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' OBJECTIONS TO REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Dkt. No. 372)

Pursuant to Fed. R. Civ. P. 72(b)(2), Defendants[1] object to Magistrate Judge Love's January 11, 2011 Report and Recommendation (the "Report") regarding Defendants' Motion for Summary Judgment of Indefiniteness as to Claims 1, 2, 5, and 6 (the "Motion").[2] Defendants respectfully object to each of the Report's findings and recommendations for at least the reasons discussed below, as well as the reasons stated in the Motion, in Defendants' Reply in Support of the Motion, and at the *Markman* hearing held October 7, 2010.[3] Defendants request that the Court grant Defendants' Motion.[4]

[1] Amazon.com Inc. ("Amazon"), Softlayer Technologies, Inc. ("Softlayer"), Google, Inc. ("Google"), Match.com, LLC ("Match.com"), Yahoo! Inc. ("Yahoo!"), MySpace Inc. ("MySpace"), and AOL LLC ("AOL") (collectively, "Defendants").
[2] Dkt. No. 372 (the "Report"); Dkt. No. 283 (the "Motion").
[3] All of the arguments presented in the prior briefing and at the *Markman* hearing are incorporated by reference herein. *See* Dkt. No. 283; Dkt. No. 311; Excerpts from Defendants' *Markman* Presentation (Exh. A.); Excerpts from the Transcript of the *Markman* Hearing held October 7, 2010 (Exh. B).
[4] Dkt. No. 283.

ARGUMENT

I. Standard of Review

Under 28 U.S.C. § 636(b)(1)(B) and L.R. Appendix B, Rule 4(B), a District Court Judge reviews objected-to portions of a Magistrate Judge's Report and Recommendation *de novo*.[5]

II. Claims 2 and 6: "dynamically determining maximum number"

Claims 2 and 6 are invalid because the '120 patent does not disclose a structure for carrying out the function of this limitation: "dynamically determining maximum number of records for the records search means to remove." A claim that includes a means-plus-function limitation is invalid for indefiniteness if the specification fails to disclose structure for carrying out the limitation's function.[6] The Report erroneously identified the needed structure to be the choice between the "Search Table Procedure" and the "Alternate Version of Search Table Procedure."[7] This is erroneous for at least three reasons: (1) under these two procedures, the number of records removed is determined only after the records are removed, and thus the procedures do not determine records **to remove** (they have already been removed); (2) these two procedures do not determine or calculate a maximum ***number*** (an actual number/numeric value such as 5, 10, or 13) of records ***to remove***[8]; and (3) there is no algorithm in the specification disclosing such a "choice."

Contrary to the Report's erroneous identification, the '120 patent explains that the Search Table Procedure and the Alternate Version of Search Table Procedure remove expired records until a condition is met (either the end of the list or the record for which the procedure is

[5] 28 U.S.C.§ 636(b)(1)(B) (2009); *see 800 Adept, Inc. v. Enterprise Rent-A-Car, Co.*, 545 F. Supp. 2d 562, 564 (E.D. Tex. 2008).
[6] *See* Dkt. No. 283 at 5-6; Dkt. No. 311 at 1.
[7] Dkt. No. 372 at 13.
[8] *See* '120 patent at 6:56-66 and at cols. 11-14.

searching is found).[9] Under these two procedures, the number removed can be determined only after the procedure runs and therefore these two procedures cannot be used to determine a maximum number ***to remove*** because the records have already been removed. Thus, there is no disclosure of "dynamically determining maximum number of records for the records search means **to remove**" in the '120 patent.

The Report further erred because claims 2 and 6 require determination or calculation of a maximum ***number*** (an actual number/numeric value such as 5, 10, or 13) of records ***to remove,*** and the specification does not disclose structure to do so. The Report incorporates the discussion of this term from Judge Love's Claim Construction Memorandum Opinion and Order (the "Order").[10] The Order found that "the maximum number need only be an upper limit as to the records to be removed"[11] and thus, per the Order, "a maximum number of records . . . ***to remove***" is an actual number or numeric value (such as 5, 10, or 13) that serves as an upper limit on the records to be removed when the linked list is accessed. As Bedrock's expert testified, the two procedures disclosed in the '120 patent (the search procedure and the alternate search procedure) do not determine an actual maximum ***number*** and do not use a maximum number to limit the number of records removed during the search.[12] Rather, the Search Table Procedure simply removes all expired records in a linked list and the Alternate Version of Search Table Procedure removes all expired records it examines in a linked list until a specific record is found.[13]

