IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC,	§	
	§	
Plaintiff,	§	**CASE NO. 6:09-cv-269-LED**
	§	
v.	§	**Jury Trial Demanded**
	§	
SOFTLAYER TECHNOLOGIES, INC., et al.	§	
	§	
Defendants.	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO YAHOO! INC.'S MOTION TO DECLARE THIS AN EXCEPTIONAL CASE AND FOR ATTORNEYS' FEES AND COSTS PURSUANT TO 35 U.S.C. § 285

I. INTRODUCTION

Plaintiff Bedrock Computer Technologies LLC ("Bedrock") hereby submits its response in opposition to defendant Yahoo! Inc.'s ("Yahoo") Motion to Declare This an Exceptional Case and For Attorneys' Fees and Costs Pursuant to 35 U.S.C. § 285 ("Section 285") (Dkt. No. 842). This case is not "exceptional" within the meaning of Section 285, thus precluding any award of attorneys' fees. Accordingly, and for the reasons discussed herein, Bedrock respectfully requests that the Court deny Yahoo's motion.

II. LEGAL STANDARDS GOVERNING SECTION 285

Section 285 provides that "the court in exceptional cases may award reasonable attorneys' fees to the prevailing party." 35 U.S.C. § 285 (2011). The fact that a party prevailed in litigation does not, by itself, justify a finding that a case is exceptional, or that an award for attorneys' fees is appropriate. "Attorney fees are not to be routinely assessed against a losing party in litigation in order to avoid penalizing a party for merely defending or prosecuting a lawsuit." *Sulzer Textil A.G. v. Picanol N.V.*, Case No. 6:00-CV-279, 2002 U.S. Dist. LEXIS 27197, *4 (E.D. Tex. Mar. 11, 2002) (citing *Revlon, Inc. v. Carson Prods., Co.*, 803 F.2d 676, 679 (Fed. Cir. 1986)).

A court's decision to award attorneys' fees pursuant to Section 285 requires a two-step inquiry. *Sulzer*, 2002 U.S. Dist. LEXIS 27197, at *3. First, the court must determine whether the case is exceptional in nature, a factual question reviewed for clear error. *See Wedgetail, Ltd. v. Huddleston Deluxe, Inc.*, 576 F.3d 1302, 1304 (Fed. Cir. 2009). After determining that a case is exceptional, the court must then determine whether an award of attorneys' fees is appropriate. *Id.* A finding of exceptionality, however, does not mandate an award of attorneys' fees. The decision to award any fees is left to the sound discretion of the trial court, and is reviewed only for an abuse of discretion. *Id.*

As the Federal Circuit has consistently found, however, "only a limited universe of circumstances warrant a finding of exceptionality in a patent case." *Wedgetail*, 576 F.3d at 1304 (internal quotations omitted); *see also Bartex Research, LLC v. FedEx Corp.*, Case No. 6:07-CV-385, 2011 U.S. Dist. LEXIS 62107, *18 (E.D. Tex. June 10, 2011). The exceptional nature of the case must be established by clear and convincing evidence, and the burden of proof is on the party seeking attorneys' fees. *See Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005). Absent a patentee's inequitable conduct or litigation misconduct, the Federal Circuit has *only* permitted an award of attorneys' fees to a prevailing accused infringer if (1) "the litigation is objectively baseless" and (2) "the litigation is brought in subjective bad faith." *Wedgetail*, 576 F.3d at 1305 (citing *Brooks*, 393 F.3d at 1381); *see also Arbrook, Inc. v American Hospital Supply Corp.* 645 F2d 273, 279 (5th Cir. Tex. 1981) (finding abuse of discretion in district court's award of attorneys' fees, noting, "That a patent plaintiff has lost on the merits is not enough to warrant a fee award under § 285; such awards are proper only when the plaintiff has acquired his patent by fraud or brings an infringement suit with no good faith belief that his patent is valid and infringed.")

