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7 Attorneys for Plaintiff
XIMPLEWARE CORP.

8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 **XimpleWare Corp.**, a California
Corporation,

13 Plaintiff;

14 v.

15 **Versata Software, Inc., f/k/a Trilogy**
16 **Software, Inc.**, a Delaware corporation;
17 **Trilogy Development Group, Inc.**, a
California corporation; **Ameriprise**
18 **Financial, Inc.**, a Delaware corporation;
19 **Ameriprise Financial Services, Inc.**, a
Delaware corporation; **Aurea Software, Inc.**,
20 **a/k/a Aurea, Inc.**, a Delaware corporation;
21 **Pacific Life Insurance Company**, a
Nebraska corporation; **United HealthCare**
22 **Services, Inc.**, a Minnesota corporation;
23 **Metropolitan Life Insurance Company**, a
New York corporation; **The Prudential**
24 **Insurance Company of America**, a New
Jersey corporation; **Wellmark, Inc.**, an Iowa
corporation, **Waddell & Reed Financial,**
Inc., a Delaware corporation; and **Aviva USA**
Corporation, an Iowa corporation,

25 Defendants.

Case No. 5:13-cv-05161-PSG

SECOND AMENDED COMPLAINT FOR:

- 16 **(1) DIRECT PATENT INFRINGEMENT**
- 17 **(2) INDUCING PATENT INFRINGEMENT**
- 18 **(3) DECLARATORY RELIEF**

Jury Trial Demanded

1 Plaintiff XimpleWare Corp. alleges the following against Defendants Versata Software,
2 Inc., f/k/a Trilogy Software, Inc., Trilogy Development Group, Inc., and Aurea Software, Inc.
3 a/k/a Aurea, Inc. (collectively “Versata” or the “Versata Defendants”); against Ameriprise
4 Financial, Inc., Ameriprise Financial Services, Inc. (the “Ameriprise Defendants”); and against
5 Pacific Life Insurance Company, United HealthCare Services, Inc., Metropolitan Life Insurance
6 Company, The Prudential Insurance Company of America, Wellmark, Inc., Waddell & Reed
7 Financial, Inc., and Aviva USA Corporation (the “Customer Defendants”); and the Versata
8 Defendants, Ameriprise Defendants, and the Customer Defendants are collectively the
9 “Defendants”):

10 NATURE OF ACTION

11 1. This action involves claims of patent infringement under 35 U.S.C. § 271 *et seq.*
12 and declaratory relief, including but not limited to whether certain defendants have falsely
13 purported to grant patent licenses for Plaintiff’s patented computer software to each of the other
14 defendants, and whether all such defendants do not have and have never been granted any license
15 under any of the patents validly issued to and properly and exclusively owned by Plaintiff.

16 PARTIES

17 2. Plaintiff XimpleWare Corp. (“XimpleWare”) is a corporation organized under the
18 laws of, and registered to do business in, California, with its principal place of business in
19 Milpitas, California.

20 3. Plaintiff XimpleWare is the designer, developer, and distributor of advanced
21 computer software and, as an enterprise that practices its own patents, it has delivered to the
22 marketplace advanced computer software that provides enterprises, Fortune 5000 corporations,
23 firms, and other businesses with an advanced data processing solution for challenging data
24 processing problems. Plaintiff XimpleWare has a number of licensed customers including
25 Matrikon, Inc., Smith & Tinker, Inc., United Stationers Technology Services LLC, and Zoosk,
26 Inc.

1 4. Defendant Versata Software, Inc., f/k/a Trilogy Software, Inc. (“Versata”) is a
2 private corporation registered to do business in California, organized under the laws of Delaware,
3 with its principal place of business in Austin, Texas.

4 5. Defendant Trilogy Development Group, Inc. (“Trilogy”) is a corporation
5 organized under the laws of California, with its principal place of business in Austin, Texas. On
6 information and belief, Trilogy acquired Defendant Versata in or about February 2006, and
7 Trilogy is now the parent company of Versata and its subsidiaries.

8 6. Defendant Aurea Software, Inc. a/k/a Aurea, Inc. (“Aurea”) is a corporation
9 registered to do business in California, organized under the laws of Delaware with its principal
10 place of business in Austin, Texas. On information and belief, Aurea merged with Trilogy and
11 Versata in October, 2013.¹

12 7. Defendant Ameriprise Financial, Inc. is a corporation registered to do business in
13 California, organized under the laws of Delaware, with its principal place of business located in
14 Minneapolis, Minnesota. On information and belief, Ameriprise is a leading diversified financial
15 services provider, providing a range of financial planning products and is a customer of Versata
16 and Trilogy.

17 8. Defendant Ameriprise Financial Services, Inc. is a corporation registered to do
18 business in California, organized under the laws of Delaware, with its principal place of business
19 located in Minneapolis, Minnesota. On information and belief, Defendant Ameriprise Financial
20 Services, Inc. is a subsidiary of Defendant Ameriprise Financial, Inc. (together, Ameriprise
21 Financial, Inc. and Ameriprise Financial Services Inc. shall be referred to as “Ameriprise”).

22 9. Defendant Pacific Life Insurance Company (“Pacific Life”) is a Nebraska
23 corporation with its principal place of business in Newport Beach, California. On information
24 and belief, Pacific Life is a customer of Versata and Trilogy.

25 10. Defendant United HealthCare Services, Inc. (“UHS”) is a public corporation
26 registered to do business in California organized under the laws of Minnesota with its principal
27

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¹ <http://www.aurea.com/pressrelease/20131013>

1 place of business in Minnetonka, Minnesota. On information and belief, UHS is a diversified
2 managed health care company and a customer of Versata and Trilogy.

