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 REPLY IN SUPPORT OF ITS MOTION TO INTERVENE

Permitting Red Hat to intervene as a matter of right or by permission of the Court provides the most fair and efficient resolution of Bedrock's patent infringement claims against Red Hat's distribution of the Linux kernel ("RHEL"). As the schedule currently stands for Bedrock II, which includes Red Hat, the Markman hearing and trial occur six months after those events in Bedrock I.[1] Without intervening, Red Hat cannot protect its RHEL products or its RHEL customers. Intervening will focus the litigation on the true merits of Bedrock's patent infringement suit without delaying the litigation or prejudicing any of the Bedrock I parties. Indeed, Bedrock does not contend that it (or any defendant in Bedrock I) is prejudiced by any delay in the filing of the present motion or by any delay or complication to the Bedrock I schedule. Bedrock instead contends that: (1) Red Hat's participation in the Bedrock II litigation is sufficient and the Court should not maintain two actions with Red Hat; and (2) filing the motion to intervene six months after the filing of the declaratory judgment action is per se untimely. Both arguments are unavailing, and Red Hat should be permitted to intervene.

I. The Pending Action for Declaratory Judgment Does Not Preclude or Undermine Red Hat's Intervening Into Bedrock I.

Red Hat is not playing procedural games with its Motion to Intervene, as Bedrock contends. Red Hat simply wants to be in a position to defend itself, its RHEL products and its RHEL customers (current and prospective) against Bedrock's unfounded patent infringement claims. Red Hat will certainly seek to dismiss its claims in Bedrock II on intervention into Bedrock I.

Moreover, Red Hat's filing the declaratory judgment action first does not preclude its intervening into Bedrock I. Courts do not require a movant to dismiss a pending declaratory

[1] See Dkt. No. 166 (amending the Docket Control order in the Bedrock II litigation to set the Markman hearing for March 10, 2011 and trial for October 11, 2011.

judgment action prior to filing a motion to intervene, and Bedrock has not cited any authority to the contrary.[2] Bedrock relies on *iWork Software, LLC, v. Corporate Exp., Inc.*, which is clearly distinguishable from the present situation.[3] In that case, the party seeking to intervene did not have a common interest with the customer-defendants since the accused instrumentality was customized software, not the original software provided by the intervenor.[4] By contrast, in this case Bedrock has accused certain versions of the Linux kernel, including versions used by RHEL, and not merely defendants' modifications to the Linux kernel.

Beam Laser Systems, Inc., v. Cox Communications, Inc. is more applicable to this case.[5] In *Beam Laser*, third-party manufacturer SeaChange first filed a declaratory action seeking a declaration of invalidity and/or non-infringement of the asserted patents and subsequently filed a motion to intervene. After the motion to intervene was granted, SeaChange voluntarily dismissed the declaratory action.[6] Similarly, Red Hat may properly seek intervention prior to filing for dismissal of the declaratory action in Bedrock II.

Finally, the Fifth Circuit has made clear that "the stare decisis effect of an adverse judgment constitutes a sufficient impairment to compel intervention."[7] Under the current docket control orders, Red Hat will follow six months behind the Bedrock I defendants, and as a result, the declaratory action fails to alleviate the effect of an adverse judgment. Despite Bedrock's assertions to the contrary, Red Hat will not "have the full opportunity to present its case" and exonerate its products if it is not permitted to intervene. Red Hat is uniquely motivated to secure

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[2] *See Golden Valley Microwave Foods, Inc., v. Weaver Popcorn Co. Inc.*, 130 F.R.D. 92, 94 (N.D. Ind. 1990) (noting that two parties had previously filed a declaratory action in California and once leave was granted to intervene, the parties dismissed the declaratory action).
[3] *iWork Software, LLC v. Corporate Exp., Inc.*, No. 02-cv-6355, 2003 WL 22494851 (N.D. Ill. 2003).
[4] *Id.* at *3.
[5] *Beam Laser Systems, Inc., v. Cox Communications, Inc.*, 144 F.Supp.2d 464 (E.D. Va. 2001).
[6] *Id.* at 467.
[7] *Heaton v. Monogram Credit Card Bank*, 297 F.3d 416, 424 (5th Cir. 2002); *Sierra Club v. Glickman*, 82 F.3d 106, 109-10 (5th Cir. 1996).

the full development of accurate facts related to RHEL, since 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. Red Hat has a direct, substantial, and legally protectable interest in the Bedrock I litigation and should be permitted to directly defend its interest in Bedrock I.

II. Red Hat's Motion to Intervene is Timely.

Under the facts and circumstances of this case, Red Hat's motion 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.[8] "[A]lthough these factors give structure to [the] timeliness analysis, [the Fifth Circuit has] explicitly observed that the timeliness analysis remains contextual, and should not be used 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."[9]

The timeliness determination is heavily concerned with prejudice to the original parties and is not a tool to punish any perceived delay. Notably, Bedrock does not and cannot contend that either Bedrock or the Bedrock I defendants will be prejudiced by Red Hat's intervention. The Bedrock I defendants are not opposed to the motion. Bedrock I is still in the early stages of discovery, and Red Hat has participated in the initial claim construction disclosures with the

[8] *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996); *Heaton*, 297 F.3d at 422–23; *Stallworth v. Monsanto Co.*, 558 F2.d 257, 263–66 (5th Cir. 1977).
[9] *Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005) (quoting *Sierra Club*, 18 F.3d at 1205 (internal quotation marks omitted)).

Bedrock I parties under Local Rule 4. This Motion to Intervene will not delay the Bedrock I litigation or prejudice any of the parties involved, accordingly, the motion is timely.

CONCLUSION

For the reason stated herein, Red Hat respectfully requests that the Court grant its motion to intervene.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically on July 9, 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).

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