

No. 10-2447

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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MARK RENFRO, et al.,  
*Plaintiffs-Appellants,*

v.

UNISYS CORP., et al.,  
*Defendants-Appellees.*

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Appeal from the U.S. District Court for the Eastern District of Pennsylvania  
No. 2:07-cv-02098-BMS

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**BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF  
PLAINTIFFS-APPELLANTS AND ARGUING FOR REVERSAL**

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**United States Court of Appeals for the Third Circuit**

**Corporate Disclosure Statement and  
Statement of Financial Interest**

No. \_\_\_\_\_

v.

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\_\_\_\_\_  
(Signature of Counsel or Party)

Dated: \_\_\_\_\_

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## INTEREST OF *AMICUS CURIAE*

Public Justice is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in courts. Through involvement in precedent-setting and socially significant litigation, we seek to ensure that courthouse doors remain open to all injured plaintiffs with meritorious claims. As part of our access-to-justice work, we created an *Iqbal* Project in 2009 to prevent misuse of the Supreme Court’s decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Our Project tracks developments in the case law, educates practitioners about proper application of the Rule 8 pleading standard, and provides strategic assistance to counsel facing *Iqbal*-based motions to dismiss.<sup>1</sup> Our work on the Project has convinced us that overbroad readings of *Iqbal* and *Twombly* threaten to deny many plaintiffs access to justice—particularly plaintiffs, like Unisys’s rank-and-file employees, who depend on courts to protect their rights against more powerful interests.

In addition to our *Iqbal*-related interest in this case, we are also deeply concerned that the district court’s decision will leave millions of employees without adequate fiduciary guidance in securing their retirement. We represent employees in a variety of contexts, including in cases involving the Employee

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<sup>1</sup> All references to rules are to the Federal Rules of Civil Procedure.

Retirement Income Security Act (ERISA), and we are committed to preserving employees’ statutory protections.<sup>2</sup>

## SUMMARY OF ARGUMENT

The district court erred in applying *Iqbal* and *Twombly* to dismiss the *Renfro* plaintiffs’ claim against Unisys.<sup>3</sup> When accepted as true and considered together, plaintiffs’ factual allegations state a plausible claim for breach of fiduciary duty. Plaintiffs’ allegations tell a coherent story of ERISA fiduciaries who have failed to take the steps necessary to determine whether plan participants pay unreasonable fees and whose failure to act with prudence and skill has cost plan participants millions of dollars in retirement savings. The district court rejected plaintiffs’ claim as implausible only because it disbelieved several of plaintiffs’ factual

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<sup>2</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party or party’s counsel contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its counsel contributed money intended to fund the preparation or submission of this brief.

<sup>3</sup> Argument in this brief is limited to the district court’s holding on Unisys’s motion to dismiss. App. 11–15 (D. Ct. Mem.). Other aspects of the district court’s decision do not appear to have turned, at least not entirely, on an *Iqbal* analysis.

*Amicus* refers to the Unisys defendants collectively as “Unisys.” *Amicus* also refers to a single “claim” against Unisys for breach of fiduciary duty although technically plaintiffs divided their claim into three counts in the complaint—one related to investment management fees, one related to administrative fees, and one for the alternative remedy of an accounting. App. 918–930, ¶¶48–72 (Second Am. Compl.). The same legal theory and underlying factual allegations form the basis for all three counts, and the district court considered them as one. App. 11–15.

allegations, ignored others, drew inferences against the plaintiffs rather than in their favor, and ignored ERISA’s remedial purpose—none of which is permissible at the motion-to-dismiss stage.

*Amicus* urges this Court to identify and correct each of these mistakes, which represent a marked departure from Rule 8’s liberal pleading standard. Many district courts are struggling with the proper application of *Iqbal* and *Twombly*, and overbroad readings of the Supreme Court’s decisions threaten to deny employee-plaintiffs access to justice. As this Court has explained, few issues are more important than proper application of pleading standards, “which are the key that opens access to courts.” *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

## ARGUMENT

### **I. Plaintiffs’ Claim Against Unisys Satisfies the Requirements of Rule 8.**

The district court dismissed plaintiffs’ claim against Unisys because it found the claim implausible under *Iqbal*. App. 14–15 (D. Ct. Mem.). That decision was erroneous: plaintiffs’ second amended complaint states a plausible claim for breach of fiduciary duty that easily satisfies Rule 8’s “liberal” pleading standard. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Twombly*, 550 U.S. at 570. The district court reached a contrary conclusion only because it made several significant analytical mistakes in applying *Iqbal* and *Twombly*.

