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Chief Judge Michael B. Thornton
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Re: Proposed Tax Court Rule Changes

Dear Judge Thornton,

This letter is submitted in response to the Court's solicitation of comments, concerns, and proposals in connection with revising the Tax Court Rules of Practice and Procedure ("the Rules").

I write as the former Director of the Cardozo School of Law Tax Clinic, where I represented low-income taxpayers for over 10 years. For the benefit of such taxpayers who file *pro se* petitions, I ask this Court to clarify (either by an amendment to the Rues or by the issuance of a T.C. opinion) the current legal standard employed by this Court in ruling on motions to dismiss for failure to state a claim upon which relief can be granted. As will be discussed below, the "notice pleadings" rules that have been applied in this Court since at least 1957 have been supplanted -- at least since 2009, in the district courts and the Court of Federal Claims -- by a "plausibility pleading" standard. Yet, this Court has not clarified whether the notice pleading or plausibility pleading standard applies when this Court rules on motions to dismiss for failure to state a claim upon which relief can be granted. It is time for the Court to clarify this issue. Since such motions are generally made by the IRS against *pro se* taxpayers who wouldn't even know what standards apply, and since the IRS may not specify which standard should apply when making a motion, if the Court does not clarify its rules, then it will have to be a Judge of this Court who will have to raise the standard issue *sua sponte* in an opinion ruling on the IRS motion.

For the reasons stated below, I call for the Court to reject plausibility pleading and retain notice pleading – preferably by a clarifying sentence in its Rules.

FRCP Background

In Conley v. Gibson, 355 U.S. 41 (1957), black railroad employees who were discharged or demoted (and whose former jobs were filled by whites) brought an action in district court against their union and the unit of their union that had been designated their exclusive bargaining agent, seeking a declaratory judgment, injunction, and damages. The black employees alleged that their discharge or demotion violated a

collective bargaining contract between the railroad and the union, and that the union and its unit had violated the Railway Labor Act by failing to give them the protection furnished white employees. The district court dismissed the employees' complaint on the ground that, under the Railway Labor Act, the National Railroad Adjustment Board had exclusive jurisdiction of the controversy. However, the Supreme Court found that the district court had jurisdiction. The Supreme Court then reached out to decide a FRCP 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted that had also been filed in the case.

FRCP 8(a)(2) provides that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief". The defendants in Conley v. Gibson argued that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal was therefore proper. The Supreme Court replied:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. [355 U.S. at 47-48 (footnotes and citations omitted)]

Earlier in Conley v. Gibson, the Court had stated that "a complaint should not be dismissed for failure to state a claim [under Rule 12(b)(6)] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Id., at 45-46

Fifty years later, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), was a putative class action antitrust suit brought by phone and Internet subscribers against the surviving regional Bell Telephone companies after the breakup of AT & T. In Twombly, the plaintiffs alleged in their complaint a conspiracy in violation of section 1 of the Sherman Act – arguing that the companies had behaved as if there were an agreement among them – i.e., certain parallel behavior. The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." Id. at 553. The Supreme Court expressed two major concerns about antitrust actions: "that proceeding to antitrust discovery can be expensive"; id., at 558;

and that there is an *in terrorem* effect of such suits that can lead to better settlements for the plaintiffs than merited. Id. The Court stated:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).
>
> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. [Id., at 555-556 (footnotes and citations omitted)]

The Court went on to make some observations on Conley v. Gibson, as follows:

> Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in Theatre Enterprises, Monsanto, and Matsushita, and their main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in Conley v. Gibson spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read Conley in some such way when formulating its understanding of the proper pleading standard.
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> On such a focused and literal reading of Conley's "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. It seems fair to say that this approach to pleading would dispense with any showing of a "'reasonably founded hope'" that a plaintiff would be able to make a case; Mr. Micawber's optimism would be enough. . . .

