A Plan for Reforming Federal Pleading, Discovery, and Pretrial Merits Review

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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 transferring 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 replaces Rules 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 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 postpleading 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

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merits—more cheaply, quickly, and reliably—thus increasing deterrence and other social benefits from the use of civil liability to enforce the law. Courts in this country, including "Mandatory Initial Discovery" pilot projects, launched by the Federal Judicial Center last year, and abroad are testing the benefits of affirmative-disclosure reforms that resemble what we propose in this Article.

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, discovery entails a high probability of producing 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 Article, 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

1. 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 ("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 prediscovery 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 Rules 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 to burden 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, 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 prefiling by settlement or default.

establishes an affirmative-disclosure mandate designed to sharply reduce the role of discovery, in essence by

- transferring the parties' burden of disclosing all discoverable matter, favorable and unfavorable, from discovery to the pleadings;
- eliminating Rule 12 merits review along with testing of 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 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; and
- restricting Rule 26 discovery, if any, to the postpleading 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 of employing civil liability to enforce the law.

Preliminarily, we provide an overview of the 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 Article to introducing the design concept and functions of our proposal, we will not undertake to elaborate 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

3. The "*Twombly-Iqbal* rule" refers to the Rule 12 merits review test derived from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (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).

Judicial Center to evaluate an affirmative-disclosure mandate that resembles, but was developed independently from, our proposal.[4]

I. OVERVIEW OF NEED AND PLAN FOR REFORM

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

Under the best of circumstances, discovery proves a cumbersome and drawn-out endeavor. But discovery's major obstacle to 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 from pursuing potentially fruitful efforts to enhance the reliability of pretrial records.[6]

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4. For further discussion of Mandatory Initial Discovery pilot projects, see *infra* Conclusion.

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.

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

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

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civil litigation overall. *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 & n.5 (2010) (estimating average expense of discovery equal to roughly fifty percent of litigation costs and ranging as high as ninety percent 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 Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1658–61 (2016) (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 litigation. *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 786 (2010) (explaining a study demonstrating "that discovery and overall litigation costs were largely proportionate to stakes, and that the stakes in a case were the single best predictor of overall costs"). This calming surmise is flawed. The study never sought to determine whether prohibitive expense rather than lack of necessity caused the parties to forego discovery. For the view that expense probably best explains most of these cases, see Marrero, *supra*, at 1657–58. Relatedly, the study's results are skewed by virtue of recording incurred, as opposed to expected, discovery expenses; in many cases, the parties—particularly defendants—may elect to pay a high price in settlement rather than an even higher one in discovery. *See* Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment*, 71 VAND. L. REV. 2117 (2018). 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 plaintiffs' attorneys taking (pre-expense-charge) percentages from settlements inflated by defendants' expected (possibly nuisance-value) discovery costs.

7. FED. R. CIV. P. 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 infra* Section III.B.1 (discussing the Court's rationale of *Twombly* pleading as protecting defendants from extortion).

forcing them to comb the haystack of materials at great expense, often in a futile search for a needle of useful information.

More generally, the parties' ability to consume discovery benefits without paying its full costs distorts their decisions regarding how and how much to use the process. Thus, requesters are encouraged to cast their discovery nets 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' expenses to prepare responses. Similarly, responders will be more inclined to adopt dumping and other costly antidisclosure 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 amplified by the parties' exemption from paying the costs that courts incur to supervise the process.

Discovery's susceptibility to be overused and gamed 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 a myriad of other discovery burdens to "extort" settlement concessions from each other. Although trial judges are supposed to prevent parties 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 objective is to increase net social benefit not solely by reducing the cost of producing pretrial records but by enhancing their substantive reliability for courts and parties to better assess case merits.

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

1. Pleading Report

The keystone reform we propose is transferring 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."

Transferring 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 obligations 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. Failure to comply will result in judicial sanctions, with *no ifs, ands, or buts* about it.

Disclosure by merely alleging "facts" will not suffice. Pleading 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 have and should, from prefiling investigation, have had 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 or, based on prefiling 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 discoverable matter that will compose 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 outstrip those 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, regarding 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.

9. *See, e.g.*, Charles E. Clark, *Simplified Pleading and the Demurrer*, 26 J. AM. JUDICATURE SOC'Y 81, 82, 84–85 (1942) (observing that Rule 12 merits review, as compared to the common law demurrer, was "not much more than a change of name," and like it, Rule 12 invites strategic delay and, by contrast to summary judgment, limits courts to judging the validity of claims and defenses "merely upon the formal averments").

10. *See, e.g.*, David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1246–48 (2013) (collecting empirical studies); William H.J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 J. EMPIRICAL LEGAL STUD. 474, 482 (2017) (noting increase in dismissal rate for antitrust cases after 2008).

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 postdiscovery 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 respond 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 prefiling investigation at their own expense and to fully and accurately disclose the evidentiary and legal results in their pleading reports. Advancing Rule 56 review to the pleading-report stage thus requires each pleading 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 Discovery After the Pleading-Report Stage

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

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11. For discussion of this critical condition on Rule 56 merits review, see *infra* Sections II.A–B.

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 composed 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 *infra* Part III.

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 scope, 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 the requesting party shows "specified reasons"; for example, 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 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 Rule 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.

13. *See* FED. R. CIV. P. 56(d); FED. R. CIV. P. 60(b)(2).

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.[16] For present purposes, the chief issue in *Celotex* was whether, given the absence of direct testimonial or documentary evidence of such exposure, the plaintiff's showing of circumstantial evidence was sufficient in form and substance to survive the defendant's motion for summary judgment.[17] The plaintiff seems to have had no factual basis for alleging in her complaint that the decedent had been exposed to a Celotex asbestos product. She subsequently acknowledged this in seeking to excuse her ten-month delay in responding (but then only in part) to the defendant's exposure-related interrogatories and production requests on the need to search for such evidence.[18] The 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's 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. The 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,

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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 nonmovant has the burden of proof. *Id.* at 322–23.