**A. The Renfro Plaintiffs' Second Amended Complaint States a Plausible Claim Against the Unisys Defendants.**

In *Iqbal* and *Twombly*, the Supreme Court held that in order to survive a motion to dismiss, a plaintiff's claim must be "plausible." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). As is clear from the Supreme Court's decisions, plausibility is a lenient standard. It requires nothing more than a "short and plain" statement, Rule 8(a)(2), that "give[s] the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted); *see also Phillips*, 515 F.3d at 232. A complaint meets this test if it tells a coherent story and "suggest[s]" the required elements of the plaintiff's claim. *Twombly*, 550 U.S. at 556; *In re Ins. Brokerage Antitrust Litig.*, Nos. 08-1455, 08-1777, 07-4046, --- F.3d ----, 2010 WL 3211147, at \*6 (3d Cir. Aug. 16, 2010); *Phillips*, 515 F.3d at 234. Plausibility does *not* depend on any showing of probable or likely success: to the contrary, a claim may proceed even if actual proof is "improbable" and ultimate recovery "unlikely." *Twombly*, 550 U.S. at 556 ; *see also Iqbal*, 129 S. Ct. at 1949; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009).

In determining whether a plaintiff's claim is plausible, courts must apply all the traditional principles that favor non-movants on motions to dismiss. Factual allegations must be taken as true and construed in the plaintiff's favor. *Iqbal*, 129 S. Ct. at 1949–50; *In re Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147, at \*6;

*Phillips*, 515 F.3d at 233. Every complaint must be considered as a whole, not piece-by-piece, *see, e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009), and courts must focus on what is “pleaded,” not on what plaintiffs can “prove.” *Fowler*, 578 F.3d at 213 (district court should not conduct an “evidentiary inquiry” at the motion-to-dismiss stage); *see also Twombly*, 550 U.S. at 556, 570 (explaining that plaintiffs may rely on “discovery” to “reveal evidence” and rejecting a “heightened fact pleading” requirement). Finally, the defendant bears the ultimate burden of showing that no claim has been stated. *See, e.g., Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

With these principles in mind, it is clear that Unisys did not meet its burden and that the *Renfro* plaintiffs’ claim satisfies the Supreme Court’s plausibility standard. Plaintiffs’ second amended complaint alleges that Unisys has breached its fiduciary duty under ERISA by failing to act with diligence and care in selecting investment options for its employees’ retirement plan. *See* App. 918–27, ¶¶49–50, 54–55 (Second Am. Compl.); *see also* 29 U.S.C. §1104(a)(1) (enumerating an ERISA fiduciary’s duties). As support for that general allegation, the complaint offers all of the following specific facts:

- Unisys has failed to implement procedures for determining whether the fees and costs paid by plan participants are reasonable in the relevant market, App. 920, 925, ¶¶50(D), 55(C) (Second Am. Compl.);

- Unisys has failed to monitor the fee and expense ratios prevalent in the relevant market, as would be required to determine whether its plan’s fees are reasonable by comparison, *id.* 912, 918–19, 925, ¶¶26(B)(viii), 50(B), 55(B);
- Unisys has failed to compare its plan’s costs to the lower costs incurred by other 401(k) plans of similar size in terms of participant numbers, assets, and features, *id.* 919–22, 925–26, ¶¶50(B), (C), (D), (H), (I), 55(B), (C), (G);
- Unisys has failed to compare the performance of actively managed retail mutual funds in its plan, net of fees, to available alternatives, and has failed to consider less-expensive alternatives, *id.* 920, 923, ¶50(C), (L);
- Unisys has failed to educate itself about the fee structures used in the industry and the fee structures in its own plan, leaving it unable to determine exactly how much its plan participants pay for services, *id.* 912, 920, 926–27, ¶¶26(B)(ix), 50(F), 55(D), 55(K);
- Unisys has failed to leverage the economies of scale that could have redounded to participants’ benefit, *id.* 923, 926–27, ¶¶50(K), 55(J);
- as a result of these failures, Unisys has obligated its employees’ 401(k) plan to pay fees and expenses that are unreasonable and excessive in light of the services provided to participants, *id.* 906, 912, 919–22, 925–26, ¶¶2, 26(B)(vii), 50(B), (H), (I), 55(B), (G);

