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24
25 **UNITED STATES DISTRICT COURT FOR THE**
26 **EASTERN DISTRICT OF CALIFORNIA**
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Case No. CV 10-00674-OWW-
JLT

GENERAL ELECTRIC COMPANY, a
New York corporation; and GE WIND
ENERGY, LLC, a Delaware limited
liability company,

Plaintiffs,

v.

THOMAS WILKINS, an individual,

Defendant.

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
INTERVENE OF MITSUBISHI
HEAVY INDUSTRIES, LTD. AND
MITSUBISHI POWER SYSTEMS
AMERICAS, INC.**

**Date: January 24, 2010
Time: 10:00 a.m.
Court: Courtroom 3
Before: Hon. Oliver W. Wanger**

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1 complaint here, GE did not name Mitsubishi as a party and, in fact, told this Court that it
2 was “unaware of any other party who may have a pecuniary interest in the outcome of
3 this case.” (Dkt. 1, Attachment 2).

4 This case simply cannot be resolved without Mitsubishi’s involvement because
5 Mitsubishi is the real party-in-interest. Mr. Wilkins has no other licensee. GE does not
6 even use the technology that is the subject of the '985 patent; thus, the patent’s only real
7 value to GE is to exclude Mitsubishi from the market. GE brings this case to get around
8 the ITC’s findings and, if successful here, GE would undoubtedly attempt to use such
9 results against Mitsubishi in one or more of the other four cases pending between GE and
10 Mitsubishi. In this way, GE could severely impair Mitsubishi’s rights without Mitsubishi
11 ever having its “fair day in court.”

12 Mitsubishi easily satisfies the requirements for intervention under Fed. R. Civ. P.
13 24. Intervention will conserve judicial resources and allow for the efficient resolution of
14 all related issues in a single proceeding rather than forcing Mitsubishi to attempt to
15 defend itself by proxy. In addition, intervention will neither cause undue delay nor
16 prejudice the rights of GE or Mr. Wilkins. Accordingly, Mitsubishi should be allowed to
17 intervene as a party defendant.¹

18 BACKGROUND

19 A. Litigation Between GE and Mitsubishi

20 GE is the dominant U.S. supplier of variable speed wind turbines and has been
21 fighting in the courts for almost three years to keep Mitsubishi out of the U.S. market.
22 GE has filed three separate patent infringement suits against Mitsubishi in multiple
23

24 ¹ Mitsubishi seeks to intervene on counts 1, 2, 3, 7 and 8 of the amended
25 complaint. Those counts relate to the ownership issues of the '985 patent. Mitsubishi
26 does not lodge any answer to the amended complaint since Wilkins has moved to dismiss
27 that complaint and thus no answer is due. “Courts, including this one, have approved
28 intervention motions without a pleading [i.e., an answer] where the court was otherwise
apprised of the grounds for intervention.” *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d
1183, 1188 (9th Cir. 2009).

1 forums. Two of these suits directly implicate the '985 patent and Mitsubishi's license of
2 the patented technology.

3 GE launched its first suit against Mitsubishi in February 2008, a complaint before
4 the ITC."² GE alleged in the ITC that Mitsubishi infringed three GE patents, including
5 the '985 patent. Over the next two years, the parties litigated the extent of Mr. Wilkins'
6 contributions to the '985 patent and whether GE acted fraudulently by removing his name
7 from the patent application. GE invoked the attorney-client privilege to shield its
8 decisions regarding Mr. Wilkins' role in the '985 patent. In the end, the ITC found that
9 "Wilkins is an unnamed inventor of claim 15 of the '985 patent, that GE has not provided
10 any showing to the effect that Wilkins had an obligation to assign the patent to GE, and
11 that GE has not joined Wilkins as a party to this investigation." (ITC Public Version
12 Opinion, at 36). The ITC did not reach the question of infringement on the '985 patent,
13 finding that GE could not preclude importation because GE did not even practice the
14 technology of the '985 patent in its own wind turbines. The ITC also ruled against GE on
15 the other two patents that it had invoked.³

16 In September 2009, while the ITC action was still pending, GE filed a second
17 patent infringement action against Mitsubishi in the U.S. District Court for the Southern
18 District of Texas (Corpus Christi).⁴ GE claimed that Mitsubishi infringed the same three
19 patents, including the '985 patent. In that action, Mitsubishi responded that GE's claims
20 under that patent are invalid or unenforceable due to prior art. Mitsubishi also asserted
21 that the '985 patent is unenforceable because GE acquired the patent by defrauding the
22

23
24 ² *Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-641,
25 73 Fed. Reg. 16,910 (Int'l Trade Comm'n Mar. 31, 2008).

