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A Trial Judge's Thoughts On Jury Selection

"I was juror No. 11 and the foreperson. I wanted to take a moment to say how I was impressed with your performance as a judge and the professionalism of the attorneys. This was my first call to jury service. I must admit that I went to my first call for service with dread, anxiety and trepidation. I expected to be subjected to a balding, tyrannical and humorless judge (stereotypical I know, but true). I thought I would have to wait around the courtroom for hours and be subjected to endless, intrusive and irrelevant questions by the court and attorneys. Instead, I was pleasantly surprised to find you as the judge, and the attorneys to be thorough and respectful of our time.

"...Throughout the jury selection process, I felt the court and the attorneys were truly attempting to find jurors who could be fair and impartial. I like that you kept reminding all of the potential jurors that you not only wanted

fair and impartial jurors, but you wanted jurors who were the right fit. In others words you wanted jurors who could be comfortable with the facts of the case and

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Hon. Teri L. Jackson

Notice Any Changes In Rule 8 Lately?

A *sbcroft v. Iqbal*, 129 S. Ct. 1377 (2009), went largely unnoticed when it was issued, being viewed initially as either a "tag-along" decision to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a "one-off" opinion refusing to allow claims against the Attorney General and the head of the Federal Bureau of Investigation arising out of the detention of Arab Muslims in the aftermath of 9/11, or both. In the months since *Iqbal* issued, however, some have called it "the most consequential decision" of the most recent Term (A. Liptak, *From Case About 9/11, Broad Shift of Civil Suits*, The New York Times, July 21, 2009 at A10 ("NYT")), and "the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts." *Id.* (quoting Thomas C. Goldstein). The wisdom and implications of *Iqbal* remain very much in question, and this article briefly examines both.



Ragesh Tangri

The Court's Opinion in *Iqbal*

Iqbal built upon *Twombly*, which had interred the oft-quoted statement 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" (*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), and instead required a plaintiff to plead sufficient facts to show that its claim was "plausible." Drawing on existing case law, *Twombly* noted that although factual allegations were presumed to be true, legal conclusions must be disregarded, and held that an allegation that competitors had agreed to act together to prevent competitive entry into, and not compete with each other in, a market was a "legal

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conclusion” to be disregarded.

Javaid Iqbal was a Muslim detained in the wake of 9/11, identified as a “high-interest” detainee, and placed in the “ADMAX SHU” of the Metropolitan Detention Center in Brooklyn, NY. After being charged with, convicted of, and serving a sentence for fraud in connection with his immigration papers, he was removed to Pakistan and then sued various federal officials, including FBI Director Robert Mueller and Attorney General John Ashcroft, in a *Bivens* action alleging that his designation as a “high-interest” detainee and subsequent brutal mistreatment in the ADMAX SHU were carried out because of his religion, race, and national origin. 129 S. Ct. at 1943-44.

The Supreme Court’s opinion concerned only the motion to dismiss brought by Mueller and Ashcroft, which had argued that the allegations against those two men were insufficient in light of *Twombly*. Iqbal’s complaint alleged that Mueller and Ashcroft “knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to the conditions of his confinement “solely on account of [his] religion, race, and/or national origin,” that Ashcroft was the “principal architect” of the policy, and that Mueller was “instrumental” in adopting it and carrying it out. The Court found that because those allegations tracked the elements of a constitutional discrimination claim, they were “conclusory” and, therefore, not allegations that the district court was required to accept as true. *Id.* at 1951.

The Court went on to consider what it acknowledged to be factual allegations: that “the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men...as part of its investigation of the events of September 11” and that “the policy [in question] was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001.” The Court found that those allegations, although consistent with the claim that defendants took actions against plaintiff “because of [his] race, religion, or national origin,” did not “plausibly establish” that conclusion, in light of what the Court decided were “more likely explanations,” *viz.* that efforts to prevent another attack in the wake of 9/11 “would produce a disparate, incidental impact on Arab Muslims” because the 9/11 hijackers had been Arab Muslims and because Al Qaeda was an Islamic group headed by another Arab Muslim. At bottom, the Court concluded, the complaint did not allege facts “sufficient to plausibly suggest petitioners’ discriminatory state of mind.” *Id.* at 1951-52.