3 11. Defendant Metropolitan Life Insurance Company (“MetLife”) is a public
4 corporation registered to do business in California organized under the laws of New York with its
5 principal place of business in New York, New York. On information and belief, MetLife is a
6 global provider of insurance, annuities, and employment benefit programs and is a customer of
7 Versata and Trilogy.

8 12. Defendant The Prudential Insurance Company of America (“Prudential”) is a
9 public corporation registered to do business in California organized under the laws of New
10 Jersey with its principal place of business in Newark, New Jersey. On information and belief,
11 Prudential provides insurance and financial services and is a customer of Versata and Trilogy.

12 13. Defendant Wellmark, Inc. (“Wellmark”) is a corporation organized under the laws
13 of Iowa, operating under the fictitious names “Blue Cross and Blue Shield of Iowa” and
14 “Wellmark Blue Cross and Blue Shield.” Wellmark has its principal place of business in Des
15 Moines, Iowa. On information and belief, Wellmark is an insurance company and a customer of
16 Versata and Trilogy.

17 14. Defendant Waddell & Reed Financial, Inc. (“W&R”) is a public corporation
18 registered to do business in California, organized under the laws of Delaware with its principal
19 place of business in Overland Park, Kansas. On information and belief, W&R provides asset
20 management and financial planning services and is a customer of Versata and Trilogy.

21 15. Defendant Aviva USA Corporation (“Aviva”) is a company organized under the
22 laws of Iowa with its principal place of business in West Des Moines, Iowa. On information and
23 belief, Aviva is a subsidiary of Aviva, plc., a multinational insurance company headquartered in
24 London, United Kingdom, and is a customer of Versata and Trilogy.

25 16. Plaintiff is informed and believes and on that basis alleges (collectively
26 hereinafter “on information and belief”), that at all relevant times Trilogy was and is the
27 operating entity of, and has effective, if not actual, control over the business decisions made by
28 its subsidiaries, Versata and Aurea.

1 this action occurred in this District; the creation, infringement, and sale of software at issue
2 involved corporations registered to do business in California with California subsidiaries,
3 branches, and partners found in and doing business in this district; and at least one act of
4 infringement took place in this District.

5 6 **BACKGROUND FACTS**

7 **XML Parsing**

8 23. A parser is a piece of software that reads certain electronic files and makes the
9 information from those files available to applications and programming languages, acting as a
10 go-between as underlying code which can be written in any number of programming languages
11 and what a user sees when the program runs.

12 24. Extensible Markup Language (known as XML) is a set of rules for encoding
13 documents electronically. Known as a metalanguage, XML allows one to design a markup
14 language which is in turn used for the easy interchange of documents on the World Wide Web.
15 XML is itself a subset of a standard called SGML, and can be used to design a tagging scheme
16 that allows elements of a document to be marked according to their content rather than their
17 format.

18 25. Information stored in XML documents can be used more effectively when
19 parsed—read line by line or node by node to fetch pieces of information for the program to read
20 and translate. In essence, parsing is the act of analyzing a set of characters or data and then
21 determining, recognizing, deciphering, or acquiring the significant data and commands from a
22 sequence of programming code, and translating the code which allows the program to do the job
23 for which it was designed.

24 **Formation of XimpleWare**

25 26. In October 2002, Zhengyu “Jimmy” Zhang founded XimpleWare (the
26 “Company”) with a since-departed co-founder Hui Tian. Mr. Ying Shum (who has since passed
27 away) was an advisor to the Company during its early stages. Using experience gained from
28 fifteen years in the software engineering field, Mr. Zhang started XimpleWare with the goal of

1 achieving maximum efficiency for XML processing by using dedicated integrated circuits as a
2 system on a chip (SOC). Mr. Tian left the venture in 2003, and since then Mr. Zhang has handled
3 all creative and managerial responsibilities at XimpleWare.

4 27. Mr. Zhang chose the name “XimpleWare” for his new venture to evoke the
5 efficiency, speed, and simplicity with which his innovative source code parses XML. The name
6 also included the letters X-M-L, further identifying XimpleWare’s goal and product in the
7 marketplace.

8 28. Mr. Zhang began writing the XimpleWare Source code (the “Source Code”) in
9 2004, and has since put in over 10,000 work hours of computer programming into developing
10 and improving the XimpleWare product.

11 29. In its nascent stages, XimpleWare was funded entirely by seed money from
12 friends and family of the original founders, mostly from Mr. Zhang and his parents. Mr. Tian still
13 holds a minority stake in the company, but apart from Mr. Zhang, Mr. Tian, and Ying Shum,
14 there are no other owners, venture capital groups, angel investors, or parties with an interest in
15 XimpleWare.

16 **Open Source Software**

17 30. Open source software is software whose source code is available free of charge
18 for the public to use, copy, modify, sublicense, or distribute. While some developers choose to
19 provide their product entirely free of charge, many developers and companies—including large
20 public companies like Oracle and IBM—make use of open source licensing and its collaborative
21 nature to create or incorporate code into products that can be licensed for profit outside the open
22 source community.

23 31. By licensing one’s source code as part of the open source community, or making
24 modifications to someone else’s source code under an open source license, the creator retains
25 certain protections, depending on the permissiveness of the particular license, from improper use
26 of his or her intellectual property. To that end, most, if not all, open source licenses apply certain
27 requirements and restrictions for the method and manner in which code extracted from an open
28 source repository can be used, and attaches conditions to any such use.

1 32. There are many commonly used open source licenses, including the GNU General
2 Public License, the BSD License, and the Apache License.

