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28***E-FILED 07-20-2011***

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MFORMATION TECHNOLOGIES, INC.,

No. C08-04990 JW (HRL)

Plaintiff,

**ORDER (1) GRANTING DEFENDANTS'
MOTION TO STRIKE ERRATA SHEET;
AND (2) DENYING WITHOUT
PREJUDICE DEFENDANTS' MOTION
FOR EVIDENTIARY SANCTIONS**

v.

RESEARCH IN MOTION LIMITED and
RESEARCH IN MOTION CORPORATION,**[Re: Docket No. 389]**Defendants.

Dr. Rakesh Kushwaha is a co-founder of plaintiff Mformation Technologies, Inc. (Mformation) and a named inventor of the '917 patent in suit.¹ He was deposed in December 2010 in his capacity as Mformation's Fed. R. Civ. P. 30(b)(6) designee. During that deposition, Kushwaha testified about the date of Mformation's claimed reduction to practice. Based on that testimony, defendants Research in Motion Limited and Research in Motion Corporation (collectively, RIM) advised plaintiff about a potential new invalidity defense. Kushwaha subsequently submitted an errata sheet changing his testimony as to the date of plaintiff's claimed reduction to practice. Mformation says that those changes were prompted by Kushwaha's post-deposition review of a certain version of plaintiff's source code.

Defendants move for an order striking Kushwaha's errata sheet. They also request evidentiary sanctions with respect to the source code Kushwaha reviewed and which defendants

¹ U.S. Patent No. 6,970,917

1 say Mformation waited nearly two years to produce. Mformation opposes the motion. Upon
2 consideration of the moving and responding papers, as well as the arguments of counsel, this
3 court grants RIM’s motion to strike and issues a report and recommendation re RIM’s request
4 for evidentiary sanctions.

5 A. RIM’s Motion to Strike

6 Rule 30(e) of the Federal Rules of Civil Procedure permits a deponent to correct his
7 deposition testimony, and “if there are changes in form or substance, to sign a statement listing
8 the changes and the reasons for making them.” FED. R. CIV. P. 30(e)(1)(B). Under Ninth
9 Circuit law, “Rule 30(e) is to be used for corrective, and not contradictory changes.”
10 Hambleton Bros. Lumber Co. v. Balking Enterprises, Inc., 397 F.3d 1217, 1225-26 (9th Cir.
11 2005). Courts have applied Hambleton to deposition changes made outside the summary
12 judgment context. See, e.g., Tourgeman v. Collins Fin. Servs., Inc., Case No. 08-CV-1392,
13 2010 WL 4817990 * 3 (S.D. Cal., Nov. 22, 2010); Lewis v. The CCPOA Benefit Trust Fund,
14 Case No. C08-03228 VRW (DMR), 2010 WL 3398521 * 3 (N.D. Cal., Aug. 27, 2010).

15 Mformation contends that Kushwaha’s changes are consistent with his prior testimony
16 (given in his capacity as an individual) about the source code version in question. On the record
17 presented, it is not clear to this court that Kushwaha was, in fact, referring to the same version
18 of the code in his prior individual deposition. In any event, defendants point out that
19 Kushwaha’s original (unchanged) Fed. R. Civ. P. 30(b)(6) deposition testimony is consistent
20 with the claimed date of reduction to practice that (1) Mformation identified, via interrogatory
21 answers, over two years ago and (2) remained unchanged over the course of seven supplemental
22 and amended interrogatory answers—that is, until earlier this year, after RIM advised plaintiff
23 of a potential new invalidity defense based on Kushwaha’s original Fed. R. Civ. P. 30(b)(6)
24 testimony. Kushwaha did not equivocate or express confusion in providing the Fed. R. Civ. P.
25 30(b)(6) deposition testimony in question. Having reviewed Kushwaha’s testimony, this court
26 is persuaded that his errata sheet is contradictory to, and not merely corrective of, the testimony
27 he gave in his capacity as Mformation’s corporate designee. (See Thakur Decl., Ex. B; Zinanni
28 Decl., Ex. W). Accordingly, RIM’s motion to strike is granted.

1 B. RIM's Motion for Evidentiary Sanctions

2 Pursuant to Fed. R. Civ. P. 37(c)(1), defendants request evidentiary sanctions for what
3 they believe to be Mformation's suspiciously late production of the source code Kushwaha
4 reviewed after he was deposed as a corporate designee. Specifically, defendants seek an order
5 not only precluding Mformation from relying on the subject source code, but establishing as
6 true that the source code included all of the elements of the claimed invention by July 2000.

7 The court may impose sanctions for a party's failure to provide information, unless the
8 failure was substantially justified or harmless. FED. R. CIV. P. 37(c)(1). Mformation has
9 provided no basis for this court to find that the belated production of the subject source code
10 was substantially justified. The source code reportedly was gathered by plaintiff for production
11 in early 2009, but was not actually produced until February 2011, a few months prior to the
12 close of discovery. Mformation says that the omission of the source code from its production
13 was an inadvertent error. But, plaintiff has no satisfactory explanation why the source code was
14 produced only this year; and, the record indicates that RIM requested full production of
15 plaintiff's source code no less than ten times before Kushwaha was deposed in December 2010.
16 (Karson Decl. ¶ 3).

17 At the same time, however, the extent and severity of the prejudice to RIM is unclear.
18 RIM has had the source code in question for several months, and RIM received the code before
19 discovery closed (albeit, toward the very end of the discovery period). Additionally, plaintiff
20 points out that, prior to the close of discovery, it offered to let RIM depose Kushwaha again as
21 to the source code version in question. Mformation was also agreeable to a modification of the
22 case schedule to allow for supplemental expert disclosures and discovery. And, according to
23 plaintiff, the source code in question does not reduce to practice every element of Claim 1 of the
24 '917 patent anyway. RIM says it does not know whether that last assertion is true. In essence,
25 defendants say that they have been prejudiced because they operated for two years under what
26 Mformation told them were the facts as to the claimed reduction to practice and made decisions
27 about what discovery to take based on the source code data Mformation actually
28

1 produced—only to have Mformation change its story and produce the subject source code at the
2 last minute.

3 *If* it is true that the subject source code does *not* include all elements of claim 1 of the
4 ‘917 patent, then it would be unfair to impose sanctions that would be contrary to the actual
5 facts or that would prevent the actual facts from being presented. While this court has been told
6 what the parties contend is the truth, the actual facts about the subject source code cannot be
7 determined from the record presented. This court therefore declines to impose the sanctions
8 requested by RIM. In the interests of resolving this action on the merits, RIM may well be
9 entitled to some additional time to properly examine the subject source code and to conduct any
10 necessary follow-up discovery. Such relief, however, is conditioned on the presiding judge’s
11 determination that the period for fact and expert discovery should be re-opened for that purpose.
12 Depending on further developments in this case, this order is without prejudice to RIM to seek
13 evidentiary sanctions, as may be appropriate, from the presiding judge.

14 SO ORDERED.

15 Dated: July 20, 2011



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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