

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., Amazon.com, Inc.,	§	JURY TRIAL
Apple Inc., Argosy Publishing, Inc.,	§	
Blockbuster Inc., CDW Corp.,	§	
Citigroup Inc., eBay Inc., Frito-Lay, Inc.,	§	
The Go Daddy Group, Inc., Google Inc.,	§	
J.C. Penney Company, Inc., JPMorgan	§	
Chase & Co., New Frontier Media, Inc.,	§	
Office Depot, Inc., Perot Systems Corp.,	§	
Playboy Enterprises International, Inc.,	§	
Rent-A-Center, Inc., Staples, Inc., Sun	§	
Microsystems Inc., Texas Instruments Inc.,	§	
Yahoo! Inc., and YouTube, LLC	§	
	§	
Defendants.	§	

**FRITO-LAY, INC.’S OPPOSITION TO EOLAS’S MOTION FOR LEAVE TO  
SUPPLEMENT P.R. 3-1 INFRINGEMENT CONTENTIONS WITH RESPECT TO  
FRITO-LAY, INC.’S [sic] *HAPPINESS.LAYS.COM***

Plaintiff Eolas Technologies Incorporated (“Eolas”), through its Motion for Leave to Supplement P.R. 3-1 Infringement Contentions (“Infringement Contention”) With Respect to Frito-Lay, Inc.’s [sic] *happiness.lays.com* (“Motion to Amend,” Dkt. 1050), seeks to add a new accused product, namely a new website located at *happiness.lays.com* (“New Accused Product”), in the case against Defendant Frito-Lay, Inc. (“Frito-Lay”) after the case has progressed for over ***twenty-five months*** since it was filed, and now only three months away from trial. Eolas's complete lack of diligence is irrefutably evidenced by its proposed Supplemental Infringement Contentions (“Supplemental Infringement Contention”) because they are solely based on information that has been, and still is, publicly available for at least ***nineteen months***. There is no excuse that Eolas could not have included the New Accused Product in its Infringement Contention or supplemented its Infringement Contention months earlier. Eolas cannot dispute that its failure to do so is inexcusable because public information is all Eolas needed for its proposed Supplemental Infringement Contention. Eolas does not and cannot explain its undue delay. Courts in this judicial district routinely refuse to condone such tardiness.

In addition, Eolas’s alleged patent rights against the New Accused Product will be exhausted because the New Accused Product is accused of patent infringement through its use of co-defendant Adobe Systems, Inc.’s (“Adobe”) accused Flash Player. Once the case against Adobe is resolved, either by judgment or settlement, Eolas cannot again seek damages from Frito-Lay. Thus, Eolas’s proposed Supplemental Infringement Contention is not important to Eolas’ claims. On the other hand, allowing Eolas to supplement its Infringement Contention at this late stage will cause severe prejudice against Frito-Lay. With only approximately two months left to the final pre-trial conference, Frito-Lay will be unjustly required to complete difficult, if not impossible, tasks anew, including providing discovery and performing non-

infringement analysis on the New Accused Product which Eolas never identified and for which Frito-Lay never knew it would need to prepare a defense.

There is no available continuance long enough to cure such prejudice to Frito-Lay because more than *nineteen months* has passed since Eolas had served its Infringement Contention. In addition, co-defendants would most likely oppose any continuance of the entire action because it would prejudice their preparation for trial in this case. Neither will Eolas agree to a continuance because it had vigorously opposed Frito-Lay's prior motion for a separate trial and to reset the pretrial schedule. *See*, Eolas's Opposition to Frito-Lay's Motion for Separate Trial and to Reset Pretrial Schedule (Dkt. 898). Even if the Court orders a continuance, Frito-Lay still faces the tantamount task of starting anew for discovery and case preparation regarding the New Accused Product.

Hence, as fully set forth below, Eolas's Motion to Amend must be rejected out of hand.

