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AN INFAMOUS ILLUSTRATION OF PATENT INFRINGEMENT PLEADING: FORM 18 AND CONTEXT- SPECIFICITY

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ABSTRACT

In evaluating the sufficiency of complaints for patent infringement, courts and litigants have struggled with the apparent conflict between the barebones requirements of Form 18 in the Federal Rules of Civil Procedure and the Supreme Court's plausibility pleading standard. The Court of Appeals for the Federal Circuit initially held that, with respect to direct infringement, the Forms control, and district courts have since referred to Form 18 as creating an exception to the more stringent plausibility standard. Such an exception is diametrically opposed to the original purpose of the Forms, and contradicts Supreme Court precedent on the Federal Rules. In more recent cases, the Federal Circuit signaled a turn away from the exception view, towards a more context-specific approach. Meanwhile, the Advisory Committee on Civil Rules has been debating an update to Form 18, or returning the Forms to their original status as mere illustrations. This Article argues that, in light of Supreme Court precedent and the history of the Federal Rules, Form 18 must be viewed as a context-specific illustration of the general pleading standard, rather than an exception to that standard.

PATENT INFRINGEMENT PLEADING AND FORM 18—EXCEPTION OR ILLUSTRATION?

The oft-discussed Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² are generally considered to have raised the bar for pleading in federal courts, from mere “notice pleading,” to requiring claimants to state a “plausible” claim for relief.³ Courts have found this “plausibility” pleading standard “difficult to reconcile” with some of the relatively barebones sample pleading forms in the appendix to the Federal

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¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

² *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

³ *See, e.g.*, Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1310 (2009) (“The conventional wisdom is that *Twombly* and *Iqbal* herald a new era for federal pleading standards; they have discarded the liberal, notice-pleading paradigm that prevailed for over a half-century in favor of a new paradigm of plausibility pleading.”).

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Rules of Civil Procedure, particularly the Form 18 sample complaint for patent infringement.⁴

This difficulty becomes a predicament in light of Rule 84, which requires that the “forms in the Appendix suffice under these rules.”⁵ The Advisory Committee Notes to the 1946 amendment of Rule 84 further emphasize that “the forms . . . are sufficient to withstand attack under the rules under which they are drawn.”⁶ Thus, even though a complaint with Form 18’s minimal level of detail might appear subject to dismissal for failure to state a plausible claim under *Twombly* and *Iqbal*, Rule 84 seems to require that such a complaint be considered sufficient. These apparently conflicting mandatory rules have led to differing results in district courts.⁷

In the 2012 *R+L Carriers* decision, the Federal Circuit appeared to resolve this predicament in favor of Form 18 for claims of direct patent infringement, stating that “to the extent the parties argue that *Twombly* and its progeny conflict with the Forms and create differing pleading requirements, the Forms control.”⁸ The court acknowledged that Form 18 has been criticized, but stated “it is not within our power to rewrite it.”⁹ The court held, however, that Form 18 should be “strictly construed,” and that “because Form 18 addresses only direct infringement, we must look to Supreme Court precedent for guidance regarding the pleading requirements for claims of indirect infringement.”¹⁰ As a result, courts have since been applying differing pleading standards to claims

⁴ See, e.g., *Tyco Fire Prods., LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 905 (E.D. Pa. 2011) (“[T]he forms purporting to illustrate what level of pleading is required do not reflect the sea change of *Twombly* and *Iqbal*”); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at *5 (N.D. Cal. Mar. 11, 2010) (“[I]t is difficult to reconcile the guidelines set forth in *Twombly* and *Iqbal* with Form 18”); *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR, 2009 WL 4432367, at *3 n.5 (W.D. Wash. Nov. 27, 2009) (“This court agrees with the sentiment expressed by at least one other district court that it is difficult to reconcile Form 18 with the Supreme Court’s guidance in [*Twombly* and *Iqbal*].”); *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009) (noting that Form 18 “requires essentially nothing more than conclusory statements” and “is not easy to reconcile . . . with the guidance of the Supreme Court in *Twombly* and *Iqbal*”).

⁵ FED. R. CIV. P. 84.

⁶ *Id.* advisory committee’s notes, 1946 amend.

⁷ See *Gradient Enters., Inc. v. Skype Techs.*, 848 F. Supp. 2d 404, 407 (W.D.N.Y. 2012) (construing *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007)) (“Not surprisingly . . . the combination of *Twombly*, *Iqbal*, *McZeal*, Form 18, and Rule 84, has led to differing conclusions among the lower courts about whether a complaint that complies with the minimum requirements of Form 18 suffices to state a claim for direct patent infringement.”).

⁸ *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1334 (Fed. Cir. 2012).

⁹ *Id.* at 1335 n.7.

¹⁰ *Id.* at 1336–37.

of direct versus indirect patent infringement.¹¹ Some district courts have even referred to Form 18 as creating, for claims of direct infringement, an “exception” to the “more stringent” plausibility standard of *Twombly* and *Iqbal*.¹²

This dual-tiered pleading regime that is apparently prevailing in the patent realm is in serious tension with Supreme Court precedent, as well as the historic intent and understanding of the Forms.¹³ The Court stated in *Iqbal* that “*Twombly* expounded the pleading standard for all civil actions,” rejecting the argument that *Twombly* was limited to the context of antitrust as “incompatible with the Federal Rules of Civil Procedure.”¹⁴ The Court explained that the *Twombly* “decision was based on our interpretation and application of Rule 8,” which “in turn governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’”¹⁵ As explained in Wright & Miller’s treatise on *Federal Practice and Procedure*, “the federal rules reject the notion that certain actions inherently carry a different pleading burden than others.”¹⁶

Furthermore, the Forms were intended to “illustrate the simplicity and brevity that [the] rules contemplate,” rather than to provide exceptional standards for certain types of claims.¹⁷ The argument for separate rules in patent cases was specifically proposed and rejected when the Rules were drafted.¹⁸ The original purpose of Form 18 was to illustrate that patent claims

¹¹ See, e.g., *Superior Indus., LLC, v. Thor Global Enters., Ltd.*, 700 F.3d 1287, 1295–96 (Fed. Cir. 2012).

¹² See, e.g., *Creagri, Inc. v. Pinnaclife Inc.*, No. 5:11-CV-06635-LHK, 2013 WL 11569, at *2 (N.D. Cal. Jan. 1, 2013) (“This exception to the specificity requirements of *Twombly* and *Iqbal* applies only to claims of direct patent infringement, not to claims of indirect infringement.”); *Loftex USA LLC v. Trident Ltd.*, No. 11 Civ. 9349(PAE), 2012 WL 5877427, at *3 (S.D.N.Y. Nov. 20, 2012) (holding that since Loftex’s complaint satisfied Form 18, the court “need not determine here whether these claims would satisfy the more stringent standard of pleading, applicable to other civil litigation, of [*Twombly*] and [*Iqbal*]”).

¹³ See *infra* Part III.

¹⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (citing FED. R. CIV. P. 1, which states that “[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts.”).

¹⁵ *Id.* (quoting FED. R. CIV. P. 1).

¹⁶ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1221 (3d ed. 2004).

¹⁷ FED. R. CIV. P. 84.

¹⁸ See, e.g., *Nagler v. Admiral Corp.*, 248 F.2d 319, 323 (2d Cir. 1957) (“When the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted a uniform system for all cases.”); *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1349 (Fed. Cir. 2012) (Newman, J., dissenting in part).

are subject to the same pleading standard as all other claims.¹⁹ A regime under which Form 18 provides an exception to the general standard is diametrically opposed to that original purpose.

Given these precedential and historic underpinnings, Form 18 should be viewed as a context-specific illustration of the generally applicable pleading standard, rather than an exception to that standard. This context-specific interpretation flows in part from *Iqbal*, where the Court famously stated that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”²⁰ Some courts have already endorsed the view that the Forms represent context-specific illustrations.²¹ Indeed in *Twombly*, the Supreme Court endorsed the Form 11 sample complaint for negligence as sufficient in the context of its “simple fact pattern.”²²

In this Article, I propose that the simple pleading illustrated in Form 18 is justified in the context of its relatively simple claim for infringement of an electric motor, but that more detail might be required in the context of more complex matters, patents, and technology.²³ In other words, instead of reading Form 18 as an entirely separate standard applicable to all claims of direct infringement, I read it as an illustration of the *Twombly* and *Iqbal* standard, sufficient in its context and in the context of comparably simple matters, patents, and technologies. I see this as the best way to reconcile Form 18 with *Twombly* and *Iqbal*, in light of Rule 84 and the historic intent of the Forms as illustrations rather than exceptions.

Since *R+L Carriers*, the tide appears to be turning back towards viewing Form 18 as a context-specific illustration rather than a direct infringement exception. In *Hall*, the Federal Circuit evaluated a complaint for direct design patent infringement for plausibility under *Twombly* and *Iqbal*, without

¹⁹ See, e.g., WRIGHT & MILLER, *supra* note 16, § 1251 (“The principles of pleading simplicity and brevity applicable to complaints in other actions also apply in infringement suits and are reflected in the illustrative form for an infringement complaint appearing in the Appendix of Official Forms.”); *Temp-Resisto Corp. v. Glatt*, 18 F.R.D. 148, 151 (D.N.J. 1955) (“There is nothing about cases under the patent laws which requires departure from the guiding principles of simplicity and brevity applicable to complaints in other actions.”).

²⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

²¹ See, e.g., *Aktieselskabet AF v. Fame Jeans Inc.*, 525 F.3d 8, 16 (D.C. Cir. 2008) (“The forms accompanying the Federal Rules of Civil Procedure illustrate the concept of fair notice with numerous exemplary complaints that ‘suffice under these rules.’” (quoting FED. R. CIV. P. 84.)).

²² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007).

²³ See *infra* Part IV. As discussed *infra*, some district courts have been receptive to this approach. See, e.g., *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at *1 (N.D. Cal. 2003) (noting that Form 18 is “limited to a single ‘type’ of product (i.e., electric motors),” but dismissing the much more complicated complaint in this case, because Form 18 “simply does not address a factual scenario of this sort”).

mentioning Form 18.²⁴ And in *K-Tech*, the court suggested that the Forms could be harmonized with *Twombly* and *Iqbal*, stating that it need not “seek to create conflict where none exists.”²⁵ Furthermore, the Civil Rules Advisory Committee recently proposed abrogation of Rule 84.²⁶

Part I briefly reviews the notice pleading standard enacted by the Federal Rules of Civil Procedure and the Supreme Court’s apparent heightening of that standard in *Twombly* and *Iqbal*. Part II describes the development of the law surrounding Form 18 and how it led to the current view that Form 18 creates an exception to *Twombly* and *Iqbal* for claims of direct patent infringement. Part III exposes how viewing Form 18 as an exception creates serious tension with Supreme Court precedent and the historic intent and understanding of the Forms. Part IV sets forth and presents support for an alternative interpretation, that the Forms represent context-specific illustrations rather than exceptions. Part V forecasts future developments, discussing the recent Federal Circuit decisions in *Hall* and *K-Tech* and examining the implications of proposals for reform that have been on the table at recent meetings of the Civil Rules Advisory Committee.

