

Pursuant to Federal Rule of Civil Procedure 37 and Local Rule CV-7, Plaintiff Eolas Technologies Incorporated (“Eolas”) files this Motion to Compel Log-in Information for stapleslink.com and eway.com from Defendant Staples, Inc. (“Staples”).

I. INTRODUCTION AND FACTUAL BACKGROUND

A. stapleslink.com and eway.com.

stapleslink.com and eway.com are password-protected websites for Staples’ contract customers. Thus, unlike staples.com—a website that can readily be used by anyone with access to a computer or mobile device and an internet connection—only those who register and obtain log-in information can access stapleslink.com and eway.com.¹ Indeed, as part of the registration process, a Staples representative must contact the customer before log-in information can be obtained by the customer to access stapleslink.com and eway.com.² Thus, Eolas has been and is restricted from accessing such websites, lacking log-in information and lacking even the ability to obtain log-in information as a contract customer would.

On June 7, 2011, after examining documents produced in discovery suggesting that stapleslink.com and eway.com may practice the patented inventions, Eolas requested access to those websites to make a determination regarding infringement.³ As has been the hallmark of this litigation with Staples, Staples has delayed in responding to Eolas’ emails, delayed in providing dates for Local Rule CV-7 meet and confers, and delayed in fulfilling promises made in the meet and confers. After receiving no response to its June 7th email, Eolas followed up on June 10th with another email.⁴ After receiving no response to its June 10th email, on June 16th,

¹ Exhibit 1 (screenshots from stapleslink.com and eway.com made on September 6, 2011).

² *Id.*

³ Exhibit 2 (e-mail from Mr. Fasone to Ms. Hutchins (June 7, 2011, 4:50 PM)).

⁴ Exhibit 3 (e-mail from Mr. Fasone to Ms. Hutchins (June 10, 2011)).

Eolas requested times for a Local Rule CV-7 meet and confer should Staples refuse Eolas access to the websites.⁵ After receiving no response to its June 16th email, Eolas sent another email on June 22nd.⁶ That day, Staples responded—not with an agreement to allow Eolas access to the websites—but with a statement that it would conduct a Local Rule CV-7 after the June 29th discovery hearing in this case.⁷ Thereafter, on June 23rd, June 24th, and June 26th, Eolas sent emails in an attempt to schedule the meet and confer.⁸ On the June 30th meet and confer, Staples offered to stipulate that its password-protected websites do not make use of accused functionality and features in this case. Eolas sent emails on July 5th and 8th to obtain the stipulation.⁹ On July 8th, Staples counsel explained that it had never promised a date of when it would provide a stipulation, that the client was on vacation that week, and that it would promptly respond once the client returned the following week.¹⁰ Not hearing back from Staples, Eolas sent another email on July 14th, inquiring about the stipulation, and not receiving a response, on July 19th, Eolas notified Staples that it intended to file a motion to compel.¹¹ Staples responded that day, offering to provide Eolas access to stapleslink.com and away.com instead of the stipulation¹²—the very same discovery Eolas had requested six weeks earlier. It was not until July 22nd—after Eolas sent another email—that Staples informed Eolas as to the location and manner of the

⁵ Exhibit 4 (e-mail from Mr. Fasone to Ms. Hutchins (June 16, 2011)).

⁶ Exhibit 5 (e-mail from Mr. Fasone to Ms. Hutchins (June 22, 2011)).

⁷ Exhibit 6 (e-mail from Ms. Hutchins to Mr. Fasone (June 22, 2011)).

⁸ Exhibit 7 (e-mails from Mr. Fasone to Ms. Hutchins (June 23, 24, 26, 2011)).

⁹ Exhibit 8 (e-mails from Mr. Fasone (July 5, 8, 2011)).

¹⁰ *Id.* (e-mail from Mr. Matuschak (July 8, 2011)).

¹¹ Exhibit 9 (e-mails from Mr. Fasone (July 14, 19, 2011)).

