

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

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Eolas Technologies Incorporated and The Regents Of )  
The University Of California )

*Plaintiffs and Counterdefendants,* )

vs. )

Adobe Systems Inc.; Amazon.com, Inc.; CDW Corp.; )  
Citigroup Inc.; The Go Daddy Group, Inc.; Google )  
Inc.; J.C. Penney Corporation, Inc.; Staples, Inc.; )  
Yahoo! Inc.; and YouTube, LLC, )

*Defendants and Counterclaimants.* )

Civil Action No. 6:09-CV-446-LED

JURY TRIAL DEMANDED

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**DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION FOR JUDGMENT AS A MATTER OF LAW**

## **I. INTRODUCTION**

Defendants respectfully request that the Court deny Plaintiffs' Motion for Judgment as a Matter of Law, D.I. 1338. The evidence and testimony presented at trial is more than sufficient for the jury to find for Defendants on their invalidity defenses. In response, plaintiffs' motion constitutes nothing more than rote restatements of law (including in at least one case an erroneous restatement) followed by conclusory statements, without further explanation or even a single citation to the record. Instead, their motion simply lumps in all defenses in an undifferentiated fashion that fails to provide Defendants with sufficient notice.<sup>1</sup> As noted herein, there is ample evidence in the record supporting Defendants' invalidity defenses. Particularly where all evidence favoring Defendants must be given credence whereas all evidence favoring Plaintiffs that the jury is not required to believe must be disregarded, the record presented at trial not only meets but exceeds the threshold sufficient for a reasonable jury to find the patents-in-suit invalid. For the reasons set forth herein, and for the reasons set forth in open court in opposition to Plaintiffs' oral motion for judgment as a matter of law on February 8, 2012, this motion should be denied.

## **II. ARGUMENT**

### **A. Governing Standard**

#### **1. Judgment As A Matter Of Law Requires Consideration Of All Evidence In The Light Most Favorable To Defendants.**

Federal Rule of Civil Procedure 50(a)(1) provides:

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the

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<sup>1</sup> Plaintiffs filed their written brief in the afternoon on February 8, 2012. Because closing arguments are scheduled for this morning, February 9, 2012, Defendants have endeavored to provide this opposition as quickly as possible to assist the Court. Accordingly, the citations provided herein are exemplary in nature and this filing is not a waiver of any legal or factual position.

court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50(a). The standard for judgment as a matter of law is the same as that for granting summary judgment, including the requirement that “the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50 (2000). In other words, the court “should give credence to the evidence favoring the nonmovant” and “must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Id.* at 151.

**B. There Is Extensive Evidence From Which A Reasonable Jury Could Find The Patents Invalid As Anticipated by Viola.**

Plaintiffs’ motion is merely over a page-long recitation of law with no attempt to apply that law, followed by eight bullets conclusorily alleging that insufficient evidence has been presented regarding certain claim limitations and, even less specifically, whole statutes, without any further explanation. This fails to provide Defendants sufficient notice of the particular evidentiary deficiency alleged by Plaintiffs that is the basis of Plaintiffs’ motion, and should for that independent reason be denied.

**1. There Is Legally Sufficient, Clear and Convincing Evidence That Viola Discloses Each of the Asserted Claims.**

“A patent is invalid for anticipation if a single prior art reference discloses each and every limitation of the claimed invention.” *Schering Corp. v. Geneva Pharms., Inc.*, 339 F.3d 1373, 1377 (Fed. Cir. 2003). The evidence presented at trial is more than sufficient for a reasonable jury to conclude that Viola anticipates each limitation of the asserted claims. This includes the testimony of Messrs. Tim Berners-Lee, David Raggett, Karl Jacob, and Scott Silvey, in addition

to Mr. Pei Wei himself, all of whom confirmed that Viola discloses the claimed inventions before September 7, 1993 (Plaintiffs' unsubstantiated and uncorroborated alleged date of conception) and certainly before October 16, 1993 (one year before the patent filing date). *See, e.g.*, Trial Tr. of Feb. 7 (AM) at 48-59 (Berners-Lee discussing Viola and the WWW Wizards demonstration); Trial Tr. of Feb. 7 (AM) at 110:18-111:9, 116:10-117:4 (Raggett discussing WWW Wizards); Trial Tr. of Feb. 7 (PM) at 7-15 (Silvey recalling May 7, 1993 demo of Viola to Sun including Karl Jacobs); Trial Tr. of Feb. 7 (PM) at 15 (Silvey recalling May 7, 1993 demo of Viola to Usenix); Trial Tr. of Feb. 7 (PM) at 17 (Silvey recalling July 1993 demo of Viola at WWW Conference); 71-76 (Wei describing publication of Viola source code by FTP); Trial Tr. of Feb. 7 (PM) at 79, 85 (Wei recalling May 7, 1993 demo); Trial Tr. of Feb. 7 (PM) at 86 (Wei describing WWW Conference demo); Trial Tr. of Feb. 7 (PM) at 174-178 (Jacob recalling May 7, 1993 demo).

It includes the testimony of Defendants' expert Dr. Phillips who described, on a limitation-by-limitation basis, how Viola discloses the asserted claims. *See, e.g.*, Trial Tr. of Feb. 8 (AM) at 43-62 (Phillips).

