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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

46 LABS LLC, an Oklahoma limited liability company, Plaintiff, vs. PARLER LLC, a Nevada limited liability company, Defendant.	Case No.: 2:21-cv-01006-APG-DJA **DEFENDANT PARLER LLC'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**

Defendant Parler LLC hereby moves the Court to Dismiss Plaintiff 46 Labs' Complaint in its entirety under Rule 12(b)(6) for failure to state a claim.

Trademark infringement claims fail as a matter of law when the parties are using the disputed marks for totally unrelated services. That is because trademark infringement requires more than just confusingly similar *marks*; it requires that the use of the marks is likely to confuse reasonable consumers *about the parties' services*. "Likelihood of confusion" is a necessary element of an infringement claim. It requires probable confusion, not merely possible confusion. This means that where the parties' services in question are unrelated, there can be no likelihood of confusion as a matter of law. Allegations showing unrelated services, then, fail to state an infringement

claim as a matter of law and should be dismissed.

All four Counts in this suit turn on precisely that showing: likely confusion between Defendant Parler's social networking platform and Plaintiff 46 Labs LLC's password-protected portal for its telecommunications infrastructure clients to view their account data. 46 Labs cannot deliver. It does not (and cannot) allege that its telecommunication-infrastructure client account portal and Parler's well-known social networking platform are in any way related, so each Count fails as a matter of law and should be dismissed. *Murray v. Cable Nat. Broadcasting Co.*, 86 F.3d 858, 860-61 (9th Cir. 1996) (affirming dismissal of infringement claims under § 1114(1), § 1125(a), and state-law unfair competition law because the parties' services were unrelated).

Even if 46 Labs' and Parler's services were related, 46 Labs would still fail to state a claim because it alleges no facts that plausibly show *probable* consumer confusion among their services. Rather, the two companies' services, business operations, users, and marketing channels are so dissimilar that confusion cannot be likely. Each Claim should be dismissed.

BACKGROUND

Plaintiff 46 Labs admits it is a communication infrastructure and services company; it serves as infrastructure that supports phone calls. ¶ 6. As part of its services, 46 Labs provides its clients a password-protected interface called "Peeredge." ¶¶ 6-7. According to 46 Labs' service mark registration, 46 Labs uses the PEEREDGE logo mark in connection with "cloud computing featuring software for use in the management of telecommunications including switching, management of call data, telecommunications systems and telecommunications business functions." ECF No. 2 at 11 (attaching Reg. No. 4,790,688). The PEEREDGE logo mark is a stylized, blue letter "P" with rounded segment tips. *Id.*; ¶¶ 7-10.

After each 46 Labs' telecommunications infrastructure client enters its log-in and password into the Peeredge interface, it is treated to an internal "dashboard" displaying phone call-related data, including graphs of "Minutes" and tabs for

"Attempts," "Ports," "CPS," "Organization Ports," "Organization CPS," "Termination Ports," and "Termination CPS." ¶ 7 (screenshot of the dashboard). When clients see Peeredge's "P," they "see [it] in the upper left corner of the dashboard during use of the service, as well as on log in screens and in other places and on other materials." *Id.* Nowhere does the Peeredge "log-in" screen or dashboard allow for posting of messages, chat, or social interaction between Peeredge clients. *Id.* Nor does 46 Labs plead that it lets 46 Labs clients use Peeredge (or any other service) to communicate with each other for online social networking. *Id.* 46 Labs does not plead that it uses "Peeredge" or its blue, rounded "P," outside the context of its specialized telecommunications infrastructure services, or with anyone other than 46 Labs' existing clients who access the Peeredge dashboard to view and manage their account data. ¶¶ 6-10.

46 Labs admits that Parler, in contrast, is a social media platform, and that at Parler's launch, Parler "promot[ed] itself as an alternative to larger social media platforms such as Twitter and Facebook." ¶ 11. 46 Labs pleads that "Parler once claimed to have over 20 million users, and was the number one free app on Apple's App store in January 2021." *Id.* Parler uses a red stylized "P" mark with three, pointed segment tips (the "PARLER" logo mark). ¶¶ 11-12.

