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

ALACRITECH, INC., A California corporation, **Plaintiff,** **v.** **TIER 3, ET AL.,** **WISTRON CORPORATION ET AL.,** **DELL INC., A Delaware corporation,** **Defendants.**	**2:16-cv-00693-JRG (LEAD CASE)** **2:16-cv-00692-JRG** **2:16-cv-00695-JRG** **JURY TRIAL DEMANDED**

INTEL CORPORATION'S MOTION TO INTERVENE

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INTEL CORPORATION'S MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24, Intel Corporation ("Intel") hereby moves to intervene in this action as of right, or alternatively, with permission of the Court. Intel seeks to intervene in this patent infringement action filed by Alacritech, Inc. ("Alacritech") to protect its interests and the interests of its customer, Dell Inc. ("Dell"), the defendant in this action. Intel seeks to intervene because many of Alacritech's infringement allegations in the Complaint against Dell target networking technology that Intel supplied to Dell. Indeed, the Complaint in this action specifically accuses certain Dell products of infringement based on their use of Intel Ethernet cards and controllers, including Intel's 82599 Ethernet Controller. Further, Intel has agreed to defend and partially indemnify Dell as to Alacritech's allegations based on Intel components incorporated into the accused Dell products. As such, Intel has a substantial, direct financial interest in the outcome of this litigation.

Intel and Dell have sought Alacritech's permission for Dell to share Alacritech's infringement contentions concerning Intel components with Intel since Alacritech served them on September 9, 2016, designated as "Confidential" under this Court's protective order. Alacritech has repeatedly refused, most recently on October 21, 2016 in meeting and conferring with Intel on this motion.[1] As Intel and Dell have told Alacritech, lack of access to Alacritech's contentions has inhibited Intel from fully assessing the scope of Alacritech's allegations concerning Intel components and the extent of Intel's indemnity obligations. Nevertheless, to avoid delay, Intel now voluntarily seeks to intervene to defend its products and its customer Dell based on the allegations in the Complaint.

[1] [Stephens Declaration Ex. 2 (email dated October 21, 2016 from Claude Stern to Garland Stephens)]. The discussion of Alacritech's infringement allegations in this Motion is thus limited to the allegations in Alacritech's Complaint.

Intel can offer unique technical knowledge and expertise as the designer and manufacturer of the Intel networking technology targeted by Alacritech's infringement allegations. Should Alacritech subsequently sue other Intel customers, Intel's interest in the issues to be litigated here, such as claim interpretation and infringement based on Intel components, will extend beyond this case to those future actions. Additionally, this case is still at a very early stage and granting Intel leave to intervene would not prejudice any of the parties.

Denying the motion, however, would significantly prejudice Intel and other companies that use Intel products. If Intel is denied the opportunity to defend its technology against Alacritech's allegations, Intel could be subjected to indemnity liability and a cloud of uncertainty could be cast over Intel's products without Intel ever having a full and fair opportunity to litigate the issues.

Intel therefore requests leave to intervene as of right in this action under Rule 24(a)(2), or in the alternative, seeks the Court's permission to intervene pursuant to Rule 24(b)(l)(B). In accordance with Rule 24(c), a copy of Intel's proposed Complaint in Intervention is attached as Exhibit A.

Intel met and conferred with Alacritech's counsel, seeking to file this motion unopposed. Due to the parties' disagreement as to certain procedural matters (such as protections for Intel source code) and scheduling issues governed by Alacritech's discretion over the scope of counterclaims it might bring against Intel, Intel could not secure Alacritech's non-opposition.[2] This motion followed.

[2] Alacritech demanded Intel agree not to seek any changes to the docket control order, a matter that will be driven primarily by Alacritech's counterclaims, if any. Alacritech also demanded that Intel agree not to seek any changes to the protective order and discovery order, neither of which provide for Intel or any intervening supplier. The latter discovery-related issues are

I. FACTUAL BACKGROUND

A. This Case Is At An Early Stage

Alacritech's Complaint against Dell was filed on June 30, 2016, alleging infringement of eight patents that relate to networking technology.[3] Alacritech also filed two complaints against other defendants on the same day, CenturyLink, Inc. and Wistron Corporation, which also contained infringement allegations directed to Intel networking products.[4] All three cases have been consolidated for pretrial matters except for venue.[5] Dell answered the Complaint on August 25, 2016. [Dkt. 27]. Alacritech filed an Amended Complaint against three CenturyLink subsidiaries on August 26, 2016. [Dkt. 29].

