

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

DIETGOAL INNOVATIONS LLC,

Plaintiff,

v.

ARBY'S RESTAURANT GROUP, INC.,  
*et al.*,

Defendants.

Civil Action No. 2:11-cv-00418-JRG

JURY TRIAL DEMANDED

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY  
REGARDING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM  
BASED ON UNPATENTABLE SUBJECT MATTER**

Defendants Google Inc. and Jimmy John's Franchise LLC (the "Defendants") file this Notice of Supplemental Authority and respectfully request that the Court consider the recent precedential opinion issued by the United States Court of Appeals for the Federal Circuit in *Fort Properties, Inc. v. American Master Lease LLC*, No. 2009-1242, 2012 WL 603969 (Fed. Cir. Feb. 27, 2012) (attached hereto as Exhibit A) in conjunction with the Defendants' Motion to Dismiss for Failure to State a Claim Based on Unpatentable Subject Matter (Dkt. No. 300) (the "Motion") and the Reply Brief in Support of Defendants' Motion to Dismiss For Failure to State a Claim Based on Unpatentable Subject Matter (Dkt. No 398) (the "Reply").

Since the Defendants filed the Motion, the Federal Circuit has issued two opinions in which the patent at issue was held invalid under 35 U.S.C. § 101: the opinion in *Dealertrack, Inc. v. Huber*, No. 2009-1566, 2012 WL 164439 (Fed. Cir. Jan. 20, 2012), discussed in Defendants' Reply, and the attached *Fort Properties* opinion. In both opinions, the Court held that claims containing "computer" limitations were unpatentable under § 101 in view of the Federal Circuit's decision in *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366 (Fed.

Cir. 2011). *See Dealertrack*, 2012 WL 164439, at \*16-\*17 (“computer aided” limitation); *Fort Properties*, 2012 WL 603969, at \*6 (“computer” limitation).

The *Fort Properties* opinion directly supports Defendants’ contention that the claims of the patent asserted by DietGoal, U.S. Patent No. 6,585,516, are unpatentable under 35 U.S.C. § 101. The Federal Circuit and the lower court employed the § 101 analysis applied in Defendants’ Motion and Reply, namely that the claims are directed to abstract ideas and that the claims fail the machine-or-transformation test, respectively. *See Fort Properties*, 2012 WL 603969, at \*2, \*5.

DATED: February 28, 2012

Respectfully Submitted,

/s/ Cono A. Carrano

Cono A. Carrano

Lead Attorney

D.C. Bar No. 445995

Akin Gump Strauss Hauer & Feld, LLP

1333 New Hampshire Avenue, N.W.

Washington, D.C. 20036

Telephone: 202.887.4136

Facsimile: 202.887.4288

Email: ccarrano@akingump.com

Dianne B. Elderkin

Akin Gump Strauss Hauer & Feld, LLP

Two Commerce Square, Suite 4100

2001 Market Street

Philadelphia, PA 19103

Telephone: 215.965.1340

Facsimile: 215.965.1210

Email: delderkin@akingump.com

David C. Vondle  
Akin Gump Strauss Hauer & Feld, LLP  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
Telephone: 202.887.4184  
Facsimile: 202.887.4288  
Email: [dvondle@akingump.com](mailto:dvondle@akingump.com)

Kellie M. Johnson  
State Bar No. 24070003  
Akin Gump Strauss Hauer & Feld, LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, TX 75201  
Telephone: 214.969.2743  
Facsimile: 214.969.4343  
Email: [kmjohnson@akingump.com](mailto:kmjohnson@akingump.com)

John Wittenzellner  
Akin Gump Strauss Hauer & Feld, LLP  
Two Commerce Square, Suite 4100  
2001 Market Street  
Philadelphia, PA 19103  
Telephone: 215.965.1241  
Facsimile: 215.965.1210  
Email: [jwittenzellner@akingump.com](mailto:jwittenzellner@akingump.com)

Jennifer Parker Ainsworth  
State Bar No. 00784720  
Wilson Robertson & Cornelius PC  
909 ESE Loop 323, Suite 400  
P.O. Box 7339  
Tyler, TX 75711  
Telephone: 903.509.5000  
Facsimile: 903.509.5092  
Email: [jainsworth@wilsonlawfirm.com](mailto:jainsworth@wilsonlawfirm.com)

*Counsel for Defendant Google Inc.*

Jennifer L. Fitzgerald  
Freeborn & Peters LLP  
311 S. Wacker Drive  
Chicago, IL 60606  
Telephone: 312.360.6585  
Facsimile: 312.360.6594  
Email: [jfitzgerald@freebornpeters.com](mailto:jfitzgerald@freebornpeters.com)

Michael E. Jones  
State Bar No. 10929400  
Potter Minton, P.C.  
110 N. College Avenue, Suite 500  
Tyler, TX 75702  
Telephone: 903.597.8311  
Facsimile: 903.593.0846  
Email: mikejones@potterminton.com

Allen F. Gardner  
State Bar No. 24043679  
Potter Minton, P.C.  
110 N. College Avenue, Suite 500  
Tyler, TX 75702  
Telephone: 903.597.8311  
Facsimile: 903.593.0846  
Email: allengardner@potterminton.com

*Counsel for Defendant  
Jimmy John's Franchise LLC*

## **CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record who consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a) on February 28, 2012. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Cono A. Carrano  
Cono A. Carrano