

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

EOLAS TECHNOLOGIES, INC.

Plaintiff,

v.

ADOBE SYSTEMS INCORPORATED,
ET AL.,

Defendants.

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

JURY TRIAL DEMANDED

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

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I. INTRODUCTION

While the Court has already granted Adobe's request for a case management conference, Adobe files this reply in order to set the record straight regarding assertions Eolas has made, particularly regarding the scope and nature of its infringement contentions.

II. ARGUMENT

A. Eolas Cannot Justify How Its "Exemplary" Claim Charts Identify "Each" Accused Instrumentality As Required By the Local Patent Rules

In its opening brief, Adobe explained that Eolas' asserted claims require multiple components, multiple actors, and cannot be infringed by any Adobe product by itself because, at least, none of Adobe's products is or includes the claimed browser. As a casual study of the claims reveals, they generally concern a particular configuration for the transfer of hypermedia documents between a server and a browser, and how that browser processes and displays interactive compound documents. This, in short, is a joint infringement case. *See, e.g., Golden Hour Data Systems, Inc. v. emsCharts, Inc. and Softtech, LLC*, ___ F.3d ___, slip op. at 27 (Fed. Cir. August 9, 2010) (discussing the joint infringement rule). In its brief, Adobe relied on and stated what Eolas told and confirmed to Adobe, that Eolas' charts provide "examples" of how accused systems infringe rather than identifying each accused model/version name and number, each accused combination of components, and so forth. In its opposition brief, however, Eolas contradicted its prior statements to Adobe, arguing that it "specifically identified each of the accused instrumentalities, not 'mere examples or illustrations of possible infringement.'" Eolas Br. (D.I. 375) at 1. Eolas' position is belied by its infringement charts.

By way of example, each chart shows a Firefox web browser in the combination alleged to infringe. Firefox is an open source web browser developed by the Mozilla Foundation, and Mozilla is not a defendant in this case. If the totality of Eolas' allegations—the exhaustive list of

all asserted infringements—is those depicted in its claim charts, then Eolas has met the Local Rule and the charts specify the limits and bounds of its case. If the charts properly present the limit of Eolas’ case, a prompt mediation may be productive, as the specific combination of products depicted is manageable. This assumes that the contentions presented are the complete set of infringement allegations as required by the Local Rule, not illustrative, and that no other combinations or products will be included in any infringement case here put to trial by Eolas.

Setting aside other defects in the charts and focusing on the simplest component to consider, the “browser” (one of many required components that Adobe does not make), Eolas claims in its papers that its thousands of pages of charts “identif[y] the browser application.” Eolas Br. at 6. But, instead of pointing to a particular and comprehensive list of software product names and versions from its claim charts, Eolas’ brief points only to the kind of generic language about which Adobe is complaining: “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.*” *Id.* (emphasis added). Moreover, Eolas ignores the footnote in all but one of its charts stating that the “[a]llegation [is] not limited to the browser in use.”¹ These statements prove Adobe’s point—although Eolas has presented screenshots from a Firefox browser in its claim charts, it leaves Adobe to guess exactly what other third party “browsers” it alleges are used in combination “to access the Adobe web pages.” Eolas is asking for detailed discovery on how the accused Adobe products interact with different web browsers, presumably because its infringement case requires not just generic evidence of a “browser,” but also evidence of how *each* browser (not made by Adobe) actually executes and the manner in which it processes user-generated hypermedia documents to complete the allegedly infringe. This requested discovery undercuts Eolas’ generic infringement contentions. This generic illustrative approach, which

¹ Eolas’ chart accusing Flash 10.1 on mobile devices does not identify *any* browser.

also applies to the other claim elements in Eolas' charts, flouts the specificity required by Local Patent Rule 3-1. These other elements required by the claims are even harder to identify than the "browser," and Adobe should not be required to guess at the allegedly infringing components.

Eolas' hide-the-ball approach is apparent when the Court considers that Eolas has already settled with Microsoft, and that neither Microsoft's Internet Explorer web browser, nor its server software and operating systems, should constitute infringing products; note that Adobe players usually operate in a browser. If Internet Explorer web browsers are charted by Eolas, the overlap between its infringement allegations and the contractual release and license issue now being litigated in Chicago by Microsoft and Eolas would be clear and overwhelming, as the vast majority of Adobe's accused players are used in Microsoft computing environments.