## **I. FACTS**

Eolas filed this case on October 6, 2009, more than two years ago (Dkt. 1). The due date for Eolas's P.R. 3-1 Infringement Contentions was approximately *twenty months* ago, on March 5, 2010 (Dkt. 249). In its Infringement Contention, Eolas only identify one accused product: *www.fritolay.com*. *See*, Dkt. 1050-2 and Exhibit 1.<sup>1</sup> Although all webpages and content, including source code therefor<sup>2</sup> located at *www.fritolay.com* were publicly available, no other websites that a visitor could access through links at *www.fritolay.com* were identified in Eolas's Infringement Contention. At least as early as March 15, 2010, Frito-Lay issued a press release

---

<sup>1</sup> Unless otherwise noted, all exhibits referenced hereto are attached to the declaration of Jeffrey Yee concurrently filed herewith.

<sup>2</sup> Source code for all webpages is publicly available to any person by using the "View Source" or "View Page Source" command through internet browsers, such as Microsoft Internet Explorer, Apple Safari, Google Chrome, and Mozilla Firefox. *See, e.g.* Exhibits 2 and 3.

regarding the official kick-off of "Happiness Exhibit," of which *happiness.lays.com* is a part. Again, this information has been, and still is, publicly available. *See*, Exhibit 4.

After Eolas served its Infringement Contention on March 5, 2010, Eolas served five sets of interrogatories to Frito-Lay within a period of approximately *eleven months*, more specifically between May 27, 2010 and April 5, 2011. None of the interrogatories identified any website beyond the *www.fritolay.com* website.<sup>3</sup>

Subsequently, the parties engaged in settlement discussion that led to a brief one-month stay of the case (between July 7 to August 5, 2011). *See*, Dkts. 757 and 789. More than a month after the stay expired, Eolas incorrectly identified a new accused webpage allegedly located at *happiness.fritolay.com* on September 12, 2011 in its second set of interrogatories to Frito-Lay. *See*, Dkt. 1050-6 at p. 5 of 8. Because there is no such webpage under the accused website located at *www.fritolay.com*, counsel for Frito-Lay informed Eolas's counsel on September 14, 2011 that no such webpage existed.<sup>4</sup> Alleging that it was a typographical error, Eolas then served an amended second set of interrogatories to Frito-Lay on September 28, 2011,<sup>5</sup> which identified the New Accused Product, *happiness.lays.com*, for the very first time. Eolas alleged in its Motion to Amend that it first learned of the New Accused Product during the stay, which was in July 2011. It, however, did not identify the New Accused Product for another *two months* after the stay had expired.

---

<sup>3</sup> *See*, Exhibit 5 at page 16, Exhibit 6 at page 15, Exhibit 7 at page 14, Exhibit 8 at page 14, and Exhibit 9 at pages 4-5.

<sup>4</sup> *See*, Dkt. 1050-9 at p. 2 of 7 ("During our Sep. 14 telephone conversation we stated that [*happiness.fritolay.com*] was not identified in Eolas' infringement contentions and we could not find that website.").

<sup>5</sup> Eolas contends that it informed Frito-Lay of the alleged typographical error on September 23, 2011 (Dkt. 1050, Motion to Amend at 4).

On October 14, 2011, Eolas's counsel, without leave from the Court, sent to Frito-Lay's counsel for the first time copies of the infringement contention charts regarding the New Accused Product (Dkt. 1050-11). Notably, the charts are solely based on public information<sup>6</sup> and relate to the use of Adobe's Flash Player.<sup>7</sup> In addition, *happiness.lays.com* is not under the domain of the currently accused *fritolay.com* and, therefore, end users cannot find a website located at *happiness.fritolay.com*.

### **III. ARGUMENT**

Local Patent Rule 3-6 governs Eolas's Motion to Amend. It provides that leave to amend is required when a plaintiff seeks to amend or supplement its infringement contentions, and the plaintiff must show good cause to amend. *Realtime Data, LLC v. Packeteer, Inc.*, 2009WL2590101, \*2, Case No. 6:08cv144 (E.D.Tex. Aug. 18, 2009). There are four factors to consider whether or not a plaintiff has shown good cause: "1) the explanation for the failure to meet the deadline; 2) the importance of the amendments; 3) potential prejudice in allowing the amendments; and 4) the availability of a continuance to cure such prejudice." *Id.* As discussed below, Eolas fails each factor.

