

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

EOLAS TECHNOLOGIES, INC. AND THE  
REGENTS OF THE UNIVERSITY OF  
CALIFORNIA,

*Plaintiffs,*

v.

ADOBE SYSTEMS INC., ET AL.,

*Defendants.*

Civil Action No. 6:09-CV-446 LED

JURY TRIAL DEMANDED

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**DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' *DAUBERT* MOTION TO  
EXCLUDE EXPERT TESTIMONY OF ROY WEINSTEIN (DKT. NO. 903)**

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**I. Eolas Cannot Justify Testimony About the Nash Bargaining Solution or Bilateral Monopoly before the Jury**

A. A Hypothetical Negotiation Cannot Be Based On Speculation About Another Hypothetical Negotiation

The Federal Circuit has made clear in *Lucent*, *ResQnet.com*, and *Uniloc*<sup>1</sup> that the “hypothetical negotiation” must be solidly grounded in the facts of the case, not further hypotheticals or “rules of thumb.” Eolas nevertheless argues that, just as the *Georgia-Pacific* test cannot be criticized even though it is “hypothetical,” the Nash Bargaining Solution (“NBS”) cannot be criticized for being “hypothetical.” But this argument was expressly rejected by *Uniloc’s* holding that a “rule of thumb” based on an abstract model has no place in patent damages analysis.

NBS, like the “25% Rule,” bases its “hypothetical” on a hypothetical starting point—a bilateral monopoly resulting in a 50-50 profit split. The problem is that NBS hypothetical is not connected to the facts of each accused infringer’s or the patentee’s circumstances. Indeed, the fact that Mr. Weinstein applies NBS to different Defendants in the same way to reach the same result, shows that NBS as used here is only the “25% Rule” recast as the “50% Rule.” A hypothetical negotiation may not be based on another hypothetical; it must be grounded in fact.

B. Eolas’ Reference to Academic Papers Cannot Trump Federal Circuit Law

Eolas offers academic literature discussing NBS, as well as reference to a Nobel Prize to Mr. Nash for related academic work. But this recitation of papers is no different in principle than the rejected justification for the “25% Rule.” The “25% Rule” purported to be based on a study of patent licenses by its author Robert Goldsneider: For forty years the “rule” was supported by papers in the legal literature and licensing professionals, endorsed by economists, and used by

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<sup>1</sup> *Lucent Techs. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860 (Fed. Cir. 2010); *Uniloc v. Microsoft*, 632 F.3d 1293 (Fed. Cir. 2011).

courts in patent cases. *See generally* Gordon V. Smith and Robert L. Parr, INTELLECTUAL PROPERTY: VALUATION, EXPLOITATION AND INFRINGEMENT DAMAGES, Chapter 22 (John Wiley & Sons 2005). Nonetheless, the Federal Circuit held that the “25% Rule” was effectively an arbitrary “rule of thumb,” and could not be a basis for calculating patent damages. The literature and past endorsement of the “25% Rule” shows this material cannot trump Federal Circuit law.

NBS has only been vetted “post-*Uniloc*” *in detail* by one opinion, which rejected NBS’ use in the patent damage analysis. *Oracle Am., Inc. v. Google Inc.*, No. 10-CV-3561, 2011 U.S. Dist. LEXIS 80280 (N.D. Cal. July 22, 2011). NBS has no history of being accepted in the software licensing industry generally, or the licensing of patents alleged against internet browsers or of “interactive website content.” NBS has not been used by Eolas or any Defendant in licensing their own patents or in licensing other companies’ patents. Certainly, Eolas points to no evidence establishing that NBS has been used to resolve real-world commercial disputes in the Internet industry. The absence of any evidence of its use in the relevant industry dooms the theory to failure and should preclude it from going to the jury in this case. *See Uniloc, supra* n. 1.

The cases relied on by Eolas do not support its position. The first two cases cited are off-point: *Grand River Enters. Six Nations v. King*, No. 02-CV-5068, 2011 U.S. Dist. LEXIS 27424 (S.D.N.Y. Mar. 17, 2011) is not a patent case. *Amakua Dev. LLC v. Warner*, No. 05-CV-3082, 2007 U.S. Dist. LEXIS 49952 (N.D. Ill. July 10, 2007), pre-dated *Lucent, ResQnet.com*, and *Uniloc*—and further the use of NBS was not contested in that case by either party. The third case cited by Eolas, *Sanofi-Aventis Deutschland GmbH v. Glenmark Pharms., Inc., USA*, No. 07-CV-6855, 2011 U.S. Dist. LEXIS 10512 (D.N.J. Feb. 3, 2011), is an ANDA case between a generic drug-maker and the “brand name” manufacturer—a situation that resembles a “bilateral monopoly” in both the injunctive remedies and the number of market participants (generally two parties,

the “brand” and the “generic”)—and ANDA has its own additional rules of exclusivity separate from the Patent Act. In *Sanofi-Aventis*, the district court found that NBS was tied to the facts of the case by evidence presented by the plaintiff and its expert. In contrast, the large number of Defendants, the multiple configurations of their products and processes, the different types of “browsers” and “interactive website content,” and the willingness of Eolas to license its patents, show that the software case here is dramatically different from the ANDA case in *Sanofi-Aventis*. Judge Alsup’s detailed analysis in *Oracle Am. v. Google, supra*, is on point and persuasive in its analysis of NBS as an unacceptable starting point for a hypothetical negotiation. This is especially so where there is no “bilateral monopoly” as in *Sanofi-Aventis*.

