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A PLAN FOR REFORMING FEDERAL PLEADING, DISCOVERY, AND PRETRIAL MERITS REVIEW

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Abstract

We propose a fundamental restructuring of the federal civil pretrial process to address its great expense and unreliability in resolving cases on their merits – problems largely attributable to discovery. The proposed reforms establish an affirmative disclosure mandate that sharply reduces the role of discovery by shifting most of the parties' burden of fully revealing discoverable matter, favorable and unfavorable, to their pleadings. To effectuate the new function for pleadings, the reformed process eliminates Rule 12(b)(6), (c) and (f), with pretrial merits review conducted exclusively pursuant to the procedures and standards for summary judgment under Rule 56. Responding parties will be required to fully disclose discoverable matter as to which they have exclusive or superior practical access ("asymmetric information"), but only if the initiating party's pleading makes a summary-judgment-proof showing on all elements of their claims or defenses that are unaffected by the information asymmetry. Discovery, if any, would generally be deferred to the post-pleading stage and restricted to court-approved targeted use as may be needed for purposes of facilitating resolution of cases by summary judgment, settlement, or trial preparation. Compared to the current regime, the reformed pretrial process should enable courts and parties to resolve more cases on the merits, more cheaply, quickly, and reliably, thus increasing deterrence and other social benefits from the use of civil liability to enforce the law. We note that tests of these projected benefits are underway in two district court pilot projects recently launched by the Federal Judicial Conference to evaluate "Mandatory Initial Discovery" rules that employ an affirmative disclosure mandate similar to, but was developed independently of, our proposal.

* David Rosenberg is the Lee S. Kreindler Professor of Law at Harvard Law School. Anne Brown, Jaehyun Oh and Benjamin Taylor recently graduated from Harvard Law School. We appreciate comments from Sergio Campos, Robert Clark, Brian Fitzpatrick, William Hubbard, Louis Kaplow, Peter Murray, David Shapiro, Ted Sichelman, Steven Shavell, and participants in the Symposium on the Future of Discovery sponsored by the Vanderbilt Law Review. David Rosenberg thanks the Harvard Summer Research Program for supporting this project.

I. Introduction

The principal function of the federal pretrial process for civil cases is to create the record of relevant law and evidence that informs judicial merits screening of claims and defenses and parties' decisions regarding settlement versus trial.[1] Indeed, the vast majority of cases are formally or effectively resolved on the basis of these records, or in anticipation of what they will contain.[2] Currently, discovery plays the central role of generating the pretrial record of legal and factual information ("discoverable matter") needed to achieve these results. But, reliance on discovery to perform this task efficiently and reliably is misplaced. By its nature, as discussed below, discovery entails a high probability of producing

[1] Consistent with the "essay" format, footnotes are limited to supplementing explanations in text and providing citations when formally required or necessary to support our argument on contestable points. The following definitions apply throughout, unless and until they are refined or replaced as needed in developing our proposal. "Pretrial process" encompasses Federal Rules of Civil Procedure ("FRCP Rules" or "Rules") 3-42, 56, and 65 and "discovery" refers to the formal standards, methods, and procedure for parties to compel disclosure of information from one another pursuant to Rules 26-37. "Discoverable matter" refers to the general scope of discovery as *substantively* defined in Rule 26(b)(1) to include "any nonprivileged matter that is relevant to any party's claim or defense" and as specified in Rule 26(a)(1) regarding pre-discovery required disclosures. "Pretrial record" comprises the sum and substance of discoverable matter disclosed by the parties to one another and the court at any given point in the pretrial process. "Rule 12 merits review" and "Rule 56 merits review" refer to the judicial power to dismiss a claim or defense respectively under Rule 12(b)(6), (c), and (f) for failure to allege sufficient legal and factual grounds for relief in the pleadings, and under Rule 56(a) for failure to show sufficient legal and evidentiary support in the pretrial record to warrant resolving a factual issue by jury trial.

[2] Pretrial merits review determines whether it is worthwhile burdening the parties and public with the cost of resolving the case by discovery and ultimately by trial. Currently, such preliminary merits screening occurs pursuant to Rules 12 and 56. Somewhat more amorphously, courts make pretrial merits assessments pursuant to Rule 26(b) in regulating the scope, methods, and intensity of discovery. The parties have the prerogative to settle (including to drop a claim or defense) or press for trial at any point in the pretrial process. A relatively small fraction of cases are tested and meet their end (though many "without prejudice" to refiling) on Rule 12 merits review. Most cases terminate, including a significant fraction following some formal discovery, as a result or in expectation of rulings on summary judgment motions under Rule 56 merits review. Rule 26(b) decisions modulating the availability of discovery prompt parties to settle many cases by dimming their prospects for succeeding at trial or even surviving summary judgment. Beyond disposing of the great bulk of filed cases, most by settlement, the merits review, discovery burdens, and other rigors of the pretrial process cast a shadow over unfiled cases, resolving an untold number pre-filing by settlement or default.

incomplete and inaccurate pretrial records, while taxing the parties and public for the service with great and unnecessary expense, delay, risk, and potential for litigation abuse.

In this essay, we propose fundamentally restructuring the process for creating pretrial records to reduce the cost, while increasing the reliability of resolving cases on their merits. The proposal establishes an affirmative disclosure mandate designed to sharply reduce the role of discovery, in essence by

- Shifting the parties' burden of disclosing all discoverable matter, favorable and unfavorable, from discovery to the pleadings;

- Eliminating Rule 12 merits review, along with testing the pleadings for factual "plausibility" under the "*Twombly-Iqbal* rule"[3];

- Testing the legal viability and evidentiary sufficiency of claims and defenses exclusively pursuant to the standards and procedures prescribed in Rule 56 for summary judgment;

- Requiring parties to affirmatively and fully disclose in their responsive pleadings (*e.g.*, answer, reply) discoverable matter as to which they have exclusive or superior practical access ("asymmetric information"), but only if the initiating pleading (*e.g.*, complaint, answer) makes a summary-judgment-proof showing regarding all elements of the relevant claim or defense that are unaffected by the information asymmetry;

- Restricting Rule 26 discovery, if any, to the post-pleading stage, and then solely to court-authorized, targeted use as may be needed for purposes of summary judgment, settlement, or trial preparation.

Compared to the current regime, the reformed pretrial process should enable courts and parties to resolve more cases on the merits, more cheaply, quickly, and reliably, yielding increased deterrence and other social benefits by employing civil liability to enforce the law.

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[3] The "*Twombly-Iqbal rule"* refers to the Rule 12 merits review test derived from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), which authorize dismissal of any claim (and presumably any defense too) when its "plausibility" is not shown by the factual allegations in the complaint (or answer).

Preliminarily, we overview these key components of our proposal in light of the basic discovery problems they are designed to address. A case example is presented to illustrate the workings and effects of the reformed process, compared to the current pretrial regime. Having limited the purpose of this essay to introducing the design concept and functions of our proposal, we will not undertake to blueprint the operational details of the reformed process or empirically assess its comparative advantages. We note that empirical perspective on the proposal's potential benefits should emerge from ongoing "Mandatory Initial Discovery" pilot projects launched by the Federal Judicial Conference to evaluate an affirmative disclosure mandate that resembles but was developed independently from our proposal.[4]

A. Problems with Discovery

Discovery empowers parties to extract secrets – crucially, unfavorable information – from each other by means of adversarial interrogation.[5] This process – like other adversarial facets of the civil liability system – is labor intensive, procedurally complex, and rife with opportunities for dispute and tactical manipulation. However, these problems with discovery are exacerbated by virtue of its nature as a game of "hide-and-seek."

In discovery, the parties seeking information ("requesters") – usually plaintiffs, as defendants typically possess the disproportionate share of discoverable matter – must hunt around, often in the dark, for clues to the whereabouts and content of the hidden or otherwise practically unavailable information. Adversaries possessing the discoverable matter ("responders") must disclose the information, but only if and when tagged and pinned down by a requester's sufficiently particularized request. Responders, however, need not – and especially regarding divulgence of damaging information, almost surely will not – be more cooperative and forthcoming than absolutely necessary to answer the specific request. Discovery never obliges parties to affirmatively fill even critical

[4] For further discussion of Mandatory Initial Discovery pilot projects, see Part IV.

[5] Discovery is principally needed to secure access to privately held information that damages the possessor's case. Parties have a natural incentive to volunteer favorable information, formally or informally. Surprise use of favorable information at trial or otherwise is readily addressed by barring admissibility or reliance on any evidence its proponent has not previously disclosed. Hence, our primary concern throughout is disclosure of unfavorable discoverable matter.

information gaps, let alone to candidly and fully disclose without prior request all the relevant evidence and legal authorities – unfavorable as well as favorable – that they actually possess or otherwise could obtain through reasonable investigation.

Under the best of circumstances, discovery proves a cumbersome and drawn-out endeavor and, in many cases, an ordeal. But the major obstacle to discovery accomplishing its information disclosure objectives is its great expense for the parties and courts. Discovery imposes high search, disclosure, and oversight costs that deter parties and courts respectively from pursuing potentially fruitful efforts to enhance the reliability of pretrial records.[6]

These burdens are greatly magnified by the incentives that "hide-and-seek" discovery creates for parties to behave wastefully and even abusively. Thus the

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[6] Discovery is widely considered to be the most expensive – prohibitively so, in many cases -- phase of the pretrial process, and indeed, given the tiny fraction of cases that go to trial, of civil litigation overall. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 and n. 5 (2010) (estimating expected average expense of discovery equal to roughly 50% of litigation costs, and ranging as high as 70% in certain types of litigation). Notably too, discovery is viewed as very often a waste of time and money. See e.g., Victor Marrero, *The Costs of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1658-61 (2017) (citing and discussing studies as well as reactions gleaned from conversations with judicial colleagues).

Recent survey responses by attorneys in relatively small-claim cases, that they often do not use discovery, and when they do, the costs are roughly proportional to parties' stakes, prompted the lead researchers to conclude that any discovery cost problem is confined to large-scale/stakes complex litigations. See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765 (2010). This calming surmise is flawed. The study never sought to determine whether prohibitive expense rather than lack of necessity caused the parties to forgo discovery. For the view that expense probably best explains most of these cases, see Marrero, supra note 4, at 1657-58. Relatedly, the studies' results are skewed by virtue of recording incurred, as opposed to expected, discovery expense; in many cases the parties – particularly, defendants – may elect to pay a higher price in settlement rather than an even higher one in discovery. *See* Brian T. Fitzpatrick & Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment*, pp. 13-14, draft dated Sept. 2016, available at http://ssrn.com/abstract_id=2845627 (last revised Jan. 2017). That discovery expense is proportionate to stakes in most cases – a virtual truism of litigation economics – tells us nothing about whether it is excessive – for a given party or collectively for both – let alone socially appropriate. And, lawyers' views may not be the most reliable source for judging the matter, given the correlation between their earnings and unnecessary discovery expense, with defense lawyers charging hourly fees and plaintiff attorneys taking (pre-expense charge) percentages from settlements inflated by defendants' expected (possibly nuisance-value) discovery costs.

parties are prone to overuse the process. Frequently, this results simply because requesters must probe for discoverable matter more or less blindly, without knowing the location, identity, or even usefulness of requested documents, witness testimony, or information. In fear of missing something useful, requesters may resort to "dragnet" strategies, issuing requests mechanically, indiscriminately, and in the sweeping terms of "general search warrants." Such broadly framed requests, especially when based on nothing more than strategically crafted allegations in requesters' "notice-plausibility" pleadings, will likely provoke broadly framed objections from responders. Often, judges must intervene on the fly and, based on little if any case-specific knowledge, decide how much ("proportional to the needs of the case"[7]) of the requested discovery to allow.[8] Alternatively, responders may seek to avoid costly courtroom battles by dumping the mass of requested documents on requesters, forcing them to comb the "haystack" of materials at great expense, often in a futile search for a "pin" of useful information.

More generally, the parties' ability to consume discovery benefits without paying its costs in full distorts their decisions regarding how and how much to use the process. Thus requesters are encouraged to cast their discovery net more broadly than necessary because, despite bearing the expense to prepare their requests and analyze the responses, they do not (with certain important exceptions) pay for responders' expense to prepare responses. Similarly, responders will be more inclined to adopt dumping and other costly anti-disclosure strategies because they pay only to prepare their responses, but not requesters' expenses to formulate requests and review disclosed material. This problematic "subsidy" for discovery is magnified by the parties' exemption from paying the costs courts incur to supervise the process.

The susceptibility of discovery to overuse and gaming by the parties not only leads to wasteful litigation, but also invites, if not licenses, opportunistic adversarial tactics. Notably, parties can threaten dragnet requests, dumping, or imposition of any of myriad other discovery burdens to "extort" settlement concessions from each other. Although trial judges are supposed to prevent parties

[7] Rule 26(b)(1).

[8] Judges are also prone to overestimate the burden on responding parties, particularly business, government, and other institutional defendants in complex litigation. See discussion, *infra* at notes 40-41.

from abusing as well as overusing discovery, they generally lack information, resources, and all too often, inclination (especially when stiff sanctions are needed) to do so effectively.

B. Reform Proposal

In essence, our proposal comprises a set of simple, interrelated, and substantial changes in the role and scope of discovery and pleadings, and their relationship to pretrial judicial merits review. Driven by its core mandate for the parties to affirmatively disclose all relevant factual and legal information in their pleadings, the reformed process addresses the basic problems with discovery that stem largely from its "hide-and-seek" structure. The object is to increase net social benefit, not solely by reducing the cost of producing pretrial records, but by doing so while enhancing their substantive reliability for courts and parties to better assess case merits.

We overview the principal components of the reformed process: pleading report, summary judgment, and restricted discovery.

1. Pleading Report.

The keystone reform we propose is switching the parties' burden to disclose discoverable matter and create pretrial records from discovery to the pleadings. In the reformed process, the parties' pleadings must specifically and accurately present all relevant facts (including but not limited to information that is or can be rendered admissible in evidence) and law (inclusive of legal authorities, theories, opinions, and arguments) — *unfavorable as well as favorable.* No longer would pleadings merely convey allegations to provide notice of the nature of claims and defenses and indicate their bare factual "plausibility," leaving discoverable matter disclosures and pretrial record creation to come later in the course of time-consuming, costly, and chancy hide-and-seek discovery. To signify this change, the current "pleading" designation for Rule 7 complaints, answers, and replies will be revised to "pleading report."