15. Although *Celotex* headed directly to postdiscovery 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. *Id.* at 319.

16. *Id.*

17. *Id.* at 319–20. Unfortunately, the *Celotex* record is not available online or, due to errant acquisition and retention policies stemming from failure to appreciate the research value of case records for academics as well as practitioners, 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, *The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693, 1701–02 (1986) (book review).

18. The plaintiff did not attribute the lack of prefiling investigation to time-bar pressures or other such difficulties.

and that although Celotex did not manufacture the Firebar in question, it subsequently acquired the Firebar manufacturer. Celotex provided the second piece of evidence, confirming that Firebar was purchased by the decedent's employer during the period of his employment and that the defendant subsequently acquired the Firebar manufacturer.[19]

The district court twice—before and on remand after the U.S. Supreme Court's review of the case—granted the 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 the 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 the plaintiff's showing of an "unbroken chain link[ing] [the decedent] to Firebar, and Firebar to Celotex" was sufficient to create a genuine issue of material fact for resolution at trial.[20]

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 summary judgment–proof case of exposure—as to which there was no asymmetric-information problem[21]—the plaintiff would be required not only to conduct a thorough prefiling 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 the plaintiff's exposure evidence in the actual case, it is likely that the 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.

19. Celotex also responded to the plaintiff's interrogatories that it might bear statutory successorship liability.

20. Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 40 (D.C. Cir. 1987). The court of appeals remanded the case for further proceedings in the district court on the defendant's denial of successor liability, statutory or common law. *Id.*

21. 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, essentially that the asymmetrically held information did not create a "prejudicial gap" in the record for summary judgment purposes, the defendant could proceed directly, without first supplying the sales information, to seek Rule 56 merits review of the sufficiency of exposure evidence in the plaintiff's pleading-report complaint. The "prejudicial gap" precondition for obligating Rule 56 movants to correct an information asymmetry is discussed *infra* Section II.A.2.

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 prefiling investigation, possibly indicating that the letter's author refused to sign an affidavit or had personal knowledge only of the 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, the defendant not only would avoid discovery but also 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.[22]

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In advancing a proposal for comprehensively reforming pleadings, discovery, and merits review to both cut cost and enhance reliability, this Article 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.[23]

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22. The mandate for affirmative and full disclosure applies to Rule 8 affirmative defenses. Hence, it will be necessary for responding parties to make a summary judgment–proof case in their pleading-report answers 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, the defendant would conduct a self-financed investigation based on the 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.

23. For important regulatory proposals for judges to 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. 849, 883 (2010), which suggests that judges stage discovery for claims that pass a thin plausibility test, with the scope of inquiry determined sequentially based on the probative value of information acquired in a prior stage; and Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 644–45 (1989), which suggests that "[i]f pleadings were used to focus legal and factual disputes before discovery began, or if discovery alternated with legal resolution, constantly paring away issues, the process would be more tolerable." For inventive fee-shifting proposals, see Samuel Issacharoff & Geoffrey

All, however, depend on the dubious assumptions that courts would have adequate information and resources to make the regulatory and fee-award decisions involved and that parties would avoid stirring up unproductive, expensive satellite litigation. Notably overlooked as well are the perverse incentives created by fee-shift solutions, motivating responding 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 also, importantly, that the reforms leave much of the principal norms of procedure and practice unchanged. The reformed process undergoes a social-welfare cost-benefit 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

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Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437, 449 (2013), which proposes that defendants be put to the choice: forego filing a Rule 12(b)(6) motion and submit to the normal scope and extent of discovery, or file a motion and submit only to targeted discovery, but if the motion is denied, pay the plaintiff's discovery-related attorney's fees and expenses; Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 879 (2012), which advocates for allocation of full discovery costs to the requesting party; and Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 882–83 (2015), which proposes that lawyers prepare a budget for each phase of a lawsuit, agree or object to the other side's budget, and present these to the court, which must either approve the budgets or modify them based on a cost-benefit assessment. 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, 213–15 (2016), which suggests alternatives of a second-price auction, posted prices, and a split-the-difference mechanism; and Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2110–17 (2017), which argues that parties be required to engage summary jury trials and that discovery should be managed through the appointment of special masters.

For proposals more closely resembling ours, see Professor Donald Elliott's suggestion 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. Easterbrook, *supra*, at 645–46. Professor 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 Unconstitutional*, 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, 204–07 (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).

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 the threat of discovery costs to extract unmerited settlement concessions); obstruction (burdening discovery to impede the uncovering of damaging information, but ultimately willing to disclose it); and concealment (preventing discovery by permanently hiding or even destroying evidence).

Our central conclusion in Part III is that the reformed process will outperform the current regime in controlling party opportunism, as well as when parties forthrightly comply. The key point is that compliance will be enforced pursuant to the general, unqualified full-disclosure mandate, authorizing judicial sanctions for *any* subsequently revealed failure by a party to disclose all relevant information in its pleading report. No prior specific request or court order is required; thus, no hide-and-seek excuses, dodges, or gaming will be tolerated. Deploying Rule 56 in place of Rule 12 merits review enhances the enforcement power of the mandate for affirmative, full disclosure of discoverable matter by creating a pretrial record comprising summary judgment–proof pleading reports that 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 the Conclusion include a 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 Center 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 turbocharged 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 compose a comprehensive and integrated process. Each part makes possible and facilitates attainment of the objectives 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 implicates the requirements of Rules 11 and 26 that the parties accurately tailor and represent their factual and legal contentions based on all relevant information—unfavorable as well as favorable—that they actually and, from prior investigation, should know, and to disclose such discoverable matter fully.[24]

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 prefiling investigation, should know. The pleading-report mandate for full disclosure is coterminous with the substantive scope of 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"–

24. 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.

