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

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

## BEDROCK'S REPLY IN SUPPORT OF ITS
## MOTION TO CLARIFY THE AGREED PROTECTIVE ORDER

Bedrock submits this reply to specific points in Google's response to Bedrock's Motion to Clarify the Agreed Protective Order.

## I. ARGUMENT IN REPLY

**First**, the Agreed Protective Order does not bar Bedrock's experts from making more than one printout of the source code from the Source Code Computers:

> The Source Code Computers shall be equipped with a printer to print copies of the source code on yellow, pre-Bates numbered paper, which shall be provided by the producing party.

(Dkt. No. 170 ¶ 8(B)(xi).)  Nothing in the Agreed Protective Order states that only one printout of the source code can  ever be made.  There is the prohibition that "no subsequent copies shall be made of the printed copies" (*id.* ¶ 8(B)(xii)), whether through photocopying or scanning and conversion into electronic format, but this prohibition is completely separate from the provision regarding the printing of source code above.  Google impermissibly stretches the prohibition on photocopying and scanning to include a prohibition on printing.

If Google's objection to the printing of source code were sustained, Bedrock and its experts would face unreasonable prejudice: Bedrock has three source code experts who live in three different cities, and it would severely hinder Bedrock's ability to litigate this case if Bedrock's experts had to share a single printout of the source code.  Although Bedrock explained this prejudice in its motion, nothing in Google's response justifies the draconian consequences of Google's strained reading of the Agreed Protective Order.

Google conflation of the provision that freely allows for the printing of source code with the provision that prohibits the making of photocopies or electronic copies of source code is also unjustified because there is an important, functional difference between the two.  To begin with, each time a printout of source code is made, it is done on "yellow, pre-Bates numbered paper." (*Id.* ¶ 8(B)(xi).)  This means that each and every page printed from the Source Code Computers

will have a unique Bates number that is logged—this is "to facilitate destruction certification" of the source code upon final disposition of this case. (*Id.*) If Bedrock makes a second printout of the same source code, the second printout will have a different Bates range than the first, and both Bates ranges will be logged. Upon the final disposition of this case, Bedrock will use the log ensure destruction of every page of source code that it printed from the Source Code Computers, including the two printouts of identical source code (that bear different Bates ranges). In short, the Agreed Protective Order provides for strict control over each and every printout made from the Source Code Computers, even if printouts are of the same source code.

On the other hand, the Agreed Protective Order bans "subsequent copies" of the source code printouts because those copies—whether photocopies or electronic copies—will all bear the same Bates numbers as the original printouts. Allowing photocopies or electronic copies of source code printouts would obviate the utility of logging the Bates ranges of source code printouts to assist with later destroying the source code. In certifying destruction of the source code printouts upon final disposition of this case, a party would not be absolutely certain that all photocopies or electronic copies of source code printouts were destroyed, because all of these copies would bear the same Bates numbers as the original printouts. Google's contention that there is "no functional difference, however, between making a photocopy and printing out multiple copies from the computers" (Dkt. No. 223 at 4) is therefore a simplistic assumption that not only contradicts the plain language of the Agreed Protective Order but also ignores the real, practical differences between printing and copying source code in this case.

**Second**, the Agreed Protective Order does not bar more than two Bedrock experts from viewing the printouts from the Source Code Computers, although it does bar more than two Bedrock experts from visiting Google's Source Code Computers:

> No more than two (2) individuals, per producing party, who
> qualify under paragraph 7.1D above, for each receiving party, may
> have access to the Source Code Computers.

(Dkt. No. 170 ¶ 8(B)(ix).)  Google points to the subsequent sentence to show that only two

Bedrock experts can view source code printouts:

> As an example to illustrate the foregoing sentence, Plaintiff may
> have up to eighteen (18) individuals have access to the source code
> of nine (9) Defendants, however, no more than two (2) individuals
> may have access to any one Defendant's source code.

(*Id.*)  But this is an unreasonable reading; the two foregoing sentences must be read together, as

indicated by the phrase "As an example to illustrate the foregoing sentence."  (*Id.*)  Thus:

> No more than two (2) individuals, per producing party, who
> qualify under paragraph 7.1D, above, for each receiving party, may
> have access to the Source Code Computers.  *As an example to
> illustrate the foregoing sentence*, Plaintiff may have up to eighteen
> (18) individuals have access to the source code of nine (9)
> Defendants, however no more than two (2) individuals may have
> access to any one Defendant's source code.

