

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

EOLAS TECHNOLOGIES, INC.

*Plaintiff,*

v.

ADOBE SYSTEMS INC., ET AL.

*Defendants.*

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

JURY TRIAL DEMANDED

**ADOBE SYSTEMS INCORPORATED'S OPPOSED MOTION REQUESTING CASE  
MANAGEMENT CONFERENCE TO ADDRESS PLAINTIFF EOLAS'S  
INFRINGEMENT CONTENTIONS OR, IN THE ALTERNATIVE, TO STRIKE  
THOSE CONTENTIONS AND MOTION FOR EXPEDITED CONSIDERATION**

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## I. INTRODUCTION

Eolas has provided Adobe with vague infringement charts that defeat the purpose of the local rules because they do not frame discovery and claim construction. Instead of specifically identifying *each* of the combinations of products it contends infringes as Local Patent Rule 3-1 expressly requires, Eolas's charts identify mere examples or illustrations of possible infringement. Indeed, Eolas has clarified in meet and confers that it has not attempted, nor does it believe it is obligated, to chart or otherwise identify *each* of the combinations of products that purportedly infringe. Local Patent Rule 3-1(b), however, specifically requires *each* accused instrumentality be identified, contrary to Eolas's position. Eolas has served over 23,000 pages of such exemplar or illustrative claim charts, leaving Adobe to wonder how many other combinations are intended to be included in the open-ended allegation against Adobe. Adobe products are named in claim charts given to Adobe and also in nearly every other Defendant's claim charts in some way, with no explanation of why Adobe is liable, and no specifics on where the infringement is found in the Adobe product in most cases.

Further, the vast majority of Adobe products accused within Eolas's contentions operate in conjunction with or within applications and operating systems from Microsoft. Many other defendants likewise use Microsoft products in creating or operating their websites or in conjunction with their products. But Eolas's vague charts and allegations have left Adobe to guess whether and which Microsoft products Eolas is accusing here as part of the combinations that make up the accused methods and systems. Indeed, Eolas's allegations are so vague, and Eolas has been so careful to phrase its allegations broadly enough to cover use of Defendants' products in conjunction with Microsoft products, that Microsoft has now filed a lawsuit in the U.S. District Court for the Northern District of Illinois stating that Eolas has breached its settlement of the *Eolas v. Microsoft* lawsuit and seeking declaratory and injunctive relief to give

effect to that settlement. A copy of the docket sheet is attached as Exhibit 1. Adobe, the other defendants, and the Illinois Court need to have clarity from Eolas as to what is and what is not accused of infringement to determine the extent of the breach and potential impact of the declaratory and injunctive relief sought in the Illinois case, as well as to coordinate between the Courts.

For all of these reasons, Adobe respectfully requests that the Court conduct a prompt case management conference to establish deadlines for Eolas to: (1) supplement its infringement contentions to provide a claim chart or to otherwise identify *each* accused instrumentality as provided by Local Patent Rule 3-1 rather than exemplar charts (such charts would then specify for “each” claim, for “each” accused combination or system, by “name and product number, if known”, which will disclose whether it includes a Microsoft product, process, instrumentality or system to satisfy any element of that asserted claim, Local Patent Rule 3-1(b)); (2) provide clear parameters for document production (including whether and when the Court might entertain potential procedures for cost shifting to keep document production as focused as possible); and (3) strike Eolas’s present contentions because they do not comply with the Patent Rules. Adobe moves for this relief on an expedited basis given the number of parties and the Court’s schedule, as well as the co-pending case by Microsoft in Illinois.

## **II. ARGUMENT**

### **A. The Local Patent Rules Require Specificity, Not Volume.**

Local Patent Rule 3-1(b) requires identification of “each” accused instrumentality; the rule is emphatic by its use of the word “each” five times and by even requiring use in the charts of names and product numbers where known. Exemplar charts that provide only open-ended

illustrations, and do not identify “each” accused instrumentality or provide names and product numbers if known violate the explicit language of the Rules.

Here, in meet and confer sessions, Eolas has explicitly stated that its charts are only illustrative combinations of products, and not meant to be exhaustive. In other words, Eolas has said that the charts are open-ended, and are meant to include in the accused combinations any other components that perform the same function as one or more products depicted in the screen shots for the combinations accused in the charts.

