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U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH — CENTRAL DIVISION

MODERN FONT APPLICATIONS LLC,

Plaintiff,

vs.

PETSMART, INC.,

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS (ECF No. 79)**

Case No. 2:19-cv-00613-BSJ

Judge Bruce S. Jenkins

The court considers the pending motion of Defendant PetSmart, Inc. to dismiss¹ the Second Amended Complaint² of Plaintiff Modern Font Applications LLC. Having reviewed the parties' written submissions, heard the arguments of counsel,³ and considered the applicable law, the court will dismiss the Second Amended Complaint with prejudice.

I. Procedural History

On September 3, 2019, Plaintiff filed a complaint for patent infringement,⁴ in which it alleged that Defendant infringed U.S. Patent No. 9,886,421.⁵ Defendant moved to dismiss or transfer.⁶ The court granted Defendant's motion in part, dismissing the original complaint with leave to amend, at the same time denying Plaintiff's motion for sanctions.⁷

Plaintiff filed a motion for reconsideration or interlocutory appeal,⁸ which was denied.⁹

¹ ECF No. 79.

² ECF No. 78.

³ ECF No. 86.

⁴ ECF No. 2.

⁵ ECF No. 78-1.

⁶ ECF No. 13 & 30.

⁷ ECF No. 52.

⁸ ECF No. 58.

⁹ ECF No. 63.

On July 9, 2020, Plaintiff filed an amended complaint.¹⁰ Defendant filed a motion to dismiss the amended complaint.¹¹ On September 18, 2020, after briefing and oral argument, the court granted Defendant's motion, dismissing Plaintiff's contributory infringement claim with prejudice and dismissing Plaintiff's direct and induced infringement claims with leave to amend.¹²

On October 5, 2020, Plaintiff filed its Second Amended Complaint.¹³ On October 19, 2020, Defendant filed the motion to dismiss now before the court.¹⁴

II. The Court Will Dismiss the Second Amended Complaint With Prejudice.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the claims stated in the complaint. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In considering a motion to dismiss, all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to the non-moving party." *Charles W. v. United Behavioral Health*, 2019 WL 6895331, *1 (D. Utah Dec. 18, 2019) (citing *GFF Corp v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997)).

Pursuant to Fed. R. Civ. P. 8(a), "a pleading that states a claim for relief must contain...(2) a short plain statement of the claim showing that the pleader is entitled to relief; ..."

¹⁰ ECF No. 64.

¹¹ ECF No. 66.

¹² ECF No. 77.

¹³ ECF No. 78.

¹⁴ ECF No. 79. Both parties submitted declarations in support of their positions. *See* ECF No. 79-1 to 79-2; ECF No. 82-1. The court does not rely on the declarations in reaching its decision, but relies only on the pleadings.

(ellipsis added). On review of the Second Amended Complaint, the Court determines that Plaintiff failed to correct the deficiencies that led to the dismissals of its original and amended complaints.

“Direct infringement of an apparatus claim requires that each and every limitation set forth in a claim appear in an accused product.” *LifeNet Health v. LifeCell Corp.*, 837 F.3d 1316, 1325 (Fed. Cir. 2016) (quotation and citation omitted). Having reviewed the allegations of the Second Amended Complaint and the authorities cited by the parties, the court concludes that Plaintiff has not plausibly alleged that Defendant directly infringed any claim of the ’421 Patent by making, using, offering to sell, selling, or importing any apparatus. *See* 35 U.S.C. § 271(a).

To state a claim of induced infringement, the complaint must identify an act of direct infringement by the party allegedly induced. *Minn. Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304-05 (Fed. Cir. 2002). Further, the complaint must plausibly plead that the defendant (1) knew of the patent; (2) knowingly induced the infringing acts; and (3) possessed a specific intent to encourage another’s infringement of the patent. *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1328 (Fed. Cir. 2009). Having reviewed the allegations of the Second Amended Complaint and the authorities cited by the parties, the court concludes that Plaintiff has not plausibly alleged that Defendant actively induced infringement of any claim of the ’421 Patent. *See* 35 U.S.C. § 271(b).

Finally, “[a] court may deny leave [to amend] on account of ‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of [the] amendment.’” *Hasan v. AIG Property Cas. Co.*, 935 F.3d 1092,


1101 (10th Cir. 2019) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (first and second brackets added, subsequent brackets in original). Applying this standard, having previously afforded Plaintiff two opportunities to amend its earlier complaints, the court determines that Plaintiff's claims of direct and induced infringement should be dismissed with prejudice.

ORDER

Based on the foregoing, the court GRANTS Defendant's Motion to Dismiss (ECF No. 79). The Court will dismiss Plaintiff's Second Amended Complaint with prejudice. The clerk is directed to enter judgment in favor of Defendant and close the file.

IT IS SO ORDERED.

Dated this 4th day of January 2021.


Hon. Bruce S. Jenkins
United States Senior District Judge