

Exhibit J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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MICROSOFT CORPORATION,)	
)	
Plaintiff,)	Docket No. 10 C 3820
)	
vs.)	
)	
EOLAS TECHNOLOGIES, INC.,)	Chicago, Illinois
)	November 23, 2010
Defendant.)	10:15 a.m.

TRANSCRIPT OF PROCEEDINGS - Motion
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

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1 THE CLERK: 10 C 3820, Microsoft versus Eolas
2 Technologies. Motion hearing.

3 MR. PRITIKIN: Good morning, your Honor.
4 David Pritikin and Richard Cederoth on behalf of
5 Microsoft. And also with us is Andrew Culbert from
6 Microsoft.

7 MR. VAN DYKE: Good morning, Judge.
8 David Van Dyke on behalf of Eolas. We have a whole
9 crew here. They can introduce themselves, your Honor.

10 THE COURT: Sure.

11 MR. VAN DYKE: Doug Cawley, Mike McKool, and Matt
12 Rappaport, and John Johnson -- I am sorry; I forgot his first
13 name -- on behalf of Eolas.

14 THE COURT: Good morning.

15 I have spent some time reviewing your briefs.
16 Interestingly, it seems to me that there is substantial
17 agreement between you: that there is this license agreement;
18 that was entered into that the license agreement relates to
19 Microsoft's software; that Eolas is barred from charging
20 infringement of the use of that software against Microsoft or
21 any of its licensees.

22 The disagreement is whether the Texas lawsuit
23 violates that agreement.

24 And a secondary or related disagreement is whether,
25 to the extent that we don't agree about whether the Texas

1 lawsuit violates that license, the decision about that
2 violation should be made here or in Texas.

3 And, again, I have studied the briefs, but
4 obviously you are ready to hold forth, and I would love to
5 hear from you. I may interrupt with some questions.

6 MR. PRITIKIN: Yes, your Honor.

7 We had talked about an order of argument this
8 morning.

9 THE COURT: Okay.

10 MR. PRITIKIN: If your Honor wanted to hear
11 argument on the motion to dismiss, I don't know whether you
12 want to hear argument on that separately from the preliminary
13 injunction, but if you did, we agreed that we would let them
14 go first on that because it was their motion.

15 THE COURT: It's their motion.

16 MR. PRITIKIN: But if we are going to go right to
17 the preliminary injunction, I think, obviously, we would ask
18 to go first on that.

19 THE COURT: I think we will proceed first with the
20 motion for preliminary injunction.

21 But I recognize that the response may relate to
22 issues that touch on the motion to dismiss -- the motion to
23 dismiss or for transfer of venue.

24 You know, before we dive into this, one thing you
25 can tell me is, are there any new developments in the Texas

1 litigation?

2 MR. PRITIKIN: Nothing to report beyond what's in
3 the papers, your Honor.

4 THE COURT: All right.

5 And the judge there hasn't held forth on any claims
6 construction issues?

7 MR. PRITIKIN: No.

8 I think the focus of my argument is going to
9 actually be on the two questions that your Honor had raised.
10 I want to give it a little context and background before I
11 get to that.

12 THE COURT: Sure.

13 MR. PRITIKIN: Your Honor will recall that we had
14 some eight years of hotly contested litigation here in the
15 original patent infringement case. My recollection is that
16 your Honor came into it sort of toward the tail end, 2006,
17 perhaps 2007, but it had started back in 1999.

18 THE COURT: Right.

19 MR. PRITIKIN: And in order to settle the case,
20 Microsoft paid a lot of money. They gave up an interference
21 that they had in the Patent and Trademark Office. They gave
22 up the right to try the validity of the patent and possibly
23 have this whole patent brought down as invalid.

24 And, of course, the Federal Circuit had remanded it
25 for a trial on inequitable conduct, and we gave that up as

1 well.

2 That's the nature of settlements. Both sides give
3 up something.

4 But importantly, what Microsoft got out of this
5 was, they got a license, a very broad license, and they got a
6 covenant that protects its customers and insulates the
7 conduct that was at issue in the first lawsuit.

8 There would be no more disputes between Microsoft
9 and Eolas about infringement. And as a consequence, the
10 covenant not to sue was not written in terms of infringing
11 conduct. It is written in terms of the use of Microsoft
12 software. Extremely broad, your Honor.

13 Moreover, it covered not only the patent that was
14 in the original lawsuit, but any future patents that they
15 might obtain from the patent office related to that.

16 The expectation coming out of that, having given up
17 as much as Microsoft did, was that forever, forever Microsoft
18 and its products would be insulated from attacks of
19 infringement under the Eolas patents.

20 That would mean that Internet Explorer could be
21 used to visit any Web site, and it would be free from further
22 allegations of infringement.

23 It would mean that companies that are providing Web
24 sites, hosting Web sites, could use Microsoft software to run
25 their Web sites, the server software.

1 And all of these things would forever be free from
2 further allegations of infringement.

3 We got one other thing out of the bargain, your
4 Honor. It's very important. And that was that any future
5 disputes about the scope of this agreement would be resolved
6 here in this court in the Northern District of Illinois.

7 That was a part of the consideration that Microsoft
8 got, and both sides went into that with their eyes wide open,
9 that it would be here and not somewhere else.

10 Now, how did we get to the circumstances we are in
11 today and the reason that we had to file this follow-on
12 lawsuit?

13 Eolas went back to the patent office and got an
14 additional patent, which they were entitled to do, but they
15 had given up the right to assert that against the Microsoft
16 products in connection with the earlier case.

17 And then they filed suit against lots of different
18 companies, not here in this court, but they went down to
19 Tyler, Texas, and filed the case there.

20 If one were to take the Eolas view of the world
21 today, it would essentially vitiate the agreement that we
22 entered into.

23 It would mean that they could sue for infringement
24 where Internet Explorer, which was at the heart of the
25 earlier case, is being used to visit Web sites. It would

1 mean that they could sue the providers of those Web sites
2 that are running Microsoft software on those servers.

3 And there are other uses of Microsoft software that
4 are implicated as well that we will get to in the course of
5 the argument.

6 Now, the place that we need to start is with the
7 covenant that was provided. And your Honor is familiar with
8 that from having seen the briefs that the parties filed here.

9 The point that I want to make here and I think is
10 very important, your Honor, and it goes to the first question
11 I think you asked, and that is that the issue under this
12 covenant is not what is or is not infringing activity. The
13 issue is, what is accused? And there is a vital and
14 important difference between those two things.

15 And I think when one reads through the various
16 briefs that have been filed by Eolas, I think they are
17 merging those two things. They are trying to confuse the
18 issue by suggesting that the question here is whether the
19 activity that is at issue in the Texas case is infringing
20 activity or not.

21 But that is not the question. The question is,
22 what is accused? because what we are dealing with is a
23 covenant not to sue. A covenant not to sue means a covenant
24 not to make the allegations, not to make accusations, not to
25 make the infringement allegations.

1 And thus, one could breach a covenant not to sue by
2 filing the lawsuit. But the ultimate question of whether the
3 lawsuit is meritorious or not is irrelevant.

4 The breach of the contract occurs when the lawsuit
5 is filed because a covenant not to sue is a promise not to
6 sue, not to bring a case that implicates the Microsoft
7 software, as this does.

8 The next slide we have simply, again, makes the
9 point from the agreement that both of the patents, the new
10 patent as well as the old one, are licensed patents under the
11 agreement and that the scope of the licensee products, the
12 Microsoft products, is very broad.

13 We have examples of Microsoft software listed
14 there, which are potentially implicated in connection with
15 the assertion of these various claims.

16 Your Honor, let me hand up a copy of these slides.

17 THE COURT: That would be great.

18 (Document tendered.)

19 MR. PRITIKIN: We are on, I think, the third slide
20 at the moment.

21 Let me just touch briefly on what these five
22 different pieces of software are. I am going to talk a
23 little about how these play out in the course of the patent
24 as we go through the argument.

25 But basically, Internet Explorer. Your Honor is

1 probably familiar with that. That's the browser that one
2 uses to visit Web sites.

3 Microsoft server software. That's the software
4 that runs on a server at a company that is hosting a Web
5 site.

6 The Windows operating system. Your Honor is
7 familiar with that, but that would be running on the
8 computer -- user's computer. And it would work with Internet
9 Explorer. Or if you had a different browser, that would
10 interact with the Windows operating system on your computer.

11 Microsoft development tools are tools that
12 Microsoft makes that help people develop Web sites. And so
13 one could have a Web site that is not running on a Microsoft
14 server, but the end user, the host of the Web site, may have
15 used Microsoft development tools to develop the Web site.

16 And then the last of these we refer to as the
17 interactive executable applications. And that is a small --
18 we will come back to this a little bit when we talk about
19 what was involved in the original lawsuit, but the
20 interactive application -- the executable application is a
21 little program that runs on your computer that would allow
22 you to interact with an image on the computer.

23 So an example of that would be something like a
24 Windows Media Player. It's a little application you would
25 have installed on your computer. When you go to a Web site

1 that wants to play a movie or something that's going to be
2 shown on it, that gets called up and gets played.

3 And all five of these different types of Microsoft
4 software are potentially implicated in the types of
5 infringement that were alleged in the first lawsuit and that
6 are alleged in the Texas case as well.

7 Now, if we look at Slide 4 -- and this kind of gets
8 to the question of, what is involved in the Texas suit? Your
9 Honor, I would submit there really is not an issue as to
10 whether or not they have breached the covenant not to sue.

11 The question really is, how far does that breach
12 go, and what is the nature of the relief that the Court needs
13 to provide?

14 This stands as a very stark example of an
15 allegation that has been leveled in that case that is
16 directly in contravention of the covenant not to sue.

17 Let me explain what this is. One of the defendants
18 in the Texas case is a company by the name of Go Daddy. Go
19 Daddy has Web sites.

20 This is a document from Eolas. It is from the
21 Texas case. And as you can see -- it's a little hard to
22 read, but as you can see, in making their infringement
23 contentions, they have pointed to the server software that is
24 running on the servers used by Go Daddy. That's the server
25 software, the engine that is used to power, to drive, to

1 program the servers that Go Daddy is using.

2 What you can see in this slide is, they are
3 pointing at the Microsoft server software that is being used
4 by Go Daddy.

5 Now, I don't think there is any way to reconcile an
6 allegation of this kind with the covenant not to sue that has
7 been provided in connection with our lawsuit here in Chicago.

8 We have a Microsoft customer, Go Daddy. We have
9 Microsoft software which is being used by Go Daddy. And we
10 have an allegation that applies directly to the use of the
11 Microsoft software.

12 So the starting point in our analysis, I think, has
13 to be, there has been a breach of the covenant not to sue.
14 They have sued Go Daddy in a way that they are not permitted
15 to do it.

16 And the question for us is, how far beyond this
17 does the breach of the covenant not to sue extend?

18 In order to understand that, it's helpful to step
19 back for a moment and to refresh our memories a bit as to
20 what was involved in the prior litigation.

21 On this slide -- I am going to take a moment just
22 to walk your Honor through this because I think it's been
23 some three years since we've actually looked at what was
24 involved in that case.

25 It might help if I walk -- can you hear me all

1 right if I walk over here?

2 THE COURT: Sure.

3 MR. PRITIKIN: Let me point to what we have.

4 This was a trial exhibit that Eolas used in the
5 earlier case. And what you are seeing on the image here is,
6 this is a Web page that has been displayed. You see the
7 little automobile in the middle of it?

8 THE COURT: Right.

9 Now, when you say "a trial exhibit," you mean the
10 trial before Judge Zage1.

11 MR. PRITIKIN: Yes, your Honor.

12 THE COURT: Because we got to the -- we were hours
13 before this case was ready to go.

14 MR. PRITIKIN: Yes. That's right.

15 And in an oversimplified manner, the functionality
16 that was at issue in its claim in the patent is the ability
17 to pull up this Web site on your computer using your browser,
18 and what will happen is, this will all automatically load.
19 So you will get the image of the car. And running in the
20 background, you will have a little program that will allow
21 you to manipulate it. So you can take your mouse and you
22 can -- in this example, you can turn the car around. It's a
23 little image within this larger image.

24 And in order to -- the claims talk about a lot more
25 than just the browser. The claims pick up all of the

1 surrounding activity. The network, the servers, all of these
2 things are implicated in it.

