IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Parallel Networks, LLC, Plaintiff, v. Adidas America, Inc., et al., Defendants.	)))))))))	CIVIL ACTION NUMBER: 6:10-cv-00491-LED

RUSSELL BRANDS, LLC'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

Defendant Russell Brands, LLC ("Russell") hereby moves this Court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint (Doc. 1) of Parallel Networks, LLC ("Plaintiff" or "Parallel Networks"). The purported claims asserted against Russell for direct, indirect and willful patent infringement fail to state a claim for which relief can be granted. In support of this motion, Russell states as follows:

Introduction

Plaintiff's complaint consists of identical paragraphs pled against 59 separate defendants with only the name of the defendant and the name of the defendant's website differentiating the allegations. The Complaint fails to assert any factual allegations supporting Plaintiff's claims of direct, indirect, and willful patent infringement and is therefore due to be dismissed. In order to avoid duplication of argument, Russell herein adopts the arguments set forth by one of its co-defendants as set forth more fully below. However, in addition to the arguments presented in the

motion filed by Russell's co-defendant, Russell also asserts that Plaintiff's claims for contributory infringement are due to be dismissed because Plaintiff failed to properly plead one of the statutorily required elements of that cause of action as set forth more fully below.

I. Russell's joinder in and incorporation of the motion to dismiss filed by BergdorfGoodman.com.

Russell hereby incorporates by reference and adopts as if fully set forth herein all sections of the "Motion to Dismiss for Failure to State a Claim, or in the Alternative, for a More Definite Statement" filed by Defendant BergdorfGoodman.com, LLC ("BergdorfGoodman.com") on November 19, 2010 (Doc. No. 255). Plaintiff's allegations against Russell are substantively identical to its allegations against BergdorfGoodman.com, with the only differences between the allegations being the name of the defendant (Russell Brands, LLC) and the defendant's website (www.russellathletic.com). The arguments asserted by BergdorfGoodman.com as to its website and the plaintiff's allegations apply equally as to Russell, and Russell adopts and incorporates those arguments and the relief requested by BergdorfGoodman.com *mutatis mutandis*. Russell seeks the same relief sought in BergdorfGoodman.com's motion on the same grounds set forth in that motion.

II. Plaintiff has failed to properly allege all of the statutorily required elements of contributory infringement.

Plaintiff fails to allege all of the statutorily required elements of contributory infringement. In order to satisfy the statutory requirements for a claim for contributory infringement, Plaintiff must allege, among other things, that Russell "offers to sell or sells within the United States or imports into the United States" a component of the patented machine or process constituting a material part of the invention. 35 U.S.C. § 271(c); *see also Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, 491 F.3d 1342, 1358 (Fed. Cir. 2007)(noting that subsection

(c) was intended to cover "cases in which a party sells a particular component that is known to be intended for an infringing use and is useful only for infringement"); *Jones v. Radio Corp. of Am.*, 131 F. Supp. 82, 83 (S.D.N.Y. 1955) (*cited in Pharmastem*) (section 271(c) does not apply if the defendant did not sell a component of the patented combination).

Plaintiff's allegations against Russell do not include any allegation that Russell offered to sell, sold, or imported the website at www.russellathletic.com or any component thereof as is required to state a viable claim for contributory infringement. Instead, Plaintiff simply alleges that Russell commits contributory infringement by "intending to provide [www.russellathletic.com] to its clients…." Complaint ¶ 281 (emphasis added). The allegation that Russell vaguely "provide[s]" its website to its clients is insufficient to satisfy the "offers to sell, or sells…or imports" element of a contributory infringement cause of action under 35 U.S.C. § 271(c). With respect to sales and offers to sell, the Federal Circuit has explained that a sale under section 271(c) requires title to the allegedly infringing product to change hands. *See Pharmastem*, 491 F.3d at 1357 *quoting Sturm v. Boker*, 150 U.S. 312, 329-330 (1893) (holding that a sale is required under the plain language of section (c) and explaining that a sale results when the "title to the property is changed"); *cf. NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1319 (Fed. Circ. 2005) (construing terms "offers to sell or sells" to include "the concept of a transfer of title or property" in the context of direct infringement claims under 35 U.S.C. § 271(a)). Despite this requirement, the words "sale," "sell," and "import" do not even appear in any of the Plaintiff's allegations related to Russell's alleged contributory infringement, nor do any other terms connoting a change in title. Similarly, the Complaint is devoid of any references to import activity. Because Plaintiff's allegation that Russell "provides" its website to clients

does not assert all statutorily required elements of a claim for contributory infringement, Plaintiff's contributory infringement claim against Russell must be dismissed.

Conclusion

For the reasons set forth in BergdorfGoodman.com's motion, as well as the additional reasons set forth above, Russell respectfully requests that this Court dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted. Alternatively, as requested in BergdorfGoodman.com's motion, Russell respectfully requests that this Court order Plaintiff to provide a more definite statement of its claims.

Respectfully submitted,

/s/ Joel M. Kuehnert
Joel M. Kuehnert
One of the Attorneys for Russell Brands, LLC

OF COUNSEL:
Nathan W. Johnson
Joel M. Kuehnert
BRADLEY ARANT BOULT CUMMINGS, LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 521-8000
Facsimile: (205) 488-6369
njohnson@babc.com
jkuehnert@babc.com

Harry L. Gillam, Jr.
State Bar No. 07921800
GILLAM & SMITH, L.L.P.
303 South Washington Avenue
Marshall, Texas 75670
Telephone: (903) 934-8450
Facsimile: (903) 934-9257
gil@gillamsmithlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by U.S. mail or facsimile transmission, on this the 29th day of November, 2010.

*/s/*Joel M. Kuehnert
Of Counsel