



**TABLE OF CONTENTS**

Table of Authorities ..... ii

BACKGROUND .....2

I. TECSEC DID NOT IDENTIFY ANY ACCUSED EBAY PRODUCTS OR SERVICES IN ITS FIRST AMENDED COMPLAINT .....2

II. TECSEC’S FINAL INFRINGEMENT CONTENTIONS ALSO DID NOT IDENTIFY ANY ACCUSED EBAY PRODUCTS OR SERVICES .....4

ARGUMENT .....7

I. CLAIMS MUST HAVE FACIAL PLAUSIBILITY TO SURVIVE A MOTION TO DISMISS .....7

II. TECSEC HAS FAILED TO STATE A CLAIM AGAINST EBAY UPON WHICH RELIEF MAY BE GRANTED .....8

A. TecSec Has Failed to State a Claim for Direct Infringement Against eBay .....8

B. TecSec Has Failed to State a Claim for Indirect Infringement Against eBay .....9

1. Active Inducement .....10

2. Contributory Infringement .....12

C. eBay’s Status as the Parent Corporation to PayPal Does Not Justify a Claim for Patent Infringement Against eBay .....13

III. TECSEC’S ALLEGATIONS AGAINST EBAY SHOULD BE DISMISSED WITH PREJUDICE .....14

**TABLE OF AUTHORITIES**

**CASES**

*A. Stucki Co. v. Worthington Indus., Inc.*,  
849 F.2d 593 (Fed. Cir. 1988) ..... 13

*ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*,  
501 F.3d 1307 (Fed. Cir. 2007) ..... 10

*Am Int’l Specialty Lines Ins. Co. v. A.T. Massey Coal Co., Inc.*,  
No. 3:09-cv-32, 2009 WL 1608828 (E.D. Va. June 2, 2009)..... 5

*Aro Mfg. Co. v. Convertible Top Replacement Co.*,  
365 U.S. 336 (1961)..... 12

*Ashcroft v. Iqbal*,  
129 S. Ct. 1937 (2009)..... 7, 8, 10, 11

*Bell Atlantic Corp. v. Twombly*,  
550 U.S. 544 (2007)..... 7, 13

*Bender v. LG Elecs. U.S.A., Inc.*,  
No. C 09-02114 JF, 2010 WL 889541 (N.D. Cal. March 11, 2010) ..... 9

*Cary v. United States*,  
552 F.3d 1373 (Fed. Cir. 2009) ..... 1

*DSU Medical Corp. v. JMS Co., Ltd.*,  
471 F.3d 1293 (Fed. Cir. 2006) ..... 10

*Elan Microelectronics Corp. v. Apple, Inc.*,  
No. C 09-01531 RS, 2009 WL 2972374 (N.D. Cal. Sept. 14, 2009) ..... 9

*Francis v. Giacomelli*,  
588 F.3d 186 (4th Cir. 2009) ..... 8

*Halton Co. v. Streivor, Inc.*,  
No. C 10-00655, 2010 U.S. Dist. LEXIS 50649 (N.D. Cal. May 21, 2010) ..... 11

*Independence News, Inc. v. City of Charlotte*,  
568 F.3d 148 (4th Cir. 2009) ..... 1

*Leggat v. Equifax Information Services, Inc.*,  
No. 3:09-cv-263, 2009 WL 2432371 (E.D. Va. Aug. 6, 2009) ..... 5

*McZeal v. Sprint Nextel Corp.*,  
501 F.3d 1354 (Fed. Cir. 2007) ..... 9

*Minn. Mining & Mfg. Co. v. Chemque, Inc.*,  
303 F.3d 1294 (Fed. Cir. 2002) ..... 10

*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*,  
591 F.3d 250 (4th Cir. 2009) ..... 8

*Phillips v. LCI Int’l Inc.*,  
190 F.3d 609 (4th Cir. 1999) ..... 5

*Ricoh Co. Ltd. v. Quanta Computer Inc.*,  
550 F.3d 1325 (Fed. Cir. 2008) ..... 12

*Tegal Corp. v. Tokyo Electron Co.*,  
248 F.3d 1376 (Fed. Cir. 2001) ..... 13

*Tseng v. Marukai Corp. U.S.A.*,  
SACV 09-0968 AG, 2009 WL 3841933 (C.D. Cal. Nov. 13, 2009)..... 9

*Witthohn v. Fed. Ins. Co.*,  
164 Fed. Appx. 395 (4th Cir. 2006)..... 5

**STATUTES**

35 U.S.C. § 271(b) ..... 6, 10

35 U.S.C. § 271(c) ..... 6, 12, 13

**RULES**

Fed. R. Civ. P. 8(a)(2)..... 7

Fed. R. Civ. P. 12(b)(6)..... 1, 8

Fed. R. Civ. P. 12(c) ..... 1

Defendant eBay, Inc. (“eBay”)<sup>1</sup> requests that the Court dismiss with prejudice all claims that Plaintiff TecSec, Inc. (“TecSec”) has asserted against eBay pursuant to Fed. R. Civ. P. 12(b)(6). In the alternative, eBay requests that the Court grant judgment in favor of eBay pursuant to Fed. R. Civ. P. 12(c).<sup>2</sup>

