

I. INTRODUCTION

Plaintiff Bedrock Computer Technologies LLC (“Bedrock”) hereby submits its response to Defendant Yahoo! Inc. (“Yahoo”)’s 12(b)(6) Motion to Dismiss for Failure to State a Claim for Willful Infringement in Response to Plaintiff’s Third Amended Petition (“the Complaint”). Yahoo’s Motion, Dkt. No. 473. Bedrock’s claim for willful infringement of U.S. Patent No. 5,893,120 (“the ‘120 Patent”) is supported by significant factual evidence in this Court’s record,¹ and undoubtedly surpasses the threshold pleading requirements to overcome Yahoo’s motion to dismiss.

Bedrock’s Third Amended Petition adequately pleads factual bases that allows the Court to draw the reasonable inference that Yahoo is liable for willful infringement. Yahoo’s motion to dismiss fails to establish that Bedrock’s complaint fails to clear that low hurdle. Accordingly, Yahoo’s motion should be denied in its entirety.

II. ARGUMENT

A. Yahoo Cannot Show that Dismissal is Warranted

Yahoo’s argument wholly avoids the legal framework governing a motion to dismiss. Rule 8(a) requires only that a complaint contain allegations sufficient to show that the plaintiff has facially plausible grounds for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the

¹ Bedrock hereby incorporates the issued raised in Bedrock’s letter briefs with respect to Defendants’ proposed motion for summary judgment of no willful infringement, in Dkt. Nos. 413, 414, and 496, as well as the arguments raised by Bedrock’s counsel in the February 16, 2011 hearing before this Court. The references incorporated set forth evidence that, prior to January, 2011, Defendants requested and received opinions of three prior art authors and witnesses in this case: Alexy Kuznetsov, Dan McDonald, and Shwan Ostermann. Each of the three prior art witnesses opined that the ‘120 Patent was valid in light of the prior art and expressly communicated this to Defendants via e-mail. Moreover, Mr. Kuznetsov opined that the accused Linux versions infringe the ‘120 Patent. These additional facts of record are consistent with Bedrock’s claim for willful infringement and illustrate that “extenuating circumstances” render Yahoo’s continuing conduct objectively reckless.

court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Dismissal under Rule 12(b)(6) is warranted only where the complaint’s factual allegations fail to “raise a right to relief above the speculative level,” or fail to support a legally cognizable theory of recovery. *Twombly*, 550 U.S. at 555. So long as a complaint contains facial plausibility, dismissal is inappropriate “even if it appears that a recovery is very remote and unlikely.” *Id.* at 556.

Tellingly, Yahoo does *not* argue that Bedrock’s claim for willful infringement is unsupported by factual allegations, nor does Yahoo attempt to discredit the facts underlying Bedrock’s willfulness claim. In effect, Yahoo’s motion fails to show that Bedrock’s Complaint lacks facial plausibility, and that dismissal is warranted. The entirety of Yahoo’s motion is instead based on the argument that Yahoo’s conduct is *not* willful under the facts of this case. *See* Yahoo’s Mot., at 3 (arguing that Bedrock fails to state a claim because “Yahoo! has an objectively reasonable and good-faith basis for asserting that the claims of the ‘120 Patent are both not infringed and invalid”). In making this argument, Yahoo necessarily admits that Bedrock’s allegations are grounded in fact — that is, that Bedrock has indeed met the requirements of Rule 8(a).

Yahoo’s argument falls far short of showing that dismissal is warranted and, at best, merely posits that recovery is improbable. However, Supreme Court precedent makes clear that “a well-pleaded complaint may proceed even if it strikes a savvy judge that proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Id.* at 556. Even if reasonable jurors could disagree as to whether Yahoo’s infringement of the ‘120 Patent was willful, this is not sufficient grounds for dismissal under Rule 12(b)(6). Yahoo has not and cannot show that

Bedrock's claim for willful infringement fails to present any plausible right to relief. Indeed, dismissal is inappropriate and Yahoo's motion should be denied.

B. Bedrock Has Adequately Pled a Claim for Willful Infringement

1. Post-Suit Willful Infringement is a Legally Cognizable Claim

It cannot be disputed that willful infringement constitutes a legally cognizable claim upon which relief may be granted. *See* 35 U.S.C. § 284. A plaintiff may recover for willful infringement where it can show that the defendant "acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007). Contrary to Yahoo's assertions, a plaintiff is *not* required to seek a preliminary injunction as a prerequisite to asserting a claim for post-suit willful infringement. *See Webmap Techs., LLC v. Google, Inc.*, 2010 U.S. Dist. LEXIS 104137, *9 (E.D. Tex. Sept. 10, 2010); *St. Clair Intellectual Property Consultants, Inc. v. Palm, Inc.*, Case No. 06-404, 2009 U.S. Dist. LEXIS 49922, *4 (June 10, 2009) ("Further, there is no *per se* requirement for a plaintiff to file for preliminary injunctive relief before raising a willful infringement claim."). When extenuating circumstances occurring *after* the filing of the lawsuit give rise to an objectively high likelihood that the defendant's continuing conduct infringes a valid patent, a plaintiff may recover for post-suit willful infringement. *Webmap Techs., LLC v. Google, Inc.*, 2010 U.S. Dist. LEXIS 104137, at *9; *Ultratech Int'l, Inc. v. Aqua-Leisure Indus., Inc.*, Case No. 3:05-CV-134, 2009 U.S. Dist. LEXIS 80997, *7-*9 (M.D. Fla. Mar. 3, 2009).

