

In the
Supreme Court of the United States

BODY BY COOK, INC. & ROBERT COOK,
Petitioners,

—v—

STATE FARM MUTUAL AUTOMOBILE
INSURANCE, ALLSTATE INSURANCE
COMPANY, LIBERTY MUTUAL INSURANCE
COMPANY, GEICO INSURANCE COMPANY,
PROGRESSIVE INSURANCE COMPANY,
TRAVELERS INSURANCE COMPANY & RAMONA
LATIOLAIS, Individually and as Corporate
Representative for STATE FARM,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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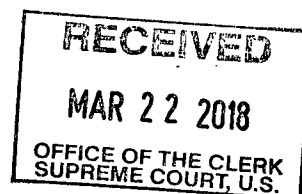


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INTRODUCTION

Pursuant to Supreme Court Rule 44, Petitioners respectfully petition the Court to rehear its February 20, 2018 dismissal of the writ of certiorari in this case.¹ Within a week of the Court denying Petitioners' writ, the Court considered the identical cases in Petitioners' writ and engaged in significant queries with counsel in *Lozman v. City of Riviera Beach*, No. 17-21 (argued February 27, 2018) on the very cases and issues that Petitioners pleaded with the Court to revisit in their petition.² Also, after the Court denied Petitioners' writ, the Federal Circuit decided *Nalco Co. v. Chem-Mod LLC*, 2018 WL 1055851 (Fed. Cir. Feb. 27, 2018).³ The pleading standard in *Nalco* differs significantly from the standard applied by the Fifth Circuit in the case at bar. Those substantial, intervening circumstances properly give rise to this petition for rehearing.



GROUND FOR REHEARING

1. On February 27, 2018, the Court heard oral arguments in *Lozman v. City of Riviera Beach*. The case transcript reveals that the members of the Court—the inventors of the current federal pleading standard—grappled with the understanding of their own decisions

¹ App.1a.

² App.38a.

³ App.2a.

of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and remain addleheaded in the application and interpretation of the pleading standard.⁴ The *Lozman* oral arguments raised substantially similar issues and argued the identical cases as set out in Petitioners' writ. Not only did the aftermath of *Twombly* and *Iqbal* leave litigants, lawyers, judges and academics in a lurch, but also it is now clear that those cases left the members of this Court in a quandary. Litigants and lawyers are left wanting as to how to draft basic federal court complaints and judges are uncertain in the application of the pleading standard, which oftentimes results in meritorious cases being dismissed. The case at bar is a clear example. The livelihood of Petitioner Robert Cook, a veteran, is literally destroyed in the pursuit of fairness and justice, because after *Twombly* and *Iqbal* not even this Court understands the current federal pleading standard.

2. In *Lozman v. Riviera Beach*, the Supreme Court granted certiorari on the question presented: "Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?" In addressing that question, there were several moments during oral argument where the members of the Court and counsel (Pamela Karlan, Esq., Shay Dvoretzky, Esq., and Jeffrey Wall, Esq.) struggled with the application, impact and understanding of *Twombly* and *Iqbal*, and thus, the federal pleading (plausibility) standard under Rule 8(a)(2). Most significantly, Chief Justice Roberts inquired:

⁴ App.38a, 44a.

Do you really think that *Twombly* and *Iqbal* require the degree of specificity that you've postulated . . . Do you really think—is it a bit of an exaggeration when you say *Twombly* and *Iqbal* are going to keep everything but that case out of court?"

App.40a.

In addition, Justice Alito questioned:

Do you really think a suit like that could be dismissed under *Twombly*?

App.39a

Also, Justice Kagan queried the plausibility standard:

You think that in serious crimes this would never get to a jury. Did I—did I mishear you?

App.41a.⁵

3. In addition, the Fifth's Circuit's pleading standard differs greatly from the recent Federal Circuit's as evidenced by a case decided a week after the Court denied Petitioner's writ of certiorari. In *Nalco Co. v. Chem-Mod LLC*, 2018 WL 1055851 (Fed. Cir. Feb. 27, 2018), Nalco appealed after the district court dismissed its fourth amended complaint.⁶ The Federal Circuit

⁵ Other significant exchanges are in App.38a-44a.

