

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 RESPONSE TO DEFENDANT'S
MOTION TO DISMISS CLAIMS OF INDUCED INFRINGEMENT,
CONTRIBUTORY INFRINGEMENT, AND WILLFUL INFRINGEMENT

I. INTRODUCTION

In its Brief in Support of Its Motion to Dismiss Groupon, Inc.'s Claims of Induced Infringement, Contributory Infringement, and Willful Infringement ("Brief in Support"), Defendant MobGob LLC ("MobGob") has conflated the requirements for pleading claims of indirect and willful infringement with the requirements for proving such claims. While Defendant recites the Twombly and Iqbal decisions as setting forth the appropriate pleading standard, Defendant instead seeks to have this court apply a standard more appropriate for the summary judgment stage. However, Defendant has not, and cannot, cite to any authority for the proposition that Plaintiff Groupon, Inc.'s ("Groupon") claims of indirect and willful infringement against Defendant are subject to the heightened pleading requirements Defendant seeks to impose. Furthermore, under the proper interpretation of Twombly and Iqbal, it is clear that Plaintiff's claims are sufficient to state causes of action for

indirect and willful infringement against Defendant. Defendant's motion should therefore be denied.

## II. ARGUMENT

### A. The Complaint Adequately States a Claim for Induced Infringement

MobGob's argument regarding Groupon's inducement claim misapplies the law of *Iqbal* and *Twombly*, and incorrectly recites the applicable pleading standard for inducement of infringement.

In *Iqbal*, the Supreme Court held that the test for the sufficiency of a claim is whether it contains "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) citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Here, Groupon explicitly alleges the factual underpinnings for its claim of inducement. Groupon alleges that "MobGob markets and advertises goods and services in conjunction with the promotion of goods and services of others by providing a website [www.mobgob.com](http://www.mobgob.com), that features coupons and discounts of those goods and services." (Complaint at ¶4). Groupon alleges further facts regarding the subject website, stating that:

MobGob has created, *or has had created for it* . . . a system for aggregating demand for the purchase of a product by a number of individual buyers. The MobGob website, located at the URL [www.mobgob.com](http://www.mobgob.com), allows sellers to provide a conditional sales offer for a product or service and set a price for that product or service

depending on the aggregate amount of acceptances of the conditional sales offer made in a specified and limited time.

*Id.* at ¶10 (emphasis added). The pertinent facts regarding the existence of the asserted patent are alleged at paragraphs 7-8 in the complaint.<sup>1</sup> On that factual basis Groupon alleges, *inter alia*, ongoing inducement of infringement. *Id.* at ¶11. These factual allegations meet the working principles given in *Iqbal* in the context-specific framework of a claim for inducement to infringe.

MobGob's motion incorrectly focuses on the standard to prove a claim for inducement, rather than the standards to plead a plausible claim as required by *Iqbal*. Neither of the Federal Circuit cases cited by MobGob discuss the pleading standard for claims of induced infringement. Rather, both address the weight and sufficiency of evidence required to prove a claim of willfulness on the merits. *See Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1321 (Fed. Cir. 2009)(noting that district court granted summary judgment of, *inter alia*, no inducement of infringement); *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1302 (Fed. Cir. 2006) (noting that the jury found one defendant liable for inducement of infringement). Reliance on a standard applied at the summary judgment or trial stage, as MobGob has done, rather than the plausible pleading standard is plainly incorrect. *Twombly*, 550 U.S. at 577 (“[o]nce it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process”).

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<sup>1</sup> In its answer, MobGob admits the identity of the asserted patent and, more importantly, necessarily admits its knowledge of the patent by at least the filing of the complaint. MobGob, LLC's Answer to Groupon, Inc.'s Complaint for Patent Infringement and Damages and Counterclaims, Doc. #24, at ¶7.

Moreover, MobGob misstates the standard, and incorrectly implies that the Federal Circuit has held that a patentee needs to provide direct evidence of the accused infringer's actual knowledge of the patent. This is simply not the law. In *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360 (Fed. Cir. 2010) the Federal Circuit explicitly recognized that the decision MobGob relies on, *DSU Med. Corp.*, “did not . . . set out the metes and bound of the knowledge-of-the-patent requirement.” 594 F.3d at 1376. The *SEB* court made clear, which MobGob's motion ignores, that “a claim for inducement is viable even where the patentee has not produced direct evidence that the accused infringer **actually knew** of the patent-in-suit.” *Id.* at 1377 (emphasis added). Given that a induced infringement can be proven without direct evidence that the defendant actually knew of the patent, its incredulous that MobGob would assert that a complaint must specifically plead “that the defendant actually knew of the patent-in-suit.” (Brief in Support, p.4.)

