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PLEADING CONDITIONS OF THE MIND UNDER RULE 9(b): REPAIRING THE DAMAGE WROUGHT BY *IQBAL*

A. Benjamin Spencer†

"There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail."

—Charles E. Clark, 1937[1]

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1 Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

INTRODUCTION

In 2009, the Supreme Court decided *Ashcroft v. Iqbal*,[2] in which it pronounced—among other things[3]—that the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure—which permits allegations of malice, intent, knowledge, and other conditions of the mind to be alleged "generally"—requires adherence to the plausibility pleading standard it had devised for Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*.[4] That is, to plead such allegations sufficiently, one must offer sufficient facts to render the condition-of-the-mind allegation plausible. This rewriting of the standard imposed by Rule 9(b)'s second sentence—which came only veritable moments after the Court had avowed that changes to the pleading standards could only be made through the formal rule amendment process[5]—is patently unsupportable for two reasons.

First, the *Iqbal* Court's interpretation of Rule 9(b) is at odds with a proper text-based understanding of the Federal Rules: (1) The plausibility pleading obligation purports to be derived from the Rule 8(a)(2)

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2 556 U.S. 662 (2009).

3 To view a fuller discussion of the *Iqbal* decision, see A. Benjamin Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010) [hereinafter Spencer, Iqbal *and the Slide Towards Restrictive Procedure*].

4 550 U.S. 544, 555 (2007).

5 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); Hill v. McDonough, 547 U.S. 573, 582 (2006) ("Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts."). The Supreme Court has never indicated that rules promulgated pursuant to the Rules Enabling Act may be interpreted more loosely by the Court because of the Court's unique role in promulgating such rules; to the contrary, the Court has steadfastly adhered to the notion that it is not free to revise such rules through judicial interpretation. *See, e.g.*, Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and reviewed [through the Rules Enabling Act process] limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'" (quoting 28 U.S.C. § 2072(b) (2000))); Harris v. Nelson, 394 U.S. 286, 298 (1969) ("We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.").

obligation to "show[]" entitlement to relief,[6] an obligation that reflects the standard for sufficiently stating claims, not the standard for sufficiently stating the individual component allegations thereof—which is found in Rule 8(d)(1), not Rule 8(a)(2); (2) text from elsewhere in the Federal Rules and from the Private Securities Litigation Reform Act (PSLRA) reveals that the *Iqbal* interpretation of Rule 9(b) is unsound; and (3) evidence from the now-abrogated Appendix of Forms—in effect at the time of *Iqbal*—contradicts any attempt to place a plausibility pleading gloss on Rule 9(b).

Second, the Court's alignment of Rule 9(b)'s second sentence with the 8(a)(2) plausibility pleading standard runs counter to the original understanding of Rule 9(b), which was borrowed from English practice extant in 1937. A review of the English rule that formed the basis of Rule 9(b), as well as the English jurisprudence surrounding that rule at the time, make clear that Rule 9(b) cannot be faithfully interpreted as requiring pleaders to set forth the circumstances from which allegations pertaining to conditions of the mind may be inferred.

Beyond reflecting an errant interpretation of Rule 9(b), the *Iqbal* understanding has resulted in tremendous harm to litigants seeking to prosecute their claims. Lower courts have embraced the *Iqbal* revision of Rule 9(b) with zeal, dismissing claims for failure to articulate facts underlying condition-of-mind allegations left, right, and center. This is undesirable not only because it turns on its head a rule that was designed to facilitate rather than frustrate such claims, but also because it contributes to the overall degradation of the rules as functional partners in the larger civil justice enterprise of faithfully enforcing the law and vindicating wrongs. In light of these ills arising from *Iqbal*'s adulteration of Rule 9(b), it should be amended to make the original and more appropriate understanding of the condition-of-mind pleading requirement clear, or at least revised to conform its language to the *Iqbal* Court's reimagining of it. What follows is an exploration of these points.

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[6] *Twombly*, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."); *see also Iqbal*, 556 U.S. at 679 ("But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (quoting FED. R. CIV. P. 8(a)(2))).

I. THE ADULTERATION OF RULE 9(b)

A. Iqbal *and Pleading Conditions of the Mind*

Although there are multiple aspects of the *Iqbal* decision worthy of critique,[7] our focus here will be on its perversion of the standard applicable to alleging conditions of the mind found in Rule 9(b). Rule 9(b) reads, in its entirety, as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.[8]

The question is what pleading standard does the second sentence of Rule 9(b)—which I will refer to as the conditions-of-the-mind clause—impose?

According to Justice Kennedy—the author of the *Iqbal* opinion—the conditions-of-the-mind clause should be read to mean that allegations of malice, intent, knowledge, and other conditions of mind must be pleaded consistently with the plausibility pleading standard of Rule 8(a)(2). Justice Kennedy made this pronouncement in the following way:

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—

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[7] *See, e.g.*, Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–201 (criticizing *Iqbal* for its endorsement of a subjective approach to scrutinizing pleading that will permit courts to restrict claims by members of social outgroups). I have criticized the *Twombly* decision as well. *See, e.g.*, A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013) [hereinafter Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*]; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) [hereinafter Spencer, *Plausibility Pleading*].

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

> though still operative—strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.[9]

In this passage, Justice Kennedy declared that in pleading conditions of the mind, one must apply the "still operative strictures of Rule 8." Those strictures require "well-pleaded factual allegations"—not mere legal conclusions—that "show[]" plausible entitlement to relief:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." FED. RULE CIV. PROC. 8(a)(2).[10]

In *Iqbal*, the condition of the mind being pleaded was discriminatory intent: that the defendants undertook the challenged course of action—the detention of certain individuals and subjugation of them to harsh conditions of confinement—"solely on account of" the plaintiff's race, religion, or national origin.[11] Justice Kennedy declared that this was a "bare" assertion, amounting to nothing more than a "'formulaic recitation of the elements' of a constitutional discrimination claim."[12] He acknowledged, however, that "[w]ere we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[13] But, alas, they (the *Iqbal* majority) could not accept it as true because the allegations' "conclusory nature . . . disentitle[d] them to the presumption of truth"[14] and "the Federal Rules do not require courts to

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9 *Iqbal*, 556 U.S. at 686–87.

10 *Id.* at 678–79.

11 *Id.* at 680.

12 *Id.* at 681 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

13 *Id.* at 686.

14 *Id.* at 681.

credit a complaint's conclusory statements without reference to its factual context."[15] Thus, the plaintiff's claims against Ashcroft and Mueller were dismissed.[16] Although this was an adverse outcome for Mr. Iqbal's individual case, the consequences of this view of Rule 9(b) have reverberated throughout the lower courts, facilitating the dismissal of a countless number of claims involving condition-of-mind allegations.[17]

B. *Lower Courts and Rule 9(b) after* Iqbal

By interpreting Rule 9(b) in a way that subsumed it within the pleading standard applicable to stating claims, the *Iqbal* Court empowered lower courts to apply the "still operative strictures of Rule 8"—the plausibility requirement—to the determination of whether an allegation pertaining to a condition of the mind is sufficient, thereby infusing fact skepticism into an analysis in which the Court purports that alleged facts are assumed to be true.[18] What this has meant operationally

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15 *Id.* at 686.

16 *Id.* at 687.

17 *See infra* Section I.B. A perhaps unexpected distinct consequence of the *Iqbal* Court's interpretation of the term "generally" in Rule 9(b) has been that lower courts have adopted and applied that interpretation to the use of the term "generally" in Rule 9(c), which permits the satisfaction of conditions precedent to be pleaded generally. *See, e.g.*, Dervan v. Gordian Grp. LLC, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 (S.D.N.Y. Feb. 28, 2017) ("This Court agrees, and holds that the occurrence or performance of a condition precedent—to the extent that it need be pled as a required element of a given claim—must be plausibly alleged in accordance with Rule 8(a)."); Chesapeake Square Hotel, LLC v. Logan's Roadhouse, Inc., 995 F. Supp. 2d 512, 517 (E.D. Va. 2014) ("The fact that these adjacent subsections within Rule 9 contain virtually indistinguishable language suggests that the pleading requirements should likewise be indistinguishable."); Napster, LLC v. Rounder Records Corp., 761 F. Supp. 2d 200, 208 (S.D.N.Y. 2011) (deeming the allegation that plaintiff "has performed all of the terms and conditions required to be performed by it under the 2006 Agreement" an insufficient "legal conclusion," and recognizing that the cited cases suggesting that such "general statement[s]" are sufficient under Rule 9(c) "all predate *Twombly* and *Iqbal*"). This interpretation of Rule 9(c) is as inappropriate as, I will endeavor to show, the *Iqbal* Court's interpretation of Rule 9(b). However, this Article will maintain a focus on the erroneousness and implications of the *Iqbal* Court's misinterpretation of Rule 9(b). For a discussion of the history and purpose of Rule 9(c), as well as coverage of post-*Iqbal* cases interpreting it, see 5A CHARLES A. WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE §§ 1302–1303 (4th ed. 2018).

18 *See* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 192 ("[T]he *Iqbal* Court's rejection of Iqbal's core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism.").

is that lower courts require what Justice Kennedy called "well-pleaded facts"[19] in support of their allegations: Pleaders must offer specific facts plausibly showing an alleged condition of the mind.[20] Many examples of

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19 *Iqbal*, 556 U.S. at 679.

