

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

<b>Eolas Technologies Incorporated,</b>	§	
	§	
<b>Plaintiff,</b>	§	<b>Civil Action No. 6:09-cv-446</b>
	§	
	§	
<b>vs.</b>	§	
	§	
<b>Adobe Systems Inc., Amazon.com, Inc., Apple Inc., Blockbuster Inc., CDW Corp., Citigroup Inc., eBay Inc., Frito-Lay, Inc., The Go Daddy Group, Inc., Google Inc., J.C. Penney Company, Inc., JPMorgan Chase &amp; Co., New Frontier Media, Inc., Office Depot, Inc., Perot Systems Corp., Playboy Enterprises International, Inc., Rent-A-Center, Inc., Staples, Inc., Sun Microsystems Inc., Texas Instruments Inc., Yahoo! Inc., and YouTube, LLC</b>	§	<b>JURY TRIAL</b>
	§	
<b>Defendants.</b>	§	

**REPLY CLAIM CONSTRUCTION BRIEF OF  
PLAINTIFF EOLAS TECHNOLOGIES INC.**

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## I. INTRODUCTION

Aside from one cryptic footnote in Defendants' responsive *Markman* brief, there is little to indicate that it reflects a wholesale abandonment of Defendants' original constructions. Dkt. No. 569 ("D.Br.") at 4 n.3. While styled in that footnote as a "streamlin[ing]," in fact almost all of Defendants' proposals were substantially rewritten in February—after Eolas filed its opening *Markman* brief in December, Dkt. No. 537 ("E.Br."). These many and significant changes are reflected in the tables below, as well as in Exhibit A to this brief. Defendants' untimely reworking of their proposals reveals two abuses of the *Markman* process: first, from the start they have advocated constructions filled with extraneous limitations, rather than constructions supported by the intrinsic record; and second, they have forced Eolas to waste time briefing proposals that they must have known were infirm. In any event, as shown below, Defendants' recently reworked proposals fare no better than their now-abandoned original constructions.

Defendants also highlight two "legal issues" upon which their new proposals rely. D.Br. at 1-3. Both miss the mark. First, Defendants suggest that—pursuant to a federal register comment accompanying the 2000 amendment of a patent-office regulation—a patentee's silence can raise a presumption of disclaimer. D.Br. at 2. That comment explicitly noted, however, that it did "not provide any new policy," but instead merely attempted to "track[] the state of the case law" in 2000. *Changes to Implement the Patent Business Goals*, 65 Fed. Reg. 54,604, 54,633 (Sep. 8, 2000). Whether or not that comment accurately tracked the law in 2000, it most certainly does not do so today. Just last month this Court confirmed that, "[c]ontrary to Defendants' contentions, the Examiner's unilateral statements during reexamination are not a clear disavowal of claim scope by [a silent patentee]." *Soverain Software LLC v. J.C. Penney Corp.*, No. 6:09-CV-274-LED, 2001 U.S. Dist. LEXIS 3336, at \*14 (E.D. Tex. Jan. 13, 2011). The extensive authority cited in Eolas' opening brief confirms the vitality of this rule. E.Br. at 9. Second, Defendants suggest that the claim-differentiation doctrine does not apply when some of the claims at issue are found in a later-filed continuation patent. D.Br. at 3. Controlling authority again confirms that Defendants are simply wrong on this point. *See Kara Tech. Inc. v.*

*Stamps.com Inc.*, 582 F.3d 1341, 1343, 1347 (Fed. Cir. 2009) (applying claim-differentiation doctrine between parent and continuation patents); *Arlington Indus. v. Bridgeport Fittings, Inc.*, No. 2010-1025, 2011 U.S. App. LEXIS 1118, at \*14-15 (Fed. Cir. Jan. 20, 2011) (same).

