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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LYFT, INC.

Plaintiff,

v.

AGIS SOFTWARE DEVELOPMENT LLC,

Defendant.

Case No. 5:21-cv-04653-BLF

PLAINTIFF LYFT, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

REDACTED VERSION

Date: July 28, 2022
Time: 9:00 A.M.
Judge: Hon. Beth Labson Freeman
Trial Date: October 16, 2023
Courtroom: 3, Fifth Floor

I. INTRODUCTION

This Court should grant Lyft's Motion (Dkt. 78) to add its breach of contract claim and the Alter Ego Parties in view of the strong policy in favor of permitting amendment and AGIS Software's failure to demonstrate that Lyft's amendment runs counter to the *Foman* factors. Notably, in its Response (Dkt. 93), AGIS Software leaves all but two *Foman* factors—futility and dilatory motive—entirely unrebutted. AGIS Software has thus failed to provide any evidence—let alone *strong* evidence—demonstrating that Lyft's amendment would cause prejudice, create undue delay, or constitute a repeated failure to cure deficiencies. Furthermore, AGIS Software's arguments regarding futility and dilatory motive do not withstand scrutiny.

First, contrary to AGIS Software's allegations, both publicly available and discovered facts strongly support Lyft's addition of AGIS Holdings, AGIS, Inc., and Malcom K. Beyer, Jr. as Alter Ego Parties to this case. Their addition is not futile. Lyft's amendment is replete with facts showing that AGIS Software, AGIS Holdings, AGIS, Inc., and Malcom Beyer are alter egos of one another. Specifically, Lyft has pled facts—based on publicly available information and the limited amount of discovery provided to date by AGIS Software—that support almost every one of the unity of interest factors considered by California courts when determining whether alter ego liability exists.

Second, AGIS Software argues that Lyft was dilatory in seeking to add its breach of contract claim, which it further argues will be moot if this Court permits AGIS Software to amend its infringement contentions. Both assertions are incorrect. AGIS Software's accusations of delay ignore that (1) Lyft timely brought its claim in advance of the deadline to amend pleadings and in a manner that respected the resources of the Court and the parties to streamline the administration of this case; and (2) AGIS Software's own litigation tactics of continuing to withhold the Apple license in this case and claiming discovery is not open because there is not an operative complaint on file limited Lyft's ability to bring its breach of contract claim at an earlier time. AGIS Software further fails to appreciate that its breach is not cured by simply withdrawing its allegations regarding Lyft's iOS products. Lyft's claim arose when AGIS Software *initially* breached the relevant contract—during the EDTX Action—and ended when it recently withdrew its allegations regarding the iOS products.

Because AGIS Software has not met its burden under the liberal standard of Rule 15 to freely allow amendment at this stage of the case, the Court should grant Lyft's Motion.

II. ARGUMENT

In its Response, AGIS Software argues that Lyft's amendment should be denied due to the alleged futility of the amendment and Lyft's alleged dilatory motive in seeking amendment. Neither argument, even when considered in combination, is sufficient to overcome the presumption to grant leave to amend. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend."); *Sonoma Cty. Ass'n of Ret. Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (explaining that leave to amend should especially be granted where the nonmoving party is unable to show strong evidence that the amendment would cause prejudice, is sought in bad faith, creates undue delay, is futile, or there was a repeated failure to cure deficiencies by previous amendments). Because AGIS Software has failed to meet its burden to show why Lyft's amendment should not be granted, this Court should grant Lyft's request because "justice so requires." *See Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 666 (Fed. Cir. 1986); FED. R. CIV. P. 15(a)(2).

a. AGIS Software Makes No Showing of Prejudice, Undue Delay, or Previous Amendment.

