

**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 Inc. (collectively "Defendants") hereby move for leave to supplement their Invalidity 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 Invalidity Contentions on January 8, 2010 ("Defendants' Invalidity Contentions"). 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 Invalidity Contentions on May 14, 2010 ("Red Hat's Invalidity Contentions"). Red Hat's Invalidity Contentions were substantially similar to the

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

Defendants' Invalidity Contentions, except for the addition of several references and accompanying claim charts. On August 27, 2010, Defendants filed an unopposed motion for leave to supplement their invalidity contentions to include the additional art cited in Red Hat's Invalidity Contentions, which this Court granted on September 1, 2010.² Red Hat and the cross-claim defendants NYSE Euronext, Rackspace Hosting, Inc., ThePlanet.com Internet Services, Inc., Whole Foods Market, Inc., 1&1 Internet, Inc., ConocoPhillips Co., ConAgra Foods, Inc., Facebook, Inc., Go Daddy Group, Inc., Nationwide Mutual Insurance Co., R.L. Polk & Co., SunGard Data Systems, Inc., The Gap Inc., and Virgin America Inc., served additional Invalidity Contentions on October 18, 2010 ("Red Hat/Crossclaim Defendants' Invalidity Contentions"). Red Hat/Crossclaim Defendants' Invalidity Contentions were substantially similar to the Defendants' Invalidity Contentions, except for the addition of several references and accompanying claim charts. On October 19, 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 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 presented in Red Hat/Crossclaim Defendants' Invalidity Contentions. A copy of the Proposed Supplemental Invalidity Contentions, which is identical to Red Hat/Crossclaim Defendants' Invalidity Contentions served on October 18, 2010, is attached hereto as Exhibit A. Bedrock has been on notice of these references since at least October 18, 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

² Dkt. No. 276.

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 both actions.

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 for the failure to make the disclosure in the party’s 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.³ For the reasons stated below, the Defendants respectfully submit that supplementing of their Invalidity Contentions is warranted.

A. Defendants’ Explanation for Failure to Include the Additional References in Its 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.⁴ Defendants’ Invalidity Contentions included all of the prior art known to the Defendants by January 8, 2010 and Defendants’ first supplement to the Invalidity Contentions included all of the prior art known to the Defendants by May 14, 2010. On October 18, 2010, Red Hat and the crossclaim Defendants served Invalidity

³ Arbitron, Inc. v. Int’l Demographics, Inc., No. 2:06-cv-434, 2008 WL 4755761, at *1 (E.D. Tex. Oct. 29, 2008).

⁴ See January 8, 2010 Invalidity Contentions at 4.

Contentions on Bedrock pursuant to the Docket Control Order in that action. Red Hat/Crossclaim Defendants' Invalidity Contentions included six additional claim charts of references of which the Defendants were not aware at the time they served their prior invalidity contentions.

Upon learning of the additional references, the Defendants now have had the opportunity to analyze the prior art references against the claims of the '120 patent. Given the complexity and fast pace of this case, the discovery of supplemental documentation and the determination that those references render the claims of the '120 patent invalid in the months following the deadline for Invalidity Contentions are reasonable.

B. The Prior Art Documentation Defendants Seek to Include in Their Invalidity Contentions is Critical to 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 claimed in the '120 patent by someone other than the named inventor of the '120 patent.⁵ They additionally support the Defendants' contention that the existing technology and knowledge in the field deemed the inventions obvious to those skilled in the art before the earliest possible priority date of the '120 patent. For example, some of these 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.⁶ These references were written more than a year—and in some cases, several years—before the filing of the '120 patent.⁷

⁵ See Exhibit A, Proposed Supplemental Invalidity Contentions at Ex. D-12 - D-17. As noted herein, these references and charts are identical to those served by Red Hat on October 18, 2010.

⁶ See Exhibit A, Proposed Supplemental Invalidity Contentions, e.g., Ex. D-12.

⁷ See, e.g., Exhibit A, Proposed Supplemental Invalidity Contentions, at Ex. D-14 and Ex. D-15, dated from 1993.

As the Proposed Supplemental Invalidity Contentions demonstrate, the additional prior art anticipates or renders obvious the claims of the '120 patent. Given the importance of these additional references, the Defendants will suffer significant prejudice if they are not allowed to present the supplemental references to the Court to prove invalidity of the '120 patent.⁸

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/Crossclaim Defendants' Invalidity Contentions on October 18, 2010 and has known of and consented to Defendants' intent to supplement their Invalidity Contentions since October 19, 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 prejudice if this motion is granted.

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.

⁸ 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).

Respectfully submitted, this 10th day of November, 2010.

/s/ E. Danielle T. Williams

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of November, 2010 a true and correct copy of the foregoing has been served on all counsel of record via electronic mail.

/s/ E. Danielle T. Williams
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