**II. EOLAS’ PROPOSED CLAIM CONSTRUCTIONS SHOULD BE ADOPTED**

**A. “Executable Application”**

<u>Eolas’ Proposal</u>	<u>Defendants’ Old and New Proposals</u>
any computer program code, that is not the operating system or a utility, that is launched to enable an end-user to directly interact with data	a <del>compiled</del> native binary program, <del>designed to help users perform certain tasks,</del> that remains discrete and separate from the browser application, and is not [part of an] <del>the</del> operating system, <del>a utility,</del> or a <del>library</del> [utility]

The Federal Circuit has confirmed that Eolas’ proposal for this term reflects its “proper definition.” *Eolas Techs., Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1332, 1336 (Fed. Cir. 2005). This definition was gleaned through an application of the intrinsic-evidence approach outlined in the *Markman* and *Vitronics* cases, Ex. B at 8, 12-24—that is, the very approach “reaffirm[ed]” in *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (“What we said in those cases bears restating, for the basic principals of claim construction outlined there are still applicable, and we reaffirm them today.”). Defendants thus have it exactly backward when they assert that *Phillips* “repudiated the methodology behind the previous construction.” D.Br. at 4. In fact, *Phillips* explicitly reaffirmed the methodology behind the construction approved by the Federal Circuit. *See Phillips*, 415 F.3d at 1312; *Eolas Techs.*, 399 F.3d at 1336; Ex. B at 8.

Defendants nevertheless argue that the Federal Circuit’s construction should be rejected because: 1) Eolas allegedly “narrowed its claims” in the ’906 patent’s second reexamination; and 2) the 73-page notice of allowance in the first reexamination contained comments regarding “instruction[s] in binary form.” D.Br. at 5-6. Both of these arguments are meritless.

First, Eolas did not narrow its claims in the second reexamination. Eolas merely substituted the synonymous phrase “enable an end-user to directly interact with”—which, as Eolas explained to the examiner, was taken directly from the construction approved by the Federal Circuit—for the phrase “interactive processing of.” Ex. C at 11 (explaining that the

substituted phrase was from the construction approved by the “Federal Circuit and therefore this language does not change the scope of claims 1 and 6”); *see also Eolas Techs.*, 399 F.3d at 1336.

Second, the unilateral statement of the examiner in the first reexamination—buried within a 73-page notice of allowance, and never endorsed by Eolas—does not constitute a disavowal of claim scope as a matter of law. *See* Ex. D; E.Br. at 9; *Soverain*, 2011 U.S. Dist. LEXIS 3336, at \*13-15. As noted above, the decade-old regulatory comment upon which Defendants’ rely, D.Br. at 2, does not undermine the more recent, uniform, and controlling case law holding that a patentee’s silence in the face of an examiner’s unilateral statement will not constitute disclaimer.<sup>1</sup> It is also worth noting that the examiner’s comment regarding “binary form” was not based upon the claims, specification, or any other intrinsic source of authority. To the contrary, the examiner stated his opinion that the “’906 specification is silent regarding the use of applications that rely upon scripts”—thus confirming that his statements were not based upon the intrinsic record of the patent. Ex. D at 54-56 (EOLASTX-0000001353-1355). Even considered on its merits, therefore, the examiner’s stray and unilateral comment provides no reason to reject the construction affirmed by the Federal Circuit as the disputed term’s “proper definition.”<sup>2</sup> *Eolas Techs.*, 399 F.3d at 1336.

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<sup>1</sup> *See* E.Br. at 9; *Salazar v. Procter & Gamble Co.*, 414 F.3d 1342, 1347 (Fed. Cir. 2005) (“After all, the applicant has disavowed nothing.”); *Sorensen v. ITC*, 427 F.3d 1375, 1378-79 (Fed. Cir. 2005). Significantly, numerous courts have applied this rule to examiner statements made post-2000—that is, to statements made after the regulatory comment upon which Defendants rely. *See Soverain*, 2011 U.S. Dist. LEXIS 3336, at \*13-15; *Biax Corp. v. Sun Microsystems, Inc.*, No. 2:06-CV-364-CE, 2008 U.S. Dist. LEXIS 55101, at \*22 (E.D. Tex. July 18, 2008); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, No. 08-CV-309; 2009 U.S. Dist. LEXIS 118320, \*51 (D. Del. Dec. 18, 2009); *IP Innovation LLC v. Mitsubishi Elec. Corp.*, No. 08-CV-393; 2009 U.S. Dist. LEXIS 100647, at \*17 (N.D. Ill. Oct. 29, 2009).

