

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

Eolas Technologies Incorporated,

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Plaintiff,

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

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vs.

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§

Adobe Systems Inc., Amazon.com, Inc.,

§

JURY TRIAL

Apple Inc., Argosy Publishing, Inc.,

§

Blockbuster Inc., CDW Corp.,

§

Citigroup Inc., eBay Inc., Frito-Lay, Inc.,

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The Go Daddy Group, Inc., Google Inc.,

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J.C. Penney Company, Inc., JPMorgan

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Chase & Co., New Frontier Media, Inc.,

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Office Depot, Inc., Perot Systems Corp.,

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Playboy Enterprises International, Inc.,

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Rent-A-Center, Inc., Staples, Inc., Sun

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Microsystems Inc., Texas Instruments Inc.,

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Yahoo! Inc., and YouTube, LLC

§

§

Defendants.

§

**FRITO-LAY, INC.'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO EOLAS'S
MOTION FOR LEAVE TO SUPPLEMENT P.R. 3-1 INFRINGEMENT CONTENTIONS**

I. INTRODUCTION

Acknowledging that the newly accused *happiness.lays.com* (“New Accused Product”) is not in the case against Defendant Frito-Lay, Inc. (“Frito-Lay”), Eolas¹ filed its motion seeking leave from the court to include the New Accused Product in this case (“Motion to Amend” or “Mot.”; Dkt. 1050). Eolas expressly asked the court to grant Eolas’s Motion to Amend.² In its Opposition (“Opp.,” Dkt. 1093), Frito-Lay laid out undisputed facts that evidence Eolas’s failure to establish good cause because, *inter alia*, Eolas failed to act diligently. In response, Eolas failed to provide any fact in its Reply to show that it acted diligently and simply rehashed the same misdirected and conclusory argument that it allegedly sought discovery with diligence, which it did not. Eolas’s assertion in its Reply (Dkt. 1095) that Frito-Lay did not provide discovery regarding the New Accused Product is a red herring and irrelevant to establishing Eolas’s diligence in seeking leave to amend its infringement contentions. As expected, Eolas remains completely silent in its Reply as to why it failed to vigorously analyze all publicly available information as required by law.

Unable to dispute the evidence showing Eolas’s complete lack of diligence in seeking leave to belatedly amend its infringement contentions, Eolas now changes course in its Reply and disingenuously argues at length³ in its Reply that its Motion to Amend is moot if Frito-Lay simply provides discovery regarding the New Accused Product. However, receiving discovery regarding a product does not mean the product should be added to the infringement contentions

¹ Unless otherwise noted, Plaintiffs The Regents of the University of California and Eolas Technologies Incorporated are collectively referred to as “Eolas.”

² Eolas stated in its Motion to Amend that “in light of the good cause set forth herein, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for leave . . .” *See*, Mot. at 2.

³ Eolas’s Reply Brief is six pages long which exceeds the page limit set forth in Local Rule 7(a)(2).

only three months before trial. Eolas's sudden change of course further demonstrates that its Motion to Amend is meritless. Hence, as fully discussed below, Frito-Lay respectfully requests the Court deny Eolas's meritless Motion to Amend in its entirety.

II. EOLAS CONTINUES TO IGNORE ITS AFFIRMATIVE DUTY TO ESTABLISH GOOD CAUSE FOR ITS BELATED INFRINGEMENT CONTENTIONS

As set forth in Frito-Lay's Opposition, Eolas is required to establish why it failed to seek amendment of its infringement contentions over a year ago when the only information Eolas needed was publicly available. *See*, Opp. at 4-6, Section III(A). In its Reply, Eolas remains utterly silent to this issue. The reason is obvious -- Eolas cannot deny its lack of diligence.

Eolas attempts to argue that it did not know about the New Accused Product until July 2011 (Mot. at 4). Eolas's argument, however, does not explain why Eolas did not exercise diligence over a period of *sixteen months* (from March 2010 to July 2011) when the law requires Eolas to vigorously analyze all publicly available information. *See, Connectel, LLC v. Cisco Systems, Inc.*, 391 F.Supp.2d 526, 528 (E.D.Tex. 2005). Eolas attempts to misdirect the Court by arguing that Frito-Lay did not dispute that Eolas did not know of the New Accused Product earlier (Mot. at 3). Eolas's argument is completely irrelevant because (1) it still does not explain why Eolas failed to exercise due diligence; and (2) other than Eolas's self-serving statement, Frito-Lay has no knowledge as to when Eolas allegedly learned of the New Accused Product.

