UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC, Plaintiff, v. SOFTLAYER TECHNOLOGIES, INC., et al., Defendants.	CASE NO. 6:09–CV–00269 Hon. Leonard E. Davis **JURY TRIAL DEMANDED**

GOOGLE AND MATCH.COM'S OPPOSITION TO BEDROCK'S MOTION TO COMPEL A COMPLETE RESPONSE TO ITS FIFTH INTERROGATORY

AND

GOOGLE AND MATCH.COM'S CROSS-MOTION TO COMPEL A COMPLETE RESPONSE TO THEIR SIXTH INTERROGATORIES

TABLE OF CONTENTS

Page

I. INTRODUCTION

Plaintiff Bedrock Computer Technologies LLC ("Bedrock") has accused a small portion of the Linux computer code running on Defendant Google Inc.'s and Defendant Match.com LLC's ("Defendants") servers of infringing its patent. The accused code is insignificant and completely unnecessary to the operation of Defendants' servers. It also contributes nothing to the revenues and profits of Defendants' businesses.

Given the insignificance of the accused code, Defendants served interrogatories in December 2009 seeking an explanation of Bedrock's damages theory. A substantive response to these interrogatories would shed light on how Defendants' use of the accused code could result in legally cognizable damages. Bedrock, however, refused to provide a substantive response to these interrogatories and refuses to do so to this day.

Several months later, in May and June 2010, Bedrock served interrogatories on Defendants seeking detailed financial information regarding the aspects of Defendants' businesses that rely "to any degree" on a server running the accused Linux operating system. This exceedingly broad request would require Defendants to provide financial details about virtually every aspect of their businesses. Because Bedrock had not set forth any damages theory, much less one explaining how the requested financial information could be relevant to a legally cognizable damages theory, and because the presence of the accused code on Defendants' servers has no relationship to the financial information sought by Bedrock, Defendants objected to Bedrock's request as seeking information that is irrelevant and not reasonably calculated to lead to the discovery of admissible information.

Defendants acknowledge that some level of financial information might be discoverable for purposes of determining damages based on the alleged infringement. But without an explanation by Bedrock of its damages theory, it is impossible to know what financial

information may be relevant to Bedrock's case. Thus, Bedrock's motion should be denied because Bedrock has refused to set forth its damages theory and meet its burden of showing how the financial information it seeks is relevant.

Bedrock's motion should also be denied in view of recent Federal Circuit cases involving patent damages. In *Lucent Technologies, Inc v. Gateway, Inc.* and *ResQNet.com, Inc. v. Lansa, Inc.*, the Federal Circuit found that damages theories must be based on evidence that is linked to the claimed invention. Although the Federal Circuit did not address how its decisions would impact damages discovery, the logical implication is that the scope of damages discovery will be narrowed in a similar manner and limited to information that is linked to the claimed invention. Here, Bedrock has not shown any link between the accused code and the financial information of Defendants' entire businesses.

Accordingly, Defendants respectfully request that the Court deny Bedrock's motion to compel a complete response to its fifth interrogatory and grant Defendants' cross-motion to compel Bedrock to provide its damages theory in response to Google's and Match.com's sixth interrogatories.

II. FACTUAL BACKGROUND

A. Bedrock Alleges Infringement Of A Trivial Portion Of Linux Code

Bedrock claims that Defendants infringe its patent because their servers use certain versions of the Linux operating system, an operating system that can be obtained and used by anyone in the world for free. More specifically, Bedrock alleges that a very small portion of the Linux source code – a few hundred lines out of millions of lines of source code in the Linux operating system – infringes its patent. This source code deals with a minor aspect of the Linux operating system, an aspect which is completely unnecessary to the operation of Defendants' computer systems and businesses.

B. Bedrock Refuses To Set Forth Its Damages Theory In Response To Google's And Match.com's Interrogatories

In December 2009, Google and Match.com each propounded their sixth interrogatories on Bedrock. These interrogatories sought information about Bedrock's damages theory. For example, Match.com's interrogatory requested:

> If Bedrock contends that it is entitled to any monetary recovery as a result of alleged infringement of the '120 Patent by Match.com, state whether it contends that it is entitled to lost profits or a reasonable royalty, and state all facts and reasons upon which it relies in support of its contention. In the case of lost profits damages, identify each of Bedrock's products that allegedly falls within the scope of any '120 Patent claim and the total annual sales from that product's introduction to the present. In the case of reasonable royalty damages, state what Bedrock asserts to be a reasonable royalty to be paid by Match.com under 35 U.S.C. § 284, including the complete factual bases on which Bedrock bases its calculation of such royalty rate.