3 What they showed in this exhibit at trial is, they
4 have the browser. They have the interactive application, the
5 executable application, running that allows you to manipulate
6 the image. They showed the operating system on the computer.
7 You can see that beneath it, down here (indicating).

8 And then they show it on the Web going out, and
9 here are the various servers that are feeding the content to
10 the computer user so that they can view and manipulate that
11 image on their screen.

12 Now, what was involved in the prior case?

13 In the prior case the allegation was directed to
14 the use of Internet Explorer to view any Web site that
15 provided this functionality.

16 THE COURT: Off the record.

17 (A discussion was had off the record.)

18 THE COURT: Back on the record.

19 MR. PRITIKIN: In the prior case, what was at the
20 core of this case was the use of Internet Explorer to visit
21 any Web site. It wasn't limited to visiting Microsoft Web
22 sites. It wasn't limited to viewing Web sites that were
23 running Microsoft software on the server. They based their
24 infringement allegations on the use of Internet Explorer
25 broadly to visit any Web site. In fact, the bulk of the

1 examples that they provided at trial were using Internet
2 Explorer to go out and view Web sites that were not running
3 on Microsoft-supported servers.

4 At the time, in 1999, when this case began, in
5 fact, the bulk of the Web sites out there, if you went out
6 and looked at them, the bulk of the Web sites, two-thirds of
7 them, actually, were not running on servers that used
8 Microsoft software so that it was the use of Internet
9 Explorer to visit those servers that was really at the heart
10 of that case.

11 Just to kind of jump ahead as to how that plays
12 out, your Honor, because that was at the core of the case, at
13 a minimum, that is what Microsoft expected that it was
14 getting out of this settlement agreement. It would be that
15 in the future when customers, when people use Internet
16 Explorer to go out and surf the Web and they go to Web sites,
17 that that is protected activity that isn't going to get
18 sued -- would be the basis for a lawsuit again.

19 Let's go to the next one.

20 The other point was that in the original lawsuit
21 the Windows operating system was, in fact, a key part of the
22 allegations that were being made by Eolas.

23 In the earlier case -- there is some confusion
24 about this in the briefs. I want to try to straighten that
25 out for your Honor because I think it's important to have it

1 and to understand it as background when we get to why there
2 is a breach here of the covenant not to sue.

3 There were requirements in the claims in that
4 lawsuit, your Honor, about the -- the issue in that case, one
5 of the issues in that case, one of the infringement issues in
6 that case was identifying and locating the executable
7 application that allowed you to manipulate the image on the
8 screen.

9 And there was a big fight at claim construction
10 about what those terms meant.

11 Judge Zagel ruled -- and then this was affirmed by
12 the Federal Circuit -- that it could involve some use of the
13 operating system. It did not have to be done exclusively by
14 a browser. Thus, the claim construction that was applied in
15 the case allowed them to point to things that were happening
16 in the Windows operating system as a part of the core
17 infringement allegations.

18 If we look at the next slide, you will see this is
19 one of their trial exhibits from the earlier trial. You can
20 see that in this trial exhibit, it actually says "Windows"
21 here, and they are pointing to code that was in the Windows
22 operating system.

23 So it wasn't just the Internet Explorer browser, it
24 was also the Windows operating system that was implicated in
25 the allegations that were made in the original case.

1 Now, in connection with the briefing before your
2 Honor, Eolas has tried to suggest that somehow the Windows
3 operating system was not a part of that earlier case, not a
4 part of the infringement allegations. But the quotations --
5 let's go to the next slide.

6 This quotation that appears in their brief, where
7 they say that Judge Zagel expressly found that the claims did
8 not include the operating system and that this language meant
9 that the enumerated functions were performed by the browser,
10 this language does not correctly state what happened in the
11 earlier case, your Honor.

12 Judge Zagel held that the language utilized by the
13 browser to identify and locate means that the enumerated
14 functions are performed by the browser, but that is not the
15 entirety of the instruction that was given to the jury.

16 He went on to say -- and the next slide, I think,
17 quotes the -- or the remainder of it is quoted in our brief.

18 If you actually look at the jury instruction that
19 was given, it did allow some use of the operating system to
20 perform the functions that were culled out in the claims of
21 the patent.

22 So that is the scope of the earlier case.

23 And let me see if I can just kind of recapitulate
24 what was involved in that earlier case.

25 We know that Internet Explorer was accused and we

1 know that it covered the use of Internet Explorer to visit
2 any Web site.

3 We know that Windows was implicated in that earlier
4 case because there are allegations directed to the Windows
5 operating system running on the computer where Internet
6 Explorer was being used.

7 So that the scope of the infringement that was
8 alleged in that case was very broad. And that sets the
9 stage, then, for the settlement that the parties reached in
10 2007. It frames and it defines the settlement. And under
11 Illinois law, obviously settlements are encouraged. These
12 things are promoted. There is a very strong public policy in
13 favor of upholding the settlement agreements.

14 And as a part of that settlement, at a minimum, one
15 has to understand that the conduct that was accused in that
16 earlier case has to be encompassed within the scope of that
17 settlement.

18 Microsoft had every reasonable expectation that
19 anything that was involved in that earlier case was going to
20 be immune from future litigation. And that is the real-world
21 setting in which we find ourselves when the Texas lawsuit was
22 launched.

23 Now, if we look at the next slide, Slide 11, this
24 gets to the question of the breach of the covenant not to
25 sue.

1 And we know that the Texas complaint, as they have
2 fleshed out their allegations in the case, implicates now the
3 use of Microsoft software. It's incontrovertible in the case
4 of the server software that's being used by companies that
5 host the Web sites because they have pointed to it in the
6 case of Go Daddy, one of the defendants there.

7 There are two other defendants in the case that we
8 know used Microsoft software on their servers. It's JCPenney
9 and Perot. And all of these companies have been accused and
10 are in the case because they are using Microsoft software to
11 run the servers on which they host Web sites.

12 We also know that there are allegations in the case
13 that relate to the use of Internet Explorer to visit Web
14 sites that -- now, what they have said they are going to
15 carve out is using Internet Explorer to visit a Microsoft Web
16 site. But clearly, they are asserting these claims against
17 the use of Internet Explorer to visit other Web sites. That
18 is the conduct that we spent weeks trying here and the
19 conduct that was at the heart of the settlement we reached in
20 the earlier case.

21 Now, we don't have a problem. Eolas can sue
22 consistent with the covenant not to sue. They can sue where
23 there is no Microsoft software that's involved. And let me
24 give you an example of that, your Honor, of something that
25 would not be covered by this covenant not to sue.

1 If someone were using -- a clear example of it
2 would be if someone were using a browser that is not a
3 Microsoft browser, not Internet Explorer, and they are
4 running it on a computer that isn't using Windows, Microsoft
5 software, and they use it to go visit a Web site where the
6 Web site host is not running the Web site on Microsoft server
7 software, and where the host didn't use Microsoft software to
8 develop the Web site, and where the little application that
9 allows you to interact with the image is not Windows Media
10 Player or Microsoft software, you have got a non-Microsoft
11 world out there. And that, they are free to pursue.

12 But the reason that they have not confined their
13 case to those bounds is because there isn't much there. They
14 really want to accuse instances where Microsoft software is
15 being used because what they want to do is extend it as far
16 as they can and to double-dip or triple-dip, to collect
17 things beyond what they already have collected from Microsoft
18 for precisely the same activity.

19 THE COURT: Would this case be different -- would
20 your motion be different if Eolas in its Texas lawsuit had
21 included a sentence that essentially says, We are not suing
22 anyone here based on your use of Microsoft software?

23 MR. PRITIKIN: I think a lot of that is
24 formalistic, your Honor. There are a lot of things that
25 could have been done that would give us comfort that it's not

1 going to pursue things they are not permitted to, but they
2 have made some of these statements. And some of them are --
3 honestly, some of them are kind of cute lawyer statements
4 about what they are doing and not doing.

5 When you look at the infringement allegations that
6 have been leveled there, like the Go Daddy allegation, you
7 can see precisely what they are doing.

8 And that's why we are here, your Honor. We want
9 some guidance from the Court. And we think they need
10 guidance from the Court to tell them what they can and cannot
11 pursue consistent with the covenant not to sue.

12 THE COURT: Well, suppose the guidance that they
13 got from the Court were as follows: You are prohibited from
14 suing any defendant, Texas or anywhere else, based on their
15 use of Microsoft software.

16 MR. PRITIKIN: That's getting close to where we
17 want to be. I would want to -- we might want to wordsmith
18 that a little bit.

19 THE COURT: But if I were to so order, would there
20 then be some -- I expect I will hear from the Eolas people on
21 this.

22 MR. PRITIKIN: Sure.

23 THE COURT: Would there then be some continuing
24 dispute about whether the lawsuit that they have brought does
25 or does not, in fact, do exactly what they have said they

1 won't do?

2 And if so -- I know we will get to this as well --
3 if so, do we need to find out what the judge in Texas has to
4 say about the nature of the claims?

5 Let me just say that you are obviously way more --
6 both of you -- way more on top of this than I am.

7 MR. PRITIKIN: Sure.

8 THE COURT: But my initial reaction on reading the
9 complaint filed in Texas was -- and I read complaints all the
10 time because that's -- complaints get filed and that's the
11 first thing we do. We read the complaint, make sure there is
12 jurisdiction, et cetera.

13 I thought that the headlines that you quoted in
14 your brief were quite accurate. Eolas sues half of the
15 world. Eolas sues the Internet, or words to that effect. So
16 it was very broad.

17 But beyond the sheer breadth of the scope of the
18 defendants, huge numbers of -- you sue Google and you have
19 sued half the world.

20 But put that aside. It seemed to me that the
21 allegations were very, very -- what's the word I want? --
22 cursory. So precisely -- they meet the test maybe even
23 post-, you know, *Twombly* and *Iqbal*, et cetera. But what they
24 have said is, you are infringing.

25 I wondered whether a simple disclaimer -- by the

1 way, we know about this license. Thus, to the extent that
2 what you are doing relies on -- or is exclusively the use of
3 Microsoft software, we hereby withdraw our accusations, or
4 some statement to that effect -- may have assisted.

5 There are a lot of other issues now. Time has
6 passed. There has been exchange of massive amounts of
7 documents in Texas. I know one of the arguments that Eolas
8 is making is, what's the immediate harm to be remedied here?
9 After all, the lawsuit has been pending for ten months,
10 et cetera.

11 I am just curious about whether the real problem,
12 what really brings us here today, is the lack of precision in
13 Eolas' allegations in Texas. And if so, can that somehow be
14 remedied?

15 MR. PRITIKIN: I do agree with you on that, your
16 Honor, because it was a general complaint, and that's what
17 prompted all of this back-and-forth. You have seen the
18 correspondence. Initially they were not very forthcoming
19 when questions were raised about what they were accusing and
20 they weren't.

21 THE COURT: Right.

22 MR. PRITIKIN: That's water over the dam.

23 THE COURT: The Perot letter was great. Perot
24 says, Dear Eolas, here is our understanding. Is this
25 consistent?

1 And the response was, We do not agree, period.
2 Words to that effect.

3 I viewed the Perot letter as, here is what we
4 think. Here is what we think. Here is what we would like.
5 We think this is pretty broad. Now come back at us here.

6 So I thought there might be some negotiation.

7 But the response from some lawyer for Eolas was,
8 no, we don't agree.

9 Okay. I thought -- I am of the view that there is
10 this disagreement about the nature of what Eolas is claiming
11 down in Texas on the one hand; but, on the other hand, an
12 acknowledgment on Eolas' part that there are aspects of
13 infringement that have really been carved out by the license.
14 And can we be precise about what those aspects are? because
15 Eolas will say, well, our Texas lawsuit doesn't step over
16 that line.

17 And the Microsoft people are saying, oh, yes, it
18 does; or at least you haven't given us any assurance that it
19 isn't. And when we have asked for some assurance, you just
20 say, we disagree.

21 MR. PRITIKIN: Well, it's more than that, your
22 Honor, because in Texas we have the local rules now here.

23 THE COURT: Correct.

24 MR. PRITIKIN: They have had that procedure for
25 some time in Texas. So we do know more about what is being

1 alleged.

