

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

TECSEC, INCORPORATED,

Plaintiff,

Case No. 1:10cv115-LMB/TCB

v.

JURY TRIAL DEMANDED

**INTERNATIONAL BUSINESS MACHINES
CORPORATION, SAS INSTITUTE, INC.,
SAP AMERICA, INC., SAP, AG, CISCO
SYSTEMS, INC., ORACLE AMERICA,
INC. (F/K/A SUN MICROSYSTEMS, INC.),
SYBASE, INC., SOFTWARE AG, INC.,
SOFTWARE AG, INC., ADOBE SYSTEMS
INCORPORATED, EBAY INC., PAYPAL,
INC., AND ORACLE CORPORATION,**

Defendants.

PLAINTIFF TECSEC'S PROPOSED DISCOVERY PLAN

Pursuant to FED. R. CIV. P. 26(f), counsel for Plaintiff TecSec, Inc. and counsel for Defendants International Business Machines Corporation, SAS Institute, Inc., SAP America, Inc., SAP AG, Cisco Systems, Inc., Oracle America, Inc. (*fka* Sun Microsystems, Inc.), Sybase, Inc., Software AG, Inc., Software AG, Adobe Systems Incorporated, eBay Inc., PayPal, Inc. and Oracle Corporation (collectively, the "parties") conferred by telephone on May 26, 2010. TecSec indicated that it intended to file a discovery plan on May 28, 2010 pursuant to the Court's April 30, 2010, and Defendants indicated that they did not believe that a plan should be submitted until the Court enters orders on Plaintiff's Motion for Entry of a Case Management Order and Defendants' Motion to Sever. TecSec respectfully submits that the proposed plan below would be appropriate and should be entered if the Court adopts the streamlining suggestions set forth in Plaintiff's Motion for Entry of a Case Management Order.

I. PROTECTIVE ORDER

The parties shall submit a stipulated Protective Order to the Court on or before June 4, 2010, or, should they fail to agree, by the date they shall file any motions for entry of a Protective Order, noticed for hearing on June 11, 2010. The parties mutually agree that until the Court enters a Protective Order, all documents produced pursuant to this Plan and in response to discovery requests, as well as any depositions taken, shall be treated by the receiving party as Attorneys-Eyes-Only. In no event shall any party withhold producing its documents based on confidentiality concerns (other than third-party obligations) or the fact that the Protective Order has not yet been entered.

II. AMENDMENT OF PLEADINGS/JOINDER OF PARTIES

All motions seeking to amend pleadings must be filed by July 30, 2010. All motions seeking to join new parties must be filed by June 30, 2010. Motions for amendment or joinder after those dates will not be allowed except for good cause shown.

III. DISCLOSURE SCHEDULE

A. Rule 26(a)(1) Disclosures. The parties served their Rule 26(a)(1) disclosures on or before May 7, 2010.

B. Claim Charts. Pursuant to the Court's April 30, 2010 Order, Plaintiff served its claim charts on May 12, 2010.

C. Invalidity Contentions. Defendants shall serve their "Invalidity Contentions" on or before June 16, 2010, which must identify as specifically as possible the following:

1. The facts and assertions relevant to Defendants' invalidity positions under 35 U.S.C. § 102(a)-(g), including each item of prior art that Defendants contend anticipates each specified claim.

2. The facts and assertions relevant to Defendants' invalidity positions under 35 U.S.C. § 103, including each item or combination of prior art that Defendants contend renders each claim obvious and the motivation to combine such items.

3. A chart that compares allegedly invalidating prior art to each asserted claim on a prior art item and claim element by claim element basis. Where Defendants contend that a claim element is governed by 35 U.S.C. § 112(6), Defendants shall identify the structure(s), act(s), or material(s) in each item of prior art that corresponds to the structure identified in the patent specification that performs the claimed function.

4. Facts and assertions relevant to invalidity positions under 35 U.S.C. § 112, including any grounds for invalidity for any of the asserted claims based on indefiniteness under 35 U.S.C. § 112(2), or enablement or written description under 35 U.S.C. § 112(1).

