

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

EOLAS TECHNOLOGIES, INC. AND THE
REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Plaintiffs,

v.

ADOBE SYSTEMS INC., ET AL.,

Defendants.

Civil Action No. 6:09-CV-446 LED

JURY TRIAL DEMANDED

ADOBE SYSTEMS INC.'S MOTION FOR SEPARATE TRIAL OR TO SEVER

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Adobe Systems Inc. (“Adobe”) moves for a separate trial, or alternatively, to sever the claims against it in this case pursuant to Fed. R. Civ. P. 20, 21, and 42, the Fifth Amendment’s due process clause, as well as this Court’s inherent power to manage its docket. Defendants Yahoo! Inc. (D1133) and Amazon.com, Inc. (D1134) have also recently moved for separate trials, and Plaintiff Eolas had filed oppositions (D1144; D1145) to those motions. In the interests of efficiency, Adobe incorporates the broad factual and legal arguments from the Yahoo! and Amazon motions, and will focus here on points specific to Adobe’s case. Again for the sake of efficiency, Adobe will respond to some of the generalized arguments raised by Eolas in its oppositions to the Yahoo! and Amazon motions, as Adobe expects Eolas to repeat these arguments in response to Adobe’s motion.

I. INTRODUCTION

Eolas has claims pending for trial against ten defendants involving two patents, the ‘906 and the ‘985. Defendants’ businesses – and their accused products and services – are not related. Adobe provides software programming tools and services that enable customers to create digital content, deploy it across media and devices, and then measure and optimize it based on user data. No other defendant is in Adobe’s particular line of business. Defendant J.C. Penney is a well-known department store. Defendant Amazon began as an on-line bookstore, and has expanded to its current offering of a wide range of consumer products. Defendant Go Daddy sells website support services, while YouTube hosts videos. One of the remaining defendants, Google, Inc., provides a web browser for users of computing devices to access webpages. Google also provides web searching tools and services, on-line advertising, and numerous well-known web pages such as Google Maps.

The only thing defendants have in common is that they operate websites as part of their businesses. Eolas alleges that any website that provides “interactive media” to enhance user

experience while visiting a website infringes its patents. “Interactive media” is a broad generic label that Eolas applies to numerous different technologies, configurations of commonly used products, and/or custom solutions. From a technology and implementation standpoint, no two defendants’ websites operate in precisely the same manner, which is of course one reason why there is no common liability expert between them—each has implemented its websites in different manners. As such, each accused website will have a different portion of its operation or technology in dispute; each will have different proofs on liability and damages (including apportionment of the value of the accused feature to the specific website at issue, as well as widely divergent hypothetical negotiation dates).¹

In its opposition to the Yahoo! and Amazon motions, Eolas does not identify a single specific overlapping factual issue requiring a joint trial as to infringement, willfulness or damages. Instead, Eolas focuses on the patent-specific validity and inequitable conduct issues. Like any patent owner, Eolas would rather not defend the validity and enforceability of its patent more than once. But that is exactly what the law requires. Each accused defendant is entitled to challenge validity and enforceability, and that right cannot be used as a bootstrap to drag unrelated defendants into a joint trial.

The case against Adobe is unique to Adobe. The Federal Rules of Civil Procedure and due process² require that Adobe be allowed to defend itself without the confusion and prejudice

¹ In its opposition to Yahoo!’s severance motion, Eolas notes that defendants have filed certain joint motions relating to summary judgment and *Daubert* issues. D1144 at pp. 12-13. But defendants have also filed numerous individual motions raising issues unique to a given defendant. *See, e.g.*, D790; D860; D861; D868; D870; D901; D904; D905; D907; D930.

² *See, e.g.*, The complexity of patent cases has been a due process concern in studies and scholarly comment. Kimberly A. Moore, *Juries, Patent Cases, & a Lack of Transparency*, 39 HOUS. L. REV. 779, 801 (2002) (examining the inadequacies of juries in patent cases); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 368 (2000) [hereinafter Moore, *Black Box*] (studying the

necessarily attendant from a trial joining five or ten unrelated defendants. To the extent that Eolas is concerned about the timing of its claims against Adobe, Adobe is willing to be the first defendant to go to trial against Eolas.

