

Filed on behalf of SurfCast, Inc.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MICROSOFT CORPORATION  
Petitioner

v.

SURFCAST, INC.  
Patent Owner

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Case IPR2013-00292<sup>1</sup>  
Patent 6,724,403

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SURFCAST, INC.'S  
PATENT OWNER RESPONSE  
UNDER 35 USC § 316(a)(8) AND 37 C.F.R. § 42.120

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<sup>1</sup> Cases IPR2013-00293, IPR2013-00294, and IPR2013-00295 have been consolidated with the instant proceeding.

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Pursuant to 35 U.S.C. § 316(a)(8), Patent Owner, SurfCast, Inc. (“SurfCast”) hereby submits the instant Response to the Petition For *Inter Partes* Review (“Petition”) filed on behalf of Petitioner, Microsoft Corporation (“Microsoft”), May 22, 2013 in the above-captioned proceeding.

## 1. Introduction

On May 22, 2013, Petitioner filed four Petitions under 37 C.F.R. § 42.100 (“Petitions”), requesting *inter partes* review, severally, of claims 1 – 52 of the ’403 patent (Ex. 1001). In the November 19, 2013 Decision, the Petitions were consolidated into a single proceeding, IPR2013-00292, and the Board initiated trial for *Inter Partes* Review as to all claims of the ’403 patent, as follows: claims 1 – 3, 5 – 8, 12 – 14, 19, 21, 22, 27, 30, 32, 34, 37 – 40, 46, and 47 under 35 U.S.C. § 102(e) over U.S. Patent No. 6,832,355, (“Duperrouzel”, Ex. 1011); claims 1, 9 – 11, 22, 41 – 43, 46, and 48 – 50 under 35 U.S.C. § 102(b) over U.S. Patent No. 5,432,932 (“Chen”, Ex. 1015); claims 1 – 13, 17 – 28, 30 – 33, 35 – 37, 39 – 43, and 46 – 50 under 35 U.S.C. § 102(e) in view of U.S. Patent No. 6,456,334 (“Duhault II”, Ex. 1014); claims 1 – 3, 5 – 8, 11, 12, 14 – 16, 19, 21, 22, 27, 30, 32, 34, 37 – 40, 43 – 47, and 50 – 52 under 35 U.S.C. § 102(b) in view of Microsoft Internet Explorer Resource Kit (“MSIE Kit”, Ex. 1007); claims 17, 20, 25, and 28 under 35 U.S.C. § 103(a) over Duperrouzel in view of U.S. Pat. No.

6,278,448 (“Brown”, Ex. 1030); claim 29 under 35 U.S.C. § 103(a) over Chen in view of MSIE Kit; and claims 17, 20, 25, and 28 under 35 U.S.C. § 103(a) over MSIE Kit in view of Brown. Decision at 40 – 41. No claim of the ’403 patent should be canceled on the basis of any of these grounds.

## **2. Claim Construction**

Several of the claim constructions adopted by the Board for the purpose of deciding whether to institute trial should be modified in light of the new expert testimony (which Patent Owner was precluded by 37 C.F.R. § 42.107(c) from submitting previously) submitted herewith (Ex. 2004), cross examination testimony from Petitioner’s expert (Ex. 2003), and the arguments set forth below.

### **A. Legal Standards**

“Under a broadest reasonable interpretation, words of the claim must be given their plain meaning, unless such meaning is inconsistent with the specification.” MPEP § 2111.01(I). “It is the use of the words in the context of the written description and customarily by those skilled in the relevant art that accurately reflects both the ‘ordinary’ and the ‘customary’ meaning of the terms in the claims.” *Ferguson Beauregard/Logic Controls v. Mega Systems*, 350 F.3d 1327, 1338, (Fed. Cir. 2003).

### **B. Tile**

The Board has construed the term “tile” to be “a graphical user interface element whose content may be refreshed and that, when selected, provides access to an information source.” (Decision at 9.) Patent Owner urges the Board to modify this construction in light of the evidence submitted herewith (Declaration of Patent Owner’s expert, Glenn Weadock, Ex. 2004; deposition transcript of Petitioner’s expert, David R. Karger, Ex. 2005) and the arguments below.

Patent Owner understands the Board to have tacitly agreed with Patent Owner that the term “tile” had no plain and ordinary meaning in the art as of the filing date of the ’403 patent and, therefore, that the meaning of the term must be found in the patent specification. MPEP § 2173.01; *Irdeto Access, Inc. v. Echostar Satellite Corp.*, 383 F.3d 1295, 1300. However, Patent Owner notes that the Board’s construction is inconsistent with the specification of the ’403 patent in several key aspects.

Thus, to provide additional clarification, Patent Owner proposes the following construction:

“a graphical user interface element whose content may be refreshed, that is persistent, and that, when selected, provides access to an information source assigned to the tile.”

This construction is based on the specification of the ’403 patent at least at 9:25 – 31: “Tiles are selectable ... . When a tile is selected, ... the tile instantly



provides the user with access to the underlying information, whether that data be a hierarchical menuing system ... , a word processing file stored on a local area network, a spreadsheet stored locally on a user's computer, HTML file on the Internet, or a television signal.” See also Ex. 1001 at 11:1 – 3. The underlying information accessed is thus particularly an information source *assigned to the tile*, such as a particular file or a particular program assigned to the tile and called when a user selects the tile. (Ex. 1001 at 9:27-32 and 11:23-25; Ex. 2004 at ¶43 – 44.)

The clarification provided by Patent Owner's proposed construction is also illustrated by the exemplary embodiments of FIGs. 5 and 6 of the '403 patent. (Ex. 1001.) In particular, these embodiments show the information source *assigned to the tile* and accessed when the tile is selected: target address (FIG. 5), “tile2\_target.htm” (FIG. 6). (Ex. 1001 at 9:61 – 65 (“the location at which the file or application program associated with the tile can be found”); and 10:2 – 4; Ex. 204 at ¶43). These embodiments also illustrate the information source **associated** with the tile and from which updates are provided to display on the tile according to a refresh rate: tile address (FIG. 5), “http://www.camelot.castle/sword/excalibur.til” (FIG. 6) (Ex. 1001 at 9:61 – 63, 10:4 – 6 (the invention may include “a refresh function 510 that handles updates to the tile image stored at the tile address 502”). The addition of the phrase “assigned to the tile” to the construction of “tile” therefore clarifies that a tile provides access

to an assigned source rather than just any source. (Ex. 2004 ¶¶44).

### Tiles Are Not Windows

In interpreting its construction the Board agreed with Patent Owner that a construction of “tile” that covers an “icon” is “overbroad”. (Decision at 10).

However, the Board stated that “the broadest reasonable interpretation of ‘tile’ encompasses a window”. (Decision at 11). Patent Owner respectfully disagrees.

The Board relies on a number of features that the Board attributes to tiles and concludes that the presence of the same features in windows means that windows are within the scope of tiles. However, the features of tiles which lead to apparent similarity with windows are not within the Board’s or Patent Owner’s constructions and are not necessary features of tiles. Other features of tiles clearly differentiate them from windows.

As already described, tiles are different from windows at least because of the manner in which they, when selected, provide access to an information source assigned to the tile.

It is clear to one of ordinary skill in the art that a tile, when unselected, displays content from its associated information source, updated according to its assigned refresh rate. When the tile is selected, however, the user is provided access to underlying information of a particular assigned information source, such as an application program. Id. at 9:43 – 10:6. (Ex. 2004 ¶¶ 43, 44, 53-57) The

selectability of a tile to give access to underlying information of an assigned information source, such as an application program, makes a tile fundamentally different from a window. *Id.* In contrast, a window is created when an application program is launched (typically from a static icon), or from within a specific application program (for example, by opening or creating a new document), and therefore the window for the already launched application program does not need to be selectable in order to display the current content of the application program or file. *Id.* ¶57. A person of ordinary skill in the art would therefore appreciate that the selectable feature of the claimed tile is among the many features of a tile that make it different from a window as that term is understood in the art. *Id.*

#### Persistence

Similarly, persistence is an attribute of a tile that the Board has specifically excluded from its construction, and is an attribute that distinguishes a tile from a window. The Board characterized Patent Owner’s apparent “reliance on column 15 of the [’403 patent] specification”, as an attempt “to import a limitation from what the specification describes as merely a ‘preferred embodiment’.” (Decision at 11). However, this passage is not a preferred embodiment but rather a description of implementation details, being found in a section of the specification entitled “Architecture of Application Program Software” (Ex. 1001 at 14:26; *cf.* also col. 16). This section describes, at length, an exemplary implementation, via a

“metabase” of what is a core feature of the grid-and-tiles interface. This section begins with the fact that “[i]tems in the metabase are ‘persistent’ ... [and] are preserved from session to session” (Ex. 1001 at 15:63 – 64). Building on that characterization, the specification goes on to describe the metabase as having a “content store 1918” that “contains content of tiles from the previous session”. (Ex. 1001 at 17:31 – 32). As further noted in this instance, “tile and grid store 1902 contains a library of stored grids and tiles” and “tiles can save themselves or be restored.” (Ex. 1001 at 17:43 – 44).

One of ordinary skill in the art would recognize that the tiles described throughout the specification of the ’403 patent are persistent, even if in some instances the property is implied. (Ex. 2004 at ¶¶ 48 – 49); (“Even when guidance is not provided in explicit definitional format, the specification may define claim terms by implication such that the meaning may be found in or ascertained by a reading of the patent documents.”) *Phillips v. AWH Corp.*, 415 F.3d at 1316; *Irdeto*, 383 F.3d at 1300. Furthermore, it does not make sense for tiles to be other than persistent; a user would not expect to set up an array of tiles, with their associated information sources, refresh rates, and positions in the array, if they just disappear when the computer shuts off (*cf.* description of a “Grid Configuration Wizard” at cols. 13 – 14 of the ’403 patent); (Ex. 2004 ¶46).

