

IN THE UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION
 TRADING TECHNOLOGIES INTERNATIONAL,) No. 05 C 4811
 INC.,)
)
 Plaintiff,)
)
 v.)
)
 CQG, INC. and CQGT, LLC.,) March 16, 2015
) Chicago, Illinois
) 8:25 a.m.
 Defendants.) Trial
 VOLUME 14
 TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE SHARON JOHNSON COLEMAN, and a
 jury

APPEARANCES:
 For the Plaintiff: TRADING TECHNOLOGIES
 INTERNATIONAL, INC.
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 BY: MR. LEIF R. SIGMOND, JR.
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 MR. MATTHEW J. SAMPSON
 MS. KIRSTEN L. THOMSON
 TRACEY DANA McCULLOUGH, CSR, RPR
 Official Court Reporter
 219 South Dearborn Street
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1 (The following proceedings were had in open court outside
 2 the presence of the jury:)
 3 THE CLERK: 05 C 4811, Trading Technologies versus
 4 CQG.
 5 THE COURT: Good morning. I'm glad one person came
 6 back. However, I will tell everyone on the record right now we
 7 just lost a juror. Miss Mann, our pregnant juror was in the
 8 hospital all weekend experiencing pain. She will not be back.
 9 All right. She was going to try to make it. This Court is
 10 making the decision, she does not have to. All right. Other
 11 people may go in the hospital and come back, but I'm not going
 12 to do that to my juror for this case.
 13 All right. Any objections, state them now on the
 14 record. Plaintiff.
 15 MR. SIGMOND: No.
 16 THE COURT: Any objection, defense?
 17 MS. WYTSMA: No, Your Honor.
 18 THE COURT: All right. Thank you very much. We're
 19 at 11. I don't know if we're at 11 because everybody hasn't
 20 come yet. Nice weekend, long case. All right. I'll be right
 21 back out and with your pile of trees that you killed over the
 22 weekend. Thank you.
 23 (Short break taken.)
 24 THE COURT: All right. I know there is lots of
 25 stuff. Unfortunately it seems that you all didn't get to enjoy

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 BY: MS. LAURA A. WYTSMA
 MR. TERRY D. GARNETT

1 any of the weather. Couldn't have unless you have printers and
 2 you were outside. So before we get to all of the various
 3 things that you have filed, is there anything -- and you all --
 4 we're still printing and still -- because frankly this Court
 5 didn't look at anything for 48 hours, still trying to keep from
 6 being sick and me not being here and really ruining things as
 7 for all your efforts.
 8 So what I want to do is know who we have left to
 9 testify today, and let's deal with that this morning. Then
 10 we'll let them have the beautiful day for three or four hours
 11 if we need to, and then we'll get to what we need to with
 12 closings. But we'll deal with all of your various filings that
 13 don't need to be dealt with before the witness. We'll deal
 14 with those first. I do want to find out whether or not Trading
 15 Technologies is resting this morning. Mr. Carden.
 16 MR. CARDEN: Let's address your first issue first,
 17 which is the witnesses. I believe all we have left is
 18 Mr. Hartmann and Mr. Giffen.
 19 THE COURT: And those are for you too? That's what
 20 I'm asking.
 21 MR. CARDEN: Mr. Giffen, Mr. Giffen was identified
 22 for us as well, Your Honor.
 23 THE COURT: Are you calling him in your case in
 24 chief?
 25 MR. CARDEN: I don't believe we need to.

