

## ***Twombly* in the Patent Infringement Context: An Update**

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### **I. INTRODUCTION.**

In May 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*,<sup>2</sup> changing the standard for dismissal under Federal Rule of Civil Procedure 12(b)(6). *Twombly*'s application outside that case's precise context has raised a variety of issues that have received a great deal of commentary from both courts and commentators.<sup>3</sup>

This article's purpose is to update its readers as to how, as of February 2008, *Twombly* has been applied in Rule 12(b)(6) dismissal or similar contexts in patent infringement cases. In Section II, we briefly review *Twombly*. In Section III, we explore the presumptively sufficient patent infringement complaint of Form 18 of the Federal Rules' Appendix of Forms.<sup>4</sup> In Section IV, we review *McZeal v. Sprint Nextel Corp.*,<sup>5</sup> the only circuit court decision applying *Twombly* in the patent infringement context. Finally, in Section V, we summarize district court decisions, in dismissal or dismissal-like contexts, which evaluate the sufficiency of patent infringement allegations in *Twombly*'s wake.

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<sup>2</sup> 127 S. Ct. 1955 (2007).

<sup>3</sup> See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 155-57 (2d Cir. 2007) (analyzing whether *Twombly* applies to motion to dismiss in detainee's rights case); *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541-42 (6th Cir. 2007) (§ 1983 suit); *EEOC v. Concentra*, 496 F.3d 773, 782 n.4 (7th Cir. 2007) (Title VII retaliation case); Andrew F. Halaby, *Post-Twombly, Form 16 Takes On New Significance*, IPLaw360.com (Jan. 14, 2008); Gregory P. Joseph, *Federal Practice: Pleading Requirements*, NAT'L L.J. (Sept. 3, 2007).

<sup>4</sup> The revised rules — effective December 1, 2007 — moved what had been Form 16 to Form 18, Complaint for Patent Infringement. The revision did not make substantive changes to Form 16, and at least one post-revision court still cited to "Form 16." See *CBT Flint Partners, LLC v. Goodmail Sys., Inc.*, \_\_\_ F. Supp. 2d \_\_\_, No. 1:07-CV-1822-TWT, 2007 WL 4531829, \*3 (N.D. Ga. Dec. 17, 2007).

<sup>5</sup> 501 F.3d 1354 (Fed. Cir. 2007).

## II. A BRIEF SUMMARY OF *TWOMBLY*.

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>6</sup> A complaint that fails to meet this standard fails to state a claim upon which relief can be granted, and is subject to dismissal on that basis.<sup>7</sup>

Over 50 years ago, the Supreme Court decided *Conley v. Gibson*,<sup>8</sup> which, until *Twombly*, was the principal case interpreting the “short and plain statement” requirement. In *Conley*, the Court held 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.”<sup>9</sup> This permissive standard created a formidable obstacle to Rule 12(b)(6) dismissal.<sup>10</sup> Because a moving defendant had to establish “beyond doubt” that the plaintiff could prove “no” set of facts entitling the plaintiff to relief, courts often would resolve doubts as to whether the plaintiff had stated a claim in the plaintiff’s favor, even where the doubts were generated by the plaintiff’s own failure to plead facts sufficient to notify the defendant of the basis of the plaintiff’s claims.<sup>11</sup>

But the “no set of facts” standard is no longer the law: *Twombly* retired it.<sup>12</sup> *Twombly* involved a Sherman Act § 1 claim brought by telephone and high-speed internet consumers against a group of regional telephone companies.<sup>13</sup> The consumers pled that the companies had acted in parallel to thwart competition from other telecommunications companies.<sup>14</sup> But even were that factual allegation true — the companies *had* acted in parallel — that conduct was

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<sup>6</sup> Fed. R. Civ. P. 8(a)(2).

<sup>7</sup> See Fed. R. Civ. P. 12(b)(6).

<sup>8</sup> 355 U.S. 41 (1957).

<sup>9</sup> *Id.* at 47.

<sup>10</sup> E.g., *Retana v. Apartment Operators Union, Local No. 14*, 453 F.2d 1018, 1022 (9th Cir. 1972) (citing *Conley*, 355 U.S. at 45-46).

<sup>11</sup> See *id.* at 1022-23.

<sup>12</sup> *Twombly*, 127 S. Ct. at 1969.

