IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CELERITY IP, LLC, ASUS TECHNOLOGY LICENSING INC., AND INNOVATIVE SONIC LTD., Plaintiffs, v. **AT&T CORP., AT&T MOBILITY LLC, AT&T MOBILITY II LLC, AND AT&T SERVICES, INC., CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, T-MOBILE USA, INC. AND ERICSSON, INC.,** Defendants.	Civil Action No. 2:24-cv-721 **JURY TRIAL**

PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED PLEADING DISMISSING WITH PREJUDICE ANTITRUST, TORTIOUS INTERFERENCE AND UNFAIR COMPETITION CLAIMS AND ADDING DECLARATORY JUDGMENT CLAIM

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiffs respectfully request that the Court grant Plaintiffs leave to file a Second Amended Complaint to a) dismiss with prejudice Counts 1 and 2 (claims for Violations of Section 1 and Section 2 of the Sherman Act), Counts 3-4 (tortious interference), and Count 5 (unfair competition); and b) add a declaratory judgment claim that Plaintiffs since the filing of the Original Infringement Action have complied with their obligations under SSO policies and that the Service Providers and Ericsson have not. Plaintiffs' proposed Second Amended Complaint is attached as Ex. A. The purpose of this motion to amend is to respond to concerns raised by Defendants that claims sounding in antitrust, tortious interference, and unfair competition may unduly constrain their ability to defend the Original Infringement Action. The proposed Second Amended Complaint addresses those concerns in two ways: by limiting the counterclaims to addressing breach of SSO contractual obligations, and by expressly disclaiming any liability based on participation in a common defense agreement or sharing of common counsel:

> No liability in this complaint arises from receiving common legal advice or participation in a common defense agreement by the Service Providers or Ericsson. Instead, it relates to the substantive positions they have taken in negotiations.

I. FACTUAL BACKGROUND

Plaintiffs filed their original petition in this action in Dallas County on July 17, 2024, alleging state law claims for unfair competition under Texas law, including claims that the Defendants violated Section 15.05 of the Texas Business and Commerce Code. Dkt. 1-3. Defendants removed this case to the Northern District of Texas on August 16, 2024. Dkt. 4 (AT&T Notice Of Removal); Dkt. 5 (Ericsson Joinder In Removal); Dkt. 7 (T-Mobile Consent To Removal); Dkt. 9 (Verizon Consent To Removal). This case was then transferred to this Court on September 3, 2024, in light of the parallel proceeding relating to patent infringement between the same parties (the Original Infringement Action). Dkt. 25. On September 16, 2024, Plaintiffs filed an Amended Complaint to include claims for federal antitrust violations which were based on the same underlying facts as Plaintiffs' state law

claims. *Compare* Dkt. 1-3 (Plaintiffs' Original Dallas County Petition) at Count 3, *with* Dkt. 34 (Plaintiffs' First Amended Complaint) at Counts 1-2:

The claims pleaded in the First Amendment Complaint were:

- Counts 1-2: Sherman Act violations against Service Providers based on formation and maintenance of a buyers cartel;
- Count 3: Tortious interference with contract against Ericsson;
- Count 4: Tortious interference with prospective business relationship against Service Providers and Ericsson;
- Count 5: Unfair competition against Service Providers and Ericsson. The predicate for this claim as to the Service Providers is Counts 1-2.

The proposed Second Amended Complaint proposes to plead:

- Declaratory Judgment that the plaintiffs have complied with SSO obligations and that the Defendants have not.

None of the proposed Second Amended Complaint allegations have as a predicate the participation in a common defense of the Original Infringement Action or the receipt of common legal advice.

II. ARGUMENT

Rule 15(a) provides that leave to amend shall be "freely given when justice so requires." Fed. R. Civ. P. 15(a); *see also Engstrom v. First National Bank*, 47 F.3d 1459, 1464 (5th Cir. 1995). The well-settled law of the Fifth Circuit holds that the language of Rule 15(a) "evinces a bias in favor of granting leave to amend." *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002) (quoting *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1983)). Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of the amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). None of these factors are present here.