> *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. [Id., at 560-563 (footnotes and citations omitted)]

Ashcroft v. Iqbal, 556 U.S. 662 (2009), involved a complaint brought in district court by a Muslim Pakistani citizen who had been arrested and incarcerated in New York after September 11, 2001 and subjected to what he alleged was harsh treatment in violation of his First and Fifth Amendment rights. In addition to naming 51 others, his compliant named the former Attorney General and Director of the FBI, alleging that "each knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest". Id. at 669. The suit was one brought on account of constitutional violation under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), which allows a nonstatutory suit for such violations against federal actors in limited circumstances. The Attorney General and FBI Director had claimed qualified immunity and had also moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct.

In Iqbal, the ultimate holding of the Court was that the complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination against the officials. The Court directed that the case be remanded to the Court of Appeals to decide in the first instance whether to remand to the district court so that Iqbal could seek leave to amend his deficient complaint. In reaching the conclusion that certain allegations in the complaint "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim"; 556 U.S. at 681; and were "conclusory and not entitled to be assumed true"; Id.: the Supreme Court clarified that Twombly's plausibility pleading standard was not merely an antitrust pleading standard: "Our decision in Twombly expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." Id., at 684 (citations omitted). To Iqbal's argument that the court below could limit or "cabin" discovery to the other defendants initially, the Supreme Court stated:

> We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. [Id. at 686]

Since district courts operate under the Federal Rules of Civil Procedure -- and there is no exception to those rules for tax cases -- complaints in tax refund and other tax-related suits in district courts since 2009 have been tested under the Twombly/Iqbal plausibility standard. See, e.g., Sarmiento v. United States, 812 F. Supp. 2d 1137 (EDNY 2011), aff'd in part and rev'd in part 678 F.3d 147 (2d Cir. 2012).

The Court of Federal Claims – which also hears tax refund suits – has its own Rule 12(b)(6), and the Twombly/*Iqbal* plausibility standard has been held to apply to complaints in that court, as well. Laguna Hermosa Corp. v. United States, 671 F.3d 1284, 1288 (Fed. Cir. 2012).

The Twombly/Iqbal plausibility pleading regime has already occasioned an outpouring of law review articles pro and con. See, e.g., Alexander A. Reinert, "The Costs of Heightened Pleading," 86 Ind. L.J. 119 (2011); Victor E. Schwartz & Christopher E. Appel, "Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal," 33 Harv. J.L. & Pub. Pol'y 1107 (2010); Arthur R. Miller, "From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure," 60 Duke L.J. 1 (2010); Douglas G. Smith, "The Evolution of a New Pleading Standard: Ashcroft v. Iqbal," 88 Or. L. Rev. 1053 (2009); Kenneth S. Klein, "Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on the Unconstitutional Shores," 88 Neb. L. Rev. 261 (2009).

A majority of the few state Supreme Courts to have considered the issue to date have rejected moving to the newer plausibility pleading standard. They long ago adopted the "notice pleadings" regime of Conley v. Gibson in interpreting their own state rules for motions to dismiss for failure to state a claim on which relief can be granted, and they see insufficient reason in their state court systems for making a similar change. Brilz v. Metro. Gen. Ins. Co., 285 P.3d 494, 500 (Mont. 2012); Hawkeye Foodservice Distr. v. Iowa Educators Corp., 812 N.W.2d 600, 607-609 (Iowa 2012); Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 537 (Del. 2011); Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 427-437 (Tenn. 2011); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863-864 (Wash. 2010); Roth v. Defelicecare, Inc., 700 S.E.2d 183, 220 n. 4 (W.Va. 2010). But see, Doe v. Bd. of Regents, 788 N.W.2d 264, 278 (Neb. 2010).

Tax Court Rules and Practices

The Tax Court does not have a rule exactly mirroring FRCP 8's requirement of a "short and plain statement of the claim". However, Rule 31 provides, in part:

(a) Purpose: The purpose of the pleadings is to give the parties and the Court fair notice of the matters in controversy and the basis for their respective positions.

(b) Pleading To Be Concise and Direct: Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading are required.

In the case of deficiency actions (the most common type of this Court's proceedings), Rule 34(b) provides that the petition shall contain, among other things, "clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency" and "clear and concise lettered statements of the facts on which petitioner bases the assignments of error."