¹² Exhibit 10 (letter from Mr. Matuschak to Mr. Budwin (July 19, 2011) (forwarded by Mr. Williams to Mr. Fasone (July 19, 2011))).

inspection of the websites.¹³ Rather than provide Eolas log-in information for the two password-protected websites, Staples required Eolas' expert to review the websites on a computer in the offices of its counsel in Boston.¹⁴ Thus, on July 27th and 28th, Eolas' expert conducted an inspection of stapleslink.com and away.com in the Boston offices of its counsel. Eolas' expert was only allowed access to the websites on stripped-down computer systems provided by Staples' counsel. Accordingly, tools that were required to conduct a complete and thorough inspection of the websites were missing from the computer systems. Given the need to expeditiously provide infringement contentions for those websites, however, Eolas' expert worked within those limitations.

During the first day of the inspection, Eolas' expert printed materials from those websites and requested that they be provided to Eolas by that Friday, July 29, 2011. Despite the Protective Order in this case, which provides for such productions within two business days,¹⁵ only after Eolas sent an email on August 5th (to which no response was received) and August 8th regarding the production of those printouts did Staples produce such documents.¹⁶ Eolas' experts then drafted infringement contentions for those two websites, which Eolas provided in an August 16th email to Staples explaining Eolas' intent to add those two websites as accused products in this litigation and seeking a determination as to whether Staples would oppose its motion for leave to amend its infringement contentions.¹⁷ Receiving no response, Eolas

¹³ Exhibit 11 (e-mail from Mr. Williams to Mr. Fasone (July 22, 2011)).

¹⁴ *Id.*

¹⁵ Dkt. 423, §13(b)(v) (Protective Order).

¹⁶ Exhibit 12 (e-mails from Ms. Curran (August 5, 8, 2011)) (e-mail from Mr. Hardt (August 8, 2011)).

¹⁷ Exhibit 13 (e-mail from Mr. Fasone (August 16, 2011)).

followed up with an email on August 17th.¹⁸ On August 18th, Eolas sent another email, attaching the infringement contentions for stapleslink.com and eway.com.¹⁹ Hearing nothing from Staples, Eolas sent an email on August 20th, providing a list of issues to address during the parties' Local Rule CV-7 meet and confer—including Eolas' motion for leave to supplement its infringement contentions.²⁰ During the August 22nd meet and confer, Staples indicated it would not oppose Eolas' motion if Eolas agreed to limit the damages discovery Eolas sought. That evening, Eolas provided a list of proposed damages discovery.²¹ The following evening, following a request by Eolas for a response to Eolas' damages discovery list, Staples provided a counter-proposal, to which Eolas agreed.²² Eolas motion for leave was filed on August 24th (Doc. No. 933), granted on August 25th (Doc. No. 939), and Eolas served its infringement contentions on August 25th.

On August 26th, Staples inquired as to when Eolas would be serving its supplemental expert reports addressing stapleslink.com and eway.com.²³ Eolas responded on August 26th²⁴ and twice on 30th²⁵ requesting access to the websites so that Eolas' experts could complete the supplementation to their expert reports. On September 2nd, Staples refused further access to its websites.²⁶ Staples' counsel equated Eolas' agreement to Staples' revised list of damages

¹⁸ *Id.* (e-mail from Mr. Fasone (August 17, 2011)).

¹⁹ Exhibit 14 (e-mail from Mr. Fasone (August 18, 2011)).

²⁰ Exhibit 15 (e-mail from Mr. Fasone (August 20, 2011)).

²¹ Exhibit 16 (e-mail from Mr. Fasone (August 22, 2011)); Exhibit 17 (list of proposed damages discovery).

²² Exhibit 18 (e-mail from Mr. Matuschak (August 23, 2011)); Exhibit 19 (list of counter-proposed damages discovery).

²³ Exhibit 20 (e-mail from Mr. Williams (August 26, 2011 4:32 PM)).

²⁴ *Id.* (e-mail from Ms. Curran (August 26, 2011 4:40 PM)).

²⁵ *Id.* (e-mails from Ms. Curran (August 30, 2011)).

