No. 14–0489

In the

# Supreme Court of the United States

October Term, 2014

**CHUCK DUNCAN**

Petitioner,

**— v. —**

**BIGMART, INC.**

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Twelfth Circuit

## BRIEF FOR RESPONDENT

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## ISSUES PRESENTED FOR REVIEW

1. Is the denial of Bigmart's motion to dismiss a complaint for insufficient pleadings—which raises a purely legal issue and constitutes a harmful error by the District Court—reviewable on appeal after entry of final judgment?
2. Must this Court apply the more recent *Twombly* and *Iqbal* plausibility standard that effectively overruled the pleading standard used in this Court's previous decision in *Swierkiewicz* to a plaintiff's complaint alleging private employment discrimination?

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## JURISDICTIONAL STATEMENT

Petitioner filed a complaint alleging a violation of federal law, namely Title VII of the Civil Rights Act of 1964. R. at 4.[1] The United States District Court for the District of Kansahoma had original jurisdiction pursuant to 28 U.S.C. § 1331 (2012), which grants "federal courts . . . jurisdiction [over] all civil actions arising under the Constitution, laws or treaties of the United States." The Court of Appeals for the Twelfth Circuit ("Twelfth Circuit") had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2012) because the appeal was taken from a final order of the United States District Court. The final order from which the appeal was taken is dated December 16, 2013. Pursuant to 28 U.S.C. § 1254(1) (2012), the United States Supreme Court has jurisdiction to hear this case as § 1254(1) permits the Supreme Court to review decisions of the federal courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." This Court granted certiorari on November 20, 2014.

[1] "R." refers to Record on Appeal.

## STATEMENT OF THE CASE

### A. Statement of Facts

Petitioner-Plaintiff, Chuck Duncan ("Petitioner"), a Caucasian male, was an employee of Defendant Bigmart, Inc. ("Bigmart") at their distribution center in Kansahoma City, Kansahoma, between the years of 1990 and 2012. R. at 3. On January 1, 2012, Samuel Turner ("Turner"), an African-American male, became the manager of the distribution center, assuming managerial authority over Petitioner and approximately 19 other employees, all of whom were either African-American or Hispanic. R. at 3; J.A. at 3, ¶ 15, 19.[2] While "his work performance was usually rated as 'adequate' by his supervisors, there were many formal job ratings that described his performance as 'poor.'" R. at 4–5. In addition, Petitioner had numerous altercations with Turner and co-workers over what radio station to listen to during the work day. J.A. at 4, ¶ 20. Moreover, his co-workers often described him as "uncooperative and difficult to work with." R. at 5. As a result, on August 1, 2012, eight months after Turner obtained managerial control over the Kansahoma distribution center, Petitioner was laid off by the company. J.A. at 4, ¶ 22. Turner informed him that he was simply "not a good fit" for the team at the Kansahoma distribution center. J.A. at 4, ¶ 22. With no more than these facts in his complaint, along with Petitioner's allegation that a performance review he received in July of 2012 indicated that he performed at an "adequate" or "good" level in the categories for which he was reviewed, Petitioner alleged that he was fired because of his race in violation of Title VII of the Civil Rights Act of 1964. J.A. at 4, ¶ 21; 5, ¶ 23; 29.

[2] "J.A." refers to Joint Appendix.

### B. Procedural History

After his lay-off, Petitioner received permission to file a complaint from the Equal Employment Opportunity Commission. R. at 4. Petitioner then filed suit alleging discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964 in the United States District Court for the District of Kansahoma. R. at 4. After commencement of the action, Bigmart filed a motion to dismiss pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(6), failure to state a claim upon which relief can be granted, which was denied by the District Court. R. at 4; J.A. at 9. Bigmart thereafter sought immediate appellate review of the District Court's denial of its motion to dismiss via interlocutory review. R. at 4; J.A. at 10. Bigmart's Motion to Amend and Certify Order for Interlocutory Review Pursuant to 28 U.S.C. § 1292(b) (2012) was denied by the District Court. J.A. at 10–11. Bigmart then filed a mandamus petition, which was rejected by the Twelfth Circuit. R. at 4; J.A. at 21.

The case proceeded through discovery and eventually to trial by jury. R. at 4–5. At the close of Petitioner's case-in-chief, Bigmart filed a Motion for Judgment as a Matter of Law under Rule 50(a), which re-asserted that Petitioner's pleading should have been dismissed. R. at 5. Bigmart then filed an identical motion after presenting its evidence. R. at 5. Both motions were denied and the jury found in favor of Petitioner. R. at 5. After entry of judgment, Bigmart filed a Rule 50(b) motion for judgment as a matter of law and a motion for a new trial under Rule 59, both of which reiterated Bigmart's position that the District Court erred in failing to grant its Rule 12(b)(6) motion to dismiss. R. at 5. The District Court denied both motions, and Bigmart timely appealed to the Twelfth Circuit. R. at 5. The Twelfth Circuit reversed the District Court's judgment and remanded the case for the District Court to enter judgment in favor of Bigmart. R. at 16. Petitioner then appealed to this Court for review of the Twelfth Circuit's decision. R. at 1.

## **STANDARD OF REVIEW**

This Court will review the Twelfth Circuit's decision *de novo* because this case involves a dispute over the availability of appeal and the pleading standards governing the sufficiency of a complaint under the Federal Rules of Civil Procedure. *See Halebian v. Berv*, 590 F.3d 195, 203 (2d Cir. 2009) ("We review dismissals pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure *de novo*"); *see also San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998) ("[a] dismissal for failure to state a claim pursuant to Rule 12(b)(6) is a ruling on a question of law reviewed de novo."); *Fed. Deposit Ins. Corp. v. Oaklawn Apts.*, 959 F.2d 170, 173 (10th Cir. 1992) ("we review a district court's ruling on a jurisdictional question de novo") (internal citations and quotations omitted).

## SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Twelfth Circuit because the District Court's denial of Bigmart's motion to dismiss for insufficient pleadings in a complaint constitutes a harmful error that may be reviewed by the appellate court after entry of final judgment pursuant to 28 U.S.C. § 1291 (2012) . In addition, the denial of Bigmart's motion raises a purely legal issue of law. This Court has recognized, and a majority of circuits have held, that a decision involving a purely legal issue may be appealed even after an adverse verdict because it is distinct from the inquiry into the sufficiency of plaintiff's evidence. Moreover, permitting appellate court review of the denial of a Rule 12(b)(6) motion protects defendants from the harm caused by allowing unfounded allegations to proceed to trial and ensures that the district courts uphold this Court's pleading standards under *Bell Atlantic Corp v. Twombly* and *Ashcroft v. Iqbal*.

In *Digital Equip. Corp. v. Desktop Direct*, this Court concluded that a plaintiff is entitled to appeal any district court error after entry of final judgment. Additionally, consistent with 28 U.S.C. § 2111 (2012), the improper denial of a Rule 12(b)(6) motion is a harmful error that affects the substantial rights of parties. According to this Court in *Iqbal*, the denial of a motion to dismiss for insufficient pleadings so substantially affects the rights of the parties that immediate appeal is warranted via the collateral order doctrine. Therefore, under this Court's precedent interpreting both § 1291 and § 2111, the denial of Bigmart's motion is appealable after entry of final judgment since it constitutes a harmful error.

Allowing appellate court review of a denial of a motion to dismiss after a trial on the merits is also consistent with the "purely legal exception" adopted by a majority of circuits, a concept that this Court recognized in *Ortiz v. Jones*. In that case, the Court declined to extend appellate court review to a pretrial summary judgment motion that turned on factual disputes

after a trial on the merits where the facts had been decided. *Ortiz* left open the question of whether purely legal inquires at the summary judgment stage may be appealed after an adverse verdict. This Court recognized that a majority of circuits have allowed appellate court review of a dismissal based on a purely legal issue even after a verdict for the plaintiff. At least two circuits, the Fifth and the Twelfth, have maintained the viability of the purely legal exception post-*Ortiz* and have applied it to both a denial at the summary judgment stage and a denial at the motion to dismiss stage. Thus, review of Bigmart's motion to dismiss even after a verdict for the plaintiff falls well within the purely legal exception. This Court, in *Iqbal*, has already held that evaluating the sufficiency of a complaint is not a fact-based inquiry, but turns on an issue of law.

