

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

**EOLAS TECHNOLOGIES, INC. AND THE
REGENTS OF THE UNIVERSITY OF
CALIFORNIA,**

Plaintiffs,

v.

ADOBE SYSTEMS INC., ET AL.,

Defendants.

Civil Action No. 6:09-CV-446 LED

JURY TRIAL DEMANDED

**STATEMENT BY GO DADDY, CDW AND JC PENNEY REGARDING DEFENDANTS'
MOTION IN LIMINE, ISSUE NO. 4**

Defendants The Go Daddy Group, Inc., CDW LLC, and J.C. Penney Corporation, Inc. (collectively “the Microsoft Server Defendants”), who use Microsoft software such as Microsoft IIS to provide their accused websites, do not join Defendants’ Motion in Limine, Issue No. 4 to the extent it seeks to exclude the license and settlement agreement between Plaintiffs and Microsoft or discussion thereof. These agreements are critical to the Microsoft Server Defendants’ noninfringement defenses. Thus, the Microsoft Server Defendants ask that any order excluding these agreements not apply in any trial involving the Microsoft Server Defendants.

All three Microsoft Server Defendants have filed motions for summary judgment of non-infringement (D.I. 790, 876) on the ground that the Microsoft license authorizes them to provide their accused websites and authorizes visitors to view them. Plaintiffs have not filed a cross motion for summary judgment. Accordingly, if the Court denies the Microsoft Server Defendants’ summary judgment motions due to a finding of genuine issues of material fact, then the Mi-

Microsoft license defense must be tried to the jury. Although Plaintiffs have posited that this defense may be tried to the bench, they have not explained why, if summary judgment is denied, a bench trial of any factual disputes related to this particular defense would be appropriate.

Moreover, in addition to forming the basis for the Microsoft Server Defendants' license defense, the Microsoft license and settlement agreements will also be important at trial as a defense against Plaintiffs' claims that these defendants induce visitors to their websites to infringe the patents-in-suit. "[I]nducement requires that the alleged infringer knowingly induced infringement and possessed *specific intent* to encourage another's infringement." *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (internal citations and quotations omitted). It likewise "requires knowledge that the induced acts *constitute patent infringement*." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011). A reasonable belief that the induced acts are noninfringing negates this element. *See, e.g., Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1351 (Fed. Cir. 2009); *Kinetic Concepts, Inc. v. Blue Sky Medical Group, Inc.*, 554 F.3d 1010, 1024–25 (Fed. Cir. 2009); *DSU Medical Corp.*, 471 F.3d at 1307. The Microsoft Server Defendants' reasonable belief that visitors to their sites were licensed will be an important defense to Plaintiffs' inducement claim.

The Microsoft license and settlement agreements would therefore be highly relevant to the Microsoft Server Defendants' defenses should they go to trial, and the Court should not exclude this evidence in any trial involving these defendants.

Dated: January 7, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on January 6, 2012 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Proshanto Mukherji

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