See Ex. A.1 at 7.[1] Google's interrogatory was identical in substance. *See* Ex. A.2 at 7.

Defendants anticipated that Bedrock's responses would attempt to explain how such an insignificant portion of code could lead to any damages. But Bedrock's responses were far from enlightening. Bedrock served a long list of objections, taking the position that the request was "a premature contention interrogatory," and asserting in conclusory fashion that Bedrock "is entitled to damages resulting from [Google's/Match.com's] infringement of the patent-in-suit, together with interest and costs as fixed by the Court." *See* Exs. A.3 at 11-12, A.4 at 11-12. Bedrock later supplemented its responses to these interrogatories, stating, again in conclusory fashion, that it "seeks compensatory damages in an amount not less than a reasonable royalty (determined under the factors set out in *Georgia-Pacific)* extending over the life of the '120 patent for the Defendants' direct and/or indirect infringement of the '120 patent." *See* Exs. A.5

[1] References to "Ex. A._" are the numbered exhibits accompanying the Declaration of Todd M. Briggs, attached as Exhibit A hereto.

at 13, A.6 at 13-14. Needless to say, Bedrock's responses left Defendants completely in the dark as to its damages theory.

C. Bedrock's Interrogatories Request Detailed Financial Information Relating To Google's And Match.com's Entire Businesses

In May and June 2010, Bedrock served interrogatories on Google and Match.com that sought detailed financial data for "each [Google/Match.com] business unit using, running, or relying upon to any degree a server or network of servers executing any Accused Version of Linux, for each quarter from 2003 to the present," including net revenues, costs, expenses, and profits. *See* Bedrock's Motion to Compel From Google and Match.com a Complete Response to Bedrock's Fifth Interrogatory ("Bedrock's Mot. to Compel") Exs. A.3, A.4.

Defendants objected to these interrogatories for a number of reasons, including because they were "overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent [they seek] financial data relating to actions occurring outside of the United States, financial data that is not related to the use of the accused route.c source code, and financial data that precedes [their] use of the accused route.c source code." *See* Bedrock's Mot. to Compel Exs. A.5 at 4-5, A.6 at 4. Even though Bedrock had not explained how any of Defendants' financial information was relevant to its case, Defendants nonetheless provided Bedrock with publicly available financial data regarding their businesses.

III. ARGUMENT

A. Bedrock's Motion To Compel Should Be Denied Because It Has Failed To Set Forth A Damages Theory

Parties may obtain discovery only where the requested information is "relevant to any party's claim or defense" or "reasonably calculated to lead to the discovery of admissible evidence." *See* Fed. R. Civ. P. 26(b)(1). Though this standard permits broad discovery, even where such information would not be admissible at trial, it does not authorize fishing

expeditions. The party seeking discovery "must establish the threshold burden of relevancy under the Rules." *Gauthier v. Union Pac. R.R. Co.*, No. 1:07-CV-12, 2008 U.S. Dist. LEXIS 47199, at *7-8 (E.D. Tex. Jun. 18, 2008). Where a discovery inquiry is "based on the party's mere suspicion or speculation," the information sought is not relevant and the Court may deny discovery. *See, e.g., Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1326 (Fed. Cir. 1990) ("[D]iscovery may be denied where, in the court's judgment, the inquiry lies in a speculative area."). Moreover, the party seeking discovery must show more than "a theoretical argument that the requested information 'somehow relates to [the pending action]'" before the "doors of the discovery process" may be opened. *Id*. at 1325.

In the context of discovery relating to damages, a plaintiff must, at the very least, be able to articulate a cognizable theory of damages before the doors to discovery of a defendant's sensitive financial information may be opened. *See, e.g., Allen v. Howmedica Leibinger GmhH*, 190 F.R.D. 518 (W.D. Tenn. 1999). In *Allen*, the plaintiff moved to compel damages discovery. The court noted that "[t]he party seeking discovery must be able to 'articulate the possible linkage between the discovery sought and admissible evidence.'" *Id.* at 522. The court then denied the plaintiff's motion, holding that "in order to determine in an ancillary proceeding if discovery is 'relevant to the subject matter' of the lawsuit and is 'calculated to lead to admissible evidence,' the plaintiff must, at a minimum, set forth a recognized damage theory." *Id.* at 524.

