

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

EVIDEO OWNERS,	)	
MAURO DIDOMENICO	)	
DOUGLAS BUERGER	)	
CRAIG LINDEN	)	
REALVIRT, LLC	)	
PAUL BAROUS	)	
	)	
Plaintiffs,	)	No. 15-413
	)	
v.	)	Judge Lydia Kay Griggsby
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT’S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... II

QUESTIONS PRESENTED ..... 1

STATEMENT OF THE CASE..... 1

    I. Nature Of The Case ..... 1

    II. Statement of Facts ..... 2

ARGUMENT ..... 3

    I. Plaintiffs’ First Amended Complaint Should be Dismissed for  
Lack of Subject Matter Jurisdiction ..... 3

        A. Plaintiffs lack standing to bring suit..... 3

        B. Plaintiffs’ claims do not fall within any of the narrow categories  
for which sovereign immunity has been waived..... 5

            1. Plaintiffs do not set forth a cognizable exaction claim..... 7

            2. None of the provisions cited by plaintiffs are money  
mandating..... 10

            3. No implied contract is created by the cited provisions..... 11

        C. The Tucker Act is displaced by the statutory scheme for refund  
of fees paid ..... 13

    II. Plaintiffs’ First Amended Complaint Alternatively Should be  
Dismissed for Failure to State a Claim ..... 14

CONCLUSION ..... 18

**TABLE OF AUTHORITIES**

**CASES**

*Aerolineas Argentinas v. U.S.*, 77 F.3d 1564 (Fed. Cir. 1996)..... 8

*Aschcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009)..... 16

*Automated Merchandising Sys., Inc. v. Lee*, 782 F.3d 1376  
(Fed. Cir. 2015)..... 17

*Baker v. United States*, 50 Fed. Cl. 483 (2001)..... 12

*Blacklight Power, Inc. v. Rogan*, 295 F.3d 1269 (Fed. Cir.  
2002)..... 17

*Booth v. United States*, 990 F.2d 617 (Fed.Cir.1993). .... 6

*Brooks v. Dunlop Manufacturing, Inc.*, 702 F.3d 624 (Fed. Cir.  
2012)..... 12

*Chevron U.S.A., Inc. v. United States*, 71 Fed. Cl. 236 (2006) ..... 8

*Dourandish v. United States*, 120 Fed. Cl. 467 (2015). .... 4

*Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d  
1002 (1967)..... 7, 8

*Fisher v. United States*, 402 F.3d 1167 (Fed.Cir.2005) ..... 7

*Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669  
(2007)..... 3

*Godwin v. United States*, 338 F.3d 1374 (Fed. Cir. 2003) ..... 14

*Greenlee County, Ariz. v. United States*, 487 F.3d 871 (Fed. Cir.  
2007)..... 18

*In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011)..... 15

*In re Patent No. 7,061,177*, 2006 WL 4559506 (Com’r Pat.  
2006)..... 14

*Ins. Co. of the West v. United States*, 243 F.3d 1367 (Fed. Cir.  
2001)..... 6

*Merrick v. United States*, 846 F.2d 725 (Fed. Cir. 1988)..... 12

*Norman v. United States*, 429 F.3d 1081 (Fed. Cir. 2005)..... 7, 8

*RHI Holdings, Inc. v. United States*, 142 F.3d 1459 (Fed. Cir.  
1998)..... 6

*Sheridan v. United States*, 120 Fed. Cl. 127 (2015)..... 3

*Taylor v. United States Patent and Trademark Office*, 385 Fed.  
Appx. 980 (Fed. Cir. 2010)..... 13

*Toon v. United States*, 96 Fed. Cl. 288 (2010) ..... 12

*United States v. Bormes*, 133 S. Ct. 12 (2012) ..... 13

*United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983) ..... 11

*United States v. Mitchell*, 463 U.S. 206 (1983)..... 11

*United States v. Salerno*, 481 U.S. 739 (1987)..... 16  
*Walton v. United States*, 213 Ct. Cl. 755 (1977). ..... 11  
*Wilson ex rel Estate of Wilson v. United States*, 405 F.3d 1002  
(Fed. Cir. 2005)..... 13

**STATUTES**

28 U.S.C. § 1491(a)(1)..... 7  
35 U.S.C. § 131..... 16  
35 U.S.C. § 132(a) ..... 11, 15  
35 U.S.C. § 42(d)..... 13

**REGULATIONS**

37 C.F.R. § 1.26..... 13  
37 C.F.R. § 1.104(a)(2)..... 11, 16  
37 C.F.R. § 1.17..... 11

**RULES**

RCFC 12(b)(1) ..... 3  
RCFC 12(b)(6) ..... 14  
RCFC 9(k)..... 12  
RCFC 9(n)..... 5

### **QUESTIONS PRESENTED**

1. Whether the Court lacks subject matter jurisdiction over the causes of action pleaded in the First Amended Complaint.
2. Whether plaintiffs' assertions that they were harmed by the Sensitive Application Warning System ("SAWS") program fail to state a claim upon which relief can be granted.

### **STATEMENT OF THE CASE**

#### **I. Nature Of The Case**

Plaintiff "eVideo Owners" purports to be the assignee of two patent applications filed with the United States Patent and Trademark Office ("USPTO")—U.S. Patent Application Nos. 09/840,868 and 13/333,840. *See* First Amended Compl. ("Compl."), Docket No. 10 ¶¶ 1, 17. Plaintiff Mauro DiDomenico is the alleged inventor for both applications. *See id.* ¶¶ 2, 18. Plaintiff Douglas Buerger purports to be the assignee of U.S. Patent Application No. 13/602,835. *Id.* ¶¶ 4, 19. Plaintiff Craig Linden purports to be the assignee of U.S. Patent Application Nos. 09/856,228, 10/469,800, and 12/172,993. *Id.* ¶¶ 5, 20. Plaintiff Realvirt, LLC purports to be the assignee of U.S. Patent Application Nos. 07/773,161 and 13/368,316. *Id.* ¶¶ 6, 21. Plaintiff Paul Barous purports to be the assignee of U.S. Patent Application No. 10/397,778. *Id.* ¶¶ 7, 22.

Plaintiffs contend that they were harmed by the alleged inclusion of these patent applications in the SAWS program. *See id.* ¶¶ 15, 46, 50, 54, 58. Plaintiffs acknowledge, however, that they are speculating that these applications were subject to review under the SAWS program, that such review would have delayed the examination process, and that such delay caused them financial harm in the form of additional fees paid to the USPTO and to their attorneys. *Id.* Based on these speculations, plaintiffs

seek damages in the amount of any fees paid to the USPTO and to their attorneys after the applications were designated under the SAWS program, along with pre-judgment and post-judgment interest and reasonable costs, expenses and attorneys' fees. *See id.*, Prayer for Relief.

## **II. Statement of Facts**

The SAWS program was an internal USPTO effort to increase the quality of issued patents. *See* United States Patent and Trademark Office, *Sensitive Application Warning System* (Mar. 2, 2015), [www.uspto.gov/patent/initiatives/patent-application-initiatives/sensitive-application-warning-system](http://www.uspto.gov/patent/initiatives/patent-application-initiatives/sensitive-application-warning-system) (accessed August 11, 2015) (hereinafter "SAWS Initiative"). Under the program, applications that could potentially be of special interest would be flagged for an additional internal quality assurance check. *Id.* Applications that were flagged under the program would undergo an additional internal quality assurance check, but would otherwise undergo the same examination procedures as other patent applications and would be held to the same substantive patentability standards.<sup>1</sup> *Id.* Only a small number of applications fell within the purview of the SAWS program, typically around 0.04% of pending applications in an average month. *Id.*

In early 2015, the USPTO conducted a review of the SAWS program. *See* SAWS

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<sup>1</sup> As explained by Nominee (now confirmed) for Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office Michelle K. Lee to the Senate, "[p]ublicly identifying which applications have undergone review under this [the SAWS] program may color those applications in the public's eye and lead to unjustified inferences as to the issued patent's strength or weakness." *See* Responses to Questions for the Record for Michelle K. Lee, Nominee for Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office (USPTO) Submitted on February 5, 2015, Senator Hatch p. 2, available at <http://www.judiciary.senate.gov/imo/media/doc/Lee%20QFR%202-5-15.pdf> (accessed Aug. 11, 2015). In keeping with this policy, the United States does not confirm or deny whether the applications cited in the First Amended Complaint were subject to SAWS review.

Initiative. Due to a number of factors, including a change in the rules governing publication of patent applications, the USPTO determined that the program provided only minimal benefit. *Id.* Therefore, the USPTO retired the program as of March 2, 2015, explaining that “[a]ny applications currently in this program will now proceed through prosecution absent any additional SAWS-related processing.” *Id.*

## **ARGUMENT**

### **I. Plaintiffs’ First Amended Complaint Should be Dismissed for Lack of Subject Matter Jurisdiction**

In accordance with RCFC 12(b)(1), subject-matter jurisdiction “must be established by the plaintiff at the outset of any case before the Court proceeds to the merits of the action.” *Sheridan v. United States*, 120 Fed. Cl. 127, 129 (2015) (citing *Hardie v. United States*, 367 F.3d 1288, 1290 (Fed. Cir. 2004)). When ruling on a motion to dismiss for lack of subject matter jurisdiction, the Court ordinarily accepts as true all of the non-movant’s factual allegations. *Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 676 (2007). When evidence is submitted challenging jurisdictional facts, however, a court may consider that evidence. *Id.* Further, where a complaint’s allegations are frivolous, the court may find subject matter jurisdiction is lacking. *Id.* at 676 n.17. Here, the factual allegations contained in the First Amended Complaint taken alone fail to demonstrate that plaintiffs’ claims fall within the subject matter jurisdiction of this Court. Further, when viewed in light of the additional evidence discussed below, it is clear that the Court lacks subject matter jurisdiction.

#### **A. Plaintiffs lack standing to bring suit**

Plaintiffs “eVideo Owners” and Mauro DiDomenico have failed to demonstrate that they have standing to bring this action. “As part of its inquiry into subject matter

jurisdiction, a court must determine whether a plaintiff has standing to sue.” *Dourandish v. United States*, 120 Fed. Cl. 467, 472 (2015) (citations omitted), *appeal docketed*, No. 15-5091 (Fed. Cir. June 2, 2015). “To establish standing, a party seeking to invoke federal court jurisdiction must demonstrate: (1) an actual or imminent ‘injury in fact’ that is concrete and particularized; (2) a causal connection between the injury and the challenged action of the defendant as opposed to that of an independent third party; and (3) a likelihood that the injury will be redressed by a favorable decision.” *Id.* (citations omitted).

Here, eVideo Owners’ and Mauro DiDomenico’s alleged injury stems from their purported ownership of U.S. Patent Application Nos. 09/840,868 and 13/333,840. According to the First Amended Complaint, Plaintiff “eVideo Owners” is the “current owner[] of the ownership rights in the eVideo applications, forming an unincorporated entity doing business in the United States as ‘eVideo.’” Compl. ¶ 17. Plaintiff “eVideo Owners” purports to be the successor to eVideo Inc., an earlier assignee of the eVideo applications. *Id.* Plaintiff Mauro DiDomenico purports to be an owner within the group of “eVideo Owners.” Compl. ¶ 18.

USPTO records belie plaintiffs’ contention: the assignment record for U.S. Patent Application No. 09/840,868 and the prosecution history for U.S. Patent Application No. 13/333,840 identify eVideo Inc. as the sole assignee, not “eVideo Owners.” Excerpts From File History of U.S. Patent Application No. 13/333,840, attached as Ex. A (including 37 C.F.R. 3.73(b) statement assigning interest in application to “EVIDEO Incorporated”); Assignment Record for U.S. Patent Application No. 09,840,868, attached as Ex. B. Despite the fact that eVideo Incorporated appears to have been dissolved as a

corporation in 2009 (Corporate Status Indicating Short Form Dissolution in 2009, attached as Ex. C), prosecution of U.S. Patent Application No. 13/333,840 has continued in the name of eVideo Incorporated—in fact, a power of attorney was executed and filed for U.S. Patent Application No. 13/333,840 on behalf of eVideo Incorporated as recently as November 14, 2013. Ex A (Power of Attorney). Plaintiffs have not provided any evidence that plaintiff “eVideo Owners” is the current assignee for these patent applications rather than eVideo, Inc. Further, proof that “eVideo Owners” is merely the assignee of the patent applications at issue would not necessarily establish standing for the claims raised in the First Amended Complaint because legal claims that “eVideo Inc.” has, or may have had, were not necessarily transferred to “eVideo Owners” with any such assignment of the patent applications. Because plaintiffs “eVideo Owners” and Mauro DiDomenico have not demonstrated that they are the rightful successors in interest to any legal claims that “eVideo Inc.” has, or may have had, these plaintiffs have failed to demonstrate an injury.<sup>2</sup>

Further, for the reasons explained in Argument Section I.B.1, *infra*, all plaintiffs have failed to demonstrate that their alleged injuries have a causal connection to the complained-of acts of the USPTO. As a result, all plaintiffs lack standing and the Court lacks subject matter jurisdiction over their claims.

**B. Plaintiffs’ claims do not fall within any of the narrow categories for which sovereign immunity has been waived**

The Court lacks subject matter jurisdiction over all plaintiffs’ claims because the

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<sup>2</sup> Notably, Plaintiffs’ complaint also fails to comply with RCFC 9(n), which requires “[i]n pleading a claim or part of a claim, ownership of which was acquired by assignment or other transfer, a party must include a statement describing when and upon what consideration the assignment or transfer was made.” RCFC 9(n).