AGIS Software makes no attempt in its Response to allege that Lyft's amendment should be denied due to prejudice, undue delay or previous amendment. *See* Dkt. 93. Of all the *Foman* factors, prejudice carries the greatest weight. *Eminence Capital*, 316 F.3d at 1052 ("Not all of the factors merit equal weight. As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight."). With respect to prejudice, AGIS Software summarily concludes that Lyft's amendment would be "unduly prejudicial" despite the fact that it identifies no basis for such finding. *See* Dkt. 94 at 4. That AGIS Software cannot identify any prejudice is unsurprising because this case is in the early stages of litigation and it has been on notice of theories and facts underlying Lyft's request to add its breach of contract claim and the Alter Ego

Parties for many months. *See* Dkt. 78 at 7. Likewise, AGIS Software failed to set forth any argument that granting Lyft's amendment would result in undue delay to the proceedings, essentially agreeing that there will be not impact to the case schedule. Lastly, AGIS Software has not and cannot allege that there has been a repeated failure to cure deficiencies as Lyft has not previously sought to amend its complaint.

In view of the above, AGIS Software has thus failed to make any showing of prejudice, and thus these *Foman* factors do not weigh against permitting Lyft's amendment.

b. Contrary to AGIS Software's Arguments, Lyft's Amendment is Not Futile.

AGIS Software's argument that Lyft's addition of the Alter Ego Parties is futile is belied by publicly available facts and the discovery obtained despite AGIS Software's attempts to obfuscate the relationship between the parties. *See* Dkt. 78. For example, the limited financial records produced by AGIS Software, in combination with the testimony from AGIS Software's 30(b)(6) deponent Mr. Meriam, indisputably demonstrate that AGIS Software intermingles its funds with the Alter Ego Parties. In particular, the limited financial records produced by AGIS Software show that, since 2017, [redacted] *See* Dkt. 79-5 at 12-17. [redacted] *See id.* And, as is also shown in AGIS Software's financial records, [redacted] *See id.*; Dkt. 79-6 at 144:7-8. Indeed, according to AGIS Software's financial records, AGIS Software has [redacted] *See* Dkt. 79-5 at 15-17. As confirmed by Mr. Meriam, AGIS Software's financial records [redacted] *See* Ex. 13 at

112:6-113:22 & 116:2-117:20 [redacted] Lyft has been unable to confirm whether the omitted licensing revenues were deposited in one of AGIS, Inc.'s or AGIS Holdings' bank accounts because all of the AGIS entities, represented by the same attorneys, have refused to provide financial records for AGIS, Inc. and AGIS Holdings. *See* Dkt. 78. Nevertheless, the facts available support multiple unity of interest factors, including the commingling of funds, the holding out by one entity that it is liable for the debts of the other, use of a company as a mere shell for the affairs of another, and inadequate capitalization. *See Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp. 3d 938, 954 (N.D. Cal. 2015) (setting forth the nine unity of interest factors).

The regular deposits and payments to AGIS, Inc. and AGIS Holdings also confirms that AGIS Software lacks the funds to cover its liabilities, including the potential $400,000 in costs and fees that Lyft is currently seeking from AGIS Software in the EDTX Action as the prevailing party and due to AGIS Software's insufficient pre-suit investigation and other exceptional litigation conduct. *See* EDTX Action, ECF Nos. 373 & 375. AGIS Software's lack of funds in its bank account to cover its potential liabilities is the definition of an undercapitalized company and demonstrates the need to add the other AGIS entities and their CEO, Mr. Beyer, to the instant case—to ensure any liabilities are recoverable.

AGIS Software's financial records are but one source of proof for Lyft's alter ego theory, which is further supported by publicly available information and other jurisdictional discovery. For example, public records confirm that AGIS Software, AGIS, Inc. and AGIS Holdings have identical directors and officers and share use of the same offices. *See* Ex. 14-16; Dkt. 32-1, ¶ 4 (affirming that Mr. Beyer resides in Jupiter, Florida); Dkt. 34 at 9 ("AGIS Software's sister entity and non-party source code, technical documents, and other data related to the claimed inventions of the Asserted Patents, are stored at AGIS's data center in Marshall, Texas."). Mr. Meriam [redacted] *See* Ex. 13 at

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