

I. ARGUMENT IN REPLY

Bedrock propounded an interrogatory seeking detailed information related to Google's and Match.com's revenue to the extent that that revenue depends on the Accused Instrumentality in this case. In response, Google cited to Rule 33(d) and directed Bedrock to its investor website, and Match.com responded by citing to Rule 33(d) and by making a promise to produce the relevant documents at some unknown point in the future. This is a clear misuse of Rule 33(d). *See Laserdynamics, Inc. v. Asus Computer Int'l*, No. 2:06-CV-348, 2009 WL 15361, at *2 (E.D. Tex. Jan. 21, 2009). In fact, Google and Match.com do not dispute that their responses to Bedrock's fifth interrogatory are deficient—their opposition brief is completely silent on Rule 33(d) and *Laserdynamics*.

Instead of attempting to justify the adequacy of their responses, Google and Match.com only offer a patchwork of excuses. **First**, Google and Match.com attempt to minimize the importance of their infringement: “This [accused] 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.” Opp. Br. at 2. Even if this were true, FED. R. Civ. P 33 (“Rule 33”) does not permit a party to refuse to answer an interrogatory on these grounds. To the contrary, Rule 33 states that “interrogatories *must* be answered[.]” *See* Rule 33(b)(1) (emphasis added).

Second, Google and Match.com complain that Bedrock's interrogatory was overly broad and unduly burdensome. *See* Opp. Br. at 4. Google and Match.com only lodge this objection in a conclusory manner and offer no explanation as to how this interrogatory is overly broad or unduly burdensome. *See id.*

Third, Google and Match.com argue that Bedrock has not established the relevancy of the discovery it seeks. *See* Opp. Br. at 4-7. Google and Match.com cite *Gauthier v. Union Pac. R.R. Co.*, No. 1:07-CV-12, 2008 WL 2467016 (E.D. Tex. Jun. 18, 2008) for the proposition that Bedrock “must establish the threshold burden of relevancy under the Rules.” *See* Opp. Br. at 5. The Local Court Rules provide guidance as to what this “threshold burden” is. Specifically, the Local Rules state that relevant information includes “information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense[.]” *See* Local Rule CV-26(d)(5). Certainly, Bedrock needs to conduct discovery on an appropriate royalty base so that its counsel can prepare, evaluate, and try its case.

Moreover, the interrogatory at issue was explicitly tailored to the defendants’ infringement. *See* e.g., Dkt. No. 246-4 at 10 (“For each Google business unit using, running, or relying upon to any degree a server or network of servers executing any Accused Version of Linux . . .”). The interrogatory is explicitly tied and linked to Google’s and Match.com’s reliance of the thing accused of infringing the patent-in-suit. Because the interrogatory at issue is within the scope of permissible discovery—on its face, no less—the burden is actually on Google and Match.com to “show why discovery should *not* be permitted.” *See Gauthier*, 2008 WL 2467016, at *3 (emphasis added). Google and Match.com have made no such showing.

Google’s and Match.com’s reliance on *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318 (Fed. Cir 1990) is misplaced. As Google and Match.com admit, the damages-related discovery sought in *Micro Motion* was “entirely speculative.” *See* Opp. Br. at 5. Here, in contrast, Bedrock is seeking damages related to Google’s and Match.com’s revenue that is attributable, at least in part, to their infringement of the patent-in-suit. *See* e.g., Dkt. No. 246-4 at 10 (“For each Google business unit using, running, or relying upon to any degree a server or

network of servers executing any Accused Version of Linux . . .”). The interrogatory at issue is therefore not a “speculative damages inquiry” by any measure, and so *Micro Motion* is inapposite.¹

Google and Match.com further urge the Court to adopt a new discovery rule based on a dubious synthesis of *Micro Motion* and *Allen*: A plaintiff is not entitled to damages-related discovery without first having “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).” *See* Opp. Br. at 7. This new rule is not only contrary to Rule 33, Rule 26, and Local Rule CV-26(d); it is also ill-advised. First, this new rule would encourage discovery disputes between future litigants. It would be entirely too easy for a defendant to refuse discovery based on fabricated, perpetual dissatisfaction with the plaintiff’s damages theory. Second, this new rule proposes an absurd framework in that it would allow a defendant to refuse damages-related discovery until the plaintiff shows a “logical, causal link between the alleged infringement and a specific, quantified economic benefit to the business.” A plaintiff could rarely satisfy this burden without first conducting damages related discovery. Plainly, this would put the cart before the horse.