It also includes the Viola code admitted into evidence, including that authenticated by Mr. Silvey and Mr. Wei. *See, e.g.*, JDX 258, 272, 274, 276, 290 (10/16/93 Viola code), 291 (vplot), 292 (05/12/93 Viola code), 293 (08/12/93 Vplot code), 295 (5/27/93 Viola code); Trial Tr. of Feb. 7 (PM) at 27-31 (Silvey recalling collecting and authenticating Viola code). Such Viola code is evidence from which they should be allowed to conclude, standing alone, that the limitations have been met by each one or all of those codebases.

Other documentary evidence likewise corroborates that Viola disclosed the limitations of the claims, including for example: emails between Mr. Wei and the named inventor of the

patents Mr. Michael Doyle, *see, e.g.*, JDX 58, 61, 234, and 235; emails between Mr. Wei and others in the industry, including the father of the World Wide Web and inventor of HTML, Mr. Tim Berners-Lee, *see, e.g.*, JDX 10; and articles and other documentary evidence about Viola, *see, e.g.*, JDX 56, 57, 95, 30, 237, 258, 16.

Plaintiffs suggested at oral argument that judgment as a matter of law of no invalidity based on Viola is appropriate merely because Dr. Phillips did not “show” excerpts from that code. But there is no requirement that “code” be shown by an expert for his testimony to be relevant and helpful for a jury to conclude that each and every one of the limitations is met by the record evidence, and Plaintiffs have cited none. *See* Fed. R. Evid. 702. But in any event, Dr. Phillips did expressly discuss relevant aspects of code, including “the <VOBJF> tag,” and did show other excerpts from the code. *See, e.g.*, Trial Tr. Feb. 8 (AM) at 47-49, 127 (Phillips direct, redirect).

**2. § 102(a): There Is Sufficient Evidence For A Reasonable Jury To Find That Viola Was Publicly Known And Used By Mr. Wei, Mr. Silvey, Mr. Jacob, And Others Before The Date Of Invention.**

As an initial matter, the Federal Circuit has rejected precisely the argument that Plaintiffs’ make here, finding that “Wei not only demonstrated [Viola code dated May 27, 1993] to two Sun Microsystems engineers without a confidentiality agreement (on May 7, 1993), but only twenty-four days later (on May 31, 1993) posted [Viola code dated May 27, 1993] on a publicly-accessible Internet site and notified a Sun Microsystems engineer that DX37 was available for downloading.” *Eolas Techs., Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1333 (Fed. Cir. 2005). Indeed, the Federal Circuit found it error by the district court in that case not to consider the same dated Viola code that has been admitted into evidence in this case. *See* JDX 292 (May 12, 1993 Viola code); JDX 295 (May 27, 1993 Viola code). Eolas should be bound

by the decisions in that case to which it was a party. On that basis alone Plaintiffs' motion with respect to this issue should be denied.

In any event, there is substantial evidence that Viola was publicly known and used before Plaintiffs' alleged conception date of September 7, 1993. For example, Mr. Wei testified that he demonstrated Viola multiple times, long before the priority date of the patents-in-suit. *See, e.g.*, Trial Tr. of Feb. 7 (PM) at 71-76, 78:8-80:5, 85:19-87:2 (Wei). This includes the testimony of Mr. Wei that he demonstrated Viola on May 7, 1993, to Sun and Usenix and on July 28-30, 1993 at the World Wide Web Wizards Conference, and that Viola was publicly distributed to Sun on May 31, 1993 and by FTP on October 16, 1993. *See, e.g.*, Trial Tr. of Feb. 7 (PM) at 69 (Wei testifying that he and others had used Viola long before the priority date of the patents-in-suit); Trial Tr. of Feb. 7 (PM) at 80:16-89:11; Trial Tr. of Feb. 7 (AM) at 15:22-16:15 (Jacob testifying to seeing "interactive program object embedded in a Web page" in Viola demo). As further amplified in the record, it is corroborated by the testimony of Prof. Berners-Lee, Mr. Bina, Mr. Silvey and Mr. Jacob, as noted above. For example, Mr. Wei testified that he demonstrated Viola to at least Mr. Jacob at Sun; Mr. Jacob confirmed this testimony. *See, e.g.*, Trial Tr. of Feb. 7 (PM) at 78:8-80:5 (Wei); Trial Tr. of Feb. 7 (PM) at 172:7-178:20 (Jacob).

It is also corroborated by the admitted physical and documentary evidence, including for example the source code noted above, as well as contemporaneous email communications by and between Mr. Wei and others in the public and with the named inventor of the patents-in-suit Michael Doyle. *See, e.g.*, JDX 29 (email from Dougherty to Wei), 30 (email from Dougherty corroborating May 7, 1993 demos to Sun and Usenix), 32 (email from Wei to Kempf), 33 (email from Dougherty to Wei), 35 (email from Dougherty to www-talk), 43 (email from Wei), 44 (email from Cahill to Wei), 61 (email from Wei to Doyle), 168 (email from Wei), 226 (email

from Dougherty to Berners-Lee), 227 (email from Dougherty to Wei and Silvey), 236 (email from Wei to Kempf), 239 (emails between Kempf, Wei, and Dougherty); JDX 95; JDX 237 (document corroborating attendees of WWW Conference); JDX 258 (Wei email of publicly distribution); JDX 16 (Wei email to Andreessen); JDX 57 (Viola article).