3 33. Due to the fundamental properties of XML technology, XML parsing innovations
4 are very hard to sell. A parser is not an end-user product, *i.e.*, is a component that must be
5 integrated into another existing product, analogous to how an engine is a component that must be
6 integrated into a car—it has little utility on its own, but matters a great deal to the larger product.
7 XimpleWare therefore made the business decision to license its Source Code under the GNU
8 General Public License version 2 (“GPL”). A copy of the GPL is attached to this Complaint as
9 **Exhibit 1**. By licensing its technology under the GPL, XimpleWare enabled potential
10 commercial licensees to evaluate XimpleWare’s technology before going into commercial
11 production, and allowed free non-commercial use of its technology, which would likely spur
12 adoption in the overall market for high-efficiency XML processing software.

13 34. The GPL requires, among other things, (1) that any changes made to the code
14 carry notices stating that the files were changed, and the date of all changes; (2) any code created
15 or derived from GPL-protected code must also be licensed under the GPL; (3) copyright notices
16 must print or display when the code is run; and (4) that when distributed, the program must be
17 accompanied by the complete machine-readable source code.

18 35. The text of the GPL contains a lengthy “Preamble” section. This preamble is not a
19 legally operative part of the GPL, as is generally understood in the open source community. For
20 example, Lawrence Rosen, an attorney and noted open source expert, states in a 2004 book:

21 The preamble, of course, is not an operative part of the GPL license. It is not
22 among its *terms and conditions*. There is nothing in its words that must be
23 obeyed. It is merely a helpful preface so that you can better understand the GPL in
24 its context.

25 Lawrence Rosen, *Open Source Licensing: Software Freedom And Intellectual Property Law* 109
26 (Prentice Hall 2004) (emphasis in original).

27 36. XimpleWare chose the GPL approach because it is one of the most restrictive
28 open source licenses available, requiring that any derivative code incorporating GPL-protected

1 code must be returned to the open source community in its entirety. This concept is often referred
 2 to as “copyleft,” which the Free Software Foundation explains succinctly on its “Frequently
 3 Asked Questions” page for the GPL:

4 [Q:] You have a GPL’ed program that I’d like to link with my code to build a proprietary
 5 program. Does the fact that I link with your program mean I have to GPL my program?
 [A:] Yes.

6 Frequently Asked Questions about version 2 of the GNU GPL, Free Software Foundation,
 7 <http://www.gnu.org/licenses/old-licenses/gpl-2.0-faq.html> (last accessed Dec. 16, 2013)
 8 (archived at <http://perma.cc/LLM9-3SED>). In other words, if Developer A creates Product A and
 9 licenses it under the GPL, and Developer B creates Product B which incorporates Product A,
 10 then Developer B must also license Product B under the GPL.

11 37. In general, a computer cannot run source code directly. Before a computer can run
 12 a program, its source code must be translated into machine-readable form called “object code”²
 13 which is also sometimes referred to as a “binary” or “binaries” because object code is not
 14 human-readable text, but rather machine-readable binary code.

15 38. The GPL also requires that any distribution of the binary version of a GPL-
 16 licensed software must be accompanied by either source code or an offer to provide source code.
 17 This is explained clearly in Section 3 of the GPL, as well as the Free Software Foundation’s GPL
 18 “Frequently Asked Questions” page:

19 [Q:] I downloaded just the binary from the net. If I distribute copies, do I have to
 20 get the source and distribute that too?

21 [A:] Yes. The general rule is, if you distribute binaries, you must distribute the
 22 complete corresponding source code too. The exception for the case where you
 23 received a written offer for source code is quite limited.³

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 25 _____
 26 ² “Object Code,” Merriam-Webster.com, [http://www.merriam-](http://www.merriam-webster.com/dictionary/object%20code)
 27 [webster.com/dictionary/object%20code](http://www.merriam-webster.com/dictionary/object%20code) (“a computer program after translation from source code
 usually into machine language by a compiler”) (last accessed Dec. 16, 2013).

28 ³ Frequently Asked Questions about version 2 of the GNU GPL, Free Software Foundation,
<http://www.gnu.org/licenses/old-licenses/gpl-2.0-faq.html> (last accessed Dec. 16, 2013)
 (archived at <http://perma.cc/LLM9-3SED>).

1 39. The GPL requires strict compliance, and, under its Section 4, any failure to
 2 comply with **any** of the GPL's multiple conditions means there is no license granted and this
 3 means any use, distribution, or other exploitation is not licensed and all rights the violator could
 4 have obtained under the GPL are voided:

5 You may not copy, modify, sublicense, or distribute the Program except as
 6 expressly provided under this License. Any attempt otherwise to copy, modify,
 7 sublicense or distribute the Program is void, and will automatically terminate your
 rights under this License...

8 GPL at § 4.

9 40. The GPL does not grant a patent license. The only mention of patents in the
 10 operative text of the GPL are in Sections 7 and 8. Those Sections state that if any conditions on a
 11 licensee's use are imposed by a patent, then the licensee may not distribute the licensed program
 12 at all (Section 7), and allowing a licensor to place geographic exclusions on the license for
 13 countries in which there are patent or other restrictions (Section 8). Neither of those Sections
 14 grant a patent license.

15 **The XimpleWare Product**

16 41. The complete XimpleWare software product, known as "VTD-XML" or "VTD-
 17 XML Extended" (collectively, the "Product"), is made up of a number of constituent parts, each
 18 with individual functions, and is written in several different programming languages. Most of the
 19 code, however, is written in Java, which is one of the most popular programming languages in
 20 use today.

21 42. XML is ubiquitous in today's business world. For example, since 2007, the file
 22 formats for Microsoft Office are based on XML,⁴ and many web pages are coded in XML.⁵

25 ⁴ Tom Ngo, "Office Open XML Overview", Ecma International, [http://www.ecma-
 26 international.org/news/TC45_current_work/OpenXML%20White%20Paper.pdf](http://www.ecma-international.org/news/TC45_current_work/OpenXML%20White%20Paper.pdf) (last accessed
 Sep. 10, 2013) (archived at <http://perma.cc/0fyzpuJ6Vzg>).