In order to focus discovery and narrow issues for claim construction, summary judgment, and trial, Local P. R. 3-1 requires infringement contentions that provide a defendant with notice of a plaintiff’s infringement theories, for “each” accused instrumentality, designating “name and product number, if known.” *See, e.g., Eon Corp. IP Holdings, LLC v. Sensus USA, Inc.*, 2010 WL 346218, \*2 (E.D. Tex. Jan. 21, 2010) (citing *Linex Techs., Inc. v. Belkin Int’l, Inc.*, 628 F. Supp. 2d 703, 706 (E.D. Tex. 2008) and *Connectel, LLC v. Cisco Sys., Inc.*, 391 F. Supp. 2d 526, 526 (E.D. Tex. 2005)). This is especially true where another lawsuit has been filed in another Court that alleges this Plaintiff has breached a settlement, license and covenant not to sue by making overbroad infringement contentions in this case. Having already settled its claims against Microsoft, the Plaintiff in this case must state each accused combination clearly, so that Adobe can determine if any Microsoft product, process, instrumentality or system is alleged to satisfy any element of any asserted claim. Nothing less will permit this Court and the Court in Illinois to coordinate how to resolve the issue of the scope of the Microsoft license, and the exhaustion effect of that license.

This Court has not hesitated to force compliance with these Rules when confronted by contentions that fail to satisfy them. *See, e.g., Eon*, 2010 WL 346218 at \*4. The Court has

previously recognized that volume is no substitute for clarity and specificity. *Saffran v. Johnson and Johnson*, Case No. 2:07-cv-0451 (TJW), (E.D. Tex. Feb. 24, 2009) (finding 800 pages of invalidity contentions lacked requisite specificity).

**B. Eolas Has Failed to Provide PICs that Can Frame the Case.**

Here, plaintiff Eolas is asserting each and every one of 61 claims<sup>1</sup> of the two patents-in-suit against the 22 disparate defendants it voluntarily chose to sue in this single litigation. The following table summarizes the number of infringement contention pages Eolas has provided to each defendant; even without the added complexity of the new Microsoft case, the volume of allegations would make this case unmanageable in its present configuration:<sup>2</sup>

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<sup>1</sup> In an effort to streamline the case, Adobe has requested that Eolas narrow its set of asserted claims to a more manageable number, *e.g.*, five claims per patent, but Eolas has refused.

<sup>2</sup> During a telephone call on July 16, 2010, Eolas informed Adobe that it would withdraw the accusations of infringement against Adobe “content tools”; and would confirm in writing within a few days; this being said, it does not address the problem of charts that are only illustrations or example but that do not specify each accused infringing combination, and most likely will not have a significant impact on the number of charts (albeit it may help reduce the discovery burden on Adobe).

<b>Party</b>	<b>Pages of Contentions</b>
Adobe	2,917
Amazon	977
Apple	2,326
Blockbuster	327
CDW	567
Citigroup	1,244
eBay	1,447
Frito-Lay	418
GoDaddy	543
Google	3,132
JC Penney	446
JP Morgan	963
New Frontier Media	985
Office Depot	564
Perot Systems	382
Playboy	1,142
Rent-a-Center	383
Staples	483
Sun	1,594
Texas Instruments	715
Yahoo	1,672
YouTube	379
<b>Total</b>	<b>23,606</b>

Eolas's claims are largely method and system claims. But, making matters worse, Eolas's contentions do *not* provide any meaningful insight into the specific acts and instrumentalities that constitute the alleged practice of the claimed methods and systems. Rather, they repeat boilerplate statements and screenshots that provide no insight into how the claim language is supposedly satisfied in operation of the combination as a method or system.

As one example, the Court can consider Claim 1 of U.S. Patent No. 5,838,906, from which all of the other '906 method claims depend:

1. A method for running an application program in a computer network environment, comprising:

providing at least one client workstation and one network server coupled to said network environment, wherein said network environment is a distributed hypermedia environment;

executing, at said client workstation, a **browser application**, that parses a first distributed **hypermedia document** to identify text formats included in said distributed hypermedia document and for responding to predetermined text formats to initiate processing specified by said text formats;

utilizing said browser to display, on said client workstation, at least a portion of a first hypermedia document received over said network from said server, wherein the portion of said first hypermedia document is displayed within a first **browser-controlled window** on said client workstation,

wherein said first distributed hypermedia document includes an embed text format, located at a first location in said first distributed hypermedia document, that specifies the location of at least a portion of an **object** external to the first distributed hypermedia document,

wherein said object has type information associated with it utilized by said browser to identify and locate an **executable application** external to the first distributed hypermedia document,

and wherein said embed text format is parsed by said browser to automatically invoke said executable application to execute on said client workstation in order to display said object and enable an **end-user** to directly interact with said object within a display area created at said first location within the portion of said first distributed hypermedia document being displayed in said first browser-controlled window.

