Eolas Technologies Incorporated v. Adobe Systems Incorporated et al Doc. 815 Att. 12

EXHIBIT 11

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From: Stroy, Brandon [Brandon.Stroy@ropesgray.com]
Sent: Friday, July 29, 2011 9:39 PM
To: Christopher J. Mierzejewski; Ropes Google Group
Cc: allengardner@potterminton.com; Eolas; mikejones@potterminton.com
Subject: RE: Eolas v. Adobe - Google & YouTube - Discovery deadline and request for plan for completing discovery by deadline

Christopher,

With respect to the list of outstanding issues you raised in your email from Wednesday regarding outstanding, we can provide the following updates in advance of next week's meet & confer:

1) On the depositions of individuals identified in Google's Initial Disclosures, we are working to narrow our witness list, and expect to be able to provide Eolas with a non-final list of expected witnesses shortly. Generally, we expect that this list will include primarily individuals who have already been deposed, or third party witnesses who are likely to be common to several of the defendants. In the latter case, we expect Eolas will arrange with the appropriate representative for each prospective third party witness an appropriate plan for their depositions. To the extent we identify trial witnesses that Eolas has not had an opportunity to depose, Google will accommodate Eolas taking such depositions.

2) Your email states, incorrectly, that well over half of Eolas' 30(b)(6) deposition topics have yet to be covered in depositions of Google 30(b)(6) witnesses. Instead, while a number of Eolas' 100+ 30(b)(6) deposition topics remain outstanding, the most important topics, as identified by Eolas, have been covered or scheduled. Google has no intention of refusing to allow 30(b)(6) depositions to occur. However, the fact of the matter is that taking depositions for all of the remaining topics simply may not be possible for Eolas given the limits that exist on its overall number of available deposition hours. Please don't mistake Eolas' meeting or exceeding that limitation with Google, or any other defendant, refusing to allow 30(b)(6) depositions to occur. Indeed, by Google's count, Eolas has already exceeded its total allotment of depositions hours to be taken among all defendants. Therefore, barring some relief from the Court, Google doesn't see any entitlement to additional depositions beyond those explicitly agreed upon by the parties. Google is, nonetheless, willing to be reasonable in attempting to accommodate Eolas' requests should there be additional 30(b)(6) topics of particular interest to Eolas, and to the extent such witnesses are reasonably available at Google.

3) With respect to revenue and usage information, we have returned to Google to collect additional information, and are in the process of requesting still further information from Google. We will provide this information to Eolas once we have obtained the complete collection and obtained permission from Google. I can also tell you that, as expected, we found that much of the requested information is simply not available from inspection of Google's regularly collected, reviewable analytics information.

4) Google does oppose Eolas' motion to add Google Music (and Google+) to its infringement contentions. 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.

5) As you will appreciate, although an email may not have passed directly between an attorney and a client, the email may still contain information that is protected by the attorney-client privilege. For example, an email from one Google employee to another may recite information that the first Google employee received from a Google attorney. In this, and in other such cases, we believe it is entirely appropriate for such communications to be withheld from production on the basis of privilege. Moreover, Eolas has had Google's privilege log since December, 2010. These concerns, raised on the eve of the close of discovery, could have, and should have been raised earlier. Nonetheless, to the extent we discover documents that were improperly excluded from production and improperly listed on the privilege log, we will produce them.

   I further would like to identify some issues Google has identified with Eolas' privilege log. Specifically, Eolas has listed documents on its privilege log from 2008 and early 2009 as containing information described as attorney work product and litigation strategy, although Eolas' Mr. Stetson testified at his deposition that had no anticipation of future litigation after the conclusion of the Microsoft case until summer 2009. Google requests that this information be reviewed and produced to the extent it does not contain privileged information.

I trust that this email answers the majority of the questions for which you had requested the meet and confer for Monday. Please let me know if you have further questions, or if, in view of the above, you would like to take any items off of your agenda for our Monday meeting.

Regards,
Brandon

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From: Christopher J. Mierzejewski [mailto:cmierzejewski@McKoolSmith.com]
Sent: Wednesday, July 27, 2011 1:49 PM
To: Ropes Google Group
Cc: allengardner@potterminton.com; Eolas
Subject: Eolas v. Adobe - Google & YouTube - Discovery deadline and request for plan for completing discovery by

deadline

Counsel,

We are about two weeks away from the discovery deadline of Aug. 12, 2011 (Dkt. No. 270). Yet we are still awaiting discovery from Google and Youtube. If you have a plan, we need to know what the plan is to take care of the remaining discovery. If you don't have a plan, we need to know so we can make sure we quickly formulate a plan. If Google or YouTube is refusing to or is otherwise unable to provide the remainder of this discovery before the discovery deadline, we need to know today so we can decide how to proceed.

I am available today for a call if that will be useful in discussing these issues as we work towards some plan for how to finish up this discovery.

(1) 30(b)(1) depositions of individuals identified in Google & YouTube's Initial Disclosures. There are around 49 individuals identified in the Initial Disclosures who appear to be employed at Google or YouTube and were noticed on April 13, 2010. We have proposed that we do not have to depose all of them if there are individuals that Google & YouTube will not be using at trial. If even a small fraction of these individuals will be needed, depositions need to be scheduled soon to allow time for all to be deposed. While we agreed to Google & YouTube's request to push their disclosure date for trial witnesses to the same day as discovery close, it is still Google & YouTube's obligation to provide these 30(b)(1) witnesses before the end of discovery. Please identify your plan for deposition of all of these individuals, or proposed plan for deposition of the limited number of individuals you plan on using at trial.

(2) 30(b)(6) depositions as noticed on March 23, 2011 and March 15, 2011. Well over half of these depositions have yet to be taken. Google and YouTube have only recently indicated they might refuse to allow some of these depositions and have not yet replied to our requests for clarification on this issue. Please identify your plans for providing deponents on the remainder of these deposition topics.

(3) Revenue and Usage numbers. On July 6, 2011 and July 13, 2011 we made specific requests for revenue and usage numbers, asking for specific Bates numbers with this information, production of additional information, or confirmation that Google and YouTube do not have the information readily available. We are still waiting for a response beyond that you will look into it. Please provide the information.

(4) Google Music PICs. Google has still not provided a position on supplementing to include the Google Music PICs provided June 24, 2011. Please provide Google's position on a motion to supplement.

(5) Privilege Log claims of attorney-client communication when no attorney is a party to the e-mails. We raised this issue July 11, 2011 and have yet to receive any response. Please provide a response.

Sincerely,
Christopher

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