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STATE OF WASHINGTON

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No. 81896-7

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SUPREME COURT
OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

BRIEF OF *AMICUS CURIAE*
WASHINGTON DEFENSE TRIAL LAWYERS

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ORIGINAL

**FILED AS
ATTACHMENT TO EMAIL**

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I. INTRODUCTION

COMES NOW, Amicus Washington Defense Trial Lawyers (WDTL), an organization of trial lawyers in the State of Washington that appears on a pro bono basis before this Court. The organization is devoted, among other things, to the advancement and protection of the interests of defendants in civil litigation in Washington. Amicus WDTL's interest in this matter is based on upon its desire for a meaningful tool to challenge baseless civil lawsuits at the pleading stage, and not having to proceed through costly discovery because of the currently inadequate remedy of CR 12(b)(6). Amicus urges the Court to affirm the Court of Appeal's opinion, which the trial court's dismissal of Plaintiff's Complaint for failure to state a claim for relief, and in so doing, adopt the *Twombly* "plausibility" standard.

II. LEGAL ANALYSIS

A. Prologue.

As any first-year associate in a defense firm can attest, defendants do not often file motions to dismiss for failure to state a claim for relief. A young lawyer's exuberance upon reading CR 8 and 12(b)(6) and writing their first motion to dismiss a meritless complaint is quickly met by the cold water of a more senior attorney who throws the motion in the garbage, stating

“Don’t waste your time, kid. Our courts allow plaintiffs to make up facts at oral argument to get around these motions.”

How did we arrive at this bizarre juncture? A tortured reading of a short phrase from a half-century old U.S. Supreme Court case has led to the mistaken belief that made-up facts -- not even appearing in a complaint -- can defeat a motion to dismiss. This ancient phrase (“no set of facts” in the complaint) has been twisted to mean “hypothetical facts” can be made part of a pleading. But this case was never meant to allow this. This Court should return to the fountainhead of this venture and correct what has led to a farcical process.

B. Procedural Background.

This civil action against a mortgage lender arose out of its imposition of fax and notary fees on home loans. Plaintiffs’ putative nationwide class action against savings bank Chevy Chase Bank, F.S.B. was dismissed at the pleadings stage. The trial court concluded that Plaintiffs’ allegations failed to state a claim for relief, as the facts alleged only advanced claims that were preempted by federal law. *McCurry v. Chevy Chase Bank, F.S.B.*, *Slip Opinion* at 1-2 (June 2, 2008). Plaintiffs argue that their complaint can be construed to set forth factual allegations which are not preempted, but they

must rely upon made-up facts to do so.

Plaintiffs' contention presents the question of the proper standard of review under CR 8 and 12(b)(6). The Court of Appeals was asked to consider whether the U.S. Supreme Court's recent interpretation of the rules in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 444, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), should be applied. The essence of the *Twombly* decision is that Rule 8 requires factual allegations to be "plausible" in order to survive a motion for dismissal. *Slip Opinion* at 2 (citing *Twombly*, 127 S.Ct. at 1965-66).

The Court of Appeals (incorrectly) believed that the standard announced in *Twombly* is at odds with this Court's interpretation of CR 8.

Accordingly, we are without authority to adopt a standard for a claim dismissal different from the one previously announced by our Supreme Court.

This being the case, "a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless *no state of facts* which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim." *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).

Slip Opinion at 3 (emphasis added).

C. The Genesis of the "Hypothetical Facts" Language.

The origin of this "no state of facts" language in *Halvorson v. Dahl*,

can be traced directly to the 52-year-old U.S. Supreme Court's opinion in *Conley v. Gibson*, 355 U.S. 41, 45-46, 278 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The actual language is 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.

Id. (emphasis supplied).

Conley lurks in the background of Washington's interpretation. *Halvorson* relied upon, *inter alia*, *Barnum v. State*, 72 Wn.2d 928, 535 P.2d 678 (1967). For its part, *Barnum* relied upon *Christensen v. The Swedish Hospital*, 59 Wn.2d 545, 368 P.2d 897 (1962). *Christensen* concluded:

A complaint should apprise the defendant of what the plaintiff's claim is and the legal grounds upon which it rests, and should not be dismissed unless it appears beyond doubt that proof of no set of facts would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957).

Id. at 548. Thus, our courts' interpretation of CR 8 is tied directly to the language in *Conley*, which was recently revisited and clarified by the *Twombly* Court.

D. The Plausibility Standard of *Twombly*.

The U.S. Supreme Court in *Twombly* examined the oft-criticized "no

set of facts” phrase from *Conley* and concluded “this famous observation has earned its retirement.” *Id.* at 563. It is not accurate to say that *Conley* was overruled. Rather, the court reasoned that *Conley*’s language should never have been read in isolation. Indeed, read as a whole *Conley* itself does not support this twisted construction of this phrase. *Id.* at 562-563.