²⁶ Exhibit 21 (e-mail from J. Hardt (September 2, 2011)).

discovery to Eolas having forfeited any right to obtain further access to the accused websites in order to complete the supplementations of its infringement and damages expert reports.²⁷ Staples then equated the information and detail required for infringement contentions with that which is necessary to establish infringement in an expert report, stating that Eolas already had access to the websites, printed more than 100 pages from them, amended its infringement contentions, and, therefore, has “all of the information it claims to need to assert that these websites infringe Eolas’ patents.”²⁸ Staples contended that Eolas’ “request for further review seems plainly designed merely to harass Staples, change the parties’ agreement, and not for any legitimate purpose.”²⁹ Thus, Staples refused Eolas’ request to access the accused websites.

When Eolas sought to schedule a meet and confer on the issue,³⁰ Staples refused to schedule a meet and confer until Eolas “fully respond[ed] to [Staples’] e-mail.”³¹ Staples stated that it wanted “an explanation why your team now needs more review given its claims to already have sufficient information to determine that these websites infringe and given the parties’ preexisting agreement.”³² Explaining that “[t]here was no such agreement that Eolas would not need further access to the accused websites to draft expert reports for infringement and damages”, and recognizing that further access to the websites on the stripped-down computer systems that lacked necessary tools would be insufficient to complete its expert reports, Eolas stated that it “merely seeks log-in codes for these publicly available websites that can easily be

²⁷ *Id.*.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (e-mail from Ms. Curran (September 2, 2011 11:40 AM)).

³¹ *Id.* (e-mail from Mr. Hardt (September 2, 2011 12:46 PM)).

³² *Id.*

sent in an email without delay.”³³ Eolas explained that “[i]f Staples is refusing to provide such log-in codes for the accused websites, please provide what times on Tuesday, September 6th Staples’ local/lead counsel are available for an L.R. 7 meet and confer.”³⁴

In an email sent by Staples’ counsel, Eolas caught a glimpse behind the curtain, and the text of the email, while brief, speaks volumes:

We’re not sending them log in codes. I can do the call next Friday.³⁵

That email further evidences the gamesmanship (as is shown in detail above by Staples’ continued delay tactics and unreasonable positions) and failure to even consider Eolas’ position and rationale for seeking log-in information to access to the websites.

The parties conducted a Local Rule CV-7 meet and confer on September 8th. During the meet and confer, counsel for Staples articulated no burden and cost associated with providing Eolas log-in information for stapleslink.com and eway.com. Instead, counsel for Staples stated that it could not provide log-in information to Eolas because of the inability to maintain the confidentiality of Staples’ information, and it would be tantamount to placing Eolas in a roomful of confidential Staples’ documents. Yet, all businesses that sign up for access to the websites obtain unfettered access to the websites; the Protective Order in this case protects the confidentiality of Staples’ information; and Eolas’ counsel agreed such log-in information would be treated as highly confidential, and—despite the fact that any business that signs up for access to the websites is able to view and print pages without restrictions—Eolas agreed to work with Staples to create a confidentiality agreement specific to accessing those websites and printing pages from those websites. During the meet and confer, Staples counsel continued to refuse

³³ *Id.* (e-mail from Ms. Curran (September 2, 2011 2:34 PM)).

³⁴ *Id.*

³⁵ *Id.* (e-mail from Mr. Matuschak (September 2, 2011 2:00 PM)).

Eolas' request for log-in information; but, it asked that Eolas wait to file its motion to determine whether its client would agree to provide the log-in information.

Later in the day on September 8th, Eolas received an email from Staples' counsel asking that Eolas continue to wait to file its motion to allow Staples' counsel to determine its client's position on supplying log-in information for the websites so long as Eolas agrees to "treating any printouts from the websites as highly confidential under the Protective Order."³⁶ In its email, Staples' counsel also stated "[i]n the meantime, one other possible compromise is that we provide additional access under the same conditions on which we've previously provided access, but in a city convenient to your counsel or experts."³⁷ As provided in detail above, the "conditions on which [Staples] previously provided access" was clearly unacceptable; thus, in response to the email from Staples' counsel, Eolas' counsel stated that "[a]ccess 'under the same conditions on which [Staples] previously provided access' is an unacceptable alternative to log-in information for the reasons set forth in the meet and confer this afternoon."³⁸ With respect to delaying the filing of its Motion to Compel, and in light of the delay that has plagued Eolas' litigation with Staples, Eolas explained that it would wait until 12:00 CST the following day to file and that it would not file its Motion to Compel contingent on Staples agreeing "to provide log-in information for stapleslink.com and eway.com by 9 AM CST Monday, September 12 and actually providing log-in information by 9 AM CST Monday, September 12. Such a contingency is necessary, given how long it took Staples to provide access to its analytics systems, even after it was ordered by the Court."³⁹ ⁴⁰ Staples' counsel did not respond to Eolas' statement regarding

