Whether The Heightened Pleading Requirements
Of *Twombly* and *Iqbal* Apply To
Pleading Affirmative Defenses

I. Introduction

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), the U.S. Supreme Court heightened the pleading requirements for stating a claim. Neither decision addressed whether those heightened requirements apply to stating affirmative defenses.

As described below, the courts are split on this issue. The determination depends on the language of Rule 8 of the Federal Rules of Civil Procedure and an evaluation of the principles and policies underlying pleading requirements, including notions of symmetry and asymmetry.

This report examines the language of Rule 8 and case law under Rule 12(f) governing motions to strike affirmative defenses. It then turns to the scope of the decisions in *Twombly* and *Iqbal* before reviewing the teachings of the cases that have addressed whether there should be a heightened pleading standard for affirmative defenses, including the district courts in the Second Circuit.

II. Rules 8(a)(2), 8(b) and 8(c)

Rule 8(a) governs the pleading of claims for relief. Rule 8(a)(2), the rule at issue in *Iqbal* and *Twombly*, provides: "(a) **Claim for Relief**. A pleading that states a clam for relief must contain *** (2) a short and plain statement of the claim showing that the pleader is entitled to relief …."

Rule 8(b) governs the pleading of defenses and provides that, "[i]n responding to a pleading, a party must: "(A) state in short and plain terms its defenses to each claim asserted against it."

Rule 8(c) governs the pleading of affirmative defenses and provides that, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense," including those listed in Rule 8(c).

Both Rules 8(a)(2) and 8(b) require a "short and plain" recitation. However, only Rule 8(a)(2) requires a "showing that the pleader is entitled to relief." Rules 8(b) and 8(c) contain no comparable requirement.

III. <u>Rule 12(f) Motions To Strike Affirmative Defenses</u>

Fed. R. Civ. P. 12(f) provides, in pertinent part, that "[t]he court may strike from a pleading an insufficient defense." A Rule 12(f) motion to strike an affirmative defense is generally disfavored. *See, e.g., EEOC v. Kelley Drye & Warren, LLP*, 2011 U.S. Dist. LEXIS 80667, at *6 (S.D.N.Y. July 25, 2011); *Bottoni v. Sallie Mae, Inc.*, 2011 U.S. Dist. LEXIS 93634, at *3 (N.D. Cal. Aug. 22, 2011); *Adams v. JP Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 79366, at *3 (M.D. Fla. July 21, 2011).

Prior to the Supreme Court decisions in *Twombly* and *Iqbal***,** at least one federal Court of Appeals had held that "[a]n affirmative defense is subject to the same pleading requirements as is the complaint." *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999). In *Woodfield*, the court held that a defendant "must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced." *Id*.

Prior to *Twombly* and *Iqbal*, the Second Circuit held that the following standard applied to the pleading of an affirmative defense: "A motion to strike an affirmative defense is not favored and will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *judgment vacated on other grounds*,

478 U.S. 1015 (1986). That pleading standard was virtually identical to the standard under *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), for pleading a claim ("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"), which standard *Twombly* explicitly rejected.

IV. ***Iqbal* and *Twombly***

In *Twombly* and *Iqbal*, the U.S. Supreme Court heightened the pleading requirements for stating a claim under Fed. R. Civ. P. 8(a). As the Court stated in *Iqbal*,

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly* [citation omitted], the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. [Citation omitted]. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do [citation omitted]." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

129 S. Ct. at 1949.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949.

In *Twombly*, the Supreme Court stated, "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the…claim is and the grounds upon which it rests.'" 550 U.S. at 555. But "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of

the elements of a cause of action will not do…. Factual allegations must be enough to raise a right to relief above the speculative level…." *Id*. at 555. The Court further stated:

> Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. *See* 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

550 U.S. at 556 n.3. *See id.* at 557 ("[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief'").

In *Twombly*, the Supreme Court also indicated its concern with potentially unnecessary expenditures of time and money in litigation: "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should…be exposed at the point of minimum expenditure of time and money by the parties and the court.' " *Id*. at 558; *see also id*. at 559.

Neither *Iqbal* nor *Twombly* discussed the pleading of affirmative defenses.