26 ³ GE appealed the ITC ruling to the U.S. Court of Appeals for Federal Circuit.
27 The appeal remains pending and a decision is expected by the Federal Circuit in 2011.

28 ⁴ *General Electric Co. v. Mitsubishi Heavy Industries, Ltd.*, Civil Action No. 2:09-
cv-00229 (S.D. Tex.).

1 PTO. In particular, Mitsubishi alleged that GE initially acknowledged that Mr. Wilkins
2 was an inventor, and then deliberately concealed this fact – inexplicably dropping him
3 from all future filings – so that it would not have to deal with the problem that Mr.
4 Wilkins had refused to make any assignment of his rights to GE. Mitsubishi has also
5 asserted as a defense that Mr. Wilkins licensed his rights in the '985 patent to Mitsubishi
6 so that, even if the patent is enforceable, there is no infringement. Pursuant to federal
7 statute, the Texas action was stayed in light of the proceedings pending before the ITC
8 and the stay remains in effect.

9 Shortly after the ITC disposed of GE's action, GE launched yet another patent
10 infringement suit against Mitsubishi, claiming the very same Mitsubishi machines
11 infringed two other GE patents, though GE had never mentioned them in two years of
12 litigation over the machines. GE filed this complaint in the U.S. District Court for the
13 Northern District of Texas (Dallas). At this point, it became apparent that GE was
14 engaging in serial claims of patent infringement in an effort to intimidate Mitsubishi's
15 customers and potential customers.

16 After months of investigation, Mitsubishi filed an antitrust complaint against GE
17 in the Western District of Arkansas.⁵ Mitsubishi's 64-page complaint explained that each
18 one of the five GE patents asserted against Mitsubishi – including the '985 patent – was
19 invalid and unenforceable. As Mitsubishi explained, GE used knowledge it obtained in
20 U.S. government-funded programs in the early 1980s, without disclosing the original
21 sources to the PTO when applying for the patents. This newly uncovered prior art – not
22 presented to the ITC – rendered the '985 patent invalid and unenforceable. Mitsubishi
23 also alleged that GE knew that Mr. Wilkins was an inventor but deliberately concealed
24 his name from the PTO because Mr. Wilkins refused to assign his rights in the patent to
25 GE. In the absence of such conduct, Mitsubishi explained, these patents would not have
26 issued.

27 _____
28 ⁵ *Mitsubishi Heavy Industries, Ltd. v. General Electric Co.*, Civil Action No. 10-
5087 (W.D. Ark.).

1 The Arkansas court denied GE's motion to dismiss the complaint but granted a
2 stay pending resolution of the other actions. Pursuant to court order, the parties are
3 required to submit quarterly reports to the Arkansas federal court on the progress of the
4 other litigation. The Arkansas court warned that, if GE engages in any dilatory or other
5 misconduct in the infringement litigation, the Court may lift the stay and permit
6 discovery to commence.

7 Mitsubishi has also presented its allegations regarding the invalidity of the '985
8 patent to the PTO. Based on Mitsubishi's allegations, on December 21, 2010, the PTO
9 ordered a reexamination of the validity of the '985 patent.

10 **B. The Overlap Between The GE-Mitsubishi Litigation and the Present**
11 **Suit**

12 GE's suit against Mr. Wilkins raises the same technology – the '985 patent – that is
13 at issue in three of the pending GE-Mitsubishi suits. In those cases, Mitsubishi has
14 contended that the patent is invalid and unenforceable. Mitsubishi has also contended
15 that GE does not hold all of the ownership rights to the '985 patent and that Mr. Wilkins
16 has issued a valid license to Mitsubishi for the technology. This latter issue – Mr.
17 Wilkins' ownership rights in the technology – is the same issue that will be litigated in
18 this case.

