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No. 10-57019

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

eBAY INC.,

Appellant,

v.

GIBSON GUITAR CORP.,

Respondent.

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District Court

Case No. CV10-8884 RGK (RZx)

On Appeal From the United States District Court  
for the Central District of California  
Honorable Judge R. Gary Klausner

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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**  
**MOTION FOR STAY PENDING APPEAL**

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**CORPORATE DISCLOSURE STATEMENT  
(FED. R. APP. P. 26.1)**

eBay Inc. is a corporation and has no parent corporation. No publicly held corporation owns 10% or more of the stock of this corporation.

**CIRCUIT RULE 27-3 CERTIFICATE**

(i) The telephone numbers, email addresses and office addresses of

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(ii) Facts showing the existence and nature of the claimed  
emergency are as follows:

As explained further in the motion, the basis for the emergency is a  
preliminary injunction order issued by the District Court against appellant eBay  
Inc. (“eBay”), which would cause irreparable harm to eBay and legitimate third  
party sellers that use eBay’s services. The damage will be irreparable because,

among other reasons, the order was issued three days before Christmas, which is the busiest season for eBay and its customers.

The contributory infringement allegations against eBay are with respect to only 5 of the 12 trademarks-in-suit, none of which relate to the Gibson name trademarks but rather relate only to guitar shapes. (Declaration of Kai Curtis ISO Motion to Stay Preliminary Injunction (“Curtis Decl.”), Ex. A at p. 14.) Plaintiff has also confirmed that its complaint relates only to certain accused products and series of Paper Jamz toy guitars -- Series 3, 4, 5 and 6 manufactured by Defendant WowWee. (Curtis Decl., Ex. A ¶¶ 6-8.) eBay cannot possibly identify by somehow “eye-balling” the shape of a toy whether it falls within the limited scope of what is alleged. (Declaration of Kai Curtis ISO Motion to Stay Preliminary Injunction (“Curtis Decl.”), Ex. A ¶¶ 6-8.) eBay has never received notice of any specific allegedly infringing listing of Paper Jamz products, as required for contributory trademark infringement. (*Id.*, Ex. A ¶ 17.) Since learning of Gibson’s general issue only upon Gibson’s filing of the complaint, eBay has repeatedly offered to immediately remove any and all allegedly infringing Paper Jamz listings if Gibson simply identifies those listings to eBay through its notice and take-down system, VeRO, which Gibson is a member and regular reporter. Gibson has repeatedly refused. (*Id.*, Ex. A ¶¶ 9-17, 33.)

(iii) When and how counsel for the other parties were notified and whether they have been served with the motion

On December 22, 2010, at 11:06 a.m., counsel for eBay emailed counsel for respondent, and requested a stay of the injunction. Counsel for respondent responded to the email at 12:03 p.m., and refused to agree to a stay. Counsel for



## I. INTRODUCTION

eBay seeks an emergency stay pending appeal of the Central District of California's December 22, 2010 order GRANTING Plaintiff's Ex Parte Application for Preliminary Injunction. (Dkt. 58). Given the extraordinary harm caused by injunctive relief issued only days before Christmas, which is the height of the eBay season, eBay requests an emergency stay of the injunction pending appeal.

One day after filing its Complaint, Plaintiff Gibson filed an Application for a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction on November 19, 2010 (Dkt. 5). The Court denied Plaintiff's TRO application on November 24, 2010 and issued an Order to Show Cause re: Preliminary Injunction, not permitting oral argument. (Dkt. 20). As ordered by the Court, defendants filed their oppositions to Plaintiff's motion for preliminary injunction on December 8, 2010. Ten of the thirteen defendants filed a joint opposition. (Dkts. 30, 38).

