

THE SEDONA CONFERENCE WORKING GROUP SERIES

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# THE SEDONA CONFERENCE

## *Commentary on Patent Litigation Best Practices: Pleading Standards Under Iqbal/Twombly Chapter*

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

OCTOBER 2017 EDITION



# The Sedona Conference Commentary on Patent Litigation Best Practices: Pleading Standards Under *Iqbal/Twombly* Chapter

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## *Preface*

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Welcome to the final, October 2017, version of The Sedona Conference *Commentary on Patent Litigation Best Practices: Pleading Standards Under Iqbal/Twombly Chapter*, a project of The Sedona Conference Working Group on Patent Litigation Best Practices (WG10). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

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

The public comment version of this commentary was published as The Sedona Conference *Commentary on Patent Litigation Best Practices: Heightened Pleading Standards Chapter* in May 2016. The editors reviewed the public comments received and, where appropriate, incorporated those into this final version.

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

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

We hope our efforts will be of immediate and practical benefit to judges, parties in litigation, and their lawyers. We continue to welcome comments for consideration in future updates. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be.

Craig W. Weinlein  
Executive Director  
The Sedona Conference  
October 2017

## *Foreword*

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For many years, Form 18 of the Federal Rules of Civil Procedure provided a very basic format for pleading claims of direct patent infringement. The bright line standard provided by Form 18 largely avoided controversy over the level of detail required to plead a claim for patent infringement. The Federal Judicial Conference, however, repealed Form 18, effective December 1, 2015, opening the possibility for disputes over how much more information is required to plead claims for direct patent infringement under the Supreme Court's *Iqbal* and *Twombly* decisions. It is beneficial for improving the efficiency of handling patent litigations to have the parties focus as soon as possible on identifying the primary issues in the litigation, e.g., the basis for the allegation of infringement.

The Sedona Conference's Working Group 10, therefore, wanted to address what minimum level of detail the Group recommends should be included in a complaint asserting patent infringement. The recommendations below address two perspectives: first, what may be required by *Iqbal/Twombly*, and second, what beyond *Iqbal/Twombly* may promote the efficient administration and resolution of patent disputes. While the courts are still determining what should be pleaded in patent infringement allegations, our goal is to provide parties guidance on drafting pleadings and to provide the courts with some ideas regarding the level of detail that would be helpful to the conduct of litigation. The main objective of the Working Group was to provide guidance on what may be included in such a claim to avoid the unnecessary expense of litigating over pleading standards. The Working Group saw that a similar gap in guidance may exist for pleading declaratory judgment actions and/or counterclaims for patent noninfringement or invalidity. Because a similar basic pleading standard was often reciprocally applied to counterclaims in the era of Form 18, the proper standard which now should be applied to counterclaims post-Form 18 likewise has the potential to be the subject of disputes.

The editors would like to express their appreciation for the members of the drafting team and the Judicial Advisors for their valuable input. This project required an extensive time commitment by those involved and included much discussion as well as occasional compromise.

Gary M. Hoffman  
Editor-in-Chief  
Chair, Working Group 10 Steering Committee

Deborah Fishman  
Steven Spears  
Chapter Editors

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# ***Pleading Standards Under Iqbal/Twombly Principles “At a Glance”***

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

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

## ***Pleading Standards Under Iqbal/Twombly Best Practices “At a Glance”***

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## *I. Introduction*

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

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

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

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

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

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<sup>1</sup> See 2015-2016 Federal Rules of Civil Procedure Amendments Released (May 13, 2015), <https://www.federalrulesofcivilprocedure.org/latest-updates> (listing numerous rule amendments taking effect on December 1, 2015, including the abrogation of Rule 84 and its incorporated Appendix of Forms [including Form 18]); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007).

