REPLY BRIEF

No. 2008-1283

United States Court of Appeals for the Federal Circuit

THE MATHWORKS, INC.,

Plaintiff-Appellant,

v.

COMSOL AB, and COMSOL, INC.,

Defendants-Appellees.

Appeal From The United States District Court
For The Eastern District Of Texas
In Case No. 6:06-CV-00334, Judge Leonard Davis

REPLY BRIEF OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant The MathWorks, Inc. hereby certifies the following:

1. The full name of every party represented by me is:

   The MathWorks, Inc.

2. The names of the real parties in interest (if the party named in the caption is not the real party in interest) represented by me are:

   None.

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party or amicus curiae represented by me are:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this Court are:

   JONES DAY: Gregory A. Castanias, Terence M. Murphy, Thomas R. Jackson, Krista S. Schwartz, Susan M. Gerber;

   GIBSON, DUNN & CRUTCHER: Mark N. Reiter; and

   THE LAW OFFICES OF CARL ROTH: Carl Roth.

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In addition to the abbreviations used in MathWorks' opening brief (*see* MBr. vi), the following additional abbreviations appear in this brief:

MBr.	MathWorks' Opening Brief
CBr.	COMSOL's Response Brief

All emphasis in this brief is added unless otherwise indicated.

INTRODUCTION

The appeal presents one straightforward question: Did the district court construe the "ranking" terms of the '338 patent too narrowly, without considering the intrinsic record as a whole, in violation of the doctrine of claim differentiation, in a way that excludes the preferred embodiment? The answer, as MathWorks showed in its opening brief, is "yes."

COMSOL's efforts to sustain the district court's claim construction fail. COMSOL's attempt to divine a "plain meaning" of the "ranking" terms from general-purpose dictionaries (and, worse, from "Wikipedia") fly in the face of this Court's warnings about using such dictionaries to determine the meaning of a term to a person of ordinary skill. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1322 (Fed. Cir. 2005). Additionally, COMSOL misconstrues several of MathWorks' arguments in order to knock down straw men, and misreads the patent specification in an unsuccessful effort to narrow the scope of that disclosure—and, thereby, the claims.

COMSOL cannot save the district court's construction with its arguments. This Court should therefore reverse the judgment, vacate the district court's claim construction, construe the "ranking" terms to mean "to assign to a particular class," and remand for further proceedings.

ARGUMENT

I. THE PROPER CONSTRUCTION OF "RANKING" IS "TO ASSIGN TO A PARTICULAR CLASS"

In its opening brief (MBr. 18-24), MathWorks showed that no justification exists for the district court's ruling that the "ordinary meaning" of the "ranking" terms requires placing the ranked items in an ordered manner relative to one another. (A0010; A0018.) MathWorks further showed that the proper construction of the "ranking" terms is "to assign to a particular class." (MBr. 18-25.) In response, COMSOL argues that the '338 patent does not give a "special meaning" to the ranking terms, and that the district court's "ordinary meaning" ruling was correct. (CBr. 10-11.) COMSOL is wrong. Contrary to the district court's construction, the "ranking" terms should be construed, in light of the specification, ***as one of ordinary skill in the art would understand them.*** In this case, the specification teaches the ordinarily skilled artisan that "ranking" means simply "to assign to a particular class."

1. COMSOL agrees that "the ordinary and customary meaning of a claim term is the meaning ***that the term would have to a person of ordinary skill in the art in question at the time of the invention.***" (CBr. 10.) However, COMSOL does not appreciate the consequences of this basic rule. Here, the district court did not tie its "ordinary meaning" construction to the meaning one of ordinary skill in the art would ascribe to the claim term—for that matter, it did not

even cite even a dictionary definition to support that supposed "ordinary meaning." (CBr. 14.) Instead, the district court apparently substituted its own judgment, devoid of any tethering to the patent—or to the computer arts—in place of the "ordinary meaning" of the "ranking" terms. Had the district court viewed the claims through the eyes of one of ordinary skill, in light of the specification, it should have arrived at a construction reflecting the fact that "ranking" categorizes a method from an object-oriented computing environment based on its determined suitability.

