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 MOTION FOR JUDGEMENT AS A MATTER OF LAW CONCERNING PHE AND INFRINGEMENT UNDER THE DOE AND FOR A NEW TRIAL

I. INTRODUCTION

On March 13, 2015 this Court entered an Order (Dkt. 1175) finding that "prosecution history estoppel applies to bar the doctrine of equivalents." This ruling was made even though there was no proper motion for judgment as a matter of law on this issue pending before the Court. Indeed, the order (Dkt. 1175) stemmed from the parties jury instruction conference, and specifically from TT's bench memo relating to the jury instructions for prosecution history estoppel ("PHE") (Dkt. 1144) and CQG's response to that bench memo (Dkt. 1167). TT did not have any opportunity, let alone a full and fair opportunity, to respond to an argument to strike from the case one of its three infringement grounds. Indeed, at the jury instruction conference, counsel did not even perceive that the issue of judgment as a matter of law was being argued and had no way of fully understanding CQG's position based on a few paragraphs in a bench memo filed shortly before that conference.

TT believes that this Court's decision was based entirely on the *eSpeed* litigation and the doctrine of collateral estoppel, and that this Court did not address the underlying merits of whether prosecution history estoppel ("PHE") actually bars TT from asserting the doctrine of equivalents ("DOE") in this case. As such, TT was barred from arguing that: (1) there is no rebuttable presumption of prosecution history estoppel ("PHE") because the accused CQG products are outside the scope of the subject matter surrender by the amendments during prosecution of the patents-in-suit and (2) the *Festo* exceptions rebut any presumption of PHE.

Because the issue of collateral estoppel is purely a legal issue, and because there is no requirement that TT file either a Rule 50(b) or a Rule 59 motion to preserve the issue for appeal, TT will not repeat here all of the arguments it made previously in its motion for reconsideration (Dkt. 1176), that was denied by this Court. Attached hereto is Dkt. 1176 for the Court's

convenience, which sets forth TT's arguments relating to collateral estoppel, which are incorporated by reference into the present motion. As TT explained in Dkt. 1176, collateral estoppel does not apply because the first three requirements for collateral estoppel are not met. First, the issues in this case (i.e., whether there is a rebuttable presumption of PHE with respect CQG's DOMTrader product and, if so, whether the rebuttable presumption is overcome by any *Festo* exception with respect to CQG's DOMTrader product) are not the same as the issue addressed in *eSpeed* (i.e., whether PHE barred TT from asserting the DOE against eSpeed's eSpeedometer product--a totally different product then DOMTrader). In addition, the issue of *Festo* exceptions was never considered in *eSpeed* for any product, let alone the accused products here. Second, the issues here were never litigated in *eSpeed*. Third, certain statements by Judge Moran in *eSpeed* (and relied upon by CQG) were not essential to the final judgment in *eSpeed*. Moreover, the Federal Circuit's ruling affirming Judge Moran made clear that the reasoning for finding PHE with respect to the eSpeedometer product does not apply to the facts here.

To the extent that this Court's March 13, 2015 order did actually address and consider the merits of any *Festo* exceptions and actually based its ruling on the lack of any such exceptions (and TT does not believe that this Court did), then TT respectfully requests that this Court grant TT's motion for a finding under Rule 50(b) that there is no PHE. The reason for this is simple. Even if there was a rebuttable presumption of PHE (and there is not as explained below), two of the *Festo* exceptions apply which would overcome any such presumption.[1] In particular, at trial, TT's expert provided unrebutted testimony that the Price Hold feature in DOMTrader would have been viewed as both unforeseeable and tangential to the purpose of the amendments by one of ordinary skill at the time of the amendments. Because these *Festo* exceptions apply, there can

[1] Although PHE ultimately is a legal question, there are underlying issues of fact including those associated with the *Festo* exceptions.

be no PHE.

Once PHE is removed, this Court should also grant TT's motion for a finding under Rule 50(b) that the accused DOMTrader product infringes under the DOE because, as set forth below, no reasonable jury could reach any other conclusion based on the evidence put forth at trial. At the very least, the Court should grant TT's alternative motion for a new trial under Rule 59 to permit the jury to consider infringement under the DOE (along with the associated damages resulting that infringement and willfulness).

II. LEGAL STANDARDS

A. Rule 50 And Rule 59

Judgment as a matter of law is appropriate under Rule 50(b) of the Federal Rules of Civil Procedure 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)[2] (quoting *Schandelmeier v. Bartels v. Chicago Park Dist*., 634 F.3d 372, 376 (7th Cir. 2011)).

Rule 59 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 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

[2] Unpublished cases are attached as Exhibit D.

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)).

B. The Law On Prosecution History Estoppel ("PHE")

The ultimate question of whether an accused product infringes under the doctrine of equivalents is one of fact for the jury to decide. *Crown Packaging Technology, Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1312 (Fed. Cir. 2009); *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1376 (Fed. Cir. 2001) ("[d]etermination of infringement by equivalents is an issue of fact, which after a jury trial we review for substantial evidence" (citations omitted)). However, before this ultimate question is reached, the court determines whether the patentee can "avail itself of the doctrine of equivalents" by determining whether PHE bars infringement under the doctrine of equivalents. *Id.* (*citing Warner–Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39 n.8 (1997) (reasoning that whether a patent's prosecution history estops the patentee from arguing an equivalent is an issue of law)).

For there to be a rebuttable presumption of PHE, three factors must be established: (1) an amendment to the claims that further limits the claim; (2) the amendment must have been for purposes of patentability; and (3) the accused product at issue must be within the scope of the surrender resulting from the amendment.[3] *Pacific Coast Marine Windshields Ltd. v. Malibu Boats. LLC,* 739 F.3d 694, 702 (Fed. Cir. 2014); *see also Intervet Inc*, 617 F.3d at 1291(stating the need for the court to conduct a comparison of the accused product with the claims as construed to determine whether the accused product falls within the scope of the subject matter

[3] TT does not contest that the *eSpeed* litigation already established factors 1 and 2.

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