IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MERCEXCHANGE, L.L.C.,

Plaintiff,

v.

Case No. 2:01-CV-736

EBAY, INC. and HALF.COM, INC.,

Defendants.

PLAINTIFF MERCEXCHANGE, L.L.C.'S BRIEF IN SUPPORT OF RENEWED MOTION FOR ENTRY OF A PERMANENT INJUNCTION ORDER

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I. INTRODUCTION

The question in this case is whether equity favors granting injunctive relief to the patent holder, MercExchange, L.L.C. ("MercExchange") after a final judgment of willful infringement against the defendants, eBay, Inc., and its wholly-owned affiliate, Half.com (collectively, "eBay").

The equities strongly favor such relief. This is a case of deliberate, and by eBay's own assertion, avoidable infringement. eBay was not only well aware of MercExchange's patent, U.S. Patent No. 5,845,265 ("the '265 patent"), but eBay tried to purchase that patent before it started infringing. And eBay deliberately chose to infringe when it could have (at least by its own contention), avoided infringement with a simple and inexpensive design-around. Under these circumstances, eBay can "make no claims whatsoever on the Chancellor's conscience." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975). Indeed, eBay continues to proclaim to the investing public that an injunction would *not* harm it.

MercExchange, on the other hand, will continue to suffer irreparable harm in the absence of an injunction. MercExchange, and MercExchange's licensees or potential licensees, are, or aspire to be, competitors of eBay. Permitting eBay to continue using MercExchange's technology would irreparably harm MercExchange's ability to market, sell, or license its technology to these existing or future competitors to eBay. Among other things, if eBay cannot be enjoined, MercExchange is effectively denied the ability to maximize the value of its patents by exclusively licensing them. The value of MercExchange's lost opportunities to enter into these license relationships, and to take advantage of the further business those relationships might generate, is unquantifiable.

Moreover, the harm to MercExchange has only intensified in the three years since this case was last before this Court. eBay has solidified its market dominance, at least in part by

infringing MercExchange's patent. MercExchange, on the other hand, is thwarted in its efforts to market its invention because of its inability to prevent eBay—whose dominance squeezes out potential competitors—from infringing.

The public interest also favors injunctive relief. In addition to serving the strong public interest in maintaining the integrity of the patent system by enforcing patent rights, enjoining eBay also serves the public interest in promoting competition. Without an injunction, eBay can further solidify its virtual monopoly power by impairing the development of potential online auction alternatives to eBay.

The factors for evaluating injunctive relief all strongly favor granting that relief to MercExchange, and this Court should enter such an injunction without delay.

II. BACKGROUND

In April 1995, several months before eBay was incorporated, Thomas Woolston filed his first patent application involving online marketing technology. U.S. Patent No. 5,845,265 (Exhibit 1 to Declaration of Gregory N. Stillman ("Stillman Decl."), filed concurrently); eBay, Inc. Form 10-Q (filed July 28, 2006) ("eBay 10-Q") at 6 (Stillman Decl., Ex. 2). The family of patents that issued from this parent application includes the '265 patent. U.S. Patent No. 5,845,265, at 1 (Stillman Decl., Ex. 1).

A. The '265 Patent

As this Court is aware, the '265 patent, in general terms, describes an "electronic market" for the sale of goods. *Id.* at 1-26. In such a market, sellers can display their wares by posting pictures, descriptions, and prices of goods on a computer network, such as the Internet. A prospective buyer can electronically browse the goods on sale by connecting to the network. After selecting an item, the buyer can complete the purchase electronically, with the "electronic market" mediating the transaction, including payment, on the buyer's behalf. The seller is then

notified that the buyer has paid for the item and that the transaction is final. A central authority within the market can police the obligations and performance of sellers and buyers over time, thereby promoting trust among participants. In short, the invention provides a platform to offer goods for sale over the Internet in which the entire sales transaction, including the mediation of payment, is performed electronically. *Id.* at 1-5.[1]