Because of its unique position among the defendants, eBay submitted a separate opposition based on law and facts specific to Plaintiff's contributory trademark infringement claims against eBay. (Dkt. 29). Plaintiff **did not file a response** to the unique issues raised by eBay which is the **only** Defendant alleged only to be liable for contributory infringement, only as to certain, not all, Paper Jamz toy guitar products, and related to some, not all, of the Gibson trademarks-in-

suit. (Dkt. 40) The District Court did not address eBay's unique circumstances and did not address contributory infringement at all, the likelihood of success on the merits and/or irreparable harm standards related to that claim. Rather, the District Court simply lumped eBay in with a broad group of Defendants, purportedly applying the injunction to "all Defendants."

The harm to eBay to be forced to comply with an injunction during its busiest business period of the year is irreparable. The Christmas holiday season is the busiest time of year for eBay as a third party marketplace. eBay does not sell items itself but rather connects third party buyers and sellers through listings posted by third parties, it does not take possession of items and does not create, approve or edit the content of the third party listings. At any given time, there are over 100 million listings on the eBay site with 8-10 million new listings each day. eBay cannot simply manually look at every one of those listings to ensure that they are not a toy in the shape of one of the Gibson guitars, which look to the untrained eye like many other guitar shapes that Gibson admits do not infringe. Nor can eBay simply cull through all Paper Jamz listings attempting to see if those look like the infringing shapes and not like other, nearly identical, shapes. eBay's only option is to remove all Paper Jamz products even though Gibson admits that at least 1/3 of the styles do not infringe Gibson's trademarks. Even then, sellers can list items without the Paper Jamz name in the title, making it virtually impossible

for eBay to identify those listings. Thus, legitimate, admittedly non-infringing products will be removed from the eBay site at the height of the holiday season, harming both eBay and its third party sellers.

Because of the urgency created by the holiday season, eBay seeks an immediate stay pending appeal of the District Court's order granting injunction. Due to this same urgency, and due to the District Court's complete disregard for the distinction between eBay, solely a contributory defendant, and the other defendants, all of which are solely charged with direct infringement, and due to the fact that only one court day remains prior to court closures for Christmas, filing a petition for stay pending appeal in the District Court would be impracticable. *See* FRAP 8(a)(2)(A)(i).

## **II. FACTUAL BACKGROUND**

The contributory infringement allegations against eBay are with respect to only 5 of the 12 trademarks-in-suit, none of which relate to the Gibson name trademarks but rather relate only to guitar shapes. (Declaration of Kai Curtis ISO Motion to Stay Preliminary Injunction ("Curtis Decl."), Ex. A at p. 14.) Plaintiff has also confirmed that its complaint relates only to certain accused products and series of Paper Jamz toy guitars -- Series 3, 4, 5 and 6 manufactured by Defendant WowWee. (Curtis Decl., Ex. A ¶¶ 6-8.) eBay cannot possibly identify by somehow "eye-balling" the shape of a toy whether it falls within the limited scope of

what is alleged. (Declaration of Kai Curtis ISO Motion to Stay Preliminary Injunction (“Curtis Decl.”), Ex. A ¶¶ 6-8.) eBay has never received notice of any specific allegedly infringing listing of Paper Jamz products, as required for contributory trademark infringement. (*Id.*, Ex. A ¶ 17.) Since learning of Gibson’s general issue only upon Gibson’s filing of the complaint, eBay has repeatedly offered to immediately remove any and all allegedly infringing Paper Jamz listings if Gibson simply identifies those listings to eBay through its notice and take-down system, VeRO, which Gibson is a member and regular reporter. Gibson has repeatedly refused. (*Id.*, Ex. A ¶¶ 9-17, 33.)

### **III. STANDARD OF REVIEW FOR A STAY PENDING APPEAL**

Under “the traditional standard for a stay . . . , a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009); *accord Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009). In the Ninth Circuit, the first two prongs can be satisfied where the applicant evinces “serious questions going to the merits” and a hardship balance that tips sharply towards the plaintiff, so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public

interest. *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1053 (9th Cir. 2010).