⁶ As an aside, Petitioners were booted out of court after only two amended complaints and all before the district court ever opined on the problems with the facts in the complaints, thus Petitioners never had an opportunity to correct the problems in the midst of the confusing federal pleading standard. Petitioners believe that it was error for them not to be able to have an opportunity to amend their complaint after the district court and appellate court

reversed and reinstated all the claims, finding that Nalco adequately pleaded its infringement theories under the *Twombly* and *Iqbal* pleading standard. Importantly none of the evidence Nalco attached to the complaint contradicted any of its allegations, just as in the case at bar. That is, a plaintiff need not prove its patent infringement case at the pleading stage, and where a defendant contradicts plaintiff's allegations, such inquiries are not appropriate for resolution on a motion to dismiss. *See generally, Nalco.*

4. *Twombly* and *Iqbal* ushered in a new heightened pleading requirement, not by extending Rule 9(b) but by reinterpreting Rule 8 to require a “plausible” claim. Although this Court indicated that it did not create a heightened pleading standard⁷—academics, practitioners and others believe that there is a new heightened pleading standard. The federal courts, as well as the members of this Court find the new “plausibility” pleading standard difficult to understand and apply.

5. In 2009, in congressional hearings on the confusion left by *Twombly* and *Iqbal*, a questioner raised whether it is too early to determine the real impact of those decisions. After a decade of confusion—coupled with the very recent inconsistency in rulings, and the quandary revealed by the members of this Court—the time is ripe to address the federal pleading standard

addressed the alleged shortcomings in the Second Amended Complaint.

⁷ *Twombly* (“[W]e do not apply any ‘heightened’ pleading standard . . . ,”) 550 U.S. 569, n.14, and, (“[W]e do not require heightened fact pleading of specifics.”) *Id.*, at 570.

to avoid continued irreparable harm to plaintiffs, who are dissuaded from filing meritorious suits or have the federal courthouse doors slammed on them. Presently, there is no way for litigants to know how to plead in federal court or for judges to know how to apply *Twombly* and *Iqbal*—this point was repeatedly made by petitioner’s counsel in *Lozman*.

6. As a result, in the case at bar, the Fifth Circuit, as other circuits are doing, attempted to apply its own version of the federal pleading standard, citing and relying upon *Bank of Abbeville & Tr. Co. v. Commonwealth Land Title Ins. Co.*, 201 F. App’x 988 (5th Cir. 2006) (unpublished). The Fifth Circuit largely disregarded *Twombly* and *Iqbal*, creating its own bungled pleading standard derived from the interred *Conley* standard,⁸ and adding an additional pleading hurdle adopted from the Seventh Circuit that otherwise has no legal basis in its origin.⁹ The Fifth Circuit’s use of the interred *Conley* standard results from the dubiety left by *Twombly* and *Iqbal*, and is very different than the pleading standard recently applied by the Federal Circuit in *Nalco*, which pleading standard differs from the Seventh Circuit, which also differs with the pleading standard from Eighth Circuit.¹⁰

7. Moreover, unlike *Twombly* and *Iqbal*, the Fifth Circuit found that Petitioners’ complaint met Rule 8,

⁸ *Conley v. Gibson*, 355 U.S. 41 (1957).

⁹ See *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999).

¹⁰ The Eighth Circuit distinguished *Kirksey* in *Topchian v. JP Morgan Chase, N.A.*, 760 F.3d 843, 848-49 (8th Cir. 2014).

yet dismissed the complaint nonetheless! Neither *Twombly* nor *Iqbal* met Rule 8, according to the Supreme Court. *See Twombly*, 550 U.S. at 569 and *Iqbal*, 556 U.S. at 683. Here, Petitioners' complaint met the requirements of Rule 8, according to the Fifth Circuit and the district court, but Petitioners' complaint was nevertheless dismissed, and the petition for writ of certiorari was denied.

8. There remains uncertainty over whether *Twombly* and *Iqbal* articulated a two-or three-part test. It appears the latter, although the cases only mention two steps. *Iqbal* at 678-79. But, the first step is confirmed in *Iqbal*, which indicated that it is important to "begin by taking note of the elements a plaintiff must plead to state a claim." *Id.* at 675. The second step then is courts should not accept the truth of factual allegations that are "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678. The third step is "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. *Iqbal*, following *Twombly*, adds that assessing the plausibility of a claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* In doing so, courts may imagine "obvious" alternative, lawful explanations for the alleged conduct that it considers at least as plausible as an explanation involving illegality. Where such "obvious" alternative explanations exist, says the Court, it is less likely that the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Therefore, while a defendant who opposes a motion to dismiss still may not introduce facts to support its

theory of the case, the defendant may challenge the plaintiff's theory by invoking "obvious" alternative explanations for the alleged facts that rest on broader background knowledge and understandings. Thus, discrimination, often masked by legitimate business practices, can become virtually untouchable in the justice system.¹¹

