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Commentary on Patent Litigation Best Practices: Heightened Pleading Standards Chapter

A Project of The Sedona Conference
Working Group on
Patent Litigation Best Practices (WG10)

MAY 2016 PUBLIC COMMENT VERSION



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Patent Litigation Best Practices (WG10)*

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Preface

Welcome to the Public Comment Version of The Sedona Conference Commentary on Patent Litigation Best Practices: Heightened Pleading Standards Chapter, a project of The Sedona Conference Working Group on Patent Litigation Best Practices (WG10). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

WG10 was formed in late 2012 under the leadership of its now Chair Emeriti, the Honorable Paul R. Michel and Robert G. Sterne, to whom The Sedona Conference and the entire patent litigation community owe a great debt of gratitude. The mission of WG10 is “to develop best practices and recommendations for patent litigation case management in the post-[America Invents Act] environment.” The Working Group consists of around 200 active members representing all stakeholders in patent litigation.

The WG10 Heightened Pleading Standards drafting team was launched in 2015, and the draft Heightened Pleading Standards Chapter was a focus of dialogue at the WG10 Midyear Meeting in Miami in May 2015 and the WG10 Midyear Meeting in Pasadena in February 2016. The editors have reviewed the comments received through the Working Group Series review and comment process. The Chapter will be regularly updated to account for future significant developments impacting this topic.

The Chapter represents the collective efforts of many individual contributors. On behalf of The Sedona Conference, I thank in particular Gary Hoffman who has graciously and tirelessly served as the Editor-in-Chief for this and all Chapters in this Commentary on Patent Litigation Best Practices, and as the Chair of WG10. I also thank everyone else involved for their time and attention during the drafting and editing process, including: Deborah Fishman, Steven Spears, Jane Politz Brandt, Melissa Finocchio, Cecil Key, Joss Nichols, and Theodore Stevenson, III.

The Working Group was also privileged to have the benefit of candid comments by several judges with extensive patent litigation experience, including the Honorable Cathy Ann Bencivengo and the Honorable Barbara M.G. Lynn, who are serving as Judicial Advisors for the Heightened Pleading Standards drafting team, and also the Honorable Gail J. Standish. The statements in this Commentary are solely those of the non-judicial members of the Working Group and do not represent any judicial endorsement of the recommended practices.

Following the Working Group Series review and comment process described above, the Commentary is published for public comment, including in-depth analysis at Sedona-sponsored conferences. After sufficient time for public comment has passed, the editors will review the public comments and determine what edits are appropriate for the final Commentary. Please send comments to comments@sedonaconference.org, or fax them to 602-258-2499. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be.

Craig W. Weinlein
Executive Director
The Sedona Conference
May 2016

Foreword

For many years, Form 18 of the Federal Rules of Civil Procedure provided a very basic format for pleading claims of direct patent infringement. The bright line standard provided by Form 18 largely avoided controversy over the level of detail required to plead a claim for patent infringement. The Federal Judicial Conference, however, repealed Form 18, effective December 1, 2015, opening the possibility for disputes over how much more information is required to plead claims for direct patent infringement under the Supreme Court's *Iqbal* and *Twombly* decisions.

The Sedona Conference's Working Group 10, therefore, wanted to address at an early stage what level of detail should be required to plead claims for patent infringement. The standards below do so from two perspectives: first, what may be required by *Iqbal/Twombly*, and second, what beyond *Iqbal/Twombly* may promote the efficient administration and resolution of patent disputes. The main objective of the Working Group was to provide clear guidance on what should be included in such a claim to avoid unnecessary litigation expense over pleading standards. The Working Group saw that a similar gap in guidance may exist for pleading declaratory judgment actions and/or counterclaims for patent non-infringement or invalidity. Those standards were likewise considered to be very basic in the era of Form 18, being viewed reciprocally, and likewise have the potential to be the subject of disputes with its repeal.

The editors would like to express their appreciation for the members of the drafting team and the judicial advisors for all of their valuable input. This project required an extensive time commitment by everyone and involved much discussion and compromise at times. This final work product is truly the result of tremendous input by everyone on the team.

Gary M. Hoffman
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Table of Contents

Heightened Pleading Standards Principles “At a Glance”	v
Heightened Pleading Standards Best Practices “At a Glance”	vi
I. Introduction	1
II. Background	2
A. <i>Iqbal</i> and <i>Twombly</i>	2
B. Proposed Legislation	4
III. What Should be Included in a Complaint for Patent Infringement	7
IV. What Should be Included in Declaratory Judgment Actions or Counterclaims for Non-infringement and/or Invalidity	15
A. Declaratory Judgment Actions and Counterclaims	15
B. Affirmative Defenses	17
Appendix A: The Sedona Conference Working Group Series & WGS Membership Program	20
Appendix B: The Sedona Conference Working Group 10 on Patent Litigation Best Practices—List of Steering Committee Members and Judicial Advisors	21

Heightened Pleading Standards Principles “At a Glance”

Principle No. 1 – The pleadings should provide sufficient disclosures to help the parties understand what is in dispute, thus serving to identify claims, products/processes, and defenses so as to help the parties focus and narrow the issues more efficiently. At the same time, the pleading requirements should not be so onerous that they result in unfair burdens and become the subject of significant motion practice (e.g., Rule 12 challenges) that bog down the litigation. 1

Principle No. 2 – A clear, uniform standard should exist for pleading claims of patent infringement to (i) avoid disputes over the sufficiency of the pleadings, which consume significant resources of the parties and the courts, and (ii) avoid forum shopping..... 2

Heightened Pleading Standards Best Practices “At a Glance”

Best Practice 1 – A properly pleaded claim for patent infringement should recite at least the following in order to help the parties focus on the issues in dispute in the litigation:8

Best Practice 2 – In addition to what is stated in Best Practice 1, a claim for patent infringement should recite all claims asserted and also each identified instrumentality against which infringement is asserted based upon the information known to the plaintiff at the time that the complaint is filed. The asserted claims may be amended during the course of the proceeding upon discovery of further information regarding the accused instrumentalities upon a showing of good cause.13