Switching the burden of disclosure from discovery to pleading reports does more than alter the format and timing of party disclosures to accelerate and reduce the costs of disclosing discoverable matter. The change fundamentally alters the substance of parties' disclosure obligation to enhance the reliability of pretrial records. The aim, in short, is to end reliance on hide-and-seek discovery. The reformed process will generate the needed information by unconditionally

mandating that the parties fully and accurately disclose all relevant facts and law in their pleading reports affirmatively, without prior request.

Disclosure by merely alleging "facts" will not suffice. Pleadings reports must fully and accurately substantiate all contentions of fact with all available evidence (defined by Rule 56 and otherwise) as well as other types of discoverable matter. Such showings will typically involve presenting the discoverable matter in attached affidavits, expert reports, exhibits, legal memoranda and opinions, and documents and other tangible materials (or if convenience requires or permits, descriptions of their nature, whereabouts, and content). This reformed process requirement applies to all discoverable matter of which the parties actually and, based on pre-filing investigation, should have knowledge, possession, and control.

The pleading report proposal also remedies problems of asymmetric information that *Twombly* and *Iqbal* present. When a party's pleading report specifically identifies and substantiates that a responding party possesses exclusive or superior practical access to relevant information, the latter's pleading report must address that information gap. Thus the responding pleading report must reveal any pertinent information that the party knows and, based on pre-filing investigation, should know, or specify and substantiate the cause of any inability to do so (whether due to lack of knowledge, loss or destruction of documents, unavailability of witnesses, unavailing investigation, or otherwise).

2. Limiting Pretrial Merits Screening to Summary Judgment.

Pretrial merits screening in the reformed process will be available exclusively pursuant to the standards and procedures of Rule 56 summary judgment. This change follows directly from the reformed role of pleadings as the primary medium for the parties to report all of the discoverable matter that will comprise the pretrial record. As such, the resulting pretrial record should, at a minimum, provide sufficient factual and legal support for the parties' respective claims and defenses to survive a summary judgment challenge.

Because the scope, intensity, standards, and flexible availability of Rule 56 merits screening comprehensively subsume and far outstrips that of Rule 12 merits review, the proposal eliminates the latter as superfluous. Removing Rule 12 merits review alone furthers the efficiency goals of the reformed process. Criticized from

the beginning as unnecessary and readily-abused,[9] Rule 12 merits screening has proven far more of a hindrance than help in resolving cases on their merits. Typically, courts conduct surface, cursory, and, on "plausibility," impressionistic review, with virtually no pretrial record to go on other than strategically crafted adversarial allegations. Consequently, judges rarely dismiss cases without leave to amend the deficient pleadings, save for the occasional, indiscriminate ouster of those presenting information asymmetry problems.[10] Despite the improbability of succeeding on a Rule 12 merits review motion to dismiss, responding parties may nonetheless find filing it worthwhile to delay and otherwise burden the opposing parties' use of discovery.

However, for purposes of promoting the goals of the reformed process, the most important consequences of the proposed change flow not from eliminating Rule 12 merits review, but rather from subjecting pleading reports to the rigorous testing procedures and standards of summary judgment review. As applied to the reformed process, Rule 56 would authorize summary judgment directly on each pleading report, in contrast to the current regime that defers review to the post-discovery stage. Thus the parties could seek summary judgment on the whole pretrial record as jointly created by their pleading reports. Movants opting not to present evidence negating the sufficiency of or otherwise responding to the nonmovant's case on a particular claim or defense (or element thereof) could also, before filing a responsive pleading report, press immediately for summary judgment on the opponent's pleading report alone. This is not the "*Twombly-Iqbal"* rule in Rule 56 guise; the reformed process conditions summary judgment on the movant correcting material asymmetrical information problems.[11] Like a Damoclean sword, the threat of summary judgment will discipline the parties to conduct a thorough, pre-filing investigation at their own expense and to fully and accurately disclose the evidentiary and legal results in their pleadings reports. Advancing Rule 56 review to the pleading report stage thus requires each pleading

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[9] *See, e.g.*, Charles E. Clark, *Simplified Pleading and the Demurrer*, 26 J. AM JUD. SOC. 81, 82-83 (1942).

[10] *See, e.g.*, David Freeman Engstrom, *The TWIQBAL Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1248 (2013); William H. J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 JOURNAL OF EMPIRICAL LEGAL STUDIES 474 (2017).

[11] For discussion of this critical condition on Rule 56 merits review, *see infra* Subsections III. A-B.

report or the jointly created pretrial record as a whole *at minimum* to make a summary-judgment-proof case for claims and defenses on which the parties respectively bear the burden of proof.[12]

3. Targeted, Post-Pleading Report Stage Discovery.

The third basic change concerns the deferred, restricted availability of discovery at the close of the pleading report stage. This is a pivotal juncture in the reformed process. At this point, with pleading reports having borne most of the burden of discoverable matter disclosure and pretrial record production, the parties can essentially choose among three paths forward: submit their case for merits review on summary judgment, (re)consider settlement, or proceed directly to trial. Regardless of the course of action the parties choose to pursue at this reformed process crossroads, the court may allow them to conduct Rule 26 discovery. The limits on methods and intensity of discovery will be determined by the court, and vary according to its use in facilitating summary judgment, settlement, or trial preparation.

Generally, the court would allow discovery sought in connection with a pending motion for summary judgment only for policing purposes of supplementing, verifying, and authenticating evidentiary and legal information that was or should have been previously disclosed in a pleading report to correct an asymmetric information problem. Oral deposition and other modes of discovery geared to trial preparation would rarely be approved to facilitate Rule 56 merits review. Discovery unrelated to initial and responsive pleading report disclosures may be allowed only if requesting party shows "specific reasons" such as that existence of the information being sought is "newly discovered," essentially, that it was neither known nor, despite diligent investigation, knowable prior to closure of the pleading report stage.[13] The court may broaden the scope and methods of discovery, including use of oral deposition, when it would serve the purpose of

[12] This is not to deny the persistence of party incentives to withhold disclosure of damaging information even to the point of concealing it permanently. The reformed process, however, has the comparative advantage over the current regime in motivating parties to fully disclose such information. The key is that pretrial records comprised of summary-judgment-proof pleading reports will provide potential party and judicial victims of abuse with far better quality and more focused, timely, and efficiently produced information for detecting, sanctioning, and therefore deterring misbehavior. The case for the superior enforcement capabilities of the reformed over the current process is made in Part III.

[13] *See,* Rules 56(d) and 60.

furthering either trial preparation (including after denial of summary judgment) or settlement efforts pursuant to party stipulation.

In the event that courts learn from discovery (or otherwise) that discoverable matter was not but should have been disclosed in a pleading report, they will swiftly impose appropriately severe sanctions on the delinquent party, including penalties for Rule 11 and 37 violations, contempt, and professional misconduct. Moreover, the court may, on its own or party motion, employ interrogatories, production requests, and other discovery methods as well as other means (including use of special masters, independent investigators and experts) to police compliance with the affirmative, full-disclosure mandate for pleading reports.

4. Case Example: *Celotex Corp v. Catrett*[14].

Celotex usefully illustrates the workings and comparative advantage of the reformed process relative to the present regime.[15] In *Celotex*, the wife of a deceased insulation installer sued Celotex claiming that her husband's workplace exposure to its asbestos product caused his death. For present purposes, the chief issue in *Celotex* was whether, given the absence of direct testimonial or documentary evidence of such exposure, plaintiff's showing of circumstantial evidence was sufficient in form and substance to survive defendant's motion for summary judgment.[16] Plaintiff seems to have had no factual basis for alleging in her complaint that the decedent had been exposed to a Celotex asbestos product. This she subsequently acknowledged in seeking to excuse her 10-month delay in

[14] 477 U.S. 317 (1986). *Celotex* was among the trilogy of Supreme Court cases endorsing broadened, rigorous Rule 56 merits review; equating the test for summary judgment with that for Rule 50 directed verdict (now styled judgment as a matter of law) in a jury trial; and authorizing its application without requiring movants to present evidence negating the case on which the non-movant has the burden of proof.

[15] Although *Celotex* headed directly to post-discovery summary judgment, the benefits of eliminating Rule 12 merits review are apparent from our comparison of how the case would have been resolved using pleading reports directly reviewable under Rule 56 in the reformed process.

[16] Unfortunately the *Celotex* record is not available online or, due to errant acquisition and retention policies, in the Harvard Law School Library. David Rosenberg has filled in some of the gaps in background information based on his study and practice involving asbestos litigation. For description of the costs, including defendant abuses of the discovery process in asbestos litigation, see David Rosenberg, Book Review, *The Dusting of America: A Story of Asbestos – Carnage, Cover-up and Litigation*, 99 HARV. L. REV. 1693 (1986).

responding (but then only in part) to defendant's exposure-related interrogatories and production requests on the need to search for such evidence.[17] Defendant's answer offered no help, apparently asserting a general denial or lack of information regarding the alleged causal connection. Thus consistent with the current process approach, the parties' pleadings punted on the factual question of legally cognizable exposure, leaving the matter entirely for development in discovery.

After a year of discovery efforts on the exposure issue, the record consisted essentially of two pieces of relevant evidence. Plaintiff supplied the first in the form of a letter from a construction company executive stating that his firm had employed the decedent and assigned him to train crews in applying the asbestos product Firebar, and that although Celotex did not manufacture the Firebar in question, it subsequently acquired the Firebar manufacturer. Celotex provided the second, confirming that Firebar was purchased by decedent's employer during the period of his employment and that defendant subsequently acquired the Firebar manufacturer.[18]

The district court twice – before and on remand after the Supreme Court's review of the case – granted defendant's motion for summary judgment. Finding the employer's letter irredeemable hearsay, the court concluded that the record provided no basis for believing the plaintiff could muster admissible evidence at trial to prove decedent's Firebar exposure. These rulings were reversed in turn by the court of appeals, which in the last round held, with one judge dissenting, that plaintiff's showing of an "unbroken chain linking worker to product and product to defendant" was sufficient to create a genuine issue of material fact for resolution at trial.[19]

Compared to the current regime, processing *Celotex* in the reformed process would have resolved the case on the merits more quickly and cheaply, and likely more reliably. Because the pleading report complaint must at minimum establish a

[17] Plaintiff did not attribute the lack of pre-filing investigation to time-bar pressures or other such difficulties.

[18] Celotex also responded to plaintiff's interrogatories that it might bear statutory successorship liability.

[19] The court of appeals remanded the case for further proceedings in the district court on defendant's denial of successor liability, statutory or common law.

summary-judgment-proof case of exposure – as to which there was no asymmetric information problem[20] – plaintiff would be required not only to conduct a thorough pre-filing investigation at her own expense *before*, not *after* commencing suit, but also to decide whether to press the claim *before*, not *after* discovery.

As indicated by the split in judicial opinion on the sufficiency of plaintiff's exposure evidence in the actual case, it is likely that defendant would regard pursuit of summary judgment worthwhile in the reformed process. Although pleading report disclosures would probably hasten settlement of the case, even if the parties proceed to summary judgment, the comparative cost-effectiveness of using the reformed process to produce the pretrial record should be evident. Suppose the parties' litigation strategies remained as they were in the actual case. Then the plaintiff would append the employer's letter to the pleading report complaint, but, in contrast to the current regime, would also disclose any unfavorable information obtained during pre-filing investigation, possibly indicating that the letter's author refused to sign an affidavit or had personal knowledge only of decedent's crew-training duty not his actual exposure to Firebar. And, while the defendant in the current regime could rely on the Rule 56 option without presenting evidence negating exposure, in the reformed process, it not only would avoid discovery, but could seek summary judgment on the pleading report complaint alone, and in the absence of any Rule 8 affirmative defenses, possibly even without filing a pleading report answer.[21]

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[20] Although the plaintiff's pleading report would specify Firebar sales records as an asymmetric information problem, the court might conclude that such information could merely corroborate the employer's testimony. On this finding, defendant could proceed directly, without first supplying the sales information, to seek Rule 56 merits review of the sufficiency of exposure evidence in plaintiff's pleading report complaint.

[21] The affirmative and full-disclosure mandate applies to Rule 8 affirmative defenses. Hence it will be necessary for the responding party to make a summary judgment-proof case in its pleading report answer on all elements of a defense unaffected by an information asymmetry problem as well as to present all discoverable matter regarding responses to factually and legally substantiated contentions in the plaintiff's pleading report complaint. Accordingly, if Celotex raised a time-bar defense, as asbestos defendants routinely do, defendant would conduct a self-financed investigation based on plaintiff's employment-exposure evidence and present all time-bar related discoverable matter, at minimum, making a summary-judgment-proof showing in its pleading report answer. Even with that delay, the reformed process would likely outpace the handling of the question in the actual case, in which the pretrial record on the time-bar defense required months of full-blown discovery to develop.

* * *

In advancing a proposal for comprehensively reforming pleadings, discovery, and merits review to both cut cost and enhance reliability, this essay contributes to the extensive and proliferating literature on reform of the federal pretrial process. For the most part, prior proposals preserve the basic structure of the process, aiming primarily at curtailing discovery costs, and more recently, also mitigating the arbitrary effects of the *Twombly-Iqbal* rule. Though many are innovative, these proposals for reforming discovery follow either of two conventional approaches: increasing judicial regulation of its scope and methods or using fee-shifting to correct party incentives.[22] All, however, depend on the dubious assumption that courts would have adequate information and resources to make the regulatory and fee-award decisions involved and the parties would avoid stirring up unproductive, expensive satellite litigation. Notably overlooked as well are the perverse incentives created by fee-shift solutions motivating responding

[22] For important regulatory proposals that judges sequence discovery based on the probative value of information obtained in a prior stage, see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 489 (2010); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 644-45 (1989). For inventive fee-shifting proposals, see Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855 (2015); Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437 (2013); Martin H. Redish, *Pleading, Discovery, and the Federal Rules*: *Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845 (2012); Fitzpatrick & Cameron, *supra* at note –. Proposals combining aspects of both approaches can be found in Jonah B. Gelbach, *Can Simple Mechanism Design Results be Used to Implement the Proportionality Standard in Discovery*?, 172 J. INSTITUTIONAL & THEORETICAL ECON. 200 (2016) and Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097 (2017).