II. ARGUMENT

A. THE LAW PRECLUDES JOINING ADOBE FOR TRIAL WITH UNRELATED DEFENDANTS

“[T]here is a substantial risk of prejudice to [each defendant] were the jury to believe that [it] is somehow linked to” other defendants who may not share all of its defenses to infringement or damages. *Philips Elecs. N. Am. v. Contec Corp.*, 220 F.R.D. 415, 418 (D. Del. 2004). Courts in nearly all other districts refuse to join unrelated defendants and products in a single suit based only on a commonly asserted patent. *See, e.g., Ho Keung, TSE v. eBay, Inc.*, No. C 11-01812, 2011 U.S. Dist. LEXIS 59675, at *6 (N.D. Cal. June 2, 2011) (citing *Philips*); *WiAV Networks v. 3Com Corp.*, No. C 10-03448, 2010 WL 3895047 at *2-4 (N.D. Cal. Oct. 1, 2010) (citing *Philips*); *Sorenson v. DMS Holdings, Inc.*, No. 08cv559, 2010 WL 4909615, at *1 (S.D. Cal. Nov. 24, 2010) (citing *Philips*); *see also, e.g., Interval Licensing LLC v. AOL, Inc.*, No. C10-1385, 2011 WL 1655713, at *1 (W.D. Wash. Apr. 29, 2011) (“It is difficult to find joinder proper when the only shared facts alleged against multiple defendants is that each infringed the same patent.”); *Multi-Tech Sys., Inc. v. Net2Phone, Inc.*, No. Civ. 00-346, 2000 WL 34494824, at *7 (D. Minn. June 26, 2000) (finding joinder improper because “[t]he only common thread running through the Complaint is Plaintiff’s contention that each Defendant infringed one or more of the four patents”); *Therma-Pure, Inc. v. Temp-Air, Inc.*, No. 10-cv-4724, 2010 WL 5419090, at *4 (N.D. Ill. Dec. 22, 2010) (“Courts in this district, however, have

patent-holder win rates in cases tried before judges and juries and finding that the data results from her study suggest problems in the jury adjudication of patent suits).

consistently held that Rule 20(a)'s requirement for a common transaction or occurrence is not satisfied where multiple defendants are merely alleged to have infringed the same patent or trademark.”).³

At the time of trial, joinder, severance and separate trials must be evaluated in light of the record as developed, the right of each defendant to defend itself, and very real due process concerns that are inevitable when complex cases are presented to a lay jury. Where, as here, the complexity of the technology and damages is challenging to sort through for even a one defendant trial, this complexity is magnified in a joint trial of unrelated defendants, each of which must defend different accused processes and products, and damages models. As the court in *WiAV Networks* explained:

[P]roof of infringement would necessarily require proof of facts specific to each individual defendant and to each accused product. The mere fact that twelve defendants all manufacture, sell, or distribute their own laptop computers does nothing to obviate the bone-crushing burden of individualized methods of proof unique to each product. Again, there is no conspiracy claim. There is no claim that any defendant induced another to infringe. Each defendant has simply been thrown into a mass pit with others to suit plaintiff's convenience.

In this connection, the accused defendants – who will surely have competing interests and strategies – are also entitled to present individualized assaults on questions of non-infringement, invalidity, and claim construction. *Cf. Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1326 (Fed.Cir.2008) (“[W]e have explicitly held that a determination of patent infringement in an infringement suit, or even an explicit determination of patent validity, does not preclude the assertion of an invalidity defense in a second action involving different products.”)

WiAV Networks, LLC v. 3Com Corp., No. C 10-03448, 2010 WL 3895047 at *2 (N.D. Cal. Oct. 1, 2010).

³ Joinder of defendants, processes and products based on claims of infringement of a common patent, never permitted by the overwhelming majority of other districts, is now prohibited by Section 299 of Title 35.

Just like *WiAV Networks*, Eolas's claims against each of the defendants in this case will necessarily involve detailed evidence regarding the unique combination of technology (much of which is proprietary) incorporated into each accused product as well as individualized damages analyses under prevailing Federal Circuit law. Each of the defendants to this action will have its own interests in the outcome, and its own strategies for protecting those interests.

