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11-1-2012

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## Recommended Citation

Issacharoff, Samuel and Miller, Geoffrey P., "An Information-Forcing Approach to the Motion to Dismiss" (2012). *New York University Law and Economics Working Papers*. Paper 320.

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# AN INFORMATION-FORCING APPROACH TO THE MOTION TO DISMISS

Samuel Issacharoff, and Geoffrey Miller<sup>1</sup>

## ABSTRACT

This article proposes a new approach to the 12(b)(6) motion to dismiss. We propose the use of cost shifting in the initial process of factual claiming and denials to create incentives for parties to acquire or reveal information germane to the motion to dismiss by forcing them to absorb the costs of either producing the information or denying its existence. Our proposal would incentivize both parties to reveal information pertinent to the court's decision. It promises to improve the operation of the motion to dismiss regardless of the substantive standard used to evaluate the sufficiency of the claims for relief.

*In law, what plea so tainted and corrupt,  
But, being seasoned with a gracious voice,  
Obscures the show of evil?*<sup>2</sup>

## 1. INTRODUCTION

How much credence should a federal court give to the allegations of the complaint when ruling on a motion to dismiss? If the court defers wholly to the plaintiff's version of the dispute, few cases will be dismissed and, rather than weed out claims that have no realistic chance of success at trial, the motion will be reduced to testing technical defects in the initial presentation of the claim. On the other hand, if the court scrutinizes complaints too strictly, the result will be equally undesirable because violations of legal rights will not be redressed.

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2 William Shakespeare, *Merchant of Venice*, Act III, Scene 2.

The choice of a pleading standard thus poses an exquisite dilemma for legal policymakers.

The Federal Rules of Civil Procedure do not specify the pleading standard with much clarity, requiring only that the complaint contain a “short and plain statement of the claim showing that the pleader is entitled to relief” and directing district courts to dismiss complaints, on defendant’s motion, if they fail to “state a claim upon which relief can be granted”. (Fed. R. Civ. P. 8(a)(2), 12(b)(6)). In default of clearer guidance, the Supreme Court has crafted its own glosses on the rules. *Conley v. Gibson*, decided in 1957, required only that the complaint allege facts that could conceivably support a claim for relief—a lenient notice-pleading standard that allowed marginal lawsuits to survive to later stages of litigation in the hope that later-discovered facts would salvage the claim (355 U.S. 41 (1957)). A half century later, in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Court announced a more demanding approach—plausibility pleading—which requires the plaintiff to allege facts that give rise to a plausible entitlement to relief (550 U.S. 544 (2007); 556 U.S. 662 (2009)).

For proponents of stronger threshold requirements, notice pleading of the *Conley* variety allows too many unmeritorious claims in the door and, consequently, imposes systemic inefficiencies as defendants are forced to bear the financial brunt of discovery—or settle out weak cases to avoid legal costs. These are the errors of commission as the liberality of pleading and the ease of getting to the expensive fact discovery stage of litigation impose deadweight losses on society as a whole. Worse yet, it is invariably cheaper to ask for information through discovery than to produce it, in turn creating a moral hazard problem since the requesting party does not have to internalize the cost of the information production (Issacharoff 2012). For those inclined to weaker threshold requirements, on the other hand, the errors are ones of omission. On this view, pleading requirements must accept that plaintiffs typically and critically lack access to the information necessary to establish liability absent the ability to take discovery. Requirements of factual specificity at the pleading stage necessarily remove litigants from the litigation arena altogether, including some whose claims would ultimately be proved meritorious.

The debate over pleading standards revolves ultimately about the relative frequency and consequences of type 1 versus type 2 error—the errors of false positives resulting from allowing too many ultimately meritless cases to consume time and resources, and the errors of false negatives, the meritorious cases that are either improperly screened out at the threshold stages of litigation or, more likely, not even brought for want of factual support prior to discovery. In turn, the pleading debate turns to what judges should do when confronted with a motion to dismiss in order to reduce the incidence of type 1 and type 2 errors.

Should they weigh the likely merits of the dispute? Manage discovery to limit the initial costs? Allow a barebones pleading into the discovery process? Test the likelihood that the claim could justify the costs associated with a deeper factual inquiry? The existing scholarly literature explores these and many other recommendations for how judges should approach the motion to dismiss.

This article adopts a different approach. We take no position on the respective merits of notice versus plausibility pleading, and we are skeptical that the relative costs and consequences of the two types of error can be assessed empirically in a fashion that would satisfy anyone not already inclined to whatever the conclusion might be. Rather, we propose a reform which can improve the motion to dismiss regardless of the applicable standard. What is distinct in our approach is that we direct our attention to what the parties should do, as opposed to trying to refine the appropriate legal standard for courts to employ in assessing whether to grant or deny a motion to dismiss. In short, we propose a use of fee and cost shifting in the initial process of factual claiming and denials that would create incentives for the parties to acquire or reveal information germane to the motion to dismiss by forcing them to absorb the costs of either producing the information or denying its existence.

This article is structured as follows. Section 2 describes the dilemma of Rule 12(b)(6) as currently administered—namely that courts make mistakes because they must decide motions to dismiss on the basis of limited information—and analyzes how different standards for gauging the sufficiency of the complaint allocate the costs of such errors among the plaintiff, the defendant, and society as a whole. Section 3 describes the debate in the academic literature triggered by the *Twombly* and *Iqbal* decisions. Section 4 sets forth our proposal and analyzes its costs and benefits. Section 5 inquires whether our proposal would make a difference in decided cases; we conclude that it could have a beneficial effect in meritorious cases which would otherwise be dismissed under the *Twombly/Iqbal* standard.

## 2. THE EVOLUTION OF RULE 12(B)(6)

The motion to dismiss sorts between cases that are so weak that they deserve to be rejected at the outset and cases that are strong enough to warrant passage to the next stage.<sup>3</sup> As with all filters, the motion to dismiss is necessarily inexact, generating two types of error. Some cases that should be dismissed survive the motion (type 1 error); others that should be litigated are dismissed (type 2

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3 On the filtering effect of the motion to dismiss, see, e.g., Anderson & Huffman (2010, 1); Bone (2010, 849); Clermont & Yeazell (2010, 825); Dodson (2010, 72–88).

error).<sup>4</sup> The problem is one of legal engineering. If the filter is demanding, the frequency of type 1 errors will be low: few cases that should be dismissed survive. But the frequency of type 2 errors will be large: many cases that should be litigated are dismissed. If the filter is lenient, few cases that should be litigated are dismissed but many cases that should be dismissed survive. Although it is impossible to eliminate error altogether, there is—in theory at least—a point of optimality: the filter should be adjusted to the level that minimizes the sum of the costs of type 1 and type 2 errors, measured by the probability of their occurring multiplied by the magnitude of harm if they do occur. The debate about Rule 12(b)(6) concerns where this point of optimality lies.

