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## NOTE

# Effectuating the Benefits of the *Twombly* Plausibility Standard in Patent Infringement Cases: Application of Rule 9 Post-Abrogation of Rule 84

*Elizabeth Chang\**

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\* Copyright © 2017 Elizabeth Chang. J.D. Candidate, University of California, Davis School of Law, 2018; B.E. Concentration in Bioengineering, Dartmouth College, 2012; B.A. Physics, Colby College, 2011; Senior Notes and Comments Editor, UC Davis Law Review. Special thanks to Professor Brian Soucek for providing me with thoughtful feedback and guidance on early drafts of this Note. Many thanks to the editors, members, and staff of the UC Davis Law Review for helpful comments and editing throughout the publication process. Finally, thanks to my family and friends for their constant love, support, and inspiration throughout law school.

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INTRODUCTION

On December 1, 2015, the Supreme Court adopted the Judicial Conference Advisory Committee's recommended changes to the Federal Rules of Civil Procedure.<sup>1</sup> Among these changes was the abrogation of Rule 84 and its Appendix of Forms,<sup>2</sup> which included sample complaints for direct patent infringement cases. Rule 84 stated, "[t]he forms suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."<sup>3</sup> In practice, Rule 84 allowed plaintiffs to use the forms to satisfy the requirements of the rules they exemplified.<sup>4</sup> This allowance was particularly significant in the use of Form 18 in direct patent infringement cases. Form 18 contained an example complaint for direct patent infringement cases, which only required: (1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a statement that defendant has been infringing the patent by "making, selling, and using [the device] embodying the patent;" (4) a statement that the plaintiff has given the defendant notice of its infringement; and (5) a demand for an injunction and damages.<sup>5</sup> Although Form 18 satisfied the requirements for a direct patent infringement complaint, the Federal Circuit recognized that Form 18 failed to provide sufficient notice to an infringer and would fail regular pleading standards.<sup>6</sup> Nevertheless, the Federal Circuit ultimately found Form 18 sufficient because of Rule 84.<sup>7</sup> Thus, the abrogation of Rule 84 has left district courts with little direction on the pleading standards for direct patent

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<sup>1</sup> Supreme Court of the United States, *Proposed Amendments to the Federal Rules of Civil Procedure*, SUP. CT. (Apr. 29, 2015), [https://www.supremecourt.gov/orders/courtorders/frcv15\(update\)\\_1823.pdf](https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

<sup>2</sup> FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

<sup>3</sup> FED. R. CIV. P. 84 (2007) (abrogated 2015).

<sup>4</sup> FED. R. CIV. P. 84 advisory committee's note to 1946 amendment (explaining that the forms were "sufficient to withstand attack under the rules under which they are drawn").

<sup>5</sup> See FED. R. CIV. P. Form 18; see also *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1334 (Fed. Cir. 2012).

<sup>6</sup> See, e.g., *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J., concurring in part and dissenting in part) (recognizing Form 18 fails to provide sufficient notice because it does not state which claims are asserted and what features of the device are alleged to infringe the claims); CIVIL RULES ADVISORY COMM., MINUTES 14 (Oct. 8-9, 2009), [hereinafter OCTOBER 2009 CIVIL RULES MINUTES], [http://www.uscourts.gov/sites/default/files/fr\\_import/CV10-2009-min.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV10-2009-min.pdf) (noting that the Chief Judge of the Federal Circuit considers Form 18 an embarrassment and believes it has been troubling even before *Twiqbal*).

<sup>7</sup> See *McZeal*, 501 F.3d at 1360.

infringement cases. Courts have the option to follow Form 18 requirements after its abrogation<sup>8</sup> or they can apply the current pleading standard used in all civil actions set forth in *Bell Atlantic Corp. v. Twombly*<sup>9</sup> and *Ashcroft v. Iqbal*<sup>10</sup> (“*Twiqbal*”), which is arguably a higher pleading standard than Form 18.

This Note argues that the current pleading standard set forth in *Twiqbal* should not be applied to direct patent infringement cases, but recognizes the need for a heightened pleading standard in patent infringement cases and proposes a solution that would lead to a uniform standard. Part I provides the legal background for pleading standards and the pleading standard that Rule 84 and Form 18 established in direct patent infringement cases. It also discusses Rule 8 of the Federal Rules of Civil Procedure, which specifies the pleading requirements that the U.S. Supreme Court ultimately interpreted and applied in *Twiqbal*. However, after the Supreme Court established a new plausibility standard in *Twiqbal*,<sup>11</sup> the Federal Circuit concluded that when there is a conflict between Form 18 and *Twiqbal*, Form 18 controls.<sup>12</sup> Thus, upon the abrogation of Rule 84 and Form 18, district courts are unclear on whether the *Twiqbal* standard applies to direct patent infringement cases, and if it does, how to apply it.<sup>13</sup>

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<sup>8</sup> See, e.g., *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 14-cv-0772-GMN-NJK, 2016 U.S. Dist. LEXIS 5426, at \*7 (D. Nev. Jan. 15, 2016) (analyzing the sufficiency of a complaint using the requirements formerly set forth in Form 18); see also *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 U.S. Dist. LEXIS 111689, at \*6 (N.D. Cal. Aug. 22, 2016) (recognizing that at least one court concluded that a plaintiff sufficiently pleads a claim for patent infringement if it complies with Form 18).

<sup>9</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face”).

<sup>10</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that conclusory allegations are not entitled to an assumption of truth).

<sup>11</sup> *Id.* at 678-81; *Twombly*, 550 U.S. at 570.

<sup>12</sup> See *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013) (“[T]o the extent any conflict exists between *Twombly* (and its progeny) and the Forms regarding pleadings requirements, the Forms control.”); *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (“[T]o the extent the parties argue that *Twombly* and its progeny conflict with the Forms and create different pleadings requirements, the Forms control.”).

<sup>13</sup> See, e.g., *RainDance Techs., Inc. v. 10X Genomics, Inc.*, No. 15-152-RGA, 2016 U.S. Dist. LEXIS 33875, at \*7 (D. Del. Mar. 4, 2016); *InCom Corp. v. Walt Disney Co.*, No. CV15-3011, 2016 U.S. Dist. LEXIS 71319, at \*7-9 (C.D. Cal. Feb. 4, 2016) (finding claimant’s allegations that the infringing product “perform[s] the same unique function” satisfy the *Twombly* plausibility standard). But see *Hologram USA, Inc.*, 2016 U.S. Dist. LEXIS 5426, at \*10.

Part II argues that the application of *Twiqbal* is not only legally inconsistent with the Federal Rules of Civil Procedure, but also, for policy reasons, is not the proper standard that should be applied in pleading direct infringement cases. Specifically, Part II.A discusses the implications of the 2015 Advisory Committee Note<sup>14</sup> that states the existing pleading standards remain unaltered upon the abrogation of Rule 84. At least one district court relied on the Advisory Committee's Note when applying Form 18 requirements post-abrogation of Rule 84.<sup>15</sup> But, the majority of district courts have rejected this reasoning by arguing that the exception created by Form 18 was not part of the existing pleading standards that the Advisory Committee was referring to in its 2015 Note.<sup>16</sup>

Part II.B addresses the inconsistent application of the *Twiqbal* standard to direct patent infringement cases post-abrogation of Rule 84 and Form 18. District courts have used varying levels of interpretation to define the *Twiqbal* standard, particularly the "same unique function" test<sup>17</sup> and the limitation-by-limitation analysis.<sup>18</sup> Because of this inconsistent application, district courts introduce a level of uncertainty in patent infringement cases that undermines the *quid pro quo* of patent law.

Part II.C explores the policy arguments that support a heightened pleading standard but contends that the application of *Twiqbal* is not the appropriate standard. Because application of *Twiqbal* is contrary to the Advisory Committee's explicit instructions, and it leads to inconsistent results, this Note explores other heightened pleading standards that might be more practical. Thus, this Note will discuss the heightened pleading standard proposed in the Innovation Act<sup>19</sup>

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<sup>14</sup> FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

<sup>15</sup> See, e.g., *Hologram USA, Inc.*, 2016 U.S. Dist. LEXIS 5426, at \*7 n.1 (relying on the Advisory Committee Note associated with Rule 84's abrogation to justify the application of the "previously existing standards in ruling upon [the motion to dismiss]").

<sup>16</sup> *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 U.S. Dist. LEXIS 111689, at \*5-7 (N.D. Cal. Aug. 22, 2016); see *Atlas IP, LLC v. Exelon Corp.*, 189 F. Supp. 3d 768, 774-75 (N.D. Ill. 2016); *Tannerite Sports, LLC v. Jerent Enters., LLC*, No. 6:15-cv-00180-AA, 2016 U.S. Dist. LEXIS 57942, at \*14-15 (D. Or. May 2, 2016); *Atlas IP LLC v. Pac. Gas & Elec. Co.*, No. 15-cv-05469, 2016 U.S. Dist. LEXIS 60211, at \*3-5 (N.D. Cal. Mar. 9, 2016).

<sup>17</sup> See *DermaFocus LLC v. Ulthera, Inc.*, 201 F. Supp. 3d 465, 469 (D. Del. 2016).

<sup>18</sup> See *e.Dig. Corp.*, 2016 U.S. Dist. LEXIS 111689, at \*3 (noting that several courts applying *Twombly* require plaintiffs to "plausibly allege that the accused product practices each of the limitations found in at least one asserted claim") (collecting cases).

<sup>19</sup> See H.R. 9, 114th Cong. (2015) (arguing for legislation addressing patent

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and will discuss how this piece of legislation will inform a superior solution proposed in Part III.