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 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, four-lane suburban highway.[25] The accident occurred midday when both cars entered the intersection, with the plaintiff driving west on the highway and the defendant crossing into its westbound 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*), the 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 the 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 comparative negligence. Did the defendant run a red light? Was he speeding? Did the 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

25. 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 [https://perma.cc/P24K-9E95].

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 these questions would be "discovered" in the course of the parties' self-financed prefiling investigation *and* disclosed upon filing of their pleading reports. The parties would thus directly and immediately create the pretrial record, composed 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 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 the defendant was momentarily delayed in crossing the eastbound lanes when an unidentified driver of an oncoming 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, concerning possible traffic-code violations by the drivers and related negligence per se import, and the effect of third-party negligence on the 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.[26] 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

26. FED. R. CIV. P. 26(a)(1).

voluntarily—namely, sources and records that they "may use to support" their respective claims and defenses at trial.[27]

2. Mandate to Correct Information Asymmetries

Information-asymmetry problems pervade civil litigation. These problems arise when one party (the "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, or state 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 can pass the plausibility test and 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 party's 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 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-

27. *Id.* Similarly, 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. FED. R. CIV. P. 26(a)(2).

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. In accord with Rule 11 requirements for alleging facts on "information and belief," the showing of inaccessibility must 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.[28] 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's 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.[29] For purposes of

28. Rule 11(b)(3) provides the appropriate standard for triggering the responding party's corrective-disclosure obligations. FED. R. CIV. P. 11(b)(3); *see, e.g.*, Carroll v. Morrison Hotel Corp., 149 F.2d 404, 406 (7th Cir. 1945) (noting Rule 11's authorization of "information and belief" allegations to address information-asymmetry problems). 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 *infra* note 54 in applying the corrective-disclosure mandate to *Twombly* and *Iqbal*. Pleading reports will not be restricted to saying simply "produce all damaging information." They can employ "including but not limited" particularizations of information. The initiating pleading report can also satisfy this requirement by adopting the style, if not form, of a Rule 33 interrogatory or Rule 36 admission request, postulating the nature and existence of the asymmetrically held information that must be disclosed. For example, the initiating pleading report might posit that if the responding party denies liability, the responding pleading report should disclose the contents and sources of information, which were or will be consulted in the process of investigating and forming that contention, including but not limited to specified particulars, and further describe the scope and methods of investigation, and the persons who conducted it. Such particularization does not compromise enforcement of the affirmative-disclosure mandate. The mandate's general injunction remains in full force and effect, authorizing judicial sanctions for any subsequently discovered failure by a party to disclose all relevant information forthwith, regardless of prior specific party request or court order.

29. This bar would not apply to impeachment, credibility, corroboration, or evidentiary weight of asymmetrically held discoverable matter related to trial preparation or otherwise normally beyond the scope of summary judgment review. Except for discoverable matter relating to impeachment, however, responding parties would generally be required to disclose information relating to trial preparation in their pleading reports or, if deferred by the court to the post-pleading-report stage, in response to its targeted discovery orders.

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."[30] 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 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 more effectively promoting 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 (nonasymmetrically held) information through their own self-financed prefiling 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 elimination of costly, hide-and-seek discovery obviates the rationale for using the highly problematic Rule 26(b)(1) "proportionality" constraint on the scope of discoverable matter, courts in the reformed process 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

30. FED. R. CIV. P. 56(d). Nonmovants will usually encounter little difficulty in satisfying this requirement as movants effectively bear the burden to delineate and establish the "essential" relevance of the missing evidence.

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, in terms of Rule 26(b)(1), "the parties' relative access"[31] to it. These disputes may raise further questions about the adequacy of the responding pleading report's disclosures (or explanation for nondisclosure), such as the sufficiency of the prefiling 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 merits review would also leave intact the court's authority to adjudicate subject matter and personal jurisdiction and other Rule 12(b) nonsubstantive 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 nonsubstantive 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 predetermining 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.[32]

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[33] restores a *Conley*-pleading benefit that was lost with the 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

31. FED. R. CIV. P. 26(b)(1).

32. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–93 (1993).

33. The Rules 56(d) and 60 criteria governing the conditions for recognizing a newly raised issue and augmenting the record accordingly are discussed *supra* notes 11, 29 and accompanying text and *infra* note 43 and accompanying text.

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 questions or 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.

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. In short, as explained more fully below, each party's pleading report must establish a summary judgment–proof case.[34]

This fast-track procedure resembles that currently provided by Rules 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

34. *See* discussion *infra* Section II.B.2.

opposing party and show the court that a legally cognizable claim or defense, broadly stated to include any nonfrivolous 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 factual allegations and legal conclusions.[35] Conducting "facial" review of such pleading contrivances under Rules 12(b)(6) and (f) operates more as a sieve than a screen, offering the form, but not substance, of accelerated testing of the legal validity of claims and defenses.

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.[36] 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.[37] 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

35. *See* FED. R. CIV. P. 12(b), (f).

36. *See* FED. R. CIV. P. 12(c).

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

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 elements 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.

For example, investors' federal securities fraud actions often involve questions of evidentiary sufficiency regarding two principal elements: materiality and scienter.[38] Sufficient evidence to survive Rule 56 merits review is often publicly available for materiality; that is, 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 the 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 this prejudicial gap on the scienter element, the defendant could immediately challenge the evidentiary sufficiency of the 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.[39] If, however, the 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

38. *See, e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 30–31 (2011) (finding plaintiffs in securities fraud action sufficiently alleged facts of materiality and scienter).

39. 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 the defendant's statements constituted a material misrepresentation in omitting reference to adverse, but not statistically significant, event reports regarding its leading pharmaceutical product. *Id.*

the record on the scienter element and forfeiting its right to move for summary judgment on that element.[40]

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 prefiling investigations. Moreover, requiring pleading reports to be summary judgment proof will avoid the costs the parties and courts 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 transferring 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.[41] 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.

40. The defendant would still have to correct the information asymmetry in its pleading-report answer, and the failure to do so would bar the defendant from litigating the scienter question at trial.

