Bloomberg BNA

The United States
Law Week

Case Alert & Legal News™

Civil Procedure

Pleadings

In *Twombly* and *Iqbal*, the U.S. Supreme Court said that claims in pleadings must be supported by plausible factual allegations. Jonathan Handler and David Lieberman of Day Pitney look at whether the same standard can be used by plaintiffs to attack affirmative defenses. They note that the legal and policy issues undergirding *Twombly* and *Iqbal* stand on different ground when it comes to affirmative defenses, but still suggest providing some factual basis for affirmative defenses in answers to complaints.

The Application of 'Plausibility' to Affirmative Defenses: Has the Wave Crested?

JONATHAN I. HANDLER AND DAVID W. LIEBERMAN

Jonathan Handler is a Boston-based partner in the Litigation Department at Day Pitney LLP. His practice focuses on complex commercial disputes. David Lieberman is a Boston-based associate in the Litigation Department at Day Pitney LLP. His practice focuses on complex commercial disputes including those under the False Claims Act.

In *Bell Atlantic v. Twombly Corp.*[1] and *Ashcroft v. Iqbal*,[2] the U.S. Supreme Court recharacterized the applicable pleading standards to require that claims be supported by plausible factual allegations. Since then, savvy defendants have successfully wielded the ''*Twombly* motion'' as a tool to short-circuit complaints for which a plaintiff has failed to articulate a plausible factual basis. Plaintiffs in turn have become well-acquainted with the quantum of facts necessary to survive this form of attack.

Parties may not be as familiar with the use of *Twombly* and *Iqbal* to attack a defendant's affirmative defenses. But in numerous cases, plaintiffs have utilized the plausibility standard to argue that affirmative defenses must be stricken absent plausible supporting facts. Where courts accept this legal predicate, some affirmative defenses are likely to fail the plausibility test, as parties regularly assert boilerplate affirmative defenses to avoid potential waiver of a later discovered defense. While a plausibility standard for affirmative defendants has appeal under a ''good for the goose-good

[1] 550 U.S. 544 (2007).
[2] 556 U.S. 662 (2009).

 ISSN 0148-8139

for the gander''[3] basis, the legal and policy rationales undergirding the *Twombly* and *Iqbal* decisions stand on a different basis when applied to affirmative defenses. This leaves the validity of application of the plausibility standard to affirmative defenses very much in doubt. Indeed, courts have struggled mightily with whether *Twombly* and *Iqbal* provide a permissible basis for attacking affirmative defenses at all.

This article reviews the basis underlying the Supreme Court's imposition of a plausibility standard for claims under Federal Rule of Civil Procedure 8(a) and considers whether applying that standard to affirmative defenses, governed by Rules 8(b) and (c), makes sense given the differing language in those rules. It then reviews some recent trends considering whether to apply this standard in the context of affirmative defenses, including a recent circuit decision that may herald a widespread rejection of this theory.

Plausibility Standards of *Twombly* and *Iqbal*.

For half a century, the Supreme Court's decision in *Conley v. Gibson* governed the evaluation of a complaint's allegations. There the Court held that ''a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.''[4] The Court went on to reject the argument that a complaint must ''set forth specific facts'' to support its allegations; rather the Federal Rules of Civil Procedure require only '' 'a short and plain statement of the claim' that will give the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests.''[5] For decades this ''fair notice'' standard was utilized by lower courts in evaluating the sufficiency of a complaint.[6]

In the late 2000s however, the Supreme Court reconsidered this ''fair notice'' standard in *Twombly* and *Iqbal*. In these cases, the Court recharacterized the standards necessary to comply with Federal Rule of Civil Procedure 8(a)(2). In particular, the Court concluded that the language in that Rule requiring a statement ''showing that the pleader is entitled to relief''—what the Court called the ''entitlement requirement''—mandated allegations ''suggesting (not merely consistent with)'' liability.[7] In practice, this required factual allegations sufficient ''to raise a right to relief above the speculative level.''[8] While the Court acknowledged that ''detailed factual allegations'' are not necessary for a complaint to survive a motion to dismiss, a complaint must present ''more than an unadorned, the-defendant-unlawfully-harmed-me accusation.''[9] ''A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.''[10]