United States has not waived its sovereign immunity. The United States is immune from suit unless it has waived its immunity. *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1372 (Fed. Cir. 2001). Sovereign immunity is a jurisdictional bar if the United States has not consented to be sued on a particular claim. *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998). The plaintiffs bear the burden of demonstrating a waiver of immunity. *Booth v. United States*, 990 F.2d 617, 619 (Fed. Cir. 1993). Plaintiffs have failed to do so.

Plaintiffs contend that they “bring this action” pursuant to 28 U.S.C. §§ 1491(a)(1) and (2) (“The Tucker Act”), averring that their claims are “founded” upon the Constitution, 35 U.S.C. § 132(a), 37 C.F.R. § 1.104(a)(2) and 37 C.F.R. § 1.17. Compl. p. 1, ¶ 16. Plaintiffs argue that the SAWS program “unconstitutionally” burdened and penalized the plaintiffs’ fundamental rights and protected interests, in violation of the Fifth Amendment’s guarantee of substantive due process. Compl. ¶ 73. Plaintiffs further argue that 35 U.S.C. § 132(a), 37 C.F.R. § 1.104(a)(2) and 37 C.F.R. § 1.17 create an implied contract that entitles plaintiffs to a monetary award of a return of their official fees and reasonable attorney fees paid after the applications had been designated under or associated with the SAWS program. Compl. ¶ 74. Taken as true for purposes of this motion, the allegations in the First Amended Complaint do not establish a cause of action for which the United States has waived sovereign immunity under the Tucker Act. Rather, because the cited regulations, statutory provisions, and the Fifth Amendment’s substantive due process clause do not mandate monetary compensation, and 35 U.S.C. § 132(a), 37 C.F.R. § 1.104(a)(2) and 37 C.F.R. § 1.17 do not create an implied contract, the Court does not have subject matter jurisdiction over plaintiffs’ claims.

The Tucker Act waives sovereign immunity for actions for monetary relief for claims “founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). To fall within the Tucker Act’s waiver of sovereign immunity, the plaintiff must (1) sue for money the Government improperly exacted or retained; (2) identify a separate source of substantive law that creates the right to money damages; or (3) allege the breach of an express or implied contract. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005); *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002, 1007 (1967) (abrogated in part on other grounds).

**1. Plaintiffs do not set forth a cognizable exaction claim**

Plaintiffs’ First Amended Complaint fails to allege any facts demonstrating that the Government improperly exacted or retained money from plaintiffs. Where the plaintiff has paid money to the Government and seeks return of all or part of that sum, “the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.” *Eastport S.S. Corp.*, 372 F.2d at 1007; *see also Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). Plaintiffs’ claims for attorneys’ fees and filing fees fail to satisfy this requirement. Thus, plaintiffs fail to invoke the court’s jurisdiction under an illegal exaction theory.

As an initial matter, plaintiffs’ claim for attorneys’ fees paid during prosecution of the patent applications cannot be pursued under an exaction theory. To be sure, exaction claims can extend beyond payments made directly to the Government; indeed, exaction claims can be based on payments made to others at the direction of the government to

meet a governmental obligation. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573-74 (Fed. Cir. 1996). Plaintiffs provide no explanation, however, how payments made by plaintiffs to prosecution counsel were at the direction of the government to meet a governmental obligation—i.e., paying for an expense the government otherwise would have to bear. *Id.*

We turn next to the “official fees” for which reimbursement is sought by plaintiffs. Here, plaintiffs fail to allege any nexus between the payment of the “official fees” and the allegedly improper act of the Patent Office—designating the applications under or associating the applications with the SAWS program and failing to notify applicants of the alleged designation. As noted above, where the plaintiff has paid money to the Government and seeks return of all or part of that sum, “the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.” *Eastport S.S. Corp.*, 372 F.2d at 1007; *Norman*, 429 F.3d at 1095. Moreover, there must be a direct causal relationship between the alleged illegal action and the exaction. *Norman*, 429 F.3d at 1096 (“The Normans argue that the 1991 Delineation had a direct or substantial effect on them, but they cannot reasonably maintain that it directly caused the actual ‘exaction’ alleged here . . . .”). Although causation (or nexus) is ordinarily a fact question that cannot be addressed in a motion to dismiss, see *Chevron U.S.A., Inc. v. United States*, 71 Fed. Cl. 236, 278 (2006) (denying motion to dismiss because the factual allegations in the complaint must be accepted as true), the alleged facts, presumed to be true, fail to establish any nexus.

Plaintiffs do not contend that the wrong fees were charged, or the properly applied

fees themselves were unconstitutional, in contravention of statute or regulation, or otherwise improper; rather, plaintiffs aver that knowing of the alleged designation for SAWS review “might have been useful in aiding the applicant to judge the propriety of continuing the prosecution of the application.”<sup>3</sup> Compl. ¶¶ 27, 63. Thus, plaintiffs appear to contend that if they had known the applications were subject to SAWS review, they might have abandoned the applications before incurring additional fees. Notably, plaintiffs do not affirmatively represent that they would not have continued prosecution of the applications had they been aware that the applications were subject to SAWS review. In fact, the allegations in the First Amended Complaint would belie any such representations.

According to the First Amended Complaint, “news reports began to emerge in the media” of the existence of the SAWS program in or about early December 2014. Compl. ¶ 9. It is telling that plaintiffs have not alleged that any of the applications were abandoned between the when “news reports began to emerge in the media” of the existence of the SAWS program in or about early December 2014 and when the USPTO publicly retired the program in March 2015. This is true despite the fact that plaintiffs allegedly had “good faith belief[s]” their applications were subject to SAWS review. Compl. ¶¶ 15, 46, 50, 54, 58. Publicly available information confirms that two of the applications raised in the First Amended Complaint have been abandoned—U.S. Patent Application No. 09/840,868 and U.S. Patent Application No. 09/856,228.<sup>4</sup> U.S. Patent Application No. 09/840,868 was abandoned in July 2012, more than two years before the

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<sup>3</sup> As discussed in Argument Section II, *infra*, the notices provided in applications subject to SAWS review fully complied with 35 U.S.C. § 132(a) and 37 C.F.R. § 1.104(a)(2).

<sup>4</sup> There is no publicly available information on the status of Application No. 13/602,835.

earliest notice of the existence of the SAWS program pleaded in the First Amended Complaint. Notice of Abandonment, Ex. D. U.S. Patent Application No. 09/856,228 was abandoned in April of 2015, *after* the U.S.P.T.O. publicly announced that it had retired the SAWS program, and no applications would be subject to SAWS review moving forward. Notice of Abandonment, Ex. E. Thus, the plaintiffs' choices of whether or not to continue prosecution of the patent applications appear to have been completely unrelated to the alleged designation of those applications for SAWS. Consequently, the First Amended Complaint fails to identify any nexus between the fees incurred by plaintiffs during prosecution and the allegedly improper acts of the USPTO.