V. Courts Are Divided On Whether The *Iqbal/Twombly* Heightened Pleading Standard Applies To Affirmative Defenses

Neither the Supreme Court nor any Court of Appeals has addressed the issue of whether the heightened pleading requirements of *Iqbal* and *Twombly* apply to pleading affirmative defenses. Federal district courts have divided on that issue. *See* 5 Wright & Miller Federal Prac. & Procedure: Civil 3d § 1274 (2011 Supp. at 290) (no position taken on whether the *Iqbal*/*Twombly* pleading standard should apply). It appears that the majority of district court decisions hold that the heightened pleading requirements of *Iqbal* and *Twombly* apply to the

pleading of affirmative defenses. *See, e.g., Dion v. Fulton Friedman & Gullace LLP*, 2012 U.S. Dist. LEXIS 5116, at *5 (N.D. Cal. Jan. 17, 2012) ("A majority of district courts have held that it does"); *Aguilar v. City Lights of China Restaurant, Inc.*, 2011 U.S. Dist. LEXIS 122531, at *5-6 (D. Md. Oct., 24, 2011) ("the majority of district courts…have concluded that the *Twombly – Iqbal* approach does apply to affirmative defenses"); *Gessele v. Jack in the Box, Inc.*, 2011 U.S. Dist. LEXIS 99419, at *4 (D. Or. Sept. 2, 2011) ("the majority of district courts across the country have extended *Twombly*'s plausibility standard to affirmative defenses); *Dilmore v. Alion Science & Technology Corp.*, 2011 U.S. Dist. LEXIS 74285, at *13-14 (W.D. Pa. July 11, 2011) ("the emerging majority of district courts apply the *Twombly/Iqbal* standards to affirmative defenses"); *Yates v. Perko's Café*, 2011 U.S. Dist. LEXIS 70059, at *9 (N.D. Cal. June 29, 2011) ("majority of district courts have applied the heightened pleading standard").[1] However, a significant number of district court decisions hold to the contrary.[2]

VI. Reasons For Applying The *Iqbal/Twombly* Heightened Pleading Standard To Affirmative Defenses

Courts that have determined that the *Iqbal*/*Twombly* pleading requirements apply to the pleading of affirmative defenses have based their decision on one or more of the following rationales:

1. Fairness, common sense and litigation efficiency require the application of the same pleading standard to complaints and to defenses, and, therefore, the pleading of a defense should provide more than merely the possibility that the defense may exist. *See, e.g., In re Fischer*, 2011 Bankr. LEXIS 1586, at *1-2 (Bankr. N.D. Ga. April 7, 2011); *Amerisure Ins. Co. v. Thomas*, 2011 U.S. Dist. LEXIS 79530, at *6 (E.D. Mo. July 21, 2011) ("'[i]t makes little

[1] A non-exhaustive list of cases holding that the heightened pleading requirements of *Iqbal* and *Twombly* apply to affirmative defenses is attached as Appendix A.

[2] A non-exhaustive list of cases holding that the heightened pleading requirements of *Iqbal* and *Twombly* do not apply to affirmative defenses is attached as Appendix B.

sense to hold defendants to a lower pleading standard than plaintiffs when, in both instances, the purpose of pleading requirements is to provide enough notice to the opposing party that there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case'"); *Lucas v. Jerusalem Café, LLC*, 2011 U.S. Dist. LEXIS 39504, at *4 (W.D. Mo. Apr. 11, 2011) (same); *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010); *Francisco v. Verizon South, Inc*., 2010 U.S. Dist. LEXIS 77083, at *17 (E.D. Va. July 29, 2010) ("[t]he same logic holds true for pleading affirmative defenses as for pleading claims – without alleging facts the plaintiff can't prepare adequately to respond") ; *Palmer v. Oakland Farms, Inc*., 2010 U.S. Dist. LEXIS 63265, at *13 (W.D. Va. June 24, 2010) ("it neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case"); *Ulyssix Technologies, Inc. v. Orbital Network Eng'g, Inc*., 2011 U.S. Dist. LEXIS 14018, at *45 (D. Md. Feb. 11, 2011). .

