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**

I. INTRODUCTION

This is a patent infringement case. Jurisdiction is proper under 28 U.S.C. § 1338. Plaintiffs in this case are eSpeed, Inc., Cantor Fitzgerald, L.P., and CFPH, L.L.C. (collectively, "eSpeed"). Defendants are BrokerTec USA, L.L.C., BrokerTec Global, L.L.C., Garban, LLC, ICAP PLC, OM AB and OM Technology (U.S.), Inc. (collectively, "BrokerTec"). The patent-in-suit, U.S. Patent No. 6,560,580 B1 (issued May 6, 2003) (the "'580 patent"), is entitled "Automated Auction Protocol Processor." (Docket Item ["D.I."] 1, Exh. A.) The named inventors of the '580 patent are Stuart A. Fraser, Howard Lutnick, and Bijoy Paul, with plaintiffs Cantor Fitzgerald, L.P. and CFPH L.L.C. as assignees. (*Id.*) Plaintiff eSpeed, Inc. is the exclusive licensee of the '580 patent. (*Id.,* ¶ 11.)

On June 30, 2003, eSpeed filed suit alleging that BrokerTec is wilfully and intentionally infringing the '580 patent. (*Id.*, ¶ 12.) On the same day, eSpeed also filed

a motion for a preliminary injunction to prevent BrokerTec from "making, using, offering for sale, selling, licensing, or otherwise distributing electronic trading systems which embody or comprise the inventions claimed in [the '580 patent]."[1] (D.I. 3.) On December 12, 2003, the United States, on behalf of the Department of the Treasury, filed a Statement of Interest in this proceeding pursuant to 28 U.S.C. § 517.[2] (D.I. 183.)

After reviewing the submissions of the parties and the government, and the applicable law, I am persuaded that the public interest strongly outweighs any private interest eSpeed may have in obtaining a preliminary injunction. eSpeed has failed to make a persuasive showing that irreparable harm will result if BrokerTec's conduct is not enjoined. Because eSpeed has not adequately shown that it is entitled to emergency relief, its motion for a preliminary injunction will be denied.

## II. BACKGROUND

Both eSpeed and BrokerTec operate electronic trading platforms that facilitate trading among wholesale purchasers and sellers of United States Treasury securities and other United States government securities. (D.I. 4 at 9; D.I. 106 at 7.) eSpeed alleges that BrokerTec's trading platform infringes the technology disclosed in the '580 patent, specifically, the "workup" protocol, which eSpeed describes as follows:

---

[1]After fully briefing eSpeed's motion for a preliminary injunction, the parties appeared for a hearing on October 30, 2003, (D.I. 128), and submitted proposed findings of fact and conclusions of law on December 4, 2003 (D.I. 159, 160, 167, 168).

[2]"The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517 (2003).

> The eSpeed electronic trading platform automatically provides the participants who are first to make a bid or offer (or the first to act on a bid or offer) with priority and a time-based right of first refusal with respect to that transaction. Only after an initial trade is done or the defined time interval lapses may others participate in the trade at the defined price. This protocol...effectively rewards participants for market participation, providing liquidity and driving the market towards the best price by preventing others from exploiting the market that the initial traders have created before they have revealed and been given the opportunity to trade their full volume. After the initial traders have finished trading with one another, the protocol allows another trader to participate in the trade without being able to exclude others from also participating.

(D.I. 4 at 13; D.I. 6, ¶ 7.) Independent claim 22 and dependent claim 23 of the '580 patent address this workup trading protocol, in particular, "its division into two periods, a period when the initial traders control the trade to the exclusion of all other participants and a period that follows in which orders placed by other participants may be executed, without others controlling the trade."[3] (D.I. 4 at 25; D.I. 6, ¶ 12.)

---

[3]Independent claim 22 reads as follows:

A method implemented on a distributed-workstation computer system for trading an item between participants, said method comprising:

providing a bid/offer system state wherein a first participant enters a bid or offer for the item at a select price and volume;

receiving from a second participant a trade command to hit or lift the bid or offer;

entering a trading system state wherein a trade transaction is executed between the first and second participants for a volume of the item at a defined price, and wherein (a) the first and second participants are provided a period to control trading, during which they may transact with each other additional volume of the item at the defined price to the exclusion of other participants desiring to participate in the trade, and (b) upon conclusion of the period, a new trade transaction is automatically executed at the defined price in response to a trade command entered by another participant without providing the other participant a period to control the trade.

'580 patent, col. 20, lns. 33-53. Dependent claim 23 claims the method of claim 22, "wherein the trade command entered by the other participant is entered during the period to control trading but not executed until the conclusion of said period." *Id.*, lns. 54-57.

On May 21, 2001, BrokerTec's electronic trading platform began offering workup privileges to initial participants in a trade.[4] (D.I. 106 at 14.) BrokerTec states that the workup privileges it "grant[s] its customers...are of fixed temporal duration," and "[b]y intentional design, [its] customers cannot 'control' a trade, as that latter term is used in the '580 patent... ." (D.I. 106 at 16.) eSpeed claims that BrokerTec's trading platform implements the same workup protocol claimed in the '580 patent, and thus literally infringes claims 22 and 23. (D.I. 4 at 26.)

In support of its motion for a preliminary injunction, eSpeed asserts that it has a high likelihood of success on the merits of its infringement claim. (D.I. 4 at 20.) eSpeed further argues that, since the '580 patent is both valid and infringed, it is entitled to a presumption of irreparable harm. (*Id.* at 30.) Finally, eSpeed asserts that both the balance of the hardships and the public interest favor granting a preliminary injunction. (*Id.* at 34, 36.) BrokerTec disputes the validity of the '580 patent (D.I. 106 at 23, 26) and claims that eSpeed has not presented competent evidence of infringement (*id.* at 34). BrokerTec further argues that granting a preliminary injunction would adversely affect the public interest. (*Id.* at 38.) The government's position is that "the proposed injunction would effectively eliminate an electronic marketplace used by a significant percentage of traders in the secondary market for Treasury securities," resulting in "a significant, detrimental impact on the public interest." (D.I. 183 at 2.)

---

[4]BrokerTec argues that eSpeed has "purposefully delayed" for over two years in seeking injunctive relief. (D.I. 106 at 12.) eSpeed, of course, denies this allegation. (D.I. 118 at 17, 18.) The parties will have the opportunity to resolve this issue at trial, as it does not impact my decision that a preliminary injunction is inappropriate given the critical public interest at stake.

## III. STANDARD OF REVIEW

A preliminary injunction is "a drastic and extraordinary remedy that is not to be routinely granted." *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993). As the moving party, eSpeed is entitled to a preliminary injunction only if it succeeds in showing (1) a reasonable likelihood of success on the merits; (2) irreparable harm if an injunction is not granted; (3) a balance of hardships tipping in its favor; and (4) the injunction's favorable impact on the public interest. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (citing *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1555 (Fed. Cir. 1994)).

When deciding whether a preliminary injunction should be granted or denied, the court should weigh and measure each of the four factors against the other factors and against the magnitude of the relief requested. *Hybritech Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1451 n.12 (Fed. Cir. 1988). Under this rule, no one factor, taken individually, is necessarily dispositive. *Chrysler Motors Corp. v. Auto Body Panel, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990). If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of others. *Id.* If the injunction is denied, the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify the denial. *Id.* "As a basic proposition, [granting or denying a preliminary injunction] lies largely in the sound discretion of the trial judge." *Id.* (citation omitted).

## IV. DISCUSSION

### A. Public Interest

In patent cases, "the focus of the district court's public interest analysis should be whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Hybritech*, 849 F.2d at 1458. Because the government has taken the extraordinary step of filing a Statement of Interest in this case that exclusively discusses the impact of eSpeed's requested preliminary injunction on the "critical market for Treasury securities," (D.I. 183 at 4), I will first consider whether the proposed injunction adversely affects the public interest.