<sup>2</sup> Defendants improperly place significant weight on the non-precedential *St. Clair* case. D.Br. at 2, 4; *St. Clair Intellectual Prop. Consultants, Inc. v. Canon Inc.*, No. 2009-1052, 2010-1137, 2011 U.S. App. LEXIS 515 (Fed. Cir. Jan. 10, 2011) (unpublished). That unpublished decision stands simply for the unremarkable proposition that an examiner’s statements are part of the relevant intrinsic record. In short, *St. Clair* does nothing to undermine *Salazar* or the other relevant cases cited above. The Court might also observe that, having failed to find support in the specification for their proposal, Defendants are forced in the end to point to dictionary definitions. D.Br. at 6. Ironically, *this* was the approach rejected in *Phillips*, 415 F.3d at 1320.



**B. “Automatically Invoking The Executable Application”**

<u>Eolas’ Proposal</u>	<u>Defendants’ Old and New Proposals</u>
No further construction needed. In the alternative: automatically calling or activating the <u>executable application</u> <sup>3</sup>	<del>in response to the browser parsing an embed text format,</del> the executable application is launched to permit a user to interact with the object <del>immediately,</del>
No further construction needed. In the alternative: <u>executable application</u> is automatically called or activated by the browser	without any intervening activation of the object by the user

As Eolas has explained, once “executable application” is construed, the additional “automatically invoke[d]/invoking” language will be clear to the jury and thus requires no further construction. E.Br. at 9-12. Defendants effectively concede this point, offering in response only a conclusory footnote suggesting that the Court must resolve the parties’ dispute. D.Br. at 7 n.5. That is correct as far as it goes, but the controlling case law cited in Eolas’ brief confirms that this Court can resolve the dispute by rejecting Defendants’ improper proposal and holding that the term will have its plain meaning. E.Br. at 10; *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1207 (Fed. Cir. 2010). And that is just what the Court should do.

Defendants’ proposal clearly demands rejection. Defendants assert that the “primary dispute” here relates to whether “the user clicks to activate the object.” D.Br. at 7. That is, to be frank, silly. Nothing in the intrinsic record has anything to do with “activation of the object.” This phrase, in fact, makes no sense. As all parties agree, in this context the “object” is a type of information. Ex. A at 2 (“information [that is] presentable to a user of a computer system”). Information is not activated; it is interacted with. The claim language itself makes clear that the “executable application” is “automatically invoke[d] . . . in order to . . . enable an end-user to directly interact with said object.” Ex. E at claim 6. In other words, the patents teach that while the invocation of the application is automatic—that is, as Defendants may argue, without a user’s click—the interaction with the object is direct—that is, certainly in the preferred embodiment, with a user’s click. Ex. F at Fig. 9, col. 15:58-16:28 (describing, inter alia, a “graphical user interface (GUI) thru which the user interacts with data”); Ex. E at claim 6.

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<sup>3</sup> Underlining indicates that the underlined word has been separately proposed for construction.

Defendants seriously misrepresent the prosecution history and testimonial evidence they cite on this point. D.Br. at 8-9. When viewed in context, this evidence clearly concerns activation of the executable application, and not Defendants’ nonsensical “activation of the object.” For example, Dr. Doyle’s testimony had nothing to do with clicking to activate the object; it concerned clicking to activate the executable application:

Q. The claims require that the executable application be automatically invoked, isn’t that right? A. That’s correct. . . .

Q. So what that means is that the executable application starts up without a mouse click, right? A. That’s correct.

D.Br., Ex. J at 55. Dr. Doyle thus did not testify that the object was activated without a mouse click—again, in the context of this invention that would make no sense. Similarly, the prosecution history related to the Mosaic and Koppolu references makes clear that they were distinguished on the ground that “there is no disclosure or suggestion in Mosaic or Koppolu of automatically invoking an external application when an embed text format is parsed.” D.Br., Ex. J at 38; *see also* Ex. G at EOLASTX-0000001021, 1028-1029 (“It is important to note here that the container document does not automatically launch the server application.”). It is also important to note that the applicants never argued, as Defendants suggest, that “even if an executable application is invoked without involvement of the user, that does not qualify as ‘automatically invoking’ within the meaning of the claimed invention.” D.Br. at 8.