These decisions had a profound impact on pretrial practice. Not only did they radically change the standards by which courts evaluated a complaint but, after *Twombly* and *Iqbal*, a motion to dismiss has become more likely to be granted.[11] Perhaps unsurprisingly, defendants are now far more likely to file a motion to dismiss in any given case.[12]

Rules Governing Affirmative Defenses.

Affirmative defenses must first be distinguished from ''negative defenses'' or denials. In general, affirmative defenses raise matters extraneous to the plaintiff's *prima facie* case, whereas ''negative defenses'' or denials negate an element of the plaintiff's prima facie case.[13] Rule 8 provides a list of exemplar affirmative defenses,[14] and courts determine whether non-enumerated defenses are affirmative defenses by reference to those examples.[15] The failure to raise affirmative defenses in a complaint is generally understood to risk waiver of the defense.[16] Moreover, as with all parts of a responsive pleading, the Federal Rules of Civil Procedure provide a party with only twenty-one days to assert affirmative defenses.[17] This combination of a short preparation period and potential waiver for failure to timely raise affirmative defenses can lead a party to assert boilerplate defenses to ensure that he not be precluded from later asserting them should the facts warrant.

Affirmative defenses stand on a different legal footing than do claims. Unlike claims, which are governed by Fed. R. Civ. P. 8(a)(2), affirmative defenses are governed by Rules 8(b) and (c). Critically, these rules lack Rule 8(a)'s ''entitlement requirement'' that the Supreme

---

[3] *See* William M. Janssen, *The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses*, 19 Wash & Lee L. Rev. 1573, 1574-75 (2013).

[4] 355 U.S. 41, 45-46, (1957).

[5] *Id.* at 47 (quoting Fed. R. Civ. Proc. 8(a)(2)) (emphasis added).

[6] *See, e.g., Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004); *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004); *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 124 (3d Cir. 1998).

[7] *Twombly*, 550 U.S. at 557.

[8] *Id.* at 555.

[9] *Iqbal*, 556 U.S. at 678.

[10] *Id.* (quotations omitted).

[11] Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 Fed. Cts. L. Rev. 6, 7 (Feb. 2012) (''[T]he FJC found that in every case category that was examined there were more orders granting dismissal after *Iqbal* than there were before *Twombly*, both with and without prejudice. Most importantly, in every case category examined it was more likely that a motion to dismiss would be granted. The higher success rate extended only to motions granted with leave to amend, but the researchers also found that the movant's success rate was significantly higher when the plaintiff had previously had a chance to amend her complaint.'').

[12] *Id.* (''After *Iqbal*, a plaintiff was twice as likely to face a motion to dismiss as compared with the period before *Twombly*, a marked increase in the rate of Rule 12(b)(6) motion activity from the steady filing rate observed over the last several decades.'').

[13] *See Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986).

[14] These are: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver. Fed. R. Civ. P. 8(c).

[15] *See Transp. Indem. Co.*, 795 F.2d at 546.

[16] 5 Wright & Miller, *Federal Practice and Procedure* § 1270 (the rule requires ''the defendant to plead any of the listed affirmative defenses and any other matters of avoidance that it wishes to raise or risk waiving them'').

[17] Fed. R. Civ. P. 12(a)(1)(A)(i).

