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 15 REVENUE SCIENCE, INC.

16  
 17 UNITED STATES DISTRICT COURT  
 18 CENTRAL DISTRICT OF CALIFORNIA  
 19 WESTERN DIVISION

20 VALUECLICK, INC.,  
 21 a Delaware Corporation,

22 Plaintiff,

23 v.

24 REVENUE SCIENCE, INC.,  
 25 a Washington Corporation,

26 Defendant.

Case No.: CV 07 2052 MMM  
 (JCX)

**DEFENDANT REVENUE  
 SCIENCE, INC.'S  
 RESPONSIVE MARKMAN  
 BRIEF**

Heller  
 Ehrman LLP

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**TABLE OF ABBREVIATIONS**

<b>RSI</b>	Defendant Revenue Science, Inc.
<b>ValueClick</b>	Plaintiff ValueClick, Inc.
<b>‘396</b>	U.S. Patent No. 5,848,396, attached as Exhibit 1 to the Declaration of Bhanu K. Sadasivan In Support Of RSI’s Opening Markman Brief
<b>‘735</b>	U.S. Patent No. 5,991,735, attached as Exhibit 3 to the Declaration of Bhanu K. Sadasivan In Support Of RSI’s Opening Markman Brief
<b>112(6)</b>	35 U.S.C. § 112, paragraph 6
<b>DI 23</b>	The Joint Claim Construction Chart (“JCCC”) filed by the parties on September 28, 2007
<b>‘396 F.H.</b>	The prosecution history of the ‘396 patent before the U.S. Patent & Trademark Office, attached as Exhibit 2 to the Declaration of Bhanu K. Sadasivan In Support Of RSI’s Opening Markman Brief
<b>‘735 F.H.</b>	The prosecution history of the ‘735 patent before the U.S. Patent & Trademark Office, attached as Exhibit 4 to the Declaration of Bhanu K. Sadasivan In Support Of RSI’s Opening Markman Brief
<b>MPEP</b>	The <u>Manual of Patent Examining Procedure</u>
<b>Roman ¶</b>	Declaration Of Kendyl Roman In Support Of RSI’s Opening Markman Brief
<b>Roman Response ¶</b>	Declaration Of Kendyl Roman In Support Of RSI’s Responsive Markman Brief
<b>Kent Decl.</b>	Declaration of Peter Kent In Support of ValueClick, Inc.’s Claim Construction Brief
<b>VC Brief</b>	Plaintiff ValueClick, Inc.’s Claim Construction Brief, dated October 15, 2007

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**STATUTES**

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1 **I. INTRODUCTION**

2 ValueClick’s opening brief appears to be intended to achieve one overarching  
3 goal, and that is to divorce the claims completely from the intrinsic record of which  
4 they are a part. The entire focus of the patents-in-suit – indeed, the very thing touted  
5 by the patentee as the benefit of the alleged invention – is a method of creating a  
6 psychographic profile for an *individual user* and then utilizing it to display content in  
7 a layout that is customized to *that individual’s* particular interests and preferences.  
8 Yet, while the constructions that RSI has proffered through the use of well-  
9 established claim interpretation principles remain faithful to this focus, ValueClick’s  
10 proposals mysteriously do not. Instead, ValueClick asks the Court to adopt claim  
11 term meanings that are not only untethered to the patent specifications or file  
12 histories, but that are instead grounded in questionable extrinsic evidence that often  
13 conflicts with the intrinsic record. The improper techniques that ValueClick uses to  
14 achieve this result can be grouped into three broad categories.

15 First, ValueClick repeatedly ignores the fundamental purpose of the  
16 technology claimed in the patent – the creation of an *individualized* user experience.  
17 For example, ValueClick’s definition of “user” as a particular computer, rather than a  
18 *particular individual* who uses that computer, vitiates this critical aspect of the  
19 patents-in-suit. A user at an Internet café wants her experience tailored to her  
20 personal psychographic profile, not to the forty users who preceded her on that  
21 computer. Similarly, a given advertisement sponsor is interested in reaching a  
22 particular individual who has certain interests and preferences, and composite data  
23 relating to the last forty users of a given computer is of no use for such purposes.  
24 Thus, the intrinsic record, the purpose of the invention, and common sense dictate  
25 that RSI’s proposed construction – that a “user” is an individual person, not a  
26 computer – is the only correct one.

27 Second, ValueClick cherry picks disclosures from the patent that support its  
28 broad definitions, while ignoring parts of the patent specification that contradict its

1 position. In contrast, RSI's definitions track the claim terms as understood by one of  
2 ordinary skill in the art when read in the context of the entire intrinsic record. For  
3 example, RSI correctly defines "psychographic profile" to include content and format  
4 preferences. As the patents state, "[p]references with respect to color schemes, text  
5 size, shapes, and the like are recorded as part of the psychographic profile of a user."  
6 ('396 col. 2:16-23). ValueClick simply ignores the repeated references in the patent  
7 and the file history to format preferences being part of the psychographic profile, and  
8 instead defines psychographic profile as including only content preferences by  
9 offering up selective and misleading quotations from the specification.

10 Third, ValueClick brushes aside established Federal Circuit precedent on claim  
11 construction. More specifically, ValueClick disregards or misapplies settled law on  
12 the consideration of extrinsic evidence, the rules on claim differentiation, the  
13 requirement that all claim terms must have meaning so as to not render a term  
14 superfluous, and even the basic principle that claim terms must be construed as  
15 understood by a person of ordinary skill in the art.

16 For all of these reasons, RSI respectfully submits that the Court should adopt  
17 RSI's definitions, and reject ValueClick's flawed constructions in their entirety.

## 18 **II. VALUECLICK'S DESCRIPTION OF THE PATENTS-IN-SUIT IS** 19 **INACCURATE AND MISLEADING**

20 In its Opening Claim Construction brief, ValueClick provides an extensive  
21 discussion regarding the alleged invention and the manner in which the software  
22 components of the alleged invention interact. VC Brief, at 1-6. ValueClick's  
23 discussion, however, is selective, confusing, and potentially misleading.

24 Accordingly, RSI provides a brief recitation here of the operation of the key  
25 components of the alleged invention, and then reveals the errors in ValueClick's  
26 description of the technology.

### 27 **A. Overview of the patents-in-suit**

28 The alleged invention disclosed in the patents-in-suit is program 31 that resides

1 in a single web server 27 connected to several servers and user computers in several  
2 networks. (Fig. 1). As shown in Figure 2 of the patents-in-suit, Program 31 has four  
3 components, each with a specific function:

4 1) **an agate data assembly 71** (the function of which is to store various agate  
5 information for user viewing);

6 2) **a user profiling member 73** (the function of which is to record information  
7 regarding each user, including user's identification, categories of interest to the user,  
8 and the user's display preferences for each category);

9 3) **an advertisement module** (the function of which is to hold sponsor  
10 information and their advertisements, with target audience profile indicated for each  
11 advertisement); and

12 4) **a program controller 79** (the function of which is to respond to commands  
13 – *e.g.*, log in and menu selection – transmitted over the Internet by an end user, and to  
14 obtain the necessary information from 71, 73, and 75 to generate and display  
15 appropriate screen views to the user). ('396, 4:39-55).

16 In the preferred embodiment, program 31 is implemented as an object oriented  
17 program. A set of Objects provide the functional equivalent for each of the  
18 components.<sup>1</sup> When a user logs in for the first time, the program controller 79  
19 assigns a unique "users computer ID," and also a user name and password, to the new  
20 user. The program controller 79 also obtains initial agate information (*e.g.* a sports  
21 score, or a weather report) from the agate data assembly 71 to display as part of the  
22 Home Page to the new user. The assignment of an ID to the user enables user  
23 profiling member 73 to begin tracking the new user's activity. ('396, 4:66-5:7).

