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## Plausible Pleading in Patent Suits: Predicting the Effects of the Abrogation of Form 18

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# PLAUSIBLE PLEADING IN PATENT SUITS: PREDICTING THE EFFECTS OF THE ABROGATION OF FORM 18

Kyle R. Williams\*

Cite as: Kyle R. Williams, *Plausible Pleading in Patent Suits: Predicting the Effects of the Abrogation of Form 18*, 22 MICH. TELECOMM. & TECH. L. REV. \_\_\_\_ (2016).

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## ABSTRACT

*On December 1, 2015, amendments to the Federal Rules of Civil Procedure took effect. The changes included, among other things, the abrogation of the Appendix of Forms, which contained templates for summons, complaints, answers, and other litigation documents. Prior to its abrogation, Form 18—a template for a “Complaint for Patent Infringement”—was widely utilized by patent plaintiffs in crafting infringement complaints. Form 18 was created during the Conley pleading regime, when conclusory allegations were generally sufficient to survive a motion to dismiss. Accordingly, the sample allegations in Form 18 were conclusory and bare-bones in nature. Under Conley, plaintiffs who followed this template almost always survived motions to dismiss. In 2007, the Supreme Court announced a heightened pleading standard in *Bell Atlantic v. Twombly*, and in 2009, it clarified that the new standard applied to all federal civil cases. Under the new standard, conclusory allegations alone are not sufficient, and complaints must be plausible on their face. Despite clear direction from the Supreme Court that the new “plausibility” standard applied to all cases, the Federal Circuit and many district courts continued to allow patent infringement plaintiffs to use Form 18’s conclusory language. With the elimination of Form 18 from the Federal Rules, courts are now unquestionably bound to apply the plausibility standard to patent infringement pleadings. Under the plausibility standard, plaintiffs will likely be required to identify the patent claims they believe are infringed. Depending on the complexity of the patent and the defendant’s business, plaintiffs may also be required to identify the accused product by name or model number. Finally, to move a claim across the line from conceivable to plausible, plaintiffs may need to allege that each claim limitation has a corresponding element in the accused product. The*

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\* J.D., University of Michigan, 2017 (expected); B.S.E., Electrical Engineering, University of Michigan, 2013. Special thank you to Lauren Babst and Daniel Koblenz for their valuable editorial assistance, and to my friends and family for their support.

*Northern District of California's Patent Local Rules would serve as a close approximation of the approach outlined here. These heightened requirements will reduce frivolous pleadings, decrease discovery costs, and encourage early settlement in competitor cases.*

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#### INTRODUCTION

In early 2015, the Supreme Court adopted several amendments to the Federal Rules of Civil Procedure.<sup>1</sup> The amendments, which were initially suggested by the Judicial Conference of the United States, officially went into effect on December 1, 2015, and included the abrogation of Rule 84 and the Appendix of Forms.<sup>2</sup> Rule 84 endorsed the Forms, stating that they “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”<sup>3</sup> The Forms included templates for summons, complaints, answers, judgments, and other litigation documents<sup>4</sup> and illustrated how the Federal Rules should be applied in practice.<sup>5</sup>

In its report to the Judicial Conference, the Committee on Rules of Practice and Procedure noted that the Forms were out of date, rarely used, and

1. Supreme Court of the United States, Order Amending the Federal Rules of Civil Procedure (Apr. 29, 2015), [http://www.supremecourt.gov/orders/courtorders/frcv15\\_5h25.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf).

2. Report of the Judicial Conference, Committee on Rules of Practice and Procedure (September 2014), at app. B-19, *available at* <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014>.

3. FED. R. CIV. P. 84 (2007) (repealed 2015).

4. See Report of the Judicial Conference, *supra* note 2.

5. See Brooke D. Coleman, *Deserving of Attention: The Proposed Abrogation of Civil Rule 84 & the Official Forms*, PATENTLY-O (Feb. 24, 2014), <http://patentlyo.com/patent/2014/02/deserving-attention-abrogation.html>.

difficult to amend.<sup>6</sup> In particular, the Committee noted that “[t]he sample complaints . . . embrace far fewer causes of action than now exist in federal court and illustrate a simplicity of pleading that has not been used in many years.”<sup>7</sup> The report refers to the more stringent “plausibility” pleading standard that the Supreme Court adopted in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.<sup>8</sup> That standard requires plaintiffs to plead “enough facts to state a claim to relief that is plausible on its face.”<sup>9</sup> The Committee noted that the single most asserted objection to the elimination of the Forms was that it would be viewed as an endorsement of the new standard.<sup>10</sup> Nevertheless, the Committee opted to remain silent on that issue, stating simply that it “continues to review the effects of *Twombly* and *Iqbal*.”<sup>11</sup>

The abrogation of the Forms will likely have a large impact on patent litigation due to patent plaintiff’s historically heavy reliance on Form 18 (the template for a “Complaint for Patent Infringement”) in crafting infringement complaints. Statistics compiled by Lex Machina on patent infringement filings are particularly illustrative of this point: a record-setting 790 patent infringement suits were filed in federal district courts last November.<sup>12</sup> On November 30—one day before the new Federal Rules took effect—259 patent suits were filed, a 15-fold increase over an average day.<sup>13</sup> These statistics suggest that many plaintiffs feared that patent pleading without Form 18 would be significantly more difficult.

This note explores the state of patent litigation pleading before and after *Twombly* and *Iqbal* and predicts the effects of the abrogation of Rule 84 and Form 18. Part I provides background information on patent infringement litigation and explores pleading under the *Conley* regime. Part II examines the Northern District of California’s innovative Patent Local Rules—which established a heightened pleading standard for patent plaintiffs—in order to discern their feasibility as a potential model for all federal courts to follow. Part III explores how patent courts reacted to the heightened plausibility standard announced in *Twombly* and *Iqbal*. Finally, Part IV predicts how federal courts will apply the plausibility standard to patent pleadings now that Rule 84 and Form 18 have been repealed.

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6. See Report of the Judicial Conference, *supra* note 2.

7. *Id.*

8. *Id.* at app. B-20.

9. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

10. See Report of the Judicial Conference, *supra* note 2, at app. B-20.

11. *Id.*

12. Joe Mullin, *Patent trolls filed hundreds of lawsuits to beat Dec. 1 deadline*, ARSTECHNICA (Dec. 2, 2015, 9:10 AM), <http://arstechnica.com/tech-policy/2015/12/patent-trolls-filed-hundreds-of-lawsuits-to-beat-dec-1-deadline/>.

13. Manatt Phelps & Phillips LLP, *Under the Wire: Record Number of Patent Lawsuits Filed on November 30, 2015, the Day Before Elimination of Plaintiff-Friendly FRCP Pleading Standards*, LEXOLOGY (Dec. 22, 2015), <http://www.lexology.com/library/detail.aspx?g=b18df885-13cd-4f95-895a-8c955f12ed85>.

## I. BACKGROUND ON PATENT PLEADING

### A. *Background on Patent Litigation*

The U.S. Patent and Trademark Office grants utility patents on inventions that are novel, non-obvious, useful, definite, and directed toward patentable subject matter.<sup>14</sup> A patent application must also describe the underlying invention in sufficient detail to enable a person of ordinary skill in the art to make and use the invention.<sup>15</sup> In exchange for public disclosure of an invention in a published patent, the owner of a patent is granted an exclusive 20-year monopoly on the invention.<sup>16</sup> This *quid pro quo* exchange incentivizes both private innovation and public dissemination of information.<sup>17</sup> Pursuant to its Article I enumerated power to “promote the Progress of Science and the Useful Arts,”<sup>18</sup> Congress has passed numerous statutes governing both the granting and litigating of patents.