Fourth, Google and Match.com argue that recent Federal Circuit opinions, specifically in *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009) and *ResQNet.com*,

¹ Similarly, *Allen v. Howmedica Leibinger GmhH*, 190 F.R.D. 518 (W.D. Tenn. 1999) is inapposite. Google and Match.com cite *Allen* for the proposition that Bedrock must “articulate a linkage between the discovery sought and admissible evidence.” *See* Opp. Br. at 5. This is simply not the law in this district. *See Ferko v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 132 (E.D. Tex. 2003) (“The definition of relevant information in Rule 26(b)(1) is broad, and relevant information need *not* be admissible at the trial of the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence.”) (emphasis added). In any event, as discussed above the interrogatory itself provides a clear linkage between the discovery sought and admissible evidence.

Inc. v. Lansa, Inc., 594 F.3d 860 (Fed. Cir. 2010), have limited the scope of damages-related discovery. Not so. Neither case narrowed the scope of damages-related discovery; rather, both cases involved a review of damages awards for supporting evidence. See *ResQNet*, 594 F.3d at 868-873; *Lucent*, 594 F.3d at 1309, 1324-1339. In the context of this procedural posture, the Federal Circuit's statement in *ResQNet* that "[a]ny evidence unrelated to the claimed invention does not support compensation for infringement but punishes beyond the reach of the statute," 594 F.3d at 869, stands for the unremarkable proposition that evidence unrelated to the claimed invention cannot support an otherwise unsupported damages award. This in no way changes what is discoverable. To the contrary, to the extent that the Federal Circuit signaled, in *Lucent* and *ResQNet*, that it will require more rigor in damages calculations, a plaintiff must conduct more extensive damages discovery to hurdle that heightened scrutiny.

II. ARGUMENT IN RESPONSE TO GOOGLE'S AND MATCH.COM'S CROSS-MOTION TO COMPEL

Google and Match.com did not satisfy the requirement to meet and confer for their cross-motion to compel as required by Local Rule CV-7(h). In the meet and confer for Bedrock's motion, Google and Match.com refused to supplement their responses to Bedrock's fifth interrogatory unless and until Bedrock supplemented its response to Google's and Match.com's sixth interrogatory. While Bedrock refused to have its discovery efforts held hostage by Google's and Match.com's satisfaction with Bedrock's response to its damages-contention interrogatory, Bedrock did not refuse to supplement its responses to those interrogatories. In fact, Bedrock expects to supplement its response as discovery progresses. To this point, however, Google and Match.com have refused even basic damages-related discovery, as exemplified by Bedrock's need to file a motion to compel a complete response to its fifth interrogatory.

III. CONCLUSION

Because Google and Match.com do not attempt to justify their deficient responses to Bedrock's interrogatory and further because they have no legitimate excuse for their deficient responses, Bedrock respectfully requests that the Court grant either Bedrock's proposed order or Bedrock's alternative proposed order. Bedrock also respectfully requests that the Court deny Google's and Match.com's cross-motion to compel.

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Respectfully submitted,
McKOOL SMITH, P.C.

/s/ Douglas A. Cawley

Sam F. Baxter
Texas Bar No. 01938000
McKOOL SMITH, P.C.
sbaxter@mckoolsmith.com
104 E. Houston Street, Suite 300
P.O. Box 0
Marshall, Texas 75670
Telephone: (903) 923-9000
Facsimile: (903) 923-9099

Douglas A. Cawley, Lead Attorney
Texas Bar No. 04035500
dcawley@mckoolsmith.com
Theodore Stevenson, III
Texas Bar No. 19196650
tstevenson@mckoolsmith.com
Jason D. Cassady
Texas Bar No. 24045625
jcassady@mckoolsmith.com
J. Austin Curry
Texas Bar No. 24059636
acurry@mckoolsmith.com
McKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: 214-978-4000
Facsimile: 214-978-4044

Robert M. Parker
Texas Bar No. 15498000
Robert Christopher Bunt
Texas Bar No. 00787165
PARKER, BUNT & AINSWORTH, P.C.
100 E. Ferguson, Suite 1114
Tyler, Texas 75702
Telephone: 903-531-3535
Facsimile: 903-533-9687
E-mail: rm Parker@pbatyler.com
E-mail: rcbunt@pbatyler.com

**ATTORNEYS FOR PLAINTIFF
BEDROCK COMPUTER
TECHNOLOGIES LLC**

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the forgoing document via the Court's CM/ECF system pursuant to the Court's Local Rules this 12th day of August, 2010.

/s/ J. Austin Curry _____
J. Austin Curry