- the Unisys plan’s fees and expenses are unreasonable because, among other things, they are set at an individual-investor/retail rate when lower fees are available to institutional investors, like the Unisys plan, for the same or similar services, *id.* 912–13, 920–21, 926, ¶¶26(B)(xi), 50(E), (I), 55(E);
- the Unisys plan’s fees and expenses can be shown to be excessive and unreasonable by comparison to the “significantly” lower fee-structures available to other large plans receiving the “same level of service,” *id.* 920, 926, 927, ¶¶50(H), 55(G), 56;
- the Unisys plan is populated with many high-cost retail mutual funds, rather than with less expensive institutional class shares of the same or similar mutual funds or other available investment structures that feature lower fees, *id.* 921–22, ¶50(I); and
- Unisys has also allowed fees to increase as plan assets increase with no corresponding increase in the level of services provided, even though many of the services provided to the plan do not vary with the amount of assets, *id.* 912, 917, 920, 926, ¶¶26(B)(x), 42–43, 50(G), 55(F), (H).

When these factual allegations are accepted as true and considered together, which the district court failed to do, *see infra* Part I(B), they easily state a plausible claim for breach of fiduciary duty. They tell a coherent story of fiduciaries who have failed to take specific identified steps that would allow them to determine that

plan participants pay unreasonable fees and who have largely abandoned their responsibility to act with prudence and skill in selecting investment options for the Unisys plan. Plaintiffs' detailed complaint is far from the "unadorned, the-defendant-unlawfully-harmed-me" type of claim that is insufficient under Rule 8. *Iqbal*, 129 S. Ct. at 1949. Taking the factual allegations as true, the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

**B. The District Court Erred in Applying *Iqbal* and *Twombly*.**

The district court rejected the *Renfro* plaintiffs' claim against Unisys because it made a series of analytical errors in applying *Iqbal* and *Twombly*. It disbelieved some of the plaintiffs' factual allegations, ignored others, drew inferences against the plaintiffs, held them to an improper probability standard, and ignored the relevant statutory context.

**1. The District Court Disbelieved Some of Plaintiffs' Factual Allegations and Ignored Others Entirely.**

Rather than accept the *Renfro* plaintiffs' factual allegations as true, the district court disbelieved some and ignored others. *Iqbal* and *Twombly* do not countenance either approach.

It is a cornerstone of the motion-to-dismiss analysis that a plaintiff's factual allegations "are assumed to be true." *Fowler*, 578 F.3d at 211; *see also, e.g., In re*

*Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147, at \*22. The Supreme Court reiterated this principle in *Iqbal*, 129 S. Ct. at 1949–50, and *Twombly*, 550 U.S. at 555–56, explaining that even if a court is skeptical about a plaintiff’s factual allegations, it must still accept them as true. *See id.* at 555 (allegations must be assumed true “even if doubtful in fact”); *see also Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010) (district court erred in concluding that some of complaint’s factual allegations “could not be true”); *Wells v. Willow Lake Estates, Inc.*, No. 09-14154, 2010 WL 3037808, at \*3 (11th Cir. Aug. 5, 2010) (per curiam) (to same effect).

The district court violated this rule when it concluded, contrary to plaintiffs’ factual allegations, that the investment options in Unisys’s 401(k) plan are likely “the best deal possible for plan participants” and are “not unreasonable.” App. 13, 14 (D. Ct. Mem.). Plaintiffs’ complaint alleges exactly the opposite. It states that the fees and costs paid by plan participants are demonstrably unreasonable because they are, *inter alia*, significantly higher than fees available to other large plans with the same level of service (*not* “the best deal possible”) and are mostly calculated at individual-investor/retail rates, rather than institutional-investor rates. *See, e.g.*, App. 919–22, 925–26, ¶¶50(B), (E), (H), (I), 55(B), (E), (G) (Second Am. Compl.). These allegations provide strong support for the plausibility of plaintiffs’

claim, and the district court was required to accept them as true rather than reach a contrary conclusion.

