Exhibit 16

IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

EPICREALM, LICENSING, LLC	§	
	§	
v	§	**No. 5:07CV125**
	§	
AUTOFLEX LEASING, INC., et al.	§	

EPICREALM, LICENSING, LLC	§	
	§	
v	§	**No. 5:07CV126**
	§	
FRANKLIN COVEY CO., et al.	§	

EPICREALM, LICENSING, LLC	§	
	§	
v	§	**No. 5:07CV135**
	§	
VARIOUS, INC.	§	

ORDER

Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) and the Amended Order for the

Adoption of Local Rules for Assignment of Duties to United States Magistrate Judges, the above-

referenced consolidated causes of action were referred to the Honorable Caroline M. Craven for

pretrial purposes. On November 1, 2007, the Court conducted a hearing on Plaintiff's motion to

compel (Docket Entry #s 283 in 5:07cv125 & 285 in 5:07cv126) for further consideration in light

of the Court's finding that the scope of discovery may include accused websites and systems

"reasonably similar" to those accused in the PICs.

I. FACTUAL BACKGROUND

[E]picRealm Licensing, LLC ("Plaintiff" or "epicRealm") filed its patent infringement case

against Autoflex Leasing, Inc., et al. on May, 2, 2005 and its patent infringement case against

Franklin Covey, et al. on August 5, 2005, alleging Defendants are infringing United States Patent

Nos. 5,894,554 and 6,415,335 (the "Patents"). On January 25, 2007, Plaintiff filed its patent

infringement case against Various, Inc., alleging Various infringes the Patents. The Patents allegedly

encompass certain systems and methods to dynamically generate web pages. Plaintiff's Patents

purport to cover a process in which a web server interacts with a page server and other data sources

to generate dynamic web pages that are subsequently transmitted over the Internet.

II. PROCEDURAL BACKGROUND

In December of 2005, epicRealm served its PICs. Thereafter, on July 13, 2006, this Court

conducted a claim construction hearing and on August 15, 2006 issued an Order construing relevant

claim language. On November 29, 2006, which was the deadline for epicRealm to serve amended

infringement contentions under the then-existing docket control order, epicRealm moved to compel

the production of documents relating to software and systems not specifically identified in its PICs.

Clark Consulting, Inc. ("Clark Consulting"), Herbalife International of America, Inc., ("Herbalife"),

Grande Communication Networks, Inc. ("Grande"), FriendFinder Network, Inc. ("FriendFinder"),

and Franklin Covey Co. ("Franklin Covey") filed responses in opposition to Plaintiff's motion.

After conducting a hearing, the Court granted in part and denied in part Plaintiff's motion

to compel by Order dated April 16, 2007. In its Order, the undersigned first noted that where

information is limited, the plaintiff has the burden to present in the PICs enough information to put

the defendant on notice of infringement if it desires to engage in discovery. The Court held that

Plaintiff had fallen short of that burden despite having sufficient information to have set forth a

theory of infringement. Specifically, the Court held Plaintiff had failed to give notice and thus to

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accuse websites utilizing Microsoft IIS or any other proprietary software.

The Court further noted that Plaintiff delayed in seeking information regarding unnamed systems. As one example, Clark Consulting represented to the Court that it had refused to produce information on its Microsoft IIS websites in February of 2006; yet, from February to November of 2006, Plaintiff did nothing with respect to Clark Consulting's refusal. Only nine months after Clark Consulting raised the issue, and two months before the close of discovery, did Plaintiff finally take action consistent with what it now says was its belief all along, that it had accused Microsoft IIS sites and intended to pursue them. Several of the other defendants, including Autoflex, Clark Consulting, and Herbalife, represented to the Court that they expressly told Plaintiff in February of 2006 that the discovery requested by Plaintiff was not forthcoming.

The Court held Plaintiff could not claim "diligence" in the face of its failure to seek discovery for over nine months. Plaintiff had not adequately explained why it waited until late November of 2006 to file its motion to compel. The Court concluded that to allow Plaintiff to initially bring up new theories of infringement at a late stage of discovery, well after completion of claim construction, would only prejudice Defendants. For these reasons, the Court found Plaintiff had not properly accused Defendants of infringement with respect to Microsoft IIS or other proprietary software not named in the PICs.

