The *Bell Atlantic Corp. v. Twombly* Pleading Standard: Has Its Application Been Outcome Determinative in Court of International Trade Cases?

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I. INTRODUCTION

In its 2007 decision in *Bell Atlantic Corp. v. Twombly*,[1] the United States Supreme Court rejected the so-called "no set of facts" standard, first articulated by the Court in *Conley v. Gibson*,[2] which had for fifty 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 (FRCP) and could survive a Rule 12(b) motion to dismiss for failure to state a claim.[3] 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."[4] Two years later, in *Ashcroft v. Iqbal*,[5] the Supreme Court further explained the reasoning underlying *Twombly* and explicitly announced that the

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1. 550 U.S. 544 (2007).
2. 355 U.S. 41, 45-46 (1957).
3. *Twombly*, 550 U.S. at 554-63.
4. *Id.* at 570.
5. 129 S. Ct. 1937 (2009).

Twombly standard applied to "all civil actions."[6] 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 cases[7] (what additional fact 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.[8] 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 drafted in Congress that, if enacted, would reverse *Twombly* and explicitly require courts to apply the *Conley* standard.[9]

Given the existing controversy over the *Twombly* standard, it is interesting to consider whether *Twombly* has been applied in United States 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 CIT 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.

II. OVERVIEW OF UNITED STATES COURT OF INTERNATIONAL TRADE RULE 8 AND PRE-*TWOMBLY* UNITED STATES COURT OF INTERNATIONAL TRADE PRECEDENT

CIT Rule 8 provides the general rules of pleading. Subsection (a) of the rule provides:

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6. *Id.* at 1953.

7. *See, e.g.*, Swanson v. Citibank, N.A., 614 F.3d 400, 403 (7th Cir. 2010) ("The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Pardus*, and *Ashcroft v. Iqbal*." (citations omitted)).

8. For example, in *Randall v. Scott*, the United States Court of Appeals for 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. 610 F.3d 701, 707 n.2 (11th Cir. 2010).

9. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

> (a) *Claim for Relief.* A pleading that states a claim for relief must contain:
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> (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;
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> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
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> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.[10]

The current language of CIT Rule 8(a) is identical to the language of FRCP 8(a), and the "short and plain statement" language of FRCP 8(a) can be traced all the way back to the 1938 adoption of the FRCP.[11] Both the United States Court of Appeals for the Federal Circuit and the CIT have recognized that it is appropriate for the CIT to "look[] to decisions and commentary on the [FRCP] for guidance in interpreting [substantially similar] CIT Rules."[12]

In *Conley*, 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 purposes of FRCP 8.[13] 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.[14] Although the district court dismissed the complaint for lack of jurisdiction, the Supreme Court held that the lower courts erred upon the jurisdictional issue, and it went on to directly address the respondents' argument (raised as an alternative

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10. CT. INT'L TRADE R. 8(a).

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

12. United States v. Ziegler Bolt & 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." (internal quotation marks omitted)); Auto Alliance Int'l, Inc. v. United States, 558 F. Supp. 2d 1377, 1380 n.1 (Ct. Int'l Trade 2008).

13. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

14. *Id.* at 42-44.

basis for affirmance) that the complaint failed to state a claim.[15] 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.[16]

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."[17] Rejecting the respondents' argument that the plaintiffs could have filed suit directly against the railway for the discriminatory discharges, the Court 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.[18]

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.[19]

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, 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.[20] 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

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15. *Id.* at 44-45.
16. *Id.* at 45-46.
17. *Id.* at 46.
18. *Id.* at 47.
19. *Id.* at 47 (footnote omitted).
20. *Id.* at 47-48.

the principle that the purpose of pleading is to facilitate a proper decision on the merits."[21]

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 court generally cited the "no set of facts" standard of *Conley* and concluded, in many instances with very little analysis, that the challenged pleading was sufficient.[22] 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 support adequately the claim and notify the defendant of the nature of the claim.[23] 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 to support a claim that the union's actions resulted from racial discrimination?). In those CIT cases that involved the issue of whether

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21. *Id.* at 48.