TecSec has accused eBay of directly and indirectly infringing five of its patents, but TecSec’s complaint – including as further understood in light of its infringement contentions – does not provide an adequate basis to allow TecSec’s unsupported allegations to proceed any further. Although nearly four months have passed since TecSec first filed this lawsuit, TecSec has failed to identify *any* product or service of eBay that allegedly infringes any of the asserted patents. TecSec’s failure in this regard extends far beyond its original complaint, as TecSec’s April 2010 amended complaint and May 2010 final infringement contentions also fail to identify a single allegedly infringing product or service of eBay. Accordingly, the Court should dismiss TecSec’s claim for direct infringement against eBay with prejudice.

TecSec’s claims for indirect infringement are similarly deficient. TecSec’s pleadings do not provide any insight into how eBay allegedly indirectly infringes, either contributorily or through inducement. Instead, TecSec relies on little more than statutory language, an approach that the Supreme Court recently rejected. TecSec’s May 2010 infringement contentions, moreover, fail to allege or identify *any* act undertaken by eBay to induce infringement or

---

<sup>1</sup> Founded in 1995, eBay offers the world’s largest online marketplace at [www.ebay.com](http://www.ebay.com) as a means of connecting buyers and sellers of practically any type of goods. Currently, there are more than 90 million active users of the eBay online marketplace throughout the world.

<sup>2</sup> Rule 12(c) allows a party, after the pleadings are closed, to move for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings pursuant to Rule 12(c) is governed by the same standard as a motion to dismiss under Rule 12(b)(6). *See Independence News, Inc. v. City of Charlotte*, 568 F.3d 148, 154 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 507 (2009); *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009), *cert. denied*, 129 S. Ct. 2878 (2009).

contributorily infringe. TecSec's allegations against eBay fail as a matter of law and should be dismissed with prejudice.

## **BACKGROUND**

On February 5, 2010, TecSec filed this patent infringement lawsuit against eBay and twelve other leading technology companies located in the United States and Europe,<sup>3</sup> asserting hundreds of claims under eleven different patents.<sup>4</sup> Prior to that time, TecSec had not contacted eBay regarding its patents or indicated in any way that it believed eBay was infringing any of the patents. TecSec filed an amended complaint on April 19, 2010. *See* First Amended Complaint for Patent Infringement (Docket No. 94) (the "FAC").

### **I. TECSEC DID NOT IDENTIFY ANY ACCUSED EBAY PRODUCTS OR SERVICES IN ITS FIRST AMENDED COMPLAINT**

In the FAC (as well as in the original complaint), TecSec did not include any specific allegations against eBay, but rather grouped eBay together with PayPal, Inc. ("PayPal"), a wholly-owned subsidiary that is a separate corporate entity from eBay, and then referred generally to the product that is accused of infringement as "PayPal's on-line payment system." TecSec relied upon virtually identical language for each of the five patents that it asserted against eBay:

Defendant eBay and Defendant PayPal, its subsidiary, have been infringing and continue to infringe one or more of the claims of the '702 patent through at least the acts of making, using, selling, offering for sale and/or importing infringing products and services. eBay and PayPal's infringing products and services

---

<sup>3</sup> In addition to eBay, TecSec asserted claims against eBay's subsidiary, PayPal, Inc., as well as the following companies: IBM Corp., SAS Institute, Inc., SAP America, Inc., SAP AG, Cisco Systems, Inc., Oracle America, Inc., Sybase, Inc., Software AG, Software AG, Inc., Adobe Systems Inc., and Oracle Corporation.

<sup>4</sup> Only the five patents that TecSec asserted against eBay are relevant to this motion: U.S. Patent Nos. 5,369,702 (the "'702 patent"); 5,680,452 (the "'452 patent"); 5,717,755 (the "'755 patent"); 5,898,781 (the "'781 patent"); and 6,694,433 (the "'433 patent").

include, without limitation, PayPal's on-line payment system, other eBay and PayPal products which include or are bundled with the aforementioned products, and other eBay and PayPal products that include the ability to perform sub-file, object-based encryption. Defendants eBay and PayPal have indirectly infringed the '702 patent by inducing the infringement of the '702 patent and contributing to the infringement of the '702 patent. Defendants eBay and PayPal have actively and knowingly induced infringement of the '702 patent by providing their customers and others with detailed explanations, instructions, information, and support services related to arrangements, applications, and uses of their products and services that promote and demonstrate how to use their products and services in an infringing manner, and upon information and belief, those customers and others have used the products and services in an infringing manner. Defendants eBay and PayPal have contributed to the infringement of the '702 patent by actively and knowingly providing their customers and others with products and services that are used as a material element in the customers' or others' infringing products and services, and the products and services provided by eBay and PayPal are not staples of commerce with substantial noninfringing uses.