Yet, this language has led some courts to the rather extreme conclusion that a plaintiff in resisting a Rule 12 motion could simply make up facts not pled in the complaint. “Mr. Micawber’s optimism would be enough.” *Id.* at 562.¹

The Supreme Court noted the widespread rejection of this overly literal interpretation of *Conley*, stating “a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.” *Id.* at 562. Rather:

The phrase is best forgotten as 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. * * * *Conley*, then, described the breath of the opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s

¹ Wilkins Micawber is a principle character in Charles Dickens’ *David Copperfield* (1852). His rather irrational expectations of avoiding debtors’ prison were often punctuated by the unfounded utterance “Something will turn up.”

survival.

Twombly at 563 (footnote omitted)(emphasis supplied).

Thus, properly read, *Twombly* is nothing more than a refinement of *Conley*. That is, once adequate facts (as opposed to bare conclusions) are actually pled, a plaintiff may then hypothesize about what other facts may support the complaint.

[O]nce a claim for relief has been stated, a plaintiff “receives the benefit of imagination, so long as the hypotheses are consistent with the Complaint....”

Twombly, supra, at 563 (quoting, *Sanjuan v. American Board of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)). As addressed below, our courts have on occasion placed the hypothetical cart before the horse, allowing “imagination” to replace well-pled facts. One can surmise as to the strange effect this has had upon CR 12(b)(6) motion practice.

The Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. __, __ S.Ct. __, __ L.Ed.2d __ (2009) recently explained the “plausibility” standard as follows:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim for relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that

a defendant has acted unlawfully. Where 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.’”

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation”). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires a reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.” Fed. R. Civ. Proc. 8(a)(2).

Iqbal, Slip Opinion at 14 (citations omitted).

One of the better expositions of the import of *Twombly* is found in a Bankruptcy Court decision from Michigan. There, the court concluded that *Twombly* had not actually changed the law that much at all:

In *Bell Atlantic Corp. v. Twombly*...the Supreme Court reformulated its guidance for judging of motions for

dismissal under Rule 12(b)(6). First, it rejected the long-standing shibboleth from the text of *Conley v. Gibson*..., 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.”

Despite that holding, much of the analysis under Rule 12(b)(6) is the same in the wake of *Twombly*. A complaint’s fact allegations *as actually pleaded* are still to be assumed as true. And as a continent, a general rule, though plaintiffs “need not provide specific facts in support of their allegations... they must include sufficient factual information to provide the ‘grounds’ on which [their] claim rests...” But though the *Twombly* court cited many of its previous opinions under Rule 12(b)(6), the decisions phraseology implied a more skeptical scrutiny: “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief requires more than labels and conclusions, and the formulaic recitation of the elements of a cause of action will not do.”

In a nutshell, establishing a new touchstone modifier, to withstand a challenge under Rule 12(b)(6), a complaint must state “enough facts to state a claim to relief that is plausible on its face.” In a comparative sense, for a complaint to “state a claim,” its recitation of facts must “raise a right to relief above the speculative level,” they must go beyond a “possibility...of entitlement to relief,” to a “*plausibility*.”

In re: Scott, 403 Bankr. Rep. 25, 31-32 (Bankr. Mich. (2009)(emphasis in original)(citations omitted)).

Thus understood, this Court’s pronouncements of the proper standard for CR 12(b)(6) motions should be no different than that announced in *Twombly*.

E. Washington's Peculiar Interpretation of *Conley's* Phrase.

In Washington, reading the *Conley* phrase in isolation ultimately led to the suspect assertion that a court "may consider hypothetical facts" not part of the formal record in construing plaintiff's complaint challenged by CR 12(b)(6). *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *affirmed on rehearing*, 113 Wn.2d 148, 766 P.2d 963 (1989). However, as explained by the U.S. Supreme Court, this hypothetical analysis is appropriate only *after* it is determined that there are some set of facts which set forth a tenable cause of action. *Twombly, supra*, at 563. Plaintiffs' gloss on the test would allow this make-believe to occur *before* that determination is made.

F. The Washington Civil Rule is Identical to the Federal Rule of Civil Procedure.

A comparison of the federal rule on pleading requirements with the Washington Civil Rule reveals that both provisions contain the identical language. A pleading setting forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief..."

Fed. R. Civ. P. 8(a)(2); and CR 8(a)(1). As one of our courts has stated:

Because the Washington rules were based on the federal rules, federal court interpretation of the federal rules is highly persuasive in determining the effect of Washington's rules.

