

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Eolas Technologies Incorporated,	§	
	§	
Plaintiff,	§	Civil Action No. 6:09-cv-446
	§	
	§	
vs.	§	
	§	
Adobe Systems Inc., Amazon.com, Inc., Apple Inc., Blockbuster Inc., CDW Corp., Citigroup Inc., eBay Inc., Frito-Lay, Inc., The Go Daddy Group, Inc., Google Inc., J.C. Penney Company, Inc., JPMorgan Chase & Co., New Frontier Media, Inc., Office Depot, Inc., Perot Systems Corp., Playboy Enterprises International, Inc., Rent-A-Center, Inc., Staples, Inc., Sun Microsystems Inc., Texas Instruments Inc., Yahoo! Inc., and YouTube, LLC	§	JURY TRIAL
	§	
Defendants.	§	

**EOLAS’ REPLY TO DEFENDANT J.C. PENNEY CORPORATION, INC.’S FIRST
AMENDED ANSWER TO PLAINTIFF’S FIRST AMENDED COMPLAINT**

Plaintiff Eolas Technologies Incorporated (“Eolas” or “Plaintiff”) hereby replies to the counterclaims set forth in J.C. Penney Corporation, Inc.’s (“JCP”) First Amended Answer to Plaintiff’s First Amended Complaint (dkt. 296, hereinafter “Answer and Defenses”) as follows:

DEFENSES

58. Paragraph 58 of JCP’s Answer and Defenses does not contain a statement which warrants an affirmance or denial. To the extent any response is warranted, Eolas responds as follows: denied.

FIRST DEFENSE

59. Eolas denies the allegations in paragraph 59 of JCP’s Answer and Defenses.

SECOND DEFENSE

60. Eolas denies the allegations in paragraph 60 of JCP's Answer and Defenses.

THIRD DEFENSE

61. Eolas denies the allegations in paragraph 61 of JCP's Answer and Defenses.

FOURTH DEFENSE

62. Eolas denies the allegations in paragraph 62 of JCP's Answer and Defenses.

FIFTH DEFENSE

63. Paragraph 63 of JCP's Answer and Defenses does not contain a statement which warrants an affirmation or denial. To the extent any response is warranted, Eolas responds as follows: denied.

64. Eolas denies the allegations in paragraph 64 of JCP's Answer and Defenses.

SIXTH DEFENSE

65. Eolas denies the allegations in paragraph 65 of JCP's Answer and Defenses.

SEVENTH DEFENSE

66. Eolas denies the allegations in paragraph 66 of JCP's Answer and Defenses.

EIGHTH DEFENSE

67. Eolas denies the allegations in paragraph 67 of JCP's Answer and Defenses.

NINTH DEFENSE

68. Eolas denies the allegations in paragraph 68 of JCP's Answer and Defenses.

TENTH DEFENSE

69. Eolas denies the allegations in paragraph 69 of JCP's Answer and Defenses.

70. Eolas admits that a publicly available opinion issued by the Federal Circuit Court of Appeals cited as *Eolas Technologies, Inc. v. Microsoft, Corp.*, 399 F.3d 1325,1330 (Fed. Cir. 2005) contains the following statement:

Michael D. Doyle (Doyle), one of the inventors of the '906 patent, knew of Viola yet did not disclose any information regarding that reference to the United States Patent and Trademark Office (PTO).

Except as expressly admitted, Eolas denies the allegations in paragraph 70 of JCP's Answer and Defenses.

71. Eolas admits that a publicly available opinion issued by the Federal Circuit Court of Appeals cited as 399 F.3d 1325, 1330 (Fed. Cir. 2005) contains the following statement:

Michael D. Doyle (Doyle), one of the inventors of the '906 patent, knew of Viola yet did not disclose any information regarding that reference to the United States Patent and Trademark Office (PTO). On August 31, 1994, Doyle issued a press release to an e-mail list indicating that researchers at the University of California had "created software for embedding interactive program objects within hypermedia documents." That same day, Wei contacted Doyle via e-mail in response to the press release. Wei alleged that his May 1993 demonstration of Viola (version DX34) to Sun Microsystems engineers exhibited a way to embed interactive objects and transport them over the web. Wei directed Doyle to his paper about Viola (the Viola paper), which was available on the Internet at least by August 13, 1994. Doyle downloaded and read the paper. In a later email exchange, Doyle attempted to get Wei to concede that he was not the first to invent. Additionally, Doyle told Wei the inventions were different.

The opinion speaks for itself, and thus no further response is required. Except as expressly admitted, Eolas denies the remaining allegations in paragraph 71 of JCP's Answer and Defenses.

72. Eolas admits that a publicly available opinion issued by the Federal Circuit Court of Appeals cited as 399 F.3d 1325, 1335 (Fed. Cir. 2005) contains the following statement:

In sum, with respect to the district court's prior art rulings, this court finds: the district court erred in finding as a matter of law that DX34 was abandoned, suppressed

or concealed within the meaning of section 102(g); Wei's May 7, 1993 demonstration to two Sun Microsystems employees without confidentiality agreements was a public use under section 102(b); and the district court erred in its JMOL that DX37 did not as a matter of law anticipate or render the '906 patent obvious. As a result, this court remands for additional proceedings on these issues.