2 Again, you take an example like Go Daddy, and we
3 know that they are accusing Microsoft software. So whatever
4 the generalities are in the pleadings or whatever the
5 responses are in the letters, you know, you got to look at
6 the actions. It's clear that they are accusing Microsoft
7 software.

8 There are a couple of things we are looking for.
9 It's not a lot. It really isn't. And we tried to
10 crystallize it in the form of the injunction we proposed.
11 But at the core of it, I would think, we want assurances that
12 when someone uses Internet Explorer, that they can visit any
13 Web site in the world and there will be no claims of
14 infringement that relate to the use of Internet Explorer for
15 that.

16 That's clearly what the last lawsuit was about.
17 And if we don't have that, what did we get for everything we
18 gave up in the case? If they can go back out and sue the
19 people who are providing the Web sites, what did we buy for
20 the people who are using Internet Explorer? That was at the
21 core of the case. At a minimum, we need that.

22 But they haven't given us that assurance. Maybe
23 they will give it to us today. Maybe they won't. But if
24 they won't, we just need guidance from the Court on that, and
25 they need a direction.

1 THE COURT: And the assurance you are looking for
2 is an assurance that anybody using Internet Explorer to visit
3 a Web site is protected by the license that you signed in
4 '07.

5 MR. PRITIKIN: That the activity is protected. I
6 mean, they can't go around --

7 THE COURT: The activity of using Internet Explorer
8 to visit Web sites.

9 MR. PRITIKIN: Right. But we don't want it
10 circumvented by their suing the person who's providing the
11 Web site, going out and saying, oh, you can't provide the Web
12 site to an Internet Explorer user. That's the conduct.
13 That's the activity that's protected, your Honor.

14 When Internet Explorer is being used to visit a Web
15 site, that's just off bounds. You can't sue the users of
16 Internet Explorer, the person who's doing it. You can't sue
17 the person who is operating the Web site and providing that
18 Web site for use by people who are using Internet Explorer.

19 THE COURT: Okay. So it is your understanding that
20 the lawsuit in Texas also challenges the providers of Web
21 sites that are then visited by people using IE.

22 MR. PRITIKIN: Exactly. Exactly. And that's
23 probably the single biggest problem down there, your Honor.

24 And if you think about it this way, at the time of
25 the earlier lawsuit, roughly two-thirds of the Web sites were

1 operated by companies that were not using Microsoft software.
2 And what we bought -- and it's confidential, but your Honor
3 knows what these numbers are from looking at the papers.
4 What we bought was the right for Internet Explorer users to
5 visit those Web sites. And we thought that was free and
6 clear forever.

7 But if their view is correct, that they can now sue
8 the companies that are providing those Web sites and they can
9 double-dip or triple-dip or potentially get an injunction,
10 they could shut down one of those Web sites, then what did
11 our Internet Explorer customers get?

12 So it really vitiates the core of the whole
13 settlement, the core of the agreement, which is that Internet
14 Explorer, when that is used to visit Web sites, that's the
15 end of the matter. And you can't go sue the customers. You
16 can't sue the people providing the Web sites for use that are
17 visited by Internet Explorer. That's what the earlier
18 lawsuit was about, and that's the peace we bought.

19 Let me go on to the other pieces of it, kind of at
20 the core of this.

21 THE COURT: Okay.

22 MR. PRITIKIN: I would say a second critical piece
23 of this is that if a Microsoft server software is being used
24 to run the Web site or Microsoft development tools were used
25 to create the Web site, that, too, is off-bounds. And in

1 that instance, it doesn't matter what browser is being used
2 to visit the Web site. So it could be a non-Microsoft
3 browser that's used to visit it, but again, that involves the
4 use of Microsoft software because the Microsoft software is
5 being used either to run or to create the Web site.

6 Again, it seems to me it's self-evident. And maybe
7 they will disclaim that; maybe they won't. I mean, in light
8 of the allegations made against Go Daddy, I guess they would
9 have to withdraw those allegations now in order to disclaim
10 that. But that ought not to be pursued either.

11 Is that helpful, your Honor? Is there a piece I
12 can respond on?

13 THE COURT: They would have to withdraw them unless
14 they interpret this differently.

15 You should go on. I will probably be in a better
16 position to ask questions once I have heard from Eolas on
17 this, but you should proceed with your argument.

18 MR. PRITIKIN: Sure.

19 So let me kind of address the second question your
20 Honor raised. And we have been alluding to it here a bit
21 anyway. Is it this court or that court? How should this
22 sequence? What's the right way for this to work itself out?

23 This comes back to a point I made earlier, and that
24 is that the issue, the issue is not what is ultimately found
25 to be infringing activity in Texas. I mean, that case is

1 going to play itself out and there is going to be
2 infringement or there isn't going to be infringement, valid
3 or invalid.

4 But the issue on the covenant not to sue is what is
5 accused, not what's infringing.

6 THE COURT: Right. Right.

7 MR. PRITIKIN: They could be -- they could file,
8 for example, infringement allegations that have no merit, but
9 they are against people they shouldn't be suing because of
10 the covenant not to sue or activity.

11 And that is for this Court to decide. And it's not
12 a matter of patent law. And it's not a matter of claim
13 construction. It's simply a matter of, what did we get when
14 we entered into the agreement with them and we entered into
15 the covenant not to sue?

16 And the scope of that is for this Court to decide.
17 And that's why we are here. We filed it as a preliminary
18 injunction motion because we want guidance. We want
19 direction from this Court as to what is out-of-bounds for
20 them to be pursuing. That's the bargain that we entered
21 into. That's the agreement that has the covenant not to sue
22 in it. And that's the one where they agreed and we agreed
23 that those disputes would be resolved here in the Northern
24 District of Illinois.

25 Let me just go back to the slides. I think we have

1 covered a fair amount of this already. I think I can go
2 through them fairly quickly. But if we go to Slide 14, I
3 think this one may be helpful in crystallizing some of the
4 areas of dispute.

5 And if you can hear me all right, I am going to
6 walk over here.

7 THE COURT: Okay.

8 MR. PRITIKIN: What we have tried to do here is to
9 show what we think we got with the covenant not to sue, what
10 it covers and what is protected.

11 And on the top we have a browser, and on the side
12 we have the server. So let's assume that you have Internet
13 Explorer, which is a Microsoft browser. That would be up
14 here (indicating). And it visits a Web site that is running
15 on Microsoft server software. Now, they got it both ways.
16 Clearly that would be protected activity.

17 THE COURT: Okay.

18 MR. PRITIKIN: By the same token, if you look on
19 the right, if you had a non-Microsoft browser -- Chrome or
20 Safari, there are various browsers out there -- but it's
21 going to a Web site that is running on Microsoft software,
22 that, too, is protected activity.

23 Remember, the covenant not to sue is very broad and
24 is framed in terms of the use of Microsoft software.

25 THE COURT: Right.

1 MR. PRITIKIN: In the lower left we have a server
2 that is not using Microsoft software, but Internet Explorer
3 is used to visit it. That's the situation we are talking
4 about. Over in this last category, where you have neither a
5 Microsoft browser nor Microsoft server software running the
6 Web site, there is still protected activity because there are
7 other ways listed here where Microsoft software would still
8 be used. And those, too, are off-bounds.

9 Now, if we look at the next slide, we can see what
10 Eolas' position is. This basically frames the dispute that
11 has been put before this Court.

12 In the upper left-hand corner -- this is a kind of
13 a paradigm where you have got Internet Explorer, a Microsoft
14 browser, visiting a Web site that is running on Microsoft
15 server software.

16 And you were right, your Honor, that the original
17 complaint was sort of open. One couldn't tell. And I think
18 that they have conceded now that that is outside the scope of
19 their allegations. But that is as far as they have gone.

20 THE COURT: Well, actually, they are saying -- what
21 they are saying is, We have not alleged infringement based --
22 in Texas -- based on any defendant's use of Microsoft
23 software.

24 MR. PRITIKIN: And it's simply untrue, because we
25 know in the case of Go Daddy -- and that's just one example

1 that comes to mind -- they clearly have. They pointed right
2 to it.

3 THE COURT: Why doesn't Go Daddy go to the Texas
4 judge and say, hey, they are saying they are not suing us for
5 any use of Microsoft software. And that's what we are doing;
6 we're just using Microsoft software. We want out of this
7 lawsuit.

8 MR. PRITIKIN: That's for Go Daddy, your Honor.
9 But Microsoft has an interest in this because Microsoft as a
10 company thought that it had bought a lot of rights when it
11 entered into this agreement. And it's very important in the
12 real world.

13 THE COURT: We need to talk about that, too,
14 because I know that Eolas has argued that Microsoft has not
15 made a showing of any irreparable harm or, for that matter,
16 they haven't alleged -- what Eolas is saying is, Microsoft
17 hasn't even shown us that their customer relations has been
18 damaged. To the contrary, Eolas argues, Microsoft has cozied
19 up with its customers on this lawsuit.

20 That's the argument.

21 MR. PRITIKIN: I understand. I understand.

22 Again, let's talk about the real world.

23 When Microsoft settled this case and paid all that
24 money and gave up all the other things it did, it had secured
25 the right for its software to be used in the systems. And

1 the system itself involves the server providing the Web site,
2 the browser being used to visit the Web site, the browser
3 running on Windows operating system. It had secured all of
4 that very broadly for the use of any Microsoft software
5 anywhere in kind of this ecosystem that's out there.

6 That did potentially give it a bit of an advantage
7 over its rivals because in those circumstances, knowing that
8 Microsoft had settled the lawsuit and secured rights, very
9 broad rights, people would have an incentive to use Microsoft
10 software, because if you used it anywhere in this ecosystem,
11 the whole thing is free and clear.

12 THE COURT: Right.

13 MR. PRITIKIN: Now what they are doing is
14 undercutting the very foundation of what it is that Microsoft
15 got, because what they are saying is that they can kind of
16 break this apart and attack it in pieces.

17 So they can say, well, Internet Explorer may be
18 used to visit these Web sites, but we can sue the person
19 who's operating the Web site.

20 Or they will say that it may be Microsoft software
21 that's running the Web site, but we can sue somebody who's
22 using a non-Microsoft browser.

23 And it undercuts the basic bargain that was entered
24 into, which was to insulate the use of the Microsoft software
25 in this ecosystem from further patent litigation.

1 That was the deal. That's what Microsoft got.
2 That's what was involved in the earlier case.

3 THE COURT: Right.

4 MR. PRITIKIN: And if they can do that, there is no
5 benefit left to Microsoft. They can attack all of it. They
6 can break it up and attack it all in these little bitty
7 pieces like that. That's essentially what's going on here.
8 And it undercuts the value of what we got.

9 It no longer gives -- it no longer gives anyone an
10 incentive to use the Microsoft software as opposed to other
11 software because the use of the Microsoft software in this
12 ecosystem is still going to bring it within infringement
13 allegations that are being made. And that's really the
14 problem that we have here.

15 THE COURT: If Microsoft is right, then one
16 potential result here is that the lawsuit -- if the lawsuit
17 in Texas could proceed, each of the defendants could raise as
18 a defense the license that Microsoft signed with Eolas back
19 in '07. And the district judge in Texas could, in fact,
20 grant summary judgment to the defendants, a huge number of
21 them, on that very basis, and carve out all but the very
22 limited nature of the claims that would survive the license.

23 At that point the defendants have all been
24 harmed -- the defendants in Texas have all been harmed by
25 having to defend a lawsuit that Eolas knew or should have

1 known it had no right to bring.

2 And the question is, how has Microsoft been harmed?
3 And can that harm be remedied by way of money damages?

4 MR. PRITIKIN: I think the answer to that question
5 is a couple things, your Honor.

6 If it played out the way that you suggested, we
7 might as well take our red pencil and just draw through the
8 covenant not to sue because there may be exhaustion, they may
9 have a release of some sort, but we don't have a covenant not
10 to sue. We don't. It's gone.

11 Covenant not to sue is different. Covenant not to
12 sue is a promise not to bring the lawsuit. And that's the
13 issue that we have here today.

14 THE COURT: All right. What about -- let's go back
15 to the language of the complaint in Texas.

16 Suppose the Texas lawsuit, the Texas complaint, had
17 said, we hereby sue you for infringing. This case, however,
18 is subject to a license we signed with Microsoft in 2007 that
19 says the following.