³⁶ Exhibit 21 (e-mail from Ms. Hutchins (September 8, 2011 4:37 PM)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* (e-mail from Ms. Curran (September 8, 2011 5:52 PM)).

the production of the log-in information by a date-certain. Instead, it focused on the rejection of Staples' "alternative compromise" and asked Eolas to articulate the reasons for finding Staples' alternative compromise unacceptable.⁴¹ Eolas responded, stating that it was "unreasonable to place any logistical burden on Eolas to inspect the accused products to prepare its case given that many (hundreds? thousands?) of companies have the same access to the accused websites that Eolas is seeking."⁴² Eolas also explained that it was "wholly unreasonable to require Eolas to travel to Boston to access these sites to generate the infringement contentions, particularly given that Staples represented these sites did not use the accused features. We hope Staples will consider reimbursing Eolas for this unnecessary expense."⁴³

The 12:00 PM CST deadline that Eolas provided to Staples' counsel passed, necessitating the filing of this Motion to Compel.

⁴⁰ On June 30, 2011, this Court ordered Staples to provide Eolas access to its web analytics data. Dkt. 743. Eolas contacted Staples, along with other Defendants on June 30, 2011 to discuss modifications to discovery schedules, as well as to obtain prompt access to these web analytics systems. Exhibit 22 (e-mail from Mr. Budwin to defense counsel (June 30, 2011)). Eolas followed up on July 1st, seeking the identity of a witness and proposed dates for the web analytics deposition. *Id.* (e-mail from Mr. Fasone (July 1, 2011)). For nearly a month, Eolas received no response from Staples, despite four separate requests between July 1st and July 23rd, that it provide a witness and access to Staples web metrics systems. *Id.* (e-mail from Mr. Fasone (July 7, 2011)), (email from Mr. Fasone (July 12, 2011)), (e-mail from Mr. Fasone (July 21, 2011)), Exhibit 23 (e-mail from Mr. Fasone (July 23, 2011)). Without responding substantively to Eolas' requests, on July 26th, Staples agreed to participate in a Local Rule CV-7 meet and confer, to take place on July 28th—four weeks after the Court ordered Staples to provide access. Exhibit 24 (e-mail from Ms. Hutchins (July 26, 2011 9:44 AM)). On the day before the scheduled meet and confer, Staples responded substantively, agreeing to provide Eolas access to its web metrics data in the offices of its legal counsel in Boston, Massachusetts: "Staples is now able to offer web analytics access on a secure computer in Wilmer's Boston office. The review can commence tomorrow morning at 9:00 am, or any day thereafter." Exhibit 25 (e-mail from Mr. Hardt (July 27, 2011 1:55 PM)).

⁴¹ Exhibit 21 (e-mail from Ms. Hutchins (September 8, 2011 5:09 PM)).

⁴² *Id.* (e-mail from J. Campbell (September 8, 2011 6:41 PM)).

⁴³ *Id.*

II. ARGUMENT

Federal Rule of Civil Procedure 26(b)(1) allows Eolas to obtain “discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense” and provides that “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” The Local Rules state that “relevant to the claim or defense” includes information “that would not support the disclosing parties’ contentions[,]” “information that deserves to be considered in the preparation, evaluation or trial of a claim or defense[,]” and “information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense.” L.R. CV-26(d). Relevant information need not be admissible at trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence. FED. R. CIV. P. 26(b). Eolas has the burden of proof regarding both infringement and damages.

