

Restoring Equilibrium: Why *Twombly* and *Iqbal* Should Apply to All Pleadings in Patent Cases

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ABSTRACT: The Supreme Court’s decisions in Twombly and Iqbal have caused a major shift in the pleading requirement for complaints and, in most district courts, counterclaims. By requiring that a claim be accompanied by “plausible” facts, the Court gave district courts a great deal more latitude to dismiss poorly pled cases. However, the full application of Twombly and Iqbal to pleadings filed by the defendant has not occurred. Courts only inconsistently apply plausible pleading to counterclaims and affirmative defenses. The effect of the higher pleading standard on patent litigation is generally positive, decreasing the amount of abusive patent litigation that gains access to full discovery. But, the imbalance between plaintiffs’ and defendants’ pleading burdens exacerbates what is already a heavily imbalanced high rate of success for defendants in patent litigation. This Note argues that the Federal Circuit should combat the already skewed defendant success rate in patent litigation by requiring defendants to plausibly plead affirmative defenses and counterclaims.

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I. INTRODUCTION

Courts have evaluated pleadings under a uniform standard for centuries. In 2007, the Supreme Court announced a “plausible pleading” standard (alternatively referred to as the “*Twiqbal*”¹ standard), demanding that plaintiffs allege more facts than were previously required under the notice-pleading standard.² Until the elimination of Form 18 in December 2015, district courts evaluated direct patent infringement complaints under a lower standard set out in the form.³ Following the elimination of Form 18, the plausible-pleading standard applies to all civil complaints.⁴ This higher pleading standard increases the burden on plaintiffs, but leaves defendants able to plead affirmative defenses or counterclaims under the less strict standards of notice pleading. The result is a pleading standard that is out of equilibrium, favoring defendants at the pleading phase of litigation.

Although courts and policymakers are seeking a solution to the problem of “patent trolls,”⁵ the ultimate solution should not decrease a legitimate plaintiff’s ability to recover for infringement, as uneven pleading burdens do.

1. “*Twiqbal*” is derived from the two Supreme Court cases that resulted in a higher pleading standard. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

2. The Court’s notice-pleading rule established that “all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (footnote omitted) (quoting FED. R. CIV. P. 8(a)(2)).

3. See FED. R. CIV. P. Form 18 (abrogated Dec. 1, 2015) (providing a simple form for patent plaintiffs to plead patent infringement).

4. See generally Brandon L. Garrett, *Applause for the Plausible*, 162 U. PA. L. REV. ONLINE 221 (2014), <https://www.pennlawreview.com/online/162-U-Pa-L-Rev-Online-221.pdf> (discussing the difficulty of pinning down a definition of “plausible” pleading).

5. See *infra* Part II.D (discussing how the Court and legislatures have attempted to curb the activity of patent trolls).

Courts ought to evaluate affirmative defenses and counterclaims under the same pleading standard as complaints to shift plaintiffs' and defendants' pleading burdens back into equilibrium. This is especially true in highly complex litigation, such as patent litigation, where a slight imbalance can have a negative impact on the impartial resolution of a case.⁶

This Note argues that the plausible-pleading standard established by the Supreme Court in *Twombly*⁷ and *Iqbal*⁸ should apply equally to all pleadings in patent litigation, including counterclaims and affirmative defenses. Part II addresses the history of the development of the pleading standard in patent litigation. Part III identifies the problems created by using two different pleading standards for complaints and affirmative defenses in patent litigation. Finally, Part IV suggests potential solutions and responds to common objections to a uniform pleading standard.

II. BACKGROUND

A. THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure (“Rules”) provide the procedural framework that civil litigants must follow in federal district courts.⁹ Each year, the United States Supreme Court suggests changes and additions,¹⁰ which are automatically adopted as an amendment to the Rules if Congress does not reject them during a statutorily mandated seven-month period for review.¹¹ The stated purpose of the Rules is “to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹²

One of the Rules’ functions is to guide the first phase of civil litigation: the pleadings.¹³ Rule 8(a) governs complaints and counterclaims, requiring, among other things, 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.”¹⁴ Rule 8(c) requires that in response to a pleading, “a

6. See *infra* Part IV.A (discussing how an already unequal system of patent litigation can be heavily impacted by imbalanced burdens).

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

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

9. *Current Rules of Practice & Procedure*, U.S. CTS., <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure> (last visited Dec. 10, 2017). The Federal Rules of Civil Procedure were first effective in 1938. *Id.*

10. See 28 U.S.C. § 2072(a) (2012) (giving the Supreme Court “power to prescribe general rules of practice and procedure and rules of evidence”).

11. *Id.* § 2074(a) (requiring submission of proposed rules “not later than May 1” for rules going into “effect no earlier than December 1” of a given year). For an overview of the process by which the judiciary establishes new rules, see *Overview for the Bench, Bar, and Public*, U.S. CTS., <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> (last visited Dec. 10, 2017).

12. FED. R. CIV. P. 1.

13. See *id.* RR. 7–15.

14. *Id.* R. 8(a)(2).

party must affirmatively state any . . . affirmative defense[s].”¹⁵ Rule 8(d) clarifies that “[n]o technical form is required,”¹⁶ and 8(e) requires that “[p]leadings must be construed so as to do justice.”¹⁷ Although no particular form is required, the Rules safeguard against the inclusion of factually unsupported or inaccurate substance in pleadings through Rule 11, which requires attorneys to represent to the court that they have made a “reasonable” inquiry into the underlying facts.¹⁸ Furthermore, Rule 12(b)(6) allows a court to dismiss a claim or counterclaim for “failure to state a claim” in the pleading¹⁹ and 12(f) allows the court to “strike from a pleading an insufficient defense.”²⁰

Although the Rules prescribe much of the procedure used by district courts, they also allow individual districts and judges to establish more specific practices.²¹ Local rules are rules adopted by “a majority of district judges” that are consistent with the Rules, but local rules govern more specific court procedures and practices.²² Judges’ directives are court practices, consistent with the Rules and local rules, promulgated by an individual judge for management in her courtroom.²³ Nearly all district courts have some local rules and these rules “vary widely on procedural matters.”²⁴ Currently, 32 district courts have adopted local rules specific to patent litigation.²⁵

B. THE PLEADING RULES IN PRACTICE

The 1957 decision in *Conley v. Gibson*, a case dealing with racial discrimination in Texas, provided the pleading standard for 50 years under the old Rules.²⁶ The *Conley* Court held that the Rules “do not require a claimant to set out in detail the facts upon which he bases his claim.”²⁷ The Court endorsed the “notice pleading” standard, stating that “the purpose of pleading is to facilitate a proper decision on the merits.”²⁸ The Court’s

15. *Id.* R. 8(c)(1).

16. *Id.* R. 8(d)(1).

17. *Id.* R. 8(e).

18. *Id.* R. 11(b).

19. *Id.* R. 12(b)(6).

20. *Id.* R. 12(f).

21. *Id.* R. 83.

22. *See id.* R. 83(a).

23. *Id.* R. 83(b).

24. Cheryl S. Bratt, *Doing Like the Locals Do: Using the Legal Writing Classroom to Teach Local-Rule Practice*, 22 PERSP.: TEACHING LEGAL RES. & WRITING 134, 134 (2014).

25. LOCAL PATENT RULES, <http://www.localpatentrules.com> (last visited Dec. 10, 2017).

26. *Conley v. Gibson*, 355 U.S. 41 (1957). The district court dismissed the complaint due to a lack of jurisdiction, but the Supreme Court held that was error. *Id.* at 44. Although the district court had not addressed the sufficiency of the pleadings, the Supreme Court chose to address the issue. *Id.* at 45-48.

27. *Id.* at 47.

28. *Id.* at 47-48.

adoption of notice-only pleading marked the definitive end of a number of pleading's historical functions²⁹ and reinforced the importance of newly liberalized discovery rules.³⁰

Over time, notice pleading's close tie to burdensome and expansive discovery practices caused critics to cry foul and seek reforms.³¹ Others defended the standard as superior to earlier pleading practices that were fraught with "technical pitfalls" and required litigants to plead in a "prescribed rhetorical form."³² One scholar argued that although courts continued to express support for notice pleading, the pleading standard required in practice varied depending on the area of law.³³

The Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*, an antitrust case, coupled with its 2009 ruling in *Ashcroft v. Iqbal* (together "*Twigbal*") marked a substantial change in the Court's interpretation of Rule 8(a).³⁴ *Twombly* came to the Supreme Court after the district court dismissed the case for failure to state a claim.³⁵ The Court found that the standard of pleading in antitrust cases was not "heightened" (as is the standard for certain claims by Rule 9),³⁶ but requires "enough facts to state a claim to relief that is plausible on its face."³⁷ The extent to which the new rule would apply to other types of civil cases was not immediately clear, leaving some scholars to conclude that the holding would be limited to antitrust or other complex litigation.³⁸ Just two years later, the *Iqbal* decision reinforced the general applicability of *Twombly* when the Court reiterated the plausibility standard and defined "facial plausibility" as "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is

29. Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 686 (2002) ("No longer were the pleadings required to state the facts, narrow the issues, or provide a means for the speedy disposition of non-meritorious claims and defenses.").