The Court also rejected three specific arguments made by Iqbal. *First*, the Court held that *Twombly* applied to “all civil actions,” not just antitrust actions, because it was based entirely on an interpretation of Rule 8. *Id.* at 1953. *Second*, the Court held although *Twombly* had invoked the discovery burdens typically imposed by sprawling antitrust litigation as a justification for its holding, the question of whether the discovery burdens of a particular case could be cabined and minimized did not serve to

alter the pleading standard in any particular case. *Id.* *Third*, the Court rejected an argument based on the distinction between Rule 8 and Rule 9 (which requires the circumstances constituting fraud or mistake to be pleaded with particularity, but makes clear that malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally), concluding that the “pleaded generally” standard of Rule 9 does not limit how much detail is required to be pleaded under Rule 8. *Id.* at 1954.

The Importance of *Iqbal*

Disregarding Conclusory Allegations – Not Just Legal Conclusions — Where *Twombly* had spoken of disregarding “legal conclusions” (550 U.S. at 564), *Iqbal* confirms that it is really any conclusion or “conclusory statement” that is to be disregarded. And a review of the allegations that were disregarded in both *Twombly* and *Iqbal* suggests that a “conclusion” may sometimes include issues that in other contexts are treated as matters of fact. For example, in *Twombly* itself, the Court disregarded the core allegation that defendants there had entered into an “agreement.” 550 U.S. at 551. In other contexts, the question whether parties entered into an agreement is a question of fact, to be submitted to a jury. *See, e.g.*, CACI 302 (Contract Formation — Essential Factual Elements). Similarly, in *Iqbal*, the allegations the Court disregarded as “conclusory” were that Ashcroft and Mueller adopted policies for a particular reason, that one was the “principal architect” of the policy, and that the other was “instrumental” in carrying it out. 129 S. Ct. at 1951. Both points — the reasons for adopting or enforcing a policy, and the role of individuals in doing so — might typically be thought of as factual issues.

Consider for a moment how the *Iqbal* ban on conclusory allegations — even conclusory allegations about matters of fact — might be applied to a typical complaint for patent infringement, which might read:

- On August 1, 2009, United States Letters Patent No. 7,890,123 were issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant’s infringing acts and still owns the patent.

- The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

Although the matters alleged are factual, could a defendant argue that the allegations are “nothing more than a formulaic recitation of the elements” of a claim for patent infringement, and that “[a]s such, the allegations are conclusory and not entitled to be assumed true”? *Iqbal*, 129 S. Ct. at 1951, *quoting Twombly*, 550 U.S. at 555. If so, the allegations would be disregarded, and the pleading ruled insufficient. But even were the court to *consider* the allegations, how should it evaluate them? Could it not decide that although the allegations were “consistent with” an ultimate finding that defendant’s motor infringed plaintiff’s patent, there were and for years had been — in the court’s

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“experience” — many electric motors which did not infringe the plaintiff’s patent? And could the court’s “common sense” therefore lead it to conclude that although infringement was “possible” on the facts alleged, the plaintiff had not “shown” that it was “plausible,” and therefore the complaint should be dismissed on defendant’s 12(b)(6) motion? *Iqbal*, 129 S. Ct. at 1950, quoting *Twombly*, 550 U.S. at 556. (Presumably it would come as no comfort to the plaintiff that he had taken his allegations of infringement verbatim from FRCP Form 18.)

The “Plausibility” Standard - At Least as Likely as Any Other Explanation? — *Twombly* was careful to speak in terms of whether a plaintiff pled enough facts to nudge a claim from “conceivable to plausible” (550 U.S. at 570) and to assert, at least, that it was not imposing a “probability” requirement (*id.* at 556) — though its holding could lead one to question that characterization. *Iqbal* was more direct in acknowledging that the allegations in both that case and *Twombly* were “consistent with” unlawful conduct (129 S. Ct. at 1950-51), but that merely alleging things “consistent with” unlawful conduct was not enough to establish “plausibility” if a court could posit “more likely” explanations. *Id.* From that it seems fair to conclude that “plausible” means “facts showing that unlawful conduct is no less likely than lawful conduct,” or, put another way, that the inference of unlawful conduct that arises from the facts pled must be at least as strong as any competing inference of lawful conduct.

