (U.S. Oct. 2, 1957).

50. Id. ("In short, if the exclusive authority to act does not exist, neither does the obligation.").

The Supreme Court soundly rejected this legal sufficiency challenge pursuant to the "no set of facts" test. First, the Supreme Court stated the applicable test for assessing the complaint's sufficiency:

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.[51]

Applying this "no set of facts" test, the Supreme Court rejected the respondents' legal sufficiency argument that the "duty not to draw 'irrelevant and invidious' discrimination among those it represents" comes to an "abrupt end . . . with the making of an agreement between union and employer."[52] Rather, the Court recognized that collective bargaining is an ongoing process, and the prohibition on discrimination applies to the entire process.[53]

C. Conley's Analysis of Factual Sufficiency

The respondents also challenged the factual sufficiency of the complaint, arguing that there was insufficient factual support for alleged discriminatory conduct by the union. For example, the respondents argued: "The factual allegations of the Complaint are completely vague as to what provision of, or in what manner, the bargaining agreement was violated by the Railroad when it abolished the particular jobs in question, and equally vague as to how Respondents could have prevented such action by the Railroad or successfully protested it."[54]

The Supreme Court rejected this factual sufficiency challenge pursuant to the "fair notice" standard. The Court first clarified the applicable test: "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[55] Applying this test, the Court rejected the factual sufficiency challenge because the "petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis."[56]

51. Conley, 355 U.S. at 46.
52. Id. (internal citation omitted).
53. See id.
54. Brief for Respondents, Conley v. Gibson, 355 U.S. 41 (1957), available at 1957 WL 87662, at *26 (U.S. Oct. 2, 1957); id. at *18 ("In short, with the single exception of the allegations of the Complaint concerning the maintenance of a separate Negro Lodge by the Brotherhood . . . the only acts of discrimination alleged by the Complaint appear to be on the part of the Railroad . . . .").
55. Conley, 355 U.S. at 47 (quoting FED. R. CIV. P. 8(a)(2)).
56. Id.

D. Distinction Between Conley's Tests for Legal and Factual Sufficiency

In sum, the Conley Court addressed both legal and factual sufficiency challenges. In addressing the former, the Court applied the "no set of facts" test; and in addressing the latter, the Court applied the "fair notice" test.

The three cases cited by the Supreme Court as authority for the "no set of facts" test[57] further demonstrate that this test is properly understood as a legal sufficiency test. In the first, Leimer v. State Mutual Life Assurance Co., the Eighth Circuit reversed the dismissal of the plaintiff's complaint because "[t]hat plaintiff's claim is barred by estoppels and laches . . . does not conclusively appear from the facts stated in the amended complaint."[58] The court contrasted the case at hand with cases where a complaint is properly dismissed for legal insufficiency: "Such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which there is clearly no remedy . . . ."[59] Similarly, in Dioguardi v. Durning, the Second Circuit reversed the dismissal of a complaint because "[i]t appears to be well settled that the collector may be held personally for a default or for negligence in the performance of his duties."[60] Finally, in Continental Collieries, Inc. v. Shober, the Third Circuit reversed the dismissal of the complaint because, under the facts alleged, it was not "a certainty" that the cause of action was unenforceable under the applicable statute of frauds.[61]

Subsequent courts and commentators have contributed to the confusion between the "no set of facts" legal sufficiency test and the "fair notice" factual sufficiency test by conflating the two standards and treating them as synonymous.[62] Indeed, the Second Circuit in its

57. Id. at 46 n.5.
58. Leimer v. State Mut. Life Assur. Co., 108 F.2d 302, 305 (8th Cir. 1940).
59. Id. at 305-06.
60. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).
61. Continental Collieries, Inc. v. Shober, 130 F.2d 631, 635 (3d Cir. 1942).
62. See, e.g., Jay S. Goodman, Two, New, U.S. Supreme Court Cases Raise the Question: Is Notice Pleading Dead?, 58 R.I. BAR J. 5, 5 (Jan/Feb 2010) ("That rule became known as notice pleading, as encapsulated in the rule that a 12(b)(6) motion had to be denied if 'it cannot be said that there (is) no set of facts on which (a respondent) would be entitled to relief.'") (quoting Conley, 355 U.S. at 47); Emily Sherwin, The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson, 52 HOW. L. J. 73, 73 (2008) (using ellipses to join the two tests); see also Patricia W. Hatamyer, The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?, 59 AM. U. L. REV. 553, 561-62 (2010) ("For decades, courts have started their opinions with boilerplate language about the governing standards of a 12(b)(6) motion . . . Of course, courts frequently begin their recitations by quoting Rule 8(a)(2). After Conley, the boilerplate language almost always included that case's two best-known quotes: the 'no set of facts' quote and the 'fair notice' quote.").

