IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

SoftWIRE Technology, LLC and Measurement Computing Corporation, Plaintiffs, v. National Instruments Corporation, Defendant.	)	Civil Action No. 03-10107REK

THIRD AMENDED COMPLAINT

I. JURISDICTION AND VENUE

This is an action for declaratory judgment of patent non-infringement and invalidity under 28 U.S.C. §§2201, 2202, and for patent infringement. Jurisdiction is proper under 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1338(a) (patents). Venue is proper under 28 U.S.C. §§1391(b) and (c), and 1400(b).

Parties

1. Plaintiff Measurement Computing Corporation ("Measurement") is a corporation organized under the laws of the Commonwealth of Massachusetts and having its principal place of business at 16 Commerce Boulevard in Middleboro, Massachusetts.

2. Measurement designs and manufactures circuit boards that connect to general purpose computers to perform data acquisition and control.

3. Plaintiff SoftWIRE Technology, LLC ("SoftWIRE") is a limited liability corporation organized under the laws of the State of Delaware having its principal place

of business at 16 Commerce Boulevard in Middleboro, Massachusetts. SoftWIRE designs and sells software in the nature of graphical programming extensions or add-ins to the Visual Basic and Visual Studio.Net products from Microsoft Corporation. SoftWIRE and Measurement are collectively referred to hereinafter as "SoftWIRE".

4. On information and belief, Defendant National Instruments Corporation ("National") is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 11500 North Mopac Expressway, Austin, Texas 78759-3504. It designs graphical instrumentation and analysis software which it sells under the mark "LabView". It alleges that it is the owner of the patents-in-suit.

II. THE TECHNOLOGY AT ISSUE

5. The issues in this case are founded on the creation and use of block diagrams. Block diagrams are commonly used to represent physical systems and processes, as well as abstract processes or reasoning. Typically, each block represents a discrete component, step, or action. In the language of "object oriented programming", which segments large software programs into a collection of smaller code segments or "objects" that each perform a well-defined function, a block in a block diagram can be viewed as a distinct code module or "object" that implements (i.e., calculates) the function specified by the block.

A. Plaintiff SoftWire's Technology.

6. As noted above, SoftWIRE's graphical programming system (also called "Softwire") is an add-in to Microsoft's Visual Basic and Visual Studio.Net products. The latter provide a graphical framework on which users can quickly build individually

tailored software programs (commonly called "application programs" or simply "applications") for a variety of uses. In particular, the underlying "Visual" frameworks comprise a working environment, and a set of tools for that environment, that provide much of the needed functionality required by nearly all software programs, thus saving the user the time and expense of creating them anew for his or her particular program. Visual Basic and Visual Studio.Net provide especially useful tools for the creation and handling of visual images and "objects"[1], and thus are frequently used as a base on which specific, graphically-oriented applications are built.

7. Softwire's add-ins are in the nature of a set of icons (visual images) that represent "tools" or "controls" that perform specific functions. These include arithmetic functions (e.g., add, subtract, etc.); logic functions; control functions (e.g., "sound audible alarm"), etc. By clicking, dragging, and dropping icons from a palette, and interconnecting them in a defined manner, the user can, without writing a single line of code, create a block diagram of a system that itself contains the code needed to implement the system. Thus, users who are not themselves programmers can nonetheless create operable applications of significant complexity and usefulness.

8. SoftWIRE has received numerous awards for its product, including the Jolt Product Excellence Award for the Libraries, Frameworks and Components category.[2] SoftWIRE also received an Editor's Choice award from the Visual Basic Programmer's Journal. The latter is a leading magazine for Windows and Visual Basic programmers.

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[1] In the world of software, an "object" can be considered to be a piece of software code, having well-defined inputs and outputs through which interaction with other portions of code are provided, and which performs a defined function.

[2] Jolt Product Excellence Awards are given to products that have "jolted" the industry with their significance and made the difficult task of creating corporate software faster, easier and more efficient.

The highly coveted Editors Choice Awards are given to newly released products that show the most promise and innovation. SoftWIRE was one of two companies honored with the award for its ability to provide innovative solutions to application development challenges.

B. Defendant National's Technology

9. The patents at issue in this suit are based on "data flow" technology. The concept of "data flow" programs or systems was originated in the 1960's in connection with the development of the field of parallel processing, i.e., the execution of two or more different portions of a program concurrently, as opposed to sequentially, as was theretofore the case. Much of the pioneering work on the development of data flow systems was done here in Massachusetts, specifically at M.I.T. and at Lincoln Laboratories, and the results of the research were widely disseminated.

