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-00269-LED
RED HAT, INC., Plaintiff, v. BEDROCK COMPUTER TECHNOLOGIES LLC, Defendant.	Case No. 6:09-CV-00549-LED JURY DEMANDED

DEFENDANTS' JOINT MOTION TO AMEND DOCKET CONTROL ORDERS

The defendants in *Bedrock Computer Technologies, LLC v. Softlayer Technologies, Inc., et al.* (Bedrock I)[1] and the crossclaim defendants in *Red Hat, Inc. v. Bedrock Computer Technologies, LLC* (Bedrock II)[2] respectfully request this Court to amend the respective Docket Control Orders.

[1] The Bedrock I defendants include Softlayer Technologies, Inc., Google, Inc., Yahoo!, Inc., MySpace, Inc., Amazon.com, Inc., Match.com, Inc., and AOL LLC.

[2] The Bedrock II crossclaim defendants include 1&1 Internet, Inc., ConAgra Foods, Inc., Conoco Phillips Company, Facebook, Inc., Nationwide Mutual Insurance Company, NYSE Euronext, R.L. Polk & Co., Rackspace Hosting, Inc., Sungard Data Systems, Inc., The Gap, Inc., The Go Daddy Group, Inc., ThePlanet.com, Virgin America, Inc., and Whole Foods, Inc. The Go Daddy Group, Inc. joins this motion without waiving its personal jurisdiction defenses. Red Hat, Inc. does not oppose this motion.

If ever there were facts establishing good cause to amend a docket control order, they are present here. Bedrock Computer Technologies, LLC's ("Bedrock") assertion of crossclaims on March 26, 2010 in Bedrock II against fourteen new parties, the Bedrock II crossclaim defendants, drives this conclusion. If not amended, the Bedrock II crossclaim defendants, through the unilateral action of Bedrock, will be severely prejudiced in their efforts to fully investigate, analyze, and participate in this patent infringement action. This result controverts the aims of this Court's Local Patent Rules: "to further the goal of full, timely discovery and provide all parties with adequate notice and information with which to litigate their cases." *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819, 822 (E.D. Tex. 2007) (Clark, J.) (emphasis added).

As set forth below, both the Bedrock I defendants and the Bedrock II crossclaim defendants (collectively "the Bedrock Defendants") respectfully submit a solution to resolve this manifest prejudice. The Bedrock Defendants propose moving the *Markman* hearing to March 2011, to allow a reasonable schedule for meaningful participation in a single *Markman* hearing, and propose moving the Bedrock I trial to the October 2011 setting.[3] As a result, the Court will have one *Markman* hearing and one trial setting for both cases, and the schedule will permit a more efficient use of the Court's and the parties' resources.

RELEVANT FACTS

What began nearly twelve months ago as Bedrock's patent infringement action against ten named defendants has evolved now into two separate yet unavoidably related cases involving the same patent. In Bedrock I, the parties have been proceeding under the February 3, 2010 Docket Control Order, which set a *Markman* hearing for October 11, 2010, and a trial beginning on April 4, 2011. (Bedrock I: Dkt. No. 174.)

[3] The Bedrock II trial is currently scheduled for October 11, 2011.

Bedrock II began in December 2009 with Red Hat, Inc. ("Red Hat") as the plaintiff, seeking a declaration of invalidity, unenforceability, and non-infringement of the Bedrock patent. On March 22, 2010, Red Hat and Bedrock, then the only parties to Bedrock II, submitted a Joint Motion for Entry of Docket Control and Discovery Order setting the *Markman* hearing for October 11, 2010, consistent with Bedrock I. (Bedrock II: Dkt. No. 27.) The Court set the *Markman* hearing for October 11, 2010, aligning it with the previously scheduled *Markman* hearing date in Bedrock I, and adopted Bedrock's proposal for all deadlines leading to an October 11, 2011 trial for Bedrock II. (Bedrock II: Dkt. No. 166.)

On March 26, 2010, four days after securing the same *Markman* deadlines as in Bedrock I, Bedrock filed a First Amended Answer and Counterclaim in Bedrock II. (Bedrock II: Dkt. No. 30.) Bedrock included "crossclaims," in its pleading, alleging infringement of United States Patent No. 5,893,120 ("the '120 Patent") against the fourteen Bedrock II crossclaim defendants. (*Id*.) None of the Bedrock II crossclaim defendants participated in the entry of the prior docket control orders in either case.

Thus, the Bedrock II crossclaim defendants, all of whom have been in this case for less than two months, will be forced to comply with a *Markman* disclosure and briefing schedule originally set for Bedrock I, a case pending now for nearly twelve months. Important deadlines under the Bedrock II Docket Control Order passed before any of the Bedrock II crossclaim defendants answered Bedrock's crossclaims. Most of the Bedrock II crossclaim defendants answered only days ago. None of the Bedrock II crossclaim defendants participated in the selection of claim terms for construction. None of the Bedrock II crossclaim defendants participated in or had an opportunity to fully understand and assert their own invalidity contentions before *Markman* claim selection occurred. If not modified, all of the Bedrock II

crossclaim defendants face the unreasonable prospect committing to their claim construction positions in Bedrock II in barely two weeks.

The Bedrock Defendants have conferred with counsel for Bedrock concerning the proposed amendments to the Docket Control orders and do not agree on the appropriate remedy for the scheduling problem Bedrock has caused. An initial call between the parties occurred on May 12, 2010, wherein Bedrock expressed the firm desire to hold to the currently scheduled *Markman* calendar. By letter dated June 1, 2010, Bedrock further proposed and amended pre-*Markman* schedule that would require the Bedrock II counterclaim defendants to disclose its proposed claim terms and elements for construction on June 8, 2010. Finally, on June 3, 2010, another in-person conference was conducted, where the parties agreed to disagree.

