

TRANSCRIPT OF TELEPHONIC HEARING - 10/02/2018

1 UNITED STATES PATENT AND TRADEMARK OFFICE  
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD

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6 INTEL CORP., and CAVIUM, INC. ) Case IPR2018-00226  
Petitioners, ) Patent No. 7,124,205 B2  
7 vs. ) Case IPR2018-00234  
ALACRITECH, INC., ) Patent No. 8,805,948 B2  
8 Patent Owner. )

9 - - - - - )

9 CAVIUM, INC., ) Case IPR2018-00401  
Petitioner, ) Patent No. 7,945,699

10 vs. )

11 ALACRITECH, INC., )

11 Patent Owner. )

12 - - - - - )

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15 TRANSCRIPT OF TELEPHONIC HEARING  
16 BEFORE CHARLES J. BOUDREAU AND STEPHEN C. SIU,  
17 ADMINISTRATIVE PATENT JUDGES

18 TUESDAY, OCTOBER 2, 2018

19 12:00 P.M.

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23 Reported by:

24 TERI J. NELSON

25 CSR NO. 7682, RPR

<p style="text-align: right;">Page 2</p> <p>1 Reporter's Transcript of Telephonic Hearing,                  2 Tuesday, October 2, 2018, 12:00 P.M., before                  3 Charles J. Boudreau and Stephen C. Siu, Administrative                  4 Patent Judges, before Teri J. Nelson, CSR No. 7682, RPR.                  5                  6 APPEARANCES (All Telephonic):                  7                  8 ADMINISTRATIVE PATENT JUDGES:                  9 JUDGE CHARLES J. BOUDREAU                  10 JUDGE STEPHEN C. SIU                  11                  12 FOR PETITIONER INTEL CORPORATION:                  13 WEIL, GOTSHAL &amp; MANGES LLP                  14 BY: GARLAND T. STEPHENS, ESQ.                  15 MELISSA HOTZE, ESQ.                  16 700 Louisiana                  17 Suite 1700                  18 Houston, Texas 77002-2784                  19 713-546-5000                  20 garland.stephens@weil.com                  21 melissa.hotze@weil.com                  22                  23                  24                  25</p>	<p style="text-align: right;">Page 4</p> <p>1 APPEARANCES (All Telephonic)(Continued):                  2                  3 FOR PETITIONER CAVIUM, INC. (Continued):                  4 RIMON, P.C.                  5 BY: KARINEH KHACHATOURIAN, ESQ.                  6 DAVID XUE, ESQ.                  7 800 Oak Grove Avenue                  8 Suite 250                  9 Menlo Park, California 94025                  10 650-461-4433                  11 karinehk@rimonlaw.com                  12 david.xue@rimonlaw.com                  13                  14 FOR PATENT OWNER ALACRITECH, INC.:                  15 QUINN EMANUEL URQUHART &amp; SULLIVAN, LLP                  16 BY: JAMES M. GLASS, ESQ.                  17 51 Madison Avenue                  18 22nd Floor                  19 New York, New York 10010                  20 212-849-7000                  21 jimglass@quinnemanuel.com                  22                  23                  24                  25</p>
<p style="text-align: right;">Page 3</p> <p>1 APPEARANCES (All Telephonic)(Continued):                  2                  3 FOR PETITIONER INTEL CORPORATION (Continued):                  4 WEIL, GOTSHAL &amp; MANGES LLP                  5 BY: ANNE M. CAPPELLA, ESQ.                  6 201 Redwood Shores Parkway                  7 Redwood Shores, California 94065                  8 650-802-3141                  9 anne.cappella@weil.com                  10                  11 FOR PETITIONER CAVIUM, INC.:                  12 DUANE MORRIS LLP                  13 BY: PATRICK D. McPHERSON, ESQ.                  14 505 9th Street, N.W.                  15 Suite 1000                  16 Washington, DC 20004-2166                  17 202-776-7800                  18 pdmcperson@duanemorris.com                  19                  20                  21                  22                  23                  24                  25</p>	<p style="text-align: right;">Page 5</p> <p>1 APPEARANCES (All Telephonic)(Continued):                  2                  3 FOR PATENT OWNER ALACRITECH, INC. (Continued):                  4 QUINN EMANUEL URQUHART &amp; SULLIVAN, LLP                  5 BY: JOSEPH M. PAUNOVICH, ESQ.                  6 865 South Figueroa Street                  7 Tenth Floor                  8 Los Angeles, California 90017                  9 213-443-3000                  10 joepaunovich@quinnemanuel.com                  11 -and-                  12 QUINN EMANUEL URQUHART &amp; SULLIVAN, LLP                  13 BY: SEAN LI, ESQ.                  14 50 California Street                  15 22nd Floor                  16 San Francisco, California 94111                  17 415-875-6600                  18 seanli@quinnemanuel.com                  19                  20                  21                  22                  23                  24                  25</p>

