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.	§	
RED HAT, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 6:09-cv-549-LED**
	§	
BEDROCK COMPUTER TECHNOLOGIES LLC,	§	**Jury Trial Demanded**
	§	
Defendant.	§	

BEDROCK'S CONSOLIDATED RESPONSE TO
DEFENDANTS' JOINT MOTION TO AMEND DOCKET CONTROL ORDERS

I. INTRODUCTION

Bedrock files this consolidated response to the Red Hat Defendants'[1] and Softlayer Defendants'[2] Joint Motion to Amend Docket Control Orders. Bedrock objects to the filing of a joint motion by the Red Hat Defendants and the Softlayer Defendants, who are parties to separate cases. However, for the convenience of the Court, Bedrock consolidates its responses in the Red Hat case and the Softlayer case in the present filing. Bedrock further objects to the joint motion to the extent that the Red Hat Defendants seek relief regarding the Softlayer case and to the extent that the Softlayer Defendants seek relief regarding the Red Hat case.

Bedrock opposes the Red Hat Defendants' proposed amendments because the Red Hat Defendants all could have and should have begun preparing for the *Markman* hearing as currently scheduled by the Court. Bedrock has worked diligently with the Red Hat Defendants to come to a compromise on the disclosure and briefing dates leading up to the scheduled *Markman* hearing, but the Red Hat Defendants never told Bedrock whether they could accept Bedrock's proposal. Instead, the Red Hat Defendants sent Bedrock their proposed amended schedule for the first time just last week on June 4, 2010, even though the Red Hat Defendants have been on notice of Bedrock's infringement claims since March 26, 2010 (Red Hat case Dkt. No. 30). The Red Hat Defendants should have acted sooner to come to an agreement with

[1] Red Hat Defendants refers to 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., who are all defendants in *Red Hat, Inc. v. Bedrock Computer Technologies LLC*, No. 6:09-cv-549-LED ("Red Hat case").

[2] Softlayer Defendants refers to Softlayer Technologies, Inc., Google, Inc., Yahoo!, Inc., MySpace, Inc., Amazon.com, Inc., Match.com, Inc., and AOL LLC, who are all defendants in *Bedrock Computer Technologies LLC v. Softlayer Technologies, Inc.*, No. 6:09-cv-269-LED ("Softlayer case").

Bedrock and should have simultaneously begun preparing for *Markman* proceedings. The Red Hat Defendants' motion now seeks relief for the very delay that their inaction caused, and this cannot be good cause for amending the Court's current Docket Control Order (Red Hat case Dkt. No. 44).

Bedrock opposes the Softlayer Defendants' proposed amendments because Bedrock first learned of the Softlayer Defendants' intention to modify the Softlayer case Docket Control Order from the instant motion. Notwithstanding the Softlayer Defendants' failure to attempt to resolve their dispute with Bedrock prior to engaging in motions practice, the Softlayer Defendants give no reasonable justification for modifying the Docket Control Order that they all negotiated in the fall of 2009. The Softlayer Defendants' motion does not point to any prejudice that the Softlayer Defendants have suffered. Because they have not demonstrated any need for delaying *Markman* proceedings or trial, they have failed to show good cause for amending the Court's current Docket Control Order (Softlayer case Dkt. No. 174).

Given that neither the Red Hat Defendants nor the Softlayer Defendants have shown the Court good cause for amending the Court's current Docket Control Orders in the Red Hat case and the Softlayer case, the Court should deny this motion.

II. ARGUMENT

A scheduling order entered by the Court pursuant to Rule 16(b) "may be modified only for good cause and with the judge's consent." FED. R. CIV. P. 16(b)(4). "The good cause standard requires the party seeking relief to show that, despite its exercise of diligence, it cannot reasonably meet the scheduling deadlines." *Sybase, Inc. v. Vertica Sys., Inc.*, No. 6:08 CV 24, 2009 WL 4574690, at *1 (E.D. Tex. Nov. 30, 2009). Neither the Red Hat Defendants nor the

Softlayer Defendants have shown that, despite their exercise of diligence, they cannot reasonably meet the deadlines set forth in the Court's current Docket Control Orders.

A. It Is Reasonable for the Red Hat Defendants to Be Able to Prepare for the *Markman* Hearing as Currently Scheduled by the Court.

