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**
vs.	§	**PATENT CASE**
SOFTLAYER TECHNOLOGIES, INC., et al.	§	
Defendants.	§	

ORDER

Before the Court are: (1) Defendants' Motion to Compel Plaintiff to Comply with Patent Rule 3-1 and Extend Time to Serve Invalidity Contentions [Docket No. 133]; (2) Defendant Google's Motion for Leave to File Notice of Supplemental Facts Regarding Defendants' Motion to Compel [Docket No. 187]; and (3) Plaintiff's Motion to Set A Case Management Conference [Docket No. 288]. Google's Motion for Leave is **GRANTED**.

In their motion to compel, Defendants argue that Bedrock's preliminary infringement contentions are insufficient.[1] Specifically, Defendants contend that Bedrock provided a single claim chart that accuses 375 versions of Defendants' Linux operating system of infringement. Each of

[1] By way of background, Bedrock filed its Original Complaint in June 2009. The complaint did not identify any products accused of infringement. Several defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Court granted the motion to dismiss and allowed Bedrock an opportunity to amend its complaint. The Court noted:

> Bedrock served its Patent Rule 3-1 disclosures while this motion was being briefed. Rule 3-1 disclosures are far more detailed than Rule 8's pleading requirements. Thus, before this motion was fully briefed, Defendants had already received greater specificity than what they sought in this motion, rendering this motion superfluous for all practical purposes. The Court strongly encourages the parties to try this case on the merits and not unnecessarily burden the Court with technical issues that lack practical substance.

these versions includes source code files that change and evolve throughout the 375 versions. Therefore, Defendants contend, Bedrock has not provided meaningful infringement contentions on which Defendants can rely when preparing their case.

Bedrock responds that its preliminary infringement contentions put Defendants on fair notice of what Bedrock is accusing. Bedrock contends that it identifies the precise functions and data structures within the accused Linux source code that perform each limitation of each asserted claim. Bedrock argues that further supplementation would require it to show *how* infringement occurs, not *where* it occurs.

P.R. 3-1 requires: "a chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality." According to Defendants, the various source code functions cited in Bedrock's chart contain hundreds of lines of source code, and those lines call out other lines. Bedrock does not dispute that its preliminary infringement contentions call many lines of source code into play. However, Bedrock argues that does not make its preliminary infringement contentions insufficient.

It is true that the mere fact that Bedrock cites a large amount of source does not mean its preliminary infringement contentions are insufficient. The rules require, though, that Bedrock be as specific as possible in its contentions. Google's notice of supplemental facts regarding this motion demonstrates that–at least as to Google–Bedrock has the ability to better comply with P.R. 3-1. In January 2010, Google served its interrogatory no. 7, asking the following:

> For each asserted claim of the '120 patent, specifically identify, on a claim-by-claim basis in a claim chart format, each line of source code in each Accused Instrumentality that Bedrock contends meets each limitation of the claim, and explain in detail how the identified lines of source code satisfy each limitation of the claim.

Google states that in response, it received the very information P.R. 3-1 requires (namely the *where*, not the *how*). Bedrock responded with three new claim charts that identify lines of source code where it contends certain elements of each asserted claim are found.[2] Bedrock responds that the fact that it provided the information above is not relevant to the Court's analysis with respect to Defendants' motion to compel because: (1) Bedrock's obligations under Federal Rule of Civil Procedure 33 are greater than its obligations under P.R. 3-1, and (2) Bedrock responded only after Google provided discovery that enabled it to make such a response. Bedrock notes that the other Defendants have not provided the information provided by Google, which would allow Bedrock to provide comparable responses to what it gave Google. Indeed, Bedrock contends that Defendants have not been forthcoming with discovery responses that would enable Bedrock to possibly narrow down its accused source code. *See* Docket No. 162 at 3-4.

The parties do not appear to be cooperating in their discovery efforts. Local Rule CV-7(h) requires parties to confer in a good faith attempt to resolve all matters without Court intervention. Currently, there are seven discovery motions pending in this case in addition to this motion.[3] While the Court understands the need for Court intervention to resolve matters that may come up, the Court

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[2] Google contends that this information does not render Defendants' motion moot because: (1) Bedrock charged Google with using three of its twenty interrogatories, and (2) the charts provided do not provide the requested information for the remaining defendants.

[3] *See* Docket No. 210, Plaintiff's Motion to Compel Complete Response to Third Interrogatory From Google; Docket No. 217, Match.com's Motion to Compel Bedrock to Remove the Confidentiality Designation of Bedrock's Second Supplemental Response to Match.com's Interrogatory No. 1; Docket No. 246, Plaintiff's Motion to Compel from Google and Match.com A Complete Response to Bedrock's Fifth Interrogatory; Docket No. 259, Defendants' Motion to Compel A Complete Response to Their Sixth Interrogatories; Docket No. 263, Defendants' Motion to Compel Non-Privileged Testimony and Documents From Lotvin and Bedrock's Request for In-Camera Review of Non-Privileged Documents; Docket No. 270, Plaintiff's Motion to Compel From AOL and MySpace A Complete Response to Bedrock's Fourth Interrogatory; and Docket No. 271, Plaintiff's Motion to Compel Documents From Myspace.

does not look with favor on having to referee such a large number of disputes that could be resolved by the highly qualified attorneys on both sides of this case. Such disputes waste clients' money, attorneys' time, and the Court's resources and patience.

Therefore, the Court **GRANTS** Defendants' Motion to Compel, and **ORDERS** Bedrock to amend its PICs to provide as specific information as possible regarding where each element of each asserted claim is found within Defendants' products. However, the Court will not at this time set a deadline for Bedrock to amend its PICs. Instead, the Court GRANTS Plaintiff's Motion to Set A Case Management Conference [Docket No. 288]. The Court will hear all of the pending motions cited in footnote three of this Order at the October 7 *Markman* hearing. Before the October 7 hearing, the Court **ORDERS** *lead trial and local counsel* to meet and confer as to each of these pending motions. The parties will notify the Court of the results of their meet and confer by October 4, 2010.

The Court also notes that it adheres to, as the Federal Rules of Civil Procedure contemplate, a policy of liberal discovery. Where something is not discoverable due to a claim of privilege, relevance, or other legal principle, the Court will allow a party to withhold that thing. However, in marginal cases, the Court will generally favor discovery. In any case, the Court will not tolerate gamesmanship that attempts to conceal or delay the production of discoverable items. The Court is optimistic that the parties will work together to resolve their pending discovery disputes as professionals.

So ORDERED and SIGNED this 27th day of September, 2010.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE