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Amended Rules, Amended Pleadings: How the Abrogation of Form 18 Politicized Direct Infringement Patent Pleading

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Amended Rules, Amended Pleadings: How the Abrogation of Form 18 Politicized Direct Infringement Patent Pleading

ABSTRACT

Since the abrogation of Form 18, the template for pleading direct infringement of patents, district courts have struggled to assess exactly what a plaintiff must assert in pleadings to survive a motion to dismiss for failure to state a claim. In place of Federal Rule of Civil Procedure 84, courts have developed multiple standards to assess pleading sufficiency. The US Court of Appeals for the Federal Circuit has provided little guidance when given the opportunity to resolve this division, leaving uncertainty for litigants and judges.

*Using data collected from opinions on motions to dismiss during 2016 and 2017, this Note identifies a significant amount of granted motions in the period immediately following abrogation. Further, the data suggests that judges appointed by Republican presidents have used stricter pleading standards, and are more likely to grant a motion to dismiss, than judges appointed by Democratic presidents. As a result, this Note argues for a uniform pleading standard that restricts the ability to politicize infringement pleadings, works to provide consistency and predictability for litigants, and complies with the Supreme Court's teachings in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*.*

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On November 30, 2015, the United States set a record for patent lawsuits filed in a single day, with 257 cases filed in district courts throughout the country.¹ This surge highlighted a busy fourth quarter for patent litigators, where courts witnessed the filing of 1,570 patent

1. Jeff John Roberts, *Patent Lawsuits Set One-Day Record with 257 New Cases, Most Filed in Texas*, FORTUNE (Dec. 2, 2015), <http://fortune.com/2015/12/02/patent-lawsuit-record/> [<https://perma.cc/HY67-P3SU>].

infringement cases (847 of which were filed in November alone).² By comparison, the third quarter of 2015 and first quarter of 2016 saw 1,113 and 962 infringement suits filed, respectively.³ At first glance, it may appear that patentees were simply eager to file during the fourth quarter to beat the holiday rush. Many, however, are linking this litigation spike to the abrogation of Federal Rule of Civil Procedure (FRCP) 84 and Form 18, which entered into effect on December 1, 2015 as part of the 2015 amendments to the FRCP.⁴ This abrogation removed the bright-line pleading standard for direct infringement and tasked courts with determining whether plaintiffs sufficiently pled a claim for relief under FRCP 8 and FRCP 12.⁵

During the last two years, courts have struggled to effectively apply these new pleading standards to direct infringement claims. Between December 2015 and November 2016, courts granted 44 percent of motions challenging the sufficiency of pleadings for failure to state a claim under FRCP 12(b)(6).⁶ Since the abrogation of Form 18 in 2015, patentees and courts have struggled to determine how to apply recent case law and decisions to patent pleading standards. To date, at least four distinctive, commonly used pleading standards have emerged in the district courts. Given the surrounding uncertainty, patentees risk heightened litigation costs and repeated amended complaints if they fail to properly interpret and apply what may appear as an arbitrary standard when drafting complaints.⁷ Further, unless a plaintiff elects to appeal rather than amend their deficient complaint, the US Court of Appeals for the Federal Circuit does not get the opportunity to review the applied pleading standard.⁸ This has proven

2. Steve Brachman, *Lex Machina Litigation Report Shows 22% Drop in Patent Infringement Suits for 2016*, IP WATCHDOG (Jan. 17, 2017), <http://www.ipwatchdog.com/2017/01/17/lex-machina-litigation-report-drop-patent-infringement-suits-2016/id=77108/> [<https://perma.cc/3XSB-T5H3>].

3. *Id.*

4. *See, e.g., id.*

5. *See* FED. R. CIV. P. 8(a) (“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 . . .”); FED. R. CIV. P. 12(b)(6).

6. Christian E. Mammen, *Update on Pleading Standards in Patent Cases*, 24 NO. 6 WESTLAW J. INTELL. PROP. 1, 2 (2017).

7. *See* AM. INTELLECTUAL PROP. LAW ASS'N, 2015 REPORT OF THE ECONOMIC SURVEY (2015), <https://www.aipla.org/detail/journal-issue/2015-report-of-the-economic-survey> [<https://perma.cc/CR8W-B85L>] (noting the average cost of patent litigation prior to trial ranges from \$400,000 in lawsuits where less than \$1 million is at risk, to almost \$3 million in lawsuits where over \$25 million is at risk).

8. *See* 28 U.S.C. § 1295 (2018) (requiring a final decision from the district courts before appellate courts are granted jurisdiction).

exceedingly rare, as the Federal Circuit has only reviewed a handful of decisions regarding pleading sufficiency since 2015.⁹

This Note provides a comprehensive review of direct infringement pleading standards since the abrogation of FRCP 84 and Form 18 in 2015. Part II begins by summarizing the history of and relevant case law on these standards, paying special attention to developments following the Supreme Court's decisions in *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*.¹⁰ Part II concludes with a summary of the four most common pleading standards district courts use when assessing whether a pleading is sufficient, as well as a brief discussion of other pleading standards adopted by courts not applying one of these four standards. Part III examines the limited Federal Circuit jurisprudence on pleading standards before discussing how each pleading standard relates to *Twombly*, *Iqbal*, and traditional patent law policy. Part IV analyzes these pleading standards using over one hundred district court patent cases since the abrogation of FRCP 84, with the goal of determining what trends, if any, have emerged since the abrogation of Form 18. This Note concludes by arguing in favor of a single consistent claim pleading standard, independent of the claim's technology, that satisfies both patent policy objectives and the heightened pleading standards in *Twombly* and *Iqbal*.

I. BACKGROUND

A. Pre-*Twombly*: Patent Pleading Under FRCP 84 and Form 18

FRCP 84 was enacted in 1938 as part of the original Federal Rules of Civil Procedure.¹¹ The Advisory Committee noted that the purpose of the rule was to prevent confusion when applying FRCP 8, which governs pleading standards.¹² At the time of its enactment, the text of FRCP 84 was simple, stating that “[t]he forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.”¹³ Among these original forms was Form 18, which

9. See *infra* Section III.A.

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

11. FED. R. CIV. P. 84 (2014) (abrogated 2015).

12. See FED. R. CIV. P. 84 advisory committee's note to 1946 amendment (2015) (abrogated 2015) (citing Walter W. Cook, “Facts” and “Statements of Fact,” 4 U. CHI. L. REV. 233, 245–46 (1936)) (“[P]leaders in the federal courts are not to be left to guess as to the meaning of [the] language’ in Rule 8(a) regarding the form of the complaint. . . . ‘All of which is as it should be. In no other way can useless litigation be avoided.’”).

13. FED. R. CIV. P. 84 (1938) (amended 1946) (amended 2007) (abrogated 2015).

governed direct patent infringement pleading requirements. Form 18 was unassuming and required, in addition to a statement of jurisdiction, that the plaintiff merely (1) identify the patent number and invention at issue; (2) identify the potentially infringing party and product; and (3) certify that it has provided notice to the defendant of the potential infringement.¹⁴ This notice pleading standard governed patent infringement pleadings for almost eighty years.¹⁵

Proponents of Form 18 lauded its simplicity because it reduced the barriers to entering the courtroom and to filing pretrial motions—therefore reducing litigation over pleading ambiguity.¹⁶ Supreme Court opinions periodically reinforce the notion that patent litigation is important, noting that a strong public interest exists in ensuring that statutorily unpatentable ideas are not improperly monopolized.¹⁷ Form 18's simplicity provided a low hurdle into the courtroom, allowing the public to police patents through litigation.¹⁸ Critics argued the barrier to the courtroom was set too low, thus enabling patent trolls¹⁹ to take advantage of the system and file information-deprived complaints in the hope of forcing a settlement, which ultimately bogged down district courts and increased discovery costs in the process.²⁰

B. Post-Twombly: Direct Infringement Pleading

Starting in 2007, the Supreme Court addressed pleading sufficiency in light of FRCP 12(b)(6)²¹ in two landmark cases. In *Bell*

14. See FED. R. CIV. P. Form 18 (2014) (abrogated 2015).

15. Andrew L. Milam, Note, *Pleading Patent Infringement: Res Ipsa Loquitur as a Guide*, 59 WM. & MARY L. REV. 301, 308 (2017).

16. See Leeron Morad & Andrew Bramhall, *3 Potential Consequences of Losing Rule 84 and the Forms*, LAW360 (June 24, 2015), <https://www.law360.com/articles/665511/3-potential-consequences-of-losing-rule-84-and-the-forms> [<https://perma.cc/S4UL-LJRH>] (noting that Form 18 created a uniform pleading standard and its demise is likely to encourage forum shopping).

17. See, e.g., *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 203 (2014) (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945)) (“The public interest, of course, favors the maintenance of a well-functioning patent system. But the ‘public’ also has a ‘paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.’” (alteration in original)).

18. See, e.g., *MedImmune, Inc., v. Genentech, Inc.*, 549 U.S. 118, 137 (2007); *Lear, Inc. v. Adkins*, 395 U.S. 653, 655–56 (1969).

19. For more about patent trolls, see generally John M. Golden, *“Patent Trolls” and Patent Remedies*, 85 TEX. L. REV. 2111 (2007); Edward Lee, *Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform*, 19 STAN. TECH. L. REV. 113 (2015).

20. Milam, *supra* note 15, at 312–13; see also Elliot Harmon, *Form 18 Is Dead. What's Next for Patent Trolls?*, ELECTRONIC FRONTIER FOUND. (Dec. 2, 2015), <https://www EFF.org/deeplinks/2015/12/form-18-dead-whats-next-patent-trolls> [<https://perma.cc/HRY8-MLNF>] (noting the cost of discovery for corporate defendants, with extensive servers, experts, and employees, often greatly exceeds that of patent trolls, who usually have fewer employees and documents).

21. FED. R. CIV. P. 12(b)(6) (“[F]ailure to state a claim upon which relief can be

Atlantic Corp. v. Twombly, the government brought antitrust claims against Bell Atlantic, asserting that stray remarks made by Bell Atlantic were sufficient to state a plausible claim of anticompetitive behavior.²² The Court disagreed, holding that the alleged behavior in the complaint did not create a plausible claim.²³ While FRCP 8 requires only a short and plain statement showing the plaintiff is entitled to relief, FRCP 12(b)(6) requires sufficient facts to raise the right to relief above a speculative level.²⁴ The Court cited the high costs of antitrust litigation when noting that this pleading standard protects against frivolous lawsuits and costly discovery when the plaintiff is unlikely to be entitled to relief.²⁵ This policy reasoning likewise applies to patent litigation, where costs can exceed \$1 million for each side.²⁶

If any doubt as to the pleading standard existed, the Court clarified its *Twombly* holding in *Ashcroft v. Iqbal*.²⁷ The Court held that Iqbal pled insufficient facts to plausibly support his Bivens action against numerous federal officials.²⁸ In the process, the Court attempted to clarify what information was necessary to survive a motion to dismiss.²⁹ The Court stated that plausible claims must contain sufficient factual content to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³⁰ The decision articulated a two-pronged approach by which courts should (1) identify and separate pleadings of fact from legal conclusions and (2) evaluate the pleadings of fact to determine whether “they plausibly suggest an entitlement to relief.”³¹

In light of *Twombly* and *Iqbal*, Form 18 soon came under fire for failing to meet the Court’s heightened pleading standards. In 2013,

granted. . .”).

22. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564–65 (2007).

23. *Id.* at 566.

24. FED. R. CIV. P. 8 (“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 . . .”); *see also Twombly*, 550 U.S. at 555.

25. *Twombly*, 550 U.S. at 558–59.

26. *See* AM. INTELLECTUAL PROP. LAW ASS’N, *supra* note 7. Although the total cost of patent litigation fell in 2017, the median trial cost was \$800,000 when less than \$1 million was at stake, and \$1.7 million when between \$1 million and \$10 million was at stake. *See* Malathi Nayak, *Cost of Patent Infringement Litigation Falling Sharply*, PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 154 (Aug. 11, 2017).

27. *Ashcroft v. Iqbal*, 556 U.S. 662, 668–69 (2009).

28. *Id.* at 687.

29. *Id.* at 678 (“Rule 8 . . . does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” (citations omitted)).

30. *Id.*

31. *Id.* at 679–81.

