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 REPLY TO MOBGOB, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES

I. INTRODUCTION

In its response, Defendant MobGob LLC ("MobGob") concedes that its First and Eighth Affirmative Defenses are deficient and indicates its agreement to dismiss those defenses. For its Second and Fifth Affirmative Defenses, however, MobGob attempts to mask the obvious deficiencies therein by ignoring binding precedent from the Seventh Circuit requiring affirmative defenses to contain a "short and plain statement" of facts. Those defenses contain no citation of fact at all, rendering both of them incapable of satisfying the requirements of Rule 8 of the Federal Rules of Civil Procedure. Accordingly, those defenses should also be stricken by the Court.

II. ARGUMENT

A. MobGob's Invalidity Affirmative Defense is Glaringly Deficient

MobGob does not dispute, and in fact completely ignores, that in this Circuit, affirmative defenses are subject to "all pleading requirements of the Federal Rules of Civil Procedure." *Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). Thus, the requirements of Rule 8 apply to affirmative defenses. *Renalds v. S.R.G. Restaurant Grp., LLC*, 119 F. Supp. 2d 800, 802-03 (N.D. Ill. 2000). An affirmative defense must therefore "set forth a 'short and plain statement' of all the material elements of the defense asserted; bare legal conclusions are not sufficient." *Davis v. Elite Mortgage Servs.,* 592 F. Supp. 2d 1052, 1058 (N.D. Ill. 2009) (citing *Heller,* 883 F.2d at 1295).

MobGob's Second Affirmative Defense is nothing more than a list of the *possible* statutory provisions that *might* serve as a basis for finding the patent-in-suit invalid. MobGob's response fails to even acknowledge that it is well-settled in this district that pleading a laundry list of legal defenses is not sufficient under Rule 8:

> Courts have held time and time again that stringing together a long list of legal defenses is not sufficient to satisfy Rule 8(a)'s short and plain statement requirement. "It is unacceptable for a party's attorney simply to mouth ADs in formula-like fashion ('laches,' 'estoppel,' 'statute of limitations' or what have you), for that does not do the job of apprising opposing counsel and this Court of the predicate for the claimed defense — which after all is the goal of notice pleading." *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 279 (N.D. Ill. 2001).

Builders Bank v. First Bank & Trust Co. of Illinois, No. 03 C 4959, 2004 WL 626827, *6 (N.D. Ill. Mar. 25, 2004). MobGob's defense is deficient on its face and

MobGob has done nothing to argue otherwise. Accordingly, MobGob's Second Affirmative Defense should be stricken.

MobGob attempts to justify its deficient affirmative defense by citation to one non-precedential decision from this district and with a policy argument based on the disclosure requirements of the Local Patent Rules. Neither, however, relieves MobGob's affirmative defenses of the requirements of Rule 8. The sole case MobGob cites, *Pfizer Inc. v. Apotex Inc.*, 726 F. Supp. 2d 921 (N.D. Ill. 2010), is not even applicable because it does not concern the pleading standards for affirmative defenses. Even if it were relevant, its finding that a listing of statutory provisions, with nothing further, is sufficient to satisfy Rule 8's "short and plain statement" requirement conflicts with *Heller* and the long standing case law from this district cited above. Furthermore, the *Pfizer* court's decision is contrary to the overwhelming majority of cases that have confronted invalidity affirmative defenses similar to MobGob's laundry list of statutory provisions. *See Sorensen v. Spectrum Brands, Inc.*, 09 CV 58, 2009 WL 5199461, at *1 (S.D. Cal. Dec. 23, 2009) (striking defense that recited "[t]he claim of the '184 patent are [sic] invalid under 35 U.S.C. §§ 101, 102, 103, and/or 112."); *Sun Valley Bronze, Inc. v. Nobilus, LLC*, 72 Fed. R. Serv. 3d 518 (D. Idaho 2008) (striking a claim reciting "that some or all of the claims of the '873 Patent are invalid for failure to comply with the requirements of 35 U.S.C. §§ 102, 103, and/or 112."); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622-23 (S.D.N.Y. 2008) (striking defense that recited "[t]he '747 patent is invalid and/or unenforceable for failure to comply with one or more