<p style="text-align: right;">Page 6</p> <p>1 TUESDAY, OCTOBER 2, 2018</p> <p>2 12:00 P.M.</p> <p>3</p> <p>4 JUDGE BOUDREAU: Hi.</p> <p>5 This is Judge Boudreau.</p> <p>6 I'm on the line with Judge Siu.</p> <p>7 This is the call in cases IPR 2018-00226, 234</p> <p>8 and 401.</p> <p>9 Are counsel for Intel, Cavium and Alacritech on</p> <p>10 the line?</p> <p>11 MR. STEPHENS: Counsel for Intel is here,</p> <p>12 Your Honor, Garland Stephens of Weil, Gotshal &amp; Manges</p> <p>13 representing Intel.</p> <p>14 Also, my colleague Melissa Hotze is on the line,</p> <p>15 and I believe my colleague Anne Cappella may be on the</p> <p>16 line as well.</p> <p>17 JUDGE BOUDREAU: Thank you.</p> <p>18 MR. McPHERSON: And Your Honor, this is Pat</p> <p>19 McPherson, counsel for Cavium.</p> <p>20 I have Karineh Khachatourian and David Xue on</p> <p>21 the line as well.</p> <p>22 JUDGE BOUDREAU: Thank you.</p> <p>23 And do we have counsel for Alacritech?</p> <p>24 MR. GLASS: Yes, Your Honor.</p> <p>25 This is Jim Glass, counsel for Alacritech.</p>	<p style="text-align: right;">Page 8</p> <p>1 We are seeking additional discovery in the three</p> <p>2 pending proceedings, 2018-226, 234 and 401.</p> <p>3 Specifically we're seeking documents</p> <p>4 memorializing the -- the nature and scope of the privity</p> <p>5 and proxy status as well as the rights and obligations</p> <p>6 between the Petitioners who have identified themselves as</p> <p>7 the sole real parties in interest with respect to the</p> <p>8 other joining Petitioners.</p> <p>9 Just to be very clear at the -- at the start of</p> <p>10 this, this is -- this request is quite different from the</p> <p>11 request that was made in the co-pending earlier</p> <p>12 proceedings, whereas in the --</p> <p>13 JUDGE BOUDREAU: How so?</p> <p>14 MR. PAUNOVICH: Yes, Your Honor?</p> <p>15 JUDGE BOUDREAU: Oh.</p> <p>16 I just said how so?</p> <p>17 MR. PAUNOVICH: It is different because this</p> <p>18 is -- whereas the Board had exercised its discretion, as</p> <p>19 it had the right to do so in allowing an amendment of</p> <p>20 real parties in interest it -- in connection with those</p> <p>21 co-pending proceedings because the one-year time bar of</p> <p>22 315(a) -- (b) had not run, here, if the real party in</p> <p>23 interest, including Dell, Wistron and CenturyLink</p> <p>24 entities is the same, and we do contend that it is, there</p> <p>25 would be no reason for it to be any different, then the</p>
<p style="text-align: right;">Page 7</p> <p>1 With me on the phone today is Joe Paunovich and</p> <p>2 Sean Li.</p> <p>3 MR. PAUNOVICH: Good afternoon, Your Honor.</p> <p>4 JUDGE BOUDREAU: Thank you.</p> <p>5 And do any of the parties have a court reporter</p> <p>6 on the line?</p> <p>7 MR. STEPHENS: Your Honor, this is counsel for</p> <p>8 Intel, Garland Stephens.</p> <p>9 We arranged for a court reporter after</p> <p>10 Alacritech declined to do so.</p> <p>11 JUDGE BOUDREAU: All right. So we do have one,</p> <p>12 then?</p> <p>13 MR. STEPHENS: We do.</p> <p>14 JUDGE BOUDREAU: Okay. Thank you.</p> <p>15 And if I can just ask you to please file the</p> <p>16 transcript from the court reporter as soon as practical,</p> <p>17 we'd appreciate it.</p> <p>18 MR. STEPHENS: We will do that.</p> <p>19 JUDGE BOUDREAU: Thank you.</p> <p>20 So Patent Owner requested this call to request</p> <p>21 to file a motion for additional discovery, so I'll let</p> <p>22 Patent Owner go ahead and -- and speak now.</p> <p>23 MR. PAUNOVICH: Thank you, Your Honor.</p> <p>24 This is Joe Paunovich on behalf of Patent Owner</p> <p>25 Alacritech.</p>	<p style="text-align: right;">Page 9</p> <p>1 one-year statutory bar would apply, requiring a single</p> <p>2 and sole remedy, termination of these three proceedings.</p> <p>3 So it is a very different footing from the</p> <p>4 earlier proceedings in that the Board would -- would not</p> <p>5 have discretion in this instance if there -- if there are</p> <p>6 real parties in -- other real parties in interest,</p> <p>7 including Dell, Wistron and CenturyLink, to allow an</p> <p>8 amendment of RPIs based on either a joinder or otherwise.</p> <p>9 JUDGE BOUDREAU: What evidence does Patent Owner</p> <p>10 currently have of an arrangement or any kind of</p> <p>11 relationship between each of the Petitioners in these</p> <p>12 cases?</p> <p>13 MR. PAUNOVICH: Sure.</p> <p>14 First and foremost, this Board already found, in</p> <p>15 connection with our previous conference in the co-pending</p> <p>16 proceedings, this is at, as an example, Paper 71 of</p> <p>17 IPR2017-1405, that the existence of the indemnity</p> <p>18 agreement between, for example, Intel and Dell has</p> <p>19 been -- was readily admitted and made of record and that</p> <p>20 that was made of record as of the filing dates of the</p> <p>21 initial co-pending proceeding, so this dates back to May</p> <p>22 or June of last year, and the present petitions were</p> <p>23 filed in -- around about November, early December of</p> <p>24 2017, which would be more than a year from the filing</p> <p>25 date -- service date, excuse me, of the underlying</p>