41. The choice to settle or go to trial with related discovery options is also available following denial of a motion for 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 twofold showing. The first, as previously discussed, 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 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.[42] Occasionally, however, a new issue will be raised by the parties or court during the summary judgment proceedings.[43]

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 not only that the evidence being sought is within the definition of discoverable matter but also, as required for similar discovery requests in the summary

42. 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. FED. R. CIV. P. 11; FED. R. CIV. P. 37. For further discussion of judicial use of discovery and other methods to police compliance as well as sanction noncompliance with the mandate for affirmative, full disclosure, see *infra* Section III.B.2–3.

43. *See supra* note 33. 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 "[u]navailable" under Rule 56, the court may allow the party to file a supplemental pleading report. FED. R. CIV. P. 56(d); FED. R. CIV. P. 60(b)(2).

judgment context, that 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

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—with or without 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 cannot justify spending any more time or money. 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.[44]

The comparatively best pretrial process minimizes total social cost: here, the sum of party and court investments in time and money plus the costs of unreliability. Obviously, investing less time and money

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44. For explanation and application of the economics of diminishing marginal returns and related tradeoffs entailed by transaction costs to the design of legal rules that maximize social welfare, see Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1305–10 (2015), which argues that if the legal system is to maximize and not impair social welfare, courts cannot and should not pursue "truth" at all cost.

to produce greater reliability (and therefore less unreliability) is preferable, and as we show, that is the result the proposed reformed process is designed to achieve.[45]

The superiority of the reformed process over the current regime derives mainly from basic changes to the structure of the parties' mandate to disclose unfavorable discoverable matter. Notably, the structural innovation is not substantive in nature. Both the reformed and current processes mandate disclosure of identical information: all discoverable matter, favorable and unfavorable.[46] 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 or, more generally, to be less than fully forthcoming.

In comparing the relative cost effectiveness of the basic structural differences in the current and reformed processes' mandates, we first assume that the parties (named and potential litigants and their lawyers) will forthrightly disclose unfavorable discoverable matter 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."[47] Our analysis of the rival regimes demonstrates the

45. Beyond the scope of this Article 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 relationships with markets and social mores as well as with other governmental law enforcement agencies.

46. The substantive identity of the regimes' disclosure mandates implies that the parties must reveal all discoverable matter that they actually and, based on predisclosure investigation, should know.

47. 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

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 outlaws keeping discoverable matter secret; requires disclosure of all relevant information without prior request, thereby relegating hide-and-seek discovery and 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 also its perverse payout of higher rewards (Rule 12 dismissal) 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

clients will usually need their attorney's complicity in planning and carrying out an opportunistic scheme.

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 reasonably investigate as thoroughly as possible—at their own expense—the merits of their respective claims and defenses (and those expected from their adversaries). This prefiling 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 decisionmaking. Our central conclusion is that the only real concern relates to ridding the system of *Twombly-Iqbal*, but 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. Required to make a summary judgment–proof showing in their pleading reports, the parties 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 about which disclosure 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 fact or conclusions of fact that plagued code pleading or, at minimum, further complicate similar disputes currently engendered by plausibility pleading.[48] 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 its timing from sometime in the near-term future to the start of litigation. Indeed, subjecting pleading reports directly to Rule 56 merits review, rather than being disruptive, will further reduce current complexities and formalities. Rule 56 involves well-established, understood, and accepted prescriptions and routines for parties to marshal and for courts to evaluate the quality and quantity of evidence (and the affidavits and other means for creating a pretrial record of it).

2. Economically Marginal Claims and Defenses

Eliminating the discovery subsidy and obligating parties to conduct, at their own expense, reasonable prefiling investigations for discoverable matter 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 to conduct prefiling 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.[49] But

48. For a summary of code-pleading problems, past and present, see Bone, *supra* note 23, at 862–64.

49. If a systematic price-out effect hampers socially needed litigation, Congress can remedy the problem with a tailored discovery subsidy or adjustment to the means and burdens of obtaining discoverable matter in the public domain. Of course, the problem can also be addressed by courts or legislatures changing the substantive rules, for example, by replacing the negligence standard with strict liability.

once the benefits are considered, the assumed reality of a higher barrier to entry 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 postpleading discovery stage of the current process. By lowering expected pretrial litigation costs overall, the net result of the reformed process 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.[50]

3. *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

50. This is a specific response to the pointed empirical criticism of our proposal that it might price out marginal cases. In arguing that these cases would gain, not lose, economic feasibility in the reformed process, however, we do not mean to forecast a significant increase in litigation or court dockets and workload. It is doubtful this would occur. First, of course, what would make these cases more economically feasible is our proposal's substantial reduction of pretrial burdens on litigants and courts, notably by eliminating unnecessarily costly, hide-and-seek discovery. Thus, even if the efficiencies of the reformed process enabled more marginal cases to enter the system for adjudication of their merits, which one might think a good in itself, it does not follow that burdens on parties and courts would actually increase relative to those imposed by the current regime. Yet the overall rate and volume of litigation may well remain roughly the same in the reformed compared to the current process. More likely to change is the mix of cases in the queue contending for access to the system. *Cf.* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 915–16 (1984) (arguing that classing small-stake claims does not give them an advantage over non–class actions for accessing the system but rather merely enables class actions to join the queue of cases competing for access based on their relative marketability to plaintiffs' lawyers). Some previously marginal cases might turn out to be more economically viable to litigate than some cases that previously would have been regarded as a shoo-in. What the resulting mix will look like, and which cases will win and lose in the competition to attract competent legal representation and get heard and decided by judges, is virtually impossible to predict, especially given that the benefits of the reformed process accrue to all cases across the board, marginal and strongly viable alike. Nor is it possible for us to undertake the complex normative analysis of whether one mix versus another, certain types of winners versus others, or even more marginal cases decided on the merits would improve social welfare.

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 on whether reliability benefits remain dominant. Our conclusion, based on the foregoing analysis showing improved reliability, is that they do.[51] 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, and potentially abusive 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.