2. COMSOL tries to buttress the district court's citation-and-analysis-free ruling with citations to various dictionary sources, including the dubious "Wikipedia" (www.wikipedia.com). (CBr. 12-14.) When those dictionary definitions are read in full, it becomes apparent that COMSOL is cherry-picking its preferred definitions from a broad list of general-purpose dictionary definitions, contrary to this Court's clear teachings in *Phillips*:

> General dictionaries, in particular, strive to collect all uses of particular words, from the common to the obscure. By design, general dictionaries collect the definitions of a term as used not only in a particular art field, but in many different settings.

Phillips, 415 F.3d at 1321; *see also id.* at 1322 ("Moreover, different dictionaries may contain somewhat different sets of definitions for the same words. A claim should not rise or fall based upon the preferences of a particular dictionary editor,

or the court's independent decision, uninformed by the specification, to rely on one dictionary rather than another.").

a. COMSOL's selective quoting of dictionaries, "uninformed by the specification," omits a number of relevant definitions of "rank." These omitted definitions, which provide a far better fit to the teachings of the specification and the context of the computer arts, support only MathWorks' construction:

- *Random House Webster's Unabridged Dictionary, 2nd Edition:* rank (n) "4. a class in any scale of comparison"; "[(v)] 19. to assign to a particular position, station, class, etc."
- *Webster's New 20th Century Dictionary 2nd Edition:* rank (n) "3. a social division; a class; an order"; "5. an official grade or position; as, the rank of captain; the rank of admiral"

b. COMSOL also relies upon definitions found in "Wikipedia." (CBr. 14.) That Internet site, which is self-described on its opening page (http://en.wikipedia.org/wiki/Main_Page) as "the free encyclopedia that anyone can edit," is an even more dubious choice for finding definitions of patent terms. Wikipedia is a dynamic, "ongoing work to which, in principle, anyone can contribute" (http://en.wikipedia.org/wiki/Wikipedia:About); that stands in pointed contrast to the task of determining the meaning of patent terms, which is to ascribe a fixed and reliable meaning to terms used in the claims as of the date of the patent application. *See, e.g., Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1377 (Fed. Cir. 2005) ("Courts construe claim terms in order to assign a fixed, unambiguous,

legally operative meaning to the claim."). Indeed, Wikipedia is so dynamic that COMSOL, or MathWorks, could themselves edit the entries to suit their purposes. It is no surprise that federal courts have been reluctant to rely upon Wikipedia.[1]

All that said, the quoted Wikipedia entry for "rank" is decidedly unhelpful to COMSOL. Like the general-purpose dictionaries COMSOL cites, the Wikipedia entry explains that "[r]ank is a very broad term with several meanings" and lists many different types of ranking, including those where multiple items may have the same ranking. *See* http://en.wikipedia.org/wiki/Rank (last visited August 7, 2008). Thus, as with dictionaries in general, it is not enough to rely on "broad," multifaceted definitions like this one, particularly without any consideration of the specification or the ordinarily skilled artisan's understanding.

In sum, COMSOL's attempt to support the district court's "ordinary meaning" construction with extrinsic evidence fails.

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[1] *See, e.g., Randy Disselkoen Props., LLC v. Charter Twp. of Cascade*, No. 1:06-cv-141, 2008 WL 114775, at *4 n.12 (W.D. Mich. Jan. 9, 2008) ("[T]his Court is skeptical of relying on the anonymous and voluntarily edited website for anything more than general background information. . . . [T]his Court notes the ease with which Wikipedia entries can be altered and further notes that others have edited entries for improper reasons."); *see also Campbell v. Sec'y of Health & Human Services*, 69 Fed. Cl. 775, 781 (2006) (noting that "[a] review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers" as to the accuracy and reliability of content).

3. In seeking to sustain the district court's construction, COMSOL engages in a pattern of mischaracterizing MathWorks' arguments, and indeed the '338 patent itself.

a. First, COMSOL portrays MathWorks' argument as urging that methods are assigned to only two possible classes—"suitable" and "not suitable"—in the "ranking step." (CBr. 3, 5, 9, and 10.) Not so. The point is that the proper construction of the "ranking" terms must ***include*** the possibility of assignment to two classes, such as "suitable" and "not suitable." That is ***one*** implementation of this aspect of the invention, but there are other implementations with any number of possible ranking classes.[2] COMSOL's—and the district court's—construction is wrong because it unjustifiably narrows the definition of the "ranking" terms, and by doing so ***excludes*** patent coverage of that very common situation.

