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## PLAUSIBLY PLEADING PERSONAL JURISDICTION

Jayne S. Ressler\*

*Courts have wrestled for decades with the phrase “arising from or related to” in the context of personal jurisdiction. Many courts have opted for liberal interpretations of the phrase, hanging their personal jurisdiction hats on the slim hook of “but for,” or even “substantial connection” analyses. In this Article, I investigate whether the recent Supreme Court case, Bell Atlantic Corp. v. Twombly, an antitrust case modifying the pleading rules regarding the merits of an action, suggests that the Supreme Court may have a preference for stricter pleading requirements across the board. I conclude that it does, and argue that courts should hold plaintiffs to a tighter standard when alleging that defendants are subject to personal jurisdiction in particular fora.*

*I also argue that Twombly gives courts guidance as to when to allow plaintiffs to take discovery to shore up weak personal jurisdiction claims. In Twombly, the Supreme Court expressed concern that discovery costs regarding the merits of an action have run amok, and that this may force defendants to settle valueless claims to avoid excessive discovery expenses. Personal jurisdiction discovery can involve similar costs, and Twombly’s message of frugality and careful review of claims should apply with equal weight to requests for such discovery.*

*I conclude the Article with three recommendations: (1) that courts adhere to the “proximate cause” test for specific jurisdiction, thus avoiding fishing expeditions and opening the door for personal jurisdiction discovery only in those rare cases when only the defendant has the evidence necessary to support the plaintiff’s assertion of personal jurisdiction; (2) that courts properly utilize the “colorable claim” requirement when plaintiffs request discovery regarding personal jurisdiction allegations; and (3) that the responsibility for evaluating plaintiffs’ personal jurisdiction claims be delegated initially to specialized judges or magistrates. The goal of these recommendations is to unify a heretofore ad hoc and unpredictable process and to heed Twombly’s mandate that costs and efficiency be essential factors in judicial decision making.*

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\* Assistant Professor of Legal Writing, Brooklyn Law School. J.D., University of Pennsylvania Law School; B.S., Wharton School at the University of Pennsylvania; B.A., University of Pennsylvania. My thanks and gratitude to Patricia Biswanger, Dana Brakman-Reiser, Robin Effron, Ted Janger, James Park, and Jack Preis for their suggestions and comments on previous drafts of this Article, and to Justin Denton, Gavin Goldstein, David Levy, and Alex Weinberg for their invaluable research assistance. I am also grateful to Dean Joan Wexler for her generous support of this project through the Brooklyn Law School Research Stipend. I could not have written this Article without the advice, encouragement, sense of humor, and endless patience of my husband, Ken Rose. Finally, all my love to my newborn son, Benjamin Rose. His looming due date kept me researching and writing at times when I wanted to do anything but.

## I. INTRODUCTION

On May 21, 2007, the Supreme Court published its decision in *Bell Atlantic Corp. v. Twombly*.<sup>1</sup> The case created a stir in the legal community, inspiring scholars to pen articles and blog entries with titles such as *Why the Motion to Dismiss Is Now Unconstitutional*<sup>2</sup> and *The Mystery of Twombly Continues*,<sup>3</sup> and to make observations such as “[n]otice pleading is dead.”<sup>4</sup> While several scholars agree that *Twombly* indeed has created a procedural mystery,<sup>5</sup> one thing is clear—*Twombly* has produced game-changing implications for the pleading standards courts should employ in antitrust matters.<sup>6</sup> *Twombly* announced a new threshold for plaintiffs seeking to plead an antitrust claim under section 1 of the Sherman Antitrust Act<sup>7</sup> by requiring antitrust plaintiffs to provide not just conceivable but “plausible grounds to infer a[] [collusive] agreement,” and to plead a “context that raises a suggestion of a preceding [collusive] agreement.”<sup>8</sup> Perhaps even more significantly, in *Twombly*<sup>9</sup> the Court explicitly “retired” the pleading standard it had articulated fifty years earlier in *Conley v. Gibson*,<sup>10</sup> when the Court held that a complaint was sufficient unless there was “no set of facts” that could support its allegations.<sup>11</sup>

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

2. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

3. Posting of Scott Dodson to PrawfsBlawg, *The Mystery of Twombly Continues*, <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/the-mystery-of.html> (Feb. 5, 2008, 23:40).

4. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008).

5. See Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 893–94 (2008) (noting difficulties circuit courts have experienced applying pleading rules after *Twombly*).

6. See, e.g., Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW, Aug. 13, 2007, <http://writ.news.findlaw.com/dorf/20070813.html> (describing confusion created by *Twombly* and noting that “[t]he hundreds of lower court opinions citing *Twombly* take a variety of positions on the meaning of the case”). However, the Supreme Court may have recently resolved some of the confusion regarding *Twombly* in its decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In *Iqbal*, the Court stated, “Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.” 129 S. Ct. at 1953 (internal citation omitted).

7. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006).

8. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007).

9. *Id.* at 562–63.

10. 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. 544.

11. *Conley*, 355 U.S. at 45–46; *see also Iqbal*, 129 S. Ct. at 1944 (acknowledging *Twombly* Court’s dismissal of *Conley*’s “no set of facts” pleading requirement). For a comprehensive discussion of *Conley*, see Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1816–20 (2008). Just two weeks after *Twombly*, however, the Supreme Court issued *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), a per curiam reversal of a dismissal on pleading grounds by the Tenth Circuit. Citing *Twombly*, the Court held that “[s]pecific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson*, 127 S. Ct. at 2200 (quoting *Twombly*, 550 U.S. at 555). Thus, to the extent *Twombly* found that *Conley* “ha[d] earned its retirement,” *Twombly*, 550 U.S. at 563, the Court’s opinion in *Erickson* clarified that the Court was retiring only *Conley*’s “no set of facts” language, which had been, in the Court’s view, extended well beyond its intended meaning over time. Clearly, the Court did not wholly reject notice pleading.

The literature is rife with discussions of *Twombly*'s impact on litigation.<sup>12</sup> One commentator has gone so far as to deem the decision "poorly crafted" with "an abundance of contradictory dicta."<sup>13</sup> Nonetheless, as one scholar phrased it, "[a]s matters now stand, it looks as though the decision has made a general transformation in pleading rules in all cases, not just within the antitrust area, although only the future will show for sure."<sup>14</sup>

What commentators have overlooked, however, is *Twombly*'s potential impact on how courts resolve challenges to their personal jurisdiction over a defendant. Despite its centrality to both the state and federal court systems,<sup>15</sup> personal jurisdiction is an area that remains fraught with uncertainties and ambiguities.<sup>16</sup> This promises to

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12. See, e.g., Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 118 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/31/> (discussing pleadings in antitrust litigation context); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 140 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (noting that "notice-plus pleading" is required for all suits); Hannon, *supra* note 11, at 1835 (presenting statistical analysis of 12(b)(6) motions in lower courts, pre- and post-*Twombly*); Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 657 (2008) (noting impact of *Twombly* pleading standard both inside and outside antitrust context); Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 605 (2006) (describing variations in courts' understanding of pleading requirements); Randal C. Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 172–77 (2008) (detailing post-*Twombly* changes in antitrust litigation); Spencer, *supra* note 4, at 483 (predicting impact that plausibility pleading requirement will have on valid claims); Thomas, *supra* note 2, at 1879 (explaining incongruence between new standards for motions to dismiss, common law principles, and Seventh Amendment); Brian Thomas Fitzsimons, Note, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 224 (2007) (arguing heightened pleading standards favor defendants); Amanda Sue Nichols, Note, *Alien Tort Statute Accomplish Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177, 2221 (2008) (arguing for application of plausibility pleading standard for Alien Tort Statute litigation); Saritha Komatireddy Tice, Recent Development, *A "Plausible" Explanation of Pleading Standards: Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL'Y 827, 838 (2008) (explaining potential uncertainty among lower courts in applying "plausibility" standard).

13. Ides, *supra* note 11, at 606; see also *id.* (noting that, consistent with *Twombly*'s deficiencies, "within three months of the decision, 808 lower federal courts [sic] opinions had cited the case, often taking divergent views of what it meant").

14. Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 64 (2007). See *supra* note 6 for an introduction to *Iqbal*. For a further discussion of *Iqbal*, see Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10. Appellate lawyer Thomas C. Goldstein stated that "*Iqbal* [was] the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts." *Id.* (internal quotation marks omitted). Liptak paraphrased corporate defense lawyer Mark Herrmann as saying that "the *Iqbal* decision will allow for the dismissal of cases that would otherwise have subjected defendants to millions of dollars in discovery costs." *Id.* Civil procedure scholar Stephen B. Burbank described *Iqbal* as "a blank check for federal judges to get rid of cases they disfavor." *Id.* (internal quotation marks omitted).

15. Cf. Hannon, *supra* note 11, at 1811–12 (discussing fundamental role that pleadings play in operation of federal judiciary and effects of court's pleading standards on framing issues, controlling access to discovery, and shaping settlement proceedings).

16. See *infra* Part III for a discussion of the problems that arise in applying personal jurisdiction law. See also Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1163–64 (2003) (discussing uncertainties surrounding law of personal jurisdiction).

become even more so with the emergence of global trade and the universality of the Internet.<sup>17</sup> Puzzlingly, the Supreme Court has not yet explained the proper interpretation of the specific jurisdiction requirement that a defendant's contacts with the forum "arise from or relate to" a plaintiff's claim. Indeed one scholar has posited that the Supreme Court's personal jurisdiction doctrine is incoherent and "deeply fragmented."<sup>18</sup>

As a consequence, courts have devised various tests to determine when a cause of action "arises from or is related to" the defendant's presence in the jurisdiction, thereby conferring specific jurisdiction over that defendant.<sup>19</sup> As I explain in this Article,

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17. See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451–53 (3d Cir. 2003) (noting changes in courts' guidelines for personal jurisdiction given rise of Internet).

18. Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530 (1991).

19. In an arena employing similar verbiage, but not implicating personal jurisdiction directly, discussions regarding a possible distinction between "arising out of" and "related to" frequently arise in the context of the interpretation of arbitration agreements. For example, clauses including all claims or controversies "arising out of" the subject contract have been considered by some courts to be narrow in scope, i.e., the scope of the arbitration clause is limited to those claims having some direct relation to the terms and provisions of the contract. See *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (noting that "arising hereunder" covers narrower field of arbitration disputes than "arising out of or relating to"); *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961) (noting parties' deviation from standard "arising out of or relating to" language limited applicability of arbitration clause). Both *Mediterranean* and *Kinoshita* hold that claims alleging breach of a separate and unrelated contract, breach of fiduciary duty, and quantum meruit, none of which rely on the interpretation or performance of the contract containing the arbitration clause, are not subject to arbitration as disputes "arising out of" the contract. These cases reason that where an arbitration clause refers solely to disputes or controversies "under" or "arising out of" the contract, arbitration is restricted to claims "relating to the interpretation of the contract and matters of performance." *Mediterranean*, 708 F.2d at 1464 (quoting *Kinoshita*, 287 F.2d at 953). On the other hand, the phrase "arising out of or relating to" the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims. See *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.7 (1984) (involving claims for fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of state franchise investment law); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (holding that contractual language "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof" is "easily broad enough to encompass" claim for fraud in inducement of contract (internal quotation marks omitted)). The addition of the phrase "relating to" to the phrases "arising out of" or "under" has been construed as broadening the scope of the arbitration provision. See *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996) (characterizing phrase "arising out of or relating to" as broad arbitration clause "capable of an expansive reach").

