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## I. INTRODUCTION

Pursuant to Patent Rule 3-6, Plaintiff Eolas Technologies Incorporated (“Eolas”) respectfully requests leave to supplement its infringement contentions as to Defendant Google Inc. (“Google”) to address two newly released products: Google Music and Google+.

Eolas served its original infringement contentions on Google on March 5, 2010. Google made its Google Music functionality available May 10, 2011 and its Google+ functionality on June 28, 2011. On May 10, 2011 and July 5, 2011, on the same day if not the same week as their announcement—and even though Eolas was not yet able to access either product—Eolas provided Google with notice of its intentions to supplement its infringement contentions to include these newly released products. Then, on June 24, 2011 and July 29, 2011, within weeks of receiving access to these new products, Eolas promptly served Google with claim charts demonstrating their infringement. In each case, the manner of infringement of these newly released products is *materially the same* as for the previously released and accused Google products included in Eolas’ earlier March 5, 2010 infringement contentions. Accordingly, these new products should be addressed as part of this case.

While Google now claims prejudice, the fact is that Google never identified these in-development products in response to Eolas’ discovery requests. Had Google done so, Eolas may have been able to provide infringement contentions before these products were released to the public. Moreover, even after Eolas promptly notified Google of its intention to accuse these products, Google instead sat on Eolas’ notice – for Google Music as for as long as eleven weeks – before stating that it would oppose this motion for leave to supplement. Despite this Google-created delay, Google opposes Eolas’ motion because “[a]dding additional infringement contentions *this close to trial* is highly prejudicial.” Google’s unilateral delay—despite Eolas’

prompt supplementation—unfairly prevented Eolas from filing this motion earlier.

Eolas has met the good cause standard for supplementing infringement contentions. First, Google released Google Music and Google+ after Eolas served its original infringement intentions. Second, Eolas notified Google of its intention to accuse these products within days of their release and served supplemental claim charts on Google within a short time of gaining access to Google Music and Google+. Third, not including Google Music and Google+ in this case would needlessly require duplicative litigation concerning the same parties and the same manner of infringing the same patents. Finally, Google would not suffer undue prejudice by being held accountable for these latest infringing products, especially because Eolas has already included them in its infringement expert reports and is seeking only minimal discovery related specifically to damages for these new products. In light of the lack of any genuine prejudice to Google, and in light of the good cause set forth herein, Eolas respectfully requests that the Court grant Eolas' motion for leave.

## **II. BACKGROUND**

Google is one of twenty-one defendants that Eolas has accused of infringing U.S. Patent Nos. 5,838,906 and 7,599,985 by using the inventions in those patents to interact with embedded interactive objects such as video on web pages. Eolas brought suit on October 5, 2009. On March 5, 2010, Eolas served infringement contentions on Google pursuant to P.R. 3-1.<sup>1</sup> Eolas included separate claim charts for eighteen categories of Google products.<sup>2</sup> Google continued to develop new products and services using Eolas' patented technologies, and on September 29,

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<sup>1</sup> Exhibit 1, attached to the Declaration of Christopher Mierzejewski in Support of Eolas' Motion to Supplement Its P.R. 3-1 Infringement Contentions With Respect To Google Music and Google+ ("Mierzejewski Declaration"). All exhibits in this motion are attached to the Mierzejewski Declaration.

<sup>2</sup> *Id.*

2010, this Court granted Eolas' unopposed motion seeking leave to supplement its infringement contentions to add Google's then newly offered Google Instant functionality.<sup>3</sup> In April 2011, Eolas moved to add Google's new version of its Android operating system ("Android 3.0") to its infringement contentions.<sup>4</sup> At the hearing on that motion, Eolas agreed that its allegations as to Android 3.0 would relate only to functionality performed within a web browser – as do Eolas' present allegations with respect to Google Music and Google+.<sup>5</sup>

More recently, on May 10, 2011, Google publicly announced that the Beta of Google Music would be released in the coming weeks by invitation-only. *On the same day as announcement*, Eolas notified Google's counsel that based on videos available from the Google Music site,<sup>6</sup> it appeared as though Google Music infringed Eolas' patents in this case and that it would prepare infringement contentions.<sup>7</sup> Having heard nothing, and shortly after securing an invitation to the Google Music Beta, on June 9, 2011 Eolas informed Google of the results of its further experimentation, including its belief that Google Music infringes the asserted patents, and it reminded Google that it expected supplementation of its discovery.<sup>8</sup> On June 24, 2011, within a few weeks of obtaining access to Google Music, Eolas served infringement contentions on Google addressing Google Music, again asking whether or not Google intended to oppose a motion to supplement Eolas' infringement contentions.<sup>9</sup> Following a July 1, 2011 letter from

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<sup>3</sup> Dkt. 436.

