

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

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

MEMORANDUM OPINION AND ORDER

In early 2010, plaintiff Trading Technologies International, Inc. (“TT”) filed a dozen cases in this District alleging infringement of various patents concerning electronic trading software that traders use to place orders on electronic exchanges like Chicago’s Mercantile Exchange and Board of Trade. Specifically, the patents at issue concern the functionality in the software that displays market information to traders and allows them to submit orders to those exchanges and others to make their trades. After the Court consolidated the cases, the parties identified several issues to be decided as a matter of law that would help the parties streamline discovery and potentially resolve the cases between them. Pursuant to this Court’s order, the parties submitted cross-motions for summary judgment on the following issues:

1. Whether a particular part of the sole independent claim relating to user input of default quantities in TT’s patent no. 7,553,056 (‘056 patent)—which TT has asserted against every defendant—meets 35 U.S.C. § 112’s written description requirement; and
2. Whether the claims of TT’s patent no. 7,676,411 (‘411 patent), which claim price axes that are static as well as ones that move automatically, are invalid for lack of a written description in light of the Federal Circuit’s analysis and

decision in *Trading Technologies, International, Inc. v. eSpeed, Inc.*, 595 F.3d 1340 (Fed. Cir. 2010) (“*eSpeed* Decision”).

Specifically, with respect to the ‘056 patent, the parties disagree whether the ‘056 patent’s specification discloses the concept of a trader selecting and then using a default quantity for multiple orders. As for the ‘411 patent, the parties dispute whether the Federal Circuit’s comments on patent no. 6,772,132’s (‘132 patent) specification—which is the same specification used by the ‘411 patent—means that the specification discloses only static price axes (that is, price axes that move only after the user re-centers them manually), and that consequently the claims in the ‘411 patent that cover price axes in general (including, presumably, those that move on their own) are too broad.

Before the Court entered its scheduling order directing the parties to brief these preliminary matters, Defendants TradeStation Securities, Inc. and TradeStation Group, Inc. (together, “Tradestation”) moved for partial summary judgment, asserting that in light of the *eSpeed* Decision, various patents in TT’s “Brumfield family” that the United States Patent and Trademark Office (“PTO”) issued in 2010, including the ‘411 patent, are not entitled to claim priority from earlier filings. TT concedes that, because the ‘411 patent shares a specification with those earlier filings, if the ‘411 patent’s claims are held invalid based on the *eSpeed* Decision, then the issue of priority is moot. The defendants other than Tradestation note that the written description analysis is the same under either approach. In short, Tradestation’s motion is really a spin on the other summary judgment motion (which TradeStation joined) and rises and falls with the Court’s interpretation of the *eSpeed* Decision.

Finally, Defendants Open E Cry, LLC and optionsXpress Holdings, Inc. (together “OEC”) filed a separate motion for partial summary judgment, also based on the *eSpeed* Decision, asserting

that TT should be barred from asserting that products with price axes that move automatically infringe under the doctrine of equivalents, because the Federal Circuit found that TT disclaimed all price axes that move automatically when it prosecuted the claims of the '132 patent and another parent patent.

For the reasons below, the Court:

1. grants TT's cross-motion for summary judgment (Doc. 393) and denies the moving defendants' motion (Doc. 372) with respect to the '056 patent;
2. grants the moving defendants' motion for summary judgment (Docs. 375/378) that under the *eSpeed* Decision, the '411 patents claims are invalid to the extent they cover price axes that move automatically or through automatic re-centering and denies TT's cross-motion that the '411 patent's claims meet the written description requirement (Doc. 394);
3. denies as moot Tradestation's motion for summary judgment (Docs. 178/181) concerning the priority issue of the '411 patent;
4. grants OEC's motion for summary judgment regarding prosecution history estoppel (Doc. 377) with respect to the first set of Brumfield family patents, denies it as moot with respect to the second set of Brumfield family patents, and denies TT's cross-motion (Doc. 394).

I. MATERIAL UNDISPUTED FACTS

A. '056 Patent Specification and Claims¹

TT owns the '056 patent, issued by the PTO on May 12, 2009 from application no. 11/417,544, filed on May 3, 2006. (TT '056 56.1 Resp. ¶ 1.)² The '544 application was a

¹TT and the moving defendants filed expert declarations in support of their cross-motions on the issue of whether the specific claim language at issue in the '056 patent met the written description requirement. Because the Court determines below that, as a matter of law based on the specification itself, no reasonable fact-finder could find that the language does not meet the written description requirement, the Court does not consider those expert declarations. *See Anascape, Ltd. v. Nintendo of Am., Inc.*, 601 F.3d 1333, 1339 (Fed. Cir. 2010) (setting aside an expert's conclusion because it could not "override the objective content" of the specification at issue).