On April 30, 2007, epicRealm moved for reconsideration of the April 16 Order denying its motion to compel. On August 27, 2007, Judge Folsom remanded the April 16 Order for further consideration in light of the Court's finding that the scope of discovery may include accused websites and systems "reasonably similar" to those accused in the PICs. In addition, Judge Folsom noted that:

Nonetheless, Magistrate Judge Craven also considered whether Plaintiff should have earlier sought leave to amend its PICs or should have included the websites and systems about which Plaintiff seeks discovery in its original PICs. Dkt. No. 340 at 5-10. 'Amendment or supplementation any Infringement Contentions . . . other than [in response to a claim construction ruling], may be made only by order of the Court, which shall be entered only upon a showing of good cause.' P.R. 3-6(b); see also 02 Micro, 467 F.3d at 1360. Magistrate Judge Craven thus properly considered that Plaintiff 'had an obligation to investigate and provide to Defendants . . . an appropriate infringement theory.' Dkt. No. 340 at 6. Delay and diligence remain factors to consider in deciding whether 'good cause' justifies the amendment of infringement contentions after the deadline contained in a scheduling order.

Order, August 27, 2007 at pg. 6. In light of Judge Folsom's remand, the undersigned requested briefing on the issues remanded. Order, August 31, 2007 at pgs. l-2.

III. PLAINTIFF'S POSITION ON REMAND

Plaintiff, in response to the Court's directive requesting briefing on the "reasonably similar" issue, identified two separate categories of systems. Plaintiff described the first category of systems as "technologies that Defendants employ in the generation of dynamic content of which epicRealm is aware." Opening Brief at pg. 2. Within this category, epicRealm named eleven "technologies" that it contends are within the scope of discovery because they are either "'reasonably similar' or because they were specifically named in epicRealm's PICs." The eleven technologies are described under the following numbered subheadings appearing in epicRealm's Opening Brief: (1) Apache/Tomcat (with modjk connector); (2) Apache/Tomcat (with mod_webapp connector); (3) Apache/PHP (Zend Engine); (4) ApacheÀ4od perl; (5) Microsoft IIS; (6) NetScaler System; (7) Jboss and Resin; (8) Netscape/Sun ONE Web Server; (9) Oracle, PostgreSQl, Tyrex, MySQL, and XDBI; (10) Weblogic; and (ll) FastCGI.

Plaintiff described the second category as "technologies that Defendants employ in the generation of dynamic content of which epicRealm is unaware ('unknown systems')." Opening

Brief at pg. 2. According to Plaintiff, several of the Defendants, including Grande, Franklin Covey, and Herbalife use masking techniques to hide from the public the identity of certain software used to run their websites. Plaintiff asserts the masking techniques used by Defendants block one of the few methods Plaintiff has for obtaining information on Defendants' systems. Plaintiff argues to the extent that these unknown systems are "reasonably similar" to the systems named in epicRealm's PICs, Judge Folsom's Order entitles epicRealm to discovery of these unknown systems.

Plaintiff further asserts the parties and the Court need some mechanism whereby Defendants' "unknown systems" can be identified. Plaintiff suggests that the Court require Defendants to identify in a list all software and hardware that they use in the generation of dynamic content. If Defendants' disclosures turn up any unknown systems, the parties can supplement their briefing on the "reasonably similar" issue.

IV. DISCUSSION

A.   Background issues

Plaintiff argued before Judge Folsom[1] and in its reply brief on the remanded issues before the undersigned that Defendants' reasoning as to why Plaintiff should be denied discovery erroneously relies on *Caritas Tech., Inc. v. Comcast Corp.*, No. 2:05CV339, slip op. at 8-9 (E.D. Tex. Feb. 9, 2006). According to Plaintiff, even though Judge Folsom directly ordered discovery on all "reasonably similar" products and services, Defendants still argue that the Court should not order the discovery of any "reasonably similar" systems and websites unless such systems and websites are first added to Plaintiff's PICs.

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[1] In his August 27 Order, Judge Folsom stated: "Contrary to *Caritas*, the Court finds no bright line rule that discovery can only be obtained if related to an accused product identified in a party's PICs."