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

## II. Background

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

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

In the absence of Form 18, the default pleading standards set by *Iqbal*<sup>2</sup> and *Twombly*<sup>3</sup> will govern the pleading of claims of direct patent infringement.<sup>4</sup> Yet, the elimination of Form 18 and application of *Iqbal* and *Twombly* to claims of direct infringement is uncharted territory. Given the nascent state of the caselaw on what *Iqbal* and *Twombly* actually require as to details in patent infringement actions, it may take a few years for the courts to provide uniform guidance as to the level of disclosure required to plead plausibility.

The *Iqbal/Twombly* standard does not require detailed factual allegations, but it does require that a well-pleaded complaint contain more than conclusory allegations or a mere recitation of the elements of a cause of action.<sup>5</sup> *Iqbal* is satisfied when the complaint recites sufficient factual material that, when taken as true, states a claim for relief that is plausible on its face.<sup>6</sup> How much detail needs to be included has not yet been decided by many district courts or by the Federal Circuit to date. The goal, as set forth by the Working Group, is to strike a balance between hyper-technical pleading requirements that may unfairly impede a plaintiff’s access to the courts, and unjustifiably exposing a defendant to expansive and costly discovery triggered by a complaint consisting merely of conclusions.<sup>7</sup>

Yet, the implementation of the principles of *Iqbal/Twombly* as a default standard in patent infringement cases may create unnecessary uncertainty at the pleading stage and might run counter

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<sup>2</sup> *Iqbal*, 556 U.S. at 662.

<sup>3</sup> *Twombly*, 550 U.S. at 554.

<sup>4</sup> In 2015, both the House and the Senate proposed legislation to specify the standards required to plead a claim for direct patent infringement, requiring patent pleadings to include, *inter alia*, a claim chart fully mapping the basis for infringement allegations (see H.R. 9, 114<sup>th</sup> Congress (2015-16) and S. 1137, 114<sup>th</sup> Congress (2015-16)), but neither bill was passed into law.

<sup>5</sup> *Iqbal*, 556 U.S. at 678.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 678–79.

to the fundamental goal of assuring “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>8</sup> Unlike the bare-bones requirements of Form 18 or some other Congressionally-adopted form, the *Iqbal/Twombly* standard is not a bright-line rule, but a balancing test applied to each case on an individual basis. As a result, a given court might apply the *Iqbal/Twombly* standard more or less stringently than another, which could result in forum shopping as plaintiffs seek to bring cases in jurisdictions where they perceive their complaints might have a greater chance of surviving a motion to dismiss. Likewise, as discussed above, it is difficult to apply a decision on the sufficiency of the pleadings under one set of asserted claims to the sufficiency of the pleadings under a different set of claims and facts, making the evolution of case law regarding pleadings of direct infringement a cumbersome, slow-going, and uncertain process.

The attempt to strike the balance called for by *Iqbal/Twombly* might also result in increased “satellite” litigation at the early stages, thereby prolonging cases and increasing their expense. The uncertain application of *Iqbal/Twombly* to patent cases could encourage motions by defendants seeking to delay the proceedings for tactical purposes. Likewise, a proliferation of motions to test the boundaries of *Iqbal/Twombly* in the patent infringement context could greatly increase the cost of litigation, and strain the resources of the courts at the very early stages of a case. Even where a complaint is dismissed under *Iqbal/Twombly*, the plaintiff is often granted leave to amend, in which case the amended complaint should clarify the plaintiff’s claims, but at added cost and delay for the defendant. Finally, the requirement of detailed factual recitations could increase the cost of bringing a complaint for patent infringement in the first instance, undermining the core purpose of the notice pleading codified in Rule 8 of the Federal Rules of Civil Procedure, which is to “raise a right to relief above the speculative level . . . on the assumption that all of the allegations in the complaint are true (even if doubtful in fact).”<sup>9</sup>

Thus, the Working Group proposes as its Best Practice 1 the minimum identification of factual content that we recommend be included in a complaint for patent infringement in order to streamline the litigation while understanding that the amount of factual content needed may vary depending on the asserted claims and the availability of information regarding the accused product or process.<sup>10</sup> The Working Group has also provided an exemplary pleading to provide a guidepost for how much content it recommends be included when alleging the direct infringement of asserted patent claims.<sup>11</sup> We recognize, however, that courts may decide to require more or less than this. It is not our goal to define governing legal standards; our goal is to recommend practices that, like local patent rules, will help move patent litigation forward efficiently.