Best Practice 3 – When invalidity under 35 USC §§ 102–103 is asserted by way of a declaratory judgment claim or counterclaim, a party should be required to identify for each patent being challenged at least one reference (for §§ 102 and/or 103) or combination of references (for § 103) as a basis for its claim or counterclaim of invalidity based on prior art. However, a party should not be required to disclose all prior art known to it at the time of filing the claim or counterclaim.....16

Best Practice 4 – When invalidity under 35 USC § 112 is asserted as a declaratory judgment claim or counterclaim, a defendant should be required to identify for each patent being challenged at least one basis for pleading invalidity for indefiniteness, lack of enablement, or lack of adequate written description.....16

Best Practice 5 – When asserting a declaratory judgment claim or a counterclaim, a party should be required to include for at least one claim of each patent being challenged a short, plain, and non-conclusory statement of how each patent claim limitation is shown in the prior art when prior art-based invalidity is alleged, and a short, plain, and non-conclusory statement of why at least one limitation is missing in the accused instrumentality when non-infringement is alleged.....17

Best Practice 6 – Although the requirements may be commensurate in some circumstances, any heightened pleading standard requirements directed toward counterclaims should not be extended to affirmative defenses raised under Rule 8.....18

I. Introduction

With the December 1, 2015, demise of Form 18, the requirements for pleading claims of direct patent infringement are now governed by *Iqbal/Twombly*.¹ The requirement to plead facts, and not conclusions, under *Iqbal/Twombly* raises unique issues when it comes to a complaint for patent infringement. To prove a claim of direct patent infringement, one must prove that all elements of a patent claim are met by an accused product, literally or under the doctrine of equivalents. Thus, the pleading requirements are inherently different in each patent case, driven by the unique language of the asserted claims and the amount of detail that may be required to provide a factual basis for the allegation of infringement. The availability of information from which to obtain that factual basis is likewise inherently claim-dependent. It is thus difficult to arrive at a one-size-fits-all statement for how much detail is enough to meet the minimum pleading requirements for a claim of direct infringement.

It is the mission of this Working Group to consider this and other aspects of pleading claims for patent infringement and to propose Best Practices to provide guidance to litigants preparing such pleadings. In the interest of more rationally filling the vacuum left by the recent elimination of Form 18, the Working Group has reached general consensus on what, at a minimum, should be included in a claim for patent infringement to avoid unnecessary disputes regarding the sufficiency of the pleadings, as well as what should be provided to advance orderly case management and reduce unnecessary discovery burdens.

An underlying premise of this Chapter, on which the Working Group has reached consensus, is that pleading claims for patent infringement raises issues different from pleading other federal claims because of the unique language of the patent claim(s) being asserted in each case.

The Working Group developed the following overarching Principles to guide the drafting of these Best Practice recommendations.

Principle No. 1 – The pleadings should provide sufficient disclosures to help the parties understand what is in dispute, thus serving to identify claims, products/processes, and defenses so as to help the parties focus and narrow the issues more efficiently. At the same time, the pleading requirements should not be so onerous that they result in unfair burdens and become the subject of significant motion practice (e.g., Rule 12 challenges) that bog down the litigation.

Principle No. 2 – A clear, uniform standard should exist for pleading claims of patent infringement to (i) avoid disputes over the sufficiency of the pleadings, which consume significant resources of the parties and the courts, and (ii) avoid forum shopping.

¹ Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic v. Twombly, 550 U.S. 554 (2007).

II. Background

Much discussion has occurred both in case law and in recent legislative proposals regarding the proper pleading standards to state a claim for patent infringement. The Federal Rules of Civil Procedure had long contained Form 18, which required only a very bare-bones pleading for a claim of direct infringement. However, change is afoot on two fronts.

First, on April 29, 2015, the Supreme Court approved amendments to the Federal Rules of Civil Procedure which became effective on December 1, 2015. The Amendments included the abrogation of Rule 84 and its incorporated Appendix of Forms, which included Form 18. The Advisory Committee Note states, “recognizing that there are many excellent alternative sources of forms, including the website of the Administrative Office of the United States Court, the websites of many district courts, and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.”

In the absence of Form 18, the default pleading standards set by *Iqbal*² and *Twombly*³ will govern the pleading of claims of direct patent infringement. Yet, the elimination of Form 18 and application of *Iqbal* and *Twombly* to claims of direct infringement is uncharted territory. Given the absence of decisions on point, it may take a few years for the courts to provide guidance as to the level of disclosure required to provide plausibility.

Second, and in parallel, Congress has proposed legislation to specify the standards required to plead a claim for direct patent infringement. Both the House and Senate Bills propose requiring patent pleadings to include a claim chart fully mapping the basis for infringement allegations. Whether Congress will pass a bill this session is unlikely given both bills have stalled in their respective chambers as of the time of this writing. Hence while the team includes here a high-level discussion of what the proposed legislation contains, it has put the Congressional proposals aside for now.

A. IQBAL AND TWOMBLY

In the absence of Form 18, the Supreme Court’s requirements for adequate pleading as set forth in *Iqbal* and *Twombly* will apply to claims of direct patent infringement. The *Iqbal/Twombly* standard does not require detailed factual allegations, but it does require that a well-pleaded complaint contain more than conclusory allegations or a mere recitation of the elements of a cause of action.⁴ *Iqbal* is satisfied when the complaint recites sufficient factual material that, when taken as true, states a claim for relief that is plausible on its face.⁵ The goal is to strike a balance between hyper-technical pleading requirements that may unfairly impede a plaintiff’s access to the courts, and unjustifiably

² *Iqbal*, 556 U.S. at 662.

³ *Twombly*, 550 U.S. at 554.

⁴ *Iqbal*, 556 U.S. at 678.