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 the current regime does with it. The reformed process outlaws the dodgy practices of adversarial pleading and hide-and-seek discovery. And by requiring parties to self-finance investigation for all nonasymmetrically held information and restricting discovery to the 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

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

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, creating 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 but 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 from 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 in a responsive pleading report. Third, further adjudication of cases that have passed initial summary judgment screening to final judgment under Rule 56 or by 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, producing the information, and policing the process—will be small and often border on negligible.[52] 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

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

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 or affidavits.[53]

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, 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 disclosure costs in complex cases—specifically to (1) search for potentially relevant information and (2) review that information for its relevance or privileged nature. The first elides the basic question: Compared to what? In particular, how much does the reformed process really add to responding parties' 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 or should 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

53. *See* Issacharoff & Miller, *supra* note 23, at 455–56 (canvassing cases dismissed pursuant to the *Twombly-Iqbal* rule).

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. In any event, Rule 11 requires parties in the current regime to possess supporting evidence to back contentions or denials of fact, including those asserting the factual implausibility of an opposing claim or defense as grounds for Rule 12 dismissal under *Twombly-Iqbal*.[54] As such, the main difference between 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

54. Consider, for example, the *Twombly* and *Iqbal* defendants' attacks on the factual plausibility of inculpatory inferences drawn from facts alleged in the plaintiffs' respective complaints. In *Twombly*, the 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, the 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 36, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126). Similarly, in *Iqbal*, the defendants, the attorney general and FBI director, denied that just because they authored and were the highest-ranking DOJ officials responsible for effectuating the post-9/11 "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 the plaintiff's imprisonment. It was, the defendants asserted, "highly *im*plausible" to infer that "the Attorney General and the FBI Director were involved in the granular decisions about which respondent complains." Brief for the Petitioners at 36–37, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015). No evidence was presented to back up these factual contentions, that the CEO in *Twombly* meant only to offer a benign rationale for the defendants' refraining from competition and that the defendants in *Iqbal* were too busy with other matters to be involved 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, the 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 create special rules for adjudicating antitrust or qualified immunity cases—the 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 the 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 antiterrorism interdiction and imprisonment program to their knowledge and authorization of its illegal implementation, the 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, the defendants would identify those in charge of running the program. If questions (unrelated to impeachment) were raised or left unanswered by these affidavits, the defendants might also be required to conduct and produce the results of an independent DOJ investigation.

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 nondiscoverable) 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.[55] Indeed, it is unlikely that the *Twombly-Iqbal* escape route from privately enforced civil liability diminishes these incentives at all, given that parties are constantly exposed to an array of other sources of law enforcement, including federal, state, and local administrative regulation; 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.

55. 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.

B. Party Opportunism

One commentator on an early draft of this Article 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*[56] reduce the abstraction of this observation to reality and provide a chilling and dispiriting impetus for relaxing our assumption of party forthrightness.

In *Haeger*, the severely injured plaintiff–family members and their subrogated insurer, Farmers Insurance Company, through separate counsel (collectively, "plaintiffs") sued Goodyear in 2005, charging that the failure of its G159 tire caused their motor home to swerve off an Arizona highway and flip over.[57] Their complaint, like others in similar G159 tire suits against Goodyear across the country, generally alleged various negligence and product liability claims, including that the tire, marketed initially for light trucks and vans, was "unreasonably dangerous as a result of either manufacturing and/or design which proximately caused the accident and Plaintiffs' injuries."[58]

From the beginning and throughout the lengthy discovery stage, the 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.[59] In response, Goodyear early on produced a report involving the results of low-speed tests, and after over a year of the plaintiffs pressing their requests for all test results, Goodyear turned over another report regarding a high-speed test.[60] The defendant represented to the plaintiffs and court that no other G159 test reports or information existed.[61]

Sometime after the parties settled in 2011, one of the 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*.[62] In the subsequent proceedings for sanctions, conducted by the judge who had presided over the *Haeger* case, Goodyear acknowledged that the heat-rise test

56. (*Haeger III*), 137 S. Ct. 1178 (2017).

57. Haeger v. Goodyear Tire & Rubber Co. (*Haeger I*), 906 F. Supp. 2d 938, 941 (D. Ariz. 2012), *aff'd*, 813 F.3d 1233 (9th Cir. 2016), *rev'd*, 137 S. Ct. 1178 (2017).

58. Complaint ¶ 21, *Haeger I*, 906 F. Supp. 2d 938 (D. Ariz. 2012) (No. CV2005-050959).

59. *Haeger III*, 137 S. Ct. at 1184.

60. *Haeger I*, 906 F. Supp. 2d at 944, 950.

61. *Id.* at 950–51.

62. *Id.* at 958–59.

data were relevant to the material issue of design defect 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 the plaintiffs and the court.[63]

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's 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 processes.

With these points in mind, we compare the costs in the rival regimes of three types of abuse:

- extortion (i.e., filing claims and defenses to extract nuisance-value settlement payoffs)[64]
- obstruction (i.e., unresponsiveness aimed at burdening and derailing opposing-party efforts to find and obtain discoverable matter, such as stonewalling, obfuscating, delaying, misleading, and dissembling)
- concealment (i.e., 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's 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 better structural disincentives against extortion and more developed and focused information for detecting and deterring obstructionism and concealment.

63. *Id.* at 968. 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. *Id.* at 941.

64. *See* David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985) (explaining a defendant's willingness to settle for a positive amount even though it knows the case is too weak for a plaintiff to pursue it to trial).

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 of bearing the high costs of full-scale discovery or settling for some lower "*in terrorem* increment."[65] The plausibility test exploits information asymmetries to screen out weak (along with potentially meritorious) cases, while plaintiffs' increased expenditures on related prefiling investigation may somewhat 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

65. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)). 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 nongovernmental institutions, usually possess most of the relevant information and incur greater costs 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 litigation 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, percentage-fee arrangements or in mass tort cases without class action to buffer 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) (showing that the separate-action process, as compared to class actions, creates a prodefendant bias and that outside of class or functionally equivalent collectivized actions, there is no non–class action rule or practical means for solving this problem).

asymmetric-information problem. Developing such a case will require an extensive, self-financed investment in prefiling 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.[66] 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 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.