B. Initial Efforts to Commercialize the Invention

Mr. Woolston's goal from the outset was to commercialize his patented inventions. For that purpose, he founded MercExchange (as well as an earlier iteration of that company, called Fleanet) and assigned his patent rights to it. Trial Tr. pp. 334-335; 493 (Stillman Decl., Ex. 4). He developed a business plan and sought capital investment to commercialize his patents. *Id.* pp. 315; 492-496; 513-516. He also hired a computer programming staff to write software to put his inventions into practice. *Id.* pp. 1084-1087. In order to make the most of its limited resources, MercExchange also entered into a licensing agreement with another company, Aden Enterprises, in October 1999. MercExchange Trial Ex. 812 (agreement granting exclusive license within the online travel-sector field-of-use) (Stillman Decl., Ex. 5). At that time, Aden Enterprises was "embarking on a major industry initiative to build and deploy Internet Markets and Auctions" (*id.* p. 1),[2] and MercExchange sought, through this license arrangement, to use its patent rights to develop its invention in ways that MercExchange could not accomplish with its own resources. *See also* MercExchange Trial Ex. 814 (non-exclusive license with Aden's wholly-owned

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[1] In affirming this Court's claim construction for the '265 patent, *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1329 (Fed. Cir. 2005), the Federal Circuit rejected eBay's contention that this Court had "failed to perform its most critical function" of instructing the jury on claim construction issues. eBay Appellant's Brief at 3 (Stillman Decl., Ex. 3).

[2] An Internet or online auction market can allow consumers to bid their own price for various items or to buy those items at a fixed price.

subsidiary Leftbid.com in the field of use of the "Fine Art Sector" of Internet markets) (Stillman Decl., Ex. 6); MercExchange Trial Ex. 813 (non-exclusive license with Aden's wholly-owned subsidiary Navlet.com that provided infrastructure (hardware and software facilities) for Internet auction systems) (Stillman Decl., Ex. 7). MercExchange hoped to leverage the resources of these licensees to help develop and commercialize the invention. *See, e.g.*, Declaration of Larry W. Evans ("Evans Decl."), (Stillman Decl., Ex. 17), ¶¶ 33-37 (noting these licensees were obligated to use their "best efforts" to develop the technology).

By the late 1990s, eBay was also looking for ways to offer goods for sale with the entire sales transaction, including the mediation of payment, performed electronically. Accordingly, in June 2000, eBay approached MercExchange to discuss eBay's interest in buying MercExchange's patent portfolio. MercExchange Trial Ex. 97 (Stillman Decl., Ex. 8); Trial Tr. pp. 348-352; 590-592 (Stillman Decl., Ex. 4). eBay had been aware of MercExchange's '265 patent and its technique for conducting electronic sales since the late 1990's; in fact, eBay had filed 24 patent applications citing the '265 patent as prior art from October 1998 through February 2002. MercExchange Trial Ex. 111 (Stillman Decl., Ex. 9). MercExchange was very interested in entering into a working relationship with eBay because MercExchange hoped that by so doing it could capitalize MercExchange into an operating company. Trial Tr. pp. 348-349; 590-591 (Stillman Decl., Ex. 4). In short, MercExchange hoped that by partnering with eBay, MercExchange could convert the innovative ideas embodied in its patents into commercial reality. eBay, however, made clear that it was interested only in buying the patents, rather than entering into any more extended business relationship. *Id.* pp. 348-349.

C. eBay's Infringement

When negotiations for the sale of MercExchange's patents broke down, eBay began using MercExchange's technology without authorization. By the fall of 2000—only months after eBay had unsuccessfully tried to buy MercExchange's patents—eBay had incorporated into its website a fixed-price sales capability using the "electronic market" system of MercExchange's '265 patent for the purchase and sale of goods and the transfer of funds in an electronic marketplace. Transcript of Whitman Deposition at 65-67 (Stillman Decl., Ex. 10); Transcript of Krauss Deposition at 21-28 (Stillman Decl., Ex. 11).

At the same time that eBay began using MercExchange's technology, it was becoming clear that lack of capital would prevent MercExchange from successfully commercializing its inventions directly. With no choice but to end its efforts at direct commercialization, MercExchange shifted its remaining resources to building a licensing program. Trial Tr. pp. 533; 1087 (Stillman Decl., Ex. 4).

