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

15 ICONFIND, INC.,

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

16 Plaintiff,

**PLAINTIFF'S REPLY IN SUPPORT OF
ITS MOTION TO DISMISS AND
MOTION TO STRIKE (DKT. 35)**

17 v.

18 GOOGLE INC.,

DATE: MAY 16, 2011

TIME: 9:00 A.M.

19 Defendant.

PLACE: COURTROOM 10

JUDGE GARLAND E. BURRELL, JR.

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1 **I. INTRODUCTION**

2 Plaintiff IconFind, Inc. (“IconFind”) moved to dismiss Defendant Google, Inc.'s
3 (“Google”) “amended” invalidity counterclaim under Rule 12(b)(6), and moved to strike
4 Google's corresponding amended affirmative defense of invalidity pursuant to Rule 12(f)
5 because they failed to state plausible claims. Google's amended pleading provides precious-little
6 more detail (in the form of label and conclusions) than its original pleading, with no explanation
7 or facts supporting how its laundry-list of statutes applies to IconFind's patent. IconFind is left
8 guessing why Google contends the '459 Patent is invalid. Google's labels and conclusions fail to
9 provide "fair notice" to IconFind.

10 Contrary to Google's arguments, IconFind does not overstate the pleading requirements
11 under Rule 8. IconFind's motion is firmly grounded in controlling Supreme Court precedent, and
12 Google acknowledges in its Opposition that a complaint must state a plausible claim under
13 Twombly and Iqbal. Yet, even though it had an opportunity to provide plausible claims in its
14 amended pleading, Google did not even attempt to do so. Instead, Google admittedly imitated
15 counterclaim language from the pre-Twombly, pre-Iqbal case Network Caching Tech., LLC v.
16 Novell, Inc., 2001 U.S. Dist. LEXIS 26211, at*6-7 (N.D. Cal. Dec. 31, 2001). In fact, the few
17 changes Google did make to the counterclaim language from that case left Google asserting that
18 the invention "lacks utility" under the wrong statutory subsections. Though Google seeks to
19 suggest otherwise, the vast majority of courts –including courts in this District— also apply
20 Twombly pleading standards to affirmative defenses. Because Google's Second Defense
21 replicates the language of its counterclaim Count Two, it is likewise deficient.

22 As a fallback, Google argues that IconFind seeks to impose a higher pleading standard on
23 Google's invalidity allegations than on IconFind's infringement claim. This is simply untrue.
24 IconFind's claim for infringement clearly articulates which statutory subsection applies, whereas
25 Google's invalidity counterclaim does not. IconFind's infringement claim contains factual

1 allegations, including an identification of accused websites and features by name, whereas
2 Google's invalidity counterclaim contains none. Google identifies no prior art and makes no
3 other factual allegations. As such, Google has not nudged its invalidity allegations across the
4 line from conceivable to plausible, as is required to survive a motion to dismiss.

5 Because Google has again failed to specify adequate grounds or supporting facts that
6 could possibly support a finding that IconFind's patent is invalid, Google's amended invalidity
7 counterclaim (Count Two) and corresponding amended affirmative defense (Second Defense)
8 fail to state claims on which relief can be granted and must be dismissed with prejudice as a
9 matter of law.

10 **II. GOOGLE'S COUNTERCLAIM FOR DECLARATORY JUDGMENT** 11 **OF INVALIDITY (COUNT TWO) IS FACIALLY IMPLAUSIBLE**

12 **A. The Ninth Circuit and Federal Circuit Adhere** 13 **to Twombly's and Iqbal's Plausibility Requirements**

14 Google cites a host of pre-Twombly, pre-Iqbal Ninth Circuit decisions (seven in total) in
15 setting forth its legal standards for Rule 12(b)(6) and concludes that "it is only under
16 extraordinary circumstances that dismissal is proper under Rule 12(b)(6)." (Def.'s Mem., Dkt.
17 No. 42, p.4-5). However, Google ignores the most pertinent and controlling authority from the
18 Supreme Court, which held that "[t]o survive a motion to dismiss, a complaint must contain
19 sufficient factual matter, accepted as true, to 'state a claim to relief that is **plausible** on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (emphasis added) (quoting Bell Atlantic Corp. v.
20 Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads
21 factual content that allows the court to draw the reasonable inference that the defendant is liable
22 for the misconduct alleged." Id. As this Court has recognized, "[t]he plausibility standard is not
23 akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant
24 has acted lawfully." Coppes v. Wachovia Mortgage Corp., 2011 U.S. Dist. LEXIS 42061, at *2

1 (E.D. Cal. April 13, 2011) (Burrell, J.) (citing Moss v. United States Secret Serv., 572 F.3d 962,
2 969 (9th Cir. 2009)).