  LW ISSN 0148-8139

Court relied upon in *Twombly* and *Iqbal*. Instead, a responsive pleading must contain, in ''short and plain terms[,] defenses to each claim,'' and must ''admit or deny the allegations asserted.''[18] In addition, ''a party must affirmatively state any avoidance[19] or affirmative defense.''[20] Nor does Rule 12(b)(6) provide an avenue to attack affirmative defenses; rather such an objection falls under Rule 12(f), which permits the striking of ''an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.''[21] Courts have interpreted as ''insufficient'' defenses that fail to identify a legally cognizable affirmative defense.[22]

Traditionally, courts have held that that a defense is not ''insufficient'' under 12(f) so long as it provides the plaintiff with ''fair notice'' of the nature of the defense.[23] However, these decisions were issued before *Twombly* and *Iqbal*, in which the Court changed the standards for claims from one of ''fair notice'' to one of plausibility. Indeed, some of the decisions applying the ''fair notice'' standard to affirmative defenses are explicitly predicated on an understanding that the standards governing claims and affirmative defenses should be the same.[24]

Split Over Affirmative Defense Standard.

At least until recently, the only circuit court faced with the question of whether *Twombly* and *Iqbal* apply to affirmative defenses avoided deciding the issue.[25] At the district court level, the decisions are divided. One can find conflicting approaches even in district courts within the same circuit.[26] Many cases suggest that the majority of decisions impose the plausibility standard on affirmative defenses.[27] However, at least one recent review of the case law argues that this statement is mistaken and ''judges are rejecting *Twiqbal* for testing affirmative defenses by very nearly a two-to-one margin.''[28]

Courts refusing to apply the plausibility test have relied upon a number of arguments[29] including the difference in the language of Rules 8(a) and 8(c).[30] Courts further point to the short time period available to a defendant to formulate his affirmative defenses coupled with the attendant danger of waiver.[31] Courts have also argued that while *Twombly* and *Iqbal* were, in part, driven by a concern for the high costs of discovery at-

[18] Fed. R. Civ. P 8(b)(1).

[19] Avoidance refers to the common law plea by way of confession and avoidance, ''which permitted a defendant who was willing to admit that the plaintiff's declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat the plaintiff's otherwise valid cause of action.'' 5 Wright & Miller, *Federal Practice and Procedure* § 1270.

[20] Fed. R. Civ. P. 8(c)(1).

[21] Fed. R. Civ. P. 12(f); *see also* 5C Wright & Miller, *Federal Practice and Procedure* § 1380 (A Rule 12(f) motion serves as ''the primary procedure for objecting to an insufficient defense.'').

[22] *See, e.g., Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982) (''Although motions to strike a defense are generally disfavored, a Rule 12(f) motion to dismiss a defense is proper when the defense is insufficient as a matter of law.'').

[23] 5 Wright & Miller, *Federal Practice and Procedure* § 1274; *see also, e.g., Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 593 (1st Cir. 1995); *Rogers v. McDorman*, 521 F.3d 381, 385 (5th Cir. 2008); *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979).

[24] *See, e.g., Woodfield v. Bowman,* 193 F.3d 354, 362 (5th Cir. 1999) (''An affirmative defense is subject to the same pleading requirements as is the complaint . . . a defendant nevertheless must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced.'').

[25] *Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 547 n.6 (6th Cir. 2012) (''[W]e need not address the sufficiency under Federal Rule of Civil Procedure 8(c) of Churchill McGee's rather barebones pleading of the affirmative defense of preclusion. We therefore have no occasion to address, and express no view regarding, the impact of [*Twombly* and *Iqbal*] on affirmative defenses.'').

[26] *Compare, e.g., Bryan Corp. v. Chemwerth, Inc.*, 2013 BL 339705, at *1-2 (D. Mass. 2013) (applying *Twombly/Iqbal*),*with Traincroft, Inc. v. Ins. Co. of Pa.*, 2014 BL 204610, at *3 (2014) (declining to apply *Twombly/Iqbal*); *Tracy v. NVR, Inc.*, 2009 BL 208909, at *6 (W.D.N.Y. 2009) *report and recommendation adopted as modified,* 667 F. Supp. 2d 244 (W.D.N.Y. 2009) (applying *Twombly/Iqbal*), *with Tardif v. City of New York*, 302 F.R.D. 31, 34 (S.D.N.Y. 2014) (declining to apply *Twombly/Iqbal*); *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (applying *Twombly/Iqbal*), *withEnough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, 2012 BL 409172, at *3 (C.D. Cal. 2012) (declining to apply *Twombly/Iqbal*).