B. ADOBE WILL SUFFER UNFAIR PREJUDICE IF IT IS JOINED FOR TRIAL WITH SOME OR ALL OF THE REMAINING DEFENDANTS

As to each of the three key trial issues – infringement, damages and willfulness – Adobe can articulate specific ways in which its interests diverge from those of other defendants.

1. Infringement

Eolas began this case by accusing Adobe's software authoring tool *products* – including Flash, Director, Acrobat and Photoshop authoring tools – of infringement. Eolas then realized (1) that some of these products were prior art;⁴ and (2) that it could not credibly seek damages from Adobe for selling these products *and* seek very large damages from downstream website operators who use the products in one way or another as part of their overall website systems. As a result, Eolas has *dropped* its claims for damages against Adobe based on sales or distribution of Adobe products to other defendants (that is damages for inducement or contributory infringement by other defendants). Instead, Eolas alleges that Adobe infringes by offering websites such as Adobe.com and Photoshop.com that contain “interactive media.” All of Eolas's damages claims arise from Adobe's operation of its own websites: None of Eolas's damages claims arise from Adobe's sales or distribution of Adobe products to other defendants or through other channels. In other words, while Eolas may have previously characterized

Adobe as a “technology provider” defendant, similar to Sun/Oracle, Apple and Google, Adobe is now a “website defendant,” being sued by Eolas solely based on its operation of the Adobe websites.⁵

In its opposition to the Yahoo! and Amazon motions, Eolas flip-flops back to the prior world where it was accusing Adobe *products* of infringement. D1144 fn. 8. Eolas complains that, if given their own trials, website defendants who incorporate Adobe products will point to Adobe as an absent technology provider that should be blamed for any infringement resulting from operation of their websites. *Id.* at pp. 9-10, 13-14.

Rather than support its opposition, Eolas’s argument demonstrates why Adobe must have its own trial. It is a fact that some defendants intend to try and shift the blame for their accused website activities to Adobe. At least two remaining defendant have made indemnification claims, and others have argued in damage expert reports that at the hypothetical negotiation they would have simply given the monies they paid to Adobe to Eolas instead. But because Eolas is not accusing Adobe’s products of infringement, Adobe will not be able to defend those products in front of the jury. Adobe also has no control over, and often no knowledge of, how other defendants have used or implemented Adobe products on their websites. As a result, Adobe has no ability to respond either to Eolas’s claims or to arguments by co-defendants that Adobe is the real culprit. Adobe will be in the untenable position of being portrayed as an infringing technology provider, but will only be able to defend the case as an accused website operator. In

⁴ Adobe has filed a motion for summary judgment (D869) based on Eolas’s now-abandoned contention that Adobe’s prior-art Acrobat products infringed the patents-in-suit.

⁵ The same is largely true for Google. While Eolas still has claims against Google for distribution of the “Chrome” browser, the vast majority of Eolas’s damages claims are based on Google’s operation of its own websites. *See* D902-04; D903 Ex. L; D905-3 (excerpts from Weinstein Google Report dated 7-29-2011).

a separate trial, Adobe defends its own technology that is used in the operation of its own websites without interference from other defendants.

This prejudice is particularly severe with regard to Scene7, which is a hosted website service business owned by Adobe. Scene7 technology allows a visitor to a website to see a 360 degree view of an item, such as a pair of shoes. It is only useful to a website visitor after he or she locates an item and wants more information about the item. Scene7 is not used to search websites or to “check out” or any number of other functions. Scene7 is never the only interactive media on any website, and further, other technologies provide for similar functionality. *See, e.g.*, D1157-02 at p. 199. Scene7 is a relatively small segment of Adobe’s overall business. Importantly, Eolas is not asking for damages from Adobe based on *Adobe’s* provision of Scene7 services to other defendants. Although Adobe does not use Scene7 on its own websites, Scene7 is the centerpiece of Eolas’s case against some other defendants, who may predictably turn and point the finger at Adobe as the supplier of Scene7. In a joint trial, Adobe may have no or limited ability to defend any Scene7 claims, since no damages are sought from Adobe on this basis, and since Adobe’s websites do not use Scene7. Adobe cannot be put in the same trial where a jury is told by a supposed indemnitee that Adobe is responsible for the accused activities taking place on its website. The unfair prejudice to Adobe in this scenario is palpable.⁶