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1 complaints against Dell, Wistron and CenturyLink.  
 2 So we have the Board finding, first and  
 3 foremost, and which flows from Intel's and Dell's  
 4 admission that those agreements were readily admitted and  
 5 made of record.  
 6 Those agree -- what we don't have are the actual  
 7 agreements spelling out the specifics, the nature and  
 8 scope of the relationship and the specific rights and  
 9 obligations that flow from those long-standing  
 10 relationships.  
 11 There's no question that those documents would  
 12 spell that out, and that was the basis for the additions  
 13 of Intel and Cavium's intervention in the underlying  
 14 District Court cases, whereas we have laid out in Patent  
 15 Owner's response to the instant proceedings, both Cavium  
 16 and Intel represented to the Court that they were  
 17 intervening to defend their clients' interests,  
 18 specifically Dell -- in the case of Intel, Dell, Wistron  
 19 and the CenturyLink entities.  
 20 So it's the combination of both the -- the  
 21 admission of these agreements existing, their  
 22 intervention in the underlying suit and this Board's  
 23 finding, express finding from the August 20th hearing  
 24 that is the -- the basis for the existence of these  
 25 long-standing agreements, which will prove that the

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1 instant petitions are time barred.  
 2 JUDGE BOUDREAU: And I just want to make sure  
 3 the record is clear.  
 4 Did you say that the Board previously found that  
 5 the existence of the indemnification agreement between  
 6 Dell and Intel demonstrates that Dell was a real party in  
 7 interest at the time that the -- at the time that Intel  
 8 filed its petition in the earlier cases?  
 9 I don't believe that accurately reflects the  
 10 record.  
 11 I believe that what we previously determined was  
 12 that the issue was moot in the earlier cases because Dell  
 13 was admittedly a real party in interest by virtue of its  
 14 filing of a petition with a motion for joinder, which was  
 15 granted.  
 16 MR. PAUNOVICH: That's correct, Your Honor.  
 17 And I -- I apologize if I misspoke.  
 18 I was not intending to do so.  
 19 The basis of your ruling that flowed from the  
 20 August 20th conference was, and I'm just reading from it:  
 21 "Petitioner Intel Corporation responded  
 22 in essence that there is nothing in the details  
 23 of any indemnification agreements that affect  
 24 these proceedings before the Board and that the  
 25 existence of the indemnification agreement

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1 between Intel Corp. and Dell, Inc. is readily  
 2 admitted and of record."  
 3 And the ultimate finding was that counsel for  
 4 Intel Corp. and Dell, Inc. acknowledged that Dell, Inc.  
 5 is a real party in interest in these proceedings at least  
 6 by virtue of Dell, Inc. joining as a party to these  
 7 proceedings.  
 8 That's the difference between those proceedings  
 9 and these, whereas in that set of co-pending proceedings  
 10 where the one-year bar would not have been exceeded, the  
 11 Board exercised its discretion, as we understood it, to  
 12 allow for an additional identification of RPIs.  
