UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC, Plaintiff, v. SOFTLAYER TECHNOLOGIES, INC., *et al*.; Defendants.	Civil Action No. 6:09-cv-00269-LED JURY TRIAL DEMANDED

DEFENDANT YAHOO! INC'S REPLY TO BEDROCK'S RESPONSE TO YAHOO!'S 12(B)(6) MOTION FOR FAILURE TO STATE A CLAIM FOR WILLFUL INFRINGEMENT IN PLAINTIFF'S THIRD AMENDED COMPLAINT

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) Defendant Yahoo! Inc. ("Yahoo!") respectfully files this Reply to Bedrock's Response to Yahoo!'s 12(b)(6) Motion for Failure to State a Claim for Willful Infringement (Dkt. No. 532) in response to Plaintiff's Third Amended Complaint ("Complaint") (Dkt. No. 473).

II. ARGUMENT

Introducing its willfulness theory after the close of expert discovery, Bedrock's basis for alleging that Yahoo! has willfully infringed the '120 patent in its Complaint is the USPTO's January 14, 2011 announcement of a notice of intent to issue a reexamination certificate for the '120 patent. *See* Complaint, Ex. B (Dkt. No. 410-2). Yahoo! argued in its motion to dismiss, *inter alia*, that the allegations were both unwarranted and in any event premature because an intent to issue a certificate is not the same as actually issuing a certificate, which has not issued and may never issue. *See* Yahoo's Mot. to Dis. at § II(A)(2). Indeed, Yahoo! has recently

learned that the USPTO issued a second reexamination order for the '120 patent on February 22, 2011, which Bedrock failed to mention in its February 28, 2011 response to Yahoo!'s motion to dismiss. *See* Exhibit A.[1] Unlike the "extenuating circumstances" described in *Webmap Technologies, LLC v. Google, Inc.*, 2010 WL 3768097 (E.D. Tex. Sept. 10, 2010) (Everingham, J.), there is still a substantial new question of patentability in the USPTO about the validity of the asserted patent. Moreover, the first reexamination resulted in some claims being amended in view of the prior art, supporting Yahoo!'s good faith belief in its challenge to the validity of the '120 patent.

In an attempt to bootstrap its new willfulness theory into its pleadings, Bedrock wrongfully imputes knowledge and intent to Yahoo!. For example, in footnote 1 of its Response, Bedrock points to its February 21, 2011 Letter Brief No. 496, alleging that: "The references set forth evidence that, prior to January, 2011, ***Defendants*** requested and received opinions of three prior art witnesses in this case…," and that "these additional facts of record are consistent with Bedrock's claim for willful infringement and illustrate that 'extenuating circumstances' render ***Yahoo's*** conduct objectively reckless." (Emphasis added). Putting aside the lack of merit to these allegations as to any of the Defendants, there is no evidence in any of Bedrock's papers that Yahoo! was a party to these communications with the third parties.

[1]Although the Court generally should not look beyond the scope of the pleadings, it is permitted to take judicial notice of the USPTO's new reexamination order and consider the documents for purposes of Yahoo!'s motion to dismiss. *See Dorsey v. Portfolio Equities, Inc*., 540 F.3d 333, 338 (5th Cir. 2008) ("Generally, a court ruling on a motion to dismiss may rely only on the complaint and its proper attachments.")(Citation omitted). "A court is permitted, however, to rely on 'documents incorporated into the complaint by reference and matters of which a court may take judicial notice.'" *Id*. quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007); *see also* FED. R. EVID. § 201.

III. CONCLUSION

For the foregoing reasons, Yahoo! respectfully requests that this Court dismiss Bedrock's claim against Yahoo! for willful infringement of the '120 Patent pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 10, 2011, a true and correct copy of the foregoing document entitled DEFENDANT YAHOO! INC'S REPLY TO BEDROCK'S RESPONSE TO YAHOO!'S 12(B)(6) MOTION FOR FAILURE TO STATE A CLAIM FOR WILLFUL INFRINGEMENT IN PLAINTIFF'S THIRD AMENDED COMPLAINT has been sent to the following counsel of record by electronic mail via the CM/ECF system pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5(a)(3). Any other counsel of record will be served by U.S. Mail.

/s/ John C. Low
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