Part III proposes a solution that will effectuate the benefits of the *Twiqbal* standard in infringement cases while eliminating the inconsistent applications resulting from *Twiqbal* jurisprudence. The proposed solution is an amendment to Rule 9 that would include a substantive pleading standard for patent infringement cases. The proposed amendment will contain elements that derive language from both the Innovation Act<sup>20</sup> and district court cases that have interpreted *Twiqbal* as applied to patent infringement cases. Additionally, the proposed amendment will also address and resolve the issues revealed by *Twiqbal* and the Innovation Act.

## I. BACKGROUND

The Federal Rules of Civil Procedure provide pleading requirements for a plaintiff to sufficiently state a claim for relief. Rule 8(a)(2) requires a complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>21</sup> The goal behind the adoption of Rule 8 was to require pleadings that put a party on notice of the claims asserted against it.<sup>22</sup> As a result of a notice-pleading standard, courts can dispose of meritless claims through liberal discovery rules and summary judgment motions.<sup>23</sup>

### A. *The Twiqbal Standard*

In interpreting Rule 8, the U.S. Supreme Court in *Bell Atl. Corp. v. Twombly* established that plaintiffs must meet a plausibility standard to survive dismissal.<sup>24</sup> The plaintiffs in *Twombly* alleged that the

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reform that includes a section advocating heightened pleading standards for patent infringement cases); H.R. 3309, 113th Cong. (2013) (same).

<sup>20</sup> See H.R. 9 (arguing for legislation addressing patent reform that includes a section advocating heightened pleading standards for patent infringement cases); H.R. 3309 (same).

<sup>21</sup> FED. R. CIV. P. 8(a)(2).

<sup>22</sup> See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (recognizing that notice pleadings “disclose more precisely the basis of both claim and defense and . . . define more narrowly the disputed facts and issues”).

<sup>23</sup> See *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002); *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009); see also *Conley*, 355 U.S. at 48 (recognizing that the “purpose of pleading is to facilitate a proper decision on the merits”).

<sup>24</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

defendants violated antitrust laws by engaging in parallel conduct to prevent plaintiff's entry into the market.<sup>25</sup> In dismissing the plaintiff's complaint, the Court noted that "[a]n allegation of parallel conduct is [] much like a naked assertion of conspiracy . . . it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility."<sup>26</sup> Thus, through *Twombly*, the Court overruled a "no set of facts" standard<sup>27</sup> and established a heightened pleading standard of plausibility.<sup>28</sup> The Court held that in order to survive dismissal there must be "enough facts to state a claim to relief that is plausible on its face."<sup>29</sup>

In *Ashcroft v. Iqbal*, the Court affirmed the plausibility standard and further defined the scope of *Twombly*. In *Iqbal*, a Pakistani Muslim claimed that federal officials unconstitutionally designated him as a person of "high interest" and subjected him to harsh conditions of confinement following the September 11, 2001 attacks.<sup>30</sup> In holding that *Iqbal's* claims against the federal officials for "purposeful and unlawful discrimination"<sup>31</sup> failed to meet the plausibility standard, the Court established a two pronged approach for pleading standards: (1) disregard any conclusory statements in the complaint; and (2) accept all non-conclusory allegations as true to determine whether the complaint states a plausible claim for relief.<sup>32</sup> In addition to establishing the "Twombly Two-Step," the Court also clarified the scope of *Twombly* and found the plausibility standard applied to all civil actions.<sup>33</sup>

The *Twombly* Court defined the plausibility standard as requiring plaintiffs to "nudge[] their claims across the line from conceivable to

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<sup>25</sup> *Id.* at 550-51.

<sup>26</sup> *Id.* at 557.

<sup>27</sup> *Conley*, 355 U.S. at 45-46 (stating "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

<sup>28</sup> *Twombly*, 550 U.S. at 562-63 (noting "*Conley's* 'no set of facts' language has been questioned, criticized, and . . . after puzzling the profession for 50 years . . . has earned its retirement").

<sup>29</sup> *Id.* at 570.

<sup>30</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 668-69 (2009).

<sup>31</sup> *Id.* at 687.

<sup>32</sup> *Id.* at 678-80 (noting "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . only a complaint that states a plausible claim for relief survives a motion to dismiss").

<sup>33</sup> *Id.* at 684 (rejecting plaintiff's argument that *Twombly* applied only to antitrust disputes).

plausible.”<sup>34</sup> Although the Court notes that the plausibility standard is not a heightened standard, some scholars disagree and argue that *Twiqbal* sets a significantly higher standard that will deprive Americans of their day in court.<sup>35</sup>

### B. Form 18 Patent Pleading Standards

Prior to its abrogation, Rule 84 established that Form 18 satisfied pleading requirements for direct patent infringement cases.<sup>36</sup> However, when *Twiqbal* was decided, the Federal Circuit had to address whether Form 18 would still be sufficient to state a claim, since Form 18’s requirements arguably did not meet the *Twiqbal* standard.<sup>37</sup> The Federal Circuit affirmed the sufficiency of Form 18, finding that whenever there is a conflict between *Twiqbal* and Form 18, the forms control.<sup>38</sup> As such, Form 18 effectively became an exception to the heightened *Twiqbal* standard.

### C. Abrogation of Rule 84 & Patent Pleading Standards

The 2015 Advisory Committee Note for Rule 84 states: “The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”<sup>39</sup> Although the Advisory Committee instructed that existing pleading standards should remain unaltered, many district courts, upon abrogation of

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<sup>34</sup> *Twombly*, 550 U.S. at 570 (holding that “[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed”).

<sup>35</sup> See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010) (arguing Americans could be deprived of a meaningful day in court by “setting significantly higher and more resource-consumptive procedural barriers for plaintiffs”).

<sup>36</sup> *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013) (“Rule 84 . . . makes clear that a proper use of a form contained in the Appendix of Forms, [i.e. Form 18], effectively immunizes a claimant from attack regarding the sufficiency of the pleading.”).

<sup>37</sup> See generally R. Benjamin Cassady et al., *2015 is Almost Over — What Happened to Patent Reform?*, LAW360 (Dec. 18, 2015), <http://www.law360.com/articles/738706/2015-is-almost-over-what-happened-to-patent-reform> (noting that the “de minimis pleading standard [Form 18] encourages patentees to use vague complaints as leverage for extracting settlements”).

<sup>38</sup> See *K-Tech Telecomms., Inc.*, 714 F.3d at 1283; *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1334 (Fed. Cir. 2012).

<sup>39</sup> FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment.



Form 18, have applied varying interpretations of the Twiqbal standard to patent infringement cases.<sup>40</sup>

Many district courts have argued that Twiqbal now applies to direct patent infringement cases since Form 18 no longer exists.<sup>41</sup> However, among cases that apply Twiqbal under this reasoning, there are differing interpretations and applications of Twiqbal in direct patent infringement cases.<sup>42</sup> Some courts have interpreted plausibility as “same unique function” — “[a] plaintiff may have a plausible claim for direct infringement sufficient to withstand [Twiqbal] scrutiny by specifically identifying . . . products which perform the *same unique function* as the patented system.”<sup>43</sup> Another interpretation provides a narrower and rigid application of plausibility through a limitation-by-limitation analysis where plaintiffs must specifically relate factual assertions to the asserted claims.<sup>44</sup>

Although the majority of district courts have applied the Twiqbal standard, at least one district court applied Form 18 requirements post-abrogation of Rule 84.<sup>45</sup> In *Hologram USA v. Pulse Evolution Corp.*, the court supported its decision by citing the 2015 Advisory Committee Note that explicitly states existing pleading standards remain unaltered.<sup>46</sup> Although the court recognized the abrogation of Rule 84 and Form 18, it argued that the exception created by Form 18

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<sup>40</sup> See, e.g., *RainDance Techs., Inc. v. 10X Genomics, Inc.*, No. 15-152-RGA, 2016 U.S. Dist. LEXIS 33875, at \*2 (D. Del. Mar. 4, 2016); *InCom Corp. v. Walt Disney Co.*, No. CV15-3011, 2016 U.S. Dist. LEXIS 71319, at \*7-9 (C.D. Cal. Feb. 4, 2016) (finding claimant’s allegations that the infringing product “perform[s] the same unique function” satisfy the *Twombly* plausibility standard). *But see* *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 14-cv-0772-GMN-NJK, 2016 U.S. Dist. LEXIS 5426, at \*10 (D. Nev. Jan. 15, 2016).

<sup>41</sup> *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 U.S. Dist. LEXIS 111689, at \*7 (N.D. Cal. Aug. 22, 2016) (arguing “[a]bsent Form 18 itself, there is simply no support in the Federal Rules of Civil Procedure for a different pleading standard for direct patent infringement claims”).

<sup>42</sup> See, e.g., *id.* at \*13; *DermaFocus LLC v. Ulthera, Inc.*, 201 F. Supp. 3d 465, 469 (D. Del. Aug. 11, 2016); *RainDance Techs., Inc.*, 2016 U.S. Dist. LEXIS 33875, at \*6 (finding “plaintiff makes no attempt to relate any [of] their factual assertions with any of the asserted claims”); *InCom Corp.*, 2016 U.S. Dist. LEXIS 71319, at \*7-9; *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 U.S. Dist. LEXIS 33075, at \*19-20 (N.D. Cal. Mar. 11, 2010).

<sup>43</sup> See, e.g., *DermaFocus LLC*, 201 F. Supp. 3d at 469 (emphasis added).

