

Plaintiff Eolas Technologies Inc. (“Eolas”) files this Response in opposition to defendant JPMorgan Chase & Co.’s (“JPMorgan”) Motion to Dismiss Eolas’s Amended Indirect Infringement Contentions (“Motion”).

I. INTRODUCTION

While not styled as such, JPMorgan’s Motion is in effect a motion for reconsideration of the Court’s prior Order denying in part and granting in part JPMorgan’s first motion to dismiss. *See* Court’s Memorandum Opinion and Order (dkt. 282) (“Order”). Importantly, JPMorgan never contends that Eolas failed to comply with the Court’s Order in this case. Rather, JPMorgan apparently believes that Eolas failed to comply with a decision from a Court in the Central District of California. *See* Motion at 2 (citing the *Clayton* case). Because Eolas complied with the Court’s Order, JPMorgan’s Motion should be denied, and the Court should not reconsider its prior Order.

II. ARGUMENT

The Court’s Order denied JPMorgan’s motion to dismiss Eolas’ direct infringement claims and granted JPMorgan’s motion to dismiss Eolas’ indirect infringement claims. *See* Order at 5. The Court’s Order granted Eolas leave to amend its complaint with respect to its indirect infringement allegations, which Eolas did. *Id.* *See also* dkt. 285 (Eolas’ First Amended Complaint). In its Order, this Court stated:

Although Rule 8 does not require detailed factual support for each element of indirect infringement, ***Eolas has not alleged a direct infringer*** in relation to its indirect infringement claims. *See PA Advisors*, 2008 WL 4136426 at *8 (requiring only the pleading of direct infringers and not other “material elements”); *Fotomedia Techs., LLC v. AOL, LLC*, 2008 WL 4135906.

Order at 5 (emphasis added). Pursuant to the Court’s Order, Eolas amended its Complaint to correct the defect identified by the Court and specifically alleged “a direct infringer”:

42. On information and belief, JPMorgan Chase has directly and/or indirectly infringed (by inducement and/or contributory infringement), and is continuing to infringe, directly and/or indirectly, the ’906 Patent and/or the ’985 Patent in this District or otherwise within the United States by making, using, selling,

offering to sell, and/or importing in or into the United States, without authority: (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.

JPMorgan Chase indirectly infringes one or more claims of the '906 Patent and/or the '985 Patent by active inducement under 35 U.S.C. § 271(b). JPMorgan Chase has induced and continues to induce *users of the web pages, software, and computer equipment identified above to directly infringe* one or more claims of the '906 Patent and/or the '985 Patent. JPMorgan Chase indirectly infringes one or more claims of the '906 Patent and/or the '985 Patent by contributory infringement under 35 U.S.C. § 271(c). By providing the web pages, software, and computer equipment identified above, JPMorgan Chase contributes to *the direct infringement of users of said web pages, software, and computer equipment*.

See dkt. 285 at ¶ 42 (emphasis added). Because Eolas' Amended Complaint alleged a direct infringer for each of its induced and contributory infringement claims, Eolas corrected the defect identified by the Court. JPMorgan's Motion should therefore be denied.

Importantly, JPMorgan *never* contends that Eolas' Amended Complaint fails to comply with this Court's Order. Rather, JPMorgan plays lip service to the Court's Order by noting that "[t]his Court has observed there is no requirement for 'detailed factual support for each element of indirect infringement.'" Motion at 2. Yet, in the very next sentence, JPMorgan disagrees with the Court's holding, arguing that Eolas was required to plead the very things the Court held Eolas was not required to plead. *Id.* For example, despite the Court's Order, JPMorgan contends that Eolas was required to plead at least the following elements:

- The "specific instances" of direct infringement. *Id.*
- The "requisite 'affirmative intent to cause direct infringement.'" *Id.*
- The "sale by JPMorgan of any product to any alleged web page user who supposedly has directly infringed." *Id.* at 3.

- The “statutory requirement for there to be ‘no substantial noninfringing use’ for whatever supposedly constitutes the predicate of a contributory infringement.” *Id.*

JPMorgan cannot square its arguments about what it contends Eolas was required to plead with this Court’s Order. *See* Order at 5 (emphasis added) (“Although ***Rule 8 does not require detailed factual support for each element of indirect infringement***, Eolas has not alleged a direct infringer in relation to its indirect infringement claims. *See PA Advisors*, 2008 WL 4136426 at *8 (***requiring only the pleading of direct infringers and not other ‘material elements’***.”) JPMorgan’s disagreement with the Court’s Order notwithstanding, Eolas complied with the Court’s Order, and JPMorgan’s Motion should be denied.

Even if this Court were inclined to reconsider its Order in light of the *Clayton* case from California, the defect the California court identified in *Clayton* was a failure of the plaintiff to “state directly that third parties have actually infringed Plaintiff’s ’151 Patent.” *Clayton v. Fisher-Price Inc.*, No. 2-09-cv-06891, slip. Op. at 4. There is no such defect here. Eolas’ amended complaint states directly that third parties have actually infringed Eolas’ patents. For example, Eolas has alleged:

- “[U]sers of the web pages, software, and computer equipment identified above . . . directly infringe one or more claims of the ’906 Patent and/or the ’985 Patent.” *See* dkt. 285 at ¶ 42.
- “[T]he direct infringement of users of said web pages, software, and computer equipment.” *Id.*

Accordingly, Eolas’ amended complaint passes muster, even under the standard laid out by the California court in *Clayton*.

III. CONCLUSION

There is no basis for the Court to reconsider its prior Order. Eolas' amended complaint corrected the defect identified in the Court's Order, and specifically alleged the "direct infringer" as required by the Court. The Court should therefore deny JPMorgan's Motion.¹

¹ Eolas expressly incorporates its Opposition (dkt. 184) and Sur Reply in Opposition (dkt. 206) to JPMorgan's First Motion to Dismiss (dkt. 175) herein.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic services on this the 24th day of June, 2010. Local Rule CV-5(a)(3)(A).

/s/ Josh Budwin

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