30. See Timothy Joyce, Comment, *Preventing Abuse of Discovery in Federal Courts*, 30 CATH. U. L. REV. 273, 278–81 (1981) (discussing the relationship between notice pleading and discovery).

31. Joseph L. Ebersole, *Discovery Problems: Is Help on the Way?*, 66 A.B.A. J. 50, 51, 53 (1980) (arguing that the one-size-fits-all pleading provisions of the Rules create excessive discovery).

32. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2205–07 (1989).

33. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1059–64 (2003).

34. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

35. *Twombly*, 550 U.S. at 544.

36. See FED. R. CIV. P. 9 (requiring that "a party must state with particularity the circumstances constituting fraud or mistake").

37. *Twombly*, 550 U.S. at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

38. See, e.g., John H. Bogart, *The Supreme Court Decision in Twombly: A New Federal Pleading Standard?*, 20 UTAH B.J. 20, 22 (2007) ("At least for the foreseeable future, its effects are likely to be confined to antitrust litigation."); Linda S. Mullenix, *Troubling Twombly*, NAT'L L.J., June 11, 2007, at 13, 13 ("*Twombly* may herald a new era of rigorous analysis of class action pleading that may make federal courts a difficult venue to pursue class action relief.").

liable for the misconduct alleged.”³⁹ The Court further instructed district court judges to ignore “threadbare” legal “conclusions” when making a plausibility determination.⁴⁰

According to Westlaw’s count, *Twombly* has been cited in over 175,000 cases and *Iqbal* in over 150,000.⁴¹ The substantial amount of litigation surrounding the new standard has spurred a great deal of academic discussion.⁴² Many scholars have criticized the decision as a tool by which courts could fashion litigation to favor corporations and the wealthy by increasing costs at the pleading phase.⁴³ Others took solace in the fact that plausible pleading could serve a valuable “screening” function during the early stages of litigation.⁴⁴ Some applauded the decision as a welcome and much needed change to “make[] it considerably more difficult for plaintiffs armed only with vague factual allegations to launch expensive litigation.”⁴⁵

The impact of *Twiqbal* on litigation has been significant. Empirical research attributes to *Twiqbal* a marked increase in the rate at which courts grant Rule 12(b)(6) motions to dismiss.⁴⁶ Civil rights cases, which have historically been prone to dismissals in dispositive motion practice, saw an increase in grants consistent with other civil litigation.⁴⁷ While *Twiqbal*’s effect of increasing dismissal rates is clear, a recent study on the usefulness of *Twiqbal* as a tool to weed out meritless or low-quality litigation could not find

39. *Iqbal*, 556 U.S. at 678.

40. *Id.* at 678–79.

41. Data current as of December 2017.

42. See, e.g., Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1235 (2008) (“*Twombly* amounts to a sea of change in the traditional pleading standard the Court has followed since *Conley*.”); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 698–99 (2016) (considering whether any pleading standard is necessary to encourage plaintiffs to divulge facts in pleading); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (2010) (stating that the “pleading standards are in crisis”).

43. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) (“It . . . marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth.”). The change even prompted the introduction of the “Notice Pleading Restoration Act of 2009” to the Senate. Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009). This proposed, but not enacted, bill would have reinstated *Conley v. Gibson*. *Id.*

44. Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1299–1300 (2010) (“[T]he Federal Rules certainly contemplate some case screening function at the pleading stage.”).

45. Caroline N. Mitchell & David L. Wallach, *Pleading State of Mind After Ashcroft v. Iqbal*, FIN. FRAUD L. REP., Oct. 2009, at 201, 201–02.

46. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 602 (2010) (presenting the results of a study of the rate at which courts grant Rule 12(b)(6) motions under different regimes: “from *Conley* (46%) to *Twombly* (48%) to *Iqbal* (56%)”).

47. *Id.* at 607 (“The percentage of 12(b)(6) motions granted in ‘Civil Rights Cases’ grew from 50% under *Conley* to 53% under *Twombly* to 58% under *Iqbal*.”).

support for either an increase or a decrease in the relative quality of post-*Twiqbal* litigation.⁴⁸

Despite the failure of *Twiqbal* to demonstrably improve the quality of complex litigation, December 2015 saw the repeal of Rule 84 and its associated forms.⁴⁹ Rule 84 provided pleading forms that were “suffic[ient] under the[] rules and illustrate[d] the simplicity and brevity that the[] rules contemplate[d].”⁵⁰ Primary grounds asserted in favor of abrogating Rule 84 were: (1) “the pleading forms live in tension with recently developing approaches to general pleading standards,” (2) updating the forms would “divert the energies” of the committee from other important work, and (3) “few if any lawyers consult the forms when drafting complaints.”⁵¹ The published committee notes regarding the abrogation explain “that there are many excellent alternative sources for forms.”⁵² Critics of the committee’s justification for abrogating the forms have suggested that the removal of the forms has the potential to do substantial harm to limited resource and pro se litigants.⁵³

The full impact of the abrogation of Rule 84 on patent litigation remains to be seen. Prior to Form 18’s abrogation, the Federal Circuit deemed compliance with the form as sufficient for a patent litigation plaintiff to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) on allegations of direct patent infringement, regardless of whether the complaint met the *Twiqbal* standard.⁵⁴ Likewise, Form 30 provided a sufficient structure for an “answer presenting defenses under Rule 12(b),” including certain affirmative defenses.⁵⁵

48. Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 424 (2016).

49. FED. R. CIV. P. 84 (abrogated Dec. 1, 2015).

50. *Id.*

51. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE: REQUEST FOR COMMENT 276–77 (2013), <http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf>.

52. FED. R. CIV. P. 84 advisory committee notes to 2015 amendment.

53. See Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1125–29 (2015) (arguing that the forms were “helpful to pro se litigants, . . . new lawyers and small-firm practitioners” and that their elimination was “the final nail in the coffin of notice pleading”); Sara Fevurly, Comment, *Down Go the Forms: The Abrogation of Rule 84 and the Official Forms of the Federal Rules of Civil Procedure*, 64 U. KAN. L. REV. 325, 326 (2015) (“[The] abrogation of Rule 84 will have a negative practical effect on the bench, the bar, and pro se litigants.”).

54. *Superior Indus., LLC v. Thor Glob. Enters. Ltd.*, 700 F.3d 1287, 1295 (Fed. Cir. 2012) (“In a complaint for patent infringement under § 271(a), Form 18 of the Federal Rules of Civil Procedure provides the pleading standard.”).

55. FED. R. CIV. P. Form 30 (abrogated Dec. 1, 2015).

C. PLEADING PLAUSIBLY AND PATENT LITIGATION

The elimination of Forms 18 and 30 has stripped away all vestiges of notice pleading in U.S. patent litigation, bringing *Twiqbal* into full force and authority. Prior to the forms' abrogation, the Federal Circuit⁵⁶ struggled to reconcile Form 18 with the holdings in *Twiqbal*.⁵⁷ The court first dealt with the conflict in 2007 in *McZeal v. Sprint Nextel Corp.*, a case involving a pro se plaintiff.⁵⁸ The pro se nature of the case left largely unresolved whether Form 18 was sufficient for pleading direct infringement.⁵⁹ The court did not clarify its position until its decision five years later in *In re Bill of Lading Transmission and Processing System Patent Litigation* where it held that "the Forms control" when the *Twiqbal* standard and the forms appear to be in conflict.⁶⁰

While maintaining that the forms were sufficient to plead direct infringement, the Federal Circuit began upholding dismissals for failure to state a claim under *Twiqbal* in cases involving indirect infringement—a cause of action not covered by the forms.⁶¹ In *Superior Industries*, the court reversed a district court's dismissal of a direct infringement claim, stating that "Form 18 . . . provides the pleading standard."⁶² But, the court upheld the district court's dismissal of Superior's indirect infringement allegation because it fell "far short of pleading facts necessary to state a plausible claim for either induced or contributory infringement."⁶³

Although *Twiqbal* dealt exclusively with the contents of a complaint, a substantial number of district courts have applied the pleading standard to patent counterclaims as well.⁶⁴ The Southern District of New York applied the *Iqbal* plausible-pleading standard to a counterclaim as early as 2008, reasoning

56. The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over patent appeals. 28 U.S.C. § 1295(a)(1) (2012).

57. A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113, 1133–36 (2015).

58. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007).

59. See Kyle R. Williams, Note, *Plausible Pleading in Patent Suits: Predicting the Effects of the Abrogation of Form 18*, 22 MICH. TELECOMM. & TECH. L. REV. 317, 329–31 (2016) (discussing the confusion and inconsistency among district courts following the *McZeal* decision).

60. *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) ("[W]hether . . . complaints adequately plead direct infringement is to be measured by the specificity required by Form 18.").