FAC at ¶ 48; *see also id.* at ¶ 71 ('452 patent), ¶ 94 ('755 patent), ¶ 117 ('781 patent), ¶ 138 ('433 patent). TecSec's allegations with respect to the '433 patent differ only slightly from the language quoted above, and identify PayPal's "Website Payments Pro Direct Payments API" instead of PayPal's "on-line payment system." *See id.* at ¶ 138. TecSec's FAC does not identify *any* eBay products or services.

TecSec's allegations against eBay stand in stark contrast to its allegations against most of the other defendants. With respect to the others, TecSec identified specific products or services that allegedly infringe the asserted patents. For example, TecSec's allegations concerning the '702 patent identified by name six allegedly infringing products or services of IBM (FAC at ¶ 32), one allegedly infringing product or service of SAS (FAC at ¶ 34), two allegedly infringing products or services of SAP (FAC at ¶ 36), one allegedly infringing product or service of Cisco (FAC at ¶ 38), six allegedly infringing products or services of Oracle America (FAC at ¶ 40), four allegedly infringing products or services of Sybase (FAC at ¶ 42), four allegedly infringing products or services of Software AG (FAC at ¶ 44), four allegedly infringing products or services

of Adobe (FAC at ¶ 46), and six allegedly infringing products of Oracle Corporation (FAC at ¶ 50).<sup>5</sup>

## **II. TECSEC'S FINAL INFRINGEMENT CONTENTIONS ALSO DID NOT IDENTIFY ANY ACCUSED EBAY PRODUCTS OR SERVICES**

Given the extraordinary breadth of TecSec's complaint and the resulting challenges to the Court and the parties, the Court required TecSec to serve "finalized claim charts" on May 12, 2010. *See* Apr. 30, 2010 Order (Docket No. 121). During a hearing on April 28, 2010, the Court informed TecSec that it was required to provide detailed claim charts "as to each defendant, each device or methodology that [TecSec] claim[s] violates [its] patents, and obviously identify the specific claims within those patents that read on those particular allegedly infringing products." Apr. 28, 2010 Tr. at 19:10-14 (Exh. 9 to the Declaration of Gary M. Rubman). As the Court explained,

I'm going to force the plaintiff to lock themselves into a position. That claims chart is it. I'm not going to allow any amendment, but I'll give you until [May] 12th so you have the time to finish it up, make it accurate, and the only change you can make to it afterwards is to take things out of it, in other words, to remove claims, but I want -- the defendants have a right at this point to know exactly what the parameters of this lawsuit are...

*Id.* at 21:5-12.

TecSec disregarded the Court's April 30 Order and its admonitions during the April 28 hearing. Examples of the deficiencies in its contentions, which are numerous, include the following:

- Despite the requirement that it serve charts "as to each defendant," TecSec did not serve charts that identify and state the basis for its infringement contentions against eBay. Instead, TecSec served combined contentions that arbitrarily group eBay and

---

<sup>5</sup> eBay takes no position regarding the adequacy of the allegations asserted against any of the other defendants.

PayPal together. Without any explanation for why such a grouping is appropriate, TecSec refers to the two separate entities throughout its contentions as simply “eBay.” By doing so, TecSec attempted to hide the fact that all of its allegations relate to PayPal, Inc., not eBay, Inc. *See* Exh. 1 (May 12, 2010 Contentions), Exh. 2 (‘702 Chart) at 1; Exh. 3 (‘452 Chart) at 1; Exh. 4 (‘755 Chart) at 1; Exh. 5 (‘781 Chart) at 1; Exh. 6 (‘433 Chart) at 1.<sup>6</sup>

- Despite the requirement that it specify “each device or methodology” that allegedly infringes its patents, TecSec did not identify any allegedly infringing eBay product or service and purports to be accusing an unspecified number of unnamed “related products.” *See, e.g.*, Exh. 2 (‘702 Chart) at 1 (“Also accused of infringement are related products that are used by or in conjunction with the Accused System and Method.”). Even with respect to the products or services that TecSec does identify, TecSec states that it is providing only “select evidence” of the alleged infringement. *See id.*
- Despite the requirement that it serve “finalized claim charts” with respect to eBay and the other defendants that cannot be supplemented, TecSec titled its contentions as “preliminary” and purported to reserve the right to supplement its contentions against eBay as the case proceeds. *See, e.g.*, Exh. 1 (Contentions) at 3 (“Following additional discovery regarding the Defendants’ products and services and receipt of Defendants’ non-infringement positions, Plaintiffs will supplement its allegations related to the doctrine of equivalents.”); Exh. 2 (‘702 Chart) at 1 (“An analysis of eBay’s technical documentation and/or source code may be necessary to more fully identify all infringing features and functionality of the Accused System and Method. Accordingly, Plaintiff reserves the right to supplement these contentions once such information is made available to plaintiff. Furthermore, Plaintiff reserves the right to revise these contentions in view of the Court’s final claim construction in this action.”).

