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

Eolas Technologies Incorporated,	§	
	§	
Plaintiff,	§	**Civil Action No. 6:09-CV-00446-LED**
	§	
vs.	§	
	§	
Adobe Systems Inc., et al.,	§	**JURY TRIAL**
	§	
Defendants.	§	

PLAINTIFFS' MOTION FOR LEAVE TO SUPPLEMENT THEIR P.R. 3-1 INFRINGEMENT CONTENTIONS WITH RESPECT TO FRITO-LAY, INC.'S *HAPPINESS.LAYS.COM*

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. ARGUMENT 5

A. Frito-Lay Should Have Provided Discovery As To *Happiness.lays.com* In Response to Plaintiffs' Prior Requests 6

B. It is Important that Infringement By Frito-Lay's *Happiness.lays.com* Be Addressed in This Litigation 7

C. There is No Prejudice to Frito-Lay in Being Held Accountable for Its Latest Infringement Activity Or Its Failure to Identify This Product Earlier in Discovery. 7

D. A Continuance is Unnecessary Because There is No Prejudice 9

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Forgent Networks, Inc. v. Echostar Techs. Corp.,
No. 6:06-cv-208, 2006 U.S. Dist. LEXIS 88872 (E.D. Tex. Dec. 8, 2006) 9

Honeywell Int'l, Inc. v. Acer Am. Corp.,
655 F. Supp. 2d 650 (E.D. Tex. 2009).....6, 8

MacLean-Fogg Co. v. Eaton Corp.,
No. 2:07-CV-472, 2008 U.S. LEXIS 78301 (E.D. Tex. Oct. 6, 2008).....5, 6, 9

MASS Engineered Design, Inc. v. Ergotron, Inc.,
No. 2:06-CV-272, 2008 U.S. Dist. LEXIS 35577 (E.D. Tex. Apr. 30, 2008).....6, 7, 9

NIDEC Corp. v. LG Innotek Co.,
No. 6:07-cv-108, 2009 U.S. Dist. LEXIS 106667 (E.D. Tex. Sept. 2, 2009).....7

Orion IP, LLC v. Staples, Inc.,
407 F. Supp. 2d 815 (E.D. Tex. 2006).....7

Reedhycalog UK, Ltd. v. United Diamond Drilling Servs., Inc.,
2008 U.S. Dist. LEXIS 93177 (E.D. Tex. Oct. 3, 2008) 8

S & W Enters., L.L.C. v. Southtrust Bank of Ala., NA,
315 F.3d 533 (5th Cir. 2003) 5

Tantivy Comms. Inc. v. Lucent Techs., Inc.,
No. 2:04-CV-79, 2005 U.S. Dist. LEXIS 29981 (E.D. Tex. Nov. 1, 2005) 7

OTHER AUTHORITIES

Fed. R. Civ. P. 16(b). 5

Local Rule CV-7 5

Patent Rule 3-1.....2

Patent Rule 3-1(c) 8

Patent Rule 3-2.....3

Patent Rule 3-4(a) 8

Patent Rule 3-6.....1, 5

I. INTRODUCTION

Pursuant to Patent Rule 3-6, Plaintiffs The Regents of the University of California and Eolas Technologies Incorporated (collectively "Plaintiffs") respectfully request leave to supplement their infringement contentions as to Defendant Frito-Lay, Inc. ("Frito-Lay"). Plaintiffs bring this motion before the Court styled as a motion to supplement infringement contentions, believing this to be the best vehicle to address the parties' dispute as to whether the webpage *happiness.lays.com* is properly part of the case. Plaintiffs believe that the webpage *happiness.lays.com* is properly a part of the case by virtue of their originally served infringement contentions. Accordingly, Plaintiffs seek Frito-Lay to provide discovery related to this webpage. Frito-Lay disagrees and has refused to produce or answer discovery beyond that directed to the specific webpage *fritolay.com* as that is the webpage URL specifically called out in Plaintiffs' originally served infringement contentions. Plaintiffs addressed Frito-Lay's concerns by preparing supplemental infringement contentions that now specifically call out the webpage *happiness.lays.com.* The theory of infringement in the supplemental infringement contentions is the same as those articulated in the infringement contentions Plaintiffs originally served. Frito-Lay now opposes Plaintiffs' motion for leave to supplement its infringement contentions.

