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

Eolas Technologies Incorporated,	§	
	§	
Plaintiff,	§	**Civil Action No. 6:09-cv-446**
	§	
	§	
vs.	§	
	§	
Adobe Systems Inc., Amazon.com, Inc.,	§	**JURY TRIAL**
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	§	
	§	
Defendants.	§	

PLAINTIFF EOLAS' RESPONSE IN OPPOSITION TO ADOBE SYSTEM INCORPORATED'S OPPOSED MOTION REQUESTING CASE MANAGEMENT CONFERENCE TO ADDRESS PLAINTIFF EOLAS'S INFRINGEMENT CONTENTIONS

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I. INTRODUCTION

Plaintiff Eolas Technologies Inc. ("Eolas") files this response in opposition to Adobe Systems Incorporated's Opposed Motion Requesting Case Management Conference to Address Plaintiff Eolas' Infringement Contentions (Dkt. 367) ("Motion"). Although the Court has ordered a case management conference, Eolas files this Response to address the various complaints raised in Adobe's Motion.

First, Adobe does not require relief from the Court in order to comply with its discovery obligations. The Agreed Discovery Order requires the parties to work together with respect to conducting focused discovery—for example, by sharing proposed search terms. Eolas has offered on multiple occasions to work with Adobe to develop search terms to help it narrowly tailor the scope of its discovery. Adobe has yet to take Eolas up on its offers, instead filing its Motion.

Second, Eolas' detailed infringement contentions fully comply with the requirements of the Patent Rules. As required by P.R. 3-1(b), Eolas' infringement contentions specifically identify each accused instrumentality, not "mere examples or illustrations of possible infringement" as Adobe contends. Motion at 1. Eolas' infringement contentions identify the following Adobe products as infringing the claims of the patents-in-suit[1] either directly or indirectly: (i) the Flash, Shockwave and PDF plug-ins and media players for browsers on PCs and mobile devices,[2] and (ii) the various Adobe websites that make use of this technology.[3] Eolas contends that Adobe directly infringes by its own use of this technology (*e.g.* on its own

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[1] "Patents-in-suit" means Patent Nos. 5,838,906 ("'906 patent") and 7,599,985 ("'985 patent").

[2] *E.g.* http://www.adobe.com/products/flashplayer/systemreqs/; http://get.adobe.com/shockwave/; http://get.adobe.com/reader/

[3] *E.g.* www.Adobe.com, CookBooks.Adobe.com, StudentEditions.Adobe.com, tv.adobe.com, labs.adobe.com, www.photoshop.com, cocomo.acrobat.com, www.adobe.com/financial, and www.adobe.com/manufacturing. Eolas also accuses Adobe's "search buddy" functionality.

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web pages) and that Adobe indirectly infringes by inducing or contributing to others' use of these products in an infringing way. Eolas' allegations are straightforward and identify "each" accused instrumentality. There is nothing "vague" about Eolas' contentions.

Third, Adobe's complaints related to the scope of the Microsoft license and Adobe's defenses of non-infringement, license, implied license, and exhaustion are premature. Eolas' position with respect to Adobe's defenses of license, implied license and exhaustion need not be stated in its infringement contentions, and Adobe's discussion of Microsoft and the Microsoft license is a premature attempt to advance this case to the dispositive motion phase.

II. ARGUMENT

A. Adobe Does Not Require Relief From The Court With Respect To Its Document Production Obligations

Adobe's request for Court intervention to discuss parameters for document production (Motion at 2) is premature. Eolas has offered on multiple occasions to work with Adobe to help it narrowly tailor the scope of its discovery. Adobe has yet to take Eolas up on its offers, instead filing its Motion.

The Agreed Discovery Order requires that the parties work together to conduct focused discovery. With respect to electronically stored documents, the Discovery Order states that "the parties" should "meet[] and confer[] on lists of search terms to be utilized in searching the electronic files." Dkt. 247 at 2. Eolas has offered on multiple occasions to work with Adobe— as it has worked with other defendants[4]—to craft a narrowly defined set of search terms and document custodians to help minimize the discovery burden on Adobe. Adobe has yet to propose a set of search terms or document custodians.

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[4] For example, Eolas worked with counsel for Oracle America, Inc. and CDW with respect to the search terms these Defendants are using to search their electronically stored documents. Ex. 2.

