Wapp Tech Limited Partnership et al v. Micro Focus International PLC

2019 | Cited 0 times | E.D. Texas | August 13, 2019

United States District Court

EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION WAPP TECH LIMITED PARTNERSHIP and WAPP TECH CORP. v. MICRO FOCUS INTERNATIONAL, PLC

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Civil Action No. 4:18-CV-00469 Judge Mazzant

MEMORANDUM OPINION AND ORDER Pending before the Court is Defendant Micro Focus International, PLC Dismiss for Lack of Personal Jurisdiction, Failure to Serve, and Improper Service of the Complaint

(Dkt. #12); Plaintiffs Wapp Tech Limited Partnership and Wapp Tech Corp. s Motion for Leave to File Amended Complaint (Dkt. #63); Plaintiffs motion for leave (Dkt. #73); and Plaintiffs motion for leave (Dkt. #74). Having considered the motions and the relevant pleadings, the Court

(Dkt. # should be granted (Dkt. #

(Dkt. #73; Dkt. #74).

BACKGROUND I. Motion to Dismiss

Plaintiffs filed this suit on July 2, 2018, alleging patent infringement of United States Patent Numbers 9,971,678, 9,298,864, and 8,924,192 (Dkt. #1). 1

On October 17, 2018, Defendant filed the motion at issue (Dkt. #

1. Plaintiffs filed three other related cases in this Court. See -Packard Enter. Co. 4:18-CV-468-ALM; , 4:18-CV-501-ALM; v. Bank of Am. Corp., 4:18-CV-519-ALM.

arguing (1) the Court lacks personal jurisdiction over Defendant and (2) Plaintiffs failed to 2018 (Dkt. #15). Defendant filed a reply to the motion on November 8, 2018 (Dkt. #16). II. Jurisdictional Discovery

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After a careful review motion, the Court ordered the parties to conduct jurisdictional discovery on December 20, 2018 (Dkt. #17). As the parties engaged in jurisdictional discovery, a discovery dispute arose. Accordingly, on January 16, 2019, Defendant filed a Motion for Protective Order (Dkt. #18). Defendant requested a protective order because it believed isdictional discovery requests were (1) improperly broad; (2) related to piercing the veil a theory not previously asserted by Plaintiffs; and (3) were irrelevant as they related to the merits of the case, not to jurisdiction (Dkt. #18 at pp. 12 18). The parties filed a response and reply to the motion (Dkt. #19; Dkt. #22). The Court disagreed with Defendant and denied Overall, [Defendant] cannot argue that the contacts cited by [Plaintiffs] are attributable only to its subsidiaries and simultaneously contend that [Plaintiffs are] not entitled to explore relationship with these subsidiaries. (Dkt. #24 at p. 4). As a result, on February 7, 2019, the Court ordered that:

The parties shall complete jurisdictional discovery with twenty-one (21) days of this order February 28, 2019. The parties shall amend or supplement the briefing to dismiss within eight (8) days of completing jurisdictional discovery March 8, 2019. (Dkt. #24 at pp. 4 5) (emphasis in original). III. Amended Complaint, Supplemental Briefing, and Motion to Strike

On March 8, 2019, (Dkt. #30; Dkt. #32). On the same day, without seeking leave of court, Plaintiffs filed a First

Amended Complaint adding five additional parties Seattle SpinCo Inc., EntIT Software LLC, EntCo Interactive (Israel) Ltd., Entco Government Software LLC, and Micro Focus (US) Inc. (Dkt. #28 ¶¶ 7 11).

On March 12, 2019, without seeking leave of court, Defendant filed a reply supplemental briefing (Dkt. #36). 2

The next day, reply to and sought clarification conce (Dkt. #41). motion to strike the same day (Dkt. #42). #60). The Court also ordered Plaintiffs to file a motion for leave to

rectify First Amended Complaint without leave of court (Dkt. #60). IV. Motion for Leave to Amend Complaint and Oral Argument Requests

Pursuant to the Amended Complaint on June 10, 2019 (Dkt. #63). On June 21, 2019, Defendant filed a response

to Plaintiff motion for leave (Dkt. #67). Defendant argues the Court should deny Plaintiffs motion because it is futile and there is evidence that Plaintiffs are acting in bad faith. Plaintiffs filed a reply in support of their motion on June 28, 2019 (Dkt. #69). Defendants filed a sur-reply to the motion on July 5, 2019 (Dkt. #70).

