IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SOLMETEX, LLC, Plaintiff, v. DENTAL RECYCLING NORTH AMERICA, INC., Defendant.	)	C.A. No. 23-602-MN

DEFENDANT DRNA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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Exhibit No.	Exhibit Title
1	U.S. Patent No. 11,660,175
2	Excerpts of the File History for U.S. Patent No. 11,660,175
3	https://drna.com/products/Cartridge-2-Compatible-with-Solmetex-r-NXT-Hg5-r-**-ONLY-p454946180, which was cited by D.I. 1 at ¶ 27
4	https://vimeo.com/509905162, included on https://drna.com/products/Cartridge-2-Compatible-with-Solmetex-r-NXT-Hg5-r-**-ONLY-p454946180, which was cited by D.I. 1 at ¶ 27

Solmetex's patent infringement claims are facially self-contradictory, and should be dismissed. Solmetex's Opposition (D.I. 14, "Opp.") twists the applicable legal standards, incorrectly asserts that the patent examiner decided the issues raised in DRNA's Motion to Dismiss (D.I. 11, "Motion"), and attempts to rewrite the prosecution history to fabricate an issue of fact as to the '175 patent's priority date. But the Court need not resolve any factual issue, because the record on the pleadings objectively demonstrates that Solmetex only disclosed the claimed "radially protruding structure for engaging the at least one retaining pin" in amendments to the specification submitted ***this year***. Accordingly, the accused Cartridge 2 product antedates the priority date of the asserted claims, and all must therefore be invalid or not infringed. Either way, Solmetex has failed to plead a viable claim for patent infringement.

Solmetex's defense of its false advertising claims also fails. The primary statement that it challenges is textbook puffery, and Solmetex's attempts to ignore the advertising's actual language and the law do not change that conclusion. And Solmetex relies only on speculation to claim that the remainder of the accused statements are actually false, which does not edge its claims over the line from possible to plausible, as the law requires.

I. SOLMETEX'S PATENT CLAIM SHOULD BE DISMISSED

Solmetex makes five arguments against dismissal of its patent claim, each of which fails.

First, in an effort to set an artificially high bar to dismissal, Solmetex argues that DRNA's Motion seeks to invalidate the '175 patent, and therefore requires proof by "clear and convincing evidence." (Opp. at 7.) Not so. DRNA's Motion argues only that Solmetex has pleaded a Catch-22. Because the Complaint establishes that the accused DRNA Cartridge 2 was on sale before the priority date of the '175 patent, one of two things must logically be true: either (1) the Cartridge 2 does not practice the claims of the '175 patent, in which case it does not infringe; or (2) the Cartridge 2 does practice the claims of the '175 patent, in which case its prior

sale invalidates the '175 patent. *Schering Corp. v. Geneva Pharms., Inc.*, 339 F.3d 1373, 1379 (Fed. Cir. 2003) ("[T]hat which would literally infringe if later in time anticipates if earlier."). The Court need not decide which is true, let alone declare the '175 patent invalid, to dismiss the complaint as internally incoherent.

Second, Solmetex argues that the priority date of the '175 patent presents a question of fact that, as a rule, cannot be resolved on a motion to dismiss. (Opp. at 6.) But, "[i]n ruling on a 12(b)(6) motion, a court need not 'accept as true allegations that contradict matters properly subject to judicial notice or by exhibit,' such as the claims and the patent specification." *Secured Mail Solutions LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 913 (Fed. Cir. 2017) (quoting *Anderson v. Kimberly-Clark Corp.*, 570 F. App'x 927, 931 (Fed. Cir. 2014)). Where the pleadings fail to establish "a claim to relief that is plausible on its face," dismissal is appropriate. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, Courts routinely grant motions to dismiss where the pleadings, the patent, or the prosecution history render patent infringement claims facially implausible. *E.g., F2VS Techs., LLC v. Aruba Networks, Inc.*, C.A. No. 17-754-RGA, 2018 U.S. Dist. LEXIS 60254, at *5 (D. Del. Apr. 10, 2018) (granting a motion to dismiss because it is not "plausible to claim that a router itself is a network" and therefore "router sales do not form the basis for a cognizable direct infringement claim"); *Pixel Display LLC v. Element Elecs. Holdings, LLC*, C.A. No. 21-1055-JPM (D. Del. May 11, 2022) (granting a motion to dismiss for failure to plead facts to plausibly show infringement); *Eagle Pharmaceuticals, Inc. v. Hospira, Inc.*, C.A. No. 18-1074- CFC-CJB, 424 F. Supp. 3d 355, 360 (D. Del. Dec. 19, 2019) (granting a motion to dismiss because the disclosure-dedication rule bars infringement based upon the "unambiguous disclosure" in the specification).