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Nevertheless, in response to Adobe's concerns, Eolas has tried to help Adobe narrow the scope of its document production. Ex. 1; Ex. 9. For example, Eolas has written to Adobe, stating, in-part, that "Eolas is not seeking—nor has it asked Adobe to produce—any documents or things related to the operation of versions of the accused products (e.g. source code) only sold before October 2003." Ex. 9. To further reduce Adobe's document production obligations, Eolas offered to assist Adobe "in complying with your source code production obligations" by working "to identify representative versions of the accused products to help reduce this [source code production] burden." Ex. 10. Additionally, in order to streamline the case and further minimize the discovery burden on Adobe, Eolas has agreed to withdraw its infringement contentions against Adobe's content creation tools. Ex. 1 (correspondence from Adobe's counsel stating "your team indicated to ours during the meet and confers regarding Adobe's motion for a case management conference that Eolas would be dropping its allegations against Adobe's authoring tools.") These tools comprise a large subset of the previously accused products and should—as Adobe recognizes in footnotes 2 and 3 of its Motion—significantly narrow the scope of its discovery obligations.

Eolas remains willing to work with Adobe to narrow the scope of Adobe's discovery obligations. However, until Adobe engages in a good faith effort to work with Eolas pursuant to the Agreed Discovery Order, Adobe's request for further Court-ordered parameters to govern document production is premature.

B.   **Eolas' Infringement Contentions Are Detailed And Fully Comply With The Local Patent Rules**

1.   **Eolas' Infringement Contentions Identify "Each" Accused Instrumentality**

Contrary to the assertions in Adobe's Motion, Eolas' infringement contentions fully comply with P.R. 3-1(b) by identifying "each" accused Adobe instrumentality with specificity, including identifying product names and numbers as appropriate. For example:

- In the infringement chart entitled "906 - Adobe - Flash - Chart 1," Eolas specifically identified the accused instrumentalities as: "www.Adobe.com, CookBooks.Adobe.com and StudentEditions.Adobe.com, etc. (hereinafter referred to as "Adobe's web pages"). Ex. 3 at 1.

- In the infringement chart entitled "906 - Adobe - Authoring Tools and Players," Eolas specifically identified the accused instrumentalities as: "Flash Player," "Flash Player 10.1," "Flash Player for Pocket PC," "Flash Lite," and "Shockwave." Ex. 2 to Adobe's Motion at 10-12.

- In the infringement chart entitled "906 - Adobe - Flash 10.1 and Flash Lite for Mobile Devices," Eolas specifically identified the accused instrumentality as "Adobe Flash Player 10.1 for mobile devices." Ex. 4 at 1.

See also Exs. 5-7; Ex. 8 at 12 (excerpts of the infringement contentions for the remaining Adobe products). Eolas specifically identified each of the accused instrumentalities, not "mere examples or illustrations of possible infringement." Motion at 1.

2. **Eolas' Infringement Contentions Provide Adobe With Eolas' Theory of Infringement**

In accordance with P.R. 3-1(c), Eolas' infringement contentions include charts for each accused Adobe product. As shown below, these charts provide, for each element of each asserted claim, a discussion of where the element is found within the accused Adobe product.

Adobe complains that Eolas' infringement contentions merely "repeat boilerplate statements and screenshots that provide no insight into how the claim language is supposedly satisfied in operation . . . ." Motion at 5. This is not true. As shown in the excerpts below (with respect to claim 1 of the '906 patent and the infringement chart for Adobe's web pages), Eolas specifically identifies—in great detail—each of the nine elements that Adobe contends are missing from Eolas' contentions. *Id.*

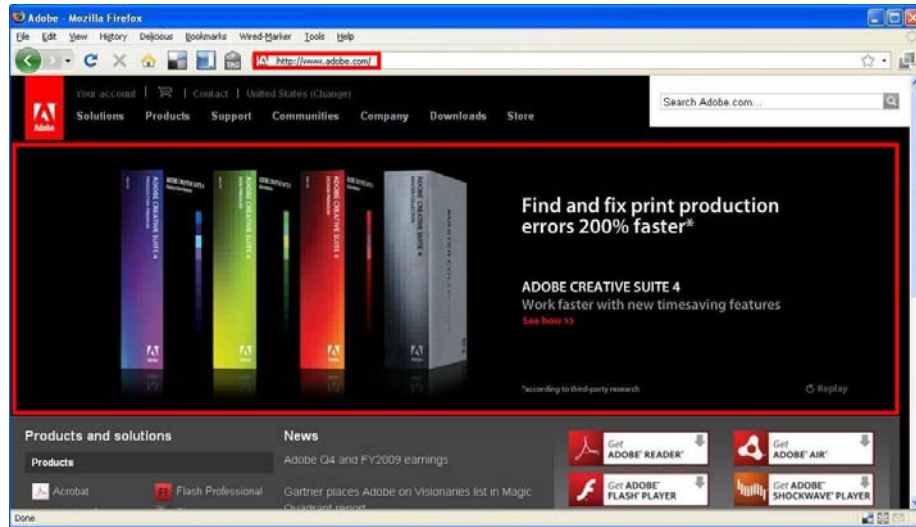**a.** **Eolas Identifies The "Client Workstation"**