20 End of problem?

21 MR. PRITIKIN: Not necessarily. It depends on what
22 they are doing. It depends upon what their actions are. It
23 depends on what they are accusing. Simply making those
24 statements wouldn't necessarily get you there if they are
25 still pointing at activity that comes within the scope of

1 them.

2 That's why we are here for an injunction, because
3 we think without an injunction --

4 THE COURT: You are right that if they are pointing
5 to activity that, in fact, is protected by the license, then
6 that violates the covenant not to sue.

7 I am back to the conclusion that the real problem
8 is that their complaint doesn't tell you what they are
9 pointing at or not pointing at. The complaint is so broad.
10 And that potentially is exactly your argument, that that's
11 why we are here.

12 MR. PRITIKIN: That is why we are here, your Honor.

13 And we think that -- let me just sort of jump to
14 the end here.

15 In terms of the injury, there is no question that
16 the companies that are being sued are suffering injury here.
17 There are third-party beneficiaries. We stand directly in
18 this contract. We clearly have a right to enforce that
19 covenant not to sue.

20 It affects the ability of Microsoft to -- it's the
21 whole benefit of the bargain that we have here that is being
22 undercut by this.

23 And that, it seems to me, is hard for them even to
24 argue that there is no injury to Microsoft where the covenant
25 not to sue is being breached, the lawsuit is being brought --

1 I mean, if we are going to assume that the violation
2 exists -- and that Microsoft's customers and end-users are
3 being dragged into litigation that they should not have been
4 brought into -- they're third-party beneficiaries -- then the
5 injury is self-evident from that, your Honor.

6 We know that -- I mean, there was a recent case, a
7 case last week, I think, in the Seventh Circuit that
8 involved -- I am sure your Honor may be familiar with the --
9 I have a copy of it here; this was since the brief -- the
10 *Thorogood* decision, Judge Posner's decision.

11 THE COURT: Oh, yes. You should hand that up. I
12 did see that.

13 (Document tendered.)

14 THE COURT: Thanks.

15 MR. PRITIKIN: But --

16 THE COURT: The one involving the dryers, right?

17 MR. PRITIKIN: Yes, that's the one, your Honor.
18 That's the one.

19 Again, as you know, there are a lot of similarities
20 here between that, and that is that in that case it was
21 collateral estoppel, I think, that had given rise to the
22 problem that existed.

23 In some ways I think our case is even stronger
24 because we have a covenant not to sue, which is for any --
25 involving any use of the Microsoft software. So in a sense,

1 it's even broader than the specific infringement issues we
2 had in the earlier case.

3 In this case Judge Posner found that just having
4 the litigation itself was sufficient to create injury that
5 the Court could remedy.

6 But let me just jump and really just go over the
7 last couple of slides here. I think it gets to the scope of
8 the injunction.

9 If we turn to Slide 23 --

10 THE COURT: Okay.

11 MR. PRITIKIN: These are in some ways the issues we
12 talked about earlier. This is the guidance that we are
13 looking for. And if they would just tell us that they are
14 not going to pursue these activities, we could all go home.
15 But they won't and they haven't, and that's why we need an
16 injunction.

17 So the first is on Slide 24. And this activity is
18 the one we have talked about, which is where Internet
19 Explorer is used to visit any Web site. That ought to be out
20 of the Texas case.

21 Second is on Slide 25. This is where the Microsoft
22 server is used to run the Web site. The Microsoft server
23 software is called Internet Information Server. IIS is what
24 it's usually referred to as.

25 The third one is on 26. This is where Microsoft

1 development tools has been used to build a Web site.

2 And the fourth one is Slide 27. And this is
3 where the interactive application -- we talked about this.
4 This would be like Windows Media Player where the application
5 that's being used to manipulate the image on the screen is --

6 THE COURT: Is MS software.

7 MR. PRITIKIN: Yes, your Honor.

8 And then the last one is where you have the
9 browser, even if it's not a Microsoft browser, is running on
10 the Windows operating system.

11 THE COURT: All right. Thank you.

12 MR. PRITIKIN: I guess the last point, your Honor,
13 just to kind of tie all of it up, is that the scope of what
14 they are allowed to accuse is the issue for this Court. It's
15 not the issue -- the Court in Texas is going to decide
16 whether the activity is infringing or not. That's a
17 different issue. It's going to interpret the claims. It's
18 going to apply the claims.

19 But the issue for this Court, under the covenant
20 not to sue, is whether they breached it by accusing things
21 they should not have accused.

22 THE COURT: All right. Thanks.

23 Let's just take five minutes, and then I will hear
24 from Eolas.

25 (A brief recess was taken at 11:10 a.m. until 11:21

1 a.m.)

2 MR. McKOOL: Good morning, your Honor.

3 Mike McKool speaking for Eolas.

4 What I want to address in my remarks this morning,
5 your Honor, is the meaning of this covenant and the fact that
6 Eolas recognizes its obligations under the covenant and has
7 scrupulously stayed in line with those obligations, not only
8 in what it's alleged but in what it has specifically
9 disclaimed in writing in open court in Texas and in the words
10 that I am going to use this morning to your Honor.

11 Let's start with the covenant.

12 Here it is on the screen, wordy like these things
13 usually are. But I have a highlighted version, which I think
14 actually both parties have used. And I think it fairly
15 illustrates the essentials.

16 To paraphrase, Eolas covenants not to sue any of
17 Microsoft's customers under the licensed patents for using
18 Microsoft's products or practicing any method in connection
19 with their using Microsoft's products.

20 That's what Eolas agreed to do. Everybody here
21 agrees that this is not a proscription against any suit
22 accusing Microsoft customers of infringing the patents.

23 This covenant precludes Eolas from suing Microsoft
24 customers for their use of Microsoft software.

25 Under our patent law, the only thing a patent

1 plaintiff can sue a defendant for is practicing the elements
2 of its patent claims.

3 Eolas has always recognized its obligation under
4 the covenant and has freely confirmed that the covenant
5 precludes assertions of infringement anytime a person uses
6 Microsoft software to satisfy any element of any claim that
7 recites software.

8 Mr. Pritikin told you that the covenant not to sue
9 did not relate to infringing conduct but to use. This
10 covenant refers to suits "under the licensed patents."
11 That's a patent suit.

12 A patent plaintiff only sues a defendant for using
13 the patented invention. And whether that is true is
14 determined by whether the defendant is satisfying the
15 elements of the claims.

16 The question is, says Mr. Pritikin, what is
17 accused?

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

22 This is the interpretation of the covenant that the
23 Texas defendants agree with, as I will show your Honor, the
24 very people that this was designed to protect.

25 In fact, Microsoft itself, in its briefing, has

1 agreed with this.

2 A patent suit -- using your Honor's question, your
3 Honor said, what if the -- what if the proscription was not
4 to sue them based on the use of Microsoft software? I
5 generally agree with that. The only problem I had with it, I
6 think we would be fussing again on what "based on" means.

7 But I will say this: A patent suit is based on the
8 defendant's performance of the patent claims. That's the
9 law. A patent suit cannot be based on any conduct that
10 doesn't perform some element of the claims.

11 Mr. Pritikin told you toward the end of his remarks
12 that what this covenant should be interpreted to proscribe
13 is -- and I am quoting -- any action "involving any use of
14 Microsoft products."

15 When he said that, an analogy came to mind. If I
16 sued Mr. Pritikin for fraud and he happened to be talking to
17 me at the time over an Apple iPhone, his use of the Apple
18 iPhone would be -- would certainly be involved in the
19 process. But I am not suing him for using that phone. I am
20 suing him for what he said. And that's exactly how this
21 covenant ought to be interpreted.

22 Now, in the Eastern District of Texas, the local
23 rules there call for a plaintiff to file what are called
24 plaintiff's infringement contentions. I don't know if this
25 court has similar rules.

1 THE COURT: We do. Recently we adopted patent
2 rules that are similar, not identical.

3 MR. McKOOL: And we refer to them by the acronym
4 PICs.

5 The second requirement of the infringement
6 contention rule is to identify the products or devices that
7 the plaintiff is accusing.

8 Now, it also asks what instrumentalities satisfy
9 the patent claims and what browser software or server
10 software is recited.

11 Eolas responded that the claims themselves are
12 satisfied by any browser software, any server software.

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

17 Eolas avoided all references to Microsoft software
18 with one exception. And I think it's going to relate to
19 something Mr. Pritikin said. Our infringement contentions in
20 this huge case consumed -- and it leaves me breathless to say
21 it -- 23,000 pages of infringement contentions.

22 More than 6,000 pages depicted accused browsers.
23 Microsoft dominates the browser market. Not one of those
24 6,000 accusations of browsers referenced a Microsoft browser.

25 There was one exception. Inadvertently two pages

1 out of the 23,000 mentioned Microsoft server software in the
2 infringement contentions relating to Go Daddy. It was a
3 mistake.

4 Before we even made the disclaimer that I am going
5 to show the Court in a moment in writing, Go Daddy writes to
6 us, lawyers at my firm, and said, You have accused a
7 Microsoft server software.

8 Our response was, We shouldn't have. We didn't in
9 the other 22,998 pages. It was a mistake, and we are going
10 to rectify it right now.

11 Let's go to, if we could, the Go Daddy
12 correspondence. I want to show the Court how Eolas handled
13 that.

14 We will have to go to the second page at the bottom
15 because, like e-mails -- I kind of blame Microsoft for this
16 maybe -- they always start at the bottom and go to the top.

17 THE COURT: Right.

18 MR. McKOOL: But you will see on August 19th -- do
19 we have the August 19th e-mail? Let's go to the bottom of
20 that page, please. You are going to have to blow it up.

21 Okay. On August 19th Josh Budwin of my firm -- I
22 am sorry -- Nick Bunch, who represents Go Daddy, writes to
23 Josh Budwin referring to a call they had yesterday. This is
24 before we appeared in court and before we made the written
25 concessions.

1 And he said, you have got Microsoft listed. He
2 says, "Thanks for the productive call yesterday." He says,
3 "We have run into some technical difficulties," at the
4 bottom, "and we will draft up," he says in the last line,
5 "the unopposition motion."

6 Why? Because we said, that's coming out.

7 And then Josh Budwin responds on September 16th
8 when we hadn't heard from them. And, in fact, we hadn't
9 heard from them, we found out, because they were changing
10 counsel in the middle of this. And he says, "Regarding Go
11 Daddy's joinder of Adobe's motion, we would like to amend our
12 infringement contentions to remove the reference identified
13 on Page 2 of your motion, Page 8 of our infringement
14 contentions. This will help clarify that our infringement
15 allegations are consistent with the letter we sent the
16 defendants in advance of the hearing."

17 And that letter was sent, as I will show your Court
18 in a moment, on August 23rd.

19 What Mr. Pritikin showed you was a mistake. It's
20 the only accusation against Microsoft software in the entire
21 23,000 pages. As soon as we learned about it, we took it
22 out. It's the only time an accusation against Microsoft has
23 been brought up. And Eolas, of course, did the right thing.

24 When the Texas defendants first raised the covenant
25 not to sue in Texas court -- I should stop and point

1 something else out.

2 Eolas insisted on sending the covenant not to sue
3 to all of the Texas defendants. Microsoft wrote to Eolas in
4 December. Mr. Cederoth, who's here for Microsoft, wrote one
5 of the lawyers in my firm and said it sent to the
6 defendants -- and then he listed his own restatement of the
7 covenant not to sue.

8 THE COURT: Right.

9 MR. MCKOOL: Which is like what Mr. Pritikin showed
10 you. We said, we don't have an objection to that. We think
11 it's a good idea, but let's send them the exact wording.

12 And Mr. Perez sent him back a letter with the
13 quoted exact wording of the covenant.

14 Microsoft never responded.

15 We wrote them back in February and said, we think
16 these defendants deserve to have this covenant. They need to
17 know what it says because it gives them certain rights. And
18 we said to Microsoft, Do you have an objection if we send
19 them the covenant?

20 And when Microsoft agreed, we immediately sent the
21 covenant not to sue to all the defendants in the Texas
22 action.

23 Eolas responded to its obligations under that
24 covenant by disclaiming in writing and in open court on the
25 record by my partner Mr. Cawley, who's here at counsel table,

1 any accusation of infringement when Microsoft software is
2 used to satisfy a software requirement in any element in any
3 of the patent claims.