The district court offered no justification for disbelieving plaintiffs' allegations; nor could it have. *Iqbal* and *Twombly* permit district courts to set aside "conclusory statements," *Iqbal*, 129 S. Ct. at 1949, but none of the allegations cited above is conclusory within the meaning of the Supreme Court's decisions. As explained in *Iqbal*, an allegation is conclusory only if it is a mere "formulaic recitation of the elements" of the plaintiff's claim. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555). None of the cited allegations fits that bill because none states merely that Unisys is a fiduciary or that it breached a duty. *See Leckey v. Stefano*, 501 F.3d 212, 225–26 (3d Cir. 2007) (elements of an ERISA breach-of-fiduciary-duty claim are that "(1) a plan fiduciary (2) breaches an ERISA-imposed duty (3) causing a loss to the plan"); *cf.* App. 919, ¶50 (Second Am. Compl.) (alleging generally that Unisys "breached [its] duties"). Instead, each allegation provides a specific fact to support the breach-of-duty element of plaintiffs' claim. It is exactly this type of supporting factual allegation that must be accepted as true under *Iqbal*. *See* 129 S. Ct. at 1950.

In addition to disbelieving some of plaintiffs' factual allegations, the district court also erred by ignoring other allegations altogether. In particular, the district court failed to consider plaintiffs' allegations about process—allegations that

Unisys has not implemented procedures to determine whether the plan's fees are reasonable, has not comparison-shopped or considered less-expensive alternatives, and has not even educated itself about fee structures in the industry or in Unisys's own plan. *See* App. 912, 919–23, ¶¶26(B)(viii), (ix), 50(B), (C), (D), (F), (L), 55(B), (C), (D), (K) (Second Am. Compl.). These allegations are important because when courts evaluate “whether a fiduciary has acted prudently,” they “focus on the process by which it makes its decisions.” *Braden*, 588 F.3d at 595. Plaintiffs made the necessary allegations about process, but the district court failed to address them without explanation.

The district court also ignored plaintiffs' allegations that Unisys has failed to bargain for additional services that might have justified increased costs. *See* App. 912, 917, 920, 926, ¶¶26(B)(x), 42–43, 50(F), (G), ¶55(F), (H) (Second Am. Compl.). These allegations are important as well: the Seventh Circuit expressly noted the absence of similar allegations when denying rehearing in *Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009), a case on which the district court relied.

By failing to address plaintiffs' factual allegations about process and additional services, the district court erred in a manner that is particularly troubling post-*Iqbal*. Plaintiffs are handicapped in their ability to tell a story that “holds together,” *Swanson v. Citibank*, --- F.3d ----, No. 10-1122, 2010 WL 2977297, at

\*3 (7th Cir. July 30, 2010), if their supporting facts are ignored. As this Court and others have emphasized, district courts must consider all the allegations in a complaint when assessing overall plausibility. *See Merritt v. Fogel*, No. 08-3622, 349 F. App'x 742, 746, 2009 WL 3383257, at \*3 (3d Cir. Oct. 22, 2009) (district court erred in that it “did not discuss” some of plaintiff’s “specific factual allegations” that, “taken as true,” raised an inference of liability); *see also Fritz v. Charter Township of Comstock*, 592 F.3d 718, 728 (6th Cir. 2010) (“A final allegation in Plaintiff’s complaint, which the district court ignored, bolsters her retaliation claim . . . .”); *Braden*, 588 F.3d at 594 (a complaint must “be read as a whole”); *Floyd v. City of Kenner, La.*, No. 08-30637, 351 F. App'x 890, 896, 2009 WL 3490278, at \*5 (5th Cir. Oct. 29, 2009) (per curiam) (“To be sure, certain portions of Floyd’s [pleadings] are insufficient to state a plausible claim. . . . But viewed in their entirety, Floyd’s pleadings contain more.”).

The two errors discussed in this section—disbelieving some of plaintiffs’ allegations and ignoring others—contributed to the district court’s incorrect ruling on plausibility. If the district court had considered all of the plaintiffs’ factual allegations and accepted them as true, it would have concluded that plaintiffs’ claim meets the minimal requirements of Rule 8. *See supra* Part I(A).

## **2. The District Court Drew Inferences against the Plaintiffs and Held Them to an Improper Probability Standard.**

The district court also erred by drawing inferences against the plaintiffs and, in the course of doing so, by holding them to a probability standard expressly rejected by the Supreme Court.

