January 28, 2011

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

Re: *Bedrock Computer Technologies, LLC v. SoftLayer Technologies, Inc.*, 6:09-CV-00269 – Defendants' Reply Letter Brief Regarding Request for Permission to File Motion for Summary Judgment of Non-Infringement

Dear Judge Love:

Defendants submit the following reply in support of their request for permission to file a summary judgment motion of non-infringement of U.S. Patent Number 5,893,120 ("the '120 patent") for servers configured with Linux kernel versions prior to 2.6.25. Further, in light of Bedrock's Jan. 12, 2011 infringement contentions, at least sections (A), (E), and (G) below also apply to 2.6.25 and later. Bedrock's Answering Letter Brief lacks merit as it mainly relies on assertions without substantiation. There are no genuine issues of material fact. Indeed, on many grounds, Bedrock concedes noninfringement by its silence.

A. Bedrock concedes non-infringement of method claims and no equivalence based on the Doctrine of Equivalents.

Bedrock's answering letter brief completely failed to address the fact that there is no evidence that the accused servers have ever executed the Linux kernel code at issue on any of the Defendants' actual systems. Nor did Bedrock's technical expert, Dr. Mark Jones, cite any evidence in his expert report to show such actual execution of the Linux code at issue on Defendants' systems. *See* Opening Expert Report of Dr. Mark Jones ("Jones Report"). Bedrock cannot meet its burden of proof with respect to infringement of the method claims of the '120 patent (claims 3, 4, 7, and 8). *See Southwest Software, Inc. v. Harlequin Inc.*, 226 F.3d 1280, 1285 (Fed. Cir. 2000). Accordingly, there is no genuine issue of material fact, and summary judgment of non-infringement as to those method claims is proper.

Likewise, Bedrock failed to address the fact that Bedrock has not alleged infringement under the doctrine of equivalents for any claim, or shown any evidence to suggest that there is a genuine issue of material fact on this issue. Summary judgment of non-infringement based upon the doctrine of equivalents is also proper.

B. The accused code does not remove expired records "when the linked list is accessed."

Bedrock fails to show or even allege any issues of material fact regarding Defendants' argument that the accused servers do not remove records "when the linked list is accessed." In particular, the Court construed that both the identification of automatically expired records and the removal of such records must occur "during the same access of the linked list." Dkt. No. 369 at 21-22 (emphasis added). There is no dispute regarding this limitation, and no dispute as to the lines of code that Bedrock has identified as performing the identification on one hand and the removal on

the other. The two functions, identification and removal, are performed in separate, distinct accesses of the linked list.[1] There are no genuine issues of material fact, and summary judgment of non-infringement is proper on this point.

C. In the accused code, the record that is removed is not "expired."

Bedrock impermissibly equates a procedure that identifies a record in the linked list with the lowest score with a determination that that record is expired, "obsolete and therefore no longer needed or desired in the storage system." *See* Dkt. No. 369 at 7-9. Bedrock utterly fails to even address part of the Court's construction – the "obsolete" requirement. This is telling. While it is true that the time the record was last used is one of several factors in the scoring algorithm, the record with the lowest score in the list is not, on that account, "obsolete." It is undisputed that for the accused code, the "candidate" record remains viable, may not be deleted, and may still be used by the system. Nor does Bedrock's expert assert that this "candidate" record is obsolete. Instead, he merely notes that the scoring routine identifies the "least desirable record;" nothing in the scoring routine designates the record as "obsolete," as required under the Court's construction. *See* Jones Report at 41, 45. Alternatively, the record may be removed based on the needs of the system to reclaim some memory space. No matter which fate awaits the record, there is nothing in the scoring evaluation that makes the record itself "obsolete" and therefore no longer needed or desired. This too cannot be disputed. Because the record identified for removal is not actually "expired," according to the claim construction of this Court, Defendants are entitled to summary judgment of non-infringement and should be allowed to file a motion to that effect.

D. No version of the Accused Linux Kernels contains code for "dynamically determining maximum number" of records to remove.

This Court has held that "maximum number" needed no construction, but did state that it "need only be an upper limit as to the records to be removed." Dkt. No. 369 at 18. Alternatively, for claims 2 and 6, the Court allowed this limitation to be met by "software instructions to dynamically determine a maximum number of records to remove by choosing a search strategy of removing all expired records from a linked list or removing some but not all of the expired records" as described in the specification or as illustrated in the pseudo-code, including equivalents. *See id*. at 40. The code identified by Bedrock does not meet these limitations.

