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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 AFL Telecommunications LLC,
10 Plaintiff,
11 vs.
12 Fiberoptic Hardware, LLC,
13 Defendant.

No. CV11-1081-PHX-DGC

ORDER

14
15 Plaintiff and Counterdefendant AFL Telecommunications LLC (“AFL”) moves to
16 dismiss the second counterclaim by Defendant and Counterclaimant Fiberoptic
17 Hardware, LLC (“FOH”) pursuant to Fed. R. Civ. P. 12(b)(6). Doc. 38. FOH opposes
18 the motion and, in the alternative, requests leave to amend the second counterclaim.
19 Doc. 41. The motion is fully briefed. Docs. 38, 41, 43. The parties do not request oral
20 argument. For the reasons below, the Court will grant AFL’s motion to dismiss and grant
21 FOH leave to amend.

22 When analyzing a claim under Rule 12(b)(6), the well-pled factual allegations
23 “are taken as true and construed in the light most favorable to the nonmoving party.”
24 *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) (citation omitted). Legal
25 conclusions couched as factual allegations “are not entitled to the assumption of truth,”
26 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), and therefore “are insufficient to defeat
27 a motion to dismiss for failure to state a claim.” *In re Cutera Sec. Litig.*, 610 F.3d 1103,
28 1108 (9th Cir. 2010) (citation omitted). To avoid a Rule 12(b)(6) dismissal, the claim

1 must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
2 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Dismissal is appropriate where the claim
3 lacks a cognizable legal theory, lacks sufficient facts alleged under a cognizable legal
4 theory, or contains allegations disclosing some absolute defense or bar to recovery. *See*
5 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988); *Weisbuch v.*
6 *County of L.A.*, 119 F.3d 778, 783, n.1 (9th Cir. 1997).

7 In its second counterclaim, FOH seeks a declaratory judgment that the Fujikura
8 trademarks at issue are invalid. Doc. 33, at 9-10. Under the Declaratory Judgment Act,
9 28 U.S.C. § 2201, “the question in each case is whether the facts alleged, under all the
10 circumstances, show that there is a substantial controversy, between parties having
11 adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a
12 declaratory judgment.” *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273
13 (1941). In its opposition to the motion to dismiss, FOH cites this standard and concludes
14 that “[t]he answer to each of those questions is yes. AFL has sued FOH for trademark
15 infringement and FOH is entitled to a declaratory judgment describing its rights. That is
16 all FOH has to show in order to survive a motion to dismiss its claim for declaratory
17 relief.” Doc. 41, at 1-2. The Court disagrees. FOH has not alleged any facts that meet
18 the required showing. FOH makes only these assertions in its second counterclaim for
19 declaratory judgment:

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21 8. A real and actual controversy exists between Counter-Plaintiff FOH
22 and Counter-Defendant AFL as to whether FOH is infringing valid
23 trademarks of AFL. The controversy warrants declaratory relief.

24 9. The Fujikura marks at issue (U.S. Reg. no 2,332,588 and U.S. Reg.
25 No. 3,774,956 are invalid and subject to cancellation.

26 10. Pursuant to 15 U.S.C. § 1119, FOH seeks a declaration that the
27 Fujikura marks at issue are invalid.
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1 Doc. 33, at 9-10. These assertions are the type of “threadbare recitals of a cause of
2 action’s elements, supported by mere conclusory statements,” that the Supreme Court
3 held insufficient to survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949.

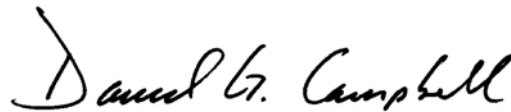
4 FOH’s second counterclaim also fails to advance a legal theory for the relief it
5 seeks. In its opposition to the motion to dismiss, FOH suggests that “[l]egal theories . . .
6 include, among others, laches/acquiescence or that the Fujikura mark has become
7 generic.” Doc. 41, at 2-3. FOH also claims that, “[b]ecause of the extensive briefing
8 already submitted in this case, and FOH’s counter-claims themselves, AFL is on notice of
9 FOH’s claims.” Doc. 41, at 2. The Court, however, may not assume that the plaintiff can
10 prove facts different from those alleged in the claim itself. *See Associated Gen.
11 Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

12 FOH requests leave to amend the second counterclaim in the event that AFL’s
13 motion to dismiss is granted. Doc. 41, at 4. AFL does not oppose this request. The
14 Court will grant FOH leave to amend pursuant to Fed. R. Civ. P. 15(a)(2).

15 **IT IS ORDERED:**

- 16 1. Plaintiff/Counterdefendant’s motion to dismiss (Doc. 38) is **granted**.
17 2. Defendant/Counterclaimant’s request to amend (Doc. 41) is **granted**.
18 Defendant/Counterclaimant shall file an amended second counterclaim by
19 **December 16, 2011**.

20 Dated this 1st day of December, 2011.

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25 David G. Campbell
26 United States District Judge
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