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

20 VALUECLICK, INC., a Delaware
 corporation,
 21
 Plaintiff,
 22
 v.
 23
 REVENUE SCIENCE, INC., a
 24 Washington corporation,
 25
 Defendant.

CASE NO. CV 07 2502 MMM (JCX)

**PLAINTIFF VALUECLICK, INC.'S
 CORRECTED RESPONSIVE
 CLAIM CONSTRUCTION BRIEF**

 Assigned: The Hon. Margaret M.
 Morrow

 Complaint Filed: March 28, 2007

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1 **I. INTRODUCTION**

2 Under the Court's Scheduling Order, ValueClick and RSI each submitted
3 simultaneous opening claim construction briefs on October 15, 2007. ValueClick
4 herein responds to RSI's opening claim construction brief.

5 In the opening briefs, each side presented the issues in a different order. For
6 consistency, ValueClick responds to RSI's arguments generally in the same order as
7 the issues were discussed in ValueClick's opening brief.

8 **II. RSI'S INCORRECT APPROACH**

9 RSI's approach to claim construction is as simple as it is incorrect: adopt
10 limitations from the specification where those limitations support RSI's non-
11 infringement arguments, and ignore examples from the specification where those
12 examples would naturally broaden the meaning of claim terms. But this sort of
13 analysis driven by infringement arguments is precisely what is forbidden by
14 *Markman* and its progeny.

15 RSI also makes much of a phrase used by ValueClick as mere shorthand – the
16 phrase “because [the] term is clear to a layperson” it receives its ordinary meaning,
17 and needs no express interpretation. In each case, these are terms which have
18 ordinary meaning to a person of ordinary skill in the art – and this is the legal
19 standard cited by ValueClick in its opening brief. As stated in that brief, there is a
20 heavy presumption that a claim term carries its ordinary and customary meaning to
21 persons of skill in the art at the time of the invention. *3M Innovative Properties Co. v.*
22 *Avery Dennison Corp.*, 350 F.3d 1365, 1370 (Fed. Cir. 2003). This is also the
23 standard relied on by Mr. Kent in his declaration at, for example, Paragraph 11, in
24 which he states his consideration of the ordinary meaning – to a person of ordinary
25 skill in the art – of, for example, data assembly:

26 Next, I was asked to consider whether the term “data assembly” had any
27 special meaning to persons of skill in the art in early 1996. I concluded, no. A
28 “data assembly” had a structural connotation under its ordinary meaning to
persons in numerous fields, not just online marketing system design. The term
connoted an arrangement for holding computer data. Several examples which

1 would have immediately come to mind to a person of skill in the art include
2 relational databases, tables with records and fields (mentioned in the patents-
3 in-suit at column 5), or even basic “flat-file” text databases. When modified
4 according to the additional language in the claims, the term was also clear to a
5 layperson – a computer system, or part thereof, which provides and supports
6 agate information display to users of a computer network, or (depending on
7 which claim) a computer system, or part thereof, which provides agate
8 information for display to users.

9 Both RSI and ValueClick agree – claim terms are to be understood from the
10 perspective of a person of ordinary skill in the art. Where RSI and ValueClick differ
11 is on what the results of that analysis provide for each term.

12 There is no question but that the Court and the jury will receive testimony,
13 both from RSI and from ValueClick, relating to what persons of ordinary skill in the
14 art understood at the time of invention of the Gerace patents, and what they
15 understand today. Where ValueClick has asserted that terms like “data assembly” do
16 not need an express interpretation, it is because they require no special re-wording,
17 and as understood in the context of the technology, have sufficient meaning. Without
18 question, the jury pool in this district is intellectually capable of immediately
19 appreciating that a “data assembly” is an assembly for data, that a “computer
20 apparatus” is an apparatus of the computer type, that a “user”, in the context here, is
21 the person using a computer, and so on. While ValueClick does not shy away from
22 explaining terms which legitimately require an express interpretation, ValueClick
23 respects the capabilities of juries in this District to understand and apply
24 understandings of claim terms where the understanding to a layperson and to a person
25 of ordinary skill is identical.
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1 **III. CLAIM TERMS THAT VALUECLICK BELIEVES REQUIRE**
2 **EXPRESS INTERPRETATION**

3 **1. Psychographic profile of a (each) user**

4 ValueClick's opening brief amply set forth the reasons for the Court adopting
5 its construction of "psychographic profile" – "a set of characteristics that identify a
6 particular user or group of users as being of a particular type, derived from the
7 history and/or pattern of activity of the user or group." Only two of RSI's
8 contentions merit discussion.