⁶ Eolas acknowledges the potential for prejudice and tries to argue at page 12 of its Yahoo! opposition that “none of the defendants are ‘peripheral’ to the allegations of infringement . . . and all are accused of infringement based upon the distribution and use of their own products.” (D1144 at p. 12) If Adobe is joined with other defendants though, it will be tried *in absentia* based on the use by those defendants of Adobe products or services. Other website defendants that believe they are entitled to indemnity have economic incentives to

2. Damages

Adobe's defense to Eolas's damages claims is unique, and in some respects at odds with the interests of other defendants. Adobe is the only remaining defendant that uses web server equipment supplied by Sun/Oracle.⁷ As a result, Adobe has a license defense arising from the settlement and license agreement between Eolas and Sun/Oracle. Other defendants do not share this defense, and deem it in their interest to try and exclude the license from evidence. A similar scenario exists with regard to the Eolas license agreements with Microsoft and Apple. Eolas does not ask for damages based on visits to Adobe's website using Microsoft's Internet Explorer browser or Apple's Safari browser, because those browsers are licensed. *See* Weinstein Adobe Report (D903 Ex. B) at ¶¶ 110-111. Adobe and other similarly-situated website defendants will therefore point to these licenses to reduce Eolas's damages claims. Google, on the other hand, is the sole remaining defendant that distributes a browser. Google predictably and understandably does not believe the jury should learn that two other prominent browser distributors – Microsoft and Apple – took licenses from Eolas, and paid large sums of money to do so.

3. Willfulness⁸

Adobe will be at a disadvantage in terms of presenting a willfulness defense if joined with other defendants, due to its prior awareness of Eolas's '906 patent, and the fact that it was forced to engage with Microsoft while Microsoft attempted to design around the '906 patent. Following the adverse jury verdict in Illinois, Microsoft considered re-designing its browser to avoid the '906 patent. Because some of Adobe's products functioned with Microsoft's browser,

push their liability or damages on to the Adobe products or services where they believe indemnity might apply.

⁷ Adobe has filed a motion for summary judgment based on its unique Sun/Oracle license defense. *See*, D870.

Adobe actively followed Microsoft's plans to determine the impact on Adobe's own products. Adobe had no notice from Eolas that it would sue Adobe, nor did Eolas indicate in any way that it believed any Adobe product, service or website infringed the '906 patent.⁹ However, Eolas now seeks to portray Adobe's communications with Microsoft arising from *Microsoft's* design-around activities as some sort of "guilty knowledge" by Adobe.¹⁰ Adobe will need to spend trial time to rebut these false claims. Other defendants who had no prior involvement with Microsoft will understandably not want to spend precious trial time on this issue. This conflict is very real and portends prejudice to Adobe.

4. Cooperation During Discovery

Additionally, Eolas asserts in its Yahoo!/Amazon oppositions that because defendants diligently endeavored to cooperate during discovery, they should be able to conduct a multi-defendant jury trial without problem or prejudice. It is true that throughout the pretrial proceedings, defendants have attempted to minimize the burden on the Court by filing joint motions where possible, agreeing to shared page limitations in briefing, and in some cases retaining the same expert witnesses for invalidity issues. All Defendants were forced, over their objections, to engage in pretrial proceedings with unrelated co-defendants whose cases had nothing to do with their own. All defendants did so with professionalism and with the maximum regard for judicial economy.

⁸ Adobe has joined other defendants in moving for summary judgment of no willfulness. By making arguments here, Adobe is in no way suggesting that willfulness should be presented to the jury. It should not.

⁹ Adobe products were prominent in the trial between Eolas and Microsoft as part of Eolas's proofs that *Microsoft* was infringing, yet Eolas never accused Adobe of infringement. There was no reason for Adobe to believe that the Microsoft trial or verdict showed Eolas considered Adobe an infringer.