provisions of the Patent Laws of the United States, Title 35, United States Code, Sections 101 et seq., including without limitation Sections 102, 103, and/or 112." (language of the defense available at 2007 WL 1993830, at ¶24); *Bartronics, Inc. v. Power-One, Inc.*, 245 F.R.D. 532, 537 (S.D. Ala. 2007) (striking claims reciting "[o]ne or more of the claims of the '057 patent are invalid under 35 U.S.C. § 103" and "[o]ne or more of the claims of the '057 patent are invalid as being indefinite under 35 U.S.C. § 112."); *Sprint Communications Co. v. Theglobe.com, Inc.*, 233 F.R.D. 615, 618-619 (D. Kan. 2006) (discussing cases and striking defense that recited "[defendant] is informed and believes that [plaintiff's seven patents], and each of the seven claims thereof, are invalid, void and/or unenforceable under one or more of the sections of Title 35 of the United States Code"); *PB Farradyne, Inc. v. Peterson*, No. C 05-03447, 2006 WL 132182, at *3 (N.D. Cal. Jan. 17, 2006) (striking defense that recited "[t]o the extent they are alleged to be infringed, the claims of the '950 and '724 patents are invalid for failure to meet one or more of the requirements of Title 35, United States Code, including the requirements of sections 102, 103, 112 and/or other applicable statutes."). This court should thus decline to follow *Pfizer*.

Likewise, MobGob's policy argument, seemingly adopted by the *Pfizer* court, that dismissal of an invalidity affirmative defense would undermine the Local Patent Rules, is not only irrelevant, but also incorrect. First, this Court's Local Patent Rules are irrelevant because they do not address the pleading requirements for affirmative defenses, nor any other requirements for pleadings. Second, even if the local rules were relevant, it would be the local rules that would have to yield to

the requirements of Rule 8, not vice versa. *See United States v. Claros*, 17 F.3d 1041, 1044-45 (7th Cir. 1994) (stating that "[a] local rule may not be inconsistent with the Constitution, a statute of the United States, or with a national rule governing the conduct of litigation in the United States courts").

Lastly, MobGob's policy argument is simply wrong. MobGob cites, in particular, LPR 2.3, which requires an accused infringer to disclose its initial non-infringement, unenforceability and invalidity contentions. MobGob implies that since it will have to set forth its basis for its invalidity counterclaims under that rule, it should not have to meet Rule 8's pleading requirements. However, MobGob's affirmative defense generally lists five section of the statute, 35 U.S.C. §§101, 102, 103, 112 and 116, but LPR 2.3 only requires disclosure of contentions falling under three statutory sections. The policy argument thus fails because the required disclosures will not cover all of MobGob's affirmative defenses. The Court should therefore reject MobGob's argument.

B. MobGob's Standing Defense is an Improper Affirmative Defense

MobGob's Fifth Affirmative Defense, lack of standing, fails the requirements of Rule 8 as it does not contain a "short and plan statement" of facts. *Heller*, 883 F.2d at 1295. MobGob expends a considerable portion of its brief arguing that *Iqbal* does not apply to affirmative defenses, but fails to even argue that its qualified statement – "[t]o the extent Groupon does not own all the rights to the '343 Patent" – satisfies the pre-*Iqbal* standard set out in *Heller*. The reason for this is that the defense obviously does not meet the *Heller* standard and therefore fails.

In any event, lack of standing is not an affirmative defense. *De Lage Landen Fin. Svcs. v. M.D.M. Leasing Corp.*, 07-cv-0045, 2007 WL 4355037, at *3 (N.D. Ill. Dec. 10, 2007); *Garmin Ltd. v. TomTom, Inc.*, 468 F.Supp. 2d 988, 1012 (W.D.Wis. 2006) ("standing is not an affirmative defense"). Accordingly, MobGob's Fifth Affirmative Defense should be stricken by the Court.

III. CONCLUSION

Based on the foregoing, as well as its Motion to Strike Affirmative Defenses and the accompanying Memorandum of Law in Support, Groupon respectfully requests that this Court grant its motion and strike MobGob's First, Second, Fifth and Eighth Affirmative Defenses.

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Respectfully submitted,

Groupon, Inc.

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