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13 Attorneys for Plaintiff IconFind, Inc.

14 IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

15 ICONFIND, INC.,

16 Plaintiff,

17 v.

18 GOOGLE INC.,

19 Defendant.

Case No. 2:11-cv-00319-GEB-JFM

**PLAINTIFF ICONFIND, INC.'S  
MEMORANDUM IN SUPPORT OF ITS  
MOTION TO DISMISS PURSUANT TO  
FRCP 12(B)(6) AND MOTION TO  
STRIKE PURSUANT TO FRCP 12(F)**

**DATE: MAY 2, 2011  
TIME: 9:00 A.M.  
PLACE: COURTROOM 10  
JUDGE GARLAND E. BURRELL, JR.**

22 Plaintiff IconFind, Inc. ("IconFind") respectfully moves to dismiss the counterclaim  
23 purporting to allege invalidity of the patent-in-suit by Defendant Google Inc. ("Google") under  
24 Rule 12(b)(6). IconFind also moves to strike Google's corresponding affirmative defense of  
25 invalidity pursuant to Rule 12(f). Because Google has failed to specify adequate grounds or  
26

1 supporting facts that could possibly support a finding that IconFind’s patent is invalid, Google’s  
2 invalidity counterclaim (Count Two) and corresponding affirmative defense (Second Defense)  
3 fail to state claims on which relief can be granted and must be dismissed as a matter of law.

4 The patent invalidity allegations by Google nakedly assert that the IconFind patent is  
5 invalid under any of Sections 101, 102, 103 and 112 of the Patent Act. As a threshold matter,  
6 merely citing a list of statutes – without more – is not a counterclaim. But Google has taken  
7 inadequate pleading to yet another level as it vaguely asserts that the IconFind patent is invalid or  
8 unenforceable for failure to satisfy “*one or more conditions of patentability set forth in Title 35*  
9 *of the United States Code, including, but not limited to 35 U.S.C. §§ 101, 102, 103 and 112.*”  
10 (Def’s Countercl., Dkt. No. 18, ¶ 11, Exhibit A). These conclusory allegations fail to identify  
11 which of the numerous statutory subsections under which they are brought, and are wholly  
12 devoid of factual support. Google’s Second Defense replicates the language of its counterclaim  
13 Count Two, and is likewise deficient. (Def’s Answer, Dkt. No. 18, ¶ 14, Exhibit A). As such,  
14 these allegations do not state a claim that is plausible on its face, and cannot withstand scrutiny  
15 under the Supreme Court’s Twombly and Iqbal decisions. On that basis, numerous courts in this  
16 Circuit have dismissed similarly deficient counterclaims and affirmative defenses.

17 Accordingly, and as set forth in further detail below, IconFind respectfully requests that  
18 the Court grant its motion to dismiss Google’s counterclaim of patent invalidity (Count Two)  
19 pursuant to Rule 12(b)(6) and grant its motion to strike Google’s affirmative defense of invalidity  
20 (Second Defense) pursuant to Rule 12(f).

21 **I. BACKGROUND**

22 On February 3, 2011, IconFind filed this suit in the United States District Court for the  
23 Eastern District of California for infringement of its United States Patent No. 7,181,459 B2.

1 Google has known about this patent for years. In January 2009, IconFind provided notice to  
2 Google that the '459 patent covered Google's operation of its website functionality. Nonetheless,  
3 Google has continued its infringement with disregard for the '459 patent. Google and its patent  
4 attorneys also were aware of the '459 patent as evidenced by the prosecution of Google's own  
5 U.S. Patent Nos. 7,664,734, 7,693,825 and 7,788,274.

6 The pleading deficiencies of Google's counterclaim are striking, particularly given  
7 Google's familiarity with the patent, and that Google sought (and IconFind agreed to) an  
8 extension of time to answer the complaint. Thus, Google has had ample opportunity to prepare  
9 and adequately set forth the basis for its invalidity claim and affirmative defense. Its complete  
10 failure to do so requires dismissal of its counterclaim and affirmative defense.

