

1. “Narrow The Number Of Disputed Claim Terms To A Reasonable Number”

Following the submission of the parties’ P.R. 4-3 statement on October 29, 2010 (*see* Dkt. 479) and prior to the receipt of the Court’s Order on December 21, 2010, the parties continued to meet and confer concerning the disputed claim terms. In the course of these discussions, and prior to the submission of Eolas’ Opening Claim Construction Brief, Defendants determined that they would forego construction of five of the terms identified as disputed in the parties’ P.R. 4-3 statement, including “parse,” “file,” “type information,” “computer readable program product,” and “computer readable media.” *See* Dkt. 537 (Eolas’ Opening Claim Construction Brief) at fn. 1. (Hereinafter “Eolas’ Brief”).

Statement of Eolas:

Eolas remains willing to drop from construction any of the remaining terms proposed by defendants. As stated in Eolas’ Brief, Eolas believes that many of the remaining terms which defendants have proposed for construction do not require construction or construction separate from the larger phrases which defendants have also proposed for construction. *See* Eolas’ Brief at 8-28.

Statement of Defendants:

Defendants voluntarily removed the five claim terms listed above from the Markman process, thus narrowing the number of claim terms to be construed to a reasonable number. *See, e.g.,* Eolas’s Brief at 8-28. With respect to the § 112, ¶ 6 claim terms at issue, the parties’ meet and confer discussions remain ongoing, and Defendants propose to address any concrete results in their February 4, 2011 claim construction filings. Eolas’s January 25, 2011 reduction in asserted claims (discussed below) could further reduce the number of claim terms requiring adjudication.

2. “Narrow The Number Of Disputed Claims To A Reasonable Number”

Statement of Eolas:

Eolas has no intention of going to trial with all of the presently asserted claims. However, for the reasons set forth herein, Eolas is not yet able to determine which claims it is willing to drop, nor will dropping claims meaningfully reduce the number of claim construction issues in dispute. Nonetheless, and as discussed herein, if the defendants comply with their discovery obligations, Eolas agrees to drop asserted claims by January 25, 2011, which is ten days prior to the date when Defendants must file their responsive claim construction brief.

First, as Eolas noted in the P.R. 4-3 submission, dropping asserted claims will not meaningfully reduce the number of claim construction disputes the Court must resolve. Dkt. 479 at 1. As shown in Eolas’ Brief, eight of the ten disputed issues of claim construction appear in every asserted claim of the patents-in-suit. Eolas’ Brief at 8-26. And, the defendants’ contention that various claims should be construed pursuant to 35 U.S.C. § 112, ¶ 6 is belied by the absence of the word “means” together with the numerous authorities cited by Eolas. *Id.* at 26-28. Defendants are unable to demonstrate otherwise. Therefore, a reduction in the number of asserted claims at this time will not meaningfully reduce the number of claim construction disputes the Court must resolve.

Second, various defendants have largely failed to comply with their document production and source code inspection deadlines. Pursuant to the Court’s Discovery Order (dkt. 247) and the several extensions to those discovery deadlines (*see, e.g.* dkt. 381), the defendants were required to make their source code available by September 1, 2010 and complete their production of documents by various dates from September 2010 to January 2011. The failure of some defendants to comply with their discovery obligations unfairly hinders Eolas’ ability to

review their responsive documents and source code prior to making case dispositive decisions such as dropping claims.

For example, defendant J.P. Morgan has produced only 38 documents and only made its source code available for inspection on January 14, 2011. *See* Exs. D and E. J.P. Morgan's counsel has promised to work with counsel for Eolas to promptly remedy this situation. Like Texas Instruments and J.P. Morgan, Defendant Citibank has produced less than 50 documents and has only made a small amount of its source code available for inspection. *See* Exs. F and G. Citi's counsel has also promised to work with counsel for Eolas to promptly remedy this situation. Similarly, defendant Texas Instruments only began producing documents and making its source code available the week of December 20th. *See* Exs. A-C. TI's counsel has promised to work with counsel for Eolas to promptly remedy this situation. Many of the other defendants have similar discovery shortcomings.