For the record, the Court's opinion in *Caritas Tech., Inc. v. Comcast Corp.*, No. 2:05CV339

(E.D. Tex. Feb. 9, 2006) is referenced nowhere in the undersigned's April 16, 2007 Order. In fact,

the undersigned purposefully did not rely on the opinion in *Caritas* for the proposition that systems

are irrelevant because they are not specifically named in Plaintiff's PICs. Instead, the Court

considered, within the context of Judge Davis' orders in *Orion IP, LLC v. Staples, Inc.*, No. 2:04-

CV-397 (E.D. Tex. July 7, 2005) ("*Orion I*") and *Orion IP, LLC v. Staples, Inc.*, 407 F.Supp.2d 815,

817 (E.D. Tex. 2006)("*Orion II*"), whether Plaintiff's motion to compel discovery from Defendants

should be granted or whether Plaintiff had changed its theory of infringement, justifying a denial of

discovery.

Importantly, the standard utilized by the undersigned in issuing its April 16 Order was the

standard urged by the parties in the briefing on Plaintiff's motion to compel. In its motion to compel,

Plaintiff relied heavily on *Orion II*.[2] Specifically, Plaintiff asserted its PICs provided "specific

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[2] Plaintiff argued as follows:

In *Orion, IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006), Judge
Davis held: 'In dealing with something like a website, it would be unrealistic to
expect plaintiffs to provide screen shots for every possible manifestation of the
alleged infringement. Instead, plaintiffs should provide specific theories of
infringement and representative examples of the alleged infringement." *See American
Video Graphics, L.P. v. Electronic Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex.
2005) (recognizing that patent holders in software patent cases do not have access to
source code, and are, therefore, not required to submit 'highly specified [preliminary]
infringement contentions'); *STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F. Supp.
2d 754, 755-56 (E.D. Tex. 2004)('Patent Rule 3-6 and 3-7 demonstrate that the
Patent Rules allow for an initial disclosure with additional detail supplemented in
later disclosures because those rules allow parties to supplement their preliminary
infringement contentions when technical information is produced'). In these three
cases, Judge Davis recognized the absurdity that would result from requiring a patent
claimant in a case involving software to name every potentially infringing system in
its PICs. This case is no different.

Plaintiff's Motion to Compel, to Extend Trial Setting and Pretrial Deadlines at pgs. 12-13.

theories of infringement" coupled with "representative examples" as held sufficient by Judge Davis in *Orion II*. In response to Plaintiff's motion to compel, several of the Defendants relied on *Orion I*, asserting there the plaintiff's PICs included broad infringement accusations against the entire Toyota family of websites, including the Scion websites, and Judge Davis denied the plaintiff's motion to compel.

Guided by the parties' briefing, the Court considered the authority urged by the parties and discussed both *Orion* opinions in detail in its April 16, 2007 Order. Based on this, the undersigned held discovery from Defendants relating to Microsoft IIS websites or other proprietary software was not permitted. Specifically, the undersigned disagreed with Plaintiff that its PICs included specific theories of infringement coupled with representative examples. Rather, the Court found Plaintiff sought discovery on new specific theories of infringement. The Court held that to allow Plaintiff to initially bring up new theories of infringement well after completion of claim construction and near the end of discovery would prejudice Defendants.

Subsequently, Judge Folsom has adopted a "reasonably similar" standard for determining the scope of discovery. The Court must consider what this standard means and whether it is significantly different from the specific theory of infringement/representative examples standard utilized by the undersigned in the April 16, 2007 Order. Assuming there is a significant difference between the standard utilized by the Court in its April 16 Order, the parties offer suggestions as to the proper meaning of the "reasonably similar" standard now adopted by the Court. The Court considers those suggestions below.

B.   Suggested standards for "reasonably similar"

1.   Plaintiff's standard

Plaintiff asserts there are basically six scenarios at issue: (1) websites and systems named in the PICs; (2) copies of systems named in the PICs, including other versions; (3) systems named in the PICs, but no named websites; (4) websites named in the PICs, but no named systems; (5) named components attached to unnamed components; and (6) unknown systems. Plaintiff's recommendation for the "reasonably similar" standard is as follows.

Regarding the first scenario, Plaintiff should be allowed discovery on all unnamed websites served by the same system. Regarding the second scenario, Plaintiff should be allowed discovery of the systems and websites served by the systems named in the PICs. Regarding the third scenario, Plaintiff should be allowed discovery on all websites served by the systems named in the PICs, with no named websites. Regarding the fourth scenario, Plaintiff should be allowed discovery on the systems for the named websites and other websites served by that system. Regarding the fifth scenario, where Plaintiff identified named components attached to unnamed components, Defendants shall identify the systems, and the parties will work together to determine whether the systems are "reasonably similar." Regarding the sixth scenario (unknown systems), Defendants shall identify such systems, and the parties will work together to determine whether they are "reasonably similar."