According to David Zaring's posting on The Conglomerate, a blog devoted to "Business, Law, Economics & Society," a similar controversy confounded the British legal system until recently. Posting of David Zaring to The Conglomerate, *News for Arbitration Fans*, <http://www.theconglomerate.org/2007/10/news-for-arbitr.html> (Oct. 18, 2007). Zaring writes that the "'arising under' language in contracts has been more narrowly tailored in the UK than 'arising out of or related to' language—which meant there was more scope to go straight to court if the 'arising under' language appeared in the dispute settlement part of the contract." *Id.* Lord Hoffman resolved that controversy, however, holding:

[T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

*Twombly* implicitly sanctions the strictest of these tests, the “proximate cause” test.<sup>20</sup> Further, plaintiffs whose claims of jurisdiction over a defendant are challenged are likely to seek personal jurisdiction discovery, and courts have had to improvise standards when determining whether to permit such discovery. *Twombly* endorses the heightened threshold underlying the “colorable claim” requirement courts have devised to screen requests for personal jurisdiction discovery.<sup>21</sup>

Given the contradictory nature of the tests for personal jurisdiction and for permitting personal jurisdiction discovery, and the inconsistent decisions that can flow from that state of affairs, this direction from the Supreme Court is welcome. *Twombly* implicitly recognizes a spectrum along which courts can judge the sufficiency of pleadings and motions,<sup>22</sup> and inspires the lower courts to factor the cost, efficiency, and complexity of discovery into their evaluation of a defendant’s contacts with the forum state.

Courts are routinely faced with setting litigation thresholds; the requirement that the court have jurisdiction over the parties is one such threshold. Setting thresholds inevitably involves tradeoffs. When courts make it easier to bring a lawsuit, they also increase the number of frivolous suits leaking into the system; when they make it harder, they also make it harder for some valid suits to be brought. Summary judgment procedures are the predominant mechanism for screening out invalid lawsuits, but summary judgment occurs late in the litigation process, after the litigants have incurred significant costs and after much valuable court time has been expended. This situation, combined with recognition of the increasing expense of litigation, has spurred many to look for an earlier screening mechanism. In *Twombly*, the Supreme Court endorsed one such method by imposing a heightened pleading standard on antitrust claims, and—since personal jurisdiction requirements are akin to pleading standards in that both are screening mechanisms—implicitly suggested that this mechanism could be applied to personal jurisdiction issues as well.

In this Article, I invoke the insights of *Twombly* and apply them to the vexing problem of personal jurisdiction. In Part II, I contemplate the lessons of *Twombly* for personal jurisdiction on a general level. In Part III, I discuss the “arises from or related to” conundrum of personal jurisdiction. “Arise from” and “related to” are inherently ambiguous terms, causing courts to employ a variety of measures to determine the sufficiency, for personal jurisdiction purposes, of a defendant’s contacts with a particular forum. Here I evaluate the conflicting standards that have emerged from the various courts of appeals for determining when a court has specific jurisdiction over a defendant. In Part IV, I review *Twombly* in greater detail, particularly those parts of the decision that evince policy concerns—specifically, a desire for more efficient, cost-effective pleading. Although the *Twombly* decision speaks directly to merit pleading

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Premium Nafta Prods. Ltd. v. Fili Shipping Co. [2007] UKHL 40 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/ship-1.htm>.

20. See *infra* Part III.C for a discussion of the proximate cause test.

21. See *infra* notes 171–78 and accompanying text for a discussion of the colorable claim requirement and its comportment with *Twombly*.

22. See *infra* Part II for a discussion of *Twombly*’s effect on personal jurisdiction standards and Part III for a discussion of the range of analyses courts employ for judging the sufficiency of pleadings.

rather than personal jurisdiction, *Twombly*'s emphasis on costs and efficiency offers an excellent solution to the problem of inefficient and costly personal jurisdiction determinations. In Part V, I discuss courts' various and far-from-uniform responses to motions for personal jurisdiction discovery, and show how the "colorable claim" requirement anticipates *Twombly*'s mandate. Finally, in Part VI, I propose that plaintiffs' requests for personal jurisdiction discovery be channeled to magistrates or specialized judges. That way, a process that has traditionally been ad hoc and unpredictable can become more streamlined and economical.

## II. TWOMBLY'S PERSONAL JURISDICTION LESSONS

The decision in *Twombly* is premised on the notion that the specificity of allegations contained in pleadings can be plotted on a spectrum with "conceivable" on one end, as the most permissive standard, and "plausible" on the other end, as the most restrictive.<sup>23</sup> According to *Twombly*, the notice pleading standard appears to permit pleadings to fall anywhere along that spectrum, but such generosity must give way to modern realities, including the high cost of litigation, particularly that of discovery.<sup>24</sup> These costs create a potential for avaricious and unscrupulous plaintiffs and their counsel to plead a "conceivable" set of facts even with a nonmeritorious claim, and then use the potential of astronomical defense fees to force the defendant to settle.<sup>25</sup>

The *Twombly* Court observed that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."<sup>26</sup> And while the discovery phase

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23. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that complaint must cross "line from conceivable to plausible" in order to survive motion to dismiss); *id.* at 574-75 (Stevens, J., dissenting) (arguing that majority's holding signaled return to difficult-to-administer "spectrum" of facts and conclusions that Federal Rules of Civil Procedure had sought to eliminate (quoting Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520-21 (1957))).

24. The citations that the Court used to show the high cost of litigation are focused almost exclusively on discovery costs. See *Twombly*, 550 U.S. at 559 (noting "extensive scope of discovery in antitrust cases" (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30 (2004))); *id.* (summarizing finding that use of discovery "accounts for as much as 90 percent of litigation costs" (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Honorable Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), reprinted in 192 F.R.D. 354, 357 (2000))). The Court also noted the "unusually high cost of discovery in antitrust cases." *Id.* at 558 (citing William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898-99 (2003)); see also Wagener, *supra*, at 1898-99 (arguing that antitrust plaintiff has tactical advantage in determining scope of discovery). The Court expressly cited discovery abuse and the alleged inability of judges to control discovery as reasons to insist on heightened pleading when the costs of discovery are high. *Twombly*, 550 U.S. at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)). However, Professor Cavanagh has criticized this aspect of the opinion for relying too heavily on the Easterbrook article, stating that the assertions are "contrary to fact" and do not account for recent innovations in the tools that judges have at their disposal to control discovery. Edward D. Cavanagh, *Twombly, the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 879, 882-89 (2008).

25. *Twombly*, 550 U.S. at 559. See also *infra* notes 138-60 and accompanying text for a discussion of the intersection of pleading rules and discovery costs.

26. *Twombly*, 550 U.S. at 558. *Twombly* also reminds us that costly discovery is not a recent development: twenty-five years ago, in 1984, the Court of Appeals for the Seventh Circuit observed that "the

of a lawsuit remains the most expensive and the most subject to abuse by unscrupulous plaintiffs' lawyers seeking to extort a settlement of a weak claim,<sup>27</sup> discovery is not conducive to effective judicial management of litigation, as the *Twombly* Court recognized.<sup>28</sup> Indeed, the Supreme Court has observed that "the success of judicial supervision in checking discovery abuse has been on the modest side."<sup>29</sup>

Thus, the concept of plausibility lies at the heart of the *Twombly* decision. The Court emphasized this notion when it repeated the oft-noted observation that, assuming that all the allegations in the complaint are true, these "[f]actual allegations must be enough to raise a right to relief above the speculative level."<sup>30</sup> The Court noted that plausibility "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the alleged] illegal agreement."<sup>31</sup> In the antitrust context explored in *Twombly*, an allegation of parallel conduct "gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"<sup>32</sup> In another context, the Supreme Court has observed that "something beyond the mere possibility of loss causation must be alleged"<sup>33</sup> in order for a claim to meet the threshold requirement of Federal Rule of Civil Procedure 8(a)(2).

What then does *Twombly* teach us about allegations of personal jurisdiction? The Court makes clear that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."<sup>34</sup> Since allegations of personal jurisdiction are indeed legal conclusions, the same concerns motivating the

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costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984).

27. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 n.1 (1981) (Powell, J., concurring) (noting danger that costs of litigation and discovery can outweigh interest in litigating meritorious claims or defenses); see also Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 31 (explaining that high costs of litigation are one reason fewer trials occur); Ben Walther, Note, *Employment Agreements and Tender Offers: Reforming the Problematic Treatment of Severance Plans Under Rule 14d-10*, 102 COLUM. L. REV. 774, 783 (2002) (explaining great economic costs of 14d-10 litigation, especially when meritless suits reach discovery stage).

28. *Twombly*, 550 U.S. at 559 (citing Easterbrook, *supra* note 24, at 638 (observing judges' inability to prevent "impositional discovery" because parties control legal claims)).

29. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (quoting *Twombly*, 550 U.S. at 559) (internal quotation marks omitted); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 97 (2009) (noting that judges try to maintain efficiency in litigation process, often by simply insisting that parties resolve pretrial disputes). Moreover, discovery abuses generally fall into two categories: (1) excessive discovery requests used to impose excessive costs (usually utilized by plaintiffs), and (2) resistance of legitimate discovery requests to avoid disclosure or buy time (usually utilized by defendants). PEGGY E. BRUGGMAN, REDUCING THE COSTS OF CIVIL LITIGATION: DISCOVERY REFORM I (1995), available at <http://w3.uchastings.edu/plri/fal95tex/discov.html>; see also Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 799-804 (1998) (discussing various types of discovery abuses).

30. *Twombly*, 550 U.S. at 555 (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004)).

31. *Id.* at 556.

32. *Id.* at 557 (citing *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)).

33. *Id.* at 557-58 (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

34. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

*Twombly* Court's decision regarding the sufficiency of the allegations regarding the merits of a case should apply to claims of personal jurisdiction as well. Although personal jurisdiction inquiries may not incur the same enormous costs as can discovery in antitrust actions, they are nonetheless expensive.<sup>35</sup> Thus, *Twombly* aids the courts by stressing the need for efficiency and cost-effectiveness in all jurisdictional inquiries, and invites application of the plausibility requirement to claims of personal jurisdiction.

### III. THE PROBLEM: ASSESSING JURISDICTION BASED ON CONTACTS "ARISING FROM OR RELATED TO" THE FORUM

It is axiomatic that a court must have personal jurisdiction over a defendant to hear a claim and rule on its merits.<sup>36</sup> By applying the "conceivable/permissive – plausible/strict" spectrum articulated in *Bell Atlantic Corp. v. Twombly*<sup>37</sup> to personal jurisdiction discovery, courts can more efficiently assess both (1) claims of personal jurisdiction and (2) requests for personal jurisdiction discovery.

The accepted analytical framework to examine claims of personal jurisdiction recognizes two different types of personal jurisdiction: specific jurisdiction and general jurisdiction.<sup>38</sup> With the latter, jurisdiction arises when a defendant has "purposefully availed itself" of the privilege of doing business in the forum state, and has "continuous and systematic general business contacts with the forum," but those contacts need not be related to the controversy.<sup>39</sup> With this type of personal jurisdiction, the court can

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35. See, e.g., Trippe S. Fried, *Maintaining the Home Court Advantage: Forum Shopping and the Small Business Client*, 6 TRANSACTIONS: TENN. J. BUS. L. 419, 431 (2005) (explaining that successful personal jurisdiction defenses raise plaintiffs' costs); Walter W. Heiser, A "Minimum Interest" Approach to Personal Jurisdiction, 35 WAKE FOREST L. REV. 915, 932 (2000) (noting that U.S. Supreme Court has identified travel costs, attorneys' costs, and participation in discovery as burdens in personal jurisdiction context); Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1309 (2007) (noting litigation advantages of engaging in personal jurisdiction discovery for defendants with greater financial resources attempting to dry out weaker plaintiffs' resources).

