



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

## I. INTRODUCTION

Like its opening brief, JPMorgan’s Reply never contends that Eolas failed to comply with 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”). The Court’s Order faulted Eolas’ original complaint for failing to allege a direct infringer as a predicate to Eolas’ indirect infringement claims. *Id.* at 5. Eolas’ Amended Complaint, filed in response to the Court’s Order, corrected this shortcoming by specifically alleging a direct infringer: the “users” of the accused products. *See* dkt. 285 at ¶ 42.

## II. ARGUMENT

In its opening brief, JPMorgan argued that Eolas’ amended complaint failed to comply with the *Clayton* case from a court in the Central District of California. *See* JPMorgan’s Motion to Dismiss Eolas’ Amended Indirect Infringement Claims at 2 (dkt. 309) (citing the *Clayton* case). Its Reply abandons this argument, nowhere discussing the *Clayton* case, and, apparently conceding its inapplicability here. The inapplicability of *Clayton*—together with the lack of any authority whatsoever in JPMorgan’s Reply—is fatal, particularly in light of this Court’s Order.

Instead of relying on *Clayton* (or any other authority), JPMorgan’s Reply instead argues that while Eolas’ amended complaint alleges direct infringers, this allegation is deficient because those direct infringers are “unidentified.” Reply at 1. Not so. Eolas’ amended Complaint identifies the direct infringers as follows:

42.

\* \* \*

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). JPMorgan cites no law for the proposition that a specific allegation of direct infringement against “users” of the accused instrumentalities is insufficient to support an indirect infringement claim. Nor does JPMorgan cite any law for its apparent—but unstated—proposition that Eolas must identify the directly infringing “users” by name.

Notably, Eolas’ amended complaint tracks the language of the patent statute—

*whoever* without authority makes, *uses*, offers to sell, or sells *any patented invention*, within the United States, or imports into the United States any patented invention during the term of the patent therefor, *infringes the patent*

35 U.S.C. § 271(a) (emphasis added)—by alleging that “users of the web pages, software, and computer equipment identified above directly infringe.” See dkt. 285 at ¶ 42. As such, Eolas’ amended complaint is more than sufficient to comply with the notice pleading requirements of the Federal Rules, in addition to the Court’s Order.

JPMorgan’s Reply pays 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.’” Reply at 1. Yet, on the same page, JPMorgan disagrees with the Court’s holding, arguing that in addition to identifying the “users” by name, Eolas was required to plead “a specific instance of direct infringement” and “an affirmative intent to cause direct 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’*).”)

Eolas has plead a direct infringer (*i.e.*, the “users”) and complied with the Court’s Order. Order at 5. Contrary to JPMorgan’s assertions, Eolas was not required to plead “other ‘material elements’” of an indirect infringement claim as JPMorgan now contends. *See id.* That JPMorgan disagrees with the Court’s Order is not a basis to revisit it.

Finally, JPMorgan’s Reply contains a discussion of what it terms “issues of ‘divided infringement’ and ‘authority.’” Reply at 2. Eolas does not understand JPMorgan’s argument, but to the extent JPMorgan is presenting a theory of non-infringement or suggesting a license defense, a motion to dismiss a pleading is not the proper vehicle. Rather, such substantive arguments are properly addressed after fact discovery in the context of a case dispositive motion (*e.g.* a motion for summary judgment). The Court has set a schedule for hearing such motions. *See dkt. 242.*

### **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.

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**McKool Smith, P.C.**

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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 16<sup>th</sup> day of July, 2010. Local Rule CV-5(a)(3)(A).

/s/ Josh Budwin

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