In addition to the Best Practice 1, the question arises whether anything more than the application of *Iqbal/Twombly*, such as another particular form of the type alluded to in the Advisory Committee’s Note, is necessary or desirable for patent infringement cases. There are certain advantages to providing greater factual exposition in the pleadings. Greater notice of accused products and

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<sup>8</sup> FED. R. CIV. P. 1.

<sup>9</sup> *Twombly*, 550 U.S. at 555.

<sup>10</sup> See *infra* Section III (What Should be Included in a Complaint for Patent Infringement).

<sup>11</sup> *Id.*

asserted claims can facilitate appropriate crafting of discovery and the litigation schedule. This better notice can facilitate early assessment, and potential resolution, of cases, both by smaller defendants who are unfamiliar with patent infringement actions, and larger defendants offering a wide variety of products incorporating a wide range of technologies. The parties and the court may also benefit from the ability to identify and dispose of non-meritorious claims at an early stage of the litigation. In jurisdictions that have adopted patent local rules or patent disclosures, additional factual exposition may be unnecessary at the pleading stage; however, in jurisdictions that do not include such patent disclosure procedures, encouraging more fulsome factual exposition in the pleading may allow both plaintiffs and defendants to frame the issues in dispute earlier and tailor discovery and defenses appropriately. To that end, the Working Group proposes as its Best Practice 2 that, in addition to factual allegations regarding a single asserted claim and single accused product or process as identified in Best Practice 1, a claimant should further include in its complaint factual allegations for each asserted claim and every accused product that it may be able to identify based upon publicly available information known to the plaintiff at the time the complaint is filed. While the law does not require this level of detail, we recommend it nonetheless.

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

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

There is general consensus across WG10 that a patentee should be required to plead at least one specific representative claim and one specific accused instrumentality, but reluctance to require a patentee to plead every asserted claim at the pleading stage. There are divergent views on whether patentees should be required to identify in the complaint all accused products or all asserted claims.

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

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

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

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

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

An initial area of substantial discussion was whether the patentee must plead all asserted claims and all accused instrumentalities, or just one asserted claim and one accused instrumentality for each defendant. *Iqbal* states, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>12</sup> Because identifying one asserted claim and one accused instrumentality for each defendant is sufficient to state a claim to relief for patent infringement, the consensus of the Working Group was that doing so would satisfy *Iqbal/Twombly*. For multicomponent instrumentalities, we believe it is also important that the complaint identify the component(s) that are alleged to be infringing.

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

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<sup>12</sup> *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570).

or how the claim allegedly reads on the accused product.<sup>13</sup> Likewise, for each claim of indirect infringement, the complaint should plead the acts of the alleged indirect infringer that contribute to, or are inducing, a direct infringement. We recognize that, when determining whether this threshold has been satisfied, all reasonable references must be drawn in favor of the claimant—*Iqbal/Twombly*, did not do away with this long-standing principle.<sup>14</sup> This principle is particularly applicable when assessing the sufficiency of allegations of knowledge or intent in connection with claims of indirect infringement. The Working Group has provided below a model complaint that provides exemplary factual content to plead a claim of direct patent infringement.

While the Working Group concluded that it is not necessary to identify all asserted claims and products to satisfy the *Iqbal/Twombly* pleading standard, it recognized the importance of having this information provided early in the discovery process. Many district courts have local rules that require that a patentee serve claim charts that provide this information. Other individual judges have standing orders that accomplish the same thing even where local rules have not been adopted. Working Group 10 recommends the early exchange of information such as the identification of representative claims and accused products as a best practice.<sup>15</sup> In courts that do not employ local patent rules or standing orders to ensure the early exchange of claim charts, the Working Group has recommended Best Practice 2 to ensure early disclosure of this type of information, even if not in claim-chart form.

