

**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 A¹ [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 submit their inequitable conduct theories without presenting additional testimony and evidence relating to that issue for the Court's consideration of this equitable defense, including 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

Edward Reines (Bar No.135960)

edward.reines@weil.com

Jared Bobrow (Bar No. 133712)

jared.bobrow@weil.com

Sonal N. Mehta (Bar No. 222086)

sonal.mehta@weil.com

Andrew L. Perito (Bar No. 269995)

andrew.perito@weil.com

Aaron Y. Huang (Bar No. 261903)

aaron.huang@weil.com

WEIL, GOTSHAL & MANGES LLP

201 Redwood Shores Parkway

Redwood Shores, CA 94065

Telephone: (650) 802-3000

Facsimile: (650) 802-3100

Doug W. McClellan (Bar No. 24027488)

doug.mcclellan@weil.com

WEIL, GOTSHAL & MANGES LLP

700 Louisiana, Suite 1600

Houston, TX 77002

Telephone: (713) 546-5000

Facsimile: (713) 224-9511

Jennifer H. Doan (Bar No. 088090050)

jdoan@haltomdoan.com

Joshua R. Thane (Bar No. 24060713)

jthane@haltomdoan.com

HALTOM & DOAN
6500 Summerhill Road, Suite 100
Texarkana, TX 75503
Telephone: (903) 255-1000
Facsimile: (903) 255-0800

Otis Carroll (Bar No. 3895700)
Deborah Race (Bar No. 11648700)
IRELAND, CARROLL & KELLEY, P.C.
6101 South Broadway, Suite 500
Tyler, Texas 75703
Telephone: (903) 561-1600
Facsimile: (903) 581-1071
Email: fedserv@icklaw.com

**Attorneys for Defendants
AMAZON.COM, INC. AND YAHOO! INC.**

/s/ Douglas E. Lumish (with permission)

Douglas E. Lumish

Jeffrey G. Homrig

Joseph H. Lee

Parker C. Ankrum

**KASOWITZ, BENSON, TORRES &
FRIEDMAN, LLP**

333 Twin Dolphin Drive, Suite 200

Redwood Shores, CA 94065

Tel: (650) 453-5170

Email: dlumish@kasowitz.com

Email: jhomrig@kasowitz.com

Email: jlee@kasowitz.com

Email: pankrum@kasowitz.com

Jonathan K. Waldrop

**KASOWITZ, BENSON, TORRES &
FRIEDMAN, LLP**

1360 Peachtree St., N.E.

Suite 1150

Atlanta, GA 30309

Tel: (404) 260-6080

Email: jwaldrop@kasowitz.com

James R. Batchelder

Sasha G. Rao

Brandon H. Stroy

Rebecca R. Hermes

Lauren N. Robinson

ROPES & GRAY LLP

1900 University Avenue, 6th Floor

East Palo Alto, CA 94303-2284

Tel: (650) 617-4000

Email: james.batchelder@ropesgray.com

Email: sasha.rao@ropesgray.com

Email: brandon.stroy@ropesgray.com

Email: lauren.robinson@ropesgray.com

Email: rebecca.hermes@ropesgray.com

Han Xu

ROPES & GRAY LLP

Prudential Tower, 800 Boylston St.

Boston, MA 02199-3600

Tel: (617) 951-7000

Email: han.xu@ropesgray.com

Daryl Joseffer
Adam Conrad
KING & SPALDING
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 2006-4707
Tel: (202) 737-0500
Email: djoseffer@kslaw.com
Email: aconrad@kslaw.com

Michael E. Jones
Allen F. Gardner
POTTER MINTON
110 N. College, Suite 500
Tyler, TX 75702
Tel: (903) 597-8311
Email: mikejones@potterminton.com
Email: allengardner@potterminton.com

ATTORNEYS FOR DEFENDANTS
GOOGLE INC. AND YOUTUBE LLC

/s/ Jason W. Wolff (with permission)

Frank E. Scherkenbach
E-mail: Scherkenbach@fr.com
Proshanto Mukherji
Email: Mukherji@fr.com
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02110-1878
(617) 542-5070 (Telephone)
(617) 542-8906 (Facsimile)

David J. Healey
E-mail: Healey@fr.com
FISH & RICHARDSON P.C.
1 Houston Center
1221 McKinney Street, Suite 2800
Houston, TX 77010
(713) 654-5300 (Telephone)
(713) 652-0109 (Facsimile)