<sup>44</sup> See, e.g., *RainDance Techs., Inc.*, 2016 U.S. Dist. LEXIS 33875, at \*6 (finding “plaintiffs make no attempt to relate any factual assertion with asserted claims”).

<sup>45</sup> See *Hologram USA, Inc.*, 2016 U.S. Dist. LEXIS 5426, at \*7 & n.1.

<sup>46</sup> *Id.*

should survive abrogation of the forms since this exception belonged to the “existing pleading standards.”<sup>47</sup>

## II. ANALYSIS

### A. The “Existing Pleading Standards” Include the Form 18 Exception

The Advisory Committee Note in the 2015 amendment explicitly instructed courts to leave existing pleading standards unaltered.<sup>48</sup> Therefore, under a plain reading of this instruction, the *Hologram* court correctly applied Form 18 requirements, post-abrogation of Rule 84, to the plaintiff’s complaint in denying the defendant’s motion to dismiss.<sup>49</sup> Although *Hologram* recognized the Rule 84 Advisory Committee Note, many district courts disagreed with the *Hologram* reasoning and applied *Twiqbal* post-abrogation. In a recent decision, the Northern District of California in *e.Digital Corp. v. iBaby Labs, Inc.* argued that the “existing pleading standards” only referred to *Twiqbal* and did not include the exception that was created by Form 18.<sup>50</sup> In support of its application of *Twiqbal*, the court argued that “nothing in the Advisory Committee Note suggests that it was aware of the [Form 18] exception to *Twombly*.”<sup>51</sup> The Northern District of California’s reasoning is erroneous because (1) the Committee had actual knowledge of the exception when it decided to abrogate Rule 84 and its forms; and (2) the Advisory Committee Note does not include a requirement that the Committee had to be aware of the exception in order for it to be included in the “existing pleading standards.”

The Advisory Committee on Civil Rules is a legislative body whose power is derived from the Rules Enabling Act.<sup>52</sup> The Act authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure.<sup>53</sup> By 1988, amendments to the Rules Enabling Act formalized the Supreme Court’s delegation of the rulemaking process

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<sup>47</sup> *See id.*

<sup>48</sup> FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment.

<sup>49</sup> *See Hologram USA, Inc.*, 2016 U.S. Dist. LEXIS 5426, at \*7-8 & n.1.

<sup>50</sup> *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 U.S. Dist. LEXIS 111689, at \*6-7 (N.D. Cal. Aug. 22, 2016) (arguing that the “existing pleading standards’ simply refer to *Twombly* and its progeny, but [do] not includ[e] the exception recognized by *K-Tech*”).

<sup>51</sup> *Id.*

<sup>52</sup> *See* 28 U.S.C. § 2071 (2012).

<sup>53</sup> *Id.* § 2071(a) (stating “[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business”).

to committees, such as the Advisory Committee on Civil Rules.<sup>54</sup> In addition to formally establishing judicial advisory committees, the 1988 amendments also required “appropriate public notice” and an “opportunity for comment.”<sup>55</sup> Based on comments from the general public, which may include lawyers, scholars, and judges, the Advisory Committee can choose to make changes to the contemplated amendments.<sup>56</sup> If the Supreme Court concurs with the proposed amendments from the Advisory Committee, then the Court promulgates the rules by order before May 1, and the rules take effect on December 1 of the same year, unless Congress rejects the rules.<sup>57</sup>

The Advisory Committee’s minutes<sup>58</sup> and the public comments<sup>59</sup> received by the Committee indicate that the Committee was aware of the Form 18 exception in direct patent infringement cases. When the Advisory Committee on Civil Rules met on November 2, 2012, part of the meeting format included a proposal and discussion on Rule 84.<sup>60</sup> At this meeting, the Rule 84 subcommittee discussed interest in abrogating Rule 84 but had concerns regarding the consequences of its abrogation.<sup>61</sup> Specifically, the subcommittee questioned whether the forms were used in practice.<sup>62</sup> The subcommittee found that “very few professionals . . . use the Rule 84 Forms,” which supported its consideration of abrogating the rule.<sup>63</sup> The subcommittee also noted that “the patent bar [was] agitated about the serious problems . . . in Form 18.”<sup>64</sup> The fact that the subcommittee addressed the

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<sup>54</sup> *How the Rulemaking Process Works*, USCOURTS.GOV, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Oct. 21, 2016); see § 2071.

<sup>55</sup> § 2071(b) (stating that “[a]ny rule prescribed by a court, other than the Supreme Court . . . shall be prescribed only after giving appropriate public notice and an opportunity for comment”); Edward Brunet, *The Civil Rules Committee and Amending Rule 56*, 18 LEWIS & CLARK L. REV. 627, 634-36 (2014).

<sup>56</sup> *How the Rulemaking Process Works*, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> See CIVIL RULES ADVISORY COMM., MINUTES 19 (Nov. 2, 2012), [http://www.uscourts.gov/sites/default/files/fr\\_import/CV11-2012-min.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV11-2012-min.pdf) [hereinafter NOVEMBER 2012 CIVIL RULES MINUTES] (introducing report of Rule 84 subcommittee).

<sup>59</sup> Public Comments to *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS (2013-14), <https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002>.

<sup>60</sup> NOVEMBER 2012 CIVIL RULES MINUTES, *supra* note 58, at 2.

<sup>61</sup> *Id.* at 19.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also OCTOBER 2009 CIVIL RULES MINUTES, *supra* note 6, at 14 (“The Chief Judge of the Federal Circuit, for example, has called the Form 18 complaint for patent

insufficiencies of Form 18 demonstrates the Committee's knowledge of the Form 18 exception. Thus, the court's argument in *e.Digital Corp.* is unfounded. The court argued that because the Committee was unaware of the Form 18 exception, it did not belong to "existing pleading standards."<sup>65</sup> The court failed to recognize that the Advisory Committee had actual knowledge of the exception. Moreover, in the November 2012 meeting, Judge Campbell discussed the notion that the "courts might view the forms, [although] no longer official, as still a form of legislative history that illuminates the continuing meaning of Rule 8 pleading standards."<sup>66</sup> Accordingly, the Advisory Committee minutes demonstrate that the Form 18 requirements should certainly belong to the "existing pleading standards" that should be unaltered post-abrogation of Rule 84.

The Committee also received public comments regarding the abrogation of Rule 84 as a result of the Rules Enabling Act.<sup>67</sup> The comments the Committee received also made the Committee aware of the Form 18 exception. On February 7, 2014, Brooke Coleman submitted a public comment to the Advisory Committee objecting to the abrogation of forms.<sup>68</sup> With her letter, she submitted her article *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*.<sup>69</sup> In her article, Coleman quoted a Federal Circuit decision in 2012, which held that Form 18 satisfied the pleading standard even if it conflicted with *Twombly*.<sup>70</sup> Coleman's article — which was made available to the Committee through her public comment — should have also made the Advisory Committee aware that Form 18 created an exception to pleading standards in patent infringement cases.

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infringement an embarrassment.”).

<sup>65</sup> *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 U.S. Dist. LEXIS 111689, at \*7 (N.D. Cal. Aug. 22, 2016) (arguing that the “existing pleading standards’ simply refer to *Twombly* . . . nothing in the Advisory Committee note suggests that it was aware of the [Form 18] exception”).

<sup>66</sup> NOVEMBER 2012 CIVIL RULES MINUTES, *supra* note 58, at 19-20 (discussing Judge Colloton's concern on whether pleading standards developed by the Forms will live on in the common law).

<sup>67</sup> See Public Comments to *Proposed Amendments to the Federal Rules of Civil Procedure*, *supra* note 59.

<sup>68</sup> Brooke Coleman, Comment to *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS (Feb. 7, 2014), <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-0654>.

<sup>69</sup> *Id.*

<sup>70</sup> Brooke Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1103 (2015) (quoting the Federal Circuit in holding Form 18 controls when it is in conflict with *Twombly*).

Even though the Advisory Committee had actual knowledge of the exception,<sup>71</sup> the Advisory Committee Note does not require that the Committee had to be aware of the exception to include it in the “existing pleading standards.”<sup>72</sup> The 2015 Advisory Committee Note for Rule 84 states: “the abrogation of [r]ule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”<sup>73</sup> In *e.Digital Corp.*, the district court did not follow a plain reading of the Advisory Committee Note and instead interpreted the Note to require that the Advisory Committee have knowledge of an exception for it to “exist” in the pleading standards.<sup>74</sup> The district court expanded the definition of the word “existing” beyond its dictionary definition. By definition, to “exist” is “to have real being.”<sup>75</sup> Upon a plain reading of the Advisory Committee Note,<sup>76</sup> the Form 18 exception certainly belonged to the “existing pleading standards,” since it was “real” and had “being,” as recognized by the Federal Circuit.<sup>77</sup>

The Advisory Committee meeting minutes and the receipt of public comments regarding the abrogation of Rule 84 show that the Committee knew about the Form 18 exception in patent pleading standards.<sup>78</sup> Moreover, a plain reading of the Advisory Committee Note does not require the Committee to know of the exception for it to belong to the “existing pleading standards.” As such, this exception should belong to the “existing pleading standards” noted by the

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<sup>71</sup> See *supra* notes 58–70 and accompanying text.

<sup>72</sup> FED. R. CIV. P. 84 advisory committee’s note.

<sup>73</sup> *Id.*

<sup>74</sup> *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 U.S. Dist. LEXIS 111689, at \*7 (N.D. Cal. Aug. 22, 2016) (arguing that the “existing pleading standards’ simply refer to *Twombly* . . . nothing in the Advisory Committee note suggests that it was aware of the [Form 18] exception”).

