

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

EOLAS TECHNOLOGIES	§	Civil Action No. 6:09-CV-446-LED
INCORPORATED,	§	
	§	
PLAINTIFF,	§	
	§	JURY TRIAL DEMANDED
v.	§	
	§	
ADOBE SYSTEMS INC., et al.,	§	
	§	
DEFENDANTS.	§	
	§	

**REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT OF  
NO ENHANCED DAMAGES FOR WILLFUL INFRINGEMENT**

Although Eolas argues that it “does not seek enhanced damages based solely on the Defendants’ post-filing conduct,”<sup>1</sup> Eolas has already stipulated that it has sustained zero damages for pre-suit conduct.<sup>2</sup> There can thus be no willfulness damages for pre-suit conduct; “three times zero is still zero.”<sup>3</sup> The *only* remaining question is whether enhanced damages are available for post-suit conduct.<sup>4</sup> Under *Seagate*, they are not. *Seagate* makes clear that a preliminary injunction is the remedy for post-filing willful infringement, and that a patentee who makes no attempt to secure one is not entitled to enhanced damages for post-filing conduct.<sup>5</sup> Having chosen not to move for a preliminary injunction, Eolas may not now seek to “enhance” any post-filing compensatory damages.

There is also no merit to Eolas’ arguments that, under the *GSI* case, Eolas is somehow exempt from *Seagate* because of Defendants’ alleged pre-suit patent knowledge.<sup>6</sup> Eolas’

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<sup>1</sup> See 9/28/2011 Eolas’ Response In Opposition To Defendants’ Motion For Summary Judgment Of No Enhanced Damages For Willful Infringement (“Eolas’ Response”) (D.N. 990) at 2.

<sup>2</sup> See 8/17/2011 Joint Stipulation of No Pre-Suit Damages (D.N. 867).

<sup>3</sup> See, e.g., *GSI Group, Inc. v. Sukup Mfg. Co.*, 591 F. Supp. 2d 977, 983-84 (C.D. Ill. 2008) (holding pre-suit enhanced damages unavailable for patents as to which pre-suit compensatory damages unavailable; “[A]vailable compensatory damages for Sukup’s alleged pre-filing infringement of these patents is zero, and three times zero is still zero. GSI, therefore, cannot recover enhanced damages for the pre-filing infringement of these patents.”).

<sup>4</sup> Eolas’ arguments about 35 U.S.C. § 287 are a red herring. Eolas’ inability to collect pre-suit enhanced damages results from its stipulation that it sustained zero damages for pre-suit conduct, and its inability to collect post-suit enhanced damages results from its failure to seek a preliminary injunction..

<sup>5</sup> See *In re Seagate Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007) (en banc) (“[A] patentee can move for a **preliminary injunction**, which generally provides an adequate remedy for combating post-filing willful infringement. **A patentee who does not attempt to stop an accused infringer’s activities in this manner should not be allowed to accrue enhanced damages** based solely on the infringer’s post-filing conduct.” (emphasis added) (citations omitted)); see also, e.g., *Baxter Healthcare Corp. v. Fresenius Med. Care. Holdings, Inc.*, No. C 07-1359, 2010 U.S. Dist. LEXIS 21778 at \*49-50 (N.D. Cal. Feb. 19, 2010) (holding no enhanced damages for post-suit conduct available under *Seagate* where patentee failed to move for preliminary injunction).

<sup>6</sup> This argument necessarily applies only to the ‘906 patent. The ‘985 patent issued on October 6, 2009—the day Eolas filed this suit. See U.S. Patent No. 7,599,852 B2; 10/6/2009 Complaint (D.N. 1). Further, Eolas’ “distinction” of *Anascape* and *Webmap* on the basis that they “involved patentees who had no evidence of pre-suit knowledge” (Eolas’ Motion at 3) completely mischaracterizes *Anascape* and ignores *Webmap*’s reliance on *Anascape*. Contrary to Eolas’ Motion, the *Anascape* plaintiff—represented by the same counsel representing Eolas here—argued that defendants had pre-suit knowledge. See *Anascape, Ltd. v. Microsoft Corp.*, No. 9:06-CV-158, 2008 WL 7182476, at \*3 (E.D. Tex. Apr. 25, 2008) (Clark, J.) (“Anascape argues that a reasonable jury could conclude that Defendants had pre-suit knowledge of the [patent-in-suit] before Anascape filed the lawsuit.”). The *Webmap* court relied heavily on *Anascape* (and referred to the *Anascape* plaintiff’s failed attempt to establish pre-suit patent knowledge) and held that the *Webmap* plaintiff, having failed to seek a preliminary injunction, was not entitled to post-suit enhanced damages under *Seagate*. See *Webmap Techs., LLC v. Google, Inc.*, No. 2:09-CV-343-DF-CE, 2010 WL 3768097, at \*3 (E.D. Tex. Sept. 10, 2010). Further, Eolas’ only “distinction” of *Cordance* is that there, the court discussed facts surrounding plaintiff’s willfulness allegations before rejecting plaintiff’s arguments. But there,

