

THE BELL ATLANTIC CORP. V. TWOMBLY PLEADING STANDARD: HAS ITS APPLICATION BEEN OUTCOME DETERMINATIVE IN COURT OF INTERNATIONAL TRADE CASES? *

Franklin E. White, Jr.¹

I. Introduction

In its 2007 decision in *Bell Atlantic Corp. v. Twombly*², the Supreme Court rejected the so-called “no set of facts” standard, first articulated by the Court in *Conley v. Gibson*³, which had for 50 years essentially established a baseline test for determining whether a pleading constituted “a short and plain statement” showing the pleader’s entitlement to relief that satisfied Rule 8 of the Federal Rules of Civil Procedure and could survive a Rule 12(b) motion to dismiss for failure to state a claim. In place of the “no set of facts” standard, the Court held that to survive a Rule 12(b) motion to dismiss the pleader must allege facts that render its claim “plausible on its face.” Two years later, in *Ashcroft v. Iqbal*⁴, the Supreme Court further explained reasoning underlying *Twombly* and explicitly announced that the *Twombly* standard applied to “all civil actions.” Perhaps not unexpectedly, in the wake of *Twombly*, there has been some confusion in the courts regarding how the new standard is to be applied in individual cases⁵ (what additional fact

¹ Assistant Director, Commercial Litigation Branch, United States Department of Justice. J.D. 1991, Columbia University; B.A. 1988, University of Virginia. The views expressed in this article are those of the author and do not represent the official position of the United States or any of its agencies.

² 540 U.S. 544 (2007).

³ 355 U.S. 41 (1957).

⁴ 129 S. Ct. 1937 (2009).

⁵ See, e.g., *Swanson v. Citibank, NA*, 614 F.3d 400 (7th Cir. 2010) (“The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar,

allegation raises a claim from being “merely conceivable” to “plausible?”) and whether/how *Twombly-Iqbal* can be reconciled with other pleading standards applied by courts in certain classes of cases.⁶ To the extent that *Twombly* is perceived (correctly or incorrectly) as making it significantly more difficult for a litigant to sue, the Supreme Court’s action has been highly controversial, with at least two bills currently pending in Congress that, if enacted, would reverse *Twombly* and explicitly require courts to apply the *Conley* standard.⁷

Given the existing controversy over the *Twombly* standard, it is interesting to consider whether *Twombly* has been applied in Court of International Trade (“CIT”) cases in a manner that suggests that *Twombly* has made it more difficult to sue. That is, can it be shown that application of *Twombly* is resulting in dismissals of complaints that would have survived under *Conley*. In this Article, I will address the court’s pre- and post-*Twombly* precedents that are directly relevant to the issue addressed in *Twombly* and consider whether there is evidence that *Twombly* has been outcome determinative. Part II presents a general overview of Rule 8 of the Rules of the United States Court of International Trade (“USCIT R.”) and the pre-*Twombly* CIT precedents in this area. Part III presents a detailed summary of the Supreme Court’s decisions in *Twombly* and *Iqbal*. Part IV includes an examination of the post-*Twombly* cases.

when it decided not only *Twombly*, but also *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), and *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).”).

⁶ For example, in *Randall v. Scott*, 610 F.3d 701, 707 n.2 (11th Cir. 2010), the Eleventh Circuit held that a heightened pleading rule that it imposed in § 1983 cases involving qualified immunity determinations was necessarily replaced by the *Twombly-Iqbal* plausibility standard.

⁷ See S. 1504 Notice Pleading Restoration Act of 2009; H.R. 4115 Open Access to Courts Act of 2009.

II. Overview of USCIT R. 8 and Pre-*Twombly* CIT Precedent

Rule 8 of the Rules of the United States Court of International Trade provides the general rules of pleading. Subsection (a) of the rule provides:

(a) Claim for Relief. A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.⁸

The current language of USCIT R. 8(a) is identical to the language of Rule 8(a) of the Federal Rules of Civil Procedure ("FRCP"), and the "short and plain statement" language of FRCP 8(a) can be traced all the way back to the 1938 adoption of the Federal Rules of Civil Procedure. Both the Federal Circuit and the CIT have recognized that it is appropriate for the Court of International Trade to "look[] to decisions and commentary on the Federal Rules [of Civil Procedure] for guidance in interpreting . . . [substantially similar] CIT Rules."⁹

In *Conley v. Gibson*, the Supreme Court explicitly adopted the "no set of facts" standard (which it characterized as "the accepted rule" in the federal courts of appeal) for determining whether a complaint adequately set forth a claim upon which relief could be granted for the

⁸ USCIT R. 8.

⁹ *United States v. Ziegler Bolt and Parts Co.*, 111 F.3d 878, 880 n.1 (Fed. Cir. 1997); *see also* *NSK Corp v. United States*, 593 F. Supp.2d 1355, 1362 n.6 (Ct. Int'l Trade 2008) ("The Rules of this court provide the starting point for analysis. However, given the similarity between this court's . . . rules and the parallel rules in the Federal Rules of Civil Procedure [(FRCP)], the jurisprudence of other circuit courts is a valuable interpretive tool.' *See Auto Alliance Intern., Inc. v. United States*, 32 CIT ----, 558 F.Supp.2d 1377, 1380 (2008) (citing USCIT R. 1; *Zenith Radio Corp. v. United States*, 10 CIT 529, 530 n. 7, 643 F.Supp. 1133, 1135 (1986)).").