b. Second, COMSOL mischaracterizes MathWorks' argument as claiming that the ***assignment*** to a particular class can be random. (CBr. 5-6.) MathWorks has never said that ***assignment*** can be random. In its opening brief, MathWorks explained that the "ranking" step assigns method signatures to a

[2] For example, another implementation of the invention could sort the retrieved method signatures into three classes, such as more suitable/less suitable/not suitable. In another implementation, the preferred embodiment sorts the retrieved method signatures into classes based upon their fitness ranking. (A0027 4:61-65; A0028 6:18-21.)

particular class, not a random one. (MBr. 22-23.) If more than one method signature is assigned to the suitable class during the "ranking" step, then the invention may ***select*** a method from that class in any number of ways during the ***selecting*** step: alphabetically by the name of the first data type, by the closest fit for the passed data types, at random, and so on. All that is necessary is that the ultimate "selection" be of a suitable method. (MBr. 23.)

COMSOL's further assertion that random ***selection*** would render the other claim steps (retrieving, comparing, and ranking) "useless" (CBr. 12) is just plain wrong. By the processes of "retrieving," "comparing," and "ranking," unsuitable methods are filtered out, leaving only suitable methods to select among. If two or more methods have been assigned to the class or category of suitable methods, the selection of a suitable method to invoke can be accomplished any number of ways, including (but not limited to) random selection.

c. Third, COMSOL's characterization of the '338 patent is likewise inaccurate and overly narrow.

- COMSOL tries to limit the invention described and claimed in the '338 patent to the preferred embodiment. (*See, e.g.*, CBr. 1 (claiming that the "invention embodied in the '338 patent allows a user ***in MATLAB environments*** to interface a separate, object-oriented computing environment such as Java . . . .").) That is improper. *Electro Med. Sys., S.A., v. Cooper Life Scis., Inc.*, 34 F.3d 1048, 1054 (Fed. Cir. 1994) ("although the specifications may well indicate that certain embodiments are preferred, particular embodiments appearing in a specification will not be read into the claims when the

claim language is broader than such embodiments"). In any event, the invention of the '338 patent is not so limited, but rather extends to technical computing environments. (A0026 1:59-63.)

- COMSOL also claims that the '338 patent is about "overloading." (CBr. 2.) Tellingly, COMSOL cites no support from the patent, and the word "overloading" does not appear anywhere in the '338 patent.

- Similarly, COMSOL wrongly identifies ***the*** purpose of the invention as finding the "best" method. (CBr. 11-12.) Certainly, ***one*** object of the invention is to find a method signature that closely fits the parameters passed by the mathematical tool, but finding a single "best" method is not ***the*** purpose. In fact, the patent teaches that a primary purpose of the invention is to allow methods and data to be used across two disparate computing environments. (A0026 1:63-67.) To that end, the '338 patent encompasses any number of ways to select from the method signatures ranked as suitable. (*See, e.g.*, A0030 9:8-9 (Claim 1; requiring only that the selection of the method signature be "according to the ranking").)

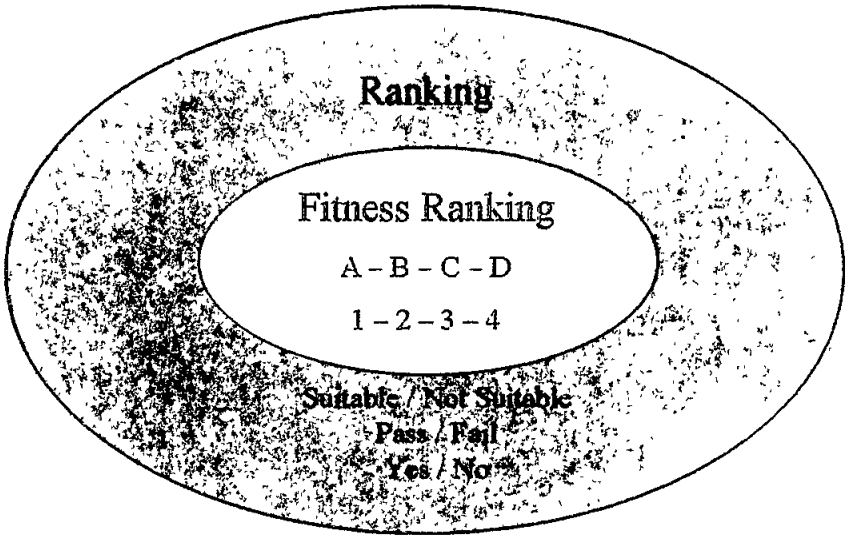
In sum, the ordinary meaning of the "ranking" terms in the '338 patent is "to assign to a particular class."