24 \_\_\_\_\_  
25 <sup>1</sup> Figure 3 in the patents-in-suit discloses the names of the Objects that provide  
26 the functional equivalent for each of the components. Specifically, the Agate Data  
27 Assembly 71 finds its functional equivalent in Objects 35a-c, the User Profiling  
28 Member 73 has a functional equivalent in Objects 37a-f, the Advertisement Module 75  
is functionally equivalent to Objects 33a-d, and the Program Controller 79 is  
functionally equivalent to Main Routine 39. ('396, 5:54-62). As explained in RSI's  
Opening Brief, and below, these descriptions do not satisfy the requirements of 112(6)  
that the patent specification must disclose adequate corresponding structure.



1 As the user makes selections, the user profiling member 73 records the user's  
2 activities and thus builds a psychographic profile of the user. ('396, 5:8-14).  
3 Specifically, User Object 37a records the user provided name and password, while  
4 User Interface Object 37c holds the user's "categories of interest" and "category  
5 display," *i.e.*, display or format preferences. ('396, 14:14-17). The Program  
6 Controller 79 responds to the user's selections and viewing actions by using the agate  
7 data assembly 71 to obtain and display the requested information. ('396, 5:8-12).

8 When the user logs in a second or subsequent time, the Program Controller 79  
9 obtains user preference information from the records of the User Profiling Member  
10 73. Then, the Program Controller uses agate information from agate data assembly  
11 71 to generate a screen view formatted to the user's recorded preferences. ('396,  
12 5:56-64). The Program Controller 79 also enables display of advertisements  
13 customized to the user by obtaining presentation details from the user profiling  
14 member 73 and content from the advertisement module 75. ('396, 5:19-25).

### 15 **B. ValueClick's Erroneous Description of the Technology**

16 ValueClick's description of the system disclosed in the patents-in-suit contains  
17 two critical errors, both of which contribute to its incorrect claim term definitions.  
18 The first of these is ValueClick's suggestion that it is the "categories of interest" data  
19 field found within User Interface Object 37c that constitutes the "psychographic  
20 profile" referenced in all of the asserted claims. *See* VC Brief, at 2. ValueClick's  
21 argument in this regard is misleading at best.

22 As an initial matter, the patent does not state that the psychographic profile is  
23 held entirely within one of the several disclosed User Objects (*i.e.*, Objects 37a-f in  
24 Figure 3). Accordingly, ValueClick's assertion that Object 37c is where the entirety  
25 of the psychographic profile can be found is a claim without any basis. Moreover,  
26 even if Object 37c could, in fact, be said to hold the entire psychographic profile,  
27 ValueClick offers no explanation as to why it selectively focuses its attention on the  
28 "categories of interest" field and ignores everything else. Specifically, the

1 specification makes abundantly clear that Object 37c – in addition to holding a given  
2 users “categories of interest” – also holds the closely-related data field of “category  
3 display” (*i.e.*, the user’s display format preferences). *See* Fig. 3D; (‘396, 17:1-5).  
4 Thus, to the extent that Object 37c can be said to hold the psychographic profile, the  
5 profile includes both “categories of interest” *and* “display” preferences.

6 ValueClick’s second mischaracterization pertains to the Ad Series Object 33c  
7 and Ad Object 33d. According to ValueClick:

8 Ad Series Object 33c (the one said to hold the “psychographic profile” for the  
9 ad, 12:27-32) does **not** contain any data about “display characteristics” and  
10 “graphic references” of the ad (e.g. color, format, location on the page, etc.).

11 A **different** object holds those – “Ad Object 33d,” depicted in Fig. 5D.

12 VC Brief, at 5.

13 ValueClick’s bold statement that the Ad Series Object 33c is “said to hold the  
14 ‘psychographic profile’ for the ad” is demonstrably false, as even a cursory review of  
15 the cited passage reveals. What the text actually says is that, “In a preferred  
16 embodiment, the sponsor specifies in Ad Series Object 33c the required and/or  
17 **preferred psychographic** and/or demographic **criteria** and relative importance (*e.g.*,  
18 weight) with respect to each criterion.” *See* ‘396, 12:27-31 (emphasis added). These  
19 “psychographic *criteria*” are used to determine the ideal audience for a given ad, and  
20 they represent an entirely different concept than the “psychographic *profile*” called  
21 out in the asserted claims. ValueClick’s attempt to conflate the two represents little  
22 more than a diversionary sleight of hand.

23 The balance of the ValueClick quote set forth above is no less inaccurate.  
24 While ValueClick suggests that the terms “display characteristics” and “graphic  
25 references” as used in connection with Ad Object 33d refers to “color, format,  
26 location on the page, etc.,” the specification again tells a very different story. In  
27 particular, the patent makes clear that these terms relate to the “daily start time” and  
28

1 “daily end time” for displaying the ad, and to the graphical or multimedia portions of  
2 the advertisement. *See* Fig. 5; ‘396 12:48-52. Thus, here again, ValueClick seeks  
3 refuge in misdirection in an attempt to change the substance of the patent disclosure.

### 4 **III. VALUECLICK’S CLAIM CONSTRUCTION METHODOLOGY IS** 5 **FLAWED**

#### 6 **A. Claim Terms Are Given Their Ordinary Meaning As Understood** 7 **By The Person Of Ordinary Skill In The Art In The Context Of The** 8 **Entire Patent**

9 ValueClick makes three fundamental mistakes in arguing what it believes  
10 constitutes the “ordinary meaning” of each claim term.

11 *First*, ValueClick’s expert, Peter Kent, employs a flawed methodology for  
12 several claim terms, by looking for a “special meaning” for the term rather than the  
13 “ordinary meaning” as understood by the person of ordinary skill in the art at the time  
14 of filing of the patents-in-suit. “[T]he words of a claim ‘are generally given their  
15 ordinary and customary meaning,’” not any special meaning. *Phillips v. AWH Corp.*,  
16 415 F.3d 1303, 1312 (Fed. Cir. 2005). For example, Mr. Kent avers that the term  
17 “computer apparatus” has no “special meaning” to persons of skill in the art. Then,  
18 based on this perceived lack of “special meaning,” Mr. Kent argues that the “ordinary  
19 meaning” – which in many cases is the dictionary definition of ValueClick’s choice –  
20 should be adopted. This flawed approach, by itself, renders Mr. Kent’s opinion on  
21 such claim terms irrelevant and of no weight.

22 *Second*, Mr. Kent repeatedly refers to what a *lay person* or a “*person of skill*”  
23 in the art would understand a particular term to mean. Yet, terms must be understood  
24 from the perspective of a person of ordinary skill in the art – not one of extraordinary  
25 skill in the art, not one of below ordinary skill in the art, and not a lay person. “[T]he  
26 ordinary and customary meaning of a claim term is the meaning that the term would  
27 have to a person of ordinary skill in the art in question.” *Phillips*, 415 F. 3d at 1313.  
28 This Court should reject Mr. Kent’s opinion based on such flawed methodology.

*Finally*, ValueClick posits that the “ordinary meaning” of a term can simply be

1 found in dictionary definitions (even, remarkably, those that post-date the filing of  
 2 the patents-in-suit by several years). This is incorrect. The “ordinary meaning”  
 3 cannot simply be gleaned from Wikipedia, Dictionary.com, or the American Heritage  
 4 Dictionary. *See* VC Brief, at 12. Rather, in defining the ordinary meaning of a term,  
 5 “the person of ordinary skill in the art is deemed to read the claim term not only in  
 6 the context of the particular claim in which the disputed term appears, but in the  
 7 context of the entire patent, including the specification.” *Phillips*, 415 F.3d at 1313  
 8 (emphasis added).<sup>2</sup>

### 9 **B. The Court Should Construe All The Claim Terms At Issue**

10 ValueClick argues that the terms identified by RSI, which are listed in Section  
 11 VI of its brief, do not require construction by the Court. Specifically, ValueClick  
 12 contends that the Court should give these terms to the jury without first construing  
 13 them because the term “is clear to a layperson, and takes on its ordinary meaning.”  
 14 VC Brief, at 20.

15 ValueClick’s reasoning is flawed for the following reasons. *First*, ordinary  
 16 meaning is determined from the perspective of a person of ordinary skill in the art at  
 17 the time the patent was filed, not from the perspective of a lay juror sitting at trial.  
 18 For this reason, a juror is *least* qualified to determine the correct “ordinary meaning”  
 19 of a term. *Second*, claim construction is the province of the judge, not the jury.

