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

EOLAS TECHNOLOGIES, INC. **Plaintiff,** **v.** **ADOBE SYSTEMS INC., et al.** **Defendants.**	**CV 6:09-cv-446 LED** **JURY DEMANDED**

DEFENDANTS' OFFER OF PROOF REGARDING TIME LIMITATION FOR INVALIDITY TRIAL

As noted during oral argument on Plaintiffs' Rule 50(a) motion for judgment as a matter of law presented this morning, Defendants Adobe Systems, Inc., Amazon.com, Inc., CDW Corporation, Go Daddy Group, Inc., Google Inc., J.C. Penney Inc., Staples, Inc., Yahoo! Inc. and YouTube, LLC (collectively "Defendants") respectfully submit this offer of proof as additional support for their objection to the Court's trial plan (Dkt. 1274) and the 7-hour limitation for the presentation of evidence to support their clear and convincing evidence burden of proof on invalidity of 13 asserted claims in two asserted patents. As stated in their objection, Defendants respectfully object that the 7-hour time allotment is unfairly prejudicial and infringes due process rights because it is insufficient time for Defendants to adequately present their cases, particularly given the voluminous evidence, numerous witnesses, and complex factual and legal issues that must be presented and resolved in this case. Indeed, even Plaintiffs—who do not bear the burden of proof and have far fewer witnesses to present—have referenced the time constraints in this

trial (Exhibit A[1] [2/7/12 Trial Tr. (AM)] at 62:13-16 (Mr. McKool advising witness "Professor, we are under a little bit of a time pressure here. We have a limited time on each side. So I appreciate your desire to be clear; but if you could just answer my question, I'd appreciate it."); Exhibit B [2/6/12 Trial Tr. (PM)] at 214:5-7 ("Well, my colleagues told me if I go longer than 15 minutes, they'll be very angry with me; so hopefully it will be short.")). This is not to suggest that Defendants do not appreciate the Court's consideration of their arguments and increase of their time from the original limit of 6 hours. However, Defendants respectfully submit this offer of evidence and testimony they would have introduced into evidence during the Invalidity Trial had they been allotted more time:

It would be a confused misuse of this document for Plaintiffs, or anyone else, to mistake that this document is in any way an admission of insufficiency regarding any particular position or Defendants' position as a whole. Rather, this submission memorializes, with specific references, that the time limitation applied to Defendants in the context of this jury trial was materially prejudicial.

1. As a result of the time limitation, Defendants were forced to altogether drop expert support for invalidity theories they would have otherwise presented in the context of the Invalidity Trial and which at least some of the defendants believed deserved greater priority. For example, as a result of the significant time constraints, Defendants were forced to omit their expert testimony and explanation for the jury on their written description defenses as set forth in *inter alia* Defendants' Motion for Summary Judgment of Invalidity for Lack of Written Description (Dkt. No. 877) and the expert report of Richard Phillips (Exhibit C [Phillips Supp. Report] and Exhibit D [Phillips video demonstrations]), and the documents, testimony and

[1] All exhibits are to the Declaration of Andrew L. Perito in Support of Defendants' Offer Of Proof Regarding Time Limitation For Invalidity Trial filed concurrently herewith.

evidence cited therein, and which resulted in the Court granting judgment as a matter of law against Defendants on their written description defenses during the charge conference earlier this evening. Defendants were also forced to drop a number of invalidity theories including *inter alia* theories relating to the combination of Mosaic, HTML+ and the Janssen www-talk posting, the combination of Mosaic, Hypercard and Director, and the Cohen reference, as set forth in the expert report of Richard Phillips (Exhibit C [Phillips Supp. Report] and Exhibit D [Phillips video demonstrations]) and the documents, testimony and evidence cited therein. Defendants were also forced to drop the inequitable conduct theories, as set forth in *inter alia* Defendant Yahoo! Inc.'s Answer, Affirmative Defenses, And Counterclaims To Plaintiffs' Third Amended Patent Infringement Complaint (Dkt. No. 1025), Defendant Amazon's Answer, Affirmative Defenses, And Counterclaims To Plaintiffs' Third Amended Patent Infringement Complaint (Dkt. No. 1026), the expert report of Nicholas Godici (Exhibit E [Godici Report]), Exhibit F [Godici Supp. Report]), and the expert report of Richard Phillips (Exhibit C [Phillips Supp. Report] and Exhibit D [Phillips video demonstrations]) and the documents, testimony and evidence cited therein.