Apart from asserting that the public interest generally favors protecting a patentee's rights, (D.I. 4 at 36 (citing *Smith Intern., Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983)), eSpeed argues that the purpose of its motion for a preliminary injunction is not to prevent BrokerTec from using "any version of a workup protocol," but rather to "stop BrokerTec from using the protocol covered by the '580 patent" (D.I. 118 at 19). Thus, eSpeed suggests that BrokerTec and its customers may easily transition back to using an outdated, inferior, and less sophisticated trading platform without causing any disruptions in the secondary market. (D.I. 4 at 35; D.I. 128 at 58:7-10.) That suggestion is belied by the evidence and common sense. eSpeed acknowledges that "virtually all outright trading of Treasury benchmarks in the wholesale secondary market is occurring on one of two electronic marketplaces, eSpeed or BrokerTec." (D.I. 4 at 17; D.I. 5, ¶ 12.) At oral argument, counsel for eSpeed estimated that, with respect to different trading instruments, thirty-five to sixty-five percent of the trading is conducted using BrokerTec's trading platform. (D.I. 128 at

52:1-8.) Though the magnitude of reliance on BrokerTec's trading platform is highly significant by either estimate, eSpeed assiduously ignores the fact that granting injunctive relief would effectively remove BrokerTec from the secondary trading market. BrokerTec's customers, who are accustomed to its current trading platform, are not likely to revert back to an antiquated method of trading. Instead, they are more likely to turn their trading, after some delay, to the only other viable player in the secondary market, namely, eSpeed. Indeed, it is reasonable to believe that that is exactly the result eSpeed hopes to achieve. While eSpeed may ultimately be entitled to the hegemony it seeks with this injunction, the government has pointed out three particular reasons why a preliminary injunction that reaches that result will adversely impact the public interest.

First, shutting down the trading system used by a significant part of the market could reduce trading in Treasury securities indefinitely, making them less liquid and decreasing their attractiveness as an investment. (D.I. 183 at 4.) The ultimate result of reduced trading would be an increased cost to the government in borrowing money to finance the Nation's debt. (*Id.*) Second, an "injunction would increase systemic risk to the secondary market for Treasury securities by leaving only one commonly used electronic trading system, the one operated by [eSpeed]." (*Id.* at 5.) Without an alternative trading system, the secondary trading market would be devastated if eSpeed's system went awry. Finally, "an injunction would give the plaintiffs a monopoly over the primary trading system used by the wholesale secondary market for Treasury securities." (*Id.*) In the absence of competition, the transaction fees paid by dealers

who trade Treasury securities is likely to increase, with these costs being passed on to the Treasury Department when it issues securities. (*Id.*)

Not surprisingly, BrokerTec's position mirrors the one taken by the government. Brokertec asserts that eSpeed's requested relief "would directly interfere with the [government's] ability to assure itself of a competitive and efficiently operating market for the trading of Treasury securities...." (D.I. 106 at 39.) eSpeed has not set forth any persuasive reason why its private interest in vindicating its patent rights is more important than the critical public interest in maintaining a fluid, competitive market for trading Treasury securities. Therefore, I see no reason to disrupt the secondary market before a full trial on the merits of eSpeed's patent infringement claims.

**B. Likelihood of Success on the Merits**

The likelihood of success on the merits is established when the moving party demonstrates that the patent-in-suit is both valid and infringed. *Reebok Intern. Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1555 (Fed. Cir. 1994). Apart from asserting that its activities do not infringe the '580 patent, BrokerTec argues that the patent is invalid due to eSpeed's inequitable conduct before the U.S. Patent and Trademark Office.[5] (D.I. 106 at 27.) "In resisting a preliminary injunction...one need not make out a case of actual invalidity. Vulnerability is the issue at the preliminary injunction stage, while validity is the issue at trial. The showing of a substantial question as to invalidity thus requires

[5]BrokerTec also asserts that the '580 patent is invalid because eSpeed impermissibly amended the disclosure of the invention to introduce new matter and because it is obvious in light of the prior art. (D.I. 106 at 23, 26.) eSpeed disputes these claims, (D.I. 118 at 5), and I express no opinion on them at this time.

less proof than the clear and convincing showing necessary to establish invalidity itself." *Amazon.com*, 239 F.3d at 1359.