Since this Chapter was first submitted for public comment in 2016, some district courts have issued decisions addressing the sufficiency of pleading a claim of direct patent infringement under an *Iqbal/Twombly* pleading standard. Most courts have applied a standard similar to that proposed here.<sup>16</sup> A few courts even required explanations of infringement for every asserted claim.<sup>17</sup>

Other courts, however, have not even required plaintiffs to plead non-conclusory facts as to each element of at least one claim. While recognizing that the *Iqbal/Twombly* standard requires more detail

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<sup>13</sup> WG10 does not recommend the requirement of element-by-element pleading. WG10, however, believes that element-by-element pleading generally would help in defining the issues and moving the process forward.

<sup>14</sup> *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1282–83 (Fed. Cir. 2013).

<sup>15</sup> See The Sedona Conference, *Commentary on Patent Litigation Best Practices: Discovery Chapter* (Dec. 2015 Ed.), at Sect. IV (Automatic Disclosures and Contentions) and Sect. VI (Scope and Limits of Discovery), <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Patent%20Litigation%20Best%20Practices%3A%20Discovery> [hereinafter *Sedona WG10 Discovery Chapter*].

<sup>16</sup> See *InsideSales.com, Inc. v. SalesLoft, Inc.*, No. 2:16CV859DAK, 2017 WL 2559932 (D. Utah June 13, 2017); *Novitaz, Inc. v. inMarket Media, LLC*, No. 16-CV-06795-EJD, 2017 WL 2311407 (N.D. Cal. May 26, 2017); *Atlas IP LLC v. Pac. Gas & Elec. Co.*, No. 15-5469, 2016 WL 1719545 (N.D. Cal. Mar. 9, 2016); *Small Axe Enterprises, Inc. v. Amscan, Inc.*, No. 316CV00981BENWVG, 2017 WL 1479236 (S.D. Cal. Apr. 25, 2017); *Cont'l Circuits LLC v. Intel Corp.*, No. CV16-2026 PHX DGC, 2017 WL 679116 (D. Ariz. Feb. 21, 2017); *InMusic Brands, Inc. v. Roland Corp.*, No. 17-010M, 2017 WL 2416228 (D.R.I. May 22, 2017); *Wright's Well Control Servs., LLC v. Oceaneering Int'l, Inc.*, No. CV 15-1720, 2017 WL 568781 (E.D. La. Feb. 13, 2017); *Raindance Techs., Inc. v. 10x Genomics, Inc.*, No. 15-152, 2016 WL 927143 (D. Del. Mar. 4, 2016); *Robern, Inc. v. Glasscrafters, Inc.*, No. 16-1815, 2016 WL 3951726 (D.N.J. July 22, 2016).

<sup>17</sup> *Oil-Dri Corp. of Am. v. Nestle Purina Petcare Co.*, No. 15-CV-1067, 2017 WL 1197096 (N.D. Ill. Mar. 31, 2017); *Werteks Closed Joint Stock Co. v. Vitacost.com, Inc.*, No. 16-CV-60695, 2016 WL 5076169 (S.D. Fla. Sept. 20, 2016); *Asghari-Kamrani v. United Servs. Auto. Ass'n*, No. 2:15CV478, 2016 WL 1253533 (E.D. Va. Mar. 22, 2016).

than Form 18, a number of courts have found it sufficient to provide a general description of how the claims relate to the accused products.<sup>18</sup>

If a claimant fails to provide the above-described short, plain, and non-conclusory explanation, alleged infringers should consider whether a Rule 12 motion may be appropriate and advisable. If the accused infringer has a good-faith belief that additional information would narrow the case and advance the goal of assisting the party in preparing its defenses, its first step should be to approach the claimant. The accused infringer should be prepared to discuss what information it needs to narrow the case or properly prepare its defense. Even if the claimant refuses to provide additional information absent court order, before filing a motion challenging the method of pleading, the accused infringer should consider whether such a challenge will advance the primary objectives of informing them of the accusations being asserted or preparing to defend the action. Because courts apply a totality of the circumstances approach to the question of whether particular allegations suffice to put the defendant on notice of what is asserted, prior interactions between the parties and the defendant's access to relevant information will be factors to consider when assessing the sufficiency of any given set of allegations. Courts may not be persuaded by a motion to dismiss where it appears a defendant's claim of confusion or ignorance is inaccurate or even misleading.