On J leave (Dkt. #73). Plaintiffs request a hearing on the motion to statements by counsel for [Defendant] pursuant to settlement discussion, but which were not

1). In the Certificate

2 Regarding the Motion to Dismiss . . (Dkt. # to avoid confusion.

a telephonic conference for this Motion for Oral Argument, [Defendant] did not provide any #73 at p. 2). The next day, Plaintiffs filed a corrected Request for Oral Argument (Dkt. #74). The only difference between the original and corrected requests for oral argument is that Plaintiffs allege in the Certificate of Conference to the corrected request that #74 at p. 2).

LEGAL STANDARD I. Personal Jurisdiction

Federal Rule of Civil Procedure 12(b)(2) enables a defendant to move to dismiss a case for lack of personal jurisdiction. involved with the substance of the patent

NexLearn, LLC v. Allen Interactions, Inc., 859 F.3d 1371, 1375 (Fed. Cir. 2017) (quoting Elecs. for Imaging, Inc. v. Coyle, 340 F.3d 1344, 1348 (Fed. Cir. 2003)); see also Apicore US LLC v. Beloteca, Inc., 2:19-CV-00077-JRG, 2019 WL 1746079, at *3 (E.D. Tex. Apr. 18, 2019) (quoting Celgard, LLC v. SK Innovation Co., Ltd., 792 F.3d 1373, 1377 (Fed. Cir. 2015)) Federal Circuit law governs personal jurisdiction where a patent question exists.

other written materials, and no jurisdictional hearing is conducted, the plaintiff usually bears only

a prima facie Celgard, 792 F.3d at 1377 (citing Coyle, 340 F.3d at 1349). The plaintiff also bears a prima facie burden if the parties conduct jurisdictional discovery, the parties dispute the jurisdictional facts, and the court does not conduct a jurisdictional hearing. Id.; accord Polar

Electro Oy v. Suunto Oy, 829 F.3d 1343, 1347 (Fed. Cir. 2016) (citing Celgard, 792 F.3d at 1378). 3 Under the prima facie accept the uncontroverted allegations in the plaintiff s complaint as true and resolve any factual conflicts in the affidavits in the plaintiff Avocent Huntsville Corp. v. Aten Int l Co., 552 F.3d 1324, 1329 (Fed. Cir. 2008). In determining whether a plaintiff has made a prima facie s long-arm statute permits service of process and whether assertion of personal NexLearn, LLC, 859 F.3d at 1375 (quoting Autogenomics, Inc. v. Oxford Gene Tech. Ltd. e Texas long-arm statute extends to the limits of federal due process, the two-step inquiry collapses into one federal Johnston v. Multidata Sys. Intern. Corp., 523 F.3d 602, 609 (5th Cir. 2008) (citing Wilson v. Belin, 20 F.3d 644, 647 (5th Cir. 1994)).

Federal due process requires that an out-of- does Maxchief Invs. Ltd. v. Wok & Pan, Ind., Inc., 909 F.3d 1134, 1137 (Fed.

Cir. 2018) (citing Bristol-Myers Squibb Co. v. Superior Court of Cal., U.S. , 137 S. Ct. 1773, 1785 (2017) to meet the federal due process requirements if the court may exercise general or specific jurisdiction over the defendant. NexLearn, LLC, 859 F.3d at 1375. Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (quoting Goodyear Dunlop

3. In both its supplemental brief in support of its motion to dismiss and its sur- Defendant contends that because the jurisdictional facts are not in dispute, Plaintiffs bear the burden of proving personal jurisdiction by a preponderance of the evidence (Dkt. #32 at p. 6; Dkt. #70 at p. 4 n.1). Considering the ego theory, the Court considers the jurisdictional facts in dispute. Therefore, Plaintiffs must make a prima facie showing of personal jurisdiction.

Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)). General jurisdiction does not require t Autogenomics, 566 F.3d at 1017 (citing Silent Drive, Inc. v. Strong Indus., Inc., 326 F.3d 1194, 1200 (Fed. Cir. 2003)). In rt to exercise general jurisdiction, courts M-I Drilling Fluids UK Ltd. v. Dynamic Air Ltda., 890 F.3d 995, 1000 (Fed. Cir. 2018) (quoting Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico, 563 F.3d 1285, 1297 (Fed. Cir. 2009)).