66. 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.

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 render 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.[67] Ultimately, Goodyear's obfuscations succeeded in preventing the 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

67. *Haeger I*, 906 F. Supp. 2d at 943–51.

G159 case and disclosed only during the *Haeger* sanctions proceedings, "*apparently by accident*").[68]

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 courts with the burden, but bereft of information needed, to expose and overcome the defendant's obstructionist scheme. Thus, as the *Haeger* plaintiffs flailed about in the dark for clues of hidden test evidence, Goodyear was free to evade detection behind smokescreens of seemingly plausible, but actually unsupportable, objections. Meanwhile, the court "referee[d]" the game on the fly without the information required to make reliable calls.[69]

More particularly, lacking knowledge of the availability, identity, and location of what they were seeking, the plaintiffs had no alternative but to generally request production of all "[t]esting documentation."[70] The generality of these requests allowed Goodyear to "respond[ ]" with "boilerplate" objections and without disclosing any of the unfavorable discoverable matter.[71] Even though, in the early phase of discovery, the plaintiffs clarified their defect theory as centering on overheating, Goodyear consistently managed to bury the heat-factor issue and refocus discovery requests and disputes exclusively on speed.[72] 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.[73] With the record consisting of little more than the complaint's mere allegation that the tires were "unreasonably dangerous as a result of either manufacturing and/or design," the plaintiffs' counsel was unable to redirect the court's attention from speed to focus on the heat factor.[74] As a result, the judge's only order directing disclosure concerned the highway speed test.[75]

Despite the plaintiffs' discovery efforts, including oral deposition of Goodyear's chief expert and Rule 30(b)(6) witness, the G159 heat-rise

68. Haeger v. Goodyear Tire & Rubber Co. (*Haeger II*), 813 F.3d 1233, 1241 (9th Cir. 2016), *rev'd*, 137 S. Ct. 1178 (2017).

69. *Haeger III*, 137 S. Ct. 1178, 1184 (2017).

70. *Haeger II*, 813 F.3d at 1238 (alteration in original).

71. *Haeger I*, 906 F. Supp. 2d at 950.

72. *Id.* at 942.

73. *Id.* at 948–49.

74. Complaint, *supra* note 58, ¶ 21.

75. *Haeger I*, 906 F. Supp. 2d at 949–51.

test never would have surfaced were it not for its disclosure in a later G159 case.[76] According to Goodyear, it felt compelled to disclose the test there because the plaintiff *specifically* requested the test by subject or name.[77] 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[78]—that were never disclosed in any case before being *accidentally* revealed in the sanctions proceeding.[79]

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 have provided all relevant information relating to the plaintiffs' defective design claim. Pursuant to the affirmative-disclosure mandate in the reformed process, Goodyear would have been obligated to correct the information asymmetry regarding G159 performance reports and test data by producing all of it, heat-rise and otherwise, without any plaintiff request or court order.

Goodyear would have expected that the 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 have presented a multidimensional 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 to evade the affirmative-disclosure mandate. Thus, in excluding nondefect causes, the pleading-report complaint would have proffered the plaintiffs' affidavits, police accident-scene and forensic investigations, and other evidence regarding the motor home's preaccident speed, load, usage, performance, and, of course, the before-and-after condition of its failed and other G159 tires.

Also, it would have presented 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 have substantiated their opinions based on general and tire-safety product-design principles; Department of Transportation ("DOT") test requirements; published, peer-reviewed heat-factor and other tire-

76. *Id.* at 951–52, 959.

77. *Id.* at 963.

78. *Id.* at 955.

79. *Haeger II*, 813 F.3d 1233, 1241 (9th Cir. 2016), *rev'd*, 137 S. Ct. 1178 (2017).

safety studies; and possibly data from the plaintiffs' self-financed tests. In addition, expert affiants with knowledge of the tire-manufacturing industry would have explained 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 on heavy, full-sized motor homes and from compounding factors such as motor homes traveling at highway speeds on Arizona's hot roads midsummer. It is also likely that the expert evidence would have identified the bureaucratic, technical, and code names for some or all of the tire-industry safety and durability tests. Precluding Goodyear from attempting to escape the disclosure mandate, the pleading-report complaint would have specified and substantiated Goodyear's asymmetric control over its 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. 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 the 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's 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' mindsets about obstructionism, the teeth in the reformed process should deter them from cheating. Had *Haeger* 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 the 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 noncompliance. Goodyear, in short, would see no option but to respond affirmatively and fully in a pleading report that comprehensively answered the 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's 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 the plaintiffs' failure to present sufficient evidence on an element of their design defect claim where 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 the 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 was 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 plaintiffs on foreseeability or state-of-the-art questions; indeed, it might even be exposed to a jury finding of recklessness or liability for punitive damages based on the evidentiary gap on testing.[80]

In furthering its obstructionist goals, Goodyear fended off the plaintiffs' requests for test evidence for years with unsupported boilerplate objections to relevance, burden, and overbreadth.[81] Goodyear's strategy would stand little chance of succeeding in the

80. Informal litigation dynamics set in motion by the affirmative-disclosure mandate would enhance the reformed process's 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 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 the plaintiffs to raise their settlement demand accordingly.

81. *Haeger I*, 906 F. Supp. 2d at 950.

reformed process. Of course, the current regime does not approve this 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. Informed 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.[82]

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—regardless of how directly an opposing party requests or a 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.[83]

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

82. Similarly, the court would and should reject any objection that collecting and evaluating the test evidence imposed an undue burden. Indeed, most and possibly all of these test data and reports were generated pursuant to DOT regulations. As such, they constitute the paradigmatic type of information that institutional parties like Goodyear would or should have created, 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 this discoverable matter in any given case are or should be negligible. In the reformed process, had Goodyear claimed inability to produce the test information in the *Haeger* case, nothing short of an act of God could be invoked to excuse it from discovery sanctions.

