

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

Eolas Technologies Incorporated,	§	
	§	
Plaintiff,	§	Civil Action No. 6:09-CV-00446-LED
	§	
vs.	§	
	§	
Adobe Systems Inc., Amazon.com, Inc.,	§	JURY TRIAL
Apple Inc., Argosy Publishing, Inc.,	§	
Blockbuster Inc., CDW Corp.,	§	
Citigroup Inc., eBay Inc., Frito-Lay, Inc.,	§	
The Go Daddy Group, Inc., Google Inc.,	§	
J.C. Penney Company, Inc., JPMorgan	§	
Chase & Co., New Frontier Media, Inc.,	§	
Office Depot, Inc., Perot Systems Corp.,	§	
Playboy Enterprises International, Inc.,	§	
Rent-A-Center, Inc., Staples, Inc., Sun	§	
Microsystems Inc., Texas Instruments Inc.,	§	
Yahoo! Inc., and YouTube, LLC	§	
	§	
Defendants.	§	

**EOLAS' MOTION TO COMPEL PRODUCTION OF
SOURCE CODE FROM GO DADDY**

Plaintiff Eolas Technologies Inc. (“Eolas”) submits this motion to compel the production of source code withheld by defendant The Go Daddy Group, Inc. (“Go Daddy”).

I. INTRODUCTION

Eolas has accused Go Daddy of infringing two of Eolas’ patents, U.S. Patent Nos. 5,838,906 and 7,599,985. Specifically, Eolas has accused Go Daddy of patent infringement through Go Daddy’s websites `godaddy.com`, `radiogodaddy.com`, and `videos.godaddy.com` (hereinafter “accused websites”).

Eolas’ complaint was filed October 6, 2009. *See* Dkt. 1. Under 35 U.S.C. § 286, Eolas is entitled to recovery for infringement from the period beginning six years prior to filing suit (hereinafter “the damages period”). Go Daddy has refused to produce the source code for each of the accused websites over the damages period. As the Court is well-aware, the source code is directly relevant to Eolas’ infringement allegations and Eolas needs this code to prove its case.

In order to ease the burden of producing source code for the accused websites over the damages period, Eolas offered all defendants—including Go Daddy—the option of producing representative versions of its source code. As explained herein, Eolas and Go Daddy initially reached an interim agreement regarding the protocol for source code production. However, when Eolas arrived to inspect the source code that Go Daddy produced pursuant to this interim agreement, Eolas discovered that Go Daddy had altered the directory structure of the code production and had failed to produce the code as it was kept in the ordinary course of its business. This not only violated the protective order, it also prevented Eolas from conducting a meaningful review of Go Daddy’s source code. Eolas promptly informed Go Daddy of these issues, which Go Daddy failed to timely correct. Eolas further notified Go Daddy that, in light of Go Daddy’s failures, the parties’ interim agreement was no longer workable given the time constraints.

Go Daddy's continued refusal to produce its source code in a timely manner unfairly hinders Eolas' ability to prepare for trial, including preparing its infringement expert reports. Under the Docket Control Order, Eolas' opening expert reports are due "21 days after Court issues claim construction order or May 25, 2011, whichever is earlier." Dkt. 242. This deadline is rapidly approaching. Accordingly, the Court should compel Go Daddy to produce the source code for its accused websites over the damages period.

II. FACTS

A. Go Daddy's Initial Source Code Production Was Deficient, Violated the Protective Order, and Did Not Allow Eolas to Conduct A Meaningful Review

Eolas first inspected Go Daddy's source code on November 17, 2010. Upon review, Eolas found Go Daddy's source code production was deficient, failed to comply the source code production provisions of the protective order, and unfairly prevented Eolas from conducting a meaningful review. As Eolas explained in its December 26, 2010 correspondence to Go Daddy:

The deficiencies in Go Daddy's source code production were numerous. Eolas expects that these deficiencies will be remedied in advance of our next source code inspection (date to be determined). As a threshold issue, the produced code was not made available in the form it is maintained by GoDaddy. Incredibly, Go Daddy's production consisted of 70,221 separate folders of source code, each folder having one file.

This folder structure, in addition to deviating from the form in which the code is maintained by Go Daddy, is unduly cumbersome and unreasonably restricted our reviewer's efforts—in contravention of paragraph 13(b)(ii) of the Protective Order. The sheer number of folders caused delay in routine operations. For example, each time our reviewers tried to open the Source Code folder containing those 70,221 folders, the computer "froze." Thus, even simple navigation amongst the folders was extremely time consuming. To give a concrete example, a simple keyword search took 4-5 minutes to complete. Going forward, we expect Go Daddy to produce its source code as it is maintained, in its native folder structure.