5. A copy of each item of prior art identified by the Defendants that does not appear in the file history of the patent(s) at issue (together with any English translations of such documents completed prior to the date of such disclosures).

6. Facts and assertions relevant to defenses based on 35 U.S.C. § 286 and § 287, including patent marking.

7. Facts and assertions relevant to any contention that any patent in suit is unenforceable.

8. Facts and assertions relevant to any contention that any claims are barred due to prosecution history estoppel.

9. Facts and assertions relevant to any contention that any claims are barred due to any equitable doctrines, including laches, waiver, estoppel or unclean hands.

10. Facts and assertions relevant to any contention that any claims or damages are barred by 28 U.S.C. § 1498(a).

11. A chart that details Defendants' bases for any assertions of non-infringement of each of the Patents in Suit on a claim-by-claim and element-by-element basis.

12. A disclosure of units of accused products, systems or services that Defendants have made, used, sold and/or imported in the United States during the six years prior to the filing of the complaint and the revenue generated from the foregoing.

D. Supplementation of Infringement, Non-Infringement and Invalidity Contentions. The parties shall timely supplement their respective contentions when additional information becomes known. Supplementation will not be allowed after August 13, 2010 except for good cause shown.

IV. PRESERVATION AND DISCLOSURE OF DISCOVERABLE ELECTRONICALLY STORED INFORMATION ("ESI")

On or before June 4, 2010 the parties shall present a general stipulation for the preservation and production of electronically stored information ("ESI"), or, should they fail to agree, by that date they shall bring the matter before the Court by motion, noticed for hearing on June 11, 2010. In no event shall any party refrain from preserving or collecting documents for production based on the fact that the parties have not yet entered into a stipulation. In addition, Plaintiff will negotiate with each Defendant (or Defendant Group, as defined herein), to prepare a stipulation regarding that Defendant's ESI discovery. All parties are expected to provide detailed information about their efforts to preserve, collect, and produce ESI, upon request, so that any other party and, if necessary, the Court may properly assess the scope and nature of such efforts to ensure compliance with Rule 26(b).

V. FACT DISCOVERY SCHEDULE AND LIMITATIONS

The scope of discovery shall be governed by the Federal Rules of Civil Procedures, as modified by the following provisions, subject to the parties' right to seek (or agree upon) additional or modified discovery provisions under appropriate circumstances.

A. Timing of Fact Discovery. All fact discovery including written, document, and deposition discovery, shall be concluded no later than September 17, 2010.

B. Coordination of Fact Discovery

1. All parties are expected to cooperate with each other on discovery and related matters so as to ensure uniformity, efficiency, and the expeditious resolution of this matter. All Defendants, in particular, are expected to coordinate closely with each other on discovery, motions, and related matters. The Court should not receive multiple filings on common issues without advanced leave of court.

2. By or before June 16, 2010, the Defendants shall appoint a single firm to act as "lead counsel" with the court and TecSec solely for scheduling and coordination of discovery, motions and related administrative matters. Lead counsel shall:

A. Coordinate the conduct of common discovery on behalf of all Defendants, including, where appropriate, joint discovery requests.

B. Coordinate the briefing of common issues in all motions so that those issues are all briefed in a single motion or opposition.

3. Lead counsel may delegate such responsibilities, as appropriate, to other Defendants so long as such delegation is consistent with paragraph (1) above.

4. All discovery should be conducted so as to avoid unnecessary duplication of efforts and burdens on the parties, witnesses, and third parties.

C. Fact Witness Depositions. The total number of fact witness deposition hours taken, including party witnesses, inventors, designees, and non-party depositions, shall not exceed three hundred (300) hours per side.

The limitations on depositions set forth in this Order are in lieu of those set forth in the Federal Rules of Civil Procedure. All of the following limits on hours of depositions are provided as an initial limit, but any party may move the Court, after attempting to reach agreement on the issue, for relief from these limits to obtain necessary discovery, including, but not limited to, extra time due to depositions of witnesses providing testimony in a foreign language involving interpreters. Any party may also move the Court, after attempting to reach agreement, for a protective order prior to another party's use of its full time if the questioning becomes duplicative, harassing or seeking discovery of non-relevant topics.

