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# AMENDED COMPLAINTS POST-TWIQBAL: WHY LITIGANTS SHOULD STILL GET A SECOND BITE AT THE PLEADING APPLE

Dane Westermeyer

*Abstract:* The Supreme Court’s landmark decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* have had a serious effect on the way that Rule 12(b)(6) Motions to Dismiss are handled in federal courts across the country. In the five years since *Iqbal* was handed down, scholars and practitioners alike have discussed the merits and effects of this decision at length. However, there has been very little—if any—discussion on the relationship between amended complaints and original complaints when it comes to this newly-minted plausibility standard. This Comment aims to examine and critique a post-*Twiqbal* practice regarding amended complaints that is beginning to emerge in the Ninth Circuit. A number of district courts in the Ninth Circuit have held that courts may compare amended complaints to their predecessors as a part of the *Twiqbal* plausibility analysis. This Comment argues that this practice is not in line with the intent of *Twiqbal* nor with available precedent on amended complaints. As such, courts should refrain from adopting this practice going forward, and the Court of Appeals for the Ninth Circuit should strike down this emerging practice if presented with a chance to do so.

## INTRODUCTION

*Bell Atlantic Corp. v. Twombly*<sup>1</sup> and *Ashcroft v. Iqbal*<sup>2</sup> are amongst the most cited Supreme Court decisions of all time.<sup>3</sup> These two decisions memorialized a new era of pleading in federal courts: “plausibility” pleading.<sup>4</sup> Scholars have widely commented on the fairness or unfairness of the *Twombly* and *Iqbal* (“*Twiqbal*”) pleading standard.<sup>5</sup>

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1. 550 U.S. 544 (2007).

2. 556 U.S. 662 (2009).

3. According to Westlaw’s KeyCite service, as of October 2014, *Twombly* had been cited by over 106,000 cases, while *Iqbal* had been cited in over 83,000 cases.

4. See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) (“Notice pleading is dead. Say hello to plausibility pleading.”).

5. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 885 (2010) (“*Iqbal* is a major decision with an ill-advised holding and a poorly reasoned opinion.”); Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1632 (2012) (“[A]ll the Supreme Court did in *Twombly* and *Iqbal* was catch up to what lower courts had been doing for some time.”); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 5, 127 (2010) (noting *Twiqbal* has “swung the pendulum” too far away from the

However, legal scholars have written very little about the effect that this new pleading standard will have on the significance of amended pleadings.

Pre-*Twigbal*, the rules regarding amended complaints were fairly clear in circuits across the country.<sup>6</sup> Amended pleadings are governed by Rule 15 of the Federal Rules of Civil Procedure.<sup>7</sup> That Rule instructs courts to “freely give leave [to amend pleadings] when justice so requires.”<sup>8</sup> The Pre-*Twigbal* case law on Rule 15 and amended pleadings dictated that an amended pleading took its predecessor off the table.<sup>9</sup> In other words, once a party filed an amended complaint, the previous complaint was no longer of any use to the court.<sup>10</sup>

Post-*Twigbal*, the rules in the Ninth Circuit are not so clear. A few district courts in the Ninth Circuit have begun to compare amended complaints to their predecessors on a Rule 12(b)(6) motion to dismiss.<sup>11</sup> To better understand this practice, consider a situation in which an amended complaint contains allegations that significantly deviate from the allegations set forth in the original complaint. Under this recent precedent taking hold in the Ninth Circuit, if there are troublesome contradictions between these two pleadings, courts may use that contradiction against the plaintiff in its plausibility analysis.<sup>12</sup> Some courts that adopt this approach argue that *Twigbal*'s new pleading standard justifies this practice.<sup>13</sup>

Although this approach may have benefits, it ultimately undermines the original purpose behind amended pleadings. Rule 15 is in place in order to allow “maximum opportunity for each claim to be decided on its

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pleading values articulated in the 1938 Federal Rules of Civil Procedure); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1139 (2010) (“*Twombly* and *Iqbal* recognize that judges must be empowered to manage litigation at the pretrial level just as they are throughout other phases of litigation.”); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1871 (2008) (arguing that the Court's new standards for dismissal under *Twombly* violate the Seventh Amendment).

6. See generally 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1476 (3d ed. 1998).

7. FED. R. CIV. P. 15.

8. *Id.* at 15(a)(2). For more in-depth information on amended complaints, see *infra* Part 0.

9. See *infra* notes 110–113 and accompanying text.

10. One exception to this rule comes from Federal Rule of Civil Procedure 15(c), which governs when a complaint “relates back” for purposes of statutes of limitations. FED. R. CIV. P. 15(c). An in-depth analysis of Rule 15(c) is not appropriate for this Comment, however.

11. See *infra* Part 0.

12. See *infra* Part III.B.1.

13. See *infra* Part III.B.1.

merits rather than on procedural technicalities.”<sup>14</sup> This suggests that plaintiffs need amendments in order to have a “second bite” at the pleading apple—so to speak. Yet, under this recent, emerging Ninth Circuit practice, it appears that plaintiffs may pay a price for this second bite. *Twiqbal* certainly stands for the proposition that plaintiffs must come to court with a well-pleaded case,<sup>15</sup> but nothing in *Twombly* or *Iqbal* expressly requires a court to infringe on the relationship between original complaints and subsequent pleadings.<sup>16</sup>

This Comment argues that courts should decline to adopt this comparative approach to amended complaints for two reasons. First, from a stare decisis viewpoint, this practice is in tension with a large body of case law defining the purpose of amended complaints. Second, it levies undue pressure on plaintiffs to plead their complaints with particularity and foresight. As such, the Court of Appeals for the Ninth Circuit should clarify this area of the law and hold that plausibility analysis does not alter the long-standing relationship between original and amended complaints.

Part I of this Comment offers an overview of *Bell Atlantic Corp. v. Twombly*, *Ashcroft v. Iqbal*, and the early evidence regarding the effects this new pleading standard has had on federal litigation. Part II explores the historical and jurisprudential background surrounding amended complaints. Part III outlines how Post-*Twiqbal* district courts are responding to amended complaints. Finally, Part IV lays out an argument for why this new approach should not be widely adopted.

## I. THE SIGNIFICANCE OF *BELL ATLANTIC CORP. V. TWOMBLY* AND *ASHCROFT V. IQBAL*

*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* marked the official end of the more liberal standard of “notice pleading” championed by *Conley v. Gibson*,<sup>17</sup> and ushered in the era of “plausibility pleading.”<sup>18</sup> Empirical studies are still emerging on what

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14. See 6 WRIGHT, MILLER, & KANE, *supra* note 6, § 1471.

15. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (requiring litigants file complaints with “well-pleaded factual allegations” that lead to a plausible claim for relief); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (noting that plaintiffs have to be able to plead “enough fact to raise a reasonable expectation that discovery will reveal evidence” of the claim asserted).

16. See generally *Iqbal*, 556 U.S. at 662; *Twombly*, 550 U.S. at 544. Both *Iqbal* and *Twombly* are silent on the relationship between amended complaints and original complaints.

17. 355 U.S. 41 (1957).

18. See Spencer, *supra* note 4.

effect—if any—this heightened standard actually has on litigants.<sup>19</sup> Regardless, the sheer amount of citations and scholarly attention that these decisions have drawn suggests that these decisions may be amongst the most important that the Court has authored for civil litigants.<sup>20</sup> This Comment is not intended to be an in-depth discussion of the merits—or lack thereof—of the *Twiqbal* movement.<sup>21</sup> However, a basic understanding of the effect that *Twiqbal* has had on federal litigation provides context for the controversy over amended complaints arising in the Ninth Circuit.

### A *Brief History of Pleading Standards*

American pleading standards have gone through a number of iterations before arriving at *Twiqbal*'s plausibility pleading standard. American pleading began with a system (inherited from England) known as common law pleading.<sup>22</sup> By the middle of the nineteenth century, problems with the rigid structure of common law pleading led to a new system: code pleading.<sup>23</sup> In the 1930s, the new Federal Rules of Civil Procedure abandoned code pleading in favor of what eventually became known as notice pleading.<sup>24</sup> Finally, with the decision rendered in *Iqbal*, notice pleading was pushed out in favor of plausibility pleading.<sup>25</sup> Each standard is briefly discussed below.

#### 1. *Common Law Pleading and Code Pleading*

The earliest form of pleading practiced in American courts was known as common law pleading, which was developed in the English

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19. See generally JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ON CIVIL RULES (2011); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2012); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012).

20. See *supra* note 3 (discussing amount of citations that *Twombly* and *Iqbal* have garnered since publication); *supra* note 5 (discussing scholarly attention that *Twiqbal* has received).

21. For persuasive and oft-cited examples of authors that have looked at this subject, see Miller, *supra* note 5, and Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

22. James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1273 (2010).

23. *Id.*

24. *Id.* at 1277.

25. See Spencer, *supra* note 4.

courts of common law.<sup>26</sup> Generally, common law pleading required that parties allege a single “form of action” that would govern the lawsuit.<sup>27</sup> This form of action determined the court’s choice of law and the procedural steps that court was permitted to take.<sup>28</sup> In response, a defendant was allowed to: (1) contest the legal sufficiency of the plaintiff’s factual allegations; (2) contest the truth of a factual assertion made by the plaintiff; or (3) accept the factual and legal allegations, but assert a new ground under which the defendant is not responsible.<sup>29</sup> Regardless of which route the defendant chose to take, the court could only decide one issue.<sup>30</sup> This made early decisions quite simple and straightforward, but also extremely limited.<sup>31</sup>

By the 1850s, American courts had begun to abandon common law pleading in favor of a new standard of code pleading famously championed by the State of New York and David Dudley Field.<sup>32</sup> Code pleading abolished the old “form of action” requirements.<sup>33</sup> Instead, code pleading required that the complaint contain “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”<sup>34</sup> A defendant was required to respond “to each allegation of the complaint controverted by the defendant” with “a specific denial thereof, or of any knowledge thereof sufficient to form a belief.”<sup>35</sup> Additionally, a defendant was allowed to allege any new, related defense to the plaintiff’s complaint.<sup>36</sup> Code pleading gave both plaintiffs and defendants freedom to add additional claims and defenses, but eventually that standard also became too unwieldy to yield efficient or fair results.<sup>37</sup>

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26. Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 519 (1925).