If that is what the Court intended, then it is worth pausing to consider the import of the Private Securities Litigation Reform Act (PSLRA), as interpreted by the Court in *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308 (2007). There, the Court considered what was meant by Section 21D(b)(2) of the PSLRA, which provides that, in securities fraud actions brought by private parties, a plaintiff must allege with particularity the facts constituting the alleged violation, but also must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” *Tellabs*, 551 U.S. at 314. Interpreting that provision, the Court held that “[t]o qualify as ‘strong’...an inference must be more than merely plausible or reasonable — it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent.” *Id.*

It could be viewed as troubling if the same pleading standard imposed under a statute specially passed to create a heightened standard applicable to certain claims became, through judicial interpretation of Rule 8, the basic pleading standard governing every claim.

Pleadings Facts About Defendant’s State of Mind — Perhaps the most striking feature of *Iqbal* is that it makes clear that the Court’s new gloss on Rule 8 applies to allegations made about a defendant’s state of mind. As noted, the Court considered and rejected the argument that its interpretation of Rule 8 was inconsistent with Rule 9, which allows state of mind to be pleaded “generally” in

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Determining Monetary Relief in Patent Litigation

Companies that generate revenue through patent enforcement, but do not manufacture or sell any products of their own, are the source of a great deal of controversy. Although a variety of terms are used to describe these entities (e.g., aggressive patent assertors, patent aggregators, patent speculators, patent trolls, patent licensing and enforcement companies, etc.) and their business models and enforcement strategies vary, they all have one thing in common: they do not practice the patents that they enforce. To avoid the implicit judgment in some of these terms, they are referred to herein as non-practicing entities (“NPEs”).

Case law attempts to balance the rights of a patent holder with the economic hardship that a defendant may face upon a judgment of infringement. This article discusses unique economic considerations in determining pre- and post-trial damages, as well as awarding injunctive relief, in matters involving NPEs. (The views expressed herein are the author’s alone; the author is a CPA, not a lawyer, and this article should not be construed as legal advice.)



Jim Pampinella

Traditional Damages Remedies in Patent Matters

Two primary forms of damages are available to a patent holder: lost profits and/or a reasonable royalty. Cases such as *Panduit Corp. v. Stablin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978), provide guidance on the elements that a patentee should establish in order to use a lost profits approach. Because NPEs, by definition, do not manufacture or sell products, they are unable to demonstrate that they possessed the sales/marketing capability and manufacturing capacity to meet market demand. Therefore, consistent with 35 U.S.C. § 284 of the patent statute, NPEs are entitled only to damages “adequate to compensate” for infringement, i.e., a “reasonable royalty.”

Cases such as *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc.*, 318 F.Supp. 1116 (S.D.N.Y. 1970), prescribe 15 factors that should be considered in determining a reasonable royalty. These 15 factors can be lumped into the following four general categories: (a) licensing/scope of the agreement (Factors 1, 2, 3, 4 and 7); (b) profitability/business considerations (Factors 5, 6, 8, 12 and 13); (c) technical/benefits of the claimed invention (Factors 9, 10 and 11); and (d) overall opinions of experts (Factors 14 and 15).

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each form of intellectual property may need to be accounted for in order to provide the licensee with a reasonable profit on the subject product(s). The confluence of patent exhaustion, the EMV rule and royalty stacking are issues that patent counsel and damages experts should jointly consider.

There are a variety of unique considerations in determining damages, injunctive relief and compulsory licensing terms in matters involving NPEs. Although case law and the proposed Patent Reform Act of 2009 may attempt to better define the playing field in this area, as unique developments occur — such as the emergence of NPEs — the legal landscape and its impact on determining patent damages will continue to evolve. In litigation involving NPEs, the ultimate goal is generally to place the parties in the financial position that they would have been if they had executed a license agreement. Towards this end, a damages expert may need to be mindful of industry practice and ensure that the correct sales base (i.e., the appropriate product in the sales channel) is used to determine a reasonable royalty.