61. Indirect infringement occurs when an entity contributes to or induces another's direct infringement. Andrew R. Sommer, *Indirect Patent Infringement—ABA YLD 101 Practice Series*, A.B.A., http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/infringement.html (last visited Dec. 10, 2017); cf. *Direct Infringement*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The act of making, using, selling, offering for sale, or importing into the United States, without the patentee's permission, a product that is covered by the claims of a valid patent.").

62. *Superior Indus., LLC v. Thor Glob. Enters. Ltd.*, 700 F.3d 1287, 1295 (Fed. Cir. 2012).

63. *Id.* at 1295–96.

64. Cf. FISH & RICHARDSON, A GUIDE TO PATENT LITIGATION IN FEDERAL COURT 4 (Larry Kolodney ed., 2014) ("In patent cases, it is common for the defendant to assert as counterclaims requests for declarations that the patent is not infringed and/or is invalid.").

that Rule 8(a) governs both claims and counterclaims.⁶⁵ Continuation of this trend is reflected in the more recent case of *EMC Corp. v. Zerto, Inc.*, which found that the counterclaim pleading at issue was “merely bare-bones legal conclusions devoid of any supporting factual allegations” and failed to meet the *Twigbal* standard.⁶⁶

Following the elimination of the forms, district courts have made short work of applying *Twigbal* to claims of direct infringement.⁶⁷ Notwithstanding, the Federal Circuit has yet to officially confirm that courts should judge direct infringement under the plausible-pleading standard. However, it has provided support for the conclusion that plaintiffs must plead direct infringement with specific attention to each element of a patent claim.⁶⁸

D. PATENTS: POLICY AND PROBLEMS

The patent system of the United States is established under the authority of the Constitution’s Patent Clause, which grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶⁹ To receive a patent, Congress requires that an invention meets certain substantive criteria. An invention must be: patentable subject matter,⁷⁰ novel,⁷¹ nonobvious,⁷² and useful.⁷³

The power and value of a patent lies in its force as an injunction against the public in general, prohibiting the making, using, or selling of the thing or process described in the patent’s claims.⁷⁴ In an ideal world, invalid patents would have no prohibitory or injunctive force, and the power of a valid patent

65. *Aspex Eyewear, Inc. v. Clarity Eyewear, Inc.*, 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008) (“Counterclaims, like claims, are subject to Rule 8(a)’s pleading requirements.”).

66. *EMC Corp. v. Zerto, Inc.*, No. 1:12-cv-00956-GMS, 2014 WL 3809365, at *2 (D. Del. July 31, 2014).

67. *See, e.g., Prowire LLC v. Apple, Inc.*, No. 1:17-cv-00223, 2017 WL 3444689, at *2 (D. Del. Aug. 9, 2017) (finding the plaintiff plausibly stated a claim for infringement); *Robern, Inc. v. Glasscrafters, Inc.*, 206 F. Supp. 3d 1005, 1012 (D.N.J. 2016) (“Plaintiff’s Complaint fails to adequately state a claim sufficient to withstand the pleading requirements of *Iqbal/Twombly*.”).

68. *Lyda v. CBS Corp.*, 838 F.3d 1331, 1340 (Fed. Cir. 2016) (“There are thus no allegations in the Amended Complaint that can form the basis of a reasonable inference that each claim step was performed by or should be attributed to Defendants.”).

69. U.S. CONST. art. I, § 8, cl. 8.

70. *See* 35 U.S.C. § 101 (2012). For an analysis of what constitutes patentable subject matter, see generally Ognjen Zivojnovic, *Patentable Subject Matter After Alice—Distinguishing Narrow Software Patents from Overly Broad Business Method Patents*, 30 BERKELEY TECH. L.J. 807 (2015).

71. 35 U.S.C. § 102.

72. *Id.* § 103.

73. *Id.* § 101.

74. *See id.* § 271 (defining the cause of action for patent infringement). A patent “claim” defines the patented invention and provides the basis for asserting a patent infringement claim. 3 DONALD S. CHISUM, CHISUM ON PATENTS § 8.01, at 8-5 to -7 (2016).

would lie strictly within the bounds of its claims.⁷⁵ Yet, the de facto prohibitory and injunctive power of a patent is not necessarily related to the patent's validity.⁷⁶ Complexities and expenses of federal patent litigation combined with uncertainties in the construction and enforcement of patents lead to a marked disconnect between patent validity and the patent's injunctive power. An unscrupulous patent owner may care little about the source of his patent's power. In such cases, a copying deterrent which almost exclusively flows from the threat of expensive infringement litigation may serve to "validate" an otherwise wholly invalid patent. In the worst of low-quality patent cases the patent owner is denominated a "troll" or a patent bully, and in many, the patent owner merely prudently follows his patent counsel's advice to adopt an aggressive scope and enforcement posture.

Unfortunately, the relative ease of asserting apparently invalid patent claims and the expense of patent litigation has resulted in a major deadweight on the patent system. Patent litigation initiated by so-called "nonpracticing entities" ("NPEs") presents a substantial problem to the system that seeks to protect and promote innovation.⁷⁷ Some refer to particularly active NPEs as "trolls." Although the term is not universally accepted, patent trolls are individuals or entities that "acquire patents for the sole purpose of suing operating companies."⁷⁸ They are "typically extremely well funded," and because "they are not engaging in any commerce . . . they do not fear [any] patent infringement counter-claim[s]."⁷⁹ Troll litigation's increase in prominence has been striking over the past 10 years, with a record number of patent suits filed in 2013 and an upward trend continuing through 2015.⁸⁰ Although the total number of patent lawsuits filed has steadily increased over the past decade, the number of suits brought by practicing entities has remained constant.⁸¹ In 2011, trolls extracted \$29 billion from defendants and licensees—money that represents "mostly deadweight" with little being reinvested in innovation.⁸²

The prevalence of patent troll litigation is due, at least in part, to the relatively low-risk venture that litigation represents for the trolls. Entities that practice their asserted patents face the prospect of expansive discovery into

75. Patent claims issued by the Patent Office are regularly determined to be invalid at a later date. See Manny Schecter, *Post Patent Issuance Challenges and the Quest for Patent Quality*, IPWATCHDOG (Sept. 11, 2014), <http://www.ipwatchdog.com/2014/09/11/post-patent-issuance-challenges-and-the-quest-for-patent-quality>.

76. See 35 U.S.C. § 282 ("A patent shall be presumed valid.").

77. See generally Lauren Cohen et al., *The Growing Problem of Patent Trolling*, 352 SCIENCE 521 (2016) (discussing the amount of troll litigation and its impact on innovation).

78. *Patent Trolls*, IPWATCHDOG (Apr. 19, 2014), <http://www.ipwatchdog.com/patent-trolls>.

79. *Id.*

80. Cohen et al., *supra* note 77, at 522 tbl.

81. *Id.*

82. BRIAN T. YEH, CONG. RESEARCH SERV., R42668, AN OVERVIEW OF THE "PATENT TROLLS" DEBATE 2 (2013), <https://fas.org/sgp/crs/misc/R42668.pdf>.

their business dealings and product lines, which results in higher per-suit costs.⁸³ Trolls do not face the same litigation obstacles because they do not produce products or otherwise practice their patents. This makes them more “likely to bring suits that practicing entities would not pursue.”⁸⁴

Patent trolls may represent the bulk of patent cases filed, but they are not alone in their apparent misuse of the patent system. “Patent bullying” occurs when a larger practicing entity asserts “weak, uncertain, and vague patents” against smaller or start-up companies.⁸⁵ Much like trolls, these bullies “take advantage of high litigation costs and the complexity of patent litigation to gain leverage in suits over smaller defendants.”⁸⁶ Patent bullying is in some ways even more harmful than troll litigation because, in addition to damages, courts are likely to grant bullies injunctive relief.⁸⁷

The Supreme Court has addressed the problem of meritless patent litigation in several ways.⁸⁸ As an offensive matter, the Court has made access to attorneys’ fees somewhat easier by giving the district courts more discretion.⁸⁹ On the defensive, the Court has raised the bar of what qualifies as patentable subject matter by providing a more demanding review of patents over “abstract ideas.”⁹⁰

The legislature has also sought to remedy the increase of meritless and troll litigation. The America Invents Act (“AIA”) took effect in 2012 and made it easier to gain *inter partes* review, a process by which a third party could challenge the validity of a patent in the patent office.⁹¹ Even after the AIA, legislators have continued to push for reform. As recently as 2014, Congress

83. Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2162–63 (2013).

84. *Id.* at 2163.

85. Ted Sichelman, *The Vonage Trilogy: A Case Study in “Patent Bullying.”* 90 NOTRE DAME L. REV. 543, 549–50 (2014).

86. *Id.* at 575–76.

87. *Id.* at 576; *see also* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 10 fig.1 (2012) (illustrating that 79% of practicing companies receive injunctive relief compared to 26% of nonpracticing entities, excluding universities and individuals).

88. *See* Prachi Agarwal, *Patent Troll: The Brewing Storm of Patent Reform in the United States of America*, 15 J. MARSHALL REV. INTELL. PROP. L. 63, 69–72 (2015) (discussing cases highlighting the Supreme Court’s apparent efforts to curb patent trolling).