II. THE SPECIFICATION AND PROSECUTION HISTORY BOTH COMPEL MATHWORKS' CONSTRUCTION

The ordinary meaning of the "ranking" claim terms, as informed by the specification and the level of ordinary skill, should be sufficient to resolve this appeal in favor of MathWorks. The rest of the intrinsic evidence, nonetheless, likewise confirms that "ranking" means "to assign to a particular class."

As MathWorks showed, and as depicted in the diagram below, "ranking" is a broad term and "fitness ranking" is a particular type (or subset) of ranking that

actually involves ascribing an ordinal relationship between different, suitable methods—the same definition given to the bare "ranking" term by the district court. (MBr. 23-24.)



In its opposition, however, COMSOL urges that "there is nothing in the claims or the specification that supports MathWorks' proposed construction." (CBr. 6; *see also* CBr. 10-11.) That is just empty rhetoric, and it fails to address the ample intrinsic record support set out in MathWorks' opening brief. (*See* MBr. 19-24, 33-35.)

1. MathWorks showed (MBr. 25-27) that the district court's construction violates the doctrine of claim differentiation, because it reads "ranking" and the narrower, more specific term "fitness ranking" as synonymous—as COMSOL's counsel admitted at the *Markman* hearing. (A2559.) Under MathWorks'

construction, however, claims 1 and 2 have a different scope: "ranking" sorts the method signatures into particular classes based on ***suitability vel non***, while "fitness ranking" orders the method signatures based on the ***level of suitability***.

a. COMSOL's responses on appeal are perplexing. COMSOL does not dispute that it told the district court that, under its construction, "ranking" and "fitness ranking" had the same meaning.[3] But in this Court, COMSOL claims that under the district court's construction, "'fitness ranking' still has its own meaning separate and apart from 'ranking.'" (CBr. 14.) Both statements cannot be true.

What COMSOL has done here is to alter the construction it agreed to in the district court. COMSOL's new construction of "fitness ranking," as "a designation, such as a classification, of fitness of a particular method signature,"[4] seeks to distinguish that term from the district court's construction of "ranking," which COMSOL re-words as "a list of the method signatures placed in order."

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[3] Indeed, COMSOL agreed with MathWorks, in the district court, that the term "fitness ranking" has the definition set forth in claim 2 of the patent—"representative of a level of suitability of the data types of the input parameters of the method signature to use the input parameters passed by the requested method invocation." (A0013, A0018.)

[4] Not surprisingly, COMSOL cites no support for its new understanding of "fitness ranking" from the specification or the claims, and, indeed, there is no such support in the intrinsic record.

(CBr. 14-15.)[5] As COMSOL explains elsewhere in its brief, its present understanding is that the step of "ranking" "puts the method signatures that have been determined to be suitable in an order relative to one another, but it does not necessarily provide information about how suitable they may be in an absolute context." (CBr. 16.)

The district court's ruling cannot possibly be read in that fashion. For one, the district court's ruling is devoid of any references to "absolute" and "relative" values (or any other terms that might be similarly understood). For another, it is impossible to understand the district court's construction of the term "ranking"—placing the method signatures in an ordered manner relative to one another—as anything other than determining levels of suitability, which runs afoul of the doctrine of claim differentiation.

COMSOL seems to be saying that "to be 'ranked,' suitable methods must be placed in a list so that the suitable methods have an ordinal relationship, or an order relative to one another, but because 'ranking' contains no particular ordering

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[5] Of course, the "ranking" step of method claim 1 cannot be defined as "a list," as COMSOL contends. Steps of a method claim are, essentially, verbs or verb forms, because they call for certain actions to be taken. *See, e.g., Masco Corp. v. United States*, 303 F.3d 1316, 1327 (Fed. Cir. 2002) ("Method claims are commonly drafted . . . by reciting the phrase 'steps of' followed by a list of actions comprising the method claimed."). "A list" is a noun, not an "action." And, in any event, the patent does not support this understanding of "ranking."

principle, that order may be any kind of order—even a random order.". (*See* CBr. at 15-16.) In essence, COMSOL has changed course and has now appropriated *MathWorks'* construction of the "ranking" terms: Both COMSOL's current construction of the "ranking" terms, and MathWorks' construction, contain no required ordering principle among the methods found to be suitable. COMSOL's sophistry, however, does not provide any defense of the district court's actual claim construction.

b. COMSOL elaborates upon its claim-differentiation argument by offering an analogy to the bar examination. (CBr. 16-17.) COMSOL stretches that analogy to the point that it bears no resemblance to the '338 patent. Indeed, COMSOL's analogy ends up supporting MathWorks' construction, not the district court's.