Similarly, in *Micro Motion, Inc. v. Kane Steel Co.*, the Federal Circuit held that a district court abused its discretion in granting damages-related discovery to a plaintiff from a non-party where the damages inquiry was entirely speculative. 894 F.2d at 1327. The plaintiff sought information from a non-party competitor regarding the non-party's products. The plaintiff asserted that information about a competitor's products was relevant to its lost profits theory of

damages, because the plaintiff had to show that the defendant had no acceptable, non-infringing alternative source for the technology in question. *Id.* at 1323-24. The Federal Circuit held that the district court abused its discretion in granting the discovery because "[t]he [district] court required no more of Micro Motion than a theoretical argument that the requested information 'somehow relates to its pending California action,'" and "[t]he doors of the discovery process may not be so easily opened." *Id.* at 1325.

Although *Micro Motion* involved a non-party, the Federal Circuit made clear that its reasoning applies equally where the discovery is sought of a party to the litigation. Indeed, the Federal Circuit reached its decision "by analogy" to a situation where suit had been brought directly against the non-party for patent infringement, concluding that "[i]t is reasonable to provide a nonparty from whom discovery is sought, at a minimum, with the same protection from discovery of information regarding infringement that it would have received had it been *sued* for infringement." *Id.* at 1327 (emphasis in original).

Allen and *Micro Motion* confirm the following rule: To establish the threshold burden of relevancy required under Rule 26, a party must, at the very least, articulate a cognizable theory of damages based on more than mere speculation or conclusory assertion. Bedrock has not met the threshold burden of relevancy because it has refused to provide *any* damages theory, much less a cognizable one.

Defendants sought Bedrock's damages theory in December 2009 through their interrogatories. Bedrock refused to provide one. Defendants again requested Bedrock's damages theory during the meet and confer process. Bedrock again refused and then filed the present motion to compel. In its motion, Bedrock stated that it sought Defendants' financial information about "their entire revenue-generating business operations" "in an effort to define a

royalty base." *See* Bedrock's Motion to Compel at 1. However, Bedrock again failed to explain how Defendants' "entire revenue-generating business operations" are in any way connected to the insubstantial and unnecessary code accused of infringement. Nor did Bedrock support its motion with a declaration from its damages expert explaining how the financial information sought is in any way relevant to the accused source code. Thus, Bedrock has yet to articulate *any* damages theory (much less a cognizable, non-speculative one) explaining how any alleged use of these lines of code could be linked to the revenues of "each business unit using, running, or relying upon to any degree a server or network of servers" executing the Linux operating system that contains such code. *See Allen*, 190 F.R.D. at 523-24.

Under Bedrock's view, a plaintiff accusing any aspect of a company's operations of infringement – no matter how trivial or unnecessary that aspect is to the company's actual business – would automatically be entitled to discover every financial detail of the *entire* company. Suppose, for example, a department store used an allegedly infringing coat hanger, cash register, elevator, door stopper, air conditioner, or computer. Because the department would rely "to [some] degree" on all of these things in its business, under Bedrock's view it would be entitled to discover all of the financial aspects of the department store's "entire revenue-generating business" without first having to set forth any damages theory (that is, a theory articulating a logical, causal link between the alleged infringement and a specific, quantified economic benefit to the business). In other words, plaintiffs would be permitted to engage in massive fishing expeditions into defendants' finances. Such a result would not be reasonable and is not the law.

B. Bedrock's Motion To Compel Should Be Denied In View Of Recent Federal Circuit Decisions That Require Damages Evidence To Be Linked To The Claimed Invention

Recently, the Federal Circuit has narrowed the scope of evidence that can be used to support a plaintiff's damages theory in a patent infringement action. In *ResQNet*, the Federal Circuit reversed the district court's award of damages because it "relied on speculative and unreliable evidence divorced from proof of economic harm linked to the claimed invention . . . ." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 868 (Fed. Cir. 2010). In reaching its decision, the Federal Circuit explained that "the trial court must carefully tie proof of damages to the claimed invention's footprint in the market place" and that "[a]ny evidence unrelated to the claimed invention does not support compensation for infringement but punishes beyond the reach of the statute." *Id*. at 869.