In determining the merits of eBay’s appeal, the Ninth Circuit reviews a district court’s denial of a preliminary injunction for abuse of discretion, namely, whether the district court based its decision “on an erroneous legal standard or clearly erroneous finding of fact.” *See id.* at 1049 (citing *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir.2008) (en banc)). *Id.* Conclusions of law are reviewed *de novo*, and findings of fact are reviewed for clear error. *Id.* (citing *Lands Council* at 987).

**IV. EBAY IS LIKELY TO SUCCEED ON THE MERITS; PLAINTIFF DID NOT RESPOND TO eBAY’S OPPOSITION TO THE PRELIMINARY INJUNCTION MOTION AND THE DISTRICT COURT’S ORDER DID NOT ADDRESS THE LEGAL STANDARDS APPLICABLE TO eBAY**

Neither plaintiff nor the District Court’s order addressed the legal issues unique to eBay. Thus, the District Court has not concluded that Gibson should be entitled to the “extraordinary and drastic remedy” of a temporary restraining order. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995)).

As eBay’s opposition to the motion for TRO and Preliminary Injunction addressed, eBay is the only defendant accused only of contributory infringement,

not direct trademark infringement. Yet, adopting the Plaintiff’s proposed order, the Court swept in eBay in the list of Defendants, also referring to “parties who aid and abet.” (Dkt. 58)<sup>1</sup> The Court did not address whether Gibson had established likelihood of success on the merits or irreparable harm against eBay on a claim for contributory infringement.

A. GIBSON CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CONTRIBUTORY INFRINGEMENT CLAIMS AGAINST eBAY

To be liable for contributory trademark infringement, a defendant must have (1) “intentionally induced” the primary infringer to infringe, or (2) continued to supply an infringing product to an infringer with knowledge that the infringer is mislabeling the particular product supplied. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982) (“*Inwood*”); *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 807 (9th Cir. 2007). Gibson concedes that *Inwood* governs its claim against eBay. (TRO App. at 8:15). Generalized knowledge of infringement by others “is insufficient under the *Inwood* test to

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<sup>1</sup> Plaintiff has not pled a cause of action for aiding and abetting and, indeed, no such cause of action exists for trademark infringement. *See Elec. Lab. Supply Co. v. Cullen*, 977 F.2d 798, 807 (3d Cir. 1992) (no case law imposing aiding and abetting liability under the Lanham Act); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 503 (E.D. Pa. 2006) (“there does not appear to be any aider and abett[o]r liability under the Lanham Act”) (citing *Elec. Lab.*, 977 F.2d at 807).

impose upon eBay an affirmative duty to remedy the problem.” *Tiffany Inc.*, 600 F.3d at 107 (internal citation omitted). Here, the only time Gibson informed eBay of any alleged third party infringement, was in a generic demand letter mailed three days before Gibson filed its complaint. Yet, non-specific demand letters which fail to identify any claimed listings do not satisfy the *Inwood* standard.<sup>2</sup> Moreover, the law is well settled that third parties such as eBay have no affirmative duty to identify and prevent infringing activity.<sup>3</sup> Plaintiff’s attempt to evade the *Inwood* standards by arguing that eBay was “willfully blind” to claims of trademark infringement strains credibility. Plaintiff has never notified eBay of any allegedly infringing Paper Jamz listings. Plaintiff does not do so now.

Plaintiff’s generic demand letter, dated only three days before Plaintiff filed the

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<sup>2</sup> *Id.* at 109; *see also Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 411, 420 (S.D.N.Y. 2001) (trademark owner’s two emails to defendant regarding allegedly infringing activity did not establish knowledge); *Fare Deals, Ltd. v. World Choice Travel.com, Inc.*, 180 F. Supp. 2d 678, 690-91 (D. Md. 2001) (plaintiff demand letter cannot establish knowledge for purposes of contributory trademark infringement); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 967 (C.D. Cal. 1997) (“[e]ven after receiving [plaintiff’s] demand letters [defendant] would not have reason to know” of infringing activity); 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:20 (4th ed. 2010) (noting recent scholarship on contributory infringement claims against online service providers concluding that “trademark owners may have a difficult road in establishing liability unless notice of specific infringements was unheeded by the service provider”) (internal quotations and citations omitted).

<sup>3</sup> *See, e.g., Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1149 (7th Cir. 1992) (noting that the law “does not impose any duty to seek out and prevent violations”); *Hendrickson*, 165 F. Supp. 2d at 1095 (holding that eBay “has no affirmative duty to monitor its own website” for potential intellectual property violations); *Lockheed Martin Corp.*, 985 F. Supp. at 967 (holding that claim for contributory infringement failed where it depended on

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complaint, did not identify any specific listings. No preliminary injunction should issue. *See Acad. of Motion Picture Arts and Scis. v. Network Solutions Inc.*, 989 F. Supp. 1276, 1280 (C.D. Cal. 1997) (denying a preliminary injunction where there was no evidence of failure to control identified infringement).

**B. GIBSON CANNOT SHOW IRREPARABLE HARM RELATED TO EBAY LISTINGS**

eBay has repeatedly offered to immediately remove any allegedly infringing listings related to the Paper Jamz products at issue; Gibson simply has to identify those listings. Instead, Gibson seeks to impose some sort of “monitoring” duty on eBay to cull through its site for allegedly infringing toy guitar shapes. As Gibson admits, some of the Paper Jamz toys allegedly infringe, some do not. The burden on Gibson, which holds the product expertise, is minimal. The burden on eBay, if it was to be required to cull through its site attempting to “eye-ball” shapes extremely similar to other shapes that Gibson admits do not infringe, is extraordinary. eBay hosts over 100 million third party listings at any time, with over 8 million added every day. Hundreds of thousands of rights owners purporting to hold tens of millions of IP rights cannot simply file a boilerplate complaint with no notice to eBay, refuse to use the simple tools

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imposing affirmative duty on service provider to police the mark for the trademark owner).

available on eBay (which Gibson has successfully used for years for other products), and require eBay to somehow manually review every listing on the site to identify potentially infringing items.<sup>4</sup>

Finally, the Court’s ruling that irreparable harm is “presumed” was erroneous. As this court has recognized, following the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), “this presumption may have been called into question.” *Quiksilver, Inc. v. Kymsta Corp.*, 360 Fed. Appx. 886, 889 (9th Cir. 2009); *but cf. Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873 (9th Cir. 2009). “Previously, a plaintiff in a trademark case was entitled to a presumption of irreparable harm upon showing a probable success on the merits. . . . However, the Supreme Court’s decision in *Winter* has effectively eliminated that presumption.” *Mortgage Elec. Registration Sys. v. Brosnan*, No. C09-3600 SBA, 2009 U.S. Dist. LEXIS 87596, at \*23-24 (N.D. Cal. Sept. 4, 2009); *see also Aurora World, Inc. v. TY Inc.*, No. CV 09-08463 MMM, 2009 U.S. Dist. LEXIS 129128, at \*152 (C.D. Cal. Dec. 15,

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<sup>4</sup> Monetary relief also is available as Gibson is engaged in licensing discussions with Defendant WowWee, and Gibson cannot show the requisite harm to goodwill. *See, e.g., T.J. Smith & Nephew, Ltd. v. Consol. Med. Equip., Inc.*, 821 F.2d 646, 648 (Fed. Cir. 1987) (plaintiff’s delay in seeking injunction coupled with its willingness to license the intellectual property at issue rebutted presumption of irreparable harm); *Dotster, Inc. v. Internet Corp. for Assigned Names & Numbers*, 296 F. Supp. 2d 1159, 1163-64 (C.D. Cal. 2003) (. “Although the loss of goodwill and reputation are important considerations in determining the existence of irreparable injury, there must be credible and admissible evidence that such damage *threatens Plaintiffs’ business with*

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2009) (concluding that the plaintiff in a copyright infringement action “[was] not entitled to invoke a presumption of irreparable harm”). This presumption should not have been applied against any Defendants, but it certainly should not have been applied against eBay given no finding on the likelihood of success on the merits.