D. The Patent Infringement Litigation

MercExchange sued eBay in this Court in September 2001 for, *inter alia*, infringement of the '265 patent. The jury found that eBay (and its wholly-owned subsidiary, Half.com) had willfully infringed the '265 patent and awarded damages for past direct infringement of that patent in the amount of $25 million.[3] *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695,

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[3] MercExchange brought infringement claims based on three of its patents: U.S. Patent No. 6,202,051 ("the '051 patent"), U.S. Patent No. 6,085,176 ("the '176 patent"), and the '265 patent. Before trial, this Court granted eBay summary judgment that certain claims of the '051 patent were invalid for lack of a written description. *MercExchange, L.L.C. v. eBay, Inc.*, 271 F. Supp. 2d 789, 794-795 (E.D. Va. 2002). The Federal Circuit reversed. *MercExchange, L.L.C.*, 401 F.3d at 1337. The '176 patent and '265 patent infringement claims went to the jury; the Federal Circuit subsequently reversed the jury's verdict of willful infringement of the '176 patent after concluding that that patent was invalid. *Id.* at 1326.

698-99 (E.D. Va. 2003). This Court upheld the jury's finding of willful infringement, *id.* at 704, and the Federal Circuit unanimously affirmed the jury's verdict and this Court's judgment that the '265 patent was valid and infringed. *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1328-29 (Fed. Cir. 2005). eBay did not seek further review on those questions, and the judgments of validity and infringement are now final.[4]

With respect to MercExchange's request for injunctive relief, this Court denied a permanent injunction, *MercExchange*, 275 F. Supp. 2d at 715, and the Federal Circuit reversed. *MercExchange*, 401 F.3d at 1339. eBay sought certiorari on the question whether the Federal Circuit had properly evaluated the propriety of a permanent injunction. Petition for a Writ of Certiorari (Stillman Decl., Ex. 12). The Supreme Court, concluding that neither lower court had properly applied the appropriate test for injunctive relief, reversed and remanded for this Court to apply the traditional "four-factor test" for such relief in the first instance. *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1841 (2006). The only question before this Court, therefore, is whether permanent injunctive relief is proper under this four-factor test. *MercExchange, L.L.C. v. eBay, Inc.*, Nos. 03-1600, 03-1616, 2006 U.S. App. LEXIS 17505 (Fed. Cir. July 6, 2006) (remand order).

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[4] While its appeal to the Federal Circuit was pending, eBay requested that the Patent and Trademark Office ("PTO") reexamine the '265 patent. Those parallel proceedings are ongoing, and the PTO has not yet issued a final decision on the reexamination. When it does so, any adverse decision will be appealed to the Board of Patent Appeals and Interferences (*see* 35 U.S.C. § 134(b)), and then ultimately to the Federal Circuit (*see* 35 U.S.C. § 306), which has already upheld the validity of the '265 patent on substantially the same grounds. Even if the PTO were to reject the claims of the '265 patent, those claims would not be cancelled unless and until that agency action were affirmed on appeal by the Federal Circuit —a process that could take years. *See* 35 U.S.C. § 307(a) (certificate canceling or confirming claims of patent on reexamination issued when appeals process has been exhausted); *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359 (Fed. Cir. 2004) (PTO's findings on reexamination not confirmed until 10 years after reexamination was requested). *See also* note 9, *infra*.

E. Current Impact of eBay's Continuing Infringement

Although MercExchange has a final judgment that eBay willfully infringed its valid patent, without an injunction ordering eBay to stop infringing the '265 patent, the prospect that eBay will persist in its infringement has continued to make MercExchange's effort to commercialize its invention extremely difficult, and may doom it entirely.

First, it is difficult for MercExchange to enter into license arrangements because potential licensees have little incentive to adequately compensate MercExchange for the use of its patented technology so long as eBay is infringing. Trial Tr. pp. 1087-1088, 1093 (Stillman Decl., Ex. 4); *see also* Evans Decl. ¶ 100. For example, in December 2002 MercExchange entered into a license agreement with AutoTrader.com, Inc. ("AutoTrader"), which competes against eBay in the field of online automobile sales. MercExchange Trial Ex. 731 (Stillman Decl., Ex. 13). The license, which was negotiated under the cloud of eBay's infringement, permits AutoTrader to make exclusive use of the '265 patent within the field of automobile sales—but it makes payment of royalties contingent on MercExchange's successfully stopping eBay's infringement. *Id.* Because of eBay's continued infringement, MercExchange has been unable to realize any benefit from this license, and, for its part, AutoTrader has been denied the rights *it* bargained for—the exclusive use of the invention for the purpose of buying and selling cars.