 13 And there was some disagreement, as the Board  
 14 may recall, at the September 13th hearing on those  
 15 matters, whereas, at least as Petitioner's counsel  
 16 recalls the -- the call, I believe it was Judge Boudreau  
 17 had questioned Intel and Dell's counsel about the timing  
 18 and existence of the indemnity agreement and whether or  
 19 not there would be -- they -- Dell, for example, would be  
 20 a real party in interest at the time of the initial  
 21 filings of the agreements -- I'm sorry, the petitions.  
 22 We do, of course, understand that the basis of  
 23 the Board's ruling in the co-pending proceedings was that  
 24 it was moot because of the joinders.  
 25 Here, in these instant proceedings, it cannot be

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1 mooted by a joinder because if they are real parties in  
 2 interest, then the one-year bar has been exceeded under  
 3 315(b), and the term -- the proceedings must be  
 4 terminated.  
 5 JUDGE BOUDREAU: All right. Thank you,  
 6 Mr. Paunovich.  
 7 We'll hear now from Petitioner's counsel.  
 8 MR. STEPHENS: Your Honor, this is Garland  
 9 Stephens representing Intel.  
 10 Before I address any of the merits that  
 11 Mr. Paunovich raised, I want to raise a procedural issue,  
 12 which is why now?  
 13 The Patent Owner filed their response to the  
 14 petition several weeks ago, the day after, in fact, they  
 15 asked for this conference.  
 16 This is not a new issue. They have known about  
 17 it for many weeks, as Your Honor knows, because we had a  
 18 phone call about this in the other IPRs, as Mr. Paunovich  
 19 talked about.  
 20 I don't see any demonstrated need for this  
 21 discovery 'cause they already put in 15 pages of briefing  
 22 in each of the responses to the three IPRs that this call  
 23 is about.  
 24 Why did they wait to now to raise all of this?  
 25 I think it should be denied -- the request for

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1 briefing should be denied on that basis alone.  
 2 We also disagree that indemnity alone can -- is  
 3 sufficient to raise any issue of RPI or a one-year bar,  
 4 so we don't think that the admitted existence of  
 5 indemnity agreements, which also, by the way, do not  
 6 necessarily establish indemnity for any of the  
 7 patents-in-suit here as opposed to some of the  
 8 patents-in-suit in the prior IPRs that we talked about,  
 9 that there is such an indemnity obligation, but even if  
 10 there were, we don't think that that is sufficient to  
 11 raise this one-year bar issue that Mr. Paunovich says.  
 12 But before any of that, we think the procedural  
 13 issue of this simply not being timely suggests that the  
 14 Board should deny it on that ground alone.  
 15 JUDGE BOUDREAU: Well, to the extent that RPI  
 16 issues are jurisdictional, is it possible for them to be  
 17 waived?  
 18 MR. STEPHENS: The discovery can certainly be  
 19 waived, Your Honor, and they've already made their  
 20 15 pages of arguments in each of the three responses that  
 21 have already been filed.  
 22 So the discovery -- the request to file a motion  
 23 for additional discovery is certainly within the Board's  
 24 discretion.  
 25 They've already presented the issue in their

