

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

T-MOBILE US, INC.,

Plaintiff,

v.

SIMPLY WIRELESS, INC.,

Defendant.

NO. 2:21-cv-00525-RSM

DEFENDANT SIMPLY WIRELESS,
INC.'S MOTION TO DISMISS

**NOTE ON MOTION CALENDAR:
July 23, 2021**

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Simply Wireless, Inc. (“Simply Wireless”) is a family-owned and family-built Virginia corporation engaged in the telecommunication business, at all relevant times primarily in the sale and distribution of mobile phones and accessories for all major telecommunication carriers. T-Mobile US, Inc. (“T-Mobile”) is a Delaware corporation based in Washington state that is also engaged in the telecommunication business and, in many ways, competes with Simply Wireless. T-Mobile is one of the three largest telecommunication carriers in the United States as well as one of the largest in the world.

The parties were engaged in business together for a number of years, most substantially during 2003–2009 and 2012–2015. During that time, Simply Wireless regularly used its “Simply” trademarks (described below) in connection with its business, both with T-Mobile and otherwise, as T-Mobile is well aware.

DEFENDANT SIMPLY WIRELESS, INC.'S MOTION TO DISMISS
- 1

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1 Simply Wireless is the owner of trademark registrations using the term “simply.” As a
2 matter of law, Simply Wireless also owns various other “SIMPLY” trademarks due to prior
3 use. Simply Wireless has used various trademarks with some form of “simply” since 1997 and
4 historically, has been referred to by the telecommunication industry, including T-Mobile, as:
5 “Simply”, “the Simply Team”, “the Simply Guys,” and other versions of “simply.” One such
6 trademark is Simply Wireless’s SIMPLY PREPAID trademark, which Simply Wireless has
7 used since 2002. As just one indication of its importance and connection to Simply Wireless,
8 the SIMPLY PREPAID trademark was prominently displayed on the reception desk at the
9 Simply Wireless headquarters in Tyson’s Corner, Virginia, where it was visible to all visitors
10 to the Simply Wireless headquarters, including T-Mobile.

11 Despite knowing of Simply Wireless’s prior use and rights in and to the Simply
12 trademarks, T-Mobile filed multiple trademark applications in bad faith, seeking to steal
13 ownership of the SIMPLY PREPAID mark from Simply Wireless. In response, Simply
14 Wireless opposed the applications and filed a lawsuit against T-Mobile in the U.S. District
15 Court for the Eastern District of Virginia in 2015 bearing Case Number 1:15-cv-1390.
16 T-Mobile sought to compel arbitration of Simply Wireless’s claims under contracts unrelated
17 to the parties’ dispute, but following a series of appeals up to the Supreme Court of the United
18 States,¹ an arbitrator ultimately determined that Simply Wireless’s claims were not subject to
19 arbitration, and Simply Wireless re-filed its lawsuit in the Eastern District of Virginia, where it
20 is currently pending under Case Number 1:21-cv-597.

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¹ Certiorari was not granted but the Court took up a substantively identical appeal at the same time and effectively consolidated the cases for appeal by entering a ruling that was dispositive of both appeals, determining that even the most frivolous of arbitrability claims had to be determined by an arbitrator if the contract provided that arbitrability determinations must be made by an arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

1 Despite the ongoing litigation between the parties over a period of years, T-Mobile
2 never raised the claims it now asserts in its Complaint here until the end of 2020 when it
3 asserted them as counterclaims in the arbitration – by all appearances seemingly for the
4 primary purpose of trying to bolster its arguments on arbitrability and to try to force Simply
5 Wireless to participate in and incur costs in an arbitration proceeding, even if it could not keep
6 Simply Wireless’s claims in that arbitration. After the arbitrator dismissed all of the claims and
7 counterclaims for lack of arbitrability, T-Mobile then chose to file its arbitration counterclaims
8 as a Complaint before this Court rather than bring them in the Eastern District of Virginia,
9 again seemingly in an apparent attempt to delay, drive up costs, and exploit T-Mobile’s
10 resource advantage over Simply Wireless.

11 T-Mobile’s claims in this case are simply not meritorious. They are a litigation tactic
12 intended to exert pressure on Simply Wireless. Moreover, they are also all time barred.
13 Accordingly, for the reasons discussed below, T-Mobile’s claims should be dismissed.

14 II. LEGAL STANDARD

15 To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff must allege
16 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
17 550 U.S. 544, 570 (2007). “A pleading that offers labels and conclusions or a formulaic
18 recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it
19 tenders naked assertions devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S.
20 662, 678 (internal citations omitted). A plaintiff must plead “factual content that allows the
21 court to draw a reasonable inference that the defendant is liable for the misconduct alleged.”
22 *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). A complaint must show “more than
23 a sheer possibility that a defendant has acted unlawfully.” *Id.* And “[w]here a complaint
24 pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line
25 between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S.