<sup>13</sup> *Id.* at 1961.

<sup>14</sup> *Id.* at 1962.

equally susceptible to competing inferences.<sup>15</sup> One was that the companies had agreed to do so, which is illegal. The other was that the companies independently had acted in parallel, which is not illegal.<sup>16</sup> The plaintiff consumers, not surprisingly, drew the conspiracy inference and alleged on information and belief that the companies had “entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high-speed internet services markets” and “ha[d] agreed not to compete with one another and otherwise allocated customers in markets to one another.”<sup>17</sup> The district court dismissed the complaint, concluding that the consumers had failed to state a claim upon which relief could be granted. The Second Circuit Court of Appeals reversed.<sup>18</sup>

The Supreme Court considered the governing procedural rules as well as the applicable substantive antitrust law, and held that the district court had properly dismissed the complaint.<sup>19</sup> Procedurally, the Supreme Court observed, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>20</sup> Noting that Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief,” the Court went on: “Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”<sup>21</sup>

*Conley* had “puzzl[ed] the profession for 50 years,”<sup>22</sup> the Court observed, in part because its “‘no set of facts’ language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the

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<sup>15</sup> *Id.* at 1963-64.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1963.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1973.

<sup>20</sup> *Id.* at 1964-65 (quoting Rule 8(a)(2)) (citations omitted).

<sup>21</sup> *Id.* at 1965 n.3.

<sup>22</sup> *Id.* at 1969.

pleadings.”<sup>23</sup> On such a reading, the Court reasoned, “a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”<sup>24</sup> The “no set of facts” language, the Court concluded, “is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”<sup>25</sup>

Applying these procedural standards to the antitrust claim before it, the Court held that “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made,”<sup>26</sup> *i.e.*, “allegations plausibly suggesting (not merely consistent with) agreement.”<sup>27</sup> This standard, the Court asserted, “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>28</sup> “[N]othing contained in the complaint invest[ed] either the action or inaction alleged with a plausible suggestion of conspiracy,”<sup>29</sup> the Court believed, and because “the plaintiffs here ha[d] not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”<sup>30</sup>

The Supreme Court immediately applied *Twombly* in *Erickson v. Pardus*,<sup>31</sup> a *pro se* prisoner’s rights case. The United States District Court for the District of Colorado had dismissed Erickson’s suit, and the Tenth Circuit affirmed.<sup>32</sup> The Supreme Court reversed, citing *Twombly* for the proposition that pleading specific facts is not necessary.<sup>33</sup> The Court observed

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<sup>23</sup> *Id.* at 1968.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1969.

<sup>26</sup> *Id.* at 1965.

<sup>27</sup> *Id.* at 1966.

<sup>28</sup> *Id.* at 1965.

<sup>29</sup> *Id.* at 1971.

<sup>30</sup> *Id.* at 1974.

<sup>31</sup> 127 S. Ct. 2197 (2007). In addition to *Erickson*, circuit courts have also applied *Twombly* outside the antitrust context. *See, e.g., Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541-42 (6th Cir. 2007) (§ 1983 suit); *EEOC v. Concentra*, 496 F.3d 773, 782 n.4 (7th Cir. 2007) (Title VII retaliation case).

<sup>32</sup> *Erickson*, 127 S. Ct. at 2199.

<sup>33</sup> *Id.* at 2200.

that “[a] document filed *pro se* is ‘to be liberally construed.’”<sup>34</sup>

### III. FORM 18: THE FEDERAL RULES’ FORM PATENT INFRINGEMENT COMPLAINT.

The “no set of facts” standard’s demise has left courts to seek new standards to fill the vacuum. In the patent infringement context, Form 18 — formerly Form 16<sup>35</sup> — of the Federal Rules’ Appendix of Forms has assumed new importance. The Federal Rules instruct that compliance with Form 18 will “suffice under the[] rules” and “illustrate the simplicity and brevity that th[e] rules contemplate.”<sup>36</sup>

In its entirety, Form 18 states:

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.

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<sup>34</sup> *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

<sup>35</sup> See *supra* note 4.

<sup>36</sup> Fed. R. Civ. P. 84.