Second, the prospect of eBay's ongoing infringement continues to make it very difficult for MercExchange to do what it has wanted to do from the outset—fully exploit its patented invention. *See* Evans Decl. ¶ 90. For example, to further this effort, MercExchange entered into a license agreement in May 2004 with the company uBid that allows uBid to practice the claims of the '265 patent. *See* Declaration of uBid Executive Vice President Timothy E. Takesue

("Takesue Decl."), (Stillman Decl., Ex.18), ¶ 22. uBid operates an online auction site that offers consumers the opportunity to bid their own price for various items or to buy items at a fixed price. *Id.* ¶¶ 5-6. Although eBay has the overwhelming market share for Internet auction sales, uBid has carved out a small slice of that market; indeed uBid has been recognized as the second most popular online auction site. *Id.* ¶¶ 15-17. And the fixed-price-sales feature of uBid's website is the fastest growing aspect of uBid's business. *Id.* ¶ 24.

MercExchange has a direct financial interest in uBid's success under the royalty structure for the '265 patent. uBid License, art. 3.2 (Stillman Decl., Ex. 14). uBid and MercExchange would like to further expand their business relationship, however, and to use MercExchange's patented technology to build a more significant presence in the online auction market. *See* Takesue Decl. ¶¶ 21, 25; Evans Decl. ¶ 70. The founder of MercExchange, Thomas G. Woolston, has submitted a declaration that details MercExchange's relationship with uBid, their goal to expand that relationship, and the harms that will flow from an inability to enjoin eBay. *See* Declaration of Thomas G. Woolston ("Woolston Decl."), (Stillman Decl., Ex. 19), ¶¶ 37-43, 49-50.

Again, however, the cloud of eBay's infringement, and the prospect that such infringement will continue unchecked, has frustrated those efforts. Although negotiations are ongoing, uBid and MercExchange have to date been unable to reach an agreement, either for an exclusive license to the '265 patent or for a formal business combination of the two entities, because of the uncertainty regarding MercExchange's ability to enforce its patent with an injunction. *See* Takesue Decl. ¶¶ 25-27; Woolston Decl. ¶ 43; Evans Decl. ¶ 71.

Third, MercExchange has lost other business opportunities to compete with eBay, at least in part because eBay is not enjoined from infringing the '265 patent. Although eBay is a virtual

monopolist in the Internet auction market, several other companies that each have a large presence in other fields of Internet commerce have expressed interest in—and are quite capable of—presenting significant competition to eBay through use of the '265 patent. *See* Evans Decl. ¶ 47 (discussing licensing negotiations with Christie's auction house and Yahoo!). MercExchange has tried to pursue such ventures, but its efforts have not come to fruition, at least in part because of its current inability to enjoin eBay from continued infringement of the '265 patent. Evans Decl. ¶ 100; Woolston Decl. ¶¶ 46-47.

III. THE EQUITIES ENTITLE MERCEXCHANGE TO A PERMANENT INJUNCTION ENJOINING EBAY FROM INFRINGING MERCEXCHANGE'S PATENT

A. Applicable Legal Standard

The Patent Act provides that, in order to prevent the violation of any patent right, courts "may" grant injunctive relief "in accordance with the principles of equity." 35 U.S.C. § 283. The exercise of this discretion has therefore been guided by traditional equitable principles. *See, e.g., Odetics, Inc. v. Storage Tech. Corp.*, 14 F. Supp. 2d 785, 794-797 (E.D. Va. 1998), *aff'd*, 185 F.3d 1259 (Fed. Cir. 1999).

The Supreme Court's recent decision in *eBay, Inc.* reaffirmed this approach, holding that traditional equitable principles, as reflected in the four-factor framework for equitable relief, should be applied in each case. 126 S. Ct. at 1839 (describing four factors as whether (1) the plaintiff has suffered an irreparable injury; (2) money damages are inadequate to compensate for that injury; (3) the balance of the hardships between the parties warrants equitable relief; and (4) the public interest would not be disserved by injunctive relief).

Courts are not "writing on an entirely clean slate" when applying these traditional equitable principles, however. *Id.* at 1841 (Roberts, C.J., concurring). Instead, a court's

discretion is guided by legal standards and historical practice. *Id.* ("'Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.'") (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 554 (2005)). That historical practice shows that, "[f]rom at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases." *Id.* As the Supreme Court made clear in *eBay*, this history does not justify a categorical rule that injunctions must issue after a finding of infringement. At the same time, however, the principles that gave rise to this historical practice—the nature of the patent right and the harm that arises from losing the right to exclude—are still important in a court's weighing of the four equitable factors.[5]

This case is no exception. Under the traditional four-factor framework, MercExchange is entitled to an immediate permanent injunction against eBay's continued infringement of the '265 patent.