In short, because “activation of the object” is a phrase completely foreign to the claims and specification, and because the applicants said nothing in the prosecution history that might require that this nonsensical limitation be imported into the claims, Defendants’ proposal containing this made-up limitation must be rejected.<sup>4</sup> *See Phillips*, 415 F.3d at 1314-15.

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<sup>4</sup> As Eolas has explained, Defendants’ proposal is also precluded by the claim-differentiation doctrine, which gives rise to a presumption that a limitation found in a dependent claim is not read into an independent claim. E.Br. at 12. Defendants provide no reason to find this presumption overcome. In fact, Defendants argue only that the doctrine should not be applied when some of the claims are found in a later-filed continuation patent. D.Br. at 9. As noted above, this argument is meritless. Defendants’ cited case does not stand for this proposition, *see ICU Med., Inc. v. Alaris Med. Sys., Inc.*, 558 F.3d 1368, 1376 (Fed. Cir. 2009), and many other cases—including cases from this Court—have applied the doctrine in this context. *See Kara*

**C. “Text Format”**

<u>Eolas’ Proposal</u>	<u>Defendants’ Old and New Proposals</u>
text that initiates processing	<del>a predefined set of tags or symbols that specify the formatting of a document [formatting]</del>

Defendants’ proposal must be rejected for a simple reason: the patents describe many “text formats” that have nothing to do with document formatting. “Embed text format,” for example, relates to embedding an object, not formatting, Ex. E at claim 6; “href” relates to a linked URL, not formatting, Ex. F at 12:54-13:5; and “type” relates to the kind of executable application needed, not formatting, Ex. F at 12:54-13:31. Indeed, the very evidence that Defendants offer in support of their construction explains that text formats may be used to “link[] to other documents.” D.Br. at 10. Because a “text format” is not limited to formatting, Defendants’ proposal improperly narrows the claim language. *See Phillips*, 415 F.3d at 1313-16.

**D. “Embed Text Format, Located At/Corresponding To A First Location”**

<u>Eolas’ Proposal</u>	<u>Defendants’ Old and New Proposals</u>
No further construction needed. In the alternative: <u>embed text format located at a first location in the first distributed hypermedia document</u>	<del>embed text format</del> [tag] located at the place in the received document where the embedded object will appear within the displayed document
No further construction needed. In the alternative: <u>embed text format</u> which relates to a first location in the document	<del>embed text format</del> [tag] located at the place in the received file where the embedded object will appear within the displayed document

**“Embed Text Format”:** As Eolas’ opening brief explained, once “text format” is construed, “embed text format” needs no further construction. In the alternative, it should be construed simply as “text format for embedding an object.” E.Br. at 14. In their brief, Defendants suggest that this term should be limited to the example of the “special” EMBED tag described in the preferred embodiment. D.Br. at 11. But Defendants point to no clear and unequivocal disavowal of claim scope, and the Federal Circuit has “repeatedly warned against

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*Tech.*, 582 F.3d at 1347; *Arlington*, 2011 U.S. App. LEXIS 1118, at \*14-15; *Sta-Rite Indus., LLC v. ITT Corp.*, 682 F. Supp. 2d 738, 760 (E.D. Tex. 2010); *IP Innovation, LLC v. Google, Inc.*, No. 2:07-CV-503-LED, 2010 U.S. Dist. LEXIS 987, at \*27-28 (E.D. Tex. Jan. 7, 2010).

confining the claims to [preferred] embodiments.” *Phillips*, 415 F.3d at 1323; *see also* E.Br. at 15 (dependent claim 3 of the ’985 patent adds “where the embed text formats are HTML tags”).

**“Located at a first location” (’906 patent):** “Located at a first location” means simply that: located at a first location. The jury will need no assistance to understand this plain-language phrase, and the Court should again resolve the parties’ dispute by rejecting Defendants’ improper proposal and holding that this term will have its plain meaning. E.Br. at 18. Defendants approach this term by pointing to another limitation in the same claim—reciting a display “at said first location”—and arguing in effect that the Court should read Defendants’ understanding of that second limitation into this first limitation. D.Br. at 12. Nothing in the ordinary meaning of “first location,” however, would require that location to be the place “where the embedded object will appear.” Just as importantly, Defendants’ attempted exercise in redundant construction is not helpful and will confuse the jury.<sup>5</sup> *See Wi-Lan Inc. v. Acer, Inc.*, No. 2:07-CV-474-TJW, 2010 U.S. Dist. LEXIS 99263, at \*76-78 (E.D. Tex. Sept. 20, 2010).