III. ARGUMENT

A. YAHOO MAY NOT OBTAIN ATTORNEYS' FEES BECAUSE THIS CASE IS NOT "EXCEPTIONAL."

Yahoo's motion should be denied because this case is not "exceptional," thus precluding any award of attorneys' fees under Section 285. Yahoo argues that Bedrock's theories on willfulness and damages were frivolous, and that Bedrock's continued litigation of those theories renders this case exceptional. Although Yahoo attempts to insert allegations of litigation misconduct throughout its motion, the crux of its claim is based on the alleged deficiencies in Bedrock's theories on willfulness and damages. Accordingly, Yahoo must prove that this case is

"exceptional" by setting forth clear and convincing evidence that (1) "the litigation is objectively baseless" and (2) "the litigation is brought in subjective bad faith." *See Wedgetail*, 576 F.3d at 1305 (citing *Brooks*, 393 F.3d at 1381).

This case is not exceptional—and thus Yahoo cannot meet its clear and convincing burden of proof—for three independent reasons. First, Yahoo's allegations, by themselves, cannot establish that the entire "*litigation* is objectively baseless" and that the entire "*litigation* is brought in bad faith," as is required by the Federal Circuit. Second, the litigation was not "objectively baseless" because Bedrock's theories on damages and willfulness were grounded in both law and fact. Third, Yahoo cannot prove that Bedrock acted with "subjective bad faith" when bringing this lawsuit. Incidentally, any alleged deficiencies in Bedrock's *execution* of its theories of damages or willfulness were a direct result of Yahoo's own litigation misconduct, which was sanctioned by this Court. (*See* Dkt. Nos. 756, 771.) Yahoo has not met its burden of proving exceptionality, nor will Yahoo be able to do so under the facts and circumstances surrounding this litigation. For these reasons, the Court should deny Yahoo's motion.

1. Yahoo's Claims are Insufficient to Prove that This Case is Exceptional.

To establish exceptionality, the Federal Circuit requires that a prevailing accused infringer prove that (1) "the litigation is objectively baseless" and (2) "the litigation is brought in subjective bad faith." *See Wedgetail*, 576 F.3d at 1305 (citing *Brooks*, 393 F.3d at 1381). Neither Section 285, nor the law of the Federal Circuit, has authorized an award of attorneys' fees to a prevailing accused infringer where the infringer cannot show that the patentee's *infringement* claim was objectively baseless and brought in subjective bad faith. Rather, "the pertinent inquiry is whether [the plaintiff] knew or should have known that it could not successfully assert the … patent against [the defendant], but pursued its infringement claim anyway." *Stephens v. Spectrum Labs., Inc.*, 393 F.3d 1269, 1274 (Fed. Cir. 2004); *see also*

iLOR, LLC v. Google, Inc., 631 F.3d 1372, 1378 (Fed. Cir. 2011) (for objective baselessness to exist, the asserted infringement argument must be "so unreasonable that no reasonable litigant could believe it would succeed").

Tellingly, Yahoo's motion does not attack the reasonableness of Bedrock's theory on infringement, which was the dispositive issue in this case. (*See* Dkt. No. 834, Jury Verdict Form.) Instead, Yahoo's entire claim for attorneys' fees is based on the grounds that Bedrock's theories on damages and willfulness were objectively baseless. (*See* Dkt. No. 842, at 11.) Yahoo's motion, however, does not point to any authority to support the proposition that deficiencies in a plaintiff's theories on willfulness and damages, alone, are sufficient to support a finding that the entire *litigation* was objectively baseless and brought in subjective bad faith. Nor does any such authority exist. In fact, the Federal Circuit has expressly *rejected* an expansive reading of Section 285, thereby precluding a finding of exceptionality in circumstances other than inequitable conduct before the USPTO, bad faith litigation, and willful infringement. *See Stephens v. Spectrum Labs.*, 393 F.3d at 1272 (citing *Forest Labs., Inc. v. Abbott Labs.*, 399 F.3d 1324, 1329 (Fed. Cir. 2003)). On its face, Yahoo's motion is insufficient to support a finding that this case is exceptional. As such, the Court should deny Yahoo's motion.

