

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

TECSEC, INCORPORATED,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION, SAS INSTITUTE INC.,  
SAP AMERICA, INC., SAP AG, CISCO  
SYSTEMS, INC., SUN MICROSYSTEMS,  
INC., SYBASE, INC., SOFTWARE AG,  
SOFTWARE AG, INC., ADOBE SYSTEMS  
INCORPORATED, EBAY INC., PAYPAL,  
INC., and ORACLE CORPORATION,

Defendants.

Case No. 1:10-cv-00115-LMB-TCB

**IBM'S BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL RECONSIDERATION**

IBM respectfully requests reconsideration of the Court's decision to *sua sponte* grant summary judgment in favor of TecSec on IBM's defenses of invalidity due to anticipation of TecSec's '433 and '448 patents over the Fletcher and Krishna prior art patents (D.I. 459, 460). There are two grounds for reconsideration.

First, as a matter of procedure, TecSec never sought summary judgment on these issues, which the Court itself noted. Because of that, IBM was not given the requisite prior notice and reasonable opportunity to be heard on these issues under the proper legal standard. A party seeking summary judgment is not subject to an adverse *sua sponte* summary judgment ruling on the issue it has raised without being given notice and an opportunity to respond.

Second, as a matter of substantive law, IBM respectfully submits that the Court did not view the material evidence in the light most favorable to IBM, or draw all reasonable inferences in IBM's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor."). When the Court raised these issues *sua sponte*, IBM should have been treated as the non-movant. IBM respectfully submits that, when viewing the record evidence—including the references themselves and both parties' expert testimony concerning the teachings of these references—in the light most favorable to IBM, and drawing all reasonable inferences in IBM's favor, a reasonable jury could properly find that the Fletcher and Krishna references anticipate the claims of the '433 and '448 patents, respectfully. Indeed, IBM submits that, on the merits, anticipation can and should be found.

IBM therefore respectfully requests that the Court reconsider its *sua sponte* grant of summary judgment in favor of TecSec, and allow these issues to be presented to the jury at trial.

### **LEGAL STANDARDS**

Under Rule 54(b), any order that “adjudicates fewer than all the claims ... may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Fed. R. Civ. P. 54(b); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 & n.14 (1983); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1472–73 (4th Cir. 1991) (district court has “plenary power” to reconsider interlocutory orders).<sup>1</sup> Thus, “a district court retains the power to reconsider and modify its interlocutory judgments....” *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 514–15 (4th Cir. 2003); *LaFarge N. Am., Inc. v. State Street Bank & Trust Co.*, No. 1:08cv761, 2008 WL 5101807, at \*2 (E.D. Va. Nov. 25, 2008). An order for partial summary judgment is interlocutory in nature. *See Am. Canoe*, 326 F.3d at 514. The district court’s reconsideration of an interlocutory order is not subject to the heightened standards that apply to reconsideration of final judgments. *Id.*; *see also LaFarge N. Am.*, 2008 WL 5101807, at \*2. Instead, the district court may exercise its discretion to afford relief from interlocutory orders “as justice requires.” *LaFarge N. Am.*, 2008 WL 5101807, at \*2 (citation omitted). IBM respectfully submits that justice requires that the Court reconsider and vacate its January 12, 2011 Order to the extent that it *sua sponte* grants summary judgment for TecSec on anticipation issues.

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<sup>1</sup> Procedural issues not unique to patent law are controlled by regional circuit law and the local rules of the district court. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574–75 (Fed. Cir. 1984), *overruled on other grounds by Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985). Reconsideration motions are not unique to patent law, and therefore are governed by regional circuit law. *See University of Colorado Found., Inc. v. Am. Cyanamid*, 902 F. Supp. 221, 222 (D. Colo. 1995) (applying regional circuit law and granting reconsideration of denial of summary judgment in patent case), *vacated in part on other grounds*, 196 F.3d 1366 (Fed. Cir. 1999). Thus, Fourth Circuit law would be properly applied to this issue.

