UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TYLER DIVISION

Eolas Technologies Incorporated, *Plaintiff*, vs. Adobe Systems Inc.; Amazon.com, Inc.; 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 Corporation, 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*.	No. 6:09-cv-00446-LED (filed Oct. 6, 2009)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO PRECLUDE EXPERT TESTIMONY OF JONATHAN H. BARI

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Eolas's brief concedes that Mr. Bari makes no attempt to address or relate his opinions to the facts of this case — and in fact his report expressly disclaims doing so. *See* D.I. 1000, Ex. A ("Bari Report") at 3. Eolas instead resorts to asserting that he will "educate the jury" on "background" and "historical context." D.I. 1000 ("Resp.") at 1. However, this justification is contradicted by Mr. Bari's own characterization of his opinions as providing "the qualitative and quantitative drivers that Eolas's Intellectual Property may provide." Bari Report at 3. In any event, expert testimony concerning the value of technology that is not sufficiently tied to the patents-in-suit is inadmissible as it can serve only to mislead and confuse the jury. *See, e.g.*, *Uniloc, USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1316-17 (Fed. Cir. 2011); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1331-37 (Fed. Cir. 2009). The cases and commentary that Eolas cites are not to the contrary, as they confirm that "generalized testimony" must "fit the facts of the case." Other than its *ipse dixit*, Eolas provides no support for its conclusory assertion that the broad categories of "features" Mr. Bari discusses are relevant to the Defendants' accused products. Because Mr. Bari's proposed testimony is not tied to the facts of the case and is merely based on "anecdotal" evidence, it should be excluded under *Daubert*, Rule 702, and Rule 403.

A. Eolas Misstates Rule 702: Even "Generalized Testimony" Must Fit The Facts of The Case — And Mr. Bari Admits His Testimony Does Not

Eolas quotes the non-binding advisory committee notes to Rule 702 to suggest that, because it is purportedly offering Mr. Bari's testimony only "to educate the factfinder about general principles," Fed. R. Evid. 702 Advisory Committee Notes ¶ 9 (2000), it need not strictly adhere to the requirements of Rule 702 or *Daubert*. This is false. Eolas omits from its quotation the immediately following sentence, which confirms that "for this kind of generalized testimony," the rule still "requires that: (1) the expert be qualified; (2) the testimony address a

subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' the facts of the case." *Id.* (emphasis added). In particular, the fourth element restates the *Daubert* and Rule 702 requirement that expert testimony, even that offered for "background" or "context" as Eolas purports to offer here, must be relevant to a factual matter at issue in the case.[1]

Mr. Bari offers opinions concerning the so-called "e-commerce industry" and broad, generic categories of "functionalities," but he does nothing to relate those opinions to the claims of the patents-in-suit or Defendants' websites — and expressly disclaims performing any such analysis. *See* Bari Report at 3. Eolas therefore does not, and cannot, point to anything in Mr. Bari's report to suggest his opinions are in any way relevant to the patents or accused products — or any other factual matter at issue in this case. Instead, Eolas conclusorily asserts, with no support in Mr. Bari's report or any other evidence, that the "background" he provides is "directly relevant" to "the value of interactive content on [Defendants'] websites." Resp. at 3. But Eolas's *ipse dixit* is not enough.

Because Mr. Bari expressly disclaims analyzing any of Defendants' websites, by his own words he does not address whether any of Defendants' websites employ the "functionalities" he describes, or whether the Defendants operate in the "industry" he generalizes. His opinions therefore cannot assist the trier of fact in understanding any "background" concerning Defendants' websites. "[O]ne major determinant of whether an expert should be excluded under

[1] Eolas cites an unpublished Western District of Texas case for the proposition that the expert's testimony "need not relate directly to the ultimate issue in a particular case," but neither that nor any of the Eighth Circuit cases Eolas cites suggests it may present expert testimony completely unmoored to the facts of the case. Eolas again omits the following sentence which admonishes that expert testimony "needs to be relevant to the evaluation of a factual matter at issue in the case and helpful to the trier of fact." *Perez v. City of Austin*, No. A-07-CA-044, 2008 U.S. Dist. LEXIS 36776, at *12 (W.D. Tex. May 5, 2008); *see id.* at *13, 19 (allowing testimony only where relevant to "one of the core issues" and excluding testimony without "tight connection").