If the First Amended Complaint is understood to allege that the patent applications would not have been rejected, or objected to, and subject to additional examination and fees but for their inclusion in the SAWS program, such an allegation is baseless. As plaintiffs admit, the SAWS program was an internal review process for pending U.S. patent applications. Compl. ¶ 9. As explained above, SAWS review did not change substantive patentability standards. Rather, all patent applications are subject to the same substantive standards, regardless of whether or not they are subject to SAWS review. Thus, any rejections or required filing fees were unrelated to the alleged designation of the applications for SAWS review. The First Amended Complaint fails to establish any connection between plaintiffs' payment of fees and the allegedly improper actions of the USPTO. Thus, jurisdiction does not lie in a claim for illegal exaction.

**2. None of the provisions cited by plaintiffs are money mandating**

Similarly, jurisdiction does not lie as a result of the existence of money mandating provisions of the authorities cited by plaintiffs. Neither the Fifth Amendment's

substantive due process clause, nor the statute and regulations cited by plaintiffs, are money mandating. The Supreme Court has explained that “the claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.” *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) (citations and quotations omitted). The Fifth Amendment’s guarantee of substantive due process is not money mandating. *See United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (“Like the due process clause of the fifth amendment, the literal terms of the first amendment neither explicitly nor implicitly obligate the federal government to pay damages.”); *see also Walton v. United States*, 213 Ct. Cl. 755 (1977).

Like the Fifth Amendment’s substantive due process clause, the statutes and regulations cited by plaintiffs are not money mandating. Plaintiffs identify nothing in 35 U.S.C. § 132(a), 37 C.F.R. § 1.104(a)(2) and 37 C.F.R. § 1.17 that contemplate payments by the government. Rather, 35 U.S.C. § 132(a) and 37 C.F.R. § 1.104(a)(2) merely set forth notice requirements for rejections or objections made during the examination process. *See* 35 U.S.C. § 132(a); 37 C.F.R. § 1.104(a)(2). 37 C.F.R. § 1.17 merely sets forth fees that must be paid by an applicant—not the United States—during examination of patent applications. 37 C.F.R. § 1.17. Nothing in these provisions can fairly be interpreted as mandating compensation by the United States. As a result, jurisdiction does not lie under a money-mandating provision of the constitution, statute or regulation.

### **3. No implied contract is created by the cited provisions**

Lastly, 35 U.S.C. § 132(a), 37 C.F.R. § 1.104(a)(2) and 37 C.F.R. § 1.17 do not create an implied contract that is enforceable under the Tucker Act. Statutes and regulations do not create contractual relationships between individuals and the

government. *Merrick v. United States*, 846 F.2d 725, 726 (Fed. Cir. 1988) (“The United States cannot be contractually bound merely by invoking the cited statute and regulation.”). “The Supreme Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.” *Brooks v. Dunlop Manufacturing, Inc.*, 702 F.3d 624, 630 (Fed. Cir. 2012) (citations and quotations omitted). “[T]he party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.” *Id.* at 630-31 (alteration in original) (citations and quotations omitted).

Although plaintiffs bear the burden to establish jurisdiction, plaintiffs fail to identify any language creating a contractual obligation. *Toon v. United States*, 96 Fed. Cl. 288, 295, 299 (2010); *see also Baker v. United States*, 50 Fed. Cl. 483, 490 (2001). “In order to invoke jurisdiction based upon an express or implied-in-fact contract, plaintiff[s] must allege all the requisite elements of a contract with the United States, which consist of ‘a mutual intent to contract including offer, acceptance, and consideration.’”<sup>5</sup> *Id.* at 299 (internal citations omitted). Failure to do so warrants dismissal. *Id.* As a result, jurisdiction does not lie under a contract theory.<sup>6</sup>

Based on the foregoing, it is clear that the allegations in plaintiffs’ First Amended

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<sup>5</sup> Similarly, RCFC 9(k) requires a party pleading a claim founded on a contract to identify the substantive provisions of the contract on which the party relies. RCFC 9(k).

<sup>6</sup> To the extent that the complaint could be read to allege a contract implied-in-law, the Court lacks jurisdiction over such claims. *See, e.g., Toon v. United States*, 96 Fed. Cl. at 299 & n.12 (noting the Court has jurisdiction under the Tucker Act over claims founded upon express contracts and contracts implied-in-fact, but not those implied-in-law).

Complaint do not establish a cause of action for which the United States has waived sovereign immunity under the Tucker Act. As a result, plaintiffs' claims do not fall within the subject matter jurisdiction of this Court.

**C. The Tucker Act is displaced by the statutory scheme for refund of fees paid**

The Court also lacks subject matter jurisdiction because the administration of fee refunds is entrusted to the USPTO. The Federal Circuit has explained that “an illegal exaction claim may not be asserted in the Court of Federal Claims under the Tucker Act when ‘Congress has expressly placed jurisdiction elsewhere,’” and that “a specific and comprehensive scheme for administrative and judicial review” preempts Tucker Act jurisdiction. *Wilson ex rel Estate of Wilson v. United States*, 405 F.3d 1002, 1009 (Fed. Cir. 2005) (citations and quotations omitted). “[W]hen a law assertedly imposing monetary liability on the United States contains its own judicial remedies . . . the specific remedial scheme establishes the exclusive framework for [liability],” and “the Tucker Act is displaced.” *United States v. Bormes*, 133 S. Ct. 12, 18 (2012) (holding that FCRA’s “self-executing remedial scheme supersedes the gap-filling role of the Tucker Act”). Such a statutory and regulatory scheme already exists, and the responsibility for administration lies with the USPTO.

35 U.S.C. § 42(d) provides that fees can be returned to patent applicants if “paid by mistake” or in “excess of that required.” 35 U.S.C. § 42(d). 37 C.F.R. § 1.26 provides the scheme and mechanism for requesting a refund of fees. 37 C.F.R. § 1.26. Decisions on fee disputes are reviewed pursuant to the Administrative Procedure Act (“APA”). *See, e.g., Taylor v. United States Patent and Trademark Office*, 385 Fed. Appx. 980 (Fed. Cir. 2010); *see also In re Patent No. 7,061,177*, 2006 WL 4559506

(Com'r Pat. 2006) (USPTO decision denying a request for refund of fees paid and indicating the "decision may be regarded as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review."). The Tucker Act is displaced by these statutory and regulatory provisions. As a result, the Court does not have subject matter jurisdiction over claims that must be raised with the USPTO and subject to review pursuant to APA procedures.