[27] *See, e.g., Herrera v. Utilimap Corp.*, 2012 BL 207809, at *2 (S.D. Tex. 2012) (''A majority of District Courts have applied the heightened *Twombly* and *Iqbal* standard to affirmative defenses.''); *Powertech Tech., Inc. v. Tessera, Inc.*, 2012 BL 121587, at *4 ((N.D. Cal. 2012) (''[M]ost have found that the heightened pleading standard does apply to affirmative defenses.''); *EEOC v. Kelly Drye & Warren, LLP*, 2011 BL 192527, at *2 (S.D.N.Y. 2011) (''[M]ost lower courts that have considered the question of the standard applicable to pleading of defenses have held that the Rule 12(b)(6) standard, as elucidated in *Twombly* and *Iqbal*, governs the sufficiency of the pleading of affirmative defenses.'').

[28] William M. Janssen, *The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses*, 70 Wash. & Lee L. Rev. 1573, 1606 (2013).

[29] *See Bayer CropScience AG v. Dow AgroSciences LLC*, 2011 BL 329381, at *1-2 (D. Del. 2011) (identifying nine bases to reject the *Twombly/Iqbal* standard). These bases included textual differences between Rule 8(a) and Rule 8(c); the absence of a concern that the defense is ''unlocking the doors of discovery''; the unfairness of a defendant having only a limited time to respond after service of the complaint while a plaintiff has until the expiration of the statute of limitations; the low likelihood that motions to strike affirmative defenses would expedite the litigation given that leave to amend is routinely granted; and the risk that a defendant will waive a defense at trial by failing to plead it at the early stage of the litigation.

[30] *See, e.g., Garber v. Mohammadi*, 2011 BL 402862, at *5 (C.D. Cal. 2011) (''Neither Rule 8(b) [which governs defenses generally] nor Rule 8(c) contains language that precisely corresponds to Rule 8(a)'s language requiring that the pleader 'show' that he is entitled to relief.''); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821, 829 n. 34 (2010) (''The Court [in *Twombly* and *Iqbal*] was construing the word 'showing' in Rule 8(a)(2) governing claims, which does not appear in Rule 8(b) or (c).'').

[31] *See, e.g., 4MVR, LLC v. Hill*, 2015 BL 202013, at *9 (D. Mass. 2015) (''[W]hile a plaintiff has some luxury of time to formulate his complaint, a defendant must provide his answer, including affirmative defenses, within twenty-one days. A defendant understandably seeks to assert all conceivable affirmative defenses given his limited opportunity for investigation.'' (citations omitted)).

tributable to parties fishing for a basis for meritless claims, concern for keeping meritless cases from proceeding to discovery is less pressing when dealing with defenses, and resolving a plethora of motions to strike may well have a detrimental effect on judicial efficiency.[32]

In contrast, courts applying the plausibility standard tend to begin by noting that all pleadings are presumed to be governed by one standard.[33] They also point to parallels in the language utilized in Rules 8(a) and 8(c).[34] These courts, noting *Twombly* and *Iqbal's* concern for judicial economy, have stated that discovery relating to meritless affirmative defenses can have a similarly deleterious effect on judicial dockets.[35] Perhaps most compellingly, courts have lamented that parties regularly assert boilerplate affirmative defenses without due consideration to whether they have any application to a given case.[36]