27 ⁵ Murray Altheim and Shane McCarron, eds., XHTML™ 1.1 - Module-based XHTML - Second
 28 Edition, W3C Recommendation, World Wide Web Consortium, Nov. 23, 2010,
<http://www.w3.org/TR/xhtml11/> (last accessed Sep. 10, 2013) (archived at
<http://perma.cc/05zB2mzwJW8>).

1 43. The XimpleWare Source Code and Product reads and parses XML at a rate
2 estimated to be five to ten times faster than other current XML parsing programs, effecting
3 greater efficiency and speed. It also provides indexing and incremental capabilities that are
4 crucial to many high performance XML applications and are not available in any other XML
5 parsing libraries. Efficiency and speed are critical in many applications of XML, especially in
6 large scale enterprise data interchange applications where entire server computers are dedicated
7 to handling streams of XML data. If XML data can be processed faster, then fewer servers are
8 needed, less leased space in data centers is needed for those servers, and less energy is required
9 to power those servers—altogether greatly reducing computing needs and costs.

10 44. The Product is an enabler for any program that uses XML in its applications, but
11 to see the upside in the parsing speed, customers have to try it.

12 45. XimpleWare has had interest and licensing discussions with several industry
13 leaders, and has established its VTD-XML software as a leading technology in XML parsing.

14 **The XimpleWare Source Code**

15 46. Over the course of over ten years, Mr. Zhang updated and improved the Source
16 Code and Product (and still does), checking out sections of code to work on and then checking it
17 back into an open source database called SourceForge. SourceForge is a community-based
18 website where software developers can publish source code to a global audience, and can join
19 and collaborate on open source projects.⁶

20 47. One of the principal tools SourceForge provides is version control systems. A
21 version control system is a computer program that manages a set of source code. Programmers
22 use version control systems by “checking out” a copy of the source code to their own computer,
23 making changes, and then submitting those changes back into the version control system in a
24 process called “checking in.” Each check-in is documented in the version control system with
25 time, date, and contributor information, as well as comments from the programmer describing his
26

27 ⁶ SourceForge “About” page, <http://sourceforge.net/about> (last accessed Sep. 10, 2013) (noting
28 SourceForge has “3.4 million developers [who] create powerful software in over 324,000
projects”) (archived at <http://perma.cc/0fwQ1xw51i1>).

1 or her changes. With a version control system, it is possible to review all changes to a set of
2 source code and to know who made those changes.

3 48. SourceForge also provides a system where programmers not affiliated with a
4 project may submit suggested changes to members of the project. The members may then choose
5 to check those changes in to the version control system, or to reject them. As with any other
6 check-in, time, date, contributor, and other information are logged in the version control system.

7 49. One version control system offered by SourceForge is the Concurrent Versions
8 System, commonly known as “CVS”. Like other version control systems, CVS tracks who made
9 which changes to the managed source code, and CVS keeps a log of those revisions.

10 50. XimpleWare placed its Source Code on SourceForge, and managed that Source
11 Code in SourceForge’s CVS system.

12 **The XimpleWare Issued Patents**

13 51. XimpleWare applied for, and the United States Patent and Trademark Office
14 issued, three patents (the “Patents”):

- 15 A. U.S. Patent No. 7,133,857, issued Nov. 7, 2006, titled “Processing structured
16 data” (the “857 Patent”)
17 B. U.S. Patent No. 7,620,652, issued Nov. 17, 2009, titled “Processing structured
18 data” (the “652 Patent”)
19 C. U.S. Patent No. 7,761,459, issued July 20, 2010, titled “Processing structured
20 data” (the “459 Patent”)

21 52. All of the Patents received a term extension to February 2024 under 35 U.S.C.
22 § 154(b). The named inventors on all of the Patents are Jimmy Zhang and Hui Tian, and all right,
23 title, and interest are assigned to XimpleWare.

24 53. The first patent (the ‘857 Patent), filed in 2002 and issued in 2006, is titled
25 “Processing Structured Data,” and contains 43 claims (including 7 independent claims) covering
26 methods, apparatuses, and program storage devices for “efficiently processing a structured data
27 file” or “efficiently processing structured data”—including XML. The ‘857 Patent has been cited
28 by five other issued U.S. patents—including patents issued to IBM, HP, and Canon—and by
three published U.S. patent applications.

1 54. The ‘652 Patent, filed in 2006 and issued in 2009, contains 35 claims (including 8
2 independent claims) for methods, apparatuses, and program storage devices, and focuses on
3 efficiently processing structured data like XML. The ‘652 Patent has been cited by two issued
4 U.S. patents by IBM and Canon and by one published U.S. patent application.

5 55. The ‘459 Patent, filed in 2006 and issued in 2010, contains 24 claims (including 4
6 independent claims) for methods, apparatuses, hardware devices, and program storage devices,
7 and again focuses on efficiently processing structured data like XML. The ‘459 Patent has been
8 cited by two issued U.S. patents and one published U.S. patent application.

9 56. There has been no challenge to any of the XimpleWare Patents or any other
10 XimpleWare intellectual property rights.

11 57. The XimpleWare Source Code and Product practice the XimpleWare Patents.

12 58. XimpleWare owned the three XimpleWare Patents throughout the period of the
13 Defendants’ infringing acts, and still owns the patents. XimpleWare uses the patent numbers on
14 its Product and in its documentation to give actual and constructive notice of the existence of the
15 XimpleWare patents.