4 Now I am going to show you that letter that we
5 wrote on August 23rd to make it clear what we were not
6 asserting because of our promise to Microsoft.

7 The first indented paragraph, as you can see, says,
8 "Eolas is asserting claims," and then it lists several claims
9 of both patents, "only for acts of infringement wherein the
10 browser application" -- the browser application being
11 mentioned in those claims -- "limitation is satisfied by
12 something other than Microsoft Internet Explorer."

13 And then the next two paragraphs follow with other
14 disclaimers pertaining to Microsoft server software.

15 Eolas, by this letter, disclaimed scope with
16 respect to 36 of its 57 claims, every claim in which we felt
17 there could be -- it could be argued that Microsoft software
18 was referred to in any claim element or software that
19 Microsoft makes could be referred to.

20 THE COURT: I want to interrupt for a second.

21 MR. McKOOL: Okay.

22 THE COURT: This letter responded to a July 27th
23 request from Adobe.

24 Was this letter to Adobe's counsel or to everybody?

25 MR. McKOOL: Everybody. Everybody.

1 THE COURT: Okay.

2 MR. McKOOL: Including the counsel here from
3 Microsoft.

4 THE COURT: In their capacity they were
5 representing --

6 MR. McKOOL: Apple.

7 THE COURT: They were representing Apple. Okay.

8 MR. McKOOL: Now, Microsoft says that users of
9 Internet Explorer visiting a Web site is still in the Texas
10 case. Not so.

11 If a claim is, in your Honor's words, based on the
12 use of a browser -- in other words, if the browser is
13 mentioned as satisfying a claim element -- by mentioning it
14 as satisfying any claim element, Eolas has agreed that it's
15 out of bounds. It is out of the case. We can't press it.
16 We gave it up.

17 There was a hearing on August 31st. At that
18 hearing, on this same subject in open court, my partner
19 Mr. Cawley stated the disclaimer.

20 Let's put it on the screen, Slide 18. Can you blow
21 up the -- it is a little hard to read. Can you blow up the
22 bottom part of it? Okay.

23 He says, "We are only suing if something other than
24 a Microsoft product is required to satisfy the claims."

25 In other words, if our allegation is based on --

1 and in the patent world "based on" means satisfies a claim --
2 it's out of the case.

3 He says, "We have notified the defendants that we
4 are only accusing instances in which something other than
5 Microsoft software is used to meet the claim elements."

6 Not everyone. Eolas, the Texas defendants, even
7 Microsoft, as I am going to show you, has expressed the same
8 interpretation of the covenant.

9 It's when Microsoft software is used to satisfy a
10 claim element that the covenant applies.

11 That's the nexus between the use of Microsoft
12 software and an element of the claim that satisfies this
13 covenant.

14 Adobe wrote -- on Slide 20, if we could, please --
15 to the Texas court that the issue under the covenant is
16 whether -- and reading from the bottom two lines -- "Eolas
17 contends Microsoft's products might be used to satisfy
18 elements of the asserted claims."

19 And that's exactly what we responded to and almost
20 exactly the words that Adobe stated.

21 Prior to our disclaimer, Oracle, fearing that we
22 were going to too broad, stated the same interpretation of
23 the covenant not to sue.

24 Slide 22. It says, "Eolas is double-dipping" --
25 meaning suing again what's under the covenant -- "by relying

1 on Microsoft products to satisfy elements of the asserted
2 claims."

3 So again, it's the nexus between the use of
4 Microsoft software and the satisfaction of claim elements
5 that would determine what the suit is based on, what the
6 suit, in the terms of the covenant, is for.

7 So if we go to Microsoft's brief on the motion to
8 dismiss, in its response to that motion, Microsoft agreed
9 with that, stating its position on what Eolas, in its words,
10 can't get paid for again: occasions when an end-user, i.e.,
11 practices the steps of its claimed methods. Not the words
12 Mr. Pritikin used, "involving any use," but practicing the
13 steps. That's the point.

14 The Texas defendants agree. That's what Eolas has
15 given up. And Microsoft in its briefing says the same thing.

16 Now, Microsoft is complaining here that Eolas'
17 disclaimer is too narrow. And one of the things it says is
18 that it ought to extend beyond browser software. It ought to
19 extend beyond server software to the operating system,
20 Windows.

21 Eolas doesn't agree that any claim element of any
22 claim in either patent is fulfilled by the operating system.

23 Judge Zagel and the Federal Circuit, contrary to
24 what Mr. Pritikin said, both ruled that the operating system
25 wasn't an actor in this invention. It was not an executable

1 application, which makes us feel very comfortable about our
2 position.

3 Mr. Pritikin didn't show you the exact wording of
4 what the Court ruled. Let's go to Slide 28, which is the
5 Federal Circuit's statement on the subject.

6 "The district court construed 'executable
7 application' to mean any computer program code that is not
8 the operating system."

9 And then at the bottom, "This court affirms the
10 district court's construction."

11 Let's go to Slide 27. Here is another quote from
12 the Federal Circuit.

13 These are the claim elements, "'utilized by said
14 browser to identify and locate' means that the enumerated
15 functions are performed by the browser."

16 And then go to the bottom. "It must be the
17 browser, not the operating system, that must do the heavy
18 lifting of identifying and locating."

19 Those are the claim elements, "identifying and
20 locating." The operating system and the browser are bundled
21 together. But the claim element, said both courts, have to
22 be fulfilled by the browser.

23 Finally, let's go to what Mr. Pritikin told the
24 jury in that case. He told them that it's the browser that,
25 in fact, has to do the action and that Microsoft does it with

1 the operating system, and therefore, there is no
2 infringement. They lost, but let's look at what he told the
3 jury.

4 He says, "The Microsoft way uses the computer's
5 operating system down here" -- obviously he is pointing to
6 some graphic -- "for critical steps that are called out in
7 the patent. The '906 patent uses the browser, the Web
8 browser, over here (indicating). There is the '906 patent
9 approach" -- which he has already identified as the
10 browser -- "and there is the Microsoft approach" -- which
11 he's identified as the operating system -- "and they are
12 completely different from each other."

13 Now, here is the most important thing, though,
14 Judge. Eolas has already committed -- and I am repeating it
15 to your Honor here in open court and on this record -- that
16 if the judge agrees with Microsoft's position on the
17 operating system -- and he has got claim construction set in
18 three months -- Microsoft will get its way.

19 If the judge says the operating system performs any
20 element of any claim, we have already said that's off limits,
21 and we will withdraw our accusation.

22 The gravamen of our motion to dismiss is that
23 Microsoft jumped the gun.

24 Until claim construction -- we certainly can't
25 assume that the operating system is implicated by the claims.

1 We feel confident, based on what two other courts have done,
2 that it won't be. But let's assume we are wrong. Let's say
3 Judge Davis disagrees with us. In Microsoft's words, to,
4 quote, practice the steps of the claimed method, if the
5 operating system is used, then it's out of the case.

6 Now, Microsoft complains repeatedly that it got too
7 little for its money. The evidence is decidedly to the
8 contrary. Even before claim construction, Eolas has
9 circumscribed its infringement accusations with respect to a
10 significant majority of its claims, but only for the benefit
11 of people that use Microsoft software.

12 The result is that Microsoft software products have
13 enhanced value over competitive products.

14 In the industry Microsoft stands alone because of
15 our disclaimer -- because of the covenant and then our
16 disclaimer. No company or individual can be sued when they
17 use Microsoft products to satisfy a claim element. And no
18 other software company has that advantage.

19 The circumstances surrounding the bargain that the
20 parties made show Microsoft got a great deal. Its own
21 release when it was facing over a half-billion dollars in
22 damages -- which the Federal Circuit, by the way, did not
23 take away. It was only questions relating to prior art that
24 was being retried.

25 Plus, this increased product attractiveness, which

1 comes from the covenant not to sue, all for a fraction of its
2 potential exposure.

3 So limiting my comments now to the motion to
4 dismiss, stay, or transfer, this case is premature.

5 If the Court desires to retain the case, any
6 consideration of the merits of whether we were violating this
7 covenant has to await claim construction and then see if we
8 don't live up to our word by withdrawing our accusation
9 against any use which fulfills an element of any claim that
10 we are asserting.

11 We are confident that it will be clear to everybody
12 as this process proceeds that Eolas is going to continue to
13 live up to its commitments.

14 I do want to say a word about the preliminary
15 injunction.

16 Microsoft's motion for preliminary injunction
17 suffers from a fatal flaw under Rule 65, under the law of
18 every Federal Circuit, certainly the Seventh.

19 Microsoft has presented your Honor with no evidence
20 whatsoever that it is suffering any harm at all. Proof in
21 the form recognized by Rule 65 jurisprudence -- affidavits,
22 declarations, documents, testimony, not lawyers' conclusory
23 allegations -- is an absolute mandatory requirement to impose
24 the exceptional remedy of preliminary injunction.

25 I think it's worth our time to spend just a moment

1 with the Supreme Court case of *Mazurek v. Armstrong* at
2 520 U.S. 968, decided in 1997.

3 The court was considering a preliminary injunction.
4 And the court said, "If the motion at issue here were a
5 defendant's motion for summary judgment, and if the
6 plaintiff's only basis for proceeding with the suit were a
7 claim of improper legislative purpose, one would demand some
8 evidence of that improper purpose in order to avoid a
9 nonsuit. And what is at issue here is not even a defendant's
10 motion for summary judgment, but a plaintiff's motion for
11 preliminary injunctive relief, as to which the requirement
12 for substantial proof is much higher.

13 "It frequently is observed" -- it's quoting now
14 from Wright, Miller, and Kane.

15 "It frequently is observed that a preliminary
16 injunction is an extraordinary and drastic remedy, one that
17 should not be granted unless the movant'" -- and then in the
18 Court's italics -- "'by a clear showing, carries the burden
19 of persuasion.'"

20 And if we go to the section of Wright, Miller, and
21 Kane, it states very clearly.

22 If we can, go to Slide 53.

23 "Evidence that goes beyond the unverified
24 allegations of the pleadings and motion papers must be
25 presented to support or oppose a motion for preliminary

1 injunction.

2 "All affidavits should state the facts supporting
3 the litigant's position clearly and specifically.

4 Preliminary injunctions frequently are denied if the
5 affidavits are too vague or conclusory to demonstrate a clear
6 right to relief under Rule 65."

7 Microsoft has submitted no affidavits at all or any
8 other proof of any kind.

9 The only suggestion to this Court that Microsoft is
10 suffering any harm is from the conclusory unsworn statements
11 of its lawyers in its briefs.

12 The lawyers say Microsoft is suffering in two ways.
13 You will find this on Page 15 of their brief. The Texas suit
14 is harming its relationships with its customers and it's
15 devaluing Microsoft's products.

16 Microsoft has submitted to your Honor not a single
17 affidavit, declaration, transcript of testimony, document of
18 any kind, spreadsheet, evidence of any nature that supports
19 those conclusions.

20 And the undocumented conclusions don't even name a
21 single product that's being devalued for us to even respond
22 to, to look at and determine for the Court to be certain that
23 it's issuing an extraordinary relief based on some evidence.

24 They don't name a single example of one customer
25 whose relationship with Microsoft has been harmed, much less

1 that any of these losses, whatever they may be -- we don't
2 really know -- can be traced to the Texas action, which, of
3 course, is essential.

4 Now, all the cases cited in Microsoft's briefing
5 that granted a preliminary injunction -- *Girl Scouts*,
6 *Gateway*, *Panduit*, *SMC*, *Arcadia* -- they all explicitly rely on
7 evidence -- sworn testimony or documents, financial results,
8 real proof -- because it's an absolute requirement of the
9 rule.

10 Microsoft says that, well, we don't have to do that
11 because goodwill can't be valued. That's not the problem.

12 The problem is that there is not a shred of
13 evidence that there has been any loss of goodwill in the
14 first place.

15 Now, Microsoft is represented here by good lawyers.
16 They certainly know how to draft affidavits. They know how
17 to gather evidence for a contention, if it exists. Rule 65
18 jurisprudence holds that the failure to present evidence of
19 harm creates the presumption that there isn't any.