For example, in *Dion v. Fulton Friedman & Gullace LLP*,[37] the defendants were sued for unlawfully attempting to collect a debt in violation of federal and state law. The defendants asserted fifteen affirmative defenses including that ''[t]he purported claims set forth in the Complaint are barred in whole or in part by the applicable statutes of limitation and/or the equitable doctrine of laches.''[38] The court concluded that the answer failed to ''point to the existence of some identifiable fact that if applicable to [Plaintiff] would make the affirmative defense plausible on its face''[39] and, noting the ''and/or'' phrasing of the defense, held that ''Defendants must give Plaintiff fair notice of which defense Defendants assert rather than leaving it to Plaintiff, and this Court, to guess.''[40] The court rejected the defendants' argument that the Federal Rules merely require that a defendant ''state'' his defenses and noted that granting the motion to strike the affirmative defenses would ''further[] the underlying purpose of Rule 12(f), which is to avoid spending time and money litigating spurious issues.''[41] In response to the defendants' argument that they had only twenty-one days in which to develop their affirmative defenses, the court referenced the Ninth Circuit's liberal policy on the late assertion of affirmative defenses along with Rule 15's amendment procedures, and concluded that ''Defendants have not been put in an unfair 'use-it-or-lose-it' situation with respect to affirmative defenses.''[42]

Much of the *Dion* court's reasoning appears motivated by an objection to the common practice of filling answers with boilerplate affirmative defenses without consideration of the facts of the particular case.[43] The Federal Rules of Civil Procedure are intended to do away with code pleading and ''technical form[s],''[44] and the requirement that a party assert meritless defenses to avoid waiver on the off-chance that facts later support them seems inconsistent with this goal. Assuming that courts continue to permit liberal amendment to add later-discovered defenses,[45] it may well be desirable to discourage thoughtless boilerplate pleadings.

Potential Resolution to the Split.

Recently, the Ninth Circuit may have led the way for this split in the district courts to be resolved against applying *Twombly* and *Iqbal* to affirmative defenses. In *Kohler v. Flava Enterprises, Inc.*,[46] the court held that a defendant facing claims under the Americans with Disabilities had property asserted an ''equivalent facilitation'' defense[47] by claiming, in its answer, a defense of ''alternative methods.''[48] While the Ninth Circuit was not called upon to address the application of *Twombly* and *Iqbal*, it invoked the ''fair notice'' standard and stated that compliance ''only requires describing the de-

[32] *See, e.g., Floridia v. DLT 3 Girls, Inc.*, 2012 BL 107725, at *2 (S.D. Tex. 2012) (''[w]hile a motion to dismiss can resolve a case, thereby avoiding discovery entirely, motions to strike only prolong pre-discovery motion practice; as such, raising the standard for pleading affirmative defenses would only encourage more motions to strike.).

[33] *See, e.g., Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D. Kan. 2009) (''It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses. In both instances, the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case.'').

[34] *See, e.g., Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) (''Rule 8's requirements with respect to pleading defenses in an answer parallels the Rule's requirements for pleading claims in a complaint. Rule 8(b)(2) further provides with respect to 'denials' that they 'must fairly respond to the substance of the allegations.' The court can see no reason why the same principles applied to pleading claims should not apply to the pleading of affirmative defenses which are also governed by Rule 8.'' (citations omitted)).

[35] *See, e.g., HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) (''[T]he holdings of *Twombly* and *Iqbal* were designed to eliminate the potential high costs of discovery associated with meritless claims. Boilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints.'' (citations omitted)).

[36] *See, e.g., Barnes*, 718 F. Supp. 2d at 1172 (''Applying the same standard will also serve to weed out the boilerplate listing of affirmative defenses which is commonplace in most defendants' pleadings where many of the defenses alleged are irrelevant to the claims asserted.'').

[37] *Dion v. Fulton Friedman & Gullace LLP*, 2012 BL 12785 (N.D. Cal. 2012).

[38] *Id.* at *3.

[39] *Id.* (quoting *Barnes*, 718 F. Supp. 2d at 1172).