Federal law allows the owner of a patent to bring a patent infringement suit if the owner’s patented invention is made, used, sold, offered for sale, or imported into the U.S. without the owner’s permission.<sup>19</sup> A patent owner can sue for either direct or indirect infringement. Direct infringement occurs when a single individual or entity makes, uses, offers to sell, sells, or imports a patented invention without the patent-holder’s permission.<sup>20</sup> Indirect infringement occurs when a party induces or contributes to a third party’s direct infringement of the patent at issue.<sup>21</sup> Inducement occurs when a person actively and knowingly aids in another’s direct infringement.<sup>22</sup> Plaintiffs may show inducement by referring to a company’s user manuals or advertisements that direct customers to practice the infringing method.<sup>23</sup> Meanwhile, contributory infringement occurs when a person supplies a component of a patented invention for which no “substantial non-infringing uses” exist.<sup>24</sup>

The group of “claims” at the end of a patent is its most important feature for purposes of patent infringement lawsuits. Patents can contain dozens of individual claims, which collectively define the contours of the patent

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14. 35 U.S.C. §§ 101, 102, 103, 112(b) (2012).

15. 35 U.S.C. § 112(a) (2012).

16. 35 U.S.C. § 154(b) (2012).

17. See ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 2 (6th ed. 2013) (“social benefits via technological progress are achieved by means of *private* rewards”) (emphasis in original).

18. U.S. CONST. art. 1, § 8, cl. 8.

19. 35 U.S.C. § 271(a) (2012).

20. *Id.*

21. *Id.* at § 271(b)-(c).

22. See MERGES & DUFFY, *supra* note 17, at 870.

23. See, e.g., CAP Co., Ltd. v. McAfee, Inc., No. 14-CV-05068, 2015 WL 3945875, at \*3 (N.D. Cal. June 26, 2015).

24. See MERGES & DUFFY, *supra* note 17, at 870.

owner's rights.<sup>25</sup> Similar to a real property deed, the claims delineate what is owned from what is not.<sup>26</sup> Each claim comprises one or more elements, or "limitations," which are the primary features of the invention.<sup>27</sup> For device patents, the elements are typically the device's individual components, and for process patents, the elements are the particular steps in the patented process. To prove infringement, a patent owner must show that the alleged infringer practiced each and every element of at least one valid patent claim. For example, in the case of a device patent, the patentee must show that the allegedly infringing device contains each and every element, or a functional equivalent of each and every element, of at least one claim.

Because claim limitations often contain words or phrases that have a distinctive meaning in the technology area of the patent, every claim at issue in an infringement suit must undergo "claim construction." Claim construction is the process by which a court construes any ambiguous claim terms in the patent so that the allegedly infringing product can be more easily compared to the allegedly infringed claim.<sup>28</sup> In general, a court will refer to intrinsic sources such as the patent's written description, and to extrinsic sources such as expert testimony and technical dictionaries, to give a more discernable meaning to ambiguous claim terms.<sup>29</sup> After claim construction, the court can compare the patent-in-suit to the allegedly infringing product and determine whether infringement actually occurred. Federal district courts have original jurisdiction over patent infringement suits. The Court of Appeals for the Federal Circuit, known for its patent law expertise, has exclusive appellate jurisdiction over patent suits.<sup>30</sup>

### B. Pleading Under *Conley*

From 1957 until 2007, *Conley v. Gibson* governed the interpretation of Rule 8(a)(2)<sup>31</sup> of the Federal Rules as it pertains to pleading in federal civil cases.<sup>32</sup> *Conley* was a class-action discrimination suit brought by African-American employees of a railroad company.<sup>33</sup> The respondents argued that the complaint failed to set forth specific facts to support the alleged discrimination.<sup>34</sup> Reversing the lower court's grant of a motion to dismiss, the Supreme Court held that "a complaint should not be dismissed for failure to

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25. *Id.* at 861.

26. *Id.* at 26.

27. *Id.*

28. *Id.* at 756.

29. *See generally*, Phillips v. AWH Corp., 415 F.3d 1203 (Fed. Cir. 2005).

30. 28 U.S.C. § 1295(a)(1) (2012).

31. FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief.").

32. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 387 (Wolters Kluwer Law & Business ed., 8th ed. 2012).

33. *Conley v. Gibson*, 355 U.S. 41, 42 (1957).

34. *Id.* at 47.

state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>35</sup> This was commonly referred to as “notice pleading”<sup>36</sup> and was generally regarded by courts and commentators as a lenient standard.<sup>37</sup> Under notice pleading, a claimant was not required “to set out in detail the facts upon which he base[d] his claim.”<sup>38</sup> Rather, *Conley* specified that Rule 8 required only that the plaintiff give the defendant fair notice of his claim and the grounds upon which it rested.<sup>39</sup> Because notice pleading did not require plaintiffs to allege specific facts, cases had to proceed all the way through the costly and time-consuming process of discovery before meritless claims could be weeded out.<sup>40</sup>

The *Conley* court also explicitly endorsed the use of the now defunct Forms in making complaints.<sup>41</sup> Accordingly, in the years following *Conley*, courts generally held that patent infringement complaints made in the mold of Form 18 were sufficient to meet the *Conley* pleading standard and overcome a motion to dismiss for failure to state a claim.<sup>42</sup> Form 18 required:

- (1) a statement of jurisdiction,
- (2) a statement that the plaintiff owned the patent in question,
- (3) a statement that the defendant infringed the patent by making, using, or selling a device embodying the patent,
- (4) a statement that the plaintiff gave the defendant written notice of infringement, and
- (5) a demand for relief.

In *Phonometrics, Inc. v. Hospitality Franchise Systems, Inc.*, the Federal Circuit had occasion to address how the *Conley* pleading standard applied to patent infringement complaints. The patent-in-suit claimed a system for long-distance call cost accounting, and the defendants used such a system in their hotels.<sup>43</sup> The plaintiff’s complaint did not identify the manufacturer of

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35. *Id.* at 45-46.

36. See YEAZELL, *supra* note 32, at 387.

37. *Id.* at 388 (“discovery, not pleading, will do the major sorting between grounded and ungrounded claims”).

38. *Conley*, 355 U.S. at 47 (quoting FED. R. CIV. P. 8(a)(2)).

39. *Id.*

40. YEAZELL, *supra* note 32, at 387.

41. *Conley*, 355 U.S. at 47 (“The illustrative forms appended to the Rules plainly demonstrate [that all the Rules require is a short and plain statement of the claim].”).

42. See, e.g., *Nichia Corp. v. Seoul Semiconductor Ltd.*, No. C-06-0162 MMC, 2006 WL 1233148, at \*1 (N.D. Cal. May 9, 2006); *Tippmann Pneumatics, LLC v. Brass Eagle, LLC*, No. 1:04-CV-449-TLS, 2005 WL 2456908, at \*2 (N.D. Ind. Oct. 4, 2005). *Nichia* refers to Form 16. This form was later renumbered to Form 18.