Bedrock recognized that the Red Hat Defendants have not been party to the Red Hat case since its inception, and Bedrock made several overtures to the Red Hat Defendants early on to bring them up to speed with the current schedule. One of these efforts was a modified disclosure and briefing schedule for *Markman* issues:

Date	**Event**
September 16, 2010	Privilege Logs to be exchanged by parties (or a letter to the Court stating that there are no disputes as to claims of privileged documents).
September 10, 2010	Comply with P.R. 4-5(b). Motion for Summary Judgment of Indefiniteness due.
September 9, 2010	Complete First Mediation.
August 27, 2010	Comply with P.R. 4-5(a).
August 25, 2010	Tutorials due.
August 19, 2010	Discovery Deadline - Claim Construction Issues.
August 3, 2010	Comply with P.R. 3-3 and 3-4.
August 5, 2010	Respond to Amended Pleadings.
July 29, 2010	Proposed Technical Advisors due.
July 29, 2010	Amended Pleadings (pre-claim construction) due from all parties without leave of Court. No new patents or parties may be added.
July 27, 2010	Comply with P.R. 4-3 (JCCS).
July 2, 2010	Comply with P.R. 4-2 - Exchange of Preliminary Claim Constructions and Extrinsic Evidence.
June 8, 2010	Comply with P.R. 4-1.

This proposal reasonably accommodated the timing of the Red Hat Defendants' entry into the Red Hat case by giving them numerous extensions:

- a three-week extension for compliance with P.R. 4-1;
- a two-week extension for compliance with P.R. 4-2;
- a one-week extension for compliance with P.R. 4-3; and

- an extension of over two months for compliance with P.R. 3-3 and P.R. 3-4 (this gave the Red Hat Defendants the standard forty-five days after Bedrock's service of its infringement contentions).

These extensions achieved a reasonable compromise by allowing the Red Hat Defendants more time while also maintaining the remaining dates for the *Markman* briefing and the *Markman* hearing itself ordered by the Court (Red Hat case Dkt. No. 23).

Despite Bedrock's efforts, the Red Hat Defendants persisted in delaying an answer to Bedrock's proposed modifications, neither accepting nor rejecting the extended deadlines. During the meet and confer on June 4, 2010, Bedrock again proposed these extensions to the Red Hat Defendants, but the Red Hat Defendants' response was that they needed to continue to confer amongst themselves about the feasibility of these extensions. The Red Hat Defendants' unwillingness to accept or reject Bedrock's proposed extensions (or even to propose any alternative) has itself amounted to significant delay that undercuts the Red Hat Defendants' contention that "have been placed in an artificially compressed schedule." (Red Hat case Dkt. No. 142 at 5.) And despite the Red Hat Defendants' contentions that they do not have sufficient time to formulate their claim construction positions, their motion provides no showing as to their ability to conform to Bedrock's proposed extensions.

In bringing this motion to modify a Rule 16(b) schedule, the Red Hat Defendants must carry their high burden of showing good cause. To show good cause, the Red Hat Defendants must have demonstrated that, despite their exercise of diligence, they cannot reasonably meet the scheduling deadlines. *See Sybase*, 2009 WL 4574690, at *1. The Red Hat Defendants have failed to show diligence in working out a compromise extended schedule with Bedrock—despite Bedrock's early and multiple attempts to engage the Red Hat Defendants—and they have also

failed to show that they could not reasonably meet the extended deadlines proposed by Bedrock. Although the Court should deny the Red Hat Defendants' motion because the Red Hat Defendants have failed to show good cause, Bedrock still holds open its proposal to extend deadlines as necessary to accommodate the disclosures and briefing leading up to the Court's currently-scheduled *Markman* hearing. Bedrock would therefore not oppose the modification of the Docket Control Order (Red Hat case Dkt. No. 44) regarding deadlines before the October 7, 2010 *Markman* hearing.

B. The Softlayer Defendants Have Not Shown Any Reasonable Justification for Amending the Schedule the Softlayer Case.

Nothing in the Softlayer Defendants' motion indicates that the Softlayer Defendants have suffered any prejudice from the current Docket Control Order (Softlayer case Dkt. No. 174) that the Softlayer Defendants negotiated with Bedrock. The relief that the Softlayer Defendants seek is therefore unnecessary, and the Softlayer Defendants are unable to show good cause as to why they need to delay the resolution of this case. Modification of a Rule 16(b) scheduling order requires good cause in order to "secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. Although the Softlayer Defendants' motion contends that "judicial economy" is at issue (Softlayer case Dkt. No. 222 at 6), neither this Court nor the Fifth Circuit has held that this is a good-cause factor to be considered in modifying a Rule 16(b) schedule. *See S&W Enters., L.L.C. v. Southtrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003); *Sybase*, 2009 WL 4574690, at *1.

III. CONCLUSION

For the foregoing reasons, Bedrock respectfully requests that the Court deny this motion. However, Bedrock does not oppose the modification of the Docket Control Order (Red Hat case Dkt. No. 44) regarding deadlines before the October 7, 2010 *Markman* hearing.

DATED: June 11, 2010

Respectfully submitted,
McKOOL SMITH, P.C.

/s/ *Douglas A. Cawley*

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of 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 June 11, 2010. Local Rule CV-5(a)(3)(A).

/s/ Jonathan R. Yim
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