On September 9, 2016, Alacritech served infringement contentions, marking them "Confidential" in their entirety. To date, Alacritech has refused to allow any defendant to share the contentions with Intel. [Stephens Declaration, ¶2-4].

On September 15, 2016, this Court entered a docket control order setting jury selection for December 4, 2017.

Wistron answered and counterclaimed against Alacritech on October 24, 2016. [Dkt. 68]. Alacritech has not yet answered Wistron's counterclaims. No depositions have yet been taken by any party.

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readily addressable and should not affect the schedule. [Stephens Declaration Ex. 1 (email dated October 21, 2016 from Garland Stephens to Claude Stern)].

[3] [Dkt. 1]. Specifically, U.S. Patent Nos. 7,124,205; 7,237,036; 7,337,241; 7,673,072; 7,945,699; 8,131,880; 8,805,948; 9,055,104.

[4] *Alacritech Inc. v. CenturyLink, Inc.*, CA No. 2:16-cv-00693-JRG (Lead Case) [Dkt. 1]; *Alacritech Inc. v. Wistron Corporation et. al.*, CA No. 2:16-cv-00692 [Dkt. 1].

[5] *Alacritech Inc. v. CenturyLink, Inc.*, CA No. 2:16-cv-00693-JRG (Lead Case) [Dkt. 8].

B. This Action Implicates Intel Products Sold To Dell And Other Intel Customers

Intel manufactures and sells networking components — including the Intel 82599 Ethernet Controller and many other Ethernet controllers and adapters — that enable computers to connect to and communicate with networks and the Internet. Customers such as Dell incorporate these network interface components into certain of the products that Alacritech accuses of infringement. In fact, Alacritech's Complaint alleges that Dell has infringed seven of the eight asserted patents based on its making, using, selling, offering for sale, and/or importing "the Intel Ethernet Network Daughter Card X520-DA2 /1350-T2," among other products.[6] Further, Alacritech's infringement allegations focus on Intel's 82599 Ethernet Controller, including the "Receive Side Coalescing (RSC)" and "TCP and UDP Segmentation" offloading (TSO) features described in the Intel 82599 Datasheet, which is cited extensively throughout the Complaint.[7] Alacritech's infringement allegations expressly implicate Intel's products and harm Intel by creating an infringement controversy over its networking technology.[8]

C. Intel Has Agreed To Partially Indemnify Dell Against Claims That Its Intel-Based Products Infringe Alacritech's Patents

After Alacritech filed its Complaint, Dell tendered a contractual claim that Intel indemnify and hold it harmless against Alacritech's claims based on an indemnity agreement involving the purchase of Intel products. Despite Alacritech's ongoing refusal to allow Intel

[6] [Complaint (Dkt. 1), ¶35, 49, 62, 75, 101, 114, 127].

[7] *See, e.g.*, [Dkt. 1, ¶35, 49, 62, 75, 101, 114, 127].

[8] Alacritech's infringement allegations in the consolidated *CenturyLink* and *Wistron* cases also expressly identify Intel products, specifically the Intel 82599 Controller and the Intel X550 Controller, respectively. *See Alacritech Inc. v. CenturyLink, Inc.,* CA No. 2:16-cv-00693-JRG (Lead Case) [Dkt. 1]; *Alacritech Inc. v. Wistron Corporation et. al.,* CA No. 2:16-cv-00692 [Dkt. 1].

access to its infringement contentions against Dell, to avoid delay, Intel has agreed to defend and partially indemnify Dell. [Kyriacou Declaration ¶¶ 2-3].

II. ARGUMENT

Intel is entitled to intervene in this action as a matter of right pursuant to Rule 24(a)(2). Alternatively, the Court should permit Intel to intervene under Rule 24(b)(1)(B).

A. Intel Is Entitled To Intervene As A Matter Of Right

Rule 24(a)(2) permits intervention on timely motion by anyone who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Four factors are considered in assessing intervention as a matter of right: (1) the timeliness of the request; (2) the potential intervenor's interest relating to the property or transaction that is the subject of the action; (3) the possibility of impairment to the potential intervenor's ability to protect its interest absent intervention; and (4) the adequacy of the representation of the potential intervenor's interest by the existing parties. *See Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).[9] In the Fifth Circuit, intervention should be permitted where "no one would be hurt and the greater justice could be attained." *Id.* Where the intervenor's interest is substantial, for example where a manufacturer seeks to intervene in a suit brought against its customer, the intervenor's interest is to be given greater weight. *See*, *e.g.*, *Honeywell Int'l, Inc. v. Audiovox Commc'ns Corp.*, No. Civ. A. 04-1337-KAJ et al., 2005 U.S. Dist. LEXIS 22933, at *9-10 (D. Del. May 18, 2005).