For Claim 1's method to be infringed, actions must be taken by or involving at least: (1) a client workstation, (2) a browser application, (3) a browser-controlled window, (4) a network server, (5) a hypermedia document, (6) an object, (7) an executable application, and (8) an end-user, all operating in (9) a network environment that is a distributed hypermedia environment. Accordingly, pursuant to Patent L.R. 3-1, one would expect Eolas's contentions to specifically identify those various components.

They do not. As just one example, none of Adobe's accused products is a browser. Nowhere in its 2,917 pages of infringement charts for Adobe does Eolas name the browsers it contends satisfy the browser limitations of the claims. To the contrary, Eolas presents screenshots taken from a Firefox browser but then footnotes nearly every page that its "[a]llegation [is] not limited to browser in use." This brings into focus the questions raised in the

Microsoft lawsuit: what is the effect of Eolas's settlement with Microsoft given that the most prevalent browser used with Adobe products is Microsoft's Internet Explorer?

By deliberately obscuring, for example, which "browser applications" it is accusing, Eolas makes it impossible for Adobe to respond to its allegations or to frame its defenses. This same problem is repeated for all of the many elements of Claim 1. Adobe is also left to wonder, whose "client workstation"? Running which operating system (which implicates a number of the claim elements) – are Microsoft operating systems accused? What "distributed hypermedia environments" are accused? Drafting the infringement contentions in this way runs directly counter to the notice function of the Local Patent Rules.

Making matters worse, Eolas's charts against each party cross-reference to its charts against *other* parties. For example, in its claim charts that ostensibly accuse Adobe's Flash Player and Shockwave Player of both indirect and direct infringement, the bulk of Eolas's "evidence" consists of citations to other claim charts:

*See also the evidence cited in the flash-based infringement charts for Adobe (and the flash-based infringement charts for the other defendants) for this claim element.*

( '906 Authoring Tools and Players chart at 10-12; identical text in '985 Authoring Tools and Players chart at 13-15; same text repeated for each limitation of each claim of each patent.)<sup>3</sup>

See attached Exhibits 2 and 3.

When considered in light of Eolas's 23,606 pages of charts, such cross-pollination only multiplies the confounding effect of the overwhelming volume of contentions while providing no additional clarity. Accordingly, the Court should find Eolas's contentions against Adobe improper. By holding a case management conference, the Court can:

- Limit the number of claims and allegations;

- Require compliance with Local Patent Rule 3-1(b), for clarity on whether, where and how Plaintiff is asserting its claims as for *each* accused instrumentality – such compliance with the Rule will reveal whether and when Eolas contends Microsoft products might be used to satisfy elements of asserted claims, and if so where or how in the methods or systems;
- Create a schedule within the overall framework of the Court’s Docket Control Order for serving amended contentions that comply with the rules by providing the necessary specificity, and tailor the remaining deadlines and discovery to these rulings; and
- Strike Eolas’s deficient ‘illustrative’ or ‘exemplar’ contentions and require it to supplement them to identify *each* accused instrumentality in the manner set forth in Rule 3-1(b).

**C. Eolas’s Lack of Specificity Betrays Its Concern About Joint Infringement.**

**1. Eolas’s Patent Claims Are Subject to the “Single Actor Rule” of *BMC* and *Muniauction*.**

“It is well settled law that infringement requires a showing that a defendant has practiced each and every element of the claimed invention.” *Golden Hour Data System, Inc. v. emsCharts, Inc.*, 2009 WL 943273, \*3 (E.D. Tex. Apr. 3, 2009) (citing *Warner-Jenkinson Co., Inc. v. Hilton Davis Corp.*, 520 U.S. 17, 40 (1997)). For method patent claims, infringement occurs when a party performs all of the steps of the process or method. *PA Advisors, LLC v. Google, Inc.*, 2010 WL 986618, \*7 (E.D. Tex. March 11, 2010) (citing *Joy Techs., Inc. v. Flakt Inc.*, 6 F.3d 770, 773 (Fed. Cir. 1993)).

