

\_\_\_\_\_  
No.  
\_\_\_\_\_

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

eBAY INC.,  
Appellant,  
v.  
GIBSON GUITAR CORP.,  
Respondent.

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

\_\_\_\_\_  
**DECLARATION OF KAI CURTIS IN SUPPORT OF MOTION  
TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**  
\_\_\_\_\_

Bingham McCutchen LLP  
MARY T. HUSER (SBN 136051)  
mary.huser@bingham.com  
LISA CHIN (SBN 259793)  
lisa.chin@bingham.com  
1900 University Avenue  
East Palo Alto, CA 94303  
Telephone: 650.849.4400  
Facsimile: 650.849.4800  
*(Additional counsel listed on signature page)*

Attorneys for Appellant eBay Inc.

## DECLARATION OF KAI CURTIS

I, Kai Curtis, declare:

1. I have been employed by eBay Inc. (“eBay”) for approximately eleven years and currently serve as Program Manager - VeRO Program. I am well-versed in eBay’s Verified Rights Owner (“VeRO”) Program and I have helped to manage it for over nine years. The VeRO Program enables intellectual property rights owners, like Gibson Guitar Corp., to report listings of merchandise that potentially infringe their rights and request removal of such listings from eBay’s site. I have extensive experience in responding to claims of intellectual property infringement on behalf of eBay and do so on a daily basis. A copy of the declaration that I filed in the District Court, explaining the VeRO Program, Gibson’s use of it with real guitars, and Gibson’s failure to use it with the cardboard “Paper Jamz” toy guitars in this action, is attached hereto as **Exhibit A**.

2. eBay provides an online marketplace where roughly 93 million active users offer for sale and purchase hundreds of millions of items across tens of thousands of categories. Hundreds of thousands of sellers in the United States use eBay as a significant source of income or to help support their small businesses.

3. eBay itself is not a retailer. It does not sell merchandise and never offers any items for sale. The electronic listings on eBay are created and posted by third-party users of eBay’s service. It is those users that sell the merchandise listed on eBay. At no point does eBay take ownership, possession, custody, or control of items sold over its site.

4. eBay is a dynamic website, and the precise number of live listings on eBay varies at any given moment. At any given time, more than 200 million active listings appear on eBay worldwide, with approximately 8 million new listings posted each day.

5. On December 22, 2010, I requested that eBay's data analytics team pull rough metrics identifying the number of live "Gibson" musical listings that appeared on eBay from June 1, 2010 through the present. There were hundreds of thousands of "Gibson" musical listings during that time period that do not appear in any way to relate to Paper Jamz toy guitars.

6. It is my understanding that Gibson's claims of contributory infringement against eBay relate to the allegedly infringing shape or design of specific components of particular Paper Jamz product lines, rather than the use of the Gibson brand itself or all Paper Jamz products. However, unlike Gibson, eBay does not possess the necessary expertise for identifying which Paper Jamz listings on eBay describe items that are potentially infringing and which are not. Gibson, through VeRO, has regularly reported allegedly infringing listings of "Gibson" products, but it has not reported any "Paper Jamz" listings as infringing.

7. On December 22, 2010, I also requested that eBay's data analytics team pull rough metrics identifying the number of live "Paper Jamz" listings that appeared on eBay from June 1, 2010 through the present. There were approximately 2,722 "Paper Jamz" listings.

8. On December 22, 2010, at around 9:45 a.m., I ran a search on eBay for "Paper Jamz guitar" listings. This search returned 199 results that were live on the site at that moment. I have no way of knowing for certain which subset of this search result might relate to allegedly infringing versus non-infringing Paper Jamz products. The eBay listings themselves, including their titles and descriptions, are user-generated content supplied by the eBay members who created the listings. Some, but not all, of these listings identify the Paper Jamz series numbers. eBay has no way of compelling members to include series numbers in their listings and, since eBay does not have physical possession of the items described in the listings, eBay has no way of verifying the accuracy of any of the serial numbers identified in

the listings that do include them. I also wish to note that, if one searches for “Paper Jamz” listings on eBay, there also appear to be listings for non-toy guitar “Paper Jamz” product lines, such as amplifiers, straps, and drum sets.

9. Based on eBay’s historical 10-Q filings, I am aware that the holiday season is one of eBay’s most important business seasons of the year. This includes both pre- and post-Christmas holiday traffic. If the preliminary injunction order is not stayed, potentially thousands of sellers of legitimate Paper Jamz merchandise will be adversely impacted.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on December 22, 2010, at San Jose, California.

  
\_\_\_\_\_  
Kai Curtis  
Program Manager – VeRO Program, Ebay Inc.

*Additional counsel:*

Bingham McCutchen LLP  
JEFFREY ROSENFELD (SBN 221625)  
jeffrey.rosenfeld@bingham.com  
1620 26th Street, Fourth Floor, North Tower  
Santa Monica, CA 90404  
Telephone: 310.907.1000  
Facsimile: 310.907.2000

Bingham McCutchen LLP  
JOHN A. POLITO (SBN 253195)  
john.polito@bingham.com  
Three Embarcadero Center  
San Francisco, CA 94111  
Telephone: 415.393.2000  
Facsimile: 415.393.2286