This Court should hold that the Twelfth Circuit had jurisdiction to review Bigmart's appeal. A contrary result would prevent appellate courts from supervising whether district courts are routinely and appropriately applying the law governing pleading standards. First, certification of interlocutory appeals under 28 U.S.C. § 1292(b) (2012) is wholly within the discretion of the district court and may likely be denied if the court is adamant about allowing an insufficient complaint to proceed to trial. Also, both mandamus review and a post-verdict motion evaluating the sufficiency of the evidence at trial are ineffective remedies to an erroneous denial of a Rule 12(b)(6) motion. Without expanding the appellate court's mandamus authority to denial of Rule 12(b)(6) motions, a petition for mandamus review will likely not be granted by the circuit courts because a majority of the courts view it as a limited, extraordinary remedy. Additionally, a post-verdict motion under Rule 50(b) is an inadequate remedy because the purely legal question of a complaint's sufficiency is independent and distinct from the sufficiency of evidence at the summary judgment stage and at trial. The denial of a Rule 12(b)(6) motion is not moot or irrelevant after an adverse verdict; rather it is a separate defense from the underlying merits of a

suit. Therefore, in order to uphold the significance of the pleading standards set forth in *Twombly* and *Iqbal* and provide defendants with an adequate remedy, this Court should affirm the Twelfth Circuit's holding that it had jurisdiction to review Bigmart's appeal.

Because the Twelfth Circuit had jurisdiction to review the sufficiency of Petitioner's complaint, this Court should also affirm its decision that Petitioner's complaint fails to meet the plausibility standard as articulated in *Twombly* and *Iqbal*. The Twelfth Circuit properly recognized that *Twombly* and *Iqbal* cannot be reconciled with this Court's previous decision in *Swierkiewicz v. Sorema*, *N.A.*, which relied on the now overruled *Conley v. Gibson* "no set of facts" standard. *Twombly* and *Iqbal* require uniform application of the plausibility standard for all complaints governed by Rule 8. Even though neither *Twombly* nor *Iqbal* explicitly overruled *Swierkiewicz*, *Twombly* did overrule *Conley*, and in doing so articulated an entirely new landscape for assessing the sufficiency of pleadings, including employment discrimination claims. *Twombly* and *Iqbal* are interpretations of Rule 8, which applies generally to all types of pleadings. Therefore, both Petitioner's argument and Judge Hill's dissent below, seeking to limit *Iqbal* to the qualified immunity context, miss the mark. The pleading standards established in Rule 8 are transsubstantive and apply to all types of claims, not explicitly governed by Rule 9(b). Thus, the correct standard by which to measure Petitioner's complaint is the plausibility standard articulated in *Twombly* and *Iqbal*, which Petitioner did not meet.

Even if *Swierkiewicz* retains some viability, there can be no dispute that it is, at minimum, inapplicable to the extent that it relies on *Conley*. Namely, even if Petitioner need not plead a *prima facie* case under the *McDonnell-Douglas* framework, his claim must still meet the plausibility standard. Applying the plausibility standard as articulated in this Court's decisions in *Twombly* and *Iqbal*, Petitioner's complaint should have been dismissed for failure to state a

claim upon which relief can be granted. *Twombly*, and later *Iqbal*, marked a significant departure from the very liberal standard articulated by *Conley*. Under the plausibility standard, the complainant may not rely on mere legal conclusions. *Iqbal* instructs that legal conclusions without factual support do not warrant the presumption of truth. *Twombly*/*Iqbal* further require courts to set aside legal conclusions, looking only to the well-pleaded facts to determine whether they state a plausible, rather than just possible, claim for relief. Here, Petitioner alleges only that he was the sole white employee at the distribution center and that he often argued with Turner and other co-workers over what to play on the radio. As the Twelfth Circuit properly recognized, these facts do not plausibly point to the conclusion that Petitioner was laid off on account of discriminatory animus.

Therefore, because the Twelfth Circuit had jurisdiction to review Bigmart's appeal and because Petitioner's complaint fails to meet the plausibility standard set forth by *Twombly* and *Iqbal*, this Court should affirm the decision of the Twelfth Circuit dismissing Petitioner's suit.

# <u>ARGUMENT</u>

## I. BECAUSE DENIAL OF A MOTION TO DISMISS CONSTITUTES A HARMFUL ERROR AND RAISES A PURELY LEGAL ISSUE, THE APPELLATE COURT MAY REVIEW THIS DECISION AFTER ENTRY OF FINAL JUDGMENT UNDER 28 U.S.C. § 1291 TO ENSURE THAT DISTRICT COURTS ARE UPHOLDING THE *TWOMBLY* AND *IQBAL* PLEADING STANDARDS.

This Court should affirm the decision of the Twelfth Circuit because the denial of a Rule 12(b)(6) motion to dismiss not only substantially harms Bigmart by erroneously forcing it to bear the time and cost of litigation, but it also raises a purely legal issue separate from the sufficiency of evidence produced at trial. In addition, allowing such an appeal is an effective remedy for defendants who were erroneously forced into discovery and trial based on unfounded allegations in frivolous complaints. It also ensures that district courts are faithfully and uniformly maintaining the pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

In fact, several circuits have observed the great import of maintaining proper pleading standards to ensure fair commencement of litigation between parties. For example, the Ninth Circuit recognized that "the Rule 8 pleading requirements prevent parties from filing complaints in order to conduct aimless fishing expeditions in the hope that some helpful evidence might possibly be uncovered." *Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 788 (9th Cir. 2013) (citing *Twombly*, 550 U.S. at 556 and *Iqbal*, 556 U.S. at 678–79). Recognizing the vital gatekeeping role played, this Court noted that "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678–79. Thorough evaluation of the sufficiency of a complaint is invaluable to ensure that plaintiffs do not abuse the judicial system by conducting fishing expeditions or fostering "settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a

settlement advantageous to the plaintiff regardless of the merits of his suit." *Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013). To preserve the importance and function of the pleading stage, namely the initiation of litigation through a legally sufficient complaint, this Court should affirm the Twelfth Circuit's decision.

Because the denial of Bigmart's Rule 12(b)(6) motion constitutes a harmful error and the district court entered a final judgment, the appellate court may review its decision pursuant to 28 U.S.C. § 1291 (2012). Moreover, the concerns that led to this Court's recent decision in *Ortiz v. Jones*, 131 S.Ct. 884 (2011) regarding appellate court review of the denial of a summary judgment motion after trial on the merits are not implicated here; the denial of Bigmart's motion to dismiss is a purely legal issue that falls outside the purview of *Ortiz*. Finally, precluding appellate court review of this denial after a final judgment—as only two circuits have improperly suggested—isolates district court abuse from appellate court supervision, leaving defendants with no recourse to rectify the error and diminishing the importance of ensuring the legal sufficiency of pleadings in a complaint.

**A. Pursuant to 28 U.S.C. § 1291, the appellate court may review the harmfully erroneous denial of Bigmart's motion to dismiss after entry of final judgment when raised and preserved before the district court.**

The Twelfth Circuit properly concluded that it had jurisdiction to review the improper denial of Bigmart's motion to dismiss because the District Court had entered final judgment and its initial denial was a harmful error that prejudiced Bigmart. Under § 1291, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts" and this Court has "held that a decision is ordinarily considered final and appealable under § 1291 only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (internal citation

omitted). For example, when a district court grants a defendant's motion to dismiss under Rule 12(b)(6) and enters judgment for the defendant—as the district court did in *Twombly*—the decision is subject to appellate court review pursuant to the final decision principle of § 1291. *Twombly*, 550 U.S. at 552–53, 570 (reversing the Second Circuit's conclusion that the complaint was sufficient). Consistent with this principle, this Court has held that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated," suggesting that interlocutory rulings, like the denial of Bigmart's Rule 12(b)(6) motion, may be reviewed by the appellate court after entry of final judgment. *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994); *see also Quackenbush*, 517 U.S. at 712.