20 Lower courts have also expanded the *Twombly* and *Iqbal* interpretation of Rule 8(a)(2) into Rule 8(a)(1), requiring the pleading of facts sufficient to support the plausible inference that there are grounds for the court to exercise subject matter jurisdiction, notwithstanding the fact that Rule 8(a)(1) does not impose a requirement to "show" that there is jurisdiction and that abrogated Form 7 did not reflect any such requirement. *See, e.g.*, Wood v. Maguire Auto., LLC, 508 F. App'x 65, 65 (2d Cir. 2013) (complaint failed to properly allege subject matter jurisdiction because allegation of amount in controversy was "conclusory and not entitled to a presumption of truth" (citing *Iqbal*, 556 U.S. 662)); Norris v. Glassdoor, Inc., No. 2:17-cv-00791, 2018 WL 3417111, at *7 n.2 (S.D. Ohio July 13, 2018) ("To establish diversity jurisdiction, a complaint must allege facts that could support a reasonable inference that the amount in controversy exceeds the statutory threshold. . . . Here, the Amended Complaint leaves the amount in controversy to pure speculation. Therefore, 28 U.S.C. § 1332 does not provide a basis for the Court's jurisdiction over Mrs. Norris's breach of contract and fraud claims."); Weir v. Cenlar FSB, No. 16-CV-8650 (CS), 2018 WL 3443173, at *12 (S.D.N.Y. July 17, 2018) ("[J]urisdictional [dollar] amount, like any other factual allegation, ought not to receive the presumption of truth unless it is supported by facts rendering it plausible."); Lapaglia v. Transamerica Cas. Ins. Co., 155 F. Supp. 3d 153, 156 (D. Conn. 2016) (plaintiff required to "allege facts sufficient to allow for a plausible inference that the amount in controversy meets the jurisdictional threshold").

this practice abound both at the circuit[21] and district court levels[22] and are too numerous to list in full.[23] A few examples will illustrate the point.

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21 *See, e.g.*, Ibe v. Jones, 836 F.3d 516, 525 (5th Cir. 2016) ("The complaint must thus set forth specific facts supporting an inference of fraudulent intent." (citing Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994))); Biro v. Condé Nast, 807 F.3d 541, 544–45 (2d Cir. 2015) ("*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent."); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible."); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 377 (4th Cir. 2012) ("[M]alice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated."); Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012) ("[T]o make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred."). Although particularity is required for allegations of *fraud*, alleging fraudulent *intent* may be done generally. *See, e.g.*, *In re* Cyr, 602 B.R. 315, 328 (Bankr. W.D. Tex. 2019) ("As previously explained, [Bankruptcy] Rule 7009(b) [the counterpart to Rule 9(b) in the bankruptcy context] distinguishes between pleading the circumstances of the alleged fraud and the conditions of the defendant's mind at the time of the alleged fraud. Thus, the heightened standard requiring the specifics of the 'who, what, when, where, and how' of the alleged fraud applies to the circumstances surrounding the fraud, not the conditions of the defendant's mind at the time of the alleged fraud.").

22 *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients' indebtedness made by Samaritan Hospital. . . . Indeed, the Amended Complaint provides no facts . . . from which the Court could draw a reasonable inference that ORDD and O'Brien knew or should have known that Plaintiff did not owe the debt."); Rovai v. Select Portfolio Servicing, Inc., No. 14-cv-1738-BAS-WVG, 2018 WL 3140543, at *13 (S.D. Cal. June 27, 2018) ("Although th[e] general averment of intent and knowledge may be sufficient for Rule 9(b), '*Twombly* and *Iqbal*'s pleading standards must still be applied to test complaints that contain claims of fraud.' This means that '[p]laintiffs must still plead facts establishing *scienter* with the plausibility standard required under Rule 8(a).'" (citations omitted)); Mourad v. Marathon Petroleum Co., 129 F. Supp. 3d 517, 526 (E.D. Mich. 2015) ("Plaintiffs have also failed to sufficiently allege facts in support of their claim that Defendant's acts, though lawful, were malicious. This is because Plaintiffs have not alleged facts from which this Court can reasonably infer that Defendant acted with the requisite state of mind. Although Plaintiffs correctly point out that Federal Rule of Civil Procedure 9(b) permits '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally[,]' this Rule does not, as Plaintiffs insist, permit a party to simply parrot the state of mind required by a particular cause of action. Rather, to withstand dismissal, factual allegations corroborating Defendant's malicious intent are necessary." (citation omitted)); United States *ex rel.* Modglin v. DJO Glob. Inc., 114 F. Supp. 3d 993, 1024 (C.D. Cal. 2015) (dismissing allegations "that defendants 'knew that they were falsely and/or fraudulently claiming reimbursements' and 'knew [their devices] were being unlawfully sold for unapproved off-label cervical use'" because "[n]one of the facts relators plead[ed] . . . support[ed] their conclusory allegation that defendants knowingly submitted false claims," and therefore, notwithstanding "that Rule 9(b) does not require particularized

The Second Circuit fully embraced the *Iqbal* interpretation of Rule 9(b) in *Biro v. Condé Nast*, a defamation case involving a public figure.[24] After noting the requirement of showing "actual malice" to prevail on a defamation claim in the public figure context, the court rebuffed the plaintiff's claim that Rule 9(b) absolved him of the duty "to allege facts sufficient to render his allegations of actual malice plausible" with the following retort: "*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent. . . . It follows that malice must be alleged plausibly in accordance with Rule 8."[25] The Seventh Circuit similarly cited *Iqbal* in imposing a requirement that allegations of bad faith be backed up with allegations of substantiating facts:

> Bare assertions of the state of mind required for the claim—here "bad faith"—must be supported with subsidiary facts. *See Iqbal*, 556 U.S. at 680–83, 129 S. Ct. 1937. The plaintiffs offer nothing to support their claim of bad faith apart from conclusory labels—that the unnamed union officials acted "invidiously" when they failed to process the grievances, or simply that the union's actions were "intentional, willful, wanton, and malicious." They supply no factual detail to support these conclusory allegations, such as (for example) offering facts that suggest a motive for the union's alleged failure to deal with the grievances.[26]

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allegations of knowledge," the complaint "f[e]ll short of plausibly pleading scienter under Rule 8, *Twombly*, and *Iqbal*"), *aff'd*, 678 F. App'x 594 (9th Cir. 2017).

[23] A more comprehensive citation to the relevant cases illustrating this trend may be found in WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301. An example of a case in which this trend was bucked is *United States ex rel. Dildine v. Pandya*, in which the court accepted the government's bald allegations of state of mind as sufficient to plead scienter. 389 F. Supp. 3d 1214, 1222 (N.D. Ga. 2019) ("Since Federal Rule of Civil Procedure 9(b) provides '[m]alice, intent knowledge, and other conditions of a person's mind may be alleged generally' and since the Complaint alleges Defendants submitted false claims with actual knowledge, reckless indifference, or deliberate ignorance to the falsity associated with such claims, the Government satisfies the scienter element.").

[24] *Condé Nast*, 807 F.3d 541.

[25] *Id.* at 544–45; *see also* Krys v. Pigott, 749 F.3d 117, 129 (2d Cir. 2014) (indicating that based on *Iqbal*, one must plead nonconclusory facts that give rise to an inference of knowledge).

[26] Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013) (citing Ashcroft v. Iqbal, 556 U.S. 662, 680–83 (2009)).

The Eleventh Circuit too, confronting this issue in 2016, concluded that the *Iqbal* approach to Rule 9(b) with respect to allegations of malice had to carry the day:

> Indeed, after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice. Joining that chorus, we hold that the plausibility pleading standard applies to the actual malice standard in defamation proceedings.[27]

District courts are imposing *Iqbal*'s condition-of-mind particularity requirement with respect to allegations of malice as well.[28] For example, in *Moses-El v. City and County of Denver*[29] the court wrote:

> [W]here Mr. Moses-El must plead a defendant's malicious intent, coming forward with a set of facts that permit the inference that the defendant instead acted merely negligently will not suffice; rather, Mr. Moses-El must plead facts that, taken in the light most favorable to him, dispel the possibility that the defendant acted with mere negligence. As noted in *Iqbal*, Fed. R. Civ. P. 9(b)'s allowance that facts concerning a defendant's *mens rea* may be "alleged generally" does not alter this analysis.[30]

As a result of embracing this stringent view of the second sentence of Rule 9(b) in light of *Iqbal*'s interpretation of it, the court in *Moses-El* dismissed

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

[28] *See, e.g.*, Diehl v. URS Energy & Constr., Inc., No. 11-cv-0600-MJR, 2012 WL 681461, at *4 (S.D. Ill. Feb. 29, 2012) ("Although paragraph 18 of Count V establishes that Plaintiff Diehl is proceeding against Defendant Walls under the theory that Walls was acting in his own self-interest when he terminated Diehl's employment, like paragraph 17, paragraph 18 is merely a conclusory statement. Count V (and the Complaint as a whole), does not set forth any factual content from which the Court can reasonably draw the inference that Diehl was acting maliciously and in his own self-interest."); Ducre v. Veolia Transp., No. CV 10-02358 MMM (AJWx), 2010 WL 11549862, at *5-6 (C.D. Cal. June 14, 2010) ("Ducre alleges that her supervisors at Veolia knew she had a disability that required her to wear a leg brace, and that they unjustly discriminated against her because of this disability by reassigning her to 'light duty' work and eventually terminating her. She asserts that she lost income and suffered hardship as a result of these actions. These factual allegations adequately allege malice and oppression under Rule 8(a) and *Iqbal*.").

[29] 376 F. Supp. 3d 1160 (D. Colo. 2019).