19 As this Court is aware, GE has filed this action against Mr. Wilkins for breach of
20 contract and declaratory relief. *See* Amended Complaint, at 10-21 (Dkt. 76). GE's
21 allegations revolve around the ownership of two wind turbine patents – the '565 and '985
22 patents – issued to GE in 2005. In this litigation, GE has not requested that the Court
23 determine whether Mr. Wilkins is, or is not, an inventor of the '985 patent. Nonetheless,
24 GE alleges that Mr. Wilkins has an obligation to assign to GE all intellectual property
25 rights, including in the '985 patent, developed in the course of his work with GE and
26 Enron Wind Corp. GE seeks a declaratory order and injunctive relief, requiring Mr.
27 Wilkins to assign his rights to GE and prohibiting him from licensing the technology to
28 any third party.

1 As GE knows, Mr. Wilkins has granted a license to Mitsubishi to use or sell any
2 product with the technology of the '985 patent. *See* Amended Complaint, at ¶ 26 (Dkt.
3 26). GE readily admits that “[t]he '985 patent is valuable” to its patent infringement suits
4 against Mitsubishi before the ITC and the Dallas federal court. *See id.* at ¶ 27. GE notes
5 that Mitsubishi has relied upon Mr. Wilkins’ ownership as a defense to those lawsuits and
6 that GE brought this lawsuit as a result. *See id.* at ¶ 28. Mitsubishi is the only licensee of
7 Mr. Wilkins’ rights in the '985 patent.

8 ARGUMENT

9 Mitsubishi’s participation is both necessary and desirable. Mitsubishi and GE –
10 two of the world’s leading electric power generating turbine manufacturers – are battling
11 out the same issues regarding the '985 patent in three separate lawsuits, all of which are
12 on appeal or stayed. GE now seeks to litigate these issues in a separate action, without
13 Mitsubishi present. GE’s strategy is clear: avoid Mitsubishi and attack an individual
14 inventor who simply does not have the same interests or the experience to vigorously
15 defend the case. Mitsubishi respectfully requests that the Court permit intervention so
16 that Mitsubishi can protect its interests.

17 I. Mitsubishi Has A Right To Intervene

18 Mitsubishi is entitled to intervene as of right. The Ninth Circuit has adopted a
19 four-part test to determine if intervention of right is warranted. An applicant must
20 demonstrate that (1) the intervention is timely; (2) the applicant has a significantly
21 protectable interest relating to the property or transaction that is the subject of the action;
22 (3) the disposition of the action may, as a practical matter, impair or impede the
23 applicant’s ability to protect its interest; and (4) the existing parties may not adequately
24 represent the applicant’s interest. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006).
25 Rule 24 is construed liberally in favor of potential intervenors, and a district court accepts
26 as true the non-conclusory allegations made in support of an intervention motion.
27 *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006).

28 Mitsubishi easily satisfies these four requirements.

1 **A. Mitsubishi’s Motion is Timely**

2 Mitsubishi’s motion to intervene is timely, for this litigation is at a very early
3 stage. GE filed an Amended Complaint on October 14 (Dkt. 76) trying to remedy the
4 prior complaint’s defects, and Mr. Wilkins has moved to dismiss that complaint. The
5 initial scheduling conference is not scheduled until February. Discovery has not
6 commenced. Thus, the parties have not litigated the substantive allegations underlying
7 this action. In fact, Mr. Wilkins has not answered the complaint.

8 In the Ninth Circuit, courts have repeatedly held that a motion to intervene filed
9 before the answer is timely. *See Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1481 (9th Cir.
10 1993) (intervention motion timely when made “before the EPA had even filed its
11 answer”); *EEOC v. Boeing Co.*, 109 F.R.D. 6, 9 (W.D. Wash. 1985) (before answer and
12 discovery); *see also Pest Committee v. Miller*, 648 F. Supp. 2d 1202, 1212 (D. Nev.
13 2009) (intervention motion timely where “filed just over two months after Defendant
14 filed his Answer to Plaintiffs’ Amended Complaint”).⁶ Indeed, this Court recently
15 deemed “timely” a motion to intervene filed three years after the action was initiated,
16 where the initial complaint was dismissed in part and intervention was sought before the
17 defendant’s answer to the first amended complaint was due. *See Delano Farms Co. v.*
18 *Cal. Table Grape Comm’n*, No. 1:07-CV-1610, 2010 WL 2942754, at*1, 2010 U.S. Dist.
19 LEXIS 74602 (E.D. Cal. July 23, 2010) (Wanger, J.).⁷

20 _____
21 ⁶ *See also* 7C Wright, Miller & Kane, *Federal Practice an Procedure: Civil 3d*, ¶
22 1916 at 557 (3d ed. 2007) (a motion to intervene filed before the answer “has been
23 regarded as clearly timely”).