⁵ *Id.*

exposing a defendant to expansive and costly discovery triggered by a complaint consisting merely of conclusions.⁶

Yet, *Iqbal/Twombly* as a default standard in patent infringement cases may create unnecessary uncertainty at the pleading stage and might run counter to the fundamental goal of assuring “the just, speedy, and inexpensive determination of every action and proceeding.”⁷ Unlike the bare-bones requirements of Form 18 or some other congressionally-adopted form, the *Iqbal/Twombly* standard is not a bright-line rule, but a balancing test applied to each case on an individual basis. As a result, a given court might apply the *Iqbal/Twombly* standard more or less stringently than another, which could result in forum shopping as plaintiffs seek to bring cases in jurisdictions where they perceive their complaints might have a greater chance of surviving a motion to dismiss. Likewise, as discussed above, it is difficult to apply a decision on the sufficiency of the pleadings under one set of asserted claims to the sufficiency of the pleadings under a different set of claims and facts, making the eventual evolution of case law regarding pleadings for direct infringement a cumbersome, slow-going, and uncertain process.

The attempt to strike the balance called for by *Iqbal/Twombly* might also result in increased “satellite” litigation at the early stages, thereby prolonging cases and increasing their expense. The uncertain application of *Iqbal/Twombly* to patent cases could encourage motions by defendants seeking to delay the proceedings for tactical purposes. Likewise, a proliferation of motions to test the boundaries of *Iqbal/Twombly* in the patent infringement context could greatly increase the cost of litigation, and strain the resources of courts at the very early stages of a case. Even where a complaint is dismissed under *Iqbal/Twombly*, the plaintiff is often granted leave to amend, in which case the amended complaint should clarify the plaintiff’s claims, but at added cost and delay for the defendant. Finally, the requirement of detailed factual recitations could increase the cost of bringing a complaint for patent infringement in the first instance, undermining the core purpose of the notice pleading codified in Rule 8 of the Federal Rules of Civil Procedure, which is to “raise a right to relief above the speculative level . . . on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)”⁸

Thus, the Working Group proposes as its Best Practice 1 the minimum identification of factual content that should be included in a complaint for patent infringement in order to meet the threshold requirements of *Iqbal/Twombly*, understanding that the amount of factual content may vary depending on the asserted claims and the availability of information regarding the accused product or process.⁹ The Working Group has also provided an exemplary pleading to provide a guidepost for how much content is enough to plead factual allegations and not just legal conclusions regarding the direct infringement of asserted patent claims.¹⁰

⁶ *Id.* at 678–79.

⁷ FED. R. CIV. P. 1.

⁸ *Twombly*, 550 U.S. at 555.

⁹ *See infra* Section III (What Should be Included in a Complaint for Patent Infringement).

¹⁰ *Id.*

In addition to the Best Practice 1, the question arises whether anything more than the application of *Iqbal/Twombly*, such as another particular form of the type alluded to in the Advisory Committee's Note, is necessary or desirable for patent infringement cases. There are certain advantages to providing greater factual exposition in the pleadings. Greater notice of accused products and asserted claims can facilitate appropriate crafting of discovery and the litigation schedule. This better notice can facilitate early assessment, and potential resolution, of cases, both by smaller defendants who are unfamiliar with patent infringement actions, and larger defendants offering a wide variety of products incorporating a wide range of technologies. The parties and the court may also benefit from the ability to identify and dispose of non-meritorious claims at an early stage of the litigation. In jurisdictions that have adopted patent local rules or patent disclosures, additional factual exposition may be unnecessary at the pleading stage; however, in jurisdictions that do not include such patent disclosure procedures, encouraging more fulsome factual exposition in the pleading may allow both plaintiffs and defendants to earlier frame the issues in dispute and tailor discovery and defenses appropriately. To that end, the Working Group proposes as its Best Practice 2 that, in addition to the required factual allegations regarding a single asserted claim and single accused product or process as identified in Best Practice 1, a claimant should further include in its complaint factual allegations for each asserted claim and every accused product that it may be able to identify based upon publicly available information known to the plaintiff at the time the complaint is filed.

B. PROPOSED LEGISLATION

Both houses of Congress propose amending title 35, section 281, to require among other things heightened pleading standards for patent cases. The heightened pleading standards of each Bill are alike in some ways but diverge in others. Pursuant to H.R. 9 as amended, unless the information is not readily available (as defined in the Bill), the party alleging patent infringement must plead the following specific details:

1. each claim of each patent infringed
2. the accused process, machine, manufacture, or composition of matter (“accused instrumentalities”), as well as name or model number or description of the accused instrumentality
3. for each accused instrumentality, a clear and concise statement of where each element of each claim is found, and how each limitation of each claim is met
4. for each claim of indirect infringement, the acts of the alleged indirect infringer that contribute to, or are inducing, a direct infringement
5. the authority of the party alleging infringement to assert each patent and the grounds for the court's jurisdiction, as well as an identification of each complaint filed that asserts any of the same patents.

If the above information is not “readily accessible,” the House Bill would require that information be generally described, along with an explanation of why such undisclosed information was not readily accessible and of any efforts made by the accusing party to access such information.¹¹

The House Bill further permits the Supreme Court to approve a new model set of allegations that would notify accused infringers of specific information of patent claims.¹²

The House Bill as amended by the House Judiciary Committee was placed on the Union Calendar on July 29, 2015. No additional action has been taken at the time of this publication.

S. 1137, The Protecting American Talent and Entrepreneurship Act or “PATENT Act” differs in a number of respects from H.R. 9. While the Senate Bill is identical in requiring the disclosures outlined in item 1, 2, and 4 above, with regard to the 3rd item, the Senate Bill requires only a description of the elements that are alleged to be infringed, including how the accused instrumentality is alleged to infringe those elements. The Senate Bill also calls for dismissal for failure to meet the pleading requirements, a provision not specifically addressed in the House Bill.

The Senate Bill also differs from the House Bill with regard to the pleading requirements when information is not accessible. First, S. 1137 identifies “information not accessible,” in contrast to the House Bill, which speaks to “information *not readily* accessible.” The Senate Bill provides that if information is not accessible after reasonable inquiry consistent with Fed. R. Civ. P. 11, then the pleading may be based upon a general description of that information, along with a statement as to why the information is not accessible.