Daubert is whether he has justified the application of a general theory to the facts of the case." *Uniloc*, 632 F.3d at 1316. "'[T]here must be a basis in fact' to apply the expert's methodology and facts to the particular facts at issue in the case, and 'an abstract and largely theoretical construct fails to satisfy this fundamental requirement.'" *Id.* at 1317. Contrary to Eolas's contention, Defendants do dispute Eolas's unbacked assertion, contradicted by Mr. Bari's own express disclaimer, that his testimony relates to the "same functionalities that Defendants utilize" or that their products provide "at least one of these specific forms of interactive online content and functionality." Resp. at 3, 6.[2]

Moreover, even assuming Mr. Bari's testimony relates to the value of "interactive content," that is still not relevant to the patents-in-suit or their footprint in the marketplace. Both Mr. Bari and Eolas concede that his testimony is not tied to the patents-in-suit. The generic category of "interactive content" is undisputedly far broader than the "claimed invention's footprint in the marketplace." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010). The Federal Circuit has repeatedly found such testimony concerning "value" that is not tied to the patents to be inadmissible, as it can only confuse the jury and mislead it into impermissibly "punish[ing] beyond the reach of the statute." *Uniloc*, 632 F.3d at 1316 (internal citation omitted); *see, e.g., Fractus, S.A. v. Samsung et al.*, No. 6:09-cv-203-LED-JDL, slip op. at 2-3 (E.D. Tex. Apr. 29, 2011) (quoted in Mot. at 7, attached as Ex. B).

Eolas attacks a straw man: Defendants do not contend that Mr. Bari must "testify as to a

[2] Eolas also suggests by way of footnote that "Mr. Bari specifically addresses" certain Defendants' "use of infringing functionalities." Resp. at 8 n.6. Not only is this belied by Mr. Bari's express disclaimer to the contrary, nothing in Mr. Bari's report, including in his general descriptions of certain alleged "functionalities," addresses the precise accused products at issue in this case, or more importantly, whether and how they allegedly use the patents-in-suit. Eolas's collateral attack on Defendants' discovery, while inappropriate and untrue, is completely inapposite and provides no basis for admission of this testimony.

specific quantum of damages" or "advance a reasonable royalty formulation," and Eolas's distinction of the Federal Circuit cases as limited to those purposes is unavailing. Resp. at 6, 7. Rather, admissible testimony must be relevant and assist the jury; the Federal Circuit cases make clear that, in the context of a patent case, testimony concerning the value of patents (as Mr. Bari offers here[3]) must be properly tied to the patents to be relevant and helpful. Unlike in those cases, Mr. Bari fails to show how the evidence he relies upon is "comparable" to the patents-in-suit.

B. Eolas Concedes Mr. Bari Does Not Disclose Any Methodology — Let Alone A Reliable One — And Admits That His Sources Are Merely "Anecdotal"

Mr. Bari's testimony also fails to satisfy the other requirements of Rule 702 and *Daubert*: namely, he does not disclose any methodology, let alone a reliable one, and he bases his opinion on admittedly anecdotal information rather than reliable data. More than an insufficient method, Mr. Bari's testimony is inadmissible because it fails to disclose any method whatsoever. Eolas's brief argues only that Mr. Bari's so-called "method" was to review a number of secondary sources "in light of his own extensive experience." Resp. at 5. But the very same advisory committee notes Eolas cites earlier in its brief confirms that conclusory assertions based on "experience" are not admissible: "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word

[3] Eolas argues that "concerns for precision" do not apply because Mr. Bari's testimony is offered only to educate the jury on background issues. Resp. at 6. But this is contradicted by Mr. Bari's own statements. *See* Bari Report at 3 (summarizing opinion as concerning the "qualitative and quantitative drivers that Eolas's Intellectual Property may provide"). As discussed in Defendants' opening brief, Mr. Bari offers precise statements concerning "benefits" and "value," but because they are irrelevant to this case they can only confuse the jury. *See* Mot. at 6 (quoting examples from Bari Report, such as "Design Within Reach increased online sales by 45%").

for it.'" Fed. R. Evid. 702 Advisory Committee Notes ¶ 13 (2000) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.")).