43. *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 790 (Fed. Cir. 2000).

the system, a particular infringing product that embodied the system, or features of the system that matched the claim elements.<sup>44</sup> The district court dismissed the plaintiff's complaint for failure to state a claim, holding that a patent plaintiff must allege infringement of particular claim elements in order to survive a motion to dismiss.<sup>45</sup> The Federal Circuit reversed, finding that "pleading requirements for a complaint of infringement cannot be extended to require a plaintiff to specifically include each element of the claims of the asserted patent" because "such requirements would contravene the notice pleading standard."<sup>46</sup> Instead, the court held that the plaintiff's complaint was sufficient to survive a motion to dismiss because it:

- (1) asserted ownership of the patent,
- (2) named each individual defendant,
- (3) cited the patent that was allegedly infringed,
- (4) described the means by which infringement occurred, and
- (5) named the relevant statutory provisions.<sup>47</sup>

The five *Phonometrics* requirements closely mirror the requirements contained in Form 18, except that the fourth *Phonometrics* requirement (which mirrors the third Form 18 requirement) appears to place a heavier burden on the plaintiff than does Form 18. The latter requires only a conclusory statement that the defendant infringed the patent by making, using, or selling a device embodying the patent; the former requires a plaintiff to describe the *means* by which infringement occurred.

Despite this apparent difference, courts have not generally interpreted the fourth *Phonometrics* requirement as placing a higher burden on patent plaintiffs. For example, in *LG Electronics, Inc. v. Asustek Computers*, a district court found that the conclusory allegation that the defendant was "making, selling, offering to sell, using, or importing into the United States computer systems embodying the claimed patents" was sufficient to overcome a motion to dismiss under the requirements of *Phonometrics*.<sup>48</sup> While the plaintiff in *LG Electronics* likely satisfied the requirements of Form 18, the court's conclusion that the plaintiff complied with all of the *Phonometrics* requirements is more dubious. First, the complaint simply parroted the language of 35 U.S.C. § 271(a)—the statute defining patent infringement—by listing all of the possible infringing actions without even specifying which infringing action it was alleging (notice the "or" in the

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44. Brief for Appellees at \*4, *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790 (Fed. Cir. 2000) (No. 99-1086), 1999 WL 33607432.

45. *Phonometrics*, 203 F.3d at 792.

46. *Id.* at 794.

47. *Id.*

48. *LG Elecs., Inc. v. Asustek Computers.*, 126 F. Supp. 2d 414, 418 (E.D. Va. 2000).



complaint).<sup>49</sup> Second, the broad reference to “computer systems embodying the claimed patent” hardly gives a computer company fair notice of what product the claim is directed toward. Given these flaws, the complaint in *LG Electronics* should have failed under the *Phonometrics* test because it failed to “describe[ ] the means by which infringement occurred” with any specificity whatsoever. The fact that the *LG Electronics* court denied the motion to dismiss suggests that, despite the court’s statement to the contrary, the standard it used to evaluate the plaintiff’s complaint was Form 18, not *Phonometrics*.

In other cases, courts more explicitly followed Form 18’s guidelines. In *Nichia Corp. v. Seoul Semiconductor Ltd.*, the district court addressed the argument that a complaint must allege specific consumer products sold.<sup>50</sup> The court held that, in light of the example language used in Form 18, the plaintiff’s allegation that the defendant sold products containing its patented “902 series LED” was sufficient to overcome a motion to dismiss.<sup>51</sup> In particular, the court argued that the plaintiff’s reference to the “902 series LED” was at least as specific, if not more so, than a reference to “electric motors embodying the patented invention” (the sample language in Form 18).<sup>52</sup> Consequently, the court concluded that the complaint was sufficient under Rule 8(a)(2).<sup>53</sup> Cases like *LG Electronics* and *Nichia* demonstrate that district courts did not necessarily follow the holding of *Phonometrics* by imposing a stricter pleading standard than Form 18. Instead, district courts around the country generally held that a conclusory allegation of infringement was sufficient to “describe the means by which the defendant allegedly infringed.”<sup>54</sup>

However, a small number of jurisdictions were more critical of Form 18 complaints. For example, the court in *Hewlett-Packard Co. v. Intergraph Corp.* held that conclusory allegations did not provide the defendant with fair notice of the plaintiff’s claims.<sup>55</sup> The complaint in *Hewlett-Packard* alleged that the defendant infringed by “making, using, offering to sell and/or selling infringing software and hardware products without authority or li-

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49. 35 U.S.C. § 271(a) (2012) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”).

50. *Nichia Corp.*, 2006 WL 1233148, at \*1.

51. *Id.*

52. *Id.*

53. *Id.*

54. See, e.g., *Tippmann Pneumatics, LLC v. Brass Eagle, LLC*, No. 1:04-CV-449-TLS, 2005 WL 2456908, at \*2 (N.D. Ind. Oct. 4, 2005); *Digigan, Inc. v. Ivalidate, Inc.*, No. 02 Civ. 420 (RCC), 2004 WL 203010, at \*4 (S.D.N.Y. Feb. 3, 2004).

55. *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at \*1 (N.D. Cal. Sept. 6, 2003).

cense from Plaintiff.”<sup>56</sup> However, the court noted that “hardware and software products” could encompass any or all of the defendant’s more than 4000 end-user application products.<sup>57</sup> Comparing the instant complaint to the “electric motors” example from Form 18, the court stated:

Not only is the example in Form [18] limited to a single “type” of product (*i.e.* electric motors) there is no indication as to the number of different electric motors the hypothetical defendant made, sold, or used. In this case, there are at least 150 different “types” of products (*i.e.* core technology platforms) with more than 4000 end-user applications.<sup>58</sup>

The court then concluded that the allegations did not give the defendant fair notice of the plaintiff’s claims due to the sheer number of products that those claims could be directed to.<sup>59</sup> The minority view that the *Hewlett-Packard* court adopted correctly held that conclusory allegations are not necessarily sufficient to overcome a motion to dismiss, even under *Conley* notice pleading.

In the abstract, the requirements set forth in *Phonometrics* appeared to comport with notice pleading; if the plaintiff identified the allegedly infringed patent and *how* the defendant infringed it, then the defendant would have fair notice of the plaintiff’s claims. In *Phonometrics*, there is little doubt that the defendant received fair notice. Although the plaintiff did not identify the manufacturer of the defendant’s call-cost accounting system or a particular infringing product that embodied the system,<sup>60</sup> the allegations in the complaint made it clear what the defendant was being accused of. This is the essence of notice pleading. But as *Hewlett-Packard* clearly demonstrated, complex cases may require more specificity than what *Phonometrics* and its progeny called for. Particularly when multiple patents and claims are at issue and the defendant sells many products in the technology area, the plaintiff may need to allege more specifically how the patent is infringed to truly put the defendant on notice.

