

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF VIRGINIA
 Alexandria Division

TECSEC, INCORPORATED,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Case No. 1:10cv115
)	(LMB/TCB)
INTERNATIONAL BUSINESS MACHINES)	
CORPORATION, <i>et al.</i> ,)	
)	
<i>Defendants</i>)	

**DEFENDANT IBM’S REPLY BRIEF IN
 SUPPORT OF ITS EMERGENCY MOTION TO ENFORCE**

Defendant International Business Machines Corporation (“IBM”) respectfully submits this reply brief in support of its Emergency Motion To Enforce (Dkt. Nos. 335-336). In its opposition, TecSec (citing *In re Deutsche Bank*) argues as if a stipulated patent prosecution bar had not already entered by the Court (Dkt. No. 346). There is one, however, and IBM *relied* on the *Stipulated Protective Order* when making its extensive production of Highly Confidential technical and source code materials, which the Hunton & Williams lawyers have reviewed in detail. TecSec and Hunton & Williams are simply trying to change the rules after the game has been played. That is unfair: “It is ‘presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied.’ ... Once a court enters a protective order and the parties rely on that order, it cannot be modified ‘absent a showing of improvidence in the grant’ of the order or ‘some extraordinary circumstance or compelling need.’” *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005). TecSec shows no grounds for narrowing the scope of the patent prosecution bar to which it stipulated and on which IBM has relied during discovery. Narrowing the scope of the patent prosecution bar now would be unfair and competitively harmful to IBM.

ARGUMENT

As set forth in IBM's Emergency Motion to Enforce, the negotiated prosecution bar entered by the Court prohibits prosecution based on the highly confidential technical and source code materials "actually received" from IBM, not by the scope of TecSec's patents:

Persons who access [highly confidential technical or source code] materials of any Producing Party shall not, for a period of two (2) years following final resolution of this action, draft or revise patent claims, supervise or assist in the prosecution of any patent application involving *the particular technology or information disclosed in the* [highly confidential technical or source code] *materials actually received from the Producing Party*

(Dkt. No. 210 ¶ 22 at p. 20.) (emphasis added). This stipulated language is clear and requires no interpretation or narrowing. The scope of the stipulated patent prosecution bar is defined by "*the particular technology or information disclosed in the* [highly confidential technical or source code] *materials actually received from the Producing Party.*"

TecSec broadly defined the "Accused Products" in this case to encompass IBM's core database software, web server software, XML processing software, and encryption hardware and software. During discovery, TecSec defined the "Accused Products" as the following:

The term "Accused Product" shall apply to and be defined to include the following products: DB2 Version 8+, Cryptographic Accelerator PCI, eServer 2900, Cryptographic Co-Processor PCI 4758, Cryptographic Co-Processor PCI-X 4764, Crypto Express2 (all versions), Crypto Express3 (all versions), Informix Dynamic Server Versions 10.x and 11.x, Websphere Application Server Versions 1, 5, 5.1, 6, 6.1, and 7+, WebSphere DataPower B2B Appliance XB60 Versions 3.7.3, 3.7.x and 3.8+, WebSphere DataPower X150 Integration Appliance Version 3.1+, WebSphere DataPower XML Security Gateway XS40 Versions 2.5+, 3.x, System Mainframe z10 and z9, IBM Data Encryption for IMS and DB2 Databases, IBM Database Encryption Expert, any other products identified in Plaintiff's Initial Infringement Contentions, other IBM products which include or are bundled with the aforementioned products, and other IBM products that include the ability to perform the following functions as defined below: Sub-

file Encryption, Access Control, XML Encryption, Split Key Cryptography or Encryption with Parallel Processors.

(*TecSec 1st Set of Interrogatories* at 6-7.) And TecSec demanded production of “all” highly confidential technical and source code materials related to each of these products:

Request No. 17: All documents relating to the design, development, structure and/or operation of any of the Accused Products made, used, sold, or offered for sale by Defendant, including without limitation documents concerning product design, testing, manufacturing, implementation, marketing requirements, business requirements, engineering response, technical response, technical specifications, user manuals, administrative manuals and support manuals.

