IN THE SUPREME COURT OF TENNESSEE

PAM WEBB,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	Docket No. M2009-01552-SC-R11-CV
	)	
NASHVILLE HABITAT FOR HUMANITY, INC.,	)	
	)	
Defendant/Appellant.	)	

BRIEF OF *AMICUS CURIAE* THE CENTER FOR INDIVIDUAL FREEDOM

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I. INTEREST OF *AMICUS CURIAE*

The Center for Individual Freedom ("CFIF") is a non-profit organization established in 1998 to advance the principles of Constitutional fidelity, individual rights and legal reform. In pursuit of these principles, CFIF frequently files *amicus* briefs before the United States Supreme Court and other courts throughout the nation.

Of particular concern to CFIF is the proliferation of frivolous lawsuits and the burden that needless litigation places on society and the nation's economy. With particular regard to employment litigation, CFIF believes that overly permissive pleading standards unfairly permit and encourage plaintiff abuse. In the instant matter, CFIF believes that the permissive "no set of facts" pleading standard advanced by Respondent Pam Webb and the Tennessee Employment Lawyers Association ("TENNELA") would only exacerbate that crisis.

CFIF has maintained an active role in advancing the common-sense pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Among other activities, when the United States House of Representatives introduced a bill in 2009 to abrogate *Twombly* and *Iqbal,* CFIF's active opposition ultimately helped defeat that proposed bill. Accordingly, the important debate over common-sense pleading standards has shifted to the states—as evidenced by the instant action and the filing of an *amicus*

brief by a number of prominent plaintiffs' attorneys. CFIF actively promotes the adoption of *Twombly* and *Iqbal* by state courts, including those courts within the State of Tennessee.

II. STATEMENT OF THE ISSUES

1. Should plaintiffs be allowed to maintain complaints that fail to provide courts and defendants with fair notice of the factual grounds upon which their claims rest?

2. Should this State's employers and individual defendants be burdened with the crippling costs of defending employment lawsuits where the complaint fails to raise a plausible right to relief, as Webb and TENNELA now suggest?

3. Should this Court accept Respondent's preferred "no set of facts" pleading standard—a standard weaker than that now adopted by the federal courts—when doing so will encourage the filing of employment lawsuits in state courts rather than federal courts, thereby significantly compounding this State's already overburdened dockets?

III. SUMMARY OF ARGUMENT

Pleading standards perform an essential gate-keeping function. They ensure that: (1) the courts do not become overwhelmed by frivolous litigation; (2) this State's citizens are not hauled into court on a whim; and (3) a defendant has fair notice of why he or she is being sued. This is precisely why the United States Supreme Court articulated the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

TENNELA—an entity comprised of members of the plaintiffs' employment bar—would have this Court believe that for Tennessee to follow *Twombly* and *Iqbal* will have cataclysmic consequences. Incorrectly classifying its proposed pleading standard as "a heightened merits review," the pro-plaintiff *amicus* falsely forecasts "dramatic changes," "impossible pleading standards for discrimination plaintiffs" and even Seventh Amendment violations if *Twombly* is adopted. Such irrational and dire predictions lack any foundation in fact, precedent or common sense.

To the contrary, *Twombly* and *Iqbal* simply stand for the proposition that would seem "self-evident to anyone who is not a lawyer"—*i.e.*, that "plaintiffs ought to at least know what their case was about before filing it." Richard J. Pockner, *Why the Iqbal and Twombly Decisions are Steps in the Right Direction,* 57-MAY Fed. Law. 38 (2010). *Twombly* and *Iqbal* merely require a plaintiff to

plead factual allegations that are sufficient to provide "fair notice of the nature of the claim" and the "grounds on which the claim rests." *Twombly,* 127 S.Ct. at 1965, n.3. If a plaintiff is unable or unwilling to take that elemental and simple step when filing a complaint (thus adding to the courts' dockets and forcing one of this State's citizens to expend significant time and resources defending the matter), the action does not belong before the Court in the first place.