## II. PATENT LOCAL RULES: THE NORTHERN DISTRICT OF CALIFORNIA’S UNIQUE HEIGHTENED PLEADING

To raise the ostensibly low bar to survive a motion to dismiss under *Conley* and Form 18, some jurisdictions have promulgated local rules which govern patent infringement suits and impose stricter pre-discovery and pre-

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Brief for Appellees at \*4, *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790 (Fed. Cir. 2000) (No. 99-1086), 1999 WL 33607432.

trial requirements on both plaintiffs and defendants.<sup>61</sup> The first set of rules was promulgated by the Northern District of California (“Northern District”) in December 2000.<sup>62</sup> The Northern District’s rules were designed to address the unique challenges that arise during patent litigation.<sup>63</sup> According to James Ware (former Chief Judge of the Northern District of California) and Brian Davy (a patent practitioner), California’s rules “dramatically heighten[ ]” the level of specificity required of a patent claimant and replace the interrogatories the defendant would otherwise have to serve on the plaintiff.<sup>64</sup> Rule 3-1 requires that the plaintiff serve a Disclosure of Asserted Claims and Infringement Contentions (“infringement contentions”) on all parties no later than 14 days after the Initial Case Management Conference.<sup>65</sup> Subsection (a) requires that the plaintiff identify each claim of each patent-in-suit that is allegedly infringed by each opposing party.<sup>66</sup> For each allegedly infringed claim, the plaintiff must identify the infringing device by name or model number.<sup>67</sup> Furthermore, for each allegedly infringing device, the plaintiff must identify how that device practices each and every element of the allegedly infringed claim or claims.<sup>68</sup> This information must be presented in a “claim chart” so that elements and corresponding device elements can be compared side-by-side.<sup>69</sup> Finally, to fully comply with Rule 3-1, the plaintiff must include a meaningful explanation as to how the infringing device reads on the infringed patent claim,<sup>70</sup> which may require the plaintiff to reverse engineer the device in order to determine the location and function of each component.<sup>71</sup>

The Patent Local Rules in the Northern District of California are certainly more onerous than the pleading requirements imposed by Form 18.

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61. James Ware & Brian Davy, *The History, Content, Application and Influence of the Northern District of California’s Patent Local Rules*, 25 SANTA CLARA COMPUT. & HIGH TECH. L.J. 965, 1012 (2008). The Northern District of Georgia, Eastern District of Texas, Western District of Pennsylvania, District of Minnesota, and numerous others have followed the Northern District of California’s lead.

62. *Id.* at 965.

63. *Id.*

64. *Id.* at 984.

65. N.D. CAL. PATENT L.R. 3-1 (“Not later than 14 days after the Initial Case Management Conference, a party claiming patent infringement shall serve on all parties a ‘Disclosure of Asserted Claims and Infringement Contentions.’ ”).

66. *Id.* at 3-1(a).

67. *Id.* at 3-1(b).

68. *Id.* at 3-1(c).

69. *Id.*

70. Ware, *supra* note 61, at 985 (citing *InterTrust Techs. Corp. v. Microsoft Corp.*, No. C 01-1640 SBA, 2003 WL 23120174, at \*2 (N.D. Cal. Dec. 1, 2003)).

71. *Bender v. Maxim Integrated Prods., Inc.*, No. C 09-01152 SI, 2010 WL 1135762, at \*2 (N.D. Cal. Mar. 22, 2010) (quoting *Network Caching Tech., LLC v. Novell, Inc.*, No. C-01-2079-VRW, 2003 WL 32126128, at \*3-4 (N.D. Cal. Aug. 13, 2002)) (holding that plaintiff’s infringement contentions did not comply with Patent Local Rule 3-1 because plaintiff did not identify a particular element within an integrated circuit but rather assumed it was there).

While Form 18 did not require a plaintiff to identify a particular infringing product—and in fact explicitly rejected the argument that the plaintiff must “include specific allegations about each [claim] limitation”<sup>72</sup>—the Patent Local Rules require an element-by-element analysis of the allegedly infringed claims.<sup>73</sup> Given that the infringement contentions required by Rule 3-1 must be submitted prior to discovery,<sup>74</sup> a plaintiff has access to substantially the same information when serving the infringement contentions as when filing the initial complaint. The practical effect of this is a heightened pleading standard, since the plaintiff must allege each infringement claim with specificity before the case proceeds to discovery.

Though Rule 3-1 does increase the pleading burden on the parties involved in patent suits, this effect has been curbed by several judicial interpretations that limit the specificity the rule requires.<sup>75</sup> For example, one court held that a plaintiff is under no obligation to provide evidence supporting the assertions in its claim chart.<sup>76</sup> Rule 3-1 is designed only to require a plaintiff to crystalize its theory of infringement.<sup>77</sup> Since infringement contentions are served prior to discovery, requiring evidence at that stage would be unduly burdensome. Also, when there are multiple infringing products in the same product family—and the products within that family are indistinguishable with respect to how they infringe—a plaintiff is not required to disclose each product separately.<sup>78</sup>

With the abrogation of the Forms, courts could use the Northern District’s Patent Local Rules as a model pleading standard in patent infringement suits. By requiring the plaintiff to identify the allegedly infringed claims and allegedly infringing products—and by further requiring an element-by-element comparison between those claims and products—the rules undoubtedly meet the elevated plausibility pleading standard announced in *Twombly* and *Iqbal*.<sup>79</sup> Moreover, the rules are not unduly burdensome on

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72. *Phonometrics*, 203 F.3d at 794.

73. N.D. CAL. PATENT L.R. 3-1.

74. In particular, Rule 3-4 states that “[s]ource code, specifications, schematics, flow charts, artwork, formulas, or other documentation” related to the allegedly infringing products are not produced by the defendant until “after service upon it of the ‘Disclosure of Asserted Claims and Infringement Contentions.’ ” (emphasis added).

75. *Ware*, *supra* note 61, at 985.

76. *Id.* at 985 (citing *Network Caching Tech., LLC v. Novell, Inc.*, No. C-01-2079 VRW, 2003 WL 21699799, at \*4 (N.D. Cal. March 21, 2003)).

77. *Network Caching Tech., LLC v. Novell, Inc.*, No. C-01-2079 VRW, 2003 WL 21699799, at \*4 (N.D. Cal. March 21, 2003) (quoting *Atmel Corp. v. Info. Storage Devices Inc.*, No. C 95-1987 FMS, 1998 WL 775115, at \*2 (N.D. Cal. Nov. 5, 1998)).

78. *Ware*, *supra* note 61, at 985 (citing *Renesas Tech. Corp. v. Nanya Tech. Corp.*, No. C03-05709JF(HRL), 2005 WL 2000926 (N.D. Cal. Aug. 18, 2005)).

79. *Macronix Int’l. Co., Ltd. v. Spansion Inc.*, 4 F. Supp. 3d 797, 803 (E.D. Va. 2014) (“[s]atisfying the requirements of *Twombly* and *Iqbal*, of course, will require counsel to focus complaints only on viable claims. Thus, before filing a complaint, counsel must ascertain exactly what claims [be] alleged to be infringed and how they are infringed.”).

patent plaintiffs, as plaintiffs are not required to produce evidence of infringement when comparing patent claims to allegedly infringing products. Rather, the rules serve to provide notice of infringement to defendants “beyond the mere language of the patent,” while also requiring plaintiffs to crystallize their theory of infringement early on in the litigation.<sup>80</sup>

### III. PATENT PLEADING UNDER *TWOMBLY* AND *IQBAL*

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court replaced the notice pleading standard with a heightened plausibility standard.<sup>81</sup> In order to survive a motion to dismiss under this new standard, a plaintiff must set forth “enough facts to state a claim to relief that is plausible on its face” (as opposed to facts that are merely conceivable).<sup>82</sup> Initially, practitioners debated whether this heightened pleading standard applied only in antitrust actions (the context of *Twombly*), or more broadly to all federal civil actions.<sup>83</sup>

In *Ashcroft v. Iqbal*, the Supreme Court reiterated and expounded on the *Twombly* standard, holding that it was “the pleading standard for ‘all civil actions,’ ”<sup>84</sup> and clarifying that the standard is met when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct.”<sup>85</sup> The court also emphasized that determining whether a complaint is plausible is a context-specific task,<sup>86</sup> and in-fact the context surrounding *Iqbal* was particularly important to the court’s decision to dismiss the complaint.<sup>87</sup> The respondent in *Iqbal* alleged that the petitioners purposefully classified Muslims and other Arabs as ‘of high interest’ because of their religion or race, constituting invidious discrimination.<sup>88</sup> The court concluded that, more likely, there was a disparate, incidental impact on Muslims and Arabs because law enforcement officers were targeting individuals with links to Al Qaeda—an organization composed largely of Arab Muslims—in the wake of the September 11 attacks.<sup>89</sup> In the context of those attacks and the subsequent law enforcement response, that was the most likely conclusion. Finally, the court noted that “while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”<sup>90</sup>

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80. *Network Caching Tech., LLC v. Novell, Inc.*, No. C-01-2079-VRW, 2003 WL 32126128, at \*3-4 (N.D. Cal. Aug. 13, 2002).

