

1 UNITED STATES DISTRICT COURT  
 2 NORTHERN DISTRICT OF ILLINOIS  
 3 EASTERN DIVISION  
 4 TRADING TECHNOLOGIES INTERNATIONAL,  
 5 INC., )  
 6 Plaintiff, )  
 7 v. ) No. 04 C 5312  
 8 eSPEED, INC., eSPEED INTERNATIONAL,  
 9 LTD., ECCO LLC, and ECCOWARE, LTD.,) Chicago, Illinois  
 10 ) September 10, 2007  
 11 Defendants. ) 10:00 o'clock a.m.

12 VOLUME 1-A  
 13 TRIAL TRANSCRIPT OF PROCEEDINGS  
 14 BEFORE THE HONORABLE JAMES B. MORAN, and a JURY

15 APPEARANCES:

16 Trading Technologies TRADING TECHNOLOGIES  
 17 International, Inc., by: INTERNATIONAL, INC.,  
 18 MR. STEVEN F. BORSAND  
 19 222 South Riverside Drive  
 20 Chicago, Illinois 60606  
 21 312-476-1000  
 22 steve.borsand@  
 23 tradingtechnologies.com

24 and  
 25 McDONNELL, BOEHNEN, HULBERT &  
 BERGHOFF, LTD.  
 MR. PAUL H. BERGHOFF  
 MR. S. RICHARD CARDEN  
 MR. CHRISTOPHER M. CAVAN  
 MR. MICHAEL D. GANNON  
 MS. JENNIFER M. KURCZ  
 MR. MATTHEW J. SAMPSON  
 MR. LEIF R. SIGMOND  
 300 South Wacker Drive  
 Chicago, Illinois 60606  
 312-913-0001  
 berghoff@mbhb.com  
 kurcz@mbhb.com

1 MR. BERGHOFF, OPENING STATEMENT 95

1 eSpeed, Inc., eSpeed WINSTON & STRAWN  
 2 International, Inc., MR. GEORGE C. LOMBARDI  
 3 Ecco LLC, Eccoware, MR. RAYMOND C. PERKINS  
 4 LTD., by: MR. IMRON T. ALY  
 5 MR. KEVIN BANASIK  
 6 MS. ELIZABETH HARTFORD ERICKSON  
 7 MR. ANDREW M. JOHNSTONE  
 8 MS. TRACEY J. ALLEN  
 9 MR. JAMES M. HILMERT  
 10 35 West Wacker Drive  
 11 Chicago, Illinois 60601  
 12 312-558-5600  
 13 glombardi@winston.com  
 14 rperkins@winston.com

15 LAW OFFICES OF  
 16 GARY A. ROSEN, P.C.  
 17 MR. GARY A. ROSEN  
 18 1831 Chestnut Street, Suite 802  
 19 Philadelphia, Pennsylvania 19103  
 20 215-972-0600

21 Rosenthal Collins Group, DOWELL BAKER  
 22 LLC, by: MR. GEOFFREY A. BAKER  
 23 201 Main Street  
 24 Lafayette, IN 47901  
 25 765-429-4004  
 gabaker@dowellbaker.com

26 Court Reporter: MS. CAROLYN COX, CSR, RPR, CRR  
 27 Official Court Reporter  
 28 219 S. Dearborn Street, Suite 1854-B  
 29 Chicago, Illinois 60604  
 30 (312) 435-5639

1 (The following proceedings were had in open court:)  
 2 THE COURT: Well, ladies and gentlemen, what  
 3 we're going to be doing -- actually, for probably --  
 4 well, at this point, we think it's going to be three  
 5 weeks; three days this week and then off Thursday and  
 6 Friday because of Rosh Hashanah and then two more weeks  
 7 on a patent case. The patents involved in this case  
 8 relate to computer software used for electronic trading  
 9 of financial instruments such as futures contracts and  
 10 commodities.

11 The disputed actions in this are United  
 12 States patents number 6,766,304, 6,722,132, and  
 13 throughout the action, the parties may refer to the  
 14 patents as the '304 patent or the '132 patent, because  
 15 those are the last three numbers of each of the patents.  
 16 The '304 and '132 patents are both entitled  
 17 click-based trading with intuitive grid display of  
 18 market depth. The inventor's name in the '302 and '132  
 19 patents are Harris Brumfield, Gary Allen Kemp, II, and  
 20 Jens-Uwe Schluette. The United States Patent and  
 21 Trademark Office issued the '304 patent on June -- July  
 22 20, 2004, and the '132 patent on August 3, 2004.