Mr. Wei's demonstrations were not limited by any nondisclosure agreements or the like. *See, e.g.*, Trial Tr. of Feb. 7 (PM) at 14:7-15:6 (Silvey). Although Mr. Wei continued to develop and, thus, make changes to the Viola code after this demonstration, that does not negate its status as a public use. *See Eolas*, 399 F.3d at 1334. Furthermore, Mr. Wei's demonstrations were not "experimental" because Mr. Wei was not attempting to see how Viola worked or have someone test its features; rather, the purpose of, for example, the Sun demonstration was to try to partner with Sun to distribute and promote Viola. *See, e.g.*, Trial Tr. of Feb. 7 (PM) at 86 (Wei); Trial Tr. of Feb. 7 (PM) at 148 (Silvey). Mr. Wei did not actively conceal his invention; on the contrary, he demonstrated it numerous times. *See* Trial Tr. of Feb. 7 (PM) at 86 *et. seq.*

Moreover, the evidence and testimony presented at trial establishes that no jury could find that Plaintiffs' alleged date of invention was September 7, 1993 — rather the only evidence presented that discloses and shows conception of essential limitations in the patent, including for example an "embed text format," is the patent application itself, which was filed on October 17, 1994, and as noted below, the evidence establishes even that disclosure provided insufficient written description of the claimed "embed text format," among other limitations. *See, e.g.*, PX 21 (notebook page relied upon for conception date); Trial Tr. of Feb. 6 (PM) at 161-162, (Doyle admitting PX 21 missing "embed text format," "browser," "hypermedia documents," user interaction, embedded interactive objects, supercomputer, security, etc.); Trial Tr. of Feb. 8 (AM) at 40-42 (Phillips direct) (opining that notebook fails to evidence conception of at least

“embed text format,” “browser,” “hypermedia documents,” “type information” and automatic invocation).

**3. § 102(b): There Is Sufficient Evidence For A Reasonable Jury To Find That Viola Was In Public Use In This Country Before October 17, 1993.**

As noted above, the Federal Circuit has already found that “Wei’s May 7, 1993 demonstration to two Sun Microsystems employees without confidentiality agreements was a public use under section 102(b).” *Eolas*, 399 F.3d at 1334. And specifically that there is sufficient evidence to support a finding that the May 12, 1993 code was publicly used at the May 7, 1993 demonstration. *Id.* at 1329. That is the same Viola code admitted in evidence in this case as JDX 292 and supported by extensive evidence of record.

The record in this case also establishes that Viola was in public use in this country more than one year before Plaintiffs’ October 17, 1994 filing date. This includes, for example, the same testimony and evidence noted above for § 102(a). *See, e.g.*, Trial Tr. of Feb 7 (PM) at 46:4-9 (Silvey testifying that members of the public had downloaded Viola from Mr. Wei’s FTP site).

**4. § 102(g)(2): There Is Sufficient Evidence For A Reasonable Jury To Find That Mr. Wei Was The First To Invent, Was First To Reduce To Practice With Reasonable Diligence, And Did Not Abandon, Conceal, or Suppress.**

The evidence presented establishes that, before the claimed invention of the patents-in-suit, Viola was made in this country by Mr. Wei; that he did not abandon, suppress, or conceal it; and that he conceived and reduced to practice with reasonable diligence at least as of May 1993. *See* Trial Tr. of Feb. 7 (PM) at 68-69, 76-89, 97 (Wei describing conception, continuous diligence, and reduction to practice of Viola from 1991-93); JDX 29 (email from Dougherty to Wei), 30 (email from Dougherty), 32 (email from Wei to Kempf), 33 (email from Dougherty to Wei), 35 (email from Dougherty to www-talk), 43 (email from Wei), 44 (email from Cahill to



Wei), 46 (email from Wei), 48 (email from Wei to Frankston), 56 (email from Wei), 57 A brief Overview of the VIOLA Engine, and its Applications), 60 (email from Doyle), 61 (email from Wei to Doyle), 168 (email from Wei), 223 (email from Perry), 226 (email from Dougherty to Berners-Lee), 227 (email from Dougherty to Wei and Silvey), 236 (email from Wei to Kempf), 239 (emails between Kempf, Wei, and Dougherty), 240 (Stanford slides from Wei presentation), 253 (Viola Diligence and Reduction to Practice emails), 277 (Viola Code Package), 278 (Viola Code Package), 290 (Viola 931016), 291 (Vplot 930507), 292 (Viola 930512), 293 (Vplot 930812), 295 (Viola 930527); 35 U.S.C. § 102(g). As noted above, this was not an experimental use. *See* Trial Tr. of Feb. 7 (PM) at 69 *et. seq.* (Wei). Furthermore, Mr. Wei's Viola codebase, email exchanges, and public distributions are all evidence of continued diligence. For example, Mr. Wei published a paper about Viola prior to the filing of the patents-in-suit. *See* Trial Tr. of Feb. 7 (PM) at 69 *et. seq.* (Wei); JDX 56, 57.

Indeed, the Federal Circuit noted that “Eolas’ arguments that Wei’s changes to the functionality and architecture of [May 12, 1993 Viola code] show abandonment are unpersuasive because such changes merely reflect improvements in advancing versions of software code.” *Eolas*, 399 F.3d at 1334. The Court thus found that there was no evidence that Viola was abandoned, suppressed, or concealed, and thus satisfies that requirement under § 102(g). *Id.* at 1333.

