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 DISMISS DEFENDANT'S SECOND COUNTERCLAIM

Plaintiff Groupon, Inc. ("Groupon"), by and through its attorneys, Dykema Gossett PLLC, submits this memorandum of law in support of its "Motion to Dismiss Defendant's Second Counterclaim" filed simultaneously herewith.

I. INTRODUCTION

Defendant MobGob, LLC's ("MobGob") counterclaim for a declaration of invalidity for U.S. Patent 6,269,343 ("the '343 Patent") is devoid of any specificity as to how the patent is invalid or even the specific statutory basis for such invalidity. MobGob's barebones allegations are merely legal conclusions that fall significantly short of the minimal detail required. The counterclaim contains no factual assertions concerning either the state of the prior art or the claims of the '343 patent. Without any factual context for its claim, MobGob has neither provided notice nor shown that its asserted counterclaim is facially plausible, as required by Rule 8(a)(2). These are the very type of allegations that the Supreme Court

cautioned against in *Iqbal* when it stated: "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of the cause of action will not do." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). MobGob's Second Counterclaim thus fails to state a claim upon which relief can be granted, warranting dismissal under Rule 12(b)(6).

II. PROCEDURAL BACKGROUND

Groupon filed this action on November 18, 2010, asserting that MobGob directly and indirectly infringes the '343 Patent and does so willfully. 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.[1]

III. ARGUMENT

A. Legal Standard

A pleading stating a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief. FED. R. CIV. P. 8(a). To comply with the requirements of Rule 8 and survive a motion to dismiss, a pleading must contain sufficient factual matter, accepted as true, to state a claim to relief

[1] MobGob's first Counterclaim, requesting a declaration that it does not infringe the '343 Patent, is not a subject of this motion to dismiss. Concurrent with this motion, Groupon is filing an answer to MobGob's first counterclaim.

that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949(citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). The "short and plain statement" of Rule 8 need only give the defendant fair notice of what the claim is and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). In evaluating the sufficiency of a pleading, a court must (a) accept all of the pleading's well-pleaded facts as true, but may disregard any legal conclusions, and (b) determine whether the facts alleged in the pleading are sufficient to show that the party has a plausible claim for relief. *Iqbal*, 129 S.Ct. 1949-50. A claim has facial plausibility when the pleading contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 1949.

B. MobGob's Second Counterclaim Fails to Provide Notice of the Claim and is an Unsupported Legal Conclusion

MobGob's Second Counterclaim is a full two sentences long, one of which merely incorporates by reference all the preceding paragraphs of MobGob's Answer and Counterclaims. The substantive allegation is a simple legal conclusion:

> 34. The '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.

(Answer & Counterclaim, ¶34.) The incorporation by reference adds nothing to the above, since the only other allegation related to the validity of the '343 Patent plead as MobGob's Second Affirmative Defense, is almost identical:

> 15. The '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, ¶15.) MobGob's entire counterclaim, therefore, is merely a laundry list of statutory grounds for patent invalidity, without any identification of which provisions in the list might actually apply.

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 addresses patentable subject matter, §§ 102 and 103 address novelty and obviousness through comparison of the claims and the prior art, and § 112 focuses on the quality of the patent's disclosure. These statutory sections comprise the whole world of patent invalidity. Rule 8, however, requires that the claim indicate on which continent Groupon's investigation should begin by providing "notice of what the claim is" within the required short and plain statement. *Erickson*, 551 U.S. at 93. Moreover, without reciting even a single element of a single invalidity defense MobGob's pleading does not even rise to the level of a "threadbare recital of the elements of a claim, supported by mere conclusory statements" that the Supreme Court in *Iqbal* considered insufficient. *Iqbal*, 129 S.Ct. at 1949.

The counterclaim 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 claim 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 claim] rests," which it has failed to do. *Erickson,* 551 U.S. at 93; *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

Courts have routinely dismissed invalidity counterclaims having no factual support. *Sorensen v. Spectrum Brands, Inc.*, 09 CV 58, 2009 WL 51994561, at *1 (S.D. Cal. Dec. 23, 2009); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008); *Sun Valley Bronze, Inc. v. Nobilus, LLC*, 72 Fed. R. Serv. 3d 518 (D. Idaho 2008); *Bartronics, Inc. v. Power-One, Inc.*, 245 F.R.D. 532, 537 (S.D. Ala. 2007); *Sprint Communications Co. v. Theglobe.com, Inc.*, 233 F.R.D. 615, 618-619 (D. Kan. 2006). MobGob's allegations are no different and should also be dismissed.

Rule 8(a)(2) requires MobGob to specify the statutory basis and plead some type of factual allegation on which to ground the claims of invalidity. MobGob has failed to do so. Accordingly, MobGob's second affirmative defense must be stricken for failing to comply with the requirements of Rule 8(a)(2).

IV. CONCLUSION

For the foregoing reasons, Groupon respectfully requests that this Court grant its Motion, and dismiss MobGob's second counterclaim for failing to state a claim.

Dated: February 23, 2011

Respectfully submitted,

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 Dismiss Defendant's Second Counterclaim* was served upon the following persons:

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

Counsel for Defendant MobGob, LLC.

via the Court's CM/ECF system.

Dated: February 23, 2011

/s/ Kyle A. Davis
Kyle A. Davis

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