1. Depositions of Defendant Groups. Plaintiff may depose each Defendant Group (as defined herein) (and its officers, directors, agents, and employees) for up to 42 hours, including depositions pursuant to Rule 30(b)(1) and 30(b)(6).

2. Depositions of Plaintiff. Collectively, Defendants may depose Plaintiff (and its officers, directors, agents, and employees) for up to 100 hours, including depositions pursuant to Rule 30(b)(1) and 30(b)(6) and of employee inventors as set forth in (3) below; however, no single Defendant Group may take more than 42 hours of deposition testimony of Plaintiff, including depositions pursuant to Rule 30(b)(1) and 30(b)(6) and employee-inventor depositions pursuant to (3) below. Defendants shall cooperate in the scheduling of the depositions of Plaintiff's individual and designee witnesses, and shall not engage in duplicate questioning of them; provided that each Defendant's counsel may make a reasonable, non-duplicative

examination on topics particular to his or her client, and may ask reasonable, non-duplicative follow-up questions based on the questioning by any other Defendant's counsel.

3. Depositions of Inventors. Collectively, Defendants may depose each inventor for up to 10 hours, such time to be split according to agreement by Defendants. If an inventor is a current employee, officer or director of Plaintiff, then time spent deposing that inventor counts against the Defendants' hour total for Plaintiff depositions as a group and against each individual Defendant Group's hour total for Plaintiff depositions as set forth in Paragraph V.B.2 above. Defendants will designate one attorney for one of the Defendants for each inventor that is deposed who will take the lead in asking questions for all Defendants; provided, that the designation of a lead counsel for the examination will not preclude counsel for any other Defendant from making a reasonable, non-duplicative examination, or from asking reasonable, non-duplicative follow-up questions.

4. No single witness, except for inventors, will sit for more than 7 hours total of deposition taken pursuant to Rule 30(b)(1), absent prior leave of Court, except that for depositions that require translation, the maximum deposition time shall be no more than 14 hours total of deposition. For depositions that require translation, only half of the total number of deposition hours shall count towards any time limitations in the Federal Rules of Civil Procedure and in the party deposition hour totals set forth above.

5. No party may engage in duplicative questioning of a single witness.

VI. EXPERT DISCOVERY.

A. Timing of Expert Discovery. All expert discovery will be completed by October 29, 2010.

B. Expert Designations.

1. The parties will undertake reasonable efforts to avoid the designation of duplicative expert witnesses. Plaintiff may designate up to ___ testifying experts. Defendants may collectively designate up to ___ total experts on invalidity and unenforceability. In addition, each Defendant Group may designate up to ___ additional experts in addition to invalidity/unenforceability experts.

C. Expert Disclosures. The parties shall exchange expert disclosures required by FED. R. CIV. P. 26(a)(2) on all issues on which they bear the burden of proof by September 17, 2010. The parties shall exchange rebuttal expert disclosures by October 1, 2010.

1. **Supplementation of Expert Disclosures.** If a party believes in good faith that the Court's claim construction ruling so requires, not later than 15 days after the Court's ruling, the party may supplement its expert reports solely to address the Court's claim construction.

D. Expert Depositions.

1. During expert discovery, each expert witness may be deposed for 7 hours total on each substantive topic (where a substantive topic is considered to be: (a) a defense other than invalidity or non-infringement, such as inequitable conduct or laches, (b) infringement/non-infringement by a Defendant Group, or (c) damages with respect to a Defendant Group), except

that each expert witness on invalidity or validity may be deposed for up to 14 hours. Depositions of experts shall not count against the hour total for fact witnesses set forth above.