27. See Maxeiner, *supra* note 22, at 1271.

28. *Id.*

29. *Id.* at 1271–72.

30. *Id.* at 1272 (“No matter which course the parties chose, in classic common law pleading they could present only one issue to the court for decision.”).

31. *Id.*

32. *Id.* at 1273–74.

33. *Id.* at 1273.

34. An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N.Y. Laws 497, 521 (1848).

35. *Id.* § 128(1).

36. *Id.* § 128(2).

37. See Maxeiner, *supra* note 22, at 1275.

## 2. *The Move to Notice Pleading*

By the 1930s, it was clear that code pleading was causing many of the same problems that led to the demise of common law pleading.<sup>38</sup> The 1938 revision to the Federal Rules of Civil Procedure adopted a notice pleading system to try to cure these pleading problems.<sup>39</sup> Judge Charles E. Clark, the principal drafter of the new federal rules, suggested that the solution to the problems of common law pleading and code pleading was to “expect less” from pleadings.<sup>40</sup> Not surprisingly, the new federal rules that Judge Clark helped to draft “massively deemphasize[d] the role of pleadings.”<sup>41</sup>

The Federal Rules of Civil Procedure only require that a complaint contain “a short and plain statement of the claim.”<sup>42</sup> This was not meant to be a demanding standard. *Dioguardi v. Durning*,<sup>43</sup> a familiar example from many first-year Civil Procedure courses, illustrates just how permissive notice pleading could be. The *Dioguardi* plaintiff submitted a home-drafted complaint, in broken English, that made only vague factual assertions without any real legal presentation.<sup>44</sup> Judge Clark, writing for the Second Circuit Court of Appeals, indicated that these new rules did not require that a plaintiff state enough facts to “constitute a cause of action.”<sup>45</sup> Clark then held, “[w]e think that, however inartistically they may be stated, the plaintiff has disclosed his claims.”<sup>46</sup> Seventy years later, *Dioguardi* resonates as an example of just how liberal pleading standards were meant to be under notice pleading.

*Dioguardi* is a well-known notice pleading case because of its unique facts, but *Conley v. Gibson*<sup>47</sup> provides a more accurate depiction of pre-*Twiqbal* pleading.<sup>48</sup> *Conley* was a class action suit brought by African American members of a railway organization against that organization, a

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38. *See id.* at 1276.

39. *Id.* at 1277.

40. *See* Clark, *supra* note 26, at 542.

41. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003).

42. FED. R. CIV. P. 8(a)(2).

43. 139 F.2d 774 (2d Cir. 1944).

44. *Id.* at 774–75.

45. *Id.* at 775.

46. *Id.*

47. 355 U.S. 41 (1957).

48. *See* Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 73 (2008) (“For fifty years, *Conley v. Gibson* stood as the landmark decision on pleading under the Federal Rules of Civil Procedure . . . , establishing that a complaint is sufficient to initiate a lawsuit if it gives fair notice of the plaintiff’s claim.”).

local union, and a number of officers within both.<sup>49</sup> The named-plaintiff's complaint was brief and conclusory.<sup>50</sup> However, the Court upheld the validity of that filing, stating that, “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”<sup>51</sup> Instead, pleadings need only “give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests” in order to survive a Rule 12(b)(6) motion to dismiss.<sup>52</sup> At the time *Conley* was decided, the Court felt it was enough to have liberal discovery and other pretrial tools to help litigants flesh out their claims.<sup>53</sup> Under a notice pleading standard, the general rule was that a 12(b)(6) motion should only be granted if it was clear from the face of the complaint that the plaintiff could prove “no set of facts in support of his claim that would entitle him to relief.”<sup>54</sup> That attitude toward pleading would survive for nearly fifty years.

### 3. *Plausibility Analysis: The Twiqbal Movement*

*Bell Atlantic Corp. v. Twombly* was the first Supreme Court decision to signal the end of the notice pleading era.<sup>55</sup> In *Twombly*, the plaintiffs filed a class action antitrust suit against major telecommunications providers, alleging a conspiracy in restraint of trade.<sup>56</sup> The complaint alleged both parallel conduct and an actual agreement to restrain trade.<sup>57</sup> In spite of these allegations, the Court dismissed this complaint under Rule 12(b)(6).<sup>58</sup> In explaining its decision, the Court first retired the “no set of facts” language from *Conley*.<sup>59</sup> Instead, the Court required complaints to plead “enough facts to state a claim to relief that is plausible on its face.”<sup>60</sup> The complaint in *Twombly* failed to meet that

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49. *Id.* at 42.

50. *Id.*

51. *Id.* at 47.

52. *See id.*

53. *Id.* at 47–48.

54. *Id.* at 45–46.

55. Because Rule 8 of the Federal Rules of Civil Procedure is still alive and well, federal courts are still governed under a “notice pleading” regime. The purpose of this Comment is not to argue that our current form of pleading is no longer “notice pleading” as Rule 8 defines it. Instead, I equate “notice pleading” with pre-*Twiqbal* pleading and “plausibility pleading” with post-*Twiqbal* pleading solely for the purpose of clearly marking the change brought about by these two decisions.

56. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007).

57. *Id.* at 550–51.

58. *Id.* at 570.

59. *See id.* at 561–63.

60. *Id.* at 570.

standard.<sup>61</sup> According to the Court, the allegations in the complaint may have made the conspiracy claim “conceivable,” but it was not “plausible.”<sup>62</sup> As such, the case was dismissed, and plausibility analysis was born.

After *Twombly*, the only remaining question was whether this new plausibility standard would be reserved specifically for antitrust actions. *Ashcroft v. Iqbal* quickly dispelled any notion that the Court intended to impose such a limit.<sup>63</sup> The *Iqbal* plaintiff was arrested and taken into federal custody in the wake of the September 11 terrorist attacks.<sup>64</sup> The plaintiff filed his complaint against various high-level government officials, arguing that he was deprived of various constitutional protections while in federal custody.<sup>65</sup> The issue that eventually reached the Supreme Court was similar to the question addressed in *Twombly*: “Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights[?]”<sup>66</sup>

Ultimately, the Court held that the plaintiff had not pled enough facts to survive a 12(b)(6) motion to dismiss.<sup>67</sup> In doing so, the Court stated that the plausibility rule announced in *Twombly* would apply to all civil actions.<sup>68</sup> *Iqbal* echoed *Twombly* by noting that a plausible complaint requires “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>69</sup> Determining the difference between “conceivable” and “plausible” pleadings is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>70</sup> In *Iqbal*, the Court determined that the plaintiff’s complaint “has not ‘nudged [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”<sup>71</sup> As such, his complaint was dismissed.<sup>72</sup>

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61. *Id.*

62. *Id.*

63. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

64. *Id.* at 666.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 684.

69. *Id.* at 678.

70. *Id.* at 679.

71. *Id.* at 680 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

72. *See id.* at 687. The Court remanded the case to the Court of Appeals, with instructions for that court to determine whether to remand the case back to the District Court so that the plaintiff could amend. *Id.* The Court of Appeals remanded to the District Court. *Ashcroft v. Iqbal*, 574 F.3d 820,

### B. *Attempts at Abrogation*

Scholars and legislators alike have harshly criticized the plausibility analysis championed by *Twombly* and *Iqbal*. For example, one scholar has deemed this new standard unconstitutional,<sup>73</sup> while others have criticized the standard as bad policy.<sup>74</sup> This criticism has led to repeated attempts to abrogate this ruling in Congress.<sup>75</sup> To date, however, none of these attempts have yielded any change in *Twombly* and *Iqbal*'s effect.

It also appears as though the Federal Rules of Civil Procedure will not be amended to override this new plausibility standard. At the time of this writing, the Advisory Committee on the Federal Rules of Civil Procedure has issued its proposed amendments for the 2016 Federal Rules of Civil Procedure.<sup>76</sup> Although, at the time of this writing, those amendments are currently still in a public comment stage, no amendments to Rule 8 or Rule 12 have been proposed.<sup>77</sup>

In short, for the time being, it appears as though plausibility pleading is here to stay. As such, litigants and courts will have to accept this new pleading standard.

### C. *Plausibility Pleading: What Does It Mean for Litigants?*

Legal theorists have not yet come to an agreement on the effect that plausibility pleading has had on federal court litigation in terms of increased dismissals and added difficulty in accessing discovery.<sup>78</sup> This

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822 (2d Cir. 2009). The case ultimately settled out of court. See Chad Howell, Note, *Qualified Discovery: How Ashcroft v. Iqbal Endangers Discovery When Civil Rights Plaintiffs File Suit Against Government Officials*, 21 GEO. MASON U. C.R. L.J. 299, 310 (2011).

73. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 38 (2010).

74. See, e.g., Miller, *supra* note 5, at 34.

75. See, e.g., Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. §§ 2–3 (2010); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2(a) (2009); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009). Extensive analysis of the congressional debates over these bills is beyond the scope of this Comment. For a concise summary of these bills, consider Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415, 425–27 (2010). Alternatively, for a primary source on the congressional debate over this issue, see generally *Open Access to Courts Act of 2009: Hearing on H.R. 4115 Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009).

76. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 309–18 (2014), available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>.

77. *Id.*

78. For examples of some studies on this subject, see *supra* note 19.

is not surprising; any statistical study aiming to quantify the effects of a decision like *Iqbal* is bound to face challenges.<sup>79</sup> Plus, the decision is fairly recent. Generally speaking, however, the early evidence shows that more claims are being dismissed with leave to amend. This suggests that the amended complaint may be more important than ever before for litigants trying to gain access to the courts.