TecSec’s contentions did not provide any additional insight to eBay that would allow it to better understand the parameters of this case.<sup>7</sup> With respect to four of the patents (‘702, ‘755,

---

<sup>6</sup> For each of the defendants, TecSec served generic contentions (Exh. 1) that were identical for each defendant. It also served defendant-specific claim charts (Exhs. 2-6) and “evidence charts” (Exhs. 7-8).

<sup>7</sup> As TecSec’s FAC is deficient on its face with respect to eBay, it is not necessary for the Court to consider TecSec’s infringement contentions in order to grant this motion. The infringement contentions, however, provide insight into TecSec’s understanding of the allegations in the FAC. “[A] court may consider official public records, documents central to a plaintiff’s claim, and documents sufficiently referred to in the Complaint without converting the motion to dismiss into one for summary judgment, so long as the authenticity of these documents is not disputed.” *Witthohn v. Fed. Ins. Co.*, 164 Fed. Appx. 395, 396-97 (4th Cir. 2006); *see also Phillips v. LCI Int’l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); *Leggat v. Equifax Information Services, Inc.*, No. 3:09-cv-263, 2009 WL 2432371, \*2 (E.D. Va. Aug. 6, 2009); *Am Int’l*

‘781 and ‘452), TecSec limited its infringement allegations to PayPal services – the “Direct Payment API and encrypted Payment Buttons” – and did not identify *any* products or services of eBay. *See* Exh. 2 (‘702 Chart) at 1; Exh. 3 (‘452 Chart) at 1; Exh. 4 (‘755 Chart) at 1; Exh. 5 (‘781 Chart) at 1. Likewise, for the fifth patent (‘433), TecSec limited its allegations to PayPal’s “Direct Payment API.” *See* Exh. 6 (‘433 Chart) at 1. Moreover, none of the “evidence” that TecSec identified in its claim charts comes from eBay. Rather, all of the evidence comes from either websites affiliated with PayPal or third party standards setting organizations. *See* Exh. 7 (‘702 Family Evidence Chart); Exh. 8 (‘433 Evidence Chart).

With regard to indirect infringement, TecSec relied upon boilerplate language and did little to expand upon the allegations contained in the FAC. For instance, TecSec’s contentions state generally, with respect to all thirteen defendants:

As set forth in the appended charts, Plaintiff asserts that Defendants further infringe the Patents-in-Suit indirectly, through inducement of infringement under 35 U.S.C. § 271(b) and contributory infringement under 35 U.S.C. § 271(c). With knowledge of the Patents-in-Suit, or at a minimum deliberate indifference, Defendants have actively encouraged, directed, authorized and instructed regarding infringement by others, including their customers, partners and service providers. The products identified in the appended charts are required to be and are installed and operated in an infringing manner. Defendants provide detailed instructions and support promoting infringement of the Patents-in-Suit. Defendants further provide software and hardware to such third parties that have no substantial noninfringing use.

Exh. 1 (Contentions) at 3. In the accompanying defendant-specific claim charts, TecSec alleged that “eBay” (which TecSec arbitrarily and improperly defined as the combination of eBay, Inc. and PayPal, Inc.) indirectly infringes the asserted patents because, among other things, it

---

*Specialty Lines Ins. Co. v. A.T. Massey Coal Co., Inc.*, No. 3:09-cv-32, 2009 WL 1608828, \*3 (E.D. Va. June 2, 2009). Because TecSec’s infringement contentions are central to its claim for patent infringement against eBay and there is no dispute as to their authenticity, the Court may consider the infringement contentions without converting this motion into a motion for summary judgment.

“instructs users to install the payment processes” and “provides installation and support services for payment processes.” *See, e.g.*, Exh. 2 (‘702 Chart) at 1; Exh. 6 (‘433 Chart) at 1. The “evidence” that TecSec identified in support of its indirect infringement allegations, however, did not include *any* materials from eBay.<sup>8</sup> Instead, TecSec cited to only publicly available documents from websites affiliated with PayPal and other third parties. *See* Exh. 7 (‘702 Family Evidence Chart); Exh. 8 (‘433 Evidence Chart). Nor did TecSec identify any of the “customers” who allegedly are committing direct infringement.

Accordingly, TecSec’s contentions fail to allege that eBay has independently engaged in any infringing activity. Instead, TecSec’s contentions focus exclusively upon the alleged activities of eBay’s corporate subsidiary, PayPal.

## ARGUMENT

### I. CLAIMS MUST HAVE FACIAL PLAUSIBILITY TO SURVIVE A MOTION TO DISMISS

In order to state a claim upon which relief may be granted, a complaint must include a “short and plain statement of the claim showing that the pleading is entitled to relief.” Fed. R. Civ. P. 8(a)(2). As the Supreme Court recently held, this standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A complaint that contains only “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” is inadequate to meet this standard. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As the Supreme Court has explained,

---

<sup>8</sup> In the Joint Discovery Plan, TecSec agreed that its May 12, 2010 contentions would state “the basis for its contention that *each Defendant* has committed indirect infringement, . . . stating the particulars of its contentions (e.g., identifying the alleged direct infringer(s), the act(s) of direct infringement, the accused product(s), and each other element of an indirect infringement claim.” *See* April 21, 2010 Joint Discovery Plan (Docket No. 97) at 4 (emphasis added). TecSec, however, failed to separately state any basis for its contention that eBay has committed indirect infringement.