[40] *Id.*

[41] *Id.* at *2.

[42] *Id.* at *3.

[43] *See id.* at *2 (noting that application of a plausibility standard ''serve[s] to weed out the boilerplate listing of affirmative defenses which is commonplace in most defendants' pleadings where many of the defenses alleged are irrelevant to the claims asserted.'' (quoting *Barnes*, 718 F. Supp. 2d. at 1171)).

[44] Fed. R. Civ. P. 8(d).

[45] *Barnes*, 718 F. Supp. 2d at 1173 (''To the extent that this order prevents the defendant from alleging affirmative defenses . . . because there are no facts that could show that an affirmative defense is plausibly applicable to Barnes, the court will grant leave to the defendant to amend its answer at such time as the defendant becomes aware of facts tending to show the plausibility of additional affirmative defenses pertaining to class members, provided that defendant exercises diligence in determining such facts.'').

[46] 779 F.3d 1016 (9th Cir. 2015).

[47] Equivalent facilitation allows for departures from the Department of Justice ADA Accessibility Guidelines if those variations ''provide substantially equivalent or greater access to and usability of the facility.'' *Id.* at 1019 (quoting 28 C.F.R. Pt. 36, App. A § 2.2).

[48] *Id.* (internal quotations omitted).

   ISSN 0148-8139

fense in 'general terms,' '' thereby apparently rejecting a heightened standard for affirmative defenses.[49] Indeed, several Ninth Circuit district courts since *Kohler* have cited that case for the rejection of *Twombly* and *Iqbal* in these circumstances.[50] However, at least one court in the Northern District of California—the district that has most strongly embraced the plausibility standard for affirmative defenses—held that *Kohler* does *not* control the analysis because the Ninth Circuit was not interpreting which standard to apply when reviewing a motion to strike.[51]

Even if *Kohler* confirms the trend observed by some commentators that courts are increasingly rejecting the plausibility standard for pleading affirmative defenses, litigants would do well to exercise caution when pleading affirmative defenses in a conclusory fashion. There are at present no binding standards (except perhaps in the Ninth Circuit), and courts remain free to evaluate affirmative defenses under *Twombly*/*Iqbal*'s plausibility standard if they so choose.

Conclusion.

While the distinction between evaluating affirmative defenses under a ''fair notice'' standard and a plausibility standard coupled with liberal leave to amend is probably not outcome-determinative in a given case, that does not mean that counsel should ignore the issue when drafting a responsive pleading and preparing a case management strategy. For example, defending against a motion to strike can be an expensive proposition and losing such a motion—even if leave is given to amend an answer should facts warrant—is an undesirable way to start a case. Thus, diligent counsel will take care to provide some factual basis for assertion of affirmative defenses in the answer. Counsel can also utilize the initial Rule 16/26 conferences to try to build sufficient time in the case schedule to assert later-discovered defenses and, if necessary, to define the appropriate scope of discovery to include the factual bases for affirmative defenses. [52]

[49] *Id.* (citing 5 Wright & Miller, *Federal Practice and Procedure* § 1274).

[50] *Lexington Ins. Co. v. Energetic Lath & Plaster, Inc.*, 2015 BL 298225, at *13 ((E.D. Cal. 2015); *Edwards v. Cty. of Modoc*, 2015 BL 231564, at *1 (E.D. Cal. 2015); *Aubin Indus., Inc. v. Caster Concepts, Inc.*, 2015 BL 203914, at *6-7 (E.D. Cal. 2015)

[51] *Perez, et al. v. Wells Fargo & Co.*, 2015 BL 305314, at *4-5 (N.D. Cal. 2015) (''Defendants' citation to the *Kohler* decision is unpersuasive, as the Ninth Circuit did not specifically hold in that case that the *Twombly*/*Iqbal* standard does not apply to the pleading of affirmative defenses.'').

[52] *See* Fed. R. Civ. P. 16, 26 (f).