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

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

VICTORIA'S SECRET DIRECT BRAND MANAGEMENT, LLC'S REPLY IN SUPPORT OF ITS 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 Rules of Civil Procedure 8(a) and 12(b)(6), Defendant Victoria's Secret Direct Brand Management, LLC ("VSDBM")[1] hereby replies to Parallel Networks, LLC's ("Parallel") Opposition (Dkt. No. 377) ("Opposition"), in support of VSDBM's Motion to Dismiss Parallel's claims of indirect and willful infringement for failure to state a claim upon which relief can be granted (Dkt. No. 355) ("Motion").

INTRODUCTION

It is often said that if the facts are against you, argue the law. That is exactly what Parallel does in its response to VSDBM's motion to dismiss Parallel's claims of indirect and willful infringement. Parallel even goes so far as to cite *bad* law, because its Complaint does not contain any facts upon which Parallel can rely. When it is not espousing outdated law, the Opposition is discussing Parallel's allegation of direct infringement,[2] which is not at issue here. All told, this renders Parallel's Opposition nothing more than a red herring. In order to defeat VSDBM's motion, Parallel must show that it has plead sufficient *facts* to support its *indirect* and *willful infringement* claims. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("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.'") (*quoting Bell Atlantic Corp.v. Twombly*, 550 U.S. 544, 570 (2007)). Parallel has not done so. VSDBM's motion should be granted.

ARGUMENT

As a threshold matter, Parallel's Opposition is premised on an outdated standard for analyzing motions to dismiss under Rule 12(b)(6). Plaintiff states that "[t]he 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." (Opposition at 8) (internal citations and

[1] This Court granted Plaintiff's Unopposed Motion to Change the Name of Defendant "Victoria's Secret" to "Victoria's Secret Direct Brand Management, LLC" on November 30, 2010. (Dkt. No. 353).
[2] VSDBM's present motion does not question the sufficiency of Parallel's direct infringement allegations, but those allegations have been expressly denied in VSDBM's Answer.

quotations omitted). This is *not currently the law*. The Supreme Court in *Twombly* stated that the "no set of facts" language "has earned its retirement." 127 S. Ct. at 1969. Parallel does not argue that the barebones allegations in its Complaint are sufficient under the current standard espoused in *Twombly*;[3] VSDBM's motion should be granted on this basis alone.

A. Plaintiff's Opposition Does Not Remedy The Insufficiency Of Its Indirect Infringement Pleading.

In order to properly state a claim for indirect infringement, Parallel's Complaint should identify: (1) which claims are directly infringed, (2) which method or systems indirectly infringe, and (3) it must identify a direct infringer in reference to the indirect infringement. *Clear with Computers, LLC v. Bergdorf Goodman, Inc.*, No. 6:09-CV-481, 2010 LEXIS 92079, at *12 (Mar. 29, 2010 E.D. Tex.) (*See* Dkt. No. 355, Motion at 4-7). In its Opposition, Parallel talks around these three requirements because it cannot point to any facts in its Complaint which would meet them – because there are none.[4] For example, with regard to the second requirement (identification of methods or systems that indirectly infringe the patent-in-suit), Parallel cites to Paragraphs 292-94 of the Complaint, which are all plead on information and belief. (Opposition at 7, 12). Based on these paragraphs, Parallel argues that, "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 www.victoriassecret.com by

[3] As also noted in co-Defendant Kodak's Reply supporting its motion to dismiss (Dkt. No. 419), in its Opposition, Parallel's Oppositions to multiple pending motions to dismiss cite numerous outdated cases that predate the 2007 *Twombly* decision, including *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 667 F.2d 1045 (5th Cir. 1982), *Campbell v. Wells Fargo Bank*, 781 F.2d 440 (5th Cir. 1986), *Photometronics, Inc. v. Hospitality Franchise Systems*, 203 F.3d 790 (Fed. Cir. 2000), *Lowery v. Texas A&M Univ. Sys., 117 F.3d 242* (5th Cir. 1997), and *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364 (11th Cir. 1997).