[30] *Id.* at 1172.

the plaintiff's malicious prosecution claim—in the face of an express allegation of malice—on the ground that the substantiating facts did not *rule out* the possibility of negligence as an alternate explanation of the defendant's actions:

> The sole allegation in the Amended Complaint that purports to demonstrate that malice is Paragraph 118, which reads "[g]iven [Dr. Brown's] qualifications and experience, as well as her previous testimony where she recognized the significant inferences that could be deduced by results such as those described above, her gross mischaracterization of the serological evidence in this case as inconclusive . . . was malicious." But the conclusion—maliciousness—does not necessarily flow from the facts: that Dr. Brown was experienced and qualified and that she recognized that inferences about the perpetrator could be drawn from the blood test results. Although malice is one inference that might be drawn from these facts, other equally (if not more likely) permissible inferences are that Dr. Brown was mistaken in her testing or analysis or that she conservatively chose not to ignore the (admittedly) small possibility that the test did *not* exclude Mr. Moses-El. Once again, *Iqbal* requires Mr. Moses-El to plead facts that establish a *probability*, not a *possibility*, that Dr. Brown acted with malice against him, and describing a set of facts that could readily be consistent with mere negligence does not suffice. Accordingly, the malicious prosecution claim against Dr. Brown is dismissed.[31]

This is a truly remarkable decision: although Rule 9(b) states that "Malice . . . may be alleged generally," and the plaintiff in this instance alleged that the actions were "malicious"—and the court acknowledged that "malice is one inference that might be drawn from these facts"—the claim was still dismissed for insufficiency under the *Iqbal* Court's perverse interpretation of Rule 9(b).[32]

Moving beyond allegations of malice for defamation claims, the Sixth Circuit has shown that it is on board with the *Iqbal* interpretation of Rule 9(b) as well. In the context of a claim under the Family and Medical Leave Act (FMLA), a Sixth Circuit panel wrote as follows:

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[31] *Id.* at 1173–74.

[32] *Id.* at 1174.

> [A]fter the Supreme Court's decisions in *Iqbal* and *Twombly*, a plaintiff must do more than make the conclusory assertion that a defendant acted willfully. The Supreme Court specifically addressed state-of-mind pleading in *Iqbal*, and explained that Rule 9(b) . . . does not give a plaintiff license to "plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009). As we have explained in a non-FMLA context, although conditions of a person's mind may be alleged generally, "the plaintiff still must plead facts about the defendant's mental state, which, accepted as true, make the state-of-mind allegation 'plausible on its face.'" *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678).[33]

Imposing a requirement to "plead facts" that "make the state-of-mind allegation 'plausible on its face,'" the court concluded that the "complaint contains no facts that allow a court to infer that [the defendant] knew or acted with reckless disregard of the fact that it was interfering with [the plaintiff's] rights."[34]

The Third Circuit offers yet another instance of this trend, here in the context of an allegation of knowledge. In *Kennedy v. Envoy Airlines, Inc.*, a New Jersey district court reflected *Iqbal*'s heightened intent pleading requirement when it wrote, "Plaintiff has not alleged any particularized facts which, if true, would demonstrate that Ms. Fritz or any other Envoy employee actually *knew* that the positive test results were false."[35] The court went on to indicate that it could not accept the plaintiff's allegation of the defendant's knowledge of falsity because "such generalized and conclusory statements are insufficient to establish knowledge of falsity."[36] On appeal to the Third Circuit, the court questioned the district court's conclusion, but not because it disagreed with the standard the district court applied.[37] Instead, the Third Circuit

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33 Katoula v. Detroit Entm't, LLC, 557 F. App'x 496, 498 (6th Cir. 2014).

34 *Id.* (quoting Republic Bank & Tr. Co. v. Bear Stearns & Co., 683 F.3d 239, 247 (6th Cir. 2012)).

35 Kennedy v. Envoy Airlines, Inc., No. 15-8058 (JBS/KMW), 2018 WL 895871, at *5 (D.N.J. Feb. 14, 2018).

36 *Id.*

37 Kennedy v. Am. Airlines, Inc., 760 F. App'x 136 (3d Cir. 2019).

embraced the standard but concluded that the plaintiff arguably satisfied it by offering additional facts showing the basis for the allegation of the defendant's knowledge:

> However, we conclude that this is a closer question than the District Court's opinion postulates. Here, while Kennedy does generally assert Appellee "should have known" of the falsity, he also offers several reasons *why* Appellee should have known. In addition to his assertion that Appellee has "administered thousands of tests and is aware of the uniform and constant rate at which alcohol is metabolized," he also references Judge Ferrara's findings on the matter in an exhibit to his complaint .... These facts, perhaps, lend themselves to a reasonable inference that Appellee knew, or should have known, the results from the breathalyzer were inaccurate—at least for purposes of surviving a Rule 12(b)(6) motion.[38]

Thus, we have here the endorsement of a requirement to offer "particularized facts" that "would demonstrate"[39] the defendant's knowledge or "lend themselves to a reasonable inference"[40] that the defendant had the requisite knowledge.

Again, district courts are requiring the allegation of substantiating facts in support of allegations of knowledge as well, citing *Iqbal*'s interpretation of Rule 9(b).[41] For instance, in *United States ex rel. Morgan v. Champion Fitness, Inc.*,[42] although the court recognized the tension between the language of Rule 9(b) and the *Iqbal* Court's interpretation of it, the district court felt it was bound to adhere to that interpretation, finding that the plaintiff in the case before it could survive a motion to dismiss only because "the Complaint's representative examples have sufficient detail to support a reasonable inference providing the necessary factual support for the assertion of Defendants' knowledge."[43]

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[38] *Id.* at 140–41.

[39] *Kennedy*, 2018 WL 895871, at *5.

[40] *Kennedy*, 760 F. App'x at 141.

[41] *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients indebtedness made by Samaritan Hospital.'").

[42] No. 1:13-cv-1593, 2018 WL 5114124 (C.D. Ill. Oct. 19, 2018).

[43] *Id.* at *7.

II. ASSESSING THE *IQBAL* VIEW OF RULE 9(b)

Certainly, as a matter of common sense, one would be hard pressed to suggest that the pleading requirements that have been outlined above are faithful reflections of what it means to permit conditions of the mind to be "alleged generally." As we have seen, courts are imposing a requirement for "well-pleaded facts," "specific facts," or "particularized facts" that "demonstrate," "show," or "establish" an alleged condition of the mind, which is the epitome of what plausibility pleading requires.[44] But does Justice Kennedy's analysis of Rule 9(b)—which has wrought all of this—stand up to scrutiny?

A. *Textual Evidence*

Justice Kennedy's determination that the conditions-of-the-mind clause must be read to incorporate the pleading standard of Rule 8(a)(2) was a facile—if not thoughtless—conclusion based on apparent logic: If "with particularity" in the first sentence of Rule 9(b) means a heightened pleading standard, "generally" in the second sentence of Rule 9(b) must mean the ordinary pleading standard of Rule 8(a)(2), which now—post *Twombly*—requires plausibility pleading. This "reasoning" represents an abject failure of statutory interpretation for multiple reasons,[45] three of which are text-based and the fourth of which is historical.[46]

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[44] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .").

[45] *See, e.g.*, McCauley v. City of Chicago, 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting in part) ("*Iqbal* is in serious tension with these other decisions [Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Erickson v. Pardus, 551 U.S. 89 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)], rules, and forms, and the Court's opinion fails to grapple with or resolve that tension.").

[46] See *infra* Section II.B for a discussion of historical evidence demonstrating the erroneous nature of Justice Kennedy's interpretation of Rule 9(b).

First. The object of the admonitions of Rule 9(b)—and its close cousin, Rule 9(c)[47]—are distinct from that of Rule 8(a)(2). Rule 8(a)(2)—the provision the Court was interpreting and applying in *Twombly* and *Iqbal*—supplies a standard for sufficiently stating a *claim for relief*, which requires making a "showing" of entitlement to relief,[48] and which, according to the Court, requires the satisfaction of the plausibility pleading standard.[49] Rule 9(b), on the other hand, supplies a standard for sufficiently stating *allegations*,[50] which are the building blocks of claims. In other words, when the *allegations* of a complaint are joined with one another and viewed as a whole, one asks whether they amount to a *claim*, i.e., do they show entitlement to relief under the applicable law.[51] The plausibility pleading standard of Rule 8(a)(2) applies to an assessment of the latter question—whether the allegations add up to *a claim*—not to the assessment of whether *an allegation* has been properly stated. This distinction tracks the intended distinction between a motion to dismiss for failure to state a claim under Rule 12(b)(6)—which challenges *claims* based on the plausibility standard of *Twombly*—and a motion for a more

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47 FED. R. CIV. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.").

48 FED. R. CIV. P. 8(a)(2) ("CLAIM FOR RELIEF. A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."); *see also Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.—Also termed *claim for relief*.").

49 Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("[*Twombly* and *Iqbal*] concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, [*Twombly* and *Iqbal*] instruct, must plead facts sufficient to show that her claim has substantive plausibility.").

50 Prior to the restyling of the Rules in 2007, references to "allegation" and "allege" in the rules were to variations of the term "averment" instead. *Compare* FED. R. CIV. P. 9(b) (2006) ("In all *averments* of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be *averred* generally." (emphasis added)), *with* FED. R. CIV. P. 9(b) (2007) ("In *alleging* fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be *alleged* generally." (emphasis added)); *see also Allegation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. A declaration that something is true; esp., a statement, not yet proved, that someone has done something wrong or illegal. 2. Something declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved; AVERMENT.").

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

definite statement under Rule 12(e)[52]—which challenges *allegations* as being "so vague or ambiguous that the party cannot reasonably prepare a response."[53] Thus, in *Iqbal*, Justice Kennedy carelessly conflated the standard for articulating allegations—the province of Rule 9(b)—with the standard for judging the sufficiency of entire claims.

