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-RWS **JURY TRIAL DEMANDED**

CAVIUM, INC.'S MOTION TO INTERVENE

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I. INTRODUCTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Cavium, Inc. ("Cavium") hereby moves to intervene in this action as of right, or, alternatively, with permission of the Court. Cavium 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"), a defendant in this action. Cavium's interest in this litigation is based on the involvement of its wholly-owned subsidiary, QLogic Corporation ("QLogic"). Cavium seeks to intervene because some of Alacritech's infringement allegations in the Complaint in this action specifically accuse some Dell products of infringement based in part on their use of QLogic network adapters, including, among others, QLogic 57840S-k quad port 10GbE blade KR NDC. Further, Cavium has agreed to defend and partially indemnify Dell as to Alacritech's allegations of infringement against QLogic components that are incorporated into the accused Dell products. As such, Cavium has a substantial, direct financial interest in the outcome of this litigation. This Court has recently permitted Intel to intervene for similar reasons.

Cavium can offer technical knowledge and expertise that its customer lacks, as the designer and manufacturer of the QLogic technology targeted by Alacritech's infringement allegations. Moreover, issues litigated in this action may affect other Cavium customers in the event that they are sued by Alacritech or its successors. Accordingly, Cavium should participate in litigating key issues such as claim interpretation and infringement based on its own components.

As this case is still at a very early stage, Cavium's intervention would not prejudice any of the parties. Cavium, however, will suffer significant prejudice if it is not permitted to intervene to litigate the claims against its own products, as it could be subjected to indemnity liability and uncertainty regarding numerous QLogic products without its participation.

Accordingly, Cavium respectfully 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 Cavium's proposed Complaint in Intervention is attached hereto as Exhibit A.

II. FACTUAL BACKGROUND

A. Alacritech's Actions Have Caused Cavium To Become A Participant

Plaintiff Alacritech chose to involve Cavium in this action by specifically accusing Dell of infringement based on its use of a number of QLogic products named in the Complaint, including QLogic 57840S-k quad port 10GbE blade KR NDC, 57840S quad port 10G FP+ rack NDC, 57810S dual-port 10GbE SFP+ converged network adapter, 57810S dual-port 10GbE KR blade converged mezzanine card, 57810S dual-port 10GbE blade converged NDC, 57810S Dual-port 10GbE BASE-T converged network adapter, 57800S quad-port SFP+/ BASET (2x10GbE + 2x1GbE) rack converged NDC, and 57800S quad-port BASE-T (2x10GbE + 2x1GbE) rack converged NDC. [Dkt. 1 at ¶¶ 34, 48, 61, 74, 100, 113 and 126] Alacritech alleged that Dell's use of multiple, specific QLogic network adapter products infringed Alacritech's patents in seven of its eight total counts of patent infringement. *Id.*

Cavium's wholly-owned subsidiary, QLogic, received a request from its customer, Dell, to defend and indemnify Dell in this action based on the accusations concerning QLogic products and the agreements between Dell and QLogic. [Declaration of Jonathan D. Belli ("Belli Decl."), ¶ 2] Based on the circumstances of this action and the allegations by Alacritech, Cavium subsequently determined that it would defend and partially indemnify Dell as to the accusations concerning QLogic products. [Belli Decl., ¶ 3]

Alacritech further involved Cavium in this action by issuing a subpoena to Cavium on December 2, 2016, with a response date of January 3, 2017. [Declaration of Karineh

Khachatourian ("KK Decl.") ¶ 2] Cavium contacted Alacritech in early December in an attempt to secure an extension of time from Alacritech for Cavium's responses, based on Cavium's unavailability during the holidays. [KK Decl. ¶ 3] In the course of communications with Alacritech between December 5 and December 19, 2016, Cavium's potential intervention in the action has been discussed with Alacritech's counsel, but the parties were unable to reach agreement concerning either an extension for Cavium's subpoena response or non-opposition to Cavium's proposed intervention. [KK Decl. ¶¶ 3-4]

