

**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.

No. 6:10-cv-00491-LED

Jury Trial Demanded

**PLAINTIFF PARALLEL NETWORKS'S OPPOSITION TO VICTORIA'S SECRET
DIRECT BRAND MANAGEMENT, LLC'S PARTIAL MOTION TO DISMISS**

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**PLAINTIFF PARALLEL NETWORKS'S OPPOSITION TO VICTORIA'S SECRET
DIRECT BRAND MANAGEMENT, LLC'S PARTIAL MOTION TO DISMISS**

Plaintiff Parallel Networks, LLC (“Parallel Networks”) hereby opposes Victoria’s Secret Direct Brand Management, LLC’s¹ (“VSDBM”) 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 (“VSDBM Motion”) (D.I. 355). VSDBM asks this Court to dismiss Parallel Networks’s accusation that VSDBM indirectly infringes U.S. Patent No. 6,446,111 (“the ‘111 patent”) and the further accusation that VSDBM willfully infringes the ‘111 patent. Importantly, VSDBM *does not ask* for dismissal of the accusation of direct infringement of the ‘111 patent, thus conceding that the charge of direct infringement has been properly pled. VSDBM’s motion therefore is not in fact a motion to dismiss all charges but rather one to dismiss the charges of indirect infringement and willful infringement only.

VSDBM’s motion is based on its contention that the complaint does not allege what claim of the ‘111 patent it is accused of infringing. VSDBM also asserts that Parallel Networks has pled no facts relevant to VSDBM, and further contends that Parallel Networks did not adequately identify the Accused Instrumentality and did not identify direct infringers.

These assertions are all erroneous. For these reasons, as discussed below, VSDBM’s motion should be denied:

I. SUMMARY OF THE ARGUMENT

VSDBM’s motion should be denied:

1. VSDBM concedes that Parallel Networks has properly pled that it has directly infringed the ‘111 patent. VSDBM therefore does not challenge the sufficiency of the pleadings

¹ The Court granted Parallel Networks’s Unopposed Motion to Change the Name of Defendant Victoria’s Secret to Victoria’s Secret Direct Brand Management, LLC on November 30, 2010. (D.I. 353).

on that issue, nor could it. In accordance with Form 18,² Fed.R.Civ.P. (“Form 18”), Parallel Networks has admittedly and sufficiently pled (1) an allegation of jurisdiction; (2) a statement that plaintiff owns the patent; (3) a statement that the defendant has been infringing the patent by making, selling or using an identified system or method; and (4) a demand for an injunction and damages. *McZeal*, 501 F.3d at 1357; *see also Xpoint Technologies, Inc. v. Microsoft Corp.*, C.A. No. 09-628-SLR, slip op. at 4 (D.Del. Aug. 12, 2010) (Exhibit E). In short, based on VSDBM’s motion that does not challenge the charge of direct infringement, those pleadings must be accepted as true.

2. VSDBM’s attempt to seek dismissal of the charge of indirect infringement should also be denied. To plead indirect infringement, all that is required is to identify a direct infringer, identify which methods or systems indirectly infringe the patent-in-suit, and, depending on the context, the Court may further require the identification of specific claims. Parallel Networks has satisfied these pleading requirements. Even though not necessary, Parallel Networks also identifies that VSDBM infringes at least claim 1 of the ‘111 patent.³ (Complaint at ¶291). VSDBM’s assertion that this allegation identifying claims is “palpably inadequate” is therefore frivolous. (*See* VSDBM Motion at 5.) The complaint also alleges that the accused website,

² To state a claim of patent infringement, “a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed.Cir. 2007) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 565 n.10 (2007)). To that end, the Federal Rules provide specific guidance for pleading in patent infringement actions. Rule 84, Fed.R.Civ.P., provides forms in an appendix that give examples of correct and sufficient pleadings. In patent infringement actions, Form 18, Fed.R.Civ.P., provides an example of a proper and sufficient patent infringement complaint. Form 18, Fed.R.Civ.P. (2007); *see also McZeal*, 501 F.3d at 1356-57 (describing the requirements of the form (current Form 18 was previously numbered Form 16 prior to the revision of the Federal Rules in 2007)); *Clear with Computers, LLC v. Kodak, Inc.*, C.A. No. 6:09-cv-481, slip op. at 3 (E.D. Tex. Mar. 29, 2010) (Davis, J.); *accord Phonometrics, Inc. v. Hospitality Franchise Systems*, 203 F.3d 790, 793-794 (Fed.Cir. 2000).