Twombly opinion used the "no set of facts" test to assess the factual sufficiency of the complaint,[63] which perhaps explains why the Supreme Court felt the need to overrule the "no set of facts" test when overruling the Court of Appeals in Twombly.

IV. THE "NO SET OF FACTS" TEST IS NOT THE CANCER MALIGNED BY TWOMBLY

In Twombly, after setting forth the "plausibility" standard for assessing factual sufficiency, the Supreme Court expressly disavowed the "no set of facts" test.[64] The Court reasoned: "This 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings."[65]

Indeed, the "no set of facts" test would be unworkable as a factual sufficiency test. For example, a complaint alleging merely "the defendant was negligent" would pass a "no set of facts" test of factual sufficiency. Many courts and commentators have expressed skepticism about the "no set of facts" test for this very reason.[66]

As shown above, however, the "no set of facts" test is a legal sufficiency test. Since the issue in Twombly was the factual sufficiency of the complaint, the Supreme Court had no need to address—let alone overrule—the "no set of facts" test. Ultimately, the "no set of facts" test is not the cancer maligned by the Twombly Court.

V. THE "NO SET OF FACTS" TEST IS NOT A CURE TO IQBAL

By the same token, the "no set of facts" test is not a cure to Iqbal. Twombly and Iqbal instituted a "plausibility" standard for assessing factual sufficiency. Reinstating the "no set of facts" test—a legal sufficiency standard—would not overrule the plausibility standard. Yet several legislative proposals attempt to do just that.

The Open Access to Courts Act of 2009 proposes to reinstate the "no set of facts" test: "A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of 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."[67]

63. See Twombly v. Bell Atlantic Corp., 425 F.3d 99, 107, 114 (2d Cir. 2005).

64. See Twombly, 550 U.S. at 563 ("[T]his famous observation has earned its retirement.").

65. Id. at 561.

66. See id. at 562 (citing courts and commentators that "have balked at taking the literal terms of the Conley passage as a pleading standard").

67. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

Similarly, the Notice Pleading Restoration Act of 2009 proposes to reinstate "the standards set forth by the Supreme Court of the United States in Conley v. Gibson."[68] The Conley v. Gibson opinion contains both the "no set of facts" legal sufficiency test and the "fair notice" factual sufficiency test, but this bill would most likely be interpreted as reinstating the "no set of facts" test because, although Conley has been cited for both tests, it is most famous for its "no set of facts" test. According to Westlaw, Conley's "no set of facts" test has been cited by courts 45,090 times,[69] while Conley's "fair notice" test has been cited by courts only 7,063 times.[70] Additionally, the Supreme Court did not explicitly overrule Conley's "fair notice" standard in Twombly and Iqbal. Indeed, in Twombly, the Court cited Conley with approval as the source of the "fair notice" test.[71] Rather, the Court reinterpreted the "fair notice" test as requiring plausibility.[72] Therefore, even if the bill were understood as reinforcing the "fair notice" test, it would not necessarily follow that the Twombly/Iqbal gloss on the "fair notice" standard would be overruled.

VI. REFORM OF FACTUAL SUFFICIENCY TEST

The "plausibility" standard in Twombly and Iqbal has been roundly criticized,[73] perhaps most compellingly because it denies court access to prospective plaintiffs with meritorious claims but without the resources to gather proof without the benefit of discovery.[74] As explained above, however, reinstating the "no set of facts" test would not accomplish the desired reform.

68. Notice Pleading Restoration Act of 2010, S. 1504, 111th Cong. (2009).

69. See Westlaw.com (last visited February 20, 2010). West Headnote 5, containing the "no set of facts" test, has 45,090 case citations.