Accordingly, the Bedrock Defendants respectfully request this Court amend the respective docket control orders to permit the Bedrock II counterclaim defendants a fair opportunity to fully investigate, analyze, and participate in this patent infringement action. The Bedrock Defendants propose a single *Markman* hearing, set for March 2011. The intervening deadlines under Local Patent Rules will be set by the Bedrock Defendants and Bedrock. The Bedrock Defendants further propose moving the current trial date in Bedrock I (April 4, 2011) to conform with the currently scheduled Bedrock II trial date (October 11, 2011).

ARGUMENT

There is good cause to amend the docket control orders of both Bedrock I and Bedrock II to accommodate the Bedrock II crossclaim defendants and their interest in meaningfully participating in the *Markman* hearing. Based on this good cause, and with the Court's consent, the Court has broad discretion to modify its scheduling orders. *Maclean-Fogg Co. v. Eaton*

Corp., No. 2:07-cv-472, 2008 U.S. Dist. LEXIS 78301, at *3, *4 (E.D. Tex. Oct. 6, 2008) (Davis, L); Fed. R. Civ. P. 16(b)(4).

None of the Bedrock II crossclaim defendants participated in either of the previously entered docket control orders. In fact, several of the deadlines set by the Bedrock II Docket Control Order elapsed long before the Bedrock II crossclaim defendants responded to Bedrock's crossclaims. In Bedrock II, invalidity contentions under P.R. 3-3 were due May 14, 2010. In Bedrock I and Bedrock II, the exchange of proposed terms and claim elements for construction under P.R. 4-1 occurred on May 18, 2010. (Bedrock II: Dkt. No. 44.) Both deadlines passed before any of the Bedrock II crossclaim defendants responded to Bedrock's crossclaims. The Bedrock II crossclaim defendants have not yet participated in the claim construction process.

Bedrock brought the Bedrock II crossclaim defendants into this dispute on March 26, 2010, and they have just filed answers to the crossclaims within the last week. The Bedrock I defendants by contrast served invalidity contentions eight months after Bedrock filed its Complaint, and exchanged claim terms eleven months after Bedrock filed its Complaint. (Bedrock I: Dkt. No. 174.) Red Hat, a participant in Bedrock II since its inception, also had nearly 6 months from the initiation of its claims against Bedrock before it was required to disclose its invalidity contentions. Not so for the Bedrock II crossclaim defendants, which have been placed in an artificially compressed schedule by Bedrock's last minute crossclaims.

The Local Patent Rules are designed to afford all parties adequate notice and information with which to litigate their cases. *Computer Acceleration Corp.*, 503 F. Supp. 2d at 822. Bedrock's tactical decision to bring the Bedrock II crossclaim defendants long after this dispute began with Bedrock I will, absent a modification of the schedule, severely prejudice the ability of the Bedrock II crossclaim defendants to fully participate in the exchange of information

governed by the Local Patent Rules. The disclosures provided in the Local Patent Rules permit at least 230 days (almost 8 months) from a patentee's infringement contentions until the *Markman* hearing, with counter-disclosures and briefing schedules staged appropriately. Defendants' proposed modification to the docket orders in both cases aligns essentially with this time frame, recognizing that Bedrock has recently served its infringement contentions (which are identical in substance to its prior contentions served on other parties) upon the newly added counterclaim defendants.

Bedrock's last minute crossclaims depart from the local rule's standard scheduling by forcing the Bedrock II crossclaim defendants to a *Markman* hearing in less than 5 months. Instead of having a few months to analyze and develop claim interpretations, Bedrock seeks to force the Bedrock II crossclaim defendants to articulate their proposed claim interpretations within a few weeks of answering the crossclaims. Since Bedrock asserted claims bringing the Bedrock II crossclaim defendants into its enforcement effort at the last minute, it should litigate those claims on a timeframe that allows the Bedrock II crossclaim defendants sufficient time to fully build their cases and defend themselves.

Furthermore, aligning the docket control orders between the Bedrock I and Bedrock II promotes judicial economy. This Court need only hold one *Markman* hearing for all parties and need only manage one set of discovery and pre-trial proceedings. Without modifying the docket control orders, the Court would be forced to manage multiple rounds of fact discovery, expert discovery, discovery disputes, dispositive motions, pretrial proceedings, and *Markman* hearings, which would only waste valuable judicial resources.

For the reasons stated herein, the Bedrock I and Bedrock II Defendants respectfully move the Court to amend the docket control orders in both cases to reflect the schedule set forth in the proposed order, filed herewith.

Date: June 7, 2010

Respectfully submitted,

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***** Third party Defendant The Go Daddy Group, Inc. joins this motion but without waiving its claims regarding the lack of personal jurisdiction against it in this matter.

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CERTIFICATE OF CONFERENCE

In compliance with Local Rule CV-7(h), Jonathan Yim counsel for Bedrock, conferred with Thad Heartfield and Danielle Williams, on behalf of the Bedrock Defendants, on June 4, 2010 by phone in a good faith attempt to resolve the matter without court intervention. The parties could not reach agreement on moving the Markman hearing and the trial date. Discussions have conclusively ended in an impasse, leaving an open issue for the Court to resolve.

/s/ Danielle T. Williams
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CERTIFICATE OF SERVICE

I hereby certify that the all counsel of record who are deemed to have consented to electronic service are being served this 7th day of June, 2010, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

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