## 11 **II. APPLICABLE LAW**

### 12 **A. Rule 8 and Rule 12(b)(6)**

13 “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain ‘a short and  
14 plain statement of the claim showing that the pleader is entitled to relief.’” Ashcroft v. Iqbal,  
15 129 S. Ct. 1937, 1949 (2009) (quoting Fed.R.Civ.P. 8(a)(2)). “A pleading that offers ‘labels’ and  
16 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Id.  
17 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). “Nor does a complaint  
18 suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” Id.

19 "A Rule 12(b)(6) dismissal motion tests the legal sufficiency of the claims alleged in the  
20 complaint." McMaster v. United States, 2010 U.S. Dist. LEXIS 99831, at \*2 (E.D. Cal. Sept. 9,  
21 2010) (Burrell, J.); Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). In deciding such a  
22 motion, all material allegations of the complaint are accepted as true. Id. “To survive a motion  
23 to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim  
24

1 to relief that is plausible on its face.” Iqbal, 129 S. Ct. at 1949 (citations omitted). The  
2 Supreme Court in Iqbal explained that:

3 [a] claim has facial plausibility when the plaintiff pleads factual content that  
4 allows the court to draw the reasonable inference that the defendant is liable for  
5 the misconduct alleged. ... The plausibility standard is not akin to a "probability  
6 requirement," but it asks for more than a sheer possibility that a defendant has  
acted unlawfully. ... Where a complaint pleads facts that are "merely consistent  
with" a defendant's liability, it "stops short of the line between possibility and  
plausibility of 'entitlement to relief.'"

7 Id. The Iqbal Court further explained that its decision in Twombly was based on two underlying  
8 principles. Id. “First, the tenet that a court must accept as true all of the allegations contained in  
9 a complaint is inapplicable to legal conclusions. *Threadbare recitals of the elements of the*  
10 *cause of action, supported by mere conclusory statements, do not suffice.*” Id. (emphasis  
11 added). “Second, only a complaint that states a plausible claim for relief survives a motion to  
12 dismiss. ... Determining whether a complaint states a plausible claim for relief will ... be a  
13 context-specific task that requires the reviewing court to draw on its judicial experience and  
14 common sense.” Iqbal, 129 S. Ct. at 1950; See Tech. Licensing Corp. v. Technicolor USA, Inc.,  
15 2010 U.S. Dist. LEXIS 113292, at \*5-6 (E.D. Cal. Oct. 15, 2010) (Shubb, J.).

## 16 **B. Rule 12(f)**

17 Under Rule 12(f), “[t]he court may strike from a pleading an insufficient defense or any  
18 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The purpose  
19 of the rule is to avoid the costs that accompany litigating spurious issues by dispensing with  
20 those issues prior to trial.” J & J Sports Prods. v. Delgado, 2011 U.S. Dist. LEXIS 9013, at \*3-4  
21 (E.D. Cal. Jan. 18, 2011) (Shubb, J.). Though a motion to strike is generally viewed with  
22 disfavor, it may be appropriate where allegations “may cause prejudice to one of the parties.”  
23 Ramos Oil Recyclers, Inc. v. AWIM, Inc., 2007 U.S. Dist. LEXIS 62608, at \*3 (E.D. Cal. Aug.

1 15, 2007) (Burrell, J.). “A defense may be struck if it fails to provide ‘fair notice’ of the basis  
2 for the defense.” Qarbon.com v. eHelp Corp., 315 F. Supp. 2d 1046, 1051 (N.D. Cal. 2004)  
3 (Ware, J.) (granting motion to strike affirmative defenses for patent invalidity for “failure to  
4 provide ‘fair notice’ of what the defense is and the grounds upon it rests”), (citing Advanced  
5 Cardiovascular Sys. v. Scimed Sys., 1996 U.S. Dist. LEXIS 11700, at \*9-10 (N.D. Cal. July 24,  
6 1996) (granting motion to strike affirmative defenses of patent invalidity)). In fact, in this  
7 Circuit, the “key to determining the sufficiency of pleading an affirmative defense is whether it  
8 gives plaintiff fair notice of the defense.” Ramos Oil Recyclers, Inc., 2007 U.S. Dist. LEXIS  
9 62608, at \*3, (citing Wyshak v. City National Bank, 607 F.2d 824, 827 (9th Cir. 1979)).