“only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 129 S. Ct. at 1950. To assert a claim with “facial plausibility,” a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949. If the complaint does not permit the Court to infer “more than the mere possibility of misconduct,” the plaintiff has failed to state a claim upon which relief may be granted. *See id.* at 1950.

The Fourth Circuit has recently applied the standard set forth in *Twombly* and *Iqbal* to procedural motions to dismiss under Rule 12(b)(6). The Court held that to survive a motion to dismiss, a complaint must “plead sufficient facts to allow a court, drawing on ‘judicial experience and common sense,’ to infer ‘more than the mere possibility of misconduct.’” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1950); *see also Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009) (affirming grant of motion to dismiss because plaintiff failed to state a plausible claim for relief).

## **II. TECSEC HAS FAILED TO STATE A CLAIM AGAINST EBAY UPON WHICH RELIEF MAY BE GRANTED**

### **A. TecSec Has Failed to State a Claim for Direct Infringement Against eBay**

TecSec’s FAC does not identify any allegedly infringing eBay product or service. Instead, TecSec accuses PayPal’s “on-line payment system” with respect to four of the patents (FAC at ¶¶ 48, 71, 94, 117), PayPal’s “Website Payments Pro Direct Payments API” with respect to one of the patents (FAC at ¶ 138), and other unspecified products that “include the ability to perform” the inventions disclosed in the asserted patents (FAC at ¶¶ 48, 71, 94, 117, 138).

In patent infringement actions, a patentee is required to plead facts sufficient to place the alleged infringer on notice of what the claim is and the grounds upon which it rests, including an

identification of the accused device or process. *See McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356-57 (Fed. Cir. 2007); Fed. R. Civ. P. Form 18. A number of district courts have dismissed claims for patent infringement where the complaint failed to specifically identify the products or services accused of infringement. *See, e.g., Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 JF, 2010 WL 889541 (N.D. Cal. March 11, 2010) (granting motion to dismiss where plaintiff identified, by way of example, only categories of allegedly infringing product types); *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, \*2 (N.D. Cal. Sept. 14, 2009) (dismissing counterclaims that identified “touch sensitive input devices or touchpads, including but not limited to the Smart-Pad”); *Tseng v. Marukai Corp. U.S.A.*, SACV 09-0968 AG, 2009 WL 3841933 (C.D. Cal. Nov. 13, 2009) (dismissing plaintiff’s complaint alleging infringement by “selling goods”).

Instead of providing proper notice through its pleading, TecSec did not identify any eBay product or service that directly infringes the asserted patents in its FAC. TecSec’s final infringement contentions – served nearly one month after the FAC and more than three months after the original complaint – suffer from the same deficiency. As a result, TecSec has failed to state a plausible claim for relief against eBay because it has utterly failed to allege a critical element of its claims, namely the identities of the products or services of eBay that allegedly infringe the asserted patents.

**B. TecSec Has Failed to State a Claim for Indirect Infringement Against eBay**

TecSec’s FAC also alleges, in a conclusory fashion, that eBay has indirectly infringed the asserted patents through inducement and contributory infringement. *See* FAC at ¶¶ 48, 71, 94, 117-138. TecSec’s allegations treat eBay and PayPal as a single entity, and therefore fail to separately place eBay on notice of its allegedly infringing conduct. Indeed, because TecSec has

not identified any allegedly infringing eBay product or service in its FAC or infringement contentions, eBay is left only to guess as how it may have induced or contributed to the infringement of unnamed products or services separately offered by some other unspecified entity.

Facial plausibility requires pleading facts that permit a reasonable inference that the defendant is liable for the alleged misconduct. *Iqbal*, 129 S. Ct. at 1949. Here, TecSec has failed to plead such facts in support of its indirect infringement claim against eBay.

### **1. Active Inducement**

A claim of active inducement requires more than merely selling a product or providing a service. *See* 35 U.S.C. § 271(b). To prevail on an inducement claim, “the patentee must establish ‘first that there has been direct infringement, and second that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another’s infringement.’” *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1312 (Fed. Cir. 2007) (quoting *Minn. Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304-05 (Fed. Cir. 2002)). The “specific intent” element of inducement is satisfied where the defendant “intended to cause the acts that constitute the direct infringement” and the defendant “kn[ew] or should have known tha[t] its action would cause the direct infringement.” *DSU Medical Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006). Thus, “inducement requires evidence of culpable conduct, directed to encouraging another’s infringement, not merely that the inducer had knowledge of the direct infringer’s activities.” *Id.* at 1306.