That persistence is a necessary and fundamental property of tiles is further

rooted in their consistency across a number of a user's devices (Ex. 1001 at 5:14 – 21 (“[t]he application therefore permits the user's interaction with a range of electronic devices to be unified.”), and 23:13-14 (“[t]he use of servers also allows for the latest versions of tiles to be downloaded and installed across all devices.”))

Additionally, tiles were conceived as a method of “bookmarking” a user's information sources, a concept that would be impossible if tiles did not persist between a user's sessions. (Ex. 1001 at 8:29 – 30 “Tiles permit “dynamic bookmarking” of information ...”).

Furthermore, the persistent nature of the tiles is not contradicted by any of the exemplary embodiments. There are no embodiments in the specification of the '403 patent that require—or even permit—a tile to be not persistent.

For example, a user's password(s) can be associated with a tile, as in, *e.g.*, FIG. 12 of the '403 patent, reference numeral 1216. This also is consistent with the specification's description of a grid of tiles as a repository for passwords and identifiers to subscription services. Ex. 1001, 11:46 – 48. One of ordinary skill in the art would understand such a repository to be suited for cross-session usage. Ex. 2004 ¶48h.

In another embodiment, it is possible to lock a tile with a password to restrict access: Ex. 1001 at 13:16 – 17. This would not be useful if the tile in question were not preserved from session to session. Ex. 2004 ¶48h.

The Board referred to the statement at 4:37 – 38 of the '403 patent (“[t]he present invention comprises a grid of tiles that resides on the user’s computer desktop.”) as “unavailing because it is unclear in that sentence whether ‘resides’ modifies ‘tiles’ or the ‘grid’ of tiles.” Patent Owner disagrees: there is nothing unclear about this statement; because “resides” is a singular verb, the only possible interpretation is that the grid of tiles is what is being described as residing on the desktop. The desktop metaphor was well known at the time of invention to act as a repository for persistent items such as shortcuts to application programs, and icons. Thus, stating that the grid resides on the desktop indicates that the grid is also persistent. [Ex. 2004 at ¶ 47].

However, either interpretation of the statement supports the conclusion that tiles are persistent; the Board fails to explain how a “grid” can be persistent while the tiles within it would not be persistent. If “grid” is simply an arrangement of tiles, then a grid cannot exist without the tiles. Furthermore, if “grid” refers to software that stores tile definitions, the tiles are still persistent: there would be no purpose in storing the definitions if there aren’t any associated tiles for display.

In fact, the concept is further elaborated at Ex. 1001, 10:47 – 49 and 11:23 – 35: “[e]ffectively, the application replaces the user’s desktop with a more visually intuitive dynamic menuing system” and “a grid of tiles replaces the functionality of a user’s computer desktop and offers similar and additional features.” The desktop

is a portion of the interface where a user typically stores items that are used frequently and therefore need to be preserved from session to session. (*cf.*, Ex. 1001 at 11:33 – 35).

Persistence is also indicated by the array of tiles being “resident on the file system”. Each tile data structure comprises an address for the tile image and an address for the “file or application program associated with the tile” (Ex. 1001 at 9:58 – 66). Both of these attributes result in the persistence of a configuration of tiles. Ex. 2004 ¶48b.

The grid provides a mechanism for preserving the tiles because it “controls the layout and priorities of tiles” (Ex. 1001 at 10:53 – 54). Furthermore, “[e]ach tile is indexed by its position on the grid” (Ex. 1001 at 11:65 – 66) and the grid stores other attributes of its layout and its tiles, including: number of rows and columns of tiles, address, priority and refresh rate of each tile, and the tiles’ positions in the grid. (Ex. 1001 at 13:7 – 14).

Finally, the implementation of persistence is described in a number of different configurations of the invention, at cols. 22 – 24 of the ’403 patent. For example, in the context of client-server embodiments, the ’403 patent describes how a “server stores locally a profile comprising user-specific content 2406 that can feed customized data to the user” and that “the user may store pre-defined grid configurations on the server” that can then be “downloaded to the user’s system”

(Ex. 1001 at 22:1 – 15, and FIG. 24). This illustrates how persistence is beneficial to a user of a client device that relies on a server for back-end computing operations. Furthermore, the same embodiment illustrates persistence across user sessions, both for convenience and for the practical benefits of restoring interrupted sessions: “[d]etails of a session, as defined by tile content and priorities can be held over from one session to another, both for the purposes of permitting a user to continue with ongoing work and in order to protect against the adverse consequences of abnormal disconnections” (Ex. 1001 at 22:22 – 34); Ex. 2004 ¶48f. Another embodiment describes a different mechanism to ensure that a grid of tiles can be communicated consistently across a number of devices: “A synchronization procedure allows the metabase to be stored on a server and queried by any device. In this way it is possible to provide consistent grid and tile implementations independent of the device and its location” (Ex. 1001 at 23:63 – 24:2).

In sum, the notion that a tile is persistent is so pervasive in the ’403 patent, and a lack of persistence so contrary to common sense, that a reader of ordinary skill would conclude that persistence is nothing less than a requirement of a tile, and a proper construction of the term must include it. Ex. 2004 at ¶49.

### Size

Size (or relative size) is not a fundamental attribute of a tile and is required



neither by Patent Owner's construction nor by the claims of the '403 patent. The fact that the '403 patent states that "a tile will typically be smaller in size [than a window], allowing the user to view multiple tiles simultaneously if desired" (Ex. 1001 at 8:39 – 41) would not be interpreted by one of ordinary skill in the art to be a limiting or required feature of a tile because windows can be resized, almost without limit, by a user. Thus, a user could, if (s)he desired, arrange for a window to be smaller than any of the individual tiles on his/her display. The point is that an array of tiles is established with a goal of permitting a user to see multiple information sources simultaneously; this may be accomplished by appropriate choice of size for the tile as well as by positioning the tiles in a non-overlapping configuration. However, the fact that a tile may adopt a size typical of a window does not mean that a tile is itself a form of window.

**C. Partitioning a visual display of the device into an array of tiles**

Patent Owner has argued for the construction of "partitioning" a [visual] "display into an array of tiles" to mean "dividing some or all of a display into a non-overlapping array of tiles". The Board agrees that the dividing may apply to some or all of a display, but has construed the terms to permit apportioning the display into either overlapping or non-overlapping tiles. Patent Owner disagrees that partitioning can include overlapping tiles. The plain and ordinary meaning of "partitioning" excludes overlapping. Ex. 2004 ¶¶ 62-65

The Board centers its conclusion that “partitioning” permits overlapping on the absence of an “affirmative disclaimer of overlapping tiles” and an interpretation that the word “may” leaves open the possibility of tiles that overlap. Decision at 13. However, neither of these aspects of the specification of the ’403 patent would lead one of ordinary skill in the art to conclude that partitioning a display would allow overlapping tiles.

In fact, the first occasion that the term “partitioning” is used in the specification of the ’403 patent is in the “SUMMARY OF THE INVENTION” section: “[t]he present invention comprises a method ... comprising the steps of: partitioning a visual display of a computer into an array of tiles in a non-overlapping configuration.” Ex. 1001 at 4:55 – 59 (emphasis herein). It is difficult to envisage a more distinct statement of an invention than that contained in the “Summary” section of a patent. One reading the ’403 patent would be informed at the outset of the patentee’s own description of the invention that tiles arise from a non-overlapping layout of space on a display. Statements that define the invention as a whole, rather than statements that describe only preferred embodiments, “are more likely to support a limiting definition of a claim term” and “are more likely to be found in certain sections of the specification, such as the Summary of the Invention.” *C.R. Bard, Inc. v. United States Surgical Corp.*, 388 F.3d 858, 864 (Fed. Cir. 2004) (citing to: *Microsoft Corp. v. Multi-Tech Sys., Inc.*, 357 F.3d

1340, 1348 (Fed. Cir. 2004)). Furthermore, use of the term “the present invention” can also limit otherwise broad claim language where it is otherwise not restricted to a particular embodiment. See *Honeywell Int’l, Inc. v. ITT Industries, Inc.*, 52 F.3d 1313, 1318 (Fed. Cir. 2006) (limiting a claim term to statements in specification defining the “present invention” and where the written description did not indicate that the term was “merely a preferred embodiment”). Indeed, Petitioner’s own expert testified that he understood the term “present invention” to be “the thing which this patent is proposing as a novel thing, which should be patented.” (Ex. 2003, at 56:2 – 14).

After the “Summary Of The Invention” section, there are no instances whatsoever among the specification and drawings of the ’403 patent in which tiles are overlapping with one another. This is entirely consistent with the first use of the term “partitioning” in the patent and its plain and ordinary meaning in the art.

A person of ordinary skill in the art would therefore understand that the ’403 patent specification is using the term “partitioning” consistent with its normal meaning to “divide space.” In fact, the dictionary definitions that Patent Owner uses to illustrate the construction (Ex. 2001) are entirely consistent with a non-overlapping division of space. According to the *American Heritage Dictionary*, meanings of “partition” include: “something that divides or separates, as a wall dividing one room or cubicle from another”; “division of a country into separate

autonomous nations”; and “the decomposition of a set into a family of mutually exclusive sets”. None of these meanings envisages a division in which the various divided portions overlap with one another; to the contrary, separation and exclusion are necessary consequences of a partitioning. Under cross examination, Petitioner’s expert concurred with this interpretation, that “dividing a room” meant separating the room into portions that were non-overlapping. (Karger transcript at 77: 14 – 19).

The fact that overlapping tiles are not “affirmatively disclaimed”, as the Board would like to see, is not surprising both because the term is being used consistently with its plain meaning and because the entire specification of the ’403 patent does not envisage an overlap at any point. The meaning of partition and the way in which it is used is therefore internally consistent and, since it is not being used in a manner contrary to its plain meaning, requires no disclaimer of a possible usage that would be inconsistent. Ex. 2004 at ¶65.