1 THE COURT: All right. So who else do you have to
2 call in your case in chief?
3 MR. CARDEN: We do not have anyone else.
4 THE COURT: So you're ready to rest?
5 MR. CARDEN: We are, Your Honor.
6 THE COURT: Have you looked at your exhibits and --
7 MR. CARDEN: We have, Your Honor.
8 THE COURT: All right. Why don't you step up.
9 Someone step up. Let's deal with exhibits. We're still
10 waiting for jurors, and we still have to make them aware of
11 what happened.
12 MS. WYTSMA: Your Honor, there's some evidentiary
13 issues relating to the witnesses this morning. Perhaps we
14 should deal with them first so we can put the testimony on as
15 soon as the jurors are here.
16 THE COURT: We've waited this long to rest. You have
17 any objection to --
18 MR. CARDEN: No.
19 THE COURT: All right. Come forward.
20 MS. WYTSMA: Your Honor, late last night, perhaps
21 even early this morning we received additional exhibits from
22 plaintiffs. They were, of course, added to -- I'm not sure if
23 we're at the 15th, 20th, or 30th exhibit list they filed now.
24 There's a real problem with one of these documents. It's
25 privileged. It contains privileged work product.

1 THE COURT: Counsel --
2 MS. WYTSMA: Sorry.
3 THE COURT: -- we'll let him suggest it. All right.
4 I'm so glad I started my day.
5 MR. CARDEN: 2925, Your Honor, is an e-mail from Mr.
6 Schroeter to Mr. Hwang, the astrologer again, attaching a
7 document called "TT versus CQG, 2005 Case Management Schedule,"
8 which is the document you have in front of you, 2924.
9 THE COURT: All right.
10 MR. CARDEN: And it is specifically provided to him
11 for purposes of having him weigh in on --
12 THE COURT: Okay. Wait a minute. Wait a minute.
13 You're saying you have another document in front of you that
14 goes along with what they're --
15 MR. CARDEN: Correct.
16 THE COURT: -- referring to.
17 MR. CARDEN: Right. I'm trying to get an extra copy
18 of it.
19 THE COURT: Oh, you don't have a copy for her?
20 MR. CARDEN: That's right. That's why I handed --
21 THE COURT: Okay. All right. I was going to say
22 just give it to her.
23 MR. CARDEN: Yes. And I can show you. What I tried
24 to give to Miss Wytmsa --
25 THE COURT: Or as you're talking about it why don't

1 THE COURT: You want to refer to that document?
2 MS. WYTSMA: Sure. I have a copy I can pass up to
3 the Court. This is Plaintiff's Trial Exhibit 2924 that was not
4 identified on any exhibit list until, I am not sure what time
5 it was served last night or this morning. May I approach.
6 THE COURT: You may.
7 (Document tendered.)
8 MS. WYTSMA: Now, I just received an e-mail I think
9 two minutes ago that bears further on this issue, and I haven't
10 had a chance to look at it carefully. But the document that is
11 attached is a document -- and this is again, Exhibit PTX 2924.
12 As the Court can see, this is a case management schedule. This
13 was prepared by Loeb & Loeb. It reflects attorney work
14 product. It has to do with the schedule and our strategy.
15 THE COURT: All right. Hold up. Why would you be
16 presenting a case management from counsel?
17 MR. CARDEN: Sure, Your Honor. And this one actually
18 goes along hand in hand with 2925, which I can give you a copy
19 of as well.
20 MS. WYTSMA: May I have a copy.
21 THE COURT: Wait. Wait. Wait. Wait. Don't hand me
22 up anything that the other side doesn't have.
23 MS. WYTSMA: I don't have a copy of that because it
24 was just served two minutes ago. I believe what they're going
25 to suggest is that --

