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INTRODUCTION

Bedrock's Opposition reveals the strength of Yahoo!'s arguments. Bedrock mischaracterizes the evidence relating to the invalidity of the asserted claims and fails to address most of Yahoo!'s overwhelming evidence that shows the asserted claims are invalid. Granting a JMOL motion is proper when the facts and inferences point so strongly and overwhelmingly in favor of one party such that a reasonable fact finder could not arrive at a contrary verdict. In this case, no reasonable fact finder could arrive at any verdict other than that the asserted claims of Bedrock's patent are invalid.¹

The '95 Linux Code invalidates claim 1. Bedrock cites a narrow band of Williams' testimony to argue that Yahoo! failed to show that the '95 Linux Code has the equivalent structure of the second and third elements of claim 1. But that was not Williams' only testimony on equivalence. Immediately preceding the testimony that Bedrock cites, Williams provided detailed testimony explaining how the lines of code operate and why those lines of code are identical or equivalent to the structure required for the second and third elements of claim 1.

The NRL code invalidates claim 1. Bedrock asserts that combining the two functions *key_search* and *key_acquire* requires impermissible "hindsight" and that the NRL code teaches away. First, Bedrock does not dispute that these two functions contain all the elements of claim 1 and that combining them would be an easy thing to do. Second, Bedrock's teaching away argument lacks merit because Bedrock cannot and did not dispute that the NRL code performs on-the-fly garbage collection, the subject matter of the '120 patent.

¹ Bedrock incorrectly claims that Yahoo! seeks to shift the burden of invalidity to Bedrock. Yahoo! has the burden on this issue. However, the jury heard no evidence that disputes Yahoo!'s invalidity defense. After hearing Yahoo!'s invalidity defense, any reasonable fact finder could not find the asserted claims valid.

Claim 1 would have been obvious in light of the '495 patent. Bedrock argues that claim 1 is not obvious. First, it argues that the '495 patent and the '120 patent are very different inventions by relying on the litigation-driven inventor testimony and by arguing that Figure 4 of the two patents are different. But inventor testimony should be accorded little weight when it is not disputed that these two patents are the same except for the hashing technique. Second the differences between Figure 4 of the two patents are irrelevant because Figure 4 is not part of the Court's construction.

Claim 2 would have been obvious. Finally, Bedrock attempts to cast doubt on the other prior art references that invalidate claim 2 by complaining that three sentences in Yahoo!'s opening brief lacked supporting citations. But Bedrock never disputes the substance of those three sentences. Yahoo! did show that the prior art disclosed each and every element of claim 2.

ARGUMENT

I. Reasonable Fact Finders Could Come to No Other Conclusion Than the '95 Linux Code Anticipates Claim 1

A. Contrary to Bedrock's assertion, Williams provided detailed testimony that the '95 Linux Code meets the requirements of the second element of claim 1

For the second element of claim 1², Bedrock argues that Williams' equivalence testimony was conclusory because he testified that the '95 Linux Code performed the same function as required by the Court's construction and that it did so "in substantially the same way to achieve substantially the same result." (T.T. 5/9/11 p.m. at 190:12-18). Bedrock incorrectly claims that Williams did not articulate or provide a rationale to justify his conclusion. Bedrock's argument fails in view of the following Williams testimony that Bedrock ignored:

² Bedrock does not substantively challenge Yahoo!'s assertion that the '95 Linux Code discloses the first and fourth elements of claim 1. (Bedrock Opp. at i, 7-15). With no evidence to the contrary, the facts and inferences strongly favor Yahoo! that the '95 Linux Code discloses the requirements of the first and fourth elements of claim 1.

Q. Let's go to the second element, which is that records search means. Let's see where the Linux Prior Art discloses this element. Can you describe that for us?

A. Yeah. There's a search means, again using a hash value to access the head of the linked list. And at Line 1365, we start stepping through the linked list looking for a duplicate record. This is in Line 1370; 1370 is where we duplicate the record. And 1372 is where the duplicate record would get removed.

(T.T. 5/9/11 p.m. at 190:1-18).

Bedrock's Opposition ignores Williams' particularized details as to how the '95 Linux Code meets the structure required by the Court's construction. Moreover, Williams testified that he presumed the '120 patent was valid, that it was Yahoo!'s burden to prove the patent valid, and that he applied the Court's required claim construction in assessing whether the prior art references disclosed the requirements of the asserted claims. (T.T. 5/9/11 p.m. at 182:20-183:20).