36. See, e.g., I.B. Diffusion L.P. v. Lands' End, Inc., No. 94 C 3331, 1995 U.S. Dist. LEXIS 5813, at \*2 (N.D. Ill. Apr. 28, 1995) (observing personal jurisdiction requirement and rule that federal court has personal jurisdiction over defendant only if state court would have personal jurisdiction); Crane v. Battelle, 127 F.R.D. 174, 176 (S.D. Cal. 1989) (observing basic due process requirement of personal jurisdiction for court to hear suit against defendant).

37. 550 U.S. 544 (2007). See *infra* Part III for a discussion of the tests courts apply along the conceivability to plausibility spectrum for personal jurisdiction.

38. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984) (distinguishing specific and general jurisdiction); *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073 (8th Cir. 2004) (identifying differences between specific and general jurisdiction); *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1170 (5th Cir. 1985) (observing importance of distinguishing between specific and general jurisdiction).

39. *Helicopteros*, 466 U.S. at 420 (Brennan, J., dissenting); *id.* at 415–16 (majority opinion); see also *Dever*, 380 F.3d at 1073 (observing that general jurisdiction permits jurisdiction over defendant who has pervasive contacts with forum state, even if dispute did not arise from contacts); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002) (same); *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 619 (1st Cir. 2001) (same).

thus proceed based on the defendant's continuous contacts with the forum, even though the suit itself does not "arise out of" nor is it "related to" those continuous contacts.<sup>40</sup>

Where a defendant's contacts with the forum are not "systematic and continuous," a court may still exercise personal jurisdiction if the court determines that it has specific jurisdiction over the defendant.<sup>41</sup> The issue of "arising out of or related to" arises largely in the context of specific jurisdiction, and it is in this context that *Twombly* provides much-needed guidance.<sup>42</sup>

Courts employ a three-pronged test to determine whether sufficient contacts exist to confer specific jurisdiction.<sup>43</sup> First, courts look at whether or not the cause of action "arise[s] out of or relate[s] to" the defendant's contacts with the forum.<sup>44</sup> Second, courts look to see whether the defendant purposefully availed itself of the benefits of the forum state and therefore can be said to have reasonably anticipated being haled into court in that forum.<sup>45</sup> Third, in what is often called the "reasonableness requirement," courts look to whether granting jurisdiction comports with "fair play and substantial justice."<sup>46</sup>

The first prong of this analytical framework is the one that has troubled courts and scholars the most, and it is here that consistency breaks down. This is the step, however, over which *Twombly* can shine considerable light. The "arises out of or

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40. *Helicopteros*, 466 U.S. at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."); *Dever*, 380 F.3d at 1073 ("Under the theory of general jurisdiction, a court may hear a lawsuit against a defendant who has 'continuous and systematic' contacts with the forum state, even if the injuries at issue in the lawsuit did not arise out of the defendant's activities directed at the forum." (quoting *Helicopteros*, 466 U.S. at 416)).

41. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) (stating manufacturer or distributor may be subject to suit in state where sale arises from efforts to serve market of state).

42. *See RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997) (stating that general jurisdiction applies only to suits "neither arising out of nor related to" nonresident defendant's contacts with forum and "is permitted only where the defendant has 'continuous and systematic general business contacts' with the forum," and that specific jurisdiction refers to personal jurisdiction in suit "arising out of or related to the defendant's contacts with the forum" (quoting *Helicopteros*, 466 U.S. at 414 n.8, 416)); *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 819 (8th Cir. 1994) (same). Of course, *Twombly*'s mandate applies only to federal courts. States are free to employ, and indeed do employ, their own mechanisms for screening allegations of personal jurisdiction. *See, e.g.*, FLA. STAT. § 48.193 (2009) (setting out requirements for state to exercise personal jurisdiction over defendant); COLO. REV. STAT. § 13-1-124 (2009) (same); N.C. GEN. STAT. § 1-75.4 (2009) (same). It is beyond the scope of this Article to examine each of the states' various procedural permutations. But, as one scholar noted, "although the full impact of *Bell Atlantic Corp. v. Twombly* on federal pleading standards remains to be seen, that decision has the potential to create real inconsistencies between state and federal pleading standards." Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 281–82 (2008).

43. *See, e.g.*, *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007) (setting out purposeful availment, "arise out of or relate to," and due process prongs); *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999) (same).

44. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Phillips Exeter Acad.*, 196 F.3d at 288; *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199 (4th Cir. 1993).

45. *Burger King*, 471 U.S. at 472; *Phillips Exeter Acad.*, 196 F.3d at 288.

46. *Burger King*, 471 U.S. at 476; *Phillips Exeter Acad.*, 196 F.3d at 288.

related to” language is ambiguous, and, before *Twombly*, the Supreme Court had not afforded the lower courts direction to interpret it.<sup>47</sup> The lower courts have been left with the difficult task of interpreting this critical phrase and have come to inconsistent conclusions when doing so.<sup>48</sup>

Over time, absent any guidance from the highest court and in their search for a satisfactory introductory step in the analytical framework, courts have devised roughly three different tests in interpreting whether or not a claim “arises out of or relate[s] to” the defendant’s contacts with the forum: (1) a “but for” test, (2) a “substantial connection” test, and (3) a “proximate cause” test.<sup>49</sup> The first and third tests, which are grounded in causation theory, both focus on evaluating when a claim “arises out of” a contact, while the second test focuses on whether the claim and contact are sufficiently “related to” each other. As detailed in the following discussion, one could place the tests along *Twombly*’s conceivable/permissive – plausible/strict spectrum, with the substantial connection test in the middle.

#### A. *The “But For” Test*

Under the “but for” test, the most permissive of the tests, a cause of action “arises out of or relates to” a defendant’s contacts with the forum if, but for those activities, the cause of action would not have arisen.<sup>50</sup> “Rather than considering only isolated contacts that relate to a specific element of proof or the proximate cause of injury, the but for analysis considers jurisdictional contacts that occur over the ‘entire course of events’ of the relationship between the defendant, the forum, and the litigation.”<sup>51</sup>

The Court of Appeals for the Seventh Circuit has favored the but for test as the first step in the analytical framework. For example, in *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*,<sup>52</sup> Bates was in the business of locating ice cream machinery for users of

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47. See, e.g., *Sandy Lane*, 496 F.3d at 318 (lamenting that Supreme Court had not “explained the scope” of purposeful availment requirement). Some courts have stated that the disjunctive phrasing “arise out of or relate to” itself implies a “flexib[le]” and “relax[ed]” standard. E.g., *Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (quoting *Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994)) (internal quotation marks omitted). The Supreme Court, however, has urged against attaching any significance to its use of the disjunctive, emphasizing:

We do not address . . . whether the terms “arising out of” and “related to” describe different connections . . . Nor do we reach the question whether, if the two types of relationship differ, a forum’s exercise of personal jurisdiction in a situation where the cause of action “relates to,” but does not “arise out of,” the defendant’s contacts with the forum should be analyzed as an assertion of specific jurisdiction.

*Helicopteros*, 466 U.S. at 415 n.10.

48. See *Sandy Lane*, 496 F.3d at 318 (citing *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 102–05 (3d Cir. 2004) (Scirica, J., dissenting in part) (noting “divergent interpretations of ‘arise out of or relate to’” phrase in specific jurisdiction analysis)).

49. *Id.* at 318–20.

50. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385–86 (9th Cir. 1990) (holding Carnival’s solicitation of business in Washington was “but for” cause of plaintiff’s fall on Carnival cruise ship in international waters), *rev’d on other grounds*, 499 U.S. 585 (1991).

51. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 580 (Tex. 2007) (quoting *Shute*, 897 F.2d at 384).

52. 726 F.2d 1209 (7th Cir. 1984).

such equipment, and met with the plaintiff in the forum state, Illinois, offering to help the plaintiff find equipment.<sup>53</sup> Bates then connected the plaintiff with SMW, a supplier of the equipment that plaintiff sought.<sup>54</sup> After the plaintiff experienced problems with the equipment that he bought from SMW, he brought suit against both Bates and SMW in the Northern District of Illinois.<sup>55</sup> In evaluating whether it had jurisdiction over Bates, the court reasoned that since the “contract under which the plaintiff is suing for breach of warranty . . . lies in the wake of Bates’s commercial activities in [the forum],” Bates was amenable to suit in the forum.<sup>56</sup> Although the Seventh Circuit used different verbiage, its choice of phrase—“lies in the wake of”—operates in the same fashion as the but for test: but for Bates’s activities in the forum, the plaintiff would not have entered into the ill-fated contract.

The Court of Appeals for the Ninth Circuit used the but for test more recently in *Shute v. Carnival Cruise Lines*.<sup>57</sup> In that case, the plaintiff brought suit in the Western District of Washington, her home state, seeking compensation for injuries she allegedly received when she slipped and fell aboard one of the defendant’s cruise ships, which she had boarded in California.<sup>58</sup> In response, the defendant–cruise line sought to enforce the forum selection clause, set forth in the cruise ticket, which required that all suits be brought in Florida, Carnival’s home state.<sup>59</sup>

Employing the but for test, the Ninth Circuit held that the forum selection clause was unenforceable and the plaintiff could proceed with her action in Washington.<sup>60</sup> According to the Ninth Circuit, but for the defendant’s advertising and sale of the ticket in Washington, the plaintiff would not have been injured, and the cause of action would not have arisen.<sup>61</sup> Because of that but for relationship, the court found that personal jurisdiction over the defendant–cruise ship line existed in Washington.<sup>62</sup>

The Ninth Circuit’s holding in *Shute* dramatically illustrates the broad and sweeping nature of the but for test and how it can sometimes lead to an excessive, and even illogical, assumption of personal jurisdiction. In *Shute*, the Ninth Circuit assumed that the plaintiff was in Washington State when she saw the advertisements and bought the cruise ship ticket.<sup>63</sup> In the modern era of global telecommunications, however, having jurisdiction turn on where a plaintiff sat when she saw an advertisement and made a purchase could conceivably confer jurisdiction in any location where a person sees a television commercial, hears a radio jingle, visits a website, or reads a print

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53. *Deluxe*, 726 F.2d at 1210–11.

54. *Id.* at 2111.

55. *Id.* at 1212.

56. *Id.* at 1216 (emphasis added).

57. 897 F.2d 377 (9th Cir. 1990), *rev’d on other grounds*, 499 U.S. 585 (1991).

58. *Shute*, 897 F.2d at 379.

59. *Id.*

60. *Id.* at 385–86.

61. *Id.* at 386.

62. *Id.* The Supreme Court later reversed the Ninth Circuit, holding that the forum selection clause was enforceable for other reasons. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596–97 (1991). The Court declined to address the plaintiff’s constitutional argument as to personal jurisdiction, since the forum selection clause was dispositive. *Id.* at 589.

63. *Shute*, 897 F.2d at 386.

advertisement. This result contravenes the spirit of *Twombly* and its theme of containing the excesses of modern litigation.

Few courts beyond the Ninth Circuit have adopted the but for approach, however, and the Fifth and Sixth Circuits have signaled a movement away from such a broad test.<sup>64</sup> The Fifth Circuit used the but for test in *Prejean v. Sonatrach, Inc.*,<sup>65</sup> but has since employed the substantial connection test.<sup>66</sup>

Consistent with the Fifth and Sixth Circuits, the Court of Appeals for the Third Circuit has recognized that, because of the “overinclusive[ness]” of the but for test, it “cannot be the sole measure of relatedness.”<sup>67</sup> According to the Third Circuit:

The problem is that [the but for test] “has . . . no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain.” If but-for causation sufficed, then defendants’ jurisdictional obligations would bear no meaningful relationship to the scope of the “benefits and protection” received from the forum. As a result, the relatedness inquiry cannot stop at but-for causation.