9 First, RSI alleges that the "stated purpose" of the psychographic profile is to
10 customize presentation (format) of agate information, per user, for display to the user.
11 (RSI Br. 13, citing '396 Patent at 2:21-23). The cited excerpt from column 2 is the
12 only place in the intrinsic record which arguably associates presentation/format
13 preferences with the terminology "psychographic profile." What controls the
14 question, though – as pointed out in our opening brief (pages 11 to 16) – is that
15 examples abound where the intrinsic record discusses psychographic profiles without
16 them containing presentation/format preferences, instead containing only content
17 preferences.

18 Fortunately, the Federal Circuit is clear about the significance of broad and
19 varied uses of certain terms in the intrinsic record. Under the law, varied use of a
20 disputed term in the intrinsic record attests to the breadth of a term rather than
21 providing a limiting definition. See, e.g., *MBO Laboratories, Inc. v. Becton,*
22 *Dickinson & Co.*, 474 F.3d 1323, 1333 (Fed. Cir. 2007) (reversing the district court's
23 construction of the claim terms "adjacent" and "proximity" since it impermissibly
24 excluded one or more embodiments from the scope of the claims); *Anchor Wall Sys.*
25 *v. Rockwood Retaining Walls, Inc.*, 340 F.3d 1298, 1308-1309 (Fed. Cir. 2003);
26 *Acromed Corp. v. Sofamor Danek Group*, 253 F.3d 1371, 1382 (Fed. Cir. 2001 (three
27 uses of a term require a meaning broad enough to apply to each); *Northern Telecom*
28 *Ltd. v. Samsung Electronics Co. Ltd.*, 215 F.3d 1281, 1291 (Fed. Cir. 2001; *Johnson*

1 *Worldwide Associates v. Zebco*, 175 F.3d 985, 991 (Fed. Cir. 1999; *Enercon GmbH*
2 *v. U.S. Int'l Trade Comm'n*, 151 F.3d 1376, 1385 (Fed. Cir. 1998) (refusing to limit a
3 term used "interchangeably" in the written description to only one of the uses of the
4 term).

5 Here, the preferred embodiment's "psychographic profile" in most cases lacks
6 presentation/format preferences. Indeed, claim 10 of the '396 Patent confirms that
7 "user profile" was the drafter's preferred term for a profile containing both content
8 and format preferences of a user. The "psychographic profile" thus receives a
9 construction that does not require presentation / format preferences to be included.

10 Second, RSI urges a construction in which the psychographic profile is "based
11 on a person's responses to prompts." RSI is clearly wrong, since the claimed
12 building of the psychographic profile has nothing to do with prompts occurring
13 before agate data are displayed. The fundamental premise of the Gerace patents is
14 that user activity in the form of mouse clicks with respect to agate data helps build
15 the profile (e.g., '396 Patent at 16:1, defining "user activities" as "what he 'clicked
16 on;" and 2:3-15, SUMMARY OF THE INVENTION, "recording user activity with
17 respect to agate data . . . a psychographic profile is inferred"). To sow confusion
18 about responses to prompts, RSI cites the '396 Patent at 16:2-4 and the '735 Patent at
19 14:62-65 at page 13 of its brief, but these citations are not pertinent. The "prompts"
20 mentioned at these citations disclose what happens before the claimed building of a
21 psychographic profile has begun. Namely, the user responds to prompts to request
22 agate information (i.e., respectively, a zip code prompt to request a weather display,
23 and a stock ticker symbol prompt to request a stock display). The response to these
24 prompts is not used to build the profile. The asserted claims create / build / generate
25 the psychographic profile after the agate information was requested or during its
26 display, based on interactions with the agate data. Properly understood, the only two
27 disclosures of "prompting" in the Gerace patents happen before agate information is
28 displayed. As such, the Gerace patents nowhere disclose or suggest creating the

