PLEADING ACTUAL MALICE IN DEFAMATION ACTIONS AFTER *TWIQBAL*: A CIRCUIT SURVEY

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INTRODUCTION

What does it take to satisfy the *Twombly/Iqbal* pleading standard when alleging actual malice in an action for defamation?[1] The answer to this question, which has so far attracted little scholarly attention,[2] not only has significant implications for public-figure defamation actions, but it also illustrates a larger problem with the *Twiqbal* pleading standard.[3] The *Twiqbal* pleading standard

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[1] This standard, also called the "plausibility" standard, was established in two U.S. Supreme Court cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[2] To date, the only published law review article to focus on this issue appears to be Clay Calvert et al., *Plausible Pleading & Media Defendant Status: Fulfilled Promises, Unfinished Business in Libel Law on the Golden Anniversary of* Sullivan, 49 WAKE FOREST L. REV. 47 (2014).

[3] *Twiqbal* is the shortened form of the two cases in which the Supreme Court articulated its new interpretation of Rule 8(a). I use the term "*Twiqbal* standard" as a shorthand reference

requires a court to evaluate a motion to dismiss for failure to state a claim by, first, discarding conclusory allegations, and second, determining whether the remaining factual allegations state a claim that is "plausible on its face." While Federal Rule of Civil Procedure 9(b) permits malice to be pleaded "generally,"[4] all Circuit Courts of Appeals that have addressed the issue have applied the plausibility standard to allegations of malice under Rule 9(b).[5] The result is a distortion of Rule 9(b) that gives virtual immunity to defendants who are sued for libel by public-figure plaintiffs and raises potential *Erie* issues when state pleading standards permit states of mind to be pleaded generally.

Analyzing the pleading of actual malice in libel actions post-*Twiqbal* demonstrates the deleterious effects of the plausibility standard on the proper functioning of the Federal Rules of Civil Procedure. The requirement that a public-figure plaintiff prove actual malice by clear and convincing evidence was designed to make it harder for public figures to use the tort system to deter robust speech, even false speech.[6] Imposing a higher proof standard was necessary to vindicate First Amendment values.[7] However, the notice function of the federal rules was unaffected by this higher substantive requirement. Post-*Sullivan*, it was still sufficient to allege actual malice in general terms.[8] Because it was assumed that plaintiffs would need discovery to unearth facts relevant to the defendant's state of mind, plaintiffs were not required to plead the evidence that they would use eventually to prove the defendant's knowledge of the statement's falsity or its reckless disregard for the truth.

This Article will examine the development of Circuit precedent on the pleading of actual malice in libel actions by public-figure plaintiffs. Part I will lay the groundwork, briefly reviewing the history of Rule 9(b) and the plausibility pleading standard introduced by *Twombly* and *Iqbal*, and discussing the "actual malice" standard that must be met by plaintiffs who are public figures. Part II will examine how the Circuits have overlain the *Twiqbal* pleading standard onto the language of Rule 9(b) with respect to the pleading of malice in libel actions and will illustrate the effect of doing so by comparing pre-*Twiqbal* cases with post-*Twiqbal* cases.[9] Part III will discuss the larger policy implica-

for both the plausibility pleading standard established in *Twombly* and the two-step process for applying the standard set forth in *Iqbal*.

[4] FED. R. CIV. P. 9(b).

[5] Michel v. NYP Holdings, Inc., 816 F.3d 686 (11th Cir. 2016); Biro v. Condé Nast, 807 F.3d 541 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2015 (2016); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610 (7th Cir. 2013); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369 (4th Cir. 2012); Schatz v. Republican State Leadership Comm., 669 F.3d 50 (1st Cir. 2012); *see also* Shay v. Walters, 702 F.3d 76 (1st Cir. 2012) (applying *Twiqbal* standard to allegation of "fault" in libel suit by non-public figure).

[6] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[7] *Id*. at 279–80.

[8] *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1301 (3d ed. 2004).

[9] Throughout this article, "defamation" and "libel" will be used interchangeably since the majority of defamation actions discussed herein encompass libel. The exception is *Mayfield*

tions of this approach, including the unintended consequences of extending the plausibility standard to interpretation of Rule 9(b). Finally, the Article will conclude with some suggestions for ameliorating the detrimental consequences of the Circuits' approach.

I. BACKGROUND

Federal Rule of Civil Procedure 9(b) has remained unchanged since its promulgation, except for the stylistic revision adopted in 2007.[10] It comprises two sentences, the first of which states, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[11] This heightened pleading standard has three primary purposes. First, it "safeguard[s] potential defendants from lightly made claims charging the commission of acts that involve some degree of moral turpitude."[12] Second, the particularity requirement assumes that some claims of fraud are made "only for their nuisance or settlement value" and permits these baseless claims to be "identified and disposed of early."[13] Finally, because claims of fraud "often are involved in attempts to reopen completed transactions," courts should be certain that "the alleged injustice is severe enough to warrant the . . . re-examination of old and settled matters."[14] Thus, the particularity requirement reflects the drafters' awareness that defendants can be burdened by serious-sounding but meritless claims unless plaintiffs are deterred by a higher pleading standard.

The second sentence of Federal Rule of Civil Procedure 9(b) is in stark contrast to the first: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[15] The juxtaposition of the two sentences clearly signals that "generally" is a less demanding standard than "with particularity." Indeed, the dictionary definition of "generally" is "[w]ithout reference to particular instances or details, not specifically."[16] This provision recognizes

v. National Association for Stock Car Auto Racing, Inc., 674 F.3d 369 (2012), which involved allegedly slanderous statements made at a press conference.

[10] *See* William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 965 (1987).

[11] FED. R. CIV. P. 9(b).

[12] WRIGHT & MILLER, *supra* note 8, § 1296, at 31.

[13] *Id.* at 37.

[14] *Id.* Other reasons include deterring plaintiffs from filing suit "in order to discover whether unknown wrongs actually have occurred—the classic fear of 'fishing expeditions'"—and to give adequate notice to the defendant since "fraud and mistake embrace such a wide variety of potential conduct . . . ." *Id.* at 38, 39.

[15] FED. R. CIV. P. 9(b).

[16] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 755 (3d ed. 1996). The original Advisory Committee Note to Rule 9(b) cited the English Rules Under the Judicature Act, Order 19, Rule 22, which reads as follows: " 'Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.' " English Order 19, Rule 22 (1936), *quoted in* 1 PALMER D. EDMUNDS, FEDERAL RULES OF CIVIL PROCEDURE 432 n.49 (1938).

the "difficulty inherent in describing a state of mind with any degree of exactitude."[17] The drafters were not concerned that permitting states of mind to be alleged generally would result in abuse by plaintiffs. When the defendant's state of mind is an element of a cause of action, that state of mind must generally be inferred from objective evidence, in the absence of an admission by the defendant. To plead state of mind with particularity would require the pleading of evidence, resulting in "complexity and prolixity."[18] Thus, Rule 9(b) "permits a general allegation using the term 'malicious' if this allegation is necessary to the cause of action."[19]

Or, at least, that is how matters stood in 2007, when the U.S. Supreme Court decided *Bell Atlantic Corp. v. Twombly*.[20] In *Twombly*, the Court interpreted Federal Rule of Civil Procedure 8(a)(2) to require the plaintiffs in an antitrust action to state a "plausible" claim of conspiracy.[21] Rule 8(a)(2) reads as follows: "A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[22] Prior to *Twombly*, the standard for determining whether a complaint was sufficient under Rule 8(a) had been articulated in *Conley v. Gibson*[23]: "[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."[24] The Court in *Twombly* "retire[d]" the *Conley* standard,[25] substituting a test that requires plaintiffs to plead "enough facts to state a claim to relief that is plausible on its face."[26] According to the Court, the plausibility requirement "does not impose a probability requirement at the pleading stage,"[27] nor does it "apply any 'heightened' pleading standard."[28] Instead, the Court explained,

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of

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[17] WRIGHT & MILLER, *supra* note 8, § 1301, at 290.

[18] *Id.*

[19] 1A WILLIAM W. BARRON & HON. ALEXANDER HOLTZHOFF, FEDERAL PRACTICE AND PROCEDURE WITH FORMS § 303, at 549 (rules ed. 1960) (revised by Charles Alan Wright).

[20] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). *Twombly* has been widely discussed and closely examined in the scholarly literature. For more detailed analyses of the case, see Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1067–81 (2009); Richard A. Duncan & Brian S. McCormac, *If It Takes Two to Tango, Do They Conspire?:* Twombly *and Standards of Pleading Conspiracy*, 8 SEDONA CONF. J. 39 (2007).

[21] *Twombly*, 550 U.S. at 556.

[22] FED. R. CIV. P. 8(a)(2).

[23] Conley v. Gibson, 355 U.S. 41 (1957).

[24] *Id.* at 45–46.

[25] *Twombly*, 550 U.S. at 563.

[26] *Id.* at 570.

[27] *Id.* at 556.

[28] *Id.* at 569 n.14.

