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,	§	**CASE NO. 6:09-CV-00446-LED**
vs.	§	
ADOBE SYSTEMS INC., AMAZON.COM INC., CDW CORPORATION, CITIGROUP INC., THE GO DADDY GROUP, INC., GOOGLE INC., J.C. PENNEY CORPORATION, INC., STAPLES, INC., YAHOO! INC., and YOUTUBE, LLC.,	§	**JURY TRIAL**
Defendants.	§	

PLAINTIFFS' OPPOSED MOTION TO CORRECT JUDGMENT PURSUANT TO RULES 59(e) AND 60(a)

Plaintiffs Eolas Technologies Incorporated ("Eolas") and The Regents of the University of California (UC) (collectively "Plaintiffs") respectfully file this Motion to Correct Judgment Pursuant to Rules 59(e) and 60(a).[1]

I. ARGUMENT

On October 6, 2009, Eolas filed suit in this action, alleging patent infringement of the '906 and '985 patents. [Dkt. No. 1]. On December 17, 2009, one of the five remaining Defendants in this action, Amazon.com Inc. ("Amazon"), filed an answer, asserting, among other things, a counterclaim for declaratory judgment of noninfringement, invalidity, and unenforceability due to inequitable conduct. [Dkt. No. 131 at ¶¶ 340-48]. Similarly, Plaintiffs' current Complaint, filed on October 28, 2011, contains allegations of patent infringement [Dkt. No. 1075], and Amazon has counterclaimed for a declaratory judgment on noninfringement, invalidity, and unenforceability. [Dkt. No. 1026 at ¶¶ 338-345].

On January 20, 2012, this Court issued its "Final Trial Plan" for this action, pursuant to which an "Invalidity and Inequitable Conduct" trial would be followed by three "Infringement and Damages" trials. [Dkt. No. 1264]. Accordingly, in the first trial in this action, which began on February 6, 2012 and concluded with a jury verdict on February 9, 2012 that claims 1 and 6 of the '906 patent and claims 1, 3, 10, 16, 18, 20, 22, 36, 38, 40, and 42 of the '985 patent were invalid [Dkt. No. 1353], no infringement issues were addressed by the jury in its verdict and no inequitable conduct issues were addressed by the Court in its judgment .

Because neither the jury nor the Court expressly ruled on Plaintiffs' infringement claims and Defendants' counterclaims of noninfringement and unenforceability due to inequitable

[1] Plaintiffs are filing contemporaneously with this Motion to Correct Judgment a Motion for Judgment as a Matter of Law Under Rule 50(b) that the Patents-in-Suit Are Not Invalid, or in the Alternative for a New Trial Under Rule 59. This Motion to Correct Judgment in no way modifies or pertains to that Motion or the relief sought in that Motion.

conduct, an argument can be made that the February 13, 2012 judgment cannot be final. This is precisely what the Federal Circuit found in *Leggett & Platt, Inc. v. Vutek, Inc.*, 239 Fed. Appx. 602 (Fed. Cir. 2007) (unpublished). In *Leggett & Platt*, the district court had granted the defendant's motion for summary judgment on invalidity and stated in its judgment that "defendant VUTEk shall have judgment on plaintiffs' complaint and on its counterclaim, and plaintiffs' complaint is dismissed in its entirety." Exhibit 1. On appeal, the Federal Circuit found that "the district court's judgment did not, one way or the other, decide its counterclaim for a declaratory judgment of noninfringement". *Id.* at 604. Because of this, the Federal Circuit declined to hear the case, holding that "until it has been disposed of, absent a Fed. R. Civ. P. 54(b) judgment, there is no final judgment on all claims for relief and we must dismiss this appeal." *Id.* at 604. On remand, the district court issued a revised final judgment, which stated that "Plaintiffs' complaint is dismissed in its entirety, and VUTEk's counterclaim for non-infringement is dismissed as moot." Exhibit 2. With such a revision to the court's judgment, the Federal Circuit heard the appeal. *Leggett & Platt, Inc. v. VUTEk, Inc.*, 537 F.3d 1349 (Fed. Cir 2008). The revised judgment Plaintiffs propose (attached hereto as Attachment A) is in line with the district court's judgment entered in *Leggett & Platt* and deemed acceptable by the Federal Circuit.

In addition, Plaintiffs entered into settlements with Adobe Systems, Inc., CDW Corporation, and Staples, Inc. prior to the jury's verdict [*see* Dkt. Nos. 1361, 1365, and 1359, respectively]. Those Defendants should, therefore, not be named in the Court's corrected judgment.

II. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court correct its "final" judgment entered in this case, replacing it with a judgment naming only Defendants

Amazon.com Inc.; Google Inc.; J.C. Penney Corporation, Inc.; Yahoo! Inc.; and YouTube, LLC and stating that Plaintiffs' claims for infringement and damages are dismissed based on Defendants' invalidity affirmative defense and counterclaim, and Defendants' counterclaims other than for invalidity are hereby dismissed as moot.

Dated: March 12, 2012.

MCKOOL SMITH, P.C.

/s/ Mike McKool
Mike McKool
Lead Attorney
Texas State Bar No. 13732100
mmckool@mckoolsmith.com
Douglas Cawley
Texas State Bar No. 04035500
dcawley@mckoolsmith.com
Holly Engelmann
Texas State Bar No. 24040865
hengelmann@mckoolsmith.com
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4000
Telecopier: (214) 978-4044

Kevin L. Burgess
Texas State Bar No. 24006927
kburgess@mckoolsmith.com
Josh W. Budwin
Texas State Bar No. 24050347
jbudwin@mckoolsmith.com
Gretchen K. Curran
Texas State Bar No. 24055979
gcurran@mckoolsmith.com
Matthew B. Rappaport
Texas State Bar No. 24070472
mrappaport@mckoolsmith.com
J.R. Johnson
Texas State Bar No. 24070000
jjohnson@mckoolsmith.com
MCKOOL SMITH, P.C.
300 West Sixth Street, Suite 1700
Austin, Texas 78701
Telephone: (512) 692-8700

Telecopier: (512) 692-8744

Robert M. Parker
Texas State Bar No. 15498000
rmparker@pbatyler.com
Robert Christopher Bunt
Texas Bar No. 00787165
rcbunt@pbatyler.com
Andrew T. Gorham
Texas State Bar No. 24012715
tgorham@pbatyler.com
PARKER, BUNT & AINSWORTH, P.C.
100 E. Ferguson, Suite 1114
Tyler, Texas 75702
Telephone: (903) 531-3535
Telecopier: (903) 533-9687

ATTORNEYS FOR PLAINTIFFS THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND EOLAS TECHNOLOGIES INCORPORATED

CERTIFICATE OF SERVICE

Pursuant to Local Rule CV-5(a)(7), the undersigned certifies that the foregoing document was filed electronically on March 12, 2012. As such, counsel for Plaintiffs has served this Motion in electronic form on all counsel who have consented to electronic service.

/s/ Gretchen Curran
Gretchen Curran

CERTIFICATE OF CONFERENCE

I certify that counsel for Plaintiffs met and conferred with counsel for Defendants regarding the relief requested in this Motion. Defendants are opposed to the relief Plaintiffs seek.

/s/ Gretchen Curran
Gretchen Curran