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

TRADING TECHNOLOGIES INTERNATIONAL, INC.,	)	
Plaintiff,	)	
v.	)	
	)	Case No. 05-cv-4811
CQG, INC., and CQGT, LLC,	)	
Defendants.	)	Judge Sharon Johnson Coleman

MEMORANDUM OPINION AND ORDER

Plaintiff Trading Technologies International, Inc., ("TT") moves to terminate the *Markman* claim construction proceedings [502], arguing that all outcome determinative claims were construed as part of the *eSpeed* litigation. Defendants CQG, Inc. and CQGT, LLC, (collectively "CQG") oppose termination of the *Markman* proceedings and request this Court construe or refine the construction of the terms: "static," "common static price axis," "static display of prices," "manual re-centering command," manual re-centering," "manual re-centering position," "in response to…sending," "[] to… send," and "as a result of…to…send." For the reasons stated below, this Court grants TT's motion to terminate the *Markman* proceedings.

Background

As in the related *eSpeed* case, TT brings this civil suit against CQG for patent infringement. TT is the owner by assignment of U.S. Patent No. 6,772,132 ("'132 patent") and U.S. Patent No. 6,766,304 ("'304 patent"). The United States Patent and Trademark Office issued the '132 patent on August 3, 2004 and issued the '304 patent on July 20, 2004. The patents claim software for displaying the market for commodity trading in an electronic exchange. Judge Moran, of the United

States District Court for the Northern District of Illinois, was the presiding judge of the *eSpeed* case and the *Markman* proceedings.

The present case was reassigned to Judge Moran for coordinating common issues, including *Markman* proceedings, with *eSpeed* and other related cases in 2005. In an effort to efficiently manage the similar cases of *eSpeed*, this case, and other related cases, Judge Moran conducted *Markman* proceedings to construct the meaning of certain terms, which are at issue in this case and others. As part of the coordination effort in 2005, Judge Moran permitted CQG to participate in the *Markman* proceedings of the *eSpeed* case. CQG fully participated in those *Markman* proceedings. CQG submitted briefs, an expert report, and presented attorney argument and expert testimony. CQG's involvement addressed the following terms in the 2005 Markman proceedings: "static display of prices," "static price axis," "order entry region, " and "single action of a user input device." Judge Moran acknowledged CQG's involvement in the *eSpeed* case *Markman* proceedings and further stated, "Accordingly, CQG elects to file this Response, but reserves the right to amend or supplement…if there are terms that are not construed in this [*eSpeed*] proceeding that require construction at a later time."

Judge Moran issued his claim construction ruling on October 31, 2006. The *eSpeed* court later clarified the claim construction in a supplement on February 21, 2007, and discussed the construction again in a June 2007 ruling. The Federal Circuit Court in *eSpeed* then affirmed Judge Moran's constructions and infringement rulings. The *eSpeed* court constructed the following terms: "static display of prices," "common static price axis," "static," order entry region," "when the [inside] market changes," "single action," and fifteen other terms.

In April of 2007, CQG filed a motion for summary judgment of non-infringement, relying on Judge Moran's construction of terms, claiming the accused CQG products did not meet the "static" limitation terms. In July 2008, Judge Moran stayed this case pending the *eSpeed* appeal and

declined to rule on the CQG's summary judgment motion because TT had not yet taken discovery about CQG's accused products. In 2010, the Federal Circuit affirmed Judge Moran's claim construction of the "static" terms.

It is worth noting that, prior to the *eSpeed* appeal decision, CQG appeared before this Court wanting to proceed with the summary judgment motion based on the "static" terms. This Court stayed the summary judgment motion while the parties attempted to settle. When the settlement talks broke down, both parties filed a joint status report outlying their positions. In the joint status report, TT stated that no *Markman* proceedings were needed because Judge Moran had already the terms in the *eSpeed* case. Conversely, CQG disagreed. CQG suggested this Court should follow local rules and move forward with the *Markman* proceedings in this case. Further, CQG stated:

CQG recognizes that the case may rise or fall based on Judge Moran's and the Federal Circuit's construction of certain claim terms from the *eSpeed* case. CQG asserted that there is no justifiable reason to preclude the parties from addressing claim construction issues in this case, especially for claim terms that have not yet been construed by the Federal Circuit. This Court set a schedule with *Markman* briefing but did not rule on whether a *Markman* hearing would be held.