Each of the key decisions under Rule 12(b)(6) employs this general form of analysis.<sup>5</sup> *Conley v. Gibson*, the Court's initial foray into the field, analyzed error costs based on two premises (355 U.S. 41 (1957)). First, the Court emphasized the achievement of “substantive justice” as a fundamental goal of federal procedure (*id.* at 73). By “substantive justice”, the Court meant accurate outcomes: cases should be decided on the underlying merits rather than extraneous factors such as the skill of counsel or the information available to the court at the time it decides the motion (*id.* at 47–48). Second, the Court suggested that continued litigation, including the “liberal opportunity for discovery” and “other pretrial procedures”, would achieve substantive justice in cases that survived the motion to dismiss (*id.* at 48).

Given these premises, the Court's analysis of error costs was straightforward, as was its choice of a pleading standard. Type 2 errors (dismissals of meritorious cases) were very costly because they resulted in a party being deprived of a remedy to which he or she would have been entitled under the law. Such errors represented potential miscarriages of justice and were systemically of high cost because they represented the final disposition of an otherwise meritorious claim. In contrast, type 1 errors (failures to dismiss meritless cases) were not threats to substantive justice because the error was not dispositive and the lack of merit would be corrected later. Since the costs of type 2 errors were large and the costs of type 1 errors were slight, the point of optimality was a lenient filter which screened out only complaints deemed wholly insufficient on their face. This was essentially the *Conley* standard: a complaint should be dismissed only

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4 On type 1 and type 2 errors in the Rule 12(b)(6) context, see, e.g., Allen & Guy (2010, 6–7); Anderson & Huffman (2010, 1) (noting that “real world” operation of standard “is poorly understood”); Herrmann et al. (2009, 147) (“given the enormous transaction costs that litigation entails, Type II errors (false negatives) are probably preferable to Type I errors (false positives)”); Epstein (2007, 98).

5 See, e.g., Allen & Guy (2010, 15) (noting that *Twombly* and *Iqbal* apply the “very same dynamic conception” that animated previous cases).

if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief” (*id.* at 46).

The *Conley* standard endured for fifty years, at least as a formal matter.<sup>6</sup> Yet its foundations were shaky. The problem was discovery.<sup>7</sup> While discovery under the federal rules was not fully developed in 1957, when the *Conley* decision appeared, over the ensuing years it blossomed in scope and cost.<sup>8</sup> The Rules took as their point of departure a simpler set of common law disputes in which two litigants would each have access to a confined set of materials. Under such circumstances, a liberal inducement to the sharing of private information was eminently desirable and would move litigation quickly toward a merits-based resolution.

Once this simple common law dispute moved into the domain of modern complex cases, however, the foundations for the *Conley* rule began to erode. This development of the scale and complexity of litigation raised questions about both premises of the *Conley* decision. If the discovery that followed the denial of a motion to dismiss was expensive, then two of the goals of federal procedure would be in tension: the goal of achieving substantive justice—highlighted in *Conley*—might call for a liberal standard that minimized the risk that bona fide claims would be dismissed, but the goal of administering an inexpensive system of procedure—also a fundamental objective of federal procedure, although not one acknowledged in *Conley*—might call for a stringent standard which disposed of more cases at the outset in order to limit the costs that would ensue if cases were not dismissed. The discovery that would occur after denial of a motion to dismiss could also generate outcomes that did not align with the substantive merits, thus undermining *Conley*’s second premise. This was because the costs of discovery were not symmetrical as between plaintiffs and defendants. It is simpler to request information than produce it and, by and large, the information critical to liability is in the hands of defendants in most civil litigation. As a result, the defendant’s expenses from discovery are typically greater than the plaintiff’s. Discovery thus arguably increased the plaintiff’s bargaining leverage in settlement negotiations. Even if the plaintiff’s

6 See, e.g., *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). For a challenge to whether the full liberal standard of pleading was still available at the time of *Twombly* and *Iqbal*, see Noll (2010, 131).

7 See Easterbrook (1989).

8 On the growing importance and costs of civil discovery, see, e.g., Beisner (2010, 555–577). For empirical data on discovery costs, see, e.g., Willging et al. (1997). On the strategic use of discovery in litigation, see, e.g., Easterbrook (1989). Judicial decisions reflecting concerns about discovery abuse include *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980); *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring); *Am. Bank v. City of Menasha*, 627 F.3d 261, 265–266 (7th Cir. 2010).

case lacked merit, the defendant might settle as long as the cost of settlement was less than the cost of discovery.<sup>9</sup> Meanwhile the potential for using discovery as a lever to extract settlements could attract even more meritless cases into the system. If the costs of type 1 errors are large, instead of negligible as contemplated in *Conley*, then notice pleading arguably does not minimize the sum of error costs and, accordingly, does not achieve the socially optimal result. The more appropriate standard, according to this analysis, is a tougher rule that screens out more cases.

*Twombly*, the first of the Court's more recent decisions, essentially accepted this critique, endorsing the view that discovery imposes high and sometimes unwarranted costs on defendants in private antitrust litigation (550 U.S. at 544, 558–559).<sup>10</sup> These large costs were troubling in themselves. Worse yet, they belied the argument that type 1 errors would be corrected at summary judgment or trial: “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings” (*id.* at 599). Because the *Twombly* Court viewed the costs of type 1 errors as significant, it rejected the “no set of facts” approach articulated in *Conley*, declaring instead that to survive a motion to dismiss, the plaintiff's claim must be “plausible on its face” (*id.* at 547). To satisfy this test, the complaint must do more than merely plead facts consistent with defendant's liability (*id.* at 557). Instead, the plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” (*id.* at 556).

*Iqbal*, in turn, made it clear that the Court considered the costs of type 1 error to be significant outside the antitrust context. Even civil rights litigation imposed significant costs on defendants after denial of a motion to dismiss: “[l]itigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government” (556 U.S. at 662, 685).<sup>11</sup> Given that type 1 error costs were significant across a range of cases, the Court made it clear that *Twombly*'s heightened pleading applies to many categories of civil litigation—perhaps even all cases governed by the federal rules. The vagueness of the ensuing standard confirmed the sense that post *Twombly* and *Iqbal* courts would be

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9 See Bebchuk (1988); Fitzpatrick (2012, 1645–1646); Kelly (2011, 1685).

10 The Court also questioned whether even active case management by judges could control these costs (550 U.S. 544, 559–560).

11 These concerns were present even if the court below had endeavored by case management techniques to limit the burden of discovery.

left with untethered authority to dismiss claims out of hand. In the language of *Iqbal*, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense” (*id.* at 679).

### 3. THE ACADEMIC RESPONSE

*Twombly* and *Iqbal* sparked a massive volume of commentary. The range of academic views, in fact, is almost as broad as the thousands of cases piling up in the lower courts interpreting and applying *Twombly* and *Iqbal*.