2.   Clark's standard

On December 22, 2005, Plaintiff served its PICs on Clark, naming www.clarkconsulting.com website. That site utilizes Apache software for the web server, Tomcat software as the application server that generates dynamic content, and a mod_jk plug-in as the connection between Apache and Tomcat. Until March 2007, Clark had two other sites, www.mgmtscience.com and

www.pearlmeyer.com, which used the same software platform and were hosted on the same physical machine. In its discovery responses served on epicRealm in February, 2006, Clark disclosed these two additional sites and provided the same discovery regarding those sites as it had provided with respect to the accused site, www.clarkconsulting.com. In addition, Clark disclosed a fourth site which operated with an Apache web server, msasurveys.i-3.com, but because it employed perl scripts to generate dynamic content, it was Clark's opinion that this platform was prior art to the patents.

Clark represents it has provided all discovery requested to date on all of its websites which use the software accused in the PICs. Clark asserts the Apache with Perl scripts platform used on the msasurveys.i-3.com is not a reasonably similar system because one of the chief claims and advantages of epicRealm's patented method is the partitioned architecture which allows off-loading of work from an overworked web server onto a page server residing on another machine. It is thus critical that the page server software be sufficiently modular such that it can readily be installed separately and apart from the web server software. According to Clark, Tomcat, JBoss, and Resin, examples of page server software cited in the PICs, exhibit this "partitionability." However, the software platform used by Clark to run msasurveys.i-3.com does not have this capability. The mod_perl component of the software which interprets, or runs, the Perl scripts that generate the dynamic content, was developed by Apache and is bundled with it. Mod_perl is embedded within Apache, meaning that it runs in the same memory and process space as Apache. Clark states it is designed to be and to function as part of Apache, and cannot stand or function alone. According to Clark, this platform is thus not divisible or partitionable as contemplated by the patents, and is therefore not reasonably similar to the Apache/Tomcat system.

In addition, Clark asserts Microsoft IIS appears to be dissimilar to the Apache/Tomcat

platform epicRealm has accused Clark of using. For example, the Apache/Tomcat architecture permits a web site design that uses one or more Apache web servers as the front end to handle static requests while joined to, and off-loading dynamic requests to, three, four, or more Tomcat page servers, thus efficiently achieving the desired "scalability" touted in the patents. On the other hand, Microsoft IIS incorporates both web server and page server capability on one package.

In sum, Clark's methodology for determining "reasonably similar" requires the page server software be "partitionable" from the web server software.

3.   Franklin Covey's standard

Plaintiff's PICs to Franklin Covey specifically identify (1) an Apache web server in combination with (2) mod_jk, "an Apache plug-in/connector/module that can operate as a bridge between an Apache web server and a page server," and (3) "page server(s) (or application server, servlet container, or software, etc.) such as Tomcat, J-Boss, and/or Resin. . . " as allegedly infringing the asserted patents. Plaintiff's PICs further identify "relational databases such as Oracle, PostgreSQl, Tyrex, and MySQL" as corresponding to the "one or more data sources" limitation of the asserted claims.

Franklin Covey does not dispute that epicRealm is entitled to discovery on systems that employ the Apache + modjk + Tomcat, J-Boss, and/or Resin combination with an "Oracle, PostgreSQl, Tyrex, and/or MySQL relational database" or systems "reasonably similar" thereto nor does Franklin Covey contest Plaintiff's ability to take discovery on other websites that employ the Apache + modjk + Tomcat, J-Boss, and/or Resin combination with an "Oracle, PostgreSQl, Tyrex, and/or MySQL relational database." As Plaintiff argues, Franklin Covey agrees such systems and websites are "reasonably similar" to the systems and sites described in Plaintiff's PICs.

Franklin Covey does not offer the Court a standard whether something is "reasonably similar." Franklin Covey contends Plaintiff has failed to establish any reasonable similarity between these new technologies and those described in its PICs that would entitle epicRealm to take the extensive discovery it now seeks. Franklin Covey argues it should not be required to produce burdensome discovery because Plaintiff will not be allowed to amend its PICs and accuse those systems of infringement. Franklin Covey also asserts it should be excused from its lack of production because third parties possess the documents. Plaintiff asserts third-party discovery does not relieve a primary party from its duty to produce relevant documents in its possession.