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<sup>3</sup> As stated, Eolas has now said it will withdraw the allegations as to the Authoring Tools, but the allegations as to the Players remain, and, accordingly, it appears that Eolas’ action will not materially reduce the number of these illustrative charts.

This Court has recognized, with respect to method claims, the Federal Circuit’s recent decisions in *Muniauction* and *BMC* have established the so-called “single actor rule,” whereby “direct infringement requires a single party to perform every step of a claimed method.” *Tune Hunter, Inc. v. Samsung Telecomms. Am., LLC*, 2010 WL 1409245 (E.D. Tex. Apr. 1, 2010) (quoting *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008) and citing *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007)); *PA Advisors*, 2010 WL 986618 at \*7 (same). Accordingly, where a method claim requires action by multiple parties, direct infringement only occurs if one party exercises “control or direction” over the entire process. *PA Advisors*, 2010 WL 986618 at \*7 (quoting *BMC*, 498 F.3d at 1380-81). A mere “arms-length cooperation” will not give rise to direct infringement by any party. *Id.* (quoting *BMC*, 498 F.3d at 1371).

## **2. Many of Eolas’s Patent Claims Require Multiple Actors.**

As the Court can see from the language of ’906 Claim 1 (above), that claim and the others require concerted activity by multiple actors in order to practice the claimed methods. Adobe doubts that Eolas can satisfy its burden to show the “direction or control” required to make out such an infringement claim. Moreover, as noted above, Adobe products are used most often in conjunction with or within applications or systems from Microsoft. Indeed, it would appear from Eolas’s deliberately vague disclosures<sup>4</sup> that it is hesitant to commit to identifying which component(s) from which companies or which acts by which entities satisfy particular

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<sup>4</sup> Adobe has met and conferred with opposing counsel on multiple occasions in an effort to understand Eolas’s contentions. During the last of these meetings, Eolas suggested, despite the language of its claims, that it was not pursuing any joint infringement theories and would instead rely on direct infringement by Adobe itself and Adobe’s inducement of infringement by others. Yet, when Adobe attempted to memorialize the substance of that concession, Eolas retreated, limiting its statement only to the few specific claims the parties discussed by phone. Accordingly, Adobe is led to conclude that Eolas *will* be pursuing joint infringement for one or more claims but does not wish to say so expressly lest it be held to the “direction or control” standard.

limitation(s), so as not to call attention to this joint infringement problem. The prior settlement with Microsoft, with which Eolas has infamously litigated issues concerning the '906 patent, is especially significant here as Microsoft had about 80 percent of the browser systems and 90 percent or more of the client systems that operated with Adobe products during most of the relevant time period. Therefore, the Microsoft settlement should put the vast amount of otherwise accused activity beyond the reach of this follow-on case. But it is impossible to tell from Eolas's illustrative or exemplar contentions whether this is so, although Eolas has suggested in other contexts (and in meet and confer) that it may well rely on Microsoft products and services to satisfy certain of the claim limitations.<sup>5</sup> Compare, e.g., Blockbuster Inc.'s Answer and Defenses to Pl.'s First Am. Compl. for Patent Infringement, at ¶ 98 (alleging “[b]ased on the Microsoft license, Eolas has exhausted all remedies for any alleged infringement (direct, contributory, or induced) that occurs when an end-user uses [Microsoft’s] Internet Explorer [browser] to access Blockbuster’s website, www.blockbuster.com.”), with Eolas’s Reply to Def. Blockbuster Inc.’s Answer and Defenses to Pl.’s First Am. Compl. for Patent Infringement (denying paragraph 98’s allegations). If indeed Eolas is seeking to double-dip in this way, that should be clear from compliance with Local Patent Rule 3-1(b) and can be efficiently resolved.

**3. Alleging Indirect Infringement Does not Avoid the Joint Infringement Problem or Bring Eolas’s Contentions Into Compliance.**

Eolas’s allegations of contributory infringement and inducement, *i.e.*, that Adobe knowingly intended and encouraged others to infringe the patents, or provided components of infringing systems that have no substantial noninfringing uses, do not save Eolas’s contentions.

