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., CITIWARE TECHNOLOGY SOLUTIONS, LLC, GOOGLE, INC., YAHOO!, INC., MYSPACE INC., AMAZON.COM INC., PAYPAL INC., MATCH.COM, INC., AOL LLC, and CME GROUP INC., DEFENDANTS	§	JURY TRIAL DEMANDED

YAHOO!'S REPLY IN SUPPORT OF ITS MOTION FOR EXTENSION OF TIME TO COMPLETE LIMITED DISCOVERY FROM TIMELY-SUBPOENAED THIRD PARTIES

Contrary to Plaintiff's assertions, Yahoo! has been and is diligently seeking discovery from two third parties—Microsoft and Oracle. Since the filing of its Motion, Yahoo! has had numerous contacts with both Microsoft and Oracle regarding the production of their highly sensitive source code and documents. Further, Yahoo! and Microsoft have stipulated to a protective order to govern the production of the requested source code, which has been filed in the Western District of Washington. Moreover, Yahoo! is reviewing Microsoft's source code this week (February 8 and 9). As Yahoo! has been and is continuing to be diligent in its discovery efforts, the Court should grant the limited relief Yahoo! seeks in its Motion for Extension of Time to Complete Limited Discovery From Timely-Subpoenaed Third Parties [Dkt. No. 367].

1. GOOD CAUSE EXISTS TO COMPLETE ALL THIRD PARTY PRODUCTION

A. Yahoo! Has Been Diligent

Yahoo! reached out to both Microsoft and Oracle as soon it could ascertain Plaintiff's shifting infringement contentions and when it became apparent that Microsoft and Oracle potentially possessed relevant prior art. Yahoo! could not have contacted Microsoft or Oracle earlier as Yahoo! did not know, prior to that time, that either potentially possessed prior art of interest. Further, since Yahoo!'s first contact with Microsoft and Oracle late last November, Yahoo! has been communicating with both parties in an attempt to minimize the discovery burden on each party and to discuss the best avenues for a secure source code review and production.

Once Yahoo! determined the best way to streamline its discovery request, in late December, it sent subpoenas to Microsoft and Oracle requesting production of confidential documents and source code prior to the current discovery deadline of January 10, 2011. Although Yahoo! was prepared to complete the discovery as originally demanded in the subpoenas, Yahoo! agreed to accommodate the requests of Microsoft and Oracle and continued the scheduled document productions and depositions until a later date. Yahoo! conferred numerous times with Microsoft and Oracle in order to tailor the requested documents and source code. Since the issuance of the subpoenas, both Microsoft and Oracle have identified the requested documents and source code and are preparing them for production. However, prior to the review and production of the requested code, Microsoft required a protective order to be in place which would maintain the confidentiality and sensitivity of the requested code. Although a protective order governs the production of documents in this case, Microsoft did not believe that the Bedrock Protective Order [Dkt. No. 170] adequately contemplates or protects a non-party's

production of highly confidential source code. As such, Yahoo! has been negotiating terms of a protective order that will alleviate any third party concerns. Since that time, the parties have stipulated to a protective order, which has been filed in the Western District of Washington. *See* Dkt. No. 456. Now that a motion for protective order has been filed, and production concerns alleviated, Yahoo! can begin to review requested production. Nevertheless, the production should be completed this week and Yahoo! should have the code within its possession.

As evidenced above, at all times, Yahoo! has been diligent in seeking discovery from both Microsoft and Oracle. However, despite Yahoo!'s exercise of diligence, the requested discovery from Microsoft and Oracle could not be obtained prior to January 10, 2011. Plaintiff's portrayal of Yahoo! as being dilatory in seeking discovery from Microsoft and Oracle is simply untrue.

B. Microsoft And Oracle Are Important To Yahoo!'s Invalidity Defense

Plaintiff attempts to distract this Court by asserting that prior art related to Microsoft and Oracle are not currently found in Yahoo!'s invalidity contentions—this argument is a red herring. The reason Microsoft and Oracle prior art are not currently found in Yahoo!'s invalidity contentions and invalidity expert report is simple – it was not until recently, due to Plaintiff's ambiguous and shifting infringement theories, that Yahoo! became aware that Microsoft and Oracle may possess relevant prior art. Yahoo! did not wait until the eleventh hour, as Plaintiff asserts, to seek the subpoenaed discovery; instead, Yahoo! sought the requested discovery as soon as it could. If anything, it was Plaintiff who hid the ball and waited until the eleventh hour to crystallize its infringement theories. Yahoo! should not be punished for now seeking highly relevant prior art that was only recently uncovered. The simple truth is this: Plaintiff opposes

Yahoo!'s motion because it is fearful of the invalidating prior art in Microsoft and Oracle's possession.

C. Plaintiff Will Not Be Prejudiced and No Continuance Is Needed

Plaintiff will not be prejudiced by a limited extension of this third party discovery from Microsoft and Oracle. Although the reports have been exchanged, the local rules contemplate—and provide—a means for supplementation. Further, the discovery obtained from Microsoft and Oracle will not require the "filing of numerous supplemental reports" as Plaintiff asserts. At most, one set of supplemental reports may be needed – one for Yahoo! and Plaintiff. Additionally, trial is not set to begin for over two months. Plaintiff will have ample opportunity to review the produced documents and attend any depositions related to the production. As such, there is no prejudice to Plaintiff and no continuance of the trial schedule will be needed.

2. THIRD PARTY DISCOVERY HAS OCCURRED AND IS OCCURING AFTER JANUARY 10, 2011

Plaintiff's true motive for opposing Yahoo!'s timely third party discovery requests is transparent. Plaintiff is attempting to block timely discovery from both Microsoft and Oracle as they possess invalidating prior art harmful to Plaintiff's contentions. Although Plaintiff is vigorously opposing Yahoo!'s timely subpoenas to Microsoft and Oracle, Plaintiff tellingly has allowed third party discovery to proceed after the current discovery deadline. For example, Plaintiff did not object to the deposition of Alexey Kuznetsov, a third party deponent, which occurred weeks after the discovery deadline. Moreover, as Plaintiff admits, it agreed to extend certain deadlines for written discovery, production of documents, and 30(b)(6) depositions. *See* Dkt. No. 433 at 5, n. 9. Simply stated, Plaintiff should not be allowed to cherry-pick what third party discovery to allow after the current discovery deadline and then deny other relevant timely served third party subpoenas.

3. CONCLUSION

For all of the foregoing reasons, good cause exists for a short extension of the time period to all Yahoo! complete the limited third party discovery from Microsoft and Oracle. As such, Yahoo! respectfully requests that the Court grant its Motion for Extension of Time to Complete Limited Discovery From Timely-Subpoenaed Third Parties [Dkt. No. 367].

Respectfully submitted,

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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 7th day of February 2011.

/s/ Jennifer H. Doan
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