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

Bedrock Computer Technologies LLC, Plaintiff, v. Softlayer Technologies, Inc., et al. Defendant, and Red Hat, Inc., Intervenor.	Case No. 6:09-CV-269 JURY TRIAL DEMANDED

RED HAT, INC.'S MOTION TO INTERVENE

Pursuant to Rule 24(a) and (b) of the Federal Rule of Civil Procedure, Red Hat, Inc. ("Red Hat") respectfully moves to intervene in this civil action (Case No. 6:09-CV-269) ("Bedrock I") as a matter of right, or alternatively by permission. In accordance with Rule 24(c) of the Federal Rules of Civil Procedure, Red Hat has filed its proposed Complaint in Intervention contemporaneously herewith.

INTRODUCTION

Red Hat is a global leader in providing open source software solutions, including its operating system platform, Red Hat Enterprise Linux ("RHEL"), to its customers. RHEL's foundation is the Linux kernel, which is one of the most widely known open source technologies. The Linux kernel has been developed and continues to be improved through the collaboration of thousands and thousands of developers world-wide. Red Hat integrates the Linux kernel into RHEL to offer a stable and high performing operating system to its customers. Red Hat's RHEL technologies "have gained broader market acceptance in mission critical areas of computing" contributing to Red Hat's $748.2 million in revenue for its last fiscal year.[1]

Despite Red Hat's prominent role, Bedrock only brought suit against companies who are users of the Linux kernel in Bedrock I, including Amazon.com, Inc. ("Amazon.com") and Softlayer Technologies, Inc. ("Softlayer") who are Red Hat customers, accusing them of infringement based on the functionality of one module buried deep in the millions of lines of code of the Linux kernel. Even though Bedrock has learned of Red Hat's development of the Linux kernel and its distribution of RHEL, Bedrock continues to resist Red Hat's involvement in Bedrock I. However, none of the defendants in Bedrock I oppose this motion. Accordingly, Red

[1] Red Hat, Inc.'s Form 10-K at 42 (filed Apr. 29, 2010), *available at* http://files.shareholder.com/downloads/RHAT/925593923x0xS1193125-10-99295/1087423/filing.pdf ("Form 10-K").

Hat respectfully requests this Court to give Red Hat the opportunity to protect its business, its operating system platform (RHEL) and its current and prospective customers against Bedrock's allegations of infringement by granting Red Hat's Motion to Intervene.

STATEMENT OF FACTS

A. Bedrock I is in the Early Stages of Discovery.

In Bedrock I, Bedrock sued ten defendants ("Bedrock I Defendants"), including Softlayer and Amazon.com, for alleged infringement of U.S. Patent No. 5,893,120 ("the '120 patent") in June 2009.[2] On October 9, 2009, Bedrock served its infringement contentions which identified the accused instrumentality to be the route.c software code within certain versions of the Linux kernel. The Linux kernel is the foundation of RHEL, Red Hat's operating system product. Simply put, there would be no RHEL without the Linux kernel. The file route.c is one file among the tens of thousands of files that make up the source code of the Linux kernel, containing functions directed at managing the Internet Protocol routing functionality and the kernel's routing cache. Softlayer and Amazon.com are Red Hat customers.

On December 9, 2009, Red Hat filed an action for declaratory judgment in the Eastern District of Texas (Case No. 09CV-549-LED) against Bedrock seeking a determination that the '120 patent is invalid and that RHEL does not infringe the '120 patent ("Bedrock II"). Thereafter, Bedrock filed a counterclaim for infringement against Red Hat and served infringement contentions on March 5, 2010. The infringement contentions served on Red Hat are essentially identical to those served on the Bedrock I Defendants, again alleging that the route.c code within the Linux kernel infringes the '120 patent.

[2] Seven defendants remain in Bedrock I since Citiware Technology Solutions, LLC never made an appearance and both PayPal, Inc. and CME Group, Inc. have been dismissed.

Prior to the March 1, 2010 scheduling conference for Bedrock II, counsel for Red Hat proposed putting Bedrock II on the same discovery, claim construction and trial schedule as Bedrock I. Bedrock would not agree to Red Hat's proposal. By the March 1, 2010 scheduling conference, Bedrock was willing to consolidate Bedrock I and Bedrock II for claim construction, and as a result, the Court consolidated Bedrock I and Bedrock II for claim construction through October 2010. During the subsequent docket control order discussions on March 18, 2010, counsel for Red Hat and counsel for Bedrock discussed Red Hat's interest in consolidating Bedrock I and Bedrock II, and counsel for Bedrock indicated Bedrock did not want to consolidate.