The Federal Circuit emphasized the same principles in *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327-28 (Fed. Cir. 2009). For example, the court rejected the patentee's reliance on certain licensees because "some of the license agreements [were] radically different from the hypothetical agreement under consideration" and the court was "unable to ascertain from the evidence presented the subject matter of the agreements." *Id*. The court also held that the entire market value rule for calculating a royalty rate cannot be applied unless the patentee proves that "the patent-related feature is the basis for customer demand." *Id*. at 1336 (quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1549 (Fed. Cir. 1995)).

ResQNet and *Lucent* have significantly narrowed the scope of damages evidence that is admissible at trial. In doing so, the Federal Circuit has also narrowed the scope of damages

information that can be sought by plaintiffs through discovery. Now patent plaintiffs can only obtain discovery that is linked to the claimed invention.[2]

Here, Bedrock has refused to disclose its damages theory and has not demonstrated any link between the accused Linux code and the financial information of Defendants' entire businesses. Thus, Bedrock's motion must also be denied under *ResQNet* and *Lucent*.

C. Google's And Match.com's Motion To Compel Bedrock To Set Forth Its Damages Theory Should Be Granted

Bedrock has had more than enough time to develop its damages theory. Bedrock filed this case more than one year ago and has obtained significant discovery from Defendants regarding their use of the accused Linux code. Although Bedrock claims that Defendants' sixth interrogatories seeking Bedrock's damages theory are premature contention interrogatories, Bedrock has failed to explain why it believes they are premature.

Bedrock has all of the information it needs to set forth its damages theory now and should be compelled to do so. Once Bedrock has set forth a cognizable damages theory, Defendants will produce financial information relevant to that theory. If the Court deems Defendants' interrogatories premature and denies Defendants' motion to compel, then Defendants ask this Court to also deny Bedrock's motion to compel an answer to its fifth interrogatory until Bedrock provides a damages theory that establishes the threshold relevancy required for production of Defendants' detailed financial information.

[2] In an attempt to justify Bedrock's extraordinary request for damages discovery on Defendants' entire businesses during the meet and confer process, Bedrock's counsel stated that he believes the recent Federal Circuit decisions limiting damages evidence/theories at trial have broadened the scope of damages discovery. This result is illogical and would turn the recent Federal Circuit jurisprudence completely on its head.

IV. CONCLUSION

For the foregoing reasons, Defendants Google and Match.com respectfully request that the Court deny Bedrock's motion to compel an answer to its fifth interrogatory and grant Google's and Match.com's motion to compel Bedrock to respond to Defendants' sixth interrogatories and provide its damages theory.

Dated: August 2, 2010

Respectfully submitted,

By: */s/ Todd M. Briggs*

Claude M. Stern
Todd M. Briggs
Evette D. Pennypacker
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Dr., 5th Floor
Redwood Shores, CA 94065
Telephone: 650–801–5000
Facsimile: 650–801–5100
Email: claudestern@quinnemanuel.com
Email: toddbriggs@quinnemanuel.com
Email: evettepennypacker@quinnemanuel.com

Michael E. Jones
State Bar No. 10929400
POTTER MINTON
110 N. College
Tyler, Texas 75702
Telephone: (903) 597–8311
Facsimile: (903) 593–0846
Email: mikejones@potterminton.com

Attorneys for Defendants Match.com LLC and Google, Inc.

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Google Inc. and Match.com has satisfied the meet and confer requirements of Local Rule CV–7(h) and Paragraph 14 of the Protective Order. The personal conference requirement of Local Rule CV–7(h) has been met. On July 15, 2010, lead and local counsel for Match.com, Claude Stern and Mike Jones, respectively, met and conferred by telephone with lead and local counsel for Bedrock Computer Technologies LLC, Douglas Cawley and Robert Parker, respectively, regarding the relief requested in the foregoing motion. In that conference, we discussed our clients' positions. These discussions conclusively ended in an impasse regarding the issues in the motion.

/s/ Todd Briggs
Todd Briggs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via electronic mail on Aug. 2, 2010, and that all counsel of record who have consented to electronic service are being served with a notice of filing of this document, under seal, pursuant to L.R. CV-5(a)(7).

Date: Aug. 2, 2010

/s/ Todd Briggs
Todd Briggs