10 **III. GOOGLE'S ONE-SENTENCE COUNTERCLAIM ALLEGING PATENT**  
11 **INVALIDITY UNDER "ONE OR MORE" CONDITIONS OF**  
12 **PATENTABILITY IN TITLE 35 INCLUDING SECTIONS 101, 102, 103**  
13 **AND 112 IS INSUFFICIENT AS A MATTER OF LAW**

14 A claim for declaratory judgment of invalidity that wholly fails to specify the grounds for  
15 invalidity is insufficient as it does not provide fair notice of the party's claims. PB Farradyne,  
16 Inc. v. Peterson, 2006 U.S. Dist. LEXIS 3408, at \*8-10 (N.D. Cal., Jan. 17, 2006). In  
17 Qarbon.com, the court dismissed a counterclaim for invalidity which was indistinguishable to the  
18 counterclaim in this case, finding it “radically insufficient.” In assessing the counterclaim, the  
19 Qarbon.com court stated:

20 eHelp alleges that "*the '441 patent is invalid and void under the provisions of*  
21 *Title 35, United States Code §§ 100 et seq., and specifically, §§ 101, 102, 103,*  
22 *and/or 112 ....*" Counterclaim P6. Such a pleading is "*radically insufficient.*" ...  
23 By making general allegations, eHelp fails to give "fair notice" to Qarbon.  
24 'Effective notice pleading should provide the defendant with a basis for assessing  
25 the initial strength of the plaintiff's claim, for preserving relevant evidence, for  
26 identifying any related counter- or cross-claims, and for preparing an appropriate  
answer."

1 315 F. Supp. 2d at 1050-1051 (internal citations omitted) (emphasis added). Similarly, in PB  
2 Farradyne, Inc., 2006 U.S. Dist. LEXIS 3408 , at \*8-10 (Illston, J.), the court granted a motion to  
3 dismiss counterclaims that were virtually identical to those in Qarbon.com and in this case,  
4 finding that, as pled, the counterclaims did not “provide defendants with sufficient notice of the  
5 basis for its claims.” Likewise, in Duramed Pharms., Inc. v. Watson Labs., Inc., the court  
6 dismissed a counterclaim which contained the general allegation that the claims of the patent-in-  
7 suit were “invalid because they fail to comply with one or more of the statutory requirements for  
8 patentability set forth in 35 U.S.C. §§ 101 et seq.,” stating “[plaintiff] is correct that this  
9 allegation fails to state a claim. By failing to specify which of the many grounds of patent  
10 invalidity it is relying upon, [defendant] does not put [plaintiff] on fair notice as to the basis of its  
11 counterclaim.” 2008 U.S. Dist. LEXIS 103389, at \*11 (D. Nev. Dec. 12, 2008).

12 Google's declaratory judgment counterclaim for patent invalidity provides no more detail  
13 than the “radically insufficient” claims dismissed in Qarbon.com, PB Farradyne, and Duramed.  
14 Google's conclusory allegations do not even contain the “threadbare recitals of the elements of  
15 the cause of action,” which the Supreme Court has held are insufficient. Iqbal, 129 S. Ct. at  
16 1949. Aside from incorporating its party and jurisdictional allegations, and its non-infringement  
17 counterclaim, the *entirety* of Google's counterclaim for patent invalidity is as follows:

18 11. The '459 patent is invalid for failure to satisfy one or more of the conditions  
19 of patentability set forth in Title 35 of the United States Codes, including, but not  
limited to, 35 U.S.C. §§ 101, 102, 103, and 112.