For proposals more closely resembling ours, *see* Professor Donald Elliott's suggestion (described in Easterbrook, at 644-45) that parties disclose all relevant documents (and other evidence) at the start of litigation, with compulsory discovery available to any litigant who believes information has been withheld, subject to bearing the responding party's fees if nothing is found. Elliott never developed or published the idea, and recently, rejected any movement toward "fact pleading" as counterproductively inviting more and cleverer ways of alleging facts to defeat Rule 12 scrutiny and reintroducing code era technical pleading disputes. *See* E. Donald Elliott, *Twombly in Context: Why Federal Rule of Civil Procedure 4(B) is Unconstitutiona*l, 64 FLA. L. REV. 895, 905-06, 961-62 (2012). *See also*, Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. Ill. L. Rev. 187, 205-07 (proposing application of summary judgment standards under Rule 12(b)(6) to screen the merits of antitrust claims based on publicly available information and use of sequentially regulated discovery for information within the defendant's exclusive control).

parties to make it even more difficult and expensive to find the hidden, damaging information. In any event, we emphasize that if any such proposal were shown to be cost-effective in promoting social welfare it could be readily incorporated in our restructured process.

We elaborate on the basic mechanics of the reformed pretrial process in Part II. Comparison to the current process shows not only the fundamental nature of the proposed changes, but importantly that the reforms leave much of the principal norms of procedure and practice unchanged. The reformed process undergoes a social welfare, benefit-cost evaluation in Part III. In particular, we gauge the comparative advantage of our proposal relative to the current regime baseline in determining which represents the better strategy for minimizing the total social costs of creating pretrial records. By this test, the superior regime outperforms its rival by consuming less time and money to produce the same or greater level of reliability. Obviously, investing less time and money to produce greater reliability is preferable, and as we show, that is the result the proposed reformed process should achieve.

Analysis in Part III proceeds first from the assumption that the parties (and their lawyers) will forthrightly disclose all discoverable matter, including unfavorable information, as required by the current and reformed regimes. Then, relaxing the assumption of party compliance, we consider the reformed regime's relative cost-effectiveness in addressing three types of party opportunism: extortion (using threat of discovery costs to extract unmerited settlement concessions); obstruction (burdening discovery to impede finding damaging information, but ultimately willing to disclose it); and concealment (preventing discovery by permanently hiding or even destroying evidence). Our central conclusions are that the reformed process will outperform the current regime in controlling party opportunism, as well as when parties forthrightly comply. Deploying Rule 56 in place of Rule 12 merits review to enforce the mandate for affirmative, full disclosure of discoverable matter, and thereby creating a pretrial record comprised of summary-judgment-proof pleading reports, the reformed process both removes the profit motive for extortion and provides potential judicial and party victims of abuse with information needed to better detect and deter obstructionism and concealment.

Closing remarks in Part IV include brief discussion of some evidence indicating the functional viability and potential benefits of our proposal for an

affirmative full-disclosure mandate. We note similar mandates in use in some U.S. state and administrative courts, and in England, Canada, Germany, Japan, and Italy. We also point out the particular relevance of the Federal Judicial pilot projects underway in two district courts to test replacing Rule 26(a)(1) with "Mandatory Initial Discovery." In the end, we suggest, that the prospect for any significant structural reform of the role and use of discovery requires tamping down the profession's turbo-charged adversarial ethos. Judges as well as lawyers must recognize that the parties' full disclosure of discoverable matter is neither a contingent result nor a dereliction of zealous advocacy, but rather is the constitutive premise of our adversarial system of adjudication.

II. Basic Reforms

Although the basic reforms are considered separately, they comprise a comprehensive and integrated process. Each part makes possible and facilitates attaining the objects for the others; indeed none would make operational sense let alone produce much social benefit standing alone. Moreover, all are intrinsically connected to and motivated by the foundational principles and requirements of the current process, the chief of which directs courts to apply the procedural rules and exercise adjudicative and administrative powers to maximize the chances for resolving cases on their merits. This directive implies the requirements of Rules 11 and 26 that the parties accurately tailor and represent their factual and legal contentions based on all of the relevant information – unfavorable as well as favorable – they actually and from prior investigation should know, and to disclose such discoverable matter fully.[23]

A. Pleading Report

1. General Scope of Affirmative Disclosure Mandate.

Pleading reports are the primary means for the parties to disclose all discoverable matter and thereby create a pretrial record in the reformed process. Pursuant to the affirmative full-disclosure mandate in the reformed process, pleading reports must reveal all relevant legal and factual information that the parties actually and from pre-filing investigation should know. The pleading report mandate for full disclosure is co-terminus with the substantive scope of

[23] The basic reforms we propose, like the current regime provisions they replace, are procedural defaults that the parties can change by agreement (with court approval as appropriate), for example opting to exchange discoverable matter informally rather than through pleading reports.

discoverable matter defined chiefly by Rule 26(b) as requiring parties to reveal all nonprivileged information (regardless of admissibility in evidence) relevant to their respective claims and defenses. Although this mandate excludes materials that qualify for legal "work product" type protections under Rule 26(b)(3), it includes legal "opinion" type information discoverable under Rules 33(a)(2) and 36(a)(1)(A).

Further, the affirmative disclosure mandate requires parties to completely and accurately substantiate their legal and factual contentions in the pleading reports, including with appended affidavits, expert reports, legal memoranda, and copies or descriptions of the sources, whereabouts, content, and availability of documents, electronically stored information, witness statements, and other discoverable matter. Privilege, relevance, or any other objection to complying with this mandate must be stated with particularity in the pleading reports, including specification of the nature of the item of information at issue and substantiation of the grounds for withholding or limiting its disclosure. Subjecting each pleading report to immediate Rule 56 review buttresses judicial enforcement of the affirmative full-disclosure mandate, effectively requiring the parties to present a summary-judgment-proof case on the law and evidence.

To illustrate the sharp contrast between the full disclosure mandate for pleading reports and the bare allegation, notice pleading paradigm in the current regime, consider a wrongful death case arising from the collision of two cars at the traffic-light regulated intersection of a local road and a busy 4-lane suburban highway.[24] The accident occurred when at mid-day, both cars entered the intersection, with plaintiff driving west on the highway and defendant crossing into its west bound lanes heading northward to continue traveling on the local road. Consistent with the model for pleading negligence actions provided by Form 9 (abrogated by *Twombly-Iqbal*), plaintiff's (federal diversity) complaint need only specify the location, date, and time of the accident, and then allege generally that the defendant negligently drove into the car plaintiff was driving, thereby causing injury to her and the death of her husband, who was riding in the front passenger seat. The defendant could answer in similarly minimalist terms, responding generally on the particulars, denying negligence, and asserting a defense of

[24] This example is loosely drawn from news reports of a recent highway accident involving tennis champion Venus Williams. *See, e.g.*, Matt Stevens, *Venus Williams Lawfully Entered Intersection before Crash, Police Say*, N.Y. TIMES (Jul. 7, 2017), https://www.nytimes.com/2017/07/07/sports/tennis/venus-williams-evidence-fatal-crash.html.

comparative negligence. Did defendant run a red light? Was he speeding? Did plaintiff fail to keep a reasonable lookout for cars in her path or neglect a reasonable opportunity to avoid the accident? Under the traffic code, which driver had the right-of-way? These and a number of other questions of law as well as fact would likely remain unanswered for months and possibly years pending, the parties' completion of the costly discovery process.

In the reformed process, by comparison, the answers to all of these questions would be "discovered" in the course of the parties' self-financed pre-filing investigation *and* disclosed upon filing of their pleading reports. The parties would thus directly and immediately create the pretrial record comprised of such discovery matter as their affidavits; witness statements; police, insurance adjuster, and expert reports; and memoranda of legal authorities and opinions. The pretrial record would thus reveal crucial evidence indicating that both cars entered the intersection on green lights – the plaintiff's just after the light turned green; the defendant's just before it turned yellow; that defendant was momentarily delayed in crossing the eastbound lanes when an unidentified driver of an on-coming car illegally turned left in front of him; and significantly, that each driver's view of the other entering the intersection may have been partially blocked by cars standing in a left-turn-only lane on the westbound side of the highway waiting for a green-arrow signal. Regarding the legal import of these facts, the pleading reports would present authorities and arguments, for example, regarding possible traffic code violations by the drivers and related negligence per se import, and the effect of third-party negligence on defendant's liability for damages. By the close of the pleading report stage – at the latest – without need for formal discovery, the case would be set for final resolution on the merits by summary judgment; possibly after court-approved depositions, by trial; or, if not earlier, by settlement.

Nothing comparable to this full affirmative disclosure mandate for pleading reports exists in the current regime. The closest approximation comes from the mandatory disclosure requirements under Rule 26(a)(1). Broadly framed, this provision directs the parties to identify without request from another party or court order any individual with knowledge of "discoverable information" and "the subjects of that information," and further to produce or describe by category and location all discoverable records they possess or over which they have custody or control. However, by contrast to the affirmative mandate for immediate full disclosure of all discoverable matter in pleading reports, the parties' Rule 26(a)(1) disclosure obligations are subject to substantial delays in taking effect. Most

telling, they compel disclosure only of information the parties would regard as the most favorable – and would in all probability disclose voluntarily – namely sources and records that they "may use to support" their respective claims and defenses at trial.[25]

2. Mandate to Correct Information Asymmetries

Information-asymmetry problems pervade civil litigation. These problems arise when one party ("controlling party") has exclusive or superior practical access to relevant information. Typically, this information involves damaging evidence regarding the controlling party's internal or otherwise "private" activities, policies, practices, purposes, knowledge, and states of mind. Disclosure of such discoverable matter is often critical, frequently determining the fate of the opposing party's claim or defense.

Currently, discovery provides the only means for compelling disclosure of such privately held information. However, on top of the general impediments to effective discovery previously discussed, the Supreme Court's *Twombly-Iqbal* rule restricts use of discovery to prevent information asymmetries from precluding adjudication of potentially meritorious cases. Operating as a catch-22, the *Twombly-Iqbal* rule bars such corrective discovery unless the party needing the information to pass the "plausibility" test can overcome the controlling party's Rule 12 dismissal motion by specifically pleading the very facts that the pleader cannot know and access without discovery. Hence, *Twombly-Iqbal* perversely compounds the responding parties' natural incentive to make nonprivileged, damaging information hard to find in discovery. For it is one thing to invest in deep-sixing damaging information when the payoff is merely lowering the adversary's chance of finding it in hide-and-seek discovery and corresponding settlement demand. But, it is quite another given the *Twombly-Iqbal* reward: preemptive Rule 12 dismissal of the opposing case without discovery. Indeed, its perverse incentives are magnified; the more damaging the information the more the responding party will spend to hide it from public view, even to the point of risking sanctions for destroying the evidence.

The reformed process corrects asymmetric information problems by requiring controlling parties to affirmatively disclose the privately held

[25] Similarly, the Rule 26(a)(2) limits required disclosures relating to experts to the names and opinions of those a party may call on its behalf at trial.

discoverable matter, and relatedly by eliminating the *Twombly-Iqbal* rule. Thus when a party's initiating pleading report establishes warrant for the adversary to correct an asymmetric information problem, the latter must disclose the discoverable matter in question or explain and substantiate the inability or refusal to comply. To create this obligation for corrective disclosure, the initiating pleading report must specify the nature and relevance of the missing information, state the purpose for its disclosure, and substantiate its inaccessibility.[26] If the responding party fails to file an adequately responsive pleading report, the court can order a more completely investigated or substantively forthcoming response, authorize the initiating party to conduct targeted discovery and tax the responder with the attorney fees and costs, or deem the responder to have admitted the facts at issue.

Eliciting corrective disclosures would not necessarily require the costs of formal process and sanctions. Unless and until the corrective disclosures are made, the responding party would be precluded from seeking judgment as a matter of law under Rule 56 (or at trial under Rule 50) based on a "prejudicial gap" in the pretrial record that results from the information asymmetries involved.[27] For purposes of determining whether a "prejudicial gap" exists to block summary judgment or judgment as a matter of law in a jury trial, courts would apply Rule 56(d) requiring the nonmovant to show that the missing, asymmetrically held discoverable matter is "essential to justify its opposition." Moreover, the responding party would be precluded from asserting an affirmative defense that implicated any uncorrected asymmetric information problem. Similarly, it could not argue to the fact-finder

[26] Rule 11(b)(3) provides the appropriate standard for triggering the responding party's corrective disclosure obligations. *See*, *e.g.*, *Carroll v. Morrison Hotel Corp.*, 149 F.2d 404, 406 (1945) (noting Rule 11's authorization of "information-and-belief" allegations to address information asymmetry problems). Pursuant to this standard, the initial pleading report would present a reasonable basis in fact for believing that the responding party possesses exclusive or superior practical access to discoverable matter supporting the initiating party's case. This showing need only indicate the asymmetrically held information by generic type or category, with the corresponding breadth of the corrective disclosure obligation varying according to the nature of the material question of law or fact involved. We illustrate this condition at *infra* note 45 in applying the corrective disclosure mandate to *Twombly* and *Iqbal*.

[27] This bar would not apply to impeachment, credibility, corroboration, and other asymmetrically held discoverable matter related to trial preparation. However, responding parties would be required to disclose such information in their pleading reports, or in the post-pleading report stage of court-targeted discovery.

that the adversary's case failed to satisfy its burden of proof for lack of (previously undisclosed) asymmetrically held information.

The reformed process thus avoids the detrimental consequences of the *Twombly-Iqbal* rule, while preserving its salutary aims. It salvages potentially meritorious cases by compelling the controlling party to disclose the relevant information needed to fill a prejudicial gap in the record under summary judgment review (or at trial) or to facilitate trial preparation. At the same time, the reformed process better achieves the *Twombly-Iqbal* goal of reducing the discovery subsidy. As explained below, mandating affirmative, full disclosure of discoverable matter in pleading reports and subjecting each directly to Rule 56 merits review, pressures parties to seek and obtain all (non-asymmetrically held) information through their own self-financed, pre-filing investigation, rather than foist the expense of supplying it on the opposing party.

3. Judicial Management of Pleading Report Stage

Courts would manage exchange of discoverable matter in pleading reports much as they currently do in overseeing bifurcated pleading and discovery. Thus the court would set and adjust the ground rules in a Rule 16 conference. During or before the conference, the court would also rule on party motions relating to the extent and mode of their own or opponent's compliance with the disclosure mandate, such as seeking a more definite statement, striking objectionable matter, or compelling or preventing public disclosure of certain information.

Although courts would not apply the Rule 26(b)(1) "proportionality" constraint on the scope of discoverable matter, they would consider the listed and other factors and circumstances relating to questions of undue burden and expense. An example would be deciding whether immediate production of copies of a mass of records rather than an itemized description would impose unnecessary costs on either the responding or receiving party. Regarding disputes relating to the obligation to disclose asymmetric information, the court would determine whether the initiating pleading report meets the burden of establishing the existence of the problem, namely by showing that the evidence is relevant and, and in terms of Rule 26(b)(1), "the parties' relative access" to it. These disputes may raise further questions about the adequacy of the responding pleading report's disclosures (or explanation for non-disclosure), such as the sufficiency of the pre-filing investigation of persons, records, and other sources of information or of affidavit

accounts of the substantive content of business records or the affiant's state of mind.

