

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

NICE LTD., NICE SYSTEMS INC., and  
MATTERSIGHT CORP.

Plaintiffs,

v.

CALLMINER, INC.

Defendant.

C.A. No. 18-02024-RGA-SRF

**JURY TRIAL DEMANDED**

**DEFENDANT CALLMINER, INC.’S MOTION FOR LEAVE TO AMEND ITS  
ANSWER TO PLAINTIFFS’ FIRST AMENDED COMPLAINT,  
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

Defendant CallMiner, Inc. (“CallMiner”) respectfully moves for leave to amend its Supplemental Answer to Plaintiffs NICE Ltd., NICE Systems Inc., and Mattersight Corp.’s (collectively, “NICE’s”) First Amended Complaint, Affirmative Defenses, and Counterclaims (D.I. 39) to assert a counterclaim that NICE infringes U.S. Patent No. 10,582,056 (the “’056 patent”). Attached hereto are CallMiner’s Answer to Plaintiffs’ First Amended Complaint, Affirmative Defenses, and Amended Counterclaims, with all exhibits thereto (Ex. 1), and a redline of CallMiner’s Answer to Plaintiffs’ First Amended Complaint, Affirmative Defenses, and Amended Counterclaims (Ex. 2) which indicates in what respects it differs from CallMiner’s Supplemental Answer (D.I. 39). CallMiner is seeking leave to amend its pleadings within the Court-ordered deadline for motions to amend pleadings. D.I. 42.

The Federal Rules state that the Court “should freely give leave when justice so requires” to amend pleadings. Fed. R. Civ. P. 15(a)(2). Thus, the “Third Circuit has adopted a liberal approach to the amendment of pleadings to ensure that a particular claim will be decided on the merits rather than on the technicalities.” *Abbott Labs. v. Johnson & Johnson, Inc.*, 524 F. Supp. 2d 553, 557 (D. Del. 2007). Leave to amend accordingly should be granted unless NICE demonstrates

undue delay, prejudice, bad faith, dilatory motive, or futility. *See Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006).

**I. THERE HAS BEEN NO UNDUE DELAY, BAD FAITH OR DILATORY MOTIVE**

CallMiner is seeking leave to amend its pleadings within the Court-ordered deadline, which deadline was set by agreement of the parties, to amend pleadings. D.I. 41. Therefore, CallMiner's request is, by definition, timely. *See Invensas Corp. v. Renesas Elecs. Corp.*, C.A. No. 11-448-GMS-CJB, 2013 WL 1776112, at \*3 (D. Del. Apr. 24, 2013). What is more, the '056 patent CallMiner seeks to assert issued on March 3, 2020, nearly one year after NICE filed its First Amended Complaint on March 11, 2019. D.I. 16. CallMiner obviously could not have asserted the '056 patent when it filed its Answer and Counterclaims in response to NICE's First Amended Complaint on March 25, 2019, as the '056 patent had not yet issued. D.I. 21. Likewise, CallMiner did not have sufficient time to assess whether to assert the '056 patent when it filed its Amended Answer and Counterclaims on April 20, 2020, particularly given the state of the country in the midst of the pandemic. D.I. 39. CallMiner timely seeks to add a counterclaim; CallMiner's motion is not made in bad faith or with a dilatory motive.

**II. NICE WILL NOT BE PREJUDICED**

The burden is on the nonmoving party to prove it will be prejudiced. The non-movant "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely." *Research Foundation of State University of New York v. Mylan Pharms., Inc.*, C.A. No. 09-184-GMS-LPS, 2010 WL 2572715, at \*3 (D. Del. June 28, 2010) (quoting *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989)). NICE cannot meet its burden to show prejudice. NICE agreed that the parties should be permitted to move to amend pleadings by July 24, 2020, and cannot now agree it has been prejudiced by CallMiner's timely motion. Moreover, CallMiner is seeking leave to amend its

counterclaims to assert the '056 patent only a few months after the patent issued and in advance of the Court-ordered deadline to amend pleadings. NICE cannot show that it was unfairly disadvantaged or that it will be deprived of the opportunity to seek discovery or present facts or evidence concerning CallMiner's new counterclaim.