purposes of FRCP 8. In that case, the Court reversed and remanded a district court judgment (which had been affirmed by a court of appeals) that dismissed a class action complaint brought by African-American members of a union who alleged in their complaint that the union had violated their statutory rights under the Railway Labor Act by consenting to the Railway's allegedly discriminatory discharge of African-American employees, and by otherwise failing to represent African-American employees in good faith because of their race. Although the district court had dismissed the complaint for lack of jurisdiction, the Supreme Court held that the lower courts had erred upon the jurisdictional issue, and it went on to directly address the respondents' argument (raised as an alternative basis for affirmance) that the complaint failed to state a claim. As noted above, the Court first pronounced that the test it applied was the "accepted" rule: "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."¹⁰

The Court then addressed both the fundamental legal argument underlying the claim and the sufficiency of the specific factual allegations for notice purposes. Regarding the former, the Court held that the discrimination alleged by the plaintiffs, if proved, would establish a manifest breach of the union's statutory duty to "represent fairly and without hostile discrimination all of the employees in the bargaining unit."¹¹ Rejecting the respondents' argument that the plaintiffs could have filed suit directly against the Railway for the discriminatory discharges, the Court

¹⁰ 355 U.S. at 45-46 (citing *Leimer v. State Mut. Life Assur. Co.*, 108 F.2d 302 (8th Cir. 1940), *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), and *Continental Collieries v. Shober*, 130 F.2d 631 (3rd Cir. 1942)).

¹¹ *Id.* at 46.

held that whether the plaintiffs had an independent cause of action against the Railway was irrelevant to whether the plaintiffs had stated a claim against the union.

The Court next summarily rejected the respondents' argument that the plaintiffs had failed to set forth specific facts to support its general allegations of discrimination:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all 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.¹²

The Court suggested that the respondents would have a "liberal opportunity for discovery" and also that numerous other pretrial procedures provided by the Federal Rules—among others, the court referenced Rule 12(e) (motion for a more definite statement) and Rule 56 (motion for summary judgment)—would ultimately lead to a more precise statement of the claim and a narrowing of the disputed facts and issues. The Court's analysis concluded with an axiom that has been often repeated: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."¹³

In the pre-*Twombly* decisions of the CIT that involved questions of whether the specific factual allegations asserted in a complaint or counterclaim were sufficient to state a claim, the courts generally cited the "no set of facts" standard of *Conley* and concluded, in many instances

¹² *Id.* at 47 (internal footnote omitted).

¹³ *Id.* at 48 (citing *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 (1938)).

with very little analysis, that the challenged pleading was sufficient.¹⁴ There were, of course, many instances where Rule 12(b)(5) motions were granted. However, in most of the published decisions where the Court *granted* a Rule 12(b)(5) motion, the basis for the motion was an argument that the complaint failed *as a matter of law* in light of the facts that *were* alleged in the complaint, rather than an argument that the facts in the complaint were insufficient without more specifics to adequately support the claim and notify the defendant of the nature of the claim.¹⁵ In other words, placing the arguments of successful movants in the *Conley* context, these cases were decided in the manner that *Conley would have been* decided had the respondents in that case been correct in arguing that, *as a matter of law*, racial discrimination did *not* violate the Railway Labor Act.

The most controversial aspects of *Twombly*, however, relate to the *second* part of the *Conley* analysis, which addressed whether the challenged pleading provided sufficient notice of and factual support for the claim (for example, in *Conley*, did the plaintiffs allege sufficient facts

¹⁴ The *Conley* standard was often discussed by the Federal Circuit and the CIT in other contexts that did not directly relate to a pending Rule 12(b) motion to dismiss. For example, in *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 802 (Fed. Cir. 1999), a case involving a patent dispute, the Federal Circuit, citing *Conley*, criticized the district court's refusal to grant the defendant leave to file an infringement counterclaim. The Court held that the district court's conclusion that the proposed counterclaim was "inconsistent and implausible" was inconsistent with *Conley* regarding the factual detail required in a pleading. In its unpublished decision in *SM3-87-0061 v. United States*, 98 F.3d 1357, 1996 WL 521464 (Fed. Cir. Sept. 16, 1996), the Federal Circuit, relying upon *Conley* in reversing the Court of Federal Claims' *sua sponte* dismissal of a complaint, held that plaintiff's bare allegation of an oral contract "implicitly alleges an offer and acceptance by parties competent to contract."

¹⁵ *See, e.g.*, *Boast, Inc. v. United States*, 17 CIT 114 (1993); *Fabrene, Inc. v. United States*, 17 CIT 911 (1993); *Degussa Canada Ltd. v. United States*, 889 F. Supp. 1543 (Ct. Int'l Trade 1995); *Steen v. United States*, 395 F. Supp.2d 1345 (Ct. Int'l Trade 2005); *Globe Metallurgical Inc. v. United States*, 530 F. Supp.2d 1343 (Ct. Int'l Trade 2007).

to support a claim that the union’s actions resulted from racial discrimination?). In those CIT cases that involved the issue of whether the facts alleged were *specific enough* to state a claim, the party seeking a 12(b)(5) dismissal almost always failed.

