UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

B.E. TECHNOLOGY, L.L.C., **Plaintiff/Counter-Defendant,** **v.** **MATCH.COM L.L.C.,** **Defendant/Counterclaimant.**	**Case No. 2:12-CV-02834 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 15, 2013

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

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

A. The *Twombly/Iqbal* Standard Governs Match'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). Match 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. 19 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").

Match 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. 47 at 5

[1] B.E. simultaneously moved to dismiss Match's counterclaims and strike certain affirmative defenses. *See* D.E. 30. 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.

("Match'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*.").

Match cites no authority establishing that Official Form 18 governs the pleading of declaratory judgment claims. Instead, Match acknowledges that the form governs the pleading of a claim of direct patent infringement. D.E. 47 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, Match's Burden to Allege Non-Infringement and Invalidity Is Different from B.E.'s Burden to Allege Direct Infringement.

Match argues there is no basis for different pleading standards for plaintiffs and counterclaimants[2] and such differences would be "nonsensical." D.E. 47 at 3 ("[I]t would be

[2] 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."

Match 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. 47 at 4 ("[D]ismissal of Match'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 Match'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, ...").

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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 Match has done here.

Match contends its counterclaims are supported by sufficient factual allegations. But Microsoft's so-called factual allegations merely render its claims possible, not plausible. For example, Match 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. 47 at 3; *see also* D.E. 19 at 9. These are legal conclusions couched as factual allegations. *See Iqbal*, 556 U.S. at 678 ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegations.") (internal quotation marks omitted).

Match'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. D.E. 19 at 9. "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.'" *PPS Data, LLC v. Allscripts Healthcare Solutions, Inc.*, 2012 WL 243346, at *4 (M.D. Fla. Jan. 25, 2012) (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);

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