10. In a data flow system, as contrasted with other software systems such as sequential systems, computation of the function associated with a given block begins as soon as all the inputs required by the block become available. Thus, several blocks in a particular implementation may execute concurrently, as opposed to sequentially, thereby accelerating the rate at which the end result is achieved.

11. National's patents are predicated on asserted "deficiencies" in then-existing data flow systems. For example, in U.S. Patent No. 4,901,221, which is one of the patents-in-suit, National asserted that "data flow programming has had difficulty representing conditional or iterative functions", that there exists a need for an easily programmed instrumentation system that employs data flow techniques and that "overcomes the difficulties in representing conditional and iterative functions", and that

"(t)he present invention meets these needs". In fact, no such "difficulties" existed[3], and no new "solution" was provided.

12. Similarly, in U.S. Patent No. 4,914,568, which is another of the patents-in-suit, National asserted the existence of "difficulty" in implementing conditional and loop type of operations in data flow systems. Again, the asserted difficulty was in fact non-existent[4], and no new "solution" was provided. Similar non-existent (straw man) "difficulties" are alleged for the other patents-in-suit, and similar non-inventive "solutions" are suggested, as will be shown in the course of this suit.

C. National Has Unequivocally Accused Softwire of Infringement And Softwire Has Reasonable Apprehension of Suit.

13. National has charged[5] Softwire with infringement of U.S. Patent Nos. 4,901,221 (hereinafter the "'221 patent"), 4,914,568 (hereinafter the "'568 patent"), 5,291,587 (hereinafter the "'587 patent"), 5,301,336 (hereinafter the "'336 patent"), 5,652,909 (hereinafter the "'909 patent"), and 6,102,965 (hereinafter the "'965 patent"). It has also asserted some of these patents against others.[6]

14. National also charged SoftWIRE with infringing U.S. Patent Nos. 5,481,740 (hereinafter the "'740 patent"), 6,064,812 (hereinafter the "'812 patent"), and

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[3] See, for example, Jack B. Dennis, "First Version Of A Data Flow Procedure Language", Project MAC ("Man and Computer") Technical Memorandum 61, May 1975, at p. 8, stating that "This conditional data flow program and the +1 operator constitute a well behaved data flow program that is the body of the iteration data flow subprogram contained within the larger dashed value." (emphasis in original) A true and correct copy of this memorandum is attached hereto as Exhibit A.

[4] See Dennis, *supra*. The conditional structure is discussed at p. 8, as noted above, and elsewhere. The loop is shown at p. 13 and discussed there and elsewhere.

[5] See letter from David Hughes, General Counsel of National, to SoftWIRE Technology LLC and Measurement Computing Corporation, dated November 27, 2001. A true and correct copy of which is attached hereto as Exhibit B. National also subsequently repeated its charge of infringement.

[6] In National's suit against The MathWorks, Inc., a company unrelated to SoftWIRE, the defendant was recently found to have infringed some of the patents at issue here.

6,437,805 (hereinafter "'805 patent"), in addition to the previously mentioned patents, in a subsequent action filed in the Eastern District of Texas.[7]

COUNT I
(Declaratory Judgment)

15. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of the Amended Complaint as though the same were fully rewritten herein.

16. A substantial and continuing controversy exists between Plaintiffs and National with regard to the alleged infringement of the '221, '568, '587, '336, '909, '965, '740, '812, and '805 patents by SoftWIRE's products.

17. Plaintiffs' products do not infringe any valid claim of the '221, '568, '587, '336, '909, '965, '740, '812, and '805 patents.

18. On information and belief, one or more claims of the '221, '568, '587, '336, '909, '965, '740, '812, and '805 patents are invalid, unenforceable, or void because of their failure to comply with one or more of 35 U.S.C. §§ 102, 103 and 112.

19. Any claim for monetary damages is barred by laches due to National's undue delay in asserting the '221, '568, '587, '336, '909, '965, '740, '812, and '805 patents against Plaintiffs.

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[7] On May 9, 2003, the Honorable T. John Ward transferred National's patent infringement suit against SoftWIRE to the District of Massachusetts.

COUNT II
(Patent Infringement)

20. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of the Amended Complaint as though the same were fully rewritten herein.