In many instances, these rulings rejected challenges to complaints filed by the United States, pursuant to 28 U.S.C. § 1582, which sought to recover customs duties and/or civil penalties.¹⁶ For example, in *United States v. Appendagez, Inc.*, an early case, the United States filed a complaint seeking civil penalties, pursuant to 19 U.S.C. § 1592, against an importer and its president, James Shane.¹⁷ Shane filed a motion to dismiss, alleging that the complaint failed to allege sufficient facts to state a cause of action against him because it did not “specify the acts that constitute such gross negligence or negligence.”¹⁸ The court relied upon *Conley* in denying the motion:

Considering . . . [Rule 8 and *Conley v. Gibson*] . . . the amended complaint’s allegations as to negligence and gross negligence are adequate. Plaintiff alleges . . . that the defendants filed written declarations with the United States Customs Service that did not set forth dutiable quota charges on the merchandise, and that these written declarations stated that the prices set forth in the entries and documents were true and that all charges upon the merchandise were set forth therein, statements that were both false and material.

¹⁶ This is not unexpected. Many of the types of cases decided by the CIT require the court to engage in administrative record review of agency determinations, and the court’s review is further limited to the specific facts and arguments that were raised and considered by the agency. *See* 28 U.S.C. § 2637 (requiring exhaustion of administrative remedies); USCIT R. 12(a)(1)(A)(i) (no answer permitted in section 1581(c) cases). The cases in which a defendant is most likely to challenge the factual sufficiency of the complaint (for notice purposes) tend to be cases that the court decides *de novo*, such as those filed by the Government pursuant to section 1582.

¹⁷ 560 F. Supp. 50 (Ct. Int’l Trade 1983).

¹⁸ *Id.* at 54.

The court stated that if Shane needed more particularity, he could file a motion for a more definite statement.

In later section 1592 cases, similar motions to dismiss were denied based upon the *Conley* standard. In *United States v. F.A.G. Bearings, Ltd.*, the court rejected a defendant’s argument that the Government’s complaint was not specific enough regarding the false statements alleged.¹⁹ The court quoted portions of the complaint, in which the Government had alleged that “[d]efendant . . . falsely described imported merchandise as ‘ball bearings with integral shafts’, dutiable at 6 percent . . . when, in fact, the merchandise was ball/roller bearings with integral shafts, dutiable at 7.5 percent plus 1.7 cents per pound . . .” and concluded that, under *Conley*, the complaint was sufficient to give defendant fair notice of the claim. In *United States v. Priscilla Modes, Inc.*, the United States filed a complaint alleging that the defendants had violated section 1592 when they entered wearing apparel by means of documents that knowingly and willfully undervalued the apparel.²⁰ The defendants filed a motion to dismiss, arguing that the Government’s complaint did “not allege fraud with particularity” and did not “give defendants fair notice of the claim asserted as required by Rule 8(a).”²¹ Noting that the Government had amended its complaint in response to a prior motion to dismiss, the court held, without directly citing *Conley*, that the amended complaint not only satisfied Rule 8, but also

¹⁹ 598 F. Supp. 401 (Ct. Int’l Trade 1984).

²⁰ 9 CIT 598 (1985).

²¹ *Id.*

Rule 9.²² Although the amended complaint is not quoted by the court, it appears that the court viewed as sufficient that the amended complaint: (1) alleged that defendants “knowingly and willfully undervalued merchandise and failed to declare its actual price”; (2) listed specifically the alleged false documents; and (3) specified the relationship of the individual defendant to the corporate defendant and detailed the basis for joint and several liability.

In *United States v. Golden Ship Trading*, the Government sought to recover penalties and unpaid duties resulting from entries that negligently misrepresented the country of origin of certain wearing apparel.²³ The importer and its corporate officer, Joanne Wu, challenged the sufficiency of the complaint for notice purposes. Relying upon *Conley* (as it was applied in earlier CIT decisions in *Appendagez, F.A.G. Bearings*, and *Priscilla Modes*), the court suggested that the Government’s complaint would have been sufficient even “without the recitation of particular acts suggesting why the [false statements] were negligent.”²⁴ The court noted that, here, the Government went “further, specifically charging negligence with respect to the allegedly false entry documents” and that the language was “sufficient under USCIT R. 8.” The court separately concluded that the Government had sufficiently plead its claim that Wu was personally liable for misrepresenting the country of origin of the merchandise on the entry

²² USCIT R. 9 provides pleading rules relating to special matters. Among other special rules, subsection (b) provides that “[i]n alleging fraud . . . a party must state with particularity the circumstances constituting the fraud. . . .”

²³ 22 CIT 950 (1998).

²⁴ *Id.* at 952.

papers.²⁵ Finally, in *United States v. Ferro Union, Inc.*, the court denied a motion to dismiss the Government's complaint in a section 1592 penalty case by summarily referring to the "detailed account of Defendants' allegedly fraudulent and misleading conduct" provided in the Government's complaint.²⁶

Motions to dismiss that alleged that the complaint included insufficient factual allegations were also routinely denied based upon the *Conley* standard in contexts other than Government complaints filed pursuant to section 1582. For example, in *NEC Corporation v. United States Department of Commerce*, an antidumping case, the plaintiffs filed suit seeking to enjoin an antidumping investigation, alleging that Commerce had impermissibly prejudged the outcome.²⁷ In denying the Government's Rule 12(b)(5) motion to dismiss, notwithstanding the *presumption* that agency determinations will be fair and unbiased, the court, relying upon the *Conley* standard, concluded that plaintiffs sufficiently alleged a claim for prejudgment:

Specifically, Plaintiffs allege in paragraph 24 of their complaint that during meetings on the UCAR procurement, 'Commerce representatives repeatedly stated that the NEC supercomputers were being offered to UCAR at less than fair value.' That allegation, when taken with other allegations in the complaint, can be construed to suggest an advance commitment by the Commerce Department decision makers that Plaintiffs were 'dumping' the

²⁵ *Id.* at 954.

