ORAL ARGUMENT HEARD ON DECEMBER 4, 2008

No. 07-5080

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SCOTT TOOLEY,

Appellant,

v.

JANET NAPOLITANO, HOMELAND SECURITY SECRETARY,
IN HER OFFICIAL CAPACITY, ET AL.,

Appellees.

ON PETITION FOR REHEARING

SUPPLEMENTAL BRIEF FOR THE APPELLEES

TONY WEST
Assistant Attorney General

DOUGLAS N. LETTER
(202) 514-3602
TEAL LUTHY MILLER
(202) 514-5048
Attorneys, Appellate Staff
Civil Division, Department of Justice
950 Pennsylvania Avenue, N.W.,
Room 7534
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Plaintiff-appellant in this civil action is Scott Tooley. His suit initially named as defendants George W. Bush, President; Richard B. Cheney, Vice President; Alberto Gonzales, Attorney General; Michael Chertoff, Homeland Security Secretary; Kip Hawley, Administrator of the Transportation Security Administration; Michael Hayden, Lieutenant General, Director, National Security Agency; and Michael B. Mukasey, Attorney General. On appeal, the only remaining defendants are Janet Napolitano, in her official capacity as Secretary of Homeland Security; Gale Rossides, in her official capacity as Acting Administrator of the Transportation Security Administration, and Eric H. Holder, in his official capacity as Attorney General of the United States.

This court has appointed Cassandra S. Bernstein to serve as amicus curiae counsel to plaintiff-appellant Tooley for purposes of this appeal.

B. Ruling Under Review. The ruling under review is the panel opinion filed on February 20, 2009.

C. Related Cases. Counsel is not aware of any pending related cases.

TEAL LUTHY MILLER
Attorney

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INTRODUCTION

In reversing the district court's judgment dismissing plaintiff's complaint, a divided panel of this Court acknowledged a conflict among the courts of appeals regarding pleading standards in the wake of *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). The panel concluded, however, that, because *Aktieselskabet AF 21. November 2001* v. *Fame Jeans*, 525 F.3d 8, 15 (D.C. Cir. 2008), held that *Twombly* "leaves the long-standing fundamentals of notice pleading intact," plaintiff's allegations were adequate to survive a motion to dismiss.

The Supreme Court's decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), establishes that *Fame Jeans* was wrong to read *Twombly* so narrowly. Under the pleading standard set out in *Iqbal*, the petition for rehearing should be granted and the district court's decision should be affirmed.

ARGUMENT

The panel regarded itself as bound by *Fame Jeans*, 525 F.3d at 15, and therefore applied what it characterized as "notoriously loose" and "famously liberal" pleading standards. *Tooley* v. *Napolitano*, 556 F.3d 836, 840, 841 (D.C. Cir. 2009). *Iqbal* makes clear that *Fame Jeans* was wrong to conclude that *Twombly* left pleading standards unchanged. The panel's conclusion that Tooley's complaint adequately establishes standing cannot be reconciled with the conclusion in *Iqbal* that the facts pleaded in that case were inadequate to state a claim.

I. *IQBAL* SHOWS THAT THE DISTRICT COURT PROPERLY DISMISSED TOOLEY'S COMPLAINT

A. *Iqbal's* Plausibility Standard Requires More than a Conclusory Allegation of Harm

Iqbal held that the plausibility standard announced in *Twombly* means that Federal Rule of Civil Procedure 8(a)(2) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. "'[N]aked assertion[s]'" of illegal conduct devoid of "'further factual enhancement'"do not suffice. *Id.*, quoting *Twombly*, 550 U.S. at 557. Instead, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*, quoting *Twombly*, 550 U.S. at 570.

Facial plausibility requires "more than a sheer possibility that a defendant has acted unlawfully," and thus a complaint that contains "facts that are 'merely consistent with' a defendant's liability. . . 'stops short of the line between possibility and plausibility' of 'entitlement to relief.'" *Id.*, quoting *Twombly*, 550 U.S. at 556-57. *Iqbal* explains that two rules apply to assessment of the allegations in a pleading: first, the "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," *id.;* and second "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader

is entitled to relief.'" *Id.* at 1950, quoting Fed. Rule Civ. Proc. 8(a)(2).

