

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

<b>Eolas Technologies Incorporated,</b>	§	
	§	
<b>Plaintiff,</b>	§	<b>Civil Action No. 6:09-CV-00446-LED</b>
	§	
<b>vs.</b>	§	
	§	
<b>Adobe Systems Inc., Amazon.com, Inc.,</b>	§	<b>JURY TRIAL</b>
<b>Apple Inc., Argosy Publishing, Inc.,</b>	§	
<b>Blockbuster Inc., CDW Corp.,</b>	§	
<b>Citigroup Inc., eBay Inc., Frito-Lay, Inc.,</b>	§	
<b>The Go Daddy Group, Inc., Google Inc.,</b>	§	
<b>J.C. Penney Company, Inc., JPMorgan</b>	§	
<b>Chase &amp; Co., New Frontier Media, Inc.,</b>	§	
<b>Office Depot, Inc., Perot Systems Corp.,</b>	§	
<b>Playboy Enterprises International, Inc.,</b>	§	
<b>Rent-A-Center, Inc., Staples, Inc., Sun</b>	§	
<b>Microsystems Inc., Texas Instruments Inc.,</b>	§	
<b>Yahoo! Inc., and YouTube, LLC,</b>	§	
	§	
<b>Defendants.</b>	§	

**PLAINTIFFS' SUR-REPLY IN OPPOSITION TO  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF INVALIDITY UNDER  
SECTION 102(B) [DKT. NO. 869]**

**TABLE OF AUTHORITIES**

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## **I. Introduction**

Defendants have failed to meet their burden to prove invalidity in light of the alleged prior art version of Acrobat (“1993 Acrobat”). Defendants’ argument cannot overcome the simple fact that the 1993 Acrobat was never accused of infringement in Plaintiffs’ infringement contentions and that Defendants have failed to present any evidence that the 1993 Acrobat anticipates any claim of the patents-in-suit. *See* Opposition (Dkt. 994, “Opp.”) at 2.

## **II. Argument**

Invalidity is a question of fact. *See* Opp. at 1. And, Defendants’ burden for establishing invalidity—particularly in the context of a motion for summary judgment—is a heavy one. *Id.*

It is undisputed that the 1993 Acrobat was never an accused product. Opp. at 2, 4. It is further undisputed that no version of Adobe Acrobat was ever accused of direct infringement. Opp. at 1. Rather, the theory of Plaintiffs’ infringement contentions<sup>1</sup> was that modern versions of Adobe Acrobat could be used to create PDF documents which could then be embedded in a web browser-controlled window. Opp. at 4-5. Thus, Plaintiffs alleged, Adobe was *indirectly* liable for the sale or use of modern versions of Adobe Acrobat to create PDFs which could then be embedded in a web browser-controlled window. Opp. at 4; *see also* Ex 1 to Mukherji Decl. attached to Motion (Dkt. 869, “Mot.”) at 5-7. Plaintiffs’ contentions never asserted infringement by Adobe Acrobat in the absence of a web browser.<sup>2</sup>

Yet, and unlike Plaintiffs’ infringement contentions, Defendants’ Motion and Reply appear to present a theory of invalidity where no web browser is required. Mot. at 3, 4-6; Reply

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<sup>1</sup> The infringement contentions directed to Acrobat were withdrawn over a year ago. Opp. at 1.

<sup>2</sup> In fact, in each and every instance, Plaintiffs’ infringement contentions show Adobe PDFs within a web browser-controlled window. *See, e.g.*, Ex. 1 to Mukherji Decl. attached to Mot. at 5-7. Rather than acknowledge this, Defendants crop portions of Plaintiffs’ infringement contentions to hide the fact that every infringement example shows PDF documents within a web browser-controlled window. *Compare* Mot. at 6 with Ex. 1 to Mukherji Decl. attached to Mot. at 52.

(Dkt. 1018) at 2. Because Defendants’ Motion advances a theory of invalidity that is fundamentally different from the theory of infringement presented by Plaintiffs’ infringement contentions (and is also based on a version of a product never accused of infringement) Plaintiffs’ infringement contentions cannot support Defendants’ invalidity assertions.

Fundamentally, and in light of these differing theories, neither Defendants nor their expert have provided a claim-by-claim analysis mapping the 1993 Acrobat to each limitation of any claim of the patents-in-suit.<sup>3</sup> In the absence of a web browser, the Defendants never explain what meets the “executable application” limitation<sup>4</sup>, the “identifying text formats” limitation<sup>5</sup>, or the “receiv[ing] . . . over said network from said server” limitation<sup>6</sup>. Not only do Defendants not say what meets these (and other) claim elements—their declarant, Robert Wulff, testified that the 1993 Acrobat was incapable of meeting these claim limitations. Opp. at 3, 5.