Therefore, neither of these two procedures, nor the choice between them, provide corresponding structure for "dynamically determining a maximum number of records for the

[9] *Id.*
[10] Dkt. No. 372 at 12.
[11] Dkt. No. 369 at 18.
[12] Excerpts from the Deposition Transcript of Dr. Mark Jones at 158:6-12 ("Jones Tr.") ("Q. So is it accurate that neither the search table procedure identified in Column 11 through 12 and the alternate version of search table procedure specifically address dynamically determining a maximum number of records to be removed in the access link list of records? A. That's correct") (Attached as Exh. C). *See* '120 patent at cols. 11-14.
[13] Jones Tr. at 157:3-158:5; *see also* 120 patent at cols. 11-14; Exh. A at slide 158.

record search means to remove."[14] The Report effectively takes the self-contradicting position that the resulting number of records ***already removed*** upon the completion of either of the search procedures is the dynamic determination of the maximum number of records ***to be removed***. It is impossible for a maximum number determined upon the completion of a procedure to serve as an upper limit on the records ***to be removed*** by that procedure.

Having demonstrated that the "structure" asserted by the Report is erroneous, Defendants again reiterate that there is no corresponding structure disclosed for the function of "dynamically determining maximum number for the record search means to remove in the accessed linked list of records." Therefore this term is indefinite under 35 U.S.C. § 112.

Finally, the Report erred because even if the "choice" could correctly be considered to be algorithmic structure that decides between the Search Table Procedure or the Alternate Search Table procedure, no such algorithm describing the "choice" is disclosed. The Report states that the decision is based on a variety of factors listed in the specification.[15] However, factors that may be considered by an algorithm in and of themselves are not algorithmic structure and no algorithmic structure that employs these factors is disclosed. The Report also asserts that the pseudocode for the Search Table Procedure and the Alternate Search Table Procedure are corresponding structure to the recited function.[16] Defendants' respectfully point out that the pseudocode for the procedures does not ***make a choice between the two procedures***.[17]

For these reasons, Defendants' object to the findings and recommendations of the Report

[14] Jones Tr. at 158:6-12; '120 patent, Claim 2: ". . .means for dynamically determining maximum number for the record search means to remove in the accessed linked list of records." and Claim 6: ". . .means for dynamically determining maximum number for the record search means to remove in the accessed linked list of records."
[15] Dkt. No. 372 at 13 (citing the '120 patent at 7:4-10).
[16] *See* Dkt. No. 372 at 13 ("In addition, Defendants have failed to show that one of ordinary skill in the art would not recognize the pseudo-code of the Search Table Procedure and Alternate Search Table Procedure as the corresponding structure to the recited functions. As such, the disputed claim terms of Claims 2 and 6 are sufficiently definite.").
[17] *See* '120 patent at cols. 11-14.

regarding the indefiniteness of the "means for dynamically determining maximum number . . ." and respectfully request that the Court hold that there is no disclosed corresponding structure for the function of this term and grant Defendants' Motion.

III. Claim 5: "hashing means . . ."

The Report erred by misconstruing the function of "hashing means" to not include "executing a hashing function"[18] and thus not requiring disclosure of "executing a hashing function" in the '120 patent. This is plainly erroneous because it contradicts the function of the "hashing means" identified by the Report and the Order. The Report and the Order identified the function of the "hashing means" as "to **provide access to** records stored in memory of the system and using an external chaining technique to store the records with the same hash address …."[19] Thus, contrary to the Report, the "hashing means" function must include "executing a hashing function" because in order to "provide access" to records stored in a system using external chaining to store records with the same hash address, a hashing function must be executed.

A "hashing means" that performs the function of "providing access to records stored in memory using an external chaining technique to store records with the same hash address" must execute a hashing function.[20] To store records having a hash address in a system using external chaining, a hash table is required.[21] To access records stored in a hash table, hashing must be performed.[22] Hashing converts a key associated with a record to a hash address in order to access the bucket in the hash table containing the record.[23] Therefore, the function for a hashing

[18] Dkt. No. 372 at 7.
[19] *Id.*; Dkt. No. 369 at 37.
[20] *See* '120 patent, Claim 5: "a hashing means to provide access to records stored in a memory of the system and using an external chaining technique to store the records with same hash address . . ."
[21] '120 patent at 1:34-64.
[22] *See id.*
[23] *Id.*

means that provides access to records stored in a hash table must include executing a hash function to convert a key associated with a record into hash address of the hash table array.