On February 21, 2002, the three named inventors of the '580 patent submitted declarations to the U.S. Patent and Trademark Office explaining why it had not previously occurred to them that a computer automated trading system, called the "Super System," might be considered prior art. (D.I. 106 at 28, D.I. 118 at 12.) eSpeed's predecessor, Cantor Fitzgerald, began using the Super System in 1993. (D.I. 106 at 28.) The inventors' declarations explained that, even though the Super System was being used in Cantor Fitzgerald's business, it was "an internal computer system." (D.I. 118 at 12, 13.) BrokerTec argues that the Super System "was used to support commercial screen brokerage activities and fed trade information to screens on customers' desks," citing the deposition testimony of one of the inventors of the '580 patent, Stuart Fraser, as support. (D.I. 106 at 28.) eSpeed states that "[t]he fact that information generated by the Super System could be advertised on customers' display screens...does not mean that the system was not an internal one... ." (D.I. 118 at 13.) BrokerTec's position is that the inventors' characterization of the Super System as an internal system was "highly misleading" and led to the Patent Examiner's mistaken belief that the Super System did not constitute prior art. (D.I. 106 at 28.)

If proven, BrokerTec's claim of inequitable conduct would invalidate the entire patent. *See Winbond Electronics Corp. v. Int'l Trade Comm'n*, 262 F.3d 1363, 1372 (Fed. Cir. 2001) (noting that patent obtained through inequitable conduct may not be enforced). Without expressing an opinion on the invalidity claim, I find that BrokerTec has presented enough facts to raise a substantial question as to the validity of the '580

patent, and I conclude that the question of inequitable conduct, while not resolved, is fairly before the court. *Arthrex Inc. v. dj Orthopedics LLC*, 2002 U.S. Dist. LEXIS 7634 at *10 (D. Del. Apr. 30, 2002). Therefore, I find that eSpeed has not demonstrated a likelihood of success on the merits to a degree that would outweigh the critical public interest in the denial of an injunction. However, even if eSpeed were to make a persuasive showing of likelihood of success, eSpeed's request for injunctive relief would still be denied, given the overwhelming public interest against entering an injunction in this case. *See Cordis Corp. v. Boston Scientific Corp.*, 2003 U.S. Dist. LEXIS 21338 at *10 n.6 (D. Del. Nov. 21, 2003) (even if movant demonstrated likelihood of success on the merits, in the absence of proof of irreparable harm, the public interest in maintaining competitive medical device market weighed against granting preliminary injunctive relief).

**C. Irreparable Harm**

As discussed, BrokerTec has raised a substantial question as to the validity of the '580 patent; thus, eSpeed is not entitled to a presumption of irreparable harm. *See Amazon.com*, 239 F.3d at 1350 (presumption of irreparable harm arises where patentee proves both infringement and validity). eSpeed's only proof of irreparable harm is that, because BrokerTec is a "competitive infringer," eSpeed is likely to lose market share and goodwill, "eroding their hard-won image as a market leader in electronic marketplace technology." (D.I. 4 at 33.) However, "[t]hese threatened injuries, which money alone could not cure," (*id.*), together with any perceived "unfair hardship" eSpeed feels it may suffer if BrokerTec is not enjoined, (*id.* at 35), are not enough to overcome the strong public interest in having both eSpeed's and BrokerTec's trading platform

remain fully functional pending a full trial.[6] *See Nutrition 21 v. United States*, 930 F.2d 867, 871 (Fed. Cir. 1991) ("[N]either the difficultly of calculating losses in market share, nor speculation that such losses might occur, amount to proof of special circumstances justifying the extraordinary relief of an injunction prior to trial.")

V. CONCLUSION

For these reasons, it is hereby ORDERED that eSpeed's Motion for a Preliminary Injunction is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
January 14, 2004

[6]I also note that, at oral argument, eSpeed's counsel was unable to suggest a reasonable amount of money to require as a bond in the event its injunction was granted. (D.I. 128 at 45-49.)