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., 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.	§	

STATUS UPDATE REGARDING THE PARTIES'
RELATIVE POSITIONS ON A TRIAL PLAN

Pursuant to the Court's Order dated December 15, 2011 (Dkt. No. 1137) Plaintiffs The Regents of the University of California and Eolas Technologies Incorporated; and Defendants Adobe Systems Inc., Amazon.com, Inc., CDW Corp., Citigroup Inc., The Go Daddy Group, Inc., Google Inc., J.C. Penney Company, Inc., Staples, Inc., Yahoo! Inc., and YouTube, LLC respectfully submit this status update regarding the parties' relative positions on a trial plan.

Plaintiffs The Regents of the University of California and Eolas Technologies Incorporated: For the reasons discussed in Plaintiffs' responsive briefing to Amazon and Yahoo's motions for separate trial (Dkt. Nos. 1144 and 1163), Plaintiffs propose two trials, the first consisting of all claims brought by and against Adobe, Amazon, Google/YouTube, JC Penney, and Staples, and the second consisting of all claims brought by and against Citigroup, CDW, Go Daddy, and Yahoo. This proposal thus envisions a first trial against five Defendants, and a second trial against the four remaining Defendants. Plaintiffs additionally propose that, should any four or more Defendants settle with Plaintiffs prior to the first trial, the five or fewer remaining Defendants should proceed to trial together. Plaintiffs accuse each Defendant of infringement based on the use and operation of its own website. Accordingly, Plaintiffs disagree that the proposed trial grouping suggested by Defendants "might obviate and will certainly simplify any succeeding trials" and disagrees with Google that any resolution of "browser issues" is required.

Adobe Systems Inc., Amazon.com, Inc., CDW Corp., Citigroup Inc., The Go Daddy Group, Inc., Staples, Inc., Yahoo! Inc.: If the Court declines to accord the defendants separate trials (severance motions have been and will be filed[1]), Adobe, Amazon, Citi, CDW, Go Daddy,

[1] This submission is without waiver or prejudice to any defendants' rights to a separate trial.

Staples, and Yahoo! propose that the 10 remaining defendants be divided into 3 groups for trial, as follows:

1. Adobe, Google, YouTube: while Eolas' damage claims against Google, YouTube and Adobe are no longer about Google's provision of browser technology to others or Adobe's provision of content presentation technology to others – instead, Eolas now accuses Google, YouTube and Adobe on the basis of the operation of their own websites – Eolas continues to allege that instrumentalities provided by Google and Adobe are implicated in some of the alleged infringement by the other defendants. It therefore makes sense to resolve Eolas' issues against Google, YouTube and Adobe first, as doing so might obviate and will certainly simplify any succeeding trials. YouTube should be tried together with Google because they are under common ownership and share counsel.

2. Amazon and Yahoo!: They should not try the case with Adobe and Google for reasons of record and expressed in their severance motion. Including them with the remaining defendants creates too large a grouping to be manageable even if defendants are required to accept groupings. In terms of alleged damages exposure, after Google, Amazon and Yahoo! are the largest of the remaining defendants and, in addition, share counsel.[2]

3. The remaining 5 defendants: the case against these parties may never need to be tried given the proposed phasing. In addition, as explained in Adobe's Motion For Separate Trial Or To Sever, there are indemnity disputes between some of these defendants and Adobe and other related considerations which make it potentially prejudicial to Adobe to have its case tried

[2] As stated in prior briefing, Amazon is not accused of infringement based on use of Scene7 and does not use it, so Plaintiffs' proposed groupings based on that criterion are incorrect and Amazon would thus not belong in plaintiffs' proposed group one in any event. Furthermore, should the Court reject three trials and prefer two groups for trial -- the groups should be based on trial efficiencies. Amazon and Yahoo! note that if included in the second group, they would not oppose the inclusion of one or two of the website defendants with whom trial efficiencies can be shared.

together with parties who use Adobe technology (along with other, non-Adobe technology) to provide the functionalities which Eolas accuses of infringement.

Google Inc. and YouTube, LLC: Defendants Google Inc., and YouTube LLC (collectively, "Google") provide this submission pursuant to the Court's December 15, 2010 Order to the parties (D.I. 1137). Google's submission is without waiver or prejudice to its rights to a separate trial, which Google believes is warranted in this action. Google plans to file a motion requesting a separate trial promptly.

Google agrees with the defense group that, given the number of defendants (10), asserted claims (22), and accused products (over 100), three trials would be more appropriate than the two trials proposed by Eolas. However, Google believes that the best division would be as follows: One trial with Google/YouTube, and two other trials along the lines proposed by Adobe except in two groups instead of three. As noted in the recently-filed motions for separate trials, Google is the only remaining browser manufacturer left in the case and, as a result, will need to address unique issues related to non-infringement and damages. Resolving the browser issues separately will be more efficient and far less confusing for the jury.

Should the Court decide to hold only two trials more in line with Eolas's proposed groupings—a first group comprised of Adobe, Amazon, Google, JC Penney, and Staples, and a second group comprised of the remaining defendants—Google should be in the second group, not the first. This is true regardless of which group is tried first. Google does not use Adobe's Scene 7 technology which, though disputed factually by other defendants, was Eolas's basis for grouping the defendants in its first group. D.I. 1144 at 14. Rather, the majority of Eolas's infringement allegations against Google, and almost the entirety of its damages case against Google, accuse websites that use AJAX or JavaScript technology (and Flash within JavaScript).

These accused technologies are more closely tied to the accused technology of Eolas' second group of defendants as opposed to the first group.

J.C. Penney Company, Inc.: JC Penney's position regarding the trial plan is that it does not oppose a three trial structure as proposed by the other defendants, but opposes any trial plan where it is not tried together with Adobe (the supplier of its accused technology), and specifically opposes being grouped in a third trial without Adobe.

All defendants oppose Plaintiffs' further suggestion that, once having scheduled two (or more) trials, the Court should collapse them back into one in the event five or fewer defendants happen to remain. This would be impossible to implement logistically while holding any specific dates, because defendants might settle on the eve of any given trial and thus whether there would be one trial instead of two (or more) and, if so, who would be in it might not be known until the eve of trial. In addition, since the mix of defendants remaining cannot be known in advance, whether they can fairly be grouped at all and, if so, how is likewise impossible to know in advance. Plaintiffs' further suggestion would therefore only compound the prejudice to Defendants and is yet another reason why many defendants maintain that only individual trials are appropriate.

Dated: January 4, 2012.

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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 January 4, 2012. Local Rule CV-5(a)(3)(A).

/s/ John B. Campbell
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CERTIFICATE OF CONFERENCE

On January 4, 2012, counsel for each of the parties conferred regarding their relative positions on a trial plan. The Parties' positions are reflected herein.

/s/ *John Campbell*