Adobe complains that Eolas has not identified "the client work station." Motion at 6. Adobe is mistaken. Eolas identifies the client workstation as the computer or other device used by "[u]sers of Adobe's websites" to access the accused web pages. *See, e.g.* Ex. 3 at 9. Eolas contends that these client workstations "operate in a hypermedia network environment" and "execut[e] browsers." *Id.* For example, this screenshot shows the browser on the client workstation receiving Adobe's web page from an Adobe server (the red box in the bottom corner identifies the Adobe server):

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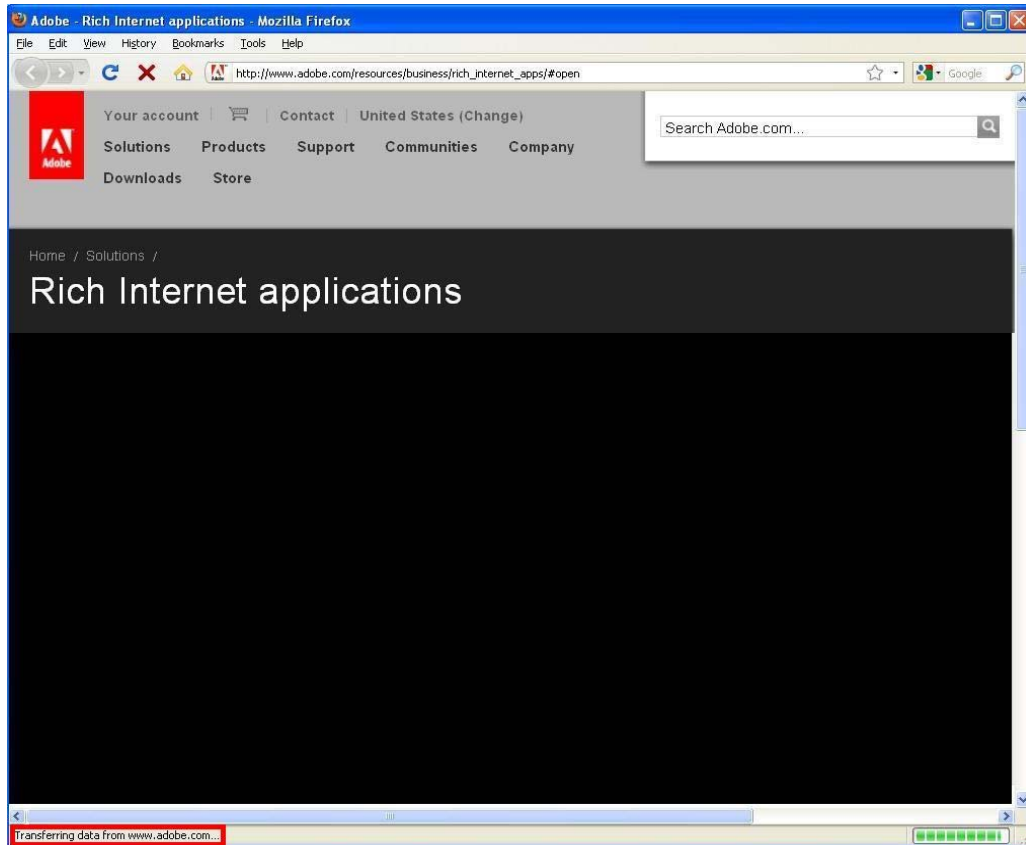
Id. at 13. The chart provides additional screenshots of the users' client workstations, as well as the IP address of the client workstation. *Id.* at 9-29. The chart also includes screenshots of network transactions between the client workstation and the network server. *Id.*