1 initial psychographic profile from prompts to the user.¹

2 **2. agate information / agate data / advertisement**

3 RSI's construction of agate data / information is flawed because it excludes
4 advertisements. But, the very examples recited in the patents include advertisements.
5 "Today, agate is used to refer to time-sensitive, reference information that is not read
6 linearly. Examples are telephone listings, *classified advertisements*, weather reports,
7 sports scores and statistics, market data, books and recordings in print, and television
8 and film listings." '396 Patent at 1:8-13 (emphasis added). Aware of this, RSI
9 trumpets a nuance found nowhere in the patents – it seeks to exclude only "sponsor
10 provided advertisements" from the construction. (RSI Br. 14). However, RSI offers
11 no principled reason why a "classified advertisement" meets the definition of "time-
12 sensitive, reference information that is not read linearly," while a so-called "sponsor
13 provided advertisement" does not. They both match the agreed express definition
14 found in column 1 of both patents: time-sensitive reference information not read
15 linearly. If there were any doubt, the intrinsic record expressly describes sponsor
16 provided advertisements as one potential type of agate data / information. See 7:30-
17 31 ("advertisements . . . which may be integrated into the agate data"), and 7:37
18 ("agate data advertisements"). The intrinsic record treats advertisements as one type
19 of agate information.

20 At a minimum, RSI seeks improperly to use claim construction proceedings to
21 get a premature advisory ruling on whether advertisements may or may not fall
22 within the otherwise agreed express definition of agate information. See *Fieldturf*
23 *USA, Inc. v. Sports Construction Group LLC*, 499 F. Supp. 2d 907, 918 (N.D. Ohio.
24 2007 (refusing to adopt defendant's proposed claim interpretation because it was "a
25

26 ¹ ValueClick believes it understands RSI's tactical and ulterior motive in seeking
27 improperly to broaden the scope of psychographic profile – it wants to use an
28 improper claim construction to advance an argument that a certain prior art patent
invalidates the claims.

1 premature attempt by [the accused infringer] to have the court decide certain
2 infringement issues.”). Whether a sponsor provided advertisement meets the explicit
3 patentee definition is at least an issue of fact for a later date. See *PPG Industries, Inc.*
4 *v. Guardian Industries Corp.*, 156 F.3d 1351, 1354-55 (Fed. Cir. 1998) (holding
5 courts do not construe claims to “redefine” them, or to provide greater precision to
6 the claim language than the patentee used).

7 **3. tracking and profiling member responsive to the data assembly**
8 **upon display of the requested agate information, in response to a**
9 **user viewing requested agate information obtained through the data**
10 **assembly, the tracking and profiling member recording indications**
11 **of physical activity by the user during viewing of the displayed**
12 **requested agate information**

13 Contrary to RSI’s arguments (RSI Br. 20), ValueClick did not “improperly
14 paraphrase” the claimed function of the “tracking and profiling member” limitation.
15 The claim language uses the wording “responsive to,” ValueClick converted this for
16 grammatical purposes to “in response to,” and RSI converted it for grammatical
17 purposes to “responding to.” All of these are distinctions without a difference, and
18 ValueClick is indifferent as to how the Court renders a grammatically correct claim
19 construction of the recited function.

20 The only other debate centers around RSI’s contention that “program
21 controller 79” must be construed as part of the corresponding structure. Since
22 program controller 79 does not itself track and profile, but rather relies on a
23 subsidiary module (profiling member 73) to do that work, RSI is incorrect to include
24 it. See *Asyst Techs, Inc. v. Empak, Inc.*, 268 F.3d 1364, 1370 (Fed. Cir. 2001)
25 (holding that structural features that do not actually perform the recited function do
26 not constitute corresponding structure and thus do not serve as claim limitations).///

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1 **4. advertising component coupled between the data assembly and**
2 **tracking and profiling member, the advertising component holding**
3 **a plurality of advertisements to be displayed to users on the**
4 **network, in accordance with the psychographic profiles of the users,**
5 **and for each advertisement, the advertising component providing a**
6 **target profile of desired users to whom to display the advertisement**

7 RSI's reluctance to acknowledge the two alternative corresponding structures
8 for the "advertising component" (namely, sponsor objects 33 and advertising module
9 75) is puzzling. In the Joint Claim Construction Chart, RSI had indicated "sponsor
10 objects 33 (Fig. 3A functional equivalent of the advertising module 75 of Fig. 2)."
11 RSI should be bound by its earlier admission. Even if not bound by it, RSI's
12 arguments discounting "advertising module 75" as an alternative structure are wrong.
13 Column 5 of the '396 Patent, particularly lines 15-40, clearly links this module 75 to
14 performance of the claimed function.