#### **(A) Eolas Failed to Show That It Acted Diligently**

Diligence is an important element of good cause that Eolas is required to establish in seeking to amend its Infringement Contentions. *O2 Micro Int'l Ltd. v. Monolithic Power Systems, Inc.*, 467 F.3d 1355, 1366 (Fed.Cir. 2006) (the burden is on the party seeking to amend

---

<sup>6</sup> Eolas contends that Frito-Lay did not provide discovery regarding *happiness.lays.com*. See Dkt. 1050, Motion to Amend at 2.

<sup>7</sup> See, Exhibit 10. Eolas specifically identified the use of Adobe Flash Player in the infringement contention charts.

its contentions to establish diligence rather than on the opposing party to establish a lack of diligence.); *see also*, *Softvault Systems, Inc. v. Microsoft Corp.*, 2007WL1342554, \*1, Case No. 2:06cv16 (E.D.Tex. May 4, 2007). Eolas completely fails this factor. Eolas spent a large portion of its Motion to Amend in an attempt to cast a dark cloud over Frito-Lay's discovery effort. Yet, as noted above, Eolas was able to complete its proposed Supplemental Infringement Contention based solely on public information without any discovery. Eolas provided no explanation in its Motion to Amend as to why it did not seek to amend its Infringement Contention when the information Eolas now relies on became public at least *nineteen months* ago. *See, Connectel, LLC v. Cisco Systems, Inc.*, 391 F.Supp2d 526, 528 (E.D.Tex. 2005) (plaintiff is expected to rigorously analyze all publicly available information before bringing suit); *Realtime Data LLC*, 2009WL2590101 at \*5 (waiting nine months after serving the original infringement contentions to seek leave to amend is not a reasonable period of time).

Eolas's conclusory assertion in its Motion to Amend that it had allegedly been diligent in pursuing discovery and developing an infringement theory completely missed the mark because Eolas clearly did not need any discovery from Frito-Lay to complete its proposed Supplemental Infringement Contention. Moreover, even if Eolas was allegedly hindered by the alleged lack of discovery from Frito-Lay regarding the New Accused Product, which it was not, Eolas has failed to diligently raise the issue with the Court. *Davis-Lynch, Inc. v. Weatherford Int'l, Inc.*, 2009WL81874, \*4, Case No. 6:07cv559 (E.D.Tex. Jan. 12, 2009) (to the extent that plaintiff was hindered by a lack of discovery, it had failed to diligently raise these issues with the court.).

Neither did Eolas explain why it waited another two months to seek leave to supplement its Infringement Contention after it allegedly "first learned of" the New Accused Product. Well after Eolas allegedly first learned of the New Accused Product, both Eolas and Frito-Lay filed

several motions regarding the pre-trial and trial schedule, but Eolas never mentioned the New Accused Product to Frito-Lay or the Court in the numerous briefs it filed with the Court. In addition, Eolas only needed public information to complete its proposed Supplemental Infringement Contention. The public information regarding the New Accused Product is right at Eolas's finger tips. No purchase is necessary. As noted above, the source code of the New Accused Product can be obtained through the "View Source" or "View Page Source" command of an internet browser application. *See, e.g.* Exhibits 2 and 3. Eolas could have obtained the public information in literally minutes. Eolas's lack of diligence is indisputable.

**(B) Eolas's Proposed Supplemental Infringement Contention Is Not Important**

As noted above, Eolas's proposed Supplemental Infringement Contention accuses the use of Adobe's Flash Player of patent infringement. *See*, Exhibit 10. Eolas's allegation that excluding its proposed supplement would result in duplicative litigation is a red herring.<sup>8</sup> Eolas has accused Adobe's Flash Player of infringement in this case. Whether or not the New Accused is included in the case will not change Eolas's case against Adobe. Indeed, once the case against Adobe is resolved, either by judgment or settlement, Eolas cannot again seek damages from Frito-Lay regarding the use of Adobe's Flash Player. Moreover, excluding the New Accused Product will not result in dismissal of Eolas's case against Frito-Lay; and such minor exclusion pales in comparison to the prejudice caused by Eolas's tardiness. *See, Davis-Lynch, Inc.*, 2009WL81874 at \*4 (exclusion of additional product would not result in dismissal of plaintiff's case in its entirety; and while precluding this product might prejudice plaintiff to some degree, the prejudice was not so great as to weigh significantly against plaintiff's lack of diligence.). Thus, Eolas's proposed Supplemental Infringement Contention is only peripheral.

