

1 UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT OF ILLINOIS
 3 EASTERN DIVISION

4 TRADING TECHNOLOGIES INTERNATIONAL,)
 INC.,)
 5)
 Plaintiff,)
 6)
 v.) No. 04 C 5312
 7)
 eSPEED, INC., eSPEED INTERNATIONAL,)
 8 LTD., ECCO LLC, and ECCOWARE, LTD.,) Chicago, Illinois
) September 17, 2007
 9 Defendants.) 10:00 o'clock a.m.

10
 11 VOLUME 4-A
 TRIAL TRANSCRIPT OF PROCEEDINGS
 12 BEFORE THE HONORABLE JAMES B. MORAN, and a JURY

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1 (The following proceedings were had in open court,
09:52:24 2 outside the presence and hearing of the jury:)

09:52:24 3 THE COURT: Well, I should bring up today as
09:52:27 4 to where I'm at from where last we met. One is on the
09:52:38 5 use of the declarations by the expert, I'm satisfied
09:52:41 6 that -- well, one, it's probably not hearsay because it
09:52:46 7 relates to state of mind, but in any event, I can see
09:52:52 8 where this sort of thing would -- might be problematic
09:52:57 9 if you had some expert that was relying solely on this
09:53:00 10 kind of evidence, so as one court mentioned, the expert
09:53:08 11 was kind of a mouth piece for the declarant. But here
09:53:14 12 the expert is relying on a lot of things and that's one
09:53:18 13 of the things that's out there and that they can do.

09:53:20 14 The Japanese prior art. Now, as I
09:53:23 15 understand it, the printed publication description
09:53:29 16 aspect relates to the invention, so what we're really
09:53:34 17 talking about is anticipation. And we've already said
09:53:40 18 no as to the use for anticipation, so the issue is
09:53:44 19 really obviousness, where I think that kind of drops out
09:53:54 20 the restriction to publications doesn't apply.

09:53:58 21 The TIFFE is obviousness, not anticipation.
09:54:02 22 And it can come in if authenticated. There is no
09:54:06 23 translation, but Trading Technologies knew about it for
09:54:10 24 a long time. Whether Midas Kapiti anticipated, I'm
09:54:16 25 unclear as to who is going to be arguing what about

09:54:20 1 that. I just don't understand, but if it's relevant to
09:54:24 2 anticipation, there is a factual dispute on whether it
09:54:28 3 was accessible and I think that's a factual dispute that
09:54:31 4 you're going to have to fight out before the jury and
09:54:34 5 let them hear what the evidence is. And it clearly can
09:54:40 6 come in with respect to obviousness.

09:54:44 7 Tokyo Stock Exchange, again, obviousness.
09:54:48 8 And here the argument that if more than one person
09:54:59 9 reasonably skilled in the art comes up with essentially
09:55:03 10 the same idea at the same time does have a bearing on
09:55:06 11 obviousness, but it also seems to me you know when you
09:55:11 12 talk about combination patents where somebody is saying
09:55:16 13 something is patentable because I combined this which
09:55:22 14 was known in the art and that that was known in the art
09:55:25 15 for a new and different result, sometimes that's
09:55:32 16 patentable and sometimes it's not and sometimes you end
09:55:35 17 up with an argument about whether it was obvious or not,
09:55:38 18 and I think that's where we're at, unless somebody can
09:55:43 19 convince me otherwise, that even if a static Price
09:55:50 20 Ladder is known in the art and even if in some other
09:56:03 21 invention, patent, the idea of single click or single
09:56:07 22 action is in the art, putting that together is that
09:56:10 23 obvious or not, it seems to me that that's something
09:56:14 24 that both sides can argue and permits that evidence to
09:56:17 25 come in.

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