Moreover, Bedrock's reliance on *Mirror Worlds* to advance its argument that Yahoo! did not provide any articulation of the rationale underlying its invalidity defense cannot succeed. In *Mirror Worlds*, the Court found the expert's analysis insufficient because he "merely repeated the claim language when testifying about the accused Mac OS X Cover Features and summarily considered them equivalent." *Mirror Worlds, LLC v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 36451, *32 (E.D. Tex. Apr. 4, 2011). For example, *Mirror Worlds* found that the following expert testimony lacked particularity:

Q. And what is it in the Cover Flow view that you considered to be the equivalent.

A. In the Cover Flow view, instead of having a moving pointer and a stationary stack, we have a moving stack and essentially a stationary pointer, because the user knows that he's looking always at the center here.

Id. at *35-*36. Unlike the expert in *Mirror Worlds*, Williams provided details on why the lines of '95 Linux Code have the identical or equivalent structure as required by claim 1. (T.T. 5/9/11 p.m. at 190:1-18).

Finally, Bedrock fails to address Kuznetsov's e-mails and trial testimony and Filo's testimony that the '95 Linux Code anticipates claim 1. Yahoo! more than met its burden with Williams' testimony (walking through the lines of code, applying the Court's claim construction, and explaining how the lines of code satisfied each claim element), Filo's testimony (showing which lines of the '95 Linux Code anticipated claim 1) and Kuznetsov repeatedly testifying that the '95 Linux Code did what the '120 patent claimed as its invention. In the absence of a challenge from Bedrock on this evidence, a jury would have but one conclusion after weighing this overwhelming evidence: the '95 Linux Code discloses the second element of claim 1.^{3,4}

B. The '95 Linux Code discloses the requirements of the third element of claim 1 of the '120 patent as Williams and Filo testified in detail

Bedrock again chose to omit portions of Williams' testimony (as with the second element, right before the testimony that Bedrock cites to in its Opposition) in alleging Williams' equivalency analysis was conclusory. (T.T. 5/9/11 p.m. at 189:24-191:15). Because Williams explained the function of the specific lines of code and why those lines of code met the requirements of this element of claim 1, Williams provided the requisite particularized testimony and linking analysis for this element. Furthermore, as stated above, the testimony of both Filo and Kuznetsov has not been challenged by Bedrock. Taken together, this evidence establishes

³ Upon consideration of all the evidence, if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable fact finders could not arrive at a contrary verdict, granting the JMOL motion is proper. *Urban Developers LLC, City of Jackson, Miss.*, 468 F.3d 281, 296-97) (5th Cir. 2006) (citing *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)). On the other hand, if there is substantial evidence opposed to the motion, evidence of quality with which reasonable and fair-minded fact finders in the exercise of impartial judgment might reach different conclusions, the motion should be denied. *Id.*

⁴ Even Bedrock agrees that because the jury did not decide the issue of invalidity, it now remains for the Court to decide the issue. And here the burden is preponderance of the evidence, not whether a reasonable fact finder could arrive at a contrary verdict as stated in the Court's jury charge of Yahoo!'s burden of proving invalidity. (T.T. 5/10/11 p.m. at 4:25-5:4).

that the third element of claim 1 was disclosed by the '95 Linux Code, and Bedrock's arguments fail. (T.T. 4/29/11 a.m. at 129:8-11; 129-132; 133:2-4; 152:22-23; 186-198, 204-05).

II. The NRL code's *key_acquire* with *key_search* Functions Render Claim 1 Obvious

Bedrock's opposition does not dispute that the *key_acquire* and *key_search* functions in combination contained all the elements of claim 1 of the '120 patent. (Bedrock Opp. at 10-11). Instead, Bedrock argues that there was no motivation to combine the functions because "persons of ordinary skill in the art are motivated to make combinations based on technical considerations rather than proximity." (Bedrock Opp. at 10). However, the evidence establishes that the combination of the two functions would have been, as Williams testified, a "fairly easy thing to do." Williams' testimony was unrebutted.

Bedrock's second argument that Williams' opinion to combine the two functions constitutes hindsight also falls short. In *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007), the Court emphasized that "[r]igid preventative rules that deny fact finders recourse to common sense, however, are neither necessary under our case law nor consistent with it." *Id.* at 421 (citations omitted). Applying common sense, as Williams did, that the two functions are side by side and that it would have been fairly easy to combine the two functions to obtain on-the-fly garbage collection with hashing provides strong evidence in favor of Yahoo!. Thus, based on common sense, reasonable fact finders could only find the asserted claims of the '120 patent obvious in light of the NRL code. (T.T. at 5/9/11 p.m. at 198, 200).