Elimination of Rule 12 merit review would also leave intact the court's authority to adjudicate subject-matter and personal jurisdiction, and other Rule 12(b) non-substantive defenses on a priority basis. To further reduce the chance of parties and courts wasting time and money litigating the merits of cases that may be dismissed or substantially reorganized on such non-substantive grounds, courts could extend deadlines for filing responsive pleading reports, except when necessary to preserve evidence or to develop an evidentiary record relating to a particular defense.

Relatedly, courts could advance Rule 56 merits review of certain substantive questions of law (including law applied to facts and legal theories applied to law or fact) when it would achieve efficiencies without pre-determining other issues. Courts could also suspend to some extent the parties' obligations to file complete, fully substantiated pleading reports. For example, in many complex cases, resolving the legal validity of a claim or defense on an expedited basis could save the parties (and court) unnecessary expense regarding development of expert evidence in their pleading reports and undergoing a *Daubert* examination of its admissibility.

Preserving judicial discretion under Rule 56 to both advance Rule 56 review of certain substantive issues and to augment the record for adjudication of newly raised legal or evidentiary issues,[28] restores a *Conley*-pleading benefit that was lost with adoption of the *Twombly-Iqbal* rule. In allowing more or less hypothetical fact pleading, *Conley* enabled parties to avoid unnecessary development of their case before gaining the court's guidance during Rule 12 merits review and Rule 16 conferences on the relative legal viability of differing approaches. *Conley*-pleading, however, invited gaming, trigger-happy litigation, and "amateur hour" case preparation. The reformed process remedies these problems not only by its strictures on courts advancing severable and accepting newly raised questions for Rule 56 merits review, but also by the practical necessity for parties to make summary-judgment-proof showings in their pleading reports.

[28] The Rules 56(d) and 60 criteria governing the conditions for recognizing a newly raise issue and augmenting the record accordingly are discussed *supra* at p. 12, and *infra* at p. 27.

B. Rule 56 Merits Review

1. General Scope and Advantage.

In the reformed process, Rule 56 summary judgment standards and procedure will provide the sole means for the parties to seek pretrial merits review of the claims and defenses in their respective pleading reports. The reformed process promises significant cost savings by eliminating Rule 12 merits review, as well as the current discovery condition on the availability of summary judgment.

Thus by the close of the pleading report stage at the latest, a case should be ready for Rule 56 merits review to determine whether the pretrial record sustains the trial-worthiness of a claim or defense, or warrants its dismissal by judgment as a matter of law. But, summary judgment may be invoked on an expedited basis even before the pleading report stage closes. In the reformed process, a party can institute Rule 56 merits review to test the legal and/or evidentiary sufficiency of the opposing case, based solely on the opponent's pleading report alone. In short, as explained more fully below, each party's pleading report must establish a summary-judgment-proof case.[29]

This fast track procedure resembles that currently provided by Rule 12(b)(6), (c), and (f) merits review for testing the legal validity of claims and defenses. However, Rule 12 operates under structural constraints that render it inferior to Rule 56 merits screening of pleading reports in the reformed process. First of all, Rules 12(b)(6) and (f) thwart the objective of issuing final judgments as a matter of law, in that these provisions do not require the pleadings to provide any, let alone a complete and accurate evidentiary showing. Nor do they require the pleadings to disclose discoverable matter relating to the law, legal theories, or opinions of law applied to the evidence. To avoid dismissal as a matter of law, the party's pleading need only notify the opposing party and show the court that a legally cognizable claim or defense, broadly stated to include any non-frivolous argument for extending, modifying, or revising existing law, can plausibly be found or inferred from among the pleader's self-serving, unsubstantiated, strategically selected and crafted allegations of fact and legal conclusions. Conducing "facial" review of such pleading contrivances under Rules 12(b)(6) and (f) operates more as a sieve than screen, offering the form but not substance of accelerated testing of the legal validity of claims and defenses.

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[29] *See* discussion *infra* Subsection II. B. 2.

The closest Rule 12 comes to affording the parties an effective means for expediting legal validity testing is subsection (c), providing for judgment on the pleadings – meaning judgment after the pleading stage is closed. To be sure, in the absence of a requirement to provide evidence, let alone to satisfy the full disclosure mandate, the pleadings in many cases may not take great effort to produce. At the same time, they will not provide anything approximating a reliable evidentiary basis that the court would have under Rule 56 to resolve the case by final judgment as a matter of law.[30] In any event, as discussed below, fast-tracked judgment as a matter of law under Rule 56 in the reformed process provides at least the same accelerated adjudication of questions of law as Rule 12(c), yet does so on a more complete and reliable evidentiary record.

2. Summary-judgment-proof Pleading Reports.

If the mandate for full disclosure of discoverable matter in pleading reports provides the principal vehicle for building pretrial records more reliably, quickly, and cheaply, then immediately subjecting each report to summary judgment review based solely on its legal and evidentiary showing is aptly described as the main engine propelling the process. Given the decisive payoff of avoiding the costs of filing a responsive pleading report, responding parties should rarely miss the opportunity to have the case against them ousted on final judgment as a matter of law under Rule 56. This credible threat of Rule 56 review will make filing summary-judgment-proof pleading reports a practical necessity in most cases.

The necessity for initiating parties to file summary-judgment-proof pleading reports requires clarification in light of the mandate for responding parties to correct information asymmetries and its effect on the availability of Rule 56 merits review. In particular, the previously noted requirement that responding parties correct prejudicial, asymmetric information gaps would be element specific. In other words, the bar on Rule 56 merits review would apply only to an element affected by a prejudicial gap created by the information asymmetry. The initial pleading report must of necessity make a summary-judgment-proof showing for any element(s) unaffected by such a prejudicial gap; failure to do so would render the claim or defense involved immediately subject to dismissal on final judgment as a matter of law, notwithstanding the existence of a prejudicial gap in the record on some other element(s).

[30] Reliable evidentiary records are particularly important when the resulting judgment may have spillover precedential or other significant social welfare effects.

For example, investors' federal securities fraud actions often involve questions of evidentiary sufficiency regarding two principal elements, materiality and scienter.[31] Sufficient evidence to survive Rule 56 merits review is often publicly available on materiality, whether the defendant's fraudulent statements actually – or, put counterfactually, whether disclosing the truth would have – affected the reasonable investor's trading decisions. However, because scienter turns on proof of defendant's intent to defraud the market, it is likely that asymmetrically held discoverable matter will create a prejudicial gap in the summary judgment record on that element. Despite the existence of the prejudicial gap on the scienter element, the defendant could immediately challenge the evidentiary sufficiency of plaintiff's case on the materiality element, and, assuming this showing is unaffected by an information asymmetry problem, the court can proceed to rule on the motion.[32] If, however, plaintiff's pleading report complaint presented public domain evidence sufficient to establish a summary-judgment-proof case of materiality, then the defendant would be forced to choose between disclosing the asymmetrically held discoverable matter to fill the prejudicial gap in record on the scienter element and forfeiting its right to move for summary judgment on that element.[33]

By subjecting each pleading report separately and immediately to summary judgment review, the reformed process achieves better screening of case merits as well as greater record production efficiencies than the current regime. As noted above, the parties will be compelled to develop summary-judgment-proof pleading reports based largely on discoverable matter they generate in the course of their independent, self-financed pre-filing investigations. Moreover, requiring pleading reports to be summary-judgment-proof will avoid the costs the parties and courts

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[31] *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 27 (2011).

[32] Even if this element was affected by an information asymmetry problem, the defendant could still obtain summary judgment on the plaintiff's legal theory of materiality. Thus had *Matrixx* been presented under Rule 56 in the reformed process, the court could decide, as the Supreme Court did under Rule 12(f), whether defendant's statements constituted a material misrepresentation in omitting reference to adverse, but not statistically-significant, event reports regarding its leading pharmaceutical product.

[33] The defendant would still have to correct the information asymmetry in its pleading report answer, and failing to do so, would be barred from litigating the materiality question at trial.

currently incur for initiating, responding to, and conducting discovery in unmeritorious cases.

C. Restricted Discovery

The reformed process promises to significantly lower, and in many cases eliminate, discovery costs by shifting the parties' burden of disclosing discoverable matter to the pleading reports and restricting any residual discovery to court-approved, targeted use in the post-pleading report stage. Driven by the affirmative, full disclosure mandate, the parties' pleading reports will reveal all manner of unfavorable as well as favorable discoverable matter – including a particularized and accurately substantiated summary-judgment-proof showing of law and evidence for their respective claims and defenses. Notably, courts and parties will assess and address the need for residual discovery, well-informed and substantively focused by the legal and factual record created by summary-judgment-proof pleading reports.

Any residual need for discovery will vary with the parties' litigation choices at the procedural crossroads that arises upon closure of the pleading report stage. In essence, the parties can choose to proceed along one of three direct pathways to resolving the case on the merits: (1) summary judgment review under Rule 56; (2) trial; or (3) settlement.[34] We briefly describe the scope of court approved discovery available depending on the parties' choice of how to proceed, beginning with its most important use for present purposes in facilitating summary judgment.

— Summary Judgment. The evidentiary record created by pleading reports constitutes the basis for summary judgment review in the reformed process. Generally, there should be no need for the parties to augment that record through discovery. However, the court may order targeted discovery on a showing of good cause to supplement or police the completeness and accuracy of the pretrial record for purposes of Rule 56 merits review. The prerequisite showing of "good cause" represents a demanding threshold, such that courts are expected to rarely approve party-directed discovery. Putting aside discovery for policing purposes, good cause entails a two-fold showing. The first, as discussed above, is that the missing evidence constitutes asymmetrically held discoverable matter that creates a prejudicial gap in the pretrial record. The second is that the specified gap in the

[34] The choice to settle or go to trial with related discovery options is also available, following denial of a motion for summary judgment.

pretrial record was not known or knowable, despite the exercise of due diligence, prior to commencement of the summary judgment proceedings. Normally, such defects will be apparent from the responsive pleading report, and the initiating party would seek an order from the court compelling the filing of a supplemental pleading report.[35] Occasionally, however, a new issue will be raised by the parties or court during the summary judgment proceedings.[36]

— *Trial.* If the parties elect to proceed directly to trial, the court will likely approve their requests to conduct discovery for purposes of trial preparation. This will usually include oral depositions as well as interrogatories and requests for document production and admissions to corroborate, impeach, or generally appraise how witness accounts and credibility will fare at trial. The court also may allow discovery to supplement and police pleading report disclosures, address incompleteness and inaccuracies, and verify previously disclosed evidence. But to obtain authorization for conducting such a wider inquiry, the requesting party must demonstrate the evidence being sought is not only within the definition of discoverable matter, but also, as required for similar discovery requests in the summary judgment context, the evidentiary questions were previously unknown despite due diligence.

— *Settlement.* To facilitate discovery efforts, the parties may, at any point in the reformed pretrial process, mutually agree to undergo discovery. The agreement can specify the method and extent of inquiry. But, court approval may be required when the parties' agreement to use discovery requires judicial oversight or presents scheduling or other management problems.

III. Social Welfare Evaluation

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[35] On a finding of convenience or needed policing, the court may authorize targeted discovery. Rules 11 and 37 provide courts with many additional options to address deficient pleading report responses, including fee-shifting, punitive sanctions, allowing the jury to draw adverse inferences from the failure to respond, and entry of judgment as a matter of law. For further discussion of judicial use of discovery and other methods to police compliance as well as sanction non-compliance with the mandate for affirmative, full disclosure, see Section III. B.

[36] *See supra* note 30. There may also be summary judgment cases involving newly found, but not asymmetrically held evidence. If such evidence qualifies as "newly discovered" under Rule 60 or excusably "unavailable" under Rule 56, the court may allow the party to file a supplemental pleading report.

In this part, we undertake a comparative social welfare evaluation of the proposed reformed and current pretrial processes. The aim is to determine the better of the two: that is, the regime that results in the greater social benefit net of social cost in producing pretrial records. We focus on their relative cost-effectiveness in securing disclosure of discoverable matter, particularly in compelling the parties to reveal information that damages their own case.

We assume that the pretrial process produces two related levels of social benefit. First, it generates reliable pretrial records of law and fact that serve as the primary basis for the parties and courts to resolve cases on their merits – without or with trial. Second, in facilitating reliable resolution of cases on their merits, the process thereby promotes the social objective of optimal deterrence as well as other public interests in using civil liability to enforce the law. Offsetting these benefits are the social costs of producing pretrial records, typically including expenditures of time and money by the courts and parties. Spending more time and money to produce a pretrial record tends to increase its reliability, but as with the production of any good, there is likely a point at which diminishing marginal returns on investment turn negative. Maximizing social welfare thus entails an incremental tradeoff that results in a residual degree of unreliability that cannot be reduced by a further, reasonable investment of party and judicial resources ("irreducible unreliability").

The comparatively best pretrial process minimizes total social cost: here, the sum of party and court investments in time and money plus the residuary of irreducible unreliability. Obviously, investing less time and money to produce greater reliability (and therefore less irreducible unreliability) is preferable, and as we show, that is the result the proposed reformed process is designed to achieve.[37]

The superiority of the reformed process over the current regime derives mainly from the basic change it works in the structure of the mandate for parties to disclose unfavorable discoverable matter. Notably, the structural innovation is not substantive in nature; both the reformed and current processes mandate disclosure

[37] Beyond the scope of our paper is a more comprehensive comparative assessment covering, for example, relative effects on rates of settlement versus trial; mix of case filings; overall litigation cost; risk-bearing and deterrence; gaming incentives, and complementary relationship with markets and social mores as well as with other governmental law enforcement agencies.

of identical information: all discoverable matter, favorable and unfavorable.[38] Rather, the key difference concerns the mode by which the parties satisfy this substantive requirement. In the current regime, the parties comply *responsively* in discovery; they have no legal obligation to reveal any (unfavorable) discoverable matter unless and until the opposing party makes an adequately justified and specified request for it. Thus the party seeking private or otherwise hidden relevant information bears the costly burden of finding it or losing it. By contrast, the reformed process imposes a legal obligation on the parties to reveal discoverable matter *affirmatively* in pleading reports, regardless of whether the opposing party requests it. In essence, this mandate makes it unlawful to keep relevant information hidden and, more generally, to be less than fully forthcoming.