While this Court addressed the "obvious" alternative explanations in the hearing in *Lozman* as this Court had done in *Twombly* and *Iqbal*, the Fifth Circuit in the case at the bar never mentioned any "obvious" alternative explanations because there are none. Despite this, the Fifth Circuit nevertheless booted Petitioners out of court. In employment cases, for example, plaintiffs must plead allegations of discrimination then employers offer legitimate, nondiscriminatory reasons for the alleged discrimination, then plaintiffs must be afforded an opportunity to show that employer's legitimate, nondiscriminatory reason was pretext.¹² Does the new pleading standard in the *Twombly* and *Iqbal* paradigm bar plaintiffs from even moving forward if employers present an alleged innocent, obvious or legitimate alternative explanation [nondiscriminatory reason] for the bad conduct? Will plaintiffs no longer have an opportunity to show pretext? Post-*Twombly* and *Iqbal*, it is unclear.

9. Additionally, this use of "judicial experience and common sense" has been sharply criticized as allowing

¹¹ See e.g., *Southfield L.P. v. Flagstar Bank*, 727 F.3d 502, 504-07 (6th Cir. 2013).

¹² See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

too much personal bias from judges in federal pleading. In the aftermath of *Twombly* and *Iqbal*, some courts misapplied the cases to invite a *Daubert*-style “gate keeper” appraisal of complaints wherein judges could ax claims that, based on their own personal experience with the subject matter at issue, appear doubtful. First, as the First Circuit keenly observed in *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011), quoting *Iqbal* and *Twombly*, respectively, “although evaluating the plausibility of a legal claim ‘requires the reviewing court to draw on its judicial experience and common sense,’ the court may not disregard properly pleaded factual allegations, ‘even if it strikes a savvy judge that actual proof of those facts is improbable.’” The sole exception to this rule may be where, as Justice David Souter pointedly noted in his *Iqbal* dissent, “allegations . . . are sufficiently fantastic to defy reality as we know it [such as] claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” *Id.* at 696. Judges apply the law. They are neither fact witnesses nor experts on subject matters. In addition, they are not fact-finders in cases where a jury has been requested. Second, while a court may use its personal judicial experience and common sense to assess whether inferences propounded by the plaintiff are reasonable, courts should remember that the pleading standard under Rule 12(b)(6) is plausibility—not probability or possibility, as the Third Circuit discussed in *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008). In *Phillips*, the Third Circuit addressed this uncertainty and concluded that the *Twombly* formulation of the pleading standard could be characterized as follows: “[S]tating . . . a claim requires a complaint with enough factual

matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.” *Id.* at 234.

The standard, then, is to determine whether an allegation is plausible, not whether it is the only or the most plausible explanation. Judges may not weigh plausible inferences to determine which is more accurate. That function is left for the trier of fact, usually a jury, after full fact and expert discovery and in the context of trial on the merits. Inferences require logical extrapolations made in the context of limited factual allegations. Thus, at the pleading stage, inferences must be drawn in favor of the plaintiff. Competing inferences need not be disputed to proceed to discovery. This would upend the civil justice system.

Courts will undoubtedly continue to grapple with the *Twombly–Iqbal* paradigm, but the Third and other circuits repeatedly concluded, in exercising *de novo* review, that plausibility is a low bar. This however, is contrary to how the majority of cases are being decided under *Twombly* and *Iqbal*. Pleadings are to put the opposing party on notice—hence, “notice pleading”—not to litigate the contradicted merits of a dispute in the limited context of motions to dismiss or even later summary judgment. Instead, as the Third Circuit made clear when reversing the district court for doing so in *Doe v. Abington Friends School*, 480 F.3d 252, 256 (3d Cir. 2007): “As any practicing attorney can attest, federal litigation revolves around the generous and wide-ranging discovery provided by the Federal Rules of

Civil Procedure.” Even when allegations appear doubtful on their face, “discovery digs subsurface and may unearth facts that tend to support the [complaint’s allegations].” *Id.* at 259.