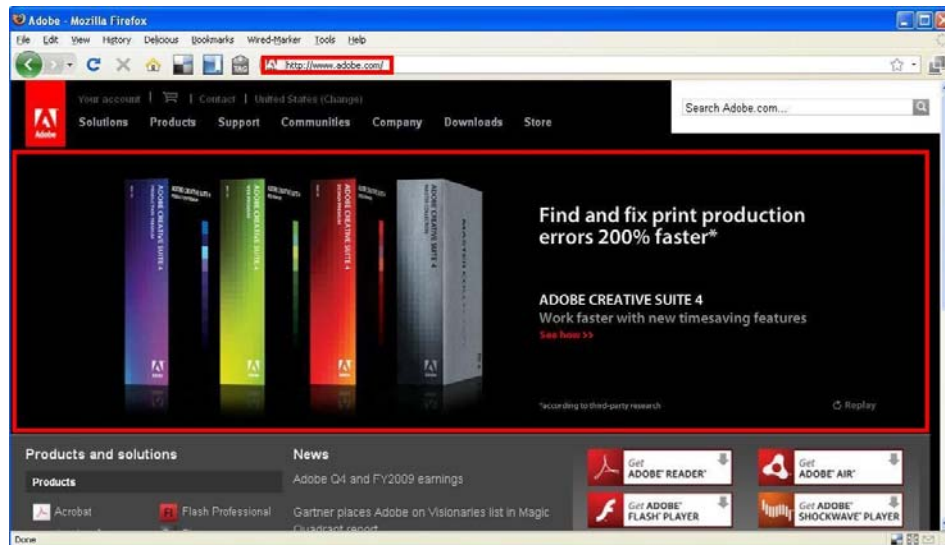### b.   Eolas Identifies The "Browser Application"

Adobe also complains that Eolas has not identified "the browser application." Motion at 6-7. Not so. The "browser application" is identified in Eolas' infringement contentions as what the "[u]sers of Adobe's websites" use to access the Adobe web pages. *See, e.g.* Ex. 3 at 29-30. Eolas contends that "Adobe's servers format the communications so that the browser 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." *Id.* at 30. For example:

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Id. at 33. As shown in the above screenshot, the chart provides screenshots of the users' client workstations executing a browser application.

c. Eolas Identifies The "Browser-Controlled Window"

Adobe next complains that Eolas has not identified the "browser-controlled window." Motion at 6. Again, Adobe is mistaken. Eolas' infringement charts provide screenshots showing the display within a browser-controlled window:

Ex. 3 at 41. The browser-controlled window is identified by the heavy red box in the above screenshot.

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d. Eolas Identifies The "Network Server"

Adobe next argues that Eolas has not identified the "network server." Motion at 6.

However, Eolas' charts identify the network server as the servers that host Adobe's web pages:

> Adobe's servers transmit a series of communications to client workstations in the distributed hypermedia network. Adobe's servers format the communications so that the client workstation receives, from the network server over the network environment, at least one file containing information to enable a browser application to display at least a portion of a distributed hypermedia document within a browser-controlled window.

Ex. 3 at 9-10. For example, this screenshot from Eolas' infringement contentions shows the geographic location, identity and type of the Adobe network server:
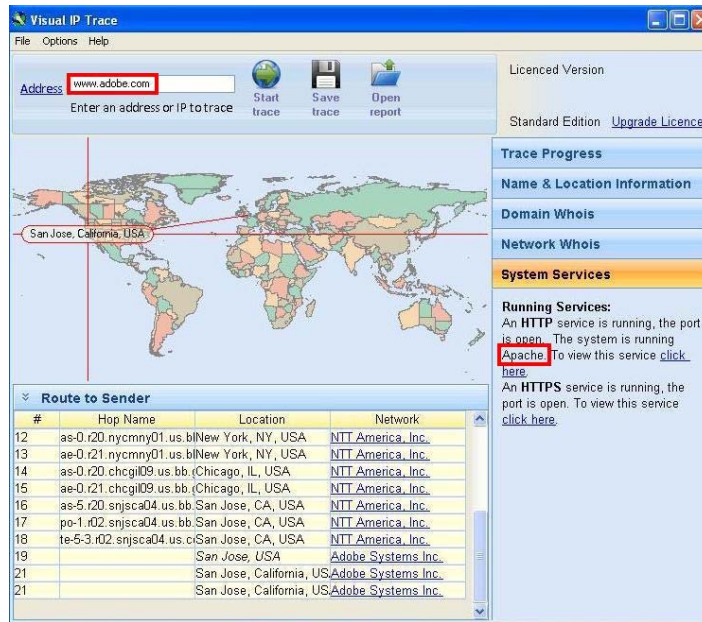
Id. at 14.