Cavium attempted to avoid contested motion practice by seeking Alacritech's non-opposition to the instant motion, particularly given that another supplier, Intel, recently was granted leave to intervene based on very similar facts. [KK Decl. ¶ 4] In meet and confer discussions, Alacritech was made aware that Cavium, like Intel, has agreed to defend and partially indemnify Dell as to the claims against Dell products incorporating QLogic's technology. [KK Decl. ¶ 4] Cavium proposed as an alternative that the parties could avoid motion practice by Alacritech dismissing the claims against Dell as to the QLogic products and then filing a new complaint to assert those claims directly against QLogic. [KK Decl. ¶ 5] Alacritech declined to dismiss any claims against Dell and invited Cavium to "feel free to move to intervene" in the action. [KK Decl. ¶ 5]

Cavium now has been drawn into the action and has a substantial financial stake in the outcome, yet it is precluded from discovering and accessing relevant evidence and directly defending its own products from infringement claims.

B. This Case Is At An Early Stage

The Court's docket control order set jury selection in this action for December 4, 2017 [Dkt. 43], and Alacritech has added new accused products to this action as recently as December 13, 2016. [Dkt. 94] Alacritech's Complaint against Dell was filed on June 30, 2016, alleging

infringement of eight patents that relate to networking technology. [Dkt. 1] Alacritech also filed two complaints against other defendants on the same day, CenturyLink, Inc. and Wistron Corporation. All three cases have been consolidated for pretrial matters except for venue. [Dkt. 8] Dell answered the Complaint on August 25, 2016. [Dkt. 27].

Intel moved to intervene in this action on October 31, 2016, on the basis that its products are implicated in the infringement allegations against its customer, Dell. [Dkt. 71] Intel's motion to intervene was granted on November 21, 2016, and its Complaint was filed on November 22, 2016. [Dkt. 84, 85] Alacritech subsequently answered Intel's complaint and counterclaimed against Intel on December 13, 2016, enlarging its allegations of infringement to include additional Intel products that were not previously accused in the action. [Dkt. 94]

Cavium's counsel repeatedly requested access to an Alacritech license agreement that may provide a complete defense as to QLogic products, but was initially denied access by Alacritech on the basis that Cavium is not a party and the license is marked as "Highly Confidential" under the Protective Order. Additionally, non-parties (including implicated suppliers) were not able to review Alacritech's infringement contentions until November, as Alacritech initially designated them as "Confidential" and declined to provide them to non-parties on that basis. As set forth above, Alacritech's own recent actions may serve to delay the defendants' ability to prepare their case. However, Cavium's proposed intervention, which is directed to the very issues and products Alacritech chose to include in the scope of this case at the outset, will cause no delay or prejudice to any party in this proceeding.

C. This Action Implicates QLogic Products Sold To Dell And Other QLogic Customers

Alacritech's complaint specifically identified multiple QLogic products in its allegations against Dell as to seven of the eight asserted patents. [Dkt. 1 at ¶¶ 34, 48, 61, 74, 100, 113 and

126] Accordingly, the outcome of this action may have an impact on QLogic, its parent Cavium, and their customers who purchase and rely on QLogic products.

D. Cavium Has Agreed to Partially Indemnify Dell Against Claims That Its QLogic-Based Products Infringe Alacritech's Patents

Pursuant to agreements between Dell and QLogic, Cavium's wholly-owned subsidiary, Cavium has agreed to defend and partially indemnify Dell against Alacritech's allegations against Dell concerning network adapters provided by QLogic as identified in the Complaint. [Belli Decl., ¶¶ 2, 3] Accordingly, Cavium has a direct and substantial financial interest in the outcome of this action and, indeed, already has been made a participant by Alacritech through its allegations concerning QLogic products and Alacritech's December subpoena to Cavium.