In fact, the Federal Rules of Civil Procedure do set forth the general standard for stating *an allegation* in a pleading, but not in Rule 8(a)(2). Rather, one finds the standard applicable to stating allegations in Rule 8(d)(1), which reads as follows: "(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required."[54] This provision was meant to solidify the notion that the Federal Rules of Civil Procedure—which took effect in 1938—were intended to be a departure from the highly technical pleading requirements of the past.[55] Indeed, the

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[52] *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 11 (2009) [hereinafter *Hearing*] (statement of Professor Stephen B. Burbank) ("The architecture of *Iqbal*'s mischief . . . is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e).").

[53] FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(e). I have previously argued that a complaint containing insufficient factual details to render a claim plausible under *Twombly* should be the target of a motion for a more definite statement under Rule 12(e), not dismissal under Rule 12(c). *See* Spencer, *Plausibility Pleading*, *supra* note 7, at 491 ("[When faced with] a complaint with insufficient detail . . . [t]he appropriate remedy for such defects is the grant of a motion for a more definite statement, not dismissal of the claim. The defendant . . . is entitled to look to the pleadings for notice, but must rely on seeking more information rather than a dismissal when such notice is lacking.").

[54] FED. R. CIV. P. 8(d)(1). Prior to the restyling of the Rules in 2007, this provision was found in Rule 8(e)(1) and read, "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." FED. R. CIV. P. 8(e)(1) (2006) (amended 2007).

[55] Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1942) (indicating that subsection (e) (now subsection (d)) of Rule 8 was designed "to show that ancient restrictions followed under certain more technical rules have no place"); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937) ("Since the time when towards the end of the eighteenth century the long struggle for procedural reform commenced in England, the movement away from special pleadings and from emphasis on technical precision of allegation has been steady."); *see also* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1281 (3d ed. 2004 & Supp. 2019) ("By including a provision such as Rule 8(d)(1) the draftsmen of the original federal rules undoubtedly sought to simplify pleading and free federal procedure from the type of unrewarding battles and motion practice over the technical form of pleading statements that had plagued English and American courts under common law

Supreme Court—prior to *Iqbal*—cited this provision as evidence of the simplified notice pleading regime ushered in by the Federal Rules.[56] Why Justice Kennedy did not cite Rule 8(d)(1) when attempting to understand what Rule 9(b)'s second sentence required is unclear. What is clear, however, is that Rule 8(d)(1) does not require pleaders to state supporting facts to make a proper factual allegation.[57] Neither does the conditions-of-the-mind clause of Rule 9(b) impose such a requirement.

Second. Evidence from elsewhere in the Federal Rules and from the PSLRA reveals that the *Iqbal* interpretation of Rule 9(b) is not sound from a textualist perspective. Requiring facts that make state-of-mind allegations plausible amounts to a requirement for particularity, which the first sentence of Rule 9(b) only requires for allegations of fraud and mistake.[58] Further, it is only in an adjacent provision—Rule 9(a)(2)—that one finds an express obligation to state supporting facts; a party who wants to raise the issues of capacity or authority to sue or be sued, or the legal existence of an entity, must do so "by a specific denial, which must *state any supporting facts* that are peculiarly within the party's knowledge."[59] If Rule 9(a)(2) imposes a special obligation to state supporting facts in the narrow context to which it is confined, it cannot

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and code practice."). This provision has also been applied to curtail overly lengthy or convoluted allegations. *See, e.g.*, Gordon v. Green, 602 F.2d 743 (5th Cir. 1979) (verbose pleadings of over four thousand pages violated the rule).

[56] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) ("Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that '[n]o technical forms of pleading or motions are required.'").

[57] Abrogated Form 15 provided an illustration of pleading in conformity with Rule 8(d)(1): "On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*." FED. R. CIV. P. Form 15 (2014) (abrogated 2015). No facts supporting the allegation of conversion are supplied in the form, which was authoritative at the time *Iqbal* was decided. *See also* Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." (citing FED. R. CIV. P. 8(d)(1))).

[58] *See* FED. R. CIV. P. 9(b); *see also* Brief for Respondent at 33, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4734962, at *33 ("If Rule 9(b) means anything, it must be that allegations regarding state of mind can be alleged without reference to specific facts. After all, if allegations of fraud must be pleaded with 'particularity,' that must mean that allegations related to knowledge, intent, or motive, need not be pleaded with particularity.").

[59] FED. R. CIV. P. 9(a)(2) (emphasis added); *see also* WRIGHT, MILLER & SPENCER, *supra* note 17, § 1294 (discussing Rule 9(a)(2)).

be that the general standard applicable to allegations found in Rule 8(d)(1) and alluded to in the second sentence of Rule 9(b) also requires the statement of supporting facts sub silentio. *Expressio unius est exclusio alterius*.[60] Interpreting the general standard for stating allegations to require the statement of supporting facts would render Rule 9(a)(2)'s express imposition of a requirement redundant surplusage.[61] Finally, in the PSLRA Congress imposed a requirement for plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[62] If Rule 9(b)'s second sentence imposes a requirement to plead facts that support an inference of intent and other conditions of the mind, Congress's move to impose a particularity requirement with respect to state of mind in the PSLRA would have been largely unnecessary.[63]

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60 ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."); *see also Swierkiewicz*, 534 U.S. at 513 ("[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*." (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); *cf.* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1064 (2019) (Thomas, J., dissenting) ("The absence of a textual foundation for the majority's rule is only accentuated when § 1608(a)(3) is compared to § 1608(a)(4), the adjacent paragraph governing service through diplomatic channels. . . . Unlike § 1608(a)(3), this provision specifies both the person to be served *and* the location of service. While not dispositive, the absence of a similar limitation in § 1608(a)(3) undermines the categorical rule adopted by the Court."); Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) ("*Zadvydas*'s reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6). . . . That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released.").

61 *See* Jay v. Boyd, 351 U.S. 345, 360 (1956) ("We must read the body of regulations . . . so as to give effect, if possible, to all of its provisions."); *see also* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

62 15 U.S.C. § 78u-4(b)(2)(A) (2018).

63 Retirement Bd. of Policemen's Annuity & Benefit Fund of Chicago v. FXCM Inc., 767 F. App'x 139, 141 (2d Cir. 2019) ("While Federal Rule of Civil Procedure 9(b) provides that 'conditions of a person's mind may be alleged generally,' under the Private Securities Litigation Reform Act ('PSLRA'), a securities plaintiff must nevertheless allege facts that suggest a 'strong inference' of scienter.").

Third. What used to be Official Form 21—now conveniently abrogated,[64] but in force at the time *Iqbal* was decided—provided the definitive and authoritative[65] illustration of what both sentences of Rule 9(b) permit and require. It read, in pertinent part, as follows:

> 4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.[66]

In this example we have both an allegation of fraud and two allegations of intent, each of which must look to Rule 9(b) for the applicable standard of sufficiency. Regarding the allegation of fraud—the "circumstances" of which must be stated "with particularity"—Form 21 taught that offering the "who, what, when, where and how" of the fraud is sufficient, an understanding innumerable courts have recognized.[67] When we turn to the two allegations relating to intent—(1) that the aforementioned actions by the defendant were undertaken "for the purpose of defrauding the plaintiff" and (2) that those same actions were done "for the purpose of . . . delaying the collection of the debt"—Form 21 taught that bald,

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[64] FED. R. CIV. P. 84 (2014) (abrogated 2015); *see also* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 276 (2013) ("[T]he pleading forms live in tension with recently developing approaches to general pleading standards."); *see generally* A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113 (2015) [hereinafter Spencer, *The Forms Had a Function*] (discussing the significance of the abrogated Official Forms and the motivation behind their abandonment).

[65] Prior to its abrogation in 2015, Rule 84 provided: "The forms in the Appendix of Forms suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." FED. R. CIV. P. 84 (2014) (abrogated 2015). That the forms were sufficient under the rules was an important component of the rule that was added in a 1946 amendment for the very reason that courts were treating the forms as merely illustrative rather than authoritative. *See* Spencer, *The Forms Had a Function*, *supra* note 64, at 1122–24.

[66] FED. R. CIV. P. Form 21 (2014) (abrogated 2015).

[67] WRIGHT, MILLER & SPENCER, *supra* note 17, § 1297 ("A formulation popular among courts analogizes the standard to 'the who, what, when, where, and how: the first paragraph of any newspaper story.'"); *see, e.g.*, OFI Asset Mgmt. v. Cooper Tire & Rubber, 834 F.3d 481, 490 (3d Cir. 2016) (applying the formulation to a securities fraud class action); Zayed v. Associated Bank, N.A., 779 F.3d 727, 733 (8th Cir. 2015) (applying the formulation to a claim of aiding and abetting fraud); United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 36 (1st Cir. 2013) (applying the formulation to a qui tam action under False Claims Act).

conclusory, and factless statements suffice to allege intent properly.[68] What we undeniably do not have in Form 21 is the slightest support for Justice Kennedy's homespun, improvised diktat that allegations of intent and other conditions of the mind must be supported by facts that render the allegations plausible. That such lawless imperialism—which would be derided as judicial activism if it came from another quarter—was endorsed by the sometimes textualists Antonin Scalia[69] and Clarence Thomas[70] is a dismaying but unsurprising instance of the inconsistency that has too often characterized their purported interpretive commitments.[71]

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68 FED. R. CIV. P. Form 21 (2014) (abrogated 2015); *see* Sparks v. England, 113 F.2d 579, 581 (8th Cir. 1940) ("The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments."); Spencer, *Plausibility Pleading*, *supra* note 7, at 474 ("The allegation [in Form 21], however, remains fairly conclusory and factless in character. It contains a bald assertion that the conveyance was for fraudulent purposes without offering any factual allegations in support of this assertion. Nevertheless, the rulemakers felt that the information offered sufficed even under the heightened particularity requirement of Rule 9(b) because it achieves notice—the defendant has a clear idea of the circumstances to which the plaintiff refers in alleging fraud and can prepare a defense characterizing the cited transaction as legitimate.").

