

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

**TYLER DIVISION**

**DATE: 4/4/11**

**JUDGE  
JOHN LOVE**

**REPORTER: Carla Sims  
LAW CLERK: Anna Phillips**

<b>BEDROCK COMPUTER TECHNOLOGIES LLC</b> Plaintiff  vs.  <b>SOFTLAYER TECHNOLOGIES, ET AL</b> Defendant	<b>CIVIL ACTION NO: 6:09cv269</b>  MOTIONS HEARING (Documents #667, #693 & #694)
<b>ATTORNEY FOR PLAINTIFF</b>	<b>ATTORNEY FOR DEFENDANT</b>
Refer to Attorney Sign-In Sheet	Refer to Attorney Sign-In Sheet

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

**OPEN: 3:16 pm**

**ADJOURN: 4:50 pm**

<b>TIME:</b>	<b>MINUTES:</b>
3:16 pm	Case called. Parties announced ready to proceed.
	The Court greeted the parties and stated we are here a continuation on pretrial matters. The Court sees to take up motion to strike, #667, motion #693 and #694. Another motion was filed, motion for leave #697 that remain pending. Any objections to depo designations and/or exhibits can be taken up as well. The Court will hear brief argument on motions, then calling it a day.
3:24 pm	Mr. Stevenson stated they could take up the motions and call it a day. Defendants concur.
	The Court will hear briefly on motion to strike the report of Dr. Jones #667.

**FILED: 4/4/11**

**DAVID J. MALAND, CLERK**

BY: *Mechele Morris*, Courtroom Deputy

TIME:	MINUTES:
3:25 pm	<p>Mr. Stern discussed the late filed request by Bedrock to file a supplemental expert report after he filed their daulbert motion attacking the report. Discussion made on problems of Jones report. He began argument on motion to strike untimely supplemental expert report of Mark Jones. Deposition was taken of Dr. Jones. It was made clear that there were problems with his report. Daulbert motion was filed after. His report had two parts and testing on efficiency done. Evening before the hearing on daulbert motion, a supplemental report was given to defendants prompted by daulbert motion. Defendants do not have new code, software and why didn't plaintiff seek leave to file this report. When did Dr. Jones do this report? Why was notice not provided? Defendant does not have new code provided, information used, software used and was just a summary of what was done. Why didn't plaintiff seek to file report? There is no foundation to this report nor has Mr. Jones been deposed. When did Jones start doing all this? He asked that this report be struck or they have deposition or ask to depose him.</p>
3:29 pm	<p>Mr. Stevenson responded. Discussion made on the performance tests done in initial report. After removing the shortcuts, he did not take next step reallocating memory. Reallocating the memory was not done. When comparing infringing code, he gave the benefit of the doubt and would make it slower. Memory leak discussed and how it would run faster. Tests was done and it ran faster and demonstrates this. Test done to make sure this was correct, then the results were produced. Appendix P had an error in report in results and were not used. There were other alternatives to show results. This in summary, was a response to a misplaced criticism leveled by Google in its rebuttal expert report. This backs up what is common sense.</p>
	<p>The Court questioned Mr. Stevenson about defendants objections and late response to the criticism and not having the underlying data that was used for them to make conclusions.</p>
3:34 pm	<p>Mr. Stevenson responded. He stated the defendants do have the data. Defendant knows what the code does. Discussion made on the Rtfree code. It is improbable that they cannot figure out what kind of code he is running. Discussion made on the late filing. Defendants had his deposition and they knew about the memory leak. Discussion made on the supplemental report and calling Mr. Jones on examination and what might be said. They were planning on calling Jones at the earlier, but didn't have time. He was going to say the memory leak was favorable to Google. He would have told why and had data to back it up. This will be a response to a criticism.</p>
3:37 pm	<p>Mr. Stern responded. Defendants should be able to look at all the baseline information. Further discussion made on appendix P. Reference made to page 106 of his report. This was not a throw away test done. This supplemental report should be excluded. This is fundamentally unfair. Either report is out, or they should be able to speak to him about the report and see the underlying data. Further discussion made on the underlying data used. It is fundamental unfair to discuss experiment when defendants do not have the data to look at. Further discussion made on the two experiments made from Dr. Jones. This was not a throw away test and was relying on this. Fairness is that this report should be excluded. Defendants asked Jones of documentation but certain documentation he didn't think he had or kept.</p>
	<p>The Court will move on to the motion to preclude reliance on documents #693.</p>

TIME:	MINUTES:
3:42 pm	<p>Mr. Stevenson responded. Discussion made on the summary judgment filed. Google signed on to the motion that documents not withheld. Five days after the Court denied motion, a graph was produced by Google about CPU is doing in a nanosecond. Certain codes do run a fraction of the time that they said didn't. Performance testing documents should be excluded. Production was not made timely. Discussion made on plaintiff's interrogatory answers, page 14 regarding denial of service. Performance tests done but not all produced after discovery. Further discussion made on the traffic data and information in report. They would like to keep out the one that was just produced b Google. There are flaws in it and is slanted way of looking at statistics. Plaintiff cannot respond by trial and would like it off the table. He would like to keep out documents or factual testimony and facts related to performance test of the infringing code from March 30. Further discussion made on Google's traffic load data. He would like instruction from the Court that says Google did not produce traffic data. Discussion made on not moving to compel. He does not have time at this time. Motion to compel was not done earlier, because he didn't think information was kept.</p>
3:53 pm	<p>Mr. Stern responded. Discussion made producing financial information and damages theory from earlier hearing in 2010. Mr. Cawley responded regarding theory before the jury regarding reasonable royalty. Defendants thought this was a denial of service case. Some document requests did not seem relevant and they did not answer but asked plaintiff to tell them. There has been a bait and switch. Denial of service went out the window. Further discussion made on what data plaintiff was asking for and defendants response on not having such data. Reference made to exhibit E, page 11 of the response. He did not believe that some information could not be answered in a form the plaintiff asked for. Documents will be from percipient witness testimony. Documents were given and deposition was made regarding documents. Plaintiff should have moved to compel. He would have worked with them if defendants would have known. These requests did not relate to denial of service which was in their heads. Defendants do not understand how these requests relate to denial of service.</p>
4:13 pm	<p>Mr. Stevenson further responded. The first issue is when they started asking for this? It was in October of 2010 and made clear they had two non exclusive alternative theories of damages. Discussion made on his interrogatory response from October 22. Notice was given and information was out there, but not gotten. Discussion made packets per second information that defendant had. Plaintiff does not have query information nor have time to do the query. He does not know how long it would take to do query correctly so they can figure out the real impact and need relief they are asking for.</p>
4:20 pm	<p>Mr. Stern responded. Discussion made on Google's interrogatory answer. This interrogatory was about denial of service and never about efficiency. The game has changed and how we have an efficiency argument. Defendants did what they could. Plaintiff has the documents and they deposed their people. There is no prejudice.</p>
4:24 pm	<p>The Court will take Bedrock's requested relief under advisement and try to get to the bottom of what happened. The Court ordered Google to identify within these documents referenced, the documents it would like to offer and identify testimony, if any, to get these in. This is ordered by tomorrow by 5:00. Plaintiff has leave from Court for Dr. Jones to look at this and provide conclusions by Saturday. The Court would like to see these documents are almost like an offer of proof so he can know what is going on behind the scenes. The Court will take a little more time to look at this. Parties work toward providing this information to the Court and how it would go at trial.</p>

TIME:	MINUTES:
4:26 pm	Mr. Stevenson asked for clarification regarding performance graphs which narrowed down subset of codes. He stated how he would meet this with Jones. He requested that they identify the more relevant portions of codes are then have Google rerun the statistics for that. He does not know if this will cure this issue or not.
4:28 pm	The Court stated if further information is needed, ask Google what is needed and we will go from there. The Court will move on to motion #694.
4:30 pm	Mr. Stevenson responded and argued motion. Three days at close of discovery, Google announced disclosure of knowledge of relevant facts, Mr. Peria. Deposition was asked for and deposition was provided last week. They learned he was not a custodian of documents. Plaintiff needs documents to cross exam him. If he is called as a "will call" witness, he would have been identified and documents produced. Not having documents puts them as huge disadvantage and asked to preclude Google from calling him.
4:31 pm	Mr. Jones responded. Mr. Pereira was not late designated. There was agreement when supplemental disclosure should be made. He was made as a supplemental disclosure five days before deadline. Deposition was allowed. He is not asking about queries per second. He is not getting into this at all. Plaintiff is not putting in one thing about Pereira's emails.
4:35 pm	The Court denied the motion #694 without prejudice. Let's move to motion for leave #697.
	Mr. Stevenson stated they do not intend to go to this unless Google opens the door. This is agreed subject to if defendants do not open the door.
4:38 pm	The Court will grant the motion. If door is opened, parties can approach the bench. The Court is wanting efficiency documents identified on what is missing of Dr. Jones and any deficiencies pointed out by Saturday.
	Mr. Stern responded.
	The Court reminded parties about juror notebooks and asked if agreement has been done as to notebooks.
4:40 pm	Mr. Jones stated he believed they are close to agreement. Parties will look at this by 5:00 today.
	The Court stated parties have 21 minutes until deadline.
	Mr. Stevenson responded about notebooks. Agreements have been made.
	The Court will take the two motions under advisement. The Court is not sure about when a ruling will come out. Exhibit and depo objections will have to be taken up during trial.
	Mr. Stevenson asked about documents wanting to be used for opening. They pertain to documents going to historical reasons.
4:42 pm	Mr. Curry discussed documents from the Linux community that explain why accused code was put into Linux that they would like to use for opening that objections have been made. Objections should be overruled.