C. The “Bilateral Monopoly” Premise for NBS Does Not Exist Here

Eolas concedes that the bilateral monopoly premise of NBS is used by Mr. Weinstein to provide context for application of the theory, but does not tie that context or premise to the facts of this case. Eolas does not directly compete with any Defendant, nor does it appear to seek anything other than money. And there is no showing by Eolas that the injunction needed to create the “bilateral monopoly” would likely issue. The Federal Circuit expressly held on October 13, 2011 in *Robert Bosch LLC v. Pylon Manufacturing Corp.*, Slip Op. No. 2011-1096, that there are no presumptions or shortcuts for proof of irreparable harm or other elements for injunctive relief: “We ... confirm that *eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief.” Slip Op. at 10. Rather, under *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), the question of whether an injunction is appropriate is fact intensive. Unlike *Sanofi-Aventis*, where the district court found that the facts supported the use of NBS in that ANDA case between two competitors, here no facts are presented by Mr. Weinstein to justify the concept of a bilateral market or the use of NBS.

#### D. NBS Presents a Question of Law for the Court

Eolas' protests that once NBS is shown as a general proposition to be accepted in the academic and scientific community, *Daubert* is satisfied, and the remaining complaints by the Defendants present questions for cross-examination and of weight for the jury. Eolas is wrong: This is a question of law for the Court. *Daubert* does not permit introduction of a theory, no matter how lauded, where it is contrary to the law governing the case: *Lucent*, *ResQnet.com* and *Uniloc*.

Procedurally, this court must conduct a preliminary fact-finding and make an assessment of not only whether the reasoning or methodology underlying the testimony is scientifically valid, but also "whether that reasoning or methodology properly can be applied to the facts in issue." *See Moore v. Ashland Chemical Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (quoting *Daubert*, 509 U.S. at 592-93). This requires some objective, independent validation of the expert's methodology. *Id.* The expert's assurances that he has utilized generally accepted scientific methodology is insufficient. *Id.* Eolas, not Defendants, bears the burden of proof on this issue. *Id.* Eolas' response is devoid of facts sufficient to make the required showing.

Defendants cannot be put in the position of having to cross-examine Mr. Weinstein before the jury to show his opinion is not consistent with controlling case law. NBS may be a praiseworthy thesis in other contexts or in the abstract, but *is not admissible here*.

#### **II. Eolas' Other Arguments in Opposition to the Motion are Wrong**

Defendants showed that Eolas has not properly apportioned its damages. This problem was highlighted by Eolas's own recent motion for reconsideration or interlocutory appeal of a key claim construction. Certain accused software or methods for "interactive website content" would likely have been removed from the case if the Court held to its original construction: Hence, the unusual request by a plaintiff to pursue an interlocutory appeal despite the resulting

long delay of trial (there would be no reason to do so otherwise). Eolas argues that Mr. Weinstein does not need to parse the different ways different Defendants implement the inventions or to what extent they make use of them, but Eolas' own prior motion practice shows that not all of the accused products are the same, and would not make use of Eolas' technology (if at all) to the same degree (or portion). Apportionment is required by *Lucent* and ignored by Mr. Weinstein.

### **III. Litigation Settlements Should Not Be Admitted**

In the absence of an ability to rely on NBS, Eolas may attempt to rely on its litigation settlements to provide a basis for Mr. Weinstein's opinion. But while the non-monetary license terms of prior settlements by Eolas do provide substantive defenses—as shown by Mr. Weinstein's own reduction of damages to account for the Microsoft and Apple settlements<sup>2</sup>—the pricing and economic bargains in these agreements are not admissible here, since these terms come from settlements. Moreover, these agreements are very different in terms of technology, terms, and impact on the settling parties (as well as their customers). Indeed, they would not meet the test for comparability under *Lucent* or *ResQnet.com* even if they were admissible. For example, the Microsoft settlement includes the IE browser and Windows operating system; most Defendants do not make a browser and none make an accused operating system; and the Microsoft settlement was for significantly more (in some cases, a hundred times more) than the amount Mr. Weinstein seeks from most Defendants. These unique bargains are irrelevant to prove value in light of the disparate motives of the individual settling parties, their disparate accused products, and their economic realities; and their terms are inadmissible for Eolas to prove damages.

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<sup>2</sup> The full scope of the releases remains in dispute, but it is not disputed that these licenses have an impact on the accused royalty base. Adobe has also complained that the Sun/Oracle license was ignored by Eolas and Mr. Weinstein in their damages calculation because this release has the impact of licensing or exhausting Eolas' patents as to Adobe's accused products.



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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on October 17, 2011 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

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