Some have claimed that despite the change in the formal standard, *Twombly* and *Iqbal* do not change the law in any fundamental way.<sup>12</sup> Most commentators, however, attribute greater significance to the decisions (Dodson 2010; Subrin 2012; Thomas 2010). Of these, some applaud the cases as reflecting a realistic assessment of discovery costs (Rennie 2011), correcting for the risk that defendants will be compelled to settle meritless claims (Schwartz & Appel 2010; Tyler 2009), improving the regime for pleading personal jurisdiction (Ressler 2009), returning to the original intent of the Federal Rules of Civil Procedure (Moline 2010), extending the law in logical and appropriate ways (Blair-Stanek 2010; Brown 2010; Moline 2010; Smith 2009), or moving American practice closer to global norms (Dodson 2010; Kourlis et al. 2010). The majority of commentators, however, have decried the decisions (Huston 2010), arguing that they exaggerate the problem of discovery abuse and strike suits (Clermont 2009; Miller 2010; Subrin 2012), valorize questionable narratives about plaintiff’s attorneys or the dangers of terrorism (Dorf 2010; Huq 2009; Miller 2010), deny justice to bona fide claimants (Miller 2010), discriminate against civil rights plaintiffs (Clarke 2010; Kassem 2010; Reinert 2011; Schneider 2010), and litigants with limited financial resources (Clermont & Yeazell 2010; Jois 2010; Miller 2010; Spencer 2010), offer a smokescreen for discrimination or bias (Eichhorn 2010; Klein 2010b; Marcus 2010; Subrin 2012), disadvantage plaintiffs who lack access to information about liability (McMahon 2008; Spencer 2009), create uncertainty and subjectivity in outcomes (Burbank 2009; Chemerinsky 2010; Eichhorn 2010; Noll 2010; Rothman 2009; Spencer 2010; Sullivan 2009), destabilize federal procedure (Clermont & Yeazell 2010), jeopardize the right to jury trial (Burbank & Subrin 2011; Klein 2009; Spencer 2010; Thomas 2007, 2010),<sup>13</sup> display hostility

12 See, e.g., Hannon (2008); Huston (2010); Karon (2010); McCarthy (2010); Moss (2009); Reardon (2010); Schwartz & Appel (2010); Steinman (2010).

13 But see Klein (2010a) (criticizing the historical approach to Seventh Amendment interpretation).

to litigation (Burbank & Subrin 2011; Coleman 2009; Schneider 2010; Tice 2008), flout the Rules Enabling Act (Bone 1999; Burbank & Subrin 2011; Subrin 2012), and even undermine the rule of law (Subrin 2012).

Several commentators have proposed ways of modifying or interpreting *Twombly* and *Iqbal* in order to improve their administration or mitigate their impact (Clermont & Yeazell 2010; Effron 2010; Hartnett 2010; Kourlis et al. 2010; Wasserman 2010; Spencer 2009; Stein 2009). Several of these articles recommend that plaintiffs have access to some type of discovery prior to the ruling on the motion to dismiss. Colin Rearden, for example, suggests that in cases where information asymmetries are significant, the federal rules should be amended to allow a “safety valve” modeled on Rule 56(d), which permits plaintiffs to postpone summary judgment by arguing that they need additional time for discovery (Reardon 2010). Arthur Miller suggests that plaintiffs might be permitted pre-dismissal discovery limited to those documents that speak directly to the threshold plausibility of their claim (Miller 2010). Robert Bone endorses pre-dismissal discovery and recommends that the court’s principal focus should be on weeding out meritless lawsuits (2009, 935).<sup>14</sup> Ray Campbell argues for a discovery period after initial filing but before resolution of a motion to dismiss; he also suggests allowing an amended complaint after the discovery period, which could be assessed under a stricter pleading standard (Campbell 2010). Paul Stancil argues for pre-dismissal discovery, but would impose a bonding requirement on the plaintiff (Stancil 2009). Suzette Malveaux recommends that courts routinely allow targeted discovery when assessing motions to dismiss (Malveaux 2010). Richard Epstein proposes a system of staggered discovery through a robust case management system, with initial discovery limited to the points most pertinent to the litigation (Epstein 2011, 206).<sup>15</sup> A few commentators have discussed approaches designed to affect the incentives and behavior of the parties rather than the courts. Scott Dodson discusses a form of pre-trial discovery coupled with the idea that the plaintiff should pay the initial discovery costs of the defendant which can be recovered if the plaintiff survives the motion to dismiss (Dodson 2010).<sup>16</sup> Brian Fitzpatrick argues

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14 Bone also notes that plaintiffs might be allowed to go forward with a deficient complaint on condition that they pay the defendant’s fees and costs if suit is dismissed at the summary judgment stage (Bone 2009, 934).

15 If materials produced in the first round of discovery support plaintiff’s version of events, a second, plaintiffs could proceed to a second, and, if necessary, a third round. To minimize the likelihood of unnecessary discovery requests at these early stages, Epstein endorses some sort of fee-shifting approach, perhaps in the form of “explicit reimbursement of at least some of the expenses that the moving party imposes on the opposite side” (Epstein 2011, 207).

16 Dodson’s recommendations are limited to the period prior to a motion to dismiss system and would not impede any ability to continue.

that type 1 errors could be reduced by a fee-shifting regime under which the losing party in a motion to dismiss pays the prevailing party's attorney's fees (Fitzpatrick 2012, 1645–1646).

The proposal set forth below is in the general spirit of the work discussed in the preceding paragraph, in that it tries to find a balance between premature rejection of claims and an unwarranted escalation of discovery costs, and does so through a combination of targeted discovery and modifications to the incentives faced by the parties. None of these earlier commentators, however, has developed our idea of combining a concrete proposal for pleading reform with an information forcing, two-way fee-shifting rule. We describe our proposal in detail in the following section.

## 4. CUSTODIAL FACTS AND INFORMATION DISCLOSURE

### 4.1 The Plausibility Paradox

*Twombly* and *Iqbal* open with a paradox. At the threshold stages of litigation, courts are asked to weigh two competing accounts of the ultimate facts of the case in order to assess the relative plausibility of the plaintiff's claim. So long as the issue is the legal plausibility of the claim, there is no issue that need detain us; either the plaintiff's allegations suffice to state some basis for an ultimate remedy or they do not. But the inquiry goes deeper and asks whether the factual averments of the complaint "raise a reasonable expectation that discovery will reveal evidence" that would in turn "allo[w] the court to draw the reasonable inference that the defendant is liable" (*Twombly* 550 U.S. at 556; *Iqbal*, 556 U.S. at 678). Or, as *Twombly* mandated, a motion to dismiss is proper where the plaintiffs "have not nudged their claims across the line from conceivable to plausible" (550 U.S. at 570).

Certainly, the examination of facts at the pretrial phases of a case is nothing new. This threshold has been crossed repeatedly with the expanded use of summary judgment,<sup>17</sup> the *Daubert* standard for pretrial determination of the admissibility of expert testimony,<sup>18</sup> the expansive evidentiary inquiry surrounding class certification,<sup>19</sup> and the *Markman* hearings for patent determinations<sup>20</sup>

17 See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See also Issacharoff & Loewenstein (1991) (discussing the effect of the three cases).

18 See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

19 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

20 See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996); See also Miller (2003) (describing trend toward judicial assumption of fact inquiries previously reserved to the jury).

all serving as prominent examples of the gravitation of factual controversies into the ambit of judicial oversight. In each of these areas, however, the question is one of competing presentations of the evidentiary record in full adversarial confrontations. The timing of the factual inquiry may have moved earlier in the litigation process, and the decider of contested facts may have shifted from jury to judge, but the adversarial development of a contested record remains central to the proceedings.

Not so with the modern motion to dismiss. The Court has now created a species of factual inquiry in which one side has the burden of establishing a factual threshold while the other is free to critique it without proffering its own factual claims.<sup>21</sup> Because trials are necessarily a confrontation between competing accounts of the relevant facts, the plausibility of a trial inference will be necessarily rough-hewn in the absence of a competing factual narrative. Unlike summary judgment, for example, the sufficiency of the factual claims cannot be tested against a completed discovery record and the factual viability of the plaintiff's trial presentation is necessarily a matter of prospective conjecture.

There are categories of cases, however, where the plausibility turns on a discrete document or point of factual inquiry, which can be ascertained relatively directly and with little cost. The troubling question in the *Twombly/Iqbal* approach is how to assess whether the incremental investment in limited discovery is worthwhile, and whether courts can manage it effectively. Indeed, this is precisely the axis of division between the majority and the dissents in the two cases, with the dissent in each case extolling the case management abilities of the trial courts (*Iqbal*, 558 U.S. at 700 (Breyer, J., dissenting); *Twombly*, 550 U.S. at 593–595 (Stevens, J., dissenting)), and the majority rejecting the managerial solution for fear that expedience on the part of the judiciary will allow search costs to be imposed on defendants, even in cases clearly lacking merit (*Iqbal*, 558 U.S. at 684–686; *Twombly*, 550 U.S. at 558–559).

What should happen where there are facts knowable to the defendant that would quickly establish the plausibility of the plaintiff's claim? The closest analog is found in Rule 56(d), in which a plaintiff may defer consideration of summary judgment until such time as specified discovery is completed. But the analogy fails if the question before a court on a motion to dismiss is whether the claim is sufficient to justify any discovery at all. There is no per se prohibition on courts permitting some discovery during the pendency of a motion to dismiss (Andrus 2010, 29; Mark 2012), and there are cases recognizing the

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21 The plausibility standard for pleading under Rule 12(b)(6) follows the congressional creation of a related standard for securities fraud claims under the Private Securities Litigation Reform Act of 1995. 15 U.S.C.A. § 78u-4(b)(2)(A). See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). Fraud cases had long been held to a discrete pleading regime under Rule 9(b).

propriety of discovery during that pendency.<sup>22</sup> The flexibility of courts operating under the Rules differentiates the customary motion to dismiss from the Private Securities Litigation Reform Act (PSLRA)—under which there is a statutory requirement that there be no discovery pending resolution of a motion to dismiss.<sup>23</sup>

Courts have had more experience with the statutory plausibility standard under the PSLRA and the problem with no possible discovery is well illustrated in a concrete setting in a case falling under the PSLRA's plausibility standard, *Flaherty and Crumrine v. TXU* (565 F.3d 200 (5th Cir. 2009)).<sup>24</sup> We choose this case as an example because it falls under the statutory requirements of the PSLRA and would therefore be unaffected by our proposal. Nonetheless, the specifics of the case indicate what may be gained by a mechanism that tests the assertion of the parties at the motion to dismiss stage. At issue in *TXU* was the sufficiency of a disclosure of impending dividend increases in a publicly traded company being taken private by its management. *TXU* was a major utility in Texas and the market value of utility stocks are highly sensitive to the company's dividend stream. Consequently, any prospective increase in dividend rates would increase the market value of the company and would presumably affect the decision whether or not to accept the buy-out by company management. The tender offer documents appeared to indicate that there was no dividend increase contemplated for several years, but the company nonetheless more than doubled the dividend within days of the close of the tender offer period. Plaintiffs predictably argued that they had been denied relevant information when they made the decision to accept the buyout offer. Defendants, in contrast, claimed that they could not announce such information until cleared by the firm's rating agencies. In effect, plaintiffs urged an inference of scienter from the failure to disclose, while defendants rebutted that their decision was the product of constraints that they could not reveal and therefore failed to establish the statutorily required intent to deceive.

22 See, e.g., *Allstate Ins. Co. v. Levy*, No. CV-10-1652 (FB)(VVP), 2011 WL 288511, at \*1 (E.D.N.Y. Jan. 27, 2011); *Integ. Systems & Power, Inc. v. Honeywell Int'l, Inc.*, No. 09 CV 5874(RPP), 2009 WL 2777076, at \*1 (S.D.N.Y. Sept. 1, 2009); *DSM Desotech Inc. v. 3D Systems Corp.*, No. 08 CV 1531, 2008 WL 4812440, at \*2 (N.D. Ill. Oct. 28, 2008); *Bocciolone v. Solowsky*, No. 08-20200-CIV, 2008 WL 2906719, at \*1 (S.D. Fla. July 24, 2008).

23 See, e.g., *Sanders v. City of Indianapolis*, No. 1:09-cv-0622-SEB-JMS, 2010 WL 1410587, at \*1 (S.D. Ind. Apr. 2, 2010); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 336 (N.D. Ill. 2005). For further argument that the PSLRA standard should apply to all litigation, see Beisner (2010, 592–593); Mark (2012).

24 This case is familiar to us because one of us argued it on appeal. The facts are emblematic of the forced binary choice courts confront.

Regardless of the merits of the case, the district court had to decide whether the claim of self-interest or the need to await credit rating agency authorization was the most plausible reason for the nondisclosure of what the market later deemed valuable information. The dispute reduced itself to a conflict between two factual renditions of the world, a dispute that could easily be resolved by the production of any document or witness establishing the threshold question of whether the defendants had acted because of the anticipated rating by the credit agencies. Under the PSLRA the court could not peek at the facts, as it were, by ordering limited discovery. It had to decide plausibility on the basis of the factual inferences alleged by the plaintiff and the rejoinder by the defendant that there may have been other reasons, put forward in a motion to dismiss rather than a pleading.

*TXU* is presented not for the particulars of the dispute, but for the posture at which a court must confront a motion to dismiss. The relevant pleading standard, regardless whether under the PSLRA or under Rule 12, sets a criterion for judicial resolution of the surface viability of a complaint. The case law under *Twombly* and *Iqbal*, and the ensuing commentary, all take as the point of departure the question of what courts should do when confronted with a claim whose factual likelihood is hard to discern. In contrast, we seek to create a bargaining environment where plaintiffs in a case like *TXU* would have their bona fides tested by being forced to risk assuming the costs associated with exploratory discovery. At the same time, defendants would presumably know whether there are documents that would confirm the plausibility of the plaintiff's claim, and would in turn have to shoulder the costs associated with a mistaken assertion of a motion to dismiss. We turn now to the mechanics of the bargaining exchange.

#### **4.2 Bargaining over Information**

Our proposal is aimed at the central weakness of the pretrial determination of plausibility. The existing system asks district courts to make an intuitive guess as to whether the costs of dismissing a potentially meritorious suit outweigh the benefits of preventing deadweight losses through fruitless discovery. The courts, however, are poorly equipped to make this judgment given their lack of knowledge of the underlying facts. Current law creates little incentive for the parties to provide the necessary information to make up for what the court lacks. No doubt, under *Twombly* and *Iqbal*, many defendants will claim that they are being blackmailed into extortionate settlements by the anticipated ruinous costs of litigation (Silver 2003, 1360–1361). And, just as certainly, many plaintiffs will claim that defendants are hiding the inculpatory smoking gun, which is just one interrogatory or deposition away from establishing nefarious

malfeasance. These claims, however, are little more than “cheap talk” because the parties incur no sanctions if their assertions turn out not to be true.

