

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

Eolas Technologies Incorporated,

Plaintiff,

vs.

Adobe Systems Inc., et al.,

Defendants.

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Civil Action No. 6:09-CV-00446-LED

JURY TRIAL

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

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I. INTRODUCTION

Plaintiffs accused Frito-Lay of infringing its patents by interactively presenting web pages and content in browsers, “including without limitation, the web pages and content accessible via www.fritolay.com.” (Dkt. No. 1, ¶40 (emphasis added).) Plaintiffs provided specific theories of infringement, using representative examples from www.fritolay.com. (*Id.*; Mot. Exh. 2.) Frito-Lay has not denied that Plaintiffs’ theories of infringement as to happiness.lays.com are the same as their theories for fritolay.com (*see* Mot. at 1), or that the former is accessible via the latter. (*See* Mot. at 5.) Thus, as stated in the motion, Plaintiffs provided Frito-Lay the necessary notice with respect to happiness.lays.com, in that it is already part of this case as an accused webpage and for purposes of obtaining discovery. Accordingly, in this circumstance, leave to amend is not necessary.¹ Frito-Lay does not directly refute this. Rather, it merely challenges a few subsidiary points, addressed in below section II(A).

Thus, the Court should order Frito-Lay to provide the outstanding discovery and dismiss Plaintiffs’ motion as moot. If however, the Court believes that leave to amend the infringement contentions is necessary, Plaintiffs have satisfied the standard for doing so, as explained in section II(B). Finally, Plaintiffs diligently sought discovery as to happiness.lays.com and the Court should order Frito-Lay to provide the outstanding discovery, as explained in section II(C).

¹ *See* Mot. at 1-2 (explaining that Plaintiffs brought motion as one seeking leave to amend infringement contentions as the best vehicle to resolve Frito-Lay’s repeated refusal to provide discovery beyond fritolay.com, in lieu of its contentions that the complaint and this suit was so limited); *see also* Mot. at 7 (explaining notice function of infringement contentions).

II. ARGUMENT

A. Leave to Amend Infringement Contentions is Unnecessary

Rather than argue leave to amend is necessary before *happiness.lays.com* can be considered part of this case, Frito-Lay asserts that (1) language in the complaint was vague, (2) the complaint could not provide notice because Frito-Lay did not launch *happiness.lays.com* until after it received the infringement contentions, and (3) *happiness.lays.com* and *fritolay.com* are different domains. (Opp. at 9.) Frito-Lay misunderstands the purpose of providing notice.

The notice function of the pleadings and infringement contentions is to put Frito-Lay on notice as to Plaintiffs' theories of infringement, not to identify each and every accused product at the start of litigation.² Thus, it does not matter whether Frito-Lay had another unnamed webpage when the complaint was filed, or as in this case, added it later. Frito-Lay had fair notice as to *happiness.lays.com* so long as the infringement contentions provided Plaintiffs' theories of infringement, so long those theories are similarly applicable to the new webpages, and so long as Plaintiffs indicated what more it was accusing than just the representative example (as Plaintiffs did in identifying webpages accessible via *fritolay.com*). If Frito-Lay believed the language in the complaint was vague, instead of implementing a new webpage using features it knew Plaintiffs had accused of infringement and then failing to provide information about the webpage during discovery, Frito-Lay could have sought clarification from Plaintiffs, or moved the Court for clarification. It did not, despite unquestionably being in a superior position to raise the issues.³ In

² See, e.g., *Orion IP, LLC v. Staples, Inc.*, 407 F.Supp. 2d 815, 817 (E.D. Tex. 2006) (Davis, J.) ("*Orion IP*"); see also Mot. at 7.

³ Whether or not Frito-Lay placed this new webpage under the domain *lays.com* (a webpage that itself redirects viewers to the webpage *fritolay.com*), in an attempt to shield it from discovery may only be resolved after Frito-Lay provides discovery. However, it clearly does nothing to deny that the new webpage is accessible directly from *fritolay.com*, as Plaintiffs qualified their notice in the complaint. (See Dkt. No. 1, ¶40.)

this way, Frito-Lay is similarly situated to the defendant, Toyota, in *Orion II*, wherein the Court permitted amendment and admonished defendant for failing to seek clarification and hiding behind a log until it could claim prejudice.⁴ Similarly, any uncertainty by Frito-Lay should not now be used to exclude *happiness.lays.com* from this case or to refuse discovery.