1 at 557). Further, while the Court must accept the well pled factual allegations in the Complaint
 2 as true when ruling on a motion to dismiss, the Court “need not accept as true legal conclusions
 3 couched as factual allegations,” *Wilson v. Craver*, 994 F.3d 1085, 1090 (9th Cir. 2021) (citing
 4 *Iqbal*, 556 U.S. at 678–79), and need not accept “unwarranted inferences,” *Rogers v. Cty. of*
 5 *Riverside*, 139 F.3d 907 (9th Cir. 1998) (internal citations omitted).

6 III. ARGUMENT

7 As discussed in detail below:

8 (A) T-Mobile’s claims are time barred because T-Mobile indisputably knew or
 9 should have known of its claims for at least five years before filing them;

10 (B) T-Mobile has failed to state a claim under the Lanham Act;

11 (C) T-Mobile has failed to state a claim under the Washington Consumer
 Protection Act (“WCPA”); and

12 (D) if the Court dismisses T-Mobile’s Lanham Act claims, it must dismiss the
 13 WCPA claims due to lack of subject matter jurisdiction.

14 A. T-Mobile’s Claims Are Time Barred.

15 1. T-Mobile Has Been Indisputably Aware of Its Claims Since 2015 and Knew or Should Have Known of Them for Years Prior to That Date.

16 The gravamen of T-Mobile’s claims is that one of its trademarks is present on Simply
 17 Wireless’s website, www.simplywireless.com, and that such presence constitutes trademark
 18 infringement under the Lanham Act as well as an “unfair or deceptive act or practice” under
 19 the WCPA. Compl. ¶¶ 26, 32, 43. Simply Wireless’s website, however, has displayed the T-
 20 Mobile mark on its front page for years, going back as far as 2004, if not further, and T-Mobile
 21 filed pleadings with the USPTO Trademark Trial and Appeal Board (“TTAB”) attaching
 22 images of the site and mark in 2015, showing it has been, at an absolute minimum, aware of
 23 the alleged infringement for over five years. These facts cannot be disputed.

24 Attached to the declaration of Daniel A. Brown (“Brown Declaration”), filed herewith,
 25 as **Exhibit 1** is an archived copy of what Simply Wireless’s website looked like on April 4,

1 2004, and the T-Mobile mark is present. Likewise, attached thereto as **Exhibits 2 & 3** are
2 archived copies of what Simply Wireless's website looked like on August 31, 2015, and
3 September 12, 2015, respectively. T-Mobile mark is present then as well. These archival
4 copies are readily available on the internet at the web addresses stated at the bottom of each
5 exhibit. Further, on April 14, 2015, T-Mobile filed an Answer and Counterclaims of Applicant
6 with the TTAB ("TTAB Counterclaim"), to which T-Mobile attached, among other things,
7 images of the Simply Wireless website displaying the T-Mobile mark. A copy of the complete
8 TTAB Counterclaim is also attached to the Brown Declaration as **Exhibit 4**, and the referenced
9 images of the Simply Wireless website are on page 5 of both Ex. E and Ex. F thereto.²

10 The Court may take judicial notice of each of the foregoing exhibits. Exhibits 1, 2, and
11 3 are archival copies of the Simply Wireless website that are stored on and available on the
12 internet and can be readily verified in the same way that one can readily verify the current
13 content of the Simply Wireless website by visiting it, and Exhibit 4 is a copy of a Court filing
14 made by T-Mobile. As such, these exhibits "can be accurately and readily determined from
15 sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. And the Court
16 "may take judicial notice of court filings and other matters of public record." *Reyn's Pasta*
17 *Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006).

18 T-Mobile alleges in its Complaint that

19 [a]s part of both the Dealer Agreements and the HSN Agreement, T-Mobile
20 granted Simply Wireless a limited license to use the T-Mobile Marks. But any
21 license to utilize the T-Mobile Marks has expired and Simply Wireless has no
right or authority to utilize the T-Mobile Marks.

22 Compl. ¶¶ 27–28. T-Mobile also alleges that the last of those agreements, the HSN Agreement,
23 expired on June 30, 2015. Compl. ¶ 20. If T-Mobile believed Simply Wireless was obligated to

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25 ² The images filed by T-Mobile with the TTAB are of the website as it displays on mobile
devices; the relevant content (the T-Mobile mark) is equally visible on the website when viewed
from non-mobile devices.

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