15 **5. screen view**

16 RSI's construction of "screen view" is flawed because it ignores that persons
17 of ordinary skill in the art do not consider the term commensurate with the entirety of
18 a browser-displayed web page. See Kent Decl. ¶ 7. Instead, ValueClick's
19 construction is correct – that a "screen view" is a page or other presentation to the
20 user. The breadth of the language alone is conclusive – a screen view is quite simply
21 a view on a screen. Nothing in this plain understanding requires either a whole
22 screen (which may contain more than the entirety of a web page) or a whole web
23 page (which may have more information than can be displayed on one screen at
24 once). Kent Decl. ¶ 7.

25 The text at lines 39-40 of the '396 Patent column 20 ("... the term 'page' is
26 used synonymously with screen view") does not support RSI's contended
27 interpretation. As mentioned in ValueClick's opening brief at 18-19, this excerpt
28 effectively broadens the sense and usage of the word "page," rather than narrowing
the sense and usage of the term "screen view."

1 **6. a user profiling member for recording information regarding each**
 2 **user including indications of user responses and physical activity**
 3 **with respect to screen views during display of said screen views,**
 4 **such that the user profiling member enables creation of a**
 5 **psychographic profile of each user from said recorded information**
 6 **and indications of user responses**

7 Similarly to “advertising component,” RSI’s reluctance also to acknowledge
 8 the two alternative corresponding structures for the “user profiling member” (namely,
 9 user objects 37 and user profiling member 73) is equally puzzling. In the Joint Claim
 10 Construction Chart, RSI had indicated “set of user objects 37 provides the functional
 11 equivalent of the user profiling member 73 of Fig. 2.” Again, RSI should be bound
 12 by its earlier admission. Even if not bound by it, RSI’s arguments discounting “user
 13 profiling member 73” as an alternative structure are wrong. Column 4 of the ‘396
 14 Patent, line 56, to column 5, line 14, clearly links this profiling member 73 to
 15 performance of the claimed function.

16 **7. demographic profile**

17 To simplify the issues, and with the Court’s approval, ValueClick agrees with
 18 RSI that the Court should postpone the construction of “demographic profile.” The
 19 issue will become ripe, though, when and if ValueClick asserts additional dependent
 20 patent claims that include that terminology.

21 **IV. CLAIM TERMS THAT VALUECLICK BELIEVES MAY GO INTO**
 22 **THE JURY INSTRUCTIONS WITHOUT ELABORATION**

23 **1. computer apparatus**

24 In rushing to construe the simple words “computer apparatus,” RSI overlooks
 25 that one part of a preamble might not be a limitation, even when another part of the
 26 preamble is. See *Intervet America, Inc. v. Kee-Vet Laboratories, Inc.*, 887 F.2d 1050,
 27 1055 (Fed. Cir. 1989) (“With respect to the significance of preamble statements in
 28 claims, in . . . *Loctite [Corp. v. Ultraseal Ltd.]*, 781 F.2d 861 (Fed. Cir. 1985),
 29 overruled on other grounds], it is to be noted that part of what was in a claim
 30 preamble was held to be a limitation and another part of the preamble was not. Each

1 case must be judged on its own facts.”); accord *One World Technologies, Ltd. v.*
2 *Rexon Industries Corp.*, 2005 U.S. Dist. LEXIS 11711, at *46-*48 (N.D. Ill. 2005)
3 (finding part of a preamble limiting, and another part a mere statement of intended
4 use).

5 Here, ValueClick does not dispute that some language in claim 1 of the ‘396
6 Patent and claim 14 of the ‘735 Patent – “initially creating a psychographic profile of
7 a user” – limits both such claims. It does not follow that the rest of the preamble
8 (such as “computer apparatus”) is a limitation. See *Intervet*, 887 F.2d at 1055. That
9 question can only be resolved by applying the preamble-as-limitation standards to the
10 term itself. The Federal Circuit exhaustively discussed how to apply those standards
11 in *Catalina Marketing International, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801,
12 807-812 (Fed. Cir. 2002).

