

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

Blackboard Inc.,)	
)	
<i>Plaintiff,</i>)	
)	Case No. 9:06 CV 155
vs.)	
)	
Desire2Learn Inc.,)	JUDGE RON CLARK
)	
<i>Defendant.</i>)	
)	
)	

**DESIRE2LEARN’S NOTICE OF ADDITIONAL EXHIBITS AND PROPOSED
ORDER IN SUPPORT OF DESIRE2LEARN’S RESPONSE TO BLACKBOARD’S
MOTION FOR PERMANENT INJUNCTION**

Desire2Learn hereby files this Notice of Additional Exhibits and Proposed Order In Support of Desire2Learn’s Response to Blackboard’s Motion For Permanent Injunction.

Dated: March 6, 2008

Respectfully submitted,

Of Counsel
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**Counsel for Defendant and Counterclaim
Plaintiff Desire2Learn Inc.**

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2008, that a true and correct copy of Desire2Learn's Notice of Additional Exhibits and Proposed Order In Support of Desire2Learn's Response to Blackboard's Motion For Permanent Injunction 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 service.

/s/ Jonathan R. Spivey
Jonathan R. Spivey

EXHIBIT L

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

Blackboard Inc.,)	
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Plaintiff,)	
)	
vs.)	Case No. 9:06 CV 155
)	
Desire2Learn Inc.,)	
)	
Defendant.)	
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**DECLARATION OF JANICE DARLENE HIGHTOWER IN SUPPORT OF
DESIRE2LEARN'S OPPOSITION TO BLACKBOARD'S MOTION FOR PERMANENT
INJUNCTION**

Janice Darlene Hightower, being duly sworn on oath, deposes and states as follows:

1. I, Janice Darlene Hightower, am employed by Oklahoma State University (OSU) as its Chief Information Officer. As OSU Chief Information Officer, I am responsible for the strategic direction, implementation, and management of enterprise technology resources. Desire2Learn is an OSU enterprise resource and is operated by one of my units, Server Administration.

2. I have been employed by OSU for 17 years. I have held the position of Chief Information Officer for three years.

3. This Declaration is submitted in support of Desire2Learn's opposition to entry of a permanent injunction barring the sale of Desire2Learn's Learning Environment and related products and services in the United States.

4. The statements herein reflect my personal views and I have not been authorized to speak on behalf of OSU.

5. I have personal knowledge of the facts set forth herein and, if called to testify in this matter, could and would testify to the following.

6. It would not be in the public interest for the Court to enjoin Desire2Learn from selling its Learning Environment and related products in the in the United States.

7. The products sold by Desire2Learn and Blackboard are largely targeted at government-funded educational organizations such as OSU. Restricting competition in this area would likely reduce innovation in a quickly changing field. Restricting competition in this area would likely also make online learning products more expensive to the students and taxpayers who fund them.

8. Online educational tools, such as Desire2Learn's Learning Environment, are valuable resources for OSU and its students because it extends the learning process beyond the classroom and facilitates many of our outreach efforts and community services. The OSU Desire2Learn implementation provides distance education services to the following campuses: OSU Center for Health Science and College of Osteopathic Medicine, OSU Oklahoma City, OSU Okmulgee, OSU Stillwater, OSU Tulsa, Langston University and Oral Roberts University. The OSU Center for Health Science and College of Osteopathic Medicine supports a forensics program with 29 enrolled students, three full-time and 24 adjunct faculty members. The students are located in ten different states and Singapore. This program is totally dependent on Desire2Learn for instruction. There are 11 outreach classes delivered via Desire2Learn. Of these 11 classes, OSU Stillwater collaborates with nine high schools to offer German and Spanish classes to 1,956 students and the OSU Okmulgee campus delivers two classes to 81 students in their podiatry program.