B. Absent An Injunction, MercExchange Will Suffer Immediate Irreparable Harm For Which There Is No Adequate Remedy At Law

Absent an injunction, eBay's infringement will continue to cause MercExchange irreparable harm, *i.e.*, harm that cannot be adequately compensated by money damages.[6] The essence of the patent right is the right to exclude others from using one's invention for a limited

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[5] Justice Kennedy's separate concurrence does not disagree. 126 S. Ct. at 1842. Justice Kennedy noted that the right to exclude does not inexorably dictate injunctive relief; rather, the four-factor test, applied in the context of analogous historical practice, governs. *Id.*

[6] Irreparable harm in the absence of equitable relief and inadequacy of legal remedies are, in effect, two sides of the same coin. *See* 11A Charles Alan Wright, *et al.*, *Fed. Prac. & Proc.*, § 2944 (2d ed. 1995) (irreparable harm is not an independent requirement for obtaining a permanent injunction but is one basis for showing inadequacy of legal remedy); Douglas Laycock, *Modern American Remedies: Cases and Materials* 370 (3d ed. 2002) (same).

time. *See* 35 U.S.C. § 154(a)(1); *see also Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1247 (Fed. Cir. 1989). The mere passage of time during which that right is deprived, therefore, can work an irremediable harm. *Richardson*, 868 F.2d at 1247.

It is for that reason that, once infringement and validity have been established, the patent holder is generally presumed to have suffered irreparable harm. *See Richardson*, 868 F.2d at 1247 (Fed. Cir. 1989) (citing *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581) (Fed. Cir. 1983)). The Supreme Court's decision in *eBay* did not alter that presumption. In *eBay*, the Supreme Court explained that a plaintiff seeking a permanent injunction must demonstrate irreparable harm. 126 S. Ct. at 1839. But, as the Federal Circuit has suggested in at least one post-*eBay* case, the plaintiff can do so where the defendant fails to rebut the presumption of irreparable harm that arises from a showing of success on the merits of validity and infringement. *Cf. Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1347 (Fed. Cir. 2006) (holding that, because plaintiff seeking preliminary injunction failed to establish likelihood of success on merits, plaintiff was not entitled to presumption of irreparable harm). And eBay cannot rebut that presumption here; MercExchange's "willingness to license" should not diminish MercExchange's right to exclude, nor the harm that befalls MercExchange through its deprivation. *See* pp. 17-19, *infra*.

Even if this Court concludes that MercExchange is not entitled to a presumption of irreparable harm, however, MercExchange will unquestionably suffer such harm, in numerous ways, absent an injunction.

1. Depriving MercExchange of the right to choose to whom it licenses its patented technology is a harm that cannot be remedied with money damages.

The necessary corollary to the right to exclude is the patent holder's right to decide if, when, and to whom to license its patented invention. 35 U.S.C. § 271(d). Absent an injunction

to enforce that right here, MercExchange would, in effect, be forced to license its technology to eBay. Such a forced license is "antithetical to a basic tenet of the patent system . . . that the decision whether to license is one that should be left to the patentee." *Odetics*, 14 F. Supp. 2d at 795.

Forcing MercExchange to license its patent to someone not of its choosing is an irreparable, harm—once lost it cannot be retroactively restored nor remedied with money. Declaration of John C. Jarosz ("Jarosz Decl."), (Stillman Decl., Ex. 21), ¶¶ 32-38. That is true whether MercExchange uses its patented invention itself in a commercial enterprise, licenses the invention, or even refuses to license or make any other use at all of the patent. *See eBay, Inc.*, 126 S. Ct. at 1840-1841 (reaffirming *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 422-430 (1908), which rejected the contention that a court of equity has no jurisdiction to grant injunctive relief to a patent holder who has unreasonably declined to use the patent).

