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Attorneys for Plaintiffs and Counterclaim-Defendants,  
MOVE, INC., NATIONAL ASSOCIATION OF REALTORS and  
NATIONAL ASSOCIATION OF HOME BUILDERS

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

MOVE, INC., ET AL.,

Plaintiffs,

v.

REAL ESTATE ALLIANCE LTD.,  
ET AL.,

Defendants,

Case No. 2:07-CV-02185-GHK-(AJWx)

Hon. George H. King

**PLAINTIFFS' ADDENDUM TO  
MAY 2, 2011 JOINT STATUS  
REPORT**

REAL ESTATE ALLIANCE LTD.,

Counterclaim-Plaintiff,

v.

MOVE, INC., ET AL.,

Counterclaim-Defendants.

Case Filed: Apr. 3, 2007  
2d Am. Complaint Filed: Jan. 12, 2009  
Counterclaims Filed: Feb. 11, 2009

Fact Discovery Cutoff: Sept. 25, 2009  
Pretrial Conference: TBD  
Trial: TBD

1 Plaintiffs Move, Inc., National Association of Realtors, and National  
2 Association of Home Builders (collectively “Plaintiffs”) submit this “Addendum”  
3 to the May 2, 2011 Joint Status Report submitted jointly by Plaintiffs and  
4 Defendants Real Estate Alliance, Ltd. (“REAL”) and Equias Technology  
5 Development LLC (collectively, “Defendants”). Plaintiffs submit this Addendum  
6 to address two important issues: (1) Plaintiffs’ desire for Court-Ordered Mediation;  
7 and (2) the affect that the Federal Circuit’s upcoming *en banc* reconsideration of the  
8 issue of divided infringement may have on the timing of this case.

9 **Mediation**

10 In its Order dated April 12, 2011, the Court ordered the parties to submit a  
11 Joint Status Report addressing: (1) the parties’ positions regarding the possibility of  
12 settlement; and (2) suggestions as to further proceedings. In their May 2, 2011  
13 Joint Status Report, the parties indicated that they had conferred concerning the  
14 possibility of settlement, but that the parties appeared too far apart for further  
15 settlement discussions to be productive. The parties did, however, express a  
16 willingness to continue their discussions.

17 Since the Joint Status Report was submitted on May 2, 2011, Plaintiffs have  
18 continued to consider the issue of settlement and now believe that the involvement  
19 of a third party mediator could greatly help facilitate settlement negotiations  
20 between the parties and that therefore mediation would be productive.  
21 Accordingly, Plaintiffs supplement the Joint Status Report with a request for Court-  
22 ordered mediation.

23 **Divided Infringement**

24 The Parties Joint Status Report further contained a proposed schedule for  
25 pre-trial proceedings and trial, wherein both parties requested the right to address  
26 timing issues at the conference with the Court on May 9, 2011. The parties,  
27 however, were informed this afternoon that the status conference scheduled for  
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1 May 9, 2011 had been taken off calendar and that the Court would enter a  
2 scheduling order in due course.

3 One of the timing issues Plaintiffs had planned to address with the Court at  
4 the May 9 conference was the affect that the Federal Circuit's upcoming *en banc*  
5 rehearing on the issue of divided infringement may have on the timing of the  
6 proposed scheduling order and more particularly on the timing of summary  
7 judgment motions and trial.

8 As the Court may recall, at the outset of this litigation, Move filed a motion  
9 for summary judgment of non-infringement on the ground that Move did not  
10 perform all of the steps of the claimed method and as such, did not infringe the  
11 asserted claims under Federal Circuit precedent such as *BMC Resources, Inc. v.*  
12 *Paymentech, L.P.*, 498 F3d 1373 (Fed. Cir. 2007) and *Muniauction, Inc. v.*  
13 *Thomson Corp.*, 2008 WL 2717689 (Fed. Cir. July 14, 2008). In that motion, Move  
14 argued that it could not be found liable for infringement because it was not Move,  
15 but visitors to the Move websites, that performed certain of the steps of the asserted  
16 claims, in particular the "selecting" steps.