## ARGUMENT

### **I. NOTICE AND AN OPPORTUNITY TO RESPOND MUST BE ALLOWED**

IBM respectfully requests reconsideration of the Court's Order *sua sponte* granting summary judgment in TecSec's favor (D.I. 460), and an opportunity to be heard, pursuant to the Federal Rules of Civil Procedure, to explain why such an order is inappropriate at this stage of the litigation. Under the 2010 changes to Rule 56, a district court may grant summary judgment for a non-movant only "[a]fter giving notice and a reasonable time to respond." Fed. R. Civ. P. 56(f) (emphasis added). This change was intended to conform Rule 56 to "procedures that have grown up in practice." 2010 ADV. COM. NOTES (reprinted online on LEXIS). The requirement of notice and opportunity to be heard prior to *sua sponte* summary judgment rulings has long been the practice in the Fourth Circuit: "[R]egardless of a claim's merits, a district court may not *sua sponte* enter summary judgment against it until the claim's proponent has been given notice and a reasonable opportunity to be heard." *U.S. Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731, 736 (4th Cir. 1989). The first IBM was aware that the Court was even considering granting summary judgment in TecSec's favor was when it received the Court's January 12, 2011, Opinion and Order, which is not sufficient notice.

Moreover, when the record evidence is viewed in the light most favorable to IBM—as it must before granting summary judgment for TecSec, *see McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992)—genuine disputed issues of fact preclude summary judgment in TecSec's favor. *See* Fed. R. Civ. P. 56(a); *see also Anderson*, 477 U.S. at 248 (stating that summary judgment should not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). This procedural issue warrants reconsideration and modification of the Court's January 11, 2011 Order.

## II. ANTICIPATION AT LEAST PRESENTS A JURY TRIABLE ISSUE

### A. A Reasonable Jury Could Find That Fletcher Anticipates The '433 Patent

IBM respectfully submits that, viewing the evidence in the light most favorable to IBM, a reasonable jury could find that the prior art Fletcher patent discloses each and every limitation of the asserted '433 patent claims. The Court's summary judgment decision hinges on what TecSec contended in its opposition to IBM's summary judgment motion to be the "fundamentally different technical approaches" to achieving XML security disclosed by Fletcher and the '433 patent. (D.I. 459, at 29.) As the Court pointed out, Fletcher uses XML tags "to delimit certain sections of a file for filtering or removal based on defined security parameters." (*Id.* at 30 (*citing* IBM Ex. B2 (Fletcher), Abstract).) "Once those sections have been removed, the entirety of the remaining document is then encrypted..." (*Id.* at 30–31 (*citing* IBM Ex. B2 (Fletcher), at 6:10–35).)

But there is at least a genuine dispute of material fact regarding whether, despite its different approach, the Fletcher patent nonetheless discloses the claimed "selecting" limitation. Although TecSec and its expert Dr. Stubblebine asserted in opposition to IBM's motion that Fletcher "discloses only the selecting of data for *removal* from the document" and therefore does not disclose the claimed "selecting" step (D.I. 434 (TecSec Opp. Br.) at 42), that was *not* the only evidence of record. Rather, in support of its motion, IBM submitted a declaration from its own cryptography expert, Dr. Paul Clark, who opined—with specific citations to Fletcher—that one of ordinary skill in the art would understand that Fletcher discloses "selecting" a "first object" for encryption, as claimed in the '433 patent, because it parses every object tag in the XML document and determines which should be removed and which should remain to be encrypted. (D.I. 404 (Clark Decl.) ¶ 12.) This "conflict in declarations created a genuine issue

of material fact that made summary judgment inappropriate.” *See, e.g., Metro. Life Ins. Co. v. Bancorp Servs., L.L.C.*, 527 F.3d 1330, 1339 (Fed. Cir. 2008). A reasonable jury could agree with Dr. Clark and find that Fletcher discloses the claimed “selecting” step, despite TecSec’s claim that it uses a different approach, and summary judgment is therefore inappropriate.

