

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GROUPON, INC.,

Plaintiff,

v.

MOBGOB, LLC,

Defendant.

Case No. 1:10-CV-07456

Hon. William J. Hibbler

**MOBGOB, LLC'S BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS GROUPON, INC.'S CLAIMS OF INDUCED INFRINGEMENT,
CONTRIBUTORY INFRINGEMENT, AND WILLFUL INFRINGEMENT**

I. INTRODUCTION

Defendant MobGob, LLC ("MobGob") respectfully requests that the Court dismiss Plaintiff Groupon, Inc.'s ("Groupon") claims of induced patent infringement, contributory patent infringement, and willful patent infringement against MobGob.

To state claims of induced, contributory and willful patent infringement, a plaintiff must meet the following specific, well-established pleading requirements:

- To state a claim of induced infringement, the plaintiff must allege that the defendant had *actual knowledge of the patent-in-suit* and *specific intent* to encourage a third party to infringe the patent;
- To state a claim of contributory infringement, the plaintiff must allege that the defendant had *actual knowledge* of the patent at issue; and
- To state a claim of willful infringement, the plaintiff must set forth some factual basis showing that the defendant acted despite an "objectively high likelihood that its actions constituted infringement," *including that the defendant knew of the patent-in-suit*.

Groupon does not meet *any* of these requirements. Instead, Groupon makes only the following blanket, conclusory allegations:

- “Infringement is direct, as well as contributory, and by actively inducing infringement by others.” (D.I. ¶ 11.)
- “On information and belief, MobGob had actual and constructive notice of the existence of the ‘343 patent. MobGob’s continued acts of infringement has been, and will continue to be, wanton and willful.” (D.I. ¶ 12.)

Groupon never alleges that MobGob specifically intended to encourage infringement of the patent, or that MobGob acted despite a high likelihood of infringement, and its allegation of notice is mere supposition. Groupon’s claims of induced patent infringement, contributory patent infringement, and willful patent infringement against MobGob should be dismissed.¹

II. NATURE AND STAGE OF THE PROCEEDINGS AND STATEMENT OF FACTS

Groupon filed the complaint in this action on November 18, 2010. (D.I. 1.) Groupon alleges that MobGob infringed U.S. Patent No. 6,269,343 (the “‘343 Patent”). (*Id.* ¶¶ 11-12.) Groupon accuses MobGob of four types of infringement: (i) direct infringement; (ii) induced infringement; (iii) contributory infringement; and (iv) willful infringement. Its allegations against MobGob, however, comprise only three sentences:

- “Infringement is direct, as well as contributory, and by actively inducing infringement by others.” (D.I. ¶ 11.)
- “On information and belief, MobGob had actual and constructive notice of the existence of the ‘343 patent. MobGob’s continued acts of infringement has been, and will continue to be, wanton and willful.” (D.I. ¶ 12.)

Groupon does not allege that MobGob had any intent to induce infringement of the ‘343 Patent, or that MobGob acted despite an objectively high likelihood that its actions constituted infringement. (*Id.* ¶¶ 11-12.) Nor does Groupon allege, beyond information and belief, that MobGob knew of the ‘343 Patent at any time before this case was filed.

III. SUMMARY OF ARGUMENT

Every claim in a complaint must contain “enough factual matter (taken as true) to suggest that required element[s] of a cause of action.” *Mallinckrodt Inc. v. E-Z-EM, Inc.*, 670 F. Supp.

¹ If the Court grants MobGob’s Motion to Dismiss, Groupon’s claim of direct patent infringement will remain. As MobGob will show, it does not directly infringe any claim of the patent-in-suit.

2d 349, 353 (D. Del. 2009). In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court clarified that this rule required a plaintiff to allege and provide factual support for *each element* of its claim. See *Iqbal*, 129 S. Ct. at 1950 (where a claim requires purposeful action, the plaintiff must set forth specific facts in its complaint showing purposeful acts); *Twombly*, 127 S. Ct. at 1966 (explaining the “threshold requirement of Rule 8(a)(2) that the ‘plaintiff statement’ possess enough heft to show that the pleader is entitled to relief”) (internal quotation marks omitted).