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1 briefing, so you will be deciding the issue one way or  
 2 another.  
 3 This is about whether or not they will be  
 4 permitted to file a motion for discovery, which will then  
 5 be briefed, and presumably we'll have another call about  
 6 that after it's fully briefed.  
 7 To be clear, Your Honor, I think what  
 8 Mr. Paunovich has just admitted to shows that we were  
 9 correct when we said at the hearing on the other IPRs  
 10 that Intel and the other Petitioners never made any  
 11 admission that -- that indemnification alone would  
 12 cau- -- give rise to this one-year bar, and even if that  
 13 were an issue in the prior case, which it's not, it  
 14 certainly wouldn't.  
 15 What we -- what we agreed is that once somebody  
 16 is a party by virtue of having filed a motion to join and  
 17 then being joined, then they're a real party in interest  
 18 because they're a party, right, and all of these -- all  
 19 of the case law concerning real party in interest is  
 20 about people who are not parties, who are hidden real  
 21 parties in interest who give rise to potential estoppel  
 22 and one-year bar issues because even though they're not  
 23 parties, they are real parties in interest.  
 24 Here -- in the prior IPRs, the -- the issue that  
 25 the Board found and what we agreed with is that, you

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1 know, once they're an actual party, well, of course they  
 2 are also a real party in interest, but they're a party,  
 3 so all of the legal issues surrounding real party in  
 4 interest are irrelevant for that reason. They're an  
 5 actual party.  
 6 JUDGE BOUDREAU: Well, I think it's a fair  
 7 reading of what we entered in the earlier cases is that  
 8 we weren't really reaching a decision as to whether or  
 9 not the indemnification agreement would make either Dell  
 10 an RPI in Intel cases or whether Intel would be an RPI in  
 11 any case that Dell filed.  
 12 MR. STEPHENS: I don't disagree with that,  
 13 Your Honor.  
 14 I agree the issue was mooted, and you did not  
 15 have to reach that issue.  
 16 I think you don't have to reach the issue here  
 17 either simply because the -- the Patent Owner's already  
 18 fully briefed this and didn't even bother to seek  
 19 discovery until the day before they filed their  
 20 opposition, which includes 15 pages on the merits of this  
 21 issue.  
 22 JUDGE BOUDREAU: Mr. Paunovich, could you  
 23 respond to the timing issue there?  
 24 MR. PAUNOVICH: Yes.  
 25 Thank you, Your Honor.

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1 Number one, this is, in part, nec- --  
 2 necessitated by what we --  
 3 I frankly wish we had a transcript from the  
 4 August 20th hearing.  
 5 On September 13th, we were, frankly, very  
 6 surprised to hear the position taken by Petitioners at  
 7 the hearing.  
 8 Whereas we understood and heard very clearly the  
 9 representations made on the earlier hearing, on  
 10 September 13th, it was stated very differently, that all  
 11 that was admitted during that call was that -- the point  
 12 about the mooted of the issue relating to the joinders.  
 13 We expected and intended to rely on the -- the  
 14 representations made by counsel during the August 20th  
 15 hearing, and those circumstances changed.  
 16 The second point is that on September 7th, the  
 17 Federal Circuit issued the Worlds v. Bungie decision,  
 18 which dealt with a factual scenario that is nearly  
 19 identical to the one that we're dealing with here,  
 20 specifically in that case where Activision was a real  
 21 party in interest, an indemnity who had been sued, and  
 22 their one-year time bar had run, and later a petition was  
 23 filed, and ultimately, the Federal -- and -- and that  
 24 issue was overlooked by -- by that particular Board, not  
 25 found to be a sufficient failure to name an RPI and not a

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