On March 26, 2010, Bedrock filed an amended answer in Bedrock II adding crossclaims for infringement against fourteen new companies ("Bedrock II Defendants"). On May 19, 2010, Bedrock served infringement contentions on the Bedrock II Defendants, again alleging that the route.c code within the Linux kernel infringes the '120 patent.[3]

For Bedrock I, discovery is in the early stages and closes on January 10, 2011. The parties have only recently started to produce documents and have engaged in limited written discovery. Only one deposition notice, by Bedrock for one of its owners, has been served and no depositions have otherwise been taken or noticed. The Bedrock I Defendants, Red Hat, and Bedrock have exchanged claim terms for construction under the Court's scheduling order and are preparing for the claim construction hearing in October 2010. No significant deadlines are scheduled prior to the claim construction hearing.

[3] All of Bedrock's infringement contentions served on the twenty-two opposing parties in Bedrock I and Bedrock II are essentially identical.

B. Bedrock's Infringement Allegations Are Directed at the Linux Kernel Which is the Foundation of RHEL.

Bedrock alleges that the Bedrock I Defendants infringe the '120 patent by their use of certain versions of the Linux kernel.[4] RHEL is "an operating system built from various open source software packages, including the Linux kernel, and is designed expressly for enterprise computing."[5] The Linux kernel is the foundation for RHEL.[6] RHEL integrates the certain Linux kernel versions identified in Bedrock's Second Amended Complaint [Dkt. 191].[7] By alleging infringement through the use of certain versions of the Linux kernel, Bedrock's infringement allegations are directed at RHEL, Red Hat's operating system product.

C. Red Hat Has a Direct and Substantial Protectable Interest in Defending Its Products and Its Customers.

Since RHEL's introduction, it has gained widespread support from hardware and software vendors, and continues to broaden its market acceptance, including among enterprises in the telecommunications, government and financial services industries.[8] For the last fiscal year, Red Hat's subscription revenue from its products increased 18% due primarily to additional subscriptions of RHEL technologies due in part to the migration of enterprises to RHEL.[9] To the extent Bedrock's infringement allegations are directed at RHEL, the allegations impair RHEL's reputation and ability to attract future customers. As a result, Red Hat has a substantial interest in defending its own products.

[4] Second Amended Complaint, at ¶17, Exh. B-J [Dkt. No. 191].
[5] Form 10-K at 11.
[6] *Id.* at 6.
[7] Second Amended Complaint at ¶17, Exh. B-J [Dkt. No. 191].
[8] Form 10-K at 42.
[9] *Id.*

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure governs intervention and provides two methods: intervention of right under Rule 24(a) and permissive intervention under Rule 24(b). Red Hat should be permitted to intervene under either provision of Rule 24.

I. RED HAT IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(a)(2).

Under Rule 24(a)(2), a motion to intervene as of right should be granted when (1) the motion to intervene is timely; (2) the potential intervenor asserts an interest in the property or transaction that is the subject of that case; (3) the disposition of that case may impair or impede the potential intervenor's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervenor's interest.[10] "The inquiry under subsection (a)(2) is a flexible one, which focuses on particular facts and circumstances surrounding each application."[11] "Intervention should generally be allowed where no one would be hurt and greater justice could be attained."[12]

A. Red Hat's Motion to Intervene Is Timely.

The timeliness determination is based on all the facts and circumstances, including the length of time before moving to intervene, the extent of the prejudice that the existing parties to the litigation may suffer from any delay in moving to intervene, the extent of the prejudice that the intervenor may suffer if its petition for leave to intervene is denied, and the existence of unusual circumstances.[13] "[A]lthough these factors give structure to our timeliness analysis, we have explicitly observed that the timeliness analysis remains contextual, and should not be used

