

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

TYLER DIVISION

Eolas Technologies Incorporated,

Plaintiff,

vs.

Adobe Systems Inc.; Amazon.com, Inc.; Apple Inc.; CDW Corp.; Citigroup Inc.; eBay Inc.; Frito-Lay, Inc.; The Go Daddy Group, Inc.; Google Inc.; J.C. Penney Corporation, 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,

Defendants.

No. 6:09-cv-00446-LED (filed Oct. 6, 2009)

Adobe Systems Inc.; Amazon.com, Inc.; Apple Inc.; CDW LLC; eBay Inc.; Frito-Lay, Inc.; The Go Daddy Group, Inc.; Google Inc.; J.C. Penney Corporation, Inc.; JPMorgan Chase & Co.; New Frontier Media, Inc.; Office Depot, Inc.; Perot Systems Corp.; Playboy Enterprises International, Inc.; Rent-A-Center, Inc.; Staples, Inc.; Oracle America, Inc. f/k/a Sun Microsystems, Inc.; Texas Instruments Inc.; Yahoo! Inc.; and YouTube, LLC,

Counterclaimants,

vs.

Eolas Technologies Incorporated,

Counterdefendant.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF INVALIDITY FOR LACK OR WRITTEN DESCRIPTION

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*PowerOasis, Inc. v. T-Mobile USA, Inc.*,  
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## **EXHIBITS**

- Ex. A: United States Patent 5,838,906 dated November 17, 1998.
- Ex. B: United States Patent 7,599,985 dated October 6, 2009.
- Ex. C: U.S. Patent 5,838,906 Prosecution History dated August 6, 1996.
- Ex. D: Deposition of Michael Doyle dated June 30, 2011.
- Ex. E: Applicants' Response in the U.S. Patent 7,599,985 Prosecution History dated February 5, 2009.
- Ex. F: Excerpts to the Deposition of Cheong Ang dated July 7, 2011.
- Ex. G: Declaration of Edward W. Felten dated September 27, 2007 accompanying Applicants' Response in U.S. Patent 5,838,906 Reexamination.
- Ex. H: Excerpts to the Expert Report of David Martin dated July 20, 2011.
- Ex. I: Excerpts to the Microsoft trial transcript dated July 9, 2003 before the Honorable James B. Zagel regarding Case No. 99 C 626 in the United States District Court Northern District of Illinois Eastern Division.
- Ex. J: Notice of Intent to Issue Reexamination Certificate dated September 27, 2005 regarding U.S. Patent 5,838,906.
- Ex. K: Excerpts to the Expert Report of Richard L. Phillips dated July 20, 2011.
- Ex. L: Applicants' Response from the U.S. Patent 5,838,906 prosecution history dated June 2, 1997.
- Ex. M: Applicants' Response from the U.S. Patent 7,599,985 Prosecution History dated March 11, 2005.

## **I. INTRODUCTION**

Defendants move for summary judgment of invalidity for lack of a written description with respect to all remaining claims-in-suit, including U.S. Patent Nos. 5,838,906 (“’906 patent”), claims 1-3, 6-8, 11, 13 and 7,599,985 (“’985 patent”), claims 1-11, 16-28, 36-43.<sup>1</sup>

## **II. STATEMENT OF ISSUE TO BE DECIDED**

Are the claims-in-suit invalid for lack of a written description pursuant to Section 112(1) of Title 35 because the patents do not show that the inventors actually invented a method for website interactivity broadly employing a so-called “embed text format” insofar as that is something other than the EMBED tag that is disclosed in the patents?

## **III. STATEMENT OF UNDISPUTED FACTS**

1. The term “embed text format” is not found in the specification to the patents-in-suit. *See* Ex. A (’906 patent); Ex. B (’985 patent).<sup>2</sup> Rather, it was coined by the inventors and added to the claims by amendment during prosecution long after the first filing. *See* Ex. C at 1-2 (Aug. 6, 1996 Applicants’ Response in ’906 PH); Ex. D at 480:19-24 (06/30/11 Deposition of Michael Doyle, named inventor) (quoted *infra*). There is no disclosure in the patents of scripting language, the use of scripts, or JavaScript.

2. The patentees have repeatedly conceded, including during prosecution of the patents-in-suit, that the only example of a so-called “embed text format” found in the patents is the HTML EMBED tag referenced in Table II. *See, e.g.*, Ex. E (’985 PH Ex. 14 at PH\_001\_0000784634) at 22 (Feb. 5, 2009 Applicants’ Response)); Ex. F at 582:8-583:2

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<sup>1</sup> Eolas has not included all these claims in its infringement reports and so many are effectively dropped from its infringement allegations. Despite this, Eolas has attempted at various points to reserve its right to assert these claims in this case. Accordingly, Defendants’ motion covers all claims originally asserted in this case.

<sup>2</sup> Citations are to exhibits accompanying the Declaration of Edward R. Reines filed herewith.

