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

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 COMPEL PRODUCTION OF DOCUMENTS FROM MYSPACE

I. ARGUMENT IN REPLY

When Bedrock filed its motion to compel documents from MySpace, MySpace had produced just 10 documents. MySpace, in its response brief (Dkt. No. 281), does not attempt to justify the adequacy of its document production and instead:

(i) denigrates the size of the code within Linux accused of carrying out the claims of the patent-in-suit (Res. at 1-2, 9, and 12);

(ii) argues, via a declaration of a MySpace employee, that it is not susceptible to a denial of service attack (Res. at 4-8);

(iii) declares that Bedrock has not met a burden—a burden that is set by MySpace—to receive discovery (Res. at 6-7, 9-14).

These arguments are mostly irrelevant. MySpace will have ample opportunity to attempt to minimize the importance of its infringement as well as its alleged noninfringing countermeasures for denial of service attacks. The issue before the Court in this motion is not about the merits of the respective parties' cases; rather, the issues are discovery and procedure.

Discoverability.

As an initial matter, MySpace should be given no credit for producing documents after its refusal to produce documents forced Bedrock to file a motion to compel. To allow a party to avoid a motion to compel by such a contrivance would defeat a key purpose of the Federal Rules of Civil Procedure and the Local Rules, which is to promote voluntary discovery without the need for motions practice.

In any event, MySpace still has not discharged its discovery obligations. MySpace's brief, itself, demonstrates this in two ways. First, MySpace admits that it is "in the process of producing" more documents even though this case has been ongoing for over a year and the

deadline for document production expired over two months ago. *See* Res. at 1. Second, MySpace's brief relies on the declaration of one of its employees, Ilya Kravchenko, to make factual allegations about MySpace's use of Linux, MySpace's server architecture, and MySpace's alleged noninfringing alternatives. *See* Res. at 2-3. If MySpace had produced all relevant documents, then it could have used and cited to those documents to make the same points. Bedrock should be enabled to test the accuracy and completeness of Ms. Kravchenko's declared facts, but without a complete production from MySpace, this is unlikely.

MySpace cannot say that it has met its discovery obligations. Instead, MySpace can only say that its document production investigation is ongoing. But this gives Bedrock no indication as to when MySpace will make a complete document production or whether that supplemental production will be complete. Without an order from the Court overruling MySpace's objections and requiring MySpace to produce the documents that Bedrock has asked for (as well as everything relevant to this case), there is simply no indication that MySpace would ever definitively discharge its discovery obligations.

Procedure.

The second issue before the Court is procedure. MySpace attempts to justify its document production by placing blame on Bedrock—particularly, by arguing that Bedrock has not come forth with a sufficient damages and infringement theories that would trigger MySpace's obligation to produce documents. *See* Res. at 9-14. Most of MySpace's briefing on this point simply repeats Google's and Match.com's briefing, which is why Bedrock has asked the Court for a case management conference on the scope of discoverability in the District. *See* Dkt. No. 288. These arguments are unavailing for the same reasons set out in Bedrock's prior briefing against Google and Match.com. *See* Dkt. No. 264 at 2-4.

Bedrock further notes that the framework that MySpace advocates is procedurally unworkable. Particularly, MySpace seems to read the Federal Rules of Civil Procedure and the Local Rules to require that Bedrock must convince MySpace—to MySpace's satisfaction—that the discovery that it is seeking is relevant. This proposed procedural framework is not only contrary to Rule 33, Rule 26, and Local Rule CV-26(d); it is also ill-advised. First, this proposed framework 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.

Take, for example, MySpace's refusal to produce discovery related to denial of service attacks. During the meet and confers leading to this motion, MySpace's counsel continually expressed disbelief and dissatisfaction with the level of detail that Bedrock was disclosing regarding denial of service attacks, and it became clear that MySpace's counsel would never be satisfied. Also, MySpace has seemingly done little to investigate the merits of Bedrock's assertion that denial of service attacks are highly relevant to Linux's implementation of the patent-in-suit. Indeed, it was only after Bedrock filed it motion to compel that MySpace served its first set of interrogatories. In contrast, Defendant Yahoo propounded an interrogatory asking about the connection between the patent-in-suit, Linux, and denial of service attacks. On September 2nd, Bedrock gave a very detailed response, which is attached as Exhibit A.1 at 7-10. Bedrock has since served a copy of these responses to MySpace.

MySpace's view of Rule 26 and LR-CV 26 would seem to require Bedrock to set forth its response to Yahoo's fifth interrogatory before MySpace had any obligation to produce discovery on denial of service attacks. Similarly, MySpace wants Bedrock to come forth with a damages theory that MySpace finds acceptable, and until then, MySpace will not give Bedrock the

damages-related discovery it needs. Contrary to MySpace's proposed procedural framework, Bedrock should not be forced to convince the Defendants that its infringement and damages theories are viable—or unassailable, or do not offend *Lucent*, or preemptively takes into account alleged noninfringing alternatives—before it can receive the discovery it seeks in this case.

II. CONCLUSION

Because MySpace's document production was deficient at the outset of this motion and remains deficient, Bedrock respectfully requests the Court to grant its motion.

DATED: September 17, 2010

Respectfully submitted,
McKOOL SMITH, P.C.

/s/ *Douglas A. Cawley*

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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 17th day of September, 2010.

/s/ J. Austin Curry
J. Austin Curry