Indeed, even courts that embrace the but-for test recognize its overinclusiveness. These courts fall back on the third step of the [personal jurisdiction] analysis—whether jurisdiction is otherwise fair and reasonable—to protect against the but-for test’s causative excesses. But-for causation, however, may have more holes than the third step can plug. Once the plaintiff proves minimum contacts, the court may consider whether the defendant has “present[ed] a *compelling case* that the presence of some other considerations would render jurisdiction unreasonable.” Moreover, even if the third step is up to the task, courts cannot elide relatedness simply because the jurisdictional inquiry has a third component. Relatedness is an independent constitutional mandate, and some but-for causes do not relate to their effects in a jurisdictionally significant way.<sup>68</sup>

#### B. The “Substantial Connection” Test

The “substantial connection” test, which falls at the midpoint of *Twombly*’s spectrum, is essentially the “related to” component of the specific jurisdiction

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64. See *Felch v. Transportes Lar-Mex SA de CV*, 92 F.3d 320, 324 (5th Cir. 1996) (finding no specific jurisdiction over Mexican trucking company that was sued in Texas when truck hit plaintiff’s mother’s vehicle on Mexican highway); *Gorman v. Grand Casino of La., Inc.—Coushatta*, 1 F. Supp. 2d 656, 658 (E.D. Tex. 1998) (holding plaintiff’s claim of sexual assault by casino employee did not support specific jurisdiction because claim did not arise out of casino’s extensive advertising in Texas but arose from casino’s Louisiana operations); *Luna v. Compania Panamena de Aviacion, S.A.*, 851 F. Supp. 826, 832 (S.D. Tex. 1994) (holding no specific jurisdiction in Texas because plaintiff’s death in plane crash over Panama “did not result from the fact that she purchased the ticket for her airline travel in Texas”); *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383, 1389 (E.D. Tex. 1989) (holding plaintiffs could not assert specific jurisdiction over nonresident ski resort because their negligence claim did not arise out of its advertising contacts with Texas but arose as result of resort’s alleged negligence in failing to maintain safe premises in New Mexico).

65. 652 F.2d 1260 (5th Cir. 1981).

66. See, e.g., *Felch*, 92 F.3d at 324 (finding no specific jurisdiction because connection between forum-related activities and cause of action was not strong enough). See *infra* Part III.B for a discussion of the substantial connection test.

67. *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007).

68. *Id.* at 322–23 (citations omitted).

language. The test asks “whether the tie between the defendant’s contacts and the plaintiff’s claim is close enough to make jurisdiction fair and reasonable.”<sup>69</sup> There is no requirement that the claim formally “arise from” the defendant’s contacts with the forum; rather there only needs to be a strong connection between the two.<sup>70</sup>

Unlike the but-for test, [under the substantial connection test] causation is of no special importance. The critical question is whether the tie between the defendant’s contacts and the plaintiff’s claim is close enough to make jurisdiction fair and reasonable. Because courts that follow this approach consider the totality of the circumstances, there appears to be no rigid distinction between general and specific jurisdiction. Instead, the two categories sit at “opposite ends of [a] sliding scale.” The degree of relatedness required in a given case is inversely proportional to the overall “intensity of [the defendant’s] forum contacts.”<sup>71</sup>

The substantial connection test has found favor in the Sixth Circuit. In *Third National Bank v. WEDGE Group Inc.*,<sup>72</sup> the Court of Appeals for the Sixth Circuit ruled that only a substantial connection is needed to confer specific jurisdiction.<sup>73</sup> The parties in that case included Third National Bank, which was located in Tennessee; WEDGE, a large Delaware corporation with its principle place of business in Texas; and the Rogers Company, a wholly owned subsidiary of WEDGE that had its principal place of business in Tennessee.<sup>74</sup> WEDGE employees served as Rogers’s officers and met regularly with Rogers personnel in Tennessee.<sup>75</sup> Third National made loans to Rogers and acquired a security interest in Rogers’s accounts receivable.<sup>76</sup> Rogers and WEDGE then entered into a “Tax Sharing Agreement” in Texas, whereby WEDGE would be liable to pay Rogers’s federal income tax.<sup>77</sup> Third National and Rogers later renewed their loan on account of WEDGE having deposited money in Third National Bank, located in Tennessee.<sup>78</sup> When Rogers began to suffer financial difficulties, WEDGE sought to sell its interest in the company, but disputes arose regarding WEDGE’s liabilities to Rogers under the tax-sharing agreement.<sup>79</sup> The three parties thereupon met in Tennessee to execute a new agreement, which temporarily resolved the issue.<sup>80</sup>

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69. *Id.* at 319.

70. *See, e.g., In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 917 (7th Cir. 1983) (requiring that forum contacts be “critical steps in the chain of events that led to the [injury]”).

71. *Sandy Lane*, 496 F.3d at 319–20 (citations omitted).

72. 882 F.2d 1087 (6th Cir. 1989).

73. *Third Nat’l Bank*, 882 F.2d at 1090 (“Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State” (citing *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957))).

74. *Id.* at 1088.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

Shortly thereafter Rogers defaulted on its loan obligations to Third National Bank.<sup>81</sup> Among Rogers's assets was the money owed to it by WEDGE under the tax-sharing agreement.<sup>82</sup> Seeking to enforce its security interest in that account receivable, Third National brought suit against WEDGE in Tennessee.<sup>83</sup> In response, WEDGE argued that Tennessee did not have personal jurisdiction over it: since the tax-sharing agreement was executed in Texas and governed by Texas law, the claims did not formally "arise out of" its contacts with Tennessee.<sup>84</sup>

Disagreeing, the Sixth Circuit held that a defendant's in-state activities must have a "substantial connection" with the plaintiff's cause of action, but they need not formally give rise to it.<sup>85</sup> Using this substantial connection test, the court pointed to WEDGE's deposits in a Tennessee bank, its negotiations with Rogers and Third National in Tennessee, and its agreements with the two parties made in Tennessee, and ultimately upheld personal jurisdiction over WEDGE.<sup>86</sup> The court explained that specific jurisdiction's relatedness element "does not require that the cause of action formally 'arise from' defendant's contacts with the forum," but instead requires "that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities."<sup>87</sup>

The Court of Appeals for the Eighth Circuit has taken a similar approach. In the Eighth Circuit, courts are advised to weigh "the nature and quality of the contacts, and [their] source and connection" to "the cause of action."<sup>88</sup> In *Miller v. Nippon Carbon Co.*,<sup>89</sup> the plaintiff, a worker's widow, filed a wrongful death suit against the defendant, a Japanese corporation, seeking to hold it liable for the worker's death, which occurred while the worker was in Tennessee unloading electrodes manufactured by the defendant in Japan.<sup>90</sup> The District Court for the Eastern District of Arkansas dismissed the suit on the ground that it lacked personal jurisdiction over the defendant-Japanese corporation.<sup>91</sup>

Affirming, the Eighth Circuit first observed that, with respect to the nature and quality of the contacts with Arkansas, the defendant's contacts were limited.

Nippon is not licensed to do business in Arkansas and has no agents, offices, employees, or property in Arkansas. Nippon contends its contacts of selling electrodes to [its customer] Nucor and sending two representatives to visit Nucor in Arkansas once or twice a year do not constitute contacts from which Miller's claims arise. Nippon states it was not involved in packaging,

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1091.

85. *Id.*

86. *Id.*

87. *Id.* (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 384 n.27 (6th Cir. 1968) (emphasis added)).

88. *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 712 (8th Cir. 2003) (quoting *Aftanase v. Econ. Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965)).

89. 528 F.3d 1087 (8th Cir. 2008).

90. *Miller*, 528 F.3d at 1089.

91. *Id.*

shipping, loading or unloading the electrodes, thus, it was not involved in the event that caused Mr. Miller's death. According to Nippon, the packaging, shipping, loading and unloading of the electrodes were performed by subcontractors. Nippon emphasizes that when Mr. Miller unloaded the electrodes, he was following orders from his employer, Global Material Services, not from Nippon. Therefore, Nippon asserts its contacts with Arkansas are not enough to establish that Miller's claims arise from those contacts.<sup>92</sup>

The Eighth Circuit concluded that

although Nippon sold electrodes to an Arkansas corporation pursuant to a sales contract, and Nippon's representatives visited Arkansas once or twice per year, these contacts do not sufficiently, for due process purposes, relate to the packing, shipping and unloading of the electrodes, the events which allegedly gave rise to Miller's cause of action.<sup>93</sup>

A California case also illustrates the operation of the substantial connection test. In *Vons Cos. v. Seabest Foods, Inc.*,<sup>94</sup> the California Supreme Court determined that a "claim need not arise directly from the defendant's forum contacts . . . to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate."<sup>95</sup>

The plaintiffs in *Vons* were restaurant franchisees whose hamburgers caused *E. coli* illnesses in California.<sup>96</sup> In California they sued two parties: the franchisor and the hamburger supplier.<sup>97</sup> After the supplier impleaded other franchisees that were located in Washington and sued them for negligence and indemnification, the issue was whether the California court had jurisdiction over these impleaded parties.<sup>98</sup> The supplier argued that, had the Washington franchisees followed protocol, the hamburgers would not have been infected with *E. coli*.<sup>99</sup> The Washington-based franchisees' contacts with California included food purchases from California suppliers, the transmission of funds to California, the inspection of the franchisees' restaurants by California-based inspectors, and the negotiation of the franchise agreements in California.<sup>100</sup> Although the impleaded franchisees' contacts were not directly related to the cause of action, the court found personal jurisdiction existed because the forum contacts bore a substantial relation to the cause of action.<sup>101</sup>

Thus, under the substantial connection test, a claim need not arise from the defendant's actions in the forum, but merely needs to be connected to those actions. Some scholars have criticized the test as erasing the distinction between general

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92. *Id.* at 1091.

93. *Id.* at 1092.

94. 926 P.2d 1085 (Cal. 1996).

95. *Vons*, 926 P.2d at 1096.

96. *Id.* at 1089.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1090.

101. *Id.* at 1101-02.

jurisdiction and specific jurisdiction, since a nexus between the act and claim no longer needs to be direct.<sup>102</sup> Courts that use the substantial connection test disagree, reasoning that the substantial connection test “retains the requirement that specific jurisdiction be based upon a connection between the plaintiff’s claim and the defendant’s forum contacts.”<sup>103</sup>

### C. The “Proximate Cause” Test

Some courts wrestling with the “arising from or related to” conundrum employ the “proximate cause” test, which would fall at the plausible/strict end of the *Twombly* spectrum. The proximate cause test “examines whether any of the defendant’s contacts with the forum are relevant to the merits of the plaintiff’s claim.”<sup>104</sup> In other words, the court determines whether the defendant’s contacts are the “proximate cause” or “legal cause” of the plaintiff’s cause of action.<sup>105</sup> This prong is satisfied if the injury is a foreseeable consequence of the defendant’s contact with the forum.

Of the three tests, the proximate cause test is regarded as the “most restrictive,”<sup>106</sup> and is therefore more likely to result in the denial of personal jurisdiction than the but for or substantial connection tests. Indeed, proximate cause requires the defendant’s conduct to be both the cause-in-fact and the foreseeable cause of injury.<sup>107</sup> The proximate cause test may best reflect the efficiency and cost-conscious spirit of

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102. See Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1461 (1988) (arguing in context of malfunctioning product cases that predicating specific jurisdiction upon presence of similar products in forum state risks turning specific jurisdiction into general jurisdiction).