A. Dismissal with Prejudice in Reliance on Defendants' Position Regarding Legal Advice

Defendants maintain that participating in common legal representation, the receipt of common legal advice, and acting on that common legal advice in patent license negotiation is not a violation of the United States Sherman Act or Texas unfair competition law. In reliance on this position, Plaintiffs are willing to dismiss all claims that participation in a common legal representation agreement among Defendants, the receipt of common legal advice, and acting on that common legal advice in the patent license negotiation that is at issue in East Texas proceedings violate the United States Sherman Act or Texas unfair competition law

B. Defendants Will Not Be Prejudiced By Plaintiffs' Proposed Amendment

There is no prejudice to Defendants because these claims do not expand the scope of the disputes between the parties. To the contrary, Plaintiffs seek to *narrow* the scope of issues between the parties by dismissing with prejudice the antitrust claims, tort claims, and claims for unfair competition under Texas state law directed at the Service Providers that Defendants allege create liability for participating in a joint defense. This Court has recognized that amendments seeking to remove claims should be granted, as finding otherwise would "seemingly [suggest] that [the Court] must force [claimant] to proceed on a claim which [claimant] itself deems fruitless." *Le-Vel Brands, LLC v. DMS Nat. Health, LLC*, No. 4:20-CV-398-SDJ, 2022 WL 949955, at *5 (E.D. Tex. Mar. 28, 2022).

Instead, Plaintiffs seek to plead claims for declaration regarding compliance with SSO policies. This amendment does not broaden the scope of issues between the parties because it stems from underlying facts that Defendants have been on notice of since the original Dallas County petition filed July 17, 2024. Further, Defendants themselves assert claims in the Original Infringement Action for Breach of Obligation to Negotiate in Good Faith based on Plaintiffs' entire patent portfolio and including post-suit conduct, the same scope Plaintiffs now seek to plead in this case. *See e.g.* Dkt. 72 (Defendants' Joint Statement submission stating "Defendants' bad faith counterclaims relate to

portfolio-wide negotiations governed by French Law according to the ETSI IPR Policy."); Dkt. 254 in the -486 Case (Ericsson Opposition to Plaintiffs' Motion to Dismiss Ericsson's Counterclaim) (arguing that "Ericsson's counterclaim derives from the same facts as the existing claims because it . . . arises from the same (ongoing) course of negotiating conduct as Plaintiffs' and the Carriers' existing bad-faith claims.").

Plaintiffs' proposed Second Amended Complaint is unambiguous in making clear that the joint defense and acting on joint advice is not an anti-trust violation and is not an element of any claim. *See* Ex. A at ¶ 19:

> No liability in this complaint arises from receiving common legal advice or participation in a common defense agreement by the Service Providers or Ericsson. Instead, it relates to the substantive positions taken in negotiations.

Ericsson and the Service Providers are taking negotiation positions that violate SSO rules. Whether or not this is based on joint legal advice under a common representation is irrelevant to the claims.

At the November 19, 2024 Case Management Conference, the Court explained it was concerned about the impact of "antitrust conspiracy" claims on Defendants' privileged communications. *See* Dkt. 82-01 (Case Management Conference Transcript) at 9:10-17 ("The big difference that I see between [breach of FRAND claims and antitrust conspiracy claims] has to do with the effect on privilege, and any communications that may go on between lawyer and client in connection with the FRAND negotiations are not even arguably unprivileged. Whereas, I understand there is a claim that if they are evidence of the -- an antitrust conspiracy, that there could be an issue about whether the attorney-client privilege covers those."). The Court also explained it appreciated Defendants' arguments as to a chilling effect resulting from antitrust conspiracy claims because they may implicate the joint defense. *Id.* at 24:17-23 ("if you are relying upon the actions taken as also constituting evidence of conspiracy, and by that I mean the actions taken in the defense of the infringement action, then I think that is chilling in and of itself."); 26:2-5 ("we'll have to get into

assessing actions taken and determining whether that action was squarely within the infringement defense or was outside of it and therefore part of a conspiracy.").