It is well-settled that on a motion to dismiss the district court must draw all reasonable inferences in plaintiffs' favor. *See, e.g., Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). This was the rule before *Iqbal* and *Twombly*, and it remains the rule today. *See Phillips*, 515 F.3d at 231 (holding that the Supreme Court's plausibility standard did not "undermine [the] principle" that all reasonable inferences must be drawn in plaintiffs' favor); *see also Iqbal*, 129 S. Ct. at 1949. As this Court recently reiterated, "[a] court confronted with a Rule 12(b)(6) motion . . . must draw all reasonable inferences in favor of the non-movant." *Revell v. Port Auth.*, 598 F.3d 128, 134 (3d Cir. 2010); *see also, e.g., Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010); *Capogrosso v. Sup. Ct.*, 588 F.3d 180, 184 (3d Cir. 2009) (per curiam).

The district court violated this principle by drawing inferences against the *Renfro* plaintiffs rather than in their favor. For example, at page 12 of its opinion, the district court inferred that Unisys's plan must offer a reasonable range of investment options because if it did not, the company's rank-and-file workforce would "demand changes" or quit. App. 13. Plaintiffs were never given an

opportunity to respond to this inference about Unisys’s employees, which is not supported by anything in the complaint or cited to any documents or data. In fact, the inference is best described as far-fetched: it assumes perfectly informed workers who have the expertise and time necessary to second-guess plan fiduciaries by comparing mutual-fund fee structures across plans, and it assumes a labor market where employees feel free to challenge management or to quit their jobs in protest if their demands for a better range of 401(k) investment options are not met.<sup>4</sup> These assumptions are contrary to available evidence, *see supra* note 4, but more importantly, the district court was not permitted to rely on them to draw an inference against the plaintiffs. *See, e.g., Revell*, 598 F.3d at 134.

The district court drew another negative inference when it assumed that because the mutual funds available in Unisys’s 401(k) plan are sold on an open market to individual investors, the funds’ fee structures are likely reasonable. App.

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<sup>4</sup> *Contra, e.g.*, 29 U.S.C. §1001(a) (citing “lack of employee information” about benefit plans as one reason for ERISA’s safeguards); Shlomo Benartzi & Richard H. Thaler, *Heuristics and Biases in Retirement Savings Behavior*, 21 J. of Economic Perspectives 81, 102 (2007) (“most employees” lack training in investment management, make “naïve” investment decisions, and “need all the help they can get”), at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.21.3.81> (last visited Sept. 9, 2010); Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus & Cass R. Sunstein, *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 68 (2007) (employees’ investment decisions are affected by “ignorance and excessive optimism”); H.R. Rep. No. 110-23, at 8–10, 15–25 (2007) (identifying obstacles that prevent employees from bargaining for better wages and benefits); Associated Press, *Jobless Rates Decline in 34 States in April*, N.Y. Times, May 22, 2010 (workers who quit their jobs would have faced a jobless rate of 9.9% in April 2010, when the district court issued its opinion).

12. The district court reached this conclusion even though plaintiffs’ allegations support an entirely different and favorable inference—that large institutional investors like Unisys’s plan participate in their own submarket, separate and apart from individual investors, and that competitive forces in the institutional-investor market lead to a lower range of reasonable fees. *See* App. 912–13, 919–22, 926–27, ¶¶26(B)(vii), (xi), 50(B), (E), (H), (I), 55(B), (E), (G), (J) (Second Am. Compl.); *see also Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1428–29 (2010) (discussing disparities between fees charged to mutual funds and institutional funds); Br. of *Amici Curiae* Richard Kopcke & Francis Vitagliano at 2–3, *Hecker v. Deere & Co.*, No. 09-447, 130 S. Ct. 1141 (2010) (No. 09-447) (retail investors and institutional investors participate in different submarkets), *available at* 2009 WL 3870823. The district court should have drawn this reasonable inference in plaintiffs’ favor, not an adverse inference against them. *See, e.g., Revell*, 598 F.3d at 134.

By rejecting favorable inferences and drawing negatives inferences instead, the district court not only violated the rule articulated in *Revell* and similar cases, it also effectively held plaintiffs to a probability standard, requiring them to demonstrate that their reasonable inferences were more compelling than the alternatives cited by the court. This approach was incorrect. Both *Iqbal* and *Twombly* reject a “probability requirement,” *Iqbal*, 129 S. Ct. at 1949 (quoting

*Twombly*, 550 U.S. at 556), and as this Court has explained, plaintiffs need not “plead facts supporting an inference of . . . liability [that is] more compelling than the opposing inference.” *In re Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147, at \*25 n.42; *see also Swanson*, 2010 WL 2977297, at \*3.<sup>5</sup> Requiring plaintiffs to tell a “more compelling” story and to rebut alternative negative inferences “invert[s] the principle that the complaint is construed most favorably to the nonmoving party.” *Braden*, 588 F.3d at 597 (internal quotation marks omitted) (in ERISA breach-of-fiduciary-duty case, district court violated this principle when it drew inferences against the plaintiff regarding reasonable mutual-fund fees).