---

<sup>8</sup> *See*, Motion to Amend at 7.

(C) **Frito-Lay Should Not Be Prejudiced by Eolas's Lack of Diligence**

On the other hand, allowing Eolas to supplement its Infringement Contention at this late stage will cause severe prejudice against Frito-Lay. With only approximately two months left to the final pre-trial conference, Frito-Lay will be unjustly required to complete difficult, if not impossible, tasks anew, including providing discovery and performing non-infringement analysis on the New Accused Product which Eolas never identified and for which Frito-Lay never knew it would need to prepare a defense.

Eolas improperly attempts to shift the blame for Eolas' lack of diligence onto Frito-Lay by alleging that Frito-Lay somehow should have provided discovery regarding the New Accused Product to Eolas. This is simply not the case. As further discussed below in Section IV, Eolas's lack of diligence is the sole cause of prejudice to Frito-Lay.

(D) **There Is No Available Continuance to Cure The Prejudice Against Frito-Lay**

Ignoring its own dilatory practice, Eolas did not even discuss the possibility of an available continuance to cure the prejudice against Frito-Lay. The truth is that the current schedule does not permit a continuance to cure such prejudice against Frito-Lay because there is no available continuance long enough to cure such prejudice. More than *nineteen months* has passed since Eolas had served its Infringement Contentions. In addition, co-defendants would most likely oppose any continuance of the entire action because it would prejudice their preparation for trial in this case. Neither will Eolas agree to a continuance because it had vigorously opposed Frito-Lay's prior motion for a separate trial and to reset the pretrial schedule. *See*, Eolas's Opposition to Frito-Lay's Motion for Separate Trial and to Reset Pretrial Schedule (Dkt. 898). Even if a the Court orders a continuance, Frito-Lay still faces the tantamount task of starting anew for discovery and case preparation regarding the New Accused Product. *See e.g.*,



*Realtime Data LLC*, 2009WL2590101 at \*9 (a continuance would cure some of the prejudice, but even a substantial continuance would not cure enough prejudice to justify the changes plaintiff proposed).

#### **IV. EOLAS’S ATTEMPTS TO MISGUIDE THE COURT**

Knowing that it did not act diligently, Eolas disingenuously spent a significant portion of its Motion to Amend to mischaracterize the New Accused Product and *www.fritolay.com* as “reasonably similar products,” despite the undeniable difference that those two websites belong to separate and distinct domains. By taking this position, Eolas improperly attempts to shift the blame onto Frito-Lay for allegedly not providing discovery regarding the separate website located at *happiness.lays.com*, a website that Eolas had never alleged was infringing.<sup>9</sup>

Eolas cited *Honeywell Int’l, Inc. v. Acer America Corp.*, 655 F.Supp.2d 650, 656-58 (E.D.Tex. 2009) in its Motion to Amend for the proposition that discovery and supplementation of infringement contentions to include reasonably similar products are permitted. However, Eolas ignored the Court’s clear admonition that “this analysis should consider the diligence of the party seeking discovery [and supplementation of infringement contentions].” *Id.* at 654; *see also, Softvault Systems, Inc.*, 2007WL1342554 at \*1 (diligence is an important element of good cause). As discussed above, Eolas clearly failed the diligence prong.

Moreover, the New Accused Product, namely *happiness.lays.com*, and *www.fritolay.com* are two distinct websites located at different domains. Eolas’s contention that *happiness.lays.com* is part of *www.fritolay.com* is incorrect. Notably, if you direct your web browser to *happiness.lays.com*, you will **not** be redirected to the *fritolay.com* domain. Indeed, if

---

<sup>9</sup> *See*, Motion to Amend at 5-8.

you direct your web browser to *happiness.fritolay.com*, you will receive an error message noting that this webpage does not exist. *See* Exhibit 11.