[9] Because intervention is not unique to patent law, regional circuit law applies. *See Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1328 (Fed. Cir. 2010).

The inquiry is a flexible one, which "must be measured by a practical rather than technical yardstick." *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005). Thus, for example, intervention is proper when the prejudice to the potential intervenor outweighs the potential prejudice to the remaining parties, particularly where there have been no legally significant proceedings other than discovery. *See Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1125-56 (5th Cir. 1970); *Ross*, 426 F.3d at 753.

As explained below, Intel satisfies the requirements for intervention as a matter of right.

1. Intel's motion to intervene is timely

When evaluating whether a motion to intervene is timely, the Fifth Circuit has "set forth four factors that must be considered," including: (1) the length of time from notice of the intervenor's interest to the filing of the motion to intervene, (2) the extent of prejudice to existing parties as a result of the timing of the motion, (3) the extent of prejudice to the intervenor if leave is denied, and (4) the existence of other special circumstances (if any). *See Ross*, 426 F.3d at 754 (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977)).

Here, Intel is seeking to intervene at an early stage of the litigation. Alacritech filed its Complaint against Dell four months ago. A Docket Control Order has only recently issued. [Dkt. 43 (dated September 15, 2016)]. A motion to dismiss is pending in the consolidated Century Link case [Dkt. 44]; other parties have yet to answer an amended complaint. If Alacritech did not refuse to allow Intel or its outside counsel access to Alacritech's September 9, 2016 infringement contentions (a designation being formally challenged by the Defendants), Intel

could have moved to intervene earlier still. The timing of Intel's intervention will not prejudice any of the existing parties. There is no question that Intel's motion to intervene is timely.[10]

2. Intel has a compelling interest in the litigation

"A party has an interest relating to the subject matter of an action when it has a 'direct, substantial, legally protectable interest in the proceedings.'" *State of Texas v. Am. Tobacco Co.*, No. 5-98CV-270, 1999 WL 1022129, at *2 (E.D. Tex. Nov. 5, 1999). "[T]he interest 'test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Ross*, 426 F.3d at 757 (citations omitted).

Courts routinely grant intervention as of right in patent actions where, as here, accused products incorporate components manufactured by the intervening party. *See Chandler & Price Co. v. Brandtjen & Kluge, Inc*., 296 U.S. 53, 55 (1935) (manufacturer's intervention in patent infringement action against its customers was "necessary for the protection of its interest"); *Tegic Commc'ns Corp. v. Bd. Of Regents of the Univ. of Tex. Sys.*, 458 F.3d 1335, 1344 (Fed. Cir. 2006) ("[T]o the extent that [the interest of the manufacturer of allegedly infringing products] may be impaired by the Texas litigation, [the manufacturer] may seek to intervene in that litigation."); *Honeywell*, 2005 U.S. Dist. LEXIS 22933, at *9-10 ("It is impracticable to try an infringement case against 40 some defendants or third-party defendants with many different

[10] *Ross*, 426 F.3d at 756 (unless some result can be demonstrated that would not have occurred "but-for" the intervenor's failure to file its motion to intervene earlier, there is no prejudice to the other parties); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (motion to intervene was timely when filed before discovery had begun); *Alabama v. U.S. Army Corps of Eng'rs*, 229 F.R.D. 669, 672 (N.D. Ala. 2005) (motion to intervene was timely when court had not yet conducted proceedings on the merits and intervention would not delay the proceedings); *Travelsource Corp. v. Old Republic Int'l Corp.*, No. 85 C 8116, 1986 WL 3848, at *2 (N.D. Ill. Mar. 14, 1986) (motion to intervene was timely because suit was only six months old and no pleadings had been filed other than the Complaint and Answer).

accused devices, and it is unwise to attempt any such thing when liability depends exclusively upon infringement being found as to an LCD component that the defendants do not manufacture and when at least some of the manufacturers of the LCDs are before the court and are willing to stand behind their products in this litigation.").[11]

As the developer and manufacturer of much of the accused networking technology in dispute, Intel has a direct and substantial interest in defending its technology and litigating Alacritech's allegations concerning its products. *See Intellectual Ventures I LLC v. AT&T Mobility LLC*, 2014 WL 4445953, at *2 (D. Del. Sept. 8, 2014) (Stark, J.) ("[I]ntervention is necessary to enable Intervenors to protect their interest in products which Intervenors manufacture for Defendants, an interest put at risk by the litigation as Plaintiffs accuse these products of infringement.").

