

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 DISMISS DEFENDANT’S SECOND COUNTERCLAIM

I. INTRODUCTION

Defendant MobGob, LLC’s (“MobGob”) only argument in support of its
invalidity counterclaim is to hide behind the Local Patent Rules and the disclosure
requirements contained therein. MobGob’s argument, however, is contrary to the
requirements of this Federal Rules of Civil Procedure, as explained by the Supreme
Court and Seventh Circuit. Since local rules cannot conflict with the Federal Rules,
the policy argument advocated by MobGob should be disregarded. Furthermore, the
idea that the Local Patent Rules would be undermined by requiring a counterclaim
to abide by Rule 8 is simply wrong. Accordingly, MobGob’s invalidity defense should
be dismissed.

II. ARGUMENT

As with its invalidity affirmative defense, MobGob’s invalidity counterclaim
is merely a statement that the patent-in-suit is “invalid for failing to comply with
one or more provisions of Title 35 of the United States Code,” and an unlimited list

of the *possible* statutory provisions that the patent *might* not comply with. MobGob must give notice to Groupon of its claim. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). A speculative list of different statutory provisions hardly provides notice to Groupon of MobGob's invalidity counterclaims. "This threadbare statement is precisely the type of allegation that is insufficient to state a claim under the *Iqbal* standard." *Sorensen v. Spectrum Brands, Inc.*, 09 CV 58, 2009 WL 5199461, at *1 (S.D. Cal. Dec. 23, 2009) (citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2007)) (dismissing a counterclaim alleging "[t]he claim of the '184 patent are invalid under 35 U.S.C. §§ 101, 102, 103, and/or 112.>").

MobGob does not even contend that its counterclaim satisfies the pleading requirements of Rule 8. Instead, MobGob states "given the timing of the disclosures required under the Local Patent Rules, it is improper to dismiss a counterclaim on the basis of the Fed. R. Civ. Proc. 8(a)." MobGob's Opposition to Plaintiff's Motion to Dismiss Defendant's Second Counterclaim. In effect, MobGob argues that the Local Patent Rules should trump the Federal Rules of Civil Procedure. That, however, is simply not the law. Instead, "[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." *United States v. Claros*, 17 F.3d 1041, 1044-45 (7th Cir. 1994). Thus, to the extent there is any conflict between the requirements of Rule 8 and the Local Patent Rules, Rule 8 takes precedence.

However, there is no conflict between requiring an invalidity counterclaim to satisfy Rule 8 and the Local Patent Rules. 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 counterclaim alleges invalidity based on failure to comply with an unlimited number of provisions of Title 35 of the U.S. Code, specifically listing five sections of the statute, 35 U.S.C. §§101, 102, 103, 112 and 116, without limitation. LPR 2.3, however, requires disclosure of only those invalidity contentions that fall under sections 102, 103 and 112 of the Title 35. In the case of MobGob's counterclaim, therefore, the disclosure requirements will not serve as a substitute to requiring MobGob to meet the pleading requirements of Rule 8 for its currently pled counterclaim. The Court should therefore reject MobGob's argument and dismiss its invalidity counterclaim.

III. CONCLUSION

Based on the foregoing, as well as its Motion to Dismiss Defendant's Second Counterclaim and the accompanying Memorandum of Law in Support, Groupon respectfully requests that this Court grant its motion to dismiss MobGob's Second Counterclaim.

Dated: April 14, 2011

Respectfully submitted,

Groupon, Inc.

s/ Steven McMahon Zeller

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