103. *Vons*, 926 P.2d at 1097. The California Supreme Court in *Vons* discussed and rejected this criticism. *Id.* (rejecting defendant’s argument relying on reasoning similar to that presented in Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 84). According to Professor Brilmayer, the purpose of specific jurisdiction is to allow states to regulate conduct *within* the state, but the substantial connection test does not necessarily limit specific jurisdiction to those kinds of claims. See Brilmayer, *supra* note 102, at 1459–60. The California Supreme Court concluded, however, that Professor Brilmayer’s argument is based on a faulty assumption. Regulating in-state conduct is not the only purpose of specific jurisdiction; rather, states also have an interest in “providing a judicial forum for its residents—so long as the goal of fairness to defendants also is observed.” *Vons*, 926 P.2d at 1110. The U.S. Supreme Court has provided some guidance as to how much “relatedness” will support specific jurisdiction over a nonresident defendant. In *Rush v. Savchuk*, the plaintiff filed a complaint in Minnesota for personal injuries arising from an Indiana automobile accident. 444 U.S. 320, 322 (1980). The plaintiff claimed jurisdiction was proper in Minnesota because the defendant’s insurance company did business there, and the insurer’s obligation to defend and indemnify its insured in the accident litigation was inevitably the focus that would determine the victim’s rights and obligations. *Id.* at 328. The Supreme Court disagreed, holding that the insurance company’s contacts could not be imputed to the defendant for the purpose of establishing personal jurisdiction. *Id.* at 328–29. Therefore, there were not “significant contacts between the litigation and the forum” because “[t]he insurance policy [was] not the subject matter of the case . . . nor [was] it related to the operative facts of the negligence action.” *Id.* at 329.

104. *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318–19 (3d Cir. 2007).

105. See, e.g., *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 142 F.3d 26, 35 (1st Cir. 1998) (holding that defendant’s contacts must be “legal cause” of plaintiff’s injury, i.e., “the defendant’s in-state conduct [must] g[i]ve birth to the cause of action” (quoting *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992)) (internal quotation marks omitted)).

106. *Sandy Lane*, 496 F.3d at 318.

107. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995).

*Twombly*.<sup>108</sup> The First Circuit provides a good example of the proximate cause test approach in *Marino v. Hyatt Corp.*<sup>109</sup> In that case, a Massachusetts resident brought suit in her home state against Hyatt, a Delaware corporation, for injuries sustained when she slipped in the bathtub of her Hawaii hotel room.<sup>110</sup> Applying a strict version of the proximate cause requirement, the court concluded that Marino's claim did not "aris[e] from" any business that Hyatt transacted in Massachusetts.<sup>111</sup> The court reasoned that "[the] plaintiffs' advance reservation agreement with Hyatt would hardly be an important, or perhaps even a material, element of proof in [the] slip and fall case," and emphasized that to accept the plaintiffs' argument "would be to render the 'arising from' requirement . . . a virtual nullity."<sup>112</sup>

The First Circuit continued its adherence to the proximate cause test in a case that illustrates its difference from the but for test. In *Pizarro v. Hoteles Concorde Int'l, C.A.*,<sup>113</sup> the plaintiff saw the defendant's advertisement in a Puerto Rican newspaper, then traveled to the defendant's hotel in Aruba and was injured there.<sup>114</sup> The plaintiff then brought suit in a Puerto Rican court, alleging negligence.<sup>115</sup> The Court of Appeals for the First Circuit held that there was no personal jurisdiction over the defendant-hotel because its newspaper advertisements were not relevant to the merits of the claim, i.e., did not in and of themselves cause the plaintiff harm and thus bore no substantive relationship to the claim.<sup>116</sup> Acknowledging that but for the advertisements no claim would have arisen, the court nevertheless found that the advertisements were not the "legal or proximate cause of the . . . injury" and therefore the claim did not "arise from" nor was it "related to" the defendant's contacts with the forum.<sup>117</sup>

With its stricter requirement of a causal nexus between the defendant's contacts with the forum and the defendant's allegedly improper conduct, the proximate cause test most closely parallels the "plausible" standard enunciated in *Twombly* and best serves the values promulgated in that case, including efficiency and cost-effectiveness. A plaintiff who is required to bring suit in a forum where the defendant's contacts are relevant to the merits of his claim is far less likely to need more information about the defendant's contacts with the forum than if the threshold contacts requirement is

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108. See *infra* Part IV for an analysis of how courts must weigh the tradeoffs between cost, efficiency, and access to courts.

109. 793 F.2d 427 (1st Cir. 1986).

110. *Marino*, 793 F.2d at 427.

111. *Id.* at 431 (alteration in original).

112. *Id.* at 430; see also *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 268 (E.D. Pa. 1991) (holding that causal link between brochures Inn sent to Pennsylvania and injury sustained at Inn in New Jersey was "simply too attenuated to say that the injury arose from Beach Terrace's activities in the Commonwealth of Pennsylvania"); *Simpson v. Quality Oil Co.*, 723 F. Supp. 382, 388 (S.D. Ind. 1989) (holding that "substantive relevance" is proper test for exercise of specific jurisdiction); *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986) (finding connection between cruise ship operator's negligent preparation of food on board ship in California and its acts of soliciting passengers and sending tickets to Kansas too tenuous to support jurisdiction).

113. 907 F.2d 1256 (1st Cir. 1990).

114. *Pizarro*, 907 F.2d at 1257-58.

115. *Id.* at 1258.

116. *Id.* at 1259.

117. *Id.* at 1260.

lower.<sup>118</sup> If courts heed *Twombly*'s call for more factual specificity in pleadings and apply the proximate cause test to averments of personal jurisdiction, less personal jurisdiction discovery will be needed. And if courts apply the colorable claim test to motions for personal jurisdiction discovery, *Twombly*'s requirement that courts factor in the costs of discovery will be met.<sup>119</sup>

Plaintiffs confronted with a challenge to their claims of jurisdiction often do not face the same draconian outcome as plaintiffs who cannot properly support their pleadings: in the latter circumstance the court dismisses the case outright. However, in the former situation the case often can be salvaged with transfer to another jurisdiction pursuant to 28 U.S.C. § 1406 or the refile of the case in a jurisdiction where personal jurisdiction is clearly proper. Indeed, even these personal jurisdiction allegations can be salvaged using the "fairness factors" articulated by the Supreme Court in *Burger King Corp. v. Rudzewicz*.<sup>120</sup> Thus, defendants should not be forced to incur needless costs regarding personal jurisdiction discovery, and *Twombly* presents a paradigm to avoid such imposition.

#### IV. *BELL ATLANTIC CORP. v. TWOMBLY*

*Bell Atlantic Corp. v. Twombly*<sup>121</sup> taps into central themes in the world of civil procedure—namely issues of cost, efficiency, and access to courts—and the tradeoffs necessarily made when courts take those matters into account. In this Part, I provide a brief review of the *Twombly* decision to set the analysis, recommendations, and conclusions of this Article in context. Although *Twombly* directly addresses substantive pleading issues, its central premise is directly relevant to solving important personal jurisdiction questions.

In 1984 the American Telephone & Telegraph Company ("AT&T"),<sup>122</sup> which until then had a nationwide monopoly on telephone service,<sup>123</sup> was forced to divest its local telephone service business.<sup>124</sup> A system of regional telephone monopolies was thereupon created, popularly known as the "Baby Bells," but also called "Incumbent

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118. See, e.g., *Savage v. Biopart, Inc.*, 460 F. Supp. 2d 55, 62–63 (D.D.C. 2006) (stating that, if plaintiff is claiming jurisdiction based on specific jurisdiction, court is more likely to deny plaintiff's request for discovery relating to contacts that do not arise out of plaintiff's claim).

119. See *infra* notes 171–78 and accompanying text for an analysis of the colorable claim test and how courts weigh the costs of discovery.

120. 471 U.S. 462 (1985).

121. 550 U.S. 544 (2007).

122. For a general history of AT&T and the events leading to its divestiture, see generally JAMES R. MESSENGER, *THE DEATH OF THE AMERICAN TELEPHONE & TELEGRAPH COMPANY: HOW "MA BELL" DIED GIVING BIRTH TO THE INFORMATION AGE* (2007). For an early history of AT&T, see ALBERT BIGELOW PAINE, *IN ONE MAN'S LIFE: BEING CHAPTERS FROM THE PERSONAL & BUSINESS CAREER OF THEODORE N. VAIL* 98–145 (Hayne Press 2007) (1921).

123. See *Twombly*, 550 U.S. at 567–68 ("In the decade preceding the 1996 [Telecommunications] Act and well before that, monopoly was the norm in telecommunications, not the exception.")

124. *Id.* at 549; see also *United States v. AT&T Co.*, 552 F. Supp. 131, 147–234 (D.D.C. 1982) (affirming that antitrust consent decree ordering AT&T to divest of local operating companies was in "public interest" and describing divestiture plan), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

Local Exchange Carriers” (“ILECs”).<sup>125</sup> In 1996, however, with the enactment of the Telecommunications Act, Congress withdrew its approval of the ILECs’ regional monopolies and imposed on the ILECs “a host of duties intended to facilitate market entry” by competitors.<sup>126</sup> Among those duties was an obligation that each ILEC “share its network with competitors.”<sup>127</sup> Those competitors came to be known as “competitive local exchange carriers” (“CLECs”).<sup>128</sup>

The plaintiff’s bar commenced the *Twombly* lawsuit on behalf of a purported class of all “subscribers of local telephone and/or high speed internet services” during certain specified dates,<sup>129</sup> seeking “treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act.”<sup>130</sup> The complaint alleged that the ILECs conspired to restrict trade in two ways, each a violation of section 1: (1) by engaging in “‘parallel conduct’ in their respective service areas to inhibit the growth of upstart CLECs,” and (2) by agreeing amongst themselves “to refrain from competing against one another.”<sup>131</sup>

The Court first noted that “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”<sup>132</sup> The Court then discussed the application of Rule 8(a)(2) to a motion to dismiss pursuant to Rule 12(b)(6):

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. 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).<sup>133</sup>

The Court then applied those standards to the Sherman Act claim and held that “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that a[] [collusive] agreement was made.”<sup>134</sup> In the context of an antitrust action, this means that the allegations set forth in the complaint must “raise[] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent

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125. The regional companies were also sometimes referred to as “Regional Bell Operating Companies.” *Twombly*, 550 U.S. at 549.

126. *Id.* (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999)) (internal quotation marks omitted); *see also* 47 U.S.C. §§ 251–252 (2006) (stating statutory duties of telecommunications carriers).

127. *Twombly*, 550 U.S. at 549 (quoting *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402 (2004)) (internal quotation marks omitted).

128. *Id.*

129. *Id.* at 550 (quoting Amended Complaint at para. 53, app. 28, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220 (GEL))) (internal quotation marks omitted).

130. *Id.*

131. *Id.* at 550–51.

132. *Id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

133. *Id.* (alterations in original) (footnote omitted) (citations omitted).

134. *Id.* at 556.

action.”<sup>135</sup> Because parallel conduct is not prohibited by section 1 of the Sherman Act, without allegations of an illicit agreement, “[a]n allegation of parallel conduct is . . . much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of ‘entitle[ment] to relief.’”<sup>136</sup> Further, according to the *Twombly* Court, “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>137</sup>

The *Twombly* opinion advocates that trial courts put an end to marginal litigation “at the point of minimum expenditure of time and money by the parties and the court.”<sup>138</sup> Throughout its opinion in *Twombly*, the Court was visibly concerned with efficiency and economy—or, it may more accurately be stated—with the inefficiency and expense that characterizes much modern litigation.<sup>139</sup> The Court reinforced the “practical significance of the Rule 8 entitlement requirement.”<sup>140</sup>

We explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “a largely groundless claim” be allowed to “take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”<sup>141</sup>

The Court then referred to earlier commentators who had emphasized the need to rein in costly litigation,<sup>142</sup> and affirmed the district court’s power to hold the plaintiff accountable for providing sufficient evidence of a claim before embarking upon expensive discovery.