2. Application of the *Iqbal/Twombly* heightened pleading standard insures that an affirmative defense supplies sufficient information to explain the parameters of and the basis for the affirmative defense such that the adverse party can reasonably tailor discovery to it. *See Francisco, supra*, 2010 U.S. Dist. LEXIS 77083, at *24 (" '[a]n even-handed standard as related to pleading insures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery' "); *Burget v. Capital West Secs., Inc.*, 2009 U.S. Dist. LEXIS 114304, at *5 (W.D. Okla. Dec. 8, 2009).

3. Applying the *Iqbal/Twombly* heightened pleading standard to affirmative defenses "serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply." *Barnes v. AT&T Pension Benefit Plan-Non Bargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010); *Hayne v. Green Ford Sales, Inc*., 263 F.R.D. 647, 650 (D. Kan. 2009) (same).

4. Defenses that are nothing but boilerplate recitations or conclusory allegations clutter the docket and create the need for unnecessary or extended discovery. *See, e.g., Barnes, supra*, 718 F. Supp. 2d at 1172-73; *Bradshaw, supra*, 725 F. Supp. 2d at 536; *Burget, supra*, 2009 U.S. Dist. LEXIS 114304, at *5-6; *Palmer, supra*, 2010 U.S. Dist. LEXIS 63265, at *14. In *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687 (N.D. Ohio 2010), the court made the same point and stressed that "the holdings of *Twombly* and *Iqbal* were designed to eliminate the potential high cost of discovery associated with meritless claims. *See, Twombly*, 550 U.S. at 558-561; *Iqbal*, 129 S. Ct. at 1950." *Id.* at 691. "Boilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints." *Id*.

5. In pleading an affirmative defense, the defendant must comply with Rule 8's requirement of a short and plain statement to give the opposing party fair notice of the defense and the grounds on which it rests. *See, e.g., Barnes, supra*, 718 F. Supp. 2d at 71; *Hayne, supra*, 263 F.R.D. at 649. The court in *Barnes*, stated:

> Rule 8's requirements with respect to pleading defenses in an answer parallel the Rule's requirements for pleading claims in a complaint. *Compare* (a)(2) "a short and plain statement of the claim showing that the pleader is entitled to relief," *with* (b)(1) "state in short and plain terms its defenses to each claim asserted against it."

718 F. Supp. 2d at 1172. *See Bradshaw, supra*, 725 F. Supp. 2d at 536 (similar language is used in Rule 8 to describe the requirements for pleading both claims in a complaint and defenses in an answer," quoting Rule 8(a)(2) and 8(b)(1)(A)).

In *Hayne*, however, the court acknowledged that the wording of Rule 8(a)(2) differs from that of Rules 8(b)(1)(A) and (c)(1), but found that the differences were not meaningful:

> In both instances [pleading claims and affirmative defenses], the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is come plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case. Moreover, Fed. R. Civ. P. 8 is consistent in inferring that the pleading requirements for affirmative defenses are essentially the same as for claims for relief. Although Rule 8(c) for affirmative defenses does not contain the same language as 8(a)(2), requiring "a short and plain statement of the claim," 8(b)(1)(A) nevertheless does require a defendant to "state in short and plaint terms its defenses to each claim." The sub-heading for Rule 8(b)(1), moreover, is "Defenses; In General." Rule 8(c)(1) provides a helpful laundry list of commonly asserted affirmative defenses to emphasize that avoidances and affirmative defenses must indeed be pleaded to be preserved. Applying the standard for heightened pleading to affirmative defense serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply.

263 F.R.D. 650.

In *HCRI TRS Acquirer LLC, supra*, 708 F. Supp. 2d 687, the court also recognized that the Rule 8(a)(2) language applicable to claims differs from the Rule 8(b) and (c) language applicable to defenses and affirmative defenses, but concluded that the difference did not matter: "While the language in Civil Rule 8(a) differs from the language Civil Rules (b) and (c), this difference is minimal and simply reflects that an answer is a response to a complaint. Furthermore, the shared use of the 'short and plain' language – the essence of the pleading standard – indicates the pleading requirements for affirmative defenses are the same as for claims of relief." *Id*. at 691; *accord Local 165, Laborers' Int'l Union of North America v. DEM/EX Group Inc.*, 2010 U.S. Dist. LEXIS 22707, at * 4 (C.D. Ill. March 11, 2010)

("Defenses must be stated in 'short and plain terms.' The same description – 'short and plain' – is used to describe how a complaint must be filed.'.