**“Corresponding to a first location” (’985 patent):** As with “located at,” “corresponding to” requires no construction. E.Br. at 18. Significantly, however, these terms are different, and the law recognizes that when different words or phrases are used in separate claims, those differences should be respected. *Phillips*, 415 F.3d at 1314-15. Defendants violate this basic claim-construction principle by proposing the same definition—including the phrase “located at”—for both terms. This violation is particularly striking given Defendants’ own argument that, in the context of the ’985 patent, “it no longer made sense to say they were ‘located at’ the same location.” D.Br. at 14. Defendants’ own argument thus confirms that their proposal for this term makes no sense. And Defendants are surely right about that—it makes

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<sup>5</sup> Defendants point to a few statements in the prosecution history where, they allege, Eolas advanced their view of the construction for this term. D.Br. at 12-13. Defendants are incorrect. Among other reasons, each of those statements is primarily directed to the second “location” limitation—that is, the location of the display—rather than the first “location” limitation at issue here. D.Br. at 13. Even more critically, none of those statements reflects any clear and unequivocal disavowal of the plain and ordinary meaning of “located at a first location.”

little sense to suggest that the location in a page’s source code will be exactly the same as the location in the rendered version of the page generated by that code. These are different things that correspond to each other but look nothing alike.

Defendants’ proposal for this term, found in the ’985 patent’s independent claims, is additionally precluded by the ’985 patent’s dependent claims. E.Br. at 16. The reason is this: if the “corresponding to” limitation necessarily required a literal and direct relationship between the location of the embed text format and the location of the object, then it would make no sense to further claim a “correspondence [that] is *implied by the order of the text format.*” Ex. G at claim 8 (emphasis added). Nor would it be necessary to further claim a text format specifying “the location of at least a portion of an object *directly.*” Ex. G at claim 9 (emphasis added).

**E. “Object”**

<u><b>Eolas’ Proposal</b></u>	<u><b>Defendants’ Old and New Proposals</b></u>
text, images, sound files, video data, documents or other types of information that is presentable to a user of a computer system	information <del>capable of being retrieved and presented</del> [presentable] to a user of a computer system, which is not a program and which does not include source code or byte code

This term is defined in the specification, and Eolas’ proposal is taken word-for-word from that definition. Ex. F at 2:14-27; E.Br. at 21. Because the “inventor’s lexicography governs” in these circumstances, Eolas’ proposal should be adopted. *Phillips*, 415 F.3d at 1316.

Defendants’ proposal, on the other hand, includes limitations not required by the claims or the specification. For example, it improperly excludes “source code or byte code.” Such code is really nothing more than a form of text, which is indisputably “presentable to a user of a computer system.” It also improperly excludes “a program.” In fact the specification describes embodiments that are not so limited. Ex. F at 3:38-40 (“Some data objects include executable code combined with data.”). The specification repeatedly describes, for example, a “spreadsheet object” related to a “spreadsheet program”:

[A]ny manner of application program may be specified by the TYPE element so that other types of applications, such as a spreadsheet program, database program, word processor, etc. may be used with the present invention. Accordingly, the

object reference[d] by the HREF element would be, respectively, a spreadsheet object, database object, word processor document object, etc.

Ex. F at 13:11-18, 3:38-51, 7:29-40, 11:40-51. Here the spreadsheet program is the “executable application,” and the embedded portion of the spreadsheet with which the user interacts is the “object.” The embedded spreadsheet is the “object” because it is “presentable to a user”—but it is also a program that may include source code (such as, e.g., programming macros or formulas). This example confirms that Eolas’ definition-tracking proposal does not “render[] superfluous” the executable application. *See* D.Br. at 18. There is no dispute that the executable application and the object are different components, with different functions. The critical point is that the patents define the “object” as a type of information that is “presentable to a user of a computer system.” Ex. F at 2:14-27. Because Defendants’ proposal adds unnecessary and litigation-inspired limitations to this definition, it should be rejected.<sup>6</sup> *See Phillips*, 415 F.3d at 1316.