81. *Twombly*, 550 U.S. at 546.

82. *Id.* at 570.

83. YEAZELL, *supra* note 32, at 389.

84. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (quoting FED. R. CIV. P. 1).

85. *Id.* at 678.

86. *Id.* at 663-64. (citing *Twombly*, 550 U.S. at 556).

87. *Id.* at 687.

88. *Id.* at 681.

89. *Id.* at 682.

90. *Id.* at 679.

Together, *Twombly* and *Iqbal* shifted the pleading paradigm in federal civil cases. Under *Conley*, a conceivable complaint supported by only conclusory allegations could survive a motion to dismiss. Under the new regime, complaints must be facially plausible and supported by at least some factual allegations.

#### A. Confusion after *McZeal*

Since *Twombly* and *Iqbal*, federal courts have struggled to reconcile the plausibility standard with Form 18. Form 18 was created when *Conley* was in force and contains only conclusory statements, which are inconsistent with the principles espoused by *Twombly* and *Iqbal*. In fact, *Iqbal* explicitly held that legal conclusions alone are insufficient to survive a motion to dismiss.<sup>91</sup>

The Federal Circuit first addressed this tension in *McZeal v. Sprint Nextel Corp.* *McZeal*, the inventor of the patent at issue and a *pro se* litigant, sued Sprint for patent infringement for sale of the Motorola i930 cellphone.<sup>92</sup> *McZeal* held that the plaintiff's complaint met all of the requirements of Form 18 and contained enough information to allow the defendants to respond.<sup>93</sup> Although the *McZeal* court claimed to apply the *Twombly* standard,<sup>94</sup> later courts and commentators have questioned whether this was actually the case.<sup>95</sup> There are several reasons for this doubt. First, *McZeal* was decided before *Iqbal*, when the Supreme Court clarified that the holding in *Twombly* applied to all federal civil actions.<sup>96</sup> Second, the court specifically acknowledged that *pro se* litigants may be granted leeway on procedural matters such as pleading requirements.<sup>97</sup> Third, the *McZeal* court questioned the entire premise that *Twombly* changed the pleading requirements as articulated in *Conley*, noting in a footnote that *Twombly* "favorably quoted *Conley*."<sup>98</sup> Consequently, it is not entirely clear whether the *McZeal* court held that Form 18 met the requirements of *Twombly*, or whether—due to the unique circumstances of the case—the court simply applied the old *Conley* standard.

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91. *Id.*

92. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355 (Fed. Cir. 2007).

93. *Id.*

94. In particular, the *McZeal* court quoted sections of *Twombly* that emphasized the continued importance of fair notice to the defendant. The court did not quote the ultimate holding in *Twombly* that a claim for relief must be plausible on its face. *Id.*

95. See, e.g., R. David Donoghue, *The Uneven Application of Twombly in Patent Cases: An Argument for Leveling the Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1, 8 (2008).

96. *McZeal*, 501 F.3d at 1356.

97. *Id.*

98. *Id.* at n. 4 ("This does not suggest that *Bell Atlantic* changed the pleading requirement of Federal Rule of Civil Procedure 8 as articulated in *Conley*.").

The confusion caused by *McZeal* was exacerbated following the *Iqbal* decision. Two cases in particular, *W.L. Gore & Associates v. Medtronic, Inc.* and *Bender v. LG Electronics U.S.A., Inc.*, illustrate this confusion. The *Medtronic* court discussed the interplay of *Twombly*, *Iqbal*, *McZeal*, and Form 18 at length.<sup>99</sup> The court observed that Form 18 appears to contain conclusory statements of the type that do not suffice to survive a motion to dismiss,<sup>100</sup> opining that the “scant factual allegations found in this form . . . appear to conflict with *Twombly*’s plausibility standard.”<sup>101</sup> Nonetheless, the court—espousing the more widespread view following *McZeal*—held that a complaint crafted in the mold of Form 18 sufficiently states a claim for direct infringement.<sup>102</sup> In reaching that conclusion, the court relied on both Rule 84 (which it noted endorsed the Forms explicitly)<sup>103</sup> and the Supreme Court’s own statements in *Twombly* that the Federal Rules can only be changed through amendment and not through judicial interpretation.<sup>104</sup>

The *Medtronic* court’s reasoning, however, fails to account for the meaningful interpretive role of the judiciary. While it is true that the judiciary cannot change the *text* of a rule or statute, it can certainly change, in good faith, the *meaning* or *application* of codified text. Through judicial interpretation, courts elucidate the intended meaning of ambiguous rules like Rule 8, and reasonable courts may differ in their conclusions about the intended meaning. In fact, this is the entire premise of the *Twombly* decision; the Supreme Court viewed the *Conley* court’s interpretation of Rule 8(a)(2) as incorrect and announced its own interpretation that became equally binding on lower courts as the text of the rule. In doing so, the Court put Rule 8 at odds with Form 18. According to the “last in time rule,” Rule 8—interpreted more recently—should have prevailed. The recent abrogation of Rule 84 and Form 18 support this conclusion. Form 18 was at odds with *Twombly*, and presumably, the Committee on Rules of Practice and Procedure recognized this. In particular, the Committee noted that the pleading illustrated in the Forms is inconsistent with the detailed pleading in most modern cases.<sup>105</sup>

Other courts have disagreed with *Medtronic*’s approach. In *Bender v. LG Electronics*, the plaintiff alleged that the defendant infringed its patent by making, using or selling products containing a particular current feedback amplifier. In its complaint, the plaintiff listed dozens of product types that

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99. *W.L. Gore & Assocs., Inc. v. Medtronic, Inc.*, 778 F. Supp. 2d 667 (E.D. Va. 2011).

100. *Id.* at 674 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)) (“While *Iqbal* counsels that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to survive a motion to dismiss under Rule 12(b)(6), Form 18 appears to contain just that.”).

101. *Id.*

102. *Id.* at 675.

103. *Id.* (quoting FED. R. CIV. P. 84 (2007) (repealed 2015)).

104. *Id.* (quoting *Twombly*, 550 U.S. at 569 n. 14).

105. Report of the Judicial Conference, *supra* note 2, at app. B-19.

contained the infringing amplifier, including, “without limitation, cell phones, computers, network drivers, [HD] television set, ultrasound machines, MRI machines, lab equipment,” and many more.<sup>106</sup> The court held that *Twombly* and *Iqbal* did apply to patent pleadings:

Bender’s infringement claim fails to provide a “plausible claim for relief” under *Twombly* and *Iqbal*. . . . Sufficient allegations would include, at a minimum, a brief description of what the patent at issue does, and an allegation that certain named and specifically identified products or product components also do what the patent does, thereby raising a plausible claim that the named products are infringing.<sup>107</sup>

The court distinguished *McZeal* by noting that it was decided before *Iqbal*.<sup>108</sup> It also emphasized that determining plausibility is a context-specific task.<sup>109</sup> The court observed that the list of products in the complaint was directed toward millions of electrical circuits designed by the defendant.<sup>110</sup> Due to the large number of potentially infringing products, the plaintiff’s vague complaint did not put the defendant on notice.<sup>111</sup> In its discussion, the court seemed to suggest that less specificity may be required when fewer infringing products are involved.<sup>112</sup> Such a sliding scale would comport with the concept of fair notice because a defendant with a limited number of potentially infringing products would have a much easier time connecting the complaint to a product than a defendant with millions of products.