Moreover, the denial of Bigmart's motion is also appealable because it constitutes a harmful error by the District Court—a claim that Bigmart has consistently raised and preserved for appeal. According to 28 U.S.C. § 2111 (2012) , "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." To constitute a harmful error that is reversible on appeal, "an error must have 'substantial and injurious effect or influence in determining the . . . verdict.'" *United States v. Dominguez Benitez*, 542 U.S. 74, 81–82 (2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Furthermore, even if an error based on a final decision is considered harmful, the right to appeal these errors is waived if not validly preserved. *See United States v. Olano*, 507 U.S. 725, 731 (1993) (recognizing that any constitutional or statutory right such as a right to an appeal "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"). As a result, any interlocutory decision by

the district court constituting a harmful error as to affect the substantial rights of the parties is appealable after final judgment on the merits, provided that the appealing party validly preserved the claim before the district court.

This Court's precedent allowing for interlocutory appeals under the collateral order doctrine has effectively demonstrated which pretrial orders, if improperly decided, constitute harmful errors that so affect the substantial rights of parties that they are immediately appealable even before entry of final judgment. For example, in *Cohen v. Ben. Indus. Loan Corp.*, this Court permitted appellate court review before final judgment of the district court's order refusing to apply a statute that would make the plaintiff indemnify the defendant with security "if he fails to make good his complaint." 337 U.S. 541, 544 (1949). This Court in *Cohen* reasoned that the dismissal by the district court involves "claims of right separable from, and collateral to rights asserted in the action, *too important to be denied review* and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546 (emphasis added). Relying on the reasoning in *Cohen*, this Court also held that "the district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).[3]

Like in *Cohen* and *Mitchell*, this Court has also extended the availability of the collateral order doctrine to dismissals regarding the sufficiency of a complaint, implicitly suggesting that the denial of Bigmart's Rule 12(b)(6) motion was a harmful error that affects the substantial rights of the parties. *See Iqbal*, 556 U.S. at 675. In *Iqbal*, defendants filed an interlocutory appeal for review of the denial of their motion to dismiss, arguing that the plaintiff's complaint was

[3] In *Mitchell*, the Attorney General appealed the denial of his motion to dismiss and summary judgment motion on the issue of qualified immunity in a suit alleging an unconstitutional wiretap. *Id.* at 513–18.

insufficient to state a claim against them. *Id*. This Court held that "[t]he District Court's order denying petitioners' motion to dismiss is a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction." *Id*. According to *Iqbal*, a denial of a motion to dismiss over the sufficiency of a complaint is deemed "final" and appealable for the purposes of § 1291 even before a final disposition on the merits. *Id*. at 672. In addition, based on this Court's reasoning in *Cohen* and *Mitchell*, decisions appealable under the collateral order doctrine are not only so substantial as to affect the rights of the parties, but are also separate from the merits of a claim. *See Mitchell*, 472 U.S. at 527 (concluding that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated"); *Cohen*, 337 U.S. at 546 ("We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.").

Recognizing that Petitioner's complaint failed to meet the plausibility standard under *Twombly* and *Iqbal*, Bigmart properly moved the United States District Court for the District of Kansahoma to dismiss the complaint; however, "[o]n April 19, 2013, without the benefit of a hearing or even an official response by Duncan, the District Court denied Bigmart's Motion to Dismiss" only three days after the motion was filed. J.A. at 13. In *Iqbal*, this Court allowed an interlocutory appeal of this issue under the collateral order doctrine which demonstrates that denial of a motion to dismiss concerning the sufficiency of a complaint is a harmful error. In light of *Iqbal*, Bigmart properly moved the District Court to certify the denial of its motion to dismiss for interlocutory review. As the Twelfth Circuit correctly acknowledged, "Bigmart's motion to dismiss in this case is *identical* to Ashcroft and Mueller's attack on Iqbal's pleadings." R. at 9 (emphasis in original). According to *Iqbal*, the denial of Bigmart's motion was effectively

a "final decision" by the District Court because it involved a distinct inquiry from the underlying merits of the suit. This decision was also a harmful error that substantially prejudiced Bigmart because, "had the District Court applied the law correctly," the parties could have avoided "the need for a costly and unnecessary trial." R. at 11; J.A. at 10.

Nevertheless, the District Court acted hastily and without the benefit of a briefing by both parties in its denial of Bigmart's motion. J.A. at 10, 13. Its decision substantially harmed Bigmart by improperly subjecting it to costly litigation. Moreover, although there is a circuit split "regarding the proper standard by which to measure the sufficiency of a complaint alleging employment discrimination by a private actor," the District Court denied Bigmart's request to certify the issue under § 28 U.S.C. § 1292(b)[4] "without the benefit of a hearing or briefing by Duncan." J.A. at 10, 13. Bigmart attempted to resolve this legal issue stemming from the erroneous final decision of the District Court before the case went to trial, but Bigmart was denied permission to file an interlocutory appeal.

As a result, consistent with the general rule that any harmful error may be appealed after final judgment is entered, Bigmart appealed the denial of its Rule 12(b)(6) motion after the District Court filed judgment on December 16, 2013. J.A. at 23. Similar to *Twombly*, where this Court afforded appellate court review to the grant of a motion to dismiss for insufficient pleadings after a final judgment was entered, this Court should also afford appellate court review to the dismissal of that same motion after a final judgment is entered to ensure parallel fairness between plaintiffs and defendants. Moreover, to preserve its claim for appeal, Bigmart filed

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[4] Congress through provisions like 28 U.S.C. § 1292 (2012) and this Court through the collateral order doctrine have provided exceptions to the general final decision principle of § 1291, allowing for certain interlocutory appeals and qualifying what constitutes a "final decision." For example, Congress enacted § 1292(b) "according the district courts circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable" with respect to "a controlling question of law . . . [that] may materially advance the ultimate termination of the litigation." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 45–46 (1995); 28 U.S.C. § 1292(b) (2012).

motions for judgment as a matter of law under Rule 50(a) and (b) and a motion for a new trial under Rule 59, reasserting its "argument that the case should have been dismissed at the pleading stage." R. at 5; J.A. at 23.

Thus, a court of appeals has jurisdiction to review the denial of a motion to dismiss regarding the sufficiency of a complaint once final judgment has been entered. Pursuant to both § 1291 and § 2111, and recognizing that Bigmart exercised all procedural options to preserve its claim that the District Court improperly denied its Rule 12(b)(6) motion, this Court should affirm the decision of the Twelfth Circuit.

**B. Evaluating the sufficiency of a complaint is a purely legal inquiry that falls outside the purview of *Ortiz v. Jones*, and the majority of the circuits permit review of district court denials involving a purely legal inquiry even after an adverse verdict.**

The Twelfth Circuit properly permitted review of Bigmart's motion to dismiss based on parallel reasoning allowing review of summary judgment motions after a full trial on the merits. This exception for purely legal issues is accepted by the majority of circuits and recognized, but left undecided, by this Court in *Ortiz*. The purely legal exception stems from this Court's understanding of interlocutory appeals under the collateral order doctrine. *See Johnson v. Jones*, 515 U.S. 304, 313–14 (1995) (discussing the significance of the interlocutory appeals allowed in *Mitchell* and *Cohen*). This Court concluded that interlocutory appeals under this doctrine involve questions of law and are appealable "even though a reviewing court must consider the plaintiff's factual allegations in resolving the [issue]." *Mitchell*, 472 U.S. at 530. Therefore, applying *Mitchell*, evaluating the sufficiency of a complaint qualifies as a purely legal issue even if the reviewing court considers the factual allegations in the complaint as true. *See Iqbal*, 556 U.S. at 678 (reasoning that a court must accept as true all factual matters in a complaint when evaluating a Rule 12(b)(6) motion).