[10] *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005) (quoting *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004)).
[11] *Id.* (quoting *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (internal quotation marks omitted)).
[12] *Id.* (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (internal quotation marks omitted)).
[13] *Edwards*, 78 F.3d at 1000; *Heaton v. Monogram Credit Card Bank*, 297 F.3d 416, 422–23 (5th Cir. 2002); *Stallworth v. Monsanto Co.*, 558 F2.d 257, 263–66 (5th Cir. 1977).

as a tool of retribution to punish the tardy would-be intervenor, but rather [should serve as] a guard against prejudicing the original parties by failing to apply sooner."[14]

Under the facts and circumstances of this case, Red Hat's motion is timely. Red Hat is moving to intervene in the early stages of the discovery.[15]

Moreover, the timing of Red Hat's motion will not prejudice any party to the action, including Bedrock. First, the Bedrock I Defendants do not object to this motion. Furthermore, Bedrock I is in the early stages of discovery process. Discovery is set to close on January 10, 2011, and trial is set for April 11, 2011. The parties have only just begun to produce documents in the litigation and have engaged in limited discovery. No depositions have been taken at this point in time and only one deposition has been noticed by Bedrock for one of its owners. The claim construction hearing is currently scheduled for October 2010. The Court previously consolidated the Bedrock I and II matters for the purpose of claim construction such that Red Hat's intervention will have no bearing on the claim construction schedule. In addition, Red Hat remains willing to comply with the Bedrock I deadlines post-claim construction hearing. As a result, the Bedrock I deadlines in the Docket Control Order will remain the same. Red Hat's motion to intervene will have no impact on the schedule or Bedrock's ability to prosecute its case.

By contrast, Red Hat will be severely prejudiced if it is not permitted to intervene in Bedrock I. Bedrock's infringement allegations are directed at the Linux kernel which is the foundation of Red Hat's RHEL product that Red Hat distributes to its customers, including Amazon.com and Softlayer, who are Bedrock I Defendants. Red Hat is uniquely motivated to

[14] *Ross*, 426 F.3d at 754 (quoting *Sierra Club*, 18 F.3d at 1205 (internal quotation marks omitted)).
[15] *See Nikon Corp. v. ASM Lithography B.V.*, 222 FRD 647, 649–50 (N.D. Cal. 2004) (allowing a manufacturer to intervene during discovery but before filing of dispositive motions).

secure the full development of accurate facts related to RHEL. Bedrock's infringement allegations implicate Red Hat's RHEL product, as well as its current and potential customers. An adverse finding of infringement may impact Red Hat and any current and potential customers and set an unfavorable precedent. Accordingly, Red Hat must be permitted to intervene now to defend RHEL and to eliminate any uncertainty caused by Bedrock I and any other threatened litigation.

Finally, Red Hat is unaware of any unusual circumstances militating for or against the motion to intervene. To the contrary, the manufacturer/customer relationship is the quintessential scenario in which motions to intervene are granted.[16]

The simple fact is that Bedrock itself has created a cloud of uncertainty over the Linux kernel harming Red Hat's business and will continue to target Red Hat's customers until Red Hat has the ability to exonerate RHEL. Accordingly, Red Hat's motion is timely.

B. Red Hat Has a Strong Interest in the Property and Transaction of this Lawsuit.

"[I]ntervention still requires a direct, substantial, legally protectable interest in the proceedings."[17] Red Hat has such an interest in Bedrock I because Red Hat's operating system platform is RHEL and the accused Linux kernel is the foundation of RHEL. Since Red Hat's business is RHEL, Red Hat has a direct, substantial, and legally protectable interest in this case.

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[16] *See, e.g., Tivo, Inc. v. AT&T, Inc.*, No. 2:09-CV-259, at 8–9 (E.D. Tex. March 31, 2010) (granting Microsoft's motion to intervene where Microsoft's product was a component of customer-defendant AT&T's accused product); *Reid v. General Motors Corp.*, 240 F.R.D. 257, 258–60 (E.D. Tex. 2006) (granting manufacturer's motion to intervene in case where its customers were accused of patent infringement); *Honeywell Int'l Inc. v. Audiovox Comm. Corp.*, 2005 WL 2465898 at *4 (D.Del. May 18, 2005) (granting third party manufacturer Seiko Epson's motion to intervene where customers multiple customers of the manufacturer were sued for patent infringement.); *see also Int'l Bus. Machs. Corp. v. Conner Peripherals, Inc.*, Nos. C-93-20117, C-93-20829, 1994 WL 706208, at *5 (N.D. Cal. Dec. 13, 1994) (granting manufacturer's request for intervention where customer used manufacturer's components in its products accused of patent infringement and demanded indemnification from manufacturer).

[17] *Ozee v. Am. Council on Gift Annuities, Inc.*, 110 F.3d 1082, 1096 (5th Cir. 1997), *vacated and remanded*, 522 U.S. 1011, *proceedings after remand* 142 F.3d 937 (1998) (reversing order denying motion to intervene); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970).

In Bedrock I, Bedrock's infringement allegations are directed at the Linux kernel which is an integral part of RHEL as provided by Red Hat. Red Hat participates in the open source community by participating in the development of the Linux kernel that is integrated into RHEL.[18] Red Hat unquestionably has interest in defending the technology that it helps to develop. When faced with similar circumstances, courts have routinely allowed intervention by the manufacturer.[19] Furthermore, Bedrock recently added fourteen new defendants who allegedly use the Linux kernel to Bedrock II. Since Red Hat has every indication that Bedrock will continue to assert the '120 patent against users of the Linux kernel, and correspondingly Red Hat's current and potential customers, Red Hat has an interest in resolving any uncertainty as to RHEL in Bedrock I.

C. Red Hat's Ability to Protect its Interests Will Be Impaired If It Cannot Intervene.

Red Hat cannot adequately defend RHEL or its current and potential customers if it is not permitted to intervene in Bedrock I. As a key developer and distributor of the Linux kernel, Red Hat personnel are critical to the case and their testimony regarding development and operation of the Linux kernel, including the route.c code, is irreplaceable. Without intervention, Red Hat will be relegated to the sidelines and may be subjected to any adverse ruling flowing from Bedrock I. "The stare decisis effect of an adverse judgment constitutes a sufficient impairment to compel

[18] *See* GREG KROAH-HARTMAN ET AL., LINUX KERNEL DEVELOPMENT 1–3, 10–12 (2009), *available at* http://www.linuxfoundation.org/publications/whowriteslinux.pdf (noting that Red Hat "maintains its commanding lead" and providing data demonstrating Red Hat's contribution level to be approximately 12% of the total changes in the Linux kernel releases from March, 2005, to June, 2009).

[19] *See, e.g.*, *Tivo*, at 8–9 (granting Microsoft's motion to intervene where Microsoft's product was a component of customer-defendant AT&T's accused product); *Reid*, 240 F.R.D. at 258–60 (granting manufacturer's motion to intervene in case where its customers were accused of patent infringement); *Honeywell*, 2005 WL 2465898, at *4 (granting third party manufacturer Seiko Epson's motion to intervene where customers multiple customers of the manufacturer were sued for patent infringement.); *see also Int'l Bus. Machs.*, 1994 WL 706208, at *5 (granting manufacturer's request for intervention where customer used manufacturer's components in its products accused of patent infringement and demanded indemnification from manufacturer).

intervention."[20] "[I]t 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."[21] If permitted to intervene, Red Hat will best be able to protect its interests and to use the Court's resources efficiently.

D. The Bedrock I Defendants Do Not Adequately Represent Red Hat's Interests.

Red Hat should be allowed to intervene because the Bedrock I Defendants do not adequately represent its interests. A potential intervenor "has only a minimum burden as to inadequate representation."[22] "All he needs to show is that the representation by the existing parties **may be** inadequate."[23] The burden is "minimal."[24]

Red Hat's interests in this case are broader than the Bedrock I Defendants. Specifically, Red Hat is a provider of open source software solutions, including RHEL, to its customers. Red Hat also participates in the development of the Linux kernel which is the foundation of RHEL. Since Red Hat is in the business of providing RHEL, Red Hat has a genuinely broad interest in protecting RHEL for use by its current and potential customers. By contrast, the Bedrock I Defendants are not providers of or developers of open source software solutions, the Linux kernel or RHEL. As a result, they do not share Red Hat's broad interest in protecting RHEL. Expecting the Bedrock I Defendants to protect Red Hat's interests is akin to expecting the car driver to protect the car manufacturer's interests. Only Red Hat can protect its interests vigorously and thoroughly, given its depth of knowledge and experience with RHEL, and its

[20] *Heaton*, 297 F.3d at 424.
[21] *Codex Corp. v. Milgo Elec. Corp.*, 553 F.2d 735, 738 (1st Cir. 1977).
[22] *Heaton*, 297 F.3d at 425.
[23] *Id.* (emphasis added).
[24] *Sierra Club*, 18 F.3d at 1207.

access to the information critical to the development and function of RHEL and the Linux kernel. Accordingly, Red Hat must intervene to protect its own interests directly.