20  
 21 <sup>2</sup> Courts have pointed out that Wikipedia is a highly questionable source of  
 22 evidence. *See, e.g., Campbell v. Sec’y of Health & Human Servs.*, 69 Fed. Cl. 775,  
 23 781 (2006) (“The articles that the Special Master culled from the Internet do not - at  
 24 least on their face - remotely meet this reliability requirement. . . . A review of the  
 25 Wikipedia website reveals a pervasive and, for our purposes, disturbing series of  
 26 disclaimers, among them, that: (i) any given Wikipedia article ‘may be, at any given  
 27 moment, in a bad state: for example it could be in the middle of a large edit or it  
 28 could have been recently vandalized;’ (ii) Wikipedia articles are ‘also subject to  
 remarkable oversights and omissions;’ (iii) ‘Wikipedia articles (or series of related  
 articles) are liable to be incomplete in ways that would be less usual in a more tightly  
 controlled reference work;’ (iv) ‘another problem with a lot of content on Wikipedia  
 is that many contributors do not cite their sources, something that makes it hard for  
 the reader to judge the credibility of what is written;’ and (v) ‘many articles  
 commence their lives as partisan drafts’ and may be ‘caught up in a heavily  
 unbalanced viewpoint.’”).

1 *Markman*. *Third*, it is to resolve exactly this type of dispute — a differing  
2 interpretation of what “ordinary meaning” is — that the Court must construe claim  
3 terms.

4 The cases cited by ValueClick do not say otherwise. *See* VC Brief, at 20. In  
5 *W.E. Hall Co., Inc. v. Atlanta Corrugating, LLC*, the parties did not dispute the  
6 meaning of the term “single piece,” but did dispute the term “single piece  
7 construction.” The Court found no need to construe the former term, but it *did*  
8 ultimately construe the latter. 370 F.3d 1343, 1350 (Fed. Cir. 2004). And in  
9 *Hastings v. United States*, 78 Fed. Cl. 729, 731 (2007), a non-precedential Federal  
10 Claims Court case, the Court summarily declined to adopt the parties’ proposed  
11 definition for the disputed term “more easily penetrated” as “easier to pass into or  
12 through” – a definition that was clearly little more than a rewrite of the original term  
13 itself. Here, unlike *W.E. Hall*, there is an actual dispute between the parties over the  
14 correct interpretation of certain terms. And unlike *Hastings*, RSI seeks definitions  
15 that are not just slightly different articulations of the terms themselves, but that are  
16 instead accurate definitions that accurately capture what is disclosed by the patent  
17 when examined from the perspective of a person of ordinary skill in the art.  
18 Accordingly, the cases cited by ValueClick are inapposite.

19 **IV. VALUECLICK’S DEFINITIONS ARE INCONSISTENT WITH THE**  
20 **PATENT SPECIFICATION AND FILE HISTORY**

21 To avoid repetition of arguments, RSI will only address arguments that were  
22 not previously addressed in RSI’s Opening Brief. To the extent the definition of a  
23 particular term is not addressed in this responsive brief, RSI respectfully directs the  
24 Court’s attention to its Opening brief and the attached opening declaration of RSI’s  
25 expert, Kendyl Roman.

1           **A. Non-112(6) claim elements**

2                   **1. user [all asserted claims]**

3           RSI proposes that “user” should be defined as: “A uniquely identifiable  
4 individual person, as distinct from the digital processor he/she is using, who interacts  
5 with a network client program (*e.g.*, web browser).”

6           ValueClick argues that a user is anyone who views screens on a computer, and  
7 that a computer ID is one way of identifying a user. VC Brief, at 21-22.

8 ValueClick’s attempt to equate a user with a computer, however, runs afoul of the  
9 very essence of the patent. Because there can be many users of a single computer,  
10 tracking activity on a given machine is likely to be of little value. Whether one  
11 considers a user sitting at an Internet café, a family of six that shares a single home  
12 computer, or college dorm residents who access a single computer room, in each of  
13 these circumstances, all of the relevant players want and need to have the individual  
14 person who is sitting at the terminal at a given moment in time uniquely identifiable.  
15 The individual user herself wants her experience to be tailored to her personal  
16 psychographic profile, not to the countless other individuals who preceded her in  
17 using that computer. The advertiser wants to target his ad properly to the individual  
18 sitting before the computer screen right now, not to some unknown “composite”  
19 person whose content and display preferences consist of the aggregated preferences  
20 of every individual who ever sat at that computer in the past. *See* ‘396, 33:43. And  
21 the website publisher wants to keep both the individual user and the advertiser happy,  
22 by ensuring that the content and display are optimally configured for that individual  
23 user’s preferences. This ability to provide an *individualized experience* for each  
24 unique user is precisely the benefit touted in the patents-in-suit as being offered by  
25 the alleged invention.<sup>3</sup> Accordingly, any definition of “user” that eviscerates the  
26 primary purpose of the alleged invention itself cannot possibly be correct.

27 \_\_\_\_\_  
28 <sup>3</sup> “To that end, **for each user** the present **invention** program 31 creates a user  
profile from the agate information viewing habits of the user. The system then

1           Moreover, ValueClick’s proposal that psychographic profile can be a profile of  
 2 a group of users is simply a linguistic ploy to shift the focus of “user” from an  
 3 individual to a computer. In the internet café example, ValueClick’s definition  
 4 would sweep in the “group” of users who had used the internet café since the  
 5 computer was first put in use. Likewise, ValueClick’s definition would sweep in the  
 6 entire family who uses one home computer as the “group” whose psychological  
 7 profile is important. But that result would not be faithful to the alleged invention: the  
 8 ability to tailor content and advertisements to an individual user’s preferences – *e.g.*,  
 9 the specific preferences of a 12 year old boy, a teenage daughter, a husband who is a  
 10 sports fan, and a wife who is a stock broker, all of which are likely to be very  
 11 different from one another.<sup>4</sup>

12           Furthermore, the only system disclosed in the patent itself includes a  
 13 mechanism for customization at the individual user level, namely the use of a  
 14 particular user login (‘735, 5:16-20). ValueClick, however, argues that “logging in is  
 15 optional, since the user may obtain a user ID and password ‘at the user’s  
 16 convenience.’” VC Brief, at 21-22. Once again, however, ValueClick selectively  
 17 misreads the patent specification. The complete quote from the cited passages states  
 18 “Program controller 79 also obtains user identification information from the user to  
 19 assign a user name and password at the user’s convenience.” (‘396, 5:5-7). Thus, the  
 20 phrase “at the user’s convenience” does not refer to optional logging in, but rather to  
 21 the assignment of a username and password when a user logs in for the first time. As  
 22 described by the specification, logging in to the claimed system is mandatory in order  
 23 for it to function properly. (‘396, 4:56-5:7; Roman Decl. ¶¶ 32-33). ValueClick  
 24

25 generates a custom Home Page, including a user’s preferred (content and presentation)  
 26 agate information. On subsequent visits to program 31 (as a Website) by the user,  
 27 program 31 displays the customized Home Page for that user instead of the initial  
 28 Home Page.” ‘396, 4:21-29. (emphasis added).

27           <sup>4</sup> ValueClick’s “group of users” definition is also severely undercut by the fact  
 28 that nowhere in the patents is a user’s psychographic profile referred to in the plural,  
*i.e.*, a “users’ profile.”

1 additionally argues that because a computer ID may be used in the process of  
 2 identifying a user, ValueClick’s construction that a user is not uniquely identifiable is  
 3 correct. VC Brief, at 22. ValueClick here again mischaracterizes the patent  
 4 disclosure and reaches the wrong conclusion. The specification states that *in addition*  
 5 *to* computer ID, the program *also* uses a username and password to identify the user  
 6 – thus making clear that the alleged invention necessarily has the ability to identify a  
 7 unique individual. (‘396, 4:66-5:7; Roman Decl. ¶¶ 38-39).

