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

SIPCO LLC, and IP CO., LLC (d/b/a INTUS IQ) **Plaintiffs,** **v.** **EMERSON ELECTRIC CO., EMERSON PROCESS MANAGEMENT LLLP, FISHER-ROSEMOUNT SYSTEMS, INC., ROSEMOUNT INC., BP p.l.c., BP AMERICA, INC., and BP AMERICA PRODUCTION COMPANY** **Defendants.**	§ § § § § § § § § § § § § § §	**Civil Action No. 6:15-CV-907**

BP P.L.C'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR MISJOINDER

Plaintiffs' recitals in the "Background" section of their Opposition are so pejorative and wrong that, though irrelevant, demand correction. The "BP U.S. subsidiaries answered the First Amended Complaint in a timely manner" because they, **unlike BP p.l.c.**, were timely served by Plaintiffs with the complaint. The Amended Complaint was filed on December 30, 2015 (Dkt. 19) but Plaintiffs did not serve BP p.l.c. for *more than three months.* (Dkt. 74 at 2). Contrary to Plaintiffs' brief, the delay was not due to the "expensive, time consuming and wasteful" Hague Convention practice or BP p.l.c.'s "refusal to cooperate." (Dkt. 97 at 2). When Plaintiffs finally got around to serving the Amended Complaint on BP p.l.c., it was done easily and uneventfully by handing it to BP p.l.c.'s lawyer, Ms. Joanne Cross. (Dkt. 74 at 2). What's more, Plaintiffs' delay in service to BP p.l.c. gave Plaintiffs an improper tactical advantage because it allowed Plaintiffs to proceed with discovery, set a case schedule, etc. without BP p.l.c.'s involvement.

Prior to serving BP p.l.c., Plaintiffs filed their allegedly "joint" discovery plan **more than two weeks before** serving BP p.l.c.(Dkt. 60) and filed their Initial Disclosures **more than two weeks before** serving BP p.l.c. with the Amended Complaint This Court entered ten orders, regarding, *inter alia*, scheduling, claim limits, time limits, mediation, discovery, and discovery protection—all before Plaintiffs served BP p.l.c. with the complaint. (Dkts 28, 38, 43, 55, 57, 59, 65, 66, 67, and 68). All delay is attributable directly to Plaintiffs.

A. The Complaint Does Not Adequately Plead a Theory of BP p.l.c.'s Liability.

Plaintiffs Opposition does not dispute BP p.l.c.'s contention that "there is nothing alleged about BP p.l.c. that isn't alleged against BP America, Inc. and/or BP America Production Company, except that the latter two are 'controlled' by the former and are its 'agents in Texas.'" (Dkt. 87 at 3, *citing* Dkt. 19 at 9). The Plaintiffs posit a red herring that their use of the collective term "BP" in the Amended Complaint to refer to the actions of all of the BP Defendants is *procedurally* proper, while missing the point that the Amended Complaint (whether using the term "BP p.l.c." or the collective "BP") still does "not allege any *facts* showing that **BP p.l.c.** has used or imported the accused products." [1] (Dkt 87 at 5). To satisfy

[1] *WesternGeco L.L.C v. Ion Geophysical Corp.*, 776 F. Supp. 2d 342 (N.D. Tex 2011), relied upon by Plaintiffs for its approval of the pled collective "Fugro" to refer to all defendants, is not binding on this Court, is distinguishable from the present facts, and if stretched to apply to the present Complaint would offend the *Twombly/Iqbal* requirements. The *WesternGeco* court recognized the existence of contrary holdings, but "decline[d] to follow these cases and instead adopt[ed] an approach we believe to be approved by the Federal Circuit in *McZeal*." *Id*. at 363-364 (*citing PLS-Pacific Laser Sys. V. TLZ Inc.*, 2007 WL 2022020, 2007 U.S.Dist. LEXIS 53176 (N.D. Cal. 2007)*; See McZeal v. Sprint Nextel Corp*., 501 F.3d 1354 (Fed. Cir. 2007)). But, *McZeal* did not dictate the *WesternGeco* holding. The *McZeal* Plaintiff, who appeared *pro se*, was given "leeway on procedural matters, such as pleading requirements" and the *McZeal* court did not identify any objection by defendants to the use of the collective term "the defendants." *McZeal* at 1356-8. What is more, the complaining defendants in *WesternGeco* appeared to have had significant involvement in the facts of the alleged infringement. *WesternGeco* at 348-9.

the Supreme Court's standard for pleading, however, the allegations contained within the complaint must be "plausible" and they must be supported by sufficient *facts* that permit "the reasonable inference that the defendant is liable for the misconduct alleged." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Gevo, Inc. v. Butamax Advance Biofuls LLC, et al*, 2013 WL 3381258 (D. Del. 2013).