The opinion speaks for itself, and thus no further response is required. Except as expressly admitted, Eolas denies the remaining allegations in paragraph 72 of JCP's Answer and Defenses.

73. Eolas admits that the '906 patent application was filed on October 17, 1994. Eolas also admits that the District Court issued a publicly available ruling (Docket Number 491) in the action (N.D.Ill. 1:99-cv-626) which states:

Doyle created a file to hold all the information he found in 1998 about the Viola browser, and he labeled his file "Viola stuff." The "Viola Stuff" file included descriptions of two "beta" releases of the Viola browser, a version 3.0 release in February 1994, and a version 3.1 release in March 1994. There were public announcements in both cases of Internet addresses where "source and binary" code for the Viola browser could be found. He also found extensive links for various purported "demos" of the Viola browser's capabilities.

The ruling speaks for itself, and thus no further response is required. Except as expressly admitted, Eolas denies the remaining allegations in paragraph 73 of JCP's Answer and Defenses.

74. Eolas admits that Dr. Doyle and the attorneys prosecuting the application for the '906 patent owed a duty of candor and good faith to the United States Patent and Trademark Office ("PTO") in connection with the prosecution of the '906 patent. Except as expressly admitted, Eolas denies the remaining allegations in paragraph 74 of JCP's Answer and Defenses.

75. Eolas admits that the '906 patent and the '985 patent share the same specification and that the '985 patent claims priority through the '906 patent. Eolas admits that during the prosecution of the application that led to the '985 patent the Patent Office issued an office action on or about July 20, 2004 and that a response to this office action was filed by the patent-owner.

The publicly-available office action and response speak for themselves and no further response is required. Except as expressly admitted, Eolas denies the remaining allegations in paragraph 75 of JCP's Answer and Defenses.

ELEVENTH DEFENSE

76. Eolas denies the allegations in paragraph 76 of JCP's Answer and Defenses.

TWELFTH DEFENSE

77. Eolas denies the allegations in paragraph 77 of JCP's Answer and Defenses.

COUNTERCLAIMS

78. Paragraph 78 of JCP's Answer and Defenses does not contain a statement which warrants an affirmance or denial. To the extent any response is warranted, Eolas responds as follows: denied.

79. Eolas denies the allegations in paragraph 79 of JCP's Answer and Defenses.

80. Eolas denies the allegations in paragraph 80 of JCP's Answer and Defenses.

81. Eolas admits the allegations in paragraph 81 of JCP's Answer and Defenses.

82. Eolas denies the allegations in paragraph 82 of JCP's Answer and Defenses.

83. Eolas denies the allegations in paragraph 83 of JCP's Answer and Defenses.

84. Paragraph 84 of JCP's Answer and Defenses does not contain a statement which warrants an affirmance or denial. To the extent any response is warranted, Eolas responds as follows: denied.

JCP'S REQUESTED RELIEF

Eolas denies that JCP is entitled to the relief requested in paragraphs 85-90 of its Answer and Defenses or any other relief on its Counterclaims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Eolas Technologies Incorporated, prays for the following relief against Defendant J.C. Penney Corporation, Inc.:

- A. that all relief requested by Eolas in its Complaint be granted;
- B. that all relief requested by JCP in its Answer and Defenses to Plaintiff's Complaint be denied and that JCP take nothing by way of its Counterclaims;
- C. that JCP be ordered to pay the costs of this action (including all disbursements) and attorney fees as provided by 35 U.S.C. § 285 and all other applicable statutes, rules, and common law; and
- D. such other and further relief as the Court deems just and equitable.

AFFIRMATIVE DEFENSES

As affirmative defenses, Eolas alleges as follows:

FIRST AFFIRMATIVE DEFENSE

JCP has failed to state a claim upon which relief can be granted, with respect to its Counterclaims set forth in paragraphs 78-84 of its Answer and Defenses.

SECOND AFFIRMATIVE DEFENSE

JCP has failed to state facts and/or a legal basis sufficient to permit recovery of its attorneys' fees and/or expenses for defending this suit.

OTHER AFFIRMATIVE DEFENSES

Eolas hereby gives notice that it intends to rely upon any other defense that may become available in this case and hereby reserves the right to amend this Answer to assert any such defense.

DEMAND FOR JURY TRIAL

Eolas demands a trial by jury of any and all issues triable of right before a jury.

DATED: June 21, 2010.

Respectfully submitted,

McKool Smith, P.C.

/s/ Mike McKool

Mike McKool

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**ATTORNEYS FOR PLAINTIFF
EOLAS TECHNOLOGIES, 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 21st day of June, 2010. Local Rule CV-5(a)(3)(A).

/s/ Josh Budwin

Josh Budwin