<sup>75</sup> *Exist*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/exist> (last visited Jan. 9, 2017).

<sup>76</sup> The “Plain Meaning Rule” is a canon of statutory interpretation, most notably used by Justice Scalia, that aids courts in interpreting a statute. See Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL’Y 401, 401 (1994) (discussing the Plain Meaning Rule as Scalia’s cardinal canon in statutory interpretation). In applying a plain reading analysis, Justice Scalia often read statutes narrowly by referring to dictionary definitions in understanding the overall meaning of a statute. *Id.* at 439-41.

<sup>77</sup> See *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1336 (Fed. Cir. 2012).

<sup>78</sup> See *supra* notes 58–70 and accompanying text.

Advisory Committee in the abrogation of Rule 84.<sup>79</sup> Therefore, in order for district courts to comply with the Federal Rules of Civil Procedure, they must continue to recognize and apply the Form 18 exception in direct patent infringement cases.

*B. Inconsistent Application of Twiqbal to Recent Direct Infringement Cases Results in Increased Uncertainty in the Patent System*

Article I, Section 8, Clause 8, of the U.S. Constitution grants Congress the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>80</sup> A patent grants a patentee “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.”<sup>81</sup> Thus, direct patent infringement consists of making, using, selling, or offering to sell a patented invention in the United States without the patentee’s permission.<sup>82</sup> To prevail on a direct patent infringement claim, either in literal infringement or under the doctrine of equivalents, the patentee must show that the allegedly infringing product practices all elements of a specific patent claim.<sup>83</sup> Thus, a key issue post-abrogation of Rule 84 is whether a plaintiff, in its complaint for patent infringement, is required to identify the specific patent claim that the allegedly infringing product practices.

*1. Inconsistent Application of Twiqbal to Recent Direct Infringement Cases*

Since the abrogation of Rule 84 and its forms, district courts have applied the Twiqbal plausibility standard inconsistently in answering this question. In some instances, courts have not required plaintiffs to identify a specific claim in their complaints, but instead assess plausibility by using broader language, such as “same unique function.”<sup>84</sup> However, in other cases, courts have analyzed Twiqbal

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<sup>79</sup> FED. R. CIV. P. 84 advisory committee’s note.

<sup>80</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>81</sup> 35 U.S.C. § 154(a)(1) (2012).

<sup>82</sup> *Id.* § 271 (2012).

<sup>83</sup> *TeleSign Corp. v. Twilio, Inc.*, CV 16-2106 PSG (SSx), 2016 U.S. Dist. LEXIS 123516, at \*7 (C.D. Cal. Aug. 3, 2016); *see also* *Wi-LAN, Inc. v. Apple Inc.*, 811 F.3d 455, 463 (Fed. Cir. 2016); *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995).

<sup>84</sup> *See, e.g.*, *DermaFocus LLC v. Ulthera, Inc.*, 201 F. Supp. 3d 465, 469 (D. Del. 2016); *InCom Corp. v. Walt Disney Co.*, No. 15-cv-3011, 2016 U.S. Dist. LEXIS

plausibility under a “limitation-by-limitation” test, which is comparable to what is statutorily required to prevail on an infringement claim (i.e., does the infringing product practice all elements of a specific patent claim?).<sup>85</sup>

In *DermaFocus L.L.C. v. Ulthera, Inc.*, a Delaware district court stated that the Twiqbal plausibility standard is satisfied when the plaintiffs specifically identify products that perform the “same unique function” as the patented system.<sup>86</sup> The patent at issue in *DermaFocus* was a method and apparatus for skin treatment using ultrasound,<sup>87</sup> and the plaintiffs alleged that the defendant’s non-invasive ultrasound technology for lifting and tightening skin infringed on the patent.<sup>88</sup> The defendants argued for a motion to dismiss since the plaintiff did not specify particular combinations of components that infringed, nor how the claimed method was performed.<sup>89</sup> Upon holding the plaintiff’s complaint sufficient to survive dismissal, the court noted that the plaintiff’s patent contained a “comprising” transition and disclosed a variety of configurations within the invention itself.<sup>90</sup> Additionally, the court recognized that the information the defendants demanded may not have been public knowledge or reasonably accessible to the plaintiff.<sup>91</sup> In doing so, the Delaware district court recognized a plausibility standard as one of “same unique function.” Since the plaintiffs had a broader patent claim, evidenced by an open (“comprising”) transition claiming a variety of configurations, and may not have had all the information necessary to specify infringing components or methods, the court seemed satisfied that the plaintiffs sufficiently pled infringement because the alleged infringing product had the same unique function as the patented invention.<sup>92</sup>

A New Jersey district court also applied the “same unique function” analysis and grappled with the issue of whether “[Twiqbal] require[s]

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71319, at \*7-9 (C.D. Cal. Feb. 4, 2016); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 U.S. Dist. LEXIS 33075, at \*19-20 (N.D. Cal. Mar. 11, 2010).

<sup>85</sup> See, e.g., *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 U.S. Dist. LEXIS 111689, at \*13 (N.D. Cal. Aug. 22, 2016); *RainDance Techs., Inc. v. 10X Genomics, Inc.*, No. 15-152-RGA, 2016 U.S. Dist. LEXIS 33875, at \*6 (D. Del. Mar. 4, 2016) (finding “Plaintiff makes no attempt to relate any [of] their factual assertions with any of the asserted claims”).

<sup>86</sup> *DermaFocus LLC*, 201 F. Supp. 3d at 469.

<sup>87</sup> *Id.* at 467.

<sup>88</sup> *Id.* at 469-70.

<sup>89</sup> *Id.* at 470.

<sup>90</sup> See *id.*

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

<sup>92</sup> See *id.*

— as a matter of law — a patentee to identify specific patent claims in a pleading to state a plausible claim for patent infringement.<sup>93</sup> In holding that a patentee only has to show the allegedly infringing product has the same unique function as the patented invention, the court in *Telebrands Corp. v. Ragner Tech. Corp.* concluded that even though specific claims were not identified by the patentee, the court could reasonably infer that the allegedly infringing products practice one or more claims of the patent.<sup>94</sup>

While some courts applying the “same unique function” had a broader conception of the Twiqbal plausibility standard, other courts applied a narrower interpretation of the Twiqbal standard by requiring plaintiffs to identify factual assertions that infringed on specific asserted patent claims.<sup>95</sup> In *RainDance Techs., Inc. v. 10X Genomics, Inc.*, the plaintiffs argued that the defendants infringed on their claim for a method for conducting autocatalytic reactions in a microfluidic system.<sup>96</sup> The court assessed two specific method claims regarding the function of the microfluidic device: (1) the method for droplet formation by applying a same constant pressure; and (2) a method for conducting the autocatalytic reaction within the device.<sup>97</sup> In granting the defendant’s motion to dismiss, the court noted that the plaintiff failed to assert specific factual assertions that demonstrated the defendant’s infringement.<sup>98</sup> Particularly, the court recognized that the plaintiff failed to identify the role of pressure in the defendant’s microfluidic device, an important mechanism in the plaintiff’s method of droplet formation.<sup>99</sup> Additionally, the court pointed to a second claim that described a method for conducting an autocatalytic reaction and determined that the plaintiff’s description of the method was unclear and the court could not definitively identify what component or element the defendant was infringing.<sup>100</sup> Furthermore, the court observed that the plaintiff only relied on the defendant’s promotional materials, instead of purchasing the device to see how the alleged

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<sup>93</sup> *Telebrands Corp. v. Ragner Tech. Corp.*, No. 15-3163, 2016 U.S. Dist. LEXIS 114436, at \*9 (D. N.J. Aug. 25, 2016).

<sup>94</sup> *See id.* at \*12-15.

<sup>95</sup> *See, e.g., RainDance Techs., Inc. v. 10X Genomics, Inc.*, No. 15-152-RGA, 2016 U.S. Dist. LEXIS 33875, at \*6 (D. Del. Mar. 4, 2016) (finding “Plaintiff makes no attempt to relate any [of] their factual assertions with any of the asserted claims”).

<sup>96</sup> *Id.* at \*1-2.

<sup>97</sup> *Id.* at \*4-6.

<sup>98</sup> *See id.* at \*6.

<sup>99</sup> *Id.* at \*5.

<sup>100</sup> *See id.* at \*6.



infringing product actually worked, suggesting that a deeper inquiry into the functionality of the alleged infringing product was necessary.<sup>101</sup> Accordingly, the court suggested that in order for a plaintiff to provide a sufficient complaint under *Twiqbal*, a plaintiff must identify specific factual assertions, beyond what is stated in promotional materials, that address each element in the patent claim.

## 2. *Twiqbal* Leads to Increased Uncertainty in the Patent System

Although uncertainty is a common feature in all areas of law, uncertainty in patent law has a particularly deleterious effect on the patent system.<sup>102</sup> Patents provide an incentive for innovation — the *quid pro quo* of granting a patent is providing the patentee a right to exclude in exchange for public disclosure of an invention that benefits society and the promotion of scientific innovation.<sup>103</sup> Legal uncertainty in patent law undermines the *quid pro quo* of the patent system and potentially disincentivizes the creation of new technology.<sup>104</sup> President Roosevelt recognized the problems associated with uncertainty in patent law, and in 1941 issued an Executive Order that established a National Patent Planning Commission in order to study the American patent system.<sup>105</sup> In its report, the National Patent Planning Commission recognized that “[t]here should be a uniformity in the grant and treatment of patents.”<sup>106</sup> Specifically, the Commission addressed the issue of uncertainty surrounding patent validity under the doctrine of nonobviousness.<sup>107</sup> In particular, they noted that “[i]t is inconsistent with sound national policy to . . . grant patents with existing uncertainty as to their validity, and unfair to the inventors of this country . . . who have proceeded on the basis of a protective security in the form of a patent issued . . . by [the] Federal Government.”<sup>108</sup> Moreover, in this same report, the Commission advocated for the creation of a single court of patent appeals to

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<sup>101</sup> *See id.* at \*4.