With regard to eBay, TecSec’s claim for active inducement is deficient, and warrants dismissal. In support of its claim for active inducement, TecSec states in the FAC:

Defendants eBay and PayPal have actively and knowingly induced infringement of the ‘702 patent by providing their customers and others with detailed

explanations, instructions, information, and support services related to arrangements, applications, and uses of their products and services that promote and demonstrate how to use their products and services in an infringing manner, and upon information and belief, those customers and others have used the products and services in an infringing manner.

FAC at ¶ 48; *see also* FAC at ¶¶ 71, 94, 117, 138. TecSec fails to identify the eBay “products and services” for which eBay has allegedly provided “explanations, instructions, information, and support services.” TecSec has also not identified any of the “customers” or alleged that eBay provides these “customers” with any such information or services concerning the products or services from any other defendant that it has accused of infringing, including PayPal’s “online payment system” or PayPal’s “Direct Payment API.”

TecSec’s infringement contentions, moreover, confirm that TecSec has not identified any activities undertaken by eBay to induce others to infringe the asserted patents. In fact, the evidence TecSec cited in support of its allegations of inducement comes exclusively from PayPal or third party standards setting organizations. *See* Exh. 7 (‘702 Family Evidence Chart); Exh. 8 (‘433 Evidence Chart). TecSec has not identified *any* evidence – including *any* evidence of the “explanations, instructions, information, and support services” that it relies upon for its allegations – that came from eBay.

Having failed to even specify the products or services for which eBay allegedly induced infringement by others, TecSec’s FAC cannot plausibly allege that eBay has induced infringement with specific intent. *See, e.g., Halton Co. v. Streivor, Inc.*, No. C 10-00655, 2010 U.S. Dist. LEXIS 50649, \*3-7 (N.D. Cal. May 21, 2010) (granting motion to dismiss where plaintiff failed to identify the act of direct infringement and failed to allege that defendant specifically intended to encourage another’s infringement). Where a cause of action requires intent to be pled, the Supreme Court has made it clear that the complaint must include “factual

allegation sufficient to plausibly suggest [the other party's] state of mind.” *Iqbal*, 129 S. Ct. at 1952. TecSec’s FAC wholly fails in this regard. The Court should therefore dismiss TecSec’s claim against eBay for inducement to infringe.

## 2. Contributory Infringement

A claim for contributory infringement also requires more than merely selling a product or providing a service to another who uses that product or service to directly infringe a patent. *See* 35 U.S.C. § 271(c). Instead, contributory infringement requires the sale of “a component especially designed for use in a patented invention” that “is not a staple article of commerce suitable for substantial noninfringing use.” *Ricoh Co. Ltd. v. Quanta Computer Inc.*, 550 F.3d 1325, 1337 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009). “[T]here can be no contributory infringement in the absence of direct infringement.” *See Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 341-42 (1961).

TecSec’s claim for contributory infringement against eBay suffers from the same deficiencies as its claim for inducement. In support of its claim for contributory infringement, TecSec states in its FAC:

Defendants eBay and PayPal have contributed to the infringement of the ‘702 patent by actively and knowingly providing their customers and others with products and services that are used as a material element in the customers’ or others’ infringing products and services, and the products and services provided by eBay and PayPal are not staples of commerce with substantial noninfringing uses.

FAC at ¶ 48; *see also* FAC at ¶¶ 71, 94, 117, 138. Once again, TecSec fails to identify the “products and services” provided by eBay that were designed to be used as a material element in infringing products and services and that are not staples of commerce with substantial noninfringing uses. Accordingly, it is not possible to determine from TecSec’s FAC – including when read in conjunction with its infringement contentions – what direct infringement allegedly

serves as the basis for the allegations of contributory infringement. TecSec's claims against eBay amount to little more than conclusory recitations of the statute.<sup>9</sup>

A complaint must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. TecSec's FAC, however, provides nothing more than labels and conclusions in support of its claim for contributory infringement against eBay. TecSec had ample opportunity to expand upon its indirect infringement allegations in its infringement contentions, but failed to do so. Accordingly, the Court should dismiss TecSec's claim for contributory infringement against eBay.

**C. eBay's Status as the Parent Corporation to PayPal Does Not Justify a Claim for Patent Infringement Against eBay**

Having failed to state a claim against eBay for direct or indirect infringement, TecSec cannot rely upon eBay's status as a corporate parent to PayPal to hold eBay liable for the allegedly infringing activities of PayPal, its subsidiary.

The law is clear that a parent company is not automatically liable for its subsidiary's alleged patent infringement. *See, e.g., Tegal Corp. v. Tokyo Electron Co.*, 248 F.3d 1376, 1380 (Fed. Cir. 2001); *A. Stucki Co. v. Worthington Indus., Inc.*, 849 F.2d 593, 596-97 (Fed. Cir. 1988). A parent company will be held liable for the actions of its subsidiary "only if the evidence reveals circumstances justifying disregard of the[ir] status . . . as distinct, separate corporations," or if the parent has itself engaged in conduct giving rise to liability under 35 U.S.C. § 271. *A. Stucki Co.*, 849 F.2d at 596.

