

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

BEDROCK COMPUTER TECHNOLOGIES	§	
LLC,	§	
PLAINTIFF	§	
	§	
VS.	§	CIVIL ACTION NO. 6:09-cv-269-LED-JDL
	§	
SOFTLAYER TECHNOLOGIES, INC.,	§	
CITWARE TECHNOLOGY SOLUTIONS,	§	JURY TRIAL DEMANDED
LLC, GOOGLE, INC., YAHOO!, INC.,	§	
MYSpace INC., AMAZON.COM INC.,	§	
PAYPAL INC., MATCH.COM, INC.,	§	
AOL LLC, and CME GROUP INC.,	§	
DEFENDANTS	§	

**MOTION FOR EXTENSION OF TIME TO COMPLETE LIMITED DISCOVERY
FROM TIMELY-SUBPOENAED THIRD PARTIES**

Defendant Yahoo! Inc. (“Yahoo!”) moves to extend the time to complete limited discovery from two timely-subpoenaed third parties, Microsoft and Oracle, and respectfully requests the Court to grant up to a thirty-day extension of time to complete this limited discovery solely from these timely-subpoenaed third parties.

I. BACKGROUND

On December 28, 2010, prior to the discovery deadline, Yahoo! signed and served courtesy copies of subpoenas on Microsoft Corporation (“Microsoft”) and Oracle Corporation (“Oracle”) and requested them to produce certain documents, including source code, and provide testimony regarding these documents, if needed. Shortly thereafter, on January 3, 2010, Yahoo! formally served these entities with the same subpoenas, which requested production and

testimony prior to the expiration of the discovery period.¹ See Exs. A and B. Specifically, Oracle was to produce documents and appear for deposition on January 5 and 7, 2011, respectively, and Microsoft was to produce documents and testify on January 5 and 10, 2011 respectfully. Currently, the discovery deadline is Monday, January 10, 2011. Dkt. No. 341. Notably, Plaintiff has agreed to extend the deadline for certain discovery until January 12, 2011, including supplementing interrogatories, answering outstanding requests for production and interrogatories, and supplementing initial disclosures. More importantly, plaintiff has agreed that defendants can produce additional documents after January 12, 2011; however it has not agreed to allow Microsoft and Oracle to produce any documents after January 10th – a deadline from which both third-party entities have requested an extension.

Importantly, trial is not set to begin until April 11, 2011, more than three months after the discovery deadline. Dkt. No. 174.

Both Microsoft and Oracle have identified subpoenaed documents and are preparing for a secure production of those documents, including source code. Nevertheless, due to their prior commitments, both have asked for additional time to complete their production of the limited discovery and to provide a witness and/or a declaration on such documents. These requests place the Microsoft and Oracle depositions and document production beyond January 10, 2011 –the current deadline. Yahoo! is cooperating with both entities to ensure that their source code production is secure and will confirm deposition dates as soon as possible, which could be as early as next week.

¹ Leslie Garrod was also timely-served with a subpoena to testify and for documents production – an issue which is currently before the Court and briefed separately. Additionally, SoftLayer Technologies and Amazon.com, timely served a subpoena for Alan Cox on December 30, 2010, well-before the close of fact discovery, which has also been separately briefed before this Court.

In an effort to prevent burdening the Court with an opposed motion, Yahoo! conferred with Plaintiff seeking a short extension to the discovery deadline for the limited purpose of allowing Microsoft and Oracle time to complete their productions and depositions, which were timely noticed and requested. Plaintiff is opposed to this limited extension.

II. ARGUMENT

Federal Rule of Civil Procedure 16(b) allows the Court to modify the Docket Control Order upon a showing of good cause. Fed. R. Civ. P. 16. *Mediostream, Inc. v. Microsoft Corp.*, No. 08-CV-369-CE, 2010 WL 4118589, at *1 (E.D. Tex. Oct. 18, 2010). The good cause standard requires the party seeking relief to show that, despite its exercise of diligence, it cannot reasonably meet the scheduling deadlines. *S & W Enters., L.L.C. v. Southtrust Bank of Alabama*, 315 F.3d 533, 535 (5th Cir.2003). The presence of good cause is illustrated by the consideration of four factors: “(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.” *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.).