In response to these points, appellees may argue that the district court’s negative inferences reflect its “judicial experience and common sense,” which courts are permitted to consult in some cases when assessing plausibility. *Iqbal*, 129 S. Ct. at 1950. But neither *Twombly* nor *Iqbal* suggests that a district court may rely on “judicial experience and common sense” to reject reasonable

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<sup>5</sup> Indeed, plaintiffs’ theory of the case need not even be equally compelling, let alone “more compelling.” A plaintiff’s theory of relief must be at least as compelling as alternative explanations if he or she seeks to plead a claim under the heightened pleading standard imposed by the Private Securities Litigation Reform Act (PSLRA), *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007), but that is because the PSLRA requires *more* than Rule 8. *See id.* (explaining that the PSLRA imposes a “more than . . . plausible” pleading standard); *cf. Iqbal*, 129 S. Ct. at 1950 (Rule 8 imposes a “plausible” standard). When the ordinary requirements of Rule 8 apply, plaintiffs cannot be held to the PSLRA’s heightened, at-least-as-compelling standard.

inferences that may be drawn from the facts alleged or to apply a de facto probability requirement. To the contrary, the Supreme Court and this Court have made clear that either approach is improper. *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 556; *Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147, at \*25 n.42; *Revell*, 598 F.3d at 134.

*Iqbal*'s reference to "judicial experience and common sense" must also be applied carefully to ensure that complaints are not dismissed on the basis of factual assumptions about complex matters, like labor economics or mutual-fund markets, that are routinely the subject of expert testimony. If courts make complicated assumptions without expert evidence, they run a significant risk of error. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 861–62 (1992) (mistakes made in *Lochner v. New York*, 198 U.S. 45 (1905), and similar cases resulted from "fundamentally false factual assumptions" about the capacities of "unregulated market[s]"). Such assumptions also raise Seventh Amendment concerns in jury-trial cases and raise due-process concerns when, as here, plaintiffs are not given an opportunity to respond to factual inferences on which the district court ultimately relies. Perhaps for these reasons, *Iqbal* and *Twombly* suggest that courts should resort to their "experience and common sense" only when the facts and issues are "obvious," *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at

567)—an adjective that cannot be used to describe the district court’s factual assumptions in this case.

In sum, the district court erred by drawing inferences against the plaintiffs and by holding them to a de facto probability standard. *Twombly*, *Iqbal*, and this Court’s jurisprudence all forbid the district court’s approach.

### **3. The District Court Failed to Consider Plaintiffs’ Complaint in the Context of ERISA’s Remedial Purpose.**

The district court erred in a third respect as well. It failed to assess the plausibility of plaintiffs’ claim in the “context” of ERISA’s remedial purpose. *Iqbal*, 129 S. Ct. at 1950.

The Supreme Court held in *Iqbal* that the plausibility inquiry required by Rule 8 is a “context-specific task.” *Id.*; *see also Phillips*, 515 F.3d at 232 (“Context matters in notice pleading.”). In other words, some complaints will require fewer supporting allegations than others, depending on the legal and factual background for the plaintiffs’ claims. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147, at \*9 n.18; *Phillips*, 515 F.3d at 232. A variety of factors may contribute to the relevant context in any given case, including the “substantive law and . . . elements” of the plaintiff’s claim, *In re Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147, at \*9 n.18, \*41 (evaluating plausibility in light of antitrust law and principles); expressions of congressional intent, *see Braden*,

588 F.3d at 597–98 (evaluating plausibility in light of Congress’s purpose in enacting ERISA); a peculiar factual background, *see, e.g., Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 328–29 (2d Cir. 2010) (Newman, J., concurring) (emphasizing AT&T’s monopolistic history as part of the relevant context in *Twombly*); or claims of immunity, which may make courts particularly cautious about “unlock[ing] the doors of discovery.” *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009).