In comparing the relative cost-effectiveness of the basic structural differences in the current and reformed process mandates, we first assume that the parties (named and potential litigants and their lawyers) will forthrightly disclose unfavorable discoverable matter, as and at least to the extent required by the rules of the respective regimes. Recognizing that this "ideal situation" may not be an entirely accurate reflection of reality, we will later relax the forthrightness assumption to consider the parties' disinclination to reveal damaging information and the related costs incurred to obtain more forthcoming compliance with the rules. For the sake of simplicity, we refer to the "ideal situation" as "Party Forthrightness" and the latter as "Party Opportunism."[39] Our analysis of the rival regimes demonstrates the superiority of the reformed process on all dimensions and in both situations.

A. Party Forthrightness

Given party forthrightness, it should be evident from the foregoing that the reformed process will substantially outperform the current regime. The changeover to the affirmative, full-disclosure mandate virtually implies the comparative advantage of the reformed process. In a single stroke, the mandate

[38] The substantive identity of the regimes' disclosure mandates implies that the parties must reveal all discoverable matter that is actually and based on pre-disclosure investigation should be known to them.

[39] Lawyer and client incentives to act opportunistically – ranging from withholding discoverable matter (until cornered and caught by direct requests or court order) to outright dissembling or even concealment – may diverge. We shall focus on lawyers' incentives, as their clients will usually need their attorney's complicity in planning and carrying out an opportunistic scheme.

outlaws keeping discoverable matter secret; requires disclosure of all relevant information without prior request, thereby relegating hide-and-seek discovery and all of its costs to the dustbin; and restricts discovery (if any) to the post-pleading report stage, and court-targeted uses.

Augmenting its cost-effective gains in pretrial record reliability, the reformed process enforces the affirmative disclosure mandate by subjecting each pleading report directly to Rule 56 merits review. Again, the benefits are manifold. Assigning pleading reports the burden of disclosing all discoverable matter and making them directly reviewable for legal and evidentiary sufficiency under Rule 56 clears from the path to resolving cases on their merits time-wasting and often abused Rule 12 merits review. Relatedly, the reformed process eliminates the *Twombly-Iqbal* rule, thereby revoking not merely its license for keeping relevant information hidden, but its perverse payout of higher (Rule 12 dismissal) rewards for hiding more damaging evidence. Further, replacing *Twombly-Iqbal* with the mandate to correct information asymmetries in responsive pleading reports salvages potentially meritorious cases that the current process would otherwise arbitrarily dismiss outright.

Though the parties are willing to cooperate, it is the pleading report-summary judgment nexus that drives, focuses, and disciplines their compliance with the affirmative disclosure mandate. Thus by conditioning the availability of Rule 56 review on the absence of any material asymmetric information problems in the challenged pleading report, the reformed process creates strong incentives for parties seeking the cost saving benefits of summary judgment to quickly and fully correct such problems by responsive pleading report (or affirmatively by stipulation in support of the summary judgment motion). More generally, subjecting each pleading report to immediate Rule 56 review nullifies the inefficiencies (and abuses) of the "discovery subsidy." In the reformed process, the threat of summary judgment motivates the parties before filing pleading reports to investigate as thoroughly as reasonably possible – at their own expense – the merits of their respective claims and defenses (and those expected from their adversaries). This pre-filing investigatory burden includes substantiating any claimed information asymmetries that would require the responding party to correct. Thus in the absence of such a problem, the reformed process confronts parties with an unavoidable choice: file a summary-judgment-proof case or none at all.

In considering whether, as compared to the current regime baseline, the reformed process adds new or increases existing pretrial costs, we anticipate and examine potential problems: burdening courts with more information disclosure disputes; pricing-out of court economically marginal claims and defenses; and erasing savings from the *Twombly-Iqbal* blanket-dismissal rule. In the course of addressing each of these concerns in detail below, we underscore a general reason for expecting lower, more controllable costs in the reformed process. The overarching explanation is that the distinctive incentive for parties to file summary-judgment-proof pleading reports will generate highly enriched and reliable, issue-focused information that should greatly improve the efficacy of party and court decision-making. Our central conclusion is that the only real concern relates to ridding the system of *Twombly-Iqbal*, but that any added costs from this reform, if more than negligible, will not significantly degrade the social welfare advantages from eliminating the rule.

1. Information Disclosure Disputes.

The reformed process cannot end information disclosure disputes; but it should substantially reduce their frequency and intensity. A good example involves the currently common conflicts in discovery regarding whether certain requested information is relevant to a pleaded claim or defense and therefore discoverable. This problem usually arises because the parties may plead claims and defenses in conclusory, self-serving terms, and defer definitional clarification to the discovery stage. This practice compounds the costly process of setting and policing Rule 26(b) limitations on the scope of discovery. In contrast, such relevance questions will rarely encumber the reformed process for the simple reason that questions provoking definitional ambiguities will rarely arise. Driven to make a summary-judgment-proof showing in their pleading reports the parties per force must know and, in demonstrating the sufficiency of their legal and evidentiary case, must specify exactly what they mean to claim and interpose by way of defense. And, with the summary-judgment-proof pleading reports in hand, the court will possess ample information and understanding with which to readily discern the relevance of any matter, the disclosure of which is in dispute.

It might nonetheless be suggested that the reformed process will reintroduce disputes over the type of elusive, hairsplitting distinctions between allegations of fact and those of ultimate or conclusions of fact that plagued code pleading, or at minimum further complicate similar disputes currently engendered by plausibility

pleading.[40] However, the reformed process will present no such problems. It preempts reincarnation of code-pleading technicalities in plausibility pleading by eliminating the *Twombly-Iqbal* rule and Rule 12 merits review. Nor will it introduce special or new distinctions in the nature of discoverable matter that its mandate requires parties to disclose. The reformed process changes only the disclosure format from discovery to pleading report, and time to right at the start of litigation from some time in the near-term future. Indeed, subjecting pleading reports directly to Rule 56 merits review, rather than disruptive, will further reduce current complexities and formalities. Rule 56 involves well-established, understood, and accepted prescriptions and routines for parties to marshal and courts to evaluate the quality and quantity of evidence (and the affidavit and other means for creating a pretrial record of it).

2. Price-out Economically Marginal Claims and Defenses.

Eliminating the discovery subsidy and obligating parties to conduct at their own expense reasonable pre-filing investigations for discoverable matter as to which they have superior public domain access may operate to raise the price of "entry" for filing some claims and defenses. Given that parties are currently required by Rule 11 (and, in any event, usually follow advice of competent counsel) to conduct pre-filing investigation for evidence supporting the pleadings – implicitly precluding reasonably avoidable inaccuracies in factual allegations – the reformed process imposes only the additional cost for presenting the fruits of that investigation in a pleading report. But once the benefits are considered, the assumed reality of higher entry barrier should disappear. Any added cost to present evidence in the pleading report stage will be far more than offset by the savings from avoiding having to seek and make such disclosures in the post-pleading, discovery stage of the current process. The net result of the reformed process in thus lowering expected pretrial litigation costs overall will likely be to render the filing of previously marginal claims and defenses more and not less economically feasible, and hence to enable presentation and resolution of more disputes on their merits.[41]

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[40] For summary of literature on code pleading problems, *see* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 489 (2010).

[41] If a systematic price-out effect hampers socially needed litigation, Congress can remedy the problem with a tailored discovery subsidy or adjustment in the means and burdens of obtaining discoverable matter in the public domain.

3. Negate *Twombly-Iqbal* Savings.

The one area where the reformed process may increase costs relative to the current regime is in revoking the *Twombly-Iqbal* rule and eliminating Rule 12 merits review. In cases presenting asymmetric information problems, the *Twombly-Iqbal* – Rule 12 nexus spares responding parties and courts significant ligation expense by speedily dismissing deficiently pleaded claims and defenses and by avoiding corrective discovery to salvage potentially meritorious cases.

We emphasize at the outset that a finding of added cost from requiring corrective disclosures and adjudication of salvaged cases on their merits in the reformed process would represent only one side of the social welfare evaluation. The other consists of benefits from more reliable pretrial records and merits-based resolution of cases. In the end, the social welfare assessment of the reformed process turns not on whether revoking the *Twombly-Iqbal* blanket-exclusion rule raises the costs of reliability, but rather whether reliability benefits remain dominant. Our conclusion, based on foregoing analysis showing improved reliability is that they do.[42] The following analysis indicates that the benefits of greater reliability are degraded little, if at all, in extending the affirmative disclosure mandate to salvage potentially meritorious cases.

To clarify the comparative costs of pretrial processes with and without the *Twombly-Iqbal* – Rule 12 nexus, we specify its ends and means. In essence, the ends are apparent from the nature of the purported savings: speedy and cheap dismissal of some "weak" cases and corresponding avoidance of the great expense of full-scale, subsidized hide-and-seek discovery. These results are accomplished in streamlined fashion by courts, simply and rather subjectively (hence shielded from appellate review) testing the pleaded factual allegations – more accurately the absence of pleaded factual allegations – to determine whether the asymmetric information problem renders the claim or defense "implausible." Although the plausibility test will dismiss and preempt discovery in many cases, the great majority of cases will likely pass its rather low and porous threshold – albeit after paying a considerable toll for unnecessary merits review under Rule 12.

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[42] To our knowledge, there are no empirical studies and analyses in the commentary evaluating the reliability differential between pretrial processes with and without the *Twombly-Iqbal* – Rule 12 nexus.

In terms of avoiding discovery expense and screening out weak cases, it should be apparent that the reformed process will do a far better job without the *Twombly-Iqbal* – Rule 12 nexus, than will the current regime does with it. The reformed process outlaws hide-and-seek discovery. And, by requiring parties to self-finance investigation for all non-asymmetrically held information and restricting discovery to post-pleading report stage, the reformed process ends subsidized, full-scale discovery and, with it, the parties' incentive to make dragnet requests and dumping responses. Further, it immediately screens the merits of all cases, not just those presenting asymmetric information problems and not merely by the grossly unreliable Rule 12 plausibility test. Rather, the reformed process employs the demanding procedures and standards of Rule 56 summary judgment. Thus when a responsive pleading is required to correct an asymmetric information problem, the initiating pleading report generally will be demonstrably meritorious, having made a summary-judgment-proof showing or, together with the opposing party's pleading report, created a record of sufficient legal and evidentiary support for any element of the claim or defense involved that is unrelated to the problem.

We narrow the cost comparison to cases that the current process would oust for implausibility, while the reformed process would continue adjudicating contingent on correction of the asymmetric information problem in a responsive pleading. Despite resolving more cases on their merits, the reformed process will likely reduce, not add, costs, because of its basic structural differences in the rival regimes. First, by contrast to the current relatively lax, if capricious *Twombly-Iqbal* – Rule 12 "plausibility" test, the corrective pleading report requirement applies only if the unchallenged elements of the claim or defense involved did or would survive Rule 56 merits screening and moreover, only if the absence of the asymmetrically held information creates a materially prejudicial gap in the record relating to the Rule 56 challenged element(s). Second, the current gateway opens to full-scale, hide-and-seek discovery, whereas summary judgment screening in the reformed process triggers an obligation to affirmatively correct a specified information asymmetry. Third, further adjudication of cases that have passed initial summary judgment screening to final judgment under Rule 56 or trial depends entirely on the showing of legally sufficient merit in or based on the responsive pleading report disclosures. However, nothing in the Court's concern about weak cases generating full-scale discovery costs suggests that adjudicating such salvaged, summary-judgment screened cases to final judgment on the merits should count as a waste of system resources.

Responding parties and courts will incur expense respectively in carrying out and overseeing compliance with the mandate to correct prejudicial information asymmetries. In a large majority of cases, these costs – for searching, reviewing relevance and privilege, and producing the information and for policing the process – will be small and often border on negligible.[43] The specification and substantiation of an existing and prejudicial asymmetric information problem will sharply define the relevance and scope of the needed inquiry and discovery matter. Normally, the responding party's Rule 56 motion will effectively narrow the scope of the problem and related corrective disclosure by precisely stipulating (or waiving some of) the evidentiary gap as grounds for summary judgment. Overall, the disclosure mandate in most cases will probably call for production of information in a relatively few records and/or affidavits.[44]

Certainly, some cases will arise in which, despite the best efforts to sharpen the prejudicial information asymmetry problem, its correction would involve costly disclosures. Nevertheless, nothing approaching full-scale, hide-and-seek discovery will ensue. Based on the initial and subsequently filed, summary-judgment-proof pleading reports, courts will be sufficiently informed to effectively manage the competing objectives of securing needed information and avoiding unnecessary disclosure burdens. Judicial options would include staging the exchange of pleading reports, for example by ordering the responding party to identify the substantive content of key documents and personal knowledge of principal witnesses, and in a follow up stage by directing the production of the most promising documents and affidavits. At the first or a subsequent stage, the responding party might also be required to undertake and report the results from further, targeted self-financed investigation conducted by its own lawyers, or in some cases, by independent counsel. The court would reserve the power to halt the process at any stage on a finding that the previously revealed information either suffices for resolving the pending summary judgment motion(s) or demonstrates the futility of further inquiry.

In managing this process, courts should beware of making two, generally unrecognized, assumptions that tend to exaggerate assessment of responding party

[43] As previously noted, oral depositions will rarely be needed, though the parties may agree to that method of inquiry.