Eolas concedes in its brief that resolution of the Microsoft license issue will have a significant impact on this case, including on claim construction. Eolas Br. at 11. If this is so, Eolas cannot justify pushing forward with discovery without providing clarity on the key infringement issues implicated by the license. Eolas' brief further implies that, despite its denials during meet and confer sessions, it is alleging joint infringement between and among various parties. Eolas Br. at 13; *see Golden Hour, supra*. Nonetheless, Eolas failed to identify each infringing component in its claim charts (and, therefore, each actor responsible for said components), and has not specifically identified any Microsoft products as part of this alleged joint infringement, instead leaving the issue open with its footnote asserting that its allegations are not limited to the browser depicted in its charts. Such identification of Microsoft products significantly broadens the scope of discovery in an already broad case. In fourteen pages of briefing, Eolas does not answer the key question: is any Microsoft technology accused in this

case? Because Eolas does not, and cannot, deny that the answer to this question will have a profound effect on the scope of discovery, the question is far from “premature.”

B. Contrary to Eolas’ Opposition, Adobe *Does* Require Guidance for Discovery

Eolas attempts to shift blame for the current state of discovery onto Adobe by suggesting *inter alia* that Adobe has not responded to Eolas’ invitations to discuss search terms. Adobe has had extensive discussions with Eolas’ counsel about the Rule 3-1 allegations, constituting many hours spread over several weeks, and Eolas has provided no clarity on its infringement contentions. Eolas cannot divert attention from both its failure to comply with the Local Rules and Adobe’s extraordinary efforts to meet and confer by raising a different issue altogether (and one that was never mentioned as a “cure all” during the Rule 3-1 discussions). *See, e.g.*, Exhibit A, June 28, 2010 letter from Jason Wolff to Josh Budwin re document production issues.

During the many hours of discussion leading to this motion, other separate topics were periodically discussed, including that of document custodians. While Adobe is identifying those custodians Eolas has described and will cooperate with Eolas on search terms, the parties’ cooperation does not resolve the primary, and different, discovery obstacle here: the volume of illustrative depictions of infringement in Eolas’ charts. The Local Rules recognize the need for specificity in the infringement charts to guide discovery, which is lacking here.

C. Microsoft’s Suit Against Eolas Will Significantly Impact the Size and Scope of this Case, and the Court Should Consider That Impact Now

If Eolas has resolved most of its claims by settling with Microsoft, this case is likely small in comparative value, and may be amendable to early resolution, or at least quick litigation. If not, and if Eolas is seeking to “wire around” its release and license, then the litigation will be neither short nor easy. Microsoft’s traditionally large market-share in the browser, operating system and server software markets for PC’s (or the market for operating systems, if the web

browser is part of the operating system) is well-known, and it is very likely that taking Microsoft products out of any combination will dramatically reduce the size of this case.

It is undisputed that Microsoft has sued Eolas for breach of their settlement agreement in Illinois. It is also undisputed that Microsoft makes widely-used operating systems, web browsers, and web server software. As such, Microsoft's Illinois suit *will* affect the size and scope of Eolas' allegations here. The additional specificity Adobe is requesting necessarily dovetails with the existence of the Microsoft suit: *if* Eolas is relying on any Microsoft products for any of its allegations, then Adobe is entitled to know so it can gauge its liability and prepare its case. Local Patent Rule 3-1 requires Eolas to disclose this information. The possibility that much of the potential exposure in this case might be resolved in Illinois by the court that supervised the prior case and settlement should be accounted for in this Court's schedule and case management plan going forward, as that resolution has the potential to save the both parties and this Court from unnecessary effort, time and expense.

III. CONCLUSION

For all of the reasons stated herein, Adobe requests that, at the case management conference currently set for August 31, the Court strike Eolas' present "illustrative" contentions because they do not comply with the Patent Rules; (2) order Eolas to supplement its infringement contentions to identify each accused instrumentality, including to specify every instance in which Eolas alleges that any Microsoft technology is involved; and (3) 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. Finally, Adobe asks that the schedule here be adjusted to deal with the proposed new infringement contentions and the litigation between Microsoft and Eolas in Illinois.

Dated: August 12, 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 12th day of August, 2010. Any other counsel of record will be served via First Class U.S. Mail on this same date.

/s/ David J. Healey

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