3 Though all well-pleaded factual allegations must be accepted as true, this tenet is
4 "inapplicable to legal conclusions." Id. (citing Iqbal, 129 S. Ct. at 1949). "A pleading that offers
5 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'
6 Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual
7 enhancement.'" Chanthavong v. Aurora Loan Servs., Inc., 2011 U.S. Dist. LEXIS 34395, at *3
8 (Mar. 18, 2011) (Burrell, J.) (citing Iqbal, 129 S. Ct. at 1949). Thus, "for a complaint to survive
9 a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that
10 content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Id. (citing Moss,
11 572 F.3d at 969 (quoting Twombly, 550 U.S. at 557)).

12 The Supreme Court has laid to rest any argument that Twombly was limited to antitrust
13 cases, holding that "Twombly expounded the pleading standard for 'all civil actions.'" Iqbal,
14 129 S. Ct. at 1953. This clearly includes patent cases. Since Iqbal, the Federal Circuit has
15 applied the plausibility standard to affirm a Rule 12(b)(6) dismissal of a patent infringement
16 claim. Colida v. Nokia, Inc., 2009 U.S. App. LEXIS 21909, at **3 (Fed. Cir. Oct. 6, 2009).¹ In
17 Colida, the Federal Circuit acknowledged that "the complaint must have sufficient 'facial
18 plausibility' to 'allow[] the court to draw the reasonable inference that the defendant is liable.'
19 Id. at **4 (citing Iqbal, 129 S. Ct. at 1949). It further recognized that "[t]he plaintiff's factual
20 allegations must 'raise a right to relief above the speculative level' and cross 'the line from
21 conceivable to plausible.'" Id. at **4 (citing Twombly, 550 U.S. at 570). These standards
22 likewise apply to Google's patent invalidity counterclaim.

23 ¹ Colida v. Nokia, Inc. was issued as unpublished or non-precedential, but under Federal
24 Circuit Rule 32.1(c), it is permissible to cite to non-precedential dispositions issued after January
25 1, 2007.

1 **B. Google Fails to Identify Statutory Subsections or Supporting**
2 **Facts That Could Possibly Provide Plausibility to its Counterclaim**

3 Simply put, Google's counterclaim fails to state a plausible claim for declaratory
4 judgment of patent invalidity because it contains **no facts** and identifies **no statutory**
5 **subsections.**² Google's list of statutes, now amended to add the barest legal conclusions, fails to
6 provide "fair notice" of Google's invalidity claims. IconFind is already aware of these statutes;
7 Google is obligated to provide a plausible basis to support why they apply in this case.
8 Otherwise, how can IconFind possibly understand and respond to Google's allegations?

9 With respect to Google's Section "102, 103 and/or 112" allegations, it broadly argues that
10 "Google's counterclaims relating to the invalidity of the '459 patent in its Amended Answer and
11 Counterclaims clearly allege facts that, if true, would state a claim for patent invalidity." (Def.'s
12 Mem., Dkt. No. 42, p. 5). What facts are alleged? Google identifies none. Google's invalidity
13 counterclaim does not even contain a recitation of the elements of the cause of action. As a
14 result, Google fails to provide IconFind notice of, for instance, which of the at least seven
15 independent grounds it is asserting under Section 102. See 35 U.S.C. § 102(a)-(g).

16 With respect to its Section 101 allegation, Google argues that "[t]o the extent that
17 Plaintiff was concerned about the adequacy and sufficiency of Google's pleading with respect to
18 invalidity under 35 U.S.C. 101, Google's Motion on the Pleadings clearly moots any such issue."