8 Finally, giving “user” the definition mandated by both its ordinary meaning  
 9 and its use in the context of the specification does not impermissibly limit the claim  
 10 to an embodiment, but rather gives the claims a scope that is commensurate with  
 11 what the inventor stated, in his application, is his alleged invention. *Phillips*, 415  
 12 F.3d at 1316 (“Ultimately, the interpretation to be given a term can only be  
 13 determined and confirmed with a full understanding of what the inventors actually  
 14 invented and intended to envelop with the claim. The construction that stays true to  
 15 the claim language and most naturally aligns with the patent’s description of the  
 16 invention, will be, in the end, the correct construction.”) (internal quotation omitted).  
 17 In sum, the Court should adopt RSI’s definition of user.

## 18 **2. Psychographic profile of a (each) user [all asserted claims]<sup>5</sup>**

19 RSI proposes that the Court construe this term to mean: “Presentation format  
 20 preferences and content preferences of a uniquely identifiable individual person (*i.e.*,  
 21 the user), based on that person’s responses to prompts regarding that person’s  
 22 preferences and lifestyle and modified by that person’s viewing and selection  
 23 history.”

24 ValueClick counters that psychographic profile includes only “content  
 25 preferences” and does not include “format preferences.” In support of its position,  
 26 ValueClick sets forth several arguments, each of which is discussed below in turn.

27 \_\_\_\_\_  
 28 <sup>5</sup> RSI will note in square brackets beside each term the asserted patent claims in  
 which that term appears.



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**a. Claim Language Supports RSI’s Definition**

ValueClick first argues that the ‘396 and ‘735 patent claims support its construction, making a number of flawed attempts at claim differentiation. For example, pointing to unasserted claim 3 of the ‘735 patent, ValueClick contends that the term “psychographic profile” in the base claim 1 of the ‘735 patent must necessarily be limited to include only a user’s content preferences, and to exclude the user’s format preferences. VC Brief, at 12. A closer review, however, demonstrates that this is incorrect.

Claim 3 of the ‘735 Patent provides:

A computer program as claimed in claim 1 wherein:

the user profiling member records format preferences of users with respect to presentation of certain agate information, the format preferences including color schemes, text size and shapes; and

- in response, the data assembly provides agate information for display to a user
- (a) in a manner customized according to the format preferences of the user and
- (b) having contents corresponding to the psychographic profile of the user.

The base claim 1 does state that the “user profiling member” records a variety of information, and thereby “enables creation of a psychographic profile.” The first element of claim 3 then simply states that the “format preferences” that the “user profiling member” records must include *particular types* of format preferences *not* required by claim 1 – namely “color schemes, text size and shapes.” Thus, there is nothing about the first element of claim 3 that suggests that format preferences are not included in the definition of “psychographic profile.” Instead, it supports the opposite, by providing further limitations about those format preferences.

The second element of claim 3 simply states how agate information is displayed to a user. It says nothing about whether display preferences are, or are not, contained within the “psychographic profile” of the claim. Other claims, however, answer this question definitively. Claim 16 of the ‘735 Patent provides:

Heller  
Ehrman LLP

1 The method of claim 15 wherein:

2 said composing includes selecting content and formatting layout of content  
3 according to the determined psychographic profile.

4 As should be apparent, this claim requires selecting both content *and* formatting  
5 layout “according to the determined psychographic profile,” which can only mean  
6 that the “psychographic profile” contains information both about content preferences  
7 and format layout preferences. Thus, while claim 3 may be agnostic about whether  
8 format preferences are included in “psychographic profile,” claim 16 decidedly  
9 answers that question in the affirmative. The Court should accordingly adopt RSI’s  
10 definition of “psychographic profile” as including both the user’s content preferences  
11 and the user’s format preferences.

12 **b. ValueClick’s Reliance on the Specification is Unavailing**

13 ValueClick once again resorts to incomplete citations to and misleading  
14 characterizations of the specification in order to support its position regarding the  
15 proper definition of the term “psychographic profile.” The Court should reject  
16 ValueClick’s arguments in their entirety.

17 *First*, ValueClick provides a lengthy quote in its brief from column 2 of the  
18 ‘396 patent, underlining words and phrases that it believes supports its position. *See*  
19 VC Brief, at 14 (citing ‘396, col. 2:3-15). Yet, a mere three lines later in the  
20 specification – at column 2, line 18 – is a quote that inescapably demonstrates the  
21 lack of merit in ValueClick’s position. Remarkably, ValueClick stops its block quote  
22 before reaching this critical passage, which states as follows:

23 Further the tracking and profiling member records presentation (format)  
24 preferences of the users based on user viewing activity. Preferences with  
25 respect to color schemes, text size, shapes, and the like are recorded as part of  
26 the psychographic profile of a user. (‘396, 2:18-23) (emphasis added).

27 As the emphasized text makes abundantly clear, preferences regarding format (*e.g.*,  
28 color schemes, text size, shapes) are, in fact, part of the psychographic profile.

1 ValueClick’s attempt to selectively quote around this key section of the patent must  
2 fail, and its definition should accordingly be rejected in its entirety.

3 *Second*, as discussed above, ValueClick attempts to rewrite the patent by  
4 incorrectly describing: (a) Ad Series Object 33c as holding the “psychographic  
5 profile,” but lacking “any display or format of the given ad;” and (b) a different ad  
6 object, Ad Object 33d, as holding an indication of display or format of the given ad.  
7 Based on these erroneous characterizations, ValueClick concludes that psychographic  
8 profile does not include format preferences. VC Brief, at 15.

9 As explained above, Ad Series Object 33c holds sponsor specified  
10 psychographic/demographic *criteria*, not the psychographic *profile*. See ‘396, 12:23-  
11 33. In other words, the “psychographic *criteria*” in Ad Series Object 33c (used to  
12 identify the ideal audience for an ad) is not in any way pertinent to the generation of a  
13 “psychographic *profile*” of a user. And although it is true that Ad Object 33d holds  
14 “display characteristics” and “graphic references,” See Fig. 5D, these terms pertain to  
15 the “daily start time” and “daily end time” for displaying the ad, and to the graphical  
16 or multimedia portions of the advertisement, respectively. (‘396, 12:48-52). They do  
17 not, as ValueClick brazenly asserts, refer to “color, format, location on the page.”  
18 Accordingly, this Court should reject ValueClick’s argument that anything pertaining  
19 to the discussion of Ad Objects indicates that the term “psychographic profile” does  
20 not include format preferences.

21 **c. Prosecution History also buttresses RSI’s definition**

22 ValueClick’s attempt to draw support from the prosecution history is equally  
23 unavailing. ValueClick argues that the prosecution history supports its definition of  
24 psychographic profile as not including format preferences, because ValueClick’s  
25 definition matches that of the prior art patent Wilkins, and the patentee “never  
26 indicated that his definition of psychographic profile was any different from that used  
27 by Wilkins.” VC Brief, at 15.

28 ValueClick is in error. The patentee clearly differentiated the psychographic

1 profile disclosed in Wilkins from that disclosed in the patents-in-suit. In response to  
2 Office Action rejecting all claims as anticipated by prior art reference, the applicant  
3 stated:

4 *Preferences with respect to color schemes, text size, shapes and the like are*  
5 *recorded as part of the psychographic profile of a user.* In turn, the  
6 psychographic profile defined and generated by the tracking and profiling  
7 member enables the data assembly to customize future presentation (format) of  
8 agate information, per user, for display to the user.” ‘396 F.H., RSI00001189  
9 (emphasis added).

10 Further, the examiner stated as his reason for allowance: “each user profile  
11 providing an indication of categories of interest to the user *and display preferences*  
12 for each category,” which reason was not objected to by the applicant. ‘396 F.H.,  
13 RSI00001194 (emphasis added).

14 In sum, the prosecution history also contradicts ValueClick’s definition, but  
15 supports RSI’s definition.

16 **d. ValueClick’s Reliance on Dictionary Definitions Is**  
17 **Misplaced**

18 ValueClick cites Wikipedia, Dictionary.com and the American Heritage  
19 Dictionary as support for the “ordinary meaning” of the term. VC Brief, at 12-13.  
20 ValueClick’s reliance on extrinsic evidence is entirely unwarranted, since the  
21 intrinsic evidence provides unambiguous meaning to the phrase “psychographic  
22 profile of a (each) user.” *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576,  
23 1582 (Fed. Cir. 1996) (“[If] an analysis of the intrinsic evidence alone will resolve  
24 any ambiguity in a disputed claim term . . . it is improper to rely on extrinsic  
25 evidence.”).

