

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

Bedrock Computer Technologies LLC,

Plaintiff,

v.

SoftLayer Technologies, Inc., et al.,

Defendants.

Case No. 6:09-CV-269

JURY TRIAL DEMANDED

**DEFENDANTS' UNOPPOSED MOTION FOR LEAVE TO
SUPPLEMENT THEIR INVALIDITY CONTENTIONS**

Defendants SoftLayer Technologies, Inc., Google, Inc., Yahoo! Inc., MySpace Inc., Amazon.com Inc., Match.com LLC, and AOL LLC (collectively "Defendants") hereby move for leave to supplement their Invalidation Contentions for U.S. Patent No. 5,893,120 (the "'120 patent") pursuant to P.R. 3-6(b). The Defendants have met and conferred with Plaintiff Bedrock Computer Technologies LLC ("Bedrock"), and Bedrock does not oppose.

I. Background

On June 16, 2009, Bedrock filed this action, accusing the Defendants of infringing the '120 patent. Pursuant to P.R. 3-3, Defendants served Invalidation Contentions on January 8, 2010. On December 9, 2009, Red Hat Inc. ("Red Hat") filed an action against Bedrock in this Court seeking a declaration that the '120 patent is invalid, among other relief.¹ Red Hat served its Invalidation Contentions on May 14, 2010. Red Hat's Invalidation Contentions were substantially similar to the Defendants' Invalidation Contentions, except for the addition of several references

¹ Red Hat, Inc. v. Bedrock Computer Technologies, LLC, Case No. 6:09-cv-549.

and accompanying claim charts. On May 27, 2010, Defendants requested Bedrock's consent to supplement their Invalidity Contentions with the additional references and corresponding claim charts from the Red Hat Invalidity Contentions, and on August 3, 2010, Bedrock indicated that it would not oppose any motion for leave to serve supplemental invalidity contentions.

Accordingly, the Defendants seek to supplement their Invalidity Contentions to include the additional references and corresponding claim charts present in Red Hat's Invalidity Contentions. A copy of the Proposed Supplemental Invalidity Contentions is attached as Exhibit A hereto. The cited references and claim charts are identical to those served by Red Hat on May 14, 2010. As a result, Bedrock has been on notice of these references since May 14, 2010, and thus will suffer no prejudice if this Motion is granted. Further, granting this Motion will allow the parties to litigate the issues surrounding all of the prior art disclosed to Bedrock in this case—rather than artificially limiting the Defendants to a subset of the art disclosed to Bedrock. This would further judicial economy by increasing the likelihood that this case could resolve key issues regarding the validity of the '120 patent which would lead to more efficient disposition of the Red Hat action.

II. Argument

Under Local Patent Rule 3-6(b), amendments or supplements to invalidity contentions are allowed “upon a showing of good cause.” P.R. 3-6(b). In determining good cause, this Court often considers four factors, all of which favor the Defendants here: (1) the explanation not including the additional references in the initial invalidity contentions; (2) the importance of the thing that would be excluded; (3) potential prejudice in allowing the thing that would be

excluded; and (4) the availability of a continuance to cure any prejudice.² For the reasons stated below, the Defendants respectfully submit that supplementing their Invalidity Contentions is warranted.

A. Defendants' Explanation for Not Including the Additional References in Initial Invalidity Contentions.

Since the beginning of the case, the Defendants have diligently searched for and analyzed prior art relevant to the '120 patent. The Defendants continue to search diligently for prior art references, additional documentation and/or corroborating evidence concerning prior art systems, as explained in Defendants' Invalidity Contentions.³ Defendants' Invalidity Contentions included all of the prior art known to the Defendants as of January 8, 2010, just six and a half months after Bedrock filed its complaint. After serving their Invalidity Contentions, the Defendants continued to search for additional prior art.

On May 14, 2010, Red Hat served Invalidity Contentions on Bedrock in connection with its own action related to the '120 patent. Red Hat's Invalidity Contentions included seven additional references which Defendants had not located at the time they served their Invalidity Contentions.

Given the complexity and fast pace of this case, the discovery of supplemental documentation in the months following the deadline for Invalidity Contentions is reasonable.

B. The Prior Art Documentation Defendants Seek to Include in Their Invalidity Contentions is Important to the Defense of this Action.

The additional references to be included in the Invalidity Contentions are important to this case because they show prior invention, knowledge, and/or use of the purported invention

² Arbitron, Inc. v. Int'l Demographics, Inc., No. 2:06-cv-434, 2008 WL 4755761, at *1 (E.D. Tex. Oct. 29, 2008).

³ See Exhibit B, January 8, 2010 Invalidity Contentions, at 4.

claimed in the '120 patent by someone other than the named inventor of the '120 patent.⁴ They additionally support the Defendants' contention that one of skill in the art would have deemed the alleged invention obvious in light of the existing technology and knowledge in the field at the time of the earliest possible priority date of the '120 patent. For example, some of the new references are dated from the early and mid-1990s and include source code that performed on-the-fly garbage collection from linked lists associated with hash tables via an external chaining technique.⁵ These references were written more than a year—and in some cases, several years—before the filing of the '120 patent.⁶

As the Defendants' Supplemental Invalidity Contentions demonstrate, the additional prior art anticipates the '120 patent. Given the importance of the additional references included in Red Hat's Invalidity Contentions, the Defendants will suffer significant prejudice if they are not allowed to present these supplemental references to the Court to prove invalidity of the '120 patent.⁷

C. Plaintiff is Not Prejudiced by the Defendants' Supplementation of Their Invalidity Disclosures.

Bedrock has been on notice of the additional references since receiving Red Hat's Invalidity Contentions on May 14, 2010 and has known of the Defendants' intent to supplement their Invalidity Contentions since May 27, 2010. In addition Bedrock will need to analyze these additional references to defend the Red Hat action. Therefore, Bedrock will not be unfairly burdened in analyzing these references for this case. Consequently, Bedrock will suffer no

⁴ See Exhibit A, Proposed Supplemental Invalidity Contentions, at Ex. B-14, C-19, and D-7 – D-11. As noted herein, these references and charts are identical to those served by Red Hat on May 14, 2010.

⁵ See Exhibit A, Proposed Supplemental Invalidity Contentions, e.g., Ex. D-8 and D-9.

⁶ See, e.g., Exhibit A, Proposed Supplemental Invalidity Contentions, at Ex. D-10, dated from 1991.

⁷ See *Alt v. Medtronic, Inc.*, No. 2:04-cv-370, 2006 WL 278868 at *4-5 (E.D. Tex., Feb. 1, 2006) (Davis, J.) (finding that exclusion of new and significant prior art would strongly prejudice the party seeking amendment).

prejudice if this motion is granted. Indeed, Bedrock has indicated that it does not oppose this motion.

D. A Continuance is Not Necessary.

Bedrock will not be prejudiced by the grant of this motion and does not oppose this motion. Accordingly, there is no need for a continuance.

III. Relief Requested

The Defendants have demonstrated the requisite good cause necessary to supplement their Invalidity Contentions. Therefore, the Defendants respectfully request that the Court grant the Defendants' Unopposed Motion for Leave to Supplement their Invalidity Contentions.

Respectfully submitted, this 27th day of August, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served this 27th day of August 2010, on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system, pursuant to Local Rule CV-5(a)(3).

/s/ E. Danielle T. Williams
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