III. ARGUMENT

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

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

Federal Rule of Civil Procedure 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). In considering the right to intervene in a patent action, regional circuit law is applied. *See Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1328 (Fed. Cir. 2010). In the Fifth Circuit, four factors are to be assessed in considering the right to intervene: first, the timeliness of the request; second, the potential intervenor's interest relating to the property or

transaction that is the subject of the action[1]; third, the possibility of impairment to the potential intervenor's ability to protect its interest absent intervention; and, finally, 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).

In the Fifth Circuit, intervention should be permitted where "no one would be hurt and the greater justice could be attained." *Id*. In considering the right to intervene, the Fifth Circuit has noted that the Court's inquiry "must be measured by a practical rather than technical yardstick." *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005). Where, as here, 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, intervention should be allowed. *See Diaz v. S. Drilling Corp*., 427 F.2d 1118, 1125-56 (5th Cir. 1970); *Ross*, 426 F.3d at 753. As explained below, Cavium is entitled to intervene in this action.

1. Cavium's Motion To Intervene Is Timely

The Fifth Circuit considers four factors to evaluate timeliness, 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)).[2] Fifth Circuit precedent addressing intervention has favored a finding of timeliness

[1] In the instant action, Cavium's interest as a supplier seeking to intervene in a case against its customer is substantial and should be afforded 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).

[2] Intervention within six months of the start of the action and before any proceedings on the merits has been found timely. *See, e.g., Alabama v. U.S. Army Corps of Eng'rs*, 229 F.R.D. 669, 672 (N.D. Ala. 2005) (motion to intervene timely when court had not yet conducted proceedings

absent articulation of substantial, specific prejudice to existing parties that they would not have suffered had the intervention occurred earlier in the action. *See, e.g., Ross*, 426 F.3d at 756 (finding party opposing intervention must point to specific "but-for" result due to later, rather than earlier, intervention by insurer); and *Stallworth*, 558 F.2d at 265 (holding "to take any prejudice that the existing parties may incur if intervention is allowed into account under the rubric of timeliness would be to rewrite Rule 24 by creating an additional prerequisite to intervention as of right."). In this action, in which Alacritech has added new accused products as recently as December 13 and trial is nearly a year away, no prejudice can be demonstrated. Here, Cavium moved promptly to intervene, Cavium's intervention will cause no prejudice to the existing parties, and Cavium will suffer significant prejudice if leave to intervene is denied.

2. Cavium Has A Compelling Interest In The Litigation

Cavium's compelling interest in these proceedings is clear based on Alacritech's own allegations. Moreover, Cavium's undertaking to defend and partially indemnify its customer cements its strong 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. American 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).

Cavium's intervention in this action is necessary to protect its strong financial interest based on both its indemnity obligations and the potential impact on its other customers. The

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on merits and intervention would not delay 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 timely where suit was six months old and no pleadings had been filed other than Complaint and Answer).

right of a manufacturer to intervene in an action accusing its products has been long recognized. *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. Board Of Regents of the Univ. of Tex. Sys.*, 458 F.3d 1335, 1344 (Fed. Cir. 2006) ("[T]o the extent that [the interest of a manufacturer of allegedly infringing products] may be impaired by the Texas litigation, [the manufacturer] may seek to intervene in that litigation."). *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 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").

Cavium has a clear, direct and substantial interest in defending its technology accused of infringement by Alacritech. *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."). As an indemnitor of defendant Dell, Cavium also has a compelling financial interest in this action. *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) *Conner Peripherals,* 1994 WL 706208 at *5 (patent infringement claims against indemnitee are in effect claims against

indemnitor). As many courts have found in similar circumstances, a supplier like Cavium "has more than a speculative economic interest, as the products that it sells will be at the heart of the litigation[.]" *LG Elecs.*, 211 F.R.D. at 365.