At least one court found that merely following Form 16 did not necessarily comply with Rule 8(a)(2). In *Hewlett-Packard v. Intergraph Corp.*,<sup>37</sup> the complaint alleged that Intergraph,

in violation of 35 U.S.C. § 271, has been and is currently infringing, contributorily infringing, or inducing infringement of [the patents-in-suit] by, among other things, *making, using, offering to sell and/or selling infringing software and hardware products* without authority or license from [Plaintiff].<sup>38</sup>

In deciding Intergraph’s motion to dismiss, the United States District Court for the Northern District of California noted that Intergraph produced multiple products, meaning that the complaint really alleged that “one or more of Defendant’s 4000-plus products directly infringes, contributorily infringes, or induces infringement of at least one claim in each of the patents-in-suit.”<sup>39</sup> Dismissing the complaint without prejudice, the court explained,

Form 16 simply does not address a factual scenario of this sort. Not only is the example in Form 16 limited to a single ‘type’ of product (*i.e.*, electric motors) there is no indication as to the number of different electric motors the hypothetical defendant made, sold, or used. In this case, there are at least 150 different “types” of products (*i.e.* core technology platforms) with more than 4000 end-user applications. Based on these facts, the Court finds that Plaintiff’s allegations do not provide Defendant with “fair notice” of what Plaintiff’s claim or claims are and, therefore, fail to satisfy Rule 8(a)(2).<sup>40</sup>

The court was correct that Form 16 addressed only a single type of product. But the form’s limitations do not end there, and those limitations carry through to the new Form 18. The form poorly reflects any but the simplest of patent infringement allegations.<sup>41</sup> For example, the form alleges infringement of a product patent, not a method patent of the sort so frequently sued upon by patent trolls. The accused product is clearly or easily identified in the form; not

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<sup>37</sup> *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517, 2003 WL 23884794, \*1 (N.D. Cal. Sept. 6, 2003).

<sup>38</sup> *Id.* at \*1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. 2007) (Dyk, J., dissenting); Halaby, *supra* note 3.

necessarily so in actual practice.<sup>42</sup> And the alleged patent rights and the accused product of the form fall within the same field of endeavor.<sup>43</sup> Modern patent law has become too complex for the model complaint of Form 18 necessarily to satisfy Rule 8(a)(2) in each particular case. Even abiding by Form 18, a plaintiff may still fail to give the defendant notice of the substance of plaintiff's claims sufficient to enable the defendant to answer.<sup>44</sup> This, *Twombly* taught, is a fundamental requirement of Rule 8(a)(2).<sup>45</sup>

#### IV. THE *PRO SE* PLAINTIFF GETS A BREAK IN *MCZEAL V. SPRINT NEXTEL CORP.*<sup>46</sup>

Not surprisingly,<sup>47</sup> the only circuit court to have applied *Twombly* in a patent infringement case is the Federal Circuit. In *McZeal*, *pro se* plaintiff Alfred McZeal filed a 95-page complaint containing 24 counts.<sup>48</sup> At a hearing held shortly after McZeal filed his complaint, the court prompted the defendants Sprint Nextel Corp. and Nextel Communications, Inc. (collectively, "Sprint") to move for dismissal under Rule 12(b)(6).<sup>49</sup> Sprint did so, and the court dismissed McZeal's complaint with prejudice "because the complaint 'is irreparable because the facts — there are no missing facts. There just aren't any facts.'"<sup>50</sup>

On appeal, the Federal Circuit asserted that it was applying the law of the regional circuit<sup>51</sup> (there, the Fifth Circuit) and reversed.<sup>52</sup> Citing Form 16, the court enumerated — in a parenthetical — five requirements to adequately allege a claim of patent infringement:<sup>53</sup>

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<sup>42</sup> *Hewlett-Packard*, 2003 WL 23884794, at \*1.

<sup>43</sup> See Form 18 (referring to "electric motor" for both the invention and the infringing product).

<sup>44</sup> *Hewlett-Packard*, 2003 WL 23884794 at \*1; Halaby, *supra* note 3.

<sup>45</sup> *Twombly*, 127 S. Ct. at 1964 n.3.

<sup>46</sup> 501 F.3d 1354 (Fed. Cir. 2007).

<sup>47</sup> See 28 U.S.C. § 1295(a)(1) (granting Federal Circuit exclusive jurisdiction over appeals arising under 28 U.S.C. § 1338 — actions "arising under any Act of Congress relating to patents").

