

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

TYLER DIVISION

DATE: 4/26/11

**JUDGE
JOHN LOVE**

**REPORTER: Kimberly Julian
LAW CLERK: Anna Phillips**

<p>BEDROCK COMPUTER TECHNOLOGIES, LLC Plaintiff</p> <p>vs. SOFTLAYER TECHNOLOGIES, INC. Defendant</p>	<p>CIVIL ACTION NO: 6:09cv269</p> <p>PRETRIAL & MOTIONS HEARING (Motions #756 #757)</p>
<p>ATTORNEY FOR PLAINTIFF</p>	<p>ATTORNEY FOR DEFENDANT</p>
<p>Refer to Attorney Sign-In Sheet Attached</p>	<p>Refer to Attorney Sign-In Sheet Attached</p>

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

OPEN: 2:12 pm

ADJOURN: 3:37 pm

TIME:	MINUTES:
2:12 pm	Case called. Parties announced ready to proceed.
	The Court greeted the parties and stated we are here for a continuation of pretrial. There are a couple of motions, #756 and #757 that the Court will provide parties to present positions on these. The Court will then open it up to issues regarding exhibits and deposition designations.
	Mr. Stevenson stated there was an issue with a motion to exclude evidence of an unaccepted offer from intellectual ventures.
	The Court intended for Judge Davis to take this up and resolve the matter.
	Mr. Stevenson stated this issue will need to be taken up before the opening.
	The Court stated he will have to request this before the jury comes in to Judge Davis. The Court is not in the best position to resolve this particular matter.

DAVID J. MALAND, CLERK

FILED: 4/26/11

BY: *Mechele Morris*, Courtroom Deputy

TIME:	MINUTES:
	<p>Ms. Doan stated they filed motions in limine and understood Judge Davis will be taking these up. They also filed some motions in limine and asked the Court if this will be taken up with Judge Davis. They also file a bench brief based upon Judge Davis' ruling allowing in the first re-exam but excluding the second re-exam. She would like the decision before case is started. Discussion made on if Google trial and verdict was to stay out.</p>
	<p>The Court stated to make the request as soon as possible with Judge Davis. Google should not come in, no reference should be made to it. The Court asked if there was a request from defendants to serve an unopposed motion to serve an expert report related to the re-exam? The Court asked about serving an expert report.</p>
2:16 pm	<p>Ms. Doan responded. Based on what happened in Google, both re-exams would stay out. Judge Davis made a slightly different ruling. There was a scramble to get an expert. They would like to brief Judge Davis and if he allows re-exams, they will designate Mr. Godici.</p>
	<p>Mr. Stevenson stated there was no objection. Judge Davis ruled that the completed final re-exam could come in and pending re-exam could not. He does not object to the supplemental expert report that Yahoo is proposing. Ms Doan further responded. They should both come in or both be out.</p>
	<p>The Court will not express his thought on this. Judge Davis can take care of this, having made the ruling. The Court will hear motion to preclude reliance #756.</p>
2:18 pm	<p>Mr. Stephenson began argument on motion on behalf of the plaintiff. Discussion made on Yahoo's tests on its servers and it being done late. These tests were not disclosed until Friday. They have not seen all the actual test data. He directed the Court to 1/7/11 deposition of Mr. Barnes deposition regarding performance of routing cache. Discussion made on privileged tests on Friday. He cannot be able to respond to this so soon. He objects to it coming in because they are late produced without excuse.</p>
	<p>Mr. Chaikovsky responded. There was no complaint of Mr. Gray's report when this motion was filed. This is not similar to the Google trial nor like Mr. Barnes testing. The supplemental report was discussed. The additional testing was done because original expert report of Weinstein was struck which was expert report on damages based on settlement agreements. The supplemental report they got was the first time there was an efficiency damage theory propounded based on efficiency. The damages theory does not hold up. This is the first notice of this. The report is not incomplete. Plaintiff has all this information. Plaintiff can talk to Mr. Gray by deposition if they want.</p>
2:25 pm	<p>The Court questioned Mr. Chaikovsky this no being real world and Yahoo's tests being ran and not produced. The Court cannot imagine that defendant would not have produced documents and prepared their expert and not have been completed before now.</p>
	<p>Mr. Chaikovsky responded. We don't maintain those test in the ordinary course of business. Defendant produced on March 11 very quickly. Plaintiff had real world traffic information. The did additional testing. The real world tests that they ran are different that what Jones ran. Why would we want to produce at trial, false information, that does not give the jury all the information they need to make a decision?</p>

TIME:	MINUTES:
	The Court asked if the issue is a document that was ran encompassed within a document, that was produced on March 11.
	Mr. Chaikovsky responded. They went and got information about what our servers do and produced it on the document. He don't know if the jury should be able to see 30,000 requests per second without seeing the real world where there will be a fact witness, Mr. Barrow and a expert witness, Mr. Gray who can testify to the facts.
	The Court questioned Mr. Chaikovsky about the tests not typically ran in the course of business. Is this why this hasn't been produced or provided? If nothing was produced, something has to be used to rely on.
2:30 pm	Mr. Chaikovsky responded and further discussed the tests at issue. They gave information about traffic information and they chose not to rely on it and chose to have Dr. Jones not rely on it. Traffic data generally was never asked for. Further discussion made on producing documents.
	The Court asked about average load for its servers and what Dr. Jones put in his report.
	Mr. Chaikovsky responded. The question they asked was not specific. A lot of more questions could have been asked about difference types of servers that exist at Yahoo, different operating systems and functionality. Further discussion made on Dr. Jones.
	The Court further questioned how this case goes along and what comes out of Bedrock is a report that relies on Yahoo traffic server.
	Mr. Chaikovsky responded. Until this expert report came out, we had no idea we would see the efficiency analysis that Dr. Jones came out and then got information through discovery in deposition.
	The Court asked about expert about Mr. Gray's meaning of this document.
	Mr. Chaikovsky responded. Further discussion made on Mr. Gray. Information does not exist on ordinary business.
	The Court further questioned what Gray is saying in his report.
	Mr. Chaikovsky responded. Mr. Gray looked Weinstein's report and his reliance of Dr. Jones' report on efficiency. Further discussion made on analysis and tests and report that was put out. There are two types of tests disclosed in the report. Both of these show that our servers don't get near what this hypothetical testing of Dr. Jones would show.
	The Court will hear a response from Bedrock.
2:40 pm	Mr. Stevenson responded. Further discussion made on the Gray issue and March 11 documents. These tests were the same as Mr. Cohen's tests. Discussion made on why defendant may have sat on information. Further discussion made on what was done in Mr. Gray's test. Plaintiff has never gotten the underlying data. Defendant's chose to do eight tests or of thousands to run tests on. Producing this late has myth bust the tests they ran. He asked the Court not permit these documents, anything over and above what Mr. Barrow said in his deposition. Discussion made on what the average load is. If Yahoo had wanted to put in traffic server data, they should have made full disclosure.

TIME:	MINUTES:
	<p>The Court asked about the point that Mr. Weinstein was allowed to provide a supplemental report. Is there something to be said for the idea that the amended report of Weinstein, there is room for Yahoo to serve supplemental conclusions from their expert that they want to provide to the jury? The idea that the report was altered somewhat and perhaps Mr. Gray should be allowed latitude to respond to that.</p>
	<p>Mr. Stevenson stated he didn't think report was altered. Further discussion made on the report. Discussion made on costs savings. What is left with in the report for each defendant-cost savings that he calculated based on Jones testing and the notion that half the cost savings would be divided up. He does not see this as a hook for producing an additional expert report. The technical issue has not changed.</p>
2:53 pm	<p>The Court granted Bedrock's motion. He is not saying that within the bounds of the Court's rulings that Yahoo cannot attack Jones conclusions.</p>
	<p>Mr. Stevenson stated the additional theory remains. They do not have objection to the supplementation on the spin lock theory.</p> <p>Mr. Chaikovsky responded. He asked to make clear if the use of a document that was referred to in cross examination of Jones.</p>
	<p>The Court has kept this out at this point.</p>
	<p>Mr. Chaikovsky responded. This was never a topic on 30B6. Information was provided when asked.</p>
	<p>The Court thinks that Jones report articulated this efficiency theory and what his information was that he was relying on. The Court does not think this could not have been produced, provided in a rebuttal report. Defendant can question Mr. Jones about this. Depending on what Jones says at trial, parties can approach the bench without prejudice. It is late and is out.</p>
	<p>The Court will move to exhibit objections.</p>
	<p>Mr. Arentz responded. Defendant still have 201 objections to their exhibits. They plan to work together to get some these worked out.</p>
	<p>Mr. Bright responded. He will do his best to work this out and thinks he can. Some will need to be carried though trial because we've got supplemental motions in limine pending.</p>
	<p>Mr. Arentz stated there are 40 to 50 objections that key on a lit of motions in limine and re-exam issues. There are some they can work out.</p>
	<p>The Court stated the bottom line is no one wants to put forth any exhibit objections. The Court asked about deposition objections.</p>
	<p>Mr. Cassidy stated they have a plan in place to deal with these and not burden the Court.</p>
	<p>The Court stated this covers everything?</p>
	<p>Mr. Doan asked about insurance agreements that are trying to get into evidence by plaintiff.</p>

TIME:	MINUTES:
	The Court would like to bring up issue about trial. There was reference to claims that have been dropped. He asked what these were.
	Mr Stevenson stated they dropped 5 and 6. Claims 1 and 2 are live for trial. Willfulness is also live for trial.
	Ms. Doan responded.
	The ruling at this point stands as to that issue is bifurcated.
	Mr. Cawley stated wilfulness was bifurcated. He asked about time limits.
	Ms. Doan further discussed the willfulness issue. She reurged the motion.
	The Court will take this up if we get to that point. The court asked parties about jury instructions. The court wants a revised updated set of jury instructions. A joint set by tomorrow night.
	Mr. Stevenson responded. There was not instruction on the verdict from last time.
	The Court stated to get with Yahoo and see where they disagree and request changes or alterations.
	Ms. Doan responded.
	The Court stated to have this in by Thursday morining. Email to Ms. Phillips. The Court stated he was advised that Yahoo was making request for jury instructions related to the fact that there were five defendants at voir dire, and now there is one.
	The Court denied the request. Instruction from the Court that Bedrock will not discuss other defendants settled.
	Ms. Doan further responded and asked to submit instruction, but understands it will be denied.
3:02 pm	The Court stated this will be fine. He discussed motion in limine on insurance. The Court's intention would be to lease these for Judge Davis. The Court asked what was going on with the insurance issue.
	Mr. Cassady responded and further discussed insurance policies. A lot of times they do not come in because those cases involve telling the jury how much insurance will pay. What is happening here is Yahoo is claiming they are going to tell the jury that denial of service attacks do not matter, they don't care, and if they did care, they have protection.
	The Court questioned about getting into the amounts specifically or the fact that they exist and these types of defendants will procure this type of insurance.
	Mr. Cassady will not talk about the dollar amounts in these insurance agreements and just talk about the fact that they have insurance agreements covering Yahoo.
	Ms. Doan responded. Discussion made on business interruption insurance. The problem is under 403 argument.
	The Court asked what her position is.

TIME:	MINUTES:
	Ms. Doan responded. They are not currently insured, they are beyond that. They are self insured.
	The Court further questioned Ms Doan about insurance. He asked Ms. Doan about the insurance and what would be wrong with protection again this happening. If amount was not gotten into, it would be hard for jury to understand.
	Ms. Doan responded. Plaintiff issue is if this code prevents a denial of service attach. This code is the issue in this case. There are other document that show there is a risk factor.
	The Court is not sure that counsel will not be fully capable of showing the jury regarding issue of insurance.
	Mr. Cassidy responded. Further discussion made on denial of service attacks and capacity.
	The Court asked about if Bedrock will want to get into this at opening.
	The Court's ruling will be the same and going to If Yahoo opens the door, insurance issues could be gotten in to. The Court is not granting the motion, but parties can approach. The Court agrees that this might muddy the water. Insurance may be a fair presentation, nor prejudicial.
3:37 pm	There being nothing further, Court is adjourned.