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

BEDROCK COMPUTER	§	
TECHNOLOGIES LLC,	§	
	§	
Plaintiff,	§	
	§	**CASE NO. 6:09-cv-269-LED**
v.	§	
	§	**Jury Trial Demanded**
SOFTLAYER TECHNOLOGIES, INC.,	§	
et al.	§	
	§	
Defendants.	§	

BEDROCK'S RESPONSE TO GOOGLE'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL FACTS REGARDING DEFENDANTS' MOTION TO COMPEL PLAINTIFF TO COMPLY WITH PATENT RULE 3-1 AND TO EXTEND THE TIME TO SERVE INVALIDITY CONTENTIONS

I. INTRODUCTION

Plaintiff Bedrock Computer Technologies LLC ("Bedrock") files this response to Google's Motion for Leave to File Notice of Supplemental Facts Regarding Defendants' Motion to Compel Plaintiff to Comply with Patent Rule 3-1 and to Extend the Time to Serve Invalidity Contentions ("Motion for Leave") (Dkt. No. 185). The Court should deny Google's Motion for Leave because Google's Notice of Supplemental Facts Regarding Defendants' Motion to Compel Plaintiff to Comply with Patent Rule 3-1 and to Extend the Time to Serve Invalidity Contentions ("Notice of Supplemental Facts") (Dkt. No. 186) proffers events and arguments that are irrelevant to the underlying motion to compel (Dkt. No. 133) pending before the Court. Although Bedrock did recently provide detailed, line-by-line examples of its infringement theories in response to Google's Interrogatory No. 7, Google's Notice of Supplemental Facts would not aid the Court in resolving the underlying motion to compel because of the following legal and factual fallacies:

- **First**, Google incorrectly equates Bedrock's obligations under Rule 33 with those under P.R. 3-1. Rule 33 entitles Google to nonprivileged, relevant discovery, including a detailed, line-by-line description of Bedrock's infringement theories as requested by Interrogatory No. 7. But P.R. 3-1 only requires infringement contentions far narrower in scope. Google's Interrogatory No. 7 is therefore irrelevant to determining Bedrock's compliance with P.R. 3-1.

- **Second**, Bedrock responded to Interrogatory No. 7 only after Google provided discovery to Bedrock that enabled Bedrock to make such a response. Google has not, however, provided discovery that would enable Bedrock to actually supplement its infringement contentions. Furthermore, other Defendants have yet to provide Bedrock with comparable discovery. The circumstances in which Bedrock responded to Interrogatory No. 7 are materially different from those in which Bedrock served its P.R. 3-1 disclosures.

For these reasons, good cause does not exist for the submission of Google's Notice of Supplemental Facts, and the Court should accordingly deny Google's Motion for Leave.

II.   ARGUMENT

A.   Because Obligations Under P.R. 3-1 and Rule 33 Are Independent, Bedrock's Response to Interrogatory No. 7 Has No Bearing on Its Claim Charts.

Google premises its Motion for Leave and Notice of Supplemental Facts on this fundamentally erroneous assertion: "Essentially, Google['s Interrogatory No. 7] asked Bedrock to provide the very information that the Patent Rules require pursuant to P.R. 3-1(c) based on publicly available information" (Dkt. No. 186 at 1). On the contrary, Google's Interrogatory No. 7 requests information beyond that required by P.R. 3-1(c):

E.D. Tex. P.R. 3-1(c)	Google's Interrogatory No. 7
A chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality . . .	For each asserted claim of the '120 patent, specifically identify, on a claim-by-claim basis in a claim chart format, each line of source code in each Accused Instrumentality that Bedrock contends meets each limitation of the claim, and explain in detail how the identified lines of source code satisfy each limitation of the claim. . . .

As explained in Bedrock's prior briefing, P.R. 3-1(c) does not require a patentee to provide claim charts with line citations to source code.[1] Also explained in Bedrock's prior briefing, P.R. 3-1(c) does not require a patentee to explain *how* the accused instrumentalities satisfy the claims.[2] Given that P.R. 3-1(c) does not require Bedrock to provide line citations to source code or explanations as to how the accused instrumentalities infringe, Google's Interrogatory No. 7

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[1] Bedrock has twice pointed out that no authority requires line citations to source code in infringement contentions (Dkt. No. 136 at 6; Dkt. No. 162 at 2), and none of Google's submissions show otherwise (*see* Dkt. No. 133; Dkt. No. 146; Dkt. No. 185; Dkt. No. 186).

[2] Defendants' motion to compel initially requested that the Court compel Bedrock to explain *how* the accused instrumentalities satisfy the claims, but Defendants have since abandoned this request. (Dkt. No. 162 at 2.)

explicitly added the request for "each line of source code in each Accused Instrumentality that Bedrock contends meets each limitation of the claim." (Dkt. No. 186-2 at 6.)