Eolas's argument that a press release regarding "Happiness Exhibit" at *www.fritolay.com* would somehow prove that *happiness.lays.com* is part of *www.fritolay.com* is equally absurd.<sup>10</sup> Press releases regarding Frito-Lay's parent company PepsiCo, Inc. also appears at *www.fritolay.com*. *See e.g.* Exhibit 12. Eolas certainly does not agree that *www.pepsico.com* is part of *www.fritolay.com* as Eolas has sternly refused to include PepsiCo, Inc.'s website in its failed settlement agreement with Frito-Lay. *See* Dkt. 898.

Eolas also contends that it only needed to provide specific infringement theories and representative examples of the alleged infringement in its Infringement Contention instead of a screenshot of each possible manifestation of the alleged infringement in a website (Motion to Amend at 7-8, citing *Orion IP, LLC v. Staples, Inc.*, 407 F.Supp.2d 815, 817 (E.D.Tex. 2006)). Eolas's contention, however, is misguided for several reasons. In *Orion IP*, the Court rejected plaintiff's attempt to include the Lexus and Scion websites into the case when its infringement contentions only identified the Toyota websites. *See*, Exhibit 13 at 2-3, *Orion IP, LLC v. Staples, Inc.*, Case No. 2:04cv297, slip. op. (Dkt. 171) (E.D.Tex. July 7, 2005). The Court held that the plaintiff needed not provide a screenshot of every possible instance of infringement in the *identified* website. The Court, however, did not allow amendment of infringement contentions to include the *unidentified* Lexus and Scion domains. Here, Eolas provided only representative screenshots of *www.fritolay.com*. In addition, by definition, the Infringement Contention could not have notified Frito-Lay that *happiness.lays.com* was allegedly infringing because that website was not launched until shortly after Eolas had served its Infringement Contention.

---

<sup>10</sup> *See*, Motion to Amend at 5.

Pointing to its complaint, Eolas argued that it had included *happiness.lays.com* in the case by alleging infringement by “web pages and content to be interactively presented in browser, including without limitation, the web pages and content accessible via [*www.fritolay.com*].”<sup>11</sup> This allegation is vague and provides no notice at all. There are numerous web pages that are “accessible via *www.fritolay.com*,” for example, *www.pepsico.com*. As discussed above, Eolas has specifically argued that PepsiCo, Inc. was not part of the case and should not be included in the settlement agreement with Frito-Lay. Eolas’s shot gun approach and self-contradicting argument should be given little weight, if any.

In sum, Eolas’s allegations regarding discovery that Frito-Lay should have provided in connection with *happiness.lays.com* is nothing more than an effort to distract the attention away from Eolas’s complete lack of diligence.

## V. CONCLUSION

Twenty-five months after the case has commenced, Eolas has no justification to add the New Accused Product in this case when it had failed to act diligently on publicly available information for over nineteen months, and this case is proceeding to trial in only three months. For the reasons set forth above, Eolas’s Motion to Amend should be denied outright.

Dated: November 4, 2011

Respectfully submitted,

/s/ Douglas R. McSwane, Jr.  
**POTTER MINTON P.C.**  
Douglas R. McSwane, Jr.  
dougmcswane@potterminton.com  
110 N. College Street, Suite 500

---

<sup>11</sup> See Motion to Amend at 2.

Tyler, Texas 75702  
Tel: (903) 597-8311  
Fax: (903) 593-0846

**GREENBERG TRAUIG LLP**

Jeffrey K. Joyner (admitted *pro hac vice*)  
joynerj@gtlaw.com  
Jeffrey F. Yee (admitted *pro hac vice*)  
yeej@gtlaw.com  
2450 Colorado Avenue, Suite 400E  
Santa Monica, California 90404  
Telephone: (310) 586-7700  
Facsimile: (310) 586-7800

Dwayne L. Mason  
Texas State Bar #00787977  
masondl@gtlaw.com  
1000 Louisiana Street, Suite 1700  
Houston, Texas 77002  
Tel: (713) 374-3500  
Fax: (713) 374-3505

**ATTORNEYS FOR DEFENDANT  
FRITO-LAY, INC.**

**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 November 4, 2011.

*/s/ Douglas R. McSwane, Jr.* \_\_\_\_\_  
Douglas R. McSwane, Jr.