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# RECONCILING *TWOMBLY* AND PATENT PLEADINGS BEYOND THE TEXT OF FORM 18

*Yoonhee Kim*\*

## INTRODUCTION

To survive dismissal, a pleading in civil cases must contain “a short and plain statement of the claim *showing* that the pleader is entitled to relief.”<sup>1</sup> Emphasizing what it takes to be a “showing” of entitlement to relief, the Supreme Court in *Bell Atlantic Corp. v. Twombly*<sup>2</sup> adopted the “plausibility” standard and overruled the “no set of facts” standard established in *Conley v. Gibson*, under which the pleading of facts is not required.<sup>3</sup> The Court in *Ashcroft v. Iqbal* later expanded the application of the *Twombly* standard to all civil cases under Rule 8.<sup>4</sup>

Nonetheless, the current pleading practice in patent infringement cases does not adhere to *Twombly*’s plausibility standard. Rather, patent practice continues to follow “Form 18” in the Appendix of Forms to the Federal Rules, which sets forth a sample complaint requiring only the statement and allegation of jurisdiction, patent number, date of patent, infringing activity, and relief.<sup>5</sup> This continued practice has been endorsed by the Court of Appeals for the Federal Circuit, which has held that “Form 18 would control in the event of a

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<sup>1</sup> FED. R. CIV. P. 8(a)(2) (emphasis added).

<sup>2</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2007).

<sup>3</sup> *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

<sup>4</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

<sup>5</sup> FED. R. CIV. P. FORM 18.

conflict between the form and *Twombly* and *Iqbal*.<sup>6</sup> Tellingly, a recently proposed bill in Congress would, if enacted, mandate a revision of Form 18.<sup>7</sup>

This paper explores the patent pleading standard as it stands now, delving into the disparity between, and how to reconcile, *Twombly* and patent pleadings. Part I revisits why and how *Twombly* raised the pleading standard and called for “plausibility” with emphasis on the meaning of “showing” in Rule 8. Part II reviews how lower courts handling patent infringement have interpreted Form 18 in light of *Twombly*. Finally, Part III explores how patent pleadings and *Twombly* can be reconciled.

### I. WHY *TWOMBLY* RAISED THE STANDARD: THE “SHOWING” OF RULE 8 & DISCOVERY ABUSE

Rule 8 provides in relevant part that “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>8</sup> Two motivating forces were behind the 1938 addition of Rule 8: the “notice pleading” principle and the “uniformity” purpose. The former hinges on whether sufficient allegations are pled to put the defendant on “fair notice.”<sup>9</sup> The latter is related to the overarching purpose of Rule 8 to establish “a uniform system for all [civil] cases,”<sup>10</sup> unless specifically carved out for the heightened standard under Rule 9, such as pleading fraud.<sup>11</sup>

*Twombly* grapples with a threshold level of factual details set forth on the face of a complaint. Special attention by the Court was directed to the incoherency between “fair notice” and *Conley*, particularly its “no set of facts” language. Importantly, in overruling the “no set of facts” standard, *Twombly* emphasized the meaning of “showing” in Rule 8 as well as the danger of “discovery abuse.”

#### A. *Twombly’s Efforts to Reconcile Conley and Rule 8*

Before *Twombly*, *Conley* governed the notice pleading regime for five decades. In *Conley*, black railroad workers were fired, and they alleged that the union refused to protect them against the wrongful discharge in violation of its

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<sup>6</sup> *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1284 (Fed. Cir. 2013).

<sup>7</sup> Patent Abuse Reduction Act, S. 1013, 113th Cong. § 2(c) (2013) (“Not later than 12 months after the date of enactment of this Act, the Supreme Court shall review and amend Form 18 . . . to ensure that Form 18 is consistent with the requirements under section 281A of title 35.”).

<sup>8</sup> FED. R. CIV. P. 8(a)(2).

<sup>9</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

<sup>10</sup> *Nagler v. Admiral Corp.*, 248 F.2d 319, 323 (2d Cir. 1957).

<sup>11</sup> FED. R. CIV. P. 9(b).

statutory duty to represent employees fairly.<sup>12</sup> The union countered that these allegations were insufficient for Rule 8; however, the Supreme Court did not accept the union's argument, reasoning that if those allegations were proven, there would be a manifest breach of the union's duty.<sup>13</sup>

*Conley* went so far as to say that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim."<sup>14</sup> If bound by this "no set of facts" standard, courts can dismiss a complaint "only when proceeding to discovery or beyond would be futile."<sup>15</sup> When *Twombly* was litigated, the "no set of facts" standard was firmly in place as *Conley* had been cited in more than ten opinions of the Supreme Court.<sup>16</sup> However, the legacy of *Conley* did not stop the Court from overruling the "no set of facts" standard in *Twombly*.

### 1. *Conley*'s "No Set of Facts" Language and Parallel Conduct in *Twombly*

It is of note that *Twombly* did not question the legitimacy of *Conley* in its entirety; only the "no set of facts" language was targeted. In reconciling Rule 8 and *Conley*, the Court highlighted what it takes to be a "showing" for the purpose of "fair notice." In *Twombly*, plaintiffs brought class actions, asking treble damages for violation of section 1 of the Sherman Act.<sup>17</sup> One of the antitrust violations alleged against service provider defendants involved "parallel conduct" in their service areas as a way to suppress the growth of new business rivals.<sup>18</sup>

In *Twombly*, the Court sought to dissociate the allegations of "parallel conduct" from the "showing" and "fair notice" requirements under Rule 8. It first articulated from *Conley* that the essence of pleading is to give fair notice about *factual* allegations on which the claims rest.<sup>19</sup> Having characterized "a formulaic recitation of the elements of a cause of action" as inconsistent with fair notice, the Court mulled over three choices concerning the required level of

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<sup>12</sup> *Conley*, 355 U.S. at 43.

<sup>13</sup> *Id.* at 43, 45–46.

<sup>14</sup> *Id.* at 45–46 (emphasis added).

<sup>15</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting).

<sup>16</sup> *Id.* at 577 n.4 (citing *SEC v. Zandford*, 535 U.S. 813, 818 (2002); *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 654 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *Brower v. Cnty. of Inyo*, 489 U.S. 593, 598 (1989); *Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Haines v. Kerner*, 404 U.S. 519, 521 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969)).

<sup>17</sup> 15 U.S.C. § 1 (2012).

<sup>18</sup> *Twombly*, 550 U.S. at 550. And the second count was a conspiracy by agreeing to refrain from competing against one another. *See id.* at 551.

<sup>19</sup> *Id.* at 555.

factual allegation: “probable,” “plausible,” and “possible.”<sup>20</sup> It concluded that the requirement should be more than a “possibility,” but need not be “probable.”<sup>21</sup> Consequently, the threshold level of pleading in compliance with fair notice is set to require factual allegations to be “plausible” that discovery will reveal evidence.<sup>22</sup>

In light of this “plausibility” standard, the Court held that a bare assertion of parallel conduct, without additional factual *showing*, “stops short of the line between possibility and plausibility.”<sup>23</sup> The Court labeled the defendants’ parallel conduct as consistent not only with an illegal agreement, but also with a legitimate, independent decision in the hope of keeping regional dominance of their own.<sup>24</sup> Given the neutral view taken by the Court as to parallel conduct, it concluded that the complaint should have contained a higher factual “*showing*” of conduct in furtherance of the illegal conspiracy.

However, *Twombly*’s plausibility standard conflicts directly with *Conley*’s “no set of facts” standard, because “the pleading standard [under *Conley*] . . . does not require, or even invite the pleading of *facts*.”<sup>25</sup> In response, likening “no set of facts” to “a formulaic recitation of the elements of a cause of action,” *Twombly* tried to put *Conley* in perspective.<sup>26</sup> Instead of dismissing it outright, *Twombly* cautioned against the liberal reading of the “no set of facts” language, because such reading would “dispense with any *showing*” of factual allegations, contrary to the text of Rule 8.<sup>27</sup>

In so reconciling Rule 8 and *Conley*, *Twombly* was faithful to the judicial maxim that “general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used.”<sup>28</sup> Targeting only the “no set of facts” language, *Twombly* did not attempt to undermine the adequacy of *Conley*’s disposition because *Conley*’s factual allegations were sufficient to put the defendant on fair notice.<sup>29</sup> It merely called into question the isolated meaning

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<sup>20</sup> *Id.* at 555–57.

<sup>21</sup> *Id.* at 556.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 557. In reaching such conclusion, *Twombly* cited antitrust precedents and leading commentators in support of that conclusion. *See id.* at 554 (“[P]roof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action.” (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984)); *see also id.* at 555–56 (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004)).

<sup>24</sup> *See Twombly*, 550 U.S. at 567–68.

<sup>25</sup> *Id.* at 580 (Stevens, J., dissenting) (emphasis added).

<sup>26</sup> *Id.* at 555 (majority opinion).

<sup>27</sup> *Id.* at 562 (emphasis added).

<sup>28</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821).

<sup>29</sup> *See Twombly*, 550 U.S. at 562–63 (“To be fair to the *Conley* Court, the passage should be understood in light of the opinion’s preceding summary of the complaint’s concrete allegations.”).

of “no set of facts,” saying it has been “puzzling the profession for 50 years.”<sup>30</sup> Viewed in light of *Conley*’s concrete allegations of facts regarding the breach of the union’s duty,<sup>31</sup> *Twombly* concluded, the “no set of facts” language in *Conley* cannot add up to the pleading standard.<sup>32</sup>

## 2. The Fact-Law Dichotomy in Characterizing Allegations of a Complaint

It may sound strict to require plausibility at the outset of proceedings;<sup>33</sup> however, the Court brushed off a risk of false acquittal because every allegation in a complaint, however doubtful, will be accepted as “true.”<sup>34</sup> But *Twombly* added one important caveat to the characterization of each allegation contained in a complaint. In testing the sufficiency of plausibility, *Twombly* announced that it will consider only “factual” allegations and disregard mere “legal” conclusions.<sup>35</sup> It ruled, upon review of the *Twombly* complaint, that the defendants’ “conspiracy” in restraint of trade and agreements not to compete are mere legal conclusions resting on the factual allegations regarding parallel conduct.<sup>36</sup> Because legal conclusions are being set aside, and parallel conduct alone is factually neutral,<sup>37</sup> the Court held that the complaint was insufficient to state a claim to relief.<sup>38</sup>

Later the Court in *Iqbal* affirmed the fact-law dichotomy, stating that “[w]e begin our analysis by identifying the allegations in the complaint that are *not entitled to the assumption of truth*.”<sup>39</sup> Any contribution that legal conclusions can make to a pleading inquiry is limited to “provid[ing] the framework of a complaint.”<sup>40</sup> Thus, what is outcome-determinative in Rule 12(b)(6) motions are *factual* allegations and reasonable inferences therefrom, which collectively must raise a *plausible showing* of entitlement to relief.

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<sup>30</sup> *Id.* at 563.

<sup>31</sup> *See supra* note 13 and accompanying text.

<sup>32</sup> *Twombly*, 550 U.S. at 563.

<sup>33</sup> *See, e.g., id.* at 580 (Stevens, J., dissenting) (“[The *Conley*] Court would have understood the majority’s remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate.”).

<sup>34</sup> *Id.* at 555 (majority opinion).

<sup>35</sup> *See id.* at 555, 564.

<sup>36</sup> *Id.* at 564-65.

<sup>37</sup> *See id.* at 557 n.5 (“[Parallel conduct] lies between the factually neutral and the factually suggestive.”).

<sup>38</sup> *Id.* at 570.

<sup>39</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (emphasis added).

<sup>40</sup> *Id.* at 679.

### B. *Twombly's Main Concern: Discovery Abuse*

*Twombly* was mindful of the glitch that an “imperfect judicial system” can distort otherwise healthy competition in the marketplace.<sup>41</sup> Throughout the opinion, the Court’s overarching concern was expressly directed to the “enormous expense” of antitrust discovery and the possibility of “discovery abuse” by a private plaintiff’s non-meritorious claim.<sup>42</sup> If faced with such high cost of litigation and discovery, antitrust defendants will likely be forced to calculate all the risk and resources involved, and non-sophisticated defendants are likely to find it cheaper to settle than to fight.

Besides, treble damages available under the Sherman Act<sup>43</sup> might lure plaintiffs with a weak case to push forward a private grievance before the courts.<sup>44</sup> However, antitrust laws were never intended to penalize a monopoly position acquired “merely by virtue of his superior skill, foresight and industry.”<sup>45</sup> Moreover, antitrust laws were enacted to protect competition, not competitors.<sup>46</sup>

Such inherent uncertainties over the dividing line between harm to competition and harm to competitors, coupled with a risk of discovery abuse, were shoving the *Twombly* Court in the direction of elevating the burden of pleading antitrust claims.<sup>47</sup> On these policy grounds, *Twombly* declared that “basic deficiency [in pleadings] should be . . . exposed at the point of *minimum expenditure of time and money* by the parties and the court.”<sup>48</sup>

Relatedly, *Twombly* delegated into the hands of district courts “the power to insist upon some specificity in pleading before allowing a potentially massive

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<sup>41</sup> Paul H. Saint-Antoine, *IP, Antitrust, and the Limits of First Amendment Immunity: Shouting “Injunction” in a Crowded Courthouse*, 27 A.B.A. ANTITRUST MAG. 41, 45 (2013).

<sup>42</sup> See *Twombly*, 550 U.S. at 559 (“[T]he threat of [enormous] discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”).

<sup>43</sup> See 15 U.S.C. § 15(a) (2012) (“[A]ny [injured] person . . . shall recover *threefold* the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”) (emphasis added).

<sup>44</sup> *But cf. Twombly*, 550 U.S. at 587 (Stevens, J., dissenting) (arguing that the Sherman Act’s awarding treble damages and attorney’s fees for successful plaintiffs indicates that Congress intended to encourage private enforcement of antitrust laws).

<sup>45</sup> *United States v. Aluminum Co. (Alcoa) of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

<sup>46</sup> See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (“The antitrust laws . . . were enacted for the protection of *competition not competitors.*”) (emphasis added) (internal quotation marks omitted).

<sup>47</sup> See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 738 n.28 (2012).

<sup>48</sup> *Twombly*, 550 U.S. at 558 (citing WRIGHT & MILLER, *supra* note 23, § 1216, at 233–34) (emphasis added).

factual controversy to proceed.”<sup>49</sup> Later, the Court in *Iqbal* demanded judicial flexibility in examining all civil pleadings, stating that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its *judicial experience and common sense*.”<sup>50</sup>

Finally, *Twombly* left a hint at the end of the opinion, anticipating the criticism that only causes of action under Rule 9 are subject to any “heightened” pleading standard:

On certain subjects understood to raise a *high risk of abusive litigation*, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Here, our concern is not that the allegations in the complaint were insufficiently “particular[ized]”; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs’ entitlement to relief plausible.<sup>51</sup>

Here, the Court’s preemptive answer is that the potential criticism does not fully understand the Court’s premise that “particularity” is not a synonym of “plausibility.” For this reason, the important lesson for lower courts and practitioners is that the Supreme Court will keep close watch on “a high risk of abusive litigation” in the form of discovery abuse, and in civil cases under Rule 8, with the “plausibility” tool at hands.

### C. Justice Stevens’ Dissent and Form 9 at Play

Justice Stevens expressed strong allegiance to *Conley*’s legitimacy in its entirety. Taking issue with the majority’s fact-law dichotomy,<sup>52</sup> Justice Stevens argued that Rule 8 was designed to avoid the law-versus-fact reference, recognizing the difficulty in distinguishing “statements of fact” from “conclusions of law.”<sup>53</sup>

Justice Stevens added a powerful piece to his logical force. Arguing that it is illustrative of what drafters of Rule 8 envisioned, Justice Stevens cited to Form 9 (now Form 11): “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.”<sup>54</sup> Since negligent driving

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<sup>49</sup> *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

<sup>50</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added).

<sup>51</sup> *Twombly*, 550 U.S. at 569 n.14 (citations omitted) (emphasis added).

<sup>52</sup> *See supra* Part I.A.2.

<sup>53</sup> *Twombly*, 550 U.S. at 574–75 (Stevens, J., dissenting).

<sup>54</sup> *Id.* at 576 (citing FED. R. CIV. P. FORM 9 (2006) (renumbered FED. R. CIV. P. FORM 11)).



is a mere “legal” conclusion, Justice Stevens continued, *Twombly* will render useless Form 9 against the drafter’s intent.<sup>55</sup>

The majority did not lose sight of the problems aroused by Justice Stevens’ citation to Form 9. In response, the majority sought to embrace, not dodge, the legitimacy of Form 9,<sup>56</sup> finding it consistent with a “showing” of Rule 8. Unlike Form 9’s delineation of facts concerning a car accident including the time, place, and persons involved, the majority characterized the *Twombly* complaint as lacking such specificity of Form 9 with regard to the alleged meetings and conspiracies.<sup>57</sup>

Consequently, defendants in *Twombly* were left with no clue as to where to begin and what to answer.<sup>58</sup> To the majority, this factual insufficiency of the *Twombly* complaint, if left unchecked, would be jeopardizing the hallmark of pleading—“fair notice.” To put the defendant on fair notice, the majority again emphasized that a complaint must possess a factual “showing” of entitlement to relief that is plausible on its face.<sup>59</sup> A blanket assertion of entitlement to relief not only adds little to that “showing,” but also runs counter to the spirit of “fair notice.”<sup>60</sup>

Importantly, even Justice Stevens did not disagree with the importance of “fair notice” and the meaning of “showing” under Rule 8.<sup>61</sup> Thereafter, *Twombly*’s rule based on fair notice and a showing of entitlement to relief has not been questioned by the judiciary. Given this acknowledgment of “fair notice” in civil pleadings, the current pleading practice in patent infringement cases is a surprising turnout.

## II. FORM 18 AND POSSIBLE ABUSES OF PATENT PLEADINGS

Along with Form 9, the Appendix to the Federal Rules provides a sample complaint for patent infringement in Form 18. Because the Federal Circuit has exclusive jurisdiction over patent law appeals,<sup>62</sup> the mission of interpreting *Twombly* in patent cases is up to the Federal Circuit. In the face of *Twombly* and

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<sup>55</sup> See *id.* at 575–576.

<sup>56</sup> *Id.* at 555 n.3 (majority opinion).

<sup>57</sup> *Id.* at 565 n.10.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 555 n.3.

<sup>60</sup> See *id.* (citing WRIGHT & MILLER, *supra* note 23, § 1202, at 95) (noting that Rule 8 does not authorize a pleader’s “bare averment that he wants relief and is entitled to it”).

<sup>61</sup> Compare *id.* at 555 n.3 (the majority), with *id.* at 580 n.6 (Stevens, J., dissenting) (“The majority is correct to say that what the Federal Rules require is a *showing* of entitlement to relief.” (emphasis added) (internal quotation marks omitted)).

<sup>62</sup> 28 U.S.C. § 1295 (2012).

*Iqbal*,<sup>63</sup> the Federal Circuit apparently unlocks the door of discovery to a plaintiff who is armed with Form 18.<sup>64</sup> A particular group of patent holders, Patent Assertion Entities, are uniquely situated to gain the maximum benefit afforded by the lower pleading standards of Form 18. However, a closer examination of both antitrust and patent infringement cases reveals a shared characteristic of a high risk of abusive litigation and discovery abuse.

#### A. Patent Pleadings in Practice Post *Twombly* & *Iqbal*

Form 18 requires the following information:

(1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a statement that defendant has been infringing the patent “by making, selling, and using [the device] embodying the patent”; (4) a statement that the plaintiff has given the defendant notice of its infringement; and (5) a demand for an injunction and damages.<sup>65</sup>

As such, Form 18 fails to bear out the “all element rule” of patent infringement that every element in the claim must be present in the accused device. In alleging that the accused device is “embodying the patented invention,” Form 18 provides no specifics of *how* that device is infringing *which* claim of the patent.<sup>66</sup>

In the course of interpreting Form 18, the Federal Circuit at first viewed Form 18 as compliant with *Twombly* in a pro se case, which led to confusion in the district courts. Later, the Federal Circuit departed from *Twombly*, on the matter of direct infringement, by electing to endorse the legitimacy of Form 18 over *Twombly*.

##### 1. Form 18 and Pro Se Litigants: *McZeal v. Sprint Nextel Corp.*

Several months after *Twombly* but before *Iqbal*, the Federal Circuit was faced with a task of reconciling *Twombly* and Form 18 (then Form 16).<sup>67</sup> In *McZeal*, a pro se litigant sued Sprint for patent infringement, and the district

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<sup>63</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (announcing that the *Twombly* standard is controlling “in all civil actions and proceedings in the United States district courts” (quoting FED. R. CIV. P. 1)).

<sup>64</sup> *Cf. id.* at 678–79.

<sup>65</sup> *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007) (alteration in original) (citing FED. R. CIV. P. FORM 16 (2006) (renumbered FED. R. CIV. P. FORM 18)).

<sup>66</sup> *Id.* at 1360 (Dyk, J., concurring in part and dissenting in part).

<sup>67</sup> When *McZeal* was decided, the patent infringement pleading form appeared in Form 16. FED. R. CIV. P. FORM 16 (2006). The Forms were updated in 2007, and now the old Form 16 is renumbered, with substantially identical contents, as “Form 18.” FED. R. CIV. P. FORM 18.

court granted Sprint's motion to dismiss, remarking that the complaint was "irreparable because . . . [t]here just aren't any facts."<sup>68</sup>

The Federal Circuit vacated the dismissal. As an initial matter, the court resolved the jurisdictional question, announcing that "[a Rule 12(b)(6) motion] is a purely procedural question not pertaining to patent law" and therefore on review should "apply the law of the regional circuit."<sup>69</sup> But, at first blush, a perplexity arises because the court could have added that review of patent law questions embodied in the pleading is subject to Federal Circuit law.<sup>70</sup> Here, the Federal Circuit seems to draw the line to distance itself from substantive patent law questions embodied in patent pleadings.

An important premise in *McZeal* was that the plaintiff was acting pro se, and hence, was entitled to less stringent pleading standards.<sup>71</sup> The court then endeavored to weave Form 18 into *Twombly*'s mandate of "fair notice,"<sup>72</sup> by emphasizing that *Twombly* in fact approved Form 9 and did not change the pleading standard as articulated in *Conley*.<sup>73</sup> It concluded that a patent complaint is not required to include each element of a patent claim because Form 18, like Form 9, can put defendants on enough notice.<sup>74</sup>

Dissenting in part, Judge Dyk argued that the majority's position is inconsistent with *Twombly* because Form 18 cannot pass the plausibility test for failure to state both the patent claim being asserted and how an infringing activity reads on the asserted claim.<sup>75</sup> Also, Judge Dyk pointed out that allowing "conclusory allegations" under Form 18 to go beyond the pleading stage would expose defendants to "extensive discovery."<sup>76</sup>

Despite his open criticism to the consequence of approving Form 18, however, Judge Dyk agreed that Rule 84, which provides that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate,"<sup>77</sup> forces judicial hands to find Form 18 sufficient per

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<sup>68</sup> *McZeal*, 501 F.3d at 1355.

<sup>69</sup> *Id.* at 1355–56.

<sup>70</sup> See *Bayer Schering Pharma AG v. Lupin, Ltd.*, 676 F.3d 1316, 1327 (Fed. Cir. 2012) (Newman, J., dissenting); see also *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1363 (Fed. Cir. 2004) ("[W]e will apply our own law to both substantive and procedural issues intimately involved in the substance of enforcement of the patent right." (internal quotation marks omitted)).

<sup>71</sup> *McZeal*, 501 F.3d at 1356.

<sup>72</sup> See *id.* at 1357 ("[A] patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend." (emphasis added)).

<sup>73</sup> See *id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007)); see also *id.* at 1356 n.4 ("*Bell Atlantic* favorably quoted *Conley*.").

<sup>74</sup> *Id.* at 1357; see also *supra* Part I.C.

<sup>75</sup> See *McZeal*, 501 F.3d at 1360 (Dyk, J., concurring in part and dissenting in part).

<sup>76</sup> *Id.* at 1362; see also *supra* Part I.B.

<sup>77</sup> FED. R. CIV. P. 84 (emphasis added).

se.<sup>78</sup> Instead, having recognized the irreconcilable gap between *Twombly* and Form 18, Judge Dyk called congressional attention to Form 18.<sup>79</sup>

The majority's position that Form 18 conforms to *Twombly* was based on the recognition that a pro se litigant is held to the lower pleading bar, although the Federal Circuit did not forget to pen admonition against *McZeal*'s "voluminous" experience however short of sophistication.<sup>80</sup> On remand, the district court in defiance of the Federal Circuit dismissed the complaint again,<sup>81</sup> and the Federal Circuit affirmed that judgment albeit on a different ground.<sup>82</sup> But the district court in *McZeal* was not alone in its want for guidance.

## 2. Sharp Divisions in District Courts over the Sufficiency of Form 18

*McZeal* caused a lack of uniformity at the trial court level. A good example is district courts in California. First, in *Bender v. LG Electronics U.S.A., Inc.*, the court called for a plausible claim in accordance with *Twombly*, ruling that to put accused infringers on notice, a patentee must specifically identify an allegedly infringing product, such as "by name or number," and plead factual allegations to plausibly show infringement.<sup>83</sup> It found *McZeal* unhelpful to patentees because *Iqbal* abrogated *McZeal* or at least because *McZeal* was a pro se case.<sup>84</sup> Other district courts in different jurisdictions expressly declined to follow *McZeal* and Form 18, taking the position that

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<sup>78</sup> *McZeal*, 501 F.3d at 1360.

<sup>79</sup> *See id.* ("One can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require [the specifics of] allegations.").

<sup>80</sup> *See id.* at 1358 ("By ruling in *McZeal*'s favor, we do not condone his method of pleading."); *see also id.* at 1359 n.2 (Dyk, J., concurring in part) ("*McZeal* is familiar with pleading requirements, and, in my view, should not benefit from the usual liberal reading given to pro se litigants.").

<sup>81</sup> *McZeal v. Sprint Nextel Corp. (McZeal II)*, 335 F. Appx 966, 967–68 (Fed. Cir. 2009) (quoting the district judge's remarks that "I'm actually comfortable simply holding the same way I held last time"; the remand is "absurd"; and "I was obliged by a gross error in the Court of Appeals to readdress the case").

<sup>82</sup> *Id.* at 969 (affirming the dismissal for want of prosecution in failing to comply with the court order).

<sup>83</sup> *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 U.S. Dist. LEXIS 33075, at \*8 (N.D. Cal. Mar. 11, 2010); *see also Bender v. Nat'l Semiconductor Corp.*, No. C 09-01151 JSW, 2009 U.S. Dist. LEXIS 113506, at \*6–7 (N.D. Cal. Dec. 7, 2009); *Tseng v. Marukai Corp. U.S.A.*, No. SACV 09-0968 AG (RNBx), 2009 U.S. Dist. LEXIS 112124, at \*3 (C.D. Cal. Nov. 13, 2009); *AntiCancer Inc. v. Xenogen Corp.*, 248 F.R.D. 278, 282 (S.D. Cal. 2007).

<sup>84</sup> *See LG Elecs.*, 2010 U.S. Dist. LEXIS 33075, at \*9–11, \*11 n.3; *see also Medsquire LLC v. Spring Med. Sys. Inc.*, No. 2:11-cv-04504-JHN-PLA, 2011 U.S. Dist. LEXIS 107416, at \*4–5 (C.D. Cal. Aug. 31, 2011).

*Twombly* and *Iqbal* practically invalidated Form 18.<sup>85</sup> Even a pro se litigant could not survive the court's searching inquiry for a plausible claim.<sup>86</sup>

To the contrary, other district court decisions in California took the side of *McZeal*, holding that allegations conforming to Form 18 are enough for pleading purposes.<sup>87</sup> Others including the Eastern District Court of Texas joined this group. For example, in *Traffic Information, LLC v. Yahoo! Inc.*, the court opined that "*Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18."<sup>88</sup>

Several other decisions found it dispositive that Form 18 only provides a template for *direct* infringement, such that *Twombly* is binding only in *indirect* infringement cases.<sup>89</sup> Under this approach, causes of action as set forth in and conforming to the Appendix of Forms will suffice per se, whereas those not listed there are subject to *Twombly*'s more demanding standard. This is the point

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<sup>85</sup> See, e.g., *Rovi Corp. v. Hulu, LLC*, No. 11-665, 2012 U.S. Dist. LEXIS 10183, at \*6-7 (D. Del. Jan. 27, 2012); *Tyco Fire Prods, LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 905 (E.D. Pa. 2011); *Ill. Tool Works Inc. v. Elektromanufaktur Zangenstein Hanauer GmbH & Co. KGaA*, No. 11-CV-262-JPS, 2011 U.S. Dist. LEXIS 137985, at \*6-7 (E.D. Wis. Nov. 30, 2011).

<sup>86</sup> See *Pieczenik v. Abbott Labs.*, No. 10-2230, 2011 WL 1045347, at \*20, \*27 (D.N.J. Mar. 23, 2011), *aff'd*, 474 F. App'x 766 (Fed. Cir. 2012).

<sup>87</sup> See *Bender v. Nokia Inc.*, No. C-09-1247 MMC, 2009 U.S. Dist. LEXIS 92482, at \*1-2 (N.D. Cal. Oct. 2, 2009); *accord* *Advanced Analogic Techs., Inc. v. Kinetic Techs., Inc.*, No. C-09-1360 MMC, 2009 U.S. Dist. LEXIS 57953, at \*2 (N.D. Cal. July 8, 2009); *see also* *Apple Inc. v. Eforcity Corp.*, No. 5:10-cv-03216 JF (HRL), 2011 U.S. Dist. LEXIS 39644, at \*6 (N.D. Cal. Apr. 5, 2011) (citing *McZeal* as case-dispositive); *Microsoft Corp. v. Phoenix Solutions, Inc.*, 741 F. Supp. 2d 1156, 1158 (C.D. Cal. 2010) (finding Form 18 sufficient). *But see* *LG*, 2010 U.S. Dist. LEXIS 33075, at \*15 (noting that *Nokia* did not discuss the sufficiency of the factual allegations in light of *Twombly* and *Iqbal*).

<sup>88</sup> *Traffic Info., LLC v. Yahoo! Inc.*, No. 2:09-CV-246-TJW-CE, 2010 WL 2545500, at \*7 (E.D. Tex. Apr. 13, 2010) (quoting *Bedrock Computer Techs., LLC v. Softlayer Techs., Inc.*, No. 609 CV 269, 2010 WL 5175172, at \*2 (E.D. Tex. Mar. 29, 2010)); *see also* *Clear with Computers, LLC v. Hyundai Motor Am., Inc.*, No. 6:09 CV 479, 2010 WL 3155885, at \*11 (E.D. Tex. Mar. 29, 2010) (dismissing Hyundai's argument that *Twombly* and *Iqbal* invalidated Form 18).

<sup>89</sup> See *Elan Microelecs. Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 U.S. Dist. LEXIS 83715, at \*7 (N.D. Cal. Sep. 14, 2009) ("In the absence of any other form that addresses indirect infringement and is made binding on the courts through Rule 84, the Court must apply the teachings of *Twombly* and *Iqbal*."); *accord* *Weyer v. MySpace, Inc.*, No. 2:10-cv-00499-MRP-FFMx, 2010 U.S. Dist. LEXIS 144008, at \*7 (C.D. Cal. June 17, 2010); *see also* *Medsquire*, 2011 U.S. Dist. LEXIS 107416, at \*7 ("Form 18 is inapplicable to claims of indirect or contributory infringement."); *Halton Co. v. Streivor, Inc.*, No. C 10-00655 WHA, 2010 U.S. Dist. LEXIS 50649, at \*7 (N.D. Cal. May 21, 2010) ("Nowhere in Form 18 are theories and elements of induced infringement or contributory infringement referenced.").

the Federal Circuit addressed in *In re Bill of Lading Transmission and Processing System Patent Litigation*.<sup>90</sup>

3. The Federal Circuit's Choice: Endorsing the Legitimacy of Form 18 Under Rule 84

Finally, the Federal Circuit stepped in to resolve diverging interpretations of Form 18. In *In re Bill of Lading*, a patentee sued defendants for induced and contributory infringement, and the district court dismissed the complaint in light of *Twombly*, concluding that it did not adequately plead direct infringement.<sup>91</sup> As direct infringement by a third party is a prerequisite for holding defendants liable for indirect infringement,<sup>92</sup> the Federal Circuit first had to come up with the rule of pleading direct infringement and to revisit *McZeal* not in the pro se context.

Reversing the district court's judgment, the Federal Circuit emphasized that neither *Twombly* nor *Iqbal* addressed "the sufficiency of a complaint alleging patent infringement or causes of action for which there is a sample complaint in the Appendix of Forms."<sup>93</sup> Despite a likelihood that information just enough to fill out Form 18 may not be sufficient under *Twombly* and *Iqbal*,<sup>94</sup> the court declined to rewrite the text of Form 18, because such act would encroach on congressional authority.<sup>95</sup>

In doing so, the Federal Circuit relied heavily on Rule 84,<sup>96</sup> pursuant to the Supreme Court's remark in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* that any changes "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."<sup>97</sup> Consequently, the court held that the complaint has sufficiently pled direct infringement, because Form 18 does not require a patentee to identify which claims are being infringed.<sup>98</sup>

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<sup>90</sup> *In re Bill of Lading Transmission & Processing Sys. Pat. Lit. (R+L Carriers, Inc. v. DriverTech LLC)*, 681 F.3d 1323 (Fed. Cir. 2012).

<sup>91</sup> *Id.* at 1330.

<sup>92</sup> *See, e.g.,* *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1320, 1332 (Fed. Cir. 2009); *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1326 (Fed. Cir. 2004); *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 774 (Fed. Cir. 1993).

<sup>93</sup> *In re Bill of Lading*, 681 F.3d at 1334.

<sup>94</sup> *Id.* at 1334 n.6.

<sup>95</sup> *Id.* at 1335 n.7.

<sup>96</sup> *See* FED. R. CIV. P. 84; *supra* notes 77–79 and accompanying text.

<sup>97</sup> *See In re Bill of Lading*, 681 F.3d at 1334 (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)); *accord McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J., concurring in part).

<sup>98</sup> *See In re Bill of Lading*, 681 F.3d at 1335–36.

Additionally, the Federal Circuit concluded that a pleading of indirect infringement would be subject to *Twombly*'s plausibility standard, because Form 18 is inapposite to indirect infringement.<sup>99</sup> Therefore, *In re Bill of Lading* embraced a bipolar approach that Form 18 trumps *Twombly* on the pleading of *direct* infringement, while leaving matters of *indirect* infringement to the discretion of district courts with the instruction to follow *Twombly*.<sup>100</sup>

*In re Bill of Lading* was dissented to even more vigorously than Judge Dyk's dissent in *McZeal*. Dissenting in part, Judge Newman faulted the panel majority for "absolv[ing] patent infringement pleadings from the uniform requirements of the Federal Rules and Supreme Court precedent."<sup>101</sup> To Judge Newman, the majority's position not only conflicts with *Twombly*'s mandate of "fair notice," but also makes useless "judicial experience and common sense" of district courts.<sup>102</sup>

Instead of Rule 84, what Judge Newman focused on is the purpose of the Federal Rules, i.e., to "provide a *uniform* procedure for all civil actions."<sup>103</sup> Relatedly, it was precisely for that reason that *Iqbal* was unconvinced by the argument that the *Twombly* standard is limited to antitrust cases.<sup>104</sup> Since Rule 8 was designed to "establish uniform rules" for all civil cases except those subject to Rule 9,<sup>105</sup> having samples attached for "illustration" should not release a limited number of causes of action from abiding by the fair notice principle. In any event, Judge Newman emphasized, there is no such "special" treatment.<sup>106</sup>

To add more weight to Judge Newman's dissent, the majority's reliance on *Leatherman* in warning against judicial activism seems misplaced.<sup>107</sup> At issue in *Leatherman*'s reference to Rule 9 was whether judicial authority can broaden

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<sup>99</sup> See *id.* at 1336 ("The Forms are controlling only for causes of action for which there are sample pleadings.").

<sup>100</sup> The Federal Circuit has since upheld the precedential value of *In re Bill of Lading*. See *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013); see also *Superior Indus., LLC v. Thor Global Enters. Ltd.*, 700 F.3d 1287, 1295 (Fed. Cir. 2012) (considering Form 18 as controlling, even where parties did not discuss Form 18). *But cf. In re Bill of Lading*, 681 F.3d at 1350 (Newman, J., dissenting in part and concurring in part) ("[T]he Chief Judge of the Federal Circuit, for example, has called the Form 18 complaint for patent infringement an embarrassment.").

<sup>101</sup> *In re Bill of Lading*, 681 F.3d at 1347.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1348 (emphasis added).

<sup>104</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (noting that *Twombly* was based on the interpretation and application of Rule 8).

<sup>105</sup> *In re Bill of Lading*, 681 F.3d at 1349 (quoting Judge William D. Mitchell's statement at the time of drafting the Forms).

<sup>106</sup> *Id.* at 1350 (citing *WRIGHT & MILLER*, *supra* note 23, § 1221, at 292).

<sup>107</sup> See *id.* at 1334 (majority opinion); *supra* note 97 and accompanying text.

the subject of Rule 9.<sup>108</sup> In addressing *Leatherman* in its footnote 14, *Twombly* did not disagree with *Leatherman*'s conclusion that any "heightened" pleading standard under Rule 9 can be achieved only through the amendment process initiated by Congress.<sup>109</sup>

Importantly, *Twombly* in the same footnote added that being "particularized" under Rule 9 is not a synonym for being "plausible" under Rule 8, although they can share the same triggering condition—"a high risk of abusive litigation."<sup>110</sup> Thus, when the courts witness certain abusive litigation tactics in the form of discovery abuse or frivolous claims, a searching inquiry for plausibility becomes increasingly more important. As Judge Newman pointed out, *Twombly* and *Iqbal* carved out no exception for pleading patent infringement.