20 (Def's Countercl., Dkt. No. 18, ¶ 11, Exhibit A). Google contends that the patent-in-suit is  
21 invalid under some *unspecified* subsections of §§ 101, 102, 103, or 112 of the Patent Act. But,  
22 Google's mere listing of the patent statutes – without any facts or even any legal elements – fails  
23  
24

1 to provide any, much less “fair [ ]notice of what the ... claim is and the grounds upon which it  
2 rests.” Twombly, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

3 For example, Section 102 of the Patent Act alone provides seven (7) subsections. (35  
4 U.S.C. § 102, Exhibit B). At least five (5) of these subsections, in turn, set forth numerous  
5 independent and far-ranging grounds for invalidating a patent claim, such as prior public use,  
6 prior offer to sell, prior printed-publication, abandonment, prior patenting in a foreign country by  
7 the inventor or his or her legal representatives or assigns, prior published patent applications by  
8 others, prior issued patents by others, non-joinder of inventors, prior invention by others and the  
9 like. See 35 U.S.C. § 102(a)-(g), (35 U.S.C. § 102, Exhibit B).

10 Google fails to identify any of these grounds under Section 102 for alleged patent  
11 invalidity, fails to provide even the barest legal elements of any such ground and, worse yet, fails  
12 to provide any facts to support its one-sentence counterclaim. The same is true with respect to  
13 the passing reference by Google to Section 103, which sets forth additional bases for patent  
14 invalidity in the event that “the invention is not identically disclosed or described as set forth in  
15 section 102 ....” (35 U.S.C. § 103, Exhibit C).

16 Section 112 likewise provides numerous additional grounds for challenging a patent  
17 including, among others, written description, lack of enablement, claim indefiniteness and failure  
18 to disclose the best mode of the invention. (35 U.S.C. § 112, Exhibit D). Google does not even  
19 identify any of these bases or plead any legal elements, much less plead adequate facts to support  
20 such elements.

21 Google's open-ended listing of statutes, without more, fails to provide *any* notice to  
22 IconFind – or the Court – of the nature of its counterclaim other than that Google apparently  
23 contends that the patent-in-suit is invalid. That is no different than an antitrust plaintiff alleging,

1 without more, that the defendant is liable because it violated some unspecified sections of one of  
2 the antitrust statutes. Not only is Google's counterclaim wholly devoid of even a formulaic  
3 recitation of the elements (which itself “will not do” under Iqbal and Twombly), but it contains  
4 no factual enhancement whatsoever. Here, the Court cannot accept as true any facts in these  
5 counterclaims, as it must under a Rule 12(b)(6) analysis, because Google has alleged *no facts* at  
6 all. As such, Google's counterclaim fails to either “raise a right to relief above the speculative  
7 level” or “state a claim that is plausible on its face.” Twombly, 550 U.S. at 555, 570.

8 Even worse, Google's invalidity counterclaim includes a “catch all” allegation that the  
9 ‘459 patent is “invalid for failure to satisfy *one or more of the conditions* of patentability set  
10 forth in Title 35 of the United States Code, *including, but not limited to*, 35 U.S.C. §§ 101, 102,  
11 103, and 112.” (Def's Countercl., Dkt. No. 18, ¶ 11, Exhibit A) (emphasis added). In essence,  
12 Google contends that the patent in suit is invalid under §§ 101, 102, 103, 112, or *any other*  
13 *provision of Title 35*. However, simply citing Title 35 of the United States Code is not a valid  
14 counterclaim. See Sprint Comms. Co. v. TheGlobe.com, Inc., 233 F.R.D. 615, 619 (D. Kan.  
15 2006). In Sprint, the court assessed a similar affirmative defense and counterclaim, which both  
16 alleged that “[Defendant] is informed and believes that [the plaintiff’s patents], and each of the  
17 seven claims thereof, are invalid, void and/or unenforceable under one or more of the sections of  
18 Title 35 of the United States Code.” Id. at 618. The court struck the affirmative defense and  
19 counterclaim, finding them “fatally vague.” Id. at 619. Google's “catch-all” allegation under  
20 “one or more of the conditions of patentability set forth in Title 35 of the United States Code” is  
21 equally defective. Accordingly, Google’s attempt to preserve its ability to later assert *any*  
22 provision of Title 35 is improper.



