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 SUR-REPLY TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT OF INDEFINITENESS
AS TO CLAIMS 1, 2, 5, AND 6 OF U.S. PATENT NO. 5,893,120

I. ARGUMENT IN SUR-REPLY

When Defendants filed their Motion, Bedrock had already filed and served its opening

claim construction brief. Nevertheless, Defendants argued:

> Whether one of skill would understand the metes and bounds of
> the claim limitation is not the issue here. Rather, the issue is
> whether the specification discloses an algorithm corresponding to a
> means-plus-function claim as required by 35 U.S.C. § 112 ¶ 6.

See Mot. (Dkt. No. 283) at 7, n.4. In their Reply, the Defendants about-faced and argue that the

disclosed structure in the '120 patent is not adequately bounded. In making these new

arguments, Defendants again improperly rely upon attorney argument and offer no evidence as to

whether the bounds of these disputed claim limitations would be understandable to an ordinary

artisan. As such, Defendants' motion for summary judgment must fail.

A. The Structure for "Record Search Means . . ." is Adequately Bounded.

The hash function that serves as part of the corresponding structure is adequately

bounded. *See* Decl. of Dr. Mark Jones (Dkt. No. 275-8) at ¶¶ 10-13 and 31-32. One skilled in

the art would know what is—and what is not—a hash function. *See id.*; *see also* '120::5:3-5 (a

"hashing function can be any operation on the key that results in subscripts mostly uniformly

distributed across a hash table"). Indeed, Defendants have retreated from their original position

that a hash function could be "any series of mathematical operations that transforms the key into

an index or storage address for a hash table." *See* Mot. at 2.

Further, Defendants' continued recitation of *Blackboard, Inc. v. Desire2Learn, Inc.*, 574

F.3d 1371 (Fed. Cir. 2009) is misleading. In *Blackboard*, the patentee attempted to avoid

indefiniteness by submitting evidence that one skilled in the art could implement a system that

performed the recited function, but the patent was found indefinite because the correct inquiry is

not what one skilled in the art could do but whether one skilled in the art would understand the

bounds of the limitation in light of the specification. *See id*. at 1384. Here, because Bedrock's expert has opined that one skilled in the art would understand the bounds of these limitations, *see*, e.g., Decl. of Dr. Mark Jones at ¶ 13, *Blackboard* is inapposite.

B. "Hashing Means . . ." Does Not Require the Execution of a Hashing Function.

For this limitation, Defendants attack Bedrock's refusal to identify unnecessary structure as not passing "the straight-face test." *See* Rep. at 4. The Federal Circuit, however, has articulated the actual test: "Structural features that do not actually perform the recited function do not constitute corresponding structure and thus do not serve as claim limitations." *See Asyst Tech., Inc. v. Empak, Inc.*, 268 F.3d 1364, 1370 (Fed. Cir. 2001).

C. "Means for Dynamically Determining . . ." Has Clearly Linked Structure.

The Defendants now claim that there is no linkage between the disclosed algorithm and this limitation, *see* Rep. at 4; however, the Defendants, themselves, saw the linkage between this recited function and the disclosed algorithm in their Joint Claim Construction Statement. *See* Dkt. No. 251-2 at 20 (citing the disclosed algorithm as intrinsic evidence for Defendants' proposed constructions for method step claims 4 and 8, which repeat verbatim the recited function of this limitation).

Defendants also attempt to cast Dr. Jones's opinion on this limitation as based on what one skilled in the art could implement. *See* Rep. at 5. To the contrary, Dr. Jones's opinion is focused on what one skilled in the art would understand in reading the specification. *See* Decl. of Dr. Mark Jones at ¶¶ 22-24; *see also* 9/29/10 Depo. Tr. of Dr. Jones at 261:5-20 (Ex. A.1).

II. CONCLUSION

For the reasons in Bedrock's response and sur-reply, Defendants' motion to invalidate claims 1, 2, 5, and 6 should be denied.

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Respectfully submitted,
McKOOL SMITH, P.C.

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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 5th day of October, 2010.

 /s/ J. Austin Curry

J. Austin Curry