Bedrock's third argument, that the NRL code's comment teaches away from on-the-fly garbage collection, is disingenuous. The NRL code comment teaches on-the-fly garbage collection by stating that "[s]ince we're already looking at the list, we may as well delete expired entries as we scan through the list." (NRL Code at ll. 1431-39.) The NRL code may suggest that in the future garbage may be collected differently. But, this suggestion does not alter the fact

that the *key_acquire* function of the NRL code currently performs on-the-fly garbage collection – a fact that none of Bedrock’s witnesses dispute.

Moreover, a combination is obvious when a patent “simply arranges old elements with each performing the same function it had been known to perform and yields no more than one would expect from such an arrangement.” *KSR*, 550 U.S. at 417. Williams’ NRL code testimony with the following Yahoo! evidence that Bedrock did not oppose—the admissions from Nemes that he did not invent any of the individual features of his ’120 patent; Filo’s testimony explaining why the NRL code is obvious; the NRL code author’s testimony at trial that on-the-fly garbage collection with external chaining is obvious; and Kuznetsov’s testimony that the techniques of the ’120 patent were known back as early as 1985 clearly and convincingly establishes that claim 1 would have been obvious. (T.T. 4/27/11 p.m. at 50-54; T.T. 4/29/11 a.m. at 12-15, 128-141; T.T. 4/29/11 p.m. at 146-52; T.T. 5/9/11 at 141-142).

III. The ’495 patent Renders Claim 1 Obvious

The evidence presented at trial shows that the only difference between the ’120 patent and the ’495 patent is the use of external chaining versus linear probing in on-the-fly garbage collection. In particular, Williams showed this at trial that by comparing the similarities of claim 1 and Figures, 3, 5, and 7 of the two patents. (T.T. at 5/9/11 p.m. at 202).

Bedrock’s argument relying on Nemes’ testimony that the ’495 patent and the ’120 patent are very different should be accorded little or no weight. Nemes’ litigation driven testimony does not change the fact that the disclosures in the ’120 patent and ’495 patent are the same as evidenced by the two patents’ claim 1 and Figures 3, 5, and 7.

Bedrock argues that the ’495 patent and ’120 patent must be very different because Figure 4 of these patents appears different. Bedrock’s argument fails because the Court did not include Figure 4 as a requirement in its construction of claim 1. In fact, during *Markman*

briefing, Bedrock argued vehemently against including Figure 4 as a structural requirement. It cannot now effectively distinguish the prior art based on that same Figure 4.

Moreover, when a patent simply modifies the invention described by the inventor's earlier patent by a simple and minor improvement within, the later patent is obvious because it is "well within the skill and ordinary creativity of a skilled artisan." *Lexion Med., LLC v. Northgate Techs., Inc.*, 292 Fed. Appx. 42, *23 (Fed. Cir. 2008) (upholding the trial court's grant of JMOL that a patent is invalid because it is obvious). Here, the evidence establishes that the '120 patent is a simple modification of the '495 patent. Nemes admitted that he did not invent linear probing, external chaining, linked lists, on-the-fly garbage collection, or on-the-fly garbage collection using either linear probing or linked lists. (T.T. 4/27/11 p.m. at 50-54). Williams testified that the only difference between Nemes' '120 patent and Nemes' '495 patent is external chaining versus linear probing. (T.T. 5/9/11 p.m. at 201-02). Williams also testified that linear probing and external chaining were well known at the time of the invention of the '120 patent. (*Id.*) As was the case in *Lexion*, claim 1 is invalid because it simply modifies the invention of the '495 patent with a simple and minor improvement.

IV. Reasonable Fact Finders Could Not Arrive at Any Other Conclusion Other than Claim 2 of the '120 patent is Invalid

Yahoo!'s opening brief explained how the evidence and testimony presented at trial showed why claim 2 of the '120 patent is invalid. Bedrock does not disagree with the any of the substantive points that Yahoo! raises. Instead, Bedrock asserts that three sentences about the Apple patent's implementation of dynamically determining a maximum number in Yahoo!'s brief were unsupported by citations. The cite for the first uncited sentence is: DX-101 (Apple patent) at Col. 7:2-7, 7:14-37, 8:44-49; T.T. 5/9/11/ p.m. at 204:2-15. The cite for the second uncited sentence is: DX-101 at Col. 1:10-45; DX-37 (NRL Code) at ll. 1431-39. The substance of the uncited sentence is supported by the NRL code (DX-37) and Apple Patent (DX-101).