II. ALTERNATIVELY, RED HAT SHOULD BE ALLOWED TO INTERVENE PERMISSIVELY UNDER RULE 24(b).

To the extent that the Court does not find intervention as a matter of right, Red Hat seeks to intervene by permission under Rule 24(b) of the Federal Rules of Civil Procedure. On a request for permissive intervention, the intervenor must show that it "has a claim or defense that shares with the main action a common question of law or fact."[25] "In acting on a request for permissive intervention, it is proper to consider, among other things, whether the intervenors' interests are adequately represented by other parties and whether they will significantly contribute to full development of the underlying factual issues in the suit."[26] However, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[27]

Courts in this district have routinely permitted manufacturers to intervene permissively in suits brought against customers. For example, in *Reid v. General Motors Corp.*, Microsoft sought to intervene – both as of right and permissively – as a defendant claiming that the plaintiffs had "essentially accused its product of infringement and brought suit against its customer."[28] The court found that "Microsoft's claims of invalidity and unenforceability raise the same questions of law and fact as similar claims by Defendants because they are all asserted

[25] Fed. R. Civ. P. 24(b)(1)(B); *Stallworth*, 558 F.2d at 269.
[26] *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (citing *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 11326, 1329 (9th Cir. 1977) (internal quotation marks omitted).
[27] Fed. R. Civ. P. 24(b)(3).
[28] 240 F.R.D. at 258–60.

against the [] patent."[29] The court, having also found no undue delay or prejudice, granted permissive intervention under Rule 24(b).[30]

Recently in *Tivo, Inc. v. AT&T, Inc.*, the court permitted Microsoft to intervene permissively.[31] Since Microsoft's software was used in the AT&T system accused of infringement, the court found that Microsoft's defenses and the pending case shared common questions of law and fact.[32] The court further noted that "Microsoft's proposed complaint-in-intervention seeks declaratory judgments of non-infringement and invalidity of the three patents-in-suit, which raises the same factual and legal questions as the patents-in-suit already before the Court."[33]

It is undisputable that there are a number of common questions of law and fact sufficient to permit Red Hat to intervene permissively. As discussed above, Bedrock served essentially identical infringement contentions on Red Hat and on the Bedrock I Defendants, confirming the common questions of law and fact related to non-infringement. The common factual and legal issues also include: (1) design and functionality of the route.c code within the Linux kernel; (2) construction of the disputed terms in the '120 patent; and (3) the invalidity of the '120 patent.

Finally, Red Hat has not engaged in any undue delay and will not prejudice Bedrock or the Bedrock I Defendants by intervening. To the contrary, Bedrock I is in the early stages of discovery, and Red Hat will follow the deadlines in the Bedrock I Docket Control Order. Including Red Hat in Bedrock I as a party will facilitate discovery and the presentation of the case. Accordingly, Red Hat should be permitted to intervene permissively.

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[29] *Id.* at 260.
[30] *Id.*
[31] *Tivo*, at 8–9.
[32] *Id.* at 7.
[33] *Id.*

CONCLUSION

For the reason stated herein, Red Hat should be allowed to intervene as of right or, in the alternative, by permission of the Court.

Dated: June 1, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically on June 1, 2010 in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ E. Danielle T. Williams
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CERTIFICATE OF CONFERENCE PURSUANT TO LOCAL COURT RULE CV-7(h)

Pursuant to Local Court Rule CV-7(h), Thad Heartfield and Danielle Williams, counsel for Red Hat, met and conferred with Ted Stevenson and Austin Curry, counsel for Bedrock, by way of teleconference on June 1, 2010. Red Hat understands that Bedrock is opposed to the relief sought by this motion. Consequently, Red Hat and Bedrock are at an impasse, leaving an open issue for the court to resolve. The Bedrock I Defendants, however, do not oppose this motion.

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