If the plaintiff does not meet this standard, its claims must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. See *Twombly*, 127 S. Ct. at 1966 (where allegations do not show that all elements of the claim are met, claim must be dismissed); *Iqbal*, 129 S. Ct. at 1949 (rules of civil procedure “demand[] more than an unadorned, the defendant-unlawfully-harmed-me accusation”); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (“After *Iqbal*, it is clear that conclusory or ‘bare-bones’ allegations will no longer survive a motion to dismiss”); *Coolsavings.Com, Inc. v. Catalina Marketing Corp.*, 1999 WL 342431, *2 (N.D. Ill. 1999) (granting motion to dismiss claim of inducing infringement because the complaint “alleges only the ‘bald assertion’ of active inducement”). As set forth below, each of Groupon’s claims of induced, contributory, and willful infringement against MobGob must be dismissed because Groupon does not allege or provide factual support of the elements of these claims.

IV. ARGUMENT

A. Groupon’s Induced Infringement Claim Should Be Dismissed

Induced infringement requires three specific elements: (1) that a third party directly infringed the patent-in-suit; (2) that the defendant knew or should have known that its actions would induce infringement; and (3) that the defendant specifically intended to encourage this third-party infringement. See, e.g., *SRI Int’l, Inc. v Internet Sec. Sys., Inc.*, 647 F. Supp. 2d 323, 325 (D. Del. 2009).

To state a claim of induced infringement under *Iqbal* and *Twombly*, a plaintiff therefore must specifically allege at least that the defendant **actually knew** of the patent-in-suit and that the defendant had **specific intent** to encourage some third party to infringe the patent. *See Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F. 3d 1317, 1328 (Fed. Cir. 2009) (inducement requires that “the alleged infringer knew of the patent, knowingly induced the infringing acts, and possessed a specific intent to encourage another’s infringement of the patent”); *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F. 3d 1293, 1304 (Fed. Cir. 2006) (“The requirement that the alleged infringer knew or should have known his actions would induce actual infringement *necessarily includes the requirement that he or she knew of the patent in suit.*”) (emphasis added).

Groupon does not meet this standard. It never alleges that MobGob intended to encourage infringement, let alone provides any factual support for such allegations. (*See* D.I. ¶ 11 (asserting only, and without support, that MobGob “actively induc[ed] infringement by other”). Nor does Groupon allege, beyond information and belief, that MobGob knew of the ‘343 Patent prior to this suit. Groupon’s claim of inducement therefore must be dismissed. *See Coolsavings.Com, Inc. v. Catalina Marketing Corp.*, 1999 WL 342431, *2 (N.D. Ill. 1999) (granting motion to dismiss claim of inducing infringement because the complaint “alleges only the ‘bald assertion’ of active inducement, which, ‘without the allegation of any facts supporting it,’ does not satisfy the pleading requirements of the federal rules”); *Ristvedt-Johnson, Inc. v. Peltz*, 1991 WL 255691, at *4 (N.D. Ill. 1991) (ruling that plaintiff must plead “every essential element to show the violations of the law claimed” to survive a motion to dismiss and dismissing inducement allegation because patentee only pled a “bald assertion” of inducement, “without the allegation of any facts supporting it” and that this “plainly does not meet the pleading requirements of the Federal Rules of Civil Procedure”); *Mallinckrodt*, 670 F. Supp. 2d at 354 (“Plaintiffs’ Complaint does not specifically allege that Defendants had knowledge of the ‘434 Patent at the time they were committing the allegedly infringing activities set forth in Paragraph 11 Further, Plaintiffs do not specifically allege any intent to induce infringement

Accordingly, the Court concludes that Plaintiffs have failed to state a claim for inducing infringement.”).

Groupon’s inducement claim is similar to the claim that was dismissed in *Coolsavings.Com*. There, the plaintiff, like Groupon, made an inducement claim but failed to allege any specific facts relating to the defendant’s specific intent to encourage infringement. *See Coolsavings.Com*, 1999 WL 342431 at *5-6. The Court concluded that the plaintiff’s failure to specifically allege that the defendant had the requisite intent to induce infringement required dismissal of the inducement claim:

Plaintiff’s inducement claim, however, fails because it does not allege the requisite intent. For an inducement claim to succeed, the plaintiff must show that the defendant encouraged another’s direct infringement with both knowledge and specific intent. ... *The instant complaint alleges only the "bald assertion" of active inducement, which, "without the allegation of any facts supporting it," does not satisfy the pleading requirements of the federal rules.* ... For this claim to satisfy Rule 12(b)(6), plaintiff must make some factual allegation that implies the existence of the requisite scienter.