Jason W. Wolff
E-mail: Wolff@fr.com
FISH & RICHARDSON P.C.
12390 El Camino Real
San Diego, CA 92130
(858) 678-5070 (Telephone)
(858) 678-5099 (Facsimile)

Michael E. Florey
Email: florey@fr.com
FISH & RICHARDSON P.C.
3200 RBC Plaza
60 South Sixth Street
Minneapolis, MN 55402
(612) 335-5070 (Telephone)
(612) 288-9696 (Facsimile)

Counsel for Defendant
ADOBE SYSTEMS INCORPORATED

/s/ Proshanto Mukherji (with permission)

Thomas M. Melsheimer
Email: melsheimer@fr.com
Neil J. McNabnay
Email: mcnabnay@fr.com
Carl E. Bruce

Email: bruce@fr.com
FISH & RICHARDSON
1717 Main Street, Suite 5000
Dallas, TX 75201
Tel: (214) 474.5070

Proshanto Mukherji
Email: mukherji@fr.com
FISH & RICHARDSON
One Marina Park Drive
Boston, MA 02110-1878
Telephone: (617) 542-5070

Attorneys for Defendant
THE GO DADDY GROUP, INC.

/s/ Christopher M. Joe (with permission)

Christopher M. Joe
Brian Carpenter
Eric W. Buether
BUETHER JOE & CARPENTER
1700 Pacific, Suite 2390
Dallas, TX 75201
Tel: (214) 466-1270
Chris.Joe@BJCIPLaw.com
Eric.Buether@BJCIPLaw.com
Brian.Carpenter@BJCIPLaw.com

Attorneys for Defendant
J.C. PENNEY CORPORATION, INC.

/s/ Michael E. Richardson (with permission)
Michael E. Richardson (Bar No. 24002838)
mrichardson@brsfirm.com
BECK REDDEN & SECREST L.L.P.
1221 McKinney, Suite 4500
Houston, TX 77010
Telephone: (713) 951-6284
Facsimile: (713) 951-3720

Joe W. Redden, Jr. (Bar No. 16660600)
jredden@brsfirm.com
BECK REDDEN & SECREST LLP
One Houston Center
1221 McKinney St, Suite 4500
Houston, TX 77010-2020
Telephone: (713) 951-3700

Facsimile: (713) 951-3720

Alexandra C. Boudreau (*pro hac vice*)
alexandra.boudreau@wilmerhale.com
Richard Ewenstein (*pro hac vice*)
richard.ewenstein@wilmerhale.com
Mark G. Matuschak (*pro hac vice*)
mark.matuschak@wilmerhale.com
Silena Paik (*pro hac vice*)
silena.paik@wilmerhale.com
WILMER CUTLER PICKERING HALE &
DORR LLP
60 State Street
Boston, MA 02109
Telephone: (617) 526-6336
Facsimilie (617) 526-5000

Donald R. Steinberg (*pro hac vice*)
don.steinberg@wilmerhale.com
Daniel V. Williams (*pro hac vice*)
daniel.williams@wilmerhale.com
WILMER CUTLER PICKERING HALE &
DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 663-6012
Facsimile: (202) 663-6363

Kate Hutchins (*pro hac vice*)
kate.hutchins@wilmerhale.com
WILMER CUTLER PICKERING HALE &
DORR LLP
399 Park Avenue
New York, NY 10022
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

Attorneys for Defendant
STAPLES, INC.

/s/ Thomas L. Duston (with permission)

Thomas L. Duston
tduston@marshallip.com
Anthony S. Gabrielson
agabrielson@marshallip.com
Scott A. Sanderson
ssanderson@marshallip.com
Marshall, Gerstein & Borun LLP
6300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6357
Telephone: (312) 474-6300
Facsimile: (312) 474-0448

Brian Craft
bcraft@findlaycraft.com
Eric H. Findlay
efindlay@findlaycraft.com
FINDLAY CRAFT, LLP
6760 Old Jacksonville Highway, Suite 101
Tyler, TX 75703
Telephone: (903) 534-1100
Facsimile: (903) 534-1137

Attorneys for Defendants
CDW LLC

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/ Jennifer Haltom Doan

Jennifer Haltom Doan