---

<sup>9</sup> 35 U.S.C. § 271(c) states: "Whoever offers or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

TecSec, however, did not plead any facts in its FAC suggesting that eBay is an alter ego of PayPal or that eBay controls the management, policies, or operations of PayPal. eBay and PayPal are, in fact, distinct corporate entities. There is, therefore, no basis for TecSec to state a claim against eBay based solely on the allegedly infringing activities of its subsidiary.

**III. TECSEC’S ALLEGATIONS AGAINST EBAY SHOULD BE DISMISSED WITH PREJUDICE**

TecSec has had ample time and opportunities to identify and accuse any allegedly infringing eBay products and/or services, including its February 5, 2010 Complaint, its April 19, 2010 First Amended Complaint, and its May 12, 2010 Infringement Contentions. Nevertheless, TecSec failed to set forth in its pleadings or contentions any claim for direct or indirect infringement against eBay. Pursuant to the Court’s April 30 Order, the time for TecSec to provide “finalized claim charts” identifying each allegedly infringing device or methodology has passed. Apr. 30, 2010 Order (Docket No. 121).

Accordingly, TecSec’s claims for patent infringement against eBay should be dismissed with prejudice.

**CONCLUSION**

For the reasons set forth above, eBay requests that the Court dismiss with prejudice all claims that TecSec has asserted against eBay.

Dated: May 26, 2010

Respectfully Submitted,

/s/

---

Sarah M. Hall (VA Bar # 71084)  
George F. Pappas (*pro hac vice*)  
Gary Rubman (*pro hac vice*)  
COVINGTON & BURLING LLP  
1201 Pennsylvania Ave. NW  
Washington, DC 20004  
Tel: (202) 662-6000  
Fax: (202) 662-6291  
Email: shall@cov.com  
gpappas@cov.com  
grubman@cov.com

Nitin Subhedar (*pro hac vice*)  
Bhanu Sadasivan (*pro hac vice*)  
COVINGTON & BURLING LLP  
333 Twin Dolphin Drive, Suite 700  
Redwood Shores, CA 94065  
Tel: (650) 632-4700  
Fax: (650) 632-4800  
Email: nsubhedar@cov.com  
bsadasivan@cov.com

*Attorneys for eBay, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2010 a copy of MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT EBAY, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS was served by e-mail on the following:

<b>Plaintiff TecSec, Inc.</b>	
Richard L. Wyatt, Jr. Michael A. O'Shea Brian M. Buroker Michael A. Oakes HUNTON & WILLIAMS LLP 1900 K Street, N.W. Washington, D.C. 20006-1109 Tel: 202-955-1500 Fax: 202-778-2201 Email: TecSec@hunton.com	Andrew G. DiNovo Jay D. Ellwanger DINOVO PRICE ELLWANGER & HARDY LLP 7000 N. MoPac Expressway, Suite 350 Austin, TX 78731 Tel: 512- 539-2626 Fax: 512-539-2627 Email: tecsec@dpelaw.com
Thomas J. Cawley Stephen Michael Sayers HUNTON & WILLIAMS 1751 Pinnacle Dr., Suite 1700 McLean, VA 22102 Tel: 703-714-7400 Fax: 703-714-7410 Email: TecSec@hunton.com	

<b>Defendant IBM Corporation</b>	
Jon T. Hohenthauer John M. Desmarais Sharon Billington Jonas McDavit KIRKLAND & ELLIS 601 Lexington Avenue New York, NY 10022 Tel: 202-446-4800 Fax: 202-446-4900 Email: IBMCounsel@kirkland.com	Elizabeth Bernard Christopher Nalevanko Philip Warrwick KIRKLAND & ELLIS 655 Fifteenth Street, N.W. Washington, D.C. 20005-5793 Tel: 202-879-5000 Fax: 202-879-5200 Email: IBMCounsel@kirkland.com
Craig Crandall Reilly LAW OFFICE OF CRAIG C. REILLY 111 Oronoco Street Alexandria, VA 22314 Tel: 703-549-5354 Fax: 703-549-2604	

Email: craig.reilly@ccreillylaw.com	
-------------------------------------	--

<b>Adobe Systems Incorporated</b>	
Henry C. Bunsow HOWREY LLP 525 Market Street, Suite 3600 San Francisco, CA 94105 Tel: 415-848-4946 Fax: 415-848-4999 Email: BunsowH@howrey.com	James F. Valentine William P. Nelson Henry C. Su Christina M. Finn HOWREY LLP 1950 University Avenue, 4th Floor East Palo Alto, CA 94303 Tel: 650-798-3560 Fax: 650-798-3600 Email: ValentineJ@howrey.com Email: NelsonW@howrey.com Email: SuH@howrey.com Email: FinnC@howrey.com
Vivian S. Kuo HOWREY LLP 1299 Pennsylvania Avenue Washington, D.C. 20004 Tel: 202-383-7220 Fax: 202-379-9859 Email: KuoV@howrey.com	