Moreover, even should Mr. Bari's recitation of a limited number of secondary sources be cognizable as a "methodology," his opinions are nevertheless inadmissible because they are not based on sufficient facts or data. Indeed, Eolas does not dispute that Mr. Bari admits that his selection is "for anecdotal purposes" only. Bari Report at 51 n.177. Mr. Bari makes no attempt to show that his selective assembling and quotation is representative of the "e-commerce industry" or otherwise has any other indicia of reliability beyond Eolas's conclusory assertion. Mr. Bari cites evidence concerning other websites, but fails to provide any explanation or evidence that those websites are representative of the so-called "e-commerce industry." More importantly, he provides no indication that the experience of those websites is in any way applicable to Defendants. Even if offered for purposes of "background" or "historical context," such unreliable testimony could serve no purpose other than unfair prejudice.

Notably, Eolas does not dispute that the purported "survey" that Mr. Bari relies upon is unreliable as it is not tied to the patent claims. As noted in the cases cited above, such evidence not tied to the patents cannot provide any basis for Mr. Bari's opinions concerning the "value" or "benefits" that "Eolas's Intellectual Property may provide," and his opinions based on this survey should be excluded for this independent reason. *See* Bari Report at 3 (defining "Eolas's Intellectual Property" as the two patents-in-suit).

For the foregoing reasons, Defendants respectfully request that the Motion to Preclude the Expert Testimony of Jonathan H. Bari be GRANTED.

DATED: October 17, 2011

By: /s/ *Jason W. Wolff (w/ permission)*

David J. Healey
Healey@fr.com
FISH & RICHARDSON P.C.
1 Houston Center
1221 McKinney Street, Suite 2800
Houston, TX 77010
Telephone: (713) 654-5300
Facsimile: (713) 652-0109

OF COUNSEL:

Frank E. Scherkenbach
Scherkenbach@fr.com
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02110-1878
Telephone: (617) 542-5070
Facsimile: (617) 542-8906

Jason W. Wolff
Wolff@fr.com
FISH & RICHARDSON P.C.
12390 El Camino Real
San Diego, CA 92130
Telephone: (858) 678-5070
Facsimile: (858) 678-5099

Attorneys for Defendant and Counterclaimant Adobe Systems Inc.

By: */s/ Edward R. Reines*

Edward R. Reines
edward.reines@weil.com
Jared Bobrow
jared.bobrow@weil.com
Sonal N. Mehta
sonal.mehta@weil.com
Aaron Y. Huang
aaron.huang@weil.com
Andrew L. Perito
andrew.perito@weil.com
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3000
Facsimile: (650) 802-3100

Doug W. McClellan
doug.mcclellan@weil.com
WEIL, GOTSHAL & MANGES LLP
700 Louisiana, Suite 1600
Houston, TX 77002
Telephone: (713) 546-5000
Facsimile: (713) 224-9511

Jennifer H. Doan
jdoan@haltomdoan.com
Joshua R. Thane
jthane@haltomdoan.com
HALTOM & DOAN
6500 Summerhill Road, Suite 100
Texarkana, TX 75503
Telephone: (903) 255-1000
Facsimile: (903) 255-0800

Otis W. Carroll, Jr. (Bar No. 03895700)
fedserv@icklaw.com
Deborah J. Race (Bar No. 16448700)
drace@icklaw.com
IRELAND CARROLL & KELLEY
6101 S. Broadway, Suite 500
Tyler, TX 75703
Telephone: (903) 561-1600
Facsimile: (903) 581-1071

Attorneys for Defendants
Amazon.com, Inc., and Yahoo! Inc.

By: */s/ Thomas L. Duston (w/ permission)*

Thomas L. Duston
tduston@marshallip.com
Anthony S. Gabrielson
agabrielson@marshallip.com
Scott A. Sanderson *(pro hac vice)*
ssanderson@marshallip.com
MARSHALL, GERSTEIN & BORUN LLP
6300 Willis Tower
233 South Wacker Drive
Chicago, IL 60606-6357
Telephone: (312) 474-6300
Facsimile: (312) 474-0448

Eric H. Findlay (Bar No. 00789886)
efindlay@findlaycraft.com
Brian Craft (Bar No. 04972020)
bcraft@findlaycraft.com
FINDLAY CRAFT, LLP
6760 Old Jacksonville Highway
Suite 101
Tyler, TX 75703
Telephone: (903) 534-1100
Facsimile: (903) 534-1137