The question of whether a court may exercise specific jurisdiction over a defendant Walden v. Fiore, 571 U.S. 277, 283 84 (2014) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984)). Under a specific jurisdiction analysis-related conduct must create Id. The determine whether specific jurisdiction exists, the court asks whether State; (2) the claims arise out of or relate to those activities (collectively, the minimum contacts

prong); and (3 NexLearn, LLC, 859 F.3d at 1376 (citing Avocent ent a compelling case

M-I Drilling Fluids UK Ltd., 890 F.3d at 1000 (citations omitted). II. Amended Pleadings

When a trial court imposes a scheduling order, Federal Rules of Civil Procedure 15 and Tex. Indigenous Council v. Simpkins,

s deadline to amend passes. See id. request to amend its pleading after the deadline to amend passes. Healthcare Sys. S&W Enters., L.L.C. v. SouthTrust

Bank of Ala., NA, 315 F.3d 533, 536 (5th Cir. 2003)).

Rule 15(a) provides that a party may amend its pleading once without seeking leave of court or the consent of the adverse party at any time before a responsive pleading is served. After a responsive FED. R. CIV. P. 15(a)(1)(2). Rule 15(a) also favor of granting leave to

Jones v. Robinson Prop. Grp., L.P., 427 F.3d 987, 994 (5th Cir. 2005) (quoting Lyn Lea Travel Corp. v. Am. Airlines, Inc., 283 F.3d 282, 286 (5th Cir. 2002)); see also Dueling v.

Devon Energy Corp., 623 F. App x. 127, 129 (5th Cir. 2015) (quoting Mayeaux v. La. Health Serv. & Indem. Co., 376 F.3d 420, 425 (5th Cir. 2004)) In other words, district courts must entertain a presumption in favor of granting parties leave to amend. automati Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co., 203 F. Supp. 2d 704, 718 (S.D.

Tex. 2000) (citing Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981)). Whether Little v. Liquid Air Corp., 952 F.2d 841, 845 46 (5th Cir. 1992). A district court reviewing a motion to amend pleadings under Rule 15(a) considers five factors: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility of amendment. Smith v. EMC, 393 F.3d 590, 595 (5th Cir. 2004) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Rule 16(b)(4) provides that a scheduling o See Agredano v. State Farm Lloyds, No. 5:15-CV-

1067-DAE, 2017 WL 5203046, at *1 (W.D. Tex. July 26, 2017) (citing E.E.O.C. v. Serv. Temps Inc., 679 F.3d 323, 333 reasonably be

S&W Enters., L.L.C., 315 F.3d at 535 (quoting 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1522.1 (2d ed. 1990)). In determining whether good cause exists, courts consider a four-part the [amendment]; (3) potential prejudice in allowing the [amendment]; and (4) the availability of

a continuance to Id. (quoting Reliance Ins. Co. v. La. Land & Expl. Co., 110 F.3d 253, 257 (5th Cir. 1997)). Only after the movant demonstrates good cause under Rule for leave to amend. Id.

ANALYSIS I. s Motion to Dismiss

(Dkt. #12). Defendant moves the Court to dismiss Defendant from the suit arguing (1) the Court lacks personal jurisdiction over Defendant and (2) Plaintiffs failed to properly serve Defendant. Plaintiffs respond that Defendant is subject to personal jurisdiction and Defendant waived service (Dkt. #15).

Personal Jurisdiction Before the Court ordered jurisdictional discovery, the parties disputed whether certain contacts cited by Plaintiffs the Eastern District of Texas were attributable to Defendant or its -owned s now contend that Defendant is subject to personal jurisdiction because (1) Defendant previously accepted the jurisdiction of this Court in a different case and (2) egos of Defendant (Dkt. #30 at pp. 7 11). Therefore, Plaintiffs claim that the contacts of

#30 at pp. 11 12). Defendant maintains that (1) it did not waive its personal jurisdiction challenge in this case by not challenging personal jurisdiction in the previous case and (2) Plaintiffs cannot establish that the subsidiaries are (Dkt. #32; Dkt. #36).

i. Previous Suit Plaintiffs first explain that Defendant was previously sued in this District in an unrelated case jurisdiction in that case (Dkt. #30 at p. 7). 4

#30 at p. 7). Plaintiffs cite no authority to support their position.