13 Applying *Catalina Marketing* here, the term “computer apparatus” does not
14 match any of the “guideposts” that usually indicate a preamble term is limiting; for
15 instance, the term (1) is not part of a *Jepson* claim format, (2) does not supply the
16 antecedent basis for later language in the claims, (3) is not essential to understand
17 later limitations or terms in the claim body, (4) was not used in the specification or
18 the prosecution history to distinguish the invention from prior art. *Catalina*, 289 F.3d
19 at 808-09. On the other hand, it does match guideposts that usually indicate a
20 preamble term is non-limiting; for instance, (1) it merely describes the environment
21 of use of an invention otherwise defined in the claim body, and (2) deletion of the
22 term from the preamble does not affect the structural definition or operation of the
23 claimed invention, since “[t]he claim body defines a structurally complete invention.”
24 *Catalina*, 289 F.3d at 810. Observe that claim 1 of the ‘396 patent and claim 14 of
25 the ‘735 patent each have two overall claim elements: “a data assembly” and “a
26 tracking and profiling member.” Here, the claimed assembly and the claimed
27 tracking and profiling member structurally define the complete invention, and thus
28 ///

1 the “computer apparatus” preamble terminology does nothing to “give life, meaning
2 and vitality” to the claim. *Id.* at 808.

3 Even if “computer apparatus” were limiting, RSI’s construction does violence
4 to the teachings of the intrinsic record. Whereas RSI wishes to limit the construction
5 to a computer program and hardware at a *single* network site, the ‘396 Patent itself
6 says no such thing. Instead, the ‘396 Patent states that in the preferred embodiment,
7 “server 27 [i.e., the ‘computer apparatus’] is a Digital Equipment Corp. Alpha server
8 cluster (e.g., 2400-8000 Series), *or a multiplicity of similar such servers.*”² ‘396
9 Patent at 3:62-65 (emphasis added). Hence, the specification unequivocally refutes
10 RSI’s contention. Under the law, varied use of a disputed term in the intrinsic record
11 (as here, where the preferred embodiment’s “computer apparatus” may be one server
12 *or* may be many) attests to the breadth of a term rather than providing a limiting
13 definition. See, e.g., *MBO Laboratories, Inc.*, 474 F.3d at 1333; *Anchor Wall Sys.*,
14 340 F.3d at 1308-1309; *Acromed Corp.*, 253 F.3d at 1382; *Northern Telecom Ltd.*,
15 215 F.3d at 1291; *Johnson Worldwide*, 175 F.3d at 991; *Enercon GmbH*, 151 F.3d at
16 1385. The intrinsic record clearly shows that the claimed “computer apparatus” (if
17 limiting at all) was intended to encompass either a single computer, or multiple
18 computers.

19 As a last shot, RSI also contends that if the “computer apparatus” could be
20 multiple computers, the “computer apparatus” and the “computer network”
21 impermissibly become one and the same. (RSI Br. 10). RSI is wrong. The preamble
22 states that the environment for the “computer apparatus” is “a computer network”
23 which has “a plurality of digital processors” coupled to a “communication channel.”
24 The preamble also states that the “computer apparatus” is “*in*” that computer
25 network. The preamble never implies that the “computer apparatus” may not be one
26

27 ² RSI’s Brief at page 9 ends its quotation from the ‘396 Patent just before the passage
28 indicating that “server 27 is . . . a multiplicity of . . . such servers.”

1 or many of the named “plurality of digital processors” in its own right. As such, the
2 words of the preamble actually suggest that the “computer apparatus” is either one of,
3 or a subset of, the “digital processors” which are “in a computer network.” Under
4 this view, contrary to RSI’s contorted logic, parts of the “computer network” may
5 indeed comprise digital processors which are *not* the claimed “computer apparatus,”
6 while other parts are.

7 Finally, why confuse the jury with an express construction at all, when the lay
8 understanding of the clear words aligns completely with what one of ordinary skill in
9 the art understands. As Mr. Kent’s expert declaration confirms, persons skilled or
10 nonskilled alike will appreciate that a “computer apparatus” is just an apparatus of
11 the computer type. (Kent Decl. ¶ 8). If the claim language were “lamp apparatus”
12 instead, this Court would not hesitate to conclude that the jury needs no lawyer-
13 driven construction.³ Substituting the word “computer” does not change that
14 analysis.