**II. Plaintiffs' First Amended Complaint Alternatively Should be Dismissed for Failure to State a Claim**

The Court should also dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted because the mere existence of an internal review step does not violate any law or the Constitution. A motion to dismiss pursuant to RCFC 12(b)(6) should be granted when a plaintiff alleges facts that do not entitle it to a legal remedy. RCFC 12(b)(6); *see Godwin v. United States*, 338 F.3d 1374, 1377-78 (Fed. Cir. 2003). Even if all facts alleged in their First Amended Complaint are taken as true, plaintiffs have failed to provide any grounds of legal entitlement, as they have not identified any law, regulation, or policy that was violated by the USPTO through implementation of the SAWS program.

Plaintiffs recognize that the SAWS program was "a purely internal review of some pending U.S. patent applications." Compl. ¶ 9. Plaintiffs do not allege, nor could they, that applications subject to SAWS review were held to more stringent patentability standards. While the First Amended Complaint points to several authorities that were allegedly violated by the USPTO, as discussed below, none of these authorities would entitle plaintiffs to relief.

First, plaintiffs allege that the USPTO failed to comply with 35 U.S.C. § 132(a).

*See, e.g.*, Compl. ¶ 64. This provision requires the USPTO to notify patent applicants of the reasons for the rejection, objection, or requirement, and to provide “information and references as may be useful in judging of the propriety of continuing the prosecution of his application.” 35 U.S.C. § 132(a). This notice requirement “‘is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.’” *In re Jung*, 637 F.3d 1356, 1362 (Fed. Cir. 2011) (quoting *Chester v. Miller*, 906 F.2d 1574, 1578 (Fed. Cir. 1990)). The SAWS program had no impact on the USPTO’s compliance with this provision. As noted above, patent applications subject to SAWS review were subject to the same patentability standards as any other application, and the same notice requirements under § 132(a). There was no special information relating to SAWS that would be relevant to the reason for rejecting a claim or to the propriety of continuing the prosecution.<sup>7</sup> An applicant whose application had been flagged under the SAWS program would be entitled to, and would receive, the same information regarding a claim rejection as if the application had not been flagged, as the SAWS designation was irrelevant to the substantive basis for rejection. Further, addressing (or failing to address) SAWS status would have no impact on an applicants’ attempts to traverse any rejections, objections, or requirements.

Second, plaintiffs allege that the USPTO failed to comply with 37 C.F.R. § 1.104(a)(2). *See, e.g.*, Compl. ¶ 64. This rule largely mirrors 35 U.S.C. § 132(a). It requires that the patent applicant be notified of the examiner’s actions, including “[t]he reasons for any adverse action or any objection or requirement . . . and such information or references . . . as may be useful in aiding the applicant . . . to judge the propriety of

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<sup>7</sup> As noted above, the alleged inclusion of plaintiffs’ applications in SAWS appears to have had no impact on plaintiffs’ actions.

continuing the prosecution.” 37 C.F.R. § 1.104(a)(2). As with 35 U.S.C. § 132(a), plaintiffs cannot show that the mere existence of an internal review step is somehow inconsistent with this provision. Inclusion in the SAWS program would not change the basis for an adverse action or change any information or references relevant to an application.

Third, plaintiffs state that the SAWS program violated applicants’ substantive due process rights under the Fifth Amendment. *See, e.g.*, Compl. ¶ 73. However, plaintiffs do not and cannot point to any due process right that would be burdened by the existence of an internal review step for a patent application. The Supreme Court has explained that substantive due process “prevents the government from engaging in conduct that ‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered liberty.’” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted) . Plaintiffs have failed to explain in their First Amended Complaint how the actions of the USPTO “shock[] the conscience” or interfere with any of plaintiffs’ fundamental rights. Plaintiffs’ mere conclusory allegations are insufficient to meet the pleading requirements to survive a motion to dismiss. *Aschcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009).

Patent applicants do not have a due process right in avoiding internal USPTO quality review procedures. Applicants also do not have a due process right in avoiding rejection if any deficiencies in their applications are discovered through that quality review process. To the contrary, the USPTO has a statutory obligation to issue a patent only when, after examination, “it appears that the applicant is entitled to a patent under the law.” 35 U.S.C. § 131; *see also Blacklight Power, Inc. v. Rogan*, 295 F.3d 1269, 1273 (Fed. Cir. 2002) (noting the obligation of USPTO officials “to assure that patents

are properly examined, and valid”). To the extent that any internal quality review process revealed a previously unidentified basis for disallowing a patent claim, such revelation would only go to show that the program was providing effective quality review. The substantive basis for rejection would still be provided to the applicant consistent with the notice requirements of 35 U.S.C. § 132(a) and 37 C.F.R. § 1.104(a)(2), the same as any other applications.

Finally, as addressed above, plaintiffs misguidedly argue that there is an “implied contract under 35 U.S.C. § 132(a), 37 C.F.R. § 1.104(a)(2) and 37 C.F.R. § 1.17” that entitles them to a monetary award. Compl. ¶ 74. These notice and fee provisions apply generally to patent applicants and they do not create a contract. As addressed above, nothing in these provisions creates a contract. Instead, they merely address provision of certain notices to applicants. Consequently there is no contract between plaintiffs and the government and no breach of contract. Moreover, as indicated above, the existence of an internal review step plainly does not violate the notice requirements in 35 U.S.C. § 132(a) and 37 C.F.R. § 1.104(a)(2). For these reasons, plaintiffs’ contractual theory of entitlement also fails.

Because plaintiffs have not shown any violation of law, or other basis for legal entitlement, by the mere existence of an internal patent application review step, their First Amended Complaint must be dismissed for failure to state a claim upon which relief can be granted.<sup>8</sup>

---

<sup>8</sup> Plaintiffs presumably recognize that the existence of an internal review step would not itself be challengeable directly, as there is no final agency action that is judicially reviewable under the APA or other law. *See, e.g., Automated Merchandising Sys., Inc. v. Lee*, 782 F.3d 1376, 1380 (Fed. Cir. 2015) (noting judicial review is available under the APA only where an agency action is made reviewable by statute or is a final agency

**CONCLUSION**

For the foregoing reasons, defendant respectfully requests that the Court dismiss the plaintiffs' First Amended Complaint.<sup>9</sup>

Respectfully submitted,

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General

JOHN FARGO  
Director, Intellectual Property Staff

**/s/ David A. Foley, Jr.**  
DAVID A. FOLEY, JR.  
Commercial Litigation Branch  
Civil Division  
Department of Justice  
Washington, DC 20530  
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Facsimile: (202) 307-0345  
Email: david.a.foley@usdoj.gov

August 14, 2015

COUNSEL FOR THE UNITED STATES

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action). For the reasons discussed above, plaintiffs' attempt to circumvent the unavailability of a direct challenge to the SAWS program by attempting to frame their allegations as claims for compensation under the Tucker Act is also unavailing.<sup>9</sup> In their complaint, plaintiffs request that the Court certify a class consisting of "Applicants and/or their Assignees of a United States utility patent application who, at any time, had one more [sic] of their patent application(s) designated under or associated with the S.A.W.S. program . . . ." Compl. ¶ 24. Plaintiffs' request for class certification is moot, as the complaint must be dismissed for the reasons described above. *See, e.g., Greenlee County, Ariz. v. United States*, 487 F.3d 871, 880-81 (Fed. Cir. 2007).