Rule 33 allows Google to ask Bedrock anything that is relevant and nonprivileged, including Bedrock's contentions. *See* FED. R. CIV. P. 33(a)(2). This Court has recently held that a defendant may serve an interrogatory seeking more detail on infringement contentions than required by P.R. 3-1. *Balsam Coffee Solutions Inc. v. Folgers Coffee Co.*, No. 6:09-CV-89, 2009 WL 4906860, at *3 (E.D. Tex. Dec. 9, 2009) (defendants' interrogatory requested a "narrative setting forth a detailed basis for [Plaintiff's] infringement allegations"). The Patent Rules also recognize that interrogatories may seek infringement contentions according to Rule 26(a)(1), which is much broader than P.R. 3-1. *See* E.D. TEX. P.R. 2-5 (providing that the Patent Rules may be used to object to discovery under the Federal Rules only if the discovery sought is premature under the Patent Rules).

Google's Interrogatory No. 7 similarly requests further information about Bedrock's infringement contentions—such as line citations to source code and detailed descriptions of how the source code meets the claim limitations—than was required under P.R. 3-1. Bedrock answered Interrogatory No. 7 by providing the information requested,[3] and this answer is in no way probative of whether Bedrock's claim charts were compliant under P.R. 3-1(c) because Bedrock's obligations to respond to Google's Interrogatory No. 7 are simply different from its P.R. 3-1 disclosure obligations. If Interrogatory No. 7 had truly sought "the very information that the Patent Rules require pursuant to P.R. 3-1(c)" as Google contends (Dkt. No. 186 at 1),

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[3] Google disingenuously argues that Bedrock's responses to Interrogatory No. 7 are somehow admissions that P.R. 3-1(c) requires line citations to source code because the exhibits to the responses were styled "PLAINTIFF'S P.R. 3-1 INFRINGEMENT CONTENTIONS." (Dkt. No. 186 at 1-2.) In reality, Interrogatory No. 7 specifically asked for a response "in a claim chart format"

then Bedrock could have answered by only referencing its P.R. 3-1(c) claim charts. But Interrogatory No. 7 explicitly requests information not required by P.R. 3-1(c), and Bedrock had to provide a complete answer as requested. Notably, during the conference for Google's Motion for Leave, Google's counsel admitted that, if Bedrock had simply responded to Interrogatory No. 7 with its P.R. 3-1 claim charts, Google would have moved the Court to compel a sufficient response from Bedrock. (Ex. A ¶ 5.)[4] *See also Balsam*, 2009 WL 4906860, at *4 (ordering plaintiff to answer an interrogatory that sought information on infringement contentions beyond that required by P.R. 3-1).

Bedrock should not be penalized just because it fulfilled its discovery obligations under Rule 33 by answering Interrogatory No. 7. Under this Court's practice for discovery in patent cases, a patentee must disclose its infringement contentions with as much specificity as possible on the date provided by the docket control order. Up until that date, the patentee may legitimately object to any discovery requests seeking information on infringement contentions. E.D. TEX. P.R. 2-5. But after that date, the patentee must respond to discovery requests, even if they seek information on the patentee's infringement contentions that exceed the requirements of P.R. 3-1. *See Balsam*, 2009 WL 4906860, at *4. A response to such a request, however, is not tantamount to an admission that the patentee's infringement contentions were lacking in detail. Bedrock's response to Google's Interrogatory No. 7 is irrelevant to the Court's determination of Bedrock's compliance with P.R. 3-1.[5]

(Dkt. No. 186-2 at 6), and Bedrock complied with this requirement by reusing the template for its actual P.R. 3-1 claim charts.

[4] References herein to "Ex. A._" are to the numbered exhibits accompanying the Declaration of J. Austin Curry, Exhibit A hereto.

[5] Google is solely responsible for propounding Interrogatory No. 7—which seeks information duplicative of that sought in the underlying motion to compel (Dkt. No. 133)—*before* the Court's

B. **Because Discovery Has Progressed Since Bedrock Disclosed Its Infringement Contentions, Bedrock's Current Ability to Respond to Interrogatory No. 7 Is Not Probative of the Sufficiency of Bedrock's Infringement Contentions.**

Even if some legal link existed between P.R. 3-1(c) and Rule 33, the factual realities in this case would still prevent a fair comparison between Bedrock's October 9, 2009 infringement contentions and February 19, 2010 responses to Interrogatory No. 7. When Bedrock served its P.R. 3-1 disclosures, it based its infringement contentions on its Rule 11 investigation and publicly-available information. Since then, however, Bedrock has served Google with Interrogatory No. 1 seeking non-public information about the accused instrumentalities, including which of the many versions of Linux Google has used. (Dkt. No. 162-3.) And Google has responded by identifying its use of three Linux versions. (Dkt. No. 162-7 at 5.) With this information in hand, Bedrock was able to answer Google's Interrogatory No. 7 with line citations to source code as well as additional information specific to the Linux versions Google identified.

