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

MACROSOLVE, INC.	§	
	§	CIVIL ACTION NO. 6:11-cv-287-MHS-JDL
v.	§	
	§	**CONSOLIDATED LEAD CASE**
ANTENNA SOFTWARE, INC., et al.,	§	

MACROSOLVE'S REPLY *MARKMAN* BRIEF

I. INTRODUCTION

Defendants say that MacroSolve has taken "snippets" of text out of context, relied, "of course," on "misleading" quotations and "marginally relevant extrinsic evidence," and proposed "strange and confusing" claim constructions. Response at 1, 6.

This rhetoric is not matched by what defendants actually show (or could show) in their response. The truth is that defendants were forced to abandon many of their claim constructions because they were not tenable in view of the evidence that MacroSolve presented in its opening brief. While some of defendants' constructions are now, in some respects, more reasonable, the constructions they are proposing still contain numerous attempts to add unwarranted limitations.

II. QUESTIONNAIRE

Disputed Term	MacroSolve's Construction	Defendants' Original Construction
questionnaire	a request for information, whether collected automatically or manually	a complete form or program that includes questions and internal branching logic, i.e., instructions that provide a path from one question to another based upon a user's response
		Geico's New Construction
		plain meaning Response at 4, n. 1

Newegg's arguments in response show that it is seeking to inject multiple separate limitations into the definition of "questionnaire." Geico, on the other hand, has now abandoned these additional limitations and says that the term should be given its plain meaning.

The Court should reject each of the additional limitations sought by Newegg because they are not warranted by the plain meaning of the claims or anything in the description of the invention. The Court should reject Gecio's proposal and should construe the term "questionnaire" because the specification explicitly defines the term.

A. The Questionnaire Need Not Be Complete

There is no basis to require the questionnaire to be "complete," and indeed the patent specification contains examples that are inconsistent with such a construction. *See* Opening Brief at 5. Newegg responds that its use of the word "complete" was not meant to suggest that it could not be modified later, but was meant only to make clear that the questionnaire "includes the series of questions and internal branching logic that it is required to include." Response at 9.

As an initial matter, the questionnaire is not required to include internal branching logic—more on that below. But more generally, Newegg's use of the word "complete" is not the normal meaning of "complete" and the jury would not understand the word "complete" to mean what Newegg says. Indeed, Newegg's meaning of "complete" is, completely, circular: it requires the questionnaire to include everything that it is "required to include." If Newegg believes that something is necessary to make the questionnaire "complete," then Newegg should have identified what it believes is required. The Court should not allow Newegg to argue that something is not a questionnaire because it is not "complete" in some undisclosed sense.

B. The Questionnaire Need Not Be A Program Or Form

Newegg argues as if the specification defines "questionnaire" to be a "form or program" and thus argues that a "questionnaire" must contain much more than requests for information. Response at 5. But, the specification defines a questionnaire as a series of questions or statements that call for a response, *i.e.*, requests for information, not as a form or program.

In ***definitional*** language, the specification makes clear that a questionnaire is simply a series of questions or statements requesting information:

> According to the preferred arrangement, data may be gathered by prompting the user via the handheld 28 with ***a series of questions or statements, each of which calls for a response***. This series of questions or statements will have been constructed on computer 22 and reduced to tokenized form for transmission to the handheld 28. ***For purposes of the instant disclosure, the series of questions/statements will collectively be referred to as a questionnaire.***

Ex. 1 at 8:12-19 [816 Patent]. The Court should adopt this express definition of "questionnaire." *See, e.g., Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 980 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996) ("As we have often stated, a patentee is free to be his own lexicographer.").[1]

> Newegg focuses on the following sentences that immediately follow the definition above:
>
> As will be discussed in greater detail below, the questionnaire is actually designed to include internal branching logic which is implemented by the OIS. Hence, with regard to the present invention, the terms 'program' and 'form' are used interchangeably with questionnaire.

Ex. 1at 8:19-24 [816 Patent]. According to Newegg, this shows that a "questionnaire" must be limited to a form or a program. But in reality it shows only that questionnaires can take the form of a program or a form, and that it should be understood in the patent specification that references to "forms" and "programs" will have the same general meaning as "questionnaire" that had already been expressly provided; *i.e.*, that they are also requests for information.

C. The Questionnaire Need Not Include Questions

Newegg's proposed construction contains a separate clause stating that the questionnaire must be something "that includes questions." It is not clear, but to the extent that Newegg is arguing that "questions" must be interrogatives with question marks at the end, this part of the proposed construction is also unwarranted. The patent says, in definitional language, that the questionnaire can contain "questions ***or statements***" requesting information. *See* Ex. 1 at 8:12-19. This is consistent with the plain meaning of questionnaire: questionnaires often contain requests for information that are not phrased in the form of a question, for example a blank field labeled "Name:", or sections that allow a choice from multiple listed options.

[1] The patent specification is also unambiguous that the responses can be provided automatically by the software running on the handheld device. *See* Opening Brief at 4-5. Defendants concede this. *See* Response at 6 (acknowledging that "the information that is 'automatically collected' represents responses to questions/inquiries that are part of the questionnaire."). Accordingly, the Court should clarify to the jury that responses can be collected manually or automatically.

D. The Questionnaire Need Not Include Branching Logic

The final limitation Newegg seeks to add to "questionnaire" is that it must include internal branching logic. The patent teaches that the questionnaire can be designed to include branching logic, and the patent has claims directed specifically to that concept, but the term "questionnaire" does not necessarily require branching logic.

Newegg's argument is premised solely on portions of the "description of the preferred embodiments" of the patent. *See* Response at 7-8. According to Newegg, the specification "consistently" describes a questionnaire as including branching logic. Not so.

The specification does not even come close to describing branching logic as some integral, necessary part of the invention such that the requirement of branching logic should be grafted onto the definition of the term "questionnaire." The patent starts by describing the general purposes of the invention, none of which requires branching logic. For example, the abstract highlights the fact that the invention can be used when a network connection is not always available. *See* Ex. 1 [816 Patent]. The patent contains a background section discussing various problems with prior art approaches, concluding with a list of "objects of the present invention" in view of those problems. Various possible aspects of the invention are highlighted in these objects, but branching logic is not mentioned. *See id.* at 1:21-4:35, specifically 4:16-36. A "summary of the invention" section follows, which starts by describing the invention in its "broadest sense" as a method designed to accomplish three things, none of which involve branching logic. *See id.* at 4:39-54. It then goes on to describe various additional aspects of the invention, only one of which is branching logic. *See generally* 4:39-6:42 (branching logic is mentioned briefly only at 5:24-27). By no means is "branching logic" so consistently disclosed in the specification that it should be injected into the construction of the word "questionnaire."

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