17 Since the Federal Circuit remanded the case, it has been Move's intent to re-  
18 file its summary judgment motion on this issue of divided infringement.<sup>1</sup>  
19 However, Move has recently learned that on April 21, 2011, the Federal Circuit  
20 ordered an *en banc* rehearing of the appeal in *Akamai Technologies, Inc. v.*  
21 *Limelight Networks, Inc.*, (Fed. Cir. April 21, 2011) (*en banc* order), a case  
22 concerning the issue of divided infringement. The specific question to be decided  
23 in the *Akamai* appeal is:

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27 <sup>1</sup> The Federal Circuit's recent claim construction order contains guidance from the  
28 Federal Circuit that supports the strength of Move's divided infringement defense.

1 If separate entities each perform separate steps of a method claim,  
2 under what circumstances would that claim be directly infringed and to  
3 what extent would each of the parties be liable?

4 *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 2009-1372, -1380, -1416, -  
5 1417 (August 21, 2011) (copy attached as Exhibit A). In other words, in the *en*  
6 *banc* rehearing, the Federal Circuit will be addressing the standard for infringement  
7 where, as here, separate entities each perform separate steps of a method claim, the  
8 result of which will be that the Federal Circuit will affirm, overrule, or clarify its  
9 jurisprudence on divided infringement including its decisions in *BMC* and  
10 *Muniauction*. Briefing in the *Akamai* case, including the submission of *amici*  
11 briefs, will conclude towards the end of July, with the Court to set a date for oral  
12 argument at some point in the future. *See Akamai*, pp. 2-3.

13 Because the Court's decision in the *Akamai* case may have a significant  
14 affect on Plaintiffs' non-infringement defense under *BMC* and *Muniauction*, Move  
15 proposes that the proposed schedule in the Joint Status Report be revised in the  
16 following respects:

17 (1) Summary Judgment motions to be filed no later than September 2, 2011  
18 or two weeks from the date that the Federal Circuit issues its *en banc*  
19 decision in *Akamai*, whichever occurs later, with 30 and 14 days for  
20 opposition and reply briefs.

21 (2) A trial date to be set by the Court after the final decision in the *Akamai*  
22 appeal, but in no event before November 7, 2011.

23 Move does not seek to adjust any of the other dates in the Joint Status Report

24 By adopting the foregoing schedule, the Court and the parties will avoid the  
25 possibility of having to address the divided infringement issue twice in the event  
26 the Federal Circuit alters the standard for divided infringement. Indeed, although  
27 the Federal Circuit reversed this court's construction of the "selecting" step (to  
28

1 require that the selecting be performed by a human), indicating that the claim  
2 language is broad enough to permit the step to be performed by either a computer or  
3 a human, the evidence in this case will show that neither Move nor any of Move's  
4 computers perform the selecting step.

5 Counsel for Move conferred with counsel for REAL on both issues discussed  
6 above. REAL opposes this filing and does not consent to the issues presented  
7 through this Addendum.

8 Dated: May 6, 2011

9 Respectfully submitted,

10  
11 /S/ Robin McGrath

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*Counsel for Plaintiffs and Counterclaim  
Defendants Real Move, Inc., National  
Association of Realtors, and National  
Association of Home Builders*

**CERTIFICATE OF SERVICE**

1 The undersigned hereby certifies that counsel of record who are  
2 deemed to have consented to electronic service are being served with a copy of this  
3 PLAINTIFFS' ADDENDUM TO MAY 2, 2011 JOINT STATUS REPORT via the  
4 Court's CM/ECF system per Local Rule CV-5(a)(3) on May 6, 2011. Any other  
5 counsel of record was served via First Class Mail.  
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8 /s/ Robin McGrath  
9 Robin McGrath  
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