23 Generally, the patents relate to a computer  
 24 screen display used by traders when trading on  
 25 electronic exchanges. The display includes a static

1 how the set up works here. This screen behind me -- and  
2 it is never ideal however we set the screens up in a  
3 courtroom.

4 This screen behind me may be the most  
5 comfortable for you to look at, and then this one here  
6 maybe, and sometimes I may be pointing to the screen. I  
7 think I will walk up to that one when I am going to  
8 point, so bear with me.

9 Trading Technologies is a Chicago company.  
10 It is located in downtown Chicago. It started in 1994,  
11 and it is a classic startup company. It started with  
12 just a handful of employees in 1994, and today it has  
13 550 employees worldwide. The vast majority of them are  
14 here in Chicago, over 400.

15 It is in the business, as you probably  
16 gathered from the questions you were asked in the  
17 beginning, of electronic trading software. That is what  
18 it does.

19 So, when specialists are looking for  
20 software to trade, especially futures, and we will talk  
21 a little bit about what that means, Trading Technologies  
22 is one of the companies, certainly not the only one, but  
23 certainly one of the companies that they would look to  
24 to obtain that trading software.

25 And Trading Technologies is the owner of

1 both of the patents that are going to be presented to  
2 you that we believe are infringed, the evidence will  
3 show they are infringed, and that we believe the  
4 evidence will show are perfectly valid.

5 Now, before we leave this screen I want to  
6 point out some terminology that will be important as we  
7 go through the case, and it is in small -- it is a small  
8 picture here, and then the words, X\_Trader.

9 X\_Trader is -- I will call it the big  
10 product, the relevant product, that Trading Technologies  
11 sells.

12 MD Trader, and you will hear that name a  
13 lot in this trial, that is the other trademark of  
14 Trading Technologies for a small portion, a portion of  
15 X\_Trader.

16 That is the reason I wanted to stop at the  
17 screen and point this out, and we will see bigger  
18 pictures of this as well. This is MD Trader and it is a  
19 subset of X\_Trader.

20 Let me try to give you an example of what I  
21 mean by that just so I am clear.

22 Microsoft sells you a whole Windows -- now I  
23 guess it is called Vista system, maybe that is analogous  
24 to X\_Trader. It is like the whole software package.

25 Whereas MD Trader, maybe that is Microsoft Word, that is

1 it. It is a program within the whole, but it is not the  
2 whole.

3 So, we will be referring to X\_Trader  
4 sometimes, the big program, and mostly to MD Trader,  
5 which is a very important part, in fact we believe the  
6 evidence will show the most important part of X\_Trader.  
7 And MD Trader is the subject of the patents that we are  
8 talking about here today.

9 Now, I would be remiss if I didn't introduce  
10 you to what I believe the evidence will show is the  
11 principal inventor on the patents in suit. There are 3  
12 inventors listed, but Mr. Harris Brumfield is the  
13 principal inventor. He wishes he could be here with you  
14 today and sit through the trial, but the specific rules  
15 of the case, because he is going to be a witness and  
16 will be here testifying in front of you, is he can't be  
17 here with us today or through the trial. But you will  
18 get a chance to meet Mr. Brumfield.

19 He is, in addition to being a named inventor  
20 on the patents in suit, a successful trader, indeed, a  
21 very successful trader. And he was, as he will describe  
22 for you, very successful in the old days when trading  
23 was done live, person-to-person, in what was called the  
24 trading floor, that is what it was called, a trading  
25 floor of the Chicago Board of Trade, he was very

1 successful at that, trading live. But then the evidence  
2 will show he went cold turkey and gave up his successful  
3 floor trading on the Board of Trade to trade  
4 electronically with trading software, and that  
5 experience led to the invention that is the subject of  
6 the 2 patents in this suit.

7 Today, Harris Brumfield is the CEO, chief  
8 executive officer, and the principal owner, of Trading  
9 Technologies, the owner of the patents. But that was  
10 not always the case.

11 When he came up with his idea for the  
12 invention he actually partnered with Trading  
13 Technologies. Why did he do that? Well, Mr. Brumfield  
14 is a trader. He is not someone who is skilled in  
15 creating software and software code. That is not his  
16 thing, the evidence will show, but that was Trading  
17 Technologies' specialty.

18 So, he partnered with Trading Technologies  
19 when he had this idea for the invention and entered into  
20 a consulting service arrangement with Trading  
21 Technologies, paid them to -- TT paid them to develop  
22 the code, software code, according to his  
23 specifications, and there was quite a period of time  
24 before things worked out.