16 59. XimpleWare’s SourceForge project page also clearly indicates that the VTD-XML
17 software is licensed under the GPL; the XimpleWare web site has always made clear that any
18 and all commercial projects and those involving any distribution, requires a commercial license
19 under the commercial terms and conditions to be concluded with XimpleWare, and that generally
20 requires a signed written agreement between the parties and payment of commercial royalties to
21 XimpleWare. Multiple other commercial parties who could not come within the GPL’s strict
22 conditions have agreed to sign and have signed commercial licenses with XimpleWare and the
23 custom and practice in the industry is for the proposed licensee to do appropriate due diligence
24 and to assure that his, her or its project is strictly within the GPL’s conditions or else to contact
25 XimpleWare to discuss the requirements for commercial licensing.

26 **Independent Contractors in the Financial Services Industry**

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1 60. According to industry publications, “For many core financial products and
2 services, independent distribution is the leading sales channel in the industry. It accounts for half
3 of life insurance new annualized premium and 40 percent of annuity business written.”⁷

4 61. The majority of Ameriprise financial advisors are not Ameriprise employees.
5 According to Ameriprise’s own 2012 Annual Report, filed publicly with the U.S. Securities and
6 Exchange Commission, Ameriprise operates a “nationwide network of more than 9,700
7 advisors,” of which “more than 7,400 are independent franchisees or employees or contractors of
8 franchisees.”

9 **Defendants Copy XimpleWare’s Patented Source Code**

10 62. In the summer of 2013, XimpleWare learned of a Texas lawsuit between
11 Defendants Versata and Ameriprise over a contract dispute (the “Texas Litigation”).

12 63. According to documents filed in the Texas Litigation, Versata licensed its DCM
13 software to Ameriprise until Ameriprise attempted to write its own software using programmers
14 in India to replace the Versata product. Versata then sued for misappropriation, among other
15 claims.

16 64. During the prosecution of the Texas Litigation, Ameriprise informed XimpleWare
17 that it had discovered portions of XimpleWare’s Source Code in the source code of Versata’s
18 DCM product, and with said XimpleWare Source code, none of the conditions of the GPL
19 license had been met. There was also no evidence of any commercial license from XimpleWare
20 and no reproduction of XimpleWare’s copyright notice in Versata’s DCM product.

21 65. Based upon documents XimpleWare received from Ameriprise, for months and
22 without ever contacting XimpleWare to check on the validity of its alleged reliance, Versata
23 asserted a theory in the Texas Litigation that XimpleWare’s Source Code was licensed under an
24 Oracle-based exception to the GPL known as the “classpath exception.” The “classpath
25 exception” is an Oracle-based exception to the GPL that has been promulgated by Oracle

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27 ⁷ Donna Chafin and Emily Tracey, “The Independent Advisor: One Size Does Not Fit All”,
28 INSURANCENEWSNET MAGAZINE (Feb. 2014),
<http://www.insurancenewsnetmagazine.com/article/the-independent-advisor-one-size-does-not-fit-all-2660> (archived at <http://perma.cc/9FVZ-PWXS>).

1 Corporation (www.oracle.com) of Redwood City, California (owner of the Java programming
2 language) for certain Java-related software packages. XimpleWare has never used and never
3 authorized this exception or any exception other than commercial licensing directly with
4 XimpleWare; neither Oracle nor any other company is authorized to make any statement on
5 behalf of XimpleWare.

6 66. The only copyright or license notices that XimpleWare has ever placed on its
7 VTD-XML Source Code give notice that the Source Code is licensed under the GPL for those
8 strictly complying with all conditions of the GPL, and that it is otherwise commercially available
9 through license directly from XimpleWare. XimpleWare has never utilized the “classpath
10 exception,” nor has it ever made any exceptions to licensing its Source Code under the unaltered
11 GPL other than through paid commercial licenses obtained directly from XimpleWare.

12 67. None of the defendants in this case did, have done, or have attempted to do any
13 appropriate due diligence with XimpleWare, and therefore none of the Defendants in this case
14 can assert truthfully that they are innocent infringers or that they otherwise relied reasonably in
15 any way in commencing, continuing, or refusing to discontinue their respective infringements.

16 68. On October 23, 2013, counsel for XimpleWare gave formal notice of the
17 XimpleWare patents to counsel for Versata. On information and belief, both Versata and
18 Ameriprise knew about the XimpleWare Patents even before that date, and have been on at least
19 inquiry notice since Ameriprise’s assertion against Versata in the Texas Litigation of defenses
20 based on XimpleWare’s contractual and copyright rights. Based on those assertions, both Versata
21 and Ameriprise should have conducted proper diligence on XimpleWare, in which they would
22 have discovered the XimpleWare patents. Versata’s willfulness is also evidenced by its attempts
23 in the Texas Litigation to conceal its unlicensed copying of VTD-XML into its DCM software, as
24 well as its lack of candor and progress in patching DCM to remove VTD-XML.

25 69. Versata’s commercial distribution of the XimpleWare Product or Source Code
26 outside the terms of the GPL was knowing and willful. According to documents filed in the
27 Texas Litigation, Versata maintained in the course of business a list of open source software
28 components that it included in its DCM product, and that list included VTD-XML as well as the

1 fact that VTD-XML and several other components were licensed under the GPL—without any
2 mention of the “classpath exception.”

3 70. XimpleWare has never granted Versata any commercial license, permission, or
4 authorization to use and redistribute any XimpleWare Product or Source Code.

5 71. The only license the Versata Defendants have ever had was the GPL. However, by
6 failing to meet any of the required conditions of the GPL license, no license was granted to any
7 of the Versata Defendants and any alleged rights any of them had or purported to have to
8 XimpleWare's VTD-XML computer software were void *ab initio* and terminated instantly and
9 automatically, and all distributions and other exploitations including all attempts to sublicense
10 were unauthorized, void, and without effect, and each constituted a wilful infringement of
11 XimpleWare’s rights.