Since the function requires executing a hash function to convert a key to a hash address, the specification must provide algorithmic structure that can perform the required function.[24] But there is no disclosure of an algorithmic structure for executing a hash function, which renders the "hashing means" indefinite. The Report points to a single line of pseudocode from the Search Table Procedure and the Alternate Search Table Procedure that represents a function that takes a "record_key" as a parameter and returns an index.[25] But this simply represents the hashing function that is necessarily part of the hashing means without disclosing any algorithmic structure for the hashing function itself.[26] Since "hashing means" is indefinite, Defendants object to the findings and recommendations of the Report related to "hashing means."

Alternatively, to the extent that the Court finds that simply listing hashing methods by name provides adequate structure for executing a hash function, Defendants' respectfully request the Court to find that the structure for the hashing means must include at least one of the hashing methods listed in the specification of the '120 patent and pointed out by the Report.[27] In particular, Defendants' request the Court to require the structure of "hashing means" to be one of the hashing methods of "truncation, folding, transposition, [or] modulo arithmetic," a combination thereof, or their § 112 equivalents.

IV. Claims 1 and 5: "record search means utilizing a search key to access the linked list"

The Report erred by misconstruing the "record search means" function to not include

[24] *See B. Braun Med. Inc. v. Abott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997).
[25] Dkt. No. 372 at 9; '120 patent at cols. 11-12.
[26] *See* Exh. A at slides 137-138; Exh. B at 124:11-125:8.
[27] '120 patent at 5:5-7; Dkt. No. 372 at 9.

"executing a hashing function"[28] and thus not requiring disclosure of "executing a hashing function" in the '120 patent. The Report finds that "[a]ll the components of the corresponding structure may be found within the '120 patent specification, which provides a lengthy discussion of how the software is configured to perform the function 'utilizing a search key to access the linked list.'"[29] However, the figures, specification, and pseudocode of the '120 patent describe only one way of accessing the linked list utilizing a search key – through executing a hashing function to convert a key to a hash address to locate a storage address within the hash table, then accessing that address directly.[30] Thus, executing a hashing function is a necessary function of this claim term.

Since the function requires executing a hash function to convert a key to a hash address, the specification must provide algorithmic structure that can perform the required function.[31] For the same reasons discussed in Section III, there is no disclosure of an algorithmic structure for executing a hash function, which renders "hashing means" in claims 1 and 5 indefinite. Again, the Report points to a single line of pseudocode from the Search Table Procedure and the Alternate Search Table Procedure that represents a function that takes a "record_key" as a parameter and returns an index.[32] But this simply represents the hashing function that is necessarily part of the hashing means without disclosing any algorithmic structure for the hashing function.[33] Since "hashing means" is indefinite, Defendants object to the findings and recommendations of the Report related to "hashing means."

Alternatively, to the extent that the Court finds that simply listing hashing methods by

[28] Dkt. No. 372 at 7.
[29] Dkt. No. 372 at 11 (citing a substantial portion of the '120 patent's specification).
[30] *See* '120 patent specification in its entirety and 1:38-42 in particular.
[31] *B. Braun Med. Inc.*, 124 F.3d at 1424.
[32] Dkt. No. 372 at 9; '120 patent at cols. 11-12.
[33] *See* Exh. A at slides 137-138; Exh. B at 124:11-125:8.

name provides adequate structure for executing a hash function, Defendants' respectfully request the Court to find that the structure for the hashing means must include at least one of the hashing methods listed in the specification of the '120 patent and pointed out by the Report.[34] In particular, Defendants' request the Court to require the structure of "hashing means" to be one of the hashing methods of "truncation, folding, transposition, [or] modulo arithmetic," a combination thereof, or their § 112 equivalents.

CONCLUSION

For the foregoing reasons and the reasons expressed in Defendants' briefing and presented at the *Markman* hearing held October 7, 2010, Defendants respectfully object to the Report and Recommendation and its findings and requests that the Court grant Defendants' Motion for Summary Judgment of Indefiniteness as to Claims 1, 2, 5, and 6.[35]

[34] '120 patent at 5:5-7; Dkt. No. 372 at 9.
[35] *See* Dkt. No. 283; Dkt. No. 311; Exh. A.; Exh. B.

Respectfully submitted, this the 28th day of January 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of January 2011 a true and correct copy of the foregoing has been served on all counsel of record via electronic mail.

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