Plaintiffs' pleading fails to meet that standard. Plaintiffs nowhere allege *specific facts* showing that "BP p.l.c." *per se* used or imported the accused products apart from the acts of its subsidiaries. Plaintiffs contend that the Amended Complaint has infringement allegations against BP (and hence, by Plaintiffs' contention, against BP p.l.c.) in "more than 60 numbered paragraphs." But each of the Counts identified by Plaintiffs follows the same conclusory contention format: a specific identification of Emerson products followed by the same general conclusion that "BP" (the collective) is "using, within the United States, or importing into the United States" those identified products. (*See, e.g.*, Dkt. No. 19 at ¶101). There is no indication of *which* of the BP entities are engaged in the allegedly infringing use or importation and thus there is no indication that BP p.l.c. did anything apart from its subsidiaries that warrants its involvement in this litigation. The only paragraphs identified by Plaintiffs not in the Count format described above are paragraphs 9, 12, 69-70 and 85-86, and those latter paragraphs are deficient for their own reasons, as follows. (*See* Dkt. 97 at n. 5).

Paragraph 9 recognizes that BP p.l.c. is merely a London company that holds BP America, Inc. and BP America Production Company as subsidiaries, which it alleges BP p.l.c. "sufficiently controls" as its "agents." (Dkt. 19 at ¶9; *see also* Dkt. 87 at 3). The pleading does not mention any BP p.l.c. personal infringement allegation *per se*. Further, because Paragraph 9 only makes the conclusory allegation that BP p.l.c. has "control" of its "agent" subsidiaries, it

does not adequately plead facts specific to BP p.l.c.'s "control" of the alleged infringing activity and thus fails even as a "control" theory allegation. *Gevo* at pp. 6-7; *See also* Dkt. 87 at 5-6.[2]

Paragraphs 12, 69 and 70 are also deficient. Each paragraph makes only one respective allegation of "infringement," where these paragraphs allege that the BP defendants are "using" the Emerson products at certain wells (paragraph 12), "operat[ing]" (paragraph 69) wells with Emerson products, or "deploy[ing]" (paragraph 70) Emerson products at wells. (Dkt. 19 at ¶12, 69, 70). Those wells are allegedly on "The Harrison County Campus," which "supports BP's oil and natural gas operations in East Texas," but no allegation is made that *BP p.l.c.* actually owns or operates either those wells or that particular campus. *Id*. Rather, Plaintiffs insist that all allegations against "BP" as a collective "refer to the actions of all three BP defendants" as individuals. But, "all three BP defendants" cannot independently own the same well, nor can all perform the *same* alleged "use" of any well. (*See* Dkt. 97 at 5). Paragraphs 85-86 simply allege that BP does not have a license. There is no specific allegation of infringement.

B. BP p.l.c. is Improperly Joined.

Plaintiffs illogically contend that all BP entities are responsible if any BP entity uses the products accused of infringement. Dkt. 97 at 7. But it is impossible for three unique entities to have independently committed the *same* act (infringing use). *See* 35 U.S.C. §299. Thus, all of the Counts that fail to allege a joint infringement theory (Counts II, IV, VIII, XI, XIII, XV, XVII, XIX, XXII, XXV) improperly join BP p.l.c. because they fail to plausibly allege the specific *same* infringements that BP p.l.c. independently caused by its "uses" as opposed to uses by the

[2] Plaintiffs wrongly dismiss the case authority cited in BP p.l.c.'s Opening Brief by contending that they "address matters of corporate law" and "have nothing to do with the sufficiency of the pleadings in this case." (Dkt. 97 at 6). Under the *Twombly/Iqbal* standard, plausible facts for establishing legal control must be pled. *Twombly*. 550 U.S. at 570; *Iqbal*, 556 U.S. at 678.

other BP defendants. It is possible to allege "joint" infringement with respect to the same infringing act, and Plaintiffs contend that they have done so in the Counts III, VI, and IX, but, joint infringement exists only "if one party exercises 'control or direction' over the entire process such that every step is attributable to the controlling party, *i.e.*, the 'mastermind.'" *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008). Here, the joint infringement Counts have no allegations of plausible facts to show the requisite "control," "alter ego," or similar situation in order to make BP p.l.c. liable for its subsidiaries' uses. *See Supra* at 2-3.

C. The Court Should Not Grant Leave to Amend the Complaint Again.

Plaintiffs have already amended their complaint once. Despite Plaintiffs' threats to the contrary, they do not have a basis to write a complaint against BP p.l.c. that satisfies the Rule 11 requirements. All of the documents Plaintiffs identify are Emerson documents, thus they are inadmissible hearsay with respect to BP p.l.c. The Emerson "PowerPoint presentation," which Plaintiffs cite as support, like the suggestion that BP p.l.c.'s CEO may have received quarterly reports, are not relevant as to whether BP p.l.c. should be a party. Recognizing potential savings or receiving an "update" is not an act of infringement and it does not establish control.

Finally, the Plaintiffs' interpretation of an Emerson report as purportedly showing "that BP p.l.c. paid for the Smart Wireless Solutions products" is pure conjecture based on hearsay. The Emerson document Plaintiffs cite does not establish what corporate entity is buying what, or where. Plaintiffs' speculation is nonsensical in determining that parts for a refinery (owned by a United States company, which is not even a defendant in this case) would be purchased directly by its ultimate foreign parent company. Furthermore, "buying" is not an act of infringement that could form the basis of a proper claim. *See* 35 U.S.C. §271. Leave should not be granted for Plaintiffs to further their futile accusations of infringement against BP p.l.c.

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