The Federal Judicial Center (FJC) conducted and issued one of the most prominent studies on the effects of *Iqbal*.<sup>80</sup> Although the study found increases in the percentage of motions filed,<sup>81</sup> and in the percentage of cases in which dismissal was granted in full or in part,<sup>82</sup> the FJC was quick to point out that these results were not statistically significant—suggesting that perhaps *Twiqbal* has not had the effect that legal scholars expected after all.<sup>83</sup> This conclusion, however, has been widely criticized and countered in the literature.<sup>84</sup>

It seems that *Iqbal* has had little effect on the likelihood that a motion to dismiss will be granted *without* leave to amend.<sup>85</sup> But the same cannot be said for dismissals granted *with* leave to amend. The FJC study found that, from 2005–2006, the rate at which motions to dismiss were granted with leave to amend was around twenty-one percent; post-*Iqbal*, from 2009–2010, that rate rose to thirty-five percent.<sup>86</sup> Similar increases were seen across other studies.<sup>87</sup> Though this statistical evidence is far from concrete, the takeaway from this data is that—in the year after *Iqbal*—more claims were being dismissed, but most judges preferred to give plaintiffs leave to amend their complaint.

Ultimately, *Twiqbal*'s effects are not yet clear from a statistical standpoint. However, determining *Twiqbal*'s exact impact is not crucial

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79. See CECIL ET AL., *supra* note 19, at 22–23 (noting that study was not able to account for certain types of cases or certain changes in pleading practice); Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1366 n.140 (2010) (arguing that measuring the effect of *Twiqbal* cannot account for the cases that are not filed *because of* plausibility pleading); Hoffman, *supra* note 19, at 32–33 (pointing out that studies could not detect the number of “meritorious claim[s]” that were dismissed due to *Twiqbal*'s heightened standard).

80. See generally CECIL ET AL., *supra* note 19.

81. *Id.* at 9 tbl.1.

82. *Id.* at 14 tbl.4.

83. *Id.* at 21.

84. See Hoffman, *supra* note 19, at 34 (arguing that there are “reasons to be concerned that the [FJC] study may be providing us an incomplete picture of actual Rule 12(b)(6) activity”); Moore, *supra* note 19, at 607 (arguing that the FJC study “minimizes *Iqbal*'s impact in a variety of ways”).

85. See CECIL ET AL., *supra* note 19, at 14 tbl.4; Moore, *supra* note 19, at 613 tbl.1.

86. See CECIL ET AL., *supra* note 19, at 14 tbl.4.

87. See Moore, *supra* note 19, at 613 tbl.1.

for this Comment. Instead, the key takeaway from this early evidence is the added emphasis on dismissals with leave to amend. A follow-up to the FJC study noted that sixty-six percent of the study's plaintiffs who had their claims dismissed with leave to amend actually amended.<sup>88</sup> If a higher percentage of claims are being dismissed with leave to amend, and around two-thirds of these dismissals lead to amendments, then the amended complaint is perhaps more important for litigants than it ever has been before. In fact, the updated FJC study indicated that "the opportunity to present an amended complaint reduced the overall rate at which movants prevail [on a Rule 12(b)(6) motion]."<sup>89</sup> As such, the way in which courts analyze amended complaints going forward could have a major effect on access to federal courts.

## II. AMENDED COMPLAINTS: A SECOND BITE AT THE PLEADING APPLE

The rules governing amended complaints are relatively short and straightforward. Amended complaints are governed by Rule 15 of the Federal Rules of Civil Procedure.<sup>90</sup> Rule 15 allows for "liberal amendment in the interests of resolving cases on the merits."<sup>91</sup> Specifically, Rule 15(a) dictates that a party may amend its pleadings twenty-one days after serving it,<sup>92</sup> or "with the opposing party's written consent or the court's leave."<sup>93</sup> The court is encouraged to give leave freely when justice requires.<sup>94</sup>

Historically, the rules on amended complaints changed along the same lines that pleading standards did. Under common law pleading, a litigant generally had very little freedom to amend.<sup>95</sup> Any amendment that attempted to plead a new cause of action—or even to change just the form of the action—was not allowed.<sup>96</sup> Code pleading expanded the permissible scope of pleading amendments.<sup>97</sup> Most courts allowed some

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88. JOE S. CECIL ET AL., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RIGHTS 3 n.7 (2011).

89. *Id.* at 4.

90. FED. R. CIV. P. 15.

91. 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.02 (3d ed. 1997).

92. FED. R. CIV. P. 15(a)(1)(A).

93. *Id.* 15(a)(2).

94. *Id.*

95. See 6 WRIGHT, MILLER, & KANE, *supra* note 6, § 1471.

96. *Id.*

97. *Id.*

form of amendment,<sup>98</sup> but some continued to deny amendments that attempted to change the cause of action.<sup>99</sup> In the years preceding the new 1930s federal rules, amendment in federal courts was governed by 28 U.S.C. § 777.<sup>100</sup> That statute essentially gave federal courts complete control over the amendment process, and allowed courts to exhibit much more flexibility than was previously allowed under common law and code pleading regimes.<sup>101</sup> This historical development of the rules on amended complaints ultimately led to the creation of Rule 15—which now governs amended complaints in federal courts.<sup>102</sup>

Generally, the goals of the original Rule 15 were similar to the intent driving the rule today. Rule 15 provides a litigant with the “maximum opportunity for each claim to be decided on its merits.”<sup>103</sup> The Rule was designed to reflect the fact that pleadings were not intended to carry the burden of fact revelation and issue formation under the new federal rules.<sup>104</sup> Ultimately, in the eighty years since the adoption of the federal rules, the language of Rule 15 has mostly remained consistent—regardless of the standard of pleading that was in place at the time.

Litigants need amended pleadings in order to have every chance to have their claim resolved on the merits.<sup>105</sup> Amendments give parties a chance to assert a matter that was unknown or perhaps overlooked at the time the original complaint was filed.<sup>106</sup> Amendments are commonly used to cure a defective pleading,<sup>107</sup> or to correct and bolster insufficiently stated claims.<sup>108</sup> Also, a party may amend to add,<sup>109</sup> substitute,<sup>110</sup> or drop<sup>111</sup> parties in the litigation.

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98. *Id.*

99. *Id.*

100. 28 U.S.C. § 777 (1934) (“[A]ny court of the United States . . . may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.”); *see also* 6 WRIGHT, MILLER, & KANE, *supra* note 6, § 1471.

101. *See* 6 WRIGHT, MILLER, & KANE, *supra* note 6, § 1471.

102. Rule 15 was derived from a number of sources. *See generally* FED. R. CIV. P. 15 advisory committee’s note (1937). These sources include the Equity Rules of 1912, various state codes and practices, and even some English rules. *Id.*

103. *See* 6 WRIGHT, MILLER, & KANE, *supra* note 6, § 1471, at 587.

104. *Id.*

105. *Id.*

106. *See* Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 703 (2d Cir. 1985).

107. *See* 6 WRIGHT, MILLER, & KANE, *supra* note 6, § 1474.

108. *Id.*

109. *E.g.*, Wilger v. Dep’t of Pensions & Sec. for Ala., 593 F.2d 12, 13 (5th Cir. 1979).

110. *E.g.*, Goodman v. Mead Johnson & Co., 534 F.2d 566, 569 (3d Cir. 1976).

111. *E.g.*, Samaha v. Presbyterian Hosp., 757 F.2d 529, 531 (2d Cir. 1985).

Before *Twiqbal*, certain rules regarding the relationship between amended complaints and original complaints were uniform and fairly simple. Under pre-*Twiqbal* Rule 15(a), an amended pleading superseded an original for the remainder of the action—unless, of course, that amended pleading is later amended.<sup>112</sup> This means that the original complaint is essentially a “dead letter”<sup>113</sup> that performs no function in the case.<sup>114</sup> Therefore, any subsequent motion must be directed at the amended pleading instead of the original.<sup>115</sup> An amended pleading represented a second bite at the pleading apple.

These rules have largely been the norm since the incipency of the federal rules in the 1930s. However, it is not entirely clear what effect—if any—the Court’s ruling in *Twombly* and *Iqbal* will have on these long-established rules.

### III. *TWIQBAL* AND THE AMENDED COMPLAINT: CHANGES IN THE NINTH CIRCUIT

At the time of this Comment’s publication, it has been almost five years since the Court handed down *Ashcroft v. Iqbal*. In those five years, courts, litigants, and scholars alike have focused their attention almost entirely on plausibility pleading and the motion to dismiss under Rule 12(b)(6).<sup>116</sup> The relationship between plausibility pleading and amended pleadings has received very little attention in the legal field to date. However, courts in the Ninth Circuit have begun changing the rules on amended complaints in light of *Twiqbal*’s new pleading standard. With that change in mind, the time has come to consider whether this kind of change is warranted.

#### A. *The Issue: Does Twiqbal Justify Amending the Rules on Amended Complaints?*

The standard precedent governing amended complaints was formed during the era in which notice pleading reigned supreme. As litigants’ reliance on *Twiqbal* and the plausibility standard develops, challenges to

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112. See 6 WRIGHT, MILLER, & KANE, *supra* note 6, § 1476.

113. *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008).

114. *E.g.*, *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). One exception to this rule is the date on which the original complaint was filed, which is important for determination of whether the complaint “relates back” under Rule 15(c). FED. R. CIV. P. 15(c).

115. *E.g.*, *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991).

