IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Trading Technologies International, Inc., Plaintiff,	Civil Action No. 05-4811
v.	Judge Sharon Johnson Coleman
CQGT, LLC and CQG, Inc. Defendants.	Magistrate Judge Sidney I. Schenkier

TRADING TECHNOLOGIES INTERNATIONAL, INC.'S RESPONSES TO CQGT, LLC'S AND CQG, INC.'S FINAL INVALIDITY CONTENTIONS

Pursuant to Local Patent Rule 3.2 and the schedule entered by this Court, Plaintiff Trading Technologies International, Inc. ("TT") hereby provides its final responses to Defendants CQGT, LLC's and CQG, Inc.'s (collectively "CQG's") final invalidity contentions with respect to U.S. Patent Nos. 6,772,132 ("the '132 patent") and 6,766,304 ("the '304 patent") (collectively, "TT's patents"). These final responses are proffered without prejudice, as discovery is still ongoing (CQG has recently produced millions of pages of documents that TT is still reviewing) and the Court has not yet conducted any claim construction in this case. These final responses shall also not be taken as an adoption, endorsement, or rejection of any particular claim construction.

At the outset, TT notes that the '132 and '304 patents have undergone ***intense scrutiny*** since the original application was filed in 2000—including standard and "quality review" examination during original prosecution, extensive discovery and analysis in multiple different litigations, the *eSpeed* trial and appeal, multiple reexamination requests, and even a coordinated

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industry-wide search for prior art—and yet these patents have repeatedly been found valid. CQG's final contentions fail to raise any legitimate basis for challenging the validity of TT's patents yet again. Indeed, CQG primarily just rehashes arguments that have already been considered and rejected on multiple occasions. Thus, for this reason alone, CQG's final contentions have no merit.

CQG's final contentions are also improper for several reasons. First, given that CQG has almost completely replaced its initial contentions with a copy of the contentions from the *GL/Sungard* case, CQG's final contentions now include many new contentions that were not previously raised in CQG's initial contentions. For instance, CQG's final contentions rely on many new references that were not even cited in CQG's initial contentions, including ePit, OM Click Trade and OpTrade Trading Systems, NYSE Display Book, and PrimeTrade. Further, CQG's final contentions include an extensive listing of "additional grounds of invalidity" that were never raised in CQG's initial contentions at all. However, given CQG's involvement in the *eSpeed* case and its relationship with GL/Sungard, CQG was fully capable of making these contentions at the time CQG served its initial contentions. This is particularly the case for CQG's added contentions regarding the disclosure of the '322 provisional and the '132/'304 specification, which CQG has been capable of making since 2005 when this case was filed.

Thus, CQG's failure to include these contentions at the time it served initial contentions violates Local Patent Rule 2.3, and precludes CQG from adding these contentions now in its final contentions. *See* LPR 2.3(b) ("[Initial] Invalidity Contentions must contain [information about alleged prior art references] ***to the extent known to the party asserting invalidity***") (emphasis added). Further, CQG's attempt to add these additional contentions now is also

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contrary to the Court's June 11, 2012 order precluding CQG from raising additional invalidity contentions in this case. Dkt. 291.

Second, given that CQG almost completely replaced its initial contentions with a copy of the contentions from the *GL/Sungard* case, CQG's final contentions also rely on a substantial amount of new invalidity discovery taken in the *GL/Sungard* case. However, this is nothing but an improper attempt to circumvent this Court's June 11, 2012 order precluding CQG from taking further discovery on its invalidity claims in this case. Dkt. 291. Also, much of the new invalidity evidence cited by CQG falls outside the permitted scope of discovery in the *GL/Sungard* case and was improperly procured by GL/Sungard—including deposition testimony on alleged prior art that was not listed in the *GL/Sungard* Court's October 20, 2010 order (e.g., Tradepad, PrimeTrade, etc.) and documents related to alleged prior art that were produced after the Court-ordered deadline for production of such documents. Case No. 05.4120, Dkt. 305.