### B. Form 18 and Patent Assertion Entities

Patent Assertion Entity (PAE) refers to a "firm[] whose business model primarily focuses on purchasing and asserting patents" against practicing firms.<sup>111</sup> Patent enforcement is at the center of its business model, seeking royalty payments from accused infringers by demanding a license or threatening to bring a lawsuit when a negotiation fails.<sup>112</sup> Counteractions are of little avail to accused infringers because PAEs do not usually manufacture any commercial product.<sup>113</sup> Advocates have argued that PAEs "give the little guy a chance," and play a crucial role in providing small inventors with due compensation.<sup>114</sup>

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<sup>108</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; see also *supra* Part I.B. (discussing *Twombly*'s premise that particularity is not a synonym of plausibility).

<sup>111</sup> FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 8 n.5 (2011) [hereinafter 2011 IP REPORT], available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>. The term "NPE" includes a patent owner who develops and transfers technology (e.g., universities), and PAEs do not include this group of NPEs. See *id.*

<sup>112</sup> See *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011) (characterizing PAEs as "exploit[ing] the high cost to defend complex litigation to extract a nuisance value settlement" from accused infringers (emphasis added)). See also Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 484 (2014).

<sup>113</sup> See 2011 IP REPORT, *supra* note 111, at 223.

<sup>114</sup> Public Comments of IPNav at 1, Patent Assertion Entity Activities Workshop (2012), available at <http://www.justice.gov/atr/public/workshops/pae/comments/paew-0010.pdf>. All public comments submitted in response to the 2012 PAE Workshop are available at <http://www.justice.gov/atr/public/workshops/pae/#comments>. More than 90% of 68 public comments are supportive of the efforts to curb PAEs, requesting actions on the part of the DOJ and the FTC.



The advent of PAEs dates back to the mid-2000s, and their business model has since evolved to capitalize on the IP transaction market.<sup>115</sup> One recent trend is to increasingly target small businesses and end-users. While the main target in the past was large operating firms, PAEs in 2012 initiated more than 60% of all patent litigation suits and sued more non-tech companies than tech companies.<sup>116</sup> Such non-tech companies include hotels, coffee shops, restaurants, supermarkets, funeral homes, advertising agencies, and other retailers.<sup>117</sup>

Clueless on how to handle patent litigation, many small business owners will decide that it is cheaper to pay up-front than to fight.<sup>118</sup> Those who fight back, if successful, can vindicate their business integrity, but they must “spend[] millions of dollars and years in court.”<sup>119</sup> The fight, on occasion, saves the whole industry by invalidating key patents being asserted, but sometimes even legally sophisticated firms choose to settle rather than to face trial.<sup>120</sup> Overall, the

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<sup>115</sup> See 2011 IP REPORT, *supra* note 111, at 63.

<sup>116</sup> Colleen Chien, *Patent Trolls by the Numbers* (Santa Clara Univ. Legal Studies Working Paper Grp., Paper No. 08-13, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2233041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233041).

<sup>117</sup> See *id.*; see also *In re Innovatio IP Ventures, LLC Pat. Lit.*, 921 F. Supp. 2d 903, 906 (N.D. Ill. 2013). Innovatio sued numerous hotels, coffee shops, restaurants, supermarkets, and other commercial users of Wi-Fi technology, alleging that, by making the wireless Internet available to their customers, they infringed Innovatio’s seventeen patents. *Id.*

<sup>118</sup> Steven J. Vaughan-Nichols, *Patent Troll Innovatio IP Goes After Small Businesses*, ZDNET (Oct. 5, 2011, 8:03 AM), <http://www.zdnet.com/blog/open-source/patent-troll-innovatio-ip-goes-after-small-businesses/9681>.

<sup>119</sup> EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 4 (June 2013), available at [http://www.whitehouse.gov/sites/default/files/docs/patent\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf). *Soverain Software LLC v. Newegg Inc.* is illustrative of what it takes to fight PAEs. 836 F. Supp. 2d 462 (E.D. Tex. 2010), *rev’d in part*, 705 F.3d 1333 (Fed. Cir. 2013), *reh’g granted and amended by* 728 F.3d 1332 (Fed. Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 910 (2014). Soverain (PAE) sued Newegg for patent infringement over the use of online “shopping cart” technology, and the jury awarded \$2.5 million judgment against Newegg. 836 F. Supp. 2d at 467–68. On appeal, the Federal Circuit reversed, finding the patent invalid for obviousness, and the Supreme Court denied certiorari in January 2014. *Soverain Software LLC v. Newegg Inc.*, 705 F.3d 1333, 1347 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 910 (2014).

<sup>120</sup> With the same set of patents, Soverain has filed numerous patent lawsuits against online retailers; Amazon is reported to settle for \$40 million, another ordered to pay \$18 million, and the others waiting for trials. See Public Comments of Nat’l Retail Fed’n at 3–4, Patent Assertion Entity Activities Workshop (2012), available at <http://www.justice.gov/atr/public/workshops/pae/comments/paew-0057.pdf>; see also Joe Mullin, *How Newegg Crushed the “Shopping Cart” Patent Troll and Saved Online Retail*, ARS TECHNICA (Jan. 27, 2013, 4:00 PM), <http://arstechnica.com/tech-policy/2013/01/how-newegg-crushed-the-shopping-cart-patent-and-saved-online-retail/>.

number of possible recipients of demand letters makes the PAEs' business model profitable.<sup>121</sup>

The White House's announcement on June 4, 2013 devoted most of its pages to calling on Congress and executive agencies to help curb PAEs' "abusive suits" and to empower small businesses and downstream users.<sup>122</sup> Even before the White House's move, a variety of measures in an effort to tackle PAEs have been proposed or already enacted by a united front of legislative and administrative branches.<sup>123</sup>

PAEs are uniquely situated to gain maximum benefits from the minimal pleading requirement set forth in Form 18 for the same reasons that *Twombly* called for plausibility. First, Form 18 plainly lacks enough information to put accused infringers on "fair notice" as to what to answer.<sup>124</sup> Just as defendants in *Twombly* were forced to investigate whether their "parallel conduct" might be in fact illegal, accused infringers are forced to study, with or without lawyers, whether the accused device is actually infringing asserted patent claim(s). Second, once having past the pleading stage, accused infringers are very likely to experience growing pressures to settle the case, as legal expense increases

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<sup>121</sup> See EXEC. OFFICE OF THE PRESIDENT, *supra* note 119, at 10.

<sup>122</sup> Press Release, Office of the Press Sec'y, The White House, Fact Sheet: White House Task Force on High-Tech Patent Issues 2-3 (June 4, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>.

<sup>123</sup> *E.g.*, America Invents Act of 2011, 35 U.S.C. §§ 299, 321 (2012) (creating post-grant review of business method patents and providing a new procedural rule of joinder); Saving High-Tech Innovators from Egregious Legal Disputes Act, H.R. 845, 113th Cong. § 2 (2013) (introducing "Loser Pays" rule); Patent Quality Improvement Act, S. 866, 113th Cong. § 2 (2013) (extending the term and subject of the AIA's post-grant review); End Anonymous Patents Act, H.R. 2024, 113th Cong. § 2 (2013) (requiring disclosure and recordation of ownership, real party-in-interest, and transfers and assignments of patent ownership); Patent Abuse Reduction Act, S. 1013 §§ 2-5 (2013) (raising the pleading standard of patent infringement, imposing discovery limits and joinder limits, and adopting "Loser Pays" rule); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-465, PATENT LITIGATION: ASSESSING FACTORS THAT AFFECT PATENT INFRINGEMENT LITIGATION COULD HELP IMPROVE PATENT QUALITY 41 (2013) (reporting that the USPTO is currently wrapping up the rulemaking process to provide greater transparency on patent ownership).

<sup>124</sup> *See, e.g.*, *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J., concurring in part) ("In my view, a bare allegation of literal infringement using [Form 18] is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement.").

exponentially at the discovery stage.<sup>125</sup> Third, PAEs are well placed to leverage “asymmetry” in discovery costs because a PAE by nature will generate far fewer documents during its course of business.<sup>126</sup>

In addition to the rationales stated in *Twombly*, what makes patent infringement defendants more vulnerable than antitrust defendants is the strict-liability nature of direct infringement.<sup>127</sup> As opposed to plaintiffs in *Twombly* who have to show defendants’ meeting of minds, PAEs can expose accused infringers to potential liability simply by sending a letter of notice (demand letter).<sup>128</sup> Because PAEs are not incentivized to disclose details of information, their demand letters typically lack transparency.<sup>129</sup> Moreover, because filing a Form 18 complaint constitutes such notice under section 287(a),<sup>130</sup> PAEs will likely take the position that any demand letter, even with little detail, is legitimate so long as it bears resemblance to Form 18.<sup>131</sup> Summarizing all of these features of the PAEs’ playing field, either closely related to *Twombly* or uniquely attributed to PAEs, they are all channeling into one observation—a high risk of abusive litigation in the form of discovery abuse.<sup>132</sup>

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<sup>125</sup> Randall R. Rader, C.J., C.A.F.C., E.D. Texas Judicial Conference: The State of Patent Litigation 7 (Sept. 27, 2011) <http://www.patentlyo.com/files/raderstateofpatentlit.pdf> (identifying the primary problem of patent litigation as “disproportionately high discovery expenses”). Compare AIPLA, REPORT OF THE ECONOMIC SURVEY 2011 35 (2011) (estimating litigation cost as ranging from a median of \$650,000 for smaller cases, to a median of over \$5 million per case), with AIPLA, REPORT OF THE ECONOMIC SURVEY 2007 25 (2007) (reporting that the median cost of discovery is between \$350,000 and \$3,000,000 in 2007).