The Senate Bill as amended by the Senate Judiciary Committee was placed on the Senate Legislative Calendar under General Orders on September 9, 2015. While the Senate Committee on Small Business and Entrepreneurship held hearings on February 16, 2016, no additional action has been taken by the Senate.

Proponents have advocated that the advantage of pleading with this level of specificity is that entities asserting patents would be required to provide significantly more information in their initial pleadings than is currently required. An accused infringer would begin the litigation with more detailed knowledge about the allegations against it than is currently the case. This could very well lead to a swifter resolution of patent infringement cases due to settlements or motions, thus reducing caseloads and burden on the parties and the courts.

Others have criticized these proposed Bills because of the belief that Congress should not be legislating how a lawsuit should be pleaded (as well as imposing other provisions of the Bills that set forth other, different rules for patent infringement cases). Many believe that the best practice would be for the judiciary, not Congress, to be the interpreter of the Federal Rules of Civil Procedure. Having a different set of rules for patent cases could be confusing at best and lead to incurable

¹¹ There is concern that this provision will force parties to waive work product immunity.

¹² Section 6 of the House Bill was amended in committee to provide that the Director of the Administrative Office of the United States Courts will designate no fewer than 6 of the district courts that are participating in the patent pilot program to develop rules and procedures to address discovery issues, to address the asymmetries in discovery burdens and costs, and to establish case management procedures for patent cases. Assuming this provision is even constitutional, the patent pilot courts will have 18 months to develop these new rules and procedures.

mistakes at worst. Many also contend that the proposals are not necessary for determining whether a suit is brought for improper purposes.

III. What Should be Included in a Complaint for Patent Infringement

All parties and the courts have an interest in avoiding extensive satellite litigation regarding the sufficiency of the pleadings. Requiring too much specificity may result in just that. There is likewise an interest in avoiding a need for serial pleading amendments as more information is discovered should greater specificity be required in the complaint. There is a further interest in having some flexibility in the standard so that it is not “one size fits all.” In some instances, it may be appropriate to have a more definitive statement of the claims than in others, for example, if the information underlying the claims is readily available to the patentee. Moreover, the judiciary is already well-versed in applying notice pleading standards, raising the question of how much specific guidance is really needed in the context of patent infringement actions.

At The Sedona Conference Working Group 10’s May 2015 Midyear Meeting, there was general consensus that a patentee should be required to plead at least one specific representative claim, and one specific accused instrumentality, but reluctance to require a patentee to plead every asserted claim at the pleading stage. There were divergent views on whether patentees should be required in the complaint to identify all accused products or all asserted claims.

On the one hand, a plaintiff is forced to plead with no discovery, and thus possesses imperfect knowledge of the full scope of possible accused instrumentalities, or details of those instrumentalities from which to evaluate all claims. In some instances, it may be too difficult for a plaintiff to know all of the implicated instrumentalities or activities of the defendant at the initial pleading stage of the case.

On the other hand, an accused infringer has an interest in knowing the full scope of potential liability presented by an accusation of patent infringement. First, this provides an accused infringer more complete information from which it can conduct an investigation and prepare a defense with regard to the entire scope of the claim, as well as make assessments regarding the potential exposure of such a claim. Second, the accused infringer has an interest in ensuring that the complaint is not simply being brought as a fishing expedition for discovery regarding the details of its products and processes. Knowing all of the asserted claims at the pleading stage would also be of benefit to any *inter partes* review (IPR) proceedings brought with respect to the patents-in-suit.

The Working Group considered a wide range of options for what would constitute a proper complaint for patent infringement under *Iqbal/Twombly*, ranging from sparse pleadings under current Form 18 to the very robust pleadings required by H.R. 9. Consensus was reached that pleading the five elements under Best Practice 1 below would satisfy the *Iqbal/Twombly* standard and could, if adopted, avoid costly and unnecessary satellite litigation regarding the sufficiency of the pleadings.

Best Practice 1 – A properly pleaded claim for patent infringement should recite at least the following in order to help the parties focus on the issues in dispute in the litigation:

- **the identity of at least one claim in each asserted patent that is alleged to be infringed**
- **for each defendant, the identity of at least one accused process, machine, manufacture, or composition of matter (“instrumentality”) that is alleged to be infringing**
- **for multicomponent instrumentalities, the identity of the component(s) that are alleged to be infringing**
- **a short, plain, and non-conclusory explanation for why at least one identified instrumentality for each defendant infringes at least one identified claim**
- **for each claim of indirect infringement, the acts of the alleged indirect infringer that contribute to, or are inducing, a direct infringement.**

An initial area of substantial discussion was whether the patentee must plead all asserted claims and all accused instrumentalities, or just one asserted claim and one accused instrumentality for each defendant. *Iqbal* states, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”¹³ Because identifying one asserted claim and one accused instrumentality for each defendant is sufficient to state a claim to relief for patent infringement, the consensus of the Working Group was that doing so would satisfy *Iqbal/Twombly*. For multicomponent instrumentalities, it is also important that the complaint identify the component(s) that are alleged to be infringing. Otherwise, the parties and the court have no notice of what, particularly, is being accused of infringement.

The Working Group further concluded that simply identifying an asserted claim and an accused instrumentality would not, by itself, satisfy *Iqbal/Twombly*, which requires that the complaint plead facts and not just conclusions. A statement that “product A infringes claim 1,” standing alone, would properly be viewed as a conclusion and not fact. Accordingly, beyond identifying a claim and an instrumentality for each defendant, a patentee should also plead a short, plain, and non-conclusory explanation for why at least one identified instrumentality for each defendant infringes at least one identified claim. This is not intended to require a detailed claim chart. Rather, sufficient facts should be pleaded regarding the alleged infringement to state a claim to relief that is plausible on its face. Moreover, the pleaded facts should not be conclusory. For example, it is insufficient for the patentee to simply recite claim elements and say that the elements are met by the accused product. The patentee should provide some short and plain explanation for why or how the accused product allegedly meets each claim element. Likewise, for each claim of indirect infringement, the

¹³ *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570).

complaint should plead the acts of the alleged indirect infringer that contribute to, or are inducing, a direct infringement. The Working Group has provided below a model complaint that provides exemplary factual content to plead a claim of direct patent infringement.