Plaintiffs believe their reasons for bringing this motion satisfy the good cause standard for supplementing infringement contentions. First, Frito-Lay launched the *happiness.lays.com* webpage after Plaintiffs filed this case and served their P.R. 3-1 contentions. Second, since learning of the *happiness.lays.com* webpage, Plaintiffs have repeatedly requested discovery related to the same that Frito-Lay should already be providing. These requests have been met without any cooperation from Frito-Lay. Third, Plaintiffs requested discovery related to *happiness.lays.com* as soon as it learned of the webpage. Fourth, and finally, any prejudice to

Frito-Lay as a result of its own late production of discovery related to *happiness.lays.com* is minimal given that: (a) the infringement theories as to *happiness.lays.com* are the same as those Plaintiffs originally presented with respect to the accused features found on *fritolay.com*; (b) failing to provide the discovery required by the Court's order and the discovery rules is Frito-Lay's own doing; (c) as of the filing of this motion, there will be no need to retrace discovery as Frito-Lay has not provided a single fact or corporate witness for deposition and has not updated its interrogatory responses since May 2011; and (d) failing to include *happiness.lays.com* in this case would needlessly require duplicative litigation between the same parties, as the same infringement theories across two webpages are to be applied to the same patents. In light of the lack of any genuine prejudice to Frito-Lay, and in light of the good cause set forth herein, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for leave, and that the Court order Frito-Lay to produce the requested discovery related to *happiness.lay.com*.

II. BACKGROUND

Plaintiffs have accused Frito-Lay of infringing U.S. Patent Nos. 5,838,906 and 7,599,985 by using the patented inventions on its website to allow for embedded interactive objects on webpages. Plaintiffs brought suit against Frito-Lay and other defendants on October 5, 2009. Plaintiffs complaint specifically identifies "web pages and content to be interactively presented in browsers, including without limitation, the web pages and content accessible via www.frito-lay.com."[1]

On March 5, 2010, Plaintiffs served infringement contentions on Frito-Lay pursuant to P.R. 3-1.[2] Plaintiffs' own investigation reveals that Frito-Lay launched its *happiness.lays.com*

[1] Dkt. No. 1, ¶40 (emphasis added).

[2] Exhibit 1, attached to the Declaration of Tom Fasone in Support of Plaintiffs Motion for Leave to Supplement Their P.R. 3-1 Infringement Contentions With Respect To

webpage shortly thereafter, on March 15, 2010.[3] On April 2, 2010, Plaintiffs sent Frito-Lay a Request for Production Pursuant to Paragraph 11 of the Discovery Order,[4] which identified the accused products to mean, again, *without limitation*:

> The websites (including the servers hosting those websites) and functionality identified in the charts titled "906 - Frito-Lay - Chart 1" and "985 - Frito-Lay - Chart 1" attached to Eolas' P.R. 3-2 submissions. This includes, *but is not limited to* the following:
> Frito-Lay.com

This request sought numerous categories of documents related to the Accused Products, including documents that show customer use of the accused features (Request 47), documents identifying which web server technology powers the Accused Products (Request 48), and manuals, web pages, on-line videos related to the Accused Products (Request 50).[5] Even upon receiving these and other discovery requests, at no time did Frito-Lay identify its *happiness.lays.com* webpage.

Between July 7, 2011 and August 5, 2011 proceedings between Plaintiffs and Frito-Lay were stayed pending an attempt at settlement, which was ultimately unsuccessful.[6] After the stay, discovery was extended until November 9, 2011.[7] It was during this stay that Plaintiffs first learned of Frito-Lay's *happiness.lays.com* webpage.

Plaintiffs served interrogatories on Frito-Lay on September 12, 2011, seeking responses

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Happiness.lays.com ("Fasone Declaration"). All exhibits in this motion are attached to the Fasone Declaration.

[3] Frito-Lay has not provided any documents or other discovery to confirm this. *See* Fasone Declaration, ¶2; Exhibit 11.

[4] Exhibit 2 ("Request for Production Pursuant to Paragraph 11 of the Discovery Order" (April 2, 2010) (emphasis added)).

[5] *Id.* at 8-9 (response nos. 47-50).

[6] *See* Dkt. Nos. 854, 898, and 949; *see also* Dkt. Nos. 757 and 789 (staying activities pursuant to the parties' request).