<b>Defendant Cisco Systems, Inc.</b>	
Craig Crandall Reilly LAW OFFICE OF CRAIG C. REILLY 111 Oronoco Street Alexandria, VA 22314 Tel: 703-549-5354 Fax: 703-549-2604 Email: craig.reilly@ccreillylaw.com	William H. Boice Mitchell G. Stockwell Michael J. Turton Russell A. Korn KILPATRICK STOCKTON LLP 1100 Peachtree Street, NE, Suite 2800 Atlanta, GA 30309 Tel: 404-815-6500 Fax: 404-815-6555 Email: bboice@kilpatrickstockton.com Email: mstockwell@kilpatrickstockton.com Email: mturton@kilpatrickstockton.com Email: rkorn@kilpatrickstockton.com
Alton L. Absher III Jon R. Pierce KILPATRICK STOCKTON LLP 1001 West Fourth Street Winston-Salem, NC 27101-2400 Tel: 336-607-7300	Amr O. Aly KILPATRICK STOCKTON LLP 31 W. 52nd Street, 14th Fl. New York, NY 10019 Tel: 212-775-8700 Fax: 212-775-8765

Fax: 336-734-2755 Email: jpierce@kilpatrickstockton.com Email: absher@kilpatrickstockton.com	Email: aaly@kilpatrickstockton.com
Stephen Eric Baskin KILPATRICK STOCKTON LLP 607 14TH St NW, Suite 900 Washington , DC 20005-2018 Tel: 202-508-5800 Email: sbaskin@kilpatrickstockton.com	

<b>Defendants Oracle Corp. and Sun Microsystems, Inc.</b>	
Jonathan D. Link TOWNSEND & TOWNSEND AND CREW LLP 1301 K St NW 9th Floor, East Tower Washington, DC 20005 Tel: (202) 481-9900 Email: jlink@townsend.com	James Gilliland, Jr. A. James Isbester Mehrnaz B. Smith TOWNSEND & TOWNSEND AND CREW LLP 2 Embarcadero Center, 8th Floor San Francisco, CA 94111 Tel: 415-273-7550 Email: jggilliland@townsend.com jisbester@townsend.com mboroumand@townsend.com

<b>Defendants SAP America, Inc. and SAP, AG</b>	
Jeffrey Kirk Sherwood Charles Daniel Ossola Frank C. Cimino Megan Woodworth Matthew B. Weinstein DICKSTEIN SHAPIRO LLP 1825 Eye Street NW Washington, DC 2006-5403 Tel: 202-887-4000 Fax: 202-420-2201 Email: SAP-TecSec@dicksteinshapiro.com	

<b>Defendant SAS Institute, Inc.</b>	
Walter D. Kelley, Jr. Tara Lynn Renee Zurawski JONES DAY 51 Louisiana Avenue, N.W. Washington, D.C. 20001-2113 Tel: 202-879-4278 Fax: 202-626-1700 Email: wdkelley@jonesday.com	David B. Cochran Thomas Groots JONES DAY 901 Lakeside Avenue Cleveland, OH 44114-1190 Tel: 216-586-7029 Fax: 216-579-0212 Email: dcochran@jonesday.com

Email: tzurawski@jonesday.com	Email: trgroots@jonesday.com
-------------------------------	------------------------------

<b>Defendants Software AG and Software AG, Inc.</b>	
Jeffri A. Kaminski VENABLE LLP 575 7th Street, N.W. Washington, D.C. 20004 Tel: 202-344-4048 Fax: 202-344-8300 Email: jakaminski@venable.com	Michael W. Robinson Stephen K. Gallagher VENABLE LLP 8010 Towers Crescent Dr., Suite 300 Vienna, VA 22182 Tel: 703-760-1684 Fax: 703-821-8949 Email: mwrobinson@venable.com Email: skgallagher@venable.com

<b>Defendant Sybase</b>	
Blair M. Jacobs Karla L. Palmer Christina A. Ondrick McDERMOTT WILL & EMERY 600 13th Street, N.W. Washington, D.C. 20005-3096 Tel: 202-756-8000 Fax: 202-756-8087 Email: bjacobs@mwe.com Email: kpalmer@mwe.com Email: condrick@mwe.com	Terrence McMahan Vera Elson Yar Chaikovsky Hong Lin McDERMOTT WILL & EMERY LLP 275 Middlefield Road Menlo Park, CA 94205 Tel: 650-815-7400 Fax: 650-815-7401 Email: tmcMahon@mwe.com Email: velson@mwe.com Email: hlin@mwe.com

\_\_\_\_\_  
 /s/  
 Sarah M. Hall (VA Bar # 71084)  
 COVINGTON & BURLING LLP  
 1201 Pennsylvania Ave. NW  
 Washington, DC 20004  
 Tel: (202) 662-6000  
 Fax: (202) 662-6291  
 Email: shall@cov.com

*Counsel for Defendant eBay, Inc.*