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February 23, 2010

VIA ELECTRONIC DELIVERY  
Representative John Conyers  
Chairman, House Judiciary Committee  
U.S. House of Representatives  
Washington, DC 20515

Dear Representative Conyers:

During my thirty years as an attorney, I have represented a broad scope of victims of horrendous conduct by sovereign states including victims of the Holocaust and for the past two decades, victims of international terrorism. Both the *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* decisions overlook decades of contrary precedent and seek to undermine the notice pleading standard that the Federal Rules of Civil Procedure. While these topics have been elucidated by many legal observers and writers; the purpose of my letter is to provide you with a picture of how these decisions are affecting cases against state and private facilitators of acts of international terrorism against U.S. citizens. While there will be many effects resulting from these surprising decisions, one is that access to the courthouse for victims of terrorism will be decreased.

A properly constructed complaint opens the doors of a United States federal court to a plaintiff and his or her claims for relief. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Congress crafted this language to codify a departure from a strict and highly technical legal pleading standard that restricts entry to the courthouse in favor of a notice pleading standard that essentially requires a complaint to put the defendant on notice as to the scope of pending claims. A notice pleading regime trusts the pretrial process to ferret out invalid claims through discovery and motions practice. This allows a plaintiff to bring charges against the class defendant against whom lawsuits are least likely to prevail – the defendant that is so highly motivated to avoid the imposition of liability that he or she would destroy evidence or otherwise subvert the discovery of evidence regarding the facts surrounding the claim. The facts underlying the claim against this class of defendant, e.g. a state sponsor of international terrorism, are difficult to obtain. Not only does the best evidence of a state sponsor's culpability lie in their hands, but they are unlikely to ever release it. A notice pleading regime then allows a plaintiff injured by a state sponsor to file a claim without requiring the plaintiff to include the difficult to obtain facts at the outset, rather a notice pleading regime gives the plaintiff crucial time to investigate the claim through pretrial discovery.

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In support of the notice pleading regime, the Supreme Court issued in 1957 the famous *Conley v. Gibson* opinion that described the long-held prevailing interpretation of Federal Rule 8(a)(2), which required 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.”<sup>1</sup> The recent *Twombly* and *Iqbal* decisions repudiate this interpretation and create a vague new pleading standard. Now a court must determine whether a complaint includes enough facts to support a “plausible suggestion of”<sup>2</sup> its claims for relief. The effect will be to restrict access to the courthouse to only those plaintiffs who already have the critical facts regarding the claim. The pleading standard is also highly subjective; it will allow for widely disparate outcomes depending on the predilections of the judge that is analyzing the complaint. This new interpretation of Rule 8 subverts the notice pleading standard in the interest of empowering judges as powerful new gatekeepers to the courthouse, rather than relying on the pretrial process to filter out invalid claims. Perhaps there are sufficient reasons for a radical departure from the *Conley* regime, but such a sea change should have been occasioned by the Judicial Conference and Congress, which control amendments to the Federal Rules of Civil Procedure, and not by the Supreme Court’s decision to overrule its own precedent. This deficit of legitimacy undermines the *Twombly* and *Iqbal* decisions.

The practical effect on anti-terrorism litigation will be that state sponsors of terrorism, such as Iran, will now be able to enter and win litigation against those U.S. citizens seeking redress for their injuries, unless the U.S. citizens have been lucky enough to discover the critical facts that explain Iran’s support for a particular terrorism attack prior to the expiration of the statute of limitations for their claims. Another problem arises from the subjectivity of the decision making process created by the “plausible suggestion of” language. It is difficult to predict how courts will interpret this language, which means that pleading standard could evolve in a more restrictive direction, requiring more information regarding a state sponsor’s culpability at the outset of litigation, which would have a chilling effect on litigation by victims of terrorism.

Lawsuits by victims of terrorism have uncovered and publicized foreign state facilitation of spectacular and tragic acts of international terrorism, often to the benefit of U.S. foreign policy interests. I can provide two concrete examples to demonstrate the potential mischief created by the *Twombly* and *Iqbal* departure from the longstanding *Conley* notice pleading standard. I was counsel for plaintiffs in two cases called *Buonocore v. Libya* and *Baker v. Libya*. In *Baker*, we filed a complaint against Libya for its support of the Abu Nidal Organization’s hijacking of an airliner in November 1985, which left one American dead and two Americans severely injured. In *Buonocore*, we filed a complaint against Libya for its support of the Abu Nidal Organization’s machine gun and grenade attack on the Rome and Vienna airports in December 1985, which resulted in numerous American dead and injured. Libya filed a motion to dismiss the complaint in both cases, but the court found the complaints sufficient under the *Conley*

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<sup>1</sup> *Conley v. Gibson*, 355 U.S. 41, 46 (1957).

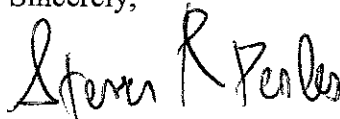
<sup>2</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

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standard. It was only later in each case that we were able to locate the surviving terrorists in Austria, Italy and the United States in their respective prisons, who provided critical details in sworn statements regarding Libya's role in the attacks. This information contributed to the eventual settlement of both cases. Had the *Twombly* and *Iqbal* standards been applicable in those cases, Libya's chances of winning at the motion to dismiss stage—prior to our uncovering of critical evidence in our post-filing of the complaint investigation—would have been dramatically greater.

Hurdles that block access to the courthouse to victims of terrorism should be removed rather than created. I urge the Congress to address the *Twombly* and *Iqbal* decisions swiftly to enable victims of terrorism to continue their pursuit for justice against the perpetrators and financiers of acts of terrorism.

Sincerely,

A handwritten signature in black ink that reads "Steven R. Perles". The signature is written in a cursive, slightly slanted style.

Steven R. Perles

cc: Representative Lamar Smith, Ranking Member