#### **F. The Remaining Terms in Dispute**

**“Specifies the location”**: The parties now propose the same construction for this term—its plain meaning, D.Br. at 15—so the Court need only adopt either party’s proposal. Curiously, Defendants also appear to suggest (in a footnote) that the Court further construe this agreed construction in accordance with an extrinsic dictionary definition. D.Br. at 15 n.10. But the importation of such an extrinsic limitation is prohibited by *Phillips*, 415 F.3d at 1321, and Defendants’ suggested language is further precluded by the claim-differentiation doctrine applied to claims 1 and 9 of the ’985 patent, E.Br. at 16-17; Ex. H at claims 1, 9. As explained above, that doctrine is fully applicable in these circumstances. *See Kara Tech.*, 582 F.3d at 1347.

**“Identify an embed text format”**: “Identify” is another plain-language term that requires no construction. E.Br. at 20. Defendants appear to concede that their proposal violates

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<sup>6</sup> Defendants also argue that their proposal is supported by another unilateral statement buried in the examiner’s 73-page notice of allowance for the first ’906 patent reexamination. D.Br. at 19. As discussed above, this unilateral statement does not constitute a disclaimer. *See Sovereign*, 2011 U.S. Dist. LEXIS 3336, at \*13-15. And Defendants point to no statement of the patentee clearly and unequivocally disavowing the definition that the specification provides for this term. Again, a patentee disclaims nothing by silence. *See Salazar*, 414 F.3d at 1347.

the claim-differentiation doctrine, but still argue that the term should be limited by a description in the preferred embodiment. D.Br. at 16-17. This is improper. *Phillips*, 415 F.3d at 1323.

**“Distributed application”:** Eolas’ proposal again tracks the specification’s definition for this term. E.Br. at 24; Ex. F at 11:18-38. Defendants have abandoned their lengthy original proposal, and now offer a construction that largely tracks the lexicographer’s definition—but for the conspicuous addition of a newly concocted “in parallel” limitation. Ex. A at 2. There is no basis for this addition to the definition, and if Defendants could not find this new limitation in the intrinsic record six months ago, the Court should not read it into the claim language today.

**“Client workstation”/“network server”:** Eolas’ proposals once again track the specification’s definitions for these terms. E.Br. at 25-26; Ex. F at 4:55-59. Defendants attempt to create a misleading distinction between “client” and “workstation,” D.Br. at 26, but in fact the claim term always appears as “client workstation.” *See* Ex. E at claims 1, 6. There is further no basis in the specification for the extraneous limitation that a client workstation “provides higher performance than a personal computer.” E.Br. at 25-26; Ex. F at 6:17-19.

**“Hypermedia document”:** *See* E.Br. at 22-23.

**The 35 U.S.C. § 112, ¶ 6 terms:** As Eolas’ opening brief explained, none of the claims use the term “means,” and Defendants thus face a strong presumption that § 112, ¶ 6 is inapplicable. E.Br. at 26. Defendants make no serious attempt to overcome this presumption. D.Br. at 28. They simply offer a conclusory assertion that the claims are “egregious,” and then: 1) stunningly suggest that Eolas agrees that some of the claims are governed by § 112, ¶ 6; and 2) misleadingly cite two Federal Circuit cases—*Altiris* and *Aristocrat*—both of which addressed claims using the term “means.”<sup>7</sup> D.Br. at 28-29. Eolas does not agree with Defendants, and the authority they mis-cite does nothing to overcome the presumption in this case.

### III. CONCLUSION

For all of these reasons, Eolas’ proposals should be adopted.

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<sup>7</sup> *See Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1376 (Fed. Cir. 2003); *Aristocrat Techs. Australia PTY Ltd. v. Int’l Game Tech.*, 521 F.3d 1328, 1332 (Fed. Cir. 2008).

Dated: February 18, 2011.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that true and correct copies of the foregoing document were served to all counsel of record via the Court's ECF system.

/s/ Josh Budwin  
Josh Budwin