Our approach focuses on the strategic implications of information forcing in party-to-party bargaining, rather than the exercise of judicial intuition anticipated by *Twombly* and *Iqbal*. The idea would allow a motion to dismiss to proceed under whatever the standard of review might be, whether the laxer requirements of *Conley*, or the more exacting plausibility scrutiny of *Twombly/Iqbal*. Regardless of the standard of review, a defendant may challenge the legal sufficiency of a complaint as anticipated by Rule 12(b)(6). The difference between our approach and current practice is the addition of an information-forcing step that corresponds to the difficulty faced by district courts in resolving factual plausibility based on the plaintiff’s allegations alone.<sup>25</sup>

The proposal works as follows. Defendant moves to dismiss exactly as under current practice. The plaintiff either responds to the motion, thus submitting the matter to the court for decision, or files an affidavit stating that she cannot respond to the motion without access to specific facts in the defendant’s possession. The ability to postpone the court ruling on the motion to dismiss begins the procedure at this point and leads to the critical information-forcing reform: the use of cost incentives to produce information relevant to the motion to dismiss.

In her affidavit seeking additional information, the plaintiff must set forth the topics which the plaintiff wishes to investigate and must propose an expedited plan of discovery targeted to the inquiries so identified. Upon receiving the defendant’s response to the plaintiff’s proposal, the court either approves, rejects, or revises the discovery plan. If the judge allows discovery to proceed, the defendant either withdraws the motion to dismiss or produces the requested information. If the motion to dismiss is withdrawn, then litigation proceeds through the usual fact development processes of discovery and summary judgment.

At the conclusion of whatever discovery the court permits, the plaintiff may be allowed to amend the complaint to incorporate newly discovered information, or may elect to rely on the complaint previously filed. In either case the court reviews the motion to dismiss taking account of any information produced in discovery which either party brings to the court’s attention. If the

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25 Insofar as it seeks to improve the efficiency of pleading rules by modifying party incentives, our proposal has similarities to Miller (2012, 93–105), and Miller (2010). The proposal in this article is significantly different from those earlier papers, however, in that its principal focus is on smoking out information in the possession of the defendant whereas the earlier papers focused on means for providing plaintiffs with an option to continue litigation in the wake of an otherwise-dispositive preliminary ruling.

court grants the motion, the case is dismissed and the plaintiff pays the defendant's reasonable expenses (fees and costs) incurred in connection with the motion and the production of the information requested during the discovery phase.<sup>26</sup> If the court denies the motion, the case continues and the defendant pays the plaintiff's reasonable expenses incurred in defending the motion to dismiss and undertaking the discovery associated with opposing the motion.<sup>27</sup>

The importance of this additional step is that it changes the strategic dynamics between the parties. In the first instance, the willingness of the plaintiff to risk absorbing the defense costs associated with the limited discovery tests the bona fides of the plaintiff's factual assertions. The basic rule of thumb in discovery is that it is cheaper to ask than to produce, and this creates a permanent moral hazard in that the plaintiff does not have any immediate reason not to ask for information when facing the risk of adverse judgment, as with a motion to dismiss. The simple "put up or shut up" response tests the willingness of the plaintiff to underwrite the costs of a preliminary factual inquiry, and narrows the "fishing expedition" quality of some discovery requests by requiring the party seeking the information to risk paying for it.

Perhaps more interesting is the corresponding strategic consequence for the defendant. In a wide variety of cases the defendant may safely be presumed to have privileged access to the critical information that would establish the threshold plausibility of the plaintiff's claim. Ready examples are any claim that turns on the subjective intentionality of the defendant, whether it be an employment termination for impermissible reasons, or the withholding of critical information from a public stock offering. Under current practice there is no reason that a defendant, even knowing that clear inculpatory evidence exists, could not challenge the surface plausibility of the complaint. So long as there are not affirmative misrepresentations, current practice does not punish or deter arguing against the plausibility of a claim that is known to be true, or at least supported by evidence in the exclusive possession of the defendant.

Faced with a request for specific limited discovery, and backed up by the potential for fee shifting if the motion to dismiss is denied, the defendant with knowledge of inculpatory information is put to a strategic choice. To pursue the motion to dismiss not only would require immediate production of the desired

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26 In certain classes of cases, notably class actions without a deep-pocket lead plaintiff, the costs of discovery in unsuccessfully resisting a class certification motion would have to be borne by class counsel rather than the nominal plaintiff(s).

27 This additional step of cost shifting differentiates this proposal from an earlier attempt to use Rule 54(d) as a model for addressing asymmetric access to information at the motion to dismiss stage. See Reardon (2010, 2206–2208). The cost shifting applies only to the discovery accompanying this extra stage of contesting the motion to dismiss; we are not proposing to alter the basic American rule of parties bearing their own costs and fees, absent express statutory cost or fee shifting.

information but would force the defendant to subsidize that part of the plaintiff's case undertaking. The wiser course where the defendant has such information might be to withdraw the motion to dismiss, or never to file it in the first place. This would not only bring the litigation closer to a resolution based on the merits but it would reduce the litigation costs for all parties. On the other hand, a defendant knowing that there are inculpatory documents easily discoverable might have to chance filing a motion to dismiss regardless, for fear that the failure to do so would signal great litigation vulnerability.

Because our proposal smokes out information from both sides, it would have the greatest benefit in exactly those cases where *Twombly* and *Iqbal* are most problematic—cases involving large information asymmetries as between the parties.<sup>28</sup> As a dividend, our proposal would facilitate earlier and more constructive settlement negotiations. Many cases settle around the time of the motion for summary judgment, simply because the need to marshal, analyze, and present probative information to the court focuses attention on the bottom line (Miller 2009). Our proposal would encourage the parties to consider settlement at an earlier stage of the litigation, and would also offer each of them an excuse for proposing settlement negotiations in a way that does not signal weakness in their case (Ayres & Unkovic 2012; Gertner & Miller 1994).

These benefits could be achieved at low cost. Our proposal would not impose an excessive burden on courts, nor would it require judges to engage in tasks other than ones with which they are already familiar: supervising plans of discovery, ruling on preliminary motions, and awarding counsel fees. Arguably, no amendment to Rule 12(b)(6) is required.

The proposal does contemplate that the parties (and the court) will sometimes incur costs of targeted discovery. We believe, however, that these are not problematic. Where the relevant information is in the public record, the plaintiff will not seek discovery because the facts she needs are available by other means. Likewise, plaintiffs who know that their cases lack merit or who have no reason to believe that there is force behind their allegations will not seek discovery because they face liability for attorney's fees and costs if the motion to dismiss is decided against them. If discovery does take place and the court denies the motion to dismiss, the result would merely accelerate costs that would be incurred in any event as the litigation progressed.