12 72. On information and belief, Versata has distributed thousands of unauthorized
13 copies of the Product or the Source Code to a number of customers like the Customer Defendants
14 and Ameriprise Defendants, and Versata has illegally collected revenues on the sale and
15 distribution of the derivative DCM product incorporating XimpleWare’s Source Code, in
16 violation of XimpleWare’s Patents. XimpleWare estimates Versata’s total sales of the infringing
17 DCM product to exceed \$300,000,000.

18 73. On information and belief, Ameriprise distributed DCM and VTD-XML to its
19 thousands of non-employee financial advisors. According to its 2012 Annual Report, “The
20 support [Ameriprise] offer[s] to [its] franchisee advisors includes generalist and specialist
21 leadership support, **technology platforms and tools**, training and marketing programs”
22 (emphasis added). On information and belief, DCM is among the “technology platforms and
23 tools” that Ameriprise provides its outside advisors.

24 74. On information and belief, when Ameriprise made its outside distributions of
25 DCM and VTD-XML, it did so under a commercial license (and not the GPL) without any
26 attribution to XimpleWare, without any XimpleWare copyright notice, without any XimpleWare
27 Source Code, and without any offer to convey the XimpleWare Source Code—all in violation of
28 the GPL and all of which were void under the GPL.

1 75. According to its website, “Prudential [Insurance Company of America] sells its
2 products through both **independent** and Prudential financial professionals.” (emphasis added)
3 On information and belief, these “financial professionals”, some of whom are “independent”
4 (*i.e.*, non-employees of Prudential), are the beneficiaries of the DCM software, which calculates
5 their compensation.

6 76. Among the risk factors discussed in United Health’s recent 10-Q quarterly report,
7 filed with the U.S. Securities Exchange Commission on May 6, 2014, United Health stated that
8 “our ability to attract, retain and provide support to a network of **independent producers** (*i.e.*,
9 brokers and agents) and consultants” could materially impact the company’s financial
10 performance. (emphasis added) On information and belief, these “independent producers” (*i.e.*,
11 non-employees of United Health) are the beneficiaries of the DCM software, which calculates
12 their compensation.

13 77. In its most recent 10-Q quarterly report, filed with the U.S. Securities Exchange
14 Commission on May 15, 2014, Metropolitan Life Insurance Company discussed its relationships
15 with non-employee: “The Company has entered into various agreements **with affiliates** for
16 services necessary to conduct its activities. Typical services provided under these agreements
17 include personnel, policy administrative functions and **distribution services.**” (emphasis added)
18 On information and belief, these “affiliates” (*i.e.*, non-employees of Metropolitan Life) are the
19 beneficiaries of the DCM software, which calculates their compensation.

20 78. In its most recent 10-Q quarterly report, filed with the U.S. Securities Exchange
21 Commission on May 2, 2014, Waddell & Reed Financial, Inc. discussed its “advisors, who are
22 **independent contractors**”. (emphasis added) Similarly, according to a prior filing, a 10-K
23 annual report for 2013, Waddell stated: “Our retail products are distributed through third-parties
24 such as other broker/dealers, registered investment advisors and various retirement platforms,
25 (collectively, the ‘Wholesale channel’) or through our sales force of independent financial
26 advisors (the ‘Advisors channel’).” On information and belief, these “independent contractor”
27 “advisors” are the beneficiaries of the DCM software, which calculates their compensation.
28

1 79. Various documents show Pacific Life’s use of non-employee “producers”,
 2 including a “Contract Summary” document which states: “We pay the independent producer or
 3 the independent producer’s third party selling firm for selling the contract to you.”⁸ On
 4 information and belief, these “independent producer[s]” are the beneficiaries of the DCM
 5 software, which calculates their compensation.

6 80. Aviva USA also contracts with non-employee producers, as shown by forms
 7 published on its website, including an “Independent Producer Contract Appointment Application
 8 and Agreement.”⁹ On information and belief, these “independent producer[s]” are the
 9 beneficiaries of the DCM software, which calculates their compensation.

10 81. Wellmark also contracts with non-employee producers or “brokers.” Wellmark’s
 11 online agent directory states that “All agents represented by Wellmark on this website are
 12 authorized independent agents for Wellmark...”¹⁰ On information and belief, these “independent
 13 agents” are the beneficiaries of the DCM software, which calculates their compensation.

14 82. XimpleWare has never granted any Defendant in this case any commercial
 15 license, permission, or authorization to use and redistribute any XimpleWare Product or Source
 16 Code.

17 83. Defendants have infringed, and are still infringing on XimpleWare’s intellectual
 18 property rights by making, selling, and using the DCM product that practices the XimpleWare
 19 Patents, and the Defendants will continue to do so unless this Court enjoins them.

20 **FIRST CLAIM FOR RELIEF**

21 **DIRECT PATENT INFRINGEMENT**

22 **(AGAINST ALL DEFENDANTS)**

23 84. XimpleWare incorporates the allegations in paragraphs 1–83 as if set forth here in
 24 full.

25 ⁸ http://www.annuities.pacificlife.com/public/forms/product_required/cs1181.pdf (last accessed
 26 May 30, 2014)

27 ⁹ [http://ameruslive.amerus.com/Pdf/indylifeline/forms/61010.pdf?CFID=14808009&CFTOKEN=
 28 59149273](http://ameruslive.amerus.com/Pdf/indylifeline/forms/61010.pdf?CFID=14808009&CFTOKEN=59149273) (last accessed May 30, 2014).

¹⁰ <http://www.wellmark.com/AgentFinder/Search.aspx> (last accessed May 30, 2014)

1 85. XimpleWare designs and licenses software designed to more effectively and more
2 efficiently parse XML in an almost limitless range of products and applications.

3 86. XimpleWare has made substantial investments of time and money, as well as great
4 efforts over a period of ten or more years developing a faster, more efficient way to parse XML.
5 These investments in research and development have, over the years, yielded many innovations,
6 including the innovations disclosed and claimed in the Patents.