carefully-chosen quotes from *GSI* refer to “pre-filing conduct” and “post-filing conduct” as “relevant.”<sup>7</sup> This discussion of *GSI* by Eolas is, at best, misleading. The referenced “pre-suit conduct” and “post-suit conduct” was deemed relevant to *pre-suit* willful infringement of *the one patent for which pre-suit compensatory damages were available*.<sup>8</sup> There is no such patent here.<sup>9</sup> Further, the *GSI* court held that *Seagate barred post-filing enhanced damages for all six asserted patents*, including the one patent for which pre-suit damages were available:

The statements in the *Seagate* opinion, however, are quite clear. ***The Federal Circuit stated that a patent holder, such as GSI, has an adequate remedy for post-filing willful infringement through the pursuit of preliminary injunctive relief.*** The Federal Circuit further stated: “A patentee [such as GSI] who does not attempt to stop an accused infringer’s activities in this manner should not be allowed to accrue enhanced damages based solely on the infringer’s post-filing conduct.” *Id.* at 1374. ***This Court must follow the Federal Circuit. GSI is not entitled to enhanced damages for any post-filing willful infringement; GSI could have stopped such infringement through preliminary injunctive relief.***<sup>10</sup>

*GSI* thus held that, for patents as to which no pre-suit compensatory damages were available (true of both patents here), no pre-suit enhanced damages were available, and that for every asserted patent, post-suit enhanced damages were not available under *Seagate*, since patentee chose not to move for a preliminary injunction (true of both patents here). Rather than attempt to distinguish *GSI*, Eolas thus resorted to misstating the critically relevant portion of its holding.

Defendants respectfully request that the Court grant their motion for summary judgment, and accordingly enter summary judgment against Eolas on its willfulness claims.

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defendants had argued that plaintiffs’ “failure to provide notice of the patents-in-suit or its claims of infringement prior to commencing this lawsuit precludes a pre-suit willfulness finding.” See *Cordance Corp. v. Amazon.com, Inc.*, 639 F. Supp. 2d 406, 414 (D. Del. 2009). There was no stipulation of no pre-suit damages in *Cordance*.

<sup>7</sup> See Eolas’ Response at 3 (“pre-filing conduct with respect to th[o]se patents . . . is still relevant”) (“Willfulness is an issue of intent.”) (“post-filing conduct . . . is still relevant to show intent.”) (alterations and omissions in Eolas’ Response); see also *GSI*, 591 F. Supp. 2d at 983-84.

<sup>8</sup> *GSI*, 591 F. Supp. 2d at 984 (“As explained above, Sukup’s pre-filing conduct with respect to these patents may tend to show a pattern of recklessness *that could support a finding of willful infringement of the ‘271 Patent.’*”).

<sup>9</sup> See 8/17/2011 Joint Stipulation of No Pre-Suit Damages (D.N. 867).

<sup>10</sup> See *GSI*, 591 F. Supp. 2d at 984-85 (emphasis added). *GSI* also undercuts Eolas’ argument that *Seagate* is somehow irrelevant where pre-suit patent knowledge is at issue. Pre-suit patent knowledge was present in *GSI*, and indeed is part of the “pre-suit conduct” conduct referenced by Eolas’ *GSI* quotes. That court recognized that it “must follow the Federal Circuit” and held patentee was not entitled to post-suit enhanced damages under *Seagate*.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 11th day of October, 2011. All other counsel of record will be served via facsimile or first class mail.

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