IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

BRIGHT RESPONSE, LLC	**Civil Action No. 2:07-cv-371-TJW**
Plaintiff,	**JURY**
v.	
GOOGLE INC., et al.,	
Defendants.	

PLAINTIFF'S REPLY BRIEF REGARDING CLAIM CONSTRUCTION

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I. INTRODUCTION

Defendants' proposed constructions should be rejected because they ignore fundamental principles of claim construction. When it suits the Defendants' needs, they ignore the teachings of the specification in order to argue that a term is indefinite. Then, when they desire to import unwarranted limitations into the claims, the specification becomes an all-important definitional limitation capable of no further breadth than what is expressly described. Bright Response's proposed constructions properly rely on intrinsic evidence and should be adopted.

II. DISPUTED CLAIM TERMS

A. Non-Interactive Electronic Message/The Electronic Message (Claim 26)

Defendants' position that "non-interactive electronic message" is so "insolubly ambiguous" that it should render the claim invalid for indefiniteness borders on the frivolous. Not only is this phrase comprised of common-ordinary words understandable to one of skill in the art, but the specification gives specific guidance as to what the inventor intended by this phrase. Defendants' position that this term is indefinite is unsupported by law and ignores the intrinsic evidence.

Section 112 of the Patent Code provides the basis for the definiteness requirement. The second paragraph of this statute states: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as a his invention." 35 U.S.C. § 112, ¶ 2. The purpose of this requirement is "to inform the public of the bounds of the protected invention, *i.e.*, what subject matter is covered by the exclusive rights of the patent. *Halliburton Energy Services, Inc. v. M-I LLC*, 514 F.3d 1244, 1249 (Fed. Cir. 2008). To determine whether a claim term is indefinite, the Court considers whether "one skilled in the art would understand the bounds of the claim when read in light of the specification." *Miles Lab. v. Shandon, Inc.*, 997 F.2d 870, 875 (Fed. Cir. 1993). Definiteness requires only that "the meaning of the claim is discernible … ." *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001) "The definiteness requirement, however,

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[15] For example, step (c) in Claim 28 refers to the "classification step" not a label such as step (b1).

does not compel absolute clarity. Only claims 'not amenable to construction' or 'insolubly ambiguous' are indefinite." *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005). As with other challenges to patent validity, indefiniteness must be shown by clear and convincing evidence. *Id.* Thus, to prove indefiniteness, Defendants must establish by clear and convincing evidence that the term is "insolubly ambiguous" and that term would be utterly indiscernible to one of ordinary skill in the art. *Id.* Defendants fail to do so.

This claim term is not indefinite. First, "non-interactive electronic message" is a claim term comprised of common, ordinary words used in their common sense. Defendants have not established (nor can they) that one of skill in the art would not be able to understand this term in the context of the patent.

Moreover, in this case, the patent specification provides explicit guidance as to what the term means in the context of the claim. Specifically, the specification explains that "This non-interactive transmission of electronic messages 11 prescribes that the customer 50 need not later provide additional input to assist the system." (Ex. A, 4:63-65) The specification goes further to explain exactly what the inventor meant:

> "***It is noted that defining an electronic message 11 as being non-interactive prescribes only that the message content need not be supplemented.*** Thus, as described in more detail below, the form of the non-interactive electronic message 11 may be altered by the system 1 after the customer 50 sends it; however, the customer 50 is not required to provide supplemental information to assist the system 1." (Ex. A, 4:67-5:5).

Thus, the specification explains that the "non-interactive" refers to the transmission of the electronic message and that it means the message content need not be supplemented. This term is capable of construction based on the disclosures in the specification.