The purely legal exception excludes interlocutory appeals of denials of summary judgment motions that hinge on the existence or nonexistence of a triable issue of fact. *Johnson*, 515 U.S. at 316–17. In *Johnson*, the defendants' appealed a summary judgment motion where the facts were primarily in contention. *Id.* at 317. The *Johnson* Court denied appellate court review of a case in that disputed fact posture, limiting the availability of interlocutory appeals to "cases presenting neat abstract issues of law." *Id*. The *Johnson* Court distinguished *Mitchell* by recognizing that "the dispute underlying the *Mitchell* appeal involved the application of 'clearly established' law to a given (for appellate purposes undisputed) set of facts" where the purely legal issue was "what law was 'clearly established.'" *Id.* at 313.

This Court in *Ortiz* similarly applied the reasoning in *Johnson* to prevent appellate court review of a summary judgment motion after a jury verdict in favor of the plaintiff when the denial of the motion turned on fact-based inquires. *Ortiz*, 131 S.Ct. 884. The *Ortiz* Court noted that, in light of *Johnson*, immediate appeal from the denial of a motion for summary judgment would have been prohibited under the collateral order doctrine since the defendants' qualified immunity plea concerned the sufficiency of evidence. *Id*. at 891. As a result, precluding appeal of this district court decision after a favorable verdict for the plaintiff—absent any attempt at the available Rule 50(a) or 50(b) motions—was a logical extension of *Johnson*. *Id.* at 892. The *Ortiz* Court, however, explicitly recognized the purely legal exception that the majority of circuits have applied in allowing review of denials of summary judgment motions over purely legal issues of law. *Id.* The Court declined to address the exception, however, because the claims by the officers in *Ortiz* "hardly present 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'" *Id.* Therefore, *Ortiz*, like *Johnson*, does not prohibit appellate court

review of district court orders concerning purely legal issues of law even after a full trial on the merits in favor of the plaintiff.

In contrast to *Johnson* and *Ortiz*, the denial of Bigmart's Rule 12(b)(6) motion qualifies as a "purely legal" issue subject to appellate court review pursuant to this Court's reasoning in *Iqbal*. In *Iqbal*, the plaintiff alleged discriminatory treatment on account of his race, religion, and national origin, and the defendants moved the district court to dismiss the claim based on both a qualified immunity defense and on insufficient pleadings in the complaint that failed to state a plausible claim. *See generally Iqbal*, 556 U.S. 662. At the time of *Iqbal*, the law was established that qualified immunity claims regarding an issue of law could be reviewed through interlocutory appeals, but this Court clarified that a motion to dismiss based on the insufficiency of a complaint should be treated similarly. *Id.* at 674. After dispelling the concerns in *Johnson*, this Court in *Iqbal* held that an order denying a defendant's motion to dismiss "turn[s] on an issue of law." *Id.* at 672. The *Johnson* Court (and later this Court in *Ortiz*) was primarily concerned about requiring appellate courts to decide the existence of a triable issue of fact—a process more suited for the district court—when "appellate judges enjoy no comparative expertise in such matters." *Johnson*, 515 U.S. at 316. In addition, the *Johnson* Court emphasized that a contrary decision would cause inefficient consumption of appellate court time by requiring the courts of appeals to consult a "vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials." *Id.* Finally, the *Johnson* Court sought to avoid having the courts of appeals confront the same issue twice, recognizing that allowing interlocutory appeals based on disputes of fact forces the reviewing court "to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision [through appealing a post-verdict motion for judgment as a matter of law]." *Id.* at 317.

This Court in *Iqbal* concluded that "the concerns that animated the decision in *Johnson*" are absent with respect to reviewing an order denying a motion to dismiss based on the sufficiency of a complaint. *Iqbal*, 556 U.S. at 674. In reviewing such an order, "the Court of Appeals considered only the allegations contained within the four corners of respondent's complaint; resort to a 'vast pretrial record' on petitioners' motion to dismiss was unnecessary." *Iqbal*, 556 U.S. at 674. Additionally, the determination of whether a plaintiff's complaint satisfied legal precedent in stating a plausible claim "is a task well within an appellate court's core competency." *Id.* (citing to *Twombly* for the proposition that appellate courts routinely evaluate the sufficiency of a complaint when a motion to dismiss is granted and appealed). Finally, evaluating the sufficiency of a plaintiff's allegations in a complaint at the motion to dismiss stage is distinguishable from reviewing the plaintiff's sufficiency of the evidence at the summary judgment stage. As the *Johnson* Court held, at the summary judgment stage, there is a divide between fact-related legal inquires and purely legal related inquires but *Iqbal* holds "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here." *Id.* at 674–75.

Moreover, a majority of circuits have been applying the purely legal exception in the context of appealing a denial of a summary judgment motion after a full trial on the merits. Indeed, the Fifth Circuit has reaffirmed the validity of the purely legal exception post-*Ortiz*. As the Twelfth Circuit correctly acknowledged, the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Twelfth circuits have recognized "that the denial of a summary judgment motion raising a 'purely legal' issue can be appealed and reviewed after an adverse jury verdict." R. at 7.[5] For example, the Second Circuit found that determining whether an indictment creates a presumption of probable cause to dismiss a malicious prosecution claim is a purely legal question of law that

[5] The Twelfth Circuit cited to *Bishop v. Klein*, 588 F.4th 1998, 2012 (12th Cir. 2009) for this proposition.

permits appellate court review of the district court's denial of defendant's summary judgment motion even after a jury found in favor of the plaintiff. *Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004). Similarly, the Fifth Circuit allowed appellate court review of the denial of summary judgment after the conclusion of a bench trial in favor of the plaintiff regarding a question of law as to whether reciprocal indemnity agreements in a maritime contract obligated the employer to indemnify the boat owner for an intern's injuries. *Becker v. Tidewater, Inc.,* 586 F.3d 358 (5th Cir. 2009). The Fifth Circuit reasoned that "[b]ecause Baker appeals the district court's legal conclusions in denying summary judgment . . . review of the denials of summary judgment [was] appropriate." *Id.* at 365 n.4.

Other circuits have similarly permitted appeal of purely legal issues of law following a trial on the merits. *See also Barber v. Louisville & Jefferson Cnty. Metro. Sewer Dist.,* 295 F. App'x 786, 789–90 (6th Cir. 2008) (discussing that the "[r]eview of the denial [of summary judgment] is appropriate where the denial involved only a pure question of law"); *Rekhi v. Wildwood Indus., Inc.,* 61 F.3d 1313, 1318 (7th Cir. 1995) (applying the purely legal exception to the denial of a summary judgment motion after a successful trial on the merits since the denial raised the purely legal question of whether res judicata is implicated when a plaintiff previously wins a claim with the Illinois Department of Labor); *Ruyle v. Continental Oil Co.,* 44 F.3d 837, 841 (10th Cir. 1994) (allowing appellate court review after trial on the merits of a collateral estoppel claim raised at the summary judgment stage and recognizing that "[a] party who properly raises an issue of law before the case goes to the jury 'need not include the issue in a motion for a directed verdict in order to preserve the question on appeal.'").

The Ninth Circuit, in applying the purely legal exception, articulated the logical distinction later recognized by this Court in *Ortiz*, that

> [i]f a district court denies a motion for summary judgment on the basis of a question of law that would have negated the need for a trial, this court should review that decision. If, however, a district court denied a motion for summary judgment based on a disputed issue of fact, and that issue of fact was decided in a subsequent trial, this court will not engage in the pointless academic exercise of deciding whether a factual issue was disputed after it has been decided.

*Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902–03 (9th Cir. 2004). Like an appeal of a district court decision that is permissible under the collateral order doctrine, since it is conceptually separate from determining the underlying merits of a claim, the reasoning for the purely legal exception with respect to reviewing denials of summary judgment motions after an adverse verdict is that the initial denial is a separate issue from determining the sufficiency of the evidence to prove the claim. Therefore, as the Second Circuit correctly noted in *Rothstein*, with respect to appealing the denial of a summary judgment motion based on a purely legal question, "the rationale behind *Rule 50* does not apply and the need for such an objection is absent" since the denial is not with respect to the sufficiency of plaintiff's evidence. *Contra Ortiz*, 131 S.Ct. at 893 (finding that the proper avenue for raising an appeal of a summary judgment dismissal regarding "the sufficiency-of-the-evidence issue is by post-verdict motion for judgment as a matter of law under *Rule 50(b)*"). Thus, under the purely legal exception as applied by the majority of circuits and consistent with this Court's understanding of the purpose of Rule 50(b), the denial of a summary judgment motion regarding a purely legal question—closely akin to the denial of Bigmart's motion to dismiss—is distinct from assessing the sufficiency of plaintiff's evidence.