³ Parallel Networks intends to assert additional claims after this Court has entered a scheduling order.

www.victoriasssecret.com, contains all of the elements of claim 1. Thus, VSDBM's assertion that more is required, *i.e.*, the identification of a "server," "client device," "constituent system" and "executable applet dynamically generated by the server," (VSDBM Motion at 5), is wrong on the law and on the facts. Even though these elements need not be alleged in the complaint, in fact these are alleged to be present in the accused identified website. (Complaint at ¶291).

VSDBM's assertion on this issue is also shown to be meritless by the fact that it admits that the Accused Instrumentality is properly identified in the charge of direct infringement. VSDBM's contention that Parallel Networks has not identified a "third-party direct infringer" (VSDBM Motion at 6) is also wrong. The complaint clearly identifies the direct infringers as VSDBM's own "clients using www.victoriasssecret.com" in an infringing manner. (Complaint at ¶292).

Finally, contrary to VSDBM's assertion (VSDBM Motion at 7), Parallel Networks pled that VSDBM knew of the '111 patent and has the required level of interest to support the charge of inducing infringement. (Complaint at ¶292). For all of these reasons, VSDBM's motion to dismiss the charge of indirect infringement should be denied.

3. In its attempt to dismiss the charge of willful infringement, VSDBM makes no specific allegation as to the deficiencies in the complaint except the general assertion that Parallel Networks has not "plead enough facts" to survive a motion to dismiss. (VSDBM Motion at 8-9). On the contrary, the facts pled are more than sufficient to support a charge of willful infringement. Parallel Networks alleged that VSDBM knew of the '111 patent before this action was brought. (Complaint at ¶305). The complaint also clearly alleges the fact that VSDBM's in its "infringing activities acted" as it did despite an objectively high likelihood that its actions constituted infringement of a valid patent. (*Id.*). The complaint further alleges the fact that that VSDBM's infringing activities were intentional and willful in that the risk of

infringement was known to VSDBM “or was so obvious that it should have been known....” (*Id.*). Even under VSDBM’s view of the law, these allegations are sufficient to properly plead the charge of willful infringement.

II. INTRODUCTION

The patent at issue, the ‘111 patent, was filed on June 18, 1999, and issued on September 3, 2002. It is entitled “Method and Apparatus for Client-Server Communication Using a Limited Capability Client Over a Low-Speed Communications Link.” (D.I. 1, Complaint at ¶64, Exh. A). Parallel Networks owns all right, title and interest in the ‘111 patent. (*Id.* at ¶65). This Court has subject matter jurisdiction over this patent infringement action and venue is proper in this district. (*Id.* at ¶¶62-63).

A. U.S. Patent No. 6,446,111

The ‘111 patent is directed to, *inter alia*, websites that operate systems and methods that allow a server to receive a request from a VSDBM customer using a “client device”; in response, the VSDBM server at www.victoriassecret.com then generates an “applet” that is transferred back to the client device. The client device may be any type of computing device, including a personal computer, a personal digital assistant, a mobile phone, or other handheld device (*e.g.*, Complaint at Exh. A, ‘111 patent at col. 8, ll. 14-18, 21-24, col. 9, ll. 49-50). An applet as disclosed and claimed in the ‘111 patent is a particular type of computer program that is generated by the server at the website and is then sent to the client device along with data that responds to the client request. For example, if a customer wants to purchase a particular type of article from VSDBM, the accused website will provide the client with an applet with data responsive to the type of article requested, along with the capabilities of browsing or performing operations on that data. (*See, e.g.*, Complaint at Exh. A, ‘111 patent at col. 2, ll. 55-65).

As disclosed in the '111 patent, the patented invention provides many advantages over the prior art. (*Id.* at col. 2, ll. 55 – col. 3, ll. 22). One advantage of the patented invention is that it allows for the decrease of the total amount of data transferred between the client and the server thus allowing for increased speed and efficiency. (*Id.* at col. 3, ll. 11-17). Another advantage of the invention is that it allows the client using a computing device that has limited storage capabilities to initiate and complete the transaction without having to load and store a variety of support programs that may be required by the server. (*Id.* at col. 2, ll. 67 – col. 3, ll. 5). Another advantage is that resources of the client device can be freed by discarding the applet after the transaction. (*Id.* at col. 3, ll. 6-10). Yet another advantage of the patented invention is the efficiency created by the avoidance of transmitting duplicate data. (*Id.* at col. 3, ll. 17-23). Because of these powerful advantages that can be achieved in the use of the patented invention, Parallel Networks believes that the '111 patent is being widely infringed.