Congress proposed several bills that called for heightened pleading standards to combat patent trolls.³² Prior to these congressional proposals, the Federal Circuit came to Form 18's defense through several cases in the years following *Twombly* and *Iqbal*.³³ The strongest defense came in *In Re Bill of Lading*, where the Federal Court relied on the Advisory Committee notes and precedent to find the sufficiency of Form 18 survived the recent decisions.³⁴ In *K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc.*, the Federal Circuit reversed the district court's dismissal of the plaintiff's claim, finding that while the requirements of Form 18 were not a particularly high pleading standard, they still satisfied FRCP 8.³⁵ In each of these decisions, the Federal Circuit upheld seventy years of precedent by attempting to reconcile the heightened pleading standard set forth in *Twombly* and *Iqbal* with the seemingly primitive requirements of Form 18 by relying on various passages of the FRCP and accompanying Advisory Committee notes. More recent decisions have declined to answer whether a difference exists between Form 18 and the *Twombly/Iqbal* standard.³⁶

Judges and scholars have criticized these contradicting standards and called for various reforms, including the end of Form 18,³⁷ a separate patent pleading regime,³⁸ the use of Form 18 as a mere context-specific illustration,³⁹ or the dismissal of complaints that "do not guide the course of discovery."⁴⁰ Jonathan Moore notes that

32. See, e.g., Patent Abuse Reduction Act of 2013, S. 1013, 113th Cong. (2013). Scholars were generally supportive of these proposed laws. See, e.g., Arjun Rangarajan, *Pleading Patents: Predicting the Outcome of Statutorily Heightening Pleading Standards*, 13 DUKE L. & TECH. REV. 195, 196 (2015).

33. See, e.g., *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1284 (Fed. Cir. 2013); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356–57 (Fed. Cir. 2007).

34. *In re Bill of Lading*, 681 F.3d at 1334 ("[A] pleading, motion, or other paper that follows one of the official forms cannot be successfully attacked." (citation omitted)); see also *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("[A]ny changes to the Federal Rules of Civil Procedure 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"); FED. R. CIV. P. 84 (2014) (abrogated 2015).

35. *K-Tech*, 714 F.3d at 1283, 1287 ("[T]o the extent any conflict exists between *Twombly* (and its progeny) and the Forms regarding pleadings requirements, the Forms control.").

36. *Disc Disease Sols. Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1259 n.3 (Fed. Cir. 2018); *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1347 n.2 (Fed. Cir. 2018).

37. See *McZeal*, 501 F.3d at 1362 (Dyk, J., dissenting).

38. Jonathan L. Moore, *Particularizing Patent Pleading: Pleading Patent Infringement in a Post-Twombly World*, 18 TEX. INTELL. PROP. L.J. 451, 493–95 (2010).

39. See Andrew C. Michaels, *An Infamous Illustration of Patent Infringement Pleading: Form 18 and Context-Specificity*, 19 B.U. J. SCI. & TECH. L. 286, 304–05 (2013).

40. See 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, 516–17 (2012).

regardless of the impact of *Twombly* and *Iqbal*, Form 18 had not been significantly revised since 1938—an era characterized by notice pleading,⁴¹ lack of a Federal Circuit, and limited patent rights.⁴² Few argued for the status quo after the Court's decisions in *Twombly* and *Iqbal*.

C. 2015 Amendments: The Fall of FRCP 84 and Form 18

The Supreme Court abrogated FRCP 84 and Form 18 in the 2015 Amendments to the FRCP, after almost eighty years in existence.⁴³ On November 30, 2015, the final day before the abrogation of Form 18, litigants set a record for most infringement suits filed in district courts around the country.⁴⁴ When abrogating FRCP 84, the Advisory Committee noted that illustrations of the rules were no longer necessary in light of sufficient examples in libraries and websites, and clarified that the abrogation does not impact existing pleading standards or the requirements of FRCP 8.⁴⁵ Since then, the Supreme Court has remained silent on the replacement standard for Form 18, and the Federal Circuit has issued few opinions that address the matter.⁴⁶ In lieu of firm appellate guidance, scholars have proposed various methods to reform patent pleading.⁴⁷

D. District Court Pleading Standards After the Abrogation of FRCP 84

Without specific direction on direct infringement pleading standards from the Federal Circuit or the Supreme Court, district courts were left to interpret post-Form 18 pleadings in light of *Twombly* and *Iqbal*.⁴⁸ Among those courts now applying *Twombly/Iqbal*

41. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

42. See Moore, *supra* note 38, at 498–99.

43. FED. R. CIV. P. 84 advisory committee's note to 2015 abrogation (2015) (abrogated 2015) ("The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly . . . Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.").

44. Roberts, *supra* note 1.

45. FED. R. CIV. P. 84 advisory committee's note to 2015 abrogation (2015) (abrogated 2015).

46. See, e.g., *Lyda v. CBS Corp.*, 838 F.3d 1331 (Fed. Cir. 2016).

47. See, e.g., Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 68 (2015); Jun Zheng, *A New Era for Patent Infringement Pleading: Twombly, Iqbal, and the Demise of Form 18*, 24 TEX. INTELL. PROP. L.J. 15, 32 (2016) (arguing that a patent pleading different from the standard in other civil suits is inappropriate in light of the spirit of *Iqbal*).

48. See, e.g., *Gracenote, Inc. v. Sorenson Media, Inc.*, No. 2:16-CV-950 CW, 2017 WL 2116173, at *2 (D. Utah May 15, 2017) ("Although the Federal Circuit has not yet addressed whether *Twombly* and *Iqbal* pleading standards now apply to direct patent infringement claims,

pleading, most begin with the baseline assertion that a plaintiff must plead each and every element of an asserted claim to adequately plead infringement.⁴⁹ However, the extent to which courts require this element varies.⁵⁰ As a result, four common standards informally emerged as courts attempted to interpret *Twombly* and *Iqbal*'s requirements as applied to direct infringement pleading.⁵¹ These four standards are described below—from most heightened to least—followed by a discussion of other pleading standards that do not align with one of the four defined standards.

1. “Each Claim” Pleading

At the strictest end of the spectrum is the “each claim” pleading. Applying this pleading standard, courts require a plaintiff to allege facts sufficient to show infringement of *each* element of *each* asserted claim.⁵² In *Asghari-Kamrani v. United Services Automobile Association*, the patentee sued for infringement of several claims of a single patent for a system improving e-commerce transaction security.⁵³ The district court found that the plaintiff's complaint insufficiently identified how Claim 1 of the patent was infringed, and the complaint lacked details beyond mere identification of the remaining potentially

the inference from *Bill of Lading* and case law since the amendments strongly suggest that they do.”).

49. See *LifeNet Health v. LifeCell Corp.*, 837 F.3d 1316, 1325 (Fed. Cir. 2016) (citing *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1310 (Fed. Cir. 2005)) (“Direct infringement of an apparatus claim ‘requires that each and every limitation set forth in a claim appear in an accused product.’”); *Sunrise Techs., Inc. v. Cimcon Lighting, Inc.*, 219 F. Supp. 3d 260, 263 (D. Mass. 2016) (citing *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995)) (“To succeed on a claim for direct infringement, the allegedly infringing product must practice all elements of a patent claim.”). But see *Crypto Research, LLC v. Assa Abloy, Inc.*, 236 F. Supp. 3d 671, 686 (E.D.N.Y. 2017) (“I decline to require that the plaintiff plead direct infringement of each and every element of the allegedly infringed claims.”).

50. Compare *Oil-Dri Corp. of Am. v. Nestle Purina Petcare Co.*, No. 15-CV-1067, 2017 WL 1197096, at *5 (N.D. Ill. Mar. 31, 2017) (“It makes little sense that a plaintiff could plead infringement as to one patent claim and then proceed in the litigation with respect to every other materially different claim in the patent. Such a result sidesteps *Twombly* and *Iqbal*'s plausibility requirements.”), with *Wright's Well Control Servs., LLC v. Oceaneering Int'l, Inc.*, No. CV 15-1720, 2017 WL 568781, at *5 (E.D. La. Feb. 13, 2017) (“[T]he Court finds that *Twombly* and *Iqbal* require plaintiffs to allege facts showing that an accused product contains each and every limitation or element of at least one patented claim.”).

51. See Paul R. Gugliuzza, *Quick Decisions in Patent Cases*, 106 GEO. L.J. 619, 664–66 (2018); Michelle Callaghan, *Patent Infringement Pleading Standards Since the Abrogation of Rule 84 and Form 18: A Year in Review*, IPWATCHDOG (Dec. 27, 2016), <http://www.ipwatchdog.com/2016/12/27/patent-infringement-pleading-standards-rule-84-form-18/id=76173/> [https://perma.cc/S84P-W99E].

52. See e.g., *Oil-Dri Corp. of Am.*, 2017 WL 1197096, at *5; *Thermolife Int'l, LLC v. Vitamin Shoppe, Inc.*, No. 0:16-CV-60693, 2016 WL 6678525, at *2 (S.D. Fla. June 8, 2016).

53. *Asghari-Kamrani v. United Servs. Auto. Ass'n*, No. 2:15CV478, 2016 WL 1253533, at *1 (E.D. Va. Mar. 22, 2016).

infringing claims.⁵⁴ The court granted the defendant's motion to dismiss with respect to all claims because each element of every claim was not sufficiently asserted.⁵⁵

To illustrate, consider a hypothetical claim for a sundae contained within U.S. Patent No. 9,999,999,999. Illustration 1 demonstrates this hypothetical.

Illustration 1. Each Claim Pleading Hypothetical

Claim 1: A dessert comprising the following ingredients: one scoop of vanilla ice cream, hot fudge sauce, whipped cream, a donut, and a cherry, wherein the ice cream is placed on top of the donut, the hot fudge and whipped cream on top of the ice cream, and the cherry placed at the apex of the whipped cream.

Under the each claim pleading standard, a plaintiff would have to plead sufficient facts in the complaint that the infringing product was a dessert that comprised (1) vanilla ice cream, (2) hot fudge sauce, (3) whipped cream, (4) a donut, and (5) a cherry, and that (6) the elements were arranged in the manner specified. Thus, one attempting to assert infringement of a complex patent, often containing dozens of claims, would be required to plead sufficient facts to allege infringement of each element of every claim.⁵⁶ For complex electronics or pharmaceutical patents, this may require a lengthy complaint to satisfy this pleading standard.

2. "At Least One Claim" Pleading

More lenient courts have interpreted the heightened pleading standard to only require that all elements of at least one patent claim in the complaint are satisfied.⁵⁷ This pleading standard lowers the burden slightly by permitting a plaintiff to pursue infringement of

54. *Id.* at *4 ("Although Plaintiffs identified several infringed claims at the outset of their complaint, they only provide details—themselves insufficient—about how the features of the website infringe claim 1. Plaintiffs must detail how each claim is infringed.").

55. *Id.*

56. For most motions analyzed in this study, judges who apply the each claim pleading standard and find some claims sufficiently pled but not others dismissed the infringement claims only with respect to the claims insufficiently pled, not the entire complaint. *See, e.g.*, *Werteks Closed Joint Stock Co. v. GNC Corp.*, No. 16-60688-CIV-MORENO, 2016 WL 8809716, at *1 (S.D. Fla. Aug. 23, 2016).

57. *Sunrise Techs., Inc. v. Cimcon Lighting, Inc.*, 219 F. Supp. 3d 260, 263 (D. Mass. 2016).

multiple claims while only pleading sufficient facts for one of the claims.⁵⁸

Hence, if U.S. Patent No. 9,999,999,999 also included three more dependent claims, a court would need to decide if additional elements must be pled in a direct infringement suit or if “at least one claim” pleading is sufficient. Illustration 2 demonstrates this hypothetical.

Illustration 2. At Least One Claim Pleading Hypothetical

Claim 2: *The dessert of claim 1, wherein said scoop of ice cream is chocolate.*

Claim 3: *The dessert of claim 1, wherein said donut includes frosting.*

Claim 4: *The dessert of claim 1 further comprising: caramel sauce, chopped bananas, and crushed cookies, wherein these ingredients are situated between the ice cream and whipped cream.*

Under the each claim pleading standard discussed in Illustration 1, the plaintiff would need to allege more facts in the complaint to satisfy each and every element of Claim 2 through Claim 4.⁵⁹ Under the at least one claim pleading standard, a plaintiff who has pled sufficient facts to show infringement of Claim 1 would be permitted to allege infringement of Claims 2 through 4 without additional facts.