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<sup>5</sup> Contrary to Eolas’s position, infringement is defined as one who acts “without authority.” 35 U.S.C. § 271(a). Thus, if a product is licensed, there can be no infringement.

Rather, they further highlight the problem confronting Adobe when it comes to understanding how to defend itself.

This Court is thoroughly familiar with the law requiring proof of direct infringement as a predicate to a finding of indirect infringement. *See, e.g., i4i Ltd. Partnership v. Microsoft Corp.*, 670 F. Supp. 2d 568, 577 (E.D. Tex. 2009); *Mass Engineered Design, Inc. v. Ergotron, Inc.*, 633 F. Supp. 2d 361, 377 (E.D. Tex. 2009). Thus, to demonstrate inducement here, Eolas will have to ultimately show who and what Adobe was inducing and that the ultimate direct infringer(s) were controlled or directed by Adobe. With respect to contributory infringement, Eolas will have to demonstrate that Adobe's products lack substantial noninfringing uses and were intended for use in infringing systems. But the glaring holes in Eolas's infringement contentions leave Adobe to wonder to what direct infringement it is contributing or encouraging. While Eolas includes snippets from Adobe manuals and files as alleged evidence of inducement, those materials do not answer any of the component identification questions raised by the claims as discussed above. Put another way, suggesting Adobe products can be used with a "browser application," for example, still sheds no light on which specific browser applications are accused, or who might have used them with Adobe's products. And, if Adobe cannot divine from Eolas's charts how its *own* actions infringe, it cannot comprehend what it is encouraging others to do or how its products are allegedly being included in such infringement.

Nevertheless, Adobe's current motion is *not* seeking to dismiss or obtain dispositive relief regarding any of Eolas's claims. Rather, Adobe is merely asking to be provided definitive notice of each accused instrumentality that Eolas claims infringes and how—whether through joint infringement with others or inducement of infringement by others—by identifying what other entities' products, services, or actions (including Microsoft's) are allegedly involved.

Indeed, in light of the settlement with Microsoft, there is a question as to whether or how much residual liability might remain for Adobe, if any. This clarity is necessary so that Adobe can develop its defenses and take discovery accordingly.<sup>6</sup>

### **III. MOTION FOR EXPEDITED RELIEF**

The issues raised by this motion need to be addressed at the Court's earliest convenience so as to avoid waste of resources and provide clarity needed for both courts to coordinate their pending cases. Adobe asks that the Court require the Plaintiff to file an opposition on an expedited basis and to consider this motion after Plaintiff responds.

### **IV. CONCLUSION**

For all of the reasons stated herein, Adobe requests that the Court order Plaintiff to respond to this motion on an expedited basis, grant the motion, and then conduct a case management conference promptly to make this litigation manageable.

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<sup>6</sup> This Court's Local Patent Rules were modeled upon those of the Northern District of California. Effective December 1, 2009, that district added a requirement that infringement contentions must contain "[f]or each claim which is alleged to have been indirectly infringed, an identification of any direct infringement and a description of the acts of the alleged indirect infringer that contribute to or are inducing that direct infringement. Insofar as alleged direct infringement is based on joint acts of multiple parties, the role of each such party in the direct infringement must be described." N.D. Cal. Patent L.R. 3-1(d). Given this case's complexity, Eolas should be required to do the same.

Dated: July 16, 2010

Respectfully submitted,

**By:** */s/ David J. Healey*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic mail are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 16<sup>th</sup> day of July, 2010. Any other counsel of record will be served via First Class U.S. Mail on this same date.

*/s/ David J. Healey*

\_\_\_\_\_  
David J. Healey

**CERTIFICATE OF CONFERENCE**

The undersigned hereby certifies that, in compliance with Local Rule CV-7(h), counsel for Adobe Systems Incorporated conferred in good faith with counsel for Eolas Technologies, Inc., on July 14, 2010. Counsel for Eolas indicated that it opposes the motion. The July 14, 2010 conference was a long discussion that followed weeks of negotiation and other meetings on these issues at which time both sides' positions were vetted and it was agreed an impasse was reached on the issues in this motion.

*/s/ David J. Healey*

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David J. Healey