20 On Page 19 of our brief we cited to the *Sisto* case,
21 decided by Judge Hart of this district, stating that.

22 But let's stop, your Honor, and think about it a
23 minute.

24 Microsoft's conclusory harm allegations just aren't
25 plausible.

1 What the Texas suit tells Microsoft customers --
2 what it tells the entire market is that if you use a
3 Microsoft browser or Microsoft server software, you have less
4 exposure because of the disclaimer that's filed of record by
5 us in this case than if you use software of any of
6 Microsoft's competitors. Anyone keeping up with the Texas
7 suit would perceive added value from Microsoft's software and
8 be incentivized to buy it over a competitor's software.

9 Eolas did present evidence, in the form of two
10 declarations, of the harm that it will suffer by this
11 preliminary injunction.

12 During the 11 months that Microsoft failed to act,
13 Eolas made a substantial investment in the Texas litigation.
14 Just consider, 23,000 pages of infringement contentions
15 alone. There is two associates sitting at this table who
16 were involved in that project, all in written discovery,
17 briefing and arguing motions, producing and reviewing over
18 5 million documents. That's harm supported by the evidence
19 before the Court. That's got to be balanced against
20 Microsoft's complete failure to produce anything.

21 Now, finally, Microsoft says that it began
22 suffering injury in October 2009. In fact, it says in its
23 papers that the breach began on the day the complaint was
24 filed.

25 It waited two months before it did anything. And

1 that's when it suggested that this new rewritten covenant not
2 to sue be sent out to the defendants. We responded promptly
3 on Christmas Day -- our e-mail said "Happy Holidays" -- that
4 let's do it, but let's send out the exact words. They didn't
5 respond to that at all.

6 We wrote to them two months later and said, these
7 defendants deserve to have this covenant. Let's send them
8 the covenant.

9 Microsoft waited eight months to file this suit.
10 Microsoft waited another three months to seek relief. That's
11 11 months of delay. And that kind of delay is itself
12 evidence that the harm is not serious.

13 Now, in another opinion, coincidentally also by
14 Judge Hart, he states, citing Seventh Circuit authority in
15 the case of *Fenje v. Feld* at 2002 U.S. District, Lexis 9492.

16 If we could, go to the quote piece.

17 He says, "Delay in pursuing relief undercuts claims
18 of irreparable harm and may be considered as circumstantial
19 evidence that the potential harm to the plaintiff is not
20 irreparable or as great as claimed."

21 The *Markman* hearing set in the Texas case is set
22 for just a bit over three months away. The trial will occur
23 in the early fall of next year.

24 But the claims require something that every -- all
25 the Texas parties in the papers before this Court show agree

1 is the key to the application of the covenant, and what Eolas
2 is accusing should be clear in a matter of months.

3 Microsoft is saying, we can't wait for that.

4 I notice that when they showed your Honor what your
5 Honor should issue as a preliminary injunction, they used
6 more than 250 new words that aren't in the covenant. We are
7 asking your Honor to construe it in the same way that we and
8 the Texas defendants construe it.

9 The preliminary injunction should be denied. There
10 isn't a breach. We have lived up to our responsibilities.

11 And Microsoft fatally fails to demonstrate the
12 strict requirements that it has to demonstrate under Rule 65.

13 THE COURT: Thank you.

14 MR. McKOOL: Thank you, Judge.

15 THE COURT: Any rebuttal, Mr. Pritikin?

16 MR. PRITIKIN: Yes, your Honor, I would like to
17 respond to some of this, if I could?

18 THE COURT: Sure.

19 MR. PRITIKIN: Let me start with the key question,
20 your Honor, of whether there is or is not a dispute about
21 what is being accused. That's kind of the central issue
22 here.

23 I want to go back to this illustration because I
24 think this really -- this kind of captures it, your Honor.

25 This is the ecosystem we talked about. And you

1 have the browser. You have the servers down here that are
2 providing the information for Web pages there.

3 They are being very careful with the words they are
4 using. But the truth is, they have not disclaimed what
5 really matters, and that's the fundamental problem.

6 There was no question but that in the prior case
7 that they were accusing Microsoft of infringing because the
8 browsers would go out on the Internet and get Web pages that
9 would come back and be viewed in this manner.

10 And what they are telling you now -- what
11 Mr. McKool said now is, the reason we are no longer -- the
12 reason that we are living up to the promises we made is that
13 right now what we are focusing on is pursuing these people,
14 the people who are operating the Web sites and providing the
15 content in a way that it can be viewed by the browser.

16 It's all the same thing. It's all the same thing.
17 It's the same patent specification. It's the same ecosystem.
18 It is the same use. It is the same conduct that is involved.

19 And what you did not hear Mr. McKool say -- and I
20 was waiting, waiting, waiting; this is what I was waiting
21 for; we didn't hear it -- is, when Internet Explorer is being
22 used up here and the servers down here are providing the
23 content that can be viewed by Internet Explorer, that's out
24 of our case. He didn't say it.

25 And that's what the fight is about, because what

1 they want to do -- what they want to do is go back and sue
2 all these Web site operators out here (indicating) who are
3 providing the content in a way that it can be viewed and
4 manipulated on a browser, a Microsoft browser, Internet
5 Explorer. That's what we fought about for seven years. And
6 that's what we got when we settled the case, was the freedom
7 for people using Internet Explorer to go to any Web site.

8 Now, if Mr. McKool is right, what he is telling us
9 is, if they prevail in that case -- he is using cute
10 language. We are not accusing the Internet Explorer browser.
11 We are just accusing the people down here who are providing
12 the content that's going to be viewed on it.

13 If he is right -- remember a patent
14 (unintelligible). A patent carries with it the right to
15 exclude, an injunction. If he is right, what he is saying
16 is, we can shut down all these Web site operators who are
17 infringing if we win in that case, and they can't send the
18 content to people using the Internet Explorer browser to view
19 it.

20 Well, that's the vast majority of Web sites out
21 there.

22 What did we get? What did we get if he is correct
23 about that? That's the dispute.

24 All we want them to do is stand up and tell us that
25 they are not accusing -- that they will not use that lawsuit

1 to try to attach providing the content for use on Internet
2 Explorer.

3 Now, the claims, if you actually look at the
4 claims -- we don't have to go there to resolve this, your
5 Honor, but you could look at the claims in both of these
6 patents. You could read through them. And what you will see
7 is that every claim, every single one of these claims talks
8 about the whole ecosystem. It talks about the servers that
9 are providing the content. It talks about a browser that is
10 out there that can receive it and that will allow you to
11 manipulate the image on it. Every one of the claims talks
12 about all of those things.

13 And what they have done with kind of cute and
14 artful drafting is to say, when they did their infringement
15 contentions to identify the Web site operator, they are
16 silent on the browser that's being used there in the
17 contentions themselves. But they are not disclaiming that
18 they are going to try to reach -- that they are, in fact,
19 reaching, that they are making allegations against sending
20 the content from the servers and having it viewed by Internet
21 Explorer.

22 And that's the fundamental problem here. It is not
23 out of the case.

24 Now, we are making some progress. We learned more
25 about Go Daddy this morning. The first time we have seen

1 those documents. And apparently now they are willing to say
2 that we are not going to try to -- we are not going to try to
3 reach servers that are running on Microsoft software. And
4 that's progress.

5 THE COURT: That's not the first time they have
6 made that statement.

7 My understanding of their statement -- this isn't
8 drafting by me, Mr. McKool. I was quoting from -- I think
9 it's Mr. Van Dyke's brief here. Eolas does not allege
10 infringement of its claims in the Texas action based on any
11 defendant's use of Microsoft software.

12 I don't understand that sentence as being, but we
13 do think if they use the Microsoft software in the server,
14 that's covered; or we do think if they use the Microsoft
15 software in the browser, that's covered; or we do think that
16 if they use the Microsoft software in some other -- they are
17 saying "Microsoft software," which I view as a very broad
18 disclaimer.

19 You are suggesting that this broad disclaimer is
20 somehow being -- they are being cagily interpreted by them as
21 not reaching certain applications. But I just don't see why.

22 If Microsoft software is used in the infringement,
23 the infringement can't be reached by the Texas lawsuit.
24 That's the way I read this.

25 MR. PRITIKIN: That's not where they are going,

1 your Honor. And you don't have to look any further than the
2 letter, the Perot correspondence. I mean, it's crystal clear
3 from that.

4 THE COURT: Actually, nothing was terribly clear
5 from the Perot correspondence because what happened there is,
6 Perot says, here is what we think, and Eolas responded by
7 saying, we don't agree.

8 MR. PRITIKIN: But they said -- your Honor, if you
9 look at the letter that Perot sent --

10 THE COURT: All right.

11 MR. PRITIKIN: -- one of the things that Perot said
12 in that letter was they were looking for an assurance --

13 THE COURT: Yes.

14 MR. PRITIKIN: -- that the infringement contentions
15 regarding Perot does not contend that Perot or its
16 customers -- this is Exhibit E in our -- attached to our
17 motion for preliminary injunction.

18 THE COURT: Oh, got it. Here it is. This is the
19 May 27th letter from Mr. --

20 MR. PRITIKIN: Yes, your Honor.

21 If you look at Exhibit E, you see there it says
22 that -- it has three things that are laid out that they
23 wanted some assurance will be carved out of this case.

24 And it says, "Does not (unintelligible) liability
25 and circumstances are, one, Microsoft servers served the

1 Perot Web site." That's what we talked about earlier.
2 That's like the Go Daddy situation.

3 THE COURT: All right.

4 MR. PRITIKIN: "Two, users access Perot's Web site
5 with a Microsoft browser." And that was at the heart of the
6 earlier case. That's what it was all about.

7 "Three, users access Perot's Web site using a
8 device running a Microsoft operating system." I am going to
9 come back to the operating system in a minute. Let's focus
10 on the other two for now.

11 THE COURT: Right.

12 MR. PRITIKIN: That is precisely the assurance.
13 And if you look at the next one, Exhibit F.

14 THE COURT: "We disagree."

15 MR. PRITIKIN: "We disagree with your letter."
16 That states it about as graphically as it could.

17 And if Mr. McKool would stand up today and simply
18 tell me that they will agree to this, I think we would be a
19 long way down the road. But they won't.

20 And the reason they won't, your Honor, is -- I
21 don't want to accuse them of being cagey or anything like
22 that, but the reason that they won't is that they do want to
23 accuse situations where Microsoft software is being used.

24 I mean, you could ask him the question, will he
25 agree to this language in the Perot letter? We could perhaps

1 even enter into a consent order on the record here today that
2 would make it clear.

3 But I don't think they are going to agree to that.
4 And that's why we need help from the Court here, your Honor,
5 to clarify that, because this is what we are entitled to.
6 This is what we bought. This is what we got.

7 Look at Point 2. "Users access Perot's Web site
8 with a Microsoft browser." It's very simple. That's what we
9 fought for seven years about.

10 And we just don't -- they will not agree that they
11 can't pursue it. In fact, to the contrary. What they want
12 to do -- and if we read through the language in that -- the
13 document that Mr. McKool showed you, where they went through
14 and they said, we are not asserting the claims against this
15 or that or the other thing, it's very artfully drafted. And
16 it is designed to keep the options open to do precisely
17 what's in Item 2 there.

18 We can go back and look at that, your Honor, if it
19 would be helpful, but that -- they are not foreclosing the
20 situations that were at the heart of the earlier case,
21 Internet Explorer being used to view all of these Web sites.
22 And the way they try to get around it is, again, to say, we
23 are just accusing the server.

24 But it's one in the same. It's two sides of the
25 same coin. If you accuse the server of providing the content

1 that's viewed on the browser, you are basically interfering
2 with the same activity as if you accuse the browser.

3 THE COURT: Well, the statements made in Eolas'
4 brief don't distinguish between software and the browser and
5 software and the server.

6 MR. PRITIKIN: I am not sure I follow, your Honor.
7 I am sorry.

8 THE COURT: They don't make this distinction
9 between browser and server. They just say "software." I
10 think what they are saying is that that's consistent with the
11 license, that we will not allege infringement of a claim
12 that's based on any defendant's use of the software.

13 And you are saying -- I think what you are saying
14 to me is, well, okay, but that means that they are only
15 disclaiming the -- they are only disclaiming a user's use of
16 the Microsoft -- of the IE browser and not disclaiming
17 visiting of sites on a server that has some Microsoft
18 software in it.

