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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 T-MOBILE US, INC.,

10 Plaintiff,

11 v.

12 SIMPLY WIRELESS, INC.,

13 Defendant.

CASE NO. C21-525RSM

ORDER GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND

14 **I. INTRODUCTION**

15 This matter comes before the Court on Defendant Simply Wireless, Inc.'s Motion to  
16 Dismiss under Rule 12(b)(6). Dkt. #13. Plaintiff T-Mobile US, Inc. opposes. Dkt. #22. The  
17 Court has determined oral argument is unnecessary. For the reasons stated below, the Court  
18 GRANTS Simply Wireless's Motion with leave to amend.

19 **II. BACKGROUND**

20 For purposes of this Motion to Dismiss, the Court will accept all facts stated in the  
21 Complaint, Dkt. #1, as true. The Court has not considered exhibits 1, 2, and 3 attached to  
22 Defendant Simply Wireless's Motion. Defendant has failed to set forth an adequate basis for  
23 taking judicial notice of these exhibits, which are purportedly archival copies of the Simply  
24

1 Wireless website. The Court has considered Exhibit 4, which is a copy of a filing submitted by  
2 T-Mobile to the Patent and Trademark Office, but only for notice that such was filed, not for the  
3 truth of the materials contained therein. *See* Dkt. #14 at 10–17. There may be an opportunity  
4 later in this litigation for the parties to discuss disputed facts outside the pleadings.

5 Unless stated otherwise, all facts below are from the Complaint. *See* Dkt. #1.

6 Plaintiff T-Mobile is a national provider of wireless voice, messaging, and data services,  
7 and the United States mobile telecommunications subsidiary of Deutsche Telekom AG  
8 (“DTAG”). DTAG owns the standard character mark T-MOBILE and a stylized T-Mobile  
9 Mark (collectively, the “T-Mobile Marks”). DTAG has granted T-Mobile an exclusive license  
10 to use the T-Mobile Marks in the United States and has authorized T-Mobile to enforce its  
11 rights in this matter.

12 Simply Wireless sells mobile phones and accessories for all major telecommunication  
13 carriers. T-Mobile and Simply Wireless had business relationships from 2003 to 2009 and July  
14 2012 to June 2015. From 2003 to 2009 Simply Wireless was an authorized dealer of T-Mobile  
15 devices and services. This relationship was memorialized in a series of agreements hereinafter  
16 referred to as the “Dealer Agreements” and include: 2008 Premier Retailer Agreement; 2008  
17 Semi-Exclusive Retailer Agreement; and 2005 Premier Dealer Agreement.

18 During the course of that business relationship, Simply Wireless engaged in cooperative  
19 advertising with T-Mobile at its retail stores and kiosks and through various advertising media.

20 From July 12, 2012, to June 30, 2015, Simply Wireless and T-Mobile were parties to a  
21 Limited Purpose Co-Marketing and Distribution Agreement for Prepay Equipment Sold through  
22 HSN and QVC (“HSN Agreement”).

23 Simply Wireless owns and maintains the website [www.simplywireless.com](http://www.simplywireless.com). At the time  
24 the Complaint was filed, a page on that site included a section with the header “Simply

1 Partners” and a list of other companies’ logos, e.g. Amazon.com, Apple and Samsung, and  
2 specifically the T-Mobile Mark.

3 As part of their prior business dealings, T-Mobile granted Simply Wireless a limited  
4 license to use the T-Mobile Marks, but now pleads that any such license has expired and Simply  
5 Wireless has no right or authority to use its Marks. T-Mobile does not consider itself a  
6 “partner” of Simply Wireless.

7 The Complaint alleges violations of the Lanham Act through false designation of origin,  
8 false advertising, and infringement, as well as violation of the Washington Consumer Protection  
9 Act (“CPA”). T-Mobile alleges that, based on the above, customers will be confused and  
10 “likely associate T-Mobile with complaints they have about Simply Wireless’s products and  
11 services.”