I. PLEADING UNDER RULE 8—FROM NOTICE TO PLAUSIBILITY

A. Notice Pleading under *Conley v. Gibson*

The adoption of the Federal Rules of Civil Procedure in 1938 represented a shift from common-law code and fact pleading, to simple “notice” pleading, with Rule 8 requiring only a “short and plain statement of the claim showing that the pleader is entitled to relief.”²⁷ As explained by Justice Stevens in his *Twombly* dissent, the simple requirements of Rule 8 were in part a response to the “English experience with Byzantine special pleading rules,” which “made obvious the appeal of a pleading standard that was easy for the common

²⁴ *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357 (Fed. Cir. 2013).

²⁵ *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1284 (Fed. Cir. 2013).

²⁶ See Memorandum from David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Jeffrey S. Sutton, Chair, Standing Committee on Rules of Practice and Procedure, at 60 (May 8, 2013) [hereinafter 2013 Campbell Memo], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf>.

²⁷ FED. R. CIV. P. 8(a)(2); see *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era.”); *Thomson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004) (Posner, J.) (“The federal rules replaced fact pleading with notice pleading”); Arthur Miller, *From Conley To Twombly To Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 7 (2010) [hereinafter Miller, *Double Play*] (“Rule 8 required only ‘a short and plain statement of the claim showing that the pleader is entitled to relief’ and no longer demanded ‘facts sufficient to constitute a cause of action,’ as was required under code pleading.”).

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litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought.”²⁸ The landmark 1957 Supreme Court ruling in *Conley v. Gibson* explicated the concept of notice pleading, stating:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this.²⁹

The Court went on to explain that such “simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to . . . define more narrowly the disputed facts and issues,” and that the “Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”³⁰ The Court even stated that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”³¹ *Conley* remained the law of the land for fifty years,³² but in 2007, the Supreme Court began to distance itself from *Conley* and its notice

²⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 573–74 (2007) (Stevens J., dissenting). *See also* WRIGHT & MILLER, *supra* note 16, § 1216 (“The substitution of ‘claim showing that the pleader is entitled to relief’ for the code formulation of the ‘facts’ constituting a ‘cause of action’ was intended to . . . eliminate the unfortunate rigidity and confusion surrounding the words ‘cause of action’ that had developed under the codes.” (quoting FED. R. CIV. P. 8(a)(2)); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 891 (2009) (“[Chief architect of the 1938 Federal Rules, Charles] Clark’s views on pleading and those of his contemporaries were developed in response to the perceived deficiencies in common law and code pleading. These deficiencies had to do mainly with an insistence on technicality unrelated to any sensible pleading function.”).

²⁹ *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting FED. R. CIV. P. 8(a)(2)). *See also* *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (“Rule 8(a)(2) requires that a complaint include only a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’ In *Conley v. Gibson*, we said in effect that the Rule meant what it said.” (quoting FED. R. CIV. P. 8(a)(2))).

³⁰ *Conley*, 355 U.S. at 47–48.

³¹ *Id.* at 45–46.

³² *See, e.g.*, Steinman, *supra* note 3, at 1300 (“For more than a half-century, the Federal Rules of Civil Procedure were read as adopting an approach to pleading known as notice pleading. . . . In the landmark case of *Conley v. Gibson*, the Supreme Court made clear that ‘the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.’” (quoting *Conley*, 355 U.S. at 47)).

pleading philosophy.

B. Plausibility Pleading under Twombly and Iqbal

The Court began an apparent shift towards higher pleading standards in *Bell Atlantic Corp. v. Twombly*, requiring “enough facts to state a claim to relief that is plausible on its face.”³³ The Court explained that while “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,” a plaintiff must provide “more than labels and conclusions.”³⁴ That is, “[f]actual allegations must be enough to raise a right to relief above the speculative level,” and “a formulaic recitation of the elements of a cause of action will not do.”³⁵ Distancing itself from *Conley*’s “no set of facts” language, the Court stated that “this famous observation has earned its retirement,” and that the “phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.”³⁶

The breadth of *Twombly*’s effect on pleading paradigms was uncertain at first, as “several of the circuits discussed the plausibility standard and attempted to harmonize it with more traditional notice pleading standards.”³⁷ The Seventh Circuit, for example, took the view that *Twombly* probably did not change the level of factual detail required by notice pleading.³⁸ But *Twombly*’s “plausibility” standard was solidified two years later in *Ashcroft v. Iqbal*, where the Court reiterated that to “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.’”³⁹ The Court explained that plausibility is something less than probability, but more than possibility, and that where “a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”⁴⁰ Extinguishing speculation that *Twombly* might have been limited to the antitrust context,⁴¹ the Court clarified that its “decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.”⁴²

³³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

³⁴ *Id.* at 555.

³⁵ *Id.*

³⁶ *Id.* at 563.

³⁷ 2 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 8.04 (3d ed. 2013).

³⁸ *See, e.g.*, *Lang v. TCF Nat’l Bank*, 249 Fed. Appx. 464, 466 (2007) (“Even after the Supreme Court’s recent *Bell Atlantic* case, complaints in federal courts need only satisfy a notice pleading standard.”).

³⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

⁴⁰ *Id.* (quoting *Twombly*, 550 U.S. at 557).

⁴¹ *See, e.g.*, *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d. Cir. 2007) (holding that “conflicting signals create some uncertainty as to the intended scope of the Court’s decision”).

⁴² *Iqbal*, 556 U.S. at 684 (quoting FED. R. CIV. P. 1).

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The Court illuminated two “working principles,” which “underlie” *Twombly*’s plausibility standard. First, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”⁴³ Second, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁴⁴

After *Iqbal*, it has been generally accepted that pleading requirements are now higher than they were under *Conley*.⁴⁵ In the words of Professor Arthur Miller, “[b]y establishing plausibility pleading, *Twombly* and *Iqbal*, have transformed the function of a complaint from *Conley*’s limited role by imposing a more demanding standard that requires a greater factual foundation than previously was required or originally intended.”⁴⁶ However, the “question with which courts are still struggling is how much higher the Supreme Court meant to set the bar.”⁴⁷

II. A FORM 18 EXCEPTION TO PLAUSIBILITY PLEADING?—*R+L CARRIERS*

A. *Form 18*—“*Sufficient Under the Rules*” Yet “*Difficult to Reconcile*”

The appendix to the Federal Rules of Civil Procedure contains a number of sample pleading forms which, according to Rule 84, “illustrate the simplicity and brevity that these rules contemplate.”⁴⁸ As explained by the Supreme Court, the “simple requirements of Rule 8(a)” are “exemplified by the Federal Rules of Civil Procedure Forms, which ‘are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.’”⁴⁹ Perhaps the most illustrious example, the Form 18 barebones sample “Complaint for Patent Infringement,” reads in its entirety as follows:

(Caption—See Form 1.)

⁴³ *Id.* at 678.

⁴⁴ *Id.* at 679.

⁴⁵ *See, e.g.*, Steinman, *supra* note 3, at 1310 (“The conventional wisdom is that *Twombly* and *Iqbal* herald a new era for federal pleading standards; they have discarded the liberal, notice-pleading paradigm that prevailed for over a half-century in favor of a new paradigm of plausibility pleading.”).

⁴⁶ Miller, *Double Play*, *supra* note 27, at 19.

⁴⁷ Swanson v. Citibank, N.A., 614 F.3d 400, 403 (7th Cir. 2010).

⁴⁸ FED. R. CIV. P. 84. *See also* Steinman, *supra* note 3, at 1300–01 (“The Forms provided in the Rules’ appendix, which are deemed to ‘suffice under these rules and illustrate the simplicity and brevity that these rules contemplate,’ confirm this lenient [notice pleading] approach.”).

⁴⁹ Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 n.4 (2002). *See also* Conley v. Gibson, 355 U.S. 41, 47 (1957) (explaining that Rule 8 requires only a short and plain statement giving the defendant notice, and that the “illustrative forms appended to the Rules plainly demonstrate this.”).

1. (Statement of Jurisdiction—See Form 7.)
 2. On *date*, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant’s infringing acts and still owns the patent.
 3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.
 4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells and has given the defendant written notice of the infringement.
- 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 and sign—See Form 2.)⁵⁰

Form 18 is a strikingly simple example of *Conley*-style notice pleading. As explained by Professor Adam Steinman, “[n]o details are required about precisely when or where the making, selling, or using occurred, or which of the defendant’s officers or employees were involved.”⁵¹ Form 18 does not even specify which claims of the patent are allegedly infringed.

Many district courts have found the *Twombly* and *Iqbal* plausibility pleading standard “difficult to reconcile” with Form 18.⁵² In *Tyco Fire Products*, for example, the Eastern District of Pennsylvania stated that “the forms purporting to illustrate what level of pleading is required do not reflect the sea change of *Twombly* and *Iqbal*.”⁵³ And in *Elan Microelectronics*, the Northern District of California observed that Form 18 “requires essentially nothing more than conclusory statements” and “is not easy to reconcile . . . with the guidance of the Supreme Court in *Twombly* and *Iqbal*.”⁵⁴ Courts have noted this difficulty

⁵⁰ FED. R. CIV. P. app. Form 18.

⁵¹ Steinman, *supra* note 3, at 1344.

⁵² See, e.g., *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at *5 (N.D. Cal. Mar. 11, 2010) (“[I]t is difficult to reconcile the guidelines set forth in *Twombly* and *Iqbal* with Form 18”); *Sharafabadi v. Univ. of Idaho*, No. C09-1043JLR, 2009 WL 4432367, at *3 n.5 (W.D. Wash. Nov. 27, 2009) (“This court agrees with the sentiment expressed by at least one other district court that it is difficult to reconcile Form 18 with the Supreme Court’s guidance in [*Twombly* and *Iqbal*].”).

⁵³ *Tyco Fire Prods., LP v. Victualic Co.*, 777 F. Supp. 2d 893, 905 (E.D. Pa. 2011).

