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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FOREVER 21, INC.,)	Case No. CV 17-4706 FMO (Ex)
Plaintiff,)	
v.)	ORDER
GUCCI AMERICA, INC., <u>et al.</u> ,)	
Defendants.)	

Having reviewed and considered all the briefing filed with respect to defendant Gucci America, Inc.’s (“defendant”) Motion for Partial Dismissal (Dkt. 21, “Motion”), the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass’n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and orders as follows.

Many motions to dismiss can be avoided if the parties confer in good faith (as required by Local Rule 7-3), especially for perceived defects in a complaint, answer or counterclaim that could be corrected by amendment. See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment). Moreover, a party has the right to amend the complaint “once as a matter of course[.]” Fed. R. Civ. P. 15(a)(1). Even after a complaint has been amended or a responsive pleading has been served, the Federal Rules of Civil Procedure provide that “[t]he court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit requires that this policy favoring amendment be applied with “extreme liberality.” Owens v. Kaiser Found. Health Plan,

1 Inc., 244 F.3d 708, 712 (9th Cir. 2001); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074,
2 1079 (9th Cir. 1990).

3 The court will grant defendant's Motion and dismiss plaintiff's Complaint (Dkt. 1) with leave
4 to amend. In preparing the First Amended Complaint, plaintiff shall carefully evaluate the
5 contentions set forth in defendant's Motion. For example, the Complaint seeks the denial of
6 Gucci's pending trademark applications with the United States Patent and Trademark Office
7 ("USPTO"), (see Dkt. 1, Complaint at ¶¶ 43-46), but the authority on which it relies, 15 U.S.C. §
8 1119, refers only to registered marks. See id. ("In any action involving a registered mark the court
9 may determine the right to registration, order the cancellation of registrations, in whole or in part,
10 restore canceled registrations, and otherwise rectify the register with respect to the registrations
11 of any party to the action."); (see Dkt. 31, Plaintiff and Counter-Defendant Forever 21, Inc.'s
12 Opposition to Defendant and Counter-Claimant Gucci America, Inc.'s Motion for Partial Dismissal
13 of the Complaint ("Opp.") at 9). Further, the court is skeptical that plaintiff has sufficiently alleged
14 facts to support its claims for cancellation based on lack of secondary meaning, aesthetic
15 functionality, and genericism. (See Dkt. 1, Complaint at ¶¶ 1, 27, 37-42). Moreover, the court
16 questions whether plaintiff has standing to seek cancellation of registrations that defendant has
17 not accused plaintiff of infringing. (See Dkt. 21, Motion at 17-19; Dkt. 31, Opp. at 7-8).

18 Based on the foregoing, IT IS ORDERED THAT:

- 19 1. Defendant's Motion for Partial Dismissal (**Document No. 21**) is **granted**.
- 20 2. The Complaint (Dkt. 1) is **dismissed with leave to amend**.
- 21 3. If plaintiff still wishes to pursue this action, it is granted until **November 17, 2017**,
22 to file a first amended complaint attempting to cure the deficiencies set forth above as well as the
23 other alleged defects outlined in defendant's Motion. The court expects that defendant will agree
24 to any amendments that will or attempt to cure the alleged defects.
- 25 4. The first amended complaint must be labeled "First Amended Complaint," filed in
26 compliance with Local Rule 3-2 and contain the case number assigned to the case, i.e., Case No.
27 CV 17-4706 FMO (Ex). In addition, plaintiff is informed that the court cannot refer to a prior
28 pleading in order to make its First Amended Complaint complete. Local Rule 15-2 requires that

1 an amended pleading be complete in and of itself without reference to any prior pleading. This
2 is because, as a general rule, an amended pleading supersedes the original pleading. See
3 Ramirez v. Cnty. of San Bernardino, 806 F.3d 1002, 1008 (9th Cir. 2015) (“It is well-established
4 in our circuit that an amended complaint supersedes the original, the latter being treated thereafter
5 as non-existent. In other words, ‘the original pleading no longer performs any function[.]’”)
6 (citations and internal quotation marks omitted).

7 5. Plaintiff is cautioned that failure to timely file a First Amended Complaint may result
8 in this action being dismissed without prejudice for failure to prosecute and/or failure to comply
9 with a court order. See Fed. R. Civ. P. 41(b); Link v. Wabash R.R. Co., 370 U.S. 626, 629-30, 82
10 S.Ct. 1386, 1388 (1962).

11 6. Defendant shall file its Answer to the First Amended Complaint or a motion pursuant
12 to Fed. R. Civ. P. 12 no later than **December 4, 2017**.

13 7. In the event defendant wishes to file another motion to dismiss, then counsel for the
14 parties shall, on **November 27, 2017, at 10:00 a.m.**¹ meet and confer in person at an agreed upon
15 location within the Central District of California to discuss defendant’s motion to dismiss.
16 Defendant’s motion must include copies of all meet and confer letters as well as a declaration that
17 sets forth, in detail, the entire meet and confer process (i.e., when and where it took place, how
18 long it lasted and the position of each attorney with respect to each disputed issue that will be the
19 subject of the motion). Failure to include such a declaration will result in the motion being denied.

20 Dated this 6th day of November, 2017.

21
22 /s/

23 _____
Fernando M. Olguin
United States District Judge

24
25
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27 _____
28 ¹ Counsel may agree to meet and confer at another time and place without seeking court approval for such an agreement.