69 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16, 22 (1997) ("[W]hen the text of a statute is clear, that is the end of the matter. . . . The text is the law, and it is the text that must be observed.").

70 *See, e.g.*, Carter v. United States, 530 U.S. 255 (2000) (Thomas, J.) ("[O]ur inquiry focuses on an analysis of the textual product of Congress' efforts, not on speculation as to the internal thought processes of its Members.").

71 Justice Thomas's inconstancy is manifestly self-evident on this score, having admonished in *Swierkiewicz v. Sorema N.A.* that the pleading requirements imposed by Rule 8(a)(2) cannot be amended by the Court outside the rule amendment process but then signing on to two opinions doing just that in *Twombly* and *Iqbal*. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))). For an example of Justice Scalia's fair-weather textualism, one can consult *Walmart Stores, Inc. v. Dukes*, in which Justice Scalia abandoned a faithful application of the plain text of Rule 23(a)—which requires questions "common to the class"—to impose his own wished-for requirements that there be a common injury among class members and that the common issues must be central to the dispute. 564 U.S. 338 (2011); *see also* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013) ("Justice Scalia, who often touts his fealty to the written text of enacted rules and statutes, displays none of that discipline in *Dukes*. The language of Rule 23(a)—that 'there are questions of law or fact common to the class'—expresses no need for class members to have suffered the 'same injury.'"); *id.* at 474 ("Rather than follow his own textualist diktats, Justice Scalia pronounces efficiency as the objective policed by the commonality rule, then uses that to banish those common questions that do little to further

B. *The Original Understanding of Rule 9(b)*

Although the textual arguments against the *Iqbal* Court's interpretation of Rule 9(b) provide compelling evidence of its waywardness, and the review of the caselaw on this point above demonstrates that this erroneous interpretation of Rule 9(b) has real world negative implications for claimants, there is historical support for the view that *Iqbal* got the interpretation of Rule 9(b) terribly wrong. When Rule 9(b) was originally promulgated in 1938, the drafters of the rule provided helpful guidance as to its meaning in the committee notes. The note pertaining to Rule 9(b) read as follows: "See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22."[72] What this citation refers to is Order 19, Rule 22 of the English Rules of the Supreme Court (the English Rules) that were promulgated under the Judicature Acts of 1873 and 1875.[73] That rule—which the Advisory Committee indicated was the source of Rule 9(b)—read as follows:

> 22. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.[74]

Here we see that the lineage of the second sentence of our Rule 9(b)—the conditions-of-mind clause—is an English rule that provides that conditions of the mind may be alleged "as a fact without setting out the circumstances from which the same is to be inferred."[75] Given that the 1938 rulemakers cited to Order 19, Rule 22 as their source—or at least as their inspiration—for Rule 9(b),[76] it is reasonable to suspect that "averred generally" (now "alleged generally") must have been intended to mean something akin to "without setting out the circumstances from which the

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efficiency from its ambit, without regard to the fact that commonality, not efficiency, is the unambiguous requirement of Rule 23(a)(2).").

[72] FED. R. CIV. P. 9 advisory committee's note to 1937 adoption.

[73] Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66, *as amended by* Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77.

[74] English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

[75] *Id.*

[76] *See, e.g.*, Love v. Commercial Cas. Ins. Co., 26 F. Supp. 481, 482 (S.D. Miss. 1939) ("This rule [Rule 9(b)] very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22.").

same is to be inferred."[77] What did this language mean and how was it interpreted at the time the 1938 rules of procedure were first crafted?

Commentator's Notes and Official Forms Accompanying the English Rules. As the notes that appear following Order 19, Rule 22, in the 1937 edition of the Rules of the Supreme Court explain, to plead knowledge under the rule, "[i]t is sufficient to plead, 'as the defendant well knew,' or 'whereof the defendant had notice,' without stating when or how he had notice, or setting out the circumstances from which knowledge is to be inferred."[78] Respecting allegations of malice, the notes remark, "But he [the plaintiff] need not in either pleading [the statement of the claim or the reply] set out the evidence by which he hopes to establish malice at the trial."[79] The same was said of allegations of fraudulent intent; although under the English Rules allegations of fraud had to be specified by stating the acts alleged to be fraudulent,[80] the notes to Rule 22 indicated that "from these acts fraudulent intent may be inferred; and it is sufficient to aver generally that they were done fraudulently."[81]

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[77] English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22. The Supreme Court has employed similar reasoning when interpreting other Federal Rules of Civil Procedure. For example, in seeking to understand the meaning of Rule 42(a), the Court wrote the following:

> [This case is] about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of "consolidate" in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

Hall v. Hall, 138 S. Ct. 1118, 1125 (2018) (internal citation omitted).

[78] English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22 (note).

[79] *Id.*

[80] *Id.* O. 19, r. 6 ("In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence . . . particulars (with dates and items if necessary) shall be stated in the pleading . . . .").

[81] *Id.* O. 19, r. 22 (note).

Reference to the forms in Appendix C of the English Rules[82] confirms the view set forth in the notes discussed above. For example, one finds there the following model allegation of the defendant's knowledge:

> 3. The wilful default on which the plaintiff relies is as follows:—
>
> *C.D.* owed to the testator 1000*l.*, in respect of which no interest had been paid or acknowledgment given for five years before the testator's death. *The defendants were aware of this fact*, but never applied to *C.D.* for payment until more than a year after testator's death, whereby the said sum was lost.[83]

No facts from which it might be inferred that the defendants had such knowledge are offered anywhere within this model form. In another instance of pleading knowledge—this time within a complaint for a "fraudulent prospectus"—Appendix C offered the following example:

> 4. The prospectus contained misrepresentations, of which the following are particulars :—
>
> (a) The prospectus stated ". . . . " whereas in fact . . . .
>
> (b) The prospectus stated ". . . . " whereas in fact . . . .
>
> (c) The prospectus stated ". . . . " whereas in fact . . . .
>
> 5. *The defendant knew of the real facts* as to the above particulars.
>
> 6. The following facts, *which were within the knowledge of the defendants*, are material, and were not stated in the prospectus . . . .[84]

The next form in Appendix C, which is for a "fraudulent sale of a lease," similarly contained an unadorned and unsupported allegation of the defendant's knowledge. It read as follows: "The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the George public-house, Stepney, by fraudulently representing

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[82] *Id.* O. 19, r. 5 ("The forms in Appendices C., D., and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings . . . .").

[83] The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § II, No. 2 (emphasis added).

[84] *Id.* § VI, No. 13 (emphasis added).

to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less, *to the defendant's knowledge*."[85]

Allegations of malice—like allegations of knowledge—were protected from particularized pleading by Order 19, Rule 22;[86] thus, it is helpful to find an example of such pleadings in Appendix C as well. The malicious prosecution form read as follows: "The defendant *maliciously* and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon . . . ."[87] Here, consistent with Order 19, Rule 22, we find no greater specificity than was presented in the context of the allegations of the defendant's knowledge outlined above.

English caselaw. The scant but available contemporaneous decisions of English courts interpreting and applying the pleading rules confirm that they did not require the pleading of any facts substantiating the basis for condition-of-the mind allegations. *Glossop v. Spindler*[88] is particularly illustrative. In that case, the plaintiff alleged—in paragraph one—that the defendant maliciously printed and published in a newspaper certain defamatory matter and—in paragraph two—that "the defendant, on previous occasions, and in furtherance of malicious motives on his part towards the plaintiff, maliciously printed and published of the plaintiff various statements and paragraphs in the said newspaper, and these, for convenience of reference, are set forth in the appendix hereto."[89] The defendant sought to have paragraph two and the appendix stricken as a violation of the pleading rules.[90] The court ruled that the allegation of paragraph two itself was sufficient, in that "it contained a statement of material facts upon which the plaintiff would rely at trial as constituting malicious motives."[91] However, the court also ruled that the appendix must be stricken because "it contained the evidence to prove the alleged

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85 *Id.* § VI, No. 14 (emphasis added).

86 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

87 The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § VI, No. 15 (emphasis added).

88 (1885) 29 SJ 556 at 556 (Eng.).

89 *Id.*

90 *Id.* at 557.