1           Moreover, IconFind will be prejudiced by Google's inadequate pleadings. Scheduling  
2 orders and other discovery controls are meant to streamline the litigation process – not to provide  
3 litigants the opportunity to offer a vague pleading, unnecessarily expand the scope of the  
4 litigation and then rely on the expensive and time-consuming fact and expert discovery process  
5 to flush out their theories. Allowing Google to proceed with its vague invalidity pleading  
6 prejudices IconFind, as it unfairly allows Google additional time to develop its theories, and  
7 forces IconFind to use the expensive and time consuming discovery process to extract Google's  
8 theories which should have been provided in the pleading.

9           In short, if Google has viable theories of patent invalidity, it should be allowed to plead  
10 and litigate them, provided that they are well-grounded in fact and law and they provide adequate  
11 notice to IconFind and the Court of its allegations. What it should not be allowed to do is to  
12 merely speculate – without providing any notice to IconFind and to the Court – that the patent-  
13 in-suit is invalid for unspecified reasons in a pleading and then use that deficient pleading to  
14 expand the scope of the lawsuit unnecessarily.

15           For this and all of the foregoing reasons, Google's invalidity counterclaim should be  
16 dismissed.

17           **IV.    GOOGLE'S SECOND AFFIRMATIVE DEFENSE SHOULD BE**  
18           **STRICKEN FROM THE PLEADING FOR FAILING TO PROVIDE**  
19           **FAIR NOTICE OF THE DEFENSE**

20           For the reasons set forth above, Google's affirmative defense alleging patent invalidity  
21 (Second Defense) should also be dismissed. Under Rule 12(f), “[t]he court may strike from a  
22 pleading an insufficient defense.” Fed. R. Civ. P. 12(f). “Under Rule 8 of the Federal Rules of  
23 Civil Procedure, an affirmative defense must be pled with the minimal specificity to give the  
24 plaintiff ‘fair notice’ of the defense.” Advanced Cardio, 1996 U.S. Dist. LEXIS 11700, at \*9-10;

1 see also Qarbon.com, 315 F. Supp. 2d at 1049 (N.D. Cal. 2004) (striking affirmative defenses  
2 and stating, “[defendant’s] affirmative defenses fail to provide ‘fair notice’ of what the defense is  
3 and the grounds upon which it rests”). In this Circuit, the “key to determining the sufficiency of  
4 pleading an affirmative defense is whether it gives plaintiff fair notice of the defenses.” Ramos  
5 Oil Recyclers, Inc., 2007 U.S. Dist. LEXIS 62608, at \*3 (citing Wyshak, 607 F.2d at 827).

6 In Advanced Cardiovascular Sys., the court struck the defendant’s affirmative defense  
7 that the patent-in-suit was “invalid, void, and unenforceable for failure to satisfy the  
8 requirements of patentability contained in Title 35, United States Code, including but not limited  
9 to, sections 101, 102, 103 and/or 112.” Id. at 1773. In so holding the court noted that “[s]ince  
10 sections 101, 102, 103, and 112 provide numerous grounds for finding a patent invalid,  
11 defendant must provide a more specific statement of the basis for this defense in order to give  
12 [plaintiff] fair notice of the claims being asserted.” Id.