(2011/07/22 Deposition of Cheong Ang, “Ang Depo”) (quoted *infra*). During subsequent proceedings before the Patent Office, the patentees continued to identify the “embed text format” as the EMBED tag and rely upon it being a “special tag” to distinguish prior art. See, e.g., Ex. G at ¶¶ 21–25 (Sept. 27, 2007 Declaration of Edward W. Felten, accompanying Applicants’ Response in ‘906 Reexam) (quoted *infra*).

#### IV. **ARGUMENT**

##### A. **Written Description Law**

“The purpose of the written description requirement is to ‘ensure that the scope of the right to exclude, as set forth in the claims, does not overreach the scope of the inventor’s contribution to the field of art as described in the patent specification.’” *ICU Med., Inc. v. Alaris Med. Sys.*, 558 F.3d 1368, 1376 (Fed. Cir. 2009) (internal citations omitted). The written description test “is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

“Compliance with the written description requirement is a question of fact but is amenable to summary judgment in cases where no reasonable fact finder could return a verdict for the non-moving party.” *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1307 (Fed. Cir. 2008) (affirming summary judgment). Indeed, summary judgment is appropriate where “expansive claim language” is supported by only one specific embodiment and the record establishes that the generic claimed invention was not in the possession of the inventor. *LizardTech, Inc. v. Earth Res. Mapping*, 424 F.3d 1336, 1344-46 (Fed.Cir.2005); *ICU Med.*, 558

F.3d at 1379 (all affirming summary judgment grants); *See also Tronzo v. Biomet, Inc.*, 156 F.3d 1154, 1159 (Fed. Cir. 1998) (reversing JMOL denial).

**B. The Claims As Construed And Applied By Eolas Overreach The Scope Of The Inventors' Contribution**

**1. Eolas Is Construing And Applying The Patents-In-Suit To Cover All Embedded Interactive Objects On Webpages Without Limitation To The Disclosed Tags**

Eolas contends that the patents-in-suit cover essentially all interactive elements embedded on web pages no matter how this embedding is accomplished. *See* Ex. H (Expert Report of David Martin, July 20, 2011) at ¶ 4 (“The patents-in-suit disclose inventions that make possible interactivity with web page embedded objects over the internet.”). Indeed, Eolas appears to contend that there is no meaningful way to include embedded interactive objects on a web page to “design around” the Eolas patents. *Id.* 68-106 (not aware of any design alternative that would “avoid infringement”). Inventor Michael Doyle even claimed in deposition that he invented and patented the idea of using “interactive media” within a web page altogether. *See* Ex. D (Doyle. Depo.) at 301:4-22 (“I define ‘interactive media’ within a web page as a fully interactive embedded application that provides interaction with data objects displayed within the web page, and in that context, we did invent that.”)

**2. “Embed Text Format” Is A Made-Up Term First Introduced During The Application Process**

Central to Eolas’ effort to expand its patent claims so broadly is the claim term “embed text format.” Eolas applies this term to cover virtually anything in a document used to embed an object in a webpage. This term is present in every asserted claim.

“Embed text format” is a made-up term, unknown to those skilled in the art, as the inventor Michael Doyle testified. *See* Ex. D (Doyle, Depo.) at 480:19-24 (“Q: No, nothing

specific. I'm just asking if—did embed text format, was that a term of art or is that a term that you coined? A: That's a term that we coined in our—in our—or that we used in our patent specification.”). Importantly, this term was not used in the patent application and only first surfaced during prosecution, years later. Ex. C at 1-2, 16 (Aug. 6, 1996 Applicants' Response in '906 PH).

3. **The Only Support For The Embed Text Format Is An HTML EMBED Tag**

While “embed text format” is admittedly a made-up phrase that Eolas is attempting to use as an all-encompassing generic term, inventor Cheong Ang confirmed that the only example of a so-called embed text format in the patent is the HTML EMBED tag referenced in Table II. *See* Ex. F (Ang Depo) at 582:8-583:2 (“[T]he patent description did not provide another example.”). During prosecution, the applicant likewise identified the EMBED tag as the only example of an embed text format in the specification. *See* Ex. E ('985 PH Ex. 14 at PH\_001\_0000784634) at 22 (Feb. 5, 2009 Applicants' Response) (referencing the phrase “a check is made as to whether the current tag is the EMBED tag” as support for the “embed text format” claim requirement).

The HTML EMBED tag that is disclosed in the patents is a short, pre-defined tag. It uses standard HTML formatting conventions and attributes. For example, it uses angle brackets to specify the beginning and end of the HTML tag. It has: (1) a TYPE attribute that specifies the same MIME type information that web browsers at the time, such as Mosaic, used to identify helper applications; (2) a HREF attribute, which is a standard HTML attribute commonly used at the time to specify the location of a file; and (3) WIDTH and HEIGHT attributes, which were standard HTML attributes commonly used at the time to specify the width and height of an image. *See, e.g.,* Ex. A ('906 patent), col. 12:66-13:36; *see also* Ex. I (MS Trial Tr.) 271:3

(“Doyle: It takes this document, and if you see these little pieces of text with these little angle brackets surrounding them, those are called text formats. The browser recognizes those as things that direct it to do something, but they are separate from the actual text, for example, that might be placed on the page.”).