1 you just have it --
2 MR. CARDEN: Can we put it on the Elmo and everyone
3 can see it?
4 THE COURT: That's fine.
5 MS. WYTSMA: Why don't you just give her a copy.
6 MR. CARDEN: So this is 2925, Your Honor. So this is
7 the document providing it to Mr. Hwang for purposes of having
8 him weigh in on dates affiliated with the case management
9 schedule. And you can see it says, "Attached, TT versus CQG
10 2005 Case Management Schedule," which is what you have in front
11 of you. The issue with this document, Your Honor, is that in
12 the actual case management schedule it shows that the witnesses
13 they put on regarding reliance at best have been telling half
14 truths, because on page 2924.003, it says, "CQG has no advice
15 of counsel defense per Joe Schroeter in 2012."
16 So the fact that they've been up there suggesting
17 that they have relied on the opinions of counsel throughout is
18 simply not correct. And this document, which was provided to a
19 third party in the context of having him weigh in on the issue
20 of dates, renders this not privileged any further.
21 MS. WYTSMA: May I respond.
22 THE COURT: You may.
23 MS. WYTSMA: Your Honor, first of all, this is
24 attorney work product that can be waived only by the attorney,
25 not by Mr. Schroeter. This reflects Loeb & Loeb work product.

1 That is not waived. The issue of whether this 10/5/2012 entry,
2 "CQG has no advice of counsel defense per Joe Schroeter," if
3 they try and put that in, it's going to require a Loeb & Loeb
4 attorney to get into that witness chair and explain what was
5 meant by that entry.

6 Second, this issue has already been dealt with by
7 Magistrate Judge Schenkier. I'm not sure if it was this exact
8 document, but he has previously addressed the issues of whether
9 documents provided to Mr. Hwang resulted in a waiver of
10 privilege. And I believe, and I wasn't present at the time,
11 but I believe -- and we're trying to find the order that he
12 found that Mr. Hwang was either a confidant or a person of
13 trust, such that it didn't waive the privilege. Because they
14 just served this on us five minutes ago, we haven't had an
15 opportunity to locate that order.

16 But this is clearly work product. It should have
17 been returned when it was discovered. It should never have
18 been retained. That work product has never been waived by any
19 attorney at Loeb & Loeb. And moreover, this is Mr. Schroeter
20 sending this e-mail. Why didn't they raise this when Mr.
21 Schroeter was here to testify? When Mr. Schroeter could have
22 explained this. This is sandbagging. It's just -- Mr. Giffen
23 has no knowledge. Mr. Hartmann has no knowledge about this.
24 The only person who can explain this is either Mr. Schroeter or
25 a Loeb & Loeb attorney.

1 MR. CARDEN: Your honor, the -- and I won't dispute
2 we've had -- we had actual discussions with Judge Schenkier
3 about the scope of the privilege waiver. And I believe it's a
4 January 2014 order where he reconsidered an order of
5 November 2013 talking about work product. However, this is a
6 different situation, and this document was not specifically
7 considered in the context of those motions. And this one is
8 one that they asked him to review and comment on with respect
9 to dates.

10 THE COURT: Asked who to review and comment on?

11 MR. CARDEN: Mr. Hwang. Sorry, Your Honor.

12 THE COURT: And Mr. Hwang is no longer here, so he's
13 not a witness.

14 MR. CARDEN: Right.

15 THE COURT: Mr. Schroeter isn't here. He's not a
16 witness. Who do you --

17 MR. CARDEN: And --

18 THE COURT: And Mr. Kelly -- I mean, I know Mr.
19 Borsand took the stand, and he's at counsel table. But they
20 shouldn't be forced to have to put their counsel on.

21 MR. CARDEN: Understood. And to address the issue of
22 the alleged sandbagging and why it wasn't addressed with Mr.
23 Schroeter, because honestly in preparing further for Mr.
24 Hartmann, it's the first time we actually saw the document with
25 respect to Mr. Schroeter. So that's why it wasn't used before.

1 THE COURT: All right. It won't be allowed. It will
2 not be allowed. All right. What else do you have?

3 MS. WYTSMA: The other issue is a self-created
4 document that's never been produced in this case. It was given
5 a Plaintiff's Trial Exhibit number again late last night.
6 They -- I believe they're going to attempt -- and I have a
7 copy. I apologize. Plaintiff's Trial Exhibit --

8 THE COURT: You know what, one second. However, as
9 the Court is not allowing it, the Court is not saying there was
10 sandbagging. Just so the record is clear. All right. All
11 right. Proceed.