3. “Unique Feature” Pleading

Some courts have established a standard even more relaxed than the at least one claim pleading standard, instead looking to unique features of the patented invention to determine sufficiency of the pleadings.⁶⁰ Under this pleading standard, a plaintiff must merely plead that the allegedly infringing product and the patented product share a unique feature.⁶¹ In *Iron Gate Security v. Lowe’s Corp.*, the plaintiff pled that the alleged infringing product, a Smart Home Management System, used a transducer and controller to communicate

58. *Id.*

59. *See* *Thermolife Int’l, LLC v. Vitamin Shoppe, Inc.*, No. 0:16-cv-60693-UU, 2016 WL 6678525, at *5 (S.D. Fla. June 8, 2016) (dismissing complaint of infringement of dependent claims even though independent claim was sufficiently pled).

60. *Iron Gate Sec., Inc. v. Lowe’s Cos.*, No. 15-cv-8814(SAS), 2016 U.S. Dist. LEXIS 34061, at *8 (S.D.N.Y. Mar. 16, 2016) (“Allegations that plead that ‘a specific product . . . allegedly infringes [the] patent by virtue of *certain specific characteristics*’ meet the *Iqbal* plausibility standard. A plaintiff is not required to list which of the claims in the patent have been infringed in its pleading[]” (third alteration added) (emphasis added)); *see also* *Regeneron Pharm., Inc. v. Merus B.V.*, No. 14-cv-1650(KBF), 2014 U.S. Dist. LEXIS 84297, at *11 (S.D.N.Y. June 18, 2014).

61. *Iron Gate Sec., Inc.*, 2016 U.S. Dist. LEXIS 34061, at *8.

with a network, as taught by the patent-in-suit.⁶² The defendant's motion to dismiss was denied because the incorporated elements were unique features of the allegedly infringed claims.⁶³ Notably, the court cited *In re Bill of Lading* in its reasoning.⁶⁴

In the case of U.S. Patent No. 9,999,999,999, merely pleading that the infringer sold a sundae with a donut at the bottom—an arguably unique feature—would be sufficient to survive a motion to dismiss under this pleading standard, even if the other elements of the claim were not sufficiently pled in the complaint.

4. Form 18 Pleading

At the other end of the spectrum are district courts holding that Form 18, although formally repealed, still exists in spirit.⁶⁵ In *Hologram USA, Inc. v. Pulse Evolution Corp.*, the court cited *K-Tech* and the Advisory Committee notes to find that the pleading standards had not changed despite the abrogation.⁶⁶ The Form 18 pleading standard ignores the heightened standards established in *Twombly* and *Iqbal*. This approach provides increased public policing of the patent system, as Form 18 pleading creates the lowest barrier to entry for litigation and subsequent review of patent validity.⁶⁷

Under the aforementioned illustrations, a plaintiff could survive a motion to dismiss by simply completing Form 18.⁶⁸ Illustration 3 demonstrates this hypothetical.

Illustration 3. Form 18 Pleading Hypothetical

On December 31, 2014, United States Letters Patent No. 9,999,999,999 was issued to the plaintiff for an invention in a sundae dessert. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

The defendant has infringed and is still infringing the Letters Patent by making, selling, and using sundae desserts that

62. *Id.* at *9.

63. *See id.* at *11–12.

64. *Id.* at *8 n.27.

65. *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-cv-0772-GMN-NJK, 2016 WL 199417, at *1 n.1 (D. Nev. Jan. 15, 2016) (noting that the abrogation of Rule 84 does not alter existing pleading standards, and Form 18 is an existing pleading standard).

66. *Id.* at *1 n.1, *2.

67. *See Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

68. FED. R. CIV. P. form 18 (2014) (abrogated 2015). Underlined sections are blank in the generic version of the form but are filled in here for illustration. *Id.*

embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all sundae desserts it manufactures and sells and has given the defendant written notice of the infringement.

5. Other Pleading

Finally, some courts have resisted rigid pleading standards when ruling on the sufficiency of pleadings, instead opting to apply the guidance offered in *Twombly* and *Iqbal* on a case-by-case basis. The Eastern District of Texas, a traditionally pro-plaintiff district, favors this approach.⁶⁹ This approach creates subjectivity and can lead to unpredictable results, but its flexibility may benefit unique situations or technologies.⁷⁰

The above illustrations, although fictional, highlight the vast differences between the various pleading standards established by the district courts. Until the Federal Circuit clarifies these varying standards, attorneys will be faced with pleading standards that vary from case to case and district to district.

II. AN ANALYSIS OF FEDERAL CIRCUIT JURISPRUDENCE AND PATENT POLICY

It is clear that district courts continue to struggle with applying a consistent pleading standard for direct infringement pleading, which has led to high rates of dismissals,⁷¹ amended complaints,⁷² and longer

69. See, e.g., *PanOptis Patent Mgmt., LLC v. Blackberry Corp.*, No. 2:16-CV-00059-JRG-RSP, 2017 WL 780885, at *3 (E.D. Tex. Feb. 10, 2017) (“It is not necessary, however, to announce a floor for the direct infringement pleading standard in this case because PanOptis’s allegations satisfy the *Lyda* and *Iqbal/Twombly* standards.”).

70. This subjectivity is particularly well observed in two cases decided by same judge within two weeks of one another, which came out different ways. Compare *LBS Innovations, LLC v. Nokia USA Inc.*, No. 2:15-cv-1972-JRG, 2016 U.S. Dist. LEXIS 80303, at *6 (E.D. Tex. June 21, 2016) (quoting language from *Ashcroft v. Iqbal* regarding a context-specific inquiry when finding complaint insufficiently pled), with *Solocron Educ., LLC v. Healthstream, Inc.*, No. 2:16-cv-16-JRG, 2016 WL 9137458, at *3 (E.D. Tex. June 7, 2016) (finding complaint sufficiently pled using roughly the same language: “While the abrogation of Form 18 does not require plaintiffs to augment their complaints with element-by-element infringement contentions, claims for direct infringement must nevertheless satisfy the pleadings standards set forth by the Supreme Court in *Twombly* and *Iqbal*,” and noting that “[d]etermining whether a complaint states a claim for infringement is a very ‘context specific task’”).

71. See *Mammen*, *supra* note 6, at 2.

72. See, e.g., *Artrip v. Ball Corp.*, No. 1:14CV00014, 2017 WL 3669518, at *5, *10 (W.D. Va. Aug. 24, 2017) (granting motion to dismiss but permitting plaintiff to file a third amended complaint).

trials.⁷³ The subjectivity inherent in the *Twombly/Iqbal* pleading standard has proven especially difficult to predict in patent litigation. When the Federal Circuit inevitably steps in, the panel will likely consider the effect of an explicit pleading standard on patent policy, including the effect on public policing of the patent system⁷⁴ and whether a rigid pleading standard is needed to avoid frivolous lawsuits by patent trolls. This Part addresses each point in turn.

A. Has the Federal Circuit Tipped Its Hand?

The Federal Circuit has come close to resolving this issue, as it occasionally handles pleading sufficiency when complaints are dismissed with prejudice. A review of post-Form 18 decisions can shed light on the stance the Federal Circuit is likely to take when it resolves this issue.

1. 2016: *Lyda v. CBS Corp.*

In *Lyda v. CBS Corp.*, the inventor's complaint, which was filed before the abrogation of FRCP 84 and Form 18, relied entirely on Form 18 when pleading joint infringement.⁷⁵ The district court dismissed under FRCP 12(b)(6), and the Federal Circuit affirmed, noting that joint infringement is not governed by Form 18 and that absent a controlling form, the *Twombly/Iqbal* pleading standard would apply.⁷⁶ By making this distinction between joint and direct infringement, the Federal Circuit left the issue of a pleading standard for direct infringement for another day. Further, the court noted that its reasoning in *Lyda* was not applicable to the abrogation of Form 18 because the complaint was filed before December 1, 2015, the date Form 18 was abrogated.⁷⁷ The Federal Circuit panel unanimously held that because joint infringement requires additional elements not addressed in Form 18,⁷⁸

73. PRICEWATERHOUSECOOPERS (PWC), 2017 PATENT LITIGATION STUDY 7 (2017), http://www.ipwatchdog.com/wp-content/uploads/2017/05/2017-Patent-Litigation-Study_PwC.pdf [<https://perma.cc/FJK2-BPRR>] (noting the median time-to-trial in patent cases has steadily increased to almost 2.5 years).

74. See *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969); *Woods v. City of Greensboro*, 855 F.3d 639, 652 (4th Cir. 2017) ("Manifestly, the rule of *Iqbal/Twombly* was not intended to serve as a federal court door-closing mechanism for arguably weak cases . . .").

75. *Lyda v. CBS Corp.*, 838 F.3d 1331, 1337 (Fed. Cir. 2016).

76. *Id.* at 1339.

77. *Id.* at 1337 n.2.

78. *Id.* at 1338 ("To prove joint infringement, where multiple actors are involved in practicing the claim steps, the patent owner must show that the acts of one party are attributable to the other such that a single entity is responsible for the infringement.").

sufficient pleading of *induced* infringement requires satisfying the *Twombly/Iqbal* pleading standards, not those of Form 18.⁷⁹

But since there can be no induced infringement unless direct infringement is present,⁸⁰ does it logically follow that the pleading standard for direct infringement is no more demanding (and maybe less so) than what the court spelled out in *Lyda*?⁸¹ The Federal Circuit's decision seems to suggest so.⁸² However, the court notably withheld judgement on this specific issue, despite an extensive discussion on its prior Form 18 jurisprudence and subsequent direct infringement pleading requirements.⁸³

2. 2017: *Lifetime Industries, Inc. v. Trim-Lock, Inc.*

The Federal Circuit provided further clarification on direct infringement pleading standards in *Lifetime Industries, Inc. v. Trim-Lok, Inc.*⁸⁴ In a lengthy discussion on this issue, Judge Lourie acknowledged the abrogation of Form 18 but declined to answer whether there exists a difference between Form 18 and *Twombly/Iqbal* pleading standards.⁸⁵ The Federal Circuit then reversed the lower court's ruling, finding that Lifetime's complaint had sufficiently pled an allegation of direct infringement.⁸⁶ While Judge Lourie did not establish a minimum pleading standard required to survive a motion to dismiss and resolve this district court split, he expressed concerns over requiring too much detail at the pleading stage.⁸⁷ This may suggest that some of the stricter pleading standards discussed in Section I.D may be disfavored if reviewed by an appellate panel. However, Judge Lourie failed to address the minimum pleading standard required to

79. *Id.* at 1339.

80. *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 924 (2014).

81. *See Lyda*, 838 F.3d at 1339 ("Because *joint* infringement requires additional elements not addressed by Form 18, we hold that allegations of joint infringement must be measured by the *Iqbal* and *Twombly* standard without reference to Form 18." (emphasis added)).

82. *Id.* ("Therefore, like claims of induced or contributory infringement, allegations of joint infringement require elements beyond those for the more typical act of direct infringement to which Form 18 is directed.").

83. *Id.* at 1337–38.

84. *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1379 (Fed. Cir. 2017).

85. *Id.* at 1377 ("The parties assume that there is a difference between the requirements of Form 18 and *Iqbal/Twombly*; however, we have never recognized such a distinction. In any event, we need not resolve the question whether there is a difference between the two standards here. . . ." (citation omitted)).

86. *Id.* at 1378.