> 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.[29]

Applying the new standard to the plaintiffs' antitrust complaint, the Court found the complaint insufficient.[30] Because the plaintiffs' allegations demonstrated only parallel conduct by competitors, two conceivable inferences could be drawn: the competitors had agreed not to compete, which would be illegal; or, the competitors were independently following the same course of action, which would not be illegal. According to the *Twombly* Court, the district court was not required to draw the inference of illegal agreement.[31] Rather, it was up to the plaintiffs to plead facts that would "nudge[] their claims across the line from conceivable to plausible."[32]

The adoption of this new standard was viewed with dismay by many commentators.[33] They saw *Twombly* as destabilizing a pleading system that had been in place since the adoption of the federal rules in 1938, swinging the pendulum too far from the liberal standard intended by the drafters toward a standard that would deter the filing of meritorious suits by setting the pre-filing investigation bar too high.[34] However, some commentators took comfort in the belief that *Twombly* was limited to the antitrust context or, alternatively, required only pleading practices that were already in wide use, given plaintiffs' propensity to incorporate factual detail into their complaints.[35]

However, the hopes of those who saw *Twombly* as a limited decision were dashed with the Court's decision in *Ashcroft v. Iqbal*,[36] in which a post-911 detainee sued the former Attorney General and the former Director of the FBI, alleging that his detention resulted from racial, religious, and national origin discrimination.[37] In *Iqbal* the Court held that the new plausibility pleading standard applies to all cases.[38] The Court also clarified how lower courts should

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[29] *Id.* at 555 (citations omitted) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

[30] *Id.* at 569.

[31] *Id.* at 564–68.

[32] *Id.* at 570.

[33] *See, e.g.*, Scott Dodson, *Pleading Standards after* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. BRIEF 135 (2007); Mark Samson, *Arizona Should Avoid* Twombly*'s Pernicious Effects*, ARIZ. ATT'Y, Sept. 1, 2007, at 27. For a summary of reactions to *Twombly*, see Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1824–28 (2008).

[34] *See, e.g.*, Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 68 (2010); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010).

[35] *See, e.g.*, Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 605 (2007); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298–99 (2010).

[36] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[37] *Id.* at 669.

[38] *Id.* at 684.

go about applying the new standard. First, the court must identify allegations that "are no more than conclusions."[39] Second, setting aside these conclusions, the court should peruse the "well-pleaded factual allegations, . . . assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[40]

Iqbal argued that his complaint was sufficient because Rule 9(b) permitted him to allege the defendants' discriminatory intent generally.[41] Responding to this argument, the Court labelled the general allegation of intent a "conclusory statement[]" which the court was not required to treat as true.[42] Instead, the Court interpreted Rule 9(b) as follows:

> But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8.[43]

Ironically, to support the proposition that the second sentence of Rule 9(b) is subject to Rule 8, the Court cited and quoted Wright and Miller's *Federal Practice and Procedure*:

> "[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) . . . should control the second sentence of Rule 9(b)."[44]

However, when Wright and Miller made this statement in 2004, the sufficiency of a complaint under Rule 8(a) was governed by the *Conley* "no set of facts" standard. The point of the quoted language was that, in contrast to the particularity requirement of the first sentence of Rule 9(b), the second sentence of Rule 9(b) required only the same kind of notice pleading required by Rule 8(a). It was only after the *Twombly* Court imposed the plausibility requirement that applying Rule 8 to the second sentence of Rule 9(b) would require something more than a general allegation of state of mind.

II. APPLYING *TWIQBAL* TO PLEADING ACTUAL MALICE

Iqbal's command that pleading state of mind is subject to the plausibility standard is exemplified in libel actions against public figures.[45] When a public

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[39] *Id*. at 679.
[40] *Id*.
[41] *Id*. at 686.
[42] *Id*.
[43] *Id*. at 686–87.
[44] *Id*. at 687 (quoting WRIGHT & MILLER, *supra* note 8, § 1301, at 291).
[45] Application of the plausibility pleading standard to states of mind will occur in other torts in which intent, knowledge, or malice is an element, such as intentional infliction of emotional distress, malicious prosecution, abuse of process, and others. *See, e.g.*, L. Foster Con-

figure sues for libel, the First Amendment requires the plaintiff to prove by clear and convincing evidence that the allegedly libelous statement was made with "actual malice."[46] In this context, "actual malice" means, not ill will or hatred, but rather that the statement was made "with knowledge of falsity or reckless disregard as to truth or falsity."[47] Such knowledge or reckless disregard is a state of mind; the Court has held that actual malice is measured by a subjective, not an objective, standard.[48] It is not enough for a libel plaintiff to prove that a "reasonably prudent [person]" would not have published the defamatory statement.[49] Instead, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[50]

As the Court's references to proof and evidence indicate, prior to *Twiqbal*, the actual malice element was understood as an evidentiary matter to be proved at trial or disposed of on summary judgment.[51] Consistent with the pre-*Twiqbal* interpretation of Rule 9(b), the defendant's state of mind with respect to publication of the defamatory statement could be pleaded generally. Pleading actual malice required only a general allegation that the defendant acted with "actual malice," meaning that the defendant "knew" the statement was false or "acted with reckless disregard as to its truth or falsity" or "entertained serious doubts" about the truth of the statement.[52] Now, however, the publisher's state of mind must be plausibly pleaded in order to avoid dismissal. Under the *Twiqbal* regime, it is no longer enough to plead that the defendant made the allegedly libelous statements with knowledge of their falsity or with reckless disregard as to their truth or falsity.[53] Such general statements are now branded as conclu-

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sulting, LLC v. XL Group, Inc., Civil No. 3:11CV800–REP, 2012 WL 2785904 at *11 (E.D. Va. June 1, 2012) (relying on *Mayfield* in holding that following allegation was insufficient to plead knowledge element of fraud: " 'XL Group knew at the time that he [sic] made these material representations that the representations were false because it never intended to fulfill these representations' ").

[46] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[47] Masson v. New Yorker Magazine, 501 U.S. 496, 510–11 (1991).

[48] St. Amant v. Thompson, 390 U.S. 727, 730 (1968).

[49] *Id*.

[50] *Id*.

[51] *See* 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 12:75 (2d ed. 2015).

[52] *E.g*., United States Med. Corp. v. M.D. Buyline, Inc., 753 F. Supp. 676, 680 (S.D. Ohio 1990) (allegation that defendant acted with "actual malice" is sufficient to withstand 12(b)(6) motion); Hoth v. Am. States Ins. Co., 735 F. Supp. 290, 293 (N.D. Ill. 1990) (allegation that defendant acted "with reckless disregard" of statement's falsity is sufficient to withstand 12(b)(6) motion); *cf*. Church of Scientology Int'l v. Behar, 238 F.3d 168, 173 (2d Cir. 2001) (holding that first two elements of a libel action—whether the statement was made "of and concerning" the plaintiff and whether the allegedly libelous statement could reasonably be understood as defamatory—could be decided at the pleading stage, while the elements of falsity and actual malice could be decided only after discovery). *But cf*. Moore v. Univ. of Notre Dame, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997) (dismissing defamation claim because, *inter alia*, plaintiff failed to plead sufficient facts to establish actual malice).

[53] *See infra* Part II.B.

sions.[54] Instead, facts must be pleaded to "nudge" the claim "across the line from conceivable to plausible."[55] So far, no libel complaint filed by a public figure that has reached a Circuit Court of Appeals has succeeded in plausibly pleading actual malice.[56]

A. The New York Times Co. v. Sullivan Standard

The U.S. Supreme Court revolutionized the law of defamation in 1964, when it held, in *New York Times Co. v. Sullivan*, that the First Amendment to the U.S. Constitution prohibits the award of damages to a public official in a defamation action unless the plaintiff proves with "convincing clarity" that the defendant acted with "actual malice."[57] According to the Court, this requirement is necessary to protect "uninhibited, robust, and wide-open" debate on public issues.[58] The Supreme Court recognized that the *New York Times Co. v. Sullivan* standard will stop some meritorious suits: "Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test."[59] Because knowledge of falsity and reckless disregard are subjective, plaintiffs must rely, in the absence of admissions by the defendant, on inferences from circumstantial evidence.[60] In *St. Amant v. Thompson*,[61] the Court elaborated on the types of circumstantial evidence from which an inference of actual malice might be drawn. First, the plaintiff could prove that the story was "fabricated."[62] Second, the plaintiff could prove that the statement was "so inherently improbable that only a reckless [person] would have put [it] in circulation."[63] Third, the plaintiff could prove that the statement was "based wholly" on an unreliable source which the defendant had "obvious reasons to doubt," such as an "unverified anonymous telephone call."[64] In contrast, the Supreme Court held that "[a]lthough failure to investigate will not alone support a finding of actual malice, . . . the purposeful avoidance of the truth" will do so.[65] The Circuit Courts of Appeals have held that a publisher's failure to corroborate statements, even from sources known to

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[54] *See id.*

[55] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 570, 570 (2007).

[56] *See infra* Part II.B.

[57] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964). The Court later extended this principle to defamation actions by public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

[58] *N.Y. Times*, 376 U.S. at 270.

[59] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[60] Levesque v. Doocy, 560 F.3d 82, 90 (1st Cir. 2009).

[61] St. Amant v. Thompson, 390 U.S. 727 (1968).

[62] *Id.* at 732.

[63] *Id.*

[64] *Id.*

[65] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 692 (1989) (citations omitted).

be unreliable, does not constitute actual malice.[66] A known absence of corroboration of false statements also does not give rise to an inference of actual malice.[67] Even the manufacturing of evidence to support the false statements is insufficient, standing alone, to prove actual malice.[68] When an article "is essentially an account of two sides of an issue" that "raises questions" in the reader's mind, no inference of actual malice arises from the fact that a reader could accept one side of the issue over the other.[69]

These strict limits on public figures' ability to successfully prosecute a libel suit traditionally applied only at the proof stage, and pre-*Twiqbal* appellate decisions on actual malice tended to be reviews of jury verdicts or grants of summary judgment.[70] Pre-*Twiqbal*, federal courts routinely permitted public-figure plaintiffs to plead generally that the alleged defamatory statement had been made "with actual malice" or "with knowledge of its falsity or with reckless disregard of its truth or falsity."[71] Indeed, the U.S. Supreme Court refused to recognize an editorial-process privilege on behalf of newspaper publishers, holding that a libel plaintiff is entitled to discovery of the newspapers' inner workings in order to prove actual malice.[72]

B. Applying Twiqbal in Public-Figure Libel Cases

To date, five reported cases from the Circuit Courts of Appeals have addressed the sufficiency of allegations of malice in public-figure libel actions after *Twiqbal*.[73] In each case, the appellate court affirmed Rule 12 dismissals in favor of the defendant because the plaintiff's allegation of malice did not meet the plausibility requirement.

In the first case to address the issue, *Schatz v. Republican State Leadership Committee*, the plaintiff was an unsuccessful Democratic candidate for the U.S. Senate from Maine.[74] Schatz sued the publisher of his opponent's campaign

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[66] McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1509 (D.C. Cir. 1996).

[67] Campbell v. Citizens for an Honest Gov't, Inc., 255 F.3d 560 (8th Cir. 2001).

[68] Frakes v. Crete Carrier Corp., 579 F.3d 426, 432 (5th Cir. 2009).

[69] Howard v. Antilla, 294 F.3d 244, 254 (1st Cir. 2002).

[70] *See, e.g.*, Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc., 738 F. Supp. 1499 (D.S.C. 1989).

[71] *See, e.g.*, *Howard*, 294 F.3d at 245 (review of jury verdict); *Campbell*, 255 F.3d at 560 (same); Levesque v. Doocy, 560 F.3d 82 (1st Cir. 2009) (review of summary judgment); *Frakes*, 579 F.3d at 426 (same); Kaelin v. Globe Commc'n Corp., 162 F.3d 1036 (9th Cir. 1998) (same); *McFarlane*, 91 F.3d at 1501 (same).

[72] Herbert v. Lando, 441 U.S. 153 (1979).

[73] Michel v. NYP Holdings, Inc., 816 F.3d 686 (11th Cir. 2016); Biro v. Condé Nast, 807 F.3d 541 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2015 (2016); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610 (7th Cir. 2013); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369 (4th Cir. 2012); Schatz v. Republican State Leadership Comm., 669 F.3d 50 (1st Cir. 2012); *see also* Shay v. Walters, 702 F.3d 76 (1st Cir. 2012) (applying *Twiqbal* standard to allegation of "fault" in libel suit by non-public figure).

[74] *Schatz*, 669 F.3d at 54.

brochures and other advertisements for libel based upon the statement that he, as a city selectman, had voted to cancel the city's Fourth of July fireworks display, instead giving the money for the fireworks display to a "political organization."[75] Schatz claimed that this statement was false and defamatory because it implied that the $10,000 of public money it would have cost to put on the fireworks show was given directly, by him, to his own political organization, which would have been a criminal act.[76]

Affirming the dismissal of the complaint on a 12(b)(6) motion, the First Circuit held that the plaintiff failed adequately to plead actual malice by alleging that the defendant "had 'knowledge' that its statements were 'false' or had 'serious doubts' about their truth and a 'reckless disregard' for whether they were false."[77] These allegations, which would have been sufficient pre-*Twiqbal*, were characterized by the First Circuit as "actual-malice buzzwords."[78] The complaint also alleged that the defendant had relied on only two newspaper articles and had maliciously linked the article about cancellation of the fireworks display with the article about the city's gift of money to a political organization unaffiliated with the plaintiff.[79] Schatz argued that this unjustified linking of the two articles, plus the defendant's failure to conduct any additional investigation, demonstrated a reckless disregard for the truth or falsity of the statements.[80] But the court rejected his argument, holding that the allegedly false statement "synced up with or at least was not out of line with what the [newspaper] stories said."[81] Any defamatory inference that might arise from the juxtaposition of the two articles resulted from pure negligence, not malice, said the court.[82] Furthermore, the defendant's failure to investigate further did not constitute actual malice in the absence of some "obvious reason to doubt [the] veracity" of the articles.[83] Thus, the reviewing court affirmed the district court's evaluation of the circumstances set forth in the complaint, deciding as a matter of law that these facts did not rise to the level of actual malice.[84]

The First Circuit also rejected the plaintiff's argument that its standard for pleading actual malice was actually higher than the *Twiqbal* standard. The court stated:

> Sure, malice is not a matter that requires particularity in pleading—like other states of mind, it "may be alleged generally." *See* FED. R. CIV. P. 9(b). But, to make out a plausible malice claim, a plaintiff must still lay out enough facts

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[75] *Id*. at 56.
[76] *Id*.
[77] *Id*. at 56–57.
[78] *Id*. at 56.
[79] *Id*.
[80] *Id*. at 56–57.
[81] *Id*. at 58.
[82] *Id*.
[83] *Id*. (quoting Levesque v Doocy, 560 F.3d 82, 90 (1st Cir. 2009)).
[84] *Id*.

> from which malice might reasonably be inferred—even in a world with *Twombly* and *Iqbal*.[85]

Mayfield v. National Association for Stock Car Auto Racing (NASCAR) represents another instance in which the appellate court rejected general allegations of malice that would have been sufficient pre-*Twiqbal* and, instead, ruled as a matter of law that the facts the plaintiff was able to present in the complaint were insufficient to state a claim.[86] There, race car driver Jeremy Mayfield sued the governing body of stock car racing, NASCAR, for libel.[87] Mayfield failed a drug test, which indicated that he had ingested methamphetamine.[88] He told NASCAR that "he had ingested Claritin-D for allergies and Adderall XR for a claimed recent diagnosis of attention deficit hyperactivity disorder."[89] However, NASCAR's CEO held a press conference in which he stated "that Mayfield had been suspended because he took a 'performance enhancing' or 'recreational' drug."[90] The complaint alleged that the CEO's statements " 'were known by [them] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity.' "[91]

The Fourth Circuit held that this allegation of malice "is entirely insufficient" under *Twiqbal*: "This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegations that *Twombly* and *Iqbal* rejected."[92] In response to the plaintiff's argument that malice need only be pleaded "generally" pursuant to Rule 9(b), the court cited *Iqbal* in holding that "Rule 9(b) ensures there is no *heightened* pleading standard for malice, but malice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated."[93] The plaintiff's additional allegations—that the defendants "intended to harm Mayfield by publishing his test results," that the drug testing agency did not follow proper procedures, and that the defendants knew prior to the press conference that Mayfield denied ingesting the illegal

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[85] *Id*. In a case decided soon after *Schatz*, *Shay v. Walters*, the First Circuit again held that a private plaintiff, who was required by Massachusetts law to show "fault" on the part of the defendant, failed to plausibly plead fault by alleging that the defamatory statements were published with "ill will" and "actual malice." Shay v. Walters, 702 F.3d 76, 82 (1st Cir. 2012). These allegations failed to satisfy the *Twiqbal* standard, held the court, because they are "bare conclusions, unembellished by pertinent facts." *Id*. at 82–83. The court in *Shay* did not refer to Federal Rule of Civil Procedure 9(b) at all.

[86] Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, 674 F.3d 369, 373 (4th Cir. 2012).

[87] *Id*. at 374.

[88] *Id*.

[89] *Id*.

[90] *Id*.

[91] *Id*. at 378.

[92] *Id*.

[93] *Id*. at 377 (emphasis in original). The court also cited its own precedent, *Hatfill v. New York Times Co*., 416 F.3d 320, 329 (4th Cir. 2005), for the proposition that "the usual standards of notice pleading apply in defamation cases." *Id*.

drug—also did not satisfy the plausibility requirement.[94] Implicitly, the court held that the defendant was under no obligation to supplement its statement with Mayfield's denial. Ultimately, the court held that the allegedly defamatory statements "did no more than report what the positive drug tests indicated—that Mayfield took a recreational or performance-enhancing drug."[95] The court affirmed the district court's grant of judgment on the pleadings.

Similarly, in *Pippen v. NBCUniversal Media, LLC*, the Seventh Circuit affirmed the dismissal of Scottie Pippen's libel suit against several publishers on grounds that he failed plausibly to allege actual malice.[96] The defendants had falsely stated that the former NBA player had filed for bankruptcy.[97] Defendants conceded the falsity of this statement and also conceded that, had they investigated official court records or interviewed Pippen himself, they would have known that the statement was false.[98] Pippen alleged that this failure to investigate, coupled with the defendants' failure to retract the statement once Pippen notified them of its falsity, demonstrated actual malice.[99] However, the court, citing U.S. Supreme Court precedent, noted that neither a failure to investigate nor a failure to retract a false statement constitute actual malice.[100] Therefore, the complaint failed plausibly to allege actual malice.

In the fourth case, *Biro v. Condé Nast*, the Second Circuit affirmed the Rule 12(b)(6) dismissal of the plaintiff's libel suit because he failed plausibly to allege actual malice.[101] Biro, an art dealer who gained fame for authenticating paintings using fingerprint analysis, alleged that a *New Yorker* article defamed him by "rais[ing] questions about the trustworthiness of Biro's methods and his authentication of paintings."[102] The article also "contained interviews of various individuals critical of Biro, and it suggested that Biro stood to profit from some of his more dubious authentications."[103] In his complaint, Biro alleged that the defendants " 'either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and nonetheless published them,' and that they 'acted with actual malice, or in reckless disregard of the truth, or both.' "[104]

Going beyond these general allegations, Biro also alleged a number of other facts. First, the defendants "failed to 'investigate and determine the validity'

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[94] *Id.* at 378.
[95] *Id.*
[96] Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 612, 616 (7th Cir. 2013).
[97] *Id.* at 612.
[98] *Id.* at 614.
[99] *Id.*
[100] *Id.*
[101] Biro v. Condé Nast, 807 F.3d 541, 542 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2015 (2016).
[102] *Id.* at 543.
[103] *Id.*
[104] *Id.*

of the allegedly defamatory statements."[105] Second, they "relied on anonymous and biased sources."[106] Third, they "ignore[d] the many other works of art which plaintiff has worked with over the years, as well as his many satisfied clients."[107] Fourth, they failed to retract the article and failed to remove the story from the internet.[108] Fifth, some defendants chose to publish the article after Biro had already sued other defendants for libel.[109] Finally, one defendant has "'defamatory propensities.'"[110]

These allegations were insufficient, held the court.[111] Cataloguing what the complaint did *not* allege, the court noted the absence of any allegation that the article was based "'wholly' on information from unverified and anonymous sources."[112] Nor did the complaint "allege facts that would have prompted the *New Yorker* defendants to question the reliability of any of the named or unnamed sources at the time the Article was published."[113] Nor was the author's "decision to focus on Biro's controversial authentications, while ignoring both his other authentications and his satisfied clients"[114] evidence of actual malice.

Biro argued that the court should not apply the *Twiqbal* plausibility standard to his allegation of actual malice because Rule 9(b) allows it to be pleaded generally and because neither the Supreme Court nor the Second Circuit had applied *Twiqbal* to defamation cases.[115] But the Second Circuit rejected this argument, noting that *Iqbal* required intent to be pleaded plausibly, and rejected the view that Rule 9(b) constitutes a "'license to evade the less rigid—though still operative—strictures of Rule 8.'"[116] Citing *Pippen*, *Mayfield*, and *Schatz*, the court noted that Biro had not presented "a persuasive reason why the pleading standard should differ in defamation cases generally or in the malice inquiry specifically."[117] In contrast, the court opined, the imposition of the plausibility pleading standard will not prove fatal to public-figure plaintiffs.[118] First, the court noted that "a court typically will infer actual malice from objective facts," and that "whether actual malice can plausibly be inferred will depend on the facts and circumstances of each case."[119] Moreover, citing three district

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[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 546.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*. at 544.
[116] *Id*. at 545 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009)).
[117] *Id*.
[118] *Id*.
[119] *Id*.

court cases, the court noted that "[i]n practice, requiring that actual malice be plausibly alleged has not doomed defamation cases against public figures."[120]

Biro filed a petition for a writ of certiorari in the U.S. Supreme Court, arguing, *inter alia*, that the *Twiqbal* standard should not apply to allegations of actual malice in a libel action, and that application of *Twiqbal* to the allegations of malice violates the *Erie* doctrine.[121] The petition argued that applying *Twiqbal* to allegations of actual malice is tantamount to amending Rule 9(b) without complying with the Rules Enabling Act.[122] Moreover, even if *Twiqbal* applies, the allegation that a defendant acted "with actual malice" is neither a legal conclusion nor a threadbare recitation of an element of a libel action.[123] Instead, it is "a *purely factual assertion about that person's subjective state of mind*."[124] As such, the petition argued, that allegation is entitled to the same presumption of truth accorded to other factual allegations.[125] Although the Supreme Court denied certiorari in *Biro*, probably because there was no Circuit split, these are the arguments that must be addressed to reconcile the *Twiqbal* standard with the second sentence of Rule 9(b) in public-figure libel suits.[126]

Finally, in *Michel v. NYP Holdings, Inc.*, the Eleventh Circuit affirmed the 12(b)(6) dismissal of a defamation action filed by rap artist Prakazrel ("Pras") Michel against the *New York Post*.[127] Although the District Court's action was based upon its finding that the article "presented only non-actionable statements of opinion under New York law,"[128] the Eleventh Circuit affirmed on *Twiqbal* grounds, holding that "Michel has failed to adequately plead facts giving rise to a reasonable inference that the defendants published the article with actual malice."[129] Michel alleged that the *New York Post* defamed him by reporting that he had been a "no-show" and had "bailed on" a charity show for "his own foundation."[130] The complaint alleged that the article was published

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[120] *Id.* at 545–46 (citing Tiversa Holding Corp. v. LabMD Inc., Civ. A. No. 13–1296, 2014 WL 1584211, at *7 (W.D. Pa. Apr. 21, 2014); Lynch v. Ackley, Civ. No. 3:12CV537 (JBA), 2012 WL 6553649, at *9 (D. Conn. Dec. 14, 2012); Ciemniecki v. Parker McCay P.A., Civ. No. 09–6450 (RBK/KMW), 2010 WL 2326209, at *14 (D.N.J. June 7, 2010)).

[121] Petition for a Writ of Certiorari at 23, Biro v. Condé Nast, 136 S. Ct. 2015 (No. 15–1123) (2016), 2016 WL 880298. The petition also argued that a public-figure plaintiff should be entitled to discovery once the court determines that the "complained-of language is susceptible of a defamatory connotation," and that First Amendment protection should extend only to "statements which are germane to the controversy and matters of public concern." *Id.* at i.

[122] *Id.* at 23.

[123] *Id.* at 23–24.

[124] *Id.* at 24 (emphasis in original).

[125] *Id.*

[126] *See supra* Part I. The Petition also argued that application of the plausibility standard violated the *Erie* doctrine because that standard would not have been applied in state court. Petition for a Writ of Certiorari, *supra* note 121, at 29. *See infra* Part III.

[127] Michel v. NYP Holdings, Inc., 816 F.3d 686, 691–92 (11th Cir. 2016).

[128] *Id.* at 691.

[129] *Id.* at 692.

[130] *Id.* at 692–93.

with "a 'blatant reckless disregard for the truth.'"[131] To support the allegation of recklessness, the plaintiff alleged, first, that "Defendants wrote, published and disseminated the Article without conducting any due diligence on the matter covered or attempting any real outreach to uncover if any truth existed relating to the matter that was being asserted therein."[132] Second, the plaintiff alleged that the defendant was informed, two days prior to the article's publication, that Michel was not a board member of the foundation, but still characterized the foundation as "his own."[133]

In response to the plaintiff's argument that the plausibility pleading standard should not be applied to his allegations of actual malice, the Eleventh Circuit joined the "chorus" of previous courts of appeals decisions holding that the *Twiqbal* standard does apply.[134] Next, the court executed the first step of *Iqbal*, disregarding the plaintiff's "conclusory" allegation that the *Post* was "reckless" in publishing the article.[135] The two supporting allegations that remained, according to the court, alleged only a failure to investigate, which is legally insufficient to support a finding of actual malice.[136] Also militating against a finding of actual malice was the *Post*'s correct reporting that Michel's name, which had been listed as a foundation Board member on its website, had disappeared from the website prior to the article's publication.[137] Holding that the plaintiff had failed plausibly to plead actual malice, the court affirmed the dismissal of the complaint but granted the plaintiff leave to amend.[138]

C. A Successful Post-Twiqbal Libel Complaint

It is not impossible for a public figure to recover on a libel claim in a post-*Twiqbal* world. In a highly publicized case, Nicole Eramo, a former Dean at the University of Virginia, won a jury verdict of $3 million against *Rolling Stone*

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[131] *Id*. at 693.

[132] *Id*. at 704.

[133] *Id*. at 704–05.

[134] *Id*. at 702 (citing Biro v. Condé Nast, 807 F.3d 741 (2d. Cir. 2015); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610 (7th Cir. 2013); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369 (4th Cir. 2012); Schatz v. Republican State Leadership Comm., 669 F.3d 50 (1st Cir. 2012)). The court included in the chorus a Tenth Circuit case, *McDonald v. Wise*, in which the court applied the plausibility pleading standard to a defamation claim by a private individual because the statements regarded an "issue of public concern." McDonald v. Wise, 769 F.3d 1202, 1210, 1219 (10th Cir. 2014). The court held that the seventy-seven factual paragraphs of the complaint satisfied the *Twiqbal* standard by permitting an inference that the defendant knew that her charge of sexual harassment against the plaintiff was false. *Id*. at 1220.

[135] *Michel*, 816 F.3d at 703–04.

[136] *Id*. at 704.

[137] In his brief to the Eleventh Circuit, the plaintiff made two additional allegations supporting actual malice, but the court refused to consider these allegations because they had not been included in the complaint. *Id*. at 705–06.

[138] *Id*. at 706.

magazine and a reporter, Sabrina Rubin Erdely.[139] The case arose from an article written by Erdely and published in the December 4, 2014 edition of *Rolling Stone* entitled "A Rape on Campus."[140] The article reported the violent gang rape of a University of Virginia ("UVA") undergraduate, identified only as "Jackie," by a group of fraternity brothers at a fraternity party.[141] According to the article, when "Jackie" finally reported the rape, Dean Nicole Eramo reacted with indifference or with "coddling" designed to discourage "Jackie" from reporting the rape to the police and to suppress the story from being publicly reported.[142]

The sensational article garnered publicity in other media outlets regarding the "rape culture" on college campuses, but it also quickly garnered some skeptical news commentary pointing out the apparent gaps and flaws in the reporting of the story.[143] During this post-publication period, reporter Erdely embarked upon a press tour and gave interviews to several news outlets in which she defended the journalistic integrity of the article.[144] However, *Rolling Stone* became so concerned by criticism of the article that it commissioned a study of the article by the *Columbia Journalism Review*.[145] The review concluded that the article was "a journalistic failure that was avoidable."[146] Likewise, the Charlottesville Police Department, which had begun an investigation of "Jackie's" story at UVA's request, concluded that "[t]here is no substantive basis to support the account alleged in the *Rolling Stone* article."[147]

Armed with the *Columbia Journalism Review* report and the findings of the Charlottesville Police Department investigation, Nicole Eramo sued *Rolling Stone* and Erdely in state court in Charlottesville, Virginia.[148] The complaint, comprising 296 paragraphs in seventy-six pages, reads like the script for a television exposé.[149] It describes Eramo's career and Erdely's prior journalistic endeavors, quotes liberally from interviews and statements given by Erdely and her editor, Scott Woods, subsequent to the article's publication, and describes

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[139] Hawes Spencer & Ben Sisario, *In* Rolling Stone *Defamation Case, Magazine and Reporter Ordered to Pay $3 Million*, N.Y. TIMES (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/media/in-rolling-stone-defamation-case-magazine-and-reporter-ordered-to-pay-3-million.html [https://perma.cc/4UPE-NE7L].

[140] *Id*.

[141] *Id*.

[142] Complaint at 22, Eramo v. Rolling Stone LLC, No. CL15–205 (W.D. Va. May 29, 2015).

[143] *Id*. at 28–31.

[144] *Id*. at 7, 26–27.

[145] Sheila Coronel et al., Rolling Stone*'s Investigation: 'A Failure that Was Avoidable*,' COLUM. JOURNALISM REV. (Apr. 5, 2015), cjr.org/investigation/rolling_stone_investigation.php [https://perma.cc/2WJW-SW7W].

[146] *Id*.

[147] *Id*.

[148] The defendants subsequently removed the case to the U.S. District Court for the Western District of Virginia on the basis of diversity of citizenship.

[149] *See generally* Complaint, *supra* note 142.

the reaction to the article of the University, the Psi Phi fraternity, other UVA students, and friends of "Jackie."

The complaint repeatedly alleged actual malice. In the "Nature of the Action" section, plaintiff alleged that "Erdely and Rolling Stone acted with actual malice when they published 'A Rape on Campus.'"[150] In the "Facts" section, plaintiff alleged actual malice in seven subheadings, reading as follows:

> Erdely and *Rolling Stone* Publish "A Rape on Campus" With Actual Malice By Making A Calculated Decision Not To Pressure-Test Jackie's Claims In Order To Publish A Biased, Preconceived Narrative Despite Serious Doubts About The Credibility Of Their Sole Source.[151]
>
> Erdely and *Rolling Stone* Act With Actual Malice By Purposefully Avoiding Obtaining A FERPA Waiver To Access University Records That Would Have Contradicted *Rolling Stone*'s and Erdely's Preconceived Storyline.[152]
>
> Erdely and *Rolling Stone* Act With Actual Malice By Making A Calculated Decision To Hide From Public View That They Were Relying Entirely On A Single Source Who They Subjectively Doubted.[153]
>
> Erdely and *Rolling Stone* Acted With Actual Malice When They Rejected Jackie's Request To Withdraw From The Story Because Jackie Was Uncomfortable With How The Article Would Portray Dean Eramo.[154]
>
> Erdely and *Rolling Stone* Acted With Actual Malice by Making A Calculated Decision Not To Seek Meaningful Comment From Phi Kappa Psi.[155]
>
> Erdely and *Rolling Stone* Acted With Actual Malice By Interviewing And Disregarding Sources And The Information They Provided About Dean Eramo.[156]
>
> Erdely and *Rolling Stone* Acted With Actual Malice By Repeatedly Lying In An Effort To Bolster The Credibility Of Their False Story.[157]

Each of these subheadings was followed by a series of paragraphs replete with quotations from Erdely, Woods, and students, as well as with facts reported by the *Columbia Journalism Review* or the Charlottesville Police Department.[158] Finally, in each of the six defamation counts, the complaint included the following allegations:

> At minimum, Erdely and *Rolling Stone* had serious doubts as to the truth of these statements and a high degree of awareness that they were probably false, and therefore were required to investigate their veracity before publishing them. Erdely and *Rolling Stone*'s failure to do so amounts to actual malice.
>
> Erdely and *Rolling Stone* purposefully avoided the truth, and purposely avoided interviewing sources and following fundamental reporting practices intentionally in order to avoid the truth.

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[150] *Id*. at 6.
[151] *Id*. at 39.
[152] *Id*. at 44.
[153] *Id*. at 45.
[154] *Id*. at 48.
[155] *Id*. at 49.
[156] *Id*. at 51.
[157] *Id*. at 53.
[158] *See, e.g.*, *id*. at 51–53.

> At the time of publication, Erdely and *Rolling Stone* knew these statements were false, or recklessly disregarded the truth.[159]

Interestingly, the defendants failed to file a 12(b)(6) motion to dismiss the complaint.[160]

It may well have been that the defendants could not, consistent with Federal Rule of Civil Procedure 11, make a motion to dismiss on *Twiqbal* grounds given the level of factual detail in the complaint. Because no *Twiqbal* motion was made, the court did not hold explicitly that the complaint satisfied the *Twiqbal* standard. Although there has been no explicit ruling that the *Eramo* complaint satisfied the *Twiqbal* plausibility standard, we can infer its sufficiency given the plethora of facts contained in the complaint and the failure of the defendants to challenge its sufficiency. And we have no way of knowing whether a less fulsome complaint would have been plausible. But, whether or not the *Eramo* complaint represents the minimum necessary to satisfy the *Twiqbal* standard, or whether it goes above and beyond what that standard requires, it is the best example we have of a successful post-*Twiqbal* libel complaint. From it, we can deduce at least two things.

First, a successful public-figure libel complaint is likely to be long, complex, and narrative. The *Eramo* complaint is novelistic: it has characters, a setting, and a plot. It is saturated with the plaintiff's theory of the case. In Rule 8(a) terms, it honors the phrase "showing the pleader is entitled to relief" over the phrase "short and plain statement of the claim."[161] Transforming the complaint into a novelistic narrative is not necessarily a bad thing; indeed, the storytelling aspect of the complaint makes for an entertaining first step in the litigation, and according to some scholars, is what plaintiffs' lawyers have always produced.[162]

We might well ask what is wrong with asking the plaintiff to tell her story in the complaint. After all, the plaintiff must know what has happened in order to bring the suit. The plaintiff's lawyer must not sign the complaint unless the "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[163] It is true that the plaintiff will know the follow-

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[159] *See, e.g.*, *id.* at 62.

[160] Because it has been uniformly held that federal pleading standards are procedural for *Erie* purposes, the *Twiqbal* standard would have applied to the Complaint once it was removed to federal court. Therefore, if the Complaint did not satisfy the *Twiqbal* standard, it would have been vulnerable to a motion to dismiss under Rule 12(b)(6).

[161] FED. R. CIV. P. 8. Because the complaint was originally filed in Virginia state court, we might surmise that the length and complexity of the complaint might be due to state pleading requirements. However, Virginia's pleading rule states, "Brevity is enjoined as the outstanding characteristic of good pleading. In any pleading a simple statement, in numbered paragraphs, of the essential facts is sufficient." VA. SUP. CT. R. 1:4(j).

[162] *See generally* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).

[163] FED. R. CIV. P. 11(b)(3).

ing elements of the cause of action for libel: the words' publication, the defamatory nature of the words, the falsity of the words, and the damages suffered because of the publication of the words. But the plaintiff may not know the subjective state of the defendant's mind at the time of publication. Whether the defendant acted negligently, recklessly, or with knowledge of the words' falsity—i.e., whether the defendant acted with "actual malice"—is usually solely within the exclusive knowledge of the defendant.

Second, we can deduce that a successful public-figure libel plaintiff will have extensive pre-filing facts about how the defamatory publication came into being, including the defendant's state of mind. The plaintiff in *Eramo* was in the unusual position of having the evidence, before the filing of the complaint, of the defendant's state of mind at the time the defamatory article was published. The *Columbia Journalism Review* had access to Erdely's notes as well as documents relating to "editing, editorial supervision and fact-checking."[164] Eramo also had a police investigation of the underlying incident.[165] As alleged in the complaint, and as verified by the jury verdict, those facts were legally sufficient to permit a jury to infer that the defendants acted in reckless disregard of the truth or falsity of the article. But few defendants will commission a neutral third party to assess their editorial products. And few articles will be subject to the factual scrutiny of a criminal investigation by a police department. Without access to these two sources, it is doubtful that Eramo could have successfully pleaded actual malice. Thus, the success of the *Eramo* complaint does nothing to dispel the catch-22 that ensnares an ordinary public figure suing for libel.

III. IMPLICATIONS OF APPLYING *TWIQBAL* TO ALLEGATIONS OF MALICE

Imposing the *Twiqbal* plausibility standard onto the pleading of actual malice has at least three implications. First, it distorts the language and purpose of Rule 9(b) by requiring that the libel plaintiff plead facts about the defendant's state of mind that the plaintiff usually has no way of knowing. Because discovery is not available under *Twiqbal* until the 12(b)(6) hurdle is surmounted, the use of the plausibility standard in public-figure libel actions works a grave injustice to plaintiffs. Faced with a substantive standard that, for good reason, is higher than normal, they are also faced with a pleading standard that is virtually insurmountable, for reasons that are unclear at best.

The *Twombly* Court suggested that the plausibility standard is needed to spare defendants the trouble and expense of discovery in cases that might eventually prove to be nonmeritorious.[166] However, the *Iqbal* Court's holding that the plausibility standard applies to all cases, whatever the risk of expensive discovery, eviscerated any apparent rationale for tightening the standard. Yet, the

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[164] Coronel et al., *supra* note 145.

[165] *See* Complaint, *supra* note 142, at 35–39.

[166] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

plausibility standard bars plaintiffs from discovery whether or not discovery in the particular case might prove to be overly burdensome or expensive for the defendant. And in cases where the defendant's state of mind must ultimately be proven by the plaintiff—like public-figure libel cases—the bar to discovery puts plaintiffs in a catch-22 situation. The plaintiff must allege facts from which knowledge of falsity or reckless disregard of truth or falsity must be inferred, but the plaintiff has no access to the tools of discovery with which to learn these essential facts.[167] Thus, applying the *Twiqbal* standard to allegations of actual malice disrupts the drafters' intended relationship between pleading and discovery.

The proper functioning of Rule 9(b) in a libel action is illustrated by the Ninth Circuit's pre-*Twombly* decision in *Flowers v. Carville*.[168] There, the plaintiff, Gennifer Flowers, alleged that she had had an affair with President Bill Clinton.[169] To give credence to her allegations, she called a press conference at which she played tapes of telephone conversations between the two.[170] Subsequently, several news outlets reported that the tapes appeared to have been "selectively edited."[171] Relying on these reports, two of Clinton's advisors, James Carville and George Stephanopoulos, asserted that the tapes had been "doctored."[172] Flowers sued the two for libel, and the defendants moved to dismiss for failure to state a claim.[173] The Ninth Circuit, speaking through Judge Kozinski, held that the complaint stated a claim for libel.[174] The complaint alleged, "without alleging corroborating evidence,"[175] that the "defendants knew that their statements were false or acted with reckless disregard of the truth."[176] This allegation was sufficient because Rule 9(b) permits state of mind to be alleged generally, "that is, simply by saying that [it] exist[s]."[177] Judge Kosinski recognized that "[t]he First Amendment imposes substantive requirements on the state of mind a public figure must prove in order to recover for defamation, but it doesn't require him to prove that state of mind in the complaint."[178] Indeed the court correctly noted that the "clear and convincing" evidence required by the *New York Times* standard can be gathered only through discovery, and that the strength of that evidence can be tested only on summary judgment:

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[167] Other scholars have noted this catch-22. *E.g.*, Dodson, *supra* note 34; Miller, *supra* note 34; Steinman, *supra* note 35.

[168] Flowers v. Carville, 310 F.3d 1118 (9th Cir. 2002).

[169] *Id.* at 1122.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 1131.

[175] *Id.*

[176] *Id.* at 1130.

[177] *Id.* (internal quotation omitted).

[178] *Id.*

> Actual malice is a subjective standard that turns on the defendant's state of mind; it is typically proven by evidence beyond the defamatory publication itself. For that reason, "the issue of 'actual malice' . . . cannot be properly disposed of by a motion to dismiss," where the plaintiff has had no opportunity to present evidence in support of his allegations. The district court threw out Flowers's lawsuit before she had a chance to depose witnesses, request documents and otherwise pursue evidence necessary to her case through the discovery process. It may be improbable that Flowers will find evidence to support her claims, but improbable is not the same as impossible . . . . Because Flowers has had no chance to present evidence supporting her claims, we cannot hold that defendants acted without actual malice as a matter of law.
>
> Flowers no doubt faces an uphill battle on remand. To survive summary judgment, she will have to marshal clear and convincing evidence that defendants knew the news reports were probably false or disregarded obvious warning signs from other sources. The difficulty of her task ahead, however, is no reason to deny her the opportunity to make the attempt.[179]

To be sure, the decision in *Flowers* potentially subjected two busy, high-profile people to discovery. But this result was contemplated by the drafters. Few defendants in our American system of justice are absolutely immune from being held accountable in court for their wrongful acts. The doctrine of qualified immunity has evolved to protect important actors from frivolous or harassing litigation. But the plausibility standard in public-figure libel cases has developed into something very like it, conferring a de facto immunity, ironically, on publishers, who are more likely to have litigation resources, at the expense of individual plaintiffs who believe, and whose lawyers have a reasonable factual and legal basis to believe,[180] that they have been wronged.[181]

Perhaps this concern is diminished in public-figure libel cases in which the plaintiffs are themselves busy and important people.[182] After all, Scottie Pippen and Jeremy Mayfield, for example, participate in lucrative professional sports; their wealth and fame depend upon their willingness to put themselves into public view in the marketplace. It is unclear how solicitously the civil justice system should treat such plaintiffs, especially compared to the solicitude that is due to media defendants.[183] But even public figures should have access to civil

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[179] *Id*. at 1131 (footnote and citation omitted).

[180] *See* FED. R. CIV. P. 11(b).

[181] *See generally* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (finding a disproportionate effect on civil rights and employment discrimination plaintiffs).

[182] This generalization is less true for limited purpose public figures, who may simply be, for example, local elected officials or University deans.

[183] *Compare*, Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2012); Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation under the New Plausibility Standard*, 47 AKRON L. REV. 329 (2014); Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-*Iqbal, 57 N.Y.L. SCH. L. REV. 719 (2013);

justice. As Judge Kozinski recognized, the *New York Times* standard adequately balances the respective rights of public figures and media defendants.[184]

However, as articulated by the Eleventh Circuit in *Michel*, the plausibility pleading standard supplements the *New York Times* standard:

> In these cases, there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation. Indeed, the actual malice standard was designed to allow publishers the "breathing space" needed to ensure robust reporting on public figures and events. Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict that breathing space in exactly the manner the actual malice standard was intended to prevent. The costs and efforts required to defend a lawsuit through that stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether.[185]

This policy justification for requiring plausibility pleading of actual malice raises the question of whether the *New York Times* standard needs help to protect defendants adequately. The actual-malice standard was developed at a time when actual malice could be pleaded generally, in what the *Iqbal* Court would call a "conclusory" manner.[186] Given the uniform results of using the plausibility standard to strengthen the *New York Times* standard, the overlay of an impossibly arduous pleading standard onto a rigorous substantive standard tips the scales too far in favor of defendants.

Judge Kozinski's understanding of the relationship between a motion to dismiss and a summary judgment motion underscores the second unintended consequence of applying *Twiqbal* to actual malice allegations.[187] Requiring public-figure libel plaintiffs to plead facts to support an inference of actual malice transforms the complaint into a statement of evidence. It transforms the 12(b)(6) motion to dismiss into a motion for summary judgment. It permits the judge to decide, as a matter of law, whether the plaintiff's factual allegations—which should be only the door-openers to discovery—would be sufficient to support a jury verdict in the plaintiff's favor. As both courts and commentators recognize, the judge who decides the merits of a case on the face of the complaint is usurping the constitutional role of the jury.[188] This danger is enhanced

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Schneider, *supra* note 181; Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011); Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

[184] Flowers v. Carville, 310 F.3d 1118, 1129–30 (9th Cir. 2002).

[185] Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016) (citation omitted).

[186] *See supra* text accompanying notes 69–71.

[187] *See Flowers*, 310 F.3d at 1131.

[188] *See, e.g.*, Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 432 (Tenn. 2011) (rejecting *Twiqbal* standard on grounds, inter alia, that standard "raises potential concerns implicating the Tennessee constitutional mandate that 'the right of trial by jury shall remain inviolate' ") (citing TENN. CONST. art. I, § 6); McCurry v. Chevy Chase Bank, 233 P.3d 861, 863 (Wash. 2010) (rejecting *Twiqbal* standard and noting that it "adds a determination of the likelihood of success on the merits"); Richard A. Epstein, Bell Atlantic v.

in public-figure libel cases because of the well-developed law about which facts are *not* sufficient to prove actual malice.[189] These principles, articulated in cases on review from jury verdicts or post-discovery summary judgments, are part and parcel of the First Amendment protection of media defendants.[190] They ensure that the focus remains on the defendant's subjective state of mind, not on an objective reasonableness standard. But, ironically, at the pleading stage, plaintiffs often have access only to the sort of facts that give rise to an inference of objective unreasonableness. Even if facts exist to prove that the defendant knew that the defamatory statement was false, a plaintiff who is unable to depose that defendant will be unable to plead those facts in order to state a claim.[191] Indeed, applying the plausibility standard to allegations of actual malice virtually ensures that no defendant will even have to admit or deny his or her state of mind.[192]

Third, applying *Twiqbal* to allegations of actual malice will, at worst, violate the *Erie* doctrine and, at best, promote forum-shopping. Several states whose rules of civil procedure are based on the federal rules have rejected the *Twiqbal* standard as being inconsistent with the notice function of their Rules 8(a). For example, the Washington Supreme Court rejected the *Twiqbal* pleading standard, reasoning that the discovery problems that prompted the new standard were unique to the federal system, that such a change to the rules should be made through the rulemaking process, and that the countervailing policy of ensuring plaintiffs' access to justice counseled against the change.[193] Likewise, the Tennessee Supreme Court rejected the *Twiqbal* standard.[194] Other states have followed suit.[195] In states that have rejected the plausibility stand-

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Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007); Miller, *supra* note 34, at 30 (noting that *Twiqbal* standard permits a "trial-like scrutiny of the merits"); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010).

[189] *See supra* Part II.B.

[190] *See supra* cases cited in notes 58–68.

[191] The circularity of this reasoning demonstrates the catch-22 to which public-figure libel plaintiffs are subjected under *Twiqbal*.

[192] *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 572 (2007) (Stevens, J., dissenting) (noting that dismissal meant that defendants never had to answer complaint).

[193] *McCurry*, 233 P.3d at 863.

[194] Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 422 (Tenn. 2011).

[195] *See* Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 607–08 (Iowa 2012) (explicitly declining to adopt *Twiqbal* standard); Roth v. DeFelicecare, Inc., 700 S.E.2d 183, 189–90 n.4 (W. Va. 2010) (noting that *Twiqbal* standard has not been adopted by court and reiterating that "all that is required by a plaintiff is 'fair notice' "). *Cf.* Crum v. Johns Manville, Inc., 19 So. 3d 208, 212–13 n.2 (Ala. Civ. App. 2009) (noting that the Alabama Supreme Court has not adopted the *Twiqbal* standard); Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 537 (Del. 2011) (declining to address change of standard explicitly, but noting that pleading standard remained "reasonable 'conceivability' "); Smith v. State, No. 104,755, 2012 WL 1072756, at *6 (Kan. Ct. App. Mar. 23, 2012) (unpublished opinion) (noting that Kansas Supreme Court has not adopted *Twiqbal* standard). *But see* Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531, 543–

ard, and whose Rules 9(b) mirror the federal rule, actual malice can still be pleaded generally. Thus, a state court defamation action by a public figure can proceed in the absence of specific facts to support knowledge of falsity or reckless disregard of truth or falsity, while a federal court action would be dismissed. Although the differing outcomes between the state and federal actions do not themselves indicate an *Erie* violation, the differing outcomes do indicate the need for an *Erie* analysis.

Because the differing outcomes result from application of a federal rule of civil procedure, the analysis in *Hanna v. Plumer* applies.[196] Applying the Rules Enabling Act (REA),[197] Rule 8(a) will pass muster under subsection (a) if it "really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law . . . ."[198] Because pleading rules have typically been viewed as procedural, it seems likely that the *Twiqbal* standard would be viewed as "procedural" under subsection (a) of the REA. The final step in the analysis addresses section (b) of the REA by asking whether application of the federal rule would "abridge, enlarge or modify any substantive right."[199]

In *Shady Grove Orthopedic Associates v. Allstate Ins. Co.*, the Supreme Court addressed a collision between Federal Rule of Civil Procedure 23 and a New York statute regulating class actions, with the victory going to the Federal Rule.[200] Showing no deference to the New York statute, the Court held that Rule 23 meant what it said: plaintiffs in federal court can file class action suits.[201] Because the class action rule is procedural, the majority held, it passes the first part of the REA analysis.[202] However, the second part of the analysis—whether Rule 23 abridged, modified, or enlarged any substantive right—was decided by a plurality, joined by Justice Stevens, concurring in part and concurring in the judgment.[203]

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44 (D.C. 2011) (adopting *Twiqbal* due to statutory mandate to follow the Federal Rules of Civil Procedure); Doe v. Bd. of Regents, 788 N.W.2d 264, 278 (Neb. 2010) (adopting *Twiqbal* standard but cautioning, "[i]n cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim."); Sisney v. Best, Inc., 754 N.W.2d 804, 808–09 (S.D. 2008) (adopting *Twiqbal* standard).

[196] Hanna v. Plumer, 380 U.S. 460 (1965). The applicable analysis is colloquially known as a "*Hanna* Part 2" analysis. *See* JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 207–08 (7th ed. 2013). A majority of the U.S. Supreme Court agreed that this is the proper analysis when facing a conflict between state law and a Federal Rule of Civil Procedure. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

[197] 28 U.S.C. § 2072 (2012).

[198] *Hanna*, 380 U.S. at 464.

[199] 28 U.S.C. § 2072(b).

[200] *Shady Grove*, 130 S. Ct. 1431.

[201] *Id.* at 1442.

[202] *See id.* at 1444.

[203] Marks v. United States, 430 U.S. 996 (1977). Under the doctrine of *Marks*, Justice Stevens's view must be taken as the view of the Court on this issue.

Justice Stevens agreed that Federal Rule of Civil Procedure 23 could be applied.[204] He addressed the second part of the *Hanna* analysis by asking whether the New York law, while procedural in form, "is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[205] Because the New York law "applies not only to claims based on New York law but also to claims based on federal law or the law of any other State," Justice Stevens found that it did not "serve[] the function of defining New York's rights or remedies."[206]

Although the Federal Rule of Civil Procedure triumphed in *Shady Grove*, Justice Stevens's analysis is highly relevant to an analysis of whether application of the *Twiqbal* pleading standard in public-figure libel cases violates the *Erie* doctrine. First, Justice Stevens warns that the REA reflects Congress's careful balancing of respect for state-created substantive rights and federal procedure.[207] This careful balance requires that a reviewing court look carefully at both the conflicting state law and the federal rule. In particular, the analysis "does not necessarily turn on whether the state law at issue takes the form of what is traditionally described as substantive or procedural. Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies."[208] Justice Stevens quoted Judge Posner's observation that "[a] 'state procedural rule, though undeniably "procedural" in the ordinary sense of the term,' may exist 'to influence substantive outcomes.'"[209] Justice Stevens then concluded: "When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice."[210]

The question becomes whether state pleading rules that permit actual malice to be alleged generally help to define the scope of the state-created cause of action for defamation. It may well be that states tolerate general pleading of the defendant's state of mind because, as we have seen, it is so difficult for those plaintiffs to gain access to the relevant facts prior to discovery. In states where general pleading of actual malice is still permitted, a federal court's application of the plausibility pleading standard to allegations of actual malice will have a substantive effect: the conditional privilege accorded to defendants in public-figure libel cases will be converted into a virtual immunity from suit. Under Justice Stevens's analysis, then, the apparently procedural rule that actual malice can be pleaded generally may define the scope of the state-created right, i.e., opening the courthouse doors to public-figure plaintiffs who have evidence

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[204] *Shady Grove*, 559 U.S. at 1452 (Stevens, J., concurring).
[205] *Id*. at 1452.
[206] *Id*. at 1457.
[207] *Id*. at 1448.
[208] *Id*. at 1449.
[209] *Id*. at 1450.
[210] *Id*.

of the other elements of libel but need discovery to prove the defendant's state of mind.

The U.S. Supreme Court has never held that a federal rule of civil procedure violates the REA.[211] However, in *Semtek International, Inc. v. Lockheed Martin Corp.*,[212] the Court avoided a collision between Federal Rule of Civil Procedure 41(b) and the *Erie* doctrine by refusing to read the phrase "operates as an adjudication on the merits" to mean "having claim preclusive effect."[213] The Court recognized that a federal court's application of Rule 41(b) to extinguish a claim while the law of the forum state would not do so "would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules shall not abridge, enlarge, or modify any substantive right."[214]

If a federal court applies the *Twiqbal* standard to extinguish a defamation claim, while the law of the forum state would not do so, the disparity in outcomes would seem to abridge a substantive right.[215] When a procedural rule like Rule 8(a) is interpreted in such a restrictive way as to deprive plaintiffs of any realistic opportunity to proceed with a state-created claim, that rule extinguishes the claim just as surely as Rule 41(b) would have done in *Semtek* if interpreted to lead to claim preclusion. As Adam Steinman puts it, "A claim that cannot survive the pleading phase is effectively no claim at all."[216] Thus, the application of the *Twiqbal* pleading standard to allegations of actual malice in public-figure libel cases violates the *Erie* doctrine.[217]

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[211] *Id.* at 1473.