12 MS. WYTSMA: May I hand up a copy of 1597-C.

13 THE COURT: You may.

14 (Document tendered.)

15 MS. WYTSMA: This is a document that has never been
16 produced in this litigation. It appears to be a self-created
17 document. You can see it doesn't bear any production number in
18 the right-hand corner. It's never been disclosed to us before
19 late last night.

20 THE COURT: All right. When you say self-created,
21 are we talking about for demonstrative purposes only?

22 MS. WYTSMA: No.

23 THE COURT: Or created at some other time?

24 MS. WYTSMA: They are intending to use it as a
25 substantive exhibit.

1 THE COURT: Counsel.

2 MR. CARDEN: Sure. It's an excerpt from the pivot
3 table you've heard so much about, Your Honor. That's why it
4 has 1597 on it. That is the pivot table. This is intended to
5 show that the versions that are now at issue as a result of
6 Your Honor's ruling Friday night continue to be used through
7 2014. That they didn't simply end on the date when the new
8 versions came out. They were continuously in use through 2014.
9 The sole purpose of the document is an excerpt from the pivot
10 table, which both of the experts have relied on and said is the
11 best source of information regarding the transaction data in
12 this case.

13 And in addition, if we look at what was provided to
14 us with respect to Mr. Giffen, there are two gateway
15 transaction data reports. So apparently Mr. Giffen is familiar
16 with this type of information.

17 MS. WYTSMA: Well, I can guarantee you that he's
18 never seen this document before. He'll have no knowledge as to
19 how it was created. You know, they can try and lay a
20 foundation, but --

21 THE COURT: Is Mr. Giffen in the courtroom? Please
22 step out. Anyone else who's testifying this morning, please
23 step out.

24 (Brief pause.)

25 THE COURT: All right.

1 MS. WYTSMA: This is a document that Mr. Giffen will
2 have no knowledge as to how it was created. It's a document he
3 has never seen. There's simply no way to lay a foundation for
4 this document with this witness who's never ever seen this
5 document. He will not be able to sit here in court today and
6 say, well, yes, I guess, you know, these are the numbers for
7 7.8818. It's just they had plenty of opportunity with the
8 right witnesses to lay a foundation for this type of evidence,
9 and they didn't do it. In fact, that pivot table, they haven't
10 even laid the foundation for that with any witness yet.

11 THE COURT: Response.

12 MR. CARDEN: Actually we have discussed the pivot
13 table thoroughly with several witnesses. And their own expert
14 has admitted it's the only source of reliable information in
15 the case. It was also discussed with other witnesses in the
16 case. So there's no suggestion here that the pivot table can't
17 come in. They used the pivot table with their own expert as
18 well.

19 THE COURT: But the pivot table that he used didn't
20 have these pages in it?

21 MR. CARDEN: That's an excerpt, Your Honor.
22 Absolutely. Because the pivot table is a multi million line
23 Excel spread sheet.

24 THE COURT: The Court understands. I just want to
25 make sure the record is clear --

1 be used. What next?

2 MS. WYTSMA: That's it, Your Honor.

3 MR. CARDEN: There's actually one exhibit with
4 respect to Mr. Giffen that was again disclosed to us yesterday,
5 which is a multi-document exhibit regarding opinions that have
6 come out of the Courts and the provision of those opinions to
7 allegedly the customers. There are probably 10 different
8 documents in the exhibit, and Mr. Giffen is not on all of them.
9 He's on some of them only. So, first of all, it's a confusing
10 exhibit because it's many many documents. Second of all --

11 THE COURT: And this is their exhibit or your
12 exhibit?

13 MR. CARDEN: It's their exhibit for Mr. Giffen.

14 THE COURT: All right.

15 MR. CARDEN: It's 1878, Your Honor.

16 THE COURT: All right.

17 MS. WYTSMA: And we'll be using only pages DTX 1879
18 through pages 6 through 9, and that is an e-mail that Mr.
19 Giffen received and sent with the attachment that was part of
20 his e-mail. We do not intend to use any portion of this
21 document on which Mr. Giffen was not copied personally and has
22 personal knowledge of it. And I can show the Court a copy of
23 what we intend to present.

