

IQBAL-ING SEAGATE: PLAUSIBILITY PLEADING OF WILLFUL PATENT INFRINGEMENT

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I. INTRODUCTION

“Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”¹ Practically speaking, pleadings are the necessary gateway to any civil action and unlock the doors to discovery.² In general, a complaint should set forth the basic facts known to the plaintiff and serves to put defendants on notice of the allegations and resulting harm that the plaintiff seeks to remedy.³ However, ascertaining the depth of the harm and defendants’ specific injurious conduct frequently requires extensive discovery procedures.⁴ In the interest of serving judicial economy and avoiding frivolous litigation,⁵ these

1. Phillips v. Cnty. of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008).

2. See, e.g., Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (“Pleading is the gateway to the federal courts.”); Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1232 (2008) (considering the possible influences for “more rigorous judicial gatekeeping at the pleading stage”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1099 (2009) (discussing “the importance of the Rule 8(a) pleading standard as the gateway to further proceedings under the generous discovery provisions of the Federal Rules”).

3. See Michael Moffit, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 729–33 (2005) (“[M]odern pleadings provide most defendants, in most circumstances, with all of the information they genuinely need to understand the legal and factual scope of the litigation at hand.”).

4. See Rivera v. NIBCO, Inc., 384 F.3d 822, 824 (9th Cir. 2004) (“[P]re-trial discovery has been recognized as an essential means for evaluation of damages . . . ”).

5. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) (noting the “widespread belief that frivolous litigation is out of control”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the ‘Litigation Explosion,’ ‘Liability Crisis,’ and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. REV. 982, 984 (2003) (“[E]xcessive and frivolous litigation overwhelms the judicial system’s capacity to administer speedy and efficient justice, leads to higher costs for litigants and society at large, and even hinders America’s competitive position in the global economy.”).

discovery procedures are generally only available once a complainant has sufficiently pled facts upon which he has shown that he is entitled to relief.⁶

In 2009, the Supreme Court in *Ashcroft v. Iqbal*⁷ raised the bar for what must be pled to survive defendants' motions to dismiss and to begin the discovery process. The Court abandoned the "no set of facts" language that prevailed as the judicial interpretation of Federal Rule of Civil Procedure 8(a)(2)⁸ for half a century, and elevated the standard to one where the pleadings must "state a claim to relief that is plausible on its face."⁹ Just two years earlier, in *In re Seagate Technology, LLC*,¹⁰ the Court of Appeals for the Federal Circuit similarly abandoned its own well-established negligence standard for proving willful patent infringement. Relying on the Supreme Court's latest interpretation of "willful,"¹¹ the Federal Circuit elevated the threshold of willfulness to a level of "objective recklessness."¹²

This Note argues that when taken together, *Iqbal* and *Seagate* will raise the bar for sufficiently pleading willful patent infringement beyond any attainable level. Part II describes the Supreme Court's recent decisions that heighten the standard for Rule 8(a)(2) pleadings and the Federal Circuit's shift from a negligence standard to a recklessness standard for proving willful patent infringement. Part III provides a review of the plausibility-standard language and suggests three mechanisms rooted in the Federal Rules of Civil Procedure that patentee-plaintiffs can employ to circumvent the stringent threshold to survive defendants' motions to dismiss. Part IV evaluates the new standard for willful patent infringement by comparing it to standards for bad-faith infractions in other areas of intellectual property law. Finally, Part IV also contemplates whether the courts should desert willfulness as the hallmark indicium for increased damages in favor of other bad-faith characteristics of the defendant or conduct surrounding the infringement.

6. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1925 (1998) (stating that pleadings "establish[] narrow gateways through which plaintiffs must pass before they can obtain any discovery").

7. 129 S. Ct. 1937 (2009).

8. "A pleading that states a claim for relief must contain . . . a short and plain statement showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

9. *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

10. *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc), cert. denied sub nom. *Convolve, Inc. v. Seagate Tech., LLC*, 552 U.S. 1230 (2008).

11. See *infra* notes 76–80 and accompanying text (discussing two Supreme Court cases that elaborated on the meaning of "willful").

12. *Seagate*, 497 F.3d at 1371.

II. BACKGROUND: PLEADING STANDARDS AND WILLFUL INFRINGEMENT

The Supreme Court's decision in *Conley v. Gibson*¹³ governed the standard of notice pleadings in civil cases for half a century. In an opinion by Justice Black, the Court announced that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."¹⁴ However, in 2007, the Court fractured the "no set of facts" bedrock with its decision in *Bell Atlantic Corp. v. Twombly*,¹⁵ raising the bar for complaints—at least in antitrust cases—to survive Rule 12(b)(6) motions.¹⁶ For nearly two years to the day,¹⁷ the legal community debated the extent of the rift between the *Twombly* and *Conley* interpretations of the Rule 8(a)(2) foundation.¹⁸ Finally, in May 2009, that crack, since widened to a crevice,¹⁹ became a canyon when the Court announced its decision in *Ashcroft v. Iqbal*,²⁰ leaving no doubt that the *Twombly* standard applied to all civil actions.²¹

While the Supreme Court was reviewing *Twombly* on certiorari,²² the Court of Appeals for the Federal Circuit was occupied with its own standard-setting opinion, *In re Seagate Technology, LLC*.²³ In *Seagate*, the Federal Circuit established a new benchmark for proving that defendants willfully infringed a plaintiff's patent: objective recklessness.²⁴ In doing so, the court expressly

13. 355 U.S. 41 (1957).

14. *Id.* at 45–46.

15. 550 U.S. 544 (2007).

16. FED. R. CIV. P. 12(b)(6) (permitting dismissal of a complaint when a plaintiff "fail[s] to state a claim upon which relief can be granted").

17. *Twombly*, 550 U.S. 544, was decided on May 21, 2007, and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, was decided on May 18, 2009.

18. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 458 (2008) ("[I]t is hard to understand how the *Twombly* approach would not apply in other types of cases."); Amy J. Wildermuth, *What Twombly and Mead Have In Common*, 102 NW. U. L. REV. 276, 277 (2008) (discussing ways in which the Supreme Court can "end the speculation regarding what *Twombly* means"); *The Supreme Court, 2006 Term Leading Cases—Pleading Standards*, 121 HARV. L. REV. 305, 310 (2007) (expressing uncertainty over "how big of an effect *Twombly* will ultimately have on pleading practice").

19. Even before the Supreme Court announced its *Iqbal* decision, other courts across the country were already applying the *Twombly* plausibility standard to non-antitrust cases. See sources cited *infra* note 40.

20. 129 S. Ct. 1937 (2009).

21. *Id.* at 1953 (stating that the *Twombly* Court's interpretation of Rule 8 "expounded the pleading standard for 'all civil actions'" (quoting *Twombly*, 550 U.S. at 554)).

22. Bell Atl. Corp. v. Twombly, 548 U.S. 903 (2006) (granting certiorari).

23. 497 F.3d 1360 (Fed. Cir. 2007) (en banc).

24. *Id.* at 1371.

overruled its own twenty-four-year-old negligence standard established in *Underwater Devices, Inc. v. Morrison-Knudsen Co.*²⁵

It is now only a matter of time until the *Twombly–Iqbal* pleading standard collides with the *Seagate* willfulness standard.²⁶ In considering how to resolve this possible conflict, it is necessary to understand the backdrop upon which these decisions were founded. While most legal scholarship offers an extensive review of Rule 8(a)(2) in the years following *Conley* and focuses on the groundbreaking implications of *Twombly*, this Note employs *Twombly* as its departure point. As professors Kevin Clermont and Stephen Yeazell hypothesize, just as “*Twombly* generated a mountain of commentary from academics . . . a new round of tumult over the combined cases [of *Twombly* and *Iqbal*] surely lies ahead.”²⁷ This Note adds to that tumult in an effort to analyze the effects of *Iqbal* on an important and growing area of the law.

A. TWOMBLY: GETTING THE BALL ROLLING

In *Bell Atlantic Corp. v. Twombly*, two members of a class of local telephone and Internet subscribers alleged that the defendant service providers violated section 1 of the Sherman Act.²⁸ The Southern District of New York dismissed the plaintiffs’ complaint pursuant to Rule 12(b)(6).²⁹ On appeal, the Second Circuit reversed, citing *Conley*, and held that a plaintiff need not plead specific facts in addition to parallel conduct to survive a motion to dismiss.³⁰

25. 717 F.2d 1380 (Fed. Cir. 1983).

26. *Ashcroft v. Iqbal* has been cited a combined 20,081 times by federal circuit courts since its adoption in May 2009. However, only five of those citations belong to the Court of Appeals for the Federal Circuit, none of which relate to willful patent infringement. Focused Shepard’s Search Results for “129 S. Ct. 1937,” LEXISNEXIS.COM, <http://www.lexisnexis.com> (last visited Mar. 5, 2011).

27. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 n.4 (2010).

28. 15 U.S.C. § 1 (2006); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007).

29. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003) (dismissing the complaint for failure to set forth a “reason to believe that defendants’ parallel conduct was reflective of any agreement”), vacated, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007).

30. *Twombly*, 425 F.3d at 114 (stating that “plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal”); *see also* 15 U.S.C. § 1 (2006) (requiring a “contract, combination . . . or conspiracy, in restraint of trade or commerce” to violate section 1 of the Sherman Act). For a discussion and explanation of parallel conduct, see 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1425a, at 181–82 (3d ed. 2010) (“‘Unnatural’ parallelism refers to parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.”).

The Supreme Court granted certiorari “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”³¹

In a highly criticized opinion,³² the Court reversed the Second Circuit.³³ Writing for the Court, Justice Souter abandoned the “no set of facts” standard set forth in *Conley* and condemned the phrase as an “incomplete, negative gloss on an accepted pleading standard.”³⁴ The Court reasoned that the language of *Conley*, when read literally and in isolation, would allow any theory of a claim to survive a motion to dismiss so long as the pleadings were not factually impossible.³⁵ While noting that a well-pleaded complaint may still proceed even if it appears that recovery is “very remote and unlikely,”³⁶ the Court nevertheless required the plaintiffs to plead specific facts that would “nudge[] their claims across the line from conceivable to plausible.”³⁷

In his dissent, Justice Stevens anticipated the uncertainty that would occupy scholars’ and judges’ minds alike in the wake of *Twombly*: “Whether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”³⁸ From the language of the opinion, it appeared that the standard applied only

31. *Twombly*, 550 U.S. at 553.