4.   Grande's standard

In its PICs to Grande, Plaintiff accused Grandecom.com and its use of the Apace/Tomcat configuration. According to Grande, it has been the most forthcoming regarding discovery from the beginning, and Plaintiff's motion regarding it is moot. Grande has offered several times for Plaintiff to review documents at its place of business, yet Plaintiff has not done this.

Regarding the "reasonably similar" standard, Grande argues Plaintiff must provide a "colorable basis of infringement" before a system or website may be deemed "reasonably similar." Grande's response at pg. 3. Plaintiff takes issue with this approach, asserting it requires Plaintiff to prepare infringement-like contentions without the benefit of discovery and it allows Defendants the discretion in censoring discovery and in determining whether Plaintiff has provided enough information.

5.   Herbalife's standard

Concerning Herbalife, Plaintiff's PICs for each of the asserted claims include processing of dynamic page requests using the following elements: (a) an Apache Web server, or HTTP-compliant

device, such as a layer 7 switch; (b) a page server(s), such as Tomcat, JBoss, Resin or servlet container(s) operable to generate dynamic content; (c) a plug-in or connector, such as a mod_jk module, operating as a bridge between the Web server and the page server(s); and (d) data sources, such as Oracle, PostgreSQL, Tyrex and MySQL, from which data is retrieved. In its PICs, epicRealm further specifies that the Web server initially evaluates Web requests and cooperates with the mod_jk module to route requests for dynamic content to the appropriate page server, which in turn retrieves data from a variety of data sources; the PICs also identify epicRealm's infringement theories concerning concurrent processing of requests, intercepting and dispatching requests, the use of templates, etc.

Herbalife operates over 100 websites, some using Apache/Weblogic systems, others Microsoft IIS, yet others PHP and/or Oracle relational databases, and only one is specifically identified in Plaintiff's PICs. Herbalife argues Plaintiff must specifically name the website of a named system to get discovery of the website or other websites on that system. Similarly, Herbalife would require Plaintiff to specifically name the system of a named website to get discovery of that system. Plaintiff objects to this methodology as limiting its discovery to the PICs.

According to Herbalife, Plaintiff's reasonable similarity methodology is guided by a "common theme," which is so broadly stated (extending the functionality of a web server) as to (1) be divorced from any specific claim limitations; and (2) apparently encompass all mechanisms for generating dynamic pages, including admitted prior art. Herbalife further asserts that of the eleven technologies used by the defendants of which epicRealm claims to be aware, nearly half (*i.e.,* items 3, 4, 7, 9, 10 and 11) are directed to individual components of a system for managing dynamic Web page generation, and do not fit the limitations of any asserted patent claim. For example, Oracle,

PostgreSQL, Tyrex and MySQL (item 9) are specifically identified in epicRealm's PICs as representative <u>data sources</u>, and epicRealm makes no suggestion that such data sources can be used as complete systems for managing dynamic Web page generation and can point to no applicable infringement theories.

In addition, Herbalife asserts JBoss and Resin (item 7) have been identified in epicRealm's PICs as examples of <u>page servers</u>; likewise Weblogic (item 10) and FastCGI (item 11) are expressly compared in epicRealm's Brief to Tomcat, another example of a page server. To the extent that epicRealm is suggesting that all of the above technologies can be operated as complete systems for managing dynamic Web page generation, Herbalife asserts this suggestion is deficient as no corresponding theories of infringement have ever been presented. Again, Herbalife contends the claim that Judge Folsom's Order "entitles" epicRealm to discovery regarding such systems or "all Defendants' websites served by such systems" has no merit.

According to Herbalife, while Plaintiff compares the mod_perl plug-in to a Tomcat page server, the Apache/PHP combination to Apache/Tomcat, and the Netscaler to a load balancer and server with script-processing capabilities, the assertion of reasonable similarity is based on conclusory statements: epicRealm does not explain how these systems are encompassed by the infringement theories set forth in its PICs, and in particular fails to identify any mechanism for intercepting or dispatching a request, or even how mod_perl, PHP or Netscaler's load balancer correspond to the specifically recited elements of the claims.

Next, with reference to Microsoft IIS (item 5) and Netscape / Sun ONE Web Server (item 8), Herbalife states epicRealm can do no better than suggest that each of these technologies, like Apache, "has a primary purpose of operating as a web server" and is well known in the art as such.