<sup>4</sup> Dkt. 634.

<sup>5</sup> Dkt. 762, at 9-12.

<sup>6</sup> These were merely videos demonstrating functionality that was to be included when the Google Music released at a later date. The Google Music service was not yet available.

<sup>7</sup> See Exhibit 2 (e-mail from Mr. Mierzejewski to counsel for Google (May 10, 2011)).

<sup>8</sup> Exhibit 3 (e-mail from Mr. Mierzejewski to counsel for Google (July 9, 2011)).

<sup>9</sup> Exhibit 4 (letter from Mr. Mierzejewski to Mr. Stroy (June 24, 2011) (attaching

Google stating that it would respond to Eolas “shortly,”<sup>10</sup> and having heard nothing, Eolas followed up again on July 8, 2011, noting its desire to file a motion seeking leave to supplement by the following week.<sup>11</sup>

On June 28, 2011, Google launched Google+, again available by invitation-only.<sup>12</sup> On July 5, 2011, Eolas notified Google that based upon the description of Google+, it intended to include Google+ in its infringement contentions.<sup>13</sup> On July 19, 2011, Eolas followed up as to both Google Music and Google+, requesting Google’s position with respect to Eolas moving to supplement its infringement contentions.<sup>14</sup> Eolas also updated Google as to Eolas’ progress in drafting infringement contentions as to Google+.<sup>15</sup> On July 29, 2011, within weeks of obtaining access, Eolas served infringement contentions addressing Google+, and once again asked whether or not Google would oppose a motion seeking leave to add Google+ to its infringement contentions.<sup>16</sup> In response to Eolas’ communications seeking a Local Rule CV-7 meet and confer, required in part by Google’s long and unexplained silence on these issues, Google

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infringement contentions directed to Google Music); *see also* Exhibit 5 (e-mail from Mr. Mierzejewski to counsel for Google (June 27, 2011) (providing Google an update on the status of outstanding discovery, including Eolas’ request regarding these infringement contentions)).

<sup>10</sup> Exhibit 6 (letter from Ms. Hermes to Mr. Mierzejewski (July 1, 2011) (“Google is reviewing Eolas’s proposed amended PICs for Google Music. Google will respond to Eolas shortly regarding whether Google intends to oppose Eolas’s motion to supplement at to Google Music.”)).

<sup>11</sup> Exhibit 7 (e-mail from Mr. Mierzejewski to counsel for Google (July 8, 2011)).

<sup>12</sup> As was true with Google Music, initially, Eolas was unable to obtain an invitation and Google never offered to provide one. This delay in obtaining an invitation to use the Google+ service delayed Eolas’ ability to prepare infringement contentions, which it nonetheless sought to do as quickly as possible.

<sup>13</sup> Exhibit 8 (e-mail from Mr. Mierzejewski to counsel for Google (July 5, 2011, 8:34 PM)).

<sup>14</sup> Exhibit 9 (e-mail from Mr. Mierzejewski to counsel for Google (July 19, 2011)).

<sup>15</sup> *Id.*

<sup>16</sup> Exhibit 10 (letter from Mr. Mierzejewski to Sasha Rao (July 29, 2011) (attaching infringement contentions directed to Google+)).

indicated *for the first time* that it would oppose supplementation; writing only:

Adding additional infringement contentions *this close to trial* is highly prejudicial, particularly in view of the discovery that has already been taken by both parties that did not include requests related to these additional products. Collecting the necessary discovery on these products *between now and trial* would simply not be possible for either party.<sup>17</sup>

During the Local Rule CV-7 meet and confer, Google maintained its position, providing no explanation for its eleven-week delay in responding to Eolas as to Google Music, or its delay of more than four weeks as to Google+. Nor did Google offer an explanation as to why it had not identified either of these to-be released products in its written discovery or included either product in its document productions despite what must have been months if not years of planning and development all the while knowing that these functionalities would use technology that Eolas has been asserting infringe the asserted '906 and '985 patents.

### III. ARGUMENT

This Court typically considers four factors in determining whether a party has met the good cause requirement to supplement infringement contentions provided under Fed. R. Civ. P. 16(b) and P.R. 3-6: “(1) the explanation for the party’s failure to meet the deadline, (2) the importance of what the Court is excluding, (3) the potential prejudice if the Court allows the thing that would be excluded, and (4) the availability of a continuance to cure such prejudice.”<sup>18</sup> Here, the first three factors clearly weigh in favor of granting Eolas leave to supplement, and the fourth is inapplicable.

