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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LOUIS VUITTON MALLETIER,
Plaintiff,
v.
THE FLEA MARKET, INC., et al.,
Defendants.

No. C 09-01062 CW
ORDER GRANTING
DEFENDANT BUMB &
ASSOCIATES' MOTION
TO DISMISS

In this contributory trademark infringement case, Plaintiff Louis Vuitton Malletier alleges that Defendants The Flea Market, Inc., Bumb & Associates, Brian Bumb, Timothy Bumb, George Bumb, Jr., Jeffrey Bumb and Patrick De Tar knowingly allowed their vendors to engage in trademark counterfeiting at the San Jose flea market. Defendant Bumb & Associates¹ moves to dismiss Plaintiff's complaint. Defendant asserts that Plaintiff's complaint does not allege sufficient facts to hold it liable for contributory trademark infringement. Plaintiff opposes the motion. The matter was heard on May 21, 2009. Having considered oral argument and all of the papers submitted by the parties, the Court grants Defendant's motion and grants leave to amend.

¹Hereinafter the Court will refer to Bumb & Associates as Defendant.

BACKGROUND

The alleged infringing activity takes place at one of the largest open-air flea markets in the United States, covering 120 acres of land. Over 2,000 vendors occupy eight miles of aisles at the market. Approximately 4 million people visit the market every year.

Plaintiff Louis Vuitton is a well known manufacturer of luxury personal items such as handbags, luggage and wallets. Plaintiff owns numerous registered trademarks in connection with these products. Plaintiff is the exclusive distributor of its products and its products are sold only through its stores, its boutiques inside department stores and on eluxury.com and louisviutton.com.

Plaintiff has sued seven Defendants: two entities and five individuals. The two entities are The Flea Market, Inc. and Bumb & Associates. The Flea Market "enters into leases with vendors, tenants, sub-tenants, lessees, sub-lessees, concessionaires, assignees, and/or any other occupant at the market." Compl. ¶ 6. Bumb & Associates is a California partnership and is being sued as an entity "or by and through its partners, Brian Bumb, Timothy Bumb and George Bumb Jr." Id. at ¶ 7. The partners are also being sued individually. Bumb & Associates and The Flea Market "are closely related to each other and collectively own the land, buildings, structures and fixtures" at the market. Id. at ¶ 6. The Flea Market "pays substantial sums of money to Bumb & Assoc. for the lucrative privilege of leasing the property" to market occupants. Id. ¶ 7.

The individual Defendants in this case are Brian Bumb, shareholder, director and President of The Flea Market and partner

1 in Bumb & Associates; Timothy Bumb, shareholder, director and Vice
2 President of The Flea Market and partner in Bumb & Associates;
3 George Bumb Jr., shareholder, director and Corporate Secretary of
4 The Flea Market and partner in Bumb & Associates; Jeffrey Bumb,²
5 shareholder, director and Vice President of The Flea Market; and
6 Patrick DeTar, "in charge of the market's relationship with its
7 vendors and tenants and [] the primary contact person at the market
8 with respect to the leasing of space from The Flea Market." Id. at
9 ¶¶ 8-12.

10 LEGAL STANDARD

11 A complaint must contain a "short and plain statement of the
12 claim showing that the pleader is entitled to relief." Fed. R.
13 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to state
14 a claim, dismissal is appropriate only when the complaint does not
15 give the defendant fair notice of a legally cognizable claim and
16 the grounds on which it rests. See Bell Atl. Corp. v. Twombly,
17 550 U.S. 544, 555 (2007).

18 In considering whether the complaint is sufficient to state a
19 claim, the court will take all material allegations as true and
20 construe them in the light most favorable to the plaintiff. NL
21 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). When
22 granting a motion to dismiss, the court is generally required to
23 grant the plaintiff leave to amend, even if no request to amend the
24 pleading was made, unless amendment would be futile. Cook, Perkiss
25 & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-

26
27 ²On May 20, 2009, Plaintiff dismissed its action against
28 Defendant Jeffrey Bumb pursuant to Federal Rule of Civil Procedure
41(a)(1)(i).

1 47 (9th Cir. 1990). In determining whether amendment would be
2 futile, the court examines whether the complaint could be amended
3 to cure the defect requiring dismissal "without contradicting any
4 of the allegations of [the] original complaint." Reddy v. Litton
5 Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

6 DISCUSSION

7 "Contributory infringement occurs when the defendant either
8 intentionally induces a third party to infringe the plaintiff's
9 mark or supplies a product to a third party with actual or
10 constructive knowledge that the product is being used to infringe
11 the service mark." Lockheed Martin Corp. v. Network Solutions,
12 Inc., 194 F.3d 980, 983 (9th Cir. 1999). Plaintiff does not allege
13 that Defendant induced a third party to infringe. Thus, Plaintiff
14 must show that Defendant supplies a product to a third party with
15 knowledge that the product is being used to infringe the mark.

16 To satisfy the "supplies a product" prong of the test, the
17 court "consider[s] the extent of control exercised by the defendant
18 over the third party's means of infringement." Lockheed, 194 F.3d
19 at 984. For instance, in Fonovisa, Inc. v. Cherry Auction, Inc.,
20 76 F.3d 259 (9th Cir. 1996), the Ninth Circuit addressed this
21 requirement in the context of flea markets. In that case, Cherry
22 Auction, Inc. operated a swap meet in which vendors paid daily
23 rental fees in exchange for booth space. Cherry Auction supplied
24 parking, conducted advertising and retained the right to exclude
25 any vendor for any reason at any time. Cherry Auction was also
26 aware that vendors in their swap meet were selling counterfeit
27 recordings in violation of the plaintiff's trademarks and
28 copyrights. The Ninth Circuit held that Cherry Auction was liable

1 for contributory infringement because it "suppl[ied] the necessary
2 marketplace" for the sale of infringing products. Id. at 265;
3 Lockheed, 194 F.3d at 984.

4 Defendant distinguishes Fonovisa because in that case the
5 defendant both owned and operated the market, whereas here, the
6 property owner, Defendant, and the market operator, The Flea
7 Market, are two separate and distinct entities. As a property
8 owner, Defendant leases land to The Flea Market without exercising
9 any specific, direct control over the Flea Market's tenants'
10 business operations. Therefore, Defendant argues, it cannot be
11 liable for having any control over the sale of the infringing
12 products.

13 Plaintiff has not alleged any facts showing a relationship
14 between Defendant and the vendors. The only facts alleged in the
15 complaint that specifically refer to Defendant state that it and
16 The Flea Market are "closely related to each other and collectively
17 own the land, building, structures and fixtures at the market."
18 The complaint also states that Defendant receives "substantial sums
19 of money" from The Flea Market's lease agreements with the market's
20 tenants and vendors. No case supports the proposition that a
21 property owner may be liable for contributory trademark
22 infringement if it only leases property to a separate and distinct
23 entity, which in turn operates a flea market and rents space to a
24 vendor, which in turn infringes trademarks. Property ownership
25 alone does not establish that Defendant exercised control over the
26 sale of the infringing products.

27 The remaining allegations in the complaint do not explain the
28 extent to which Defendant participated in any illegal conduct

1 separate and apart from the participation of the other named
2 Defendants. For instance, the section of the complaint entitled,
3 "Defendants' Unlawful Conduct" repeatedly refers to conduct
4 performed by "Defendants," but never mentions any of the seven
5 Defendants by name. Thus, there is no allegation that Defendant
6 has any relationship with any of the market vendors.

7 Therefore, in this respect, the complaint does not give fair
8 notice under Fed. R. Civ. P. 8(a) to Defendant of the role it is
9 alleged to have played in the infringement. Plaintiff offers the
10 following boilerplate paragraph to remedy this fault:

11 On information and belief, at all times mentioned in this
12 Complaint, each of the Defendants was the agent of the other
13 Defendants, and in doing the things alleged in this Complaint
14 was acting within the course and scope of such agency.
15 Further, on information and belief, at all times mentioned in
16 this Complaint, each of the Defendants aided and abetted each
17 of the other Defendants in doing the things alleged in this
18 Complaint. In addition, each of the Defendants informs the
19 other Defendants of their actions, as well as the lawful and
20 unlawful activities transpiring at the market.

21 Complaint ¶ 13. Plaintiff offers no factual allegations to support
22 this paragraph. Such blanket assertions do not provide Defendant
23 with the requisite fair notice of the factual grounds on which the
24 claim rests.

25 CONCLUSION

26 For the foregoing reasons, the Court GRANTS Defendant's motion
27 to dismiss. If Plaintiff is currently in possession of facts
28 sufficient to allege, within the restrictions of Fed. R. Civ. P.
11, that Defendant Bumb & Associates in particular controlled The
Flea Market's vendors, it may file an amended complaint within
fifteen days making those allegations specifically against that
Defendant. Otherwise, Plaintiff may later move for leave to amend

1 to allege such facts, if they are later discovered.

2 IT IS SO ORDERED.

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4 Dated: 6/10/09



CLAUDIA WILKEN
United States District Judge

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