In *Francisco, supra*, 2010 U.S. Dist. LEXIS 77083, the court also noted the language difference between Rule 8(a)(2) and Rules 8(b) and (c) "suggesting requirements as to pleadings that may differ as well." *Id*. at *24. Yet, the court concluded that the *Iqbal/Twombly* heightened pleading standard applies, stating that "*Twombly* and *Iqbal* require only minimal facts establishing plausibility, a standard this Court presumes most litigants would apply when conducting the abbreviated factual investigation necessary before raising affirmative defenses in any event." *Id*. at 24-25.

6. Application of the *Iqbal/Twombly* heightened pleading standard will not limit a defendant's ability to mount a thorough defense because under Rule 15(a)(2) a defendant can seek to amend its answer to assert a viable defense that becomes apparent during discovery, and leave to amend is to be freely given absent a showing of prejudice or futility. *See Bradshaw, supra*, 725 F. Supp. 2d at 536; *Burget, supra*, 2009 U.S. Dist. LEXIS 114304, at *6; *Hayne, supra*, 263 F.R.D. at 651; *Palmer, supra*, 2011 U.S. Dist. LEXIS 63265, at *16; *see also* 6 Wright, Miller & Kane, Federal Prac. & Procedure: Civil 3d §§ 1471, 1473, 1484 & 1487 on policy and practice regarding amendments.

7. Form 30, appended to the Federal Rules of Civil Procedure pursuant to Rule 84,[3] "underscores the notion that a defendant's pleading of affirmative defenses should be subject to the same pleading standard as a plaintiff's complaint because it includes factual assertions in the example it provides. The Form includes within it a suggestion that minimal facts be asserted before raising a statute of limitations defense." *Francisco, supra*, 2010 U.S. Dist. LEXIS 77083,

[3] Rule 84 states: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." Fed. R. Civ. P. 84.

at *26; see Form 30, ¶ 6, which states: "the plaintiff's claim is barred by the statute to limitations because it arose more than _____ years before this action was commenced."

VII. Reasons For Not Applying The *Iqbal/Twombly* Heightened Pleading Requirements To Affirmative Defenses

Courts that have concluded that the *Iqbal/Twombly* heightened pleading requirements do not apply to pleading affirmative defenses have based their conclusion on one or more of the following rationales:

1. There are differences in wording between Rule 8(a)(2) and Rules 8(c) and 8(b), and *Iqbal* and *Twombly* only addressed the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a "statement…showing that the pleader is entitled to relief," while Rules 8(b) and 8(c) do not contain comparable language requiring a party to show why a defense or affirmative defense is relevant or why the party is entitled to claim that defense. The Supreme Court in *Iqbal* and *Twombly* relied heavily on the language in Rule 8(a)(2) requiring a "showing" of entitlement to relief in concluding that the claimant must allege sufficient facts to "show that the claim is plausible." The absence of language in Rules 8(b) and (c) comparable to the "showing…entitled to relief" language in Rule 8(a)(2) means that the pleading requirement under Rules 8(b) and (c) is not the same as that under Rule 8(a)(2). *See, e.g., Cottle v. Falcon Holdings Mgmt., LLC.*, 2012 U.S. Dist. LEXIS 10478, at *8-9 (N.D. Ind. Jan. 30, 2012); *Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, 2012 U.S. Dist. LEXIS 6745, at *4-6 (C.D. Cal. Jan. 20, 2012); *Aros v. United Rentals, Inc.*, 2011 U.S. Dist. LEXIS 125870, at *8-9 (D. Conn. Oct. 31, 2011); *Adams v. JP Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 79366, at *7-9 (M.D. Fla. July 21, 2011); *Bowers v. Mortgage Electronic Regis. Sys*., 2011 U.S. Dist. LEXIS 58537, at *11-13 (D. Kan. June 1, 2011); *Dilmore v. Alion Science & Technology Corp*., 2011 U.S. Dist. LEXIS 74285, at *14 (W.D. Pa. July 11, 2011); *EEOC v. Courtesy Bldg. Serv., Inc*., 2011 U.S. Dist.