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. . . . “[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”<sup>143</sup>

The majority worried that, if the problem of discovery abuse was resolved not at the pleading stage, but later, at the summary judgment stage, “the threat of discovery

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135. *Id.* at 557.

136. *Id.*

137. *Id.* at 556.

138. *Id.* at 558 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 233–34 (3d ed. 2004)) (internal quotation marks omitted).

139. *Id.* at 558–60.

140. *Id.* at 557.

141. *Id.* at 557–58 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

142. *Id.* at 558; see also Martha Neil, *OK, Discovery’s a Problem, But What Can Be Done About It?*, ABA JOURNAL: LAW NEWS NOW, Sept. 11, 2008, [http://www.abajournal.com/news/ok\\_discoverys\\_a\\_problem\\_but\\_what\\_can\\_be\\_done\\_about\\_it/](http://www.abajournal.com/news/ok_discoverys_a_problem_but_what_can_be_done_about_it/) (reporting that survey of trial lawyers found that discovery costs prevent some cases from being brought to trial).

143. *Twombly*, 550 U.S. at 558 (citation omitted) (quoting *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”<sup>144</sup>

Concluding this line of thought, the majority reasoned that “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence.’”<sup>145</sup>

While commentators continue to engage in a vigorous debate over whether *Twombly* should be applicable to pleadings in cases other than antitrust matters, several circuits have already made their determinations:<sup>146</sup>

- In the First Circuit, the court of appeals held that *Twombly* gives Rule 12(b)(6) “more heft.”<sup>147</sup>
- In the Second Circuit, the court of appeals rejected a narrow view of *Twombly*, holding that the Supreme Court’s reasoning suggested “that it intended to make some alteration in the regime of pure notice pleading” and has since applied *Twombly* in various contexts.<sup>148</sup>

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144. *Id.* at 559; *see also* Stancil, *supra* note 29, at 94–95 (recommending bifurcation of pleading standards along cost disparity lines to avoid plaintiffs’ filing of “objectively frivolous lawsuits when they can impose higher net pretrial costs upon defendants than defendants can impose upon plaintiffs”). The Senate also has recognized this possibility, albeit in the context of their deliberations preceding the enactment of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2006). *See* S. REP. NO. 104-98, at 8 (1995) (finding that coercive or *in terrorem* settlements are driven by time that employees must spend responding to discovery requests and providing testimony), *reprinted in* 1995 U.S.C.C.A.N. 679, 687; H.R. REP. NO. 104-369, at 37 (1995) (Conf. Rep.) (quoting general counsel of investment bank as stating that in securities fraud cases, discovery costs are “roughly 80% of total litigation costs” (citing *Hearings Before the Securities Subcomm. of the Senate Comm. on Banking, Housing & Urban Affairs*, 104th Cong., 1st Sess. (Mar. 2, 1995) (testimony of former SEC Commissioner J. Carter Beese, Jr., Chairman of the Capital Markets Regulatory Reform Project, Center for Strategic and International Studies))), *reprinted in* 1995 U.S.C.C.A.N. 730, 736.

145. *Twombly*, 550 U.S. at 559 (alteration in original) (quoting *Dura Pharms.*, 544 U.S. at 347).

146. *See* Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 107–08 (2008) (noting *Twombly* relates to antitrust regulation, but federal courts have applied new standard in other types of cases). Moreover, one could argue that the Supreme Court itself has extended the reach of *Twombly*. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314–15 (2007) (requiring that allegations of scienter in a securities fraud action under Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2006), be not just plausible, but in fact be “cogent and at least as compelling as any opposing inference of nonfraudulent intent”). Not all circuits take such an expansive view of *Twombly*, however. In *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, the Court of Appeals for the D.C. Circuit concluded that *Twombly* “leaves the long-standing fundamentals of notice pleading intact.” 525 F.3d 8, 15 (D.C. Cir. 2008). That circuit was emphatic that in *Twombly* the Supreme Court “indicated quite clearly” that it did not intend to create a heightened pleading standard for all cases arising under the Federal Rules of Civil Procedure. *Id.* at 16 (arguing *Twombly* reiterated that heightened pleading standard would have to arise from amendment of Federal Rules of Civil Procedure). The Ninth Circuit shares the D.C. Circuit’s limited view of *Twombly*. *See* *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 841–42 (9th Cir. 2007) (citing *Twombly* as instructing courts “not to impose such heightened [pleading] standards”).

147. *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008).

148. *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007), *rev’d on other grounds sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *see also* *Benzman v. Whitman*, 523 F.3d 119, 129 (2d Cir. 2008) (stating that under *Twombly*, an implausible claim must be supported by supplemental facts in order to survive motion to dismiss); *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008) (applying *Twombly* to case alleging discrimination in violation of Fair Housing Act); *ATSI Commc’ns., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98

- In the Third Circuit, in an action under 42 U.S.C. § 1983, the court of appeals held that *Twombly*'s "'plausibility' paradigm for evaluating the sufficiency of complaints" is not restricted to the antitrust context.<sup>149</sup> The court noted that "[t]he plausibility paradigm announced in *Twombly* applies with equal force to analyzing the adequacy of claims of employment discrimination."<sup>150</sup>
- In the Fourth Circuit, the court of appeals applied *Twombly*'s "plausibility standard" to a case brought under the Virginia Freedom of Information Act.<sup>151</sup>
- In the Sixth Circuit, the court of appeals "cited the heightened pleading standard of *Twombly* in a wide variety of cases," thereby expanding its applicability beyond antitrust actions.<sup>152</sup>
- In the Eighth Circuit, the court of appeals held, in a non-antitrust case, that a plaintiff must allege facts "that affirmatively and plausibly suggest" he has the claimed right, not just "facts that are merely consistent with such a right."<sup>153</sup>
- In the Tenth Circuit, the court of appeals has given the *Twombly* standard greater "bite" in cases involving government defendants, including civil rights claims brought under section 1983, "reflecting the special interest in resolving the affirmative defense of qualified immunity at the earliest [possible] stage of a litigation."<sup>154</sup>
- In the Eleventh Circuit, the court of appeals cited *Twombly* in reversing the dismissal of a claim brought under the Fair Labor Standards Act.<sup>155</sup>

Furthermore, courts share an abiding concern about the escalating and potentially devastating costs of discovery, particularly when the claim appears less than meritorious,<sup>156</sup> thus mirroring *Twombly*'s heightened concern with the expense and

n.2 (2d Cir. 2007) (stating belief that *Twombly* applies beyond only antitrust cases (citing *Iqbal*, 490 F.3d at 158)); *Iqbal*, 490 F.3d at 155–58 (stating *Twombly* does not apply only to antitrust cases, and *Twombly* does not require heightened fact pleading, only flexible plausibility standard requiring pleader to amplify claim with factual allegations when necessary to render claim plausible).

149. *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

150. *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 322 (3d Cir. 2008).

151. *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008) (holding that allegation of lack of rational relationship between statutory prisoner exclusion and state interest does not meet plausibility standard due to presumption of legislative rationality and "readily apparent justification" for legislation).

152. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 n.2 (6th Cir. 2008) (compiling list of these cases and their contexts).

153. *Stalley ex rel. U.S. v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007).

154. *VanZandt v. Okla. Dep't of Human Servs.*, 276 F. App'x 843, 847 (10th Cir. 2008) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008)) (internal quotation marks omitted); *see also Patton v. West*, 276 F. App'x 756, 758 (10th Cir. 2008) (discussing action brought under 42 U.S.C. §§ 1983, 1985, and 1986).

155. *Sec'y of Labor v. Labbe*, 319 F. App'x 761, 763 (11th Cir. 2008); *see also Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007) (holding that courts may not assess probability of facts, but plaintiff must "allege[] enough facts to suggest, raise a reasonable expectation of, and render plausible" his claim).

156. *See, e.g., Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 182 (3d Cir. 1988) (discussing long-held belief by courts that modern litigation is too expensive to waste time and money on "fanciful claims"); *Jacobs v. Tempur-Pedic Int'l, Inc.*, No. 4:07-CV-02-RLV, 2007 WL 4373980, at \*2 (N.D. Ga. Dec. 11, 2007) (recognizing that while courts should be cautious in granting motions to dismiss prior to discovery, courts must remember that antitrust discovery can be expensive); *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (holding threshold of plausibility must be met before

burden of discovery. Indeed, as one commentator noted, the “central problem confronted by *Twombly* is discovery run amok.”<sup>157</sup> The Court of Appeals for the Seventh Circuit stated that *Twombly* “teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case.”<sup>158</sup>

All courts therefore should heed *Twombly*’s mandate that they “avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence.”<sup>159</sup> *Twombly* represents an effort by the Court to rein in some of the excess and extravagance of modern litigation.<sup>160</sup> This mandate should apply to claims of personal jurisdiction, as well as those regarding the merits of an action. *Twombly* offers an opportunity to resolve a clash among the courts as to what standard to apply when considering a plaintiff’s claim that the court has personal jurisdiction over a defendant, and under what circumstances a court should allow discovery into personal jurisdiction issues. By focusing on cost and efficiency in matters regarding personal jurisdiction, courts will heed *Twombly*’s clear warnings regarding judicial waste and abuse.

#### V. THE DILEMMA: HOW MUCH IS TOO MUCH?

Courts seeking to resolve the “arising from or related to” conundrum often have to do more than apply one of the three tests discussed in Part III above. As already noted, a plaintiff might also call upon the court to allow some discovery into the defendant’s contacts with the forum state. In that event, *Bell Atlantic Corp. v. Twombly*<sup>161</sup> again

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antitrust case may proceed to discovery); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. Rev. 1217, 1238 (2008) (reasoning Court decided *Twombly* as means to prevent costs of discovery from incentivizing defendants to settle without regard to merits of case).

157. Picker, *supra* note 12, at 202–03 (stating that *Twombly* suggests Court believes refining discovery rules will not control discovery costs, and heightened standards outweigh plaintiffs’ inability to get at antitrust conspiracies); *see also* Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007) (reasoning that discovery concerns evident in *Twombly* suggest that adjusted pleading standards only apply to cases where massive discovery may create unacceptable settlement pressures), *rev’d on other grounds sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

158. *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 802–03 (7th Cir. 2008).

159. *Twombly*, 550 U.S. at 559 (alteration in original) (internal quotation marks omitted).

160. In this respect, *Twombly* may also reflect the character and personal proclivities of its author, Justice David Souter, whose frugality has long been noted. *See, e.g.*, Jerome Cramer, *Mr. Souter Comes to Town*, TIME, Oct. 15, 1990, at 67 (describing Souter’s “image as a shy, decent man who likes old cars, black-and-white television sets and the Boston Red Sox” and who lives in a “modest one bedroom apartment”); Jennifer O’Shea, *10 Things You Didn’t Know About David Souter*, U.S. NEWS & WORLD REP., Oct. 1, 2007, <http://www.usnews.com/articles/news/national/2007/10/01/10-things-you-didnt-know-about-david-souter.html> (noting that Souter “often brings his own lunch to the office and, at the time of his confirmation, claimed not to own a color television”). Interestingly, this is not the first time that the normally old-fashioned Justice Souter has taken the lead in a case that deals with modern technology. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 245–46 (2007) (discussing Justice Souter’s handling of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), and noting that this “man who worked exclusively with a fountain pen” crafted opinion that “showed a sophisticated understanding of the markets for both technology and entertainment”).

