UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRADING TECHNOLOGIES INTERNATIONAL, INC.,	)	
Plaintiff	)	Judge Sharon Johnson Coleman
v.	)	Civil Action No. 05 C 4811
CQG, INC., and CQGT, LLC,	)	
Defendants.	)	

TT'S RULE 50(b) MOTION FOR JUDGMENT AS A MATTER OF LAW ON INDIRECT INFRINGEMENT OR ALTERNATIVELY FOR NEW TRIAL PURSUANT TO RULE 59

I. Introduction

The jury found that Trading Technologies International, Inc. ("TT") had not established that CQG induced infringement of the patents in suit. TT submits that this finding is inconsistent with the record at trial. Therefore, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, TT herein moves for judgment as a matter of law on the issue of inducement of infringement or alternatively for a new trial under Rule 59. Similarly, in an order of March 13, the Court held that TT could not prove contributory infringement. TT asserts that this finding was based on an errant interpretation of the law and facts. Therefore, TT also moves for a new trial pursuant to Rule 59 on the issue of contributory infringement.

II. Legal Standards

Judgment as a matter of law is appropriate under Rule 50(b) if, in light of the entire record, no reasonable jury could find to the contrary. *McMillan v. Stoll*, No. 09 C 1622, 2012 WL 707117 at *1 (N.D. Ill. Mar. 5, 2012)[1] (quoting *Schandelmeier-Bartels v. Chicago Park Dist.*, 634 F.3d 372, 376 (7th Cir. 2011)).

Rule 59 of the Federal Rules of Civil Procedure permits a court to order a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed.R.Civ.P. 59(a)(1). In deciding whether to grant a new trial, district courts determine "whether the verdict was against the manifest weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party." *Fujitsu Ltd. v. Tellabs Operations, Inc.*, 08 C 3379, 2013 WL 268607, at *4 (N.D. Ill. Jan. 24, 2013) (*quoting Frizzell v. Szabo*, 647 F.3d 698, 702 (7th Cir.2011)); *see also Shaps v. Provident Life & Accident Ins. Co.*, 244 F.3d 876, 885 (11th Cir.2001) (noting that a new trial may be ordered "when the interests of substantial justice are at stake").

Among other reasons, a court may grant a new trial because "a material issue was improperly . . . withdrawn from a jury." *DeWitt v. New York State Hous. Fin. Agency*, 97 CIV. 4651 SAS, 1999 WL 672560, at *1 (S.D.N.Y. Aug. 26, 1999) (noting that "[i]n evaluating a Rule 59 motion, the trial judge's duty is essentially to see that there is no miscarriage of justice" (internal quotations omitted)); *Am. HealthNet, Inc. v. Westside Community Hosp., Inc.*, 8:04CV9, 2006 WL 3063481, at *1 (D. Neb. Oct. 24, 2006).

Rule 59 also permits the Court to "alter or amend a judgment." Fed.R.Civ.P. 59(e). This allows the Court to correct manifest errors of law or fact or consider newly discovered material evidence. *Black & Decker Inc. v. Robert Bosch Tool Corp.*, 04 C 7955, 2006 WL 3783006, at *2

[1] Unreported cases are attached as Exhibit S.

(N.D. Ill. Dec. 22, 2006) (*citing County of McHenry v. Insurance Co. of the West,* 438 F.3d 813, 819 (7th Cir.2006)). A manifest error of law is the "disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000). The district court may review its prior judgment under Rule 59(e) to determine whether "'there exists a manifest error of law or fact so as to enable the court to correct its own errors and thus avoid unnecessary appellate procedures.'" *Pet Prod. Innovations, LLC v. Paw Wash, L.L.C.*, 11 C 7182, 2012 WL 4461765, at *2 (N.D. Ill. Sept. 25, 2012) (*quoting Divane v. Krull Elec. Co., Inc.*, 194 F.3d 845, 847 (7th Cir.1999)).

With respect to each of the issues addressed herein, the evidence conclusively establishes that Plaintiff is entitled to judgement as a matter of law or alternatively a new trial.

III. Induced Infringement

Although the jury correctly found that CQG directly infringed the patents-in-suit, the jury erred by finding that TT had not proven by a preponderance of the evidence that CQG induced infringement of the patents in suit. This Court should set aside the latter finding and enter judgment as a matter of law that CQG has committed acts of indirect infringement, namely induced infringement. Such judgment is warranted because TT has definitively established, beyond the requisite preponderance of the evidence, each element necessary for liability under 35 U.S.C. §§ 271(b)[2]. Indeed, the trial record reveals that there is little or no evidence to the contrary.