<sup>102</sup> *See* Kelly Casey Mullally, *Legal (Un)certainty, Legal Process, and Patent Law*, 43 *LOY. L.A. L. REV.* 1109, 1112 (2010).

<sup>103</sup> *See id.* at 1112-13.

<sup>104</sup> *See id.*

<sup>105</sup> NAT’L PATENT PLANNING COMM’N, *THE AMERICAN PATENT SYSTEM, REPORT OF THE NATIONAL PATENT PLANNING COMMISSION*, reprinted in 25 *J. PAT. OFF. SOC’Y* 455, 456 (1943).

<sup>106</sup> *Id.* at 463.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

mitigate the uncertainty surrounding patent law.<sup>109</sup> Today, this court is known as the U.S. Court of Appeals for the Federal Circuit.<sup>110</sup>

The fact that a thirteenth court of appeals was created in order to combat uncertainty in patent law demonstrates the importance of uniformity in patent litigation. The Federal Circuit was established in 1982 in the midst of a circuit split on the nonobviousness requirement for patentability.<sup>111</sup> Because of the circuit split, patent validity often depended on where the case was filed, leading plaintiffs to forum shop and bring their suits in districts where circuit precedence would provide a favorable result.<sup>112</sup> Furthermore, this uncertainty surrounding patent validity dramatically affected the value of patents. In a subcommittee meeting for the Federal Courts Improvement Act of 1979, Homer Blair addressed the members of the committee in support of the formation of the Federal Circuit.<sup>113</sup> Mr. Blair recognized that whether a patent is valid depends on where the suit was tried, and argued that the worth of a patent should not depend on where litigation takes place.<sup>114</sup> Additionally, Pauline Newman, in her statement on behalf of seventy-eight technology-based companies in support of establishing the Federal Circuit, argued that the incentives to innovate and invest in technology are diminished if patent owners are uncertain on whether their patents will be upheld in court.<sup>115</sup>

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<sup>109</sup> *Id.* at 464.

<sup>110</sup> See Charles W. Adams, *The Court of Appeals for the Federal Circuit: More than a National Patent Court*, 49 MO. L. REV. 43, 45-46 (1984) (discussing the motivations behind the creation of the Federal Circuit).

<sup>111</sup> Some regional circuit courts rejected synergism as a requirement for the nonobviousness analysis. See, e.g., *Rengo Co. v. Molins Mach. Co.*, 657 F.2d 535, 543-47 (3d Cir. 1981); *Plastic Container Corp. v. Cont'l Plastics*, 607 F.2d 885, 904-05 (10th Cir. 1979); *Champion Spark Plug Co. v. Gyromat Corp.*, 603 F.2d 361, 372 (2d Cir. 1979); *Republic Indus., Inc. v. Schlage Lock Co.*, 592 F.2d 963, 967-72 (7th Cir. 1979). Whereas, other circuits required synergism as a part of the analysis. See, e.g., *Kori Corp. v. Wilco Marsh Buggies & Draglines*, 708 F.2d 151, 155 (5th Cir. 1983); *Smith v. Acme Gen. Corp.*, 614 F.2d 1086, 1093-95 (6th Cir. 1980); *Reinke Mfg. Co. v. Sidney Mfg. Corp.*, 594 F.2d 644, 648 (8th Cir. 1979); *Int'l Tel. & Tel. Corp. v. Raychem Corp.*, 538 F.2d 453, 456-57 (1st Cir. 1976).

<sup>112</sup> See Adams, *supra* note 110, at 57.

<sup>113</sup> *Federal Courts Improvement Act of 1979: Addendum to Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 96th Cong. 63 (1979) (statement of Homer O. Blair, Vice President, Patents and Licensing, Itek Corporation).

<sup>114</sup> *Id.*

<sup>115</sup> *Court of Appeals for the Federal Circuit-1981: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong., 192 (1981) [hereinafter *1981 Hearings*] (statement of Pauline Newman, Director, Patents and Licensing, PMC Corporation) (stating that "the

Thus, the Federal Circuit was established at a time when a centralized court would unify patent law and decrease the unpredictability of patent litigation that diminishes the incentives to innovate and invest in technology. In other words, the Federal Circuit remedied uncertainty and unpredictability that undermined the quid pro quo of patent law so that the patent system could serve “to promote the Progress of Science and useful Arts,” which the U.S. Constitution demands.<sup>116</sup>

The abrogation of Rule 84 and its Forms have led to the very uncertainty in patent law that concerned President Roosevelt, the National Patent Planning Commission, and industry proponents for the Federal Circuit.<sup>117</sup> Whether a court uses the “same unique function” test or a “limitation-by-limitation” test can determine whether or not a plaintiff’s infringement claim will proceed.<sup>118</sup> In practice, this means that in one court a patentee may succeed in bringing his claim but in another court, even within the same district, that same complaint might be dismissed for failure to state a claim.<sup>119</sup> This level of uncertainty frustrates the quid pro quo of patent law.<sup>120</sup> The incentives to publicize an invention or invest in technology are seriously undermined by the unpredictability of whether or not the judicial system will enforce the patentee’s right to exclude.<sup>121</sup> Thus, the application of *Twiqbal* in direct patent infringement cases is not only legally inconsistent with the Federal Rules of Civil Procedure, but it also leads to a level of uncertainty in patent law that undermines the quid pro quo of the patent system.

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proposed court will enhance the industrial incentive toward technological growth, and will have a direct and tangible benefit on our investment decisions and commercial incentives”).

<sup>116</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>117</sup> See *1981 Hearings*, *supra* note 115; NAT’L PATENT PLANNING COMM’N, *supra* note 105, at 456; Adams, *supra* note 110, at 45-46.

<sup>118</sup> See *supra* Part II.B.

<sup>119</sup> See *supra* Part II.B.

<sup>120</sup> See Mullally, *supra* note 102, at 1112-13.

<sup>121</sup> See *In re Bilski*, 545 F.3d 943, 977 (Fed. Cir. 2008) (Newman, J., dissenting) (“Uncertainty is the enemy of innovation. These new uncertainties not only diminish the incentives available to new enterprise, but disrupt the settled expectations of those who relied on the law as it existed.”).

C. *Twiqbal Reveals a Need for a Heightened Pleading Standard to Reduce Patent Troll Activity, but Is Not the Appropriate Standard to Apply*

While the application of *Twiqbal* in direct patent infringement cases conflicts with the Federal Rules of Civil Procedure and leads to undesirable uncertainty in patent law, there are strong policy arguments in favor of its application. By applying the *Twiqbal* plausibility standard, courts are more likely to dismiss frivolous claims early on in litigation, particularly those brought by non-practicing entities asserting their patents strictly to make a profit.<sup>122</sup> Thus, this section argues that there is a need for a heightened pleading standard, but *Twiqbal* should not be the solution because of its inconsistency with the Federal Rules of Civil Procedure and the uncertainty that results from its application.<sup>123</sup>

1. The Problem with Patent Trolls

Patent trolls are non-practicing entities that have a particularly injurious effect on the patent system.<sup>124</sup> Non-practicing entities are firms that own patents on inventions, but do not practice or manufacture the invention itself.<sup>125</sup> Some non-practicing entities include universities and individual inventors.<sup>126</sup> Universities are considered non-practicing entities since academic research rarely involves manufacturing, marketing, or distributing of a patented invention.<sup>127</sup> Similarly, individual inventors are often non-practicing because they do not have the capital to bring their inventions to the

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<sup>122</sup> See Kyle R. Williams, Note, *Plausible Pleading in Patent Suits: Predicting the Effects of the Abrogation of Form 18*, 22 MICH. TELECOMM. TECH. L. REV. 317, 338-39 (2016); Daniel Fisher, *A Small Rules Change May Make Life Much Harder for Patent Trolls*, FORBES (Sept. 12, 2014, 9:00 AM), <http://www.forbes.com/sites/danielfisher/2014/09/12/a-small-rules-change-may-make-life-much-harder-for-patent-trolls/#72819aab2b71>.

<sup>123</sup> See *supra* Part II.A-B.

<sup>124</sup> John M. Golden, “Patent Trolls” and Patent Remedies, 85 TEX. L. REV. 2111, 2112 (2007) (defining patent trolls as “a class of patent owners who do not provide end products or services themselves, but who do demand royalties as a price for authorizing the work of others”).

<sup>125</sup> FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, ch. 2, at 31 (Oct. 2003) [hereinafter TO PROMOTE INNOVATION], <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

<sup>126</sup> David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 426 (2014) (recognizing “an increasing number of patent lawsuits have been initiated by entities who do not manufacture products themselves, including universities, individual inventors, failed businesses, and speculators who purchase patents from others”).