VII. OTHER MATTERS

A. Service of Pleadings, Motions, Other Papers, and Discovery Requests and Responses. All pleadings, motions, and other papers that are filed are to be served on the other party electronically as provided by the Federal Rules and local rules. In addition, the parties agree to serve by e-mail all discovery requests and written responses and other papers that are not filed. The serving party shall attach the pleading or paper in “Portable Document Format” (.pdf) or other form of electronic file; if transmission of voluminous materials (such as a compendium of attachments or transcripts) as an e-mail attachment is impractical, then those materials shall be served by overnight delivery via service with the ability to “track” deliveries and verify receipt. Service of discovery requests, objections and responses by e-mail prior to 9:00 p.m. Eastern Time shall be the equivalent of service by hand that day for purposes of Rules 5 and 6. If service by overnight courier has been used for these papers, it will be the equivalent of service by hand on the date of receipt. The parties agree to exchange “listserv” addresses or other group e-mail addresses to facilitate service on all parties and all outside counsel for each party. The parties shall serve their discovery requests, responses, and objections on all other parties and outside counsel.

B. Drafts and Counsel Communications with Experts. The parties agree that no notes, drafts, or other type of preliminary written work by or for experts concerning the subject matter of this civil action shall be the subject of discovery or inquiry at trial. No communication, whether written or oral, between or among any expert(s) and counsel for the party retaining said expert(s) concerning the subject matter of this action shall be the subject of discovery or inquiry

at trial. The foregoing shall not apply to any communications or documents upon which the expert relied in forming his or her opinion as expressed in an affidavit, report or testimony, or on which an expert intends to rely as a basis for an opinion expressed in an affidavit, report or testimony in connection with this action; such communications shall be subject to discovery and inquiry at trial. Materials, communications, and other information exempt from discovery under this paragraph shall be treated as attorney work product.

C. Weekly Meet-and-Confer Conference Calls. Throughout the discovery period, the parties shall participate in weekly meet-and-confer conference calls to be held on Tuesday at 3:00 p.m. Eastern Time. A counsel for each party shall participate prepared to discuss discovery issues. Topics for discussion must be identified the day before the call.

E. Privilege log. The parties agree to make a good-faith effort to provide a privilege log within fourteen (14) calendar days of service of documents responsive to document requests. The parties further agree that communications between any party and its litigation counsel related to this action, documents and things created by or for a party's litigation counsel in anticipation of this action, and documents and things created after the date of the filing of this lawsuit need not be identified on any such privilege log.

F. Dismissal of Defendant Groups. If a Defendant Group is dismissed from this lawsuit, the individual discovery and deposition time allocated to that Defendant Group will not be allocated back among the Defendant Groups still remaining in the suit. Likewise, individual discovery and deposition time allocated to the Plaintiff for a dismissed Defendant Group will not be allocated back to the Plaintiff.

G. 30(b)(6) Witness Designations. The parties agree to identify the corporate representative being offered to testify as a witness pursuant to Rule 30(b)(6) and the topics on

which the witness is being offered to testify at least five (5) days in advance of the deposition date.

H. Requests for Admission. Plaintiff may serve up to forty (40) requests for admission per Defendant Group, and each Defendant Group may serve up to forty (40) requests for admission on Plaintiff. The parties agree to meet and confer before serving requests for admission or a stipulation regarding the authenticity of documents.

I. Third Party Materials. The parties shall provide or make available all materials obtained from third parties pursuant to Rule 45.

J. Defendant Group. A “Defendant Group” means all affiliated party Defendants as set forth below:

- The SAP Defendant Group: SAP AG and SAP America, Inc.
- The Software AG Defendant Group: Software AG and Software AG, Inc.
- The eBay/PayPal Defendant Group: eBay, Inc. and PayPal, Inc.
- Oracle Corporation
- Oracle America, Inc. (fka Sun Microsystems, Inc.)
- International Business Machines
- SAS Institute
- Cisco Systems, Inc.
- Sybase, Inc.; and
- Adobe Systems, Inc.

VIII. PRETRIAL AND *MARKMAN* HEARINGS

A. Claim Construction Procedures.

1. No later than July 15, 2010, the parties shall simultaneously exchange (but not file) a list of claim terms to be construed and proposed constructions. The proposed constructions are not binding on any party and cannot be cited by any party.