46 Labs pleads that Parler "gained national notoriety" during the runup to the 2020 election, when news and media outlets "disseminated numerous images" of Parler's logo. ¶ 13. 46 Labs does not allege that either Parler or national news media reported that Parler provided communications infrastructure services to clients, or that it was held out to be anything other than a social networking platform.

46 Labs alleges that not until November 2020 did an unknown number of unnamed "customers" "contact" it regarding Parler. ¶ 14. 46 Labs does not name any customer or plead what any of them said in their "contact." *Id.* Without further factual detail, 46 Labs speculates that its clients' contact was "based on their confusion that 46 Labs was responsible for or affiliated with Parler." *Id.* Its clients' alleged confusion, 46 Labs further speculates, is "due to" what 46 Labs claims is the "nearly

identical logos" for Parler's social networking platform and 46 Labs' telecommunications infrastructure client portal. *Id.* at ¶ 14. 46 Labs therefore pleads "[o]n information and belief," without supporting facts, that "Parler's use" of its PARLER logo "has caused confusion among other customers of 46 Labs and is likely to cause additional confusion in the future." ¶ 15.

46 Labs pleads that Parler was offline between about January 10 and February 15, 2021. ¶ 20. By February 15, 2021, 46 Labs claims without any supporting facts or detail that "irreparable damage had been done" to the PEEREDGE logo mark and to 46 Labs' reputation and goodwill. ¶ 20. 46 Labs claims that Parler's use of the PARLER logo mark rendered 46 Labs' PEEREDGE logo mark "unusable" and has "completely destroyed" the PEEREDGE logo mark's goodwill and value — and 46 Labs has lost control over its product identity and reputation. ¶ 21. However, 46 Labs provides no factual information to support these legal conclusions. *Id.*

ARGUMENT

A complaint that does not allege facts that state "a claim for relief that is plausible" on its face should be dismissed under Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord* Fed. R. Civ. P. 8(a)(2).[1] A claim is facially plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Rule 8's "plausible" claim standard requires more than a mere possibility that the pleader is entitled to relief. *Id.* at 679.

Determining whether a Complaint states a claim "is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

[1] A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

The Court may consider only well-pleaded, nonconclusory factual allegations. *Id.* at 678-80. Threadbare recitals of a cause's elements or mere conclusory statements cannot support a claim under Rule 8. *Id.* at 678.

The "nub" of 46 Labs' complaint is the likelihood of consumer confusion, presented as claims for trademark infringement and unfair competition (each governed by the same legal standard). *Twombly*, 550 U.S. at 565; *see* ECF No. 2 at ¶1. In fact, all four Counts are essentially the same trademark infringement claim. Section I below explains in the context of Count I why 46 Labs fails to state a claim: (a) it alleges totally unrelated services, which cannot support an infringement claim as a matter of law; and (b) even if the parties' services were related (they are not), 46 Labs' allegations would fail to plausibly show that consumer confusion is likely under the *Sleekcraft* factor test. Section II then establishes that Counts II, III, and IV likewise fail to state a claim because they are governed by the same legal standard as Count I. All four Counts should be dismissed.

I. Count I should be dismissed because 46 Labs does not plausibly allege a likelihood of confusion.

Count I alleges trademark infringement under 15 U.S.C. § 1114(1), which prohibits the unauthorized use of a reproduction, copy, counterfeit, or colorable imitation of a registered mark in a way that is "likely to cause confusion, or to cause mistake, or to deceive." The key element of an infringement claim is that the offending use must be likely to cause consumer confusion. *Aronca, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074, 1078-79 (9th Cir. 2020); *see* CA9 Civ. Instr. 15.18. "The test for likelihood of confusion is whether a reasonably prudent consumer in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks." *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015) (quotation and citation omitted). "The confusion must 'be probable, not simply a possibility.'" *Id.* (quoting *Murray v. Cable Nat. Broadcasting Co.*, 86 F.2d 858, 861 (9th Cir. 1996)).

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