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

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|---|---|---|
| Eolas Technologies Incorporated, et al. | ) | |
| *Plaintiffs*, | ) | |
| v. | ) | No. 6:09-cv-00446-LED |
| Adobe Systems Inc., et al. | ) | |
| *Defendants*. | ) | |

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**GO DADDY'S MOTION FOR JUDGMENT UNDER THE COURT'S ORDER
(DKT. 1297) REGARDING GO DADDY'S MOTION FOR SUMMARY JUDGMENT OF
NONINFRINGEMENT BASED ON ITS LICENSE DEFENSE (DKT. 790)**

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# EXHIBITS

Ex. A: Eolas's March 5, 2010 P.R. 3-1 Infringement Contentions under the '985 patent re Go Daddy.

Defendant Go Daddy moves for judgment of noninfringement under the Court's recent Order on Go Daddy's Microsoft license defense motion. (Dkt. 1297). In their infringement contentions, plaintiffs contend that Go Daddy's Microsoft IIS server software satisfies at least one limitation of every asserted claim.[1] Thus, per the Court's Order, "the covenant [not to sue] is triggered" for every one of plaintiffs' accusations, and Go Daddy is entitled to judgment of noninfringement.
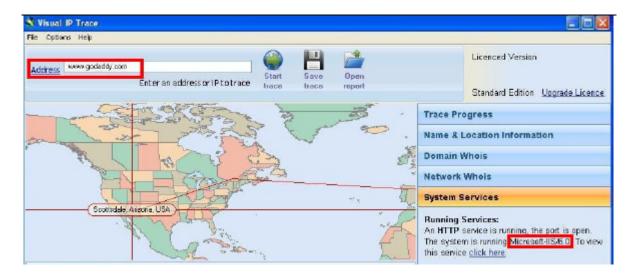
## I. ARGUMENT

In its recent Order on Go Daddy's motion for summary judgment based on its license defense (Dkt. 790), the Court held that "a Microsoft product [must] be implicated in performing at least one step of a claimed method before the covenant [not to sue in the Microsoft license] is triggered." (Dkt. 1297, at 6). Go Daddy is therefore entitled to a judgment of noninfringement because, quite simply, plaintiffs contend that Go Daddy' Microsoft IIS server software satisfies at least one step of <u>every</u> asserted claim.[2]

Specifically, plaintiffs assert independent claims 1 and 16 of the '985 patent against Go Daddy. As Go Daddy argued at the pre-trial conference, plaintiffs' contentions include figures that highlight "Microsoft IIS 6.0" as an accused instrumentality for at least one element of each of these claims. For example:

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[1] Plaintiffs served their infringement contentions against Go Daddy, per P.R. 3-1, on March 5, 2010, and have not amended those contentions since.

[2] During the January 24, 2012 oral argument on Go Daddy's motion, plaintiffs' counsel represented to the Court that plaintiffs "mistakenly" mentioned Microsoft IIS in their Go Daddy infringement contentions in two instances. In fact, plaintiffs' infringement contentions against Go Daddy alone expressly identify Microsoft IIS at least fifteen times, and Microsoft IIS is identified as satisfying at least one limitation of every asserted claim. Moreover, plaintiffs have never amended their original 3-1 infringement contentions, which were served on March 5, 2010.

Eolas's March 5, 2010 P.R. 3-1 infringement contentions Ex. A, at 28 ('985, limitation 1a) (original highlighting). Similar figures appear for limitations of <u>all</u> asserted claims for <u>every</u> accused website, examples of which are summarized in the table below:

| | | Contentions Re Www.Godaddy.Com | Contentions Re Videos.Godaddy.Com |
|---|---|---|---|
| '985 patent Claim 1 | <u>Preamble</u> | Ex. A at 8 (figure accusing IIS included) | Ex. A at 21 (figure accusing IIS included) |
| | <u>Limitation 1a</u> | Ex. A, at 28 (figure accusing IIS included) | Ex. A, at 49 (figure accusing IIS included) |
| '985 patent Claim 16 | <u>Preamble</u> | Ex. A, at 230 (fig. accusing IIS included) | Ex. A, at 242 (fig. accusing IIS included) |
| | <u>Limitation 16a</u> | Ex. A, at 243 (fig. accusing IIS incorporated by ref.) | Ex. A, at 243 (fig. accusing IIS incorporated by ref.) |

Other parts of plaintiffs' contentions also accuse Go Daddy's Microsoft IIS software of practicing elements of claims 1 and 16, by accusing actions that are performed by the servers under control of IIS and by accusing the computer readable media that serve the websites:

| | Contentions Re Both Www.Godaddy.Com and Videos.Godaddy.Com | Evidence from Contentions |
|---|---|---|
| '985 patent Claim 1 | <u>Go Daddy's servers transmit a series of communications</u> to client workstations … <u>Go Daddy's servers format the communications</u> … | Ex. A, at 22 (limitation 1a)<br>Ex. A, at 55 (limitation 1b)<br>Ex. A, at 62 (limitation 1c)<br>Ex. A at 66 (limitation 1d)<br>Ex. A at 76 (limitation 1e)<br>Ex. A at 85 (limitation 1f) |
| '985 patent Claim 16 | Go Daddy's websites exist on one or more computer readable media (such as … <u>the hard-disk/volatile memory of the server from which the Go Daddy's websites are hosted</u>) | Ex. A, at 243 (limitation 16a)<br>Ex. A, at 243–44 (limitation 16b)<br>Ex. A, at 244 (limitation 16c)<br>Ex. A, at 244–45 (limitation 16d) |

| | Ex. A, at 245 (limitation 16e) |
| | Ex. A, at 245–46 (limitation 16f). |

Plaintiffs have never amended these contentions or sought leave to do so. Thus, these remain the operative contentions in this case. P.R. 3-6 (a) ("'Infringement Contentions' … shall be deemed to be [a] party's final contentions" unless amended); P.R. 3-6(b) (leave required to amend).

Thus, per the Court's order, "the covenant [not to sue] is triggered" for every one of plaintiffs' accusations, and Go Daddy is entitled to a judgment of noninfringement.

Dated:  January 30, 2012          Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on January 30, 2011.

/s/ Neil J. McNabnay
Neil J. McNabnay