Defendant responds that it did not waive its personal jurisdiction challenge in this case by not challenging personal jurisdiction in the prior, unrelated case (Dkt. #36 at pp. 5 6) (citing Rozenblat v. Sandia Corp., 05-1556, 2006 WL 678923, at *3 (Fed. Cir. Mar. 17, 2006)). In Rozenblat before the district court that personal jurisdiction was established because [the defendants] appeared in that court in another action previously filed by

4. See Uniloc USA, Inc. v. ABB Ltd., 6:13-cv-00906-RWS-KNM (E.D. Tex. Nov. 25, 2013).

Mr. Rozenblat . The Federal Circuit noted that the district court correctly observed that the prior appearance did not necessarily waive the personal jurisdiction requirement in future actions, nor constitute related business conduct within the jurisdiction. Id. If the defendants in Rozenblat did not necessarily waive the personal jurisdiction requirement when they appeared in a previous case filed by Mr. Rozenblat, the Court does not believe that Defendant waived the personal jurisdiction requirement here by appearing in a previous, unrelated case filed in the District.

ii. Alter Ego Plaintiffs next argue that the evidence gathered from jurisdictional discovery demonstrates alter egos and, therefore, Defendant is subject to personal jurisdiction in this case imputed to Defendant. 5

- Celgard, 792 F.3d at 1379. alter ego theory, Fellowship Filtering Techs., LLC v. Alibaba.com, Inc., 2:15-CV-2049-JRG, 2016 WL

6917272, at *2 (E.D. Tex. Sept. 1, 2016) (quoting QR Spex, Inc. v. Motorola, Inc., 507 F. Supp. 2d 650, 663 (E.D. Tex. 2007)). be lightly disregarded. Id. (citing Manville Sales Corp. v. Paramount Sys. Inc., 917 F.2d 544, 552 (Fed. Cir. 1990)). As a result, the typical corporate relationship between a parent and

5. Oddly, Plaintiffs do not allege their alter ego theory in the jurisdictional allegations of the Complaint or proposed First Amended Complaint. Instead of ordering Plaintiffs to replead, the Court will treat the alter ego theory as if it is alleged in the Complaint.

subsidiary . . . is not a sufficient basis to impute the contacts of a third party to the defendant under an alter ego theory. Id. (citing QR Spex, Inc., 507 F. Supp. 2d at 663).

jurisdiction over a defendant on the basis of unilateral acts of third- Celgard, 792 F.3d at

1380 (citing Hanson v. Denckla, 357 U.S. 235, 253 54 (1958)). Therefore, under an alter ego exercise of

personal jurisdiction to comport with due process. Nuance Comm s, Inc., 626 F.3d at

1232 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 76 (1985)).

Courts consider a number of factors in assessing the relationship between a parent company and its alleged alter egos, such as: (1) the parent company attempt to purposely direct or control the activities of the subsidiary; (2) evidence of common control or joint-venture agreements; (3) company; (4) the existence of separate headquarters for each entity; (5) the sharing of common officers and directors; (6) the observance of corporate formalities; (7) the maintenance of separate accounting systems; (8 exercise of complete authority over its daily operations; and (9) the degree of the parent

control over the general policy and administration of the subsidiary. See Celgard, 792 F.3d 1380 81 (considering factors (1) and (2)); Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1160 (5th Cir.

1983) (considering factors (1) and (3) (7)); Licea v. Curacao Drydock Co., Inc., 627 F. App x. 343, 348 (5th Cir. 2015) (quoting PHC Minden, L.P. v. Kimberly Clark Corp., 235 S.W.3d 163, 174 75 (Tex. 2007)) (citing factors (1), (3) (4), (6), and (9)). Here, the parties address the first, third, and sixth factors (Dkt. #30 at pp. 8 11; Dkt. #36 at pp. 6 12).

a. Control of its Subsidiaries (having about 300 subsidiaries), setting the internal policies of these disparate groups (Dkt. #30

at p. 9). To support their argument, [s] ; (2) financing arrangements; (3) material acquisitions and divestments; (4) approval of the annual budget; (5) major capital expenditure projects; (6) risk management; (7) treasury policies; and (8) monitoring internal controls. (Dkt. #30 at p. 10) .

#30 at p. 10) (c .