**5. Plaintiffs’ Motion Misleads Regarding Corroboration: There Is No Requirement That Corroboration Be Established By Exact-Dated Code, And There Is Ample Corroboration By Admitted Code.**

Plaintiffs’ contention that Defendants’ failed to produce evidence to “corroborate its witnesses’ testimony” that Viola anticipated and/or rendered obvious the asserted claims, either alone or in combination with other prior art, is demonstrably false. There is ample evidence that Viola was publicly known, used, distributed, demonstrated, reduced to practice, and diligently

pursued in the several Viola codebases that has been admitted into evidence — including the codebases recovered and authenticated by Mr. Silvey, *see, e.g.*, Trial Tr. of Feb. 7 (AM) at 132-147 — and that there is Viola code that pre-dates Plaintiffs’ alleged date of conception and that is dated more than one year before filing of the patents-in-suit. *See, e.g.*, JDX 290 (93/10/16), 291 (Vplot 93/05/07), 292 (Viola 93/05/12), 293 (Vplot 93/08/12), and 295 (Viola 93/05/27). Indeed, Plaintiffs do not appear to dispute that fact. And as noted above, Defendants’ expert witness Dr. Phillips has offered testimony that the admitted code, standing alone, can meet each and every limitation of the asserted claims. *See, e.g.*, Trial Tr. of Feb. 8 (AM) at 29-30, 38-39, 43-62 (Phillips direct). This code is admitted non-testimonial evidence that needs no corroboration.

Moreover, Defendants have presented substantial testimony from non-interested third party witnesses, including persons having ordinary skill in the art such as Prof. Tim Berners-Lee, Mr. Eric Bina, Mr. Scott Silvey, and Mr. Karl Jacob, that further corroborate that Viola, as embodied in that code, disclosed the claimed limitations and was known and publicly demonstrated before September 7, 1993 and before October 17, 1993. Each has testified that he recalled personally observing public demonstrations of Viola, and Mr. Silvey even confirmed that the code was a fair and accurate depiction of what he recalled observing. *See, e.g.*, Trial Tr. of Feb. 7 (AM) at 148-150.

The testimony evidence presented by Defendants is more than sufficient. Such evidence has at least a tendency to make the fact that the Viola reference having all of the claimed elements that witnesses like Mr. Jacob, Prof. Berners-Lee, and Mr. Bina personally recalled seeing publicly demonstrated and distributed more probable than it would be without the evidence.

Furthermore, Plaintiffs' counsel appeared to suggest at oral argument that third-party witnesses' testimony required corroboration by an exact-dated source code distribution. In all events, as noted above, their testimony *was* corroborated by the code. The linkage between code and testimony regarding the numerous public demonstrations and distributions of Viola is further established by, for example, Mr. Silvey's testimony that the May 12, 1993 code was an accurate representation of what he recalled demonstrating to Sun engineers on May 7, 1993. *See, e.g.*, Trial Tr. of Feb. 7 (AM) at 160 (Silvey stating that May 12 code is "a clear and accurate representation of what we presented" at the May 7, 1993 demo). Similarly, Mr. Wei testified that the October 16, 1993 code and May 27, 1993 code were publicly distributed by email dated within a day of those codebases. *See, e.g.*, Trial Tr. of Feb. 7 (PM) at 71-76 (Wei describing publication of Viola source code by FTP); 79, 85 (Wei recalling May 7, 1993 demo). Both of those codebases have been admitted into evidence, JDX 290 (10/16/93 Viola code); JDX 295 (5/27/93 Viola code), and additional documentary evidence admitted in this case provides further linkage between the witnesses' testimony and the admitted code and public uses of that code. *See, e.g.*, JDX 30 (May 8, 1993 email to Dougherty corroborating May 7, 1993 demos to Sun and Usenix); JDX 237 (document corroborating attendees of WWW Conference); JDX 258 (Wei email of publicly distribution); JDX 16 (Wei email to Andreessen); JDX 57 (Viola article).

The Federal Circuit has already rebuffed Plaintiffs' implication in this case that each Viola "codebase" must be linked in piecemeal fashion as though it were a separate invention: "In this case, [Viola code dated May 27, 1993], which includes the same contested feature as [Viola code dated May 7, 1993], represents an improved version of Wei's invention, not an entirely new invention, as the district court suggests. Because creating an improved version of

an invention does not in any sense abandon the original invention, the district court erroneously excluded [Viola code dated May 7, 1993] as prior art.” *Eolas*, 399 F.3d at 1333.

The Viola source code, Dr. Phillips’s expert witness testimony, Mr. Wei’s testimony, Mr. Silvey’s testimony and the testimony of other non-interested parties is more than sufficient to support a finding that Viola had been publicly known, used, demonstrated, and distributed.

**C. There Is More Than Sufficient Evidence For A Reasonable Jury To Find The Patents Obvious.**

Like Plaintiffs’ anticipation argument, Plaintiffs’ obviousness argument again lumps together Defendants’ obviousness arguments into four bullets, and fails to provide any notice to Defendants.