91 *Id.*

facts in paragraph 2, and was, therefore, a violation of ord. 19, r. 4."[92] Two things are worth noting here. First, Rule 4, which was cited by the Court, supplied the ordinary pleading standard, which required "only, a statement in a summary form of the material facts on which the party pleading relies for his claim . . . but not the evidence by which they are to be proved . . . ."[93] Providing additional details beyond the allegation of malicious intent violated that rule. Second, when the plaintiff went above and beyond what was required, offering (in an appendix) additional facts from which malicious intent could be inferred, that was not lauded as helpful to the presentation of the case but was challenged by the defendant as a pleading offense and thrown out by the court as inappropriate. Thus, not only were facts from which malice might be inferred not required of pleaders under Order 19, Rule 22, the pleading of such factual detail appears to have been affirmatively prohibited by Order 19, Rule 4.[94]

Herring v. Bischoffsheim[95] offers similar insight into the minimal pleading burden under the English Rules in the context of an allegation of fraudulent intent. There, the plaintiff's claim was that the prospectus issued by the defendant was fraudulent to the knowledge of the defendant company; the plaintiff offered extensive evidentiary details in support of that allegation. The court, in response to a motion to strike these details

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92 *Id.*

93 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4. A "material fact" might be described as what in the United States previously was referred to an "ultimate fact" under code pleading, as opposed to evidentiary facts. *See, e.g.*, *In re* Dependable Upholstery Ltd (1936) 3 All ER 741 at 745–46 (Eng.) (holding an allegation that dividends were paid from an improper source to be a "material fact" under Rule 4 and that plaintiffs would not be ordered to give particulars of that fact, which would merely disclose the evidence by which that fact was intended to be proved). *But see* Millington v. Loring (1880) 6 CPD 190 at 190, 194 (Eng.) ("[I]n my opinion those words ['material facts'] are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial."). Thus, in *Glossop v. Spindler* the "material fact" is that the publication was with malicious intent, while the evidentiary facts are those details on which the ultimate fact of malicious intent is based. Glossop v. Spindler (1885) 29 SJ 556 at 557 (Eng.). An innovation of the Federal Rules of Civil Procedure was to avoid distinguishing between ultimate and evidentiary facts by abandoning any reference to pleading facts altogether. *See* CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 242 (2d ed. 1947).

94 *See also* Gourard v. Fitzgerald (1889) 37 W.R. 265 (Eng.) (rejecting a lower court's order for particulars pertaining to the plaintiffs' allegation that statements were maliciously published by the defendants).

95 [1876] WN 77 (Eng.).

from the statement of the claim, agreed with the defendant that the pleading violated Order 19, Rule 4, and permitted the plaintiff to amend.[96] In doing so, the court wrote,

> It is unnecessary for the statement of claim to state the motives which led to the issuing of the prospectus, or the scheme of which it is a part. It is sufficient to state generally that the prospectus was, to the knowledge of the defendants, fraudulent, without specifying the particulars.[97]

Finally, we have some evidence of how allegations of knowledge generally were permitted under these rules. In *Sargeaunt v. Cardiff Junction Dry Dock & Engineering Co.*,[98] the court rejected a request for particulars setting out how certain knowledge on the part of the defendant came to exist, citing and relying on Order 19, Rule 22 in the process. In *Griffiths v. The London & St. Katharine Docks Co.*,[99] the court reported that the plaintiff alleged that the defendant company "knew or ought to have known of the defective, unsafe, and insecure condition of the said iron door" without further elaborating the facts supporting the allegation.[100] No fault was found with this allegation; the claim only failed because the plaintiff failed to allege also that he was unaware of the said defective condition, a critical element of stating the negligence claim asserted in the case.[101]

From the previous discussion, it is readily apparent that the progenitor of Rule 9(b)'s conditions-of-the-mind clause—Order 19, Rule 22 of the English Rules (and the English cases that applied that rule)—give lie to the notion that Rule 9(b) may properly be interpreted to require the pleading of facts that make state-of-mind allegations plausible. That the 1938 rulemakers cited to the English rule in the notes accompanying Rule 9(b) can reasonably be read as evidence of their intent to embrace the associated English practice of not requiring pleaders to allege facts from which conditions of the mind might be inferred. But Rule 9(b)'s

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96 *Id.*

97 *Id.*

98 [1926] WN 263, 264 (Eng.) ("[T]he plaintiff had no right under the rule [Order 19, Rule 22] to obtain the particulars asked for, and they must be refused.").

99 (1884) 12 QBD 493 (Eng.).

100 *Id.* at 494.

101 *Id.* at 496.

admonition must also be understood in the wider context of the liberal general pleading ethos of the English Rules embraced by the drafters of the 1938 rules.[102] As Charles Clark, reporter to the original rules committee, noted at the Cleveland Institute on Federal Rules:

> I think there is no question that the rules can not [sic] be construed to require the detailed pleading that was the theory, say, in England in 1830 .... About the only time when this specialised detailed pleading was really tried was in England in the 1830's, after the adoption of the Hilary Rules. The Hilary Rules were the first step in the procedural reform in England, and they got the expert Stephen to write the rules. He went on the theory, which many experts have, that what you want is more and better and harsher rules, and never at any time in the history of English law was pleading so particularised, and never were the decisions so strict and technical, and never was justice more flouted than in that short period in the '30's, ... which led immediately to greater reform, finally culminating in the English Judicature Act and the union of law and equity.[103]

In other words, the pleading reforms brought about by the English Judicature Acts, which were a response to the highly particularized pleading regime of the Hilary Rules, were the inspiration for much of what Charles Clark and the 1938 drafters were trying to do with their new pleading rules. But the result of the *Iqbal* revision of Rule 9(b)—and the antecedent rewriting of the ordinary pleading standard of Rule 8(a)(2) in *Twombly*—is that we have regressed very nearly to the state of affairs that the 1938 rule reformers sought to save us from. That this was done without due regard for the previously-reviewed evidence of Rule 9(b)'s proper meaning is problematic. Equally (if not more) disconcerting,

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[102] A.B.A., FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 40 (Edward H. Hammond ed., 1938) ("I would say this, that I think you will see at once these pleadings follow a general philosophy which is that detail, fine detail, in statement is not required and is in general not very helpful.").

[103] A.B.A., RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220–22 (William W. Dawson ed., 1938); *see also* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–98 (5th ed. 2019) (discussing the Hilary Rules and their development).

however, is that the *Iqbal* interpretation of Rule 9(b) is at variance with the policies that underlie the rule, a topic to which we now turn.

III. THE AFFRONT TO THE POLICY BEHIND RULE 9(b)

By applying the plausibility fact-substantiation standard to allegations of conditions of the mind, this heightened pleading standard is being applied to the very kinds of allegations Rule 9(b)'s second sentence was quite obviously crafted to protect.[104] Requiring pleaders to provide the particulars of a person's state of mind is not something that all pleaders will be able to do without the benefit of discovery,[105] making the imposition of such a requirement at the pleading stage unfair.[106] This is particularly true for plaintiffs asserting discrimination claims, who are more likely (than fraud plaintiffs or public figure defamation plaintiffs, for example) to lack the resources to overcome the information asymmetry that exists at the pleading stage.[107] Wrongful conduct is already something not likely to be broadcast; wrongful intentions—which lurk within a person's mind—are even more likely to be obscured from external view. The drafters of Rule 9(b) understood this, agreeing with the English system that requiring complainants to articulate facts

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104 WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301 ("[T]he trend seems to be an embrace of the more rigid pleading requirements for conditions of mind that the second sentence of Rule 9(b) was designed to suppress.").

105 *Id.* ("The concept behind this portion of Rule 9(b) is an understanding that any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable. It would be unworkable because of the difficulty inherent in ascertaining and describing another person's state of mind with any degree of exactitude prior to discovery.").

106 *See* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 160 (2008) ("[T]o the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair. This appears to be the case for many civil rights claims, where claimants often lack direct evidence of an official municipal policy or of discriminatory motivation and where circumstantial evidence of bias is equivocal. It is in these types of cases that plaintiffs need access to discovery to explore whether they can find needed factual support. Thus, courts should not invoke *Twombly* to require the pleading of substantiating facts that a plaintiff needs discovery to gain . . . .").

107 *See, e.g.*, Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982) ("We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, *i.e.*, that there was an official policy or a de facto custom which violated the Constitution.").

substantiating an alleged condition of the mind would be unreasonable.[108] In a system in which the right to petition courts for redress is constitutionally protected by the Petition Clause of the First Amendment,[109] the pleading standard must be one that avoids blocking potentially legitimate claims solely based on the inability of claimants to articulate supporting facts—such as those pertaining to conditions of the mind—that it would be nearly impossible for them to know.[110] As we have seen, Rule 9(b)'s second sentence was designed with this concern in mind, as was Rule 11(b)'s allowance of making "factual contentions [that] will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[111] The *Iqbal* fact-substantiation interpretation of Rule 9(b) thus has pushed the system over the line that the Petition Clause was designed to protect, something that a reparative revision to Rule 9(b) could address.[112]

An additional consideration suggesting that imposing a heightened burden for condition-of-the-mind pleading is problematic from a policy perspective derived from the *Iqbal* Court's endorsement of the use of "judicial experience and common sense" to inform judges' plausibility assessments.[113] Research has shown that people make decisions based on various biases and categorical or stereotypical reasoning, particularly when they lack complete information about an individual or a situation.

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108 *See supra* Part II.

109 U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (stating that the First Amendment serves as the constitutional basis for the right of access to courts).

110 *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 29–30 (2009) [hereinafter Spencer, *Understanding Pleading Doctrine*] ("[R]equiring particularized pleading in these types of cases [e.g. discrimination cases] effectively prevents some claimants from seeking redress for what could be legitimate grievances. If the constitutional line is drawn at permitting procedural rules to bar 'baseless' claims that lack a 'reasonable basis'—a line that admittedly has not been definitively drawn by the Court—then the line drawn by contemporary pleading doctrine is inapt in certain cases." (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983))).

111 FED. R. CIV. P. 11(b)(3).

112 *See* Spencer, *Understanding Pleading Doctrine*, *supra* note 110, at 30 ("Reforming the doctrine to relieve plaintiffs of the obligation to allege the specifics underlying subjective motivations or concealed conditions or activities might be one way to remedy the imbalance.").