The only situation where our proposal would increase overall litigation costs is where the court grants plaintiff's request for discovery and then rules in favor of the defendant on the motion to dismiss. Even here, however, the costs are

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28 See Epstein (2007) (defending the heightened pleading standard under *Twombly* and *Iqbal* where most of the information pertinent to liability is in the public domain but noting that this justification does not extend to cases of severe information asymmetry).

likely to be manageable. Both the plaintiff and the defendant have incentives to limit the scope and extent of discovery, since each faces liability for their adversary's attorney's fees and costs in the event the motion is decided against them. The requirement for judicial approval further limits costs, since the court would be expected to authorize only the minimum discovery consistent with accommodating the plaintiff's legitimate need for information. Because the costs of implementation are low, our proposal may well represent a desirable reform even if it achieves only modest increases in the accuracy of rulings on motions to dismiss.

## 5. A MILD EMPIRICAL INQUIRY

In an effort to test the likely impact of our suggested alternative, we surveyed the universe of appellate decisions in 2011 that addressed the effects of *Twombly/Iqbal*, a search that ultimately yielded 466 cases.<sup>29</sup> We took this dataset to be the universe of appellate decisions that were trying to engage the proper standards for motions to dismiss in calendar year 2011. There are no doubt some cases that may have escaped our survey because courts could have addressed a motion to dismiss without citing either of the leading Supreme Court cases on point. We suspect that this will be a small number, as any case having to address legal standards would still have to engage *Twombly* and *Iqbal*.

Canvassing appellate decisions yields specific information about how doctrine plays out in a rarified set of cases. Litigated cases in general, and cases that reach appellate decisions in particular, are of course not a random distribution of the universe of potential legal disputes. To the extent that the effect of *Twombly/Iqbal* is to make motions to dismiss more difficult to survive—and even if that were in fact only the perception of the effect of the new pleading cases—there would be disputes that would be deterred from the judicial system and that as a result would never be reflected in any litigation statistics. Moreover, faced with a fortified motion to dismiss, some plaintiffs might pull down their cases hoping for favorable future developments (such as evidence provided by a whistleblower) or might not challenge a dismissal on appeal.

But decisional law is important in defining the known legal environment in which litigants have to decide whether to proceed to litigation, to settle, or to

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29 We searched specifically for appellate court cases that applied the factual plausibility standard developed in *Twombly* and *Iqbal* on a motion to dismiss. We used the following search string: (Twombly OR Iqbal) & (8(a) OR 12(b)(6)). The search produced 477 results, of which 3 were duplicate opinions or remand orders. Another eight were decided on a different procedural posture—such as a motion for summary judgment—and were thus also excluded outright. We therefore started with a sample of 466 cases.

risk formal adjudication. Surveying decisional law is an excellent means of understanding the available information under which litigants must make the relevant decisions on how to proceed in litigation.<sup>30</sup> Particularly when there is a systemic alteration in the controlling doctrinal regime, such as a change in standards for motions to dismiss that potentially affect all cases in the federal district courts, the sweep of decisional law is what guides the parties in making the primary decision to litigate, defend, settle, or appeal.

Moreover, to the extent that litigants or potential litigants look to appellate law to guide their initial assessment whether or not to file a claim or file a motion to dismiss, it is likely they will seek guidance in Circuit law applying the leading Supreme Court cases on point. In other words, our search corresponds to the intuitive guidepost for potential or actual litigants. Since we are trying to engage likely litigant behavior rather than a conclusive empirical assessment of the effects of *Twombly* and *Iqbal* (an effort thankfully undertaken by others<sup>31</sup>), this search satisfies our purposes.

We further culled the 466 cases to remove claims brought by prisoners or pro se litigants since these tend to be mechanical recitations of rather perfunctory affirmances of dismissal, and these are not the litigants that could benefit from a cost-shifting regime. Further, we removed cases in which a district court grant of a motion to dismiss was reversed on appeal. We also removed cases governed by discrete substantive legal regimes, such as PSLRA cases. These technical adjustments left us with a potential universe of 236 cases as the universe of

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30 This is the critical insight of the major scholarship on how parties bargain in the shadow of the controlling legal environment. Mnookin & Kornhauser (1979, 950–953). The ability to predict the controlling law further underlies the Priest/Klein hypothesis that plaintiffs and defendants should win roughly half of cases litigated to judgment. Under Priest/Klein, the absence of settled decisional law is a primary determinant of the inability of parties to reach mutually advantageous settlements and leads them to embark on the costly search for judicial vindication. See Priest & Klein (1984, 4–5). Surveying actual court behavior to assess the legal environment is an important endeavor, even if it is not an accurate measure of primary disputant behavior.

31 The empirical studies that have tried to measure the full impact of *Iqbal* and *Twombly* have offered mixed results. Because researchers do not have access to any statistical account of how potential disputants might be deterred from entering the court system, empirical studies to date have only sought to measure win/loss rates in cases in the court system before and after *Twombly/Iqbal*. Necessarily, these data suffer from endogeneity effects, meaning that the dataset is compromised by the very effect that they seek to measure. The best summary of these studies and their respective methodological limitations is found in Gelbach (2012). Even with that limitation, the studies are split depending on the method utilized. A number of studies have concluded that these opinions have had only a minor effect and that for the most part federal practice has continued as before. See, e.g., Brescia (2011–2012); Cecil et al. (2011); Janssen (2011). For a critique of the Cecil study, see Hoffman (2011). Several studies have concluded that *Iqbal* and *Twombly* have increased the frequency of dismissals, without or without leave to amend, and that the effect is most pronounced in particular areas of litigation such as civil rights cases. See Hatamyar (2010); Moore (2012).

*Twombly/Iqbal* decisions and we used these to test our proposal.<sup>32</sup> Specifically, we were interested in the number of cases in which an intervening capacity for party-driven limited factual inquiry might have altered the outcome.

Once so culled, we were left with 236 cases in which appellate courts were assessing the propriety of a motion to dismiss having been granted. The denial of a motion to dismiss is not normally appealable and any such denial would be subsumed by later developments in the case as it proceeded through discovery, summary judgment, trial, or more likely, settlement. Thus, we were looking for cases in which district courts had dismissed claims brought by represented plaintiffs and in which appellate courts had affirmed based on *Twombly/Iqbal*.

Of this set of 236, we found that 199 presented no apparent change as a result of *Twombly/Iqbal*. These were cases that courts resolved on the grounds that the asserted claim did not present a cognizable legal entitlement to relief. In other words, these are claims that fall within the textual command of Rule 12(b)(6) in that even under all facts asserted, the claim fails to state a legal basis for relief. These are claims that would have been analyzed in identical fashion under either *Conley* or *Twombly/Iqbal*. Put yet more simply, these were claims that would have been subject to dismissal before or after *Twombly/Iqbal* with no apparent effect from the new factual plausibility standard.<sup>33</sup>

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32 First, we excluded the 64 cases were brought by prison inmates and the 113 brought by other pro se plaintiffs, for a total of 177 cases. These cases often produce mechanical recitations of rather perfunctory affirmances of dismissal. On occasion, courts have applied a more relaxed pleading standard to pro se plaintiffs, and thus the effect of *Twombly* and *Iqbal* is not as straightforward as in the case of represented parties. Pro se plaintiffs would also not be in a position to take advantage of any cost-shifting discovery provisions under our proposal. We also excluded the twelve cases that were governed by discrete substantive legal regimes, such as the PSLRA. Finally, we excluded the thirty-eight cases in which the appellate court overturned the lower court's dismissal order, as well as the three cases in which the appellate court upheld the lower court's denial of qualified immunity on a finding that plaintiffs had adequately stated a § 1983 claim. These cases were not the product of the Supreme Court's elevated pleading standard so much as its erroneous application.

