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## I. INTRODUCTION

The parties agree that the Court's discretion in granting leave to supplement infringement contentions is informed by the following factors as part of a "good cause" analysis: the parties diligence in filing the motion; the importance of supplementing the infringement contentions to include the additional products; prejudice to the parties; and whether a continuance would cure any prejudice.<sup>1</sup> Google has raised no serious contention as to any one of these issues. It has chosen as well not to contest any of the following points made by Eolas:

1. Google Music and Google+ were very recently released;
2. Google Music or Google+ use functionality claimed by Eolas' patents in ways materially similar to the ways Eolas argues that Google's other twenty-six accused products infringe the patents (*see* Mot. at 7);
3. Google has an obligation to supplement discovery with respect to Google Music and Google+ as reasonably similar to the accused products, whether or not these new product are added into the infringement contentions (*see* Mot. at 6, fn. 20; 8, fn. 25);
4. Google has failed to provide this discovery and has delayed resolution of this motion (*see* Mot. at 3-5); and
5. Eolas acted diligently in notifying Google of its intentions with respect to this motion and in presenting claim charts for Google Music and Google+. *See* Mot. at 4, 6.

The first four of these points critically undermine any issue of undue prejudice to Google and remove any need for a continuance. The first and fourth (the recent release of these products and Google's discovery failures and delay) explains why this motion is being filed at this stage of the litigation, and together with other reasons (cost, effort, and discouraging litigation misconduct) they explain why it is important to resolve these materially similar infringements at the same time rather than in duplicative litigation. Neither party has suggested that a continuance is needed here, though for different reasons. *See* Mot. at 9; Opp. at 8-9.

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<sup>1</sup> *See* Mot. at 5; Opp. at 4.

## II. ARGUMENT

### A. Diligence

As explained in Eolas' Motion for Leave, Eolas has been diligent, clearly communicated its intentions after Google announced these new products, and produced infringement contention charts within weeks of their introduction. Mot. at 3-4. In its opposition Google does not seriously dispute these facts, which show Eolas' diligence.<sup>2</sup> Google does interject an off-handed "even if Eolas had been diligent," but it does so without any support or further analysis. Opp. at 6. Instead, Google attempts to change this "good cause" inquiry as to Eolas' diligence, into a sufficiency of pleadings test.<sup>3</sup> Although both "good cause" tests may be "essentially the same,"<sup>4</sup> Google is not asking that the Court strike Eolas' pleadings. See Opp. at 4-5. Nor would such a motion be successful.<sup>5</sup> Eolas cited case law directly on the point of Eolas' diligence, which Google does not

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<sup>2</sup> Nor does Google contest Eolas' diligence in seeking related discovery, especially given Eolas' many attempts to do so. See Motion at 3-4 (citing Exhs. 2 (May 10<sup>th</sup>), 3 (June 9<sup>th</sup>), 8 (July 5<sup>th</sup>), 9 (July 19<sup>th</sup>), and 11 (July 27<sup>th</sup>)).

<sup>3</sup> See Opp. at 4-5 (citing *Power-One, Inc. v. Artesyn Technologies, Inc.*, No. 2:05-CV-463, 2007 WL 2986671, \*10 (E.D. Tex., Oct. 11, 2007)). However, in *Power-One*, plaintiff was moving both to amend its infringement contentions and to compel discovery, due to its "lack of information regarding whether [it] can make a viable infringement case for the products." Id. at \*4, \*10. Eolas has far more than "at least some solid justification" to accuse Google's products, having already had access to Google's websites, analyzed and described the infringement to Google in the form of claim charts, and provided Google an expert report demonstrating the infringement of Google Music in still greater and more specific detail.

<sup>4</sup> See *Davis-Lynch, Inc. v. Weatherford Int'l, Inc.*, No. 6:07-CV-559, 2009 WL 81874, \*3 (E.D. Tex. April 24, 2009).

<sup>5</sup> Google's suggestion is factually incorrect, as Eolas did not block cite code, it provided two separate examples that demonstrate the infringement (Mot. Exh. 12 at 17-18, 19-24), and in contrast to Google's unsupported allegation (Opp. at 5 ("without any explanation ...")), Eolas provided a description in its claim charts as to how the cited code demonstrates the elements in clause "d" of claim 36, of the '985 patent. See Mot. Exh. 12 at 25-26. Eolas' claim charts are 58 pages (Google Music) and 326 pages (Google+) long, in contrast to *Power-One* where no charts were provided. More importantly, Google has not suggested that it does not know or understand what functionality Eolas is accusing of infringement, especially given that the infringement is materially similar to the infringement in twenty-six other products, or given the expert report that provides still greater detail as to the nature of the Google Music's infringement. Google does not raise this issue with respect to any other clause in any other asserted patent claims.

address. *See* Mot. at 6. Instead, Google cites to *Davis-Lynch* (Opp. at 7-8), which held that plaintiff's motion to amend its infringement contentions was not *diligent* where it proffered new infringement contentions for 52 products after examining only one of these products during the 1-5 years they were available for discovery. *See Davis-Lynch*, 2009 WL 81874, \*3-4. Such facts simply are not present here, where Eolas clearly communicated its intentions and provided infringement contentions for these new products within weeks of their release.