LEXIS, at *7-8 (N.D. Tex. Jan. 21, 2011); *Falley v. Friends Univ*., 2011 U.S. Dist. LEXIS 40921, at *6-8 (D. Kan. Apr. 14, 2011); *Lane v. Page*, 2011 U.S. Dist. LEXIS 11636, at *29-42 (D.N.M. Jun. 14, 2011).

2. It would be unfair to defendants to require them to provide detailed factual allegations when they have only 21 days to respond to the complaint (see Fed. R. Civ. P. 12(a)(1)(A)), whereas plaintiffs have a great deal more time to conduct an investigation prior to filing the complaint. *See, e.g., Cottle, supra*, 2012 U.S. Dist. LEXIS 10478, at *10; *Aros, supra*, 2011 U.S. Dist. LEXIS 125870, at *9-10; *Adams, supra*, 2011 U.S. Dist. LEXIS 79366, at *10; *Bowers, supra*, 2011 U.S. Dist. LEXIS 58537, at *14; *Falley, supra*, 2011 U.S. Dist. LEXIS 40921 at *9; *Lane, supra*, 2011 U.S. Dist. LEXIS 11636, at *44-45, 47-49. It should be noted that defendants typically obtain at least an additional 30 days to respond to a complaint, although that does not change the fact that plaintiffs almost always have more time to investigate and file a complaint.

3. Failure to plead an affirmative defense risks waiving that defense. *See, e.g., Falley, supra*, 2011 U.S. Dist. LEXIS 40921, at *9; *Lane, supra*, 2011 U.S. Dist. LEXIS 11636, at *47-48.

4. The purpose of Rule 8(c) is merely to provide the plaintiff with notice of an affirmative defense that may be raised at trial. *See, e.g. Adams, supra*, 2011 U.S. Dist. LEXIS 79366, at *9; *Jackson v. City of Centreville*, 269 F.R.D. 661, 662 (N.D. Ala. 2010).

5. Federal Rule of Civil Procedure Form 30 serves as a form for presenting a Rule 12(b) defense and allows the simple statement that "[t]he complaint fails to state a claim upon which relief can be granted" in order to assert the defense of failure to state a claim. *See, e.g.,*

Bowers, supra, 2011 U.S. Dist. LEXIS 58537, at *14; *Falley*, 2011 U.S. Dist. LEXIS 40921, at *8-9; *Lane*, 2011 U.S. Dist. LEXIS 11636 at *40-41. As the court in *Lane* explained:

> Forms appended to the rules bolster the Court's analysis that Rule 8(b) does not require defendants to provide factual allegations supporting defenses. Form 30 provides an example of an "answer presenting defenses under Rule 12(b)." Fed. R. Civ. P. Form 30. The section "Failure to State a Claim" states, in its entirety: "4. The complaint fails to state a claim upon which relief can be granted." Fed. R. Civ. P. Form 30. Failure to state a claim is a defense under Rule 12 and therefore falls under Rule 8(b)'s requirements. Form 30 provides no factual allegations in support of the defense, and Form 30 is sufficient under the rules. *See Fed. R. Civ. 84*. "The forms in the appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

2011 U.S. Dist. LEXIS 11636, at *41.

6. Granting a motion to strike an affirmative defense under Rule 12(f) encourages parties to bog down litigations by filing and fighting motions to strike prematurely, which is contrary to the purpose of Rule 12(f) to "minimize delay, prejudice and confusion." *See, e.g.*, *Bowers, supra*, 2011 U.S. Dist. LEXIS 58537, at *15; *Falley, supra*, 2011 U.S. Dist. LEXIS 40921, at *9-10; *see also Aros, supra*, 2011 U.S. Dist. LEXIS 125870, at *10 ("would encourage motions to strike, which are disfavored").

7. Avoiding the Court having to rule on multiple motions to amend the answer during the course of discovery as the defendant obtains additional information that would support those affirmative defenses that defendant had no practical way of investigating before discovery. *See Leon v. Jacobson Transp. Co., Inc.*, 2010 U.S. Dist. LEXIS 123106, at *3 (N.D. Ill. Nov. 19, 2010).