24 ⁷ Other courts have permitted intervention years after the litigation was first
25 initiated where the existing parties were not prejudiced. *See Mountain Top Condominium*
26 *Ass’n v. Dave Stabbert Master Builder*, 72 F.3d 361, 371 (3d Cir. 1995) (motion to
27 intervene filed four years after initiation of case deemed timely where “there were no
28 depositions taken, dispositive motions filed, or decrees entered during the four year
period”); *Oneida Indian Nation of New York v. New York*, 201 F.R.D. 64, 67-69
(N.D.N.Y. 2001) (finding timely a motion to intervene filed “approximately twenty six
years” after lawsuit began in the absence of any substantial court rulings, discovery, or
prejudice to existing parties).

1 No party will be prejudiced by permitting Mitsubishi to intervene. Although the
2 Court has already granted preliminary relief in favor of GE (Dkt. 83), Mitsubishi will not
3 seek reconsideration of that order.

4 By contrast, Mitsubishi is threatened with substantial prejudice if its motion is
5 denied. If GE is successful in obtaining a declaration from this Court that Mr. Wilkins is
6 required to assign his rights in the '985 patent to GE, GE will undoubtedly use the result
7 in its continuing fight to keep Mitsubishi's competitive turbines out of the U.S. market.
8 Accordingly, Mitsubishi's motion is timely.

9 **B. Mitsubishi Has a "Significant Protectable" Interest at Stake in this**
10 **Action**

11 An applicant has a significant protectable interest in an action if (1) "the interest is
12 protected by law," and (2) "there is a relationship between the legally protected interest
13 and the plaintiff's claims." *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir.
14 2004). As the Ninth Circuit has observed, "the 'interest' test is primarily a practical
15 guide to disposing of lawsuits by involving as many apparently concerned persons as is
16 compatible with efficiency and due process." *Forest Conservation Council v. United*
17 *States Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995).

18 Mitsubishi obviously has a direct and substantial interest in this action. Mr.
19 Wilkins is now licensing his rights in the '985 patent technology to Mitsubishi. As this
20 Court has recognized, a licensee's interest in the continued use of the licensed technology
21 is "significant" and "protectable." *Delano Farms Co. v. Cal. Table Grape Comm'n*, No.
22 1:07-CV-1610, 2010 WL 2942754, at *2, 2010 U.S. Dist. LEXIS 74602 (E.D. Cal. July
23 23, 2010) (Wanger, J.) (granting intervention because the licensee "possesses a
24 significant, protectable interest in the license that would be impeded if Plaintiff prevails"
25 in its suit seeking to set aside the license); *see also LG Elecs., Inc. v. Q-Lity Computer,*
26 *Inc. v. Asustek Computer, Inc.*, 211 F.R.D. 360, 364-65 (N.D. Cal. 2002) ("An applicant
27 demonstrates a significantly protectable interest when the injunctive relief sought by the
28

1 plaintiffs will have direct, immediate, and harmful effects upon its legally protectable
2 interests.”).

3 Indeed, GE’s own complaint establishes that GE intends to threaten Mitsubishi’s
4 interests. The complaint emphasizes that “GE currently is asserting the '985 patent in
5 ongoing actions against MHI” and that “MHI has relied upon Mr. Wilkins’ assertion [of
6 ownership] to challenge GE’s standing to bring the Actions and the enforceability of the
7 '985 patent.” Amended Complaint at ¶¶ 27-28 (Dkt. 76). Thus, it is clear that GE intends
8 to use the results in this action to thwart Mitsubishi’s defenses in the patent infringement
9 litigation. Mitsubishi therefore satisfies the second requirement for intervention as of
10 right.