[7] Dkt. No. 979 (Docket Control Order), at 3.

intended to include *happiness.lays.com* explicitly.[8] These interrogatories were amended on September 28, 2011 to correct a typographical error in the URL for the webpage *happiness.lays.com*.[9] After serving these interrogatories, Plaintiffs requested updated discovery responses during a telephone call with Frito-Lay's counsel on September 14, 2011, and again in an e-mail on September 23, 2011.[10] Frito-Lay responded on September 27, 2011 that Plaintiffs had not properly pled a claim against "happiness.lays.com," and that because Plaintiffs had not specifically identified what features of the webpage infringe Plaintiffs' patents, it would not know which documents to produce.[11]

While preparing for an informal meet and confer on outstanding discovery issues, Plaintiffs explained to Frito-Lay that "the language in [Plaintiffs'] PICs and the definitions set forth in its discovery mechanisms served to date cover "happiness.lays.com."[12] The parties discussed the issue once again on October 6, 2011, after which Frito-Lay responded on October 11, 2011, maintaining its refusal to provide discovery as to *happiness.lays.com* on the grounds of prejudice:

> To start from the beginning and have to produce documents, conduct an investigation into the new accused product, identify witnesses, and develop our defenses at a time when the concentration is on the defense of the only accused product identified, i.e. www.fritolay.com, prejudices our ability to prepare for trial on the accused product.[13]

Though maintaining that the webpage was already in the case by virtue of their originally

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[8] Exhibit 5 ("Plaintiff's Second Set of Interrogatories (No. 3) To Be Answered By Frito-Lay," (Sept. 12, 2011).

[9] Exhibit 6 ("Plaintiff's First Amended Second Set of Interrogatories (No. 3) To Be Answered By Frito-Lay," (Sept. 28, 2011).

[10] Exhibit 7 (e-mail from T. Fasone to J. Yee and J. Joyner (Sept. 23, 2011, 9:15 AM)).

[11] Exhibit 8 (e-mail from J. Yee to T. Fasone (Sept. 27, 2011)).

[12] Exhibit 4.

[13] Exhibit 9 (e-mail from J. Yee to H. Engelmann and T. Fasone (Oct. 11, 2011 7:49 PM), in response from H. Engelmann on Oct. 12, 2011).

served contentions — as a response to Frito-Lay's articulated concern — Plaintiffs thereafter provided Frito-Lay with infringement contention charts that specifically include the *happiness.lays.com* URL on October 14, 2011.[14] These charts advance the same infringement theories found in Plaintiffs' originally served infringement contentions. The parties then met and conferred pursuant to Local Rule CV-7 on October 20, 2011, at which time Frito-Lay maintained its refusal to provide discovery related to *happiness.lays.com*.

III. ARGUMENT

Plaintiffs believe that even without supplementing its originally served infringement contentions, the *happiness.lays.com* webpage is already in the case and related discovery should be provided. The webpage at *happiness.lays.com* is part of Frito-Lay's website, which is the subject of the originally served infringement contentions.[15] The fact that the URL of the webpage *happiness.lays.com* lacks the domain "fritolay.com" does not exclude it from falling in the ambit of "Frito-Lay, Inc.'s website." Rather, upon inspection webpages across both the "lays.com" and "fritolay.com" domains are obviously part of Frito-Lay's website. To wit, if you direct your web browser to the website "lays.com" you will find that Frito-Lay automatically redirects you to the webpage with the URL "fritolay.com." Even more to the point, the press release Frito-Lay released for the "Happiness Exhibit" on *happiness.lays.com* was provided on a "fritolay.com" webpage, not a "lays.com" webpage. [16] Frito-Lay's refusal to provide discovery related to *happiness.lays.com* has prompted this motion.

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[14] Exhibit 10 (letter from T. Fasone to J. Yee and J. Joyner (October 14, 2011) (exhibits omitted)).

[15] *See* Exhibit 1 ("Frito-Lay, Inc.'s website Frito-Lay.com, the website itself, and/or the servers hosting that Website. . . .").

[16] *See* Exhibit 11 (Frito-Lay's Press Release entitled "Lay's Unveils Happiness Exhibit Spotlighting Simple Moments of Happiness as Captured in Consumer Photos," dated March 15, 2011 available at www.fritolay.com/about-us/press-release-20100315.html).

Courts typically consider four factors in determining whether a party has met the good cause requirement to supplement infringement contentions provided under Fed. R. Civ. P. 16(b) and P.R. 3-6: "(1) the explanation for the party's failure to meet the deadline, (2) the importance of what the Court is excluding, (3) the potential prejudice if the Court allows the thing that would be excluded, and (4) the availability of a continuance to cure such prejudice."[17] Here, the first three factors clearly weigh in favor of granting Plaintiffs leave to supplement, and the fourth is inapplicable.

