UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC, Plaintiff, v. SOFTLAYER TECHNOLOGIES, INC. et al., Defendants.	CASE NO. 6:09–CV–00269 Hon. Leonard E. Davis **JURY TRIAL DEMANDED**

DEFENDANTS' OPPOSED MOTION TO STRIKE UNTIMELY SUPPLEMENTAL EXPERT REPORT OF DR. MARK JONES

I. INTRODUCTION

The Court should reject Bedrock's eleventh-hour attempt to remedy flaws Defendants identified in the testing performed by Dr. Mark Jones, Bedrock's expert on non-infringement. Jones' purported correction comes in the form of a "Supplemental Expert Report" submitted on March 16, 2011 – more than 45 days after the deadline for rebuttal expert reports, the night before the hearing on Defendants' *Daubert* motion to exclude portions of Jones' opening report, and less than three weeks before jury selection is set to begin.

Federal Rule of Civil Procedure 26 permits only "timely" supplementation and correction of expert reports. Failure to comply with this Rule can preclude use of the untimely information, including at trial. Here, Jones' supplemental report cannot be considered timely under any standard, and Bedrock neither sought leave of Court, nor notified Defendants before its belated submission. Moreover, Bedrock's supplementation, if not struck, will cause severe prejudice to Defendants, including because the proximity to trial leaves Defendants with insufficient time to analyze Jones' new testing and results and draft a rebuttal report with their experts.

Because of the untimeliness and potential prejudice from the disclosure of Jones' supplemental opinion so close to trial, Defendants[1] respectfully move to strike the Supplemental Report. Should the Court allow the Supplemental Report, Defendants respectfully request leave to depose Jones regarding the testing and opinions expressed in his new report.

II. FACTUAL BACKGROUND

Expert Report Schedule

Bedrock filed suit against Defendants in June 2009, about two years ago. (Dkt. No. 1) Early on in the litigation, the Court entered a docket control order ("DCO") which established

[1] Amazon.com Inc.; Softlayer Technologies, Inc.; Google, Inc.; Match.com, LLC; Yahoo! Inc.; MySpace Inc.; and AOL LLC.

deadlines for, among other things, expert discovery, submission of opening and rebuttal expert witness reports, and motions to strike or exclude expert testimony. (Dkt. No. 174) Notably, in the DCO, the Court did not provide for the submission of any reports after rebuttal expert witness reports. (*See id.*)

Through a series of joint motions to amend the case schedule, (Dkt Nos. 253, 255, 344, and 366), the deadlines for expert witness reports and expert discovery ultimately were set for the following dates:

ACTION	**DUE DATE**
Parties with burden of proof to designate expert witnesses (non-construction issues). Expert witness reports due.	Jan. 25, 2011
Parties designate rebuttal expert witnesses (non-construction issues). Rebuttal expert witness reports due.	Feb. 1, 2011
Expert Discovery Deadline	Feb. 11, 2011

(Dkt. No. 375, at 2.) None of these expert deadlines have been subject to any further requests for extension by either party.

Bedrock Submits Jones Opening Expert Witness Report on Non-infringement

On January 25, Bedrock submitted the "Opening Expert Report of Dr. Mark Jones." This report consisted mainly of the opinions of Jones on Bedrock's theories of infringement. However, the report also included a section describing experimental testing that Jones had allegedly performed to "demonstrate the advantages of the claims of the '120 patent" on server performance. (Jones Opening Report, at 97; *see also id.* at 97-114, App. Q.)

Pursuant to the DCO, Google's expert witness on non-infringement, Dr. Kevin Jeffay, submitted his rebuttal report on February 1. Both parties' expert witnesses were deposed in mid-

February: Jones on February 9 and 10, and Jeffay on February 15[2].

Defendants Complete Briefing on their Motion to Exclude Testimony of Jones

In early February, the parties filed letter briefs requesting permission from the Court to file *Daubert* motions. Among other letter briefs, Defendants filed a letter brief with respect to Jones' testimony. (Dkt No. 485 (filed under seal).) In particular, the letter brief requested permission to file a motion to exclude his opinions on a number of subjects, including his purported server performance testing. (*Id.* at 1-3.) Full briefing on the Defendants' letter brief was complete by the end of February. (Dkt. No. 531 (filed under seal).)

On March 4, the Court granted Defendants permission to file a motion to exclude testimony of Jones. (Dkt. No. 548.) Five days later, Defendants filed that motion. (Dkt. No. 558 (filed under seal).) Bedrock filed its opposition on March 14, (Dkt. No. 588 (filed under seal)), and the Defendants' motion was heard before Magistrate Judge Love on March 17.