2. No later than July 22, 2010, the parties shall meet and confer to agree on the claim terms to be construed.

3. Twenty-one (21) days in advance of the *Markman* hearing date, each party may file with the Court a statement of the interpretation for which it contends, along with a memorandum explaining how the intrinsic evidence (claims, specification and prosecution history) of the patent(s)-in-suit support that interpretation. If either side claims that it also intends to rely on extrinsic evidence, it shall:

- (i) explain why extrinsic evidence is necessary,
- (ii) explain the extrinsic evidence it intends to offer, and
- (iii) if the extrinsic evidence is testimony (e.g., from an expert or the inventor), submit to the Court such testimony in the form of an affidavit.

4. No later than ten (10) days in advance of the *Markman* hearing date, each party may file with the Court a response to the other side's opening statement and memorandum.

5. A *Markman* hearing, if necessary, shall be held on August 26, 2010 at 9 a.m., or as soon thereafter as it practicable for the Court.

F. ***Daubert* Motions and Motions *in Limine*.** The parties agree that all *Daubert* motions to exclude experts or expert testimony and all motions *in limine* shall be filed by in time

to be heard at least two (2) weeks before the trial date. In advance of a hearing date, the parties involved shall prepare and submit a proposed briefing schedule.

G. Dispositive Motions. Dispositive motions shall be filed by November 5, 2010, and set for hearing on the earliest available motions day thereafter. A motion for summary judgment may be made earlier if properly made and noticed by a party.

IX. MEDIATION AND SETTLEMENT CONFERENCE

The parties will complete mediation by September 30, 2010. Mediation shall be conducted separately between Plaintiff and each Defendant Group. If the parties are unable to agree on a mediator, the Court will appoint a mediator for this case.

A settlement conference may be requested at any time in the case. The Court may refer the parties to consult with a United States Magistrate Judge regarding settlement.

X. TRIAL

A. Magistrate Judge. The parties do not agree to proceed to trial before a Magistrate Judge.

B. Jury Trial. A jury trial has been demanded.

C. Trial Date and Trial Time. The case will be set for trial by jury to commence within 4-8 weeks of the November 4, 2010 final pretrial conference. Assuming that all parties remain in the case and that all patents-in-suit are still at issue, the parties estimate that trial by jury in this action of all claims, defenses, and counterclaims will take 15 days.

Dated: May 28, 2010

Respectfully submitted,

/s/ Brian M. Buroker

Richard L. Wyatt, Jr. (*pro hac vice*)

Michael A. O'Shea (*pro hac vice*)

Brian M. Buroker (VSB #39581)

Michael A. Oakes (VSB #47245)

HUNTON & WILLIAMS LLP

1900 K Street, N.W.

Washington, D.C. 20006-1109

Telephone: (202) 955-1500

Facsimile: (202) 778-2201

Thomas J. Cawley (VSB #04612)

HUNTON & WILLIAMS LLP

1751 Pinnacle Dr

Suite 1700

McLean, VA 22102

Telephone: (703) 714-7400

Facsimile: (703) 714-7410

Service Email: tecsec@hunton.com

Andrew G. DiNovo (*pro hac vice*)

Jay D. Ellwanger (*pro hac vice*)

Adam Price (*pro hac vice*)

Raymond Mort III (*pro hac vice*)

**DINOVO PRICE ELLWANGER
& HARDY LLP**

7000 N. MoPac Expressway, Suite 350

Austin, Texas 78731

Telephone: (512) 539-2626

Facsimile: (512) 539-2627

Service Email: tecsec@dpelaw.com

Attorneys for Plaintiff TecSec, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2010, the foregoing PLAINTIFF TECSEC'S DISCOVERY PLAN was electronically filed with the Clerk of the Court using the CM/ECF system which will issue an electronic notification of filing to the following:

Attorneys for International Business Machines Corporation:

John M. Desmarais
Desmarais LLP
230 Park Avenue
New York, NY 10169

Service Email: jdesmarais@desmaraisllp.com

Jon Hohenthanner
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022

Elizabeth Bernard
Kirkland & Ellis LLP
655 15th Street, N.W.
Washington, D.C. 20006

Craig C. Reilly
Law Office of Craig C. Reilly
111 Oronoco Street
Alexandria, VA 22314

Service Email: IBMCounsel@kirkland.com

Attorneys for SAS Institute, Inc.