²⁶ 24 CIT 762 (2000). This case demonstrates part of the inherent difficulty in trying to determine the impact of *Twombly*. Because some of the court's published decisions do not actually *quote* large passages from the challenged complaint, without actually investigating the source documents from the court's docket, we must generally take at face value the court's characterization of the complaint as a "detailed account" that provided "more than fair notice to Defendants."

²⁷ 967 F. Supp. 1305 (Ct. Int'l Trade 1996).

supercomputers.²⁸

In a Trade Adjustment Assistance case, *Former Employees of Quality Fabricating, Inc. v. U.S. Dep't Of Labor*, the court relied upon the *Conley* “no set of facts” standard in rejecting the Government Rule 12(b)(5) motion that challenged whether the claims pressed by the plaintiffs, relating to benefits as a secondarily-affected worker group, had been raised by their complaint.²⁹ The court concluded its opinion by stating that “[t]he dismissal standard is extraordinary and viewed with disfavor.”³⁰ This same attitude appears to have informed the court’s decision in *Halperin Shipping Co., Inc. v. United States*, a Customs protest case, where the court denied the Government’s Rule 12(b)(5) motion to dismiss a complaint involving the importer’s argument that it had paid the Government the duties owed upon its entry twice.³¹ The importer’s complaint alleged that the first payment had been made to a broker, who, plaintiff alleged, was the agent of the Government. Notwithstanding the implausible nature of the plaintiffs’ argument (which was seemingly acknowledged by the court), the complaint was still held to satisfy the *Conley* pleading standard: “While the Court notes it will not permit frivolous lawsuits it nevertheless holds that the plaintiff has alleged a sufficient plain statement . . . which if proven could entitle Halperin to the relief sought.”³²

²⁸ *Id.* at 1307.

²⁹ 343 F. Supp.2d 1272 (Ct. Int’l Trade 2004).

³⁰ *Id.* at 1289.

³¹ 13 CIT 465 (1989).

³² *Id.* at 466.

The overall impression left by the CIT decisions applying the *Conley* standard is that the party requesting that a complaint be dismissed *due to insufficient notice of facts supporting the claim or general factual implausibility* was hard pressed to succeed. In general, the only Rule 12(b)(5) motions that could be expected to succeed were those which involved legal arguments that could have just as well have been raised, after the answer, in a Rule 12(c) motion for judgment upon the pleadings.

III. The Supreme Court's Decisions in *Twombly* and *Iqbal*

In *Bell Atlantic Corp. v. Twombly*, Justice Souter, writing for a seven-Justice majority of the Supreme Court, concluded that “no set of facts” standard in *Conley* had, “after puzzling the profession for 50 years, . . . earned its retirement.”³³ *Twombly* was an antitrust case and its disposition turned specifically upon the Court’s determination of what must be pled to state a claim under Section 1 of the Sherman Act.³⁴ William Twombly (one of two named plaintiffs) represented a class of all subscribers of local telephone and high speed internet services. Generally, the plaintiffs alleged that, starting in 1996³⁵, the Bell Atlantic Corporation and other incumbent exchange carriers (“ILECs”) had violated the Sherman Act by conspiring with each other to prevent upstart competitive local exchange carriers (“CLECs”) from meaningfully competing for customers in the ILECs’ respective territories, and by agreeing among themselves

³³ 540 U.S. 544, 563 (2007).

³⁴ 15 U.S.C. § 1.

³⁵ Prior to the Telecommunications Act of 1996, 110 Stat. 56, the ILECs held monopolies in their respective regions. The Telecommunications Act was intended to foster competition by removing barriers to entry, including requiring the ILECs to allow competitors access to their networks.

to refrain from competing in each others territories. In its opinion, the Supreme Court referenced the operative paragraphs of the plaintiffs’ complaint that provide the factual support for the claim:

Plaintiffs say, first, that the ILECs “engaged in parallel conduct” in their respective service areas to inhibit the growth of upstart CLECs. Complaint ¶ 47. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs’ relations with their own customers. *Ibid.* According to the complaint, the ILECs’ “compelling common motivatio[n]” to thwart the CLECs’ competitive efforts naturally led them to form a conspiracy; “had any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . ., the resulting greater competitive inroads into that [ILEC’s] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct.” *Id.*, ¶ 50.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs’ common failure “meaningfully [to] persu[e]” “attractive business opportunit[ies]” in contiguous markets where they possessed “substantial competitive advantages,” *Id.*, ¶¶ 40-41, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Quest, that competing in the territory of another ILEC “might be a good way to turn a quick dollar but that doesn’t make it right,” *Id.*, ¶ 42. (internal appendix cites omitted).³⁶

Based upon the alleged absence of meaningful competition, plaintiffs alleged “upon information and belief” that the ILECs had entered into a contract, combination, or conspiracy to prevent competitive entry into the ILECs respective territories and had agreed not to compete with each other.³⁷ A federal district court dismissed plaintiffs complaint for failure to state a claim, holding

³⁶ *Id.* at 550-551.

³⁷ *Id.* at 551.

that the facts alleged by the plaintiffs were consistent with independent, self-interested conduct that would not violate the Sherman Act, and that the facts alleged did not raise an inference of a conspiracy. The Court of Appeals for the Second Circuit, relying upon *Conley*, reversed.

