

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

PARALLEL NETWORKS, LLC	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	Case No. 6:10-cv-00491-LED
	)	
ADIDAS AMERICAN, INC., <i>et al.</i>	)	
<i>Defendants.</i>	)	

**VICTORIA’S SECRET DIRECT BRAND MANAGEMENT, LLC’S  
MOTION TO DISMISS PARALLEL NETWORKS, LLC’S CLAIMS  
OF INDIRECT AND WILLFUL INFRINGEMENT FOR FAILURE TO  
STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Victoria’s Secret Direct Brand Management, LLC (hereinafter “VSDBM”) respectfully moves this Court to dismiss Plaintiff Parallel Networks, LLC’s (“Plaintiff”) claims for indirect and willful infringement of U.S. Patent No. 6,446,111 (“the ‘111 Patent”). Plaintiff’s Complaint must provide sufficient information to allow VSDBM to investigate Plaintiff’s specific allegations, identify potential witnesses and third-party defendants, and make informed decisions regarding document preservation. It fails to do so. Plaintiff’s indirect and willful infringement allegations are based only on information and belief without any factual support. Such boilerplate pleadings fail under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), *Bell Atlantic Corp.v. Twombly*, 550 U.S. 544 (2007), and the Federal Rules of Civil Procedure.

**BACKGROUND**

Plaintiff sued over fifty defendants including AT&T, Harley Davidson, Gillette and VSDBM, all with identical barebones allegations. Complaint ¶¶ 65-302. The only meaningful

connection between the defendants is the fact that they all operate websites. For each defendant, Plaintiff merely identifies its website, summarizes the claims of the '111 Patent, and offers conclusory allegations of infringement. Plaintiff's complete allegations of indirect infringement against VSDBM are as follows:

On information and belief, since becoming aware of the '111 Patent, VICTORIA'S SECRET has been and is now indirectly infringing by way of inducing infringement and contributing to the infringement of at least claim 1 of the '111 Patent in the State of Texas, in this judicial district, and elsewhere in the United States, by providing the website [www.victoriassecret.com](http://www.victoriassecret.com) for use by VICTORIA'S SECRET's clients. VICTORIA'S SECRET is a direct and indirect infringer, and its clients using [www.victoriassecret.com](http://www.victoriassecret.com) are direct infringers.

On information and belief, since becoming aware of the '111 Patent VICTORIA'S SECRET is and has been committing the act of inducing infringement by specifically intending to induce infringement by providing the identified website to its clients and by aiding and abetting its use. On information and belief, VICTORIA'S SECRET knew or should have known that through its acts it was and is inducing infringement of the '111 Patent. On information and belief, VICTORIA'S SECRET is and has been committing the act of contributory infringement by intending to provide the identified website to its clients knowing that it is a material part of the invention, knowing that its use was made and adapted for infringement of the '111 Patent, and further knowing that the system is not a staple article or commodity of commerce suitable for substantially noninfringing use.

Defendant VICTORIA'S SECRET is thus liable for infringement of the '111 Patent pursuant to 35 U.S.C. § 271.

*Id.*, ¶¶ 292-94.

Plaintiff's willfulness allegations are even less detailed – all fifty-plus defendants are charged with willful infringement in a single paragraph. *Id.*, ¶ 305.

## STANDARD OF REVIEW

A defendant can use a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) to challenge whether a complaint alleges a claim upon which relief can be granted. Dismissal of

any insufficient claims is appropriate. Fed. R. Civ. P. 8(a). A motion to dismiss a patent infringement case is governed by the law of the regional circuit. *McZeal v. Spring Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007). Denial of the motion requires that the plaintiff plead “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. In other words, the plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949 (citing *id.*). Further, a plaintiff’s “factual allegations must be specific and not mere conclusory allegations.” *Teirstein v. AGA Med. Corp.*, No. 6:08-CV-14, 2009 U.S. Dist. LEXIS 125002, at \*4 (E.D. Tex. Feb. 13, 2009) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)). “A court will not accept as true conclusory allegations or unwarranted deductions of fact.” *Id.* (citing *Collins*, 224 F.3d at 498) (internal edits and quotations omitted).

The Supreme Court has stated that to satisfy Federal Rule of Civil Procedure 8(a), “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949 (citing *id.*). Plaintiff’s claims of indirect and willful infringement are, at best, “formulaic” and “threadbare.” They fall far short of the pleading requirements set forth in *Iqbal* and *Twombly*, and, accordingly, should be dismissed.

## **ARGUMENT**

Under Federal Rule of Civil Procedure 11, a plaintiff certifies that, “after an inquiry reasonable under the circumstances,” its “factual contentions have evidentiary support.” Fed. R. Civ. P. 11(b). Plaintiff’s Complaint, raising identical assertions against over fifty widely varying

companies entirely “[o]n information and belief,” strongly suggests that the required inquiry was not undertaken. See Complaint ¶¶ 65-302.

