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,	§	**JURY TRIAL**
	§	
Defendants.	§	

RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO DESIGNATE 1,500 ADDITIONAL EXHIBITS (DKT. NO. 1176)

Plaintiffs, The Regents of the University of California and Eolas Technologies Inc., file this Response in opposition to Defendants' Motion for Leave to Designate Additional 1,500 Exhibits (Dkt. No. 1176) and would respectfully show the Court as follows:

The Court's Standing Order Regarding Letter Briefs, dated August 12, 2011, limits each "side" to designating 250 exhibits. In this case, where there are 10 Defendants, Plaintiffs have sought leave to designate 400 exhibits—which amounts to 40 exhibits per Defendant. Dkt. No. 1169. Defendants' motion seeks leave to designate 1,750 exhibits. Defendants represent in their motion that they are seeking 250 exhibits common to all Defendants[1] plus an additional 150

[1] Curiously, the joint list served on Plaintiffs by the Defendants on January 6, 2012, after

exhibits per Defendant,[2] for a total of 1,750 exhibits for Defendants' side.

Eolas opposes the Defendants' request for two reasons. ***First***, as shown by the email attached as Exhibit 3, Defendants sought and obtained from Plaintiffs an agreement to move exhibit exchange deadlines closer to trial and compress the time frame to review and prepare objections to exhibits. Defendants' represented that the proximity to trial and the compressed time period for lodging objections to exhibits would not cause a hardship to Plaintiffs "[g]iven the Court's limitation on the amount of material that can be designated." Ex. 3. Defendants now seek to entirely remove this limitation just weeks before trial through their request to designate 1,750 exhibits.

Second, Defendants request is entirely unreasonable. If Defendants are granted leave to increase their designation to 1,750 exhibits, they will have multiplied by seven times the Court's limit on the number of exhibits that Plaintiffs must review and to which they must object in a very short time. Such an increase in exhibits above the amount likely to be used at trial—and the expense of reviewing and objecting to those exhibits—is the exact harm that the Court's standing order was meant to alleviate. *See* Standing Order at 3. Here, where the Defendants all share <u>one</u> expert on invalidity, the only issue on which they bear the burden of proof, it is unlikely each Defendant needs 150 exhibits in excess of the 250 exhibits common to all Defendants that Defendants seek leave to designate.

Rather than attempt to be reasonable, Defendants have presented to Plaintiffs exhibit lists that designate numerous exhibits that are irrelevant and inadmissible. As just one example, in Defendants' recently exchanged exhibit lists, Yahoo! lists as exhibit number YDX185 an article

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Defendants had filed their motion seeking a joint exhibit list of 250, contains 400 joint exhibits rather than the 250 exhibits requested. See Ex. 1.

[2] Defendant Yahoo! did not limit itself to the requested 150; it served an individual list of 193 exhibits. Ex. 2.

entitled "McKool Hennigan Merger Creates Tech-Savvy Trial Firm," which has no relevance to the issues in this case and is obviously objectionable. See Ex. 2. This exhibit also appears as Exhibit 400 on Defendants' joint exhibit list. See Ex. 1. As the Standing Order recognizes, Defendants should be required to limit the number of exhibits so that they will focus on the admission of exhibits that are relevant and non-objectionable. Otherwise, Plaintiffs unreasonably and unnecessarily are required "to go through the expense of reviewing and objecting" to these exhibits when only a handful of exhibits will be used in front of the jury. *See* Standing Order at 3.

As Plaintiffs advised Defendants, Mot. at Ex. 1, Plaintiffs do not oppose Defendants' obtaining a reasonable increase of the number of designated exhibits. Plaintiffs recognize that the designation of 250 common exhibits may streamline the Defendants' presentation of their invalidity defense, as they have all designated the same expert, but Plaintiffs suggest that an additional 40 exhibits for designation per Defendant is fully adequate to present their individual cases. A total of 650 exhibits for Defendants' side, where Plaintiffs have limited their side to 400 exhibits, is entirely reasonable, given the number of exhibits that will actually be used at trial.[3]

[3] Defendants also ignored the Court's Standing Order regarding the limitation of deposition designations. Defendants have designated over 4,000 pages of deposition testimony for approximately 66-67 hours of deposition testimony—over 50 hours in excess of the Court's 10 hour limit. As the Standing Order recognizes, this conduct requires Plaintiffs "to undergo the expense of reviewing and objecting to the testimony" even though only a few hours will be used at trial. *See* Standing Order at 3. Defendants did not, and have not, moved for leave for the excess designations.

Dated: January 8, 2012.

MCKOOL SMITH, P.C.

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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 8, 2012. Local Rule CV-5(a)(3)(A).

/s/ John Campbell
John Campbell