e. Eolas Identifies The "Hypermedia Document"

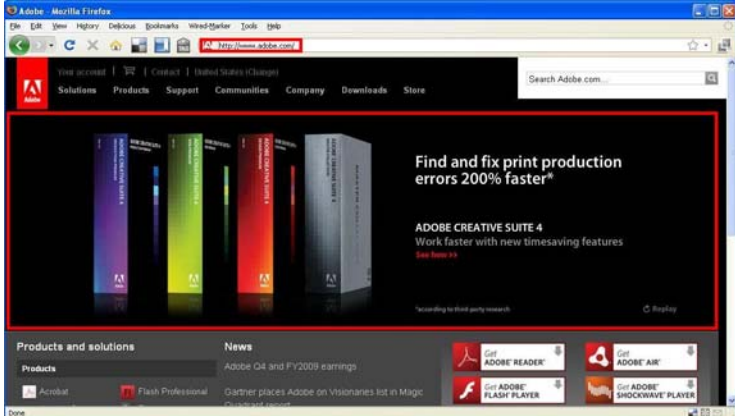Adobe asserts that Eolas has not identified the "hypermedia document." Motion at 6. This too, is not true. Eolas' infringement contentions identify the Adobe web pages as the hypermedia documents and include excerpts of the HTML (*i.e.* "HyperText Markup Language")

code for these hypermedia documents. *See, e.g.* Ex. 3 at 29-39. For example, when the Adobe

code shown on the left is parsed, the Adobe web page shown on the right is displayed:
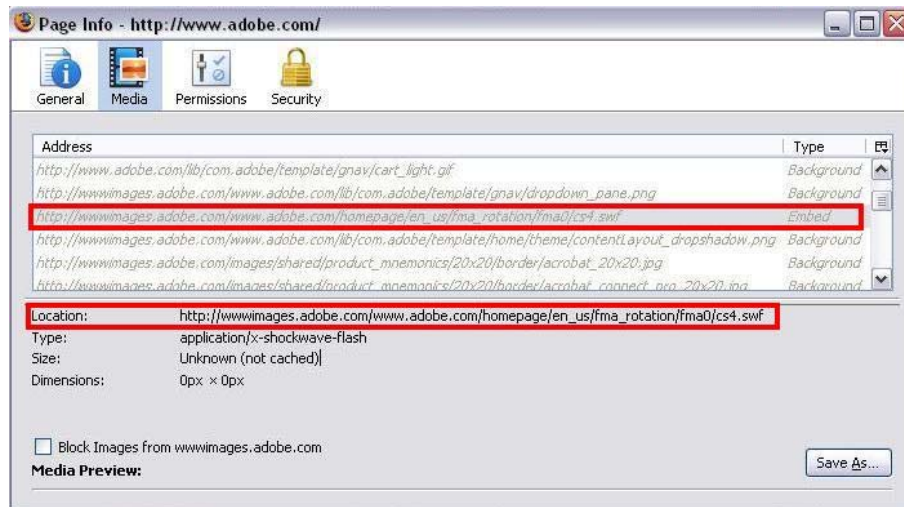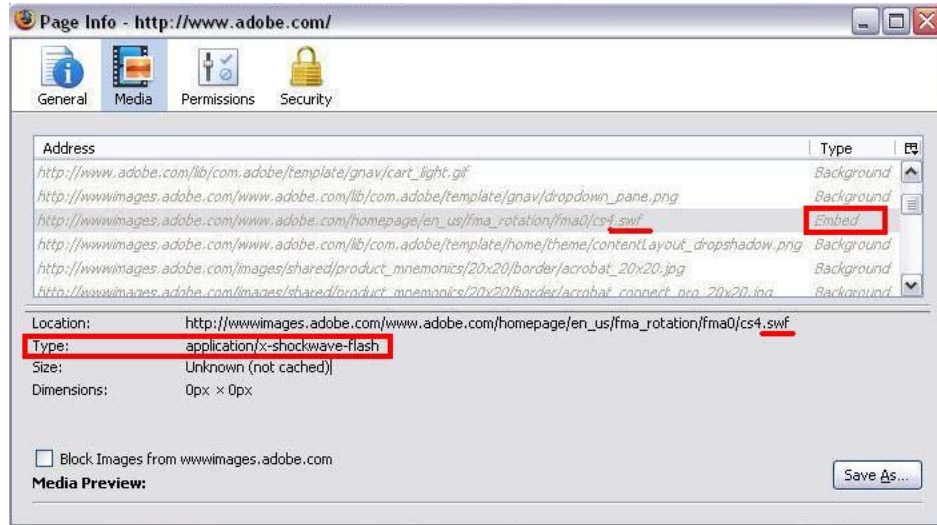

