



## I. INTRODUCTION

Bedrock's motion amounts to little more than an attempt at an end-run around the Court's rejection of Bedrock's prior attack on Google's and Match.com's (collectively, "Defendants") standing defense. In its letter brief requesting permission to seek summary judgment on that defense, Bedrock argued that Defendants "lack sufficient evidence to establish the affirmative defense[] of lack of standing . . . ." Although the Court denied that request, Bedrock now doubles-back to challenge Defendants' counterclaim for lack of standing.

Defendants' counterclaim, like their affirmative defense, is *at a minimum* supported by sufficient evidence to be tried to the jury. Thus, Bedrock now raises a purely procedural challenge, arguing that a counterclaim is an improper way to plead lack of standing. Under Federal Circuit law, however, challenges to standing can be raised at any time and can be pled as an affirmative defense, a counterclaim, or both. This remains true whether Defendants claim an ownership interest in the patent-in-suit or not. Because Defendants' counterclaim seeking a declaration that ownership of the patent-in-suit never vested in Bedrock due to a prior assignment is adequately and properly plead under federal pleading standards, Bedrock's motion should be denied.

Moreover, Bedrock's attempts to elevate to preclusive effect Magistrate Judge Love's recommendation order must also fail. Although Magistrate Judge Love recommended Defendants' motion to dismiss Bedrock's infringement claims for lack of standing be denied, his recommendation offered no reasons for this conclusion. As such, it provides no basis for dismissing Defendants' standing counterclaim (or its affirmative defense, for that matter). And it certainly does not establish, as Bedrock claims, that Bedrock is entitled to a conclusive ruling

that it owns the patent-in-suit as no such finding has even been requested let alone been decided in Bedrock's favor.

For at least these reasons, Bedrock's motion to dismiss Defendants' counterclaim for lack of standing should be denied.

## **II. ARGUMENT**

### **A. Lack of Standing Can be Raised at Any Point in Litigation**

"Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994), *rehearing denied*, 510 U.S. 1215 (1994). "It is well-established that any party, and even the court *sua sponte*, can raise the issue of standing for the first time at any stage of the litigation, including on appeal." *Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1367 (Fed. Cir. 2003); *Rick's Mushroom Service, Inc. v. U.S.*, 521 F.3d 1338, 1346 (Fed. Cir. 2008).

Here, Defendants raised the issue of standing as both an affirmative defense and as a counterclaim. (Dkt No. 476 (Google's Answer to Bedrock's Third Amd. Cmpl.), at 8, 11-12; Dkt No. 477 (Match.com's Answer to Bedrock's Third Amd. Cmp.), at 9, 12-13.) And while a final decision on Defendants' motion to dismiss Bedrock's infringement claims for lack of standing is pending, Defendants assert that dismissal of their counterclaim or their affirmative defense would be improper.

### **B. Defendants Properly Pled Lack of Standing as a Counterclaim and an Affirmative Defense**

Contrary to Bedrock's claim that "Defendants improperly raise the issue of Bedrock's standing to sue as a counterclaim," ownership can be plead as an affirmative defense *and* a counterclaim, not just one or the other. *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 583 F.3d 832, 840 (Fed. Cir. 2009) ("There is no indication that [defendant]

Roche erred when it pleaded ownership as both a declaratory judgment counterclaim and an affirmative defense, nor any reason why Roche could not have pleaded both to preserve its arguments.”); *Dubied Mach. Co. v. Vt. Knitting Co.*, 739 F.Supp. 867, 871 n. 3 (S.D.N.Y.1990) (“It is permissible to label a response to a plaintiff’s cause of action as both an affirmative defense and as a counterclaim.”). Thus, Defendants have done no wrong by pleading lack of ownership as both a declaratory judgment counterclaim and an affirmative defense, and were well within their rights to preserve both arguments.

Bedrock relies on a single district court decision from Wisconsin to argue that standing cannot be pled as a counterclaim. (Motion, at 1.) However, to the extent *Ardisam, Inc. v. Ameristep, Inc.*, 302 F. Supp. 2d 991, 993 (W.D. Wis. 2004) stands for this proposition, it is wrongly decided. As discussed above, under controlling Federal Circuit law, standing based on lack of patent ownership may be pled as an affirmative defense or a counterclaim. *Roche*, 583 F.3d at 840.

**C. Defendants Need Not Assert Any Ownership Interest in the Patent-in-Suit to Contest Bedrock’s Ownership**

Bedrock asserts that because Defendants have not asserted any ownership interest in the patent-in-suit, they have no standing to challenge Bedrock’s ownership by declaratory judgment. This argument does not stand up to scrutiny. Defendants need not have any ownership interest in the patent-in-suit – nor assert that they do – to seek a declaratory judgment of no standing based on lack of patent ownership. They need only satisfy the test for declaratory judgment jurisdiction. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (“Basically, the question in each case is whether the facts alleged, under all circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient

immediacy and reality to warrant the issuance of declaratory judgment.”). Bedrock cites no authority to the contrary. (*See* Motion at 2.)