116. For a few examples of articles focusing on the validity of plausibility pleading, see sources *supra* note 5.

the traditional rules governing amendments are starting to arise.<sup>117</sup> These challenges have even gained some precedential momentum in the Ninth Circuit.<sup>118</sup> This evolution is particularly predictable given the increase in the number of complaints that are being dismissed with leave to amend.<sup>119</sup>

If courts decide to align with the Ninth Circuit and rewrite the common law rules governing amended complaints, the effects will not go unnoticed. If an amended complaint no longer completely supersedes its predecessor, then courts may compare original and amended complaints for the purposes of plausibility analysis. In that world, amending to add parties, to pursue new causes of action, and to plead additional facts could be enough for a court to dismiss an amended complaint as implausible.<sup>120</sup>

The *Iqbal* decision is notably silent on the effect amended complaints have in the world of plausibility analysis.<sup>121</sup> This is not surprising. Although the complaint that the Court ultimately dismissed in *Iqbal* had been amended, it does not appear that the Court had any interest in examining—and potentially rewriting—the rules on amended complaints. The fact that the plaintiff had filed an amended complaint was never mentioned by the *Iqbal* Court.<sup>122</sup> Therefore, district courts and courts of appeals are largely working with a clean slate when it comes to the relationship between *Twiqbal* and amended complaints.

With *Twombly*—and, even more so, *Iqbal*—the Court threw open the door to pleading reform. Therefore, if there was ever a time to change the way that amended complaints interact with their predecessors, now would be the time for courts to do so.

### *B. Amended Complaints in the Ninth Circuit: The Comparison and Non-Comparison Approaches*

Challenges to the long-held presumptions surrounding Rule 15 and amended complaints have already begun to gain a foothold in the Ninth Circuit.<sup>123</sup> In the past few years, a number of district courts have

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117. It appears as though the Ninth Circuit has already begun to take on challenges of this nature. See *infra* Part III.B.

118. See *infra* Part III.B.

119. See *supra* Part 0.

120. For examples of the effects that this might have, see *infra* Part 0.

121. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

122. *Id.*

123. See *Kennedy v. Wells Fargo Bank, N.A.*, No. C 11-0675 MMC, 2011 WL 3359785, at \*5 (N.D. Cal. Aug. 2, 2011); *Fasugbe v. Willms*, No. CIV. 2:10-2320 WBS KJN, 2011 WL 2119128,

compared allegations in an amended complaint to those filed in an original complaint on a 12(b)(6) motion to dismiss.<sup>124</sup> For simplicity, I will refer to this approach as the “comparison approach.” This comparison approach has begun to develop in the Ninth Circuit,<sup>125</sup> and the defense bar is slowly taking note.<sup>126</sup> Still, not all courts in the Ninth Circuit are adopting the comparison approach; some have held steady and continue to apply the traditional doctrines.<sup>127</sup> The approach taken by these courts will be referred to as the “non-comparison approach” throughout the remainder of this Comment.

### 1. “Comparison Approach” Decisions

Comparison approach courts have altered the traditional rules on amended complaints by comparing amended complaints to their predecessors on a 12(b)(6) motion to dismiss. Three district court decisions from the Ninth Circuit exemplify the comparison approach: *Stanislaus Food Products Co. v. USS-POSCO Industries*,<sup>128</sup> *Cole v. Sunnyvale*,<sup>129</sup> and *Fasugbe v. Willms*.<sup>130</sup>

*Stanislaus* was the first published district court case to adopt the comparison approach. In that case, a California tomato canner sued various manufacturers of tin-mill products, alleging various antitrust violations.<sup>131</sup> One of the plaintiff’s major claims was that the defendants had entered into an agreement to restrain trade by allocating the tin mill

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at \*5 (E.D. Cal. May 26, 2011); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1075 (E.D. Cal. 2011); *Cole v. Sunnyvale*, No. C-08-05017 RMW, 2010 WL 532428, at \*4 (N.D. Cal. Feb. 9, 2010).

124. *See infra* Part 0.

125. *See infra* Part 0.

126. A number of defendant briefs in the Ninth Circuit have begun to argue that courts may compare amended complaints to original complaints as a part of the plausibility analysis. *See, e.g.*, Defendant General Mills Inc.’s Notice of Motion & Motion to Dismiss Plaintiff’s Second Amended Complaint at 17, *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097 (N.D. Cal. 2012) (No. 11-CV-5056-SC) (“The ‘context-specific’ inquiry required by *Iqbal* includes a comparison of facts alleged in prior complaints to those in the operative complaint.”); Defendant BNSF Railway Co.’s Motion to Dismiss Plaintiff’s First Amended Complaint at 20, *Oxbow Carbon & Minerals v. Union Pac. R.R. Co.*, 926 F. Supp. 2d 36 (D.D.C. 2013) (No. 1:11-cv-01049 (PLF)) (arguing that the court should take account of the “blatant inconsistencies” between the first and second amended complaints to evaluate the plausibility of the plaintiff’s claims).

127. *See infra* Part 0.

128. 782 F. Supp. 2d 1059 (E.D. Cal. 2011).

129. No. C-08-0517 RMW, 2010 WL 532428 (N.D. Cal. Feb. 9, 2010).

130. No. CIV. 2:10–2320 WBS KJN, 2011 WL 2119128 (E.D. Cal. May 26, 2011).

131. *Stanislaus*, 782 F. Supp. 2d at 1062.

products market.<sup>132</sup> The plaintiff alleged that his agreement had caused significant negative effects in this market.<sup>133</sup> In the plaintiff's first amended complaint (FAC), the plaintiff pleaded that this agreement began in 1986.<sup>134</sup> However, that claim was barred due to the statute of limitations.<sup>135</sup> As such, plaintiff amended his pleading, and in the second amended complaint (SAC) the alleged date of the agreement was 2006.<sup>136</sup> Ultimately, the court considered these factual allegations insufficient in light of *Twombly* because they were not sufficient enough to make the plaintiff's case plausible.<sup>137</sup> Therefore, under *Twombly*, that claim was dismissed.<sup>138</sup>

This holding, itself, is not significant or startling. But the fact that the court took note of the inconsistencies between the FAC and SAC is. The court recognized that "there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations."<sup>139</sup> However, the court also stated that "[t]he Court does not ignore the prior allegations in determining the plausibility of the current pleadings."<sup>140</sup> Ultimately, the district court decided that the plaintiff was free to plead this case as he wished, but the inconsistencies between the FAC and the SAC meant that the plaintiff needed to plead additional facts to make his allegations plausible.<sup>141</sup>

A district court in the Northern District of California reached a similar result in *Cole v. Sunnyvale*.<sup>142</sup> In that case, the plaintiff brought a civil rights claim against the City of Sunnyvale and members of the Sunnyvale police department for actions that arose out of a warrantless search of the plaintiff's home.<sup>143</sup> A number of the plaintiff's claims under 42 U.S.C. § 1983 were dismissed in the district court's order.<sup>144</sup> Again, the court relied on previous pleadings in order to reach this

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132. *Id.* at 1063.

133. *Id.*

134. *Id.* at 1075.

135. *Id.*

136. *Id.*

137. *Id.* at 1076.

138. *Id.* at 1081.

139. *Id.* at 1076 (citing *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007)).

140. *Id.* at 1075 (citation omitted).

141. *Id.* at 1076.

142. No. C-08-05017 RMW, 2010 WL 532428 (N.D. Cal. Feb. 9, 2010).

143. *Id.* at \*1.

144. *Id.* at \*7.

conclusion.<sup>145</sup> The court explicitly stated that it may “consider the prior allegations [from earlier complaints] as part of its ‘context-specific’ inquiry based on its judicial experience and common sense to assess whether the Third Amended Complaint plausibly suggests an entitlement to relief, as required under *Iqbal*.”<sup>146</sup> The court then proceeded to consider portions of a letter that was attached as an exhibit to the original complaint, but had been detached from later amendments to the complaint.<sup>147</sup> Ultimately, the court concluded that “[i]n consideration of the facts alleged in the Third Amended Complaint, *the facts alleged in prior iterations of the pleading*, and [other case-specific facts],” the plaintiff had not pled enough to plausibly state a claim for relief.<sup>148</sup> As such, the plaintiff’s claim was dismissed.<sup>149</sup>

Finally, in *Fasugbe v. Willms*, the plaintiffs brought suit in the Eastern District of California based on state law against a seller of online auction currency and its affiliates.<sup>150</sup> The claims alleged revolved around violations of certain California consumer protection laws.<sup>151</sup> In the original complaint, the plaintiffs attached a screenshot of the website in question that contained a section for payment submission; in the amended complaint, a nearly identical screenshot was attached, but the section for payment submission was slightly different in this version.<sup>152</sup> The court cited both *Cole* and *Stanislaus* in determining that it may consider the plausibility of the amended complaint in light of the allegations in the original complaint.<sup>153</sup> Ultimately, the court compared the two pleadings and determined that the inconsistencies essentially condemned the plaintiff’s claims.<sup>154</sup>

## 2. *The Non-Comparison Approach*

The comparison approach appears to be gaining some strength within the Ninth Circuit, but there are still Ninth Circuit courts applying the non-comparison approach. These courts adhere to the traditional

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145. *Id.* at \*3–4.

146. *Id.* at \*4.

147. *Id.*

148. *Id.* at \*5 (emphasis added).

149. *Id.*

150. No. CIV. 2:10–2320 WBS KJN, 2011 WL 2119128, at \*1 (E.D. Cal. May 26, 2011).

151. *Id.*

152. *Id.* at \*5.

153. *Id.*

154. *Id.* at \*6.

amended-complaint doctrines. First, at the appellate level, *PAE Government Services, Inc. v. MPRI, Inc.*<sup>155</sup>—a 2007 decision that predates *Iqbal*—serves as a strong example of the traditional approach that the Ninth Circuit typically applies to amended complaints. *Valadez-Lopez v. Chertoff*<sup>156</sup>—a post-*Iqbal* decision—suggests that this traditional doctrine might still be alive and well in the Court of Appeals for the Ninth Circuit. Certain district courts have also adhered to this traditional rule. *Lam v. General Mills, Inc.*<sup>157</sup> and *State National Insurance Co. v. Khatri*<sup>158</sup> exemplify this approach at the district court level.