A. Frito-Lay Should Have Provided Discovery As To *Happiness.lays.com* In Response to Plaintiffs' Prior Requests

As set forth above, Plaintiffs have been diligent in pursuing discovery and in developing its infringement theories with respect to Frito-Lay's webpages that use the accused features. Plaintiffs have been entitled to discovery related to *happiness.lays.com* even prior to bringing the webpage to the attention to Frito-Lay. *Happiness.lays.com* is a reasonably similar product to the webpage product found at *fritolay.com*, which has already been specifically called out in Plaintiffs' infringement contentions.[18]

However, in the face of Plaintiffs' attempts to obtain discovery, Frito-Lay introduced and continues to maintain a webpage with features it knew Plaintiffs had accused of infringement in their infringement contentions. Not only has Frito-Lay ignored its discovery obligations as they pertain to *happiness.lays.com*, but it has forced Plaintiffs to expend needless time and effort to obtain this discovery. Plaintiffs' conduct has been diligent since it became aware of Frito-Lay's *happiness.lays.com* webpage and Frito-Lay should not be heard to say otherwise given the dearth

[17] *MacLean-Fogg Co. v. Eaton Corp.*, No. 2:07-CV-472, 2008 U.S. LEXIS 78301, at *4 (E.D. Tex. Oct. 6, 2008); *see also S & W Enters., L.L.C. v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535–36 (5th Cir. 2003).

[18] *See Honeywell Int'l, Inc. v. Acer Am. Corp.*, 655 F. Supp. 2d 650, 656-58 (E.D. Tex. 2009) (permitting discovery and supplementation of infringement contentions to include reasonably similar products).

of discovery it has provided.

B. It is Important that Infringement By Frito-Lay's *Happiness.lays.com* Be Addressed in This Litigation

Happiness.lays.com utilizes Plaintiffs' patented technologies in materially the same way as the webpage *fritolay.com*, which is indisputably already within this litigation. Trying issues related to all of Frito-Lay's webpages as part of this case will reduce the risk of inconsistent judgments as between the two and will reduce the costs and burdens on the Court and the parties of having to address this infringement in a later lawsuit. The alternative would require Plaintiffs to initiate duplicative litigation on the same patents and the same theories of infringement against Frito-Lay, when it can be addressed now.[19]

C. There is No Prejudice to Frito-Lay in Being Held Accountable for Its Infringement Activity Or Its Failure to Identify This Product Earlier in Discovery.

Frito-Lay will not be unduly prejudiced by inclusion of the *happiness.lays.com* webpage into this litigation.[20] Plaintiffs' discovery requests have called for information related to Frito-Lay's webpages beyond those with the URL "fritolay.com," specifically requesting information relevant to *happiness.lays.com.* In response, Frito-Lay has chosen to bury its head in the sand by producing only discovery related to the webpage with its URL specifically written out in the complaint and in the originally served infringement contentions.[21] However, the function of infringement contentions is not to list every instance of infringement on Frito-Lay's website. This Court has found that "[in] dealing with something like a website, it would be unrealistic to

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[19] *See MASS Engineered*, 2008 U.S. Dist. LEXIS 35577, at *16; *NIDEC Corp. v. LG Innotek Co.*, No. 6:07-cv-108, 2009 U.S. Dist. LEXIS 106667, at *6 (E.D. Tex. Sept. 2, 2009).

[20] *Id.*

[21] *See Tantivy Comms. Inc. v. Lucent Techs., Inc.*, No. 2:04-CV-79, 2005 U.S. Dist. LEXIS 29981, at *11 (E.D. Tex. Nov. 1, 2005) ("A party may not conduct discovery by "lay[ing] behind the log and avoiding their discovery obligations.").

expect plaintiffs to provide screen shots for every possible manifestation of the alleged infringment. Instead, plaintiffs should provide specific theories of infringement and representative examples of the alleged infringement so as to give defendants fair notice of infringement beyond that which is provided by the mere language of the patent claims themselves."[22] Plaintiffs have clearly met this standard in the case at hand. Moreover, the law imposes a broader duty as to reasonably similar products that Frito-Lay has not satisfied.[23]

As between the parties, Frito-Lay has been in the best position to know what other webpages on its website beyond the *fritolay.com* URL used the accused functionality. Yet, Frito-Lay has not been forthcoming in providing this discovery.[24] Not only should Frito-Lay have produced documents and discovery responses related to *happiness.lays.com* once the site was created, but it should have been updating this discovery on a rolling basis along with its other discovery (documents, depositions and interrogatory responses), all of which remain outstanding.[25] [26] As a result of these deficiencies, Frito-Lay cannot now claim prejudice from

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[22] *See Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006) (Davis, J.).