The Board dismisses the description at 11:63 – 12:6 of the ’403 Patent (and accompanying FIG. 8), in which “tiles are not permitted to overlap” as merely a “preferred embodiment”. Patent Owner believes that one of ordinary skill in the art would interpret the exemplary nature of that embodiment as being the aspect drawn to a “regular layout of tiles ... such that the tiles are uniform in size and shape”, not the fact that the tiles do not overlap one another, which is simply stated

for completeness in describing FIG. 8. In other embodiments discussed in that section of the specification (Ex. 1001 at 11:63 – 12:35), the tiles are not of the same size and shape (see, *e.g.*, '403 patent at FIG. 9 and 12:13 – 19). The tiles' attribute of not overlapping with one another is not, however, limited to particular embodiments but is essential to all embodiments of the invention. The feature is illustrated and described appropriately in and with respect to the description of FIGs. 8 – 11, each of which serves to illustrate some other aspect of tile layout but all have in common the fact that the tiles do not overlap.

Petitioner has argued that the tiles recited in claim 1 may overlap one another because claim 3 recites tiles that are “non-overlapping”, and would not therefore be narrower in scope than claim 1 if claim 1 also required the tiles to be non-overlapping. This argument ignores the fact that claim 3 additionally recites “wherein each tile of said array of tiles is a uniform size and shape.” This limitation is also not found in claim 1 and therefore claim differentiation is not implicated.<sup>2</sup> See, *e.g.*, *Anderson Corp. v. Fiber Composites, LLC*, 474 F.3d 1361,

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<sup>2</sup> Petitioner's expert, under cross-examination, acknowledges that the limitation “uniform size and shape” alone serves to limit claim 1. (Karger depo. Transcript at 41:2 – 42:9)

1370 (claim differentiation held inapplicable because each claim presented to support application of the doctrine has more than one distinguishing feature); *see also Athletic Alternatives Inc. v. Prince Manufacturing Inc.*, 73 F.3d 1581, 37 USPQ2d 1365, 1372 (Fed. Cir. 1996) (claim differentiation not applicable because interpreting broader claim to include contested limitation still leaves differences from narrower claim).

Finally, the usage cited by the Board as permissive of overlap is in fact not so, if read in its entire context:

Therefore tiles lead to a reduction in clutter on the display screen because many tiles may be displayed simultaneously without overlapping with one another in the way that windows must necessarily do. Ex. 1001 at 8:45 – 49.

This sentence conveys to one of ordinary skill in the art a direct comparison between, on the one hand, a cluttered display having windows that overlap one another, and on the other hand, a clearer display in which all of the tiles are displayed simultaneously and without overlapping one another. Thus the use of the word “may” in this sentence does not convey a possibility but rather a capability. (*cf.* Ex. 2064 (Merriam-Webster’s Collegiate Dictionary) for the “archaic” use of “may”, as in “have the ability to” or “be free to”, “used nearly interchangeably with *can*”.)

Accordingly, Patent Owner's construction should be adopted because it is consistent with the plain and ordinary meaning of the terms and the intrinsic record.

Patent Owner also notes that the term "grid", as recited in claim 12 of the '403 patent, implies a non-overlapping configuration of tiles. This too is consistent both with the usage of the term in the specification and its plain and ordinary meaning. (e.g., "a network of horizontal and perpendicular lines, uniformly spaced". Ex. 2064) Interpreting "grid" in its plain and ordinary meaning would leave no room for tiles that "occup[y] a fixed position on [the] grid" (Ex. 1001 at claim 12) to overlap one another. Claim 12 limits the scope of claim 1 in at least one other way, however: in that the tiles are forced to occupy fixed positions on the grid, and therefore also does not implicate any claim differentiation issue.

**D. "Refresh rate"/"retrieval rate"**

The Board, in view of the evidence then of record, found that the terms "refresh rate" and "retrieval rate" were limited to periodic rates, i.e., "*a recurring time interval* at which information displayed in a tile is refreshed or retrieved." Decision at 14 (emphasis added). These constructions should be modified (a) because they are contrary to the plain and ordinary meaning of "refresh rate" and "retrieval rate" and to how those terms are used in the specification of the '403

patent, and (b) in view of the new evidence, which Patent Owner was precluded from submitting prior to the Board's Decision to institute this review, including an expert declaration as to the meaning of "rate" to one of ordinary skill in the art at the time of the '403 patent and cross examination testimony of Petitioner's expert.

There can be no doubt that the plain and ordinary meaning of "rate" is NOT limited to quantities measured with respect to recurring time intervals. Aperiodic rates are well-known in everyday life. Anyone who has traveled abroad is familiar with *currency exchange rates* which are used to convert one currency with respect to another currency, such as U.S. Dollars per Euros. The *fuel consumption rates* familiar to most car shoppers indicate the number of miles traveled per gallon of gasoline consumed, *i.e.*, miles per gallon. Ex. 2003 at 86:24 – 87:3. Anyone who has driven over a toll bridge is familiar with *toll rates*, which are expressed as a cost per crossing. See Ex. 2071. There are also college admission *acceptance rates* that measure the number of accepted applications as a fraction of the total number of applications. Ex. 2070.

In addition to being familiar with many of the every-day examples discussed above, aperiodic rates specific to the field of computers and user interfaces were also well known to those of ordinary skill in the art at the time of the '403 patent. For example, *bit error rate* is the rate of error to the total number of bits being sent in a data transmission from one location to another. Ex. 2004 ¶ 61. In caching



(e.g., browser caching, hard drive caching, etc.), the *cache hit rate* is the number of times data is found in the cache, per total number of read requests. *Id.* In network communications using TCP/IP, the *retransmission rate* is the number of packets that had to be resent (e.g., due to not being received in a timely manner) per total sent packets. *Id.*

Under cross examination when faced with several of the examples discussed above, Petitioner's expert attempted to obfuscate this issue but ultimately admitted that there are many "rates" that are not measured as a function of time. Ex. 2003 at 83:15–84:2 and 85:22–86:3.

This common understanding that rates are neither periodic nor limited to those measured with respect to the passage of time is reflected in the dictionary definition of rate: "a quantity measured with respect to another measured quantity." (Ex. 2001). That is, the second measured quantity is not always a unit of time, and the way in which the rate is measured is not necessarily periodic. The example given after this definition — "a rate of speed of 60 miles an hour" — is just that, an example, which does not in itself limit the breadth of the term "rate" to a quantity measured with respect to time. This is plainly true when one considers the numerous examples of aperiodic rates discussed above, and when one considers that very dictionary's definition of "example" — "one that is representative of a group as a whole: the squirrel, an example of a rodent." Just as

one would understand that the term “example” is not itself limited to animals that are types of rodents, one would also understand that the term “rate” is not limited to quantities that are measured with respect to time.

The Decision cites *TIP Systems, LLC v. Phillips & Brooks/Gladwin, Inc.*, 529 F.3d 1364, 1373 (Fed. Cir. 2008) for the proposition that “a claim need not be construed to encompass every disclosed embodiment *when the claim language is clearly limited* to one or more embodiments.” (Emphasis added). This proposition, which is a narrow exception to the general rule that a construction that excludes a preferred embodiment is “rarely, if ever, correct” (*Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 Fed. Cir. 1996), is not applicable here because the claim language of the ’403 patent is *not* “clearly limited” to a “recurring time interval” as required by the Board’s construction. To the contrary, the claim language is clearly not so limited, as reflected by both the numerous aperiodic rates discussed above and by the dictionary definition cited by Patent Owner and discussed in the Board’s Decision.

For all of the reasons discussed above, the plain and ordinary meaning of “rate,” both in general and in the art to which the ’403 patent is directed, is not limited to rates measured with respect to time. Thus, in order for the Board’s limiting constructions to be correct, there would need to be support in the specification of the ’403 patent to limit the claimed rates to those measured with

respect to a recurring time interval. There is no such support in the specification.

To the contrary, the specification clearly contemplates aperiodic refresh and retrieval rates. The very paragraph of the specification from which the Board selected the examples of periodic rates relied on at page 14 of its Decision is reproduced below in its entirety:

In a preferred embodiment, according to priorities that may be applied to individual tiles on a tile by tile basis if desired, the grid manages the *refresh rate* of each tile in the grid. *For example*, for locally stored word processing or spread sheet files, the user might configure the tiles *to refresh only when the underlying data is written to the local hard drive*. Similarly, a user might configure tiles containing infrequently updated HTML data from the Internet to refresh at a certain time each day. At the other extreme, a user might configure an active tile to display a television channel at a refresh rate of 29 frames per second, while at the same time configuring inactive tiles to display different channels at a refresh rate of once every five seconds. In this way, a user could monitor many channels until program content of interest appeared in one of the tiles without the burden of actively refreshing each tile.

Ex. 1001, 12:50-65 (emphasis added). The phrase “for example” at the start of the second sentence in this passage can only be understood to mean that what follows is an example of the grid managing a refresh rate of a tile as discussed in the previous sentence. The *very first* example of managing such a “refresh rate” is to

refresh “only when the underlying data is written to the local hard drive.” Said another way, the very first example of a refresh rate is once per write-to-disk, which is not a temporal or periodic rate. That the examples that follow are also examples of refresh rates, as indicated in the Decision at 14, is a further indication that the first example is a refresh rate because it would be incongruous and illogical for the specification to signal that it is providing an example, and then list something that is an not example followed by a number of things that are. The specification is clear: once per write-to-disk is a refresh rate, and this is not a periodic rate.