The jury has heard extensive unrebutted evidence regarding the background knowledge of a person of ordinary skill in the art. That evidence included the testimony of multiple witnesses, all of whom testified that embedded interactive objects were either known at the time of the invention or would have been obvious to persons of skill in the art. *See, e.g.*, Trial Tr. of Feb. 7 (AM) at 48-59 (Berners-Lee discussing Viola and the WWW Wizards demonstration); Trial Tr. of Feb. 7 (AM) at 110:18-111:9, 116:10-117:4 (Raggett discussing WWW Wizards); Trial Tr. of Feb. 6 (PM) at 184-196 (Bina discussing code revision, functionality of Mosaic, and www-talk posts).

**1. Plaintiffs Rely On Overruled Law And Inappropriately Seeks Judgment On “Motivation To Combine.”**

As an initial matter, Plaintiffs’ motion misstates the law of obviousness: the Supreme Court has expressly overturned and rejected the requirement of a demonstration of teachings, suggestions, or motivations to combine, the so-called “TSM test.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 414-16 (2007); *see e.g., id.* at 421 (“The same constricted analysis led the Court of Appeals to conclude, in error, that a patent claim cannot be proved obvious merely by showing

that the combination of elements was ‘obvious to try.’”). Plaintiffs’ motion thus mischaracterizes the governing law in arguing that “courts require the presentation of ‘evidence from before the time of the invention in the form of some teaching, suggestion, or even mere motivation.’” Pl.’s Mot. at 6 (emphasis added). Obviousness is a flexible inquiry. The Court “must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.” *KSR*, 550 U.S. at 417. “[A]ny need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.* at 420. Plaintiffs’ motion thus seeks judgment on an issue which is no longer a requirement for the obviousness inquiry.<sup>2</sup> .

**2. There Is Sufficient Evidence for a Reasonable Jury to Conclude that the Patents are Obvious in View of Viola, Including Alone Or In Combination With Other Executable Applications Including Vplot.**

As noted above, Viola satisfied each and every limitation of the asserted claims. Even if a reasonable jury were to find that Viola did not meet a particular limitation, there is more than sufficient evidence in the record for a reasonable jury to find by clear and convincing evidence that that claimed invention would have been obvious in view of Viola. To the extent there are any differences between Viola and the claimed invention, those involve nothing more than the “predictable use of known elements,” as supported by record including for example the testimony of Dr. Phillips. *See, e.g.*, Tr. of Feb. 8 (AM) at 38-40, 51, 59 (Phillips).

Indeed, denial of JMOL on obviousness is warranted by the Federal Circuit’s holding in *Eolas*’s prior litigation, where it reversed the Northern District of Illinois’s grant of JMOL

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<sup>2</sup> Nonetheless, the trial record is loaded with evidence that persons skilled would have been motivated to (and did) combine the building block technologies of the claims-in-suit within the skill of those of ordinary skill in the art to arrive at the claimed inventions. This includes the testimony of the third party witnesses, including Bina, Raggett, Tim Berners-Lee and others about the skill level in the field as well as the expert testimony in this case. Those working in the field were all working on making the nascent worldwide web more interactive.

because Microsoft's expert had discussed: "(1) the scope of [May 12, 1993 Viola code] and [May 27, 1993 Viola code]; (2) the potential differences between [May 12, 1993 Viola code] and [May 27, 1993 Viola code] and the claimed invention; and (3) the state of the art and the level of skill in the art in 1993." *Eolas*, 399 F.3d 1335. As described and cited above, Dr. Phillips's testimony in this case has provided at least that much, and therefore "provided sufficient evidence to survive JMOL." *Id.* Indeed, Dr. Phillips has provided testimony in this case that far exceeds the threshold requirement to survive JMOL, as he expressly provided testimony that Viola also supports a finding of obviousness, whereas the Federal Circuit denied JMOL on obviousness even though Microsoft's expert provided only direct testimony regarding anticipation—such anticipation-focused information nevertheless "might also support an argument of obviousness in the alternative." *Id.*

For example, Plaintiffs allege that Viola does not disclose HTML because VOBJF is not an HTML tag. To the extent that VOBJF is not an HTML tag, the evidence shows it would be have been trivially obvious to combine the teaching of VOBJF with the use of HTML, already a part of Viola. *See, e.g.*, Trial Tr. of Feb. 8 (PM) at 55-57 (Phillips). Plaintiffs allege that Viola does not constitute a distributed application because in certain examples, Viola and for example vplot run on the same computer. To the extent that Viola does not constitute a distributed application, it would have been trivially obvious to combine, for example, vplot with the hypermedia network. *See, e.g.*, Trial Tr. of Feb. 8 (PM) at 58-59 (Phillips).

Plaintiffs allege that Viola does not disclose a "hypermedia network" because certain versions of Viola have non-standards-compliant HTTP code. To the extent that Viola does not disclose a "hypermedia network," the evidence shows that it would have been trivially obvious

to combine Viola with the use of, for example, NFS, which all versions of Viola could successfully use. *See, e.g.*, Trial Tr. of Feb. 8 (PM) at 44-45 (Phillips).

The testimony of other witnesses in this case also provides ample evidence that the patents are obvious in light of Viola. *See, e.g.*, Trial Tr. of Feb. 7 (PM) at 17, 33-35 (Silvey recalling demo of Viola with vplot, testifying that it would be obvious to combine the two); JDX 56 (depiction of plot.v in Viola).

