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

GELLYFISH TECHNOLOGY OF TEXAS, LLC, Plaintiff, v. ALLTEL CORP. *et al*;, Defendants.	Civil Action No. 2:11-cv-00216-DF-CE DEFENDANT OTTER PRODUCTS LLC'S MOTION TO SEVER AND "REVERSE" BIFURCATE THE CASE AGAINST OTTER PRODUCTS LLC.

Defendant Otter Products LLC ("Otter") respectfully submits the following Motion to Sever and "Reverse" Bifurcate Pursuant to Federal Rules of Civil Procedure ("Rules") 21 and 42(b):

I. INTRODUCTION

On April 13, 2011 Plaintiff Gellyfish Technologies of Texas LLC ("Gellyfish") filed suit against 37 defendants alleging infringement of US Patent No. 6,847,310 (the "'310 patent"). Upon being served with the Complaint, Otter attempted to identify the purported products accused of infringing the '310 patent. *See* Gellyfish Complaint (Doc. No. 1) ¶¶67-68. Of the five purported Otter products named in the Complaint, only two were actually ever sold by Otter. These two products were only sold from 2006 to 2009 and both were discontinued in 2009. Both products were secondary Otter products and the sales of both products were trivial. *See* Lamkin Decl. ¶5.

Otter denies that its products infringe the '310 patent. Further, it appears unlikely that Gellyfish's asserted patent will survive an invalidity challenge. *See* Otter Answer, Second

Counterclaim ¶¶8-13. However, after conducting a damages analysis, Otter realized that the cost of litigating this lawsuit may exceed a ***thousand times*** any conceivable damages value.[1] Based on those calculations, Otter drafted a settlement offer under Federal Rule of Evidence ("FRE") 408. On July 5, 2011, Otter sent the offer to Gellyfish's lead counsel via email. Lamkin Decl. ¶7. The next day, Otter sent the offer to Gellyfish's counsel via US Mail. *Id.* at ¶8. Otter's local counsel sent a second copy of the offer to Gellyfish's counsel on July 7, 2011. *Id.* at ¶9. Gellyfish's counsel did not respond in any way to any of Otter's communications. *Id.* at ¶10. On July 14, Otter sent the offer again. *Id.* Nothing. On or about July 18, Otter telephoned Gellyfish's counsel and left a voicemail stating the facts and offer in the FRE 408 communication. *Id.* at ¶11. Again, no response from Gellyfish. *Id.* Finally, in anticipation of this motion, on July 20, 2011, Otter both telephoned and emailed Gellyfish's counsel requesting a meet and confer pursuant to Local Rule CV-7(h). Gellyfish's counsel did not respond to either request. Lamkin Decl. ¶12. This morning, Otter reached out a final time to Gellyfish's counsel and informed him that Otter intended to file this Motion and asked, once again, that counsel meet and confer pursuant to Local Rule CV-7. Only then did Gellyfish's counsel reply. Gellyfish's counsel responded that Gellyfish had rejected Otter's FRE 408 offer to settle. Lamkin Decl. ¶13.

Gellyfish's refusal to settle even though trivial damages are at issue is puzzling; Gellyfish will surely also spend considerably more money than the trivial damages value to litigate the case against Otter. In fact, Gellyfish will likely spend considerably more money to respond to this Motion alone than it could garner as damages against Otter. Puzzling, that is, unless Gellyfish believes it can extract much more than the damages value from Otter given the cost of litigation. However, Otter is

[1] The damages value for the case against Otter, assuming *arguendo* the '310 patent is valid and infringed, may be approximately $800-$2,250 dollars depending on the royalty and other considerations. In light of the law and facts, Otter believes the damages could not exceed $2,250.

unwilling to pay an unwarranted settlement cost simply to avoid litigation expenses. That is not the purpose of the patent laws or infringement litigation. *See Uniloc USA, Inc. v. Sony Corp. of Am.*, No. 6:10-CV-373-CA, 2011 U.S. Dist. LEXIS 54541, at *23 (E.D. Tex. May 20, 2011) ("This Court has some concerns about plaintiffs who file cases with extremely weak infringement positions in order to settle for less than the cost of defense and have no intention of taking the case to trial. **Such a practice is an abuse of the judicial system and threatens the integrity of and respect for the courts.**") (emphasis added; citing *Raylon* at *5, *infra*); id. ("In some cases, Defendants are faced with a Hobson's choice of spending more than the settlement range on discovery, or settling for less than their cost of defending the case, regardless of the merits of the case.") (citing *Parallel Networks, infra*).

Otter now moves for a procedural remedy directly aimed at preventing the extraction of settlements based on the cost of defense instead of actual damages. Pursuant to this Court's broad discretionary authority under Rules 21 and 42(b), Otter respectfully asks this Court to:

- Sever Otter from Case No. 2:11-cv-00216;
- Order a "reverse bifurcation" procedure in the new Gellyfish v. Otter matter so that damages discovery and trial precede liability discovery; and
- Set a mandatory mediation subsequent to the damages determination.