While the majority of circuit court case law regarding the purely legal exception was developed before *Ortiz*, the Fifth Circuit and the Twelfth Circuits have correctly recognized the question left open by the *Ortiz* Court. *FDIC v. Amtrust Fin. Corp. (In re Amtrust Fin. Corp.)*, 694 F.3d 741, 750 (6th Cir. 2012); R. at 8 ("We therefore conclude that when a defendant asserts a 'purely' legal issue in a motion to dismiss, the defendant retains the ability to pursue this legal argument on appeal after an adverse final judgment, particularly if the defendant has reasserted this argument in a Rule 50(a) and (b) Motion for Judgment as a Matter of Law."). In a case involving the denial of summary judgment over the purely legal issue of whether a provision in a contract was ambiguous, the Fifth Circuit permitted appellate court review under the purely legal exception, acknowledging that "the opinion in *Ortiz* was actually limited to cases where summary judgment is denied because of factual disputes" and noting that "[t]he Court brushed aside the defendants' claim that they were appealing a purely legal issue that would be preserved for appeal even without a Rule-50 motion." *Amtrust Fin. Corp. (In re Amtrust Fin. Corp.)*, 694 F.3d at 750. Therefore, both the Fifth and the Twelfth Circuit correctly recognized that *Ortiz* is limited to inquiries that turn on disputed facts and does not preclude appeals of denials of motions that involve purely legal questions.

Accordingly, the denial of Bigmart's Rule 12(b)(6) motion involves a purely legal question of law that was ripe for appellate court review. This Court should affirm the decision of the Twelfth Circuit because it properly applied the holdings in *Iqbal*, its decision provides the correct and compelling answer to the question left open by *Ortiz*, and its holding is supported by the reasoning of the majority of circuits.

### C. Appellate court review of a denial of a motion to dismiss even after an adverse verdict provides defendants with the only effective remedy for correcting the harmful error caused by allowing insufficient claims against them to proceed to trial and ensures that district courts are maintaining the proper pleading standards set forth in *Twombly* and *Iqbal*.

A result other than that reached by the Twelfth Circuit would prevent the appellate courts from ensuring that the district courts are regularly and faithfully applying the law with respect to maintaining the proper pleading standards of *Twombly* and *Iqbal*. First, while defendants may request appellate court review of the denial of their motion through an interlocutory appeal pursuant to § 1292(b), as Bigmart did here, certification of such an appeal is wholly within the discretion of the district court. J.A. at 20. As this Court emphasized, § 1292(b) "grants to the court of appeals discretion to review *only orders first certified by the district court*." *Swint*, 514 U.S. at 37 (emphasis added). As a result, if a district court is adamant about allowing an insufficient complaint to proceed, then it is unlikely that it will then certify a defendant's interlocutory appeal disputing its decision.

Second, along with other courts of appeals, the Twelfth Circuit has "been reluctant to review the denial of motion to dismiss by mandamus" as demonstrated by the dismissal of Bigmart's petition for mandamus in this case. J.A. at 20–21; *Ozee v. Am. Council on Gift Annuities, Inc.*, 110 F.3d 1082, 1093–94 (5th Cir. 1997), *cert. granted, judgment vacated on other grounds*, 522 U.S. 1011 (1997). This Court has limited mandamus review to an "extraordinary situation" or "exceptional circumstance" since it considers mandamus review to be a "drastic remedy." *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). Thus, many circuits, including the Twelfth Circuit here, have found the denial of a motion to dismiss as falling outside the realm of an extraordinary situation or exceptional circumstance, concluding that it "is quite an *ordinary* litigation event." J.A. at 20 (emphasis in the original). While

mandamus review is appropriate to remedy the harmful error against Bigmart, this relief is likely unavailable without an expansion of the court of appeal's mandamus authority to Rule 12(b)(6) motions.[6]

Third, the availability of Rule 50(a) or 50(b) does not purge the harm caused by the denial of a motion to dismiss on the sufficiency of a complaint as it would the denial of a pretrial summary judgment motion on the sufficiency of facts like in *Ortiz*. The *Ortiz* Court, relying on *Johnson*, as well as many circuit courts prior that have paved the way for the reasoning in *Ortiz*, disallowed an appeal solely based on the denial of pretrial summary judgment motion regarding a fact-based inquiry because such a ruling would circumvent the requirement of filing a post-verdict motion for judgment as a matter of law. *See Ortiz*, 131 S.Ct. at 887; *Johnson*, 515 U.S. at 317; *see, e.g., Barber*, 295 F. App'x at 789 n.3 ("review of a denial of a directed verdict or judgment as a matter of law motion obviates the need for review of a denial of a pre-trial summary judgment.") (internal quotations and citations omitted). In contrast, the review of a purely legal issue, like evaluating the sufficiency of a complaint, does not involve a dispute of fact that was thereafter decided at trial. Review of a decision that turns on a factual dispute that is thereafter decided at trial better implicates the remedy provided by a post-verdict motion for judgment as a matter of law. While Petitioner may have proven certain facts at trial, the purpose of evaluating the sufficiency of a complaint at the pleading stage is a separate legal question from the sufficiency of the evidence at the summary judgment stage or at trial. Petitioner would not have been entitled to evidence and discovery used to prove facts at trial had the District Court properly granted Bigmart's motion to dismiss. R. at 11. Therefore, unlike a denial of a pretrial motion for summary judgment, a denial of a motion to dismiss at the pleading stage is not adequately addressed by a post-verdict motion for judgment as a matter of law because a

[6] A grant of a petition for mandamus review is subject to the requirements of 28 U.S.C. § 1651 (2012).

plaintiff who was unable to plead sufficient facts would have been precluded from even proceeding to discovery under the law established by *Twombly* and *Iqbal*.

Furthermore, only two circuits, the Fifth and the Tenth, have explicitly and erroneously held that a denial of a motion to dismiss after a verdict in favor of the plaintiff is not appealable. In a suit where a plaintiff alleged that a sheriff had raped her in his official capacity, the Fifth Circuit held that the defendant county (which was vicariously liable) was precluded from appealing the denial of its Rule 12(b)(6) motion since it followed a final judgment on the merits in favor of the plaintiff, reasoning that "[a]fter a trial on the merits, the sufficiency of the allegations in the complaint is irrelevant" and the inquiry over the denial becomes "moot." *Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996). Similarly, in a suit involving allegations of misappropriated trade secrets, the Tenth Circuit in *Clearone Commc'ns, Inc. v. Biamp Sys.* also held that an appellate court cannot review the denial of a motion to dismiss after a plaintiff prevailed at trial. 653 F.3d 1163, 1172–73 (10th Cir. 2011). While the Tenth Circuit adopted the rule from *Bennett*, it still recognized the potential of applying the purely legal exception used at the summary judgment stage to denials at the motion to dismiss stage and declined to address the argument since "the district court's denial of Biamp's motion to dismiss was based largely on its conclusion that additional factual development was necessary . . . ." *Id*. The Tenth Circuit improperly assumed that the bifurcation of a purely legal inquiry and a fact-based inquiry that is more obviously present at the summary judgment stage would also be implicated when evaluating the sufficiency of a complaint. Evaluating the sufficiency of a complaint is not a fact-based issue of law; all Rule 12(b)(6) motions to dismiss fall within the purely legal exception. *Iqbal*, 556 U.S. at 674–75.

