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

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

**BEDROCK'S RESPONSE IN OPPOSITION TO AOL'S MOTION FOR CLARIFICATION AND RECONSIDERATION OF JUDGE LOVE'S ORDER DENYING SUMMARY JUDGMENT [DKT. NO. 665]**

## I. INTRODUCTION

After submitting both summary judgment and *Daubert* letter briefs, a motion for summary judgment of non-infringement, and an emergency motion for leave to file a motion for summary judgment of non-infringement on this issue, AOL again asks the Court to rule as a matter of law that infringement of a system claim must be proven by evidence of actual use. Dkt. No. 665 ("Motion"). Because AOL has not presented any new argument and relies upon an erroneous interpretation of the law, Bedrock respectfully requests that AOL's motion be denied.

## II. ARGUMENT

### A. AOL Presents No New Arguments.

AOL now presents for the fifth time its flawed argument that infringement of a system claim must be proven by evidence of actual use.

**January 12, 2011:** AOL first raised its erroneous position regarding infringement of system claims, citing the *ACCO*[1] and *Typhoon Touch*[2] cases,[3] in a letter brief requesting leave to file a motion for summary judgment of non-infringement. *See* Dkt. No. 378 ("*ACCO* Brief 1"). The Court denied AOL's request in its February 1, 2011 Order. *See* Dkt. No. 450. The Court, however, permitted the Defendants to file a motion of non-infringement. *See id.*

[1] *ACCO Brands, Inc. v. Micro Sec. Devices, Inc.*, 346 F.3d 1075 (Fed. Cir. 2003).

[2] *Typhoon Touch Techs. v. Dell, Inc.*, Case 6:07-cv-00546, 2009 WL 2243126 (E.D. Tex. July 23, 2009).

[3] Bedrock's arguments responding to the reliance upon claim construction opinions in support of this non-infringement argument were fully detailed in its answering letter brief in opposition to the Defendants' letter brief requesting permission to file a *Daubert* challenge against Dr. Jones. Dkt. No. 517.

**February 8, 2011:** Despite the Court's denial of AOL's request to file a motion for summary judgment, the Defendants included this argument (again relying on the *ACCO*/*Typhoon* cases) in the Defendants' Motion for Summary Judgment of Non-Infringement. *See* Dkt. No. 463 at 26-27 ("*ACCO* Brief 2").

**February 14, 2011:** AOL recast its *ACCO*/*Typhoon* argument as a *Daubert* challenge against Bedrock's expert. *See* Dkt. No. 484 ("*ACCO* Brief 3").

**February 16, 2011:** During the status conference, after having already received Defendants' *Daubert* letter brief, the Court made clear that AOL must show "new" grounds for summary judgment in its motion for leave.

**February 22, 2011:** AOL filed an emergency motion for leave to file a motion for summary judgment of non-infingement, Dkt. No. 505, which asked the Court to accept its already-filed motion where AOL again briefed its erroneous *ACCO*/*Typhoon* argument, Dkt. No. 507 ("*ACCO* Brief 4").

**March 2, 2011:** The Court denied both the Motion for Leave and the Motion for Summary Judgment, explaining that "the Court sees no need for another motion on the issue." Dkt. No. 539.

**March 28, 2011:** AOL filed the Motion at hand, Dkt. No. 665 ("*ACCO* Brief 5"), which asks the Court to clarify and reconsider its order denying AOL's fourth attempt to resurrect this argument.

Unfathomably, AOL contends that this Court has not sufficiently rejected AOL's contention that capability to perform the functional limitations is insufficient to establish infringement of a system claim and requests clarification on this issue. However, this is now the fifth time AOL has raised this *exact* issue. This Court should not be required to waste its limited

resources analyzing this issue again. *See Retractable Techs. v. New Med. Techs.*, No. 4:02-CV-34, 2004 U.S. Dist. LEXIS 3855, at *28 (E.D. Tex. Jan. 8, 2004) (Davis, J.) (refusing to "indulge [Defendant's] request for duplicative analysis"). For this reason, alone, AOL's motion should be denied in its entirety.

### B. Evidence of Use Is Not Required to Establish Infringement of a System Claim.

AOL contends that "any other conclusion other [sic] than the requirement that the functional limitations of the claim be performed flies in the face of basic tenants of patent law." MOTION at 6. This is an incorrect interpretation of the controlling law. Rather, claims governed by 35 U.S.C. § 112 ¶ 6 are construed to "cover the corresponding structure, material, or acts described in the specification and equivalents thereof," and the Court has construed the means-plus-function claims in this case to cover the algorithms disclosed in the patent. *See* Dkt. No. 369. Thus, to prove infringement, Bedrock must prove that AOL's systems have the claimed structure and that this structure has the capability of functioning as described by the claim. *See Mass Engineered Design, Inc. v. Ergotron, Inc.*, 633 F. Supp. 2d 361, 378 (E.D. Tex. 2009) (Davis, J.) ("All that is required is that the device have the claimed structure, and that this structure in the device have the capability of functioning as described by the claim.").[4]

With respect to AOL's arguments regarding Bedrock's evidence of infringement, the sufficiency of such evidence has already been addressed at the summary judgment stage. Dkt. No. 539 (denying AOL's Motion for Summary Judgment of Non-Infringement); Dkt. No. 659

[4] As such, Bedrock need not address AOL's plea for reconsideration, which discusses Bedrock's evidence of infringement, as it is predicated on the assumption that the Court has applied an incorrect interpretation of the controlling case law. In its Motion, AOL has attached portions of Dr. Jones's Opening Report which detail Bedrock's evidence regarding the presence of the accused versions of Linux on AOL's computers. MOTION, Ex. A. Any arguments as to the sufficiency of that evidence are an issue for the jury.

(denying Defendants' Motion for Summary Judgment of Non-Infringement). From that point forward, whether or not Bedrock has met its burden to prove non-infringement became an issue for the jury and will be determined at trial.[5]

## III. CONCLUSION

In light of the foregoing, Bedrock respectfully requests that the Court deny AOL's Motion for Clarification and Reconsideration of Judge Love's Order Denying Summary Judgment (Dkt. No. 665).

[5] AOL's discussion regarding the possibility for prejudice and jury confusion relating to its being tried with multiple defendants was addressed in AOL's Emergency Motion for a Separate Trial. Dkt. No. 570. The Court has denied that Motion. Dkt. No. 678.

DATED: March 30, 2011

Respectfully submitted,
**McKOOL SMITH, P.C.**

/s/ *Douglas A. Cawley*

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**ATTORNEYS FOR PLAINTIFF BEDROCK COMPUTER TECHNOLOGIES LLC**

**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 30th day of March, 2011.

*/s/ Ryan A. Hargrave*
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