19 No?

20 MR. PRITIKIN: Not quite. Let me try it again,
21 your Honor, and see if I could do better.

22 I think what's happening -- all of the claims in
23 these patents talk about the content being provided from the
24 server to being capable of being viewed on the browser. So
25 we have a browser that has the ability to deal with this. We

1 have a Web site that sends it in a way you can manipulate it
2 in that way.

3 We brought this screen.

4 Now, here is what they are saying. They are saying
5 that they will take their claims and they are going to parse
6 them and chop them up and parse them. What they are going to
7 do is, the named defendant is going to be a company down here
8 that is operating the server.

9 THE COURT: Right.

10 MR. PRITIKIN: Let's assume for the sake of
11 argument now this is a non-Microsoft server.

12 THE COURT: Okay.

13 MR. PRITIKIN: Okay. So the Microsoft software
14 that we are concerned about is Internet Explorer up here.

15 THE COURT: Right.

16 MR. PRITIKIN: And the way they are chopping this
17 up is, they are saying that we can do that -- notwithstanding
18 the covenant not to sue, notwithstanding the settlement of
19 the earlier case -- we can do that because the person we are
20 accusing of infringing down here is the person who's
21 operating this non-Microsoft server. And we can do that.
22 That's really what they are saying.

23 And our response, your Honor, is, if they can do
24 that, we got no value in the earlier case when we paid a lot
25 of money so that Internet Explorer users can visit all of

1 these Web sites.

2 And if you listen very carefully to what Mr. McKool
3 said and if you look at their briefs, what you will see is,
4 they are leaving themselves all that wiggle room. They are
5 leaving themselves the room to accuse non-Microsoft servers
6 down here (indicating) that are providing content that will
7 be viewed and manipulated by Internet Explorer.

8 All I am saying is, if Mr. McKool will stand up in
9 court today and tell us that's out of the case, I think we
10 are a long way down the road. But he won't. He won't. And
11 they are going to pursue that. And that's at the core of the
12 breach of the covenant not to sue. That's the problem.

13 The activity -- the very activity that we paid all
14 that money for, this activity (indicating), even on
15 non-Microsoft servers down here, is caught up in that case
16 because they won't let it go. They don't want to let it go.

17 And that's why we are here, because we need relief.
18 We need help on that, your Honor.

19 I don't know whether that helps. Does that clarify
20 what our position is on that, your Honor?

21 THE COURT: Yes. Yes.

22 MR. PRITIKIN: Okay. All right.

23 Let me just respond to a couple of the other points
24 that were made.

25 On this question of the Microsoft operating system,

1 this is really -- this is really -- as I said, this is one of
2 the five problem areas where they are getting back into
3 Microsoft software. But I want to go at that one more time
4 to try to clarify it because I don't think we are getting a
5 correct version from the other side on this.

6 Let me try it again, your Honor.

7 THE COURT: All right.

8 MR. PRITIKIN: The way these claims are
9 structured -- and it's true of all of the claims in both
10 patents -- they involve the use of an executable application,
11 which is the application that let's you manipulate and view
12 the image that you see. Remember, that's the application
13 that allows you to, in this instance --

14 THE COURT: Turn the car around, right.

15 MR. PRITIKIN: That term, "executable application,"
16 was construed by Judge Zagel, and he said, that is not the
17 operating system. The software is not the operating system.
18 They are correct on that. But that is not the claim term
19 that implicates the operating system. That's not the one.

20 There is another claim term in all of these patents
21 where it talks about that executable application being
22 identified and located by the browser. In other words, when
23 the Web page comes, you got to figure out what -- which
24 application to get. Do you want the one that turns the car,
25 or you want the one that plays a movie? You got to get the

1 right one.

2 And in the language of the claims, it's identified
3 and located by the browser. So we had a big fight in the
4 earlier case of, well, what code is actually going to do
5 that? Is it browser code? Is it operating system code?
6 That's what the fight was about. That's the relevant claim
7 term here.

8 And it was construed by the Court and there was a
9 jury instruction given that allows the browser to make use of
10 the operating system in meeting that claim requirement.

11 So Mr. McKool put up the language of the jury
12 instruction and he had some of it highlighted, but he left
13 the middle part out, not highlighted. And in the Federal
14 Circuit's opinion at -- I will hand up a copy of that, your
15 Honor.

16 (Document tendered.)

17 MR. PRITIKIN: At 1331, the jury instruction is
18 quoted there. You will see it says, "'utilized by said
19 browser to identify and locate' means that the enumerated
20 functions are performed by the browser." That part he
21 highlighted.

22 Then the next sentence says -- this was in a jury
23 instruction -- "The inventors contemplated the browser's use
24 of some outside resources such as the operating system, as
25 operating systems are always involved in the operation of

1 computer programs."

2 And then it said, "Nevertheless, it must be the
3 browser, not the operating system, that must do the heavy
4 lifting of identifying and locating."

5 And the point here was that the operating system
6 was, in fact, involved. They were pointing to the operating
7 system, and it did, in fact, satisfy part of the claim
8 requirements.

9 And the reason that figures in here is that the
10 Windows operating system, to the extent they are pointing to
11 that, to the extent that is used to support browsers that are
12 accused, they are violating again the covenant not to sue,
13 because Microsoft bought and got for the money that it paid
14 the right for the people to use the Windows operating system.
15 That just can't be involved in this.

16 The language of the covenant is very broad. It's
17 for any use, your Honor. That is the language of it.

18 Let me just touch on one or two other points, and
19 then I can answer further questions, if the Court has any.

20 On the question of the evidence that supports the
21 harm here, your Honor.

22 THE COURT: Right.

23 MR. PRITIKIN: It's the contract. The contract
24 itself is sufficient to do that. It is the covenant not to
25 sue. And that's -- I think that it flows from the *Thorogood*

1 case and others, that where one is filing a lawsuit, pursuing
2 litigation that you are not entitled to, that is sufficient
3 to create the harm.

4 Beyond that, they have recognized and they have
5 admitted that there is -- on the customers that are the
6 third-party beneficiaries to this contract, that they are
7 being subjected to lots of the travails of the litigation.
8 And the notion that that would not affect Microsoft products
9 makes no sense at all.

10 Clearly, your Honor, when Microsoft has paid all
11 this money and gotten the relief that it is entitled to, to
12 secure the covenant, the broad covenant, that when they
13 breach that, that is sufficient to evidence the harm itself.

14 I guess the last point I would make, your Honor, on
15 the question of the preliminary injunction is, we think the
16 issues that are presented are really largely legal issues
17 here. It's a question of contract interpretation. It's the
18 interpretation of the agreement that the Court has.

19 And we had not asked you to combine this hearing
20 with a hearing on a permanent injunction, but I think as far
21 as a preliminary injunction, we did that because we thought
22 it was an appropriate vehicle and the right vehicle to raise
23 this issue promptly for the Court to resolve it.

24 As far as the question of the timing on this,
25 that's laid out in the briefs, and I am not going to go over

1 that. But the Court can see that the correspondence that
2 proceeded back and forth as the allegations emerged and as
3 they were unfolded in the course of this, that we moved with
4 dispatch to raise these issues before the Court.

5 I guess the last point that I would respond to is
6 the suggestion by Mr. McKool that this case is somehow
7 premature and that we should be waiting for the Court in
8 Texas to somehow construe the claims before we -- I am not
9 quite sure what followed from that, whether he wants us to
10 come back after the claims are construed.

11 The point here is that the lawsuit ought not to be
12 proceeding in ways that are covered by the covenant not to
13 sue. I mean, that is the point of it.

14 There is nothing in the claim construction that is
15 going to occur that would have a bearing on this. Judge Coar
16 recognized that recently in the *Civix* case where it was a
17 question of whether or not a case raised patent issues. It
18 was a jurisdictional issue as to whether or not jurisdiction
19 could be founded on patent laws.

20 And the question is whether or not on a covenant
21 not to sue something similar to this, whether or not that
22 raises the federal jurisdiction. He concluded that it did
23 not because the issues of patent law and claim construction
24 are not implicated in that.

25 And the same principle pertains here. We have

1 diversity jurisdiction here.

2 But the point is that it is not a question of claim
3 construction. It's a question of what they are accusing.
4 And that's what needs to be clarified.

5 The parties don't agree on what they are permitted
6 to accuse. As I said, if Mr. McKool would give us the
7 assurances here on the record today, we may be able to
8 resolve all of this. But the fact that he won't shows that
9 there still is a dispute between the parties over the scope
10 of this covenant not to sue.

11 And for better or worse, that's why we are here,
12 your Honor. We would like to have you clarify that for us so
13 that we can get the benefit of the bargain that we thought we
14 struck three years ago.

15 THE COURT: All right. Thank you.

16 Anything further from Eolas on this browser and
17 server distinction?

18 MR. MCKOOL: Your Honor, I wasn't planning to say
19 anything, but if your Honor wants a comment on that --

20 THE COURT: Just a comment on that.

21 MR. MCKOOL: We have identified in our disclaimer
22 that we showed your Honor, the August 23rd disclaimer -- if
23 we could put it up -- those patent claims that -- we have
24 listed the claims by number in each patent.

25 THE COURT: Right.

1 MR. McKOOL: -- which we believed -- and I really
2 think it's beyond argument -- that called out for the browser
3 on the one hand, which is in the first paragraph, or the
4 server on the other hand, in the second two paragraphs.
5 Those are the only claims that we believe call for any
6 activity by those.

7 So we set out that we are not claiming any
8 infringement if Microsoft software is used to satisfy any of
9 those.

10 What I want to make clear is what Mr. Cawley told
11 the Court, and that is, if the district judge finds that
12 there is other claims where these things are implicated or if
13 the district court finds that there are any claims where the
14 operating system is implicated as performing an element of
15 the claim, that's what a patent suit is for, then we give
16 that up, too.

17 This is just our view of what the claims are now.
18 And we have had no defendant in Texas come forward and say,
19 you missed a claim. No one suggested that we were being
20 inaccurate in terms of identifying those claims in which
21 these types of server -- these types of software are
22 involved.

23 And these are the only ones that any of the
24 defendants in Texas have told us that they are using
25 Microsoft software.

1 If they come forward and say there is other
2 Microsoft software we are using, we have made the commitment,
3 and I make it here in open court, if the judge finds that
4 software is required to fulfill an element of any claim, the
5 use of Microsoft software to fulfill that is out of our case.
6 We are not claiming it. We are not alleging it. That's what
7 the covenant says and that's what we are doing.

8 MR. PRITIKIN: One last comment.

9 THE COURT: Sure.

10 MR. PRITIKIN: Put the slide up for a second
11 because I think this is important as to what it is. I think
12 this is pretty carefully written.

13 If you look at it, the language of it, the first
14 one says that they are asserting these claims only for acts
15 of infringement wherein the browser application limitation is
16 satisfied by something other than Microsoft Internet
17 Explorer.

18 Then, if you go down to the next one, you will see
19 it is written a little differently. It says these claims
20 wherein the executing on the network server limitations are
21 satisfied by something other than Microsoft server software.

22 This makes the point by itself.

23 They are reserving the right to assert these claims
24 (indicating) where the browser that's being used is Internet
25 Explorer. And they are reserving the right to assert these

1 claims (indicating) where the server software is Microsoft
2 server software.

3 So when I first read that, I thought -- I had to
4 read it twice. It looked like it covered everything. It
5 doesn't. It doesn't. It excludes the important things.

6 THE COURT: But I understood that's because Claims
7 1, 4, 5, 6, 9, 10, et cetera, are claims that are talking
8 about a browser application. And they are saying this
9 infringement -- but we don't mean Internet Explorer.

10 And then Claims 4, 5, 9, 10 refer to network
11 server. And they are saying, oh, by the way, when we talk
12 about network server, we don't mean the Microsoft server
13 software.

14 MR. PRITIKIN: You put your finger right on it,
15 your Honor. The problem is that these claims also talk about
16 a browser. If you read the claims, you will see the word
17 "browser."

