2008-1511, -1512, -1513, -1514, -1595

IN THE

United States Court of Appeals for the Federal Circuit

THERASENSE, INC. (now known as Abbott Diabetes Care, Inc.) and ABBOTT LABORATORIES,

Plaintiffs-Appellants,

v.

BECTON, DICKINSON AND COMPANY, and NOVA BIOMEDICAL CORPORATION,

Defendants-Appellees,

and

BAYER HEALTHCARE LLC,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of California in Consolidated Case Nos. 04-CV-2123, 04-CV-3327, 04-CV-3732, and 05-CV-3117, Judge William H. Alsup

LAWRENCE S. POPE'S REPLY IN SUPPORT OF HIS MOTION FOR LEAVE TO INTERVENE ON APPEAL

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ARGUMENT

I. Mr. Pope Has A Substantial Interest In The Outcome Of This Appeal.

Appellees Becton, Dickinson and Company and Nova Biomedical Corporation (collectively, "BD/Nova") and Appellee Bayer Healthcare LLC ("Bayer") do not and cannot dispute the single most important basis for granting Mr. Pope leave to intervene: his substantial and direct personal and pecuniary interest in this appeal. The district court specifically found Mr. Pope "guilty of inequitable conduct," relying on erroneous findings about his conduct. *Therasense, Inc. v. Becton, Dickinson & Co.*, 565 F. Supp. 2d 1088, 1115 (N.D. Cal. 2008). Beyond simply concluding that inequitable conduct occurred, the district court targeted Mr. Pope for what amounts to a public reprimand.

This reprimand has done much to destroy Mr. Pope's previously unblemished professional reputation – painstakingly built through 35 years of hard work – as a skilled, respected patent attorney. (Motion ¶¶ 2-4, 12-15.) As a direct result of the court's findings, Mr. Pope must answer to professional disciplinary bodies, and legal publications have broadcast the court's faulty conclusions concerning his conduct. (*Id.* ¶¶ 13-15.) Given the direct and immediate impact of the district court's decision on his career and livelihood, Mr. Pope has exactly the kind of interest in this appeal that warrants intervention. (*Id.* ¶¶ 22-25.)

II. Mr. Pope Meets The Requirements For Leave To Intervene On Appeal.

Appellees' opposition to Mr. Pope's motion relies on a misapprehension of the law governing permissive intervention in this appeal. As a consequence, Appellees offer no legitimate reason to deny Mr. Pope's motion. ***First***, because Abbott Diabetes Care, Inc. and Abbott Laboratories (collectively, "Abbott") – the plaintiffs below – are prosecuting this appeal, Mr. Pope does *not* have to meet Article III standing requirements to intervene, nor must the district court's comments regarding his conduct be independently appealable, nor is a writ of mandamus his proper route. For the same reason, Appellees' reliance on *Nisus Corp. v. Perma-Chink Systems, Inc.*, 497 F.3d 1316 (Fed. Cir. 2007) is misplaced. (*See* BD/Nova Opp. at 8-10, 13; Bayer Opp at 3-6, 10.) ***Second***, Mr. Pope meets the requirements of permissive intervention because he asserts defenses involving questions of law or fact in common with Abbott's appeal, and his intervention will not unduly delay the proceedings or prejudice the original parties.

A. Mr. Pope Meets Permissive Intervention Requirements, Which Here Do Not Demand Standing Or A Separate Appealable Injury.

1. Mr. Pope Need Not Demonstrate Standing To Intervene In This Appeal.

Contrary to the three appellate court decisions BD/Nova cites (BD/Nova Opp. at 7-8), a proposed intervenor need not demonstrate standing to participate in an appeal already being prosecuted by a party with standing. In *Didrickson v. U.S. Dep't of the Interior*, the Ninth Circuit held that an intervenor must have

independent jurisdictional grounds and standing only "absent an appeal by the party on whose side the intervenor intervened." 982 F.2d 1332, 1337-38 (9th Cir. 1992). The Eleventh Circuit similarly has held that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (reversing denial of detainees' motion to intervene).

The Second, Fifth, Sixth, and Tenth Circuits agree. *See, e.g.*, *San Juan County, Utah v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("[P]arties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case . . . .") (quotation and citation omitted); *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) ("Article III does not require intervenors to possess standing" and reversing denial of motion to intervene); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (holding intervenor did not need standing where the plaintiff aligned with its interest had standing, but the intervenor needed standing to appeal on its own); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("The existence of a case or controversy having been established as between the [parties], there was no need to impose the standing requirement upon the proposed intervenor."); *cf.*

Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Ehlmann, 137 F.3d 573, 576-77 (8th Cir. 1998) (cited in BD/Nova Opp. at 7) (intervenor needed standing where losing party did not appeal district court's ruling). Moreover, this view is consistent with Supreme Court precedent: in *Diamond v. Charles*, the Court noted: "an intervenor's right to continue a suit *in the absence of the party on whose side intervention was permitted* is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." 476 U.S. 54, 68 (1986) (emphasis added).

Although this Court has not yet addressed the issue, in *Nisus* it recognized the critical distinction between (i) intervening to take an appeal when the parties below have not appealed and (ii) intervening in an appeal that the parties below have taken to the appellate court themselves. 497 F.3d at 1323 n.1. In *Nisus*, affirming a Tennessee district court's denial of the attorney's motion to intervene, this Court explained that "neither party [below] has taken an appeal" and that "[t]here is no reason to believe Sixth Circuit law would permit [the attorney] to intervene for purposes of pursuing an appeal . . . under these circumstances." *Id.* On this point, this Court cited to a Sixth Circuit case, *Associated Builders & Contractors v. Perry*. *Id.* In that case, the Sixth Circuit dismissed an intervenor's appeal upon determining standing was required because the losing party below had opted not to appeal, but also noted that intervenors do not need standing where the party aligned with its interests is participating in the case. 16 F.3d at 690-93.

Because Abbott is already prosecuting this appeal, the majority of courts of appeal, including the Ninth Circuit (from whose district court this case arises), require Mr. Pope only to meet Rule 24's criteria to intervene. *See Didrickson*, 982 F.2d at 1337-38. Consequently, Appellees' standing arguments must be rejected.[1]

2. Mr. Pope Does Not Need To Show The District Court's Comments As To His Conduct Are Separately Appealable.

Appellees argue Mr. Pope must show that the district court's findings regarding his conduct are themselves appealable. (BD/Nova Opp. at 10; Bayer Opp. at 10.) This also results from a flawed reading of the law. Abbott has appealed the district court's judgment of inequitable conduct, and Mr. Pope seeks to intervene to appeal that judgment, as well. (Motion ¶¶ 18-21.) Thus, he does not need to show these individual comments are separately appealable. *See, e.g.*, *Didrickson*, 982 F.2d at 1337-38.

Again, *Nisus* is inapplicable. There, after the district court's inequitable conduct judgment, the parties "settled all aspects of the litigation between them

[1] For this reason, mandamus is unavailable. If Mr. Pope can intervene here, he cannot show that he "has no other means of attaining the relief desired." *See, e.g.*, *In re Roche Molecular Sys., Inc.*, 516 F.3d 1003, 1004 (Fed. Cir. 2008) (refusing mandamus where petitioner could obtain appellate review after final judgment) (quotation and citation omitted). Further, here, mandamus would be wasteful, as it would require two panels of this Court to address the same inequitable conduct issues. Nevertheless, the fact that this Court was inclined to extend mandamus to an attorney in Mr. Pope's circumstances when no avenue of appeal existed, *see Nisus*, 497 F.3d at 1322-23, is a strong indication that the interests at stake merit intervention where, as here, a proper appeal pends.

and . . . disclaimed any interest in appealing from the judgment." *Nisus*, 497 F.3d at 1318. Because neither party below appealed the judgment, this Court had to inquire whether it had jurisdiction to take an appeal from the attorney who had been the subject of the district court's inequitable conduct ruling. *Id.* The Court concluded that the district court's comments about the attorney did not amount to a sanction and thus did "not constitute a final decision sufficient to confer jurisdiction in this court." *Id.* at 1322.

Here, by contrast, Mr. Pope seeks leave to intervene in the appeal – prosecuted by Abbott – of the district court's inequitable conduct finding itself, and there is no question the Court has jurisdiction over Abbott's appeal. Thus, because there is "an appeal by the party on whose side [Mr. Pope] intervened," the Ninth Circuit, and the majority of the appellate courts, hold that there is no need for Mr. Pope to demonstrate "independent jurisdictional grounds" to participate in this appeal. *See, e.g.*, *Didrickson*, 982 F.2d at 1337-38.

B. Mr. Pope Meets Rule 24(b)'s Permissive Intervention Standards.

Under Rule 24(b), Mr. Pope can intervene in this appeal if he shows that (1) he "has a claim or defense that shares with the main action a common question of law or fact" and (2) the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b). Rule 24(b), governing permissive intervention, thus stands in contrast to Rule 24(a), which

governs intervention as of right and contains the more onerous requirements Appellees seek to impose. Mr. Pope has shown he meets Rule 24(b)'s criteria.

First, Mr. Pope asserts defenses that share questions of law or fact in common with Abbott's appeal of the district court's inequitable conduct judgment. (Motion ¶¶ 18-19.) By arguing that Mr. Pope must have a legal interest in the '551 patent, Appellees frame the issue too narrowly.[2] (BD/Nova Opp. at 14.) As the Ninth Circuit has explained, "'[Rule 24(b)] requires only that [the intervenor's] claim or defense and the main action have a question of law or fact in common.'" *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002) (quoting 7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1911 (2d ed. 1986)). Thus, to intervene in this appeal, Mr. Pope simply need not have a legal interest in the '551 patent.