⁵⁴ *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at

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in the context of other Forms as well.⁵⁵ As stated by the Seventh Circuit, “the Supreme Court’s recent tightening of pleading standards,” is “difficult to reconcile with Federal Rule of Civil Procedure 8(a)(2) . . . and with the forms approved as sufficient as part of the Federal Rules of Civil Procedure.”⁵⁶

This difficulty becomes a predicament in light of Rule 84, which requires that the “forms in the Appendix suffice under these rules.”⁵⁷ The Advisory Committee Notes to the 1946 amendment of Rule 84 further emphasizes that “the forms . . . are sufficient to withstand attack under the rules under which they are drawn.”⁵⁸ Thus though complaints mirroring some of the sample forms might appear subject to dismissal for failure to state a claim under the *Twombly* and *Iqbal* standard, Rule 84 deems the Forms sufficient to withstand attack and would seem to preclude such a dismissal.⁵⁹

B. McZeal and the Ensuing Confusion in District Courts

Just months after *Twombly* was decided, the Federal Circuit was confronted with review of a motion to dismiss on a claim for direct patent infringement in *McZeal*,⁶⁰ and essentially proceeded as though *Twombly* changed nothing. In the court’s opinion authored by Judge Archer and joined by Chief Judge Michel, the court did not mention plausibility, instead quoting *Twombly*’s statement that “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”⁶¹ After the ensuing citation to *Twombly*, the court added a “*see also*” signal, and cited Form 18 as:

[S]etting forth a sample complaint for patent infringement that includes only the following elements: 1) an allegation of jurisdiction; 2) a statement that the plaintiff owns the patent; 3) a statement that

*2 (N.D. Cal. Sept. 14, 2009).

⁵⁵ See, e.g., *Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1348 (11th Cir. 2010) (Ryscamp, J., dissenting) (“Form 11 . . . entitled ‘Complaint for Negligence,’ . . . would likely be considered scant under the *Twombly* standard.”).

⁵⁶ *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 686–87 (7th Cir. 2012).

⁵⁷ FED. R. CIV. P. 84.

⁵⁸ *Id.* advisory committee’s notes, 1946 amend.

⁵⁹ 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) (“[A] bare allegation of literal infringement using the form is inadequate However, I agree that under Rule 84 of the Federal Rules of Civil Procedure, we would be required to find that a bare allegation of literal infringement in accordance with Form 16 would be sufficient under Rule 8 to state a claim.”). The Rules formerly referred to Form 18 at Form 16, but it has since been renumbered. See FED. R. CIV. P. app. Form 18.

⁶⁰ *McZeal*, 501 F.3d 1354 (majority opinion).

⁶¹ *Id.* at 1356 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

defendant has been infringing 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.⁶²

The court’s use of a “*see also*” signal suggests that the court viewed Form 18 as an illustration consistent with the general *Twombly* standard. The court stated that a “plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent.”⁶³ Noting that McZeal was appearing *pro se*, the court found his pleadings sufficient in that they “met the low bar for *pro se* litigants to avoid dismissal.”⁶⁴

In a separate opinion, Judge Dyk expressed his view that “a bare allegation of literal infringement using the form is inadequate to provide sufficient notice to an accused infringer,” but that “under Rule 84 of the Federal Rules of Civil Procedure, we would be required to find that a bare allegation of literal infringement in accordance with Form [18] would be sufficient under Rule 8 to state a claim.”⁶⁵ In a call for reform, he expressed “hope that the rulemaking process will eventually result in eliminating the form, or at least revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.”⁶⁶

As the majority opinion in *McZeal* did not speak directly or definitively on the interaction between *Twombly* and Form 18, district courts reached varying conclusions in the ensuing years.⁶⁷ Some district courts found that in light of Rule 84, a complaint that conforms to Form 18 must suffice to state a claim for direct patent infringement.⁶⁸ Other district courts concluded that in light of

⁶² *Id.* at 1356–57 (citing FED. R. CIV. P. app. Form 18). The court actually cited to Form 16, but that form was renumbered as Form 18. *See supra* note 59.

⁶³ *McZeal*, 501 F.3d at 1357.

⁶⁴ *Id.* at 1358.

⁶⁵ *Id.* at 1360 (Dyk, J., concurring in part and dissenting in part). Though Judge Dyk actually referred to Form 16, that form was renumbered as Form 18. *See supra* note 59.

⁶⁶ *McZeal*, 501 F.3d at 1360.

⁶⁷ *See supra* note 7.

⁶⁸ *See, e.g.*, *Wright Mfg. Inc. v. Toro Co.*, No. MJG-11-1373, 2011 WL 6211172, at *1 (D. Md. Dec. 13, 2011); *Comfort Inn Oceanside v. Hertz Corp.*, No. 11-CV-1534 (JG)(JMA), 2011 WL 5238658, at *8 n.11 (E.D.N.Y. Nov. 1, 2011); *W.L. Gore & Assocs., Inc. v. Medtronic, Inc.*, 778 F. Supp. 2d 667, 675 (E.D. Va. 2011); *Eolas Techs., Inc. v. Adobe Sys., Inc.*, No. 6:09-CV-446, 2010 WL 2026627, at *2–3 (E.D. Tex. May 6, 2010) (“The Supreme Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18. To hold otherwise would render Rule 84 and Form 18 invalid. This cannot be the case Thus, a patent complaint that complies with Form 18 will suffice to state a claim that is plausible on its face.”).

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Twombly and *Iqbal*, a Form 18-style complaint will not suffice.⁶⁹ Perhaps attempting to resolve this confusion among the district courts, the Federal Circuit spoke more directly to this issue in *R+L Carriers*.

C. Federal Circuit Says the “Forms Control” for Direct Infringement

In the 2012 *R+L Carriers* decision, the Federal Circuit resolved this predicament in favor of Form 18 for claims of direct patent infringement, stating that “to the extent the parties argue that *Twombly* and its progeny conflict with the Forms and create differing pleading requirements, the Forms control.”⁷⁰ The court noted that “[r]ecent Supreme Court precedent has defined the contours of the plausibility standard,” but that none of these cases “address the sufficiency of a complaint alleging patent infringement or causes of action for which there is a sample complaint in the Appendix of Forms to the Federal Rules of Civil Procedure.”⁷¹ The court concluded that “whether *R+L*’s amended complaints adequately plead direct infringement is to be measured by the specificity required by Form 18.”⁷² The court acknowledged that Form 18 has been criticized, but stated “it is not within our power to rewrite it.”⁷³

The court essentially expressed the view that Form 18 is inconsistent with the *Twombly* and *Iqbal* plausibility standard, stating that it “will not always be true that a complaint which contains just enough information to satisfy a governing form will be sufficient under *Twombly* and its progeny.”⁷⁴ The court noted that the defendants’ arguments for dismissal “all focus on whether the amended complaints’ allegations of direct infringement contain sufficient factual detail to withstand attack under *Twombly* and *Iqbal*,” and faulted these arguments for being “premised on a pleading standard that is too stringent,” when “compared to the requirements of Form 18.”⁷⁵ The court concluded that “all six of the complaints adequately pled direct infringement” under the Form

⁶⁹ See, e.g., *Proxyconn Inc. v. Microsoft Corp.*, No. SACV 11-1681 DOC (ANx), 2012 WL 1835680, at *4 (C.D. Cal. May 16, 2012) (“The Court is persuaded by those authorities which hold that threadbare recitations of the language in Form 18 is no longer sufficient to state a claim.”); *Rovi Corp. v. Hulu, LLC.*, No. 11-665, 2012 WL 261982, at *2 (D. Del. Jan. 27, 2012); *Illinois Tool Works Inc. v. Elektromanufaktur Zangenstein Hanauer GmbH & Co. KGaA*, No. 11-CV-262-JPS, 2011 WL 6002967, at *2–3 (E.D. Wis. Nov. 30, 2011); *Medsquire LLC v. Spring Medical Systems Inc.*, No. 2:11-cv-04504-JHN-PLA, 2011 WL 4101093, at *2 (S.D.N.Y. Aug. 31, 2011).

⁷⁰ *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1334 (Fed. Cir. 2012).

⁷¹ *Id.* at 1333–34.

⁷² *Id.* at 1334.

⁷³ *Id.* at 1335 n.7.

⁷⁴ *Id.* at 1334 n.6.

⁷⁵ *Id.* at 1335.

18 standard.⁷⁶

Turning to indirect infringement, the court held that the “Forms are controlling only for causes of action for which there are sample pleadings,” and that Form 18 should be “strictly construed as measuring only the sufficiency of allegations of direct infringement, and not indirect infringement.”⁷⁷ The court stated that “because Form 18 addresses only direct infringement, we must look to Supreme Court precedent for guidance regarding the pleading requirements for claims of indirect infringement.”⁷⁸ The court concluded that the complaints had adequately pled a plausible claim for induced infringement, but not contributory infringement.⁷⁹

Citing *R+L Carriers*, courts have since been applying separate pleading standards to claims of direct versus indirect patent infringement. For example, in *Superior Industries*, the Federal Circuit found that the complaint adequately pled direct infringement in accordance with Form 18 because it “served to give [the defendant] notice.”⁸⁰ But as Form 18 “does not determine the sufficiency of pleading for claims of indirect infringement,” the court applied “the pleading requirements set forth in [*Twombly*] and [*Iqbal*]” to those claims, finding that “Superior’s complaint falls far short of pleading facts necessary to state a plausible claim for either induced or contributory infringement.”⁸¹ The Federal Circuit again reaffirmed Form 18 in the April 2013 *K-Tech* decision, stating “as we made clear in *R+L Carriers*, to the extent any conflict exists between *Twombly* (and its progeny) and the Forms regarding pleading requirements, the Forms control.”⁸²

Although the standard for a motion to dismiss is supposedly a “purely procedural issue . . . reviewed under the applicable law of the regional circuit,”⁸³ district courts have looked to *R+L Carriers* for guidance in the patent context.⁸⁴ In *K-Tech*, the Federal Circuit rejected the argument that analysis of Form 18 should differ depending on the regional circuit from which a case arises, reasoning that its “decision regarding the requirements of Form

⁷⁶ *Id.* at 1336.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1336–37.

⁷⁹ *Id.* at 1346–47.

⁸⁰ *Superior Indus., LLC, v. Thor Global Enters., Ltd.*, 700 F.3d 1287, 1295–96 (Fed. Cir. 2012).

⁸¹ *Id.*

⁸² *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013).

⁸³ *R+L Carriers*, 681 F.3d at 1331. *See also, e.g., Superior Industries*, 700 F.3d at 1292.

⁸⁴ *See, e.g., Joao Control & Monitoring Sys. of Cal., LLC v. Sling Media, Inc.*, No. C-11-6277 EMC, 2012 WL 3249510, at *4 n.1 (N.D. Cal. August 7, 2012) (citing *R+L Carriers*, 681 F.3d 1323) (noting that *R+L Carriers* “is technically not binding,” but finding it to be “strongly persuasive authority,” “because of Form 18’s specific application to patent law.”).

