IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GROUPON INC., PLAINTIFF, v. MOBGOB LLC., DEFENDANT.	Civil Action No. 10-CV-07456 Hon. William J. Hibbler

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE AFFIRMATIVE DEFENSES

Pursuant to Fed. R. Civ. P. 12(f), Plaintiff Groupon, Inc. ("Groupon"), by and through its attorneys, Dykema Gossett PLLC, submits this memorandum of law in support of its Motion to Strike Defendant's Affirmative Defenses filed simultaneously herewith.

I. INTRODUCTION

For its Affirmative Defenses, Defendant MobGob, LLC's ("MobGob") recites two defenses that are not legally proper, and fails to include any factual support for several others rendering them nothing more than legal conclusions. MobGob's first and eighth affirmative defenses are duplicative of MobGob's separate motion to dismiss and its Answer, respectively, and merely clutter the pleadings rather than add a meaningful basis for relieving MobGob of liability. MobGob's second and fifth affirmative defenses are barebones conclusory allegations without any supporting factual recitation. Furthermore, MobGob has attempted to hedge its bets depending

on what is uncovered during discovery by qualifying each of these defenses. Consequently, MobGob has failed to both provide notice and to show the second and eighth affirmative defenses to be facially plausible as required by Rule 8(a)(2). Such "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Accordingly, MobGob's affirmative defenses should be struck.

II. PROCEDURAL HISTORY

Groupon filed this action on November 18, 2010, asserting that MobGob willfully infringes, both directly and indirectly, Groupon's U.S. Patent 6,269,343 ("the '343 Patent"). On February 2, 2011, MobGob filed a motion to dismiss Groupon's allegations of induced infringement, contributory infringement and willful infringement. It also filed its Answer to Groupon, Inc.'s Complaint for Patent Infringement and Damages And Counterclaims ("Answer & Counterclaim"), setting forth an answer and affirmative defenses to the remainder of Groupon's complaint and two counterclaims requesting declarations for non-infringement and invalidity of the '343 Patent.

III. ARGUMENT

A. Pleading Standard for Affirmative Defenses

Rule 12(f) of the Federal Rules of Civil Procedure allows "[t]he court to strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A court may strike an affirmative defense if it is legally insufficient on its face. *See Heller Financial, Inc. v. Midwhey Powder Co.,* 883 F.2d

1286, 1294 (7th Cir. 1989). Affirmative defenses are subject to all pleading requirements of the Federal Rules of Civil Procedure, *id.*, and thus must set forth a "short and plain statement" showing they are entitled to the defense. FED. R. CIV. P. 8(a)(2). The short and plain statement may not be merely bare bones conclusory allegations, but rather must include factual material. *Heller*, 883 F.2d at 1295. Further, the analysis of the "short and plain statement" set forth in *Iqbal* is also applied to affirmative defenses. *See Bank of Montreal v. SK Foods, LLC*, 2009 WL 3824668, at *4 (N.D. Ill. Nov. 13, 2009) (applying *Iqbal* to affirmative defenses). Thus, an affirmative defense is evaluated on whether it contains "factual allegations" and whether they "plausibly give rise to an entitlement to relief." *Iqbal*, 129 S.Ct. at 1950.

In addition, a proper affirmative defense must assume that the complaint's allegations are true, then assert that a specific legal reason nonetheless excuses the defendant from liability. *Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897, 906 (N.D. Ill. 2006). Thus, an asserted affirmative defense that is merely a restatement of the denials contained within the answer is not only unnecessary, but also improper. *Id.*

B. MobGob's First and Eighth Affirmative Defenses Should be Stricken with Prejudice as Inappropriately Pled Defenses

1. MobGob's First Recited Affirmative Defense is Repetitive Material That Fails to Plead Additional Material Excusing Liability