**3. There Is Sufficient Evidence for a Reasonable Jury to Conclude that the Patents are Obvious in View of MediaView, Including Alone Or In Combination With Web Browsers And Distributed Applications Including Mathematica.**

The evidence and testimony presented also shows that MediaView is a browser application that the Patent Office never once considered in connection with any prosecution or reexamination of the patents-in-suit. *See, e.g.*, Trial Tr. of Feb. 8 (AM) at 67, 122-23 (Phillips).

The evidence and testimony presented at trial is sufficient for a jury to conclude that the patents-in-suit are obvious, including in combination with Viola, Mosaic, and other well-known web browsers at the time, based on at least the admitted evidence and testimony from Dr. Richard Phillips, the inventor of MediaView, the testimony of Mr. Daniel Sadowski, several articles published by and about Dr. Phillips in 1990-1993, a video demonstration of MediaView created in 1993, and other demonstrations given at SIGGRAPH Conferences. *See, e.g.*, Trial Tr. of Feb. 8 (AM) at 68-77 (Phillips describing claim-by-claim analysis for MediaView); Trial Tr. of Feb. 7 (PM) at 183-84 (Sadowski recalling MediaView demo); JDX 5, 6, 7, 121, 184, 269, 210, and 145.

For example, one of Dr. Phillips's 1991 articles discloses that it would be "obvious" to implement "hyperlinking" in MediaView. *See, e.g.*, Trial Tr. of Feb. 8 (AM) at 74-75 (Phillips); JDX 5, 6, 7. The evidence also establishes that it would have been obvious to combine

MediaView with web browsers such as Mosaic and Viola. *See, e.g.*, Trial Tr. of Feb. 8 (AM) at 37, 74-75 (Phillips). Likewise, the evidence shows that MediaView would render obvious all of the asserted claims, either alone or in combination with distributed applications like Mathematica. *See, e.g.*, Trial Tr. of Feb. 8 (PM) at 76 (Phillips).

**4. There Is Sufficient Evidence for a Reasonable Jury to Conclude that the Patents are Obvious in View of the EMBED Tag, Including Alone, And/Or In Combination With Mosaic and Other Prior Art.**

Eric Bina testified that he developed the Mosaic web browser, and that it supported inline images in HTML documents at least by March 1993. *See, e.g.*, Trial Tr. of Feb. 6 (PM) at 177:14-16, 186:21-187:4 (Bina).

Mr. Raggett testified that the www-talk community, many of whom used Mosaic, was having discussion about embedding arbitrary things in web pages as early as March or April 1993. *See, e.g.*, Trial Tr. of Feb. 7 (AM) at 97:13-15 (Raggett). In fact, Mr. Raggett proposed an embed tag in HTML. *See, e.g., id.* at 100:16-21 (Raggett). The evidence shows that HTML+ described the EMBED tag and taught that it could be used to embed arbitrary things in a web page. *See, e.g.*, Trial Tr. of Feb. 7 (AM) at 97:13-15. Mr. Raggett specifically testified that he had in mind to use MIME content type to embed interactive objects. *See, e.g., id.* at 103:23-104:1 (Raggett). For example, Mr. Raggett was hoping that his work would “become a standard that people could use to embed documents or do other things with the markup language.” *Id.* at 105:7-10 (Raggett). Mr. Raggett’s testimony concerning the EMBED tag is further supported by the documentary evidence. *See, e.g.*, JDX 119, 42, 35, 152; PX 3; *compare to* PX 1 (patent).

The evidence is sufficient for a reasonable jury to find the claimed inventions are obvious in light of the EMBED tag, either alone or in combination with Mosaic or other prior art. *See, e.g.*, Trial Tr. of Feb. 8 (AM) at 35-36 (Phillips).



#### **D. Patentable Subject Matter.<sup>3</sup>**

Whether a patent claim is directed to statutory subject matter is a question of law. *E.g.*, *Prometheus Labs. v. Mayo Collaborative Svcs.*, 628 F.3d 1347, 1353 (2010); *see* 35 U.S.C. § 101. Under recent Federal Circuit authority, and as construed and applied by Eolas, the patents-in-suit are invalid for lack of patent-eligible subject matter because they are “directed to an abstract idea preemptive of a fundamental concept or idea that would foreclose innovation in this area.” *Dealertrack, Inc. v. Huber*, No. 2009-1566, -1588, slip op. at 35 (Fed. Cir. Jan. 20, 2012). “Simply adding a ‘computer aided’ limitation to a claim covering an abstract concept, without more, is insufficient to render the claim patent eligible.” *Id.* at 36.

Just like in *Dealertrack*, “[t]he claims here do not require a specific application, nor are they tied to a particular machine.” *Id.* at 36. Indeed, Plaintiffs sought and received a construction of terms such as “client and “server” that was not limited to any particular machine and “executable application” that do not require a specific application. *See* D.I. 914 (Claim Construction Order). As construed, described, and applied by Eolas, the general purpose computer claimed by Eolas does no more than the computers in *Dealertrack* and *Gottschalk v. Benson*, 409 U.S. 63 (1972) to limit the scope of the claims and would thus cover a method for viewing content using any existing or future-devised machinery without requiring any particular any particular algorithm. *See Dealertrack* (“The claims here do not require a specific application, nor are they tied to a particular machine.”). Indeed, Plaintiffs’ actions confirm this, as they have alleged infringement against a broad swath of unrelated defendants in diverse industries, and have accused vastly different products of infringing the same claims—to the extent of alleging that their claims cover the whole “interactive web.” Nor do these claims, as construed and

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<sup>3</sup> This section relates only to Amazon, CDW and Yahoo!, who maintained a defense under Section 101, as set forth in the Pretrial Order.

applied, limit themselves to concrete steps requiring a specially programmed computer interface. “[T]he claims here recite only that the method is ‘computer aided’ without specifying any level of involvement or detail.” *Id.* at 36. Limiting such claims to one particular application, like the World Wide Web, as Plaintiffs have previously argued (but that this Court has rejected), is insufficient to confer patent eligibility. *See Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

Accordingly, the patents are invalid under 35 U.S.C. § 101.