Bedrock Submits "Supplemental Report" of Jones

On the evening of March 16, without any advance warning, Bedrock emailed to Defendants another report from Jones. (Briggs Decl., Exh. A.) The five-page report, entitled "Supplemental Report: Supplemental Test Results," purported to "address the Defendants' criticisms and further quantify and verify my expert report and deposition testimony." (Briggs Decl., Exh. B, at 2.) It included two pages of further tests results which according to Jones included only a "single change" from his previous tests. (*Id.*) He opined that the results of the supplemental testing "is consistent with my earlier results" and "confirms my analysis" from the earlier report. (*Id.*)

[2] On February 14, Bedrock requested, and Defendants did not oppose, to depose Dr. Jeffay outside of the expert discovery period, which ended February 11. (Dkt. No. 482.) The Court granted the motion the next day. (Dkt. No. 489.)

Jones further claimed that, while performing his supplemental tests, he "uncovered a mistake [he] made in Appendix P of my Opening Report." (*Id.* at 3.) He opined that this mistake – described as unintended low levels of memory on the test server – "was isolated to the data in Appendix P, and [he] did not form [his] opinion of the 11-25% performance improvement from the '120 patent based on these results." (*Id.*) Jones purports to have "verified that this mistake was isolated to Appendix P by re-examining the remainder of the results in the tests in Appendices H, N, O and P to verify that there was sufficient, available memory." (*Id.*)

Beyond what is in the report itself, Bedrock gave no explanation for why the supplemental report was necessary or why it was not submitted to Defendants until 45 days after the date for rebuttal expert reports. (*See id*.) Additionally, Bedrock failed to produce to Defendants any of the materials used to perform the testing (e.g., code, software, hardware, documentation) or any data withheld from the supplemental report.

III. ARGUMENT

A. Rule 26 Permits Only "Timely" Supplementation or Correction of Expert Reports

Under Rule 26 of the Federal Rules of Civil Procedure, any disclosures pursuant to Rule 26(a) – including expert testimony – must be supplemented or corrected pursuant to Rule 26(e)(1) in a "*timely manner* if the party learns that in some material respect is incomplete or incorrect" (emphasis added). Failure to following the strictures of Rule 26(a) and (e) precludes "use [of] that information . . . on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 379-382 (5th Cir. 1996) (affirming order striking testimony pursuant to Rules 16 and 37 because experts had failed to formulate final opinions by deadline in discovery order).

District courts have inherent power to enforce scheduling orders and to impose sanctions.

FED. R. CIV. P. 16(f)(1)(C). When determining whether to exclude untimely expert testimony, courts in the Fifth Circuit consider (1) the explanation (if any) given for failure to identify the witness, (2) the prejudice to the opposing party if the witness is allowed to testify, (3) the importance of the testimony, and (4) the possibility that a continuance would cure potential prejudice. *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1000 (5th Cir. 1998). These same factors are applied to late disclosures of expert reports. *See, e.g., Green v. Blitz U.S.A., Inc.*, Case No. 2:07-CV-372, 2008 WL 5572822, at *1-2 (E.D. Tex., Sept. 30, 2008) (applying *Campbell* factors to strike late supplemental expert reports in absence of "any justification . . . for Defendant's noncompliance with the requirements of Fed. R. Civ. P. 26"). The Fifth Circuit has emphasized the importance of enforcing expert deadlines when applying the *Campbell* factors. *See Geiserman v. MacDonald*, 893 F.2d 787, 792 (5th Cir. 1990) ("[O]ur court gives the trial court broad discretion to preserve the integrity and purpose of the pretrial order.").

Here, for at least the reasons given below, each of the four *Campbell* factors warrants striking the Jones Supplemental Report.

B. Bedrock Has Failed to Justify its Delay in Supplementing the Jones Opening Expert Report

First, Bedrock has not offered any justification for the delay in service of Jones Supplemental Report. Neither Bedrock nor Jones has given any reason why he could not have performed this confirmatory testing or double-checked his work (to discover the mistake) much earlier. This failure to explain why the report was served more than 45 days after the Court's deadline and a mere three weeks before trial is reason to exclude Jones' new testimony. *See Blitz*, 2008 WL 5572822 at *2 (striking late supplemental expert reports where defendant "fail[ed] to provide the Court with any reason why its delay . . . should be excused").

The timing of the submission strongly suggests that the supplemental report is a direct response to Defendants' *Daubert* motion. Indeed, Jones has admitted as much: "[i]n this Supplemental Test Results, I used the same testing methodology *to address the Defendants' criticisms* . . . ." (Briggs Decl., Exh. B, at 2.) However, Bedrock is not permitted to use Defendants' *Daubert* motion – and the accompanying briefing – as a roadmap to attempt to correct flaws in its expert's methodology and opinions. Nor does the challenge to Jones' testimony justify a late supplemental report, especially when that report does little more than "verify" and "confirm[]" inadmissible testimony. *Young v. Brand Scaffold Servs., LLC*, Case No. 1:07-CV-917, 2009 WL 4674050 at *2 (E.D. Tex., Feb. 24, 2009) ("An expert's [opening] report must be detailed and complete in order to avoid the disclosure of sketchy and vague expert information.") (internal quotations omitted).

C. Allowing Bedrock to Supplement Jones' Opening Expert Report Just Before Trial Would Severely Prejudice Defendants

Second, Bedrock's dilatory expert disclosure is prejudicial to Defendants because the proximity to trial leaves insufficient time to analyze the new testing and its results, let alone prepare a complete response to Jones' last-minute supplemental report. *See, e.g.*, *Brand Scaffold*, 2009 WL 4674050 at *5 (striking late expert report because of plaintiff's "inadequate explanation and the prejudice that would inure to [Defendant]").

Bedrock served the Supplemental Report the night before the hearing on Defendants' motion to exclude Jones' testimony, less than a month before trial. Notwithstanding that the deadline for expert discovery has long passed, the time remaining before trial is insufficient for Defendants to work with their expert to perform a thorough analysis of Jones' new testing results and his other "supplemental" opinions. *See Tyco Healthcare Group LP v. Applied Med. Resources Corp.*, No. 9:06-CV-151, 2009 WL 5842062 at *3 (E.D. Tex. March 30, 2009)

(striking expert theory where ability to analyze and respond to that theory was "severely curtailed" by late disclosure). By depriving Defendants of a full and fair opportunity for rebuttal, Bedrock causes severe prejudice to Defendants. *See Brand Scaffold*, 2009 WL 4674050 at *3 ("Disruption of the court's discovery schedule and the opponent's preparation constitutes sufficient prejudice to militate in favor of the exclusion of testimony.").

Defendants will suffer additional prejudice from Bedrock's failure to provide all relevant evidence with respect to his supplemental testing. FED. R. CIV. P. 26(a)(2)(B)(ii) (expert witness must supply all "the facts or data considered by the witness in forming" opinions). As with the Jones Opening Report,[3] Bedrock has again failed to produce to Defendants code, software, hardware, and documentation used in the testing. Bedrock also has not turned over any data considered but ultimately excluded from the report – e.g., memory monitoring results. Such data, even if seen as merely "preliminary" by Jones, is crucial to Defendants' ability to fully analyze the testing and fully evaluate Jones' opinions. Withholding this information is grounds for striking the report. *See, e.g., R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 905, 911 (N.D. Ohio 2008) ("If conclusions in a report are based all or in part on facts not disclosed in the report, the report does not comply with Rule 26(a)(2)(B).").

Had Bedrock provided the report and data earlier, Defendants might have had adequate time to prepare and submit (with leave of Court as appropriate) a supplemental rebuttal report. But Defendants received the report on the night of March 16 with no forewarning. In the time since Jones' opening report on February 1, Bedrock had ample opportunity to disclose to

[3] Further details can be found in Defendants' briefing in support of their Letter Brief Requesting Permission to File *Daubert* and Rule 26(a) Motions to Exclude Testing Testimony of Bedrock's Expert Dr. Mark Jones (Dkt. Nos. 485 and 531), and Defendants' opening brief in support of their Defendants' Combined *Daubert* And Rule 26(A) Motion To Exclude The Expert Testimony Of Dr. Mark Jones, (Dkt. No. 558).

Defendants that it intended to supplement. But Bedrock gave no notice it was preparing and would serve – long after the scheduled deadline and just before trial – a supplemental report that included additional testing. Given the nature of the report, the prejudice to Defendants will be multiplied because, while Defendants are without time to rebut Jones' new report, Bedrock will have the benefit at trial of testimony submitted specifically to "address the Defendants' criticisms" of Jones' prior opinions.[4]

D. Jones' Belated Supplemental Expert Testimony is Purely Self-Serving

Third, Bedrock should not be heard to argue that the Supplemental Report is "important" enough to justify the violation of the Court's scheduling order. By its own terms, the report consists of little more than self-serving, rather than instructive, opinion: its purposes are to "address the Defendants' criticisms," "verify [his] expert report and deposition testimony," "confirm [his] analysis," and downplay a mistake committed during the testing Jones previously relied on to reach his opinions. (Briggs Decl., Exh. B, at 2-3.) As such, the report serves primarily, if not solely, to rehabilitate Jones' prior expert testimony, which as explained in detail in Defendants' briefing on the motion to exclude, is deeply flawed and inadmissible under *Daubert*.

Beyond rehabilitation, Jones' opinions in his supplemental report add little, if anything, to his prior opinions. The supplemental testing involved the "same testing methodology," the "same parameters and conditions," and the "same code" as his prior tests. (*Id.* at 2.) The only difference in the code used for the new tests was one minor change to ancillary code. (*Id.*) Jones' supplemental testing is thus mostly redundant and confirmatory in nature. Such testing belongs, if anywhere, in his opening report – not as an after-thought in a belated supplemental

[4] By contrast, Defendants have not submitted any supplemental or corrected expert reports of a similar nature – namely, to address positions raised in Bedrock's *Daubert* motions.

report. FED. R. CIV. P. 26(a)(2)(A) ("The [opening] report must contain a complete statement of all opinions the witness will express and the basis and reasons for them.").

Similarly, Jones' disclosure of his mistake fails to justify the violation of the Court's scheduling order. Although he claims to have uncovered a problem with low memory during the supplemental testing, he was aware of the issue (or should have been) while running tests for his opening report. Jones testified at this deposition that he monitored memory levels during the original tests because he knew a "memory leak" could lead to low memory and, in turn, affect performance. (Dkt. No. 558, at 11.) But nowhere in his new report does Jones explain how he failed to notice low memory during those tests while allegedly actively monitoring memory. Nevertheless, regardless of when Jones discovered the mistake, since he claims the erroneous tests played no role in his opinion on performance, (*see* Briggs Decl., Exh. B, at 3)[5], this mistake would not rise to the level of justifying a supplemental report. *See* FED. R. CIV. P. 26(e)(1)(A) (correction must be made "in a timely manner if the party leans that in some *material respect* the disclosure or response is incomplete or incorrect. . . .") (emphasis supplied).

E. Only A Continuance of Trial Would Cure the Potential Prejudice to Defendants

Fourth, short of delaying trial, a continuance here would not remedy the prejudice to Defendants. Trial for Defendant Google is two weeks away. Using precious time at this late stage to analyze and rebut yet another report from Jones – including a new set of testing results – will only distract from the Defendants' trial preparation. Thus, unless trial is continued to allow adequate time for preparation of a rebuttal report, Defendants will be severely prejudiced.

[5] This assertion is questionable on its face given that Jones claims not to have been aware of the mistake until he performed his supplemental tests. But prior to this awareness, there was no reason to exclude those results from any of his opinions in his opening report on non-infringement.

Nor would permitting Bedrock's dilatory supplement "deter future dilatory behavior, []or serve to enforce local rules or court imposed scheduling orders." *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 381 (5th Cir. 1996). Indeed, permitting a supplemental report of this nature would encourage other litigants to wait until *Daubert* briefing is complete to serve supplemental reports correcting errors identified by their adversaries. Such tactics, if they became routine, would lead to countless last-minute disputes over eleventh-hour supplemental reports, taxing the resources of the Court and the parties at a time when trial should be the priority.

IV. CONCLUSION

For all of the reasons given above, Defendants respectfully request that the untimely Jones Supplemental Report be stricken. Should the Supplemental Report be allowed, Defendants respectfully request leave to depose Jones regarding the opinions expressed in his new report and the testing he performed to arrive at those opinions.

Dated: March 28, 2011

Respectfully submitted,

/s/ Claude M. Stern, with permission by Michael E. Jones

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on March 28, 2011. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Michael E. Jones

CERTIFICATE OF CONFERENCE

I hereby certify that counsel on behalf of Defendants, Henry Lien, attempted to meet and confer with counsel for Plaintiff regarding their position as to this motion via email. Counsel for Defendants were unable to confirm with counsel for Plaintiff regarding their position and file this motion under the assumption that Plaintiff is opposed to the relief sought in this motion.

/s/ Claude M. Stern, with permission by Michael E. Jones