In addition, the Fifth Circuit's conclusion that the evaluation of the sufficiency of a complaint is moot and irrelevant after a trial on the merits is misguided. As the Seventh Circuit correctly articulated in upholding the purely legal exception for review of a pretrial summary judgment motion, "[r]es judicata, like most defenses (statute of limitations is another example), would have no function if all it did was bar meritless suits; so it remains available as a defense even when the plaintiff, having survived summary judgment, goes on to win a judgment on the merits." *Rekhi*, 61 F.3d at 1318. Similarly, raising a Rule 12(b)(6) motion to dismiss is a legal defense by any defendant, and such improper denial of this defense is neither moot nor irrelevant simply because the case proceeded to trial on the merits. Otherwise, the purpose of maintaining proper pleadings standards which protect defendants from fishing expeditions and settlement extortion would be eroded if plaintiffs and district courts can override the law armed with the understanding that they are shielded from appellate court review if the plaintiff happens to succeed at trial.

In order to preserve the importance of maintaining proper pleadings standards and to ensure that district courts are faithfully and uniformly applying this Court's jurisprudence regarding the sufficiency of plausible allegations in a complaint, this Court should affirm the Twelfth Circuit's conclusion that it had jurisdiction to hear Bigmart's appeal. Allowing defendants to appeal the improper denial of their Rule 12(b)(6) motion to dismiss after entry of a final judgment is consistent with both § 1291 and § 2111 because it constitutes a harmful error against the defendant. Even before trial commenced, Bigmart took all available steps to have its claim reviewed through an interlocutory appeal under § 1292(b) and through petitioning the Twelfth Circuit for mandamus review. Because neither of these efforts were fruitful, Bigmart's only remedy is allowing it to appeal the denial of its Rule 12(b)(6) motion to dismiss after entry

of final judgment. Moreover, the denial of Bigmart's motion to dismiss raises issues that qualify under the purely legal exception recognized by this Court and a majority of the circuits. Therefore, this Court should affirm the decision of the Twelfth Circuit that it had jurisdiction to review Bigmart's appeal.

## II. THE *TWOMBLY* AND *IQBAL* PLAUSIBILITY STANDARD APPLIES TO PRIVATE EMPLOYMENT DISCRMINATION SUITS AND REQUIRES DISMISSAL OF PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Under the plausibility standard required by this Court's decisions in *Twombly* and *Iqbal*, Petitioner's claim must be dismissed for failure to state a claim upon which relief can be granted. Rule 8(a) of the Federal Rules of Civil Procedure governs claims for relief. It states, in pertinent part, that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Federal Rules, specifically Rule 8, supplanted the more rigorous "code pleading" regime in favor of a more simplified, and far less rigorous, notice pleading regime. *See Horras v. Am. Capital Strategies, Ltd.*, 729 F.3d 798, 807 (8th Cir. 2013). For many years, this Court's governing precedent as to the requirements of notice pleading was *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). In *Conley*, this 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." *Id.* at 45–46. It was during the *Conley* era that this Court decided *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). This Court held that the plaintiff did not have to plead facts establishing a *prima facie* case of discrimination under the *McDonnell-Douglas* framework because notice pleading, under the liberal *Conley* standard, required only that the "allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." *Id.* at 510, 514.

However, this Court's decisions in both *Twombly* and *Iqbal*, while not creating a heightened pleading standard *per se*, overruled the *Conley* "no set of facts" standard and replaced it with the more robust plausibility standard, effectively overruling prior cases that relied on *Conley*, including *Swierkiewicz*. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (recognizing that after *Twombly* and *Iqbal*, "pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss"). In *Twombly*, this Court refined what is required for a complaint under Rule 8 in order to survive a motion to dismiss. This Court acknowledged that

> [w]hile 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 'entitlement 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.

*Twombly*, 550 U.S. at 555. At the pleading stage, this Court required that allegations in a pleading plausibly suggest, rather than being "merely consistent with," unlawful conduct. *Id.* at 557. A pleading alleging facts merely consistent with unlawful conduct "stops short of the line between possibility and plausibility." *Id.* In adopting this standard, this Court expressly overruled the *Conley* "no set of facts" standard, as that standard permits conclusory statements to "survive a motion to dismiss whenever the pleadings left open the possibility that plaintiff might later establish some" facts to support a claim for recovery. *Id*. at 561. In sum, this Court's current standard requires that the well-pleaded facts plausibly suggest that unlawful conduct has occurred; if it is equally possible that the actions taken by a defendant point to an alternative,

lawful explanation, the plaintiff has failed to cross "the line from conceivable to plausible." *Id.* at 570.

This Court reaffirmed the plausibility standard established in *Twombly* in a subsequent case, *Ashcraft v. Iqbal*. In *Iqbal*, this Court began its analysis by clarifying that the plausibility standard announced in *Twombly* is an interpretation of the language of Rule 8, governing all pleadings. 556 U.S. at 677–78. This Court explained that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. The plausibility standard has two main governing principles:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.

*Id.* at 678–79. Determining plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. *Iqbal* instructs that a court evaluating a Rule 12(b)(6) motion "can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* Thus, legal conclusions that are stated without factual support may be struck. The well-pleaded facts will be assumed true and the court will then "determine whether they plausibly give rise to an entitlement to relief." *Id.* This Court concluded in *Iqbal* that the counterterrorism measures that were the basis for the race discrimination claim had an '"obvious alternative explanation"' and as a result, "discrimination is not a plausible conclusion." *Id.* at 682.

Thus, after *Twombly* and *Iqbal*, it is clear that the plausibility standard governs application of Rule 8(a)(2) and must be applied to this case. First, *Swierkiewicz* was overruled by

this Court's decision in *Iqbal*, albeit not explicitly, because its reasoning is irreconcilably at odds with the more robust plausibility standard articulated in *Iqbal*. The plausibility standard articulated in both *Twombly* and *Iqbal* is an interpretation of Rule 8, which applies to all civil proceedings in the federal system, and therefore must be applied in all cases not explicitly covered by Rule 9(b). Second, even if *Swierkiewicz* survives, it is overruled at least in part, to the extent that it relies on *Conley* and the "no set of facts" standard that was explicitly overruled in *Twombly*. A different conclusion would effectively create different pleading burdens for different claims, which contravenes the intent and purpose of the Federal Rules. Finally, under the more robust plausibility standard, Petitioner's complaint must be dismissed. Therefore, this Court should affirm the decision of the Twelfth Circuit remanding with instructions to enter judgment in favor of Bigmart.

### A. This Court should resolve the circuit split and decide, as the Twelfth Circuit did, that *Swierkiewicz* is overruled because it is contrary to this Court's later pronouncements in *Twombly* and *Iqbal*.

This Court should affirm the Twelfth Circuit's decision recognizing that *Iqbal* effectively overrules *Swierkiewicz*. In *Swierkiewicz*, this Court held that an employment discrimination complaint need not "contain specific facts establishing a *prima facie* case of discrimination" under the *McDonnell-Douglas* framework, and must only comport with the requirements of Rule 8(a)(2), which at the time were understood through the lens of *Conley*. There is no heightened pleading standard for employment discrimination claims; rather, "the *ordinary* rules for assessing the sufficiency of a complaint" apply. *Swierkiewicz*, 534 U.S. at 510–11 (emphasis added). At the time, the "ordinary rules" were governed by *Conley*, and indeed this Court relied on *Conley* explicitly. *Id.* at 512. However, now, the proper framework for analyzing the viability of a complaint is the plausibility standard as articulated in *Twombly* and *Iqbal*. While not a

heightened pleading standard, these cases create a significantly higher bar than the liberal "no set of facts" standard described in *Conley* and relied on in *Swierkiewicz*.