Furthermore, the folder structure GoDaddy has employed further impedes Eolas' ability to review by removing all information about how each individual file is used on GoDaddy's accused webpages in relation to other files.

Ex. D. Section 13(b)(ii) of the Protective Order provides that “[t]he Producing Party may not configure its Confidential Source Code or Restricted Material in a manner that unreasonably impedes or slows the Receiving Party’s ability to inspect the Confidential Source Code” Dkt. 423. Go Daddy’s alteration of the directory structure of its source code production violated this provision of the protective order as it unreasonably impeded and slowed Eolas’ review of that code.

B. The Deficiencies in Go Daddy’s Initial Production of Source Code, And its Failure to Promptly Cure Those Deficiencies, Renders the Parties’ Interim Agreement on Code Production Unworkable

Pursuant to the Court’s Order (dkt. 381), Go Daddy was required to produce source code by September 1, 2010. Prior to the deadline for source code production, Eolas offered all defendants—including Go Daddy—the option of producing representative versions of its source code. *See* Ex. A. Eolas suggested that the production of representative source code would ease the burden on Go Daddy of collecting and producing the source code for the accused websites over the damages period. *See id*; *see also* Ex. B.

Eolas and Go Daddy discussed the prospect of identifying representative versions of Go Daddy’s source code in August 2010. The results of such discussions were memorialized in subsequent emails between the parties. *See* Ex. C. As expressed in Go Daddy’s email to Eolas on August 4, 2010: “[Go Daddy does] not mean to suggest that ‘one recent version of [the] code’ would be the entirety of our source-code production. Rather, as we discussed, we will make one version available on August 9 serve to [sic] as the basis for us to collaboratively figure out what ‘representative’ versions of the code are.” *Id.* (correspondence of Aug. 4, 2010).

Consistent with this understanding, Eolas arrived to inspect Go Daddy’s source code on November 17, 2010 and noted the deficiencies discussed above. These deficiencies were brought to Go Daddy’s attention through correspondence between the parties, culminating in

Eolas' December 26, 2010 omnibus correspondence outlining the deficiencies in Go Daddy's source code production. Ex. D. As Eolas further explained in a telephone conversation on January 5, 2011, given the failures in Go Daddy's source code production, Eolas was unable to proceed under the parties' August 2010 interim agreement because the form of Go Daddy's production unfairly hindered Eolas' review. Ex. E (Jan. 14, 2010 correspondence); *see also* Ex. F (Feb. 15, 2011 correspondence).

Not until March 10, 2011 did Go Daddy finally—and for the first time—produce one version of its code without the alteration to the directory structure of the code. Due to the four month delay in Go Daddy's production of the source code (from November 2010 to March 2011), Eolas explained that the iterative approach of inspecting Go Daddy's source code and then identifying portions of code for further production as contemplated by the parties' interim agreement was no longer tenable. Under the Docket Control Order, Eolas' opening expert reports are due "21 days after Court issues claim construction order or May 25, 2011, whichever is earlier." Dkt. 242. This deadline is rapidly approaching, showing the necessity for Go Daddy's prompt production of its source code without further delay and without the need for further iterative inspections of that code.

C. Go Daddy Continues to Delay Eolas' Inspection of Its Source Code

On February 7, 2011 Eolas provided notice that it would conduct a second inspection of Go Daddy's source code. Eolas requested that this inspection take place on February 21-22, 2011. Ex. K. In response, Go Daddy informed Eolas that: (i) it would only produce source code dating back to 2007 and (ii) that it would not produce source code from prior to 2007, absent Eolas' agreement to pay for the cost of such code production. Ex. F. (Feb. 14 and Feb. 23, 2011 correspondence). Go Daddy also informed Eolas that the subset of the requested code it would

produce would not be available on the noticed date, but rather would be unavailable until “early March.” *Id.* (Feb. 14, 2011 correspondence).

Eolas responded, indicating that it would not reimburse Go Daddy for its compliance with its discovery obligations. *Id.* (Feb. 15, 2011 correspondence). Eolas noted that the continued delay associated with Go Daddy’s source code production was prejudicial to Eolas’ preparation of its case. *Id.* Nonetheless, Eolas delayed its noticed source code inspection until March 10-11, 2011 to allow Go Daddy to complete its production of a subset of the requested code by “early March.” Ex. G (Feb. 15, 2011 correspondence). On March 4, 2011 Go Daddy informed Eolas that instead of “early March” it would now take an additional three weeks, until March 25, 2011 for the subset of the source code it would produce to be made available for inspection. *See* Ex. G (March 4, 2011 correspondence). This further delay violated the protective order’s requirement that Go Daddy produce the requested code within twenty-one days of Eolas’ February 7, 2011 request. Dkt. 423.