The Court examined Exhibit 3 2018 and finds little of the information Plaintiffs cite. To begin, Plaintiffs claim to cite

#30 at p. 10). Yet, as previously stated, Exhibit 3 is See Dkt. #30, Exhibit 3). Moreover, Plaintiffs cite page 58 of Exhibit 3 when Exhibit 3 ends at page 57 (See Dkt. #30 at p. 10; Dkt. #30, Exhibit 3). The Court also cannot find the information Plaintiffs cite in Exhibit 3. For example, Exhibit 3 does not state that the s. The Court also cannot locate ed to the Executive In fact, Exhibit 3 appears to mention the Board only once - generating qualities of Micro Focus with a target net debt to Adjusted EBITDA multiple of 2.7 #30, Exhibit 3 at p. 7). Considering these issues, the Court assumes Plaintiffs

Turning to the substance of Exhibit 3, it does not support a prima facie showing of and demonstrates that Defendant instituted general financial policies and strategies for its subsidiaries (See Dkt. #30, Exhibit 3). Otherwise, it does not show the level of control by Defendant over its subsidiaries that is

necessary to support an alter ego theory.

Plaintiffs next suggest that Defendant sets the budget, revenue, and business goals of its subsidiaries (Dkt. #30 at p. 10). Plaintiffs cite the deposition of Raffi Margaliot, a Senior Vice #30, Exhibit 2 at p. 4). 6

During his deposition, Mr. Margaliot testified:

Q. What business relationship does [Defenant] have with EntIT Software, LLC? 7 A. So for my ADM business group, we get, again, as I said, goals for profit generation, which would include budget for spend and revenue target, and we execute throughout the year to deliver these profits. Q. Are there any other instructions or communications that come from [Defendant] to your group in terms of how you should operate that group? A. No, we do have reporting. Q. What do you mean by that? A. We report up to [Defendant] on our business performance. (Dkt. #30, Exhibit 2 at p. 10). On its face, a parent company setting financial goals or requiring financial reporting from its subsidiaries does not present a prima facie case that the subsidiary is

6. Defendant previously acknowledged that Defendant and its subsidiaries colle tradename (Dkt. #17 at p. 4). 7. Plaintiffs allege that EntIT Software, LLC is another wholly owned subsidiary of Defendant (Dkt. #30 at p. 5).

8

See Fellowship Filtering Techs., LLC, 2016 WL 6917272, at *2 (quoting QR Spex, Inc., 507 F. Supp. 2d at 663 defendant under an alter ego theory, the lines between the defendant and the third party must

Licea, 627 F. App x. at 348 (quoting PHC- Minden, L.P., 235 S.W.3d at than that normally associated with common ownership and directorship . .

Plaintiffs next cite an instance where Defendant shared a common director with its subsidiaries (Dkt. #30 at p. 10). As stated in the deposition of Philip Horner Company Secretarial Manager Chris Hsu acted as a director for Defendant while simultaneously acting as a director for two of Def (Dkt. #12, Exhibit 1; Dkt. #30, Exhibit 1 at p. 4). The Court cannot find that the shared directorship of one corporate officer is sufficient to show a prima facie case of alter ego. Fellowship Filtering Techs., LLC, 2016 WL 6917272, at *2 (citing QR Spex, Inc. relationship between a parent and subsidiary, including one hundred percent stock ownership and

identity of directors and officers, is not a sufficient basis to impute the contacts of a third party to ; see also PHC-Minden, L.P., 235 S.W.3d at 175 (quoting Gentry v. Credit Plan Corp. of Hous., 528 S.W.2d 571, 573 (Tex. 1975)) (emphasis subsidiary corporation will not be regarded as the alter ego of its parent merely because of stock ownership, a duplication of some or all of the directors or officers,

or an exercise of the control that stock ownership gives to stockholders.).

8. Plaintiffs assert this argument again in their contention that Defendant and its subsidiaries do not respect corporate formalities (Dkt. #30 at p. 8). conclusion.