70. See Westlaw.com (last visited March 5, 2010). No West Headnote directly states the "fair notice" test. Therefore, the author ran the following terms and connectors search in the "allcases" database: (conley gibson) /50 "fair notice." This search generated 7,063 results.

71. See Twombly, 550 U.S. at 555.

72. See id. at 570.

73. See, e.g., Elizabeth Thornburg, Law, Facts, and Power, 114 PENN ST. L. REV. PENN STATIM 1 (2010), available at http://pennstatelawreview.org/114/114 Penn Statim 1.pdf; see also Symposium: Pondering Iqbal, 14 LEWIS & CLARK L. REV. 1-450 (2010) (compiling numerous scholarly critiques of Iqbal).

74. *See Hearing on Whether the Supreme Court has Limited Americans' Access to* Court: Hearing Before the Committee on the Judiciary, 111th Cong. 11 (Dec. 2, 2009) (prepared statement of Stephen B. Burbank), available at http://www.pennstatelawreview.org/iqbal-portal/.

A. Reinstatement of "Fair Notice" Test of Factual Sufficiency

Certainly the most obvious reform would be to reinstate the "fair notice" standard for factual sufficiency as it was interpreted before Twombly. For example, Professor Stephen Burbank in testimony before Congress proposed the reinstatement of "interpretations of the Federal Rules of Civil Procedure by the Supreme Court of the United States, and by lower decisions consistent with such interpretations, that existed on May 20, 2007."[75] Draft legislation to this effect is currently pending before the Senate.[76]

The "fair notice" factual sufficiency standard has always been somewhat problematic, however, because it renders superfluous Federal Rule of Civil Procedure 12(e), which allows a party to move for a more definite statement if a pleading "is so vague or ambiguous that the party cannot reasonably prepare a response."[77] Moreover, the existence of separate legal and factual sufficiency standards, which do not work symbiotically, results in a disjointed interpretation of Rule 8(a)(2), perhaps best exemplified by the Twombly and Iqbal opinions.

B. Proposal for a New Factual Sufficiency Test

This essay proposes that, rather than merely reinstating the old factual sufficiency test, Congress take this opportunity to reassess the appropriate factual sufficiency standard. As explained above, factual sufficiency and legal sufficiency are analytically distinct. Rather than operating as different frameworks, however, the factual sufficiency test and legal sufficiency test should work symbiotically.

In particular, this essay proposes the following factual sufficiency test: Does the complaint allege sufficient facts to allow the court to assess the legal sufficiency of the complaint?

Rather than focusing on "fair notice" to the defendant, who has resort to Rule 12(e) if unable to discern the plaintiff's allegations, this factual sufficiency standard would focus on notice to the court. Indeed, some district courts already include themselves as part of the intended

75. *Hearing on Whether the Supreme Court has Limited Americans' Access to* Court: Hearing Before the Committee on the Judiciary, 111th Cong. App. A (Dec. 2, 2009) (prepared statement of Stephen B. Burbank), available at http://www.pennstatelawreview.org/iqbal-portal/.

76. Notice Pleading Restoration Act of 2010, S. 1504, 111th Cong. (2010) (proposing an almost identical standard).

77. FED. R. CIV. P. 12(e); see Hearing on Whether the Supreme Court has Limited *Americans' Access to Court: Hearing Before the Committee on the Judiciary*, 111th Cong. App. A (Dec. 2, 2009) (prepared statement of Stephen B. Burbank) (arguing that factual sufficiency should be tested only under Rule 12(e)), available at http://www.pennstatelawreview.org/iqbal-portal/.

audience to whom "fair notice" must be given.[78] The crucial inquiry in assessing whether a pleading affords the court sufficient notice would be whether the court possesses enough information about the plaintiff's version of events to determine whether the complaint is legally sufficient.[79]

Applying this standard to Twombly and Iqbal, both complaints would survive dismissal because they apprise the court of the plaintiffs' versions of events, thus enabling the court to rule that – assuming the veracity of the plaintiffs' versions—the claims are legally actionable. In other words, assuming that the Twombly defendants had entered into an agreement to "prevent competitive entry" into their markets and "not to compete with one another,"[80] they would have violated § 1 of the Sherman Act.[81] Similarly, assuming that the Iqbal defendants had "adopted an unconstitutional policy that subjected [the plaintiff] to harsh conditions of confinement on account of race, religion, or national origin,"[82] they would have been subject to Bivens liability.[83]