Additionally, Intel has a direct financial stake in the suit due to its partial indemnification of Dell. *See Fisherman's Harvest, Inc. v. U.S.*, 74 Fed. Cl. 681, 685 (2006) ("An indemnitor may be allowed to intervene in a lawsuit brought against an indemnitee in order to protect its interest under an indemnity agreement.") (internal citations omitted); *IBM*, 1994 WL 706208, at *5 (patent infringement claims against an indemnitee are in effect claims against the indemnitor); *Lemelson v. Larami Corp.*, No. 80CIV6081, 1981 WL 319072 (S.D.N.Y. Mar. 23, 1981) (permitting intervention in patent infringement action by manufacturer that had an indemnification obligation). Moreover, Intel has many other customers that incorporate its

[11] *Accord LG Elecs. Inc. v. Q-Lity Computer, Inc.*, 211 F.R.D. 360, 365 (N.D. Cal. 2002) ("[An intervening manufacturer] has more than a speculative economic interest, as the products that it sells will be at the heart of the [patent infringement] litigation"); *IBM Corp. v. Conner Peripherals, Inc.*, No. C-93-20117, 1994 WL 706208, at *5 (N.D. Cal. Dec. 13, 1994) (intervening manufacturer "played an important role in manufacturing and designing the controllers that allegedly infringed" and "should be able to present facts relevant to whether the controllers actually did infringe").

networking technology into their products. Consequently, the potential impact of this litigation on Intel and its customers may extend beyond claims made by those named in this suit.

3. The disposition of this action may impair Intel's ability to protect its interests

The nature of the intervenor's interest and the effect that the outcome of the case will have on its ability to protect that interest are closely-related factors for determining whether to grant a motion to intervene. *Chiles*, 865 F.2d at 1214. As a general rule, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should... be entitled to intervene." Fed. R. Civ. P. 24, Fed. R. Civ. P. 24, Advisory Committee Notes, 1966 Amendments.

Intel's ability to protect its interests will be significantly impaired if it cannot intervene. A manufacturer has a strong interest in being heard in a patent infringement action where the accused products incorporate its components. *See Honeywell Int'l.*, 2005 U.S. Dist. LEXIS 22933, at *12-13 (in a patent infringement action, a manufacturer's interests "will be impaired or affected, as a practical matter, by the disposition of the action, unless it is involved in the case directly and able to make its positions known"). An adverse ruling could also substantially damage Intel's reputation, its relationships with its other customers, and its future customer base. *See U.S. Ethernet Innovations, LLC v. Acer, Inc.*, No. 6:09-cv-448, Dkt. No. 224 at 4 (E.D. Tex. May 10, 2010) (explaining that "a manufacturer" could face injury such as "the loss of its customer base and reputation as a result of patent infringement allegations."); *Katz v. Lear Siegler, Inc*., 909 F.2d 1459, 1464 (Fed. Cir. 1990) ("it is a simple fact of life that a manufacturer must protect its customers, either as a matter of contract, or good business, or in order to avoid the damaging impact of an adverse ruling against its products") (citing *Codex Corp. v. Milgo Elec. Corp*., 553 F.2d 735 (1st Cir. 1977)). Moreover, Alacritech has repeatedly informed Intel

that unless it is a party to the case, Alacritech will not even reveal its infringement allegations against Intel Ethernet components to Intel. [Stephens Decl. Ex. 2]

Finally, as discussed above, Intel has agreed to partially indemnify Dell. Given Intel's direct interest in the litigation and the potential impact on its business and customers, Intel should be allowed to protect its interests first hand. Intel should not be required to stand back and watch its fate litigated without a say in the outcome.

4. The named defendant cannot adequately represent Intel's interests

In assessing whether representation by the existing parties is adequate, a potential intervenor need only show that "representation by the existing parties *may* be inadequate." *Ross*, 426 F.3d at 761 (emphasis added). Indeed, the Fifth Circuit has described the potential intervenor's burden as "minimal." *Id.; see also Edwards v. City of Houston,* 78 F.3d 983, 1005 (5th Cir. 1996) (minimal burden of would-be intervenor to show inadequate representation met by showing that representation by existing parties "may" be inadequate).