Rule 40 provides that a defense of "failure to state a claim upon which relief can be granted" may be asserted either in the answer or in a motion. It is a little odd that this Court should have adopted this motion from the FRCP, when in fact the Rules nowhere require the pleader to state "a claim upon which relief can be granted". While the petitioner in this Court is told to provide a clear and concise assignment of every error committed by the Commissioner, that is not really the same thing as a complete, self-contained claim. Perhaps because of this slight, but significant semantic difference, where the Commissioner moves to dismiss a petition for failure to state a claim upon which relief can be granted, the Tax Court's practice is to issue an order directing the petitioner either to file an amended pleading complying with Rule 34(b)'s language or file a written response to the motion. Bratcher v. Commissioner, T.C. Memo. 1996-252, aff'd per unpublished order, 116 F.3d 1482 (7th Cir. 1997); Arredondo v. Commissioner, T.C. Memo. 1996-185.

Nevertheless, a long time ago, this Court chose to interpret Rule 40 in conformity with FRCP 12(b)(6) and Conley v. Gibson's "notice pleading" regime. Conley v. Gibson has been cited by this Court in about 50 memorandum opinions when either applying Rule 40 or addressing other pleading issues. See, e.g., Richardson v. Commissioner, T.C. Memo. 1991-159

Since 2007, this Court has continued to apply the "notice pleading" regime to Rule 40. The most recent published opinion in which this Court cited Conley v. Gibson was Carskadon v. Commissioner, T.C. Memo. 2003-237.

Since 2003, this Court, while not directly citing Conley v. Gibson, has, on occasion, continued to cite other cases that rely on the same notice pleading standard and themselves cite Conley v. Gibson. Most motions for failure to state a claim upon which relief can be granted are ruled on by this Court in unpublished, nonprecedential orders. Since June 17, 2011, this Court has put those orders on its website and made them searchable. My research through those orders reveals that of the hundreds of such orders on motions to dismiss for failure to state a claim issued since then, only one has even cited Conley v. Gibson,[1] and indeed most such orders do not even indicate what standard is being applied. However, on occasion, the orders cite other cases indicating the standard. One such order was issued by Chief Special Trial Judge Peter Panuthos on September 15, 2011 in Baker v. Commissioner, Docket No. 10394-11. In that order, Judge Panuthos dismissed the petition in response to an IRS motion to dismiss for failure to state a claim, citing, in part, a Ninth Circuit opinion, Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995). Hicks v. Small itself cited another Ninth Circuit opinion, Love v. United

[1] Order in Kaye v. Commissioner, Docket No. 16383-13 (Nov. 1, 2013).

States, 915 F.2d 1242, 1245 (9th Cir. 1990), which quoted from Conley v. Gibson's notice pleading standard.

As far as I can tell, no published Tax Court opinion has ever discussed Twombly or Iqbal.[2] No unpublished orders searchable on the Tax Court's website have ever cited or discussed Iqbal. And only two unpublished orders searchable on the Tax Court's website have ever cited Twombly. See orders in Cozby v. Commissioner, Docket No. 2517-12 (July 11, 2012) (confusingly citing both Twombly and Hicks v. Small), and Whistleblower 22323-12W v. Commissioner, Docket No. 22323-12W (Aug. 14, 2013) (citing Twombly, but not indicating Twombly's standard).

Since a search of its website shows that this Court issues about 200 unpublished orders a year in response to motions to dismiss for failure to state a claim upon which relief can be granted, this Court's failure to tell the public whether it follows or rejects the plausibility pleading standards of Twombly and Iqbal is an unfortunate omission. Indeed, it is particularly troublesome, since such motions are made by the IRS in less than 1% of this Court's roughly 30,000 annual dockets, and, probably, nearly all of such motions are directed at petitions filed by *pro se* taxpayers. Such petitioners are unlikely to know that there are two alternate pleading standards that might be applicable to such motions and are usually not informed by this Court about what standard this Court is applying to their petitions. Reviewing Courts of Appeals also deserve a discussion of which pleading regime this Court applied when such a motion was granted.