In patent cases, this Court has “high expectations as to plaintiffs’ preparedness before bringing suit, requiring plaintiffs to disclose their preliminary infringement contentions before discovery has even begun.” *Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005); see also *Judin v. United States*, 110 F.3d 780, 784 (Fed. Cir. 1997) (failure to conduct pre-filing investigation to compare products accused of infringement with claims of patent is sanctionable). The Federal Circuit has held that Rule 11 requires a plaintiff alleging patent infringement to, “at a bare minimum, apply the claims of each and every patent that is being brought into the lawsuit to an accused device and conclude that there is a reasonable basis for a finding of infringement of at least one claim of each patent so asserted.” *View Eng’g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). Assuming, *arguendo*, that Plaintiff has satisfied its Rule 11 obligations, Plaintiff has still failed to allege any facts supporting its accusations of infringement. Therefore, Plaintiff’s claims of indirect and willful infringement should be dismissed. Fed. R. Civ. P. 8(a), 12(b)(6).

**A. Plaintiff’s Claim of Indirect Infringement Should be Dismissed Because it Fails to Identify Which Claims are Allegedly Infringed, What Entity is Allegedly Infringing Said Claims and How That Alleged Infringement is Occurring.**

This Court has required a complaint for patent infringement to include “facts . . . that would give Defendants sufficient notice of the claims alleged against them.” *Clear With*

*Computers, LLC v. Bergdorf Goodman, Inc.*, No. 6:09-CV-481, 2010 U.S. Dist. LEXIS 92079, at \*12 (Mar. 29, 2010 E.D. Tex.). Allegations that “[1.] fail to identify which claims are indirectly infringed, [2.] fail to identify which methods or systems indirectly infringe, and [3.] fail to identify a direct infringer in reference to its indirect infringement claims . . . do[] not state a claim for indirect infringement that is plausible on its face.” *Id.* Plaintiff has not satisfied a single one of these prongs.

Here, Plaintiff has failed to identify the allegedly infringed claims with any specificity. Plaintiff’s allegation of infringement of “at least claim 1” is palpably inadequate. Complaint ¶¶ 292-93. Plaintiff’s Complaint fails to provide even the slightest hint as to where or how VSDBM’s website or “clients” infringe the ‘111 Patent. Accordingly, Plaintiff has failed to specify which claims are being infringed.

Plaintiff has also failed to identify which methods or systems used by VSDBM’s “clients” allegedly infringe the unidentified claims. *Id.*, ¶¶ 292-93. Plaintiff fails to state exactly who allegedly uses each of the claimed “server,” “client device,” “constituent system” and “executable applet dynamically generated by the server.” *See id.*; ‘111 Patent, cl. 1. The Complaint further fails to explain how the Victoria’s Secret website could infringe any claim of the patent-in-suit. A website is not “[a] data processing system,” nor does it consist of “a server,” “a client device,” “a constituent system” or “an executable applet,” much less “an executable applet dynamically generated by the server in response to the client request,” as required by claim 1 of the patent-in-suit. *See* ‘111 Patent, cl. 1. This is clear from the ‘111 Patent’s specification, which states: “A website is typically a set of information stored on a computer connected to the Internet which makes information on the computer available to other server and client computers on the Internet.” ‘111 Patent, col. 4, lns. 31-33. The ‘111 Patent is

directed to “a data processing system” and a “method of processing data,” however the ‘111 Patent itself makes clear that a website is neither a data processing system nor a method of processing data. ‘111 Patent, col. 4, cl.1, 17, 27. Because a website does not comprise any of the above-mentioned elements of the ‘111 Patent, Plaintiff’s allegations do not serve to provide VSDBM with sufficient information to identify exactly where or how the infringement alleged to be occurring in conjunction with VSDBM’s website is or was occurring. *See Realtime Data, LLC v. Morgan Stanley*, No. 6:09-CV-326, 2010 U.S. Dist. LEXIS 58049, at \*11-12 (E.D. Tex. May 7, 2010) (Love, Mag.) (adopted with clarification by Davis, J. in No. 6:09-CV-326, 2010 U.S. Dist. LEXIS 58140 (E.D. Tex. June 10, 2010)) (“one or more data compression products and/or services” is too vague to identify an infringing product).

Plaintiff here has alleged identical, vague claims against over fifty defendants in a situation where the purportedly infringing “websites” definitionally do not comprise “a server,” “a client device,” “a constituent system,” or “an executable applet dynamically generated by the server in response to the client request.” The Complaint’s lack of factual specificity fails to provide VSDBM with adequate information to prepare a defense, identify potential witnesses, make informed decisions regarding document preservation or identify third-party indemnitors.