In addition, the specification describes that the grid functionality “manages the refresh rate *of each tile* in the grid,” where “the address *of each tile*, its priority and *its refresh rate* are stored by the grid program.” Ex. 1001, 12:51-56, 13:10-11. The person of ordinary skill in the art understands that the tiles managed by the grid would include tiles that refresh “only when the underlying data is written to the local hard drive,” where the refresh rate of such a tile, as stored by the grid program, would be once per write-to-disk. Ex. 2004 ¶59. The specification nowhere contemplates that the write-to-disk refresh rate cannot be managed and stored by the grid.

Moreover, the fact that the write-to-disk example is the very first recited in the paragraph in column 12 discussing refresh rates is a clear indication that this is

not some alternative embodiment that one might foresee being excluded from the scope of the claims. The Board glosses over this by noting that “as an initial matter, Microsoft’s proposal does not exclude embodiments in which underlying data is written to the local hard drive at a recurring time interval.” Decision at 14-15. But there is no such embodiment discussed in the specification of the ’403 patent.<sup>3</sup> Even if a word processing or spreadsheet program were to have an active

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<sup>3</sup> Dr. Karger’s tortured attempt to distinguish this example (which he candidly admitted is problematic and contrary to his construction; Ex. 2003 at 90:18-20) is telling. His attempt to manufacture a refresh rate for this example by hypothesizing a periodic polling rate for checking the drive for updates (Ex. 2003 at 91:5-13) is unpersuasive because there is no such disclosure in the ’403 patent and their functionality may be implemented via an event driven mode). Ex. 2004 ¶60. The fact that Dr. Karger relied on this example in ¶ 171 of his report to illustrate that the “retrieval rate” required by claim 22 can be different for different information sources is significant, and Dr. Karger’s cross examination testimony that he relied on an example of something that was not a rate to illustrate that “retrieval rates” could be different is not credible because it is illogical. Ex. 2003 at 106:2-9. What’s clear from Dr. Karger’s testimony is that the only reason he considers this example not to be a rate is that it is contrary to his construction that

timed backup function, the underlying data would also be written to the hard drive (and thus the associated tile would be refreshed) when the user chooses to save and/or close the file, neither of which occurs at a time dictated by such a timed backup function. Accordingly, the specification contradicts the Board's construction.

Furthermore, the Petition and its accompanying expert declaration do *not* allege that the broadest reasonable interpretation of “refresh rate” or “retrieval rate” is *limited* to “a recurring time interval,” but instead that the “broadest reasonable construction of a ‘refresh rate’ *would encompass* a recurring time interval ... .” *See, e.g.,* Ex. 1003 at ¶ 163. Patent Owner agrees that the broadest reasonable construction *encompasses* a recurring time interval, but it is *not limited* to a recurring time interval.

For the reasons discussed above, the Board's construction is contrary to both the plain and ordinary meaning of the terms “refresh rate” and “retrieval rate” and to the usage of those terms in the specification of the '403 patent. The Board has

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requires rate to be specified as a recurring time interval – a position he has contradicted by admitting under cross examination that many rates are not measured with respect to recurring time intervals.

essentially given an example from a dictionary greater weight than the very first example of “refresh rate” disclosed in the specification of ’403 patent. This is clear error, particularly in view of the broadest reasonable construction in view of the specification standard that is applicable here. The Board’s constructions of “refresh rate” and “retrieval rate” should therefore be modified to adopt SurfCast’s proposed constructions (*See, e.g.*, IPR2013-00292, paper no. 18 at 29 – 31).

**E. “User-defined array size”**

In its Decision, the Board construed claim 2’s “user-defined array size” as “the number and arrangement of tiles to display, as specified by the user.” Decision at 16. Patent Owner respectfully disagrees with this construction for at least the reasons set forth in its preliminary responses to two of Petitioner’s petitions for inter partes review. *See, e.g.*, IPR2013-00292, paper no. 18 at 22-23 and IPR2013-00295, paper no. 13 at 23 – 25. That is, Patent Owner maintains that the “user-defined array size” also includes the positions of the tiles within the array since the ’403 patent specification states that “a user may specify a presentation of the grid, consisting of its dimensions, (i.e., ***the number of tiles to display and their arrangement***).” Ex. 1001, 11:9–11 (emphasis added). A person of ordinary skill in the art would understand that a user-defined “arrangement” of tiles would include each tile’s respective position within the array because an “arrangement”

implies positioning (*e.g.*, an arrangement of flowers is largely a matter of positioning of the flowers). Ex. 2004 ¶66. As such, Patent Owner respectfully maintains that the broadest reasonable construction of “user-defined array size” that is consistent with the specification is “the number and arrangement of tile *positions* in the array as specified by the user.”

### **3. No Claim of the '403 Patent Is Invalid Over Any Prior Art of Record**

Independent claim 1 recites “partitioning a visual display ... into an array of tiles, wherein each tile in said array of tiles is associated with an information source in [a] plurality of information sources.” Independent claims 22 and 46 recite “associate[ing] a first information source of [a] plurality of information sources to a first tile of [an] array of tiles and a second information source of said plurality of information sources to a second tile of said array of tiles.” In its Preliminary Responses, Patent Owner construed “tile” as being “a graphical representation of an associated information source capable of displaying refreshed content, the graphical representation being persistent, and selectable to provide access to underlying information of the associated information source.” *See, e.g.*, IPR2013-00292, paper no. 18 at 11. Patent Owner maintains this position.

In its decision to institute inter partes review of the '403 patent, however, the Board construed the term “tile” as “a graphical user interface element whose



content may be refreshed and that, when selected, provides access to an information source.” Decision at 9.

**A. None of Claims 1 – 13 and 17 – 28, 30 – 33, 35 – 37, and 39 – 43 is Anticipated by Duhault II**

The Board determined that the Petitioner has “established a reasonable likelihood that claims 1 – 13 and 17 – 28, 30 – 33, 35 – 37, and 39 – 43 are unpatentable as anticipated by Duhault II” under 35 U.S.C. § 102(e). Decision at p. 23 *et seq.* Patent Owner respectfully submits that Duhault II cannot anticipate any claim of the ’403 patent for at least the following reasons.

i. Duhault II Is Not Prior Art

Patent Owner contends that Duhault II is not prior art to claims 1 – 9, 12 – 41, 44 – 48, 51, and 52 of the ’403 patent under 35 U.S.C. § 102(e) because it can establish prior invention through conception prior to the effective date of Duhault II (June 29, 1999) coupled with due diligence from prior to that date to a subsequent constructive reduction to practice by filing U.S. provisional patent application no.60/162,522 on October 29, 1999.

(a) Legal Standard

For a first patent to be prior art under 35 U.S.C. § 102(e)(2) to a second patent, the statute requires the first patent to have been filed “before the invention

by the applicant for” the second patent. *See, e.g., Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1577 (Fed. Cir. 1996). Priority of invention goes to the first party to reduce the claimed invention to practice, such as by filing a patent application, unless the other party can show that it was the first to conceive the invention and that it exercised reasonable diligence in later reducing that invention to practice. *Brown v. Barbacid*, 276 F.3d 1327, 1337 (Fed. Cir. 2002); *Mahurkar*, 79 F.3d at 1577. Both conception and diligence must be established by relation to factual evidence. However, an inventor’s testimony, standing alone, is insufficient to prove conception, as some form of corroboration is required. *Price v. Symsek*, 988 F.2d 1187, 1194 (Fed. Cir. 1993). And a rule of reason applies to determine whether the inventor’s testimony has been corroborated. *Id.* at 1194.

Where a party is first to conceive but second to reduce to practice, that party must demonstrate reasonable diligence toward reduction to practice from a date just prior to the other party’s conception, to its own reduction to practice.

*Mahurkar*, 79 F.3d at 1578. Activities related to both an actual reduction to practice and a constructive reduction to practice are relevant when determining diligence. *Scott v. Koyama*, 281 F.3d 1243, 1248-49 (Fed. Cir. 2002). Whether diligence has been established should also be evaluated under a rule of reason. *See D’Amico v. Koike*, 347 F.2d 867 (CCPA 1965). During the period in which

reasonable diligence must be shown, there must be continuous exercise of reasonable diligence. *In re McIntosh*, 230 F.2d 615, 619 (CCPA 1956). A party asserting that they had been diligent must provide corroboration with evidence that is specific both as to facts and dates. *Gould v. Schawlow*, 363 F.2d 908, 920 (CCPA 1966). The rule of reason does not dispense with the need for corroboration of diligence that is specific as to dates and facts. *Id.*

(b) Conception

The inventors of the '403 patent, Ovid Santoro and Klaus Lagermann, began collaborating on the invention described and claimed in the '403 patent prior to June 28, 1999. This collaboration is evident from e-mails exchanged between the two inventors [the “conception emails,” Exhibits 2024-2029 and 2036], entries from a notebook kept by Mr. Santoro [Ex. 2023], and from written documents created prior to June 28, 1999 [Exhibits 2067, 2068 and 2037, the “white papers”].

The collaboration between the inventors began with the conception emails. The two inventors met shortly thereafter (prior to June 28, 1999), along with Dixon Chan Dick, and further discussed and elaborated the details of their ideas on a series of whiteboard “flip charts.” Ex. 2005 ¶ 13. Exhibit 2041 illustrates the “flip charts” from that meeting. Additional evidence of the conception of a majority of the subject matter of the '403 patent can be found in inventor Ovid

Santoro's notebook, which was prepared during that meeting.<sup>4</sup> Ex. 2023.