Finally, Frito-Lay's reference to the two webpages having different URLs⁵ is an attempt to invoke the holding of *Orion I* and is a red herring. In *Orion I*, plaintiff was denied leave to amend its infringement contentions so that it could assert *new* theories of infringement with regard to the Scion and Lexus websites.⁶ Because Plaintiffs in this case have already disclosed their theories of infringement, and the theories are the same as to Frito-Lay's new webpage, the present case is more akin to *Orion II*, where the Court denied defendant's motion to enforce Patent Rule 3-7 (amendment or modification to infringement contentions may be made only by order of the court). There, the Court "clarified that this limitation [from *Orion I*] would not apply to those aspects of the accused websites, of which the defendant did have notice."⁷

B. Plaintiffs Satisfied the Standard for Granting Leave to Amend

Frito-Lay suggests that Plaintiffs have not satisfied the standard for granting leave to amend because this motion was filed 19 months after Frito-Lay launched *happiness.lays.com*. However, as to the great majority of this time, Frito-Lay does not contest that (1) Plaintiffs did not know

⁴ *Orion II* at 817-18.

⁵ Opp. at 9 (attaching Opp. Ex. 13).

⁶ See *Orion IP, LLC v. Staples, Inc.* Case No. 2:04cv297, slip op. at 2-4 (Dkt. 171) (E.D. Tex. July 7, 2005) (Davis, J.) ("*Orion I*"). ("[t]hat scope cannot be widened during the course of discovery by amending PICs to include theories that should have [been] disclosed initially" and "Plaintiff has added theories that should have been disclosed initially...."); see also *Honeywell Int'l, Inc. v. Acer Am. Corp.*, 655 F. Supp. 2d 650, 655-56 (E.D. Tex. 2009). The *Orion I* Court also denied the motion because, unlike the present case, the Scion and Lexus websites existed and were publicly available before Orion's complaint. See *Orion II* at 816-17.

⁷ *Honeywell*, 655 F. Supp. 2d at 655-56 (citing *Orion II*, 507 F. Supp. 2d at 816).

about the new webpage (until the period of the stay),⁸ and (2) Frito-Lay did not produce discovery concerning this webpage, which discovery may have fronted the need to file this motion earlier. As to the period after Plaintiffs discovered the webpage, Frito-Lay merely asserts that Plaintiffs have not affirmatively established diligence (*see* Opp. at 4-5 (citing cases)), while completely ignoring the numerous factual circumstances Plaintiffs set forth to establish diligence in the Motion. These facts included Plaintiffs' belief that *happiness.lays.com* was already part of this case (*see supra* §II(A)) such that rushing to file a motion was unnecessary, or in attempting to resolve the matter without seeking Court intervention. (*See* Mot. at 3-5.) Plaintiffs brought this motion three days after the formal meet and confer made it clear that Frito-Lay would not provide the requested discovery or consider the website part of the case.⁹

As to Frito-Lay's claim of prejudice, this webpage has been a part of this case since Frito-Lay introduced it, regardless of whether Frito-Lay has been withholding discovery since that time, and regardless of the time it took Plaintiffs to discover it. If leave to amend is required, Frito-Lay has failed to respond to Plaintiffs' points that (1) any prejudice is of Frito-Lay's own doing (Mot. at 8); (2) as of the filing of this motion, Frito-Lay's discovery was so deficient that any discovery as to the new website would not require much duplication; (3) little if any additional work has to be performed since Plaintiffs are relying on the same theories of infringement;¹⁰ and (4) the prejudice

⁸ The fact that Plaintiffs were able to serve claim charts based on the code Frito-Lay claims was publicly available since March 15, 2010, does not change the fact that Plaintiffs could not serve claim charts for webpages it did not know about, and does not make earlier conduct any less diligent. (*See* Opp. at 6.) Instead, this only underscores the fact that had Frito-Lay provided the requested discovery and identified Frito-Lay's new webpage, or even had it sought clarification, Plaintiffs could have served claim charts and/or raised this motion earlier.

