



## I. INTRODUCTION

Adobe's Reply abandons many of the arguments regarding the alleged insufficiency of Eolas' infringement contentions that it made in its opening brief. *Cf.* Dkt. 367 at 6 (arguing Eolas' infringement contentions failed to set forth at least nine elements of the asserted claims) with Dkt. 383 at 2 (focusing solely on the "browser" claim element). Contrary to Adobe's remaining assertions, Eolas' infringement contentions comply with the Patent Rules. Eolas' infringement contentions are detailed and specific, and serve to put Adobe on notice of Eolas' theories of infringement. *See, e.g.*, Dkt. 375 at 5-12. However, Adobe wants more. Contrary to Adobe's position, Eolas' infringement contentions are not required to provide proof and evidence setting forth a prima facie showing of infringement. Likewise, Eolas' infringement contentions need not set forth Eolas' rebuttals to Adobe's affirmative defenses of license, implied license and exhaustion.

## II. ARGUMENT

### A. Eolas' Infringement Contentions Specify The Bounds Of Its Infringement Case.

Adobe argues that Eolas' infringement contentions are deficient because none of Eolas' asserted claims can "be infringed by any Adobe product by itself because, at least, none of Adobe's products is or includes the claimed browser." Dkt. 383 at 2. This is incorrect. Just because Adobe does not make a browser does not mean that it cannot be directly liable for Adobe's own use of its infringing technology with a browser or indirectly liable for others' use of Adobe's infringing technology with a browser. Contrary to Adobe's assertion, this is not necessarily "a joint infringement case." *Id.* And, if it were, Eolas' contentions are detailed enough to put Adobe on notice of its infringement theories. Eolas' infringement contentions need not "set forth a prima facie case of infringement."<sup>1</sup>

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<sup>1</sup> *See Eon Corp. IP Holdings, LLC v. Sensus US, Inc.*, No. 6:09-cv-116, 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 "[i]nfringement contentions are not intended to require a party to set forth a prima facie case of infringement and evidence in support thereof"))).

Eolas' contentions serve the notice function of the Patent Rules. *See, e.g.*, Dkt. 375, Ex. 3 at 1 (stating “[u]sers of Adobe Systems Inc.’s websites” are the direct infringers); *id.*, Ex. 4 at 1 (stating “[u]sers of Adobe Flash Player 10.1 for mobile devices” are the direct infringers); *id.*, Ex. 5 at 1 (stating “[u]sers of Adobe’s websites are the direct infringers); *id.*, Ex. 6 at 1 (same); Ex. 7 at 1 (stating “[u]sers of Adobe’s Search Buddy Functionality” are the direct infringers); *id.*, Ex. 8 at 4 (stating “users of Adobe pdf authoring tools” are the direct infringers). These “users” utilize Adobe’s infringing technology with a browser. This allegation — and the others Eolas makes — are straightforward.

In this example, Adobe is directly liable for the “users’” infringement when that “user” is an Adobe employee. For example, in the infringement chart for the Flash player for mobile devices, Eolas’ infringement contentions provide screenshots of an Adobe employee utilizing the mobile Flash player, on a mobile device with a browser. *See* Dkt. 375, Ex. 4 (all of the screenshots are from a blog hosted by Adobe, showing an Adobe employee utilizing a mobile device with a browser to perform all of the elements of the asserted claims of the asserted patents). Adobe is indirectly liable when that “user” is a person other than an Adobe employee.<sup>2</sup>

**B. Eolas’ Infringement Contentions “Provide Specific Theories Of Infringement And Representative Examples Of The Alleged Infringement.”**

Adobe takes issue with whether Eolas’ infringement contentions “specifically identified each of the accused instrumentalities” as opposed to “examples of illustrations of possible infringement.” Dkt. 383 at 3. As Eolas explained in its Opposition to Adobe’s Motion, “[t]he accused products are (i) the Flash, Shockwave and PDF plug-ins and media players for browsers on PCs and mobile devices, and (ii) the various Adobe websites that make use of this technology.” Dkt. 375 at 1. These are the accused Adobe products — which are specifically identified in Eolas’ infringement contentions.

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<sup>2</sup> With respect to indirect infringement, Adobe has long had knowledge of the patents-in-suit, even requesting a reexamination of one of them. Ex. 1. Similarly, Adobe was actively engaged in undermining Microsoft’s purported attempt to design-around the patents. Ex. 2. These facts illustrate its culpable mental state.

To the extent Adobe contends that the accused products are really these Adobe products together with a specific browser, Eolas has nonetheless complied with its obligations under the Patent Rules to put Adobe on notice of its theories of infringement. As this Court has recognized:

In dealing with something like a website, it would be unrealistic to expect plaintiffs to provide screen shots for every possible manifestation of the alleged infringement. Instead, plaintiffs should provide specific theories of infringement and representative examples of the alleged infringement so as to give defendants fair notice of infringement beyond that which is provided by the mere language of the patent claims themselves.

*Orion IP, LLC v. Staples, Inc., et al.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006) (Davis, J.). At the very least, Eolas' infringement contentions "provide specific theories of infringement" and "representative examples of the alleged infringement." *Id.* Eolas' infringement contentions comply with the standards of the Patent Rules and this Court's prior authority.