Keeping Conley v. Gibson Notice Pleadings

I believe that the Tax Court should retain the notice pleading regime of Conley v. Gibson when deciding motions to dismiss for failure to state a claim upon which relief can be granted under Rule 40. Below are my reasons:

First, it is a little hard to figure out how to apply the plausibility pleading standard to a Tax Court petition: Would the plausibility standard require the dismissal of a petition that did not get beyond boilerplate in identifying each of the errors committed by the Commissioner? Would a petition have to state legal theories – something the rules currently do not appear to require? On the fact side, would such a standard require the dismissal of, say, an innocent spouse petition seeking equitable relief under sec. 6015(f) if the taxpayer did not allege facts going to each of the multiple factors normally considered by the IRS and the courts in making the determination?[3]

Second, district courts governed by the Federal Rules of Civil Procedure are courts of general jurisdiction. They handle all kinds of cases – antitrust, Bivens actions, shareholder suits, mass tort actions, the whole gamut of diversity suits, etc. Recent statistics show that *pro se* plaintiffs accounted for only 10.3% of the non-prisoner civil

[2] In an opinion involving a motion to dismiss for lack of jurisdiction, this Court did quote a passage from the taxpayer's brief that cited both Supreme Court opinions. However, this Court's opinion does not thereafter mention or discuss the Supreme Court opinions. Cross v. Commissioner, T.C. Memo. 2012-344 at *8.

[3] See the factors at section 4.03(2)(a) of Rev. Proc. 2003-61, 2003-2 C.B. 196.

filings in district courts for the fiscal year ending in September, 30 2014. See United States Courts, Table C-13 —U.S. District Courts –Civil Judicial Business (September 14, 2014), available at http://www.uscourts.gov/statistics/table/c-13/judicial-business/2014/09/30. So, the vast majority of district courts suits are filed by represented parties. Many of these represented suits have the potential of becoming discovery nightmares or ones merely brought to trigger nuisance settlements. Even if one subscribes to the notion that such suits need reining in as early as the complaint stage (a notion about which I am conflicted), the concerns about those types of cases do not extend to the Tax Court. The Tax Court is, by contrast, a court of very limited jurisdiction.

The Commissioner of Internal Revenue is the only defendant in each Tax Court case.

Tax Court cases are only on a very limited number of subjects – primarily the amount of tax, penalties, and/or interest that should be assessed; sections 6213(a) (deficiency jurisdiction) and 6404(h)(interest abatement jurisdiction); and tax collection issues; sections 6015(e) (innocent spouse jurisdiction) and 6330(d)(1) (Collection Due Process appeals jurisdiction).

And, probably 99% of this Court's cases brought are brought in response to IRS-issued notices,[4] so the IRS can control how busy it is with Tax Court cases and can prevent itself being overwhelmed. Indeed, it is hardly an original observation that a petitioner in the Tax Court is more like a defendant in a lawsuit – as if responding to the IRS' complaint (i.e., an IRS notice) – not the plaintiff that the Supreme Court was concerned about generating a doubtful suit in Twombly and Iqbal.

Next, there are not the kinds of discovery issues likely in this Court that were of concern to the Supreme Court in Twombly and Iqbal. Under FRCP 26(a), parties to a district court suit first engage in non-court-supervised disclosure – which can be expensive where there are a lot of potentially relevant documents. Then, the parties proceed to possibly rather extensive further discovery under FRCP 26(b). By contrast, the Tax Court Rules do not provide for formal "disclosure", and before any formal discovery may be had, Rule 70(a)(1) states that "the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication". This has led to the practice of Branerton letters and conferences in Tax Court cases before formal discovery may be had.

Discovery by deposition in district court cases – an often expensive process – has undergone some tightening over the years. For example, currently, under FRCP 30(a)(2)(A), a plaintiff may, without leave of the court, orally depose no more than 10 non-parties where neither the defendant nor the deponent wishes the deposition to take place. Yet, in Twombly, the Supreme Court chided the dissent: "It is no answer to say

[4] In rare cases, the taxpayer brings a Tax Court suit in the absence of an IRS notice, but even these are usually only brought when a predicate taxpayer filing was made with the IRS and the IRS simply failed to act – e.g., suit may be brought if the IRS fails to rule within a certain period under sec. 6015(e)(1) (innocent spouse) or sec. 7428(b)(2) (declaratory judgment on qualification for exempt status).

that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." 550 U.S. at 559 (citation omitted).

