

**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.	§	

PLAINTIFFS' OPPOSED MOTION TO CORRECT THE CAPTION

Plaintiffs The Regents of the University of California and Eolas Technologies Incorporated (collectively "Plaintiffs") file this Opposed Motion to Correct the Caption as reflected in the proposed order attached hereto and would show as follows:

BACKGROUND

On October 6, 2009, Plaintiff Eolas Technologies Incorporated, as a sole plaintiff and exclusive licensee of the patents-at-issue in this case, filed its Original Complaint against Defendants Adobe Systems Inc., Amazon.com, Inc., Apple 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 in this Court. [Dkt. No. 1]. The captions in the First Amended Complaint [Dkt. No. 285], Second Amended Complaint [Dkt. No. 517], and Third Amended Complaint [Dkt. No. 891] all reflect that Eolas Technologies Incorporated is the sole plaintiff and that claims against all of those named defendants are still included in this action. Since the filing of the October 6, 2009 Complaint, however, this Court has granted Eolas' joint motions to dismiss (with respect to Blockbuster Inc., sever)/stipulations of dismissal for Apple Inc. [Dkt. No. 910], Blockbuster Inc. [Dkt. No. 445], eBay Inc. [Dkt. No. 835], Frito-Lay, Inc. [Dkt. No. 1116], JPMorgan Chase & Co. [Dkt. No. 662], New Frontier Media, Inc. [Dkt. No. 672], Office Depot, Inc. [Dkt. No. 788], Perot Systems Corp. [Dkt. No. 705], Playboy Enterprises International, Inc. [Dkt. No. 720], Rent-A-Center, Inc. [Dkt. No. 758], Sun Microsystems Inc. [Dkt. No. 692], and Texas Instruments Inc. [Dkt. No. 708]. Most recently, this Court granted Eolas' Motion for Leave to File Amended Complaint to Add The Regents of the University of California as Co-Plaintiff. [Dkt. No. 988].

ARGUMENT

In light of the Court's previous granting of Eolas' joint motions to dismiss or sever/stipulations of dismissal and the Court's most recent granting of Eolas' Motion, which added The Regents of the University of California as a co-plaintiff to this case, in order to accurately reflect (i) that the owner of the patents-at-issue is a plaintiff in this case and, thus, should be listed as the first plaintiff in the caption; and (ii) the current parties remaining in this case, Plaintiffs respectfully request that the Court order the Clerk of the Court to amend the caption in the present action to reflect that The Regents of the University of California and Eolas Technologies Incorporated are co-plaintiffs in this case and to reflect that claims against Defendants Apple Inc., Blockbuster Inc., eBay Inc., Frito-Lay, Inc., JPMorgan Chase & Co.,

New Frontier Media, Inc., Office Depot, Inc., Perot Systems Corp., Playboy Enterprises International, Inc., Rent-A-Center, Inc., Sun Microsystems Inc., and Texas Instruments Inc. have been dismissed. *See, e.g., Hernandez v. United States*, No. EP-11-CV-027-DB, 2011 U.S. Dist. LEXIS 90234, at *31-32 (W.D. Tex. Aug. 11, 2011) (“IT IS FURTHER ORDERED that the Clerk of the Court AMEND the caption in the present action to reflect that claims against Defendant Jesus Mesa, Jr. and all unknown Defendants are no longer included within the above-captioned cause.”); *Marcair, Inc. v. United States*, No. 4:07cv77, 2007 U.S. Dist. LEXIS 50607, at *6 (E.D. Tex. July 12, 2007) (“The Court, in granting the United States’ Motion to Amend Caption, orders that the caption in this cause be amended to reflect the proper party defendant and directs the Clerk of the Court to make this change in the record such that the United States of America is listed as the sole defendant.”); *EEOC v. Allied Aviation Serv.*, No. 3:05-CV-1379-L, 2006 U.S. Dist. LEXIS 35657, at *4 (N.D. Tex. May 31, 2006) (“For the reasons stated herein, Proposed Intervenor’s Motion to Intervene is granted. The clerk of court is directed to amend the caption of this case to reflect Eric Mitchel, Francisco Ochoa, Christopher DiGiorgio, Carl Gaines, Mark Barret, Andrew Cervantes, Tristian Fernandez, Henry Firth, Walter Kelley, Wilborn Lyles, David McCoy, Scotty Mills, Michael Nelson, Jerome Sloan, Josh Toram Sr., Anthony Walker, Mark Webster, and Willie Winters as Plaintiffs/Intervenors.”).