Rather than seek Court intervention to correct these discovery shortcomings, Eolas has been working with the defendants to correct their discovery shortcomings without Court involvement. However, until all of the defendants have meaningfully complied with their discovery obligations, Eolas is unable to make decisions related to case dispositive issues such as dropping claims. Nonetheless, if the discovery shortcomings identified herein are corrected, Eolas agrees to drop asserted claims by January 25, 2011, which is ten days prior to the date when Defendants must file their responsive claim construction brief.

Contrary to Defendants' assertions below, as Eolas has consistently represented in discovery, pleadings and written correspondence, Eolas is not asserting claims against Defendants in violation of the Microsoft license agreement (*see* Section 4, below).

Statement of Defendants:

Defendants believe that Eolas can and should reduce now the number of asserted claims to a reasonable number, and Defendants welcome Eolas's promise to reduce the number of asserted claims no later than ten days prior to the date for the submission of Defendants' responsive claim construction brief, *i.e.*, by January 25, 2011. The alleged discovery concerns raised by Eolas with respect to three Defendants do not justify continuing to assert every claim of each patent-in-suit against every Defendant. Moreover, given the covenant not to sue contained in the Eolas/Microsoft license agreement, Eolas should not be asserting claims against Defendants in scenarios where Microsoft software is used in connection with any alleged infringement (*see* Section 4, below), and Eolas should now indicate which claims it is prepared to withdraw on this basis as to each Defendant.

3. "Discuss Proposals Regarding How To Narrow The Case"

The parties have met and conferred to discuss proposals regarding how to narrow the case.

Statement of Eolas:

The parties remain hopeful that settlements will be reached. As required by the Court's September 1, 2010 Order (dkt. 401), the parties have begun mediation and hope to complete mediation prior to date of the claim construction hearing. Eolas has already had a mediation session with defendant CDW. Eolas and the other defendants are presently attempting to schedule the remaining mediations as the parties and mediator are available. Eolas further believes that following claim construction, and additional discovery, it will be in a better position to group defendants for purposes of trial.

Defendants also ask for “[a] full and complete explanation from Eolas concerning its damages theories as to each Defendant.” However, to-date only defendant Adobe has served discovery related to Eolas’ damages theories. The other defendants have yet to serve such discovery. Moreover, at this stage of the case, well in advance of expert discovery, and before depositions on damages related topics, such request is premature.

The defendants also contend that “sixteen (16) of the 21 Defendants are accused of infringement based on their operation of websites that allegedly employ software provided by one or more of the remaining Defendants Adobe, Apple, Google/YouTube, and Oracle America, Inc.” This is not a correct statement—the so-called “website” defendants, as shown by Eolas’ infringement contentions, create systems that directly infringe the claims at-issue. They also directly contribute to and induce the direct infringement of the end-users. Moreover, as shown by the declarations many of these defendants provided as part of the transfer briefing, the “design, maintenance, development and strategic planning” of their accused systems “occurs at [its] facility located in Plano, Texas.” *See, e.g.* Ex H at 2 and Ex I at 2. These so-called “website” defendants thus infringe independently of things done by, or supplied by other defendants, including Adobe, Apple, Google/YouTube, and Oracle America. Accordingly, a stay as to some or all of these defendants is not warranted.

Statement of Defendants:

Defendants require additional clarity concerning the nature of and basis for Eolas’s damages theories. For example, the scope and nature of any damages base Eolas intends to advocate is unclear, which is particularly problematic given the Microsoft-related issues addressed below in section 4. A full and complete explanation from Eolas concerning its damages theories as to each Defendant would therefore be helpful.