9. The decision to change an enterprise system is not taken lightly due to the time and expense involved. Prior to 2006, OSU was using Blackboard 6.2 and WebCT 4.1. Growth in system utilization and the student body request for one learning management system spurred

the search for a new product. A committee review process was launched to determine the required functionality of a new learning management system for OSU. There were 26 members on the committee representing each of the OSU colleges, Institute for Teaching and Learning Excellence Department, Information Technology Department, and campuses under the direction of the OSU/A&M Board of Regents. A survey completed by faculty and students outlined the importance of the following features: email, online grading, course management, student tracking, file exchange, discussion forum, testing & online quizzes, and calendar. The committee was also interested in ease of use, customer service beyond the purchase, portability, student accessibility, and security/ADA compliance to HB 2197. Based on an Internet search using EduTools, a service found on the Western Cooperative for Educational Telecommunications (WCET) website, four vendors were selected to demonstrate their systems to the committee. These vendors were Angel, Blackboard, Desire2Learn, and WebCT. Educator, a course management system being used by one of the A&M campuses, was also invited to present. Educator declined. Following each presentation, the committee members were asked to rate each system as positive or negative according to the compiled features list. Angel and Desire2Learn received the most positive marks. After committee discussion, the members were asked to rank the four systems. The vote overwhelmingly showed once again, that Angel and Desire2Learn would be asked to return for a more in-depth presentation. Desire2Learn won the final vote held on March 10, 2006.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 5, 2008



NAME

EXHIBIT M

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

Blackboard Inc.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 9:06 CV 155
)	
Desire2Learn Inc.,)	
)	
Defendant.)	
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**DECLARATION OF KENNETH NIEMI IN SUPPORT OF DESIRE2LEARN'S
OPPOSITION TO BLACKBOARD'S MOTION FOR PERMANENT INJUNCTION**

Kenneth Niemi, being duly sworn on oath, deposes and states as follows:

1. I, Kenneth Niemi, am the Vice Chancellor for Information Technology-Chief Information Officer of Minnesota State Colleges and Universities (MnSCU or system). The MnSCU System is a public higher education system authorized under Minnesota Statutes Chapter 136F, and is comprised of 25 two year colleges and seven universities located across the state on 53 campuses.

2. As Vice Chancellor for Information Technology, my responsibilities include oversight for the entire MnSCU information technology (IT) infrastructure and network. This includes IT systems for providing classroom support and online courses, handling all student data, administrative and financial data and systems, human resources data and systems, and classroom support and on-line courses. As vice chancellor I recommend policy for the MnSCU System to the Chancellor (MnSCU's chief executive officer) and Board of Trustees (MnSCU's governing board), consult with the system's 32 presidents and their staffs regarding IT needs, advocate with the state legislature and others regarding system IT needs, and make decisions regarding the design and purchase of IT hardware and software for the system.

3. I have been employed as MnSCU's vice chancellor for information technology-

chief information officer for over nine years and during that time have had primary responsibility for IT support for online education and classroom needs. Additionally, I have a total of 15 years employment dealing with issues surrounding online education.

4. I am authorized in my role as vice chancellor for information technology-chief information officer to speak on behalf of Minnesota State Colleges and Universities with respect to this topic.

5. This Declaration is submitted in support of Desire2Learn's opposition to entry of a permanent injunction barring the sale of Desire2Learn's Learning Environment and related products and services in the United States because of the anticipated impact of an injunction on the MnSCU System.

6. I have personal knowledge of the facts set forth herein and, if called to testify in this matter, could and would testify to the following.

7. The Desire2Learn Learning Environment is an essential academic tool for Minnesota State Colleges and Universities. Our system serves 374,000 students annually. This year, Desire2Learn has been used to deliver course materials and conduct course work for over 110,000 sections. On average, 5,000 quizzes and exams using the Desire2Learn system are conducted each day. Minnesota Online, which delivers purely online courses on behalf of MnSCU's 32 colleges and universities, accounted for 6,909 course sections and enrolled 9,902 Full Year Equivalent online students. Our online students rely on the Desire2Learn platform and tools as their sole "classroom" for all coursework and interaction with faculty and administrative staff. Any disruption in support and services by Desire2Learn, including timely delivery of upgrades and software patches, would severely impact students and faculty throughout our system.

8. Desire2Learn was chosen by Minnesota State Colleges and Universities as our System's software platform for on-line instruction and class support as the result of a year-long intensive Request for Proposal (RFP) process. Prior to the Desire2Learn selection, MnSCU's colleges and universities used a variety of classroom support software platforms, including Anlon at five MnSCU institutions, Blackboard at five institutions, WebCT at 27 institutions, UCompass Educator at two institutions, and MnMaster at one institution.