22. The *Conley* standard was often discussed by the United States Court of Appeals for 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.*, 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. 200 F.3d 795, 802 (Fed. Cir. 1999). 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. *Id.* In its unpublished decision in *SM3-87-0061 v. United States*, 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." No. 96-5047, 1996 WL 521464, at *2 (Fed. Cir. Sept. 16, 1996).

23. *See, e.g.*, Boast, Inc. v. United States, 17 Ct. Int'l Trade 114, 118 (1993); Fabrene, Inc. v. United States, 17 Ct. Int'l Trade 911, 913-15 (1993); Degussa Canada Ltd. v. United States, 19 Ct. Int'l Trade 864, 867-68 (1995); Steen v. United States, 29 Ct. Int'l Trade 1241, 1243, 1248-49 (2005); Globe Metallurgical Inc. v. United States, 530 F. Supp. 2d 1343, 1347 (Ct. Int'l Trade 2007).

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.[24] 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.[25] 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."[26] The court relied upon *Conley* in denying the motion:

> Considering [Rule 8 and *Conley*], 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.[27]

The court stated that if Shane needed more particularity, he could file a motion for a more definite statement.[28]

In later § 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.[29] The court quoted portions of the complaint, in which the government had alleged that the "defendant . . . falsely described the 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

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24. 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 (2006) (requiring exhaustion of administrative remedies); Ct. Int'l Trade R. 12(a)(1)(A)(i) (no answer required 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 § 1582. *See* 28 U.S.C. § 1582 (2006).

25. 560 F. Supp. 50, 51 (Ct. Int'l Trade 1983).

26. *Id.* at 54.

27. *Id.*

28. *Id.*

29. 598 F. Supp. 401, 404 (Ct. Int'l Trade 1984).

concluded that under *Conley*, the complaint was sufficient to give the defendant fair notice of the claim.[30] In *United States v. Priscilla Modes, Inc.*, the United States filed a complaint alleging that the defendants had violated § 1592 when they entered wearing apparel by means of documents that knowingly and willfully undervalued the apparel.[31] 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)."[32] 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 Rule 9.[33] 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.[34]

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.[35] The importer and its corporate officer, Joanne Wu, challenged the sufficiency of the complaint for notice purposes.[36] Relying upon *Conley* (as it was applied in earlier CIT decisions: *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."[37] 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 CIT Rule 8.[38] 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

30. *Id.*
31. 9 Ct. Int'l Trade 598, 598-99 (1985).
32. *Id.* at 598.
33. *Id.* at 599. USCIT R. 9 provides pleading rules relating to special matters. Among other special rules, subsection (b) provides, "In alleging fraud . . . a party must state with particularity the circumstances constituting fraud." CT. INT'L TRADE R. 9.
34. *Priscilla Modes, Inc.*, 9 Ct. Int'l Trade at 599-600.
35. 22 Ct. Int'l Trade 950, 950 (1998).
36. *Id.* at 951.
37. *Id.* at 952.
38. *Id.*

merchandise on the entry papers.[39] Finally, in *United States v. Ferro Union, Inc.*, the court denied a motion to dismiss the government's complaint in a § 1592 penalty case by summarily referring to the "detailed account of Defendants' allegedly fraudulent and misleading conduct" provided in the government's complaint.[40]

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 1592. For example, in *NEC Corp. v. United States Department of Commerce*, an antidumping case, the plaintiffs filed suit seeking to enjoin an antidumping investigation, alleging that the United States Department of Commerce (DOC) had impermissibly prejudged the outcome.[41] 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, "[DOC] 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 [DOC] decision makers that Plaintiffs were "dumping" the supercomputers.[42]

In a trade adjustment assistance case, *Former Employees of Quality Fabricating, Inc. v. United States Department of Labor*, the court relied upon the *Conley* "no set of facts" standard in rejecting the government's 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.[43] The court concluded its opinion by stating, "The dismissal standard is extraordinary and viewed with disfavor."[44] This same attitude appears to have informed the court's decision in *Halperin Shipping Co. v. United States*, a United States

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39. *Id.* at 953-54.

