

The Honorable Ricardo S. Martinez

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON (SEATTLE)**

T-MOBILE US, INC.,

Plaintiff,

v.

SIMPLY WIRELESS, INC.,

Defendant.

Case No. 2:21-cv-00525

**PLAINTIFF’S RESPONSE TO SIMPLY
WIRELESS’S MOTION TO DISMISS**

Simply Wireless, Inc.’s (“Simply Wireless”) Motion should be denied. The Motion fails to meet the high standard required for dismissal under Fed. R. Civ. P. 12(b)(6). As the Court is well aware, Rule 12 requires the Court to consider only the allegations in the Complaint. Here, there is nothing in the Complaint justifying dismissal as a matter of law under Rule 12.

No doubt recognizing this, Simply Wireless turns to unauthenticated and inadmissible third-party internet printouts in a flawed attempt to make a statute of limitations argument. Not only is this an affront to the Rule 12 standard, but it also fails to demonstrate as a matter of law that T-Mobile’s claims are time barred.

Further, T-Mobile US, Inc.’s (“T-Mobile”) Complaint sufficiently alleges a cause of action under the Lanham Act and Washington Consumer Protection Act. Simply Wireless admits to utilizing the T-Mobile logo and trade name to sell T-Mobile products and services as alleged in the Complaint. Again, the Motion misses the mark.

PLAINTIFF’S RESPONSE TO SIMPLY

1 At the very least, each of the arguments Simply Wireless raises require a more fully
2 developed factual record for determination and cannot be determined based on the Complaint. The
3 Court should deny Simply Wireless's Motion.

4 **I. INTRODUCTION**

5 This action stems from Simply Wireless's deliberate and wrongful use of the registered
6 T-Mobile trademark, and Simply Wireless holding itself out as a T-Mobile partner on its website.
7 Although Simply Wireless seeks dismissal as a matter of law, it *admits* to utilizing the T-Mobile
8 mark and representing itself as a T-Mobile partner in selling T-Mobile products and services
9 without authorization. Having no other basis for dismissal, Simply Wireless argues that
10 T-Mobile's Complaint should be dismissed as time barred and for failing to sufficiently state a
11 claim for relief. But Simply Wireless's Motion to Dismiss falls far short of the high bar necessary
12 for dismissal under Fed. R. Civ. P. 12(b)(6).

13 *First*, Simply Wireless's statute of limitation arguments fail. It provides no legal authority
14 that a claim under the Lanham Act is time barred, and improperly relies on materials outside the
15 Complaint to make its argument. But even considering these materials, Simply Wireless still has
16 not proven as a matter of law that T-Mobile's claims under the Lanham Act and Washington
17 Consumer Protection Act ("CPA") are time-barred as a matter of law, and dismissal under Rule
18 12 would be inappropriate.

19 *Second*, Simply Wireless boldly asks the Court to find, by clear and convincing evidence,
20 that T-Mobile's claims are precluded by the doctrine of laches. But laches is a factual defense and
21 nothing in the Complaint shows by clear and convincing evidence that the doctrine of laches
22 applies to bar T-Mobile's claim at the pleadings stage.

23 *Third*, T-Mobile has sufficiently pled a cause of action under the Lanham Act and CPA.
24 T-Mobile has alleged that Simply Wireless is using T-Mobile's registered trademark and trade
25 name to sell goods and services without T-Mobile's permission, and that it is also holding itself
26 out as a T-Mobile partner to sell goods and services when it is not authorized to do so. These
27



1 allegations, when taken as true, are textbook allegations supporting Lanham Act and CPA claims.
2 This is especially true given that Simply Wireless admits that it is utilizing T-Mobile's marks, and
3 holding itself out as a T-Mobile partner in order to sell T-Mobile goods and services. T-Mobile
4 has clearly stated a claim for relief in its Complaint.

5 In summary, Simply Wireless's arguments to dismiss T-Mobile's claims ask the Court to
6 engage in highly factual analyses not suited for the pleadings phase of any case. T-Mobile's
7 Complaint more than sufficiently alleges causes of action against Simply Wireless under the
8 Lanham Act and CPA. Accordingly, the Court should deny Simply Wireless's Motion to Dismiss.

9 **II. LEGAL STANDARDS**

10 In considering a Rule 12(b)(6) motion to dismiss, a Court must determine whether the
11 plaintiff has alleged sufficient facts to state a claim for relief which is "plausible on its face."
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.
13 544, 570 (2007)). A claim is facially plausible if the plaintiff has pled "factual content that allows
14 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
15 *Id.* (citing *Twombly*, 550 U.S. at 556). In ruling on a Rule 12(b)(6) motion, courts accept as true
16 all of the factual allegations set out in a plaintiff's complaint, draw inferences from those
17 allegations in the light most favorable to plaintiff, and construe the complaint liberally. *Barker v.*
18 *Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).

