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 SURREPLY IN OPPOSITION TO 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

I. ARGUMENT IN REPLY

A. Yahoo Misapplies the Legal Framework Governing Section 285

Yahoo's reply avoids the legal framework that governs an accused infringer's ability to prove that a case is "exceptional" under Section 285, and effectively seeks to punish the continued litigation of claims that, although unsuccessful at trial, were neither "objectively baseless," nor were litigated in a manner that constitutes an "egregious abuse of the judicial process." *See iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1376-77 (Fed. Cir. 2011). A patent plaintiff may only be sanctioned under Section 285 based on: (i) inequitable conduct before the USPTO; (ii) litigating claims that were "objectively baseless" and brought in "subjective bad faith"; and (iii) litigation misconduct that rises to the level of "vexatious" or "egregious." *Id.* at 1380; *Sulzer Textil A.G. v. Picanol N.V.*, 2002 U.S. Dist. LEXIS 27197, *4 (E. D. Tex. March 11, 2002); *Arbrook, Inc. v. Am. Hospital Supply Corp.*, 645 F.2d 273 (5th Cir. 1981). Yahoo's claims simply do not meet the threshold requirements necessary to establish that this case is "exceptional" under any of these grounds. To account for this deficiency, Yahoo uses the terms "litigation misconduct," "bad faith," and "vexatious behavior" as catch-all phrases that transcend the permissible grounds upon which a finding of exceptionality may be made.

Yahoo's initial motion was based on the grounds that Bedrock's theories on willfulness and damages were frivolous. (*See* Dkt. No. 842, "Mot." at 1.) Where an accused infringer's motion is based on litigating frivolous claims, a plaintiff's alleged misconduct is relevant to a finding of subjective bad faith; however, "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motive." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (holding that the right to bring litigation implicates First Amendment rights, and that bringing allegedly frivolous litigation may only be sanctioned if the lawsuit was "objectively baseless"). Because Yahoo cannot, by clear and

convincing evidence, prove that Bedrock's theories on willfulness and damages were "objectively baseless" (*see infra*, Part II.C. and D), Bedrock's alleged "vexatious behavior" in continuing the pursuit of these theories cannot otherwise cause this case to be exceptional.[1]

In a departure from its Motion, Yahoo's reply now shifts the focus of its motion to Bedrock's alleged "litigation misconduct" and "vexatious behavior" (*see* Dkt. No. 870, "Reply" at 3), presumably because Yahoo cannot prove that Bedrock's theories were frivolous. Although a patent plaintiff's litigation misconduct alone may provide adequate grounds for a finding that a case is "exceptional," such misconduct must constitute an "egregious abuse of the judicial process." *Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 929 F.2d 676, 678 (Fed Cir. 1991); *Wedgetail, Ltd. v. Huddleston Deluxe, Inc.*, 576 F.3d 1302, 1304 (Fed. Cir. 2009). Bedrock's alleged litigation misconduct—allegedly faulty legal theories of damages and willfulness—is not even the type of conduct that is considered to be eligible for sanction under Section 285. *See, e.g., Arbrook*, 645 F.2d at 279 (considering discovery litigation misconduct); *see also Bartex Research, LLC v. FedEx Corp.*, 2011 U.S. Dist. LEXIS 62107, *17-18 (considering declarations from witnesses that were inconsistent with prior testimony); *see also Stephens v. Spectrum Labs., Inc.*, 393 F.3d 1269, 1276 (Fed. Cir. 2004) (considering a plaintiff's investigation and credit check). In this way, Yahoo inappropriately uses the terms "litigation misconduct" and "vexatious behavior" to attempt to ensnare a plaintiff's choice to proceed with claims that a

[1] *But see Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals*, 182 F.3d 1356, 1361 (Fed. Cir. 1999) (finding that plaintiff's infringement allegations were not "objectively unreasonable" despite prior verdict of invalidity due to inequitable conduct, yet remanding to district court for determination of whether plaintiff's pursuit of willfulness claims and avoidance of the prior invalidity determination constituted vexatious behavior). The present case is distinguishable because Bedrock's pursuit of its willfulness and damages theories did not follow a prior verdict of invalidity. Rather, Bedrock's pursuit of its willfulness and damages claims followed the previous jury verdict against co-defendant Google, Inc., finding that the patent was valid and infringed.

Court has determined to be substantiated by adequate law and fact. Yahoo has provided no credible evidence—much less clear and convincing evidence—that Bedrock's conduct during the litigation was egregious or improper. Accordingly, Yahoo's motion should be denied.

B. The Court's Denial of Yahoo's JMOL Motions Completely Disposes of Yahoo's Claim that This Case is Exceptional

Yahoo's reply brief is conspicuously silent on the substantial weight of authority that precludes a case from being "exceptional" based on a patentee's continued litigation of claims that were sufficient to overcome a motion for judgment as a matter of law ("JMOL"). Rather than squarely address this authority, or cite any authority to the contrary, Yahoo's reply faults Bedrock's response for not discussing the merits of its damages and willfulness theories. (*See* Reply at 3.) Yahoo misses the point. The Court's denial of Yahoo's JMOL motions are dispositive of its motion for attorneys' fees.