89. *See* *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755–56 (2014) (“Th[e] text is patently clear. It imposes one and only one constraint on district courts’ discretion to award attorney’s fees in patent litigation: The power is reserved for ‘exceptional’ cases.”).

90. *Alice Corp. v. CLS Bank Int’l.*, 134 S. Ct. 2347, 2355 (2014); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70–73 (2012).

91. Deborah L. Lu et al., *Summary of the America Invents Act*, NAT’L L. REV. (Apr. 12, 2012), <http://www.natlawreview.com/article/summary-america-invents-act>.

considered legislation to increase the pleading standard and make the system less favorable to plaintiffs.⁹²

III. PROTECTING THE RIGHTS OF HONEST INVENTORS AND TROLLS

Although courts and commentators have spent countless pages addressing the problem of patent trolls, they have paid very little attention to the effect that adjusting pleading standards has on the honest, but often less affluent, patentee.⁹³ The Patent Act creates the exclusive right to prevent others from practicing a claimed invention⁹⁴ and provides civil litigation as the mode of enforcing that right.

In order to effectively defend her patent right, an inventor must have some feasible mode of preventing would-be infringers from practicing her invention.⁹⁵ The Patent Act allows a patentee to recover damages for infringement, to receive an injunction, or both as justice demands.⁹⁶ Such a statutory provision is meaningless if a patentee cannot access the courts due to unmanageably high pleading burdens or if the patentee is virtually guaranteed to fail in court due to outrageous litigation costs and burdensome discovery. The problem of patent troll litigation should be resolved with an eye toward not just stopping the problem, but also promoting a just system of patent litigation.

A. PLAUSIBLE PLEADING: IMPEDING ACCESS WHILE INCREASING EFFICIENCY

The *Twiqbal* decisions make access to the courts more difficult for plaintiffs by requiring them to plead more specific facts. The plausibility standard set out in *Twombly* has the effect of insulating defendants from a variety of conspiracy-type claims because such claims, although sometimes

92. Innovation Act, H.R. 3309, 113th Cong. (2013). According to Senator Patrick Leahy, the Innovation Act was taken “off the Senate Judiciary Committee agenda” due to insufficient support for a comprehensive deal. Press Release, Senator Patrick J. Leahy, Chairman, Senate Judiciary Comm., Comment on Patent Legislation (May 21, 2014), <https://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-d-vt-chairman-senate-judiciary-committee-on-patent-legislation>.

93. *But see* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 908–09 (2009) (arguing that a plaintiff’s decreased ability to access the courts does not implicate a moral right).

94. In patent law, practicing a patent refers to an actor engaging in behavior that is the subject of the monopoly conferred by the patent. 1 DONALD S. CHISUM, CHISUM ON PATENTS, Glossary Patent Terms G1-8 (2016) (“A patent confers the right to exclude others from making, using or selling the claimed invention. It does not necessarily guarantee the owner the affirmative right to use the invention since such use may be blocked by other patents or by regulatory laws.”).

95. *See* WORLD INTELLECTUAL PROP. ORG., WIPO INTELLECTUAL PROPERTY HANDBOOK 207 (2d ed. 2004), http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf (“Accessible, sufficient and adequately funded arrangements for the protection of rights are crucial in any worthwhile intellectual property system.”).

96. 35 U.S.C. § 283 (2012) (granting the right to injunctive relief); *id.* § 284 (granting the right to damages no less than a reasonable royalty).

true, often involve what may appear to the judge as an unlikely set of facts.⁹⁷ Post-*Twiqbal* courts across the country, concerned about potential plaintiff overreach in complex litigation, have carefully parsed fact from conclusion, demanding every allegation in the complaint be accompanied by “plausible” factual support.⁹⁸ Defenders of the *Twiqbal* approach argue that costly litigation, especially complex litigation where discovery burdens can become massive, should not be allowed to move past the pleading phase absent a careful evaluation of factual support.⁹⁹

Plausible pleading extends beyond complex litigation; the standard applies to all types of civil litigation pled according to Rule 8(a).¹⁰⁰ For example, the standard extends into the realm of civil rights litigation where the defendant’s mental state is at issue.¹⁰¹ Under the *Twiqbal* standard, a judge’s determination of a motion to dismiss can be highly subjective and “context-specific,” leaving room for the judge to make what appear to be factual determinations prior to any factual development of the record.¹⁰²

The “context-specific” analysis has reinforced what was already an unequal rate of dismissal for civil rights litigation. Under the *Conley* notice-pleading standard, 50% of Rule 12(b)(6) motions to dismiss were granted in civil rights cases.¹⁰³ Following the Court’s decision in *Iqbal*, the number of Rule 12(b)(6) motions granted in civil rights cases has increased to 58%.¹⁰⁴ In contrast, grants of Rule 12(b)(6) motions in contract and labor cases remained constant pre- and post-*Twiqbal*.¹⁰⁵ The increase cannot readily be attributed to selecting only quality cases—empirical research does not support a conclusion that the *Twiqbal* standard increases the quality of

97. Roger M. Michalski, *Assessing Iqbal*, HARV. L. & POL’Y REV., <http://harvardlpr.com/online-articles/assessing-iqbal> (last visited Dec. 10, 2017) (“*Twombly* protects the inherent secrecy of co-conspirators who now can act with less fear of pre-trial discovery.”).

98. See, e.g., *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 755 (E.D. Pa. 2011) (finding that some, but not all, alleged conspiracies were supported with sufficient facts in the complaint); *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 1:08-cv-00042-JG-VVP, 2011 WL 7053807, at *19–20 (E.D.N.Y. Jan. 4, 2011) (considering the sufficiency of factual allegations of a complex, multiunit conspiracy separate from the plausibility of such conspiracy); *In re Cal. Title Ins. Antitrust Litig.*, No. 3:08-cv-01341-JSW, 2009 WL 1458025, at *7 (N.D. Cal. May 21, 2009) (“[L]ooking at the allegations as a whole, the Court concludes that the allegations regarding the rate setting organizations taken together with the ‘plus factors’ identified by Plaintiffs do not ‘nudge their claims across the line from conceivable to plausible.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007))).

99. See *Mitchell & Wallach*, *supra* note 45, at 202.

100. Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2001 (2010).

101. See Michalski, *supra* note 97 (“[M]eritorious claims involving a defendant’s state of mind are . . . increasingly at risk of dismissal at the pleading stage.”).

102. *Id.*

103. Hatamyar, *supra* note 46, at 607.

104. *Id.*

105. See *id.* fig.6 (showing a slight increase in Rule 12(b)(6) grants following the *Twombly* decision and a return to *Conley* levels under *Iqbal*).

litigation.¹⁰⁶ Rather, the language used in *Iqbal* most readily explains the increased number of dismissals in civil rights cases: “Determining 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.”¹⁰⁷ Since judges have historically dismissed half of all civil rights cases, it follows that judges, instructed by the Supreme Court to use their experience, would act in a self-reinforcing way, leading to continued and increased rates of dismissal in these cases.

The elimination of the forms, once its full impact is felt, may lead to similar increases in patent dismissals. Shortly after *Twiqbal*, one scholar found a marked increase in granted Rule 12(b)(6) motions in all IP cases.¹⁰⁸ The application of plausible pleading to direct infringement claims is likely to self-reinforce higher rates of dismissal. This is especially true considering the directive of the Supreme Court for district judges to draw on experience and common sense when faced with Rule 12(b)(6) motions. Many judges have experience with patent trolls, and those judges are now free to use that experience in making decisions about the plausibility of a claim of patent infringement.¹⁰⁹

The elimination of the forms exacerbates the difficulty of plaintiffs, especially plaintiffs in patent cases, in gaining full access to the courts. Prior to the forms’ abrogation, three circuit courts had found that the *Twiqbal* standard of pleading did not undermine the forms’ authority as the last word on sufficiency.¹¹⁰ This meant that the forms’ examples of sufficiently pled claims for recovering money owed,¹¹¹ negligent driving,¹¹² conversion of property,¹¹³ “specific performance of a contract to convey land,”¹¹⁴ and patent

106. See Gelbach, *supra* note 48, at 424 (concluding that “it is not possible to clearly determine the quality-filtering effects of *Twiqbal*”).

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

108. Hatamyar, *supra* note 46, at 607 fig.6.

109. For example, cases will come before district court judges which clearly display an aggressive posture on claim construction in relation to the accused infringing article. In many of these cases, the judge’s “experience” will inform the judge that the plaintiff is a patent troll. It is these types of cases where increased dismissals may be seen.

110. *García-Catalán v. United States*, 734 F.3d 100, 104 (1st Cir. 2013) (acknowledging Rule 84’s declaration that the appended forms were sufficient and adopting the reasoning of the Federal Circuit in *K-Tech*); *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013) (“[T]o the extent any conflict exists between *Twombly* (and its progeny) and the Forms regarding pleadings requirements, the Forms control.”); *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010) (holding that the statement in the Rules that the forms are sufficient resolves any conflict between the forms and *Twiqbal*).

111. FED. R. CIV. P. Form 10 (examples included recovering money owed on a promissory note, for “goods sold and delivered,” and for “money paid by mistake”) (abrogated Dec. 1, 2015).

112. *Id.* Form 11 (abrogated Dec. 1, 2015).

113. *Id.* Form 15 (abrogated Dec. 1, 2015).

114. *Id.* Form 17 (abrogated Dec. 1, 2015).

infringement¹¹⁵ were all guaranteed to allow a plaintiff to survive a motion to dismiss.

The forms did not require a great deal of factual specificity. For example, the form for direct patent infringement required only: (1) a statement of jurisdiction; (2) a statement of ownership of a patent, the date of its issuance, and its general subject matters; (3) a statement that the defendant was infringing the patent; and (4) a statement that the plaintiff was in compliance with statutory requirement regarding notice.¹¹⁶ Notably, Form 18 did not require the plaintiff to point out which of the patent claims were infringed or which of the defendant's products were allegedly infringing the patent.¹¹⁷ The elimination of the forms' full impact on direct patent infringement pleading has not yet been realized, but most practitioners agree that under *Twiqbal*, asserted claims and infringing products are facts that must be pled in the complaint.¹¹⁸

Despite added difficulty for plaintiffs, the Court's transition from notice to plausible pleading does decrease the amount of meritless patent litigation that survives the complaint phase. Because Rule 11 has always required a plaintiff to complete a pre-suit investigation into the merits of a claim, the plausible-pleading requirement "only impose[s] additional costs on those unscrupulous plaintiffs that currently take advantage of" the low pleading standard as a way to shirk the investigation responsibility.¹¹⁹ By more effectively requiring trolls to undertake Rule 11 pre-suit diligence, "the elevated pleading standard will discourage frivolous filings by . . . patent trolls."¹²⁰ Additionally, the standard facilitates significant cost savings by allowing early disposition of frivolous lawsuits and by "forc[ing] plaintiffs to crystalize their theory of infringement early on in the litigation."¹²¹ Moreover, the early revelation of the plaintiff's position makes the litigation process more efficient by allowing the defendant to formulate more specific responses in its answer.¹²²

115. *Id.* Form 18 (abrogated Dec. 1, 2015).

116. *Id.*

117. *Id.*

118. *E.g.*, Mark Hannemann et al., *How the Elimination of Form 18 Has Impacted Direct Patent Infringement*, LEXOLOGY (Aug. 19, 2016), <http://www.lexology.com/library/detail.aspx?g=4aacee14-e1f3-4296-9f3b-d88751aee0aa> ("[I]t is clear that patent owners . . . should . . . identify at least one infringed claim [and] identify at least one infringing product . . .").

119. Jonathan L. Moore, *Particularizing Patent Pleading: Pleading Patent Infringement in a Post-Twombly World*, 18 TEX. INTELL. PROP. L.J. 451, 502 (2010).

120. *See* Williams, *supra* note 59, at 338.

121. *Id.* at 339.

122. *See* 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, 3-4 (2008) ("Without a precise identification of asserted claims, courts can hardly expect defendants to provide any meaningful detail as to their noninfringement and invalidity defenses, without any idea as to which claims are at issue.").

B. HOW PLAUSIBILITY HAS PLAYED OUT THUS FAR

The courts' use of the *Twiqbal* pleading standard to address known abuses of the patent system makes sense. Despite early rumbles of discontent, Congress has not acted to revive the *Conley* notice-pleading standard.¹²³ Congress has also failed to enact pleading standard reforms specific to the patent litigation context.¹²⁴ Absent action by Congress, the courts are left to address the misuse of patent litigation within the broader context and constraints of civil litigation. Although the elimination of Form 18 represents the most recent change in patent litigation pleading, the courts have been applying the *Twiqbal* pleading standard to indirect infringement claims, counterclaims, and, in some cases, affirmative defenses for several years.¹²⁵

1. Application of *Twiqbal* to Indirect Infringement

Since Form 18 insulated only those plaintiffs pleading direct infringement, courts have had ample opportunity after *Twiqbal* to address the standard of pleading required in cases of indirect patent infringement. In 2012, the Federal Circuit addressed the issue of *Twiqbal* as applied to pleading contributory infringement under 35 U.S.C. § 271(c).¹²⁶ The court upheld the district court's dismissal—a dismissal that was based on a failure to state in the pleading that the product marketed by the defendant had no “substantial noninfringing use[.]”¹²⁷ The court flatly rejected the plaintiff's argument that noninfringing uses could not be determined prior to claim construction, concluding that the complaint itself contained a number of plainly noninfringing uses.¹²⁸ Later that year, the court again upheld a district court's dismissal for failing to state that the accused product was “especially made or especially adapted” for an infringing purpose.¹²⁹ These cases stand for the proposition that each element of the claim must be stated with specific factual

123. See Notice Pleading Restoration Act, S. 1504, 111th Cong. § 2 (2009) (representing an early, but ultimately unsuccessful, effort by Congress to return to notice pleading).

124. See Innovation Act, H.R. 3309, 113th Cong. (2013) (an unsuccessful resolution aimed at specifying what facts should be pled in cases of infringement).

125. See *infra* Parts III.B.1–3 (discussing courts' application of the standard to indirect infringement, counterclaims, and affirmative defenses).

126. *In re* Bill of Lading Transmission & Processing Sys. Patent Litig., 681 F.3d 1323, 1337 (Fed. Cir. 2012).

Contributory infringement occurs if a party sells or offers to sell, a material or apparatus for use in practicing a patented process, and that “material or apparatus” is material to practicing the invention, has no substantial non-infringing uses, and is known by the party “to be especially made or especially adapted for use in an infringement of such patent.”

Id. (quoting 35 U.S.C. § 271(c) (2012)).

127. *Id.* at 1331.

128. *Id.*

129. *Superior Indus., LLC v. Thor Glob. Enters. Ltd.*, 700 F.3d 1287, 1296 (Fed. Cir. 2012) (quoting 35 U.S.C. § 271(c)).

support and that the facts alleged in the complaint must not negate the substance of the claim.

The court had the opportunity to address the pleading requirements for cases of induced infringement under 35 U.S.C. § 271(b) in *In re Bill of Lading*.¹³⁰ Induced infringement occurs when an entity induces another's infringing actions with knowledge that those actions constitute infringement.¹³¹ The court held that the "amended complaint[] must contain facts plausibly showing that [the defendants] specifically intended their customers to infringe the . . . patent and knew that the customer's acts constituted infringement."¹³² The court clarified that *Twiqbal* did not change the standard that all reasonable inferences based on the facts asserted in the pleadings should be made in favor of the nonmoving party.¹³³ The court ultimately reversed the district court's grant of the defendant's motion to dismiss by finding that the facts pled supported a reasonable inference of plausible specific intent.¹³⁴ The court restated the requirement of "reasonable inferences" later that year in *Superior Industries*.¹³⁵ Under the guidance of the Federal Circuit's decisions, district courts have largely been able to resolve questions of plausibility.¹³⁶

2. Application of *Twiqbal* to Counterclaims

Iqbal and *Twombly* both dealt exclusively with the contents of a complaint pled according to Rule 8(a).¹³⁷ While Rule 8(a) governs the complaint, Rule

130. *In re Bill of Lading*, 681 F.3d at 1339.

131. *Id.*

132. *Id.*

133. *Id.* at 1340 ("Nothing in *Twombly* or its progeny allows a court to choose among competing inferences as long as there are sufficient facts alleged to render the non-movant's asserted inferences plausible.").

134. *See id.* at 1342-46 (evaluating the facts pled regarding each of six defendants and reversing on each dismissal).

135. *Superior Indus., LLC v. Thor Glob. Enters. Ltd.*, 700 F.3d 1287, 1296 (Fed. Cir. 2012) ("[Plaintiff] does not allege any facts to support a reasonable inference that [defendant] specifically intended to induce infringement of the . . . Patent or that it knew it had induced acts that constitute infringement.").

136. *See, e.g.*, *LaserDynamics USA, LLC v. Cinram Grp., Inc.*, No. 1:15-cv-03822-RWS, 2015 WL 6657258, at *5-7 (S.D.N.Y. Oct. 30, 2015) (finding that a letter sent by the plaintiff did not establish knowledge because "the correspondence could have been received as unsubstantiated and unenforceable patent trolling"); *Core Wireless Licensing S.A.R.L. v. Apple Inc.*, No. 6:14-cv-00752-JRG-JDL, 2015 WL 4910427, at *4 (E.D. Tex. Aug. 14, 2015) ("[G]eneric allegations that an alleged infringer provides instructional materials along with the accused products, without more, are insufficient to create a reasonable inference of specific intent for the purposes of an induced infringement claim."); *M2M Sols. LLC v. Telit Commc'ns PLC*, No. 1:14-cv-01103-UNA, 2015 WL 4640400, at *4 (D. Del. Aug. 5, 2015) (concluding the plausibility standard could not be met in a claim of induced infringement where defendants were lumped together for the purposes of pleading).