Defendants cannot meet their burden of proving by clear and convincing evidence that no one of skill in the art could figure out what this term means. Defendants' argument that "non-interactive electronic message" is ambiguous and would not allow a competitor to design a non-infringing system is unavailing. (Response at 6-7.) The Federal Circuit has rejected this precise argument in other cases. For example, in *Kinetic Concepts* the defendants argued that "'selected stage of healing' is indefinite because the specification does not explain how the selected stage is to be determined for particular wounds at particular times." *Kinetic Concepts Inc. v. Blue Sky*

Med. Group, Inc., 554 F.3d 1010, 1022 (Fed. Cir. 2004). The Federal Circuit noted that the specification of the patent-in-suit provided examples of selected stages of healing and found that the defendants had not shown that a person of skill in the art would be unable to ascertain the meaning of the term. *Id.* Similarly, here, the specification provides an explanation as to what it means for an electronic message to be "non-interactive."

Defendants' reliance on an inventor's and attorney's testimony is misplaced for two reasons. First, according to Defendants' own authority, the Court must be *unable* to construe the disputed term in light of the specification. *See Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1308-09 (Fed. Cir. 1999). As shown above, the specification adequately supports the construction of this term, so consulting extrinsic evidence such as deposition testimony is improper. Second, indefiniteness is looked at from a person of ordinary skill in the art. *See Miles Lab.*, 997 F.2d at 875. Defendants establish neither the relevant level of skill in the relevant art is nor what level of skill in the art Ms. Piccolo and Mr. Gregson have. As such, they fail to establish that their testimony is even relevant.

Bright Response respectfully requests the Court to adopt its proposed construction.

B.   Rule Base … Knowledge Engine (Claim 26)

BRIGHT RESPONSE'S CONSTRUCTION	DEFENDANTS' CONSTRUCTION
A knowledge engine that tests whether an electronic message meets one or more conditions, and if so, applies specified actions.	A knowledge engine that contains "question" rules which take the form of IF-THEN statements with a left hand side of the statement containing a condition (or set of conditions) and a right hand side of the statement containing conclusion(s) (or actions).

Defendants claim that their proposed construction come from a "definition," yet there are no words reflecting an intent to define the term in the part of the specification on which they rely: "[t]he rule base 35 of the automatic message reader 30 contains "question" rules which take the form of IF-THEN statements with a left hand side of the statement containing a condition (or set of conditions) and a right hand side of the statement containing conclusion(s) (or actions)." (Ex. A, 5:64-6:2.) This statement occurs in the section entitled "DESCRIPTION OF THE PREFERRED EMBODIMENT."

As noted above, "[a]bsent a clear disavowal or contrary definition in the specification or the prosecution history, the patentee is entitled to the full scope of its claim language." *Home Diagnostics, Inc.*, at 1358. The default position is that a patentee is entitled to the full scope of its claim language. It is the party arguing *against* this position that must justify its incorporation of the limitations of a preferred embodiment into the claims. Defendants have failed to do so in this case, and thus their proposed construction must be rejected.

Moreover, Defendants' definition is inconsistent with the very portion of the specification on which they rely. The very next sentence of the specification provides an example that does not use the words "IF" or "THEN":

"For example, a typical rule will take the following form:
condition$_1$?, condition $_2$? . . . => action$_1$, action$_2$ . . . (Ex. A, 6:1-3).

Defendants' construction is overly restrictive in that it could confuse a jury into believing that the rules must literally be formulated using "IF" and "THEN", which is not the case and contrary to the express teaching of the patent. Accordingly, Bright Response respectfully requests that the court adopt its proposed construction for Rule Base Knowledge Engine.

C. Case Base Knowledge Engine (Claim 26)

BRIGHT RESPONSE'S CONSTRUCTION	DEFENDANTS' CONSTRUCTION
A knowledge engine that processes electronic messages by comparing them to a stored set of exemplar cases.	A knowledge engine that compares an incoming set of facts (a "problem") with a stored set of exemplar cases representing past "problems" to obtain a set of prior cases which are used to formulate an appropriate action.

The concept of the case base knowledge is not substantively in dispute – it is a knowledge engine that compares attributes and/or text from incoming electronic messages to a stored set of exemplar cases to find exemplar case(s) that can be used to formulate an appropriate response to the incoming electronic message.