15 **2. a computer program embodied on a computer readable medium**

16 RSI is also mistaken that the preamble term “a computer program embodied on
17 a computer readable medium” is a claim limitation. While RSI cites remarks in the
18 prosecution history which accompany the filing of the continuation application that
19 became the ‘735 Patent (RSI Br. 10), those comments were not for “distinguish[ing]
20 the claimed invention from the prior art.” See *Catalina*, 289 F.3d at 808. Instead,
21 those remarks were a simple transmittal advising the Examiner before examination
22 how the continuation claims compared to the parent claims. RSI cites no case where
23 prosecution comments *other than* those which use preamble language to distinguish
24 the prior art transform preamble language into claim limitations.

25 Just as with “computer apparatus,” none of the *Catalina* guideposts are present

26 _____
27 ³ To drive home a previous point, a “lamp apparatus” by its plain words might
28 be any different?

1 – these terms are not used as antecedent basis for terms that appear later in the ‘735
2 Patent claim 1, and the rest of the claim elements already set forth the software pieces
3 that make up the entirety of the invention. As a mere statement of intended use, this
4 preamble language is not limiting. See *Catalina*, 289 F.3d at 809 (holding that
5 statements of intended use are limiting only in the “rare” instance they were used to
6 distinguish prior art).

7 Even if limiting, RSI relies on bare attorney argument to contend that it is
8 “only logical” that the “computer readable medium” must be “in one place.” (RSI Br.
9 10). However, the claim language adds only one qualifier to the term “medium” –
10 that it is “computer readable.” It does not state that the “medium” must be “in one
11 place” – a narrowing qualifier the drafter could have drafted if she wanted to, but did
12 not. It was already well known in 1996 (and the Court may take judicial notice) that
13 networked computers operated via the interaction of distributed software – a server in
14 one place and a client in another. The web browser itself is based on such
15 technology. Hence, there is nothing unusual about giving “a computer program
16 embodied on a computer readable medium” its fair scope – algorithms that might (but
17 need not) execute exclusively at one location.

18 Finally, the lay understanding of the clear words aligns completely with what
19 one of ordinary skill in the art understands. (Kent Decl. ¶ 8). Why confuse matters
20 by trying to explain to a jury what the inventor meant, when the words themselves
21 communicate it clearly, broadly and well.

22 3. user

23 RSI effectively seeks a construction of “user” as a “uniquely identifiable user.”
24 (RSI Br. 11-12). However, it is error to add a narrowing modifier (“uniquely
25 identifiable”) to an otherwise general term (“user”) that stands unmodified in a claim.
26 *Renishaw PLC v. Marpos Societa' Per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998).

27 RSI’s ulterior motive is transparent. RSI wants the Court to redraft the claims
28 to impute some sort of log-in requirement. No such requirement is justified. While

1 the preferred embodiment in some cases involved user log-in, it did not always. See
2 '396 Patent at 5:5-7 (logging in is "at the user's convenience"). And in any case, log-
3 in was deliberately left out of the claims. Even if all of the embodiments involved
4 log-in, claims are not limited to the preferred embodiments. *Phillips v. AWH Corp.*,
5 415 F.3d 1303, 1323 (Fed. Cir. 2005) ("[W]e have expressly rejected the contention
6 that if a patent describes only a single embodiment, the claims of the patent must be
7 construed as being limited to that embodiment."). Moreover, at the deepest
8 technological level, after log-in, the preferred embodiment identified users by
9 identifying their data processors. See, e.g., '396 Patent at 4:66-5:7 (describing the
10 *computer ID* enabling the user profiling member to initialize tracking of a new user's
11 viewing activity).

12 For these reasons, a "user" is simply a person who views screens on a
13 computer. Accord, *Z4 Technologies, Inc. v. Microsoft Corp.*, ___ F.3d ___, 2007 U.S.
14 App. LEXIS 26567, at *12-*19 (Fed. Cir. Nov. 16, 2007) (rejecting argument that
15 "user" must be a specific person, and holding it broad enough to be a "person or
16 person using a computer"). With the issue so simple, it is hard to justify why the
17 word needs to be defined for the jury in the jury instructions. Since the preferred
18 embodiment itself contemplates that the ID of the computer terminal that many
19 people could use serves in the overall system as the indicator of who the "user" of the
20 system is, it very well may happen that one user gets up out of his chair for another
21 user to sit down. That event would hardly negate infringement. RSI alleges that
22 unless the claimed computer apparatus / program can uniquely identify an individual,
23 it fails its fundamental purpose. (RSI Br. 12). Not so. Just because there exists an
24 unusual circumstance that the "user" viewing the screens might not be the "user" who
25 was viewing the screens five minutes before does not change the fact that each are
26 "users" of the overall system.