While it also includes the contention that such web servers can be connected to "server side scripting engines," such as Tomcat and PHP, Herbalife asserts epicRealm fails to explain how the web servers are bridged to these "scripting engines" and, in particular, whether and how these systems use intercepting and dispatching requests. Herbalife further asserts there is no discussion of mechanisms to accomplish concurrent processing, of whether or not the combined systems employ templates, and in general of how such systems are encompassed by epicRealm's infringement theories set forth in its PICs.

C.   Discussion

The Court understands Defendants' argument that there is a difference in applying Judge Ward's "reasonably similar" standard in the beginning of a case[3] and applying the standard two years into discovery, expecting a defendant to produce all documents regarding unnamed websites when only certain specific websites were named in the PICs. However, Judge Folsom did not indicate the standard would be different depending upon the stage of the litigation, and the Court must apply the "reasonably similar" standard. Moreover, the Court will not incorporate a good cause analysis with regard to Plaintiff's ability to amend late its PICs into the determination of which systems and websites are "reasonably similar."

The Court will not attempt to precisely define the "reasonably similar" standard identified in Judge Folsom's August 27 Order. Instead, the Court has considered the parties' arguments and

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[3] Judge Folsom adopted the "reasonably similar" standard from an initial, pre-Scheduling Conference discovery order issued *sua sponte* by Judge Ward in *Microunity Sys. Eng'g, Inc. v. Advanced Micro Devices, Inc.*, Cause No. 2-06-cv-486, Dkt. No. 38 at ¶ 3 (E.D. Tex. May 23, 2007)("Discovery 'relevant to these disclosures' includes discovery relating to the technical operation of the accused products, as well as the identity of and technical operation of any products reasonably similar to any accused product.").

suggested methodologies and finds persuasive Plaintiff's "reasonably similar" methodology for the first three scenarios and the first portion of the fourth scenario presented by Plaintiff at the hearing. Specifically, the Court agrees with Plaintiff that the "reasonably similar" standard requires—at a minimum—that each Defendant must produce all information concerning each system and component specifically identified in Plaintiff's PICs. Plaintiff's PICs do not have to name both the website and describe the system operating that website in order for either the website or the system to be discoverable. If Plaintiff named a system in its PICs (e.g., Apache/Tomcat) with no named website, "reasonably similar" means that Plaintiff is entitled to all discovery for that system, including all of the websites that run on that system, regardless of whether the websites were specifically named in Plaintiff's PICs.

But, before ordering discovery on the first four scenarios presented by Plaintiff, the Court must consider Plaintiff's diligence in moving to compel the requested discovery. Defendants assert there is no reason why Plaintiff could not have earlier pursued discovery on non-accused websites and systems it had notice of from Defendants. As one specific example, Clark asserts Plaintiff did not do anything until November 29, 2006 regarding four unaccused websites it had notice of since late February of 2006. By the end of February 2006, Clark had identified by domain name every website it owned and had identified the software that ran on each of those websites. By the end of February 2006, Clark had also informed Plaintiff that it was not providing discovery as to its Microsoft IIS sites and its Apache/Perl site.

Similarly, Herbalife states that after receiving Plaintiff's interrogatories, Herbalife acknowledged they had other dynamic websites, yet Plaintiff did not respond. Even though Herbalife asked for clarification from Plaintiff, it did not get any clarification. According to

Herbalife, depositions were scheduled in June of 2006, and then cancelled. Again, depositions were scheduled in November of 2006, and cancelled again.

Oftentimes, when an issue is remanded to a magistrate judge for further consideration or reconsidered by a District Judge, the moving party presents the Court with additional, more specific information not contained in the original briefing or presented to the magistrate judge. This is the case here. In attempting to establish it was diligent during the discovery process, in its reply brief currently before the Court, Plaintiff has presented a "Chronology of Discovery and Claim Construction Issues" (the "Discovery Chronology"), which details significant events occurring in this lawsuit between the time Plaintiff served its first discovery requests and the time it filed its motion to compel.

The Discovery Chronology reveals as follows. Plaintiff sent its first round of discovery requests to Defendants in late 2005 and early 2006. According to Plaintiff, those requests sought the production of systems and websites not named in Plaintiff's PICs. Defendants began responding to these requests in piecemeal fashion in February of 2006.

During that same period, several defendants also sent letters to Plaintiff asking whether Plaintiff was seeking discovery regarding unnamed systems. Plaintiff responded to those letters and informed Defendants that it was seeking discovery regarding unnamed systems and that it could not amend its infringement contentions to add those systems until it obtained and analyzed that discovery. *See, e.g.,* Letter of January 25, 2006, from Larry Carlson to Charles Ainsworth (requesting discovery regarding Microsoft IIS); Letter of February 9, 2006, from Larry Carlson to Steve Ravel (requesting discovery regarding www.grandecom.net, which was specifically named in epicRealm's PICs).

From February through May of 2006, Defendants produced or supplemented their productions approximately twenty-six times. In April and May of 2006, Plaintiff began conferring with several defendants in an attempt to resolve discovery disputes. Plaintiff sent letters to numerous defendants complaining of deficient discovery responses. In May of 2006, Herbalife made its first production. Other defendants supplemented their productions in late May. The last supplemental production was provided to Plaintiff on May 31, 2006.

From June through August 15, 2006, the parties focused on the claim construction process. According to Plaintiff, this process consumed most of Plaintiff's manpower and resources until July 13, 2006, the date of the claim construction hearing. After that date, and throughout August and September of 2006, Plaintiff continued to review and analyze Defendants' documents productions and discovery responses.

In September and early October of 2006, Plaintiff served Defendants with a number of deposition notices. Plaintiff planned to use these depositions to obtain additional discovery from Defendants and fill in the gaps where Defendants had refused to produce documents. However, on November 3, 2006, two weeks before the scheduled depositions for Clark, Herbalife, and their web hosters, counsel for Clark and Herbalife sent an email to counsel for epicRealm, informing epicRealm that deposition questions directed at any topics other than named systems would be "inappropriate." *See* email of November 3, 2006, from Luke Kolman to Jeff Moles and Kevin Meek.

Left with no other avenue to obtain discovery on unnamed systems, Plaintiff prepared and filed its motion to compel on November 29, 2006, two months before the fact discovery cutoff. Defendants suggest that epicRealm should have brought its discovery disputes to the Court as they arose instead of waiting until November of 2006 to raise all of the discovery disputes in one motion.

Although this would certainly have been proper, the Court will not fault Plaintiff for attempting to resolve all of the discovery disputes with Defendants first through written discovery, correspondence, and depositions and then, after these avenues failed, filing one motion with the Court encompassing all the discovery disputes.

The Court finds Plaintiff has been diligent in seeking discovery from Defendants. Therefore, as indicated above, the Court will allow discovery on the following first four scenarios presented by Plaintiff and modified by the Court. For websites and systems named in Plaintiff's PICs, to the extent they have not already done so, Defendants shall produce to Plaintiff, within thirty days from the date of entry of this Order, discovery on all unnamed websites served by the same system. Where Plaintiff's PICs include a copy of a system, including other versions, to the extent they have not already done so, Defendants shall produce to Plaintiff, within thirty days from the date of entry of this Order, discovery on the systems and websites served by those systems. For systems named in Plaintiff's PICs and no website is named, to the extent they have not already done so, Defendants shall produce to Plaintiff, within thirty days from the date of entry of this Order, discovery on all websites served by those systems. For websites named in Plaintiff's PICs and no system is named, to the extent they have not already done so, Defendants shall produce to Plaintiff, within thirty days from the date of entry of this Order, discovery on the systems for the named websites. The Court will not require Defendants to produce discovery on all other unnamed websites served by those systems.

What's more, the Court will not require Defendants to identify systems in situations where Plaintiff identified a named component attached to unnamed components nor will the Court require Defendants to identify unknown systems. The Court is of the opinion the "reasonably similar"

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standard does not encompass the last two scenarios presented by Plaintiff. Based on the foregoing

analysis, it is

ORDERED that for websites and systems named in Plaintiff's PICs, to the extent they have

not already done so, Defendants shall produce to Plaintiff, within thirty days from the date of entry

of this Order, discovery on all unnamed websites served by the same system. Where Plaintiff's PICs

include a copy of a system, including other versions, to the extent they have not already done so,

Defendants shall produce to Plaintiff, within thirty days from the date of entry of this Order,

discovery on the systems and websites served by those systems. For systems named in Plaintiff's

PICs and no website is named, to the extent they have not already done so, Defendants shall produce

to Plaintiff, within thirty days from the date of entry of this Order, discovery on all websites served

by those systems. For websites named in Plaintiff's PICs and no system is named, to the extent they

have not already done so, Defendants shall produce to Plaintiff, within thirty days from the date of

entry of this Order, discovery on the systems for the named websites.

SIGNED this 20th day of November, 2007.

CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE