UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Trading Technologies International, Inc., Plaintiff, v. eSpeed, Inc., eSpeed International, Ltd., Ecco LLC, and EccoWare Ltd., Defendants.	Civil Action No. 04 C 5312 Judge: James B. Moran Magistrate: Sidney I. Schenkier

PLAINTIFF TRADING TECHNOLOGIES INTERNATIONAL, INC'S REPLY IN SUPPORT OF MOTION TO VACATE PERMANENT INJUNCTION ORDER PENDING FORMAL ENTRY OF FINAL JUDGMENT

eSpeed's argument that TT has filed an improper notice of appeal but that this Court does not maintain jurisdiction over this litigation is completely contradictory. Such an inconsistent argument is undermined by the caselaw, which provides that an *improperly* filed notice of appeal does not divest a court of jurisdiction over the issues. *Gilda Industries, Inc. v. U.S.* 511 F.3d 1348, 1350 (Fed. Cir. 2008); *FOGADE v. ENB Revocable Trust*, 263 F.3d 1274, 1286 (11th Cir. 2001) ("As a result of the time for appeal never having started to run, the district court never lost jurisdiction over the case."); *see also Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L. Ed. 2d 225 (1982). Thus, if, as eSpeed argues, TT's notice of appeal was improper because final judgment has not yet formally been entered, it would not divest this Court of jurisdiction over the underlying issues in the litigation. Accordingly, under such a scenario, the Court would be entitled to enter the relief sought by TT.

Alternatively, even if this Court did not have jurisdiction to momentarily vacate the permanent injunction or determined that such a course of action was not necessary, it is clear that

the Court may still resolve the argument between the parties by formally entering "Final Judgment" immediately. As this Court has already agreed, there is nothing left for the Court to do on the merits, and the entry of permanent injunction was not interlocutory, but the final decision. Ex. B, June 5, 2008 Tr., at 2. While TT believes that this Court's decision on the permanent injunction wrapped up the litigation, formal entry of a separate paper entitled Final Judgment will remove any hyper-technical argument by eSpeed that the Court's entrance of the permanent injunction was not a final decision, sufficient to confer the right to appeal on both parties. A draft final judgment for this Court's immediately consideration and entrance is attached as Exhibit A.[1]

Notably, eSpeed provides no support for the argument it made before this Court at the recent status that it "disagreed" with the Court's view that the entry of the permanent injunction was a final judgment. Ex. B, June 5, 2008 Tr., at 3. Instead, the permanent injunction cannot be anything but a final decision because it "end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Slip Track Sys., Inc. v. Metal Lite, Inc*. 159 F.3d 1337, 1339 (Fed. Cir. 1998) (quoting *Catlin v. United State*s, 324 U.S. 229, 233 (1945)). eSpeed has already moved to dismiss TT's notice of appeal before the Federal Circuit because eSpeed argues that TT's notice is based off of interlocutory orders, and not a final judgment.[2] However, as this Court recognized, eSpeed's argument fails because the permanent injunction was the final decision in the case. Ex. B, June 5, 2008 Tr., at 2.

[1] TT is also emailing a word copy of this proposed order to the Court.

[2] eSpeed has argued to the Federal Circuit that the pending motions for attorneys fees, outstanding costs, and prejudgment interest are additional matters pending before this Court that have precluded final judgment. eSpeed's argument fails as this Court has already recognized, none of these issues have anything to do with "the merits." eSpeed cannot dispute that these motions' pendency fails to convert any order to now being subject to interlocutory appeal.

To be clear, while the permanent injunction is clearly not an interlocutory order conferring an immediate right to appeal that order pursuant to 28 U.S.C. § 1292, formal entry of final judgment pursuant to Federal Rule of Civil Procedure 58(a) may be required to begin the appeal clock. A separate paper denoting final judgment is contemplated by the rules, separate and apart from other orders and memoranda. FED. R. CIV. P. 58(a). While it is not improper to appeal after the Court has ruled on all issues on the merits but before formal entry of final judgment, the effect of doing this is that the date of the appeal may become the date of formal entry of final judgment. FED. R. APP. P. 4(a)(2). Thus, under this scenario, both parties' appeals are held up and do not take effect until the date that this Court complies with the formality of entering a document denoted as the final judgment. While a separate document entitled "Final Judgment" has not yet been entered, doing so should be done immediately to quell all arguments by eSpeed that no appeal of this Court's orders may be had.

While not necessary, if this Court is prepared to rule on TT's motion for attorney's fees, TT requests that the Court enter an order regarding attorney's fees and then formally enter the final judgment at Exhibit A. However, if this Court has not yet reviewed the attorney's fees motion and believes that a ruling on the motion is not imminent (i.e., within the next day), then TT requests that the Court immediately proceed with the formal entry of Final Judgment. Such entrance is just a formality that should be complied with and will have the effect of mooting much of the motion practice currently before the Federal Circuit regarding the appropriateness of the parties' appeals.

Respectfully submitted,

Date: June 12, 2008

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The undersigned hereby certifies that a copy of the foregoing was served on June 12, 2008 as follows:

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