33 The coding was performed by our excellent research assistants Gabriel Geada and Maria Ponomarenko. The culled groups of 199 cases fell in one of two categories. A large proportion of these cases presented no apparent change as a result of *Twombly* and *Iqbal* and turned on the legal sufficiency of the claim rather than the plausibility of the factual claims. These included cases in which petitioners lacked a legal basis for their claim, failed even to allege a material element of the claim, or were barred by a statute of limitations. The others were affected by the heightened pleading requirements, but only to the extent that they required plaintiffs to state with greater particularity the facts in their possession—to adequately plead damages, for example, or to demonstrate that plaintiff's injuries actually resulted from defendant's conduct. This left a subset of thirty-seven cases dismissed as a result of plaintiff's failure to plead sufficient facts with respect to defendant's conduct so as to state a plausible claim for relief under the heightened pleading requirements announced in *Twombly* and *Iqbal*.

We were a bit surprised by this initial cut at the data. While it is not a random distribution of cases, and certainly does not capture decisions not to file claims from fear of the new plausibility dismissal standard, we were nonetheless struck by how few cases in the appellate pipeline seem to present any issue challenging initial pleadings under the richer fact-based inquiry of *Twombly* and *Iqbal*. Even accepting that this sample has all sorts of methodological limitations, it does conform to arguments that less rather than more was changed by *Twombly* and *Iqbal*, or perhaps that the district courts had already moved the law in this direction in practice, if not formally (Fitzpatrick 2012, 1622–1623; Noll 2010, 121–123).

When reduced to this subset, we then find that of the thirty-seven cases, there were perhaps a dozen that revealed the problem we are concerned with. These are the cases in which a simple and confined factual test might have relieved the courts of the need to assess plausibility in the factually impoverished environment that prompts our concern in this article. The limited universe of cases indicates that our proposal would be expected neither to upend radically the way in which legally marginal cases are dealt with in the legal system, nor to be without consequence for cases that present genuine concerns over premature factual disposition. Moreover, the strategic incentive provided by cost shifting may result in fewer motions to dismiss needing to be filed or adjudicated by courts.

Two cases provide paradigmatic examples of the prospects for the motion for limited discovery, one from the domain of concerted economic action, the other addressing the problem of intent in an employment discrimination suit. In *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, a purchaser of lawn mowers charged a firm with acting as both distributor and retailer and violating the prohibitions on price discrimination under the Robinson–Patman Act (650 F.3d 1046 (6th Cir. 2011)). The decisive question in the case was whether the manufacturer of the Scag brand lawnmowers actually controlled the retailer—a statutory predicate for liability. That information in turn required access to the defendants’ records to show that the two companies were simply joint operations of a single enterprise and that New Albany was forced to pay an unlawful premium for its purchases. As well expressed by the Sixth Circuit, this presented plaintiffs with what proved to be a fatal dilemma:

This new “plausibility” pleading standard causes a considerable problem for plaintiff here because defendants Scag and Louisville Tractor are apparently the only entities with the information about the price at which Scag sells its equipment to Louisville Tractor. This pricing information is necessary in order for New Albany to allege that

it pays a discriminatory price for the same Scag equipment, as required by the language of the Act. This type of exclusive distribution structure makes it particularly difficult to determine whether discriminatory pricing exists.

Before *Twombly* and *Iqbal* courts would probably have allowed this case to proceed so that plaintiff could conduct discovery in order to gather the pricing information that is solely retained within the accounting system of Scag and Louisville Tractor. It may be that only Scag and Louisville Tractor have knowledge of whether Scag exercises control over the terms and conditions of Louisville Tractor's sales to retailers, including the retail operations of Louisville Tractor. 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 of discriminatory pricing is solely within the purview of the defendant or a third party, as it is here . . . . In this case that means, as the district court held, that plaintiff must allege specific facts of price discrimination even if those facts are only within the head or hands of the defendants (*id.* at 1050).

Similarly, in *Santiago v. Puerto Rico*, a mother sued over alleged sexual abuse of her disabled son by a school bus driver (655 F.3d 61 (1st Cir. 2011)). The critical question under Title IX was whether the school principal had actual knowledge of the alleged misconduct, and whether despite that knowledge had failed to act. The complaint presented the information that was observable to the plaintiff:

The complaint alleges that the plaintiff went to the school on October 16, 2003, and told her son's special education teacher that Jherald had been molested by his bus driver; that the teacher referred her to the school social worker; that the plaintiff visited the social worker, who "did not do anything;" and that the plaintiff "attempted to meet [on] various occasions with the Principal," who "was never available and/or refused to meet with her." Based on these "facts," the complaint asserts that the principal "demonstrated deliberate indifference by failing to take appropriate action when he had knowledge that the abuse was occurring" (*id.* at 74).<sup>34</sup>

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34 *Williams v. Time Warner, Inc.*, 440 F. App'x 7 (2d Cir. 2011), also turns on one dispositive fact in a classic claim of employment discrimination. There a black female vice president was terminated four months into her tenure and six days after complaining for the second time to human resources about various alleged slights and episodes of mistreatment. Once again, the lack of access to

Here again, the complaint was dismissed as not plausible based on an intuitive assessment by the trial court of a factual claim that was untested. More starkly, because the issue was presented on a motion to dismiss, the school authorities did not even need to deny the factual averments in the complaint. At the motion to dismiss stage, the complaint remains unanswered and the defendant is not even put to the task of admitting or denying any of the factual claims. Accordingly, a district court relying on its “its judicial experience and common sense”, in the language of *Iqbal*, would have to determine whether it was or was not likely that a particular principal was on notice of the attempted meetings with an irate parent and the subject of those meetings. It is difficult to see what intuitions derived from either judicial experience or common sense could accurately guide a judicial determination that a particular school official was or was not on notice of claimed sexual abuse.

In *Santiago*, as in *New Albany*, a limited factual inquiry would have obviated the need for judicial speculation. The principal’s calendar, or emails from the dates in question, or perhaps even a deposition, would have resolved the basic jurisdictional fact every bit as certainly as the records of the prices paid by Louisville Tractor would have in the *New Albany* case. These are what may be considered “custodial facts”, issues specific to the relation between the parties that are no doubt true in some cases, but whose application to a specific case cannot be known with any certainty. There are in the universe of human relations retailers that serve as subsidiaries of manufacturers or distributors (as alleged in *New Albany*), just as there are supervisory school officials who are aware of misconduct by subordinates (the critical factual allegation in *Santiago*). It is difficult to say whether such custodial facts are likely to be true in any particular case, or at least it is easy to see why such uninformed assessments are likely to lead to either inclusion of baseless claims or exclusion or potentially meritorious claims.