Here, there are no immunity defenses or peculiar facts at issue, and the relevant context is provided by ERISA. As the Eighth Circuit explained recently in *Braden*, the plausibility of a breach-of-fiduciary-duty claim under ERISA must be assessed in light of the statute’s “remedial purpose” and Congress’s intent that “private individuals would play an important role in enforcing ERISA’s fiduciary duties—duties which have been described as the ‘highest known to the law.’” *Braden*, 588 F.3d at 597, 598 (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)); *see generally Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (“[T]he crucible of congressional concern [in enacting ERISA] was misuse and mismanagement of plan assets . . . .”); *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (describing ERISA’s fundamental purposes as “to protect and strengthen the rights of employees, to enforce strict fiduciary standards, and to encourage the development of private retirement plans”). Courts must also

be cognizant of the fact that “[n]o matter how clever or diligent, ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery comments.” *Braden*, 588 F.3d at 598. Both of these contextual factors “counsel careful and holistic evaluation of an ERISA complaint’s factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.” *Id.*

But rather than conducting that type of analysis and considering plaintiffs’ claim in light of ERISA’s remedial purpose, the district court in this case appears to have held plaintiffs to a *higher*-than-normal pleading standard. On the basis of unsupported assumptions about market incentives and “[l]abor market forces,” App. 13 (Dist. Ct. Mem.), the district court adopted a “skeptical” attitude toward plaintiffs’ claim and concluded that the conduct of the Unisys fiduciaries “needs less judicial oversight to ensure fairness.” *Id.* at 14. This skeptical approach is directly contrary to Congress’s intent in enacting the statute. Congress provided a private right of action to enforce ERISA fiduciaries’ obligations because it concluded that plan participants need “ready access to the Federal courts” in order to protect their rights and interests. 29 U.S.C. §1001(b). The district court was not free to set this congressional judgment aside.

In short, the district court erred by failing to assess the plausibility of plaintiffs’ claim in light of ERISA’s remedial purpose and Congress’s

determination to provide “ready access” to the courts. If the district court had considered those factors—and if it had accepted plaintiffs’ allegations as true and drawn inferences in their favor—it would have found plaintiffs’ claim plausible under Rule 8.

## **II. It Is Important To Correct Overbroad Applications of *Iqbal* and *Twombly* in Order To Preserve Access to Justice.**

Taken together, the district court’s errors in applying *Iqbal* and *Twombly* represent a marked departure from Rule 8’s liberal pleading regime. Decisions like the district court’s, which adopt an overbroad reading of the Supreme Court’s holdings, threaten to undermine the principal purposes of Rule 8 and to close the courthouse doors against many injured employee-plaintiffs with meritorious claims. *Amicus* urges this Court to provide needed guidance regarding the pleading standard by identifying and correcting each of the analytical mistakes discussed above.

The Advisory Committee that drafted Rule 8 sought to achieve two related goals—“lower[ing] the entry barriers for federal plaintiffs,” *Wynder v. McMahon*, 360 F.3d 73, 78 (2d Cir. 2004), and facilitating resolution of cases on their merits, rather than on the basis of technical pleading requirements. *See, e.g., Krupski v. Crociere S. p. A.*, 130 S. Ct. 2485, 2494 (2010) (federal rules express a preference “for resolving disputes on their merits”); *Borse v. Pierce Goods Shop, Inc.*, 963

F.2d 611, 626 n.21 (3d Cir. 1992); 2 James Wm. Moore, *et al.*, Moore’s Federal Practice §8.04(1)(a) (3d ed. 2006). The rule-makers achieved the goal of improved access to justice by reducing the pleading standard to the “narrowest possible requirement.”<sup>6</sup> And in doing so, the Advisory Committee sought to “devise a procedural system . . . in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.” Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 439 (1986); *see also* *Maty v. Grasselli Chem. Co.*, 303 U.S. 197, 200–01 (1938) (“Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. . . . Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment.”).

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<sup>6</sup> *Has the Supreme Court Limited Americans’ Access to Courts? Hearing Before the Sen. Comm. on the Judiciary*, 111th Cong. 4 (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, Univ. of Pa.) (quoting *Rules of Civil Procedure for the District Courts of the United States: Hearings before the H. Comm. on the Judiciary*, 75th Cong. 94 (1938) (statement of Edgar B. Tolman, Secretary of the Advisory Comm. on Rules for Civil Procedure)), at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189>; *see also* Thomas P. Gressette, *The Heightened Pleading Standard of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal: A New Phase in American Legal History Begins*, 58 Drake L. Rev. 401, 407 (2010) (“The intent . . . of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement . . . .”) (quoting Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 186–87 (1958)).

