UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

B.E. TECHNOLOGY, L.L.C., **Plaintiff/Counter-Defendant,** **v.** **APPLE INC.,** **Defendant/Counterclaimant.**	**Case No. 2:12-cv-02831 JPM tmp** **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: July 22, 2013

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Defendant Apple Inc. ("Apple") 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 Apple's counterclaims.[1] The sufficiency of Apple's pleading is not measured against Official Form 18 of the Appendix to the Federal Rules of Civil Procedure. The standard against which Apple's counterclaims must be measured is the Supreme Court's *Twombly* and *Iqbal* standard and Apple's declaratory judgment counterclaims do not measure up. For that reason, the Court should grant B.E.'s motion to dismiss.

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

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

As discussed in B.E.'s opening brief,[2] 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). Apple 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. 26 at 6, 7 *with Groupon, Inc. v. MobGob LLC*, 2011 WL 2111986, at *5 (N.D. Ill. May 25, 2011) (the counterclaim "provides the Court with no basis for making a reasonable inference in [defendant's] favor").

[1] B.E. simultaneously moved to dismiss Apple's counterclaims and strike certain affirmative defenses. *See* D.E. 38. 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.

[2] Apple complains that B.E. filed its motion to dismiss "without any attempt to confer with Apple's counsel." D.E. 49-1 at 1. Civil Local Rule 7.2(a)(1)(B) does not require prior consultation of counsel for motions made pursuant to Fed. R. Civ. P. 12, 56, 59, and 60. Since B.E.'s motions were made pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), B.E. was not required "to confer with Apple's counsel."

Apple wrongly argues that its counterclaims are adequate because they meet the requirements of Official Forms 18 and 30 of the Federal Rules of Civil Procedure. D.E. 49-1 at 2. 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 Enters., 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*.").

Apple cites no authority establishing that Official Form 18 governs the pleading of declaratory judgment claims. Apple also repeatedly acknowledges that the form governs the pleading of a claim of direct patent infringement. D.E.49-1 at 2 ("Form 18 sets forth an example of a sufficient complaint for patent infringement . . . ."); *id.* at 3 ("[T]he Federal Circuit has held that the forms remain the standard against which ***claims for direct infringement*** are to be measured."); *id.* at 4 ("Since *In re Bill of Lading*, district courts have followed the Federal Circuit and held that ***claims related to direct infringement*** are sufficient if they reflect the degree of particularity in Form 18.") (emphasis added). 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.").

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

Apple argues that the existence of different pleading standards for plaintiffs and counterclaimants[3] results in an incongruity. D.E. 49-1 at 2 ("B.E. argues incongruously that defendants in patent infringement suits should be held to a higher pleading standard than plaintiffs, ..."). If there is an incongruity, 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 the true "incongruity" would result if the Court were to recognize an exception, benefiting patent infringement defendants, but not other defendants, to the *Twombly/Iqbal* standard governing "all civil actions."

Apple 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. 49-1 at 6 ("Apple's counterclaims meet . . . the spirit of the overall set of rules governing this case, which includes the District's Local Patent Rules requiring early and detailed disclosures."); *id*. at 7 ("Apple's Counterclaims One and Three, for declaration of non-infringement, . . . should be read in the context of the Local Patent Rules' requirement for early detailed disclosure of the defendants' non-infringement theories."). 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

[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.

assertion of 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 Apple has done here. *See 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)); *Duramed Pharms, Inc. v. Watson Labs, Inc.*, 2008 WL 5232908, at *4 (D. Nev. Dec. 12, 2008) (granting motion to dismiss counterclaims); *Sprint Commc'ns. Co. v. Theglobe.com, Inc.*, 233 F.R.D. 615, 619 (D. Kansas 2006) (striking counterclaim); *PB Farradyne, Inc. v. Peterson*, 2006 WL 132182, at *3 (N.D. Cal. Jan 17, 2006) (dismissing counterclaim).

Finally, Apple argues that its allegations are at least as detailed as the allegations in B.E.'s complaint. D.E. 49-1 at 8 ("Apple's counterclaims are supported by at least the same level of detail as B.E.'s allegations."). Regardless of whether that is true, B.E.'s complaint is

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