Accepting Plaintiffs cited evidence as true and resolving all factual conflicts in Plaintiffs favor, the cited evidence either (1) does not state what Plaintiffs claim it does or (2) demonstrates a close relationship between Defendant and its subsidiaries, but nothing more. Accordingly, Plaintiffs do not make a prima facie showing that Defendant exercises a degree of control over its subsidiaries sufficient to establish that re

b. It is uncontroverted that Defendant owns (See Dkt. #36 at pp. 7 12). Therefore, this factor weighs in favor of Plaintiff alter ego theory. However, 100% stock ownership by a parent company of its subsidiaries cannot alone establish an alter ego theory. See Fellowship Filtering Techs., LLC, 2016 WL 6917272, at *2 (citing QR Spex, Inc., 507 F. Supp. 2d at 663); PHC-Minden, L.P., 235 S.W.3d at 175 (quoting Gentry, 528 S.W.2d at 573).

c. Corporate Formalities Plaintiffs next cite instances demonstrating that Defendant and its subsidiaries do not respect corporate formalities (Dkt. #30 at pp. 8 9). First, Plaintiffs note that Mr. Margaliot reported to Stephen Murdoch and certain employees of other subsidiaries reported to Mr. Margaliot (Dkt. #30, Exhibit 2 at p. 12). Mr. Margaliot testified that Mr. Murdoch sets his pay and evaluates his performance (Dkt. #30, Exhibit 2 at pp. 12 13). In describing his relationship with Mr. Murdoch, Mr. Margaliot stated that he calls Mr. Murdoch once or twice a month; meets with Mr. Murdoch once a quarter to update him on performance results; and hears Mr. Murdoch present at staff or leadership meetings (Dkt. #30, Exhibit 2 at pp. 12 14). Mr. Margaliot also testified th #30, Exhibit 2 at p. 14). Mr. Margaliot a other subsidiaries and Mr. Margaliot Case 4:18-cv-00469-ALM Document 75 Filed 08/13/19 Page 15 of 20 PageID #: 2247 I could only remember the name of one other EntIT Interactive board member (Dkt. #30, Exhibit 2 at pp. 5 6, 10 11). 9

Accepted as true, these allegations demonstrate that Defendant and its subsidiaries disregard corporate formalities to the extent that (1) the relationship between Mr. Murdoch and the are not active or used.

the evidence (Dkt. #36 at pp. 9 11). Defendant also provides other, separate examples of how Defendant and its subsidiaries respect corporate formalities (Dkt. #32 at pp. 12 14; Dkt. #36 at pp. 9 11). Specifically, Defendant produced evidence of entity-specific income and property tax returns; arms-length transactions between the entities; policies concerning cross-entity transactions; and explains that at least one employee who is employed by a subsidiary is designated as a contractor by other subsidiaries when he performs work for the other subsidiaries (Dkt. #30, Exhibits 24 28; 34 at pp. 9, 16; 35 at pp. 25 27). Therefore, there is contravening evidence that Defendant and its subsidiaries strive to respect corporate formalities. Considering Plaintif the factual do not respect

certain corporate formalities. Nevertheless, this evidence does not present a prima facie case that 9 #30, Exhibit 7 at pp. 23 24). Even

when these statements are accepted as true, they only speak to confusion concerning a complicated merger. The evidence does not show a lack of respect for corporate formalities.

Fellowship Filtering Techs., LLC, 2016 WL 6917272, at *2 (quoting QR Spex, Inc., 507 F. Supp. 2d at 663).

iii. As Plaintiffs do not make a prima facie aries are to Defendant. As Plaintiffs personal jurisdiction, the Court must dismiss Defendant as the Court cannot exercise personal jurisdiction over Defendant (See Dkt. #30). 10

As the Court dismisses Defendant for lack of improper service argument (Dkt. #12 at pp. 16 18). II. Motion for Leave to Amend

tion for leave to amend complaint (Dkt. #63). The Court has not yet entered a scheduling o motion for leave to amend. See Tex. Indigenous Council at 420. Because Rule

15(a) gov factors provided by Smith and must 393 F.3d at 595. Plaintiffs argue that the Smith factors are met (Dkt. #63 at pp. 4 7). Defendant responds stating that Plaintiffs proposed amendments are futile and there is evidence that Plaintiffs are acting in bad faith (Dkt. #67 at pp. 6 20). 11

10. Even if Plaintiffs continued to allege that the Court may exercise general personal jurisdiction over Defendant , the Court would find that Plaintiffs have not provided sufficient evidence to establish a prima facie case of general personal jurisdiction over Defendant. 11. Defendant does not contest the undue delay, repeated failure to cure deficiencies, or the undue prejudice factors from Smith (See Dkt. #67). the Jones, 427 F.3d at 994 (quoting Lyn Lea Travel Corp., 283 F.3d at 286); see also Dueling Mayeaux, 376 F.3d

