UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC, Plaintiff, v. YAHOO! INC. Defendant.	CASE NO. 6:09–CV–00269 Hon. Leonard E. Davis

YAHOO! INC.'S REPLY IN SUPPORT OF ITS MOTION TO DECLARE THIS AN EXCEPTIONAL CASE AND FOR ATTORNEYS' FEES AND COSTS PURSUANT TO 35 U.S.C. § 285

Yahoo! respectfully submits this Reply in support of its Motion to declare this an exceptional case and for attorneys' fees pursuant to 35 U.S.C. § 285 (Dkt. No. 842) ("Motion"). Plaintiff Bedrock's Response (Dkt. No. 863) ("Response") fails to justify its vexatious pursuit of baseless willfulness allegations and damages demands. Bedrock's Response fails to address the merits of Yahoo!'s Motion and relies on an incorrect understanding of Section 285.

A. Bedrock's Response Rests on an Incorrect Statement of Law.

Rather than addressing Yahoo!'s arguments regarding willfulness and damages on the merits, Bedrock advances an incorrect interpretation of the law. Bedrock argues that Yahoo! must "establish that the ***entire*** 'litigation is objectively baseless' and that the ***entire*** 'litigation is brought in bad faith.'"[1] *Response* at 3 (emphasis added). Such an approach thwarts the most basic purpose behind 35 U.S.C. § 285: to "prevent [] gross injustice where a party has demonstrated bad faith and misconduct during litigation." *Takeda Chem. Indus., Ltd. v. Mylan Labs, Inc*., 549 F.3d 1381 1388 (Fed. Cir. 2008); *Central Soya Co., Inc. v. Geo. A. Hormel*, 723 F.2d 1573, 1578 (Fed. Cir. 1983). Bedrock should be held accountable for its "take no prisoners approach" in pursuing legal theories that inflicted substantial burden in the absence of credibility or support. *See Engineered Prods. Co. v. Donaldson Co., Inc*., 147 Fed. Appx. 979, 992 (Fed. Cir. Aug. 31, 2005).

Section 285 is not limited to Rule 11 "infringement" violations. It is firmly established that "[a] case may be found exceptional in terms of § 285 when there has been ***some material inappropriate conduct related to the matter in litigation***, such as willful infringement, fraud or

[1] For instance, Bedrock relies on the analysis in *Bartex Research, LLC v. FedEx Corp*. to suggest that there should not be a finding of exceptionality. The contentions in *BarTex* related to claim construction positions and deposition testimony. That case is not instructive here because the Court invalidated the asserted patent on summary judgment without ever reaching questions of willfulness and damages. *Bartex Research LLC v. FedEx Corp*., No. 6:07-cv-385, 2011 U.S. Dist. LEXIS 62107 (E.D. Tex. June 10, 2011). The facts of this case present a different procedural posture.

inequitable conduct in procuring the patent, misconduct during litigation, ***vexatious or unjustified litigation***, conduct that violates Fed. R. Civ. P. 11, or other major impropriety." *Aspex Eyewear Inc. v. Clariti Eyewear, Inc.*, 605 F.3d 1305, 1314 (Fed. Cir. 2010) (emphasis added) (internal citations omitted); 35 U.S.C. § 285. There are "a myriad of factual circumstances [that] may give rise to a finding that a case is exceptional for purposes of 35 U.S.C. § 285." *Glaxo Group Ltd. v. Apotex, Inc*., 376 F.3d 1339, 1350 (Fed. Cir. 2004); *see also, Realtek Semiconductor Corp. v. Marvell Semiconductor, Inc*., No. 04-cv-4265, 2005 WL 3634617, at *6-8 (N.D. Cal. Nov. 21, 2005) (ordering patentee to pay the accused infringer's attorneys' fees even after plaintiff voluntarily dismissed allegations because the patentee was manifestly unreasonable in dragging out discovery and necessarily generating costs that could have been avoided); *Warren Publishing Co. v. Spurlock*, No. 08-cv-3399, 2010 WL 760311, at *4-5 and *7 (E.D. Pa. Mar. 3, 2010) (in a copyright infringement case, partially granting attorneys' fees to deter the advancement of litigation theories that were "objectively unreasonable," including a "baseless" punitive damages claim and a "disingenuous" claim for unfair competition).

Relying on the *Stephens* case, Bedrock argues that "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." *Response* at 4 (citing *Stephens v. Spectrum Labs., Inc.*, 393 F.3d 1269 (Fed. Cir. 2004)). The *Stephens* case does not support Bedrock, but rather supports Yahoo! on the law. In *Stephens*, an accused infringer raised three arguments that the patentee's case was "exceptional" under Section 285, including that the patentee's "infringement suit was frivolous and in bad faith," and that the patentee engaged in "litigation misconduct" and "vexatious behavior" beyond

the infringement allegations. 393 F.3d at 1272-73. The Federal Circuit rejected the first argument regarding infringement but did not stop there. Recognizing that "[s]uch 'exceptional' cases involve inequitable conduct before the PTO, litigation misconduct, vexatious and otherwise bad faith litigation, frivolous suit or willful infringement," the Federal Circuit went on to address "litigation misconduct" and "vexatious behavior" apart from the infringement allegations. *Id.* at 1273. The *Stephens* case thus supports Yahoo! on the law. Bedrock's pursuit of baseless willfulness and damages theories before and during trial are legally sufficient to meet Section 285, regardless of the merits of Bedrock's infringement allegations.