### **III. CONCLUSION**

For the foregoing reasons, Defendants’ respectfully requests the Court deny Plaintiffs’ Motion for Judgment as a Matter of Law.

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/s/ Edward R. Reines

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Edward Reines (Bar No. 135960)  
edward.reines@weil.com  
Jared Bobrow (Bar No. 133712)  
jared.bobrow@weil.com  
Sonal N. Mehta (Bar No. 222086)  
sonal.mehta@weil.com  
Andrew L. Perito (Bar No. 269995)  
andrew.perito@weil.com  
Aaron Y. Huang (Bar No. 261903)  
aaron.huang@weil.com  
WEIL, GOTSHAL & MANGES LLP  
201 Redwood Shores Parkway  
Redwood Shores, CA 94065  
Telephone: (650) 802-3000  
Facsimile: (650) 802-3100

Doug W. McClellan (Bar No. 24027488)  
doug.mcclellan@weil.com  
WEIL, GOTSHAL & MANGES LLP  
700 Louisiana, Suite 1600  
Houston, TX 77002  
Telephone: (713) 546-5000  
Facsimile: (713) 224-9511

Jennifer H. Doan (Bar No. 088090050)  
jdoan@haltomdoan.com  
Joshua R. Thane (Bar No. 24060713)  
jthane@haltomdoan.com  
HALTOM & DOAN  
6500 Summerhill Road, Suite 100  
Texarkana, TX 75503  
Telephone: (903) 255-1000  
Facsimile: (903) 255-0800

Otis Carroll (Bar No. 3895700)  
Deborah Race (Bar No. 11648700)  
IRELAND, CARROLL & KELLEY, P.C.  
6101 South Broadway, Suite 500  
Tyler, Texas 75703  
Telephone: (903) 561-1600  
Facsimile: (903) 581-1071  
Email: fedserv@icklaw.com

Attorneys for Defendants  
AMAZON.COM, INC. AND YAHOO! INC.

/s/ Jason Wolff (with permission)

David J. Healey  
Healey@fr.com

FISH & RICHARDSON P.C.  
1 Houston Center  
1221 McKinney Street, Suite 2800  
Houston, TX 77010  
Telephone: (713) 654-5300  
Facsimile: (713) 652-0109

Frank E. Scherkenbach  
Scherkenbach@fr.com  
Proshanto Mukherji  
Mukherji@fr.com  
FISH & RICHARDSON P.C.  
One Marina Park Drive  
Boston, MA 02110-1878  
Telephone: (617) 542-5070  
Facsimile: (617) 542-8906

Jason W. Wolff  
Wolff@fr.com  
FISH & RICHARDSON P.C.  
12390 El Camino Real  
San Diego, CA 92130  
Telephone: (858) 678-5070  
Facsimile:(858) 678-5099

Attorneys for Defendant  
ADOBE SYSTEMS INCORPORATED

/s/ Thomas L. Duston (with permission)  
Thomas L. Duston  
tduston@marshallip.com  
Anthony S. Gabrielson  
agabrielson@marshallip.com  
Scott A. Sanderson  
ssanderson@marshallip.com  
Marshall, Gerstein & Borun LLP  
6300 Sears Tower  
233 South Wacker Drive  
Chicago, IL 60606-6357  
Telephone: (312) 474-6300  
Facsimile: (312) 474-0448

Brian Craft  
bcraft@findlaycraft.com  
Eric H. Findlay  
efindlay@findlaycraft.com  
FINDLAY CRAFT, LLP  
6760 Old Jacksonville Highway, Suite 101  
Tyler, TX 75703  
Telephone: (903) 534-1100  
Facsimile: (903) 534-1137

Attorneys for Defendants

CDW LLC

/s/ Neil J. McNabney (with permission)

Neil J. McNabney (Bar No. 24002583)

mcnabney@fr.com

Carl E. Bruce (Bar No. 24036278)

bruce@fr.com

FISH & RICHARDSON P.C.

1717 Main Street., Suite 5000

Dallas, TX 75201

Telephone: (214) 747-6134

Facsimile: (214) 747-2091

John R. Lane (Bar No. 24057958)

jlane@fr.com

FISH & RICHARDSON P.C.

1221 McKinney Street, Suite 2800

Houston, TX 77010

Telephone: (713) 654-5300

Facsimile: (713) 652-0109

Proshanto Mukherji (*pro hac vice*)

pvm@fr.com

FISH & RICHARDSON P.C.

One Marina Park Drive

Boston, MA 02110-1878

Telephone: (617) 542-5070

Facsimile: (617) 542-8906

Attorneys for Defendant

THE GO DADDY GROUP, INC.