By the same token, a complaint that merely alleges that "the defendant was negligent" would fail this standard because, without an understanding of the plaintiff's version of events, the court would be unable to assess whether the claim is legally actionable.[84] For example,

78. See, e.g., Gregory v. TCF Bank, No. 09-C-5243, 2009 WL 4823907, at *2 (N.D. Ill. Dec. 10, 2009) ("The purpose behind Rule 8 is to ensure that both the defendant and the court have fair notice of the claims alleged.") (citation omitted) (emphasis added); Potts v. Pike County Sheriff's Office, No. 2:09-CV-974-ID, 2009 WL 3747213, at *2 (M.D. Ala. Nov. 5, 2009) (stating that, in order to comply with Rule 8(a), a complaint must "provide [] fair notice to the court and a defendant of the claim against the defendant") (emphasis added); McCarthy v. Stollman, No. 06-Civ-2613, 2009 WL 1159197, at *3 (S.D.N.Y. Apr. 29, 2009) (stating that a pleading "must give the court and the defendant fair notice of what [the] plaintiff's claim is and the grounds upon which it rests") (citation omitted) (emphasis added); Rourke v. Rhode Island, No. 09-10S, 2009 WL 1160255, at *2 (D.R.I. Apr. 27, 2009) ("One of the primary purposes of Rule 8(a) is to give the defendant(s) and the Court fair notice of the claim being made by a plaintiff.") (emphasis added).

79. Accord Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433, 435 (1986) ("Contrary to the conventional wisdom that the sole purpose of pleadings is to give notice, this Article suggests that their role should be to enable courts to decide cases on their merits.").

80. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 551 (2007) (quoting the plaintiffs' complaint).

81. Id. at 571.

82. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

83. Id. at 1947-48.

84. See Richard L. Marcus, The Puzzling Persistence of Pleading Practice, 76 TEX. L. REV. 1749, 1770-71 (1998) (recognizing that courts may vary the level of factual detail required at the pleading stage depending on whether additional factual allegations will resolve the case); id. at 1771 ("Even though Palsgraf was also a claim for negligence, such a delphic complaint cries out for inclusion of more details, not only to give defendant notice but also to permit the court to scrutinize the legal sufficiency of

in most jurisdictions, if the plaintiff's negligence claim sought purely economic damages for breach of a contractual duty, the economic loss rule would bar the claim.[85] Therefore, the plaintiff must plead sufficient facts to allow the court to assess whether, under the plaintiff's version of events, the negligence claim survives the economic loss rule.

Under this proposal, factual and legal sufficiency tests would operate symbiotically to allow the court to dismiss claims that are not actionable under the plaintiff's version of events, thus "dispens[ing] with needless discovery and factfinding."[86] At the same time, this proposal would reopen the courthouse doors to plaintiffs with meritorious claims but without the resources to compile their evidence without the aid of discovery. Finally, under this proposal, defendants whose only quibble is the lack of notice to themselves would have to resort to a Rule 12(e) motion for more definite statement rather than rely on a Rule 12(b)(6) motion to dismiss.

VII. CONCLUSION

Several conclusions follow from the analytical distinction between factual and legal sufficiency and the classification of the "no set of facts" test as a legal sufficiency test. First, the Twombly Court's disavowal of the test was unnecessary. More importantly, efforts to reverse Iqbal by reinstating the "no set of facts" test are misguided. Rather, if Congress wishes to reverse the plausibility standard, it should do so with a factual sufficiency test. One example is to reinstate the "fair notice" standard without a "plausibility" gloss. This essay proposes that, rather than merely reinstating the pre-Twombly standard, Congress should enact a factual sufficiency test that works symbiotically with the legal sufficiency test. In particular, this essay proposes the following factual sufficiency test: Does the complaint allege sufficient facts to allow the court to assess the legal sufficiency of the complaint?

plaintiff's claim in terms of the necessary elements of foreseeability and proximate cause.").

85. Vincent R. Johnson, The Boundary-Line Function of the Economic Loss Rule, 66 WASH. & LEE L. REV. 523, 526 (2009).

86. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989).