19 ² The entirety of Google's counterclaim for patent invalidity is as follows:

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

22 12. The '459 patent is invalid because it fails to meet the "conditions for
23 patentability" of 35 USC §§ 102, 103, and/or 112 because the alleged invention
24 thereof lacks utility; is taught by, suggested by, and/or obvious in view of, the
25 prior art; and/or is unsupported by the written description of the patented
26 invention.

 (Countercl., Dkt. No. 27, ¶¶ 11-12).

1 (Def.'s Mem., Dkt. No. 42, p. 3, n.1). Not so. If anything, Google's motion on the pleadings, and
2 IconFind's response thereto, underscore the inadequacy of Google's pleading. As the briefing on
3 that motion makes clear, Google's allegation that the patent is invalid because it "seeks to claim
4 an abstract idea" is merely a legal theory. See Bilski v. Kappos, 130 S. Ct. 3218 (2010). For the
5 purposes of that motion, both parties were forced to request judicial notice of the patent and file
6 history because Google's pleading included no factual allegations on their substance. (See Req.
7 Judicial Not., Dkt. Nos., 31, 46). In any event, Google's motion for judgment on the pleadings is
8 premature because Rule 12(c) requires that the pleadings be "closed." Fed. R. Civ. P. 12(c).
9 Thus, Google's untimely Rule 12(c) motion is not a proper supplement for its insufficient
10 pleading.

11 That Google alleges **no facts** in support of its invalidity counterclaim likely explains why
12 it chose not to argue (and in fact totally avoided the subject) in its Opposition that its invalidity
13 allegations are "plausible." Indeed, though Google admits that it must state a "plausible" claim
14 in its Legal Standards section, not once does Google mention plausibility in its arguments.
15 (Def.'s Mem., Dkt. No., pp. 4-12). As such, Google clearly fails the Supreme Court's two-
16 pronged plausibility analysis: "[w]e begin our analysis by identifying the allegations in the
17 complaint that are not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1951. Here, none
18 of Google's invalidity allegations are entitled to the assumption of truth because they are, at
19 most, merely legal conclusions. Id. "We next consider the factual allegations in [the] complaint
20 to determine if they plausibly suggest an entitlement to relief." Id. Here, Google's invalidity
21 allegations contain **no factual allegations**³ for the Court to consider. With no allegations
22

23 ³ For instance, had Google wanted to assert invalidity under the on-sale bar of 35 U.S.C.
24 § 102(b), and provide supporting facts, it could simply allege that "[Insert person] sold [insert
25 product] which embodied the claims of the patent-in-suit more than one year prior to IconFind's
26 date of application."

1 assumed as true, and no supporting facts to consider, Google's invalidity counterclaim clearly
2 does not "plausibly suggest an entitlement to relief." Id.

3 Google should not be rewarded for replicating the counterclaim language at issue in
4 Network Caching Tech., LLC v. Novell, Inc., 2001 U.S. Dist. LEXIS 26211, at*6-7 (N.D. Cal.
5 Dec. 31, 2001). Given that the Network Caching court acknowledged that "more factual
6 specificity would be helpful," Google's reliance on that ten-year old decision after Twombly and
7 Iqbal is unsound. Additionally, among the language Google plucked from that decision was the
8 assertion that the invention "is taught by, suggested by, and/or obvious in view of, the prior art."
9 (Countercl., Dkt. No. 27, ¶ 12). This language is clearly directed at the so-called teaching-
10 suggestion-motivation (TSM) test for obviousness, which is no longer the critical test for
11 obviousness. Specifically, in KSR Int'l Co. v. Teleflex Inc., the Supreme Court criticized the test
12 as "incompatible with our precedents" and stated that "[t]he obviousness analysis cannot be
13 confined by a formalistic conception of the words teaching, suggestion, and motivation"
14 KSR Int'l Co., 550 U.S. 398, 419 (U.S. 2007). As IconFind has previously noted, as a result of
15 the few changes Google did make to the counterclaim language from Network Caching, Google
16 nonsensically asserts that the invention "lacks utility" under Sections 102, 103 and/or 112.
17 (Countercl., Dkt. No. 27, ¶ 12). Utility is an issue under Section 101, not the statutes Google
18 cites. See 35 U.S.C. § 101. Given Google's failed efforts at modifying the language it took from
19 Network Caching, and given that Network Caching is outdated in view of Twombly, Iqbal and
20 KSR, Google's reliance on that decision is clearly flawed.