The *PAE Government Services, Inc. v. MPRI, Inc.* decision is a fairly typical example of the pre-*Twiqbal* approach to amended complaints. In that case, plaintiff PAE alleged that it had entered into a “Teaming Agreement” contract with defendant MPRI to share work on a government project.<sup>159</sup> When MPRI won the bid for this project, PAE alleged that MPRI failed to enter into a subcontract with PAE, which was a breach of the “Teaming Agreement.”<sup>160</sup> The district court, however, determined that this “Teaming Agreement” was governed by Virginia law, and Virginia does not permit enforcement of this kind of contract.<sup>161</sup> As such, the original complaint was dismissed.<sup>162</sup>

After dismissal, PAE amended its complaint to allege a second agreement that had taken place after MPRI won the government contract.<sup>163</sup> This allegation was supported with some generalized factual assertions.<sup>164</sup> The issue, however, was that this amended claim was contradictory to PAE’s original claim that MPRI’s wrongful conduct was its failure to enter into a second agreement with PAE in the first place.<sup>165</sup> In fact, the district court struck these amended pleadings for that very reason.<sup>166</sup>

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155. 514 F.3d 856 (9th Cir. 2007).

156. 656 F.3d. 851 (9th Cir. 2011).

157. 859 F. Supp. 2d 1097 (N.D. Cal. 2012).

158. No. C 13–00433 LB, 2013 WL 5183193 (N.D. Cal. Sept. 13, 2013).

159. *MPRI, Inc.*, 514 F.3d at 857.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 857–58.

164. *Id.* at 858.

165. *Id.*

166. *Id.* (“The district court found PAE’s new allegations of a second agreement with MPRI to be ‘sham pleadings that contradict allegations made in the original Complaint.’”).

The Ninth Circuit reversed this decision.<sup>167</sup> The court stated that the Rules of Civil Procedure govern a court's ability to strike pleadings, and "there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations."<sup>168</sup> Therefore, the fact that a litigant chose to make inconsistent pleadings does not give a district court "free-standing authority to strike pleadings."<sup>169</sup> In sum, the court held that "Rule 12 provides no authority to dismiss 'sham' pleadings," so the district court was wrong to compare the amended complaint to the original.<sup>170</sup>

The rationale underlying holdings like the one articulated in *MPRI* lies in the traditional interpretations of Rule 15. As noted above, the traditional rule is that an amended complaint completely supersedes its predecessor.<sup>171</sup> However, the Ninth Circuit issued this decision before *Iqbal* made it clear that plausibility pleading applies to all cases in federal courts. In other words, although *MPRI* articulated a well-supported rule regarding amended complaints, that rule developed during the notice pleading era. As such, it is not clear what effect—if any—the *Twiqbal* plausibility movement could have on this decision.

However, a post-*Iqbal* Ninth Circuit decision, *Valadez-Lopez v. Chertoff*, tangentially affirmed that *MPRI*'s interpretation of Rule 15 is still alive and well within the Ninth Circuit.<sup>172</sup> In this case, Valadez-Lopez brought a Federal Tort Claims Act (FTCA) claim against the government in an amended complaint.<sup>173</sup> The government cited Rule 15(c) and argued that this FTCA claim was inappropriate because Valadez-Lopez's amended complaint "relates back" to the date of the original pleading, and Valadez-Lopez had not exhausted his administrative remedies at the time the original pleading was filed.<sup>174</sup> The Ninth Circuit dismissed this argument for two reasons. First, the court said that Rule 15(c) was not applicable in this case because that Rule was reserved for statute of limitations issues. Second, the court stated that "it is well-established that an 'amended complaint supersedes

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167. *Id.* at 860.

168. *Id.*

169. *Id.* at 859.

170. *Id.* at 860. The court also stated that this type of situation—where amended pleadings *may* suggest bad faith—is best dealt with under Rule 11. *Id.* That alternative solution will be discussed *infra* Part 0.

171. *See supra* notes 112–115 and accompanying text.

172. 656 F.3d. 851, 857 (9th Cir. 2011).

173. *Id.* at 854.

174. *Id.* at 857.

the original, the latter being treated thereafter as non-existent.”<sup>175</sup> This latter statement was dicta, but it still suggests that the Ninth Circuit may be working under the traditional amended complaint rules articulated in *MPRI*.<sup>176</sup>

District courts also follow this non-comparison approach. *Lam v. General Mills, Inc.* serves as an example. In *Lam*, the plaintiff brought a consumer class action suit against General Mills on the grounds that General Mills had misled consumers about the nutritional qualities of some popular fruit snacks.<sup>177</sup> Due to allegations of inconsistencies between the First Amended Complaint and the original complaint, both parties briefed the comparison and non-comparison approaches.<sup>178</sup> In response, the *Lam* court began its analysis by largely ignoring these arguments and simply stating, “on a Rule 12(b)(6) motion to dismiss, the Court takes all well-pleaded facts in Lam’s First Amended Complaint . . . *the operative pleading*, as true.”<sup>179</sup> There was never any discussion about potentially comparing the amended complaint to its predecessor; in fact, the original complaint was never mentioned in the opinion.<sup>180</sup> Instead, the *Lam* court simply applied the plausibility analysis to the facts alleged within the First Amended Complaint, despite the fact that the defense advocated for the comparison approach during briefing.<sup>181</sup>

The district court in *State National Insurance Co. v. Khatri* directly rejected the comparison approach.<sup>182</sup> The *Khatri* litigation hinged on an insurance company’s reimbursement claims against a former insurance

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175. *Id.* (quoting *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967))). *See also* *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012). In *Lacey* the Ninth Circuit etched out an exception to this traditional rule that an amended complaint *completely* took its predecessor off the table for purposes of appeal. *Id.* The court indicated that a plaintiff may appeal dismissal of claims that were included in an original complaint but dropped in the amended complaint due to the trial court’s instructions. *Id.* As the court pointed out, this holding does not undermine the traditional rule that an amended complaint supersedes the original. *Id.*

176. One could argue that this precedent suggests that the comparison approach movement is just acting on “bad law.” I explore that argument in more detail below. *See infra* Part 0.

177. *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1099 (N.D. Cal. 2012).

178. *See* Defendant General Mills Inc.’s Notice of Motion & Motion to Dismiss Plaintiff’s Second Amended Complaint, *supra* note 126, at 17; Plaintiff’s Opposition to Defendant General Mills Inc.’s Motion to Dismiss Plaintiff’s Second Amended Complaint, at 13 n.7, *Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097 (N.D. Cal. 2012) (No. 11-CV-5056-SC).

179. *Lam*, 859 F. Supp. 2d at 1099–1100 (emphasis added).

180. *See generally Lam*, 859 F. Supp. 2d at 1097.

181. *Id.* at 1101.

182. No. C 13–00433 LB, 2013 WL 5183193 (N.D. Cal. Sept. 13, 2013).

policy holder.<sup>183</sup> There were two complaints filed in this litigation. In the original complaint, State National alleged that it had been involved in two separate settlement hearings on the defendant's behalf, and the final settlement offer reached was \$137,500.<sup>184</sup> In the amended complaint, however, State National claimed that there had only been one settlement hearing, and the final settlement offer was \$125,000.<sup>185</sup> The court recognized that "State National's story appears to have changed from its Original Complaint to its First Amended Complaint."<sup>186</sup> Despite this change, the district court declined to compare these two complaints as a part of the plausibility analysis.<sup>187</sup> Instead, the court cited *MPRI* and reiterated the rule that plaintiffs may make inconsistent or contradictory pleadings because "at the outset of a case, a plaintiff may not have all of the facts completely nailed down."<sup>188</sup> The court recognized that decisions like *Cole* and *Fasugbe* were on the books, but ultimately determined that the *MPRI* holding was more persuasive.<sup>189</sup>

C. *Confusion Going Forward: Which Approach Has the Better Argument?*

The cases outlined in the previous section show that this issue is hardly a model of clarity in the Ninth Circuit. Courts have recognized the existence of the comparison approach and litigants are trying to take advantage of this emerging doctrine. At the same time, there appears to be support for the non-comparison approach in the Ninth Circuit. Although this issue is still just in its incipiency, it is important to quash this confusion before this divide has time to grow and potentially reach other circuits. As such, in order to avoid inequitable administration of the law, the Ninth Circuit needs to resolve this confusion before it spreads.

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183. *Id.* at \*3.

184. *Id.* at \*6.

185. *Id.*

186. *Id.*

187. *Id.* at \*7.

188. *Id.*

189. *Id.* at \*6–7.

#### IV. THE NINTH CIRCUIT SHOULD DECLINE TO CHANGE THE WAY THAT COURTS VIEW AMENDED COMPLAINTS AND REAFFIRM THE NON-COMPARISON APPROACH

The non-comparison approach is preferable to the comparison approach. Courts grant leave to amend complaints in order to give litigants a second bite at the pleading apple. If courts regularly begin comparing amended complaints to original complaints as a part of this new plausibility analysis, the usefulness of amended complaints may diminish. The new *Twiqbal* standard is tough enough on plaintiffs; courts do not need to further heighten this standard to ensure fairness among litigants. Instead, litigants need to have the opportunity to amend freely because the litigation process is complex and ever-changing. Plus, there are already tools in place to deal with unfairly inconsistent pleadings. As such, this Comment argues that the Court of Appeals for the Ninth Circuit should reiterate the original rule that an amended complaint completely takes an original complaint off the table for the purposes of the plausibility analysis.

The practice of comparing amended complaints to their predecessors appears to still be in its infancy. But this issue is quickly becoming ripe for a Ninth Circuit appellate decision because the district courts cannot agree on how amended complaints should be treated in a post-*Twiqbal* world. The decisions referenced above demonstrate that a number of district courts believe that comparing amended complaints to their predecessors is a part of the plausibility analysis.<sup>190</sup> However, other recent decisions came out differently.<sup>191</sup> A Ninth Circuit decision resolving this split could have lasting effects on the way litigants plead cases.