<sup>48</sup> *McZeal*, 501 F.3d at 1355.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> As a practical matter, only the Federal Circuit has occasion to determine on appeal whether a district court has properly dismissed a patent infringement complaint. So whatever the law of the regional circuit in which they sit, district courts looking for guidance on whether they should grant Rule 12(b)(6) dismissal motions in their patent infringement cases will tend to follow the Federal Circuit's lead — especially since the Federal Circuit may be reviewing any dismissal order — whether or

1) an allegation of jurisdiction; 2) a statement that the plaintiff owns the patent; 3) a statement that defendant has been infringing the patent “by making, selling, and using [the device] embodying the patent”; 4) a statement that the plaintiff has given the defendant notice of its infringement; and 5) a demand for an injunction and damages.<sup>54</sup>

“It logically follows,” the court continued, “that the patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend.”<sup>55</sup> Although McZeal admitted that he “‘didn’t know what device, what mechanism or what means Nextel uses to transmit and connect its telephone customers to the rest of the world,’”<sup>56</sup> the court held that McZeal’s complaint “contain[ed] enough detail to allow the defendants to answer and thus meets the notice pleading standard required to survive a Rule 12(b)(6) motion.”<sup>57</sup>

To the extent *Twombly* signaled a departure from previous dismissal standards, then, the Federal Circuit used Form 16 to limit that departure. But in one respect, at least, the Federal Circuit’s decision was consistent with the Supreme Court’s precedent. Just as the Supreme Court had done in *Erickson v. Pardus*,<sup>58</sup> the Federal Circuit gave the plaintiff pleading latitude in *McZeal* because the plaintiff was proceeding *pro se*.<sup>59</sup> *McZeal* has (correctly, in our view) been distinguished by one district court on this basis.<sup>60</sup> Other district courts, however, have applied

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not that precedent is, in fact, consistent with the regional circuit’s dismissal standards as expatiated in other kinds of cases.

<sup>52</sup> 501 F.3d at 1356, 1359.

<sup>53</sup> *Id.* at 1356-57.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1357.

<sup>56</sup> *Id.* at 1357-58

<sup>57</sup> *Id.* at 1357. According to the court, “a plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent.” *Id.* at 1357. As it had in *Phonometrics, Inc. v. Hospitality Franchise Sys.*, 203 F.3d 790, 794 (Fed. Cir. 2000), the court relegated exposure of elemental defects in the plaintiff’s infringement claims to discovery. *Id.* at 1358.

<sup>58</sup> 127 S. Ct. at 2200; *see also* Joseph, *supra* note 3, at 13 (noting this distinction between *Twombly* and *Erickson*).

<sup>59</sup> *Id.* at 1356 (“[w]here, as here, a party appeared *pro se* before the trial court, the reviewing court may grant the *pro se* litigant leeway on procedural matters, such as pleading requirements”); *id.* at 1358 (“McZeal met the low bar for *pro se* litigants to avoid dismissal.”).

<sup>60</sup> *Performance Aftermarket Group, Ltd. v. TI Group Auto. Sys.*, No. H-05-4251, 2007 WL 2818269, \*1 n.2 (S.D. Tex. Sept. 25, 2007).



*McZeal* — and refused to dismiss — though plaintiffs in those cases were represented by counsel.<sup>61</sup>

Judge Dyk dissented from the majority’s decision to vacate dismissal of *McZeal*’s patent infringement claims.<sup>62</sup> In his view, a key rationale underlying *Twombly* — preventing unmeritorious but extremely-expensive-to-litigate claims from proceeding into discovery<sup>63</sup> — applies equally to patent infringement cases.<sup>64</sup> By reversing, the court would enable *McZeal*, “a serial litigator who ha[d] frequently brought unmeritorious cases,”<sup>65</sup> to reach the discovery phase, forcing Sprint to spend perhaps millions of dollars in litigation expense before it could move for summary judgment.<sup>66</sup> Judge Dyk noted the dissonance between the practical truth that “a bare allegation of literal infringement using [Form 16] is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement”<sup>67</sup> and Fed. R. Civ. P. 84, which he agreed would make “a bare allegation of literal infringement in accordance with Form 16 . . . sufficient under Rule 8” by *fiat*.<sup>68</sup> But Judge Dyk would have limited Form 16 to claims of literal infringement, and excluded from its application claims of infringement under the doctrine of equivalents such as *McZeal*’s.<sup>69</sup>

#### V. DISTRICT COURT PATENT INFRINGEMENT CASES DECIDED AFTER *TWOMBLY* IN DISMISSAL OR DISMISSAL-LIKE SETTINGS.

Here, in chronological order, are eight district court decisions, in dismissal or dismissal-like contexts, which evaluate the sufficiency of patent infringement allegations in *Twombly*’s wake.