Further Statement of Defendants Adobe, Apple, Google/YouTube,¹ and Oracle²:

The above Defendants agree that the case in its current form is not practical or manageable. Such Defendants propose that the parties submit a joint report summarizing their suggestions, if any, regarding the propriety of conducting trial in stages based on the grouping of parties, asserted claims, accused products, or otherwise at a time closer to trial.

Further Statement of Defendants Amazon.com, CDW, Citigroup, eBay, Frito-Lay, Go Daddy, J.C. Penney, JPMorgan, New Frontier Media, Office Depot, Perot Systems, Playboy, Rent-A-Center, Staples, Inc., Texas Instruments, and Yahoo!:

During the parties' various meet and confers, Eolas suggested that it would seek separate trials against groups of Defendants, although it declined to specify what specific groupings it would propose or how the trial staging would work. Indeed, a single trial involving twenty-one (21) unrelated defendants is not practical or manageable.

Sixteen (16) of the 21 Defendants are accused of infringement based on their operation of websites that allegedly employ software provided by one or more of the remaining Defendants Adobe, Apple, Google/YouTube, and Oracle America, Inc. Defendants Amazon.com, CDW, Citigroup, eBay, Frito-Lay, Go Daddy, J.C. Penney, JPMorgan, New Frontier Media, Office Depot, Perot Systems, Playboy, Rent-A-Center, Staples, Inc., Texas Instruments, and Yahoo! ("Website Defendants") believe that this case could be most efficiently managed by staying proceedings against them, pending the outcome of any trials against Adobe, Apple, Google/YouTube or Oracle America, Inc. Additionally, the Website Defendants submit that the resolution of Eolas's claims against Adobe, Apple, Google/YouTube or Oracle America, Inc.

¹ YouTube, LLC is a wholly-owned subsidiary of Google Inc. and therefore is grouped with Google.

² Oracle America, Inc. was formerly known as Sun Microsystems, Inc.

could likewise resolve (or at minimum, significantly narrow) Eolas's claims against the Website Defendants.

4. The Impact Of The Microsoft Preliminary Injunction Matter

The District Court in Illinois held a hearing on November 23, 2010 in which it denied Microsoft's request for a Preliminary Injunction. *See* Exs. J (Transcript of Nov. 23, 2010 Hearing) and K (Minute Order entered Nov. 23, 2010). The Illinois District Court also denied Eolas' request that Microsoft's action be dismissed, denied Eolas' alternative request that Microsoft's action be transferred to this Court, and set a further status conference for February 4, 2011, at 10:00 a.m. *See id.*

Statement of Eolas:

Following the November 23, 2010 hearing, the Illinois Court entered a minute order stating:

Oral argument held on 11/23/2010. Plaintiff [Microsoft] seeks a preliminary injunction to enforce the terms of a license agreement that it entered into with EOLAS in 2007. Plaintiff [Microsoft] has not demonstrated that the Texas lawsuit that allegedly constitutes a breach of the agreement has caused Plaintiff irreparable harm, however.

Moreover, the order Plaintiff seeks, enforcing certain limits on the claims that can be asserted by EOLAS in that Texas litigation, might have the effect of interfering with or complicating the progress of a lawsuit that has been pending for almost 11 months. The motion for preliminary injunction [52] is denied. Because the court agrees with Plaintiff, however, that this court has jurisdiction to enforce the license agreement itself, Defendant's motion to dismiss or transfer this litigation [32] is also denied.

Status conference is set for February 4, 2011, at 10:00 a.m.

Id. (emphasis added).

Eolas has also consistently represented to the defendants that it is not asserting claims against Defendants in violation of the Microsoft license agreement. For example, and while it

was under no obligation to do so, in a further effort to put this issue to rest Eolas' counsel sent letters to counsel for each of the defendants in August 2010 clarifying, on a detailed claim-by-claim and term-by-term basis, that those defendants are not being sued for their use of Microsoft software to satisfy any element of any asserted claim. Ex. L. That correspondence provided that:

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.

