

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

AMAZON WEB SERVICES, INC.

and

VADATA, INC.,

Plaintiffs,

v.

Civil Action No. 3:16cv619

GLOBAL EQUITY MANAGEMENT, S.A.,

Defendant.

MEMORANDUM OPINION

This matter comes before the Court on five motions: (1) Defendant Global Equity Management, S.A.’s (“GEMSA”) “Rule 12(b)(5)^[1] Motion to Quash Insufficient Service of Process” (the “Motion to Quash”), (ECF No. 18); (2) GEMSA’s “Rule 12(b)(2)^[2] Motion to Dismiss for Lack of Personal Jurisdiction” (the “Motion to Dismiss”), (ECF No. 20); (3) Plaintiffs Amazon Web Services, Inc. and VADATA, Inc.’s (collectively, the “Amazon Plaintiffs”) “Motion to Enjoin [GEMSA] From Litigating More Than 30 Collateral Identical Customer Suits in the Eastern District of Texas” (the “Motion to Enjoin”), (ECF No. 25); (4) GEMSA’s “Motion to Strike or Stay [the Amazon Plaintiffs’] Motion to Enjoin” (the “Motion to Strike”), (ECF No. 27); and, (5) GEMSA’s “Opposed Motion to Withdraw as Counsel” (the “Motion to Withdraw”), (ECF No. 35).

¹ Federal Rule of Civil Procedure 12(b)(5) allows dismissal for “insufficient service of process.” Fed. R. Civ. P. 12(b)(5).

² Federal Rule of Civil Procedure 12(b)(2) allows dismissal for “lack of personal jurisdiction.” Fed. R. Civ. P. 12(b)(2).

The matters are ripe for disposition. The Court dispenses with oral argument because the materials before it adequately present the facts and legal contentions, and argument would not aid the decisional process. For the reasons that follow, the Court will: (1) deny the Motion to Quash and the Motion to Dismiss; (2) deny the Motion to Enjoin and the Motion to Strike as moot; and, (3) grant the Motion to Withdraw subject to the conditions stated in this Memorandum Opinion.³

I. Procedural and Factual Background

The Amazon Plaintiffs bring this case seeking a declaratory judgment of non-infringement and invalidity of two patents purportedly assigned to and owned by GEMSA: United States Patent Numbers 6,690,400 (the “400 patent”) and 7,356,677 (the “677 patent”) (collectively, the “GEMSA Patents”).

In light of GEMSA’s status as a patentee not residing in the United States, and pursuant to 35 U.S.C. § 293,⁴ the Amazon Plaintiffs requested permission to serve GEMSA by alternative means. (ECF No. 10.) The Court granted that request on the following basis:

According to records filed with the Patent and Trademark Office, GEMSA is an Australian corporation with a principal place of business at 458 Morphett Road, Warradale, South Australia 5046. (Mem. Supp. Mot. Ex. A, Patent Assignment Abstract of Title for the ‘400 Patent at 1, ECF No. 11-3; Mem. Supp. Mot. Ex. B, Patent Assignment Abstract of Title for the ‘677 Patent at 1, ECF No. 11-4.) Additionally, the Amazon Plaintiffs indicate that the file wrappers for the GEMSA Patents do not reflect that GEMSA has designated with the Patent and

³ The Court will also grant GEMSA’s “Motion to Withdraw [GEMSA’s] Opposed Motion to Withdraw as Counsel,” (ECF No. 34), and deny as moot the June 16, 2017 “Opposed Motion to Withdraw as Counsel,” (ECF No. 33).

⁴ Under § 293, “[e]very patentee not residing in the United States may file in the Patent and Trademark Office a written designation stating the name and address of a person residing within the United States on whom may be served process or notice of proceedings affecting the patent or rights thereunder.” 35 U.S.C. § 293. If no person on whom process may be served has been designated in the Patent and Trademark Office, “the United States District Court for the Eastern District of Virginia shall have jurisdiction and summons shall be served by publication or otherwise as the court directs.” *Id.*

Trademark Office a person on whom process may be served. (See Pls.' Mem. Supp. Mot. 2-3, ECF No. 11.)

(Mem. O. 2, ECF No. 16.) The Court allowed the Amazon Plaintiffs to serve process by two means: (1) “[p]ublication in a newspaper of general circulation, such as *The New York Times* or *The Washington Post*”; and, (2) “[p]ersonal service on GEMSA’s United States Patent and Trademark correspondence address: William P. Ramey III of the law firms of Ramey & Browning, PLLC and/or Ramey & Schwaller, LLP, 5020 Montrose Boulevard, Suite 750, Houston, Texas 77006.” (*Id.*) One week after the Court’s order, the Amazon Plaintiffs filed proof of service by attaching a summons served on Mr. Ramey, (ECF No. 17), and a copy of *The Washington Post*’s classified section dated Thursday, August 18, 2016, (ECF No. 17-1).