Unable to provide any explanation as required to establish good cause, Eolas argued that Frito-Lay should have produced discovery regarding the New Accused Product earlier, and Frito-Lay should have sought clarification regarding Eolas's infringement contentions (Mot. at 2 and 4). Eolas's argument is nothing but a red herring. Eolas's infringement contentions clearly identified *only* the *www.fritolay.com* website (Dkt. 1093-2). Indeed, as noted in Frito-Lay's Opposition, Eolas had served numerous interrogatories between 2010 and 2011 (Opp. at 3) to

which Frito-Lay had responded. Eolas never raised any issue regarding anything beyond *www.fritolay.com*. Neither did Eolas voice any issue regarding Frito-Lay's document production for over a year. Indeed, there was no need for clarification. Eolas's contention that it allegedly sought discovery with diligence is misguided because it is irrelevant to Eolas's diligence in seeking amendment of its infringement contentions that are solely based on public information, not any discovery that Frito-Lay might have produced. Indeed Eolas was not diligent in seeking discovery because Eolas has never raised any discovery issue for over one year. *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).

Eolas also erroneously contends in its Reply that there is no prejudice to Frito-Lay because "any discovery as to the [New Accused Product] would not require much *duplication*." (Mot. at 4 (emphasis added)). Eolas is missing the point. As noted in its Opposition (Opp. at 7-8), the unfair prejudice to Frito-Lay is that Frito-Lay would be required to prepare its case, not just discovery, with respect to the New Accused Product *anew* if Eolas is permitted to add the New Accused Product at this late stage in the case; and there is simply no continuance available to cure such prejudice to Frito-Lay. *See e.g., Realtime Data LLC*, 2009 WL 2590101 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).

In support of its assertion that leave to amend its infringement contentions should be granted, Eolas cited in its Reply the Federal Circuit Court's opinion in *O2 Micro International Ltd. v. Monolithic Power Systems, Inc.*, 467 F.3d 1355, 1365-66 (Fed. Cir. 2006). *See*, Mot. at 4, fn. 10. Contrary to Eolas's assertion, however, the Court in *O2 Micro* in fact affirmed the lower

court's decision denying the plaintiff's motion for leave to amend infringement contentions because the plaintiff failed to act diligently. *Id.* at 1366, 1367-68 (“We agree with the Northern District of California that ‘good cause’ requires a showing of diligence. . . . Given O2 Micro’s delay in moving to amend its infringement contentions and its lack of adequate explanation for this delay, we concluded that the district court did not abuse its discretion in finding a lack of diligence and therefore a lack of ‘good cause.’”).

III. EOLAS DISINGENUOUSLY ARGUES THAT ITS OWN MOTION IS “MOOT”

Apparently, Eolas knew it had failed to act diligently and could not establish good cause in seeking leave to amend its infringement contentions. In its Reply, Eolas reversed course by disingenuously arguing that its Motion to Amend should be dismissed as moot so long as Frito-Lay provides discovery regarding the New Accused Product.⁴ This argument demonstrates that Eolas’s Motion to Amend is meritless because obtaining discovery of a product does not mean the product is in the case. In addition, Eolas rehashed the same argument that the New Accused Product is already in the case because it is accessible from *fritolay.com*. Eolas’s own action, however, belies its words. As discussed in the Opposition, there are numerous web pages that are “accessible” from *fritolay.com*, such as *www.pepsico.com*, and Eolas had specifically argued that *pepsico.com* was not part of the case and should not be included in the settlement agreement with Frito-Lay (Opp. at 10). Moreover, Eolas never filed a motion to compel Frito-Lay to produce documents and its suggestion in its Reply that the Court should order Frito-Lay to do so is an attempt to avoid the Court’s Local Rules requiring Eolas to meet and confer with Frito-Lay and file a motion to compel if necessary.

⁴ “[T]he Court should order Frito-Lay to provide the outstanding discovery and dismiss Plaintiff’s motion as moot.” *See*, Reply (Dkt. 1095) at 1.

This case is different from the court's decision that Eolas relied on its Reply, *Orion II*.⁵ In *Orion II*, Toyota (defendant) realized that plaintiff also accused the other webpages and failed to seek clarification from either the plaintiff or the court. *Id.* at 817-18. In this case, however, it is undisputed that that Eolas never accused the New Accused Product. Instead, Eolas failed to exercise due diligence and identify the New Accused Product. Frito-Lay would have sought clarification if Eolas, based on a simple review of public information, had timely raised any issue regarding the New Accused Product, rather than at this eleventh hour.

In sum, Eolas's new shift of focus in its Reply only demonstrates that its Motion to Amend is without merit.

IV. **CONCLUSION**

The misstatements and misguided arguments in Eolas's Motion to Amend and Reply demonstrate that Eolas has failed to establish the required good cause in seeking leave from the Court to amend its infringement contentions. For the reasons set forth herein and in Frito-Lay's Opposition, Eolas's Motion to Amend is without merit and should be denied.

Dated: November 14, 2011

Respectfully submitted,

/s/ Douglas R. McSwane, Jr.

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⁵ *Orion IP, LLC. v. Staples, Inc.*, 407 F.Supp.2d 815 (E.D.Tex. 2006); see also Mot. at 2-3.

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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 service. Local Rule CV-5(a)(3)(A) on this November 14, 2011.

/s/ Douglas R. McSwane, Jr. _____
Douglas R. McSwane, Jr.