24 Counsel is correct, there was a memorandum that was
25 prepared in March of 2007 relating to the eSpeed case. This is

1 MR. CARDEN: That's correct.

2 THE COURT: -- that the documents that are presented
3 to me in PTX 1597, 1, 2 -- 1597-C, 1, 2, and 3 have never
4 before been presented in court. Is that correct?

5 MR. CARDEN: That is correct, Your Honor.

6 THE COURT: And you are not looking at them for
7 demonstrative evidence. You're looking at it for -- to be able
8 to either impeach or lay some -- give some substantive
9 evidence, is that correct?

10 MR. CARDEN: It certainly depends on what Mr. Giffen
11 is going to testify about, Your Honor.

12 THE COURT: Well, since Mr. Giffen -- and you don't
13 deny that you don't know if he's ever seen this before.

14 MR. CARDEN: We -- no.

15 THE COURT: You don't know. You don't know.

16 MR. CARDEN: He hasn't seen it before.

17 THE COURT: He's never seen it before.

18 MR. CARDEN: I mean, cross exhibits are disclosed
19 midnight the night before they're used.

20 THE COURT: The Court understands, but there's
21 demonstrative.

22 MR. CARDEN: Sure.

23 THE COURT: And then there's exhibits that you want
24 to put on substantively and ask someone to either opine on or
25 try to figure out. So the objection's sustained. This won't

1 a document that was presented to CQG customers who were
2 concerned about potential infringement, and it goes to the
3 state of mind of Mr. Giffen and others at the company as to
4 whether they believed that they were infringing. And I can
5 show a copy of this to the Court if you'd like.

6 THE COURT: All right. Why don't you respond.

7 MR. CARDEN: Part of our difficulty, Your Honor, here
8 is again, and you have noted to both parties, that the concern
9 you have about other opinions coming in in this case. And this
10 is simply just getting those opinions in because they were cut
11 and pasted into a memo, so we still have concerns if --

12 THE COURT: One second.

13 (Brief pause.)

14 MR. CARDEN: When Your Honor prevented TT and
15 actually in cases even as of Friday I believe CQG, from
16 entering this type of evidence, and where it's just simply
17 presenting the text of a Court opinion, we're in the same
18 situation we've been in all along.

19 THE COURT: Last word.

20 MS. WYTSMA: Your Honor, this goes directly to CQG's
21 state of mind. Plaintiff was the one that brought eSpeed into
22 this case. Plaintiff is the one that wanted to rely on a
23 judgment in another case to establish its reasonable royalty.
24 We're just responding to the claims that are made. You know,
25 this willfulness claim has turned into everything about

1 astrology and birthdays. This bears directly on their state of
2 mind. This is evidence that is actually probative as to
3 whether they believed that they infringed.

4 THE COURT: First of all, as to plaintiff bringing in
5 eSpeed, eSpeed was necessary for the issue of reasonableness,
6 and the Court needed that in. And so it wasn't plaintiff that
7 brought it in. It's appropriate to be in there. The Court
8 allowed it to be brought in. The Court isn't going to again
9 allow the rest of the case to be -- the jury has heard enough
10 about eSpeed, and the Court's going to sustain their objection.
11 That won't be in.

12 MS. WYTSMA: Thank you, Your Honor.

13 THE COURT: Anything else?

14 MS. WYTSMA: No.

15 MR. CARDEN: I think that's it, Your Honor.

16 THE COURT: Nothing else. All right. Let's see if
17 my jury -- anything else for the witnesses who are going to
18 testify?