Id. (emphasis added); *see also* Ex. M (Eolas' Supplemental Response to Adobe's Special Interrogatory No. 5). Similarly, in response to written discovery from Defendant Adobe, Eolas explained again that its "contentions do not rely on the operating system [i.e. Microsoft Windows] for performing the claim language identified by Adobe in its Special Interrogatory No. 2." *Id.* at 43.^{3,4}

³ In light of the foregoing, Eolas believes that its position is clear, no defendant in this case is being sued for their use of Microsoft software to satisfy any element of any claim. Despite Eolas' efforts, to the extent Defendants still express "confusion," they are free to serve written discovery on Eolas. To date, no Defendant has served written discovery addressing these issues. As set forth in Eolas' August 2010 correspondence, Eolas' position with respect to each of the "scenarios" Defendants pose in their statement below depend on the claim at issue.

⁴ Defendants' selective quotation of the Illinois Court's statements during the November 23 hearing mischaracterizes the Court's findings. The Illinois Court never indicated that Eolas was delinquent for failing to provide its position with respect to the use of Microsoft software. Rather, Judge Pallmeyer stated "I am hearing from Eolas not that Microsoft is not entitled to relief, but instead Eolas acknowledging Microsoft is entitled to enforcement of its license and insistence on the part of Eolas that, *in fact, Eolas is prepared to do exactly that, comply with the letter and spirit of the license.*" Ex. J at 88:1-6 (emphasis added). The Court agreed that further

Some defendants, including—CDW, Go Daddy, J.C. Penney, New Frontier Media, Office Depot and Perot Systems—also suggest that they are being sued for their use of Microsoft server software to satisfy an element of the claims of the asserted patents. They are not. As a threshold matter, none of these defendants have served any written discovery on Eolas directed to these issues. Moreover, some of the responses of these defendants to Eolas’ written discovery confirm that they employ server technologies *other than* Microsoft. *See* Exs. R (Go Daddy identifying its use of third-party servers) and S (J.C. Penney identifying the same). Additionally, Eolas’ independent investigation of these defendants’ accused products, as shown in its infringement charts, confirms the presence of server technologies *other than* Microsoft. *See, e.g.* Exs. N (demonstrating CDW’s use of non-Microsoft server software), O (demonstrating J.C. Penney’s use of non-Microsoft server software), P (demonstrating New Frontier’s use of non-Microsoft server software), and Q (demonstrating Perot Systems’ use of non-Microsoft server software). Finally, as Eolas’ August 23, 2010 letter quoted above confirms, certain claims of the asserted patents read solely on the client computer, and therefore, for these claims, the identity of the server is not relevant. *See* Ex. L. Accordingly, no defendant is being sued for their use of Microsoft server software to satisfy an element of the claims of the asserted patents.

Statement of Defendants:

The Illinois District Court has retained jurisdiction over Microsoft’s action for declaratory relief, including issues surrounding the scope of the covenant not to sue contained in the Eolas/Microsoft license agreement and Eolas’s compliance with its commitment not to assert its patents against the activities of Microsoft software users. Judge Pallmeyer has scheduled a status conference with lead counsel for both Eolas and Microsoft on February 4, 2011.

negotiations — not the unilateral actions of Eolas — may result in resolution of the dispute between Eolas and Microsoft. *Id.* at 87:23-88:1.

Moreover, Judge Pallmeyer expressed her expectation that Eolas will clarify its infringement contentions against Defendants in this action so as to assist her in making the necessary determinations. *See* Ex. J (Transcript of Motion Hearing) at 87:19-23 (“A couple of times this morning [counsel for Microsoft] made the comment that [counsel for Eolas] Mr. McKool was unwilling to make certain assertions, unwilling to take certain positions, and perhaps if Mr. McKool would do so, this whole issue would be resolved. ***I agree with that.***”) (emphasis added).