25 That partnership between TT, the software

1 bid, 33, here is the best offer, 34, here is the next  
 2 best offer, next best offer all the way to the top of  
 3 the book. Same thing, best bid, next best bid, next  
 4 best bid. So when I went to Gary I asked him to build,  
 5 make this column, the price column static, don't make  
 6 them dynamic like in my view the whole world looked at  
 7 it. Like stop that, freeze it, and actually keep the  
 8 prices -- keep the bids and offers dynamic, let them run  
 9 up and down here, and I'm sorry, and so then over here  
 10 was -- we had the order book down there, right, with  
 11 those three pictures, so we had the grid, we had the  
 12 order entry, and we had the order book. So this was my  
 13 version of what I wanted, I turned it into an order  
 14 column and these were eventually again I turned this  
 15 into one column, but at first I was going to have my  
 16 working bids over here and my working offers over here.  
 17 So this one exists down here, the order book.

18 Q. And the working bids and the working offers that  
 19 you were pointing to, those were the columns with the  
 20 diagonal lines in them?

21 A. Yes.

22 Q. Now at the time that you drew the drawing that's  
 23 on the screen there, PTX 1276 and then 1277 in the  
 24 colorized version, did a product exist?

25 A. No, I never -- no, no product existed.

1 Q. Was it just this piece of paper at this time?

2 A. Nothing but a piece of paper. I went down and  
 3 sat with Gary and said, hey, can you build customized  
 4 software, can you customize and bill me per hour is what  
 5 we decided on a consulting, very similar to the 85,000  
 6 on the customized iceberg.

7 Q. Mr. Brumfield, I think you can take your seat for  
 8 a little bit.

9 Now, you mentioned you talked to Gary, that's  
 10 Gary Kemp from Trading Technologies?

11 A. Yes.

12 Q. And you wanted Trading Technologies to do what  
 13 with your piece of paper, your drawing?

14 A. I wanted them to commence -- first, I asked them  
 15 can you do this. Technically can you freeze the prices  
 16 like this and can you do it, and so Gary thought they  
 17 could do it. So I asked him, can you build -- on a  
 18 customized basis, on a consulting deal, can you build it  
 19 for me, I want it completely confidential, completely  
 20 secret and it's my idea, I don't want it going out in  
 21 the market, I don't want it going anywhere, in fact I  
 22 only want a few people at Trading Technologies knowing  
 23 about it.

24 Q. Why didn't you build the software yourself,  
 25 Mr. Brumfield?

1 A. My banking and finance degree wasn't going to  
 2 help me much on that.

3 Q. You are not a software engineer?

4 A. No, sir.

5 Q. And was it your intention at this point in your  
 6 early discussions with Trading Technologies that TT was  
 7 going to make and sell a product based on your idea?

8 A. Absolutely not.

9 Q. And that includes even a product they were going  
 10 to sell back to you, is that your intent at this point?

11 A. No.

12 Q. Now, were there any just in general, we'll go --  
 13 if there are, we'll go through them one by one. Were  
 14 there any downsides, any issues with your idea in the  
 15 September 1998 drawing?

16 A. Yes. So trying to think through it as a whole  
 17 again and trying to go through the Nth degree, you weigh  
 18 -- the project and consulting fee was going to be  
 19 expensive. Gary told me it was going to be much more  
 20 expensive than the iceberg solution, but even before I  
 21 went to Gary, I already -- I just know I mean this is a  
 22 whole different concept and it was going to cost some  
 23 good money to actually build it. So thinking through it  
 24 to the Nth degree -- can I stand up and point again,  
 25 please? I can talk.

1 Q. Let me put an exhibit up just so we're all on the  
 2 same page. I think that might help. Could we put up  
 3 PTX 1279. And what does this -- and you may or may not  
 4 need -- I am not sure you do need to stand up for this  
 5 one, but you can if you want, Mr. Brumfield.

6 A. I'd love to.

7 Q. Thank you.

8 What does this -- what does this slide represent?

9 A. Okay. This is the concept that I went there.  
 10 Again, by now we've taken the prices and turned them  
 11 into one column instead of two columns like you saw on  
 12 the scratch drawing, and so that's one column. And also  
 13 the working order column you see is one instead of two,  
 14 so other than that, it's the same thing. We just  
 15 consolidated those two columns.

16 Q. And the picture on the right is of the commercial  
 17 product MD Trader?

18 A. Yes. This is Trading Technologies' product, MD  
 19 Trader, which conceptually came from my idea. And over  
 20 here is the inside market, the dynamic bids and offers.  
 21 Bids, offers are yellow circles, and this is the top  
 22 line of that grid. And sometimes I wouldn't have the  
 23 whole depth up. I would just -- sometimes all you  
 24 needed was the best bid and best offer because that was  
 25 the market. Going back to the pit, that's the market.