COMSOL hypothesizes a bar examination in which five passing students receive the top scores on the exam. According to COMSOL, the "ranking" only places these five students in relative relationship to one another, whereas a "fitness ranking" of each student would provide "absolute" information about each student's ability ("fitness") to practice law. (*Id.*) Unfortunately, COMSOL's analogy is—like the district court's construction—untethered to the actual language of the patent. In this respect, the '338 patent demonstrates that a "fitness ranking" is a ***relative***—not an absolute—ordering of suitable methods: "After

calculating fitness rankings for each potential signature, signature selector **112** selects the signature having ***the highest ranking***, unless all of the signatures have been rejected as being unsuitable (step **215**)." (A0028, 6:18-21.) Not a word there about "fitness rankings" being absolute values. To the contrary, this passage makes crystal clear that in the preferred embodiment the signature selector is to select the signature having the "highest" ranking relative to the others, without regard to whether that signature has a low value in "absolute" terms.[6] Here, the

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[6] COMSOL's bar-examination hypothetical could be restructured to more closely mirror the various method steps of the '338 patent, as follows: Students who take the bar exam must meet a threshold score in order to pass. To determine if the student passes, the student's answers are ***compared*** to the answer key to determine if the answers are correct or not. Based upon the student's total number of correct answers (the determined suitability) the student is ***ranked*** as a "pass" or a "fail" depending on whether the threshold level is met. A handful of states, including Texas, actually "rank" students according to their particular score on the exam. That would be a ***fitness ranking***: The students' scores are ordered with respect to each other.

To extend the analogy, consider the group of students who take the bar exam and are assigned to the "passing" category. Each of those students is deemed equally qualified to practice law in that jurisdiction. Just as the invention of the '338 patent does not limit the way a method is selected, a client (or a law firm making a hiring decision) may employ any criterion or set of criteria to choose a lawyer. Some may want the single "best" lawyer based on bar-exam results (in which case they need a "fitness ranking"), while others may choose from the "passing" group based on criteria such as the lawyer's specialty, proximity of the lawyer's office, the lawyer's billing rates, or by simply choosing a lawyer at random. In these latter cases, the client or law firm making the selection needs only the "ranking" (*i.e.*, whether the lawyer passed the exam or not), not a "fitness ranking."

specification guides the way to the correct construction—"ranking" is basic classification, while "fitness ranking" is an ordered list.

2. MathWorks showed (MBr. 27-33) that the district court's requirement that the method steps must be performed in order was erroneous, and would violate a basic tenet of claim construction by excluding the preferred embodiment, which has two of the method steps being performed simultaneously, not consecutively. (A0028 5:54-56.) COMSOL says that MathWorks' construction renders the "comparing" step superfluous. (CBr. 3, 8-9.) COMSOL is wrong.

Under MathWorks' construction, the "comparing" and "ranking" steps have independent life and meaning. As the claim language indicates, the "comparing" step compares the data types of the input parameters with the input parameters of the retrieved method signatures. (A0029 8:65-A0030 9:3.) This comparison gleans data ***for the purpose of*** determining suitability. The "ranking step" uses that data to assign the methods to a particular class. And, further, "fitness ranking" takes that data from the comparing step and "calculat[es] a fitness ranking for each signature . . . representative of a level of suitability . . . ." (A0030 9:17-19.) The relationship between "comparing," "ranking," and "fitness ranking" only makes sense if suitability is determined in connection with "ranking."

Under MathWorks' construction—unlike COMSOL's and the district court's—the preferred embodiment is within the scope of the claims. The

preferred embodiment "ranks" the method(s) and determines the suitability of the method(s) simultaneously, as part of the same step. The specification makes this clear: The preferred embodiment "calculate[s] the fitness ranking for the signature ***while*** iterating over the data types defined by the signature," (A0028 5:54-56), not consecutively ("in the order written"), as the district court required. Because the district court's claim construction would exclude the preferred embodiment of the '338 patent, that is a highly persuasive indicator that the district court's construction was not correct—indeed, it is the kind of construction that this Court has said is "rarely, if ever, correct." (*See* MBr. 29 and cases cited there.)