Often a successful Rule 12 motion relating to how a patent infringement claim is pleaded results in an order of dismissal without prejudice and an opportunity for the claimant to replead. The resolution of such early motion practice often requires the expenditure of party and judicial resources that ultimately would be better spent elsewhere. While leave to re-plead may be frequently granted, there have been instances where a defendant, through a well-targeted, post-Form 18, Rule 12 motion, has been able to demonstrate that there is no plausible basis to plead a claim for patent infringement, and has secured a dismissal with prejudice.<sup>19</sup>

A bare-bones pleading of patent infringement may in some instances provide an accused infringer with insufficient information regarding the nature of the claims to effectively prepare its defense. Or the patent may be so disconnected with the nature of the accused activity that a plausible claim for patent infringement cannot properly be stated. It can be true, moreover, that as greater pleading detail is required, a claimant might plead its way out of court by adding factual allegations that make it clear that its claim of infringement by the defendant's product cannot be plausible.<sup>20</sup> The accused infringer should weigh the costs of satellite litigation at the early pleading stage against waiting for preliminary infringement contentions, which set forth claimant's accusations in more detail.

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

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<sup>18</sup> Raytheon Co. v. Cray, Inc., No. 216CV00423JRGRSP, 2017 WL 1362700 (E.D. Tex. Mar. 13, 2017); InCom Corp. v. Walt Disney Co., No. CV15-3011 PSG (MRWX), 2016 WL 4942032 (C.D. Cal. Feb. 4, 2016); Orbcomm Inc. v. Calamp Corp., 215 F. Supp. 3d 499, 503 (E.D. Va. 2016); Simplivity Corp. v. Springpath, Inc., No. 15-13345, 2016 WL 5388951 (D. Mass. July 15, 2016).

<sup>19</sup> Ruby Sands LLC v. Am. Nat'l Bank of Texas, No. 2:15-CV-1955-JRG, 2016 WL 3542430 (E.D. Tex. June 28, 2016); Gym Door Repairs, Inc. v. Young Equip. Sales, Inc., 206 F. Supp. 3d 869 (S.D.N.Y. 2016).

<sup>20</sup> *In re* Bill of Lading Trans. & Processing Sys. Patent Litig., 681 F.3d 1323, 1338 (Fed. Cir. 2012).



**UNITED STATES DISTRICT COURT**  
**for the**  
**DISTRICT OF \_\_\_\_\_**

Name(s) of plaintiff(s),	)	
	)	
Plaintiff(s),	)	
	)	Civil Action No. _____
v.	)	
	)	<b>COMPLAINT FOR PATENT</b>
Name(s) of defendant(s),	)	<b>INFRINGEMENT</b>
	)	
Defendant(s)	)	<b>DEMAND FOR JURY TRIAL</b>
_____	)	

Plaintiff [ ], by and through its undersigned counsel, files this Complaint against Defendant(s) [ ], and alleges as follows:

**THE PARTIES**

1. [Fill in]
2. [Fill in]

**JURISDICTION AND VENUE**

3. This action arises under the patent laws of the United States, Title 35 of the United States Code. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

4. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and 1400(b). On information and belief, Defendant has transacted business in this district and has committed acts of patent infringement in this district.

**PATENT**

5. On \_\_\_\_\_, the United States Patent and Trademark Office (USPTO) duly and legally issued United States Patent No(s). \_\_\_\_\_ to the plaintiff. Plaintiff holds all right, title and interest in and to the \_\_\_\_ Patent(s). [Or: Plaintiff owned the patent throughout the period of Defendant’s infringing acts and still owns the patent]. A true and correct copy of the \_\_\_\_ Patent is attached as Exhibit A.