21 For at least these reasons, IconFind respectfully requests that this Court dismiss Google's
22 counterclaim Count Two - Declaratory Judgment of Invalidity of the '459 Patent.

1 **III. GOOGLE'S SECOND DEFENSE SHOULD BE STRICKEN**
2 **UNDER TWOMBLY, IQBAL, AND RULES 8 AND 12**

3 **A. IconFind's Motion to Strike Google's Affirmative Defense**
4 **is a Proper Use of Rule 12(f), and the Twombly and Iqbal Standards Apply**

5 Google's legal standards incorrectly assert that a motion to strike an affirmative defense is
6 an improper use of Rule 12(f), and that the pleading standards for affirmative defenses are
7 different than counterclaims. Google invites error on both counts. Specifically, Google argues
8 that "the Ninth Circuit has not ruled on the proper use of a Rule 12(f) motion to strike an
9 affirmative defense." (Def.'s Mem, Dkt. No. 42, p. 7) (quoting McArdle v. AT&T Mobility
10 LLC, 657 F. Supp. 2d 1140, 1149 (N.D. Cal. 2009). However, the Ninth Circuit has clearly
11 affirmed the use of Rule 12(f) to strike affirmative defenses. See Federal Sav. & Loan Ins. Corp.
12 v. Gemini Management, 921 F.2d 241, 243 (9th Cir. 1990) ("We must decide whether the district
13 court ... abused its discretion in striking Gemini's affirmative defenses under Fed. R. Civ. P.
14 12(f). ... the decision of the district court is affirmed."). Likewise, courts in this District have
15 granted motions to strike affirmative defenses brought under Rule 12(f), including affirmative
16 defenses of patent invalidity. J&J Sports Prods., Inc. v. Franco, 2011 U.S. Dist. LEXIS 25642, at
17 *6 (E.D. Cal. Mar. 1, 2011) (striking patent invalidity defense); The Wine Group LLC v. L.
18 AND R. Wine Co., 2011 U.S. Dist. LEXIS 5765, at *7 (E.D. Cal. Jan. 13, 2011) (striking
19 trademark defenses).

20 Additionally, Google attempts to create uncertainty in the standard by arguing that "[case
21 law is unsettled whether the standard of pleading claims and counterclaims articulated in
22 Twombly and Iqbal apply to affirmative defenses." (Def.'s Mem., Dkt. No. 42, p.9). Contrary to
23 Google's argument, "the vast majority of courts presented with the issue have extended
24 Twombly's heightened pleading standard to affirmative defenses." Barnes v. AT&T Pension
25 Benefit Plan, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010) (applying Twombly standards to
26 affirmative defenses). Among these are numerous courts in California, including in this District.

1 J&J Sports Prods., Inc., 2011 U.S. Dist. LEXIS 25642, at *3-5 (striking patent invalidity defense
2 under Twombly and Iqbal); The Wine Group LLC, 2011 U.S. Dist. LEXIS 5765, at *4-8
3 (striking defenses under Twombly and Iqbal); Hudson v. First Transit, Inc., 2011 U.S. Dist.
4 LEXIS 14097, at *3 (N.D. Cal. Feb. 3, 2011) ("Twombly's heightened pleading standard applies
5 to affirmative defenses."). Thus, the heightened standards of Twombly, Iqbal and their progeny
6 clearly apply to Google's patent invalidity affirmative defense.

7 **B. Google's Second Affirmative Defense of**
8 **Patent Invalidity Is Insufficient and Should be Stricken**

9 Because the standards set out in Twombly and Iqbal apply to affirmative defenses,
10 Google's patent invalidity defense (Second Defense) fails for the reasons set forth above
11 regarding Google's deficient counterclaim. Google identifies no reasons why its Second Defense
12 should survive beyond those it articulated regarding the identical, corresponding counterclaim.
13 Thus, for the same reasons Google's invalidity counterclaim should be dismissed, its Second
14 Defense of patent invalidity should also be stricken.