40. 24 Ct. Int'l Trade 762, 763 (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." *Id.*

41. 20 Ct. Int'l Trade 1483, 1484 (1996).

42. *Id.* at 1485-86.

43. 28 Ct. Int'l Trade 679, 688-89, 691 (2004).

44. *Id.* at 697.

Customs and Border Protection (CBP) 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.[45] The importer's complaint alleged that the first payment had been made to a broker whom the plaintiff alleged was the agent of the government.[46] Notwithstanding the implausible nature of the plaintiff's 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."[47]

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 that 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 *Twombly*, Justice Souter, writing for a seven-Justice majority of the Supreme Court, concluded that the "no set of facts" standard in *Conley* had, "after puzzling the profession for 50 years, . . . earned its retirement."[48] *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.[49] William Twombly (one of two named plaintiffs) represented a class of all subscribers of local telephone and high-speed Internet services.[50] Generally, the plaintiffs alleged that starting in 1996,[51] the Bell Atlantic Corporation and other incumbent local exchange carriers (ILECs) had violated the Sherman Act

45. 13 Ct. Int'l Trade 465, 465-66 (1989).
46. *Id.* at 466.
47. *Id.*
48. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007).
49. 15 U.S.C. § 1 (2006).
50. *Twombly*, 550 U.S. at 550.
51. Prior to the Telecommunications Act of 1996, 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. *Id.* at 549.

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 to refrain from competing in each other's 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. 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. According to the complaint, the ILECs' "compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad 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."
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> 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] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages," and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, 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.'"[52]

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.[53] A federal district court dismissed plaintiffs' complaint for failure to state a claim, holding 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.[54] The United States Court of Appeals for the Second Circuit, relying upon *Conley*, reversed.[55]

The Supreme Court reversed and remanded. In concluding that the specific antitrust complaint at issue failed to state a claim, the Court,

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52. *Id.* at 550-51 (citations omitted).
53. *Id.* at 551.
54. *Id.* at 552.
55. *Id.* at 553, 561.

relying upon its antitrust precedents holding that parallel business behavior (even "conscious parallelism") does not automatically violate the Sherman Act, held that the 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: "Without 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."[56] The Court held that Rule 8 required that at the pleading stage, plaintiffs make allegations "plausibly suggesting (not merely consistent with) agreement" between the ILECs.[57] The Court stated, "Asking 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 illegal agreement."[58] 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.[59]

Addressing the policy reasons behind the Rule 8 pleading requirements, the *Twombly* 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."[60]

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."[61] 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."[62] Recognizing that the literal reading of *Conley* had often

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56. *Id.* at 556-57.
57. *Id.* at 557.
58. *Id.* at 556.
59. *Id.* at 556-57.
60. *Id.* at 558 (internal quotation marks omitted).
61. *Id.* at 561.
62. *Id.* at 563.

been resisted by courts and commentators over the decades, the Court repudiated it.

Two years after *Twombly*, the Supreme Court issued its decision in *Iqbal*,[63] 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.[64]

Iqbal was a *Bivens*[65] action filed by an Arab Muslim who alleged that, in the aftermath of September 11, 2001, and prior to his deportation to Pakistan, he was imprisoned in the United States under extremely restrictive conditions and mistreated in the maximum security housing unit of the Metropolitan Detention Center in New York.[66] Of the dozens of federal officials named in his complaint, Iqbal sued John Ashcroft, former United States Attorney General, and Robert Mueller, Director of the FBI (the "federal officials").[67] Specifically with respect to the federal officials, Iqbal alleged that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation 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."[68] 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.[69]