Defendants too focused their arguments at the Conference on the potential chilling effect of "antitrust conspiracy" claims. *Id.* at 11:17-21 ("Our fundamental position . . . is that ***given the nature of these antitrust claims***, it is extremely difficult, if not impossible, to defend against the patent infringement and licensing claims"); 12:2-17 ("they're going to try to draw these inferences from letters that they get from various employees, and say, ah-ha, ***this is indicative of an antitrust conspiracy*** . . . one of the things that they point to in their motion to dismiss opposition as ***evidence of an antitrust conspiracy*** is that two of the three carriers in this case rejected an offer to perform negotiations under Rule 408 . . . What Celerity is saying . . . is because there's that commonality of position, ***that's evidence of an antitrust conspiracy***."); 13:8-11 ("if my clients take that advice, if they decide it's in their best interest to advance those positions in a letter, Mr. Sheasby will say, well, ***that's evidence of an antitrust conspiracy***."); 14:5-11 ("we have significant concerns, setting aside whatever privilege representation he will make that somehow ***he'll grab something from a letter and say that's evidence from a conspiracy***."); 15:3-5 ("He's now pointing to positions and questions asked in letters on essentiality as ***evidence of the conspiracy***."); 16:8-15 ("My clients are entitled to advice on whether they should or should not be, and that shouldn't be something that gives rise to ***potential antitrust liability***.").

The declaratory judgment as to SSO obligations claims does not raise any of the concerns the Court found that the antitrust conspiracy claims or unfair competition claims may bring.

As to the claim for breach of SSO obligations, Defendants themselves have brought similar claims against Plaintiffs. *See e.g.* Dkt. 15 in the Infringement Action at Count II (T-Mobile Counterclaim asserting breach of FRAND); Dkt. 213 in the Infringement Action at Count V (Ericsson Counterclaim asserting breach of FRAND). The Service Providers assert that these allegations

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encompass behavior after the filing of the lawsuit. Dkt. 256 (Case No. 2:23-cv-486) (Defendants' Reply Brief In Support Of Motion To Stay) at 3 ("But there is no distinction—in fact or law—between the pre- and post-filing negotiations. They are the same set of negotiations that straddle the initiation of these cases. The filing of a lawsuit does not segment any party's negotiation claims. . . . Plaintiffs failed to negotiate in good faith before initiating the East Texas Cases, and that failure has continued (and in fact increased) during the course of litigation."). Of course, Defendants cannot inject post-suit contact into their own FRAND claims and yet seek to be immune from FRAND claims simply because they are in a joint defense.

C. Plaintiffs' Proposed Amendment Is Not Futile

Plaintiffs' proposed amendment is not futile. "Futility is determined under Rule 12(b)(6) standards, meaning an amendment is considered futile if it would fail to state a claim upon which relief could be granted." *Wiggins v. La. State Univ.-Health Care Servs. Div.*, 710 F. App'x 625, 628 (5th Cir. 2017). Plaintiffs' amendment removing claims cannot be futile. *Le-Vel Brands*, 2022 WL 949955, at *6 ("amendment is not futile, as the amendment removes claims.").