Liability for induced infringement requires evidence that (1) CQG knew, or was willfully blind to the fact, that performing certain actions would infringe at least one claim of the TT patents, (2) CQG took affirmative steps to induce others to perform these actions, and (3) others

[2] 35 U.S.C. § 271 (b) provides that "[w]hoever actively induces infringement of a patent shall be liable as an infringer."

did in fact perform these actions. *Cascades Computer Innovation, LLC v. Samsung Electronics Co. Ltd.*, 2015 WL 94117 (N.D. Ill. 2015); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2065 (2011); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006). TT has shown by much more than a preponderance of the evidence that each of these elements is met in the present case.

A. CQG Knew That Performing Certain Actions Would Infringe

TT has established this first element through at least the testimony of Mr. Shterk, Mr. Korepanov, Mr. Mather, and Mr. Schroeter. Messrs. Shterk, Mather, and Schroeter each testified that they were aware of the patents-in-suit before and after their issuance. Ex. A, Trial Tr. 1516:19-1518:25 (Mr. Shterk); 1662:25-1664:15 (Mr. Mather); 1670:6-1672:12 (Mr. Mather); 2238:3-2239:25, 2241:10-2242:4 (Mr. Schroeter). Further, Messrs. Mather and Schroeter testified that they were monitoring the proceedings related to the patents-in-suit throughout the *eSpeed* litigation, and particularly through claim construction proceedings. *Id.* at 1670:6-20 (Mr. Mather); 2251:23-2253:18 (Mr. Schroeter).

Additionally, CQG was aware what functionality in its DOMTrader was infringing. Indeed, the testimony of Mr. Shterk and Mr. Korepanov establishes that they were both aware that the use of price selection in the Browse Prices Mode would result in "static" price levels, thereby infringing the TT patents. *See id.* 1476-78, 1547-49, 1557 (Shterk); Ex. B, PTX 2871 at p. 9-10 (Korepanov); Ex. C, PTX 169 at p. 4 (No re-centering if price selected); Ex. D, PTX 170 at p. 3 ("if user selects the top most visible price (or bottom) the price grid will not be jumping on him anymore"); Ex. E, PTX 188 ("Now we can select the price, the grid freezes"); Ex. F, PTX 189 at p. 3 ("When have we made the change that once the user selects the prices on responsive

dt the grid would stop moving completely"); and Ex. G, PTX 341 at p. 2 (when price selected "the market will just go off the grid and grid remains static").

On this topic, TT offered at trial Exhibit PTX 336 (attached as Ex. H) as evidence of CQG's knowledge that their product infringed. The Court sustained an objection based on Rule 408. Ex. A at 2224:4-2230:19. TT submits that the exclusion of the evidence was inappropriate because, as explained in court, TT was using the document for a purpose not barred by Rule 408, *i.e.*, to prove CQG's knowledge. Had the document been admitted into evidence it would have provided further evidence that CQG was aware that its product operated in a manner that infringed the patents in suit. Indeed, in PTX 336, Mr. Fischer concludes that TT's position is "fairly persuasive" and agrees that TT's "argument on past damages liability is stronger than we have thought." Ex. H.

Further, Mr. Shterk, Mr. Korepanov and Mr. Katin all testified to CQG's knowledge that the accused products included functionality to disable the appearance of a market window (at trial this was referred to as the Market Window Disabled Mode). Ex. A at 1481-82 (Shterk), 2187 (Katin); Ex. B at 14, 18, 23, and 27 (Korepanov). *See also* Ex. I, PTX 135 at p. 63 (.ini file setting set forth); Ex. J, PTX 175 at p. 3 (set up to resize the market window); Ex. K, PTX 190 ("market window is not shown here is because its height is higher than the DOM grid height"); Ex. L, PTX 191 at p. 19 (setting forth steps to resize the market window); and Ex. M, PTX 194 at p. 4 ("market window does not show up if its higher than the DOMTrader height'). Once the market window is disabled and a price is selected, the Market Window Disabled Mode functions exactly as described in patents-in-suit. Ex. A at 640:17–19; 642:18-21; 643:22-644:19 (Thomas); *Id*. at 761:1-762:25 (Burns). CQG eventually removed this functionality from the products because CQG personnel, including Mr. Shterk, considered it to infringe the TT patents.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.