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

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

1. A smartphone USB charger comprising:

a USB connector receiving power from a power source;

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

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

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

8. Defendant's smartphone USB charger includes a USB connector, which is connected to a laptop to facilitate charging of the smartphone. The first pin (the VCC pin) of the USB charger is soldered to a pad of a perfboard.<sup>21</sup>

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

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

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<sup>21</sup> In crafting this exemplary complaint, the Working Group was mindful to provide factual content to show how each limitation of the asserted claim was present in the accused product. For example, rather than simply parrot the claim language, "USB connector receiving power from a power source," the complaint should preferably, where feasible, specify the particular elements of the USB connector that receive the power, namely, the first pin (VCC pin) and the pad of the printed circuit board to which it is connected (soldered). Again, we do not assert that this level of detail is required by law, only that such detail is recommended, preferred, and should be sufficient.

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

12. Plaintiff [ ] has complied with the statutory requirement of placing a notice of the Letters Patent on all \_\_\_ it manufactures and sells and has given Defendant [ ] written notice of the infringement.<sup>22</sup>

### PRAYER FOR RELIEF

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

Therefore, the Plaintiff demands:

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

Date: \_\_\_\_\_

Signature of the attorney/unrepresented party

\_\_\_\_\_  
Printed name  
Address  
Email address  
Telephone number

<sup>22</sup> While the notice or marking allegation is not technically required to state a claim for direct patent infringement under *Iqbal/Twombly* (though it may be required for entitlement to past damages), because this allegation was included in the bare-bones requirements of Form 18, the Working Group decided to carry it over to the exemplary model complaint here.

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

The Working Group believes that the requirements stated in Best Practice 1 are consistent with *Iqbal/Twombly*. In recommending a further requirement to plead all asserted claims based upon the information known to the plaintiff at the time that the complaint is filed, the Working Group is not suggesting this requirement is required by *Iqbal/Twombly*. Alleging the infringement of one claim by one instrumentality for each defendant (with the accompanying details described above) is clearly sufficient to state a claim for relief under *Iqbal/Twombly*.

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

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

The Working Group does not view the burden placed upon the plaintiff for complying with Best Practice 2 to be overly burdensome. The identified claims and accused instrumentalities must simply be based upon the information known to the plaintiff at the time that the complaint is filed. Because the plaintiff is expected to have conducted a good-faith analysis of how the patent claims relate to the accused instrumentalities, it should not require substantially more effort to identify what claims are being asserted based upon that analysis. It is fully expected that further information will be developed through discovery that may impact other claims—particularly dependent claims with narrower limitations that may not be apparent from publicly-available information. Likewise, claim construction may impact which claims should be asserted in a case. While we recognize that many courts already have rules regarding preliminary infringement contentions and when amendment of those contentions is appropriate, those same standards cannot be applied to the amendment of claims asserted in a complaint for patent infringement. Such amendments are and would remain governed by the liberal amendment standard set forth in Rule 15 of the Federal Rules of Civil

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

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

## ***IV. What Should be Included in Declaratory Judgment Actions or Counterclaims for Noninfringement and/or Invalidity***

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The application of the *Iqbal/Twombly* standards to declaratory judgment actions or counterclaims for noninfringement and/or invalidity poses additional challenges for the bench and bar in patent cases. As discussed in more detail in the commentary to Best Practice 6, and the authority cited there, a majority of courts have drawn a distinction between the pleading standards for counterclaims and affirmative defenses. As a general rule, courts have treated counterclaims in essentially the same manner as the original claims in terms of pleading requirements, and therefore required that counterclaims meet the *Iqbal/Twombly* standards. They generally have not, however, required that an affirmative defense meet the same standards.