[44] *See,* Issacharoff & Miller, *supra* note 19 at 455-56 (canvassing cases dismissed pursuant to *Twombly-Iqbal* rule).

disclosure costs in complex cases, specifically to (1) search for and (2) review potentially relevant information. The first elides the basic question: "compared to what." In particular, how much does the reformed process really add to responding party's disclosure costs compared to what they otherwise would or *should be expected* to incur if *Twombly-Iqbal* governed their fate? The difference is likely to be significantly less than is commonly believed. Indeed, much of the evidence that the reformed process calls upon the responding party to reveal in a pleading report would have been obtained at roughly the same disclosure cost, albeit kept hidden, in the current regime. In either regime, to effectively represent the responding party from the outset (or in anticipation) of litigation, competent counsel needs to know the same thing – all discoverable matter, especially the potentially damaging evidence – and therefore will perform the same work of thoroughly investigating, collecting, and reviewing all private or public sources of information to acquire it. Moreover, the Rule 11 requirement that parties possess supporting evidence to back contentions or denials of fact applies to responding party's assertions characterizing the factual plausibility of pleaded facts for purposes of invoking Rule 12 dismissal under *Twombly-Iqbal*.[45] As such, the main difference between

[45] Consider for example the *Twombly* and *Iqbal* defendants' attacks on the factual plausibility of inculpatory inferences drawn from facts alleged in plaintiffs' respective complaints. In *Twombly*, defendants denied the plausibility of inferring from public statements by one of their CEOs that he meant to suggest their refusal to compete against each other resulted from concerted action, not independent business judgements. Stressing the CEO's knowledge of and remarks on the regulatory environment, defendants contended that he meant nothing more than that competition was not a "sound long-term business plan" for any of them. Brief for Petitioners, at 35, *Bell Atlantic Corporation v. Twombly*, 550 U.S. 556 (2007). Similarly in *Iqbal*, the defendants Attorney General and FBI Director denied that just because they authored and were the highest ranking DoJ officials responsible for effectuating the post-911 "person of high interest" incarceration policy involved, it was plausible to infer that they closely monitored and managed its use, including by knowingly approving the alleged invidiously discriminatory conditions of plaintiff's imprisonment. It was, defendants asserted, "highly implausible" to infer that "the Attorney General and the FBI Director were involved in the granular decisions about which respondent complains." *Ashcroft v. Iqbal*, Brief for Petitioners, at 36-37, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

No evidence was presented to back up these factual contentions, that the CEO in *Twombly* meant only to offer a benign rationale for defendants' refraining from competition and the defendants in *Iqbal* were uninvolved in implementing their vitally important policy for swiftly identifying and imprisoning terrorists, their accomplices, and would-be attackers in the New York area. In the current regime, of course, defendants had no obligation to disclose the evidence, though Rule 11 required them to possess it. In the reformed process – assuming the Court and Congress do not

the rival regimes regarding disclosure costs related to such evidence is that responding parties in the reformed process incur the expense of *formally* filing such evidence in their pleading reports, while currently they can hide their evidentiary hand at no expense.

The other misleading assumption holds that the *Twombly-Iqbal* rule shields responding parties from incurring substantial costs of searching through and reviewing numerous documents and other sources of potentially discoverable matter, and implies the corollary that eliminating the rule, as we propose, would reimpose this burden. These suppositions conflict with the reality in many cases: responding parties, particularly businesses, governments, and other institutions, would incur the search and review expense with or without the *Twombly-Iqbal* rule. Strongly motivated to protect and promote their profit, political, market, and other interests, these parties normally seek and acquire discoverable (along with non-discoverable) matter "ex ante" in the course of assessing and controlling the risks of their products, policies, projects, and other activities to assure compliance with the law.[46] Indeed, it is unlikely that the *Twombly-Iqbal* escape route from privately enforced civil liability diminishes these incentives at all, given the parties' constantly pressing exposure to the array of other sources of law enforcement, including federal, state, and local administrative regulation,

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create special rules for adjudicating antitrust or qualified immunity cases – defendants would be mandated to both possess the evidence and disclose it in their pleading reports or risk dismissal on summary judgment. The mandated disclosure in *Twombly* would impose the relatively narrow obligation on defendants to file the executive's affidavit stating his intended meaning, and assuming he affirmed it was benign, as he effectively did before the Supreme Court, whether he had said, believed, or done anything to the contrary. A broader category of disclosure might be required in *Iqbal.* In responding to the evidential inference from their authorship and control of the anti-terrorism interdiction and imprisonment program that they must have known about and authorized its illegal implementation, defendants would describe in affidavits their relationship to its day-to-day operation. Assuming they denied any operational involvement, as they effectively did in the Supreme Court, defendants would identify those in charge of running the program. If questions (unrelated to impeachment) were raised or left unanswered by these affidavits, defendants might also be required to conduct and produce the results of an independent DoJ investigation.

[46] Such investment in managing risks ex ante to prevent them from exceeding at least legally determined levels is a fundamental element of our system of law enforcement; without it the law would fail to accomplish its safety and other regulatory objectives. Despite the pervasive presence of ex post policing by a multiplicity of government agencies, deterrence-based law enforcement would prove a nullity if it did not effectively compel – together with and amplified by political, market, media, and other social forces – ex ante legal compliance.

legislative investigation and lawmaking, criminal prosecution, and executive civil actions for injunctions and sanctions.

Thus long before the onset or even anticipation of litigation, institutional risk-takers will – or, as a matter of best "business" practice as well as prescribed legal obligation, *should* – have investigated and analyzed the relevant evidence for ex ante compliance purposes. Performing due diligence, they will likely have invested at least as much (and probably a great deal more) in obtaining discoverable matter ex ante than such parties would ex post to correct an information asymmetry in the reformed process. If and when litigation arises, the expense of this ex ante legal-compliance work will largely represent a sunk cost for the responding parties, often leaving them with little more burden in the reformed process than to organize the previously acquired discoverable matter for submission in a pleading report. It follows that when the discoverable matter in question was or *should have been* obtained ex ante for legal compliance purposes, courts should overrule responding party pleas for staging or otherwise modulating the purported burden of correcting the information asymmetry and enforce the affirmative disclosure mandate full-bore.

B. Party Opportunism

One commentator on an early draft of this paper astutely observed that much more of the pretrial process could be eliminated than we proposed if only lawyers would refrain from abusing what remained. The facts of the recent Supreme Court case *Goodyear Tire & Rubber Co. v. Haeger*,[47] reduce the abstraction of this observation to reality and provide chilling and dispiriting impetus for relaxing our assumption of party forthrightness.

In *Haeger*, the severely injured plaintiff family members and, through separate counsel, their subrogated insurer (Farmers Insurance Company) ("plaintiffs") sued Goodyear in 2005 charging that failure of its G159 tire caused their motorhome to swerve off an Arizona highway and flip over. Their complaint, like others in similar G159 tire suits against Goodyear across the country, asserted various negligence and product liability claims, including that the tire, marketed initially for light trucks and vans, was defectively designed for motorhome use, particularly at highway speeds.

[47] 137 S. Ct. 1178 (2017).

At the beginning and throughout the lengthy discovery stage, plaintiffs sought to flesh out their defective design claim by repeatedly requesting Goodyear to produce all reports and data from G159 safety and performance tests. In response, Goodyear early on produced a report involving the results of low-speed tests, and after a year or more of plaintiffs' pressing their requests for all test results, turned over another report regarding a high-speed test. Both reports were in the public domain, having been filed by Goodyear with DOT before the G159 litigation arose. Defendant represented to the plaintiffs and court that no other G159 test reports or information existed.

Sometime after the parties settled in 2011, plaintiffs' counsel read an article stating that in another G159 litigation, Goodyear had produced heat-rise test data that it had previously failed to disclose in any other case, including *Haeger*. In the subsequent proceedings for sanctions conducted by the judge who had presided over the *Haeger* case, Goodyear acknowledged that the heat-rise test data were relevant to the material design defect issue in *Haeger*, that it also possessed a number of other pertinent test reports, and that two of its senior defense attorneys deliberately concealed the existence of this evidence from plaintiffs and the court.[48]

The *Haeger* case drives home two important points. First, it shows that lawyers do not always follow the rules. Thus in reality, it cannot be taken for granted that they would actually comply with the reformed process mandate for affirmative disclosure of all information that may damage their clients' case. And second, it shows that this problem of dishonesty, including the most blatant sort, exists even in the current pretrial process. This second point is critical, because it makes clear that the inquiry with respect to party opportunism seeks to determine the relative cost of abuse (in terms of the rate, severity, and policing) in the current versus reformed process.

With this question in mind, we compare the costs in the rival regimes of three types of abuse:

[48] Working at separate firms, one served as local counsel in *Haeger*, and the other as the national coordinating counsel for the G159 litigation, including among his chief responsibilities reviewing and formulating responses to discovery in all cases.

∗ Extortion (*e.g.*, filing claims and defenses to extract nuisance-value settlement payoffs)[49];

∗ Obstruction (*e.g.*, unresponsiveness aimed at burdening and derailing opposing party efforts to find and obtain discoverable matter, such as stonewalling, obfuscating, delaying, misleading, and dissembling); and

∗ Concealment (*e.g.*, preventing revelation of discoverable matter by hiding or, if need be, destroying the evidence).

Our central conclusion is that the reformed process will likely reduce the total cost from party opportunism. Its superiority over discovery in the current regime derives primarily from the reformed process mandate for affirmative disclosure of discoverable matter. In essence, compelling the parties to file summary-judgment-proof pleading reports at the start of the litigation provides both better structural disincentives against extortion and better developed and focused information for detecting and deterring obstructionism and concealment.

1. Extortion

The "plausibility" test in *Twombly* addresses the Court's major concern that requiring merely *Conley*-notice pleading facilitated extortion strategies. It enabled plaintiffs in particular to file weak cases on the cheap to confront defendants with the choice between bearing the high costs of full-scale discovery and settling for some lower "*in terrorem* increment."[50] The plausibility test exploits information

[49] David Rosenberg & Steven Shavell, *A Model in which Suits are brought for their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

[50] In addition to the defects in the *Twombly* Court's analysis noted earlier, the majority also failed to recognize that defendants are not the only possible victims of this extortion strategy; they can readily assert weak defenses to impose nuisance-value settlement pressures on plaintiffs. Apparently, the Court adopted the conventional assumption that defendants are more likely to be victimized because they, particularly businesses and other non-governmental institutions, usually possess most of the relevant information and incur greater cost than would plaintiffs to produce it. But this assumption is problematic in many cases in which defendants can leverage weak defenses for extortion purposes, for example by burdening plaintiffs in antitrust, employment discrimination, and other complex litigations with great expense for expert analysis of reams of records and data, or in conventional tort cases with costly discovery regarding comparative negligence. Moreover, even when the assumption of defendants' disproportionate discovery exposure holds, the Court erred in ignoring the relative adverse effect of extortionate discovery cost on the economic viability of plaintiffs' claims, particularly those prosecuted on contingent-fee arrangements, or in mass tort cases without class action to buffer

asymmetries to screen out weak (along with potentially meritorious) cases while plaintiffs' increased expenditures on pre-filing investigation reduce the spread between their costs of bringing suit and defendants' costs of undergoing full-scale discovery. The question is whether in replacing the "plausibility" test backed by Rule 12 merits review with the mandate for affirmative disclosure of discoverable matter in pleading reports backed by Rule 56 merits review, the reformed process will significantly increase the level of extortion above the current baseline.

Our conclusion is not merely that no increase should be expected. Rather, the reformed process promises to virtually eliminate the abuse. The reformed process achieves this result for the simple reason that it drastically reduces the spread between the low cost of filing weak cases and the high cost of undergoing responsive discovery that makes extortion profitable in the current regime. The price of filing claims and defenses will increase considerably because the initiating pleading report must, as a practical necessity, make a summary-judgment-proof case on all elements unaffected by a material asymmetric information problem. Developing such a case will require an extensive self-financed investment in pre-filing investigation. At the same time, the reformed process sharply lowers the costs of discoverable matter disclosure. This latter result is achieved by eliminating current extortion-prone discovery, characterized by hide-and-seek gaming, subsidized usage, and virtually uncheckable party discretion to threaten an adversary with an overbearing full-scale inquisition. In its place, the reformed process restricts discovery, if any, to the post-pleading report stage and court-specified scope, targets, and methods.

With higher expected costs of filing initial summary-judgment-proof pleading reports and much lower expected costs of restricted discovery, the remaining leverage for extracting ransom derives from the burden on responding parties to disclose discoverable matter in their pleading reports.[51] However, at this point in the reformed process, the extortion problem loses its premise, that responding parties may be forced to settle weak claims and defenses. Subjecting initial pleading reports directly to Rule 56 review assures that, far from being

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the adjudicative biasing effects of separate-action litigation. *See,* David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305 (2014).

[51] We ignore the expense of moving for Rule 56 merits review in the reformed process, as it is unlikely to cost responders more than current motions for Rule 12 merits review.

weak, the surviving claims or defenses have demonstrable legal and evidentiary merit. At the very least, summary judgment sufficiency on a challenged claim or defense will have been established to the extent its elements are unaffected by an asymmetric information problem.

The obligation to file a responsive pleading report thus resolves into correcting a specified information asymmetry relating to an otherwise trial-worthy claim or defense. But before that mandate becomes effective, the initiating party must specify the nature of the discoverable matter, substantiate that it exists within the responding party's exclusive or superior practical control, and show that its absence creates a prejudicial gap in the record on summary judgment. And, as pointed out above, the court is empowered to stage and otherwise modulate the substance and means of the corrective disclosures. In view of these constraints on the expected costs of the corrective disclosure mandate, together with the higher expected costs of satisfying the initial disclosure mandate to present a summary-judgment-proof case, there is little chance that the initiating party will profit from and therefore attempt extortion.

2. Obstruction

As we use the term, obstruction involves a party scheming to avoid revealing unfavorable information for as long as possible, but not going so far as to deliberately and permanently conceal it. Obstructionism is a natural outgrowth of hide-and-seek discovery, and probably represents the most prevalent type of litigation abuse in the current regime. Far too numerous and varied to catalogue, obstructionist tactics have the coherent purpose or knowing effect of not only misleading, burdening, delaying, restricting, and otherwise impeding disclosure of unfavorable discoverable matter, but also exhausting the requesting party's economic resources to pursue fruitful lines of analysis and inquiry to find the evidence. However, despite the aim to impede revelation of the information, the responding party is willing (albeit begrudgingly) to disclose it – if and when tracked down, cornered, and tagged by the requesting party or court.

The reformed process should greatly reduce the incidence of obstructionist abuses. Its most powerful counterforce against obstruction, as with other forms of opportunism, is the pretrial record created by summary-judgment-proof pleading reports, which puts potentially victimized courts and parties in the well-informed position to effectively detect and sanction misbehavior.

The stonewalling, obfuscation, and other common varieties of obstructionism in *Haeger* make this case a useful example of the principal defects in the current discovery regime and structural advantages of the reformed process that renders it less vulnerable to abuse. In seeking to avoid disclosing its G159 test results, Goodyear deployed (1) opaque and unspecified boilerplate objections of irrelevance, overbreadth, and burdensomeness; (2) evasive responses consisting of half-truths, befogging quibbles over semantics, and obdurate refusal to comply with production requests that failed to specify tests by bureaucratically, technically, and scientifically precise types and titles; and (3) diversionary partial disclosures creating the illusion that all existing evidence had been produced. Ultimately, Goodyear's obfuscations succeeded in preventing plaintiffs from finding not only the heat-rise report it subsequently disclosed in another G159 case, but also a number of other reports concerning the tire's durability (which Goodyear was never compelled to reveal in any G159 case and disclosed only during the *Haeger* sanctions proceedings, "***apparently by accident***"[52]).