13 Similarly, the court in Sprint, following the “cogent analysis” of the PB Farradyne,  
14 Qarbon.com, and Advanced Cardiovascular Sys. line of cases struck a similar affirmative  
15 defense which stated “[defendant] is informed and believes that [plaintiff’s seven patents], and  
16 each of the seven claims thereof, are invalid, void and/or unenforceable under one or more of the  
17 sections of Title 35 of the United States Code.” 233 F.R.D. at 619. In so holding the court stated:

18 Simply examining the first affirmative defense on its face, it is immediately  
19 apparent that [defendant] has not met the minimal pleading requirements of Rule  
20 8. As [plaintiff] explains, Title 35 of the United States code includes 112 discrete  
21 sections. It is unreasonable to make [plaintiff] guess which of these sections  
22 [defendant] is relying upon to contend that [plaintiffs] patent claims are  
23 unenforceable.

24 Id. at 619.

25 In Reid-Ashman Manufacturing, Inc. v. Swanson Semiconductor Service, LLC, the court  
26 struck an affirmative defense which stated that the patent-in-suit was “invalid for failing to meet

1 one or more of the conditions for patentability specified in Title 35 of the United States Code,  
2 including but not limited to 35 U.S.C. §§ 102, 103, 112, and 132.” 2007 U.S. Dist. LEXIS  
3 37665, at \*17-18 (N.D. Cal., May 10, 2007). In striking the affirmative defense, the court noted  
4 “[e]ven under the minimal notice pleadings requirements of Fed.R.Civ.P 8(a), which requires  
5 only a ‘short statement of the claim showing that the pleader is entitled to relief,’ this allegation  
6 is insufficient because it does not provide [plaintiff] with sufficient notice of the defense being  
7 asserted.” Id.

8 As set forth by the authority above, Google's *counterclaim* for invalidity clearly does not  
9 meet the requirements of Rule 8, does not provide IconFind fair notice of Google's counterclaim  
10 and cannot withstand a Rule 12(b)(6) challenge. Likewise, Google's *corresponding affirmative*  
11 *defense* provides no more detail than those asserted in Advanced Cardiovascular Sys.,  
12 Qarbon.com, Sprint and Reid-Ashman, and states as follows:

13 14. The claims of the '459 patent are invalid and/or unenforceable for failure  
14 satisfy one or more conditions of patentability set forth in Title 35 of the United  
15 States Code, including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and 112.

15 (Def's. Answer, Dkt. No. 18, ¶ 14, Exhibit A). Google's affirmative defense merely includes  
16 labels and fails to provide fair notice of the factual grounds on which it rests and, therefore,  
17 should be stricken on those bases. Like Google's deficient counterclaim, Google's affirmative  
18 defense on patent invalidity prejudices IconFind because it unfairly allows Google additional  
19 time to develop its theories, and forces IconFind to use the expensive and time consuming  
20 discovery process to extract Google's invalidity theories which should have been pled.

## 21 **V. CONCLUSION**

22 WHEREFORE, IconFind respectfully requests that the Court grant its motion to dismiss  
23 Google's counterclaim of patent invalidity (Count Two) pursuant to Rule 12(b)(6) and grant its  
24

1 motion to strike Google's affirmative defense of patent invalidity (Second Defense) pursuant to  
2 Rule 12(f).

3 Respectfully submitted,

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21 **Attorneys for Plaintiff IconFind, Inc.**

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on April 1, 2011 the foregoing

3 **PLAINTIFF ICONFIND, INC.'S MEMORANDUM IN SUPPORT OF ITS**  
4 **MOTION TO DISMISS PURSUANT TO FRCP 12(B)(6) AND MOTION TO**  
5 **STRIKE PURSUANT TO FRCP 12(F)**

6 was filed with the Clerk of Court using the CM/ECF system, which will then send a notification  
7 of such filing to the following counsel of record.

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16 **Attorneys for Defendant Google Inc.**

17 I certify that all parties in this case are represented by counsel who are CM/ECF participants.

18 /s/ Brian E. Haan  
19 Attorney for Plaintiff