4. **Eolas Is Overreaching The Scope Of The Invention By Applying The “Embed Text Format” To JavaScript And Other Complex, Non-Tag Processes**

Because the written description of the patent-in-suit only briefly identifies a simple HTML tag as the way to embed objects in a web page, that disclosure cannot support Eolas’s sweeping application of the claims to cover the use of virtually any technique for rendering objects including the use of JavaScript, or other scripting language, to present objects in a web page. This complex non-tag approach to interactive websites is well beyond the scope of what was invented.

When distinguishing the prior art Mosaic browser, the applicant relied heavily upon its “special” embed *tag* to distinguish the prior art, equating the claimed “embed text format” only with its special EMBED *tag*. See Ex. G at 21-25 (Sept. 27, 2007 Decl. of Edward W. Felten accompanying Sept. 27, 2007 Applicants’ Response in ‘906 Reexam) (“In the claimed ‘906 system, the browser instead used a special tag, the ‘embed text format,’ to specify that an embedded object should be included. Mosaic lacked the embed text format.”). See *Id.* There is no mention of a script or anything other than the “special” EMBED tag in the applicants’ submission.

Indeed, the Patent Office clearly understood that the claimed “embed text format” was only properly supported to the extent it was an EMBED tag, expressly stating that they were the same thing. See Ex. J at 8-9 (Sept. 27, 2005 Notice of Intent to Issue Reexamination Certificate)

(“[I]nteractive processing’ is invoked . . . in response to the browser application parsing an ‘embed text format’ (i.e., an ‘EMBED’ tag, see col. 12, line 60, ’906 patent) . . .”). The Patent Office’s conspicuous and noteworthy use of the signal “i.e.” confirms that it did not envision support for the claims beyond the use of the “special” tags to which the written description of the patents is limited.

In contrast to a special “tag,” the use of scripts (which Eolas contends is within the scope of the “embed text format”) involves a much higher level functionality than a tag. These scripts require special interpreters, which render the HTML document in a tree-like structure called a DOM tree. *See* Ex. K (Expert Report of Richard L. Phillips, July 20, 2011) at ¶ 805. None of this is explained, disclosed or even mentioned in the patent.

Based on the objective evidence about what the patent means, one skilled in the art simply would not conclude that the inventors contemplated or possessed non-tag scripts as part of their invention for embedding objects on web pages. *See id.* at ¶ 800-809.

**5. Eolas Is Overreaching The Scope Of The Invention By Applying The “Embed Text Format” Such That It Is At A Location Other Than Where The Object Is Displayed**

The patents-in-suit do not support an “embed text format” at a location other than the one located at a “first location” where the object is displayed. As explained above, the only “embed text format” shown in the patent is the EMBED tag of Table II. This tag does not have the capability to alter the location of the object it represents. There is no disclosure of the object being located anywhere else. All that is contemplated by the patent is “simple in-line processing.” *See id.* at ¶ 811.

During prosecution, the applicant repeatedly noted that a key characteristic of the claimed invention is that the object is displayed at the location of the “embed text format.” *See, e.g.,* Ex.

L at 11 (June 2, 1997 Applicants' Response in '906 PH) ("Further, [in Mosaic] a display window is not created in the first hypermedia document at the location in the document of the embed text format as required by the claim."); *See* Ex. G (Declaration of Edward W. Felten) at ¶¶ 51-52 ("[Cohen's] LDESC tags cannot be the embed text format, because they do not satisfy the required claim element 'wherein said first distributed hypermedia document includes an embed text format, located at a first location . . . .' This claim element requires that the embedded object be displayed at a location in the distributed hypermedia document (*e.g.*, the Web page) that corresponds to the location of the embed text format within the document. . . . The LDESC tag does not appear in the document at the required location. Instead, the LDESC (link description) tag appears in the document file's prologue . . . ."); Ex. M at 18 (March 11, 2005 Applicants' Response in '985 PH) ("Further, there is no teaching in NoteMail of parsing an embed text format at a first location and displaying and enabling interactive processing within the first location because, in NoteMail, the location of information is specified elsewhere, by the 'Format' data type.").

Based on the objective evidence about what the patent means, one skilled in the art simply would not conclude that the inventors contemplated or possessed the use of "embed text format" at a location other than the one located at the "first location" where the object is displayed. *See* Ex. K (Phillips Expert Report) at ¶¶ 810-814.

## V. CONCLUSION

For all of these reasons, Defendants' motion for summary judgment of invalidity should be granted as set forth in the proposed order.

Respectfully submitted,

Dated: August 17, 2011

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have 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)(3) on this 17th day of August 2011. All other counsel of record will be served via facsimile or first class mail.

*/s/ Cynthia Jacobs*

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Cynthia Jacobs