32. See, e.g., Stephen B. Burbank, *Pleading and the Dilemma of “General Rules”*, 2009 WIS. L. REV. 535, 560 (noting the “enormous confusion and transaction costs as a result of [the] uncertainty” imposed by *Twombly*); Lee Goldman, *Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 BYU L. REV. 1057, 1058 (2008) (“*Twombly* is a confusing opinion replete with inconsistent statements [I]t is impossible to discuss the [*Twombly*] opinion without being critical of its lack of clarity.”); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6, 9 (2009) (criticizing the Court’s opinion for “inconsistent rhetoric” and a “lack of precision”). But see, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 890 (2009) (“[I]t is wrong to condemn *Twombly*’s plausibility standard for being inconsistent with the language of Rule 8(a)(2) or the intent of the 1938 Advisory Committee.”); Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 605 (2006) (“Assertions that [Rule 8(a)(2)] does not require the pleading of facts . . . [are] demonstrably false.”); Smith, *supra* note 2, at 1097 (“The Court’s decision [in *Twombly*] is fully consistent with the text of the rules as well as their underlying rationale. As such, it articulates a standard that is neither ‘vague’ nor ‘confusing,’ nor a ‘startling’ deviation from existing precedent.”).

33. *Twombly*, 550 U.S. at 570.

34. *Id.* at 563 (concluding that the criticism and questioning by courts of the *Conley* “no set of facts” language earned the phrase its retirement).

35. *Id.* at 561.

36. *Id.* at 556 (citing *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974)).

37. *Id.* at 570.

38. *Id.* at 596 (Stevens, J., dissenting).

to antitrust cases.³⁹ Courts across the country, however, opined (correctly, as the Supreme Court later determined in *Iqbal*) that the *Twombly* plausibility standard reached beyond the scope of antitrust complaints.⁴⁰ The question Justice Stevens posed would be answered when the Court granted certiorari to determine the sufficiency of a Pakistani prisoner's allegations that he was deprived of constitutional protections while in federal custody.⁴¹

B. *IQBAL-ING TWOMBLY: PLAUSIBILITY FOR ALL*

In the aftermath of September 11, 2001, the FBI launched an investigation to seek out and identify the individuals involved in the terrorist attacks.⁴² The Bureau detained a target of the investigation, petitioner and Pakistani-Muslim Javaid Iqbal, and held him in the Administrative Maximum Special Housing Unit of the Metropolitan Detention Center in Brooklyn, New York.⁴³ In his *Bivens*⁴⁴ complaint, Iqbal alleged that he was deprived of various constitutional protections during his confinement, including being subjected to harsh conditions on account of his race, religion, or national

39. *Id.* at 554–55 (majority opinion) (“This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.”); *id.* at 556 (“In applying these general standards to [a 15 U.S.C.] § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.”).

40. See, e.g., *Robinson v. Am. Honda Motor Corp.*, 551 F.3d 218, 222 (4th Cir. 2009) (applying *Twombly* to a breach-of-warranty claim); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (“[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.”); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1362 (Fed. Cir. 2007) (Dyk, J., concurring in part and dissenting in part) (“Plainly, *Bell Atlantic* applies outside the antitrust context.”); *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007) (“We are reluctant to assume that all of the language of *Bell Atlantic* applies only to [15 U.S.C.] section 1 allegations based on competitors’ parallel conduct or, slightly more broadly, only to antitrust cases.”), *rev’d on other grounds sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

41. *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (granting certiorari).

42. *Iqbal*, 129 S. Ct. at 1943.

43. *Id.* According to Iqbal’s complaint, he was arrested in November 2001 on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal*, 490 F.3d at 147–48.

44. Iqbal’s complaint included a *Bivens* claim and allegations that federal officials violated his First and Fifth Amendment rights through targeting him by using constitutionally prohibited factors. *Iqbal*, 129 S. Ct. at 1943–44. For a brief explanation of the facts of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the related cause of action, see Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability under Bivens*, 88 GEO. L.J. 65, 68–72 (1999).

origin.⁴⁵ The complaint named John Ashcroft, former U.S. Attorney General, as the “principal architect” of the policy that resulted in Iqbal’s treatment, and Robert Mueller, Director of the FBI, as being “instrumental” in its adoption and execution.⁴⁶

In its decision to grant the defendants’ motion to dismiss, the Supreme Court relied heavily on the language of *Twombly* and scarcely, if at all, on the “no set of facts” language of *Conley*.⁴⁷ The Court shed light on the outcome of *Twombly* by illuminating a fundamental principle underlying the decision: “Only a complaint that states a plausible claim for relief survives a motion to dismiss.”⁴⁸ In fleshing out the plausibility requirement, the Court placed “plausible” along the likelihood spectrum between “possible” and “probable.”⁴⁹

The thunder of the Court’s *Iqbal* decision, however, came not from its in-depth explanation of plausibility under *Twombly*, but rather from its announcement of *Twombly*’s far-reaching application beyond section 1 of the Sherman Act. Specifically, the Court rejected Iqbal’s contention that the *Twombly* standard was limited to antitrust cases and held that the decision in *Twombly* “expounded the pleading standard for *all* civil actions.”⁵⁰ The Court reasoned that pursuant to Federal Rule of Civil Procedure 1,⁵¹ the *Twombly* interpretation of the pleading standard governing Rule 8 applies to all civil cases.⁵²

45. *Iqbal*, 129 S. Ct. at 1942. In particular, Iqbal claimed he was abused, denied food and medical treatment, unnecessarily stripped and body-cavity searched, and verbally accosted as a “terrorist” and “Muslim killer.” *Id.* at 1955.

46. *Id.* at 1944.

47. In fact, the Court mentioned *Conley v. Gibson* a total of only two times in its *Iqbal* opinion—once in reference to the petitioners’ argument, and once in reference to the circuit court’s evaluation of the district court’s test for a motion to dismiss. *Id.* at 1944, 1961. Whatever doubt *Twombly* left as to the retirement of *Conley*, *Iqbal* made it clear that the “no set of facts” regime was gone for good.

48. *Id.* at 1950.

49. *Id.* at 1949 (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”).

50. *Id.* at 1953 (emphasis added) (internal quotation marks omitted).

51. In relevant part, Rule 1 states that “[the Federal Rules of Civil Procedure] govern the procedure in all civil actions and proceedings in the United States district courts.” FED. R. CIV. P. 1.

52. See *Iqbal*, 129 S. Ct. at 1953 (stating that the standard announced in *Twombly* applies to “antitrust and discrimination suits alike”). While applying the plausibility standard in *Iqbal* as mandated by Rule 1 may seem to be the obvious reason for the Court’s holding, there may have been a subsurface motivation for dismissing the petitioners’ complaint. The Court addressed the issue of costs pertaining to government officials involved in costly litigation.

The Court's *Iqbal* analysis sets the stage for a heightened pleading standard in all civil actions, including patent infringement cases.⁵³ The following Section details the long history of pleading bad-faith infringement in patent actions to recover treble damages and discusses how the *Iqbal* standard will affect such bad-faith claims.⁵⁴

C. THE NATURE OF PATENT INFRINGEMENT AND THE HISTORY OF INCREASED DAMAGES

The United States Constitution sets forth the framework for a legal monopoly providing inventors the exclusive right to their discoveries for a limited period of time.⁵⁵ Consequently, any person who, "without authority, makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."⁵⁶ Upon such infringement, the patentee is entitled to a civil remedy.⁵⁷ If defendants are found liable, relief may be granted in the form of an injunction⁵⁸ or damages.⁵⁹ As discussed below, damages may be increased based on the defendants' conduct surrounding the infringement.

1. Patent Infringement as a Strict-Liability Offense

Patent infringement is a strict-liability tort.⁶⁰ To determine liability, courts need only construe the language of a patent's claims and then compare it to

Id. Like *Twombly*, the Court noted that litigation can yield heavy financial burdens and can take away from government officials' proper execution of their duties. *Id.*

53. 35 U.S.C. § 281 (2006) ("A patentee shall have remedy by civil action for infringement of his patent."). Professors Clermont and Yeazell predict that under the Court's new plausibility pleading standard, "patent cases . . . [will] cause experienced judges to shudder." Clermont & Yeazell, *supra* note 27, at 836.

54. See *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996) ("Increased damages also may be awarded to a party because of the bad faith of the other side.").

55. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

56. 35 U.S.C. § 271(a) (2006).

57. *Id.* § 281.

58. *Id.* § 283.

59. *Id.* § 284.

60. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (en banc) ("[P]atent infringement is a strict liability offense."); *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1519, 1527 (Fed. Cir. 1995) (en banc) ("Intent is not an element of infringement . . . Infringement is, and should remain, a strict liability offense."), *rev'd on other grounds*, 520 U.S. 17 (1997); see *Blair v. Westinghouse Elec. Corp.*, 291 F. Supp. 664, 670

the allegedly infringing device.⁶¹ If, after comparison, the fact-finder determines that the defendant's device does not meet each and every claim limitation, there is no infringement.⁶² Thus, because the strict-liability nature of direct patent infringement requires no inquiry into the alleged infringer's intent,⁶³ and because claim construction is a matter of law,⁶⁴ the scope of discovery sought by patentee–plaintiffs largely relates to the nature of the infringement rather than to the simple finding of liability.⁶⁵

2. *The History of Increased Damages*

Congress has expressly authorized courts to increase damages for patent infringement. Such a provision first appeared in the Act of February 21, 1793.⁶⁶ Similarly, the Act of April 17, 1800, permitted a patentee to recover in an action at law "a sum equal to three times the actual damage sustained."⁶⁷ Not until the Act of July 4, 1836, however, were courts given the discretion to determine *when* increased damages should be awarded.⁶⁸ Under this legislation, courts could render judgments of increased damages "according to the circumstances of the case."⁶⁹

(D.D.C. 1968) ("[A]n infringement may be entirely inadvertent and unintentional and without knowledge of the patent.").

61. *See* Tate Access Floors, Inc. v. Interface Architectural Res., Inc., 279 F.3d 1357, 1365 (Fed. Cir. 2002) ("Infringement analysis involves two steps: the court first construes the scope of the asserted claims and then compares the accused device to the properly construed claims to determine whether each and every limitation of a claim is present, either literally or equivalently, in the accused device.").

62. Dynacore Holdings Corp. v. U.S. Phillips Corp., 363 F.3d 1263, 1273 (Fed. Cir. 2004) ("To prove infringement, the patentee must show that the accused device meets each claim limitation, either literally or under the doctrine of equivalents.").

63. This Note is concerned only with direct patent infringement under 35 U.S.C. § 271(a). *See* Intel Corp. v. U.S. Int'l Trade Comm'n, 946 F.2d 821, 832 (Fed. Cir. 1991) ("[T]here is no intent element to *direct* infringement."). *Compare* 35 U.S.C. § 271(a) (2006) (lacking a mens rea for direct infringement), *with* § 271(c) (requiring a contributory infringer to aid the direct infringement knowingly).

64. *Markman* v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996) ("[T]he court has the power and obligation to construe as a matter of law the meaning of language used in the patent claim.").

65. *Seagate*, 497 F.3d at 1371–72 ("[I]t is indisputable that the proper legal standard for willful infringement informs the relevance of evidence relating to that issue and, more importantly here, the proper scope of discovery.").