The white papers of Exhibits 2067 and 2068 were exchanged as attachments to e-mails between Mr. Santoro and Mr. Lagermann prior to June 28, 1999. The white paper attachment to the email of Exhibit 2067 describes "the SurfCast Software" and depicts a "grid of tiles covering the entire PC screen," and thus is clearly directed toward the subject matter of the '403 patent. The white paper of Ex.2067 itself is dated prior to June 28, 1999 and authored by inventor Ovid Santoro. The e-mail of Ex. 2067 to which that white paper was attached is a contemporaneous electronic communication that corroborates the existence of the attached white paper, in this form, on that date and, because of the similarity between the white paper and the notebook of Ex. 2023, also corroborates that document. Furthermore, Mr. Santoro's declaration establishes that he retained his e-mail and other documentary records from the 1999 time period. Ex. 2005 ¶13. Under the rule of reason, an e-mail of this nature is self-authenticating. It is a true

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<sup>4</sup> Corroboration is not required when a party seeks to prove conception through the use of physical exhibits. *Mahurkar v. C. R. Bard, Inc.*, 79 F.3d 1572, 1577 (Fed. Cir. 1996). Thus, Mr. Santoro's notebook can serve to establish conception of the subject matter of the claims of the '403 patent.

and accurate record of the transmission because the time and date stamp are provided by an external entity, in this case, a computer system whose ability to record the time and date are not under the control of Mr. Santoro or Mr. Lagermann.

Moreover, as discussed in Exhibit 2005 ¶ 17, a letter [Ex. 2009] from one of SurfCast's attorneys at the law firm of Pennie & Edmonds LLP ("Pennie") indicates that Mr. Santoro made a presentation regarding a potential patent application on a date after the email of Exhibit 2067 but prior to June 28, 1999. Among the information provided to Pennie was the white paper attachment to Ex. 2067. [Ex. 2005 ¶ 17]. This is consistent with the statement in the email of Ex. 2067 in which Mr. Santoro states that he wanted to "get something to pennie." This additional corroboration is more than sufficient under the rule of reason.

The chart of Exhibit 2065 demonstrates where conception of the subject matter of claims 1-3, 5-12, 17-28, 30, 32-43, and 46-50 is evidenced in the emails, notebook and white papers discussed above. Thus, Patent Owner has demonstrated conception of the subject matter of these claims prior to Duhault II.

#### (c) Diligence

The inventors and their legal counsel, together, were diligent in reducing the invention to practice from before the effective filing date of Duhault II, to the filing of a provisional application for patent, on October 29, 1999.

Diligence in preparation of the provisional patent application is demonstrated by the activities of persons at the Pennie firm. The inventors consulted with their counsel at Pennie in preparation for filing a provisional patent application on the inventive subject matter, from May 1999. Copies of invoices from Pennie (Exhibits 2049 and 2050) establish the time from which work began. After some initial work on the matter by Brett Lovejoy and Andrew J. Gray in June 1999 that centered on searching for potential prior art, Pennie tasked Richard Bone with preparing the patent application. Richard Bone's contemporaneous time entry logs from 1999 (Ex. 2035) indicated that he started working at Pennie on June 16, 1999 (Ex. 2035 at 2) and had first discussions about the SurfCast patent application on June 18, 1999 (Ex. 2035 at 7) *i.e.*, prior to the effective date of Duhault II.

Richard Bone's time entry logs are summarized in Ex. 2051. The accompanying Declaration by Richard Bone, (Ex. 2008) further establishes that the entire period of time from before June 29, 1999 through to October 29, 1999 can be accounted for as constituting either days on which work was carried out on the SurfCast patent application, or as days on which Richard Bone was obliged to work on other client matters that had contemporaneous deadlines. As evidenced by Richard Bone's time entry logs, he worked diligently to constructively reduce the invention to practice (*i.e.*, by preparing and filing the provisional application to which the '403 patent claims priority) from June 21, 1999 to October 29, 1999

(*i.e.*, the date on which the provisional application to which the '403 Patent claims priority was filed with the U.S. Patent and Trademark Office). See *e.g.*, Ex. 2035 at pp. 7-13, 17, 27-31, 34-43, 46-48, 55-57, 60-63, 68, 75-78, 87-89, 92, 97-98, 101-102, 104-105, 109-113, 117-118, 123-124, 126-127, and 129-131. The work included several meetings with the inventors, and attorneys, at offices of Pennie in New York, NY, and in Palo Alto, CA (from July – October, 1999), research on the relevant technology and possible prior art (in June and July, 1999), and several rounds of preparing and revising the draft specification and figures for the application (from June – October, 1999).

Dr. Bone's time entry logs [Ex. 2035] also show that Dr. Bone was engaged in working for other clients of Pennie. Ex. 2035 at pp. 2-134 (client information redacted to protect their confidential information). Dr. Bone worked diligently on the preparation of the SurfCast provisional application despite it being necessary to interleave work for other firm clients having intervening deadlines, and to prioritize tasks involving other complex subject matter and work during this same time period.

Invoices from Pennie indicate that other attorneys at the firm supervised and/or assisted Dr. Bone during the application process. See *e.g.*, Ex. 2049 and Ex. 2050. Thus, they too contributed to the diligent efforts to constructively reduce the invention to practice.

Furthermore, in the period June 29, 1999 – October 29, 1999, the inventors were working diligently to both assist in preparation of the patent application, and to actually reduce the invention to practice in the form of the SurfCast application program. Santoro Decl. [Ex. 2005] ¶¶9-42, Dechaene Decl. [Ex. 2007] ¶¶ 6-8, and Lagerman Decl. [Ex. 2006] ¶¶ 8-30. Exhibit 2052 is a chart specific to both dates and facts that summarizes the activities and the corroborating evidence for all of Dr. Bone’s activities during this time.

ii. No Claims are Anticipated by Duhault II

Patent Owner has established that Duhault II is not prior art to the majority of claims of the ’403 patent. Nevertheless, Patent Owner takes this opportunity to distinguish the disclosure of Duhault II from all claims of the ’403 patent and to establish that Duhault II cannot anticipate any claim of the ’403 patent even if it were prior art (which it is not).

Duhault II describes the presentation, within a window of a computer monitor or on a television display, of a number of video images, each of which shows content from a video channel. (Ex. 1014 at 1:65–67) The Duhault II system comprises two or more tuners (*id.* at 7:53–55), each of which cycles around a group of one or more of the video channels so that each video image displays recent content. According to Duhault II, “a first portion of the plurality of video images is periodically refreshed using a first tuner” while “a second portion of the



plurality of video images are ... periodically refreshed using a second tuner.” *Id.* at 3:9-24. When a user wishes to view one of the channels in real time, (s)he selects one of the video images, which then causes that video source to be sampled and displayed at a rate consistent with the display of “live” video, while the images on the remaining display areas associated with that tuner are frozen (*id.* at 4:12-21).

(a) Validity Based on the Board’s Construction

The Board concluded that the video images in Duhault II are “tiles” within the meaning of the ’403 patent’s claims. Patent Owner respectfully disagrees.

The video images of Duhault II are not “tiles” within the meaning of the ’403 patent’s claims at least because they are not assigned individual refresh rates. Instead, each video image is associated with a group of video images that are tied to one another by being refreshed by the same tuner. That is, each individual video image associated with one of the tuners is updated at the same rate as other images in the group; this rate is determined by the rate at which the tuner cycles around the channels associated with the particular group of images. Thus, the refresh rate is not assigned to the video image itself, but rather is a property of the tuner. See, *e.g.*, Ex. 1014 at col. 3, lines 9–24 (“a first portion of the plurality of video images is periodically refreshed using a first tuner ... [and] a second portion of the plurality of video images are identified, and periodically refreshed using a second

tuner.”). This applies even where groups of video images are assigned to each of multiple tuners. Thus, the refresh rate of each video image is determined by the rate at which the tuner cycles around the various images and the number of such images assigned to the particular tuner. As a consequence, and unlike the tiles of the ’403 patent, the video images of Duhault II are not assigned individual refresh rates. Ex. 2004 at ¶ 94.

Moreover, the video images of Duhault II are not tiles as construed by the Board because they are not selectable to provide access to an information source. In Duhault II, each video image can display at any given time one of: full-motion video stream; a static frame from its associated video stream; or a video stream updated according to a rate at which a tuner is cycling between it and other associated video streams. In one embodiment, when a single video image is selected for full motion video, the video image changes its appearance from one of the latter two display modes to the first. However, that change upon selection does not provide access to the underlying information source because the information from the underlying information source was already being displayed before the image was even selected. Instead, only the rate at which the video image receives information from the tuner is updated. This is one more reason why Duhault II does not anticipate any claim of the ’403 patent under the Board’s construction.

(b) Validity Based on the Patent Owner’s Construction

Patent Owner respectfully submits that the video images of Duhault II are not tiles under Patent Owner's construction for the same reasons set forth above with respect to the Board's construction. That is, the video images are not assigned individual refresh rates and are not "persistent and ... when selected, provide[] access to an information source assigned to the tile" for at least the reasons set forth above.

Moreover, the video images of Duhault II are not persistent and therefore lack another attribute of tiles as construed by the Patent Owner. One of ordinary skill in the art would conclude that the video images of Duhault II are not persistent because there is no disclosure in Duhault II suggesting that a configuration of video images is preserved from one usage of the Duhault II system to another, subsequent, usage of that system. Ex. 2004 at ¶ 93. In fact, Duhault II is silent as to how a set of video streams is initially selected for display and associated with the tuners. Other facets of a display that would be consistent with persistency, such as but not limited to attaching user-specific attributes, passwords or access codes to individual video viewing areas, or saving for future use particular configurations of viewing areas (such as laid out in FIGs. 1–4), are similarly absent from Duhault II. There is no disclosure, inherent in Duhault II of how the system will display a selection and arrangement of video viewing areas (or an empty set of such areas) each time it is started. Ex. 2004 at ¶ 93. This is a

further reason why Duhault II does not anticipate any claim of the '403 patent under the Patent Owner's construction.