(*TecSec 1st Set of Document Requests* at 7 (incorporating by reference the above definition of “Accused Product”).) IBM produced the requested highly confidential technical and source code materials regarding all “Accused Products.” Importantly, IBM’s production was not limited to those aspects of the “Accused Products” that perform encryption functions, but to the entire operation of the accused systems and products.

IBM respectfully submits that, having “actually received” all of IBM’s highly confidential technical and source code materials for the “Accused Products,” none of the attorneys or other individuals with access to this information should be participating in prosecuting patents in the technologies embodied in the “Accused Products.” The risk of inadvertent disclosure or reliance upon IBM’s confidential information in connection with such patent prosecution is too high. IBM respectfully submits that the stipulated prosecution bar should be enforced to cover at least the following technologies:¹

¹ IBM previously identified “networking software” as another technology area that should be encompassed within the prosecution bar. While the disclosed technical documents include substantial confidential networking technology, it is less central to the focus of this case than the

(Continued...)

- **Database Software:** IBM has produced voluminous highly confidential technical documents and source code relating to its core database software technologies, including for its DB2 and Informix Dynamic Server database management systems.
- **Web Server and XML Processing Software:** IBM has produced voluminous highly confidential technical documents and source code relating to web server and XML processing software, including for its WebSphere Application Server, WebSphere DataPower B2B Appliance XB60, WebSphere DataPower X150 Integration Appliance, and WebSphere DataPower XML Security Gateway XS40 product families.
- **Encryption Hardware and Software:** IBM has produced voluminous highly confidential technical documents and source code relating to encryption hardware and software, including for its Cryptographic Co-Processor PCI 4758, Cryptographic Co-Processor PCI-X 4764, Crypto Express 2 and 3, Data Encryption for IMS and DB2 Databases, and Database Encryption Expert.²

The millions of pages of highly confidential technical documents and source code produced by IBM for the accused products reveal trade secrets and proprietary information relating to all aspects of these technologies, so prosecution in these areas must be barred.

Accordingly, having itself broadly defined the term “Accused Products,” it is not unfair to use that term to define the scope of the patent prosecution bar. The breadth of the patent prosecution bar is a function of TecSec’s own decision on how to approach discovery in this case. Having sought the broadest possible scope of technical and source code discovery, TecSec cannot be heard to complain about the scope of the patent prosecution bar to which it stipulated

other identified technologies and IBM will withdraw this category for purposes of narrowing the scope of the prosecution bar. IBM does not, however, agree that anyone with access to this or any other IBM confidential information produced in this case may disclose or rely upon in any way any IBM confidential information for any purpose unrelated to this case.

² TecSec has also pursued discovery on what it characterizes as key management software. While IBM does not necessarily agree with TecSec’s characterizations regarding “key management,” the topic is related to encryption and thus need not be separately identified. For this reason, IBM withdraws “key management software” as a separate category for the prosecution bar.

in order to induce IBM to make its production. Thus, the TecSec lawyers—at both Hunton & Williams and DiNovo Price—who have reviewed IBM’s highly confidential technical and source code materials should be barred from prosecuting patents in any technology embodied in the “Accused Products,” which include the following:

- database software;
- web server software;
- XML processing software; and
- encryption hardware and software.

Any narrower definition would be unfair and competitively harmful to IBM. TecSec cannot change the rules after the fact, or subject IBM to competitive risks simply because the TecSec lawyers had not thought through the consequences of their participation in this action.

CONCLUSION

For the foregoing reasons and those stated in IBM’s opening brief, IBM respectfully submits that the scope of the patent prosecution bar should include the following technologies:

- database software;
- web server software;
- XML processing software; and
- encryption hardware and software.

Thus, IBM’s emergency motion to enforce the *Stipulated Protective Order* should be granted.

Dated: September 20, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2010, a true and correct copy of the foregoing pleading or paper was served using the Court's CM/ECF system, with electronic notification of such filing to all counsel of record:

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