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

64. The issue of how much higher *Twombly* set the bar does not appear to be conclusively settled in the Federal Circuit's precedential decisions. In *McZeal v. Sprint Nextel Corp.*, a patent case decided *before* the Supreme Court's *Iqbal* decision clarified that *Twombly* applied outside of the antitrust context—a divided panel suggested that *Twombly* was merely a "clarification" of *Conley* and not a fundamental change. 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007). In later decisions, however, the Federal Circuit does appear to recognize *Twombly* as a significant change in the law. *See, e.g.*, Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (affirming dismissal for failure to state a claim because plaintiff did not allege sufficient facts to render her claim plausible). Importantly, in many of the patent cases (including *McZeal*) in which the Federal Circuit has addressed this issue, it was applying the law of a regional court of appeals. *See, e.g.*, Colida v. Nokia, Inc., 347 F. App'x 568, 569-70 (Fed. Cir. 2009).

65. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (authorizing damages suits against individual federal officers alleged to have committed constitutional torts during the performance of their official duties).

66. *Iqbal*, 129 S. Ct. at 1943.

67. *Id.* at 1942.

68. *Id.* at 1944 (internal quotation marks omitted).

69. *Id.* (internal quotation marks omitted).

The federal officials claimed qualified immunity and moved to dismiss the complaint for failure to state a claim.[70] The district court denied the motion to dismiss, and the federal officials filed an interlocutory appeal to the Second Circuit.[71] 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.[72]

The Supreme Court reversed and remanded.[73] In the first part of its decision, which is not pertinent here, the Court held that the Second Circuit possessed appellate jurisdiction to entertain the federal officials' interlocutory appeal.[74] 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.[75] 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 effect of those policies upon Arab Muslims.[76]

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."[77] Given the identities of the September 11 hijackers, the Court suggested, "[I]t 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."[78] 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

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70. *Id.* at 1942.
71. *Id.*
72. *Id.*
73. *Id.* at 1954.
74. *Id.* at 1945-47.
75. *Id.* at 1947-48.
76. *Id.* at 1948.
77. *Id.* at 1951 (internal quotation marks omitted).
78. *Id.*

on its face, and that "[w]here a complaint 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."'"[79] 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."[80] 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."[81]

IV. RECENT UNITED STATES COURT OF INTERNATIONAL TRADE 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 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.[82] 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

79. *Id.* at 1949 (citing *Twombly*, 550 U.S. 554, 557 (2007)).
80. *Id.* at 1950.
81. *Id.* at 1953 (citation omitted).
82. 569 F. Supp. 2d 1315, 1319 (Ct. Int'l Trade 2008), *aff'd*, 594 F.3d 1346 (Fed. Cir. 2010).

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."[83] The government sought dismissal of Totes' 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' factual allegations were insufficient to state a claim under the *Twombly* standard.[84]

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 exceedingly persuasive justification, or in other words, that the government has used discriminatory means that are not substantially related to important governmental objectives."[85] 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.[86]

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*.[87] Given this context, the court held that Totes' reliance upon "the express use of gender in the tariff classification scheme" was not enough.[88] 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,"[89] the court held that the complaint did not state a claim.

In more recent cases, the CIT has, relying upon *Twombly*, dismissed complaints or individual counts in a multicount complaint for failure to allege sufficient facts to render the claim plausible. For example, in

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83. *Id.* at 1320.
84. *Id.* at 1319, 1328.
85. *Id.* at 1326.
86. *Id.* ("[The *Twombly* standard] does demand . . . at least a purpose that focuses upon women by reason of their sex.").
87. *Id.* at 1327.
88. *Id.* at 1326-27.
89. *Id.* at 1327-28.

