

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

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

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

Defendant Russell Brands, LLC (“Russell”) files this reply in support of its Motion to Dismiss, or in the alternative for a More Definite Statement (Dkt. No. 344) (“Motion”), pursuant to local rule 6(f), in response to plaintiff Parallel Networks, LLC’s (“Plaintiff”) Opposition to Russell’s Motion (Dkt. No. 371) (“Opposition”).

Introduction

Like Plaintiff’s complaint (Dkt. No. 1) (“Complaint”), the Opposition confuses formulaic recitation of the elements of a cause of action with factual allegation. As a consequence, the Opposition fails to address the deficiencies of the Complaint, which contains but one insufficiently vague factual allegation – a website name – for each of 59 separate defendants. As noted by Plaintiff itself in the Opposition, the asserted 6,446,111 patent (the “Patent”) refers to “systems” and “methods” (Opposition at 3); therefore even this sole factual identification is insufficient because the claims do not even mention a “website,” which is neither a “system” nor

a “method.” Moreover, Plaintiff even failed at rote recitation of the elements of a contributory infringement claim, substituting the vague allegation that Russell “provides” a component or material for the more particular statutory requirement that components or materials have been “sold.” Having no answer to Russell’s analysis on this point, Plaintiff has chosen to completely ignore both Russell’s argument and the statutory requirement.

I. Russell’s joinder in and incorporation of BergdorfGoodman.com’s Reply and Motion to Dismiss.

In its original Motion, Russell adopted 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 (Dkt. No. 255) (“Bergdorf Motion”). In response to Russell’s Motion, Plaintiff has filed its Opposition (Dkt. No. 371) in which Plaintiff incorporates its opposition to the Bergdorf Motion. (Dkt. No. 360). BergdorfGoodman.com filed a reply to Plaintiff’s opposition (Dkt. No. 414) (“Bergdorf Reply”). Because the arguments of BergdorfGoodman.com remain equally applicable to Russell, and to avoid unnecessary duplication, Russell now adopts and incorporates the Bergdorf Reply *mutatis mutandis*.

Consistent with the Bergdorf Reply, Russell stands by the law that “[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Southern Christian Leadership conference v. Supreme Ct.*, 252 F.3d 781, 786 (5th Cir. 2001)(quoting *Fernancez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993). The Complaint has not done more than this, hiding from Russell and this Court any explanation of what Russell is alleged to have done to infringe the Patent other than have an internet presence.

II. Plaintiff failed to allege any offer to sell, sale, or import of *anything*, and therefore fails to even allege all statutorily required elements of contributory infringement.

As demonstrated in Russell’s Motion, Plaintiff fails to allege all of the statutorily required elements of contributory infringement. Section 271(c) of the Patent Act sets out the statutorily required elements of contributory infringement:

(c) Whoever **offers to sell or sells** within the United States **or imports** into the United States a component of a patented machine, manufacture, combination, or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

35 U.S.C. § 271(c)(emphasis added). The plain language of the statute restricts a claim of contributory infringement to circumstances in which an offer for sale, sale, or import is made.

In its Opposition, Plaintiff attempts to divert the Court’s attention from this plain reading by focusing unnecessarily (and improperly) on the term “component,” arguing that Plaintiff meets its burden by alleging that the statute also refers to “material,” and that the website at www.russellathletic.com constitutes “material.” Plaintiff’s confusing argument about the difference between apparatus claims and method claims is nothing more than diversion.¹

Russell’s point – and the statute’s requirement – is that a case for contributory infringement requires a **sale, offer for sale, or import**. Plaintiff does not dispute that the Complaint never uses these terms, and never approaches or implies these concepts. Even in response, Plaintiff can only argue that it alleged Russell “supplied ‘material’...”. (Dkt. No. 360, at p. 13). But the terms used by the statute are very specific as Russell noted in its Motion.

¹ Plaintiff’s argument is also inconsistent with Plaintiff’s other statements. The only claim that Plaintiff mentions in the Complaint by number is claim 1, for a “system.” In the context of apparatus claims versus method claims, a claim to a “system” is not treated as a method claim (*see, e.g., NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1316-1318 (Fed. Cir. 2005) (treating a “system” similarly to apparatus for analytical purposes under Section 271(a)). The system of Claim 1 of the Patent would be treated as a machine or combination, and therefore Plaintiff’s attempt to distance itself from the requirement that it sell a “component” is misplaced.

An allegation that Russell “supplied” or, as worded in the Complaint, “provided” components (or a material) does not make out a claim under Section 271(c). The plain meaning of the statutory terms “sale” and “offer for sale” requires that title be conveyed. *Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, 491 F.3d 1342, 1357 (Fed. Cir. 2007)(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”). Simply put, the Complaint does not address the statutory requirement that a **sale, offer for sale, or import** be alleged for a claim of contributory infringement under Section 271(c). Plaintiff cannot contest this legal reality, and cannot show that the Complaint contains such an allegation. Therefore, Plaintiff instead chooses to ignore the argument and the statutory requirement.

In its effort to avoid the statutory requirements, Plaintiff turns to the order of this Court in *Real Time Data, LLC v. Morgan Stanley*, C.A. No. 6:09 CV 326, at 1 (E.D. Texas June 10, 2010). Beyond the fact that Plaintiff’s characterization of the opinion in that case would pit the ruling against the statute, Plaintiff is simply wrong. Far from establishing a bright line rule that a complaint for indirect infringement is sufficiently plead in every case if only it “identifies a direct infringer and identifies the infringing method or system,” the cited opinion repeats the principle that the Court will examine the context of the complaint and allegations to determine the sufficiency of the pleading. *Id.* In any event, the question of the statutory requirement was not before the court in *Real Time*. In the context of this case, the statutory requirement is expressly before the Court and is evidently lacking from the Complaint.

Conclusion

For the reasons set forth in the Bergdorf Reply, 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, Russell respectfully requests that this Court order Plaintiff to provide a more definite statement of its claims.

Respectfully submitted,

/s/ Joel M. Kuehnert

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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 20th day of December, 2010.

/s/Joel M. Kuehnert

Of Counsel