19 **III. ARGUMENT**

20 **A. T-Mobile's Lanham Act Claims Are Not Time Barred.**

21 In arguing that T-Mobile's claims are time barred, Simply Wireless contends that T-Mobile
22 has known of its infringement claim for at least five years. Even accepting that as true—which
23 T-Mobile disputes below—Simply Wireless provides no legal argument or support as to why the
24 claim would be time barred. In fact, Simply Wireless acknowledges in its motion that there is no
25 "explicit statute of limitations" for Lanham Act claims, and that courts instead apply the doctrine
26 of laches to claims under the Lanham Act. Dkt. 13 at 7. But while Simply Wireless argues for the
27 application of laches (which is addressed below), it does not provide any legal support for why

1 T-Mobile's claims should be dismissed, even if T-Mobile knew or should have known of the
2 infringement for at least five years (which is disputed). Accordingly, Simply Wireless's Motion
3 should be denied.

4 **1. Simply Wireless Cites No Legal Support for its "Time Bar" Arguments.**

5 A motion to dismiss based on the statute of limitations "can be granted only if the assertions
6 of the complaint, read with the required liberality, would not permit the plaintiff to prove that the
7 statute was tolled." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980), quoting
8 *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 206 (9th Cir. 1991). That is not the case here.

9 There is nothing in T-Mobile's Complaint that in any way establishes that T-Mobile's
10 claims are time barred, such that dismissal is appropriate as a matter of law. This is because none
11 of the allegations in the Complaint could plausibly be interpreted to indicate when T-Mobile first
12 became aware, or otherwise should have been aware, of Simply Wireless's improper use of the
13 T-Mobile Marks—*i.e.*, when T-Mobile's claim accrued. *See generally* Dkt. 1. Nor does the
14 Complaint allege information that could reasonably be interpreted to establish the requisite tolling
15 period for any purported statute of limitations. *Id.* On this basis alone, Simply Wireless time bar
16 arguments fail under a Rule 12 inquiry.

17 Apparently recognizing this, Simply Wireless argues (without any legal support) that
18 T-Mobile's Lanham Act claims are time barred based on the purported length of time that Simply
19 Wireless' website has infringed upon T-Mobile's marks. In doing so, it attaches screen shots from
20 a website labeled the "Way Back Machine" to allegedly show the content of Simply Wireless's
21 website as it allegedly existed in 2014 and 2015. Dkt. 14, Exhibits 1–3.

22 But this is not the law. Rights under the Lanham Act do not automatically expire after the
23 infringer has "gotten away with" its infringement for long enough, nor does Simply Wireless cite
24 any law standing for this proposition.

25 **2. The Materials That Simply Wireless Relies on Are Inadmissible and**
26 **Improper.**

27 Setting aside that Simply Wireless has no valid legal position as to why the claims are time



1 barred, its Motion should also be denied because it relies exclusively on evidence from the
2 “Wayback Machine,” which is wholly improper and insufficient for dismissal under Fed. R. Civ.
3 P. 12(b)(6).

4 It is well-settled law that the Court must analyze a Rule 12 motion based solely on the
5 allegations set forth in the Complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
6 2001) (“As a general rule, ‘a district court may not consider any material beyond the pleadings in
7 ruling on a Rule 12(b)(6) motion.’”). A court may only consider matters outside the Complaint
8 without turning the motion into a motion for summary judgment if (1) the materials attached to the
9 motion to dismiss were referenced in the complaint; or (2) by taking judicial notice of matters
10 pursuant to Fed. R. Evid. 201. *Id.*

11 Under this standard, Simply Wireless’s exhibits are inadmissible for consideration under
12 Rule 12. Simply Wireless attaches a declaration to its motion where its counsel declares under the
13 penalty of perjury that Exhibits 1-3 attached to the declaration “are a true and correct copy of an
14 archived copy of what Simply Wireless’s website looked like” on April 4, 2004, August 31, 2015,
15 and September 12, 2015. Dkt. 14, ¶¶ 2–4. But these exhibits were not referenced in T-Mobile’s
16 complaint. As such, they may only be admissible for Rule 12 consideration if they are properly
17 the subject of judicial notice.

18 Simply Wireless argues—again without legal support—that the Court may take judicial
19 notice of the websites because “they are stored and readily available on the Internet.” Dkt. 13 at
20 5. In other words, Simply Wireless asks the Court to accept that because something is on the
21 Internet, it must be true. This is not the law. Without proper foundation, courts are hesitant to
22 take judicial notice of website materials generally, and especially when there are factual disputes
23 as to the content of the website. *Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011, 1028
24 (C.D. Cal. 2015) (“As a general matter, courts are hesitant to take notice of information found on
25 third party websites and routinely deny requests for judicial notice, particularly when the
26 credibility of the site's source information is called into question by another party.”); *Lee*, 250 F.3d
27 at 689 (“[A] court may not take judicial notice of a fact that is ‘subject to reasonable dispute.’”);

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