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RE: *Bedrock Computer Techs., LLC v. Softlayer Techs., Inc.*, 6:09-CV-00269  
Plaintiff's Supplemental Letter Brief Regarding Willful Infringement

Dear Judge Love:

Plaintiff Bedrock Computer Technologies, LLC ("Bedrock") hereby submits this supplemental letter brief with respect to the issues raised during the February 16, 2011 hearing on Defendants' request for leave to file a motion for summary judgment of no willful infringement of the '120 patent. [Dkt. No. 491] For the reasons described herein, Bedrock respectfully requests that the Court deny Defendants' proposed motion.

Willfulness is a question of fact, determined by the totality of circumstances presented by each case.<sup>1</sup> The issue of willfulness is thus relegated to the trier of fact for resolution, stemming from a patentee's Seventh Amendment right to a trial by jury.<sup>2</sup> Accordingly, like any other issue triable to a jury, Bedrock is entitled to a jury trial on the issue of willfulness if the evidence leaves material questions of fact.<sup>3</sup> As will be demonstrated herein, ample evidence of record illustrates that Defendants have continued to infringe the '120 patent despite having no tenable defense to avoid liability. To be clear, the Defendants have been willfully infringing the '120 patent as soon as they had an opportunity to examine the merits of this case and concluded that there is no tenable defense. The evidence discussed in this brief does not mark the beginning of the time period of the Defendants' willful infringement. Rather, the evidence discussed in this letter is evidence that the Defendants' defenses are—and always have been—without merit. Bedrock acknowledges that not every case will support a material issue of fact when the alleged willful infringement is based solely on post-suit activity. Some cases, however, are so clear on the merits that a defendant's continued litigation is objectively reckless. This is one such case, and Bedrock has numerous facts establishing as much. As such, summary judgment is inappropriate, and Bedrock should be permitted to present its evidence of willfulness to the jury.<sup>4</sup>

An example of Bedrock's evidence of willful infringement is an e-mail that Alexey Kuznetsov sent to Defendants on December 3, 2010. This email is sufficient to illustrate willfulness as it illustrates that the Defendants' invalidity and noninfringement defenses are facially untenable. As background, Mr. Kuznetsov authored a large portion of the Linux route.c code that is accused in this case, including code in prior art versions of Linux. Defendants, on

<sup>1</sup> See *SRI Int'l v. Advanced Tech. Lab.*, 127 F.3d 1462, 1465 (Fed. Cir. 1997).

<sup>2</sup> See *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1547 (Fed. Cir. 1983).

<sup>3</sup> See *Abstrax, Inc. v. Dell, Inc.*, 2009 U.S. Dist. LEXIS, \*8 (E.D. Tex. Oct. 7, 2009) (reversing grant of summary judgment of no willful infringement where evidence could permit a reasonable jury to find that the defendant's conduct met standard of willfulness).

<sup>4</sup> *Id.* at \*8.

their own volition, contacted Mr. Kuznetsov, offered to pay Mr. Kuznetsov for his assistance, and requested his opinion on whether (1) the claims of the '120 patent were anticipated by prior art versions of Linux, and (2) whether the claims were infringed by the accused versions of Linux.<sup>5</sup> Mr. Kuznetsov's opinion swiftly and explicitly dispelled both of Defendants' invalidity and noninfringement defenses. Denying that the '120 patent was invalid, Mr. Kuznetsov stated: "My analysis showed that code written by me does not actually collide with forementioned [sic] patent, my code uses quite different techniques."<sup>6</sup> Confirming infringement by accused Linux versions, Mr. Kuznetsov went on to state that "current Linux kernel actually contains logic which could be considered as infringing the patent,"<sup>7</sup> and again confirmed this opinion at his deposition.<sup>8</sup>

Moreover, Mr. Kuznetsov was not the only prior art witness that communicated this opinion directly to Defendants. Indeed, in August and November 2010, Defendants initiated contact with two additional prior art witnesses, offered to pay these prior art fact witnesses for their assistance, and nevertheless received two separate opinions that the '120 patent was valid in light of the prior art. In August 2010, third-party prior art witness Shawn Ostermann, upon review of the '120 patent and prior art code called "gcache," sent an email to Defendants stating that an "important distinction" existed between the prior art and the '120 patent.<sup>9</sup> In November 2010, third-party prior art witness Dan McDonald, upon review of the '120 patent and the NRL code, sent an email to Defendants stating that "I cannot help you use NRL code to defend against this troll."<sup>10</sup> The receipt of infringement and validity analyses from three separate prior art witnesses demonstrates Defendants' willful infringement, and the jury should be permitted to confirm as much.

Further, on January 14, 2011, the USPTO confirmed the validity of the asserted claims of the '120 patent (claims 1, 2, 5, and 6) after considering Defendants' invalidity contentions and each of the prior art references cited by Defendants during *ex parte* reexamination proceedings.<sup>11</sup> As a result of the re-exam, the Defendants' invalidity defenses amount to nothing more than

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<sup>5</sup> See Kuznetsov Deposition [hereinafter "Kuznetsov Dep."], at Ex. 8.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Kuznetsov Dep., at 120:9-13.

<sup>9</sup> See Ostermann Deposition [hereinafter "Ostermann Dep."], at 107:15-25 ("Q: ... So in August 2010 you wrote an email to the defense counsel in this case saying that you had found an important distinction between the 120 patent and the gcache code; is that right? A: Correct. Q: And at some point between then and now you reached an agreement to receive a hundred dollars an hour for your time in giving testimony in this case; is that correct? A: Correct.").

<sup>10</sup> See McDonald Deposition [hereinafter "McDonald Dep."], at Ex. 8; see also McDonald Dep., at 107:17-24 through 108:1-12.

<sup>11</sup> See USPTO Notice of Intent to Issue Ex Parte Reexamination Certificate dated January 14, 2011 [hereinafter "Reexamination Certificate"].

second-guessing the USPTO, and the re-exam demonstrates the objective and subjective willfulness of Defendants' continued infringement.<sup>12</sup>

The objectively high likelihood that Defendants' infringe the '120 patent is further evidenced by Defendants' expert reports and Defendants' motion for summary judgment of noninfringement. Defendants rely on strained interpretations of the claims that are, in fact, collateral attacks on the Court's constructions. For example, Defendants' argue that the record removal must occur during traversal of the linked list—a construction specifically rejected by the Court.<sup>13</sup> Defendants' noninfringement arguments are objectively reckless, and they evidence the objective and subjective willfulness of Defendants' continued infringement.

For all of the reasons discussed herein, as well as the reasons discussed in Bedrock's prior letter briefs on willfulness [Dkt. Nos. 381 and 384], substantial evidence demonstrates that the Defendants' defenses are meritless, and the Defendants have been willfully infringing the '120 patent. The jury should therefore be allowed to answer a question on willful infringement. For these reasons, Bedrock respectfully requests that the Court deny Defendants' request for summary judgment of no willful infringement.

Regards,

*/s/ Douglas A. Cawley*

Douglas A. Cawley

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<sup>12</sup> See *Webmap Techs., LLC v. Google, Inc.*, 2010 U.S. Dist. LEXIS, at \*9 (E.D. Tex. Sept. 10, 2010) (a patent's emergence from reexamination proceedings without addition of narrowing claim limitations constitutes evidence of post-suit willfulness).

<sup>13</sup> See, e.g., Memorandum Opinion and Order dated January 11, 2011 at 18-22.