Futility Plaintiffs filed their proposed First Amended Complaint on March 8, 2019 (Dkt. #28). In the proposed First Amended Complaint, Plaintiffs this suit Seattle SpinCo Inc. EntIT Software LLC EntCo Interactive (Israel)

Ltd., Entco Government Software LLC, and Micro Focus (US) Inc. (Dkt. #28 ¶¶ 7 11). Defendant explains that on October 15, 2018, SSI and EntIT filed a declaratory judgment action in the United States District Court for the District of Delaware asserting that the patents at issue in this case are invalid (Dkt. #67 at p. 9). Although this case was filed on July 2, 2018, proposed First Amended Complaint adding SSI and EntIT cannot relate back to July 2, because each party to be brought in by

(Dkt. #67 at p. 13) (citing FED R. CIV. P. 15(c)(1)(C)(ii)). As the First Amended Complaint cannot relate

back to July 2, Defendant concludes that the Delaware Suit is the first-filed suit (Dkt. #67 at pp. 17 19). Pursuant to the first-to-file rule, Defendant argues that adding its subsidiaries to this suit is futile, because the case must proceed in Delaware (Dkt. #67 at pp. 17 19).

To begin, Defendant claims that only two of the five parties First Amended Complaint are parties to the Delaware Suit. As a result, it is not futile to add the

three other parties. Concerning SSI and EntIT, the Court does not believe that an amendment is futile simply because the amendment may require the case to be transferred. The first-to-file rule is a venue and efficiency consideration, not an adjudication on the merits or a question of jurisdiction. -to-file rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases

substantially Cadle Co. v. Whataburger of Alice, Inc., 174 F.3d 599, 603 (5th Cir. 1999). -to-file rule, the second-filed court must examine Brown v. Peco Foods, Inc., 4:07CV99-KS-MTP, 2008 WL 4145428, at *2 (S.D. Miss. Feb. 25, 2008) (quoting Cadle Co. f the likelihood of su the proper course of action [is] for the [second-fi to the first-filed court. Id. (quoting Save Power Ltd. v. Syntek Fin. Corp., 121 F.3d 947, 950 (5th Cir. 1997)). not only determines which court may decide the merits of substantially similar cases, but also

establishes which court may decide whether the second suit filed must be dismissed, stayed or Sutter Corp. v. P & P Indus., Inc., 125 F.3d 914, 920 (5th Cir. 1997). Even if the Court later decides to transfer this case to the District of Delaware pursuant to the first-to-file rule, Plaintiffs might still prevail against SSI and EntIT on the claims asserted in the proposed First Amended Complaint. Consequently, the Court does not believe that adding SSI and EntIT to this suit is futile.

Bad Faith or Dilatory Motive Defendant also alleges that Plaintiffs acted in bad faith by continuing to assert that Defendant was a proper party to this suit (Dkt. #67 at pp. 19 20). There is no reason to address -faith argument as Defendant will be dismissed from the argument does not relate to the parties Plaintiffs intend to add to this suit. Even so, the Court finds

-faith assertion. Considering the arguments above, the Court finds that Defendant provides no reason that overcomes the presumption in favor of granting Plaintiffs leave to amend. Accordingly

CONCLUSION Based on the preceding discussion, Jurisdiction, Failure to Serve, and Improper Service of the Complaint (Dkt. #12) is hereby

GRANTED. The Court, therefore, DISMISSES Defendant Micro Focus International, PLC from the case. Moreover, Plaintiffs Motion for Leave to File Amended Complaint (Dkt. #63) is hereby GRANTED. (Dkt. #28) contains allegations against Defendant Micro Focus International, PLC, Plaintiffs may file a Second Amended Complaint removing the allegations against Defendant Micro

Focus International, PLC within seven (7)

days of the date of this order, without seeking leave of court. 12 Plaintiffs Request f motion for leave (Dkt. #73) and Plaintiffs Corrected Request for Oral Argument (Dkt. #74) are

hereby DENIED as MOOT. IT IS SO ORDERED.

12. This is not an invitation to add additional allegations against the newly added Defendants or to add additional parties, only to remove the allegations against Defendant Micro Focus International, PLC.