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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 16, 2011**

**TIME: 9:00 A.M.**

**PLACE: COURTROOM 10**

**JUDGE GARLAND E. BURRELL, JR.**

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

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

5 Even after filing an amended pleading, Google’s invalidity allegations fall far short of the  
6 requirements of Rule 8 and recent Supreme Court precedent. In place of Google’s blatantly  
7 insufficient “catch all” invalidity counterclaim, Google has instead added language that still does  
8 not provide to IconFind notice of the basis for Google’s invalidity allegations. (Def's First  
9 Amended Answer, Dkt. No. 27, ¶ 11-12, Exhibit A). The amended patent invalidity  
10 counterclaim asserts that the Iconfind patent is invalid because it fails to meet the “conditions for  
11 patentability” of 35 USC §§ 102, 103, and/or 112 because the “alleged invention thereof lacks  
12 utility; is taught by, suggested by, and/or obvious in view of, the prior art; and/or is unsupported  
13 by the written description of the patented invention.” (Def's First Amended Answer, Dkt. No.  
14 27, ¶ 14-15, Exhibit A). Instead of identifying what prior art Google contends invalidates the  
15 Iconfind patent, Google simply added legal buzzwords to its allegations in a thin attempt to raise  
16 its pleading up to the proper standard. While Google has narrowed the statutory subsections on  
17 which it intends to rely, it still provides no facts to support its allegations. Google's Second  
18 Defense replicates the language of its counterclaim Count Two, and is likewise deficient. (Def's  
19 First Amended Answer, Dkt. No. 27, ¶ 14-15, Exhibit A). Moreover, Google’s amended  
20 counterclaim alleging invalidity under "35 USC §§ 102, 103 and/or 112 because the alleged  
21 invention thereof lacks utility" is nonsensical: lack of utility is an issue brought under Section  
22 101 – not Sections 102, 103 or 112. As such, these allegations do not state a claim that is  
23 plausible on its face, and cannot withstand scrutiny under the Supreme Court’s Twombly and  
24

1 Iqbal decisions. On that basis, numerous courts in this Circuit have dismissed similarly deficient  
2 counterclaims and affirmative defenses.

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

7 **I. BACKGROUND**

8 On February 3, 2011, IconFind filed this suit in the United States District Court for the  
9 Eastern District of California for infringement of its United States Patent No. 7,181,459 B2.  
10 Google has known about this patent for years. In January 2009, IconFind provided notice to  
11 Google that the '459 patent covered Google's operation of its website functionality. Nonetheless,  
12 Google has continued its infringement with disregard for the '459 patent. Google and its patent  
13 attorneys also were aware of the '459 patent as evidenced by the prosecution of Google's own  
14 U.S. Patent Nos. 7,664,734, 7,693,825 and 7,788,274.

15 On April 1, 2011, Iconfind filed its first Motion to Dismiss and Motion to Strike  
16 Google's invalidity counterclaim and corresponding affirmative defense. Recognizing the  
17 deficiencies in its pleading, Google on April 11, 2011 filed a First Amended Answer and  
18 Counterclaims (Dkt. No. 27) and requested Iconfind to withdraw its pending Motion to Dismiss  
19 in light of this filing. (Correspondence, Exhibit B). Iconfind informed Google that its pleading  
20 was still deficient, but in an effort to compromise, suggested that Google agree to provide to  
21 Iconfind substantive discovery responses concerning invalidity. Id. Google declined to agree to  
22 Iconfind's request. Id. Accordingly, without fair notice Google's counterclaims via the pleading,  
23 and without any assurance from Google that it would substantively respond to discovery,  
24 Iconfind had no choice but to file this Motion regarding Google's amended pleading.

1 The pleading deficiencies of Google's counterclaim are striking, particularly given  
2 Google's familiarity with the patent and that this is Google's second attempt to adequately plead  
3 its counterclaim. Google has now twice been given ample opportunity to prepare and adequately  
4 set forth the basis for its invalidity claim and affirmative defense. Its complete failure to do so  
5 requires dismissal of its counterclaim and affirmative defense.

## 6 **II. APPLICABLE LAW**

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

8 "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain 'a short and  
9 plain statement of the claim showing that the pleader is entitled to relief.'" Ashcroft v. Iqbal,  
10 129 S. Ct. 1937, 1949 (2009) (quoting Fed.R.Civ.P. 8(a)(2)). "A pleading that offers 'labels' and  
11 conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Id.  
12 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "Nor does a complaint  
13 suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id.

