UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

B.E. TECHNOLOGY, L.L.C., **Plaintiff/Counter-Defendant,** **v.** **TWITTER, INC.,** **Defendant/Counterclaimant.**	**Case No. 2:12-cv-02783 JPM cgc** **JURY DEMAND**

PLAINTIFF B.E. TECHNOLOGY, L.L.C.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

Dated: August 19, 2013

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Defendant Twitter, Inc. ("Twitter") presents no legally sufficient response to the points and authorities presented in plaintiff B.E. Technology, L.L.C.'s ("B.E.") motion to dismiss Twitter's counterclaims.[1] The sufficiency of Twitter's pleading is not measured against Official Form 18 of the Appendix to the Federal Rules of Civil Procedure. The standard against which Twitter's counterclaims must be measured is the Supreme Court's *Twombly* and *Iqbal* standard. The Court should grant B.E.'s motion to dismiss because Twitter's declaratory judgment counterclaims do not meet that standard.

I. TWITTER'S COUNTERCLAIMS FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT AND INVALIDITY SHOULD BE DISMISSED.

A. The *Twombly/Iqbal* Standard Governs Twitter's Counterclaims.

As discussed in B.E.'s opening brief, declaratory judgment counterclaims must satisfy the standard set forth by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Twitter does not approach the requirements of that standard and its counterclaims are devoid of factual allegations sufficient to permit an inference that B.E.'s patents are not infringed or invalid. *Compare* D.E. 19 at 5-6 *with Xilinx, Inc. v. Invention Inv. Fund I LP*, 2011 WL 3206686, at *6 (N.D. Cal. July 27, 2011) ("This bare-bones recitation of statutes does not meet the requirements of *Twombly* and *Iqbal* and does not put defendants on notice of the basis of Xilinx's claims of invalidity."); *see also Iqbal*, 556 U.S. at 678 ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation.") (internal quotation marks omitted).

[1] B.E. simultaneously moved to dismiss Twitter's counterclaims and strike certain affirmative defenses. *See* D.E. 29. A party moving for relief under Fed. R. Civ. P. 12(b) has a right to file a reply memorandum without leave of court, Civil L.R. 12.1(c), while no such right exists for a party seeking relief under Fed. R. Civ. P. 12(f). Civil L.R. 7.2(c). To avoid further burdening the Court's already heavy docket, B.E. files only a reply in support of its Rule 12(b) motion and rests on its moving papers to support its Rule 12(f) motion.

Twitter wrongly argues that its counterclaims are adequate because they meet the requirements of Official Form 18 of the Federal Rules of Civil Procedure. D.E. 48 at 5 ("Twitter's compliance with Form 18 and 30 should end the inquiry regardless of *Twombly*."); *id.* at 6 ("Because Twitter's Counterclaims provide the same level of detail contemplated by Forms 18 and 30, B.E.'s Motion should be denied."). A complaint for direct patent infringement is measured against Official Form 18. *In re Bill of Lading Transmission and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012). There is no Official Form for pleading declaratory judgment claims or counterclaims. *See Memory Control Enter., LLC v. Edmunds.com, Inc.*, 2012 WL 681765, at *3 (C.D. Cal. Feb. 8, 2012) ("[W]hile the Appendix of the Federal Rules of Civil Procedure includes a form for patent infringement, it includes no such form for patent invalidity. Until such a form is included, defendants must meet the pleading standard that the Supreme Court announced in *Twombly* and *Iqbal*.").

Twitter cites no authority establishing that Official Form 18 governs the pleading of declaratory judgment claims,[2] and the Federal Circuit has made clear that "Form 18 should be strictly construed as measuring only the sufficiency of allegations of direct infringement." *In re Bill of Lading*, 681 F.3d at 1336. The *Twombly/Iqbal* standard, a standard based on Federal Rule of Civil Procedure 8 that is generally applicable to cases filed in federal court, therefore governs the pleading of a declaratory judgment claim. *See Iqbal*, 556 U.S. at 684 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike.").

[2] Twitter incorrectly contends that the Federal Circuit held that Form 18 is "the standard against which claims for infringement and non-infringement are to be measured." D.E. 48 at 5 (citing *In re Bill of Lading*, 681 F.3d at 1334). The Federal Circuit did not address declaratory judgment claims or counterclaims for non-infringement or invalidity in *In re Bill of Lading*.