A manufacturer such as Intel has a greater interest than its customers in defending allegations of patent infringement focused on its products. It would be unfair to expect Intel to rely on a customer to fully protect Intel's interests, particularly when the customer is partially indemnified. In practice, it makes more sense for the manufacturer of the parts, rather than the customer who uses those parts, to litigate issues such as infringement. *Honeywell*, 2005 U.S. Dist. LEXIS 22933, at *11 ("[F]rom the perspective of the host of defendants [plaintiff] has chosen to sue, and in the interest of judicial economy, dealing with the manufacturers first is the fairest and most efficient way to proceed."). In *Honeywell*, for example, the court found that because the manufacturer was uniquely situated to understand and defend its own products, its interests were not adequately represented by existing parties to the litigation, even though the

manufacturer's customers had an interest in defending against the allegations of infringement. *Id.* at *13.

Further, Intel is in a better position to defend against infringement allegations focused on Intel products because it has the relevant knowledge and expertise regarding its own technology. While Dell incorporates Intel's highly complex networking technology components into its own products, it does not design or manufacture those components. As such, Intel is in a better position to assert all applicable non-infringement defenses relevant to its technology. *Id*. at *4 (because a manufacturer "is uniquely situated to understand and defend its own product, its interests are not adequately represented by existing parties to the litigation").

In addition, Alacritech has improperly used the protective order to prevent Intel from providing assistance to Dell in this case. Unless Intel intervenes, Alacritech's improper tactics will effectively prevent Intel from even assisting Dell in defending infringement contentions based on Intel products.

Moreover, Intel has a compelling interest in seeing the case through judgment and fully addressing the merits of Alacritech's claims. Because the cost of patent litigation is high and often forces parties into settlement before the merits are fully addressed, a customer may not have as great an interest as a manufacturer, such as Intel, in fully litigating the case to obtain findings of non-infringement. Intervention as of right should be granted to one who may potentially present a "more vigorous presentation" of its interests than the existing parties. *N.Y. Pub. Interest Research Group, Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975).

B. Alternatively, the Court Should Exercise Its Discretion to Permit Intel to Intervene

Although Intel satisfies the criteria for intervention as a matter of right, it moves in the alternative for leave to intervene with permission of the Court. The Court may permit intervention on timely motion where the intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(l)(B). This court also requires that the intervention not unduly delay or prejudice the adjudication of rights of the original parties. *Am. Tobacco*, 1999 WL 1022129, at * 1.

Permissive intervention should be construed liberally to permit intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." *See Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co*., Civ. A. Nos. B-87-00507-.CA, B-88-00429-CA, 1989 WL 237732, at *4 (E.D. Tex. Feb. 14, 1989). Permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Sec. & Exch. Comm'n v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459 (1940).

As shown above, this motion has been timely filed. Moreover, there are issues of law and fact common among Dell and Intel. Alacritech is accusing Dell of infringement based on its use of Intel networking technology. The common questions of law and fact include whether Dell's products that incorporate Intel networking technology, including without limitation the Intel 82599 Ethernet controller discussed extensively in Alacritech's Complaint against Dell, infringe the asserted patents. *See U.S. Ethernet Innovations, LLC v. Acer, Inc.,* No. 6:09-cv-448, Dkt. No. 224 at 3 (E.D. Tex. May 10, 2010) (identifying common questions of law and fact concerning Intel products in accused Dell computers). Intel's Complaint in Intervention, which seeks declaratory judgment of non-infringement of the patents-in-suit, raises questions of law

and fact that overlap with the defenses raised by Dell. *See Reid v. Gen. Motors Corp.*, 240 F.R.D. 257, 260 (E.D. Tex. 2006) (granting manufacturer permissive intervention in patent infringement action due to common issues); *Salem Eng'g Co. v. Nat'l Supply Co.*, 75 F. Supp. 993, 996 (W.D. Pa. 1948) (granting permissive intervention to manufacturer in patent infringement action because "'it is plain the applicant's defense and the main action have a question of law and fact in common.").

Finally, Intel's intervention will not delay the litigation. To the contrary, Intel's participation will simplify these proceedings, particularly given the complex nature of technology at issue and the current scope of the patent infringement allegations. Intel's intervention will also facilitate discovery and allow for the most efficient adjudication of the claims.

III. CONCLUSION

For the above reasons, Intel respectfully requests that the Court grant its Motion to Intervene as a matter of right pursuant to Rule 24(a)(2), or alternatively, to intervene by permission pursuant to Rule 24(b)(1)(B).

Dated: October 31, 2016

Respectfully submitted,

/s/ Garland T. Stephens

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CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with counsel for **Alacritech Inc.** regarding the subject matter of this motion on October 21, 2016 and they stated they oppose this motion.

/s/ Garland T. Stephens

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on October 31, 2016 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Garland T. Stephens