<sup>126</sup> Joshua Wright, Comm’r, Fed. Trade Comm’n, Remarks at the Dechert Client Annual Antitrust Spring Seminar: What Role Should Antitrust Play in Regulating the Activities of Patent Assertion Entities? 6 (Apr. 17, 2013), <http://www.ftc.gov/speeches/wright/130417paespeech.pdf>; see also Patent Abuse Reduction Act, S. 1013 § 4 (imposing discovery limits in patent litigation).

<sup>127</sup> *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (en banc) (stating that patent infringement is a strict liability offense).

<sup>128</sup> See 35 U.S.C. § 287(a) (2012) (“In the event of failure so to mark, no damages shall be recovered . . . except on proof that the infringer was *notified* of the infringement.” (emphasis added)). Because they do not offer commercial products, PAEs must notify accused infringers of infringement to recover damages.

<sup>129</sup> See Press Release, Office of the Press Sec’y, *supra* note 122, at 2 (one of seven legislative recommendations is to require demand letter “transparency” to help curb abusive suits).

<sup>130</sup> See 35 U.S.C. § 287(a) (“Filing of an action for infringement shall constitute such notice.”).

<sup>131</sup> Relatedly, the Federal Circuit has set a low bar on the requirement of actual notice. See, e.g., *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1346 (Fed. Cir. 2010) (“[A]s long as the communication from the patentee provides sufficient specificity regarding its belief that the recipient may be an infringer, the statutory requirement of actual notice is met.”).

<sup>132</sup> See discussion *supra* Part I.B.

### III. RECONCILING PATENT PLEADINGS AND *TWOMBLY*: THE “BROADEST POSSIBLE CONSTRUCTION” STANDARD

As Judge Dyk in *McZeal* pointed out, Form 18 is devoid of the requirement to identify which patent claims are asserted and how the accused device reads on the claims.<sup>133</sup> Given the high risk of abusive litigation, one measure to strike balance between *Twombly* and patent pleadings is to require a patentee to articulate some “plausibility” of infringement, for example, by attaching a claim chart construed under the “broadest possible construction.” The “broadest possible construction” standard comports well with the normal pleading standard because it can function similar to “assumption of truth.”

By doing so, patent pleadings of direct infringement can adhere to *Twombly*. Reliance on Form 18 is misplaced for the following reasons. First, under the construction of Federal Circuit laws, patent infringement at the pleading stage is a quasi-fact question that sufficient factual allegations must be pled to show a plausible entitlement to relief. Second, a “showing” of Rule 8 always demands plausibility because the technicality of Form 18 cannot override the general, uniform objective of Rule 8. Finally, the time has come to revisit the legitimacy of Form 18 now that judicial experience dealing with patent infringement outdates Form 18.

#### *A. Patent Infringement at the Pleading Stage Is a Quasi-Fact Question that Sufficient Factual Allegations Must Be Pled to Show a Plausible Entitlement to Relief.*

Under *Twombly*, in assessing a Rule 12(b)(6) motion, only factual allegations are entitled to the assumption of truth, and *Iqbal* has directed lower courts to disregard legal allegations.<sup>134</sup> Relatedly, patent infringement is a two-step inquiry consisting of claim construction and the determination of whether an accused product meets every limitation of the claim as constructed.<sup>135</sup> The first step is a question of law;<sup>136</sup> the second step is a question of fact.<sup>137</sup> It follows that the hearing for claim construction (*Markman* hearing) must predate conclusions of any infringement inquiry. However, although claim construction is inapposite at the pleading stage, it does not necessarily absolve a patent

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<sup>133</sup> *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J., concurring in part and dissenting in part).

<sup>134</sup> *See supra* Part I.A.2.

<sup>135</sup> *Freedman Seating Co. v. Am. Seating Co.*, 420 F.3d 1350, 1356–57 (Fed. Cir. 2005).

<sup>136</sup> *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388–90 (1996) (holding that claim interpretation is a question of law because of the importance of uniformity and functional considerations).

<sup>137</sup> *RF Del., Inc. v. Pac. Keystone Techs., Inc.*, 326 F.3d 1255, 1266 (Fed. Cir. 2003).

plaintiff of a burden of pleading facts adequate to show a “plausible” infringement claim.

Importantly, *In re Bill of Lading* alluded in a footnote that claims at the pleading stage are afforded the “broadest possible construction.”<sup>138</sup> A patentee is then allowed to lay out its version of claim construction as broadly as possible to capture the accused devices.<sup>139</sup> Subsequently, a pleading of *facts* to show that an accused device falls within such broadly outlined claims is entitled to the assumption of truth.

This “broadest possible construction” standard, while related to a question of law, echoes well with “the assumption of truth.” Federal Circuit law might seem contradictory, because, while being a question of law, claim construction at the pleading stage is afforded the broadest possible construction, which sounds very much like assumption of truth, despite that assumption of truth is available only to a pleading of facts. However, because of the unique mixture of fact and law, the allegation of infringement under Form 18 that an accused device is “embodying the patent” cannot be aptly characterized as a mere legal conclusion either.<sup>140</sup>

As such, the Federal Circuit seems willing to set aside the fact-law dichotomy, where bifurcating fact and law is next to impossible.<sup>141</sup> The bottom line for this *quasi-factual* inquiry is that the room in which a patentee is allowed to maneuver for its “broadest possible construction” is more than sufficient to withstand a Rule 12(b)(6) motion. Therefore, any attempt to immunize Form 18 from *Twombly* not only runs counter to the mandate of fair notice, but also leaves neglected a duty of pleading that is easy to fulfill in good faith.

*B. A “Showing” of Rule 8 Always Demands Plausibility Because the  
Technicality of Form 18 Cannot Override the General, Uniform Objective of  
Rule 8.*

In the realm of *Twombly*, any pleading inquiry must be committed to the guiding principle under Rule 8 that a “showing” of facts suggestive of a plausible claim serves the purpose of giving a defendant “fair notice” of the

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<sup>138</sup> *In re Bill of Lading Transmission & Processing Sys. Pat. Lit.*, 681 F.3d 1323, 1343 n.13 (Fed. Cir. 2012) (“We afford the claims their *broadest possible construction* at this stage.” (emphasis added)).

<sup>139</sup> It is important that this lenient construction may not go beyond the pleading stage. Trial courts will likely be conducting the *Markman* hearing anew without deference.

<sup>140</sup> *But cf.* *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1288 (Fed. Cir. 2013) (Wallach, J., concurring) (opining that the allegation that defendant “is infringing” a patent seems to be a legal conclusion that the court is instructed to disregard under *Twombly*). However, Judge Wallach may not fully discuss factual components regarding the language “embody” in Form 18 that a patentee must plead to show a plausible claim.

<sup>141</sup> *See supra* note 53 and accompanying text.

allegations.<sup>142</sup> None of the Justices in *Twombly* disagreed as to this general objective of Rule 8.<sup>143</sup> If bound by *Twombly*'s interpretation of Rule 8, plausibility is always required to survive a Rule 12(b)(6) motion.<sup>144</sup>

Conversely, the technicality of Form 18 serves the purpose of “illustration” in view of the statement made at the time of drafting: “The following forms are intended for *illustration only*.”<sup>145</sup> As the D.C. Circuit commented, the Forms are illustrative of details that are sufficient, on the assumption that they give a defendant fair notice of a claim against him.<sup>146</sup> And the vitality of that assumption hinges on the uncontestable fact that “patents, technology, and litigation were generally *less complex*” at the time of drafting Form 18.<sup>147</sup>

Because that assumption no longer holds true in view of the complexity of modern technologies, the Form ought to give way to the fundamental principle of fair notice. The text of Rule 84 cannot be dispositive because Rule 8, along with Rule 84, was adopted to establish “a uniform system for all cases,”<sup>148</sup> and the unconditional allegiance to Form 18 is at the opposite of what “uniformity” stands for now. A practical technique to master a rule cannot trump the general, uniform objective of that rule.

Although *Twombly* did not question the sufficiency of Form 9,<sup>149</sup> there are compelling reasons for the Supreme Court to view Form 18 differently. Needless to say, under the basic principle of pleading, a patentee bears a burden of alleging “facts” in support of infringement.<sup>150</sup> Because patent infringement is a question of *both* fact and law, the Court would not accord the pure “legal” status to Form 18's allegation of infringement as it did to Form 9's allegation of negligence.<sup>151</sup>

On the policy side, the Court will take note of the imbalance between Form 18 and the public's entitlement to sufficient “notice” as to the scope of a patent. A patent claim sets forth “the metes and bounds” of a right to exclude,<sup>152</sup>

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<sup>142</sup> See *supra* Part I.C.

<sup>143</sup> See *supra* note 61 and accompanying text.

<sup>144</sup> *Time Warner Cable*, 714 F.3d at 1287 (Wallach, J., concurring).

<sup>145</sup> Introductory Statement, App'x of Forms, 28 U.S.C. app. at 282 (2006) (emphasis added); see also *In re Bill of Lading Transmission & Processing Sys. Pat. Lit.*, 681 F.3d 1323, 1349 (Fed. Cir. 2012) (Newman, J., dissenting in part).

<sup>146</sup> *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17–18 (D.C. Cir. 2008).

<sup>147</sup> *In re Bill of Lading*, 681 F.3d at 1350 (emphasis added).

<sup>148</sup> *Id.* at 1349.

<sup>149</sup> See *supra* Part I.C.

<sup>150</sup> *Dunlap v. Schofield*, 152 U.S. 244, 248 (1894).

<sup>151</sup> Compare discussion *supra* Part III.A., with *supra* text accompanying notes 54–60 (discussing the issue regarding Form 9 that Justice Stevens raised in his dissent).