B. Under the Governing Rules, Twitter's Burden to Allege Non-Infringement and Invalidity Is Different from B.E.'s Burden to Allege Direct Infringement.

Twitter argues that the existence of different pleading standards for plaintiffs and counterclaimants[3] results in unfairness. D.E. 48 at 9 ("[I]t would be grossly unfair to allow B.E. to plead patent infringement with the meager allegations it has provided and then hold Twitter to a significantly more rigorous standard."). If there is unfairness, it is the direct result of Rule 8, *Twombly* and *Iqbal*, and the decisions that were made in the adoption of the Official Forms. B.E. submits that it would be "unfair" for the Court to make an exception to the *Twombly/Iqbal* standard governing "all civil actions" benefiting patent infringement defendants, but not other defendants.

Twitter also argues that pleading standards for patent declaratory judgment counterclaims can be lowered because of the existence of unique local rules governing patent cases. D.E. 48 at 8 (claiming a "pragmatic approach" to pleading is appropriate for non-infringement and invalidity declaratory judgment counterclaims "in light of local patent rules providing for early disclosure of non-infringement and invalidity theories"); *id*. at 1 ("This District's Local Patent Rules govern those disclosures, and B.E.'s demands, if accepted, would significantly undermine this carefully considered procedure."). The adoption of local rules does not "alter a defendant's pleading obligations" and does not create an exception to a defendant's pleading obligations under *Twombly* and *Iqbal*. *See Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 904 (E.D. Pa. 2011); *see also GE Lighting Solutions, LLC v. Lights of Am., Inc.*, 2013 WL 1874855, at *2 (N.D. Ohio May 3, 2013) ("[I]t would undermine Rule 8 to permit a threadbare assertion of

[3] The actual distinction in the law is between infringement claimants and counterclaimants on the one hand, and declaratory judgment claimants and counterclaimants, on the other. A counterclaimant alleging direct patent infringement may rely on Official Form 18. A plaintiff asserting a declaratory judgment claim must satisfy the *Twombly/Iqbal* standard because there is no official form for declaratory judgment claims and counterclaims.

a claim on the promise that discovery will unveil the claim's factual basis."). Moreover, under Federal Rules of Civil Procedure 83(a)(1), a local rule cannot modify the pleading requirements of Rule 8, as they have been determined by the Supreme Court. *See* Fed. R. Civ. P. 83(a)(1) ("A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, ...").

In *Tyco Fire*, the district court explained that the difference in pleading standards cannot be remedied by allowing a counterclaimant to evade the Supreme Court's rulings. 777 F. Supp. 2d at 904 ("Two wrongs do not make a right."). If there is a problem requiring a solution, the appropriate remedy is to modify or eliminate the Rule 84 forms or to update the official forms to comply with the otherwise existing requirements of current law. *Id.* at 905. Until then, defendants asserting counterclaims must do so in the manner required by *Twombly* and *Iqbal*, which requires more than what Twitter has done here. *Compare* D.E. 19 at 5-6 ("The '314 Patent is invalid for failure to meet one or more of the conditions for patentability specified in Title 35, U.S.C., or the rules, regulations, and law related thereto, including, without limitation, one or more of 35 U.S.C. §§ 101, 102, 103, and/or 112.") *with PPS Data, LLC v. Allscripts Healthcare Solutions, Inc.*, 2012 WL 243346, at *4 (M.D. Fla. Jan. 25, 2012) ("A fleeting reference to all (or most) of these [invalidity] defenses does not rise to the level of 'a short and plain statement of the claim showing that the pleader is entitled to relief.'") (quoting Fed. R. Civ. P. 8(a)(2)); *Orientview Techs. LLC v. Seven For All Mankind, LLC*, 2013 WL 4016302, at *7 (S.D.N.Y. Aug. 7, 2013) ("Measured against the heightened pleading standard, [defendant's] invalidity counterclaim falls well short."); *Gemcor II, LLC v. Electroimpact Inc.*, 2012 WL 628199, at *2 (D. Kan. Feb. 27, 2012) (granting motion to dismiss); *Duramed Pharms, Inc. v. Watson Labs, Inc.*, 2008 WL 5232908, at *4 (D. Nev. Dec. 12, 2008) (granting motion to dismiss

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