¹⁰ These pre-suit activities relating to *Microsoft's* concerns about the '906 patent should be excluded from evidence in any event, as they are not relevant to any claim against any party to *this* case.

But a jury trial is different. To vigorously defend their respective clients, counsel for each defendant needs to present that client's specific case. There is no "group" defense here – each defendant has its own story to tell. No amount of cooperation can eliminate the prejudice that flows from being forced to address the jury as merely one of five or ten accused infringers. It is wrong for Eolas to argue otherwise.

C. NOTHING ABOUT THE FEDERAL CIRCUIT'S MANDAMUS ORDER IN THIS CASE SUGGESTS THAT THE COURT SHOULD NOT CONDUCT SEPARATE TRIALS

In its Yahoo!/Amazon oppositions, Eolas argues that the Federal Circuit's mandamus decision in this case establishes that joinder is proper, and counsels against separate trials. This is wrong. This Court denied a motion to transfer or in the alternative to sever and transfer at an early stage of this case. The severance request in the original motion was to facilitate transfer if the presence of the Texas-based defendants was an impediment to transfer. The Federal Circuit denied a writ of mandamus on March 4, 2011 in *In re Google*, Misc. No. 968.¹¹ The focus of the

¹¹ The propriety of the Federal Circuit's prior non-precedential ruling in *In re Google*, as well as the Court's prior order in this case, are currently among the issues now pending before the Federal Circuit in a fully briefed mandamus petition in *In re EMC*, Misc. Dkt. 100 (Fed. Cir., filed Sept. 7, 2011), from an order denying severance in *Oasis v. EMC et al.*, 10-CV-435 (E.D. Tex.)(Sherman) See Petition for Writ of Mandamus, *In re EMC*, Misc. Dkt. 100, filed Sept. 7, 2011, at pp. 5, 15, 23-24. A brief filed by several *Amicus Curiae* in support of the petition in *In re EMC* specifically raises the impact of the House Committee's Report on the America Invents Act's joinder provision, now Section 299 of Title 35. Brief of *Amicus Curiae* in Support of Petition for Writ of Mandamus, Misc. Dkt. 100, filed Sept. 22, 2011, at pp. 2-3, 5-6.

Separately, the Federal Circuit has recently consolidated two other petitions for writs of mandamus that address the issue of severance under Fed. R. Civ. P. 20 prior to the effective date of Section 299, in *In re TD Ameritrade* and *In re Scottrade*, Fed. Cir. Misc. Dkt. 107 and 109, petitions from *Ganas LLC v. Scottrade et al.*, No. 10-CV-320 (E.D. Tex.)(Marshall). The Federal Circuit's Orders requiring responses to the Petitions by EMC (in September 2011), Scottrade and TD Ameritrade (consolidated opposition due January 9, 2012), show an interest in the joinder and severance issue as it applies in cases prior to the effective date of Section 299, and this Court's prior decision and the Federal Circuit's own denial of writ of mandamus are issues in those cases. Likewise, the view of the House expressed in the

prior motion and the non-precedential Federal Circuit order denying mandamus was on the transfer issue: In fact, the Federal Circuit addressed only one paragraph to severance and did not address any of the Federal Rules of Civil Procedure in that paragraph. The prior motion and order of this Court, as well as of the Federal Circuit, were done in the context of the lawsuit at an early stage, focused on transfer, with severance being an alternative presented to facilitate transfer.

Now, following extensive merits discovery, claim construction, reconsideration of claim construction, motions for summary judgment, expert reports, and several settlements, the parties have changed and the record has sharpened to show what issues will go to trial. In particular, Eolas seeks no damages from Adobe for inducement of other defendants to infringe, contributory infringement of other defendants or joint infringement with other defendants. Instead, the claim against Adobe is only for indirect or direct infringement by Adobe's own websites in connection with visits by Adobe's own end user customers.

