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

BEDROCK COMPUTER TECHNOLOGIES LLC,	§	
	§	
Plaintiff,	§	
	§	**CASE NO. 6:09-cv-269-LED**
v.	§	
	§	**Jury Trial Demanded**
SOFTLAYER TECHNOLOGIES, INC., et al.	§	
	§	
Defendants.	§	

BEDROCK'S SUR-REPLY IN OPPOSITION TO
RED HAT'S MOTION TO INTERVENE

A. This Case Is Not About Red Hat.

Red Hat tries to leave an impression that its participation in this case is needed and that the issue of infringement revolves around its product, RHEL. This case is not about Red Hat, nor is it about RHEL. The Accused Instrumentality in this case is computer equipment running software based on certain versions of Linux, and Red Hat did not create Linux. Red Hat has not shown that it has any particular interest or any particular knowledge in the portion of the Linux kernel that is at the heart of infringing Bedrock's patent. Further, Red Hat has not shown that its customizations to Linux, as embodied in RHEL, impact Bedrock's infringement contentions in any way. Simply put, Red Hat is not needed as a party in this case.

B. Red Hat's Motion Is Procedurally Flawed.

Although Red Hat promises that it will seek to dismiss its DJ action if it succeeds in its motion to intervene, it has made no such motion. As such, if the Court were to allow Red Hat's intervention, Red Hat would have two duplicative actions against Bedrock. This is impermissible in the Fifth Circuit. *See Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985). Red Hat's reliance on *Beam Laser Systems, Inc., v. Cox Communications, Inc.*, 144 F.Supp.2d 464 (E.D. Va. 2001) is misguided. The intervenor in *Beam Laser* voluntarily dismissed its declaratory judgment action by filing a notice of voluntary dismissal, which is permitted by FED. R. CIV. P. 41(a)(1)(A)(i) only "before the opposing party serves either an answer or a motion for summary judgment[.]" *See Beam Laser*, 771 F.2d at 467.

Here, Bedrock has already answered Red Hat's DJ complaint, and as a result, Red Hat can only dismiss its complaint by an order from the Court under Rule 41(a)(2), which requires the plaintiff to request dismissal. *See* FED. R. CIV. P. 41(a)(2). Bedrock pointed out this procedural deficiency in its response to Red Hat's motion, yet Red Hat still has made no such request. Taking *Oliney* and Rule 41 together, Red Hat cannot simply rely on a promise to

dismiss its DJ action pending favorable resolution of its motion to intervene because Bedrock has answered Red Hat's DJ complaint. Rather, Rule 41 and *Oliney* require commitment—a commitment that Red Hat has refused to make. In this way, not only is Red Hat's motion procedurally flawed, Red Hat's unwillingness to commit fully to its motion to intervene also undercuts Red Hat's claimed need for intervention.

C. Red Hat's Interests Are Vested in Its Declaratory Judgment Action, and Stare Decisis Poses Little Threat to Red Hat.

Red Hat's opening brief in support of its motion to intervene left open many questions:

(1) Why did Red Hat choose to file a DJ action against Bedrock rather than intervene in this case?

(2) Why did Red Hat wait six months to move to intervene?

(3) If Red Hat's six month delay is "timely" under Rule 24, why is six months too long for Red Hat to wait to try its case?

(4) Does Red Hat have any special knowledge or evidence concerning this litigation?

(5) Did the engineers at Red Hat have anything to do with the development of the Linux code that is at the heart of the accused infringement?

Red Hat completely ignores these questions in its reply brief. Instead, Red Hat claims that it needs to intervene, notwithstanding its declaratory judgment action, because of stare decisis. *See* Rep. at 2-3. Red Hat, however, does not point to any potential ruling that will impair its interests, and it is unlikely that any rulings stemming from this litigation *could* impair Red Hat's interests. Bedrock has alleged that the defendants directly infringe the claims of its patent. Bedrock's allegations do not require the amalgamation of various common law doctrines or a new interpretation of any statute. Nor does this case present any radically unique set of facts. This is in stark contrast to the complex allegations and facts at issue in *Heaton v.*

Monogram Credit Card Bank, 297 F.3d 416 (5th Cir. 2002) and *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996). Simply put, this case does not contemplate any novel questions of patent law, and stare decisis poses very little threat, if any, to Red Hat and its customers.

D. Bedrock Would Be Prejudiced By Red Hat's Intervention.

Red Hat points to its own willingness to meet the deadlines of the Docket Control Order to show that Bedrock is not prejudiced, but this is beside the point. The defendants in this litigation generate revenue in conjunction with their use of Linux; Red Hat, on the other hand, generates revenue by selling "subscriptions" to RHEL. Thus, Red Hat and the defendants exploit the patent in different ways. Red Hat's intervention would therefore burden Bedrock at trial as Bedrock would frequently need to account for Red Hat as an outlier in presenting its case.

E. Red Hat's Motion to Intervene Should Be Denied.

For the reasons stated in this sur-reply and the reasons stated in Bedrock's response, Bedrock respectfully requests that the Court deny Red Hat's motion to intervene.

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Respectfully submitted,
McKOOL SMITH, P.C.

/s/ *Douglas A. Cawley*

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing document were filed via CM/ECF, and were thereby made available to all counsel of record.

/s/ J. Austin Curry
J. Austin Curry