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

AND

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

I. BEDROCK'S MOTION TO COMPEL SHOULD BE DENIED

Contrary to Bedrock's claims, Defendants Google Inc. and Match.com, LLC ("Defendants") have not refused damages related discovery. In fact, Defendants have provided the financial information sought by Bedrock's interrogatories and are willing to provide additional information relating to Bedrock's apparent damages theory.

Bedrock's interrogatories to Defendants seek financial information for any part of Defendants' businesses "*relying upon to any degree* a server or network of servers executing any Accused Version of Linux." Because it applies to any use of these servers, no matter how incidental or trivial, this very broad request covers virtually every aspect of Defendants' businesses. Consequently, Defendants produced their SEC quarterly and yearly filings, which provide detailed financial information for Defendants' entire businesses, including their current assets, liabilities, gross revenues, costs and expenses, and net income.[1] Thus, Defendants provided the financial information responsive to Bedrock's interrogatory.[2]

Bedrock argues that citations to SEC filings are "insufficient because [] 10ks do not provide revenue data separately for each business unit, do not provide cost data separately for each business unit, and do not affirmatively indicate reliance or use of the Accused Instrumentalities." Bedrock's Mot. to Compel at 3. However, Bedrock's interrogatories specifically requested that Defendants provide their financial information "with the data

[1] Google pointed Bedrock to the location of these documents, which are available online, in its interrogatory response and produced these documents on June 30, 2010 as documents Bates labeled GGL-BED00037986 to GGL-BED00040067. Similarly, Match.com produced these documents on June 30, 2010 as documents Bates labeled MATCH00002177 to MATCH00005226. The financial information in these SEC filings results from a rigorous analysis of each company's financial condition and is certified by an independent auditor and each company's management.

[2] Bedrock's Mot. to Compel, Exs. A.3, A.4 (seeking net revenues, costs, expenses, and profits). In doing so, Defendants do not concede, and in fact dispute, that the appropriate royalty base is the entire revenue of their companies.

segregated by whatever classifications [Defendant] makes in its normal course of business." Bedrock's Mot. to Compel, Exs. A.3, A.4. This is precisely what the SEC filings do. Thus, Defendants have also provided their financial information in the form requested by Bedrock.

Although Defendants have provided the financial information sought by Bedrock's interrogatories, Defendants are also willing to produce financial information relating to what appears to be Bedrock's damages theory. Defendants have repeatedly asked Bedrock to explain its damages theory during the course of this case, including through an interrogatory that is the subject of Defendants' cross-motion to compel. Bedrock, however, has steadfastly refused to explain its theory. Nevertheless, Bedrock's document requests, interrogatories and Rule 30(b)(6) deposition topics focus heavily on "denial of service" attacks and the costs associated with them. For example, Bedrock has requested:

- "All documents showing any potential consequence or costs of a denial of service attack or other loss of service";
- "All documents describing any risk associated with denial of service attacks and any cost associated with preventing or quickly recovering from a denial of service attack."[3]

In view of this discovery, Bedrock appears to believe that its patent covers a technique implemented in Defendants' Linux servers that prevents a specific type of denial of service attack, and that its damages are directly related to Defendants' costs associated with preventing or responding to such attacks. Given this, Defendants are also willing to provide financial information they have relating to such costs.

Beyond the financial information provided in Defendants' SEC filings and costs associated with denial of service attacks, it is not clear what financial information Bedrock seeks or how that undefined financial information is relevant or reasonably likely to lead to the

[3] *See, e.g.*, Ex. A.7 at 3 (Bedrock Document Request Nos. 18, 23, 28, and 31).

discovery of admissible evidence relating to this case. It is clear, however, that Bedrock should not be allowed to engage in a fishing expedition into Defendants' financial records without showing how such information is linked to the allegedly infringing portion of Linux source code at issue in this case. *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990) (holding that 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); *see also Allen v. Howmedica Leibinger GmbH*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999) ("The party seeking discovery must be able to 'articulate the possible linkage between the discovery sought and admissible evidence.'").