161. 550 U.S. 544 (2007).

provides guidance as to when and how much personal jurisdiction discovery courts should permit.

Federal Rule of Civil Procedure 12(b)(2) allows a defendant to move to dismiss a claim based on lack of personal jurisdiction.<sup>162</sup> In response to such a motion, the burden is on the plaintiff to demonstrate that jurisdiction is proper.<sup>163</sup> Further, “in the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has [personal] jurisdiction.”<sup>164</sup>

Presented with a properly supported 12(b)(2) motion and opposition, the court has three procedural alternatives: it may decide the motion upon . . . affidavits [and other supporting documents] alone [without permitting discovery]; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions.<sup>165</sup>

The court has the discretion to select the procedural method to utilize.<sup>166</sup> The court’s choice determines the weight of the plaintiff’s burden.<sup>167</sup>

When the court decides the motion without discovery, “on the basis only of motion papers, supporting legal memoranda and the relevant allegations of a complaint, the burden on the plaintiff is simply to make a prima facie showing of a sufficient jurisdictional basis in order to survive the jurisdictional challenge.”<sup>168</sup> Making a prima facie showing of personal jurisdiction means that the plaintiff must present “evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction.”<sup>169</sup> Moreover, generally plaintiffs may not rely on unsupported allegations in their complaints to make a prima facie showing of personal jurisdiction.<sup>170</sup>

162. FED. R. CIV. P. 12(b)(2).

163. *See* Second Amendment Found. v. U.S. Conference of Mayors, 274 F.3d 521, 524 (D.C. Cir. 2001) (stating that plaintiffs did not produce enough evidence to meet burden); *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998) (discussing plaintiff’s burden with or without evidentiary hearing); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261–62 (6th Cir. 1996) (stating that plaintiff bears burden).

164. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) (quoting *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 930 (6th Cir. 1974)).

165. *Id.* (citing *Serras v. First Tenn. Bank Nat’l Ass’n*, 875 F.2d 1212, 1214 (6th Cir. 1989)).

166. *Id.*

167. *Dean*, 134 F.3d at 1272; *Theunissen*, 935 F.2d at 1458; *Serras*, 875 F.2d at 1214.

168. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). Moreover, “[i]n considering a challenge on such a record, the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction.” *Id.* at 676. To establish a prima facie case for personal jurisdiction, a plaintiff must show: (1) that a statute or rule authorizes service of process on the nonresident defendant, and (2) that service on the nonresident defendant comports with the requirements of the Due Process Clause. *In re Celotex Corp.*, 124 F.3d 619, 627 (4th Cir. 1997).

169. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992); *see also* *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. 2003) (stating that when court’s power to exercise personal jurisdiction over nonresident defendant is challenged by Rule 12(b)(2) motion, judge resolves questions of jurisdiction, with plaintiff carrying burden to prove grounds for jurisdiction by preponderance of evidence).

170. *See, e.g., Boit*, 967 F.2d at 675 (noting rule that plaintiffs may not rely on unsupported assertions in pleadings to establish prima facie existence of personal jurisdiction).

Often, however, a plaintiff will seek to obtain discovery in order to make the factual presentation necessary to survive a 12(b)(2) motion. Some courts employ a requirement that the plaintiff provide a “colorable” claim of personal jurisdiction before they will permit discovery.<sup>171</sup> The colorable claim requirement anticipates the heightened standards announced in *Twombly*, in that the colorable claim requirement dictates that the plaintiff must demonstrate that it “can supplement its [personal] jurisdictional allegations through discovery,”<sup>172</sup> or that it has “at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant.”<sup>173</sup> Further mirroring *Twombly*’s distaste for attenuated claims, courts are likely to deny discovery if the plaintiff’s jurisdictional allegations are “speculative” or “conclusory” or if the plaintiff’s case for jurisdiction is “implausible.”<sup>174</sup>

In *Twombly*, the Supreme Court required a plaintiff bringing an antitrust claim to provide “enough factual matter (taken as true) to suggest that an agreement was made.”<sup>175</sup> Similarly, the focus under the colorable claim standard is both on the degree of factual specificity of the plaintiff’s threshold case for personal jurisdiction and the likelihood that discovery will uncover facts relevant to the jurisdictional question. Additionally, courts are especially wary of permitting discovery when the plaintiff seeks discovery of private information, particularly if the plaintiff has not presented a “colorable basis” for personal jurisdiction, thereby “render[ing] the request burdensome.”<sup>176</sup> Nevertheless, there is a significant degree of flexibility in the colorable claim standard, and a plaintiff may have to make a lesser or greater threshold showing in different types of cases, depending on the basis upon which the plaintiff claims personal jurisdiction exists.<sup>177</sup> Some courts have elected not to use the colorable claim standard at all.<sup>178</sup>

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171. See, e.g., *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625 (1st Cir. 2001) (noting that plaintiff who makes out case against out-of-state corporation for existence of personal jurisdiction *may* be entitled to degree of jurisdictional discovery if corporation asserts jurisdictional defense); *Sunview Condo. Ass’n v. Flexel Int’l, Ltd.*, 116 F.3d 962, 964 (1st Cir. 1997) (same); *Savage v. Bioport, Inc.*, 460 F. Supp. 2d 55, 62 (D.D.C. 2006) (stating that courts act reasonably in requiring plaintiff to show colorable basis for jurisdiction before subjecting defendant to “intrusive and burdensome discovery” (citation omitted) (internal quotation marks omitted)); *Bancoult v. McNamara*, 214 F.R.D. 5, 10 (D.D.C. 2003) (stating that denial of discovery is not abuse of discretion where plaintiff fails to assert colorable claim of jurisdiction). “In addition to making a colorable claim, it is also incumbent upon the plaintiff to ‘present facts to the court which show why jurisdiction would be found if discovery were permitted.’” *Negrón-Torres v. Verizon Commc’ns, Inc.*, 478 F.3d 19, 27 (1st Cir. 2007) (quoting *Swiss Am. Bank*, 274 F.3d at 626).

172. *Bancoult*, 214 F.R.D. at 10 (quoting *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000)) (internal quotation marks omitted).

173. *Savage*, 460 F. Supp. 2d at 62 (citation omitted) (internal quotation marks omitted).

174. See, e.g., *Boit*, 967 F.2d at 675 (stating long-established rule that plaintiffs cannot rely on unsupported pleading allegations to make prima facie case for personal jurisdiction).

175. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

176. *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 313 (S.D. Ind. 1997); see also *Commercial Union Ins. Co. v. Westrope*, 730 F.2d 729, 732 (11th Cir. 1984) (finding that court can deny motion to compel discovery after concluding that questions are irrelevant).

177. For example, if the plaintiff claims that the court has jurisdiction based on general jurisdiction, the court is likely to require a greater threshold showing from the plaintiff than if he had claimed that the court had jurisdiction based on specific jurisdiction. See *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 562 (9th Cir.

Furthermore, courts have often indicated that personal jurisdiction discovery should be allowed in response to a Rule 12(b)(2) motion when the facts that are needed to establish personal jurisdiction are in the exclusive control of the defendant and the plaintiff may not otherwise be able to establish personal jurisdiction.<sup>179</sup> According to the Supreme Court, when a defendant “put[s the jurisdictional] issue in question, [it does] not have the option of blocking the reasonable attempt of [the plaintiff] to meet its burden of proof [through discovery].”<sup>180</sup>

Additionally, courts are more likely to allow discovery when a plaintiff claims that personal jurisdiction exists based on a fact-specific multifactor test such as a stream-of-commerce theory or when jurisdiction is based on a foreign corporation’s relationship to an in-forum subsidiary.<sup>181</sup>

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1995) (finding that district court did not abuse discretion in refusing discovery request where plaintiff offered only bare allegations of personal jurisdiction in face of specific factual denials made by defendant). If the plaintiff is claiming jurisdiction based on specific jurisdiction, the court is more likely to deny the plaintiff’s request for discovery relating to contacts that do not arise out of the plaintiff’s claim. *E.g.*, *Savage*, 460 F. Supp. 2d at 62–63.

178. In contrast to the “colorable claim” requirement, the Third Circuit has adopted a more liberal standard, which requires only that the plaintiff’s claim of personal jurisdiction not be “frivolous.” *Compagnie des Bauxites de Guinee v. L’Union Atlantique S.A. d’Assurances*, 723 F.2d 357, 362 (3d Cir. 1983) (finding that district court should allow discovery where claim is not “clearly frivolous”); *see also* *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 458 (3d Cir. 2003) (finding that courts should assist plaintiffs by permitting jurisdictional discovery if claim isn’t clearly frivolous); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1042 (3d Cir. 1997) (stating that jurisdictional discovery is allowed unless claim is “clearly frivolous” (citation omitted) (internal quotation marks omitted)); *Nehemiah v. Athletics Cong. of U.S.A.*, 765 F.2d 42, 48 (3d Cir. 1985) (reiterating not “clearly frivolous” standard expressed in *Compagnie des Bauxites de Guinee*). This standard requires only that the plaintiff provide “some competent evidence to demonstrate that personal jurisdiction over the defendant might exist before allowing discovery to proceed” and the “court must be satisfied that there is some indication that this particular defendant is amenable to suit in this forum.” *Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 475 (D. Del. 1995). Put otherwise, if a plaintiff presents factual allegations that suggest “with reasonable particularity” the possible existence of the requisite “contacts between the defendant and the forum state,” the plaintiff’s right to conduct jurisdictional discovery should be sustained. *Mellon Bank (E.) PSFS v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992) (citation omitted) (internal quotation marks omitted). Under the standard used by courts in the Third Circuit, however, it is inappropriate for the court to allow discovery if the plaintiff presents no jurisdictional facts or relies on the “bare allegations” in his complaint. *See Hansen*, 163 F.R.D. at 475–76 (articulating standard and finding that plaintiff may not simply rely on complaint as grounds for additional discovery); *Sandvik AB v. Advent Int’l Corp.*, 83 F. Supp. 2d 442, 447 (D. Del. 1999) (stating that although courts typically allow discovery to establish jurisdiction when complaint alone is inadequate for this purpose, courts need not allow discovery if suit is frivolous), *aff’d*, 220 F.3d 99 (3d Cir. 2000); *Joint Stock Soc’y v. Heublein, Inc.*, 936 F. Supp. 177, 192 (D. Del. 1996) (noting that plaintiff cannot rely on allegations in complaint after discovery has begun); *Garshman v. Universal Res. Holding, Inc.*, 641 F. Supp. 1359, 1366 (D.N.J.1986) (holding that mere unsupported allegation that defendant “transacts business” in area is “clearly frivolous”), *aff’d*, 824 F.2d 223 (3d Cir. 1987). Nevertheless, in the Third Circuit, a “low threshold for permitting [personal jurisdiction] discovery” prevails. *Greene v. New Dana Perfumes Corp. (In re Renaissance Cosmetics, Inc.)*, No. 99-783, 2000 WL 33712289, at \*3 (Bankr. D. Del. Dec. 14, 2000).

179. *Hansen*, 163 F.R.D. at 475.

180. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982).