<sup>127</sup> *Id.* at 429.

market and, therefore, prefer to license their patents instead.<sup>128</sup> Although these types of non-practicing entities play an important role in innovation, other non-practicing entities known as patent trolls<sup>129</sup> or patent assertion entities<sup>130</sup> actually play a detrimental role in the patent system.<sup>131</sup> Patent trolls assert their patents against others by threatening patent infringement actions, which lead to substantial financial losses for defendants.<sup>132</sup> To achieve their goals, patent trolls purchase ambiguously worded patents that can be interpreted to cover a breadth of technologies and use them opportunistically to extract exorbitant licensing fees by threatening meritless lawsuits.<sup>133</sup> Consequently, the Supreme Court has expressed concern over “an industry [that] has developed in which firms use patents not as a basis for producing and selling goods but, instead primarily for obtaining licensing fees.”<sup>134</sup>

Recently, aggressive patent troll activity has increased.<sup>135</sup> In 2013, a report from President Obama’s Executive Office stated that patent trolls brought 62% of all infringement suits, when only two years earlier patent trolls brought just 29% of suits.<sup>136</sup> The Executive Office also identified the significant economic and social costs of patent troll

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<sup>128</sup> See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393 (2006) (“For example, some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves.”); Schwartz & Kesan, *supra* note 126, at 430.

<sup>129</sup> See James Bessen et al., *The Private and Social Costs of Patent Trolls*, 34 REGULATION 26, 26 (2012).

<sup>130</sup> Colleen V. Chien, *Patent Assertion Entities: Presentation to the Dec 10, 2012 DOJ/FTC Hearing on PAEs*, SSRN 4 (Dec. 10, 2012), <https://papers.ssrn.com/sol3/papers.cfm?abstractid=2187314>.

<sup>131</sup> See EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 1 (June 2013), [https://obamawhitehouse.archives.gov/sites/default/files/docs/patent\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/patent_report.pdf).

<sup>132</sup> See TO PROMOTE INNOVATION, *supra* note 125.

<sup>133</sup> See Bessen et al., *supra* note 129.

<sup>134</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring) (discussing his concern that patent trolls will use an injunction “as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent”).

<sup>135</sup> See Joe Mullin, *Trolls Made 2015 One of the Biggest Years Ever for Patent Lawsuits*, ARSTECHNICA (Jan. 5, 2016, 9:38 AM), <https://arstechnica.com/tech-policy/2016/01/despite-law-changes-2015-saw-a-heap-of-patent-troll-lawsuits> (stating that 66.9% of all patent lawsuits were filed by patent trolls); Roger Parloff, *10 Biggest Patent Troll Targets in Business*, FORTUNE (Feb. 27, 2014), <http://fortune.com/2014/02/27/10-biggest-patent-troll-targets-in-business> (stating that non-practicing entity suits accounted for 67% of all new patent cases filed in 2013).

<sup>136</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 131.

activity.<sup>137</sup> In a study involving seventy-seven companies and 839 resolved litigations, the mean resolution cost of a patent troll suit was \$7.6 million, while the ninety-fifth percentile cost was \$19.1 million.<sup>138</sup> Moreover, in some instances, while corporations underwent excessive litigation costs, they ceased innovation in the infringing technology, which not only stifled scientific innovation but also deprived society of the technology itself.<sup>139</sup>

In September 2011, patent reform legislation, referred to as the Leahy-Smith America Invents Act (“AIA”),<sup>140</sup> included provisions to help curb patent troll activity. Under the AIA, Congress included a joinder statute that would increase litigation costs for patent trolls by making it harder to join multiple defendants in a single lawsuit.<sup>141</sup> Prior to the AIA, joinder issues in patent infringement cases were only subject to Rule 20 of the Federal Rules of Civil Procedure.<sup>142</sup> Under Rule 20, accused infringers could be joined together if claims against them arose “out of the same transaction, occurrence . . . and [if there was] any question of law or fact common to all defendants . . . .”<sup>143</sup> In comparison, the AIA joinder statute only permits a patentee to join multiple infringers if the claims against them arose “out of the same transaction [or] occurrence relating to the [infringement] of the *same accused product or process* [and there are] *questions of fact* common to all defendants . . . .”<sup>144</sup> The AIA joinder statute created a higher bar to join multiple infringers by requiring patentees to show common questions of fact (instead of law or facts) in their claims against defendants and that the transaction or occurrence relates to the infringement of the same accused product or process.<sup>145</sup> However, even though these AIA provisions address some of the problems

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<sup>137</sup> See *id.* at 9-10.

<sup>138</sup> RPX CORP., 2012 NPE COST STUDY: HIGH-LEVEL FINDINGS 10 chart 3 (2012), <https://www.rpxcorp.com/wp-content/uploads/sites/2/2013/07/RPX%E2%80%99s-NPE-Cost-Study-results.pdf>.

<sup>139</sup> See EXEC. OFFICE OF THE PRESIDENT, *supra* note 131, at 10 (discussing one example where a health information technology company ceased all innovation during the time they were being sued for patent infringement).

<sup>140</sup> *Id.* at 3.

<sup>141</sup> Fisher, *supra* note 122; see 35 U.S.C. § 1 (2012).

<sup>142</sup> See FED. R. CIV. P. 20.

<sup>143</sup> *Id.* 20(a)(2).

<sup>144</sup> 35 U.S.C. § 299(a) (2012) (emphasis added).

<sup>145</sup> See R. Bruce Bower & Stephen E. Kabakoff, *Reconciling Joinder and Consolidation Under the Federal Rules of Civil Procedure and Under the America Invents Act*, FINNEGAN (Dec. 7, 2012), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=2efb05db-3efd-498e-9622-6ad11c5c5828>.

resulting from patent troll activity, the Act does not completely relieve the aggressive litigation tactics brought on by patent trolls.<sup>146</sup> President Obama recognized the deleterious effects that patent trolls had on the patent system and acknowledged that the AIA “only went about halfway to where we need to go” on curbing patent troll activity.<sup>147</sup>

## 2. *Twiqbal* Is an Impractical Solution to Patent Troll Activity

As discussed in Parts II.A–B, district courts’ application of *Twiqbal* is incredibly flawed. However, there is one convincing policy argument in favor of its application. Depending on how the *Twiqbal* plausibility standard is applied, it could be another source of regulation on patent troll activity.<sup>148</sup> Because of Form 18, patent trolls easily filed complaints against various defendants to extract settlements from defendants that wanted to avoid the costs of litigation.<sup>149</sup> Therefore, district courts that apply the *Twiqbal* plausibility standard, particularly a “limitation-by-limitation” analysis, might reduce patent troll activity because it requires patentees to provide more information than what was required under Form 18.<sup>150</sup> Under a *Twiqbal* plausibility standard, patent trolls may have to spend more money on the front end of litigation to gather the necessary information to sufficiently plead a case.<sup>151</sup> If patent trolls are forced to spend more money on the front end of litigation, they may be disincentivized to initiate frivolous litigation because they cannot quickly make a profit. However, as noted in Parts II.A–B, *Twiqbal* is an impractical solution because it is legally inconsistent with the Federal Rules of Civil Procedure and it generates uncertainty in patent law that undermines the quid pro quo of the patent system. Furthermore, because district courts’ apply *Twiqbal* inconsistently, its effect on patent trolls may not be strong since there is still a chance that their complaints would succeed.<sup>152</sup> Thus, *Twiqbal* is not a practical solution to reduce patent troll activity.

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<sup>146</sup> See Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.); EXEC. OFFICE OF THE PRESIDENT, *supra* note 131, at 3.

<sup>147</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 131, at 3.

<sup>148</sup> See Williams, *supra* note 122, at 338-39; Fisher, *supra* note 122.

<sup>149</sup> See Fisher, *supra* note 122.

<sup>150</sup> See *supra* Part II.B.

<sup>151</sup> See Fisher, *supra* note 122.

<sup>152</sup> See *supra* Part II.B.

Even if *Twiqbal* fails as a solution, there is pending legislation that could set a clear and bright line rule for a heightened pleading standard that would reduce patent troll activity. In 2013, Congress introduced the Innovation Act, which provided a potential heightened pleading standard that would combat aggressive litigation tactics by patent trolls.<sup>153</sup> Under section 281A, a plaintiff must meet specific and particularized pleading requirements for patent infringement actions.<sup>154</sup> Specifically, the Innovation Act would require plaintiffs to identify each patent allegedly infringed, each claim of each patent allegedly infringed, and for each claim, each accused process, machine, or manufacture alleged to infringe the claim.<sup>155</sup> Similar to the “limitation-by-limitation” analysis under *Twiqbal*, the heightened pleading standard in the Innovation Act would require a plaintiff to provide much more than what was required under Form 18.

Although the Innovation Act died in the 113<sup>th</sup> Congress because it failed to pass the Senate,<sup>156</sup> it was revitalized on February 5, 2015 in the 114<sup>th</sup> Congress.<sup>157</sup> However, even though the bill is still being considered by Congress, there has been no activity since June 11, 2015<sup>158</sup> and there is speculation on whether or not the bill will even pass.<sup>159</sup> Some attorneys comment that “Congress may allow implications of the rule [84] change to shape before passing any legislation that tinkers with the pleadings standards.”<sup>160</sup> Politicians from both the Senate and the House have indicated their opposition to the bill,<sup>161</sup> suggesting that the bill will not pass at all. In a committee report from the House, dissenters of the Innovation Act argued that the Act would limit rights of all patent holders, not just those of patent trolls.<sup>162</sup> Furthermore, the dissenters explicitly opposed the heightened pleading requirements.<sup>163</sup> The dissenters contended that they are unfair to all patent holders and are “unduly burdensome”

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<sup>153</sup> H.R. 3309, 113th Cong. (2013).

<sup>154</sup> H.R. 3309 § 281A.

<sup>155</sup> H.R. 3309 § 281A(a)(1)-(3).

<sup>156</sup> H.R. 3309.

<sup>157</sup> H.R. 9, 114th Cong. (2015).

<sup>158</sup> H.R. 9.