14 "A Rule 12(b)(6) dismissal motion tests the legal sufficiency of the claims alleged in the  
15 complaint." McMaster v. United States, 2010 U.S. Dist. LEXIS 99831, at \*2 (E.D. Cal. Sept. 9,  
16 2010) (Burrell, J.); Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). In deciding such a  
17 motion, all material allegations of the complaint are accepted as true. Id. "To survive a motion  
18 to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim  
19 to relief that is plausible on its face.'" Iqbal, 129 S. Ct. at 1949 (citations omitted). The  
20 Supreme Court in Iqbal explained that:

21 [a] claim has facial plausibility when the plaintiff pleads factual content that  
22 allows the court to draw the reasonable inference that the defendant is liable for  
23 the misconduct alleged. ... The plausibility standard is not akin to a "probability  
24 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.'"

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

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

11 Under Rule 12(f), “[t]he court may strike from a pleading an insufficient defense or any  
12 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The purpose  
13 of the rule is to avoid the costs that accompany litigating spurious issues by dispensing with  
14 those issues prior to trial.” J & J Sports Prods. v. Delgado, 2011 U.S. Dist. LEXIS 9013, at \*3-4  
15 (E.D. Cal. Jan. 18, 2011) (Shubb, J.). Though a motion to strike is generally viewed with  
16 disfavor, it may be appropriate where allegations “may cause prejudice to one of the parties.”  
17 Ramos Oil Recyclers, Inc. v. AWIM, Inc., 2007 U.S. Dist. LEXIS 62608, at \*3 (E.D. Cal. Aug.  
18 15, 2007) (Burrell, J.). “A defense may be struck if it fails to provide ‘fair notice’ of the basis  
19 for the defense.” Qarbon.com v. eHelp Corp., 315 F. Supp. 2d 1046, 1051 (N.D. Cal. 2004)  
20 (Ware, J.) (granting motion to strike affirmative defenses for patent invalidity for “failure to  
21 provide ‘fair notice’ of what the defense is and the grounds upon it rests”), (citing Advanced  
22 Cardiovascular Sys. v. Scimed Sys., 1996 U.S. Dist. LEXIS 11700, at \*9-10 (N.D. Cal. July 24,  
23 1996) (granting motion to strike affirmative defenses of patent invalidity)). In fact, in this  
24

1 Circuit, the “key to determining the sufficiency of pleading an affirmative defense is whether it  
2 gives plaintiff fair notice of the defense.” Ramos Oil Recyclers, Inc., 2007 U.S. Dist. LEXIS  
3 62608, at \*3, (citing Wyshak v. City National Bank, 607 F.2d 824, 827 (9th Cir. 1979)).

4 **III. GOOGLE'S AMENDED COUNTERCLAIM ALLEGING PATENT**  
5 **INVALIDITY IS INSUFFICIENT AS A MATTER OF LAW**

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

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

20 315 F. Supp. 2d at 1050-1051 (internal citations omitted) (emphasis added). Similarly, in PB  
21 Farradyne, Inc., 2006 U.S. Dist. LEXIS 3408 , at \*8-10 (Illston, J.), the court granted a motion to  
22 dismiss counterclaims that were similar to those in Qarbon.com and in this case, finding that, as  
23 pled, the counterclaims did not “provide defendants with sufficient notice of the basis for its  
24 claims.” Likewise, in Duramed Pharms., Inc. v. Watson Labs., Inc., the court dismissed a  
25 counterclaim which contained the general allegation that the claims of the patent-in-suit were  
26 “invalid because they fail to comply with one or more of the statutory requirements for  
patentability set forth in 35 U.S.C. §§ 101 et seq.,” stating “[plaintiff] is correct that this  
allegation fails to state a claim. By failing to specify which of the many grounds of patent

1 invalidity it is relying upon, [defendant] does not put [plaintiff] on fair notice as to the basis of its  
2 counterclaim.” 2008 U.S. Dist. LEXIS 103389, at \*11 (D. Nev. Dec. 12, 2008).

3 Google’s amended counterclaim for invalidity is as follows:

4 11. The ’459 patent is invalid under 35 U.S.C. § 101 because it fails to claim patentable  
5 subject matter insofar as it seeks to claim an abstract idea.

6 12. The ’459 patent is invalid because it fails to meet the “conditions for patentability” of  
7 35 USC §§ 102, 103, and/or 112 because the alleged invention thereof lacks utility; is  
8 taught by, suggested by, and/or obvious in view of, the prior art; and/or is unsupported by  
9 the written description of the patented invention.

10 (Def’s First Amended Answer, Dkt. No. 27, Exhibit A).