15 Google's arguments are threefold and none are persuasive. First, Google argues that its
16 affirmative defense is adequate under Network Caching, 2001 U.S. Dist. LEXIS 26211. As set
17 forth in detail in Section II-B above, Network Caching is outdated in view of Twombly, Iqbal
18 and KSR, so Google's reliance on that decision is clearly unsound. Google also argues that
19 "Plaintiff, however, points to nothing in [Network Caching] that would necessitate a different
20 holding in light of Twombly and Iqbal." (Def.'s Mem., Dkt. No. 42, p. 8, n. 3). In addition to the
21 numerous reasons articulated in Section II-B of why Google's reliance on that decision is flawed,
22 IconFind notes that, like Google's Opposition to this motion, the Network Caching court
23 conducted no "plausibility" analysis as it must under Twombly and Iqbal. Iqbal, 129 S. Ct. at
24 1949; Twombly, 550 U.S. at 570. Thus, Network Caching simply does not support the adequacy
25 of Google's affirmative defense.

1 Next, Google cites a different Google litigation where the plaintiff agreed to withdraw its
2 motion to dismiss Google's invalidity counterclaims and affirmative defenses, and instead
3 proceed with discovery. (Def.'s Mem., Dkt. No. 42, p. 8). As set forth more fully in Section V
4 below, discovery is no replacement for adequate pleadings. See Iqbal, 129 S. Ct. at 1950 (noting
5 that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than
6 conclusions"). Moreover, IconFind fails to see how the plaintiff's agreed withdrawal in that case
7 demands a similar result here.

8 Lastly, Google argues that Form 30 of the Federal Rules of Civil Procedure demonstrates
9 that Google's affirmative defense of patent invalidity is sufficient. (Def.'s Mem., Dkt. No. 42,
10 p.10). Form 30 does not support Google's positions. First of all, the exemplary affirmative
11 defense provided in Form 30⁴ pertains to a statute of limitations, so its illustrative value for this
12 case is minimal at best. Nevertheless, IconFind notes that the example in Form 30 provides a
13 fill-in space for providing a factual allegation as to how many years the claim arose before the
14 action commenced. See Fed. R. Civ. P. Form 30. Thus, if anything, Form 30 supports
15 IconFind's assertion that affirmative defenses should include factual allegations. Like Google's
16 insufficient counterclaim, Google's identically-worded affirmative defense contains no factual
17 allegations at all, and should thus be dismissed.

18 **IV. DISCOVERY AND CAREFUL CASE MANAGEMENT**
19 **DOES NOT RELIEVE GOOGLE OF ITS OBLIGATION**
20 **TO PROVIDE SUFFICIENT PLEADINGS; LIKEWISE,**
21 **EQUITY CANNOT SAVE GOOGLE'S INSUFFICIENT ALLEGATIONS**

22 Google's last-ditch effort to save its deficient invalidity counterclaim and affirmative
23 defense is to rely on discovery in place of proper pleadings, and to implore the Court to consider

24 ⁴ Form 30 provides the following exemplary affirmative defense: "Statute of Limitations
25 – The plaintiff's claim is barred by the statute of limitations because it arose ___ years before this
26 action was commenced." Fed. R. Civ. P. Form 30.

1 the equities. As set forth below, Google's reliance on discovery is at odds with the express
2 language of Twombly and Iqbal. Likewise, Google cites no authority, and IconFind has located
3 none, for the proposition that a Rule 12(b)(6) motion to dismiss is an equitable decision.

4 First, Google argues that "discovery is the appropriate mechanism for the parties to
5 receive detailed contentions," and that "Google and Plaintiff have reached agreement that formal
6 infringement contentions and invalidity contentions should be part of the Court's scheduling
7 order in this matter." (Def.'s Mem., Dkt. No. 42, p. 11). This is no replacement for adequate
8 pleadings, and Google's suggestion otherwise would render the Supreme Court's Twombly and
9 Iqbal decisions meaningless. Specifically, the Supreme Court has held that careful case
10 management does not alleviate a party's burden to meet Rule 8's pleading requirements: "[w]e
11 have held, however, that the question presented by a motion to dismiss a complaint for
12 insufficient pleadings does not turn on the controls placed upon the discovery process." Iqbal,
13 129 S. Ct. at 1953. In Twombly, the Supreme Court also noted:

14 [i]t is no answer to say that a claim just shy of a plausible entitlement to relief can,
15 if groundless, be weeded out early in the discovery process through "careful case
16 supervision in checking discovery abuse has been on the modest side. ...
17 Probably, then, it is only by taking care to require allegations that reach the level
18 suggesting [the alleged claim] that we can hope to avoid the potentially enormous
19 expense of discovery in cases with no "reasonably founded hope that the
20 discovery process will reveal relevant evidence..."