3. The Disposition Of This Action May Impair Cavium's Ability To Protect Its Interests

The nature of Cavium's interest in this matter as the manufacturer of accused products identified in the Complaint against its customer, and the effect that the outcome of this action will have on Cavium's ability to protect that interest, are closely-related factors the court must consider in deciding the instant motion. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989). 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 cause harm to Cavium'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)).

In addition, Cavium has a financial stake in this action because it has agreed to partially indemnify Dell. Given all of Cavium's substantial interests (both monetary and non-monetary)

in the outcome of this action, Cavium should be a party to the litigation to ensure that its interests are protected. 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. Accordingly, Cavium's motion to intervene should be granted.

4. Cavium's Interests Cannot Be Adequately Represented By Its Customer

Cavium is in a better position to defend its interests than its customer, Dell, based on its greater knowledge of its own products Dell purchased and its substantial financial interest as an indemnitor. Under Fifth Circuit law, the intervenor's burden to show inadequate representation by a named party is very low, and is met by a mere showing that "representation by the existing parties *may* be inadequate." *Ross*, 426 F.3d at 761 (emphasis added). S*ee also Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996).

Cavium naturally has a greater interest than its customers in defending allegations of patent infringement focused on its QLogic products. Cavium also is uniquely situated to understand and defend its own products, which Cavium's subsidiary designed and manufactured, and which Dell merely purchased. Allowing direct participation by Cavium as a party in this action is both the fairest and most efficient outcome. *See Honeywell*, 2005 U.S. Dist. LEXIS 22933, at *4, *11, *13.

Dell may not have as great an interest as Cavium in fully litigating the case to obtain findings on the merits, and may have differing interests in considering potential settlement of the claims impacting Cavium. Cavium has a compelling interest in fully addressing the merits of Alacritech's claims and may present a "more vigorous presentation" of its interests than would Dell. *N.Y. Pub. Interest Research Group, Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350,

352 (2d Cir. 1975). For each of the reasons set forth above, Cavium is entitled to intervene in the instant action as a matter of right.

B. The Court Should Exercise Its Discretion To Permit Cavium To Intervene, If Cavium Is Not Entitled To Intervene As A Matter Of Right

Cavium moves in the alternative for leave to intervene with permission of the Court, in the event that the Court does not find Cavium is entitled to intervene as a matter of right. The Court may permit intervention where the proposed 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). *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). While Cavium has demonstrated a substantial direct interest in the outcome of this action, such interest is not required for permissive intervention. *Sec. & Exch. Comm'n v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459 (1940).

The common questions of law and fact shared by the action against Dell and Cavium's proposed Complaint in Intervention are evident from Alacritech's own allegations against Dell. In its Complaint against Dell, Alacritech specifically identifies numerous QLogic network adapters in its allegations that Dell products incorporating the QLogic adapters infringe its patents. [Dkt. 1] Alacritech's claims against Dell are based on its use of QLogic network adapters, as well as its use of networking technology from other suppliers (including Intel). Cavium's proposed Complaint in Intervention seeks judgment as to whether QLogic network adapters incorporated into Dell's products infringe the Alacritech patents at issue in this action, questions which directly overlap with Dell's defenses of non-infringement of the same seven Alacritech patents. *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

questions of law and fact); *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.").

Intervention by Cavium in this action will not unduly delay or prejudice the adjudication of rights of the original parties, given the early stage of the proceedings. *See American Tobacco*, 1999 WL 1022129, at * 1. As set forth above, Cavium's intervention will facilitate discovery and ensure the most fair and efficient adjudication of Alacritech's claims.

IV. CONCLUSION

For all of the foregoing reasons, Cavium respectfully requests that the Court grant its Motion to Intervene in this action.

Dated: January 13, 2017

Respectfully submitted,

/s/ Karineh Khachatourian

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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 at least December 5, 12, 16 and 19, 2016, who declined to consent to filing the motion unopposed and stated we should "feel free to move to intervene" and they will then consider whether they oppose.

/s/ Karineh Khachatourian

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on January 13, 2017 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/ Melissa R. Smith