26 In any event, ValueClick’s reliance on Wikipedia and Dictionary.com is  
27 gravely misplaced. Wikipedia and Dictionary.com are unreliable sources, because  
28 anyone can edit the content of these online sources. Moreover, there is absolutely no

1 evidence that either the Wikipedia or Dictionary.com definitions were available at the  
 2 time of filing of the patents-in-suit in 1996, and that is the only appropriate time  
 3 period from which extrinsic evidence – if any can be properly relied upon at all –  
 4 may be used. For all these reasons, the Court should not consider ValueClick’s  
 5 extrinsic evidence in construing this term.

6 In sum, the Court should accept RSI’s definition of “psychographic profile of a  
 7 (each) user” as: “Presentation format preferences and content preferences of a  
 8 uniquely identifiable individual person (*i.e.*, the user), based on that person’s  
 9 responses to prompts regarding that person’s preferences and lifestyle and modified  
 10 by that person’s viewing and selection history.”

11 **3. agate information / agate data [all asserted claims] AND**  
 12 **advertisement [‘396:5, 7; ‘735:5, 8, and 18]**

13 The parties agree that the definition of agate information must include “Time-  
 14 sensitive reference information that is not read linearly,” but apparently disagree  
 15 about whether there is any distinction between “agate information” and “sponsor  
 16 provided advertisements.” Because the patentee chose to carve out “sponsor  
 17 provided advertisements” from the scope of agate information, *See* RSI’s Opening  
 18 Brief, RSI’s definition provides further clarification that agate information is “distinct  
 19 from sponsor provided advertisements.” For the same reason, RSI proposes that  
 20 “advertisement” in the context of the patents-in-suit be construed as “Sponsor  
 21 provided advertisement, distinct from agate data.” ValueClick, on the other hand,  
 22 seeks to blur the distinction between two, perhaps hoping to sow confusion where  
 23 none should exist. The portion of the specification that ValueClick cites in support of  
 24 its position that no distinction should be drawn between these concepts – *i.e.*,  
 25 “advertisements . . . which may be integrated into the agate data” at ‘396, 7:30-31  
 26 (VC Brief, at 17) - actually reinforces RSI’s point that advertisements and agate are  
 27 distinct terms. Roman Decl. ¶ 72. Time and again, the patentee draws a distinction  
 28 in the specification between sponsor-provide advertisements, on the one hand, and

1 the agate data to be displayed on the other. RSI’s definition of “advertisement”  
2 merely seeks to capture the line drawn by the patentee, so that the jury will  
3 understand how and where the two terms differ from one another.

4 ValueClick attacks RSI’s definition of “agate information” on the grounds that  
5 RSI seeks an “infringement comparison, not a construction” and that this is  
6 “improper at this stage.” VC Brief, at 16. ValueClick also argues that “RSI  
7 construction overlooks that an advertisement is a type of agate information.” VC  
8 Brief, at 26. Both of these arguments are unfounded.

9 First of all, RSI’s definition is merely seeking clarity regarding the boundary  
10 between two claim terms – a boundary that the patentee himself created and repeated.  
11 This is the very purpose of the claim construction process, and ValueClick’s assertion  
12 that this is somehow “improper” at this stage is utterly baseless. Second, RSI’s  
13 position does not in any way overlook the fact that a *classified* advertisement can be a  
14 type of agate data. As disclosed in the patents, the patentee expressly included  
15 “classified advertisements” in his definition of agate, but chose to carve out sponsor  
16 provided advertisements from agate data. RSI’s definition remains faithful to this  
17 patent disclosure.

18 Finally, ValueClick disputes RSI’s definition on the grounds that it is  
19 “circular,” *i.e.*, the definition includes the term being defined (“advertisement”). VC  
20 Brief, at 26. This borders on the frivolous. The parties are not disputing what the  
21 term “advertisement” means in general, but rather how the patent uses this term.  
22 When read in the context of the patent, the term “advertisement” means a particular  
23 type of advertisement, which is captured by RSI’s construction.

24 By contrast, ValueClick’s construction of “advertisement” ignores the patent  
25 disclosure, instead relying completely on dictionary evidence. ValueClick’s  
26 definition should be rejected and RSI’s definition adopted.

#### 27 **4. screen view [‘735:1, 5, 8, 15 and 18]**

28 RSI proposes that this term be construed as the “Entire page displayed on an

1 end user’s network client program (*e.g.*, web browser).”

2 Both parties agree that a screen view is a page. The dispute is whether “screen  
3 view” means the entire page as RSI proposes, or some fragment of a page, per  
4 ValueClick. ValueClick argues that the “intrinsic record does not support” RSI’s  
5 construction, “which is itself unclear insofar as an ‘entire page’ is a concept foreign  
6 to the intrinsic record.” VC Brief, at 18.

7 ValueClick is simply wrong. The specification consistently explains that in  
8 generating a page, the program queries Page Display Objects 35a, b, and c. See, *e.g.*,  
9 ‘396, 14:53-57. Page Display Object 35a holds agate or other data. Page Display  
10 Object 35c provides the outline for screen views, such as a home page, and a  
11 financial page. Page Display Object 35a cross-references with User Object 37c  
12 which holds the category and display preferences of the user. Thus, in putting  
13 together a page, the program does not simply query 35c for a page outline and  
14 display the outline to the user, or only query 35b and display only agate data, without  
15 the outline to the user. Instead, the specification discloses that *the entire page*—  
16 outline and agate data customized to the user’s psychographic profile – is displayed  
17 as the screen view to the user. Roman Decl. ¶¶ 54-58.

18 In contrast, ValueClick points to little support for its construction. The only  
19 intrinsic evidence ValueClick cites for its construction is the patent disclosure that  
20 “the term ‘page’ is used synonymously with screen view.” VC Brief, at 18 (citing  
21 ‘735, 20:64-65). This disclosure, however, supports RSI’s proposal. A page means  
22 an *entire page*, not part of a page. Similarly, a screen view means the entire page, not  
23 part of the page.

24 The only other support that ValueClick points to is alleged expert opinion  
25 testimony that a “screen view was known to encompass (potentially) less than the  
26 complete viewable portion of a web page.” VC Brief, at 18-19. Yet, there is  
27 absolutely no support for this proposition in the patent or prosecution history. See  
28 *Phillips*, 415 F.3d at 1318 (“conclusory, unsupported assertions by experts as to the

1 definition of a claim term are not useful to a court. Similarly, a court should discount  
2 any expert testimony ‘that is clearly at odds with the claim construction mandated by  
3 the claims themselves, the written description, and the prosecution history, in other  
4 words, with the written record of the patent.’”). Accordingly, the Court should reject  
5 ValueClick’s definition and adopt RSI’s construction.

#### 6 **5. demographic profile [no asserted claims]**

7 The Court should not construe this term since it is not in any of the asserted  
8 claims, and construing it is akin to offering an advisory opinion. According to  
9 ValueClick, the Court should construe the term because it is included in RSI’s  
10 definition of target profile. *See* VC Brief, at 20. This argument has no merit. If the  
11 Court were to follow ValueClick’s logic, this Court would be buried under an endless  
12 task of defining all of the definitions. ValueClick also argues that it will be helpful  
13 for the jury to have “demographic profile” in mind while it considers issues related to  
14 psychographic profile. VC Brief, at 20. Again, to the extent it will be helpful to  
15 provide context to the patents-in-suit, RSI’s definitions provide that context by giving  
16 a clear definition for the relevant claim terms in dispute.

17 ValueClick further argues that construction of the term would be relevant,  
18 insofar as ValueClick decides to assert additional claims later. VC Brief, at 20. The  
19 same thing could be said of any term in any unasserted claims at any time during a  
20 patent case. ValueClick should be in a position to assess from publicly available  
21 information and documents produced by RSI whether it has sufficient basis to assert  
22 infringement of the remaining claims. Because ValueClick has chosen not to assert  
23 claims containing the term “demographic profile,” ValueClick should not be  
24 permitted to seek an “advisory” construction of this claim term.