While the Working Group concluded that it was not necessary to identify all asserted claims and products to satisfy the *Iqbal/Twombly* pleading standard, it recognized the importance of having this information provided early in the discovery process. Many district courts have local rules that require that a patentee serve claim charts that provide this information. Other Sedona Working Groups addressing patent case management are recommending the early exchange of information such as the identification of representative claims and accused products as a best practice.¹⁴ In courts that do not employ local patent rules or standing orders to ensure the early exchange of claim charts, the Working Group has recommended Best Practice 2 to ensure early disclosure of this type of information, even if not in claim-chart form.

If a claimant fails to provide the above-described short, plain, and non-conclusory explanation, alleged infringers should consider whether a Rule 12 motion may be appropriate and advisable. If the accused infringer has a good-faith belief that additional information would narrow the case and advance the goal of assisting the party in preparing its defenses, its first step should be to approach the claimant. The accused infringer should be prepared to discuss what information it needs to narrow the case or properly prepare its defense. Even if the claimant refuses to provide additional information absent court order, before filing a motion challenging the method of pleading, the accused infringer should consider whether such a challenge will advance the primary objectives of informing the client of the accusations being asserted or preparing to defend the action. Usually a successful Rule 12 motion relating to how a patent infringement claim is pleaded results in an order of dismissal without prejudice and an opportunity for the claimant to replead. The resolution of such early motion practice often requires the expenditure of limited party, and in particular judicial, resources that ultimately would be better spent elsewhere.

However, a bare-bones pleading of patent infringement may in some instances provide an accused infringer with insufficient information regarding the nature of the claims to effectively prepare its defense. Or the patent may be so disconnected with the nature of the accused activity that a plausible claim for patent infringement cannot properly be stated. The accused infringer should weigh the costs of satellite litigation at the early pleading stage against waiting for preliminary infringement contentions which should set forth claimant's accusations in more detail.

Included below is an exemplary model complaint that illustrates the level of detail recommended by Best Practice 1.

¹⁴ See The Sedona Conference, *Commentary on Patent Litigation Best Practices: Discovery* (Dec. 2015 Edition), at Sec. IV (Automatic Disclosures and Contentions) and Sec. VI. (Scope and Limits of Discovery), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Patent%20Litigation%20Best%20Practices%3A%20Discovery> [hereinafter *Sedona WG10 Discovery Chapter*].

6. [For each asserted patent:] Upon information and belief, Defendant has infringed and continues to infringe Claim X of the ____ Patent by making, using, selling, offering for sale, and/or importing [name of at least one accused instrumentality].

7. [Example for an accused instrumentality:] Defendant's smartphone USB charger infringes at least Claim 1 of U.S. Pat. No. 1,234,567 ("the '567 patent"). Claim 1 recites:

1. A smartphone USB charger comprising:

a USB connector receiving power from a power source;

a resistor having a first end connected to a first pin of the USB connector;

a capacitor having a first end connected to ground and a second end connected to the second end of the resistor, wherein the connection between the second end of the resistor and the second end of the capacitor creates a node; and

an NPN transistor having a collector connected to the first pin of the USB connector, a base connected to the node, and an emitter connected to a battery of the smartphone.

8. Defendant's smartphone USB charger includes a USB connector, which is connected to a laptop to facilitate charging of the smartphone. The first pin (the VCC pin) of the USB charger is soldered to a pad of a perfboard.¹⁵

9. Defendant's smartphone USB charger includes a resistor. One end of the resistor is connected to the VCC pin of the USB connector by soldering the first end of the resistor to a pad of the perfboard and then creating a solder bridge between the resistor pad and the pad connected to the VCC pin of the USB connector.

10. Defendant's smartphone USB charger includes a capacitor. One end of the capacitor is connected to ground and the other end of the capacitor is connected to the second end of the resistor to create a node. These connections are made by soldering each end of the capacitor to a respective pad of the perfboard. The pad connected to the first end of the capacitor is connected to ground via a solder bridge. The pad connected to the second end of the capacitor is connected to the resistor pad via a solder bridge. The solder bridge between the capacitor and resistor forms the node.

¹⁵ In crafting this exemplary complaint, the Working Group was mindful to provide factual content to show how each limitation of the asserted claim was present in the accused product. For example, rather than simply parrot the claim language, "USB connector receiving power from a power source," the complaint specifies the particular elements of the USB connector that receive the power, namely, the first pin (VCC pin) and the pad of the printed circuit board to which it is connected (soldered).

11. Defendant's smartphone USB charger includes an NPN transistor. It is a BC547 NPN bi-polar junction transistor having a collector, base, and emitter. The collector is soldered to the VCC pin of the USB connector. The base is connected to the node by soldering the base to a pad in the perfboard, which is then connected by a solder bridge to the solder bridge between the capacitor and resistor. The emitter is connected to the smartphone's battery by soldering the emitter to a pad of the perfboard, which is then connected by a solder bridge to the first pin (the VCC pin) of a micro-USB connector.

12. Plaintiff [] has complied with the statutory requirement of placing a notice of the Letters Patent on all ___ it manufactures and sells and has given Defendant [] written notice of the infringement.¹⁶

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment in its favor and award the following relief against Defendant:

Therefore, the Plaintiff demands:

- (a) a preliminary and final injunction against the continuing infringement;
- (b) an accounting for damages; and
- (c) interest and costs.

Date: _____

Signature of the attorney/unrepresented party

 Printed name
 Address
 E-mail address
 Telephone number

¹⁶ While the notice or marking allegation is not technically required to state a claim for direct patent infringement under *Iqbal/Twombly* (though it may be required for entitlement to past damages), because this allegation was included in the bare-bones requirements of Form 18, the Working Group decided to carry it over to the exemplary model complaint here.

Best Practice 2 – In addition to what is stated in Best Practice 1, a claim for patent infringement should recite all claims asserted and also each identified instrumentality against which infringement is asserted based upon the information known to the plaintiff at the time that the complaint is filed. The asserted claims may be amended during the course of the proceeding upon discovery of further information regarding the accused instrumentalities upon a showing of good cause.

The requirements stated in Best Practice 1 naturally flow from the requirements of *Iqbal/Twombly* for the reasons provided in the above commentary. In recommending a further requirement to plead all asserted claims based upon the information known to the plaintiff at the time that the complaint is filed, the Working Group is not suggesting this requirement is necessary to likewise meet the *Iqbal/Twombly* requirements. Alleging the infringement of one claim by one instrumentality for each defendant (with the accompanying details described above) should be sufficient to state a claim for relief under *Iqbal/Twombly*.

The Working Group developed Best Practice 2 to supplement the requirements of Best Practice 1 and help the parties more efficiently and quickly focus and narrow the issues in the case. Having a more fulsome identification of the asserted claims will permit the parties and the court to more effectively determine whether post-grant review before the Patent Trial and Appeals Board might better address in the first instance all the claims to be litigated. Moreover, because the defendant may be able to streamline the claims presented to the PTAB for review based upon what is actually asserted in the litigation, the burden on the PTAB may be similarly reduced.

Similarly, the disclosure of all accused instrumentalities in the complaint, while not required under *Iqbal/Twombly*, may be necessary to provide the defendant sufficient notice as to the scope of the litigation and allow the defendant to put a properly crafted and not overbroad litigation hold in place. Should patent plaintiffs choose to assert anything less than the entirety of the accused products or processes (or categories thereof) known to them from their pre-filing investigation in the complaint, then they should not later assert spoliation with respect to documentation regarding the unasserted instrumentalities. Furthermore, defendants who do not know the extent of their litigation exposure are also not generally in a position to mediate meaningfully, even if they would otherwise do so.

The Working Group does not view the burden placed upon the plaintiff for complying with Best Practice 2 to be overly burdensome. The identified claims and accused instrumentalities must simply be based upon the information known to the plaintiff at the time that the complaint is filed. Because the plaintiff is expected to have conducted a good-faith analysis of how the patent claims relate to the accused instrumentalities, it should not require substantially more effort to identify what claims are being asserted based upon that analysis. It is fully expected that further information will be developed through discovery that may impact other claims—particularly dependent claims with narrower limitations that may not be apparent from publicly-available information. Likewise, claim construction may impact which claims should be asserted in a case. Many courts already have rules regarding preliminary infringement contentions and when amendment of those contentions is appropriate. The same standards can be applied regarding when it is appropriate to amend the

claims asserted in the original complaint for patent infringement. Moreover, whereas Best Practice 1 requires “a short, plain, and non-conclusory explanation for why at least one identified instrumentality for each defendant infringes at least one identified claim,” there should not be a requirement to provide this explanation for each claim asserted against each accused instrumentality

This Best Practice is most useful in districts that have not yet implemented patent local rules or required patent disclosures, which provide for an early identification of infringement contentions. In districts where no patent local rules have been adopted, a court may consider incorporating this Best Practice as part of its standing order or case management order to ensure that there is adequate disclosure and specificity before discovery proceeds.

IV. What Should be Included in Declaratory Judgment Actions or Counterclaims for Non-infringement and/or Invalidity

The application of the *Iqbal/Twombly* standards to declaratory judgment actions or counterclaims for non-infringement and/or invalidity poses additional challenges for the bench and bar in patent cases. A majority of courts have drawn a distinction between the pleading standards for counterclaims and affirmative defenses. As a general rule, courts have treated counterclaims in essentially the same manner as the original claims in terms of pleading requirements, and therefore required that counterclaims meet the *Iqbal/Twombly* standards. They generally have not, however, required that an affirmative defense meet the same standards.

In the context of patent cases, however, this general practice may often give rise to conflict, as many defendants assert as a matter of course the same arguments as both affirmative defenses and counterclaims. However, for the reasons explained in Part B below, WG10 cautions the patent litigation bench and bar against, in effect, automatically imposing a heightened pleading standard to such parallel affirmative defenses.

In presenting its Best Practice recommendations below, WG10 has given much consideration to balancing the *Iqbal/Twombly* goal of providing the court and the parties at the pleadings stage with a well-formed statement of the issues to be litigated, thereby allowing the opportunity for more efficient case management, with certain unique aspects of patent infringement litigation. For example, the complexity of both claims and defenses in patent infringement cases enhances the value of a more particularized framing of the issues at the pleadings stage. A more precise understanding of the scope of the claims, the instrumentalities at issue, the scope of prior art assertions, and the scope and extent of other invalidity assertions, can help sharpen and define discovery, and inform the parties and the court of the feasibility of pretrial resolution. At the same time, this same complexity may prevent a defendant from fully investigating its defenses where it presumptively has only twenty-one days in which to respond. On balance, this counsels against overly-restrictive requirements for pleading of defenses to claims of patent infringement.

A. DECLARATORY JUDGMENT ACTIONS AND COUNTERCLAIMS

For declaratory judgment actions and counterclaims, WG10 has developed the Best Practice recommendations set forth below for the pleading of invalidity claims based on 35 U.S.C. §§ 102-103 and § 112, or non-infringement claims. These recommendations apply only to the assertion of declaratory judgment claims or counterclaims, and do not apply to affirmative defenses under Fed. R. Civ. P. 8(b).

Given the short 21-day period within which the defendant is required, barring the grant of extension, to file its answer and counterclaims, patent plaintiffs and the courts should continue to be generous in permitting extensions on the timing of the answer, in particular with respect to invalidity or non-infringement counterclaims. While the extension of time to answer necessarily means a delay in the progress of the case, the delay would be more than offset by the progress and efficiencies to be gained by the parties from the more informative statements from defendants as to why a patent may be invalid and/or not infringed.

Best Practice 3 – When invalidity under 35 USC §§ 102–103 is asserted by way of a declaratory judgment claim or counterclaim, a party should be required to identify for each patent being challenged at least one reference (for §§ 102 and/or 103) or combination of references (for § 103) as a basis for its claim or counterclaim of invalidity based on prior art. However, a party should not be required to disclose all prior art known to it at the time of filing the claim or counterclaim.

In asserting claims of invalidity by declaratory judgment action or by counterclaim (referred to jointly here as a “claim of invalidity”) based on 35 U.S.C. § 102 anticipation or § 103 obviousness grounds, the consensus of the Working Group is that a defendant would meet any heightened pleading standard under *Iqbal/Twombly* by first identifying at least one reference or combination of references as a basis for pleading a claim of invalidity based on prior art, for each patent being challenged. The defendant, however, should not be required to disclose all prior art known to it with the claim of invalidity. Such a requirement would be particularly problematic for claims of invalidity given the short 21-day period to file the answer and counterclaims and the inherently time-consuming nature of conducting an appropriate prior art search in many cases. It would be thus unfair to preclude the defendant from introducing or relying on additional prior art that comes to its attention after the filing of its claims.

Best Practice 4 – When invalidity under 35 USC § 112 is asserted as a declaratory judgment claim or counterclaim, a defendant should be required to identify for each patent being challenged at least one basis for pleading invalidity for indefiniteness, lack of enablement, or lack of adequate written description.

In asserting a claim of invalidity based on § 112, a party should specify what aspect of § 112 it is invoking—enablement, written description, or indefiniteness—and should provide a short and non-conclusory basis for its § 112 challenge. For example, in asserting a claim of invalidity based on § 112 indefiniteness, the consensus of the Working Group is that a party would meet the pleading requirements of *Iqbal/Twombly* by identifying at least one claim term that it is challenging on § 112 grounds and providing a short and non-conclusory basis for its indefiniteness challenge.

A party, however, should not be required in its initial pleading to raise all claim terms and all theories that it may develop or assert on § 112 grounds; it need only provide sufficient content to demonstrate for each patent being challenged that it has one plausible claim for relief supporting each assertion of invalidity under § 112.

Best Practice 5 – When asserting a declaratory judgment claim or a counterclaim, a party should be required to include for at least one claim of each patent being challenged a short, plain, and non-conclusory statement of how each patent claim limitation is shown in the prior art when prior art-based invalidity is alleged, and a short, plain, and non-conclusory statement of why at least one limitation is missing in the accused instrumentality when non-infringement is alleged.

Like the heightened pleading standard required by a patent plaintiff in its infringement complaint, a defendant asserting a claim of invalidity should be required to include a short, plain, and non-conclusory statement of how each element of the patent claim is shown in the prior art for at least one claim of each patent being challenged.

Likewise, with respect to any assertion of non-infringement, the defendant should be required to provide for at least one claim of each patent being challenged a short, plain, and non-conclusory statement as to why one or more elements, for which the patent plaintiff has provided factual allegations, is not met by the accused instrumentality expressly identified by the plaintiff in the complaint.

The level of detail for such a pleading need only be sufficient to provide the plaintiff and the court with an indication of the substance of the claim of invalidity. Such disclosure is consistent with the requirements a patent plaintiff must meet to state a plausible claim of direct patent infringement. A declaratory judgment claimant or counterclaimant is not required to identify all bases that support its claim or counterclaim. Thus, a party need not disclose all prior art of which it is aware at the pleading stage. Furthermore, what is provided in the pleading should not prejudice a party from later disclosure and assertion of additional bases for its claims or counterclaims consistent with the procedures and rules set by the court.

B. AFFIRMATIVE DEFENSES

To balance the tension between robust early-stage disclosure and the desire to avoid increased “satellite” litigation of procedural issues, the consensus of WG10 is to limit the above Best Practice recommendations to the pleading of counterclaims and claims in a declaratory judgment action, and not to extend these recommendations to affirmative defenses. While a patent owner can set its own schedule for performing an investigation and bringing suit, often a defendant has not had adequate time to investigate and develop fulsome details to support its potential affirmative defenses.

WG10 notes that these recommendations are not intended to and should not be interpreted as altering or amending the pleading requirements for certain affirmative defenses, such as inequitable conduct or patent misuse, for which courts already require sufficient factual allegations to support such defenses. WG10 does not intend to change such requirements in any way.

Best Practice 6 – Although the requirements may be commensurate in some circumstances, any heightened pleading standard requirements directed toward counterclaims should not be extended to affirmative defenses raised under Rule 8.

As recognized by a number of courts, there is a distinction between counterclaims and defenses in terms of pleading requirements based on the text of the Federal Rules of Civil Procedure. Rule 8(a) requires that a party seeking relief must include in its pleading a “showing” that it is entitled to relief.¹⁷ In contrast, an affirmative defense need only provide fair notice of the issue involved.¹⁸ Thus, while a plaintiff must state a claim that is plausible, a defendant need only put the plaintiff on notice of the facts supporting its defense.¹⁹ Under this reasoning, a defendant who asserts a counterclaim is seeking relief, and must therefore meet the same pleading standards as a plaintiff, i.e., the showing of entitlement to relief required by Rule 8(a). Where a defense without a claim for relief is asserted, only a plain and simple statement should be necessary.²⁰

A majority of courts recognize the distinction between pleading claims under Rule 8(a) and providing notice of affirmative defenses under Rule 8(c).²¹ Moreover, many courts acknowledge the practical reality that while a plaintiff generally has an open-ended amount of time to prepare its claims, a defendant may only have twenty-one days, the default time for responding to a complaint, to prepare a defense and should not be prejudiced by the imbalance in time to prepare a pleading.²²

Applying the majority view to patent infringement cases therefore suggests that defendants should not be required to recite substantial supporting facts, such as identification of prior art or the basis for inadequate disclosure, unless those defenses are asserted as counterclaims.²³

Notably, though, certain equitable affirmative defenses, e.g., those based on allegations of fraud (such as inequitable conduct or unenforceability) already require a pleading of sufficient facts to

¹⁷ FED. R. CIV. P. 8(a).

¹⁸ FED. R. CIV. P. 8(b).

¹⁹ See, e.g., *Senju Pharm. v. Apotax, Inc.*, 921 F.Supp.2d 297 (D. Del. 2013); see also *Internet Media Corp. v. Hearst Newspapers, LLC*, 2012 WL 3867165, at *3 (D. Del. Sept. 6, 2012) (quoting *Tyco Fire Prod. v. Victaulic*, 777 F.Supp.2d 893, 900 (E.D. Pa. 2011); see also *Bayer CropScience AG v. Dow Agrosciences LLC*, 2011 WL 6934557, at *1–2 (D. Del. Dec. 30, 2011) (articulating nine reasons utilized by courts recognizing a Rule 8(a)/Rule 8(c) distinction).

²⁰ See, e.g., *Tyco Fire*, 777 F. Supp. 2d at 893.

²¹ While it has been a minority view, some courts have rejected this textual distinction and found that plaintiffs have the same entitlement to understand the basis for a defense as defendants have to understand asserted claims, and that fair notice under *Iqbal/Twombly* requires some factual allegation. See *PageMelding, Inc. v. ESPN, Inc.*, 2012 WL 3877686 (N.D. Cal. Sept. 6, 2012) (“Affirmative defenses are governed by the same pleading standards as claims. Notice requires more than legal conclusions; factual allegations must establish a right to relief that is ‘beyond the speculative level.’”) (internal citations omitted).

²² FED. R. CIV. P. 12; *Tyco Fire*, 777 F. Supp. 2d at 893.

²³ As a practical matter, however, in most patent cases, the defenses are pleaded simultaneously as both a defense and a counterclaim, in which case sufficient facts will need to be pleaded to support the defense in order to meet the heightened standard of *Iqbal/Twombly*.

support the defense under Fed. R. Civ. P. 9.²⁴ Courts are likely to find it appropriate in light of the policy rationale underlying *Iqbal/Twombly* to impose a heightened pleading requirement to the assertion of such affirmative defenses. In addition, some factual allegation may be required to provide notice under Rule 8(c) where the nature of the defense may be unclear from its label. Whereas an affirmative defense alleging that a patent is invalid under 35 U.S.C. §§ 102 or 103 gives a patentee notice of what issue is at stake—the accused infringer is stating that prior art invalidates the patent—the assertion of an equitable defense does not provide similar notice of the theory underpinning the asserted defense. For example, the identification of an affirmative defense of “laches” fails to provide a patent holder with any factual basis as to which type of laches or misuse may apply. In this situation, it would seem that even if *Iqbal/Twombly* were not generally applied to affirmative defenses, such a vague allegation would be susceptible to a motion to strike even under the minimal requirements of Fed. R. Civ. P. 8(c).

Thus, while the heightened pleading standards are applicable to the assertion of declaratory judgment claims and counterclaims of invalidity, they should not be applied to affirmative defenses under Rule 8(c).

²⁴ See, e.g., *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009).

Appendix A: The Sedona Conference Working Group Series & WGS Membership Program

**“DIALOGUE
DESIGNED
TO MOVE
THE LAW
FORWARD
IN A
REASONED
AND JUST
WAY.”**

The Sedona Conference was founded in 1997 by Richard Braman in pursuit of his vision to move the law forward in a reasoned and just way. Richard’s personal principles and beliefs became the guiding principles for The Sedona Conference: professionalism, civility, an open mind, respect for the beliefs of others, thoughtfulness, reflection, and a belief in a process based on civilized dialogue, not debate. Under Richard’s guidance, The Sedona Conference has convened leading jurists, attorneys, academics, and experts, all of whom support the mission of the organization by their participation in conferences and the Sedona Conference Working Group Series (WGS). After a long and courageous battle with cancer, Richard passed away on June 9, 2014, but not before seeing The Sedona Conference grow into the leading nonpartisan, nonprofit research and educational institute dedicated to the advanced study of law and policy in the areas of complex litigation, antitrust law, and intellectual property rights.

The WGS was established to pursue in-depth study of tipping point issues in the areas of antitrust law, complex litigation, and intellectual property rights. It represents the evolution of The Sedona Conference from a forum for advanced dialogue to an open think tank confronting some of the most challenging issues faced by our legal system today.

A Sedona Working Group is created when a “tipping point” issue in the law is identified, and it has been determined that the bench and bar would benefit from neutral, nonpartisan principles, guidelines, best practices, or other commentaries. Working Group drafts are subjected to a peer review process involving members of the entire Working Group Series including—when possible—dialogue at one of our regular season conferences, resulting in authoritative, meaningful, and balanced final commentaries for publication and distribution.

The first Working Group was convened in October 2002 and was dedicated to the development of guidelines for electronic document retention and production. Its first publication, *The Sedona Principles: Best Practices Recommendations & Principles Addressing Electronic Document Production*, has been cited favorably in scores of court decisions, as well as by policy makers, professional associations, and legal academics. In the years since then, the publications of other Working Groups have had similar positive impact.

Any interested jurist, attorney, academic, consultant, or expert may join the Working Group Series. Members may participate in brainstorming groups, on drafting teams, and in Working Group dialogues. Membership also provides access to advance drafts of WGS output with the opportunity for early input. For further information and to join, visit the “Working Group Series” area of our website, <https://thesedonaconference.org/wgs>.

Appendix B: The Sedona Conference Working Group 10 on Patent Litigation Best Practices—List of Steering Committee Members and Judicial Advisors

The Sedona Conference's Working Group 10 on Patent Litigation Best Practices Steering Committee Members and Judicial Advisors are listed below. Organizational information is included solely for purposes of identification.

The opinions expressed in publications of The Sedona Conference's Working Groups, unless otherwise attributed, represent consensus views of the Working Groups' members. They do not necessarily represent the views of any of the individual participants or their employers, clients, or any organizations to which they may belong, nor do they necessarily represent official positions of The Sedona Conference. Furthermore, the statements in each publication are solely those of the non-judicial members of the Working Group; they do not represent judicial endorsement of the opinions expressed or the practices recommended.

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