But the harm to MercExchange is particularly severe on the record here. MercExchange, and MercExchange's licensees or potential licensees, are (or aspire to be) *competitors* of eBay—an entity that commands 90 percent of the relevant market. *See* Jarosz Decl. ¶¶ 34-35, 42-43; *Market Share Reporter*, Vol. 2, 573 (Robert S. Lazich, ed., 2006) (eBay has 90 percent share) (Stillman Decl., Ex. 15). Money damages are therefore particularly inadequate to compensate MercExchange for eBay's unauthorized use of the patented invention. Not only is MercExchange forced to license someone *not* of its choosing, which negates an essential and irremediable aspect of MercExchange's patent rights, but MercExchange's ability to license its patent to those of its *own* choosing is degraded. *See* Evans Decl. ¶ 100. A potential licensee might be undeterred from taking a license if the unenjoined competitor is a small part of the market but would have little incentive to adequately compensate MercExchange for the use of its

technology where the unenjoined competitor so dominates the market. *See* Jarosz Decl. ¶¶ 38, 42-44. 81, 90.

And as this court explained in *Odetics*, the argument that future royalty payments ameliorate such harm to a patent holder is untenable. 14 F. Supp. 2d at 795. The court observed that "[d]efendants are incorrect that absent an injunction Odetics will not suffer irreparable harm simply because it will be paid royalties for all future infringement. If no injunction issues, Odetics effectively will be forced to license [its] patent to [the infringer], a result antithetical to a basic tenet of the patent system, namely that the decision whether to license is one that should be left to the patentee." *Id.* In addition, a compulsory license denies the inventor the opportunity to take an active role in the exploitation of his invention. Evans Decl. ¶ 112. Permitting eBay to continue using MercExchange's technology without authorization is antithetical to the patent law and irreparably harmful to MercExchange.

2. Absent an injunction, MercExchange will suffer substantial losses in the value of its patent, and in business opportunities to use its patent, that cannot be adequately compensated with money.

Absent an injunction against eBay, MercExchange will be hindered in its ability to enter into the kinds of license agreements that are necessary to maximize the economic value of the patent. Declaration of Lori Pressman ("Pressman Decl."), (Stillman Decl., Ex. 20), ¶¶ 27-39. It is particularly important for a small inventor like MercExchange to preserve flexibility in the way it licenses its patent. *Id.* ¶ 28. It may be advantageous for MercExchange to license its patent non-exclusively in certain situations, for example, when the licensee is a potential partner or customer. *Id.* ¶ 37. And MercExchange may need to license exclusively in other situations, for example, to attract capital, talent, and strategic business partners to develop the invention in ways MercExchange could not achieve on its own. *Id.* ¶ 28. It is critically important, however, in order to realize the full value of its patent, for MercExchange to preserve the ability to license

exclusively. But without the ability to enforce the right to exclude through an injunction, MercExchange is crippled in its efforts to do so. *Id.* ¶¶ 53-54. No potential licensee would pay MercExchange anything close to full value for a patent license if eBay is not enjoined from infringing. And few, if any, potential licensees would be willing to commit resources to develop the invention if eBay is not enjoined from infringing. *See* Jarosz Decl. ¶¶ 46-47; Woolston Decl. ¶¶ 43, 46-47, 49. Without the ability to license its patent strategically or exclusively, a substantial portion of the value of MercExchange's patent is irretrievably lost—effectively blocked by eBay's infringement. *See* Pressman Decl. ¶¶ 16-18. As the Federal Circuit has explained, without an injunction to enforce it, "the right to exclude . . . would have only a fraction of the value it was intended to have." *Smith Int'l*, 718 F.2d at 1578.

MercExchange is also deprived of its ability to exploit the business opportunities created by the patent's value—to market, sell, or license its technology to potential competitors to eBay. Evans Decl. ¶ 100. So long as eBay is allowed to use MercExchange's patented technology, such business opportunities are irretrievably, and non-compensably, lost.

As the Fourth Circuit recognized in *Blackwelder Furniture Co. v. Seilig Mfg Co.*, "irreparability of harm includes the 'impossibility of ascertaining with any accuracy the extent of the loss.'" 550 F.2d 189, 197 (4th Cir. 1977) (quoting *Foundry Servs., Inc. v. Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir. 1953) (Hand, J., concurring)). In this case, the value of MercExchange's lost opportunities to enter into licensing relationships—and to take advantage of the further business those relationships would generate—is unquantifiable. Certainly, "it would be very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999) (concluding that irreparable