Southern Shrimp Alliance v. United States,[90] the plaintiffs broadly challenged CBP policies and procedures relating to administration of the Continued Dumping and Subsidy Offset Act[91] (CDSOA or Byrd Amendment). In their eleven-count complaint, the plaintiffs, domestic producers of warm water shrimp and purported "affected domestic producers" (ADPs) entitled to a *pro rata* share of annual CDSOA distributions, challenged CBP's distribution of CDSOA funds relating to certain antidumping orders.[92] They alleged that CBP's 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.[93] The government sought dismissal of ten of the counts raised in the complaint, and the court granted the motion.[94] Relevant here, the court, relying upon *Twombly*, dismissed two of plaintiffs' claims for failure to allege certain facts necessary to make the claims plausible.[95]

In count eight, plaintiffs alleged that CBP 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)."[96] The court held that the allegations did not satisfy *Twombly* and that § 552(a)(1) does not require CBP to create procedural rules—it only requires CBP to publish whatever procedural rules are promulgated.[97] As such, the court held that plaintiffs' allegation that CBP had failed to publish any procedural rules, standing alone, did not plausibly suggest a violation of the statute.[98] 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*."[99] 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."[100] Because the complaint did not include an allegation of that sort, the court held that it "fail[ed] to

90. 617 F. Supp. 2d 1334 (Ct. Int'l Trade 2009).
91. *Id.* at 1339-40.
92. *Id.* at 1341-42.
93. *Id.*
94. *Id.* at 1339-40.
95. *Id.* at 1356-59.
96. *Id.* at 1356 (internal quotation marks omitted).
97. *Id.* at 1357.
98. *Id.*
99. *Id.* (internal quotation marks omitted).
100. *Id.*

raise Plaintiffs' right to relief under § 552(a)(1) beyond the speculative level" and the claim was dismissed.[101]

The court also dismissed plaintiffs' count seven based upon *Twombly*. In that count, plaintiffs alleged that they had a property interest in their share of CDSOA funds and that CBP 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 to which Plaintiffs are entitled."[102] The court held that plaintiffs' claim failed to state a claim upon which relief could be granted because the applicable CBP regulation permitted reconsideration only where, through a mistake or clerical error, CBP 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*).[103] As such, the court reasoned, no reconsideration could result in a deprivation of plaintiffs' alleged property interest unless CBP was conducting reconsideration proceedings in a manner contrary to its regulation.[104] Because plaintiffs did not allege that CBP had conducted reconsideration in violation of the regulation (and the court refused to infer it), the claim was not plausible under *Twombly*.[105] "Simply put, the Complaint lacks the grounds necessary to suggest that Plaintiffs have actually been deprived of their claimed property interest."[106]

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.[107] The plaintiffs, domestic producers of honey and other products, alleged that they were ADPs eligible to receive *pro rata* shares of CBP's annual CDSOA offset distribution of antidumping duties (duties that were secured by "new shipper" CBP surety bonds).[108] 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 CBP and the DOC, the government had failed to collect

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101. *Id.*
102. *Id.* at 1357-58.
103. *Id.* at 1359.
104. *Id.*
105. *Id.*
106. *Id.*
107. 722 F. Supp. 2d 1342, 1347 (Ct. Int'l Trade 2010).
108. *Id.*

from the surety defendants more than $900 million in antidumping duties owed in connection with several antidumping orders upon Chinese imports.[109] In granting the government's motion to dismiss the counts of the complaint stated against the government,[110] 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 the speculative level. They must be dismissed now for failure to satisfy the pleading standard the Supreme Court set forth in [*Twombly*]. The high degree of speculation called for by these claims makes questionable plaintiffs' implied premise that burdensome discovery should be allowed because it might lead to claims upon which this litigation could proceed.[111]

Specifically, in count ten, plaintiffs alleged, upon information and belief, that CBP "failed to distribute, or to withhold from distribution . . . certain AD duties that were assessed and collected on imports."[112] The court held that this count was insufficient under *Twombly*, stating:

> In 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.[113]

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 [*Twombly*]."[114]

In count eleven, plaintiffs alleged, again upon information and belief, that "on one or more occasions, [CBP] has failed to issue a demand that a Surety Defendant perform under one or more new shipper

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109. *Id.* at 1347, 1369.