Nor must the Court wait for claim construction to dismiss Solmetex's claims. Even in the

more demanding context of a motion to invalidate an asserted patent on a motion to dismiss, "claim construction is not an inviolable prerequisite." *Reese v. Sprint Nextel Corp.*, 774 F. App'x 656, 659 (Fed. Cir. 2019). Where a plaintiff fails to articulate how claim construction might somehow change the result of a motion to dismiss, that argument is waived. For instance, in *Whitserve LLC v. Dropbox, Inc.*, 854 F. App'x 367 (Fed. Cir. 2021), the Federal Circuit rejected the argument that the district court erred by dismissing for invalidity under 35 U.S.C. § 101 before claim construction, because the plaintiff "waived any such argument . . . by failing to explain how a different construction of any claim term would lead to a different result." *Id.* at 373. Numerous other Federal Circuit opinions have reached the same conclusion. *E.g.*, *Simio, LLC v. FlexSim Software Prods., Inc.*, 983 F.3d 1353, 1365 (Fed. Cir. 2020) (affirming dismissal where the plaintiff "ha[d] not explained how it might benefit from any particular term's construction"); *Mortg. Application Techs., LLC v. MeridianLink, Inc.*, 839 F. App'x 520, 524-25 (Fed. Cir. 2021); *Cleveland Clinic Found. v. True Health Diagnostics LLC*, 859 F.3d 1352, 1360 (Fed. Cir. 2017). Accordingly, by failing to articulate how claim construction might somehow change the result of DRNA's Motion, Solmetex has waived that argument.

Third, Solmetex argues that the Court cannot dismiss its Complaint because the "the Examiner [found] that the claims of the '175 patent met the requirements of § 112." (Opp. at 2-3.) But that is beside the point. Whether the '175 patent satisfies the written description and enablement requirements of 35 U.S.C. § 112 depends on the sufficiency of ***its own specification***—i.e., the amended specification. By contrast, whether the '175 patent is entitled to an earlier priority date depends on the sufficiency of the specifications of its ***parent applications***. *See Hollmer v. Harari*, 681 F.3d 1351, 1355 (Fed. Cir. 2012) ("[I]f any application in the priority chain fails to make the requisite disclosure of subject matter, the later-filed application is not

entitled to the benefit of the filing date of applications preceding the break in [] priority.").

Solmetex later states the correct test, noting in passing that "[t]he prosecution history demonstrates that the Patent Office acknowledged that [] the original disclosure provided adequate written description support for the claimed features." (Opp. at 7.) But the only support Solmetex provides for this statement is a citation back to its argument that the examiner purportedly found the '175 patent's ***amended*** specification sufficient ***under § 112***. (*Id*. (citing § II.A, i.e., Opp. at 2-3).) Again, that analysis is not directed to the '175 Patent's priority date.

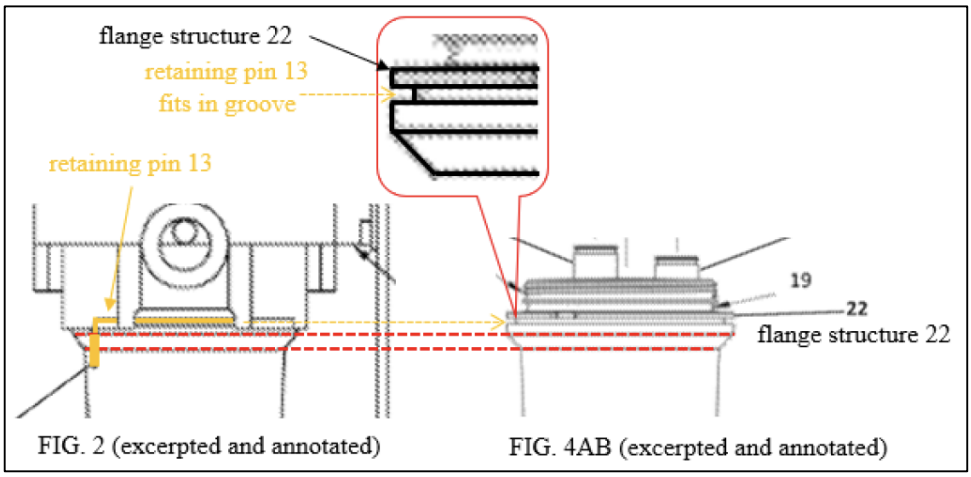
Finally, Solmetex argues that the Court should ignore the objective facts of the prosecution history because "the Examiner . . . did not allege that Solmetex's amendments introduced new matter." (Opp. at 3; *Id*. at 7.) But the examiner's silence on a question that was not at issue is not somehow an endorsement; it is standard procedure. As the Manual of Patent Examining Procedure explains:

> The Office ***does not need to make a determination*** as to whether the requirement of 35 U.S.C. 120 that the earlier nonprovisional application discloses the invention of the second application in the manner provided by 35 U.S.C. 112(a) is met ***unless the filing date of the earlier nonprovisional application is relied upon*** in a proceeding before the Office.

M.P.E.P. § 201.08. Here, although Solmetex included self-serving statements during prosecution that its amendments to overcome § 112 added "no new matter" (D.I. 12-2 at 98), Solmetex concedes that "[t]he Section 112 rejection was the only rejection" in play. (Opp. at 2.) The priority date of the '175 patent was not at issue. (*Id*.) Because "neither the PTO nor the Board has previously considered priority, there is simply no reason to presume that claims . . . are entitled to the effective filing date of an earlier filed application. Since the PTO did not make a determination regarding priority, there is no finding for the district court to defer to." *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1305 (Fed. Cir. 2008).

Fourth, Solmetex argues that the Court cannot dismiss because the claimed "retaining

pins" engaging with a "radially protruding surface"—undisputedly not ***disclosed in*** the original specification—could be retroactively ***grafted onto*** the original specification. (Opp. at 7-10.) But "Solmetex's straightforward explanation," reproduced below, implicitly admits the opposite:



(Opp. at 8.) At the outset, Solmetex's markup employs the ***amended*** version of Fig. 4A (mislabeled as "FIG. 4AB" above), not the ***original*** version of Fig. 4A. (*Compare* D.I. 1-1 at Fig. 4A *with* D.I. 12-2 at 222.) And in support, Solmetex cites not to the patent specification, but to the very representations Solmetex made to the examiner while adding the new material at issue. (*E.g.*, Opp. at 8 (Solmetex quoting itself—not the original specification—for the proposition that "'the removable retaining pin 13 is pulled in the left direction in' Figure 2 such that the retaining 'pin 13 is removed from the region directly below the flange structure 22.'").) On top of this inapposite foundation, Solmetex superimposes even more new disclosure: strategically aligning a cropped and resized version of Fig. 2, adding four new labels, replacing pixelated and illegible portions of Fig. 4A with its own redrawn lines, and drawing in a retaining pin 13 that does not match the underlying figure. (Opp. at 8.)

Solmetex's need to reinvent the specification only confirms what is plain on the face of the prosecution history: there was no such disclosure prior to Solmetex's additions. Indeed, "[t]he written description requirement 'is not a question of whether one skilled in the art ***might*** be

able to construct the patentee's device from the teachings of the disclosure. . . . Rather, it is a question whether the application ***necessarily*** discloses that particular device." *C.R. Bard, Inc. v. United States Surgical Corp.*, 102 F. Supp. 2d 199, 210 (D. Del. 2000). Whatever Solmetex's counsel might reverse engineer after prosecution, the Court need not resolve a question of fact to hold that such disclosure was not ***necessarily*** present in the original specification. *TurboCare Div. of Demag Delaval Turbomachinery Corp. v. GE*, 264 F.3d 1111, 1118-20 (Fed. Cir. 2001) (holding that to comply with the written description requirement the location of the spring must be actually or inherently disclosed; that the location may be obvious is not enough).

Fifth, Solmetex argues that it would be improper for the Court to dismiss all 22 claims of the '175 patent given that Solmetex has only alleged that the Solmetex Collection Container "practices one or more claims of the '175 patent." (Opp. at 11.) But this argument does not apply to the DRNA's accused Cartridge 2 product. Again, because the accused Cartridge 2 predates the priority date of the '175 patent, one of two things must logically be true: either (1) the Cartridge 2 does not practice the claims of the '175 patent, in which case it does not infringe; or (2) the Cartridge 2 does practice the claims of the '175 patent, in which case its prior sale invalidates the '175 patent. In either case, Solmetex has not stated a plausible claim for relief. The Court therefore need not actually invalidate any specific claims to grant this motion, only find that the Complaint is self-contradictory.