MathWorks further demonstrated that because the district court's construction ***requires*** an ordinal relationship for "ranking," it necessarily excludes the situation where zero or one method signatures are retrieved and therefore excludes the preferred embodiment. (MBr. 30-31.) It also necessarily excludes the situation where multiple method signatures have the same ranking, which again excludes the preferred embodiment. (MBr. 31-33.) COMSOL agrees that this is the consequence of the district court's construction, but nonetheless argues that the '338 patent does not allow for the set of retrieved method signatures to contain zero or one method signatures, and so the situation where a set consisting of zero or one method signatures is retrieved cannot possibly exist. (CBr. 19.) Again, COMSOL is wrong.

COMSOL argues that the inventors' use of the plural word "signatures" in the '338 patent means that more than one method signature must necessarily be retrieved. (*Id.*) That argument is flawed, because it ignores the context in which "signatures" appears. For example, claims 1 and 15 refer to retrieving "a ***set*** of method signatures." The use of the plural "signatures" with "set" is a linguistically and grammatically correct way of capturing all of the possible situations: A "set" in technical terms may contain zero ("the null set"), one, or more elements; there was no requirement that this patent be drafted to say "a set containing none, one, or multiple method signatures" when the simpler "a set of method signatures" sufficed to convey exactly the same meaning.

This is confirmed when seen through the eyes of one of ordinary skill. As MathWorks showed (MBr. 30), Mr. Foti, one of the named inventors, testified to this very understanding of the term "set." (A2490-91.) COMSOL has no response.

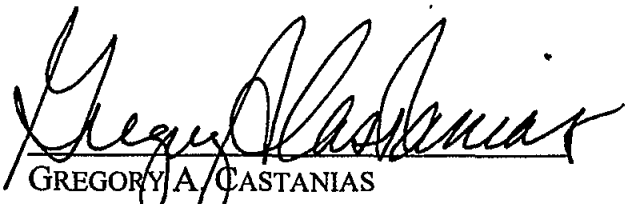
3. Finally, COMSOL points to a single citation in the file history as alleged support for the district court's claim construction. (CBr. 20-21.) MathWorks already answered this contention in its opening brief (MBr. 33-34), and COMSOL simply parrots the district court's reliance on the cited passage, which is no answer to MathWorks' showing.

CONCLUSION

For these reasons, and those set forth in MathWorks' opening brief, the judgment of the district court should be reversed, the "ranking" terms should be construed to mean "to assign to a particular class," and the case remanded for further proceedings.

Dated: August 8, 2008

Respectfully submitted,



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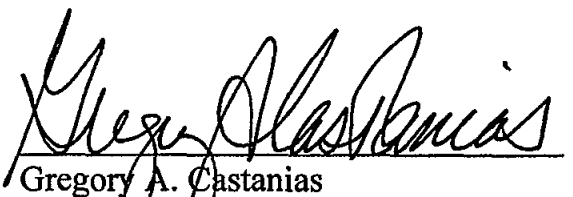
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 3,912 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 point font.

Dated: August 8, 2008

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that on August 8, 2008, two bound copies of the foregoing BRIEF OF PLAINTIFF-APPELLANT were served by overnight mail through a third-party commercial carrier (Federal Express) upon the following principal counsel:

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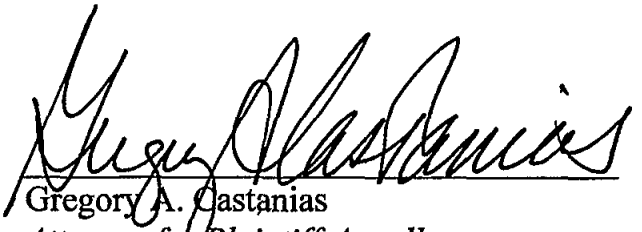
I also certify that on August 8, 2008, twelve bound copies, including the original, of the foregoing BRIEF OF PLAINTIFF-APPELLANT were filed, by hand delivery, in the Office of the Clerk, United States Court of Appeals for the Federal Circuit.



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