Recognizing that *Swierkiewicz* and *Iqbal* cannot be reconciled, the Twelfth Circuit correctly concluded that it "must acknowledge that *Swierkiewicz* is no longer good law." R. at 15. The Twelfth Circuit is not alone in this conclusion. The Fourth Circuit, in *Francis v. Giacomelli*, was called upon to assess the sufficiency of the complaint arising out of the termination of a police commissioner and several top deputies. 588 F.3d 186, 189 (4th Cir. 2009). The complaint alleged city officials violated the plaintiffs' constitutional rights both by conducting unreasonable searches and seizures and depriving plaintiffs' of due process "because they were not given notice and an opportunity to be heard before being removed from their positions." *Id.* at 190. Moreover, the complaint alleged that as to "Commissioner Clark and Francis, who are African–American . . . that their firings were racially motivated, in violation of 42 U.S.C. § 1981." *Id.* After the district court granted defendant's motion to dismiss, applying the plausibility standard, plaintiffs appealed. *Id*. Quoting *Swierkiewicz*, the plaintiffs contended that "a motion must be denied unless 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the [well-pleaded] allegations' in the Complaint.'" *Id.* at 192 (quoting *Swierkiewicz*, 534 U.S. at 514). The court recognized, however, that the standard quoted from *Swierkiewicz* was overruled explicitly by *Twombly*. *Francis*, 588 F.3d at 192 n.1. The court then went on to apply the plausibility standard and determined that, assuming the truth of the well-pleaded facts, "that the complaint does not state any claim for relief that is plausible on its face." *Id.* at 197.

Moreover, the Third Circuit has also recognized that the reasoning of *Swierkiewicz* cannot be reconciled with this Court's later pronouncements in both *Twombly* and *Iqbal*. In *Fowler*, the court recognized the "demise" of *Swierkiewicz* and explained that

> *Swierkiewicz* and *Iqbal* both dealt with the question of what sort of factual allegations of discrimination suffice for a civil lawsuit to survive a motion to dismiss, but *Swierkiewicz* is based, in part, on *Conley,* which the Supreme Court cited for the proposition that Rule 8 "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal,* so too has *Swierkiewicz,* at least insofar as it concerns pleading requirements and relies on *Conley.*

*Fowler*, 578 F.3d at 211 (internal citations omitted). In sum, one cannot reasonably contend that *Swierkiewicz* remains viable when the decision is grounded in precedent that was expressly overruled and departed from significantly by the imposition of a new, far more stringent, pleading regime, to wit plausibility. *See* R. at 15 (explaining that while *Iqbal* did not expressly overrule *Swierkiewicz*, "the pleading regime on which *Swierkiewicz* is based . . . *was* overruled in *Twombly*") (emphasis in original).

The lens through which *Swierkiewicz* was decided (*i.e*., *Conley*) was far different than the lens through which Rule 12(b)(6) motions to dismiss are decided now (*i.e*., *Twombly* and *Iqbal*). If *Swierkiewicz* were decided today rather than in 2002, the analysis would be different. Today, the Court has eschewed the very liberal "no set of facts" standard relied on in *Swierkiewicz* by overruling *Conley*, which relied "on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *See Swierkiewicz*, 534 U.S. at 512, 514 (explaining that "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations") (internal quotations omitted). Instead, the more stringent plausibility standard

would be the proper lens, recognizing the need for greater gatekeeping at the pleading stage. *See Twombly*, 550 U.S. at 546 ("It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest."); *Iqbal*, 556 U.S. at 679. By examining the divergence in how pleadings are considered pre- and post-*Twombly*, it is clear that *Swierkiewicz* cannot be considered viable due to its reliance on a pleading regime that has been completely overhauled. In short, *Swierkiewicz* is a relic of a bygone era.

Some courts have attempted to apply both *Swierkiewicz* and *Twombly/Iqbal* simultaneously. *See, e.g.*, *Reynolds v. AAA Auto Club Enters.*, 525 F. App'x 488, 490–91 (7th Cir. 2013) (explaining that "[t]here is undoubtedly tension between *Swierkiewicz* and later decisions, such as [*Twombly* and *Iqbal*] . . . . But neither *Iqbal* nor *Twombly* overrules *Swierkiewicz,* and our duty is to apply the Supreme Court's precedents unless the Justices themselves inter them."). However, the *Reynolds* court understated the issue by describing the divergence between the two cases as mere "tension," when in reality the two cases are irreconcilable. To apply both cases is to proverbially serve two masters. Necessarily a court can apply one or the other; either the correct standard is plausibility or it is the "no set of facts" standard as described in *Conley* and applied in *Swierkiewicz*. The Twelfth Circuit properly recognized this and applied the "more recent pronouncement by the Supreme Court on the proper pleading standard by which to measure the sufficiency of complaints in federal court," namely the *Twombly*/*Iqbal* plausibility standard. R. at 15.

Any other result, including that proposed by Judge Hill's dissent from the Twelfth Circuit's majority opinion to limit *Iqbal* to the context of qualified immunity, would undermine the purpose of the Federal Rules. R. at 20. The dissent contends that because the "qualified

immunity defense is designed to protect government officials from unnecessary discovery and litigation," plaintiffs "alleging discrimination by a *government* official, and seeking discovery from this official, might need to plead more than a plaintiff alleging discrimination by a *private* citizen." *Id*. Thus, the dissent is suggesting that a higher pleading standard exists for cases involving qualified immunity than in cases that do not involve a qualified immunity defense. This, however, as the Twelfth Circuit properly recognized, contravenes the Federal Rules. R. at 14 (explaining that the "Federal Rules are transsubstantive in that they are designed to apply the same to all different types of disputes"); *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998). Even *Swiekiewicz* makes clear that with the exception of Rule 9(b), which expressly requires heightened pleading for certain causes of action (not including qualified immunity), "complaints . . . must satisfy only the simple requirements of Rule 8(a)." *Swierkiewicz*, 534 U.S. at 513.

Thus, the plausibility standard as described in *Twombly* and *Iqbal* is an interpretation of Rule 8 generally, and applies to all pleadings not specifically governed by Rule 9(b). *See Fowler*, 578 F.3d at 210 (noting that *Iqbal* "makes clear that the *Twombly* 'facial plausibility' pleading requirement applies to all civil suits in the federal courts."). As such, *Iqbal* is not an outlier case limited to its facts; rather, *Iqbal*, along with *Twombly*, represents this Court's current interpretation of Rule 8(a), which applies transsubstantively to all civil complaints in the federal system. Because *Swierkiewicz* was decided based exclusively on principles that are no longer controlling law, and in fact have been explicitly and decidedly disposed of, it cannot be considered viable precedent.

**B. Even if *Swierkiewicz* survives, there can be no dispute that it is overruled at least to the extent that it relies on the prior standard of *Conley*.**

Even if this Court should find that *Swierkiewicz* remains partially viable, there can be no doubt that it is overruled at least to the extent that it relies on the *Conley* "no set of facts"

standard that was specifically overruled in *Twombly*. Petitioner contends, and Judge Hill in his dissent agrees, that *Swierkiewicz* was not explicitly overruled in *Iqbal*, placing great import on this Court's citation of *Swierkiewicz* in *Twombly*. Moreover, Judge Hill lists a long string of cases that purportedly recognize the continued viability of *Swierkiewicz*. However, a close reading of these cases show that these courts have properly recognized that, at minimum, *Swierkiewicz* cannot be applied to the extent it relies on *Conley*, and that the plausibility standard governs all complaints falling under Rule 8(a), including employment discrimination cases. Therefore, in either case the adequacy of Petitioner's complaint must be measured against the more exacting plausibility standard, which, as the Twelfth Circuit recognized, requires dismissal of Petitioner's complaint. *See* R. at 13 ("The *Iqbal* decision establishes that a plaintiff alleging discrimination must plead more evidence than what Duncan did in this case, and that Bigmart should never have even been subject to the discovery . . . .").

Judge Hill was correct in noting that *Swierkiewicz* was not mentioned in *Iqbal* and was cited in *Twombly*. *See* R. at 19. However, neither of these premises point to the conclusion that *Swierkiewicz* should be applied in full. First, the fact that *Swierkiewicz* was not cited in *Iqbal* lends no support to its continued vitality. *Iqbal* broadly states that the plausibility standard as outlined in *Twombly* is an interpretation of Rule 8 generally. *See Iqbal*, 556 U.S. at 677–78. This means that the plausibility standard that supplanted the *Conley* "no set of facts" standard governs all pleadings, and *ipso facto*, every case relying on the *Conley* "no set of facts" standard is similarly overruled to the extent that it is relies upon that more liberal standard to determine that a complaint should survive a motion to dismiss. It would be both unnecessary and repetitious for the Court to explicitly mention every case between 1957 and 2007, including *Swierkiewicz*, that

relied on the *Conley* standard to reach its conclusion. By recognizing that the *Conley* standard is overruled, it is clear that all of its progeny is similarly no longer viable.