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<sup>17</sup> Exhibit 11 (e-mail from Mr. Stroy to Mr. Mierzejewski (July 29, 2011) (emphasis added)).

<sup>18</sup> *MacLean-Fogg Co. v. Eaton Corp.*, No. 2:07-CV-472, 2008 U.S. LEXIS 78301, at \*4 (E.D. Tex. Oct. 6, 2008); *see also S & W Enters., L.L.C. v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535–36 (5th Cir. 2003).



**A. Eolas Acted Diligently in Supplementing Infringement Contentions for Infringing Functionality Added Subsequently by Google.**

As set forth above, Eolas has been both diligent in developing its infringement theories with respect to Google's newly released Google Music and Google+ functionality, and it has been forthcoming in disclosing them to Google. In marked contrast to Eolas' diligence and forthcoming communications, Google kept silent for two-and-a-half months (with respect to Google Music), and largely refused to acknowledge Eolas' communications and its request that Google indicate whether or not it opposed a motion to supplement infringement contentions as to Google Music.

Eolas' conduct was diligent.<sup>19</sup> Google does not assert that Eolas has not been diligent or forthcoming as to its intentions, or explain why Google failed in its obligation to provide discovery into these reasonably similar accused products during the discovery period.<sup>20</sup> Rather, instead of providing discovery into these products during their development, Google sat silent. Had Google provided some discovery on these products prior to their release, Eolas may have been able to prepare infringement contentions earlier. Similarly, even after Eolas communicated its intention to accuse these products, Google instead sat silent and waited until two weeks before the close of fact discovery to indicate it would oppose Eolas' motion. Now, Google claims prejudice as a result of the delay *it created*.

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<sup>19</sup> See *MacLean-Fogg Co.*, U.S. LEXIS 78301, at \*3-5 (finding diligence where more than three months passed between a March 5, 2008 production and the plaintiff's June 20, 2008 motion to amend infringement contentions based on that production); *MASS Engineered Design, Inc. v. Ergotron, Inc.*, No. 2:06-CV-272, 2008 U.S. Dist. LEXIS 35577, at \*15-16 (E.D. Tex. Apr. 30, 2008) (finding diligence where the plaintiff filed a motion to amend infringement contentions one month after being able to access the defendant's website that identified new accused products).

<sup>20</sup> See Exhibit 12; see also *Honeywell Int'l, Inc. v. Acer Am. Corp.*, 655 F. Supp. 2d 650, 656-58 (E.D. Tex. 2009) (permitting discovery and supplementation of infringement contentions to include reasonably similar products).

**B. It is Important that Google Music and Google+ Be Addressed in This Litigation**

Google Music and Google+ utilize Eolas' patented technologies in materially the same way as Google's other accused products, which are already the subject of this litigation. For example, Google Music and Google+ use AJAX and Flash to provide an interactive experience for the user through an Internet browser: Google Music allows users to play, pause, and adjust volume controls on audio interactively through the browser; Google+ allows users to play, pause, and adjust volume controls on videos interactively through the browser. Eolas has accused various other products such as YouTube, GMail, Google Maps and Google Documents for the same or similar interactive functionality.

With minimal additional discovery related to damages, the parties should be able to address these new products in their expert reports and at trial, since they rely on the same theory of infringement.<sup>21</sup> In fact, Eolas has already included these new products in its infringement expert report. Trying issues related to these newly released products as part of this case will reduce the risk of inconsistent judgments as well as the costs and burdens on the Court and the parties of having to address these infringements again in a later lawsuit. The alternative would require Eolas to initiate duplicative litigation on the same patents and the same theories of infringement against Google, when it can be addressed now.<sup>22</sup>

**C. There is No Potential Prejudice to Google in Being Held Accountable for Its Latest Infringement Activity Or Its Failure to Identify these Products Earlier in Discovery.**

Google has suggested that the late inclusion of its newly released products into this

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<sup>21</sup> Eolas should be entitled to additional discovery related to damages and willful infringement as (1) Google has known for months if not years that Google Music and Google+ use features that Eolas has asserted infringe its patents, and (2) Google would have both estimates and actual usage of both Google Music and Google+ that are relevant to this case.

<sup>22</sup> See *MASS Engineered*, 2008 U.S. Dist. LEXIS 35577, at \*16; *NIDEC Corp. v. LG Innotek Co.*, No. 6:07-cv-108, 2009 U.S. Dist. LEXIS 106667, at \*6 (E.D. Tex. Sept. 2, 2009).

litigation would prejudice Google.<sup>23</sup> First as to Google Music, and as explained above, Google delayed an entire month in responding to Eolas' related claim charts, and two and one-half months since Eolas' first notice. This time would have presented Google more than enough time to prepare in whatever manner it felt it needed. The additional time would also have permitted Google to prepare its non-infringement contentions (if any).<sup>24</sup> Moreover, because of Eolas' diligence in notifying Google of its intentions with respect to both Google Music and Google+, together with the fact that Eolas is not seeking any new discovery related to either product, makes Google's claim of prejudice hard to fathom.

Finally, as between the parties, Google has been in the best position to know what functions it is using in Google Music and Google+ as it has been aware of its own plans for what is likely months, if not years before its released them to the public. It was Google's own choice to develop and release Google Music and Google+ when it did. Google never disclosed either product to Eolas during the discovery period, nor did Google produce a meaningful set of related documents related to these products even though it was developing them both during this litigation.<sup>25</sup> Google should have been providing discovery as to these features voluntarily "without awaiting a discovery request"<sup>26</sup> on a rolling basis even before its public release of

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<sup>23</sup> *Id.*

<sup>24</sup> If it does not, Google should not be heard to complain about the amount of time it took Eolas to prepare its claim charts – especially without access to any non-publicly available information, all of which is readily available only to Google.

<sup>25</sup> See P.R. 3-4(a) (duty to produce documents sufficient to show operation of aspects or elements of accused instrumentality identified by patent claimant in P.R. 3-1(c) charts); *Honeywell Int'l, Inc. v. Acer Am. Corp.*, 655 F. Supp. 2d 650, 656-58 (E.D. Tex. 2009) (duty to provide discovery as to reasonably similar products); see also Dkt. No. 247 ¶¶ 2(B) (duty to disclose), 10 (duty to supplement immediately)).

<sup>26</sup> Joint Agreed Discovery Order §2(B) (April 2, 2010) (Dkt. 247) ("After disclosure is made pursuant to this order, each party is under a duty to supplement or correct its disclosures immediately if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.");

Google Music and Google+,<sup>27</sup> rather than wait, and now seek to obstruct Eolas' motion and conduct trial by avoiding discovery.<sup>28</sup> Had Google provided discovery into these products during their development, Eolas may have been in a position to provide infringement contentions related to these products prior to their public release.

**D. A Continuance is Unnecessary Because There is No Prejudice**

The Court need not consider the fourth factor, as allowing supplemental infringement contentions does not prejudice Google in any way that it did not bring on itself by burying its head in the sand for at least these past 2-3 months, if not longer.<sup>29</sup>

**IV. CONCLUSION**

For the foregoing reasons, Eolas respectfully requests that the Court grant its motion to supplement its infringement contentions, and compel Google to supplement its discovery.

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*Honeywell*, 655 F. Supp. 2d at 661 (ordering party to supplement interrogatory responses and to produce a corporate representative to provide relevant testimony).

<sup>27</sup> *Reedhycalog UK, Ltd. v. United Diamond Drilling Servs., Inc.*, 2008 U.S. Dist. LEXIS 93177, at \*\*6-7 (E.D. Tex. Oct. 3, 2008) (“This Court adheres to the policy of liberal, open and forthright discovery and will not tolerate gamesmanship.”).

<sup>28</sup> *Tantivy Comms. Inc. v. Lucent Techs., Inc.*, No. 2:04-CV-79, 2005 U.S. Dist. LEXIS 29981, at \*11 (E.D. Tex. Nov. 1, 2005) (A party may not conduct discovery by “lay[ing] behind the log and avoiding their discovery obligations.”).

<sup>29</sup> See *MacLean-Fogg*, 2008 U.S. Dist. LEXIS 78301, at \*7; *MASS Engineering*, 2008 U.S. Dist. LEXIS 35577, at \*16-17; *Forgent Networks, Inc. v. Echostar Techs. Corp.*, No. 6:06-cv-208, 2006 U.S. Dist. LEXIS 88872, at \*11 (E.D. Tex. Dec. 8, 2006).

DATED: August 2, 2011

Respectfully submitted,

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**CERTIFICATE OF CONFERENCE**

The undersigned certifies that the parties have complied with Local Rule CV-7(h)'s meet-and-confer requirement. On August 1, 2011, Mike McKool, John Campbell, Josh Budwin and Christopher Mierzejewski, counsel for Eolas conducted a personal conference by telephone with James Batchelder, Mike Jones, Sasha Rao, and Brandon Stroy, counsel for Google. The discussions ended conclusively in an impasse, leaving an open issue for the Court to resolve. Google opposes this motion.

*/s/ Christopher Mierzejewski*  
Christopher Mierzejewski

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic services pursuant to Local Rule CV-5(a)(3)(A), on August 1, 2011.

*/s/ Christopher Mierzejewski*  
Christopher Mierzejewski