IV. ARGUMENT

A. The Majority of State Courts to Consider This Issue Have Followed *Twombly.*

TENNELA attempts to convince this Court that the pleading standard set forth in *Tombly* is radical and dramatic. To this end, TENNELA spends much of its brief citing four cases where courts declined to follow *Twombly.* (*See* TENNELA Br. at 20-22). What TENNELA neglects to state, however, is that a majority of the states to consider this issue have adopted *Twombly. See, e.g., Doe v. Bd. of Regents of University of Nebraska,* 788 N.W.2d 264, 278 (Neb. 2010) ("we believe that the Court's decision in *Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery"); *McKinnon v. Western Sugar Co-Op. Corp.,* 225 P.3d 1221, 1228 (Mont. 2010) ("This Court, like other courts, has steadfastly rejected the use of conclusory statements in a pleading in the absence of factual basis"); *Fink v. Twentieth Century Homes, Inc.,* No. 94519, 2010 WL 4520482, *3 (Ohio App. 8

Dist., Nov. 10, 2010) (holding that "the claims set forth in the complaint must be plausible, rather than conceivable," and "a formulaic recitation of the elements of a cause of action will not do"); *Tuban Petroleum, L.L.C. v. SIARC, Inc.,* 11 So.3d 519, 523 (La. App. 4 Cir. 2009) (applying *Twombly* when holding that an anti-trust complaint failed to state a claim, holding that "parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality"); *Iannacchino v. Ford Motor Co.,* 888 N.E.2d 879, 890 (Mass. 2008) ("We agree with the Supreme Court's analysis of the *Conley* language ... and we follow the Court's lead in retiring its use); *Desimone v. Barrows,* 924 A.2d 908, 928 -929 (Del. Ch. 2007) (observing that "our nation's high court has now embraced the pleading principle that Delaware courts have long applied, which is that a complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks"); *Charles H. Wesley Educ. Foundation, Inc. v. State Election Bd.,* 654 S.E.2d 127, 132 (Ga. 2007) ("While the complaint need not include detailed factual allegations, it must contain more than a formulaic recitation of the elements of a legal cause of action").

If *Twombly* truly was as radical as TENNELA now suggests, most of the states to consider the case surely would have flatly rejected the adoption of its

pleading standard. Instead, the exact opposite has occurred, a fact that only supports the adoption of that standard here.

B. *Twombly* Is Neither Revolutionary Nor Onerous.

TENNELA characterizes *Twombly* and *Iqbal* as a "heightened merits review" that will place "jury functions in the hands of judges." (TENNELA Br. at 2, 3). This characterization ignores the purpose and plain language of those cases' holdings.

Twombly expressly and directly rejected the notion that it was requiring a heightened pleading standard. As the Supreme Court held, "a complaint attacked by a Rule 12(b)(6) motion to dismiss ***does not need detailed factual allegations.***" *Twombly,* 127 S.Ct. at 1959 (emphasis added). Reiterating this point, *Twombly* elaborated that "the Court ***is not requiring heightened fact pleading of specifics.***" *Id.* at 1960; *see Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 595 (8th Cir. 2009) (observing that post-*Twombly*, Fed. R. Civ. P. 8 does not "require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful")[1]. Any assertion that the intent or effect of *Twombly* is to create "impossible pleading standards" is simply false.[2]

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[1] *See also Doe v. Bd. of Regents of University of Nebraska,* 788 N.W.2d 264, 278 (Neb. 2010) (quoting *Twombly,* 127 S.Ct. at 1960) (observing that "the Supreme Court specifically stated that it was not requiring 'heightened fact pleading of specifics'" and holding that *Twombly* would be adopted by the Nebraska courts).

Twombly is not the seismic shift that its opponents make it out to be. As one analysis recently noted:

> The more basic fallacy underlying many opponents' arguments is that ***they drastically overstate what Twombly and Iqbal say and do.*** The Court did not reinvent or completely change pleading; it articulated the basic concept that a claim must meet a minimum threshold, and that the threshold is that the claim needs to be plausible. Stating a plausible claim that provides a court with the reasonable belief that discovery will prove worthwhile and turn up demonstrative evidence of the misconduct alleged is not a chain on the courthouse door; it is a common sense reading of the Federal Rules. The alternative would be to allow claims to proceed to discovery where a court has no reasonable basis to believe that the claim has merit. That result would be intolerable to any civilized justice system.