f. Eolas Identifies The "Object"

Adobe also complains that Eolas has not identified the "object." Motion at 6. Again,

Adobe is mistaken. Eolas' charts identify the object as the Flash content embedded in the web

page (*e.g.* as shown by the heavy red box in the above screenshot), and as denoted by the heavy

red boxes in this image:

Ex. 3 at 47. As shown under the "type" column, the ".swf" file (*i.e.* the flash object) is

"embed[ed]" in the web page. *Id.*

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g. Eolas Identifies The "Executable Application"

Next, Adobe contends that Eolas has not identified the "executable application." Motion at 6. Adobe is mistaken. Eolas' charts identify the executable application as the Flash player, as indicated by the heavy red boxes in this image:

Ex. 3 at 56. As illustrated above, the executable "application" is "x-shockwave-flash." *Id*.

h. Eolas Identifies The "End-User"

Adobe next complains that Eolas has not identified the "end-user." Motion at 6. Again, Adobe is mistaken. Eolas' charts identify "end-user[s]" as "[u]sers of Adobe's websites." *See, e.g.* Ex. 3 at 9.

i. Eolas Identifies The "Network Environment That Is A Distributed Hypermedia Environment"

Finally, Adobe complains that Eolas has not identified the "network environment that is a distributed hypermedia environment." Motion at 6. Here too, Adobe is mistaken. Eolas' charts identify the "network environment that is a distributed hypermedia environment" as the internet. *See, e.g.* Ex. 3 at 9-29.

As is apparent from the foregoing, Eolas' infringement contentions fully comply with the Patent Rules by "identifying specifically where each element of each asserted claim is found

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within each Accused Instrumentality . . . ." P.R. 3-1(c). No more is required. In particular, the Patent Rules "do not require the disclosure of specific evidence nor do they require a plaintiff to prove its infringement case." *Eon Corp. IP Holdings, LLC v. Sensus USA, Inc.*, 2010 WL 346218, at *2 (E.D. Tex. Jan. 21, 2010) (citing *Realtime Data, LLC v. Packeteer, Inc.*, No. 6:08-cv-144, 2009 WL 2590101, at *5 (E.D. Tex. Aug. 18, 2009) (stating that "[i]nfringement contentions are not intended to require a party to set forth a prima facie case of infringement and evidence in support thereof")).[5]

3. Adobe Should Not Be Permitted To Raise Dispositive Issues Under The Guise Of A Challenge To Eolas' Infringement Contentions

Adobe's Motion improperly conflates assertions regarding the sufficiency of Eolas' infringement contentions with whether some of its infringement is excused by virtue of Eolas' license with Microsoft. But any defenses that Adobe may raise based on the Microsoft license agreement are separate and apart from, and not affected by, Eolas' infringement contentions. Resolution of issues pertaining to the Microsoft license agreement may not only implicate claim construction, but may also present factual issues that are better reserved for the dispositive phase of this case.[6] Such issues are not properly decided in the context of Adobe's motion requesting a case management conference related to the sufficiency of Eolas' infringement contentions.

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[5] Adobe's reliance on *Eon* is misplaced. Although the *Eon* court required supplementation, it did so because "[t]he description of the accused system explicitly references only six of the eleven disclosed accused instrumentalities." *Eon*, 2010 WL 346218, at *3. Here, however, Eolas' infringement contentions identify where each element of each asserted claim is found in each of Adobe's accused products, not just a subset of those products.