(c) Dependent Claims

Claims 4 and 31 are not anticipated by Duhault II for the additional reason that there is no disclosure in Duhault II of priority values being assigned to video images. Petitioner merely refers to its discussion of Duhault I to allege anticipation of these claim by Duhault II. *See, e.g.*, IPR2013-00292, paper no. 6 at 26. According to Petitioner, a “selected viewing area in Duhault I has a higher priority than other viewing areas that are not selected.” *Id.* at 23. However, this is an incorrect construction of claim 4. A priority value and a refresh rate are different from one another: for example a priority value may be used to distinguish between two tiles that, because of their contents, might be automatically assigned the same refresh rates. As such, Duhault II does not anticipate claims 4 and 31 for this additional reason.

Claims 10, 42 and 49 are not anticipated by Duhault II for the additional reason that there is no disclosure in Duhault II of assigning refresh rates uniformly to all of the video images; instead, as discussed hereinabove, the refresh rate is defined by the tuner associated with the images. As such, Duhault II does not anticipate claims 10 and 49 for this additional reason.

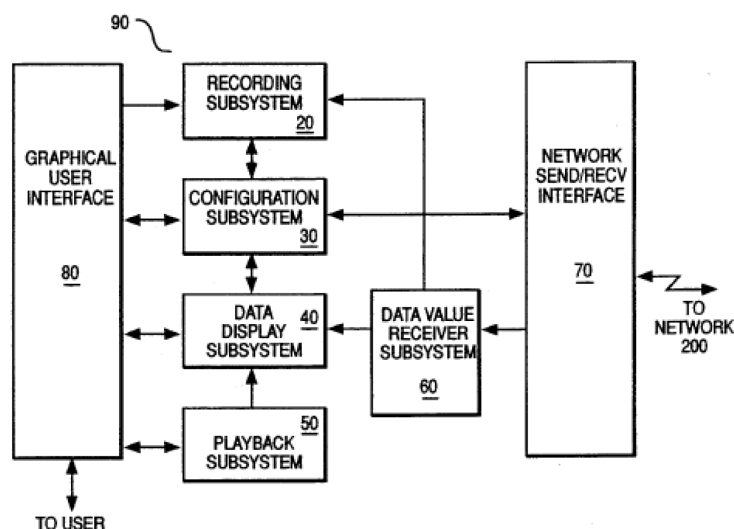
**B. None of Claims 1, 9 – 11, 22, 41 – 43, 46 and 48 – 50 is Anticipated by Chen**

The Board determined that the Petitioner has “established a reasonable likelihood that claims 1, 9 – 11, 22, 41 – 43, 46, and 48 – 50 are unpatentable as anticipated by Chen.” Decision at 26. Patent Owner, however, respectfully submits that Chen cannot anticipate any claim of the ’403 patent at least because Chen does not disclose “tiles” as construed by the Board or Patent Owner, and also because the disclosures of Chen that the Board relies upon must be pieced together from disparate parts of the reference. A “prior art reference—in order to anticipate under 35 U.S.C. § 102—must not only disclose all elements of the claim within the four corners of the document, but must also disclose those elements ‘arranged as in the claim’.” *Net Moneyin, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008).

Chen discloses a system, referred to as “performance tool 90,” for monitoring the performance of remote computers and presenting information, particularly performance statistics, about those computers on a display in graph form. Ex. 1015 at 2:60–3:4. The performance tool 90 consists of five subsystems 20, 30, 40, 50, 60 and two interfaces 80, 90 and is illustrated on the next page.

The tool 90 is implemented on a local host computer, which interfaces with remote computers running a subset 210 of the tool 90 over a network. Ex. 1015 at

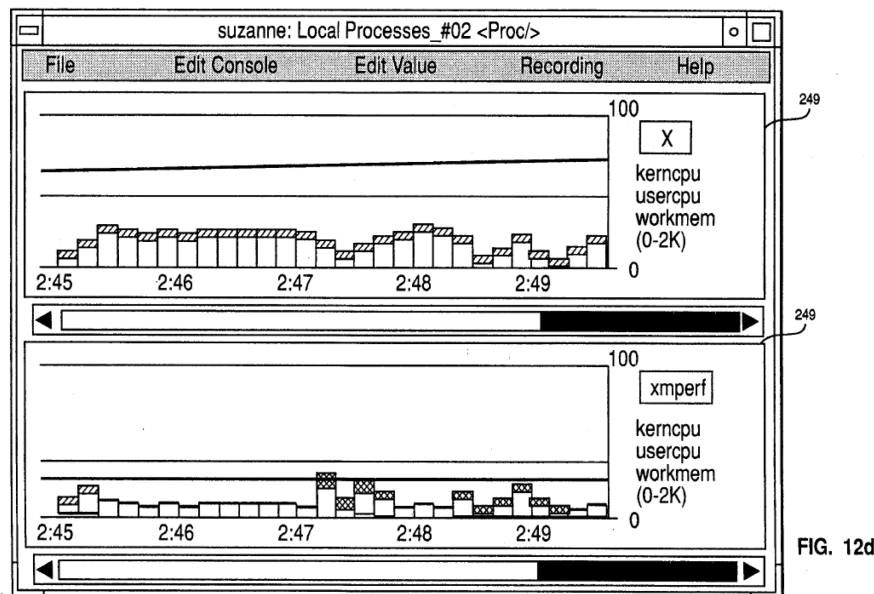
36:58-37:3; FIG. 22. The subset 210 of the performance tool is implemented as a “Data Supplier” program that runs on the remote computers and collects and transmits performance data over a network to the host computer. *Id.* at 4:3-10; 36:58-37:3.



Chen discloses that a user can set up a graphical performance monitoring “console” window using the graphical user interface (GUI) subsystem 80. Ex. 1015 at 8:26-31. Within the console, a user can set up “instrument” subwindows that can be used to display monitored statistics from a remote computer. *Id.* at 29-38. The monitored statistics are displayed in the form of graphs (e.g., line, skyline, area or bar graphs). *Id.* at 5:21-33; 23:35-44. One example of a console containing two instruments 249 is reproduced on the next page.

According to Chen, the console and/or the instruments can be used to record the statistics being monitored into a recording file. Ex. 1015 at 8:29-38; 13:38-65.

The recording file will also contain console and instrument configuration information such that the same console and instruments can be displayed when a user decides to playback recorded statistics from a selected recording file. *Id.* at 18:54-19:4.



The Petitioner has alleged that Chen’s “instruments” are the tiles claimed in the ’403 patent. *See, e.g.*, IPR2013-00292, paper no. 1 at 30. Patent Owner respectfully disagrees because Chen’s instruments are not graphical user interface elements “that, when selected, provides access to an information source,” as required by the Board’s construction of “tile.” Moreover, Chen’s instruments are not graphical representations that are “persistent and, when selected, provide access to an information source assigned to the tile,” as required by the Patent Owner’s construction of “tile.” (Ex. 2004 at ¶ 102.)

This fact is tacitly admitted by the Petitioner's expert who merely concludes that "[i]f it is found that a tile must be 'selectable to provide access to underlying information of the associated information source' ... Chen shows that instruments may be selected." IPR2013-00292, Ex. 1003 at ¶759 (citations omitted). Neither the Petitioner nor its expert provide any explanation or evidence that ties the purported selection of an instrument to *providing access* to an information source or the underlying information of the information source associated with the instrument. Patent Owner respectfully submits that the reason for Petitioner's omission is simple — there is no such evidence. Ex.2004 at ¶ 103.

Chen's instruments are defined by a configuration file, not through selection of a blank instrument. Changes to existing instruments, such as changes to the information displayed within an instrument, as well as the instrument's style, size, etc., are also not made through selecting an instrument but rather are made using a menu-based interface on the GUI 80. Ex. 1015 at 25:10-17. Thus, any access that is provided by setting up and/or changing an instrument is not provided by selecting the instrument.

The only support for the notion that access to an information source is provided when Chen's instrument is selected identified by either Petitioner or the Decision is that submenu items become active when an instrument is selected. In particular, the Board, referring to the same citations as the Petitioner (*i.e.*, column



14, line 67 – column 15, line 2 and Figure 11), left open the possibility that Chen discloses the claimed tiles by stating:

“... if some instruments are recording but the selected instrument is not recording, the only option available to the user is to Begin Recording. Conversely, if some instruments are recording and the selected instrument is recording, the only option available to the user is to End Recording. Based on Chen’s disclosure, we are not persuaded that the ability to Begin Recording or End Recording when selected does not disclose “selectable to provide access to the underlying information.”

Decision at 28. These portions of Chen, however, merely indicate “what *submenu items* are active at any point in time” for a recording operation. Ex. 1015 at 14:67-68 (emphasis added). *See also*, Ex. 2004 at ¶ 104.

		ALL INSTRS ARE RECORD- ING	SOME INSTRUMENTS ARE RECORDING			
			SELECT'D INSTR IS RECORD- ING	SELECT'D INSTR NOT RECORD- ING	NO INSTR IS SELECTED	NO INSTR IS RECORD- ING
CONSOLE MENU	SAVE BUFFER	-	-	-	-	+
CONSOLE MENU	BEGIN RECORDING	-	+	+	+	+
CONSOLE MENU	SAVE & BEGIN REC	-	-	-	-	+
CONSOLE MENU	END RECORDING	+	+	+	+	-
INSTRUMENT MENU	SAVE BUFFER	-	-	-	N/A	+
INSTRUMENT MENU	BEGIN RECORDING	-	-	+	N/A	+
INSTRUMENT MENU	SAVE & BEGIN REC	-	-	-	N/A	+
INSTRUMENT MENU	END RECORDING	+	+	-	N/A	-

FIG. 11

As can be seen in Chen’s Figure 11 reproduced above, these “submenu items” correspond to “save buffer,” “begin recording,” “save & begin rec[ording]” and “end recording” operations. These submenu items and their corresponding operations are available from a console menu when no instrument is currently selected or from an instrument menu when an instrument has been selected. Ex. 1015 at 14:37-66. Selecting any one of these submenu items, however, will not *provide access* to an information source or the underlying information of the instrument’s information source.<sup>5</sup> Instead, all of the submenu items relate to whether information is *written into a recording file*. See, e.g., *Id.* at 13:38-65; 14:4-29. Writing information to a recording file is not providing access to that information. Chen discloses that the information in the recording file is subsequently accessed by selecting the recording file — rather than an instrument — from a list of files. *Id.* at 18:27-51 and Fig. 12b. The recording file is stored on a disk and is thus not accessed by selecting any instrument or any of the submenu

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<sup>5</sup> The fact that it is selection of a submenu item rather than the instrument itself that results in the starting and stopping of recording operations is another reason why Chen’s instruments are not tiles under either the Board’s or Patent Owner’s construction of that term.

items illustrated in Chen Figure 11. *Id.* at 7:58-66. As such, Chen cannot teach the claimed tiles under either the Board's or Patent Owner's construction of this term.