Victor E. Schwartz and Christopher E. Appel, *Rational Pleading in the Modern World: the Lessons and Public Policy Benefits of Twombly and Iqbal,* 33 Harv. J.L. & Pub. Pol'y 1107, 1144 (2010) (emphasis added).

Indeed, the scholarship that has actually examined *Twombly* and its impact on motions to dismiss has not found a dramatic increase in the success of such motions:

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[2] Indeed, as a cursory review of Westlaw or Lexis reveals, there is no shortage of employment discrimination cases in federal court that are surviving post-*Twombly* motions to dismiss. As explained *infra,* the scholarship that has examined the effect of *Twombly* discovered that this case has not resulted in a dramatic increase in the success of motions to dismiss.

> The most detailed review of *Iqbal's* effects thus far supports these judges understanding of Iqbal as having ***a relatively limited impact.*** Although members of Congress have worried that *Iqbal* will lead to significantly more cases being dismissed, an ongoing comprehensive survey of cases applying *Iqbal* concludes that 'the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency.' Judge Mark Kravitz, Chair of the Judicial Conference Advisory Committee on Civil Rules, agrees that judges have taken a 'fairly nuanced' response to *Iqbal* and that the decision is not 'a blockbuster that gets rid of any case that is filed.'

Michael R. Hudson, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal,* 109 Mich. L. Rev. 415, 432-33 (2010) (emphasis added) (quoting Kendall W. Hannon, *Note, Much Ado About Twombly?: A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 Notre Dame L. Rev. 1811, 1835-38 (2008)).

If *Twombly* has not had a dramatic impact on the ability of employment suits to survive in federal court, there is no reason to believe its adoption in Tennessee will result in anything different. Its pleading standard encapsulates a concept that lies at the core of the Constitution—*i.e.*, that a complaint should give a defendant "fair notice" of why he or she is being sued. *Twombly,* 127 S.Ct. at 1965, n.3. Rather than an apocalyptic departure from past precedent, *Twombly's* impact has been limited, adhering as it does to basic principles of fairness and due process.

C. The "No Set of Facts" Standard Advanced by Webb and TENNELA Invites Frivolous Lawsuits and Fosters the Use of Tennessee Courts for Legalized Extortion.

Both Webb and TENNELA ask this Court to embrace an outdated (and now rejected) standard—that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 78 S.Ct. 99, 102 (1957). Under that "no set of facts" standard Respondent and *amicus* advance, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery." *Iannacchino v. Ford Motor Co.,* 888 N.E.2d 879, 890 (Mass. 2008) (quoting *Twombly,* 127 S.Ct. at 1968). In that distorted worldview, all a complaint need do to commence exhaustive litigation and burdensome discovery is either regurgitate the *prima facie* elements of a claim (as Webb's Complaint does in the instant action) or, if that is too much of a burden, just say "I am suing you for retaliation." Such a "standard" wholly abrogates the gate-keeping function of Tenn. R. Civ. P. 12.

One obvious question comes to mind when considering these two parties' vociferous opposition to *Twombly* and *Iqbal*: Why are they so afraid of and resistant to a standard that merely requires a plaintiff to provide enough facts so as to give "fair notice" as to the grounds for a claim and "raise the right to relief

beyond a speculative level?" The rules of this State demand that, prior to filing a complaint, a lawyer must perform factual due diligence and only file the action if there is a good faith basis for doing so. *See* TENN. R. CIV. P. 11; *see also* Sup. Ct. Rules, Rule 3.1. If counsel has actually performed the ethically required factual investigation into a potential suit and feels comfortable enough with those facts to sign a pleading claiming that a decision-maker[3] was motivated by hatred and discrimination, how exactly is it an unfair burden to simply plead the factual grounds upon which his claim rests?

Strong public policy considerations demand the rejection of Respondent's proposed pleading standard, a standard that is in reality no standard at all. These policy considerations are made all the more important by the practical realities that all defendants now face when sued—in the post-electronic discovery world, litigation is extremely expensive.