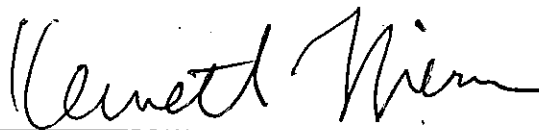
9. Led by MnSCU's Instructional Management Systems (IMS) of the Future Task Force, consisting of 36 representatives from throughout MnSCU, the final software selection was made from fifteen responses to the RFP. The RFP finalists were CyberLearning Labs, Desire2Learn, UCompass, and WebCT. The IMS of the Future Task Force followed a rigorous and lengthy process, beginning with initially defining requirements for the new IT platform to the final selection. In addition to the IMS of the Future Task Force, a wide variety of constituents from the 32 institutions participated in the selection process through focus groups and review meetings. Based on those reviews, Desire2Learn was the overwhelming choice because of its rich feature set, technical architecture, cost, and the company's ability to implement and support a large installation in a complex, multi-campus environment.

10. Since the installation of Desire2Learn in 2004, MnSCU has expended thousands of staff hours and several million dollars optimizing and customizing the software and hardware to our information technology environment. This included data integration with our system-wide student information system, authentication integration with our identity management infrastructure, and database optimization to achieve system scalability. In most cases these investments are specific to the Desire2Learn environment. Replacing the Desire2Learn environment with another application would mean substantially re-doing the work of purchasing

new software and hardware, testing, converting each course to the new platform, retraining all faculty and staff using the software, and would likely cost MnSCU millions of additional dollars.

I declare to the best of my knowledge that the foregoing is true and correct.

Dated: March 5, 2008

A handwritten signature in cursive script that reads "Kenneth Niemi". The signature is written in black ink and is positioned above a horizontal line.

KENNETH NIEMI

EXHIBIT N

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

Blackboard Inc.,)	
)	
Plaintiff,)	
vs.)	
)	Case No. 9:06 CV 155
Desire2Learn Inc.,)	
)	
Defendant.)	
)	
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**DECLARATION OF WILLIAM R. THOMAS IN SUPPORT OF DESIRE2LEARN'S
OPPOSITION TO BLACKBOARD'S MOTION FOR PERMANENT INJUNCTION**

William R. Thomas, being duly sworn on oath, deposes and states as follows:

1. I, William R. Thomas, am employed by the Southern Regional Education Board (SREB) as its Director, Educational Technology. In this position my responsibilities are to provide leadership on educational technology issues and topics impacting K - 12 and postsecondary schools and colleges in the SREB 16 state region. Through my leadership, the SREB Educational Technology Cooperative, comprised of 37 K - 12 and higher education state education agencies, was created and implemented over the last thirteen years. The Southern Regional Education Board is the nation's first interstate compact for education; was created in 1948 at the request of Southern governors and legislators. Its purpose is to help education and governmental leaders work together to advance education and improve the social and economic life of the region. Its' member states are from Delaware to Texas.

2. I have been employed by SREB for 13 years in job responsibilities include dealing with online education and/or distance learning issues and topics.

3. This Declaration is submitted in support of Desire2Learn's opposition to entry of a permanent injunction barring the sale of Desire2Learn's Learning Environment and related products and services in the United States.

4. The statements herein reflect my personal views and I have not been authorized to

speak on behalf of SREB.

5. I have personal knowledge of the facts set forth herein and, if called to testify in this matter, could and would testify to the following.

6. It would not be in the public interest for the Court to enjoin Desire2Learn from selling its Learning Environment and related products in the in the United States.

7. The products sold by Desire2Learn and Blackboard are largely targeted at government-funded schools and colleges in the 16-state region served by SREB. Restricting competition in this area would likely reduce innovation in a quickly changing field, placing U.S. students at a competitive disadvantage. Restricting competition in this area would likely also make online learning products more expensive to the students and taxpayers who fund them and could cause some states, schools and colleges to forego these valuable tools altogether.

8. Online educational tools, such as Desire2Learn's Learning Environment, are valuable resources for SREB states' schools and colleges and their students because it permits educational access across states and the nation.