#### 25 **6. “computer apparatus” [‘396:1, 5, 8; and ‘735:14]**

26 RSI proposes that “computer apparatus” should be construed as: “A computer  
27 program (*i.e.*, set of statements or computer instructions) and the server hardware at a  
28 single network site for running or executing it, the server hardware distinct and



1 separate from end user digital processors.”

2 RSI’s definition focuses on the simple fact that the patent discloses that the  
3 invention is a program operating at a single network site. By contrast, ValueClick’s  
4 expansive definition, “a computer, or a multiplicity of computers, connected on a  
5 network such as the Internet” literally includes any computer or computers connected  
6 to the Internet. *See* VC Brief, at 20. As support for the multiplicity concept,  
7 ValueClick cites to the ‘396 specification at 3:54-67. The specification, however,  
8 supports RSI’s position. The specification discloses several “loosely coupled”  
9 networks of computers, with each network including several “loosely coupled”  
10 personal computers and a single server, and the invention is described as “software  
11 program 31 operated on and connected through a server 27 to the Internet for  
12 communication among the various networks.” Thus, the specification suggests a  
13 computer apparatus is *a server at a single network site* that is connected to other  
14 networks—a concept that is captured by RSI’s definition. *See* Roman Response ¶¶  
15 25-27.

16 ValueClick further argues that RSI’s construction has limitations that find no  
17 support in the intrinsic record. VC Brief, at 21. ValueClick is wrong. RSI’s  
18 construction takes into account the patentee’s choice to include in his claims  
19 references to more than one type of computer, but to only claim one of them. For  
20 example, claim 1 of the ‘396 patent uses two different terms to describe a computer--  
21 “computer apparatus” and “digital processor.” The digital processor must be  
22 different from the computer apparatus; for otherwise, the term “digital processor”  
23 would be rendered superfluous. *See, e.g., Ethicon Endo-Surgery v. United States*  
24 *Surgical Corp.*, 93 F.3d 1572, 1579 (Fed. Cir. 1996) (“If the terms ‘pusher assembly’  
25 and ‘pusher bar’ described a single element, one would expect the claim to  
26 consistently refer to this element as *either* a ‘pusher bar’ or a ‘pusher assembly,’ but  
27 not both, especially not within the same clause. Therefore, in our view, the plain  
28 meaning of the claim will not bear a reading that ‘pusher assembly’ and ‘pusher bar’

1 are synonyms.”). RSI’s construction captures this self-engineered limitation chosen  
 2 by the patentee. In contrast, ValueClick’s definition ignores the distinctions drawn  
 3 by the patentee, instead proposing a broad definition that could include “digital  
 4 processor” and “multiplicity of computers.” RSI’s proper construction should be  
 5 adopted.

6 **7. “a computer program embodied on a computer readable  
 7 medium” [‘735:1, 5, and 8]**

8 This term should be construed as: “Set of statements (computer instructions)  
 9 stored on a single piece of storage material for execution on the hardware of a server  
 10 at a single network site, the server hardware distinct and separate from the end user  
 11 digital processors.”

12 ValueClick proposes a broad definition: “the physical manifestation of a  
 13 computer algorithm (or set of algorithms), without limitation as to the form on which  
 14 it might reside.” VC Brief, at 21. ValueClick argues that this definition “recognizes  
 15 that object-oriented programs (like the ones described in the Gerace patents) were  
 16 known to be an aggregation of multiple self-contained subprograms.” *Id.* VC’s  
 17 argument is nonsensical. The objects in an object oriented program are not “self-  
 18 contained subprograms.” Rather, the objects are all compiled together into a single,  
 19 interdependent computer program. Roman Responsive Decl. ¶ 29.

20 ValueClick also contends that RSI’s definition adds unrecited limitations that  
 21 find no support in intrinsic record. VC Brief, at 21. As explained previously in RSI’s  
 22 Opening Brief, RSI’s construction is fully supported by intrinsic record. For all these  
 23 reasons, this Court should accept RSI’s proposed construction.

24 **8. “Physical Activity” [all asserted claims] AND “User  
 25 Response” [all asserted claims]**

26 RSI proposes that “physical activity” means “Inputs (mouse and keyboard) to  
 27 the user’s computer,” and that “user response” means “Information provided by a  
 28 user in response to a prompt for the user’s presentation format preferences and  
 content preferences.”

1 RSI's definitions take into consideration the basic canon of claim construction  
 2 that two separate terms must each have separate meaning. *Bancorp Servs., L.L.C. v.*  
 3 *Hartford Life Ins. Co.*, 359 F.3d 1367, 1373 (Fed. Cir. 2004) ("the use of [two] terms  
 4 in close proximity in the same claim gives rise to an inference that a different  
 5 meaning should be assigned to each"). Accordingly, "Physical Activity" and "User  
 6 Response" must have different meanings since both terms are found in the same  
 7 claim. For example, claim 1 of the '396 patent provides that a computer apparatus  
 8 (or program) records both "physical activity" and "user response" to create a  
 9 psychographic profile. If "physical activity" means mouse clicks and keyboard  
 10 inputs, then "user response" must mean something more. *See, e.g., Primos, Inc. v.*  
 11 *Hunter's Specialties, Inc.*, 451 F.3d 841, 848 (Fed. Cir. 2006) ("the terms 'engaging'  
 12 and 'sealing' are both expressly recited in the claim and therefore 'engaging' cannot  
 13 mean the same thing as 'sealing'; if it did, one of the terms would be superfluous.").  
 14 The only logical thing it could mean, as supported by the intrinsic evidence, is  
 15 information provided by a user in response to a prompt for the user's preferences.  
 16 *See* RSI's Opening Brief. By contrast, ValueClick's identical definitions for these  
 17 terms renders one of the terms superfluous, thereby violating a basic canon of claim  
 18 construction that each term must have a separate meaning.

19 Regarding the term "physical activity," ValueClick argues that input cannot be  
 20 limited to mouse and keyboard inputs. VC Brief, at 23. ValueClick, however,  
 21 points to no support in the patent for any other kind of input. Thus, when the claim  
 22 term is read in the context of the specification, physical activity should be limited to  
 23 mouse and keyboard input, as RSI proposes. *Phillips*, 415 F.3d at 1315 ("the best  
 24 source for understanding a technical term is the specification from which it arose,  
 25 informed, as needed by the prosecution history." (internal quotations omitted)).

26 **9. target profile of desired users to whom to display the**  
 27 **advertisement / target audience profile of each advertisement**  
**['396:5, 7; '735:5, and 8]**

28 This term should be construed as: "Information associated with each

1 advertisement that identifies the characteristics of the audience to whom the  
 2 advertiser wants the advertisement displayed, distinct from demographic or  
 3 psychographic profile of a user.” RSI’s construction properly captures the fact that  
 4 “target profile” is distinct from a psychographic or a demographic profile. If this  
 5 were not the case, claim 6 of the ‘396 patent, which discloses target profile,  
 6 psychographic profile and demographic profile would be nonsensical—the term  
 7 “target profile” would be rendered superfluous by “psychographic profile.”

8 ValueClick, nonetheless, argues that claim 6 indicates that the target profile  
 9 can include demographic or psychographic profiles of desired users for a given ad.  
 10 VC Brief, at 25. However, ValueClick’s proposal would convert the “can” to  
 11 “must,” making the pertinent terms refer to precisely the same thing. In other words,  
 12 a “target profile” will be the same thing as a “demographic” and/or “psychographic  
 13 profile” of a user, if ValueClick’s definition were adopted.

14 In any event, the claim language of, for example, unasserted claim 6 of the  
 15 ‘396 patent, requires that the target profile be “substantially matching” with the  
 16 psychographic profile or demographic profile in order to serve an ad. As such, the  
 17 target profile must be a different component. Otherwise, the claim would be calling  
 18 for the target profile to be compared to itself. For all these reasons, ValueClick’s  
 19 definition equating “target profile” with a “demographic and/or psychographic  
 20 profile” of a user should be rejected and RSI’s definition adopted.

