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

Bedrock Computer Technologies LLC,	
Plaintiff,	
v.	Case No. 6:09-CV-269
Softlayer Technologies, Inc., et al.,	JURY TRIAL DEMANDED
Defendants.	

DEFENDANTS' MOTION FOR LEAVE TO DEPOSE THIRD-PARTY ALAN COX

Pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure, Defendants SoftLayer Technologies, Inc. and Amazon.com, Inc. respectfully file this Motion for Leave to Depose Third-Party Alan Cox after the January 10, 2011 deadline for the completion of fact discovery. As discussed more fully below, Mr. Cox is listed as the author on two prior art references and the Defendants seek Mr. Cox's testimony regarding those references. Defendants have been working with Mr. Cox, his current employer (Intel Corporation) and outside counsel for Intel Corporation ("Intel") to confirm a deposition date. On January 10, 2011, outside counsel for Intel Corporation confirmed that they are still working to provide a proposed date promptly. Permitting Defendants to depose Mr. Cox after the close of discovery will not prejudice Bedrock nor inject any delay to the expert discovery, pre-trial, or trial schedules.

I.   Background

Bedrock Computer Technologies, LLC ("Bedrock") accuses portions of the Linux networking code within versions of the Linux kernel of infringing the '120 patent. In the invalidity contentions, Defendants identified Linux networking source code files arp.c (Linux

kernel version 1.2.13) and route.c (Linux kernel version 1.3.51) as anticipating prior art. Mr. Cox is an author of these Linux networking source code files. As an author of anticipating prior art, Mr. Cox possesses first-hand knowledge of facts central to this case.

In September 2010, Defendants initially contacted Mr. Cox, who resides in the United Kingdom. Mr. Cox directed Defendants to in-house counsel at his employer, Intel. Defendants contacted in-house counsel for Intel and requested deposition dates on several occasions between October and December 21, 2010. On several occasions, both Mr. Cox and in-house counsel for Intel indicated their intention to cooperate with Defendants' requests, including the scheduling of a deposition. Despite these indications and for reasons that have not been articulated to Defendants, Defendants did not receive proposed dates from Mr. Cox or from Intel for Mr. Cox's deposition before December 29, 2010. Consequently, Defendants served a subpoena for Mr. Cox on December 30, 2010, well-before the close of fact discovery.[1]

On January 3, 2011, outside counsel for Intel, WilmerHale, contacted Defendants regarding the subpoena to Intel. Since January 3, 2011, Defendants have been working with WilmerHale to schedule Mr. Cox's deposition. On January 10, 2011, WilmerHale confirmed that they are working to address the subpoena as promptly as possible. Accordingly, Defendants request leave to take Mr. Cox's deposition after January 10, 2011. Defendants fully expect WilmerHale to provide deposition dates for Mr. Cox promptly.

Defendants conferred with Bedrock on January 10, 2011 to request an extension of the discovery period for the limited purpose of deposing Mr. Cox. Bedrock, however, is not agreeable to this limited extension.

II.   Argument

Rule 16(b)(4) of the Federal Rules of Civil Procedure permits this Court to modify a

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[1] The subpoena is attached hereto as Exhibit A.

docket control order "for good cause." Fed. R. Civ. P. 16(b)(4). To meet the good cause

standard, the party seeking relief must "show that, despite its exercise of diligence, it cannot

reasonably meet the scheduling deadlines."[2] When deciding whether to allow a modification to

the scheduling order, the Court has broad discretion and generally considers a number of factors,

including "(1) the explanation for the party's failure to meet the deadline, (2) the importance of

what the Court is excluding, (3) the potential prejudice if the Court allows the thing that would

be excluded, and (4) the availability of a continuance to cure such prejudice."[3]

A.   Mr. Cox's Testimony is Important to Defendants' Invalidity Defense.

The Linux 1.3.51 and Linux 1.2.13 networking code is important to Defendants'

invalidity defense. Given that Mr. Cox is an author of this code, his testimony regarding the

Linux 1.3.51 and Linux 1.2.13 networking code is important to help the jury understand the

reference as well as for establishing the date the code was publicly available. While Bedrock

would not be prejudiced by the requested extension, Defendants would suffer substantial

prejudice if not allowed to secure Mr. Cox's deposition testimony.

B.   Defendants Do Not Control Mr. Cox or His Availability for Deposition.

Mr. Cox is a third-party to this litigation. Defendants do not control Mr. Cox or his

availability for deposition. Defendants diligently sought to schedule Mr. Cox for deposition

amicably through Mr. Cox and Intel, and then through issuance of a subpoena. For reasons that

have not been articulated to Defendants, Mr. Cox and Intel never provided dates for Mr. Cox's

deposition despite consistent indications that they would cooperate. Additionally, Defendants

served a subpoena for Mr. Cox on December 30, 2010. Since WilmerHale contacted

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[2] *Ciena Corp. v. Nortel Networks Inc.*, 233 F.R.D. 493, 494 (E.D. Tex. 2006) (*citing S & W Enters., L.L.C. v. Southtrust Bank of Ala.*, 315 F.3d 533, 535 (5th Cir. 2003)).
[3]*Mass Engineered Design, Inc. v. Ergotron, Inc.,* 250 F.R.D. 284, 286 (E.D.Tex.2008) (*citing S & W Enters.,* 315 F.3d 533 at 536.).

Defendants, Defendants have been working with WilmerHale to schedule Mr. Cox's deposition. Defendants expect to hear from WilmerHale promptly, but have no control over the timing of WilmerHale's response.

> **C.** **Scheduling Mr. Cox's Deposition After the Close of Discovery Will Not Impact the Schedule or Prejudice Bedrock.**

Scheduling Mr. Cox's deposition after the close of discovery will not impact the remaining deadlines on the Docket Control Order. In addition, Bedrock will not be prejudiced by having Mr. Cox's deposition occur after January 10, 2011. There are a number of depositions scheduled after the close of discovery by agreement, including third party depositions and Rule 30(b)(6) depositions. Bedrock also has had notice of the Linux 1.3.51 and Linux 1.2.13 networking code for some time. Given Bedrock's awareness of the networking code and the deposition, Bedrock cannot contend it is prejudiced by scheduling this one deposition after the close of discovery.

III.   Conclusion

For the reasons described above, Defendants respectfully request the Court to grant Defendants leave to depose Alan Cox after the January 10, 2011 deadline for the completion of fact discovery.

Dated: January 10, 2011

Respectfully submitted,

/s/ J. Thad Heartfield
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**Attorneys for Defendants SoftLayer
Technologies, Inc. and Amazon.com, Inc.**

CERTIFICATE OF CONFERENCE

Counsel for Defendants and counsel for Plaintiff conferred on January 10, 2011 and Plaintiff opposes the limited extension sought in this motion.

/s/ E. Danielle T. Williams
E. Danielle T. Williams

CERTIFICATE OF SERVICE

The undersigned certifies that, on January 10, 2011, the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this notice was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ J. Thad Heartfield
J. Thad Heartfield