137. *See generally* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

13 provides the basis for a defendant's right or obligation to plead a counterclaim.¹³⁸ Despite the technical difference between complaints and counterclaims, a majority of district courts have applied the *Twiqbal* pleading standard to counterclaims in patent cases.¹³⁹ Courts largely ground their decision to apply *Twiqbal* to counterclaims in the natural reading of the Rules. Rule 8(a) requires that any "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."¹⁴⁰ Although a counterclaim appears in the answer, not the pleading at issue in *Twiqbal*, it "is a 'claim for relief,' just like a claim in the complaint."¹⁴¹ Since Rule 8(a) covers *all* pleadings,¹⁴² the Supreme Court's interpretation of the Rule in *Twiqbal* cannot reasonably be limited to the Rule's application to complaints.¹⁴³

Unfortunately, absent the guidance of the Federal Circuit on this point, there is no consistent standard for what is sufficient in counterclaim pleading. For example, a judge from the Northern District of California denied a plaintiff's motion to dismiss an invalid counterclaim where the defendant identified several "specific statutory subparts," but not *all* potential grounds for invalidity.¹⁴⁴ But, a different judge from that district has held that a "bare-bones recitation of statutes does not meet the requirements of *Twombly* and *Iqbal*."¹⁴⁵ Likewise, a judge from the District of Delaware denied a motion to dismiss a counterclaim of invalidity which claimed the asserted patent was invalid "for failure to comply with one or more of the conditions for patentability set forth in Title 35 . . . including, but not limited to" sections

138. FED. R. CIV. P. 13(a)–(e) (governing compulsory counterclaims arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim" and permissive counterclaims that may be unrelated to the claims of the opposing party).

139. *E.g.*, *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 898 (E.D. Pa. 2011) ("In the wake of *Twombly* and *Iqbal*, it is clear that a claim or counterclaim must set forth sufficient facts to give rise to a plausible claim for relief."). *See generally* CONRAD GOSEN & TASHA FRANCIS, *THE CONFUSING AND OFTEN CONTRADICTORY WORLD OF PLEADING DEFENSES AND COUNTERCLAIMS IN PATENT CASES* (2015), http://www.ipso.org/wp-content/uploads/2015/06/Confusing_World_Patent_Pleadings.pdf (concluding that most courts apply *Twiqbal* to counterclaims but that the standard of application is inconsistent).

140. FED. R. CIV. P. 8(a).

141. Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 149, 173 (2014).

142. *See* FED. R. CIV. P. 7(a) ("Only these *pleadings* are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer." (emphasis added)).

143. *See* St. Eve & Zuckerman, *supra* note 141, at 173 ("[T]he counterclaim is subject to the pleading requirements of Rule 8(a) (1), as interpreted by *Twombly* and *Iqbal* . . .").

144. *Fitness Anywhere LLC v. Woss Enters. LLC*, No. 14-cv-01725-BLF, 2014 WL 4802432, at *2–3 (N.D. Cal. Sept. 26, 2014).

145. *Xilinx, Inc. v. Invention Inv. Fund I LP*, No. 5:11-cv-00671-S/i, 2011 WL 3206686, at *6 (N.D. Cal. July 27, 2011).

102, 103, and 112.¹⁴⁶ The judge reasoned that the defendant “identifie[d] the specific statutory sections regarding invalidity . . . and provide[d] examples of invalidating prior art.”¹⁴⁷ But, a different judge from that district, granting a motion to dismiss a counterclaim, held that merely listing statutory provisions fails the test set out in *Twiqbal*.¹⁴⁸

Some judges argued for a lower standard for pleading counterclaims to promote fairness in pleading while the forms were still in force. These judges argued that the imbalance created by imposing the requirement of plausible pleading on counterclaims would be unfair since, under Form 18, a plaintiff was not required to assert specific claims or infringing products.¹⁴⁹ Of course, after the elimination of the forms, such a justification for limiting the plausible-pleading standard can no longer stand. The inconsistency of lower court decisions represents not a failure of plausible pleading, but rather a need for the Federal Circuit to provide unifying guidance on what facts are necessary and sufficient to meet the *Twiqbal* standard for patent counterclaims.

3. Inconsistent Application of *Twiqbal* to Affirmative Defenses

Unlike the near consensus among district courts regarding *Twiqbal*'s application to counterclaims, districts—and individual judges within districts—are largely split on whether the plausible-pleading standard applies to affirmative defenses described in Rule 8(c).¹⁵⁰ The key source of the split revolves largely around courts' interpretations of *Twiqbal* as it applies to the language of Rule 8(c), which is different from the language of Rule 8(a).¹⁵¹ Courts that focus primarily on *Twiqbal* as an effort to clarify what constitutes good notice to the opposing party tend to find that the *Twiqbal* standard

146. *CryoLife, Inc. v. C.R. Bard, Inc.*, No. 1:14-cv-00559-SLR, 2015 WL 1069397, at *4 (D. Del. Mar. 10, 2015) (quoting First Amended Complaint for Declaratory Judgment at 17 ¶ 57).

147. *Id.*

148. *EMC Corp. v. Zerto, Inc.*, No. 1:12-cv-00956-GMS, 2014 WL 3809365, at *2 (D. Del. July 31, 2014) (“[The counterclaims] are merely bare-bones legal conclusions devoid of any supporting factual allegations.”).

149. *Aubin Indus., Inc. v. Caster Concepts, Inc.*, No. 2:14-cv-02082-MCE-CKD, 2015 WL 3914000, at *3 (E.D. Cal. June 25, 2015); *Microsoft Corp. v. Phoenix Sols., Inc.*, 741 F. Supp. 2d 1156, 1159 (C.D. Cal. 2010) (“[I]t would be incongruous to require heightened pleading when the pleading standard for infringement does not require facts such as ‘why the accused products allegedly infringe’ or ‘to specifically list the accused products.’” (quoting *Teirstein v. AGA Med. Corp.*, No. 6:08-cv-00014, 2009 WL 704138, at *5 (E.D. Tex. Mar. 16, 2009))).

150. *Compare* *Shinew v. Wszola*, No. 2:08-cv-14256, 2009 WL 1076279, at *2–5 (E.D. Mich. Apr. 21, 2009) (concluding that the plausible-pleading standard applies to affirmative defenses), *with* *First Nat’l Ins. Co. of Am. v. Camps Servs., Ltd.*, No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009) (finding that the standard did not apply to affirmative defenses).

151. *Compare* FED. R. CIV. P. 8(a)(2) (requiring “a short and plain statement of the claim *showing* that the pleader is entitled to relief” (emphasis added)), *with* *id.* R. 8(c)(1) (“[A] party must affirmatively *state* any avoidance or affirmative defense.” (emphasis added)).

applies to affirmative defenses.¹⁵² However, those “[c]ourts that interpret *Twombly* and *Iqbal* as a strict reading of Rule 8(a)(2)’s requirement of ‘showing’ the grounds on which the claim rests do not extend the new standard beyond that domain” to encompass other policy motivations.¹⁵³

The split decisions regarding application of *Twiqbal* to affirmative defenses extend into patent litigation.¹⁵⁴ In *PageMelding, Inc. v. ESPN, Inc.*, a judge from the Northern District of California declared all 12 affirmative defenses in a patent suit insufficiently pled under *Twombly* to give notice to the plaintiff.¹⁵⁵ Additionally, a judge from the Northern District of Illinois determined that since counterclaims and affirmative defenses often rely on the same facts, it would be inconsistent to hold them to different standards.¹⁵⁶ But, a judge in the District of Delaware, considering the sufficiency of a pleading containing affirmative defenses, outlined nine points of analysis rejecting the application of *Twiqbal* to affirmative defenses.¹⁵⁷ His summary of reasons not to apply plausible pleading to affirmative defenses included: “textual differences between Rule 8(a) . . . and Rule 8(c),” a number of considerations regarding discovery, unfairness regarding the amount of time the defendant has to respond, a lack of increased efficiency, Form 30’s “lack of detail,” and judges’ disfavor for motions to strike.¹⁵⁸

Despite the wide variety of rationales district courts provide for choosing whether to apply *Twiqbal* to affirmative defenses, none of the federal courts of appeals have directly addressed the question. The Second and Sixth Circuits, when presented with the opportunity to address the issue, both resolved on other grounds and declined to address the question.¹⁵⁹ A 1999 opinion from

152. Miller, *supra* note 43, at 101 n.391.

153. *Id.*

154. See generally GOSEN & FRANCIS, *supra* note 139 (describing the disagreement among courts adjudicating patent case affirmative defenses).

155. *PageMelding, Inc. v. ESPN, Inc.*, No. 3:11-cv-06263-WHA, 2012 WL 3877686, at *3 (N.D. Cal. Sept. 6, 2012) (“Affirmative defenses are governed by the same pleading standards as claims. Notice requires more than legal conclusions; factual allegations must establish a right to relief that is ‘beyond the speculative level.’” (misquoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

156. *Oleksy v. Gen. Elec. Co.*, No. 1:06-cv-01245, 2013 WL 3233259, at *17 (N.D. Ill. June 26, 2013) (“Holding that the rule articulated by *Twombly* should not apply to affirmative defenses would create needless confusion and would undoubtedly lead to inconsistent results because it would require courts to interpret pleadings under different standards depending on the form of the pleading.”).