**EXHIBIT A**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re the Application of:

Confirmation No: 2705

Mauro DiDomenico

Art Unit: 2421

Application No.: 13/333,840

Examiner: Salce, Jason P.

Filed: 12/21/2011

Attorney Dkt. No.: 12296-0002

For: SYSTEM AND METHOD FOR DELIVERING VIDEO ON DEMAND

**SUBMISSION OF REVOCATION OF POWER OF ATTORNEY WITH A NEW  
POWER OF ATTORNEY AND STATEMENT UNDER 37 CFR 3.73(b)**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

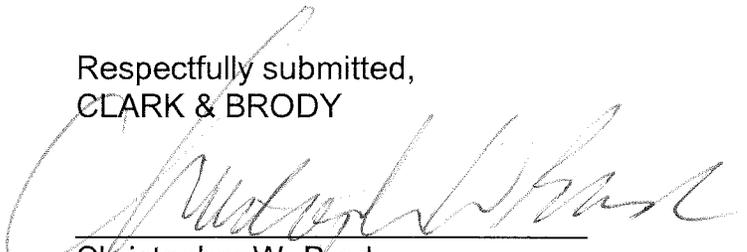
November 20, 2013

Sir:

Applicants respectfully submits a Revocation of Power of Attorney with a new Power of Attorney and Change of Correspondence Address with the Statement under 37 CFR 3.73(b). Entry is respectfully requested.

Applicants submit that there is no fee required for this submission, however, please charge any fee deficiency or credit any overpayment to Deposit Account No. 50-1088.

Respectfully submitted,  
CLARK & BRODY



\_\_\_\_\_  
Christopher W. Brody  
Registration No. 33,613

**Customer No. 22902**  
1700 Diagonal Road Suite 510  
Alexandria VA 22314  
Telephone: 202-835-1111  
Facsimile: 703-504-9415

PTO/SB/81 (01-09)

Approved for use through 11/30/2011. OMB 0651-0035  
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

<b>POWER OF ATTORNEY OR REVOCATION OF POWER OF ATTORNEY WITH A NEW POWER OF ATTORNEY AND CHANGE OF CORRESPONDENCE ADDRESS</b>	<b>Application Number</b>	13/333,840
	<b>Filing Date</b>	2011-12-21
	<b>First Named Inventor</b>	Mauro DiDomenico
	<b>Title</b>	SYSTEM AND METHOD FOR DELIVERING VIDEO ON D
	<b>Art Unit</b>	2421
	<b>Examiner Name</b>	Salce, Jason P.
	<b>Attorney Docket Number</b>	

I hereby revoke all previous powers of attorney given in the above-identified application.

A Power of Attorney is submitted herewith.

OR

I hereby appoint Practitioner(s) associated with the following Customer Number as my/our attorney(s) or agent(s) to prosecute the application identified above, and to transact all business in the United States Patent and Trademark Office connected therewith:

22902

OR

I hereby appoint Practitioner(s) named below as my/our attorney(s) or agent(s) to prosecute the application identified above, and to transact all business in the United States Patent and Trademark Office connected therewith:

Practitioner(s) Name	Registration Number
Christopher W. Brody	33,613
Conrad J. Clark	30,340

Please recognize or change the correspondence address for the above-identified application to:

The address associated with the above-mentioned Customer Number.

OR

The address associated with Customer Number:

22902

OR

<input checked="" type="checkbox"/> Firm or Individual Name	Clark & Brody		
Address	1700 Diagonal Road, Suite 510		
City	Alexandria	State	VA
		Zip	22314
Country	USA		
Telephone	202-835-1111	Email	cbrody@clarkbrody.com

I am the:

Applicant/Inventor.

OR

Assignee of record of the entire interest. See 37 CFR 3.71.  
*Statement under 37 CFR 3.73(b) (Form PTO/SB/96) submitted herewith or filed on \_\_\_\_\_*

**SIGNATURE of Applicant or Assignee of Record**

Signature		Date	11/14/13
Name	Mauro DiDomenico	Telephone	239-947-5694
Title and Company	eVideo Incorporated, Vice President		

**NOTE:** Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below\*.

\*Total of 1 forms are submitted.

This collection of information is required by 37 CFR 1.31, 1.32 and 1.33. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 3 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

PTO/SB/96 (04-07)

Approved for use through 09/30/2007. OMB 0851-0031  
U.S. Patent and Trademark Office: U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

**STATEMENT UNDER 37 CFR 3.73(b)**

Applicant/Patent Owner: EVIDEO Incorporated

Application No./Patent No.: 09/840,868 Filed/Issue Date: 04/25/2001

Entitled: SYSTEM AND METHOD FOR DELIVERING VIDEO ON DEMAND

EVIDEO Incorporated, a corporation  
(Name of Assignee) (Type of Assignee, e.g., corporation, partnership, university, government agency, etc.)

states that it is:

- 1.  the assignee of the entire right, title, and interest; or
- 2.  an assignee of less than the entire right, title and interest  
(The extent (by percentage) of its ownership interest is \_\_\_\_\_ %)

in the patent application/patent identified above by virtue of either:

A.  An assignment from the inventor(s) of the patent application/patent identified above. The assignment was recorded in the United States Patent and Trademark Office at Reel 011755, Frame 0515, or for which a copy thereof is attached.

OR

B.  A chain of title from the inventor(s), of the patent application/patent identified above, to the current assignee as follows:

- 1. From: \_\_\_\_\_ To: \_\_\_\_\_  
The document was recorded in the United States Patent and Trademark Office at Reel \_\_\_\_\_, Frame \_\_\_\_\_, or for which a copy thereof is attached.
- 2. From: \_\_\_\_\_ To: \_\_\_\_\_  
The document was recorded in the United States Patent and Trademark Office at Reel \_\_\_\_\_, Frame \_\_\_\_\_, or for which a copy thereof is attached.
- 3. From: \_\_\_\_\_ To: \_\_\_\_\_  
The document was recorded in the United States Patent and Trademark Office at Reel \_\_\_\_\_, Frame \_\_\_\_\_, or for which a copy thereof is attached.

Additional documents in the chain of title are listed on a supplemental sheet.

As required by 37 CFR 3.73(b)(1)(i), the documentary evidence of the chain of title from the original owner to the assignee was, or concurrently is being, submitted for recordation pursuant to 37 CFR 3.11.

