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

BEDROCK COMPUTER TECHNOLOGIES L.L.C., *Plaintiff,* *v.* SOFTLAYER TECHNOLOGIES, INC. *et al.*, *Defendants.*	§ § § § § § § § § § § § §	No. 6:09-CV-269-LED-JDL JURY TRIAL DEMANDED

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

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff Bedrock Computer Technologies, L.L.C. (Bedrock) submits its Opposition to Defendants' Motion For Leave to Depose Third-Party Alan Cox. Defendants' request to take discovery after the discovery deadline has passed is wholly attributable to their own delay in seeking discovery throughout the case. Defendants provide no good cause for their request and it should therefore be denied.

Discovery in this case opened in October 2009, yet Defendants did not attempt to notice a party deposition until August 27, 2010. Defendants did not notice any third party depositions until November 2010, and even then did not actually take a third party deposition until December 6, 2010, over a year after discovery opened. The first deposition of a third party prior art witness - regarding issues upon which Defendants have the burden of proof - took place on January 4, 2011, less than four (4) business days prior to the January 10, 2011 fact discovery deadline.

Tellingly, the subpoena for the deposition that Defendants seek leave to take was not served until December 30, 2010.

Defendants state in their motion that they first contacted Mr. Alan Cox in September 2010. Defendants, however, fail to mention that they were aware of Mr. Cox much earlier. Defendants state that Mr. Cox is an author of the route.c code in certain versions of Linux dating back to Version 1.3.51. Defendants listed in their January 8, 2010 Joint Invalidity Contentions the following reference, "Linux 1.3.52 - route.c, released on December 29, 1995 to the public." (Aurentz Decl. at Ex. A.) Thus, Defendants were aware of Mr. Cox and his contribution at least as early as January 8, 2010 and presumably earlier. Furthermore the first document produced to Bedrock as part of Defendants' P.R. 3-4 production, a copy the Version 1.0.14 Linux Code containing Mr. Cox's name was produced on January 8, 2010. (Aurentz Decl. at Ex. B.) It is clear that Defendants were aware of Mr. Cox well before they tried to contact him in September 2010.

II. APPLICABLE LEGAL STANDARD

Under Rule 16(b)(4) of the Federal Rules of Civil Procedure, "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *S & W Enters., L.L.C. v. Southtrust Bank of Alabama, NA*, 315 F.3d 533, 535 (5th Cir. 2003). "The good cause standard requires the party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension." *Id.* at 535 (internal quotations omitted).

"Trial courts have broad discretion to allow scheduling order modifications and should consider four elements when determining whether to allow a modification: (1) the explanation for the failure to meet the deadline; (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 such prejudice." *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F.Supp. 2d 845, 850 (E.D.Tex. 2004). "Additionally, under element one, a party's failure to meet a deadline due to mere inadvertence 'is tantamount to no explanation at all.'" *Id*. (quoting *S & W Enters.*, 315 F.3d at 536).

Rule 1 of the Federal Rules of Civil Procedure states that the Federal Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Finally, one of the goals of the Federal Rules and the Local Patent Rules is to speed up the litigation process and make it less expensive. Amendments to case deadlines should be considered in view and care of the requirements of Rule 1. *See Finisar v. DirecTV Group, Inc.*, 424 F.Supp.2d 896,902 (E.D. Tex. 2006)(*reversed on other grounds*).

III. ARGUMENT

A. Defendants Have Not Shown Good Cause

1. Defendants Have No Explanation For Their Delay

As discussed above, Defendants knew that Alan Cox was the author of the route.c code at least as early as January 8, 2010. (Aurentz Decl. at A and B.) Defendants state in their motion that they attempted to contact Mr. Cox for the first time in September 2010. However Defendants give the Court no explanation why they waited nine months before they ever even attempted to initiate contact with Mr. Cox. Even though Defendants did not receive any deposition dates from Mr. Cox in September, October, or November, Defendants did not issue a subpoena to Mr. Cox until December 30, 2010. (Def. Motion at 2.) Other than "reasons that have not been articulated to Defendants," the Defendants offer no explanation why they did not subpoena Mr. Cox and seek Court intervention prior to December 30, 2010, even though three months passed without receiving dates from Mr. Cox for his deposition. The Defendants were

fully aware of the discovery deadline and knowingly left themselves only 11 days of discovery to take this deposition after the subpoena issued.