11 **C. Mitsubishi’s Interests May Be Impaired By this Action**

12 There is no question that a judgment in favor of GE here on the '985 patent “may,
13 as a practical matter, impair or impede” Mitsubishi’s interest if intervention is not
14 allowed. Fed. R. Civ. P. 24(a)(2). Because Rule 24(a) “refers to impairment ‘as a
15 practical matter,’” a court “is not limited to consequences of a strictly legal nature.”
16 *Forest Conservation Council*, 66 F.3d at 1498 (quotations and citation omitted); *see also*
17 Fed. R. Civ. P. 24(a)(2) Advisory Committee Note to 1966 amendment (“if an absentee
18 would be substantially affected in a practical sense by the determination made in an
19 action, he should, as a general rule, be entitled to intervene”).

20 A ruling adverse to Mr. Wilkins would directly impair Mitsubishi’s license of the
21 '985 patent from Mr. Wilkins. Mitsubishi’s defense of licensed use – as invoked in the
22 other federal courts – could be affected by any ruling regarding patent ownership. Such a
23 ruling could also affect Mitsubishi’s production, sales and other business decisions
24 related to its use of the patented technology in wind turbines. *See Sierra Club v. EPA*,
25 995 F.2d 1478, 1486 (9th Cir. 1993) (finding that a potential impact on future litigation
26 “results in practical impairment” of the applicant’s interests). Mitsubishi thus has
27 sufficient economic and legal interests in the outcome of the case to warrant intervention
28 as of right.

1 **D. Mitsubishi's Interests Are Not Adequately Represented**

2 Finally, Mitsubishi easily satisfies the minimal burden of showing “that [its]
3 interest [is] inadequately represented by the existing parties.” *Forest Conservation*
4 *Council*, 66 F.3d at 1409 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538
5 n.10 (1972)). The point is not whether there is a commonality of interests. It is always
6 true that the defendant and an intervenor both seek to defeat the claims of a plaintiff. The
7 proper inquiry is whether defendant Wilkins will adequately represent Mitsubishi in
8 pursuing that common interest.

9 In determining whether a would-be intervenor's interests will be adequately
10 represented, this Court considers: (1) “whether the interest of a present party is such that
11 it would undoubtedly make all the intervenor's arguments;” (2) “whether the present
12 party is capable and willing to make such arguments;” and (3) “whether the intervenor
13 would offer any necessary elements to the proceedings that other parties would neglect.”
14 *Id.* at 1498-99. The burden of showing inadequacy is “minimal,” and the applicant need
15 only show that representation of its interests by existing parties “may be” inadequate. *Id.*
16 at 1409; *see also Trbovich*, 404 U.S. at 538 n.10.

17 Mitsubishi's interests make it less reluctant to proffer certain types of evidence.
18 Mitsubishi has taken the position in other litigation that the '985 patent is not valid or
19 enforceable at all. Mr. Wilkins may, understandably, shy away from presenting evidence
20 that, while supportive of the “no assignment” position, might raise questions about the
21 patent's fundamental validity. For example, GE's key assertion is that Mr. Wilkins
22 executed a written agreement assigning all inventions developed during his employment
23 to GE. *See Amended Compl.* ¶¶ 12-14. Mitsubishi can bring forward facts that make
24 this argument substantially less credible. Based on the ITC litigation and its own
25 independent investigation, Mitsubishi believes that GE intentionally removed Mr.
26 Wilkins from the patent application precisely because it knew that Mr. Wilkins had not
27 and would not execute an assignment. Removing Mr. Wilkins from the list of inventors
28 covered up a gaping hole in GE's claim of ownership. This will not only shed light on

1 GE's motives, but substantiate in a different way the argument that Mr. Wilkins never
2 signed any form of assignment. But Mr. Wilkins may not advance such evidence, as the
3 removal of his name from the application or the non-disclosure of prior art would, if true,
4 render the '985 patent unenforceable by GE or by Mr. Wilkins. *See Frank's Casing Crew*
5 *v. PMR Technologies, Ltd.*, 292 F.3d 1363, 1376 (Fed. Cir. 2002).