27 ///

28

- 1 **4. data assembly for providing and supporting display of agate**
- 2 **information to users of the computer network**
- 3 **5. agate data assembly for providing agate information for display to**
- 4 **users**
- 5 **6. a program controller responsive to user commands of a user for**
- 6 **generating screen views to the user, the program controller (i)**
- 7 **obtaining information from the agate data portion and user**
- 8 **profiling member, including creating and obtaining the**
- 9 **psychographic profile of the user and (ii) generating and displaying**
- 10 **appropriate screen views to the user based on the created**
- 11 **psychographic profile of the user**

12 For the reasons discussed in ValueClick’s opening brief, pages 22-25, the “data
13 assembly,” “agate data assembly” and “program controller” limitations are not
14 means-plus-function limitations. They disclose sufficient structure. RSI’s brief at
15 22-25 does not provide any persuasive argument to rebut the presumption that this is
16 so. An “assembly” is a structural term, just as a “controller” is. See Ex. J, Kent Decl.
17 ¶¶ 11, 14; see also *Honeywell Int’l, Inc. v. Universal Avionics Sys. Corp.*, 264 F.
18 Supp. 2d 135, 153 (D. Del. 2003) (holding “controller” not a means-plus-function
19 element), *rev’d in part on other grounds*, 488 F.3d 982 (Fed. Cir. 2007). Contrary to
20 RSI’s suggestion (RSI Br. 23), nothing is inconsistent about finding these terms
21 structural, but terms like “profiling member” or “advertising component” not
22 structural.

23 If these limitations were in means-plus-function format, there is general
24 agreement about what the corresponding structures are (putting to one side RSI’s
25 specious “no algorithm” argument): page display objects 35 / agate data assembly 71
26 for the “data assembly” and “agate data assembly” limitations, and program
27 controller 79 / main routine 39 for the “program controller” limitation.

28 **7. physical activity**

 RSI’s construction of “physical activity” is not completely wrong – “inputs
(mouse or keyboard) to the user’s computer.” It is just unnecessary. RSI does not
justify why such simple terms as “physical activity” require explanation to a jury. In
the end, ValueClick is indifferent to whether the Court places the terms in the jury

1 instructions without explanation, or adopts RSI's unnecessary explanation (which
2 might understate the term's true scope).

3 **8. user response**

4 RSI offers a contorted interpretation of "user response" because it fails to
5 consider that term in the context of the claim language where it appears. In every
6 case, "user response" does not exist in a vacuum, but rather is stated as "user
7 response" to screen views, "user response" to viewing of agate information, or "user
8 response" during viewing of agate information. Thus, in its proper grammatical
9 context, "user response" simply clarifies and/or modifies the nature of the "physical
10 activity" that the claims also recite. RSI is wrong to criticize ValueClick for tying
11 the construction of "user response" so closely to the construction of "physical
12 activity" (e.g., RSI Br. 16) because the claims themselves bind these two terms so
13 tightly.

14 In any case, RSI makes the same error with "user response" that it makes with
15 "psychographic profile." The claimed "response" is not to "prompts" as RSI
16 contends, but (as the claim text makes clear) is in response to screen views and/or
17 displayed agate information. To conflate this concept with responses to prompts, RSI
18 again cites the '396 Patent at 16:2-4 and the '735 Patent at 14:62-65 at page 13 of its
19 brief, but these citations are again not pertinent. Namely, at those citations the user
20 responds to prompts to *request* agate information (i.e., respectively, a zip code
21 prompt to request a weather display, and a stock ticker symbol prompt to request a
22 stock display). But the "user response" language in the asserted claims occurs *after*
23 the agate information was requested or *during* its display. Properly understood, the
24 only two disclosures of "prompting" in the Gerace patents happen *before* agate
25 information is displayed. As such, "prompting" has nothing to do with "user
26 response" in the Gerace specifications. RSI invites error when it asks the Court to
27 construe "user response" as information provided "in response to a prompt."
28

1 ValueClick's contended construction (if one is needed at all) is "computer
2 inputs by a user which can (after processing) indicate what has been viewed and/or
3 what has been clicked." The rest of the claim language confirms what does not need
4 to be stated in the explanatory construction: these responses respond to screen views /
5 aggregate information viewed by the user.