Defendants' construction is overly complicated and unnecessarily introduces new concepts that have the potential to confuse a jury. For example, why introduce the concepts of "incoming set of facts" or "problem", when those concepts are not recited in the claims, and are just other words for the electronic message.

Defendants' construction is also unduly narrow in that it limits the stored set of exemplar cases to "prior cases." This is unduly restrictive because one of skill in the art would know that the exemplar cases could be cases that one anticipates encountering in the future (for the first time). There is nothing in the intrinsic record that would indicate a clear disavowal of exemplar cases that were anticipated (i.e., hypothetical cases not based on actual past cases). *Home Diagnostics, Inc. v. LifeScan, Inc.*, 381 F.3d 1352, 1358 (Fed. Cir. 2004) ("Absent a clear disavowal or contrary definition in the specification or the prosecution history, the patentee is entitled to the full scope of its claim language.").

Defendants have failed to establish that the inventor's summary description of the Allen Patent, from which they derive their proposed construction, is a limiting *definition* of "case base knowledge engine." This assertion is improper for two reasons. First, unlike other cases in which there was a finding that the specification defined a term, there is no express language of definition in the '947 Patent specification, such as the use of "as used herein." *See, e.g., Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1370 (Fed. Cir. 2008); *Davis-Lynch, Inc. v. Weatherford Int'l, Inc.*, 2009 U.S. Dist. LEXIS 33414 (E.D. Tex. Apr. 20, 2009). Second, while the Allen Patent may provide general background for the invention described in the '947 Patent, the Allen Patent does not address processing electronic messages. Rather, the Allen Patent describes a help desk application which includes "a customer service representative 602, who may typically be receiving a telephone call 603 from a customer 604." (Response, Ex. 2, 9:8-10 & Fig. 6.) In that context, references to "problems" of the customer may make sense. The invention of the '947 Patent is not limited to a help desk application.

The prosecution history does not support Defendants' construction. Defendants selectively quote on passage from the prosecution history, but ignore the portion that immediately follows:

> The specification describes in detail an example of a case base knowledge engine for interpreting electronic messages. (p. 12, line 7-p. 13, line 31). In that example, *an incoming message (a "presented model") is compared to each of a set of stored case models*, and a score for each stored case model is calculated based on whether a piece of text, a combination of text, and/or a pattern of text of

the presented case model matches or does not match the stored case model. (p. 12, line 25-p. 13, line 5). (Response, Ex. 1 at BR000625 (emphasis added).)

Description that "an incoming message (a 'presented model') is compared to each of a set of stored case models" lends further support for Bright Response's proposed construction that of "a knowledge engine that processes electronic messages by comparing them to a stored set of exemplar cases." Defendants' unduly narrow construction should be rejected because it is unduly restrictive and because it has the potential to confuse the jury unnecessarily.

D. Predetermined Responses (Claim 26)

Defendants do not contest that the specification of the '947 Patent teaches that a predetermined response may be modified or altered. Defendants argue against Bright Response's proposed construction on the ground that that it "suggests that a response can be modified at any time." (Response at 18.) This is incorrect. The proposed construction states that "the response may be modified and/or altered based on the interpretation of the electronic message." The term appears in Claim 26, which recites "receiving the electronic message from a source." (Ex. A, 14:43.) The proposed construction's reference to "the electronic message" means that the response cannot be modified, if at all, until the receipt and interpretation of the electronic message. Thus, Defendants' argument fails.

The specification specifically states that "It is understood that the predetermined response may be modified and/or altered in accordance with the interpretation of the E-mail message 11 if required to properly respond to a customer." (Ex. A, 9:33-35.) Accordingly, if this term is construed, Bright Response's proposed construction should be adopted.

