

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

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

CAVIUM, INC.'S REPLY IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

Proposed Intervenor Cavium, Inc. (“Cavium”) respectfully submits this Reply in support of its Motion to Intervene [Dkt. 109]. Alacritech, Inc.’s (“Alacritech”) Response admits that Cavium should be permitted to intervene. [Dkt. 113] Faced with the same facts that formed the basis for Intel’s successful motion to intervene (as Cavium had advised), Alacritech’s initial reluctance to consent to the motion is difficult to explain. [Dkt. 71, 84] Alacritech now improperly asks the Court to issue an order preventing Cavium from seeking future relief that would disturb any prior order and compelling production of discovery -- without ever bringing a motion. [Dkt. 113-8] Alacritech attempted a similar tactic in its response to Intel’s motion to intervene [Dkt. 82] and the Court declined to impose any conditions upon Intel’s intervention. [Dkt. 84] Cavium, like Intel, is entitled to intervene in the action without conditions.

II. ARGUMENT

Alacritech’s attempt to impose conditions on Cavium’s intervention is improper for multiple reasons. First, Alacritech’s requested relief asks the Court to ignore Due Process, the Federal Rules of Civil Procedure, the Civil Local Rules and the Court’s own orders concerning motion practice, case management and discovery. Moreover, the conditions requested are not supported by Federal Rule of Civil Procedure 24 and the case law interpreting Rule 24. Finally, even if Alacritech’s requested conditions were authorized by law, the facts of this case simply do not warrant imposition of such conditions.

A. Alacritech’s Requested Order Is Improper

Cavium is entitled as of right to participate as an intervening party in this action pursuant to Rule 24(a). Alacritech cites to a treatise discussing the propriety of granting Rule 24(b) *permissive* intervention subject to certain conditions or limitations. [Dkt. 113, pp. 3-4]

However, Alacritech can cite to no case authorizing the conditions it seeks to impose on Cavium in the circumstances of this action, regardless of whether intervention is granted pursuant to Rule 24(a) or (b). Cavium should have the same rights as any other party to seek relief for good cause from any prior order of the Court. Alacritech's attempt to prevent a future request for modification is particularly troubling in light of Alacritech's own recent expansion of the scope of accused products and failure to provide meaningful infringement contentions as to many products identified in the Complaint.

Alacritech's attempt to obtain an order compelling discovery – without ever having filed a motion and without having met and conferred, is unprecedented in any context. Putting aside that the non-party subpoena issued to Cavium in the Northern District of California now is moot, for any discovery dispute Alacritech must follow the Court's procedures to meet and confer to attempt to narrow the issues and file a properly-noticed motion to compel addressing Cavium's objections to the discovery requests at issue. *See, e.g.*, Dkt. 45-1 at 9(c) and Local Rule CV-7. Alacritech asks the Court, by its response and proposed order, to effectively grant a motion to compel discovery that Alacritech has yet to bring, on discovery that is not before the Court.

B. Cavium Is Entitled To Intervene As Of Right And Without Conditions

Alacritech concedes that Cavium should join this action at least as a permissive intervenor, and fails to refute that Cavium is entitled to intervene as of right under Rule 24(a), as set forth in Cavium's Motion. [Dkt. 109] Four factors must be considered to determine the right to intervene pursuant to Rule 24(a): the timeliness of the request; the potential intervenor's interest relating to the property or transaction that is the subject of the action¹; the possibility of

¹ Cavium's interest as a supplier to a defendant 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).

impairment to the potential intervenor's ability to protect its interest absent intervention; and the adequacy of the representation of the potential intervenor's interest by existing parties. *See Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). Alacritech addresses only one of these factors, timeliness, which it erroneously evaluates in isolation from the other factors and the factual context of this action.

1. Cavium's Motion Is Timely Under The Circumstances Of The Action

Cavium's motion to intervene is timely. No substantive proceedings have yet been conducted in this action. Whether the case schedule should be adjusted in this action is dependent on many factors that are not driven by Cavium. For example, Alacritech's recent expansion of the scope of the action with respect to the accused products of other parties; Alacritech's failure thus far to provide meaningful infringement contentions as to the accused QLogic products; and whether Alacritech will further expand the products accused in the action.

In addition to the fact that the action still is in an early stage, the timing of Cavium's intervention is entirely reasonable under the circumstances. About a month after the lawsuit was filed, Dell sought indemnification from QLogic Corporation ("QLogic") based on Alacritech's identification of QLogic products in the complaint. Several weeks later, on August 16, QLogic was acquired by Cavium. In the midst of an acquisition, the Dell letter was one of many tasks on the plates of the QLogic and Cavium legal teams. The decision to become a party to a patent lawsuit is not made lightly by any organization, and becomes even more complex for the decision-makers of a newly-combined corporation.

Intel's intervention in this action was not completed until November, and Alacritech's infringement contentions also did not become accessible to non-parties until November. In addition, Alacritech denied Cavium's counsel access for months to a license agreement that may

provide a complete defense as to QLogic products, on the basis that Cavium is not a party and the license is marked “Highly Confidential” under the Protective Order. In December, Alacritech sent Cavium a broad subpoena, further increasing Cavium’s involvement in the action. As explained in Cavium’s motion, the relevant Cavium decision-makers were largely unavailable during the holidays, and promptly after the holidays Cavium moved to intervene.

2. Cavium’s Motion Is Timely According To Applicable Law

As explained in Cavium’s Motion, “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.” *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). Courts have found intervention timely in a wide range of circumstances, absent some specific “but for” prejudicial result to the existing parties due to later, rather than earlier, intervention. *See Ross v. Marshall*, 426 F.3d 745, 756 (5th Cir. 2005). Here, Alacritech has not articulated (and cannot articulate) any prejudice it will suffer by virtue of Cavium intervening in January as opposed to a few months earlier.

Alacritech’s Response cites two decisions denying post-judgment intervention for the proposition that Cavium’s motion is untimely. Neither case is applicable here. In *Corley v. Jackson Police Department*, a group of police officers sought to intervene in a discrimination action after a consent decree was entered. *Corley*, 755 F.2d 1207, 1208 (1985). Intervention was denied based on both unreasonable delay and prejudice to existing parties where the movants should have known of the suit by 1973, a consent decree was entered in 1974, and the movants sought to intervene in 1978. *Id.* at 1210. In *Staley v. Harris County*, the Southern District of Texas denied a motion to intervene based on three of the four factors to be considered, finding the motion untimely, that the movant’s substantive rights were not adversely affected by

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