The more that a claim turns on intentionality in the relation between parties, the more one would expect there to be critical custodial facts. Thus, as one would expect, there are several employment discrimination or workplace retaliation claims in the group of dismissed actions, some of which offer poorly

potentially corroborating evidence—either emails about the decisions leading to her termination, or other discovery about her actual work performance—doomed her claim:

In this case, Williams’s specific complaint “about management’s . . . stereotyping her as an ‘angry black woman’ ” plainly constitutes a claim that she faced discrimination in the workplace as a result of her race and gender . . . Williams’s complaint merely provides a list of allegations of mistreatment by her employer and suggests the weakest of reasons that she believed her rights had been violated. As such, her claim does not state a plausible retaliation claim and must therefore be dismissed (*id.* at \*2–3).

formulated accounts of personal retaliation mixed with claims of systemic discriminatory barriers to minority or female advancement.<sup>35</sup> This is to be expected because wrongful termination claims as a group are lawsuits whose merits are largely determined by the factually rich environment in which everyday decisions to hire or fire, promote and reward, are routinely made. In such cases, the dispositive information is likely to be found in the work records maintained by the defendant, records that give an oftentimes definitive first-cut assessment of whether the claims of the employee to be qualified for the job, or to have performed at a superior level, can quickly be evaluated.

Our suggested reform of limited factual examination at the peril of the parties seems particularly well suited in such fact-dependent assessments that turn on custodial facts. In the first instance, these are facts as to which the plaintiff's counsel is unlikely to have pre-litigation access, and is therefore limited in what forms of pre-filing investigation can be done.<sup>36</sup> But more significantly, it is in this setting that courts are least able to be guided by the generalized wisdom that comes from prior experience. The benefits may be compromised by the underlying economics in certain categories of cases subject to statutory fee shifting, such as employment discrimination cases. In such cases, the litigation is presumed not to justify the full costs of prosecution (hence the statutory fee shifting), and our proposal may place a difficult financial question on the plaintiff and her counsel. Even so, our proposal offers a potential recourse to truly targeted discovery that would otherwise not be present under the current state of the law.

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35 It is easy to see the temptation to remove some of these cases quickly from litigation. In *Delgado-O'Neil v. City of Minneapolis*, for example, the court upheld the dismissal of a retaliation claim arising out of a workplace promotion dispute (435 Fed. App'x 582 (8th Cir. 2011)). At bottom was an employee who alleged that she was the victim of sexual advances by a non-supervisory co-worker early in her career, was subject to discriminatory testing practices, was subject to subjective evaluations that were discriminatory, and was subject to retaliation for filing complaints about workplace misbehavior. While it does not appear likely that this mix of allegations could mature into an actual lawsuit, the plaintiff did finally allege specific misconduct by her supervisor in retaliation for the plaintiff airing all her grievances in a newspaper article about her lawsuit. The complaint was dismissed because the magistrate judge found despite specific allegations of the plaintiff being yelled at by her direct supervisor about the offending newspaper article, there were not sufficient facts alleged about the supervisor having had a direct role in the decision not to promote her (*Delgado-O'Neil v. City of Minneapolis*, 2010 WL 330322 (D.Minn. 2010)). That is exactly the sort of information available only to the defendant that a limited factual inquiry could readily establish.

36 In this context, we agree with our colleague Richard Epstein, who distinguishes between a motion to dismiss based on the insufficiency of the pleading itself and a motion that presupposes information in which the defendant "relies on private information that should be vetted through discovery" (Epstein 2007, 82). Our proposal does not address the argument advanced by Coin Reardon that, given the breadth of public regulatory information, the class of disputes needing private information may be narrowing (Reardon 2010, 2171–2172).

## 6. CONCLUSION

This article proposes an information-forcing approach to the motion to dismiss under Rule 12(b)(6). The idea builds on the fundamental problem of the Rule 12(b)(6) procedure: because rulings on motions to dismiss are made in an impoverished factual environment, the court predictably makes mistakes. The applicable pleading standard allocates the cost of errors as between plaintiff and defendant but does not necessarily affect the overall level of error, regardless whether the error is the type 1 error of letting meritless cases into the system or the type 2 error of denying real claims access to the judicial process. The key insight of this article is that, in some number of cases, much of the information needed to reduce the error level is in existence at the time the court rules on the motion to dismiss. Although the information is unavailable to the court, it is in the possession of the parties separately, though not in the form of a joint record that could be presented to the court. The problem is that the parties do not have the incentive to disclose this information to each other and that, as a result, the court is forced to make a decision despite the gulf in factual knowledge. A defendant who has infringed the plaintiff's rights knows facts probative of liability, just as a plaintiff who is pursuing a weak or even a nonmeritorious claim knows her intentions and evaluation of the case. Each side has private information pertinent to the motion to dismiss. But for obvious reasons, neither wishes to disclose it.

Our proposal forces the parties to reveal pertinent information. Faced with a motion to dismiss, the plaintiff would have the option to request that the court order expedited discovery targeted to specific facts pertinent to liability that the plaintiff believes are in the defendant's possession. The court could either order the requested discovery, deny it, or order a modified or scaled down discovery plan. If discovery is ordered, the defendant could either drop the motion to dismiss or produce the required information. At the conclusion of targeted discovery, the defendant could renew the motion to dismiss. The court would rule on the motion on the basis of the complaint and any information produced by the parties, including facts uncovered by the plaintiff as a result of the targeted discovery.

The key to our proposal is that the court's ruling on the motion to dismiss after targeted discovery would be accompanied by an order shifting expenses (attorney's fees and costs). If the court grants the motion to dismiss, the plaintiff would be required to pay the defendant's expenses associated with prosecuting the motion and producing the required discovery. If the court denies the motion to dismiss, the defendant would be required to pay the plaintiff's expenses. Our proposal does two critical things. First, it alters the strategic

dynamics between the parties in making and defending motions to dismiss. Second, it moves the locus of initial evaluation of plausibility from the court to the litigants.

Shifting expenses effectively forces the parties to reveal private, highly relevant information pertinent to the motion to dismiss. If the plaintiff is willing to incur the risk of proceeding with discovery, knowing that she will have to pay the defendant's expenses if the motion is granted, this behavior reveals that the plaintiff has a degree of confidence in the case and is not bringing a meritless lawsuit in hopes that the defendant will settle in order to avoid discovery costs. If the defendant is willing to prosecute the motion to dismiss, knowing that it will have to pay the plaintiff's expenses if the motion is denied after discovery, this reveals that the defendant has a degree of confidence that it is not in possession of inculpatory information that would defeat the motion.

The result, if the procedure works as anticipated, is that the courts would be able to administer the motion to dismiss with greater accuracy than under current law: fewer meritorious cases would be dismissed at the outset, and fewer nonmeritorious cases would be allowed through. As a bonus, the procedure would also work to encourage early settlements.

Were our proposal adopted, the possible strategic effects run further than just these initial accounts, and in turn push beyond the scope of this article. It may be that there will be fewer motions to dismiss filed, and that the failure to file a motion to dismiss will be the basis for early settlement discussions. It could also be the case that a plaintiff opposing a motion to dismiss who does not request limited discovery effectively signals a weak belief in her case, and allows for a settlement to be reached quickly at a low price, reflecting the revealed weakness of the claim. In either case, our approach appears to move the parties closer to an informed bargaining situation more quickly and with less costs than current practice

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