

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS**

TYLER DIVISION

DATE: 3/17/11

**JUDGE
JOHN LOVE**

**REPORTER: Keith Johnson
LAW CLERK: Anna Phillips**

<p>BEDROCK COMPUTER TECHNOLOGIES, LLC. Plaintiff</p> <p>vs.</p> <p>SOFTLAYER, ET AL Defendant</p>	<p>CIVIL ACTION NO: 6:09cv269</p> <p>MOTIONS HEARING (Documents #462, 463, 558 & 559)</p>
<p>ATTORNEY FOR PLAINTIFF</p> <p>see sign-in sheet attached</p>	<p>ATTORNEY FOR DEFENDANT</p> <p>see sign-in sheet attached</p>

On this day, came the parties by their attorneys and the following proceedings were had:

OPEN: 9:08 am

ADJOURN: 12:14 pm

TIME:	MINUTES:
9:08 am	Case called. Parties announced present and ready for hearing.
9:09 am	The Court greeted the parties. The Court would like to go into the summary judgment motions, then the daubert motions. The Court would like to keep this hearing 2 hours max.
9:09 am	The Court discussed trial procedure. Both juries will be selected on the 4 th . Second trial will begin immediately after the first trial. There will be as little lag time between.
9:10 am	Mr. Cawley asked if there would be two separate voir dices.
9:11 am	The Court believes that there will be two. If this changes, the Court will let parties know. There will one panel and will be divided into to juries. If this changes, we will let parties know.

DAVID J. MALAND, CLERK

FILED: 3/17/11

BY: *Mechele Morris*, Courtroom Deputy

TIME:	MINUTES:
9:12 am	Mr. Boise began argument on #462 Motion for Summary Judgment of Invalidity of U.S. Patent '120 by defendants'. There is no genuine issue of material fact that the '120 patent is invalid over the Linux prior art. In claims 1 and 5, most elements are not in dispute. The question is, does prior art Linux use multiple accesses? Discussion made on the reasons why Linux does not use multiple accesses. Prior art Linux removes expired records on the fly. Prior art Linux works like the accessed code.
9:31 am	Mr. Hejny responded to motion and made argument on behalf of the plaintiff. Discussion made on meaning of "expired" in the non-infringement report of Howard Cohen. Discussion made on the code, <code>rt_cache_add()</code> and the construction of claim "a record search means utilizing...". There is a disagreement with the experts regarding these issues. Email to Nathan Day and Absher discussed by Mr. Kuznetsov. Jury should be able to see at this evidence and decide for themselves.
9:44 am	Mr. Boise responded to plaintiff's argument. The <code>cli()</code> and <code>sti()</code> commands do not affect the on-the-fly removal of records. Discussion made on Mr. Kuznetsov's testimony. There is no triable issue here.
9:47 am	Mr. Hejny responded. Discussion made on expert's testimony on access. Further discussion made on the infringing code, <code>rt_intern_hash()</code> .
9:53 am	The Court will move on to the #463 Motion for Summary Judgment regarding non-infringement of '120 patent by defendants'.
9:53 am	Mr. Morrisseau began argument on motion #463. Discussion made on the 3 important points about the CAND code, how a record is removed and first access to the linked list. No record is removed during the intervening operation. Discussion made on the accused code. Claim 1 requires identification and removal in a single access of a linked list. Bedrock's expert, Jones, agrees that the removal comes after the end of the while loop. Discussion made in Bedrock's proof. Discussion made on the Court's construction of "automatically expiring" or "expiring". Reference made to Dr. Cohen's report on page 37 regarding expiration date. The Jones report is incomplete and does not create factual issues. The records removed are not obsolete.
10:05 am	Mr. Briggs addressed the non-infringement defendant claims 2 and 6. Discussion made on the Court's construction. CAND code does not choose between alternative search strategies.
10:09 am	Mr. Whitehurst addressed issue on the functional language in claim 1.
10:10 am	Mr. Stevenson responded. Discussion made on the infringing code. Dr. Jones has been able to, and will testify that defendants' infringed the code.
10:15 am	Mr. Whitehurst responded and stated there is no evidence against AOL.

TIME:	MINUTES:
10:16 am	Mr. Stevenson continued argument. Discussion made on the testimony of how Dr. Jones will show defendants' accuse the code. Discussion made on the patent algorithm of what plaintiff is accusing. Discussion made on CAND deletion. Discussion made on Dr. Jones chain length test. Dr. Jones stated that all defendants' would have gone over the threshold. Discussion made on the performance test of Dr. Jones. Discussion made on how they get damages from defendants'. Exhibit 1 offered regarding Google email and investigation of maglev performance. Discussion made on the typical Google loads. Plaintiff's has seen documentation on increasing performance from defendants' on "loads".
10:43 am	Mr. Whitehurst responded. Further discussion made on-the-fly deletion. It is not occurring with AOL.
10:45 am	Mr. Stevenson responded. Just because AOL takes code out, didn't mean they didn't have shortcuts to exceed the threshold. Defendants' have not really removed the code, they just bypass it. Employees have ability to access it. Further discussion made on Dr. Jones testimony against AOL and other defendants' regarding infringement.
10:49 am	Recess for 10 minutes.
11:00 am	Court resumed.
11:02 am	Mr. Stevenson responded to the access argument by defendants'. Discussion made on the generation ID. Further discussion made on "when the linked list is accessed". Defendants' want to parse their accesses. Claim construction application is a issue of fact.
11:09 am	The Court will move to the "dynamically determining" issue.
11:09 am	Mr. Stevenson responded and made argument on issue. Reference made on the specifications, 6:66-7:10.
11:14 am	Mr. Morressau responded. Discussion made on problems in Bedrock's proof.
11:17 am	Mr. Stevenson discussed their proof on access. The Jones declaration meets this burden.
11:19 am	The Court will move on to points made to Dr. Jones report.
11:20 am	Mr. Stern responded. Further discussion made on Dr. Jones report and tests done. It was misrepresented here. Discussion made on plaintiff's exhibit 1. Objections made on exhibit.
11:22 am	Mr. Whitehurst responded. Further discussion made on Dr. Jones report. AOL cannot be infringing.
11:23 am	Mr. Stern further responded as to Dr. Jones report. Discussion made on load parameters. The problem is the plaintiff's expert and trivial test done and brought before the jury. Burden is on the plaintiff to test actual use of the system. Reference made Cintillian vs. Quest regarding use of the system from Fed Circuit.
11:25 am	Mr. Chaikovsky began argument on Motion to Exclude Testimony of Dr. Jones, #558. Dr. Jones living room testing does not reflect defendants' systems and are not relevant. Jones failed to provide relevant test facts and data. He did not test a version of Linux actually used by defendants'. Memory leak was introduced into the code.

TIME:	MINUTES:
	The Court will move on to Bedrocks' response.
11:34 am	Mr. Stevenson responded. Dr. Jones tests are reliable. Argument made to support this. Exhibits 2 and 3 offered regarding test information. The methodology here is sound. This is a fact issue to the jury. Discussion made on what Dr. Jones tested and his testimony of tests.
11:40 am	The Court will move on to the Weinstein motion #559. The Court asked Mr. Cassady on damages.
11:40 am	Mr. Cassady responded and discussed damages report and what it was based off of. The 7 settlement licenses should come in and comparable license can as well. 4 of the 7 licenses have the server count in it. Reference made on "litigation kickers". Discussion made on if the Court left the licenses out and what it would do to their damages case. Further discussion made on Weinstein's analysis. Discussion made on Weinstein's analysis on denial of service.
11:54 am	Mr. Stern responded. Weinstein's damages report for Bedrock fails the daubert vs. Merrell Dow Pharmaceuticals expert opinion standard. Discussion made on past litigation induced licenses not being admissible. Defendants' would have to take deposition on reasons of settlements. Reference made to "Fenner". Discussion made on where the Weinstein opinion fails daubert. Reference made on the settlement and license agreements and being settled in lump sum. This information does not matter here or bear any relation. Every agreement contains an integration clause. The license agreement state they are not royalty bearing.
12:10 pm	The Court asked to get slides from the parties. The Court asked if he had Jones and Weinstein's report. The Court wants this by Monday.
12:11 pm	The Court ordered that motions in limine be met on prior to filings. Response extended until Tuesday.
12:12 pm	Mr. Cawley discussed management of trial. Match.com settled and would like trial scheduling to be rebalanced.
12:13 pm	Mr. Morrissea responded and objected changing of order of cases tried.
12:13 pm	The Court will take this under consideration.
12:14 pm	Mr. Stern opposes this as well.
12:14 pm	There being nothing further, Court is adjourned.