



## I. INTRODUCTION

Plaintiff acknowledges that Rule 50 motions are generally brought at the close of a party's case. However, the rule states that a motion can be brought "any time before the case is submitted to the jury" once "a party has been fully heard on an issue during a jury trial." FRCP Rule 50 (a). CQG has 7 witnesses left<sup>1</sup> in their case. None of those witnesses are in a position to address CQG's written description defense. Therefore, all of the evidence that CQG is going to put in on the issue is already of record, i.e., CQG has been fully heard. The evidence is woefully inadequate to establish failure that the patent in suit fail to meet the written description requirement. As a result, judgment as a matter of law should be granted for TT.

In addition, TT submits that it is appropriate that the Rule 50 motion be ruled on expeditiously, because if the court believes that the evidence put in by CQG is sufficient to submit to the jury, then TT must have an opportunity to submit a responsive case on the issue. CQG bears the burden of proving the failure to meet the written description by clear and convincing evidence. CQG has put in its proofs. TT has not had a full opportunity to address the proofs. If the Court believes that issue is not ripe for directed verdict then TT's responsive case would comprise one witness, Dr. Pirrong, to explain to the jury how TT's patents are sufficient. Unfortunately, Dr. Pirrong is only available on Friday March 13<sup>th</sup> to present such testimony. TT would rather not have to call Dr. Pirrong for this issue, but if the issue is being submitted to the jury, then TT believes it is necessary. Therefore, for the reasons set forth below, TT requests that the court grant it judgment as a matter of law on the issue of whether the patents in suit comply with the written description requirement.

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<sup>1</sup> CQG has yet to call: Mr. Peterson (damages expert), Mr. Hartmann (willfulness expert); Mr. Prince (a TT customer rep); Mr. Schroeter (former president of CQG); Mr. Giffen (current president of CQG); Mr. Kemp (by video) (former president of TT) and Mr. Katin (CQG programmer).

## II. BACKGROUND

On January 20, 2015 the court denied CQG's summary judgment motion that the patents-in-suit are invalid under the §112 written description requirement. In the ruling, the Court reiterated its previous construction of the "static" limitation in the claims. The Court found that "[t]he patents in suit do not expressly state that the entire price column must be static nor do they exclude a price column that is static with additional features." Dkt. 889 at p.10. These findings resolve any argument that CQG could possibly make with respect to its written description challenge based on the evidence at trial.

All "evidence" in support of CQG's 112 defense is now in. This amounts to just two things: (1) an errata sheet from TT's expert Dr. Pirrong; and (2) a non-expert's summary of what written description means from Mr. Borsand. No other witness' testimony even bears on the written description issue.

The errata sheet, which is not proper evidence<sup>2</sup>, contains the following footnote on which CQG seeks to base its entire 112 defense:

Upon reading my transcript, I realized that this portion of my testimony is potentially confusing and ambiguous because it may create the impression that I was stating that a portion of the price levels shown in the examples of Figures 3 and 4 of the patent specification and the corresponding pages of the provisional may not be "static." My errata with respect to pages 126-187 makes clear that in the examples of Figures 3 and 4 of the patent specification and corresponding pages of the provisional, all of the price levels shown are "static."

DTX 2343\_0001, ft nt. 1. The only other "evidence" that CQG could possibly rely on to support its 112 defense is testimony from Mr. Borsand that written description means, in layman terms,

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<sup>2</sup> The errata sheet is nothing more than prior deposition testimony. As Dr. Pirrong was on the stand, thus not unavailable, his errata is inadmissible hearsay. Simply having Dr. Pirrong identify the document from the stand does not overcome the hearsay problem.

that the patent specification needs to provide support for what is in the claims. Tr.T at p. 1407 ln. 22 to p. 1408 ln. 4.

The above cited evidence does not come close to carrying the day in establishing a 112 defense and no reasonably jury could find otherwise. Dr. Pirrong's errata merely notes that in the examples in the patent, all of the displayed price levels are static and that the patent does not provide an example of an additional non-static zone. This is completely irrelevant to the 112 issue.

### III. ARGUMENT

CQG's 112 defense is based on the flawed proposition that if the claims are interpreted to "cover" a product that has a price column that has a range of price levels that are static and other ranges of price levels that are not static, and the specification does not describe such a product, then the patent does not meet the written description requirement. CQG's argument is flawed because its focus is entirely wrong; the focus should be on the claims, not characteristics of the accused product.

The written description requirement is met if the description in the specification "reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date." *Ariad Pharm. Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). While the recited elements of a claim must have adequate written description support, there is no requirement that the specification describe features of a product that are not recited in the claims. *See, e.g., Amgen Inc. v. Hoechst Marion Roussel*, 314 F.3d 1313, 1333 (Fed. Cir. 2003) ("the patentee need only describe the invention as claimed, and need not describe an unclaimed method of making the claimed product"); *Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp.*, 93 F.3d 1572, 1581-82 (Fed. Cir. 1996) (explaining that a specification can

fully support a claim even if it does not describe some features in a product that is within the scope of the claim). In other words, the proper focus is not on the features of the accused product; rather it is on the features in the claim.

Here the claims recite a “static display of prices” and a “common static price axis.” The controlling construction of “static” is a display of prices or a line “comprising price levels that do not change positions unless a manual re-centering or re-positioning command is received, meaning if there is movement, it must be by manual command as opposed to automatic.” See Court’s construction as submitted to the jury. Thus, the written description requirement of §112 only requires support for a range of price levels (*i.e.*, “a line of price levels” or a “display of prices”) in the display or axis that meet these claim terms, *i.e.*, that are static. There is no dispute that the specification describes a static column of prices that fully supports the “static” claim limitations. The specification clearly establishes that the inventors were in possession of the claimed invention.

The written description requirement does not demand that the specification provide a description of a price axis with some but not all of the price levels being static, as argued by CQG. These features are not elements of the claim. Moreover, this is not a case where the specification has limiting language that creates a written description issue. *See, e.g., Crown Packaging Tech. v. Ball Metal Bev. Container Corp.*, 635 F.3d 1373, 1381 (Fed. Cir. 2011) (where the specification describes an essential element missing from the claim, there may be a written description issue). Indeed, the Court has already found that that is not the case, stating “[t]he patents in suit do not expressly state that the entire price column must be static nor do they exclude a price column that is static with additional features.” Dkt. 889 at 10. Accordingly,

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