Goodyear's "success" was largely due to the problematic structure of discovery. The current regime forces plaintiffs to play the adversarial hide-and-seek discovery game that leaves them and the court with the burden, but bereft of information needed, to expose and overcome defendant's obstructionist scheme. Thus as the plaintiffs flailed about in the dark for clues of hidden test evidence, Goodyear was free to evade detection behind smokescreens of seemingly plausible, but really unsupportable, objections. Meanwhile, the court "refereed" the game on the fly without the information required to make reliable calls.[53]

More particularly, lacking knowledge of the availability, identity, and location of what they were seeking, plaintiffs had no alternative but to generally request production of all "[t]esting documentation."[54] The generality of these requests allowed Goodyear to "respond" with "boilerplate" objections and without disclosing any of the unfavorable discoverable matter. Even though in the early phase of discovery, plaintiffs clarified their defect theory as centering on overheating, Goodyear consistently managed to bury the heat-factor issue and

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[52] *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1241 (9th Cir. 2016) (emphasis in original).

[53] *Haeger,* 137 S. Ct. at 1184.

[54] *Haeger,* 813 F.3d at 1238.

refocus discovery requests and disputes exclusively on speed. For example, when the court spent a few minutes inquiring about any outstanding production requests for G159 tests, Goodyear quickly narrowed and diverted discussion to a previously requested, but as yet undisclosed, highway speed report. With the record consisting of little more than the complaint's mere allegation that the tire was "defective" for motorhome use at highway speeds, plaintiffs' counsel was unable to redirect the court's attention to the heat factor. As a result, the judge's only order directing disclosure concerned the highway speed test, which, as noted above, was already publicly available from DOT.

Despite plaintiffs' discovery efforts including oral deposition of Goodyear's chief expert and Rule 30(b)(6) witness, the G159 heat-rise test never would have surfaced were it not for its disclosure in a later G159 case. According to Goodyear, it felt compelled to disclose the test there because the plaintiff *specifically* requested the test by subject or name. This suggests that had the plaintiffs in *Haeger* only known the correct passwords, they would have obtained not only the heat-rise report, but also reports of the various other technically coded and named tests — including bead durability, crown durability, W16, W64, G09, and L04 — that were never disclosed in any case before being *accidentally* revealed in the sanctions proceeding.

Had *Haeger* arisen under the reformed process, Goodyear would have been obligated to affirmatively and fully disclose all discoverable matter immediately in its responsive pleading report. Their disclosures would provide all relevant information relating to plaintiffs' defective design claim. Pursuant to the affirmative disclosure mandate in the reformed process, Goodyear, without any plaintiff request or court order, would be obligated to correct the information asymmetry regarding G159 performance reports and test data by producing all of it, heat-rise and otherwise.

Goodyear would expect that plaintiffs' summary-judgment-proof pleading report complaint on the design-defect claim, among others, would "corner" it into confessing the test evidence. It is reasonable to surmise that the complaint would present a multi-dimensional evidentiary as well as legal showing, crafted both to establish the trial-worthiness of their case and to close off possible obstructionist routes for Goodyear's evading the affirmative disclosure mandate. Thus in excluding non-defect causes, the pleading report complaint would proffer plaintiffs' affidavits, police accident scene and forensic investigations, and other

evidence regarding the motorhome's pre-accident speed, load, usage, performance, and of course, the before and after condition of its failed and other G159 tires. Also, it would present reports of one or more experts explaining the tire's design, manufacturing, and marketing, with specific focus on the heat-rise theory of its defect. These experts would substantiate their opinions based on general and tire-safety product design principles, DOT records, published, peer-reviewed heat-factor and other tire-safety studies, and possibly data from plaintiffs' self-financed tests. In addition, expert affiants with knowledge of the tire manufacturing industry would explain the state-of-the-art in tire-safety design and testing, particularly homing in on heat-rise problems from mismatched use of light truck tires in heavy, full-sized motorhomes and from such compounding factors as motorhomes traveling at highway speeds and on Arizona's hot road pavements in mid-summer. It is also likely that the expert evidence would identify the bureaucratic, technical, and code names for some or all of the tire-industry durability tests. Precluding Goodyear from attempting to escape the disclosure mandate, the pleading report complaint would specify and substantiate defendant's asymmetric control over their safety-test reports, data, and related information.

To assess the relative effectiveness of the reformed process in detecting and deterring abuse, we consider more particularly scenarios of some obstructionist options that Goodyear exploited in *Haeger*. We start from the perspective of the basic structural difference in the disclosure mandates of the rival processes. It is clear that the current regime licensed Goodyear's general obstructionist (as opposed to concealment) strategy of keeping its tests secret and putting the onus to hunt around for them, more or less blindly, on plaintiffs and at their behest, the court. In outlawing obstructionism, the reformed process would mandate Goodyear to affirmatively and fully disclose all of its test information. Even though this structural difference from the current regime is theoretical, the reformed process mandate is not aspirational; it will make a major difference in practice. Many, and perhaps most lawyers practice obstructionism in the belief they are playing by the adversarial hide-and-seek rules of the game; the reformed process removes that justification.

Beyond changing lawyers' mindset about obstructionism, the teeth in the reformed process should deter them from cheating. Had *Heager* been litigated in the reformed process, the mandate for affirmative and full disclosure would have "cornered" Goodyear from multiple directions. To begin with, Goodyear would be confronted with the above described pleading report complaint that would

probably make a summary-judgment-proof case on all elements of plaintiffs' design defect claim and certainly on all elements unaffected by asymmetric information regarding the G159 tests and other discoverable matter. With the plaintiffs' summary-judgment-proof showing on the design-defect claim demonstrating the nature and relevance of the test evidence, the well-informed court could, if called upon to deal with a recalcitrant Goodyear, spell-out the terms of compliance and the consequences of non-compliance. Goodyear, in short, would see no option but to respond affirmatively and fully in a pleading report that comprehensively answered plaintiffs' complaint, including by revealing all G159 tests.

Yet, judicial policing of pleading report responses may be unnecessary in many cases. Pressure to disclose asymmetric information such as the G159 tests would arise internally, as the reformed process disclosure mandate would confront the responding party with the choice between pursuing an obstructionist strategy, say of delay, and forfeiting advantageous procedural and substantive options. The pressure, in essence, results from the basic structural difference in disclosure mandates for correcting asymmetric information problems: the burden falls on the initiating party in the current regime and on the responding party in the reformed process. Thus in the reformed process, the responding party would be precluded from obtaining summary judgment for plaintiffs' failure to present sufficient evidence on an element of their design defect claim were the prejudicial gap in the record related to an asymmetric information problem. For example, Goodyear could not obtain Rule 56 review of the sufficiency of plaintiffs' proof of the foreseeability of a G159 heat-rise risk without disclosing everything it knew about the tire's durability and performance, including existing test information. Similarly, unless it comes clean on the tests, Goodyear would have to sacrifice the state-of-the-art defense, which manufacturers regard as one of the most important hedges against liability on design defect claims. If Goodyear were successful in avoiding disclosure of evidence relating to G159 tests prior to trial, it would be barred from contending for a jury finding against the plaintiff on foreseeability or state-of-the-art questions; indeed, it might even be exposed to a jury finding of recklessness and liability for punitive damages based on the evidentiary gap on testing.[55]

[55] Informal litigation dynamics set in motion by the affirmative disclosure mandate would enhance reformed process efficiency as well as reliability benefits in many cases. Thus the pressure on Goodyear from foreclosure of its Rule 56 defense option and assiduous judicial

In furthering its obstructionist goals, Goodyear fended off plaintiffs' requests for test evidence for years with unsupported boilerplate objections to relevance, burden, and overbreadth. Defendant's strategy would stand little chance of succeeding in the reformed process. Of course, the current regime does not approve the type of misconduct; it is just that courts lack sufficient information to stop it. As the foregoing shows, summary-judgment-proof pleading reports provide the key to effective judicial policing of obstructionism. Well versed by the summary-judgment-proof showings in the pleading report complaint in support of the design-defect claim, the court would emphatically dismiss the credibility of both Goodyear's objections and its lawyers.[56]

3. Concealment

In contrast to obstructionism, a party engaging in concealment intends never to reveal relevant evidence – usually the most pertinent, damaging information in the case – however directly an opposing party requests or court orders its disclosure. Other opportunistic options, certainly obstructionism and possibly extortionate tactics, may be employed to facilitate the illegal scheme. But, in the end, the party will barricade the information behind a wall of lies, fake bureaucratic complexities, and sworn falsehoods by craven and mercenary lawyers – and if need be, destroy it. Lawyer perfidy of this type is not just the stuff of a John Grisham thriller; all too many detected cases, implying a far greater number of undetected ones, confirm the reality of this professional pathology. The fraud Goodyear's lawyers perpetrated on the court and plaintiffs in *Haeger* represents only a recent, particularly flagrant, but hardly unique example.[57]

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commands and policing would leave it little choice but to quickly, and indeed, "voluntarily" disclose the test evidence, including privately in confidence before time expired for filing the responsive pleading report. Not doing so would signal the incriminating nature of the evidence, prompting plaintiffs to raise their settlement demand accordingly.

[56] Similarly, the court would and should reject any objection that collecting and evaluating the test evidence imposed an undue burden. Indeed, such test data and reports constitute the paradigmatic type of information that institutional parties like Goodyear would or should have generated, evaluated, and maintained in an orderly accessible manner *ex ante* in the normal course of assuring that their products, projects, and other activities comply with and can be held accountable to the law. Thus marginal costs of producing discoverable matter in any given case should be negligible.

[57] *See e.g.*, Cade Metznov, Judge Tells Uber Lawyer: 'It Looks Like You Covered This Up,' N. Y. Times (Nov. 29, 2017) (referring to confidential information volunteered by the U.S. Attorney, court rebukes Uber lawyers on eve of a trade-secrets trial for deliberately concealing

Neither model of discoverable matter disclosure – notice-plausibility pleading and full-scale discovery in the current regime nor pleading reports in the reformed process – provides a cure-all for concealment. There is good reason to believe, however, that the reformed process will produce better results.

The key again is well-informed parties and courts. Short of a whistle-blower or independent monitoring of the party's legal maneuvers, only good detective work by potential party and judicial victims stands a chance of recognizing the scheme, piercing its protective shield of fabrications to find what has been hidden (or destroyed) and where, and punishing the wrongdoers. Doing this work well requires possessing a great deal of concrete information about the case. The scheme's targets must be alert to their exposure to fraud, specifically regarding what, how, and where evidence is likely to be concealed. And, they must be prepared to recognize evasive, deceptive, and contradictory representations, unusual and suspicious activity, and other telltale signs of concealment encoded in the particular case context.

Hide-and-seek discovery is generally not up to this task; indeed, it facilitates rather than hinders concealment schemes.[58] The reformed process is far superior. With parties and courts having timely access to a pretrial record comprised of summary-judgment-proof pleading reports, providing focused, detailed, developed, and reliable information, the reformed process should prove substantially more effective in detecting and deterring concealment.

The informational advantage of the reformed process can be illustrated by comparing its capacity to the actual performance of discovery in ferreting out Goodyear's concealment scheme in *Heager*. Suppose that in its response to the asymmetric information problem specified in plaintiffs' pleading report, Goodyear

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damaging evidence and the company for using computer systems to destroy intra-firm communications).

[58] The risk of concealment is often invoked in opposing cutbacks to full-scale discovery. However, stumbling across concealed evidence in hide-and-seek discovery is a socially problematic mode of detection. Even if rummaging through a mass of records might by chance turn up the mythical "smoking-gun," the costs of such sweeping, untethered searches would likely swamp the probative benefits of the seized evidence. Also, it would do little to deter concealment. If the concealment scheme were any good, its cover-up would be virtually infeasible to penetrate by discovery.

filed an expert's affidavit that represented essentially what the expert and Rule 30(b)(6) witness actually testified in oral deposition: "I've been told by those in charge of releasing the tire that a number of different test procedures were run on it. But I don't presently have any in my possession that I can attach to this affidavit, and I don't believe any are still available."[59] Apparently, in the helter-skelter of the discovery process in which the pretrial record is a work-in-progress, the *Haeger* trial court was left with too little information to closely examine and probe these representations. As a result, the judge, as well as plaintiffs' counsel, failed to notice let alone correct the critical ambiguities, indeed, substantial gaps in the expert's statements, as well as conflicts between his representations intimating that he and certain Goodyear employees had previously possessed the tests and had possible information about their whereabouts and results and its lawyers' flat denial of their existence and knowledge about them. Therefore, they ultimately accepted his representations that no test reports existed except for the two on speed that were publicly available and had previously been produced.

In the reformed process, by contrast, the trial judge would have a pretrial record comprised at the least of the summary-judgment-proof pleading report complaint on key if not all elements of the design defect claim. Possessing knowledge derived from that record, the judge surely would appreciate the crucial nature and importance of the tests, recognize the ambiguities and gaps in the expert's representations concerning their existence, and direct Goodyear to rectify the defects. The court could order Goodyear – based on its corporate knowledge, not the witness's personal beliefs – to file a supplemental report identifying "those in charge of releasing the tire" and the "different test procedures [that] were run on it," fully answering the question whether the test information exists, and if so producing it forthwith. The court might also censure and fine Goodyear for its prevarications. The expert's evident artifice, however, could move the court to take a different, more forceful approach to deterring opportunism. For example, the judge could authorize a policing investigation, employing plaintiffs' targeted discovery and/or a magistrate's or special master's inquiry and taxing defendant with the costs.[60]

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[59] Paraphrasing deposition transcript quoted in *Haeger v. Goodyear Tire and Rubber Co.*, 906 F. Supp.2d 938, 952 (D. Ariz. 2012).

[60] When effective oversight requires more time and expertise, the presiding judge could appoint an expert special investigator vested with powers to subpoena witnesses for interrogation and

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Preventing concealment and other forms of opportunism will require courts to dynamically and decisively exploit the superior structural and informational means provided by the reformed process for enhanced enforcement of the law. This commitment must begin with taking the problem more seriously. Strange to say this, but stranger still is what prompts it: the Supreme Court's reaction of resignation bordering on indifference to the nefarious conduct of the defense lawyers in *Heager*. Contrary to the Court's characterization, the case did not involve merely "contentious discovery battles."[61] Goodyear's lawyers, as the trial judge meticulously documented and court of appeals confirmed, perpetrated outright "fraud and deceit … on the district court."[62]

IV. Conclusion

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documents for inspection and to make findings of fact and recommendations for sanctions, if any, for final decision by the court. If the problem calls for an even stronger mode of investigation, the court could report the matter to prosecutorial authorities who could seek search warrants, including authorization for examining lawyer files. See e.g., Jack Ewing & Bill Vlasic, *German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry*, N.Y. TIMES (Mar16, 2017).