181. *See, e.g., In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir. 2003) (holding that discovery should have been permitted to develop facts related to degree of control of foreign corporation over its in-forum subsidiary); *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 283–84 (3d Cir. 1994) (holding that discovery should have been permitted to develop facts necessary to determine whether there was jurisdiction

Courts also consider the relationship between the parties in deciding what threshold showing of personal jurisdiction the plaintiff must make before it will permit discovery into the issue. A court is likely to be more lenient if the plaintiff is a “stranger” to a corporate defendant. In the oft-cited words of the First Circuit:

A plaintiff who is a total stranger to a corporation should not be required, unless he has been undiligent, to try [personal jurisdiction] on affidavits without the benefit of full discovery. . . . The condemnation of plaintiff’s proposed further activities as a “fishing expedition” was unwarranted. When the fish is identified, and the question is whether it is in the pond, we know no reason to deny a plaintiff the customary license.<sup>182</sup>

On the other hand, a court is likely to require a stronger factual showing before allowing personal jurisdiction discovery if there is a contractual relationship between the plaintiff and the defendant because “the court can reasonably expect the plaintiff to be able to specify at the outset at least those contacts the defendant has had with the forum that would support specific (as opposed to general) personal jurisdiction.”<sup>183</sup>

In some situations, courts have raised policy reasons why jurisdictional discovery should be denied when a plaintiff has not made a certain threshold showing of personal jurisdiction. For example, courts have indicated that foreign defendants in particular should be protected from discovery when the plaintiff has made an inadequate threshold showing that the court has personal jurisdiction.<sup>184</sup> This reflects a broader wariness about requiring defendants to submit to extensive discovery when personal jurisdiction is especially questionable.<sup>185</sup>

Recently, however, courts have begun to focus on the costs of personal jurisdiction discovery. For example, in *Sinochem International Co. v. Malaysia International Shipping Corp.*,<sup>186</sup> the Supreme Court held that when the district court is presented with a “textbook” case for dismissal based on *forum non conveniens*, it is not required to first determine whether it has personal jurisdiction especially where “personal jurisdiction is difficult to determine” and “[d]iscovery concerning personal jurisdiction would have burdened [the defendant] with expense and delay.”<sup>187</sup>

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under post-*Asahi* stream-of-commerce theory); *Crane v. Carr*, 814 F.2d 758, 760 (D.C. Cir. 1987) (holding that discovery should have been permitted to determine if multifactor long-arm statute for personal jurisdiction in District of Columbia had been satisfied); *Hansen*, 163 F.R.D. at 475 (allowing plaintiff to go forward with limited discovery to establish personal jurisdiction over foreign corporation alleged to have manufactured and installed equipment in forum state that injured plaintiff). Further, jurisdictional discovery is more likely to be granted where the defendant is a corporate entity, rather than an individual. See *Mass. Sch. of Law*, 107 F.3d at 1042 (noting that jurisdictional discovery relates to corporate defendants and whether they “do[] business” in state, and where defendant is individual, presumption of discovery diminishes).

182. *Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255–56 (1st Cir. 1966).

183. *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 313 n.3 (S.D. Ind. 1997).

184. See, e.g., *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 947 (7th Cir. 2000) (noting that foreign defendants should not usually be subjected to extensive and burdensome discovery for purposes of determining personal jurisdiction); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 186 (2d Cir. 1998) (holding that it would be inappropriate for court to deviate from established discovery rules for foreign defendants simply because plaintiffs have problems meeting standards).

185. *Ellis*, 175 F.R.D. at 312.

186. 549 U.S. 422 (2007).

187. *Sinochem Int’l*, 549 U.S. at 435.

Acknowledging *Sinochem*, the district court in Guam decided to transfer a case in which the defendant disputed personal jurisdiction.<sup>188</sup> The court indicated that the cost of personal jurisdiction discovery was one of the reasons that transfer was proper since there was clearly personal jurisdiction in the Northern District of California.<sup>189</sup>

The District of Connecticut denied personal jurisdiction discovery in a case where the plaintiff was “already aware of the facts giving rise to the action” and discovery would have been “expensive and burdensome for the non-resident defendants.”<sup>190</sup> Similarly, the Southern District of New York denied personal jurisdiction discovery, stating that the “plaintiff cannot put defendant through the costly process of discovery, even discovery limited to jurisdictional matters, simply because it thinks that it can probably show significant contact with the state of New York if discovery were to proceed.”<sup>191</sup>

Thus, although the case law may be limited, it appears that some courts are, at least inadvertently, adhering to *Twombly*'s admonition that discovery costs must be factored into a court's decisions, including those involving personal jurisdiction determinations. The colorable claim requirement, if properly applied, is a step toward meeting that directive.

#### VI. THE ROLE OF A MAGISTRATE OR SPECIALIZED JUDGE

I suggest that a specialized judge or magistrate be responsible in the first instance for evaluating a plaintiff's claim of personal jurisdiction over a defendant.<sup>192</sup> Designating a judicial officer who can focus her attention on the often intricate and intimate investigative work necessary to properly review a defendant's contacts with a forum will help standardize and streamline the process of evaluating the existence of personal jurisdiction. Indeed, a specialized magistrate or judge experienced with requests for personal jurisdiction discovery would be ideally suited to opine whether such discovery should even proceed—or whether such an undertaking would be costly and inefficient. In this way, a degree of uniformity can be attained in what heretofore has been an ad hoc process.

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188. *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. 06-00025, 2007 WL 1845556, at \*1 (D. Guam June 27, 2007).

189. *Id.* at \*5 (stating that issue of personal jurisdiction has resulted in hundreds of thousands of pages of discovery into connection between defendants and their contacts with foreign nation, as well as hundreds of unanswered filings due to jurisdictional issue).

190. *Anderson v. Bedford Assocs., Inc.*, No. 3:97 CV 1018, 1997 WL 631117, at \*1, \*5 (D. Conn. Sept. 19, 1997).

191. *Bellepointe, Inc. v. Kohl's Dep't Stores, Inc.*, 975 F. Supp. 562, 565 (S.D.N.Y. 1997).

192. For a similar discussion of the proposed role of a magistrate in evaluating plaintiffs' requests to litigate pseudonymously, and in overseeing the compilation and review of documentation necessary to determine the assets of an alleged debtor held in civil contempt, see, respectively, Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 237–40 (2004), and Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 394–97 (2006).

Reviewing a plaintiff's request for personal jurisdiction discovery is an ideal use of a federal magistrate's authority under 28 U.S.C. § 636,<sup>193</sup> and would be appropriate for state magistrates or specialized judges as well.<sup>194</sup> The primary function of a magistrate judge is to improve the efficiency of the judicial system and to handle pretrial and preliminary matters.<sup>195</sup> The determination of a defendant's contacts with the forum, or the evaluation of the costs of discovery regarding such alleged contacts, thus fits squarely within the duties of the magistrate judge.<sup>196</sup> In this role, the specialized judge or magistrate would have numerous functions. Primarily, she would make a thorough evaluation of a defendant's contacts with the forum. After doing so, the specialized judge or magistrate would present these contacts to the court, which would then apply the appropriate test (preferably, the proximate cause test) and determine whether or not those contacts sufficed for personal jurisdiction.

Over time specialized judges or magistrates would develop an expertise and efficiency in dealing with evaluating defendants' contacts with the forum, and they could continue their involvement with the case should problems develop throughout the course of the litigation. This would increase judicial efficiency by freeing the courts from the often time-consuming efforts necessary to evaluate defendants' contacts with the forum. Additionally, specialized judges or magistrates would be in the best position to determine the costs inherent in personal jurisdiction discovery. They could then recommend that the court either permit or decline to allow such discovery. Having a specialized judge or magistrate handle these matters in the first instance will reduce the number and types of problems inherent in the current system. It is important, however, for magistrates handling these personal jurisdiction claims to author written opinions regarding their findings. This is particularly true because of the fact-intensive nature of

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193. 28 U.S.C. § 636 states in relevant part: "Notwithstanding any provision of law to the contrary . . . a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court . . ." 28 U.S.C. § 636(b)(1)(A) (2006).

194. *See, e.g.*, CAL. CONST. art. VI, § 22 ("The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform *subordinate judicial duties*." (emphasis added)).

195. S. REP. NO. 96-74, at 3 (1979) (expressing purpose of Federal Magistrates Act as facilitating rational division of labor among district court judicial officers, since magistrate relieves judges from personally hearing each pretrial motion or proceeding in preparation of case for trial), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1471-72; S. REP. NO. 92-1065, at 3 (1972) (noting that magistrates provide valuable assistance to district court judges, thereby allowing those judges to spend more time on actual trial of cases), *reprinted in* 1972 U.S.C.C.A.N. 3350, 3351. The Supreme Court has also affirmed the intentions of Congress in establishing the position of the federal magistrate. *See, e.g.*, *Peretz v. United States*, 501 U.S. 923, 934 (1991) (holding that Federal Magistrates Act was designed to relieve district courts of "subordinate duties that often distract the courts from more important matters"); *McCarthy v. Bronson*, 500 U.S. 136, 142 (1991) (finding that policy behind Act authorizes greater use of magistrates to assist federal judges); *Mathews v. Weber*, 423 U.S. 261, 268 (1976) (finding that Congress intended magistrates to assist with vast amount of additional work created for district courts); *Wingo v. Wedding*, 418 U.S. 461, 463 (1974) (noting that Act authorizes magistrates to perform duties formerly allocated to U.S. commissioners).

196. *See, e.g.*, *Cimon v. Guardian Life Ins. Co. of Am.*, No. 03-255-P-H, 2004 WL 444026 (D. Me. Mar. 11, 2004) (denying, in decision by magistrate, plaintiff's motion for jurisdictional discovery and recommending denial of plaintiff's motion to transfer), *aff'd in part, vacated in part sub nom.* *Cimon v. Gaffney*, 401 F.3d 1 (1st Cir. 2005).

the relevant inquiries. The precedential value of these decisions depends in large part on the factual detail contained therein.

#### VII. CONCLUSION

It is beyond cavil that as our society, our economy, and our laws all become more complex, litigation becomes more complicated as well. Increasing complexity leads to increasing costs. Modern realities—including, not least of all, the enormous cost of now-ubiquitous electronic discovery—demand that the courts' screening mechanisms be tightened up, if they are to avoid being crushed under the weight of frivolous or otherwise inappropriate lawsuits. Although personal jurisdiction questions may not typically generate the astronomical costs of discovery that can arise in antitrust litigation, they nonetheless contribute to a litigation system that, by necessity, has been forced to focus on setting litigation thresholds. The but for test of personal jurisdiction swings the courthouse door open far too wide, particularly when so many transactions would not have occurred, and so many wrongs would not have befallen plaintiffs, "but for" the defendant's Internet participation. The substantial connection test does a better job of reigning in potentially frivolous and costly claims of personal jurisdiction, but it does not go far enough in mandating that a plaintiff's personal jurisdiction claim move from "conceivable" to "plausible." In contrast, the proximate cause test does not close the courthouse door, but it does require plaintiffs to show that the defendant's contacts with the forum are relevant to the merits of the claim. Because of its stricter requirement of a causal nexus between the defendant's contacts with the forum and the defendant's allegedly improper conduct, the proximate cause test most closely parallels the "plausible" standard enunciated in *Twombly* and best promotes efficiency and cost-effectiveness. This stricter reading of personal jurisdiction requirements is in keeping with *Twombly*, and courts should adopt it.

Furthermore, if properly utilized, the colorable claim standard for deciding whether to permit personal jurisdiction discovery anticipates the heightened standards announced in *Twombly*. This is because the focus under the colorable claim standard is both on the degree of factual specificity of the plaintiff's threshold case for personal jurisdiction and the likelihood that discovery will uncover facts relevant to the jurisdictional question. As a result, courts are likely to deny discovery if the plaintiff's jurisdictional allegations are speculative, conclusory, or implausible.

Finally, employing magistrates and specialized judges to handle the first step in the process of determining whether personal jurisdiction is proper in a particular forum could streamline and make more cost-effective a process that has heretofore been ad hoc, unpredictable, and uneconomical. This will in turn heed *Twombly*'s mandate that expense and efficiency be essential factors in judicial decision making.