## **V. EBAY WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT STAYED PENDING APPEAL**

The harm to eBay from such an injunction is irreparable. Curtis Decl., ¶¶ 2-9. eBay is an online marketplace (www.ebay.com) that connects third party buyers and seller of goods to one another. (*Id.*, ¶ 2-4.) It does not itself sell any items, nor ever possess, inspect, or have any role in the exchange of merchandise between the buyers and sellers who utilize its site. *Id.* Indeed, more than 200 million listings appear on eBay at any given time, and approximately 8 million new listings are posted daily. (*Id.* ¶ 4.) The listings appearing on eBay’s website at any given time are created and posted exclusively by eBay’s third-party users. (*Id.* ¶¶ 2-4; *see also id.*, Ex. A ¶¶ 5-62-8, 37.) eBay does not create, approve, or edit the content of the listings provided by any seller. (Curtis Decl., ¶ 3, and Ex. A ¶ 5).

As eBay does not have possession of the items for sale or familiarity with the millions of products offered for sale. (Curtis Decl., ¶ 6, and Ex. A ¶ 4) As

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*termination.*”) (emphasis added).

eBay has repeatedly notified plaintiff, it is impossible for eBay to identify third party product listings and whether they are in the trademarked shape of a toy guitar, particularly where not even the entire Paper Jamz line is accused and the eBay listings do not refer to Paper Jamz series numbers.

Gibson need only identify the allegedly infringing listings through eBay's automated VeRO program of which Gibson is a member and consistent reporter, based on Gibson's own expertise, and eBay will immediately remove those listings. Gibson has refused to do so. Instead, in the absence of such reporting by the party most familiar with its trademarks, eBay would be left to guess about which specific toy guitar shapes might be offensive to Gibson and which might be perfectly permissible.

Moreover, it is not at all clear how eBay would comply with the injunction with respect to the shape of the toys. It would be an impossibly high burden for eBay to comb through millions of listings looking for any toy products in the shape of a Gibson guitar, without any reference to the Gibson or trademark names, and to have to base removal on a manual review of photographs alone. (*Id.*, Ex. A ¶¶ ¶¶ 33-37.) Alternatively, would eBay be expected to remove every legitimate toy guitar listing from its site during the busiest holiday season of the year on the chance that it "might" infringe a Gibson trademark that Gibson itself refuses to even identify? The damage to eBay's reputation, and to the livelihoods of innocent

sellers, would be severely and needlessly compromised.

On the other hand, as previously stated, if Gibson has a good faith belief that third parties have listed infringing products on the eBay site, Gibson need only report those specific listings to eBay using the notice and take-down process, as it has previously done for non-Paper Jamz items. Those items will be removed expeditiously. Gibson cannot argue it has no remedy when it has already used eBay's tools to remove allegedly infringing listings from eBay in the past and failed to show that those tools are inadequate in the present case.

## **VI. THE PUBLIC INTEREST WARRANTS A STAY OF THE INJUNCTION**

The public interest is served by allowing millions of buyers and sellers to buy and sell authentic goods and services around the world at competitive prices through eBay's marketplace. Given Gibson's failure to take any steps to remove the small number of allegedly infringing listings that it alleges have appeared on the eBay website, and given the suspect notice and timing of Gibson's motions immediately before the biggest retail period of the year, one can only suspect that Gibson's real intent is to limit distribution of authentic merchandise to the detriment of consumers. Such an overboard ban of authentic merchandise on legitimate websites such as eBay only serves to increase prices, limit available merchandise to those who cannot locate it elsewhere and otherwise stifle legitimate