11 Google’s amended Section 101 pleading is a formulaically recited legal theory asserted  
12 wholly without factual support. As such, it fails to state a claim that is plausible on its face.  
13 Iqbal, 129 S. Ct. at 1949. Google's next allegation of invalidity for failure "to meet the  
14 'conditions for patentability' of 35 USC §§ 102, 103, and/or 112 because the alleged invention  
15 thereof lacks utility" is groundless; lack of utility is an issue brought under Section 101, not  
16 Sections 102, 103 and 112. See 35 U.S.C. § 101 (Exhibit C); See MPEP § 2107.01 General  
17 Principles Governing Utility Rejections. Google’s further inclusion of the legal concepts “is  
18 taught by, suggested by, and/or obvious in view of, the prior art” is still no replacement for  
19 adequate Section 102 and 103 allegations. Similarly, Google’s inclusion of the legal concept  
20 “unsupported by the written description of the patented invention” is no replacement for  
21 adequate Section 112 allegations. As set forth below, these Sections provide numerous  
22 independent grounds for relief. (See Exhibits A-E) Google's allegations fail to provide any, much  
23 less “fair [ ]notice of what the ... claim is and the grounds upon which it rests.” Twombly, 550  
24 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

25 For example, Section 102 of the Patent Act alone provides seven (7) subsections. (35  
26 U.S.C. § 102, Exhibit C). At least five (5) of these subsections, in turn, set forth numerous

1 independent and far-ranging grounds for invalidating a patent claim, such as prior public use,  
2 prior offer to sell, prior printed-publication, abandonment, prior patenting in a foreign country by  
3 the inventor or his or her legal representatives or assigns, prior published patent applications by  
4 others, prior issued patents by others, non-joinder of inventors, prior invention by others and the  
5 like. See 35 U.S.C. § 102(a)-(g), (35 U.S.C. § 102, Exhibit C). For instance, what is the “prior  
6 art” that Google contends to be invalidating?

7 The same is true with respect to the passing reference by Google to Section 103, which  
8 sets forth additional bases for patent invalidity in the event that “the invention is not identically  
9 disclosed or described as set forth in section 102 ....” (35 U.S.C. § 103, Exhibit D). Again, what  
10 is the “prior art” that Google contends invalidates the Iconfind patent under Section 103?  
11 Moreover, merely including the buzzwords of obviousness in its allegation is not enough. Iqbal,  
12 129 S. Ct. at 1949 (“a formulaic recitation of the elements of a cause of action will not do”).

13 While Google's Amended Answer has replaced its former counterclaim’s open-ended  
14 listing of statutes with additional legal language, it still fails to provide any notice to IconFind –  
15 or the Court – of the nature of its counterclaim other than that Google apparently contends that  
16 the patent-in-suit is invalid. Google's amended counterclaim is barely a formulaic recitation of  
17 elements, which itself “will not do” under Iqbal and Twombly, and also contains no factual  
18 enhancement whatsoever. Here, the Court cannot accept as true any facts in these counterclaims,  
19 as it must under a Rule 12(b)(6) analysis, because Google has alleged *no facts* at all. As such,  
20 Google's counterclaim fails to either “raise a right to relief above the speculative level” or “state  
21 a claim that is plausible on its face.” Twombly, 550 U.S. at 555, 570.

22 Google will presumably rely on Network Caching Tech., LLC v. Novell, Inc. in support  
23 of the sufficiency of its amended counterclaim because Google admitted to IconFind that it used  
24 the "exact language" analyzed in that decision. (April 12 Correspondence, Exhibit B, citing 2001



1 U.S. Dist. LEXIS 26211, at\*6-7 (N.D. Cal. Dec. 31, 2001))). First of all, that case was decided  
2 long before the binding decisions relied upon to support IconFind's motion, including Twombly  
3 and Iqbal. Moreover, in the modifications Google did make to the language in that case, it only  
4 further confounded its problems by asserting that the invention "lacks utility" under the wrong  
5 statutory sections. Google's reliance on Network Caching does not support the sufficiency of its  
6 counterclaim, but instead, only shows that Google intended to provide the bare minimum, See  
7 Network Caching, 2001 U.S. Dist. LEXIS 26211, at\*6-7 (noting that "more factual specificity  
8 would be helpful"), which is insufficient under the current, controlling case law.

9         Moreover, IconFind will be prejudiced by Google's inadequate pleadings. Scheduling  
10 orders and other discovery controls are meant to streamline the litigation process – not to provide  
11 litigants the opportunity to offer a vague pleading, unnecessarily expand the scope of the  
12 litigation and then rely on the expensive and time-consuming fact and expert discovery process  
13 to flush out their theories. Relatedly, in an effort to compromise, IconFind requested that Google  
14 assure IconFind that it would substantively respond to invalidity interrogatories rather than  
15 object to them as premature. (April 12-13 Correspondence, Exhibit B). Google would provide  
16 no such assurance. Id. Thus, allowing Google to proceed with its vague invalidity pleading  
17 prejudices IconFind, as it unfairly allows Google additional time to develop its theories, and  
18 forces IconFind to use the expensive and time consuming discovery process to extract Google's  
19 theories which should have been provided in the pleading.