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<sup>61</sup> *Every Penny Counts v. Am. Express Co.*, No. 8:07-cv-1255, 2007 WL 3171313, \*1 n.1 (M.D. Fla. Oct. 29, 2007); *Taltwell, LLC v. Zonet USA Corp.*, No. 3:07cv543, 2007 WL 4562874, \*13 (E.D. Va. Dec. 20, 2007).

<sup>62</sup> *McZeal*, 501 F.3d at 1359 (Dyk, J., dissenting).

<sup>63</sup> *Twombly*, 127 S. Ct. at 1967.

<sup>64</sup> 501 F.3d at 1362 (Dyk, J., dissenting).

<sup>65</sup> *Id.* at 1360 n.2.

<sup>66</sup> *Id.* at 1362 n.8.

<sup>67</sup> *Id.* at 1360.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1361.

***Bartronics, Inc. v. Power-One, Inc.***<sup>70</sup>

The first reported district court decision applying *Twombly* in the patent infringement context came from the United States District Court for the Southern District of Alabama, in June 2007.<sup>71</sup> The defendants moved to amend their counterclaims with a new claim under 35 U.S.C. § 103 (asserting obviousness) and another under section 112 (indefiniteness).<sup>72</sup> Bartronics objected to the would-be amended counterclaims — which the court found “difficult to discern” — claiming they failed to satisfy *Twombly*.<sup>73</sup> The court agreed, denying the defendants’ motion because the causes of action were “pleaded in [an] entirely conclusory fashion, with no supporting facts of any kind.”<sup>74</sup>

***Halo Electronics, Inc. v. Bel Fuse Inc.***<sup>75</sup>

In July 2007, the United States District Court for the District of Nevada granted defendants Pulse Engineering, Inc.’s (“Pulse’s”) and Technitrol, Inc.’s (“Technitrol’s”) motion to dismiss for failure to state a claim with leave to amend, but without regard to *Twombly*.<sup>76</sup> The court agreed with Pulse and Technitrol that Halo’s patent infringement complaint failed to meet the “barebones” requirements of Form 16.<sup>77</sup> Halo had alleged that Pulse and Technitrol “‘have been and are infringing, actively inducing others to infringe, and/or contributing to the infringement of the [six] patents’”<sup>78</sup> The court held that while Halo did not have to “identify each accused product with specificity or do a claim by claim analysis,” Halo was required to allege “the means by which the Defendants infringe the patents at issue akin to Form 16’s allegation that the defendant has infringed the patents ‘by making, selling, and using electric

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<sup>70</sup> 245 F.R.D. 532 (S.D. Ala. 2007).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 537. The court refused, however, to strike the defendants’ proposed affirmative defenses based on these same grounds, asserting that “[n]othing in Bell Atlantic would appear to require more detailed pleading of affirmative defenses.” *Id.*

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

<sup>74</sup> *Id.*

<sup>75</sup> No. 2:07-CV-00331, 2007 WL 2156332 (D. Nev. July 26, 2007).

<sup>76</sup> *Id.* at \*1-2.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at \*1.

motors embodying the patented invention.”<sup>79</sup> But Halo had failed “to allege the manner or means by which Defendants infringe the patents, instead alleging only the legally conclusory allegation . . . without any factual allegations in support.”<sup>80</sup>

***Anticancer Inc. v. Xenogen Corp.***<sup>81</sup>

In August 2007, the United States District Court for the Southern District of California dismissed Anticancer’s fourth amended complaint with leave to amend.<sup>82</sup> Defendants moved to dismiss the complaint for failure to state a claim.<sup>83</sup> Anticancer had alleged only that “[e]ach of the defendants has directly infringed the [ ] Patent and has indirectly infringed the [ ] Patent by contributing to or inducing direct infringement of the [ ] Patent by others.”<sup>84</sup>