6 The differing interests of Mitsubishi and Mr. Wilkins may also cause them to
7 highlight different facts. For example, GE has repeatedly claimed to this Court that the
8 '985 patent is "valuable." *See, e.g.*, Amended Compl. ¶¶ 27, 30. Mr. Wilkins, as an
9 inventor, also has an interest in making the '985 patent seem valuable. Mitsubishi, in
10 contrast, is in a position to reveal the truth about the '985 patent – its only value to GE
11 lies in its ability to block competition. Even though Mr. Wilkins has made several filings
12 in this case, he has never informed this Court that the ITC found GE was not using the
13 '985 patent in its own wind turbines. Mitsubishi has reason to show that GE manipulated
14 the patent application process as an integral part of an overall business strategy and that
15 GE needed to ignore or override Mr. Wilkins' refusal to assign because it thwarted that
16 GE strategy.

17 Further, as to GE's claim under the California statute, Mitsubishi will show that
18 GE vigorously litigated the assignment issue before the ITC and yet never raised the
19 argument that Mr. Wilkins was obligated to assign the technology to GE under any
20 California statute. Thus, Mitsubishi's selection of theories could clearly differ based on
21 its own work product and litigation with GE. When different arguments or defenses may
22 be available, Federal Circuit precedent requires granting permission to intervene. *See*
23 *Israel Bio-Engineering Project v. Amgen, Inc.*, 401 F.3d 1299, 1306 (Fed. Cir. 2005)
24 (reversing the district court's denial of a Rule 24 motion where the intervening party had
25 a defense not available to other defendants).

26 Finally, Mitsubishi has genuinely broader interests than Mr. Wilkins. Mitsubishi
27 is GE's main competitor in the U.S. wind turbine sales market. GE has filed multiple
28 patent infringement suits against Mitsubishi to block its sales of competitive turbines to

1 U.S. customers. So far, not one claim has been upheld. Mitsubishi has pointed out that
2 the assertion of multiple, baseless patent claims as means of frightening customers and
3 blocking competition constitutes an antitrust violation. The litigation stakes are high.
4 Each variable speed turbine today costs roughly \$3.5 million installed, and customers
5 may buy hundreds of turbines for a single wind turbine farm. Mitsubishi was an active
6 player in that market until GE's dubious infringement suits began to scare its clients off.

7 By contrast, Mr. Wilkins is an individual inventor. He simply wants this case
8 resolved with respect to a patent that he has licensed to only one company. Mitsubishi
9 wants to defeat GE's blocking patents and compete fairly in the U.S. market. Expecting
10 Mr. Wilkins to represent Mitsubishi's interests is akin to expecting a single NFL player to
11 represent the interests of the National Football League. Intervention as of right should be
12 granted where, as here, the moving party may potentially present a "more vigorous
13 presentation" of its interests than the existing party. *N.Y. Pub. Interest Research Group,
14 Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975).

15 Absent intervention, Mitsubishi would be dependent on Mr. Wilkins to present
16 theories and arguments favorable to Mitsubishi. GE has characterized Mr. Wilkins as "an
17 idiosyncratic individual who doesn't cooperate." (PI Hearing, 67:18). While Mitsubishi
18 does not share GE's view, Mitsubishi certainly disagrees with some of the tactics Mr.
19 Wilkins has chosen in this case. Any counsel who represents him has an ethical
20 obligation to follow his directions.

21 And Mr. Wilkins has many personal interests in the litigation that Mitsubishi does
22 not share. Mr. Wilkins has his own personal concerns about the deposition procedures.
23 He has his reputational interests to vindicate. He has his own disputes with GE. He has
24 his own concerns with the contempt motion now pending against him and his lawyer. He
25 also has two patents at issue – the '565 patent as well as the '985 patent – and could make
26 tactical decisions that sacrifice the interests of the '985 patent in order to enhance his
27 chances with the '565 patent. Mr. Wilkins' counsel will be responsible for furthering all
28 of his interests, which may diverge from the interests of Mitsubishi. Thus, Mr. Wilkins'

1 representation will not be adequate to protect all of Mitsubishi's interests. *See Delano*
2 *Farms Co. v. Cal. Table Grape Comm'n*, No. 1:07-CV-1610, 2010 WL 2942754, at *2,
3 2010 U.S. Dist. LEXIS 74602 (E.D. Cal. July 23, 2010) (Wanger, J.) (intervention
4 warranted where existing party's interests "are 'not simply to confirm' the applicant's
5 interests, but include a broader 'range of considerations'") (quoting *Sw. Cntr.*, 268 F.3d at
6 823).⁸

7 Because Mitsubishi satisfies all four prongs of the Ninth Circuit test, Mitsubishi is
8 entitled to intervention as of right under Fed. R. Civ. P. 24(a).