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18 and its relationship to the pleading standards set forth in *Twombly* and *Iqbal* was dictated by Supreme Court precedent.”⁸⁵

Some district courts have even referred to Form 18 as creating, for claims of direct infringement, an “exception” to the “more stringent” *Twombly* and *Iqbal* plausibility standard.⁸⁶ In *Creagri*, for example, the Northern District of California stated that “[t]his exception to the specificity requirements of *Twombly* and *Iqbal* applies only to claims of direct patent infringement, not to claims of indirect infringement.”⁸⁷ And in *Loftex*, the Southern District of New York held that since *Loftex*’s complaint satisfied Form 18, the court “need not determine here whether these claims would satisfy the more stringent standard of pleading, applicable to other civil litigation, of [*Twombly*] and [*Iqbal*].”⁸⁸

Thus, a prominent view is that Form 18 represents an exception to the general plausibility standard set forth in *Twombly* and *Iqbal*. As explained in Part III, there are some serious issues with this exception approach, including tension with Supreme Court precedent, and with the historic intent of the Federal Rules of Civil Procedure.

III. PROBLEMS WITH THE EXCEPTION APPROACH

A. *Tension with Supreme Court Precedent on the Federal Rules*

Supreme Court precedent generally rejects the notion that different types of claims inherently carry entirely separate pleading standards. For example, in *Iqbal*, the Court stated that “*Twombly* expounded the pleading standard for all civil actions,” and rejected the argument that *Twombly* was limited to the context of antitrust as “incompatible with the Federal Rules of Civil Procedure.”⁸⁹ The Court explained that the *Twombly* “decision was based on

⁸⁵ *K-Tech*, 714 F.3d at 1283 n.1.

⁸⁶ See, e.g., *Robert Bosch Healthcare Syst., Inc., v. Express MD Solutions, LLC*, No. C 12-00068 JW, 2012 WL 2803617, at *4 (July 10, 2012) (citing *R+L Carriers*, 681 F.3d 1323) (stating that the court [in *R+L Carriers*] held that “whether a complaint for patent infringement ‘adequately plead[s] direct infringement is to be measured by the specificity required by Form 18,’ rather than by the more stringent pleading standards articulated by the Supreme Court in *Twombly* and *Iqbal* However, the court went on to expressly state that its holding was limited to pleading standards for *direct* infringement.” (quoting *R+L Carriers*, 681 F.3d at 1334)).

⁸⁷ *Creagri, Inc. v. Pinnacle Inc.*, No. 5:11-CV-06635-LHK, 2013 U.S. Dist. LEXIS 427, at *4, 2013 WL 11569, at *2 (N.D. Cal. Jan. 1, 2013).

⁸⁸ *Loftex USA LLC v. Trident Ltd.*, No. 11 Civ. 9349(PAE), 2012 U.S. Dist. LEXIS 166553, at *8–9, 2012 WL 5877427, at *3 (S.D.N.Y. Nov. 20, 2012).

⁸⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (citing FED. R. CIV. P. 1); see also WRIGHT & MILLER, *supra* note 16, § 1221, at 290 (“[T]he federal rules reject the notion that certain actions inherently carry a different pleading burden than others.”).

our interpretation and application of Rule 8,” which “in turn governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’”⁹⁰

Similarly, in *Swierkiewicz v. Sorema*, the Court stated that “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions.”⁹¹ The Court explained that “Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake,” but that the Court “has declined to extend such exceptions to other contexts.”⁹² For example, in *Leatherman*, the Court noted that the “Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*”⁹³ As explained by Wright & Miller:

The requirements for pleading set forth in Federal Rule 8(a) apply to all actions in the federal courts. Other than Rule 9, which governs a limited number of particular matters, and the existence of at least one federal statute providing a specialized pleading requirement for certain types of federal cases, there are no special pleading provisions in the federal rules for civil cases.⁹⁴

This notion that pleading standards and the rules of procedure in general should be “transsubstantive,”⁹⁵ derives in part from the Rules Enabling Act, which grants the Supreme Court “power to prescribe general rules of practice and procedure.”⁹⁶ As explained by Professor Stephen Burbank, “[o]ne of the foundational assumptions of modern American procedure is that the Rules Enabling Act’s reference to ‘general rules’ forecloses the promulgation of different prospective rules for cases that involve different bodies of substantive law.”⁹⁷

B. *Historic Intent and Understanding—Illustrations not Exceptions*

As originally conceived, the Forms were intended to be illustrations of the

⁹⁰ *Iqbal*, 556 U.S. at 684 (quoting FED. R. CIV. P. 1).

⁹¹ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002).

⁹² *Id.*

⁹³ *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (the express mention of one thing excludes all others).

⁹⁴ WRIGHT & MILLER, *supra* note 16 § 1221, at 288.

⁹⁵ Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 536 (2009)

⁹⁶ 28 U.S.C. § 2072 (2006); *see generally* Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006).

⁹⁷ Burbank, *supra* note 95, at 541.

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general pleading standard, rather than exceptions to that standard.⁹⁸ As explained by Chief Judge Charles E. Clark, the principle draftsman of the Federal Rules:⁹⁹

We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms. These are important because when you can't define you can at least draw pictures to show your meaning.¹⁰⁰

The Federal Rules themselves state that the “forms in the Appendix suffice under these rules and *illustrate* the simplicity and brevity that these rules contemplate.”¹⁰¹ The Supreme Court has repeatedly referred to the Forms as “illustrations” or “examples” and has never intimated that they might provide exceptional standards for the few types of claims that they cover.¹⁰²

There is no indication that the substantive areas covered by the Forms were chosen because it was thought that those areas deserved separate or lower pleading standards. The Committee explained that the “forms cover an incomplete range of the rules,” and that it “is difficult to account for the selection of some subjects while others are excluded.”¹⁰³ It seems extremely

⁹⁸ See, e.g., WRIGHT & MILLER, *supra* note 16, § 1223, at 296 (“The justification for using illustrative forms drafted by the Advisory Committee is predicated on the virtual impossibility of effectively describing the desiderata of pleading in a general formula.”); R+L Carriers, Inc. v. DriverTech LLC, 681 F.3d 1323, 1350 (Fed. Cir. 2012) (Newman, J., dissenting in part) (“The adoption of notice pleading, a concept not easily expressed in words, required that the Committee paint pictures in the guise of Forms to illustrate the meaning of Rule 8(a)(2).”).

⁹⁹ See Bone, *supra* note 28, at 891 (“Charles Clark, reporter for the original Advisory Committee and chief architect of the 1938 Federal Rules, was an authority on pleading Pleading reform was one of his key innovations for the new Federal Rules.”).

¹⁰⁰ Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L. J. 177, 181 (1958).

¹⁰¹ FED. R. CIV. P. 84 (emphasis added).

¹⁰² See, e.g., Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting) (“The pleading paradigm under the new Federal Rules was well *illustrated* by the inclusion in the appendix of Form 9.” (emphasis added)); Mayle v. Felix, 545 U.S. 644, 660 (2005) (“The federal rulemakers . . . included in the Appendix to the Federal Rules an *illustrative* form indicating that a personal injury plaintiff could adequately state a claim for relief simply by alleging that the defendant negligently operated a certain instrumentality at a particular time and place.” (emphasis added)); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 n.4 (2002) (explaining that the “simple requirements of Rule 8(a)” are “*exemplified* by the Federal Rules of Civil Procedure Forms” (emphasis added)); Conley v. Gibson, 355 U.S. 41, 47 (1957) (explaining that Rule 8 only requires a “short and plain statement of the claim” giving the defendant notice, as demonstrated by the “*illustrative* forms appended to the Rules” (emphasis added)).

¹⁰³ Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Mark R. Kravitz, Chair, Standing Comm. on Rules of Practice and

unlikely that direct patent infringement was chosen as a subject for one of the Forms so that it might carry a different pleading standard from all other claims.

In fact, the notion of separate pleading standards for patent cases was specifically rejected when the Rules were drafted. As Judge Newman explained in her dissent in *R+L Carriers*:

The minutes of an October 1936 meeting of the Advisory Committee on Rules for Civil Procedure, at the inception of the Federal Rules, contain a transcript of arguments by the patent bar for special rules for patent cases; the chairman of the Advisory Committee, Judge William D. Mitchell, disagreed, stating that “we are trying to establish uniform rules in equity cases as well as in law cases.”¹⁰⁴

Chief Judge Clark, writing for the Second Circuit in *Nagler*, explained that “[w]hen the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted a uniform system for all cases.”¹⁰⁵ As interpreted in *Wright & Miller*, the “point of *Nagler* simply is that the federal rules reject the notion that certain actions inherently carry a different pleading burden than others.”¹⁰⁶ Thus, the original purpose of Form 18 seems to have been to illustrate that patent claims are subject to the same pleading standard as all other claims.¹⁰⁷ A regime under which Form 18 provides an exception to the general standard is diametrically opposed to that original purpose.

C. *Hypertechnicality, and Rigidity*

Another problem with the notion that Form 18 provides a direct infringement safe harbor is that it leads to the curious result that claims for direct infringement are evaluated under one standard, while all other claims, including claims for indirect infringement, are evaluated under an entirely separate standard.¹⁰⁸ In certain cases, particularly joint direct infringement

Procedure, at 13 (Dec. 2, 2011) [hereinafter 2011 Campbell Memo], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2011.pdf>.

¹⁰⁴ *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1349 (Fed. Cir. 2012) (Newman, J., concurring in part and dissenting in part).

¹⁰⁵ *Nagler v. Admiral Corp.*, 248 F.2d 319, 323 (2d Cir. 1957).

¹⁰⁶ *WRIGHT & MILLER*, *supra* note 16, at § 1221.

¹⁰⁷ *See id.* at § 1251 (“The principles of pleading simplicity and brevity applicable to complaints in other actions also apply in infringement suits and are reflected in the illustrative form for an infringement complaint appearing in the Appendix of Official Forms.”); *Temp-Resisto Corp. v. Glatt*, 18 F.R.D. 148, 151 (D.N.J. 1955) (“There is nothing about cases under the patent laws which requires departure from the guiding principles of simplicity and brevity applicable to complaints in other actions.”).