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claims alleging fraud or mistake, concluding that the word “generally” in the second portion of Rule 9(b) did not prevent it from imposing whatever standard it concluded appropriate under Rule 8. The Court did not appear to address, however, the objection that what it was requiring under Rule 8 — the setting forth of enough specific, underlying, particularized facts (as opposed to “conclusory” factual statements) to make an allegation about defendant’s state of mind “plausible” — could be seen as rather close to what is required under the first portion of Rule 9(b), viz. that “a party must state with particularity the circumstances constituting fraud or mistake” (especially in light of *Tellabs*), and that the familiar maxim of *expressio unius* might therefore militate against its conclusion.

Taking the conclusion as a given, though, suggests something about the potential impact of *Iqbal* in patent cases. It has long been established that Rule 9(b) applies to pleading an inequitable conduct defense in patent cases. See, e.g., *Xilinx v. Altera*, 1994 WL 782236 (N.D. Cal. Feb. 8, 1994). Inequitable conduct requires a showing that a material reference was withheld, and withheld with the intent to deceive the USPTO. *Praxair v. ATMI*, 543 F.3d 1306, 1313-14 (Fed. Cir. 2008). The withholding of a material reference alone may not give rise to an infer-

ence of intent to deceive, but a showing of a high degree of materiality, coupled with the absence of an explanation from the patentee, may give rise to such an inference. *Id.* Pleading facts sufficient to make a “plausible” allegation about a patentee’s intent to deceive could prove challenging under *Iqbal*. Cf. *Exergen Corp. v. Wal-Mart Stores, Inc.*, 2009 WL 2366535, *15 (Fed. Cir. Aug. 4, 2009) (pleading alleging inequitable conduct must contain facts showing that specific individual knew of material information and deliberately withheld it from PTO). On the other side of the coin, pleading facts sufficient to make a “plausible” allegation that a defendant’s infringement was willful could prove equally challenging.

Why (and Whither) *Iqbal*?

All of this raises the question of why the Court decided *Iqbal* as it did. One obvious speculation is that the underlying facts of *Iqbal* made it a “hard case” — that the understandable desire to shield Ashcroft, Mueller, and future high government officials from intrusive and disruptive civil suits perhaps factored into the decision. At least one fact cuts against that speculation: the Court previously had left open, in *Leatherman v. Tarrant County*, 507 U.S. 163 (1993), the possibility that the substantive doctrine of qualified immunity would require a heightened pleading standard in cases brought against individual government officials (*id.* at 166-167), and Judge Cabranes, writing separately in the Second Circuit’s opinion in *Iqbal*, had invoked just such a possibility. 129 S. Ct. at 1945. The Court nevertheless declined Judge Cabranes’ (and its own earlier) invitation, and articulated a general standard under Rule 8.

Another possibility is that Rule 8 is the new Rule 11. It is possible to view both *Twombly* and *Iqbal* as asking the question “Could plaintiff get to the jury based only on the facts alleged?” — and answering that question “no” in both cases. In the world according to *Conley*, that is the wrong question: it would be proper to allege, albeit in conclusory fashion, that the competitors *had agreed*, or that *Iqbal* was *targeted because of his religion and ethnicity* — the facts required to get to the jury could come along later. A robust (i.e., pre-amendment) version of Rule 11, however, might require plaintiff’s counsel to have such facts in her possession — or at least to have a fairly concrete reason to think certain, particularized facts existed, which discovery would bring to her in evidentiary form. But with Rule 11 weakened and in disfavor, the Court may simply have concluded that making the “conclusory” allegation has become too easy, and deterring the improper making of it too uncertain. *Iqbal* and *Twombly* can be viewed as giving courts the enhanced gatekeeping role that Rule 11 once might have provided, without presenting the issues in the difficult context of a sanctions motion.