This Comment argues that, on balance, the non-comparison approach has the better side of the argument. The comparison approach could potentially force litigants to come to court with a well-pled case, which would have efficiency benefits for courts and litigants. But the potential for efficiency is not enough to outweigh two significant problems with the comparison approach. First, the comparison approach's methodology is problematic simply from a stare decisis point of view. Based on precedent alone, the court could strike down the comparison approach. Second, the comparison approach is not justifiable from a policy standpoint because it adds very little value to our current pleading

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190. See *supra* Part 0.

191. See *supra* Part 0.

system. Adopting the comparison approach to stop “fishing” expeditions is unnecessary. Courts have other tools at their disposal to deal with poorly-pled cases. If a party’s pleadings are egregiously inconsistent, for example, courts are free to deal with this “sham” pleading through alternative methods—including Rule 11. Ultimately, the reality of the litigation process is that each case is complex and constantly changing. Litigants need to have the opportunity to amend freely in order to successfully navigate that process.

For these reasons, this Comment argues that—when the opportunity arises<sup>192</sup>—the Ninth Circuit should decline to adopt these new rules and instead re-assert the traditional rules surrounding amended complaints.

A. *The Comparison Approach Decisions Are Based on Weak Precedential Foundations*

*Twiqbal* may be silent on the issue of comparing amended complaints to original complaints, but the Ninth Circuit has not been. Comparing amended complaints to original complaints as a part of the plausibility analysis casts aside a wide body of jurisprudence on the purpose of amended complaints.<sup>193</sup> This suggests that the comparison approach decisions referenced above are—for lack of a better term—“bad law.” This is one of the most compelling reasons why the Ninth Circuit needs to clear up the uncertainty in this area.

1. *Twiqbal Is Silent on the Comparison Approach*

Supporters of the comparison approach would likely argue that this approach is consistent with *Twiqbal*. The obvious intent behind both *Twombly* and *Iqbal* was to raise the pleading bar and force litigants to come to the table with a strong factual foundation for their cases.<sup>194</sup> Viewed in that light, the comparison approach appears to align with *Twiqbal*. Refusing to give litigants a blank slate upon which they may re-plead their case would levy additional pressure on plaintiffs to get facts right the first time. From an efficiency standpoint, perhaps that is a

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192. At the time of this writing, there is no litigation pending that presents this issue. Due to the fact that this doctrine is still in its infancy, it is difficult to predict when the Court of Appeals for the Ninth Circuit might get a case that does present this issue.

193. See *infra* Part 0.

194. See Miller, *supra* note 5, at 19 (“By establishing plausibility pleading, *Twombly* and *Iqbal*, have transformed the function of a complaint from *Conley*’s limited role by imposing a more demanding standard that requires a greater factual foundation than previously was required or originally intended.”).

desirable result that aligns well with this new standard of plausibility analysis.

Before jumping to this conclusion, however, it is important to take a look at the text of *Twiqbal*. True, *Twiqbal* was concerned with efficiency, which is one of the main benefits of the comparison approach. But is that similar interest enough to argue that *Twiqbal* justifies changing the rules on amended complaints? Ultimately, the answer to that question, based on the text of the *Twiqbal* opinions alone, is not clear.

Neither *Twombly* nor *Iqbal* give any clear guidance on the validity of the comparison approach's rationale. *Twombly* never really comes close to reaching the issue of comparing amended complaints to originals. The court simply held that, in the antitrust context, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>195</sup> For claims under section 1 of the Sherman Act, that simply required pleading "enough factual matter" to suggest an agreement was made.<sup>196</sup> Amended complaints were never at issue.

*Iqbal* is equally unclear. *Iqbal* resolved the issue about the reach of *Twombly* and plausibility pleading,<sup>197</sup> but the relationship between original complaints and amended complaints was also not before the Court in that case. The closest the *Iqbal* decision comes to endorsing the comparison approach comes in its ambiguous statement that plausibility pleading requires a "context-specific" inquiry.<sup>198</sup> But the opinion does not dictate what this "context-specific" inquiry includes.

Comparison approach supporters could argue that *Iqbal*'s "context-specific" inquiry allows a court to compare amended complaints to their predecessors.<sup>199</sup> One immediate problem with this conclusion is its

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195. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

196. *Id.* at 556.

197. See Steinman, *supra* note 21, at 1296 ("Concerns about *Twombly* have been exacerbated by *Iqbal*, which eliminated any hope that *Twombly* might be narrowly confined to complex antitrust cases.").

198. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

199. In fact, the *Cole v. Sunnyvale* court reached this conclusion. *Cole v. Sunnyvale*, No. C-08-05017 RMW, 2010 WL 532428, at \*4 (N.D. Cal. Feb. 9, 2010). The district court concluded that it "may . . . consider the prior allegations [from an earlier complaint] as part of its 'context-specific' inquiry based on its judicial experience and common sense to assess whether the Third Amended Complaint plausibly suggests an entitlement to relief, as required under *Iqbal*." *Id. Iqbal*." *Id. Iqbal* was the court's only authority for this proposition; no Ninth Circuit case was cited to bolster this point. *Id.*

characterization of *Iqbal*. *Iqbal* memorialized the *Twombly* plausibility pleading standard in a broader context.<sup>200</sup> The Court reiterated that a judge must determine whether the complaint has actually “shown”—as opposed to merely “alleged”—that the pleader is entitled to relief.<sup>201</sup> Nothing in *Iqbal* proposed to alter the way that courts consider amended pleadings. The decision certainly changed the standard under which pleadings would be scrutinized in federal courts. However, the Court did not directly amend any of the Federal Rules of Civil Procedure. “Judicial experience and common sense” must factor into the post-*Iqbal* analysis.<sup>202</sup> But altering the traditional interpretations of Rule 15 and amended complaints in the name of “judicial experience and common sense” seems like an overreach.

Ultimately, *Twiqbal* is not clear on this issue. *Twombly* and *Iqbal* neither support nor reject the comparison approach. As such, it remains up to the lower courts to develop their own precedent on this issue.

## 2. *Ninth Circuit Precedent Is Inapposite to the Comparison Approach*

Both the *MPRI* and *Valadez-Lopez* decisions strongly support the traditional rules regarding amended complaints. The *Valadez-Lopez* court restated *MPRI*'s rule that amended complaints supersede original filings.<sup>203</sup> When amended complaints supersede original filings, the original complaint becomes a dead letter that no longer performs any function in the case.<sup>204</sup> If the original complaint no longer performs any function in the case, then courts would presumably be unable to compare amended complaints to original complaints.<sup>205</sup> As such, this language from the *Valadez-Lopez* decision arguably precludes the comparison approach—simply as a matter of *stare decisis*.<sup>206</sup>

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200. See *Iqbal*, 556 U.S. at 684 (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.” (internal citations omitted)).

201. *Id.* at 679.

202. See *id.*

203. See generally *Valadez-Lopez v. Chertoff*, 656 F.3d. 851, 857 (9th Cir. 2011) (noting that “it is well-established that an amended complaint supersedes the original, the latter being treated thereafter as non-existent” (internal quotations omitted)).

204. See *supra* notes 113–114 and accompanying text.

205. *Lam v. General Mills, Inc.* and *State National Insurance Co. v. Khatri* serve as good examples of cases that applied this particular logic. See *supra* notes 177–189 and accompanying text.

206. The doctrine of *stare decisis* “compels lower courts to follow the decisions of higher courts on questions of law.” 18 MOORE ET AL., *supra* note 91, § 134.01[1]. *Valadez-Lopez* was handed down by the Court of Appeals for the Ninth Circuit. See generally *Valadez-Lopez*, 656 F.3d. at 851.

The problem with this argument is that its validity hangs on what is most likely an overstatement of the actual precedential value of *Valadez-Lopez*. The motion in that case was not a 12(b)(6) motion to dismiss for failure to state a claim.<sup>207</sup> This means that *Iqbal* and the plausibility pleading standard were not implicated. Additionally, the Ninth Circuit's affirmation of *MPRI*'s rule that amended complaints supersede their predecessors was dicta. The court decided *Valadez-Lopez* on an attempted misuse of the relation back guidelines in Rule 15(c).<sup>208</sup> That is not the same issue that has fueled the debate between the comparison and non-comparison approach.

In sum, the *Valadez-Lopez* decision—combined with the *MPRI* rule—casts doubt on the validity of the comparison approach decisions referenced above. The Ninth Circuit could justify resolving this issue without even looking at the comparison approach decisions. But, *MPRI* was decided pre-*Iqbal*, and the *Valadez-Lopez* decision does not conclusively resolve this issue. As such, a more in-depth analysis of the actual comparison approach decisions is warranted.

### 3. Comparison Approach Decisions that Emerge Post-*Iqbal* Are Based on Inadequate Precedent

Ninth Circuit precedent may not categorically resolve this debate, but the precedent that the comparison approach decisions use to justify their approach seems unpersuasive. *Stanislaus* exemplifies these weaknesses. That court attempted to pay homage to the traditional rules surrounding amended pleadings.<sup>209</sup> But the resulting opinion did not cite and use those rules correctly. In *Stanislaus*, the court cited *Ellingson v. Burlington Northern, Inc.*<sup>210</sup> in support of the proposition that “[t]he Court does not ignore the prior allegations in determining the plausibility of the current pleadings.”<sup>211</sup> The *Ellingson* court did state that courts may consider certain judicially-noticeable facts, court records, and affidavits in a motion to strike the pleadings as “sham” under Rule 11.<sup>212</sup>

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If the *Valadez-Lopez* court's restatement of the *MPRI* rule is considered a part of the Ninth Circuit's decision on a question of law, then lower courts in the Ninth Circuit—including the comparison approach courts—would be required to follow this rule.

207. See *supra* note 174 and accompanying text.

208. See *supra* note 175 and accompanying text.

209. *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1076 (E.D. Cal. 2011) (distinguishing *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007)).

210. 653 F.2d 1327 (9th Cir. 1981).