⁹ Plaintiffs also describe its repeated attempts to negotiate the issue with Frito-Lay in September and October of this year, including informal meet and confers as well as oral and written communications. (*See* Mot. at 5, Mot. Exhs. 8 and 9.)

¹⁰ This is precisely the circumstance where leave to amend infringement contentions should be granted. *See, e.g., O2 Micro Intern. Ltd. v. Monolithic Power Systems*, 467 F.3d 1355, 1365-66 (Fed. Cir. 2006) (cited by Frito-Lay).

to Plaintiffs and the waste of judicial resources caused by needless duplication of litigation outweighs any prejudice.¹¹

C. Discovery of *happiness.lays.com* is Warranted, Regardless of Whether Leave to Amend is Necessary

Frito-Lay does not contest that throughout this case, Plaintiffs have sought discovery as to Frito-Lay's entire website, not just *fritolay.com*.¹² Such discovery included the April 2, 2010 requests that Frito-Lay produce documents that show use of the accused features on webpages not limited to *fritolay.com*,¹³ as well as interrogatories seeking information about Frito-Lay's use of accused features in Frito-Lay's websites, not just *fritolay.com*.¹⁴ Nor does Frito-Lay deny that, as a matter of law, Plaintiffs are entitled to discovery of reasonably similar products such as *happiness.lays.com*¹⁵ as explained in *Honeywell*. (See Opp. at 8.) Frito-Lay merely argues that *Honeywell* also requires that Plaintiffs' requests be diligent. While Frito-Lay challenged Plaintiffs' diligence in seeking leave to amend, it did not challenge Plaintiffs' diligence in seeking this discovery.¹⁶ Thus, Frito-Lay has been withholding the diligently requested discovery for more than

¹¹ Frito-Lay's argument that claims against the new webpage would be exhausted by resolution of the case against Adobe is merely attorney speculation. (See Opp. at 1, 6). Frito-Lay does not know what judgment or settlement would look like, nor does it explain why treatment of the new webpage should be any different than treatment of its webpage *fritolay.com*.

¹² See Mot. at 3.

¹³ Mot. Exh. 2; Mot. at 3 (noting other relevant requests for discovery).

¹⁴ See, e.g., Opp. Exh. 5 at 16, 27-28 (identifying *frito-lay.com*, but clearly stating that the interrogatory seeks information that "includes, but is not limited to ... Frito-Lay.com").

¹⁵ See Mot. at 6, n.18 and Mot. at 8, n.23 (citing *Honeywell*).

¹⁶ Compare Opp. at 4-6, to *id.* at 8-9. In *Honeywell*, plaintiff was seeking discovery orders, not a motion for leave to amend infringement contentions. The case did not hold that diligence in seeking leave to amend is required to obtain relevant and diligently pursued discovery. See *Honeywell*, 655 F. Supp. 2d at 656 ("Honeywell must demonstrate that its PICs gave CPT notice of a specific theory of infringement and that the products for which it seeks discovery operate in a manner reasonably similar to that theory. Honeywell must also demonstrate that it has diligently sought this information.") (citing *Epicrealm Licensing LLC v. Autoflex Leasing, Inc.*, 2007 WL 2580969 at *3 (E.D. Tex. Aug. 27, 2007) (*Epicrealm I*) ("no bright line rule that discovery can only be obtained if related to an accused product identified in a party's PICs").

19 months without justification or explanation, and should now be ordered to produce it expeditiously—regardless of whether leave to amend is necessary.

III. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court either hold that *happiness.lays.com* is already part of the case and deny this motion as moot, or grant this motion for leave to amend Plaintiffs' infringement contentions. Either way, Plaintiffs request that the Court order Frito-Lay to provide the outstanding discovery as to this webpage expeditiously.

Dated: November 9, 2011.

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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 November 9, 2011.

/s/ Thomas Fasone III
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