157. *Bayer CropScience AG v. Dow AgroSciences LLC*, No. 1:10-cv-01045-RMB-JS, 2011 WL 6934557, at *1–2 (D. Del. Dec. 30, 2011).

158. *Id.*

159. *Jones v. Bryant Park Mkt. Events, LLC*, 658 F. App’x 621, 624 (2d Cir. 2016) (declining to reach the question of *Twiqbal*’s applicability to affirmative defenses); *Depositors Ins. Co. v. Estate of Ryan*, 637 F. App’x 864, 869 (6th Cir. 2016) (“[B]ecause the district court did not actually apply [the *Twiqbal*] standard to appellants’ affirmative defenses, it is unnecessary for us to resolve this issue.”); *Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 547 n.6 (6th Cir. 2012) (“We . . . express no view regarding, the impact of [*Twiqbal*] on affirmative defenses.”).

the Fifth Circuit suggests in dicta that, pre-*Twigbal*, the court felt that “[a]n affirmative defense is subject to the same pleading requirements as is the complaint.”¹⁶⁰ However, the complete lack of post-*Twigbal* guidance from any federal appellate court reinforces the divide among the district courts and leaves defendants to guesswork regarding what standard a district court will use.

The affirmative defenses available to defendants in patent litigation are many and varied—requiring distinct factual findings on each defense.¹⁶¹ Defendants may also plead several of these affirmative defenses as counterclaims in patent cases, including: noninfringement, unenforceability, and invalidity.¹⁶² Since defendants can choose, the disparity between the requirements for pleading counterclaims and affirmative defenses is especially problematic. To circumvent the plausible-pleading standard usually applied to counterclaims, a defendant can simply plead the claim as an affirmative defense and receive the same access to discovery. Additionally, differing pleading standards require a judge to consider essentially the same claim through two different lenses.¹⁶³ A system that regularly allows the defendants to raise the same claim under two different pleading standards does not align with traditional notions of fairness or serve *Twigbal*'s purpose of curbing discovery abuse.¹⁶⁴

IV. APPLICATION OF *TWIGBAL* TO ALL PATENT PLEADINGS

The current pleading standard, as applied to the complaint, deters abusive patent litigation by forcing plaintiffs to crystalize their claims early in litigation.¹⁶⁵ However, an imbalance between a plaintiff's and a defendant's

160. *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999); see also *Heller Fin., Inc. v. Midwehy Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989) (“Affirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure.”); *Marine Overseas Servs., Inc. v. Crossocean Shipping Co.*, 791 F.2d 1227, 1233 (5th Cir. 1986) (“The pleading of affirmative defenses is governed by the same liberal standards as those for a complaint.”).

161. See 35 U.S.C. § 282 (2012) (listing noninfringement, unenforceability, invalidity, and “[a]ny other fact or act made a defense by this title” as defenses available in a patent actions). See generally Tom Filarski & Heather N. Shafer, *Patent Defenses*, in *PATENT LITIGATION STRATEGIES HANDBOOK* 1224 (Barry L. Grossman & Gary H. Hoffman eds., 3d ed. 2010) (discussing defenses raised during patent litigation).

162. 2 ETHAN HORWITZ & LESTER HORWITZ, *HORWITZ ON PATENT LITIGATION* § 10.01 (2017) (“Often, a defendant will assert non-infringement, invalidity, and unenforceability not only as affirmative defenses but also as counterclaims . . .”).

163. See *Oleksy v. Gen. Elec. Co.*, No. 1:06-cv-01245, 2013 WL 3233259, at *17 (N.D. Ill. June 26, 2013) (applying *Twigbal* standard to affirmative defenses to avoid inconsistent results between similar claims).

164. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery . . .”).

165. See *supra* Part III.A (discussing the changed pleading standard and its interaction with abusive patent litigation practice).

pleading burden cannot be justified “abuse” grounds. Requiring all parties to state claims and defenses in the pleadings with “plausibility” under *Twiqbal* promotes careful construction of the case during the pleading phase, balances the pleading burdens between the plaintiff and defendant, and serves the purpose of *Twombly* by precisely tailoring the parties’ access to discovery to the needs for the case.¹⁶⁶ The Federal Circuit is uniquely positioned to reinforce the Supreme Court’s policy goals by establishing the *Twiqbal* standard of pleading for patent specific counterclaims and defenses.¹⁶⁷ Finally, judges and commentators may object to blanket application of *Twiqbal* to all pleadings, but this is inconsistent with traditional notions of fairness in pleading.¹⁶⁸

A. PLAUSIBLE PLEADING RESTORES EQUILIBRIUM

Shortly after *Twiqbal*, district courts began to recognize and articulate the potential unfairness associated with applying different pleading standards to plaintiffs and defendants. The Western District of Oklahoma framed it as a matter of judicial evenhandedness, holding that each party should have the opportunity to “reasonably tailor” discovery.¹⁶⁹ A judge from the Western District of Virginia agreed, stating:

[I]t neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case.¹⁷⁰

Since those two early decisions, many, but far from all, districts have adopted similar reasoning and applied the plausible-pleading standard to affirmative defenses.¹⁷¹

166. See *infra* Part IV.A (discussing the benefits of equalizing pleading burdens between plaintiffs and defendants).

167. See *infra* Part IV.B (discussing how the plausible-pleading standard should be applied to all pleadings in patent cases).

168. See *infra* Part IV.C (addressing the most prominent criticisms of applying the plausible-pleading standard to all pleadings).

169. See *Burget v. Capital W. Sec., Inc.*, No. 5:09-cv-01015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009) (“An even-handed standard . . . ensures that the affirmative defenses supply enough information . . . such that the adverse party can reasonably tailor discovery.”).

170. *Palmer v. Oakland Farms, Inc.*, No. 5:10-cv-00029, 2010 WL 2605179, at *4 (W.D. Va. June 24, 2010).

171. See, e.g., *AirWair Int’l Ltd. v. Schultz*, 84 F. Supp. 3d 943, 950 (N.D. Cal. 2015) (applying the plausible-pleading standard as the means by which all parties receive fair notice from pleadings); *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 234 (E.D.N.C. 2010) (holding that consideration of fairness demands application of *Twiqbal* to affirmative defenses); *Castillo v. Roche Labs, Inc.*, No. 1:10-cv-20876-PAS, 2010 WL 3027726, at *4 (S.D. Fla. Aug. 2, 2010) (adopting a fairness analysis to defend application of *Twiqbal* to affirmative defenses).

In addition to concerns about fairness, many courts echo the reasoning forwarded in *Twiqbal*—decreasing access to abusive discovery¹⁷² and increasing judicial efficiency¹⁷³—as support for application of the plausible-pleading standard to affirmative defenses. In the same way barebones complaints were problematic in *Twiqbal*, “[b]oilerplate defenses clutter the docket and . . . create unnecessary work.”¹⁷⁴ This is especially true since “there is an almost unlimited supply of affirmative defenses, each one implicating a different potential fact pattern.”¹⁷⁵ The “unnecessary work” very often takes the form of “interrogatories or other discovery aimed at ascertaining which defenses are truly at issue and which are merely asserted without factual basis.”¹⁷⁶ Discovery would be most efficient if defendants were required to plead according to the *Twiqbal* pleading standard so that discovery requests could be “reasonably tailor[ed].”¹⁷⁷ This is true because, in the same way that notice pleading led to discovery abuses, allowing a defendant to plead an unending list of factually unsupported affirmative defenses harms the judicial process and creates waste.

Some courts and academics believe that there should be one pleading standard as a matter of legal history. Under *Conley*, courts routinely found that a single pleading standard applied to *all* pleadings.¹⁷⁸ In fact, pleadings have been judged by the same standard not just since *Conley* was decided in 1957, but for hundreds of years.¹⁷⁹ The recent diversion of several district courts into a bifurcated system of evaluating pleading sufficiency is at odds with a long history of what has been considered evenhanded pleading in this country. Although burdens of proof are not equal in each case, equality in the standard of pleading has served to promote a sense of equal access to the courts for centuries.

Highly technical litigation such as patent litigation magnifies the impact of an unequal pleading burden. Patent litigation is a very expensive endeavor

172. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

173. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (rejecting “the careful-case-management approach” as inefficient in addressing discovery abuses).

174. *Safeco Ins. Co. of Am. v. O’Hara Corp.*, No. 08-cv-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008).

175. Matthew J.M. Pelikan, Note, *Plausible Defenses: Historical, Plain Meaning, and Public Policy Arguments for Applying Iqbal and Twombly to Affirmative Defenses*, 96 MINN. L. REV. 1828, 1855 (2012).

176. *Safeco Ins.*, 2008 WL 2558015, at *1.

177. *Burget v. Capital W. Sec., Inc.*, No. 5:09-cv-01015-M, 2009 WL 4807619, at *2 (W.D. Okla. Dec. 8, 2009).