Third, CQG's final invalidity contentions identify well over 100 different references that CQG then groups into 40 different alleged "items of prior art," which goes well beyond reasonable limits and is unduly burdensome. Indeed, Local Patent Rule 3.1 now specifies that "Final Invalidity Contentions may rely on more than twenty-five (25) prior art references only by order of the Court upon a showing of good cause and absence of unfair prejudice to opposing parties." LPR 3.1. Moreover, CQG's contentions are insolubly vague as to how these numerous reference are being combined to create these "items of prior art" that allegedly anticipate and/or render obvious the claimed invention.

Fourth, CQG's final invalidity contentions repeatedly fail to include the level of specificity required by Local Patent Rule 2.3. For instance, as discussed in further detail below, CQG repeatedly fails to identify and describe the functionality of a ***specific item of alleged prior***

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***art**,* such as a specific publication or a specific instance of software that was allegedly offered for sale or publicly used/disclosed in the United States. Rather, CQG attempts to avoid this requirement by defining overarching, amorphous "references" that CQG pieces together based on a combination of different evidence (e.g., code, documents, witness testimony, etc.), which is insufficient and improper. *See* LPR 2.3(b)(1); 35 U.S.C. § 102. Further, CQG's claim charts include various contentions that fail to specify what portion of the cited evidence is of relevance, which is also insufficient. *See* LPR 2.3(b)(3).

In view of these issues, TT objects to CQG's final contentions as improper and prejudicial, and maintains that CQG should be precluded from making any invalidity contentions beyond those set forth in its initial invalidity contentions. In fact, TT maintains that any one of these issues renders CQG's final contentions improper. Thus, TT expressly reserves its right to raise these issues with the Court at a later date.

Nevertheless, without prejudice to this right, TT has gone ahead and provided its responses to CQG's final contentions below based on TT's current understanding of these contentions. TT expressly reserves the right to supplement and/or amend any and all of its responses to CQG's invalidity contentions as permitted by the Federal Rules of Civil Procedure and/or the Local Rules of this District.

I. TT's Response to CQG's Allegations of Invalidity Under 35 U.S.C. § 101

CQG contends that "[e]ach claim recited in the '132 patent and the '304 patent, which are directed to the abstract idea of either placing a trade order for a commodity on an electronic exchange, or displaying market information relating to trading of a commodity being traded in an electronic exchange, is invalid under 35 U.S.C. § 101 for failing to claim patentable subject matter." This contention is wrong for multiple independent reasons.

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To begin, none of the claims in TT's patents are directed to merely abstract ideas. Instead, these claims are directed to, for example, a tool that is used for trading. The tool is implemented in software and is embodied in a novel and non-obvious graphical user interface. Among other things, the claims require dynamically displaying bid/ask indicators relative to a static price axis, displaying an order entry region for receiving commands to send orders, and selecting a location of the order entry region via a single action of a user input device to set parameters for and send an order message. Thus, the claims are not merely directed to "placing a trade order for a commodity on an electronic exchange," or "displaying market information relating to trading of a commodity being traded in an electronic exchange." Regardless, even claims merely directed to placing an order or displaying market information would not be abstract.

Notably, each of the claims also clearly meets the machine or transformation test. And the claims are clearly not directed to natural phenomena, a law of nature, or a mathematical formula. Thus, for at least these reasons, the claims in TT's patents are not invalid under 35 U.S.C. § 101.

II. TT's Response to CQG's Allegations of Invalidity Under 35 U.S.C. § 102(b)

CQG contends that the '132 and '304 patents are invalid under the public use bar of 35 U.S.C. § 102(b), because of co-inventor Harris Brumfield's alleged public use of the inventions, and because the '132 and '304 patents are allegedly not entitled to the benefit of the application date of the earlier U.S. Provisional Application No. 60/186,322 ('the '322 provisional') to antedate the alleged public use. Both of these assertions are wrong.

TT already addressed this exact same issue in the related *GL/Sungard* case in connection with GL/Sungard's motion for summary judgment that the '132 and '304 patents are invalid under

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