Under *Iqbal*, a court applying these rules to a motion to dismiss begins "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* After disregarding those allegations, the court assumes the truth of the remaining, well-pleaded allegations and makes a second determination: whether the remaining allegations "plausibly give rise to an entitlement to relief." *Id.* Those judgments are "context-specific" and require "the reviewing court to draw on its judicial experience and common sense." *Id.*

The Court in *Iqbal* applied these principles to determine whether respondent's complaint was adequate to survive a motion to dismiss and concluded that it was not. The complaint alleged that petitioners "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." *Iqbal*, 127 S. Ct. at 1951 (internal quotation marks omitted). It further alleged that former Attorney General Ashcroft was the "principal architect" of that invidious policy, and that Director Mueller was "instrumental" in adopting and executing it. *Id.* The Court concluded that those "bare assertions" were not entitled to the assumption of truth "because they amounted to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" and

were accordingly "conclusory and not entitled to be assumed true." *Id.* at 1951, quoting *Twombly*, 550 U.S. at 554-555. The remaining factual allegations, although "consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin" did not plausibly establish a discriminatory purpose in light of "more likely explanations," *i.e.*, a "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.*

B. Tooley's Complaint Fails to Satisfy the Plausibility Standard

Before *Iqbal*, Tooley had argued – relying on this Court's decision in *Fame Jeans* – that *Twombly* had not broken any new ground. *See, e.g.*, Amicus Br. at 20 n.6; Amicus Reply Br. at 3-4. Now that *Iqbal* makes clear that *Twombly* did announce a new plausibility standard, Tooley argues that *Iqbal* does not provide a basis for rehearing because it "merely applies *Twombly*'s 'plausibility' standard to the particular pleading at issue." May 22, 2009 *Letter*. The tension between those positions is obvious and irreconcilable. Because *Iqbal* makes clear that *Twombly* announced a new standard, and because *Fame Jeans* explicitly rejected the argument that *Twombly* announced a new standard, plaintiff is wrong that *Iqbal* provides "no warrant for this Court to reexamine its line of post-*Twombly* cases." May 22, 2009 *Letter*. *Iqbal* implicitly overrules *Fame Jeans* and the panel's decision here insofar

as it followed *Fame Jeans* and applied a "notoriously loose" pleading standard.

The panel's conclusion that Tooley's complaint satisfied pleading requirements cannot be squared with *Iqbal*. Tooley contends that his "allegations about Southwest Airlines's paranoid reaction to his comments on airline security, the bugging of his phones (*evidenced* by clicking sounds on the lines), physical surveillance, extraordinary airport searches, and tracking devices hidden on his cars *do* give rise to a plausible inference of illicit federal government surveillance." May 22, 2009 *Letter*. But that characterization of the facts is rife with conclusory allegations that are not entitled to the assumption of truth, and the remaining well-pleaded allegations fail to plausibly suggest that defendants injured Tooley.

1. This Court must assume the truth of the allegation that Tooley began hearing clicking noises on his phone more than a year after his conversation with Southwest, but it should not assume the truth of his conclusory allegation that the clicking noises "evidenced" the wiretapping of his phones (and those of his extended family). Tooley previously conceded (Amicus Br. at 38) that an allegation of clicking sounds on a phone line, standing alone, is not a credible allegation of wiretapping. *See also In re Grand Jury Proceedings*, 525 F. Supp. 831, 834 (D.S.C. 1981); *Sedwick* v. *West*, 92 F.Supp. 2d 813, 817, 822 (S.D. Ind. 2000). Furthermore, even if clicking noises did "evidence" wiretapping, nothing ties these defendants to any