Accordingly, Patent Owner respectfully submits that all of the claims of the '403 patent are patentable over Chen for at least the reason that Chen fails to disclose "tiles" within the meaning of the '403 patent and any other limitation requiring a tile.

**C. Claim 29 is not obvious over Chen in view of MSIE Kit**

The Board determined that the Petitioner has established "a reasonable likelihood that claim 29 is unpatentable under 35 U.S.C. § 103(a) as obvious over Chen and MSIE Kit." Decision at 31. Patent Owner, however, respectfully submits that Chen in view of MSIE Kit cannot render claim 29 unpatentable because claim 29 depends from claim 22 and therefore also recites "tiles" and because neither Chen nor MSIE Kit disclose tiles under either the Board's or Patent Owner's constructions for the reasons discussed herein. Moreover, Patent Owner submits that there is no clear rationale for combining Chen and MSIE Kit. The systems are very different art and are used for very different purposes. One of skill in the art would not be motivated to use Active Desktop items in a high-performance monitoring system disclosed by Chen. Ex. 2004 at 108, 109, and 111. Accordingly, Patent Owner respectfully submits that claim 29 is patentable over

the Chen and MSIE Kit combination.

**D. None of Claims 1 – 3, 5 – 8, 11, 12, 14 – 16, 19, 21, 22, 27, 30, 32, 34, 37 – 40, 43 – 47, and 50 – 52 is Anticipated by MSIE Kit**

i. All Claims

No claim of the '403 patent is anticipated or obvious in view of MSIE Kit under either the Board's or Patent Owner's claim constructions.

The Board construed the term “tile” found in all claims of the '403 patent to mean, in part, “a graphical user interface element . . . that, when selected, provides access to an information source.” Decision at 9 – 11. Patent Owner asserts that a tile should be construed as a “graphical user interface element whose content may be refreshed” that is “persistent, and that, when selected, provides access to an information source assigned to the tile.” Under both of these constructions, the tiles themselves must be capable of being selected. MSIE Kit does not anticipate any claim of the '403 patent because it does not disclose any graphical user interface (“GUI”) element that provides access to an information source when the graphical user interface element itself, rather than something presented inside it, is selected.

Unlike the “tiles” of the '403 patent, MSIE Kit discloses Active Desktop Items which themselves do not provide access to an information source when

selected. Rather, MSIE Kit's Active Desktop Items *may* (but do not necessarily) include one or more hyperlinks or hot spots that (rather than the Active Desktop Items themselves) provide access to an information source when selected. This is evidenced by the following excerpts from Ex. 1007:

Desktop Items are typically designed to provide summary information in a small amount of screen space. Therefore, *information in desktop items often* includes *hyperlinks or hot spots*, so users can *click a designated area* to open a browser window and obtain the details they want.

*Id.* at 177 (emphasis added). Also:

Active Desktop items are meant to be lightweight and therefore have no navigation controls available for the user to move backward and forward. By default, *clicking on a link inside an Active Desktop Item* creates a new browser window.

*Id.* at 183 (emphasis added). Both of these passages indicate that a user cannot select an Active Desktop item itself, but rather can only select a link or a hot spot inside the Active Desktop item, to provide access to information pointed to by the link by creating a new browser window. Ex. 2004 at ¶ 115.

The Petition and the evidence cited therein do not compel a different conclusion. The Petition itself does not even address the issue of selectability of Active Desktop items. The declaration of Petitioner's expert (Ex. 1003) states at ¶

270 that Active Desktop items are selectable, but cites the exact same pages and presumably relies on the exact same passages quoted above. But, as discussed above, these passages establish that it is the links and hot spots that may or may not be included in the Active Desktop items, rather than the Active Desktop items themselves, that can be selected by a user.

The Board apparently agrees with this fact. In its Decision, the Board stated that “[u]sers may select an item in order to move it on the desktop or may select a link within the item to open that link in a new browser window.” Decision at 31-32. Neither of these is sufficient to qualify an Active Desktop item as the “tile” of the ’403 patent claims under the Board’s construction. An icon may be selected in order to move it on the desktop, but “tile” cannot be construed to cover an icon. Decision at 10. Further, providing an ability for an Active Desktop item to be moved from one location to another on the desktop when selected is not providing access to any information because what is displayed in the Active Desktop item is not altered when the Active Desktop item is moved. Moreover, selecting a link inside an Active Desktop item is not the same as selecting the Active Desktop item itself (even if that were possible [within the meaning of Patent Owner’s claims]).

The difference between a tile that itself is selectable to provide access to information and an Active Desktop item that itself cannot be selected but that allows for the inclusion of selectable links is significant. The latter relies on the

existence of a link inside the information to be displayed in the Active Desktop item. This means that an Active Desktop item configured to display a web page that has no links, or even a link-free portion of a web page with links, provides no mechanism to launch a web browser or do anything else to provide access to any information, and a user must rely on traditional methods such as an icon to launch a web browser application and then point that application at the desired website. Ex. 2004 at ¶¶ 115, 119. In contrast, the tiles of the '403 patent do not require any links or hotspots to be visible or even present in the information displayed by the tile to provide this functionality because the tile itself is selectable to provide such access.

This distinction is the result of a significant difference in focus between the tiles of the '403 patent and Microsoft's Active Desktop. As discussed in the '403 patent, the "grid [of tiles] can replace the functionality of a user's computer desktop and offers similar and additional features." Ex. 1001 at 10:47-49; *see also* Ex. 2004 at ¶¶ 116, 117. In contrast, the Active Desktop items share space on a computer user's desktop with conventional icons and shortcuts and complement, rather than replace, the user's desktop. Ex. 1007 at 183; Ex. 2004 at ¶ 116. This difference is particularly pronounced when one considers that, unlike Active Desktop items that display only HTML items (Ex. 1007 at 174), the tiles of the '403 patent may be associated with a wide variety of information sources such as

word processing or spreadsheet files (Ex. 1001 at 12:50-56) that typically do not themselves include links or hot spots.<sup>6</sup> That a tile itself can be selected by a user to invoke an application such as a word processing or spreadsheet program to provide access to the word processing or spreadsheet file associated with the tile thus facilitates the replacement of a desktop with a grid of tiles as discussed in the '403 patent, and is therefore a significant difference between the tiles of the '403 patent and the Active Desktop items of MSIE Kit. Accordingly, Active Desktop items are not “tiles” under either the Board’s or Patent Owner’s constructions, and MSIE Kit does not anticipate any claim of the '403 patent for at least this reason.

ii. Validity of Claim 1 and Dependents Under Patent Owner’s Construction

Active Desktop does not perform the step of “partitioning a visual display of

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<sup>6</sup> Even where a tile is associated with a “nesting” of grids (Ex. 1001 at 11:43 – 45; 11:52 – 62; and FIGs. 4, 7, and 10), it is clear that a single tile is associated with a single grid and that selecting the tile brings the user to that associated grid, rather than tiles of the associated grid being selectable from within the tile itself. (see also Ex. 1001 at 11:1 – 3 “Each tile is separately associated with a source of information, for example, an application program, datastream or file, any one of which may be another grid object.”).



the device into an array of tiles” as required by claim 1 under Patent Owner’s construction because Active Desktop does not divide any array of tiles into a non-overlapping configuration. Rather, Active Desktop “is built from two separate layers,” the existing desktop and a lower “wallpaper” layer. Ex. 1007 at p. 175. Active Desktop items are placed on the lower wallpaper layer beneath other desktop items such as icons and the “user’s existing desktop shortcuts.” *Id.* Therefore, Active Desktop items can be obscured by existing icons or desktop shortcuts on the upper layer. Moreover, Active Desktop items can overlap each other on the same layer. *Id.* at 183. Thus, even if one were to assume *arguendo* that Active Desktop items are tiles as required by the ’403 patent (which they are not) Active Desktop does not divide a display into an array of non-overlapping tiles because Active Desktop items can be overlapped by each other and by other GUI elements such as icons and desktop shortcuts. Ex. 2004 at ¶ 122.

iii. Claims 3 and 30

Claims 3 and 30 require that each tile in an array of tiles be “a uniform size and shape.” Ex. 1001, cl. 3. This feature is not disclosed in MSIE Kit. Petitioner relies on the Karger Declaration (Ex. 1003) at ¶¶ 289-92 and 380, which in turn relies on MSIE Kit at pp. 183, 186, 224 and xxx. Nowhere in these portions or anywhere else in MSIE Kit are tiles of uniform size and shape disclosed. Ex. 2004 at ¶ 126.

Dr. Karger asserts that each Active Desktop item “by default” will have a uniform size and shape. However, none of the portions of MSIE Kit cited by Dr. Karger support this conclusion. Page 183 of MSIE Kit says nothing about any *default* Active Desktop item size. This passage does discuss a “maximum tile size of no more than 200 X 200 pixels,” but a maximum is not a default, and Active Desktop items are not tiles. Moreover, as Dr. Karger admitted under cross examination, this passage of MSIE Kit is nothing more than suggested guidelines for persons who author Active Desktop items, not any limitation of the MSIE Kit software itself. Ex. 2003 at 145:3-146:23. Indeed, MSIE Kit states at 183 that “Internet Explorer 4 does not itself enforce any restrictions on the size of an Active Desktop Item,” which further confirms that the “maximum tile size of 200 X 200 pixels” is nothing more than a suggestion for authors of Active Desktop items. Ex. 2004 at ¶ 126.