Under the clearer *Conley* standard, plaintiffs could allege wrongdoing generally and then count on discovery to unearth the facts necessary to establish the elements of such causes of action. By requiring plaintiffs to allege such facts before Rule 12(b)(6) adjudication, *Twombly*’s plausibility standard sets up a Catch-22: pleading sufficiently to reach discovery requires access to information that is available only through discovery and that information is usually in the possession of defendants. Such is most often the case for civil rights, employment, Section 1983 cases and the like. In civil rights claims or motive-based torts—or in claims where the defendant’s conduct is by nature hidden, like fraud or antitrust—evidence is in the hands of the defense. Discovery is the sole opportunity to gather this kind of evidence. If a meritorious claim can never get past the pleading stage, discovery—often plaintiffs’ primary chance to unearth facts—is not even an option.

10. In the *Lozman* oral arguments however, respondent’s counsel argued about the burdens of litigation—the high costs of discovery.¹³ This has been the best argument for supporters of the heightened pleading standard created in *Twombly* and *Iqbal*,¹⁴ but Justice

¹³ App.42a.

¹⁴ See *Twombly*, 550 U.S. at 596 (Stevens, J. dissenting) (“The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of

Breyer dealt with that in *Iqbal* wherein he stated that the law provides legal weapons designed to deal with unwarranted burdens or improper litigation—through the district courts’ proper management of the discovery tools. *Id.* at 700 (Breyer, J. dissenting). Moreover, it is really plaintiffs who shoulder the unfair burden of costs under *Twombly* and *Iqbal*. Plaintiffs are expected to present detailed facts from the outset, rather than acquiring them through pretrial discovery, thus they have to foot the bill to investigate on their own. That imposes at best an unfair burden just to have a case heard on the merits, and at worst a complete barrier to the courthouse—to justice.

11. As the *Lozman* oral arguments reveal, plaintiffs rarely have direct evidence of animus because there has been no opportunity for discovery. *See Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 662 (9th Cir. 2002) (“Particularly because employers now know better, direct evidence of employment discrimination is rare.”). But, says this Court, such direct evidence is not required. *Desert Palace*, 539 U.S. 90, 100 (2003) (explaining that circumstantial evidence is sufficient and may even be “more certain, satisfying and persuasive than direct evidence” (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957))). However, as *Twombly* and *Iqbal* are interpreted and as petitioner’s counsel in *Lozman* argued, anything other than direct evidence will not meet the plausibility bar, thus, will be dismissed just as in the case at

pretrial discovery.”) It is error to apply *Twombly* beyond antitrust cases; *Twombly* was not designed for that.

bar. That is what stumped Chief Justice Roberts, and Justices Alito, Kagan and Kennedy.¹⁵

12. This present case is a particularly appropriate vehicle to address this conflict for several reasons. The area of uncertainty is clear. This Court will be able to review and clarify the confusion among the variety of federal circuits' pleading standards and the confusion with the pleading standard in *Twombly* and *Iqbal*. The Court will have the opportunity to delineate in uncertain terms the proper pleading standard as left by *Twombly* and *Iqbal*, rather than address the issue as a side issue in the *Lozman* case. The confusion left by *Twombly* and *Iqbal* is not surprising as Justice Souter, joined by current Justices Ginsburg and Breyer, stated that the majority misapplied *Twombly* in deciding *Iqbal*. *Iqbal* at 688.

13. The question presented is one of substantial legal and practical importance. Unclear rules impede access to courts and consequently access to justice. Granting the rehearing would allow this Court to properly revisit the current federal pleading standard under *Twombly* and *Iqbal*, by which even the members of this Court remain addlepered. The time is ripe.

¹⁵ App.38a generally.



CONCLUSION

For the foregoing reasons, this Court must grant the petition for rehearing.

Respectfully submitted,

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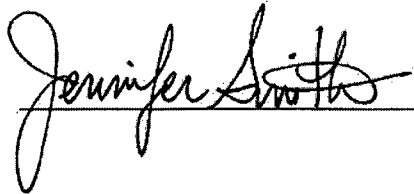
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RULE 44 CERTIFICATE

I, Jennifer Smith, Counsel for Petitioners, pursuant to Supreme Court Rule 44.1, certify that (1) This petition for rehearing is presented in good faith and not for delay; and (2) The grounds of this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

A handwritten signature in cursive script, reading "Jennifer Smith", is written over a horizontal line.

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