The appropriate test for whether Groupon has set forth a claim for inducement is, as stated in *Iqbal*, whether there is a “reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949. Groupon has set forth facts providing a “plausible suggestion” of MobGob's inducement. Groupon has alleged that MobGob operates a website that constitutes an infringing system and has induced others to create, use or operate that site. (Complaint at ¶¶4, 10). MobGob's knowledge of the patent, both constructive and actual, is specifically alleged at paragraph 12.

In *Cal. Inst. of Computer Assisted Surgery, Inc. v. Med-Surgical Svcs., Inc.*, No. 10-C-05067, 2011 WL 672709 (N.D. Cal. Feb. 16, 2011), the Court found that when the plaintiff alleged the existence of a website alleged to infringe the asserted patents “one can infer from the information on [Defendants’] website . . . that Defendants were advertising and intended to use or sell the technologies.” *Id.* at \*4-5. Such allegations “satisfy the requirement to plead knowledge and intent.” *Id.* at \*5. As in *Cal. Inst. of Computer Assisted Surgery*, Groupon has alleged that MobGob “created or has had created for it” a system in the form of its website at www.mobgob.com that infringes and induces others to infringe the patent-in-suit. (Complaint at ¶¶10-11.)

In contrast, the cases cited by MobGob in its Brief in Support are plainly inapposite to the “context-specific task” of analysis of the pleadings in this case. *Iqbal*, 129 S.Ct. at 1950. Specifically, in both *Coolsavings.com, Inc. v. Catalina Mktg. Corp.*, No. 98-C-6668, 1999 WL 342431 (N.D. Ill. May 19, 1999) and *Ristvedt-Johnson, Inc. v. Peltz*, No. 91-C-3273, 1991 WL 255691 (N.D. Ill. Nov. 18, 1991), the complaints contained no facts to support the induced infringement claims, instead consisting of just “the ‘bald assertion’ of active inducement,” or the mere conclusion of inducement. *Coolsavings.com*, 1999 WL 342431, at \*2; *Ristvedt-Johnson*, 1991 WL 255691, \*3. In contrast, as noted above, Groupon has detailed the factual underpinnings of its inducement theory in its complaint—namely, that MobGob has used others to at least create its infringing website. That website, referenced in the complaint, confirms that at least one other entity is involved in the infringing

activity. See [www.mobgob.com](http://www.mobgob.com), front page (“This sale is safely and securely done on Amazon.com servers . . .”). Thus, the facts in Groupon’s complaint do raise a plausible claim that MobGob induces others to perform the claimed acts of infringement.

MobGob also relies on *Mallinckrodt Inc. v. E-Z EM Inc.*, but that case too is distinguishable. There, the Court found deficient the fact that there was no allegation whatsoever as to the Defendants’ knowledge of the patent-in-suit. *Mallinckrodt Inc. v. E-Z EM Inc.*, 670 F. Supp. 2d 349, 354 (D. Del. 2009). First, that requirement is directly contrary to the elements of the claim of inducement set out by the Federal Circuit in *SEB*, as discussed above. Second, here, Groupon has directly addressed MobGob’s knowledge of the patent. (Complaint at ¶12)(“MobGob had actual and constructive notice of the existence of the ‘343 patent.”).

Decisions from this District make clear that Groupon’s pleading of inducement is sufficient. In *Edge Capture LLC v. Lehman Brothers Holdings Inc.*, No. 09-C-2412, 2008 WL 4083146 (N.D. Ill. Aug. 28, 2008), the Court stated that:

The Complaint states that  
The technology and methods of automated trading [used by Defendants] infringe directly and/or indirectly one or more claims of the ‘ 833 patent and/or one or more claims of the ‘629 patent.” This statement sufficiently puts Defendants on notice. Further specificity is not required at this stage of the proceedings.