66. Act of Feb. 21, 1793, ch. 11, sec. 5, 1 Stat. 318, 322 (allowing a patentee to recover "a sum, that shall be at least equal to three times the price, for which the patentee has usually sold or licensed to other persons, the use of [the invention]").

67. Act of Apr. 17, 1800, ch. 25, sec. 3, 2 Stat. 37, 38.

68. Act of July 4, 1836, ch. 357, sec. 14, 5 Stat. 117, 123.

69. *Id.*

Currently, 35 U.S.C. § 284 allows courts to “increase the damages up to three times the amount found or assessed.”⁷⁰ Despite the longstanding power to award increased damages, no statute has ever provided courts with any standard or guidelines for determining when to do so.⁷¹ Rather, these criteria have been left largely for courts to decide on a case-by-case basis.⁷²

D. OBJECTIVELY HIGHER: THE FEDERAL CIRCUIT’S NEW STANDARD OF WILLFULNESS

The Federal Circuit first crafted a standard for evaluating willfulness in *Underwater Devices Inc. v. Morrison-Knudsen Co.*⁷³ The court set forth the following criteria for evaluating willful infringement: “Where . . . a potential infringer has actual notice of another’s patent rights, he has an affirmative duty to exercise due care to determine whether or not he is infringing.”⁷⁴ Expounding upon this affirmative duty, the Federal Circuit indicated that an alleged infringer is considered “willful” if he is merely negligent.⁷⁵

The Supreme Court considered the meaning of “willfulness” in its 2007 decision *Safeco Insurance Co. of America v. Burr*,⁷⁶ a case governed by the Fair Credit Reporting Act.⁷⁷ The Court concluded that “reckless disregard” qualifies as a “willful violation.”⁷⁸ This finding was not surprising in light of the Court’s decision nearly two decades earlier in *McLaughlin v. Richmond Shoe Co.*⁷⁹ In *McLaughlin*, the Court held that “[t]he word ‘willful’ . . . is generally

70. 35 U.S.C. § 284 (2006).

71. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (en banc) (noting that treble damages are awarded “[a]bsent a statutory guide” and stating that § 284 is “devoid of any standard for awarding [enhanced damages]”). This judicial discretion for determining when to award enhanced damages will prove to be the saving grace of treble damages after the *Iqbal* and *Seagate* decisions. See *infra* Section IV.C (recommending alternative criteria that courts can adopt for awarding increased damages).

72. See *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996) (“[T]he court . . . exercising its sound discretion, [determines] whether, and to what extent, to increase the damages award given the totality of the circumstances.”).

73. 717 F.2d 1380, 1389–90 (Fed. Cir. 1983).

74. *Id.* at 1389.

75. *Seagate*, 497 F.3d at 1371 (noting that the standard of willfulness pursuant to *Underwater Devices* was “more akin to negligence”); see also Stephanie Pall, Note, *Willful Patent Infringement: Theoretically Sound? A Proposal to Restore Willful Infringement to Its Proper Place Within Patent Law*, 2006 U. ILL. L. REV. 659, 659 (stating that the Federal Circuit’s previous duty-of-care standard in *Underwater Devices* was a “concept[] mainly associated with negligence law”).

76. 551 U.S. 47 (2007).

77. 15 U.S.C. § 1681 (2006).

78. *Safeco*, 551 U.S. at 71.

79. 486 U.S. 128 (1988).

understood to refer to conduct that is not merely negligent.”⁸⁰ Thus, the negligence standard in *Underwater Devices* set the threshold for proving willful infringement too low.⁸¹ Following the language of the Supreme Court, the Federal Circuit expressly overruled *Underwater Devices* in *Seagate*: “Accordingly, we overrule the standard set out in *Underwater Devices* and hold that proof of willful infringement permitting enhanced damages requires at least a showing of objective recklessness.”⁸² Despite articulating the new standard, the Federal Circuit did nothing to elaborate on what conduct constitutes “objective recklessness” in the context of patent infringement.⁸³

After *Seagate*, to succeed on a claim of willful infringement, patentee–plaintiffs must demonstrate that the objectively defined risk of infringement, “determined by the record developed in the infringement proceeding,” was “either known or so obvious that it should have been known to the accused infringer.”⁸⁴ Therefore, the Federal Circuit set forth a framework in which, absent substantial knowledge about the actions of the alleged infringer prior to filing suit, the plaintiff must rely exclusively on discovery procedures to produce a record that demonstrates the defendant’s recklessness.⁸⁵ Thus, the new framework for proving willful conduct places a high premium on a plaintiff’s complaint getting to the discovery phase.⁸⁶

Herein lies the paradox presented by the combination of *Iqbal* and *Seagate*: patentee–plaintiffs must plead sufficient factual allegations to warrant discovery related to defendants’ willful conduct in accordance with *Iqbal*; however, as the Federal Circuit stated in *Seagate*, the factual foundation for

80. *Id.* at 133.

81. See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) (“[The negligence] standard fails to comport with the general understanding of willfulness in the civil context.”).

82. *Id.* The court further delineated the standard by stating that an accused infringer acts with objective recklessness by proceeding “despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *Id.*

83. *Id.* (“We leave it to future cases to further develop the application of this standard.”).

84. *Id.*

85. See Justin P. Huddleson, Note, *Objectively Reckless: A Semi-Empirical Evaluation of In re Seagate*, 15 B.U. J. SCI. & TECH. L. 102, 117–18 (2009) (“*Seagate* clearly raises the bar for proving willfulness . . . [and] limits a patentee’s ability to prove willful infringement through discovery.”).

86. See James E. Hopenfeld, *A Proposal for a “Good-Faith Offer” Standard for Evaluating Allegations of Willful Infringement—With Thanks to Major League Baseball*, 20 FED. CIR. B.J. 5, 22 (2010) (discussing how the current version of the Patent Reform Act incorporates the *Seagate* standard of willfulness, and stating that under the current version of the Act, one of the most important limitations is that patentees “must plead willful infringement with particularity”).

demonstrating recklessness will often be established by the discovery proceedings themselves.⁸⁷ In other words, plaintiffs are expected to sufficiently plead allegations of willfulness to warrant discovery related to defendants' conduct while they are simultaneously allowed—and indeed, *expected*—to rely on the discovery proceedings themselves to expose the alleged willful conduct.

III. GETTING COMPLAINTS THROUGH THE (SEA)GATE: APPLYING *IQBAL* TO WILLFUL INFRINGEMENT

The language of the Supreme Court's decision in *Iqbal*—much of which is taken from *Twombly*—lays the groundwork for a new plausibility regime in civil pleadings under Federal Rule of Civil Procedure 8. The Court's standard will serve as the gatekeeper for all claims to pass through on their way to discovery, dispositive motions, and ultimately, trial. Since *Iqbal* adopts the *Twombly* standard, it is important to understand the exact criteria that Justice Souter established in *Twombly*. Section III.A will revisit the language of the *Twombly* opinion (and consequently, the *Iqbal* standard), and attempt to reconcile the Court's inconsistent language, which seems hesitant about retiring *Conley*.⁸⁸ Section III.B will then consider three ways in which patentee–plaintiffs can use the Federal Rules of Civil Procedure to overcome the high *Iqbal* pleading standard and satisfy the Court's plausibility threshold.

A. POSSIBILITY, PLAUSIBILITY, PROBABILITY: WHAT IS THE ACTUAL STANDARD?

The wave of confusion and uncertainty that resulted from the *Twombly* decision was not entirely unexpected in light of Justice Souter's inconsistent

87. The Federal Circuit indicated in *Seagate* that it could proceed on the issue of infringement alone without the same scope of discovery that willfulness allegations required:

The ultimate dispute in this case is the proper scope of discovery. While it is true that the issue of willful infringement, or even infringement for that matter, has not been decided by the trial court, it is indisputable that the proper legal standard for willful infringement informs the relevance of evidence relating to that issue and, more importantly here, the proper scope of discovery.

Seagate, 497 F.3d at 1371–72.

88. In his *Twombly* dissent, Justice Stevens appears to accuse the majority of putting the *Conley* “no set of facts” language to rest with a sense of melancholy and admiration. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting) (“If *Conley*'s ‘no set of facts’ language is to be interred, let it not be without a eulogy.”).

opinion.⁸⁹ Moreover, while *Iqbal* stated that the *Twombly* standard applies to all civil actions, it did very little to explain “plausibility” in a way that could be understood without relying—almost entirely—on the language of *Twombly* itself.⁹⁰ Thus, absent a clarification of the Court’s intent, plaintiffs and judges are left without any explanation regarding an apparently complete overhaul⁹¹ to one of the cornerstones of the civil justice system.⁹²

As a point of departure for analyzing the language of *Iqbal*, it is significant to note that the floor for pleading requirements under the *Conley* standard is drastically—and objectively—different from that set forth in *Twombly*. A literal reading of *Conley* establishes that a complaint should not be dismissed “whenever the pleadings [leave] open the *possibility* that a plaintiff might later establish some set of [undisclosed] facts to support recovery.”⁹³ In other words, claims should not be dismissed unless they are shown to be factually impossible.⁹⁴ In contrast, *Twombly* made it clear that pleadings must set forth more than just mere possibility of recovery: allegations that “stop[] short of the line between possibility and plausibility” should be dismissed.⁹⁵ While this language may suggest that the *Twombly*–*Iqbal* plausibility standard is significantly more stringent than the *Conley* threshold (as this Note contends), the Court’s explicit language calls that conclusion into question. For example, in dismissing the plaintiff’s complaint, the *Twombly* majority

89. See *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2008) (“[T]he [*Twombly*] Court’s explanation contains several, not entirely consistent, signals”), *rev’d sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); see also Benjamin W. Cheesbro, Note, *A Pirate’s Treasure?: Heightened Pleadings Standards for Copyright Infringement Complaints After Bell Atlantic Corp. v. Twombly*, 16 J. INTELL. PROP. L. 241, 248 (2009) (“Some language indicates that a new and ‘heightened’ pleading standard was intended, while other language explicitly or implicitly rejects that notion.”).

90. In his opinion in *Ashcroft v. Iqbal*, Justice Kennedy cited *Twombly* over two dozen times.

91. Arthur Miller, a civil procedure scholar and professor at New York University School of Law, stated the following: “I have spent my entire life with the Federal Rules of Civil Procedure, and I firmly believe that [*Twombly* and *Iqbal*] represent a philosophical sea of change in American civil litigation.” *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (testimony of Arthur R. Miller), available at http://judiciary.house.gov/hearings/printers/111th/111-36_53090.PDF.

92. See Spencer, *supra* note 18, at 447 (framing the *Conley* “no set of facts” standard as the “fifty-year-old statement providing the bedrock understanding of the general pleading standard in our system”).

93. *Twombly*, 550 U.S. at 561 (emphasis added) (internal quotation marks omitted).

94. See *id.* (“This ‘no set of facts’ language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings”).

95. *Id.* at 557.

averred that the Court was “not requir[ing] heightened fact pleading of specifics.”⁹⁶

Furthermore, while one can argue that what was really rejected in *Twombly* was the “no set of facts” language, *Twombly* nevertheless expressly held that stating a plausible claim “requires a complaint [to have] *enough* factual matter (taken as true) to suggest an agreement was made” that would violate section 1 of the Sherman Act.⁹⁷ Hence, there appears to be a distinct discrepancy between “short and plain statement” and “enough factual matter” such that the two standards require different levels of specificity. Consequently, the broad application of *Iqbal* affirmatively raises the bar for pleading.⁹⁸

B. WHAT ABOUT THE RULES?

The *Twombly* opinion was widely criticized for failing to clarify the extent to which the Court’s new plausibility standard would apply to other areas of the law beyond antitrust litigation.⁹⁹ However, now that the Court has answered the question posed by Justice Stevens in his *Twombly* dissent, the legal community has shifted focus to asking whether the *Iqbal* standard of plausibility comports with the purpose and meaning of the Federal Rules of Civil Procedure.¹⁰⁰ This Section will examine three approaches to circumventing *Iqbal*’s plausibility standard in an effort to maintain—at least as closely as possible—patentees’ short and plain statements as sufficient to open the gates of discovery related to willful infringement.

96. *Id.* at 570.

97. *Id.* at 556 (emphasis added).

98. See Spencer, *supra* note 32, at 4 (“Although . . . the Court itself would perhaps deny it, *Twombly* appeared to be a departure from the simple ‘notice’ pleading standard announced in *Conley v. Gibson . . .*”).

99. See, e.g., sources cited *supra* note 32.

100. See Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleadings Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009) (“[T]he [*Iqbal*] decision inescapably interprets *Federal Rule of Civil Procedure* 8 in a manner that is unconstitutional.”); Michelle Spiegel, Comment, *Ashcroft v. Iqbal: The Question of a Heightened Standard of Pleading in Qualified Immunity Cases*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 375, 383 (2009) (finding the plausibility standard to be a distinct departure from the “short, plain statement” interpretation of the Federal Rules). Even before *Iqbal* was granted certiorari, members of the Court already shared the sentiment that *Twombly* may “rewrite the Nation’s civil procedure textbooks and call into doubt the pleading rules of most of its States.” *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting).

1. The Sample Complaint of Form 18

The Federal Rules of Civil Procedure provide model complaints for various causes of action.¹⁰¹ Of particular importance is Form 18—the Complaint for Patent Infringement.¹⁰² Form 18 sets forth the basic elements of a cause of action for patent infringement: (1) the plaintiff owned a patent throughout the defendant's infringing period and still owns the patent; (2) the defendant infringed the plaintiff's patent and is still infringing the patent by making, selling, or using the patented invention; and (3) the plaintiff complied with the statutory requirement of placing notice of the patent on the patented invention and gave the defendant written notice of the infringement.¹⁰³ Form 18 even provides a formulaic recitation of the harm the plaintiff seeks to remedy and sets forth relief in the form of a preliminary and final injunction against the continuing infringement, and accounts for damages, interests, and costs.¹⁰⁴ However, Form 18 fails to go so far as to set forth the elements of willful infringement that would allow for an increase in damages. Because treble damages are codified in the Patent Act¹⁰⁵ and allegations of willfulness have become a routine element of infringement complaints,¹⁰⁶ Form 18, in its current form, inadequately reflects the current state of pleading in patent litigation.

The Federal Circuit provided very little guidance to potential patentee-plaintiffs as to what the elements of willfulness are in the post-*Seagate* era. While *Seagate* itself may have been significant for altering the standard from one of negligence to one of recklessness, the opinion evaded the task of laying down a clear set of instructions for what actually constitutes reckless

101. FED. R. CIV. P. app. B; *see also* Conley v. Gibson, 355 U.S. 41, 47 (1957) (“The illustrative forms appended to the Rules plainly demonstrate [the pleading requirements].”).

102. FED. R. CIV. P. form 18.

103. *Id.*

104. *Id.*

105. 35 U.S.C. § 284 (2006) (allowing the court to increase damages up to three times the amount assessed).

106. *See The Fourteenth Annual Judicial Conference for the United States Court of Appeals for the Federal Circuit*, 170 F.R.D. 534, 615 (1996) [hereinafter *Judicial Conference*] (citing commentary from one patent attorney who stated: “I think if you ask most District Court Judges, they think that willful infringement is one word. I have never heard of an infringer called anything but willful.”); Danny Prati, Note, *In re Seagate Technology, LLC: A Clean Slate for Willfulness*, 23 BERKELEY TECH. L.J. 47, 52–53 n.42 (2008) (citing Kimberly A. Moore, *Empirical Statistics on Willful Patent Infringement*, 14 FED. CIR. B.J. 227, 232 (2004) (finding that between 1999 and 2000, plaintiffs pled willfulness in 92.3% of patent infringement cases)); Jon E. Wright, *Willful Patent Infringement and Enhanced Damages—Evolution and Analysis*, 10 GEO. MASON L. REV. 97, 97 (2001) (“A charge of willful infringement has become a routine adjunct to almost every pleading asserting patent infringement.”).

conduct.¹⁰⁷ Thus, patentees are left without a guidepost for determining what elements need to be pled to constitute willful conduct, let alone the specificity with which they need to be pled under *Iqbal* to open the doors of discovery. One solution to this problem may be for the Federal Circuit to explicitly address what the elements of objective recklessness are in the patent infringement context beyond any fundamental commentary the courts previously relied upon when defining “reckless.”¹⁰⁸ However, incorporating any necessary elements into Form 18 is a daunting task since the Federal Circuit itself “fully recognize[s] that the term [‘reckless’] is not self-defining.”¹⁰⁹

In a patentee’s utopia, Form 18 would include specific language regarding what must be pled in a willfulness allegation. According to Rule 84, “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”¹¹⁰ Thus, any guidelines set forth in the form should technically be sufficient to open the gates of discovery. However, *Twombly* and *Iqbal* may say otherwise. On their face, the allegations in Form 18 appear as only facts that are “merely consistent with a defendant’s liability” and are a far cry from “contain[ing] sufficient factual matter” in accordance with *Twombly*.¹¹¹ Under the plausibility regime, such statements do not “nudge[] . . . claims . . . across the line from conceivable to plausible.”¹¹²

The Federal Circuit recently reinforced this proposition in *Colida v. Nokia, Inc.*,¹¹³ where the plaintiff alleged that Nokia infringed four design patents for cellular telephones.¹¹⁴ In a per curiam opinion affirming the Southern District of New York’s dismissal of the plaintiff’s complaint, the

107. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) (“We leave it to future cases to further develop the application of [the] [objective recklessness] standard.”).

108. At common law, “recklessness” was defined as engaging in an “action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007) (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (internal quotation marks omitted)).

109. *Seagate*, 497 F.3d at 1371 (internal quotation marks omitted) (citing *Farmer*, 511 U.S. at 836).

110. FED. R. CIV. P. 84.

111. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

112. *Id.* at 1951 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

113. 347 F. App’x 568 (Fed. Cir. 2009).

114. *Id.* at 569.

Federal Circuit cited both *Iqbal*¹¹⁵ and *Twombly*¹¹⁶ and stated that the plaintiff's infringement claims were "facially implausible."¹¹⁷ In a footnote, the court acknowledged Form 18 but ultimately rejected its sufficiency.¹¹⁸ In doing so, the court stated: "Form 18 is a sample pleading for patent infringement, but . . . was last updated before the Supreme Court's *Iqbal* decision."¹¹⁹ Therefore, absent new amendments to Form 18 that would instruct patentee-plaintiffs on how to provide more specificity in their complaints, *Iqbal* has stripped Form 18 and Rule 84 of any practical significance.

2. Liberal Constructions Under Rule 8

To the extent that Federal Rule of Civil Procedure 8 maintains a pulse after its most famous phrase was "retired" by *Twombly*¹²⁰ and then exiled in its entirety by *Iqbal*, Rule 8(e) may provide a safe harbor for plaintiffs whose allegations are somewhere on the likelihood spectrum between "possible" and "probable" (wherever "plausible" may actually be).¹²¹ Federal Rule of Civil Procedure 8(e) states that "[p]leadings must be construed so as to do justice."¹²² Therefore, a court that is uncertain how to apply the plausibility standard in light of the Supreme Court's language¹²³ may be lenient with plaintiffs' complaints that the court believes come close to satisfying the *Iqbal* threshold.¹²⁴

115. *Id.* at 570 (stating that a "complaint must have sufficient 'facial plausibility' to 'allow[] the court to draw the reasonable inference that the defendant is liable'" (citing *Iqbal*, 129 S. Ct. at 1949)).

116. *Id.* (stating that "[t]he plaintiff's factual allegations must 'raise a right to relief above the speculative level' and cross 'the line from conceivable to plausible'" (citing *Twombly*, 550 U.S. at 555, 570)).

117. *Twombly*, 550 U.S. at 570.

118. *Id.* at 575 n.2. *But see* Automated Transactions, LLC v. First Niagara Fin. Grp., Inc., No. 10-cv-00407 (A)(M), slip op. at 13 (W.D.N.Y. Aug. 31, 2010) (holding that willfulness allegations suffice under Rule 84 notwithstanding *Twombly* and *Iqbal*).

119. *Colida*, 347 F. App'x at 571 n.2.

120. *Twombly*, 550 U.S. at 562–63 (2007) (stating that the "no set of facts" language in *Conley v. Gibson*, 355 U.S. 41, 45 (1957), earned its "retirement" due to being "questioned, criticized, and explained away long enough" over the last fifty years).

121. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). For discussion of the placement of "possibility," "plausibility," and "probability" along the Court's likelihood spectrum, see *supra* Section III.A.

122. FED. R. CIV. P. 8(e).

123. *See* sources cited *supra* note 32 (discussing the confusion and uncertainty resulting from the language of the Court's *Twombly* opinion).