Walter Kelley, Jr.
Tara Lynn Zurawski
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
wdkelley@jonesday.com
tzurawski@jonesday.com

Thomas Goots
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
trgoots@jonesday.com

Attorneys for SAP America, Inc. and SAP AG:

Jeffrey K. Sherwood,
Frank C. Cimino
Matthew Weinstein
Megan Sunkel Woodworth
Dickstein Shapiro LLP
1825 Eye Street NW
Washington, DC 20006

Service Email:
SAP-TecSec@dicksteinshapiro.com

Attorneys for Cisco Systems, Inc.

William Boice
Mitchell Stockwell
Kilpatrick Stockton LLP
1100 Peachtree Street
Atlanta, GA 30309-4530
bboice@kilpatrickstockton.com
mstockwell@kilpatrickstockton.com

Amr Aly
Kilpatrick Stockton LLP
31 West 52nd Street
New York, NY 10019
aaly@kilpatrickstockton.com

Craig C. Reilly
Law Office of Craig C. Reilly
111 Oronoco Street
Alexandria, VA 22314
craig.reilly@ccreillylaw.com

Attorneys for Sybase, Inc.

Blair Jacobs
Christina Ondrick
Karla Palmer
McDermott, Will & Emery LLP
600 13th Street, N.W.
Washington, D.C. 20005
bjacobs@mwe.com
kpalmer@mwe.com
condrick@mwe.com

Terrence McMahon
Vera Elson
Yar Chaikovsky
Hong Lin
McDermott Will & Emery LLP
275 Middlefield Road
Menlo Park, CA 94025
tmcMahon@mwe.com
velson@mwe.com
hlin@mwe.com

*Attorneys for Software AG USA, Inc and
Software AG, Inc.*

Michael Robinson
Stephen K. Gallagher
Venable LLP
8010 Towers Crescent Drive
Vienna, VA 22182
mwrobinson@venable.com
skgallagher@venable.com

Jeffri Kaminski
Venable LLP
575 7th Street, NW
Washington, DC 20004
jakaminski@venable.com

Attorneys for Adobe Systems Incorporated

Henry Su
James Valentine
William Nelson
Christina Finn
Howrey LLP
1950 University Avenue
East Palo Alto, CA 94303-2281

Henry Charles Bunsow
Howrey LLP
525 Market Street, Suite 3600
San Francisco, CA 94105

Service Email: adobe@howrey.com

Attorneys for eBay Inc. and PayPal, Inc.

Sarah Hall
George Pappas
Gary Rubman
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Nitin Subhedar
Bhanu Sadasivan
Covington & Burling LLP
333 Twin Dolphin Drive
Redwood Shores, CA 94065

Service Email: ebay-ts@cov.com

*Attorneys for Oracle Corporation & Sun
Microsystems, Inc (Now Oracle America, Inc.)*

Jonathan D. Link
Townsend and Townsend and Crew LLP
1301 K Street, N.W., East Tower
Washington, D.C. 20005

James G. Gilliland, Jr.
A. James Isbester
Mehrnaz Boroumand Smith
Townsend and Townsend and Crew LLP
Two Embarcadero Center
San Francisco, CA 94111

Matthew Hulse
Townsend and Townsend and Crew LLP
379 Lytton Avenue
Palo Alto, CA 94301

Service Email: oracle-tecsec@townsend.com

/s/ Brian M. Buroker
Brian M. Buroker (VSB #39581)
Hunton & Williams, LLC
1900 K Street, N.W.
Washington, D.C. 20006
Phone: (202) 955-1500
Facsimile: (202) 778-2201
bburoker@hunton.com
Attorney for TecSec, Incorporated