[6] In addition to implicating the proper construction of the "browser" claim term, Adobe's Motion also asserts that the "operating system" is "implicate[d] [by] a number of the claim elements." Motion at 7. Not so. In fact, in Eolas' prior case against Microsoft, Judge Zagel expressly found that the claims of the '906 patent did not include the operating system. For example, Judge Zagel's construction of the "executable application" claim term was "any computer program code, *that is not the operating system* or a utility, that is launched to enable an end-user to directly interact with data." *Eolas Techs. v. Microsoft Corp.*, 2000 U.S. Dist. LEXIS 18886, at

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C. **Adobe's Request That The Court Resolve Its Defenses Of Non-Infringement, License, Implied License And Exhaustion Is Premature**

1. **Adobe's Attempt To Have The Court Address The Scope Of The Microsoft License Is Premature**

Adobe complains that Eolas' infringement contentions prevent resolution of "the issue of the scope of the Microsoft license, and the exhaustion effect of that license." Motion at 3. In other words, Adobe's complaint is not one of insufficient notice provided by Eolas' infringement contentions, but rather a desire to resolve the scope and effect of the Microsoft license.

Adobe cites no law for the proposition that Eolas' position with respect to the implied license and exhaustion issues should be presented in its infringement contentions. In fact, the authority Adobe cites leans in the opposite direction. *Eon*, 2010 WL 346218, at *3-4 (finding "[w]hether certain documents support or refute EON's infringement case is a question for summary judgment or trial" and that plaintiff's "position regarding the meaning of [certain claim] terms are properly reserved for claim construction briefing."). Resolution of these issues properly waits for the dispositive phase of this case. *Id.; see also* Dkt. 242 (setting dispositive motion deadline for July 1, 2011).

2. **Adobe's Discussion Of Microsoft's Complaint In Illinois Is Premature**

Adobe's Motion spends considerable time discussing—and drawing inferences from— the case Microsoft recently filed in the U.S. District Court for the Eastern District of Illinois. Given that Microsoft filed its complaint under seal, Eolas cannot discuss the specifics of

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*56 (N.D. Ill. Dec. 28, 2000) (emphasis added). On appeal, the Federal Circuit affirmed Judge Zagel's claim construction of this term. *Eolas Techs., Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1341 (Fed. Cir. 2005). Judge Zagel also held "utilized by said browser to identify and locate means that the enumerated functions are performed by the browser." *Eolas*, 2000 U.S. Dist. LEXIS 18886, at *56.

Microsoft's allegations.[7] Eolas will respond to Microsoft's allegations in Illinois according to the procedures of that court. Presently, Eolas' deadline to respond to Microsoft's complaint is August 13, 2010 (approximately eleven days after Eolas' deadline to file this response to Adobe's Motion). Given the early stage of the Microsoft proceeding and that Eolas has not yet answered or responded to Microsoft's allegations, the relief Adobe purports to seek is premature.

3. Adobe's Attempt To Have The Court Address Its Non-Infringement Arguments Is Premature

Adobe asserts in its Motion that practicing at least one of the method claims of the patents-in-suit requires activity by multiple actors. Motion at 9. For example, Adobe states that "[a]s 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." *Id*. Whether the respective claims of the patents-in-suit may be satisfied by one actor or require multiple actors acting in concert raises issues of claim construction and infringement, and those issues are not yet ripe for the Court's consideration. *Eon*, 2010 WL 346218, at *3-4; *see also* Dkt. 242 (setting *Markman* hearing for March 3, 2011 and dispositive motion deadline for July 1, 2011). Nonetheless, as detailed above, Eolas' infringement contentions comport with P.R. 3-1(c) by identifying where each element of each asserted claim is found within the accused Adobe products.

III. CONCLUSION

Adobe needs no additional help to comply with its document production obligations—particularly where it has yet to engage Eolas in the meet and confer procedures outlined in the Discovery Order. Moreover, Eolas' infringement contentions comply with the requirements of

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[7] It is unclear how Adobe has authority to disclose in its publicly filed Motion what Microsoft purportedly stated in a complaint filed under seal in another district. *See*, *e.g.*, Motion at 1.

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the Patent Rules, and Adobe has not shown otherwise. In reality, Adobe's Motion is an attempt to extract premature summary disposition of Adobe's defenses. Accordingly, the Court should decline Adobe's request to resolve these issues now—in the context of a motion ostensibly directed to the sufficiency of Eolas' infringement contentions—and instead allow the case to proceed according to the schedule set by the Court.

Dated: August 2, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing document were served to all counsel of record via the Court's ECF system.

        /s/ Josh Budwin
        Josh Budwin