### 12 III. DISCUSSION

#### 13 A. Legal Standard under Rule 12(b)(6)

14 In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as  
15 true, and makes all inferences in the light most favorable to the non-moving party. *Baker v.*  
16 *Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).  
17 However, the court is not required to accept as true a “legal conclusion couched as a factual  
18 allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,  
19 550 U.S. 544, 555 (2007)). The complaint “must contain sufficient factual matter, accepted as  
20 true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This requirement is met  
21 when the plaintiff “pleads factual content that allows the court to draw the reasonable inference  
22 that the defendant is liable for the misconduct alleged.” *Id.* The complaint need not include  
23 detailed allegations, but it must have “more than labels and conclusions, and a formulaic  
24

1 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Absent  
2 facial plausibility, a plaintiff’s claims must be dismissed. *Id.* at 570.

3 Where a complaint is dismissed for failure to state a claim, “leave to amend should be  
4 granted unless the court determines that the allegation of other facts consistent with the  
5 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-*  
6 *Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

## 7 **B. Analysis**

### 8 **1. Lanham Act Claims**

9 T-Mobile asserts claims under 15 U.S.C. § 1125(a)(1)(A) and (B) and 15 U.S.C. § 1114.  
10 § 1114 prohibits trademark infringement. More specifically, it prohibits using a trademark in a  
11 way that is likely to confuse consumers about goods or services, such as by confusing  
12 consumers into believing that goods or services were made by the trademark’s owner when they  
13 were not. Similarly, § 1125(a)(1)(A) and (B) prohibit persons from misleading consumers  
14 about the origin or nature of products sold by those persons.

15 “Trademark law generally does not reach the sale of genuine goods bearing a true mark  
16 even though such sale is without the mark owner’s consent.” *NEC Elecs. v. CAL Cir. Abco*, 810  
17 F.2d 1506, 1509 (9th Cir. 1987). Once a trademark owner sells his product, the buyer ordinarily  
18 may resell the product under the original mark without incurring any trademark law liability.  
19 *Id.* (citing *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368-69, 68 L. Ed. 731, 44 S. Ct. 350 (1924)).  
20 The reason is that trademark law is designed to prevent sellers from confusing or deceiving  
21 consumers about the origin or make of a product, which confusion ordinarily does not exist  
22 when a genuine article bearing a true mark is sold. *Id.*

23 T-Mobile pleads that Simply Wireless sold its goods and services for years, *see* Dkt. #1  
24 at ¶¶ 17–20, and as Simply Wireless puts it, “does not allege that Simply Wireless no longer

1 sells T-Mobile goods and services.” Dkt. #13 at 12 n.5. Simply Wireless argues it “is entitled  
2 to advertise that it sells products and services of T-Mobile,” that “using T-Mobile’s logo to  
3 convey to consumers that Simply Wireless sells such products is not a violation of the Lanham  
4 Act,” and that “it would be misleading if Simply Wireless sold T-Mobile products *without* using  
5 the T-Mobile logo to designate their source of origin.” *Id.* at 10 (emphasis in original).

6 In sum, Simply Wireless argues its conduct *as alleged* hardly demonstrates a violation of  
7 the Lanham Act because it is or was a reseller of T-Mobile phones and services. The Court  
8 agrees. The sole conduct at issue is the portion of Simply Wireless’s website in paragraph 26 of  
9 the Complaint. The image reproduced there has the words “Simply Partners” at the top,  
10 followed by the corporate logos of 26 companies. Given Simply Wireless’s business model, the  
11 obvious reason why these companies are identified in this way is that Simply Wireless works  
12 with these entities in one capacity or another, such as by selling their goods and services.

13 T-Mobile has not identified any goods or services sold by Simply Wireless that could  
14 support a claim under either statute. T-Mobile’s Complaint only refers generally to “Simply  
15 Wireless’s . . . goods and/or services” and does not identify any good or service it believes to be  
16 misleading or otherwise fall afoul of the statutes. *See* Dkt. #1 at ¶ 30. Nothing in the Complaint  
17 supports T-Mobile’s position that any consumer is confused about who makes or provides the  
18 goods and services being purchased at a Simply Wireless stores. Conclusory statements of  
19 consumer confusion do not pass the *Twombly/Iqbal* test. T-Mobile has failed to plead facts  
20 supporting a plausible claim for liability under these statutes.

## 21 **2. CPA Claim**

22 To prevail on its CPA claims, Plaintiff must prove: (1) an unfair or deceptive act or  
23 practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a  
24 person’s business or property, and (5) causation. *Ambach v. French*, 216 P.3d 405, 407 (Wash.

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