January 12, 2011

The Honorable John D. Love William M. Steger Federal Building and Unites States Courthouse 211 W. Ferguson, Room 210 Tyler, Texas 75702

Re: Bedrock Computer Technologies, LLC v. Softlayer Technologies, Inc., 6:09-CV-00269

## Dear Judge Love:

Defendants respectfully submit this letter to preserve their right to file a motion for summary judgment or summary adjudication of issues directed to damages, after Defendants receive Plaintiff's expert report on damages. Defendants anticipate that Plaintiff Bedrock Computer Technologies, LLC will attempt to recover damages based on theories that rely on the revenues generated by Defendants' respective business operations and/or will claim that the entire market value rule applies. Should Plaintiff pursue such damages theories, or present other damages theories for which summary judgment would be appropriate, Defendants respectfully submit that a motion for summary judgment or summary adjudication would lie for at least the reasons discussed briefly below.<sup>2</sup>

As a matter of law, the entire market rule is inapplicable in this case and evidence of Defendants' revenues is inadmissible and unavailable as a basis for the determination of damages. It is fundamental that the "entire market value rule allows a patentee to assess damages based on the entire market value of the accused product only where the patented feature creates the "basis for customer demand" or "substantially create[s] the value of the component parts." *Uniloc USA v. Microsoft*, Case No. 03-CV-0440, p. 48 (Fed. Cir., Jan. 4, 2011 citing *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336 (Fed. Cir. 2009); *see also TVM Mfg. Co., Inc. v. Dura Corp.*, 789 F.2d 895, 900-01 (Fed. Cir. 1986), *cert denied*, 479 U.S. 892 (1982). Here, there is no evidence that the patented feature is a basis for customer demand. The methods of "garbage collection" for a data base system described in the '120 Patent are completely unrelated to customer demand for Defendants' business activities. Indeed, the accused product is a minuscule portion of the Linux operating system used by Defendants on some of their computers.

<sup>&</sup>lt;sup>1</sup> "Defendants" refers to all defendants in the litigation, each of which joins in this letter brief.

<sup>&</sup>lt;sup>2</sup> Defendants may also challenge Plaintiff's damages theories through a *Daubert* motion and/or a motion in limine. By this letter, Defendants do not intend to foreclose the possibility of such motions, but instead intend only to preserve their right to also challenge Plaintiff's damages theories by a motion for summary judgment or summary adjudication, if such motion is deemed appropriate after Plaintiff submits its expert report and Plaintiff's damages theories are better framed. Defendants also reserve the right to seek summary adjudication of other factually unsupported damages theories that Plaintiff might advance in its expert report, such as the equally baseless notion that the patented feature prevents performance degradation of Defendants' computer systems.

The computer operating systems, and the miniscule portions Plaintiff accuses form no part of consumer demand for Defendants' businesses, as a matter of law.

The absence of any customer demand based on the patented features is not overcome by claims Plaintiff is anticipated to make that the accused code performs some function to prevent Denial of Service ("DOS"). First, the evidence will establish that the code performs no such function. Second, even if the code did perform such a function, that does not form any basis in fact or law for damages to be based on Defendants' revenues. Multiple, inexpensive, alternative means to protect against DOS are available, and no evidence would support payment of royalties for the patented feature based on Defendants' revenues.

For at least these reasons, Defendants' respectfully reserve their right and seek permission to file, at an appropriate time after Plaintiff's expert reports are submitted, a motion for summary judgment or summary adjudication of issues directed to damages.

Respectfully submitted,

/s/ Claude M. Stern

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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 this document via the Court's CN/ECF system per Local Rule CV-5(a)(3) this 12<sup>th</sup> day of January 2011.

/s/ Louis A. Karasik Louis A. Karasik