such wiretapping of Tooley's telephones. In particular, Tooley's phone conversation with Southwest does not plausibly suggest that these defendants are wiretapping his telephones. First, neither common sense nor any factual material in the complaint supports the inference that these defendants routinely wiretap everyone who makes a comment to an airline that might be perceived as a threat. Second, as this Court has already observed, the long time lag between Tooley's conversation with Southwest and the point at which he first noticed clicking noises on his phone stretches any arguable connection between the two "nearly to the breaking point." *Tooley*, 556 F.3d at 840. Under *Iqbal*, that stretch makes other explanations for the clicking noises – that they are normal interference on a phone line, or the product of a vivid imagination – sufficiently "more likely" that the court must reject as implausible Tooley's conclusory allegation that these defendants are wiretapping him. Like the allegation in *Twombly* that parallel conduct evidenced conspiracy, the allegation that the conversation with Southwest plus clicking noises evidence wiretapping should be rejected on grounds of implausibility.

2. The Court also must assume that in March 2005 (*i.e.*, three years after Tooley's conversation with Southwest) some unidentified individual sat in a Ford Crown Victoria across the street from Tooley's home for six hours each day for a two-week period that coincided with a visit by the President to that area. But nothing

supports an inference that the unidentified individual was directed by defendants, or indeed by the federal government at all. The allegation that the individual was an "officer" coupled with the allegation that the individual drove a Crown Victoria is insufficient to tie the individual to defendants, as those facts are also consistent with an individual having nothing to do with defendants. As in *Iqbal*, where the Court assumed the truth of Iqbal's allegation that he was subjected to harsh conditions, but not the truth of the allegation that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to those conditions for discriminatory reasons because that allegation was conclusory and not supported by any factual matter, *Iqbal*, 127 S. Ct. at 1951, in this case this Court should not assume the truth of the allegation that defendants subjected Tooley to physical surveillance because it is conclusory and not supported by any factual material in the complaint.

3. This Court must assume that Tooley found tracking devices on his cars, but should not assume the truth of the allegation that defendants placed the devices there because no facts support that conclusory allegation. Tooley bears the burden of establishing injury; if he has some information that plausibly ties defendants to the tracking devices, it was his burden to set that forth in his pleading. As in *Iqbal*, Tooley's allegation is nothing more than an "unadorned, the-defendant- unlawfully-harmed-me accusation" that fails the plausibility standard. *Iqbal*, 129 S. Ct. at 1949.

Notably, nothing in the complaint suggests that either the alleged physical surveillance or the tracking devices caused Tooley any legally cognizable injury. These allegations are thus helpful to Tooley only if, applying "judicial experience and common sense," they make it plausible that these defendants have otherwise injured Tooley. Because they do not, the allegations adds nothing to his claim of standing.

4. This Court must assume the truth of the allegation that Tooley is stopped and searched at the airport every time he flies, but the Court cannot assume the truth of the conclusory allegation that those searches are extraordinary. As Judge Sentelle observed, "[s]tripped of his conclusory adjectives and adverbs, his allegations say that he has been searched or detained at airports," and "it is "unlikely that anyone who flies with any frequency has not." *Tooley,* 556 F.3d at 843-44 (Sentelle, J., dissenting). The complaint contains no information regarding how many airplane trips are at issue or additional facts regarding the searches that would push the allegation that the searches were unconstitutional over the line to plausibility. *See Iqbal*, 129 S. Ct. at 1949; *Tooley*, 556 F.3d at 844 (Sentelle, J., dissenting) (If "there is anything unconstitutional about any particular search . . . then he should allege the facts that demonstrate its unconstitutionality.").

Also, even if an allegation that one is searched whenever one flies establishes standing to challenge placement on an aviation-related watchlist, that does not make

plausible Tooley's other allegations. The wiretapping and surveillance allegations are not made more credible by the airport search allegation because, as this Court has held,"the presence of one's name on a watchlist cannot be presumed to establish that interceptions of one's communications have occurred." *Halkin* v. *Helms*, 690 F.2d 977, 997-98 (D.C. Cir. 1982). Even assuming that there is some support for the belief that the government is more likely to surveil or wiretap individuals on aviation-related watchlists, the link would be too tenuous under *Iqbal*'s plausibility standard to establish that Tooley's unlawful wiretapping and surveillance claims are plausible. Just as parallel conduct is consistent with, but does not establish, a plausible claim of antitrust conspiracy, watchlisting might be consistent with, but does not plausibly establish, other forms of government attention.