178. Manuel John Dominguez et al., *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 FLA. B.J. 77, 78 (2010). *Conley* dealt exclusively with the sufficiency of a complaint.

179. Pelikan, *supra* note 175, at 1854 (“The evolution of pleading shows that affirmative defenses have been judged in the same light as complaints for hundreds of years.”).

and tends to favor the wealthier party.¹⁸⁰ In most cases, the plaintiff in a patent infringement action is the less wealthy party.¹⁸¹ Thus, patent plaintiffs already face an uphill battle based on wealth alone.¹⁸² In some cases, the plaintiffs in patent litigation are trolls and are rightly excluded from access to the courts due to factually insufficient complaints. But once a patentholder has pled sufficient facts to remain in court, she should not be subject to unequal treatment. *Twiqbal* limits discovery to what the plaintiff has reasonable facts to support. Courts should likewise limit defendants' access to discovery to those affirmative defenses and counterclaims which have been pled with sufficient facts. The unequal pleading burden in patent litigation, recently reinforced by the abrogation of Form 18, throws the entire system out of equilibrium. Applying plausible pleading to all aspects of a patent action nudges the system closer to a semblance of balance.

B. IMPLEMENTING THE STANDARD

The most natural course of action for resolving the unequal pleading problem, with an eye towards its impact on patent litigation, is through a congressional response. A simple resolution or addition to the Patent Act stating that "all pleadings in patent litigation will be subject to a uniform pleading standard" would provide a narrowly tailored response.¹⁸³ Unfortunately, because previous congressional attempts to create a uniform pleading standard have failed, prompt congressional action seems unlikely.¹⁸⁴

Since Congress is unlikely to resolve the disparity, the Federal Circuit should use its authority as the exclusive court for patent appeals to remedy the pleading disparity. Because it is a court of limited appellate jurisdiction, the Federal Circuit maintains a dual system of review whereby it has exclusive jurisdiction over substantive patent issues, but examines procedural issues

180. Paul M. Janicke & LiLan Ren, *Who Wins Patent Infringement Cases?*, 34 AIPLA QJ. 1, 25–26 (2006) ("In the . . . numerous cases in which the accused infringers prevailed, they also tended to be wealthier than their losing adversaries.").

181. Bruce L. Beron & Jason E. Kinsella, *David vs. Goliath Patent Cases: A Search for the Most Practical Mechanism of Third Party Litigation Financing for Small Plaintiffs*, 38 N. KY. L. REV. 605, 606 (2011) ("[T]he allegedly infringing defendants frequently have greater financial resources for litigation than the patent-holders.").

182. *See id.* at 606–07 (summarizing the data on the impact of wealth disparity on the outcome in patent litigation).

183. Notably, such a resolution would not bring the full force of *Twiqbal* on affirmative defenses in all types of litigation, leaving the question largely unresolved in other areas of the law. Such a result may be preferable because not all types of litigation face the same set of problems as patent litigation. Allowing federal courts of appeals and the Supreme Court to monitor *Twiqbal's* general application to affirmative defenses would be in keeping with norms surrounding the interpretation of the Rules.

184. Recall the failed Senate Bill 1504, Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009), and House Bill 3309, Innovation Act, H.R. 3309, 113th Cong. (2013).

under the law of the regional circuit.¹⁸⁵ The distinction between a procedural issue and a substantive issue is not always clear. However, the court has stated that procedural issues fall within its jurisdiction “if the issue ‘pertain[s] to patent law,’ if it ‘bears an essential relationship to matters committed to [the court’s] exclusive control by statute,’ or if it ‘clearly implicates the jurisprudential responsibilities of [the] court in a field within its exclusive jurisdiction.’”¹⁸⁶

Currently, the district courts rely primarily on the law of the Federal Circuit and Supreme Court when determining what facts are required by the *Twiqbal* standard in patent cases.¹⁸⁷ Determining which facts are required to meet the pleading standard in a patent action or for an affirmative defense in a patent case directly “implicates the jurisprudential responsibilities of [the] court”¹⁸⁸ and are “intimately involved in the substance of enforcement of the patent right.”¹⁸⁹ The standard that district courts apply to pleadings in patent cases directly impacts the patent owner’s ability to effectively protect its exclusive patent rights. Therefore, as a matter of protecting substantive patent enforcement rights, the Federal Circuit should resolve the standard of pleading that applies to affirmative defenses and counterclaims. As a matter of fairness and efficiency, the court should hold that all pleadings in patent actions must be pled plausibly.

C. ADDRESSING THE CRITICS

Judges and scholars who reject the conclusion that *Twiqbal* should apply to all pleadings provide a few rationales. One prominent rationale is concerned with the textual differences between Rules 8(a) and 8(c).¹⁹⁰ Historically, courts made short work of the textual differences, concluding the standard for pleading was uniform.¹⁹¹ Because of the strong historical norm of a uniform pleading standard, parsing the Supreme Court’s language to divine a substantial difference between claims and affirmative defenses is

185. Adam Steinmetz, Note, *Pleading Patent Infringement: Applying the Standard Established by Twombly and Iqbal to the Patent Context*, 13 COLUM. SCI. & TECH. L. REV. 482, 511–12 (2012). Steinmetz addressed the application of *Twiqbal* to the patent context prior to the elimination of the forms and without consideration of affirmative defenses. *See generally id.*

186. *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1359 (Fed. Cir. 1999) (first alteration in original) (citations omitted).

187. *See* Steinmetz, *supra* note 185, at 511 (“[T]he approach often taken by the courts is to cite *Twombly*, *Iqbal*, the Federal Circuit’s *McZeal* and/or *Phonometrics* decisions, Form 18, and precedent from its own circuit . . .”).

188. *Midwest Indus.*, 175 F.3d at 1359 (quoting *Gardco Mfg., Inc. v. Herst Lighting Co.*, 820 F.2d 1209, 1212 (Fed. Cir. 1987)).

189. *Viam Corp. v. Iowa Exp.–Imp. Trading Co.*, 84 F.3d 424, 428 (Fed. Cir. 1996).

190. *See supra* text accompanying notes 150–51, 158.

191. *See, e.g., Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999).

likely inconsistent with the Court's intention. Such a conclusion also ignores the many policy concerns expressed by the Court in *Twombly* and *Iqbal*.¹⁹²

In addition to concerns about textual differences, judges and commentators often focus on the limited time defendants have to respond to a complaint.¹⁹³ As a general rule, defendants have 21 days to respond to a complaint.¹⁹⁴ However, this rule is very loose, and most defendants get at least an additional 30 days to respond.¹⁹⁵ Additionally, Rule 15(a)(2) specifies that judges should "freely give leave [to amend pleading] when justice so requires."¹⁹⁶ District court judges should allow defendants to freely amend their pleadings if information supporting a previously unpled affirmative defense comes to light. This is much more desirable than allowing a defendant to plead all possible affirmative defenses without factual support—a practice that defeats the balance struck by *Twiqbal*.

V. CONCLUSION

Recent changes in pleading practices have fundamentally shifted the way courts and litigants handle the first phases of litigation. Prior to the elimination of the forms in December 2015, litigants did not feel the full impact of *Twiqbal* in the realm of patent litigation. Without Form 18, plausible pleading requires patentees to plead many more specific facts in a complaint alleging direct patent infringement.¹⁹⁷ Although its full range of impacts may not be desirable, the plausible-pleading standard has a positive effect on patent litigation by helping limit the number of meritless patent infringement suits that survive motions to dismiss. In addition to its beneficial exclusionary effect, *Twiqbal* decreases the amount of discovery directed at factually unsupported claims. To effectively serve the discovery-limiting purpose of *Twiqbal* and preserve some balance at the pleading phase of patent

192. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (discussing at length the problem of discovery abuse as a result of vaguely pled claims).

193. See, e.g., James V. Bilek, Comment, *Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 CHAP. L. REV. 377, 410–16 (2011) (discussing the time constraints faced by defendants).

194. FED. R. CIV. P. 12(a)(1)(A).

195. JAMES F. PARVER ET AL., N.Y. STATE BAR ASS'N, WHETHER THE HEIGHTENED PLEADING REQUIREMENTS OF *TWOMBLY* AND *IQBAL* APPLY TO PLEADING AFFIRMATIVE DEFENSES 11 (2012), https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/Whether_The_Heightened_Pleading_Requirements_of_Twombly_and_Iqbal_Apply_to_Pleading_Affirmative_Defenses.html.

196. FED. R. CIV. P. 15(a)(2); see also PARVER ET AL., *supra* note 195, at 9 ("[A] defendant can seek to amend its answer to assert a viable defense that becomes apparent during discovery, and leave to amend is to be freely given absent a showing of prejudice or futility.").

197. Compare FED. R. CIV. P. Form 18 (abrogated Dec. 1, 2015) (requiring only minimal factual allegations and conclusory statements to plead a direct infringement claim), with Hannemann et al., *supra* note 118 (discussing which facts should be alleged to plead direct infringement following the abrogation of Form 18).

infringement cases, the Federal Circuit should apply the plausible-pleading standard to all pleadings in patent litigation.