Today, with the advent of electronic discovery (technology that did not exist in 1957 when *Conley* was decided), the costs of discovery can be unbearable,

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[3] Employment lawsuits often take a terrible toll on the person accused of wrongdoing. To be falsely called a racist or a sexual harasser in a public pleading nearly always exacts an emotional price. This is especially true when (as is frequently the case) a local newspaper picks up the story and simply repeats a complaint's allegations as if they were true. In light of the very serious nature of these types of allegations—allegations which cast an immediate public stigma upon the decision-maker at issue—it is baffling that anyone would oppose a pleading standard that simply requires fair notice of the factual grounds upon which such terrible allegations rest.

especially in an economy as fragile as the present. As the Schwartz and Appel article noted:

> [T]he expanding use of electronic data storage has exponentially increased discovery costs. At present, more than ninety percent of discoverable information is generated and stored electronically. Such storage mechanisms have dramatically increased the volume of information that either is itself discoverable or that must be reviewed to find discoverable information. For instance, large organizations, on average, receive 250 to 300 million e-mail messages per month, generating data measured by the terabyte, each of which represents the equivalent of about 500 million typed pages. Unsurprisingly, then, electronic discovery, or 'e-discovery,' which typically requires a document-by-document attorney review, can end up costing defendants millions of dollars to defend a single case. ***The public policy behind the Supreme Court's interpretation of federal pleading standards, in a nutshell, is that such tremendous cost outlays must be justified by something more than a plaintiff's 'bare assertions' of harm.***

33 Harv. J. L. & Pub. Poly at 1141 (emphasis added) (citations omitted). The cost of discovery can now be tremendous, especially in employment lawsuits where emails frequently come into play. In light of this reality, it only makes sense to require a complaint to transcend a speculative level before forcing this State's employers and individual defendants to spend vast sums on discovery when the plaintiff's pleading has not even articulated a claim that is plausible on its face.[4]

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[4] Indeed, the courts of other states have held as much when adopting *Twombly*. *See, e.g., Desimone v. Barrows,* 924 A.2d 908, 928-29 (Del. Ch. 2007) ("[T]he realities of modern complex litigation make proceeding past the pleading stage and

Additionally, the adoption of *Twombly* would discourage the "file first, ask questions later" compulsion that has become all too common in employment lawsuits.[5] Recognizing the enormous discovery costs that an employment lawsuit can place on an employer, the temptation of filing a bare bones discrimination complaint in the hopes of extracting a prompt settlement has become too great for many to resist. "The modern world of litigation has become too complex and exacting simply to grant plaintiffs a free pass to engage in broad discovery while maintaining fair protection for defendants." 33 Harv. J.L. & Pub. Pol'y 1107, 1145-46. The ability of plaintiffs "to inappropriately leverage a costly and time consuming discovery process to the detriment of a defendant is significantly reduced through heightened screening of pleadings." *Id.* at 1142.

Moreover, adoption of *Twombly* may be the only solution to prevent the conversion of this State's courts into a "super-personnel department." With greater

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into discovery exceedingly expensive. In light of that, our nation's high court has now embraced the pleading principle that Delaware courts have long applied, which is that a complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks. If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted.").

[5] Due to contingency fee arrangements and the fee shifting provisions present in all employment statutes, an employment plaintiff has almost nothing to lose by filing suit, other than his or her time. By contrast, on top of their own attorneys' fees and costs, employers must pay their opponent's fees if he wins (something that an employment plaintiff is not required to do if he loses). This reality, combined with the enormous discovery costs that an employment lawsuit places on an employer, indisputably encourages the filing of suit regardless of a claim's merit.

and greater frequency, especially after this State's recent adoption of summary judgment standards that are less than difficult for a plaintiff to overcome, employment plaintiffs in Tennessee are gravitating toward filing lawsuits in state court, rather than federal. Fraudulently naming an individual as a defendant or claiming that the damages sought supposedly are only "$74,999" so as to attempt to defeat diversity is becoming the norm.[6] A ruling by this Court that a plaintiff need only plead a claim under the Tennessee Human Rights Act, without providing the factual grounds behind that claim, would only further encourage a flood of employment lawsuits into this State's already burdened courts.[7] In fact, if Webb and TENNELA's position is adopted, an employment plaintiff need not even draft a pleading that sets forth a plausible right to relief—something that he would be

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[6] *See, e.g. Adams v. Ficosa North American Corp.,* Case No. 2:09-0050, 2009 WL 1971599 (M.D. Tenn., July 7, 2009) (denying remand after plaintiff fraudulently sought to defeat federal jurisdiction by falsely claiming that the damages sought were only "$74,500," even though the plaintiff sought back pay, front pay, emotional distress damages, and punitive damages).