Furthermore, the Court adopted TecSec’s argument that, in contrast to Fletcher, the ’433 patent provides that “different portions of a file or document can be encrypted and decrypted at various hierarchical levels, while the underlying file or document itself remains intact.” (D.I. 459 at 31.) But TecSec failed to point to anything in the ’433 patent claims that requires such “hierarchical” encryption capabilities or that “the underlying file or document itself [must] remain[] intact,” and, as such, these alleged distinctions cannot preclude anticipation. *See, e.g., Respironics, Inc. v. Invacare Corp.*, 303 Fed. Appx. 865, 878 (Fed. Cir. Dec. 16, 2008) (vacating summary judgment of no anticipation where patentee and district court failed to explain how alleged differences between prior art reference and the patent-in-suit related to the claims of the patent). Indeed, nothing in the claims requires any sort of hierarchy of encryption or any sort of “intact” document, so these alleged “differences” are irrelevant to anticipation, *i.e.*, whether every element of the *claims* reads on the disclosure of Fletcher. When invalidity is at issue, “the name of the game is the claim.” *See In re Hiniker Co.*, 150 F.3d 1362, 1369 (Fed. Cir. 1998). TecSec, as the patentee, cannot now add limitations to its claim—like “hierarchal levels”—to avoid the prior art.

Accordingly, because genuine issues of material fact exist regarding whether Fletcher discloses the limitations of the ’433 patent claims, IBM respectfully requests that the Court reconsider and vacate its Order granting summary judgment that Fletcher does not anticipate the ’433 patent.

**B. A Reasonable Jury Could Find That Krishna Anticipates The '448 Patent**

Similarly, IBM respectfully submits that, viewing the evidence in the light most favorable to IBM, a reasonable jury could find that Krishna discloses each and every limitation of the asserted '448 patent claims. In granting summary judgment for TecSec, the Court relied upon two grounds: (1) that Krishna's "input FIFO" does not "extract control data and main data from input data"; and (2) that IBM had not identified a "control unit" which "forwards" a "control parameter." (D.I. 459 at 35–39.) IBM respectfully submits that a reasonable jury could find otherwise based on the record evidence, including Krishna's disclosure, the opinions of IBM's cryptography expert Dr. Blaze, and the admissions of TecSec's cryptography expert Dr. Rubin.

**1. A Reasonable Jury Could Find That Krishna Discloses The Claimed "Format Filter" And "Extracting" Limitations.**

In granting summary judgment, the Court held that Krishna's input FIFO does not perform the claimed "extracting" function because "it just ensures that the data packets remain in order, and that the first packet of data that enters the buffer is the first packet to be sent out of the buffer for processing." (D.I. 459 at 38.) But the evidence of record indicates otherwise. Indeed, the disclosure of Krishna demonstrates that the input FIFO does more than just hold data in place until a processor is available to begin processing it. (IBM Ex. C2 (Krishna) at 7:63–67 ("*From the input FIFO 302, packet header information is sent to a packet classifier unit 304*" where a classification engine rapidly determines security association information required for processing the packet, such as encryption keys, data etc.)). Notably, TecSec did not even dispute that Krishna's input FIFO extracts "control data" (header information) from "input data" (an input IP packet) and sends it to a "control unit" (packet classifier). Rather, TecSec argued only that the input FIFO does not *also* extract "*main data*" from the IP packet. (D.I. 434 at 52 ("[The input

FIFO] cannot meet the ‘format filter’ requirement of the ’448 Patent because *it does not extract main data from the input packet.*”) (emphasis added).)

But the evidence of record was far from undisputed in that regard. In fact, IBM submitted a declaration from its expert Dr. Blaze in which he opined that, as demonstrated in Krishna’s figure 3 (which shows two separate lines of data emanating from the input FIFO), the input FIFO extracts “control data” (header information) *and* “main data” (packet data) from “input data” (input IP packets), and subsequently sends those different data on to different components—the “control data” to a “control unit” (packet classifier), and the “main data” to a “first distributor” (packet distributor). (D.I. 406 (Blaze Decl.) at ¶¶ 13–14.) As above, this “conflict in declarations created a genuine issue of material fact that made summary judgment inappropriate.” *See, e.g., Metro. Life Ins.*, 527 F.3d at 1339. IBM respectfully submits that Dr. Blaze’s declaration at least raises a genuine issue of fact precluding summary judgment.