¹⁰⁸ Infringement under Section 271(a) is direct infringement; indirect infringement encompasses induced infringement under Section 271(b) and contributory infringement

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cases¹⁰⁹ and willful direct infringement cases,¹¹⁰ district courts have run into some confusion in deciding which standard should be used and have ultimately applied essentially a “Form 18 plus” type of standard. It is difficult to explain why indirect infringement claims should be evaluated under the general plausibility standard, while direct infringement claims should be evaluated under an entirely separate Form 18 standard.¹¹¹

Furthermore, the complaints at issue in *R+L Carriers* were only for claims of indirect infringement; none of the defendants at issue were accused of direct infringement.¹¹² The court nevertheless addressed direct infringement, reasoning that “[b]ecause liability for indirect infringement of a patent requires direct infringement, R+L’s amended complaints must plausibly allege that the ‘078 patent was directly infringed to survive Appellees’ motion to dismiss.”¹¹³ The upshot is that not only are claims of direct infringement evaluated under a different standard than claims of indirect infringement, but different *aspects* of claims for indirect infringement are evaluated under different standards. This complex multi-tiered regime harkens back to the “insistence on technicality unrelated to any sensible pleading function” of common law and code pleading that the Federal Rules of Civil Procedure were drafted to avoid.¹¹⁴

under Section 271(c). See 35 U.S.C. § 271 (2006); *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 774 (Fed. Cir. 1993) (“Although not direct infringement under section 271(a), a party’s acts in connection with selling equipment may, however, constitute active inducement of infringement or contributory infringement . . . under 35 U.S.C. § 271(b) and (c).”).

¹⁰⁹ See, e.g., *Pragmatus AV, LLC v. TangoMe, Inc.*, No. 11-1092-LPS, 2013 WL 571798, at *3 (D. Del. Feb. 13, 2013) (“[F]or a claim of joint infringement, in addition to satisfying the requirements of Form 18, a plaintiff must also plead facts sufficient to allow a reasonable inference that one party exercises the requisite ‘direction or control,’ such that performance of every step is attributable to the controlling party.”).

¹¹⁰ See, e.g., *Robert Bosch Healthcare Sys., Inc., v. Express MD Solutions, LLC*, No. C 12-00068 JW, 2012 WL 2803617, *1, *4 (July 10, 2012) (citing *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323 (Fed. Cir. 2012)) (noting that Robert Bosch alleged “that Defendant directly and willfully infringes,” but concluding “that the [*R+L Carriers*] decision is inapposite to its consideration of . . . whether Plaintiff’s *willful* infringement claim is adequately pleaded.”).

¹¹¹ See J High, *Patent Suit Pleading Standards Must be Conformed to Supreme Court Precedents*, 27(17) LEGAL BACKGROUNDER, Oct. 5, 2012, at 3, available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/10-5-12High_LegalBackgrounder.pdf (“[T]here is no justifiable policy reason to have widely divergent pleading standards for direct infringement and other types of infringement claims.”).

¹¹² *R+L Carriers*, 681 F.3d at 1328.

¹¹³ *Id.* at 1333; see also *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1308 (Fed. Cir. 2012) (en banc) (“[T]here can be no indirect infringement without direct infringement.”).

¹¹⁴ Bone, *supra* note 28, at 891 (As the “chief architect” of the 1938 Federal Rules,

D. *Supreme Court Trend Against Patent Exceptionalism*

There has been a recent theme in Supreme Court jurisprudence that patent litigation is not exceptional and is subject to the same procedural rules and standards as all other litigation in federal courts.¹¹⁵ In the 2006 *eBay* decision, the Supreme Court granted certiorari to determine the appropriateness of the Federal Circuit's "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."¹¹⁶ The Court determined that the Federal Circuit's exceptional rule for patent cases was not appropriate, holding that the "traditional" four-factor test applies "with equal force to disputes arising under the Patent Act."¹¹⁷ The Court made clear that "a major departure from the long tradition of equity practice should not be lightly implied."¹¹⁸

The next year, in *MedImmune*, the Supreme Court again overturned an exceptional rule created for patent cases, rejecting the Federal Circuit's "reasonable apprehension of suit" test for declaratory judgment jurisdiction.¹¹⁹ The Court held that the proper test in patent cases is the generally applicable one, that is, whether "under all the circumstances . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."¹²⁰

This trend continued in 2013 in *Gunn*, where the Supreme Court limited the scope of the Federal Circuit's jurisdiction over state law malpractice claims and rejected the Federal Circuit's rule that jurisdiction lies wherever a question of patent law is a necessary element of the malpractice claim.¹²¹ The Court applied the standard four factor test for whether there is federal jurisdiction over a state law claim, and determined that there was no jurisdiction because the issue of patent law raised by the malpractice claim at issue was not of

"[Charles] Clark's views on pleading and those of his contemporaries were developed in response to the perceived deficiencies in common law and code pleading. These deficiencies had to do mainly with an insistence on technicality unrelated to any sensible pleading function."). See generally *supra* Part I.A.

¹¹⁵ See, e.g., Rochelle Cooper Dreyfuss, *What The Federal Circuit Can Learn From the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 795 (2010) ("[T]he Supreme Court has made smallish doctrinal adjustments intended to keep patent law in the mainstream."); Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 77 (2010) ("[T]he Court's relative insulation from patent law, as well as its generalist outlook, has made it skeptical of patent 'exceptionalism.'").

¹¹⁶ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 132 n.11 (2007).

¹²⁰ *Id.* at 127.

¹²¹ *Gunn v. Minton*, 133 S. Ct. 1059 (2013).

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substantial importance to the federal system as a whole.¹²²

The Supreme Court has consistently rejected the notion of separate pleading standards depending on the type of claim.¹²³ In light of the Court's trend against patent exceptionalism, it is especially unlikely that the Court would approve of the view that Form 18 creates a special pleading regime for cases of direct patent infringement.

IV. ALTERNATIVE APPROACH—FORM 18 AS CONTEXT-SPECIFIC ILLUSTRATION

A. *The Forms as Context-Specific Illustrations—A Graphic Portrayal*

The Supreme Court in *Iqbal* observed that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹²⁴ The basic idea is that more detailed pleading is required in more complex cases.¹²⁵ I propose that the Forms be viewed as illustrations of this general context-specific approach, sufficient in their relatively simple contexts. This view avoids all of the problems with the exception approach discussed above.¹²⁶ And as explained below, this view has support in Supreme Court and regional circuit case law.¹²⁷ In fact the Supreme Court in *Twombly* endorsed the sample complaint for negligence as sufficient in its simple context to put the defendant on notice.¹²⁸

Figure 1, below, illustrates the problematic view that the Forms represent exceptions and an entirely separate pleading regime. Figure 2, below, portrays my proposal that the Forms represent context-specific illustrations.

Figure 1: Forms as Exceptions

¹²² See *id.* at 1068.

¹²³ See *supra* Part III.A.

¹²⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

¹²⁵ See *infra* Part IV.C.

¹²⁶ See *supra* Part III.

¹²⁷ See *infra* Part IV.D.

¹²⁸ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007).

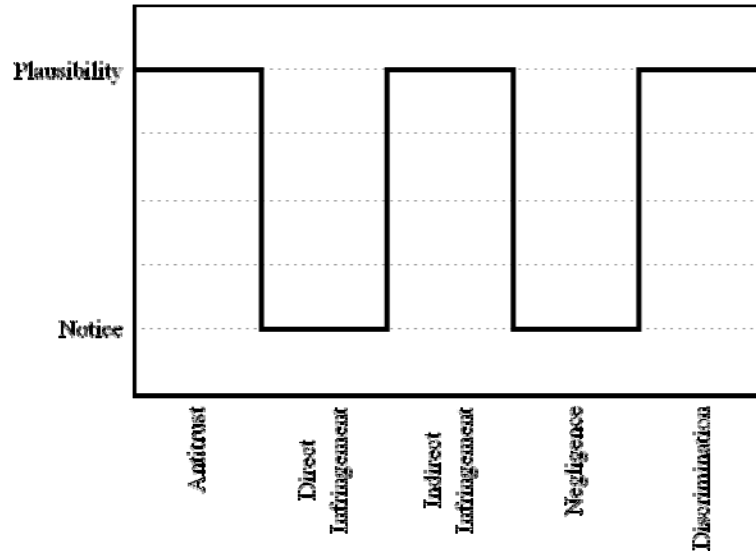


Figure 1 portrays the rigid two-tiered regime apparently set forth by the Federal Circuit in *R+L Carriers*, where the Forms represent exceptions to the heightened plausibility pleading standard. The vertical axis represents the level of pleading detail required, and the horizontal axis represents the type of claim. Types of claims that happen to have sample complaints in the Appendix of Forms, such as direct infringement (Form 18) and negligence (Form 11), are governed by the Forms, which embody the simple notice pleading standard. All other types of claims are governed by the *Twombly* and *Iqbal* plausibility standard.

Figure 2: Forms as Context-Specific Illustrations

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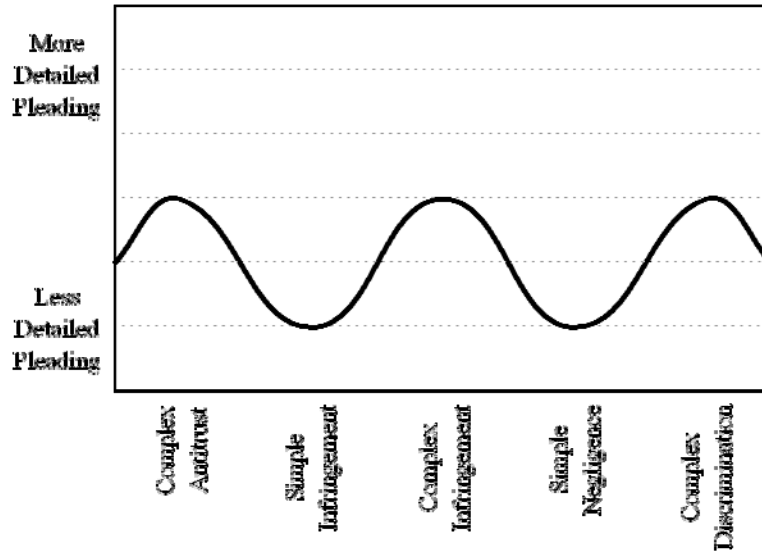


Figure 2 portrays my proposed alternative, in which the Forms represent illustrations of the general flexible context-specific standard expounded in *Twombly* and *Iqbal*. Again, the vertical axis represents the level of pleading detail required, and the horizontal axis represents the type of claim. Instead of the rigid two-tiered regime in Figure 1, there is one pleading standard in Figure 2, though it is a flexible one. Under this view, the level of pleading detail required increases with the complexity of the claim. Less detail is required for a simple claim, such as Form 11’s simple claim for negligently driving a motor vehicle,¹²⁹ or Form 18’s relatively simple claim for infringement of a patent on an electric motor. More detail is required in complex cases like *Twombly*’s Sherman Act Antitrust claim or *Iqbal*’s complex discrimination claim.

Another difference between the two regimes is that the pleading standard does not vary quite as highly in Figure 2 as it does in Figure 1. Figure 2 reflects the view that *Twombly* and *Iqbal* did not heighten the pleading standard so drastically. This view has support, as discussed below in Part IV.B, and further facilitates Figure 2’s reconciliation of *Twombly* and *Iqbal* with the simple notice pleading of the Forms.