8. An additional reason for not applying the *Iqbal/Twombly* pleading standard to affirmative defensesrelates to the scope of permissible discovery under Rule 26(b)(1). Rule 26(b)(1) limits the scope of discovery to non-privileged matter "that is relevant to any party's claim or defense," unless otherwise limited by court order. If an affirmative defense cannot

properly be pled until the party has sufficient facts to satisfy *Iqbal/Twombly*, and the facts needed to plead that affirmative defense are in the hands of the plaintiff, how can the defendant obtain them? Presumably any discovery request (including questions at a deposition) seeking such information will be subject to the objection that because the particular affirmative defense has not been raised, the requested discovery, including the deposition question, is improper. The argument that a defendant needs the discovery to determine if there is a basis for asserting the affirmative defense will be subject to the argument that defendant is engaged in an impermissible fishing expedition; that a defendant cannot use discovery to determine if an affirmative defense may exist. *See Leon, supra*, 2010 U.S. Dist. LEXIS 123106, at *3 ("The Court would also like to avoid the discovery disputes that would inevitably develop as a defendant seeks discovery related to an affirmative defense it had not stated in its answer").

In that Catch-22 situation, a possibly meritorious affirmative defense will fall by the wayside because the defendant does not have sufficient facts allowing the defendant to allege the affirmative defense in its answer and those facts can only be learned though discovery from the plaintiff, which cannot be obtained because it relates to an affirmative defense which has not been alleged.

In *Bayer Cropscience A.G. v. Dow Agrosciences LLC*, 2011 U.S. Dist. LEXIS 149636 (D. Del. Dec. 30, 2011), the court listed nine reasons for not making the *Twombly*/*Iqbal* pleading standard applicable to affirmative defenses: (1) the textual differences between Rules 8(a) and 8(c); (2) "a diminished concern that plaintiffs receive notice in light of their ability to obtain more information during discovery;" (3) "the absence of a concern that the defense is 'unlocking the doors of discovery;'" (4) "the limited discovery costs, in relation to the costs imposed on a defendant, since it is unlikely that either side will pursue discovery on frivolous defenses;" (5)

unfairness of holding the defendant to the same pleading standard as the plaintiff when the defendant has only a limited time to respond to the complaint; (6) "the low likelihood that motions to strike affirmative defenses would expedite the litigation, given that leave to amend is routinely granted;" (7) the risk that a defendant will waive an affirmative defense by failing to plead it at the early stage of the litigation; (8) the lack of detail in Form 30; and (9) "the fact that a heightened pleading requirement would produce more motions to strike, which are disfavored." *Id*. at **3-4.

VIII. District Court Decisions In The Second Circuit

District courts in the Second Circuit are split. Three district courts have concluded that the *Iqbal/Twombly* pleading standard applies to pleading affirmative defenses. *See EEOC v. Kelley Drye & Warren, LLP*, 2011 U.S. Dist. LEXIS 80667, at *4-6, 15 (S.D.N.Y. July 25, 2011) (Swain, J.); *Tracy v. NVR, Inc.*, 2011 U.S. Dist. LEXIS 90778, at *28-30 (W.D.N.Y. Sept. 30, 2009) (Payson, M.J.) (Report & Recommendation), *aff'd without discussion on the basis of the Report & Recommendation*, 667 F. Supp. 2d 244, 247 (W.D.N.Y. 2009) (Larimer, J.); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620 (S.D.N.Y 2008) (Chin, J.). Judge Hall in the District of Connecticut has concluded that the *Iqbal/Twombly* pleading standard did not apply to the pleading of affirmative defenses. *See Aros v. United Rentals, Inc.*, 2011 U.S. Dist. LEXIS 125870, at *4-11 (D. Conn. Oct. 31, 2011); *Whitserve, LLC v. GoDaddy.Com, Inc.*, 2011 U.S. Dist. LEXIS 132636, at *4-5 (D. Conn. Nov. 17, 2011) (Hall, J.).

In *Aspex Eyewear, Inc.*, the court based its decision on the following: *Twombly*'s plausibility requirement governs a motion to dismiss pursuant to Rule 12(b)(6); "[t]he standard on a motion to dismiss also applies to … a motion to strike an affirmative defense." 531 F. Supp. 2d at 621-622. In striking certain affirmative defenses, the court quoted from the Second Circuit's decision in *Shechter v. Comptroller of New York*, 79 F.3d 265, 270 (2d Cir. 1996), that

"'[a]ffirmative defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy.'" 531 F. Supp. 2d at 623. The court further stated, "Mere conclusory assertions are not sufficient to give plaintiff notice of the counterclaims and defenses and, thus, do not meet Rule 8(a)'s pleading standards. *Id*.