In the confusing wake of *McZeal*, the Federal Circuit stepped up to clarify how to reconcile the *Twombly* pleading standard with Form 18.

### B. “The Forms Control”

In 2012, following *Iqbal* and numerous contradictory holdings by the district courts,<sup>113</sup> the Federal Circuit addressed the question of whether the

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106. *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at \*2 (N.D. Cal. Mar. 11, 2010).

107. *Id.* at \*6.

108. *Id.* at \*3.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.* at \*5 (“Similarly in *Hewlett-Packard v. Intergraph*, the court explained that the example in Form 18 is ‘limited to a single ‘type’ of product’ and ‘simply does not address a factual scenario’ involving a multitude of allegedly infringing products.”) (quoting *Hewlett-Packard v. Intergraph*, No. C 03–2517 MJJ., 2003 WL 23884794 at \*5 (N.D. Cal. Sept. 6, 2003)).

113. *See, e.g., Bender*, 2010 WL 889541, at \*6; *Lantiq N. Am., Inc. v. Ralink Tech. Corp.*, No. CV 11-00234 EJD, 2011 WL 2600747 (N.D. Cal. June 30, 2011); *Interval Licensing LLC v. AOL, Inc.*, No. C10-1385 MJP, 2010 WL 5058620 (W.D. Wash. Dec. 10, 2010); *W.L. Gore & Associates, Inc. v. Medtronic, Inc.*, 778 F. Supp. 2d 667 (E.D. Va. 2011).



Forms or *Twombly* and *Iqbal* control with respect to patent pleadings.<sup>114</sup> The plaintiff in *In re Bill of Lading* was a freight shipping company that alleged indirect infringement of its “less-than-a-load”<sup>115</sup> trucking method patent.<sup>116</sup> The plaintiff alleged that several logistics companies supplied computing systems to moving companies, thereby contributing to or inducing direct infringement by those moving companies.<sup>117</sup> The district court concluded that the plaintiff, who had relied on Form 18 to craft its complaint, failed to state a claim and dismissed the case.<sup>118</sup> The Federal Circuit reversed, holding that to the extent that *Twombly*, *Iqbal* and Form 18 conflict, the Forms control.<sup>119</sup> The court began by noting that the Supreme Court had yet to address the sufficiency of a complaint for a cause of action for which there was a sample complaint in the Appendix of Forms.<sup>120</sup> Next, the court invoked an argument substantially similar to the argument in *Medtronic*—that Rule 84 and the Forms have supremacy over a judicial interpretation of Rule 8.<sup>121</sup> As mentioned above, this argument fails to account for the meaningful interpretive role of the judiciary and the last in time rule.<sup>122</sup> Finally, the court stated that a plaintiff need not compare claim elements to the allegedly infringing product,<sup>123</sup> or even identify the allegedly infringed claims.<sup>124</sup> This is consistent with the holdings in both *McZeal* and *Medtronics*—though of course inconsistent with *Twombly* and *Iqbal*.

To address the apparent discrepancy between *In re Bill of Lading* and *Twombly* and *Iqbal*, the Federal Circuit attempted to clarify its views on Form 18 in its 2013 decision, *K-Tech Telecommunications v. Time Warner Cable*.<sup>125</sup> The *K-Tech* court reiterated that in the event of a conflict between *Twombly* and *Iqbal* and Form 18, the Form controls.<sup>126</sup> In dicta, however, the court explained at length that notice and facial plausibility are the cornerstones of an analysis under the Forms, and that implausible claims should be

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114. *In re Bill of Lading Transmission and Processing Sys. Patent Litig.*, 681 F.3d 1323 (Fed. Cir. 2012).

115. Less-than-a-load trucking is the transportation of small freight. Carriers pick up freight from different customers, and the freight is often destined for different locations around the country. In order to ensure efficient delivery, freight bound for similar areas is grouped together. *Id.* at 1328-29.

116. *Id.*

117. *Id.* at 1329, 1335-36.

118. *Id.* at 1331.

119. *Id.* at 1334 (internal citation omitted).

120. *Id.* at 1333-34.

121. *Id.* at 1334

122. See *infra* note 105 and accompanying text.

123. *In re Bill of Lading*, 681 F.3d at 1335.

124. *Id.*

125. *K-Tech Telecomms. v. Time Warner Cable*, 714 F.3d 1277 (Fed. Cir. 2013).

126. *Id.* at 1279 (“District courts must evaluate complaints alleging direct infringement by reference to Form 18 . . .”).

dismissed.<sup>127</sup> It also emphasized that the adequacy of the facts pled depends on both the complexity of the patent and the defendant's business.<sup>128</sup>

It is difficult to reconcile this dicta with the court's holding. Form 18, at least as illustrated in the Federal Rules, consists entirely of conclusory statements which are normally insufficient to state a claim to relief under the *Twombly* and *Iqbal* plausibility standard. So it cannot be the case that "Form 18 controls," but "implausible claim[s] for patent infringement should be dismissed," unless the court was reading stricter requirements into Form 18 than appear in its text. This is the only reading of *K-Tech* that gives effect to both its holding that the Forms control and its strongly worded dicta that seems to endorse the plausibility standard of *Twombly* and *Iqbal*.

Judge Wallach, concurring in the outcome of *K-Tech*, but not joining the majority opinion,<sup>129</sup> observed that the majority—while expressly holding that the Forms control—actually conducted a context-specific plausibility analysis that otherwise conformed to the *Twombly* and *Iqbal* pleading standard.<sup>130</sup> Indeed, the majority's ultimate holding conflicts with much of its reasoning. It seems like the court was attempting to lend credence to prior Federal Circuit decisions while simultaneously acknowledging the binding character of *Twombly* and *Iqbal*. The result was a disjointed opinion that argued one way but held another.

A minority of district courts have treated Federal Circuit opinions like *K-Tech* and *McZeal* with hostility, arguing that *Twombly* and *Iqbal* (and not the Forms) control with respect to patent pleading.<sup>131</sup> The district court in *Macronix International Co. v. Spansion Inc.*, noted that the majority in *McZeal* did not view *Twombly* as altering the pleading standard—which is at odds with how *Twombly* and *Iqbal* are commonly understood.<sup>132</sup> Furthermore, the court argued that both *McZeal* and *In re Bill of Lading* are based on the faulty premise that the Forms remain sufficient to get past the pleading stage until the Federal Rules are changed.<sup>133</sup> According to the *Macronix* court, Supreme Court decisions like *Twombly* and *Iqbal* that instruct how to

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127. *Id.* at 1286 (citations omitted).

128. *Id.*

129. *Id.* at 1287 (Wallach, J., concurring in part).

130. *Id.* at 1288-89 ("Moreover, the majority's analysis of Form 18 compliance is just the sort of 'context-specific' analysis required by the plausibility standard. The majority states the adequacy of facts pled under Form 18 'depends on the breadth and complexity of both the asserted patent and the accused product or system and on the nature of the defendant's business activities.' This analysis does not square with the dicta that 'the Forms control,' but is entirely consistent with the framework presented by this concurring opinion.") (citation omitted).