113 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

Jerry Kang and his collaborators explained this phenomenon in the context of the 12(b)(6) motion to dismiss after *Iqbal*:

> [W]hen judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.
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> . . . .
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> Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas.[114]

The "judicial experience and common sense" that the Court empowered judges to rely upon in assessing claims necessarily complicates the now-imposed duty to offer facts substantiating

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[114] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160, 1162 (2012).

conditions of the mind because pleaders will have to overcome the categorical schemas dominant within the judicial class.[115] Thus, we see Justice Kennedy himself providing exhibit number one: In *Iqbal*, he found insufficient facts to substantiate the allegation that Ashcroft was the "principal architect" of the discriminatory policy, "and that Mueller was 'instrumental' in adopting and executing it," but credited the allegation that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11" and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER . . . ."[116] Because both sets of allegations were articulated with the same level of specificity, it cannot be—as Justice Kennedy suggested—that the difference between them is that the former are conclusory and the latter are factual.[117] Rather, Justice Kennedy is applying a schema that tells him that it is plausible for the FBI Director to have directed the arrests and detention of thousands of Arab Muslim men, and for the FBI Director and the Attorney General to have "cleared" the policy of holding those men in restrictive conditions, while it is not plausible to believe—without substantiating facts—that the same

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115 Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–98 ("Beyond constituting a violation of the assumption-of-truth rule and interfering with the jury right, the *Iqbal* majority's new fact skepticism is problematic because it derives from, and gives voice to, what appears to be the institutional biases of the Justices, as elite insiders with various presumptions about the conduct and motives of other fellow societal elites."); *Hearing*, *supra* note 52, at 13 ("Judgments about the plausibility of a complaint are necessarily comparative. They depend in that regard on a judge's background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual's cultural predispositions as are judgments about adjudicative facts.").

116 *Iqbal*, 556 U.S. at 681.

117 *Id.* at 699 (Souter, J., dissenting) ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory."); *see also* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 193 ("These are not conclusory assertions but rather plain-English descriptions of the phenomena they attempt to describe. There can be no question that if I were to say 'Mr. Smith was the "principal architect" of the Chrysler building,' that would be a non-conclusory factual claim, as would the statement that 'Ms. Smith "approved" the design plans for the Chrysler building.' These statements are factual because they make claims about what transpired and who took certain actions.").

men designed and had a hand in the execution of a discriminatory arrest and detention policy.[118]

Because it is well documented that the use of categorical thinking and explicit and implicit biases infect all of us[119]—including judges[120]—and because among those biases are background assumptions about the behaviors and tendencies of members of various groups—whether those groups are public officials, racial,[121] ethnic,[122] or religious groups,[123]

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[118] *See Iqbal*, 556 U.S. at 682 (indicating that because "Arab Muslims" were responsible for the September 11 attacks, an "obvious alternative explanation" for the arrests in question was Mueller's "nondiscriminatory intent" to detain aliens "who had potential connections to those who committed terrorist acts").

[119] *See, e.g.*, JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS (2009), https://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx [https://perma.cc/WYQ3-4X27].

[120] *See, e.g.*, Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 113 (2017) ("Little has been said of the role of the way judges perceive these fundamental issues and the actors involved: how individual lives are automatically valued, how corporations are implicitly perceived, and how fundamental legal principles are unconsciously intertwined with group assumptions. This Article suggests, and the empirical study supports the idea, that automatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered."); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210–11 (2009) (finding among judges a strong implicit bias favoring Caucasians over African Americans); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) ("I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. . . . Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.").

[121] *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (showing biases connecting African-American faces with perceptions of the presence of a weapon).

[122] *See, e.g.*, Levinson, Bennett & Hioki, *supra* note 120, at 89–92 (discussing implicit bias against Asians).

[123] *See, e.g.*, *id.* at 110–11 ("The results of the study, for example, showed that federal district judges (the very judges who make sentencing determinations for the federal crime we presented) were more likely (of marginal statistical significance) to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant.").

cultural minorities,[124] or women[125]—allegations of discriminatory intent (for example) will run up against judicial presumptions of non-discrimination, which research has proven are unwarranted.[126] Nevertheless, because of the presumption of non-discrimination, a pleader will be under a particularly stringent burden to offer facts that dislodge judges from this presumption if it is hoped that they will accept an allegation of discrimination as plausible. As I have previously argued,

> [o]nce we make normalcy in the eyes of the judge the standard against which allegations of wrongdoing are evaluated, we perversely disadvantage challenges to the very deviance our laws prohibit. A civil claim is all about deviation from the norm, which has happened many times in history—even at the hands of good capitalist enterprises and high-ranking government officials. While businesses and government officials may normally not do the wrong thing, sometimes (or perhaps often) they do. When that happens, they certainly are not going to leave clear breadcrumbs for outsiders to expose them. All we may see are the fruits of their wrongdoing, which in turn will be all that can be alleged in a complaint. Without the opportunity to initiate an action that asserts deviance in the context of seemingly normal behavior, such wrongdoing will go undiscovered and unpunished.[127]

Freeing pleaders from the obligation to offer sufficient facts to convince normatively biased judges that an allegation of deviant intent is plausible is necessary if we wish to give such claimants the opportunity to access a judicial process in which they can employ the tools of discovery to further substantiate and vindicate legitimate claims.

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124 Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

125 *See, e.g.*, Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005) (finding study participants shifted their valuation of the worth of various credentials to preference a male in selecting a police chief).

126 *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (showing that identical applicants with White-sounding versus Black-sounding names received fifty percent more callbacks for interviews).

127 Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7, at 1734.

More broadly, an interpretation of Rule 9(b) that obligates pleaders to substantiate condition-of-mind allegations with supporting facts is inconsistent with any sound theory of what worthwhile procedural rules should be designed to accomplish. If we want rules that promote the classic law enforcement objectives of general and specific deterrence, as well as the reification of abstract legal rules and the pacification of the governed that comes from its perception of systemic legitimacy and efficacy, then those rules must be—or at least must be seen to be—facilitative of efforts to vindicate transgressions of the law. No rule—or interpretation thereof—that by design shields many wrongdoers from culpability on the basis of the inability of their accusers to perform the metaphysical task of mind reading will succeed at permitting the translation of our laws as written into meaningful prohibitions that would-be transgressors will be inclined to respect.

IV. RESTORING RULE 9(b)

We have seen that the *Iqbal* majority's interpretation of Rule 9(b)—and the lower courts' subsequent application of it—are inconsistent with the proper and original understanding of Rule 9(b). Further, we have seen that the more faithful understanding of the rule laid out in this Article has the benefit of reflecting a wiser approach to the kind of pleading obligations that are sensible to impose with respect to state-of-mind allegations. Rule 9(b) should thus be restored to its intended meaning, which can happen in one of two ways. The first would be for the Supreme Court to correct its error in *Iqbal* in a future case concerning the application of Rule 9(b). Lower courts, equipped with the insight it is hoped this Article will provide, could (and should) make an effort to interpret and apply Rule 9(b) in ways that honor the language, history, and intent behind it. However, because both of these responses seem unlikely, a second approach—a restorative amendment to Rule 9(b)—should be pursued.

To revise Rule 9(b) to eliminate *Iqbal*'s requirement that sufficiently alleging conditions of the mind requires the statement of well-pleaded facts that render the allegation plausible, the rule should be amended as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the

> circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

This revised language borrows directly from Order 19, Rule 22—the original source of the admonition that was promulgated as the second sentence of Rule 9(b) in 1938. It also has the benefit of directly and unambiguously addressing what has become problematic about lower court application of Rule 9(b)—the imposition of a requirement to state facts that provide the basis for condition-of-the-mind allegations.

An accompanying committee note for this revision would need to be crafted to ensure that there is no room for courts—including the Supreme Court—to interpret Rule 9(b) in a way that reverts towards the contemporary interpretation of the rule that has taken hold since *Iqbal*. The following may be a possible approach:

> *Subdivision (b).* Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g.*, *Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term "generally" in Rule 9(b)'s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)'s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to "state any supporting facts" as is found in

> Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.
>
> To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted "maliciously" or "with fraudulent intent" or "with the purpose of discriminating against the plaintiff on the basis of sex," or that the defendant "had knowledge of X." For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, "On March 1, [*year*], defendant [*name of defendant 1*] conveyed all of defendant's real and personal property to defendant [*name of defendant 2*] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."
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> Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

Were Rule 9(b) to be revised in this manner, one might argue that it would entirely undo the *Iqbal* and *Twombly* regime, permitting conclusory legal allegations to receive credit that permits claims to proceed without having to demonstrate plausibility. Not so. Take *Twombly* itself, for instance. There the key allegation was that the defendants entered into an unlawful agreement to exclude certain players from the market; the Court's beef was that there were not sufficient facts to which one could point that would assure courts that that allegation was more than mere speculation.[128] The proposed revision of Rule 9(b) would not alter this result because the allegation of an unlawful agreement is not

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[128] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566 (2007) ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.").

a condition of the mind that would be covered by Rule 9(b). Rather, it is an allegation pertaining to something that the defendants have done.[129] Thus, the Court would have still been able to hold (under its plausibility pleading approach) that the complaint fell short under Rule 8(a)(2).

Amended Rule 9(b) would comport with the result that the Court produced in *Swierkiewicz v. Sorema N.A.*,[130] a result the Court endorsed in *Twombly*. In *Swierkiewicz*, the plaintiff alleged that he had been discriminated against in employment based on his nationality but—in the district court's words—"ha[d] not adequately alleged circumstances that support an inference of discrimination."[131] The Court disagreed and found the complaint to be sufficient.[132] As the *Twombly* Court explained it, "Swierkiewicz's pleadings 'detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination'" and indicated that "[w]e reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief."[133] The proposed revision of Rule 9(b) simply honors the approach to pleading discrimination endorsed by the Court in *Swierkiewicz* and *Twombly*—specific facts substantiating an allegation of discrimination are not necessary; the sufficiency of a discrimination complaint will rest on whether the facts alleged beyond those pertaining to conditions of the mind plausibly show entitlement to relief. In the context of Swierkiewicz's discrimination claim, by alleging that he had been fired and replaced with a younger person of a different nationality, coupled with his allegations of negative age-based comments from his supervisor,[134] Swierkiewicz crafted a complaint that satisfied the Rule 8(a)(2) standard without having to provide the substantiation of

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129 *Id.* at 551 (reporting that the plaintiff alleged that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another").