[23] *See* P.R. 3-4(a) (duty to produce documents sufficient to show operation of aspects or elements of accused instrumentality identified by patent claimant in P.R. 3-1(c) charts); *Honeywell Int'l, Inc. v. Acer Am. Corp*., 655 F. Supp. 2d 650, 656-58 (E.D. Tex. 2009) (duty to provide discovery as to reasonably similar products); *see also* Dkt. No. 247 ¶¶ 2(B) (duty to disclose), ¶10 (duty to supplement immediately)).

[24] *See Reedhycalog UK, Ltd. v. United Diamond Drilling Servs., Inc.*, 2008 U.S. Dist. LEXIS 93177, at **6-7 (E.D. Tex. Oct. 3, 2008) ("This Court adheres to the policy of liberal, open and forthright discovery and will not tolerate gamesmanship.").

[25] Joint Agreed Discovery Order §2(B) (April 2, 2010) (Dkt. 247) ("After disclosure is made pursuant to this order, each party is under a duty to supplement or correct its disclosures immediately if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true."); *Honeywell*, 655 F. Supp. 2d at 661 (ordering party to supplement interrogatory responses and to produce a corporate representative to provide relevant testimony).

[26] There is no prejudice to Frito-Lay in Plaintiffs seeking discovery related to *happiness.lays.com* as related to revisiting previous discovery because, in effect, discovery has already stalled. To date, Frito-Lay has not produced a single fact or corporate witness for deposition nor offered a specific date for any deposition. *See* Exhibit 3 (e-mail from T. Fasone to J. Joyner, J. Yee and D. McSwane (Oct. 6, 2011)). Frito-Lay has not updated its document

having to provide discovery related to *happiness.lays.com*.

D. A Continuance is Unnecessary Because There is No Prejudice

The Court need not consider the fourth factor, as allowing supplemental infringement contentions does not prejudice Frito-Lay in any way that it did not bring on itself by hiding its head in the sand.[27] Given that the same infringement theory is advanced as between *happiness.lays.com* and *fritolay.com*, there should be more than enough time for Frito-Lay to provide the requested discovery and prepare for trial now scheduled for February 2011.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant its motion to supplement their infringement contentions as to *happiness.lays.com* URL, and to compel Frito-Lay to provide and supplement its discovery related to this webpage accordingly.

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production since June 15, 2011 — prior to the stay between the parties. All but eight of the documents Frito-Lay has produced in this entire litigation are from the same custodian, with only a single document produced from any individual identified as having knowledge in Frito-Lay's Initial Disclosures. *See* Exhibit 4 (e-mail from T. Fasone to J. Yee (Sept. 28, 2011)). Finally, Frito-Lay last updated, answered or supplemented its interrogatory responses in May, 2011. *Id.*

[27] *See MacLean-Fogg*, 2008 U.S. Dist. LEXIS 78301, at *7; *MASS Engineering*, 2008 U.S. Dist. LEXIS 35577, at *16-17; *Forgent Networks, Inc. v. Echostar Techs. Corp.*, No. 6:06-cv-208, 2006 U.S. Dist. LEXIS 88872, at *11 (E.D. Tex. Dec. 8, 2006).

Dated: October 24, 2011.

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CERTIFICATE OF CONFERENCE

The undersigned certifies that the parties have complied with Local Rule CV-7(h)'s meet-and-confer requirement. On October 20, 2011, John Campbell, Tom Fasone, and Holly Engelmann, counsel for Plaintiffs conducted a personal conference by telephone with Jeffrey Yee, Jeff Joyner and Doug McSwane, counsel for Frito-Lay. By prior agreement between the parties, John Campbell served as lead counsel for Plaintiffs during this conference. The discussions ended conclusively in an impasse, leaving an open issue for the Court to resolve. Frito-Lay opposes this motion.

/s/ Thomas Fasone III
Thomas Fasone III

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 services pursuant to Local Rule CV-5(a)(3)(A), on October 24, 2011.

/s/ Thomas Fasone III
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