But it defies logic to use Bedrock's recent responses to Interrogatory No. 7 to mischaracterize Bedrock's earlier infringement contentions as deficient, given that discovery in the meantime has resulted in more information about the accused instrumentalities. Google contends that Bedrock's *subsequent* responses to Interrogatory No. 7 require the supplementation of Bedrock's *prior* infringement contentions. This illogical proposition is not limited to just

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resolution of the motion to compel. None of the other Defendants who joined Google on the motion to compel has propounded such a duplicative interrogatory. The other Defendants' restraint in awaiting the Court's decision contrasts sharply with Google's contention that it "had little choice but to pursue an interim self-help remedy" in the form of Interrogatory No. 7 (Dkt. No. 186 at 1). None of the other Defendants found it necessary to pursue such "self-help."

If Google genuinely believed that Bedrock had not complied with P.R. 3-1, Google would have simply waited for the Court to rule on the underlying motion to compel. The fact that Google chose, instead, to propound Interrogatory No. 7 is a tacit admission that the underlying motion to compel should be denied. In any event, Google's request to withdraw the interrogatory should be denied.

Bedrock's current responses to Interrogatory No. 7. In the upcoming months, as Google gives Bedrock documents and other discovery piecemeal, Bedrock will discharge its duty to supplement its responses to Interrogatory No. 7 (as well as future interrogatories), but Bedrock should not be required to make parallel supplementations to its infringement contentions. Yet this is exactly what Google's Motion for Leave suggests: Google would have Bedrock supplement its infringement contentions continuously throughout the course of this lawsuit to include all applicable discovery and even expert analysis. Such reasoning defeats the purpose of infringement contentions, which "need not meet the level of detail required, for example, on a motion for summary judgment on the issue of infringement because infringement contentions 'are not meant to provide a forum for litigation of substantive issues.'" *Realtime Data, LLC v. Packeteer, Inc.*, No. 6:09cv144, 2009 WL 2590101, at *5 (E.D. Tex. Aug. 18, 2009) (citation omitted). Simply put, Bedrock's responses to Google's Interrogatory No. 7 tell the Court nothing about the sufficiency of Bedrock's infringement contentions served over four months earlier.

Notwithstanding the improper comparison of Bedrock's responses to Google's Interrogatory No. 7 with Bedrock's infringement contentions, Bedrock would not even be able to give comparable responses to other Defendants. None of Defendants' responses to Bedrock's Interrogatory No. 1 is complete, and some Defendants have even refused to provide any response information. (*See* Dkt. No. 162 at 3.) Bedrock was able to provide Google with line citations to source code based on the partial information Google disclosed regarding the Linux versions it uses,[6] but Bedrock cannot be expected to provide detailed, line-by-line citations to Linux

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[6] Bedrock's Interrogatory No. 1 asked Google the following: "Separately for each year since 2003, identify the Accused Version(s) of Linux that were/was installed during that year on a server in your possession or control . . ." (Dkt. No. 162-7 at 4.) Google's response did not

versions that Defendants will not even admit they use. Because Defendants have yet to provide

Bedrock with a definitive list of Linux versions that they use, Bedrock is unable to provide more

detailed infringement contentions.[7] And to this point in time, no Defendant, including Google,

has given Bedrock the access to source code that could enable it to supplement its infringement

contentions.[8] Thus, Bedrock's current ability to give responses to Google's Interrogatory No. 7,

based on the partial discovery that Google provided, is irrelevant to determining whether

Bedrock's infringement contentions as to all Defendants were sufficient.

III.   CONCLUSION

For the foregoing reasons, good cause dose not exist for the submission of Google's

Notice of Supplemental Facts. Bedrock requests that the Court deny Google's Motion for Leave

and strike Google's Notice of Supplemental Facts.

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identify Linux versions separately for each year as requested. (*Id.* at 5.) Bedrock therefore does
not know whether Google uses more than just the three identified Linux versions.

[7] Defendants originally contended that 375 versions of Linux were at issue and required to be
charted individually by Bedrock. (Dkt. No. 133 at 1.) It is unreasonable and unduly burdensome
for Bedrock to chart 375 versions of Linux line-by-line when Defendants have so far collectively
identified only six versions that they actually use (Dkt. No. 162 at 4 n.3).

[8] Bedrock requested source code from all Defendants on February 3, 2010. Despite this request
and multiple follow-up requests asking the same, none of the Defendants, including Google, has
produced any source code to date. (Ex. A.1; Ex. A.2; Ex. A.3.)

DATED: March 19, 2010

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on March 19, 2010. Local Rule CV-53(a)(3)(A).

        /s/ J. Austin Curry
        J. Austin Curry