The proposed alternative view does not conflict with Rule 84. The Forms still suffice, but they are essentially limited to their factual contexts. In other words, instead of governing all claims of direct infringement, Form 18 is a

¹²⁹ FED. R. CIV. P. app. Form 11 (“On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.” (emphasis added)).

sufficient example of *Twombly* and *Iqbal* plausibility pleading for a comparably simple claim involving comparably simple patents and technology. Because Form 18 does not specify which claims are asserted, it could perhaps be assumed that infringement of only one patent claim is asserted.

The level of pleading detail required is flexible and to some degree in the discretion of the judge, with a number of factors to be considered, including; (1) the complexity of the technology; (2) the number and complexity of claims being asserted; and (3) the complexity of the matter. Some factors that might increase the “complexity of the matter” include assertions of indirect infringement, willful infringement, joint infringement, or infringement under the doctrine of equivalents.

B. Twombly and Iqbal Left Some Aspects of Notice Pleading Intact

As portrayed in Figure 2, above, recognition of the fact that *Twombly* and *Iqbal* may not have drastically heightened pleading standards facilitates reconciliation of these cases with the simple notice pleading of the Forms. Despite the common view that *Twombly* and *Iqbal* caused a “sea change” in pleading standards,¹³⁰ the idea that *Twombly* and *Iqbal* left notice pleading intact for simple contexts has support. Though *Conley*’s “no set of facts” language was “retired” in *Twombly*,¹³¹ some of *Conley*’s basic pronouncements on notice pleading live on. For example, the Court in *Twombly* stated that “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”¹³² This portion of *Twombly* was quoted by the Federal Circuit in *Hall*, discussed below.¹³³ Other circuit courts have also concluded that *Twombly* left “the long standing fundamentals of notice pleading intact.”¹³⁴

In addition, a number of studies indicate that *Twombly* and *Iqbal* have not in fact caused the “sea change” that some predicted. A study conducted for the United States Judicial Conference Standing Rules Committee found that the “case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency.”¹³⁵ The study found instead that “appellate courts are taking a

¹³⁰ See *supra* Part I.B.

¹³¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (construing *Conley v. Gibson*, 355 U.S. 41 (1957)) (“*Conley*’s ‘no set of facts’ language . . . has earned its retirement.”).

¹³² See *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47).

¹³³ *Hall v. Bed Bath & Beyond, Inc.*, 703 F.3d 1357, 1362 (quoting *Twombly*’s quotation of *Conley*). See *infra* Part V.A.

¹³⁴ See, e.g., *Aktieselskabet AF v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008).

¹³⁵ Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal,

subtle and context-specific approach to applying *Twombly* and *Iqbal* and are instructing district courts to be careful in determining whether to dismiss a complaint.”¹³⁶ Similarly, a study conducted by the Federal Judicial Center found “no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case.”¹³⁷ These studies “may suggest that *Twombly* and *Iqbal* are providing a new framework in which to analyze familiar pleading concepts, rather than an entirely new pleading standard.”¹³⁸

C. More Detailed Pleading in More Complex Cases

Even before the Supreme Court in *Iqbal* observed that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,”¹³⁹ some courts endorsed a context-specific approach.¹⁴⁰ The Tenth Circuit, for example, stated that the “degree of specificity needed to establish plausibility and fair notice, and the need for sufficient factual allegations depend upon the context of the case.”¹⁴¹

Under this context-specific approach, the more detailed pleading required in complex cases is justified in part by the higher discovery costs in such cases. The Court in *Twombly* explained that it “is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to

to the Civil Rules Comm. & Standing Rules Comm., at 4 (Dec. 15, 2010) [hereinafter Kuperman Memo], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf (reviewing case law applying *Twombly* and *Iqbal*).

¹³⁶ *Id.*

¹³⁷ JOE S. CECIL ET AL., FEDERAL JUDICIAL CENTER, MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, at vii (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/motioniqbal.pdf>.

¹³⁸ Kuperman Memo, *supra* note 135, at 5.

¹³⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

¹⁴⁰ *See, e.g., Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)) (“[T]he *Twombly* decision focuses our attention on the ‘context’ of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case.”); *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008) (“The Third Circuit has noted, and we agree, that the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context.”); Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 32 (2009) (“pleading doctrine . . . is context dependent, meaning the level of factual detail needed to get to a presumption of impropriety will vary depending on the factual and legal context of the claim.”).

¹⁴¹ *Breaux v. Am. Family Mut. Ins. Co.*, 554 F.3d 854, 862 (10th Cir. 2009).

support a § 1 claim.”¹⁴² Critics of Form 18 have pointed to discovery expense in patent cases as a reason that greater factual specificity in pleading should be required.¹⁴³ Under the context-specific approach, although greater detail may not have been necessary to state a claim for infringement in the context of a simple electric motor, it would be necessary to support a modern infringement claim involving complex patents and technologies.¹⁴⁴

However, courts should be careful not to require details in the complaint that cannot be ascertained without discovery. The Federal Circuit commendably recognized this concern in *K-Tech*, refusing to read Form 18 to require the plaintiff to identify an accused device by name, “especially when the operation of those systems is not ascertainable without discovery.”¹⁴⁵ The court aptly reasoned that a “defendant cannot shield itself from a complaint for direct infringement by operating in such secrecy that the filing of a complaint itself is impossible.”¹⁴⁶

¹⁴² *Twombly*, 550 U.S. at 559. See also *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (“The Court’s specific concern in *Bell Atlantic* was the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement that would spare the defendant that burden [T]he height of the pleading requirement is relative to the circumstances.”); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) (“For complaints involving complex litigation—for example, antitrust or RICO claims—a fuller set of factual allegations may be necessary to show that relief is plausible. The Court in *Bell Atlantic* wished to avoid the ‘in terrorem’ effect of allowing a plaintiff with a ‘largely groundless claim’ to force defendants into either costly discovery or an increased settlement value.”).

¹⁴³ See Jonathan L. Moore, *Particularizing Patent Pleading: Pleading Patent Infringement in a Post-Twombly World*, 18 TEX. INTELL. PROP. L. J. 451, 495 (2010) (arguing that the additional costs of heightened pleading in patent cases “would make obtaining a nuisance-value settlement more difficult, thereby reducing the incentive to file a nuisance value action”); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 n.3 (Fed. Cir. 2007) (Dyk, J., dissenting) (“To some extent, the problem with the brevity of the form has been ameliorated by some local rules But these local rules do nothing to require an adequate statement of the claim before discovery commences.”).

¹⁴⁴ See John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77, 81 (2002) (“Patents issued in the 1990s contained approximately 50% more claims than patents issued in the 1970s.”); Moore, *supra* note 143, at 499–500 (“[P]atents themselves are significantly more complex today than they were when Form 18 was originally drafted. As the twentieth century progressed, there was a drastic increase in the number of claims per patent. The underlying technology also became significantly more complicated during this period.”).

¹⁴⁵ *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1286 (Fed. Cir. 2013).

¹⁴⁶ *Id.*

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D. Support For The Forms as Context-Specific Illustrations

A number of courts have expressed the view that the Forms are consistent with *Twombly* and *Iqbal*. Indeed, in *Twombly* itself, the Supreme Court approved of the relatively barebones model form for pleading negligence as sufficient in its context, stating that a “defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiff’s conclusory allegation in the [Sherman Act] § 1 context would have little idea where to begin.”¹⁴⁷ This shows that the Court did not view the Forms as exceptions to the plausibility standard it was explaining. Rather, the Court seems to have viewed the Forms as illustrations consistent with that standard and sufficient in their respective contexts. As explained by the D.C. Circuit:

The forms accompanying the Federal Rules of Civil Procedure illustrate the concept of fair notice with numerous exemplary complaints that “suffice under these rules.” . . . For example, Form 11, the example complaint for negligence, says that the defendant drove a car against the plaintiff at a certain time in a certain place Form 18, for patent infringement, recites the number of the patent allegedly infringed and explains what product of the defendant’s infringes. *Twombly* observed that a direct allegation of conspiracy analogous to the forms would say who conspired, at what time, to do what.¹⁴⁸

Other courts have similarly found ways to reconcile the Forms as illustrations consistent with the *Twombly* and *Iqbal* standard. For example, the Ninth Circuit stated that “Form 7(a) requires more than just a recitation of the legal conclusion that the parties are diverse. It requires the assertion of facts regarding the location of a party’s principal place of business. Those factual allegations are entitled to a presumption of truth under *Twombly* and *Iqbal*.”¹⁴⁹ The Seventh Circuit also endorsed the view that the Forms represent context-specific illustrations, remarking that “how many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual

¹⁴⁷ *Twombly*, 550 U.S. at 565 n.10. The model form for negligence was renumbered from Form 9 to Form 11 subsequent to the *Twombly* decision. See Miller, *Double Play*, *supra* note 27, at 40 (“It remains to be seen . . . whether district courts will extend the demands of plausibility pleading to require factual allegations of the elements of relatively uncomplicated civil actions, as exemplified by Official Form 11—formerly Form 9—the paradigm negligence complaint.”); Rex Mann, *What the Federal Rules of Civil Procedure Forms Say About Twombly and Iqbal: Implications of the Forms on the Supreme Court Standard*, 41 U. MEM. L. REV. 501, 526 (2011) (“The Supreme Court briefly discussed Form 9 (now Form 11) in footnote 10 and indicated that the pleading standard in *Twombly* was compatible with the form.”).

¹⁴⁸ *Aktieselskabet AF v. Fame Jeans Inc.*, 525 F.3d 8, 17 (citing *Twombly*, 550 U.S. at 565 n.10).

¹⁴⁹ *Harris v. Rand*, 682 F.3d 846, 850–51 (9th Cir. 2012).

allegations than found in the sample complaints in the civil rules' Appendix of Forms may be necessary to show that the plaintiff's claim is not 'largely groundless.'"¹⁵⁰

As explained in Moore's Federal Practice:

Although the plausibility requirement applies to the pleading of "all" claims . . . the amount of factual detail that is required should vary with the complexity of the claim being asserted. Context determines the level of detail required in a pleading. While simple claims might establish "plausibility" under the *Twombly* standard using relatively broad, simple allegations, more complex claims will call for more complex allegations in order to establish "plausibility." Form 11 in the Appendix of Forms provides an example.¹⁵¹

This approach also comports with recent discussions of the Advisory Committee on Civil Rules, which noted in a November 2012 meeting that "Form 11, for example, may well suffice as a complaint for an automobile accident case even though it would not do as a complaint for negligence in more complicated settings."¹⁵²

Even before *Hall* and *K-Tech*, discussed below, some district courts found room in Form 18 to require more detail in more complex situations. In *Prism Techs*, for example, the District of Nebraska found the complaint insufficient under the Form 18 standard, because "the term 'wireless products' [from the complaint] is considerably more generic than the term 'electric motor' as identified in Form 18."¹⁵³ In *Eidos Communications*, the District of Delaware found that the "complaint at bar does not provide a general product category even analogous to 'electric motors.'"¹⁵⁴ And in *Hewlett-Packard*, a case

¹⁵⁰ *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008).