Legal Standard

Determining a patent infringement is a two-step process. *Markman v. Westview Instruments, Inc.,* 517 U.S. 370, 384 (1996); *AFG Indus., Inc. v. Cardinal IG Co., Inc.*, 375 F.3d 1367, 1371 (Fed. Cir. 2004). The first step requires the court to determine the scope and meaning of the asserted claim. *AFG Indus., Inc.*, 375 F.3d at 1371. Then, the court compares the properly construed claims with the accused device to reach a verdict regarding the infringement. *Id.* TT's motion to terminate the *Markman* proceedings relates to the first step – determining the scope and meaning of the asserted claim.

Claim construction is a question of law. *Markman,* 517 U.S. at 384; *Miken Composites, L.L.C. v. Wilson Sporting Goods Co.,* 515 F.3d 1331, 1336 (Fed. Cir. 2008). A term is construed according to its ordinary and customary meaning as understood by a person of ordinary skill in the art at the time of the invention. *Wavetronix LLC v. EIS Elec. Integrated Sys.*, 573 F.3d 1343, 1355 (Fed. Cir. 2009). The court construes the claim using the letters-patent, the description of the invention and specifications of the claim annexed to them. *Markman*, 517 U.S. at 384. Furthermore, judges are better versed and equipped than juries to construe written instruments and are thus charged with claim construction. *Id.*

The United States Supreme Court stressed that treating interpretive issues, such as claim construction, as purely legal will promote certainty and uniformity through the application of *stare decisis* and issue preclusion. *Markman,* 517 U.S. at 390. Construction of the claim becomes the law of the case, barring retrial of issues that were previously resolved. *AFG Indus., Inc.*, 375 F.3d at 1372. Courts are not free to second-guess the Federal Circuit's prior decisions on issues of law, such as claim construction, unless there is an exception. *AFG Indus., Inc.*, 375 F.3d at 1372. Some recognized exceptions include: the discovery of new and different material evidence that was not presented in a prior action; an intervening change in controlling legal authority; or when a prior decision is clearly wrong and its preservation would manifest an injustice. *Id.*

The issue of *stare decisis* becomes difficult when a plaintiff secures a claim construction of a term against one defendant and that construction becomes binding as to all future defendants regardless of the initial scope arguments raised. *Eolas Technologies, Inc. v. Adobe Sys., Inc.*, 2011 WL 11070303 *1- *2 (E.D. Tex. 2011). "However the principal of *stare decisis* would lose all meaning if a later defendant could unbind itself by merely framing the issue differently." *Id.* The Federal Circuit's decision is binding as a matter of law and a district court must apply the Federal Circuit's claim construction even where a non-party to initial litigation would like to present new arguments.

Id. (quoting *Rambus Inc. v. Hynix Semiconductor, Inc.*, 569 F.Supp.2d 946, 963–64 (N.D. Cal. 2008), which the Federal Circuit later affirmed in *Hynix Semiconductor, Inc.* v. *Rambus Inc.*, 645 F.3d 1336, 1351 (Fed. Cir. 2011)).

Discussion

TT argues that all terms proposed by CQG were already construed by Judge Moran in proceedings where CQG was an active participant and CQG is improperly seeking to alter those constructions. Further, CQG agreed that it would be bound by constructions of terms addressed in those proceedings. TT also argues that several of the constructions CQG seeks to revisit were affirmed by the Federal Circuit on appeal in *Trading Technologies Int'l, Inc. v. eSpeed, Inc.*, 595 F.3d 1340, (Fed. Cir. 2010). CQG responds that one group of terms, the "static limitation" terms, needs clarification, and two groups of terms, the "manual recentering" terms and the "in response to… sending" terms, were never presented to Judge Moran.

I. "Static Limitation" Terms

TT argues that the "static" terms were construed by Judge Moran and affirmed by the Federal Circuit and thus this Court should not refine them as CQG requests because the construction is law of the case and we are bound by *stare decisis*. CQG on the other hand, asserts that this Court should adopt the Federal Circuit's construction of the "static limitation" terms and refine it to address new disputes. Specifically, CQG asks this Court to adopt the "permanency" requirement included by the Federal Circuit, and determine whether all or some prices in a price column must exhibit the static condition. CQG's position is that the scope of TT's patent rights requires that <u>all</u> prices in the price column must be static. TT takes the opposition position, that only <u>some</u> prices in the price column must be static.

The "static limitation" terms are "common static price axis" and "static display of prices." Judge Moran construed "common static price axis" as "a line comprising price levels that do not

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