21 **B. 112(6) claim terms**

22 **1. RSI’s Position that the 112(6) Elements Disclose Insufficient**  
 23 **Structure is correct and appropriate at this stage**

24 The parties do not dispute that means-plus-function terms at issue in this case  
 25 are computer implemented or that the corresponding structure is an algorithm. *See*  
 26 *Harris Corp. v. Ericsson, Inc.*, 417 F.3d 1241, 1253 (Fed. Cir. 2005). The dispute  
 27 arises over whether the specification discloses adequate corresponding structure. RSI  
 28 believes that no algorithm is disclosed, thus rendering the claims fatally indefinite

1 and thus, invalid. ValueClick argues otherwise.

2 It is well-established law that the algorithm must be disclosed in the  
3 specification, not in sources outside of the specification, such as the knowledge of a  
4 person of ordinary skill in the art. *See* 35 U.S.C. 112, 6 (means-plus-function “claim  
5 shall be construed to cover the corresponding structure, material, or acts described *in*  
6 *the specification* and equivalents thereof.”) (emphasis added). Whether the  
7 specification adequately discloses that corresponding structure must be measured  
8 from the knowledge of the person of ordinary skill in the art. *Med. Instrumentation*  
9 *and Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1211 (Fed. Cir. 2003).  
10 However, this does not relieve the patentee of the duty of fully describing the  
11 corresponding structure. The testimony of one skilled in the art as to what the  
12 structure *could* be cannot be substituted for the “total absence of structure from the  
13 specification.” *Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A.*, 412 F.3d  
14 1291, 1302 (Fed. Cir. 2005).

15 Thus, the proper question is whether “one of skill in the art would have  
16 understood that [patent] disclosure to encompass software for [the disclosed function]  
17 and been able to implement such a program, not simply whether one of skill in the art  
18 would have been able to write such a software program.” *Med. Instrumentation*, 344  
19 F.3d at 1212.

20 Putting it in the context of this case, the question is twofold: first, whether one  
21 of ordinary skill in the art would have understood the disclosure in the patents-in-suit  
22 to encompass the algorithm for the following claim terms: “(agate) data assembly;”  
23 “Tracking and profiling member/ user profiling member;” “advertising component;”  
24 and “program controller” to perform their respective functions; and second, whether  
25 one of ordinary skill in the art would have been able to implement the disclosed  
26 algorithm, not whether one of ordinary skill in the art would have been able to  
27 develop her own algorithm and then write a software program based upon it.

1                   **a. A Person Of Ordinary Skill In The Art Would Not Have**  
2                   **Understood The Patents-In-Suit To Encompass An**  
3                   **Algorithm For Each Of The Claim Terms**

4                   A skilled artisan would not have understood that the patent discloses algorithm  
5 for at least four reasons. *First*, the patents-in-suit do not include a single flow chart or  
6 listing of source code. By contrast, in *Allvoice Computing PLC v. Nuance*  
7 *Communications, Inc.*, , the case relied upon by ValueClick, nine out of the fifteen  
8 figures in the patent were flow charts disclosing the relevant algorithm(s). No. 2006-  
1440, 2007 WL 2963933 (Fed. Cir. Oct. 12, 2007).

9                   In *Allvoice*, the issue was whether sufficient algorithmic structure was disclosed  
10 “for determining positions of the recognized words” and “for updating word positions  
11 after edits.” *Id.* at \*5. The Court concluded that “the disclosure at Col. 7 l.7 *et seq.* of  
12 the ‘273 patent, along with Figures 4 and 8A of the patent,” constituted sufficient  
13 algorithmic structure. *Id.* at \*6. Notably, Fig. 8A was a complete flow chart with  
14 several boxes and arrows. ValueClick, nonetheless, conveniently ignores this fact,  
15 instead arguing erroneously that “the only ‘structure’ disclosure for the function of  
16 ‘determining the position of recognized words’ was a box in a flowchart that stated  
17 ‘DETERMINE WORD LOCATION IN TEXT.’” VC Brief, at 27-28. Thus, it was the  
18 entire flow chart, coupled with other disclosures, that resulted in the Court finding  
19 adequate disclosure of algorithm, *not* a single box. Moreover, the described function  
20 employed “well-known features of windows operating system (messages, operating  
21 system function calls, and hooking.” *Allvoice*, 2007 WL 2963933, at \*6. This was a  
22 straightforward programming task using low-level routines. Roman Decl. ¶ 89. In  
23 contrast, the higher level functions claimed in ValueClick’s patents are complex and  
24 not so easily reducible, thereby demanding a greater level of explanation, *i.e.*, a  
25 complete and detailed disclosure of the algorithm. *Id.*

26                   *Second*, not a single routine or method is identified for each of the several  
27 objects that correspond to the claimed functions. In object oriented programming,  
28 “Each object is formed of data and subroutines (methods) for acting on the data.”

1 ('396, 5:43-45). Figures 3-5 of the patents disclose what appears to be “data” for  
2 each of the several Objects. However, not a single routine is disclosed. In a typical  
3 case, an Object would not only include “data” but also routines that act on the data.  
4 Thus, for example, User Interface Object 37c in Fig. 3D would not only be identified  
5 by the data, *i.e.*, User Computer ID, Categories, and Category display, but would also  
6 include, for example, a Return value. *See* Roman Response ¶¶ 78, 81. In the  
7 absence of such information, a person of ordinary skill in the art would not  
8 understand which methods act on the data, because there are hundreds of routines  
9 that can act on such a complex data set. Roman Decl. ¶¶ 84-88, 90. Thus, a person  
10 of ordinary skill in the art would not understand the patents-in-suit to have adequately  
11 disclosed the algorithm(s) corresponding to the claimed functions.

12 *Third*, ValueClick’s own expert acknowledges the brevity of disclosure in the  
13 patent and struggles to fill in the holes. Regarding “data assembly,” Mr. Kent states  
14 that the “patent discloses that Page Object 35a cross-references User Interface Object  
15 37c, which specifies which Page Display Object 35c and which agate information is  
16 appropriate for the current user.” Kent Decl. ¶ 18. Mr. Kent continues: “The “cross-  
17 referencing” mentioned above would be accomplished with some sort of main  
18 routine, which “dips into” the data assembly to “grab” items for display.

19 Programming techniques to accomplish these algorithms would have been trivial.”  
20 *Id.*(emphasis added). Mr. Kent’s phrase “some sort of main routine” exemplifies the  
21 utter lack of detail in the patent. This is akin to a person who cannot write a sentence  
22 of code stating that his invention is “fetching a webpage” and then providing, as the  
23 only description, “that some sort of main routine X” fetches a webpage from a web  
24 server by “dipping” into the data in the web server and “grabbing items for display.”  
25 There is simply no disclosure of an implementable algorithm in that statement.  
26 Roman Decl. ¶¶ 75-111.

27 *Fourth*, the patents are remarkably silent as to *how* the different functions are  
28 accomplished, even though the patents provide information on what function is

1 purportedly performed by the different components of the invention. Specifically,  
2 the patents completely fail to disclose how the tracking and profiling member or the  
3 user profiling member records user's activity. Likewise, the patents do not provide  
4 what are surely several steps that the Program Controller must take in order to  
5 perform the complex function of obtaining preference information and generating the  
6 appropriate content and format for display to the user. Similarly, four different  
7 objects perform the function of the advertising module 75, and three distinct objects  
8 perform the function of agate data assembly 71. Yet remarkably, the way in which  
9 these different objects coordinate to perform their functions is simply undisclosed.  
10 *See* Roman Decl. ¶¶ 91-97.

11 In light of the above, a person of ordinary skill in the art would not have  
12 understood the patents to disclose an algorithm corresponding to each of the  
13 functional limitations of the claims.