¹⁵¹ MOORE, *supra* note 37, § 8.04[1][d]. See also Mann, *supra* note 147, at 535 (citing *Twombly*, 550 U.S. 544; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)) ("Because *Twombly* and *Iqbal* are said to interpret Federal Rule of Civil Procedure 8(a), these cases should be read consistently with the forms that are also supposed to be an example of the pleading requirements of Rule 8(a).").

¹⁵² Draft Minutes of the Advisory Committee on Rules of Civil Procedure, at 21 (Nov. 2, 2012) [hereinafter Nov. 2012 Minutes], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2012-min.pdf>.

¹⁵³ *Prism Techs. v. Sprint Spectrum L.P.*, No. 8:12CV123, 2012 WL 3867983, at *5, 2012 U.S. Dist. LEXIS 126625, at *12-13 (D. Neb. Sept. 6, 2012).

¹⁵⁴ *Eidos Commc'ns, LLC v. Skype Techs. SA*, 686 F. Supp. 2d 465, 467 (D. Del. 2010) ("Plaintiffs allege that defendants' 'communication system products and/or methodologies' infringe its patents, without settling conclusively on whether they are targeting either a product or a method. Plaintiffs were obligated to specify, at a minimum, a general class of products or a general identification of the alleged infringing methods."). *But see* *IpVenture Inc. v. Lenovo Group Ltd.*, No. 11-588-RGA, 2012 WL 2564893, at *7 (D. Del. June 29, 2012) (citing *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323 (Fed. Cir. 2012)) ("Dell

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involving complex patents and technology, the Northern District of California dismissed the complaint for failure to state a claim, noting that Form 18 “simply does not address a factual scenario of this sort.”¹⁵⁵

Thus, a number of courts have supported the flexible context-specific approach to pleading standards. Recent developments, discussed in Part V, below, suggest that the tide may be turning towards a more flexible, context-specific view of Form 18.

V. RECENT AND FUTURE DEVELOPMENTS

A. *Hall and K-Tech—The Federal Circuit Steps Towards Context-Specificity?*

Recently, the Federal Circuit arguably took a step towards a more flexible context-specific approach in *Hall v. Bed Bath & Beyond*.¹⁵⁶ Though the claim in *Hall* was for direct infringement, the court did not mention Form 18 or *R+L Carriers*, instead reciting the *Twombly* and *Iqbal* plausibility standard.¹⁵⁷ The court found that “Hall’s factual allegations in the complaint ‘raise a right to relief above the speculative level’ and cross ‘the line from conceivable to plausible.’”¹⁵⁸ However, in reversing the district court’s 12(b)(6) dismissal, the court relied primarily on the pre-*Twombly* and *Iqbal* Federal Circuit case of *Phonometrics*, stating:

In [*Phonometrics*], this court outlined five elements of a patent infringement pleading, to (i) allege ownership of the patent, (ii) name each defendant, (iii) cite the patent that is allegedly infringed, (iv) state the means by which the defendant allegedly infringes, and (v) point to the sections of the patent law invoked.¹⁵⁹

These “five elements of a patent infringement pleading,” are similar though not identical to the elements contained in Form 18.¹⁶⁰ In *R+L Carriers* and

particularly complains about the description of the accused infringing products, which is so general as to be meaningless. However, as I am bound by the Federal Circuit’s decision [in *R+L Carriers*], I believe Dell’s argument is insufficient since Form 18 uses an example of the accused product ‘electric motors,’ which is analogous to ‘computers.’”)

¹⁵⁵ *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at *1, (N.D. Cal. Sept. 6, 2003) (noting that Form 18 is “limited to a single ‘type’ of product (i.e., electric motors),” and dismissing the complaint for failure to state a claim where the case involved “at least 150 different ‘types’ of products (i.e. core technology platforms) with more than 4000 end user applications.”).

¹⁵⁶ *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357 (Fed. Cir. 2013).

¹⁵⁷ *Id.* at 1362.

¹⁵⁸ *Id.* at 1364 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

¹⁵⁹ *Id.* at 1362 (citing *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000)).

¹⁶⁰ Compare *id.*, with FED. R. CIV. P. app. Form 18.

McZeal, the Federal Circuit characterized Form 18 as requiring: “(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.”¹⁶¹ Though the five element *Phonometrics* standard is similar to the Form 18 standard, *Phonometrics* did not mention Form 18, instead applying the leading Supreme Court precedent of the day, which at the time was *Conley v. Gibson*.¹⁶²

It is curious that even though *Hall* involved a claim for direct infringement, and although the court in *R+L Carriers* appeared to hold that Form 18 trumps *Twombly* and *Iqbal* for claims of “direct infringement,”¹⁶³ *Hall* cited *Twombly* and *Iqbal*, and did not mention Form 18.¹⁶⁴ There are a number of different ways to interpret this curiosity. One possibility is that *Hall* did not mention Form 18 because *Hall* involved a design patent rather than a utility patent.¹⁶⁵ In an unpublished decision prior to *R+L Carriers*, the Federal Circuit noted that “Form 18 . . . is not tailored to design patents.”¹⁶⁶ This interpretation is problematic though. *R+L Carriers* gave no indication of being limited to utility patents, and *Hall* did not purport to distinguish *R+L Carriers* or Form 18 on this basis. Perhaps more importantly, *Hall* primarily applied *Phonometrics*, which involved a utility patent rather than a design patent.¹⁶⁷

A second possible interpretation is that *Hall* actually did apply the Form 18 standard, without saying so, since the *Phonometrics* standard that *Hall* applied is quite similar to the Form 18 standard. The *Phonometrics* standard was based on *Conley*,¹⁶⁸ the Supreme Court’s old bastion of notice pleading.¹⁶⁹ So if the lesson of *R+L Carriers* was that claims for direct infringement are governed by notice pleading rather than plausibility pleading, *Hall*’s application of *Phonometrics* would comport with that lesson. But this interpretation is problematic as well, because *Hall* did not mention Form 18, and because while applying *Phonometrics*, *Hall* also recited the *Twombly* and

¹⁶¹ *R+L Carriers, Inc. v. DriverTech LLC*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (quoting *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2000)).

¹⁶² *Phonometrics*, 203 F.3d at 794.

¹⁶³ See *R+L Carriers*, 681 F.3d at 1334 (“Form 18 sets forth a sample complaint for direct patent infringement.”); *id.* at 1336 (“We agree with several district courts that have addressed this issue that Form 18 should be strictly construed as measuring only the sufficiency of allegations of direct infringement, and not indirect infringement.”).

¹⁶⁴ *Hall*, 705 F.3d at 1362.

¹⁶⁵ *Id.* at 1360.

¹⁶⁶ *Colida v. Nokia*, 347 Fed. Appx. 568, 571 n.2 (Fed. Cir. 2009) (unpublished).

¹⁶⁷ See *Phonometrics*, 203 F.3d at 791–92; *Hall*, 705 F.3d at 1362.

¹⁶⁸ *Phonometrics*, 203 F.3d at 794 (construing *Conley v. Gibson*, 355 U.S. 41 (1957)).

¹⁶⁹ See *supra* Part I.A.

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Iqbal plausibility standard with respect to *Hall*'s direct infringement claim.¹⁷⁰

The best way to reconcile *Hall* with *R+L Carriers*, is that *Hall* applied *Iqbal*'s context-specific approach. This passage from *Iqbal* was quoted at the outset of *Hall*'s pleading analysis.¹⁷¹ *Hall* might signify that in the context of a simple design patent, relatively barebones allegations are sufficient to state a plausible claim for relief, just as Form 18 was sufficient in the context of a relatively simple patent on an electric motor. That is, Form 18 is an illustration of the *Twombly* and *Iqbal* standard for a simple context, rather than an exception to that standard for all claims of direct infringement.¹⁷² This interpretation has many advantages. As explained above, the Forms were intended to be illustrations rather than exceptions,¹⁷³ and the Supreme Court rejected the idea of separate pleading standards depending on the cause of action.¹⁷⁴ This interpretation helps relieve the described tension with Supreme Court precedent, the Federal Rules, and the history of the Forms. Thus, *Hall* could be seen as a step away from the Federal Circuit's implication in *R+L Carriers* that "*Twombly* and its progeny conflict with the Forms and create differing pleading requirements."¹⁷⁵

In the April 2013 *K-Tech* decision, the Federal Circuit apparently took another step towards the context-specific approach, and towards the notion that the Forms are consistent with *Twombly* and *Iqbal*.¹⁷⁶ Although the majority opinion reaffirmed that the Forms would control in case of a conflict, the court suggested that there might not be a conflict, stating that a "complaint containing just enough information to satisfy a governing form may well be sufficient under *Twombly* and *Iqbal*," and that the court need not "seek to create conflict where none exists."¹⁷⁷ The court emphasized that "Form 18 in no way relaxes the clear principle of Rule 8, that a potential infringer be placed on notice of what activity or device is being accused of infringement," and that the "touchstones of an appropriate analysis under Form 18 are notice and facial

¹⁷⁰ *Hall*, 705 F.3d at 1364 ("Hall's factual allegations in the complaint 'raise a right to relief above the speculative level' and cross 'the line from conceivable to plausible.'").

¹⁷¹ *Id.* at 1362 ("Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

¹⁷² See *supra* Part IV.A.

¹⁷³ See *supra* Part III.B.

¹⁷⁴ See *supra* Part III.A.

¹⁷⁵ *R+L Carriers*, 681 F.3d at 1334 ("to the extent the parties argue that *Twombly* and its progeny conflict with the Forms and create differing pleading requirements, the Forms control" (emphasis added)).

¹⁷⁶ *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277 (Fed. Cir. 2013).

¹⁷⁷ *Id.* at 1284.

plausibility.”¹⁷⁸ Embracing a context-specific approach, the court stated that the “adequacy of the facts pled depends on the breadth and complexity of both the asserted patent and the accused product or system and on the nature of the defendant’s business activities.”¹⁷⁹ Judge Wallach authored a concurring opinion in which he disagreed with the majority’s “dictum” that “the Forms control” over *Twombly* and *Iqbal*, and argued that the two standards “must be harmonized.”¹⁸⁰

Thus multiple judges have expressed disagreement with the notion that the Forms can trump *Twombly* and *Iqbal*.¹⁸¹ In *Hall* and *K-Tech*, the court seems to be backing away from suggestions that Form 18 conflicts with *Twombly* and *Iqbal*, instead leaning towards harmonizing the Forms with Supreme Court precedent through context-specificity.