124. *See* Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009) (advocating that courts "draw on [their] judicial experience[s] and common sense" when reviewing complaints (quoting *Twombly*, 550 U.S. at 556) (quotation marks omitted)); *cf.* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60

For example, even under the more stringent plausibility standard in pleading, the Federal Circuit has already been relatively lenient with plaintiffs in the post-*Twombly* era. In *McZeal v. Sprint Nextel Corp.*,¹²⁵ the Federal Circuit allowed pro se plaintiff Alfred McZeal, Jr.'s claim to survive the defendants' motion to dismiss.¹²⁶ McZeal had alleged infringement of his utility patent related to cellular telephone technology.¹²⁷ After the U.S. District Court for the Southern District of Texas dismissed his claim for failure to plead sufficient allegations, McZeal appealed to the Federal Circuit for a review of his ninety-five page complaint—not including exhibits.¹²⁸ Writing for the court, Judge Archer determined that the pro se plaintiff should be “grant[ed] . . . leeway on procedural matters, such as pleading requirements.”¹²⁹

While the court's decision in *McZeal* was influenced by the fact that the plaintiff was appearing pro se, the court nevertheless went out of its way to state that McZeal was “no stranger to legal proceedings, having filed numerous complaints in the past.”¹³⁰ Therefore, a holding that reversed the district court's Rule 12(b)(6) dismissal indicates that the Federal Circuit may be lenient in construing pleadings in accordance with Rule 8. Thus, despite a higher standard for pleadings under *Iqbal*, construing pleadings liberally under Rule 8(e) may inject just enough support to keep the *Conley* “no set of facts” standard alive.

3. Amending Pursuant to Rule 15

Federal Rule of Civil Procedure 15 allows plaintiffs to amend their pleadings after the initial complaint has already been filed with the court and served upon the defendant.¹³¹ To do so, Rule 15 requires either one of two actions to occur: (1) the opposing party grants the plaintiff written permission to amend, or (2) the court grants the plaintiff leave to amend.¹³²

DUKE L.J. 1, 29 n.107 (2010) (citing cases where “courts [have been] more lenient than others in allowing a claim to go forward even if there is an alternative explanation”).

125. 501 F.3d 1354 (Fed. Cir. 2007).

126. *Id.* at 1358 (vacating the trial court's dismissal and remanding for further proceedings).

127. *Id.* at 1357.

128. *Id.* at 1355.

129. *Id.* at 1356 (referring to a lesser procedural standard for pro se litigants in *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)).

130. *Id.* at 1358.

131. FED. R. CIV. P. 15.

132. FED. R. CIV. P. 15(a)(2). In limiting a plaintiff to these two actions for amending, I am of course assuming that the twenty-one-day period after the complaint has been served

While it is unlikely that a defendant staring down the explosive barrel of potentially expensive patent litigation¹³³—in addition to tens of millions of dollars in punitive damages if the court finds willfulness¹³⁴—will grant a plaintiff permission to amend the complaint to be more specific about the allegedly willful conduct, Rule 15 provides that “court[s] should freely give leave [to amend] when justice so requires.”¹³⁵ Thus, the Rules may provide a plaintiff a chance to amend the complaint to set forth and describe a course of conduct that rises to the level of objective recklessness without being defeated by *Twombly–Iqbal* plausibility.¹³⁶

However, the leave to amend a complaint, absent gathering any additional information between the time of filing and the time of amending, may be futile in light of *Iqbal*. Under the Court’s plausibility standard, plaintiffs will likely set forth all facts known at the time of filing the complaint to ensure that their claims rise beyond a level of being merely “conceivable.”¹³⁷ The implication of this is that a plaintiff will likely show all his cards to the defendant in the initial complaint rather than choosing to only set forth the minimal detail sufficient to get to the discovery phase.¹³⁸

in which the plaintiff can amend the complaint as a matter of course has lapsed. *See* FED. R. CIV. P. 15(a)(1).

133. *See* Christopher A. Harkins, *A Budding Theory of Willful Patent Infringement: Orange Books, Colored Pills, and Greener Verdicts*, 2007 DUKE L. & TECH. REV. 6, *7 (discussing a “2007 survey published by the American Intellectual Property Law Association [that] affirms what patent owners and attorneys knew all along: patent litigation is expensive”); Joseph Scott Miller, *Building a Better Bounty: Litigation-Stage Rewards for Defeating Patents*, 19 BERKELEY TECH. L.J. 667, 703 (2004) (“Patent litigation is, after all, quite expensive.”).

134. *See infra* Section IV.A (discussing the high compensatory damages imposed on defendants when a court finds liability for infringement); *see also, e.g.*, i4i Ltd. P’ship v. Microsoft Corp., 598 F.3d 831, 858–59 (Fed. Cir. 2010) (affirming an award of \$40 million in enhanced damages due to willful infringement).

135. FED. R. CIV. P. 15.

136. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 598–600 & tbl.1 (2010) (presenting evidence from a study that revealed that the number of Rule 12(b)(6) dismissals granted with leave to amend increased from six percent under *Conley* to nineteen percent under *Iqbal*, and speculating that “the newness of the *Iqbal* standard [has] caused [district courts] to err on the side of allowing the plaintiff one more chance to plead”).

137. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1840 (2008) (noting the “dramatic and readily apparent impact” that the heightened standard will have with respect to the length of complaints for some types of cases).

138. *See* Hon. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts after Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 868 (2008)

This tendency to file much more detailed complaints harkens back to archaic code pleading¹³⁹ and departs from notice pleading as intended by the Federal Rules and enforced in *Conley*.¹⁴⁰ For instance, recall that even McZeal's ninety-five-page complaint was initially dismissed by the Southern District of Texas for failure to plead sufficient allegations.¹⁴¹

Notwithstanding, while Rule 15 may allow courts to grant leave in the interest of justice, Rule 15 does not provide a patentee–plaintiff with a sneak peek into a defendant's potentially discoverable documents that may uncover indicia of willful infringement before filing an amended complaint. In fact, the Federal Circuit was clear in *Seagate* that willfulness is a function of the discovery record: “[i]f this threshold objective standard is satisfied, the patentee must also demonstrate that this objectively-defined risk (*determined by the record developed in the infringement proceeding*) was either known or so obvious that it should have been known to the accused infringer.”¹⁴² Therefore, unless patentees withhold material information related to willful conduct from their initial complaints (a strategy highly unlikely after *Iqbal*), the leave to amend will impart very little benefit to patentees if they have no new information to plead. Thus, the safe-harbor provision that allows plaintiffs to amend pleadings may provide little comfort to a plaintiff nakedly “armed with nothing more than conclusions.”¹⁴³

IV. THE IQBAL AFTERMATH: DAMAGES, DICHOTOMY, AND THE DESERTION OF WILLFULNESS

Iqbal's effects on treble damages in patent cases are yet to be determined. However, because plaintiffs allege willfulness in approximately ninety percent

(noting how district courts will have to spend more time deciding Rule 12(b)(6) motions due to the increase in the complexity of complaints).

139. For a general discussion of code pleading prior to the adoption of notice pleadings, see Koan Mercer, Comment, “*Even in These Days of Notice Pleadings*”: *Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1168–70 (2004) (noting how the code pleadings required specific “facts constituting the cause of action”).

140. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 447–49 (2010) (discussing how the Federal Rules of Civil Procedure were a response to the dissatisfaction associated with code pleading).

141. *McZeal v. Nextel Sprint Corp.*, 501 F.3d 1354, 1355 (Fed. Cir. 2007).

142. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) (emphasis added).

143. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

of their complaints,¹⁴⁴ it seems inevitable that the standard for obtaining discovery orders pertaining to willfulness allegations will in some way be affected by a heightened pleading threshold. Moreover, proceeding past the dismissal phase of a lawsuit without the fear of enhanced damages may make defendants more willing to fight the allegations since the risk of tripled liability¹⁴⁵ has been taken out of the equation. Section IV.A will examine the current state of damages in patent cases and the role that willfulness plays in pursuing such claims. Section IV.B will then examine bad-faith conduct in two other areas of intellectual property law. First, Section IV.B.1 overviews the willfulness standard in copyright law. Second, Section IV.B.2 compares the standard of liability for inequitable conduct, as defined by the U.S. Patent and Trademark Office (PTO), to that of willful patent infringement and the different Federal Rules applicable to each. Section IV.C then suggests how patentees may overcome *Twombly–Iqbal* plausibility and contemplates what effects eliminating willfulness will have on patent litigation and whether treble damages will soon be interred alongside the *Conley* “no set of facts” regime.

A. DAMAGES: TREBLE DAMAGES AND THE INCENTIVE TO SUE

Enhanced damages in patent cases can be extremely costly for defendants and handsomely rewarding for plaintiffs.¹⁴⁶ In fact, even without the assessment of multiplied damages, litigation alone can be rather expensive for many companies seeking to either enforce their patent rights or defend against an infringement allegation.¹⁴⁷ Thus, it is important to evaluate

144. See *Judicial Conference*, *supra* note 106, at 615 (citing Judge Sue Robinson of the District of Delaware, who stated that willfulness is pled in eighty-seven percent of her pending patent infringement cases); Prati, *supra* note 106, at 52 n.42 (referring to Kimberly Moore’s study that found that willfulness is alleged in 92.3% of patent infringement cases).

145. See 35 U.S.C. § 284 (2006) (allowing a court to increase damages up to three times the amount assessed).

146. See, e.g., Harkins, *supra* note 133, at *7 (“Allegations of willful patent infringement frequently take center stage in patent litigation, offering treble damages and attorneys’ fees to patent owners eager to turn actual damages into a windfall.”); Andrew M. Newton, *Encouraging Willful Infringement? Knorr-Bremse Leaves Due Care in Patent Litigation in a State of Flux*, 15 TEX. INTELL. PROP. L.J. 91, 111–12 (2006) (noting that treble damages can rise “well into the tens of millions of dollars, or even much higher”); Shashank Upadhye, *Understanding Willfulness in Patent Infringement: An Analysis of the ‘Advice of Counsel’ Defense*, 8 TEX. INTELL. PROP. L.J. 39, 40 (1999) (“A large damages award can often bankrupt a company.”).

147. See, e.g., John M. Golden, Comment, “*Patent Trolls*” and *Patent Remedies*, 85 TEX. L. REV. 2111, 2128 (2007) (“[A] party’s expected litigation costs are substantial—generally at least on the order of \$1 million.”); David O. Taylor, *Wasting Resources: Reinventing the Scope of Waiver Resulting from the Advice-of-Counsel Defense to a Charge of Willful Patent Infringement*, 12 TEX.

the role that treble damages play in plaintiffs' incentives to sue and how those incentives may be influenced by a higher standard for pleading willfulness.¹⁴⁸

Although actual compensatory damages in patent infringement cases can escalate well into the hundreds of millions of dollars,¹⁴⁹ patentees are often faced with the economic dilemma of whether suing to enforce their rights will accrue any substantial benefit when balanced against the costs of litigation and the likelihood of success.¹⁵⁰ One empirical study shows that patentees prevail in just over half of patent infringement cases that go to trial.¹⁵¹ In light of such data, compensatory damages alone may not provide enough incentive to undergo potentially costly litigation. Additionally, the patentee risks paying for the defendant's attorney's fees¹⁵² if the defendant is not found liable, and if the court determines that the patentee purposefully prolonged the suit in bad faith to fish for a settlement agreement.¹⁵³ Furthermore, patentees must consider that the court may find inequitable

INTELL. PROP. L.J. 319, 322 (2004) ([T]he cost of bringing a patent infringement case, let alone defending one, is . . . substantial."); Wright, *supra* note 106, at 97 ("[P]atent infringement lawsuits are enormously expensive and often swamp balance sheets." (internal citation and quotation marks omitted)).

