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

Bedrock Computer Technologies LLC, Plaintiff, v. Softlayer Technologies, Inc., et al., Defendants.	Case No. 6:09-CV-269-LED **JURY TRIAL DEMANDED**

DEFENDANTS' OBJECTIONS TO AND MOTION FOR RECONSIDERATION OF JUDGE LOVE'S ORDER GRANTING BEDROCK'S MOTION FOR LEAVE TO SUPPLEMENT EXPERT REPORT OF ROY WEINSTEIN [DOC. NO. 666]

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, Defendants[1] object to Magistrate Judge Love's March 31, 2011 Order granting Bedrock's Motion for Leave to Supplement the Expert Report of Roy Weinstein (Doc. No. 691) (the "Order"). Defendants respectfully object to the Order for at least the reasons stated in Defendants' brief in opposition to Bedrock's motion (Doc. No. 686).[2] Below, Defendants highlight the reasons to set aside the Order, which is clearly erroneous and contrary to law.

I. INTRODUCTION

On March 24, 2011, Judge Love granted, in part, Defendants' Motion to Exclude and/or Strike the Expert Report and Opinions of Mr. Weinstein (Doc. 656), to the extent Mr. Weinstein relied on the litigation licenses to calculate his $250 per server royalty. With less than two weeks before voir dire and three weeks before the trial against Google was scheduled to begin, Bedrock then filed a motion seeking leave to "supplement" Mr. Weinstein's report. Judge Love granted the motion to provide "Bedrock the opportunity to supplement its report to conform to the Court's ruling as to the extrapolation of a per server royalty from the litigation licenses." (Doc. No. 691).

Bedrock's March 28, 2011 "supplemental" report ("New Report") is not a proper supplement and, respectfully, it was error to permit Bedrock to submit this new damages report. In the "supplemental" report Mr. Weinstein: 1) changed his royalty opinions to incorporate a completely different methodology; 2) dramatically altered his damages calculations and conclusions against all Defendants; 3) materially contradicted the opinions expressed in his

[1] SoftLayer Technologies, Inc.; Google, Inc.; MySpace Inc.; and AOL Inc.

[2] All arguments presented in the prior briefing are incorporated by reference herein. *See* Doc. No. 686.

original report of January 25, 2011 ("Original Report"); and 4) based his revised royalty opinions on facts that are nowhere in his Original Report. Mr. Weinstein's New Report is therefore anything but "supplemental" and should be stricken under Federal Rule of Civil Procedure 26(e) and 37.

Even if Mr. Weinstein's New Report was not an improper supplementation, it should be stricken on the additional ground that it is untimely. With less than three weeks before trial, Defendants had insufficient time to properly consider the new theories or to obtain and marshal witnesses and evidence appropriate to rebut the new theories at trial. Defendants have been severely prejudiced and Bedrock's new damages theory undermines the Federal Rules, this Court's Docket Control Order and fundamental fairness, resulting in a trial by ambush.

II. THE COURT SHOULD STRIKE THE UNTIMELY "SUPPLEMENTAL" EXPERT REPORT OF ROY WEINSTEIN

A. Mr. Weinstein's "Supplemental" Expert Report Is Not A Proper Supplement Under Rule 26(e)

Under Federal Rule of Civil Procedure 26(a)(2)(B), an expert must provide a report "containing a complete statement of all opinions to be expressed and the bases and reasons therefore…." Those disclosures must be made at least 90 days before trial. Fed. R. Civ. P. 26(a)(2)(D). The Original Report was the first expert report Mr. Weinstein submitted. On March 24, 2011, Judge Love granted, in part, Defendants' Motion to Exclude and/or Strike the Expert Report and Opinions of Mr. Weinstein (Doc. No. 656), to the extent Mr. Weinstein relied on the litigation licenses to calculate his $250 per server royalty. As a result of this ruling, on March 28, 2011, Bedrock filed and served its Motion for Leave to Supplement Mr. Weinstein's Report, together with the proposed "supplemental" report in which Mr. Weinstein set forth an entirely new methodology and doubled his damages calculation as to certain Defendants.