131. *See, e.g., Macronix*, 4 F. Supp. 3d 797.

132. *Id.* at 801 (quoting *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n. 4 (Fed. Cir. 2007)).

133. *Id.* at 802.

interpret a Federal Rule are controlling even if there is no change to the text of the rule being interpreted:<sup>134</sup>

[I]f the Supreme Court . . . says that Rule 8(a) must be applied differently than is provided for in a form, then the viability of the form must be measured against the new standard, even if the effect of doing so is to nullify the form.<sup>135</sup>

In essence, the *Macronix* court applied the last-in-time rule and held that, since the Supreme Court spoke most recently on the meaning of Rule 8, its interpretation of Rule 8 should control when there is a conflict with Rule 84. The *Macronix* view has been adopted by some district courts, but such courts are in the minority. Most districts have opted to use the *K-Tech* approach—that a complaint in the mold of Form 18 will survive a motion to dismiss.

#### IV. THE FUTURE OF PATENT PLEADING: HOW *TWOMBLY* MAY BE APPLIED

With the elimination of Rule 84 and Form 18 from the Federal Rules, district courts are now unquestionably bound by *Twombly* and *Iqbal* to apply the plausibility standard to patent infringement pleadings.<sup>136</sup> Several district courts have indeed already confirmed this.<sup>137</sup> Now the question on everyone's mind is—what does this mean in practice?

##### A. Identifying Infringed Claims

In applying *Twombly* and *Iqbal* to patent pleadings, courts will likely require patentees to identify the particular claim or claims allegedly infringed in addition to identifying the patent number.<sup>138</sup> Many patents have dozens of claims, each of which could potentially be infringed; and each claim has a unique set of limiting elements, so a product could easily infringe one claim but not another. If a patentee does not identify which claims are allegedly infringed, the defendant is left to speculate and is hindered in

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134. *Id.* (“And, it needs no authority to accept that decisions by the Supreme Court that instruct how to apply the Federal Rules of Civil Procedure are controlling.”).

135. *Id.*

136. Craig N. Henschel, *Coming Changes to the FRCP Can Affect IP Litigation*, SERENDIPITY (June 17, 2015), <http://www.ip-lawblog.com/Coming-Changes-to-the-FRCP-Can-Affect-IP-Litigation-06-17-2015>.

137. See *Mayne Pharma Int'l PTY Ltd. v. Merck & Co., Inc.*, No. 15-438-LPS-CJB, 2015 WL 7833206, at \*6 n.1 (D. Del. Dec. 3, 2015) (“Under the new rules, allegations of direct infringement will be subject to the pleading standards established by *Twombly* and *Iqbal*, requiring plaintiffs to demonstrate a ‘plausible claim for relief.’ ”); *Rembrandt Patent Innovations LLC v. Apple Inc.*, No. C 14-05093 WHA, 2015 WL 8607390, at \*2 (N.D. Cal. Dec. 13, 2015) (“Rule 84 has been abrogated, so *In re Bill of Lading* no longer applies.”).

138. Even under *Conley* notice pleading, it is surprising that this was not required.

drafting an answer.<sup>139</sup> In other words, the defendant is not given fair notice of the claim and the grounds upon which it rests. This is consistent with the court's position in *Macronix* when it stated that *Twombly* "will require counsel to focus complaints only on viable claims."<sup>140</sup> Such a focus will solve the concern expressed by the *Macronix* court—that a complaint of vague or conclusory allegations would force defendants to "prepare defenses for the many claims that will inevitably fall by the way side."<sup>141</sup> Given that *Macronix* took the position that *Twombly* and *Iqbal* (and not Form 18) control with respect to patent pleadings, courts should treat it as relevant precedent in the absence of Form 18.

### B. Identifying Infringing Products

Determining whether a complaint states a plausible claim to relief is a context-specific task.<sup>142</sup> Even in *K-Tech*, where the court ultimately held that the Forms control, it still acknowledged that the plausibility of a complaint is largely dependent on the complexity of the patent-in-suit, the accused product or products, and the defendant's business.<sup>143</sup> Thus, in some circumstances, plaintiffs may be required to identify the allegedly infringing product by name or model number, in addition to the infringed claims.<sup>144</sup> For example, in cases like *Hewlett-Packard* and *Bender*, the complaints were directed toward 4000 end-user products and millions of circuits, respectively.<sup>145</sup> In each case, the defendant was left to speculate what the plaintiff was actually asserting because the complaint was so broad with respect to the allegedly infringing product or products. This does not constitute fair notice.

In some instances, though, identifying the patent number may be sufficient to state a claim. For example, an alleged infringer may make or use only a single product of a certain type. For example, the defendant hotels in *Phonometrics* used only a single call-cost accounting system. Despite the fact that the plaintiff did not and could not name the particular infringing system by name or model number, it was certainly clear to the defendant what the plaintiff was referring to in the complaint.

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139. See Peter S. Menell et al., *Patent Case Management Judicial Guide* ch. 2 p. 8, FEDERAL JUDICIAL CENTER (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/patent01.pdf/\\$file/patent01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/patent01.pdf/$file/patent01.pdf) ("Because a plaintiff may assert multiple claims in multiple patents, a defendant reading a notice pleading complaint is typically left to guess as to the boundaries of a plaintiff's case and the available defenses.").

140. *Macronix*, 4 F. Supp. 3d at 803.

141. *Id.*

142. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

143. See *K-Tech Telecomms.*, 714 F.3d at 1286.

144. See *Bender*, 2010 WL 889541, at \*6 (N.D. Cal. Mar. 11, 2010) (holding that sufficient allegations would include, at minimum "certain named and specifically identified products," among other things).

145. See *infra* notes 55-59 and accompanying text.

In summary, the specificity required of a patent pleading with respect to the allegedly infringing product will depend on the particular facts of each case. A simple patent asserted against a defendant selling a single product will likely require less specificity than a complex patent asserted against a corporation selling dozens of products in a single technology area.

*C. Comparing Claim Limitations to Elements of the  
Allegedly Infringing Product*

There is also some authority to suggest that plaintiffs will be required to compare claim limitations to the elements of an allegedly infringing product.<sup>146</sup> While identifying the infringed claim and infringing product would likely put the defendant on notice, courts may be hesitant to hold that complaints “cross[ ] the line from conceivable to plausible” if they do not include allegations that particular claim elements are practiced.<sup>147</sup> For example, the *Macronix* court held that “alleging how the offending products [meet] the claims recited” is required to make a plausible showing of infringement.<sup>148</sup> The court further held that simply parroting the claim language for each element did not satisfy the requirements of *Twombly* and *Iqbal*.<sup>149</sup> This reasoning suggests that plaintiffs may have to compare specific claim limitations to specific product elements in order to survive a motion to dismiss.

Post-*Twombly* inducement cases also offer guidance on this issue. Federal courts, including the Federal Circuit in *In re Bill of Lading*, have held that Form 18 applies only to claims of direct infringement.<sup>150</sup> This means that *Twombly* and *Iqbal* applied to inducement cases even before the abrogation of the Forms.<sup>151</sup> Furthermore, because inducement is predicated on direct infringement, we can examine post-*Twombly* inducement cases to ascertain how courts may apply *Twombly* to *direct* infringement cases.