5. Finally, contrary to the May 22, 2009 *Letter,* it would not be sufficient for the complaint to plausibly suggest "illicit federal government surveillance." Tooley has sued the Attorney General, the Secretary of Homeland Security, and the head of the Transportation Security Administration, and his complaint must plausibly suggest that *these* specific defendants have injured him. *Iqbal*, 129 S. Ct. at 1949.[1]

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[1] Iqbal's allegations failed to satisfy the plausibility standard not because they were "extravagantly fanciful," but because they were conclusory and lacked factual material adequate to support them. *Iqbal*, 129 S. Ct. at 1951. Tooley's allegations were properly dismissed for these same failings. But the principle that an "extravagantly fanciful" complaint may be dismissed for lack of jurisdiction also

II. *IQBAL* INSTRUCTS THAT CONTROLS ON DISCOVERY PROVIDE NO BASIS FOR RELAXING PLEADING STANDARDS

Iqbal holds that "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Iqbal*, 129 S. Ct. at 1953. To the extent that the panel believed that Tooley's suit should be allowed to proceed because he would not be "automatically entitled to unlimited discovery," *Tooley*, 556 F.3d at 841, that consideration was misplaced. As defendants' petition for rehearing explained (and as the panel observed), discovery in a suit concerning allegations of wiretapping and surveillance has a significant cost even when the suit is meritless, because "a pattern of government answers (denying specific conduct in some cases, refusing to answer on national security grounds in others) would constitute a de facto disclosure of information not formally disclosed." *Id.* And invoking the state secrets privilege in all national security cases to avoid such a pattern carries its own significant costs. *See* Reh'g Pet. at 15. The case merits rehearing for those reasons as well.

CONCLUSION

This case should be reheard and the district court's decision affirmed.

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separately justifies dismissal here, because several of Tooley's allegations reflect "fanciful, paranoid, or irrational" beliefs based on "nothing more than [Tooley's] internal belief structure." *Tooley*, 556 F.3d at 843 (Sentelle, J. dissenting); *see also Tooley,* 556 F.3d at 840 (doubting the "ultimate plausibility" of Tooley's claims).

Respectfully submitted,

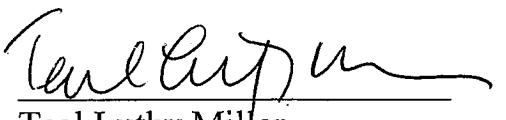
TONY WEST
Assistant Attorney General

DOUGLAS N. LETTER
(202) 514-3602
TEAL LUTHY MILLER
(202) 514-5048
Attorneys, Appellate Staff
Civil Division, Department of Justice
950 Pennsylvania Avenue, N.W.,
Room 7534
Washington, D.C. 20530-0001

JUNE 2009

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing supplemental brief complies with the requirements of Fed. R. App. P. 32 and this Court's May 28, 2009 Order in that it is no more than ten pages and was prepared in a 14 point proportionally spaced font.



Teal Luthy Miller

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2009, I caused copies of the foregoing supplemental brief to be filed with the Court by hand delivery before 4 p.m., as required by this Court's May 28, 2009 order, and also served two copies to counsel appointed by this court to serve as amicus curiae for appellant by hand-delivery at the following address:

Richard P. Bress
Cassandra S. Bernstein
Gabriel K Bell
Kimberly Fielding
Latham & Watkins, LLP
555 Eleventh St. N.W.
Suite 1000
Washington, DC 20004-1304

I also certify that I caused a copy of the petition to be sent via overnight delivery service to

Scott Tooley, Esq.
3401 Vista Greens Court
Louisville, KY 40241

Teal Luthy Miller