

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

**B.E. TECHNOLOGY, L.L.C.,** )  
 )  
 **Plaintiff/Counter-Defendant,** )  
 )  
 v. )  
 )  
 **PEOPLE MEDIA, INC.,** )  
 )  
 **Defendant/Counterclaimant.** )  
 )  
 \_\_\_\_\_ )

**Case No. 2:12-CV-02833 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: August 12, 2013

Richard M. Carter (TN B.P.R. #7285)  
Adam C. Simpson (TN B.P.R. #24705)  
MARTIN, TATE, MORROW & MARSTON, P.C.  
6410 Poplar Avenue, Suite 1000  
Memphis, TN 38119-4839  
Telephone: (901) 522-9000

Robert E. Freitas (CA Bar No. 80948)  
Craig R. Kaufman (CA Bar No. 159458)  
Daniel J. Weinberg (CA Bar No. 227159)  
Qudus B. Olaniran (CA Bar No. 267838)  
FREITAS TSENG & KAUFMAN LLP  
100 Marine Parkway, Suite 200  
Redwood Shores, CA 94065  
Telephone: (650) 593-6300

Attorneys for Plaintiff  
B.E. Technology, L.L.C.

Defendant People Media, Inc. (“People Media”) 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 People Media’s counterclaims.<sup>1</sup> The sufficiency of People Media’s pleading is not measured against Official Form 18 of the Appendix to the Federal Rules of Civil Procedure. The standard against which People Media’s counterclaims must be measured is the Supreme Court’s *Twombly* and *Iqbal* standard and People Media’s declaratory judgment counterclaims do not measure up. For that reason, the Court should grant B.E.’s motion to dismiss.

**I. PEOPLE MEDIA’S CLAIMS FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT, INVALIDITY, AND UNENFORCEABILITY SHOULD BE DISMISSED.**

**A. The *Twombly/Iqbal* Standard Governs People Media’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). People Media 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, invalid or unenforceable. Compare D.E. 21 at 8-10 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”).

People Media 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. 50 at 5

---

<sup>1</sup> B.E. simultaneously moved to dismiss People Media’s counterclaims and strike certain affirmative defenses. See D.E. 33. 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.

(“People Media’s counterclaims for declaratory judgment are consistent with Forms 18 and 30 of the Federal Rules of Civil Procedure.”). 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 the Supreme Court announced in *Twombly* and *Iqbal*.”).

People Media cites no authority establishing that Official Form 18 governs the pleading of declaratory judgment claims. Instead, People Media acknowledges that the form governs the pleading of a claim of direct patent infringement. D.E. 50 at 5 (“Form 18 states that a complaint for patent infringement should include. . .”). 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, People Media’s Burden to Allege Non-Infringement and Invalidity Is Different from B.E.’s Burden to Allege Direct Infringement.**

People Media argues there is no basis for different pleading standards for plaintiffs and counterclaimants<sup>2</sup> and such differences would be “nonsensical.” D.E. 50 at 3 (“[I]t would be

---

<sup>2</sup> 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

nonsensical to suggest that Plaintiff's Complaint, which contains fewer allegations than Defendant's non-infringement counterclaim, is somehow satisfactory while a mirror allegation of non-infringement is not."). If it is nonsensical, 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 equally, if not more, nonsensical, for the Court to recognize an exception, benefiting patent infringement defendants, but not other defendants, to the *Twombly/Iqbal* standard governing "all civil actions."

People Media 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. 50 at 4 ("[D]ismissal of People Media's counterclaims would undermine the Local Patent Rules, which require more detailed disclosures at a later stage."); *id.* ("Under the Local Patent Rules these filings will contain any additional basis for People Media's counterclaims."). 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 a claim on the promise that discovery will unveil the claim's factual basis."). Moreover, under Federal Rule 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, . . .").

---

asserting a declaratory judgment claim must satisfy the *Twombly/Iqbal* standard because there is no official form for declaratory judgment claims and counterclaims.

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 People Media has done here.

People Media contends its counterclaims are supported by sufficient factual allegations, but its claims are not plausible, merely possible. For example, People Media contends that it "points to specific prior art as a basis for invalidity," but it makes no allegations supporting how or why "[t]he '418 Patent anticipates and/or renders obvious at least claim 11 of the '314 Patent," or how or why "[t]he '392 Patent (in view of the '061 Patent) renders obvious at least claim 11 of the '314 Patent." D.E. 50 at 3; *see also* D.E. 21 at 9. Moreover, People Media's citation to "Title 35, United States Code, including §§ 101, 102, 103 and/or 112, and the rules, regulations, and laws pertaining thereto," offers no additional support. *Id.* *But 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)). *See also 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).

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.