The court examined *Twombly*’s “new standard,”<sup>85</sup> and analyzed whether *Twombly* applied outside that case’s antitrust context.<sup>86</sup> After reviewing the Second Circuit’s *Iqbal v. Hasty*<sup>87</sup> decision, as well as *Bartronics*, the court held that “the new *Bell Atlantic* pleading standard applies to pleadings in patent infringement actions.”<sup>88</sup> Anticancer’s pleading, the court held, “must allege enough facts so as to demonstrate a plausible entitlement to relief.”<sup>89</sup> Here, the court held, Anticancer had not done so.

***Performance Aftermarket Parts Group, Ltd. v. TI Group Automotive Systems***<sup>90</sup>

In September 2007, the United States District Court for the Southern District of Texas held that TI Group had not (at all, let alone adequately) alleged contributory infringement.<sup>91</sup>

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*Id.*

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*Id.* at \*2.

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\_\_\_ F. Supp. 2d \_\_\_, No. 05-CV-0448-B, 2007 WL 2345025 (S.D. Cal. August 13, 2007).

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*Id.* at 1.

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*Id.*

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*Id.* at \*4.

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*Id.* at \*2.

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*Id.* at \*3.

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490 F.3d 143 (2d Cir. 2007).

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2007 WL 2345025 at \*4.

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*Id.* Unlike the Southern District of Alabama in *Bartronics*, this court extended this holding to all pleadings — “claims, counterclaims, cross claims, third party claims, and separate affirmative defenses.” *Id.*

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No. H-05-4251, 2007 WL 2818269 (S.D. Tex. Sept. 25, 2007).

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*Id.* at \*1.

Plaintiffs had sued for a declaration that they did not infringe TI Group’s patented automotive fuel pumps and that TI Group’s patents were invalid. TI Group, in turn, asserted a contributory infringement counterclaim — or so it argued — and sought discovery designed to advance that counterclaim. Plaintiffs resisted those discovery efforts, and argued to the court that TI Group had not asserted such a counterclaim.<sup>92</sup>

The court began its analysis by reciting *Twombly*’s holdings.<sup>93</sup> TI Group had failed to mention the words “contributory infringement” in its counterclaim, answer or any other filing.<sup>94</sup> TI Group argued that it had adequately asserted its counterclaim by citing 35 U.S.C. § 271 — the statute which, in a subsection, creates a claim for contributory infringement — in the “Parties, Jurisdiction, and Venue” section of TI Group’s counterclaim.<sup>95</sup> The court rejected the argument, observing that Plaintiffs should not be “required . . . to guess what claims may be asserted against them.”<sup>96</sup>

The court distinguished *Erickson* and *McZeal*, noting that in both, the courts had found the complaints adequate at least in part based on the plaintiffs’ *pro se* status. TI Group, in contrast, was represented by counsel.<sup>97</sup>

***Every Penny Counts, Inc. v. American Express Co.***<sup>98</sup>

In this succinct, late October 2007 decision, the United States District Court for the Middle District of Florida denied defendant Visa U.S.A. Inc.’s (“Visa’s”) motion to dismiss Every Penny’s amended complaint for patent infringement.<sup>99</sup> Citing *McZeal*, the court found the allegations of Every Penny’s complaint sufficient since, in its view, Every Penny’s complaint “specifie[d] that it is the Visa open prepaid card program that is the infringing product.”<sup>100</sup> Thus,

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at \*2.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at \*2 n.3.

<sup>97</sup> *Id.*

<sup>98</sup> No. 8:07-cv-1255, 2007 WL 3171313 (M.D. Fla. Oct. 29, 2007).

<sup>99</sup> *Id.* at \*1.

