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 OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

I. INTRODUCTION

Affirmative defenses need only provide a plaintiff with adequate notice that the defendant intends to pursue a particular defense. Plaintiff Groupon, Inc., however, attempts to import additional requirements that are inconsistent with the Local Rules and the Federal Rules of Civil Procedure. These attempts should be rejected.

First, Groupon believes that because Defendant MobGob, LLC has asserted an affirmative defense for invalidity of the patent-in-suit, MobGob must disclose its invalidity contentions at the pleading stage rather than according to the timeline set forth in the Local Patent Rules. As more fully set forth in MobGob's opposition to Groupon's Motion to Dismiss MobGob's counterclaim of invalidity, Groupon's assertion is entirely inconsistent with the early invalidity disclosure requirements of the Local Patent Rules in this District.

Second, Groupon also tries to mischaracterize MobGob's affirmative defenses as being inconsistent. Not only has MobGob pleaded consistent defenses, but also (more importantly) Groupon's attempt to require consistent defenses contradicts the Federal Rules of Civil Procedure.

The requirements for adequately pleading affirmative defenses are well-established, and MobGob has satisfied those requirements. Therefore, Groupon's motion should be denied.

II. LEGAL STANDARDS

"Motions to strike are not favored and will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *High Sierra Sport Co. v. Travelers Club Luggage, Inc.*, No. 10 C 3419, 2010 U.S. Dist. LEXIS 132591, at *3 (N.D. Ill. Dec. 15, 2010) (*quoting Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991)). "[A]ffirmative defenses should be stricken only when they are insufficient on the face of the pleadings." *Comerica Bank v. FGMK, LLC*, No. 10 C 1930, 2011 U.S. Dist. LEXIS 2648, at *8 (N.D. Ill. Jan. 11, 2011) (internal quotation marks omitted). Furthermore, "defenses will not be struck if … they present questions of law or fact." *Id.*

III. MOBGOB'S INVALIDITY AFFIRMATIVE DEFENSE HAS BEEN PROPERLY PLED

Groupon has not only attacked MobGob's invalidity affirmative defense, but has also attacked MobGob's invalidity counterclaim. (Dkt. Nos. 31, 32.) For the same reasons as set forth in MobGob's opposition to that motion, Groupon's motion to strike MobGob's affirmative defense for invalidity should be denied. To prevent unnecessary duplication, MobGob incorporates by reference the arguments set forth in its opposition to Groupon's Motion to Dismiss (filed concurrently). In short, MobGob has adequately pleaded an affirmative defense for invalidity given the disclosures required under the Local Patent Rules. *See Pfizer Inc. v. Apotex Inc.*, 726 F. Supp. 2d 921, 937-38 (N.D. Ill. 2010) (finding that dismissal of the plaintiff's "counterclaims for failure to satisfy Rule 8(a) would undermine the Local Patent Rules, which require more detailed disclosures at a later stage.").

IV. MOBGOB'S AFFIRMATIVE DEFENSE FOR LACK OF STANDING SHOULD NOT BE DISMISSED

Ironically, Groupon's motion itself does not adequately describe how MobGob's affirmative defense for lack of standing is deficient. MobGob's fifth affirmative defense states: "To the extent Groupon does not own all the rights to the '343 Patent, the Complaint must be

dismissed for lack of standing." (Dkt. No. 24, ¶ 18.) As required by Fed. R. Civ. Proc. 8(d)(1), this affirmative defense is "simple, concise, and direct." It also provides adequate notice to Groupon that to the extent Groupon does not have sufficient rights to the '343 Patent, MobGob will assert that Groupon lacks standing to bring this suit. Nothing more is required. *See Mobley v. Kelly Kean Nissan, Inc.*, 864 F. Supp. 726, 732 (N.D. Ill. 1993) ("[F]ederal courts adhere to a system of notice pleading, whereby parties need only notify the other side of the nature of their claims or defenses and need not plead with particularity.").