87. *Id.* at 1379 ("Trim-Lok's complaints concerning lack of detail ask for too much. There is no requirement for Lifetime to 'prove its case at the pleading stage.' Our precedent requires that a complaint place the alleged infringer 'on notice of what activity . . . is being accused of infringement.'" (alteration in original) (citations omitted)).

survive a motion to dismiss, concluding the discussion of direct infringement by noting the limited scope of the lower court's decision prevented a more detailed review by the panel.⁸⁸

3. 2018: *Nalco Company v. Chem-Mod, LLC*

The Federal Circuit's next opportunity to clarify the pleading standard came in *Nalco Company v. Chem-Mod, LLC*, where the court held in a fact-intensive opinion that the plaintiff had adequately alleged direct infringement.⁸⁹ As in *Lifetime Industries*, the court declined to rule on Form 18's relation to minimum pleading standards.⁹⁰ Rather, the appellate panel found that the lower court incorrectly applied claim construction principles in deciding the complaint's infringement contentions were implausible.⁹¹

4. 2018: *Disc Disease Solutions, Inc. v. VGH Solutions, Inc.*

Finally, the Federal Circuit provided some clarity when it decided *Disc Disease Solutions, Inc. v. VGH Solutions, Inc.* in May 2018.⁹² In *Disc Disease*, the appellate panel overturned the lower court's dismissal with prejudice, finding that the plaintiff's complaint sufficiently alleged that the defendant's product met "each and every element of at least one claim of Plaintiff's patents."⁹³ In a short opinion, Judge Reyna noted that the patents at issue, which covered spinal braces, were a simple technology consisting of only four independent claims.⁹⁴ In this instance, meeting the at least one claim pleading standard through disclosures and allegations was sufficient to survive

88. *Id.* ("[T]he limited scope of the district court's decision similarly limits our own review. . . . Lifetime adequately alleged that Trim-Lok created an infringing combination We need not, and do not, express any other opinion relating to the level of detail contained in Lifetime's [Second Amended Complaint].").

89. *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1349 (Fed. Cir. 2018).

90. *Id.* at 1347 n.2 ("We have held previously that compliance with Form 18 'effectively immunize[d] a claimant from attack regarding the sufficiency of the pleading.' Nalco argues that all of its complaints should have been entitled to this leeway We need not resolve this question because, as explained below, we find Nalco's [4th Amended Complaint] sufficient under the current version of the Federal Rules and those cases interpreting those rules." (first alteration in original) (citations omitted)).

91. *Id.* at 1350 ("It is not appropriate to resolve these disputes . . . on a Rule 12(b)(6) motion, without the benefit of claim construction. The 'purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits.'" (quoting *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990)) (emphasis omitted)).

92. *Disc Disease Sols., Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018).

93. *Id.*

94. *Id.* ("This case involves a simple technology. The asserted patents, which were attached to the complaint, consist of only four independent claims.").

a motion to dismiss.⁹⁵ Notably, the court did not even address whether a difference exists between Form 18 and the *Twombly/Iqbal* pleading standard.⁹⁶

This new development shifts the focus of the inquiry for lower courts. The Federal Circuit has clarified that the at least one claim pleading standard will satisfy *Twombly/Iqbal* for some patents, but this will ultimately depend on the nature and complexity of the technology.⁹⁷ Now, courts must define what constitutes a “simple technology”; whether a heightened pleading standard is appropriate for more complex patents; and whether *Disc Disease* represents a minimum pleading floor or if an even simpler pleading requirement may be appropriate in other cases.⁹⁸

While attempts to predict the Federal Circuit’s course have proved futile in the past, the takeaways from these previous decisions at the very least suggest that the Federal Circuit is likely to adopt the *Twombly/Iqbal* pleading standard for direct infringement pleading if the opportunity ever arises. But it remains unclear whether the Federal Circuit will require anything further than Form 18’s requirements to satisfy the *Twombly/Iqbal* pleading standard. Judge Lourie’s recent apprehension of overstrict pleading standards in *Lifetime Industries* suggests the bar may not be as high as some courts have recently required.⁹⁹ A decision by the Federal Circuit establishing a low-level pleading requirement (equivalent to or slightly above the requirements of Form 18) would also fall in line with the Federal Circuit’s longstanding—but debated—reputation of being pro-patent holder.¹⁰⁰

95. *Id.*

96. *Id.*

97. *Id.*

98. *Disc Disease* featured two patents-in-suit, which were twenty pages (with nineteen claims) and fifteen pages (with six claims), respectively. See *Disc Disease Sols., Inc. v. VGH Sols., Inc.*, No. 1:15-CV-188 (LJA), 2016 WL 6561566, at *1 (M.D. Ga. Nov. 2, 2016). While the Federal Circuit declared this a “simple technology,” this term is subjective—the Author of this Note looked at patents-in-suit that were as short as 5 pages (with only 3 claims). See *Erfindergemeinschaft Uropep GbR v. Eli Lilly & Co.*, No. 2:15-cv-1202-WCB, 2016 WL 1643315, at *1 (E.D. Tex. Apr. 26, 2016).

99. See *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1377 (Fed. Cir. 2017).

100. See Ryan T. Holte & Christopher B. Seaman, *Patent Injunctions on Appeal: An Empirical Study of the Federal Circuit’s Application of eBay*, 92 WASH. L. REV. 145, 201 (2017) (“In sum, the Federal Circuit’s apparent inclination toward injunctive relief—and thus more valuable patent rights—lends supports to the claim that the Federal Circuit has used its position as the primary appellate court over patent claims to shape the law in a pro-patentee direction.”); David R. Pekarek Krohn & Emerson H. Tiller, *Federal Circuit Patent Precedent: An Empirical Study of Institutional Authority and Intellectual Property Ideology*, 2012 WIS. L. REV. 1177, 1208 (2012) (concluding after an extensive statistical analysis that Federal Circuit precedent is relied upon by lower courts more in pro-patent opinions). But see Molly Mosley-Goren, *Jurisdictional Gerrymandering? Responding to Holmes Group v. Vornado Air Circulation Systems*, 36 J.

B. Reconciling Patent Policy with General Pleading Standards

Although the Supreme Court has recently deferred to Congress on patent policy, it often discusses the subject in its patent opinions.¹⁰¹ The original Advisory Committee made very few comments about FRCP 8, other than relating back to the original Equity Rules from which the rule was fashioned.¹⁰² However, one need not look further than FRCP 1 to see an overarching theme of balancing truth seeking and judicial efficiency at a low reasonable cost to all parties.¹⁰³ The Supreme Court has noted that FRCP 8's purpose is to enable courts to reach a proper decision on the merits, and lower courts have echoed this sentiment.¹⁰⁴ Additionally, lower courts repeatedly emphasize FRCP 8's critical notice function to defendants, ensuring efficient preparation and focused discovery.¹⁰⁵ Finally, at least one court has gone so far as to note that FRCP 8 is intended to "prevent surprise" over which issues are to be litigated.¹⁰⁶

The Supreme Court clarified these purposes through its *Twombly* and *Iqbal* opinions. In the majority opinion of *Twombly*, Justice Souter expressed concerns that a complaint must raise a "reasonable expectation that discovery will reveal evidence" related to alleged misconduct.¹⁰⁷ If this fails, a court should expose this deficiency at the earliest possible opportunity.¹⁰⁸ The remainder of the decision discussed the hypersensitivity of this purpose in antitrust lawsuits,

MARSHALL L. REV. 1, 51–52 (2002) ("[C]omplaints that the Federal Circuit has become a specialized or 'pro-patent' biased court, as cautioned against in hearings on the court's creation, appear largely unsupported . . .").

101. See, e.g., *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2405 (2015).

102. FED. R. CIV. P. 8 advisory committee's 1937 note (noting the similarities between FRCP 8 and Equity Rules 18, 30, and 31). The Equity Rules governed Federal civil procedure from 1822 to 1938. See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 469–71 (2003).

103. FED. R. CIV. P. 1 ("[The Federal Rules of Civil Procedure] should be construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding.").

104. *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); see also *Moustakas v. Margolis*, 154 F. Supp. 3d 719, 725 (N.D. Ill. 2016).

105. See, e.g., *Jones v. Kirchner*, 835 F.3d 74, 80 (D.C. Cir. 2016) (finding that FRCP 8 does not require plaintiffs to identify each relevant item and document prior to discovery); *Edelman v. Belco Title & Escrow, LLC*, 754 F.3d 389, 395 (7th Cir. 2014).

106. See *Lopez v. U.S. Fidelity & Guaranty Co.*, 18 F.R.D. 59, 61 (D. Alaska 1955).

107. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

108. *Id.* at 558 ("[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" (second alteration in original) (citations omitted)).

where the cost of discovery is often extravagant.¹⁰⁹ The same logic can easily be applied to patent infringement discovery, where the average cost of litigation through discovery ranges from \$400,000 to \$2.6 million, depending on the amount at risk.¹¹⁰ *Iqbal* largely echoed these sentiments, emphasizing that a court is obligated to deny costly discovery to an insufficient complaint.¹¹¹

Twombly's test, which was reaffirmed in *Iqbal*, requires courts to (1) identify and separate pleadings of fact from legal conclusions and (2) evaluate the pleadings of fact to determine whether "they plausibly suggest an entitlement to relief."¹¹² Direct infringement requires that a defendant "makes, uses, offers to sell, or sells any patented invention, within the United States . . ."¹¹³ The Federal Circuit has held that a plaintiff's showing of alleged infringement must reveal that "the accused device contains each and every limitation of the asserted claims," either literally or under the doctrine of equivalents, suggesting that more detail may be required under *Twombly* and *Iqbal* than Form 18 provided.¹¹⁴

However, Adam Steinman has led the academic charge concerning the overextension of *Twombly* and *Iqbal*—arguing that the two cases have been misinterpreted and that the decisions clarify, rather than significantly restrict, pleading standards.¹¹⁵ Steinman's argument focuses on several Supreme Court pleading decisions post-*Iqbal* that return to the pre-*Twombly* notice-pleading regime that dominated for almost seven decades.¹¹⁶

Finally, the Supreme Court has cited to policy that expresses the importance of a self-policing patent system, noting the difficult task of identifying and challenging "bad" patents.¹¹⁷ Rather than task this to

109. *Id.* at 558–59.

110. *See* AM. INTELLECTUAL PROP. LAW ASS'N, *supra* note 7.

111. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79, 687 (2009).

112. *Id.* at 679–81.

113. 35 U.S.C. § 271(a) (2018).

114. *See* *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1215 (Fed. Cir. 2014) (citing *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d 1351, 1358 (Fed. Cir. 2012)) (emphasis omitted).

115. Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 381 (2016).

116. *Id.* at 367–80.

117. *See* *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969) ("[T]he equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain. Licensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification.").

the US Patent and Trademark Office, the Court has noted a potential infringer is among the most motivated to challenge patent validity through an affirmative defense.¹¹⁸ A low pleading bar ensures that a wider range of patents are challenged and promotes weeding out “bad” patents. However, this interest must be balanced with the desire to discourage frivolous lawsuits by patent trolls.¹¹⁹

A review of these sources of policy reveals several notable observations. In the patent context, courts are left to balance FRCP 8’s notice function and concerns about costs and efficiency—which were focused on and potentially heightened in *Twombly* and *Iqbal*—with patent self-policing that the court has found necessary to maintain a healthy patent system. However, this pleading standard must not be so relaxed that patent trolls are permitted to bring frivolous suits to the costly discovery phase.¹²⁰

III. PLEADING TRENDS: A LOOK AT TWO YEARS OF PLEADING STANDARDS

This Part analyzes opinions on motions to dismiss that were collected in the two years immediately following the abrogation of FRCP 84. By analyzing these data, trends and factors that influence court behavior when ruling on the sufficiency of pleadings are identified and discussed. The dataset indicates a political divide in patent pleading standards since 2015.

A. Methodology

This Note identifies 141 database-accessible¹²¹ opinions¹²² rendered by federal district courts in 2016 and 2017 regarding motions to dismiss direct patent infringement claims for insufficient pleading pursuant to FRCP 12(b)(6). Motions to dismiss under FRCP 12(b)(6)

118. *Id.* While potential infringers could pursue a declaratory judgement from a court or an invalidity ruling from the Patent Trial and Appeal Board, a potential infringer’s motivation is arguably highest when facing an infringement suit. *See id.*

119. James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 397 (2014) (estimating approximately \$29 billion in “socially wastefully litigation-related expenditures” absorbed by law firms as a result of patent trolls—also known as non-practicing entities—in 2011 alone).

120. *See* Dan L. Burk, *On the Sociology of Patenting*, 101 MINN. L. REV. 421, 446 (2016).

121. The Author used both Thomson Reuters® Westlaw and LexisNexis® when compiling the dataset. To identify cases, the Author ran the following search: “*motion to dismiss*” /p patent AND “*direct infringement*.” The results were then filtered to include district court opinions between January 1, 2016 and December 31, 2017. When reading these opinions, the Author omitted additional cases that did not meet the characteristics of the study, as described in this Section.