Bedrock's representation to the Court that its report was a "supplemental" report is simply inaccurate because the New Report significantly changes the opinions in Mr. Weinstein's Original Report and adds a completely different theory for recovery. *Better v. U.S.*, 221 F.R.D. 689, 694 (D.N.M. 2003).

In *Better*, the district court granted a motion to strike plaintiffs untimely supplemental expert report. When its original report proved wrong, plaintiff argued that it was entitled to supplement expert reports beyond the time limits in Rule 26 because the new report merely broadened and deepened the original report. The court rejected this reasoning. "Although Fed.R.Civ.P. 26(e) requires a party to 'supplement or correct' disclosure upon information later acquired, that provision does not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness report (indeed, the lawsuit from the outset)." *Id.*

Bedrock's New Report is the same brand of sandbagging rejected by *Better*. Mr. Weinstein's prior opinion is that there would be a $250 per-server royalty. This Court's decision to strike Mr. Weinstein's reliance on litigation licenses to establish that per server royalty rate was not an invitation to develop a completely new theory of the case. Bedrock has taken a second crack at damages based on facts and a methodology that were never fully articulated in Mr. Weinstein's Original Report. "Filing a 'supplemental' report does not permit a party to promulgate new and different opinions on the eve of trial. Numerous districts have rejected such tactics as incongruous with the intent and spirit of rule 26 and unduly prejudicial." *O'Connor v. Boeing N. Am., Inc.*¸ 2005 WL 6035243, *8 (C.D. Cal., Sept. 12, 2005); *see also Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998) ("Supplementation under [Rule 26] means correcting inaccuracies, or filling the interstices of an incomplete report based on information

that was not available at the time of the initial disclosure."); *Lampe Berger USA, Inc. v. Scentier, Inc.*¸ 2008 WL 3386716, *2 n. 3 (M.D. La., Aug. 8, 2008) ("Courts have similarly made it clear that supplemental expert reports cannot be used to 'fix' problems in initial reports."). The Order should be set aside because Mr. Weinstein's New Report sets forth on the eve of trial a fundamentally different opinion than the one he articulated in his Original Report, rather than purporting to correct inaccuracies or supplying facts not available at the time of initial disclosure.

The Order indicates that the Court granted Bedrock leave to supplement Mr. Weinstein's report because "there is some uncertainty on [whether litigation licenses are admissible at trial] due to cases such as *ResQNet*, *Data Treasury*, and *ReedHycalog*." (Doc. 691, p. 1.) No authority supports use of settlement licenses to derive a per-unit royalty, as Mr. Weinstein did in his Original Report. To the extent uncertainty existed, Mr. Weinstein could have developed and articulated (but did not) an alternative damages calculation in his Original Report. Bedrock elected not to develop such a theory in the Original Report. Allowing Bedrock to do so now, on the eve of trial and in violation of the Federal Rules, prejudices Defendants by providing insufficient time to respond and providing misdirection on its theories to be presented at trial. This Court should not give Bedrock a second bite at the apple.

These principles are particularly important here because the "supplemental" report advances an opinion expressly disclaimed in the Original Report. Mr. Weinstein states unequivocally in this Original Report that no royalty in this case would be arrived by a division of Defendants' revenue or profits. Expert Report of Roy Weinstein ("Weinstein Rep."), ¶ 224 attached as Ex. A, to the Declaration of Evette D. Pennypacker ("Pennypacker Decl."), Doc. No. 559. Defendants were entitled to rely on that disclaimer in preparing their case for trial. But in the "supplemental" report submitted on the eve of trial, this is precisely what Mr. Weinstein now

asserts – the new damages opinion is predicated on a purported 50/50 split of cost savings, which Mr. Weinstein readily admits in deposition is the same thing as dividing profits (since profits = revenue minus cost savings). Where an expert has expressly disclaimed a damages analysis in an Original Report, it works manifest prejudice to then permit plaintiff to proceed with that disclaimed damages opinion just days before trial, with Defendants having no meaningful opportunity to rebut or to develop responsive evidence.