²The parties filed two separate sets of Local Rule 56.1 statements: one set pertaining to the '056 patent and the other set pertaining to the *eSpeed* Decision and the '411 patent.

continuation of an earlier application, no. 09/289/550, which was filed on April 9, 1999 and issued as patent no. 7,212,999 on May 1, 2007. (*Id.* at ¶ 2; Def. '056 56.1 Resp. ¶ 4.) The '056 patent's specification is the same, in all relevant respects, to the specification submitted in 1999 as part of the '550 application. (TT '056 56.1 Resp. ¶ 5.)

According to the '056 patent's specification, the invention disclosed is a "user interface for an electronic trading exchange which allows a remote trader to view in real time bid orders, offer orders, and trades for an item." (TT '056 56.1 Resp. ¶ 5; Doc. 396-1 at 1.) More specifically, the interface displays all the outstanding bids and offers for an item (rather than just the highest bid and lowest offer), which "allows the trader to view trends in orders for an item, and thus better enables the trader to anticipate demand for the item." (TT '056 56.1 Resp. ¶ 7.) The specification describes various types of interfaces, but for purposes of the issue of user input of default quantities, the parties focus on the "priority view," shown by the following diagram from the specification:

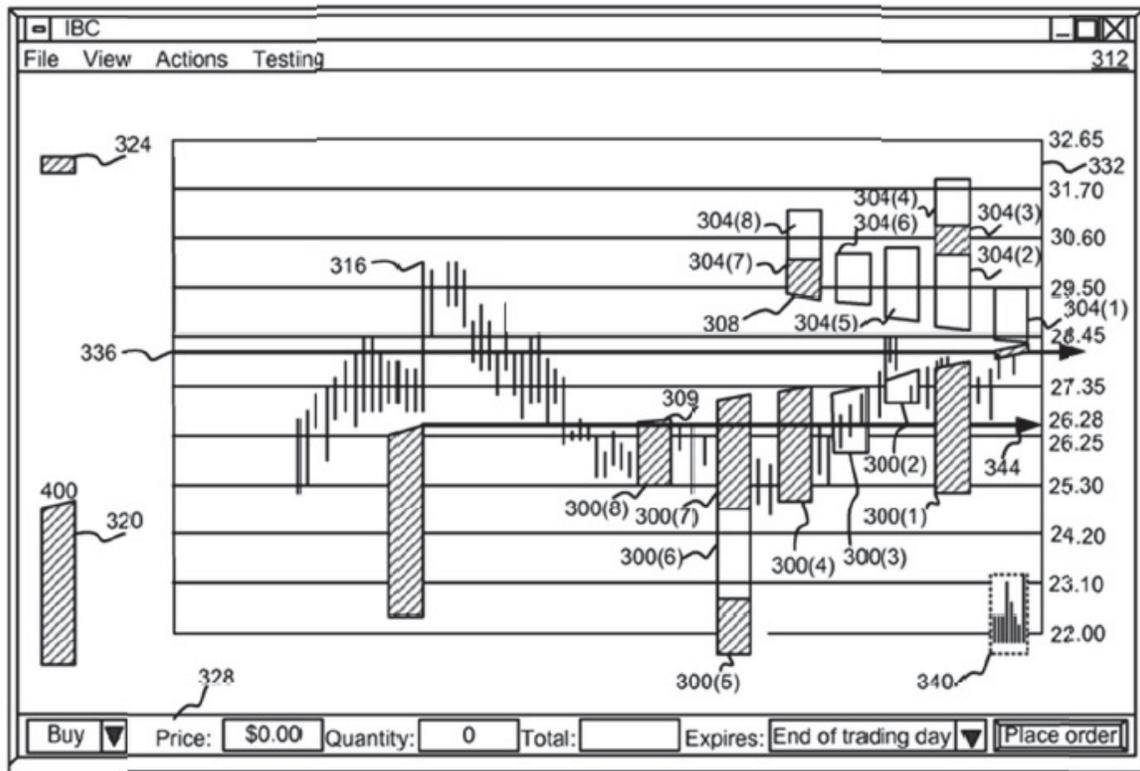


FIG. 3A

(TT '056 56.1 Resp. ¶ 10; Def. '056 56.1 Resp. ¶ 5.) The figure shows the y (or “value”) axis (332), with icons representing bids (labeled 300(_)) and offers (labeled 304(_)). (TT '056 56.1 ¶ 11.) The relative size of each order is represented by the vertical size of the icon, with larger icons representing larger orders; where there is more than one order at a given value (like 300(5), 300(6) and 300(7) above), the orders are “stacked,” one on top of the other, based on their priority. (*Id.*) As shown on the left side of the figure, the priority view includes a bid token (labeled 320) and an offer token (labeled 324). (Def. '056 56.1 Resp. ¶ 6.) Per the specification, to submit an order for a trade, the trader selects one of the tokens on the left side with his mouse and resizes it to the desired amount (again, a larger token representing a larger offer or bid). (*Id.* at ¶ 10; TT '056 56.1 Resp. ¶ 14.) Specifically, with respect to the re-sizing of the tokens, the specification states:

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