

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

TRADING TECHNOLOGIES)	Case No. 10 C 715
INTERNATIONAL, INC.)	(Consolidated with:
)	10 C 716, 10 C 718,
Plaintiff,)	10 C 720, 10 C 721,
)	10 C 726, 10 C 882,
v.)	10 C 883, 10 C 884,
)	10 C 885, 10 C 929,
BGC PARTNERS, INC.)	10 C 931)
)	
Defendants.)	Judge Virginia M. Kendall
)	
)	

**DEFENDANTS' CASE MANAGEMENT STATEMENT FOR
MAY 5, 2011 STATUS HEARING**

In complex patent cases involving multiple patents and defendants, the court has “broad discretion to administer the proceeding.” *In re Katz Interactive Call Processing Patent Litigation*, ___ F.3d ___, 2011 WL 607381, at *3-4 (Fed. Cir. Feb. 18, 2011) (Exhibit 2). The ten groups of still-active defendants in this complex, multi-patent case, by their under signed counsel, jointly submit this Case Management Statement to provide suggestions as to case management for the initial stage of proceedings.

I. ISSUES FOR EARLY RESOLUTION TO STREAMLINE THE CASE

In a case of this nature, involving eleven patents and numerous accused products, it would be wishful thinking to suggest that there are “silver bullet” dispositive issues that will resolve everything. Nonetheless, defendants submit that there are three sets of issues which are susceptible of an early resolution without lengthy and costly discovery and which, *regardless of which way the court decides them*, should vastly simplify this case. These issues also stand as significant barriers to any serious settlement discussions between Plaintiff and the still-active defendants. Accordingly, the defendants respectfully suggest that the parties be permitted to

brief the following three issues — and that discovery unrelated to these issues be stayed for a period of 120 days to permit briefing and decision on these issues:

A. Application of the *eSpeed* Decision

Plaintiff has asserted six patents from the so-called “Brumfield Family.” These six patents share the exact same specification. One of these patents, U.S. Patent No. 7,676,411, is asserted against *every* defendant.

The court is not writing on a blank slate. A lawsuit on the two earliest Brumfield patents (U.S. Patent Nos. 6,772,132 and 6,766,304, applied for in 2000 and issued in 2004), was litigated by Plaintiff against eSpeed, Inc. et al. before Judge Moran in this Court (No. 04-5312). The case went through claim construction, summary judgment, and trial. TT appealed this Court’s claim construction and its partial summary judgment that found most of the accused electronic trading software in that case — including products with an “automatic re-centering” feature — did not infringe these two “Brumfield patents.”

In a precedential opinion, the Federal Circuit agreed with Judge Moran’s claim construction and affirmed the partial summary judgment of non-infringement, as well as various other rulings.

The Federal Circuit determined *de novo* that the written description of the Brumfield patents disclosed only a price axis that does not change positions unless a manual re-centering command is received, and never permitted automatic “re-centering” of the price axis on the user interface. The Federal Circuit opinion, *Trading Technologies International, Inc. v. eSpeed, Inc.*, is attached for the Court’s convenience (Exhibit 1).

Defendants submit that the subsequent Brumfield patents, which share the same written description, cannot be construed to cover auto-recentering. If the court agrees, many accused products will be eliminated from this case. If, however, the court finds that any claims of the

Brumfield patents can be construed to cover auto-recentering, then those claims are invalid for lack of written description, *i.e.*, those claims encompass subject matter not described in the corresponding patent applications as originally filed.

Thus, regardless of which way the Court rules with respect to the impact of *eSpeed*, the case will be streamlined enormously, and the burden on the Court and the parties greatly reduced.

B. Invalidity of the ‘056 Patent for Lack of Written Description

Plaintiff has asserted three members of the “Friesen Family” of patents. One of those patents, U.S. Patent No. 7,533,056 (the “‘056 Patent”), is asserted against *every* defendant, and is argued by TT to be the broadest of its patents.

Defendants contend that if the ‘056 Patent claims are as broad as Plaintiff asserts they are, they are invalid under 35 U.S.C. § 112 for lack of written description, as those claims, issued in 2009, bear little resemblance to the supporting disclosure initially filed ten years earlier, in 1999. If the court agrees, the claims of the ‘056 Patent will be invalid.

If the court, on the other hand, construes the claims of the ‘056 Patent in a manner that is consistent with what is disclosed in the written description, many accused products will clearly not infringe and will drop out of the case. Again, regardless of which way the Court rules, the case will be streamlined enormously, and the burden on the Court and the parties greatly reduced.

Whether the claims of a patent lack an adequate written description can be determined largely from the four corners of the specification. *See Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc) (holding that the written description requirement of Section 112 requires that the “disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date”) (citations omitted). Since this issue may be resolved by reference to intrinsic evidence, it would be useful to resolve it early. Thus, with little discovery directed only to the

issue of written description and some motion practice, a key patent asserted against every defendant could be disposed of at the outset of the case, narrowing the remaining issues in the case.

C. Priority between the Brumfield and Friesen Patent Families

Plaintiff has asserted at least one member of the Brumfield Family and one member of the Friesen Family against each defendant. The Friesen Family was not originally owned by TT, but was later acquired by TT. These two families of patents involve technologies related to user interfaces for electronic trading of commodities. More importantly, TT contends that both unrelated families cover the same trading interface. Because TT contends that both unrelated families cover the same alleged invention, one of the patent families likely constitutes invalidating prior art against the other family of patents. To date, TT has not taken a position on which patent family has priority. A determination on priority will likely determine which family invalidates the other. Resolving this issue early, again either by requiring TT to make an election or the Court determining priority, could potentially invalidate and eliminate from the case one of the two main patent families at issue, substantially streamlining the case.

II. PROCEDURES FOR STREAMLINING CASE MANAGEMENT

Defendants also propose the following procedures to simplify the management of these consolidated cases.

A. Pleadings Deadlines

Based on the Second Amended Complaints asserted against settling defendants Cunningham and TradeHelm, it is already apparent that TT intends to add additional patents. Defendants respectfully submit that TT should be given a firm deadline for amending the complaint in each case in which it intends to add additional patents or otherwise change its

allegations.¹ These cases were filed well over a year ago and the pleadings should reach closure in each case.

B. Initial Disclosures

Once the pleadings phase has closed, disclosures under Federal Rule of Civil Procedure 26 and any local rules other than the Local Patent Rules should be made by each party. In addition, Plaintiff should be required to submit complete preliminary infringement contentions as required by the Local Patent Rules, but no further Local Patent Rules deadlines (such as invalidity disclosures) should proceed while the parties and Court address the issues above to reduce the number of claims and patents and issues in these consolidated cases. This will conserve resources that would otherwise be spent on costly broad discovery, and will focus the parties on issues likely to eliminate entire patents and/or patent families.

C. Selection of Claims

A procedure for streamlining complex patent cases was recently approved by the Federal Circuit in *In re Katz Interactive Call Processing Patent Litigation*, ___ F.3d ___, 2011 WL 607381, at *3-4 (Fed. Cir. Feb. 18, 2011) (Exhibit 2). There, the patentee was required to select a certain number of claims (far fewer than all claims of all asserted patents) on which the patentee wished to proceed in the litigation. Defendants propose that such a procedure should be used streamline the management of this complex case.

TT should be required to select the claims that it intends to assert against each group of related corporate entities (“defendant group”). TT should be required to select, at most, 30 claims in its preliminary infringement contentions for each defendant group across all patents,

¹ CQG will file, pursuant to Fed. R. Civ. P. 15(a), for leave to amend its answer to assert counterclaims seeking declaratory judgments of non-infringement and invalidity of the '999, '056, '411 and '424 Patents. These declaratory judgment counterclaims are consistent with those asserted by other defendants in these consolidated cases and TT has been on notice of such counterclaims for more than 6 months, thus, this amendment will not result in any undue prejudice to TT. Should TT seek to amend its Amended Complaint against CQG to assert additional patents, CQG reserves the right to further respond at the appropriate time.

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