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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MOVE, INC., ET AL.,

Plaintiffs,

v.

REAL ESTATE ALLIANCE LTD., ET AL.,

Defendants,

REAL ESTATE ALLIANCE LTD.,

Counterclaim-Plaintiff,

v.

MOVE, INC., ET AL.,

Counterclaim-Defendants.

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

Hon. George H. King

REAL'S OPPOSITION TO MOVE'S PURPORTED "ADDENDUM" TO MAY 2, 2011 JOINT STATUS REPORT

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

Defendants Real Estate Alliance, Ltd. and Equias Technology Development LLC (for convenience only, and collectively, "REAL") submit this Opposition to Plaintiffs' Move, Inc., National Association of Realtors, and National Association of Home Builders (for convenience only, and collectively, "Move") unauthorized so-called "Addendum" to the parties' May 2, 2011 Joint Status Report. That Joint Status Report, which was negotiated, mutually agreed, and filed with this Court, contained six specific and jointly agreed upon dates by which the parties would complete all pre-trial proceedings to get this case to trial in early November 2011. Not four days after that Joint Status Report was filed with the Court, Move suddenly purported to recognize the need for 1) mediation and 2) a stay of this case pending the Federal Circuit's en banc review of a completely unrelated case that has no bearing on REAL's primary case against Move and, at most, might have some tangential bearing on secondary theories of liability. What is evident is that Move was waiting to be before the Court on May 9 to ambush REAL with these requests, and when the Court took the status conference off calendar on Friday, May 6, Move scurried to file its improperly styled "Addendum".

Move's "Addendum" is not an addendum at all but is merely Move's unilateral effort to walk away from the specific and joint agreements set forth in the May 2 Joint Status Report and to seek an indefinite stay without making any effort to satisfy the standard for obtaining a stay **or** meeting and conferring as required by

Local Rule 7-3 ("conference of counsel shall take place at least ten (10) days prior to the filing of the motion"). Worse, Move failed to state correctly REAL's positions regarding the issues presented by the surprise Addendum. Upon being informed for the first time on Friday afternoon of Move's imminent filing, REAL requested that Move include a short statement of REAL's position in the "Addendum". Move refused – and instead mischaracterized REAL's position on the issues Move raised. REAL's position is that nothing in Move's "Addendum" should change any of the agreed dates specifically negotiated and jointly agreed and thereafter set forth in the Joint Status Report. In addition and specifically:

Mediation: REAL is willing to engage in mediation with Move immediately and sees no impediment to doing so, ***provided*** that the schedule agreed to by the parties and set forth in the Joint Status Report is preserved. REAL began the lawsuit now embraced by this suit in 2005 – six years ago. REAL believes it is imperative, and contemplated by the Federal Circuit decision, that there be no further delays in this case and that it be finally resolved within the time-frame jointly agreed by the parties in the Joint Status Report. Indeed, any change in the trial date is likely to undermine any chance of settlement, rather than promote it, as the Federal Circuit's decision in this case and an impending trial date in 2011 appear to be why Move suddenly and for the first time regards mediation as an appropriate option.

REAL today suggested to Move that former Senator Arlen Specter act as the mediator here. A person of such experience and esteem will likely be indispensible to successfully mediate the "coverage of a release and quantum" issues the parties adverted to in the Joint Status Report (at 2). We are awaiting Move's response.

Stay Pending *Akamai* En Banc Review: REAL opposes Move's belated effort to delay the jointly agreed dates set forth in the Joint Status Report. The schedule set forth in the Joint Status Report was agreed to and filed more than 10 days after the Federal Circuit advised the public that it would rehear *Akamai*, and there is no reason to delay that jointly agreed schedule on the basis of *Akamai* or for any other reason. Indeed, Move makes no effort whatsoever to satisfy the well-known standard for obtaining a stay, which includes Move's burden to show a likelihood of success on the merits based upon the potential ruling in *Akamai*, that Move will suffer irreparable injury absent a stay, ***and*** that the balance of hardships and public interest favor a stay. *See, e.g., United States v. Peninsula Comm's*, 287 F.3d 832, 838 (9th Cir. 2002). Move has not demonstrated and cannot demonstrate anything of the kind.