E. Repository (Claim 26): "A storage medium, for example, a database."

As noted above, "[a]bsent a clear disavowal or contrary definition in the specification or the prosecution history, the patentee is entitled to the full scope of its claim language." *Home Diagnostics, Inc.*, at 1358. As discussed in the Opening Brief, a "repository" is broader than a database. Defendants have not substantiated their position that the specification defines a repository as a database, or otherwise limits the scope of repository to the specific example of a database. The specification also refers to an "archive" as an example of a repository. (Ex. A,

9:27-29 ("one or more predetermined responses (or prepared responses) are retrieved from a *repository (or database), preferably an archive* 32 . . .") (emphasis added). Bright Response is entitled to the full scope of the claim language used in the '947 Patent. Accordingly, if this term is construed, Bright Response's proposed construction should be adopted.

F. **Construction Of The Order In Which The Steps Of The Claimed Methods Must Be Performed.**

Defendants contend that the logic or grammar of the claims require that the steps recited therein must be performed in the order they appear. However, Defendants only analyze Claim 26 and completely ignore the dependent claims. It is unclear, for example, whether Defendants contend that steps (b1)-(b6) of Claim 30 must be performed after step (c) of Claim 26. Claim 30 depends on Claim 28, which in turn depends on Claim 26. Step (c) requires "retrieving one or more predetermined responses corresponding to the interpretation of the electronic message." Claim 30 requires that interpreting the electronic message includes steps (b1)-(b6). It does not makes sense that all of the steps in the dependent claims must be performed after steps in the claim on which they depend. To the extent this is intended by Defendants' proposed construction, this must be rejected.

Alternatively, Defendants' construction might be read to mean that the steps in the dependent claims must be performed in the order they appear without regard to when they are performed with respect to the steps in the claims on which they depend. Under this interpretation, Defendants' proposed construction might be read to mean that in Claim 30 step (b1) must precede step (b2), which must precede step (b3), etc. This interpretation, too, cannot be correct. There is no logic or grammar requiring, for example, that step (b4) of Claim 30, "comparing the flagged attributes of the case model with stored attributes of stored case models of the case base," must precede step (b5) of Claim 30, "comparing the text of the case model with the stored text of the stored case models of the case base." As such, steps (b4) and (b5) could be performed in any order, and Defendants' proposed construction would not be correct.

Given that Defendants have only justified their proposed construction with regard to Claim 26, if Defendants' proposed construction is adopted, it should only be adopted with respect to Claim 26.

G.   Claims 28, 30, 31, and 33 Are Not Invalid.

The Patent Act provides that "[a] claim in dependent form *shall be construed to incorporate by reference all the limitations of the claim to which it refers*." 35 U.S.C. § 112, para. 4 (emphasis added). Defendants' suggestion that the limitations in dependent claims 28, 30, 31, and 33 might *replace* the steps in the claims on which they depend must be rejected. The claims themselves recite that they are claiming the method of the claim from which they depend (meaning all of it), and "*further comprising* the steps of . . ." Defendants' novel argument is utterly without support in the law and is contrary to the clear doctrines of patent law that dependent claims necessarily incorporate all limitations of the claims from which they depend.

With regard to Claim 28, a proper reading of the claim does not require two step (c)'s, as Defendants suggest. Instead the phrase "when the classification step indicates that the electronic message can be responded to automatically" is a further limitation of the step (c) that is incorporated from Claim 26.

Claim 30 states on its face that it incorporates the method of Claim 28 and includes further steps. The reuse of the label "(b1)" is irrelevant, and Defendants fail to provide any support to the contrary. Further, the label is irrelevant because none of the claims ever refer to an antecedent step according to its label.[5]

Defendants' attempt to sow confusion should be rejected. Claims 28, 30, 31, and 33 are not indefinite.

H.   Requiring Assistance From A Human Operator (Claim 28)

Defendants do not address the defect in their proposed construction. Bright Response noted in the Opening Brief that the specification discusses human review of a response. But

Bright Response also pointed out, and Defendants ignore, that the specification also teaches review of *the electronic message* by a human operator. Moreover, the specification expressly states that the proposed responses *may* be provided to the human for review, but contemplates that proposed responses may not be provided to the human for review: "If possible, one or more predetermined responses for proposed release and delivery to the source are retrieved from the repository of the automatic message reader and routed to the manual review inbox along with the E-mail message." (Ex. A., 10:34-38.)

