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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

INTEGRATED VOTING SOLUTIONS,
INC., a California Corporation,

Plaintiff,

v.

ELECTION SYSTEMS & SOFTWARE,
LLC., a Delaware corporation; and
ADVANCED BALLOT SOLUTIONS
LLC, a Delaware corporation,

Defendants.

14-cv-35 GSA

**ORDER GRANTING PLAINTIFF'S
MOTION TO AMEND THE COMPLAINT**

(Doc. 19)

INTRODUCTION

On May 30, 2014, Plaintiff, Integrated Voting Solutions, Inc. (“Plaintiff” or “IVS”) filed a Motion to file a First Amended Complaint. (Doc. 19). (Hereinafter, “FAC”). Defendant Election Systems & Software, LLC (“ES&S”) filed an opposition on June 13, 2014. (Docs. 20, 21, and 23). IVS filed a reply on June 20, 2014. (Doc. 24). The Court has reviewed the papers and determined that this matter is suitable for decision without oral argument pursuant to Local Rule 230 (g). The hearing set for June 27, 2014, at 9:30 a.m. was VACATED. Upon a review of the pleadings, Plaintiff’s motion is GRANTED.

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1 **BACKGROUND**

2 The complaint was filed in this case on January 9, 2014. It alleges that Defendants
3 infringed upon Plaintiff’s trademark, IntegraVote, and that Defendants ES&S and Advanced
4 Ballot Solutions, LLC (“ABS”) procured their own trademark registration (the ‘717 Registration)
5 by fraud on the United States Patent and Trademark Office (“USPTO”). The proposed First
6 Amended Complaint adds allegations that Defendants’ U.S. Registration No. 4,154,535 (“the
7 ‘535 Registration”) was also obtained by fraud on the USPTO.
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9 Defendant ES&S filed an opposition. It does not oppose the amendment except that it
10 argues that ABS should not be a named defendant because both ES&S and ABS were Delaware
11 limited liability companies (“LLC”S) and merged on October 1, 2013. It has submitted the
12 certificate of merger from the State of Delaware in support of its claims. (Doc. 21, pg. 5-7).
13 ES&S argues that under Delaware law, when LLCs merge, the disappearing company, (in this
14 case ABS), ceases to exist and the surviving company (in this case ES&S) succeeds to the
15 disappearing company’s rights and liabilities. *See*, Del. Code Ann. Tit. 6 § 18-209(g). Thus,
16 when ES&S and ABS merged, ABS ceased to exist and ES&S succeeded to ABS’ rights and
17 liabilities, which would include IVS’ purported claims. As such, Plaintiff’s attempt to name ABS
18 as a defendant in the new complaint would be futile.
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20 In reply, IVS argues that previously, ES&S did not move to dismiss ABS. To the
21 contrary, in its answer, ES&S asserted that any alleged misconduct in the complaint is attributable
22 to ABS and not ES&S. (Doc. 6, ¶ 46). Additionally, Plaintiff contends that under Delaware law,
23 debts and liabilities of the disappearing company succeeds to the surviving company, however,
24 these rights survive only for creditors, debtor holders, lienholders, or other parties who have
25 contracted with the disappearing company. Here, IVS is a third party competitor of ABS, and is
26 not a creditor or debt holder of ABS, nor has Plaintiff otherwise contracted with ABS regarding
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1 the '535 or '717 registrations. Finally, Plaintiff has submitted a business entity search from the
2 California Secretary of State indicating that ABS is an active corporation. (Doc. 24-2).

3 Accordingly, Plaintiff requests that the Court allow the amendment.

4 **DISCUSSION**

5 Under Rule 15(a), a plaintiff may amend his complaint once “as a matter of course,” and
6 without leave of court, before a response has been filed. Fed.R.Civ.P. 15(a)(1); *Bonin v.*
7 *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). However, a party can only amend the pleading with
8 the opposing party’s written consent or the court’s leave once a responsive pleading has been
9 filed. Fed.R.Civ.P. 15(a)(2). Here, Defendants filed a responsive pleading to Plaintiffs’
10 complaint and have not stipulated to the amendment, so leave of the court is required.

11 Fed. R. Civ. Proc. 15(a) provides that a court “should freely give leave [to amend] when
12 justice so requires.” The United States Supreme Court has stated:

13 [i]n the absence of any apparent or declared reason – such as undue delay, bad faith or
14 dilatory motive on the part of the movant, repeated failure to cure deficiencies by
15 amendments previously allowed, undue prejudice to the opposing party by virtue of
16 allowance of the amendment, futility of amendment, etc. – the leave sought should, as the
17 rules require, be “freely given.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

18 This policy is “to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon,*
19 *Inc.*, 316 F. 3d 1048, 1052 (9th 2003) (citations omitted). The Ninth Circuit has summarized these
20 factors to include the following: (1) undue delay; (2) bad faith; (3) prejudice to the opponent; and
21 (4) futility of amendment. *Loehr v. Ventura County Cmty. Coll. Dist.*, 743 F.2d 1310, 1319 (9th
22 Cir. 1984).

23 The Court has examined all of the factors listed above. Plaintiff’s amendments appear
24 reasonable and there is no evidence that the amendment will cause undue delay or that it will
25 cause prejudice to Defendants. Similarly, there is nothing to suggest that the amendment is made
26 in bad faith. Moreover, ES&S has not objected to the amended complaint except with regard to
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1 whether ABS should be a named Defendant. Here, although the Court acknowledges Del. Code
2 Ann. Tit. 6 § 18-209(g), the record is still ambiguous with regard to the relationship between
3 ES&S and ABS. On the one hand, ES&S argues that the companies have merged and ES&S
4 assumed ABS' liabilities. However, the answer filed in response to the initial complaint directly
5 contradicts this assertion. (Doc. 6, ¶ 46). Moreover, Plaintiff has submitted evidence that ABS is
6 still an active corporation. Given these inconsistencies, and the fact that Rule 15 provides that
7 leave should be freely given, the Court cannot conclude at this stage of the proceedings that it
8 would be futile to permit the filing of the FAC. Notwithstanding the above, this appears to be an
9 issue that the parties should be able to resolve without further Court involvement and are
10 encouraged to do so.
11

12 CONCLUSION

13 Accordingly, for the above reasons, IT IS HEREBY ORDERED :

- 14 1) Plaintiff's Motion Amend the Complaint is GRANTED;
- 15 2) Plaintiff shall file the FAC no later than **July 31, 2014**; and
- 16 3) Defendants' Answers are due 21 days after the FAC is filed.
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19 IT IS SO ORDERED.

20 Dated: July 17, 2014

21 /s/ Gary S. Austin
22 UNITED STATES MAGISTRATE JUDGE
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