...

For the foregoing reasons, we grant defendants’ motion to dismiss the portion of paragraph 8 of plaintiff’s complaint that alleges that Catalina "actively induced" SuperMarkets to infringe the '648 patent.

Id. (emphasis added). Groupon’s inducement claim should be dismissed for the same reason.

B. Groupon’s Contributory Infringement Claim Should Be Dismissed

To state a claim for contributory infringement, the plaintiff must allege and provide factual support for three elements: (1) that a third party directly infringed on the patent-in-suit using a component supplied by the defendant; (2) that the defendant knew of the patent; and (3) that the component the defendant supplied was “especially designed” for the infringing use. *See In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 695 F. Supp. 2d 680, 688 (S.D. Ohio 2010) (dismissing contributory infringement claim where plaintiff failed to allege that defendant “knew its product was especially designed for use to infringe”); *Mallinckrodt*, 670 F. Supp. 2d at 354-55.

Groupon again fails to meet the pleading standard. Groupon does not allege that a third party infringes the ‘343 Patent using a component supplied by MobGob, does not allege that MobGob “especially designed” any component for such an infringing use, and does not allege, beyond information and belief, that MobGob had any knowledge of the ‘343 Patent. (D.I. ¶¶ 11-12.) Without these allegations – or any factual basis for them – Groupon’s contributory infringement claim must be dismissed.

C. Groupon’s Willful Infringement Claim Should Be Dismissed

In *In re Seagate Tech, LLC*, 497 F. 3d 1360, 1371 (Fed. Cir. 2007), the Federal Circuit established that willful infringement requires: (1) that the defendant was aware of the asserted patent; (2) that the defendant acted despite an objectively high likelihood that its actions constituted infringement of the patent; and (3) that the defendant knew or should have known of this objective risk. *See also i4i P’ship v. Microsoft Corp.*, 598 F. 3d 831, 860 (Fed. Cir. 2010) (willful infringement requires evidence that the accused infringer “was aware of the asserted patent, but nonetheless ‘acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.’” (quoting *Seagate*, 497 F. 3d at 1371)).

Groupon fails to meet these elements of willful infringement. Its willfulness claim is limited to the following conclusory allegation: “On information and belief, MobGob had actual and constructive notice of the existence of the ‘343 patent. MobGob’s continued acts of infringement has been, and will continue to be, wanton and willful.” (D.I. ¶ 12.). Groupon never alleges, beyond information and belief, that MobGob knew of the ‘343 Patent, let alone facts demonstrating MobGob’s knowledge of the patent and objectively unreasonable conduct. Accordingly, Groupon’s willful infringement claim must be dismissed. *See Sentry Protection Prods., Inc. v. Eagle Mfg. Co., Inc.*, 400 F. 3d 910, 918 (Fed. Cir. 2005) (plaintiff alleging willfulness must allege that infringement has been “with full knowledge” of the patents-in-suit); *Seagate*, 497 F. 3d at 1374 (“[W]hen a complaint is filed, a patentee must have a good faith basis for alleging willful infringement.”); *Realtime Data, LLC v. Stanley*, 2010 WL 2403779, at *7

(E.D. Tex. June 10, 2010) (dismissing willfulness claim where plaintiff merely alleges that “Defendants’ infringement of the Patents-in-Suit is or has been willful”).

V. CONCLUSION

For the reasons stated above, Groupon’s conclusory allegations against MobGob fail to state a claim for induced, contributory, or willful patent infringement. Groupon’s claims of induced, contributory, and willful infringement should be dismissed.

Dated: February 2, 2011

Respectfully submitted,

RUSS AUGUST & KABAT

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CERTIFICATE OF SERVICE

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served on February 2, 2011 with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

Dated: February 2, 2011

By: /s/ Alexander C.D. Giza
Alexander C.D. Giza