2. Bedrock's Complaint Adequately Pleads Facial Plausibility of Relief

Bedrock's Complaint contains factual allegations that are sufficient to show that that relief for post-suit willful infringement is facially plausible. (Compl. at ¶¶ 22-24.) In *Webmap Technologies, LLC v. Google, Inc.*, the United States District Court for the Eastern District of Texas held that, where "extenuating circumstances" exist, a plaintiff may sustain a claim of post-

filing willful infringement despite the plaintiff's failure to first seek a preliminary injunction. 2010 U.S. Dist. LEXIS 104137, at *9 (E.D. Tex. Sept. 10, 2010). "Those circumstances include a material change that could create an objectively high likelihood of infringing a valid patent, *such as a patent surviving reexamination proceedings without narrowed claims.*" *Id.*, at *9-*10 (citing *St. Clair Intellectual Property Consultants, Inc. v. Palm, Inc.*, 2009 U.S. Dist. LEXIS 49922 (Dist. Del. June 10, 2019)).

The "extenuating circumstances" sufficient to sustain a claim for post-suit willful infringement discussed in *Webmap* and *St. Clair* are identical to the factual circumstances pled in Bedrock's Complaint. Bedrock's Complaint states that an *ex parte* reexamination proceeding was initiated with respect to the '120 Patent on February 9, 2010 (Compl. at ¶ 21). The Complaint further states that the "USPTO issued a Notice of Intent to Issue Ex Parte Reexamination Certificate" ("Notice of Intent") confirming the patentability and validity of all claims of the '120 Patent. (Compl. at ¶ 23.) Bedrock expressly alleged that asserted "claims 1, 2, 5, and 6 remain unchanged" and provided evidence thereof by attaching the Notice of Intent to the Complaint. (Compl. at ¶ 22; Ex. B to Compl.) The Notice of Intent included the Examiner's comments confirming the validity of the '120 Patent, as well as the statement that "Prosecution on the merits is (or remains) closed." (Ex. B to Compl. at 3.) Finally, the Complaint alleges that Defendant's were aware of the aforementioned extenuating circumstances, yet "nevertheless continued their infringing activities." (Compl. at ¶ 22.) In sum, Bedrock's Complaint set forth facts sufficient to show that its entitlement to relief far exceeds the threshold "facial plausibility" required by Rule 8(a). Yahoo's motion does not dispute these facts.

Moreover, the facts pleaded in this case even surpass those found to be “extenuating” in *Webmap* and *St. Clair*, because the identical prior art references and invalidity arguments raised by Yahoo in this case were before the USPTO and expressly rejected. (Ex. B to Compl., at 9-18.) The references considered by the Examiner during the reexamination proceedings were listed in the Notice of Intent attached to Bedrock’s Complaint. This provides adequate grounds for the Court to infer that Bedrock is plausibly entitled to relief. Further, the Notice of Intent includes evidence that Defendants’ invalidity charts were also before the USPTO during the reexamination, and were expressly rejected as invalidating the ‘120 Patent. (Ex. B to Compl., at 17 (indicating that the 130 page “Exhibit_A_Bedrock_Softlayer_Technologies_130p_.pdf” file was submitted to the USPTO by the *ex parte* applicant).) As a result of the re-exam, Yahoo’s invalidity defenses amount to nothing more than second-guessing the USPTO, and the Notice of Intent demonstrates the objective and subjective willfulness of Yahoo’s continued infringement. These facts — housed in Bedrock’s Complaint — show that Bedrock’s entitlement to relief is not only plausible — it is likely. Accordingly, dismissal under Rule 12(b)(6) is inappropriate and Yahoo’s motion should be denied.

III. CONCLUSION

For all of the reasons discussed herein, Bedrock’s Complaint states a claim for willful infringement upon which a court may grant relief. Yahoo’s motion fails to show that dismissal is appropriate under the extenuating circumstances that are present in this case. Accordingly, Bedrock respectfully requests that the Court deny Yahoo’s motion to dismiss in its entirety.

DATED: February 28, 2011

Respectfully submitted,
McKOOL SMITH, P.C.

/s/ Douglas A. Cawley
Sam F. Baxter
Texas Bar No. 01938000

McKOOL SMITH, P.C.

sbaxter@mckoolsmith.com

104 E. Houston Street, Suite 300

P.O. Box 0

Marshall, Texas 75670

Telephone: (903) 923-9000

Facsimile: (903) 923-9099

Douglas A. Cawley, Lead Attorney

Texas Bar No. 04035500

dcawley@mckoolsmith.com

Theodore Stevenson, III

Texas Bar No. 19196650

tstevenson@mckoolsmith.com

Scott W. Hejny

Texas Bar No. 24038952

shejny@mckoolsmith.com

Jason D. Cassady

Texas Bar No. 24045625

jcassady@mckoolsmith.com

J. Austin Curry

Texas Bar No. 24059636

acurry@mckoolsmith.com

Phillip M. Aurentz

Texas Bar No. 24059404

paurentz@mckoolsmith.com

Stacie Greskowiak

Texas State Bar No. 24074311

sgreskowiak@mckoolsmith.com

Ryan A. Hargrave

Texas State Bar No. 24071516

rhargrave@mckoolsmith.com

McKOOL SMITH, P.C.

300 Crescent Court, Suite 1500

Dallas, Texas 75201

Telephone: 214-978-4000

Facsimile: 214-978-4044

Robert M. Parker

Texas Bar No. 15498000

Robert Christopher Bunt

Texas Bar No. 00787165

PARKER, BUNT & AINSWORTH, P.C.

100 E. Ferguson, Suite 1114

Tyler, Texas 75702

Telephone: 903-531-3535

Facsimile: 903-533-9687
E-mail: rmparker@pbatyler.com
E-mail: rcbunt@pbatyler.com

**ATTORNEYS FOR PLAINTIFF
BEDROCK COMPUTER
TECHNOLOGIES LLC**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on February 28, 2011. As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Stacie L. Greskowiak
Stacie L. Greskowiak