122. The empirical dataset of opinions utilized in this study is on file with the Author and is available upon request.

not pertaining to direct infringement pled in the complaint were removed.¹²³ Finally, because case data were compared against Article III judge characteristics,¹²⁴ cases decided *solely* by magistrate judges—of which characteristics are not kept by the Federal Judicial Center (FJC)—or cases where an opinion by an Article III judge adopting the magistrate’s report could not be located were removed from the dataset.¹²⁵ This led to the removal of ten additional rulings. Opinions issued by magistrate judges that were subsequently reviewed and adopted in formal opinions by Article III judges, were included and the pleading sufficiency standard applied was attributed to that Article III judge, as appropriate.

Notably, the dataset included opinions that concerned the sufficiency of a complaint filed prior to the abrogation of FRCP 84.¹²⁶ While in some cases judges applied Form 18 based on interests of “justice and practicability,”¹²⁷ in other cases judges did not provide any reasoning when deciding to retroactively apply Form 18.¹²⁸ Because this study does not analyze the underlying reasoning behind the pleading standard applied, these cases were all included in the dataset.

Using these criteria, the Author filtered the identified cases, resulting in the total number of opinions in the dataset being reduced from over 300 to 141. From this dataset, several metrics were collected to assess the state of direct infringement pleading since the abrogation

123. For the purpose of this study, Rule 12(b)(6) motions to dismiss for willful, contributory, or induced patent infringement were removed because different standards cover them. *See, e.g.,* Lyda v. CBS Corp., 838 F.3d 1331, 1339 (Fed. Cir. 2016). Additionally, Rule 12(b)(6) motions decided on the basis of patent ineligible subject matter under 35 U.S.C. § 101 (2018) (rather than pleading sufficiency) were also omitted. *See* Genetic Techs. Ltd. v. Merial L.L.C., 818 F.3d 1369, 1373 (Fed. Cir. 2016) (“[I]t is possible and proper to determine patent eligibility under 35 U.S.C. § 101 on a Rule 12(b)(6) motion.”). Further, in order to focus this study on infringement pleading, motions to dismiss counterclaims of infringement were included, but counterclaims of noninfringement were removed from the dataset. While subject to the same pleading standard, the reasoning provided when ruling on these counterclaims was often sparse. *See, e.g.,* PetEdge, Inc. v. Marketfleet Sourcing, Inc., No. CV 16-12562-FDS, 2017 WL 2983086, at *3 (D. Mass. July 12, 2017) (using a mere sixty-two words to find a counterclaim insufficiently pled).

124. *See Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CENTER, <https://www.fjc.gov/history/judges> [<https://perma.cc/34KK-8SFL>] (last visited Feb. 4, 2019).

125. *See Magistrate Judgeships*, FED. JUD. CTR., <https://www.fjc.gov/node/7501> [<https://perma.cc/KQ84-AQYV>] (last visited Feb. 4, 2019).

126. *See, e.g.,* Prime Focus Creative Servs. Can. Inc. v. Legend3D, Inc., No. CV-15-2340-MWF (PLAx), 2016 WL 6678009, at *5 (C.D. Cal. Mar. 1, 2016).

127. *See id.* (“Because Rule 84 and Form 18 would have been in force at the time the Court considered Defendant’s original motion to dismiss, it would *not* be ‘just and practicable’ to apply the new Rules and any attendant heightened pleading standard” (emphasis in original) (citation omitted)).

128. *See, e.g.,* John Keeler & Co. v. Heron Point Seafood, Inc., No. 1:14-CV-1652, 2016 WL 6839615, at *4 (N.D. Ohio July 8, 2016) (applying Form 18 without discussion of whether Form 18 complies with *Twombly* or if it is merely being retroactively applied due to the filing date).

of FRCP 84. These included the sufficiency of the complaint;¹²⁹ which pleading standard was applied;¹³⁰ and various judge characteristics such as the judge's gender,¹³¹ age, appointing party,¹³² American Bar Association (ABA) qualification rating at the time of nomination,¹³³ and confirmation date,¹³⁴ as well as whether the judge held a degree in the sciences¹³⁵ and whether or not the judge received their law degree from a top-fourteen (T14) law school.¹³⁶

Finally, in response to the Federal Circuit's guidance regarding patent complexity in *Disc Disease*¹³⁷—where the Federal Circuit

129. For motions that were granted in part, the complaint was deemed insufficiently pled because at least part of the pleading was dismissed. *See, e.g.*, *Novitaz, Inc. v. inMarket Media, LLC*, No. 16-CV-06795-EJD, 2017 WL 2311407 (N.D. Cal. May 26, 2017).

130. For the five types of pleading standards utilized, see *supra* Section I.D. Oftentimes, judges did not explicitly define a standard (even though they appeared to rely on one of the four common standards) or relied on boilerplate language borrowed from *Twombly* and *Iqbal*. *See, e.g.*, *Howard v. Ford Motor Co.*, No. 1:16CV127-LG-RHW, 2016 WL 4077260, at *2 (S.D. Miss. July 29, 2016). In these instances where the judge was not explicit, a standard of "other" was recorded.

131. Gender was included as a control variable.

132. Judges' appointing party is often an effective and convenient metric to explain behavior of the lower courts due to the difficulty in deviating from their political ideology. *See* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 220 (1999). For an analysis noting the risks inherent in this approach, see Michael A. Bailey, *Measuring Ideology on the Courts*, in ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 65 (Robert M. Howard & Kirk A. Randazzo eds., 2017) ("Everyone recognizes the dangers here; such an approach for Supreme Court justices, for example, would imply that Justices Warren, Brennan, Stevens and Souter were to the right of Justice Frankfurter . . .").

133. *See Ratings*, AM. BAR ASS'N, https://www.americanbar.org/groups/committees/federal_judiciary/ratings.html [<https://perma.cc/MS2W-RMVE>] (last visited Feb. 4, 2019). Judicial nominees are either rated "Well Qualified," "Qualified," or "Not Qualified" by the Standing Committee. *Id.*

134. This was used to calculate the judge's experience on the bench at the time of the opinion by subtracting the judge's confirmation date from the date of the opinion.

135. For purposes of this study, a degree in the sciences is considered to be a Bachelor of Science (B.S.) or Master of Science (M.S.). The Author acknowledges that this is an imperfect metric, as not all B.S. and M.S. degrees pertain to disciplines that are traditionally related to patents or technology. *See, e.g.*, *College of Arts and Sciences Bulletin 2016-2017: List of Bachelor of Science Degrees*, IND. UNIV., <http://bulletins.iu.edu/iub/college/2016-2017/admission/majors-minors/bachelor-science.shtml> [<https://perma.cc/26UJ-FJ7V>] (last visited Feb. 4, 2019) (offering, for example, B.S. degrees in Interior Design and International Studies).

136. *See* KIVVIT, HIDDEN IN PLAIN SIGHT: LESSONS FROM THE 2018 U.S. NEWS LAW SCHOOL RANKINGS 6 (2018) https://www.kivvit.com/Kivvit_USNReport.pdf [<https://perma.cc/CY7X-L5GJ>]. While the list is updated annually, the T14 law schools remain relatively constant. *Id.* The 2018 list was utilized for purposes of this analysis, and consists of Yale University, Stanford University, Harvard University, University of Chicago, Columbia University, New York University, University of Pennsylvania, University of Michigan-Ann Arbor, University of Virginia, Duke University, Northwestern University (Pritzker), University of California-Berkeley, Cornell University, and the University of Texas-Austin. *Id.*

137. *See Disc Disease Sols. Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018) ("[The] allegations are sufficient under the *Iqbal/Twombly* plausibility standard. This case involves a simple technology. The asserted patents, which were attached to the complaint, consist of only four independent claims."). The reasoning in this case arguably shifts the focus of the inquiry towards the complexity of the technology when resolving a motion to dismiss. *Id.*

directed the focus of the inquiry towards the complexity of the technology—the number of independent claims, total claims, drawing sheets, and total number of pages was collected for each patent at issue. For cases with multiple patents-in-suit, these numbers were averaged for each patent. While there are many ways to analyze complexity, the Federal Circuit specifically noted the number of independent claims when discussing the complexity of the patents at issue in *Disc Disease Solutions*.¹³⁸

B. Overall Results

For the two-year period analyzed, the overall pleading sufficiency rate was 62 percent, slightly higher than the 56 percent sufficiency rate found by Christian E. Mammen and other scholars during roughly the same period.¹³⁹ When analyzing the pleading standards applied nationwide, Table 1 demonstrates that a majority of judges did not apply a rigid pleading standard, but rather applied *Twombly/Iqbal* principles on a case-by-case basis. Many of these cases illuminate a common thread: that Form 18 pleading may remain sufficient for simple technologies, whereas additional pleading may be required for complex inventions.¹⁴⁰ While still claiming to satisfy *Twombly* and *Iqbal*, this other pleading standard appeared to be just as rigid as each claim pleading in some instances and as simplistic as Form 18 pleading in others.

138. While there are many studies assessing patent complexity, see, for example, *infra* note 192, the Federal Circuit specifically noted the number of independent claims in the patents-in-suit when discussing the complexity of the patents at issue in *Disc Disease*. See 888 F.3d at 1260. For cases with multiple patents, these numbers were summed, as the court did in *Disc Disease*. *Id.*

139. See Mammen, *supra* note 6, at 2.

140. See, e.g., *Niazi v. Pressure Prods. Med. Supplies, Inc.*, No. 16-CV-670-jdp, 2017 WL 108114, at *1 (W.D. Wis. 2017) (“First, the old Form 18 approach is still generally sufficient to articulate a plausible claim for direct infringement. . . . In most patent cases, identifying the claims asserted and the devices accused will be enough to do the job . . .”).

Table 1. Number of Motions and Pleading Sufficiency Rate by Pleading Standard

	Number of Motions	Sufficiency Rate
Each Claim	20	30%
At Least One Claim	30	50%
Unique Feature	12	100%
Form 18	15	100%
Other	64	63%
Nationwide	141	62%

Unsurprisingly, the pleading sufficiency rate was lowest for the most rigid and demanding standards, and grew as the pleading standard became less strict.

C. Results by District

During the period analyzed, thirty-six of ninety-four federal districts decided a motion to dismiss on the pleadings for a claim of direct infringement, with ten districts handling five or more motions. The pleading sufficiency rates of these districts are summarized in Table 2. There are few surprises on the list—the US District Courts for the District of Delaware, the Southern District of California, and the Eastern District of Texas lead the group for most motions resolved.¹⁴¹ The Eastern District of Texas, a traditionally pro-patentee district,¹⁴² had the highest pleading sufficiency rate, followed closely by the District of Delaware. This may come as a relief to plaintiffs, as Delaware is widely seen as replacing the Eastern District of Texas as the go-to patent venue in light of the Supreme Court's recent decision in *TC Heartland, LLC v. Kraft Foods Brand Group, LLC*.¹⁴³

141. Jacqueline Bell, *Patent Litigation in US District Courts: A 2016 Review*, LAW360 (Mar. 1, 2017, 12:13 PM), <https://www.law360.com/articles/895435/patent-litigation-in-us-district-courts-a-2016-review> [https://perma.cc/3X6P-6UXM].

142. Jeff Bounds, *Meet the New King of Patent Litigation (Sorry East Texas)*, TEX. LAWBOOK (Sep. 22, 2017, 6:14 PM), <https://www.bizjournals.com/dallas/news/2017/09/22/meet-the-new-king-of-patent-litigation-sorry-east.html> [https://perma.cc/TZ9Y-V6SH].

143. *Id.* In *TC Heartland*, the Supreme Court reigned in patent venue by holding that a domestic corporation resides only in its state of incorporation under the patent venue statute 28 U.S.C. § 1400(b) (2018). See *TC Heartland, LLC v. Kraft Foods Grp. Brands, LLC*, 137 S. Ct. 1514, 1521 (2017).