/s/ Douglas E. Lumish (with permission)

Douglas E. Lumish (Bar No. 183863)

dlumish@kasowitz.com

Jeffrey G. Homrig (Bar No. 215890)

jhomrig@kasowitz.com

Joseph H. Lee (Bar No. 248046)

jlee@kasowitz.com

Parker C. Ankrum (Bar No. 261608)

pankrum@kasowitz.com

KASOWITZ, BENSON, TORRES &

FRIEDMAN LLP

333 Twin Dolphin Drive

Suite 200

Redwood Shores, CA 94065

Telephone: 650-453-5170

Facsimile: 650-453-5171

Jonathan Keith Waldrop

jwaldrop@kasowitz.com

KASOWITZ BENSON TORRES &

FRIEDMAN LLP

1360 Peachtree Street NE, Suite 1150  
Atlanta, GA 30309  
Telephone: (404) 260-6133  
Facsimile: (404) 393-0743

Michael E. Jones (Bar No. 10929400)  
mikejones@potterminton.com  
Allen F. Gardner (Bar No. 24043679)  
allengardner@potterminton.com  
POTTER MINTON P.C.  
110 N College , Suite 500  
PO Box 359  
Tyler, TX 75710-0359  
Telephone: (903) 597-8311  
Facsimile: (903) 593.0846

Brandon Stroy (*pro hac vice*)  
brandon.stroy@ropesgray.com  
ROPES & GRAY LLP  
1211 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 596-9000  
Facsimile: (212) 596-9090

James R Batchelder (*pro hac vice*)  
James.Batchelder@ropesgray.com  
Han Xu (*pro hac vice*)  
han.xu@ropesgray.com  
ROPES & GRAY LLP  
Prudential Tower  
800 Boylston Street  
Boston, MA 02199  
Telephone: (617) 235-4903  
Facsimile: (617) 235-9873

Mark D. Rowland (Bar No. 157862)  
mark.rowland@ropesgray.com  
Rebecca R. Hermes (Bar No. 252837)  
rebecca.hermes@ropesgray.com  
Sasha Rao (Bar No. 244303)  
sasha.rao@ropesgray.com  
Lauren N. Robinson (Bar No. 255028)  
lauren.robinson@ropesgray.com  
ROPES & GRAY LLP  
1900 University Ave., 6th Floor  
East Palo Alto, CA 94303  
Telephone: (650) 617-4000  
Facsimile: (650) 617-4090

Attorneys for Defendants  
GOOGLE INC. and YouTube LLC

/s/ Christopher M. Joe (with permission)

Christopher M. Joe (Bar No. 00787770)  
chris.joe@bjciplaw.com  
Eric W. Buether (Bar No. 03316880)  
eric.buether@bjciplaw.com  
Brian A. Carpenter (Bar No. 03840600)  
brian.carpenter@bjciplaw.com  
Mark D. Perantie (Bar No. 24053647)  
mark.perantie@bjciplaw.com  
Niknaz F. Bukovcan  
niky.bukovcan@bjciplaw.com  
BUETHER JOE & CARPENTER, LLC  
1700 Pacific Avenue, Suite 2390  
Dallas, TX 75201  
Telephone: (214) 466-1279  
Facsimile (214) 635-1830

Attorneys for Defendant  
J.C. PENNEY CORPORATION, INC.

/s/ Michael E. Richardson (with permission)  
Michael E. Richardson (Bar No. 24002838)  
mrichardson@brsfirm.com  
BECK REDDEN & SECREST L.L.P.  
1221 McKinney, Suite 4500  
Houston, TX 77010  
Telephone: (713) 951-6284  
Facsimile: (713) 951-3720

Joe W. Redden, Jr. (Bar No. 16660600)  
jredden@brsfirm.com  
BECK REDDEN & SECREST LLP  
One Houston Center  
1221 McKinney St, Suite 4500  
Houston, TX 77010-2020  
Telephone: (713) 951-3700  
Facsimile: (713) 951-3720

Alexandra C. Boudreau (*pro hac vice*)  
alexandra.boudreau@wilmerhale.com  
Richard Ewenstein (*pro hac vice*)  
richard.ewenstein@wilmerhale.com  
Mark G. Matuschak (*pro hac vice*)  
mark.matuschak@wilmerhale.com  
Silena Paik (*pro hac vice*)  
silena.paik@wilmerhale.com  
WILMER CUTLER PICKERING HALE &  
DORR LLP  
60 State Street  
Boston, MA 02109  
Telephone: (617) 526-6336  
Facsimilie (617) 526-5000

Donald R. Steinberg (*pro hac vice*)

don.steinberg@wilmerhale.com  
Daniel V. Williams (*pro hac vice*)  
daniel.williams@wilmerhale.com  
WILMER CUTLER PICKERING HALE &  
DORR LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
Telephone: (202) 663-6012  
Facsimile: (202) 663-6363

Kate Hutchins (*pro hac vice*)  
kate.hutchins@wilmerhale.com  
WILMER CUTLER PICKERING HALE &  
DORR LLP  
399 Park Avenue  
New York, NY 10022  
Telephone: (212) 230-8800  
Facsimile: (212) 230-8888

Attorneys for Defendant  
STAPLES, INC.



**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 on this the 9th day of February 2012. Local Rule CV-5(a)(3)(A).

/s/ Edward R. Reines  
Edward R. Reines