Further, Plaintiff has not identified an alleged third-party direct infringer. Complaint ¶¶ 292-93. Indeed, Plaintiff’s vague allegation that VSDBM’s “clients using www.victoriasscret.com are direct infringers” is less than helpful. Many people visit the www.victoriasscret.com website every day. Are they all infringers? Without describing how infringement occurs, it is impossible to determine who is allegedly infringing. *See Clear With Computers*, 2010 U.S. Dist. LEXIS 92079, at \*12 (indirect infringement claims dismissed for failure to allege “facts . . . that would give Defendants sufficient notice of the claims alleged

against them”); *PA Advisors, LLC v. Google Inc.*, 2:07-CV-480, 2008 U.S. Dist. LEXIS 71285, at \*19-20 (E.D. Tex. Aug. 7, 2008) (complaint survived motion to dismiss because it “named the products and websites, described how they infringed, and cited the specific sections of patent law”).

Finally, a claim of inducement requires Plaintiff to show “first that there has been direct infringement, and second that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another’s infringement.” *Minn. Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304-05 (Fed. Cir. 2002); *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1312 (Fed. Cir. 2007). “The requirement that the alleged infringer knew or should have known his actions would induce actual infringement necessarily includes the requirement that he or she knew of the patent.” *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006) (cited section considered *en banc*).

Here, Plaintiff fails to offer a single fact showing either VSDBM’s knowledge of the ‘111 Patent prior to this litigation or VSDBM’s intent to induce infringement by a third party. Complaint ¶¶ 292-93. Plaintiff’s contentions, predicated solely on “information and belief,” are entirely speculative. *Id.* As the Supreme Court recognized in *Iqbal*, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). Plaintiff’s allegation of indirect infringement “simply fails to inform Defendants as to what they must defend” and should therefore be dismissed. *See Clear With Computers*, 2010 U.S. Dist. LEXIS 92072, at \* 12.

**B. Plaintiff's Claim of Willful Infringement Should be Dismissed Because it Fails to Allege the Requisite Pre-Filing Behavior on the part of VSDBM.**

"[W]hen a complaint is filed, a patentee must have a good faith basis for alleging willful infringement." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007) (*en banc*) (citing Fed. R. Civ. P. 8, 11(b)). Thus, "a willfulness claim asserted in the original complaint must necessarily be grounded exclusively in the accused infringer's pre-filing conduct." *Id.* Here, Plaintiff's Complaint uses a single paragraph in an attempt to levy claims of willful infringement against over fifty defendants. Complaint ¶ 305. Such a claim, consisting of a mere four sentences, cannot possibly be based exclusively (if at all) on VSDBM's pre-filing conduct.

In *Seagate*, the Federal Circuit "abandon[ed] the affirmative duty of due care," holding that "proof of willful infringement permitting enhanced damages requires at least a showing of objective recklessness." *In re Seagate*, 497 F.3d at 1371. For a complaint to survive a motion to dismiss, it must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. This Court recently dismissed a willful infringement charge that was purportedly based on facts that might be "learned in discovery." *Realtime Data*, 2010 U.S. Dist. LEXIS 58049, at \*17-18 (noting that "*Seagate* clearly requires a patentee to do more than suggest that more definite allegations are to follow once discovery is underway"). Similarly, other courts have held that a claim of willful infringement "on information and belief" is inadequate in the absence of supporting facts. *See, e.g., Trebor Indus., Inc. v. Regatta AS*, No. 10-60371, Order (S.D. Fla. June 14, 2010) (citing *CTF Development, Inc. v. Penta Hospitality, LLC*, 2009 WL 3517617, at \*5 (N.D. Cal. 2009); *Btresh v. City of Maitland, Fla.*, 2010 WL 497718, at \*4 (M.D. Fla. 2010)).

Here, Plaintiff has not merely failed to plead enough facts to demonstrate objective recklessness, Plaintiff has failed to plead any facts whatsoever. Accordingly, Plaintiff's claim of



willful infringement fails to state a claim upon which relief can be granted and should therefore be dismissed. *See Twombly*, 550 U.S. at 570; *in re Seagate*, 497 F.3d at 1371-74; Fed. R. Civ. P. 8(a), 12(b)(6).

## CONCLUSION

Plaintiff's allegations of indirect and willful infringement do not allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6), Defendant Victoria's Secret Direct Brand Management, LLC respectfully asks that this Court dismiss Plaintiff's claims of indirect and willful infringement for failure to state a claim upon which relief can be granted.

DATED: December 1, 2010

Respectfully submitted,

/s/ Charles Ainsworth

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**CERTIFICATE OF SERVICE**

The undersigned 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 on December 1, 2010.

/s/ Charles Ainsworth