In *In re Bill of Lading*, the defendants were accused of inducing infringement of a method patent for the less-than-a-load trucking industry.<sup>152</sup> The patent recited seven steps, including scanning an image of shipping documentation data, processing that image and transmitting it to a remote processing center, and, at that remote processing center, preparing a loading manifest.<sup>153</sup> The accused defendants allegedly provided logistics and computing systems to trucking companies, which induced the trucking compa-

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146. *Macronix*, 4 F. Supp. 3d at 804.

147. *Twombly*, 550 U.S. at 546.

148. *Macronix*, 4 F. Supp. 3d at 804.

149. *Id.*

150. *In re Bill of Lading*, 681 F.3d at 1336.

151. *Id.* at 1337.

152. *Id.* at 1328.

153. *Id.* at 1329.

nies to infringe the patent.<sup>154</sup> In order to support its allegations of inducement, the plaintiff pointed to numerous statements and advertisements by the defendants that indicated that the defendants and their customers were using the patented method.<sup>155</sup> For example, the plaintiff pointed to statements and advertisements by the defendants touting their products' in-cab scanning and wireless transmission features.<sup>156</sup> Other advertisements explained the benefits of these features, including the ability to assign and dispatch drivers more quickly.<sup>157</sup> Each of these statements encouraged the defendants' customers to practice one or more of the steps of the method patent. In holding that the plaintiff had stated a claim of inducement with respect to all of the defendants, the court stated that "[i]n some circumstances, [the] failure to allege facts that plausibly suggest a specific element or elements of a claim have been practiced may be fatal in the context of a motion to dismiss."<sup>158</sup>

This logic can be extended to claims of direct infringement.<sup>159</sup> If a plaintiff fails to allege facts that suggest that a particular element is present in a product or that a particular step in a method patent is practiced, then the plaintiff may not survive a motion to dismiss under the *Twombly* plausibility standard. This would be a context-specific analysis, as *Iqbal* demands.<sup>160</sup> For example, although a plaintiff fails to allege facts showing a particular element is present in an infringing product, he may survive a motion to dismiss if he alleges that the element must inherently be present in the product due to its function. Allying that each limitation of a patent claim has a corresponding element in the accused product likely takes a claim from conceivable to plausible.

Plaintiffs may argue that comparing claim limitations to product elements is unduly burdensome at the pleading stage, but the Northern District of California has required this since 2000,<sup>161</sup> and it remains one of the most popular forums for patent litigation.<sup>162</sup> Additionally, Rule 11 requires that

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154. *Id.*

155. *Id.* at 1341-46.

156. *Id.* at 1341-42.

157. *Id.* at 1343.

158. *Id.* at 1342.

159. See *Macronix*, 4 F. Supp. 3d at 799 (citing an earlier court order to plaintiff to amend its complaint to include "specific claim or claims which are alleged to be infringed, and the elements thereof that are alleged to be infringed by the allegedly infringing product," and then dismissing the amended complaint when the plaintiff failed to do so).

160. *Iqbal*, 556 U.S. at 663-64.

161. *Ware*, *supra* note 61, at 965.

162. In 2015, the Northern District of California had the fourth most patent filings, behind only the Eastern District of Texas, the District of Delaware, and the Central District of California. The Eastern District of Texas, the most popular forum by a wide margin, has local patent rules similar to the Northern District of California's. See Brian Howard, *2015 End-of-Year Trends, Patent Litigation*, LEX MACHINA (Jan. 7, 2016), <https://lexmachina.com/lexmachina-2015-end-of-year-trends/>.

plaintiffs' counsel conduct a reasonable inquiry into the legal and factual bases of the claims.<sup>163</sup> The Federal Circuit has held that "at a bare minimum," a law firm must "apply the claims of each and every patent that is being brought into the lawsuit to an accused device and conclude that there is a reasonable basis for a finding of infringement of at least one claim."<sup>164</sup> Since Rule 11 already requires a comparison of the claim limitations to the elements of the allegedly infringing product, it is hard to imagine that it would be too burdensome on plaintiffs to require that this information be included in the complaint and supported by some factual allegations.

In summary, a complaint for patent infringement under *Twombly* and *Iqbal* will, in most circumstances, require more specificity in order to survive a motion to dismiss than complaints filed prior to the abrogation of the Forms. Plaintiffs will likely be required to identify the claim or claims it believes are infringed. Depending on the complexity of the patent and the defendant's business, plaintiffs may also be required to identify the accused product by name or model number. Whether or not this is actually required will depend on the particular facts of the case. Finally, to move a claim across the line from conceivable to plausible, plaintiffs may need to allege that each claim limitation has a corresponding element in the accused product. The Northern District of California's Patent Local Rules would serve as a close approximation of the approach outlined here.<sup>165</sup>

#### CONCLUSION

With the elimination of Rule 84 and Form 18, the plausibility standard announced in *Twombly* and *Iqbal* will apply to patent infringement pleadings. The practical result of this change is that plaintiffs will have a harder time surviving a motion to dismiss for failure to state a claim. Prior to December 1, 2015, courts struggled to reconcile the conclusory nature of Form 18 with the plausibility standard set forth in *Twombly* and *Iqbal*. Now, there is a clear standard—patent complaints must include much more than Form 18 conclusory statements.

For defendants and federal courts, this is beneficial for several reasons. First, the elevated pleading standard will discourage frivolous filings by non-practicing entities, or patent trolls. Filing a complaint that is sufficient under the new pleading regime will require more diligence and research that patent trolls may not be willing to undertake. Second, frivolous complaints that *are* filed will be disposed of quickly by the courts through motions to dismiss—

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163. FED. R. CIV. P. 11.

164. *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000).

165. It should be noted, though, that the rules are less amendable to context and circumstances than this approach. Under the Northern District of California's Patent Local Rules, the infringed claims and infringing products *must* be identified. Also, claim limitations *must* be compared to corresponding elements in the accused product; there is little flexibility. N.D. CAL. PATENT L.R. 3-1.

conserving time and resources for the courts and parties involved. Third, tougher pleading requirements will force plaintiffs to crystalize their theory of infringement early on in the litigation, reducing expenses for both plaintiffs and defendants. As the *Macronix* court succinctly observed:

The current practice is to file a Form 18 complaint and then, using claim charts, prior art charts, discovery, and motions, to pare claims that ought not to have been brought or that cannot withstand careful scrutiny. That process has proven to be an increasingly expensive proposition for the parties and one that takes a tremendous toll on already strained judicial resources.<sup>166</sup>

Now, meritless claims will be weeded out early, greatly reducing the number of cases proceeding to discovery, allowing parties to avoid the most expensive part of a patent infringement suit. Finally, earlier exploration into the merits of patent claims in competitor cases will encourage early settlement, reducing externalities such as legal fees and court costs.<sup>167</sup>

With the abrogation of the Forms, federal courts will no longer struggle to reconcile the conclusory nature of Form 18 with the plausibility standard. Instead, courts must now decide how to apply the plausibility standard to patent infringement complaints. They must determine, in a context-specific inquiry, whether complaints for patent infringement are sufficiently plausible in light of guidance from *Twombly*, *Iqbal*, and *Macronix*. In doing so, courts may be inclined to look to the Northern District of California's Patent Local Rules for guidance. Regardless, it will be interesting to observe how both courts and plaintiffs react in the absence of the simple template they once so heavily relied on.

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166. *Macronix*, 4 F. Supp. 3d at 803.

167. On the other hand, plaintiffs with legitimate claims may be discouraged from filing complaints due to the up-front costs associated with a stricter pleading requirement.