<sup>159</sup> See Steve Brachmann, *Innovation Act Delayed in House Amid Bipartisan Bicameral Disapproval*, IPWATCHDOG (July 15, 2015), <http://www.ipwatchdog.com/2015/07/15/innovation-act-delayed-in-house-amid-bipartisan-bicameral-disapproval/id=59858>; Cassaday et al., *supra* note 37.

<sup>160</sup> Cassaday et al., *supra* note 37.

<sup>161</sup> See Brachmann, *supra* note 159.

<sup>162</sup> See H.R. REP. NO. 114-235, at 169 (2015).

<sup>163</sup> *Id.* at 170.



because the information required for their complaints may not be available to them at the time of filing<sup>164</sup> and goes beyond what is required under *Twiqbal*.<sup>165</sup> Congressman Thomas Massie expressed deeper concerns when considering “where the hotbeds of innovation are in this country.”<sup>166</sup> Pointing to universities, startups, and individual inventors as the innovators in America, Massie argues that these entities, who are often classified as non-practicing entities, would particularly be harmed by the Innovation Act.<sup>167</sup>

Not only is there a strong dissent against enactment of the Innovation Act, but the bill’s passage is also statistically unlikely. In the 113<sup>th</sup> Congress, only 3% of bills and resolutions introduced became enacted laws.<sup>168</sup> The 114<sup>th</sup> Congress has only enacted 2% of introduced bills and resolutions.<sup>169</sup> In the past five congressional sessions, dating back to 2009 and including the current session, 3% of bills and resolutions have become enacted laws, whereas 84% of the bills and resolutions have had no further action beyond their introduction to Congress.<sup>170</sup> Thus, the congressional opposition expressed against the Innovation Act might hinder or prevent its enactment, especially since statistically only a small percentage of bills and resolutions become enacted laws.

Given the preceding analysis, the Innovation Act and the *Twiqbal* plausibility standard offer compelling modes of restricting patent troll activity through heightened pleading standards. But, because of their imperfections, they are not viable options to address the overwhelming amount of litigation commenced by patent trolls today without causing significant harm to the patent system. The *Twiqbal* plausibility standard would introduce superfluous uncertainty in the patent system that would disturb the quid pro quo of an inventor’s right to exclude.<sup>171</sup> Equally problematic, the Innovation Act, which

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 189 (arguing “[o]nce Form 18 is eliminated, the . . . need for [the Innovation Act’s] heightened pleading requirements will be unnecessary and . . . would unfairly burden plaintiffs seeking to enforce their patent rights by requiring . . . more details in their complaints beyond what is required under [*Twiqbal*]”).

<sup>166</sup> 161 CONG. REC. H4019 (daily ed. June 10, 2015) (statement of Rep. Massie).

<sup>167</sup> *Id.* (statement of Rep. Massie) (“[W]ould you take a lawnmower to your flower garden if you saw a weed in it?”).

<sup>168</sup> *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (last visited July 13, 2017).

<sup>169</sup> *Id.*

<sup>170</sup> *See id.* (calculating an average of enacted laws and other legislation in the 110<sup>th</sup>, 111<sup>th</sup>, 112<sup>th</sup>, 113<sup>th</sup>, and 114<sup>th</sup> Congressional sessions).

<sup>171</sup> *See supra* Part II.B.2.

may not even pass Congress, would hinder innovation because it would prevent innocent inventors with legitimate lawsuits from actually enforcing their intellectual property rights.<sup>172</sup> These imperfect options would undermine and decrease the value of patents since people will not invest in patents that cannot be protected.<sup>173</sup>

### III. SOLUTION

The Innovation Act and *Twiqbal* plausibility standard reveal strong policy arguments for adopting a heightened pleading standard in direct patent infringement cases. However, as discussed in Part II, these are not practical solutions. Thus, this Note proposes an amendment to the Federal Rules of Civil Procedure that would provide a heightened pleading standard for patent infringement cases that resolves some of the issues arising from the Innovation Act and *Twiqbal*. Adopting a heightened pleading standard through the Federal Rules of Civil Procedure, rather than congressional action, is beneficial for two reasons. First, as argued in Part II.C, it is unlikely that the Innovation Act will become an enacted law since some representatives of Congress have shown strong opposition to the Innovation Act<sup>174</sup> and statistically only a small percentage of proposed bills actually become enacted laws.<sup>175</sup> Secondly, and more importantly, the Advisory Committee should address the issue through amendments to the Federal Rules because, in abrogating Rule 84, the Committee violated the Rules Enabling Act by not addressing the rules that the forms exemplified.

Opponents of the abrogation of Rule 84 and its forms argued that abrogation without changing the accompanying rules they exemplified violated the Rules Enabling Act.<sup>176</sup> The forms helped practitioners

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<sup>172</sup> 161 CONG. REC. H3924 (daily ed. June 9, 2015) (statement of Rep. Rohrabacher) (“Almost every American university now has come out opposed to [the Innovation Act] because . . . by restricting the people’s right to actually defend their own intellectual property rights, [it] will undermine the value — dramatically decrease the value — of patents, which will mean people won’t invest in patents . . .”).

<sup>173</sup> *Id.*

<sup>174</sup> See, e.g., 161 CONG. REC. H4019 (daily ed. June 10, 2015) (statement of Rep. Massie opposing the Innovation Act); 161 CONG. REC. H3924 (daily ed. June 9, 2015) (statement of Rep. Rohrabacher arguing against the Innovation Act); see also H.R. REP. NO. 114-235, at 169 (2005) (recognizing issues with the Innovation Act).

<sup>175</sup> See *Statistics and Historical Comparison*, *supra* note 168.

<sup>176</sup> COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA BOOK FOR MAY 29-30, at 412 (2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf> (recognizing that “[s]ome of the opposition is expressed by

interpret the meaning of the rules.<sup>177</sup> Thus, abrogation of the forms “eliminates part of the interpretive language [of the rules] and changes the meaning of the rule to which that form is linked.”<sup>178</sup> Consequently, when the Advisory Committee considered abrogating Rule 84, it should have also proposed, and published for public comment, amendments to the rules that the forms exemplified.<sup>179</sup> Based on a finding that abrogation of Rule 84 violated the Rules Enabling Act, Form 18 and Rule 8 should have both been considered by the Advisory Committee in the 2015 amendments.<sup>180</sup> Because Form 18 provided a sample complaint for direct patent infringement that satisfied the general pleading standards of Rule 8, both Rule 8 and Form 18 should have been published together for public comment to prevent violating the Rules Enabling Act.<sup>181</sup>

Since courts have held that Rule 8 and Rule 9 must be read together,<sup>182</sup> this Note alternatively suggests that a superior option would be to amend Rule 9 to require plaintiffs to plead with particularity in patent infringement cases. Rule 9(b) requires a party to “state with particularity the circumstances constituting fraud or mistake.”<sup>183</sup> In interpreting what constitutes “particularity” under Rule 9(b), courts have required a complaint to contain facts regarding “the who, what, when, where, and how” of false or fraudulent statements.<sup>184</sup> Accordingly, this Note proposes that for patent infringement cases, a non-practicing-entity plaintiff must state with particularity the circumstances constituting patent infringement.

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arguing that the Enabling Act process is not satisfied by simply publishing a proposal to abrogate Rule 84 and the official forms”); *see, e.g., Coleman, supra* note 70, at 1106 (arguing abrogation of Rule 84 violated the Rules Enabling Act).

<sup>177</sup> *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958); *see also* Coleman, *supra* note 70, at 1106.

<sup>178</sup> Coleman, *supra* note 70, at 1106.

<sup>179</sup> *See id.*

<sup>180</sup> *See id.* at 1109 (discussing the relationship between Form 11 and Rule 8, which is comparable to the relationship between Form 18 and Rule 8).

<sup>181</sup> *See id.*

<sup>182</sup> *See* Campbell v. Nat'l Union Fire Ins. Co., 130 F. Supp. 3d 236, 248 (D.D.C. 2015) (stating that “the short and plain statement requirement of Rule 8(a) is joined by the particularized pleading standards of Rule 9”) (quotation marks omitted); Todd v. Oppenheimer & Co., 78 F.R.D. 415, 419 (S.D.N.Y. 1978) (stating that “Rule 9(b) requirements must be reconciled with [Rule 8]”).

<sup>183</sup> FED. R. CIV. P. 9(b).

<sup>184</sup> Benchmark Elecs., Inc. v. J.M. Huber Corp., 343 F.3d 719, 724 (5th Cir. 2003) (quoting Williams v. WMX Techs., Inc., 112 F.3d 175, 179 (5th Cir. 1997)); *U.S. ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003); *see also* Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 19 (1st Cir. 2002).

Specifically, these plaintiffs must answer the “who, what, when, where, and how” relating to the infringement in a manner similar to the district court’s “limitation-by-limitation” analysis or the Innovation Act’s heightened pleading standard. It should require plaintiffs to identify each patent allegedly infringed, each claim of each patent allegedly infringed, and for each claim, each accused process, machine, or manufacture alleged to infringe the claim.<sup>185</sup>

However, to address the issues brought up by the dissenters to the Innovation Act,<sup>186</sup> the heightened pleading requirement should only be applied to patent trolls. Thus, there should be an exception to the particularity requirement for innocent, non-practicing entities such as universities and individual inventors. The burden of proof for classifying whether a plaintiff is a patent troll or an innocent, non-practicing entity should be on the patentee. Because patent trolls bring more than half of the current patent infringement cases,<sup>187</sup> it is reasonable to place the burden on the patentee to demonstrate that the patentee is not using the judicial system to extract exorbitant licensing fees or a nuisance-settlement. Thus, this proposed heightened pleading standard will not stifle innovation by devaluing patents owned by universities and individual inventors because it will only require patent trolls to plead with particularity. If a patentee is able to demonstrate that it is not a patent troll, then it would not be subjected to a particularity requirement and the abrogated Form 18 requirements would suffice, since Rule 84 did not alter the existing pleading standards.