Otter believes the above solution will avoid a monumental waste of resources, promote judicial efficiency, and discourage plaintiffs from using patent litigation as a tactic for extracting cost-of-defense settlements and refusing to participate in early settlement negotiations as part of that strategy.

II. LEGAL AUTHORITY

"District court judges have broad discretion in managing their own dockets." *Saqui v. Pride Cent. Am.*, LLC, 595 F.3d 206, 211 (5th Cir. 2010). Likewise, district courts have broad discretion to

sever under Rule 21. *See Anderson v. Red River Waterway Comm'n*, 231 F.3d 211, 214 (5th Cir. 2000); *accord Adrain v. Genetec Inc.*, No. 2:08-CV-423, 2009 WL 3063414, at *1 (E.D. Tex. Sept. 22, 2009) (slip op.; *citing Red River Waterway*). Moreover, "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or thirdparty claims." Fed.R.Civ.P. 42(b). The decision to sever "is a matter within the sole discretion of the trial court." *Conkling v. Turner*, 18 F.3d 1285, 1293 (5th Cir. 1994) (*citing* Rule 42(b)).

III. ARGUMENT

A. This Court Has the Broad Authority Necessary to Grant Otter's Request

This Court has been granted broad discretion to manage its dockets. *Saqui,* 595 F.3d at 211. That discretion includes the authority to sever a party from a particular matter. *Red River Waterway Comm'n*, 231 F.3d at 214; Fed.R.Civ.P 21, 42(b). The decision to sever "is a matter within the sole discretion of the trial court." *Conkling* 18 F.3d at 1293 (5th Cir. 1994). In particular, when "the Patent Rules and the Court's standard docket control order do not achieve their intended result in [a] particular case, it is necessary to depart from them in an effort to accomplish both parties' objectives in the most cost effective manner." *Parallel Networks v. AEO Inc. et. al.*, Case 6:10-cv-00111, Docket No. 338 p.6 (ED Tex. March 15, 2011). (slip op); *Uniloc USA, Inc. v. Sony Corp. of Am.,* No. 6:10-CV-373-CA, 2011 U.S. Dist. LEXIS 54541, at *23-24 (E.D. Tex. May 20, 2011) (accord).

B. Reverse Bifurcation is a Solution Well-Suited to Addressing This Court's Express Concerns

This District has been actively engaged in devising procedural solutions to facilitate the efficient, fair, cost-effective resolution of multi-defendant patent litigations. *See, e.g., Whetstone v. Xerox*, Case No. 6:10-cv-00278, Docket No. 156 (ED Tex. April 7, 2011) (slip op); *Parallel Networks v. AEO Inc. et. al.*, Case No. 6:10-cv-00111, Docket No. 338 (ED Tex. March 15, 2011). (slip op); *Uniloc USA, Inc. v. Sony Corp. of Am.,* No. 6:10-CV-373-CA, 2011 U.S. Dist. LEXIS

54541 (E.D. Tex. May 20, 2011); *Adjustacam LLC v. Amazon.com, Inc. et al.*, Case No. 6:10-cv-00329, Docket No. 426 (ED Tex. April 17, 2011). These procedural solutions are particularly warranted where a plaintiff suing multiple defendants has engaged in questionable tactics and the court must "level the playing field." *See Uniloc* at *23-24 ("In those situations the Patent Rules, with their quick discovery deadlines, may not provide the most efficient case management schedule, and the Court has modified its Docket Control and Discovery Orders to level the playing field."). Courts in this District are particularly concerned "about cases where a plaintiff asserts questionable patent claims against a large number of Defendants to extract cost of defense settlements." *Uniloc* at *23; *Raylon, LLC v. Complus Data Innovations, Co. et al.*, Case No. 6:09-cv-00355 Docket No. 147 at *5 (ED Tex. March 9, 2011). Although Otter currently has not fully developed a position on the merits of Gellyfish's infringement claims, this Court should be equally concerned about a plaintiff that refuses to settle where trivial damages are implicated, thus suggesting the same troubling motivation discussed in *Uniloc*, *Raylon*, and *Parallel Networks:* a case filed and maintained in order to extract cost-of-defense settlements. As in those cases, this Court is empowered to modify standard procedures to alleviate the harms associated those questionable motivations. *Parallel Networks* at *6; *Uniloc* at *23; *Raylon* at *5. Reverse bifurcation appears particularly suited to alleviating the combination of trivial damages and a defendant held hostage by a plaintiff with a motivation to extract higher than warranted settlements.