B. The Court's Prior Denial of Summary Judgment and JMOL Motions Does Not Prove That This Case is Not Exceptional.

Bedrock argues that the Court's denial of Yahoo!'s summary judgment motions and motions for judgment as a matter of law preclude this from being an "exceptional" case. *Response* at 5-6. This is wrong. As set out in Yahoo!'s motion, Bedrock misrepresented its willfulness allegations to survive summary judgment and judgment as a matter of law. *Motion* at 1-2, 4-6. In addition, the Court's order denying summary judgment on the issue of damages preceded the Court's striking of Bedrock's damages theory (based on litigation settlements) and Bedrock's new damages theory offered thereafter. *Id.* at 15. The Court's denial of Yahoo!'s motion for judgment as a matter of law on damages also does not help Bedrock. Yahoo!'s JMOL motion established that Bedrock's damages position seeking some $32 million was both legally and factually baseless, and Yahoo! contends that it should have been granted.

Yahoo!'s motion for an exceptional case relies on the record and litigation history to show that Bedrock never had a basis to allege willful infringement and never had a legitimate damages theory. Nowhere does Bedrock's response specifically address the legal or factual foundation for Bedrock's willfulness or damages theories. Bedrock does not put forward any

justifications, nor does it deny that Yahoo! suffered hardship and excessive costs in defending against these theories. In fact, Bedrock does not even discuss what Yahoo! knew or should have known under *Seagate*,[2] or how its damages theory is supportable under current case law.[3] Put simply, Bedrock cannot hide behind the Court's rulings.

C. Bedrock's Arguments Regarding Yahoo!'s Conduct Are Irrelevant.

Rather than address the fairness of its own conduct, Bedrock chooses to sling mud and attack Yahoo! in the latter pages of its Response. *See Response* at 6-7. However, none of the instances of Yahoo!'s conduct raised by Bedrock have anything to do with the merits of Bedrock's willful infringement or damages theories. Bedrock's attack on Yahoo! is just further evidence of Bedrock's bad faith litigation tactics. As with its willfulness and damages theories, Bedrock strays from the requirements of the law to cast aspersions at Yahoo!. Accordingly, Yahoo! declines to delve into irrelevant discovery and *limine* issues that the Court resolved long ago.

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For the foregoing reasons, Yahoo! respectfully requests that this Court declare this an exceptional case and for an award of its attorneys' fees and costs pursuant to 35 U.S.C. § 285.

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[2] Bedrock correctly dropped all wilfullness assertions in the Google trial. Nonetheless, against Yahoo! Bedrock refused to make the same concession– despite nearly the same evidentiary record. Bedrock knew it had no chance to prevail on these allegations against Google, thus there is no good faith reason why Yahoo! should have had to mount a willfulness defense and bear the risk of treble damages.

[3] The controlling cases on willfulness and damages should have informed Bedrock that, for example, a default split of cost savings as the measure of damages was impermissible (*Uniloc*).

Dated: July 12, 2011

Respectfully submitted,

/s/ Yar R. Chaikovsky
Yar R. Chaikovsky

Fay E. Morisseau (Texas Bar No. 14460750)
fmorisseau@mwe.com
MCDERMOTT WILL & EMERY LLP
1000 Louisiana, Suite 1300
Houston, TX 77002
Tel: 713.653.1700
Fax: 713.739.7592

Yar R. Chaikovsky
ychaikovsky@mwe.com
John A. Lee
jlee@mwe.com
Bryan K. James
bjames@mwe.com
MCDERMOTT WILL & EMERY LLP
275 Middlefield Rd., Suite 100
Menlo Park, CA 94025
Tel: 650.815.7400
Fax: 650.815.7401

Christopher D. Bright
cbright@mwe.com
MCDERMOTT WILL & EMERY LLP
18191 Von Karman Ave, Ste. 500
Irvine, California 92612
Tel: 949.757.7178
Fax: 949.851.9348

Natalie A. Bennett
nbennett@mwe.com
MCDERMOTT WILL & EMERY LLP
227 West Monroe
Chicago, IL 60614
Tel: 312.984.7631
Fax: 312.984.7700

Jennifer Doan
Texas Bar No. 08809050

jdoan@haltomdoan.com
HALTOM & DOAN
Crown Executive Center, Suite 100
6500 Summerhill Rd.
Texarkana, Texas 75503
Tel: 903.255.1002
Fax: 903.255.0800

ATTORNEYS FOR DEFENDANT YAHOO! INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on July 12, 2011 to counsel of record in the manner agreed by the parties, via electronic mail.

/s/ Yar R. Chaikovsky
Yar R. Chaikovsky