The Supreme Court reversed and remanded. In concluding that the specific antitrust complaint at issue failed to state a claim, the Court, relying upon its antitrust precedents holding that parallel business behavior (even “conscious parallelism”) does not automatically violate the Sherman Act, held that plaintiffs’ allegation that the ILECs had all engaged in certain actions was simply not enough to state a claim that the ILECs had violated the Sherman Act: “[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of an agreement at some unidentified point does not supply facts adequate to show illegality.”³⁸ The Court held that Rule 8 required that, at the pleading stage, plaintiffs make allegations “plausibly suggesting (not merely consistent with) an agreement” between the ILECs. The Court stated that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.”³⁹ The Court concluded that the complaint rested only upon descriptions of parallel conduct and not on any independent allegation of actual agreement, and that nothing in the complaint provided a plausible suggestion of a conspiracy.⁴⁰

Addressing the policy reasons behind the Rule 8 pleading requirements, the *Twombly*

³⁸ *Id.* at 556-57.

³⁹ *Id.* at 556.

⁴⁰ *Id.* at 565-66.

Court, clearly holding a more cynical viewpoint than that of *Conley* court regarding the ability of discovery and other pretrial procedures to weed out early groundless claims, and acknowledging the expense of modern antitrust discovery, stated that a deficient claim “should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.”⁴¹

Criticizing the court of appeals’ literal reading of *Conley*, the Court stated disapprovingly that, taken literally, the *Conley* “no set of facts” standard would protect from dismissal a “wholly conclusory statement of claim . . . whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” The Court concluded that the *Conley* “no set of facts” language was “an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Recognizing that the literal reading of *Conley* had often been resisted by courts and commentators over the decades, the Court repudiated it.

Two years after *Twombly*, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, which demonstrated the applicability of the *Twombly* standard in an entirely different context from antitrust law, and provided further explanation regarding how a court should decide a motion to dismiss for failure to state a claim.⁴²

Iqbal was a *Bivens*⁴³ action filed by an Arab Muslim who alleged that, in the aftermath of

⁴¹ *Id.* at 558 (internal quotation omitted).

⁴² 129 S. Ct. 1937 (2009).

⁴³ *See Bivens v. Six Unknown Named Agents of Fed. Bur. Of Narc.*, 403 U.S. 388 (1971).

September 11, and prior to his deportation to Pakistan, he was imprisoned in the United States under the most restrictive conditions and mistreated in the maximum security housing unit of the Metropolitan Detention Center in New York. Of the dozens of federal officials named in his complaint, Iqbal sued John Ashcroft, former Attorney General, and Robert Mueller, Director of the FBI (the “federal officials”). Specifically with respect to the federal officials, Iqbal alleged that “[t]he [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigations of the events of September 11,” and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”⁴⁴ Iqbal also alleged that both Ashcroft and Mueller had condoned and agreed to Iqbal’s conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest” in violation of the First and Fifth Amendments.⁴⁵

The federal officials claimed qualified immunity and moved to dismiss the complaint for failure to state a claim. The district court denied the motion to dismiss, and the federal officials filed an interlocutory appeal to the Court of Appeals for the Second Circuit. Though applying *Twombly* (which had been decided during the pendency of the appeal), the Second Circuit nevertheless affirmed the district court, holding that Iqbal’s complaint was adequate.

The Supreme Court reversed and remanded. In the first part of its decision, which is not

⁴⁴ *Id.* at 1944.

⁴⁵ *Id.*

pertinent here, the Court held that the Second Circuit possessed appellate jurisdiction to entertain the federal officials' interlocutory appeal. In analyzing whether Iqbal's complaint stated a claim upon which relief could be granted, the Supreme Court first reviewed its *Bivens* precedents, which provide that a claim cannot be founded upon concepts of *respondeat superior* and also that a plaintiff claiming invidious discrimination must plead that the defendant acted with a discriminatory purpose. The Court held that because there was no possibility of vicarious liability, to state a claim Iqbal was required to allege facts that show the federal officials had, personally, adopted and implemented the detention policies "because of" the adverse affect of those policies upon Arab Muslims.

Applying the *Twombly* "plausibility" standard, the Court held that Iqbal's complaint had not "'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"⁴⁶ Given the identities of the September 11 hijackers, the Court suggested that it "should come as no surprise" that a legitimate policy "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."⁴⁷ Therefore, it was not plausible to infer that Iqbal's arrest or his maximum security confinement resulted from discrimination in the absence of specific allegations that the federal officials adopted the policies with a discriminatory motive.

In reaching this conclusion, the Court further explained that *Twombly* requires that a plaintiff plead facts that make its claim plausible on its face, and that "[w]here a complaint

⁴⁶ *Id.* at 1951.

⁴⁷ *Id.*

pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”⁴⁸ The Court also stated that determining whether a complaint states a plausible claim will be “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁴⁹ Finally, the Court rejected Iqbal’s argument that *Twombly* was limited to antitrust: “Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.”⁵⁰

IV. Recent CIT Decisions Applying The *Twombly* Standard

In *Twombly* and *Iqbal*, the Supreme Court clearly sought to strike a different balance than Conley had between two competing interests. On one side is the interest in maintaining streamlined notice pleading that does not revert back to the pre-FRCP procedural gamesmanship that Rule 8 was intended to eliminate. On the other side is the interest in the just, speedy and (especially) inexpensive disposition of meritless complaints. In *Twombly* and *Iqbal*, the Supreme Court tilted the balance in the direction of efficient dismissal of complaints that, upon their face, were not plausible. In the CIT, the application of *Twombly* appears to have made a difference, at least superficially. During the three years following *Twombly*, the CIT has dismissed (in whole or in part) several complaints based upon a determination that the facts alleged were insufficient to render the claim plausible. These decisions are notable because, as discussed above, Rule

⁴⁸ *Id.* at 1949 (citing *Twombly*, 550 U.S. at 557).