MobGob's first affirmative defense should be stricken with prejudice because it is not properly pled as an affirmative defense and is redundant matter. This

defense alleges that Groupon's "Complaint fails to state a claim upon which relief may be granted." (Answer & Counterclaim, ¶14.) The defense is completely duplicative of MobGob's motion to dismiss. An affirmative defense that simply raises the same issue that has been already been raised by separate motion is repetitive and adds nothing to the litigation and therefore should be struck. *Surface Shields, Inc. v. Poly-tak Protective Sys.*, 213 F.R.D. 307, 308 (N.D. Ill. 2003)(striking two affirmative defenses restating the standard for evaluating a motion to dismiss under Rule 12(b)(6) as clutter). Accordingly, the first affirmative defense should be struck.

2. MobGob's Eighth Affirmative Defense Is Not Consistent With the Allegations of the Complaint

MobGob's eighth affirmative defense should be struck with prejudice because it is redundant and fails to adequately state a legal defense. The eighth affirmative defense states:

> 21. Groupon is not entitled to injunctive relief, because any injury to Groupon is not immediate or irreparable, Groupon has an adequate remedy at law, the balance of hardships favors no injunction, and the public interest is best served by no injunction.

(Answer & Counterclaims, ¶21.) In its Complaint, Groupon requests injunctive relief against MobGob, stating that MobGob's infringing activities has and continues to damage Groupon. MobGob generally denied those allegations in its Answer. (Answer & Counterclaims, ¶13.) MobGob's affirmative defense, therefore, simply repeats its previous denial and should be dismissed as duplicative.

In addition, however, this affirmative defense is legally insufficient because it does not assume the allegations in the complaint to be true. MobGob's assertion that Groupon has no adequate remedy at law is contrary to the Complaint's allegation, and thus cannot serve as an affirmative defense. *Reis*, 462 F. Supp. 2d at 906; s*ee also State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 279 (N.D. Ill. 2001). Accordingly, the defense should be stricken with prejudice as legally insufficient.

C. MobGob's Second Affirmative Defense Fails to Satisfy the Pleading Requirements of Rule 8(a)(2)

MobGob's second affirmative defense fails to satisfy the pleading standards of Rule 8(a)(2) because it merely is a laundry list of statutory sections that could provide a basis for the defense. The defense states that "[t]he '343 Patent is invalid for failing to comply with one or more provisions of Title 35 of the United States Code, including without limitation, 35 U.S.C. §§ 101-103, 112, and 116, and is also unenforceable." (Answer & Counterclaim at ¶15.) The defense does not even specify whether all or only one of the sections supports the defense. Nor does the defense include even general factual contentions on which the invalidity claims rest.

This minimal allegation cannot be said to give Groupon "fair notice of what the claim is" as the required elements for establishing invalidity under 35 U.S.C. §§ 101-103 and 112 vary greatly. For instance, § 101 focuses on whether the invention is drawn to patentable subject matter, §§ 102 and 103 focus on the state of the prior art compared to the claims of the patent, and § 112 focuses primarily on the quality

of the patent's disclosure viewed by a person having skill in the art compared to the scope of the claims. Each of these statutory sections requires investigation into a separate arena, and the required short and plain statement of Rule 8(a)(2) must identify the particular area in which Groupon should investigate. Courts have consistently held stringing together a list of affirmative defenses fails to satisfy Rule 8(a). *See Sorensen v. Spectrum Brands, Inc.*, 09 CV 58, 2009 WL 5199461, at *1 (S.D. Cal. Dec. 23, 2009); *Sun Valley Bronze, Inc. v. Nobilus, LLC*, 72 Fed. R. Serv. 3d 518 (D. Idaho 2008); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622-23 (S.D.N.Y. 2008); *Bartashnik v. Bridgeview Bancorp, Inc.*, 05 C 2731, 2005 WL 3470315, at *3 (N.D. Ill. Dec. 15, 2005)(citing a listing of cases). Moreover, without reciting even a single element of a single invalidity defense MobGob's defense does not even rise to the level of a "threadbare recital of the elements of a [defense], supported by mere conclusory statements" that the Supreme Court in *Iqbal* considered insufficient. *Iqbal*, 129 S.Ct. at 1949.