A. MobGob Has Pleaded Consistent Defenses.

The crux of Groupon's objections to MobGob's standing affirmative defense appears to be that MobGob has pleaded inconsistent defenses. There is no inconsistency. In paragraph 8 of its Answer, MobGob asserts that it has insufficient information as to whether Groupon owns the '343 Patent. MobGob's fifth affirmative defense consistently alleges that to the extent Groupon does not, in fact, own the '343 Patent, MobGob will assert a lack of standing defense. It is unclear what Groupon considers to be the perceived inconsistency.

Moreover, even if the defenses were inconsistent, MobGob is fully within its right to assert such defenses. Groupon conveniently ignores Fed. R. Civ. Proc. 8(d)(2) and (3), which expressly permit inconsistent claims and defenses. *See* Fed. R. Civ. Proc. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); Fed. R. Civ. Proc. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."). In short, Groupon's assertion of inconsistency is both factually and legally unsupported.

B. MobGob Has Pleaded Sufficient Facts.

Finally, relying on *Ashcroft v. Iqbal*, (a case dealing with causes of action and not affirmative defenses), Groupon claims that the Court should strike MobGob's affirmative defense without prejudice for lack of factual support. But this Court recently declined to extend *Iqbal* to affirmative defenses. *Leon v. Jacobson Transportation Co., Inc.*, No. 10 C 4939, 2010

U.S. Dist. LEXIS 123106, at *2 (N.D. Ill. Nov. 19, 2010). The Court likewise rejected "the proposition that a defendant must include sufficient factual allegations in affirmative defenses to make them plausible." *Id.* at *2-3. With an appreciation of the realities of litigation, the Court explained:

> The Court, though, has never once lost sleep worrying about defendants filing nuisance affirmative defenses and considers the risk that defendants would file nuisance defenses sufficiently small so as not to warrant extending *Twombly* and *Iqbal*. Second, a plaintiff has the length of the statute of limitations to investigate claims and ensure that it has sufficient facts to state a plausible claim. A defendant, on the other hand, has only twenty days to file an answer. Third, the Court would like to avoid having to rule on multiple motions to amend the answer during the course of discovery as the defendant obtains additional information that would support those affirmative defenses (such as mitigation of damages) that defendant has no practical way of investigating before discovery. The Court would also like to avoid the discovery disputes that would inevitably develop as a defendant seeks discovery related to affirmative defenses it had not stated in its answer. It is to everyone's benefit to have defendant plead its affirmative defenses early, even if defendant does not have detailed facts. Thus, the Court will not strike any affirmative defenses for not having enough detail or for being speculative.

Therefore, dismissing MobGob's affirmative defense would not serve the purpose of a motion to strike – to "remove unnecessary clutter from the case" that would "serve to expedite" the litigation. *Comerica,* 2011 U.S. Dist. LEXIS 2648 at *8. Instead, dismissal would only necessitate unnecessary pleadings and disputes in the near future. Groupon's motion should, therefore, be denied.

V. MOBGOB WILL DISMISS, WITHOUT PREJUDICE, ITS FIRST AND EIGHTH AFFIRMATIVE DEFENSES

To streamline this case, MobGob will agree to dismiss its first and eighth affirmative defenses, without prejudice, with the understanding that MobGob is expressly reserving its rights to oppose Groupon's claim for injunctive relief against MobGob.

VI. CONCLUSION

For the reasons set forth in MobGob's opposition to Groupon's Motion to Dismiss MobGob's counterclaim for invalidity, Groupon's motion to strike MobGob's affirmative defense of invalidity should be denied. For the reasons set forth above, MobGob's motion to

strike MobGob's affirmative defense for lack of standing should also be denied. Groupon's motion to strike MobGob's first and eighth affirmative defenses is moot as MobGob will voluntarily dismiss without prejudice its first and eighth affirmative defenses.

Respectfully submitted,

Dated: March 9, 2011

RUSS AUGUST & KABAT

By: /s/Alexander C.D. Giza

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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 March 9, 2011 with a copy of this document via the Court's CM/ECF system pursuant to Local Rule CV-5.2 and General Order 09-014. Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

Dated: March 9, 2011

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