B. *Discussions of the Civil Rules Advisory Committee*

The Civil Rules Advisory Committee has recognized the quandary in which courts and litigants have found themselves.¹⁸² The Supreme Court, authorized by Congress to promulgate rules of procedure, delegated the work and oversight of the rulemaking process to the advisory committees.¹⁸³ Further, the Supreme Court has explained that amendments to the rules “can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation.”¹⁸⁴

The minutes of an October 2009 meeting note that the “Rule 84 Forms attached to the Civil Rules have seemed troubling,” and that the “Chief Judge of the Federal Circuit, for example, has called the Form 18 complaint for

¹⁷⁸ *Id.* at 1284, 1286.

¹⁷⁹ *Id.* at 1286 (citing Patent Harbor, LLC v. DreamWorks Animation SKG, Inc., 2012 U.S. Dist. LEXIS 114199, at *13-15 (E.D. Tex. July 27, 2012) (stating that “[t]he required detail level of the description is dictated by the facts and circumstances surrounding the action” and finding that an identification of a general category of products as well as specific features is sufficient to satisfy Form 18)).

¹⁸⁰ *Id.* at 1287–88 (Wallach, J., concurring).

¹⁸¹ *See id.* at 1287 (Wallach, J., concurring); *R+L Carriers*, 681 F.3d at 1348 (Newman, J., dissenting in part).

¹⁸² *R+L Carriers*, 681 F.3d at 1350 (Newman, J., dissenting in part) (“[U]nrest concerning the forms is reflected in the Minutes of the Advisory Committee for recent years.”).

¹⁸³ *See* Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006).

¹⁸⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (citation omitted); *see also* *Jones v. Bock*, 549 U.S. 199, 224 (2007) (“We once again reiterate . . . as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.”).

patent infringement an embarrassment.”¹⁸⁵ Judge David G. Campbell of the Civil Rules Advisory Committee noted that “[t]he Form 18 complaint for patent infringement has created particular difficulties for lower courts attempting to find some reconciliation with the Supreme Court’s pronouncements.”¹⁸⁶

A Rule 84 subcommittee was created to consider possibilities on how to deal with this issue.¹⁸⁷ One option on the table was revising the Forms, including Form 18, to add more detail. The Campbell Memo notes that a “more detailed substitute” has been proposed, which “echoes the common lament that the Form 18 model of a complaint for patent infringement is woefully inadequate.”¹⁸⁸ The proposed substitute includes claim numbers and a “chart identifying specifically where each element of Claim [Number] is found within each [Accused Product / Device / Process / Method / Act / Instrumentality].”¹⁸⁹ The Federal Circuit has interpreted Rule 11 to require a “reasonable pre-filing inquiry,” stating that “the key factor in determining whether a patentee performed a reasonable pre-filing inquiry is the presence of an infringement analysis.”¹⁹⁰ As such, the proposal that this infringement analysis be included in the complaint would not seem to impose much of an added burden on plaintiffs.¹⁹¹ Indeed in *K-Tech*, the Federal Circuit clarified that compliance with Form 18 “does not immunize a plaintiff who fails to identify easily ascertainable evidence of noninfringement through appropriate pre-suit investigation” as required by Rule 11.¹⁹²

The Committee, however, has recognized that there are “powerful reasons to doubt the capacities of the Enabling Act process to devise a suitable form.”¹⁹³

¹⁸⁵ Minutes of the Advisory Committee on Rules of Civil Procedure, at 14 (Oct. 8–9, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-2009-min.pdf>.

¹⁸⁶ 2011 Campbell Memo, *supra* note 103, at 13.

¹⁸⁷ Nov. 2012 Minutes, *supra* note 152, at 19.

¹⁸⁸ 2011 Campbell Memo, *supra* note 103, at 38.

¹⁸⁹ Letter from Memorandum from David Swetnam-Burland & Stacy O. Stitham to Advisory Committee on Rules of Civil Procedure, at 4 (Jan. 13, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Suggestions%202010/10-CV-G%20Suggestion%20Swetnam-Burland.pdf>.

¹⁹⁰ *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1302 (Fed. Cir. 2004).

¹⁹¹ See *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1363 (Fed. Cir. 2000) (Dyk, J., dissenting) (“The majority’s remand is particularly puzzling since McZeal’s failure to investigate the accused device may indeed be sanctionable.”).

¹⁹² *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1284 n.2 (Fed. Cir. 2013).

¹⁹³ Memorandum from Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure, at 56 (May 2, 2011) [hereinafter Kravitz Memo], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf>.

Some take the view that the “goal should be to remove the Forms from the Enabling Act process,” because the “process takes too long.”¹⁹⁴ Judge Campbell noted that it “is fair to ask whether a choice must be made: Tend to the rules regularly and thoroughly, deploying the full resources of the Enabling Act, or demote them from official status as forms that suffice under the rules.”¹⁹⁵

The Committee thus appears to be leaning towards either abrogating Rule 84, or at least “defanging” it by deleting the provision that the Forms suffice under the rules, leaving them as mere illustrations. Judge Campbell reported in May, 2013, that the Advisory Committee “recommend[ed] approval to publish for comment proposals that would abrogate Rule 84 and the Official Forms.”¹⁹⁶ Judge Campbell reasoned that lawyers “do not much use these forms,” and recognizes that “the pleading forms live in tension with recently developing approaches to general pleading standards.”¹⁹⁷ However, he also suggested that an Administrative Office working group, working in conjunction with the Advisory Committee, create an alternative set of forms.¹⁹⁸ He reasoned that these forms “would have to win their way by intrinsic merit, unaided by official status,” in that a “court dissatisfied with a particular form would not be obliged to accept it.”¹⁹⁹

The Forms were initially enacted in 1938 with the statement: “[t]he following forms are intended for illustration only.”²⁰⁰ As explained at the November 2012 meeting of the Advisory Committee, the “forms were illustrative in the beginning, but in 1946 Rule 84 was amended to state that they suffice under the rules.”²⁰¹ Thus the proposal to abrogate Rule 84, with Forms as “mere illustrations,” would seem to bring the Forms back in line with their original purpose.²⁰²

One concern expressed at recent Advisory Committee meetings is that even if the Forms were removed or Rule 84 abrogated, “decisions that have relied on the Forms in developing pleading standards will live on, giving the Forms renewed life in the common law.”²⁰³ However, it was suggested that this concern is not too serious, because the “precedents may carry forward, but they

¹⁹⁴ Nov. 2012 Minutes, *supra* note 152, at 21.

¹⁹⁵ 2011 Campbell Memo, *supra* note 103, at 14.

¹⁹⁶ 2013 Campbell Memo, *supra* note 26, at 60.

¹⁹⁷ *Id.* at 61.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 62.

²⁰⁰ See FED. R. CIV. P. app. Forms (1938).

²⁰¹ Nov. 2012 Minutes, *supra* note 152, at 21.

²⁰² See also Clark, *supra* note 100100, at 182 (1957–58) (“As Rule 84 was originally drafted, we did not have a statement that the forms were sufficient under the rules. We just said that they were illustrative.”). See generally *supra* Part III.B.

²⁰³ Nov. 2012 Minutes, *supra* note 152, at 20.

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will be treated in the same way as other precedents developed under the aegis of subsequently repealed statutes.”²⁰⁴ In other words, the Forms “will live on, but the half-life will be short.”²⁰⁵ Whether the abrogation of Rule 84 or Form 18 would have any effect on the precedential value of the *Hall* decision is debatable, since *Hall* did not purport to rely on Form 18.²⁰⁶ Thus, *Hall*’s application of *Phonometrics*’s “five elements of a patent infringement pleading”²⁰⁷ might survive any action by the Advisory Committee.

In the case of abrogation of Rule 84 and Form 18, the context-specific approach advocated in this article would still be advisable, though it would no longer be necessary to reconcile *Twombly* and *Iqbal* with the Forms. *Iqbal*’s statement that evaluating the sufficiency of a complaint is a “context-specific task” would remain,²⁰⁸ as would the cases expounding the context-specific approach to pleading.²⁰⁹

VI. CONCLUSION

R+L Carriers has been interpreted to have created a dual-tiered pleading regime, under which Form 18 provides an exception or safe harbor to the general pleading requirements of *Twombly* and *Iqbal*.²¹⁰ Under *R+L Carriers*, the Form 18 safe harbor covers only claims for direct patent infringement, while claims for indirect infringement are subject to the *Twombly* and *Iqbal* plausibility standard.²¹¹ The dual-tiered nature of this pleading regime is in serious tension with Supreme Court precedent,²¹² and is diametrically opposed to the historic intent and understanding that the Forms represent illustrations rather than exceptions.²¹³

The best way to reconcile Rule 84 and Form 18 with *Twombly* and *Iqbal* is to view the Forms as context-specific illustrations of the *Twombly* and *Iqbal* standard.²¹⁴ Form 18 should be read as consistent with *Twombly* and *Iqbal* in the context of relatively simple patents and technology, just as Form 11 has been seen as sufficient to state a plausible claim for negligence in the context of a simple motor vehicle accident. In other words, instead of governing all claims of direct infringement, Form 18 is a sufficient example of *Twombly* and

²⁰⁴ *Id.* at 22.

²⁰⁵ *Id.* at 21.

²⁰⁶ *See supra* Part V.A.

²⁰⁷ *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1362 (Fed. Cir. 2013).

²⁰⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2007).

²⁰⁹ *See supra* Part IV.C.

²¹⁰ *See supra* Figure 1 and Part IV.A.

²¹¹ *See supra* Part II.C.

²¹² *See supra* Parts III.A, III.D.

²¹³ *See supra* Part III.B.

²¹⁴ *See supra* Part IV.

Iqbal plausibility pleading for a comparably simple claim involving comparably simple patents and technology.

There are a number of possible avenues by which the dual tiered pleading regime could be overtaken by a more flexible context-specific approach. The abrogation of Rule 84, as is currently being proposed before the Civil Rules Committee,²¹⁵ would likely accomplish that goal. Barring that, the Supreme Court could speak to the issue,²¹⁶ or the Federal Circuit could change direction. Indeed the recent Federal Circuit decisions in *Hall* and *K-Tech* appear to indicate that the tide is turning towards a more flexible context-specific approach.²¹⁷ Thus there remains hope that the complex and rigid dual-tiered pleading regime in patent cases will be toppled in favor of a more flexible, context-specific regime, so that the Forms may once again “illustrate the simplicity and brevity that these rules contemplate.”²¹⁸

²¹⁵ See *supra* Part V.B.

²¹⁶ See *supra* Parts III.A, III.D.

²¹⁷ See *supra* Part V.A.

²¹⁸ FED. R. CIV. P. 84.