GEMSA then filed two motions simultaneously: the Motion to Quash and the Motion to Dismiss. The Motion to Quash seeks to quash the attempted service of process on GEMSA because it failed to “comply with Due Process requirements.” (Mot. Quash 1.) The Motion to Dismiss seeks to dismiss the case against GEMSA because “GEMSA did not initiate the patent application process in [the Eastern District of Virginia], has no relevant contacts to [the Eastern District of Virginia,] and has already subjected itself to personal jurisdiction in [the United States District Court for the Eastern District of Texas].” (Mem. Supp. Mot. Dismiss 2, ECF No. 21.) The Amazon Plaintiffs responded to both motions in one response, (ECF No. 24), and GEMSA did not reply. The time to reply has expired.

Before the Court ruled on the Motion to Quash and the Motion to Dismiss, the Amazon Plaintiffs filed the Motion to Enjoin, and GEMSA responded via the Motion to Strike. The Motion to Enjoin, which is now moot, sought a ruling from this Court enjoining GEMSA from litigating more than 30 collateral suits in the United States District Court for the Eastern District of Texas. GEMSA sought to strike the Motion to Enjoin pending resolution of the Motion to

Quash and the Motion to Dismiss. Before the Court ruled on the Motion to Enjoin and the Motion to Strike, the United States District Court for the Eastern District of Texas transferred GEMSA's claims against the Amazon Plaintiffs to this Court. (*See Global Equity Management, S.A. v. Amazon Web Services, Inc., et al.*, 3:17cv81.)⁵ Accordingly, the Court will deny both the Motion to Enjoin and the Motion to Strike as moot.

GEMSA then filed the Motion to Withdraw, "request[ing] that William P. Ramey, III, Martin Conn and Matthias Kaseorg, and the law firms of Ramey & Schwaller, LLP and Moran Reeves & Conn PC, be permitted to withdraw as counsel of record for GEMSA." (Mot. Withdraw 1.) The Amazon Plaintiffs oppose the Motion to Withdraw "[o]ut of an abundance of caution . . . because it is uncertain whether by granting [the Motion to Withdraw], the Court may divest itself of jurisdiction over former counsel with respect to ordering sanctions for pre-withdrawal misconduct." (Opp'n Mot. Withdraw 2, ECF No. 36.) GEMSA filed a reply, refuting the Amazon Plaintiffs' argument and stating that the Court could permit withdrawal while ordering GEMSA to hire substitute counsel. The Court addresses these pending motions, seriatim, below.

II. Analysis: Motion to Quash

GEMSA's Motion to Quash advances one argument: that, by serving process in the manner approved by this Court and under 35 U.S.C. § 293, the Amazon Plaintiffs failed to comply with the due process requirements of the Fifth Amendment to the United States Constitution.⁶ Specifically, GEMSA argues that, by attempting service by publication in a

⁵ GEMSA's counsel similarly filed a motion seeking to withdraw their appearances in that transferred case, which is also pending before this court. The Court will address that motion by a separate order in that case.

⁶ "No person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

newspaper of general circulation and by serving GEMSA's outside counsel, the Amazon Plaintiffs served process in the manner most convenient to them, while neglecting to serve process in the manner most likely to reach GEMSA. Although GEMSA essentially concedes that the Amazon Plaintiffs complied with 35 U.S.C. § 293,⁷ GEMSA argues that doing so fails to satisfy due process. In essence, GEMSA challenges the constitutionality of the effectuated service. GEMSA's argument fails.

A. Federal Rule of Civil Procedure 12(b)(5) in Patent Cases

Federal Rule of Civil Procedure 12(b)(5)⁸ permits a defendant to challenge the method of service attempted by the plaintiff.⁹ In patent infringement cases, federal law provides for two methods of service. *See Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648, 652 (N.D. Tex. 2000). First, the plaintiff may serve non-resident defendants who maintain a regular

⁷ GEMSA does not appear to dispute that the Amazon Plaintiffs complied with 35 U.S.C. § 293. (Mem. Supp. Mot. Quash 3 (“While that service arguably may have complied with 35 U.S.C. § 293, it did not comply with Due Process’s requirement that the most likely method of reaching the defendant . . . was used for service.”).)

⁸ GEMSA asks that the Court *quash* the Amazon Plaintiffs’ allegedly insufficient service of process. Unlike most Rule 12 defenses, Rule 12(b)(5) allows defendants to seek two courses of action: dismissal and quashing of process. “[T]he difference between the two results is not substantial.” 5C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1354 (3d ed.). First, “[i]n the case of a dismissal, the plaintiff merely reinstutes the action and has process served again, making sure that the earlier defect in the summons or the mode of service has been corrected.” *Id.* On the other hand, “[w]hen process is quashed, only the service need be repeated.” *Id.*

⁹ The Court sees it appropriate to distinguish the Rule 12(b)(5) motion asserted by GEMSA from motions to dismiss brought under Federal Rule of Civil Procedure 12(b)(4). A Rule 12(b)(4) challenge concerns the *form of the process* rather than *the manner or method of service*. Thus, Rule 12(b)(4) motions challenge noncompliance with Federal Rule of Civil Procedure 4(b), while Rule 12(b)(5) motions—like GEMSA’s argument here—challenge the mode of delivery or the lack of delivery of the summons and complaint.

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