14 **b. Even if the General Information in the Specification**  
15 **Could Somehow be Deemed an Algorithm, A Person Of**  
16 **Ordinary Skill In The Art Would Not Have Been Able**  
17 **To Implement Such An Algorithm**

18 Assuming *arguendo* that the general information provided in the patent  
19 specification constitutes an algorithm (which it does not), a person of ordinary skill in  
20 the art would not be able to *implement* such an algorithm. For example, there is no  
21 disclosure as to how the user profiling member records user activities during viewing  
22 and correlates those with items within screen views that are being displayed and,  
23 therefore, being viewed. Roman Decl. ¶¶ 98-111. Thus, even if the artisan of  
24 ordinary skill is asked to implement the "algorithm" by using object oriented  
25 programming, she would not know how to implement the step of recording user  
26 activities with respect to screen views during display. More specifically, a person of  
27 ordinary skill in the art would not be able to implement the methods to act on the data  
28 in the Objects because there are hundreds of routines that can act on this kind of  
complex data. Roman Decl. ¶ 87.



1 In sum, one of ordinary skill in the art: (1) would not have understood  
 2 disclosure in the patents-in-suit to encompass algorithm for “(agate) data assembly,”  
 3 “Tracking and profiling member/user profiling member,” “advertising component,”  
 4 and “program controller” to perform their respective functions; or (2) been able to  
 5 implement such an algorithm.

6 **c. Due To the Lack of Corresponding Structure RSI Must**  
**Raise the Invalidity of the Patents Now**

7  
 8 In light of the complete absence of structure disclosing how the relevant  
 9 functions are performed, RSI is left with no choice but to point to the Court that the  
 10 patent fails to provide adequate structure. *Atmel Corp. v. Info. Storage Devices, Inc.*,  
 11 198 F.3d 1374, 1379 (Fed. Cir. 1999) (“We have previously observed that an analysis  
 12 under § 112, P.2 is inextricably intertwined with claim construction and that in the §  
 13 112, P.6 context, a court’s determination of the structure that corresponds to a  
 14 particular means-plus-function limitation is indeed a matter of claim construction.”)  
 15 (internal citation omitted) . Thus, while RSI does not at this time move for a  
 16 determination that the means-plus-function claim terms are indefinite under 35  
 17 U.S.C. § 112, if RSI failed to notify the Court that the lack of structure should  
 18 ultimately render the patents invalid, RSI would be doing the Court a disservice.  
 19 Accordingly, RSI’s presentation of the fact that the patents disclose insufficient  
 20 corresponding structure is appropriate at this stage.

21 **2. Specific 112(6) Claim Terms**

- 22 **a. “data assembly for providing and supporting display of**  
**agate information to users of the computer network”**  
**[‘396:1, 5, 7 and ‘735:14] AND**  
 23 **“agate data assembly for providing agate information**  
**for display to users” [‘735:1, 5, and 8]**

24 RSI submits that the terms “data assembly” and “agate data assembly” should  
 25 be defined as means-plus-function terms because they recite a function to be  
 26 performed rather than the structure used to perform the function. ValueClick,  
 27 however, contends that “a ‘data assembly’ is terminology evocative of structure –  
 28 namely, an assembly of data” and because the terms do not include “means,” the two

1 terms are presumptively not governed by 112(6). VC Brief, at 22.

2 ValueClick misinterprets the law. The presumption that 112(6) does not apply  
3 to a term not using “means” is rebutted if “the claim term fails to recite sufficiently  
4 definite structure or else recites a function without reciting sufficient structure for  
5 performing the function.” *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d  
6 1311,1320 (Fed. Cir. 2004). The issue is not whether a claim term generally evokes  
7 structure, but rather whether the claim term recites “sufficiently definite structure” or  
8 where a claim phrase recites a function, does the claim phrase also recite “sufficient  
9 structure for performing the function.” These claim terms neither recite “sufficiently  
10 definite structure,” nor do they recite “sufficient structure for performing the  
11 function” of these claim elements.

12 That the claim terms do not recite “sufficiently definite structure” is shown by  
13 ValueClick’s own expert’s declaration. Mr. Kent suggests two separate meanings for  
14 data assembly “relational databases” and “flat-file text databases,” *See* Kent Decl. ¶  
15 11 neither of which are referenced by the patents-in-suit. Rather, the patent discloses  
16 the data assembly as Page Display Objects and such Objects are entirely different  
17 from relational and textual databases. *See* Roman Decl. ¶¶ 16-19. Thus, the term  
18 “data assembly” encompasses a variety of possible structures and accordingly does  
19 not recite a sufficiently definite structure for one of ordinary skill in the art to  
20 understand what is being claimed.

21 Even when the term “data assembly” is read together with the rest of the  
22 disputed phrases, the term still does not recite “sufficient structure for performing the  
23 function.” Mr. Kent avers that the term “data assembly” in 1996 “connoted an  
24 arrangement for holding computer data.” Kent Decl. ¶ 11. “Holding data” is not the  
25 same as “providing agate information for display to users” or “providing and  
26 supporting display of agate information to users of the computer network.”  
27 Accordingly, “an arrangement for holding computer data” discloses no structure that  
28 could perform the functions demanded by the claims. Rather, the term “data

1 assembly” has no identifiable structure, but takes on an identity co-extensive with its  
 2 function. Accordingly, “data assembly” should be construed as a mean plus function  
 3 element.

4 **b. “a program controller responsive to user commands of**  
 5 **a user for generating screen views to the user, the**  
 6 **program controller (i) obtaining information from the**  
 7 **agate data portion and user profiling member, including**  
 8 **creating and obtaining the psychographic profile of the**  
 9 **user and (ii) generating and displaying appropriate**  
 10 **screen views to the user based on the created**  
 11 **psychographic profile of the user” [‘735:1, 5, and 8]**

12 RSI contends that the term a “program controller” is a means-plus-function  
 13 claim term because it recites neither “sufficiently definite structure” nor “sufficient  
 14 structure for performing the function.” ValueClick argues that the term “program  
 15 controller” is not a 112(6) term for reasons similar to those it set forth for “data  
 16 assembly.” Specifically, ValueClick contends that “‘program controller’ is  
 17 terminology evocative of structure – namely a controller of a program (*e.g.*, a  
 18 computer CPU).” VC Brief, at 25.

19 ValueClick’s argument that “program controller” evokes the structure  
 20 “controller of program” underscores the utter lack of definiteness of structure for this  
 21 term.<sup>6</sup> By ValueClick’s own assessment, the term “program controller” could  
 22 literally mean any number of possibilities, with the reader’s imagination being the  
 23 only limit. Clearly, the term “program controller” has no “sufficiently definite  
 24 structure.” *See Roman Decl.* ¶¶ 112-117.

25 Even when read in the context of its function recited by the claim, the term

26 <sup>6</sup> ValueClick cites *Honeywell Int’l, Inc. v. Universal Avionics Sys. Corp.*, a  
 27 Delaware district court case, in support of its argument that “controller” should not be  
 28 construed as a means-plus-function. VC Brief, at 25. However, a claim element must  
 be construed in light of the specific claims at issue, not because other courts have  
 construed a similar term in a particular manner. Indeed, the Federal Circuit reached  
 the opposite conclusion on the term “control mechanism” after the *Honeywell* case.  
*See Toro Co. v. Deere Co.*, 355 F.3d 1313, 1325 (Fed. Cir. 2004). (holding that  
 “control mechanism” is governed by 112(6) even though “means” is not used, because  
 the claim “discloses a function for a ‘control mechanism’ but does not provide  
 sufficient structural description of this mechanism.”)

1 “program controller” fails to recite “sufficient structure for performing the function.”  
2 The function of “program controller” as claimed is not “controlling a program,” but  
3 “generating screen views to the user . . . (i) obtaining information from the agate data  
4 portion and user profiling member, including creating and obtaining the  
5 psychographic profile of the user and (ii) generating and displaying appropriate  
6 screen views to the user based on the created psychographic profile of the user.”  
7 Accordingly, “program controller” fails to recite sufficient structure for performing  
8 its defined function.

9 **V. CONCLUSION**

10 Based on the arguments and evidence provided above, RSI respectfully  
11 requests that the Court adopt the RSI’ proposed claim constructions.

12 Dated: November 19, 2007

HELLER EHRMAN LLP

13  
14  
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