83. *See, e.g.*, Cade Metz, *Judge Tells Uber Lawyer: 'It Looks Like You Covered This Up,'* N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/business/waymo-uber-trial.html [https://perma.cc/BD83-HYEH] (referring to confidential information volunteered by the U.S. attorney, who obtained it during an independent investigation, and describing the court's reprimand of Uber lawyers on eve of a trade secrets trial for deliberately concealing damaging evidence and the company for using computer systems to automatically destroy intrafirm communications).

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 whistleblower or independent monitoring of the parties' 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 effectively 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 also be prepared to recognize evasive, deceptive, and contradictory representations; unusual and suspicious activity; and other telltale signs of concealment encoded in the particular case's context.

Hide-and-seek discovery is generally not up to this task; indeed, it facilitates rather than hinders concealment schemes.[84] The reformed process is far superior. With parties and courts having timely access to a pretrial record composed 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 *Haeger*.[85] Suppose that, in its response to the asymmetric-information problem specified in the plaintiffs' pleading report, Goodyear filed an expert's affidavit that represented essentially what the expert and Rule 30(b)(6) witness actually testified in oral deposition: "I have been told by those in charge of releasing the tire that a number of different test procedures were run on it. But I do not presently have any in my possession that I can attach to this affidavit, and I do not believe any are still available."[86] Apparently, in the helter-skelter of the discovery process in which the

84. 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 was any good, its cover-up would be virtually infeasible to penetrate by discovery.

85. *See supra* notes 67–79 and accompanying text.

86. This hypothetical quotation paraphrases the deposition transcript quoted in *Haeger I*, 906 F. Supp. 2d at 952.

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 the plaintiffs' counsel, failed to notice, let alone correct, not merely critical ambiguities but also substantial gaps in the expert's statements. Nor did they recognize, let alone confront, Goodyear's lawyers with conflicts between their flat denial of the tests' existence or knowledge about them and their expert's representations intimating that he and certain Goodyear employees had previously possessed the tests and had possible information about their whereabouts and results. Therefore, the judge and the plaintiffs' counsel ultimately accepted his representations that no test reports existed except for the two on speed that had previously been produced.[87]

In the reformed process, by contrast, the trial judge would have a pretrial record composed 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 "people who were involved in the release of this tire" and the "different test procedures that [were] run [on it],"[88] 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 the plaintiffs' targeted discovery or a magistrate's or special master's inquiry and taxing the defendant with the costs.[89]

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87. *Id.* at 953–54.

88. *Id.* at 952.

89. When effective oversight requires more time and expertise, the presiding judge can appoint an expert special investigator vested with powers to subpoena witnesses for interrogation and 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 (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html [https://perma.cc/44JA-HYX7].

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

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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 *Haeger*. Contrary to the Court's characterization, the case did not involve merely "contentious discovery battles."[90] Goodyear's lawyers, as the trial judge meticulously documented and the court of appeals confirmed, perpetrated outright "fraud and deceit . . . on the district court."[91]

CONCLUSION

This Article 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

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) (proposing simple, random sampling to improve administrative enforcement while also cutting costs). 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 *Haeger* ordered the attorneys responsible for concealing evidence, together with their firms and Goodyear, to reimburse $2.7 million of the 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 the 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. *Haeger I*, 906 F. Supp. 2d at 941.

90. *Haeger III*, 137 S. Ct. 1178, 1184 (2017).

91. *Haeger II*, 813 F.3d 1233, 1237 (9th Cir. 2016), *rev'd*, 137 S. Ct. 1178 (2017).

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 Article in introducing the basic conceptual design of the reformed process.

However, our proposal is not without significant precedent in practice. Examples (gleaned from a limited survey) 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-directed discovery, as opposed to court-directed discovery.[92]

Remarkably, there is a federal pretrial process in actual practice that closely resembles but was developed independently from our proposal for mandatory, affirmative, and full disclosure: the "Mandatory Initial Discovery" pilot projects in the U.S. District Courts for the District of Arizona and the Northern District of Illinois.[93] Launched in 2017 for a run of three years, these pilot projects were developed and designed by the Federal Judicial Center to test the benefits of requiring full disclosure of all relevant facts and law prior to discovery and merits review under Rules 12 or 56.[94] 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

92. 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.

93. *Mandatory Initial Discovery Pilot Project: Overview*, FED. JUD. CTR., https://www.fjc.gov/content/321837/mandatory-initial-discovery-pilot-project-overview (last visited Oct. 7, 2018) [https://perma.cc/H9WQ-HXYR].

94. 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 Project*, U.S. DISTRICT CT. FOR N. DISTRICT ILL. 1, https://www.ilnd.uscourts.gov/_assets/_documents/MIDP%20Standing%20Order.pdf [https://perma.cc/28WN-RAAF].

whether they intend to use the information in presenting their claims or defenses."[95] 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 materials 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."[96]

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 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' prefiling investigations and provide them and courts with better information to police against abuses but also to enable resolution of more cases more quickly and reliably on the merits. By contrast, the pilot projects' disclosure mandates 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-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.[97] Colorado recently adopted a mandatory-

95. *Id.* at 2. Parties are relieved of this requirement if the court approves their written stipulation foregoing the option to conduct discovery in the case.

96. *Id.* at 5.

