

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Eolas Technologies Incorporated	§	
and The Regents of the University of	§	
California	§	
	§	
Plaintiffs,	§	Civil Action No. 6:09-CV-00446-LED
	§	
vs.	§	
	§	
Adobe Systems Inc., Amazon.com, Inc.,	§	JURY TRIAL
Apple Inc., CDW Corp., Citigroup Inc.,	§	
The Go Daddy Group, Inc., Google Inc.,	§	
J.C. Penney Company, Inc., Staples, Inc.,	§	
Yahoo! Inc., and YouTube, LLC	§	
	§	
Defendants.	§	

REPLY IN SUPPORT OF EMERGENCY MOTION TO STRIKE THE
SUPPLEMENTAL ERRATA SHEET OF ERIC BINA

Defendants do not address any of Plaintiffs' authority which establishes that errata sheets submitted after the 30 days provided by Rule 30(e) should be stricken. *Reed v. Hernandez*, 114 F. App'x 609, 611 (5th Cir. 2004) (The Fifth Circuit "does not provide any exceptions to [Rule 30(e)'s] requirements."); *see also Raytheon Co. v. Flir Sys., Inc.*, No. 4:07-cv-109, 2009 U.S. Dist. LEXIS 12558, at *9 (E.D. Tex. Feb. 18, 2009) (striking amended errata sheet filed two months after 30-day deadline pursuant to Rule 30(e)). Accordingly, Mr. Bina's supplemental errata should be stricken.

If, as Defendants assert, Mr. Bina plans to come to trial and testify then Defendants do not need his belated errata. And, in any event, Mr. Bina should be subject to impeachment and cross-examination based upon the substance of his sworn deposition testimony—without alteration by his belated errata. *See Raytheon*, 2009 U.S. Dist. LEXIS 12558, at *8 (sworn testimony remains part of the record for cross-examination and impeachment); *Reilly v. TXU Corp.*, 230 F.R.D. 486, 490 (N.D. Tex. 2005) (same).

Finally, Defendants' seriously misrepresent the lone out-of-circuit district court case they cite. First, the *Leeds* Court was addressing Rule 37(c) and not the 30-day requirement under Rule 30(e). *Leeds LP v. United States*, 2010 U.S. Dist. LEXIS 106022 at *9 (S.D. Cal. 2010). And, in any event, far from "permitting supplemental errata with substantial changes (including changing multiple answers from 'no' to 'yes')" as Defendants suggest, the *Leeds* Court held:

Although Ms. Ballantyne's errata sheet will not be barred under Rule 37(c), the Court agrees with Defendant that *it may not be offered at trial for the truth of the matter asserted under FRE 804(b)(1)*.

* * *

The Government had no such opportunity to question Ms. Ballantyne regarding changes to her deposition testimony. *Thus, because Plaintiff does not contest that Ms. Ballantyne can be made available and alternatively, because Ms. Ballantyne's errata declaration was not subject to cross examination, Plaintiff will not be able to introduce the errata sheet under this hearsay exception. See*

United States v. United Techs. Corp., No. 3:99-cv-093, 2004 U.S. Dist. LEXIS 31011, at *6 (S.D. Ohio Oct. 11, 2004) (holding Rule 804(b)(1) inapplicable where party sought to introduce an untimely errata declaration because the errata declaration "was never subject to examination by the government").

Leeds LP, 2010 U.S. Dist. LEXIS 106022 at *9. Accordingly, while the *Leeds* Court declined to bar the belated errata under Rule 37(c), it nonetheless determined that it could not be offered at trial "for the truth of the matter asserted." *Id.*

For all of the foregoing reasons, Mr. Bina's supplemental errata must be stricken. If he comes to trial, Mr. Bina should be subject to impeachment and cross-examination based upon the substance of his sworn deposition testimony.

DATED: February 3, 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). This document was served on all counsel by email on February 3, 2012.

/s/ Josh Budwin