## **B. Prejudice**

Google articulates no *specific* prejudice beyond what it is already required to provide,<sup>6</sup> the always-present “looming deadlines,”<sup>7</sup> and the cost and effort necessary to try the issues, which would surely be more significant in duplicative litigation between the same parties on the same patents for these new, but materially similar products. Beyond Google's allegations, any prejudice resulting from the timing of this motion is entirely Google's own doing – as it has been in control of its release of these products into the marketplace, it chose not to produce discovery of these products reasonably similar to those already accused (before or after their release), and its choice to stall for months before responding to Eolas' requests for consent.

If there was any prejudice, it would be minimal due to the similarity in the manner of infringement (a point Google does not contest), and because Eolas has indicated that it is only seeking damages related discovery (Mot. at 7), a point Google appears to adopt.<sup>8</sup> Finally, any

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<sup>6</sup> Google's discovery obligations are clearly set forth in *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), as well as P.R. 3-4(a), and the Joint Agreed Discovery Order §§2(B), 10 (Dkt. 247). Eolas cited these (*see* Mot. at 6, 8), and Google chose not to address this obligation either directly or indirectly in opposing this motion.

<sup>7</sup> Google admits these deadlines would have been looming earlier. *See* Opp. at 8, fn.3. There is no reason to believe the cost of discovery, including the preparation of witnesses, would be greater in this litigation than in Google's preferred *duplicative* litigation. As Eolas has explained, the infringement theories are materially similar, so any additional cost should be less than having to try all the issue a second time.

<sup>8</sup> *See* Opp. at 7 (“Eolas acknowledges that only ‘minimal additional discovery related to damages’ are needed.”).

prejudice would be far outweighed by the benefit to the parties, the Court and the public in early resolution of the infringement of Eolas' patents by Google Music and Google+, as well as the benefit doing so would bring in deterring future litigation misconduct rather than rewarding parties for delaying and refusing to cooperate.

### **C. Importance**

It is important to try like issues, and like infringements in one case. Doing so minimizes the burden on all parties. Google suggests that it is not important to try these products this time because denying leave would not constitute dismissal on the merits and because of the availability of duplicative follow-on litigation. However, Google does not make out a case for why it is preferable to try Google Music or Google+ separately from the twenty-six similar accused products,<sup>9</sup> or more to the point why saving the additional time and cost to the parties, the witnesses and the Court associated with duplicative litigation, or discouraging discovery abuse (as Google has done here in delaying discovery) are not more important. In fact, Google cites *Davis-Lynch* on this point, which states that deterring “game-playing” can also be an important reason to permit amendment of the infringement contentions. *Davis-Lynch*, at \*4 (quoting *Computer Acceleration Corp. v. Microsoft Corp.*, 503 F. Supp. 2d 819, 822 (E.D. Tex. 2007)).

Google also suggests that Google Music and Google+ are not “important” to this case because damages at this point are minimal. See Opp. at 7. The fact that Google released Google Music and Google+ as “field trials” or “beta” releases does not mean that they are not important or reach only a “small number of people,” as Google suggests. Opp. at 3, 6-7 (citing Def. Exhs. 1, 2). Google is notorious for keeping its widely used products in “beta” despite hundreds-of-millions of users.<sup>10</sup> More importantly, Google Music and Google+ are already widely used.<sup>11</sup> Google does not

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<sup>9</sup> Google does suggest that adding its two new products is not important because the case will proceed against Google's other twenty-six accused products (*see* Opp. at 7), but it does not deny that the manners of infringement are materially similar and that duplicative and costly litigation would be necessary.

<sup>10</sup> For example, Google also launched “Gmail” by invitation-only in 2004, it was released in general to the public in 2007, and Google only upgraded it from beta status in 2009, when it had 193 million users per month. *See* [www.facebook.com/pages/Wwwgmailcom/109975902359267](http://www.facebook.com/pages/Wwwgmailcom/109975902359267).

deny that it is a for-profit company or that it intends to generate advertising for, and thus business revenue by encouraging its users to infringe Eolas' patents, both directly and by increasing its overall user base.

Finally, Eolas takes issue with Google's suggestion that Eolas is conducting trial by ambush. *See* Opp. at 2, 8-9. It is not Eolas who introduced new infringing websites into the market months before trial, who failed to identify them during the course of discovery, who withheld consent to this motion for more than six weeks, who refused to communicate with opposing parties until the very end of fact discovery, or who refused discovery that would be required with or without the grant of leave to supplement as these are reasonably similar products.

### **III. CONCLUSION**

For the foregoing reasons, and as set forth in Eolas' Motion for Leave, Eolas respectfully requests leave to supplement its infringement contentions to include the newly released Google Music and Google+ products.

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<sup>11</sup> In contrast to Google's suggestion that its products "are being made available to only a limited few" (Opp. at 7), Google's own CEO reported that Google+ had 10 million U.S. users by July 18 2011, less than three weeks after its launch, and two weeks before Google served its opposition to this motion. *See* [www.wired.co.uk/news/archive/2011-07/18/google-plus-ten-million-visitors](http://www.wired.co.uk/news/archive/2011-07/18/google-plus-ten-million-visitors).

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Respectfully submitted,

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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). 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   , 2011.

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