B. Parallel Networks's Allegation of Infringement

At present, Parallel Networks accuses VSDBM of infringing claim 1 of the '111 patent. (Complaint at ¶¶291-294). Parallel Networks intends to assert additional claims and will identify those claims in a timely fashion after the Court's case management conference or at such other time as may be appropriate or required by the Court. While the allegation of direct infringement is not denied, it is nonetheless relevant to the motion to dismiss.

The direct infringement accusations against VSDBM specifically recite that VSDBM infringes claim 1:

291. On information and belief, Defendant VICTORIA'S SECRET [now changed to VSDBM] has been and now is infringing at least claim 1 the '111 patent in the State of Texas, in this judicial district, and elsewhere in the United States, by actions comprising making and using its website at www.victoriasscret.com, which comprises a server coupled to a communications link that receives a request from a client device and collects data items as a function of the requests; an executable

applet dynamically generated by the server in response to the client request; a constituent system associated with the applet comprising a subset of the data items and a further constituent system comprising a data interface capability configured to provide a plurality of operations associated with the subset of data items; with such applet operable to be transferred over the communications link to the client device.

(Complaint at ¶291). It is thus completely clear that VSDBM, as it admits, was put on notice that VSDBM is accused of infringing at least claim 1 of the ‘111 patent. Parallel Networks also recited the pertinent elements of claim 1 (including a “server,” a “client device,” a “constituent system” and an “executable applet dynamically generated”), therefore further putting VSDBM on notice that it infringes at least claim 1 (even though a patentee need not identify any infringed claim in the complaint). *McZeal*, 501 F.3d at 1357. And Parallel Networks identified the infringing website as www.victoriasecret.com. Again, VSDBM does not deny the sufficiency of these allegations, and that fact undermines VSDBM’s contentions in this motion with respect to indirect infringement and willful infringement.

On the issue of indirect infringement, Parallel Networks pleads as follows:

292. 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.victoriasecret.com for use by VICTORIA’S SECRET’s clients. VICTORIA’S SECRET is a direct and indirect infringer, and its clients using www.victoriasecret.com are direct infringers.

293. 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.

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

(Complaint at ¶¶291-294) (note again that the name Victoria's Secret was changed to VSDBM pursuant to Court order (D.I. 353)). The complaint therefore plainly alleges that VSDBM as a direct infringer is also an indirect infringer by inducing or contributing to infringement through the use of its website at www.victoriasecret.com by VSDBM's clients. The clients in Parallel Networks's accusation of indirect infringement are the direct infringers that use the infringing website. The requisite level of intent required for the assertion of contributory infringement is also alleged, as is the relevant statute (35 U.S.C. §271). (*Id.*).

On the issue of willful infringement, Parallel Networks pleads as follows:

305. On information and belief, prior to the filing of the complaint, Defendants' infringement was willful and continues to be willful. On information and belief, prior to the filing of this Complaint, Defendants were aware of the '111 patent and knew or should have known that Defendants were infringing at least claim 1 of the '111 patent. On information and belief, Defendants in their infringing activities acted as they did despite an objectively high likelihood that their actions constituted infringement of a valid patent. The Defendants' infringing activities were intentional and willful in that the risk of infringement was known to Defendants or was so obvious that it should have been known to Defendants.

(Complaint at ¶305). VSDBM's contention that the complaint fails to allege facts on the issue of willful infringement with respect to VSDBM is therefore plainly erroneous. That ground for seeking to dismiss the allegation of willful infringement is therefore entirely baseless.

III. THE APPLICABLE LAW

The applicable law is well-settled. Regional circuit law applies to motions to dismiss for the failure to state a claim under Rule 12(b)(6), Fed.R.Civ.P.. *McZeal*, 501 F.3d at 1356; *Eolas*

Techs., Inc. v. Adobe Systems, Inc., C.A. No. 6:09-cv-446, slip op. at 2 (E.D. Tex. May 6, 2010) (Davis, J.) (Doc. 282) (Exhibit A); *Clear with Computers, LLC v. Bergdorf Goodman, Inc.*, C.A. No. 6:09-cv-481, slip op. at 2 (E.D. Tex. Mar. 29, 2010) (Davis, J.) (Doc. 77) (Exhibit B). The standard for deciding a Rule 12(b)(6) motion has been summarized by the Court of Appeals for the 5th Circuit as follows:

A motion to dismiss under rule 12(b)(6) “is viewed with disfavor and is rarely granted.” *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986). The district court may not dismiss a complaint under rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

Lowery v. Texas A&M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997) (citations omitted); *see Phonometrics, Inc. v. Hospitality Franchise Systems*, 203 F.3d 790, 793-794 (Fed.Cir. 2000) (“the dismissal standard is extraordinary, and one not to be taken lightly”; a motion to dismiss “is viewed with disfavor and rarely granted.... Dismissal of a claim... is a precarious disposition with a high mortality rate.” (citing and quoting *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997))).

