

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

**TRADING TECHNOLOGIES INTERNATIONAL,
INC.,**
Plaintiff-Appellant,

v.

**OPEN E CRY, LLC, AND OPTIONSXPRESS
HOLDINGS, INC.,**
Defendants-Appellees,

AND

**TRADESTATION SECURITIES, INC., AND
TRADESTATION GROUP, INC.,**
Defendants-Appellees,

AND

**IBG, LLC, THINKORSWIM GROUP, INC.,
TD AMERITRADE, INC., TD AMERITRADE
HOLDING CORP., AND INTERACTIVE BROKERS,
LLC,**
Defendants-Appellees,

AND

CQG, INC., AND CQGT, LLC,
Defendants-Appellees,

AND

**FUTUREPATH TRADING LLC,
SUNGARD DATA SYSTEMS, INC.,
SUNGARD INVESTMENT VENTURES LLC, AND
GL TRADE AMERICAS, INC.,**
Defendants-Appellees,

AND

**STELLAR TRADING SYSTEMS, LTD., AND
STELLAR TRADING SYSTEMS, INC.,**
Defendants-Appellees,

AND

**ESPEED MARKETS, LP,
BGC CAPITAL MARKETS, LP, AND
ECCOWARE LTD.,**
Defendants-Appellees,

AND

ROSENTHAL COLLINS GROUP, LLC,
Defendant.

2012-1583

Appeal from the United States District Court for the
Northern District of Illinois in consolidated No. 10-CV-
0715, Judge Virginia M. Kendall.

Decided: August 30, 2013

STEVEN F. BORSAND, Trading Technologies International, Inc., of Chicago, Illinois, argued for plaintiff-appellant. Of counsel on the brief were LEIF R. SIGMOND, JR., MICHAEL D. GANNON, PAUL A. KAFADAR, and SARAH E. FENDRICK, McDonnell Boehnen Hulbert & Berghoff LLP, of Chicago, Illinois. Of counsel were JENNIFER KURCZ and MATTHEW SAMPSON.

ANTHONY B. ULLMAN, Salans LLP, of New York, New York, argued for all defendants-appellees. With him on the brief for FuturePath Trading, LLC, et al., was LORA A. MOFFATT. Of counsel on the brief were PHILIPPE BENNETT and AOIFE BUTLER, Alston & Bird, LLP, of New York, New York. On the brief for IBG, LLC, et al., were MICHAEL BRETT LEVIN and CHRISTOPHER P. GREWE, Wilson Sonsini Goodrich & Rosati, of Palo Alto, California, and NATALIE J. MORGAN, of San Diego, California. On the brief for CQG, Inc., et al., were ADAM G. KELLY, WILLIAM J. VOLLER, and J. SIMONE JONES, Loeb & Loeb, LLP, of Chicago, Illinois. On the brief for eSpeed Markets, LP, et al., was GARY A. ROSEN, Law Offices of Gary A. Rosen, P.C., of Ardmore, Pennsylvania. On the brief for TradeStation Securities, Inc., et al., were DAVID J. HEALEY, Fish & Richardson P.C., of Houston, Texas, and ADAM KESSEL and KEVIN SU, of Boston, Massachusetts.

SCOTT J. BORNSTEIN, Greenberg Traurig, LLP, of New York, New York, for defendants-appellees Open E. Cry, LLC, et al. With him on the brief was JAMES J. LUKAS, JR., of Chicago, Illinois.

LAURA A. LYDIGSEN, Brinks Hofer Gilson & Lione, of Chicago, Illinois, for defendants-appellees, Stellar Trading Systems, Ltd., et al. Of counsel were RALPH J. GABRIC and MARC V. RICHARDS.

Before LOURIE and PLAGER, *Circuit Judges*, and BENSON,
District Judge.*

LOURIE, *Circuit Judge*.

In this patent infringement action, Plaintiff-Appellant Trading Technologies International, Inc. (“TT”) appeals from the district court’s entry of summary judgment that (i) the asserted claims of TT’s U.S. Patents 7,676,411 (the “411 patent”), 7,693,768 (the “768 patent”), 7,904,374 (the “374 patent”), and 7,685,055 (the “055 patent”) are invalid for failure to comply with the written description requirement of 35 U.S.C. § 112; and (ii) prosecution history estoppel bars TT from asserting the ’055 patent against software products that include certain display functions. The district court premised both holdings on deference to our prior decision in *Trading Technologies International, Inc. v. eSpeed, Inc.*, 595 F.3d 1340 (Fed. Cir. 2010) (“*eSpeed*”), which considered two related patents from TT’s portfolio.

We conclude that *eSpeed* does not control the issues presented in this appeal, and the district court’s rulings based on that case are therefore incorrect. Accordingly, and as described more fully below, we reverse and remand for further proceedings.

BACKGROUND

A. The TT Patent Family

TT owns a number of related patents generally directed to software used for electronic trading on a commodities exchange, including the ’411, ’768, ’374, and ’055 patents at issue in this appeal. Issued between March 2010 and March 2011, those four patents claim priority

* Honorable Dee V. Benson, District Judge, United States District Court for the District of Utah, sitting by designation.

from U.S. Provisional Patent Application 60/186,322, filed on March 2, 2000, and U.S. Patent Application 09/590,692, which was filed on June 9, 2000, and later issued as U.S. Patent 6,772,132 (the "132 patent") on August 3, 2004. The '411, '768, and '374 patents all arose from a series of continuation applications stemming from the parent '132 patent. *See, e.g.,* '411 patent, at [63]. Accordingly, the '411, '768, and '374 patents share a common written description matching that of the progenitor '132 patent in all material respects. In contrast, the '055 patent traces its priority from the '132 patent as a continuation-in-part, *see* '055 patent, at [63], and as such, the '055 patent contains substantial new matter relative to the original written description of the '132 patent.

In general, the subject TT patents concern a graphical user interface that can display essential data from a commodities market and allow a user to enter electronic trade orders on an exchange. Drawings common to the '411, '768, '374, and '055 patents exemplify several key aspects of the disclosed displays:

FIG. 3

	E/W	10:48:44	BidQ	AskQ	Prc	LTQ
1008	L	3		104	99	
1010	R	5		24	98	
1011		720		33	97	
1012	X	10		115	96	
1013		0				
1014		10 1H		32	95	
		50 3H		27	94	
	S 0 W 24	1K 5H		63	93	
1007	S 0 W 7	CLR		45	92	
1015	X	10		28	91	
1016		17		20	90	10
1008	B 0 W 15	CXL	18		89	
	B 0 W 13	+ -	97		88	
1017		NET 0	30		87	
1018	B 0 W 17	NET REAL	43		86	
			110		85	
1019			23		84	
			31		83	
1021			125		82	
			21		81	

FIG. 4

	E/W	10:48:44	BidQ	AskQ	Prc	LTQ
	L	3		104	99	
	R	5		24	98	
		720		33	97	
	X	10		115	96	
		0				
		10 1H		32	95	
		50 3H		27	94	
	S 10 W 14	1K 5H		63	93	10
		CLR	43		92	
	X	10	125		91	
		17		97	90	
	B 0 W 15	CXL	18		89	
	B 0 W 13	+ -	97		88	
		NET 0	30		87	
	B 0 W 17	NET REAL	43		86	
			110		85	
			23		84	
			31		83	
			125		82	
			21		81	

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