Table 2. Pleading Sufficiency Rates Among District Courts That Handled at Least Five Motions to Dismiss from 2016–2017¹⁴⁴

	Total Motions	Sufficiency Rate	2016	2017
Central District of California	11	45%	44%	50%
Northern District of California	7	43%	50%	33%
Southern District of California	14	36%	11%	80%**
District of Delaware	15	87%	80%	90%
Southern District of Florida	7	0%	0%	0%
Northern District of Illinois	7	43%	0%	75%**
District of Massachusetts	5	60%	50%	67%
District of Nevada	8	75%	50%	100%
District of New Jersey	6	83%	80%	100%
Eastern District of Texas	17	82%	71%	90%
Nationwide	141	62%	48%	77%

The district data become interesting when the dataset is broken down by year, which suggests a shift in behavior in the patent litigation community to adjust to the abrogation of FRCP 84. Despite seeing a similar quantity of motions between the two years, pleading sufficiency rebounded to 77 percent in 2017 after falling to 48 percent in 2016. This suggests the low pleading sufficiency rates discovered by scholars in 2016 may not be as alarming as they initially appear.¹⁴⁵ Whether courts have applied a more lenient pleading standard (despite claiming to apply the same standard), or whether plaintiffs have adapted to the change is beyond the scope of this study; however, the data suggest the patent community is rebounding to the national average.¹⁴⁶

D. Factors Influencing Judge Behavior

For the purpose of this analysis, pleading sufficiency rates and pleading standards applied by each judge are broken down and analyzed by the judge characteristics collected and discussed in Section IV.A. Although most judge characteristics had an insignificant effect

144. Asterisks indicate a difference between 2016 and 2017 in that district. Differences are calculated using a z-test analysis. *** Significant at the 1 percent level. ** Significant at the 5 percent level. * Significant at the 10 percent level.

145. See Mammen, *supra* note 6, at 2.

146. See Patricia W. Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 613–14 (2011).

on pleading sufficiency rate and pleading standards, political affiliation was found to be significant.

1. Gender

Gender was not a significant factor in pleading sufficiency rate. The pleading standard utilized was also mostly insignificant. This was unsurprising, and this data were collected as a form of control statistic against the other metrics collected.

2. Age

Age did not have a significant impact on pleading sufficiency. Although substantial research exists that suggests that technology usage decreases significantly with age, senior judges' potential lack of experience with technology did not appear to impact their ability to rule on the sufficiency of the direct infringement complaint.¹⁴⁷ Rather, the data demonstrate there is no significant trend for either metric. Notably, the pleading standards breakdown is nearly identical for the three age groups (ages 50–59, 60–69, and 70–79) that resolved at least twenty motions during the sample period.

3. Science Degree

The possession of a science degree also did not significantly impact the results. If anything, the presence of a science degree slightly increased the pleading sufficiency rate, although this trend was not statistically significant. However, as Table 3 demonstrates, a significant difference was observed in the frequency of judges without science degrees utilizing “other” as a pleading standard. As previously discussed, other pleading was designated to any opinions where judges chose not to define a pleading standard, instead giving themselves flexibility (and litigants uncertainty) by relying on the generic language of *Twombly*.¹⁴⁸ Whether this is because scientists traditionally favor rigid tests with clear rules or for some other reason is beyond the scope of this study.¹⁴⁹

147. See Aaron Smith, *Older Adults and Technology Use*, PEW RES. CTR. (Apr. 3, 2014), <http://www.pewinternet.org/2014/04/03/older-adults-and-technology-use/> [<https://perma.cc/9S46-XXVD>].

148. See *supra* Section I.D.5.

149. See Anne Roe, *A Psychologist Examines 64 Eminent Scientists*, 187 SCI. AM. 21, 23 (1952) (examining background, personality, and skills characteristics of scientists).

Table 3. Pleading Sufficiency Standard by Science Degree¹⁵⁰

	Number of Motions	Each Claim	At Least One Claim	Unique Feature	Form 18	Other
Science Degree	19	21%	32%	11%	16%	21%
Nonscience Degree	122	13%	20%	8%	10%	49%**

4. Law School

Holding a law degree from a T14 law school was also not a significant factor in pleading sufficiency rate or pleading standard selection, with the exception of a T14 law school preference for the unique feature pleading standard.¹⁵¹ In fact, percentages were nearly identical in almost all categories between judges holding degrees from T14 law schools and their colleagues.

5. ABA Qualification

ABA qualification at the time of confirmation also made little difference in either pleading sufficiency rate or pleading standard applied.¹⁵² The data show little difference between “Well Qualified” and “Qualified” judges in both pleading sufficiency rate and the pleading standard applied. There is a difference between these categories and “Not Qualified” judges, but this difference is not significant as there were only eight “Not Qualified” cases, all of which were handled by the same judge and featured the same plaintiff.¹⁵³

6. Judicial Experience

Judicial experience was measured as the number of years on the bench when the decision on pleading sufficiency was made. Like the other factors analyzed thus far, judicial experience was also not a significant indicator of pleading sufficiency rate or which pleading

150. Asterisks indicate a difference between judges with science degrees and nonscience degrees within each pleading standard. Differences are calculated using a z-test analysis. *** Significant at the 1 percent level. ** Significant at the 5 percent level. * Significant at the 10 percent level.

151. Judges from T14 law schools utilized the “unique feature” standard in 15 percent of cases analyzed; non-T14 law school judges only utilized the standard in 5 percent of cases. This variation was significant at the 5 percent level.

152. One judge did not have a qualification on the FJC database, and thus the total dataset for ABA qualification is only 140 motions.

153. See, e.g., *Anza Tech., Inc. v. D-Link Sys., Inc.*, No. 3:16-CV-01263-BEN-AGS, 2016 WL 8732647, at *1 n.1 (S.D. Cal. Nov. 4, 2016).

standard was applied, as there is no significant trend for either pleading sufficiency rate or pleading standard with respect to this variable.

7. Appointing Political Party

Tables 4 and 5 demonstrate a significant variation in both pleading sufficiency rates and pleading standards applied between judges appointed by Democratic versus Republican presidents. In general, judges appointed by Democratic presidents appear more likely to deny a motion to dismiss under FRCP 12(b)(6) by using the flexible other pleading standard. In contrast, judges appointed by Republican presidents have a noticeably lower pleading sufficiency rate and are more likely to use rigid pleading standards when ruling on motions to dismiss.

Table 4. Pleading Sufficiency Rate by Appointing Political Party¹⁵⁴

	Number of Motions	Sufficiently Pled	Pleading Sufficiency Rate
Republican President Appointee	61	33	54%*
Democratic President Appointee	80	55	69%
Totals	141	88	62%

Table 5. Pleading Sufficiency Standard by Appointing Political Party¹⁵⁵

	Number of Motions	Each Claim	At Least One Claim	Unique Feature	Form 18	Other
Republican President Appointee	61	28%***	30%**	8%	8%	26%***
Democratic President Appointee	80	4%	15%	9%	13%	60%

154. Asterisks indicate a difference between judges with different political affiliations. Differences are calculated using a z-test analysis. *** Significant at the 1 percent level. ** Significant at the 5 percent level. * Significant at the 10 percent level.

155. Asterisks indicate a difference between judges with different political affiliations within each pleading standard. Differences are calculated using a z-test analysis. *** Significant at the 1 percent level. ** Significant at the 5 percent level. * Significant at the 10 percent level.

First, it is important to reaffirm that age and experience are not factors in this result. Due to President Obama's two terms, the most recently a Republican president could have appointed a judge for purposes of this study was 2008, as President Trump did not appoint any judges studied in this dataset. As a result, one could argue that the greater age¹⁵⁶ and experience¹⁵⁷ of judges appointed by a Republican president may factor into this result. Yet, as previously discussed, age and experience were not significant in predicting either pleading sufficiency rate or pleading standard.

Rather, these results support the conclusion that patent policy is correlated with political ideology. This result is surprising, both because sufficiency of pleadings are often viewed as a procedural issue and because scholars have often argued that intellectual property is immune from political polarization.¹⁵⁸ However, scholars have argued that since *Twombly* and *Iqbal*, a decision on pleading sufficiency requires courts to substantively rule on what is "plausible" given the facts plead.¹⁵⁹ And others have argued that this position may be incorrect,¹⁶⁰ noting that patents have become more political in the last decade as both the Supreme Court and Congress have taken a more active role in policymaking.¹⁶¹ Notably, a groundbreaking empirical study by Matthew Sag, Tonja Jacobi, and Maxim Sytch convincingly argued that conservative judges more often rule in favor of enforcing

156. The average age of judges appointed by Republican presidents who resolved at least one motion to dismiss in this dataset was 67.1 years, compared to 61.3 years for judges appointed by Democratic presidents.

157. The average experience of judges appointed by Republican presidents who resolved at least one motion to dismiss in this dataset was 17.9 years, compared to 11.2 years for judges appointed by Democratic presidents.

158. See Gregory N. Mandel, *Institutional Fracture in Intellectual Property Law: The Supreme Court Versus Congress*, 102 MINN. L. REV. 803, 838–39 (2017) (observing that Congress has enacted patent-strengthening laws at times when both Democrats and Republicans have held control of both houses of Congress); Kimberly A. Moore, *Are District Court Judges Equipped To Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 27 (2001) (concluding no difference in how Republican and Democratic judges construed patent claims).

159. See Edward Brunet, *The Substantive Origins of "Plausible Pleadings": An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 10 (2010); Elizabeth M. Schneider & Nancy Gertner, *"Only Procedural": Thoughts on Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 768 (2013).

160. See Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 849 (2009).

161. Hayden W. Gregory, *IP and the Romance with Its Policy Makers: Can This Marriage Be Saved?*, 8 LANDSLIDE 16, 19–20 (2016) (arguing the Supreme Court has abandoned its laissez faire approach to patent law in recent cases such as *Bilski v. Kappos*, 561 U.S. 593 (2010) and *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014), and that policymakers and public interest groups have responded in turn).

strong intellectual property rights, but that this ideological effect is less pronounced than in non-IP cases.¹⁶²

Under this political lens, there are two potential ways to approach this result. The first, from the Democratic point of view, is that judges appointed by Democratic presidents are properly applying the *Twombly/Iqbal* pleading standard, which was never designed to be a rigid pleading standard but rather a fact-specific inquiry that must vary case-to-case.¹⁶³ Further, by requiring a less rigid pleading standard, cases are more likely to be resolved on the merits than at the pleading stage, as *Twombly* and *Iqbal* intended.¹⁶⁴ Judges appointed by Democratic presidents can point to the fact that the Federal Circuit has refused to state whether Form 18 was inconsistent with *Twombly* and *Iqbal* as a way to argue the abrogation of FRCP 84 did little to change pleading requirements.¹⁶⁵ Judges appointed by Republican presidents would argue stricter pleading standards are needed and that the contrary position permits frivolous suits by patent trolls and other NPE's to enter the costly discovery phase.¹⁶⁶

The second approach—which provides a counterargument to the Democratic position—argues that the position of judges appointed by Republican presidents creates clear rules to expedite the pleading stage and aligns with the national averages for FRCP 12(b)(6) motions to dismiss.¹⁶⁷ In 2011, Patricia Hatamyar Moore found a nationwide pleading sufficiency rate of 40 percent post-*Iqbal*.¹⁶⁸ Both the instant study and Hatamyar Moore's study analyzed data two years immediately following a "seismic" event in motions to dismiss—namely, the abrogation of FRCP 84, and the *Iqbal* decision, respectively. The 49 percent pleading sufficiency rate among judges appointed by

162. See Sag, Jacobi & Sytch, *supra* note 160, at 847–49.

163. See, e.g., *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 43–44 (1st Cir. 2013) ("Courts have evaluated the line between 'merely' alleging parallel conduct and alleging plausible agreement on a case-by-case basis after *Twombly* . . ."); *In re Medtronic, Inc., Sprint Fidelis Leads Prod. Liab. Litig.*, 623 F.3d 1200, 1209 (8th Cir. 2010) ("To apply *Twombly* rigidly without permitting discovery as to these documents effectively creates an impossible-to-achieve specificity requirement. I do not believe the Court intended *Twombly* to create this type of insurmountable hurdle. Rather, I believe the application of *Twombly* must be pragmatic.").

164. See, e.g., *Sepulveda-Villarini v. Dep't of Educ.*, 628 F.3d 25, 30 (1st Cir. 2010) ("But *Twombly* cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor.").