At all events, by one account *Iqbal* already has been cited over 500 times by the lower federal courts. *NYT* at A10. It has also been targeted for legislative reversal. On July 22, 2009, Senator Arlen Specter introduced a

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bill to enact the “Notice Pleading Restoration Act of 2009.” If enacted, it would require the federal courts “not to dismiss a complaint under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*” (unless a specific statute or a subsequent amendment to the federal rules provided otherwise). Stay tuned.

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Trial Judge’s Thoughts On Jury Selection

would not allow their biases or emotions to interfere with their ultimate decision. Throughout the process I did a lot of soul-searching to make sure that I could be fair, impartial and the right fit.

“I appreciated that our time as jurors was not wasted. I might add that the way the court and the attorneys conducted the selection process made me and most of the other potential jurors eager to serve.

“...Thank you and the attorneys for making my first jury experience a positive one. I sincerely hope to see you again one day...but there is no rush.”

This was a letter written by a former juror in an emotionally difficult and complex trial that lasted over five weeks. Because of this juror’s positive experience, I am confident that he will serve again and possibly encourage others to serve in the future. Both the court and the parties have the basic goals of selecting jurors who can be fair, impartial and the right fit for a case. The court’s definition of the right fit may differ from the parties’ definition. For instance, the court’s definition may mean that the jurors will not allow emotions or biases to interfere with their duties. In other words, they will be comfortable with the facts of the case and be able to reach a verdict objectively. The attorneys’ definition of the right fit may mean that they want jurors to render a verdict favorable to their clients. These definitions are not necessarily in conflict with one another in the jury selection process. In fact, it should be the goal of the court and the litigants to allay the fears, dreads, anxieties and trepidations of potential jurors in order to select individuals who can be fair, impartial and the right fit.

Voir Dire and Jury Questionnaires

The overall goal of the *voir dire* process is to ensure a panel of impartial and indifferent jurors. *People v. Chaney*, 234 Cal.App. 3d 853 (1991). The right to *voir dire* a jury is not a constitutional right, but is merely a means to achieve an impartial verdict. *Voir dire* is usually

performed in open court, by asking potential jurors a series of questions. It can be conducted by the court, and/or the parties. The Code of Civil Procedure provides for *voir dire* in civil cases, and states that “the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case.” Code Civ. Proc. § 222.5. The trial judge is authorized to put reasonable limits on *voir dire*, based on, among other criteria, “any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.” *Id.* “Specific and unreasonable or arbitrary time limits shall not be imposed.” *Id.* In addition, in California state court (unlike the practice in many federal courts) prior submission of *voir dire* questions is not required unless counsel engages in improper questioning. Improper questioning is “any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law.” *Id.*

It is not uncommon today that attorneys request the use of jury questionnaires. The Code of Civil Procedure provides for use of questionnaires to assist in the *voir dire* process. See Code Civ. Proc. § 205(d); see also Code Civ. Proc. § 222.5 (in civil cases, “[a] court should not arbitrarily or unreasonable refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel.”).

I find written questionnaires to be extremely useful in dealing with sensitive or discrete issues about which a prospective juror might not be as forthcoming in open court, with a room full of strangers. Over the years I have allowed the use of written questionnaires. However, I have seen some problems with the practice. For instance, I have sometimes been presented with 15- to 24-page jury questionnaires. I have found that the last things prospective jurors want to be greeted with on the first day of trial are long and cumbersome jury questionnaires to complete. I have actually seen a juror write the following:

“Filling out this questionnaire reminds me of a loan application. Where I am assured that I will be denied then I will have to serve!!!”

Further, jurors have responded to questions regarding favorite sports, last book read, and political affiliations by answering, “None of your business.” I appreciate that these questions might have some relevance to issues involved in the case, but jurors sometimes find these questions intrusive and overwhelming. The longer the questionnaire, the more likely that the prospective juror may write anything just to finish it.

Therefore, I encourage and instruct attorneys to keep the jury questionnaires simple and relevant to the issues surrounding the case. The questionnaire should never take the place of actual questioning of prospective jurors in the courtroom. Attorneys need to see and hear from

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