Again, denial of a JMOL motion requires a court to find—as the Court did—that there is "evidence of such quality and weight that reasonable and fair-minded individuals in the exercise of impartial judgment might reach different conclusions." *Sulzer*, 2002 U.S. Dist. LEXIS 27197, at *6 (citing *Rutherford v. Harris County, Texas*, 197 F.3d 173, 179 (5th Cir. 1999)). The Court's denial of Yahoo's motions—and the implicit finding that sufficient evidence supported Bedrock's theories—establishes that the theories could not have been "objectively baseless." *Id.* It also establishes that Bedrock's continued pursuit of those theories, alone, could not constitute subjective bad faith. *Id*. The Court's prior denials thus dispose of Yahoo's claim in its entirety.[2]

[2] Yahoo's assertion that Bedrock "misrepresented" its willfulness theory to overcome Yahoo's various motions (*see* Reply at 3) is inaccurate and disingenuous. At the pretrial conference, Bedrock delineated the evidence that would support a finding of willful infringement, and it did so in a manner that was consistent throughout the litigation. Moreover, the evidence of willfulness that Bedrock cited in various pre-litigation motions and proceedings is the same evidence that Bedrock presented to the jury on that issue. (*See* 2/16/2011 Hearing Tr. at 13:3-16; 15:11-16:18.)

C. Yahoo's Misconduct is Relevant to Section 285

Yahoo claims that its own litigation misconduct is irrelevant to a determination of whether a case is "exceptional" under Section 285, turning a blind eye to the Federal Circuit authority that has expressly held otherwise. *See, e.g.*, *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1575 (Fed. Cir. 1996) ("Indeed, the court may consider the litigation actions of both sides in connection with § 285."); *see also Elk Corp. of Dallas v. GAF Building Materials Corp.*, 2000 U.S. Dist. LEXIS 2658, *9-11 (N.D. Tex. Mar. 7, 2000) (finding that case was not exceptional because "both parties engaged in behavior that exceeded the normal bounds of aggressive advocacy" and that "neither party can hold its head high"). Importantly, Yahoo has cited no authority to the contrary. The reason for this rule is self-evident. If Yahoo's case truly were exceptional, then it would have had no reason to engage in the litigation misconduct that it did.

While Bedrock does not wish to revisit the details of Yahoo's misconduct—which was repeatedly sanctioned by the Court—Bedrock believes that this provides ample reason for the Court to find this case unexceptional.

D. Bedrock's Theories on Willfulness and Damages Were Far from "Vexatious."

Bedrock did not address the merits of its willfulness and damages theories in its response and instead focused on correcting Yahoo's misapplication of the law and noting authority that Yahoo's denied JMOLs entirely dispose of Yahoo's motion. For the sake of completeness, Bedrock will briefly summarize the merits of its theories on willfulness and damages.

Willfulness. Bedrock's theory of willful infringement was grounded in law and fact. Courts have recognized that certain "extenuating circumstances" permit a plaintiff to sustain claims of post-filing willfulness, despite the plaintiff's failure to first seek a preliminary injunction. *See Webmap Technologies, LLC v. Google, Inc.*, 2010 U.S. Dist. LEXIS 104137, *9-*10 (E.D. Tex. Sept. 10, 2010). Those circumstances include the patent's emergence from

reexamination without narrowed claims, or the defendant's receipt of opinions that the patent is valid and infringed by third-party prior art witnesses. When the USPTO issued a notice that the '120 patent was coming out of re-exam, Bedrock accordingly amended its complaint to include an allegation of willfulness.

Damages. Bedrock's damages theory was also grounded in law and fact. Yahoo alleges that, pursuant to *Uniloc*, Bedrock should have known that its damages theory was unacceptable. (*See* Reply at 4 n.3.) This is a misreading of *Uniloc*. Bedrock's damages theory did not use the "25 percent rule of thumb," which was at issue and eschewed by *Uniloc*. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F,3d 1292, 1315 (Fed. Cir. 2011). Moreover, *Uniloc* does not stand for the proposition that any division of profits or cost-savings over 25 percent is, as a matter of law, impermissible. Such an interpretation of *Uniloc* is too simplistic and wrong.

The *Uniloc* decision is further distinguishable because it held that the 25 percent rule was impermissible because there was no economic justification for its application in any particular case. *Id.* at 1315. Bedrock's damages theory, however, had significant economic justification, as it was based on the peer-reviewed, Nobel Prize winning work of John Nash. (*See* 4/28/11 p.m. Trial Tr. at 96:23-98:8.) For these reasons, and the reasons Bedrock set forth at trial and in its pre-litigation motions and proceedings, Bedrock's theories on damages and willfulness had merit.

II. CONCLUSION

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

DATED: July 18, 2011

Respectfully submitted,
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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 July 18, 2011.

By: */s/ Stacie L. Greskowiak*
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