Rather, as required by Rule 24(b), Mr. Pope shares defenses to the inequitable conduct judgment that raise factual and legal issues in common with Abbott's defenses. In its opening brief, Abbott argues that the materials Mr. Pope did not provide to the U.S. Patent & Trademark Office ("the PTO") during the '551 prosecution were: (1) not inconsistent with prior attorney arguments in an appeal concerning a foreign prior art patent, and (2) not material because they

[2] BD/Nova first argues that intervention is inappropriate because "Mr. Pope has no legal interest in the issue of the enforceability of the '551 patent" but then admits that "an 'interest' in the underlying litigation is not a requirement under Rule 24(b)." (BD/Nova Opp. at 14-15.)

consisted entirely of attorney argument, which is traditionally deemed irrelevant to an examiner's decision. (Abbott Br. at 50-58.) Abbott also argues that Mr. Pope lacked intent to deceive the PTO. (*Id.* at 59-63.) Mr. Pope shares each of these defenses with Abbott, and that is enough to meet Rule 24(b)'s requirements.

Further, because Mr. Pope's professional career and reputation have suffered as a result of the inequitable conduct decision, Mr. Pope does have a substantial interest in this appeal. A reversal will undo those consequences; that interest is enough to support Mr. Pope's intervention in this appeal.

Second, Mr. Pope has not unduly delayed seeking intervention. Indeed, Bayer does not assert prejudice or unduly delay, thus undercutting BD/Nova's boilerplate response on these grounds.

As an initial matter, though BD/Nova asserts that its time for responding to Abbott's brief has begun to run (BD/Nova Opp. at 12), the fact remains that BD/Nova has been served an opposed motion to file an extended-length brief, not a filed brief. This Court has not yet ruled on that motion, or on two other motions that, if granted, would affect the Abbott filing date: Abbott's motion to extend the time in which to file and its motion to deconsolidate the appeals concerning separate patents. This Court could grant Mr. Pope's intervention motion (which he filed well before Abbott's motion to file an extended-length brief) before it addresses any of Abbott's motions. Furthermore, if Appellees were to need more

time to respond, they could file an extension motion, which Mr. Pope certainly would not oppose.

Ultimately, this Court has broad discretion in deciding whether Mr. Pope's motion to intervene is timely – which it is. Though Mr. Pope was aware he would be *involved* in the proceedings below sometime in 2007 (BD/Nova Opp. at 11), his need to intervene became clear at the earliest with the district court's judgment, and really when that judgment began to take its toll on Mr. Pope's reputation.[3] Mr. Pope sought intervention promptly after those interests became apparent.

On these facts, Mr. Pope's motion is timely. As the Eleventh Circuit has explained, "'[t]imeliness is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.'" *Chiles*, 865 F.2d at 1213 (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)) (finding detainees' motion to intervene to be timely). Moreover, "the timely application requirement under Rule 24 was not intended to punish an intervenor for not acting more promptly but rather was designed to insure that the original parties should not be prejudiced by the intervener's failure to apply sooner." *McDonald*, 430 F.2d at 1074 (trial court abused discretion in holding intervention motion to be untimely).

[3] As a non-party not acting as counsel, Mr. Pope had no reason to know about the pretrial matters BD/Nova identifies. (*See* BD/Nova Opp. at 11.)

BD/Nova can show no prejudice, either from any delay or generally. It argues only that it will incur additional expense in opposing Mr. Pope's brief and that it does not know what "new" issues Mr. Pope might raise. (BD/Nova Opp. at 12-13.) That BD/Nova may have to spend time responding to Mr. Pope is not the kind of *undue* prejudice that Rule 24(b) prohibits. Indeed, because Mr. Pope has defenses in common with Abbott, his arguments will highlight nuances relevant to his conduct but will not raise new issues. Accordingly, intervention poses no prejudice to BD/Nova – as is demonstrated by Bayer's failure to even raise this issue.

CONCLUSION

For the reasons stated above and in his motion, Mr. Pope respectfully requests that this Court grant him leave to intervene in this appeal.

Dated: October 24, 2008

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) proposed intervenor certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Lawrence S. Pope

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Lawrence S. Pope

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

none

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Jenner & Block LLP, Barry Levenstam, William D. Heinz, Russell J. Hoover, April A. Otterberg

10/24/08
Date

Signature of counsel

BARRY LEVENSTAM
Printed name of counsel

Please Note: All questions must be answered

cc: Rohit K. Singla, Bradford J. Badke, Rachel Krevans

PROOF OF SERVICE

I, April A. Otterberg, hereby certify that on October 24, 2008, I caused an original and three copies of the foregoing **Lawrence S. Pope's Reply in Support of His Motion For Leave To Intervene On Appeal** to be transmitted to the Court for filing via hand delivery, and one copy of the same to be served on counsel for the parties listed below via facsimile, with two copies of the same to follow via UPS overnight delivery.

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