"Reverse bifurcation" is a subset of the standard bifurcation procedures provided by Rule 42(b). *See Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993) (discussing reverse bifurcation as a method of bifurcation provided by Rule 42(b)). Reverse bifurcation has been employed by the Fifth Circuit and this District. *See Johnston v. Johnstone*, 7 F.3d 1217, 1218 (5th Cir. 1993) ("The action was tried using a procedure referred to as 'reverse bifurcation.' Medical causation and damages were determined in the first phase of the trial, and liability was determined in

the second phase.") (vacated and recalled "in view of the pending bankruptcy proceedings" by *Johnstone v. American Oil Co.*, 17 F.3d 728 (5th Cir. 1994)); *Exxon Corp. v. Jarvis Christian College*, No. TY-80-432-CA, 1991 U.S. Dist. LEXIS 4274 (E.D. Tex. Feb. 15, 1991) (Court ordered reverse bifurcation with trial of the damage issue to precede trial of the liability issue.); *see also Cimino v. Raymark Indus.*, 751 F. Supp. 649, 665 (E.D. Tex. 1990) ("The Court addressed these variables by structuring a damages only trial in Phase III that was indistinguishable from a reverse bifurcation damage trial that defendants favor in many parts of the country.") (reversed on other grounds by *Garwood Cimino v. Raymark Indus.*, 151 F.3d 297, 299 (5th Cir. 1998)). Under a reverse bifurcation procedure, the extent of any damages accrued to Gellyfish would be determined prior to any determination of liability, thereby allowing the court and all parties to plainly see the value of proceeding with the litigation. *Angelo,* 11 F.3d at 964.

Reverse bifurcation is "clearly [] conducive to expedition and economy." *Angelo,* 11 F.3d at 964. At the core of reverse bifurcation's merit is that it encourages settlement and narrows and streamlines issues and parties for trial. *Id.; see also Simon v. Philip Morris*, 200 F.R.D. 21, 25 (E.D.N.Y. 2001) ("Sometimes damages are tried before liability in a process known as 'reverse bifurcation' to encourage settlement and shortening of the trial."). Realistic information about the value of the case does more than foster settlements, it also produces better settlements, *i.e.*, agreements more reflective of the true value of the case. Stevenson, Drury D., Reverse Bifurcation, University of Cincinnati Law Review, Vol. 75, No. 213, at p.8 (2006).[2] Upon completion of the damages phase of the new Otter matter, and consistent with this Court's standard scheduling order which sets mediation early in a litigation, the parties could be compelled to mandatory, nonbinding mediation. *See* Local Rules, Appendix L.

[2] Also available at SSRN: http://ssrn.com/abstract=895003.

Given the trivial damages at issue,[3] it is inconceivable that the parties would not settle upon completion of the damages phase, if not sooner. Moreover, in the impossible-to-imagine situation where the parties do not settle after the reverse bifurcation and subsequent mediation, this Court has broad authority to, for example, stay the Gellyfish v. Otter proceeding until the original Gellyfish matter (Case No. 2:11-cv-00216) catches up with the Otter matter. *See Clinton v. Jones,* 520 U.S. 681, 707 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). At that point, the two matters can be rejoined. *See* Fed.R.Civ.P. 21, 42(a).

Finally, a generous view of Gellyfish's conduct could warrant a hypothesis that Gellyfish doubted the veracity of Otter's damages calculation and therefore rejected the FRE 408 Offer. However, Gellyfish made no attempt to respond to Otter's Offer, much less ascertain the accuracy of the calculations. Surely counsel should conduct a minimal investigation to determine whether it was going to cost his client a million dollars to collect a thousand. Moreover, and most critical, this scenario is exactly why reverse bifurcation is so ideally suited to the specific facts of the Gellyfish v. Otter litigation; it allows the Parties and the Court to understand the exact damages value before launching into wasteful, unnecessary procedures.

IV. CONCLUSION

Otter is in the difficult position of having to spend much more on the defense of this matter than the case is worth to Plaintiff should Otter lose. Reason suggests that Plaintiff may be engaging in the same type of conduct that has concerned this Court on several other occasions: filing and

[3] Not only are potential damages to Plaintiff trivial, Plaintiff's refusal to settle even though damages are trivial may arguably result in an award of attorney's fees against Gellyfish under 35 U.S.C. § 285. *See Wedgetail, Ltd. v. Huddleston Deluxe, Inc.,* 576 F.3d 1302, 1305 (Fed. Cir. 2009) ("Findings of exceptional case have been based on a variety of factors; for example, . . . vexatious or unjustified litigation, or other misfeasant behavior.") (*quoting Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1481-82 (Fed. Cir. 1998)).

maintaining multi-defendant patent litigations in order to extract cost-of-defense settlements. However, the Federal Rules of Civil Procedure provide a remedy to the above concerns: severance, reverse bifurcation, and subsequent mandatory mediation are procedures likely to resolve this dispute quickly and efficiently. Otter respectfully requests that the Court use its broad discretion to implement this appropriate solution.

DATED: July 22, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 22nd day of July 2011.

/s/ Rachael D. Lamkin
Rachael D. Lamkin

Certificates of Conference

(1) On July 22, 2011, counsel for Defendant Otter Products LLC (Rachael D. Lamkin and Scott Stevens) engaged in a telephonic meet and confer with counsel for Plaintiff Gellyfish Technologies of Texas LLC (John Edmonds).

(2) Mr. Edmonds stated that his client opposed the motion as he believed it was too early in the case for such a motion to be filed. Conversely, counsel for Defendant believes this to be the appropriate time under the Federal Rules of Civil Procedure for a motion to sever. Therefore, discussions have conclusively ended in an impasse. The issue is now one for this Court to resolve.

/s/ Rachael D. Lamkin
Rachael D. Lamkin