The dissent is correct, however, that *Swierkiewicz* was explicitly cited in *Twombly*, which has led some courts to the conclusion that *Swierkiewicz* remains viable precedent. *See, e.g.*, *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (finding, over a compelling dissent, that "[t]he Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema N.A.,* which was cited with approval in *Twombly*, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions.") (internal citations omitted). However, it is important to recognize *why* and *how* *Swierkiewicz* was cited in *Twombly* in order to understand why *Swierkiewicz* should not be applied in full. First, it is cited for the proposition that courts must accept as true the factual allegations of a complaint—this is undoubtedly true and remains the case even after *Twombly/Iqbal*. *Twombly*, 550 U.S. at 555–56 (citing *Swierkiewicz,* 534 U.S. at 508 n.1). Second, this Court explained that the plausibility standard described in *Twombly* did not run counter to *Swierkiewicz* insofar as the latter correctly held that there is no *heightened* pleading standard for Title VII cases. *Id.* at 569–70. *Swierkiewicz* correctly held that it was error to apply a heightened pleading standard to an ordinary claim not otherwise encompassed by Rule 9(b), and this Court in *Twombly* simply recognized that the plausibility standard did not create a heightened pleading requirement, but merely requires the claimant to plead "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. It does not follow, however, that the plausibility standard is not applied to private employment discrimination cases or, put another way, that private employment discrimination cases are held to a lesser standard than other types of pleadings. This Court, in *Twombly*, did not "reaffirm" *Swierkiewicz* to the extent

that it allows conclusory, implausible pleading previously allowed under *Conley*. Rather, it only affirmed *Swierkiewicz* insofar as it stands for the proposition that no heightened pleading is required for Title VII claims. That does not mean, and it would be incorrect to say, that Title VII claims are not subject to the current, more rigorous, plausibility standard for testing the sufficiency of the pleadings.

In addition, many of the cases cited by the dissent purportedly recognizing the continued viability of *Swierkiewicz* in fact recognize that the plausibility standard must be applied to employment discrimination claims. *See, e.g.*, *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 54 (1st Cir. 2013) (explaining that "[t]o the extent that the *Swierkiewicz* Court relied on *Conley v. Gibson* to describe the pleading standard, that description is no longer viable."). The First Circuit explained that *Swierkiewicz* remains viable only to the extent that it does not require a claimant to plead a *prima facie* case of discrimination at the pleading stage, but "the elements of a prima facie case may be used as a prism to shed light upon the plausibility of the claim." *Id.*; *accord al-Kidd v. Ashcroft*, 580 F.3d 949, 974–76 (9th Cir. 2009) (recognizing that *Swierkiewicz* was affirmed to the extent that it does not require heightened pleading, but applying the plausibility standard), *rev'd on other grounds*, 131 S. Ct. 2074 (2011); *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012) (recognizing that "the Supreme Court established a 'plausibility' standard in *Twombly* and *Iqbal* for assessing whether a complaint's factual allegations support its legal conclusions, and that standard applies to causation in discrimination claims"). Thus, even assuming *Swierkiewicz* survives to the extent that it does not require Petitioner to plead a *prima facie* case of discrimination, it does not exempt Petitioner's pleadings from the plausibility requirement of *Twombly* and *Iqbal*, application of which is fatal to his case.

Therefore, this Court should affirm the Twelfth Circuit's dismissal of Petitioner's complaint because, even assuming partial viability of *Swierkiewicz*, it does not exempt Petitioner's complaint from the exacting plausibility analysis, which Petitioner fails to meet in this case.

**C. Applying the plausibility standard to Petitioner's pleadings, the dearth of any factual allegations whatsoever require dismissal of the complaint.**

The plausibility standard requires dismissal of Petitioner's complaint due to the lack of any factual support for his claim. As the Twelfth Circuit noted, Petitioner alleges that he was the only white employee at the distribution center, that he often argued over what should be played on the radio, that his final job evaluation was rated "adequate" or "good," and that he was laid-off with the explanation being that he was "not a good fit on our team." R. at 12; J.A. at 3–4. On these facts, Petitioner offers the legal conclusion that the decision to terminate him was motivated by race. J.A. at 4, ¶ 23. Recognizing that the well-pleaded facts do not plausibly suggest that Petitioner was laid-off on account of his race, the Twelfth Circuit reversed the District Court's decision denying Bigmart's motion to dismiss. R. at 12, 16.

Sufficiency of Petitioner's complaint must be measured against the "[t]wo working principles" underlying the *Twombly* decision. *Iqbal*, 556 U.S. at 678. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Petitioner offers the legal conclusion that "[u]pon information and belief, Mr. Turner's decision to fire Mr. Duncan was motivated by Mr. Duncan's color." J.A. at 4, ¶ 23. Just as in *Twombly*, where this Court held that simply alleging that an unlawful agreement existed was a legal conclusion not entitled to the assumption of truth, here too simply alleging that an otherwise lawful lay-off was motivated by race is not entitled to assumption of truth. *Compare* *Twombly*, 550 U.S. at 555 *with* J.A. at 4, ¶ 23. This sort of conclusion is the type of "[t]hreadbare

recital" that this Court need not accept as true. *Iqbal*, 556 U.S. at 678–79. Similarly, in *Iqbal*, the plaintiff's contention that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'" was a legal conclusion not entitled to assumption of truth. 556 U.S. at 680.

Because Petitioner's contention that his lay-off was discriminatorily motivated is a legal conclusion not entitled to the assumption of truth, the second working principle of *Twombly* requires that a complaint state "a plausible claim for relief" to survive a motion to dismiss. *Id.* at 679. Here, as the Twelfth Circuit properly concluded, Petitioner's allegations do not rise to the level of plausibility. R. at 12. The facts that he alleges do not plausibly suggest that he was laid off because of his race. The fact that he was the sole white employee when Turner arrived does not give rise to a plausible inference of discrimination. There is no indication that Turner was responsible for hiring the 19 other employees, all of whom were Hispanic or African-American; rather, that was simply the existing demographic when he arrived. J.A. at 3–4. Much like in *Twombly*, where allegations of parallel conduct were insufficient on their own to make conspiracy plausible, here too the fact that Petitioner was the only white employee does not, on its own, make discrimination plausible. *Twombly*, 550 U.S. 544, 556–57. Notably, Petitioner does not plead any facts suggesting racial animus. There are no allegations in the complaint of any racial slurs made by Turner or any direct evidence that Turner singled him out because of his race, making his claim less plausible.

The next major factual allegation that Petitioner makes is that he would argue with Turner and others over what radio station to listen to. J.A. at 4, ¶ 20. This fact, rather than making his discrimination claim plausible, actually cuts against his claim insofar as it shows

Petitioner was belligerent with other employees and his supervisor, and suggests that the more plausible scenario is that Petitioner was indeed "not a good fit," as he alleges Turner said. J.A. at 4, ¶ 22. It suggests that Petitioner was terminated not because of his race, but because of his temperament and demeanor with his co-workers. J.A. at 4. At minimum, as the Twelfth Circuit noted, Petitioner's claim regarding the radio does not plausibly point to a discriminatory motive for his termination. R. at 12. Even accepting the facts alleged in Petitioner's case as true, all they plausibly suggest is that an at-will employee was laid off due to his temperament on the job and disagreeable nature, not because of his race. Therefore, this Court should affirm the Twelfth Circuit's decision granting Bigmart's motion to dismiss.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Twelfth Circuit, and hold that (1) a defendant may appeal a district court's denial of its motion to dismiss for failure to state a claim upon which relief may be granted even after a verdict in favor of the plaintiff and (2) the plausibility standard set forth in *Twombly* and *Iqbal* governs the sufficiency of pleadings in all civil matters including private employment discrimination suits, necessitating the dismissal of Petitioner's original complaint.

Respectfully Submitted,

Team 243
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