With the expert report deadline rapidly approaching, Eolas declined to further delay its source code inspection. On March 10, 2011, Eolas inspected Go Daddy’s source code for the second time. This code consisted of a single recent version of Go Daddy’s code. This was the first time Eolas was able to inspect Go Daddy’s code without the altered directory structure that plagued Eolas’ prior review attempts. However, this code inspection was limited to one recent version of the code as Go Daddy failed to make earlier versions of the source code available during this review. Accordingly, and to-date, Eolas has been unable to inspect any Go Daddy code beyond the one recent version that was finally made available on March 10, 2011.

D. Go Daddy Continues to Refuse to Produce Any Code from Prior to 2007.

On March 7 and March 9, 2011, the parties met and conferred to discuss the production of Go Daddy’s source code from 2003 to 2007 (*i.e.* the portion of the damages period over which

Go Daddy continues to refuses to produce code). Go Daddy again indicated that it would not produce such versions of source code absent cost-sharing with Eolas. Eolas stated that it would not bear the expense of such production, as such production falls within Go Daddy's discovery obligations. Eolas further noted that Go Daddy remained free to accept Eolas' offer to identify versions of source code for other time frames as representative in lieu of producing code for each such version, but Go Daddy has chosen not to, necessitating this motion to compel.

III. ARGUMENT

Eolas is entitled to “discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.” FED. R. CIV. P. 26(b)(1). Information is relevant, even though inadmissible at trial, if its discovery appears “reasonably calculated to lead to the discovery of admissible evidence.” *See id.*

The source code that Eolas seeks from Go Daddy contains relevant information. The source code for the accused websites goes directly to proving infringement over the relevant damages period. This necessitates inspection of all versions of source code, absent a stipulation that the produced source code is representative over a time period.

The request for production of Go Daddy's source code over the damages period is not overly burdensome. Other defendants in this matter have produced such versions of code for their accused websites. *See, e.g.* Ex. H (defendant CDW agreeing to produce each version of its source code over the damages period). Furthermore, Go Daddy was free to produce less than all versions of its source code and stipulate that the code it produced was representative over the period from October 2003 onward. Go Daddy could have, for example, provided a single representative version of its archived source code for each accused website over each of the years 2003, 2004, 2005, 2006, and 2007. Other defendants in this case opted for such a stipulation. *See, e.g.*, Exs. I and J (Apple and Oracle agreeing to produce representative versions

of their source code over the damages period). Go Daddy chose not to, thus any complaint that the request to produce source code over the damages period is overly burdensome ignores that the situation is one of Go Daddy's own making.

It was Go Daddy that chose to initially produce its source code in a form that prevented Eolas from conducting a meaningful inspection, preventing Eolas from proceeding under the interim agreement the parties contemplated in August 2010. In the parties' August 2010 discussions Eolas had no reason to believe that Go Daddy's initial source code production would fail to comply with the protective order's prohibition against impeding the source code inspection, that the directory structure of the code would be altered and that Go Daddy would fail to produce the code in the form kept in the ordinary course of its business. *See* Dkt. 423. Instead, Go Daddy unreasonably impeded Eolas' ability to inspect Go Daddy's source code which violated the protective order. *See* Ex. D. It was also Go Daddy that failed to correct the deficiencies in its code production until March 10, 2011 — four months after Eolas' initial inspection of that code. Go Daddy's unilateral actions render the interim agreement of the parties on source code inspection unworkable.

Eolas can wait no longer for Go Daddy to comply with its source code production obligations. Accordingly, Eolas asks the Court to compel Go Daddy to produce its source code for the damages period.

IV. CONCLUSION

For the foregoing reasons, Eolas respectfully requests that this Court enter an order compelling Go Daddy to produce its source code for each of the accused websites from the time period October 2003 onward, including all archived versions of its source code from the time period beginning October 6, 2003 until 2007.

Dated: March 17, 2011.

McKool Smith, P.C.

/s/ Mike McKool

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CERTIFICATE OF CONFERENCE

I hereby certify that lead counsel for Plaintiff Eolas Technologies, Inc. met and conferred with lead and local counsel for Go Daddy on Wednesday, March 9, 2011. Even after the meet and confer, Go Daddy continued to refuse to produce source code for the accused websites from the time period of October 2003 until 2007. The parties are therefore at an impasse.

/s/ Matt Rappaport
Matt Rappaport

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic services on this the 17th day of March, 2011. Local Rule CV-5(a)(3)(A).

/s/ Matt Rappaport
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