Moreover, TecSec’s own expert, Dr. Rubin, *admitted* at his deposition that Krishna’s input FIFO performs the claimed “extraction” functionality:

Q. [W]ould you agree that the input FIFO is extracting main data and control data from the IP packets?

A. *Yes.*

(IBM Ex. C6 (Rubin Dep. Tr.) at 247:23–248:2.) And while Dr. Rubin subsequently attempted to retreat from that testimony under direct questioning from his own attorney (*id.* at 324:7–330:4), a reasonable jury faced with Dr. Rubin’s conflicting testimony could accept his initial admission that the input FIFO meets the claimed “format filter” limitation and performs the claimed “extracting” step. This credibility issue precludes summary judgment in favor of TecSec. *See Summerlin v. Edgar*, 809 F.2d 1034, 1039 (4th Cir. 1987) (“Credibility of conflicting testimony is not, on a summary judgment motion, an issue to be decided by the trial

judge.”). This is especially true considering that this conflicting testimony must be viewed in the light most favorable to IBM, not TecSec. *See Anderson*, 477 U.S. at 255.

Finally, “[a]n accused infringer that introduces a prior art reference and makes a non-frivolous argument that ‘each and every limitation of a claim is found, expressly or inherently, in [that] single prior art reference’ generally is entitled to have anticipation decided by the finder of fact.” *See Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1363 (Fed. Cir. 2008) (vacating summary judgment of no anticipation). IBM has at least made that showing. Under these circumstances, there is at least a genuine issue of fact regarding whether Krishna discloses the claimed “format filter” and “extracting” limitations.

**2. A Reasonable Jury Could Find That Krishna Discloses The Claimed “Control Unit” And “Forwarding” Limitations.**

The Court’s second ground for granting summary judgment was that “IBM has not identified structures in Krishna that function as a ‘control unit,’ or a ‘control parameter,’ at least as disclosed and configured in the ’448 patent” and that “IBM utterly fails to explain how Krishna discloses *forwarding* the control parameter from the control unit.” (D.I. 459 at 39.) As an initial matter, the Federal Circuit has held that “a district court cannot rely on its assessment of one party’s motion for summary judgment of invalidity when evaluating the other party’s motion for summary judgment of no invalidity.” *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1332 (Fed. Cir. 2009) (vacating summary judgment of no invalidity). IBM respectfully submits, therefore, that any perceived failure by IBM to identify certain features in the prior art in support of its own summary judgment motion could not, in and of itself, justify the grant of summary judgment in TecSec’s favor.

Furthermore, IBM respectfully submits that it did present evidence that Krishna discloses the claimed “control unit” and “forwarding” limitations, and a reasonable jury could conclude

based on the record evidence that Krishna discloses those limitations. For example, IBM submitted the declaration of its cryptography expert Dr. Blaze in which he explained in detail how the claim elements are disclosed by Krishna. As explained by Dr. Blaze, Krishna discloses a packet classifier which corresponds to the “control unit” of the ’448 patent. (D.I. 406 (Blaze Decl.) ¶ 16.) This packet classifier receives header information (“control data”) from the input FIFO (“format filter”) and, based on that header information, determines “security association information required to process the packet, such as encryption keys, data, etc.” (*Id.* ¶¶ 16–19.) As Dr. Blaze explained, this “security association information” is defined by an “SA Auxiliary Structure” which includes various parameters including “u32byteCount” (which corresponds to the claimed “control parameter”) and “cryptoState algoCrypto” or “u8crypto:2” (which correspond to the claimed “cryptographic parameters”). (*Id.*) As Dr. Blaze further explained, Krishna describes that the packet classifier *forwards* this “security association information” to a plurality of cryptography engines (“plurality of processors”) via the packet distributor. (*Id.* ¶ 19.)

Moreover, at his deposition, TecSec’s own expert Dr. Rubin admitted that Krishna’s packet classifier generates “security association information,” that includes “at least one control parameter,” such as “u32byteCount.” (IBM Ex. C6 (Rubin Dep. Tr. at 234:24–235:16, 249:7–25.) And Dr. Rubin admitted that the packet classifier sends this “security association information,” including the “control parameter,” to each of the plurality of cryptography engines:

Q. Well, I think you just agreed with me that the security association information originates with the packet classifier, right?