[212] Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

[213] *Id.* at 1026.

[214] *Id.* at 1025.

[215] The plaintiff in *Biro* took this position in its Petition for Certiorari. The complaint would have been sufficient if filed in state court, and the case would have proceeded to discovery. Application of the federal pleading standard led to dismissal of the complaint, resulting in a "substantial variation in outcomes" due to application of federal law. Because of this substantial variation in outcomes, Rule 9(b) as interpreted by the Second Circuit, "abridge[d]" the plaintiff's substantive rights under New York law in violation of the Rules Enabling Act. Under settled *Erie* doctrine, therefore, Biro argued, the court was required to apply New York's pleading standard instead of the federal standard. Petition for a Writ of Certiorari, *supra* note 121, at 26–29.

[216] Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 389 (2016).

[217] Moreover, this drastic disparity in pleading standards enhances the probability of forum shopping, as defendants facing suit by public-figure plaintiffs in states that have not adopted *Twiqbal* will seek to remove to federal court to take advantage of the *Twiqbal* pleading standard. For example, two of the five cases examined herein were originally filed in state court and were then removed to federal court. *See* Michel v. NYP Holdings, Inc., 816 F.3d 686 (11th Cir. 2016); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369 (4th Cir. 2012). *But see* Jill Curry & Matthew Ward, *Are* Twombly *and* Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 830 (2013) (finding "no systematic increase in the rate of removal from state to federal courts after *Twombly* and *Iqbal*, and the effect was not more pronounced in notice-pleading states compared to fact-pleading states"). *But see* Shady Grove Orthopedic Assocs. V. Allstate Ins. Co., 130 S. Ct. 1431, 1448 (2010) ("[D]ivergence from state law, with the attendant

IV. PROPOSED REMEDIES

The line of Circuit Court of Appeals cases dismissing public-figure libel actions demonstrates the deleterious consequences of applying the *Twiqbal* pleading standard to allegations of state of mind under Federal Rule of Civil Procedure 9(b). Instead of following the Rule's prescription that states of mind can be pleaded generally, the Court required states of mind to be pleaded plausibly—that is, to be supported by factual allegations from which an inference of the requisite state of mind can be drawn.[218] When applied to allegations of actual malice in public-figure defamation cases, this requirement has resulted in uniform holdings by five Circuit Courts of Appeals that the plaintiffs' factual allegations are insufficient.[219] The resulting creation of a virtual immunity for defendants in public-figure libel cases distorts the intention of the drafters, transforms the 12(b)(6) motion to dismiss into a summary judgment motion, and violates the *Erie* doctrine. These consequences should be remedied.

At the outset, however, some might argue that no remedy is warranted because it *should* be difficult for public figures to sue for libel.[220] As the Eleventh Circuit opined, eliminating general pleading of actual malice furthers the aim articulated in *New York Times* of ensuring that media reporting is not chilled by the threat of frivolous litigation.[221] Moreover, in the current environment of largely unregulated social media discourse, epithet-laden political speech, and fake news, it can be argued that defamation is an outmoded concept, at least as applied to public figures. But if a state wants to eliminate its cause of action for defamation by public figures, it should do so as a matter of substance. The cause of action should not be ended by implication as a matter of pleading in federal court.

Assuming the effects of *Twiqbal* in public-figure libel cases should be remedied, the most thoroughgoing remedy would be for the Court to abandon the plausibility pleading standard altogether.[222] Unfortunately, however, more

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consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.").

[218] *See* Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009).

[219] *See supra* Part II.B.

[220] *See, e.g.*, Clay Calvert et al., *supra* note 2, at 83.

[221] *See Michel*, 816 F.3d at 695.

[222] President Donald J. Trump has advocated "open[ing] up" libel laws. Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 [https://perma.cc/CNV7-YSUF]. Although the precise nature of his proposal is unclear, he appears to be advocating that the Court abandon the actual malice standard for public-figure libel actions. *See* Sydney Ember, *Can Libel Laws Be Changed Under Trump?*, N.Y. TIMES (Nov. 13, 2016), http://www.nytimes.com/2016/11/14/business/media/can-libel-laws-be-changed-under-trump.html?_r=0 [https://perma.cc/AV52-63RZ]. Most scholars would agree that the Court is even more unlikely to abandon the *New York Times* standard than it is to abandon the *Twiqbal* standard. The Third Circuit has refused to apply the *Twiqbal* standard to Rule 9(c). In *Hildebrand v. Allegheny County*, 757 F.3d 99, 112 (3d Cir. 2014), the court declared that "[n]either *Iqbal* nor *Twombly* purport to alter Rule 9 . . . . [W]e therefore con-

than six years after *Iqbal* and several years after the failure of Congressional efforts to repeal the *Twiqbal* standard, it appears that plausibility is here to stay. The second-best solution would be for the Court to reverse its application of the plausibility standard to allegations of states of mind. This solution might be possible if the Court recognizes the unintended consequences of requiring plausibility in allegations of actual malice. When the Court is finally faced with a public-figure defamation case dismissed on *Twiqbal* grounds, it will have the opportunity to do so.[223]

In the meantime, the Circuit Courts of Appeals should avoid the fatal consequences of applying the plausibility standard to allegations of actual malice. They can recognize that facts alleged to support knowledge of falsity or reckless disregard of truth or falsity are not substitutes for proof. Instead, the courts can treat these fact allegations as door-openers to discovery. If a plaintiff alleges facts that give rise to an inference of objective unreasonableness, the court should not rule as a matter of law that these allegations are insufficient, even though they would be insufficient if presented as the only proof of actual malice at trial. The court should recognize that these types of facts are the only type readily available to plaintiffs without discovery and should allow these allegations to "nudge[] their claims across the line from conceivable to plausible."[224] Only by permitting public-figure plaintiffs access to discovery[225] can the intention of the drafters be effectuated and a violation of the *Erie* doctrine be avoided.

CONCLUSION

The line of cases discussed in this Article—*Schatz, Mayfield, Pippen, Biro,* and *Michel*—is the canary in the coal mine of plausibility pleading. If public-figure defamation actions cannot survive in the *Twiqbal* environment, this serves as a warning for every other type of case. That is, this line of cases demonstrates just how bad the *Twiqbal* pleading standard is by showing that plausibility pleading raises an insurmountable barrier to one class of plaintiffs. Now that general allegations of actual malice are labelled conclusory, a plaintiff must have insider access to a defendant's state of mind to satisfy the *New*

clude that the pleading of conditions precedent falls outside the strictures of *Iqbal* and *Twombly*."

[223] There is an argument that the Circuit Courts of Appeals have been misapplying the *Twiqbal* standard to allegations of actual malice. *Cf.* Steinman, *supra* note 216, at 364 (arguing that *Twombly* and *Iqbal* "should *not* be read to impose a more restrictive pleading standard" than before and that "lower federal courts are *wrong* to take a more restrictive approach to pleading"). If so, the Court can remedy the Circuits' approach when it takes up a public-figure libel case.

[224] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[225] At least one scholar has suggested that courts grant plaintiffs limited access to discovery when they are faced with a *Twiqbal* motion to dismiss; Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010).

York Times standard at the pleading stage. Unless the defendant has commissioned a neutral third-party review of its own reporting and editorial processes, as in *Eramo*, a public figure is unable to plead enough facts to show that the defendant believed the publication was false or acted with reckless disregard of its truth or falsity.

Commenting on *Schatz*, *Mayfield*, and *Pippen*, one defense lawyer opined:

> [C]ritics of the requirement that public figure defamation plaintiffs plead facts plausibly supporting "actual malice" fault really are critics of *Iqbal* and *Twombly*. If you accept the premise that every litigant has an obligation to allege facts sufficient to render a claim "plausible on its face" in order to survive a motion to dismiss and thereby "unlock the doors of discovery" and impose substantial burdens on a defendant there is no reason to treat speech claims any differently from other claims.[226]

There are good reasons not to like *Twiqbal* generally. But there are even better reasons to dislike the application of the plausibility standard to allegations of actual malice by public-figure libel plaintiffs. Like other classes of plaintiffs, and perhaps more than most types of plaintiffs, the public-figure defamation plaintiff must unlock the doors of discovery to get the facts supporting the defendant's state of mind. Even the Court whose solicitude for the press led it to create the actual malice standard did so against a backdrop of general pleading of actual malice, and did so without undue concern for subjecting the defendants to the costs of discovery. As applied by the Circuit Courts of Appeals, *Twiqbal* distorts the meaning of Rule 9(b), creates a catch-22 for public-figure libel plaintiffs, and results in a violation of the *Erie* doctrine in states that have not adopted plausibility pleading. Supreme Court review of a public-figure libel case dismissed on *Twiqbal* grounds will indicate how committed the Court is to plausibility pleading.

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[226] Clay Calvert et al., *supra* note 2, at 85 (quoting Chad Bowman, partner, Levine Sullivan Koch & Schulz LLP, email from Bowman to authors (Sept. 23, 2013)).