9 **II. Mitsubishi Should Be Permitted to Intervene**

10 In the alternative, Mitsubishi Heavy Industries, Ltd. ("MHI") seeks permissive
11 intervention. MHI easily satisfies the more liberal standard of permissive intervention.
12 *See* Fed. R. Civ. P. 24(b)(1). The Ninth Circuit has identified three necessary
13 prerequisites: (1) the applicant must share a common question of law or fact with the
14 main action; (2) the motion must be timely; and (3) the applicant must show independent
15 grounds for jurisdiction. *Forest Resource Council v. Glickman*, 82 F.3d 825, 839 (9th
16 Cir. 1996).

17 First, as discussed above in the context of intervention as of right, this motion is
18 timely. Second, MHI has executed a license agreement with Wilkins. As MHI seeks to
19 protect the patent license granted to it, MHI's interests clearly share common questions of
20 law and fact with the current action. In fact, GE is seeking declaratory and injunctive
21 relief preventing Mr. Wilkins from licensing the patent, which could directly implicate
22 MHI's interests and forms the primary basis for MHI's intervention. Third, the Court has
23 independent jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

24
25 ⁸ *Cf. Taub v. Glickman*, 67 Civ. 3447, 1970 WL 210, at *1-3 (S.D.N.Y. Dec. 1,
26 1970) (denying class certification because plaintiffs' counsel had been "criticized for
27 conduct that would at least seem to be of questionable propriety" and thus would "not
28 fairly and adequately represent the suggested class"); *Maynard, Merel & Co. v.*
Carcioppolo, 51 F.R.D. 273, 278 (S.D.N.Y. 1970) (class representative who had "special
axe to grind" with individual defendants not an adequate representative).

1 Specifically, plaintiff GE is a resident of Connecticut and incorporated in New York. *See*
2 Amended Compl. ¶ 1. Plaintiff GE Wind Energy, LLC is a limited liability corporation,
3 and its membership interests are held by Delaware corporations with principal places of
4 business in Missouri and Kentucky. *See id.* at ¶ 2. According to the amended complaint,
5 Defendant Wilkins is a resident of California. *See id.* at ¶ 3. MHI is a foreign corporate
6 entity headquartered in Japan. Thus, diversity of citizenship exists as to the intervention
7 itself and would still exist as to the whole action post-intervention. *See* Amended Compl.
8 ¶ 5 (asserting subject matter jurisdiction based on diversity of citizenship).⁹

9
10 **CONCLUSION**

11 For the foregoing reasons, the Court should grant Mitsubishi's Motion to Intervene
12 and allow Mitsubishi to intervene as of right pursuant to Fed. R. Civ. P. 24(a). In the
13 alternative, the Court should grant MHI permissive intervention pursuant to Fed. R. Civ.
14 P. 24(b). The Court should set the deadline for answering the amended complaint on the
15 same date that defendant Wilkins' answer becomes due. A proposed order is attached.

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RESPECTFULLY SUBMITTED this 22nd day of December, 2010.

STEPTOE & JOHNSON LLP

By: /s/ Daniel R. Blakey

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⁹ *See also Hazel Green Ranch, LLC v. United States DOI*, No. 1:07-CV-00414-OWW-SMS, 2007 U.S. Dist. LEXIS 68728, at *46-47 (E.D. Cal. Sept. 4, 2007) (“the independent jurisdiction requirement for permissive intervention is applicable in diversity cases and there is not a problem when the intervenor relies on the same statute as the original plaintiff”); *Md. Cas. Co. v. Electrolux Home Prods.*, No. 1:10-cv-00232-OWW-JLT, 2010 U.S. Dist. LEXIS 118833, at *3 (E.D. Cal. Oct. 25, 2010) (granting permissive intervention where there existed “an independent basis for jurisdiction . . . based on diversity of citizenship”).

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2010 I filed the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE OF MITSUBISHI HEAVY INDUSTRIES, LTD. AND MITSUBISHI POWER SYSTEMS AMERICAS, INC. using the Court's CM/ECF system, pursuant to which notification of the filing was sent to counsel for the parties, identified on the Court's system as the following:

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