

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

eSPEED, INC.; CANTOR FITZGERALD, L.P.; and CFPH, L.L.C.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 03-612-KAJ
)	
BROKERTEC USA, L.L.C.; BROKERTEC GLOBAL, L.L.C.; GARBAN, LLC; ICAP PLC; OM AB; and OM TECHNOLOGY (U.S.), INC.,)	
)	
Defendants.)	

MEMORANDUM ORDER

On July 27, 2004, I had a teleconference with the parties to resolve, among other things, another round in the ongoing dispute over the scope of waiver of the attorney-client privilege effected by the plaintiffs' reliance on certain affidavits before the PTO. In those affidavits, the inventors claim it had not occurred to them that a previous securities trading system used at Cantor Fitzgerald might constitute prior art. Since first considering the waiver issue in this case last October, I have attempted to keep the parties on the same page about the scope of waiver. I have explained that the topic on which the waiver is centered is the so-called "Super System" used at Cantor Fitzgerald prior to the use of the current trading platform. Regardless of the name by which that system went, "[t]hat was the topic ... around which the inequitable conduct defense had enough weight, enough prima facie significance ... to warrant the attorney time, effort, energy, client money that has been expended." (7/27/04 Tr. at 25.)

Most recently, the parties have disagreed over the production of documents reflecting interviews between attorneys who drafted the affidavits submitted to the PTO and employees at Cantor Fitzgerald. I have reviewed *in camera* the disputed documents and conclude that they do fall within the waiver, as they appear to reflect knowledge within Cantor Fitzgerald to which the drafters of the affidavits were apparently privy and which one could argue was known to the signers of the affidavits, given their in-depth involvement at Cantor Fitzgerald in the development of the patented invention. I hasten to add that I have not concluded that the inventors knew what is reflected in the documents, only that an argument to that effect could be made.

Accordingly, IT IS HEREBY ORDERED that copies of the documents provided to the court pursuant to the July 27, 2004 teleconference shall be provided forthwith to the defendants. Any discovery application which defendants wish to make to the court as a consequence of receiving those documents shall be made within five (5) business days of receiving the documents.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

August 5, 2004
Wilmington, Delaware