

EXHIBIT 10

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF TEXAS
3 TYLER DIVISION

3 BEDROCK COMPUTER) DOCKET NO. 6:09-cv-269
4 TECHNOLOGIES, LLC)
5 VS.) TYLER, TEXAS
6 SOFTLAYER TECHNOLOGIES,) FEBRUARY 16, 2011
7 INC., ET AL) 9:30 A.M.

7 MOTION HEARING
8 BEFORE THE HONORABLE JOHN D. LOVE
9 UNITED STATES MAGISTRATE JUDGE

10 APPEARANCES:

11 FOR THE PLAINTIFF:

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24 (PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
25 TRANSCRIPT PRODUCED ON CAT SYSTEM.)

1 that the basis, either solely or I guess primarily, for
2 a willfulness allegation here?

3 MR. HEJNY: That's correct, Your Honor.
4 That's one of the bases for our willfulness
5 allegations.

6 The first objective basis would be the
7 fact that Bedrock prevailed on almost every claim
8 construction position in the provisional order that you
9 issued on October 29th, and in the final memorandum and
10 opinion that came out on January 11th. As has been
11 discussed before, on January 14th Bedrock received a
12 notice of intent to issue the reexamination certificate
13 in the case, and those two factors, Your Honor, Bedrock
14 believes establish a likelihood that there is no reason
15 why Defendants are acting without objective
16 recklessness.

17 THE COURT: So your willfulness case runs
18 from -- whatever it is -- November of 2010 to January
19 2011. So you've got about a four-, five-month window
20 here of willful infringement? Is that what's going on
21 here?

22 MR. HEJNY: That's correct Your Honor.

23 THE COURT: Well, I guess; one, I wonder
24 in such a situation as you've presented, what issue is
25 there for the jury to decide? It's almost as if there

1 could be stipulations as to, yeah, this reexam
2 happened, yeah, the Court ruled, yeah, we continued to
3 do the same thing, I guess. I guess I'm trying to
4 figure out what fact issues -- what would the jury need
5 to hear about these circumstances as you've put forward
6 as the basis for a willfulness case?

7 MR. HEJNY: Your Honor, Bedrock's
8 position is the fact that Defendants have continued to
9 use the accused code, even though they have no basis
10 for -- any objective basis for believing that the
11 claims were not valid and not infringed. And as we
12 stated, there are a couple of bases for that, Your
13 Honor.

14 THE COURT: One thing I wonder about,
15 too -- let me throw this out there, too -- would be are
16 we talking about willful infringement or are we talking
17 about their conduct during this litigation as being
18 improper, as putting forward -- you almost seem to be
19 saying they're putting forward frivolous claim
20 construction positions and frivolous defenses. I mean,
21 if that's the case, we talking willfulness, willful
22 infringement or we talking something else?

23 MR. HEJNY: Well, with respect to this
24 motion, Your Honor, it would deal strictly with
25 willfulness. Obviously there'll probably be some

1 discussions later regarding litigation misconduct. But
2 what we're talking about today is just strictly
3 willfulness.

4 THE COURT: Okay. You get up in front of
5 a jury, you're talking willfulness, and you're going to
6 say what to the jury about how these Defendants
7 willfully infringed this patent? The fact the Court
8 issued a claim construction that was unfavorable to
9 them and the fact that a reexam happened and it was
10 favorable, according to Bedrock?

11 MR. HEJNY: That's correct, Your Honor.
12 Essentially the claims were in reexam; Claims 1, 2, 5
13 and 6 are going to come out of the reexamination
14 proceeding without amendment. All of the Defendants'
15 invalidity contentions in this case, all the prior art,
16 all their invalidity charts have been before the
17 examiner during the reexamination process. The
18 examiners have nevertheless determined that these
19 claims should be reissued without amendment and
20 Defendants' activities going forward is objectively
21 reckless.

22 And, Your Honor, there's one other issue
23 that we haven't discussed today, and that's actually
24 not in the briefing that I'd like to call to the
25 Court's attention.

1 At some point in the past, Defendants
2 were in communication with the actual author of the
3 code, Alexey Kuznetsov, and the Defendants took their
4 first depositions of third-party prior art witnesses on
5 January 4th, 2011, about five days before the close of
6 fact discovery. In advance of that, Bedrock requested
7 that the Defendants produce any communications they had
8 with third parties. During the last week of December,
9 the Defendants produced an email from Mr. Kuznetsov,
10 the author of the accused code, to counsel for
11 Defendants in which Mr. Kuznetsov stated unequivocally
12 that the current Linux kernel actually contains logic
13 that could be considered as infringing the patent. He
14 also stated his belief that he felt that the prior art,
15 of which he was aware, did not collide with the claims
16 of the patent, and that the best the Defendants could
17 do would to seek an expert who could help them find a
18 loophole in the patent rules.

19 THE COURT: This is an email that he sent
20 to who?

21 MR. HEJNY: To counsel for Defendants,
22 Your Honor. And I've got a copy if the Court would
23 like to see it.

24 THE COURT: Okay. So that would be --
25 you're saying you want to introduce that as evidence of