<sup>100</sup> *Id.*

according to the court, Every Penny’s amended complaint adequately specified the infringing product.<sup>101</sup>

***Hynix Semiconductor v. Rambus Inc.***<sup>102</sup>

In this November 2007 case, defendant manufacturers moved to strike patent infringement counterclaims alleged by Rambus in its replies to the manufacturers’ counterclaims.<sup>103</sup> While the United States District Court for the Northern District of California denied the motion on grounds deriving from the unique procedural posture of the case, the court agreed that a motion to strike was a proper mechanism to “enforce[] the policies of ‘fair notice’ encoded in Rule 8 and Rule 9,” and cited *Twombly* in characterizing “fair notice” as the “touchstone of modern civil procedure.”<sup>104</sup> The court further observed that “being forced to litigate without fair notice of the claims . . . arrayed against you constitutes ‘prejudice.’”<sup>105</sup>

***CBT Flint Partners, LLC v. Goodmail Systems, Inc.***<sup>106</sup>

In this December 2007 opinion, the United States District Court for the Northern District of Georgia<sup>107</sup> denied Goodmail Systems’s motion to dismiss CBT’s claims of direct, contributory, and inducement of patent infringement.<sup>108</sup> The court noted *McZeal*, but only for its holding that regional circuit law should be followed in deciding a motion to dismiss.<sup>109</sup> The court observed that the Eleventh Circuit had yet to apply *Twombly* in a patent infringement case,<sup>110</sup> leaving the court free, in its view, to decide how to apply *Twombly* in that context. The court was “loath to assume that,” in *Twombly*, “the Supreme Court [had] circumvented the

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<sup>101</sup> *Id.*

<sup>102</sup> Nos. CV-00-20905, C-05-02298, C-05-00334, C-06-00244, 2007 WL 4062845 (N.D. Cal. Nov. 15, 2007).

<sup>103</sup> *Id.* at \*1.

<sup>104</sup> *Id.* at \*2-3.

<sup>105</sup> *Id.* at \*3.

<sup>106</sup> F. Supp. 2d \_\_\_, No. 1:07-CV-1822, 2007 WL 4531829 (N.D. Ga. Dec. 17, 2007).

<sup>107</sup> United States District Judge Thomas W. Thrash, Jr. was a member of the Committee on Rules of Practice and Procedure of the Judicial Conference and participated “in the writing of the restyled rules.” *Id.* at \*3 n.1.

<sup>108</sup> *Id.* at \*1-2.

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

<sup>110</sup> *Id.* at \*2.

normal channels for amending the Federal Rules.”<sup>111</sup> Rather, the court favored “narrowly confining” *Twombly* to its facts — referring to *Twombly* as “merely a specific way to articulate a solution to . . . a specific pleading problem, in a specific area of law.”<sup>112</sup> For consistency with the proposition that *Twombly* is to be narrowly applied, the court limited the retirement of *Conley’s* “no set of facts” to *Twombly’s* context.<sup>113</sup>

The court invoked Form 16 in support of its narrow reading of *Twombly*.<sup>114</sup> Goodmail Systems argued that Form 16 did not apply to any but direct infringement claims. The court disagreed. Form 16’s “extremely barebones factual allegations,” wrote the court, were not “appreciably different from the allegations contained in” CBT’s complaint.<sup>115</sup> In the court’s view, CBT’s allegations were similar enough to Form 16 to give sufficient notice to Goodmail Systems.<sup>116</sup> The court also asserted that “[r]equiring [a] heightened factual pleading in the patent context is particularly unnecessary” due to “[t]he Northern District’s Local Patent Rules[’] require[ment] to disclose a great deal of extremely detailed information.”<sup>117</sup>

***Taltwell, LLC v. Zonet USA Corp.***<sup>118</sup>

Days later, in the United States District Court for the Eastern District of Virginia, Zonet moved to dismiss Taltwell’s claim that Zonet had infringed its Automatic Dialing System patent — a “credit-card sized device that stores an individual’s credit card information and frequently dialed telephone numbers.”<sup>119</sup> In the court’s view, the motion to dismiss did not implicate “unique issues of patent law,” so the court did not view itself as bound to follow *McZeal*.<sup>120</sup>

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<sup>111</sup> *Id.* at \*2.  
<sup>112</sup> *Id.*  
<sup>113</sup> *Id.* (using such phrases as “[n]arrowly understood” and “[i]n the Sherman Act § 1 context.”).  
<sup>114</sup> *Id.* at \*3.  
<sup>115</sup> *Id.*  
<sup>116</sup> *Id.*  
<sup>117</sup> *Id.* at \*3.  
<sup>118</sup> No. 3:07cv543, 2007 WL 4562874 (E.D. Va. Dec. 20, 2007).  
<sup>119</sup> *Id.* at \*13.  
<sup>120</sup> *Id.*

