

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S
“EMERGENCY MOTION TO VACATE PERMANENT INJUNCTION
INJUNCTION PENDING FORMAL ENTRY OF FINAL JUDGMENT”**

Not content merely to prevail at the jury trial, win money damages, and obtain a permanent injunction, TT is apparently determined to “win” the right to be heard first on appeal before the Federal Circuit. In its zeal to achieve this dubious goal, TT’s emergency motion ignores fundamentals of jurisdiction, requests a bizarre form of relief that is literally unprecedented, and seeks to invade the province of the Federal Circuit.

In particular, TT’s emergency motion should be denied because eSpeed’s timely Notice of Appeal automatically divested this Court of the jurisdiction. Even if it was proper for this Court to entertain the motion, however, TT cites no authority whatsoever for the relief it seeks. Finally, regardless of the merits of TT’s arrogation of appellant status, the question of what party should be deemed appellant is an issue before the Federal Circuit and should not be improperly influenced by TT’s gamesmanship.

Accordingly, TT’s emergency motion should be denied.

ARGUMENT

First, TT's motion should be denied because eSpeed's Notice of Appeal automatically divested this Court of the jurisdiction to award the relief TT seeks. It is black letter law that "the act of filing a notice of appeal confers jurisdiction on an appellate court and divests the trial court of jurisdiction over matters related to the appeal." *Gilda Indus., Inc. v. U.S.*, 511 F.3d 1348, 1350 (Fed. Cir. 2008) (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). See also *Blue Cross and Blue Shield Asso. v. American Express Co.*, 467 F.3d 634, 637 (7th Cir. 2006) ("A notice of appeal deprives the district court of jurisdiction over the issues on the appeal.") (J. Easterbrook).

Because it is undisputed that eSpeed filed a timely Notice of Appeal of the permanent injunction Order, this Court lacks jurisdiction to vacate that Order and then re-enter the order at some future date, as TT bizarrely requests, presumably to bolster its attempt to be deemed appellant. Cf. *Chemlawn Servs. Corp. v. GNC Pumps, Inc.*, 823 F.2d 515, 518 (Fed. Cir. 1987) ("[A] notice of appeal divests the District Court of jurisdiction over all matters involved in the appeal. . . . In this instance, the District Court clearly lost jurisdiction on November 18, 1986 when GNC filed a notice of appeal to this court [of the District Court's preliminary injunction order].") (citations omitted); see also *Diomed, Inc. v. AngioDynamics, Inc.*, 533 F. Supp. 2d 224, 226 (D. Mass. 2008) (noting that "[g]enerally, the filing of a notice of appeal divests the district court of jurisdiction over matters related to the appeal" and that a district court retains jurisdiction only to enforce a permanent injunction pending appeal) (citations omitted); *American Fam. Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2007 WL 63983, at *3 (N.D. Ill. Jan. 10, 2007) ("As the defendants have already filed an appeal attacking the merits of Judge Guzman's decision to enter the preliminary injunction, the court does not have jurisdiction to entertain the defendants' motions to modify the preliminary injunction.").

Second, even if this Court were to consider TT's motion on the merits, the motion should be denied because it is improper gamesmanship, pure and simple, not supported by any relevant authority. Indeed, TT confesses that the only reason it filed the motion is because it was concerned that, if eSpeed were permitted to appeal the permanent injunction, eSpeed might be deemed the appellant before the Federal Circuit. (Dkt. No. 1250, TT's Emergency Motion, at 2.) Setting aside whether TT has any right to be considered the appellant after prevailing at trial, winning money damages, and obtaining a permanent injunction, TT cites no authority whatsoever for the proposition that this Court can vacate its permanent injunction now and then re-impose that injunction later when the Court is ready to enter final judgment simply to vindicate TT's perceived "right" to appellant status.

Third and finally, TT's motion should be denied because, aside from its fundamental jurisdictional defect, its lack of supporting authority, and its improper purpose, the Federal Circuit itself will decide whether eSpeed or TT should be deemed appellant. As TT notes in its motion, the Federal Rules of Appellate Procedure dictate which party will be deemed appellant. *See* Federal Rules of Appellant Procedure 4 and 28.1. And as hinted at by TT's motion, eSpeed has filed with the Federal Circuit a motion to dismiss TT's "me too" notice of appeal or alternatively to deem eSpeed the appellant in a consolidated appeal, which puts the issue of the proper appellant front and center before the Federal Circuit. (Ex. A, eSpeed's Motion to Dismiss Appeal for Lack of Jurisdiction.) In fact, it is clear that TT filed its emergency motion with this Court only after eSpeed communicated its intent to move the Federal Circuit to dismiss TT's premature Notice of Appeal. (Ex. B, 6/2/08 letter from A. Johnstone to J. Kurcz.) Accordingly, because it invites this Court to invade the Federal Circuit's prerogative, TT's motion should be denied.

CONCLUSION

For these reasons, TT's emergency motion to vacate the permanent injunction should be denied.

Dated: June 9, 2008

Respectfully submitted,

**eSpeed, Inc., eSpeed International, Ltd.,
Ecco LLC, and EccoWare Ltd.**

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CERTIFICATE OF SERVICE

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