Finally, it is also undisputed that there has been no application of the Court’s claim construction to 1993 Acrobat. Defendants try to sidestep their responsibility by citing *Vanmoor v. Wal-Mart*, 201 F.3d 1363 (Fed. Cir. 2000). However, the *Vanmoor* case is inapposite.<sup>7</sup>

### **III. Conclusion**

For the reasons set forth herein and in Plaintiffs’ Opposition, Defendants have not met their burden of proof and their Motion should be denied.

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<sup>3</sup> Contrary to Defendants’ assertion the claim language is not “largely irrelevant” (Wolff Decl. attached to Reply at ¶ 8)—it is the crux of any proper invalidity argument.

<sup>4</sup> Under the theory of Plaintiffs’ infringement contentions, the web browser was the “hypermedia browser” and Adobe’s Acrobat PDF plug-in was the “executable application.” See, e.g., Ex. 1 to Mukherji Decl. attached to Mot. at 10-13, 18, 26, 32.

<sup>5</sup> Under the theory of Plaintiffs’ infringement contentions, the “text formats” were things like HTML tags and JavaScript that were identified by the parser in the web browser. See, e.g., Ex. 1 to Mukherji Decl. attached to Mot. at 20-27.

<sup>6</sup> Under the theory of Plaintiffs’ infringement contentions, the “hypermedia network environment” was the internet, and the web browser “received” a web page containing an Adobe PDF document from a web server. See, e.g., Ex. 1 to Mukherji Decl. attached to Mot. at 10-20.

<sup>7</sup> In *Vanmoor*—unlike here—it was proven that “the accused [products] were identical to [products] manufactured, sold, and used prior to the critical date.” *Vanmoor*, 201 F.3d at 1365.

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**McKool Smith, P.C.**

/s/ Mike McKool

Mike McKool

Lead Attorney

Texas State Bar No. 13732100

[mmckool@mckoolsmith.com](mailto:mmckool@mckoolsmith.com)

Douglas Cawley

Texas State Bar No. 04035500

[dcawley@mckoolsmith.com](mailto:dcawley@mckoolsmith.com)

Holly Engelmann

Texas State Bar No. 24040865

[hengelmann@mckoolsmith.com](mailto:hengelmann@mckoolsmith.com)

J.R. Johnson

Texas State Bar No. 24070000

[jjohnson@mckoolsmith.com](mailto:jjohnson@mckoolsmith.com)

**McKool Smith, P.C.**

300 Crescent Court, Suite 1500

Dallas, Texas 75201

Telephone: (214) 978-4000

Telecopier: (214) 978-4044

Kevin L. Burgess

Texas State Bar No. 24006927

[kburgess@mckoolsmith.com](mailto:kburgess@mckoolsmith.com)

Josh W. Budwin

Texas State Bar No. 24050347

[jbudwin@mckoolsmith.com](mailto:jbudwin@mckoolsmith.com)

Gretchen K. Curran

Texas State Bar No. 24055979

[gcurran@mckoolsmith.com](mailto:gcurran@mckoolsmith.com)

Matthew B. Rappaport

Texas State Bar No. 24070472

[mrappaport@mckoolsmith.com](mailto:mrappaport@mckoolsmith.com)

**McKool Smith, P.C.**

300 West Sixth Street, Suite 1700

Austin, Texas 78701

Telephone: (512) 692-8700

Telecopier: (512) 692-8744

Robert M. Parker  
Texas State Bar No. 15498000  
[rmparker@pbatyler.com](mailto:rmparker@pbatyler.com)  
Robert Christopher Bunt  
Texas Bar No. 00787165  
[rcbunt@pbatyler.com](mailto:rcbunt@pbatyler.com)  
Andrew T. Gorham  
Texas State Bar No. 24012715  
[tgorham@pbatyler.com](mailto:tgorham@pbatyler.com)  
**PARKER, BUNT & AINSWORTH, P.C.**  
100 E. Ferguson, Suite 1114  
Tyler, Texas 75702  
(903) 531-3535  
(903) 533-9687- Facsimile

**ATTORNEYS FOR PLAINTIFF  
EOLAS TECHNOLOGIES INC.  
AND THE REGENTS OF THE  
UNIVERSITY OF CALIFORNIA**

**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 service. Local Rule CV-5(a)(3)(A) on this October 21, 2011.

*/s/ Matt Rappaport* \_\_\_\_\_  
Matt Rappaport