II. SOLMETEX'S FALSE ADVERTISING CLAIMS SHOULD BE DISMISSED

Solmetex's Opposition likewise fails to salvage its false advertising claims, which rely on implausible inferences and interpretations of advertising language that courts have routinely rejected at the pleading stage.

First, Solmetex misconstrues DRNA's performance-related statements to sidestep the doctrine of puffery. The advertising statement at issue is that DRNA's products "perform as well

as the most cost, big name brands." (D.I. 1, ¶ 32.) This is textbook puffery: "vague, highly subjective claims as opposed to specific, detailed factual assertions." *Ezaki Glico Kabushiki Kaisha v. Lotte Int'l Am. Corp.*, Civil Action No. 15-5477, 2016 U.S. Dist. LEXIS 185577, at *5 (D.N.J. Dec. 13, 2016); *In re Milo's Kitchen Dog Treats*, 9 F. Supp. 3d 523, 531 (W.D. Pa. 2014) ("Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim.'" (quoting *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv.*, 911 F.2d 242, 245-46 (9th Cir. 1990)). Solmetex's only argument to the contrary is that "***the Complaint*** identifies at least two specific and objective measurements (i.e., leaking and clogging)" demonstrating the supposed superiority of Solmetex's product. (Opp. at 12.) But Solmetex's belief that its products are superior as judged by purportedly objective performance metrics does not change the reality that ***DRNA's advertising statements*** do not raise these metrics.

Solmetex's proffered caselaw (*see* Opp. at 13) is inapt, as the defendant's "claims regarding superior engine protection" in that case were not generalized performance claims, but very specific statements that the product "outperform[ed] any leading motor oil against viscosity breakdown" and "provide[d] longer engine life and better engine protection." *See Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 941 (3d Cir. 1993). The accused false advertising in *Castrol*, in other words, referenced "specific product attributes" that were supposedly misrepresented (*Id.* at 946), unlike the accused statement here.[1]

[1] This distinction also scuttles Solmetex's attempt to distinguish *Liqwd, Inc. v. L'Oréal United States*, No. 17-14-JFB-SRF, 2019 U.S. Dist. LEXIS 233247 (D. Del. June 25, 2019). (*See* Opp. at 13.) Solmetex cites to the magistrate judge's report and recommendation in that case (*Id.*), to argue that the conclusion that the accused statements were puffery turned on the ***pleading***'s failure to propose objective criteria regarding the products at issue in the accused statements. But the relevant opinion from Judge Bataillon is silent on whether the ***counterplaintiff*** proposed objective criteria in its ***pleading***. Rather, the Court there properly focused on whether the

Even if the Complaint had alleged that DRNA had made objective advertising claims, Solmetex has not adequately pled that those claims are false. The law is clear that Solmetex may not plead a false advertising claim based on "naked assertions" that advertisements are false or misleading; it must offer "further factual enhancement." *Sebela Pharms. v. Trupharma, LLC*, C.A. No. 20-1677-SB, 2021 U.S. Dist. LEXIS 85965, at *3 (D. Del. May 5, 2021). Solmetex's only two supposed "factual enhancements"—(1) that the Cartridge 2 has a different design than Solmetex's product (D.I. 1, ¶ 33); and (2) that Solmetex has received complaints from its own customers, and some unspecified proportion of those customers were using the Cartridge 2 (*Id.*, ¶ 36)—do not suffice.[2] Were it otherwise, any company could sue a competitor for performance claims based simply on its own say-so that those claims are false. Indeed, the former is true in any dispute between competitors, and it does not follow from the latter that the DRNA Cartridge 2 is ***more*** prone to leaks than Solmetex's NXT Hg5 Collection Container standing alone. Solmetex thus pleads facts that are "merely consistent" with liability, which "stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 676.

Second, Solmetex continues to rely on faulty logic to support the purported falsity of the statement that DRNA's Cartridge 2 is "[s]uccessfully tested to ISO 11143:2008 standard." Solmetex contends that because the Cartridge 2 does not bear a certificate that it has been tested ***by NSF International***, it has not been tested ***by any laboratory***. (Opp., at 16-17.) But one does not follow from the other. Solmetex allegation amounts to pure guesswork, unsupported by logic or pre-suit analysis. To distract from this deficiency, Solmetex faults DRNA for not representing

accused statements made by the ***counterdefendant*** suggested objective criteria, i.e., whether they were "statements of fact." *Liqwd*, 2019 U.S. Dist. LEXIS 233247, at *28.