In *EEOC v. Kelley Drye & Warren, LLP*, the court's entire analysis consisted of the following:

> Rule 8 of the Federal Rules of Civil Procedure requires that a party responding to a pleading "state in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). Although no Circuit Court of Appeals has yet spoken to the issue since the Supreme Court's rulings in *Twombly* and *Iqbal* concerning pleading standards for claims, most lower courts that have considered the question of the standard applicable to pleading of defenses have held that the Rule 12(b)(6) standard, as elucidated in *Twombly* and *Iqbal*, governs the sufficiency of the pleading of affirmative defenses. *See, e.g., Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622-623 (S.D.N.Y. 2008) (recognizing that the equivalent standard governs a motion to dismiss pursuant to Rule 12(b)(6) and a motion to strike an affirmative defense pursuant to Rule 12(f)); *Tracy v. NVR, Inc.*, No. 04 Civ. 6541L, 2009 U.S. Dist. LEXIS 90778, 2009 WL 3153150, *7 (W.D.N.Y. Sept. 30, 2009) (same); *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 456 (S.D.N.Y. 2008) (same). It has long been held that affirmative defenses that contain only "bald assertions" without supporting facts should be stricken. *Shechter v. Comptroller of City of New York*, 79 F.3d 265, 270 (2d Cir. 1996).

2011 U.S. Dist. LEXIS 80667, at *4-6.

In *Tracy, supra*, the court's analysis was :

> "Affirmative defenses are … subject to the general pleading requirements of Rule 8(a) [and] 8(e) … generally requiring a short and plan statement of the facts."
>
> * * *
>
> [A]ffirmative defenses that contain only "bald assertions" unaccompanied by supporting facts will be stricken. *Schecter v. Comptroller of City of New York*, 79 F.3d 265, 270 (2d Cir. 1996) (parenthetical text omitted). Indeed, the *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense under Rule 12(f). *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622 (F.D.N.Y. 2008). [Citations from other districts omitted.]

2009 U.S. Dist. LEXIS 90778, at *27-28.

Judge Hall in *Aros, supra*, reached her conclusion that the *Iqbal*/*Twombly* standard did not apply after first citing district court decisions going both ways on the issue. The court then gave the following reasons for its decision. First, "the Supreme Court placed great reliance on the Rule 8(a)(2) requirement that a pleading must show that the pleader is entitled to relief." "In contrast, Rule 8(c)(1), which governs the pleading of affirmative defenses, requires that 'a party must affirmatively state any avoidance or affirmative defense.'" Second, "the Supreme Court's reasoning in both *Twombly* and *Iqbal* revealed the Court's underlying concern: allowing unfounded cases to survive motions to dismiss and proceed to costly discovery." Third, because "plaintiff's time to prepare pleadings is limited only by the statute of limitations, whereas defendant's time is limited to twenty-one days, it makes sense that plaintiff's claims would be required to meet a higher standard than defendant's affirmative defenses." Fourth, "a motion to dismiss can resolve a case and avoid discovery entirely, whereas a motion to strike an affirmative defense can only prolong pre-discovery motion practice. Raising the standard for pleading affirmative defenses would encourage motions to strike, which are disfavored. [Citations omitted.] Such a decision would undermine *Twombly* and *Iqbal*, both of which attempt to impose a heightened standard of pleading to limit wasteful expansions of litigation costs." 2011 U.S. Dist. LEXIS 125870, at *8-10.

In *Whitserve, LLC, supra*, Judge Hall based her decision on her earlier decision in *Aros*.

IX. Conclusion

There are arguments on both sides of the issue as to whether the *Iqbal/Twombly* pleading standard should apply to affirmative defenses. Not only is there a split in the courts, but there is also a split among practitioners, including on this Committee. All agree, however, that there

should be one standard for pleading affirmative defenses, whether imposed through the rule-making process or by an interpretation by the Supreme Court.

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