Bedrock contends that information is relevant if "reasonable and competent counsel would consider [it] reasonably necessary to prepare, evaluate or try a claim or defense," and that "Bedrock needs to conduct discovery on an appropriate royalty base so that its counsel can prepare, evaluate, and try its case." Reply at 2. Again, Bedrock fails to explain why the financial information already provided is insufficient or what additional information is reasonably necessary to prepare, evaluate and try its case. And by refusing to explain its damages theory, it is unclear what additional financial information is properly subject to discovery in this case. *See Micro Motion*, 894 F.2d at 1325 ("Micro Motion's assertion of a claim for damages or even lost profit damages in itself does not provide a mantle of relevancy with respect to all of the information it sought . . . ."); *Allen*, 190 F.R.D. at 524 ("[I]n 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.").

Bedrock does not cite any case that contradicts the limits on discovery drawn by *Micro Motion* and *Allen*. Indeed, the only case Bedrock cites actually supports the position that a party seeking discovery must be able to articulate some linkage between the discovery sought and admissible evidence. *See Ferko v. NASCAR, Inc.*, 218 F.R.D. 125, 137 (E.D. Tex. 2003). In *Ferko,* the court explained that it had previously denied a discovery request where the party seeking discovery "did not sufficiently articulate[] why [the information sought] is relevant to this lawsuit . . . ." *Id*. In contrast, the court permitted the discovery at issue because the plaintiff had in fact "articulated a logical reason why [the information sought] is material." *Id.* Unlike in *Ferko,* Bedrock has failed to articulate *any* theory of damages that would explain how the trivial bit of accused code at issue in this case provides any benefit to Defendants' businesses, much less one that would justify wholesale access to every aspect of Defendants' financial operations.

Bedrock argues that, unlike here, *Micro Motion* involved discovery that was "entirely speculative." In reality, however, Bedrock is seeking discovery that is *more* speculative than that sought in *Micro Motion.* There, the plaintiff had advanced a number of damages theories to explain why the discovery sought was relevant to the case. Here, Bedrock has refused to assert *any* damages theory linking the accused code to the discovery it seeks, much less a non-speculative one. Instead, Bedrock in essence contends that it is entitled to unfettered discovery so that it can try to find a damages theory. This is exactly the kind of fishing expedition the Federal Circuit disapproved of in *Micro Motion.* *Micro Motion,* 894 F.2d at 1327 ("The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim.") (emphasis in original).

Finally, Bedrock argues that the Federal Circuit's decisions in *Lucent* and *ResQNet.com* have broadened, rather than narrowed, the permissible scope of discovery. This is simply not

true. Both *Lucent* and *ResQNet.com* narrowed the scope of evidence admissible to support a damages theory in a patent suit. *See Lucent Techs, Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860 (Fed. Cir. 2010). Narrowing the scope of admissible evidence necessarily narrows the scope of permissible discovery as well, since discovery must be "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

II. DEFENDANTS' CROSS-MOTION TO COMPEL SHOULD BE GRANTED

Although Bedrock agrees that interrogatories "must" be answered (Reply at 1), it inexplicably refuses to provide a response to Defendants' interrogatories requesting Bedrock's damages theory. Instead, Bedrock claims that it "expects to supplement its response as discovery progresses." Reply at 4. However, Bedrock has not provided anything substantive that it could later supplement, and has offered no reason why it cannot at this point simply answer Defendants' interrogatories.[4] Given that Bedrock's complaint alleges that it suffered damages, Bedrock, in accordance with the dictates of Rule 11, *must* have formed *some* damages theory more than a year ago. Bedrock should be compelled to disclose that theory or its current damages theory in response to Defendants' interrogatories.

III. CONCLUSION

For the foregoing reasons, Bedrock's motion to compel should be denied and Google's and Match.com's motion to compel should be granted.

[4] Defendants satisfied the meet and confer requirement for their cross-motion to compel. As Bedrock admits, at the July 15, 2010 meet and confer, Defendants indicated to Bedrock that they were willing to produce additional financial data relevant to Bedrock's damages theory and requested that Bedrock set forth that theory in its response to Defendants' interrogatories. Bedrock refused to supplement its interrogatory responses. Accordingly, the parties reached an impasse on the issue.

Dated: August 23, 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 SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of this motion, via the Court's CM/ECF system per Local Rule CV–5(a)(3) on August 23, 2010.

Date: Aug. 23, 2010

/s/ Todd Briggs
Todd Briggs