211. *Stanislaus*, 782 F. Supp. 2d at 1075.

212. *Ellingson*, 653 F.2d at 1329–30.

But this holding does not support the comparison approach in the way that the *Stanislaus* court suggested it does.<sup>213</sup>

The main problem with citing *Ellingson* is that *MPRI*, not *Ellingson*, should have controlled in *Stanislaus*. *Ellingson* was a 1981 Ninth Circuit decision that conflicts with the much more recent 2007 Ninth Circuit decision in *MPRI*.<sup>214</sup> *MPRI* specifically held that courts were not permitted to compare amended complaints to original complaints on a motion to strike pleadings.<sup>215</sup> That was essentially the issue in *Stanislaus*, and the court should have taken note of this similarity and followed *MPRI*'s ruling.<sup>216</sup> In contrast, the *Ellingson* court approved of the use of certain “judicially noticeable” documents like affidavits and prior court documents.<sup>217</sup> There is a significant difference between judicially noticeable facts, which are governed by Federal Rule of Evidence 201,<sup>218</sup> and amended complaints, which are controlled by Federal Rule of Civil Procedure 15.<sup>219</sup> Furthermore, the *Ellingson* court affirmed dismissal under Rule 11, while the issue in *Stanislaus* was a motion to dismiss under Rule 12.<sup>220</sup> This distinction matters because the standard for dismissal under Rule 11 has important differences—in both form and purpose—from the standard under Rule 12.<sup>221</sup>

After citing *Ellingson* in support of the notion that courts can compare pleadings as part of the plausibility analysis, the *Stanislaus* court attempted to address the *MPRI* decision.<sup>222</sup> The court recognized that “that there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations.”<sup>223</sup> Despite noting this rule, the court proceeded to rely on the inconsistencies between the two pleadings as

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213. See *Stanislaus*, 782 F. Supp. 2d at 1075 (citing *Ellingson*, 653 F.2d at 1329).

214. See *supra* notes 167–170 and accompanying text for a discussion of *MPRI*'s holding.

215. *MPRI, Inc.*, 514 F.3d at 860.

216. As noted above, there is potentially room to distinguish *MPRI* as a pre-*Iqbal* case; however, the *Stanislaus* court did not justify this comparison approach by citing to *Iqbal*. Instead, that court cited *Ellingson*—which was also a pre-*Iqbal* decision—as if it had been the rule all along. See *Stanislaus*, 782 F. Supp. 2d at 1075–76.

217. *Ellingson*, 653 F.2d at 1329–30.

218. See FED. R. EVID. 201.

219. Generally, a court is permitted to take judicial notice of certain types of facts that are “not subject to reasonable dispute.” *Id.* This is a very different standard than the one articulated in Rule 15. See FED. R. CIV. P. 15.

220. *Ellingson*, 653 F.2d at 1330; *Stanislaus*, 782 F. Supp. 2d at 1064.

221. These differences will be explored below. See *infra* Part 0.

222. See *Stanislaus*, 782 F. Supp. 2d at 1076.

223. *Id.* (quoting PAE Gov't Servs., Inc. v. MPRI, Inc., 514 F.3d 856, 860 (9th Cir. 2007)).

part of its rationale for finding against the plaintiff. Specifically, the court concluded that a plaintiff is free to amend a complaint with inconsistent allegations, but doing so will require “more factual support” in order to survive a motion to dismiss.<sup>224</sup>

Viewed in this light, the *Stanislaus* court misinterpreted the traditional rules surrounding amended complaints. The whole purpose of allowing a plaintiff leave to amend is to give that plaintiff a meaningful opportunity to re-plead his or her case.<sup>225</sup> To achieve this, amended complaints must take their predecessors off the table for the remainder of the litigation.<sup>226</sup> There is no support within the Federal Rules of Civil Procedure for the notion that litigants who plead inconsistent or contradictory materials within an amended complaint have to meet a higher pleading standard.<sup>227</sup> As discussed in more detail below, the litigation process is a fluid one—especially for plaintiffs trying to gather the right facts and plead the right claim.<sup>228</sup> This often requires changing parties, altering causes of action, and tweaking factual allegations.<sup>229</sup> So long as plaintiffs can satisfy the requirements of Rule 15, they should not have to overcome a higher pleading bar simply because they were not able to get their complaint right the first time. Instead, plaintiffs who amend should be required to meet the same pleading standard as those who choose not to.

Once *Stanislaus* had been decided, the comparison approach had created enough of a foothold to start to gain traction within the Ninth Circuit district courts. *Fasugbe v. Willms* illustrates this point. In that case, the district court cited *Cole* and *Stanislaus* in support of the conclusion that “the court may properly consider the plausibility of the [First Amended Complaint] in light of the prior allegations [in the original complaint].”<sup>230</sup> Other litigants are also taking note. A number of defendants have begun to insert the boilerplate language in these

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224. *Id.*

225. *See supra* notes 103–111 and accompanying text.

226. *See supra* notes 112–115 and accompanying text.

227. Although the *MPRI* court did not consider a higher pleading standard for inconsistent pleadings, the court did make a strong statement in favor of a litigant’s right to make inconsistent pleadings freely under the Federal Rules of Civil Procedure. *See MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007) (“The short of it is that there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations.”).

228. *See infra* Part 0.

229. *See MPRI, Inc.*, 514 F.3d at 858–59 (noting that litigants need the freedom to amend because litigation is such a fluid process).

230. *Fasugbe v. Willms*, No. CIV. 2:10–2320 WBS KJN, 2011 WL 2119128, at \*5 (E.D. Cal. May 26, 2011).

decisions into their briefing on motions to dismiss.<sup>231</sup> It appears that the comparison approach is taking hold of a number of Ninth Circuit district courts and the litigants who practice there, regardless of whether these foundational decisions are soundly supported or not.

#### 4. *The District Courts Applying the Non-Comparison Approach Are More Persuasive*

In sum, the approach highlighted above by *Khatri* and *Lam*<sup>232</sup> is based on stronger precedent than the one outlined in *Stanislaus*, *Cole*, *Fasugbe*, and other comparison approach decisions.<sup>233</sup> I argue that the comparison approach is not in line with *Twiqbal*, the Federal Rules of Civil Procedure, and traditional Ninth Circuit precedent. Widespread adoption of this approach would require revisions or additions to each of these doctrines. In contrast, the non-comparison approach seems to avoid many of these issues. On that reason alone, the Ninth Circuit should refuse to adopt the comparison approach.

Even though the Ninth Circuit could resolve this split by simply reiterating that *MPRI* and the non-comparison approach still apply, this Comment looks deeper into this divide. The exact boundaries of *Twiqbal* remain in question,<sup>234</sup> and both *MPRI* and *Valadez-Lopez* have weaknesses that could be exploited on appeal.<sup>235</sup> If faced with the argument, the Ninth Circuit could hold that *Twiqbal*'s new plausibility analysis and the "context-specific" inquiry justifies ramping up the rules on amended complaints. In fact, the *Cole* court has already adopted this interpretation of *Twiqbal*.<sup>236</sup> As noted above, the text of *Twombly* and *Iqbal* is not clear enough to determinatively call that interpretation inaccurate. In sum, even though existing precedent appears to fall in favor of the non-comparison approach, this Comment will also explore the policy justifications supporting both of these approaches.

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231. See, e.g., Defendant General Mills Inc.'s Notice of Motion & Motion to Dismiss Plaintiff's Second Amended Complaint, *supra* note 126, at 17 ("The 'context-specific' inquiry required by *Iqbal* includes a comparison of facts alleged in prior complaints to those in the operative complaint."); Defendant BNSF Railway Co.'s Motion to Dismiss Plaintiff's First Amended Complaint, *supra* note 126, at 20 (arguing that the court should take account of the "blatant inconsistencies" between the first and second amended complaints to evaluate the plausibility of the plaintiff's claims).

232. See *supra* notes 177–189 and accompanying text for the discussion of these cases.

233. See *supra* Part III.B.1 for the discussion of the comparison approach decisions.

234. See *supra* Part IV.A.1.

235. See *supra* Part IV.A.2.

236. See *supra* note 199.

*B. The Policy Arguments Supporting the Comparison Approach Do Not Justify the Added Burden that Would Be Placed on Litigants If that Approach Were Adopted*

Although the Ninth Circuit could feasibly justify striking down the comparison approach based on precedent—or a lack thereof—alone, the court could also swing the other way based on the impact that *Twiqbal* has had on pleading standards. As such, the debate over these two approaches may boil down to a policy argument.

The comparison approach is not supported by strong policy arguments. In theory,<sup>237</sup> comparison approach supporters have one major argument in their corner: added efficiency. Requiring plaintiffs to plead consistently might help to weed out unmeritorious claims and quell “sham” litigation.<sup>238</sup> Although these potential benefits appear compelling at first glance, they are not enough to outweigh the costs of adopting the comparison approach for two reasons. First, any added efficiency would be outweighed by the loss plaintiffs could suffer if the comparison approach took hold. Litigation is a fluid process, and Rule 15 is in place to allow plaintiffs to successfully navigate the complications that arise throughout that process.<sup>239</sup> The comparison approach unfairly undermines that goal.<sup>240</sup> Second, the Federal Rules of Civil Procedure contemplate other methods of dealing with unfairly inconsistent pleadings.<sup>241</sup> If a litigant is particularly disingenuous—to the point that it appears as though he or she may be involved in a “fishing” expedition—then the opposing party can use Rule 11 sanctions to resolve that problem. The current pleading system does not need the comparison approach’s additional protection.

With these two points in mind, the comparison approach is difficult to

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237. The policy arguments discussed in this section are theoretical constructs created for this Comment. As of this writing, this is the first piece of scholarship to assess the relationship between amended complaints and the *Twiqbal* plausibility standard. As such, I have tried to project logical policy arguments onto the comparison approach for purposes of assessing the validity of that approach.