⁴⁹ *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007))

⁵⁰ *Id.* at 1953 (internal citation omitted).

12(b)(5) dismissals predicated upon the lack of factual specificity of a complaint were very rare in CIT cases that had applied the *Conley* “no set of facts” standard.

In *Totes-Isotoner Corp. v. United States*, the very first CIT decision to include a detailed analysis and application of the Twombly standard, the court granted a Rule 12(b)(5) motion, finding that the facts alleged in the complaint were insufficient to render the claim plausible.⁵¹ Plaintiff Totes-Isotoner Corporation (“Totes”), an importer of men’s leather gloves, filed suit and alleged that the Harmonized Tariff Schedule of the United States (“HTSUS”) violated the Equal Protection guarantees of the Fifth Amendment of the Constitution because the amount of duty imposed by the HTSUS upon men’s leather gloves was higher than the amount of duty imposed upon leather gloves “for other persons.” According to Totes, the HTSUS classifications constituted invidious discrimination “on the basis of gender or age.”⁵² The Government sought dismissal of Totes’s complaint for jurisdictional reasons (political question and standing) as well as for failure to state a claim. The CIT rejected the Government’s jurisdictional arguments, but it dismissed, *without prejudice*, after concluding that Totes’s factual allegations were insufficient to state a claim under the *Twombly* standard.

Referencing Supreme Court precedents defining the level of scrutiny applied to gender-based classifications, the court concluded that, to state a claim that the HTSUS violated the Equal Protection component of the Fifth Amendment, Totes was required to show that “the Government has engaged in gender-based discrimination without an exceeding persuasive

⁵¹ 569 F. Supp.2d 1315 (Ct. Int’l Trade 2008), *aff’d*, 594 F.3d 1346 (Fed. Cir. 2010).

⁵² *Id.* at 1320.

justification, or in other words, that the Government has used discriminatory means that are not substantially related to important Governmental objectives.”⁵³ Further, to “show” that the HTSUS classifications were, in fact, gender based, the court held that Totes was required to allege that the Government had *intended* to impose a benefit or burden because of sex, or, at least, allege a disparate impact upon one sex caused by the classification.⁵⁴

The court noted that the HTSUS classification of gloves as “men’s gloves” or as gloves “for other persons,” did not mandate which gender would purchase or use the gloves, and that the additional duties imposed upon men’s gloves would fall upon the *importers*. Given this context, the court held that Totes’s reliance upon “the express use of gender in the tariff classification scheme” was not enough. Because Totes did not specifically allege that the HTSUS classifications were made “because of or based on gender or otherwise disfavors individuals because of their gender,”⁵⁵ the court held that the complaint did not state a claim.

In more recent cases, the CIT has, relying upon *Twombly*, dismissed complaints or a individual counts in a multi-count complaint for failure to allege sufficient facts to render the claim plausible. For example, in *Southern Shrimp Alliance v. United States*,⁵⁶ the plaintiffs broadly challenged United States Customs and Border Protection (“Customs”) policies and

⁵³ *Id.* at 1326.

⁵⁴ *Id.* (*Twombly* standard “[d]oes demand . . . at least a purpose that focuses upon women by reason of their sex.”)

⁵⁵ *Id.* at 1327.

⁵⁶ 617 F. Supp.2d 1334 (Ct. Int’l Trade 2009).

procedures relating to administration of the Continued Dumping and Subsidy Offset Act⁵⁷ (“CDSOA” or “Byrd Amendment”). In their 11-count complaint, the plaintiffs, domestic producers of warmwater shrimp and purported “affected domestic producers” (“ADPs”) entitled to a *pro rata* share of annual CDSOA distributions, challenged Customs’ distribution of CDSOA funds relating to certain antidumping orders. They alleged that Customs’ interpretations of the CDSOA, as well as other actions and inactions of the agency, resulted in their receiving a smaller share of the CDSOA distributions than that to which they were entitled. The Government sought dismissal of ten of the counts raised in the complaint, and the court granted the motion. Relevant here, the court, relying upon *Twombly*, dismissed two of plaintiffs’ claims for failure to allege certain facts necessary to make the claims plausible.

In count 8, plaintiffs alleged that Customs violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(1), by “failing to publish any procedures, rules, or guidelines for reconsideration proceedings (other than the regulations already in existence).”⁵⁸ The court held that the allegations did not satisfy *Twombly*. The court held that section 552(a)(1) does not require Customs to create procedural rules – it only requires Customs to publish whatever procedural rules are promulgated. As such, the court held that plaintiffs’ allegation that Customs had failed to publish any procedural rules, standing alone, did not plausibly suggest a violation of the statute. The court noted that *Twombly* requires a party to “‘amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.’”

⁵⁷ 19 U.S.C. § 1675c (2000), *repealed by* Pub. L. No. 109-171, Title VII, Subtitle F § 7601(a), 120 Stat. 4, 154 (February 8, 2006).

⁵⁸ *Id.* at 1356 (citing complaint ¶¶ 157-161, 163).