21 550 U.S. 544, 560 (internal citations omitted). Moreover, allowing Google to proceed with its
22 vague pleading prejudices IconFind by forcing IconFind to provide its full infringement
23 contentions without any notice of Google's invalidity theories.

24 Finally, Google implores the Court to consider the equities by arguing that because
25 Plaintiff and its counsel have not allegedly held others, or themselves, to the standards of
26 Twombly and Iqbal, Google should be allowed to proceed with deficient pleadings. First,
IconFind's decision not to move to dismiss Yahoo's invalidity counterclaim in the Yahoo matter

1 is of no import here. Yahoo's counterclaim, and IconFind's reply thereto, were filed in March
2 2009 – months before the Supreme Court's May 18, 2009 decision in Iqbal. See IconFind, Inc. v.
3 Yahoo! Inc., Case No. 2:09-cv-00109 (E.D. Cal), Dkt. Nos. 20, 22. Google's reliance on
4 IconFind's counsel's pleadings in unrelated matters that are pre-Twombly and/or in other circuits
5 is simply irrelevant.

6 Lastly, Google's equitable argument incorrectly asserts that, "[IconFind's] allegations of
7 infringement certainly do not meet the pleading requirement Plaintiff posits is required in
8 Google's counterclaim and affirmative defenses." (Def.'s Mem., Dkt. No. 42, p. 11). Google is
9 plainly mistaken. Had IconFind taken Google's approach to pleading—i.e. identifying no facts
10 or statutory subsections—it would have merely alleged: “Google has infringed IconFind's ‘459
11 Patent under 35 U.S.C. § 271.” Google would surely have chided IconFind for such bald
12 allegations in a motion to dismiss of its own. Unlike Google, however, IconFind articulated the
13 subsection of the relevant statute—specifically, “Google has infringed and continues to infringe
14 ... the '459 patent under 35 U.S.C. § 271(a) ...” (Compl., Dkt. No. 1, at ¶ 7). IconFind also
15 alleged factual specifics, such as 1) the allegedly infringed claims, 2) the accused websites by
16 name, 3) a specific infringing feature of the websites by name, and 4) that Google had actual
17 notice of its infringement before the suit. Accordingly, IconFind is not asking the Court to
18 require more of Google than of IconFind, but instead, is merely asking for the specific grounds
19 of invalidity asserted and sufficient facts in support, as required by Rule 8, so that IconFind can
20 understand Google's allegations and respond to them. Iqbal, 129 S. Ct. 1949 (“A pleading that
21 offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of the cause of action
22 will not do. ... Nor does a complaint suffice if it tenders ‘naked assertions’ devoid of ‘further
23 factual enhancement.’”) (citations omitted). Google has for a second time failed to specify

1 adequate grounds or supporting facts that could plausibly support a finding that IconFind's patent
2 is invalid, and thus, its invalidity counterclaim and affirmative defense should be dismissed.⁵

3 **V. CONCLUSION**

4 For all of the foregoing reasons, IconFind respectfully requests that the Court grant its
5 motion to dismiss Google's amended counterclaim of patent invalidity (Count Two) pursuant to
6 Rule 12(b)(6) and grant its motion to strike Google's amended affirmative defense of patent
7 invalidity (Second Defense) pursuant to Rule 12(f).

8 Respectfully submitted,

9 May 9, 2011

10
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22 ⁵ In its opposition, Google failed to identify how it could cure the deficiencies in its
23 already-amended counterclaim and defense, so the Court should dismiss them with prejudice.
24 Gumbs v. Litton Loan Serv., 2010 U.S. Dist. LEXIS 87095, at *6 (E.D. Cal. Aug. 24, 2010)
(Burrell, J.) (dismissing with prejudice because the complainants "failed to identify in their
25 opposition how they will cure the deficiencies" and "granting leave to amend would be futile").