[NOTE: A separate copy (i.e., a true copy of the original assignment document(s)) must be submitted to Assignment Division in accordance with 37 CFR Part 3, to record the assignment in the records of the USPTO. See MPEP 302.08]

The undersigned (whose title is supplied below) is authorized to act on behalf of the assignee.

Alan Sherman

4/24/2007

Signature  
Alan Sherman

Date  
301-299-3300

Printed or Typed Name

Telephone Number

President  
Title

This collection of information is required by 37 CFR 3.73(b). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

**Electronic Acknowledgement Receipt**

<b>EFS ID:</b>	17455587
<b>Application Number:</b>	13333840
<b>International Application Number:</b>	
<b>Confirmation Number:</b>	2705
<b>Title of Invention:</b>	SYSTEM AND METHOD FOR DELIVERING VIDEO ON DEMAND
<b>First Named Inventor/Applicant Name:</b>	Mauro Didomenico
<b>Customer Number:</b>	30671
<b>Filer:</b>	Christopher W. Brody/tara lim
<b>Filer Authorized By:</b>	Christopher W. Brody
<b>Attorney Docket Number:</b>	P3431US01
<b>Receipt Date:</b>	20-NOV-2013
<b>Filing Date:</b>	21-DEC-2011
<b>Time Stamp:</b>	15:05:53
<b>Application Type:</b>	Utility under 35 USC 111(a)

**Payment information:**

Submitted with Payment	no
------------------------	----

**File Listing:**

Document Number	Document Description	File Name	File Size(Bytes)/ Message Digest	Multi Part /.zip	Pages (if appl.)
1		rev1.pdf	285389 f9d5007aa086a43f4bd9baf32c3fe34dafef5e33	yes	3

Multipart Description/PDF files in .zip description

Document Description	Start	End
Miscellaneous Incoming Letter	1	2
Miscellaneous Incoming Letter	3	3

**Warnings:****Information:****Total Files Size (in bytes):**

285389

**This Acknowledgement Receipt evidences receipt on the noted date by the USPTO of the indicated documents, characterized by the applicant, and including page counts, where applicable. It serves as evidence of receipt similar to a Post Card, as described in MPEP 503.**

**New Applications Under 35 U.S.C. 111**

**If a new application is being filed and the application includes the necessary components for a filing date (see 37 CFR 1.53(b)-(d) and MPEP 506), a Filing Receipt (37 CFR 1.54) will be issued in due course and the date shown on this Acknowledgement Receipt will establish the filing date of the application.**

**National Stage of an International Application under 35 U.S.C. 371**

**If a timely submission to enter the national stage of an international application is compliant with the conditions of 35 U.S.C. 371 and other applicable requirements a Form PCT/DO/EO/903 indicating acceptance of the application as a national stage submission under 35 U.S.C. 371 will be issued in addition to the Filing Receipt, in due course.**

**New International Application Filed with the USPTO as a Receiving Office**

**If a new international application is being filed and the international application includes the necessary components for an international filing date (see PCT Article 11 and MPEP 1810), a Notification of the International Application Number and of the International Filing Date (Form PCT/RO/105) will be issued in due course, subject to prescriptions concerning national security, and the date shown on this Acknowledgement Receipt will establish the international filing date of the application.**

**EXHIBIT B**

09/840,868

System and method for delivering video on demand

01002-1001

08-10-  
2015::15:21:38**Patent Assignment Abstract of Title****Total Assignments: 1****Application #:** 09840868**Filing Dt:** 04/25/2001**Patent #:** NONE**Issue Dt:****PCT #:** NONE**Intl Reg #:****Publication #:** NONE**Pub Dt:****Inventor:** Mauro Didomenico**Title:** System and method for delivering video on demand**Assignment: 1****Reel/Frame:** 011755 / 0515**Received:** 05/07/2001**Recorded:** 04/25/2001**Mailed:** 07/18/2001**Pages:** 4**Conveyance:** ASSIGNMENT OF ASSIGNORS INTEREST (SEE DOCUMENT FOR DETAILS).**Assignor:** MAURO DIDOMENICO**Exec Dt:** 04/24/2001**Assignee:** EVIDEO INCORPORATED  
7922 TURNCREST DRIVE  
POTOMAC, MARYLAND 20854**Correspondent:** DITTHAVONG & CARLSON, P.C.  
STEPHEN C. CARLSON  
10507 BRADDOCK RD, STE A.  
FAIRFAX, VA 22032

Search Results as of: 08/10/2015 15:20:26 PM

**Disclaimer:****Assignment information on the assignment database reflects assignment documents that have been actually recorded.****If the assignment for a patent was not recorded, the name of the assignee on the patent application publication or patent may be different.****If you have any comments or questions concerning the data displayed, contact OPR / Assignments at 571-272-3350**[Close Window](#)

**EXHIBIT C**

**NOTE:**  
**1 OF 1 RECORD(S)**

**Date/Time of Results:**

08/10/2015 at 14:08

**File Number:**

3339453

**Name Type:**

Inactive Delaware Co.

**Stock Co Flag:**

Stock Company

**Name:**

EVIDEO INCOPORATED

**Kind:**

CorporationGeneral

**Status:**

Dissolved as of 01/30/2009

**Tax Type:**

A/R Filing Required

**Residency:**

Domestic

**State of Incorp:**

DE

**Country:**

US

**Original Country:****Incorp/Qualify Date:**

01/03/2001

**Foreign Incorporation Date:****Proclamation Date:****Renewal Date:****Expiration Date:****Bankruptcy Status:****Bankruptcy Date:****State:****Case Number:****Merged To:****State:****Federal ID:**

522288872

**Quarterly Filing?:****Last Annual Report:**

2009

**Registered Agent:**

9030670

**Registered Agent County:**

New Castle

AGENTS AND CORPORATIONS, INC.  
1201 ORANGE ST STE 600  
WILMINGTON, DE 19801**Phone:**  
302-575-0877**Fax:**  
302-575-1642**Stock Information:****Amendment Number:**

000

**Effective Date:**

01/03/2001

**Effective Time:**

09:00

Stock Seq Number	Description	Series	Class	Authorized	Par Value
1	COMMON			1,500	

**Filing History (last 5 filings):**

Seq Filing Num Year	Doc Code	Doc Code Desc	Doc Pages	Dom Pages	Doc Filing Date	Doc Filing Time	Doc Ef- fective Date	Doc Filing Status	Co Prev Name	Merger Type
1	2009	0391	Short Form Dissolution	1		01/30/2009 08:00	01/30/2009			
2	2001	0102S	Incorp Delaware Stock Co.	1		01/03/2001 09:00	01/03/2001			

**Tax Info:**

As Of Date: 08/10/2015

Tax Balance: .00

TaxYear	TotalFiling	TotalTaxes	TotalPenalty	TotalInterest	TotalOther	TotalPaid	TotalBalance
2009	25.00	75.00	.00	.00	.00	100.00	.00
2008	25.00	75.00	.00	.00	.00	100.00	.00
2007	25.00	35.00	.00	.00	.00	60.00	.00