<sup>152</sup> *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989).

while what is not claimed is dedicated to the public.<sup>153</sup> Also, a patent is granted in return for its meaningful disclosure of a novel and useful invention that “give[s] public notice of the subject matter that is protected.”<sup>154</sup>

This process of public notice must be bilateral, not unilateral, considering “information asymmetry” between the public and patent holders.<sup>155</sup> While it is usually an infringer who knows more about infringing products,<sup>156</sup> a patentee is irrefutably in the best position to know the metes and bounds of its claim. It is all the more so because a patentee is statutorily required to “possess” its claim within “the four corners of the specification” building upon its knowledge in the prior art and prosecution history.<sup>157</sup> The specification is “always highly relevant” and is the single best guide in claim construction.<sup>158</sup> Thus, the legitimacy of Form 18 depends in part on how well it can mediate this information asymmetry while ensuring transparency of information.

However, it is obvious that Form 18 tips the balance heavily in favor of the plaintiff. Form 18 is utterly deficient in critical information, not even requiring a patentee to specify which claim is allegedly being infringed, despite the fact that, in the last decade, the average number of claims per patent is more than *fifteen*.<sup>159</sup>

Furthermore, while the court gave leeway to information on the plaintiff’s side regarding patent claims by allowing the “broadest possible construction” standard,<sup>160</sup> information on the defendant’s side, such as on accused products, is not a meaningful variable in the equation. For example, in *K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc.*, the district court dismissed a complaint on the ground that it failed to identify the accused device

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<sup>153</sup> *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 614 (1950) (Black, J., dissenting).

<sup>154</sup> *Univ. of Rochester v. G.D. Searle & Co.*, 358 F.3d 916, 922 n.5 (Fed. Cir. 2004) (emphasis added); *see also id.* (“We and the Supreme Court have frequently used the term ‘public notice’ in connection with claims . . . the point being that the public is entitled to notice of what the inventor has claimed.”).

<sup>155</sup> Christine Meyer, Vice President, NERA Econ. Consulting, Economists’ Roundtable on Hot Patent-Related Antitrust Issues, in 27 A.B.A. ANTITRUST MAG. 10, 18 (2013), available at [http://www.edgeworthetheconomics.com/files/documents/Greg\\_in\\_Antitrust\\_Journal\\_Roundtable\\_Article.pdf](http://www.edgeworthetheconomics.com/files/documents/Greg_in_Antitrust_Journal_Roundtable_Article.pdf).

<sup>156</sup> *Id.*

<sup>157</sup> 35 U.S.C. § 112 (2006); *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

<sup>158</sup> *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc).

<sup>159</sup> Dennis Crouch, *Claims in Issued Patents*, PATENTLY-O BLOG (Feb. 22, 2013, 10:05 AM), <http://www.patentlyo.com/patent/2013/02/claims-in-issued-patents.html>.

<sup>160</sup> *See discussion supra* Part III.A.

by name or model number.<sup>161</sup> In reviving the case, however, the Federal Circuit held that in a Form 18 complaint, a plaintiff need not so identify the accused device,<sup>162</sup> reasoning that an infringer should not be able to shield itself from liability by operating in “secrecy.”<sup>163</sup> Therefore, Form 18 aids little in making the process of public notice bilateral, and only serves as a meaningless bar against frivolous pleadings at the expense of the public’s entitlement to notice.<sup>164</sup>

*C. The Time Has Come to Revisit the Legitimacy of Form 18 Now that Judicial Experience Dealing with Patent Infringement Outdates Form 18.*

At the heart of disputes surrounding Form 18 is to what extent, if any, district courts can allow a patentee to construct claims at the pleading stage. Although the Federal Circuit mentioned in passing the “broadest possible construction,” no construction is theoretically necessary under Form 18’s template because it spares no paragraph for factual allegations as to how the accused device, “electric motor,” meets each claim limitation.

Since its inception, claim construction has consistently been thought of as an “elusive” task to district courts and practitioners alike.<sup>165</sup> The Federal Circuit reviews a district court’s claim construction without deference. This de novo standard has been under criticism because the standard allegedly leads to “a steadily high reversal rate” and “a lack of predictability about appellate outcome.”<sup>166</sup> The debate over the proper standard of review continues to date.<sup>167</sup>

This lack of early certainty, combined with Form 18’s silence as to patent claims, may explain in part a district court’s hesitance to construct claims, however minimal, at the pleading stage. Additionally, because the *Markman*

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<sup>161</sup> *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1280 (Fed. Cir. 2013). *But cf.* *Enlink Geoenergy Servs., Inc. v. Jackson & Sons Drilling & Pump, Inc.*, No. C 09-03524 CW, 2010 U.S. Dist. LEXIS 37859, at \*4–5 (N.D. Cal. Mar. 24, 2010) (suggesting that Form 18 requires a plaintiff to identify the accused device, “electric motors”).

<sup>162</sup> *Time Warner Cable*, 714 F.3d at 1286. *Accord* *Realtime Data, LLC v. Stanley*, 721 F. Supp. 2d 538, 539 (E.D. Tex. 2010) (clarifying that the court has not required a specific identification of accused products).

<sup>163</sup> *Time Warner Cable*, 714 F.3d at 1286.

<sup>164</sup> *Accord* *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J., concurring in part) (“In my view, a bare allegation of literal infringement using [Form 18] is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement.”).

<sup>165</sup> *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1478 (Fed. Cir. 1998) (en banc) (Newman, J., dissenting from the pronouncements on claim interpretation).

<sup>166</sup> *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 469 F.3d 1039, 1040 (Fed. Cir. 2006) (Michel, J., dissenting from denial of the petition for rehearing en banc).

<sup>167</sup> *Lighting Ballast Control LLC v. Philips Electronics N. Am. Corp.*, 744 F.3d 1272 (Fed. Cir. 2014) (en banc) (affirming the standard of de novo review in claim construction).



hearing is inappropriate at the pleading stage, a district court may be comfortable giving the benefit of the doubt to patentees to the extent possible, thereby allowing patent cases to reach the discovery stage. However, even an “early” *Markman* hearing is not early in a practical sense for the purpose of safeguarding defendants from non-meritorious claims, because it occurs after the “expensive” discovery stage.<sup>168</sup>

Relatedly, in support of the holding that claim construction is a question of law for a judge to decide, the Court in *Markman v. Westview Instruments, Inc.* emphasized “the importance of uniformity” in patent cases, fearing that uniformity will be ill-served if juries decide the meaning of a disputed claim term.<sup>169</sup> Then the question to ask now is whether more than a decade and a half of judicial experience dealing with claim construction is enough to draw any “empirically sound conclusions” as to *uniformity*.<sup>170</sup>

One empirical study documenting data from 2000 through 2011 suggests that the claim construction reversal rate has dropped remarkably, from 37.2% to 24.0%, since the Federal Circuit’s 2005 en banc ruling in *Phillips v. AWH Corp.*, which set forth the important claim construction guidelines for district courts.<sup>171</sup> This current rate stands for even more dramatic improvement when compared to the rate “hovering near 50%” in the year the *Markman* hearing was first introduced.<sup>172</sup> Moreover, judicial experience here need not be extensive. Because a district court’s adjudication on pleadings is to be reviewed by the “broadest possible construction” standard under the regional circuit law,<sup>173</sup> free from de novo constraints, only frivolous pleadings may not pass this deferential standard.

Given these statistics and standard of review, the Federal Circuit’s adherence to the text of Form 18 might be misplaced.<sup>174</sup> Such bipolar characterization that *Twombly* comes into play only when the Forms are silent

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<sup>168</sup> See *Parallel Networks, LLC v. Abercrombie & Fitch*, No. 6:10cv111, 2011 WL 3609292, at \*1 (E.D. Tex. Aug. 12, 2011) (recognizing the importance of conducting an early *Markman* hearing).

<sup>169</sup> *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390–91 (1996).

<sup>170</sup> *Cybor*, 138 F.3d at 1463 (Plager, J., concurring).

<sup>171</sup> J. Jonas Anderson & Peter S. Menell, *Informal Deference: An Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 Nw. U. L. Rev. 1, 40 (2013).

<sup>172</sup> *Cybor*, 138 F.3d at 1476 (Rader, J., dissenting) (indicating that the Federal Circuit’s official 1997 statistics showed “53%” in the claim construction reversal rate).

<sup>173</sup> See *supra* text accompanying note 69 (on appellate review, the Federal Circuit in *McZeal* applied the law of the regional circuit, not the Federal Circuit law); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355–56 (Fed. Cir. 2007); *Bayer Schering Pharma AG v. Lupin, Ltd.*, 676 F.3d 1316, 1327 (Fed. Cir. 2012) (Newman, J., dissenting); see also *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1363 (Fed. Cir. 2004) (“[W]e will apply our own law to both substantive and procedural issues intimately involved in the substance of enforcement of the patent right.”) (internal quotation marks omitted).

<sup>174</sup> See *supra* Part II.A.3.

stifles useful resources and know-how accumulated for more than a decade in the hands of trial judges. Furthermore, it plainly leaves unfulfilled the *Twombly/Iqbal* mandate that a pleading inquiry is “a context-specific task that requires the reviewing court to draw on its *judicial experience and common sense*.”<sup>175</sup> The consequence of having Form 18 unrefined by the *Twombly* interpretation of Rule 8 is to practically allow every patent case asserting direct infringement to propel forward and entertain discovery, in the face of a high risk of abusive litigation.