The scope of the prior motion and order, and the significance of these changes, show the prior order is not applicable at this stage of the litigation to a request for separate trial under Fed. R. Civ. P. 42(b) or the due process problems of trial of the case as currently configured.¹² Adobe is not moving to transfer, but only for severance or separate trial. As the Court has recognized in

Committee Report for the reason to enact Section 299 is at issue as expressed in footnote 61 to the Report, citing the Court's prior decision here as an incorrect application of the rules in view of the House Committee. It is very possible, if not likely, that an opinion of the Federal Circuit addressing its prior denial of writ in this lawsuit, as well as the proper application of Rule 20 and the impact of the House Committee Report on Section 299, will be forthcoming in the next few weeks.

¹² The possibility of a ruling from the Federal Circuit in one of the pending mandamus cases discussed in footnote 11, that addresses its prior denial of writ in this case, as well as the House Committee's Report, also counsel toward reconsideration of joinder under Fed. R. Civ. P. 20.

Bedrock and other cases, it is not fair, efficient or practical to have a single trial on unrelated allegations against several unrelated defendants. Even the most diligent and well-prepared juror cannot absorb the volume of detailed information about infringement and damages in a trial with multiple unrelated defendants. Forcing several defendants with disparate products and business models into one trial is manifestly unfair, improper under the Rules, and a denial of due process. The House of Representatives Report on what is now Section 299 of Title 35, relating to joinder, shows that Congress does not believe the rulings on joinder formerly applied in this case were correct when made under Rule 20. While Section 299 itself is not retroactive, the law on Rule 20 recited in the House Committee Report illustrates Congress did not consider Section 299 a change to Rule 20, but only a way to ensure its uniform application in all districts.

Even assuming joinder is proper under Rule 20, “the court may at any time . . . add or drop a party. . . . [or] sever any claim against a party” under Rule 21. Fed. R. Civ. P. 21; *see also, e.g., Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994) (“The trial court has broad discretion to sever issues to be tried before it.”); *United States v. Donsky*, 825 F.2d 746, 754 (3d Cir. 1987) (“Our standard of review a district court’s severance decision is whether the district court abused its discretion by its ruling”); *Kimmel v. Cavalry Portfolio Servs., LLC*, 747 F. Supp. 2d 427, 434 (E.D. Pa. 2010) (“District courts are given broad discretion when deciding whether to sever a case pursuant to Rule 21”).

Rule 42(b) provides a further basis for separate trials where, “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues[or] claims.” Fed. R. Civ. P. 42(b). The power to order separate trials under Rule 42 is left to the district court, as part of its wide discretion in trial management. *See, e.g., Alaniz*

v. Zamora-Quezada, 591 F.3d 761, 773-74, (5th Cir. 2009); *Shum v. Intel Corp.*, 499 F.3d 1272, 1282 (Fed. Cir. 2007); *Idzotjic v. Pa. R.R. Co.*, 456 F.2d 1228, 1230 (3d Cir. 1972).

Due process requires that each defendant be given a fair opportunity to develop its case and to present it at trial. *See* footnote 2. This is impossible when the constraints of a single lawsuit or trial require that defenses to liability and damages be blended or diluted so they can be adopted by all of the defendants in trial to avoid juror confusion and to meet time limitations on the trial. Where complex patents, complex products, and damages based on apportionment (among other things), are in issue, due process concerns are very real given the finite amount of discovery that can be done in one case, and the finite amount of information any judge or juror can absorb in a single trial. This is not to say some coordination is impossible, but pretrial coordination is different from joinder of all parties and products in a single trial that crowds out room for many of the details of a defendant's position.

III. CONCLUSION

For the foregoing reasons, Adobe moves the Court to sever it from the case to pursue the remainder of the case through trial to conclusion, pursuant to Rules 20, 21, and the Court's inherent powers. Alternatively, Adobe asks that it have a separate trial under Rule 42, and the Court's inherent powers to preserve its right to a fair opportunity to present its case both fully and efficiently to the jury. Due process requires Adobe have its day in court to present its defenses in a way that a reasonable juror can understand them, as opposed to being forced to compete for time, attention, and tax the limits of any juror in a joint trial.

Dated: December 29, 2011

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that I spoke with attorney John Campbell for Plaintiff on December 30, 2011 by phone and that the motion is opposed.

/s/ David J. Healey

David J. Healey

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on December 29, 2011 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ David J. Healey
David J. Healey