Here, good cause exists to grant this limited extension. Despite Yahoo!’s exercise of diligence, the depositions of Microsoft and Oracle cannot reasonably occur before the current discovery deadline, Monday, January 10, 2011. As such, and being mindful of the current discovery deadline, Yahoo! seeks leave from the Court within the discovery period, for a limited extension to complete the requested third party discovery. Importantly, until recently, Yahoo! did not know that Microsoft and Oracle may have prior art of interest. On October 14, 2010, Bedrock changed its infringement theories and cited new code. In November, Yahoo! learned

that Microsoft and Oracle may have prior art of interest. Just before Thanksgiving, Yahoo! reached out to Microsoft and Oracle to further investigate. Yahoo! thereafter had further communications with Microsoft and Oracle, who had requested that Yahoo! provide more specificity about what it was seeking. Yahoo! did further investigation in December to provide more specificity. After that further investigation, Yahoo! timely issued subpoenas and requested that Microsoft and Oracle respond prior to the close of discovery. Microsoft and Oracle have identified the requested documents and are preparing them for production. However, despite Yahoo!'s reasonable diligence, Microsoft and Oracle have advised that they need additional time to ensure a secure production of the requested code and documents. Thus, a limited extension of time to complete discovery from Microsoft and Oracle is needed.

Further, potential information within the possession, custody, or control of Microsoft and Oracle may be of high import to the invalidity defenses in this case. Specifically, Microsoft and Oracle potentially have information and documents regarding prior art operating systems, which may bear directly on Yahoo!'s defense that one or more of the claims of the patent-in-suit are invalid under of 35 U.S.C. § 101 *et seq.* Without the opportunity to complete discovery on Microsoft and Oracle, Yahoo! may be hamstrung and unable to adequately defend Plaintiff's infringement allegations as well as pursue all invalidity claims.

Moreover, Plaintiff will not be prejudiced by a limited extension of discovery from timely-subpoenaed third parties² – namely Microsoft and Oracle. In fact, Plaintiff will have an

² Indeed, Bedrock itself is still unilaterally and without leave seeking new discovery at this stage. Although Yahoo! is still evaluating them, Yahoo! notes that this evening Bedrock unilaterally served notices for deposition of defense counsel without seeking leave of Court, without requesting a stipulation from defendants, and without moving to extend the discovery deadline.

opportunity to attend the depositions, review the documents produced, and depose defendant's experts well before trial is scheduled to begin in this case – which is over three months away. As such, there is no prejudice to Plaintiff. Notably, no continuance will be needed if the Court allows this limited extension to obtain the timely-requested discovery from third parties.

Finally, Yahoo! provided courtesy copies and formally served the subpoenas and requested production well within the discovery deadline. *See* Exs. A and B. As such, both subpoenas were timely – both in service and scheduled testimony and production.³ Although these entities have identified documents and source code for production, nevertheless, in order to ensure a secure production, both Microsoft and Oracle have requested additional time to complete this production and to produce a witness and/or declaration on such production. Interestingly, Plaintiff has agreed that defendants may produce documents after the discovery deadline (which defendants control) but refuses to agree to allow third-parties to complete their production (which defendants do not control). These actions shed light on Plaintiff's true motive—to thwart the discovery and production of source code which could potentially invalidate these patents. Plaintiff's thinly-veiled attempts to block this discovery should not be tolerated.

III. CONCLUSION

For all of the foregoing reasons, good cause exists for a short extension of the time period to complete the limited third-party discovery which was timely subpoenaed in this case. As such, Yahoo! respectfully requests that the Court grant up to a thirty-day extension for Microsoft

³ *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812 (5th Cir. 2004) (holding that, even though the court's decision on a motion to quash a subpoena was reached after the discovery deadline had expired, the subpoena was valid and timely, as it had been served prior to the expiration of the discovery period.)

and Oracle to complete their production and depositions (if needed), all of which were timely noticed and requested prior to the expiration of the current discovery deadline.

Respectfully submitted,

/s/ Jennifer H. Doan

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**ATTORNEYS FOR
YAHOO!, INC.**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 10th day of January, 2011.

/s/ Jennifer H. Doan _____

Jennifer H. Doan

CERTIFICATE OF CONFERENCE

Counsel for Yahoo! and counsel for Plaintiff conferred and Plaintiff opposes the limited extension sought in this motion.

/s/ Jennifer H. Doan _____

Jennifer H. Doan