Here, the court held that the plaintiffs were required to allege “that the agency has formulated some rule of procedure that the agency has not published.” Because the complaint did not include an allegation of that sort, the court held that it “fail[ed] to raise Plaintiffs’ right to relief under § 552(a)(1) beyond the speculative level” and the claim was dismissed.⁵⁹

The court also dismissed plaintiffs’ count 7 based upon *Twombly*. In that count, plaintiffs alleged that they had a property interest in their share of CDSOA funds and that Customs violated their rights under the Due Process Clause by refusing to allow them to participate in reconsideration proceedings brought by other ADPs that, plaintiffs alleged, result in decisions that “directly decrease or increase the share of funds which plaintiffs are entitled to.”⁶⁰ The court held that plaintiffs claim failed to state a claim upon which relief could be granted because the applicable Customs regulation permitted reconsideration only where, through a mistake or clerical error, Customs had unlawfully deprived an ADP of the CDSOA funds to which it was entitled (which logically means that any resulting reduction of the *pro rata* shares of *other* ADPs merely reflected the amount that those ADPs had been *overpaid*). As such, the court reasoned, no reconsideration could result in a deprivation of plaintiffs’ alleged property interest unless Customs was conducting reconsideration proceedings in a manner contrary to its regulation. Because plaintiffs did not allege that Customs had conducted reconsideration in violation of the regulation (and the court refused to infer it), the claim was not plausible under *Twombly*. “Simply put, the Complaint lacks the grounds necessary to suggest that Plaintiffs have actually

⁵⁹ *Id.* at 1357.

⁶⁰ *Id.* at 1358.

been deprived of their claimed property interest.”⁶¹

The court’s recent decision in *Sioux Honey Ass’n v. United States*, is another example (similar in many respects to *Southern Shrimp Alliance*) of the court’s relying upon *Twombly* in the surgical dismissal of specific claims contained in a sprawling complaint.⁶² The plaintiffs, domestic producers of honey and other products, alleged that they were ADPs eligible to receive *pro rata* shares of Customs’ annual CDSOA offset distribution of antidumping duties (duties that were secured by “new shipper” Customs surety bonds). In their wide-ranging complaint (which also included claims brought directly against named surety defendants), plaintiffs broadly alleged that, as a result of unlawful actions and/or inactions of both the Customs and Commerce, the Government had failed to collect from the surety defendants more than \$700 million in antidumping duties owed in connection with several antidumping orders upon Chinese imports. In granting the Government’s motion to dismiss the counts of the complaint stated against the Government,⁶³ the court expressly relied upon *Twombly* in dismissal of certain claims (the court also rejected plaintiffs’ request for discovery to support these claims prior to dismissal):

In summary, the claims in Counts Ten, Eleven, and Fifteen rest on only vague factual allegations which, if assumed to be true, do not establish a right to relief beyond a speculative level. They must be dismissed now for failure to satisfy the pleading standard the Supreme Court set forth in *Bell Atlantic*, 550 U.S. at 555. The high degree of speculation called for by these claims makes questionable plaintiffs’ implied premise that burdensome discovery

⁶¹ *Id.* at 1359.

⁶² No. 09-00141, 2010 WL 3377449 (Ct. Int’l Trade Aug. 27, 2010)

⁶³ The court had previously issued an opinion that dismissed the plaintiffs claims against the surety defendants. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 700 F. Supp.2d 1330 (2010).

should be allowed because it might lead to claims upon which this litigation could proceed.⁶⁴

Specifically, in count 10, plaintiffs alleged, upon information and belief, that “Customs failed to distribute, or to withhold from distribution . . . certain AD duties that were assessed and collected on imports.” The court held that this count was insufficient under *Twombly*, stating that “[i]n support of this bare allegation, plaintiffs plead no facts whatsoever. . . . There is nothing in Count Ten to indicate what occurred, or when it occurred, that resulted in duties that were collected on the China new shipper orders but that were not distributed under the CDSOA as required by law.”⁶⁵ The court also rejected plaintiffs’ argument that it be permitted to engage in what the court characterized as “broad, and burdensome, discovery in support of Count Ten,” when the complaint “state[d] no definite claim, allege[d] no specific facts, and requires a degree of speculation that the Supreme Court considered unacceptable in *Bell Atlantic*. . . .”⁶⁶

In count 11, plaintiffs alleged, again upon information and belief, that “on one or more occasions, [Customs] has failed to issue a demand that a Surety Defendant perform under one or more new shipper bonds. . . .”⁶⁷ Again, the court held that the count was too speculative to satisfy *Twombly*, concluding that “[t]he facts alleged amount to nothing more than an opaque allegation that there has been at least one instance in which a claim against a surety for unpaid antidumping duties in a China new shipper review has accrued and Customs has yet to make a

⁶⁴ 2010 WL 3377449 at *22.

⁶⁵ *Id.* at *10.

⁶⁶ *Id.*

⁶⁷ *Id.*

demand on the surety for payment. Plaintiffs allege no specific facts in support of their claim . . . which as a result rests almost entirely on speculation.”

Finally, in count 15, plaintiffs alleged, upon information and belief, that Customs had failed to refer to the Department of Justice (“DOJ”) for prosecution unsatisfied demands issued to sureties. Plaintiffs further alleged that, based upon their review of the court’s docket, “Justice, to date, has not filed any collections lawsuit against any Surety Defendant for performance under a new shipper bond.”⁶⁸ Noting that 19 C.F.R. § 113.52 (the regulation upon which plaintiffs relied) provides Customs with a measure of discretion to settle unsatisfied demands *without* making a referral to the DOJ, the court concluded that plaintiffs had not alleged sufficient facts that would plausibly suggest a violation of law. The court stated that plaintiffs made “no allegation . . . of any specific instance in which there has been neither a referral by Customs nor measures taken to ‘satisfactorily’ settle the liability [under section 113.52].” The court also noted that plaintiffs allegations were consistent with the possibility that, subsequent to a referral, it was the *DOJ* that had decided not to initiate a collection action (a matter which the court held to be beyond judicial review).

The *Twombly* standard has also been applied by the court in its consideration of two complaints filed by the Government in section 1592 cases. In both cases, the Government’s complaint was found to not state a claim upon which relief could be granted. As noted above, during the Conley era, the court had generally rejected Rule 12(b)(5) motions that challenged the specificity of the allegations contained in the Government’s complaints filed in this type of

⁶⁸ *Id.* at *18.

action.

In *United States v. Scotia Pharmaceuticals Ltd.*⁶⁹, the court denied the Government's motion for default judgment against a defendant, Callanish, a foreign corporation alleged to have been part of a conspiracy to fraudulently import evening primrose oil by means of false invoices. Instead, relying upon *Twombly* and *Iqbal*, the court ordered the Government to file an amended complaint, having concluded that the Government's original complaint did not provide sufficient factual allegations to state a claim against the Callanish. The court held that the Government's complaint did not sufficiently allege unlawful actions *taken by Callanish* in connection with the customs entries at issue. After considering, paragraph by paragraph, the specific factual allegations stated in the Government's complaint, the court concluded that the Government had not specifically alleged that Callanish had either itself made a material false statement or omission or had aided and abetted another party in making a material false statement or omission that violated section 1592.⁷⁰ Simply stated, the court found that the Government's complaint required the court to "speculate as to what Callanish is being alleged to have done," in a manner not permitted under *Twombly*.⁷¹

In another section 1592 case, *United States v. Tip Top Pants, Inc.*, the court held that the Government's complaint failed to state a claim against an individual defendant, Saad Nigri, who was the CEO of an importer that was alleged to have negligently entered goods by means of

⁶⁹ No. 03-00658, Slip Op. 09-49, 2009 WL 1410437 (Ct. Int'l Trade May 20, 2009).

⁷⁰ *Id.* at *5-6.

⁷¹ *Id.* at *6.

material false statements or omissions.⁷² The court, noting that the Government’s complaint alleged “as to Nigri only one fact: ‘At all times relevant to the matters described in the complaint, Saad Nigri was the Chairman and Chief Executive Officer of Tip Top,’” stated that the Government’s complaint “sets forth no facts upon which liability allegedly incurred by Tip Top, based on negligence in importing the merchandise, could be imputed to Nigri.”⁷³ Notably, in rejecting the Government’s reliance upon the CIT’s prior decision in *Golden Ship Trading* (discussed above in Part II), the court held that *Golden Ship Trading* was distinguishable (because the Government had plead more facts in the earlier case) but also suggested that, because *Golden Ship Trading* was a pre-*Twombly* case, it was no longer relevant:

In contrast to the facts of this case, the Government’s complaint in *Golden Ship Trading* alleged a specific act on the part of the individual defendant, stating that this individual “signed the country of origin declaration falsely, stating that the country of origin was the Dominican Republic, and that these materially false statements, acts and/or omissions were negligent violations of 19 U.S.C. § 1592.” *Id.* *Golden Ship Trading not only is distinguishable from this case but also was decided prior to the decisions of the Supreme Court in Bell Atlantic Corp. v. Twombly . . . and Ashcroft v. Iqbal. . . .* To avoid dismissal for failure to state a claim upon which relief can be granted, the “[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atlantic*, 550 U.S. at 555. (emphasis added).

V. Conclusion

The quote immediately above from *Tip Top Pants* brings us back to the question posed at

⁷² No. 07-00171, Slip Op. 10-5, 2010 WL 167952 (Ct. Int’l Trade Jan. 13, 2010).

⁷³ *Id.* at *7.

the beginning of this paper. Is there evidence that the court's application of the *Twombly* standard has resulted in the early dismissal of claims that would have survived under *Conley*? Certainly, there have been no *direct* judicial pronouncements in any of the post-*Twombly* cases that a claim then being dismissed as implausible would (or might) have survived under the *Conley* "no set of facts" standard. In fact, the *Tip Top Pants* quotation appears to suggest that the court believed that the Government complaint at issue would likely have been dismissed *even under the Conley standard*.⁷⁴ That the courts have not announced the change as outcome determinative, however, does not tell the entire story. As reflected in the cases discussed above, the number of cases in which the court has relied upon *Twombly* in dismissing a complaint or claim based for factual implausibility or notice reasons appears to be significant based upon a comparison to the court's *Conley*-era precedents which routinely rejected arguments that a complaint failed to state a claim for those reasons. It seems safe to say that a dismissal standard which had been previously described as "extraordinary and viewed with disfavor,"⁷⁵ has given way to one that is not as disfavored, and it may be that the very fact that there is a new standard that is intended to be (at least incrementally) tougher than the old standard is causing the courts to scrutinize the claims more closely than they had previously.

⁷⁴ In another very recent decision, the court suggested that the application of *Twombly* instead of *Conley* would not have made a difference. *See* United States v. Pressman-Gutman Co., Inc., No. 06-00043, Slip Op. 10-105, 2010 WL 3632726 *4 (Ct. Int'l Trade Sept. 16, 2010) (In granting motion to dismiss the Government's complaint, the court stated: "In the instant case, the nuances of *Iqbal* and *Twombly* are purely academic. As discussed below, whether considered under *Iqbal*, *Twombly*, or any other standard, it is not just implausible that the Government could prevail in this case; it is impossible.")

⁷⁵ Former Employees of Quality Fabricating, Inc., 343 F. Supp.2d at 1289.