A. **The Parties Did Not Agree to “a Universe of Documents It Needed Related to Those Amended Contentions” for stapleslink.com and eway.com.**

Staples argues that it “explicitly agreed it would not object to Eolas amending its infringement contentions *if* and only if Eolas would agree on a universe of documents it needed related to those amended contentions.”⁴⁴ Accordingly, Staples contends that Eolas’ request for log-in information for stapleslink.com and eway.com is in breach of that agreement. Staples’ argument, however, is belied by the correspondence of the parties.

On August 22nd, Eolas sent an email “attach[ing] a list of the damages discovery Eolas seeks for the B2B sites stapleslink.com and eway.com, which is being provided pursuant to Staples’ request during today’s LR7 on Eolas’ MFL to add the B2B sites.”⁴⁵ Staples responded

⁴⁴ *Id.* (e-mail from Mr. Hardt (September 2, 2011 12:46 PM) (emphasis in original)).

⁴⁵ Exhibit 16 (e-mail from Mr. Fasone (August 22, 2011)).

on August 23rd, stating “[w]e thought the original draft of damages-type discovery for staples-link and eway were too broad and essentially covered almost every conceivable document about those products. In the spirit of cooperation, however, we’ve made some edits to your list and, if those are acceptable to you, Staples will not oppose your motion to add accused features on staples-link and eway.”⁴⁶ Moreover, the original and revised lists bear the following heading: “STAPLESLINK.COM AND EWAY.COM DAMAGES DISCOVERY REQUEST”.⁴⁷

The foregoing correspondence establishes that the parties had agreed to a universe of documents that Staples was required to produce related to damages. Thus, the parties’ agreement was not regarding “a universe of documents [Eolas] needed related to those amended contentions”, and it certainly had no bearing on whether Eolas’ experts required additional access to stapleslink.com and eway.com.

B. The Level of Detail Required to Make Out a Prima Facie Case of Infringement and Provide Proof of Such Infringement in an Expert Report Exceeds What Is Required to Put a Defendant on Notice of a Patentee’s Infringement Contentions.

According to Staples, “given that [Eolas’] expert already reviewed the sites, printed more than 100 pages from them, and, thereafter Eolas amended its infringement contentions, it is apparent that Eolas already has all of the information it claims to need to assert that these websites infringe Eolas’ patents.”⁴⁸ Thus, argues Staples, Eolas’ “request for further review seems plainly designed merely to harass Staples, change the parties’ agreement, and not for any legitimate purpose.”⁴⁹ Such an argument—information that is sufficient to put a defendant on

⁴⁶ Exhibit 18 (e-mail from Mr. Matuschak (August 23, 2011)).

⁴⁷ Exhibit 17 (list of proposed damages discovery); Exhibit 19 (list of counter-proposed damages discovery).

⁴⁸ Exhibit 21 (email from Mr. Hardt (September 2, 2011 9:40 AM)).

⁴⁹ *Id.*

notice of a party's infringement contentions provides the same level of detail required to make out a prima facie case of infringement and provide proof of such infringement in an expert report—finds no support in relevant case law, the Patent Rules, or the Federal Rules of Civil Procedure.

Recently, in *Fenner Invs., Ltd. v. Hewlett-Packard Co.*, No. 6:08-CV-273, 2010 U.S. Dist. LEXIS 17536 (E.D. Tex. Feb. 26, 2010), the Court distinguished between the level of detail required for infringement contentions and that for expert reports. The Court acknowledged the need for the patentee to provide as much detail as possible in its contentions to put the defendant on notice of the patentee's theories of infringement. *Id.* at *7. But, as the Court held, “[t]he scope of infringement contentions and expert reports are not, however, coextensive. Infringement contentions need not disclose ‘specific evidence nor do they require a plaintiff to prove its infringement case,’ whereas expert reports must include a complete statement of the expert’s opinions, the basis and reasons for them, and any data or other information considered when forming them.” *Id.* (quoting *EON Corp. IP Holdings, LLC v. Sensus USA Inc.*, No. 6:09-cv-116, 2010 U.S. Dist. LEXIS 4973, 2010 WL 346218, *2 (E.D. Tex. Jan. 21, 2010); citing FED. R. CIV. P. 26(a)(2)(B)).