110. 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, 1335 (Ct. Int'l Trade 2010).

111. *Sioux Honey Ass'n*, 722 F. Supp. 2d at 1369 (citations omitted).

112. *Id.* at 1356.

113. *Id.* at 1357.

114. *Id.* at 1368.

bonds."[115] Again, the court held that the count was too speculative to satisfy *Twombly*, concluding:

> The 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 [CBP] has yet to make a 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.[116]

Finally, in count fifteen, plaintiffs alleged, upon information and belief, that CBP had failed to refer to the United States Department of Justice (DOJ) for prosecution unsatisfied demands issued to sureties. The plaintiffs further alleged that based on their review of the court's docket, "[the DOJ], to date, has not filed any collections lawsuit against any Surety Defendant for performance under a new shipper bond."[117] Noting that 19 C.F.R. § 113.52 (the regulation upon which plaintiffs relied) provides CBP 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.[118] The court stated that plaintiffs made "no allegation . . . of any specific instance in which there has been neither a referral by [CBP] nor measures taken to 'satisfactorily' settle the liability [under § 113.52]."[119] 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 that the court held to be beyond judicial review).[120]

The *Twombly* standard has also been applied by the court in its consideration of two complaints filed by the government in § 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 action.

In *United States v. Scotia Pharmaceuticals Ltd.*,[121] the court denied the government's motion for default judgment against a defendant,

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115. *Id.* (internal quotations marks omitted).
116. *Id.* at 1358.
117. *Id.* at 1365-66.
118. *Id.* at 1366.
119. *Id.*
120. *Id.*
121. No. 03-00658, slip op. 09-49 (Ct. Int'l Trade May 20, 2009).

Callanish, a foreign corporation alleged to have been part of a conspiracy to import evening primrose oil by means of false invoices.[122] 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 Callanish.[123] 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.[124] 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 § 1592.[125] 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*.[126]

In another § 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 material false statements or omissions.[127] 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."[128] Notably, in rejecting the government's reliance upon the CIT's prior decision in *Golden Ship Trading* (discussed *supra* 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,

122. *Id.* at 1-3.
123. *Id.* at 11-12, 14.
124. *Id.* at 12.
125. *Id.* at 9-12.
126. *Id.* at 11-12.
127. No. 07-00171, slip op. 10-5, at 1-2 (Ct. Int'l Trade Jan. 13, 2010).
128. *Id.* at 15-16 (footnotes omitted).

> 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." *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)."[129]

V. CONCLUSION

The quote immediately above from *Tip Top Pants* brings us back to the question posed at the beginning of this Article: 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's complaint at issue would likely have been dismissed *even under the Conley standard*.[130] 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 upon factual implausibility or notice reasons appears to be significant based upon a comparison to the court's *Conley*-era precedents that routinely rejected arguments that a complaint failed to state a claim for those reasons. It seems safe to say that a dismissal standard that had been previously described as "extraordinary and viewed with disfavor,"[131] 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

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129. *Id.* at 18-19 (citations omitted).

130. In another very recent decision, the court suggested that the application of *Twombly* instead of *Conley* would not have made a difference. United States v. Pressman-Gutman Co., 721 F. Supp. 2d 1333, 1338 (Ct. Int'l Trade 2010). While granting a motion to dismiss the government's complaint, the court stated: "In the instant case, the nuances of *Iqbal* and *Twombly* are purely academic. As detailed 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." *Id.*

131. Former Emps. of Quality Fabricating, Inc. v. U.S. Dep't of Labor, 28 Ct. Int'l Trade 679, 697 (2004).

causing the courts to scrutinize the claims more closely than they had previously.