UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Eolas Technologies Incorporated and The Regents of the University of California, *Plaintiffs,* vs. Adobe Systems Inc., Amazon.com, Inc., CDW Corp., Citigroup Inc., The Go Daddy Group, Inc., Google Inc., J.C. Penney Corporation, Inc., Staples, Inc., Yahoo! Inc., and YouTube, LLC, *Defendants.*	Civil Action No. 6:09-CV-446-LED JURY TRIAL

OPPOSITION TO PLAINTIFFS' EMERGENCY
MOTION TO STRIKE THE SUPPLEMENTAL ERRATA SHEET OF ERIC BINA
[DKT. 1313]

This is no emergency. Indeed, Plaintiffs admit that there is no issue at all if Mr. Bina is called at trial. Dkt. No. 1313 at 1 n.1. Rather than engage in a meet-and-confer with Defendants about their plans to call Mr. Bina, Plaintiffs waited three days after receiving the supplemental errata to reach out to Defendants and then filed the instant motion on less than seven hours notice. If they had engaged in a meaningful discussion with Defendants, Plaintiffs would know that Defendants do plan to call Mr. Bina at trial and that the supposed emergency is thus a non-issue. For that reason alone, Plaintiffs' motion should be rejected.

Nevertheless, Plaintiffs have presented this issue to the Court and Defendants wish to respond should the Court wish to consider the context underlying Plaintiffs' motion. By way of background, Eric Bina was deposed in this case on August 2, 2011. At that time, Mr. Bina was testifying about facts and events that occurred almost twenty years earlier. Mr. Bina gave the best testimony he could in 2011, and reviewed his deposition within thirty days and signed an errata sheet on September 1, 2011. Since that time, Mr. Bina has continued to think on the historical events that are the subject of his testimony and study the evidence in this case in preparation for trial. As is often the case, his memory has been jogged. There is nothing surprising or improper about this.

Nevertheless, as soon as Mr. Bina advised counsel for Defendants that his memory had been jogged, Defendants acted promptly to give notice to Plaintiffs, as reflected by the Supplemental Errata submitted on January 29, 2012. While it is common for these sorts of things to come up on-the-fly at trial, Defendants took the extraordinary step of providing Plaintiffs notice of Mr. Bina's recollection to avoid any argument by Plaintiffs that they would have to scramble to prepare to examine Mr. Bina on his jogged memory. This type of early and open disclosure should be encouraged, not the subject of an emergency motion to strike.

This is particularly so because there is no prejudice to Plaintiffs from Mr. Bina's refreshed memory. Mr. Bina's Supplemental errata makes only a handful of clarifications to his deposition, none of which should be surprising to Plaintiffs. The crux of Mr. Bina's clarifications is to confirm that, when he testified that certain elements were not known in the

prior art, he was excluding the Viola prior art from his answers. As the Court is well aware, the Viola prior art has been at the center of this case, and Plaintiffs have known about and seen extensive evidence relating to it in dozens of depositions and hundreds, if not thousands, of documents and lines of code over the course of many years. Indeed, Plaintiffs knew that Mr. Bina knew about Viola based on his deposition testimony. *See, e.g.*, Exh. A [Bina Tr.] at 108:17-19, 109:21-24, 110:9-18, 154:5-10. At that time, however, Mr. Bina was not certain whether the version of Viola he saw included those elements or not:

> Q. Okay. And when you answered those questions, okay, you were excluding Viola because you know you saw Viola, you just don't recall sitting here today whether it had in-line video; is that fair?
>
> A. My memory of the previous testimony was we kept going round and round and he kept reframing his question until he reframed it as asking if I could be certain that it had been implemented in a browser before I left, and I said no.
>
> Q. Okay. And the reason you can't be certain why the other is, is because you're not certain about Viola; is that right?
>
> A: That's what I meant, yes.
>
> * * *
>
> Q. We know before you left NCSA you saw Viola demonstrated?
>
> A. Yes.
>
> Q. And we know that Viola had some type of external application, right?
>
> A. Yes.
>
> Q. Okay. And you know that -- but what you don’t recall one way or the other is whether it had in-line or not?
>
> A. Correct.
>
> Q. So all of your answers with respect to Mr. Rappaport’s questions, Viola may have done that, you're just not sure one way or the other; is that fair?
>
> A. That is true.

See, e.g., id. at 181:24-182:16, 183:10-184:4 (objections omitted). Now that Mr. Bina has had an opportunity to think on this further and to review the extensive discovery relating to Viola that

has been exchanged in this case, Mr. Bina is certain as to what was and was not disclosed in Viola. Far from "rewriting" his testimony or performing a "take home examination", Mr. Bina's Supplemental Errata merely clarifies that that his memory has been jogged. While Plaintiffs might not like this testimony, the jury is entitled to hear it.

In any event, Plaintiffs admit that they will have the opportunity to cross-examine Mr. Bina at trial on his recollection, including on his supplemental errata sheet. *See* Dkt. No. 1313 at 1 n.1 ("If Mr. Bina would like to change or alter the substance of his sworn deposition testimony, he can do so on the witness stand and be subject to cross based on his prior sworn testimony."). If Plaintiffs genuinely believe that Mr. Bina's clarification is surprising or illegitimate, they will have ample opportunity to explore that on cross-examination. *See, e.g., Leeds LP v. United States*, 2010 U.S. Dist. LEXIS 106022 at *9 (S.D. Cal. 2010) (permitting supplemental errata with substantial changes (including changing multiple answers from "no" to "yes") nearly a year after deposition because Defendants would have the opportunity to cross-examine the witness); *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 266 (fn. 12) (3rd Cir. 2010) (noting that Rule 30 "grants courts discretion to [allowing more time] for errata under appropriate circumstances").

This motion should be denied.

Dated: February 3, 2012

Respectfully submitted,

/s/ Edward R. Reines

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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). 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 3rd day of February, 2012.

/s/ Edward R. Reines
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