97. Courts have also used targeted discovery to augment the record for Rule 12 merits review. *See, e.g.*, Swanson v. Citibank, N.A., 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. CIV. PROC. CODE § 425.10(a)(1) (West 2018) (requiring complaint to contain "statement of the facts constituting the cause of action"); Beckler v. Hoffman, 550 So. 2d 68, 70 (Fla. Dist. Ct. App. 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

disclosure rule designed along the lines of the prediscovery requirements of Federal Rule 26(a)(1) that were in effect between 1992 and 2000.[98] Pursuant to Colorado Rule of Civil Procedure 26(a)(1), the parties, "without awaiting a discovery request . . . [and] whether or not supportive of the disclosing party's claims or defenses," must provide identifying, contact, and content-related information 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."[99] The avowed aim of this provision is to minimize the use of discovery.[100] The greatest displacement of discovery by affirmative-disclosure mandate is found in the congressional design for the U.S. Patent Trial and Appeal Board's adjudication of "inter partes" claims of patent invalidity.[101] To commence the pretrial process, called a "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.[102]

Among foreign jurisdictions, common law systems employ the most extensive mandates for affirmative disclosure combined with tightly limited discovery.[103] For example, in Canada, as a rough

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v. Claussen, 936 P.2d 394, 395 (Or. Ct. App. 1997) (applying OR. R. CIV. P. 21 to require sufficient factual basis for inferring the ultimate fact alleged).

98. *Compare* FED. R. CIV. P. 26(a)(1) advisory committee's note to 1993 amendment (noting amendment's requirement that parties disclose identity of all persons likely to have discoverable information relevant to the factual disputes between the parties; nature and location of potentially relevant documents and records; calculation of damages and documents supporting it; and any liability insurance policies), *with* COLO. R. CIV. P. 26(a)(1) (requiring the same four types of information).

99. COLO. R. CIV. P. 26(a)(1). For background on the adoption of this rule, see Richard P. Holme, *Proposed New Pretrial Rules for Civil Cases—Part I: A New Paradigm*, 44 COLO. LAW. 43 (2015).

100. *See* COLO. R. CIV. P. 26 cmt. 17 (explaining that, in requiring that "disclosure include information 'whether or not supportive' of the disclosing party's case, . . . it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically").

101. 35 U.S.C. §§ 311–312 (2012); 37 C.F.R. § 42.104 (2017).

102. Under 35 U.S.C. § 312(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 printed publications . . . and (B) affidavits or declarations of supporting evidence and [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 Rule 26 methods. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,761 (Aug. 14, 2012) (to be codified at 37 C.F.R. pt. 42); *see* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1370 (2018) (sustaining the constitutionality of assigning patent validity trials to a non–Article III court).

103. France is an outlier in general, as it relies primarily on judicial investigation to prepare cases for trial. *See* OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 205–06 (1st ed. 2007).

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.[104] Normally, the availability of discovery is restricted to the post-document-disclosure stage and to party examinations.[105]

The affirmative-disclosure mandate in England and Wales more closely resembles our proposal in demanding production of all evidence—unfavorable as well as favorable.[106] 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.[107] To halt the countdown on a time bar at the outset of litigation, the complainant must provide the defendant with a detailed "particulars of [the] claim," including a concise statement of the facts on which the claim is based.[108] In response, the defendant must state the factual particulars as far as they differ from the complainant's.[109] 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."[110]

Germany and civil law systems patterned on the German process, like Japan's, 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.[111] Pleadings must substantiate factual assertions with a designation of the evidence that proves the contention, and parties subsequently submit further legal arguments and evidentiary matter to supplement the pleadings during this "preparatory" phase of the litigation.[112] Similar to our proposal for correcting information

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104. LINDA S. ABRAMS & KEVIN P. MCGUINNESS, CANADIAN CIVIL PROCEDURE LAW 740 (2d ed. 2010); TODD L. ARCHIBALD ET AL., DISCOVERY: PRINCIPLES AND PRACTICE IN CANADIAN COMMON LAW 42 (2d ed. 2009).

105. Although Quebec is a civil law jurisdiction, it departs from that tradition in adopting the other provinces' pleading requirements and, even more strikingly, follows the U.S. model of discovery. *See* Code of Civil Procedure, R.S.Q., c C-25 (Can.).

106. *See* CPR 31.6.

107. CPR 31.16.

108. CPR 7.4; CPR 16.4.

109. CPR 16.5.

110. CPR 31.6.

111. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 422, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1651 [https://perma.cc/7G2J-6RD5].

112. CHASE ET AL., *supra* note 103, at 222.

asymmetries, when a party bearing the burden of a factual allegation lacks detailed knowledge of certain relevant facts, the adversary with such knowledge may be required to disclose the information.[113] 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.[114] 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 as well as disclose all documents containing or detailed description of the substantiating evidence—favorable or unfavorable.[115]

* * *

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 everyone else, including the public generally.[116] Manifestation of its perverse influence can be seen in Justice Scalia's dissent (joined by Justices Souter and Thomas) to the 1993 amendments to the Federal Rules of Civil Procedure, opposing the Court's acceptance of the short-lived forerunner of the Mandatory Initial Discovery rule.[117] In Justice Scalia's view, the precept of zealous representation is offended by obligating lawyers to find and disclose "information damaging to their clients" in service of their adversary's case.[118] This "new regime," he concluded, "does not fit comfortably within the American judicial

113. See PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 231 n.211 (2004), and generally for incisive analysis of German civil system policy, procedures, and practice.

114. ZPO §§ 377, 404, 425. 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. *Id.* § 141–142.

115. Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts*, 20 IND. INT'L & COMP. L. REV. 213, 228 & nn.51–52 (2010). The court may also intervene pretrial to compel disclosure and conduct examination of evidence.

116. *See, e.g.*, 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1219, at 281 (3d ed. 2004) (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").

117. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 510–11 (1993) (Scalia, J., dissenting).

118. *Id.* at 511.

system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker."[119]

Though pitched against expanding the required prediscovery disclosures, Justice 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 Justice 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 Justice Scalia essentially recognized, is to enable parties to develop more accurate and complete factual (and legal) records before the court, thereby facilitating reliable decisions on the merits. Disclosure of all relevant information, however damaging some of it might be, is an inevitable by-product of discovery fulfilling its central role in our 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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119. *Id.*