A. ***Right.***

Q. And it ends up at the plurality of processors, right?

A. ***Right.***

(*Id.* at 238:11–18; *see also id.* at 237:19–25, 250:4–22.) Perhaps most significantly, when asked whether this disclosure in Krishna meets the “control unit” limitation of the asserted claims, Dr. Rubin conceded that “*it does meet it.*” (*Id.* at 240:11–241:9.)<sup>2</sup> A reasonable jury faced with Krishna’s disclosure, Dr. Blaze’s opinions, and Dr. Rubin’s initial admissions, could find that Krishna discloses the claimed “control unit” and “forwarding” limitations. *See Cohesive Techs.*, 543 F.3d at 1363; *see also Respirationics*, 303 Fed. Appx. at 878 (vacating summary judgment of no anticipation where district court failed to consider a claim chart submitted by the accused infringer’s expert comparing the prior art with the asserted claims). This is especially true considering that this testimony must be viewed in the light most favorable to IBM, not TecSec. *See Anderson*, 477 U.S. at 255.

Accordingly, because genuine issues of material fact exist regarding whether Krishna discloses each and every limitation of the ’448 patent claims, IBM respectfully requests that the Court reconsider and vacate its Order granting summary judgment that Krishna does not anticipate the ’448 patent.

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<sup>2</sup> Although TecSec raised a new theory in opposition to IBM’s summary judgment motion that the “security association information” in fact originates from a component called an “SA buffer” (D.I. 434 (TecSec Opp. Br.) at 55–57), this theory is contrary to Dr. Rubin’s deposition testimony, was not disclosed during discovery, and is contrary to Krishna’s disclosure and Dr. Blaze’s interpretation of that disclosure. (*See* D.I. 448 (IBM Repl. Br.), at 37–38.) At best for TecSec, therefore, its new theory raises an issue of fact for trial. *See, e.g., Metro. Life Ins.*, 527 F.3d at 1339. At worst for TecSec, it should be precluded from raising this new theory altogether. Fed. R. Civ. P. 37(c)(1); *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003); *Military Servs. Realty, Inc. v. Realty Consultants of Va., Ltd.*, 823 F.2d 829, 832 (4th Cir. 1987).

**CONCLUSION**

For the foregoing reasons, IBM respectfully requests that the Court reconsider and vacate its Order granting summary judgment *sua sponte* that (1) the '433 patent is not anticipated by Fletcher, and (2) the '448 patent is not anticipated by Krishna, as those issues should be tried by a jury.

Dated: January 28, 2011

Respectfully submitted,

/s/ Craig C. Reilly

Craig C. Reilly, Esq. (VSB # 20942)  
111 Oronoco Street  
Alexandria, Virginia 22314  
Telephone: 703-549-5354  
Facsimile: 703-549-2604  
E-mail: [craig.reilly@ccreillylaw.com](mailto:craig.reilly@ccreillylaw.com)  
*Counsel for Defendant IBM*

*Of Counsel for Defendant IBM:*

John M. Desmarais  
DESMARAIS LLP  
230 Park Avenue  
New York, NY 10169  
Telephone: 917-340-6940  
Facsimile: 914-666-6962

Jon T. Hohenthauer  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, NY 10022-4675  
Telephone: 212-446-4800  
Facsimile: 212-446-4900

Elizabeth Bernard  
KIRKLAND & ELLIS LLP  
655 15th Street, N.W.  
Washington, D.C. 20005  
Telephone: 202-879-5000  
Facsimile: 202-879-5200

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of January 2011, a true and correct copy of the foregoing pleading or paper was served using the Court’s CM/ECF system, with electronic notification of such filing to all counsel of record:

<p>Brian Mark Buroker  HUNTON &amp; WILLIAMS  1900 K St NW  Washington , DC 20006-1109  TEL: (202) 955-1500  FAX: (202) 778-2201  Email: <a href="mailto:bburoker@hunton.com">bburoker@hunton.com</a></p> <p>Thomas J. Cawley  HUNTON &amp; WILLIAMS  1751 Pinnacle Drive  McLean, VA 22102  Tel: (703) 714-7400  Email: <a href="mailto:tcawley@hunton.com">tcawley@hunton.com</a>  <i>Counsel for Plaintiff</i></p>	<p>Andrew James Isbester  TOWNSEND AND TOWNSEND AND CREW LLP  Two Embarcadero Ctr., 8th Floor  San Francisco, CA 94111  Tel: (415) 273-4335  Email: <a href="mailto:jisbester@townsend.com">jisbester@townsend.com</a></p> <p>Jonathan Dyste Link  TOWNSEND AND TOWNSEND AND CREW LLP  1301 K St NW, 9Th Floor, East Tower  Washington, DC 20005  Tel: (202) 481-9900  Email: <a href="mailto:jlink@townsend.com">jlink@townsend.com</a>  <i>Counsel for Defendants Oracle America, Inc. and Oracle Corp.</i></p>
<p>Michael Robinson  Stephen K. Gallagher  VENABLE LLP  8010 Towers Crescent Drive  Vienna, VA 22182  mwrobinson@venable.com  <a href="mailto:skgallagher@venable.com">skgallagher@venable.com</a></p> <p>Jeffri Kaminski  VENABLE LLP  575 7th Street, NW  Washington, DC 20004  <a href="mailto:jakaminski@venable.com">jakaminski@venable.com</a>  <i>Counsel for Software AG Defendants</i></p>	<p>Jeffrey K. Sherwood,  Frank C. Cimino  Matthew Weinstein  Megan Sunkel Woodworth  DICKSTEIN SHAPIRO LLP  1825 Eye Street NW  Washington, DC 20006  <a href="mailto:sherwoodj@dicksteinshapiro.com">sherwoodj@dicksteinshapiro.com</a>  <a href="mailto:ciminof@dicksteinshapiro.com">ciminof@dicksteinshapiro.com</a>  <a href="mailto:weinsteinm@dicksteinshapiro.com">weinsteinm@dicksteinshapiro.com</a>  <a href="mailto:woodworthM@dicksteinshapiro.com">woodworthM@dicksteinshapiro.com</a>  <i>Counsel for SAP Defendants</i></p>
<p>Walter D. Kelley, Jr.  Tara Lynn R. Zurawski  JONES DAY  51 Louisiana Avenue, NW  Washington, DC 20001  Tel: (202) 879-3939  Fax: (202) 626-1700  Email: <a href="mailto:wdkelley@jonesday.com">wdkelley@jonesday.com</a>  <i>Counsel for Defendant SAS</i></p>	<p>Henry C. Su  HOWREY LLP  1950 University Ave  4th Floor  East Palo Alto, CA 94303-2250  <a href="mailto:suh@howrey.com">suh@howrey.com</a>  <i>Counsel for Defendant Adobe</i></p>

<p>Sarah Hall George Pappas Gary Rubman COVINGTON &amp; BURLING LLP 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20004 shall@cov.com gpappas@cov.com <a href="mailto:grubman@cov.com">grubman@cov.com</a></p> <p>Nitin Subhedar Bhanu Sadasivan COVINGTON &amp; BURLING LLP 333 Twin Dolphin Drive Redwood Shores, CA 94065 nsubhedar@cov.com bsadasivan@cov.com <i>Counsel for Defendant Sybase</i></p>	<p>William H. Boice bboice@kilpatrickstockton.com Mitchell G. Stockwell mstockwell@kilpatrickstockton.com KILPATRICK STOCKTON LLP 1100 Peachtree Street, N.E. Suite 2800 Atlanta, Georgia 30309 (404) 815-6500 (404) 815-6555 (Facsimile) <i>Counsel for Defendant Cisco Systems</i></p> <p>Amr O. Aly aaly@kilpatrickstockton.com KILPATRICK STOCKTON LLP 31 West 52nd Street, 14th Floor New York, NY 10019 (212) 775-8700 (212) 775-8800 (Facsimile) <i>Counsel for Defendant Cisco Systems</i></p>
<p>Blair Jacobs Christina Ondrick Karla Palmer MCDERMOTT, WILL &amp; EMERY LLP 600 13th Street, N.W. Washington, D.C. 20005 bjacobs@mwe.com kpalmer@mwe.com <a href="mailto:condrick@mwe.com">condrick@mwe.com</a></p> <p>Terrence McMahon Vera Elson Yar Chaikovsky Hong Lin MCDERMOTT WILL &amp; EMERY LLP 275 Middlefield Road Menlo Park, CA 94025 tmcMahon@mwe.com velson@mwe.com <a href="mailto:hlin@mwe.com">hlin@mwe.com</a> <i>Counsel for Defendants eBay and PayPal</i></p>	
	<p><u>          s/          Craig C. Reilly          </u> Craig C. Reilly (VSB No. 20942) craig.reilly@ccreillylaw.com 111 Oronoco Street Alexandria, Virginia 22314 (703) 549-5354 (703) 549-2604 (Fax) <i>Counsel for Defendant IBM</i></p>