2. In addition, Defendants were required to significantly curtail their presentation of evidence and testimony on invalidity defenses under 35 U.S.C. § 102(a), (b) and (g), and § 103 on multiple references including Viola, MediaView, Mosaic and HTML+. For example, as criticized by Plaintiffs in their motion for judgment as a matter of law, Defendants were unable to have their expert witness Dr. Richard Phillips offer term-by-term testimony and citation to source code and documents for each of the 13 asserted claims for each of the three core prior art references/combinations and the relevant versions thereof. Defendants were also forced to cut a number of witnesses from their trial presentation, including the following witnesses relating to invalidity who were properly identified in Defendants' witness lists submitted with the Pretrial

Order (Dkt. Nos. 1244-3, 1244-9) and trial exhibits that would have been introduced through those witnesses (Dkt Nos. 1244-21, 1244-27):

a. Testimony of Nicholas Godici regarding Patent Office procedure and the complex prosecution history of the asserted patents, including multiple reexamination proceedings (Exhibit E [Godici Report]), Exhibit F [Godici Supp. Report]). Mr. Godici was present at the trial and sworn in as a witness, but was not called due to time constraints (Exhibit B [2/6/12 Trial Tr. (PM)] at 84:1-22 (swearing in witnesses); Declaration of Jennifer Doan at ¶ 3).

b. Testimony of Dale Dougherty regarding state of the art, secondary considerations and facts relating to invalidity under 35 U.S.C. § 102(a), (b) and (g) and § 103 based on the Viola prior art, including, for example, corroboration of conception, reduction to practice, diligence and public use of Viola as Mr. Wei's supervisor at O'Reilly & Associates (Exhibit G [Dougherty Depo. Tr.]). Mr. Dougherty was present at the trial and sworn in as a witness, but was not called due to time constraints (Exhibit B [2/6/12 Trial Tr. (PM)] at 84:1-22 (swearing in witnesses); Declaration of Jennifer Doan at ¶ 3).

c. Testimony of David Filo regarding his early work on the World Wide Web as co-Founder of Yahoo!, including for example testimony regarding the state of the art, secondary considerations and facts relating to the Viola prior art and Mosaic prior art (Exhibit H [Filo Depo. Tr.]). Mr. Filo was present at the trial and sworn in as a witness, but was not called due to time constraints (Exhibit B [2/6/12 Trial Tr. (PM)] 84:1-22 (swearing in witnesses); Declaration of Jennifer Doan at ¶ 3).

d. Testimony of Christopher McRae regarding state of the art, secondary considerations, inequitable conduct and facts relating to the Viola and Mosaic prior art, including for example corroboration of conception, reduction to practice, diligence and public use of Viola as an attendee of the World Wide Web Wizards Workshop (Exhibit I [McRae Depo. Tr.]; Exhibit J [McRae Depo. Designations]). Defendants identified deposition excerpts to be introduced into evidence, but did not offer Mr. McRae's testimony due to time constraints (Exhibit B [2/6/12 Trial Tr. (PM)] at 84:1-22 (swearing in witnesses); Declaration of Jennifer Doan at ¶ 3).

e. Testimony of Sunita Rajdev regarding involvement of Plaintiff Regents of the University of California in the litigation to rebut Plaintiffs' presentation (Exhibit K [Rajdev Depo. Tr.]; Exhibit L [Rajdev Depo. Designations]). Defendants identified deposition excerpts to be introduced into evidence, but did not offer Ms. Rajdev's testimony due to time constraints (Exhibit B [2/6/12 Trial Tr. (PM)] at 84:1-22 (swearing in witnesses); Declaration of Jennifer Doan at ¶ 3).

Defendants also were unable to introduce deposition testimony of other unavailable witnesses whose testimony was designated and had to significantly curtail counterdesignations to Plaintiffs' designated testimony due to time constraints (Dkt. Nos. 1244-10, 1244-12; Declaration of Jennifer Doan at ¶ 4).

3. In addition, Defendants were required to significantly curtail direct and cross-examination of witnesses that did testify at trial including Michael Doyle, Eric Bina, Tim Berners-Lee, David Raggett, Scott Silvey, Pei Wei, Dr. Richard Phillips, Dr. David M. Martin, William Tucker, David C. Martin and Cheong Ang. Declaration of Jennifer Doan at ¶ 5. This

required that Defendants not elicit certain testimony from these individuals further supporting Defendants' invalidity and related defenses, unduly prejudicing Defendants' ability to fully present their case. Declaration of Jennifer Doan at ¶ 5.

4. Due to time constraints, Defendants were only able to present their rebuttal case for 9 minutes, unfairly prejudicing Defendants' ability to fully rebut Plaintiffs' presentation of its case. Declaration of Jennifer Doan at ¶ 6. Had Defendants had more time they would have offered additional testimony and evidence, including of the individuals identified in Paragraphs 3(a)-2(e) above. Declaration of Jennifer Doan at ¶ 3, 6.

Dated: February 8, 2012

Respectfully submitted,

/s/ Jennifer Haltom Doan

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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 8th day of February, 2012.

/s/ Edward R. Reines
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