

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

WHITSERVE, LLC,
*Plaintiff/Counterclaim Defendant-
Cross Appellant,*

AND

WESLEY W. WHITMYER, JR.,
*Third Party Defendant-
Cross Appellant,*

v.

COMPUTER PACKAGES, INC.,
*Defendant/Counterclaim Plaintiff-
Appellant.*

2011-1206, -1261

Appeals from the United States District Court for the
District of Connecticut in case no. 06-CV-1935, Judge
Alfred V. Covello.

ON MOTION

Before O'MALLEY, *Circuit Judge.*

ORDER

Whitserve, LLC and Wesley W. Whitmyer, Jr. (Whitserve) move to preclude Computer Packages, Inc. (CPI) from raising arguments in its reply brief challenging the district court's construction of the term "automatically" or, in the alternative, for leave to file a 4,000 word sur-reply. CPI opposes. Whitserve replies.

In the motion, which was filed before CPI filed its reply brief, Whitserve argues that CPI did not sufficiently raise arguments in its opening brief challenging the district court's claim construction and that any such arguments are waived. Whitserve also raises this concern in its responsive brief. CPI responds to the motion by asserting that it raised its disagreement with the construction of the term "automatically" in its brief and that by appealing the district court's denial of its motion for judgment as a matter of law on non-infringement it has necessarily challenged the district court's claim construction.

We believe the better course is to allow the merits panel to consider, if appropriate, whether CPI's arguments are permissible, in view of all of the briefing. Whitserve may of course at oral argument also raise any issues concerning arguments in CPI's reply brief. We grant Whitserve leave to argue, in its final reply brief, that arguments in CPI's reply brief are impermissible, and Whitserve may seek enlargement of its word limitation for that brief if CPI's reply brief justifies such a request.

Accordingly,

IT IS ORDERED THAT:

The motion is denied without prejudice. A copy of this order shall be transmitted to the merits panel assigned to hear this case, to inform the panel that the motion was denied without prejudice.

FOR THE COURT

SEP 30 2011

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

cc: Gene S. Winter, Esq.
John A. Krause, Esq.

s20

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SEP 30 2011

JAN HORBALY
CLERK