[2] Solmetex disclaims its information-and-belief allegation that DRNA has received complaints from customers, contending that this allegation does not support an inference of falsity. (Opp. at 13.)

in its Motion that the product has been tested, which it deems "telling[]." (Opp. at 17.) But it would have been patently improper for DRNA to raise this fact on a motion to dismiss,[3] and it is Solmetex's resort to this gambit in lieu of a substantive defense of its allegations that is "telling."[4]

Unable to defend the purported falsity of the statement that the Cartridge 2 has been "[s]uccessfully tested to ISO 11143:2008 standard," Solmetex pivots to argue that the statement is instead misleading. But Solmetex alleges only falsity in its complaint, so this new position is irrelevant. (*See* D.I. 1, ¶ 43.) Even if this allegation were in play, it is not plausible. Solmetex argues that this statement is misleading because DRNA ***separately*** advertises compliance with legal regulations, and in context customers would "likely" understand the statement that the product is "tested to" the standard to indicate compliance with ***other*** (non-testing) aspects of the standard. Solmetex's contention requires crediting that consumers reading the challenged statement would necessarily (1) connect it to the statement regarding legal compliance, (2) understand that statement, which references "all local, state, and federal regulations," to specifically refer to one particular EPA regulation (40 C.F.R. § 441.30(a)(1)), (3) know the content of that EPA regulation, and (4) assume that reference to compliance with the EPA regulation, which mentions two distinct standards (see below), means compliance with one standard (ISO 11143:2008) and not the other. The Court need not credit that strained series of assumptions. *See Sebela Pharms*, 2021 U.S. Dist. LEXIS 85965, at *3 (plaintiff's "say so" did not show consumers were misled; plaintiff should "point to examples").

Third, Solmetex attempts to rewrite both its own complaint and the EPA regulations at

[3] Although it has no relevance to this motion, to quell Solmetex's curiosity, DRNA confirms that the Cartridge 2 was in fact successfully tested to the ISO 11143:2008 standard by an accredited laboratory.

[4] So too for Solmetex's criticism of DRNA's supposed "hedge" regarding ISO certification. (Opp. at 17 n.4.).

issue to remedy its failure to plead that DRNA's Cartridge 2 "satisfy[ies] all local, state, and federal regulations" is false. (Opp. at 18.) Solmetex argues that its allegation that DRNA's products are not fully compliant with ISO 11143:2008 equates to an allegation that they are not compliant with 40 C.F.R. § 441.30(a)(1)(i) notwithstanding that that regulation permits compliance with either ISO 11143:2008 or ANSI/ADA Specification 108 (*see* Mot. at 20 n.6) because "DRNA only mentions the ISO 11143:2008 standard in its marketing materials and never mentions ANSI/ADA Specification 108." (Opp. at 19.) But that allegation appears nowhere in the Complaint. Next, Solmetex argues that it has successfully pled a lack of compliance with 40 C.F.R. § 441.30(a)(1)(v) because that EPA regulation requires replacement of the amalgam separator ***system***, not a component of that system. (Opp. at 19.) But even crediting that interpretation of the regulation, Solmetex's allegations still fail: Solmetex does not allege that the NXT H5 system cannot be replaced, and therefore fails to establish that DRNA cannot have achieved legal compliance through this alternative method. It therefore it does not successfully plead that DRNA misrepresents compliance with applicable law. (*See* Mot. at 20.)

Fourth, Solmetex fails to defend its allegation that the statement that DRNA's Cartridge 2 is "compatible with" the NXT H5 system is false. Solmetex admits that this inference rests on its other allegations (Opp. at 20), and thus fails as those other allegations fail. And Solmetex's new assertion that it has alleged incompatibility by alleging that the Cartridge 2 cannot be used in accordance with the instructions in the NXT Hg5 manual (Opp. at 20) provides no better ground, as Solmetex offers nothing to demonstrate that consumers would equate a product's "compatibility" with a system to that product's operation in compliance with the system's instruction manual.

III. CONCLUSION

DRNA respectfully submits that the Complaint should be dismissed with prejudice.

Respectfully submitted,

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