UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

EOLAS TECHNOLOGIES, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 6:09-CV-446 (LED)
	§	
ADOBE SYSTEMS, INC. ET AL.,	§	
	§	
Defendants.	§	
	§	
	§	

OPPOSED MOTION FOR LEAVE TO SERVE DISCOVERY ON APPLE, INC., PATRICK HEYNEN, AND LOS ALAMOS NATIONAL LABRATORY

Defendants Adobe Systems Incorporated, Amazon.com, Inc., CDW LLC, Citigroup Inc., The Go Daddy Group, Inc., Google, Inc., J.C. Penney Corp., Inc., Yahoo! Inc., and YouTube LLC respectfully move for leave to serve discovery on Apple, Inc. ("Apple"), Apple employee Patrick Heynen[1], and Los Alamos National Laboratory ("LANL") and would show the Court as follows:

Following the close of discovery, Defendants became aware of, or gained an appreciation for, information that is believed to be in the possession of Apple, Inc. and/or Los Alamos National Laboratory ("LANL"). Defendants believed that Apple had produced all relevant, responsive information pertaining to one of the prior art systems. Defendants had a common interest agreement with Apple, had reciprocally shared

[1] Defendants identify Mr. Heynen out of abundance of caution since they believe the subpoena to Apple, based on the positions of Apple and Eolas as understood by Defendants, should be sufficient to secure the information they are seeking.

information about the case, and identified Apple in their initial disclosures on their various witness lists. Moreover, Defendants recently learned that a current Apple employee, Patrick Heynen, who was not known to Defendants before this time, has specific, relevant, and responsive information pertaining to the distribution, use and demonstration of one of their prior art references called MediaView from his personal possession, but believed to be located in an office at Apple. Defendants requested this information from Apple, but were rebuffed by both Apple and Eolas based on the settlement agreement between Apple and Eolas, which prohibits Apple from assisting Defendants in any way. Defendants asked Eolas if it would release Apple from this provision—one that Defendants question both the validity and fairness of—but Eolas has not responded. Defendants request leave to serve a subpoena on Apple to obtain this information, as it appears based on the meet and confers between Defendants and Eolas that both Apple and Eolas agree that Apple may provide information to Defendants in response to a subpoena. Exhibit 1 contains the subpoena topics related to Apple that Defendants seek leave to serve.

With regard to LANL, Defendants had timely noticed a deposition of the Regents of the University of California ("Regents") on LANL topics pertaining to the MediaView prior art. At the time MediaView was developed, LANL was managed by the Regents, and some of the MediaView materials have a Regents copyright mark. Without first informing Defendants, Apple and Eolas informed the Regents on July 20 at 11:01 Pacific time that Apple would not proceed with the noticed depositions of the Regents. *See* July 20, 2011 email exchange, a true and correct copy of which is attached as Exhibit 2. The Regents notified Defendants of this development at 2:44 Pacific time. *Id.* Counsel for

Adobe (Linhong Zhang), who traveled to California for the depositions, promptly called counsel for the Regents back to try and keep the depositions, or at least some of them, on calendar, but the Regents objected that the subpoena would need to be re-served. *Id.* Thus, the Regents position was that there was no properly noticed subpoena by Defendants. Exhibit 1 contains the subpoena topics Defendants seek leave to serve on LANL.

With the addition of Regents as a party, the depositions have been postponed due to additional production by Regents that is rolling in nature and objections by Plaintiffs to potentially subjecting the same witnesses to multiple depositions. Moreover, Defendants recently obtained from LANL a video of the MediaView prior art,[2] made during the time the Regents managed LANL, and wish to authenticate this and the MediaView materials from LANL directly given the delays that have been experienced obtaining discovery information from the Regents, the nearly 20 year time span between when the video was made and the likelihood, based on the Regents' initial disclosures, that they will not produce a witness who is able to authenticate the MediaView materials and their expert's recent position that they are of questionable provenance in his rebuttal report served on November 15, 2011. Eolas has indicated that it would not oppose discovery to authenticate [LANL92] and [LANL93], but otherwise object to the scope of the subpoena because they believe the Regents' witnesses should be able to cover the remaining topics. *See* Exhibit 1.

[2] Defendants learned of the video on September 23, 2011 through a catalog released on October 31, 2010 by the Department of Energy pursuant to a Freedom of Information Act Request filed May 28, 2006. Upon learning of the catalog, which was republished online some time after October 31, 2010 by a third party, Defendants immediately requested the video from LANL and promptly produced what they received.

This motion is not made for delay, and should not impact any other deadline applicable to this case. Accordingly, the Defendants respectfully move the Court for leave to serve discovery on Apple, Inc., Patrick Heynen, and Los Alamos National Laboratory. Copies of the subpoena topics are attached as Exhibit 1.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

The undersigned certifies that the parties have conferred by telephone at least twice on this matter, the most recent conference on November 28. Plaintiffs do not oppose portions of the relief requested, namely an authentication deposition of LANL regarding production materials [LANL92] and [LANL93] (*see* Exhibit 1), and the parties agreed that an attempt would be made to obtain authentication of these materials through a deposition on written questions or another mutually agreeable method that does not require the expense and logistics of a formal deposition. Defendants agree that it may be possible to postpone discovery on the LANL-Regents relationship (Exhibit 1, LANL Topic 3) if the Regents witness was sufficiently prepared to address topics beyond simply licensing, but Defendants prefer to have the follow-up discovery lined up now.

Plaintiffs oppose Defendants seeking leave to take the Media-View related discovery upon Apple, but offered to not oppose the motion for leave if Defendants agreed to allow Plaintiffs to take discovery from Apple related to Defendants' knowledge of the patents-in-suit and attempted design around efforts. Defendants do not object to Plaintiffs taking MediaView-related discovery upon Apple related to any information Apple provides responsive to Defendants' subpoena, but believe the discovery should not be broader. The parties could not come to an agreement and reached an impasse.

/s/ Joshua R. Thane
Joshua R. Thane

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 29th day of November, 2011.

/s/ Joshua R. Thane
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