By contrast, under Rule 74(b)(3), even if both parties agree to a deposition, a non-party cannot be deposed without his or her consent without the party seeking the deposition first moving the court for an order to the proposed deponent to attend. Further, under current Rule 74(c), an order of a Tax Court judge is required to take the deposition of an objecting non-party in the absence of the parties' agreement, and is described as "an extraordinary method of discovery". Unlike the district courts in certain cases, the Tax Court is well-known for successfully policing excessive discovery requests.

Further, Tax Court formal discovery is usually something only sought by the IRS – and only in large-dollar cases or the rare cases of recalcitrant taxpayers refusing to cooperate with Branerton requests. It is in nearly all cases[5] the taxpayer – not the IRS -- who has all of the information and documents that may be relevant to the case. And where the taxpayer does not, Chief Counsel attorneys are usually quite willing to voluntarily comply with taxpayer requests for reasonably pertinent, non-privileged information and documents.

Another concern of the Supreme Court in Twombly and Iqbal was a plaintiff's suit involving a boilerplate-language complaint (i.e., one stating legal conclusions, but giving few facts), where a defendant would prefer to terminate the suit at a somewhat expensive nuisance settlement value – i.e., a settlement more reflective of the costs of discovery and trial than the chances of losing on the merits. By contrast, Tax Court cases are in nearly all cases ones in which a petitioner is not seeking money from the government. Rather, the reverse is usually true: The government is almost always the one seeking money from the taxpayer. The Tax Court does not have general refund suit jurisdiction. Under its deficiency jurisdiction, the Tax Court only may determine an overpayment if the taxpayer first petitioned the Tax Court in response to a notice of deficiency for the same year. Sec. 6512(b). And even where the Tax Court can find an overpayment (such as in a deficiency case or in an innocent spouse case under section 6015(e)), there is an upside limit on the overpayment based on (1) the amount of money that the taxpayer actually paid to the IRS before and (2) a no-more-than-multi-thousand-dollar deemed-paid amount from a refundable credit (such as the earned income tax credit under section 32). Thus, the government will not be subjected to multi-million-dollar claims in the Tax Court unless the government is being asked to return money a taxpayer previously paid to it – not remotely the situation in an antitrust or Bivens suit.

Finally, with its large staff of Chief Counsel attorneys, the IRS simply does not engage in nuisance settlements – paying out money simply to get rid of cases.

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[5] In Collection Due Process cases under section 6320 or 6330, the IRS possesses relevant documents – such as the administrative record – some of which (like the Appeals case activity report) have not been seen before by the taxpayer. Yet, I have never had any occasion where I have requested the entire administrative record in a CDP case informally and had the Chief Counsel attorney refuse to provide it.

Even if none of the above differentiated district court and Tax Court cases, there is – to my mind – one overriding reason why the Tax Court should retain the "notice pleading" standard: Almost 70% of the petitions filed in the Tax Court are filed pro se – i.e., without the assistance of a lawyer to help comply with any heightened pleading standard that might be imposed. A heightened pleading standard could give rise to thousands of *pro se* taxpayers being denied their ability to challenge an incorrect proposed tax assessment. If a deficiency petition were dismissed from this Court under Rule 40 for failure to state a "plausible" claim on which relief could be granted, that would be a decision on the merits against the petitioner; see sec. 7459(d) – treated as *res judicata* in all future court proceedings. This would be a disaster.

Conclusion

Whatever the merits of the Twombly/Iqbal plausibility pleading standard in the district courts, there is no good reason for this Court to adopt that standard for its own proceedings. Indeed, given this Court's limited jurisdiction, the absence of discovery abuses herein, and the huge numbers of *pro se* petitions that would potentially fail the plausibility standard – even if this Court gave *pro se* taxpayers a chance to fix their pleadings – there are very substantial reasons for this Court to retain the Conley v. Gibson "notice pleading" standard for evaluating whether a petition fails to state a claim upon which relief can be granted. It is overdue for this Court to clarify what pleading standard it is applying when the IRS currently makes such motions to dismiss. I would urge this Court to clarify that notice pleadings are still sufficient.

Sincerely,

Carlton M. Smith

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