Attorneys for Defendant CDW LLC

By: */s/ Edwin R. DeYoung (w/ permission)*

Edwin R. DeYoung (Bar No. 05673000)
edeyoung@lockelord.com
Roy W. Hardin (Bar No. 08968300)
rhardin@lockelord.com
Roger Brian Cowie (Bar No. 00783886)
rcowie@lockelord.com
M. Scott Fuller (Bar No. 24036607)
sfuller@lockelord.com
Galyn Gafford (Bar No. 24040938)
ggafford@lockelord.com
Jason E. Mueller
jmueller@lockelord.com
LOCKE LORD BISSELL & LIDDELL LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201-6776
Telephone: (214) 740-8000
Facsimile: (214) 740-8800

Eric L. Sophir (*pro hac vice*)
esophir@kslaw.com
KING & SPALDING LLP
1301 K. Street. NW, Suite 600
Washington, D.C. 20005-3364
Telephone: (202) 626-8980
Facsimile: (202) 626-3737

Attorneys for Defendant Citigroup Inc.

By: */s/ Sasha G. Rao (w/ permission)*

James R. Batchelder (*pro hac vice*)
james.batchelder@ropesgray.com
Sasha G. Rao (*pro hac vice*)
sasha.rao@ropesgray.com
Mark D. Rowland
mark.rowland@ropesgray.com
Brandon Stroy (*pro hac vice*)
brandon.stroy@ropesgray.com
Rebecca R. Hermes (*pro hac vice*)
rebecca.wight@ropesgray.com
Han Xu (*pro hac vice*)
han.xu@ropesgray.com

ROPES & GRAY LLP
1900 University Avenue, 6th Floor
East Palo Alto, California 94303-2284
Telephone: (650) 617-4000
Fascimile: (650) 617-4090

Michael E. Jones (Bar No. 10929400)
mikejones@potterminton.com
Allen F. Gardner (Bar No. 24043679)
allengardner@potterminton.com
POTTER MINTON
A Professional Corporation
110 N. College, Suite 500
Tyler, TX 75702
Telephone: (903) 597-8311
Facsimile: (903) 593-0846

Attorneys for Defendants
Google, Inc. and YouTube, LLC

By: */s/ Brian Carpenter (w/ permission)*

Christopher M. Joe
Chris.Joe@BJCIPLaw.com
Brian Carpenter
Brian.Carpenter@BJCIPLaw.com
Eric W. Buether
Eric.Buether@BJCIPLaw.com

Buether Joe & Carpenter
1700 Pacific, Suite 2390
Dallas, TX 95201
Telephone: (214) 466-1270

Attorneys for Defendant
J.C. Penny Corporation, Inc.

By: */s/ Neil J. McNabnay (w/ permission)*

Thomas M. Melsheimer (Bar No. 13922550)
txm@fr.com
Neil J. McNabnay (Bar No. 24002583)
njm@fr.com
Carl E. Bruce (Bar No. 24036278)
ceb@fr.com
FISH & RICHARDSON P.C.
1717 Main Street, Suite 5000
Dallas, TX 75201
Telephone: (214) 747-5070
Facsimile: (214) 747-2091

Proshanto Mukherji (*pro hac vice*)
pvm@fr.com
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02110-1878
Telephone: (617) 542-5070
Facsimile: (617) 542-8906

Attorneys for Defendant
The Go Daddy Group, Inc.

By: */s/ Kate Hutchins(w/ permission)*

Mark G. Matuschak (*pro hac vice*)
mark.matuschak@wilmerhale.com
Donald R. Steinberg (*pro hac vice*)
donald.steinberg@wilmerhale.com
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Telephone: (617) 526-6000
Facsimile: (617) 526-5000

Kate Hutchins (*pro hac vice*)
kate.hutchins@wilmerhale.com
Wilmer Cutler Pickering Hale and Dorr LLP
399 Park Avenue
New York, NY 10011
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

Daniel V. Williams, (*pro hac vice*)
daniel.williams@wilmerhale.com
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Michael E. Richardson (Bar No. 24002838)
mrichardson@brsfirm.com
Beck Redden & Secrest
1221 McKinney, Suite 4500
Houston, TX 77010
Telephone: (713) 951-6284
Facsimile: (713) 951-3720

Attorneys for Defendant Staples, Inc.

SIGNATURE ATTESTATION

I hereby certify that concurrence in the service of this document has been obtained from each of the other signatories shown above.

/s/ Aaron Y. Huang
Attorney for Amazon.com, Inc. and Yahoo!, Inc.

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on October 17, 2011.

/s/ Danielle Delorio