Noting the absence of post-*Twombly* Fourth Circuit precedent in the patent infringement context, the court nevertheless treated *McZeal* as persuasive.<sup>121</sup>

According to the court, *McZeal* held that a claim for patent infringement is sufficiently pleaded if it “(1) asserts that the plaintiff owns the patent at issue; (2) names the defendants; (3) states that the defendant infringed the patent; (4) describes, in general terms, the means by which the patent was infringed; (5) and identifies the specific parts of patent law that are implicated.”<sup>122</sup> The court held that Taltwell’s complaint met all five requirements. In its view, Taltwell’s allegation that it owned and that Zonet infringed Taltwell’s patent met the first three *McZeal* requirements.<sup>123</sup> The complaint met the fourth requirement, held the court, by alleging that the Zonet “infringed ‘directly or under the doctrine of equivalents, one or more claims of the 660 patent by making, using, offering for sale, and/or selling the communications devices in the United States that are within the scope of the claims of the 660 patent.’”<sup>124</sup> And the court held that Taltwell met the fifth requirement by invoking 35 U.S.C. § 271.<sup>125</sup> Thus, held the court, Taltwell did not need to “specify which claims of the 660 patent have been performed by the allegedly infringing products.”<sup>126</sup>

## VI. CONCLUSION.

*Twombly* has not yet been with us a year. The foregoing cases are few in number, and they are not readily synthesized. But as of February 2008, it appears that *Twombly* and Form 18 are wrestling for supremacy in the wake of the *Conley* “no set of facts” standard’s demise. In some — perhaps many — patent infringement cases, *Twombly* and Form 18 exist in tension, with *Twombly* eschewing conclusory allegations while Form 18 seems to invite them. Read together, *Twombly* and Form 18 stand, at a minimum, for the proposition that if a patent infringement complaint does not supply enough information to enable the defendant to answer,

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*14.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

that complaint is deficient under Rule 8(a)(2). Even *McZeal*, a *pro se* patent infringement case, acknowledged as much. While the issue of whether a particular patent infringement complaint does so may be difficult to resolve, the court should not hesitate to tackle that issue, nor to dismiss the complaint if the court finds the information it supplies to be lacking.

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Center for Professional Responsibility

Intellectual Property Section

Patent Litigation Committee

Trademark Litigation Committee

Litigation Section

### REPRESENTATIVE PUBLICATIONS

Author, *Post-Twombly, Form 16 Takes on New Significance*, IPLaw360.com (Portfolio Media (New York) January 14, 2008).

Author, *"The Trickiest Problem with Functionality" Revisited: A New Datum Prompts a Thought Experiment*, 63 N.Y.U. ANN. SURV. AM. L. 151 (2007).

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Author, *No Summary Judgment for You! One State's (Unjustified) Treatment of Contract Claims for Lost Profits*, 7 U. MIAMI BUS. L. REV. 57 (1999).

## REPRESENTATIVE PRESENTATIONS

Moderator, Committee Forum, *Important Patent Law Developments for the Business Lawyer*, ABA Annual Meeting, San Francisco, CA (August 12, 2007).  
Moderator, Committee Forum, *Up to the Minute IP for the Business Lawyer: Recent Court Decisions*, ABA Business Law Section Spring Meeting, Washington, D.C. (March 16, 2007).  
Panelist, *IP Reps and Warranties Gone Wrong: Avoid Potholes in the Business Transaction*, ABA Business Law Section Spring Meeting, Nashville, TN (April 2005)  
Panelist, *Annual Review of Developments in Business & Corporate Litigation* (IP segment), ABA CLE Teleconference (March 24, 2004).  
Moderator/Panelist, Program, *Finding the Hidden IP Claims in Business Disputes: A Litigation Perspective*, ABA Business Law Section Spring Meeting, Los Angeles, CA (April 4, 2003).  
Moderator/Panelist, *Internet Law and Liability Update*, Maricopa County Bar Ass'n CLE, Phoenix, AZ (Feb. 21, 2001).

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Co-author, *Global Impact on Arizona Soil: Recognition and Enforcement of Foreign Judgments in Arizona*, Arizona Attorney (Feb. 2007), 24.

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