Under Rule 8(a)(2), a pleading is sufficient if it contains “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2), Fed.R.Civ.P. What is required in a complaint are allegations sufficient to show that the complainant is plausibly entitled to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007) (“[W]e do not require heightened fact pleadings of specifics, but only enough facts to state a claim to relief that is plausible on its face.”). In deciding whether a complaint states a plausible claim for relief is a context-specific task that requires this Court “to draw on its judicial experience and common sense.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009).

To state a claim of patent infringement, “a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend.” *McZeal*, 501 F.3d at 1357 (citing *Twombly*, 550 U.S. at 565 n.10). To that end, the Federal Rules provide specific guidance for pleading in patent infringement actions. Rule 84, Fed.R.Civ.P., provides forms in an appendix that give examples of correct and sufficient pleadings. In patent infringement actions, Form 18, Fed.R.Civ.P., provides an example of a proper and sufficient patent infringement complaint. Form 18, Fed.R.Civ.P. (2007); *see also McZeal*, 501 F.3d at 1356-57 (describing the requirements of the form (current Form 18 was previously numbered Form 16 prior to the revision of the Federal Rules in 2007)); *Clear with Computers*, C.A. No. 6:09-cv-481, slip op. at 3; *accord Phonometrics*, 203 F.3d at 793-794. VSDBM does not deny that the pleading guidelines set forth in Form 18 for direct infringement are met and that on that issue the complaint is sufficient.

For indirect infringement, as VSDBM fails to acknowledge, a complaint alleging indirect infringement is sufficient if it identifies a direct infringer and identifies the infringing methods or systems. *Realtime Data, LLC v. Morgan Stanley*, C.A. No. 6:09 CV 326, at 1 (E.D. Texas June 10, 2010) (Exhibit C). These elements are properly pled, and there are no further elements that are required to be pled for the charge of indirect patent infringement. *PA Advisors, LLC v. Google Inc.*, C.A. No. 2:07-CV-480 (DF) at 13 (E.D. Texas August 8, 2008) (Exhibit C).

The authorities relied on by VSDBM do not support its position. In *ACCO Brands, Inv. V. ABA Locks Mfrs. Co., Ltd.*, after a full trial on the merits and appeal to the Federal Circuit, the court held that the plaintiff did not satisfy its burden of proof on indirect infringement, not the pleading requirements of indirect infringement. 501 F.3d 1307, 1314 (Fed. Cir. 2007). *DSU Medical Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1304-06 (Fed. Cir. 2006), and *Minnesota*

Mining & Mfg. Co. v. Chemque, Inc., 303 F.3d 1294, 1304-1305 (Fed.Cir. 2002), also state the well-settled law on indirect infringement and how that law applies to a jury verdict and accompanying district court decision. These cases therefore are irrelevant to the issue here, *i.e.*, whether the **pleadings** on their face are sufficient. *American Video Graphics, L.P. v. Electronic Arts, Inc.* deals with the sufficiency of preliminary infringement contentions, an issue that is also not relevant here. 359 F.Supp.2d 558, 560-61 (E.D. Tex. 2005) Finally, *In re Seagate Technology, LLC* is directed to the scope of waiver of attorney-client privilege and work product and therefore obviously has no relevance here. 497 F.3d 1360, 1374-76 (Fed. Cir. 2007).

IV. PARALLEL NETWORKS’S COMPLAINT FULLY COMPLIES WITH THE APPLICABLE LAW

Parallel Networks’s complaint admittedly complies with the pleading requirements for direct infringement. VSDBM’s contention that Parallel Networks has not pled the requirements for indirect infringement and willful infringement, as discussed below, is erroneous and should be rejected.