To determine whether a patentee is a patent troll, courts should apply a totality of the circumstances test. The Supreme Court has applied a totality of the circumstances standard to situations where specific factual contexts cannot be reduced to a set of rigid legal rules, particularly where the legal and factual questions can only be addressed when many factors are considered.<sup>188</sup> This totality analysis is particularly applicable in determining whether a non-practicing entity should be classified as a patent troll. Whether a non-practicing

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<sup>185</sup> Using the same phrasing and terminology used in the Innovation Act.

<sup>186</sup> See *supra* Part II.C.2.

<sup>187</sup> EXEC. OFFICE OF THE PRESIDENT, *supra* note 131, at 5 (identifying that 62% of all infringement suits were brought by patent trolls).

<sup>188</sup> See *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (discussing a totality of circumstances test to reasonable suspicion so that “officers [can] draw on their own experience . . . to make inferences from and deductions about the cumulative information”); *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (discussing a totality of the circumstances test to probable cause because probable cause is a “fluid concept . . . not readily . . . reduced to a set of legal rules”).

entity is a patent troll or an innocent inventor can be unclear since both participate in similar activities, but with significantly different motives.<sup>189</sup> Both types of non-practicing entities do not manufacture a product and may collect licensing fees from third parties who practice their inventions.<sup>190</sup> However, the motives of patent trolls are usually entirely different than those of innocent entities, such as an individual inventor or a university. An individual inventor does not manufacture a product and may choose to license his invention because he does not have capital to manufacture his invention and can only profit from his innovation through licensing.<sup>191</sup> Similarly, a university does not manufacture a product and may choose to license its inventions because their mission as an academic institution is to educate and contribute valuable research to the scientific community.<sup>192</sup> On the other hand, a patent troll's activities are motivated by financial greed — the patent troll aims to extract the most profits out of its patent portfolio with the least amount of expenses by demanding exorbitant licensing fees without actually manufacturing a product.<sup>193</sup> Moreover, because patent trolls use litigation as a primary tactic in achieving profits, they often join multiple defendants in the same lawsuit to efficiently profit.<sup>194</sup> Thus, in determining whether a non-practicing entity is a patent troll, a totality of the circumstances test is ideal so that courts may consider a list of factors on a case-by-case basis to conclude whether the particularity requirement should apply.

Factors that courts should consider under the totality of the circumstances include: (1) the number of patents of which the non-practicing entity is not the original inventor; (2) the amount of litigation that the non-practicing entity is engaged in; (3) the number of defendants that the non-practicing entity is asserting its patent

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<sup>189</sup> The totality of the circumstances test is most applicable in distinguishing a patent troll from an individual inventor and not as important when the patentee is a university since it is fairly obvious whether a non-practicing entity is a university or educational institution.

<sup>190</sup> See Schwartz & Kesan, *supra* note 126, at 429-30 (discussing characteristics of innocent non-practicing entities).

<sup>191</sup> *eBay Inc. v. MercExchange*, 547 U.S. 388, 393 (2006) (recognizing researchers and inventors might prefer to license their patents for financial reasons).

<sup>192</sup> *Id.*

<sup>193</sup> See Bessen et al., *supra* note 129, at 26; TO PROMOTE INNOVATION, *supra* note 125, at 31 (discussing why patent trolls pursue high royalty rates).

<sup>194</sup> See Bessen et al., *supra* note 129, at 29 (finding between 1990 and October 2010, the number of defendants ranged from two to nine in non-practicing entity disputes and that only seventeen percent of the defendants were sole defendants compared to eighty-five percent in other patent litigations).

against; (4) the non-practicing entity's financial status; and (5) the primary purpose of the non-practicing entity (i.e., is it an educational institution?). By considering these factors holistically, courts would have more flexibility in determining whether a non-practicing entity should be considered a patent troll. As discussed, patent trolls tend to have patent portfolios in which they are not the original inventor, engage in copious litigation while joining multiple defendants, and seek large settlements or exorbitant licensing fees throughout litigation.<sup>195</sup>

This test is superior to a bright line rule since innocent inventors and patent trolls often participate in similar activities.<sup>196</sup> Although a totality of the circumstances test potentially increases litigation in the early stages of a case, it addresses the policy concerns posed by the dissenters of the Innovation Act.<sup>197</sup> A bright line rule will unduly burden innocent inventors. Individual inventors and universities having meritorious claims may not have the resources to identify all the relevant information that is necessary for a complaint to meet the particularity standard.<sup>198</sup> Having this exception encourages research and innovation because it gives innocent entities confidence that courts will enforce their intellectual property rights. Furthermore, implementing a totality of the circumstances test would not increase litigation significantly because a university or an individual inventor can easily plead their status as an innocent, non-practicing entity in their complaints. The totality of the circumstances test is triggered only when a non-practicing entity — whose status as an innocent entity is unclear — files a complaint. Additionally, because the particularity standard only applies to non-practicing entities, plaintiffs that practice or manufacture their inventions do not fall under the particularity standard. For these plaintiffs, the Form 18 requirements suffice.

This proposed solution also addresses the issues resulting from *Twiqbal*. So long as the suggested amendment follows the Rules Enabling Act requirements, the amendment to Rule 9 adopting a heightened pleading standard for patent infringement will not be legally inconsistent with the Federal Rules of Civil Procedure. Moreover, because the proposed amendment will have specific and explicit requirements, there will likely be consistent application of the

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<sup>195</sup> See *supra* notes 124–134, 190–191 and accompanying text.

<sup>196</sup> See generally Schwartz & Kesan, *supra* note 126 (discussing the different types of non-practicing entities).

<sup>197</sup> See *supra* notes 162–167.

<sup>198</sup> H.R. REP. NO. 114-235, at 169-70 (2015).

rule that will not lead to the type of uncertainty that results from *Twiqbal*.

Although there are concerns over inconsistent results and judicial subjectivity in a totality analysis, Judge Bork, in a concurring opinion in *Ollman v. Evans*, addressed these concerns and explained the benefits of such a test.<sup>199</sup> In the context of free speech in libel actions, Judge Bork explained that judicial subjectivity, which would lead to inconsistent results, would be reduced over time.<sup>200</sup> In the process of balancing, a judge will state his or her reasons fully to guide future cases.<sup>201</sup> In a patent troll case, Judge Bork's reasoning applies. Over time, as district courts apply the totality analysis to patent trolls, judicial subjectivity will decrease as courts analyze the relevant factors that will provide guidance for future cases. Specifically, the factors described above provide courts with a framework more detailed than a simple "plausibility" standard under *Twiqbal*, which has ultimately led to superfluous uncertainty in patent pleading.<sup>202</sup> Accordingly, a heightened pleading standard based on the totality of the circumstances under Rule 9 can effectively reduce patent troll activity, while preserving an incentive to innovate and preventing the introduction of superfluous uncertainty in the patent system.

#### CONCLUSION

Currently, the state of patent pleading standards is unclear and complicated. After the abrogation of Rule 84 and Form 18, district courts have erroneously applied the *Twiqbal* plausibility standard to assess the sufficiency of a patent infringement complaint.<sup>203</sup> Because application of *Twiqbal* is inconsistent with the Federal Rules of Civil Procedure and introduces a level of uncertainty that would undermine the patent system, its application is not practical.<sup>204</sup>

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<sup>199</sup> *Ollman v. Evans*, 750 F.2d 970, 997 (D.C. Cir. 1984) (Bork, J., concurring) (recognizing the totality analysis is "a balancing test and risks admitting into the law an element of judicial subjectivity").

<sup>200</sup> *Id.*

<sup>201</sup> *See id.* at 998.

<sup>202</sup> Relatedly, for those plaintiffs that do not fall under the particularity requirement, Form 18 suffices because Rule 84 did not alter the existing pleading standards. Thus, the superfluous uncertainty introduced by *Twiqbal* in patent infringement cases is also eliminated in these instances because courts will return to the analysis used prior to Rule 84 and Form 18's abrogation.

<sup>203</sup> *See supra* Part II.A–B.

<sup>204</sup> *See supra* Part II.

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The Innovation Act contains a heightened pleading standard that seemed to be a promising tool to combat patent troll activity.<sup>205</sup> However, dissenters to its enactment recognized that the heightened pleading standard actually disincentivized innovation since the Act made it more difficult for all patentees to plead a claim for relief, not just patent trolls.<sup>206</sup> Although the heightened pleading standard would reduce frivolous litigation overall, innocent parties such as universities and individual inventors would be disincentivized because the value of their patents would be reduced if it became more difficult to protect their intellectual property rights.

Thus, there is a need for a heightened pleading standard in patent infringement cases and this Note proposes an amendment to Rule 9 of the Federal Rules of Civil Procedure that sets forth a standard that is specifically designed to reduce patent troll activity. Because the Rule would explicitly state what constitutes particularity, and provides an exception to the heightened pleading standard for innocent, non-practicing entities, the incentive to innovate remains intact without introducing needless uncertainty into the patent system.

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<sup>205</sup> H.R. 3309, 113th Cong. § 281A(a)(1)-(3) (2013).

<sup>206</sup> H.R. Rep. No. 114-235, at 169 (2015); 161 Cong. Rec. H4019 (daily ed. June 10, 2015) (statement of Rep. Massie).