The affirmative defense is further deficient because it is completely bereft of any facts relevant to even one of the invalidity defenses. With no alleged facts, there is nothing for the court to accept as true and the defense cannot even be evaluated under the first part of the *Iqbal* test. MobGob must at least put Groupon on notice of "the grounds upon which [the defense] rests," which it has failed to do. *Erickson,* 551 U.S. at 93; *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

While specific facts are not required, MobGob must plead some type of factual basis on which to ground the claims of the invalidity defenses as required to satisfy

the requirements of Rule 8(a)(2). MobGob has simply not done so. Accordingly, MobGob's second affirmative defense should be stricken for failing to comply with the requirements of Rule 8(a)(2).

D. MobGob's Fifth Affirmative Defense Is An Unsupported Legal Conclusion and Contrary to MobGob's Recitation of Its Own Knowledge

MobGob's fifth affirmative defense also fails to comply with the pleading requirements of Rule 8(a)(2). MobGob's statement "[t]o the extent Groupon does not own all the rights to the '343 Patent" improperly qualifies the assertion with "to the extent" and therefore does not "state in short and plain terms" the defense. *See* FED. R. CIV. P. 8(a)(2). Further, when the qualifying language is considered with MobGob's response to the Complaint's allegation of ownership, it becomes clear that MobGob has plead this defense with nothing more than hope that it will uncover supporting evidence in discovery.

In response to paragraph 8 of the Complaint, MobGob responded by stating that it "is without knowledge or information sufficient to form a belief as to the truth or falsity of whether the '343 Patent is owned by Groupon." (Answer & Counterclaim, ¶ 8.) How can MobGob claim it lacks enough knowledge to make an outright denial of Groupon's alleged ownership, yet then turn around and assert an affirmative defense that depends on Groupon not having ownership? The two statements are simply logically incompatible, and MobGob makes no additional factual allegations that might both resolve the ambiguity and provide notice as to the factual grounds for the defense. Without any clarifying facts, the Answer &

Counterclaim merely recites an unsupported legal conclusion contradicted by MobGob's own responses to the Complaint. Rather than plead the defense purely speculatively, the Federal Rules of Civil Procedure allow for amending pleadings under Rule 15 should supporting facts be unearthed in discovery. Accordingly, MobGob's fifth affirmative defense must be struck.

IV. CONCLUSION

For the foregoing reasons, Groupon respectfully requests that this Court grant its Motion, strike MobGob's first and eighth affirmative defenses with prejudice, and strike MobGob's second and fifth affirmative defenses without prejudice.

Dated: February 23, 2011

Respectfully submitted,

Groupon, Inc.

s/ Kyle Davis
One of its Attorneys

Steven McMahon Zeller
szeller@dykema.com
Kyle A. Davis
kdavis@dykema.com
Dykema Gossett PLLC
10 South Wacker Drive, Suite 2300
Chicago, Illinois 60606
Telephone: (312) 876-1700
Fax: (312) 627-2302

CERTIFICATE OF SERVICE

I, Kyle Davis, hereby certify that a copy of *Plaintiff's Memorandum of Law in Support of its Motion to Strike Affirmative Defenses* was served upon the following persons:

Alexander C.D. Giza
Russ, August & Kabat
12424 Wilshire Boulevard, 12th Floor
Los Angeles, California 90025

David B.H. Williams
Williams, Bax & Saltzman, P.C.
221 N. LaSalle Street #3700
Chicago, Illinois 60601

Counsel for Defendant MobGob, LLC.

via the Court's CM/ECF system.

Dated: February 23, 2011

/s/ Kyle A. Davis
Kyle A. Davis

CHICAGO\3195364.5A
ID\KD - 065640/0042