In *EON Corp. IP Holdings, LLC v. Sensus USA Inc.*, No. 6:09-cv-116, 2010 U.S. Dist. LEXIS 4973 (E.D. Tex. Jan. 21, 2010), the Court acknowledged that “[p]roper infringement contentions provide a defendant with notice of a plaintiff's infringement theories.” *Id.* at *8 (citing *Linex Techs., Inc. v. Belkin Int’l, Inc.*, 628 F. Supp. 2d 703, 706 (E.D. Tex. 2008) (“enough specificity is required to give an alleged infringer notice of the patentee’s claims”)). However, “[t]he Rules do not require the disclosure of specific evidence nor do they require a plaintiff to prove its infringement case.” *Id.* at *8-9 (citing *Realtime Data, LLC v. Packeteer*,

Inc., No. 6:08-cv-144, 2009 U.S. Dist. LEXIS 73217, at *5 (E.D. Tex. Aug. 18, 2009) (“Infringement contentions are not intended to require a party to set forth a prima facie case of infringement and evidence in support thereof”); *Balsam Coffee Solutions Inc. v. Folgers Coffee Co.*, No. 6:09-cv-089, 2009 U.S. Dist. LEXIS 114794, at *3 n.2 (E.D. Tex. Dec. 9, 2009) (“P.R. 3-1 does not require the disclosure of evidence and documents supporting infringement contentions”). It is within the expert report that the patentee supports its allegations of infringement with evidence cited therein.

Eolas’ inspection of the stapleslink.com and eway.com websites during the two-day period afforded Eolas’ experts was sufficient in order to set forth sufficient detail for its infringement contentions. However, in order to put forth a prima facie case of infringement and provide evidence in support thereof in the supplemental expert reports, Eolas’ experts necessarily require additional access to stapleslink.com and eway.com. Any assertion by Staples’ counsel that Eolas does not need log-in information to access stapleslink.com and eway.com because it has “all of the information it claims to need to assert that these websites infringe Eolas’ patents”, by virtue of the fact that it had enough information to draft its infringement contentions flies in the face of relevant case law, the Patent Rules, and Federal Rules of Civil Procedure.

Moreover, Staples’ refusal to provide Eolas log-in information due to “confidentiality” concerns does not comport with the fact that (i) businesses that sign up for access to stapleslink.com and eway.com have unfettered access to those websites; (ii) the Protective Order in this case protects Staples’ confidential information, and Eolas has indicated its willingness to agree to additional provisions for access to and printing of pages from the websites; and (iii) the fact that Staples has not articulated the burden or cost associated with providing Eolas such log-in information.

III. CONCLUSION

In light of the foregoing, Eolas respectfully requests that the Court grant its Motion to Compel, requiring Staples to provide Eolas log-in information for stapleslink.com and away.com within 3 days of the Court's Order.

DATED: September 9, 2011

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned certifies that the parties have complied with Local Rule CV-7(h)'s meet-and-confer requirement on September 8, 2011. During the meet and confer, counsel for Staples articulated no burden and cost associated with providing Eolas log-in information for stapleslink.com and eway.com. Instead, counsel for Staples stated that it could not provide log-in information to Eolas because of the inability to maintain the confidentiality of Staples' information, and it would be tantamount to placing Eolas in a roomful of confidential Staples' documents. Yet, all businesses that sign up for access to the websites obtain unfettered access to the websites; the Protective Order in this case protects the confidentiality of Staples' information; and Eolas' counsel agreed such log-in information would be treated as highly confidential and, despite the fact that any business that signs up for access to the websites is able to view and print pages without restrictions, Eolas agreed to work with Staples to create a confidentiality agreement specific to accessing those websites and printing pages from those websites. Staples continued to refuse Eolas' request for log-in information. Thus, the discussions ended conclusively in an impasse, leaving an open issue for the Court to resolve.

/s/ Gretchen K. Curran
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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 September 9, 2011. Local Rule CV-5(a)(3)(A).

/s/ Gretchen K. Curran
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