The Defendants fail to mention that no less than 17 depositions occurred from December 30 through January 10, the majority of which were the 30(b)(6) representatives of the Defendants in this case. It was the Defendants' choice to withhold their witnesses and attempt to prove up their entire case within the last month of discovery, not Bedrock's.

The Defendants knew about Mr. Cox's involvement with Linux for at least a year and waited until the eleventh hour of the discovery period to schedule his deposition. "One of the goals of the Federal Rules of Procedure and the Local Patent Rules is to speed up the litigation process and make it less expensive. A party simply can not wait until shortly before trial to prepare its case. Invalidity is an affirmative defense, and the party which does not properly investigate applicable prior art early enough to timely meet disclosure requirements risks exclusion of that evidence." *Finisar*, 424 F. Supp. 2d at 901-902. Defendants are in such a position because they failed to timely schedule the deposition of Mr. Cox and are asking this Court to reward them for their own delay.

2. Mr. Cox's Testimony Is Not Important to Defendants' Invalidity Defense

Defendants argue that Mr. Cox's "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." Defendants' contentions are unsupported. It is apparent from Defendants' expert, Joel Williams, that Linux version 1.2.13 is not even asserted as an invalidating reference. (Aurentz Decl. at ¶ 2.) Mr. Williams states that his opinions are based on versions 1.3.51, 1.3.52, and 2.0.1, and he gives no opinions at all related to 1.2.13. (Aurentz Decl. at ¶ 3.) If version 1.2.13 was of any importance to Defendants' invalidity defense, Bedrock suspects that version would have made its way into Mr. Williams report.

With regard to Linux 1.3.51, Defendants have taken the deposition of Alexey Kuznetsov, another author of the code. (Aurentz Decl. at ¶ 4.) This deposition did occur after the discovery period, but only because 1) Defendants failed to produce relevant documents until the end of the discovery period and 2) the witness was located in Moscow, Russia. (Aurentz Decl. at Ex. C.) Any questions about the public availability of the Linux code could have been asked of Alexey Kuznetsov. The same is true about explanatory questions about the versions for the jury. Defendants have had the opportunity to get the discovery they state is important, and have no need for a second attempt at discovery they either already have or decided not to take.

3. Bedrock Would Be Prejudiced By Allowing This Deposition

Expert reports are already underway in this case, and Bedrock's rebuttable report on validity is due on February 1, 2011. There is no way that a deposition of Mr. Cox will occur before this deadline. Any evidence that the Defendants obtain and rely on would force Bedrock to supplement its validity report and could impact the scheduling of expert depositions. Furthermore, Bedrock would be prejudiced by having to undertake the cost and preparation required by a deposition in the middle of expert discovery and trial preparation. The Court set the discovery deadline to avoid this situation, and the Defendants should abide by it.

Additionally, Bedrock is already being prejudiced by the fact that multiple depositions are occurring after the discovery period due to delay caused by the Defendants. The only reason that Bedrock has agreed to take any of these depositions is because of late document productions that would have forced Bedrock to either take a deposition without needed documents or agree to take the depositions after the discovery deadline. (Aurentz Decl. at Exs. C-F.) Bedrock was forced to choose the latter. These depositions already hindered Bedrock during completion of its burden reports, and Bedrock is trying to avoid the same prejudice during rebuttal reports and trial preparation. Discovery has got to end sometime because "[e]nough time and money will

eventually cure any prejudice caused by late disclosure of information, but that will not result in the 'just, speedy, and inexpensive determination of every action.'" *Finisar,* 424 F. Supp. 2d at 902

4. A Continuance Will Not Cure The Prejudice To Bedrock

As this Court has stated, "[t]he Patent Rules disclosure dates are all interrelated and thus a continuance of one date may be insufficient to cure any prejudice." *STMicroelectronics*, 307 F. Supp. 2d at 851, n. 7. This is true here where extending the discovery deadline will interfere with expert reports, expert discovery, and pretrial. Furthermore, Bedrock will be ready for its April trial date and would be further prejudiced if that date is continued as a byproduct of any continuance allowed for Defendants to take depositions after the discovery deadline. As such, a continuance is not curative.

IV. Conclusion

For the reasons described above, Bedrock respectfully requests the Court to deny Defendants' motion for leave to depose Alan Cox after the discovery deadline.

Date: January 27, 2011.

Respectfully submitted,

/s/ Phillip M. Aurentz

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on counsel of record via email on January 27, 2011.

/s/ Phillip M. Aurentz
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