165. *Lifetime Indus., Inc., v. Trim-Lok, Inc.* 869 F.3d 1372, 1377 (Fed. Cir. 2017).

166. See Burk, *supra* note 120, at 446.

167. See, e.g., *Rampage, LLC v. Glob. Graphics SE*, No. 16-CV-10691-ADB, 2017 WL 239328, at *2 (D. Mass. Jan. 19, 2017) ("Use of the *Twombly/Iqbal* standard also promotes uniformity across the judicial system, whereas reliance on a now-abrogated form would only cause confusion and inconsistency." (citation omitted)).

168. See Hatamyar Moore, *supra* note 146, at 613–14.

Republican presidents in this study fits within the range of Hatamyar Moore's results.

However, this finding that judges appointed by Republican presidents are dismissing more infringement complaints—and making it more difficult to enforce patent property rights as a result—is surprising given prior studies of IP polarization, which argue Republicans favor strong patent protection.¹⁶⁹ In contrast, Mark Lemley reasons that the patent system is a restriction on property rights and free markets,¹⁷⁰ which most conservatives are likely to disfavor. As a result, conservatives must balance protection of private property with free market restrictions when analyzing the patent system.¹⁷¹ These conflicting positions may help explain this trend. Additionally, there has been evidence of growing disfavor of the patent system among Republicans during the Trump presidency, which could influence this result.¹⁷²

8. Patent Complexity

The complexity of the patents-in-suit had no influence on the pleading sufficiency rate or the pleading standard applied. Contrary to the teachings of *Disc Disease Solutions*, cases with only one independent claim had the lowest pleading sufficiency rate (44 percent), but this rate was not statistically significant. The only indicator that patent complexity impacted pleading sufficiency was in drawing sheets, where cases involving patents with less than five drawing sheets were 15 percent more likely to survive a motion to dismiss than cases with patents involving more than ten drawing sheets. Again, this difference was not statistically significant.

The number of total claims and independent claims did not impact the pleading standard utilized, although there was a slight trend towards using the stricter each claim and at least one claim standards in cases with fewer drawing sheets and fewer total pages. This may indicate judges' wishes to see a greater level of detail when the patent can be easily reviewed. However, it is surprising that the

169. See Sag, Jacobi & Sytch, *supra* note 160, at 849.

170. See Mark A. Lemley, *The Regulatory Turn in IP*, 36 HARV. J.L. & PUB. POL'Y 109, 110 (2013).

171. *Id.*

172. See Steve Brachmann, *Former Trump Campaign Advisor: "Today, Patents Are Worthless,"* IP WATCHDOG (Aug. 24, 2017), <http://www.ipwatchdog.com/2017/08/24/former-trump-advisor-patents-worthless/id=87207/> [<https://perma.cc/W2VP-H4VS>]; Jan Wolfe, *U.S. Patent Review Board Becomes Conservative Target*, REUTERS (Nov. 20, 2017, 12:05 AM), <https://www.reuters.com/article/us-usa-patent-ptab/u-s-patent-review-board-becomes-conservative-target-idUSKBN1DK0EB> [<https://perma.cc/4KA2-C5YJ>].

pleading sufficiency rate is relatively constant regardless of patent complexity, as more complexity would require judges (under several of the analyzed pleading standards) to sufficiently understand the technology at the motion to dismiss stage to determine whether infringement allegations are plausible.

A future review of these same metrics using post-*Disc Disease* cases will shed light on what metrics, if any, judges use when determining the complexity of the technology.

9. Reviewing Judge Gilstrap and Judge Andrews

Finally, it is worthwhile to briefly discuss the jurisprudence of Judge Gilstrap of the Eastern District of Texas and Judge Andrews of the District of Delaware. These judges resolved the most motions to dismiss during the analyzed period and are likely to continue to see a high volume of motions due to their patent-heavy districts.¹⁷³

Judge Gilstrap resolved thirteen motions during the studied period, often with the assistance of a magistrate judge.¹⁷⁴ Of these motions, Judge Gilstrap ruled that 85 percent of complaints were sufficiently pled overall, rising from 50 percent in 2016 to 100 percent in 2017, although Judge Gilstrap only handled four motions in 2016. Judge Gilstrap has been steadfast in not declaring a specific pleading standard, appearing to opt for the generic language of *Twombly* in all of his opinions.¹⁷⁵ While this provides flexibility and allows the Eastern District of Texas to continue its pro-plaintiff reputation,¹⁷⁶ it can create uncertainty not seen under the Form 18 pleading standard.

Judge Andrews is likely to experience the largest patent docket in the country for the foreseeable future in the aftermath of *TC Heartland*.¹⁷⁷ During the period analyzed, Judge Andrews resolved nine motions, ruling that 78 percent of complaints were sufficiently pled

173. See Bounds, *supra* note 142.

174. See, e.g., *Semcon IP, Inc. v. Huawei Device USA, Inc.*, No. 2:16-cv-437-JRG-RSP, 2017 U.S. Dist. LEXIS 36606, at *5 (E.D. Tex. Mar. 14, 2017) (adopting the report and recommendation of the magistrate judge in full by Judge Gilstrap). Judge Gilstrap utilized a magistrate judge in seven of his thirteen opinions in the dataset.

175. See, e.g., *Solocron Educ., LLC v. Healthstream, Inc.*, No. 2:16-CV-16-JRG, 2016 WL 9137458, at *3 (E.D. Tex. June 7, 2016) (“[C]laims for direct infringement must nevertheless satisfy the pleadings standards set forth by the Supreme Court in *Twombly* and *Iqbal*. Determining whether a complaint states a claim for infringement is a very ‘context specific task.’”).

176. See Bounds, *supra* note 142.

177. See *TC Heartland, LLC v. Kraft Foods Grp. Brands, LLC*, 137 S. Ct. 1514, 1520 (2017); Bounds, *supra* note 142. As a result, plaintiff-friendly districts, such as the Eastern District of Texas, may no longer be a possible venue if the defendant is not (1) incorporated within the state or (2) committing acts of infringement and has a regular and established place of business within the district. Bounds, *supra* note 142. In contrast, the District of Delaware, where most businesses are incorporated, is expected to see an increase in patent litigation. See *id.*

(67 percent in 2016, and 83 percent in 2017). Judge Andrews also utilized a magistrate judge in many opinions.¹⁷⁸ Like Judge Gilstrap, Judge Andrews appears hesitant to define a specific pleading standard; however, he has frequently continued to apply Form 18 pleading standards when the complaint was filed prior to the abrogation of FRCP 84.¹⁷⁹

IV. PLEADING FOR A RESOLUTION

After reviewing the decisions of the Federal Circuit, along with data collected from district courts since the abrogation of FRCP 84, it is clear that a uniform pleading standard is necessary to avoid confusion, inefficiency, and potential politicization of patent pleading. However, this pleading standard must survive an analysis under *Twombly* and *Iqbal*. It is significant to note that since *Twombly*'s inception, scholars have criticized the heightened scrutiny of defendant's answers in direct infringement lawsuits while courts continue to permit the bare-bones pleading standard in complaints.¹⁸⁰ It is likely courts have overlooked this analysis of pleadings due to the long tradition of Form 18.

On a broader level, *Twombly*'s overarching policy goals—namely, reducing costs and time of litigation—apply to all areas of law and are especially relevant in the expensive patent litigation realm.¹⁸¹ Given these concerns, it is unthinkable that the Supreme Court would approve of a system that creates extensive delays and undue costs during prelitigation,¹⁸² while simultaneously serving as a potential bar to the courtroom by requiring extensive research to satisfy heightened pleading standards.¹⁸³

Worse yet, the Federal Circuit has further muddled the situation with its opinion in *Disc Disease Solutions*, which provided little reasoning beyond its assertion that at least one claim pleading was

178. See, e.g., *Zimmer Surgical, Inc. v. Stryker Corp.*, No. CV 16-679-RGA-MPT, 2017 WL 3736750, at *2 (D. Del. Aug. 30, 2017) (adopting the report and recommendation of the magistrate judge with regard to direct infringement by Judge Andrews). Judge Andrews utilized a magistrate judge in three of his nine opinions in the dataset.

179. See, e.g., *Waters Techs. Corp. v. Aurora SFC Sys.*, No. 11-708-RGA, 2017 U.S. Dist. LEXIS 132901, at *11 (D. Del. Aug. 21, 2017) ("Given that the amended complaint was filed more than four years ago, I do not think it is proper to evaluate it under the December 1, 2015 amendments abrogating Form 18.7").

180. 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 (2008); Yekaterina Korostash, *Pleading Standards in Patent Litigation After Bell Atlantic Corp. v. Twombly*, 14 INTELL. PROP. STRATEGIST 1, 8 (2008).

181. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007).

182. See, e.g., *Artrip v. Ball Corp.*, No. 1:14CV00014, 2017 WL 3669518, at *5 (W.D. Va. Aug. 24, 2017) (permitting plaintiff to file a third amended complaint).

183. *Id.*

appropriate for simple technologies. In a pre-*Disc Disease* world, the judge merely had to determine which pleading standard applied and whether the complaint satisfied it. Post-*Disc Disease*, a judge must now determine a number of factors: (1) how complex the technology is, (2) which pleading standard applies to this level of complexity to satisfy the *Twombly/Iqbal* pleading standard, and (3) whether the complaint meets that pleading standard.¹⁸⁴ The Federal Circuit provided little guidance for answering these and other relevant questions.¹⁸⁵

This creates at least two problems for practitioners moving forward. First, each inquiry is now subject to the political bias and subjectivity this study has identified.¹⁸⁶ Second, for all the flaws of the post-Form 18 world, many of the judges analyzed in this study uniformly applied a single pleading standard across their entire patent docket.¹⁸⁷ Post-*Disc Disease*, a single judge could potentially apply five (or more!) different pleading standards based on the complexity of the technology at issue.¹⁸⁸ Both problems reduce the level of predictability and efficiency in the system.

With this framework in mind, the following is a brief assessment of how each pleading standard discussed in Section I.D may withstand scrutiny under the *Twombly/Iqbal* pleading standard, stated patent policy goals, and empirical data analysis. Because pleadings are extremely fact specific, it is impossible to make blanket statements about whether certain pleading standards will always survive a failure to state a claim challenge.

A. Each Claim Pleading

As discussed in Part III, the demanding each claim pleading standard has been frequently used by judges appointed by Republican presidents and has resulted in the highest dismissal rate among

184. Cf. *Disc Disease Sols., Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018) (deciding pleading sufficiency based on the complexity of the patented technology, but failing to discuss what metric, if any, should be used to define complexity).

185. See Stephanie Scruggs & Jessica Zurlo, *Some Fed. Circ. Guidance on Patent Pleading Standard*, LAW360 (May 4, 2018, 5:49 PM), <https://www.law360.com/articles/1040535/some-fed-circ-guidance-on-patent-pleading-standard> [<https://perma.cc/FT82-6VL3>] (discussing other unanswered questions in the wake of *Disc Disease*, including the relationship between the number of independent claims and patent complexity).

186. See *supra* Section III.D.

187. See *supra* Section III.D.

188. While Judge Reyna declared that “at least one claim” pleading was appropriate in cases involving “simple technology,” *Disc Disease* does not answer whether “at least one claim” is a minimum pleading standard or if an even more relaxed standard may be appropriate for simpler technology than the spinal brace at issue in *Disc Disease*. See 888 F.3d at 1260.

standards.¹⁸⁹ Complaints satisfying the each claim pleading standard are more likely to be found sufficient under *Twombly* and *Iqbal*, as they individually spell out and identify each claim and how the defendant infringed.¹⁹⁰ However, the data suggest the pleading standard may be too demanding, with only 30 percent of claims sufficiently pled under this standard.¹⁹¹ In an era where patents have never been longer, requiring such detail may place too high of a burden on plaintiffs at the pleading stage, which may be unavailable without additional information.¹⁹² This barrier to entry runs afoul of the established policy in *Twombly* by requiring a plaintiff to do extensive research about the relationship between a patent and an infringing product (almost akin to claim construction, where terms in a patent are construed) without the benefit of discovery.¹⁹³ This is overly burdensome, given the procedural safeguard permitting amended complaints during discovery if new information is found.¹⁹⁴ Collectively, the policy considerations and low sufficiency rate discourage continued use of the each claim pleading standard.

B. At Least One Claim Pleading

Plaintiffs have found more success with the at least one claim pleading standard, with roughly 50 percent of pleadings in the dataset ruled sufficient.¹⁹⁵ This percentage is more favorable to plaintiffs and closer to similar studies on overall pleading sufficiency rate.¹⁹⁶ While the Federal Circuit has verified this standard complies with *Twombly* and *Iqbal* in cases involving simple technologies, a defendant may lack requisite notice of any additional claims, running the risk that issues

189. See *supra* Section III.D.

190. The Federal Circuit's approval of "at least one claim" pleading lends strong support that "each claim" pleading is sufficient under *Twombly*. See *Disc Disease*, 888 F.3d at 1260.

191. See *supra* Section III.B.

192. John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77, 79 (2002) (finding that the average number of claims per patent has risen from 9.94 in the 1970s to 14.87 in the 1990s); Kristen Osenga, *The Shape of Things to Come: What We Can Learn from Patent Claim Length*, 28 SANTA CLARA COMPUT. & HIGH TECH. L.J. 617, 629–30, 632 n.53, 633 n.54 (2012) (studying over 4,500 patents from 1958 to 2008, and finding that average words per claim has remained relatively steady at 175.1 words per independent claim and 41.2 words per dependent claim).

193. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

194. The Federal Rules permit plaintiffs to amend their complaints during discovery if additional claims for relief arise. See FED. R. CIV. P. 15 (mandating that a court freely give a party leave to amend its complaint at any time "when justice so requires").

195. See *supra* Section III.B.

196. See Hatamyar Moore, *supra* note 146, at 613–14.

are not narrowed prior to discovery.¹⁹⁷ To alleviate these concerns, the Federal Circuit should add a limitation to the at least one claim pleading standard to allow plaintiffs to merely mention—and not plead each element of—additional claims encompassed *within the same patent* once they have pled sufficient facts to allege at least one claim, regardless of the technology at issue. This would provide notice to defendants that any named claim within a given patent is subject to litigation, without permitting plaintiffs to piggyback additional patents—even within the same patent family—without sufficient facts. Under *Twombly*'s policy aims, this modification to the at least one claim pleading standard puts the defendant on notice of the causes of action, while maintaining FRCP 8's efficiency goals by preventing overly demanding and costly work by the plaintiff and court during the pleading process.¹⁹⁸ This modified pleading standard also encourages filtration of frivolous suits by patent trolls by requiring a minimum level of facts to support infringement without closing the door to cases that may legitimately challenge "bad" patents but which require discovery.¹⁹⁹

C. Unique Feature Pleading

Unique feature pleading lowers the burden on the plaintiff even further, but a look at the data shows inherent problems with the pleading standard. In the period analyzed, every single complaint analyzed under the unique feature pleading standard was deemed sufficiently pled. This leads to issues with subjectivity and bias, which can be particularly trying to litigants that are not on notice of the requirements. Under this pleading standard, courts are tasked with deciding if the patented product even has a unique feature, and if so, whether it is embodied in the infringing product. Such a subjective inquiry runs the risk of judges incorporating an "I know it when I see it" approach,²⁰⁰ a test which is often criticized as being based on a

197. *Disc Disease Sols., Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018); see AM. INTELLECTUAL PROP. LAW ASS'N, *supra* note 7 (summarizing the costs of discovery in patent litigation).

198. While rare, courts have been known to dismiss complaints for being too long or rambling, citing the creation of undue work on the court and defendant in analyzing and answering the complaint. See, e.g., *Koplow v. Watson*, 751 F. Supp. 2d 317, 321 (D. Mass. 2010) (dismissing 500-page complaint for failure to satisfy FRCP 8).

199. See *Burk*, *supra* note 120, at 446 ("Patent trolling appears to be directly responsible for a number of judicial changes in patent doctrine and procedure . . .").

200. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart famously established this "test" when determining whether a motion picture qualified as pornographic material, and it has been repeated in courts ever since. See, e.g., *Stanojkova v. Holder*, 645 F.3d 943, 949 (7th Cir. 2011).

“nonrational, intuitive gut reaction, instead of reasoned analysis.”²⁰¹ Such a pleading standard creates the potential for subjectivity and unwelcome confusion for plaintiffs. As the subjectivity of the pleading standards creates the ability to impact pleading sufficiency—a trend noted with respect to political affiliation—such a subjective pleading standard is not recommended if uniformity is sought.

Further, FRCP 8’s notice requirement may be scrutinized here, as reasonable minds could disagree whether pleading a unique feature, which is often only one limitation of a claim, is sufficient to provide a defendant the requisite notice that the Federal Rules and *Twombly* require. These lingering doubts further teach away from the unique pleading standard.

D. Form 18 Pleading

Some courts have permitted plaintiffs to adequately plead direct infringement using the now-abrogated Form 18.²⁰² A review of the form clearly puts such a pleading in the crosshairs of *Twombly*, as it does little to establish a claim to relief besides provide a blanket statement of infringement borrowed heavily from 35 U.S.C. § 271.²⁰³ Courts are likely to find many of the statements in Form 18 to be legal conclusions which must be struck from the pleadings under *Twombly* and *Iqbal*. However, under existing Federal Circuit precedent, *Twombly*’s pleading standard has not killed Form 18, despite the apparent conflict between the two and the abrogation of the Form.²⁰⁴ Indeed, courts utilizing and defending this pleading standard have pointed to this precedent when denying motions to dismiss.²⁰⁵ Form 18 pleading also opens the door for patent trolls, risks costly and unnecessary discovery for claims lacking merit, and provides questionable notice to defendants of the issues being litigated.²⁰⁶ For these reasons alone, courts should continue to apply Form 18 pleading only to complaints filed prior to

201. See Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1025 (1996).

202. See *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-CV-0772-GMN-NJK, 2016 WL 199417, at *2 n.1 (D. Nev. Jan. 15, 2016); *supra* Section I.D.

203. Compare FED. R. CIV. P. Form 18 (2014) (abrogated 2015) (“The defendant has infringed and is still infringing the letters patent by making, selling, and using [electric motors] that embody the patented invention. . . .”), with 35 U.S.C. § 271(a) (2018) (“[W]hoever without authority makes, uses, offers to sell, or sells any patented invention . . . infringes the patent.”).

204. See *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1377 (Fed. Cir. 2017); *Lyda v. CBS Corp.*, 838 F.3d 1331, 1337 (Fed. Cir. 2016) (“For claims of direct patent infringement, this court has determined that the pleading requirements of Form 18 suffice to survive a motion to dismiss.”).

205. *Hologram USA*, 2016 WL 199417, at *2.

206. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957); Harmon, *supra* note 20.

abrogation when justice and practicability require, regardless of the Form's sufficiency under *Twombly* and *Iqbal*.²⁰⁷

E. Other

Finally, some courts have favored an indistinct approach to pleading after abrogation, using the bare principles of *Twombly* and *Iqbal* to determine if pleadings are sufficient without any special application to patent law.²⁰⁸ Although *TC Heartland* and the abrogation of Form 18 suggest that patent litigation does not receive special treatment,²⁰⁹ continuing to permit multiple pleading standards creates unnecessary subjectivity, resulting in confusion for plaintiffs that could be easily resolved with a uniform pleading standard for patent pleading. While the pleading sufficiency rate for this other pleading standard is around 63 percent,²¹⁰ judges can easily utilize this flexible pleading standard to appear more patent friendly. Though *Twombly* is intended to be a flexible pleading standard, the data shows this level of subjectivity creates confusion and inefficiency, resulting in increased costs during the pleading stage. Further, the Federal Circuit's adoption of the at least one claim pleading standard in cases of simple technologies may call into question the sufficiency of this generic approach.²¹¹

To conclude, requiring a plaintiff to plead at least one claim of every asserted patent in an infringement claim regardless of the technology at issue provides the best uniform pleading standard going forward. This pleading standard does not place undue burden on plaintiffs, provides defendants sufficient notice of the issues in dispute, and restricts frivolous suits brought by patent trolls. At the same time, the pleading standard is not devoid of sufficient factual detail as to run afoul of *Twombly*, increases predictability for both parties in the pleading stage, and restricts the ability of judges to subjectively influence the result of a motion to dismiss.

It should be noted that even if a uniform pleading standard is applied, this would not create a rigid rule that would be too inflexible to adapt to fact-specific situations that arise during the pleading stage.

207. See *Prime Focus Creative Servs. Canada, Inc. v. Legend3D, Inc.*, No. CV152340MWFPLAX, 2016 WL 6678009, at *5 (C.D. Cal. Mar. 1, 2016).

208. See, e.g., *Solocron Educ., LLC v. Healthstream, Inc.*, No. 2:16-CV-16-JRG, 2016 WL 9137458, at *3 (E.D. Tex. June 7, 2016).

209. See *TC Heartland, LLC v. Kraft Foods Grp. Brands, LLC*, 137 S. Ct. 1514, 1520 (2017) ("The current version of § 1391 does not contain any indication that Congress intended to alter the meaning of § 1400(b) as interpreted in *Fourco*.").

210. See *supra* Section III.B.

211. *Disc Disease Sols., Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018).

Rather, under the at least one claim pleading standard, judges retain the ability to decide what facts are necessary to sufficiently plead infringement of at least one claim in the patent, which will vary in each case based on the specific technology and circumstances surrounding each suit.²¹²

V. CONCLUSION

The 2015 Advisory Committee notes state that the purposes for which FRCP 84 was enacted, namely to indicate the “simplicity and brevity of statement[s] which the rules contemplate,” have been fulfilled and the forms “are no longer necessary.”²¹³ However the behavior from courts and plaintiffs during the last two years suggests plaintiffs and courts are lost without FRCP 84 and Form 18. In the void left by the abrogation of Form 18, district courts have implemented a wide range of standards to assess pleading sufficiency under *Twombly* and *Iqbal* that have confused plaintiffs and delayed trials. With many complaints often being dismissed without prejudice, the Federal Circuit has had few opportunities to resolve this divide between the district courts.²¹⁴

A review of two years of FRCP 12(b)(6) motions to dismiss since the abrogation of Rule 84 indicates a higher rate of dismissals, which has created inefficiency as plaintiffs often file several amended complaints.²¹⁵ Analysis of these motions indicates a politically driven divide among judges, with Republican appointees more likely to favor strict pleading standards and subsequently granting motions to dismiss significantly more than judges appointed by Democratic presidents. This result is somewhat surprising as Republicans traditionally favor strong private property rights but have often ruled against plaintiffs asserting their patents in these decisions.

A modified version of the at least one claim pleading standard would provide much needed clarity to this situation. This pleading standard would require plaintiffs to sufficiently plead each element of at least one claim of the infringed patent, regardless of technology,

212. See *MACOM Tech. Sol. Holdings, Inc. v. Infineon Techs. AG*, No. 2:16-CV-02859-CAS, 2017 WL 3449596, at *5 (C.D. Cal. June 5, 2017) (“Where the subject patent is ‘a relatively simple, mechanical product,’ plaintiff may plausibly allege infringement based only upon the patent claims themselves and an image of the accused product. ‘In a more complex, unusual case, the minimal approach might not establish a plausible allegation of direct infringement.’” (citation omitted)).

213. FED. R. CIV. P. 84 advisory committee’s note to 2015 abrogation (2015) (abrogated 2015).

214. See *supra* Section II.A.

215. See, e.g., *Artrip v. Ball Corp.*, No. 1:14CV00014, 2017 WL 3669518, at *5 (W.D. Va. Aug. 24, 2017) (granting motion to dismiss but permitting plaintiff to file a third amended complaint).

while allowing other claims within the same patent to be pled with lesser specificity. This pleading standard complies with the Supreme Court's pleading jurisprudence in *Twombly* and *Iqbal* by requiring a plausible claim for relief that puts the defendant on notice of infringement allegations, without placing an undue burden on the plaintiff at the pleading stage. Additionally, this pleading standard creates a barrier to entry for patent trolls while not being so strict as to deter meritorious suits. Regardless of which pleading standard is eventually chosen, the data suggests a single pleading standard is required that clarifies pleading for plaintiffs and provides flexibility for judges. With a single pleading standard, courts may finally be able to agree that the purposes of FRCP 84 have been fulfilled and that Form 18 is truly no longer necessary.

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