130 534 U.S. 506 (2002).

131 *Id.* at 509.

132 *Id.* at 515.

133 *Twombly*, 550 U.S. at 570 (quoting *Swierkiewicz*, 534 U.S. at 508, 514).

134 *Swierkiewicz*, 534 U.S. at 508–09.

discriminatory intent that the defendants and lower courts had demanded.

That said, amending Rule 9(b) as proposed would alter the outcome in *Iqbal*. A key requirement for being able to state a claim against the government officials in *Iqbal* was that their conduct was done with discriminatory intent. Justice Kennedy declared that a bald allegation of discriminatory intent was not entitled to the assumption of truth because it was conclusory and not supported by well-pleaded facts.[135] He reached this conclusion by interpreting Rule 9(b)'s second sentence as imposing a plausibility requirement as described above.[136] However, Justice Kennedy acknowledged that a rule obligating the Court to accept an allegation of discriminatory intent as true would require a different result: "Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[137] Allegations of discriminatory intent, like all allegations pertaining to a defendant's state of mind, are factual contentions because they pertain to experienced reality rather than to the legal consequences that flow therefrom. Thus, once conditions of the mind are permitted to be simply stated under revised Rule 9(b), those allegations of fact will be entitled to benefit from the accepted assumption-of-truth rule that the Court continues to endorse.[138]

Similarly, revised Rule 9(b) would undo the position that the circuit courts have taken in this field, abrogating the decisions in which they have dismissed claims based on a determination that substantiating facts must

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135 Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009) ("These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy '"because of," not merely "in spite of," its adverse effects upon an identifiable group.' As such, the allegations are conclusory and not entitled to be assumed true." (citations omitted)).

136 *See supra* Section I.A.

137 *Iqbal*, 556 U.S. at 686. Were there to be an interest in providing a greater degree of protection against litigation for defendants who are potentially entitled to qualified immunity (as may have characterized the defendants in *Iqbal*), it would be appropriate to vindicate that interest through an amendment to the Federal Rules (or via a legislative enactment) tailored to such cases, not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule 9(b).

138 *Id.* at 678 (referring to "the tenet that a court must accept as true all of the allegations contained in a complaint"); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citation omitted)).

be offered to support allegations pertaining to conditions of the mind. This, of course, is by design and is the principal purpose behind the revision. Thus, in a case like *Biro*,[139] in which the Sixth Circuit required the plaintiff to offer facts substantiating the allegation of actual malice,[140] the result would be different. There, the plaintiff alleged as follows regarding actual malice:

> Biro generally alleged that each of the New Yorker defendants "either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and nonetheless published them," and that they "acted with actual malice, or in reckless disregard of the truth, or both."[141]

Malice and knowledge are conditions of the mind protected from particularized pleading by Rule 9(b). As revised, Rule 9(b) would treat the quoted allegations as sufficient. As in *Iqbal*, crediting these allegations as true would result in rendering the complaint sufficient under Rule 8(a)(2). Indeed, there are certainly a great many cases in which crediting allegations of condition of the mind as true will render them impervious to attack under Rule 8(a)(2). If such a result is not desired, then making the *Iqbal* interpretation of Rule 9(b) explicit or abrogating the second sentence of Rule 9(b) altogether would be the appropriate course to pursue.[142]

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139 807 F.3d 541 (6th Cir. 2015).

140 *Id.* at 542.

141 *Id.* at 543.

142 Codifying the *Iqbal* interpretation of Rule 9(b)'s second sentence could be achieved by revising it to read as follows: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ by setting forth the circumstances from which the condition may be inferred." Codification might also be achieved by deleting the second sentence of Rule 9(b).

CONCLUSION

Revising promulgated federal rules through judicial decision making is a perilous[143] and illegitimate[144] business. After *Twombly* and *Iqbal*, one cannot know what Rule 8(a)(2)'s "short and plain statement of the claim showing entitlement to relief" is, nor can one know what Rule 9(b) means when it permits a party to allege conditions of the mind "generally," without consulting the judicial interpretation of those rules by courts, notwithstanding the divergence of the latter from the text of the former.[145] If our rules of federal civil procedure are not to be an overtly duplicitous exercise in which the rules say one thing but mean another,[146] then either the Court must interpret the rules faithfully according to their text, or the text of the rules should be brought into conformity with their interpretation. Stated differently, given that the *Iqbal* interpretation of Rule 9(b) and that which it has spawned among lower courts is manifestly

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143 Green v. Bock Laundry Mach. Co., 490 U.S. 504, 534 (1989) (Blackmun, J., dissenting) ("The implications of the majority's opinion today require every lawyer who relies upon a Federal Rule of Evidence, or a Federal Rule of Criminal, Civil, or Appellate Procedure, to look *beyond* the plain language of the Rule in order to determine whether this Court, or some court controlling within the jurisdiction, has adopted an interpretation that takes away the protection the plain language of the Rule provides.").

144 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity . . . 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation'" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))).

145 My view, as expressed extensively in previous work, is that the Court's interpretation of Rule 8(a)(2)—like its interpretation of Rule 9(b)—diverges from the meaning supported by all relevant textual and historical evidence. *See* Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7; Spencer, *Plausibility Pleading*, *supra* note 7. Restoring the intended meaning of Rule 8(a)(2) could be achieved by revising it as follows: "a short and plain statement of the claim ~~showing that~~ articulating the pleader's grounds ~~is entitled to~~ for relief . . . ." Other approaches have been put forward as well. *See, e.g.*, Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 OR. L. REV. 955, 979–83 (2012) (providing multiple suggestions for revising Rule 8(a)(2) to restore it to its pre-*Twombly* meaning). Unfortunately, it appears that ship has sailed. Hopefully, however, there remains the possibility that the misinterpretation of Rule 9(b) can be repaired.

146 *See* Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 80–81 (2006) ("[T]he rich context of common law procedural rules . . . function in conjunction with the 1938 Rules to determine the actual function of the federal district courts . . . . These Other Federal Rules of Civil Procedure . . . interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules and produce a functioning system which is not progressive in reality but conservative.").

counter to the intended meaning of Rule 9(b) and to all available textual evidence, the rulemakers have a duty *to at least consider* whether the rule should be revised in a way that better tracks how courts interpret and apply the rule, or be revised to correct the errant construction. Doing nothing, though, should not be an option—unless we[147] want to be complicit in the duplicity that permits liberal-sounding rules to be restrictive in practice.[148] None of us should want that, although I fear that doing nothing is precisely the most likely thing that we will do.[149]

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147 I currently serve as a member of the Judicial Conference Advisory Committee on Civil Rules, which bears responsibility for considering proposals to amend the Federal Rules of Civil Procedure. The views expressed in this piece are my own and do not reflect the position of the Committee or its members.

148 *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 369 (2010) ("[P]rocedure's central thesis (the liberal ethos) and antithesis (the restrictive ethos) can be synthesized into a concept I refer to as ordered dominance: procedure's overarching, unified goal is to facilitate and validate the substantive outcomes desired by society's dominant interests; procedure's veneer of fairness and neutrality maintains support for the system while its restrictive doctrines weed out disfavored actions asserted by members of social out-groups and ensure desired results.").

149 This sentiment arises from my experience as a member of the Rules Committee. Whether it be due to the prioritization that necessarily arises in the context of limited deliberative capacity and bandwidth, the institutional conservatism that comes from being a committee dominated by members of the judiciary, or the awkwardness associated with rebuffing the work of the Court (and the Chief Justice) under whose aegis we operate, the Rules Committee in modern times has shied away from undertaking liberalizing, access-promoting reforms in response to interpretive drift in a restrictive direction. *See* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 927 (2020) ("The second theme—institutional actor timidity—demonstrates how the Committee is quite timid of its role in the Rules Enabling Act process. That process requires the work of other institutional actors, and one of the most fraught relationships is between the Supreme Court and the Committee. After all, the Committee's members are appointed by the Chief Justice, the work of the Committee is delegated from the Court to the Committee, and the Court is part of the process as its approval is required for an amendment to be adopted."). As Charles Clark pointed out long ago, it is not surprising that the judiciary will constantly turn back to restrictive pleading, but it is our job to periodically press for corrective measures that will maintain the access-facilitating ethos that the rules were originally intended to institutionalize. *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459–60 (1941, 1942, 1943) ("With the development of code pleading, from the Field Code first adopted in New York in 1848 to the present time, the emphasis was shifted from the detailed issue-pleading of the common law to a statement of the facts, so simple, it was said at the time, that even a child could write a letter to the court telling of its case. Notwithstanding this history, however, courts recurrently turn back to the course of requiring details. Such a return, on the whole, is not surprising, for all rules of procedure or administration tend to become formalized and rigid and need to be checked regularly with their objectives and in the light of their present accomplishment. Moreover, the pressure from one side to force admissions from the opponent and the court's desire to hurry up adjudication and avoid lengthy trials tend somewhat to push in this same direction. It is

necessary, however, always to bear in mind that nowadays we are not willing to enforce harsh rules or to sacrifice a party for his lawyer's mistake, induced perhaps by technical ignorance or even by lack of clarity of the decisions.").