21. On July 18, 1989, the United States Patent and Trademark Office (hereinafter, the "PTO"), duly and legally issued United States Patent No. 4,849,880, entitled "Virtual Machine Programming System" to the John Fluke Mfg. Co., Inc., now known as Fluke Corp. (hereinafter "Fluke"), as assignee of the inventors Kasi S. Bhaskar and James K. Peckol (the "'880 patent"). A true and correct copy of the '880 patent is attached hereto as Exhibit C.[8]

22. By virtue of a Technology Purchase and Patent Transfer Agreement, dated May 23, 2003, Fluke transferred all right, title and interest, including all rights to sue for past infringement, in and to the '880 patent to SoftWIRE Technology LLC.

23. Upon information and belief, National has manufactured, used, sold and/or offered for sale products, including its LabVIEW product, in this judicial district since a time prior to July 18, 2001.

24. National has infringed directly, indirectly, by way of inducing infringement and/or by contributing to the infringement of the'880 patent in this judicial district and elsewhere by making, using, offering for sale and selling products, including its LabVIEW product, covered by at least one claim of the '880 patent, to the injury of SoftWIRE.

[8] The '880 patent lapsed on or about July 18, 2001 for failure to pay the third maintenance fee. However, as provided by 35 U.S.C. §§271 and 284, National is liable for infringement between the time commencing six years prior to this suit and July 18, 2001.

25. SoftWIRE has been damaged by National's infringement of the '880 patent.

26. Upon information and belief, National has been aware of the '880 patent and of its infringement, and National's infringement has been willful.

COUNT III
(Patent Infringement)

27. Plaintiffs incorporate by reference the allegations contained in the preceding paragraphs of the Amended Complaint as though the same were fully rewritten herein.

28. On December 26, 1995, the PTO duly and legally issued United States Patent No. 5,479,643, entitled "Virtual Machine Programming System" to Fluke as assignee of the inventors Kasi S. Bhaskar and James K. Peckol (the "'643 patent"). A true and correct copy of the '643 patent is attached hereto as Exhibit D

29. By virtue of the May 23, 2003 Technology Purchase and Patent Transfer Agreement, Fluke also transferred all right, title and interest, including all rights to sue for past infringement, in and to the '643 patent to SoftWIRE Technology LLC.

30. National has infringed and is now infringing directly, indirectly, by way of inducing infringement and/or by contributing to the infringement of the'643 patent in this judicial district and elsewhere by making, using, offering for sale and selling products, including its LabVIEW product, covered by at least one claim of the '643 patent, to the injury of SoftWIRE.

31. SoftWIRE has been damaged by National's infringement of the '643 patent, and will continue to be damaged in the future unless National is permanently enjoined from infringing the '643 patent.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered by this Court in its favor and against National, as follows:

A. Declaring that none of Plaintiffs' products infringes any valid claim of the '221, '568, '587, '336, '909, '965, '740, '812, and '805 patents;

B. Declaring that the '221, '568, '587, '336, '909, '965, '740, '812, and '805 patents are invalid, unenforceable, or void for failing to comply with one or more of 35 U.S.C. §§ 102, 103 and 112;

C. Enjoining National, its officers, employees, agents, attorneys, and those in active concert with them, from enforcing or threatening to enforce the '221, '568, '587, '336, '909, '965, '740, '812, and '805 patents against Plaintiffs;

D. Finding that National has infringed the '880 and'643 patents now owned by SoftWIRE Technology LLC;

E. Entering an injunction preventing National and its officers, directors, agents, servants, employee, attorneys, licensees, successors, and assigns, and those in active concert or participation with any of them, from infringing, inducing the infringement of, or contributing to the infringement of the '643 patent;

F. Ordering National to pay SoftWIRE damages under 35 U.S.C. § 284 adequate to compensate Plaintiffs for National's infringement of the '880 and '643 patents, including treble damages for willful infringement as provided by 35 U.S.C. §284, with interest;

G. Ordering National to pay SoftWIRE damages under 35 U.S.C. § 284 adequate to compensate Plaintiffs for all future and continuing infringement from the date of this

Amended Complaint up until the date National is finally and permanently enjoined from further infringement of the '643 patent, including treble damages for willful infringement as provided by 35 U.S.C. §284, with interest;

H. Finding this action exceptional under 35 U.S.C. § 285, and awarding Plaintiffs their costs and reasonable attorneys' fees incurred as a result of this action; and

I. Awarding Plaintiffs such other and further relief as this Court may deem just.

JURY DEMAND

Plaintiffs demand a jury trial on all issues so triable.

Respectfully submitted,

SOFTWIRE TECHNOLOGY, LLC and
MEASUREMENT COMPUTING CORP.

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Dated: November 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served by hand on November 6, 2003 to:

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