*Id.* at \*1. Here, Groupon has alleged far greater detail than in *Edge Capture*, and likewise further specificity is not required at this stage. See also *UTStarcom, Inc. v. Starent Networks, Corp.*, 7 C 2582, 2009 WL 3104402, \*2 (N.D. Ill. March 24, 2009) (denying motion to dismiss “bare allegations of inducement” and stating that “[t]his

is not the time to evaluate whether plaintiff has made or can make a special showing, but rather to determine whether the allegations of the complaint sufficiently allege claims against defendants under notice pleading standards.”); *Kilopass Tech. Inc. v. Sidense Corp.*, 10-C-02066, 2010 WL 5141843, \*4-5 (N.D. Cal. Dec. 13, 2010) (denying motion to dismiss inducement and contributory infringement claims where plaintiff alleged defendant “actively induced infringement” and awareness of the patent); *Aspex Eyewear, Inc. v. Hardy Life, LLC*, 9-61515-Civ, 2010 WL 2926511, \*2 (S.D. Fla. July 23, 2010) (denying motion to dismiss and finding that allegations of aiding and abetting infringement, even when “somewhat light on factual allegations,” meet Rule 8 standard).

**B. The Complaint Adequately States a Claim for Contributory Infringement**

MobGob’s argument regarding Groupon’s claims of contributory infringement are also flawed as they ignore the facts pled in Groupon’s complaint and the reasonable inferences that *Iqbal* allows the court to draw from those facts. Not only has Groupon sufficiently alleged third party infringement and knowledge of the patent, as discussed above, but also has plead enough facts to support a reasonable inference that components of the accused website supplied by MobGob have no substantial noninfringing uses and are a material part of the invention. Rather, than prove such claims, at the present stage Groupon need only establish plausibility. *Twombly*, 550 U.S. at 577 (“matters of proof are appropriately relegated to other stages of the trial process”).

The complaint's recitation that "MobGob has created, or has had created for it" (Complaint at ¶10) alleges that MobGob created and operates the accused website with the aid of third parties, a fact that is advertised on the website by reference to its collaboration with [www.amazon.com](http://www.amazon.com). The allegation of collaboration is sufficient to allow the court to draw the reasonable inference that MobGob supplies components, such as controlling software for the accused website, that have no substantial noninfringing uses as particular software components cannot be said to be readily interchangeable. Rather, they are custom designed to interact with each other. Similarly, it is reasonable to assume that MobGob supplies components that are a material part of the invention. At least claims 1-7 of the '343 patent require "webpages which display said conditional offer" and the court may reasonably conclude that MobGob controls the content of its webpage displaying the products for sale. '343 patent col. 13:20-14:3.

Further, Groupon's allegations have provided notice as to the ground on which the claim lies. MobGob knows the structure of the system associated with the accused website. Thus, MobGob can easily determine both if the system components it supplies to others have a substantial noninfringing use, and if those components are material to the claims of the patent-in-suit. To require more detailed allegations from Groupon would be to move beyond the "plausibility standard" established by *Iqbal* by requiring more than the "a reasonable expectation that discovery will reveal evidence of illegal [contribution of components]." *Twombly*, 550 U.S. at 556.

Accordingly, MobGob's motion to dismiss Groupon's claims of contributory infringement should be denied.

**C. The Complaint Adequately States a Claim for Willful Infringement**

In its argument against Groupon's claim of willful infringement, MobGob once again attempts to impose the standard for *proving* the claim instead of the standard for pleading it. Specifically, MobGob asserts that Groupon's claim is deficient because it does not allege "facts demonstrating MobGob's knowledge of the patent and objectively unreasonable conduct." *Id.* However, no such requirement for pleading a claim of willful infringement exists, and MobGob has cited no controlling authority in support.

The fallacy in MobGob's arguments lies in its insistence that Groupon's claims must meet the elements for proving willful infringement set out in *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007). However, *Seagate* is not applicable at the pleading stage, and Groupon's claim need only satisfy the pleading requirements of Rule 8(a). As noted in *Twombly*, "matters of proof are appropriately relegated to other stages of the trial process." 550 U.S. at 577. MobGob's argument is identical to one rejected just last month by the court in *Milwaukee Electric Tool Corp. v. Hitachi Koki, Co.*, 09-C-948, 2011 WL 665439 (E.D. Wis. Feb. 14, 2011). There, the defendant asserted that *In re Seagate* required a complaint to allege facts suggesting "objective recklessness" on the part of defendant. *Id.* 2011 WL 665439, at \*3. The court disagreed, however, stating:

Although the defendants properly assert that *Seagate* sets forth the standard for establishing willful infringement, the defendants fail to

recognize that *Seagate* is not controlling for purposes of pleading under Fed.R.Civ.P. 8(a). In fact, several courts have noted that *Seagate* is not appropriate for the pleading stage of litigation, and find that a plaintiff need only meet the standards set forth in Fed.R.Civ.P. 8(a) to survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). See *Rambus, Inc. v. Nvidia Corp.*, No. C 08-3343 SI, 2008 WL 4911165, at \*2 (N.D.Cal. Nov. 13, 2008) (stating that the defendant erroneously cited *Seagate* in “address[ing] what is necessary to prove a claim of willfulness, not whether a plaintiff ha[d] sufficiently alleged willful infringement as a pleading matter.”) See also *Plant 21 LLC v. Cascade Greenhouse*, No. C07-5640-BHS, 2008 WL 3540602, \*1 (W.D.Wash. Aug. 8, 2008) (“An allegation of willful infringement is not subject to a heightened pleading standard but must meet the requirements of Rule 8.”)