9. SREB and other founding members of the ATAlliance (<http://www.atalliance.sreb.org/>) which are MHEC, the Midwestern Higher Education Commission; WICHE, the Western Interstate Commission for Higher Education; and MICTA, a telecommunications association of nonprofit organizations, conducted a nationwide eLearning Management Systems RFP in 2003. Following an extensive review and evaluation of products submitted, the ATAlliance endorsed D2L's products and services and judged them to be the best value based on price, quality and service. Blackboard responded to the RFP but was not recommended.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 4, 2008

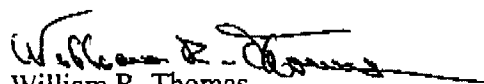

William R. Thomas

EXHIBIT O

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

Blackboard Inc.,)
)
Plaintiff,)
)
vs.) Case No. 9:06 CV 155
)
Desire2Learn Inc.,)
)
Defendant.)
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**DECLARATION OF ELIZABETH GLOWA IN SUPPORT OF DESIRE2LEARN'S
OPPOSITION TO BLACKBOARD'S MOTION FOR PERMANENT INJUNCTION**

Elizabeth Glowa states as follows:

1. I, Elizabeth Glowa, was employed by the Maryland State Department of Education (MSDE) as its Coordinator for Online Learning. As MSDE's Coordinator for Online Learning, my responsibilities were to coordinate MSDE's virtual high school, online professional development, and e-communities. I also provided leadership, coordination, and administrative support for the development of the online courses and curricular resources related to the high school assessments for use by classroom teachers in a face-to-face environment augmented with the use of Desire2Learn. As of March, 2007, I retired from this position. However, I still do consulting work with MSDE.

2. I had been employed by MSDE for 6 years in job responsibilities dealing with online education and/or distance learning. Additionally, I have a total of 16 years employment dealing with issues surrounding online education.

3. This Declaration is submitted in support of Desire2Learn's opposition to entry of a permanent injunction barring the sale of Desire2Learn's Learning Environment and related products and services in the United States.

4. The statements herein reflect my personal views and I have not been authorized to speak on behalf of MSDE.

5. I have personal knowledge of the facts set forth herein and, if called to testify in this matter, could and would testify to the following.

6. It would not be in the public interest for the Court to enjoin Desire2Learn from selling its Learning Environment and related products in the in the United States.

7. The products sold by Desire2Learn and Blackboard are largely targeted at educational organizations such as MSDE. Restricting competition in this area would likely reduce innovation in a quickly changing field, placing U.S. students at a competitive disadvantage. Restricting competition in this area would likely also make online learning products more expensive to the students and taxpayers who fund them and could cause some institutions to forego these valuable tools altogether.

8. Online educational tools, such as Desire2Learn's Learning Environment, are valuable resources for MSDE and its students because MSDE operates a virtual school which offers online courses, has developed and supports teachers in using online course materials


directly targeted to support student achievement on the required high school assessments, and uses the LMS to support online professional development for teachers across the state.

9. In choosing between D2L and Blackboard, MSDE reviewed many criteria as part of the bid process. As a result of that process, D2L was selected because it best met the bid requirements for ease of use and functionality.

10. The D2L product was selected because D2L would support consortium level buying and hosting by distinctly different governmental organizations.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 6, 2008


Elizabeth Glowa

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

Blackboard Inc.,

Plaintiff,

vs.

Desire2Learn Inc.,

Defendant.

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Case Action No. 9:06-CV-155

JUDGE RON CLARK

FINAL JUDGMENT AND ORDER DENYING PERMANENT INJUNCTION

IT IS HEREBY ORDERED that claims 1-35 of U.S. Patent No. 6,988,138 (“the ’138 patent”) are invalid as indefinite for failure to satisfy the statutory requirements of 35 U.S.C. § 112, paragraph 6.

Additionally, having considered the parties’ arguments and the evidence before the Court, the Court finds that a permanent injunction is not appropriate in this case. Therefore, Blackboard’s motion for permanent injunction is DENIED.

Additionally, having considered the parties’ arguments and the evidence before the Court, the Court finds that a compulsory royalty rate of 10% will apply to Desire2Learn’s current U.S. customers for which lost profits were not awarded and any new U.S. customers of self-hosted systems that use Learning Environment 8.2.1 and earlier versions.