6 **9. target profile of desired users to whom to display the advertisement**
7 **/ target audience profile of each advertisement**

8 RSI's arguments do not change the fact that the "target profile" terms are clear
9 enough that a jury would immediately appreciate their meaning to one of ordinary
10 skill in the art. The terms use no unusual or idiosyncratic words, and there is no
11 patent lexicography to deviate them from their plain meaning. As such, they should
12 go into the jury instructions without embellishment.

13 If an express construction is given, RSI and ValueClick apparently agree on
14 the substance of how to construe the "target profile" terms. RSI caused some initial
15 confusion by stating that the "target profile" must be "distinct from demographic or
16 psychographic profile of a user." However, ValueClick never disagreed that the
17 target profile of an advertisement is a separate item from the user profile of a user. It
18 appears as well that RSI would agree that the target profile *can* include demographic
19 or psychographic profiles of desired users for a given ad. To cut through the
20 confusion RSI generated, ValueClick's wording should be used: "the demographic
21 and/or psychographic profile of desired users for viewing a given advertisement."
22 ValueClick's wording is identical to the use of the "target profile" terminology in the
23 '396 Patent at claim 6.

24 **V. RSI CONCEDES THAT INDEFINITENESS ARGUMENTS ARE**
25 **PREMATURE**

26 Though RSI says it is not moving for summary judgment of indefiniteness
27 (RSI Br. 19 n.6), RSI contends the Court should address the alleged "critical
28

1 omission” of corresponding structure for ValueClick’s means-plus-function elements.
2 There is no such “critical omission.”

3 RSI does not cite a single case which found that a patentee failed to disclosed
4 an algorithm, thus rendering a means-plus-function element indefinite. The two
5 cases RSI cites – *WMS Gaming, Inc. v. Int’l Game Tech.*, 184 F.3d 1339 (Fed. Cir.
6 1999) and *Harris Corp. v. Ericsson, Inc.*, 417 F.3d 1241 (Fed. Cir. 2005) – are both
7 infringement cases, not indefiniteness cases. On the other hand, ValueClick cited
8 pertinent caselaw. As ValueClick’s discussion shows at pages 26-28 of its opening
9 brief, very little needs to be disclosed in order to pass the low threshold for claim
10 definiteness – in some cases just five words in a box. See *Allvoice Computing PLC v.*
11 *Nuance Communications, Inc.*, ___ F.3d ___, 2007 U.S. App. LEXIS 23949, at *16-*18
12 (Fed. Cir. Oct. 12, 2007).

13 RSI alleges that the Gerace patents do not disclose routines or methods for
14 acting on data, but Peter Kent’s thorough treatment of each means-plus-function
15 corresponding structure belies that argument. See Kent Decl. ¶¶ 17-21. In each case,
16 Mr. Kent explains several straightforward ways that the algorithms represented by
17 the various objects and program modules could be implemented by one skilled in the
18 art using well-known techniques. There is “no need for the disclosure of the specific
19 program code if software [is] linked to the [claimed function] and one skilled in the
20 art would know what *kind* of program to use.” *Med. Instrumentation and Diagnostics*
21 *Corp. v. Elekta AB*, 344 F.3d 1205, 1214 (Fed. Cir. 2003) (emphasis added).

22 In any case, there is mostly agreement between ValueClick and RSI regarding
23 the remaining aspects of the corresponding structures. Therefore, ValueClick
24 believes the most effective use of judicial resources is to implement those
25 agreements, resolve whatever non-definiteness disputes remain, and postpone the ill-
26 timed indefiniteness arguments for another day. See *Biovail Labs. Int’l SRI v. Impax*
27 *Labs.*, 433 F. Supp. 2d 501, 522 (E.D. Pa. 2006) (holding it premature to address
28 patent claim indefiniteness during claim construction, citing cases).

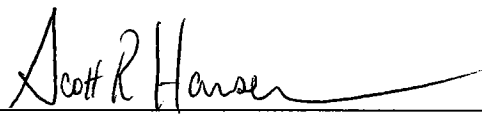
1 **VI. CONCLUSION**

2 For the foregoing reasons, ValueClick respectfully requests the Court issue a
3 Claim Construction Order consistent with ValueClicks' correct interpretation of the
4 disputed claims.

5
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