20         In short, if Google has viable theories of patent invalidity, it should be allowed to plead  
21 and litigate them, provided that they are well-grounded in fact and law and they provide adequate  
22 notice to IconFind and the Court of its allegations. What it should not be allowed to do is to  
23 merely speculate – without providing any notice to IconFind and to the Court – that the patent-

1 in-suit is invalid for unspecified reasons in a pleading and then use that deficient pleading to  
2 expand the scope of the lawsuit unnecessarily.

3 Google's second attempt to adequately plead that the Iconfind patent is also deficient.  
4 Google should not be given a third bite at the apple. For this and all of the foregoing reasons,  
5 Google's amended invalidity counterclaim should be dismissed.

6 **IV. GOOGLE'S AMENDED SECOND AFFIRMATIVE DEFENSE SHOULD**  
7 **BE STRICKEN FROM THE PLEADING FOR FAILING TO PROVIDE**  
8 **FAIR NOTICE OF THE DEFENSE**

9 For the reasons set forth above, Google's affirmative defense alleging patent invalidity  
10 (Second Defense) should also be dismissed. Under Rule 12(f), “[t]he court may strike from a  
11 pleading an insufficient defense.” Fed. R. Civ. P. 12(f). “Under Rule 8 of the Federal Rules of  
12 Civil Procedure, an affirmative defense must be pled with the minimal specificity to give the  
13 plaintiff ‘fair notice’ of the defense.” Advanced Cardio, 1996 U.S. Dist. LEXIS 11700, at \*9-10;  
14 see also Qarbon.com, 315 F. Supp. 2d at 1049 (N.D. Cal. 2004) (striking affirmative defenses  
15 and stating, “[defendant’s] affirmative defenses fail to provide ‘fair notice’ of what the defense is  
16 and the grounds upon which it rests”); see also Sprint Communications Co., L.P. v.  
17 Thegolbe.com, Inc., 233 F.R.D. 615, 619 (D. Kan. 2006) (striking affirmative defense which  
18 stated “[defendant] is informed and believes that [plaintiff’s seven patents], and each of the  
19 seven claims thereof, are invalid, void and/or unenforceable under one or more of the sections of  
20 Title 35 of the United States Code.” In this Circuit, the “key to determining the sufficiency of  
21 pleading an affirmative defense is whether it gives plaintiff fair notice of the defenses.” Ramos  
22 Oil Recyclers, Inc., 2007 U.S. Dist. LEXIS 62608, at \*3 (citing Wyshak, 607 F.2d at 827).

23 Google's amended counterclaim for invalidity clearly does not meet the requirements of  
24 Rule 8, does not provide IconFind fair notice of Google's counterclaim and cannot withstand a  
25 Rule 12(b)(6) challenge. Likewise, Google's amended affirmative defense added minimal legal

1 language which does nothing to clarify its allegations, particularly concerning its Section 102  
2 and 103 contentions and states as follows:

3 14. The claims of the '459 patent are invalid under 35 U.S.C. § 101 because they fail to  
4 claim patentable subject matter insofar as each seeks to claim an abstract idea.

5 15. The claims of the '459 patent are invalid because they fail to meet the “conditions  
6 for patentability” of 35 USC §§ 102, 103, and/or 112 because the claims lack utility; are  
7 taught by, suggested by, and/or obvious in view of, the prior art; and/or are not  
8 adequately supported by the written description of the patented invention.

9 (Def's First Amended Answer, Dkt. No. 27, ¶ 14-15, Exhibit A). Google's amended affirmative  
10 defense fails to provide fair notice of the defense or the factual grounds on which it rests and,  
11 therefore, should be stricken on those bases. Like Google's deficient counterclaim, Google's  
12 amended affirmative defense on patent invalidity prejudices IconFind because it unfairly allows  
13 Google additional time to develop its theories, and forces IconFind to use the expensive and time  
14 consuming discovery process to extract Google's invalidity theories which should have been  
15 pled.

16 **V. CONCLUSION**

17 WHEREFORE, IconFind respectfully requests that the Court grant its motion to dismiss  
18 Google's amended counterclaim of patent invalidity (Count Two) pursuant to Rule 12(b)(6) and  
19 grant its motion to strike Google's amended affirmative defense of patent invalidity (Second  
20 Defense) pursuant to Rule 12(f).

21 Respectfully submitted,

22 /s/ Anna B. Folgers

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**Attorneys for Plaintiff IconFind, Inc.**

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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on April 18, 2011 the foregoing

3 **PLAINTIFF ICONFIND, INC.'S MEMORANDUM IN SUPPORT OF ITS**  
4 **MOTION TO DISMISS PURSUANT TO**  
5 **FRCP 12(B)(6) AND MOTION TO 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/ Anna B. Folgers  
19 \_\_\_\_\_  
20 Attorney for Plaintiff