This is not to ignore the reality of the difficulty and cost of detecting concealment or any deliberate, concerted opportunistic schemes. Law enforcement theory teaches that effective countermeasures include recalibrating the investment in policing by lowering the costs of detection, while raising the severity of punishment to maintain deterrence levels. As an example, courts could randomly authorize targeted investigation by an expert special master for cases that by nature or by trip-wire alarms manifest the need for closer scrutiny. *See* Robert J. Jackson, Jr. & David Rosenberg, *A New Model of Administrative Enforcement*, 93 VA. L. REV. 1983 (2007). If the random inquiry uncovers misconduct, deterrence requires offsetting the probability of wrongdoers escaping detection by increasing the severity of sanctions, including professionally disciplining the offending individual lawyers and their law firms. We note that, even though the trial court in *Heager* ordered the attorneys responsible for concealing evidence, together with their firms and Goodyear, to reimburse $2.7 million of plaintiffs' total attorney's fees, the Supreme Court, going against the lessons of law enforcement theory, cut the fee-award by around $2 million to reflect only the fees plaintiffs would not have incurred but for the misconduct. And, even though the trial court recognized the "unfortunate professional consequences that may flow from the [fee-award] Order," it appears on last check that both lawyers remain members in good standing of their respective state bars.

[61] *Haeger,* 137 S.Ct. at 1184

[62] *Haeger*, 813 F.3d at 1233.

The foregoing makes the social welfare case for the superiority of the reformed over the current pretrial process. The fundamental changeover from hide-and-seek discovery to mandatory affirmative and full disclosure of discoverable matter in pleading reports directly reviewable under Rule 56 should greatly enhance both the reliability of pretrial records and cost-effectiveness of producing them. This change should increase the rate and quality of merits-based adjudicative and settlement decisions, with resulting deterrence and other social benefits from civil liability.

The question remains: what are the chances of these analytically projected advantages proving out systemically in the federal civil pretrial process? To our knowledge, there is no empirical study addressing or particularly relevant to answering this question. Such an inquiry lies beyond the limited aims of this essay in introducing the basic conceptual design of the reformed process.

However, our proposal is not without significant precedent in practice. Examples include some U.S. and several major foreign jurisdictions that employ affirmative disclosure mandates more or less resembling the key facets of our proposal. These litigation-tested systems indicate the functional utility and operational viability of the reformed process. For illustration, we present a sampling of these systems in groupings, first U.S., then foreign, that reflect the relative extent to which their affirmative disclosure mandates displace party- (as opposed to court-) directed discovery.[63]

Remarkably, there is a federal pretrial process in actual practice that closely resembles but was developed independently from our proposal for mandatory affirmative, full-disclosure: "Mandatory Initial Discovery" pilot projects in the District of Arizona and the Northern District of Illinois. Launched in 2017 for a run of three years, these pilot projects were developed and designed by the Federal Judicial Conference to test the benefits of requiring full disclosure of all relevant

[63] The reliance by U.S. jurisdictions on party-directed discovery to offset the adversarial slant and selectivity of the pleadings is frequently contrasted with court-directed discovery in foreign, particularly civil law systems. However, the divergence is not as great as commonly believed. Federal and most other U.S. courts play an active (we dare say, inquisitorial) role, for example in Rule 16 conferences, in motivating parties to present their respective cases more accurately and completely. The extent to which a system employs court-directed versus party-directed "discovery" involves a tradeoff, which we note but cannot pursue here, between the benefits of courts devoting public funds to acquire publicly valuable information and costs of judges becoming enmeshed in the litigation and compromising their impartiality.

evidence and law prior to discovery and merits review under Rule 12 or 56.[64] In particular, unless excused by the court for privilege or another good and fully substantiated cause, the parties must initially disclose along with or soon following their pleadings all information and legal theories regarding specified discoverable matter "relevant to the parties' claims or defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims and defenses."[65] Thus the parties are instructed to disclose among other things, the names and contact information of everyone believed to possess "discoverable information" and a "fair description of the nature of the information," everyone to whom the party has given a written or recorded statement, a list of material subject to Rule 34 production, and generally, a "state[ment of] facts relevant to [each claim or defense] and the legal theories upon which it is based."

A close comparison of the Mandatory Initial Discovery pilot projects and our proposal is not possible here. We note, however, the principal difference created by eliminating of Rule 12 merits review and subjecting each pleading report directly to Rule 56 review in the reformed process. The upshot is that the parties in our regime must make a summary-judgment-proof case on the law and evidence in their pleading report on all elements other than those specified and substantiated as affected by an asymmetric information problem. The result is not only to discipline the parties' pre-filing investigations and provide them and courts with better information to police against abuses, but also to enable resolution of more cases, more reliably on the merits. The pilot project disclosure mandates, by contrast, lack the focus, completeness, and substance that result from requiring parties to muster summary-judgment-proof showings at the start of the case. The combination of notice-plausibility pleadings and mandated initial disclosures of persons and records with potentially relevant information will in most cases simply set the stage for discovery, albeit somewhat more targeted in nature pursuant to the court's case management order, diluting the disciplining and information

[64] These pilot projects are established by identical standing orders that expressly impose new "discovery obligations …supersed[ing] the disclosures required by Rule 26(a)(1) ..." *See*, Standing Order Regarding Mandatory Initial Discovery Pilot, https://www.ilnd.uscourts.gov/_assets/_documents/MIDP%20Standing%20Order.pdf.

[65] Parties are relieved of this requirement if the court approves their written stipulation foregoing the option to conduct discovery in the case.

generating advantages of the affirmative mandatory disclosures. A number of potentially meritorious cases will still also be preemptively dismissed under the *Twomby-Iqbal* rule.

In addition to these pilot projects, two other U.S. jurisdictions supply precursors for the affirmative, full-disclosure mandate in our reformed process proposal.[66] Thus Colorado recently adopted a mandatory disclosure rule designed along the lines of the pre-discovery requirements of FRCP Rule 26(a)(1) that were in effect between 1992 – 2000.[67] Pursuant to CO. R. C. P. Rule 26(a)(1), the parties, "without awaiting a discovery request … whether or not supportive of the disclosing party's claims or defenses … [must provide identifying, contact, and content related descriptions of] each individual likely to have discoverable information," and records, documents, and "other evidentiary material" that are "relevant to the claims and defenses of any party."[68] The avowed aim of this provision is to minimize the use of discovery. The greatest displacement of discovery by affirmative disclosure mandate is found in the congressional design for the U.S. Patent Trial and Appeal Board adjudication of "inter partes" claims of patent invalidity.[69] To commence the pretrial process ("Preliminary Proceeding"), petitioners must particularize and substantiate with exhibits, affidavits, and expert opinions their entire legal and evidentiary case in chief for invalidating the patent.[70]

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[66] Courts have also used targeted discovery to augment the record for Rule 12 merits reviews, *see e.g., Swanson v. Citibank NA*, 614 F.3d 400, 412 (7th Cir. 2010)(Posner, J. concurring). We also note that a number of states require fact pleading to reduce reliance on full-scale discovery. *See e.g.*, Cal. C.C.P. §425.10 (requiring complaint to contain "statement of the facts constituting the cause of action"); *Buckler v. Hoffman*, 550 So. 2d 68 ((Fla. Dist. Ct. App., 5th Dist. 1989) (interpreting Fla. R. Civ. P. §1.110(b) to require pleading of facts with particularity sufficient to establish a factual basis for inferring the ultimate fact alleged); *Huang v. Claussen*, 936 P.2d 394 (Or. App. 1997) (applying OR R. C. P. 18 to require sufficient factual basis for inferring the ultimate fact alleged).

[67] *Compare* Fed. R. Civ. P. 26(a)(1) (1993) *with* Colorado R. Civ. P. 26(a)(1).

[68] For background on adoption of this rule, *see* Richard P. Holmes, *Proposed New Pretrial Rules for Civil Cases – Part I: A New Paradigm*, 44-APR Colo. Law. 43 (2015).

[69] Inter Partes Review, 35 U.S.C. §§311, 312; 37 C.F.R. §42.104.

[70] Under §3112((a)(3) the petition must show with "particularity … the grounds … and the evidence that supports the grounds for the challenge … including (A) copies of patents and

Among the foreign jurisdictions, common law systems employ the most extensive mandates for affirmative disclosure combined with tightly limited discovery.[71] For example in Canada, as a rough common denominator across its nine common law provinces, the pretrial process mandates the parties to present a complete statement of material facts in their pleadings and, by close of the pleading stage, to automatically disclose all relevant documents.[72] Normally, the availability of discovery is restricted to the post-document disclosure stage and to party examinations.[73]

The affirmative disclosure mandate in England and Wales more closely resembles our proposal in demanding production of all, unfavorable as well as favorable, evidence. Thus prior to commencing suit, the claimant must notify the prospective defendant of the nature of the case, and after that both parties must exchange the relevant information. At the outset of litigation, the complainant must provide the defendant with the "particulars of the claim," including a concise statement of the facts on which the claim is based. In response, the defendant must state the factual particulars as far as they differ from the complainant's. Further, the parties must supplement their pleadings automatically with production of all relevant documents, including not only those on which the party relies, but also those that "adversely affect his own case," or "support another party's case."[74]

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printed publications … (B) affidavits or declarations of supporting evidence or [expert] opinions." Once trial commences, to "continually narrow[]" its scope, the parties are allowed to engage in "routine" and cross-examination related discovery, including use of depositions and other FRCP Rule 26 methods. 77 Fed. Reg. 48761. *See, Oil States Energy Services v. Greene's Energy Group*, – U.S. – (2018) (sustaining constitutionality of assigning patent validity trials to a non-Article III court).

[71] France is an outlier in general, as it relies primarily on judicial investigation to prepare cases for trial. *See*, HELEN HERSHKOFF ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 222 (2007).

[72] Linda S. Abrams & Kevin P. McGuinness, CANADIAN CIVIL PROCEDURE LAW (2nd ed. 2010); Todd L. Archibald *et al*., DISCOVERY: PRINCIPLES AND PRACTICE IN CANADIAN COMMON LAW (2nd ed. 2009).

[73] Although Quebec is a civil law jurisdiction, it departs from that tradition in adopting the other provinces' pleading requirements, and even more strikingly in following the U.S. model of discovery. *See* http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-25.01.

[74] *See* Civil Procedure Rules, 31.6.

Germany and civil law systems patterned on the German process, like the Japanese, hew to an adversarial model of the affirmative disclosure mandate that limits the parties' obligation to revealing supporting information, and relies on judicial inquisition to secure the damaging matter. Pleadings must substantiate factual assertions with a designation of the evidence that proves the contention, and subsequently with parties submitting further legal arguments and evidentiary matter to supplement the pleadings during this "preparatory" phase of the litigation.[75] Similar to our proposal for correcting information asymmetries, when a party bearing the burden of factual allegation lacks detailed knowledge of certain relevant facts, the adversary with such knowledge may be required to disclose the information.[76] Judges, on their own motion or upon party request, can intervene in the preparatory phase to order production of records, appoint and elicit opinions from experts, and direct witnesses to submit written statements of the prospective oral testimony.[77] Breaking-away from the inquisitorial, civil law tradition in 1990, Italy requires pleadings to affirmatively and fully state the specific facts at issue and legal arguments and disclose all documents containing or detailed description of the substantiating evidence – favorable or unfavorable.[78]

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Putting aside the shameful evidence suggesting that lawyers will disobey the rules, the source of the strongest headwinds against adopting the Mandatory Initial Discovery rule, or some more demanding affirmative disclosure mandate, let alone our proposal, is the profession's turbocharged adversarial ethos. Its postulates of zealous advocacy spur lawyers to elevate guarding client interests above that of

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[75] HELEN HERSHKOFF ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 204-06 (2007).

[76] *See*, Peter L. Murray & Rolf Sturner, GERMAN CIVIL JUSTICE 231 n. 211 (2004), and generally for incisive analysis of German civil system policy, procedures and practice.

[77] This process of judicial development of the record continues in the trial phase, during which the court takes plenary control over examining witnesses, scrutinizing documents, and otherwise developing the legal and evidentiary record for final judgment.

[78] Simona Grossi, *A Comparative Analysis between Italian Civil Proceedings and American Civil Proceedings before Federal Courts*, 20 IND. INT'L & COMP. L. REV. 213 (2010). The court may also intervene pretrial to compel disclosure and conduct examination of evidence.

everyone else, including the public generally.[79] Manifestation of its perverse influence can be seen in Justice Scalia's dissent in Amendments to the FRCP of 1993,[80] opposing the Court's acceptance of the short-lived forerunner of the Mandatory Initial Discovery rule. In Scalia's view, the precept of zealous representation is offended by obligating lawyers to find and disclose "information damaging to their client's interests" in service of their adversary's. This "new regime," he concluded, "does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decision-maker."

Though pitched against expanding the required pre-discovery disclosures, Scalia's argument implicated the validity of discovery in general. Compelling lawyers to comply with a standard discovery request, such as requiring production documents under Rule 34, can jeopardize a client's interests and advance the adversary's just as much as producing damaging documents in compliance with the requirements of Rule 26(a)(1). But whatever Scalia's true target, his argument fails because the presumed conflict between adversarial litigation and discovery of damaging information is spurious. The primary function of discovery is to promote the goal of adversarial litigation, which as Scalia essentially recognized is to enable parties to develop more accurate and complete factual (and legal) records before the court, thereby facilitating its making reliable decisions on the merits. Disclosure of all relevant information, however damaging some of it might be, is an inevitable byproduct of discovery fulfilling its central role in the "American judicial system." Accepting this proposition leaves only the question whether we should continue playing the game of hide-and-seek discovery to build pretrial records or employ the affirmative, full disclosure mandate to get the job done straightaway, more cheaply, quickly, and reliably.

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[79] *See e.g.*, WRIGHT, MILLER ET AL., 5 FED. PRAC. & PROC. CIV. § 1219 (3d ed.)(warning lawyers that "overpleading" legal theories "might render the complaint vulnerable to attack by pretrial motion should it show on its face that no claim for relief exists").

[80] *See Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 511 (1993)(Scalia, J, dissenting, joined by Justices Thomas and Souter).