148. See Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 70 (1997) ("For a plaintiff, the decision whether to file a suit requires a weighing of the expected benefits and anticipated expenses of litigation.").

149. Taylor, *supra* note 147, at 321–22 ("Compensatory damages in patent cases often amount to more than ten million dollars and sometimes rise into the hundreds of millions of dollars.").

150. See Nathaniel C. Love, Comment, *Nominal Reasonable Royalties for Patent Infringement*, 75 U. CHI. L. REV. 1749, 1772 (2008) (noting that where "no significant damage award can be expected or an injunction has low value against a non-competitor that can adopt an alternative," a patentee may have "insufficient incentives to file suit").

151. Kimberly A. Moore, *Judges, Juries, and Patent Cases: An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 385 & fig.2 (2000) (finding that patentees prevailed in fifty-eight percent of the lawsuits that proceeded to the trial stage between 1999 and 2000).

152. 35 U.S.C. § 285 (2006) (allowing the court in exceptional cases to award reasonable attorneys fees to the prevailing party in patent cases); see also Phonometrics, Inc. v. Westin Hotel Co., 350 F.3d 1242, 1246 (Fed. Cir. 2003) ("[A]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." (citing 28 U.S.C. § 1927 (2003))); Thomas F. Cotter, *An Economic Analysis of Enhanced Damages and Attorney's Fees for Willful Patent Infringement*, 14 FED. CIR. B.J. 291, 292 n.3 (2004) ("Defendants are sometimes entitled to an award of their attorney's fees, if the court determines that the plaintiff filed or litigated the suit in bad faith.").

153. See sources cited *supra* note 5 (discussing abusive litigation tactics used by plaintiffs to force a defendant into a settlement agreement).

conduct during the prosecution process.¹⁵⁴ Stated best: “Patent holders and litigators must decide whether asserting patent rights against an infringer outweighs the financial cost of defending against an inequitable conduct challenge and the risk of losing the entire patent should the defendant uncover some evidence a court finds to be inequitable conduct.”¹⁵⁵ This is a significant and costly deterrent to enforcing one’s monopoly rights and one that potential patentee–plaintiffs must contemplate.¹⁵⁶

Moreover, a patentee’s hesitation to proceed with a suit may be magnified if the outcome is determined by a judge rather than jury. As then-professor Kimberly Moore (now a Federal Circuit judge) noted, “[t]he identity of the adjudicator . . . is a statistically significant predictor of who wins the claims in the lawsuit.”¹⁵⁷ Specifically, Judge Moore conducted a study that found that patentee–plaintiffs have a seventeen-percent-lower win rate in cases tried before judges compared to juries.¹⁵⁸ Therefore, absent the anticipation of enhanced damages due to willfulness, patentees may be less likely to file suit due to the risk that the court will find the defendant not liable.¹⁵⁹

B. DICHOTOMY: COMPARING WILLFUL PATENT INFRINGEMENT TO OTHER BAD-FAITH INFRACTIONS

Increasing liability based on willful conduct is not new to intellectual property law. For instance, federal copyright law allows plaintiffs to collect enhanced damages if “the court finds[] that infringement was committed willfully.”¹⁶⁰ And analogous to *Seagate*, copyright law already requires a finding of “reckless disregard” as the threshold for obtaining enhanced

154. See *infra* Section IV.B.2 (detailing and explaining inequitable conduct during patent prosecution and the ramifications for plaintiffs).

155. Kate McElhone, *Inequitable Conduct: Shifting Standards for Patent Applicants, Prosecutors, and Litigators*, 17 TEX. INTELL. PROP. L.J. 385, 388 (2009).

156. See Kingsdown Med. Consultants, Ltd. v. Hollister, Inc., 863 F.2d 867, 876 n.15 (Fed. Cir. 1988) (“[T]he habit of charging inequitable conduct in almost every major patent case has become an absolute plague.” (quoting Burlington Indus., Inc. v. Dayco Corp., 849 F.2d 1418, 1422 (Fed. Cir. 1988))).

157. Moore, *supra* note 151, at 386–87.

158. *Id.* at 386 tbl.2 (finding only a fifty-one percent win rate for patentees when the case is decided by a judge, and a sixty-eight percent win rate for patentees when the case is decided by a jury).

159. See Harkins, *supra* note 133, at *1–2 (“From a patent owner’s perspective, the possibility of recovering treble damages and attorneys’ fees may tip the scales in favor of enforcing its patent in an infringement lawsuit.”).

160. 17 U.S.C. § 504(c)(2) (2006).

damages.¹⁶¹ Additionally, many states' trade secret laws award plaintiffs increased damages for willful misappropriation. For example, section 550 of the Iowa Code awards plaintiffs "exemplary damages" where the court finds that the defendant "commits a willful and malicious misappropriation."¹⁶² Similarly, transferring liability for bad-faith conduct is also present in federal intellectual property law. For example, defendants in patent infringement cases may seek to recover attorney's fees from the plaintiff under a theory that the plaintiff engaged in inequitable conduct during the patent prosecution process, thus leading to frivolous litigation over an invalid patent.¹⁶³

1. Copyright Law's Recklessness Standard

For over a decade before the Federal Circuit decided *Seagate*, courts were already employing recklessness as the standard for proving willfulness in copyright infringement actions.¹⁶⁴ Thus, it is not unreasonable to believe that, even absent the Supreme Court's clarification of the meaning of "willful" in *Safeco Insurance Co. of America v. Burr*,¹⁶⁵ it was only a matter of time until the Federal Circuit established a more stringent test for patentees seeking treble damages.¹⁶⁶ For example, in *Island Software and Computer Service, Inc. v. Microsoft Corp.*,¹⁶⁷ the Second Circuit stated that one way for a plaintiff to prove willful copyright infringement is to demonstrate that "the defendant's actions were the result of 'reckless disregard' for, or 'willful blindness' to, the copyright

161. *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 112 (2d Cir. 2001) ("Willfulness . . . means that the defendant recklessly disregarded the possibility that its conduct represented infringement." (internal citation and quotation marks omitted)).

162. IOWA CODE § 550.4 (2009).

163. *See Epcon Gas Sys., Inc. v. Bauer Compressors, Inc.*, 279 F.3d 1022, 1034 (Fed. Cir. 2002) (quoting 35 U.S.C. § 285 and including "inequitable conduct before the PTO" and "vexatious, unjustified, and otherwise bad faith litigation" as among the reasons that a prevailing party may receive reasonable attorney's fees).

164. *See, e.g., Yurman*, 262 F.3d at 112; *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 97 (2d Cir. 1999); *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1010 (2d Cir. 1995).

165. *See supra* Section II.D (discussing the Federal Circuit's reliance in *Seagate* on the Supreme Court's interpretation of the word "willfulness").

166. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1370 (Fed. Cir. 2007) (*en banc*) (discussing copyright law's definition of "willfulness" as including reckless behavior); *see also* Rachel L. Emsley, Note, *Copying Copyright's Willful Infringement Standard: A Comparison of Enhanced Damages in Patent Law and Copyright Law*, 42 SUFFOLK U. L. REV. 157, 159 (2008) (stating that in adopting the recklessness standard, the Federal Circuit "import[ed] a standard from copyright law into patent law"); Justin McCarthy, Note, *In re Seagate: One Step Closer to a Rational Doctrine*, 10 MINN. J.L. SCI. & TECH. 355, 374 (2009) ("[T]he *Seagate* majority 'harmonized' willfulness between patent law and copyright law.").

167. 413 F.3d 257 (2d Cir. 2005).

holder's rights.”¹⁶⁸ Several other circuit courts have adopted similar language when formulating their willful-infringement standards.¹⁶⁹ In *Zomba Enterprises, Inc. v. Panorama Records, Inc.*,¹⁷⁰ the Sixth Circuit applied this widely accepted standard when it found that the defendant acted recklessly when it continued to distribute copies of the plaintiff's copyrighted works after the district court entered a suspension order prohibiting the defendant from doing so.¹⁷¹

Since copyright law dealt with a recklessness standard for over a decade before *Iqbal* was decided, copyright law did not face the one–two punch that patent law encountered due to the relatively short period of time between the *Seagate* and *Iqbal* decisions. In other words, copyright law has had time to develop its standard for willful conduct. Patent law, on the other hand, was left high and dry in the wake of *Seagate* without much time to develop the standard for willfulness before also being faced with the task of determining what pleadings would satisfy the Court's new plausibility threshold.

However, copyright law may help to shed some light on patent law's post-*Seagate* development. For example, similar to the Second Circuit's holding in *Knitwaves, Inc. v. Lollytags, Ltd.*,¹⁷² a copyright case, the Federal Circuit adopted the view that “[t]he state of mind of the accused infringer is not relevant to th[e] objective inquiry [of willfulness].”¹⁷³ This rule is a significant departure from the Federal Circuit's previous negligence doctrine in the *Underwater Devices* regime, where the court placed substantial weight on an infringer's knowledge in determining whether the infringement was willful, and consequently, whether to award treble damages.¹⁷⁴ Therefore,

168. *Id.* at 263.

169. E.g., *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996) (permitting a willfulness finding based on “any factor which the jury believes evidences the defendants . . . recklessly disregarded the fact that its conduct constituted copyright infringement”); *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 511–12 (7th Cir. 1994) (finding willful infringement where “the infringer has acted in reckless disregard of the copyright owner's right” (internal citation and quotation marks omitted)); *see RCA/Ariola Int'l v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988) (“[R]eckless disregard of the copyright holder's rights (rather than actual knowledge of infringement) suffices to warrant award of the enhanced damages.”).

170. 491 F.3d 574 (6th Cir. 2007).

171. *Id.* at 585.

172. 71 F.3d 996, 1010 (2d Cir. 1995) (“Knowledge of infringement may be constructive rather than actual; that is, ‘it need not be proven directly but may be inferred from the defendant's conduct.’” (quoting *N.A.S. Import Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992))).

173. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc).

174. See *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1390 (Fed. Cir. 1983) (discussing the defendant's failure to obtain competent legal advice before infringing as a sign of a lack of good faith and a “fact to be weighed”). The Federal Circuit

under the objective standard in *Seagate*, the defendant's conduct *alone* provides the sufficient basis for collecting treble damages without any inquiry into the defendant's actual intent. Copyright law maintains a similar view.¹⁷⁵ Furthermore, the Federal Circuit made it clear in *Seagate* that while *Seagate* itself may have initiated the climb from negligence to recklessness, what actually constitutes reckless behavior and what must be alleged in a pleading would be for later cases to determine.¹⁷⁶ Given this lack of guidance, copyright law may provide valuable insight into the willfulness threshold and what must be pled to satisfy the *Twombly–Iqbal* plausibility standard.