Finally, even if the Court disregards the substance of the third sentence, the strong and overwhelming evidence presented by Yahoo! shows that the '95 Linux Code, NRL code, the '495 patent, '663 patent, and the Apple Patent render claim 2 obvious. No substantive challenge has been raised against Yahoo!'s prior art references that combined invalidate claim 2. *See Boeing*, 411 F.2d at 374.

Finally, Bedrock falsely claims that Yahoo! presented “absolutely no testimony” that the structural requirements of claim 2 have been met. For example, Williams testified how the formula in the Apple patent met the structure of claim 2. (T.T. 5/9/11 p.m. at 204:2-20, Ex. 1 (Slide 28)). Williams also testified how the '663 patent met claim 2's structural requirement for dynamic determination. When explaining the '663 patent with reference to Figure 5, he said, “[y]es, in this patent, Dr. Nemes is comparing the system load. That's how busy the system is at the particular time and deciding whether to remove all of records or none of the records.” (T.T. 5/9/11 p.m. at 204:24-205:2, Ex. 1 (Slide 29)).

V. Prior to Entry of Final Judgment, the Issue of Invalidity Needs to Be Resolved

A finding of non-infringement does not moot Yahoo!'s declaratory judgment claim of invalidity. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 93-94 (1993); *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340 (Fed Cir. 2005) (jury verdict of non-infringement does not dispel defendant's unlitigated counter claims). Bedrock's reliance on Rule 49(a) is flawed because the rule applies to “special verdicts,” which this case did not involve.

Here, the Court has the authority to decide the issue of validity because the final judgment must address all the issues raised in the parties claims and counterclaims. *Fin Control Sys. Pty, Ltd. V. OAM, Inc.*, 265 F.3d 1311, 1321 (Fed. Cir. 2001) (ruling on counter claims is a prerequisite to entering judgment). And when no verdict is reached by the jury, a party who has properly made a Rule 50(a) motion may renew its motion post-trial under Rule 50(b) for the

Court to decide the issue. Fed. R. Civ. P. 50(b); *Compaer Corp. v. Antec, Inc.*, 596 F.3d 955, 963 (5th Cir. 1998) (a party that preserved its right by raising a Rule 50(a) motion pre-verdict, may renew its motion post-verdict). And Bedrock does not dispute that the Court should make his or her finding fact on the invalidity issue. (Bedrock Opp. at 17).

Finally, in this case, Yahoo! has the burden of proving invalidity by a preponderance of the evidence. The Court instructed the jury that “Yahoo! has the burden of proving invalidity by a preponderance of the evidence” reflecting the burden of proof on invalidity for this case. (T.T. 5/10/11 a.m. at 5, 12). Bedrock’s proffered reason for stipulating to a preponderance of the evidence standard is irrelevant; the stipulation was made and cannot and should not be undone at this juncture. (Bedrock Opp. at 4). Instead of holding to its stipulated standard, Bedrock argues that Yahoo! must prove to a “virtual certainty” that the claims are invalid in order to prevail. However, “virtual certainty” represents a higher burden than would have been required in the absence of the stipulation. In fact, “virtual certainty” would essentially require that Yahoo! prove invalidity “beyond a reasonable doubt”, the highest standard of proof reserved for criminal cases. Bedrock’s attempt to equate patent invalidity with criminal law is simply wrong. Moreover, the evidence does not support that the PTO considered either the ’95 Linux Code or the NRL code. As the Supreme Court stated, “[s]imply put, if the PTO did not have all material facts before it, its considered judgment may lose significant force.” *Microsoft Corp. v. I4I Limited Partnership*, No. 10-290, 2011 U.S. LEXIS 47376, *146-47 (U.S. Jun. 9, 2011) at 17-18. Beyond proving invalidity by a preponderance of the evidence, Yahoo! also proved the asserted claims were invalid by clear and convincing evidence.

CONCLUSION

Regardless of the standard applied, Yahoo!’s overwhelming evidence of invalidity proves that the asserted claims are invalid. Yahoo! requests that the Court grant its Renewed Motion for

Judgment as a Matter of Law Regarding Invalidity and enter judgment that the asserted claims of the '120 patent are invalid under 35 U.S.C. §§ 102 (a), (b), (g)(2) and/or 103(a).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 12th day of June, 2011.

/s/ John A. Lee

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