18 THE COURT: Sure, 4, 5, 9 also talk about browser.
19 But look at the paragraph above. This claim recovers.

20 The disclaimer on 4, 5, 9 also appears in
21 Paragraph 1.

22 MR. PRITIKIN: But there are claims that they have
23 carved out, your Honor.

24 THE COURT: Which ones?

25 MR. PRITIKIN: If you look, for example, at --

1 THE COURT: 4, 5, 9, and 10 are mentioned in
2 Paragraph 2, but they are also mentioned in Paragraph 1.

3 MR. PRITIKIN: But look at these claims down here.

4 THE WITNESS: 20, 32, 40, and 44.

5 MR. PRITIKIN: Of the '985 patent. So they are not
6 mentioned up here (indicating).

7 THE COURT: So we are not -- we have now narrowed
8 down our dispute to those four claims?

9 MR. PRITIKIN: We have this both ways. I am trying
10 to give you an illustration. I can go back over it.

11 Let's start with that, your Honor.

12 THE COURT: Okay. Those claims refer to
13 communication via a network server.

14 But do they say something also about browser
15 application?

16 MR. PRITIKIN: Yes, your Honor. They do.

17 THE COURT: They do. Okay.

18 MR. PRITIKIN: We can get them out and I can show
19 it to you.

20 Let's look at Claim 20 of the '985 patent, your
21 Honor.

22 THE COURT: I am in the '906 patent.

23 Got it. Claim 20. Okay.

24 MR. PRITIKIN: Do you see Claim 20 there?

25 THE COURT: Yes.

1 MR. PRITIKIN: This is a method claim, so Claim 20
2 is one where, if you look at it -- there are more than just
3 Claim 20, but this is an example of it.

4 If you look down at Line 64 --

5 THE COURT: Right. There is a reference to the
6 browser application.

7 MR. PRITIKIN: It's executing on it.

8 You see what the browser is doing? It's doing what
9 IE was accused of doing in the last lawsuit. It's responding
10 to these text formats. There's a lot of the language it's
11 displaying.

12 These are all the things -- that's what we
13 litigated, whether IE does those things.

14 And you see it's utilizing the type information to
15 identify and locate (unintelligible). So that's -- I mean,
16 that's one of the problems here, is that it's very cleverly
17 drafted.

18 So they are saying no Internet Explorer here, but
19 down here we are reserving the right to sue. And they are
20 suing the people who are operating the Web sites, but they
21 are not disclaiming that it's going to extend to the use of
22 Internet Explorer. That's the fundamental problem.

23 We can go through and parse these others --

24 THE COURT: No.

25 MR. PRITIKIN: -- the same way. I don't think we

1 need to. It makes the point, your Honor. That's the basic
2 problem we have got. That's why we need injunctive relief.

3 MR. McKOOL: May I respond to that, your Honor?

4 THE COURT: Sure.

5 MR. McKOOL: Claim 20 is the only claim -- and they
6 put it in their brief. It is the only claim Microsoft points
7 out where they say, we left something out of these three.
8 Our position on Claim 20 is that the browser doesn't have to
9 do anything.

10 Claim 20 says that, when you get to the steps,
11 communicating via the network server in order to cause the
12 client workstation to receive.

13 Our view of Claim 20 is that everything that has to
14 be done is done by the server. It has to enable the browser
15 to do something, but the browser doesn't actually have to do
16 it.

17 In other words, if you tapped the line from that
18 server before it ever got to the browser and it had the
19 elements that would allow the browser to then do something,
20 then the claim is fulfilled. The claim does not require the
21 browser to do anything. The server does it all.

22 Now -- and the Federal Circuit has approved claims
23 like this, saying that -- they are called enabling claims.
24 They enable other things to do it, but all of the activity is
25 done by the enabling device.

1 Now, that's our interpretation of Claim 20. We
2 feel strongly about it. It is the only one where they have
3 said some other element is used that's not claimed in one of
4 those three paragraphs.

5 But what we are telling the judge and what we told
6 the judge in Texas, if they win -- if the judge disagrees
7 with our interpretation, it's out of the case. They win.
8 Claim 20 cannot be accused against a browser if their
9 interpretation is correct. That's the point.

10 We don't have to give up our claim constructions
11 now. We shouldn't have to. They shouldn't be asking this
12 Court to make claim constructions without the rigor required
13 by the *Markman* process.

14 We are affirming -- we are disclaiming any
15 allegation in which the Court finds that software is required
16 and Microsoft software does it. We just don't think browser
17 software is required here. We think it's all on the server
18 side. That's the claim construction debate. We'll win or
19 lose. But if we lose, we will live by our disclaimer.

20 THE COURT: I am prepared to make a few comments
21 here.

22 The two significant issues are whether the Court
23 should enter a preliminary injunction that essentially puts a
24 halt to the lawsuit in Texas, as I understand plaintiff's
25 position, Microsoft's position.

1 MR. PRITIKIN: Can I clarify that? That's not what
2 we are seeking.

3 THE COURT: I am saying the result that you are
4 seeking would effectively have that. Otherwise I am sitting
5 with another judge and I am telling that other judge what
6 parts of the lawsuit are going forward and which are not. It
7 seems to me that that involves this Court in the activities
8 of a colleague in Texas in an inappropriate way.

9 The only way to satisfy what Microsoft is asking
10 happen here would effectively halt the litigation.

11 Again, I am saying "effectively" in the sense that,
12 of course, Microsoft is not asking for an order to that
13 effect. I am saying that the only effective way to
14 accomplish it would have that result.

15 That kind of relief is extraordinary, just as
16 preliminary injunctive relief is extraordinary. It might be
17 appropriate in some circumstances. There are cases in which
18 courts enjoin litigation in other districts or enjoin
19 litigation altogether. That does happen from time to time.

20 Typically a lawsuit that alleges a breach of
21 contract does not generate a basis for preliminary injunctive
22 relief.

23 Mr. Pritikin has argued that the showing that is
24 necessary here has been made because the contract itself
25 precludes what Eolas -- what Microsoft believes Eolas is

1 doing, and that establishes irreparable harm.

2 If that were by itself enough, any breach of
3 contract would support preliminary injunctive relief. And we
4 know that that's typically not the ordinary relief that's
5 accorded.

6 I am concerned here by the fact that Microsoft has
7 not made any showing of irreparable harm other than its
8 assertions to that effect.

9 Obviously, litigation that interferes with
10 Microsoft's business would have irreparable harm. But there
11 isn't even a showing that there has been any interference
12 with Microsoft's business, no showing of any kind that any of
13 the customers at issue have withdrawn from working with
14 Microsoft, have notified Microsoft that it won't do any
15 business with Microsoft anymore, have ceased entering into
16 contracts, have ceased paying whatever royalties they might
17 be paying. There is no indication of that at all. There is
18 no record evidence of any harm to Microsoft at this point.

19 I am satisfied by the dispute about what the
20 lawsuit in Texas does and does not seek, that the case should
21 not be dismissed at this point.

22 But I am also of the view that, given
23 Microsoft's -- given Eolas' repeated insistence that it's not
24 breaching the language of the license and that any conclusion
25 that it is breaching the language of that license would

1 result in a withdrawal of its claims, I am satisfied by those
2 assertions that any harm that Microsoft is experiencing as a
3 result of the alleged breach can be remedied.

4 What I think is the appropriate result here is for
5 us to have another hearing after the claims construction
6 proceeding is complete here, because the judge there might
7 very well conclude that, in fact, Eolas' interpretation of
8 the claims language is improper or that Eolas has, in fact,
9 been playing some cagey game in suggesting that it's not
10 pursuing infringement claims based on defendant's use of
11 Microsoft's software when, in fact, Eolas is doing precisely
12 that.

13 I realize that that would ordinarily be a decision
14 for the Court that entered the -- that's supervising the
15 settlement to conclude, but it seems to me that it really is
16 intertwined with the activities of the Texas court in such a
17 way that for this Court to enter the injunction that
18 Microsoft has asked for would interfere with the continuing
19 progress of the lawsuit that I think has been moving along
20 promptly.

21 In reaching that conclusion, I would note that the
22 case has been pending for some almost 11 months, that the
23 motion for preliminary injunction didn't get filed until late
24 this year, after there had been substantial discovery,
25 substantial exchange of information between the plaintiff,

1 Eolas, and the defendants there.

2 And after, it sounds as though Eolas had on its own
3 reached out, or at least with some cooperation from
4 Microsoft, reached out and asked for what communications to
5 the licensees -- I am sorry -- to the defendants would be
6 appropriate, received no response from Microsoft to that
7 overture for almost two months.

8 All those things suggest to me that the kind of
9 urgent injunctive relief that the plaintiff is asking for
10 should not be accorded at this point.

11 That does not mean that Eolas wins the lawsuit, it
12 doesn't mean that Microsoft won't ultimately be entitled to a
13 permanent injunction, and it doesn't mean that I am finding
14 that there has been no breach of the contract at this point.

15 What I am satisfied about, however, is that at this
16 juncture there hasn't been a sufficient showing that the
17 preliminary injunctive relief that Microsoft has asked for is
18 appropriate.

19 A couple of times this morning Mr. Pritikin made
20 the comment that Mr. McKool was unwilling to make certain
21 assertions, unwilling to take certain positions, and perhaps
22 if Mr. McKool would do so, this whole issue would be
23 resolved. I agree with that.

24 It seems to me that the posture that we are in
25 suggests that further negotiations might well result in a

1 resolution of this particular dispute, because I am hearing
2 from Eolas not that Microsoft is not entitled to relief, but
3 instead Eolas acknowledging Microsoft is entitled to
4 enforcement of its license and an insistence on the part of
5 Eolas that, in fact, Eolas is prepared to do exactly that,
6 comply with the letter and the spirit of the license.

7 And with those representations, it seems to me the
8 parties have further negotiations to do before I can be
9 satisfied that any preliminary relief should be accorded by
10 this Court.

11 I think we need another status date.

12 MR. PRITIKIN: Your Honor, may I?

13 THE COURT: Sure.

14 MR. PRITIKIN: Just a couple things.

15 I appreciate the ruling. We are not going to argue
16 with any of that.

17 I do want to just clarify that as far as the
18 lawsuit, we do think that there is a scope of claims they
19 can't assert. And I understand -- I mean, there is a scope
20 where you would have non-Microsoft software all the way
21 around in that ecosystem.

22 THE COURT: Right. But, Mr. Pritikin, that's
23 exactly what Eolas insists they are doing. That's exactly
24 what they insist they are doing.

25 MR. PRITIKIN: It's going to get fleshed out.

1 THE COURT: Right.

2 MR. PRITIKIN: What I would request, your Honor, is
3 that -- I think that the claim construction hearing down
4 there is scheduled for sometime in March. But I think it
5 might be salutary if we could schedule a status hearing
6 before then because there could very well be other
7 developments that would clarify some of this.

8 THE COURT: I would be happy to schedule a status.
9 I was going to suggest a date earlier than that. How about
10 January?

11 MR. PRITIKIN: That would be terrific, your Honor.
12 And I think what I would like to do is have a
13 chance to come back and we can update you on where we are.
14 And if anything has happened that would have a bearing on it,
15 either side could bring it to your attention.

16 THE COURT: How about Friday, January 14th?

17 MR. PRITIKIN: Can I just check my calendar?

18 THE COURT: Sure.

19 MR. VAN DYKE: Judge, may I check my calendar?

20 THE COURT: A warning that it might be that the
21 17th is a holiday. Is that Martin Luther King Day? So if
22 you want to take a long weekend, maybe that's not good.

23 The 21st is also okay for me.

24 MR. McKOOL: Your Honor, could I approach the
25 bench, please?

1 THE COURT: Sure.

2 MR. McKOOL: Mr. Pritikin, could you approach with
3 me? I want to say something to the Judge in private.

4 MR. PRITIKIN: Sure. I am still trying to figure
5 out how to use my new calendar.

6 (A discussion was had off the record.)

7 THE COURT: Okay. We are going to push into
8 February. Maybe February 4th. Let's say at 10 o'clock.

9 All right. Anything further today?

10 MR. McKOOL: Not from us.

11 THE COURT: I will see you in February. Thank you.

12 MR. PRITIKIN: Thank you, your Honor.

13 THE CLERK: This court stands adjourned.

14 (An adjournment was taken at 12:37 p.m.)

15 * * * * *

16 I certify that the foregoing is a correct transcript from the
17 record of proceedings in the above-entitled matter.

18 /s/ Frances Ward December 9, 2010.
19 Official Court Reporter
F/j

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