The Supreme Court’s recent decisions did not alter the language of Rule 8 or undermine the principles discussed above. In *Twombly*, the Court rejected the notion that it was applying any new or “heightened pleading standard,” 550 U.S. at 569 n.14 (internal quotation marks omitted), and it “reaffirmed that Rule 8 requires only a short and plain statement of the claim and its grounds.” *Phillips*, 515 F.3d at 232 (citing *Twombly*, 550 U.S. at 555 & n.3); *see also Iqbal*, 129 S. Ct. at 1954 (Rule 8 retains the “less rigid” features of notice pleading and does not impose heightened pleading requirements akin to Rule 9); *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (rejecting argument that either *Twombly* or *Iqbal* “heighten[ed] the pleading requirements”); *Smith v. United States*, 561 F.3d 1090, 1103 (10th Cir. 2009) (“heightened fact pleading” was “expressly rejected” in *Twombly*) (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). Only days after issuing *Twombly*, the Court reaffirmed that “[s]pecific facts are not necessary” to state a plausible claim. *Erickson*, 551 U.S. at 93. The *Iqbal/Twombly* analysis may represent a new (or newly rephrased) “emphasis,” but it draws on “pre-existing principles.” *Phillips*, 515 F.3d at 232, 233.

Although *Iqbal* and *Twombly* left Rule 8 intact, many courts have struggled with applying the new decisions. In quite a few cases (often involving employee plaintiffs), district courts have adopted overbroad readings of the Supreme Court’s holdings that threaten to undermine the purposes of Rule 8. *See, e.g., Casanova*,

595 F.3d at 1125 (district court failed to take plaintiff’s factual allegations as true and to construe the plaintiff’s allegations “in the light most favorable to him”); *Dolgaleva v. Va. Beach City Pub. Schs.*, No. 08-1515, 364 F. App’x 820, 826, 2010 WL 325957, at \*5 (4th Cir. Jan. 29, 2010) (district court considered facts outside the pleadings); *Braden*, 588 F.3d at 597 (district court required plaintiff to rebut alternative inferences); *Merritt*, 2009 WL 3383257, at \*3 (district court did not consider all plaintiff’s allegations when assessing plausibility). These incorrect approaches to *Twombly* and *Iqbal*—like the approach taken in this case—threaten to deny access to justice for a variety of wrongs. *See generally Phillips*, 515 F.3d at 230 (“Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”).

Moreover, the *Renfro* plaintiffs’ claim is of a type that is particularly vulnerable to the risk posed by overbroad applications of *Iqbal* and *Twombly*. For one thing, plaintiffs’ claim depends on information that is peculiarly within defendants’ control, *see Braden*, 588 F.3d at 598, as is often the case with employees’ claims. *See, e.g., Connolly v. Smugglers’ Notch Mgmt. Co.*, No. 09-CV-131, 2009 WL 3734123, at \*3 (D. Vt. Nov. 5, 2009) (employee could not be expected to plead specific facts contained in employer’s records); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 Lewis & Clark L.

Rev. 65, 91 (2010) (information about an employer’s “intent or practices is often in its exclusive possession”). Plaintiffs’ theory of ERISA violation is also relatively new to the legal landscape, which means that it may fall outside many judges’ “judicial experience.” *Iqbal*, 129 S. Ct. at 1950. It is in these kinds of cases where a misapplied plausibility standard can do the most harm.

Because overbroad applications of *Iqbal* and *Twombly* pose a significant threat to employee-plaintiffs’ ability to access to justice, and because many courts appear to be struggling with the plausibility standard, *amicus* urges the Court to identify and reject each of the analytical mistakes made in the district court’s decision.

## CONCLUSION

For the foregoing reasons, the district court’s holding on Unisys’s motion to dismiss should be reversed.

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Respectfully submitted,

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s/ Claire Prestel  
\_\_\_\_\_  
Claire Prestel

**CERTIFICATION AS TO BAR MEMBERSHIP**

I hereby certify that at least one of the attorneys whose names appear on this brief (specifically, Claire Prestel) is a member of the bar of this Court.

s/ Claire Prestel  
\_\_\_\_\_  
Claire Prestel

## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on September 16, 2010, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Court's electronic filing system.

I further certify that all participants in the case are registered Filing Users who will be served electronically by the Notice of Docket Activity generated by the Court's electronic filing system.

s/ Claire Prestel

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Claire Prestel