Bedrock’s argument is that Defendants cannot show “injury-in-fact,” which is part of the “substantial controversy” required for declaratory judgment jurisdiction. (*Id.*) However, given the current status of the litigation, Defendants can readily establish the three requirements for injury-in-fact. *See Teva Pharm. USA, Inc. v. Novartis Pharm. Corp.*, 482 F.3d 1330, 1337 (Fed. Cir. 2007). The injury to Defendants arising from Bedrock’s assertion of a patent it does not own for money damages and a preliminary injunction is: (1) “personal” (because the patent infringement lawsuit is affecting Defendants adversely – by directly costing time, money, and other resources – and will continue to do so); (2) “concrete and particularized” (because Bedrock’s infringement allegations are solely based on the patent being challenged by Defendants); and (3) “actual or imminent” (because the litigation is ongoing and set for trial in less than a month). “Taken as a whole, these circumstances establish a justiciable controversy with [Bedrock] that can be resolved by allowing [Defendants] to bring a declaratory judgment.” *Id.* at 1341 (finding declaratory judgment jurisdiction on patent claims). For this reason too, Bedrock’s motion should be denied.

**D. The Magistrate Judge’s Order Denying Defendants’ Motion to Dismiss is Not Final and Did Not Make Factual Findings as to Bedrock’s Ownership of the Patent-in-Suit**

Presumably relying on Magistrate Judge Love’s March 4th recommendation on the Defendants’ motion to dismiss for lack of standing, Bedrock states that it has “affirmatively established [its] ownership and Defendants’ [sic] have not met their burden to establish that Dr. Nemes previously assigned the ‘120 patent to Bellcore.” But this reliance is misplaced. The one-page order is not final and merely recommends that the Defendants’ motion to dismiss be denied. The reasons for the denial are not set forth in the recommendation. Absent specific

factual findings, the recommendation, even if approved and final, should not preclude consideration by the jury of Defendants' counterclaim for lack of standing.

Absent factual findings, the basis for Magistrate Judge Love's recommendation that Defendants' motion to dismiss be denied is speculation. The recommendation could simply be a recognition that the standing facts and the facts underlying the merits of the cause of action are substantially intertwined, and thus that standing should be resolved at trial rather than on the pleadings. *See DBB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1291 (Fed. Cir. 2008). In any event, the District Court conducts a *de novo* review of a magistrate judge's recommendation on a dispositive motion. The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge," and "may also receive further evidence." 28 U.S.C. § 636(b)(1)(C). Here, there is nothing for the Court to review, let alone anything that can form the basis for conclusively determining ownership of the patent-in-suit by Bedrock.

**E. Defendants Have Adequately Pled Facts Sufficient to Support Their Counterclaim for Lack of Standing**

To survive a motion to dismiss, Defendants' counterclaim need only satisfy Federal Rule of Civil Procedure 8, which requires no more than a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); *see Teirstein v. Aga Medical Corp.*, 2009 WL 704138, at \*3 (E.D. Tex. March 16, 2009) (J. Davis) ("Counterclaims and affirmative defenses are subject to the same pleading requirements as complaints."). While sufficient facts must be pled to state a claim for relief that is plausible on its face, "detailed factual allegations" are not required. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550 (2007)); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (applying *Twombly* pleading standard to all federal

civil actions). A claim is plausible when the facts (which are assumed to be true) allow the court to draw the reasonable inference that the allegation is true. *Twombly*, 55 U.S. at 556.

In their Answers to Bedrock's Third Amended Complaint, Defendants each pled the following facts in support of their counterclaim for lack of standing:

The idea for the '120 Patent was created by the named inventor, Dr. Richard Nemes, either jointly or individually, while he was employed by Telcordia's predecessor, Bellcore. Under Dr. Nemes' Employee Agreement with Bellcore and a separate patent assignment, Dr. Nemes effected a present assignment of the inventions of the '120 Patent to Bellcore. Accordingly, when Dr. Nemes issued the '120 Patent, it was automatically the property of Bellcore and Dr. Nemes had no power to assign it to Bedrock.

(Dkt. No. 476, Count Three at ¶ 17; Dkt. No. 477, Count Three at ¶ 17).<sup>1</sup> Assuming these facts to be true, Defendants have stated facts sufficient to state a plausible claim for relief based on lack of standing. *See Teirstein*, 2009 WL 704138, at \*4 (Rule 8 requires pleading “‘only enough facts to state a claim for relief that is plausible on its face.’”) (citing *Twombly*, 550 U.S., at 570). And when these facts are taken together with Defendants' other allegations, (Dkt. No. 476, Count Three, at ¶¶ 14-16, 18; Dkt. No. 477, Count Three, at ¶¶ 14-16, 18), the counterclaim is “clear enough as to effectively put Plaintiff on notice of the legal and factual grounds for the asserted [] claim[.]” *Teirstein*, 2009 WL 704138, at \*4.

### **III. CONCLUSION**

For all of the reasons given above, Defendants Google and Match.com respectfully requests that Bedrock's Motion to Dismiss be denied in its entirety.

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<sup>1</sup> Defendants have fully briefed the issue of Bedrock's lack of standing. (Dkt Nos. 452, 541.)

Dated: March 22, 2011

/s/ Claude M. Stern, with permission by  
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on March 22, 2011. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Michael E. Jones