The litigation in Illinois has the potential to narrow the scope of this action. Eolas itself acknowledges that its infringement allegations necessarily exclude Microsoft software in light of the covenant not to sue contained in the Eolas/Microsoft license agreement. For example, Eolas made the following admissions and representations in the Illinois litigation about Eolas’s inability to assert infringement claims with respect to Microsoft software:

Eolas, as I will show the Court, has disclaimed any accusation of infringement as we will see when Microsoft software is used to satisfy any element of any claim calling for the use of the software.

...

But with regard to the second requirement of what we are accusing in the lawsuit, Eolas made it clear that it was refraining from accusing any activity in which Microsoft software performed any element of any claim.

...

In the industry, Microsoft stands alone because of our disclaimer, -
- because of the covenant and then our disclaimer. No company or individual can be sued when they use Microsoft products to satisfy a claim element.

Ex. J at p. 41:18-21, 43:13-16, and 53:14-17.

As Judge Pallmeyer noted, Eolas needs to provide greater clarity concerning whether and to what extent it is accusing Defendants in this action of infringement in scenarios involving the

use of Microsoft software.⁵ Such clarity has not been provided to date, and Defendants suggest that the receipt of this information from Eolas prior to the due date for the their responsive claim construction brief (February 4, 2011) could assist in narrowing the issues before this Court.

Further Statement of Defendants CDW, Go Daddy, J.C. Penney, New Frontier Media, Office Depot and Perot Systems Related to Microsoft Issues:

Apart from the constructions rendered during the Markman procedure in this case, this case can and should be narrowed for a certain group of defendants who use Microsoft server software to operate their accused websites. These Microsoft server defendants include CDW, Go Daddy, J.C. Penney⁶, New Frontier Media, Office Depot⁷ and Perot Systems. At the Microsoft hearing in Illinois, Eolas made representations to Judge Pallmeyer about the scope of the Microsoft license that preclude Eolas from continuing to allege infringement against the Microsoft server defendants.

At the Microsoft hearing, Eolas represented to Judge Pallmeyer that “Eolas . . . [is] refraining from accusing any activity in which Microsoft software perform[s] any element of any

⁵ As a result of the disclaimers made by Eolas in the Illinois litigation, it remains unclear for which claims Eolas will seek a remedy against the Defendants in the following example scenarios involving the use of Microsoft software:

1. A user uses Microsoft’s Internet Explorer browser running on a Microsoft operating system to visit an accused website, and the website is running Microsoft’s server software.
2. A user uses Microsoft’s Internet Explorer browser running on a Microsoft operating system to visit an accused website, and the website is not running Microsoft’s server software.
3. A user uses a non-Microsoft browser operating on a Microsoft operating system to visit an accused website, and the website is running Microsoft’s server software.

These examples are not exhaustive of the questions that remain, but are used to illustrate the fact that Eolas’s statements raise issues regarding the infringement contentions in this action.

⁶ The source code for the website addressable as www.jcpenney.com or jcp.com resides on servers owned or controlled by J.C. Penney Corporation, Inc. that operate with Microsoft Windows Server 2003 with Internet Information Services 6.0.

⁷ One of Office Depot’s accused websites, www.techdepot.com, uses Microsoft Internet Information Server (IIS) server software and the Windows 2000 Server operating system.

claim.” (Hearing Tr., at 43:14–16). But all server-side operations of the Microsoft server defendants’ are performed under instructions from their Microsoft server software. Thus, every claim that requires server-side activity cannot be asserted against these defendants consistent with Eolas’s representations to Judge Pallmeyer.

To date, however, Eolas is continuing to accuse the Microsoft server defendants of direct infringement for their server-side activities. Indeed, the Microsoft server defendants make no browser or other client-side software. Thus, any claims that do not require server-side activity cannot be asserted against these defendants either. Thus, regardless of claim construction, Eolas cannot continue to allege that the Microsoft server defendants directly infringe the asserted claims. Accordingly, this case could be further narrowed by simply applying Eolas’s admissions in Illinois about the scope of its Microsoft license to this case.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on January 11, 2011, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

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