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

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

### **A. DECLARATORY JUDGMENT ACTIONS AND COUNTERCLAIMS**

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

Given the short 21-day period within which the defendant is required, barring the grant of extension, to file its answer and counterclaims, patent plaintiffs and the courts should continue to be

generous in permitting extensions, in particular with respect to invalidity or noninfringement counterclaims. While the extension of time to answer necessarily means a delay in the progress of the case, the delay would be more than offset by the progress and efficiencies to be gained by the parties from the more informative statements from defendants as to why a patent may be invalid and/or not infringed.

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

In asserting claims of invalidity by declaratory judgment action or by counterclaim (referred to jointly here as a “claim of invalidity”) based on 35 U.S.C. § 102 anticipation or § 103 obviousness grounds, the consensus of the Working Group is that a defendant should be able to meet any pleading standard under *Iqbal/Twombly* by first identifying at least one reference or combination of references as a basis for pleading a claim of invalidity based on prior art, for each patent being challenged. The defendant, however, should not be required to disclose all prior art known to it with the claim of invalidity. Such a requirement would be particularly problematic for claims of invalidity given the short 21-day period to file the answer and counterclaims and the inherently time-consuming nature in many cases of conducting an appropriate prior art search. It would thus be unfair to preclude the defendant from introducing or relying on additional prior art that comes to its attention after the filing of its claims.<sup>23</sup>

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

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

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<sup>23</sup> Some courts have local rules or standing orders that recognize the need for post-complaint flexibility with respect to invalidity assertions. *E.g.*, N.D. CAL. PATENT L.R. 3.6 (Amendment to Contentions): “Amendment of the [ ] Invalidity Contentions may be made only by order of the Court upon a timely showing of good cause. Non-exhaustive examples of circumstances that may, absent undue prejudice to the non-moving party, support a finding of good cause include: . . . (b) Recent discovery of material, prior art, despite earlier diligent search.”

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

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

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

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

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

## **B. AFFIRMATIVE DEFENSES**

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

WG10 notes that these recommendations are not intended to and should not be interpreted as altering or amending the pleading requirements for certain affirmative defenses, such as inequitable

conduct or patent misuse, for which courts already require sufficient factual allegations to support. WG10 does not recommend changing such requirements in any way.

**Best Practice 6 – Pleading standard requirements under *Iqbal/Twombly* directed toward counterclaims should not be extended as a matter of course to affirmative defenses raised under Fed. R. Civ. P. 8.**

As recognized by a number of courts, there is a distinction between counterclaims and defenses in terms of pleading requirements based on the text of the Federal Rules of Civil Procedure. Rule 8(a) requires that a party seeking relief must include in its pleading a “showing” that it is entitled to relief.<sup>24</sup> In contrast, an affirmative defense need only provide fair notice of the issue involved.<sup>25</sup> Thus, while a plaintiff must state a claim that is plausible, a defendant need only put the plaintiff on notice of the facts supporting its defense.<sup>26</sup> Under this reasoning, a defendant who asserts a counterclaim is seeking relief, and must therefore meet the same pleading standards as a plaintiff, i.e., the showing of entitlement to relief required by Rule 8(a). Where a defense without a claim for relief is asserted, we believe that only a plain and simple statement should be necessary.<sup>27</sup>

A majority of courts recognize the distinction between pleading claims under Rule 8(a) and providing notice of affirmative defenses under Rule 8(c).<sup>28</sup> Moreover, many courts acknowledge the practical reality that while a plaintiff generally has an open-ended amount of time to prepare its claims, a defendant may only have twenty-one days, the default time for responding to a complaint, to prepare a defense and should not be prejudiced by the imbalance in time to prepare a pleading.<sup>29</sup>

Applying the majority view to patent infringement cases therefore suggests that defendants should not be required to recite substantial supporting facts, such as identification of prior art or the basis

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<sup>24</sup> FED. R. CIV. P. 8(a).

<sup>25</sup> FED. R. CIV. P. 8(b).