Courts routinely strike expert reports filed far earlier than three weeks before trial *See Yetti by Molly, Ltd. v. Deckers Outdoor Corp*, 259 F.3d 1101, 1105 (9th Cir. 2001) (excluding expert report submitted 28 days prior to trial); *O'Connor v. Boeing N. Am., Inc.*¸ 2005 WL 6035243, *10 (C.D. Cal., Sept. 12, 2005) (striking expert reports filed two months before trial); *Trustmark Ins. Co. v. Gen. Cologne Life Re of Am.*, 2003 WL 21673934, *1 (N.D. Ill., Jul. 16, 2003) ("While it is true that the [untimely] report was filed over two months before the start of trial, this is not sufficient to make the delay harmless."). The Court should set aside the Order and strike Mr. Weinstein's New Report as an improper supplementation under Federal Rule of Civil Procedure 26(e). Trial is imminent and Defendants will be severely prejudiced if Bedrock is permitted to introduce these new opinions and analyses at trial. The prejudice and surprise brought by his New Report cannot be cured this close to trial. Defendants have prepared their cases based on the damages calculation in the Original Report, upon which Mr. Weinstein was first deposed.

B. Mr. Weinstein's "Supplemental" Report Is Untimely Regardless Of Whether It Is Proper Supplementation

Even if Mr. Weinstein's New Report could possibly be characterized as a supplemental report under Rule 26(e) (it cannot), it is still untimely under the Federal Rules. Rule 26(e)

requires all supplemental disclosures to be provided 'by the time the party's disclosures under Rule 26(a)(3) are due." Fed. R Civ. P. 26(e). Disclosures under Rule 26(a)(3) "must be made at least 30 days before trial." Fed. R. Civ. P. 26(a)(3)(B). That date was March 11, 2011, which Bedrock missed by over two weeks. Moreover, the expert discovery deadline was February 11, 2011. (Doc. 375). Thus, regardless of whether the New Report could be characterized as "supplemental," it still would be untimely and should be excluded pursuant to Federal Rule of Civil Procedure 37(c). Exclusion is a "self-executing automatic sanction to provide a strong inducement for disclosure of material." *Yeti by Molly*, 259 F.3d at 1106 (quoting Fed. R. Civ.. P. 37(c) advisory committee note (1993)); *Versata Software, Inc. v. SAP Am.*, No. 2:07-cv-153, slip op. at 2-3 (E.D. Tex. Aug. 7, 2009) (striking untimely supplemental expert report served 12 days after the close of expert discovery and 11 days after the pretrial disclosure deadline); *see also Wilson v. Bradlees of New England*, 250 F.3d 10, 20 (1st Cir. 2001) (stating that Rule 37(c) "requires the near automatic exclusion of Rule 26 information that is not timely disclosed").

Bedrock's new damages claims were conjured up in response to the Court's granting Defendants' motion to preclude the expert testimony of Mr. Weinstein based on a $250 per server royalty rate. Permitting Bedrock to change course this late in the litigation would circumvent the very purpose of discovery and the Federal Rules of Civil Procedure 26 and 37, both of which are designed to avoid a trial by ambush.

III. CONCLUSION

For the reasons explained above, Defendants respectfully requests that the Court set aside the Order granting Bedrock leave to supplement Mr. Weinstein's report and strike his New Report and opinions.

Respectfully submitted, this the 14th day of April 2011.

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CERTIFICATE OF SERVICE

This is to certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this April 14, 2011. Any other counsel of record will be served by first class mail.

/s/ Louis A. Karasik