What Adobe apparently requests is for Eolas to go through its infringement contentions and include additional screenshots for each additional type of browser, in addition to the Firefox browser already included. *See* Dkt. 383 at 2. After each screenshot of a Firefox browser, Adobe apparently wants Eolas to then include an identical screenshot, showing the very same content, from the very same Adobe accused product, being displayed in the very same way, for additional browsers. This is precisely the type of "boilerplate statements and screenshots that provide no insight into how the claim language is supposedly satisfied" that Adobe complained of in its opening brief. Dkt. 367 at 5. Providing additional screenshots with additional browsers will add nothing to Adobe's understanding of Eolas' infringement allegations and will further increase the volume of those contentions — another of Adobe's complaints. *Id.* This illustrates the discordant nature of Adobe's complaint: on one hand Adobe complains Eolas' contentions lack specificity (*see* Dkt. 383 at 2-3), and on the other hand Adobe complains that Eolas' infringement contentions are too voluminous (*see* Dkt. 367 at 4-5).

**C. Issues Related To The Microsoft License Are Only Relevant To Adobe's Affirmative Defenses — Not The Sufficiency Of Eolas' Infringement Contentions.**

The identity of the browser is only relevant to whether infringement is excused when that browser is Microsoft Internet Explorer, per Eolas' settlement and license agreements with Microsoft. This issue does not go to the sufficiency of Eolas' infringement contentions. Rather, as discussed in Eolas' Opposition (Dkt. 375 at 12-13), it goes to Adobe's affirmative defenses of license, implied license, and exhaustion. Dkt. 307 at ¶ 67 (Adobe pleading these as affirmative defenses). Adobe cites no law for the proposition that Eolas' infringement contentions are required to set forth its contention as to Adobe's, or the other defendants', affirmative defenses. *See* Adobe's Answer and Counterclaims (Dkt. 307 at ¶ 67); *see also* FED. R. CIV. P. 8(c)(1).

Moreover, Eolas informed Adobe in the meet and confer that preceded the filing of Adobe's Motion that Eolas' infringement claims do not violate the terms of Eolas' settlement and license with Microsoft. To avoid doubt on this issue, Eolas sent a letter to Adobe and all other defendants in this case which stated:

Eolas is asserting claims 1, 4, 5, 6, 9, and 10 of the '906 patent (and their dependent claims) and claims 1, 16 and 36 of the '985 patent (and their dependent claims) against the defendants only for, and is seeking damages only for, acts of infringement wherein the "browser application" limitation is satisfied by something other than Microsoft Internet Explorer.

Eolas is asserting claims 4, 5, 9, and 10 of the '906 patent (and their dependent claims) against the defendants only for, and is seeking damages only for, acts of infringement wherein the "executing, on the network server" or "said network server to execute" limitations are satisfied by something other than Microsoft server software.

Eolas is asserting claims 20, 32, 40, and 44 of the '985 patent (and their dependent claims) against the defendants only for, and is seeking damages only for, acts of infringement wherein the "communicating via a/the network server" limitation is satisfied by something other than Microsoft server software.

Ex. 3.

Read in this light, it becomes apparent that Adobe's complaint is not the sufficiency of Eolas' infringement contentions, but rather, curiosity as to Eolas' contention with respect to Adobe's affirmative defenses. The proper vehicle for ascertaining Eolas' contentions with respect to Adobe's affirmative defenses are the discovery provisions of the Federal Rules and the

Court's discovery order. No defendant — including Adobe — has served any discovery seeking Eolas' contentions with respect to the affirmative defenses it has pleaded. Nonetheless, to avoid doubt, Eolas provided the above representation to Adobe's counsel and the other defendants. Therefore, Adobe's complaints are now moot.

**D. Adobe Needs No Help To Comply With Its Discovery Obligations.**

In its Opposition to Adobe's Motion, Eolas detailed the steps it has taken to work with Adobe with respect to discovery. Dkt. 375 at 2-4. Despite the requirements imposed by the Discovery Order, Adobe has yet to propose document search terms or identify custodians. *See id.* To date, Eolas has been the one to make concessions to Adobe in an attempt to narrow the scope of Adobe's discovery obligations. *Id.* In response to Eolas' concessions, Adobe has taken no affirmative steps of its own — including those imposed by the Discovery Order.

**E. Microsoft's Suit Will Have No Impact On The Size Or Scope Of This Case.**

On August 12, 2010, Eolas moved to dismiss Microsoft's complaint in the N.D. Ill. for failure to state a claim and for failure to allege diversity jurisdiction. Ex. 4. Specifically, Microsoft failed to plead an actual breach of the License Agreement. *Id.* Instead, it only alleged the possibility of a breach. *Id.* In the alternative, Eolas requested that the Court in Illinois stay proceedings on Microsoft's allegations until after the conclusion of this case (to see if Eolas actually breaches the agreement via its infringement actions here) and/or to transfer Microsoft's complaint so that this Court may deal with the common issues. *Id.* Whether, and to what extent, Eolas breached (or will breach) the License Agreement necessarily depends on the scope and content of Eolas' infringement allegations here. Therefore, this case — and not Microsoft's Complaint in Illinois — will drive resolution of issues related to the Microsoft license.

**III. CONCLUSION**

Eolas' infringement contentions comply with the requirements of the Patent Rules and Adobe is on notice of what it must defend. The Court need not take any remedial action.

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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  
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