Google and AOL's contention that a manual review of the responses is required by the claim language does not withstand scrutiny. Claim 28 requires classification of a message as at least one of "being able to be responded to automatically" or "requiring assistance from a human operator." As discussed in the Opening Brief, at least two type of human assistance—review the message and reviewing responses—are described in the specification, but neither is described as being mandatory. Defendants' attempt to impose further unclaimed limitation in the construction of this term should be rejected. Accordingly, Bright Response's proposed construction should be adopted.

I.   Stored Case Model (Claim 30)

BRIGHT RESPONSE'S CONSTRUCTION	DEFENDANTS' CONSTRUCTION
Stored text and attributes associated with an exemplar case stored in the case base.	Stored text and attributes, derived from a previously received electronic message, and an associated stored response.

After Bright Response filed its Opening Brief, the parties agreed to various constructions that affect Bright Response's proposed constructions. Specifically, the parties have agreed that the Court should construe two terms: 1) "a case model of the electronic message"; and 2) "stored case model." The parties have agreed that the other "case model" related terms need not be construed.[7] "Stored case model" should have a parallel construction as "a case model of the electronic message", which the parties have agreed means "text and attributes derived from the

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[7] The terms that the parties agree need no construction include: "case model", "stored case models of the case base" and, except to clarify the antecedent basis, "the case model."

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I.   Stored Case Model (Claim 30)

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I.   Stored Case Model (Claim 30)

BRIGHT RESPONSE'S CONSTRUCTION	DEFENDANTS' CONSTRUCTION
Stored text and attributes associated with an exemplar case stored in the case base.	Stored text and attributes, derived from a previously received electronic message, and an associated stored response.

After Bright Response filed its Opening Brief, the parties agreed to various constructions that affect Bright Response's proposed constructions. Specifically, the parties have agreed that the Court should construe two terms: 1) "a case model of the electronic message"; and 2) "stored case model." The parties have agreed that the other "case model" related terms need not be construed.[7] "Stored case model" should have a parallel construction as "a case model of the electronic message", which the parties have agreed means "text and attributes derived from the

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[7] The terms that the parties agree need no construction include: "case model", "stored case models of the case base" and, except to clarify the antecedent basis, "the case model."

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electronic message." Thus, "stored case model" should be construed as "stored text and attributes associated with an exemplar case stored in the case base." This construction is fully supported by the claims and the specification.

The claims make clear that the claimed method require comparing the flagged attributes of the case model with the attributes of the "stored case model" (see Ex. A, Claim 30, step b4) and comparing the text of the case model with the text of the "stored case model" (see Ex. A, Claim 30, step b5).

As discussed above, nothing in the specification or the claims would limit the exemplar cases in the stored case base to message previously received (excluding anticipated cases, for example). Because the claims are not limited to stored case models based on previously received messages, Defendants' construction is overly narrow and should be rejected. Bright Response respectfully requests the Court to adopt its proposed construction, which is fully supported by the intrinsic record.

J.   Predetermined Match Weight and Predetermined Mismatch Weight (Cl. 31)

Defendants do not justify in their response why the construction of the terms "predetermined match weight" and "predetermined mismatch weight" must be limited to the operations of addition and subtraction, other than that being how weights are described in a preferred embodiment. Of course, this is an improper ground for limiting the scope of a claim's language. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004).

Bright Response's construction is consistent with Defendant's example of "4+6=10." Whether four is said to be increased by an amount of six or a degree of six, adding six to four has the effect that the result is 2.5 times larger than it began. Defendants' real complaint is that Bright Response's proposed construction is broader than a preferred embodiment, not that it excludes a preferred embodiment. Bright Response's proposed construction should be adopted.

III.   CONCLUSION

Bright Response respectfully requests the Court to adopt it proposed constructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the following counsel of record who are deemed to have consented to electronic service are being served on March 11, 2010, with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served by first class U.S. mail on this same date.

By: /s/ Marc A. Fenster
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