

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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NORTHBROOK DIGITAL, LLC,

Case No. 07-CV-2250 (PJS/JJG)

Plaintiff,

v.

ORDER

VENDIO SERVICES, INC.,

Defendant.

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Peter M. Lancaster, Devan V. Padmanabhan, James K. Nichols, and Bartholomew B. Torvik, DORSEY & WHITNEY LLP; Mark A. Wolfe, NORTHBROOK DIGITAL LLC, for plaintiff.

Henry C. Su, Paul Alexander, and Sara E. Jenkins, HOWREY LLP; Felicia J. Boyd and Kevin P. Wagner, FAEGRE & BENSON LLP; Theodore F. Shiells, CARR LLP, for defendant.

As required by the Court's pretrial scheduling order, the parties submitted a joint claim-construction statement on April 17, 2009, in which they set forth their proposed interpretations of disputed claim terms. Docket No. 145. Over three months later, in late July, the parties submitted an amended joint claim-construction statement, in which they had a second opportunity to present their proposed interpretations of disputed claim terms. Docket No. 202.

Despite having had two opportunities to set forth its proposed claim interpretations before *Markman* briefs were due, Vendio submitted a *Markman* brief on November 3, 2009, in which Vendio argued for claim constructions that varied (in some cases significantly) from the constructions offered by Vendio in the joint claim-construction statements. Docket No. 232. At the *Markman* hearing, in response to the Court's questions, Vendio failed to provide a

satisfactory explanation for having changed its claim-construction positions in the roughly three months between late July and early November.

The Court disapproves of Vendio's behavior with respect to claim construction. By offering changed or new claim-construction positions in its *Markman* briefing, Vendio deprived Northbrook of a fair opportunity to respond to all of Vendio's arguments, and Vendio made the Court's claim-construction task more difficult than it already was. In particular, the Court cannot construe the phrase "detecting that a document . . . is being displayed" on the basis of the briefing to date. Vendio's *Markman* brief proposes a construction of this term that is entirely different from the construction Vendio offered in the original and amended joint claim-construction statements. How to construe this phrase is a difficult question on which the Court could benefit from further briefing. Because Vendio's misbehavior has made this additional briefing necessary, Vendio should pay for it.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Northbrook may file a supplemental brief addressed solely to the meaning of the phrase "detecting that a document . . . is being displayed" (term 13 of the amended joint claim-construction statement). The brief must not exceed 2,500 words and must be filed and served by January 12, 2010.
2. Vendio may file a response to Northbrook's supplemental brief. The brief must not exceed 1,200 words and must be filed and served by January 19, 2010.

3. Vendio must pay the reasonable fees incurred by Northbrook in connection with its supplemental brief.

Dated: December 28, 2009

s/Patrick J. Schiltz  
Patrick J. Schiltz  
United States District Judge