The statement in ¶ 293 of Dr. Karger’s Declaration (Ex. 1003) that p. 186 of MSIE Kit illustrates how Active Desktop items will have a uniform size and shape when presented in a 3 X 2 grid illustrates the fallacy of Dr. Karger’s reasoning: while the passage of MSIE Kit at 183 discusses a “maximum size” of 200 X 200 pixels in this 3 X 2 default grid, the example of a single CDF file for a single Active Desktop Item on p. 186 will have a size of 200 X 80 pixels rather than the 200 X 200 “maximum size.” Ex. 2004 at ¶ 126. The same is true for the example

shown on page 224 of MSIE Kit. Again, nowhere on p. 186 or p. 224 is there any indication that the size of 200 X 80 pixels is a default value.

Finally, Dr. Karger's Declaration relies on page xxx of MSIE Kit. The only possible disclosure of a uniform tile size on that page might be the 2 X 2 grid of images on the left-hand side of the screen shot illustrated on that page. However, when questioned at deposition, Dr. Karger indicated that he could not tell whether the two-by-two grid of images was a single Active Desktop Items or multiple Active Desktop Items. Ex. 2003 at 119:8 – 121:6. Dr. Karger's inability to determine whether the four images are part of a single Active Desktop item or constitute multiple desktop items is not a result of poor copying of the exhibits used at the deposition, but rather is present in the copy of Exhibit 1007 provided by Petitioner. In any event, the 2 X 2 grouping of images is in fact a single Active Desktop Item. Accordingly, there is no disclosure in MSIE Kit of a uniform tile size as required by claims 3 and 30.

**E. None of Claims 1 – 3, 5 – 8, 12 – 14, 19, 21, 22, 27, 30, 32, 34, 37 – 40, 46, and 47 is Anticipated by Duperrouzel**

The Board determined that the Petitioner has “established a reasonable likelihood” that claims 1–3, 5–8, 12–14, 19, 21, 22, 27, 30, 32, 34, 37–40, 46 and 47 are unpatentable as anticipated by Duperrouzel (Ex. 1011) (Decision at 34). Patent Owner rebuts because Duperrouzel does not disclose tiles according to

either the Board's or Patent Owner's construction of that term.

i. Analysis Under The Board's Construction of Tile

The Board has concluded that the panes of Duperrouzel meet the limitations of tiles, according to the construction of "tiles" adopted by the Board. According to that construction, tiles are not required to be persistent. The Board also states that "[w]hen a user selects maximize control 240 in a display pane, that pane is maximized to provide access to the underlying web page." [citation] However, selecting one of Duperrouzel's panes does not in fact provide access to underlying web page information.

This distinction is the result of a significant difference in focus between the tiles of the '403 patent and the panes of the browser in Duperrouzel. As discussed in the '403 patent, the "grid [of tiles] can replace the functionality of a user's computer desktop and offers similar and additional features." Ex. 1001 at 10:47-49; *see also* Ex. 2004 at ¶ 26. In contrast, the application of Duperrouzel can only provide web browser functionality. Ex. 2004 at ¶ 133. This difference is particularly pronounced when one considers that, unlike the program of Duperrouzel that can only display web pages, the tiles of the '403 patent may be associated with a wide variety of information sources such as word processing or spreadsheet files (Ex. 1001 at 12:50-56) that typically are not themselves viewed through a browser.

Duperrouzel describes the display, on a computer monitor or a television, of

multiple web-pages, in separate, non-overlapping rectangular “display areas”, under a single unified control. (Ex. 1011 at 2:4–6). Duperrouzel describes two embodiments: one in which “only one instance of most executable portions of the associated browser software” are used to control multiple display panes (*Id.* at 5:8–10), and one in which “an entire copy of the web browser engine must be executed for each display pane” (*id.* at 5:32 – 34). In either case, however, each display pane contains a web-browser application, which has active functions including: forward and back buttons, a stop loading button, a search control, a minimize control, a ‘home’ button, and a status indicator (*id.* at 5:48 – 6:45). Even though some other controls are dedicated to allowing a user to perform simultaneous operations on all of the display panes (*id.* at 6:46 – 50), this does not change the fact that each pane is a window that contains an application and is always active and accessible to the user. Ex. 2004 at ¶ 141.

The display panes of Duperrouzel are not “tiles” within the meaning of Patent Owner’s claims at least because, according to Duperrouzel, they are actually active instances of web-browser software. (*See, e.g.*, Ex. 1011 at 5:11–12, 7:26).

By contrast, under the Board’s construction, the tiles of Patent Owner’s claims must “when selected, provide access to an underlying information source.” Therefore, a user performs a selection operation on a tile that causes the tile to provide the user access to the underlying information source, *e.g.*, by invoking an

application. No such operation is associated with or required for the display panes of Duperrouzel because they are fully functional web-browser applications displaying active web-pages that can be accessed directly by the user. The Board (Decision at 35) and the Karger Declaration (Ex. 1003 ¶ 439) rely solely on the maximize control 240 discussed in Duperrouzel at 6:36-40 as providing access to information when selected. Patent Owner disagrees that maximizing a display pane in Duperrouzel is equivalent to providing access to it: when maximizing a display pane, the only change that occurs is to the display pane's size. The display pane remains an active web-browser application and can be accessed in the same way by the user when maximized as when it is normal size. Thus, maximizing a display pane does not perform the function of providing access to any information because that access was already present and is unaltered by increasing the size of the pane. Ex. 2004 at ¶ 140.

ii Analysis Under Patent Owner's Construction of Tile

Duperrouzel's panes are not tiles under Patent Owner's construction that tiles "are persistent and, when selected, provide access to an information source assigned to the tile" for the same reasons discussed above in connection with the Board's construction. Additionally, Patent Owner's construction requires tiles to be persistent for the reasons discussed above. Patent Owner notes that the panes of Duperrouzel are not persistent and therefore lack another attribute of tiles as

construed by Patent Owner.

There is no disclosure in Duperrouzel of saving particular configurations of display panes (such as laid out in FIGs. 1–4) for future use. Although Duperrouzel describes populating display panes from a predefined list of web-sites (Ex. 1011 at 2:18–25) and such lists may be stored (*id.* at 11:7–8), or for “navigating to sites last viewed”, neither is the same as the display panes themselves being persistent because the panes must be manually launched from a list as discussed in Duperouzzel at 11:9-36. There is no description of a way to force the display area to preserve the arrangement and content of various display panes each time it is started. Furthermore, the ability of a user to cause the application program to “navigat[e] to sites last viewed on startup” (*id.* at FIG. 19, and 13:23) does not equate to persistence at least because the user will not have the same display of panes in successive sessions if the user has used any of the panes to navigate to different pages on the previous session. In other words, if a pane configured to display information from the home page of the Wall Street Journal were truly persistent, a user who has navigated from that home page to a particular story and then shut down his computer would again be presented with information from the home page of the Wall Street journal in the next session. In contrast, a pane in Duperouzzel’s system in the next session would again present the user with information on the particular story viewed the previous day as this is the site last

viewed by the user. Moreover a user cannot control which panes the most recently-accessed web-sites are displayed in when restoring the program, because the list of most recent sites is aggregated, by time, from all panes. Thus the program is not configured to restore the most recently visited, or a particular, web-site, into each pane of a given layout of panes. For all intents and purposes, after a user exits the web-browser application program of Duperrouzel, the user must either start anew and repopulate the panes, or rely on the program to populate each of the ‘N’ panes with one web-page from the list of ‘N’ most recently viewed web-pages. If a user had most recently spent a lot of time browsing in one particular pane, then the program would just select its most recent pages from those web-pages viewed in that pane, and use those to populate that pane and the remaining panes. Ex. 2004 at ¶ 142. This means that if a user starts his day with a number of panes directed to a series of home pages on different web sites (*e.g.*, the home pages of the Wall Street Journal, CNN, the New York Times, etc.) and finishes the day by browsing a series of web pages from, *e.g.*, CNN, the next day he will be presented with a number of panes all pointing to different web pages (none of them the home page) from the CNN site and none of panes will display the other websites displayed for the user at the start of the prior day. This is not persistence.

Accordingly, claims 1, 22, and 46 are not anticipated by Duperrouzel under either the Board’s or Patent Owner’s constructions. Claims depending from claims



1, 22, and 46 are therefore also not anticipated by Duperrouzel for at least these reasons. In sum, claims 1–3, 5–8, 12–14, 19, 21, 22, 27, 30, 32, 34, 37–40, 46 and 47 are not anticipated by Duperrouzel.

**F. None of Claims 17, 20, 25, and 28, is Obvious over MSIE Kit, or Duperrouzel, in view Brown**

In view of the fact that neither MSIE Kit nor Duperrouzel discloses tiles within the meaning of Patent Owner’s claims, and Brown does not provide any commensurate teaching (see, *e.g.*, Ex. 2004 at ¶¶ 128 – 131 and 145), none of claims 17, 20, 25, and 28 is obvious in view of MSIE Kit or Duperrouzel separately in combination with Brown.

**4. Conclusion**

For at least the foregoing reasons, the Board should find that no claim of the ’403 Patent is invalid on any of the grounds proposed by Petitioner.

Respectfully submitted by:

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CERTIFICATE OF SERVICE UNDER 37 C.F.R. § 42.6 (e)(4)

It is hereby certified that on this 24 day of January, 2014, a copy of the  
foregoing

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