2. Inequitable Conduct: An Expressly Higher Threshold?

Another type of bad-faith behavior that must be specifically pled in the interest of expanding the scope of discovery—like willful infringement after *Iqbal* and *Seagate*—is a plaintiff's inequitable conduct before the PTO when prosecuting a patent.¹⁷⁷ A patent is presumed valid upon issuance;¹⁷⁸ however, defendants in patent litigation frequently seek to render the patent unenforceable by alleging that the patentee failed to disclose material information during the prosecution process that, had such information been

further expounded upon its definition of “willfulness” in another pre-*Seagate* case, *Bott v. Four Star Corp.*, 807 F.2d 1567 (Fed. Cir. 1986). In *Bott*, the court set forth three criteria for assessing willfulness:

- (1) whether the infringer deliberately copied the ideas or design of another; (2) whether the infringer, when he knew of another's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; and (3) the infringer's behavior as a party to the litigation.

Bott, 807 F.2d at 1572.

175. See *Knitwaves*, 71 F.3d at 1010 (“[R]eckless disregard of the copyright holder's rights . . . suffices to warrant award of the enhanced damages.” (quoting *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988)) (internal quotation marks omitted)).

176. Although the *Seagate* court set forth what the new standard for willful infringement is, the Federal Circuit gave very little guidance on what actions satisfy that standard. Rather, the court stated that it will “leave it to future cases to further develop the application of this standard.” *Seagate*, 497 F.3d at 1371.

177. See 37 C.F.R. § 1.56 (2009). This regulation states:

Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the [Patent and Trademark] Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section.

Id.

178. 35 U.S.C. § 282 (2006) (“A patent shall be presumed valid.”).

known by the patent examiner, may have prevented such a broad claim scope from issuing.¹⁷⁹ This allegation falls within the framework of the doctrine of “unclean hands” on behalf of the then-applicant.¹⁸⁰ Conduct that can lead to a patent being rendered unenforceable includes the failure to disclose a known, material reference, or a false statement in an affidavit to the PTO.¹⁸¹

The Federal Circuit has not been shy about stating that inequitable-conduct defenses must be pled with particularity by defendants seeking to render a patent unenforceable.¹⁸² In a recent reinforcement of this standard, the Federal Circuit stated that in “pleading inequitable conduct in patent cases, Rule 9(b) requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO.”¹⁸³ While it did not expressly state what must be pled with

179. See Christian E. Mammen, *Controlling the “Plague”: Reforming the Doctrine of Inequitable Conduct*, 24 BERKELEY TECH. L.J. 1329, 1329, 1345 (2009) (noting how “claims directly affected by a [patentee’s] inequitable conduct . . . should be deemed unenforceable” and that the effect of the inequitable-conduct defense is to “render[] the entire patent, and possibly any descendant patents, unenforceable”); see also Kevin Mack, Note, *Reforming Inequitable Conduct to Improve Patent Quality: Cleansing Unclean Hands*, 21 BERKELEY TECH. L.J. 147, 161–62 (2006) (discussing the standard of materiality for inequitable conduct and how courts must determine if “one or more claims of the patent should not have issued or should have issued with different scope” (internal citation and quotation marks omitted)).

180. The doctrine of unclean hands is best explained by the Supreme Court’s opinion in *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933). The Court elaborated:

[B]efore a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. . . . [W]henever a party who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*

Id. at 244–45.

181. Courts draw a fine distinction between failure to disclose a reference and making false statements. False affidavits technically fall under the category of “fraud on the Patent Office” and not inequitable conduct. *See Timely Prods. Corp. v. Arron*, 523 F.2d 288, 297 (2d Cir. 1975). However, “the distinction is without practical significance insofar as the consequences are concerned. In either case, the only value the patent has the right to exclude others from the use of the invention during the patent term is irreparably destroyed.” *Id.* at 297–98.

182. *E.g.*, *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326–27 (Fed. Cir. 2009) (“Inequitable conduct, while a broader concept than fraud, must be pled with particularity under Rule 9(b).” (internal quotation marks omitted) (citing *Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega Sys., LLC*, 350 F.3d 1327, 1344 (Fed. Cir. 2003)); *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1116 (Fed. Cir. 1996).

183. *Exergen*, 575 F.3d at 1327.

particularity, the Supreme Court in *Twombly* and *Iqbal* nevertheless set forth a standard that, at the very least, looks very similar to Rule 9(b) pleadings.¹⁸⁴

The language of the *Seagate* opinion thus puts patentees seeking to recover damages from alleged willful infringement in a difficult position: because willfulness does not require an inquiry into the defendant's state of mind,¹⁸⁵ the fact that the accused willful infringer may have had the intent to infringe the patent is of no consequence and thus, a general allegation will not suffice; however, "plead[ing] facts that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility . . .'"¹⁸⁶ Therefore, it seems that Rule 8 pleadings under *Iqbal* actually set forth a higher threshold than do Rule 9 pleadings for inequitable conduct. While the *Iqbal* Court does not specifically mention the "who, what when, where, and how" facts that must be alleged, the Court does make it clear that even when well-pleaded factual allegations are set forth, and *even* when their veracity is assumed, the complainant may *still* come up short of what is necessary under Rule 8(a).¹⁸⁷ Reconciling how the Rule 8 pleading standard can—at least as far as the *Iqbal* opinion is most reasonably interpreted—rival the specificity required for Rule 9 pleadings and become more stringent illustrates a grave discrepancy among the courts as to what truly is a "short and plain statement."¹⁸⁸

C. DESERTION: THE RETIREMENT OF WILLFULNESS

Ashcroft v. Iqbal may signify the beginning of the end for treble damages in patent cases due to willfulness. The Supreme Court set what appears to be a virtually unattainable level of specificity for pleading to open the doors of discovery necessary for proving willful conduct. However, patentees may take refuge from the heightened pleading standard in two ways. First, at least in the case of high-technology patents, close-knit technology communities

184. Compare *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("[A] district court must retain the power to insist upon some specificity in pleading" (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983))), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (requiring pleadings to contain "'further factual enhancement'" to overcome the plausibility threshold (quoting *Twombly*, 550 U.S. at 557)), with FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

185. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc).

186. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557).

187. *Id.* at 1950 ("When there are well-pleaded factual allegations, a court should assume their veracity and *then* determine whether they plausibly give rise to an entitlement to relief." (emphasis added)).

188. FED. R. CIV. P. 8(a)(2).

may provide patentees the requisite information necessary to overcome the plausibility standard when pleading recklessness. Second, courts could adopt alternative criteria upon which to base treble-damages awards.

1. *Close-Knit Technology Communities: A Solution?*

Under the *Iqbal* regime, pleading sufficient facts about a defendant's conduct per *Seagate* may be just as difficult as pleading a defendant's specific state of mind in accordance with *Underwater Devices*. This is because the patent holder is only able to compare his own claims with the defendant's allegedly infringing device and may have no prior knowledge about the defendant.¹⁸⁹ However, at least in the case of high-technology patents, specialized-technology firms—like close-knit communities of artists in the copyright context¹⁹⁰—may provide a solution for plaintiffs who otherwise lack sufficient knowledge to prove willfulness.¹⁹¹ Under this theory, patentee–plaintiffs may be able to overcome the new pleading standard for objective recklessness by claiming that an alleged infringer had knowledge of the plaintiff's patent due to the close-knit communities that certain technology fields entail.¹⁹²

189. See Matthew A. Josephson, Note, *Some Things Are Better Left Unsaid: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 42 GA. L. REV. 867, 894 (2008) (“Plaintiffs often face the problem of not being able to access concrete evidence at the pleading stage because the information concerning a particular controversy is accessible to only one party, usually the defendant.”); see also *supra* Section II.C.1 (discussing the strict-liability nature of patent infringement and resulting limited scope of discovery).

190. See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1885 (2009) (“Members [of close-knit copyright communities] are inclined to take an interest in each other’s actions precisely because each person, in terms of the actual utilities and disutilities, has an interest in any step that other members take to commercialize their acts of remix.”); see also Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 681–82 (2006) (discussing, *inter alia*, four ways that potential copyright infringers communicate with one another about protected works, including “monitoring and reporting illegal activities”).

191. See Jordan Barry, *When Second Comes First: Correcting Patent’s Poor Secondary Incentives Through an Optional Patent Purchase System*, 2007 WIS. L. REV. 585, 588 (“As research has advanced, technologies have become more closely knit, and the complementary and competitive relationships between them have become increasingly important.”); Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 359 (2003) (defining close-knit groups as “network[s] in which power is broadly distributed and information pertinent to informal control circulates easily among network members”).

192. See, e.g., Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1175 (2003) (“Highly detailed and patent-specific information is not only indispensable, but the limited audience of potential violators *can be expected to process it.*” (emphasis added)); Strahilevitz, *supra* note 191, at 359 (“Typically, close-knit groups are made

While the *Seagate* standard imputes no value to the infringer's mental state, that an infringer was aware of another's patented technology may nevertheless bolster a plaintiff's claim that the objectively defined risk "was either known or so obvious that it should have been known to the accused infringer."¹⁹³ Berkeley Law Professor Robert Merges has expanded on this idea by claiming that there are some firms that knowingly infringe another group member's patents with the intention to either "settle up" in the future (by paying money damages) or "trade off" infringement liabilities.¹⁹⁴

2. Alternative Criteria for Increasing Damages

The average patentee probably has only limited knowledge of a defendant's allegedly infringing device, and almost no knowledge of the defendant's conduct leading up to his decision to manufacture that device.¹⁹⁵ Thus, the *Twombly–Iqbal* plausibility pleading standard, in combination with *Seagate*'s recklessness standard, will almost certainly be beyond the reach of most plaintiffs in infringement actions. However, this is not to say that willfulness and treble damages are inexorably linked. In fact, while willfulness has been the longstanding criterion for awarding enhanced damages, a finding of willfulness does not require a court to award a plaintiff treble damages.¹⁹⁶ And, as the converse is also true, treble damages are not awarded

up of repeat players who can identify one another."); Richard Li-dar Wang, *Biomedical Upstream Patenting and Scientific Research: The Case for Compulsory Licensing Bearing Reach-Through Royalties*, 10 YALE J.L. & TECH. 251, 259–60 (2008). In his article, Professor Wang states:

Under the coordination of an "invisible hand" operating in the scientific community, however, scientists' pursuit of personal achievement weaves a closely knit web, as they tackle their common subject of research from every potential angle. Dissemination of scientific findings . . . works as a guiding compass, leading scientists [to] work[] on the same topic

Id.

193. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc).