Even as described by Bedrock, the code accused of meeting this limitation does not dynamically determine a number to serve as an upper limit, and does not contain alternate search strategies for removing all, some, or even no expired records. *See* Answering Letter Brief at 2. Rather, the code simply determines whether or not to execute a single procedure for removing a previously identified record from the linked list. Because the code does not meet this claim limitation, summary judgment of non-infringement is proper on Claims 2, 4, 6, and 8.

E. The accused versions do not meet the delete limitation of Claim 5 and 6.

According to the Court's construction of Claim 5, the means for deleting records requires utilizing the "record search means" to remove expired records it identifies while searching for a

[1] And only the identification step occurs "while searching for a target record." *See* Defs. Letter Brief at 4.

record to delete. *See* Dkt. No. 369 at 42-43. Bedrock fails to identify such a procedure in the code at issue other than a conclusory statement that such a procedure exists. *See* Answering Letter Brief at 3. Moreover, the example cited by Bedrock does not even facially meet the claim limitation of removing an expired record while utilizing a record search means to search for a particular record to delete. Bedrock implies that any single deletion of a record will satisfy this claim limitation, but this is simply incorrect. *See id*. Moreover, Bedrock has apparently dropped its infringement allegations that Linux kernels prior to version 2.6.25 infringe these claims, as Bedrock's technical expert has not provided any infringement analysis in his expert report for such versions. *See* Jones Report at 39-62. There is no genuine issue of material fact, and Defendants are entitled to summary judgment of non-infringement of Claim 5 and 6.

F. Bedrock cannot meet the requirements of 35 U.S.C. § 112(6)

With regard to equivalence under § 112(6), Bedrock misstates the law and the facts. *See* Answering Letter Brief at 4. Defendants recognize that statutory equivalence for means-plus-function claims under § 112(6) is available under the claim construction order. However, with respect to removal of expired records "when the linked list is accessed" (claims 1, 2, 5, and 7) and "dynamically determining maximum number" (claims 2 and 6), the accused code does not perform the identical function in substantially the same way. *See Ishida Co. v. Taylor*, 221 F.3d 1310, 1316-17 (Fed. Cir. 2000). Defendants' letter showed that the code at issue is not equivalent under § 112(6). Bedrock identifies no evidence to rebut this argument, but only makes conclusory statements. Accordingly, there are no genuine issues of material fact and Defendants are entitled to summary judgment of non-infringement as to structural equivalents under § 112(6).

G. There is no evidence to show that the accused code has executed on Defendants' systems.

Finally, Bedrock's lack of evidence that the Linux code at issue has ever executed on any of Defendants' actual systems not only forecloses proving infringement of the method claims of the '120 patent, but, in this particular instance, the means-plus-function claims as well. *See Acco Brands, Inc. v. Micro Security Devices, Inc.*, 346 F.3d 1075, 1078 (Fed. Cir. 2003); Mem. Op. and Order at 12, *Typhoon Touch Techs. V. Dell, Inc.*, Case 6:07-cv-00546, No. 437 (E.D. Tex. July 23, 2009) (Davis, J.). In *Fantasy Sports Properties, Inc. v. Sportsline.com, Inc.*, 287 F.3d 1108 (Fed. Cir. 2002), the Federal Circuit affirmed judgment of non-infringement where the means-plus-function claims require execution, not merely capability. This is the situation here. For example, without executing the code, there can be no "expired" records and the code at issue cannot meet this limitation. Because Defendants' systems are architected and configured in such a way that the code at issue is not useful, functional or operational, Defendants are entitled to summary judgment of non-infringement of claims 1, 2, 5, and 6.

H. Conclusion

As outlined above, there are no genuine issues of material fact and Defendants are entitled to summary judgment of non-infringement of the '120 patent given Bedrock's admissions. For all the foregoing reasons the Court should permit Defendants to file a joint motion of non-infringement of the '120 patent for Linux kernels prior to 2.6.25, and for kernels 2.6.25 and later for the reasons in sections (A), (E), and (G) above.

Respectfully submitted,

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