(*Id.* (emphasis added).)  The phrase "As an example to illustrate the foregoing sentence"

indicates that the second sentence operates solely within the confines of the first sentence; the

second, exemplary sentence cannot restrict, extend, or otherwise modify the conditions of the

first, principal sentence.  If the second, exemplary sentence were to restrict, extend, or otherwise

modify the conditions of the first, principal sentence, then it would no longer be "an example to

illustrate the foregoing sentence."  (*Id.*)  Therefore, Google's sole reliance on the phrase "no

more than two (2) individuals may have access to any one Defendant's *source code*" (Dkt. No.

223 at 5) is misplaced, because that phrase out of context is materially misleading.

**Third**, Google's out-of-context, misleading reliance on the phrase "no more than two (2)

individuals may have access to any one Defendant's *source code*" will lead to an absurd result:

no one other than these two experts would be able to see the source code printouts, whether in

Bedrock's counsel's offices, in motions practice, at depositions, or at trial.  Google admits this:

"Paragraph 8(B)(ix) makes it clear that only two such 'qualified' experts may access any one Defendant's source code." (*Id.* at 5.) Once again, the provision at issue reads:

> No more than two (2) individuals, per producing party, who qualify under paragraph 7.1D, above, for each receiving party, may have access to the Source Code Computers. As an example to illustrate the foregoing sentence, Plaintiff may have up to eighteen (18) individuals have access to the source code of nine (9) Defendants, however no more than two (2) individuals may have access to any one Defendant's source code.

(Dkt. No. 170 ¶ 8(B)(ix).) As explained above and in Bedrock's motion, Bedrock vigorously disputes Google's objection to more than two Bedrock experts' review of the source code printouts. But if one accepts Google's contention that the foregoing two sentences apply to the source code printouts and not the Source Code Computers, then one must also accept that only two people may ever see the source code in this litigation. According to Google's strained reading, only two people who qualify under paragraph 7.1(D) ("[t]echnical advisors, consultants, and testifying experts") would be allowed to see the source code printouts—and this category of people would not include that vast majority of people necessary to litigate and resolve this case (*see id.* ¶ 7.1). The correct and sensible reading of these sentences is that only a maximum of two technical advisors, consultants, or testifying experts may have access to one defendant's Source Code Computers—these sentences have no effect on paragraph 7.2's allowance for the proper disclosure of information designated "HIGHLY CONFIDENTIAL – SOURCE CODE CONFIDENTIAL."[1]

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[1] Bedrock also disputes Google's accusation that "Bedrock ignored Google's offer of compromise and instead filed the instant motion." (Dkt. No. 223 at 3.) Google's offer improperly implicated substantive issues not related to the Agreed Protective Order—Google made it clear that "the source code we were discussing was the source code already produced in the case and not more." (Dkt. No. 223-1 at 2.) Thus, Google was attempting to force Bedrock to concede to the non-discoverability of Non-Produced Source Code, production of which Bedrock has moved to compel (Dkt. No. 210). Moreover, Bedrock made several efforts to compromise

## II.    CONCLUSION

This is an action for patent infringement that focuses on complicated source code at the heart of sophisticated Internet servers, and Bedrock has retained a number of consulting and testifying experts to assist in the arduous task of analyzing the source code for this case. As shown in Bedrock's motion, the Agreed Protective Order unambiguously gives Bedrock the flexibility to make more than one printout of the source code from the source code computers and to allow more than two experts to review those printouts. Hindering this flexibility has already prejudiced Bedrock by forcing Bedrock's experts to share via mail the single copy of the source code so far produced, and it will greatly complicate Bedrock's preparation for litigation as this case develops and progresses through discovery towards trial and beyond. The other provisions of the Agreed Protective Order provide comprehensive protection for the source code, and nothing in Google's response indicates that this flexibility will result in improper disclosure of source code. In sum, Google's objections to the number of source code printouts and experts allowed to review the source code printouts are unsupported by the Agreed Protective Order, highly prejudicial to Bedrock's ability to investigate, prepare, and try its case, and unnecessary for protecting the source code from improper disclosure. For the foregoing reasons, Bedrock respectfully requests that the Court grant this motion.

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with Google on the number of source code printouts and experts allowed to view the source code printouts, but each "had either been rejected or gone unanswered." (Dkt. No. 223-1 at 1.)

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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 June 18, 2010.  Local Rule CV-5(a)(3)(A).

*/s/ Jonathan R. Yim*
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