2. This Case was not "Objectively Baseless."

Yahoo's motion should be denied because Yahoo has not set forth any evidence—much less clear and convincing evidence—to prove that Bedrock's theories on willfulness and damages were "objectively baseless." A claim is only objectively baseless if "no reasonable litigant could believe it would succeed." *iLOR*, 631 F.3d at 1378. Thus, if evidence of record might cause fair-minded individuals to reach different conclusions, a claim will not be objectively baseless. *See Sulzer*, 2002 U.S. Dist. LEXIS 27197, at *4. Likewise, a claim

"cannot be considered baseless" if it has previously overcome a motion for summary judgment or a motion for judgment as a matter of law. *Id.* (citing *Beckman Instruments, Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551 (Fed. Cir. 1989).

This Court, on multiple occasions, has found that the evidence of record substantiates Bedrock's theories on both willfulness and damages. Upon careful review of the evidence and consideration of the arguments, the Court determined that Bedrock's theories were sufficient to overcome Yahoo's summary judgment attacks. (*See* Dkt. Nos. 496[1] and 542.[2]) The Court also determined that Bedrock's theories were sufficient to overcome Yahoo's motions for judgment as a matter of law. (*See* Apr. 29, 2011 Afternoon Tr., at 50-54.[3]) "The fact that [Bedrock's] claims survived [Yahoo's] Motion for Judgment as a Matter of Law shows that [Bedrock's] claims cannot be considered baseless." *See, e.g.*, *Sulzer*, 2002 U.S. Dist. LEXIS 27197, at *5. Yahoo's motion does not present any new reason to question the Court's findings and, contrary to any of Yahoo's implications, the jury's non-infringement verdict provides no guidance as to the viability of Bedrock's theories on damages and willfulness. The jury simply never reached those questions on the Jury Verdict Form. (*See* Dkt. No. 834.[4]) Yahoo cannot fulfill its burden

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[1] The Court issued an Order denying Defendants' letter briefs requesting permission to file a motion for summary judgment on the issue of damages. (Dkt. No. 450.)

[2] After conducting a hearing on Defendants' letter briefs requesting permission to file a motion for summary judgment of no willful infringement (*see* Feb. 16, 2011 Tr., at 23-24), the Court issued an Order stating that it would carry the motions on willfulness to trial, and setting procedures that contemplated a jury trial on the issue of willfulness. (Dkt. No. 540.)

[3] After Bedrock presented the issues of damages and willfulness to the jury, Yahoo moved for judgment as a matter of law as to both damages and willfulness. (*See* Apr. 29, 2011 Afternoon Tr. at 49.) The Court denied Yahoo's motions. (*See* Apr. 29, 2011 Afternoon Tr., at 50-54.)

[4] The Jury Verdict Form instructed the jury to answer the question of infringement (question 1) first, and "skip" the subsequent questions related to validity, willfulness, and damages (questions 2, 3, and 4, respectively) if it did not make the threshold finding that there had been infringement. (*See* Dkt. No. 834.)

of showing that Bedrock's theories were so deficient that "no reasonable litigant could believe that they would succeed." *See, e.g., iLOR*, 631 F.3d at 1378. For these reasons, Yahoo's motion should be denied.[5]

3. Yahoo's Litigation Misconduct Indicates That This Case Was Not Exceptional.

The Court may consider the litigation conduct of both parties in adjudicating a request for attorney fees. *See Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1575 (Fed. Cir. 1996) ("[T]he court may consider the litigation actions of both sides in connection with § 285."). Although Bedrock would not ordinarily raise such matters with the Court out of professional courtesy, Yahoo has pressed the issue of attorney fees and, therefore, Bedrock has no option but to raise Yahoo's conduct in this case in defense. Yahoo's litigation conduct included the following:

- Yahoo withheld performance testing documents throughout this litigation resulting in the sanction of exclusion of evidence and testimony, *see* Dkt. No. 771;
- Yahoo attempted to take discovery on Dr. David Garrod's ex-wife and Dr. Richard Nemes' ex-wife to probe into valuation of the patent as part of divorce proceedings, *see* Dkt. Nos. 355 and 423 (granting Bedrock's motions for protective order enjoining Defendants from deposing Ms. Helen Nemes and Ms. Leslie Garrod);

[5] Also relevant is the fact that other Defendants took a license from Bedrock. *See IP Innovation, L.L.C. v. eCollege.com*, 156 Fed. Appx. 317, 324 (Fed. Cir. 2005) ("Moreover, five companies with products similar to the defendant's products took a license to the patented technology, which inferentially supports IP Innovation's argument that it had reasonable grounds upon which to initially bring suit against Docent.").

- Yahoo paid a non-expert, prior art witnesses, after which he changed his opinion as to whether his prior work rendered the Bedrock patent invalid, *see* TT 4/29 a.m. at 37:8-38:24, *see also* PX 90;
- Yahoo first disclosed, on the second day of trial, that months earlier it had started rolling out Linux code with the accused infringing functionality disabled, resulting in the Court excluding any mention of that fact, *see* TT 4/28 a.m. at 3:7-5:18.
- Yahoo violated the Court's Order *in limine*, Dkt. No. 660, covering "[a]ny evidence, testimony, or reference implying that Bedrock is not the owner of the '120 patent," *see* TT 4/27 p.m. at 86:17-87:5;[6]
- Yahoo violated the Court's Order *in limine*, Dkt. No. 660, covering "[a]ny evidence, testimony, or references implying that the copying of portions of claims and/or specifications from the '495 patent is improper and/or violates the patent laws, copyright laws, or is in violation of Bellcore/Telcordia's property rights," *see* TT 4/27 p.m. at 99:25-100:4 ("Q. Did you ever tell anybody at Bell Labs that you were copying part of the patent over when you had your own individual patent for '120? A. No. No, I did not. Q. Did you ever ask for their permission?").

[6] "Q. And there's no question that Bellcore owns all the ideas that you developed while you were there, right?
A. That is correct, ma'am.
Q. All the ideas that relate to the removing of automatically expired records, which involved using a hashing technique, correct?
A. Could you repeat the question?
Q. Sure. There's no question that Bellcore owns all the ideas that you developed while you were there, which would involve automatically -- the removing of automatically expired records involving a system using a hashing technique. Bellcore would own all of those, correct?"

B. THIS CASE WAS NOT BROUGHT IN "SUBJECTIVE BAD FAITH."

To establish the second prong of exceptionality Yahoo must prove, through clear and convincing evidence, that the litigation was brought in "subjective bad faith." Subjective bad faith may be shown by wrongful intent, recklessness, or gross negligence. *See Bartex*, 2011 U.S. Dist. LEXIS 62107, at *5. However, the Supreme Court has stated that "only if challenged litigation is objectively baseless may a court examine the litigant's subjective motivation." *Prof. Real Estate Investors, Inc. v. Columbia Pictures, Indus., Inc.*, 508 U.S. 49, 60 (1993). As discussed above, Yahoo cannot meet this initial burden, so the Court need not address Bedrock's intent in bringing suit. Regardless, Yahoo has offered no evidence—let alone clear and convincing evidence—that Bedrock brought this lawsuit in bad faith.

IV. CONCLUSION

For the foregoing reasons, Bedrock respectfully requests that the Court find that this case is not exceptional, and deny Yahoo's motion.

DATED: June 30, 2011

Respectfully submitted,
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/s/ *Douglas A. Cawley*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document will be served on all counsel of record who have consented to electronic service on June 30, 2011.

By: */s/ Stacie L. Greskowiak*
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