We show briefly below – and request leave to appear immediately if the Court has any doubt at all that more delay would be completely inappropriate in this case – that notwithstanding Move's amorphous and at best theoretical assertions, the explicit and concrete claim construction set forth in the opinion of

the Federal Circuit in this case wholly undermines Move's effort to engender yet more delay. Move originally argued that the claim element of "selecting" must be performed by a person, the end user logging onto the Move zoom-enabled mapping website, and that this element cannot be performed by a computer. Had Move prevailed in that argument, the issue of divided infringement might – might – have come to the fore. But Move flatly lost that argument in the Federal Circuit. The Federal Circuit explicitly ruled that "**A User *or* a Computer May Select an Area**" (slip op. at 9, Section Heading, emphasis supplied). In so ruling the Federal Circuit wholly rejected the specter of a divided direct infringement problem in this case.

Accordingly, regardless of the eventual decision in the *Akamai* case, REAL's position is that Move performs all the steps of the claim. As a result, Move directly infringed the patent-in-suit, and Move has induced infringement and contributorily infringed. As mandated by the Federal Circuit's claim construction, REAL is entitled to make its infringement case at trial, unless this Court grants summary judgment of noninfringement in response to a motion by Move. Move has made no such motion – indeed it was Move who said it needed until September 2, 2011 to make such a motion. Move has not complied with the detailed Order this Court entered on February 11, 2009 or with the specific rules of the Central District of California for making a summary judgment motion. This Court should surely reject any suggestion that Move get the benefit of making a motion it has not even begun to make or succeeded in winning.

Akamai will not control this case. In *Akamai*, the Federal Circuit granted rehearing en banc to decide the specific issue, as framed by the Federal Circuit, as follows:

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

It is thus clear that neither *Akamai* nor its rehearing will have any relevance to the principal situation presented by this case. REAL is prepared to show that Move directly performed every step of the claim. Even were it true as Move alleges in support of its "Addendum" – and it is not – that Move can show that neither it nor any of its computers perform the claimed selecting step, any anticipated impact of the decision upon rehearing in *Akamai* is simply too speculative and remote to warrant holding up the proceedings in this case. It is clear that Move's proposed stay is nothing but another calculated dilatory tactic. We have had more than enough of those already in this case.

REAL believes that it would not only be improvident, it would be highly prejudicial to REAL and an abuse of discretion to stay this case pending the decision of a Court of Appeals in an unrelated matter of – at most – peripheral interest. Awaiting future decisions in other purportedly significant cases by other courts would lead to unnecessary and indeed endless delay of this action. See *Asustek Computer Inc. v. Ricoh Company, Ltd.*, 2007 U.S. Dist. Lexis 86302 (N.D.

Cal. 2007) (denying stay conditioned on appeal to Federal Circuit as imprudent in light of Supreme Court's recent interest in patent cases). For District Courts to grant stays in such cases would lead to complete paralysis of the system, as every litigant, seeking to delay its case, dredged up issues presently on appeal and urged trial courts to defer trial until final resolution of the issues presented. The stay proposed by Move would result in an undue and indefinite delay of the case before this Court (indefinite since Move will no doubt argue for a stay pending Supreme Court review even after the Federal Circuit's decision). Move has shown no hardship or inequity or irreparable harm that would result in the absence of a stay.

Move's desire to avoid a trial and its speculation that *Akamai* could have some relevance to this case are not sufficient grounds to stay proceedings. See *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059 (9th Cir. 2007) (Ninth Circuit reversing lower court stay as abuse of discretion where stay was indefinite and would likely result in damage to the defendant).

Accordingly, REAL urges the Court to hold Move to the dates that Move just expressly and knowingly agreed to in the Joint Status Report and direct the parties to move forward expeditiously to proceed in accordance therewith.

Dated: May 9, 2011

Respectfully submitted,

/s/ Louis M. Solomon

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STATE OF NEW YORK, COUNTY OF NEW YORK

I declare that: I am employed in the county of New York, New York. I am over the age of eighteen years and not a party to the within cause; my business address is One World Financial Center, New York, NY 10281.

On May 9, 2011 I served the foregoing document, described as:

REAL'S OPPOSITION TO MOVE'S' "ADDENDUM" TO MAY 2, 2011 JOINT STATUS REPORT

☒ by placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

Ron M. Cordova, Attorney at Law
16520 Bake Parkway, Suite 280
Irvine, CA 92618

☒ (By Mail) I am "readily familiar" with the Firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at New York, New York, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (By Overnight Courier) By causing such envelope to be delivered the next business day to the office or residence of the addressees via Federal Express or other similar overnight delivery service.

☐ (State) I declare under penalty of perjury under the laws of the State of New York that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 9, 2011 at New York, New York.

By: _____
Nicholas A. Ritzmann