

and computer equipment identified above, JPMorgan Chase contributes to the direct infringement of users of said web pages, software, and computer equipment.

(Pl.'s First Am. Compl. ¶ 42 (D. 285).) But even with that amendment, the pleading is missing critical elements of each type of indirect infringement. In addition, the context-specific nature of this case also demonstrates that no plausible claim for indirect infringement has been stated, and therefore, the indirect infringement allegations should be dismissed.

II. Argument

A. Missing Elements Of The Inducement Claim

The recital of *unidentified* web page users as direct infringers fails to satisfy the requirement for “specific instances” of direct infringement. *See Clayton v. Fisher-Price Inc.*, No. 2-09-cv-06891, slip. Op. at 4 (CDCal. June 1, 2010 Order) (citing *ACCO Brands Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307,1313 (Fed. Cir. 2007)).

Moreover, the pleading is devoid of any allegation that JPM possessed a requisite “affirmative intent to cause direct infringement.” *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en banc). Knowledge of possible infringement by web page users is insufficient; there must be a specific intent and action to induce such infringement, *id.* at 1305. Eolas’s pleading alleges none.

This Court has observed there is no requirement for “detailed factual support for each element of indirect infringement”. (Mem. Op. and Order 4 (D.282).) However, without the critical elements of specific intent and specific instances of direct infringement, Eolas’s inducement pleading cannot be said to rise to the threshold level of plausibility required by the Supreme Court. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

B. Missing Elements Of The Contributory Claim

Eolas's pleading of contributory infringement fares no better. The Federal Circuit has noted that the "plain language" 35 U.S.C. 271(c) speaks to the "sale of a product" as the essential predicate for a claim of contributory infringement. *PharmaStem Therapeutics Inc. v. ViaCell Inc.*, 491 F.3d 1342, 1357 (Fed. Cir. 2007). Although paragraph 42 of Eolas's pleading makes a generic reference to "selling" or "offering to sell" by JPMorgan, the pleading does not allege any **sale** by JPMorgan of any product to any alleged web page user who supposedly has directly infringed.

Moreover, Eolas's pleading fails to address the statutory requirement for there to be "no substantial noninfringing use" for whatever supposedly constitutes the predicate of a contributory infringement. That is an additional defect in Eolas's pleading. See *Clayton*, No. 2-09-cv-06891, slip. Op. at 4-5 (citing *Preemption Devices, Inc. v. Minn. Mining & Mfg. Co.*, 803 F.2d 1170, 1174 (Fed. Cir. 1986)).

As with its claim of inducement, Eolas's pleading of contributory infringement therefore lacks critical elements, which makes it fatally deficient. Without pleading either a requisite sale or 'no substantial noninfringing use,' Eolas's contributory infringement pleading cannot be said to rise to the threshold level of plausibility required by the Supreme Court. See *Ashcroft*, 129 S. Ct. 1937, 1947; *Twombly*, 550 U.S. 544, 570.

C. Context Also Reveals Implausible Indirect Infringement

This Court has recognized that "whether the complaint states a plausible claim for relief" is determined "by examining the complaint in context and relying on the Court's own judicial experience and common sense". (Mem. Op. and Order 4 (D.282).) The context of this case involves both divided infringement issues and authority issues that further mandate dismissal of Eolas's indirect infringement claims

1. Divided Infringement

Direct infringement requires performance of all of the steps of the patented method. *Canton BioMedical, Inc. v. Integrated Liner Techs., Inc.*, 216 F.3d 1367, 1369-70 (Fed. Cir. 2000) ("Infringement of process inventions is subject to the 'all-elements rule' whereby each of the claimed steps of a patented process must be performed in an infringing process") (citing *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997)). Here, it takes both a web page user and a source of the web page to carry out the supposedly infringing steps of the method claims in Eolas's patents. Similarly, the apparatus claims in Eolas's patents implicate both a client work station and a server. Paragraph 42 of the complaint confirms the requirements for:

(i) web pages and content to be *interactively* presented in browsers, including, without limitation, the web pages and content accessible via www.jpmorgan.com and maintained on servers located in and/or accessible from the United States under the control of JPMorgan Chase; (ii) software, including, without limitation, software that allows content to be *interactively* presented in and/or served to browsers; and/or (iii) computer equipment, including, without limitation, computer equipment that stores, serves, and/or runs *any of the foregoing*.

(Pl.'s First Am. Compl. ¶ 42 (D. 285).) There is no allegation of facts to conclude that any webpage user either perform all the claimed method steps or would somehow be "vicariously responsible" for JPMorgan's performance of some of them.

Yet, that is just what is required for the pleaded direct infringement by the web page user to constitute something other than a non-actionable divided infringement. *See BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1375, 1380-81 (Fed. Cir. 2007). *See also Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008), *reh'g en banc denied* 2008 U.S. App. LEXIS 25099 (Fed. Cir. July 14, 2008), and *cert. denied*, 129 S. Ct. 1585 (2009). Likewise, there is no allegation of facts to conclude direct infringement by the web page user of Eolas's apparatus claims which implicate both the client workstation and the remote servers.

2. Authority

Only activity undertaken without authorization constitutes an infringement. See 35 U.S.C. 271(a). And such authorization can come through a license.

Eolas's prior litigation with Microsoft is no secret. Neither is the settlement of that litigation. In addition, common sense makes it plain that Microsoft's browsers are clear candidates for use with the web pages that the complaint targets.

Notwithstanding that context, while Eolas's pleading does allege activity by JPMorgan "without authority", the pleading makes no such allegation regarding the web page users whose direct infringement was supposedly induced or contributed to by JPMorgan. That additional deficiency is further grounds for dismissal.

IV. Conclusion

Whether viewed in terms of the missing critical elements of indirect infringement or through a lens that is context-specific for this case, Eolas's First Amended Complaint fails to state a claim on which relief can be granted for indirect infringement. Accordingly, the indirect infringement claims should be dismissed.

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Respectfully submitted,

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Certificate of Service

This is to certify that all counsel deemed to have consented to electronic service are being served with a copy of the foregoing motion via the Court's CM/ECF system per local rule CV-5(a)(3) on June 7, 2010. All other counsel not so deemed will be served via fax or first class mail.

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