The Second Amended Complaint's claims for Breach of SSO obligations are not futile because, accepting as true all of the well-pleaded facts, as required under Rule 12(b)(6), Plaintiffs have pled sufficient facts to state a claim. For example, Plaintiffs have a reasonable apprehension that the Defendants maintain that the four patents at issue in this case (US. Patent Nos. 10,951,383; 10,841,914; 10,827,487; and 10,993,141) meet the definition of Essential under ETSI policy. *See* Dkt. 35, 37 (Ericsson and AT&T Counterclaims) at Counts 9-12. To the extent this is correct, Plaintiffs have complied with their obligations under ETSI policy and the Service Providers have not. *See* Ex. A at ¶¶ 32-41. The behavior pled in the amended complaint includes:

- Service Providers are refusing to negotiate with the Plaintiffs unless third party ASUSTeK, who has no control over the licensing of the Plaintiffs' patents, takes a license to Service Providers' own patents.
- Service Providers are falsely claiming ignorance as to how their systems operate and using this as a basis for not negotiating.
- Service Providers are refusing to provide information that would be necessary to conduct a negotiation.
- Service Providers are claiming that ETSI gives then contractual rights to patents that do not meet the definition of ESSENTIAL in the ETSI Patent Policy.
- Ericsson has attempted to extort Plaintiffs to provide rights to their patents by tying access to patents that it claims are essential under various SSO polices. For example, Ericsson is refusing to grant rights to HVEC patents it claims are essential to ASUSTeK, unless it receives a royalty free license to patents held by Plaintiffs that Ericsson does not claim are essential to the HVEC standard.

D. Plaintiffs Timely Seek Leave To Amend And The Amendment Is Not Brought In Bad Faith

There is no undue delay because Plaintiffs seek leave to amend at the earliest stage of the case. Discovery has yet to begin in this case, the Court has yet to enter a scheduling order, and Plaintiffs provided notice of their intent to bring this motion within 24 hours of the Court's first case management conference. Further, Plaintiffs' amendment is not the result of bad faith, or dilatory motives. Plaintiffs seek to expeditiously resolve the disputes between the parties. Based on the November 19, 2024 Case Management Conference, Plaintiffs believe that Plaintiffs' proposed amendment is the most efficient way to continue moving this case forward.

III. CONCLUSION

In the interest of resolving the disputes between the parties in the most efficient manner, Plaintiffs are prepared to dismiss Counts 1-5 in reliance on Defendants' position that participation of the Defendants in a common defense of claims by Celerity and acting on common legal advice received by common counsel is not a violation of United States competition law. The parties should bear their own costs and fees relating to these claims. "Courts have held that if the plaintiff seeks a voluntary dismissal with prejudice, it should not be conditioned on an award of fees or expenses unless there is an independent basis for granting such relief." *Big Dog Logistics, Inc. v. Strategic Impact Corp.*, No. CIV.A. H-06-1559, 2007 WL 2908857, at *1 (S.D. Tex. Oct. 4, 2007) (collecting cases). There is no independent basis for awarded costs here because as set out in Plaintiffs' Oppositions to Defendants' Motions to Dismiss, Dkt. Nos. 63, 64, Plaintiffs' claims have legal merit. Further, Plaintiffs' claims were brought in good faith and Plaintiffs only seek dismissal to ensure the efficient progress of the cases between the parties.

To be clear, Plaintiffs do not waive their right to assert that Defendants' actual negotiating positions (as opposed to how they are formulated) violates SSO policies. Breach of SSO claims between the parties have been pending since October 19, 2023, and Defendants have raised no argument that breach of FRAND claims raise the same concerns pertaining to their joint defense group that Plaintiffs' antitrust claims purportedly raise. For example, Defendants themselves have asserted breach of FRAND claims against Plaintiffs since December 26, 2023. *See, e.g.*, Dkt. 15 in the Original Infringement Action at Count II (T-Mobile Counterclaim asserting breach of FRAND).

Plaintiffs therefore respectfully request the Court enter Plaintiffs' proposed Second Amended Complaint attached hereto as Ex. A.

DATED: December 6, 2024.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via the Court's ECF system on December 6, 2024.

/s/ N. Isabella Chestney
N. Isabella Chestney

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), I hereby certify that, on November 19, 2024, counsel for Plaintiffs and Defendants participated in a Case Management Conference where Plaintiff gave notice of its intent to seek leave to file a Second Amended Complaint. Defendants oppose.

/s/ Jason Sheasby
Jason Sheasby