19 MS. WYTSMA: Not on CQG's part.

20 THE COURT: All right. If the jurors are not here,
21 get that exhibit list ready, and the Court will start looking
22 at the exhibit list for the plaintiff if I don't have my last
23 juror. All right.

24 (Short break taken.)

25 THE COURT: All right. The witnesses appear to be

1 the law firm of Leydig Voit & Mayer, and he's testifying about
2 the competency of CQG's opinion of counsel. All right. Keep
3 your voice up, sir.

4 THE WITNESS: I will.

5 THE COURT: You may proceed.

6 DIRECT EXAMINATION

7 BY MS. WYTSMA:

8 Q Good morning, Mr. Hartmann.

9 A Good morning.

10 Q Can you tell the jury a little bit about your educational
11 background.

12 A Yes. I received an engineering degree at the Colorado
13 School of Mines in 1970. I thereafter attended Tulane
14 University for a while, working on an MBA before I decided to
15 go into law. I then came to Chicago and attended DePaul
16 University, receiving a degree in 1976.

17 Q And after you received your juris doctorate in 1976, did
18 you begin practicing as an attorney?

19 A I did indeed. Even while I was attending school, the
20 university at DePaul, I became a law clerk at my firm Leydig
21 Voit & Mayer. I worked there during the summers and part-time.
22 And after I graduated I joined the firm full-time.

23 Q Can you tell the jury a little bit about your professional
24 experience as an attorney.

25 A Well, I'm concentrating on just patent law or what we call

1 in. Anything else on the record from the plaintiff?

2 MR. CARDEN: No, Your Honor.

3 THE COURT: Anything else from the defense?

4 MS. WYTSMA: No, Your Honor.

5 THE COURT: All right. And again, so the record is
6 clear, plaintiff has not yet rested. They have -- for purposes
7 of time we'll continue with the witnesses. But I don't want --
8 plaintiff has not rested their case.

9 MS. WYTSMA: May I approach.

10 THE COURT: Sure. Who's the witness? Who's the
11 first witness?

12 MS. WYTSMA: Mr. Hartmann.

13 (Before the jury:)

14 THE COURT: Ladies and gentlemen, we're about to
15 start with our next witness. Again, I know you've been
16 informed about Miss Mann. And she actually wanted to come in,
17 but we assured her, and counsel agreed, that this is one she
18 should sit out the rest of the time, and she could call in
19 later. We want her and the baby to be okay.

20 All right. Step forward, please, sir.

21 MICHAEL HARTMANN, DEFENDANT'S WITNESS, DULY SWORN

22 MS. WYTSMA: Your Honor, may I present the witness
23 statement.

24 THE COURT: Yes. Ladies and gentlemen, Mr. Michael
25 Hartmann has just been sworn in. He is the managing partner of

1 intellectual property law, which includes patent law, as well
2 as trademark law, copyright law, trade secret law. Anything
3 having to do with technology. So I always wanted to combine my
4 undergraduate degree, which is engineering, actually chemical
5 engineering, with the law. And so our firm specializes just in
6 patent law. We don't -- or intellectual property law. We
7 don't do anything else. We don't do taxes. We don't do
8 divorce. We don't do traffic tickets. We only do intellectual
9 property law.

10 So I very early on learned, if you will, under Fred
11 Leydig, who was then the senior partner. I did an awful lot of
12 litigation in my time at the firm. As you can tell, I've spent
13 40 years there now. I became the president of the firm about I
14 believe seven years ago. I just finished my term two weeks ago
15 as president. So in the course of that work I've done a lot of
16 litigation, as I said. Patent suits like this. I've done a
17 lot of advising clients how to not get into a lawsuit, how to
18 stay away from trouble, which is what these so-called opinions
19 are about, where we lawyers advise clients of how to stay clear
20 of any patent conflicts.

21 Q Mr. Hartmann, let me ask you, are you a registered patent
22 attorney?

23 A I am indeed.

24 Q And you were just mentioning these opinions. Have you
25 ever authored an opinion of counsel for a client?

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