On January 21, 2012, Plaintiffs met and conferred with Defendants regarding the relief requested in this Motion. While Defendants are amenable to the caption being corrected to accurately reflect that The Regents of the University of California is a co-plaintiff in this case and the remaining Defendants in this case, they oppose the caption setting forth The Regents of the University of California as the first-named Plaintiff.

There can be no argument regarding whether The Regents of the University of California is the owner of the patents-at-issue. Nor can there be any argument regarding whether Eolas Technologies Incorporated is the exclusive licensee of those patents. In “[t]he Parties’ Statement of Uncontested Facts” in Section V of the Joint Proposed Pretrial Order the parties jointly filed on January 16, 2010, the parties indicated as follows:

7. The ’906 patent and the ’985 patent are owned by assignment by the University of California. Eolas has an exclusive license to the ’906 patent and the ’985 patent that includes, without limitation, the following: (a) all exclusionary rights under the patents, including, but not limited to, (i) the exclusive right to exclude others from making, using, offering for sale, or selling products embodying the patented inventions throughout the United States or importing such products into the United States, and (ii) the exclusive right to exclude others from using and otherwise practicing methods embodying the patented inventions throughout the United States; and (b) the exclusive right to sue and seek damages for infringement of any of the exclusionary rights identified above.

[Dkt. No. 1244 at p. 61]. Accordingly, listing The Regents of the University of California before Eolas Technologies Incorporated in the caption would be an accurate reflection of the status of those parties in relation to the patents-at-issue in this case—owner and exclusive licensee, respectively. Defendants’ withheld consent to the relief requested in this Motion based on Plaintiffs seeking to list first in the caption the owner of the patents-at-issue is, thus, baseless and unreasonable.

CONCLUSION

Plaintiffs respectfully request that this Court grant Plaintiffs’ Motion to Correct the Caption in this action and adopt the amended caption contained in this Motion and the Proposed Order to this Motion.

Dated: January 22, 2012.

McKool Smith, P.C.

/s/ Mike McKool

Mike McKool

Lead Attorney

Texas State Bar No. 13732100

mmckool@mckoolsmith.com

Douglas Cawley

Texas State Bar No. 04035500

dcawley@mckoolsmith.com

Holly Engelmann

Texas State Bar No. 24040865

hengelmann@mckoolsmith.com

J.R. Johnson

Texas State Bar No. 24070000

jjohnson@mckoolsmith.com

McKool Smith, P.C.

300 Crescent Court, Suite 1500

Dallas, Texas 75201

Telephone: (214) 978-4000

Telecopier: (214) 978-4044

Kevin L. Burgess

Texas State Bar No. 24006927

kburgess@mckoolsmith.com

Josh W. Budwin

Texas State Bar No. 24050347

jbudwin@mckoolsmith.com

Gretchen K. Curran

Texas State Bar No. 24055979

gcurran@mckoolsmith.com

Matthew B. Rappaport

Texas State Bar No. 24070472

mrappaport@mckoolsmith.com

McKool Smith, P.C.

300 West Sixth Street, Suite 1700

Austin, Texas 78701

Telephone: (512) 692-8700

Telecopier: (512) 692-8744

Robert M. Parker
Texas State Bar No. 15498000
rmparker@pbatyler.com
Robert Christopher Bunt
Texas Bar No. 00787165
rcbunt@pbatyler.com
Andrew T. Gorham
Texas State Bar No. 24012715
tgorham@pbatyler.com
PARKER, BUNT & AINSWORTH, P.C.
100 E. Ferguson, Suite 1114
Tyler, Texas 75702
(903) 531-3535
(903) 533-9687- Facsimile

**ATTORNEYS FOR PLAINTIFFS
EOLAS TECHNOLOGIES INC.
AND THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA**

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Plaintiffs conferred with counsel for Defendants on January 21, 2012, who indicated they are opposed to the relief sought in this Motion, to the extent Plaintiffs seek to have the caption corrected to list The Regents of the University of California as the first-named Plaintiff.

/s/ Gretchen K. Curran
Gretchen K. Curran

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via the Court's ECF system on January 22, 2012.

/s/ Gretchen K. Curran
Gretchen K. Curran