*Id.*, 2011 WL 665439, at \*3. The court went on to conclude that the plaintiffs did not need to allege facts that establish “objective recklessness” under *Seagate*. *Id.*, 2011 WL 665439, at \*4. MobGob’s argument that Groupon’s claims must meet the *Seagate* standards should similarly be rejected.

To plead willful infringement, a plaintiff’s allegations need only be the equivalent of the defendant acted “with knowledge of the patent and of his infringement.” *Sentry Prot. Prods., Inc. v. Eagle Mfg. Co.*, 400 F.3d 910, 918 (Fed. Cir. 2005). The level of detail needed to allege willfulness is no more than the amount of detail present in Form 18 of the Federal Rules of Civil Procedure. See *S.O.I. Tec Silicon On Insulator Tech. v. MEMS Electronic Materials, Inc.*, No. 8-cv-292, 2009 WL 423989, \*2 (D. Del. Feb. 20, 2009) (“the court declines to require more detail with respect to plaintiffs’ willful infringement claims than is required by Form 18”); *Fotomedia Tech., LLC v. AOL, LLC*, No. 07-cv-255, 2008 WL 4135906, \*2 (E.D. Tex. Aug. 29, 2008)(same); see also *McZeal v. Spring Nextel Corp.*, 501 F.3d 1354, 1356-67 (Fed. Cir. 2007) (holding that infringement claims conforming to Form 18 are sufficient under *Twombly* to state a claim).

Groupon’s claim of willful infringement meets this requirement. Groupon’s complaint alleged that “MobGob had actual and constructive notice of the existence of the ‘343 patent,” and that MobGob had infringed and was continuing to infringe the ‘343 patent “through the creation and use of the MobGob website.” (Complaint at ¶¶11-12.) Such allegations are sufficient to provide MobGob with adequate notice of Groupon’s claim. *See, e.g., Milwaukee Electric Tool*, 2011 WL 665439 at \*5 (finding allegations “that defendants were aware of the plaintiffs’ patents and that the defendants were infringing and continue[d] to infringe” adequate to state a claim for willfulness); *Jardin v. Datallegro*, No. 8-cv-1462, 2009 WL 186194, at \*7 (S.D. Cal. Jan. 20, 2009)(finding allegation of “Defendants has [sic] actual or constructive knowledge of the ‘874 Patent, yet continue to infringe this patent to this very day” sufficient to allege knowledge of the patent and of the infringement); *Rambus, Inc. v. Nvidia, Corp.*, 08-C-3343, 2008 WL 4911165, at \*2 (N.D. Cal. Nov. 13, 2008)(finding allegation that infringement has been “deliberate and in disregard of [plaintiff’s] patent rights” was sufficient to state a claim of willfulness).

Lastly, MobGob complains that Groupon’s allegations are made upon “information and belief,” but cites no authority that such pleading is insufficient. To the contrary, “allegations ... cannot be faulted for their reliance on ‘information and belief.’” *Brown v. Budz*, 398 F.3d 904, 914 (7th Cir. 2005); *Lincoln Park Savings Bank v. Binetti*, No. 10-cv-5083, 2011 WL 249461, \*3 (N.D. Ill. Jan. 26, 2011) (stating that neither *Twombly* nor *Iqbal* changed the rule for pleading on “information and belief”). MobGob’s complaints should therefore be ignored.

### III. CONCLUSION

For the reasons stated above, Groupon has met the *Twombly* and *Iqbal* standards for pleading its claims of inducement to infringe, contributory infringement, and willful infringement. MobGob's relies on an incorrect standard—that is, the standard of proving claims, rather than pleading them—in its motion to dismiss. When the correct standard of law is applied, and the facts pled by Groupon are considered, MobGob's motion should be denied.

Dated: March 9, 2011

Respectfully submitted,

Groupon, Inc.

s/ Steven McMahon Zeller .

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