<sup>26</sup> See, e.g., *Senju Pharm. v. Apotax, Inc.*, 921 F. Supp. 2d 297 (D. Del. 2013); see also *Internet Media Corp. v. Hearst Newspapers, LLC*, 2012 WL 3867165, at \*3 (D. Del. Sept. 6, 2012) (quoting *Tyco Fire Prod. v. Victaulic*, 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011)); see also *Bayer CropScience AG v. Dow Agrosciences LLC*, 2011 WL 6934557, at \*1–2 (D. Del. Dec. 30, 2011) (articulating nine reasons utilized by courts recognizing a Rule 8(a)/Rule 8(c) distinction).

<sup>27</sup> See, e.g., *Tyco Fire*, 777 F. Supp. 2d at 893.

<sup>28</sup> Whether the *Iqbal/Twombly* standards apply to pleading affirmative defenses may be treated as an issue governed by regional circuit law. Some courts in the Fourth and Ninth Circuit have taken what may be a minority view that the *Iqbal/Twombly* standards do apply to pleading affirmative defenses. See *Info. Planning & Mgmt. Serv. Inc. v. Dollar Gen. Corp.*, No. 2:15CV206, 2016 WL 69902 (E.D. Va. Jan. 5, 2016) (“Since the *Twombly* and *Iqbal* decisions, Fourth Circuit district courts are divided on whether the *Twombly/Iqbal* standard applies to affirmative defenses, and the Fourth Circuit Court of Appeals has not yet resolved this issue.”); *Aubin Ind., Inc. v. Caster Concepts, Inc.*, No. 2:14CV02082, 2015 WL 391400 (E.D. Cal. 2015) (recognizing that while “district courts in this circuit were split on whether the heightened pleading standard in [*Twombly* and *Iqbal*] applied to affirmative defenses” ... “this Court reads *Kohler* as standing for the proposition that [fair notice] and not *Twombly/Iqbal*, provides the proper yardstick for assessing the sufficiency of affirmative defenses.”) (citing *Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015)); 5 Charles Alan Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 1274 (3d ed., updated April 2017) (noting that courts are in disagreement as to whether the pleading the *Iqbal/Twombly* standards extends to the pleading of affirmative defenses and collecting representative cases).

<sup>29</sup> FED. R. CIV. P. 12; *Tyco Fire*, 777 F. Supp. 2d at 893.

for inadequate disclosure, unless those defenses are asserted as counterclaims.<sup>30</sup> We do not imply that, as part of its case management effort, a court may not seek more detailed explanation of any affirmative defenses; we only recommend that affirmative defenses not be the subject of motions practice regarding the adequacy of the answer as filed.

Notably, though, certain equitable affirmative defenses, e.g., those based on allegations of fraud (such as inequitable conduct or unenforceability), already require a pleading of sufficient facts to support the defense under Fed. R. Civ. P. 9.<sup>31</sup> Courts must, by rule, continue to impose a heightened pleading requirement to the assertion of such affirmative defenses. In addition, some factual allegations may be required to provide notice under Rule 8(c) where the nature of the defense may be unclear from its label. Whereas an affirmative defense alleging that a patent is invalid under 35 U.S.C. §§ 102 or 103 gives a patentee notice of what issue is at stake—the accused infringer is stating that prior art invalidates the patent—the assertion of an equitable defense does not provide similar notice of the theory underpinning the asserted defense. For example, the identification of an affirmative defense of patent misuse fails to provide a patent holder with any factual basis as to which type of misuse may apply. In this situation, it would seem that even if *Iqbal/Twombly* were not generally applied to affirmative defenses, such a vague allegation would be susceptible to a motion to strike even under the minimal requirements of Fed. R. Civ. P. 8(c).

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

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<sup>30</sup> As a practical matter, however, in most patent cases, the defenses are pleaded simultaneously as both a defense and a counterclaim, in which case sufficient facts will need to be pleaded to support the defense in order to meet the pleading standard of *Iqbal/Twombly*.

<sup>31</sup> See, e.g., *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009).

## *The Sedona Conference Working Group Series & WGS Membership Program*

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

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

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

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

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

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

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

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

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