194. Robert P. Merges, *Contracting into Liabilities Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1354–55 (1996).

195. Cf. Kevin G. McBride, Comment, *Attributing Knowledge to a Corporation as an Element of Laches in a Suit for Patent Infringement*, 80 NW. U. L. REV. 698, 698–702 (1985) (explaining how a plaintiff's lack of knowledge about a defendant and its corresponding infringing activities can bar a defendant's laches defense); Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 CALIF. L. REV. 1, 44 (2009) ("Courts refuse to permit a laches defense in the absence of actual or constructive knowledge.").

196. Johns Hopkins Univ. v. CellPro, Inc., 152 F.3d 1342, 1365 (Fed. Cir. 1998) ("[A] finding of willful infringement does not mandate that the district court enhance damages; it merely authorizes the court to do so at its discretion."); Read Corp. v. Portec, Inc., 970 F.2d 816, 826 (Fed. Cir. 1992) ("[A] finding of willful infringement does not mandate that damages be enhanced, much less mandate treble damages."), abrogated on other grounds by

only upon a court finding that the defendant infringed willfully (although willfulness has emerged to be the hallmark indicia).¹⁹⁷ Indeed, the Federal Circuit has long recognized this proposition.¹⁹⁸

As the ease of proving willfulness becomes largely a luxury of past pleading and negligence regimes under *Conley* and *Underwater Devices*, patent law may need to develop alternative criteria for awarding treble damages. While one could argue that reasonable-royalty damages will simply become higher to compensate patentees for their inability to prove willfulness, the Federal Circuit has made it clear that compensatory damages must remain at a level “adequate to compensate for the infringement”¹⁹⁹ and must not stray into being awarded punitively where there is no finding of bad faith.²⁰⁰ Thus, *Iqbal* has presented a challenge that the Federal Circuit must address when awarding treble damages that may be founded on bad-faith conduct other than willfulness. The task is not an impossible one, however. Although the Patent Act’s damages provision provides very little to no guidance for when treble damages should be awarded,²⁰¹ and courts have previously found this

Markman v. Westview Instruments, Inc., 52 F.3d 967, 975 (Fed. Cir. 1995); Modine Mfg. Co. v. Allen Grp., Inc., 917 F.2d 538, 543 (Fed. Cir. 1990) (“The decision to increase damages is committed to the discretion of the trial judge and a district court’s refusal to award increased damages will not be overturned absent a clear showing of abuse of discretion.”).

197. See *Seagate*, 497 F.3d at 1381 (referring to numerous Supreme Court cases that recognize the “uncontroversial proposition that a finding of willfulness is *sufficient* to support an award of enhanced damages,” but none of which “hold that a finding of willfulness is *necessary* to support an award of enhanced damages”).

198. See *Portec*, 970 F.2d at 826 (stating that “[a]n award of enhanced damages for infringement, as well as the extent of the enhancement, is committed to the discretion of the trial court” and acknowledging that “no statutory standard dictates the circumstances under which the district court may exercise its discretion”).

199. 35 U.S.C. § 284 (2006) (“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer”).

200. *Beatrice Foods Co. v. New Eng. Printing & Lithographing Co.*, 923 F.2d 1576, 1579 (Fed. Cir. 1991) (“[E]nhanced damages may be awarded *only* as a penalty for an infringer’s increased culpability, namely willful infringement or bad faith. Damages cannot be enhanced to award the patentee additional compensation to rectify what the district court views as an inadequacy in the actual damages awarded.” (emphasis added)). The court in *Beatrice Foods* rejected the district court’s reasoning for increasing the damages by \$16 million to “compensate” the plaintiff. *Id.*

201. See 35 U.S.C. § 284 (2006) (“When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.”); see also James G. McEwen, *Is the Cure Worse than the Disease? An Overview of the Patent Reform Act of 2005*, 5 J. MARSHALL REV. INTELL. PROP. L. 55, 67 (2005) (“[T]here has been little statutory guidance as to when increased damages can be assessed.”); Wright, *supra* note 106, at 101 (“The Patent Act of 1952 merely recited past statutory

ambiguous provision troublesome in determining the appropriate circumstances for awarding treble damages, the want of constraints may inure to patentees' benefit. The Act's lack of guidance may allow courts to develop conduct standards that can be pled with specificity more easily and that can nevertheless be indicative of bad faith.²⁰²

In fact, many district courts and circuit courts other than the Federal Circuit have already established alternative criteria for determining when to increase—as well as when to limit—a patentee–plaintiff's treble damages. For example, in *American Safety Table Co. v. Schreiber*,²⁰³ the Second Circuit declined to award a plaintiff enhanced damages despite acknowledging that the defendant acted “deliberately] and with knowledge of plaintiff's rights.”²⁰⁴ The Second Circuit considered the defendant's motivation for infringement and based its reasoning on the fact that the defendant's infringing conduct was prompted by economic pressures due to customer dissatisfaction.²⁰⁵ In *St. Regis Paper Co. v. Winchester Carton Corp.*,²⁰⁶ the District Court of Massachusetts cabined an enhanced-damages award based on the defendant's size.²⁰⁷ Sitting by designation, Senior Judge Aldrich of the First Circuit qualified the damages award by stating that “[i]f [the] defendant were the giant and plaintiff the small independent [business], I would make it treble.”²⁰⁸ Similarly, other courts have also considered the defendant's financial condition in deciding when and to what extent to increase damages.²⁰⁹ The First Circuit in *Russell Box Co. v. Grant Paper Box Co.*²¹⁰ even

language and offered no additional guidance to the courts. Thus, it was left to the courts to exercise discretion in awarding enhanced damages under the statute.”).

202. See, e.g., *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508 (1964) (noting that the patentee could recover punitive damages for “willful or bad-faith infringement” (emphasis added)); see also *Seagate*, 497 F.3d at 1381 (reviewing a line of Supreme Court cases that the Federal Circuit determined “cannot be interpreted to mean that enhanced damages are limited to a finding of willfulness”).

203. 415 F.2d 373 (2d Cir. 1969).

204. *Id.* at 379.

205. *Id.*

206. 410 F. Supp. 1304 (D. Mass. 1976).

207. *Id.* at 1309.

208. *Id.*

209. E.g., *Lightwave Tech., Inc. v. Corning Glass Works*, No. 86 Civ. 759 (KC), 1991 WL 4737, at *13 (S.D.N.Y. Jan. 18, 1991) (concluding that the defendant “can withstand some increase in damages, but not treble damages”); *Bott v. Four Star Corp.*, Civ. No. 79-71438, 1985 WL 6071, at *19 (E.D. Mich. Dec. 16, 1985) (recognizing that “a threefold increase in damages would severely affect [defendant's] financial condition”), vacated and remanded for clarification of damage amount, 807 F.2d 1567 (Fed. Cir. 1986).

210. 203 F.2d 177 (1st Cir. 1953).

went so far as to increase damages based on the defendant's conduct after the suit was initiated and during the trial.²¹¹ Other factors courts have used to increase or limit treble damages include remedial actions by the defendant,²¹² "closeness" of the case,²¹³ and duration and timing of the defendant's infringement.²¹⁴

These cases illustrate that even if enhanced damages due to willfulness are to drown under the weight of *Iqbal*'s pleading standard and *Seagate*'s objective-recklessness framework, enhanced damages as a whole do not necessarily have to meet a similar fate. Rather, the Federal Circuit can adopt other indicia of bad faith that may be more easily pled to overcome *Iqbal*'s plausibility standard or that may be self-revealing during litigation. Furthermore, as illustrated in some of the above cases, the Federal Circuit can choose to broaden the criteria for awarding treble damages beyond bad faith. Because 35 U.S.C. § 284 provides no guidance to courts on when to increase damages,²¹⁵ a defendant's characteristics alone can establish grounds for awarding a plaintiff enhanced damages (e.g., a large corporate defendant being sued by a small independent inventor).

V. CONCLUSION

Under the Supreme Court's instruction in *Ashcroft v. Iqbal*, the path to treble damages due to willfulness in patent infringement cases will undoubtedly be steeper—and more expensive—for patentees. This is because access to defendants' documents and indicia of objective

211. *Id.* at 183 (enhancing damages based on the defendant's attempt to conceal the wrongdoing, and noting that "the defendant had failed to preserve its records and had failed to cooperate as it should at the trial of the issue of damages").

212. *Intra Corp. v. Hamar Laser Instruments, Inc.*, 662 F. Supp. 1420, 1439 (E.D. Mich. 1987) (limiting the enhanced damages based on the defendant's remedial conduct, and acknowledging that the defendant "voluntarily ceased manufacture and sale of infringing systems during the pendency of this litigation"), *aff'd*, 862 F.2d 320 (Fed. Cir. 1988).

213. *Modine Mfg. Co. v. Allen Grp., Inc.*, 917 F.2d 538, 543 (Fed. Cir. 1990) (weighing the "closeness of the case" in its decision to allocate litigation burdens among the parties) (citing *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 201 (Fed. Cir. 1986)); *Crucible, Inc. v. Stora Kopparbergs Bergslags AB*, 701 F. Supp. 1157, 1164 (W.D. Pa. 1988) ("[B]ecause the court still considers the question [of infringement] to be a close one; . . . the court concludes that double, and not treble damages are appropriate.").

214. *Bott*, 1985 WL 6071, at *19 (increasing damages by twenty percent for sales made while liability was under appeal and doubling damages for sales made after the appellate court affirmed the finding of liability).

215. 35 U.S.C. § 284 (2006) ("[T]he court may increase the damages up to three times the amount found or assessed."); *see supra* notes 71, 201 and accompanying text (noting how the damages provision is devoid of any instruction on when to award enhanced damages).

recklessness will not be attainable without sufficiently pleading facts that demonstrate a plausible showing of willful conduct. Because patent infringement is a strict-liability offense, the judge or jury will be able to determine whether the defendant is liable for compensatory damages by merely comparing the plaintiff's patent claims with the defendant's allegedly infringing article.²¹⁶ The scope of discovery, then, will be limited to matters related only to direct infringement. Thus, under the Court's new plausibility regime for Rule 8 pleadings, patentees must do more than merely plead the bare elements of willful infringement to "nudge" willfulness allegations "across the line from conceivable to plausible"²¹⁷ and open further the doors of discovery.

When assessing the validity of willfulness allegations, district courts and the Federal Circuit should construe the pleadings in accordance with Federal Rule 8(e) so as to promote justice for the plaintiff while steadfastly requiring the complaint to "contain sufficient factual matter" beyond a mere "[t]hreadbare recital[] of the elements of [the] cause of action."²¹⁸ Moreover, the Federal Circuit should consider expounding the criteria for awarding treble damages, which has traditionally been narrowly limited to bad faith, to other indicia that may justify larger damage awards. Adhering to these principles, the Federal Circuit can ensure that discovery will be limited to only those indicia of recklessness which pass muster under the Supreme Court's heightened plausibility standard while still adequately compensating plaintiffs in patent infringement cases.

216. See *supra* Section II.C.1 (explaining the strict-liability nature of patent infringement).

217. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (internal quotation marks omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

218. *Id.* at 1949.

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