7 87. The '857, '652, and '459 were duly and legally issued to XimpleWare, as assignee
8 of the inventors named therein, for an invention entitled "Processing Structured Data." True and
9 correct copies of the Patents are attached as **Exhibits 2, 3, and 4**, respectively.

10 88. The Patents are valid and enforceable.

11 89. At all material times since the original issue dates, XimpleWare has been the
12 owner of the entire right, title, and interest in the Patents.

13 90. XimpleWare's Product as well as its Source Code practices each of the
14 independent claims of the Patents.

15 91. On information and belief, Defendants have infringed and continue to infringe
16 XimpleWare's Patents and each of them by making, using, selling, and/or offering for sale in the
17 United States a number of products that practice the claims contained in the Patent, and will
18 continue to do so unless enjoined by this Court.

19 92. Without entering a commercial license with XimpleWare and without strict
20 compliance with any of the conditions for the GPL license, the Versata Defendants incorporated
21 the XimpleWare Product and/or Source Code into a number of their own products (the "Versata
22 Products"), including but not limited to the Versata DCM product. Therefore, the Versata
23 Products **necessarily** practice **at least** independent Claims 1 and 7 the '857 Patent, independent
24 Claims 1 and 9 of the '652 Patent, and independent Claim 1 of the '459 Patent.

25 93. The Versata Products and each of them literally infringe because every element of
26 each of those Claims is included in DCM, and are necessarily included in any other product into
27 which Defendants incorporated the XimpleWare Source Code or Product. The Versata
28 Defendants used and sold its infringing products in the United States, and did so willfully.

1 94. On information and belief, and without entering a commercial license with
2 XimpleWare and without strict compliance with any of the conditions for the GPL license, the
3 Ameriprise Defendants, Customer Defendants, and others purchased the Versata Products from
4 the Versata Defendants without authorization. The Ameriprise Defendants and Customer
5 Defendants infringed and continue to willfully infringe the Patents by using the infringing
6 Versata Products, incorporated into the Ameriprise Defendants' and Customer Defendants'
7 software systems which those Defendants used and continue to use in their daily course of
8 business.

9 95. On information and belief, and without entering a commercial license with
10 XimpleWare and without strict compliance with any of the conditions for the GPL license, the
11 Ameriprise Defendants and Customer Defendants have distributed without authorization DCM
12 and VTD-XML to thousands of non-employee independent contractor or franchisee advisors or
13 "producers."

14 96. Defendants' conduct constitutes direct infringement of XimpleWare's patent
15 rights under 35 U.S.C. § 271(a).

16 97. The Versata Defendants' patent infringement was and is knowing and willful. The
17 GPL, a copy of which must be included with all GPL-licensed source code, was always included
18 with every version of the XimpleWare Source Code available on SourceForge. XimpleWare's
19 SourceForge project page—which XimpleWare has records of the Versata Defendants visiting—
20 clearly indicates that VTD-XML is licensed under the GPL. Further, according to documents
21 filed in the Texas Litigation, Versata maintained in the course of business a list of open source
22 software components that it included in its DCM product, and that list included VTD-XML, and
23 included the fact that VTD-XML was licensed under the GPL version 2. Therefore, Defendants
24 actually knew or reasonably should have known that the Source Code was the work of
25 XimpleWare, for which Defendants did not have a commercial license, and Defendants did in
26 fact copy, adapt, and distribute works practicing the XimpleWare patents, derived from the
27 Source Code in either source or compiled form without authorization from XimpleWare. No
28 Defendants have ever obtained a commercial license from XimpleWare. The Versata Defendants

1 were on actual notice before the filing of this lawsuit, and were on inquiry notice long before
2 given Ameriprise's assertions in the Texas Litigation of defenses based on Versata's
3 incorporation of unlicensed XimpleWare software into DCM.

4 98. Defendants' direct infringement of XimpleWare's exclusive patent rights has
5 damaged, and/or will damage XimpleWare's business, causing irreparable harm for which there
6 is no adequate remedy at law, unless Defendants are enjoined by this Court pursuant to 35 U.S.C.
7 § 283.

8 99. Defendants' direct infringement of XimpleWare's Patents is the direct and
9 proximate cause of damages to XimpleWare, and XimpleWare is entitled to compensatory
10 damages in an amount to be determined at trial.

11 100. Defendants' direct infringement of the Patents entitles XimpleWare to preliminary
12 and permanent injunctive relief pursuant to 35 U.S.C. § 283, an award of all damages sustained
13 by XimpleWare as a result of Defendants' infringement, and enhanced damages adequate to
14 compensate for Defendants' collective and willful infringement of XimpleWare's patent rights
15 together with attorneys' fees and costs, pursuant to 35 U.S.C. §§ 284 and 285.

16 **SECOND CLAIM FOR RELIEF**

17 **INDUCING PATENT INFRINGEMENT**

18 **(AGAINST VERSATA DEFENDANTS)**

19 101. XimpleWare incorporates the allegations in paragraphs 1–83 as if set forth here in
20 full.

21 102. The Versata Defendants have infringed and induced infringement of the '857,
22 '652, and '459 Patents.

23 103. The Versata Defendants deliberately downloaded the XimpleWare Source Code
24 from the SourceForge open source repository and incorporated it into DCM and a number of
25 other products. On information and belief, the Versata Defendants then sold those products to a
26 number of customers, without authorization, including, but not necessarily limited to, the
27 Ameriprise Defendants who incorporated those products into their own internal systems, which
28 the Ameriprise Defendants used and continue to use in the daily course of business without any

1 authorization and without entering a commercial license with XimpleWare and without strict
2 compliance with any of the conditions for the GPL license.

