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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RSI CORP., dba RESPONSIVE SYSTEMS
COMPANY, a New Jersey corporation,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES
CORPORATION, a New York corporation;
and DOE DEFENDANTS 1-20,

Defendants.

Case No. C-08-03414 RMW

**ORDER DENYING MOTION TO
CONTINUE TRIAL; MODIFYING
DISCOVERY ORDER**

[Re Docket No. 259]

IBM has moved for a continuance of the trial date and other scheduling dates because: (1) it needs more time to comply with the court's Order on Discovery Report No. 1 ("the Discovery Order"); (2) RSI has failed to produce vital discovery; and (3) a ruling on IBM's pending summary judgment motion may narrow the issues. The court has considered the papers filed and the arguments of counsel. The court denies the motion to continue the trial date, modifies the Discovery Order and extends the time to comply with it and denies the motion to otherwise continue the scheduling dates.

The court issued the Discovery Order on October 5, 2012 believing it had fairly balanced RSI's need for information with the burden placed upon IBM to comply with the Order. It has

1 now become clear that the Order places an unreasonable burden on IBM and that a modification
2 will ease that burden but not significantly impair RSI's access to the information it seeks.
3 Although IBM should have detailed before the Discovery Order was issued the burdens that
4 would be placed upon it by RSI's discovery request, the court will nevertheless now modify the
5 Order.

6 As represented to the court in the January 18, 2013 hearing and in the papers, the "Z IM"
7 and "Z Tivoli" sales representatives are IBM's employees that focus on selling a group of IBM
8 products that includes DB2 Buffer Pool Analyzer, DB2PE and OMPE (collectively, "the
9 Products"). Thus, they are the individuals most likely to be involved in any communications
10 about those Products with customers. Because of the burden of collecting and reviewing
11 documents from all of the employees in IBM's sales force, most of whom are unlikely to have
12 communicated about the Products, the Court modifies the Discovery Order as follows.

13 IBM is ordered to conduct a diligent search for communications regarding the licensing of
14 the Products between the 76 U.S.-based employees in the positions of "Z IM" sales representative
15 and/or "Z Tivoli" sales representative it has identified and IBM customers who licensed at least
16 one of the Products since February 15, 2004, or who appear on the list of direct licensees of RSI's
17 Buffer Pool Tool product since 2003 that RSI recently produced. The court understands that IBM
18 used information from its incentive support systems to identify the 76 Z IM and Z Tivoli
19 representatives who received credit for transactions involving sales of the Products since 2005.
20 IBM may employ electronic search terms to ease its burden provided those search terms are
21 consistent with the terms IBM represented at the January 18 hearing that it was using. The court
22 extends the fact discovery deadline as to the documents described to March 1, 2013. The
23 documents will be produced on a rolling basis. Full compliance with this modification will
24 satisfy IBM's obligation under the Discovery Order.

25 RSI's concern that the modified Order will enable IBM to avoid producing
26 communications with potential customers who did not elect to use IBM's product is not
27 convincing. RSI contends that they are the ones with whom IBM most likely interfered.
28 However, not only does the court have difficulty with RSI's premise, the communications IBM

1 must produce from the representatives who received credit for transactions involving sales of the
2 Products include communications with potential customers who elected not to utilize any of
3 IBM's products.

4 Except as set forth above, all discovery and scheduling dates remain in effect including
5 dates for discovery the parties previously agreed to conduct after the discovery deadline as
6 represented to the court at the January 18 hearing.

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Dated: January 22, 2013



Ronald M. Whyte
United States District Court Judge