A. Parallel Networks’s Accusation of Indirect Infringement is Properly Pled

On the issue of indirect infringement, Parallel Networks has complied with the legal requirements for pleading indirect infringement: Parallel Networks identified the direct infringer (“clients using www.victoriasssecret.com are direct infringers”), the method or system that indirectly infringes the patent-in-suit (“the website www.victoriasssecret.com”), and also a specific claim (“claim 1 of the ‘111 patent”). (Complaint at ¶¶292-293). No further elements to support the charge of indirect infringement need to be pled. *PA Advisors*, C.A. No. 2:07-CV-480 (DF) at 13 (Exhibit D). Certainly, VSDBM’s attempt to argue on the merits that it does not infringe (VSDBM Motion at 5-6) has no place in a motion to dismiss. Equally as irrelevant is VSDBM’s Rule 11, Fed.R.Civ.P., argument. (VSDBM Motion at 3-4). The requirements of

bringing a Rule 11 motion have not been met (*e.g.*, prior notice to Parallel Networks), and so this frivolous argument should be dismissed. *Judin* and *View Engineering* relied on by VSDBM are directed to issues under Rule 11 that therefore have no relevance here. *Judin v. U.S.*, 110 F.3d 780, 783-85 (Fed. Cir. 1997); *View Eng'g v. Robotic Vision Sys.*, 208 F.3d 981, 984 (Fed. Cir. 2000).

As discussed below, VSDBM's specific contentions on the issue of indirect infringement have no merit and its motion should be denied.

First, VSDBM alleges that Parallel Networks failed to specify what claim is asserted in the complaint. (VSDBM Motion at 5). While this is generally not a requirement, Parallel Networks did indeed plead that VSDBM was and is infringing claim 1. (Complaint at ¶¶291-292). On that point, the complaint clearly alleges that claim 1 was and is being presently infringed by VSDBM. (Complaint at ¶291). In fact, VSDBM actually cites in its brief that claim 1 was clearly identified as being infringed. (VSDBM Motion at 5). In addition, the complaint also alleges that "prior to the filing of this Complaint," VSDBM was "aware of the '111 patent...." (Complaint at ¶305). VSDBM does not deny these facts.

Secondly, VSDBM alleges that Parallel Networks has not sufficiently identified the alleged infringing activities or what elements of claim 1 are infringed. (VSDBM Motion at 5). This allegation is also meritless. (Complaint at ¶¶291-294). The complaint recites the elements of claim 1 and that VSDBM infringes those elements. The specific elements recited in VSDBM's motion have therefore been pled. (*Compare* Complaint at ¶291 *with* VSDBM Motion at 5 reciting "server," "client device," "constituent system" and "executable applet dynamically generated by the server").

Third, VSDBM alleges that Parallel Networks failed to identify the direct infringers. On the contrary, the complaint clearly states that the direct infringers are VSDBM's own customers or clients. (Complaint at ¶292). These direct infringers are well known to VSDBM as users of the infringing website.

Fourth, VSDBM asserts that the required level of intent to support a charge of indirect infringement (*i.e.*, inducement) has not been pled. As is shown above, that assertion is baseless. (*supra* pp. 6-7). Even though such an allegation does not need to be plead, the complaint alleges that VSDBM “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.” (Complaint at ¶293). The complaint also alleges that VSDBM “knew or should have known that through its acts it was and is inducing infringement of the ‘111 patent.” (*Id.*). With respect to pleading intent or knowledge, it is well settled under Rule 9(b), Fed.R.Civ.P., that “intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Rule 9(b), Fed.R.Civ.P. Rule 9(b), Fed.R.Civ.P. VSDBM never cites Rule 9(b) and therefore does not dispute its applicability. Parallel Networks’s pleading, even according to VSDBM’s view of the law, is thus plainly more than sufficient to satisfy its contention that the pleading should allege the defendant’s “intent” to induce infringement.

B. Parallel Networks’s Accusation of Willful Infringement is Properly Pled

VSDBM’s attempt to seek dismissal of Parallel Networks’s charge of willful infringement is based on its assertion that Parallel Networks has pled no facts relevant to the charge of willful infringement. (VSDBM Motion at 8-9). This assertion is frivolous. Parallel Networks’s complaint clearly accuses VSDBM of willful infringement with respect to knowledge of the ‘111 patent and with respect to conduct that occurred “prior to the filing of the complaint.” (Complaint at ¶305). And, the allegation of intent is also properly pled. *See* Rule

9(b), Fed.R.Civ.P. (as discussed above). On the issue of intent, the complaint clearly states that VSDBM “in their infringing activities acted as they did despite an objectively high likelihood that their actions constituted infringement of a valid patent. (Complaint at ¶305). The complaint also alleges that VSDBM’s infringing activities were intentional and willful in that the risk of infringement was known to VSDBM or was so obvious that it should have been known to Defendants. (Complaint at ¶305).

In sum, VSDBM’s attempt to dismiss the charge of willful infringement is equally as fruitless as all of its other assertions.

CONCLUSION

For the foregoing reasons, VSDBM’s motion should be denied.

Dated: December 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this 15th day of December, 2010, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ Charles Craig Tadlock _____

Charles Craig Tadlock