The Federal Circuit’s treatment of Form 18 seems more striking when viewed in contrast to other areas of patent pleading jurisprudence. The first example is design patents. In *Colida v. Nokia, Inc.*, a pro se plaintiff sued Nokia for infringing his design patents, and the district court dismissed the complaint, finding infringement implausible.<sup>176</sup> The district court additionally imposed sanctions on the plaintiff, reasoning that a series of his “meritless” lawsuits warranted an “anti-filing injunction.”<sup>177</sup>

Affirming both judgments, the Federal Circuit in *Colida* applied *Twombly*’s plausibility test and concluded that infringement is “facially implausible.”<sup>178</sup> In doing so, the court noted that no argument was made about Form 18, while equivocating over whether it is of any use for design patents.<sup>179</sup> Here, the Federal Circuit approved the trial judge’s visual examination of designs drawing upon judicial experience and common sense,<sup>180</sup> although the text of Form 18 does not limit its subjects to utility patents.<sup>181</sup> Even the plaintiff’s pro se status did not help the case.<sup>182</sup>

Another example is patent eligibility under section 101.<sup>183</sup> In *Bancorp Services, L.L.C. v. Sun Life Assurance Co. of Canada*, the Federal Circuit signaled to the district courts that they need not undertake claim construction before examining patent eligibility.<sup>184</sup> Citing *Bilski v. Kappos*,<sup>185</sup> the court noted

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<sup>175</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added).

<sup>176</sup> *Colida v. Nokia, Inc.*, 347 F. App’x 568, 569 (Fed. Cir. 2009) (per curiam).

<sup>177</sup> *Id.* at 571.

<sup>178</sup> *Id.* at 570.

<sup>179</sup> *Id.* at 571 n.2. *Contra* *Superior Indus., LLC v. Thor Global Enters. Ltd.*, 700 F.3d 1287, 1295 (Fed. Cir. 2012) (considering Form 18 *sua sponte* even where parties do not discuss Form 18).

<sup>180</sup> *Colida*, 347 F. App’x at 570–71.

<sup>181</sup> Languages in Form 18 including “invention” and “letters patent” are universal terms in both utility and design patents. *See* 35 U.S.C § 171 (2012). The design of “electric motors” can be protected by design patents as well.

<sup>182</sup> *Colida*, 347 F. App’x 568. *But cf.* *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (“[T]he pleadings of pro se litigants should be held to a lesser standard.”).

<sup>183</sup> 35 U.S.C § 101 (2006).

<sup>184</sup> *Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Can.*, 687 F.3d 1266, 1273 (Fed. Cir. 2012).

<sup>185</sup> *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

that the Supreme Court in *Bilski* found ineligible the subject matter at issue without engaging in claim construction.<sup>186</sup> Taking up this message, several district courts have since resolved subject matter eligibility at the motion to dismiss stage.<sup>187</sup>

The last example lies at the intersection of patent and antitrust laws. An antitrust counterclaim is one of a few defenses available to an accused infringer, including sham litigation and *Walker Process* fraud.<sup>188</sup> However, for these counterclaims to be of any merit, accused infringers must hurdle a high standard of proof. A counterclaim of sham litigation requires an accused infringer to show that the patentee was “both *objectively* baseless and *subjectively* motivated by a desire to impose . . . anti-competitive injury.”<sup>189</sup> For a *Walker Process* fraud counterclaim, an accused infringer must successfully show that the patentee committed a “knowing and willful fraud.”<sup>190</sup> Accordingly, as Judge Posner puts it, “some threshold of plausibility” must be crossed on the face of these counterclaims.<sup>191</sup> Again, the underlying concern is “inevitably costly and protracted discovery.”<sup>192</sup>

One way to strike a balance between the three examples above and patent pleading under Form 18 is to require a patent plaintiff to articulate some level of plausibility of infringement by attaching a simple claim chart construed under

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<sup>186</sup> *Bancorp*, 687 F.3d at 1273. *But cf. id.* at 1273–74 (cautioning that conducting claim construction prior to the section 101 inquiry would be desirable).

<sup>187</sup> *See, e.g.*, *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, No. 12-2501 (MAS)(TJB), 2013 WL 3964909, at \*5 (D.N.J. July 31, 2013); *Cardpool, Inc. v. Plastic Jungle, Inc.*, No. C 12-04182 WHA, 2013 WL 245026, at \*4 (N.D. Cal. Jan. 22, 2013).

<sup>188</sup> *See Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998).

<sup>189</sup> *Id.* at 1071 (emphasis in original) (citing *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62 (1993)).

<sup>190</sup> *Id.* at 1068 (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)).

<sup>191</sup> *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) (“[T]o avoid turning every patent case into antitrust case, *some threshold of plausibility* must be crossed at the outset before a patent antitrust case should be permitted to go into its *inevitably costly and protracted discovery* phase.”) (emphasis added).

<sup>192</sup> *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566 (2007) (citing *Asahi Glass* with approval).

the “broadest possible construction.”<sup>193</sup> Patentees will likely argue against such a requirement, as claim construction is exclusively handled through *Markman* proceedings, which typically are not conducted until after discovery. However, patentees, armed with “the possession” of the scope of claims,<sup>194</sup> bear the initial burden of alleging infringement. Disparate treatment in favor of one side against the other is unwarranted because both patent and antitrust claims can equally pose a high risk of abusive litigation and discovery abuse.

As this article was being prepared for publication, Judge Robert E. Payne in the Eastern District Court of Virginia dismissed a complaint satisfying Form 18 for failure to comply with *Twombly* and *Iqbal*.<sup>195</sup> In noting that patent claims may pose a *higher* risk of “extensive discovery and high litigation costs” than antitrust claims, Judge Payne reasoned:

Finally, to exempt patent complaints from the requirements of *Twombly* and *Iqbal* is to ignore a fundamental rationale that underpins those decisions. In *Twombly*, the Supreme Court made clear that the more rigorous application of Rule 8(a) was needed to assure that the parties would not embark on expensive litigation unless the plaintiff had made in the complaint a plausible case.

*Twombly* was an antitrust case, a kind of litigation well-known for *extensive discovery and high litigation costs. Patent cases fit the same bill, perhaps even more so.* Indeed, patent cases generally are among the most expensive kinds of cases in federal court. It is not logical to exempt them from the reach of *Twombly* and *Iqbal*, whose prime purpose was to assure that such expense was not incurred unless the plaintiff had posited a plausible claim in the complaint.<sup>196</sup>

Of particular note is how Judge Payne took issue with *McZeal* and *In re Bill of Lading*, saying that “they accord no force to either the text or teaching of *Twombly* and *Iqbal* which require more to plead a legally sufficient claim than is set out in Form 18.”<sup>197</sup> Thus, the same observations were made by this article

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<sup>193</sup> A group of district courts have raised the pleading bar. *See, e.g.*, Eastern District of Texas Patent Rule 3-1; Northern District of California Patent Rule 3-1; Northern District of Georgia Patent Rule 3.1; Northern District of Illinois Patent Rule 2.2; District of New Jersey Patent Rule 3.1. In those jurisdictions, a claim chart prior to discovery is routinely required. *See McZeal v. Sprint Nextel Corp. (McZeal II)*, 335 F. App’x 966, 969 (Fed. Cir. 2009). Local patent rules requiring initial infringement contentions in the form of a claim chart are deemed valid, so long as they do not conflict with the discovery regime under the Federal Rules. *See O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1365 (Fed. Cir. 2006).

<sup>194</sup> *See* 35 U.S.C. § 112 (2012); *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

<sup>195</sup> *Macronix Int’l Co. v. Spansion Inc.*, No. 3:13CV679, 2014 WL 934505 (E.D. Va. Mar. 10, 2014) (order granting motion to dismiss direct infringement claims).

<sup>196</sup> *Id.* at \*6 (emphasis added) (citations omitted).

<sup>197</sup> *Id.* at \*4.

and Judge Payne as to a high risk of discovery abuse arising from litigating patent cases.

### CONCLUSION

Patentees should not be discouraged from exercising patent enforcement rights as rooted in the IP Clause of the Constitution,<sup>198</sup> just because the case may turn out to be less meritorious than expected later during trial. However, a patent grant does not necessarily mean giving free rein to patent holders either, given the “infirmities in the definition and scope” of patent rights.<sup>199</sup>

Asking no more than what is recited in Form 18 comes close to insulating patent pleadings from the benefit of judicial experience in the hands of district judges dealing with patent infringement, even where the central concern of *Twombly*, i.e., discovery abuse, remains in full force. In this situation, the Federal Circuit’s endorsement of Form 18 for the reason that *Twombly* does not apply when a sample complaint form is provided is misguided.

We may not need to wrestle with how to shape a rule conforming to both Rule 8 and *Twombly*, because the rule, albeit in a footnote,<sup>200</sup> is already in place. Requiring a claim chart construed under the “broadest possible construction” will be a meaningful step toward reconciling *Twombly* and patent pleadings beyond the text of Form 18, without undermining the “elementary” principle of pleadings that the burden of alleging facts is upon the plaintiff.<sup>201</sup>

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<sup>198</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>199</sup> Ted Voorhees, *Quality Check – Connect the Dots from IP to Merger Retrospectives*, 27 A.B.A. ANTITRUST MAG. 3, 3 (2013) (citing Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 ANTITRUST L.J. 749, 754 (2011)); see also Fed. Trade Comm’n v. Actavis, Inc., 133 S. Ct. 2223, 2231 (2013) (“[T]he patent here may or may not be valid, and may or may not be infringed. . . . But an *invalidated* patent carries with it no such right [to exclude].”) (emphasis in original).

<sup>200</sup> *In re Bill of Lading Transmission & Processing Sys. Pat. Lit.*, 681 F.3d 1323, 1343 n.13 (Fed. Cir. 2012).

<sup>201</sup> *Dunlap v. Schofield*, 152 U.S. 244, 248 (1894).