3 104. Because the XimpleWare Patents cover the main algorithms and functionality of
4 VTD-XML, and because VTD-XML implements the XimpleWare Patents, there are no
5 substantial non-infringing uses of VTD-XML.

6 105. Without entering a commercial license with XimpleWare and without strict
7 compliance with any of the conditions for the GPL license, the Versata Defendants, in violation
8 of 35 U.S.C. § 271(b), have knowingly aided, abetted, and actively induced the Ameriprise
9 Defendants, Customer Defendants, and others to infringe XimpleWare's Patents.

10 106. The Versata Defendants have committed contributory infringement of
11 XimpleWare's exclusive rights, which has damaged and will continue to damage XimpleWare's
12 business, causing irreparable harm for which there is no adequate remedy at law, unless it is
13 enjoined by this Court pursuant to 35 U.S.C. § 283.

14 107. The Versata Defendants' infringement of XimpleWare's exclusive patent rights
15 has damaged, and/or will damage XimpleWare's business, causing irreparable harm for which
16 there is no adequate remedy at law, unless Defendants are enjoined by this Court pursuant to 35
17 U.S.C. § 283.

18 108. The Versata Defendants' willful contributory infringement of XimpleWare's
19 Patents is the direct and proximate cause of damages to XimpleWare, and XimpleWare is entitled
20 to compensatory damages in an amount to be determined at trial.

21 109. The Versata Defendants' infringement of the Patents entitles XimpleWare to
22 preliminary and permanent injunctive relief pursuant to 35 U.S.C. § 283, an award of all
23 damages sustained by XimpleWare as a result of Defendants' infringement, and enhanced
24 damages adequate to compensate for Defendants' collective and willful infringement of
25 XimpleWare's patent rights together with attorneys' fees and costs, pursuant to 35 U.S.C. §§ 284
26 and 285.

THIRD CLAIM FOR DECLARATORY RELIEF**(AGAINST ALL DEFENDANTS)**

1
2
3 110. XimpleWare incorporates the allegations in paragraphs 1–83 as if set forth here in
4 full.

5 111. XimpleWare owns each and every of the three issued Patents.

6 112. XimpleWare has the superior, and indeed only, right to continue to use, make,
7 sell, or offer for sale its Source Code, subject to the GPL, as the lawful owner of the Patents.

8 113. Versata improperly downloaded and exploited XimpleWare’s Source Code
9 without a commercial license with XimpleWare, and without strict compliance with any of the
10 conditions for the GPL license, all to XimpleWare’s detriment. On information and belief,
11 Versata has incorporated the Source Code into its DCM product, and sold it to, among others,
12 Ameriprise and a number of other companies.

13 114. XimpleWare requests that this Court declare that United States Patents Nos.
14 7,133,857, 7,620,652, and 7,761,459 and each of them are valid and enforceable.

15 115. XimpleWare also requests a declaration from the Court confirming that the GPL
16 does not confer a patent license, which, as far as XimpleWare is aware, is a question of first
17 impression in any court. As discussed above, there is no express patent grant in the GPL, and
18 whether the GPL confers any implied license is a matter of debate in the open source community
19 as well as a matter of public concern. The open source community, the public, and all the parties
20 before the Court would benefit from a clear resolution of this question.

21 116. XimpleWare also requests a declaration from the Court that any purported grant
22 of patent licenses for XimpleWare’s patented computer software by any Defendant to any other
23 of the Defendants are invalid, and that no such Defendants have ever been granted any license
24 under any of the patents validly issued to and properly and exclusively owned by Plaintiff.

25 117. The requested declaration is necessary and appropriate at this time to affirm
26 XimpleWare’s rights to exclusive use and sale of its protected intellectual property rights under
27 federal patent law.

28 118. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

XimpleWare prays for judgment against all Defendants, and each of them, and those persons in control of or acting in concert with them as follows:

A. On the First Claim for Relief, for preliminary and permanent injunctive relief enjoining the manufacture, production, marketing, or sale by Defendants, or any of them, of any product practicing the ‘857, ‘652, and/ or ‘459 Patents; for all damages sustained by XimpleWare as a result of Defendants’ infringement; and for an award to XimpleWare of enhanced damages adequate to compensate for Defendants’ collective infringement, up to and including trebling of XimpleWare’s damages for the Versata Defendants’ willful infringement.

B. On the Second Claim for Relief, for preliminary and permanent injunctive relief enjoining the Versata Defendants or any of them from contributing to the manufacture, production, marketing, or sale of any product practicing the ‘857, ‘652, and/ or ‘459 Patents; for all damages sustained by XimpleWare as a result of the Versata Defendants’ infringement; and for an award to XimpleWare of enhanced damages adequate to compensate for the Versata Defendants’ collective and willful infringement, up to and including trebling of XimpleWare’s damages for the Versata Defendants’ willful infringement.

C. On the Third Claim for Relief, for a declaration that:

1. XimpleWare is the sole owner of the XimpleWare Patents;
2. the XimpleWare Patents are valid and enforceable;
3. the GPL does not confer a patent license; and
4. as such, XimpleWare has the exclusive right to make sell, offer for sale, distribute, and copy and otherwise exploit the XimpleWare Product and Source Code.

D. On all Claims for Relief, for a constructive trust of all benefits Defendants gained, and disgorgement of all revenues and profits associated with Defendants’ licensing or sale of products containing the XimpleWare Source Code.

E. For costs of suit including any applicable interest and reasonably attorneys’ fees as allowed by law.

F. For such other, further, and different relief as the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury on each and every cause of action which is triable by or which may otherwise be tried by jury in this action.

COMPUTERLAW GROUP LLP

Dated: May 31, 2014

By: /s/ Jack Russo
Jack Russo
Christopher Sargent
Ansel Halliburton

Attorneys for Plaintiff
XIMPLEWARE CORP.