238. This seems to be the motivating factor behind some of the comparison approach decisions discussed above. *See, e.g.,* Stanislaus Food Prods. Co. v. USS-POSCO Indus., 782 F. Supp. 2d 1059, 1075 (E.D. Cal. 2011) (expressing concern about a twenty-year gap between the agreement alleged in the original complaint and the agreement alleged in the amended complaint); Fasugbe v. Willms, No. CIV. 2:10-2320 WBS KJN, 2011 WL 2119128, at \*1 (E.D. Cal. May 26, 2011) (noting that plaintiff’s explanation of differences between screenshot attached in original complaint and screenshot attached in amended complaint “is not plausible”).

239. *See supra* Part II.

240. *See infra* Part IV.B.1.

241. *See infra* Part IV.B.2.

justify. As such, the Ninth Circuit should avoid creating more controversy for an already controversial pleading doctrine that is still in its infancy. Instead, the court of appeals should err on the side of caution and apply the more traditional non-comparison approach.

1. *The Added Efficiency that the Comparison Approach May Provide Is Outweighed by the Need to Give Litigants Pleading Flexibility*

The efficiency argument behind comparison approach decisions is not enough to justify the burden this approach potentially will place on litigants. Comparison approach supporters could argue that tying a plaintiff to an original complaint may help force plaintiffs to come to the table with a better pled case from the outset. Theoretically, this could help curb the type of discovery “fishing” expeditions that the *Twiqbal* Courts seemed so concerned with,<sup>242</sup> while simultaneously saving time and resources by weeding out unworthy claims earlier in the litigation process.<sup>243</sup> Viewed in that light, the comparison approach seems fairly consistent with the guiding purpose of the Federal Rules of Civil Procedure: “secur[ing] the just, speedy, and inexpensive determination of every action and proceeding.”<sup>244</sup>

Yet any value added by the comparison approach comes at the cost of the amended complaint. This cost would be a significant one. As the *MPRI* court noted, the amendment process is quite valuable for litigants, given how uncertain the early stages of litigation can be:

At the time a complaint is filed, the parties are often uncertain about the facts and the law; and yet, prompt filing is encouraged and often required by a statute of limitations, laches, the need to preserve evidence and other such concerns. . . . As the litigation progresses, and each party learns more about its case and that of its opponents, some allegations fall by the wayside as legally or factually unsupported. . . . Parties usually abandon claims

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242. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting) (calling the *Twombly* majority’s concerns about “fishing expedition[s]” unwarranted); Jonathan D. Frankel, Note, *May We Plead the Court? Twombly, Iqbal, and the “New” Practice of Pleading*, 38 HOFSTRA L. REV. 1191, 1222 (2010) (identifying the policy concerns addressed in *Twiqbal* as “plaintiff fishing expeditions, costly discovery, and the slim hope of effective judicial supervision during discovery”).

243. The *Iqbal* Court seemed concerned with unnecessary costs and wasted time—especially when lawsuits are filed against the government. See *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (“Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”).

244. FED. R. CIV. P. 1.

because, over the passage of time and through diligent work, they have learned more about the available evidence and viable legal theories, and wish to shape their allegations to conform to these newly discovered realities. We do not call this process sham pleading; we call it litigation.<sup>245</sup>

Federal courts certainly have an interest in requiring litigants to initiate a lawsuit with a well thought out complaint, but plausibility pleading largely takes care of that concern. Any plaintiff who cannot plead sufficient facts to “nudge[] their claims across the line from conceivable to plausible” will risk 12(b)(6) dismissal.<sup>246</sup> But if a litigant can amend an original complaint in a way that independently satisfies the plausibility pleading standard, that litigant should survive a Rule 12(b)(6) motion. In order to meet that standard, however, federal courts need to allow plaintiffs to plead with flexibility. Rule 15 is designed to provide plaintiffs with that flexibility; the comparison approach unfairly undermines that goal.

## 2. *Concerns over Sham—Or Bad Faith—Pleading Are More Appropriately Addressed Under Rule 11*

The argument that the comparison approach would help weed out “sham” litigation is also not enough to justify changing the rules on amended complaints. *Twiqbal* makes the Rule 12 motion more important than ever before, which puts additional pressure on plaintiffs to survive this type of motion.<sup>247</sup> *Twiqbal* aimed to force litigants to come to the table with enough factual assertions to form a well-pleaded complaint<sup>248</sup> in order to try to quell some of the costs of discovery.<sup>249</sup> Proponents of the comparison approach might argue that this approach helps achieve these goals. Under the non-comparison approach, a plaintiff could repeatedly amend a complaint with entirely inconsistent facts until he or

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245. *PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 858–59 (9th Cir. 2007).

246. *See Twombly*, 550 U.S. at 570.

247. *See supra* notes 85–89 and accompanying text.

248. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (requiring litigants file complaints with “well-pleaded factual allegations” that lead to a plausible claim for relief); *Twombly*, 550 U.S. at 556 (noting that plaintiffs have to be able to plead “enough fact to raise a reasonable expectation that discovery will reveal evidence” of the claim asserted).

249. *See Iqbal*, 556 U.S. at 685 (“Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”); *Twombly*, 550 U.S. at 558 (noting that courts should not “forget that proceeding to . . . discovery can be expensive” when determining whether plaintiffs have satisfied Rule 8’s demands).

she pleads something that either satisfies a court or leads to dismissal without leave to amend. In contrast, if courts can compare an amended complaint to its predecessor, then litigants will want to make sure that the facts pled in each complaint are accurate and well thought out. This would theoretically discourage plaintiffs from “fishing” for the facts necessary to create a plausible complaint.

Courts should not ignore “sham” pleadings; however, Rule 12 is not the proper Rule to deal with such pleadings. Instead, challenges to “sham” pleadings should be left to Rule 11. Federal Rule of Civil Procedure 11(b) states:

By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) 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; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.<sup>250</sup>

Rule 11(c) gives the court authority to issue sanctions for violations of Rule 11(b), when appropriate.<sup>251</sup> Rule 11 can handle the type of “sham” litigation that proponents of the comparison approach are concerned with.<sup>252</sup>

The Ninth Circuit has indicated that courts should use Rule 11 when pleadings suggest dishonesty.<sup>253</sup> In *MPRI*, for example, the court of appeals stated that its holding “does not mean, of course, that allegations

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250. FED. R. CIV. P. 11(b).

251. *Id.* 11(c).

252. See 5A WRIGHT, MILLER, & KANE, *supra* note 6, § 1334 (“The [1993] amended signature requirement [of Rule 11] mandates that signers weigh their behavior against their duties as professionals, particularly their duty to the judicial system, which includes a duty to refrain from wasting its resources on frivolous or otherwise improper litigation requests.”).

253. *PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 859 (9th Cir. 2007); *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1330 (9th Cir. 1981).

in a complaint can never be frivolous, or that a district court can never determine that a complaint or answer was filed in bad faith. But the mechanism for doing so is in Rule 11, which deals specifically with bad faith conduct.”<sup>254</sup> Courts applying the non-comparison approach have picked up on this language and adopted it.<sup>255</sup>

If courts start comparing and contrasting amended and original complaints at the 12(b)(6) stage due to concerns over “sham” litigation, then Rule 11 could be engulfed by Rule 12(b)(6). This would be problematic for a number of reasons. As a policy matter, accusations of dishonesty or bad faith should not be levied against parties lightly. Rule 11 sets out very specific procedural safeguards for those accused of bad faith that are not contained in Rule 12.<sup>256</sup> These safeguards protect the reputation of the accused, and ensure that courts have ample information in front of them to make a reasoned determination on bad faith.

Another issue is that the scope of Rule 12 motions is too limited to determine whether bad faith is really in play. Rule 12(b)(6) is concerned with the legal sufficiency of a litigant’s complaint.<sup>257</sup> Therefore, the issue before the court on a 12(b)(6) motion should be limited to the legal facts and conclusions contained in the complaint before it.<sup>258</sup> The facts in a complaint—even if they are inconsistent with earlier complaints—are hardly enough to determine that a party acted in bad faith. To really make this determination, a court should have more information available to consider than is normally allowed on a 12(b)(6) motion. Furthermore, one of the touchstones of 12(b)(6) analysis is that the court must view all facts in the light most favorable to the plaintiff.<sup>259</sup> It seems hard to reconcile this rule with the notion that courts can compare and contrast pleadings to determine that a particular pleading is a “sham.”

Ultimately, federal courts have a strong interest in deterring litigants from pleading “sham” complaints; however, Rule 11 is capable of deterring that kind of conduct. If a defendant has evidence to support an allegation of bad faith pleading, then a motion can be brought for sanctions under Rule 11. Allowing courts to compare complaints, infer a litigant’s intent, and label that conduct as “bad faith” or a “sham” at the 12(b)(6) stage would not be appropriate.

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254. *MPRI, Inc.*, 514 F.3d at 859.

255. *See, e.g., State Nat’l Ins. Co. v. Khatri*, No. C 13–00433 LB, 2013 WL 5183193, at \*6 n.3 (N.D. Cal. Sept. 13, 2013).

256. *See* FED. R. CIV. P. 11(c).

257. *Id.* 12(b).

258. *Id.*

259. *See* 5B WRIGHT, MILLER, & KANE, *supra* note 6, § 1357.

## CONCLUSION

It is not clear when the Court of Appeals for the Ninth Circuit will have the opportunity to address the division between these two approaches. When that opportunity arises, however, the court should refuse to adopt the comparison approach, and restate the rule that amended complaints take their predecessors off the table. In the interim, courts in other circuits should also decline to adopt this emerging comparison approach to amended complaints. Plausibility pleading has the potential to become cumbersome enough on plaintiffs. There is no need to further this burden by taking away a plaintiff's ability to freely amend. Instead, plaintiffs should be allowed to have the same second bite at the pleading apple that has been given to litigants in federal courts since the Federal Rules of Civil Procedure were first adopted in the 1930s.