### **III. CALLMINER'S AMENDED PLEADING IS NOT FUTILE**

An amendment is futile if "the [pleading], as amended, would fail to state a claim upon which relief could be granted." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). CallMiner has pled with specificity its allegation that NICE has infringed the '056 patent. *See* Ex. B at ¶¶ 37-46. CallMiner has also attached to its amended pleading a detailed claim chart setting forth examples of NICE's infringement. *See* Ex. B at Ex. F. Because CallMiner has adequately pled its infringement allegation, its amendment is not futile. *See, e.g., Livery Coach Solns., L.L.C. v. Music Express/East, Inc.*, 245 F. Supp. 3d 639, 648 (D. Del. 2017) (finding amendment was futile because it would not survive a 12(b)(6) motion as the claim was expressly barred by law).

### **IV. CALLMINER'S COMPLIANCE WITH LOCAL RULE 7.1.1**

Pursuant to Local Rule 7.1.1, counsel represents that it made a reasonable effort to reach agreement with NICE on the matters set forth in this motion in view of the July 24, 2020 deadline. In particular, on July 10, counsel for the parties discussed the possibility that one or both parties could potentially add one or more patents in amended pleadings filed on or before the July 24 deadline. Although NICE has already asserted *14 patents* in this case against CallMiner, counsel for NICE indicated on the July 10 call that NICE would probably file an amended pleading adding patents if CallMiner amended its counterclaims. Counsel for NICE proposed on the July 10 call that the parties mutually exchange information on July 17 regarding their respective plans to amend pleadings. Ultimately neither party provided such information to each other on July 17.

On July 22, CallMiner counsel informed NICE counsel that it intended to file a motion to amend its counterclaims to assert the '056 patent. CallMiner provided NICE with a detailed claim chart, a redlined copy of the amended pleading it planned to file, and a copy of the new patent it intended to assert. CallMiner requested the courtesy of NICE's position regarding CallMiner's forthcoming motion by the close of business on July 23. After the close of business on July 23, NICE counsel informed CallMiner that counsel had not conferred with NICE and would not be able to confer with NICE until the week of July 27. Notwithstanding the fact that NICE contemplated the possibility of the parties both amending pleadings to add patents, NICE counsel indicated on July 23 that "it has had insufficient time to consider this motion and plans to decide next week whether it will oppose."

On July 24, CallMiner counsel sought a meet and confer, and counsel briefly spoke telephonically. In correspondence later that day, NICE offered to stipulate to extend the deadline to move to amend; but, since NICE had made no request to amend its complaint, CallMiner offered to extend only *CallMiner's* deadline to file its motion to amend in response to NICE's contention that it had had "insufficient time" to consider CallMiner's motion. NICE rejected CallMiner's offer, but indicated it "would be in touch" the following week. CallMiner will, of course, promptly inform the Court if NICE advises CallMiner next week that it does not intend to oppose CallMiner's motion.

## **V. CONCLUSION**

CallMiner timely and without undue delay or a bad faith or dilatory motive filed this motion to amend. Because the motion is not futile and will not prejudice NICE, CallMiner respectfully requests that the Court grant CallMiner's Motion.

Dated: July 24, 2020

**OF COUNSEL:**

Michael Strapp (admitted *pro hac vice*)  
Safraz Ishmael (admitted *pro hac vice*)  
Michael Van Handel (admitted *pro hac vice*)

**DLA PIPER LLP (US)**

33 Arch Street, 26th Floor  
Boston, MA 02110-1447  
Telephone: (617) 406-6000  
Facsimile: (617) 406-6100  
michael.strapp@dlapiper.com  
safraz.ishmael@dlapiper.com  
michael.vanhandel@dlapiper.com

Tiffany Miller (admitted *pro hac vice*)

**DLA PIPER LLP (US)**

401 B Street, Suite 1700  
San Diego, CA 92101-4297  
Telephone: (619) 699-2700  
Facsimile: (619) 699-2701  
tiffany.miller@dlapiper.com

**DLA PIPER LLP (US)**

/s/ Brian A. Biggs

Denise S. Kraft (DE Bar No. 2778)  
Brian A. Biggs (DE Bar No. 5591)  
Erin E. Larson (DE Bar No. 6616)  
1201 North Market Street, Suite 2100  
Wilmington, DE 19801  
Telephone: (302) 468-5700  
Facsimile: (302) 394-2341  
denise.kraft@dlapiper.com  
brian.biggs@dlapiper.com  
erin.larson@dlapiper.com

*Attorneys for Defendant CallMiner Inc.*