[7] Over the last several years, Tennessee has been successful in luring corporations (and tens of thousands of jobs) away from states whose courts are viewed as being unfairly favorable to plaintiffs. It would be a shame to remove the competitive advantage that Tennessee has over such states by becoming one of them. That a state's litigation environment plays a role in a company's decision to relocate is supported by quantifiable statistics. Notably, in a recent survey of 1,482 general counsel, sixty-seven percent reported that a state's litigation environment impacts their companies' decisions on where to locate or do business. *See* U.S. Chamber Institute for Legal Reform, *Ranking the States Lawsuit Climate 2010, State Liability Systems Survey,* (March 22, 2010), at 10. This survey was conducted by Harris Interactive, is publicly available and can be found at http://www.instituteforlegalreform.com/component/ilr_issues/29.html.

required to do in federal court. Facing such a disparity in pleading standards, an employment plaintiff would be foolish to file his claim in federal court, rather than state. Common sense dictates therefore that the rejection of *Twombly* and *Iqbal* will lead to an increase of employment lawsuits filed in this State's Circuit and Chancery courts.

Lastly, asking a plaintiff to set forth the basic factual grounds of his claim is a reasonable, and not onerous, request. "An injured individual today, compared with a plaintiff in the 1930s, can much more easily hire an experienced attorney (often at no initial cost) who can make a case and construct a proper pleading when there is truly a case to make." 33 Harv. J.L. & Pub. Pol'y at 1146. Encouraging a plaintiff and his attorney to spend a nominal amount of time investigating a potential claim and drafting a pleading is to the benefit of all involved. A plaintiff would better know whether or not he had an actionable claim, the court would better understand the basis for the lawsuit, and the defendant would have some notice of why exactly he or she has been sued. Prior to filing suit, one should at least be able to write and file a coherent and plausible description of a course of events that demonstrates his right to a remedy from the courts. Considering the enormous cost of defending a lawsuit and the overcrowded nature of the courts' dockets, this is not too much to demand of a complaint.

Given the nature of modern litigation, "shoring up the standards for pleadings as the Supreme Court has in *Twombly* and *Iqbal* represents the most logical, efficient, and effective means for judges to fulfill their gatekeeping role." 33 Harv. J.L. & Pub. Poly at 1142. These public policy considerations strongly militate in favor of the adoption of a reasonable pleading standard, a standard that actually gives defendants fair notice of why they have been sued.

V. CONCLUSION

Twombly and *Iqbal* stand for an unremarkable and common-sense legal proposition—a plaintiff should not subject one of our State's citizens to the ever-increasing costs and burdens of litigation if there is no plausible basis for his claims. Far from a "dramatic" proposition, the discouragement of complaints that merely contain bald assertions, unsupported allegations and legal conclusions is in the best interests of this State and its citizens. While Webb and TENNELA focus exclusively on the purported rights of plaintiffs, they ignore that defendants have rights as well—in this case, to be given fair notice of the factual grounds upon which a claim rests prior to being hauled into court.

CFIF respectfully encourages this Court to adopt the much-needed pleading standard of *Twombly* and *Iqbal.*

Respectfully submitted the 14th day of January 2011.

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CERTIFICATE OF SERVICE

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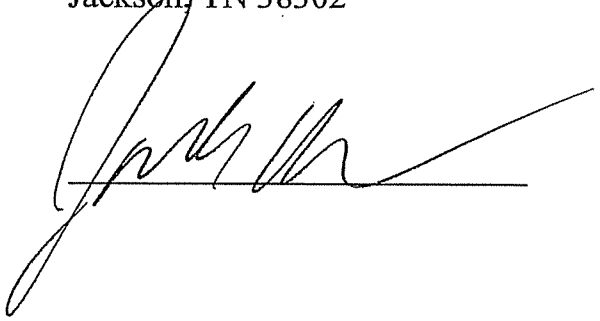

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