

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**

**YAHOO!’S RESPONSE IN OPPOSITION TO BEDROCK’S MOTION TO  
PRECLUDE RELIANCE ON DOCUMENTS AND FACTS RELATED TO  
PERFORMANCE TESTING PRODUCED BY YAHOO!  
AFTER CLOSE OF DISCOVERY**

Defendant Yahoo! Inc. (“Yahoo!”) files this response in opposition to Bedrock’s Motion to Preclude Reliance on Documents and Facts Related to Performance Testing Produced by Yahoo! After Close of Discovery. Dkt. No. 756.

**I. INTRODUCTION AND LEGAL BACKGROUND**

Bedrock seeks by its motion to prevent Yahoo! from fairly and legitimately supplementing its discovery pursuant to Rule 26(e) of the Federal Rules of Civil Procedure. During the deposition of Bedrock’s expert, Dr. Mark Jones, Yahoo! learned that Dr. Jones is basing his analysis of Yahoo!’s total network traffic on a post on a public website regarding Yahoo! Traffic Servers (YTS). BTEX0752445. In response to this new information, Yahoo! produced two pages of charts and information regarding its YTS servers, showing that Dr.

Jones's interpretation of the traffic figures in the public posts about YTS is *incorrect*. Dkt. No. 756, Exh. L.

Yahoo!'s production in direct response to Bedrock's incorrect expert testimony is legitimate and proper. If Dr. Jones attempts to testify as to his incorrect interpretation of YTS traffic based on the public web posts, Yahoo! should be permitted to cross-examine him using actual traffic data that has been provided to Bedrock. Therefore, Bedrock's motion to preclude reliance on those documents should be denied.

## II. ARGUMENT

### A. Yahoo! Has Diligently Supplemented Its Production in Response to Bedrock's Overbroad and Vague Discovery Requests

Despite Bedrock's claims that its discovery requests were specific to YTS documents, that simply is not the case. Bedrock's initial document request cited in its motion requested "[a]ll Documents relating to the quality, value, usability, performance, demand, or benefits of the Accused Instrumentalities." Dkt. No. 756 at ¶ 31. There is absolutely no mention of traffic data whatsoever in this request. Yahoo! properly objected to this request as overly broad, but tried to produce relevant and responsive documents. Bedrock never specifically requested documents related to YTS.<sup>1</sup>

Bedrock further cites to its 30(b)(6) Notice as evidence of its diligence. Dkt. No. 756 at 1 n. 2. Bedrock requested testimony on the "design, use, function, operation, structure, code dimensions, manufacturing, and processing specifications" of Yahoo!'s accused servers. *Id.*; *see also* Dkt. No. 756, Exh. D at 7, Topic 1. Again, there is absolutely no mention of traffic data whatsoever in this request. Bedrock's own exhibits show both that Yahoo! objected to this topic

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<sup>1</sup> Bedrock also notes Topic 53 of its Apr. 30, 2010 letter, which asks for documents "evidencing any testing of any Accused Version of Linux . . . ." Dkt. 756 at 1 n. 1. This request does not request Yahoo! traffic data.

as overbroad, and tried over several months to meet and confer with Bedrock regarding the scope and specificity of this topic. Dkt. No. 756, Exh. H, esp. email of Chris Bright dated on Nov. 15, 2010. Nonetheless, Yahoo! did produce a witness on Topic 1, as requested. Dkt. No. 756, Exh. I at 1.

Finally, Bedrock argues that the YTS documents were encompassed by its Interrogatories 15-17. *Id.* at 1 n. 3. Again, Bedrock glosses over the fact that Yahoo! responded appropriately to the discovery as written. The requests themselves are not directed specifically to YTS. Yahoo! responded with estimated traffic figures for its typical traffic load. *Id.*, Exh. J at 12-16. Upon later learning that Bedrock was specifically interested in the YTS servers, Yahoo! properly supplemented pursuant to Fed. R. Civ. P. 26(e).

**B. Yahoo!'s Document Production is Proper for Cross-Examination of Dr. Mark Jones**

In his deposition on February 9-10, 2011, Bedrock's expert, Dr. Jones, stated that his calculations regarding Yahoo!'s network were specifically based on information related to the Yahoo Traffic Servers. James Decl. Exh. 1, Jones Depo. Tr. at 340:12-343:6.

In light of this new information, and Dr. Jones's incorrect interpretation of those public web posts, Yahoo! properly supplemented its document production with actual YTS traffic figures on March. 11, 2011. This supplementation is directly related to the new information learned in discovery and is proper under Fed. R. Civ. P. 26(e)(1)(A). If Dr. Jones testifies to his incorrect interpretation of the public web posts regarding YTS, Yahoo! should be permitted to cross-examine Dr. Jones using the actual YTS traffic data.

Bedrock protests that this discovery is prejudicial because it is not timely and is "voluminous." This statement is incorrect. The YTS traffic data was timely provided in response to Yahoo!'s awareness of Dr. Jones's opinions. It was provided more than 1 month

before trial, and consists of 2 pages. There is no prejudice to Bedrock. By contrast, it would be highly prejudicial to Yahoo! to allow Dr. Jones to incorrectly testify regarding Yahoo!'s network traffic data without permitting Yahoo! to cross-examine Dr. Jones using accurate YTS traffic data.

### **III. CONCLUSION**

For all the reasons given above, Yahoo! respectfully requests that the Court deny Bedrock's Motion to Preclude Reliance on Documents and Facts Related to Performance Testing Produced by Yahoo! After Close of Discovery.

Dated: April 24, 2011

/s/ Yar. R. Chaikovsky

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*Attorneys for Defendant Yahoo! Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 24, 2011, all counsel of record for Plaintiff who have or are deemed to have consented to electronic service are being served with a copy of this document via electronic mail.

/s/ Yar R. Chaikovsky

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Yar R. Chaikovsky