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Your DPPA Permissible Use is: I have no permissible use

Your GLBA Permissible Use is: I have no permissible use



**EXHIBIT D**



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/840,868	04/25/2001	Mauro Didomenico	01002-1001	4911

30671 7590 07/30/2012  
DITTHAVONG MORI & STEINER, P.C.  
918 Prince Street  
Alexandria, VA 22314

EXAMINER

SALCE, JASON P

ART UNIT	PAPER NUMBER
2421	

2421

NOTIFICATION DATE	DELIVERY MODE
07/30/2012	ELECTRONIC

07/30/2012

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docket@dcpatent.com

<b>Notice of Abandonment</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	09/840,868	DIDOMENICO, MAURO
	<b>Examiner</b>	<b>Art Unit</b>
	JASON SALCE	2421

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--**

This application is abandoned in view of:

1.  Applicant's failure to timely file a proper reply to the Office letter mailed on 17 January 2012.
  - (a)  A reply was received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the period for reply (including a total extension of time of \_\_\_\_\_ month(s)) which expired on \_\_\_\_\_.
  - (b)  A proposed reply was received on \_\_\_\_\_, but it does not constitute a proper reply under 37 CFR 1.113 (a) to the final rejection. (A proper reply under 37 CFR 1.113 to a final rejection consists only of: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114).
  - (c)  A reply was received on \_\_\_\_\_ but it does not constitute a proper reply, or a bona fide attempt at a proper reply, to the non-final rejection. See 37 CFR 1.85(a) and 1.111. (See explanation in box 7 below).
  - (d)  No reply has been received.
  
2.  Applicant's failure to timely pay the required issue fee and publication fee, if applicable, within the statutory period of three months from the mailing date of the Notice of Allowance (PTOL-85).
  - (a)  The issue fee and publication fee, if applicable, was received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the statutory period for payment of the issue fee (and publication fee) set in the Notice of Allowance (PTOL-85).
  - (b)  The submitted fee of \$\_\_\_\_\_ is insufficient. A balance of \$\_\_\_\_\_ is due.  
The issue fee required by 37 CFR 1.18 is \$\_\_\_\_\_. The publication fee, if required by 37 CFR 1.18(d), is \$\_\_\_\_\_.
  - (c)  The issue fee and publication fee, if applicable, has not been received.
  
3.  Applicant's failure to timely file corrected drawings as required by, and within the three-month period set in, the Notice of Allowability (PTO-37).
  - (a)  Proposed corrected drawings were received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the period for reply.
  - (b)  No corrected drawings have been received.
  
4.  The letter of express abandonment which is signed by the attorney or agent of record, the assignee of the entire interest, or all of the applicants.
  
5.  The letter of express abandonment which is signed by an attorney or agent (acting in a representative capacity under 37 CFR 1.34(a)) upon the filing of a continuing application.
  
6.  The decision by the Board of Patent Appeals and Interference rendered on \_\_\_\_\_ and because the period for seeking court review of the decision has expired and there are no allowed claims.
  
7.  The reason(s) below:

7/24/2012

/Jason Salce/  
Primary Examiner, Art Unit 2421

Petitions to revive under 37 CFR 1.137(a) or (b), or requests to withdraw the holding of abandonment under 37 CFR 1.181, should be promptly filed to minimize any negative effects on patent term.

**EXHIBIT E**



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
 United States Patent and Trademark Office  
 Address: COMMISSIONER FOR PATENTS  
 P.O. Box 1450  
 Alexandria, Virginia 22313-1450  
 www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/856,228	05/16/2001	Craig L. Linden	LIN01-PT001	6674

120286 7590 04/21/2015  
 The Law Office of Alissa L. Saenz, LLC  
 151 4th Avenue  
 Phoenixville, PA 19460

EXAMINER
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SIMMS JR, JOHN ELLIOTT

ART UNIT	PAPER NUMBER
----------	--------------

3711

MAIL DATE	DELIVERY MODE
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04/21/2015

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Notice of Abandonment</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	09/856,228	LINDEN, CRAIG L.
	<b>Examiner</b>	<b>Art Unit</b>
	JOHN E. SIMMS JR	3711

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--**

This application is abandoned in view of:

1.  Applicant's failure to timely file a proper reply to the Office letter mailed on 02 October 2014.
  - (a)  A reply was received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the period for reply (including a total extension of time of \_\_\_\_\_ month(s)) which expired on \_\_\_\_\_.
  - (b)  A proposed reply was received on \_\_\_\_\_, but it does not constitute a proper reply under 37 CFR 1.113 to the final rejection. (A proper reply under 37 CFR 1.113 to a final rejection consists only of: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) if this is utility or plant application, a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. Note that RCEs are not permitted in design applications.)
  - (c)  A reply was received on \_\_\_\_\_ but it does not constitute a proper reply, or a bona fide attempt at a proper reply, to the non-final rejection. See 37 CFR 1.85(a) and 1.111. (See explanation in box 7 below).
  - (d)  No reply has been received.
  
2.  Applicant's failure to timely pay the required issue fee and publication fee, if applicable, within the statutory period of three months from the mailing date of the Notice of Allowance (PTOL-85).
  - (a)  The issue fee and publication fee, if applicable, was received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the statutory period for payment of the issue fee (and publication fee) set in the Notice of Allowance (PTOL-85).
  - (b)  The submitted fee of \$\_\_\_\_\_ is insufficient. A balance of \$\_\_\_\_\_ is due.  
The issue fee required by 37 CFR 1.18 is \$\_\_\_\_\_. The publication fee, if required by 37 CFR 1.18(d), is \$\_\_\_\_\_.
  - (c)  The issue fee and publication fee, if applicable, has not been received.
  
3.  Applicant's failure to timely file corrected drawings as required by, and within the three-month period set in, the Notice of Allowability (PTO-37).
  - (a)  Proposed corrected drawings were received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the period for reply.
  - (b)  No corrected drawings have been received.
  
4.  The letter of express abandonment which is signed by the attorney or agent of record or other party authorized under 37 CFR 1.33(b). See 37 CFR 1.138(b).
  
5.  The letter of express abandonment which is signed by an attorney or agent (acting in a representative capacity under 37 CFR 1.34) upon the filing of a continuing application.
  
6.  The decision by the Board of Patent Appeals and Interference rendered on \_\_\_\_\_ and because the period for seeking court review of the decision has expired and there are no allowed claims.
  
7.  The reason(s) below:

/JOHN E SIMMS JR/  
Examiner, Art Unit 3711

Petitions to revive under 37 CFR 1.137, or requests to withdraw the holding of abandonment under 37 CFR 1.181, should be promptly filed to minimize any negative effects on patent term.