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

BEDROCK COMPUTER TECHNOLOGIES LLC,	§	
	§	
Plaintiff,	§	
	§	**CASE NO. 6:09-cv-269-LED**
v.	§	
	§	**Jury Trial Demanded**
SOFTLAYER TECHNOLOGIES, INC., et al.	§	
	§	
Defendants.	§	

BEDROCK'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION AND OBJECTIONS TO MEMORANDUM OPINION & ORDER ON CLAIM CONSTRUCTION (DKT. NO. 431)

I. ARGUMENT IN SUR-REPLY

A. Defendants' Motion is Untimely.

All parties agreed that the Court's Provisional Claim Construction Order ("Provisional Order"), and not the final Order, would dictate the filing deadlines for the following items: (1) Bedrock's P.R. 3-6 infringement contentions, (2) Defendants' P.R. 3-6 invalidity contentions, and (3) Defendants' objections to claim construction. Further, Bedrock agreed not to oppose the Defendants' request for an extension to lodge their objection. *See* Dkt. No. 332 (extending the Defendants' deadline to file objections to the Court's claim construction to December 3, 2010). The Defendants have had no reservations about enforcing this agreement. Indeed, Yahoo moved to strike Bedrock's infringement contentions as untimely. *See* Dkt. No. 400 (arguing that the deadline for 3-6 disclosures were keyed off the Provisional Order and that Bedrock's January 12, 2011 infringement contentions were served after that deadline). Had the parties agreed to have the deadlines keyed off of the final Order, Yahoo would have had no argument that the contentions were untimely. In sum, Defendants' attempt to now disavow the parties' agreement should be rejected, and their objections are late.[1]

B. "Removing . . . From the Linked List" Does Not Include Deallocation.

Defendants' argument essentially asks the Court to disregard the statements within the '120 patent relied upon by Judge Love, which incontestably delineate the removal procedure, in favor of the portions of the specification cited by Defendants. Simply put, Defendants failure to demonstrate clear disavowal of claim scope or that Dr. Nemes acted as his own lexicographer

[1] Defendants' argument as to Judge Love's December 3, 1010 standing order is a red herring. Defendants cannot reasonably contend to have been relying on an order that was issued on the very day their objections were due. Further, given that the Defendants materially benefitted from the agreement—by receiving Bedrock's 3-6 contentions earlier than they would have without the agreement—the Defendants should not be allowed to use the standing order to disavow the agreement.

when drafting the preferred embodiments cited by Defendants precludes reliance upon such embodiments to limit the scope of the claims. *See* Dkt. No. 481 at 3-4. The Defendants again point to other portions of the specification that allegedly suggests that deallocation is an aspect of the removal procedure. But again, because Judge Love's construction relies upon the language in the specification which most squarely addresses this issue, which unequivocally states that "[t]he remove procedure causes actual removal of the designated element by adjusting the predecessor pointer so that it bypasses the element to be removed," '120:7:43-45, Judge Love correctly construed this claim term, and the Defendant cannot show clear error.

C. "When the Linked List Is Accessed" Does Not Mean Traversal.

Defendants contend that, because Bedrock has not "identif[ied] any other example of an 'access' in the specification," the Court should adopt Defendants' proposed traversal limitation. On the contrary, it is Defendants' burden to show that Dr. Nemes "clearly expressed the intent [to assign to a term a unique definition that is different from its ordinary and customary meaning] in the written description." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 843 (Fed. Cir. 2010). Defendants have not met and cannot meet that burden.

D. "Dynamically Determining" Does Not Encompass a Temporal Limitation.

Because Defendants' argument that the dynamic determination must occur before the linked list is accessed finds no support in the claim language or specification, Defendants again resort to unsupported attorney argument. Such argument, however, cannot establish that Judge Love's construction is clearly erroneous or contrary to law, especially in light of the fact that Judge Love's construction *is* supported by the claim language and the specification. *See* Dkt. No. 481 at 6-7.

E. "Maximum Number" Does Not Mean a Single Number.

Defendants wholly fail to address the discussion within the '120 specification which makes clear that the alternative method of on-the-fly garbage removal allows for the removal of all, none, or some of the expired records. *See* '120 patent at 6:66-7:15. Instead, Defendants reassert their prosecution history argument without even attempting to show that Dr. Nemes acted as his own lexicographer in overcoming the prior art. Dkt. No. 520 at 4. In doing so, Defendants effectively ignore their burden to demonstrate as much. *See Helmsderfer v. Brobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1381 (Fed. Cir. 2008). As such, Defendants cannot reasonably contend that Judge Love's construction is clearly erroneous or contrary to law.

F. "Automatically Expiring" and "Expired" Do Not Require That the Record Be Compared to an External Condition.

Defendants point to Judge Love's construction, which rejects Defendants' attempt to read in the "external condition" language proffered by Defendants but incorporates other language from the specification, as inconsistent. However, Defendants' argument confuses Judge Love's refusal to *limit* the claim scope by improperly incorporating preferred embodiments with his attempt to read the claims "in view of the specification," which Defendants have consistently advanced as the correct approach. *See* Dkt. No. 520 at 2. Although conflated by Defendants, these are two entirely independent considerations. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005); *i4i*, 598 F.3d at 843.

II. CONCLUSION.

For the reasons in Bedrock's response and sur-reply, Defendants' Motion for Reconsideration should be denied in its entirety.

DATED: March 7, 2011

Respectfully submitted,
McKOOL SMITH, P.C.

/s/ *Douglas A. Cawley*

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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 the forgoing document via the Court's CM/ECF system pursuant to the Court's Local Rules this 7th day of March, 2011.

/s/ Ryan A. Hargrave
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