[4] Parallel also baselessly attacks the case law cited by VSDBM. For instance, Parallel asserts that *American Video Graphics, L.P. v. Electronic Arts, Inc.*, 359 F.Supp.2d 558 (E.D. Tex. 2005) is "not relevant here" because it "deals with the sufficiency of preliminary infringement contentions." (Opposition at 10). However, this Court used that very case to explain the dismissal of a plaintiff's indirect infringement contentions in *Clear with Computers, LLC v. Bergdorf Goodman, Inc.*, 2010 U.S. Dist. LEXIS 92079, *11-12 (E.D. Tex. Mar. 29, 2010) (Davis, J.).

VSDBM's clients." (Opposition at 7). In short, Parallel believes it has adequately identified the "method or system" that allegedly infringes the patent-in-suit by accusing the Victoria's Secret website generally. However, as noted in VSDBM's Motion, a website is not a "system," even as defined by the patent-in-suit itself. (Motion at 5-6). The patent-in-suit 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." Nor does any website, much less the Victoria's Secret website, necessarily consist of "[a] data processing system," "a server," "a client device," "a constituent system," or "an executable applet", all of which are required by claim 1 of the patent-in-suit. *Compare* '111 Patent, col. 4, lns. 31-33 *with* '111 Patent cl. 1. The Complaint does not identify what aspects of www.victoriassecret.com Parallel believes meet these limitations, because most likely, Parallel does not know.[5] Parallel's Opposition provides no further clarity on this dispositive question. Since Parallel is in possession of no facts to support the conclusion it wants to reach, its Complaint merely contains conclusory statements that the Victoria's Secret website meets these limitations, which is not enough. 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)).

B. Plaintiff's Opposition Does Not Remedy The Insufficiency Of Its Willful Infringement Pleading.

In order to properly state a claim for willful infringement, "the original complaint must necessarily be grounded exclusively in the accused infringer's pre-filing conduct." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007). It also requires at least a showing of objective recklessness. *Id.* at 1371. It is widely held that a claim of willful infringement made purely on "information and

[5] Parallel also misunderstands VSDBM's discussion of Rule 11. While VSDBM has yet not filed a motion for Rule 11 sanctions, it strongly believes that Parallel has failed to satisfy the Rule's standards, and reserves the right to file a motion thereunder in the future.

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); *Btesh v. City of Maitland, Fla.*, 2010 WL 497718, at *4 (M.D. Fla. 2010)).

Parallel acknowledges in its Opposition that its willful infringement allegation is confined to Paragraph 305 of the Complaint. (*See* Opposition at 7). This paragraph would not be enough to meet the pleading standard required by *In re Seagate* even if the paragraph was directed only to VSDBM's conduct, but it is even more egregious because this singular paragraph is *the entirety of the willfulness allegations made against all 50-plus defendants*. Plaintiff's Complaint contains *no facts* about VSDBM's alleged willful conduct. Paragraph 305 concludes that all of the defendants (not just VSDBM) knew or should have known about the patent-in-suit, but it contains no facts about how they knew or why they should have known. Paragraph 305 also concludes that all of the defendants (not just VSDBM) have acted in an objectively reckless manner via provision of their websites (even though there is no evidence in the Complaint that they knew about the patent-in-suit) but does not allege any facts to illustrate how or why the defendants' conduct meets the objectively reckless standard. This is exactly the type of pleading that *Twombly* and *In re Seagate* were meant to prevent.

CONCLUSION

Plaintiff's allegations of indirect and willful infringement utterly fail to "allege enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The contested claims are vague and utterly devoid of factual support, and thus do not provide VSDBM with notice of what it must defend. Accordingly, they should be dismissed.

DATED: December 22, 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 this 22nd day of December, 2010.

/s/ Charles Ainsworth