Sanderson v. University Village, 98 Wn.App. 403, 410, n.10, 989 P.2d 587

(1999)(citing *American Discount Corp. v. Saratoga W., Inc.*, 81 Wn.2d 34, 499 P.2d 869 (1972)).

Likewise, CR 12(b)(6) “mirrors its federal counterpart.” *Wright v. Colville Tribal Enterprises Corp.*, 159 Wn.2d 108, 119, n. 2, 147 P.3d 1275 (2006)(Madsen J., concurring).

G. The Plausibility Standard Has Been Broadly Applied.

Plaintiffs’ sole objection to the application of *Twombly*’s “plausibility” standard is that the U.S. Supreme Court has not “clarified” that the analysis applies outside of *Sherman Act* anti-trust litigation. *Supplemental Brief of Petitioners* at 15-16. Thus, Plaintiffs urge the Court to cling to their interpretation of *Conley*’s “no set of facts” standard. *Id.*

To the extent that the assertion (that the plausibility standard applies only to anti-trust cases) was accurate when Petitioners’ brief was filed on March 9, 2009 (it was not) it certainly is no longer the case. About two months later, on May 18, 2009, the U.S. Supreme Court issued *Ashcroft v. Iqbal*, *supra*. The Court in *Iqbal* extended the plausibility standard announced in *Twombly* to a *Bivens* action (the federal officer counterpart to civil rights actions under 42 U.S.C. §1983).

Whatever arguments Plaintiffs may have had in attempting to cabin

the plausibility standard exclusively to enormous anti-trust litigation were distinctly removed by *Iqbal* where the court applied the standard to common law *Bivens* constitutional claims against federal officers. While sometimes legally complicated, these lawsuits are often no more than constitutional torts involving a single plaintiff and a single defendant.

It is no answer to say that a civil defendant in more mundane litigation should be held hostage to a baseless lawsuit and forced to undergo costly discovery prior to having the case finally dismissed on summary judgment. Cost is cost. The Court in *Twombly* did make note of the expensive nature of anti-trust litigation discovery. But, on a proportionate basis, discovery in a breach of contract or employment discrimination lawsuit is certainly no less expensive to an individual or a small business.

The Court in *Twombly* continued its analysis by citing factors which apply beyond the anti-trust context. It noted that the effectiveness of judicial supervision in discovery problems “has been on the modest side.” *Id.* at 559. This has more to do with the parties controlling discovery than the court process. *Id.* However, the Court also mentioned the increasing case load of trial courts as another factor supporting the weeding out frivolous claims at an early stage. *Id.* Those concerns are certainly not unique to the *Sherman*

Act case.

And, since *Twombly's* announcement in 2007, numerous courts have extended its plausibility standard to a variety of legal contexts.

Civil Rights Act Litigation. *Iqbal, supra*, extended the standard to federal common law constitutional claims. And, the lower courts have applied it in Section 1983 Civil Rights Act litigation. *Keating v. City of Miami*, 598 F.Supp.2d 1315, 1325-26 (S.D. Fla. 2009); and, *Demery v. Montgomery County, Md.*, 602 F.Supp.2d 206, 212 (D.C. 2009).

Negligence Claims. *Jennings v. Hart*, 602 F.Supp.2d 754, 758 (W.D. Va. 2009).

Disability Discrimination. *Bahl v. County of Ramsey*, 597 F.Supp.2d 981, 984-85 (D. Minn. 2009).

ERISA. *Thompson v. Continental Casualty Co.*, 602 F.Supp.2d 943-945 (N.D. Ill. 2009).

Breach of Contract. *Klayman v. Barmak*, 602 F.Supp.2d 110, 114 (D.D.C. 2009).

Administrative Procedure Act. *Fraternal Order of Police v. Gates*, 602 F.Supp.2d 104, 107 (D.D.C. 2009).

Bankruptcy. *In re: Scott*, 403 Bankr. Rep. 25, 31-32 (Bankr. Mich. (2009)).

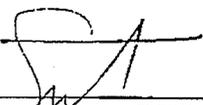
Thus, the plausibility standard has wide-spread application and certainty can be adopted here.

IV. CONCLUSION

In conclusion, this Court should affirm the Court of Appeal's dismissal of Plaintiffs' Complaint. In so doing, the Court should recognize the "plausibility" standard for motions for dismissal under CR 12(b)(6). This simple clarification of *Conley* would only state that hypothetical facts can be offered only after a plaintiff shows that the complaint sets out the basic factual elements of a cause-of-action.

RESPECTFULLY submitted this 22nd day of June, 2009.

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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.



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